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STATE OF MAINE

## Citizen Trade Policy Commission

### DRAFT AGENDA

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

**8:30 AM Meeting called to order**

- I. **Welcome and introductions**
  - a. distribute contact sheet
- II. **Review of CTPC statutes (Lock Kiermaier, Staff)**
- III. **Basic Review of free trade agreement concepts (Lock Kiermaier, Staff):**
  - a. Overview of free trade agreements and required congressional approval
  - b. Current FTA's under negotiation
    - i. Trans Pacific Partnership (TPP)
    - ii. TransAtlantic Trade and Investment Partnership (TTIP)
    - iii. Trade in Services Agreement
  - c. Description of Fast Track Authority
  - d. Description of Investor-State Dispute Resolution mechanisms
- IV. **Briefing from Chris Rector, Regional Representative, Senator Angus King:** update on current Fast Track Authority proposal
- V. **Briefing from CTPC member Sharon Anglin Treat:** Update on status of TTIP including issues of most concern to European legislators, and issues discussed at recently concluded round 9 negotiations, especially the leaked EU regulatory cooperation chapter and its potential impact on Maine legislators and executive branch agencies if adopted.
- VI. **Briefing from Attorney General Janet Mills:** update on her recent meeting with USTR
- VII. **Possible invitations to members of Maine's Congressional Delegation:** Senator Susan Collins, Senator Angus King, Representative Chellie Pingree, Representative Bruce Poliquin
- VIII. **Articles of interest (Lock Kiermaier, Staff)**
- IX. **Discussion of next meeting date**

**Adjourn**

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



**Maine Revised Statutes**  
**Title 10: COMMERCE AND TRADE**  
**Chapter 1-A: INTERNATIONAL TRADE AND THE ECONOMY**

**§11. MAINE JOBS, TRADE AND DEMOCRACY ACT**

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

[ 2003, c. 699, §2 (NEW) .]

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

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

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

[ 2003, c. 699, §2 (NEW) .]

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

[ 2003, c. 699, §2 (NEW) .]

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

A. The following 17 voting members:

- (1) Three Senators representing at least 2 political parties, appointed by the President of the Senate;
- (2) Three members of the House of Representatives representing at least 2 political parties, appointed by the Speaker of the House;
- (3) The Attorney General or the Attorney General's designee;
- (4) Four members of the public, appointed by the Governor as follows:
  - (a) A small business person;
  - (b) A small farmer;
  - (c) A representative of a nonprofit organization that promotes fair trade policies; and
  - (d) A representative of a Maine-based corporation that is active in international trade;
- (5) Three members of the public appointed by the President of the Senate as follows:
  - (a) A health care professional;
  - (b) A representative of a Maine-based manufacturing business with 25 or more employees; and
  - (c) A representative of an economic development organization; and

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

- (a) A person who is active in the organized labor community;
- (b) A member of a nonprofit human rights organization; and
- (c) A member of a nonprofit environmental organization.

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

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

- (1) Department of Labor;
- (3) Department of Environmental Protection;
- (4) Department of Agriculture, Conservation and Forestry; and
- (5) Department of Health and Human Services. [2003, c. 689, Pt. B, §6 (REV); 2007, c. 266, §1 (AMD); 2011, c. 657, Pt. W, §5 (REV) .]

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

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

[ 2003, c. 699, §2 (NEW) .]

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

[ 2003, c. 699, §2 (NEW) .]

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

[ 2003, c. 699, §2 (NEW) .]

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

[ 2013, c. 427, §1 (RPR) .]

**9. Powers and duties.** The commission:

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

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

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

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

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

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

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

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

[ 2007, c. 266, §§2, 3 (AMD) .]

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

[ 2013, c. 427, §2 (AMD) .]

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

[ 2003, c. 699, §2 (NEW) .]

#### SECTION HISTORY

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

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## §12. QUORUM

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

### SECTION HISTORY

2007, c. 266, §4 (NEW) .

## §13. LEGISLATIVE APPROVAL OF TRADE AGREEMENTS

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

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

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

[ 2009, c. 385, §1 (NEW) .]

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

[ 2009, c. 385, §1 (NEW) .]

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

[ 2009, c. 385, §1 (NEW) .]

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

[ 2009, c. 385, §1 (NEW) .]

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

[ 2009, c. 385, §1 (NEW) .]

SECTION HISTORY

2009, c. 385, §1 (NEW) .

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

By Matthew Grimson

Updated 7 Apr 2014, 6:36pm

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

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

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

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

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

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

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

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

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

## Are there downsides to free trade agreements?

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

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

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

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

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

## **Legal nuances a factor in negotiations**

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

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

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

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

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

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

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

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

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

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

[http://en.wikipedia.org/wiki/Trans-Pacific\\_Partnership](http://en.wikipedia.org/wiki/Trans-Pacific_Partnership)

# Trans-Pacific Partnership

From Wikipedia, the free encyclopedia

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

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

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

## Membership

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



■ Currently in negotiations  
■ Announced interest in joining

## □ Potential future members

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

## Potential members

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

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

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

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

# History

## Trans-Pacific Strategic Economic Partnership Agreement

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

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

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

## Trans-Pacific Partnership

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

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

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

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

In 2010, Canada had become an observer in the TPP talks, and expressed interest in officially joining,<sup>[44]</sup> but was not committed to join, purportedly because the US and New Zealand blocked it due to concerns over Canadian agricultural policy (i.e. supply management)—specifically dairy—and intellectual property-rights protection.<sup>[45][46]</sup> Several pro-business and internationalist Canadian media outlets raised concerns about this as a missed opportunity. In a feature in the Financial Post, former Canadian trade-negotiator Peter Clark claimed that the US Obama Administration had strategically outmaneuvered the Canadian Harper Government. Wendy Dobson and Diana Kuzmanovic for The School of Public Policy, University of Calgary, argued for the economic necessity of the TPP to Canada.<sup>[47]</sup> Embassy warned that Canada's position in APEC could be compromised by being excluded from both the US-oriented TPP and the proposed China-oriented ASEAN +3 trade agreement (or the broader Comprehensive Economic Partnership for East Asia).<sup>[40][41][43]</sup>

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

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

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

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

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

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

## Causes of delays

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

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

## US Trade Representative's summary

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

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

- Comprehensive market access by eliminating tariffs and other barriers to goods and services trade and investment, so as to create new opportunities for our workers and businesses and immediate benefits for our consumers.
- A fully regional agreement by facilitating the development of production and supply chains among TPP members, which will support the goals of job creation, improving living standards and welfare, and promoting sustainable growth among member countries.
- Cross-cutting trade issues by building on work being done in APEC and other fora by incorporating four new cross-cutting issues in the TPP. These issues are:
  1. Regulatory coherence: Commitments will promote trade between the countries by making trade among them more seamless and efficient.
  2. Competitiveness and business facilitation: Commitments will enhance the domestic and regional competitiveness of each member country's economy and promote economic

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

3. Small- and Medium-Sized Enterprises: Commitments will address concerns small- and medium-sized businesses have raised about the difficulty in understanding and using trade agreements, encouraging these sized enterprises to trade internationally.
  4. Development: Comprehensive and robust market liberalisation, improvements in trade and investment enhancing disciplines, and other commitments will serve to strengthen institutions important for economic development and governance and thereby contribute significantly to advancing TPP countries' respective economic development priorities.
- New trade challenges by promoting trade and investment in innovative products and services, including the digital economy and green technologies, and to ensure a competitive business environment across the TPP region.
  - Living agreement by enabling the updating of the agreement when needed to address trade issues that materialise in the future as well as new issues that arise with the expansion of the agreement to include new countries.<sup>[175]</sup>

## United States

The majority of United States free trade agreements are implemented as congressional-executive agreements.<sup>[186]</sup> Unlike treaties, such agreements require a majority of the House and Senate to pass.<sup>[186]</sup> Under "Trade Promotion Authority" (TPA), established by the Trade Act of 1974, Congress authorises the President to negotiate "free trade agreements... if they are approved by both houses in a bill enacted into public law and other statutory conditions are met."<sup>[186]</sup> In early 2012, the Obama administration indicated that a requirement for the conclusion of TPP negotiations is the renewal of "fast track" Trade Promotion Authority.<sup>[187]</sup> This would require the United States Congress to introduce and vote on an administration-authored bill for implementing the TPP with minimal debate and no amendments, with the entire process taking no more than 90 days.<sup>[188]</sup> Fast-track legislation was introduced in Congress in mid-April 2015.<sup>[189]</sup>

[http://en.wikipedia.org/wiki/Transatlantic\\_Trade\\_and\\_Investment\\_Partnership](http://en.wikipedia.org/wiki/Transatlantic_Trade_and_Investment_Partnership)

# Transatlantic Trade and Investment Partnership

From Wikipedia, the free encyclopedia



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

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

An agreement is not expected to be finalized before 2016.<sup>[6]</sup>

## Background

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

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

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

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

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

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

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

## Proposed contents

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

## Negotiations

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

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

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

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

## Proposed benefits

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

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

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

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

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

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

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

## Controversy

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

### Activism

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

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

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

## National sovereignty and Investor State Dispute Settlements (ISDS)

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

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

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

## National objections

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

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

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

[http://en.wikipedia.org/wiki/Trade\\_in\\_Services\\_Agreement](http://en.wikipedia.org/wiki/Trade_in_Services_Agreement)

# Trade in Services Agreement

From Wikipedia, the free encyclopedia

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

## Origin



Parties to Trade in Services Agreement (TiSA)

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

## Proposed Agreement

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

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

European Union

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

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

## Parties involved

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

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

## Controversy

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

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

## Analysis

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

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

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

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

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

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

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

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



# Fast track (trade)

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

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

## Enactment and history

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

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

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

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

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

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

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

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

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

## Procedure

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

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

## Negotiating objectives

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

Principal objectives include:

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

## Scope

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

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

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

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

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

## Arguments in favor

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

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

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

## Arguments against

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



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

United States Trade Representative

Investor-State Dispute Settlement (ISDS)

### **What is ISDS?**

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

Governments put ISDS in place for at least three reasons:

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

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

### **What are the major criticisms of ISDS?**

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

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

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

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

- **Freedom from discrimination:** An assurance that Americans doing business abroad will face a level playing field and will not be treated less favorably than local investors or competitors from third countries.
- **Protection against uncompensated expropriation of property:** An assurance that the property of investors will not be seized by the government without the payment of just compensation.
- **Protection against denial of justice:** An assurance that investors will not be denied justice in criminal, civil, or administrative adjudicatory proceedings.
- **Right to transfer capital:** An assurance that investors will be able to move capital relating to their investments freely, subject to safeguards to provide governments flexibility, including to respond to financial crises and to ensure the integrity and stability of the financial system.

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

### **Why aren't local courts enough?**

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

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

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

### **Where did ISDS come from?**

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

ISDS represented a better way.

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

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

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

## **How expensive is ISDS?**

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

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

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

## **Will ISDS affect the ability of TPP governments to regulate?**

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

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

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

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

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

- **Full transparency in cases.** Governments must make all pleadings, briefs, transcripts, decisions, and awards in ISDS cases publicly available, as well as open ISDS hearings to the public. One key objective of these provisions is to allow governments that are party to the agreement, as well as the public at large, to carefully monitor pending proceedings and more effectively make decisions about whether to intervene.
- **Public participation in cases.** Tribunals have the clear authority to accept *amicus curiae* submissions. In U.S. cases, *amicus* briefs have been submitted by a variety of NGOs, including the Sierra Club, Friends of the Earth, and Center for International Environmental Law. (Documents in all investor-State cases filed against the United States are available on the State Department website.)
- **Mechanism for expedited review and dismissal of frivolous claims and claims outside the tribunal's jurisdiction.** This mechanism enables respondent countries, on an extremely expedited basis, to move to dismiss (1) frivolous or otherwise unmeritorious claims (akin to provisions under the Federal Rules of Civil Procedure) and (2) claims the tribunal is not empowered to resolve.
- **Denial of benefits for sham corporations.** This provision prevents the use of shell companies to access ISDS.
- **Restriction on parallel claims.** This provision prevents a party from pursuing the same claims both in ISDS proceedings and domestic courts (i.e., restricting "forum shopping").
- **Statute of limitations.** A three-year statute of limitations protects respondents against old claims, which are difficult for governments to defend in part because access to documents and witnesses becomes more difficult over time.
- **Challenge of awards.** Both parties to an arbitration have the option to challenge a tribunal award.
- **Consolidation.** On request, tribunals may consolidate claims raising common questions of fact and law, which may increase efficiency, reduce litigation costs, and prevent strategic initiation of duplicative litigation.

- **Interim review of ISDS awards.** Parties to the arbitration are permitted to review and comment on a draft of the tribunal's award before it is made final.
- **Prudential exception.** This exception provides that nothing prevents countries from taking measures to safeguard the stability of their financial systems. If such measures are challenged, this provision allows the respondent country and investor's home country to jointly agree that the prudential exception applies and that decision is binding on the tribunal.
- **Tax exception.** This exception defines and limits the coverage of government tax measures under the investment provisions. In addition, this provision provides that if the respondent country and investor's home country agree that a challenged measure is not expropriatory, that decision is binding on the tribunal.
- **Mechanism for treaty Parties to issue binding decisions on how to interpret treaty provisions.** A binding interpretation mechanism enables TPP countries to confer after the agreement has entered into force and to issue joint decisions on questions of treaty interpretation that bind all tribunals in pending and future cases.
- **Independent experts on environmental, health, or safety matters.** In most ISDS cases, the disputing parties retain and appoint the experts. This provision provides arbitral tribunals with the power to appoint experts of their own choosing on environmental, health, and safety matters to ensure maximal objectivity in the evaluation of claims challenging such measures.
- **Limitations on obligations:** Clear limiting rules and definitions, including guidance on interpretation on the obligations frequently subject to litigation, to safeguard against subjective or overbroad interpretation – for example, the incorporation of U.S. Supreme Court standards on indirect expropriation and a clear tying of the “minimum standard of treatment” obligation to requirements under customary international law (i.e. the general and consistent practice of states that they follow from a sense of legal obligation).

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

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

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

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



ISDS Undermines National Legislation and Policy

Erin Nichole Mooney

George Mason University

GOVT 446

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## I. Introduction

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

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

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<sup>1</sup> Van Harten, Gus and David Schneiderman. "Public Statement on the International Investment Regime." 31 Aug 2010. 2.

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

## II. ISDS Mechanism

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

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

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<sup>2</sup> European Parliamentary Research Service (EPRS). *Investor-State Dispute Settlement (ISDS) State of play and prospects for reform*, 2014, 1.

<sup>3</sup> European Commission (EC). (2013). Factsheet on investor-state dispute settlement.

<sup>4</sup> EPRS, 2.

<sup>5</sup> Ibid, 3.

<sup>6</sup> International Centre for Settlement of Investment Disputes (ICSID). (n.d.) *World Bank Group*.

<sup>7</sup> EC, 1.

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

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

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<sup>8</sup> EPRS, 7.

<sup>9</sup> EC, 1.

<sup>10</sup> EPRS, 3.

<sup>11</sup> Ibid, 4.

<sup>12</sup> United Nations Conference on Trade and Development (UNCTAD). May 2013. Recent Developments in Investor-State Dispute Settlement (ISDS). *UNCTAD, United Nations.*

and therefore for promoting and securing economic growth”, a sentiment that is shared by many states and investors alike.<sup>13</sup>

### **i. ISDS Courts and Processes**

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

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

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<sup>13</sup> EC, 3.

<sup>14</sup> UNCTAD, 2.

<sup>15</sup> EPRS, 3.

<sup>16</sup> International Centre for Settlement of Investment Disputes (ICSID). (n.d.) Background information on the international centre for settlement of investment disputes (ICSID). *World Bank Group*.

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

## **ii. Why not National Courts?**

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

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<sup>17</sup> EPRS, 4.

<sup>18</sup> Ibid, 3.

<sup>19</sup> Ibid.

<sup>20</sup> EC, 2.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

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

### **iii. ISDS Mechanism and Arbitration Court Criticism**

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

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<sup>23</sup> Tienhaara, Kyla and Patricia Ranald. July 2011. Australia’s rejection of Investor-State Dispute Settlement: Four potential contributing factors. *Investment Treaty News*. 12 July 2011.

<sup>24</sup> United Nations Conference on Trade and Development (UNCTAD). May 2013. Recent Developments in Investor-State Dispute Settlement (ISDS). *UNCTAD, United Nations*. 48.

<sup>25</sup> Yackee, Jason Webb. (2013). Do States Bargain over Investor-State Dispute Settlement - Or, toward Greater Collaboration in the Study of Bilateral Investment Treaties. *Santa Clara Journal of International Law* 12.1: 303-316. HeinOnline Database.

<sup>26</sup> *Ibid*, 288.

<sup>27</sup> Gaukrodger, D. and Gordon, K. (2012). Investor-state dispute settlement: A scoping paper for the investment policy community. *OECD Working Papers on International Investment, No. 2012/3, OECD Investment Division*. 40.

<sup>28</sup> EPRS, 3.

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

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<sup>29</sup> Gaukrodger and Gordon p. 40

<sup>30</sup> UNCTAD p. 48

<sup>31</sup> EPRS p. 4

<sup>32</sup> Ibid, 2.

<sup>33</sup> Vadi, Valentina S. (2012). Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law. *Stanford Journal of International Law* 48.93: n.p.. LexisNexis Academic. n.p.

### III. Consequences on Public Health Policy

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

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

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<sup>34</sup> Ibid.

<sup>35</sup> Porterfield, M. and C. Byrnes, Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?. *Investment Treaty News* 12 July 2011, n.p.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

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

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

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<sup>38</sup> Porterfield, M. and C. Byrnes, Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?. *Investment Treaty News* 12 July 2011, n.p.

<sup>39</sup> Australian Government Attorney-General’s Department. “Investor-state arbitration - tobacco plain packaging.” n.p.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Porterfield and Byrnes, n.p.

<sup>43</sup> Ibid.

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

#### IV. Consequences on the environment

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

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<sup>44</sup> Porterfield and Byrnes, n.p.

<sup>45</sup> Sabahi, Borzu and Kabir Duggal. “Occidental Petroleum v Ecuador (2012): observations on proportionality, assessment of damages and contributory fault.” *ISCID Review: Oxford Journals* 28.2 (2012): 279-290.

<sup>46</sup> Ibid.

<sup>47</sup> Wallach, Lori, Ben Beachy and Global Trade Watch. “Occidental v. Ecuador Award Spotlights Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used ‘Egregious’ Damages Logic to Hit Ecuador with \$2.4 Billion Penalty in Largest Ever ICSID Award.” Nov. 21, 2012 Public Citizen: Washington D.C., n.p.

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

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

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

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<sup>48</sup> Sabahi, B. and K. Duggal, n.p.

<sup>49</sup> Ibid.

<sup>50</sup> Sabahi, B. and K. Duggal, n.p.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

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

## V. Conclusion

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

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<sup>54</sup> Garcia, J. (2013). THE ERA OF PETROLEUM ARBITRATION MEGA CASES. *Houston Journal Of International Law*, 35(3), 537-588. EBSCO Host Database, 540.

<sup>55</sup> [http://www.osgoode.yorku.ca/public-statement/documents/Public\\_Statement\\_\(final\)\\_\(Dec\\_2013\).pdf](http://www.osgoode.yorku.ca/public-statement/documents/Public_Statement_(final)_(Dec_2013).pdf) 2

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

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

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<sup>56</sup> Van Harten, Gus and David Schneiderman. "Public Statement on the International Investment Regime." 31 Aug 2010. 1.

<sup>57</sup> Ibid, 8.

## ISDS Undermines National Legislation and Policy

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

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

*New York Times*

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

By JONATHAN WEISMAN

APRIL 16, 2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Others appeared dead set against the accord.

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

MEMORANDUM

**DATE:** May 5, 2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> This provision is specific to U.S. states: “Article 11. Information and Regulatory Exchanges on regulatory acts at non-central level

1. The Parties encourage regulatory exchanges on regulatory acts at non-central level in areas or sectors where there may be common interest (new footnote).
2. At the request of one Party made via the respective Focal Points the other Party shall request the regulators and competent authorities at non-central level concerned to engage in regulatory exchanges on planned or existing regulatory acts. The regulators and competent authorities at central level of both Parties will coordinate the exchanges involving the regulatory authorities at non-central level responsible for the regulatory acts concerned.”



**Article notes**  
**Citizen Trade Policy Commission**

**Articles from April 2015**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

Daily News

## News Analysis

Posted: April 01, 2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



# Round two in America's battle for Asian influence

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

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

The Financial Times

By David Pilling

April 1, 2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4/6/15

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

In two words: New Balance.

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

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

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

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

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

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

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

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

Nike: Eliminate the tariff

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

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

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

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

Fast track authority

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

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

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

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

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

Will it help Maine?

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

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

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

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



# What Vietnam Must Now Do

Tuesday, April 07, 2015 7:25 AM

<http://mobile.nytimes.com/2015/04/07/opinion/what-vietnam-must-now-do.html?referrer=>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Forbes

# TPP Is A Mistake

By Jean-Pierre Lehmann

April 9, 2015

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

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

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

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

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

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

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

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

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

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

Nor is there much integration in their respective regions.

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

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

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

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

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

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



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

April 12, 2015

Michaela Whitbourn

*Legal Affairs and Investigations reporter*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



For Immediate Release:  
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[llwallach@citizen.org](mailto:llwallach@citizen.org)

Contact: Symone Sanders (202) 454-5108  
Lori Wallach (202) 454-5107,

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

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

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

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

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

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

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

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

**Background:**

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

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

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

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

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



## Special courts for foreign investors

The Hill

By Simon Lester and Ben Beachy

April 15, 2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Lester is a trade policy analyst with Cato's Herbert A. Stiefel Center for Trade Policy Studies.  
Beachy is research director at Public Citizen's Global Trade Watch.*



Boston Globe

# Obama's trade agreements are a gift to corporations

By Robert Kuttner April 17, 2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Obama's new trade deal represents massive executive overreach

The Hill

By Kevin L. Kearns

April 17, 2015

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

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

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

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

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

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

Obama's "negotiate-now-consult-afterwards" approach is a de facto rejection of the way fast track is designed to work. Instead, the Obama administration has relied mainly on itself and the advice of 600 non-governmental organizations, including many multinational corporations.

These corporate advisors represent neither the American people nor the U.S. national interest. They represent only the parochial interests of their shareholders, officers, and directors.

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

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

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

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

## Don't Let TPP Gut State Laws

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

By ERIC T. SCHNEIDERMAN

April 19, 2015

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

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

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

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

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

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

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

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

Maybe that's why the agreement is being negotiated in secret. If it weren't for WikiLeaks and a few media outlets, we wouldn't even know about this dangerous provision. The effort by negotiators to keep their discussions from the public is telling.

The beneficiaries here would be a discrete group of multinational business interests that should be entitled to treatment no better and no different than any other plaintiff receives in the trial and appellate courts of this country. The separate and unaccountable system of justice that TPP would create poses a major risk to critical statutes and policy decisions that protect our citizens — and it has no place in a nation committed to equal justice under law.

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

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

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

April 20, 2015

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

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

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

Section 8 of the TPA bill states:

### 8. SOVEREIGNTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Monday, April 20, 2015

Common Dreams

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

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

by

Sarah Lazare, staff writer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Boston Globe

## US owes allies a clear path forward on Pacific trade talks

By The Editorial Board April 20, 2015

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

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

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

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

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

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

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

[http://www.euractiv.com/sections/trade-society/ttip-negotiators-get-earful-american-critics-314056?utm\\_source=EurActiv+Newsletter&utm\\_campaign=46c69cd930-newsletter\\_daily\\_update&utm\\_medium=email&utm\\_term=0\\_bab5f0ea4e-46c69cd930-245803241](http://www.euractiv.com/sections/trade-society/ttip-negotiators-get-earful-american-critics-314056?utm_source=EurActiv+Newsletter&utm_campaign=46c69cd930-newsletter_daily_update&utm_medium=email&utm_term=0_bab5f0ea4e-46c69cd930-245803241)

## TTIP negotiators get an earful from American critics

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

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

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

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

>>**Read:** [EU, US trade talks seek to advance regulatory pillar](#)

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

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

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

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

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

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

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

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

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

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

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

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

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

New York Times

The Opinion Pages

OP-ED COLUMNIST

## On Trade: Obama Right, Critics Wrong

APRIL 29, 2015

Thomas L. Friedman

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

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

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

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

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

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

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

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

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

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

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

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

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

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