

Sen. Amy Volk, Chair  
Sen. Rodney L. Whittemore  
Sen. John L. Patrick  
Rep. Robert Saucier, Chair  
Rep. Craig Hickman  
Rep. Stacey Guerin

Christy Daggett  
James Detert  
Sharon A. Treat  
Dr. Joel Kase



John Palmer  
Linda Pistner  
Harry Ricker  
Randy Levesque

*Ex-Officio*  
Justin French  
Wade Merritt  
Pamela Megathlin

*Staff:*  
*Lock Kiermaier*

STATE OF MAINE

## Citizen Trade Policy Commission

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### **DRAFT AGENDA**

Thursday, August 6, 2015 at 10 A.M.  
Room 208, Burton M. Cross State Office Building  
Augusta, Maine

#### **10:00 AM Meeting called to order**

- I. Welcome and introductions
- II. Review 7/10/15 letter from CTPC Chairs to USTR Michael Froman
- III. Presentation from Janine Bisailon-Carey, President of the Maine International Trade Center (10:15 AM)
- IV. Presentation from Linda Murch, New England Field Coordinator for the Alliance for American Manufacturing (11:15 AM)
- V. Articles of interest (Lock Kiermaier, Staff)
- VI. Discussion of next meeting date
- VII. Adjourn



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STATE OF MAINE

## Citizen Trade Policy Commission

July 10, 2015

The Honorable Michael Froman  
United States Trade Representative  
600 17th Street NW  
Washington, DC 20508

Re: Support for Tobacco Carve-out in the TransPacific Partnership Agreement

Dear Ambassador Froman:

The Maine Citizen Trade Policy Commission (CTPC) is established in Maine State Law "...to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements." Since its inception in 2003, the CTPC has had a tradition of bipartisanship and unanimous votes. As the current Chairs of the CTPC, we are writing to you with that tradition in mind to reiterate a past motion of the CTPC with regards for the need to include a comprehensive Tobacco Carve-out in the soon-to-be completed TransPacific Partnership Agreement.

We have attached a letter to your predecessor as USTR, the Honorable Ron Kirk. This letter was dated August 1, 2012 and prominently referenced the 2012 Trade Policy Assessment which was authored by Professor Robert Stumberg of Georgetown University who was commissioned by the CTPC to conduct that assessment. In brief, the following outcomes listed by Professor Stumberg regarding the possible treatment of tobacco in the TPP continue to be concerns of the CTPC:

1. Investment - would give greater rights to foreign investors to challenge regulations outside of domestic courts. PMI is using investor rights to seek compensation for "indirect expropriation" of its trademarks by Uruguay and Australia.
2. Intellectual property- would provide (as proposed by the United States) a new right to use elements of trademarks (e.g., non-origin names that refer to a place like Salem and Marlboro).
3. Cross-border services-would expand the number of laws covered by trade rules that limit regulation of tobacco-related services such as advertising, distribution and display of products.
4. Regulatory coherence-would create obligations to involve tobacco companies ("stakeholders") in policy-making, which could undermine an FCTC obligation to limit the influence of tobacco companies.

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

5. Tobacco tariffs –would reduce tariffs to zero (as proposed by the United States) for a range of tobacco products. Several TPPA countries have relatively high tobacco tariffs, which inhibit expansion by international tobacco companies.

The 2012 Trade Policy Assessment can be viewed in its entirety at the following site:  
<http://www.maine.gov/legis/opla/CTPC2012finalassessment.pdf>

To reiterate the recommendations made to Ambassador Kirk in the August 1, 2012 letter, to preserve various public health related tobacco provisions in Maine state law and regulations, the CTPC continues to favor:

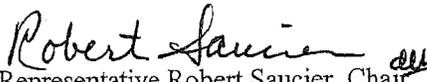
- A complete carve out of tobacco from the trade provisions of the TPP;
- Absent a complete carve out, a more moderate approach which exempts all federal and state laws and regulations pertaining to tobacco from provisions in the TPP; and
- The development of a policy statement from the USTR which clearly states the US position on tobacco related provisions which may be included in the TPP.

Recent news reports indicate that the TPP is nearing final negotiation and completion. We strongly recommend that the completed TPP agreement fully reflect the concerns and recommendations contained in this letter.

We look forward to hearing from you.

Sincerely,

  
Senator Amy Volk, Chair *all*

  
Representative Robert Saucier, Chair *all*

cc: President Barack Obama  
Senator Susan Collins  
Senator Angus King  
Representative Chellie Pingree  
Representative Bruce Poliquin

Sen. Roger Sherman Chair  
Sen. Thomas Martin Jr.  
Sen. John Patrick  
Rep. Joyce Maker, Chair  
Rep. Bernard Ayotte  
Rep. Margaret Rotundo

Heather Parent  
Stephen Cole  
Michael Herr  
Michael Hiltz  
Connie Jones



Wade Merritt  
John Palmer  
Linda P. Stier  
Harry Ricker  
Michael Roland  
Jay Wadleigh  
Joseph Woodbury

Staff:  
Lock Kiermaier

STATE OF MAINE

## Citizen Trade Policy Commission

August 1, 2012

The Honorable Ronald Kirk  
Trade Ambassador  
Office of the United States Trade Representative  
600 17<sup>th</sup> Street, NW  
Washington, DC 20508

Ms. Barbara Weisel  
Assistant U. S. Trade Representative for Southeast Asia and the Pacific  
Office of the United States Trade Representative  
600 17<sup>th</sup> Street, NW  
Washington, DC 20508

Re: 2012 Trade Policy Assessment; commissioned by the Maine Citizen Trade Policy Commission

Dear Ambassador Kirk and Ms. Weisel:

As you may know, the Citizen Trade Policy Commission (CTPC) is required by current Maine Law (10 MRSA Chapter 1-A) to provide an ongoing state-level mechanism to assess the impact of international trade policies and agreements on Maine's state and local laws, business environment and working conditions. An important part of the CTPC mandate is to conduct a biennial assessment on the impacts of international trade agreements on Maine.

We have enclosed a copy of our recently completed 2012 Trade Policy Assessment. In a process that is more fully described in an addendum included within the printed document, the Citizen Trade Policy Commission contracted with Professor Robert Stumberg of Georgetown University to conduct this assessment.

We believe that the 2012 Trade Policy Assessment is an invaluable tool for a more complete understanding of both the proposed TransPacific Partnership Agreement (TPPA) which is currently being negotiated and other international trade treaties and their current and potential effects on Maine. As a specific result of the 2012 Trade Policy Assessment, the CTPC has voted unanimously to make a number of recommendations regarding the potential treatment of *tobacco* within the TPPA:

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c/o Office of Policy & Legal Analysis  
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- We favor a complete "carve out" of tobacco from the trade provisions of the TPPA; in other words, we would prefer that any regulations or laws pertaining to tobacco be completely excluded from the TPPA. The CTPC believes strongly that the efforts of individual nations to control tobacco and combat its adverse health effects should not be interfered or impeded in any way by provisions of the TPPA or any other international trade agreement;
- Absent a complete "carve out" of tobacco from the TPPA, we favor an approach which modifies the purported compromise proposal being made by the USTR; more specifically, the CTPC favors an approach which ensures that all federal and state laws and regulations pertaining to tobacco regulation are not subject to jurisdiction under the TPPA and further that any tobacco-related provisions of the TPPA embrace an approach which minimizes potential litigation be it through local, state or federal court and the possible use of "investor-state" dispute settlement systems; and
- Finally, the CTPC requests that the USTR develop a clear public statement on the specifics on the specific elements of a tobacco-related provision, as they are proposed by the USTR for consideration as a part of the TPPA.

In making these and other recommendations, members of the CTPC expressed a clear desire to further discuss these subjects in detail with either of you in the context of a public meeting held by the CTPC. We invite you to appear at such a public meeting at a date that is mutually satisfactory and as an alternative to you traveling to Maine, we suggest that a conference call could be arranged on a date to be determined in the near future.

On behalf of the CTPC, we thank you for your attention to the issues we have raised regarding the treatment of tobacco-related provisions in the TPPA and we look forward to discussing these issues with you in more detail.

Sincerely,

*Roger Sherman*  
Senator Roger Sherman, Chair

*Joyce Maker*  
Representative Joyce Maker, Chair

c: Governor Paul LePage  
Senator Olympia Snowe  
Senator Susan Collins  
Representative Michael Michaud  
Representative Chellie Pingree  
Maine State Representative Sharon Treat, member of Intergovernmental Policy Advisory Committee

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**Testimony of  
Linda Murch  
Field Coordinator  
Alliance for American Manufacturing  
Before the  
Maine Citizen Trade Policy Commission  
August 6, 2015**

Senator Volk, Representative Saucier, Members of the Commission, thank you for the opportunity to testify today. Trade agreements can have a serious impact on Maine's manufacturers and workers, which is why getting trade right is of the utmost importance for the people of Maine.

My name is Linda Murch. I was born and raised in Maine and currently live in Bangor. I worked for over 25 years in manufacturing facilities here in Maine. Most of my career was spent in the Bucksport paper mill, which, sadly, closed in December 2014, costing the state 500 good-paying jobs.<sup>1</sup>

Today, I work for the Alliance for American Manufacturing because I care about keeping manufacturing jobs here in America. And because I know what it is like to build a life, and a community, through manufacturing.

The Alliance for American Manufacturing (AAM) is a non-profit, non-partisan partnership formed in 2007 by some of America's leading manufacturers and the United Steelworkers. Our mission is to strengthen American manufacturing and create new private-sector jobs through smart public policies.

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<sup>1</sup> MacQuarrie, Brian, "[Closing of Maine Papermaker Ends a Way of Life](#)", The Boston Globe, 20 Dec. 2014.

As recently at 1998, one in five Americans worked in manufacturing. But since that time, our nation lost 5.7 million good paying manufacturing jobs. Here in Maine, we have not been spared. Maine lost 31,000 manufacturing jobs, or 5.5% of all employment over that time.<sup>2</sup>

Today, eight percent of Maine's workforce is employed in manufacturing. And manufacturing punches above its weight in terms of economic impact, accounting for 10.36 percent of the state's economic activity.

If we want to maintain, and grow, Maine's manufacturing sector, we need to make sure that trade agreements reflect and enforce our economic values.

Right now the United States is negotiating two major trade agreements, the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). I would like to briefly outline AAM's perspective on how these agreements can ensure a brighter future for American manufacturing and workers.

### **Trade Agreements and Manufacturing:**

**Trade Enforcement** – Manufacturers and workers harmed by unfair trade should not have to wait for layoffs before taking action. Legislation passed by Congress and signed into law this year updates our trade laws to allow the U.S. government to more effectively hold trade cheats accountable. Through any trade agreements, we must support strong domestic trade enforcement as the central mechanism for holding our trading partners accountable.

**Currency Manipulation** – Some countries manipulate their currencies to get a trade advantage. When they do this, U.S. goods become relatively more expensive both at

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<sup>2</sup> Scott, Robert E., "The Manufacturing Footprint and the Importance of U.S. Manufacturing Jobs", Economic Policy Institute, 22 Jan. 2015.

home and abroad. AAM urges the United States government to establish enforceable rules in the TPP to deter currency manipulation. Both Malaysia and Japan have engaged in this practice in recent years. The Economic Policy Institute (EPI) estimates that ending currency manipulation could create as many as 24,000 Maine jobs, and up to 5.8 million jobs nationally.<sup>3</sup>

**Market Access** – Many tariff and non-tariff barriers prevent American-made products from making their way into markets in the Asia-Pacific. For example, Japan sold over 5.3 million cars in the U.S. in 2012. Yet the Big Three sold fewer than 14,000 cars in Japan.<sup>4</sup> For U.S. manufacturers to get value out of the TPP, we must remove barriers that keep American-made goods from being sold abroad.

**Rules of Origin** - “Rules of origin” determine the national source of a product. This matters in trade deals because only those countries bearing the risks and responsibilities of signing an agreement should receive its benefits. Without strong rules of origin, it is possible to evade trade laws by obscuring the true source of a manufactured product.

**Competition and State Owned Enterprises** – American producers can compete with private companies anywhere, but not with foreign governments. State-Owned Enterprises (SOEs) in countries such as China benefit from subsidies like low-cost loans, rent-free land, cheap energy, and other supports unavailable to American producers. Trade agreements should encourage market-oriented business practices and level the playing field for American manufacturers.

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<sup>3</sup> Scott, Robert E., “[Stop Currency Manipulation and Create Millions of Jobs](#)”, Economic Policy Institute, 26 Feb. 2014.

<sup>4</sup> Paul, Scott, “[There’s Still Time to get the TPP’s Trade Rules Right](#)”, The Washington Examiner, 31 July 2015.

**Government Procurement and Investment** – 91 percent of American voters support Buy America preferences for taxpayer-funded projects.<sup>5</sup> They want their dollars to be reinvested back in the American economy. By maximizing the domestic content of infrastructure projects, we can create 33 percent more jobs than by allowing the production to be outsourced.<sup>6</sup> Trade agreements should continue to recognize that domestic procurement, be it for national security or transportation, can rightfully be used to support domestic manufacturing supply chains.

Maine needs manufacturing. That is why it is important to understand how these trade agreements impact our citizens. With these measures in mind we can create a level playing field on which American manufacturers and workers can compete fairly.

I want to thank you again for allowing me to testify here today. I look forward to your questions.

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<sup>5</sup> Mellman Group and North Star Opinion Research, "Make it in America: New Polling Shows Manufacturing Seen as the Most Important Industry to the American Economy", Jan. 2014.

<sup>6</sup> Pollin, Robert; Heintz, James; Garrett-Peltier, Heidi, "How Infrastructure Investments Support the U.S. Economy: Employment, Productivity and Growth", Political Economy Research Institute and the Alliance for American Manufacturing, Jan. 2009.

July 24, 2015

The Honorable Michael Froman  
United States Trade Representative  
600 17<sup>th</sup> Street NW  
Washington, DC 20508

Dear Ambassador Froman:

On behalf of the Alliance for American Manufacturing, I am writing to outline a number of priority issues within the Trans-Pacific Partnership (TPP) trade agreement negotiations that will determine whether or not U.S. manufacturing companies and American workers benefit from the final deal.

The "Petri" study – widely cited by proponents of the TPP to show the potential benefit of the agreement – predicts a \$39 billion increase in the manufacturing trade deficit. Factory workers, who already face a high level of competition from TPP partner countries, deserve a deal that will work for them as well. We urge you to adopt the following points as negotiating goals, ensure they become core features of the TPP, and recognize that they are consistent with the objectives set out in the most recent grant of Trade Promotion Authority (TPA).

- **Currency manipulation.** Japan has a lengthy track record of foreign exchange manipulation and, in recent years, has aggressively devalued the yen to boost its own exports at our expense. Indeed, the Economic Policy Institute estimates that the trade deficit with Japan, driven by currency devaluation and structural impediments, cost the United States nearly 900,000 job opportunities in 2013. Other potential TPP partners, including Malaysia, have manipulated their currencies in the past. Without enforceable rules to deter predatory currency distortions, any bargained-for benefits elsewhere in the agreement could quickly be negated after a deal is signed, particularly if notorious manipulators like China "dock" to the TPP in the future. The TPA legislation passed by Congress includes principle negotiating objectives directing the Administration to address exchange rate manipulation with enforceable rules and other mechanisms.
- **Market access.** A host of tariff and non-tariff barriers prevent American-made manufactured products from making their way into markets in the Asia-Pacific. Meanwhile, the U.S. market is the most open in the world. Japan, for example, maintains an atmosphere that keeps U.S. exports from entering its market. According to the House Ways & Means Committee, in 2012, the Big Three auto companies sold just 13,637 cars in the Japanese market while Japanese auto companies sold 5,343,578 cars in the U.S. market – selling more in a single day than U.S. producers were able to sell in Japan over an entire year. Unfortunately, this example extends into a range of other domestic products. U.S. producers and American workers can benefit from the TPP only if these barriers are eliminated and the benefits of trade are reciprocal.
- **Rules of origin.** A trade agreement's rules of origin determine the national source of a product. This is important in the context of trade deals because only those countries bearing the risks and responsibilities of signing an agreement should obtain its benefits. The NAFTA

included a rule of origin of 62.5%. The US-Australia FTA included a 50% rule of origin. For South Korea, the rule of origin was set at 35%. We believe that a rule of origin must be set high enough to maximize the benefits for signatory countries and minimize the advantages to non-participating countries. In autos, auto parts and several other sectors, it is critical to ensure that production and job creation is maximized within the signatory countries. The goal must be to maintain, and reclaim, supply chains that have been outsourced. Lower rules of origin work against that goal.

- **Competition and state-owned enterprises.** The rise of “state-capitalism” has created enormous economic distortions in recent years. As globalization accelerates, the impact of state-owned enterprises (SOE) and state-controlled enterprises (SCE) is having a significant adverse impact on competition – globally, and also here at home as SOEs pursue investments in the U.S. market. While China has the largest and best-known SOEs and SCEs, Vietnam, Malaysia and other TPP participants have significant state actors whose rise could skew production and employment patterns. If the goal of the TPP is to write the rules of trade, rather than letting China do so, then SOEs and SCEs must be reined in. Unfortunately, it appears that what started out as an area of so-called “high ambition” has been weakened to a level where any new disciplines may have limited impact. U.S. negotiators should only accept proposals that create the framework that will put enforceable rules in place to ensure fair competition.
- **Government procurement and investment.** It is vital that U.S. taxpayers are able to ensure that their hard-earned tax dollars promote domestic production and employment. The President recognized this goal by supporting the retention of Buy America policies within the *American Recovery and Reinvestment Act* and the Administration, as a whole, has been a strong supporter of Buy America. Members of Congress from both parties have repeatedly reaffirmed their interest in ensuring government funds are not used to offshore U.S. jobs and domestic supply chains. Trade negotiations must not undermine or restrict these important domestic economic tools. In addition, investment protections must be enhanced while also ensuring that U.S. laws can be effectively used to ensure our economic and national security interests.

The outcome of these priority issues will have an enormous impact on trade flows as they influence siting and employment decisions of industrial America. We must not accept lowered ambitions in the hope of meeting an arbitrary deadline. An approach that opens foreign markets and ensures that our competitors will follow a robust set of enforceable rules is vital to the success of America’s manufacturing sector. Thank you for your consideration of these issues.

Sincerely,



Scott N. Paul  
President

## Article notes

### Citizen Trade Policy Commission

#### Articles from June, July and August 2015; and other miscellaneous articles

**TTIP and Digital Rights; (European Digital Rights; no date)**- This paper lists the concerns that a network of 33 civil and human rights organizations from 19 European countries have about the TTIP and how it pertains to digital rights. With regards to the TTIP, their concerns include:

- Lack of transparency;
- Respect for the rule of law and democracy;
- Data protection;
- Privacy;
- “Intellectual Property”;
- Net neutrality; and
- The use of ISDS

**Transatlantic Investment Treaty Protection –A Response to Poulsen, Bonnitcha and Yackee; (Centre for European Studies; March 2015)**- This scholarly article suggests several alternatives to including ISDS in the TTIP:

1. Provide for nation-to-nation arbitration which would be unwieldy and inevitably lead to international controversy;
2. Allow the home nation to block any claims brought by investors; this approach could be modified to allow the home nation to be a third party intervener;
3. Allow the exhaustion of local remedies before allowing use of ISDS;
4. Adopt a fixed or flexible time frame for pursuing local remedies; and
5. Exclude substantive investment provisions entirely from the TTIP thereby eliminating any need for ISDS.

**TPP May Set Stage for More Challenges Of U.S. Laws After WTO Ruling on COOL;(International Trade Daily; May 29, 2015)**- This article makes the connection between a recent WTO decision that overturned a US country-of-origin labeling law and the likelihood that a similar ruling could result from the adoption of the TPP.

**Wikileaks Releases Largest Trove of Trade Negotiations Documents in History on Proposed “Trade in Services Agreement,” Exposes Secret Efforts to Privatize and Deregulate Services; (Wikileaks; June 3, 2015)**- This news release from Wikileaks holds that recently leaked text from the ongoing TISA negotiations proves that adoption of TISA is likely to lead to extensive domestic deregulation of the financial industry as well as almost any other domestic regulation that can be construed as affecting a service industry.

**Huge trade deal hinges on Big Pharma protections; (Politico; June 3, 2015)**- This article reports that the pharmaceutical industry is heavily pressuring the Obama administration to include provisions in the TPP which would establish a 12 year protection on prices for costly drugs that are crucial for poorer, underdeveloped nations thereby effectively banning the use of cheaper, generic drugs during that time span.

**Revealed Emails Show How Industry Lobbyists Basically Wrote The TPP; (techdirt.com; June 6, 2015)**- This blog piece discusses the close relationship that industry lobbyists have with the USTR regarding the specific contents of the TPP. The author highlights the following passage:

*“ What is striking in the emails is not that government negotiators seek expertise and advice from leading industry figures. But the emails reveal a close-knit relationship between negotiators and the industry advisors that is likely unmatched by any other stakeholders.”*

**Divided EU lawmakers postpone vote on U.S. trade deal; (Reuters; 6/9/15)**- This article reports that the European Parliament recently took a preliminary, but crucial vote on whether to take a unified stance on the TPP; the vote failed.

**Confidential LAC Report Says TPP Falls Short On Automotive, SOE Rules; (Inside US Trade; 6/5/15)**- This detailed article reports on a confidential report issued by the Labor Advisory Committee (LAC) in September of 2014 regarding the TPP. The report outlines two major criticisms of the TPP:

1. The report alleges that the TPP will weaken rules of origin for automobiles, thereby resulting in the future migration of American auto jobs to other TPP countries; and
2. The report also claims that the TPP is weak regarding the lack of disciplines and rules for State-owned enterprises (SOE); specifically, the TPP will lack provisions that adequately address mergers and acquisitions.

**MEMO: Three Burning Questions about the Leaked TPP Transparency Annex and Its Implications for U.S. Health Care; (Citizen.org; 6/10/15)**- This blog piece questions the recently leaked provisions of the TPP text entitled, “Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices”. The author raises three fundamental questions about this part of the TPP:

1. *What guarantees are there that the TPP’s requirements would not override existing procedures for Medicare?* The author maintains that the relevant parts of the TPP are sufficiently vague so that the agreement could be used to override certain Medicare procedures.
2. *Would the TPP constrain pharmaceutical reform efforts in the US?* The author suggests that current efforts to negotiate the price of prescription drugs on behalf of Medicare beneficiaries would be at considerable risk under the provisions of the TPP; and

3. *Could the inclusion of this Annex in the TPP bolster the case of a pharmaceutical company that is suing the United States?* The author concludes that the inclusion of ISDS in the TPP would indeed increase the chance of success for such a legal action.

**TPP Transparency Chapter ANNEX ON TRANSPARENCY AND PROCEDURAL FAIRNESS FOR PHARMACEUTICAL PRODUCTS AND MEDICAL DEVICES,**

*(Wikileaks, 6/10/15)* – This release from Wikileaks asserts several claims regarding the recently leaked Transparency Chapter of the TPP:

- It seeks to regulate state schemes for medicines and medical devices;
- It will force healthcare authorities to give more information about national decisions on public access to medicine to large pharmaceutical companies;
- It grants corporations greater opportunities to challenge policy decisions that they regard as harmful to their interests;
- It will create obstacles to efforts to reform Medicare by the US Congress; and
- The text of this chapter cannot be publicly released until four years after the TPP is signed into law.

**Why Does Obama Want This Trade Deal So Badly?;** *(The New Yorker; 6/11/15)*- This column, authored by William Finnegan, entails a basic review of the President Obama's Fast Track authority proposal and the TPP and examines the reasons that many people oppose both proposals. Most prominently, a lot of opposition from Congressional Democrats is based on the allegations that NAFTA resulted in the loss of hundreds of thousands of manufacturing jobs in the US. Also cited as reasons used to oppose these proposals is the lack of transparency, extreme secrecy and inclusion of ISDS.

**What will TTIP mean for food and climate?;** *(Food Climate Research Network; 6/16/15)*- This bog piece offers a number of concerns about how the TTIP may affect food production and climate:

- It could stifle the enforcement of, and development of, agricultural rules and regulations as well as those pertaining to consumer protection and public safety;
- Use of the ISDS provides a means by which corporations can override governments;
- It could override the current EU authority to ban on the use of GMO foods; and
- It could be used to end the current US limitations on crude oil and natural gas exports, thereby increasing the use of these energy sources which consequently will hasten global warming.

**Letter from US Senator Jeff Sessions to President Obama;** *(6/5/15)*- This letter, authored by US Senator Jeff Sessions (R- Alabama), asks President Obama to provide the legal and constitutional basis used to justify the secrecy by which the text of the TPP agreement is being denied to members of Congress and the American public.

**Trade agreements should not benefit industry only; (The Boston Globe; 6/23/15)** – This opinion piece, authored by US Senator Elizabeth Warren (D- Massachusetts), questions why major trade agreements have been designed to favor large multinational corporations and suggests that modern trade agreements should benefit all segments of American society. Senator Warren assails the use of ISDS in trade agreements by stating:

*“Leading economic and legal experts have called on America to drop ISDS from its trade deals. Hillary Clinton recently called ISDS “a fundamentally antidemocratic process.” The conservative Cato Institute agrees, noting that ISDS is “ripe for exploitation by creative lawyers” looking to challenge the “world’s laws and regulations.”*

*And here lies the double standard at the heart of our trade deals: Once they sign on, countries know that if they strengthen worker, health, or environmental standards, they invite corporate ISDS claims that can bleed taxpayers dry. But countries also know that if they fail to raise wages or stop dumping in the river — even if they made such promises in the trade deal — the US government will likely do nothing. “*

**Leaked: What’s in Obama’s trade deal; (Politico; June 2015)**- This article discusses the contents of the recently leaked TPP chapter on intellectual property and emphasizes the chilling effect that this chapter will have on the availability of cheaper generic drugs that are crucial to underdeveloped countries. The article also focuses on the USTR’s apparent willingness to support the position of leading pharmaceutical manufacturers who have advocated for these provisions.

**Just Before Round of Negotiations on the Proposed 'Trade in Services Agreement' (TISA), Wikileaks Releases Updated Secret Documents; (Huffington Post; 7/2/15)**- This article reviews the recent Wikileaks release of leaked chapters of the ongoing TISA negotiations. These leaked documents include chapters on:

- Financial Services;
- Telecommunications Services;
- Electronic Commerce; and
- Maritime Transport.

The article’s concerns about these chapters are summarized in the following excerpt:

*“The documents, along with the analysis, highlight the way that the TISA responds to major corporate lobbies’ desire to deregulate services, even beyond the existing World Trade Organization (WTO) rules. This leak exposes the corporate aim to use TISA to further limit the public interest regulatory capacity of democratically elected governments by imposing disciplines on domestic issues from government purchasing and immigration to licensing and certification standards for professionals and business operations, not to mention the regulatory process itself.”*

*U.S. Chamber of Commerce Works Globally to Fight Antismoking Measures; (New York Times; 6/30/15)*- This article reports on recent efforts of the US Chamber of Commerce to use international trade agreements to fight antismoking laws and regulations.

*Q&A on TTIP to leading trade expert Dr Gabriel Siles-Brügge, University of Manchester;(uniglobalunion.org; 7/6/15)* – This blog post consists of an interview with trade expert Dr Gabriel Siles-Brügge, University of Manchester. In the course of the interview, Dr. Siles-Brügge makes the following points:

- The TTIP negotiations are being hastened by fears that delays will result in further opposition and a “diluted” TTIP;
- The recent actions within the European Parliament (EP) to modify a version of the ISDS within the TTIP includes the following elements:
  - moving towards a permanent roster of arbitrators;
  - including an appellate mechanism;
  - clarifying the relationship to domestic courts (so that foreign investors have to choose whether to take their case to domestic courts or arbitration tribunals) and
  - enshrining the ‘right to regulate’ in the investment protection text.
- Recent arguments in favor of including ISDS in the TTIP include:
  - EU-US investment flows can be boosted by providing investors with greater legal security, as there are both EU and US jurisdictions where courts are either slow/unreliable in upholding investor rights or indeed outright discriminate against foreign investors;
  - including ISDS in TTIP is necessary to set a precedent, and to ensure that such provisions can be included in a future investment agreement with China (such as the EU is currently negotiating); and
  - TTIP provides an opportunity to reform the flawed system of BITs (which some supporters admit had their problems) and replace it with a new, improved system that protects investors while fully recognizing the ‘right to regulate’ of states.

*Exclusive - U.S. upgrades Malaysia in annual human trafficking report: sources; (Reuters; 7/9/15)*- This article reports that the Obama administration has approved a measure which removes Malaysia from the lowest category of countries that contain the worst human trafficking centers. The article alleges that this move clears the way for Malaysia to be included as a signatory in the proposed TTP.

*U.S.-Canada Dairy Spat Sours Trade Talks; (Wall Street Journal; 7/10/15)*- This article reports on a disagreement between the US and Canada which threatens adoption of the proposed TPP. In short, the US objects to current Canadian policy which establishes dairy prices that are determined through a calculation the average costs of production; production is regulated through the use of a quota system and is protected through the use of tariffs.

*U.S. firm sues Canada for \$10.5 billion over water; (CBC News; 7/9/15)*- This article reports that Sun Belt Water Inc. of California is suing the Canadian government under the provisions of NAFTA for its prevention of the importation of fresh water from British Columbia to the US.

*TPP Deal Puts BC's Privacy Laws in the Crosshairs; (theyee.ca; 7/16/15)*- This opinion piece, authored by Scott Sinclair, explains how the proposed TPP will establish the rights of companies to freely move digital data such as financial transactions, consumer tendencies, online communications and medical records across international borders.

*Yeutter sees 'slim' prospects for TPP agreement at Hawaii session; (agri-pulse.com; 7/15/15)*- This article reports that former USTR Clayton Yeutter has significant doubts that the US and other countries will be able to finalize TPP negotiations in late July.

*The TPP's Bad Medicine: The Draft Agreement's Intellectual Property Protections Could Go Too Far ; (Foreign Affairs; 7/13/15)*- This opinion piece, authored by Fran Quigley, maintains that the TPP text regarding intellectual properties protections are likely to go too far in that they will severely restrict the international availability of crucial generic drugs at an affordable cost. Mr. Quigley also holds that the US is pushing for these protections in the TPP over the objections of many other nations participating in the TPP negotiations.

*UACT Letter to TPP Negotiators; Re: Effects of TPP provisions on cancer patients and their families; (Union for Affordable Cancer Treatment; 7/26/15)*- This document consists of a letter from the UACT to the TPP negotiators regarding their concerns over possible provisions in the TPP which would inhibit access to affordable cancer treatment.

**T**ransatlantic  
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AND DIGITAL RIGHTS

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European Digital Rights (EDRi) is a  
network of 33 civil and human rights  
organisations from 19 European  
countries. Our goal is to promote,  
protect and uphold fundamental  
human rights and  
freedoms in the digital  
environment.

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# WHAT IS TTIP?

The Transatlantic Trade and Investment Partnership (TTIP – pronounced “tee-tip”) is a draft trade agreement being negotiated between the United States (US) and the European Union (EU). President Barack Obama announced TTIP at his State of the Union address to Congress in February 2013. Representatives from the European Commission and the US Government held their first meeting to discuss TTIP in June 2013 and they have met roughly every three months since then.

TTIP’s proponents argue that it will increase trade and investment by reducing trade barriers between two of the largest economic blocs in the world. The European Commission says that it will inter alia help large and small businesses by increasing their access to US markets, reducing the amount of red tape they have to go through and making it easier to develop new rules to make international trade.<sup>1</sup>

Despite the assurances given by the European Commission and the US Government, European and US citizens have serious concerns about TTIP, the way it is being negotiated without adequate levels of transparency, and its potentially negative impacts, including on fundamental rights and freedoms.

This booklet presents the concerns that EDRI and its members have regarding TTIP, such as the lack of transparency in

the negotiations, respect for the rule of law and democracy, data protection, privacy, “intellectual property”, net neutrality, and ISDS, which would give rights to foreign companies to claim compensation from governments, undermining democracy and the right to legislate.

## EDRI’s RED LINES on TTIP

1. Ensuring real **transparency** and accountability
2. Protection of the **right to regulate** and a guarantee of respect for **rule of law**
3. **Data protection and privacy** not included
4. End of **mass surveillance** and no lock-in of **encryption** standards
5. “**Intellectual Property**” not included
6. No provisions on **net neutrality**
7. **Exclusion of any form of ISDS**
8. Inclusion of a binding and enforceable **Human Rights clause**

<sup>1</sup> European Commission Trade Policy In focus: Transatlantic Trade and Investment Partnership (TTIP) - About TTIP <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/>

# 1. INSUFFICIENT TRANSPARENCY AND DEMOCRATIC DEFICIT: NOT A GOOD STARTING POINT

Transparency, democracy and accountability are core principles that any trade negotiation should respect. However, both the US' and the EU's trade policies fail to even set these as possible goals. The lack of real transparency and the democratic deficit of the negotiations are two of the key criticisms surrounding TTIP and other free trade agreements.

Before the TTIP negotiations even started, many civil society organisations had asked the European Union and the United States to "release, in timely and ongoing fashion, any and all negotiating or pre-negotiation texts."<sup>2</sup> However, citizens' demands have not been adequately addressed.

Thanks to pressure from the public opinion and certain policy- and decision-makers, the European Commission has taken small steps to change its transparency policy in TTIP,<sup>3</sup> fearing a repeat of ACTA's failure.<sup>5</sup> According to official documents<sup>4</sup>, the Council of the European Union (which represents Member States) and the Commission want to do so by reinforcing<sup>7</sup> their public relations activities, "explain[ing] the basics of the negotiations and [addressing] criticism".<sup>8</sup>

However, transparency is not achieved by telling people that they know what they don't know.

Due to the serious concerns raised, the European Ombudsman, the EU authority dealing with maladministration in EU bodies and institutions, launched a public consultation on transparency in the TTIP negotiations.<sup>9</sup> On 6 January 2015, she adopted a decision on the matter.<sup>10</sup> The Ombudsman challenged the anti-openness position that she caricatured as saying that "greater transparency could lead to confusion and misunderstandings among citizens." She said that "such arguments are profoundly misguided. The only effective way to avoid public confusion and misunderstanding is more transparency and a greater effort proactively to inform public debate." As of 19 May 2015, the European Ombudsman's view was that she still did not see enough efforts regarding transparency, especially from the US side.<sup>11</sup>

**Transparency is achieved by opening the negotiations to the public. Otherwise, the result is lack of accountability and public scrutiny and a democratic deficit.**

2 <http://www.citizen.org/IF-out-of-TAFTA>

3 <https://edri.org/editorial-transparency-ttip/>

4 <https://edri.org/acta-archive/>

5 <http://edri.org/ttip-european-ombudsman-warns-european-institutions-learn-acta-negotiations/>

6 <http://data.consilium.europa.eu/doc/document/ST-14713-2014-INIT-en.pdf>

7 In November 2010, the Commission had already foreseen a PR strategy to overcome criticism: <http://corporateeurope.org/trade/2013/11/locked-european-commission-pr-strategy-communicating-ttip>

8 <http://corporateeurope.org/international-trade/2014/11/eu-communicating-ttip>

9 You can read EDR's response to the consultation here: [https://edri.org/files/ttip\\_consultation.pdf](https://edri.org/files/ttip_consultation.pdf)

10 <http://www.ombudsman.europa.eu/en/case/v-decision/fact/en/38668/html.bookmark>

11 <http://www.ombudsman.europa.eu/ta/ta-see/correspondence/cases/en/37793/html.bookmark>

## 2. REGULATORY COOPERATION: ADDING BUREAUCRATIC HURDLES AS A WAY OF REMOVING BUREAUCRATIC HURDLES

With the stated purpose of cutting costs and bureaucratic red-tape for European companies, the European Commission is negotiating Regulatory Cooperation provisions within TTIP. But it is not possible to surmise what Regulatory Cooperation actually means when reading the Commission's proposal of 4 May 2015.<sup>12</sup> Apart from being characterised by the same vague wording as the first proposal,<sup>13</sup> the text does not actually include any definition of Regulatory Cooperation. What is clear is that the Commission's proposed text contains legal obligations for EU and US regulators to consult each other before developing new regulations or reviewing existing ones, with the purpose of aligning their standards.

These legal obligations could range from information sharing and exchange of best practices, to regulatory exchanges on planned acts – which “may take place at any stage” of the legislative process and which would “continue until the adoption of the regulatory act”<sup>14</sup> – and joint evaluation of possible regulatory compatibility.<sup>15</sup> Such provisions would deeply influence the development of potential regulations, producing a “chilling effect” on legislators – both from EU and Member States, since the

Regulatory Cooperation chapter would apply also at national level.<sup>16</sup>

As to the implementation of these rules, the Commission's position again is not clear. An unspecified “bilateral cooperation mechanism” would be responsible for the “information and regulatory exchanges,” but the Commission also proposed the establishment of a “Regulatory Cooperation Body.”<sup>17</sup> This body, composed of “senior representatives of regulators and competent authorities, as well [as by] representatives responsible for regulatory cooperation activities and international trade matters at the central level,”<sup>18</sup> would “monitor and facilitate the implementation of the provisions<sup>19</sup> on Regulatory Cooperation” in different ways, such as drafting an “Annual Regulatory Co-operation Programme”<sup>20</sup> and considering “new initiatives for regulatory co-operation”<sup>21</sup>. It is not clear how this body would be organised, how it would be held accountable and, even more importantly, which value and effects its acts would have. What is clear is that, ironically, it is a proposal to invent new bureaucracy as a means of generating less bureaucracy.

Having the Regulatory Cooperation chapter

12 European Commission textual proposal on Regulatory Cooperation in TTIP, 4 May 2015, <http://trade.ec.europa.eu/doclib/html/153403.htm>. This proposal was preceded by leaks and other official versions.

13 TACD Resolution on Regulatory Cooperation in TTIP: <http://tacd.org/wp-content/uploads/2015/02/TACD-TTIP-Resolution-on-Regulatory-Cooperation.pdf>

14 Article 12 of the textual proposal on Regulatory Cooperation

15 Article 9 and 11 of the textual proposal on Regulatory Cooperation

16 Art 3, p 2 of the textual proposal on Regulatory Cooperation

17 Art 8 of the textual proposal on Regulatory Cooperation

18 Art 6, p 1 of the textual proposal on Regulatory Cooperation

19 Art 14, p 1 of the textual proposal on Regulatory Cooperation

20 Art 14, p 2, lett a) of the textual proposal on Regulatory Cooperation

21 Art 14, p 2, lett d) of the textual proposal on Regulatory Cooperation

in force would mean that every time the Commission will propose new rules – or reviews existing ones – they will be firstly addressed as trade issues in an additional impact assessment process<sup>22</sup> and debated in non accountable bodies, even before submitting them to EU legislators or regulators. This would affect European Commission's power of initiative and would undermine the European Parliament and Council's powers and role in the legislative procedure.

The broad application of these provisions is even more worrisome. The Regulatory Cooperation chapter would apply to regulatory acts which “determine requirements or related procedures for the supply or use of a service” or “determine requirements or related procedures applying to goods”<sup>23</sup> “[...] in areas not excluded from the scope of TTIP provisions [...] that have or are likely to have a significant impact on trade or investment between the Parties.”<sup>24</sup> This is particularly dangerous because it opens the application of these rules outside of TTIP's scope and to every sector not explicitly excluded in the text. Additionally, they could apply to standards of protection which do not have the same legal basis in the EU and in the US. The right to the protection of personal data, for example, is considered a fundamental right in the EU but only a consumer right in the US. Regulatory Cooperation would allow the US to influence future EU rules in this field.<sup>25</sup>

The Commission has repeatedly stated that EU standards will not be watered down by TTIP. Even if this turns out to be true for measures that are in the final draft of TTIP,

regulatory cooperation provisions are likely to have this effect in the future, prejudicing the possibility to adopt new regulations.

**If Regulatory Cooperation is adopted, strong and enforceable safeguards shall be put in place so that the right to regulate is not undermined.**

<sup>22</sup> Art. 7 of the textual proposal on Regulatory Cooperation

<sup>23</sup> Art. 3, par. 1, of the textual proposal on Regulatory Cooperation

<sup>24</sup> Art. 3, para 2, of the textual proposal on Regulatory Cooperation

<sup>25</sup> EPP's red line on TTIP: [http://een.org/stip\\_redline/](http://een.org/stip_redline/)

### 3. TTIP & DATA PROTECTION: SECRETS AND LIES

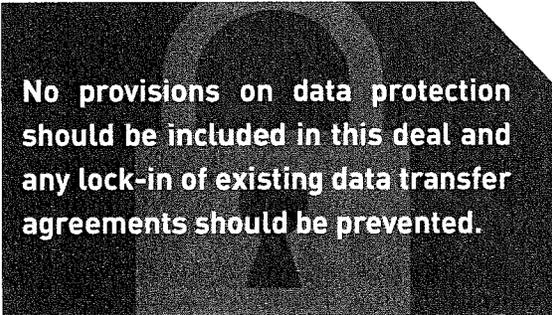
With the intended chapter on e-commerce, it was clear from the very beginning of the trade negotiations that TTIP would have an impact on the digital sphere. While privacy has been excluded from the EU negotiating mandate, the discussion on “data flows” within the e-commerce chapter necessarily draws privacy and data protection into the discussion.<sup>26</sup>

In December 2014, a leaked e-commerce proposal from the US that was tabled in both TiSA and TTIP revealed provisions that would undermine the protections developed in the EU to guarantee the rights to privacy and data protection, as recognised by the EU Charter of Fundamental Rights.<sup>27</sup> For instance, the US proposal would authorise the transfer of EU citizens’ personal data to any country, trumping the EU data protection framework, which ensures that this data can only be transferred in clearly defined circumstances.<sup>28</sup>

For years, the US has been trying to bypass the default requirement for storage of personal data in the EU. It is therefore not surprising to see such a proposal being tabled in the context of the trade negotiations. While the US has been accusing the EU of “data protectionism” through the establishment of data localisation rules, it is important to

remind that data *can* be transferred from the EU by developing rules ensuring adequate standards for the protection of data that is being processed.<sup>29</sup> In an attempt to weaken the EU framework on data protection, the US is confusing two different principles - local data protection storage measures and mandatory data localisation practices. While local data protection storage allows transfer of data under clearly defined conditions, mandatory data localisation practices impede the movement of data and can put the fundamental openness of the internet at risk.

In line with EDRi’s redlines on TTIP, we restate our view that trade negotiations are not an appropriate forum to discuss measures for the protection of privacy nor a place where to establish new standards.<sup>30</sup>



**No provisions on data protection should be included in this deal and any lock-in of existing data transfer agreements should be prevented.**

<sup>26</sup> TTIP negotiating mandate from the EU: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

<sup>27</sup> US proposal in TiSA on e-commerce: <https://data.europa.eu/first/2014/12/17/19.html>

<sup>28</sup> See European Commission page on adequacy mechanisms: [http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index\\_en.htm](http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index_en.htm)

<sup>29</sup> Obama Calls out European Data Protection as Plain Protectionism, Marketing Research Association, 18 February 2015: <http://www.marketingresearch.org/article/obama-calls-out-european-data-protection-plain-protectionism>

<sup>30</sup> EDRi’s Redlines on TTIP: [https://edri.org/ttip\\_redlines/](https://edri.org/ttip_redlines/)

## 4. SURVEILLANCE AND ENCRYPTION: NO TO ENTANGLED ALLIANCES

### Surveillance

Since the Snowden revelations, it is clear that the NSA spies on EU diplomats (and everybody else in Europe).<sup>31</sup> Spying on EU diplomats prevents the necessary level playing field for the negotiators and this – as well as the mass-surveillance on EU citizens – undermines the trust necessary to reach a balanced agreement on TTIP.<sup>32</sup>

The European Parliament has been very clear in condemning US mass surveillance. The Resolution of the European Parliament on the NSA surveillance programme states that “as long as the blanket mass surveillance activities and the interception of communications in EU institutions and diplomatic representations are not completely abandoned and an adequate solution is found for the data privacy rights of EU citizens, including administrative and judicial redress, the consent of the European Parliament to the TTIP agreement could be withheld.”<sup>33</sup> The Council of Europe adopted a resolution with similar language.<sup>34</sup>

31 <http://www.spiegel.de/international/europe/nsa-spied-on-european-union-offices-a-908590.html>

32 <https://www.c4i.org/deepink/2013/07/new-revelations-nsa-surveillance-european-citizens>

33 Cf. Paragraph 74 of the European Parliament's Resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0139+0+000+XML+0/EN>

This was reflected by the Parliamentary Committee on Civil Liberties, Justice and Home Affairs (LIBE) in its opinion on TTIP, 7 April 2015, point 11(b) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+LIBE+OPINION+LIBE+COMPARUS+2015-04-07+020001+01+PDF+0/EN+0/EN>

34 <http://assembly.coe.int/treaties/VR4/VR4-07-01/VR4-07-01-020001+01+PDF+0/EN>

Put simply, if these conditions are not met, there should not be an agreement on TTIP.

### Encryption

There are also negotiations on encryption in TTIP.<sup>35</sup> Both for our security and our privacy, it is vital to create and use the best level of encryption possible and to keep improving this level. There is an increasing demand to lower encryption standards and/or have “damaged by default” encryption with back-doors for state authorities.<sup>36</sup> Weak and damaged encryption undermine our security. Negotiating standards on encryption in TTIP could lead to creating weak security or a lack of flexibility<sup>37</sup>, as these standards might be, due to the inflexible nature of trade agreements, very difficult to improve.

**The (digital) security of European and American citizens should not be negotiated upon in a trade agreement. Any form of standardisation of encryption or interoperability of encryption standards leading to a possible lock-in of standards, should be discussed in other fora than a trade agreement.**

35 [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152666.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152666.pdf)

36 <http://www.theguardian.com/us-news/2015/feb/29/nsa-director-defends-backdoors-into-technology-companies>

37 <http://www.brookings.edu/~media/papers/files/papers/2013/09/15-cyber-security-and-trade-global-lead-friedman/brookings-cybersecuritynew.pdf>

## 5. COPYRIGHT AND OTHER IP RIGHTS IN TTIP: INTERFERENCE WITH THE EU'S DEMOCRATIC PROCESS

EDRi is of the opinion that so-called intellectual property rights (IPR) are fundamentally intertwined with freedom of expression, the right to participate in cultural life and to share in scientific advancement and its benefits,<sup>38</sup> both in substantive legislation as well as in relation to enforcement. For these reasons alone, IPR legislation requires a full and transparent democratic process and should not be negotiated as part of international agreements.<sup>39</sup> It is therefore fundamentally objectionable for IPR reform to be included in TTIP.

From the TTIP negotiation mandate, we do know that so-called intellectual property rights are on the agenda for TTIP. What is also public is the Commission's position paper on the TTIP IPR chapter<sup>40</sup>, the US Trade Representative publicly stated goals<sup>41</sup> as well as the Trans-Atlantic Business Council's position paper,<sup>42</sup> which reads like a wish list for anyone that would like to return to a pre-digital age, in which gatekeepers of culture would go unchallenged by modern technology. Examples of these wishes are:

- more direct enforcement;
- more indirect enforcement imposed

by liability of intermediaries (such as internet service providers);

- enforcing trade secrets as IPR;
- 'global leadership to combat IPR erosion', which translates as resistance to any attempt to reintroduce balance in currently unbalanced IPR regimes.

After the failure of ACTA, demanding ACTA 2.0 hardly seems like a productive lobbying position.

The Commission's ambitions are more modest and largely focused on geographic indicators, but also include the export of uniquely European problematic aspects of IPR rules, such as levies on broadcast content (with all the accompanying problems of the governance of collecting societies) and the idea that the resale of certain types of artistic works should incur a payment to the original artist (the so-called *droit de suite*). However, it can be expected that there will be pressure on the European Commission to broaden the scope and depth of its ambitions, both from industry and from the USA. A proof of such intentions are emails revealed in the SonyHack leak.<sup>43</sup>

In the European Commission's "factsheet" on IPR and Geographical indicators, we can read that "[i]n TTIP [they] want to raise awareness of the role of IPR in encouraging innovation and creativity". A trade agreement is not a mechanism for raising "awareness" of anything and the idea that TTIP could or should be used to raise awareness of IPR in

38 <http://www.un.org/en/documents/udhr/>

39 See also this civil society statement: <http://www.citizen.org/IP-out-of-TAFTA>

40 [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153331\\_7%20IPR%20EU%20position%20paper%2020%20M-rcip%202015.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153331_7%20IPR%20EU%20position%20paper%2020%20M-rcip%202015.pdf)

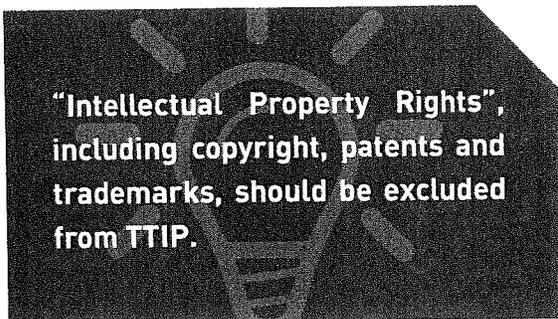
41 <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-ttip-10>

42 <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-ttip-10>

43 <http://wikileaks.org/sony/press/>

the USA is laughable. The factual basis for this “encouragement” is also rather difficult to ascertain.<sup>44</sup>

In the Commission’s public consultation on copyright reform<sup>45</sup>, the vast majority of respondents called for a moratorium on additional enforcement legislation and a focus on readjusting copyright to make it fit for the digital age. It is clear, therefore, that any inclusion of copyright and trade secrets in TTIP would pre-empt the ongoing democratic process in the European institutions and therefore aggravate the already fundamental problem of negotiating IPR as part of a trade agreement.



<sup>44</sup> [http://trade.ec.europa.eu/doclib/docs/2015/january/tradedoc\\_155070714201PR11200051200.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradedoc_155070714201PR11200051200.pdf)

<sup>45</sup> [http://ec.europa.eu/internal\\_market/consultations/2015/copyright\\_rules/doc/contributions-consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2015/copyright_rules/doc/contributions-consultation-report_en.pdf)

## 6. TTIP & NET NEUTRALITY: IS THIS THE END OF INTERNET AS WE KNOW IT?

Rules on access to the internet and access to online services are being proposed in the TTIP and the TiSA negotiations.<sup>46</sup>

Net neutrality lies at the very core of the internet's potential for development and the exercise of rights online. According to this principle, all traffic on the internet is treated on an equal basis, no matter the origin, type of content or means of communication. Any deviation from this principle, for instance for traffic management purposes, must be proportionate, temporary, targeted, transparent, and in accordance with relevant laws, including with the letter and spirit of international law. If these criteria are not respected, individuals and businesses face restrictions on their freedoms to receive and impart information. Historically, this type of interference has been imposed by direct intervention in the network through blocking or throttling and, as seen most recently, by agreements between internet access providers and online platforms in the form of paid prioritisation, price discrimination or zero-rating schemes.<sup>47</sup> These new types of restrictions limit user access to a narrow range of services and applications. Users are then delivered access to some, but not all, of the internet — the very opposite of net neutrality. Such practices also limit the market for new online services, reducing incentives to innovate, damaging the internet ecosystem and the economy.

The broad and vague language put forward in the provisions on internet access proposed by the US in the e-commerce chapter would not successfully limit such restrictions, thereby putting at risk the openness that is at the heart of the social and economic benefits of the internet. In the absence of any real possibility of including text that would ensure networks stay open, competitive and innovative, the addition of net neutrality provisions carries possible costs but no possible benefits.

**Net neutrality principles and rules on access to the internet should not be discussed within the context of the TTIP negotiations or any other trade or investment agreements.**

<sup>46</sup> US proposal in TiSA on e-commerce: <https://data.sfp.is/illtrala/2014/12/17/19.html>

<sup>47</sup> Access policy brief on zero-rating: [https://accessnow.org/page/-/Access\\_Position-Zero-Rating.pdf](https://accessnow.org/page/-/Access_Position-Zero-Rating.pdf)

## 7. ISDS: INCOMPATIBLE WITH DEMOCRATIC RULE OF LAW

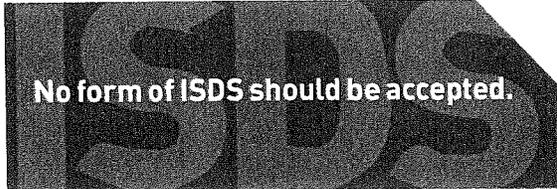
TTIP could include an investment protection chapter, which would provide foreign investors with special rights. That chapter would include provisions for a dispute settlement mechanism between foreign investors and a state. That mechanism is the so-called "ISDS", which stands for Investor-to-state dispute settlement.

ISDS would give foreign investors - and only foreign investors - the right to bypass local courts and challenge governments' decisions before supranational investment tribunals. The essence of ISDS is to implement a structural and explicit discrimination against local investors, governments and citizens in order to "solve" a problem that does not exist in countries with developed legal systems (like the EU and USA) - an inability to protect foreign investors from incidental discrimination.<sup>48</sup>

ISDS lacks institutional safeguards for independence, such as tenure, fixed salary, neutral appointment of adjudicators, and prohibition of outside remuneration. Only foreign investors can start cases; arbitrators have an incentive to favour foreign investors, as this will attract new cases. In addition, ISDS offers procedural advantages to the USA. For example, in all (currently 73) annulment procedures (the only form of appeal possible), the president of the World Bank appointed all three the arbitrators. The president of the World Bank has always been the candidate of the US.<sup>49</sup>

Democratic states can change laws if courts use unacceptable interpretations. In contrast, to change a treaty, all parties have to agree. ISDS in agreements with Canada and the US would lock the EU into a mechanism that is systemically biased towards investors and the US, as it is practically impossible to withdraw from trade agreements. ISDS poses specific problems for digital rights, as ISDS tribunals rule on intellectual property rights cases and may decide cases on data flows and privacy issues.

Most importantly, ISDS is not essential. Major international investments are almost always accompanied by contracts negotiated between governments and the investor, often including their own dispute settlement mechanisms that are tailored to the situation. Investors also have the option to take out political risk insurance and, overall, local courts and state-to-state arbitration adequately complement the above-mentioned negotiated contracts.



**No form of ISDS should be accepted.**

<sup>48</sup> <http://www.washingtonpost.com/n/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphic-oppose-ISDS-letter.pdf>

<sup>49</sup> <http://blog.iki.org/wide-house-attend-isds/>

## 8. A HUMAN RIGHTS CLAUSE MUST BE MEANINGFUL

The European Commission started discussing the necessity of a standard Human Rights clause in trade agreements in the late 1970s and 1980s<sup>50</sup> and these have been included since the 1990s.<sup>51</sup> However, they usually lack of enforcement measures or binding effects. For instance, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) consolidated text published on September 2014<sup>52</sup> refers only to the importance of Human Rights in the preamble and occasionally refers to them, with no apparent real applicability by any of the Parties to the agreement.

TTIP and all trade agreements need a human rights clause, but not *any* Human Rights clause, as no trade agreement should obstruct states in their respect and enforcement of human rights. Instead, any trade agreement should contain a binding, enforceable and suspensive Human Rights clause to promote and ensure their respect. But what does this mean? In short, and in accordance with EDRI's red lines<sup>53</sup>, we believe TTIP should contain a Human Rights clause, including:

- confirmation of state obligations under the Universal Declaration of Human Rights and other relevant Human Rights instruments;

- assurance that no obligation arising from TTIP would in any way alter the Parties' obligations to respect and protect fundamental rights and freedoms;
- an exception for the Parties to the agreement, permitting them to suspend their obligations arising from TTIP if evidence shows fundamental rights have been breached;
- a mechanism establishing a periodic human rights impacts assessment, to be conducted jointly by the US Congress and the European Parliament;
- a mechanism for bringing complaints before national courts;
- assurance that citizens will have, as an absolute minimum, equality with businesses before the law;
- non-discrimination on the basis of citizenship in any matter related to public order, national security, crime or other public interest grounds;
- an accessible mechanism to impose sanctions when fundamental rights and standards are abused, after dialogue or mediation have been exhausted.

50 Bartels, L., A Model Human Rights Clause for the EU's International Trade Agreements, German Institute for Human Rights and Misereor, 2014, available at <http://earn.com/abstract=2405852>

51 The first one was in the 1990 EC-Argentina cooperation agreement. Cf. *Ibid.*

52 [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

53 EDRI's red lines on TTIP: [https://edri.org/ttip\\_redlines/](https://edri.org/ttip_redlines/)

**All trade-related agreements need a binding, available, enforceable and suspensive Human Rights clause.**

# CONCLUSION: TTIP AND DIGITAL RIGHTS

Throughout this booklet, we demonstrated the dangers of including certain provisions in trade and/or investment agreements that may lead to undesired outcomes - to the detriment of EU and US citizens. Ultimately, there is one important question negotiators, policy makers and the public opinion should ask themselves: how can digital rights be respected?

## ✓ What is needed in TTIP

- Negotiations open to the public and subject to accountability
- Rule of law and the right to regulate
- Exclusion of rules on data protection or privacy
- Exclusion of lock-in of encryption standards; end of mass surveillance programmes
- Exclusion of IPR
- Exclusion of net neutrality
- Exclusion of ISDS out of all trade and investment agreements; thereby respecting the 97% negative responses to the European Commission's public consultation
- Binding and enforceable human rights clause



**TTIP would set a precedent in the digital rights sphere**

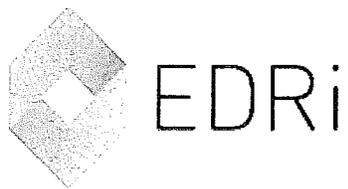
## ✗ What is NOT needed in TTIP

- Secrecy, lack of accountability or democratic scrutiny
- Chilling effects on decision-making and public policies
- Restrictions to the fundamental rights to privacy and data protection; lock-in of existing data transfer agreements
- Restrictions to the fundamental right to privacy
- ACTA/SOPA/PIPA II
- Breaches to net neutrality, discriminating traffic on the basis of origin, destination or type of data
- Failed efforts to fix the fundamentally flawed and unnecessary mechanism of ISDS
- Mere references to human rights which would not be enforceable



**The conclusion of the agreement may be jeopardised and we will fight!**

**What outcome do the EU and the US want in TTIP?**



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## Transatlantic Investment Treaty Protection – A Response to *Poulsen, Bonnitcha and Yackee*

Freya Baetens

Paper No. 4 in the CEPS-CTR project “TTIP in the Balance”  
and CEPS Special Report No. 103 / March 2015

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### Abstract

An investment chapter in TTIP offers an unprecedented opportunity to reform and improve the system of investment law. If the EU and the US seize this opportunity, it would set an important precedent in treaty-drafting, allowing for the incorporation of public policy objectives, thereby protecting states' right to regulate. Ultimately, this type of concerted strategy is likely to be far stronger than the individual country strategy necessitated by the present system of over 3,000 bilateral treaties. The most important conclusion that should emerge from current discussions is that there is a need for correct, timely and complete information for law- and policy-makers as well as the broader public, in relation to international investment law and procedures for investor-state dispute settlement (ISDS).



This paper is the fourth in a series produced in the context of the “TTIP in the Balance” project, jointly organised by CEPS and the Center for Transatlantic Relations (CTR) in Washington, D.C. It is published simultaneously on the CEPS ([www.ceps.eu](http://www.ceps.eu)) and CTR websites (<http://transatlantic.sais-jhu.edu>). For more information about the project, please see the penultimate page of this paper.

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# Transatlantic Investment Treaty Protection – A Response to *Poulsen, Bonnitcho and Yackee*

Freya Baetens\*

Paper No. 4 in the CEPS-CTR project “TTIP in the Balance”  
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*This paper is intended as a response to the thought-provoking paper of Lauge Paulson, Jonathan Bonnitcho and Jason Webb Yackee, focusing on some of their findings that are open to discussion and structuring the arguments made below along the lines of their paper. As such, the present paper does not intend to raise any new topics in this debate but serves only as a response to the original paper.*

## 1. Introduction

A number of preliminary comments apply to the *Poulsen, Bonnitcho and Yackee* (2015) paper as a whole: firstly, while its focus on investor-state dispute settlement (ISDS) is valid, it is important to keep in mind that there is more to the investment chapter in TTIP than solely its dispute settlement clause. As such, it would be productive for future work to address how the bulk of the investment chapter, namely its substantive standards, could be improved upon. Secondly, the authors chose not to cover pre-establishment national treatment – a regrettable exclusion, as this might well be included in the final text of the agreement, following the US approach in its other investment treaties. Furthermore, the authors’ assumption that post-establishment investment protection will be enforceable by way of ISDS is not necessarily correct, in light of the ongoing debate of the issue, and as such it would have been interesting to conduct a cost-benefit analysis of investment protection in TTIP *without* an ISDS clause, if only to assess whether this is a viable option.

## 2. Treaty provisions: The likely content of the ‘I’ in ‘TTIP’

*Poulsen, Bonnitcho and Yackee* offer an overview of US practice in negotiating investment treaties, for example drawing attention to the prudential measures taken to ensure its ability to regulate the finance sector, but also including references to safeguard domestic labour laws and the environment in order to preserve the host-state’s policy space. Another pertinent example is the manner in which the ‘minimum standard of treatment’ is defined in Annex A of the US model BIT as “the customary international law minimum standard of treatment of aliens”. However, one aspect of this practice – relevant when it comes to assessing the legitimacy and desirability of such treaties – is *not* mentioned, namely the fact that the US has been among the first states to include provisions concerning an ISDS appeals mechanism in several investment agreements (Annex 10-H of the US-Chile FTA, Annex 10-F of CAFTA, and the 2012 US model BIT). Admittedly, none of these proposals has yet materialised, but the foundation stones have been laid, making clear that the US is open to creating such a mechanism.

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One further aspect of US practice – the transparency of ISDS proceedings as for example adopted in NAFTA Chapter 11 disputes – is only cursorily mentioned. However, this increased level of transparency might prove vital in the future, as “justice should not only be done: it must also be seen to be done”, and this will contribute to the legitimacy of the entire ISDS process.

### 3. Potential benefits of ISDS

*Poulsen, Bonniticha and Yackee* note that the benefits of TTIP could materialise in two possible ways: firstly, by promoting US investment in the EU; and secondly, by protecting EU investment in the US.

#### 3.1 Protection of US investment in the EU

On the question of whether TTIP – or any other investment agreement – will promote US investment in the EU, the authors argue that past practice has shown that investment treaties with investment protection chapters have negligibly (or not at all) affected investment flows. As such, TTIP would not provide much benefit to the EU in terms of higher investment rates by the US, as the region is already considered ‘safe’ from the perspective of US investors. However, this argument is made on the basis of limited empirical evidence, and such evidence often cuts both ways: for every study that claims that there is a significant economic benefit that can be gained by the inclusion of an investment chapter,<sup>1</sup> another can be found that says that this is not the case.<sup>2</sup>

In any event, just because there may be no impressive increase in FDI as a result of the conclusion of a BIT, this does not mean that BITs are valueless. They may not be a direct gateway to massively increased investment rates, but rather a tool that is considered by a given company as part of its investment strategy. Ultimately, a company’s decision to invest in a country will be based upon a range of factors about the country or region in which they are seeking to invest, of which the availability of ISDS is one, serving as a “confidence and credibility-inspiring signal”.<sup>3</sup>

There are several other aspects of this discussion that merit further mention. Firstly, *Poulsen, Bonniticha and Yackee* argue that the types of risks an investment protection chapter would cover are generally not considered present in most EU member states. However, one type of risk that is certainly present in several EU member states relates to the possibility of not being granted a fair trial before a domestic court. According to a recent country ranking of ‘judicial independence’ performed by the World Economic Forum,<sup>4</sup> some EU countries are among the best in the world (Finland and Denmark are in the top five), but others perform rather poorly (Slovakia ranks at 130 out of 140, Bulgaria at 126) – at place 30, the US is still below countries with which ISDS is planned to be concluded, such as Canada (place 9) or Singapore (at 20), or with which it can be expected to be concluded, such as Uruguay (at 21) or Saudi Arabia (at 26). The extensive jurisprudence of the European Court of Human Rights shows that some EU

<sup>1</sup> See e.g. Sauvart & Sachs (2009); UNCTAD (1998), Banga (2003), Tobin & Rose-Ackerman (2006), Salacuse & Sullivan (2005), Neumayer & Spess (2005), Aisbett (2007) and Busse et al. (2008).

<sup>2</sup> See e.g. Hallward-Driemaier (2003), Tobin & Rose-Ackerman (2003) and Gallagher & Birch (2006).

<sup>3</sup> Interview with Eric Neumayer, Kevin P. Gallagher and Horchani Ferhat at [www.iisd.org/itm/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/](http://www.iisd.org/itm/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/);

<sup>4</sup> See <http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/>

member states such as Italy, France and Germany have repeatedly violated Article 6 of the European Convention on Human Rights through their inability to provide a hearing and/or a decision within a ‘reasonable time’.<sup>5</sup> This also shows why investors may prefer international arbitration: in the large majority of cases, a final decision will be rendered much sooner than if such disputes were to be decided through the domestic court system.

Secondly, the authors mostly focus on whether US or Chinese investors consider the EU a safe place to invest, but do not address whether the converse is true.

Thirdly, *Poulsen, Bonnitcha and Yackee* rely upon a 2010 survey of legal counsel within the 100 largest American multinationals in order to underscore their argument that investment treaties have little impact on investment flows, given that the majority of counsel stated that these treaties did not play a (critical) role in their decisions to invest abroad. However, the ISDS system is not employed to a great extent by the large multinationals, but rather by middle-sized or smaller ones. An OECD survey concluded that 22% of all ISDS claims are brought by individuals or “very small corporations”.<sup>6</sup> Medium and large multinational companies account for 50% of the claims, and the rest of the cases (28%) were brought by investors about which there is little public information. The fact that larger companies do not rely as frequently upon ISDS as one might expect due to their relative size, is arguably because the largest companies have other means of leverage, and thus do not need to resort to the courts in order to achieve their goals.

This author agrees with *Poulsen, Bonnitcha and Yackee* that, in Europe, BITs have not been widely publicised or ‘politicised’ – at least not until quite recently. It is important that the public is informed of the role that BITs play in the international realm, as the current level of knowledge about these instruments – even amongst media and NGOs claiming to specialise in this area – is shockingly low. This is dangerous because they play such an important role in informing civil society – as was evident by their impact on the recent consultation of the European Commission. There, many of the replies to the survey circulated by the Commission indicated fears that ISDS inclusion in TTIP would place too great a limit on states’ policy space. However, the majority of these replies “were based on copy-and-paste templates circulated by non-governmental organisations campaigning against TTIP”,<sup>7</sup> much like pressing a ‘dislike’ button on Facebook or signing an online petition, without the need for any actual knowledge or substantiated contribution to the debate. Such tactics are not new; they were applied by Philip Morris in order to allege that public opinion was against the EU Tobacco Products

<sup>5</sup> See, e.g. landmark cases: *H. v. France*, 24 October 1989, Series A no. 162-A; *X. v. France*, 31 March 1992, Series A no. 234-C; *Caloc v. France*, no. 33951/96, ECHR 2000-IX; *Kress v. France* [GC] no 39594/98, ECHR 2001-VI; *Frydlender v. France*, [GC] no 30979/96, ECHR 2000-VII; *Katte Klitsche de la Grange v. Italy*, 24 October 1994, Series A, no 293-B; *Scordino v. Italy (no. 1)* [GC] no 36813/97, ECHR 2006-V; *Capuano v. Italy*, 25 June 1987, Series A no. 119; *Bottazzi v. Italy*, [GC] no 34884/97, ECHR 1999-V; *Di Pede v. Italy*, 26 September 1996, ECHR 1996-IV; *Vocaturo v. Italy*, 24 May 1991, Series A no. 206-C; *Cappello v. Italy*, 27 February 1992, Series A no. 230-F; *Fisanotti v. Italy*, 23 April 1998, ECHR 1998-II; *Bock v. Germany*, 29 March 1989, Series A no. 150; *Pammel v. Germany*, 1 July 1997, ECHR 1997-IV; *Probstmeier v. Germany*, 1 July 1997, ECHR 1997-IV; *Sürmeli v. Germany*, [GC] no 75529/01, ECHR 2006-VII; *Blake v. UK*, no 68890/01, 26 September 2006; *Robins v. UK*, no. 22410/93, 23 September 1997; *H. v. UK*, 8 July 1997, ECHR 1997-VIII. For a more complete overview see European Court of Human Rights, *Guide to Article 6 – Right to a Fair Trial* (2013) p. 51 et seq.

<sup>6</sup> OECD (2012), “Investor-State Dispute Settlement”, Public Consultation Document, p. 16 ([www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf](http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf)).

<sup>7</sup> C. Olivier, “Public Backlash Threatens EU Trade Deal with the US”, *Financial Times*, 13 January 2015.

Directive<sup>8</sup> – an example which suggests that mass automatic replies ought to be interpreted cautiously.

### 3.2 Protection of EU investment in the US

Turning to the second strand of *Poulsen, Bonniticha and Yackee's* argument – whether TTIP will protect EU investment in the US – several comments can be made. The authors argue that TTIP is unlikely to improve the situation for EU investors in the US, because, in general, the protection level of foreign investors in the US is already high, and TTIP will not offer much additional protection. In general, it is indeed true that there is no evidence of systematic, serious flaws in the US system. But do *Poulsen, Bonniticha and Yackee* mean to state that domestic courts should deal with all private claims in countries where the rule of law is strong, to the exclusion of international judicial review?

Following this line of reasoning to its logical conclusion, they should in that case also be advocating the abolishment of the various regional courts for human rights as the legal systems of the European member states and the US already contain strong human rights protection. The only difference would be that the European Convention on Human Rights for example, does require applicants to exhaust local remedies – as a result, there can easily be 10-15 years or more between the injury and the remedy. However, an argument could be made for allowing a state to first attempt to address a violation in relation to a protected investment via its own court system and only if this does not result in an appropriate solution within an acceptable time frame (for example, two years after bringing a claim), the investor could revert to an international tribunal. This option is further discussed below, in the Conclusions.

To state that domestic courts should 'suffice' for the handling of investment claims overlooks the fact that many domestic courts are not allowed – meaning that it is not within their legal scope of jurisdictional competence – to apply public international law, such as BITs, directly. Moreover, US courts that are in theory allowed to do so have a track record of nevertheless not accepting any claims of individuals based on any form of international law.<sup>9</sup> (Indeed, the same is true in Europe.<sup>10</sup> For example, on 13 January 2015, the Grand Chamber of the European Court of Justice held, inter alia, that the NGO *Stichting Natuur en Milieu* was not entitled to invoke the Aarhus Convention of 1998 on access to information, public participation, and access to justice in environmental matters, in spite of an explicit reference in the EU regulation implementing this Convention.<sup>11</sup> Importantly, this was decided upon at the request of the European Commission, Council and Parliament – some members of which are now arguing that investment protection standards in international treaties should be enforced by domestic and EU courts. Why would private investors be allowed to rely upon international treaties before such courts, while NGOs are not?)

Hence stating that “the appropriate response by the EU would be to insist in its negotiations that the US pass implementing legislation securing a right to access US courts for certain TTIP violations”, as *Poulsen, Bonniticha and Yackee* do, shows a lack of knowledge about US

<sup>8</sup> See e.g. article at: [www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging](http://www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging)

<sup>9</sup> See e.g. Haljan (2014), Wojcik (2013) and Hix (2013).

<sup>10</sup> See Bronckers (2015).

<sup>11</sup> Joined cases C-404/12 P and C-405/12 P, *Council of the European Union and European Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, Judgment of the Court (Grand Chamber) of 13 January 2015, not yet published (Court Reports - general).

negotiation policy and the actual practice of domestic courts. Looking at US practice concerning domestic enforcement of individual rights under international treaties,<sup>12</sup> it is highly unlikely that the US would ever agree to pass legislation that would make substantive treaty standards domestically enforceable. For example, the US only ratified the International Covenant on Civil and Political Rights on the condition that its standards would not be enforceable before US courts.<sup>13</sup> In practice, if substantive protection for investors is included in TTIP, the only option of redress for violations of such standards would be through some form of international dispute settlement mechanism.

Another common misconception is that investment arbitration is consistently more expensive than national court proceedings; this is not necessarily the case. *Poulsen, Bonnitcha and Yackee* argue that “it is impossible to say whether investor-state arbitration is more cost-effective than resolving disputes through national court proceedings in the absence of significantly more comprehensive evidence than is currently available”. But they proceed to examine precisely that question, making four points. First, EU countries will need to maintain court systems regardless of whether they agree to ISDS. That may be so, but referring more cases (and in particular, more complex cases concerning matters in which domestic judges are not specialised) to domestic courts, already overburdened and prone to delays, is not an obvious remedy.

Secondly, it is true that the parties’ legal and witness costs constitute the vast majority of costs associated with investment treaty arbitration (although tribunal costs are not negligible either). For this reason, the ‘loser pays’ principle, whereby the claimant who brings a manifestly unfounded claim has to reimburse the state’s legal and witness costs, would form a valuable safeguard – one that cannot be offered under most domestic court systems (including the US). In *Chemtura*, to take a salutary example, the unsuccessful claimant was ordered to pay Canada’s costs, including an allowance for the time invested by government officials in preparing Canada’s defence.<sup>14</sup> Other cases in point are *ADC v Hungary*, *Plama v Bulgaria*, *Europe Cement v Turkey*, and *Gemplus v Mexico*.<sup>15</sup>

Thirdly, arbitrators who are specialised in the interpretation of ‘vague and imprecise’ standards should have less trouble deciding the factual and legal questions in an investment dispute than local judges would have who would be called upon to decide such cases (particularly if investment standards would be ‘copied and pasted’ into national legislation, as the authors seem to envisage). This is not to say that some investment standards such as ‘fair and equitable treatment’ or ‘indirect expropriation’ as such would not benefit from the incorporation of more clearly defined standards. Additionally, if treaty standards would have to be implemented in national legislation, this risks exacerbating interpretation problems due

<sup>12</sup> See Powell (2001, p. 245); Roth (2001, p. 891); Spiro (1997, p. 567); Kaye (2013, p. 95).

<sup>13</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, S. Exec. Doc. E, 95-2 (1978) 999 UNTS 171, ratified by the US 8 June 1992.

<sup>14</sup> *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*) 2 August 2010.

<sup>15</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, 2 October 2006; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 27 August 2008; *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, 13 August 2009; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3 16 June 2010.

to the well-known problem of translation differences across the EU.<sup>16</sup> The same standard in Portuguese, for example, may be interpreted by local courts as meaning something different in Latvian – thereby nullifying the stability and predictability that a uniform treaty could bring.

Finally, in the majority of cases, arbitral proceedings offer a complete and final resolution of a dispute. Under any ISDS system, except the one set up by International Centre for Settlement of Investment Disputes (ICSID), annulment and appeal are not possible. The ICSID system cannot be included in TTIP because the EU, as a regional organisation is not, and cannot, be a member of the Convention; but even if it were, its annulment procedure is intended to be rare and limited to five strictly defined grounds,<sup>17</sup> unlike an appeal before a national court which reviews the entire case. In most countries, even an appeal is not the end of the dispute: there is a possibility to ask for a third consideration of the case before a supreme court or court of cassation. Furthermore, arbitral awards and national court decisions alike can subsequently be subjected to review as soon as the claimant attempts to enforce them in a different country – so there is no difference in this regard. Admittedly, annulment procedures have become more frequent in recent years and as the European Commission proposal for TTIP is putting forward the inclusion of an appeal mechanism, the gap in time and cost is, in this respect, narrowing.

#### 4. Potential costs

In their fourth section, *Poulsen, Bonniticha and Yackee* posit that the costs of the agreement significantly outweigh any possible benefits to the EU in general. However, this argument is not systematically supported by evidence and appears to be based on a number of challengeable extrapolations. Firstly, they argue that the likelihood of claims against the EU can be expected to increase roughly in proportion with the size of the investment stock in the EU covered by the treaty, but do not properly underscore why this would be this case. The authors make a number of further claims in their paper, without specifying how they arrived at or calculated them, such as the fact that a great number of investment projects are of sufficient size to make the economics of an investment claim viable in theory; or that, with respect to sectors, US companies have made significant investments across virtually all sectors of the EU economy.

They also state that an investment treaty with the US would be disadvantageous given that ‘American’ investors tend to be the most litigious. This statement is, however, outdated; in 2013, it was investors from the Netherlands, Germany, Luxembourg and the United States that brought the largest number of claims. This also corresponds with overall trends throughout the history of ISDS.<sup>18</sup> By the end of 2013, US investors had brought 125 claims against states, followed by the Netherlands (61), the United Kingdom (42) and Germany (39). Comparing US investor claims to all EU investor claims helps put this hypothesis into perspective – six of the top ten home states for investors are member states of the European Union, which have brought a total of 225 claims.

<sup>16</sup> See for example, Künnicke (2013, pp. 243-260) and Pozzo (2006).

<sup>17</sup> Article 52 of the ICSID Convention.

<sup>18</sup> Tietje & Baetens (2014, p. 26).

*Poulsen, Bonnitcha and Yackee* note that there remain several important factors that would increase the risk of adverse awards, one of which is the fact that certain important terms within investment law remain undefined (such as ‘fair and equitable treatment’) and are thus capable of being interpreted expansively by an arbitral tribunal in a manner unfavourable to the EU. Whilst this is true, one must pause to consider the other alternative: would this situation not be as bad if such treaty provisions were to be interpreted by various domestic courts?

The mere fact that arbitral tribunals have significant discretion to interpret the terms of investment law should not be an argument against the conclusion of an investment treaty, as this role is also performed by domestic judges – interpretation is what adjudicatory bodies do for a living. Another option would be through state-to-state dispute settlement, i.e. espousal of investors’ claims by their home state. However, it was precisely to prevent the problems arising from the essentially political and arbitrary character of espousal that ISDS procedures as well as human rights adjudicatory bodies were created, establishing private standing for injured individuals.

*Poulsen, Bonnitcha and Yackee* furthermore argue that the legal costs of investment disputes are disproportionately high, even if the respondent state ‘wins’ the case. As stated above, several tribunals have recently adopted some form of the ‘loser pays’ approach, ordering the losing party not only to bear all arbitration costs of an adverse award, but also to make a substantial contribution to the winning party’s legal fees – in particular when a case concerns a frivolous claim. This approach has also been taken in the discussions surrounding the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, where frivolous claims can be terminated at an early stage in proceedings, and generally the unsuccessful party is required to cover all the costs made in the process of a case.<sup>19</sup> Ultimately, even if the costs of ISDS are considered too high, there are ways of lowering them. One could think of negotiating the fees with the registry office and arbitrators, or capping lawyers’ fees and negotiating an hourly rate – given that the market for arbitrators and lawyers is sufficiently saturated in order to survive a payment cap.

Two risks are raised as possible political costs of TTIP: i) the risk of reduced policy space, and ii) the risk of controversial claims or adverse awards. Particularly the first emerged as one of the main grounds of concern in the results from the recent consultations on TTIP conducted by the European Commission. The results from these consultations indicated that one of the most prevalent fears amongst respondents was the perceived negative effects that the inclusion of ISDS in TTIP would have on national sovereignty.<sup>20</sup>

Essentially, all obligations that a state undertakes, ‘limit’ its policy space: promising to do A, may affect how one can do B. Also, governments will not infrequently wait with the enactment of new legislation until the result of a domestic or EU court case emerges, the same as if a state would postpone a certain measure pending the outcome of an arbitral award. Investment claims are mostly brought against executive decisions made with respect to one particular investor or in the context of a particular concession, permission or promise granted to an investor, *not* against legislative acts (with a limited number of notorious exceptions). When looking at all ISDS disputes, the respondent states have *won* in approximately 60% of the cases.<sup>21</sup> In the few cases where claims have been brought against acts of legislation, the investor quasi-invariably ended up on the losing side, as tribunals recognised and protected the policy

<sup>19</sup> Kuijper (2014, p. 111).

<sup>20</sup> C. Olivier, “Public Backlash Threatens EU Trade Deal with the US”, *Financial Times*, 13 January 2015.

<sup>21</sup> Tietje & Baetens (2014).

space and the right to regulate of the respondent state.<sup>22</sup> As such, the inclusion of ISDS would not threaten or reduce policy space, because most arbitral awards would not encroach upon it.

An example of this was the *Vattenfall/Germany* arbitration, where the government first granted licenses to a coal plant (which resulted in the awarding of voluntary damages to the investor) and for a nuclear plant (of which the case is still pending), and subsequently retracted these licences.<sup>23</sup> These cases have not had a measurable impact on Germany's environmental regulations – only on the procedures followed with regards to transparency in the decision-making process (benefitting not only investors but also other stakeholders), as well as the fact that 'disclaimers' are now incorporated into any licenses granted by the state; such developments could hardly be seen as negative. Even if there is an adverse award, one must recall that the state will *not* be forced to make any changes in policy: a tribunal can only require a state to pay appropriate damages to the individual investor, and investors usually receive much less compensation than what they asked of the tribunal (as the authors show). Ultimately, the fear of regulatory chill expected from the inclusion of ISDS, due to which states allegedly would refrain from adopting certain legislative, executive or administrative acts, has not been empirically (beyond the mere anecdotal or purely hypothetical) established.<sup>24</sup> In other words, there is no scientific ground to assume there would be more regulatory chill because of the risk of ISDS cases, than there is based on the looming possibility of domestic court cases.

Furthermore, the apparent widespread fear of ISDS inclusion in TTIP might appear more endemic than it actually is, when one takes into account that many of the negative responses to the consultations that vocalised this fear "were based on copy-and-paste templates circulated by non-governmental organisations campaigning against TTIP", as stated above.<sup>25</sup> Similarly, with regard to the risk of controversial claims, public controversy also surrounds domestic court decisions. One would be greatly pressed to prove that the societal impact would not be demonstrably greater than a 'notorious' case at the national level. If fears still remains that ISDS inclusion will limit policy space to too great an extent, the stakeholders could opt to include "an express general clarification in TTIP and other investment treaties that foreign investors should get the same high levels of protection as domestic investors receive in domestic law, but not higher levels of protection".<sup>26</sup> They could also make explicit statements that the treaty is not to impinge upon the good-faith exercise of public policy objectives by the state; such statements would need to be taken into account by arbitral tribunals in their interpretation of the relevant investment agreement.<sup>27</sup> Another option, would be to restrict ISDS access for the more controversial issues which are related to the exercise of public policy objectives of the State, such as *bona fide* environmental measures.<sup>28</sup>

*Poulsen, Bonniticha and Yackee* posit that it is unlikely that TTIP will change much of the already close relations between the EU and the US, nor would it, they argue, make it more likely that

<sup>22</sup> Tietje & Baetens (2014, p. 47).

<sup>23</sup> Tietje & Baetens (2014, p. 103).

<sup>24</sup> Tietje & Baetens (2014, p. 48).

<sup>25</sup> C. Olivier, *Public Backlash Threatens EU Trade Deal with the US*, Financial Times, 13 January 2015; see also [www.vieuws.eu/eutradeinsights/exec-to-struggle-for-way-out-of-controversy-after-release-of-isds-consultation-results/](http://www.vieuws.eu/eutradeinsights/exec-to-struggle-for-way-out-of-controversy-after-release-of-isds-consultation-results/)

<sup>26</sup> Kleinheisterkamp & Poulsen (2014).

<sup>27</sup> Kuijper et al. (2014, p. 42).

<sup>28</sup> Kuijper et al. (2014, p. 87).

China and India would enter into an investment treaty with the EU. The US and the EU member states have to date concluded many more BITs with developing than with developed countries. It is important to keep in mind the signal that might be sent out if the EU somehow refuses to incorporate ISDS into TTIP, given that “the EU has 1,400 bilateral ISDS agreements ... Rejecting ISDS completely would open up European countries to a charge of double standards in that they are seeking to deny US companies the same safeguards that their businesses enjoy”.<sup>29</sup> Apart from being a potentially detrimental starting position in further treaty negotiations, this is ultimately sending out a signal of distrust and inferiority towards developing states, forming a strong and, in this author’s opinion, highly unfortunate reminiscent of certain colonial attitudes.

## 5. Conclusion

Four possible alternatives to the inclusion of ISDS in TTIP are frequently mentioned. The first would be to opt for state-to-state arbitration. However, such an option would hardly be preferable, as it will invariably politicise a dispute and blow it far out of proportion, potentially influencing the international relations between states as a whole. As these cases are not actually located at the inter-state level, they should not be framed as disputes between states. In order for such cases to proceed to the inter-state level, investors would need to rely upon diplomatic protection, which is sporadic, arbitrary in its incidence and prone to politicisation, as there is no control over the process or any form of remedy for the individual whose claim is espoused. Furthermore, the decision whether to espouse a claim is often not taken on legal grounds but is rather dependent upon other factors such as the relative size of a state and potential need for foreign aid. As such, espousal of claims has rightly been superseded by investment protection and human rights law.

A second option would be for the home state to be able to block any claims brought by investors. Some of the problems of this second approach could be mitigated by allowing the home state to be a third-party intervener – which is perhaps a route that could still be explored.

The third option would be to require the exhaustion of local remedies before allowing a claim to be brought under ISDS. However, the problem with this is that the amount of time and costs required are significantly higher for all parties involved. A possible solution to such issues would be to rely upon ‘fork-in-the-road’ clauses (where the investor has to initiate national court proceedings or international arbitration, but not both). Also, one could establish mediation as a mandatory precursor or alternative to ISDS proceedings.

Another possible solution would be to adopt a fixed or elastic time period for pursuing local remedies. The latter could be based on a “third-party index measuring the potential of domestic courts to produce effective solutions to claims of remedies rule”. The more such an index would indicate that a domestic court system is ‘reliable’, the greater emphasis would be placed upon domestic courts being the first port of call, as opposed to other, more internationalised paths to dispute resolution.<sup>30</sup> Other potential procedural safeguards could include protection against frivolous claims, by virtue of offering tribunals a way to reject manifestly unfounded claims at a preliminary stage or by forcing a frivolous claimant to pay

<sup>29</sup> C. Olivier, “Public Backlash Threatens EU Trade Deal with the US”, *Financial Times*, 13 January 2015.

<sup>30</sup> Kuijper et al. (2014), p. 44.

not only its own legal costs but all costs of the proceedings and potentially the legal costs of the respondent also.

The fourth, and ultimately most honest option, would be to exclude substantive investment provisions from the agreement entirely. If TTIP is to include a right, there should also be a remedy for violations of that right; if one is to take away the remedy of ISDS, then it is better not to grant the right.

One final issue that was raised during the discussion of the paper at the Brussels Conference in 2014 was the question of whether a standing court for investment claims would be preferable over an *ad hoc* method of procedure, as is currently the case. Poulsen (presenting the paper) argued in favour of the former and this author recognises the merits of such argument – in part because of the aversion the term ‘arbitration’ seems to provoke among the general public. However, some important problems remain. Crucially, there is no single legal instrument giving jurisdiction to a single court, but instead there is a network of BITs. As such, to argue in favour of a standing court raises the issue of how one could confer competence upon such a court – or would the idea be to create a standing court for each and every treaty the EU concludes? In the latter case, possibly the TTIP Court could serve as a model court for subsequent treaty partners. Further potential problems would arise in the appointment of the judges to the Court – who is to be appointed, and what would happen if the integrity of a judge is called into question? Such problems could be solved by careful treaty drafting.

However, at present it seems unrealistic to hope for the creation of an overarching international investment organisation with a separate dispute settlement body, such as the WTO. Both options – a standing court or a permanent international organisation – have been tried and failed, notably in the case of the Multilateral Investment Agreement and the International Trade Organisation, which was to be established by the Havana Charter. Ultimately, the issue with ISDS, as often becomes clear in heated public discussions, is that certain segments of civil society simply do not want ‘foreigners’ to examine the legality of state actions – whether this examination is done by a standing or *ad hoc* body could be seen as being of little import, in the broader scheme of things.

*Poulsen, Bonnitcho and Yackee* distinguish broadly two camps in the discussion surrounding ISDS in TTIP: those who see its inclusion as an unmitigated good, and those who see it as the exact opposite. But there remains a large number of scholars who choose the middle path, arguing that the system currently catering to the settlement of investment disputes needs to be reformed but that the risks of ISDS inclusion are overestimated. The present author would see herself in the last category, based on her view that domestic law *does* sufficiently protect investors most of the time and that domestic courts *do* a good job at applying the law in most disputes. As is the case for the European and American Conventions on Human Rights and their respective courts, investment law and its international enforcement (whether by means of arbitration or a new court) should serve only as a safety net, to provide a remedy in those cases (no doubt rare but by no means unknown) where the domestic system has not been able to provide a fair remedy.

It is necessary that, in the future, investment disputes are depoliticised, and that a general international standard of treatment is established. Much work remains; one can think of further defining and limiting of the scope of application of investment law, so that not all and sundry qualifies as an investor; or further definition of the scope of the more vague standards of protection, such as fair and equitable treatment and indirect expropriation. There is a need to incorporate more justifications for state action with regard to environmental, health and labour issues; the inclusion of an appeals system within the ISDS framework; greater

transparency, or a review of the methods to calculate damages. Unfortunately, few of these issues are discussed in *Poulsen, Bonnitcha and Yackee's* paper.

There are many ways in which safeguards could be built into the arbitral process, in order to refine the current procedures and make them more amenable to those stakeholders currently opposed to ISDS inclusion. Firstly, with regards to transparency, one can think for example of the publication of information about the dispute at hand; whilst final awards are in the large majority of cases already in the public domain, further actions can be taken, such as allowing open hearings, or making written submissions and evidence publicly accessible online (where the information concerned is not classified information or confidential business knowledge, as determined by the tribunal). Secondly, there should also be an active role given in proceedings to other states that are parties to the treaty, as well as third-party stakeholders, such as NGOs, industry groups, or international and regional organisations. Furthermore, it would be desirable to establish a code of conduct with clear disclosure rules and methods of avoiding conflicts of interests, as well as to create a roster of arbitrators ahead of any conflict between states and investors.

Fourthly, one could perhaps envisage the creation of an appellate mechanism, as suggested by the European Commission. It is frequently argued that such a mechanism would add to the stability, predictability and legitimacy of investment law; whilst the opportunity for appeal would add to the duration and cost of proceedings, it is likely that – over time – the number of appeals would decrease (as has been the case for the WTO Appellate Body), thus offsetting a potential increase in cost by the probable increase in stability within investment procedures. If such an appeals mechanisms were to prove politically unfeasible, one could envision the creation of a treaty committee or an *ad hoc* procedure through which the parties to TTIP could give “authoritative interpretations of the provisions of the investment instrument”,<sup>31</sup> thus ultimately providing for some measure of consistency and perceived fairness between cases. Such an option – the establishment of a treaty committee that interprets controversial treaty provisions in order to provide clarity and consistency – appears to also be currently taken by the EU and Canada in the context of the CETA negotiations, with the establishment of a Committee on Services and Investment.<sup>32</sup>

In sum, an investment chapter in TTIP offers an unprecedented opportunity to reform and improve the system of investment law, in a way that gradual renegotiation of individual BITs never would be able to achieve. This author hopes that the EU and the US will grasp this opportunity to rewrite international investment law by setting an important precedent in treaty-drafting, allowing for the incorporation of public policy objectives, thereby protecting states’ right to regulate. Ultimately, the type of concerted strategy that could result from TTIP is likely to be far stronger than the individual country strategy necessitated by the present system of over 3,000 international investment agreements (IIAs). Perhaps the most important conclusion that should emerge from the current discussions – irrespective of whether TTIP will actually include an investment chapter – is that there is a need for correct, timely and complete information for law and policy-makers as well as the broader public, in relation to international investment law and ISDS procedures.

<sup>31</sup> Kuijper et al., pp 40-41 and p. 68.

<sup>32</sup> Kuijper et al., p. 70.

## References

- Aisbett, E. (2007), "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation", CUDARE Working Paper 1032, University of California at Berkeley, Department of Agricultural and Resource Economics and Policy, Berkeley, CA (<http://repositories.cdlib.org/are.ucb/1032>).
- Banga, Rashmi (2003), "Impact of Government Policies and Investment Agreements on FDI Inflows", Working Paper No. 116, Indian Council for Research on International Economic Relations, New Delhi, November.
- Bronckers, M. (2015), "Schizophrenia in the EU about International Law", 21 January (<http://ssrn.com/abstract=2555622>).
- Busse, M., J. Koeniger and P. Nunnenkamp (2008), "FDI Promotion through Bilateral Investment Treaties: More Than a Bit?", Kiel Working Papers, No. 1403, Kiel Institute for the World Economy, February.
- Gallagher, K.P. and M.B.I. Birch (2006). "Do Investment Agreements Attract Investment? Evidence from Latin America", *Journal of World Investment and Trade*, Vol. 7, No. 6, pp. 961-974.
- Haeck, Y. and E. Brems (eds.) (2014), *Human rights and civil liberties in the 21st century*, Dordrecht: Springer.
- Haljan, D. (2013), *Separating powers: International law before national courts*, The Hague: T.M.C. Asser Press.
- Hallward-Driemaier, M. (2003), "Do Bilateral Investment Treaties Attract FDI?. Only a bit and they could bite", World Bank Policy Research Paper, WPS 3121, World Bank, Washington, D.C.
- Hix, J.P. (2013), *Indirect effect of international agreements: Consistent interpretation and other forms of judicial accommodation of WTO law by the EU courts and the US courts*, Volumes 3-13 of Jean Monnet Working Papers, NYU School of Law, New York, NY.
- International Covenant on Civil and Political Rights, adopted 16 December 1966, S. Exec. Doc. E, 95-2 (1978) 999 UNTS 171, ratified by the US 8 June 1992.
- Kaye, D. (2013), "State Execution of the International Covenant on Civil and Political Rights", *University of California at Irvine Law Review*, Vol. 3. No. 1.
- Kleinheisterkamp, Jan and Lauge Poulsen (2014), "Investment Protection in TTIP: Three Feasible Proposals", Global Economic Governance Programme and Blavatnik School of Government (<http://www.globaleconomicgovernance.org/sites/geg/files/Kleinheisterkamp%20and%20Poulsen%20December%202014.pdf>).
- Kuijper, P.J., I. Pernice, S. Hindelang, M. Schwarz and M. Reuling (2014), "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements", Vol. 2, study requested by the European Parliament's Committee on International Trade, Brussels, September.
- Künnecke, M. (2013), "Translation in the EU: Language and Law in the EU's Judicial Labyrinth", *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 2, pp. 243-260.

- Neumayer, E. and L. Spess (2005), "Do bilateral investment treaties increase foreign direct investment to developing countries?", *World Development*, Vol. 33, No. 10, pp. 1567-1585.
- Neumayer, E., Kevin P. Gallagher and Horchani Ferhat (2009), "Do Bilateral Investment Treaties Lead to More Foreign Investment?", interview in *Investment Treaty News*, April ([www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/](http://www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/)).
- OECD (2012), *Investor-State Dispute Settlement, Public Consultation Document*, Paris.
- Olivier, C. (2015), "Public Backlash Threatens EU Trade Deal with the US", *Financial Times*, 13 January
- Poulsen, Lauge, Jonathan Bonnitcha and Jason Yackee (2015), "Transatlantic Investment Treaty Protection", CEPS Special Report No. 102, CEPS, Brussels, March.
- Powell, C. (2001), "Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States", *University of Pennsylvania Law Review*.
- Pozzo, B. (2006), *Multilingualism and the harmonisation of European law*, Amsterdam: Kluwer Law International.
- Quinn, Ben and Mark Sweney (2013), "Tobacco firm begins 'stealth-marketing' campaign against plain packaging", *The Guardian* ([www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging](http://www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging)).
- Roth, B.R. (2001), "Understanding the 'Understanding': Federalism Constraints on Human Rights Implementation", *Wayne Law Review*, Vol. 47, p. 891.
- Salacuse, J.W. and N.P. Sullivan (2005), "Do BITs really work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", *Harvard International Law Journal*, Vol. 46, pp. 67-130.
- Sauvant, Karl P. and Lisa E. Sachs (2009), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford: Oxford University Press.
- Spiro, P.J. (1997), "The States and International Human Rights", *Fordham Law Review*, Vol. 66, p. 567.
- Tietje, C. and F. Baetens (2014), *The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, study prepared for the Ministry of Foreign Affairs of The Netherlands ([www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html](http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html)).
- Tobin, J. and S. Rose-Ackerman (2003) "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties", William Davidson Institute Working Paper No. 587, Ann Arbor, MI: University of Michigan Business School.
- Tobin, J. and S. Rose-Ackerman (2006), "Bilateral Investment Treaties: Do They Stimulate Foreign Direct Investment?", Yale University, mimeo, June.
- UNCTAD (1998), *Bilateral Investment Treaties in the Mid-1990s*, United Nations Conference on Trade and Development, United Nations, New York and Geneva.

Wojcik, M.E. (2013), "Legislative Attempts to Prohibit the Use of International Law and Islamic Law in US Courts", in Kyriaki Topidi and Lauren Fielder (eds), *Transnational Legal Processes and Human Rights*, Farnham, Surrey: Ashgate.

World Economic Forum, Global Competitiveness Index (GCI), Competitiveness Rankings (<http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/>).

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## **TPP May Set Stage for More Challenges Of U.S. Laws After WTO Ruling on COOL**

By Catherine Boudreau | May 29, 2015 07:35PM ET

Trans-Pacific Partnership and Country-of-Origin Labeling

**Key Takeaway:** Critics of trade agreements say recent WTO decision on U.S. country-of-origin labeling serve as reminder that nation's laws can be challenged by foreign countries, and as warning about ongoing TPP negotiations.

**Potential Impact:** International trade lawyers say U.S. can't be forced to change its laws but should comply with trade obligations, promote compliance.

May 29 (BNA) -- The Trans-Pacific Partnership (TPP) is likely to contain provisions that could undermine U.S. policies, similar to the effect of a recent World Trade Organization decision that U.S. country-of-origin labeling (COOL) regulations violate international obligations, according to Democratic legislators and consumer advocates.

The WTO, founded to promote free trade and settle disputes, ruled on May 18 that the U.S. Department of Agriculture's (USDA) COOL rules discriminate against beef and pork imported from Canada and Mexico. COOL requires that meat producers specify on retail packaging where an animal was born, raised and slaughtered and prohibits the mixing of muscle cuts from different countries under a general label.

Canada and Mexico have threatened retaliatory tariffs on U.S. products (32 ITR 924, 5/21/15). As a result of the WTO decision, the House Agriculture Committee approved legislation designed to repeal COOL that is scheduled to be considered on the House floor the week of June 8. While the Senate has yet to take action, Agriculture Committee Chairman Pat Roberts (R-Kan.) has said COOL repeal is an option .

As the TPP nears completion, it and other free trade agreements open U.S. laws and regulations to challenges by foreign countries and businesses. Further, in a global system that promotes the concept of a level playing field, one country can't ask its trading partners to eliminate trade barriers without doing so itself.

Critics say trade agreements can diminish U.S. sovereignty by taking down congressionally enacted policies, including those designed to protect consumers. This is a major reason that groups like Consumers Union and Public Citizen, as well as many Democratic lawmakers, oppose the TPP, which is being negotiated among the U.S. and 11 other countries on the Pacific Rim.

"The TPP will contain provisions that are similar to the WTO rules that they used in this country-of-origin labeling case, if not even worse for domestic laws and regulations," Rep. Rosa DeLauro (D-Conn.), one of Congress's leading critics of the TPP, said during a May 19 press call. "So we should expect similar results."

### **Cost of Defying Trade Rules**

Ted Posner, a partner at Weil, Gotshal & Manges LLP, told Bloomberg BNA that there is a distinct difference between the ability to challenge a country's law and forcing repeal or modification of that law. Critics often merge these two very separate concepts.

A country can keep a law found to be noncompliant with trade rules after a decision like the WTO's on COOL, but it will face consequences. Posner pointed to the European Union's decision to maintain its ban on imports of hormone-treated beef after the WTO ruled in 1997 that it violated international trade rules. As a result, the U.S. slapped tariffs on EU agricultural goods. "That's the nature of the bargain; it's not a cost-free system," Posner said. "But a country can't be forced to change its law; that's up to each country to decide based on the cost and benefits." Should the U.S. decide to keep its COOL regulations intact, Canada plans to seek retaliation by imposing an estimated \$2 billion in tariffs on imports of U.S. goods. Mexican officials haven't announced what U.S. goods they would target (32 ITR 983, 5/28/15).

Critics say that large compliance costs of the USDA rules and the ongoing trade dispute offset consumer benefits.

"Technically it's true, nothing can require us to repeal laws, but the U.S. is facing enormous economic pressure, and [Congress] is already proceeding with repealing COOL before we know what the degree of retaliation is," Karen Hansen-Kuhn, director of international strategies at the Institute for Agriculture and Trade Policy (IATP), told Bloomberg BNA.

Rep. Peter DeFazio (D-Ore.) shared those concerns during the May 19 conference call, saying while the U.S. can pay to keep its laws, odds are against COOL regulations and other consumer laws being upheld, considering the swift action expected in Congress. This scenario could play out regarding other policies on the environment and labor in trade agreements, for example.

#### **ISDS Further Weakens U.S. Law**

Others contend that U.S. policies could be challenged under investor-state dispute settlement (ISDS) provisions that are included in the TPP but not in WTO agreements.

ISDS allows private investors to initiate a case against a foreign government for violating terms of a treaty, whether it be a free trade agreement or an investment pact. Three arbitrators are selected by the parties involved under varying conflict-of-interest rules, according to Kenneth Vandeveld, professor at Thomas Jefferson School of Law, San Diego.

Vandeveld said these provisions are necessary to ensure an impartial, law-based approach to resolving investment disputes in countries that may not have a legal system as robust as in the U.S.

"If we're going to have a system of treaty protections for investment, there needs to be an effective remedy to enforce that," Vandeveld said. "Where there's no remedy there's no right. ISDS is the best mechanism we've come up with. That doesn't mean it can't be improved, and debate on that should be welcomed."

Opponents of ISDS, including DeLauro and DeFazio, say this is another example of how free trade deals undermine U.S. sovereignty and allow foreign entities to circumvent the national judicial system by using a private tribunal. Even if foreign corporations lose a case, the U.S. and other countries still have spent hundreds of millions of dollars defending their laws.

The lawmakers cited tobacco companies that used ISDS to challenge cigarette labeling requirements intended to discourage smoking in Uruguay and Australia, and the Canadian generic drug company Apotex, which challenged U.S. Food and Drug Administration rulings on certain medications. U.S. COOL rules could be a target as well.

International trade lawyers like Vandeveld and Posner said it is far-fetched to say COOL regulations would be challenged using ISDS. The North American Free Trade Agreement already includes ISDS provisions, as do 50 other treaties the U.S. has signed.

The lawyers again pointed to the difference between bringing a case and winning one. "So far, 17 [investment] claims have been brought against the U.S., and we have prevailed in every one,"

Vandavelde said. "The reason for that is investment treaties are designed to incorporate U.S. legal norms. So as long as we're acting consistently with our own federal laws, there shouldn't be a legitimate claim against us."

### **Prioritizing Trade Over Safety**

International rules favor trade flows over consumer information and safety laws, critics say. These rules will likely be adopted into the TPP, with additional mechanisms for settling trade disputes.

COOL was challenged under the WTO agreement on Technical Barriers to Trade (TBT), while the EU lost its beef hormone case under the Sanitary and Phytosanitary (SPS) measure that allows countries to enact policies to protect human, animal or plant life or health. Both the TBT and SPS agreements aim to ensure that countries' laws don't create unnecessary obstacles to trade and that they serve a legitimate objective.

"Rules in the WTO go beyond just treating imports and domestic exports the same; they prioritize trade flows over other kinds of policy priorities, and in the case of COOL, consumer information," Lori Wallach, director and founder of Global Trade Watch, a division of Public Citizen, said. "The WTO ordering the U.S. to gut a key consumer law is a little bit of a canary in coal mine reminder that we know everything in WTO is in TPP, plus."

Posner said he doesn't see trade flow and consumer laws as being incompatible. Free trade agreements are adopted on a broad spectrum of issues, including investments and goods, against a backdrop that acknowledges that governments regulate in the interest of public health and the environment. In some cases, a country may have ulterior motives.

"There are governments around the world that do things under the pretense of protecting welfare, but really want to protect a local industry against foreign competition," Posner said, adding that WTO cases should be put into perspective. The global organization has been around for 20 years and heard nearly 500 cases, most of which didn't challenge health and safety.

### **Encouraging Compliance**

The U.S. should comply with WTO decisions to set an example for the more than 150 members of the organization should they lose a case in the future, Scott Miller, senior adviser and Scholl Chair in international business at the Center for Strategic and International Studies, said.

"Encouraging compliance is superior to other approaches because it protects our export interests and makes sure the U.S. plays by the rules," Miller told Bloomberg BNA.

Critics say while a rules-based international trade system is important, the rules matter. Hansen-Kuhn of IATP said the rules are already problematic, so including them in the expansive TPP deal with countries like Japan, Malaysia and Vietnam is dangerous.

"I think there's different ways to adopt trade agreements, like focusing on specific areas, such as the U.S. has done in equivalency agreements," Hansen-Kuhn said. "Focus on one issue instead of within a larger context so it can be done right."

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<https://wikileaks.org/tisa/owinfs-statement.html>

Wikileaks June 3, 2015

## **Wikileaks Releases Largest Trove of Trade Negotiations Documents in History on Proposed “Trade in Services Agreement,” Exposes Secret Efforts to Privatize and Deregulate Services**

**Leaks Prove “Fast Track” Critics in the United States like Senator Elizabeth Warren Right: were Fast Track passed, a potential TISA, if approved under it, would lead to Financial (and other Services) Deregulation**

### **Statement of Our World Is Not for Sale (OWINFS) global network**

Today, as Ministers meet to further a controversial and little known proposed Trade in Services Agreement (TISA) on the sidelines of the annual Organization for Economic Cooperation and Development (OECD) meeting, Wikileaks released ([wikileaks.org/tisa/](https://wikileaks.org/tisa/)) a trove of negotiating texts, including annexes covering a wide range of issues on domestic regulation, financial services, air and maritime transportation, electronic commerce, transparency, telecommunications, professional services, and the natural movement of persons (called “Mode 4” in trade agreements.)

The TISA negotiating texts are supposed to remain secret for five years after the deal is finalized or abandoned. Today, the secrecy charade has collapsed, and the risks to Wall Street oversight are exposed for all to see.

“The secrecy charade has collapsed. TISA members trying to keep their publics in the dark as to the negative implications of the corporate TISA for financial stability, public safety, and elected officials’ democratic regulatory jurisdiction have been exposed to the light of day, in the largest leak of secret trade negotiations texts in history,” said Deborah James of the OWINFS network.

The leak throws further fuel on the fire ignited by the debate in the United States over the controversial Fast Track legislation, also known as Trade Promotion Authority (TPA). Critics like U.S. Senator Elizabeth Warren, who played a crucial role in leading the post-crisis regulation of the financial sector in the U.S., has already warned that the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) risk undermining even the limited changes achieved to restore financial stability. After President Obama called her worrying “wrong”, analysts in Bloomberg, The Hill, and other publications concurred with the Senator. However, their debate focused on the speculated impacts of a potential TPP, the financial services text of which has yet to be made public; with this leak, the dangers to financial stability of a financial services chapter in the proposed TISA are no longer speculative. (The 2015 Fast Track bill specifies that Fast Track procedures will apply to “an agreement with respect to international trade in services entered into with WTO [World Trade Organization] members” – the TISA.)

Trade unionists in Uruguay have been engaged in a high-stakes battle with pro-corporate government officials as to whether the nation should participate in the agreement. The leaked **telecommunications annex**, among others, demonstrate potentially grave impacts for deregulation of state owned enterprises like their national telephone company. The leak of the documents today provides direct ammunition for the “No to TISA” side.

Analysis of the **air transport services annex** by the International Transport Workers’ Federation notes that “[i]n the TISA document there is virtually no discussion on safety standards. . . . Over the last decade outsourcing and offshoring aircraft maintenance has been on the rise and there are scientific studies pointing out the possible negative implications of this for current and future aviation safety.” The TISA proposed TISA annex states that its rules would take precedence over the International Civil Aviation Organization (ICAO), which has far more credibility and expertise on the issue.

Analysis of the text on so-called “**transparency**” states that “[t]ransparency’ in this TISA text means ensuring that commercial interests, especially but not only transnational corporations, can access and influence government decisions that affect their interests – rights and opportunities that may not be available to local businesses or to national citizens.”;

Preliminary analysis notes that the goal of **domestic regulation texts** is to remove *domestic* policies, laws and regulations that make it harder for transnational corporations to sell their services in other countries (actually or virtually), to dominate their local suppliers, and to maximize their profits and withdraw their investment, services and profits at will. Since this requires restricting the right of governments to regulate in the public interest, the corporate lobby is using TISA to bypass elected officials in order to apply a set of across-the-board rules that would never be approved on their own by democratic governments.

The documents show that the TISA will impact even non-participating countries. The TISA is exposed as a developed countries’ corporate wish lists for services which seeks to bypass resistance from the global South to this agenda inside the WTO, and to secure an agreement on services without confronting the continued inequities on agriculture, intellectual property, cotton subsidies, and many other issues.

## Background

This leak backs warning from global civil society about the privatization and deregulation impacts of a potential TISA since our [first letter on the issue](#), endorsed by 345 organizations from across the globe, in September 2013. At that time, OWINFS argued that “[t]he TISA negotiations largely follow the corporate agenda of using “trade” agreements to bind countries to an agenda of extreme liberalization and deregulation in order to ensure greater corporate profits at the expense of workers, farmers, consumers and the environment. The proposed agreement is the direct result of systematic advocacy by transnational corporations in banking, energy, insurance, telecommunications, transportation, water, and other services sectors, working through lobby groups like the US Coalition of Service Industries (USCSI) and the European Services Forum (ESF).” Today’s leaks prove the network’s arguments beyond a shadow of a doubt.

Today's leak follows others, including a June 2014 Wikileaks revelation of a previous version of the Financial Services secret text, the December 2014 leak of a U.S. proposal on cross-border data flows, technology transfer, and net neutrality, which raised serious concerns about the protection of data privacy in the wake of the Snowden revelations.

The TISA is currently being negotiated among 24 parties (counting the EU as one) with the aim of extending the coverage of scope of the existing General Agreement on Trade in Services (GATS) in the WTO. However, even worse than the opaque talks at the WTO, the TISA negotiations are being conducted in complete secrecy – until now. Public Services International (PSI) global union federation published the first critique, TISA vs Public Services, by Scott Sinclair, in March 2014, and PSI and OWINFS jointly published The Really Good Friends of Transnational Corporations Agreement report on Domestic Regulation by Ellen Gould in September 2014. A factsheet on the TISA can be found here and more information on the TISA can be found at <http://ourworldisnotforsale.org/en/themes/3085>.

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OWINFS is a global network of NGOs and social movements working for a sustainable, socially just, and democratic multilateral trading system. [www.ourworldisnotforsale.org](http://www.ourworldisnotforsale.org)



POLITICO

Huge trade deal hinges on Big Pharma protections

By Brett Norman and Adam Behsudi

6/3/15 3:41 PM EDT

A class of drugs with the potential to treat intractable diseases like cancer and other killers — as well as to explode health spending globally — is at the center of the toughest negotiations of the biggest trade deal in history.

The pharmaceutical industry has been pressing the Obama administration to demand that these complex and costly drugs receive 12 years of monopoly pricing power around the world. Critics of the trade pact say such unprecedented protection from cheaper copycat versions globally would lock in higher drug costs for poorer countries and prevent the United States from setting its own policy.

The 12-year provision is unanimously opposed by the other 11 nations that would be party to the TPP. International relief organizations have very publicly warned that the deal would mean far fewer people in developing countries would be able to afford life-saving medical breakthroughs.

Yet with the backing of many Republicans and some Democrats, major pharmaceutical companies and their trade associations have thrown down the gauntlet. They insist they're standing firm on the 12-year provision for biologics, as these highly promising drugs are known. As organic products derived from living cells, they're typically injectable — in contrast to the traditional prescription pills most consumers get at the pharmacy.

The industry recently garnered a letter supporting the full period from GOP Sen. Rob Portman, a former U.S. trade representative under President George W. Bush, and 10 fellow Republicans. Some of the administration's essential allies on the trade pact say they would have to rethink their support if biologics don't get the full protection.

"I'll be very upset," Sen. Orrin Hatch told POLITICO. "I'd have a rough time supporting the bill."

And then there's the Obama administration's own complicated position on the issue.

As part of the ACA, the White House allowed industry a dozen years of exclusivity with the drugs. Since then, however, the administration has repeatedly tried through budget proposals to cut the period to seven years. Agreeing to a dozen years in the trade talks would lock that in at home, too.

U.S. negotiators adopted the 12-year term as their initial position — it is current U.S. law, after all — but the other Pacific Rim countries in the talks are vehemently fighting back. In

Washington, many Democrats and AARP oppose it based on the same concerns of affordability and access abroad as well as at home.

Trade Representative Michael Froman, who declined a request to comment for this story, has been quick to respond to lawmakers pressing for the full period by highlighting the huge differences in monopoly protection among TPP participants.

“Around the table, you have five countries that have zero years, four countries that have five years, two countries that have eight years, and we’re 12 years,” Froman testified at a Senate Finance Committee hearing in April.

The TPP trade deal aims to be the largest ever, covering more than 40 percent of the world’s gross domestic product. The pharmaceutical issue is only one among a set of broad new intellectual property rules the agreement would establish. Movie studios, publishers and software companies all have a stake in rules that would set the global standard for decades to come.

The drug industry says it needs the extended protection to recoup biologics’ higher development costs. But even as drug company executives reaffirmed the issue’s priority last month at a Pharmaceutical Research and Manufacturers of America meeting, an industry source said many were taking a broader view of how the overall deal would benefit them.

“I think potentially at the end of the day, we have to look at the totality of the agreement,” he said. “Are we at a better place or a worse place?”

Despite the public pressure for the 12-year lockout, two industry lobbyists said an eight- or nine-year period may be the most that pharma can realistically expect. Some Democrats are pushing for just five years, the same as was given for traditional medications in a 2007 trade deal that House Democrats negotiated with the Bush administration. A House Democratic aide familiar with the negotiations said that seven years would likely be acceptable, though — since that’s considered the target for U.S. law.

The length of the exclusivity period isn’t the only consideration for biologics. Also in play are provisions about when countries will have to comply with the new standards. The definition of exactly what constitutes a biologic drug is on the table, as well.

The stakes are huge. Sales of biologics were \$130 billion worldwide in 2013 and are projected to hit \$290 billion by 2020, according to Deloitte. And while drug makers often have patents that are longer than the government-sanctioned monopolies they get under U.S. law after a product is approved, those patents aren’t always honored internationally, especially in developing countries. The guaranteed monopoly pricing would be an added defense against weaker patent laws abroad.

Nongovernmental relief groups like Oxfam; Doctors Without Borders; and amfAR, the Foundation for AIDS Research, have protested that the trade deal could make the drugs unaffordable for many poorer countries — even after accounting for the lower prices that manufacturers regularly negotiate outside of the United States. Doctors Without Borders

mounted an advertising campaign in Washington Metro stations last month to decry TPP as “a bad deal for medicine.”

Other critics point to the potential impact closer to home, where changing the amount of time biologics have the market to themselves could also have major economic consequences. The White House estimates that capping the monopoly term at seven years would save \$4.5 billion in spending over a decade just for federal health care programs.

Enshrining 12 years in the trade deal would block any future efforts to cut back the protection that was written into the ACA.

“Yes, BIO and PhRMA won in 2010,” Generic Pharmaceutical Association CEO Ralph Neas said, referring to the two biggest industry trade groups. “The important point here is that if BIO and PhRMA get their way in the TPP ... then that 12 years would be permanent. That’s why they’re fighting so hard on this.”

Exactly what effect competition will have is unknown. The FDA approved the first generic-like “biosimilar” drug this year, but legal wrangling has so far kept it off the U.S. market. In Europe, where such biosimiliars have been available since 2006, the cost in general is about 30 percent cheaper than the biologics they copy, according to some estimates. The European Union provides 10 years of exclusivity for biologics.

With the TPP trade ministers expected to bring negotiations to a close by early July, the protection provision must be resolved soon. Before that happens, President Barack Obama will have to secure fast-track legislation pending in Congress, which would allow him to submit an unamendable trade agreement for an up-or-down vote. Many countries are reluctant to offer their own bottom lines until they know the deal won’t get picked apart by U.S. lawmakers.

House Ways and Means ranking member Sander Levin considers the issues to be integrally linked. The Michigan Democrat fears the TPP discussions are moving “in the wrong direction” and eroding the progress reflected in that 2007 trade deal.

That pact “struck the right balance on medicines between the need to promote innovation and the need to protect public health,” Levin said in a statement to POLITICO. “This is the wrong time for Congress to give up its leverage. ... This issue is too important to lives around the globe to fast-track the wrong approach in TPP.”



<https://www.techdirt.com/articles/20150605/11483831239/revealed-emails-show-how-industry-lobbyists-basically-wrote-tpp.shtml>

techdirt.com; 6/5/15

## Revealed Emails Show How Industry Lobbyists Basically Wrote The TPP

*from the well-isn't-that-great... dept*

Back in 2013, we wrote about a FOIA lawsuit that was filed by William New at IP Watch. After trying to find out more information on the TPP by filing Freedom of Information Act (FOIA) requests, and being told that they were classified as "national security information" (no, seriously), New teamed up with Yale's Media Freedom and Information Access Clinic [to sue](#). As part of that lawsuit, the USTR has now released a bunch of internal emails concerning TPP negotiations, and IP Watch has a full writeup showing [how industry lobbyists influenced the TPP agreement](#), to the point that one is even openly celebrating that the USTR version copied his own text word for word.

*What is striking in the emails is not that government negotiators seek expertise and advice from leading industry figures. But the emails reveal a close-knit relationship between negotiators and the industry advisors that is likely unmatched by any other stakeholders.*

The article highlights numerous examples of what appear to be very chummy relationships between the USTR and the "cleared advisors" from places like the RIAA, the MPAA and the ESA. They regularly share text and have very informal discussions, scheduling phone calls and get together to further discuss. This really isn't *that* surprising, given that the USTR is somewhat infamous for its [revolving door with lobbyists](#) who work on these issues. In fact, one of the main USTR officials in the emails that IP Watch got is Stan McCoy, who was the long term lead negotiator on "intellectual property" issues. But he's no longer at the USTR -- he now [works for the MPAA](#).

You can read through the emails, embedded below, which show a very, very chummy relationship, which is quite different from how the USTR seems to act with people who are actually more concerned about what's in the TPP (and I can use personal experience on that...). Of course, you'll notice that the USTR still went heavy on the black ink budget, so most of the useful stuff is redacted. Often entire emails other than the salutation and signature line are redacted.

Perhaps the most incredible, is the email from Jim DeLisi, from Fanwood Chemical, to Barbara Weisel, a USTR official, where DeLisi raves that he's just looked over the latest text, and is gleeful to see that the rules that have been agreed up on are "our rules" (i.e., the lobbyists'), even to the point that he (somewhat confusingly) insists "someone owes USTR a royalty payment." While it appears he's got the whole royalty system backwards (you'd think an "IP advisor" would know better...) the point is pretty

clear: the lobbyists wrote the rules, and the USTR just put them into the agreement. Weisel's response?  
"Well there's a bit of good news..."

Markets | Tue Jun 9, 2015 2:09pm EDT

## Divided EU lawmakers postpone vote on U.S. trade deal

BRUSSELS | By [Robin Emmott](#)

The European Parliament failed on Tuesday to agree a unified stance on a proposed trade deal with the United States, postponing a vote that was meant to cement its support for the biggest accord of its kind.

The failure to agree on a resolution meant that the parliament would merely debate the proposed deal in Strasbourg on Wednesday, but not hold a vote, highlighting the growing doubts in the European Union about its benefits.

Negotiations on the Transatlantic Trade and Investment Partnership (TTIP), which would encompass a third of world trade, are still under way but, because the parliament has the power to reject any final deal, it must set out its position during the process.

EU lawmakers preparing the resolution received more than 200 proposed amendments, meaning it was highly unlikely to pass, prompting parliament president Martin Schulz to postpone the vote to avoid the public embarrassment of having the resolution defeated.

"One could call it failure," tweeted centre-right lawmaker Daniel Caspary of the European People's Party (EPP).

Far-left, far-right and Green lawmakers who are determined to block the pact seized on the postponement as a sign that the deal was in danger, but aides to centre-right and centre-left lawmakers told Reuters that a vote was still likely to be held after the summer.

"The European Parliament's establishment is in a panic that the vote will reveal the clear divisions," said French Green Yannick Jadot.

While an accord will not be ready before 2016, the European Parliament must establish its position much as the U.S. Congress must decide whether to grant President [Barack Obama](#) "fast-track" powers to negotiate trade deals.

The parliament's positions have become harder to predict since last year's European elections, in which anti-EU parties did well.

Much of the discord focuses on how companies settle disputes under the pact; lawmakers fear that U.S. multinationals will challenge European laws on grounds that they restrict free commerce.

Washington says it considers the issue of investment arbitration non-negotiable because EU governments have secured some 1,400 investment protection agreements since the 1960s.

Critics of the deal also fear it will be detrimental to food safety and the environment.

"It is high time for the negotiators to take stock and stop the negotiations," said Natacha Cingotti, a campaigner at Friends of the Earth Europe.

(Editing by Kevin Liffey)

## Confidential LAC Report Says TPP Falls Short On Automotive, SOE Rules

A confidential assessment of the Trans Pacific Partnership (TPP) prepared by the Labor Advisory Committee (LAC) in September 2014 and reprinted below charges that the automotive rules of origin as they are emerging in the negotiations are so weak they will result in the migration of U.S. and North American auto sector jobs to Malaysia, Vietnam, and other TPP partners, and provide benefits for third countries not part of the agreement.

The 11-page assessment, in which LAC members in their official capacity detail their specific recommendations for TPP that have been rejected by the U.S. government, was part of a 16-page "interim report" on the TPP negotiations that the AFL-CIO had sought clearance from the administration to release to members of Congress.

The other five pages consisted of an April 13 analysis signed by AFL-CIO President Richard Trumka explaining in more general terms how the administration has ignored labor's recommendations for TPP and has failed to provide effective briefings on developments in those talks.

The Office of the U.S. Trade Representative ultimately gave clearance for the AFL-CIO to publish the April 13 analysis, with a paragraph relating to the auto rule of origin redacted, but not the September 2014 assessment. Unredacted copies of both documents were obtained by *Inside U.S. Trade*.

The September 2014 assessment charges USTR has not heeded LAC recommendations for strong rules of origin in the auto sector, although it does not disclose what the regional value content requirement will likely be.

However, the unredacted version of the April 13 analysis states that "based on proposals shared with cleared advisers [the TPP regional value content requirement would be] 55 percent at best and we understand that it will probably be lower as a result of objections by other parties."

This analysis notes the TPP will coexist with existing FTAs and that companies will be able to choose which of them will provide them with the most benefits. In the case of cars, the TPP therefore "could result in the immediate reduction in content requirements for vehicles sold in the U.S.", implying firms would mostly likely choose the more lenient TPP rules in contrast to those under the North American Free Trade Agreement (NAFTA).

According to the analysis, USTR has denied this is the case and that the rule in TPP will be effectively as stringent as the origin requirements under NAFTA, but has not substantiated this claim. "While USTR staff have indicated that their intention is that the new rule would be as strict as the existing NAFTA rule, as there are certain methodological differences to date, after numerous meetings with interested [labor union staff], no data has been provided that would support this contention," the analysis says.

This part of the analysis was blacked out at the insistence of USTR, according to Trumka. The only part of the paragraph that was left unredacted in the public version stated that "to date, after numerous meetings with interested [labor union staff], no data has been provided that would support this contention."

The September 2014 document notes that individual unions made a proposal that would have started with the current 62.5 percent regional value standard set in NAFTA and increase it over time to 75 percent using a similar formula to NAFTA. This proposal is justified to retain automotive jobs in the United States, the document says.

Critics of the TPP, such as Sen. Sherrod Brown (D-OH), have charged that failure to set strong automotive rules of origin in TPP will have a ripple effect on the health of the steel industry and other suppliers to auto companies.

Labor advocates have expressed anger over USTR's withholding approval to release the September 2014 document and pressure to censor the AFL-CIO-released analysis part of it, which the administration also insisted could only be

released if it was published in LAC members' personal capacity and not as a "LAC product." They have also accused the administration of purposely delaying authorization of the analysis until the vote on Trade Promotion Authority (TPA) in the Senate had passed by throwing up procedural hurdles.

A U.S. official sidestepped a request to respond to these specific charges, and instead said only that the September 2014 document was out of date and inaccurate, while stressing the lengths the administration has gone to in order to garner feedback from labor unions.

"The document released today is inaccurate, incomplete, and out of date. It does not reflect the text of the agreement or the conversations labor representatives have had with the Administration in the course of hundreds of hours of consultations," said the official. "As with any other stakeholder, labor has achieved many of their priorities in the negotiation, but not all of them. We are proud of the impact labor input has had on our negotiations and their positive contribution to trade policy over the years."

**The confidential Sept. 3, 2014, assessment by the LAC also expresses alarm on the issue of disciplines for state-owned enterprises (SOEs) — an area of TPP that the administration has frequently touted as going beyond any previous free trade deal. By contrast, the LAC report rattles off a litany of areas where the proposed SOE text falls short.**

The document says that among its "greatest concerns" about the SOE chapter are a lack of coverage for mergers and acquisitions, an adverse effects test that is too limited and will leave too many workers without remedy, and a lack of coverage for sovereign wealth funds.

It also says there is a "lack of clarity regarding the ability to address SOE activities in our domestic market that may have an anti-competitive impact on production and jobs, and whether the definition of an SOE is broad enough to cover necessary foreign commercial entities while also providing definite assurances for public services in each country and U.S. public institutions."

In its rebuttal to the analysis part of the report, USTR emphasized that it had included SOE disciplines at the request of the labor union, though the issue has been a priority for major trade associations such as the U.S. Chamber of Commerce.

The document also takes issue with the structure of the TPP, and specifically that it will allow other countries to dock on at a later stage. It says that the LAC has repeatedly urged the administration "to include standards for new entrants regarding labor rights, democratic governance, open markets, and other readiness criteria."

But the LAC says it has seen no U.S. proposal to include such provisions in the TPP. "We therefore remain concerned that future administrations would commence negotiations with inappropriate trading partners and without adequate Congressional consultations and approval."

The document also notes that LAC members have been assured that Congress will have an opportunity for an up or down vote for each new entrant to the TPP, but have seen nothing in writing. "We are reluctant to trust such oral assurances and would prefer to see the legislative text that would ensure that, unlike for the WTO, Congress must vote in the affirmative before any new party may join the TPP," the document said.

In the congressional debate over TPA, Brown offered an amendment that would require congressional approval prior to any new entrants joining the TPP. It was defeated 47-52 in the Senate.

This notion of the living agreement to which other countries can dock has also been flagged by Sen. Jeff Sessions (R-AL), who complained in a public memo that TPP's "living agreement" provisions could allow China to accede to the deal without congressional approval.

In 2012, Assistant U.S. Trade Representative Barbara Weisel, the chief negotiator in the TPP talks for the U.S., said that the subsequent entry of another country after conclusion of the deal would likely require an additional vote in Congress. She said this would also be the case if TPP parties themselves reopened the agreement to change its obligations (*Inside U.S. Trade*, July 6, 2012).

**According to Trumka, the administration has refused to allow the release of the interim report in full** on the grounds that it had not been discussed at a LAC meeting and therefore has not been drafted or submitted in a manner that complies with the Federal Advisory Committee Act. The administration has set June 22 as the date for the next LAC meeting — past the date when House Republicans have said they may seek a vote on TPA.

Trumka rejected USTR's argument by pointing out that the Sept. 3, 2014 document was discussed at a Sept. 4 LAC meeting. He also repeatedly criticized the administration for dealing with the LAC request for the release of the entire interim report to Congress so slowly, noting that it was first sent to USTR on April 16.

Both the April 13 analysis and the September 2014 document say the U.S. has failed to take up LAC recommendations in the TPP negotiations to curb foreign countries' policies that force U.S. companies to transfer technology, production and jobs in return for market access and government procurement opportunities. These policies are incentives for U.S. companies to move U.S. jobs offshore, they charge.

It also charges that USTR has not heeded LAC advice in these and almost all other areas of the TPP negotiations, has failed to provide "full and on-going access" to negotiating texts, which it says severely undermines the ability of the LAC to fulfill its statutory mandate.

A USTR spokesman issued a lengthy rebuttal of the April 13 analysis before it was published by the labor federation on June 2. USTR did not share these comments ahead of time with labor unions, according to AFL-CIO sources.

The USTR rebuttal insisted that the "latest U.S. proposals, in their entirety, have been and continue to be provided to the LAC and all advisory committees." It notes that there are many areas where negotiations are still underway and where negotiators cannot report more than that they are "making progress towards meeting our objectives."

In countering the LAC charge that USTR has largely ignored the recommendations made by the LAC, USTR insisted that "the labor community has had a demonstrable and significant impact on individual trade agreements and the evolution of American trade policy as a whole over the last two decades."

It notes that since the early 1990s, labor has advocated for enforceable labor and environmental obligations in trade agreements subject to the same dispute settlement mechanism than other obligations. "We have made this a bedrock principle in our negotiations," USTR said.

The cover letter by LAC Chairman R. Thomas Buffenbarger to the September 2014 report notes that while there have been some important improvements on labor and environment in the past 20 years, "these changes have fallen significantly short of what is needed to guarantee that workers are able to exercise their basic rights and that the environment is protected."

As an example, Buffenbarger says that the "reality" in Colombia — a U.S. FTA partner since 2012 — is that workers cannot exercise their fundamental rights to organize and bargain collectively without fear for their lives, despite the strong FTA provisions on labor rights.

September 3, 2014

The Honorable Thomas Perez Secretary of Labor

The Honorable Michael Froman United States Trade Representative

U.S. Department of Labor  
Office of the United States Trade Representative

Re: Labor Advisory Committee for Trade Negotiations and Trade Policy: Advice for Negotiating the Trans-Pacific Partnership Agreement

Dear Secretary Perez and Ambassador Froman:  
We strongly support President Obama's efforts to create

shared prosperity for all families in America. However, we do not believe that continuing to put in place trade policies similar to those enacted over the last 25 years will in fact achieve our shared goals. In our experience, our current trade policies have been an obstacle to creating good and sustainable jobs, providing the opportunity for rising prosperity for all, alleviating gross income inequality, and reinvigorating our manufacturing sector.

We, as members of the Labor Advisory Committee, on behalf of the millions of working people we represent, believe that our current trade policy is imbalanced. The primary measure of the success of our trade policies should be increasing jobs, rising wages, and broadly shared prosperity, not higher corporate profits and increased offshoring of America's jobs and productive capacity. Trade rules that enhance the already formidable economic and political power of global corporations undermine worker bargaining power, here and abroad, and weaken both democratic processes and regulatory capacity at the national, state, and local levels.

Repeatedly, over many decades, America's workers have protested flawed trade policies, including those enshrined in the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO), Permanent Normal Trade Relations (PNTR) for China and more recently implemented agreements.

Under these agreements, U.S. communities lost hundreds of thousands of jobs, as companies shed their U.S. workforces to shift jobs and production to places where workers' fundamental labor and human rights are routinely violated and wages are consequently unfairly suppressed. While there have been some important improvements in trade-linked labor and environmental provisions over the past twenty years, these changes have fallen significantly short of what is needed to guarantee that workers are able to exercise their basic rights and that the environment is protected. The reality is that in Colombia, which is bound to the strongest labor rights provisions in any U.S. trade agreement, workers still cannot exercise their fundamental rights to organize and bargain collectively without fear for their lives and for their families' well-being.

Furthermore, improvements in labor and environmental standards must be coupled with changes to the underlying trade rules, which incentivize the offshoring of jobs and exacerbate the erosion of worker bargaining power and leakage of trade benefits to countries that are not part of the agreements.

The statutory mandate to provide advice to the USTR and Department of Labor is severely undermined by the lack of full and ongoing access to negotiating texts. Given the importance of trade policy to our nation's overall economic strategy, we will continue our work to reform and update the trade negotiating authority process so that this and future trade negotiations can be more open, democratic, and participatory.

We believe our government must enact and implement a broad set of domestic industrial and economic policies to rebuild, repair and modernize our infrastructure and prepare our workforce for the jobs of the future. Absent these investments, so-called globalization and free trade will continue to leave workers behind.

Similarly, we are concerned that current U.S. trade agreements undermine our regulatory capacity and democratic decision-making processes. We believe strongly that our government must use trade negotiations and trade rules to work toward balanced and reciprocal trade by effectively addressing mercantilist policies such as currency manipulation that harm U.S.-based manufacturers and their employees. Likewise, our trade rules do not effectively address other countries' market-distorting policies that require the transfer of U.S. technology and production in return for market access.

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In addition, U.S. trade policies unduly protect and privilege the “rights” of corporations and investors—even to the point of creating a private system of “corporate courts” (investor-to-state dispute settlement, or ISDS). The result is an ever-widening gulf between the share of GDP going to profits for corporations and the share that workers take home. The status quo approach is unacceptable.

America’s workers—and our brothers and sisters around the world—are not willing to accept more trade deals that put profits before people.

Annexed to this letter is a list of concrete suggestions we have requested in one or more venues since the beginning of the TPP negotiations in 2010. We would very much like to discuss the reasons why these suggestions have not been incorporated into the TPP, while status-quo proposals harmful to working people continue to advance.

Trade can be a force for progress in the world, or it can continue to be a disguise for rules that create profit centers for global corporations that do not behave as good global citizens. This is unsustainable.

The U.S. can and must lead the world in creating progressive trade rules that build middle classes and consumer demand everywhere. America’s workers want our government to alter its current approach to trade so that it will promote broadly shared prosperity.

Sincerely,

R. Thomas Buffenbarger  
Chair, Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)

FOR SECURED ADVISERS ONLY —NOT FOR DISTRIBUTION— Annex

LAC letter, September 3, 2014 Suggestions for a Worker-Centered Trade Policy

**1. Currency:** Misaligned currency is an important contributing factor to the U.S. trade imbalance with China and other Asian nations. Overnight, a country can undermine the price-reduction effects of tariff elimination by devaluing its currency. Traditional trade theory assumes the absence of such manipulation, yet USTR has repeatedly failed to address the issue either at the World Trade Organization or in any of bilateral or plurilateral trade agreements.

Since we filed our initial comments on the prospective TPP negotiations in January 2010, we have urged the administration to include in the TPP an “effective tool to deal with misaligned or manipulated currency.” We have yet to see any proposal to include effective curbs on currency manipulation in the TPP.

**2. Rules of Origin:** Strong, specific, and enforceable rules of origin help to ensure the bulk of the benefits of a trade agreement inure to the parties to that agreement—those who have made reciprocal promises to each. Otherwise, benefits are likely to leak to countries that are free to operate in a manner wholly inconsistent with the strictures of the agreement. In our 2010 filing, we advised that “rules of origin should be negotiated such that the signatories are the primary beneficiaries of new market access.”

In May 2012, the USTR requested comments on its “RVC Percentages for Select Product-Specific Rules (Non-Textile Goods) in the TPP Negotiations.” We responded that the TPP “must include strong rules of origin that will target benefits to the parties to the agreement (including, of course, the United States)—rather than weak rules of origin that will allow non-parties, who have made no reciprocal obligations to the U.S., to reap the rewards. Our primary goal must not be to expand supply chains, but to expand employment opportunities here in America.” Moreover, several individual affiliates developed and presented a very thoughtful proposal on regional value content for autos (starting with the current NAFTA standard of 62.5% and increasing over time to a higher 75% using a similar increasing formula to that used in NAFTA). The ambitious proposal is justified because anything less will

result in the migration of auto sector jobs to Malaysia, Vietnam, and other TPP partners and away from North America and the U.S. specifically.

Our comments appear to have fallen on deaf ears. It does not appear that rules of origin are being strengthened in any significant way.

**3. Market Access Assurances:** Part of the reason that successive FTAs have failed to cure existing trade imbalances is that these agreements fail to ensure reciprocal market access. USTR has not developed an impressive history of accurately identifying and eliminating arbitrary and unreasonable non-tariff barriers. Such tools were included in a very limited way in the Korea FTA, but the proof is in the pudding. So far, the Korea FTA has only succeeded in adding to our trade woes. In our January 2010 filing on the TPP, we advised that “a results-oriented approach that allows for automatic responsive measures when market access limitations are not lifted should be included in a TPP.”

Since then, testimony by the AFL-CIO and UAW at the International Trade Commission requested that reductions in U.S. tariffs on Japanese imports must be tied to an actual, verifiable opening of the Japanese auto market and a substantial reduction in our bilateral auto trade deficit with Japan.

Unfortunately, we have seen no proposals that would ensure that tariff reductions for Japan on autos, auto parts, and light trucks will be contingent upon actual inroads into the Japanese market.

**4. State-Owned Enterprises (SOEs):** While the AFL-CIO recognizes that foreign direct investment (FDI) can and often does contribute to the creation and maintenance of high-skill, high-paying jobs, such an outcome is not inevitable. Of particular concern are investments by state-owned, state-controlled, and state-influenced enterprises (collectively SOEs) which may not operate on the basis of commercial considerations, but instead may orient their operations to drive existing U.S. competitors out of the market, to undermine U.S. supply chains or to transfer valuable technology, equipment, intellectual property, and other assets to the home country or other points abroad. Moreover, regardless of an SOE’s purpose for investing in the U.S., if it can access subsidized inputs (such as low or no cost capital or subsidized inputs imported directly from its home-country operations), traditional U.S. anti-dumping and countervailing duty law would not be able to reach such behaviors, leaving U.S.-located producers and their employees injured and without remedy.

To address this issue, we were hopeful that provisions in the TPP would appropriately discipline the behavior of SOEs. We have been providing advice on creating such disciplines since our initial filing in 2010. After numerous in-person meetings and multiple rounds of written comments, including specific textual suggestions, we remain greatly concerned about the current state of the SOE disciplines.

Our greatest concerns about the SOE Chapter’s current weakness include lack of coverage for mergers and acquisitions, an adverse effects test that is too limited and will leave too many workers without remedy, lack of coverage for sovereign wealth funds, lack of clarity regarding the ability to address SOE activities in our domestic market that may have an anti-competitive impact on production and jobs, and whether the definition of an SOE is broad enough to cover necessary foreign commercial entities while providing definite assurances for public services in each country and U.S. public institutions.

**5. Labor Provisions:** As you know, firms that can operate in conditions in which ILO core labor standards are not respected will drive down wages and working conditions, drawing in additional investment, enabling social dumping of lower-priced goods, and suppressing wages and working conditions in other markets against which producers everywhere are forced to “compete.” Past trade agreements, even those that contain the so-called “May 10” provisions, failed to include standards and institutions that would effectively protect labor rights and reverse the race to the bottom. Thus, in Colombia, illegal subcontracting and threats against workers persist, and in Peru, the government has weakened some labor and environmental laws in hopes of attracting additional foreign investment.

In the case of labor provisions, not only have we attended a number of meetings and submitted numerous written comments, we joined with trade union federations from a number of other TPP nations to draft a labor chapter so

there would be no question regarding our advice on meaningful improvements to the labor provisions. The following list comprises critical suggestions we have made that we understand were never included in the USTR labor chapter proposal:

- a. Reference to the ILO Core Conventions, not just the ILO Declaration.
- b. Elimination of the “May 10” footnote limiting the interpretation of the labor provision to the Declaration—a “principles” document—rather than the ILO Conventions, which the ILO relies upon to interpret labor standards.
- c. A requirement that Parties not waive or derogate from any of their labor laws (laws implementing either ILO Core Conventions or acceptable conditions of work)—regardless of whether the breach occurred inside or outside of a special zone.
- d. A broader definition of “acceptable conditions of work” to also include all wages (not just minimum wages), workers representatives, termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement, as well as a directive that Parties should “give full effect” to any ILO conventions or recommendations that cover any of the aforementioned “acceptable conditions of work.”
- e. The ability of a petitioner to bring a claim based on a single egregious violation, rather than waiting for a “sustained or recurring course of action” to occur.
- f. An entirely new article protecting the rights of migrant workers and specifically guaranteeing them the same rights and remedies under its labor laws as they relate to the core labor rights as well as wages, hours of work, occupational safety and health and workers compensation. We also proposed an annex laying out “Protections for Workers Recruited Abroad.”
- g. Additional duties for the Labor Affairs Council, including preparing reports on matters related to the implementation of the Chapter and developing guidelines for consideration of public communications to the LAC that include clear deadlines. (See Model Labor Chapter Article 17.7.2 and Annex 2 for full details—the major point of Annex 2 is that a meritorious submission will not languish, but will continue to move through the system in a prompt fashion).
- h. A requirement that a Party that has received a public submission and has issued a finding that, if confirmed, would lead the Party to determine that the Party complained against is in violation of its obligations under the labor chapter must continue to proceed to the next step in the process. We also requested clearer deadlines for each Party to advance labor cases (to avoid years-long delays like those confronted in the Guatemala and Honduras cases).
- i. The creation of an independent labor secretariat and Trans-Pacific works councils for firms operating in more than one TPP country.

**6. Investment:** In order to ensure that the TPP achieves shared prosperity rather than simply further skewed gains for global corporations, it is important that the TPP provide better balance in its investment provisions. If the skew toward private interests in the investment chapter is not remedied, global corporations will continue to force a race to the bottom, chilling efforts to increase labor, environmental, public health and consumer safety standards by countries competing with each other for foreign direct investment (FDI). Such a competition cannot and does not benefit working families, either here or abroad. America in particular cannot win and should not engage in such a race to the bottom. As such, since our first TPP filing in 2010, we have put forth a number of suggestions to rebalance investment protections to provide due respect and space for governmental decisions about how best to secure the public interest, including not only the replacement of the investor-to-state dispute settlement process (ISDS) with a state-to-state mechanism, but other specific, practical changes to the investment chapter and the ISDS process to address current shortcomings, key elements of which are included below.

- a. Require investors to exhaust domestic remedies before filing an ISDS case.
- b. Require a foreign investor to have the burden of demonstrating that a purported standard of protection under customary international law is based on actual state practice rather than on the unsupported assertions of previous investment tribunals (as the U.S. argued in the Glamis Gold case).
- c. Codify the traditional, narrow definition of Minimum Standard of Treatment so that it applies only to the following three areas (as the U.S. argued in the Glamis Gold case): The obligation to provide internal security and protection to foreign investors and investment; to not deny justice by engaging in notoriously unjust or egregious conduct in judicial and administrative proceedings; and to provide compensation for direct expropriation.
- d. Clarify that regulatory measures that adversely affect the value of an investment but do not transfer ownership of the investment or permanently destroy its entire economic value do not constitute acts of indirect expropriation.
- e. Narrow the definition of investment to include only the kinds of property that are protected by the U.S. Constitution. This would mean excluding the expectation of gain or profit and the assumption of risk.
- f. Ensure that foreign investors may not use the most favored nation principle to assert rights provided by other investment agreements or treaties.
- g. Explicitly limit national treatment to instances in which a regulatory measure is enacted primarily for a discriminatory purpose.
- h. Clarify the language to ensure that foreign subsidiaries are not allowed to bring investment claims against a nation that is the home of their parent company.
- i. Modify the restriction on capital controls (used for example in the U.S.-Korea FTA, Art. 11.7.1(a)) so that it allows the use of such controls—at least with regard to circumstances consistent with recent IMF guidance.
- j. In Annex 10-B on Expropriation, strengthen the “exception” by omitting the phrase “except in rare circumstances.” In addition, the non-exhaustive list of “excepted” policies should also explicitly include, “labor,” “decent work” as that term is understood by the ILO, and all measures that Parties take in order to comply with the Labor and Environment Chapters of the agreement.

Our understanding is that none of these suggestions have been incorporated into the TPP’s investment chapter.

**7. Enhanced Screening Mechanism for Inward Bound FDI:** On a related note, we have repeatedly recommended that the administration improve the current Committee on Foreign Investment in the United States protocol so that the Committee can examine more than just national security issues, but can also consider economic security. The U.S. should emulate the screening mechanisms that Australia and Canada use (e.g., add a “net economic benefit test”) in order to ensure that FDI is not used to undermine the U.S. economy or U.S. workers. Existing policy prevents the U.S. from scrutinizing deals such as the original proposal by China Development Bank Loan to Lennar Corporation, which would have required the homebuilder to use a Chinese state-owned construction company. Specifically, we requested that USTR abandon its policy of constricting other nation’s investment screening policies and instead leave room for the U.S. to add such a policy in the future. Our understanding is that this suggestion has been rejected.

**8. Procurement:** Because they undermine important job creation programs, we have long opposed procurement chapters altogether. We believe that government procurement at the federal, state, and local level is an important tool of economic and social policy. When governments so decide, they should be able to use stimulus funds to create jobs within their borders, and not be required to spend those funds to create jobs elsewhere. In addition, it is simply bad policy to limit a government’s ability to make its spending conditional so as to advance domestic social policy. We strongly support the widest possible use of Buy America, Buy American, and Buy “State” policies. We oppose

any procurement commitments in FTAs that restrict the potential stimulative benefits of procurement programs by requiring procuring entities to treat foreign bidders the same as domestic bidders or that do not allow government entities to prohibit the purchase of goods made with child labor, forced labor, under unfair labor conditions, from employers who unlawfully discriminate, or from employers who practices otherwise undermine U.S. policy. Since our 2010 filing on the TPP, we have recommended, in the case that the Administration refuses to omit a procurement chapter, that:

- The USG should negotiate language that would carve out from procurement access obligations all procurement projects funded by stimulus funds appropriated in response to a verified recession.
- The USG should expand the language in the “May 10” agreement to include living wage laws and, for the sake of clarity, prevailing wage laws.

Not only do we understand that the USG has failed to include either recommendation in its TPP proposals, we were surprised to learn at a recent meeting with your staff, that these suggestions regarding prevailing wages were “new” to them. Such a response indicates our suggestions were never seriously considered at all.

**9. Dock-on:** The existence of the dock-on approach presents a potential major problem—the rules negotiated in the TPP could be even more devastating to U.S. workers depending upon which countries join at a later date. Since our 2010 filing, we have repeatedly urged the Administration to include standards for new entrants regarding labor rights, democratic governance, open markets, and other readiness criteria. To date we have not seen a proposal for such provisions in the TPP. We therefore remain concerned that future administrations would commence negotiations with inappropriate trading partners and without adequate Congressional consultation and approval. In addition, while we have been assured that Congress will have an opportunity for an up or down vote for each new entrant to the TPP, we have seen nothing in writing. We are reluctant to trust such oral assurances and would prefer to see the legislative text that would ensure that, unlike for the WTO, Congress must vote in the affirmative before any new party may join the TPP.

#### **10. Elimination of Technology Transfer Mandates and Production Offsets in Return for Market**

**Access:** Some foreign countries rely heavily on official and non-official policies that force U.S. companies to transfer technology, production, and jobs in return for market access or government procurement. While such activity has been well-noted by the Department of Commerce, Bureau of Industrial Security in its annual reports to Congress with respect to the defense industry, this market distorting mechanism also occurs in the commercial sector—the effect is clear: it is yet another incentive to move jobs and whole factories from the U.S. As we have argued in numerous fora, trade agreements, including the TPP, should prohibit such activity. To date, we are unaware of any proposals in the TPP to effectively eliminate this practice.

**11. Intellectual Property:** Though we strongly support intellectual property protections, we have long opposed excessive protections for pharmaceutical products, which form part of the basic human right to health care. Proposals that require patent linkage, excessive data exclusivity periods, and evergreening of patents and that ban pre-grant opposition to patents actually deter innovation instead of promoting it by turning drug makers into rent seekers instead of innovative organizations. Since our initial TPP filing in 2010, we have recommended that pharmaceutical protections adhere to the TRIPS, rather than TRIPS+ provisions that jeopardize access to affordable medicines, particularly in developing countries. In addition, we recommended that USTR abandon its so-called “transparency provisions” that give drug makers leverage over drug listing and pricing decisions made by government health programs.

The USTR’s proposals for the TPP failed to incorporate any of these recommendations (in fact, some of the USTR’s intellectual property proposals were not even fully consistent with existing U.S. intellectual property law). Although we understand the text has subsequently changed due to strong opposition by TPP Parties, since we have not seen the working text, we do not know if those changes will adequately protect U.S. job creation while promoting public health here and abroad.

**12. Services and Regulations:** From the beginning, we have also provided concrete suggestions for improving the carve-out for public services and clarifying the prudential exception for the financial services chapter. Such suggestions will preserve the stability of our financial system and the right of state, local, and national governments to provide public services at the level and in the manner they see fit. Likewise, we have objected to a variety of proposals that would undermine effective environmental protections and food and consumer product regulations and put in place burdensome obligations to engage in “regulatory impact analysis” and similar requirements that undervalue the protective benefits of regulations while overemphasizing the “costs” to business interests.

Given our lack of access to the working texts, we do not know the latest status of these texts or to what degree, if any, our suggestions have been incorporated.

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## **MEMO: Three Burning Questions about the Leaked TPP Transparency Annex and Its Implications for U.S. Health Care**

June 10, 2015

Today, [WikiLeaks](#) published the draft Trans-Pacific Partnership (TPP) “Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices.” This Annex sets rules that TPP country health authorities would be required to follow regarding pharmaceutical and medical device procurement and reimbursement. The draft is dated December 17, 2014. An earlier version leaked in 2011. Unlike that document, the new leak expressly names the Centers for Medicare & Medicaid Services (CMS) as covered by the text, “with respect to CMS’s role in making Medicare national coverage determinations.” Under the TPP, then, these determinations would be subject to a series of procedural rules and principles, the precise meaning of which are not clear and perhaps not knowable.

Pharmaceutical companies could attempt to exploit the general language of the annex to mount challenges to Medicare and health programs in many TPP negotiating countries. The Annex would constrain future policy reforms, including the ability of the U.S. government to curb rising and unsustainable drug prices.

Medicare’s national coverage determinations include whether Medicare Part A and Part B will pay for an item or service. Among other things, Part A and B cover drugs administered in a hospital or a physician’s office, and durable medical equipment.<sup>[1]</sup> Below are questions to which the American public and members of Congress should have full and complete answers before voting on whether to cede trade promotion authority (fast track) to the Obama administration.

1. **What guarantees are there that the TPP’s requirements would not override existing procedures for Medicare?**

The Office of the United States Trade Representative (USTR) claims that Medicare today is fully compliant with the proposed provisions of the TPP. Yet the ambiguous language of the TPP leaves our domestic healthcare policies vulnerable to attack by drug and device manufacturers. For example:

Could companies use the Annex to compel Medicare to cover expensive products without a corresponding benefit to public health? Medicare reimbursement is limited to products that are “reasonable and necessary” for treatment. But the TPP “recognize[s] the value” of pharmaceutical products or medical devices through the “operation of competitive markets” or their “objectively demonstrated therapeutic significance,” regardless of whether there are effective, affordable alternatives.

The TPP also requires countries to “make available a review process” for healthcare reimbursement decisions. Medicare national coverage determinations allow for appeals, but only in a limited set of circumstances.<sup>[2]</sup> Might this conditional appeal process be construed as insufficient, if companies argue the TPP grants them an unconditioned right to review?

Similarly, the TPP mandates that parties provide opportunities for applicants to comment on reimbursement considerations “at relevant points in the decision-making process.” Though Medicare national coverage determinations allow for comments in certain stages of the process, these determinations may be vulnerable to legal challenge depending on the construction of “relevant points.”

## **2. Would the TPP constrain pharmaceutical reform efforts in the U.S.?**

In addition to its application to Medicare Part A and B, the Annex would apply to any future efforts related to national coverage determinations by the CMS, including potential Medicare Part D reforms.

In response to soaring drug costs, advocates have increasingly called on the government to enable the Secretary of Health and Human Services to negotiate the price of prescription drugs on behalf of Medicare beneficiaries. Vital to this reform would be the establishment of a national formulary, which would provide the government with substantial leverage to obtain discounts.

[3]

The development of such a national formulary would be subject to the requirements of the TPP. These procedural requirements would pose significant administrative costs, enshrine greater pharmaceutical company influence in government reimbursement decision-making and reduce the capability of the government to negotiate lower prices.

**3. Could the inclusion of this Annex in the TPP bolster the case of a pharmaceutical company that is suing the United States?**

Investor-State Dispute Settlement is a mechanism that has been a prominent feature of U.S. trade and investment pacts over the last two decades. It allows foreign companies to challenge directly government policies which they claim impinge on their expected future profits, demanding unlimited sums in taxpayer compensation.

Would a foreign pharmaceutical company that has launched an investor-state suit against a government for a reimbursement decision use this annex to bolster their case? The company could attempt to claim that their legitimate expectations have been frustrated, making reference to the expectations created by the annex.

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[1] Medicare Drug Coverage under Medicare Part A, Part B, Part C , & Part D. (2015, May 1). Retrieved June 9, 2015, from <http://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/downloads/11315-P.pdf>

[2] "Department of Health and Human Services; Centers for Medicare & Medicaid Services [CMS-3285-N] Medicare Program; Revised Process for Making National Coverage Determinations," 78 Federal Register 152 (7 August 2013), pp. 48164 - 48169.

[3] Outterson, K., & Kesselheim, A. (2009). How Medicare Could Get Better Prices On Prescription Drugs. Health Affairs. Retrieved June 9, 2015, from <http://content.healthaffairs.org/content/28/5/w832.full>

<https://wikileaks.org/tpp/healthcare/press.html>

# TPP Transparency Chapter

## ANNEX ON

## TRANSPARENCY AND PROCEDURAL FAIRNESS FOR PHARMACEUTICAL PRODUCTS AND MEDICAL DEVICES

Today, Wednesday 10 June 2015, WikiLeaks publishes the Healthcare Annex to the secret draft "Transparency" Chapter of the Trans-Pacific Partnership Agreement (TPP), along with each country's negotiating position. The Healthcare Annex seeks to regulate state schemes for medicines and medical devices. It forces healthcare authorities to give big pharmaceutical companies more information about national decisions on public access to medicine, and grants corporations greater powers to challenge decisions they perceive as harmful to their interests.

Expert policy analysis, published by WikiLeaks today, shows that the Annex appears to be designed to cripple New Zealand's strong public healthcare programme and to inhibit the adoption of similar programmes in developing countries. The Annex will also tie the hands of the US Congress in its ability to pursue reforms of the Medicare programme.

The draft is restricted from release for four years after the passage of the TPP into law.

The TPP is the world's largest economic trade agreement that will, if it comes into force, encompass more than 40 per cent of the world's GDP. Despite the wide-ranging effects on the global population, the TPP and the two other mega-agreements that make up the "Great Treaty", (the TiSA and the TTIP), which all together cover two-thirds of global GDP, are currently being negotiated in secrecy. The Obama administration is trying to gain "Fast-Track" approval for all three from the US House of Representatives as early as tomorrow, having already obtained such approval from the Senate.

Julian Assange, WikiLeaks publisher, said:

It is a mistake to think of the TPP as a single treaty. In reality there are three conjoined mega-agreements, the TiSA, the TPP and the TTIP, all of which strategically assemble into a grand unified treaty, partitioning the world into the west versus the rest. This "Great Treaty" is described by the Pentagon as the economic core to the US military's "Asia Pivot". The architects are aiming no lower than the arc of history. The Great Treaty is taking shape in complete secrecy, because along with its undebated geostrategic ambitions it locks into place an aggressive new form of transnational corporatism for which there is little public support.

Few people, even within the negotiating countries' governments, have access to the full text of the draft agreement and the public, who it will affect most, have none at all. Hundreds of large corporations, however, have been given access to portions of the text, generating a powerful

lobby to effect changes on behalf of these groups. WikiLeaks has launched a campaign to crowd-source a \$100,000 reward for the rest of the TPP, which at time of press had raised \$62,000.

Read the TPP Transparency for Healthcare Annex [here](#)

Read the Analysis by Dr Deborah Gleeson (Australia) on TPP Transparency for Healthcare Annex [here](#)

Read the Analysis by Professor Jane Kelsey (New Zealand) on TPP Transparency for Healthcare Annex [here](#)

The New Yorker

June 11, 2015

## Why Does Obama Want This Trade Deal So Badly?

By William Finnegan

Republican opponents of the Trans-Pacific Partnership have begun calling it Obamatrade. And yet most of the plan's opponents are from the President's own party. Credit Credit: Pablo Martinez Monsivais / AP

The political battle over the enormous, twelve-nation trade agreement known as the Trans-Pacific Partnership keeps getting stranger. President Obama has made the completion of the deal the number-one legislative priority of his second term. Indeed, Republican opponents of the T.P.P., in an effort to rally the red-state troops, have begun calling it Obamatrade. And yet most of the plan's opponents are not Republicans; they're Democrats.

Obama's chief allies in his vote-by-vote fight in the House of Representatives to win "fast-track authority" to negotiate this and other trade deals are Speaker John Boehner and Representative Paul Ryan—not his usual foxhole companions. The vote may come as soon as Friday. The House Republican leaders tell their dubious members that they are supporting Obama only in order to "constrain" him. Meanwhile, Obama is lobbying members of the Black Congressional Caucus, whose support he can normally count on, tirelessly and, for the most part, fruitlessly. "The president's done everything except let me fly Air Force One," Representative Cedric Richmond, Democrat of Louisiana, told the *Christian Science Monitor* this week. Nonetheless, Richmond said, "I'm leaning no."

The long, bad aftertaste of NAFTA—the North American Free Trade Agreement, enacted in 1994—explains much of the Democratic opposition to the T.P.P. Ronald Reagan originally proposed NAFTA, but Bill Clinton championed it, got it through Congress mainly on Republican votes, and signed it. In many Democratic districts, NAFTA is still widely blamed for the loss of hundreds of thousands of American manufacturing jobs, and for long-term downward pressure on wages. When President Obama argues that the T.P.P. is not NAFTA, he is correct. It convenes Pacific Rim nations and economies of many stripes, from wealthy, democratic Japan to authoritarian, impoverished Vietnam, and it includes six countries with which the United States already has free-trade agreements. If enacted, it will encompass forty per cent of global economic activity. It is less a traditional trade deal than a comprehensive economic treaty and, at least for the United States, a strategic hedge against the vast and growing weight of Chinese regional influence. What exactly the T.P.P. will *do*, however, is difficult to know, because its terms are being negotiated in secret. Only "cleared advisors," most of them representing various private industries, are permitted to work on the text. Leaked drafts of chapters have occasionally

surfaced—enough to alarm, among others, environmentalists, labor groups, and advocates for affordable medicine.

Some of the fear and loathing inspired by the T.P.P. is hard to take seriously. Conservative opponents of immigration reform, for instance, have described in the T.P.P. a Trojan horse, inside which, they fear, the dreaded immigration reform will be smuggled into law. (Paul Ryan has tried to debunk this notion, calling it an “urban legend.”) There are House Republicans who seemingly refuse to support any measure that Obama wants, simply because he wants it. Last week, contemplating the approaching fast-track vote, Representative Ryan Zinke, of Montana, said, “We are talking about giving Barack Obama—a President who negotiates with rogue nations like Iran and Cuba—exorbitant authority to do what he thinks is best.” Zinke, a former Navy SEAL commander, went on, “I don’t have faith that President Obama will negotiate in the best interest of Montana or America.”

More substantive objections to the T.P.P. have emerged from senators and representatives, who are now allowed, under strictly controlled conditions—in a guarded basement room under the Capitol, with no note-taking—to read drafts of the eight-hundred-page agreement. Senator Elizabeth Warren has criticized its provisions for “investor-state dispute settlement.” I.S.D.S. allows corporations to sue governments over laws that may adversely affect “expected future profits.” Environmental regulations, public-health measures, and even minimum-wage laws can be challenged under I.S.D.S., which is already a feature of many trade agreements. A Swedish power company is currently suing Germany, seeking \$4.6 billion in damages, because of steps Germany is taking to phase out nuclear power, and Philip Morris is suing to prevent Uruguay and Australia from implementing policies to reduce smoking. Under the T.P.P., the international tribunals that would hear such cases would not, according to Warren, be staffed by judges but by a rotating cast of corporate lawyers. Challenges to American laws should at least be lodged, she argues, in American courts.

WikiLeaks has published T.P.P. draft chapters on investment, the environment, and two versions, from 2013 and 2014, of the intellectual-property-rights chapter. The environment chapter was a major disappointment to activists who had been led to believe that it would contain real enforcement mechanisms. In the Sierra Club’s analysis, the T.P.P. will generate a rapid increase in exports of American liquefied natural gas, which will in turn lead to more fracking, more methane emissions, a shift of the domestic energy market from gas toward coal, and the exacerbation of climate change. The proposed intellectual-property agreements appear to have been dictated by the entertainment, tech, and pharmaceutical industries. Doctors Without Borders declared that, if the drug-patent provisions do not change in the final draft, the T.P.P. is on track to become “the most harmful trade pact ever for access to medicines” in developing countries. With each glimpse of the draft chapters, the coalition opposing the agreement grows. Even a “sweetener” in the form of assistance for workers who lose their jobs because of trade agreements turns out to be partly financed by a seven-hundred-million-dollar raid on Medicare. Now Julian Assange, the Wikileaks founder, is trying to raise a hundred thousand dollars through crowdsourcing, planning to offer the money as a reward to anyone who leaks the entire T.P.P. text—twenty-nine chapters’ worth.

With the fast-track authority that President Obama seeks, he would be able to negotiate trade agreements and present them to Congress for an up-or-down vote, with no amendments or filibusters permitted. Such agreements would then require only fifty-one votes, not sixty, to pass. Paul Ryan recently said, on CNN, that “every President since Franklin Delano Roosevelt has had” some form of fast-track authority. That is not quite right—Richard Nixon never got it, although he initiated the modern version of it. Still, not having it plainly galls Obama. And his only realistic hope of enacting the T.P.P. now turns on getting fast-track authority from the House.

The Senate passed fast-track last month, sixty-two to thirty-seven, with only fourteen Democrats voting yes. Boehner and Ryan expect to be able to produce two hundred Republican votes. That means eighteen Democratic votes are needed. Nancy Pelosi, the minority leader, is reported to be working closely with Boehner and Ryan to come up with the number they need—although she still hasn’t said which way she’ll vote herself. That’s how strange the legislative politics of the T.P.P. have become. Nearly every constituency in the Democratic Party opposes it; and the more they learn about it, the more they oppose it. And yet their leader, Obama, wants it badly.

But why? Maybe it’s a better agreement—better for the American middle class, for American workers—than it seems in the leaked drafts, where it appears bent to the will of multinational corporations. John Kerry, the Secretary of State, and Ashton Carter, the Secretary of Defense, co-authored a column on Monday in USA Today arguing, in evangelical tones, that the T.P.P. will usher in a glorious new era of American-led prosperity, a “global race to the top” for all parties. Meanwhile, the A.F.L.-C.I.O. sees only a race to the bottom. Organized labor, by all accounts, plans to punish any elected Democrat who supports the T.P.P., or even supports fast-track for Obama, in the next campaign. It’s difficult, again, to evaluate the agreement when we can’t see it. And it will be difficult for Congress to do its job if its members can’t study each part of the many-tentacled T.P.P. on its merits, but must simply vote yes or no on the whole shebang. What’s the rush? Is it simply Obama’s wish to make his mark on history and to complete his pivot toward Asia before his time is up? Politicians are often accused of supporting pro-corporate policies to please wealthy backers, looking toward the next campaign. That can’t be Obama’s motive now.



Food Climate Research Network

## What will TTIP mean for food and climate?

Submitted by [Vicki Hird](#) on 16 Jun 2015 - 8:22am.

*This blog-post is written by FCRN advisory board member [Vicki Hird](#) MSC FRES RSA. She is a food, farming and environmental professional with 25 years' experience in research, policy advocacy and campaigning with some great wins, some moderate successes, some useful failures, many reports and a book on food and farming policy. She started out studying slime mould ecology and agricultural pest control but got sidetracked...*

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A trade treaty between the US and EU, which represents around a third of global trade, should be big news. And rightly so. The Transatlantic Trade and Investment Treaty (TTIP) will result in a comprehensive free trade and investment treaty between the European Union and the USA. It is aimed at reducing barriers to trade between the two blocks - such as customs duties, red tape and restrictions on investment. Negotiations started in June 2013 are expected to conclude in 2016. It could have a potentially major effect on our economy, businesses and society.

And it may not. Making a concrete case for why this trade negotiation is so contentious and increasingly problematic is not so easy. In the absence of a negotiating text, when talking of trade negotiations going on behind well closed doors, it is often a case of known unknowns and unknown unknowns.

The politics are getting very [messy](#) (link is external) – and for some EU members states a bit tied up in national politics right now (see some [MEPs making a merry with parliament](#) (link is external)). In the US the ability of the Obama administration to [fast track these negotiations](#) (link is external) is getting mired in politics.

There is much hype about how much economic gain and how many jobs would be created through greater trade between these two giants. The modelling and data these claims are [based on](#) have been strongly critiqued (link is external).

Yet what is clear that any wide-ranging trade deal between the EU and US could have a significant impact on global food trade. In such deals, food and farm related regulations may be traded away in the negotiations in return for gains in other areas. The real 'unknown unknowns'. Additionally, given that both climate and chemical related policies (including pesticides and food treatments) are also likely to be affected, the impact on food production and consumption could go far wider.

## TTIP – why complacency is not a good idea

Trade negotiations in the era of the General Agreement on Tariffs and Trade used to be about reducing trade barriers, such as quota and import taxes. Now they are more about the alignment of regulations. And we have, rightly, a strongly regulated food sector.

TTIP cannot change European laws and regulations outright, yet it could create huge pressure to weaken how those rules are applied – and it can chill the development of new rules for consumer protection or public safety. Other similar trade partnerships have shown this. The North American Free Trade Agreement (NAFTA) which allows free trade between Canada, the US and Mexico for instance – 20 years old last year – weakened labour, environmental and public health standards.[1] It also accelerated an [obesity epidemic in Mexico. \(link is external\)](#) In the UK the MPs Environmental Audit Committee (EAC) reported on findings of their TTIP enquiry noting that it “*could weaken European and UK environmental and public health regulations if laxer US regulations are ‘mutually accepted’ in the deal*”. [2]

Additionally the Investor State Dispute Settlement (ISDS) – a core and hugely contentious element of this and many other trade treaties – provides a means by which corporate interests can override governments – if corporations believe that laws restrict or harm their investments. In essence, companies are given powers to contest – and potentially reverse – government decisions (on health, environment etc.) using international private tribunals. There are many examples where this mechanism has proved effective for them.[3] The EAC noted further that the “*prospect of litigation ... produces a chilling effect on policy-making*” and noted also that there was not a strong case made yet for ISDS whilst many risks in introducing it.

## What the TTIP may do to regulations

Trade commissioner Cecilia Malmström insists that the alignment of European and American regulations will not be at the expense of the environment, health, safety or consumer protection.[4]

Sam Lowe of Friends of the Earth highlighted in a 2014 blog three key concerns from his reading of the European Commission draft [TTIP chapter on Sanitary and Phytosanitary \(food safety, animal health and plant health\) issues \(link is external\)](#), leaked to the US based Institute for Agriculture and Trade Policy[5]:

1. **Food safety standards jeopardised** by conflict of interest - the EU is pushing for a system of ‘mutual recognition’. This means that both parties (the EU and US) would accept each other’s approach so long as it complies with “the importing Party’s appropriate level of protection”. Each may lodge an objection on individual issues, so long as it doesn’t create an “unjustified barrier to trade” ... whatever that is.
2. **Cut in port inspections** could lead to a rise in contaminated food imports - The European Commission is planning to reduce port of entry food safety inspections and tests. This increases the probability of contaminated goods slipping through the safety net; and the importing party would be required to accept the exporting party’s judgement despite there being clear safety concerns.

3. **Importing countries lose power to block suspected unsafe food from entering.** Even if the importing party suspected contamination, TTIP would render it unable to ban or restrict imports of the potentially infected product.

Beyond these basics there are other food related concerns in the 'known unknown' category. One of the US government's key objectives is to secure better access to European markets for US-grown GM food. US negotiators, pushed by their biotech industry, see Europe's labelling rules and safety checks for GM food as [barriers to trade \(link is external\)](#). The US was hugely annoyed at [\(link is external\)](#) the recent EU decision to allow members states to ban GM. It is unclear how this will be used in negotiations. Will the EU give in on GM seeds and food in return for another part of the deal?

Pesticides and chemicals used in the food sector are another potential stumbling block. The European Parliament's [environment committee reports \(link is external\)](#) that 82 pesticides used in the US are banned in Europe. The precautionary principle which underpins EU chemical safety rules and licencing[6] – is almost the opposite of the US approach where the onus is on authorities to prove that a chemical is hazardous before imposing any restrictions. [Endocrine disrupting chemicals \(link is external\)](#) – a group which includes chemicals used in food packaging and some pesticides and which are linked to reproductive disorders and some cancers - has been identified already as TTIP sensitive. Reports of meetings have suggested that proposed new EU bans on use of this group of chemicals have been watered down to accommodate the US [position during the TTIP negotiations \(link is external\)](#).

Hormones and chemical washes as well as standards overall (including those affecting livestock welfare) used in the livestock industry are also hugely contentious. [European Parliamentarians published a paper \(link is external\)](#) outlining concerns that if the EU accepts US standards then EU farmers will be disadvantaged. UK [farmers hold mixed views \(link is external\)](#) – there is a huge opportunity to get Americans eating our sheep apparently - but they are clearly concerned at having their market flooded.

### **How trade-treaties influence our climate policies?**

It is worth noting how our fellow campaigners in the US see this negotiation. [This blog reflects on some of their deep \(link is external\)](#) concerns about TTIP. Amongst many, a major concern is how the EU appears to want the US to end its current legal prohibition on crude oil exports and restrictions on natural gas exports. That means more US coal, oil and gas exports that will fuel continued global warming and it "*threatens to turn the US into an EU fracking colony*". This would have direct (land and water) and indirect implications for food production.

As FCRN members know well, the IPCC make it clear that climate change is already drastically affecting food security for some and is set to grow in impact globally unless strong and rapid action is agreed at the UNFCCC and at national level. A 2°C rise in temperature will have enormous impacts on agricultural and other types of food production around the world. This will be via heat waves, droughts, loss of farmland and fisheries and flooding. Weather extremes, disease spread, sea level rise, ocean acidification, and salinization will all worsen the extent and

severity of food impacts. Agriculture is also central to the lives and livelihoods of billions globally so the social impacts are and will be severe.

With every failure to curb temperature rise, the extent of these impacts become harsher. If TTIP and other such treaties increase the likelihood of more fossil fuels (link is external) being taken out of the ground we can be clear the food impact is at the very least unhelpful.

So whilst overall it is not possible to say yet how the TTIP could affect the food system, the potential for harmful impacts are evident. The health, cultural, environmental, ethical and economic issues already plaguing our food system are unlikely to be sorted by more unfettered trade, a 'harmonisation of legislation' and more corporate control.

Perhaps I am being unduly pessimistic, but positive impacts potentially arising from this agreement - in terms of a truly sustainable, resilient food system for all - have been hard to find. That said, if you know of any - or have any additional details and comment about the agreement and its development, I'd be keen to hear them.

Any discussion via the FCRN website would be most welcome.

*Vicki Hird MSc FRES RSA.*

**Please contribute with your views** or share additional details in the comments box below - especially if you have suggestions on studies and reports looking into potential sustainability impacts from this agreement. You will need to be signed in as a member to do so. Contact us (link sends e-mail) if you have any problems.

Connect with Vicki on twitter: @Vickihird

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[1] For example a recent case <http://www.commondreams.org/views/2015/04/09/new-nafta-rulings-favor-corporations-over-community-values-environment> (link is external)

[2] <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenvaud/857/85702.htm> (link is external)

[3] This paper provides an excellent overview - Christiane Gerstetter & Nils Meyer-Ohlendorf, Investor-State Dispute Settlement under TTIP: A risk for environmental regulation? (December 2013) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2416450](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416450) (link is external)

[4] [http://europa.eu/rapid/press-release\\_SPEECH-14-1921\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-1921_en.htm) (link is external)

[5] <http://www.iatp.org/documents/leaked-document-reveals-us-eu-trade-agreement-threatens-public-health-food-safety> (link is external)

[6] <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN>  
(link is external)



# United States Senate

WASHINGTON, DC 20510-0104

June 5, 2015

President Barack Obama  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

Dear President Obama:

On May 6th of this year, I sent you a letter (enclosed) regarding your request for Congress to grant you fast-track executive authority. Under fast-track, Congress transfers its authority to the executive and agrees to give up several of its most basic powers. These concessions include: the power to write legislation, the power to amend legislation, the power to fully consider legislation on the floor, the power to keep debate open until Senate cloture is invoked, and the constitutional requirement that treaties receive a two-thirds vote.

The latter is especially important since, having been to the closed room to review the secret text of the Trans-Pacific Partnership, it is clear it more closely resembles a treaty than a trade deal. In other words, through fast-track, Congress would be pre-clearing a political and economic union before a word of that arrangement has been made available to a single private citizen.

The letter, which received no reply, asked several fundamental questions Congress ought to have answered before even considering whether to grant the executive such broad new powers. Among those, I asked that you make public the section of the TPP that creates a new transnational governance structure known as the Trans-Pacific Partnership Commission. The details of this new governance commission are extremely broad and have the hallmarks of a nascent European Union, with many similarities.

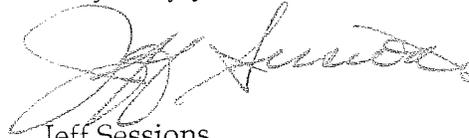
Reviewing the secret text, plus the secret guidance document that accompanies it, reveals that this new transnational commission - chartered with a "Living Agreement" clause - would have the authority to amend the agreement after its adoption, to add new members, and to issue regulations impacting labor, immigration, environmental, and commercial policy. Under this new commission, the Sultan of Brunei would have an equal vote to that of the United States.

25

The implications of this new Pacific Union are extraordinary and ought to be discussed in full, in public, before Congress even contemplates fast-tracking its creation and pre-surrendering its power to apply the constitutional two-thirds treaty vote. In effect, to adopt fast-track is to agree to remove the constitutional protections against the creation of global governance structures before those structures are even made public.

I would therefore ask that you provide to me the legal and constitutional basis for keeping this information from the public and explain why I cannot share the details of what I have read with the American people. Congress should not even consider fast-tracking the transfer of sovereign power to a transnational structure before the details of that new structure are made fully available for public review.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jeff Sessions".

Jeff Sessions  
United States Senator

JS:ph

# United States Senate

WASHINGTON, DC 20510-0104

May 6, 2015

The Honorable Barack Obama  
President  
The White House  
Washington, DC 20500

Dear Mr. President:

You have asked Congress to approve fast-track legislation (Trade Promotion Authority) that would allow international trade and regulatory agreements to be expedited through Congress for the next six years without amendment. Fast-track, which proponents hope to adopt within days, would also ensure that these agreements—none of which have yet been made public—could pass with a simple majority vote, rather than the 67 votes applied to treaties or the 60 votes applied to important legislative matters.

The first international trade and regulatory agreement that would be expedited under “fast-track” is the Trans-Pacific Partnership, or TPP. This is one of the largest international compacts in the history of the United States. Yet, this agreement will be kept a closely-guarded secret until *after* Congress agrees to yield its institutional powers and provide the Administration with a guaranteed “fast-track” to adoption.

The U.S. ran a record \$51.4 billion trade deficit in March, the highest-level recorded in six years. This is especially concerning since assurances were made from the Administration that the recent South Korea free trade deal would “increase exports of American goods by \$10 billion to \$11 billion.” But, in fact, American domestic exports to Korea increased by only \$0.8 billion, an increase of 1.8 percent, while imports from Korea increased \$12.6 billion, an increase of 22.5 percent. Our trade deficit with Korea increased \$11.8 billion between 2011 and 2014, an increase of 80.4 percent, nearly doubling in the three years since the deal was ratified.

Overall, we have already lost more than 2.1 million manufacturing jobs to the Asian Pacific region since 2001.

Former Nucor Steel Chairman Daniel DiMicco argues that we have not been engaged in free trade but in “unilateral trade disarmament and enablement of foreign mercantilism.”

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**WINN-DIXIE**

U.S. House of Representatives, B-10307  
100 West Troy Street  
Dothan, AL 36023  
(205) 792-1024

Due to the enormity of what is at stake, I believe it is essential Congress have answers to the following questions before any vote is scheduled on "fast-track" authority.

1. **Regarding the "Living Agreement":** There is a "living agreement" provision in TPP that allows the agreement to be changed after adoption—in effect, vesting TPP countries with a sweeping new form of global governance authority. TPP calls this new global authority the "Trans-Pacific Partnership Commission." These measures are unprecedented. While I and other lawmakers have been able to view this provision in secret, I believe it must be made public before any vote is scheduled on TPA, due to the extraordinary implications. I call on you today to make that section of TPP public for the American people to see and review.
2. **Regarding trade deficits:** Will TPP increase or reduce our cumulative trade deficit with TPP countries overall, and with Japan and Vietnam specifically?
3. **Regarding jobs and wages:** Will TPP increase or reduce the total number of manufacturing jobs in the United States generally, and American auto-manufacturing jobs specifically, accounting for jobs lost to increased imports? Will average hourly wages for U.S. workers, including in the automobile industry, go up or down and by how much?
4. **Regarding China:** Can TPP member countries add new countries, including China, to the agreement without future Congressional approval?
5. **Regarding foreign workers:** TPA is a six-year authority. Can you state unconditionally that no agreement or executive action throughout the lifetime of TPA will alter the number, duration, availability, expiration enforcement, rules, or processing time of guest worker, business, visitor, nonimmigrant, or immigrant visas to the United States?

Thank you for your responses to these questions. Congress has an obligation to defend the legitimate interests of U.S. workers, and the rights of all Americans as citizens of a sovereign Republic.

Very truly yours,



Jeff Sessions  
U.S. Senator

Boston Globe

## Trade agreements should not benefit industry only

By Elizabeth Warren June 23, 2015

Recently Hillary Clinton joined Nancy Pelosi and many others in Congress to call on the president to reorient our trade policy so that it produces a good deal for all Americans — not just for a handful of big corporations. Here's a realistic starting point: Fix the way we enforce trade agreements to ensure a level playing field for everyone. Many of our close allies — major trading partners like Australia, Germany, France, India, South Africa, and Brazil — are already moving in this direction. American negotiators should stop fighting those efforts and start leading them.

We live in a largely free trade world. Over the past 50 years, we've opened up countless markets, so that tariffs today are generally low. As a result, modern trade agreements are less about reducing tariffs and more about writing new rules for everything from labor, health, and environmental standards to food safety, prescription drug access, and copyright protections.

Even if those rules strike the right balance among competing interests, the true impact of a trade deal will turn on how well those rules are enforced. And that is the fundamental problem: America's current trade policy makes it nearly impossible to enforce rules that protect hard-working families, but very easy to enforce rules that favor multinational corporations.

For example, anyone who wishes to enforce rules that impose labor or environmental standards must plead with our government to bring a claim on their behalf. Reports from the Government Accountability Office, the Labor Department, and the State Department have shown that the Clinton, Bush, and Obama administrations have rarely brought such claims, even in the face of overwhelming evidence of violations. Without strong enforcement, promises that American workers won't have to compete against 50-cent-an-hour foreign laborers or promises that countries with terrible environmental records will raise their standards are meaningless.

But multinational corporations don't have to plead with the government to enforce their claims. Instead, modern trade deals give corporations the right to go straight to an arbitration panel when a country passes new laws or applies existing laws in ways that the corporations believe will cost them money. Known as investor-state dispute settlement (ISDS), these international arbitration panels can force countries to pony up billions of dollars in compensation. And these awards stick: No matter how crazy or outrageous the decision, no appeals are permitted. Once the arbitration panel rules, taxpayers must pay.

Because of how costly these awards can be, ISDS creates enormous pressure on governments to avoid actions that might offend corporate interests. Corporations have brought ISDS cases against countries that have raised their minimum wage, attempted to cut smoking rates, or prohibited dumping toxic chemicals. Just last month, a foreign corporation successfully challenged Canada's decision to deny a blasting permit because of concerns about the environmental impact on nearby fishing grounds, and now the company could get up to \$300 million from Canadian taxpayers. Will Canada's environmental regulators hesitate before they say no to the next foreign corporation that wants to dump, blast, or drill?

Leading economic and legal experts have called on America to drop ISDS from its trade deals. Hillary Clinton recently called ISDS "a fundamentally antidemocratic process." The conservative Cato Institute agrees, noting that ISDS is "ripe for exploitation by creative lawyers" looking to challenge the "world's laws and regulations."

And here lies the double standard at the heart of our trade deals: Once they sign on, countries know that if they strengthen worker, health, or environmental standards, they invite corporate ISDS claims that can bleed taxpayers dry. But countries also know that if they fail to raise wages or stop dumping in the river — even if they made such promises in the trade deal — the US government will likely do nothing.

While American negotiators ignore this problem, the rest of the world is waking up and fighting back. After Phillip Morris targeted it for billions in ISDS compensation, Australia began raising significant objections to ISDS. Negotiations with Europe over a massive new trade deal have stalled in part because of objections to ISDS, including from Germany and France. India is considering abandoning ISDS. So is South Africa, after being hit with an ISDS action challenging — incredibly — its postapartheid policies promoting minority ownership in its mining sector. Brazil has flatly refused to include ISDS in any of its trade agreements.

America needs trade — but not trade agreements that offer gold-plated enforcement for giant corporations and meaningless promises for everyone else. If we truly want better deals that work for everyone, we should stop clinging to our enforcement double standard and start joining our allies in trying to level the playing field.

*Elizabeth Warren is a US senator from Massachusetts.*

Politico

## Leaked: What's in Obama's trade deal

Is the White House going to bat for Big Pharma worldwide?

By Michael Grunwald

A recent draft of the Trans-Pacific Partnership free-trade deal would give U.S. pharmaceutical firms unprecedented protections against competition from cheaper generic drugs, possibly transcending the patent protections in U.S. law.

POLITICO has obtained a draft copy of TPP's intellectual property chapter as it stood on May 11, at the start of the latest negotiating round in Guam. While U.S. trade officials would not confirm the authenticity of the document, they downplayed its importance, emphasizing that the terms of the deal are likely to change significantly as the talks enter their final stages. Those terms are still secret, but the public will get to see them once the twelve TPP nations reach a final agreement and President Obama seeks congressional approval.

Still, the draft chapter will provide ammunition for critics who have warned that TPP's protections for pharmaceutical companies could dump trillions of dollars of additional health care costs on patients, businesses and governments around the Pacific Rim. The highly technical 90-page document, cluttered with objections from other TPP nations, shows that U.S. negotiators have fought aggressively and, at least until Guam, successfully on behalf of Big Pharma.

The draft text includes provisions that could make it extremely tough for generics to challenge brand-name pharmaceuticals abroad. Those provisions could also help block copycats from selling cheaper versions of the expensive cutting-edge drugs known as "biologics" inside the U.S., restricting treatment for American patients while jacking up Medicare and Medicaid costs for American taxpayers.

"There's very little distance between what Pharma wants and what the U.S. is demanding," said Rohit Malpini, director of policy for Doctors Without Borders.

Throughout the TPP talks, the Obama administration has pledged to balance the goals of fostering innovation in the drug industry, which means allowing higher profits, and promoting wider access to valuable medicines, which means keeping prices down. U.S. Trade Representative Michael Froman has pointed out that pharmaceutical companies often have to invest hundreds of millions of dollars to get a new drug to market, which they would have little incentive to do without strong protections for the patented product. But Froman has also recognized the value of allowing much cheaper generic drugs to enter the market after those brand-name patents expire. In the U.S., generics now comprise more than five-sixths of all prescription drugs, but only about one-quarter of drug costs.

Advocates for the global poor, senior citizens, labor unions and consumers as well as the generics industry have accused the administration of abandoning that balance, pushing a pharmaceutical-company agenda at the expense of patients and taxpayers. One critic, hoping to illustrate the point and rally opposition to TPP in Congress, gave POLITICO the draft chapter, which was labeled “This Document Contains TPP CONFIDENTIAL Information” on every page.

U.S. officials said the key point to remember about trade deals is that no provision is ever final until the entire deal is final—and that major compromises tend to happen at the very end of the negotiations. They expect the real horse-trading to begin now that Obama has signed “fast-track” legislation requiring Congress to pass or reject TPP without amendments.

“The negotiations on intellectual property are complex and continually evolving,” said Trevor Kincaid, a spokesman for Froman. “On pharmaceutical products, we are working closely with stakeholders, Congress, and partner countries to develop an approach that aims to make affordable life-saving medicine more widely available while creating incentives for the development of new treatments and cures. Striking this important balance is at the heart of our work.”

The draft chapter covers software, music and other intellectual property issues as well, but its most controversial language involves the rights of drug companies. The text reveals disputes between the U.S. (often with support from Japan) and its TPP partners over a variety of issues—what patents can cover, when and how long they can be extended, how long pharmaceutical companies can keep their clinical data private, and much more. On every issue, the U.S. sided with drug companies in favor of stricter intellectual property protections.

Some of the most contentious provisions involve “patent linkage,” which would prevent regulators in TPP nations from approving generic drugs whenever there are any unresolved patent issues. The TPP draft would make this linkage mandatory, which could help drug companies fend off generics just by claiming an infringement. The Obama administration often describes TPP as the most progressive free-trade deal in history, citing its compliance with the tough labor and environment protections enshrined in the so-called “May 10 Agreement” of 2007, which set a framework for several trade deals at the time. But mandatory linkage seems to be a departure from the May 10 pharmaceutical provisions.

In an April 15 letter to Froman, Heather Bresch, the CEO of the generic drug company Mylan, warned that mandatory patent linkage would be “a recipe for indefinite evergreening of pharmaceutical monopolies,” leading to the automatic rejection of generic applications. The U.S. already has mandatory linkage, but most other TPP countries do not, and Bresch argued that U.S. law includes a number of safeguards and incentives for generic companies that have not made it into TPP.

“With all due respect, the USTR has...cherry-picked the single provision designed to block generic entry to the market,” Bresch wrote.

Generics are thriving in the U.S. despite linkage, saving Americans an estimated \$239 billion on drugs in 2013. But the U.S. is the world's largest market, and advocates fear that generic manufacturers may not take on the risk and expense of litigation in smaller markets if TPP tilts the playing field against them. One generics manufacturer, Hospira, reportedly testified at a TPP forum in Melbourne, Australia, that it would not launch generics outside the U.S. in markets with linkage.

The opponents are also worried about the treaty's effect on the U.S. market, because its draft language would extend mandatory patent linkage to biologics, the next big thing in the pharmaceutical world. Biologics can cost hundreds of thousands of dollars a year for patients with illnesses like rheumatoid arthritis, hepatitis B and cancer, and the first knockoffs have not yet reached pharmacies. The critics say that extending linkage to biologics—which can have hundreds of patents—would help insulate them from competition forever.

“It would be a dramatic departure from U.S. law, and it would put a real crimp in the ability of less expensive drugs to get to market,” said K.J. Hertz, a lobbyist for AARP. “People are going to look at this very closely in Congress.”

Drug companies are already pushing for TPP to guarantee them 12 years of exclusivity for their data regarding biologics, although the draft text suggests the other TPP nations have not agreed. Jay Taylor, vice president of the Pharmaceutical Research and Manufacturers of America, said it's crucial for TPP to protect the intellectual property that emerges from years of expensive research, so that drug companies can continue to develop new medicines for patients around the world.

“These innovations could be severely hindered if IP protections are scaled back,” Taylor said. “This is especially important in the area of biologic medicines, which could hold the key to unlocking treatments for diseases that have thwarted researchers for years.”

U.S. officials would not discuss the status of the TPP talks. But they suggested the May 10 Agreement did include a milder form of linkage, although it didn't prevent regulators from approving generics mired in patent disputes. They also believe a 2009 U.S. law included a form of linkage for biologics, although again, that law's dispute resolution process for patent issues was not as prescriptive as the TPP draft. And they cautioned that any pre-Guam draft would not reflect recent negotiations over “transition periods” that would delay the stricter patent standards in developing countries like Vietnam.

In any case, Kincaid said U.S. negotiators are determined to strike a balance between innovation and access in the final product.

“While this is our touchstone, the negotiations are still very much in process, and the details of a final outcome cannot yet be forecasted,” he said.

But Malpani of Doctors Without Borders said U.S. negotiators have basically functioned as drug lobbyists. The TPP countries have 40 percent of global economic output, and the deal is widely seen as establishing new benchmarks for some of the most complex areas of global business.

Malpani fears it could set a precedent that crushes the generic drug industry under a mountain of regulation and litigation.

“We consider this the worst-ever agreement in terms of access to medicine,” he said. “It would create higher drug prices around the world—and in the U.S., too.

## Just Before Round of Negotiations on the Proposed 'Trade in Services Agreement' (TISA), Wikileaks Releases Updated Secret Documents

Posted: 07/02/2015 1:21 pm EDT Updated: 07/02/2015 6:59 pm EDT



Today, Wikileaks released a *second batch* of the most updated draft texts on the proposed TISA, along with substantive analysis, on each of four massive services sectors: Financial Services, Telecommunications Services, Electronic Commerce, and Maritime Transport. This follows on their release yesterday of cross-cutting annexes on Domestic Regulation, the "Movement of Natural Persons," Transparency, and Government Procurement, and the Agenda for next week's negotiations, along with what Wikileaks called the journalistic holy grail: the Core Text of the proposed agreement. The negotiating texts are supposed to remain secret for five years after the deal is finalized or abandoned.

The documents, along with the analysis, highlight the way that the TISA responds to major corporate lobbies' desire to deregulate services, even beyond the existing World Trade Organization (WTO) rules. This leak exposes the corporate aim to use TISA to further limit the public interest regulatory capacity of democratically elected governments by imposing disciplines on domestic issues from government purchasing and immigration to licensing and certification standards for professionals and business operations, not to mention the regulatory process itself.

The Agenda indicates that other services will likely come under the jurisdiction of the proposed TISA -- topics include energy services, environmental services, delivery services, and "patient mobility."

Given the added dangers of the recently approved Fast Track provisions which would apply to a potential TISA, it is clear that governments should abandon negotiations on this corporate wish list and focus on strengthening public interest regulation and the democratic process.

"The Annex on **Domestic Regulation** is a serious threat to regulations that people really care about -- like what kind of development is allowed in their neighbourhood or the standards for hospital care. Negotiators are using the excuse that these regulations are somehow related to trade in order to create a vast array of restrictions on the right to regulate," said Ellen Gould, a Canadian-based consultant on trade agreements whose research accompanies the Domestic Regulation Annex. The existence of an annex restricting even non-discriminatory domestic

regulations belies the claims by some TISA proponents that the agreement is only about promoting transparency and tackling discriminatory laws.

The existence of a **Transparency Annex** in a secret trade agreement is itself ironic. The annex shows that corporations are pushing far beyond how a normal person understands "transparency." The sections on "prior notification of new measures" would mandate that any measure (including laws, regulations, agency rulings, etcetera) must be published in advance, with a "reasonable opportunity" for corporations to comment on them to the governmental entity. But it goes much further; the rationale for the measure must be included, and governments must set up an avenue by which it must respond to the comments. Some countries are even pushing for a mandatory "judicial or administrative review of decisions," if corporation disagrees with a proposed measure. This Annex, then, proposes a direct pathway for foreign corporate input into the domestic policymaking process of parliamentary and also local elected officials.

The leaked TISA texts reveal the dangers of sweeping, so-called "trade" agreements that are negotiated outside of public scrutiny, providing a cautionary tale for the controversial Trans-Pacific Partnership and Trans-Atlantic Free Trade Agreement that are also being negotiated in secret. "As governments around the world implement the lessons of the 2008 financial crisis by re-regulating financial firms to prevent another crisis, the leaked TISA rules could require countries -- including the world's largest financial centers -- to halt and even roll back financial regulations. Indeed, TISA would expand deregulatory "trade" rules written under the advisement of large banks before the financial crisis, requiring domestic laws to conform to the now-rejected model of extreme deregulation that led to global recession," noted Ben Beachy, Research Director at Public Citizen's Global Trade Watch and author of the analysis on the leaked **Financial Services** proposed text.

According to analysis provided by the International Transport Workers' Federation (ITF), the secret documents predict a power grab by transport industry players at the expense of the public interest, jobs and a voice for workers. Specifically they reveal a potential and continuing threat to seafarers' wages and conditions, should the agreement be adopted. The **Maritime Annex** does acknowledge the sectoral standards adopted by the UN bodies but fails to recognise these are minimum protections, stating that in cases where parties 'apply measures that deviate from the above mentioned international standards, their standards shall be based on non-discriminatory, objective and transparent criteria.'

ITF president Paddy Crumlin stated: "Who decides the criteria? What will happen to safety provisions, pay or qualifications which are better than the minimum? The ILO Maritime Labour Convention explicitly sets minimum standards, with member states being encouraged to go above and beyond its provisions. This fact appears to have escaped those drawing up the plans."

The Annex on the "**Movement of Natural Persons**," called Mode 4, makes crystal clear that immigration policy would be an integral part of the TISA, notwithstanding certain governments' protestations to the contrary. A labor lawyer with IDEALS in the Philippines, Tony Salvador said that "we oppose trade agreements that include migrant workers, rather than just bona fide service suppliers, as migrants should instead be protected by the domestic labor and employment laws of the host country where they work. Having the status of a worker/employee guarantees

that she/he is also covered by ILO Conventions," referring to the International Labor Organization. He added, "however, the host country should maintain its prerogative to pass and implement immigration and national security laws, and apply them to both migrant workers and foreign service suppliers, even as the home country of the migrants may continue to have laws that protect migrants from recruiters and their purported employers in the home country."

The leaked documents include a previously unpublished annex on state purchasing, which, according to analysis published by Wikileaks provided by Sanya Reid Smith of the Third World Network, "would require extreme opening of services **government procurement** (GP) of TISA countries, beyond the level required by the optional rules at the WTO or in free trade agreements involving the EU, U.S. or others. If accepted, this proposal is predicted to undermine programs in developed and developing TISA countries that facilitate development, help create local jobs and assist disadvantaged communities including indigenous peoples and Small and Medium Enterprises (SMEs)."

Perhaps the most explosive text is that on **Electronic Commerce**. "You can't negotiate an open internet behind closed doors. The recent leak of the TISA Annex on e-commerce once again demonstrates that trade negotiations are playing an important role in shaping the future of internet governance. Because these negotiations are closed, they are a poor forum for making internet policy, leading to policy that naturally favors businesses with major lobbying operations in Geneva and Washington DC, rather than the sort of open and multi-participant forums deciding issues on the merits we would prefer," said Burcu Kilic, a lawyer at Public Citizen, who co-authored the analysis on the subject. "Privacy is a fundamental human right central to the maintenance of democratic societies. TISA includes requirements that could damage privacy protections. TISA should be debated publicly, in order to ensure that adequate, express privacy safeguards are included. Multistakeholderism requires this," she added.

The documents show that the TISA will impact even non-participating countries. The TISA is exposed as a developed countries' corporate wish lists for services which seeks to bypass resistance from the global South to this agenda inside the WTO, and to secure an agreement on services without confronting the continued inequities on agriculture, intellectual property, cotton subsidies, and many other issues.

### **Background Information**

This leak justifies warnings from global civil society about the privatization and deregulation impacts of a potential TISA since our first letter on the issue, endorsed by 345 organizations from across the globe, in September 2013. At that time, OWINFS argued that "[t]he TISA negotiations largely follow the corporate agenda of using "trade" agreements to bind countries to an agenda of extreme liberalization and deregulation in order to ensure greater corporate profits at the expense of workers, farmers, consumers and the environment. The proposed agreement is the direct result of systematic advocacy by transnational corporations in banking, energy, insurance, telecommunications, transportation, water, and other services sectors, working through lobby groups like the US Coalition of Service Industries (USCSI) and the European Services Forum (ESF)." Today's leaks prove the network's arguments beyond a shadow of a doubt.

Today's leak follows others, including a June 2014 Wikileaks revelation of a previous version of the Financial Services secret text; the December 2014 leak of a U.S. proposal on cross-border data flows, technology transfer, and net neutrality (available in English and Spanish), which raised serious concerns about the protection of data privacy in the wake of the Snowden revelations; the February 5, 2015 release of a background paper promoting health tourism in the TISA (available in English, French, German, and Spanish); and last month's Wikileaks publication of 17 documents on the TISA.

The TISA is currently being negotiated among 24 parties (counting the EU as one) with the aim of extending the coverage of scope of the existing General Agreement on Trade in Services (GATS) in the WTO. However, even worse than the opaque talks at the WTO, the TISA negotiations are being conducted in complete secrecy. Public Services International (PSI) global union federation published the first critique, TISA vs Public Services in March 2014, and PSI and OWINFS jointly published The Really Good Friends of Transnational Corporations Agreement report on Domestic Regulation in September 2014. A factsheet on the TISA can be found here and more information on the TISA can be found here.

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[www.ourworldisnotforsale.org](http://www.ourworldisnotforsale.org)

New York Times

## U.S. Chamber of Commerce Works Globally to Fight Antismoking Measures

By DANNY HAKIM

JUNE 30, 2015

KIEV, Ukraine — A parliamentary hearing was convened here in March to consider an odd remnant of Ukraine’s corrupt, pre-revolutionary government.

Three years ago, Ukraine filed an international legal challenge against Australia, over Australia’s right to enact antismoking laws on its own soil. To a number of lawmakers, the case seemed absurd, and they wanted to investigate why it was even being pursued.

When it came time to defend the tobacco industry, a man named Taras Kachka spoke up. He argued that several “fantastic tobacco companies” had bought up Soviet-era factories and modernized them, and now they were exporting tobacco to many other countries. It was in Ukraine’s national interest, he said, to support investors in the country, even though they do not sell tobacco to Australia.

Mr. Kachka was not a tobacco lobbyist or farmer or factory owner. He was the head of a Ukrainian affiliate of the U.S. Chamber of Commerce, America’s largest trade group.

From Ukraine to Uruguay, Moldova to the Philippines, the U.S. Chamber of Commerce and its foreign affiliates have become the hammer for the tobacco industry, engaging in a worldwide effort to fight antismoking laws of all kinds, according to interviews with government ministers, lobbyists, lawmakers and public health groups in Asia, Europe, Latin America and the United States.

The U.S. Chamber’s work in support of the tobacco industry in recent years has emerged as a priority at the same time the industry has faced one of the most serious threats in its history. A global treaty, negotiated through the World Health Organization, mandates anti-smoking measures and also seeks to curb the influence of the tobacco industry in policy making. The treaty, which took effect in 2005, has been ratified by 179 countries; holdouts include Cuba, Haiti and the United States.

Facing a wave of new legislation around the world, the tobacco lobby has turned for help to the U.S. Chamber of Commerce, with the weight of American business behind it. While the chamber’s global tobacco lobbying has been largely hidden from public view, its influence has been widely felt.

Letters, emails and other documents from foreign governments, the chamber’s affiliates and antismoking groups, which were reviewed by The New York Times, show how the chamber has embraced the challenge, undertaking a three-pronged strategy in its global campaign to advance the interests of the tobacco industry.

In the capitals of far-flung nations, the chamber lobbies alongside its foreign affiliates to beat back antismoking laws.

In trade forums, the chamber pits countries against one another. The Ukrainian prime minister, Arseniy Yatsenyuk, recently revealed that his country's case against Australia was prompted by a complaint from the U.S. Chamber.

And in Washington, Thomas J. Donohue, the chief executive of the chamber, has personally taken part in lobbying to defend the ability of the tobacco industry to sue under future international treaties, notably the Trans-Pacific Partnership, a trade agreement being negotiated between the United States and several Pacific Rim nations.

"They represent the interests of the tobacco industry," said Dr. Vera Luiza da Costa e Silva, the head of the Secretariat that oversees the W.H.O treaty, called the Framework Convention on Tobacco Control. "They are putting their feet everywhere where there are stronger regulations coming up."

Thomas J. Donohue, the head of the U.S. Chamber of Commerce, has defended the tobacco industry's right to sue under future international treaties. Credit Brendan Hoffman for The New York Times

The increasing global advocacy highlights the chamber's enduring ties to the tobacco industry, which in years past centered on American regulation of cigarettes. A top executive at the tobacco giant Altria Group serves on the chamber's board. Philip Morris International plays a leading role in the global campaign; one executive drafted a position paper used by a chamber affiliate in Brussels, while another accompanied a chamber executive to a meeting with the Philippine ambassador in Washington to lobby against a cigarette-tax increase. The cigarette makers' payments to the chamber are not disclosed.

It is not clear how the chamber's campaign reflects the interests of its broader membership, which includes technology companies like Google, pharmaceutical giants like Pfizer and health insurers like Anthem. And the chamber's record in its tobacco fight is mixed, often leaving American business as the face of a losing cause, pushing a well-known toxin on poor populations whose leaders are determined to curb smoking.

The U.S. Chamber issued brief statements in response to inquiries. "The Chamber regularly reaches out to governments around the world to urge them to avoid measures that discriminate against particular companies or industries, undermine their trademarks or brands, or destroy their intellectual property," the statement said, adding, "we've worked with a broad array of business organizations at home and abroad to defend these principles."

The chamber declined to say if it supported any measures to curb smoking.

The chamber, a private nonprofit that has more than three million members and annual revenue of \$165 million, spends more on lobbying than any other interest group in America. For decades, it has taken positions aimed at bolstering its members' fortunes.

While the chamber has local outposts across the United States, it also has more than 100 affiliates around the world. Foreign branches pay dues and typically hew to the U.S. Chamber's strategy, often advancing it on the ground. Members include both American and foreign businesses, a symbiotic relationship that magnifies the chamber's clout.

For foreign companies, membership comes with "access to the U.S. Embassy" according to the Cambodian branch, and entree to "the U.S. government," according to the Azerbaijan branch. Members in Hanoi get an invitation to an annual trip to "lobby Congress and the administration" in Washington.

Since Mr. Donohue took over in 1997, he has steered the chamber into positions that have alienated some members. In 2009, the chamber threatened to sue if the Environmental Protection

Agency regulated greenhouse gas emissions, disputing its authority to act on climate change. That led Nike to step down from the chamber's board, and to Apple's departure from the group. In 2013, the American arm of the Swedish construction giant Skanska resigned, protesting the chamber's support for what Skanska called a "chemical industry-led initiative" to lobby against green building codes.

The chamber's tobacco lobbying has led to confusion for many countries, Dr. da Costa e Silva said, adding "there is a misconception that the American chamber of commerce represents the government of the U.S." In some places like Estonia, the lines are blurred. The United States ambassador there, Jeffrey Levine, serves as honorary president of the chamber's local affiliate; the affiliate quoted Philip Morris in a publication outlining its priorities.

The tobacco industry has increasingly turned to international courts to challenge antismoking laws that countries have enacted after the passage of the W.H.O. treaty. Early this year, Michael R. Bloomberg and Bill Gates set up an international fund to fight such suits. Matthew L. Myers, president of the Campaign for Tobacco-Free Kids, an advocacy group that administers the fund, called the chamber "the tobacco industry's most formidable front group," adding, "it pops up everywhere."

In Ukraine, the chamber's involvement was no surprise to Hanna Hopko, the lawmaker who led the hearing in Parliament. She said the chamber there had fought against antismoking laws for years.

"They were against the tobacco tax increase, they were against placing warning labels on cigarettes," she said. "This is just business as usual for them."

Photo

### **Country-by-Country Strategy**

More than 3,000 miles away, in Nepal, the health ministry proposed a law last year to increase the size of graphic warning labels from covering three-fourths of a cigarette pack to 90 percent. Countries like Nepal that have ratified the W.H.O. treaty are supposed to take steps to make cigarette packs less appealing.

Not long afterward, one of Nepal's top officials, Lilamani Poudel, said he received an email from a representative of the chamber's local affiliate in the country, warning that the proposal "would negate foreign investment" and "invite instability."

In January, the U.S. Chamber itself weighed in. In a letter to Nepal's deputy prime minister, a senior vice president at the chamber, Tami Overby, wrote that she was "not aware of any science-based evidence" that larger warning labels "will have any discernible impact on reducing or discouraging tobacco use."

A 2013 Harvard study found that graphic warning labels "play a lifesaving role in highlighting the dangers of smoking and encouraging smokers to quit."

While Nepal eventually mandated the change in warning labels, cigarette companies filed for an extension and compliance has stalled.

"Since we have to focus on responding to the devastating earthquake, we have not been able to monitor the state of law enforcement effectively," said Shanta Bahadur Shrestha, a senior health ministry official.

The episode reflects the chamber's country-by-country lobbying strategy. A pattern emerged in letters to seven nations: Written by either the chamber's top international executive, Myron Brilliant, or his deputies, they introduced the chamber as "the world's largest business federation."

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Then the letters mention a matter “of concern.” In Jamaica and Nepal, it was graphic health warnings on packages. In Uruguay, it was a plan to bar cigarettes from being displayed by retailers. The Moldovan president was warned against “extreme measures” in his country, though they included common steps like restricting smoking in public places and banning advertising where cigarettes are sold.

A proposal to raise cigarette taxes in the Philippines would open the floodgates to smugglers, the government there was told. Tax revenue has increased since the proposal became law.

“We are not cowed by them,” said Jeremias Paul, the country’s under secretary of finance. “We meet with these guys when we’re trying to encourage investment in the Philippines, so clearly they are very influential, but that doesn’t mean they will dictate their ways.”

Protecting tobacco companies is portrayed by the chamber as vital for a nation’s economic health. Uruguay’s president is warned that antismoking laws will “have a disruptive effect on the formal economy.” El Salvador’s vice president is told that “arbitrary actions” like requiring graphic health warnings in advertisements undermine “investment and economic growth.”

On the ground, the chamber’s local affiliates use hands-on tactics.

After Moldova’s health ministry proposed measures in 2013, Serghei Toncu, the head of the American Chamber of Commerce in Moldova, laid out his objections in a series of meetings held by a regulatory review panel.

“The consumption of alcohol and cigarettes is at the discretion of each person,” Mr. Toncu said at one meeting, adding that the discussion should not be about “whether smoking is harmful.”

“You do not respect us,” he told the health ministry at another.

At a third, he called the ministry’s research “flawed from the start.”

His objections were not merely plaintive cries. The American chamber has a seat on Moldova’s regulatory review panel giving it direct influence over policy making in the small country.

“The American Chamber of Commerce is a very powerful and active organization,” said Oleg Chelaru, a team leader on the staff that assists the review panel. “They played a very crucial role in analyzing and giving an opinion on this initiative.”

Mr. Toncu, who has since left the chamber, declined to comment. Mila Malairau, the chamber’s executive director, said its main objective was to make sure the industry “was consulted” in “a transparent and predictable manner.”

Photo

After recently passing in Parliament, the long-stalled measures were subject to fresh objections from the chamber and others, and have not yet been enacted.

### **Fighting a Trade Exception**

In Washington, the U.S. Chamber’s tobacco lobbying has been visible in the negotiations over the Trans-Pacific Partnership, a priority of the Obama administration that recently received critical backing in Congress.

One of the more controversial proposals would expand the power of companies to sue countries if they violate trade rules. The U.S. Chamber has openly opposed plans to withhold such powers from tobacco companies, curbing their ability to challenge national antismoking laws. The chamber says on its website that “singling out tobacco” will “open a Pandora’s box as other governments go after their particular bêtes noires.”

The issue is still unresolved. A spokesman for the United States trade representative said negotiators would ensure that governments “can implement regulations to protect public health” while also “ensuring that our farmers are not discriminated against.”

Email traffic shows that Mr. Donohue, the chamber's head, sought to raise the issue in 2012 directly with Ron Kirk, who was then the United States trade representative. In email exchanges between staff members of the two, Mr. Donohue specifically sought to discuss the role of tobacco in the trade agreement.

"Tom had a couple of things to raise, including urging that the tobacco text not be submitted at this round," one of Mr. Donohue's staff members wrote to Mr. Kirk's staff. The emails were produced in response to a Freedom of Information request filed by the Campaign for Tobacco-Free Kids, which provided them to The Times.

Mr. Kirk is now a senior lawyer at Gibson, Dunn, a firm that counts the tobacco industry as a client. He said in an interview that during his tenure as trade representative, he met periodically with Mr. Donohue but could not recall a specific conversation on tobacco.

He said trade groups were generally concerned about "treating one industry different than you would treat anyone else, more so than doing tobacco's bidding."

The chamber declined to make Mr. Donohue available for an interview.

### **A Face-Saving Measure**

In Ukraine, it was Valeriy Pyatnytskiy who signed off on the complaint against Australia in 2012, which was filed with the World Trade Organization. At the time, he was Ukraine's chief negotiator to the W.T.O. His political career has survived the revolution and he is now an adviser to the Ukrainian prime minister, Mr. Yatsenyuk.

In a recent interview, he said that for Ukraine, the case was a matter of principle. It was about respecting the rules.

He offered a hypothetical: If Ukraine allowed Australia to use plain packaging on cigarettes, what would stop Ukraine from introducing plain packaging for wine? Then Ukrainian winemakers could better compete with French wines, because they would all be in plain bags marked red or white.

"We had this in the Soviet times," he said. "It was absolutely plain packaging everywhere."

Some Ukrainian officials have long been troubled by the case.

"It has nothing to do with trade laws," said Pavlo Sheremeta, who briefly served as Ukraine's economic minister after the revolution. "We have zero exports of tobacco to Australia, so what do we have to do with this?"

Last year, he urged the American Chamber in Kiev to reconsider.

"I wrote a formal letter, asking them, 'Do you still keep the same position?' " Mr. Sheremeta said. "Basically I was suggesting a face-saving way out of this." But when he met with chamber officials, the plain packaging case was outlined as a top priority.

They refused to back down. After Mr. Pyatnytskiy, a tobacco ally, was installed as his deputy, Mr. Sheremeta resigned.

"The world was laughing at us," he said of the case.

Shortly after The Times discussed the case with Ukrainian government officials, there were new protests from activists. Mr. Yatsenyuk called for a review of the matter. Ukraine has since suspended its involvement, but other countries including Cuba and Honduras are continuing to pursue the case against Australia.

Andy Hunder, who took over as president of the American Chamber of Commerce in Kiev in April, said the organization was moving on, adding, "We are looking forward now."



July 6, 2015

## **Q&A on TTIP to leading trade expert Dr Gabriel Siles-Brügge, University of Manchester**

UNI Europa poses some of the tough questions to trade expert Dr Gabriel Siles-Brügge, Lecturer in Politics based at the University of Manchester, ahead of the plenary vote on TTIP in the European Parliament.

**Although the negotiations have taken longer than planned, it is as though there is a sense of urgency surrounding completing the trade agreement. Do you agree, and if so, why do you think this is so?**

Given the immense controversy that surrounds the negotiations of the trade agreement between the EU and the US (TTIP), it is not altogether surprising that negotiators are keen to press on. Delays not only embolden the opposition, and may result in a potential TTIP agreement being 'diluted', but also mean that TTIP's supporters in the business community may eventually lose interest in the talks (as indeed happened during the Doha Round of multilateral trade talks).

**You have followed the TTIP discussions closely, not only in Brussels, but around Europe and the US, what is your take on the report written by the European Parliament's Trade Committee (INTA), and the new compromise amendment on investor-state-dispute settlement, ISDS, proposed by Schultz? Are you surprised?**

Having followed the political debate surrounding the recent INTA resolution, it is clear that the key fault-line was within the group of socialists and democrats (S&D group) in the European Parliament, with some of its members more concerned than others over the potential inclusion of ISDS provisions in TTIP. There are some suggestions, moreover, that the S&D agreed to a compromise amendment with the conservative EPPs in an earlier session of INTA (with softer language on ISDS than Bernd Lange's earlier draft report) in exchange for a call in the resolution for TTIP to include enforceable labour standards in its sustainability chapter. The new compromise amendment (approved by a vote of 56 to 34 MEPs) seems to reflect these tensions within the S&D group: the concerns of several members over ISDS have been weighed up against a simultaneous interest in participating 'constructively' in the TTIP discussions and shaping them in an ostensibly more centre-left vein.

**Is it, as some claim, an ISDS light?**

Two things should be stressed at this point. First, the EP resolution is legally non-binding (although of course it carries much political significance as the EP has to give its w assent to the final TTIP text). Second, the amendment is the length of a short paragraph and there are therefore considerable ambiguities as to its meaning in practice. That being said, it is notable that

the text of the amendment does not reject the principle of foreign investor arbitration itself. It merely notes that this should be 'subject to democratic principles and scrutiny' through 'public hearings' where 'publicly appointed, independent judges' make decisions that 'respect' EU and Member State courts and which 'cannot undermine public policy objectives'. It also mentions the need to include an appellate mechanism (whereby a ruling can be appealed, which is not currently the case).

So, in short, the answer is broadly yes. The compromise sounds very much in tune with the European Commission's proposals to reform ISDS by moving towards a permanent roster of arbitrators; including an appellate mechanism; clarifying the relationship to domestic courts (so that foreign investors have to choose whether to take their case to domestic courts or arbitration tribunals) and enshrining the 'right to regulate' in the investment protection text. These reforms (and the amendment which seems to implicitly support them) only tinker with the investment protection regime. Indeed investors will still likely be able to choose the proceeding they feel is most likely to give them the desired result: domestic court or arbitration tribunal. While the inclusion of an appellate mechanism and a permanent roster would represent modest improvements, on the whole the proposed changes do not appear to change the fundamental nature of a system where only investors can bring suits against states: their interests are ultimately privileged over public policy considerations.

**UNI Europa initiated that research on the position of collective agreements and ISDS was clarified. The answer from Prof. Dr. Markus Krajewski was that autonomous agreements could not be subject to ISDS, but tripartite agreements and generalised erga omnes agreements could. In your view, does the compromise agreement change this?**

The new amendment does not appear to change the fundamental principle that a foreign investor can bring a claim against a state, including potentially one based on tripartite agreements that are perceived to infringe their rights as investors.

**We have been reaching out to pro-TTIP/ISDS voices (via facebook and twitter) for good reasons why an ISDS is needed, but no one has answered. What do you hear the reasons are, and are they plausible?**

As far as I understand the case being made for ISDS in TTIP this rests on three broad sets of arguments.

First of all, advocates will argue that EU-US investment flows can be boosted by providing investors with greater legal security, as there are both EU and US jurisdictions where courts are either slow/unreliable in upholding investor rights or indeed outright discriminate against foreign investors. On this, my argument would be that there is very little evidence that the inclusion of ISDS boosts investment between OECD states with developed legal systems (indeed, EU-US investment flows are already very substantial). Moreover, from a public policy perspective, why would you include a provision which systematically discriminates in favour of foreign investors when there is no systematic discrimination against such investors in either the EU or the US?

The second argument that is often heard is that including ISDS in TTIP is necessary to set a precedent, and to ensure that such provisions can be included in a future investment agreement with China (such as the EU is currently negotiating). But China has gone from merely being a

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capital importing to a capital exporting country and is thus quite keen on such provisions in its bilateral investment treaties (BITs).

A third, and related argument, is that TTIP provides an opportunity to reform the flawed system of BITs (which some supporters admit had their problems) and replace it with a new, improved system that protects investors while fully recognising the 'right to regulate' of states. Such an argument is made particularly forcefully with respect to the EU's Member States that currently have 'old-style' BITs with the US. Moreover, there are currently (vague) proposals on the table to multilateralise the system of investor protection in TTIP by setting up a permanent investment court (on the base of the Commission's proposed arbitrator roster). The problem here is threefold. For one, as I noted above in response to q. 3, a reformed ISDS does not alter the fundamental nature of the system, which privileges foreign investors over other considerations. Secondly, not only would TTIP not replace existing EU Member State BITs with the US (these would have to be terminated separately, with various 'sunset clauses' applying) but it would leave in place a whole network of EU BITs with third parties that would still be very difficult to reform. Finally, talk of a permanent, multilateral investment court is extremely premature at this stage as that would require the agreement of many other states, a number of which have started to voice fairly critical views of investor arbitration.

### **Is TTIP ever going to happen?**

That's the million dollar (or euro) question. At this stage I think it's too early to tell what will happen. But TTIP will certainly take far longer to negotiate than its initiators had intended. The key questions are whether: a) business loses interest because the negotiations drag out or the agreement is substantially 'watered down' from its perspective; b) the opposition from civil society is appeased by compromises on such issues as ISDS or GMOs.

*For many more angles and insightful criticisms on TTIP, read Gabriel's upcoming book available this autumn: [TTIP: The Truth about the Transatlantic Trade and Investment Partnership](#) (Polity Press) (co-authored with Ferdi De Ville). Available [here](#)*



Reuters

## Exclusive - U.S. upgrades Malaysia in annual human trafficking report: sources

«Top News

Thu Jul 9, 2015 10:33am BST

By Jason Szep, Patricia Zengerle and Matt Spetalnick

WASHINGTON (Reuters) - The United States is upgrading Malaysia from the lowest tier on its list of worst human trafficking centres, U.S. sources said on Wednesday, a move that could smooth the way for an ambitious U.S.-led free-trade deal with the Southeast Asian nation and 11 other countries.

The upgrade to so-called "Tier 2 Watch List" status removes a potential barrier to President Barack Obama's signature global trade deal.

A provision in a related trade bill passed by Congress last month barred from fast-tracked trade deals Malaysia and other countries that earn the worst U.S. human trafficking ranking in the eyes of the U.S. State Department.

The upgrade follows international scrutiny and outcry over Malaysian efforts to combat human trafficking after the discovery this year of scores of graves in people-smuggling camps near its northern border with Thailand.

The State Department last year downgraded Malaysia in its annual "Trafficking in Persons" report to Tier 3, alongside North Korea, Syria and Zimbabwe, citing "limited efforts to improve its flawed victim protection regime" and other problems.

But a congressional source with knowledge of the decision told Reuters the administration had approved the upgraded status. A second source familiar with the matter confirmed the decision.

Some U.S. lawmakers and human-rights advocates had expected Malaysia to remain on Tier 3 this year given its slow pace of convictions in human-trafficking cases and pervasive trafficking in industries such as electronics and palm oil.

This year's full State Department report, including details on each country's efforts to combat human trafficking, is expected to be released next week.

State Department spokesman John Kirby said the report was still being finalised and that "it would be premature to speculate on any particular outcome."

Obama visited Malaysia in April 2014 to cement economic and security ties. Malaysia is the current chair of the 10-nation Association of Southeast Asian Nations. It is seeking to promote unity within the bloc in the face of China's increasingly assertive pursuits of territorial claims in the South China Sea, an object of U.S. criticism.

In May, just as Obama's drive to win "fast-track" trade negotiating authority for his trade deal entered its most sensitive stage in the U.S. Congress, Malaysian police announced the discovery of 139 graves in jungle camps used by suspected smugglers and traffickers of Rohingya Muslims from Myanmar.

Malaysia hopes to be a signatory to Obama's legacy-defining Trans-Pacific Partnership (TPP), which would link a dozen countries, cover 40 percent of the world economy and form a central element of his strategic shift towards Asia.

On June 29, Obama signed into law legislation giving him "fast-track" power to push ahead on the deal.

#### MALAYSIAN GRAVES

Lawmakers are working on a compromise that would let Malaysia and other countries appearing on a U.S. black-list for human trafficking participate in fast-tracked trade deals if the administration verified that they have taken concrete steps to address the most important issues identified in the annual trafficking report. The graves were found in an area long known for the smuggling of Rohingya and local villagers reported seeing Rohingya in the area, but Malaysia's Deputy Home (Interior) Minister Wan Junaidi Tuanku Jaafar has said it was unclear whether those killed were illegal migrants. The discovery took place after the March cut-off for the U.S. report.

The State Department would have needed to show that Malaysia had neither fully complied with minimum anti-trafficking standards nor made significant efforts to do so to justify keeping Malaysia on Tier 3, which can lead to penalties such as the withholding of some assistance.

In its report last year, the State Department said Malaysia had reported 89 human-trafficking investigations in the 12 months to March 2014, down from 190 the previous year, and nine convictions compared with 21 the previous year.

In the latest year to March, Malaysia's conviction rate is believed to have fallen further, according to human-rights advocates, despite a rise in the number of investigations. That reinforced speculation Malaysia would remain on Tier 3.

"If true, this manipulation of Malaysia's ranking in the State Department's 2015 TIP report would be a perversion of the trafficking list and undermine both the integrity of this important report as well as the very difficult task of confronting states about human trafficking," said Democratic Senator Robert Menendez, who had pushed to bar Tier 3 countries from inclusion in the trade pact.

Phil Robertson, deputy director of Human Rights Watch's Asia division, said he was "stunned" by the upgrade.

"They have done very little to improve the protection from abuse that migrant workers face," he said. "This would seem to be some sort of political reward from the United States and I would urge the U.S. Congress to look long and hard at who was making the decisions on such an upgrade." Malaysia has an estimated 2 million illegal migrant labourers, many of whom work in conditions of forced labour under employers and recruitment companies in sectors ranging from electronics to palm oil to domestic service.

Last year's report said many migrant workers are exploited and subjected to practices associated with forced labour. Many foreign women recruited for ostensibly legal work in Malaysian restaurants, hotels, and beauty salons are subsequently coerced into prostitution, the report said.

An administration official told Reuters in June that the White House had been working closely with the Malaysian government and stakeholders to fight the problem.

Among the 12 TPP countries, Brunei has also come under attack by human-rights groups for adopting Islamic criminal law, which includes punishing offences such as sodomy and adultery with death, including by stoning. Vietnam's Communist government has been criticized for jailing dissidents.

(Additional reporting by David Brunnstrom; Writing by Jason Szep; Editing by Stuart Grudgings, Eric Walsh and Lisa Shumaker)



# U.S.-Canada Dairy Spat Sours Trade Talks

Negotiators threaten to exclude Ottawa if no concessions are made on farm issues

The Wall Street Journal

By WILLIAM MAULDIN And PAUL VIEIRA

July 10, 2015

Milk may do a body good, but it's giving trade negotiators fits.

Because of a decades-old dispute between the U.S. and Canada, dairy is emerging as the thorniest issue souring final talks to conclude a sweeping trade agreement, known as the Trans-Pacific Partnership, linking 12 countries around the Pacific.

The U.S. wants Canada to loosen a decades-old system for protecting dairy farmers from imports, seeing the severe restrictions on milk products as a piece of unfinished business from earlier negotiations on the 1994 North American Free Trade Agreement and an earlier free-trade deal with Canada. Some officials involved in the Pacific talks are even threatening to sign a deal without Canada if Ottawa doesn't make concessions on dairy and related agricultural issues.

"The Canadians need to step it up and get serious about agriculture and dairy," said Rep. [Paul Ryan](#), the Republican who leads the House committee that oversees trade. Mr. Ryan's state produces three times as much cheese as Canada, and [in January he brandished a Gouda-style wedge in part to protest Canada's stance.](#)

Like many countries, Canada instituted measures to protect dairy farmers that remain politically popular because of the large number of small farms. Prime Minister [Stephen Harper](#) is walking a delicate balance ahead of an election in October and doesn't want to lose support in Ontario and Quebec, which benefit from the high prices for milk products the Canadian system all but guarantees.

At the heart of the dispute is what Canada calls its supply-management system, in which prices for dairy products are set based on the average costs of production. Production is controlled through a regulated quota system, and competition is thwarted through tariffs.

Other countries in the TPP talks are looking at the U.S.-Canada milk fight closely, especially New Zealand, where dairy is the biggest export of all. New Zealand wants tariffs lifted in the U.S. Meanwhile, Washington officials this week flew to Tokyo to seek a deal that would include greater dairy access to Japan.

“We have made it very clear that we draw the line if we don’t get access to those countries,” said Jaime Castaneda, senior vice president for the National Milk Producers Federation and the U.S. Dairy Export Council.

President Barack Obama and top officials are seeking to conclude the TPP talks as soon as this month, after narrowly winning special trade powers from Congress in June.

The trade bloc would cover countries comprising two-fifths of the world’s gross domestic product, and the U.S. and Japan—the two biggest economies in the group—have narrowed their differences on agriculture and automobiles to within striking distance and could shake hands in coming days, according to officials on both sides.

Also outstanding are final agreements on a minefield of divisive rules included in the deal, ranging from intellectual-property protections for biologic drugs to limits on state ownership in Vietnam and Malaysia.

Agriculture is expected to be the biggest winner among traditional U.S. industries in the trade agreement, and after the near-defeat of so-called fast-track legislation in June the Obama administration is hoping to leverage the support of farm groups for all it’s worth when a TPP deal comes up for a vote, possibly in November or December.

After years of focusing on domestic demand, the U.S. dairy industry has started flexing its muscles abroad in recent years, led by large West Coast producers. Exports more than doubled over seven years to \$7.25 billion in 2014, according to the U.S. Dairy Export Council. But dairy shipments to Canada, the biggest U.S. trading partner, represent only about a quarter the amount shipped to Mexico, according to the Census Bureau.

In Canada, the average family spends an additional C\$276 each to support the supply-management system, which effectively shuts out competition, according to the Conference Board of Canada, an Ottawa-based nonpartisan think tank.

But the milk industry is touting its broader impact. The Dairy Farmers of Canada recent launched a website and social-media campaign to tout the “milkle-down effect” of dairy dollars to hockey and other national priorities, while casting doubt on the safety and environmental stewardship of foreign dairy. The Canadian dairy industry supports 215,000 jobs, adds C\$18.9 billion (\$14.8 billion) to Canada’s economy and contributes C\$3.6 billion in taxes, according to the group.

A spokesman for Canadian Trade Minister Ed Fast said Canada continues to be a “committed and constructive” partner at the negotiating table. “The government will continue to promote Canadian trade interests across all sectors of our economy, including those subject to supply management,” said the spokesman, Rick Roth.

Canadian officials have yet to address concerns raised by U.S. and other parties on remaining issues related to Ottawa’s tariff regime on dairy, poultry and egg production, a person familiar with the TPP talks said.

Canadian officials are waiting until the last possible moment before instructing negotiators on what type of concessions—which could be politically damaging to Mr. Harper’s Conservatives—to make to secure participation in the TPP, the person said. The person added

that Ottawa has determined the trade pact is important to pursue given Asia's rising influence in global economic affairs.



# U.S. firm sues Canada for \$10.5 billion over water

Jul 09, 2015 3:34 PM ET [CBC News](#)

## *Share this story*

- **UPDATED:** Since this story was first published, the federal government has [posted a status update](#) on the case on the Foreign Affairs, Trade and Development website stating that despite the initial notice of intent to submit a claim for arbitration, a valid claim was not filed and no Chapter 11 arbitration occurred. There has been no financial settlement either, according to the government.

An American-owned water export company has launched a massive lawsuit against Canada for preventing it from exporting fresh water from British Columbia.

Sun Belt Water Inc. of California is suing Canada for \$10.5 billion US, the Canadian foreign ministry said Friday.

The suit has been filed under Chapter 11 of the North American Free Trade Agreement. Sun Belt says it has been "mistreated" by the B.C. government.

The clash over exporting water goes back to 1993, when Sun Belt and Snowcap Waters Ltd., a Canadian partner, sued the B.C. government for banning bulk water exports to California. Snowcap Waters agreed to a settlement of \$335,000 (Cdn).

Sun Belt did not settle with the province. The company says the B.C. government's banning of water exports from the province violates the terms and conditions of NAFTA.

The lawsuit has upset environmentalists who are angry that companies wanting to make money exporting water are using NAFTA to override environmental laws. Ottawa has 90 days to examine the Sun Belt lawsuit.

In a related development, at a hearing Thursday night in Montreal, groups concerned about exports of bulk water demanded the International Joint Commission include this recommendation when it reports to Ottawa and Washington early in the new year.

The IJC is the group appointed by the Canada and U.S. governments to manage the countries' shared water.

The problem with NAFTA's Chapter 11 is that it allows water to be regarded simply as a good or product that can be sold or traded between countries. If a country stops its export, the company proposing the commercial use could sue for compensation.



## TPP Deal Puts BC's Privacy Laws in the Crosshairs

*TPP negotiators aim to enshrine the rights of companies to freely move data -- including records of financial transactions, consumer behaviour, online communications and medical histories -- across borders.*

<http://thetyee.ca/Opinion/2015/07/16/TPP-and-Personal-Data/>

By [Scott Sinclair](#), Today, TheTyee.ca

British Columbia's privacy laws are in the crosshairs of the nearly completed Trans-Pacific Partnership (TPP) agreement. If you're wondering what the heck data privacy protections have to do with trade, you're not alone. Public awareness of the far-reaching, 12-country negotiation is scant, with [polls](#) showing three-quarters of Canadians have never even heard of the TPP.

Unfortunately for privacy advocates in B.C. and the rest of the country, the advancement of "[digital free trade](#)" is a high priority for the U.S. in the negotiations. This carefully chosen euphemism conjures up the free flow of information, the convenience of cloud computing, even escaping Internet censorship. It all sounds so positive.

The thing is, the TPP e-commerce chapter aims not only to free the movement of digital goods, such as software or downloadable music, but also to enshrine the rights of companies to freely move data -- including records of financial transactions, consumer behaviour, online communications and medical histories -- across borders. This personal data is much sought after by marketers, insurers and intelligence agencies that can build detailed profiles and histories of individuals, frequently without their knowledge or informed consent.

U.S. negotiators are pushing hard to eliminate national laws in TPP countries that require sensitive personal data to be stored on secure local servers, or within national borders. This goal collides with the [B.C. Freedom of Information and Privacy Act](#) and similar regulations in Nova Scotia, which are listed as "foreign trade barriers" in a 2015 United States Trade Representative (USTR) [report](#).

According to that report, the B.C. privacy laws "prevent public bodies such as primary and secondary schools, universities, hospitals, government-owned utilities, and public agencies from using U.S. services when personal information could be accessed from or stored in the United States." In practical terms, this means U.S. firms hoping to provide health information management services to the government or online educational software to provincial schools or libraries must guarantee any personal data, such as a person's medical history or academic achievement, is securely stored within Canada and can only be accessed from here, with the express consent of the person involved.

The TPP text is secret, but we can assume the section on data flows will be the same as, or very similar to, the [draft e-commerce chapter](#) of another controversial negotiation called the Trade in Services Agreement (TISA). WikiLeaks recently published the TISA text, which reads, "No Party may prevent a service supplier of another Party from transferring, accessing, processing or

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storing information, *including personal information*, within or outside the Party's territory, where such activity is carried out in connection with the conduct of the service supplier's business [emphasis added]."

This would give corporations the right to transfer personal data anywhere in the world as they, not public officials, see fit. The Canadian government supports this language in the TISA, according to the leaks, so we must assume they have already agreed to it in the TPP, though it's still unclear whether that deal will outlaw government regulations restricting cross-border data flows in a limited number of sectors or ban them entirely, as U.S. business lobbies are asking.

### **Lessons from Korea's massive credit card breach**

What might the effect be of this language in practice? Well, after signing a comprehensive free trade agreement with the U.S., which included e-commerce rules, South Korea dutifully eliminated its existing laws requiring financial data to be stored within the country. In their place, companies were required to obtain permission from authorities when personal data was stored or transferred outside the country. To further reduce possible leaks of personal information, the new regulations also banned the use of third-party data processors; multinational companies were required to use their own in-house data processing operations, rather than contracting out this work.

U.S. business organizations and the USTR claimed the substitute privacy regulations violated the U.S.-Korea free trade agreement. In early 2014, the country suffered a major breach of personal privacy when the credit card information of 20 million Koreans (half the population) was leaked and sold. This incident heightened public concern and government caution. Nevertheless, the U.S. continued to hammer away and just last month, South Korea gave in, announcing it would replace its data transfer regulations with a toothless after-the-fact notification procedure.

What happened in South Korea can happen in Canada, too. Public officials charged with protecting data privacy are usually playing catch-up in the fast-moving digital era. As Korea's back-peddling on privacy shows, agreeing to restrict regulatory flexibility in trade treaties can undermine privacy laws. The threat of retaliation and trade sanctions from a major trading partner such as the U.S. is often too powerful to ignore.

For example, current federal contracts for updating communications technology and email systems include requirements that data be stored within Canada. The U.S. government and the information technology industry oppose these conditions because they preclude U.S. companies who rely on cloud computing hosted through U.S. servers. Official documents unearthed by the BC Freedom of Information and Privacy Association reveal a steady stream of meetings, memos and negotiating pressure on Canada to weaken these privacy rules. They confirm the USTR regards the TPP as a golden opportunity to address U.S. industry concerns -- typically the paramount concerns in any trade negotiation.

### **TPP open to corporate interests, lobbyists**

While closed to ordinary citizens, the TPP is very open to influence from corporate special interests, whose lobbyists have special access as cleared advisors to negotiators. The U.S. lead negotiator on e-commerce, Robert Holleyman, is a former high-ranking industry lobbyist. And the lobbyist for IBM, one of the chief proponents of digital free trade, is Chris Padilla, a former U.S. trade official. This chummy relationship between negotiators and corporate special interests is all too common in the field of trade treaties.

Just as U.S. corporate interests dominate their government's negotiating position in the TPP, so too does the U.S. dominate the overall project. The TPP cannot truly be called a multilateral agreement; it is more a series of one-on-one bargains with the U.S. hub. This gives the U.S. government undue influence over the end result, which is particularly true of the chapter on data flows, where other countries might have been inclined to band together against overly corporate-friendly rules.

They would have very good reasons to do so. Thanks to Edward Snowden, the whole world now knows the U.S. is massively violating privacy rights at home and abroad. Whether it is the U.S. goal, or a thoughtless side effect, embedding unrestricted rights to cross-border data flows and cloud computing in trade agreements virtually assures that a vast trove of personal data will be more easily accessible to U.S. intelligence agencies subject to U.S. security laws.

The lack of public awareness in Canada that any of this is happening is quite disturbing. What media coverage there is of the negotiations has focused almost exclusively on the threat to supply management in dairy and poultry -- an important issue, but far from the only one.

The reality is that the TPP negotiations are a perfect cauldron for brewing bad policy. Although the terms are still secret, Prime Minister Stephen Harper insists it is "essential" for Canada to be part of the deal, even if that involves "difficult choices." In this pressure cooker, compromising Canadians' privacy protections is a tempting card for our negotiators to play. It will take greater public awareness and outcry to ensure that privacy protections, including B.C.'s exemplary safeguards, are not sacrificed in the name of digital free trade.



## Yeutter sees 'slim' prospects for TPP agreement at Hawaii session

WASHINGTON, July 15, 2015 - Former U.S. Trade Representative Clayton Yeutter said he thinks chances are "slim" that the U.S. and 11 other nations trying to forge the Trans-Pacific Partnership (TPP) will reach agreement during the upcoming negotiations in Hawaii in late July.

Earlier this month, U.S. Trade Representative Michael Froman said negotiators had made "considerable progress" in closing gaps on remaining issues. But Yeutter, who served as agriculture secretary under President George H.W. Bush, says some of those gaps - most notably Canada's reluctance to open its dairy market - may be too difficult to close during the scheduled sessions on the island of Maui.

"Closure is hard," Yeutter said at a round-table discussion on TPP at the CATO Institute in Washington. The negotiators, many of whom are new in their jobs, "will find out when they hit Hawaii how hard it is," said Yeutter, now a senior adviser at the Hogan Lovells law firm. His assessment was seconded by Bill Reinsch, the president of the National Foreign Trade Council, the other featured speaker at the discussion.

Both men predicted that there will eventually be an agreement, and put the chances at "better than 50-50" that Congress will approve the deal, possibly sometime next year, but approval won't come easy.

Reinsch said supporters of TPP, which has been under negotiation for five years, are going to have to seek out the businesses and individuals who stand to gain from the free-trade agreement and make sure these "winners" bring their stories to their representatives in Congress. If they don't, Reinsch said he could guarantee that opponents, including labor leaders concerned about job losses and people in the environmental movement, will be highlighting the "losers."

USTR says the effort would be more than worthwhile. On its website, it cites an analysis that says TPP could generate an additional \$123.5 billion per year in U.S. exports by 2025, with real income benefits estimated at \$77 billion annually. With a potential market of nearly 800 million consumers, the combined economic output of the 12 countries involved account for about 40 percent of world GDP.

Beyond its own economic benefits, Yeutter said a successful TPP would lay the groundwork for completion of another ambitious trade agreement, the Trans-Atlantic Trade and Investment Partnership (T-TIP) currently being negotiated with the European Union. And it would bolster U.S. foreign policy and national security interests by countering China's efforts to increase its position as a regional power in the Asian-Pacific region, he said.

TPP, Yeutler said, is “the most important trade negotiations in the world today, by far - in the last 20 years and in the next 20 years.”

The chief negotiators for the TPP countries will meet from July 24-27, followed by a meeting of trade ministers scheduled from July 28-31.

## **The TPP's Bad Medicine**

The Draft Agreement's Intellectual Property Protections Could Go Too Far

By *Fran Quigley*

Intellectual property protections for medicines are often overlooked in public discussions of U.S. trade agreements. But they shouldn't be. Negotiations over such intellectual property can mean the difference between antiretroviral medicine that costs over \$10,000 per year—the price originally set in the 1990s by monopoly patent holders—and the eventual grudging concessions that dropped the drug prices to less than a dollar a day. For millions of HIV-positive people in the developing world, that price gap is a matter of life and death. The same dynamic applies to patients in need of medicines to treat cancer, heart disease, and any number of other health conditions.

Here's what usually happens: the U.S. trade representative, acting in concert with pharmaceutical companies, proposes extensive patent protections for medicines and daunting barriers that delay generic alternatives from entering markets. Patient-focused civil society organizations, especially those connected to low- and middle-income countries, vigorously object. In the end, though, the prospective U.S. trading partners, looking ahead to increased access to coveted U.S. markets, usually agree to terms that elevate intellectual property rights and restrict affordable access to medicines.

At first glance, the Trans-Pacific Partnership looks to be traveling down this same path. If the agreement is finalized as expected at a late July meeting in Hawaii, the TPP would be largest regional trade agreement in history. The TPP's 12 member nations, the economies of which make up nearly 40 percent of global GDP, have conducted their talks in secret, with no terms officially announced. But leaked draft texts show that the United States is again pushing provisions that would permit new patents for minor revisions of old medicines, a process known as "evergreening," and create delays in getting generic alternatives to market by restricting access to clinical test data for patented medicines, a process known as "data exclusivity."

Other U.S.-drafted TPP terms include patent linkage, which can allow spurious patent filings to delay generic market entry. Further, a proposed investor-state dispute settlement system would allow pharmaceutical corporations to force a government into arbitration over decisions that would reduce the price of medicines. A similar process has served as the platform for corporate challenges to the Canadian government's invalidation of drug patents, antismoking regulations in Australia and Uruguay, and an environmental court ruling in Ecuador. In short, the United States is extending patent holders' monopoly over medicines and, in turn, ensuring higher medicine prices.

*Leaks of the draft intellectual property chapter of the TPP confirm that the U.S. proposals to extend medicine monopolies have been met with staunch opposition from nearly all of the other participating nations, with the occasional exception of Japan. These proposals have attracted criticism. In a 2013 statement, Peru's trade minister*

noted that the intellectual property terms elevate the interests of U.S. corporations over the needs of Peruvian citizens, calling for the country to “not go one millimeter beyond what was already negotiated” on intellectual property issues in past agreements. The Australian government, meanwhile, has insisted that no TPP terms are acceptable if they undermine the country’s popular pharmaceutical price control program. In a 2013 statement, the Malaysian prime minister condemned any trade agreement restrictions on his government’s efforts to provide affordable medicine because it would “impinge on fundamentally the sovereign right of the country to make regulation and policy.” The announcements are all the more notable given that they came from high-level government officials rather than the fringes of civil society.

Such pronouncements, and similar concerns expressed by current or former officials in Canada, Chile, Singapore, and New Zealand, are the public reflection of the dynamic that is playing out even more intensely in the private TPP negotiations. Leaks of the draft intellectual property chapter of the TPP—and reports from multiple people familiar with the five-plus years of negotiations—confirm that the U.S. proposals to extend medicine monopolies have been met with staunch opposition from nearly all of the other participating nations, with the occasional exception of Japan. As *Politico* has reported, as of May 11, 2015, the draft chapter was a 90-page document “cluttered with objections from other TPP nations” to U.S.-drafted protections for pharmaceutical companies.

In part, the officials are just reflecting long-standing popular opinion. Ever since the legendary AIDS treatment struggles of the early 2000s, when South African and Brazilian grass-roots AIDS treatment advocates successfully pressured their governments to resist U.S. and pharmaceutical challenges to generic drug distribution, civil societies around the world have launched vigorous campaigns demanding that their leaders not bargain away access to affordable medicines. On the eve of U.S. President Barack Obama’s visit to Malaysia in April 2014, 21 health organizations released a joint statement of concern about the TPP, with the message that affordable medicines are a matter of life and death for cancer and AIDS patients, among others. During the visit, Obama and Malaysian Prime Minister Najib Razak faced enough TPP-themed protests in Kuala Lumpur that they felt compelled to address the concerns in a joint press conference. “We have made so much noise about this,” Fifi Rahman of the Malaysian AIDS Council told me, “I don’t think the TPP issues would have gotten the attention here without civil society pressure.”

*The good news is that the TPP’s critics have some strength in numbers and could help strengthen the resolve of those looking to ease U.S. intellectual property controls in the final talks.*

The opposition to TPP’s intellectual property terms has been so pronounced in part because other countries believe that the United States is pushing for greater protections than it ever has before. “Some of the TPP terms being proposed by the U.S. go further in their demands for patent protection than any previous trade agreement has ever seen,” says Judit Rius Sanjuan of Médecins Sans Frontières. “There is an attempt here to set up norms to be used much more broadly after this agreement.” Multiple United Nations health officials have also recently sounded the alarm about trade agreements’ potential to handcuff governments’ ability to pursue public health initiatives. Groups such as Médecins Sans Frontières, Oxfam, and Public Citizen are particularly worried that the

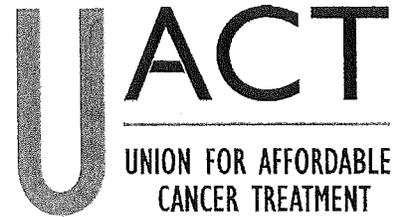
historic TPP agreement could serve as the benchmark for future deals.

The scope of the TPP and the Obama administration's push for historic levels of intellectual property protection at the TPP negotiating table, including extensive periods of market exclusivity for patented biologic drugs, has even inspired some U.S.-based economists, elected officials, and nongovernmental organizations to lend their voices to the opposition. The powerful AARP, formerly the American Association of Retired Persons, is among them. It argues that TPP terms, such as the barrier to generic alternatives to biologic drugs, could limit future efforts to control domestic drug costs in programs such as Medicare and Medicaid. Other groups cite a 2007 agreement between Congress and the George W. Bush administration designed to limit the negative public health impacts of U.S. trade deals as evidence for why the TPP should not be approved.

The good news is that the TPP's critics have some strength in numbers and could help strengthen the resolve of those looking to ease U.S. intellectual property controls in the final talks, leading to an agreement that protects access to affordable medicines, or at least minimizes the potential damage. Some even harbor hopes of scuttling the agreement altogether. There is some precedent for that outcome: the proposed Free Trade Area of the Americas (FTAA) collapsed after similar disputes about intellectual property terms, the vigorous opposition of the economically strong Brazil, and the public exposure of the once secret draft.

But the TPP talks have progressed much further than the FTAA ever did, and the intellectual property chapter is just one of 29 in the TPP. This month's final talks will lump together patent discussions with negotiations on issues such as agriculture and textile and footwear exports, leaving objections to U.S. intellectual property terms vulnerable to political tradeoffs. We can only hope that those pushing for the protection of access to medicine will be able to hold out for a decent bargain for those in need.





UACT Letter to TPP Negotiators

Re: Effects of TPP provisions on cancer patients and their families

July 26, 2015

Dear Trans Pacific Partnership Negotiators,

I am writing to you today on behalf of the Union for Affordable Cancer Treatment (UACT)<sup>1</sup>, an international network of people who share the conviction that cancer treatment and care should be available everywhere for everyone, regardless of gender, age, nationality, or financial resources. We are a union of people -- people affected by cancer, their family members and friends, people who take care of people with cancer, health care professionals and cancer researchers -- committed to increasing access to effective cancer treatment and care. I myself am a stage IV HER2 positive breast cancer patient in active treatment since May 2010, and I consider myself extremely fortunate to have access to the most advanced treatment available.

We are particularly concerned about the rapidly escalating cost of cancer medication and we believe that cancer medicines and other essential medical tools, such as diagnostic tests, should be affordable.

We will focus our comments on the effect of some of the proposed TPP language on cancer patients and their families regarding access to the best care available. This includes access to affordable biologic drugs, which are among today's game-changers in cancer treatment.

In this letter to all TPP negotiators we would like to express our concerns regarding proposals that would:

1. Mandate exclusive rights in test data for medicines,
2. Ban statutory limits on remedies including damages for the infringement of patents,

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<sup>1</sup> <http://cancerunion.org/>

3. Create more restrictive standards for using compulsory licenses,
4. Require linkage between drug registration and patent status,
5. Give drug companies access to governments processes for reimbursements, and
6. Create new investors rights, directed against patient interests

A major concern for UACT is a US proposal in the TPP to require the granting of a monopoly on the evidence – including the data from clinical trials – that a specific drug is safe and efficacious. The monopoly on data will extend the delays for registration of more affordable products. Biosimilar drugs will be affected by the longest data monopoly in the TPP.

The data monopoly effectively requires generic and biosimilar drug manufacturers to unnecessarily duplicate experiments involving human subjects where the result is known. This conflicts with the Declaration of Helsinki on Ethical Principles for Medical Research Involving Human Subjects.<sup>2</sup>

It is important that the TPP, at a minimum, allows exceptions to rights in test data for cases when prices are excessive and/or a barrier to access, where there are shortages of drugs, when duplicative trials are unethical, or for other legitimate policy reasons.

UACT is also concerned with proposed language that would ban statutory limits on damages for patents on biologic drugs, when drug companies fail to make timely disclosure of assertions that patents are relevant to a biologic drug.<sup>3</sup> This could increase the risk of costly and time-consuming litigation to manufacturers of biosimilar drugs and result in delays in the availability of more affordable drugs. Many cancer patients do not have time to waste.

UACT is concerned that the current TPP text would change the WTO standard for compulsory licensing of drugs, with a new more restrictive standard, and/or create new opportunities for drug companies to challenge compulsory licenses by using the TPP Investor State Dispute Settlement mechanisms (ISDS). The TPP proposes to give drug

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<sup>2</sup> World Medical Association (WMA) Declaration of Helsinki Ethical Principles for Medical Research Involving Human Subjects, as amended most recently in October 2013.

<http://www.wma.net/en/30publications/10policies/b3/>. The WMA is an international organization representing physicians founded on 17 September 1947, when physicians from 27 different countries met at the 1st General Assembly of the WMA in Paris. It was created to ensure the independence of physicians, and to work for the highest possible standards of ethical behaviour and care by physicians, at all times. This was particularly important to physicians after World War II, and therefore the WMA has always been an independent confederation of free professional associations. Funded by annual contributions of its members, now numbering 111 National Medical Associations.

<sup>3</sup> Such as the limitation in the United States, under 5 USC 271 (e)(6)(B), which states "the sole and exclusive remedy that may be granted by a court, upon a finding that the making, using, offering to sell, selling, or importation into the United States of the biological product that is the subject of the action infringed the patent, shall be a reasonable royalty." Compare this to the TPP language in Article QQ.H.4: {Civil Procedures and Remedies / Civil and Administrative Procedures and Remedies}.

companies the right to call for and participate in arbitration over the meaning of WTO provisions, something that is not currently possible in the WTO. We are concerned that this will affect patients in all countries where the ever-increasing cost of cancer treatments results in unnecessary rationing and death.

We agree with the World Medical Association (WMA) that the language in the TPP in Article QQ.E.17: {TPP Patent Linkage} is unacceptable. It creates an unwanted linkage between drug registration and patents, a practice that has been rejected in Europe, and is famously abused in the United States and in every country where linkage has been implemented. Drug registration decisions should be based on evidence of a drug's safety and efficacy and quality only, reflecting standards that support the promotion of the public's health. Assessing the validity, scope and relevance of patents involves assertions of private rights -- complex legal topics that drug regulatory agencies should not be asked to evaluate.<sup>4</sup> When linkage mechanisms are abused, the monopoly on the drug is extended, and prices are higher.

The TPP Transparency Chapter Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices is also of concern. This Annex will give drug companies undue influence on government policies and decisions regarding the reimbursement of new drugs, and also give pharmaceutical companies new rights to challenge the reimbursement policies and decisions they do not deem favorable to their interests.

Finally, we would like to point out that the standards and investor rights created by the TPP, under the guise of free trade, will make it more difficult for governments to modify intellectual property rules as well as undertake the future health care reforms necessary to restrain and lower the cost of cancer treatments.

We would like to bring to your attention the WMA Council Resolution on Trade Agreements and Public Health Adopted by the 200th WMA Council Session, Oslo, April 2015 which states that the WMA Council members:

Oppose any trade agreement provisions which would compromise access to health care services or medicines including but not limited to:

- Patenting (or patent enforcement) of diagnostic, therapeutic and surgical techniques;
- "Evergreening", or patent protection for minor modifications of existing drugs;

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<sup>4</sup> The standards proposed by some countries in the TPP draft text go far beyond even the legal mechanisms in the United States. Congress has limited the use of linkage for pharmaceutical drugs, and linkage is not used under the U.S. Biologics Price Competition and Innovation Act.

- Patent linkage or other patent term adjustments that serve to as a barrier to generic entry into the market;
- Data exclusivity for biologics;
- Any effort to undermine TRIPS safeguards or restrict TRIPS flexibilities including compulsory licensing;
- Limits on clinical trial data transparency.

As the world population is aging as well as surviving cancer longer, innovation in AND access to new and effective treatments become even more crucial to many of us. Policies that promote uncontrolled escalation in high prices contribute to unnecessary suffering and death.

As we have stated before to USTR -- and we would like all TPP negotiators to hear us on this -- your time and expertise would surely be better spent designing and advancing trade policies that allow all of us to promote rather than impede access to medicines, while expanding funding for medical R&D, including for better cancer drugs and diagnostic tools. This is in every country's interest.

I am available for any questions you may have.

Sincerely,



Manon Ress  
On behalf of UACT

Contact information:

Cell phone: +1.571.331.6879  
Email: [manon.ress@cancerunion.org](mailto:manon.ress@cancerunion.org)

## **Annex 1: World Medical Association (WMA) Council Resolution on Trade Agreements and Public Health**

WMA Council Resolution on Trade Agreements and Public Health  
Adopted by the 200th WMA Council Session, Oslo, April 2015

### **PREAMBLE**

Trade agreements are sequelae of globalization and seek to promote trade liberalization. They can have a significant impact on the social determinants of health and thus on public health and the delivery of health care.

Trade agreements are designed to produce economic benefits. Negotiations should take account of their potential broad impact especially on health and ensure that health is not damaged by the pursuit of potential economic gain.

Trade agreements may have the ability to promote the health and wellbeing of all people, including by improving economic structures, if they are well constructed and protect the ability of governments to legislate, regulate and plan for health promotion, health care delivery and health equity, without interference.

### **BACKGROUND**

There have been many trade agreements negotiated in the past. New agreements under negotiation include the Trans Pacific Partnership (TPP),<sup>[1]</sup> Trans Atlantic Trade and Investment Partnership (TTIP)<sup>[2]</sup> the Trade in Services Agreement (TISA) and the Comprehensive Economic and Trade Agreement (CETA).<sup>[3]</sup>

These negotiations seek to establish a global governance framework for trade and are unprecedented in their size, scope and secrecy. A lack of transparency and the selective sharing of information with a limited set of stakeholders are anti-democratic.

Investor-state dispute settlement (ISDS) provides a mechanism for investors to bring claims against governments and seek compensation, operating outside existing systems of accountability and transparency. ISDS in smaller scale trade agreements has been used to challenge evidence-based public health laws including tobacco plain packaging. Inclusion of a broad ISDS mechanism could threaten public health actions designed to effect tobacco control, alcohol control, regulation of obesogenic foods and beverages, access to medicines, health care services, environmental protection/climate change and occupational / environmental health improvements. This especially in nations with limited access to resources.

Access to affordable medicines is critical to controlling the global burdens of communicable and non-communicable diseases. The World Trade Organization's Agreement on Trade-Related Aspects of

Intellectual Property Rights (TRIPS) established a set of common international rules governing the protection of intellectual property including the patenting of pharmaceuticals. TRIPS safeguards and flexibilities including compulsory licensing seek to ensure that patent protection does not supersede public health.[4]

TiSA may impact on eHealth provision by changing rules in licensing and telecoms. Its impact on the delivery of eHealth could be substantial and damage the delivery of comprehensive, effective, cost-effective efficient health care.

The WMA Statement on Patenting Medical Procedures states that patenting of diagnostic, therapeutic and surgical techniques is unethical and “poses serious risks to the effective practice of medicine by potentially limiting the availability of new procedures to patients.”

The WMA Statement on Medical Workforce states that the WMA has recognized the need for investment in medical education and has called on governments to “...allocate sufficient financial resources for the education, training, development, recruitment and retention of physicians to meet the medical needs of the entire population...”

The WMA Declaration of Delhi on Health and Climate Change states that global climate change has had and will continue to have serious consequences for health and demands comprehensive action.

## **RECOMMENDATIONS**

Therefore the WMA calls on national governments and national member associations to:

Advocate for trade agreements that protect, promote and prioritize public health over commercial interests and ensure wide exclusions to secure services in the public interest, especially those impacting on individual and public health. This should include new modalities of health care provision including eHealth, Tele-Health, mHealth and uHealth.

Ensure trade agreements do not interfere with governments' ability to regulate health and health care, or to guarantee a right to health for all. Government action to protect and promote health should not be subject to challenge through an investor-state dispute settlement (ISDS) or similar mechanism.

Oppose any trade agreement provisions which would compromise access to health care services or medicines including but not limited to:

- Patenting (or patent enforcement) of diagnostic, therapeutic and surgical techniques;
- “Evergreening”, or patent protection for minor modifications of existing drugs;
- Patent linkage or other patent term adjustments that serve to as a barrier to generic entry into the market;
- Data exclusivity for biologics;
- Any effort to undermine TRIPS safeguards or restrict TRIPS flexibilities including compulsory licensing;
- Limits on clinical trial data transparency.

Oppose any trade agreement provision which would reduce public support for or facilitate commercialization of medical education.

Ensure trade agreements promote environmental protection and support efforts to reduce activities that cause climate change.

Call for transparency and openness in all trade agreement negotiations including public access to negotiating texts and meaningful opportunities for stakeholder engagement.

**Notes**

[1] TPP negotiations currently include twelve parties: the United States, Canada, Mexico, Peru, Chile, Australia, New Zealand, Brunei, Singapore, Malaysia, Japan and Vietnam.

[2] TTIP negotiations currently include the European Union and the United States.

[3] CETA negotiations currently include European Union and Canada.

[4] See World Trade Organization, Declaration on TRIPS and Public Health ("Doha Declaration") (2001)

## **Annex 2 WMA Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects**

Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964, and amended, most recently, by the 64th WMA General Assembly, Fortaleza, Brazil, October 2013

*(Quoted here are paragraphs 1-10, 16-18. The Declaration includes 37 paragraphs in total.)*

### **Preamble**

1. The World Medical Association (WMA) has developed the Declaration of Helsinki as a statement of ethical principles for medical research involving human subjects, including research on identifiable human material and data.

The Declaration is intended to be read as a whole and each of its constituent paragraphs should be applied with consideration of all other relevant paragraphs.

2. Consistent with the mandate of the WMA, the Declaration is addressed primarily to physicians. The WMA encourages others who are involved in medical research involving human subjects to adopt these principles.

### **General Principles**

3. The Declaration of Geneva of the WMA binds the physician with the words, "The health of my patient will be my first consideration," and the International Code of Medical Ethics declares that, "A physician shall act in the patient's best interest when providing medical care."

4. It is the duty of the physician to promote and safeguard the health, well-being and rights of patients, including those who are involved in medical research. The physician's knowledge and conscience are dedicated to the fulfilment of this duty.

5. Medical progress is based on research that ultimately must include studies involving human subjects.

6. The primary purpose of medical research involving human subjects is to understand the causes, development and effects of diseases and improve preventive, diagnostic and therapeutic interventions (methods, procedures and treatments). Even the best proven interventions must be evaluated continually through research for their safety, effectiveness, efficiency, accessibility and quality.

7. Medical research is subject to ethical standards that promote and ensure respect for all human subjects and protect their health and rights.

8. While the primary purpose of medical research is to generate new knowledge, this



goal can never take precedence over the rights and interests of individual research subjects.

9. It is the duty of physicians who are involved in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects. The responsibility for the protection of research subjects must always rest with the physician or other health care professionals and never with the research subjects, even though they have given consent.

10. Physicians must consider the ethical, legal and regulatory norms and standards for research involving human subjects in their own countries as well as applicable international norms and standards. No national or international ethical, legal or regulatory requirement should reduce or eliminate any of the protections for research subjects set forth in this Declaration.

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#### **Risks, Burdens and Benefits**

16. In medical practice and in medical research, most interventions involve risks and burdens.

Medical research involving human subjects may only be conducted if the importance of the objective outweighs the risks and burdens to the research subjects.

17. All medical research involving human subjects must be preceded by careful assessment of predictable risks and burdens to the individuals and groups involved in the research in comparison with foreseeable benefits to them and to other individuals or groups affected by the condition under investigation.

Measures to minimise the risks must be implemented. The risks must be continuously monitored, assessed and documented by the researcher.

18. Physicians may not be involved in a research study involving human subjects unless they are confident that the risks have been adequately assessed and can be satisfactorily managed.

When the risks are found to outweigh the potential benefits or when there is conclusive proof of definitive outcomes, physicians must assess whether to continue, modify or immediately stop the study.

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