

**CITIZEN TRADE POLICY COMMISSION
DRAFT AGENDA**

Friday, April 26, 2013 at 9:30 A.M.
Room 214, Burton M. Cross State Office Building
Augusta, Maine

9:30 AM Meeting called to order

I. Welcome and introductions

II. Update of CTPC contact information

III. PowerPoint presentation on Maine International Trade Center (Wade Merritt, CTPC member)

IV. Review of past Legislative Resolution on "Fast Track Authority" (Lock Kiermaier, Staff)

V. Update on IGPAC/USTR activity (Representative Sharon Treat, CTPC Chair)

VI. Review of Legislative Bills of Interest (Lock Kiermaier, Staff)

VII. Articles of interest (Lock Kiermaier, Staff)

VIII. Proposed next meeting date and suggestions for agenda topics

Adjourn

Citizen Trade Policy Commission

Contact List

Mar-13

<u>Name</u>	<u>street address</u>	<u>City/ Town</u>	<u>Zip</u>	<u>Business Phone</u>	<u>Home Phone</u>	<u>Cell Phone</u>	<u>E-mail</u>
Palmer, John	P.O. Box 519	Oxford	04270	539-4800			gatecoach@hotmail.com
Ricker, Harry	35 Macintosh Drive	Turner	04282		754-3455		SenTroy.Jackson@legislature.maine.gov
Jackson, Troy	167 Allagash Road	Allagash	04774		436-0763		rsherm_2000@yahoo.com
Sherman, Roger	P.O. Box 682	Houlton	04730		532-7073		Johnpat2000@hotmail.com
Patrick, John L.	206 Strafford Avenue	Rumford	04276		364-7666		joelkase@gmail.com
Kase, Joel A.	36 Water's Edge Drive	Lewiston	04240	872-1300	777-3777	281-3665	score@ceimaine.org
Cole, Stephen	80 Bristol Road	Damariscotta	04543				bobumphrey@nepcobags.com
Umphrey, Robert	875 Skyway Street	Presque Isle	04769				satreat@gmail.com
Treat, Sharon	22 Page Street	Hallowell	04347		623-7161		RepBernard.Ayotte@legislature.maine.gov
Ayotte, Bernard L.	1469 Van Buren Road	Caswell	04750		325-4905		ReplJeff.McCabe@legislature.maine.gov
McCabe, Jeff M.	13 Olive Street	Skowhegan	04976		474-5402		miherz@gmail.com
Hertz, Michael	P.O. Box 1462	Damariscotta	04543			462-4527	ls6vp@hotmail.com
Wadleigh, Jay	40 Wadleigh Way	Belgrade	04917	443-5566			Linda.Pistner@maine.gov
Pistner, Linda	6 State House Station	Augusta	04333-0006	626-8821			Mike.Karagiannes@maine.gov
Karagiannes, Mike	17 State House Station	Augusta	04333-0017	287-8662			merritt@mitc.com
Merritt, Wade	511 Congress Street	Portland	04101	541-7400			
CIPC Staff							
Kiermaier, Lock	16 Court St. Place	Augusta	04330	446-0651		446-0651	lock.kiermaier@legislature.me.gov

For Immediate Release: April 23, 2013

Contact: Adrienne Bennett, Communications Director (207) 287-2531

Governor LePage travels to Montreal to encourage economic growth between Maine and Quebec

AUGUSTA – Governor Paul R. LePage signed a memorandum of agreement yesterday with Premier of Quebec Pauline Marois to encourage economic development and support job creation between Maine and Province of Quebec. The Premier invited the Governor to Montreal to sign the agreement, which she described as an important collaboration between Maine and Quebec.

Although Maine and Quebec share a border, as well a common history and culture, this is the first time that the state has entered into such an MOU to strengthen relations with Quebec.

“I was pleased to meet with Premier Marois to discuss how Maine and Quebec can work together to create jobs and cooperate in the areas of energy, natural resources transportation, border security and culture,” the Governor said. “And I know she was pleased to converse with me in French, which is my native language, and to talk about our shared French-Canadian heritage.”

The MOU encourages Maine and Quebec to coordinate with their business communities to set up partnerships and implement economic development initiatives. The agreement also encourages an exchange of cross-border solutions for clean energy, such as hydropower and bioenergy, which could lower home heating costs for Maine people”.

“Le Québec et le Maine partagent non seulement une histoire et un patrimoine, mais également des enjeux et des défis qui présentent des occasions de collaboration importantes. Je me réjouis de la signature de cet accord qui témoigne de notre volonté à travailler ensemble pour assurer le développement de relations qui nous seront mutuellement bénéfiques,” said Premier Marois.

A Quebec-Maine Joint Committee will be responsible for implementing the agreement.

In addition to signing the agreement with the Premier, Governor LePage spoke to 150 business leaders at luncheon conference sponsored by The Montreal Council on Foreign Relations. Titled "Maine and Quebec: Opportunities to Stimulate our Economic Relations," the Governor spoke about economic agenda of Maine, strengthening of business relations with Quebec and business opportunities that Maine can offer Quebec.

ATTACHED PHOTOS

LePage CORIM.jpg: Governor Paul R. LePage speaks at The Montreal Council on Foreign Relations

Marois LePage 003.jpg: Governor Paul R. LePage signs an agreement with Premier of Quebec Pauline Marois

**JOINT RESOLUTION MEMORIALIZING THE MAINE DELEGATION, THE
CONGRESS OF THE UNITED STATES AND THE PRESIDENT TO SAFEGUARD
THE STATE'S ROLE IN INTERNATIONAL TRADE AGREEMENTS**

WHEREAS, the State of Maine strongly supports international trade when fair rules of trade are in place, and seeks to be an active participant in the global economy; and

WHEREAS, the State of Maine seeks to maximize the benefits and minimize any negative impacts of international trade; and

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

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

WHEREAS, existing trade agreements have not done enough to ensure a level playing field for Maine workers and businesses, or to include meaningful human rights, labor, and environmental standards, which hurts Maine businesses, workers, and communities; and

WHEREAS, the negative impact of existing trade agreements on the State's constitutionally guaranteed authority to protect the public health, safety and welfare, and regulatory authority has occurred in part because U.S. trade policy has been formulated and implemented under the Trade Promotion Authority (Fast Track) process; and

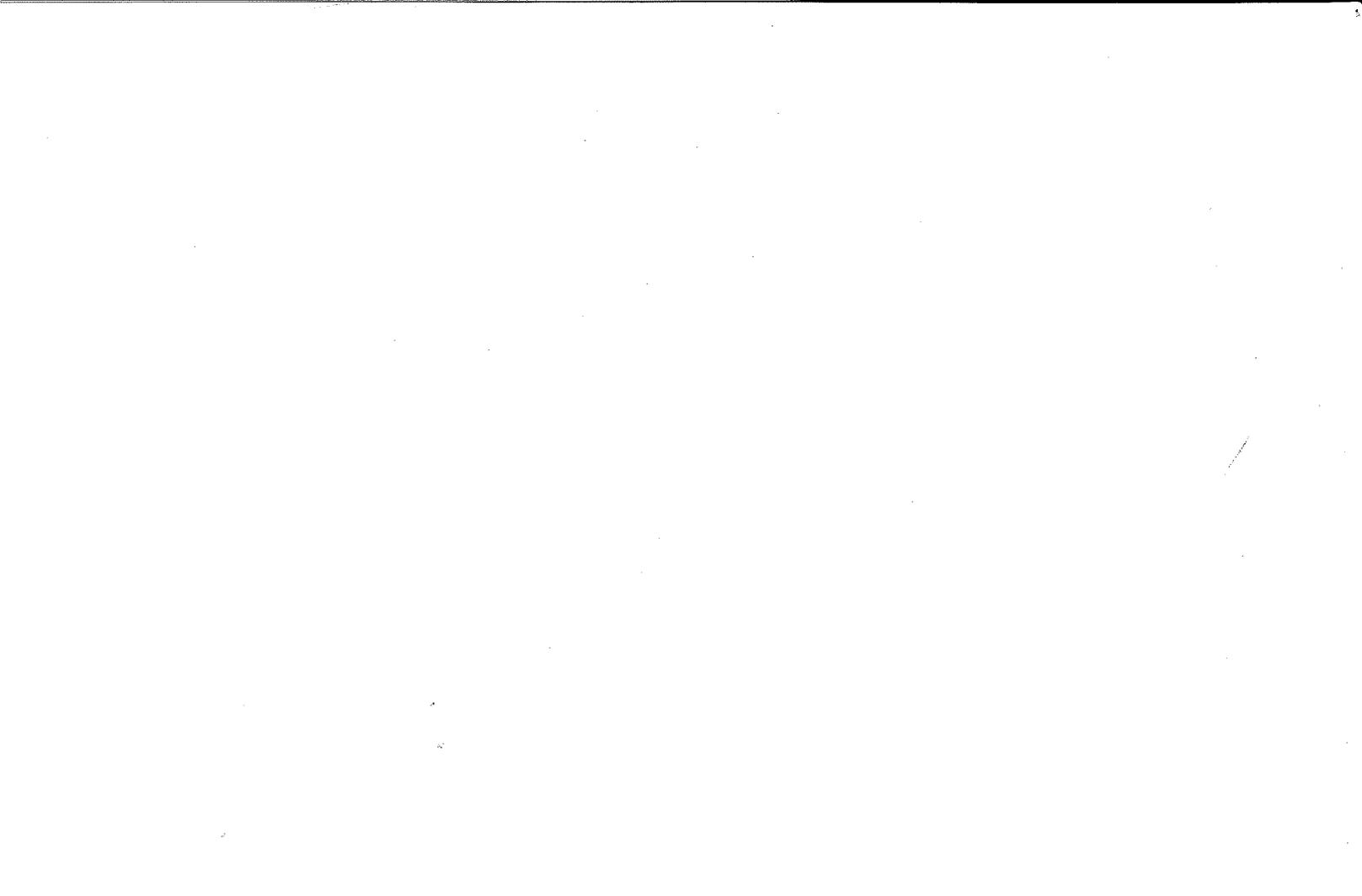
WHEREAS, Trade Promotion Authority (Fast Track) eliminates vital checks and balances established in the U.S. Constitution by broadly delegating to the Executive Branch authority reserved for Congress to set the terms of international trade; and

WHEREAS, Trade Promotion Authority (Fast Track) circumvents normal congressional review and amendment committee procedures, limits debate to 20 hours total, forbids any floor amendments to the implementing legislation that is presented to Congress, and generally creates a non-transparent trade policymaking process; and

WHEREAS, Trade Promotion Authority (Fast Track) is not necessary for negotiating trade agreements, as demonstrated by the existence of scores of trade agreements, including major pacts such as the agreements administered by the WTO, implemented without use of Fast Track; and

WHEREAS, the current grant of Trade Promotion Authority (Fast Track) expires in July 2007; now, therefore be it





ID #	Bill Title	Bill Sponsor	Committee of Reference		Date of Public Hearing	Date of Work Session	Current status	Fiscal Impact?	Summary	CTPC Staff Comment
171	An Act To Facilitate the Licensing of International Mail Order Prescription Pharmacies by the Maine Board of Pharmacy	Sen. Troy Jackson	Labor, Commerce, Research, and Econ. Dev		2/19/2013	not yet scheduled	No Fiscal Impact	The purpose of this bill is to facilitate the licensing of international mail order prescription pharmacies by the Maine Board of Pharmacy. See detailed summary on CTPC WORD document	The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties	
449	An Act To Ensure Consumer Choice in the Purchase of Prescription Drugs	Sen. Doug Thomas	Labor, Commerce, Research, and Econ. Dev		3/13/2013	not yet scheduled	Not yet determined	This bill clarifies and affirms the ability of Maine consumers to purchase mail order prescription drugs from licensed pharmacies that are located in certain nations specified under federal law.	The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties	
813	An Act To Promote the Sale of Maine Milk	Rep. Joseph Brooks	State & Local Gov		3/27/2013	4/8/2013	Not yet determined	This bill requires a state-owned or state-operated facility that sells or contracts with a person to sell beverages directly to the public, including a facility on the Maine Turnpike, to have available for sale milk processed at a milk plant in the State. This bill exempts facilities in an institutional setting in which sales of beverages to the public are incidental, including a state-owned postsecondary institution or correctional facility.	The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties	
1326	An Act To Prevent Youth Tobacco Use	Rep. Megan Rochelo	Taxation		not yet scheduled	not yet scheduled	Not yet determined	This bill requires that all tobacco products be taxed at rates equivalent to the current tax on cigarettes. The bill provides an appropriations and allocations section to fund anticipated increased demand on the tobacco hotline for those people who are seeking to quit tobacco use.	The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties	

<u>LD #</u>	<u>Bill Title</u>	<u>Bill Sponsor</u>	<u>Committee of Reference</u>	<u>Date of Public Hearing</u>	<u>Date of Work Session</u>	<u>Current status</u>	<u>Fiscal Impact?</u>	<u>Summary</u>	<u>CTPC Staff Comment</u>
1338	An Act To Prohibit State and Local Governments from Contracting with Corporations That Engage in Business in Known Terrorist States	Rep. Teresea Hayes	State & Local Gov	4/22/2013	not yet scheduled	Not reported out	Not yet determined	<p>This bill requires that, beginning January 1, 2014, the State, the University of Maine System, the Maine Community College System, the Maine Maritime Academy and municipalities exclude any business entity or individual from doing business with the State, the University of Maine System, the Maine Community College System, the Maine Maritime Academy or a municipality if that business entity or individual does business with any company, or any subsidiary, affiliate or parent of any company, that does business with a country designated by federal law as a state sponsor of terrorism. It also requires that counties and school boards adopt policies by January 1, 2014 that require counties and school boards to exclude any business entity or individual from doing business with a county or school board if that business entity or individual does business with any company, or any subsidiary, affiliate or parent of any company, that does business with a country designated as a state sponsor of terrorism.</p>	<p>The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties</p>

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1381	An Act To Promote Rural Job Creation and Workforce Development	Sen. Troy Jackson	Labor, Commerce, Research, and Econ. Dev	4/22/2013	not yet scheduled	Not reported out	Not yet determined	<p>This bill gives a preference in state contracting to bidders who primarily employ residents of the State and to bidders who coordinate with regional workforce development programs and who fill at least 20% of positions on the project with low-income or long-term unemployed people. The bill requires that successful bidders on public building or public works contracts with the State, counties, cities and towns and every charitable or educational institution that is supported in whole or in part by aid granted by the State or by a municipality commit to coordinate with regional workforce development programs and make best efforts to hire low-income and long-term unemployed people. The bill also requires state public works programs to give hiring preference to residents of the county where the work is being performed.</p>	<p>The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties</p>

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1254	An Act To Increase Consumption of Maine Foods in All State Institutions	Rep. Craig Hickman	State & Local Gov	4/22/2013	not yet scheduled	Not reported out	Not yet determined	Current law requires state and school purchasers to buy meat, fish, dairy products, excluding milk and eggs, and species of fruits and fresh vegetables directly from Maine food producers or from food brokers. This bill establishes a minimum percentage of Maine foodstuffs that must be purchased, requiring at least 15% for the 10 years beginning January 1, 2014, at least 25% for the next 10 years and at least 35% beginning in 2034.	The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties
1103	An Act To Encourage Development in the Logging Industry	Sen. Troy Jackson	State & Local Gov	4/8/2013	4/12/2013	Not reported out	Not yet determined	This bill would withhold a tax incentive, eliminate General Fund money for forest fire protection, and would proscribe a tax penalty for individuals who, either directly or through a contracting entity, hire foreign H-2A visa workers for timber harvesting operations or fail to give required notice concerning their use of H-2A foreign workers for timber harvesting on their land.	The purpose of this bill could conceivably be overridden by prospective sections of the TPPA or other existing or prospective international trade treaties

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1151	An Act Regarding the Financial Transparency and Administration of the Citizen Trade Policy Commission	Rep. Joyce Maker	Labor, Commerce, Research, and Econ. Dev	4/8/2013	4/12/2013	OTP as Amd	Appropriations to a new Citizen Trade Policy Commission program in the Legislature and offsetting deappropriation	This bill modifies the law governing the Citizen Trade Policy Commission to provide that: 1. To the extent funding permits, the Legislature, through the commission, must contract for year-round staff support for the commission. To the extent the commission lacks 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; and 2. All funds appropriated, allocated or otherwise provided to the commission must be separately accounted for and used solely for the purposes of the commission and are nonlapsing. At the beginning of each fiscal year, and at any other time at the request of the cochairs of the commission, the Executive Director of the Legislative Council must provide to the commission an accounting of all funds available to the commission, including funds for staff support. The bill is designated an emergency to ensure that the limited funding available to the commission does not lapse at the end of the current fiscal year.	

Article notes: 4/26/13 CTPC agenda

TPPA/Japan Articles

Japan's Possible Entry Into the Trans-Pacific Partnership and Its Implications

- The TPPA is the Obama administration's most significant trade policy initiative and represents an effort to "rebalance" the US relationship with its Asia-Pacific trading partners;
- Japan has the second largest economy in Asia and the third largest economy in the world so inclusion of Japan is crucial to a meaningful and comprehensive TPPA ;
- Inclusion of Japan into the TPPA will represent a de facto free trade agreement between the U.S. and Japan and has the potential to reinvigorate the economic relationship between the two countries. On the downside, failure to include Japan in a meaningful TPPA could result in a failure to establish a more open free trade and prosperous economic relationship between the two countries.

Japan wins spot in mega trade pact

- Japan has been accepted into the proposed 11 nation trade pact referred to as the Trans-Pacific Partnership Agreement (TPPA);
- Canada had been the sole remaining nation opposed to Japan's inclusion in the TPPA;
- The U.S. had formally agreed to Japan's inclusion earlier in April;
- As a condition of inclusion in the TPPA, Japan agreed that "US tariffs on its cars would be phased out at the latest time allowed by a future accord".

TPPA Articles

Baucus Sees Trans-Pacific Partnership Agreement as Major Spark to U.S. Economy

- Senator Max Baucus, Chair of the Senate Finance Committee, has endorsed the proposed TPPA by stating that "The TPP presents tremendous opportunities to expand U.S. exports and support hundreds of thousands of good-paying jobs here in America. The Asia-Pacific economies are some of the fastest growing in the world, and Asia is importing more and more goods from around the world. The United States needs to share in that growth, and the TPP offers the way to do so,";
- Senator Baucus also endorsed a "fast track approach" by which Congress could approve the TPPA.

Safeguards for Tobacco Control: Options for the TPPA

- As a useful follow-up to his 2013 Assessment for the CTPC, Dr. Robert Stumberg has prepared an article on the latest implications of how tobacco may be treated in the TPPA;
- The tobacco industry continues to use international trade agreements like the TPPA to "chill, divert or delay" national tobacco-control policies. Specifically, the tobacco industry makes use of the following strategies:
 - The expansion of investor-state arbitration process to circumvent local regulation through the Investment Chapters of agreements like the TPPA;
 - The Intellectual Property Chapter is used to expand on the ability to use a Trade name that indicates a location for a particular product;
 - The Cross Border Services Chapter expands service sectors to which trade rules apply thereby providing another opportunity for tobacco companies to circumvent local regulation;

- The Regulatory Coherence Chapter promotes tobacco industry representation in the stakeholder process enabling the industry to have more control over regulatory impact assessments;
- The Technical Barriers to Trade Chapter has the potential to limit how governments can cooperate with each other with regards to tobacco control measures; and
- The use of Tariff Schedules for tobacco control measures is undermined by increased market access by the tobacco industry.
- Dr. Stumberg also states that the proposed USTR “carve out” for tobacco in the TPPA is still under consideration. This carve-out provides for a limited regulation of tobacco products.

With TPP Tobacco Proposal On Hold, Stakeholders Eye Impact On EU FTA

- The fate of the USTR “carve out” proposal for the treatment of tobacco in the TPPA will have a significant bearing on how tobacco is treated in the upcoming EU FTA negotiations;
- The lack of current action by the USTR to “table” the carve out provision for the TPPA has led to a certain amount of uncertainty about how tobacco will ultimately be treated in either agreement;
- The U.S. is likely to have a greater ability to influence the possible inclusion of a tobacco carve out provision in the TPPA than in the EU FTA agreement where the European Union members are perceived as having a more equal ability to influence events.

USTR Still Mulling Two Possible Approaches For Next TPA Bill

- The USTR is still considering what legislative approach to take with Congress regarding approval on international trade treaties like the TPPA;
- The two options under consideration both involve renewal of Trade Promotion Authority (TPA); the first involves a TPA timeline approach which establishes a timeframe for congressional oversight and the second approach tethers TPA to a particular treaty such as the TPPA.

U.S. struggles with pharmaceutical goals in Asia trade talks

- The USTR is striving for a balance in the manner in which pharmaceuticals are handled in the TPPA ;
- One goal is to ensure strong patent and data protections for US drug manufacturers and the other competing goal is to ensure that developing countries have affordable access to medicine;

Miscellaneous Articles

Free trade versus food democracy

- Recent trends in worldwide agriculture places a new emphasis on healthier, locally grown produce with fewer pesticides;
- This trend towards local agricultural sustainability necessarily involves a series of local decisions which should be reflected in national trade policy;
- However, as reflected in the recent actions of the USTR, U.S. trade policy seems to ignore these trends, opting instead for a position which opposes “localization barriers to trade” and favors the removal of trade barriers which impede the free flow of goods and services;
- The USTR opposition to the realities of sustainable local (re:national) agriculture in favor of free flowing international agricultural trade fits in with the market demands of large international food corporations but contradicts the recent success of nations that have built domestic agricultural production;
- Proposed free trade provisions within the TPPA not only work against the agricultural success of small nation states but also work against the local interests of U.S. dairy farmers that worry about the free trade impact of dairy imports from countries like New Zealand.

India Takes Aim at U.S. State, Local Incentives for Renewable Energy Sector

- India has formally challenged a number of state and local renewable energy sector incentive programs by maintaining that these programs may be in violation of global trade rules;
- The formal objection lodged by India with the WTO, challenges these programs on the basis of incentives that are contingent upon the use of "domestic or state specific products";
- In particular, India's allegations are based on the provisions of Article III:4 of GATT which states that WTO members must treat imported goods the same as domestic goods with respect to all applicable federal, state and local regulations;
- The five programs challenged by India are offered in Michigan, California (2) and Texas (2);
- The U.S. has also filed a formal complaint against India for its requirement that alternative energy equipment manufactured in India must contain certain technical components manufactured in India.

Tar sands oil pipeline bill advances in Vermont Senate, in spite of warning from petroleum industry

- The Vermont Legislature is considering a bill which would increase the regulatory oversight of the expanded use of an existing oil pipeline running from Vermont to Maine to allow for the transmission of heavier tar sands oil;
- Among the several objections to this proposed legislation is the contention that such regulation would impose an "unconstitutional barrier" on foreign and interstate commerce.

Testing the Right to Frack

- Canada's ability to initiate legislation to regulate the practice of "fracking" is being challenged by international corporations from the US and China under the provisions of international trade treaties like NAFTA;
- The article suggests that treaties like NAFTA "actually give foreign firms more rights and legal protections than local companies";
- International companies can use the arbitration process provided by NAFTA to bypass local, provincial and federal regulations.



Japan's Possible Entry Into the Trans-Pacific Partnership and Its Implications

William H. Cooper

Specialist in International Trade and Finance

Mark E. Manyin

Specialist in Asian Affairs

April 8, 2013

Congressional Research Service

7-5700

www.crs.gov

R42676

Summary

On March 15, 2013, Prime Minister Abe announced that Japan would formally seek to participate in the negotiations to establish the Trans-Pacific Partnership (TPP). In taking this step, Prime Minister Abe has had to confront influential domestic interests that argued against the move. Among the most vocal have been Japanese farmers, especially rice farmers, and their representatives. In his March 15 statement, Prime Minister Abe acknowledged these domestic sensitivities, but also insisted that Japan needed to take advantage of “this last window of opportunity” to enter the negotiations, if it is to grow economically. Other Japanese business interests, including manufacturers, strongly support the TPP.

The TPP would be a free trade agreement (FTA) among at least the current 11 participants—Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. The United States and its TPP partners envision the agreement as “a comprehensive, next-generation regional agreement that liberalizes trade and investment and addresses new and traditional trade issues and 21st century challenges.”

The 11 countries must still reach a consensus, if Japan is allowed to join the negotiations. As part of the process, Japan has been discussing conditions for its entry into the negotiations with each of the 11 countries. It has completed discussions with six countries, while continuing discussions with the United States, Australia, Canada Mexico, and New Zealand. The United States has identified issues regarding autos, insurance, and beef that need to be addressed.

Congress has a direct and oversight role in the issue of U.S. participation in the TPP. It must approve implementing legislation, if the TPP is to apply to the United States. Some Members of Congress have already weighed in on whether Japan should be allowed to participate in the TPP and under what conditions. More may do so as the process proceeds.

The TPP is the leading U.S. trade policy initiative of the Obama Administration and a core component of Administration efforts to “rebalance” U.S. foreign policy priorities toward the Asia-Pacific region by playing a more active role in shaping the region’s rules and norms. As the second largest economy in Asia, the third largest economy in the world, and a key link in global supply/production chains, Japan’s participation would be pivotal to enhancing the credibility and viability of the TPP as a regional free trade arrangement.

Japan’s membership in the TPP with the United States would constitute a *de facto* U.S.-Japan FTA. A large segment of the U.S. business community has expressed support for Japanese participation in the TPP, if Japan can resolve long-standing issues on access to its markets for U.S. goods and services. However, the Detroit-based U.S. auto industry and the UAW union have expressed strong opposition to Japan participating in the TPP negotiations.

The TPP issue presents both risks and opportunities for the United States and Japan. On the one hand, if successful, it could reinvigorate an economic relationship that has remained steady but stagnant, by forcing the two countries to address long-standing, difficult issues, and allowing them to raise their relationship to a higher level. On the other hand, failure to do so could indicate that the underlying problems are too fundamental to overcome and could set back the relationship. It could signify the failure of the United States and/or Japan to deal with domestic opposition to a more open trade relationship.

Contents

Introduction.....	1
An Overview of the TPP.....	2
U.S.-Japan Economic Ties.....	3
U.S.-Japan Trade Trends.....	3
Managing the Trade Relationship.....	5
Pending Challenges and the TPP.....	6
Market Access for U.S. Beef.....	7
Market Access for U.S.-Made Autos.....	7
Insurance, Express Delivery, and Japan Post.....	8
Overall U.S. Objectives.....	9
Market Access.....	9
Rules-based Trade Framework and Impartial Dispute Settlement.....	9
Enhanced TPP.....	10
Foreign Policy Interests.....	11
Japan's Objectives.....	12
Japanese Politics and the TPP.....	14
The Views of U.S. Stakeholders.....	16
Outlook, Possible Outcomes, and Consequences.....	17

Figures

Figure 1. U.S. Merchandise Trade with Various Countries and Trading Blocs.....	11
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Tables

Table 1. U.S.-Japan Merchandise Trade, 2004-2012.....	4
Table 2. U.S.-Japan Trade in Services, 2004-2012.....	4
Table 3. Japan's Free Trade Agreements.....	13
Table 4. Comparative Japanese and U.S. Tariff Rates on Select Agricultural Products.....	15

Contacts

Author Contact Information.....	18
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Introduction

The United States is engaged in negotiations with 10 other countries to form a regional free trade agreement (FTA)—the Trans-Pacific Partnership Agreement (TPP).¹ In the negotiations, the United States and the other TPP partner-countries seek to build “a comprehensive, next-generation regional agreement that liberalizes trade and investment and addresses new and traditional trade issues and 21st century challenges.”² The TPP partners also envision the agreement to be a building block towards the establishment of a broader, Asian-Pacific regional FTA, sometimes referred to as the Free Trade Area of the Asia-Pacific (FTAAP).

On March 15, 2013, Japanese Prime Minister Shinzo Abe announced on March 15, 2013, that Japan would formally seek to participate in the negotiations to establish the TPP. The announcement followed an initial expression of interest in November 2011 by then-Prime Minister Noda. In the intervening months, Japanese supporters of the TPP, including representatives of major companies, and TPP opponents, including representatives of the very vocal and politically influential agricultural sector engaged in debate. In addition, lower house parliamentary elections led to the formation of a new government under the Liberal Democratic Party (LDP) and Abe as prime minister. In his March 15 statement, Prime Minister Abe acknowledged the interests and sensitivities of the agricultural groups, but he also insisted that Japan needed to take advantage of “this last window of opportunity” to enter the negotiations, if it is to grow economically.

U.S. and Japanese trade officials are engaged in preliminary discussions on conditions for Japanese entry into the discussions. The Obama Administration has identified issues regarding autos, insurance, and beef, which need to be addressed.

Congress has a direct and oversight role in U.S. participation in the TPP. It must approve implementing legislation, if a final TPP agreement is to apply to the United States. Some Members of Congress have already weighed in on whether Japan should be allowed to participate in the TPP and under what conditions. More may do so as the process proceeds.

The Obama Administration has been proceeding in negotiating the TPP as if trade promotion authority (TPA), which expired on June 30, 2007, were in force. TPA is the authority that Congress gives to the President to enter into trade agreements that can receive expedited legislative consideration. The Administration has been adhering to consultation requirements and notification deadlines that have been an integral part of previous TPA or fast-track statutes. To maintain this practice, the Obama Administration would have to notify both Houses of Congress 90 calendar days before it begins official negotiations (as opposed to preliminary discussions) with Japan on the TPP.

The TPP is the leading U.S. trade policy initiative of the Obama Administration and a pillar of its efforts to “rebalance” U.S. foreign policy priorities toward the Asia-Pacific region by playing a more active role in shaping the region’s rules and norms. As the second largest economy in Asia,

¹ The eight countries are: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam. The governments of Mexico and Canada also expressed interest and, after a series of consultations, were formally invited to join by the nine TPP partners on June 18 and June 19, 2012, respectively. They will join the negotiations officially in the fall of 2012.

² Trans-Pacific Partnership Leaders Statement, November 11, 2011.

the third largest economy in the world, and a key link in the global supply chain, Japan's participation would be pivotal to the credibility and viability of the TPP as a regional trade arrangement. The inclusion of Japan would expand the amount of U.S. trade and foreign investment that the TPP would cover if implemented.

For Japan, participation in the TPP could potentially transform its economy by providing unprecedented access to the Japanese market for foreign exporters and investors. It could also force Tokyo to confront structural economic problems that have long impeded economic growth. It would also symbolize Japan's continued position as an economic power in East Asia, an image that has been tarnished by decades of economic stagnation and the growth of China.

Japan's participation in the TPP would have important implications for the U.S.-Japan relationship. For example, it already has renewed a focus on long-standing issues, such as access to Japan's markets for autos, agricultural products, and insurance, which have remained irritants in the relationship. These issues will likely have to be addressed in one form or another, perhaps even before Japan is approved as a full-fledged TPP participant. New issues will undoubtedly also be raised in the process.

An Overview of the TPP

The TPP is an evolving regional free trade agreement (FTA). It was originally formed as the Trans-Pacific Strategic Economic Partnership—an FTA now in effect among Singapore, New Zealand, Chile, and Brunei (the so-called "P-4"). In the fall of 2008, the United States, along with Australia, Peru, and Vietnam, joined the negotiations to accede to the arrangement. Malaysia joined as the ninth negotiating partner in October 2010.

On November 14, 2009, President Obama committed the United States to engage with the TPP countries to transform the original P-4 pact into a regional arrangement with broad-based membership and "the high standards worthy of a 21st century trade agreement."³ After several months of discussions, the nine partners announced a framework for the agreement in time for the ministerial meeting of the Asia-Pacific Economic Cooperation (APEC) forum in Honolulu, Hawaii, which was held November 8-13, 2011. The TPP partners conducted a series of rounds since that time and are aiming to complete the agreement by the end of 2013.

As reflected in the framework, the TPP partners envision a comprehensive arrangement covering a broad range of trade and trade-related activities, similar in structure to a number of recently concluded U.S. FTAs. These activities include market access for goods and services; government procurement; foreign investment; technical barriers to trade; trade remedies; sanitary and phytosanitary measures;⁴ intellectual property rights; worker rights; and environmental protection. The TPP countries also agreed to pursue cross-cutting issues such as regulatory coherence, competitiveness and business facilitation, also known as transnational supply and production chains; the participation of small and medium-sized companies; economic development; and potential disciplines on the state-owned enterprises (SOEs).

³ Remarks of President Obama at Suntory Hall, Tokyo, Japan, November 14, 2009.

⁴ Sanitary and Phytosanitary measures are procedures used by government agencies to ensure the animal and plant products are safe for consumption.

The TPP participants also envision the TPP to go beyond typical FTAs by being:

- a regional agreement that facilitates trade by minimizing the “noodle bowl” effect that has been created by different sets of rules under the more than 100 bilateral and regional FTAs that exist in the Asia Pacific-region;
- an agreement that addresses trade challenges that are emerging in the 21st century, for example, cloud computing and SOEs, that have not been addressed in previous FTAs nor not fully in the World Trade Organization (WTO) because they did not exist or were considered not as important; and
- a “living agreement” that will not restrict its membership to the 11 countries but will be open to other countries acceding to it as long as they are willing to commit to its provisions and will take on new issues as they arise.

The leaders of the nine TPP countries instructed their negotiators to develop a completed legal text as soon as possible. The complexity of the issues at hand, the diversity of the membership, and the possibility of new members, such as, Japan, and newly invited Canada and Mexico, suggest challenges ahead for the negotiators.

U.S.-Japan Economic Ties

A brief overview of U.S.-Japan economic ties can provide context for understanding U.S. and Japanese interests in the TPP and the potential implications from various perspectives. It could also shed light on opportunities and challenges presented by an FTA that includes the United States and Japan. A U.S.-Japan FTA is not a new idea, but it is a policy option that has failed to take hold in the past because of some fundamental issues which have been seemingly intractable.

U.S.-Japan Trade Trends

The United States and Japan are the world's first and third largest economic powers. Together they account for over 30% of gross world product.⁵ The two countries remain very important economic partners, accounting for large shares of each other's foreign trade and investment, even though their relative economic significance to one another has declined over the last few years. In 1999, Japan slipped from being the second largest U.S. trading partner to the third largest. In 2004, it slipped to number 4, where it has remained. Until 2007, the United States was Japan's largest trading partner, but it slipped to number 2 since 2007.⁶

The global financial crisis and economic downturn added another dimension to the relationship as the two countries have grappled with the severe impact of the crisis on their respective economies, while working with their partners in the G-20 to coordinate a multilateral response.⁷ The impact of the March 11, 2011 earthquake and subsequent tsunami and nuclear accidents in northeast Japan also affected trade, although not as much as originally anticipated.

⁵ CRS calculation based on data in CIA, *World Factbook*, <http://www.CIA.gov>.

⁶ Global Trade Atlas.

⁷ The G-20 countries are: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the United States, and the European Union.

U.S.-Japanese bilateral trade in goods and services declined significantly in 2009 over 2008 levels because of the global economic downturn but has picked up since. (See **Table 1** and **Table 2**.)

Table 1. U.S.-Japan Merchandise Trade, 2004-2012

(\$ billions)

Year	U.S. Exports	U.S. Imports	Total Trade	U.S. Trade Balances
2004	54.4	129.6	184.0	-75.2
2005	55.4	138.1	193.5	-82.7
2006	59.6	148.2	207.8	-88.6
2007	62.7	145.5	208.2	-82.8
2008	66.6	139.2	205.8	-72.3
2009	51.2	95.9	147.1	-44.8
2010	60.5	120.3	180.8	-59.8
2011	66.2	128.8	195.0	-62.2
2012	70.0	146.4	216.4	-76.3

Source: U.S. Department of Commerce, U.S. Census Bureau.

Table 2. U.S.-Japan Trade in Services, 2004-2012

(\$ billions)

Year	U.S. Exports	U.S. Imports	Total Trade	U.S. Trade Balances
2004	36.0	21.3	57.3	14.8
2005	42.5	23.8	66.3	18.7
2006	42.0	25.5	67.5	16.5
2007	41.2	26.2	67.4	15.0
2008	42.3	25.7	68.0	16.6
2009	41.4	22.9	64.3	18.5
2010	45.1	25.9	71.0	19.2
2011	44.9	27.5	72.4	17.4
2012*	47.1	29.4	76.5	17.7

Source: U.S. Department of Commerce, Bureau of Economic Analysis.

Note: * Preliminary.

Raw trade data likely underestimate Japan's importance because they do not readily measure Japan's role in the East Asian supply and production networks that produce goods exported to the United States. The two countries are also economically tied through investment flows. For example, Japanese investors are the second largest group (next to China) of foreign holders of U.S. treasury securities and, therefore, U.S. government debt and of direct investments in the U.S. economy.

In the 1980s and 1990s, the bilateral economic relationship was the centerpiece of U.S. and Japanese foreign economic agendas. Persistent and increasing U.S. merchandise trade deficits with Japan, sharp increases in Japanese exports to the United States of high-value manufactured products, such as cars, and large volumes of Japanese investments in the United States (including purchases of high-profile properties, such as the Empire State Building) stoked fears in the United States of Japan as an economic threat to the United States. Many scholarly and popular books and journal articles were written on the subject.⁸

However, since the mid-1990s, the trade relationship with Japan has been a lower priority for U.S. officials. One reason for the shift may be the rise of China as a global trade and economic power, and source of challenges and opportunities to U.S. trade policymakers. Symbolic of this rise are the relative merchandise trade balances with Japan and China. While U.S. merchandise trade deficits with Japan have remained relatively constant in recent years, the U.S. deficits with China have risen significantly. In 2012, the U.S. trade deficit with Japan was \$76.3 billion, while the trade deficit with China was \$315.1 billion.⁹

Another reason may have been that Japan's economic problems over the last two decades have made it seem less of a competitive "threat."¹⁰ In addition, the level of Japanese foreign direct investments in the United States has declined. Furthermore, security issues, such as North Korea's nuclear program (the United States and Japan are parties to talks on North Korea's fledgling nuclear program) and the relocation of U.S. troops in Japan, have overshadowed bilateral trade relations as a priority.¹¹ Nevertheless, trade-related tensions remained, albeit below the surface.

Managing the Trade Relationship

Over the years, U.S.-Japan economic relations have experienced degrees of friction, sometimes to the point of threatening the stability of the alliance. The United States dominated the economic relationship with Japan for many years after World War II. The United States was by far the largest economy in the world, and Japan was dependent on the United States for national security. The United States set the agenda, and the issues on the agenda were driven by the U.S. demands for Japan to curb exports to the United States and/or to remove barriers to U.S. exports and investments.

In the 1960s and 1970s, the primary issues were Japan's perceived protectionist economic policies that it implemented through high tariffs and other border restrictions. As Japan's economy became more developed and competitive and as it negotiated reductions in its tariffs with other members of the General Agreement on Tariffs and Trade (GATT)—now the World Trade Organization (WTO)—the United States focused on non-tariff barriers, including "behind the border" measures, such as government regulations that, while not ostensibly protectionist, may be applied in a way that restricts trade. Certain measures are not covered by WTO

⁸ For example, Clyde V. Prestowitz, *Trading Places: How We Allowed Japan to Take the Lead*, New York: Basic Books, 1988.

⁹ For more information on the rise of China in U.S. economic relations, see CRS Report RL33536, *China-U.S. Trade Issues*, by Wayne M. Morrison.

¹⁰ For more information on Japan's economic problems, see archived CRS Report RL30176, *Japan's "Economic Miracle": What Happened?*, by William H. Cooper.

¹¹ For more information on the overall U.S.-Japan relationship, see CRS Report RL33436, *Japan-U.S. Relations: Issues for Congress*, coordinated by Emma Chanlett-Avery.

agreements and are currently not readily addressed in trade negotiations since they serve non-trade functions. Examples of such measures include

- domestic taxes on car purchases and other regulations said to discriminate against sales of imported vehicles;
- a government contract bidding system that favors certain domestic providers of construction services;
- zoning regulations that discourage the establishment of large retail stores that are more likely to sell imported products than the smaller stores the regulations are designed to protect;
- government health insurance reimbursement regulations that discourage the purchase of newer, leading-edge pharmaceuticals and medical devices, many of which are imported; and
- government subsidies for the production of semiconductors.

To address these non-tariff barriers Japan and the United States employed, largely at the latter's instigation, special bilateral frameworks and agreements to conduct their government-to-government economic relations. These arrangements included

- the Market-Oriented Sector-Specific (MOSS) talks started in 1985;
- the Structural Impediments Initiative (SII), begun in March 1989;
- the United States-Japan Framework for a New Economic Partnership, begun in 1993;
- the Enhanced Initiative on Deregulation and Competition Policy (the Enhanced Initiative), begun in 1997;
- the U.S.-Japan Economic Partnership for Growth (The Economic Partnership) begun in 2001; and
- the United States-Japan Economic Harmonization Initiative, launched in 2010, which now operates as the primary bilateral forum for bilateral discussions.

The two countries also concluded bilateral agreements or memoranda of understanding (MOUs), whereby Japan agreed to address U.S. concerns about its trading practices for specific products, including autos and semiconductors.

These arrangements varied in their approaches. However, they shared some basic characteristics: they were bilateral; were designed to remedy U.S. - Japan trade problems by focusing on regulations and other fundamental barriers; and were typically initiated by the United States. However, these arrangements were only of limited success, judging by the fact that many of the issues they were supposed to address remain.

Pending Challenges and the TPP

Many of that issues that have continually irritated the U.S.-Japan economic relationship could be addressed within the TPP. U.S. policymakers and other stakeholders have identified three issues that, if resolved, would be considered "confidence-building measures" that could boost U.S.

support of Japan's inclusion in the TPP. The issues relate to: Japanese restrictions on imports of U.S. beef; market access in Japan for cars made by Detroit-based U.S. manufacturers; and preferential treatment for insurance and express delivery subsidiaries of state-owned Japan Post.¹²

Market Access for U.S. Beef

In December 2003 when Japan imposed a ban on imported U.S. beef (as did some other countries) in response to the discovery of the first U.S. case of bovine spongiform encephalopathy (BSE or "mad cow disease") in Washington State. In the months before the diagnosis in the United States, nearly a dozen Japanese cows infected with BSE had been discovered, creating a scandal over the Agricultural Ministry's handling of the issue (several more Japanese BSE cases have since emerged). Japan had retained the ban despite ongoing negotiations and public pressure from Bush Administration officials, a reported framework agreement (issued jointly by both governments) in October 2004 to end it, and periodic assurances afterward by Japanese officials to their U.S. counterparts that it would be lifted soon.

In December 2005, Japan lifted the ban after many months of bilateral negotiations, but reimposed it in January 2006 after Japanese government inspectors found bone material among the initial beef shipments. The presence of the bone material violated the procedures U.S. and Japanese officials had agreed upon. The then-U.S. Secretary of Agriculture Johanns expressed regret that the prohibited material had entered the shipments.

In July 2006, Japan announced it would resume imports of U.S. beef from cattle 20 months old or younger. The first shipments arrived in August 2006. Members of Congress had pressed Japan to lift restrictions on imports of U.S. beef from even older cattle. U.S. officials met with Japanese agricultural officials September 14-15, 2010, for technical discussions but produced no clear indication of resolution of the issue. On August 4, 2011, a bipartisan group of Senators sent a letter to Secretary of Agriculture Vilsack and to USTR Ron Kirk, urging them to press Japan (and China) to end restrictions on imports of U.S. beef. In December 2011 Japan announced that it was reassessing its BSE-related restrictions with the objective to raise the maximum age of cattle from which U.S. beef can be exported to Japan.

On February 1, 2013, the Japanese government loosened its restrictions on beef imports from the United States to allow beef from cattle 30 months or younger for the first time since December 2003. According to a joint press release from the Office of the United States Trade Representative and the Department of Agriculture, the Japanese government's Food Safety Commission would continue to monitor shipments of U.S. beef and would consider the possibility of allowing U.S. beef from cattle of any age to be imported into Japan.

Market Access for U.S.-Made Autos

Auto and auto-parts-related trade and investment have been a very sensitive set of issues in the U.S.-Japan economic relationship. The issue has its roots in the late 1970s and early 1980s, when U.S. imports of Japanese-made vehicles surged as a result of the increase in U.S. consumer

¹² Office of the USTR, *U.S., Japan Hold High-Level Discussions on the Trans-Pacific Partnership*, <http://www.ustr.gov/about-us/press-office/press-releases/2012/february/us-japan-hold-high-level-consultation-trans-pacif>.

demand for smaller vehicles, largely in response to the rapid increase in gasoline prices, while demand for U.S.-manufactured cars plummeted. Facing pressure from the U.S. auto industry and pressure from Congress in the form of limits on imports of Japanese made cars, the Reagan Administration persuaded Japan to agree in 1981 to voluntary export restraints. Japanese manufacturers responded to the restraints by establishing manufacturing facilities in the United States and exporting high-valued, passenger cars. U.S. manufacturers asserted that Japan employed various measures to restrict sales of foreign-made cars in Japan and the use of U.S.-made parts in Japanese cars manufactured in the United States. These issues were the subject of bilateral negotiations and agreements through the 1990s. The agreements were mostly in the form of Japanese government pledges to ensure that government regulations did not impede the sale of U.S.-made cars in Japan and voluntary efforts on the part of Japanese manufacturers to increase the use of U.S.-made auto parts in cars made in the United States. The U.S. government pledged to implement programs to promote the export of U.S.-made cars in Japan.

The intensity of the issue had subsided somewhat but has regained attention in the context of Japan's possible participation in the TPP negotiations. (See TPP discussion below.) The three Detroit-based car manufacturers—Chrysler, Ford, and General Motors—charge that Japanese government regulations continue to prevent them from obtaining their fair share of Japanese domestic vehicle sales. They cite the traditionally small share of total cars sales in Japan that consist of imported cars—around 7.4%. U.S. manufacturers account for a small share of sales of imported cars in in Japan—2.1% in 2011.¹³

Insurance, Express Delivery, and Japan Post

Japan is the world's second largest insurance market, next to the United States. U.S.-based insurance providers have found it difficult to enter the market, especially in life and annuity insurance. They have been concerned about favorable regulatory treatment that the government gives to the insurance subsidiary Japan Post Insurance of Japan Post, the national postal system, which holds a large share of the Japanese domestic insurance market. Japan Post subsidizes the insurance operations from revenues from its other operations. Also, Japan Post Insurance is not subject to the same regulations as other, privately owned insurance providers, both domestic and foreign-owned. Similarly, U.S. express delivery providers have charged that Japan Post's express delivery company obtains subsidies from the government-owned parent agency that gives it an unfair competitive advantage.

On October 1, 2007, the Japanese government of then-Prime Minister Junichiro Koizumi introduced reforms to privatize Japan Post and a major objective of his administration. The Bush Administration and many U.S. companies, particularly insurance companies, supported these reforms. However, successor governments led by the Democratic Party of Japan (DPJ) have taken steps to roll back the reforms. On March 12, 2012, the government introduced, and on April 27, 2012, Japan's legislature passed, a bill into law to loosen regulatory requirements. According to industry reports and other commentaries, the bill reverses the reforms that the Koizumi government introduced.¹⁴

¹³ Japan Automobile Manufacturers Association, <http://www.jama.org/pdf/MVS2011.pdf>.

¹⁴ Coalition of Service Industries, *Proposed Japanese Legislation Complicates Entry in to the TPP*, press release, April 6, 2012. Also, Parker, David A. and Matthew P. Goodman, *Japan Post Reform: Return to Sender*, commentary from Center for Strategic and International Studies, May 30, 2012.

Among other things, the United States wants the Japanese government to refrain from allowing Japan Post to expand its coverage of services until a “level playing field” for competition between its services and those offered by privately owned providers. In addition, the U.S. government wants enhanced transparency in the development and implementation of regulations pertaining to Japan Post-provided services. The U.S. government and U.S.-based providers have had similar concerns about insurance services sold by cooperatives (kyosai) that are not subject to the same regulatory authorities as private insurers and have argued give them an unfair advantage over U.S. and other privately owned and operated companies.¹⁵

Overall U.S. Objectives

Japan’s possible entry into the TPP touches on a range of U.S. trade and foreign policy objectives. Acting USTR Demetrios Marantis greeted positively Prime Minister Abe’s March 15, 2013 statement but stipulated:

Since early last year, the United States has been engaged with Japan in bilateral TPP consultations on issues of concern with respect to the automotive and insurance sectors and other non-tariff measures, and also conducting work regarding meeting TPP’s high standards. While we continue to make progress in these consultations, important work remains to be done. We look forward to continuing these consultations with Japan as the 11 TPP countries consider Japan’s candidacy for this vital initiative in the Asia-Pacific region.¹⁶

The United States is also working with Japan on “gap issues,” to make sure that Japan would be prepared to take steps to meet goals of the TPP in areas that Japan has not addressed in its previous FTAs.¹⁷

Market Access

Japan’s entry into TPP negotiations could likely expand U.S. trade and investment opportunities in Japan. The target for the United States would be to get Japan to liberalize non-tariff measures, such as certain government regulations, which have been a more significant irritant than tariffs in U.S.-Japan trade relations. The TPP, as envisioned and being negotiated by the current set of 11 countries, would cover at least some of these non-tariff measures that Japan maintains. If Japan enters the TPP negotiations, the United States and Japan would have a framework within which to address these long-standing market access issues.

Rules-based Trade Framework and Impartial Dispute Settlement

One drawback of bilateral frameworks that the United States and Japan have used in the past is that they have had no formal dispute settlement mechanism. For example, a number of trade

¹⁵ United States Trade Representative, *National Trade Estimates Report on Foreign Trade Barrier*, 2013.

¹⁶ United States Trade Representative, *Statement by Acting U.S. Trade Representative Demetrios Marantis on Japan’s Announcement Regarding the Trans-Pacific Partnership*, March 15, 2013.

¹⁷ *World Trade Online*, March 21, 2013.

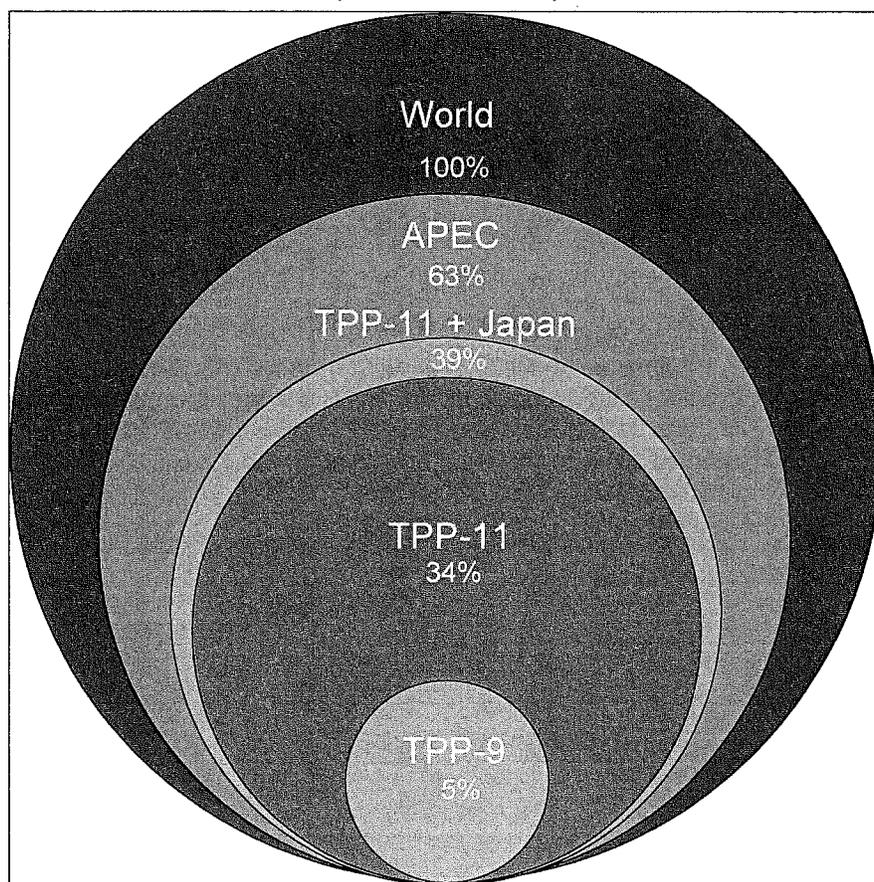
disputes in the 1980s and 1990s—including on market access for U.S.-made autos and autoparts in Japan, Japanese trade practices in semiconductors, and access to Japanese markets for construction services—became highly politicized with threats of U.S. unilateral action, potentially undermining the overall relationship. Disputes usually were resolved through brinkmanship but often did not produce meaningful changes in Japan's trade practices or a significant increase of U.S. exports of the products in question. The TPP would provide a set of mutually agreed-upon rules that go beyond the WTO but would likely use an impartial, multi-party dispute settlement mechanism like that used in the WTO that would reduce the role of one-on-one confrontations in resolving issues.

Enhanced TPP

Japan would increase the economic importance of the TPP from the U.S. perspective. It would increase the amount of U.S. merchandise trade that the TPP (the original 9 countries plus Canada and Mexico) would cover, from 34% to 39% based on 2011 data and would also increase trade in services and foreign investment activity within the TPP. (See **Figure 1.**) Japan would increase the share of the world economy accounted for by TPP countries (including Canada and Mexico), from around about 30% to about 38%.¹⁸

¹⁸ CRS calculations based on data in nominal dollars contained in the *CIA World Factbook* at <http://www.cia.gov> and in CRS Report R42344, *Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis*, by Brock R. Williams.

Figure 1. U.S. Merchandise Trade with Various Countries and Trading Blocs
(shares of total, 2011)



Source: Analysis by CRS. See CRS Report R42344, *Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis*, by Brock R. Williams, Data from U.S. ITC.

Japan's participation might strengthen the U.S. position on many issues within the TPP. The United States and Japan share some common objectives, including strong intellectual property rights protection; protection of foreign investment; clear rules of origin to facilitate trade; and market access for services.

Foreign Policy Interests

In addition to trade and investment interests, Japan's participation in the TPP could affect U.S. political and foreign policy interests. The U.S. entry into the TPP negotiations is part of the Obama Administration's foreign policy and military "rebalancing" to the Asia-Pacific—often referred to as the "pivot" to the Pacific—announced in 2011.¹⁹ The pivot refers to a series of diplomatic, military, and economic measures that the United States has taken or plans to initiate to influence the evolving rules and norms of the Asia-Pacific region. Many policymakers and

¹⁹ For more analysis of the "pivot," see CRS Report R42448, *Pivot to the Pacific? The Obama Administration's "Rebalancing" Toward Asia*, coordinated by Mark E. Manyin.

analysts believe that China's pursuit of its own bilateral and multilateral economic arrangements has produced a competition of sorts over the shape of Asia's future economic architecture, in which the United States and several other countries in the Pacific are pushing for a deeper set of regional economic rules and expectations than Chinese leaders prefer.²⁰ The potential inclusion of Japan, as the second largest economy—and richest economy on a per capita basis—in East Asia could transform this struggle between alternative visions of regional trade rules. Additionally, U.S. and Japanese participation in the same free trade agreement could arguably be viewed as a means to reaffirm their alliance. The long-running bilateral relationship at times over the years has been overshadowed by U.S. and Japanese interests and concerns elsewhere in Asia, e.g., China and the Korean Peninsula, and in other parts of the world.

Japan's Objectives

Underlying the arguments for Japan to join the TPP talks is a growing feeling among many Japanese that, after two decades of relatively sluggish growth, Japan's economic and political influence is waning in comparison with China and with middle powers such as South Korea. The rapid aging and gradual shrinking of Japan's population has added to a sense among many in Japan that the country needs to develop new sources of growth to maintain, if not increase, the country's living standards. Japanese proponents of TPP have called for joining the talks for a number of overlapping reasons, some defensive in nature, others more proactive:

- **A desire to promote Japanese growth and prevent the hollowing out of Japan**—i.e., the relocation of Japanese companies to other countries—by expanding Japanese exports, especially to the fast-growing Asia-Pacific region. The decade-long stalemate in the WTO's "Doha Round" of trade talks, plus the explosion in bilateral and multilateral FTAs over the past decade, has led Japan to cautiously pursue its own FTAs.²¹ As noted earlier, Japan is an important link in the Asia's global supply chains, and the TPP could facilitate operations within the supply chain. Conversely, greater trans-Pacific economic integration could potentially erode Japan's place in these manufacturing and export networks.²² In his March 15, 2013 press conference announcing his decision to seek entry into the TPP negotiations, Prime Minister Abe spoke of the multiple commercial benefits Japan would derive from joining, and how doing so would help "leave to our children and our children's children a strong Japan...."²³
- **A feeling that Japan is being left behind in negotiating FTAs.** Although Japan has signed 13 FTAs—what it calls Economic Partnership Agreements (EPAs)—it has none with a major economic power, with the possible exception of the 2011 Japan-India EPA, and many of them exclude agricultural trade. (See **Table 3.**) In contrast, South Korea, the country many Japanese now compare themselves to, has signed FTAs with the United States, the European Union (EU), and in 2012 opened

²⁰ August 2012 conversation with Takeshi Terada, Professor, Doshisha University.

²¹ For historical background on Japan's FTA strategy, see archived CRS Report RL33044, *Japan's Free Trade Agreement Program*, by Raymond J. Ahearn.

²² For more information on supply chains, CRS Report R40167, *Globalized Supply Chains and U.S. Policy*, by Dick K. Nanto.

²³ Japanese Prime Minister's Office, "Press Conference by Prime Minister Shinzo Abe," Friday, March 15, 2013 (provisional translation).

negotiations with China. If Japan is left behind in the FTA race, the feeling runs, its companies will be left at a competitive disadvantage.²⁴ Japan has belatedly tried to make up for the gap in 2013 by launching FTA negotiations with the EU and with China and South Korea on a trilateral FTA.

- **A desire to help shape the rules of economic activity in the Asia-Pacific and beyond.** In his announcement of Japan's bid to participate, Prime Minister Abe said that the TPP would likely serve as "a basis for rule-making" in other multilateral trade negotiations.²⁵ If Japan waited any longer to join the talks, in his view, it would be too late to help write the TPP's rules. "Now is our last chance," Abe said, "Losing this opportunity would simply leave Japan out from the rule-making in the world. Future historians will no doubt see that "the TPP was the opening of the Asia-Pacific Century."²⁶

Table 3. Japan's Free Trade Agreements

In Force	Negotiating	Under Discussion
Japan—ASEAN ^a	Japan—Australia	
Japan—Brunei	ASEAN+3	Japan—Canada
Japan—Cambodia	ASEAN+6	
Japan—Chile	Japan—European Union	Japan—Mongolia
Japan—India	Japan—China—South Korea	Japan—South Korea
Japan—Indonesia		TPP
Japan—Malaysia		
Japan—Mexico		
Japan—Peru		
Japan—Philippines		
Japan—Singapore		
Japan—Switzerland		
Japan—Thailand		
Japan—Vietnam		

Source: Japanese Ministry of Foreign Affairs, <http://www.mofa.go.jp/policy/economy/fta/index.html>.

²⁴ For instance, in his opening statement at a November 2011 press conference to discuss Japan's decision to explore joining the TPP talks, Prime Minister Noda said, "as a trading nation, in order to pass down the affluence we have cultivated to our future generations and to develop our society into one with vigor, we must incorporate the economic growth of the Asia-Pacific region." Japanese Prime Minister's Office, "Press Conference by Prime Minister Yoshihiko Noda," Friday, November 11, 2011. In his March 2013 press conference, Prime Minister Abe said "If Japan alone should become inward-looking, we would have no chance of growth."

²⁵ Abe specifically mentioned the 16-nation Regional Comprehensive Economic Partnership (RCEP), a 16-nation economic grouping among nearly all East Asian countries plus Australia, India, and New Zealand. Thus, in Abe's vision, TPP and RCEP appear to complement rather than compete with one another.

²⁶ "Press Conference by Prime Minister Shinzo Abe," Friday, March 15, 2013.

- a. ASEAN stands for the Association of Southeast Asian Nations, which consists of Brunei Darussalam, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam.
- **A belief that entering the TPP will help promote economic reforms inside Japan.** Over the years, many experts and government officials have argued that Japan needs structural reform to spur its economy. A number of Japanese commentators and officials believe that one way to overcome resistance to reform from vested interests is through negotiating a comprehensive, high-standard FTA such as the TPP, which will help reform-minded groups and individuals by giving them political cover. Also, negotiating the TPP could potentially enable Japan to gain benefits by trading structural reforms for concessions from negotiating partners.
- **A hope that entering the TPP will help Japan's strategic situation in Asia.** Joining the TPP would complement Japan's moves in recent years to augment the U.S.-Japan alliance by strengthening Tokyo's relationships with middle powers in and around the Asian region. Behind this push is a concern that China's rise is diminishing Japan's influence and jeopardizing its security and economic interests. Since leading his party to power in late 2012, Prime Minister Abe has made one of his top priorities restoring Japanese standing, through revitalizing its economy and strengthening relations with the United States.²⁷

Japanese Politics and the TPP

The question of whether Japan should join the TPP negotiations has often been front-page news in Japan and has generated enormous political controversy since serious discussion of the possibility began in 2009 and 2010. Both Prime Minister Abe's ruling Liberal Democratic Party (LDP) and the largest opposition party, the Democratic Party of Japan (DPJ) are split over the TPP issue. Until Abe's March 2013 announcement, the frequent turnover among Japanese prime ministers—Abe is the seventh premier in as many years—failed to produce the leadership that might unify the pro-TPP camps across the two parties. These political weaknesses exacerbated the traditional institutional limitations of the prime minister's powers, making it easier for motivated interests to effectively veto government action and stymie the efforts of Abe's two predecessors from unambiguously trying to enter the talks. For the moment, Abe appears to have surmounted these obstacles, in part by using his high popularity ratings as leverage against opponents in his LDP and by centralizing decision-making on TPP issues in the prime minister's office. The latter move could blunt opposition to the TPP within the LDP. Abe came to power in December 2012 after leading the LDP to victory in national elections, ending the DPJ's roughly three-year reign.

Japan's powerful agricultural institutions, most notably the nationwide agricultural cooperative organization (JA), have been the most vocal opponents of joining the TPP, as has been true of virtually all trade liberalization agreements that Japan has pursued for the past 40-50 years. JA has called for over 800 farm items to be exempt from tariff elimination.²⁸ Japan's farm sector has taken advantage of the fact that Japan's rural areas are over-represented in the Diet. As a result,

²⁷ See, for instance, Japanese Prime Minister's Office, "Press Conference by Prime Minister Shinzo Abe," December 26, 2012; and Shinzo Abe, "Japan is Back," Speech at the Center for Strategic and International Studies, February 22, 2013.

²⁸ "Abe Surprises on TPP," *The Oriental Economist*, Volume 81, No.3, March 2013.

farm lobbies have significant sway in both the ruling LDP and opposition DPJ and have supported an array of policies that benefit the agricultural sector. For example, many farm products remain protected behind high tariff barriers such as rice (778%) and wheat (252%). (For others, see **Table 4**.) Additionally, a range of other policies ensure that Japanese farming remains small scale, performed increasingly by aging and part-time farmers, and generally unproductive compared to farms in most other countries. The Japanese government provides around ¥1 trillion (about \$12 billion) annually in direct income to farming households.²⁹ The Abe government and the LDP reportedly are considering a new subsidy package that could be offered to Japan's farm sector to compensate for losses that would be expected if a TPP agreement is reached.³⁰

Table 4. Comparative Japanese and U.S. Tariff Rates on Select Agricultural Products
(Average applied ad valorem MFN rates)

Category	Japan	United States
Animal Products	18.9	2.3
Dairy Products	93.3	20.3
Fruits & Vegetables	10.6	4.9
Coffee & Tea	15.3	3.2
Cereals & Preparations	42.0	3.5
Oilseeds, Fats & Oils	9.0	4.6
Sugars and Confectionary	27.2	10.3
Beverages & Tobacco	14.6	15.6

Source: WTO Tariff Profiles.

JA has allied with a variety of other powerful interest groups to mount an aggressive campaign against entering the TPP. The most significant of these other groups may be the Japan Medical Association, which argues that TPP will erode if not eliminate Japan's universal healthcare insurance system because it will be forced to pay higher prices for medicines and medical equipment. Many experts argue that until Abe's March 2013 announcement, Japan's traditional agriculture interests, medical lobby, and other TPP opponents successfully controlled the debate about TPP inside Japan. They have gained the support of scores of lawmakers, including over 200 LDP members (over half the LDP's parliamentary caucus) that prior to Abe's decision joined a group calling for Japan not to join the TPP. Nonetheless, in mid-March, after considerable internal debate the LDP formally announced it supported Abe's decision.³¹ Around the same time, an LDP panel on the TPP designated five product lines – rice, sugarcane/sugar products, wheat, dairy products, and beef – as “important items” that must be protected.³² In 2012, prior to the elections that swept Abe into power, the Abe-led LDP had said it opposed entering the negotiations unless the final agreement allowed for some exemptions, a position that many interpreted as designed to appeal to anti-TPP voters. At the time, the LDP also objected to some

²⁹ Aurelia George Mulgan, “Japan's New Agricultural Policy Plan Neglects Trade Liberalisation,” East Asia Forum blog, November 2, 2011, <http://www.eastasiaforum.org>.

³⁰ “Analysis: New Farm Subsidy May Turn Into Another Pork Barrel,” *Nikkei Report*, March 26, 2013.

³¹ Liberal Democratic Party, “LDP's Decision to Participate in the TPP,” March 13, 2013.

³² “LDP Designates Rice, Sugar, Others as ‘Important Items’,” U.S. Embassy Tokyo, Japan Morning Highlights, March 13, 2013.

investor-state dispute settlement requirements that might be agreed to in the TPP, and argued that government procurement and financial services must have their basis in Japan's "special characteristics."³³ It is unclear to what extent these views have or will become Japanese government positions. The reservations about TPP among many LDP members indicate that, if Japan enters the talks, the Abe government may face difficulties gaining domestic support for making painful concessions, particularly if Abe's public approval ratings decline.

The Views of U.S. Stakeholders

In a December 7, 2011 *Federal Register* notice, the Office of the USTR solicited the views of private sector stakeholders on whether Japan should be included in the TPP. USTR received over 100 responses. Around 40% of the responses were from agricultural firms, another 25% came from manufacturing firms, 15% from services providers and the remainder from various non-government organizations (NGOs) and business associations. Some of the responses came from Japanese companies or associations representing Japanese companies.

In a few cases, the respondents expressed outright opposition to Japan's participation. One of the most notable members of this group is the American Automotive Policy Council (AAPC).³⁴ The AAPC represents the three Detroit-based auto manufacturers—Chrysler, Ford and General Motors. In its statement, the AAPC said:

The AAPC opposes Japan joining the Trans-Pacific Partnership negotiations at this time.... Japan's trade barriers in the auto sector cannot be addressed easily or quickly, and will needlessly slow down the negotiations. To date Japan has not indicated a willingness to change its decades-long practice of maintaining a closed automotive market. Given the systemic trade imbalance and lack of willingness to reform, a U.S. free trade agreement with Japan would only lock-in the already one-way trade relationship that Japan's closed auto market has created, and significantly delay, if not prevent proceeding with a high quality TPP trade agreement with other more compatible trade partners in the important and rapidly growing Pan-Pacific region.

The AFL-CIO also opposes Japan's participation in the TPP, having stated:

Given the numerous unknowns about the yet unfinished Trans-Pacific FTA, it is difficult to provide significant technical advice or even formulate well-grounded opinion with respect to the possible impacts on working families of Japan's accession to the Trans-Pacific FTA.

As such, the AFL-CIO has serious concerns regarding the premature expansion of the Trans-Pacific FTA negotiations to include Japan or any other nation before US negotiators first demonstrate an ability to successfully negotiate an agreement that will produce genuine benefits for American workers and increase domestic production.

[Japan's] markets are notoriously closed to foreign goods, and this is not the result of high tariff barriers.... To gain significant and substantial market access to Japan, the United States

³³ Aurelia George Mulgan, "Can Trade Talks Drive Reform in Japan?" *Current History*, Volume: 111, Issue: 746, September 2012, p. 242.

³⁴ AAPC, The American Automotive Policy Council's (AAPC) Views Regarding Japan's Expression of Interest in the Trans-Pacific Partnership (TPP) Trade Negotiations, January 13, 2012.

Trade Representative (USTR) would have to adopt a new and revolutionary approach.... If USTR is not willing to 'think outside the box' and abandon its currently slavish approach to free trade, it is difficult to see how Japan's accession to the Trans-Pacific FTA can benefit American working families.³⁵

In some cases, respondents expressed strong support for Japan's inclusion in the TPP. For example, Caterpillar, Inc. argues that the TPP would be the vehicle for addressing Japan's remaining non-tariff barriers.³⁶ The U.S. Chamber of Commerce and the U.S.-Japan Business Council, in separate submissions, also expressed support for Japan's participation in the TPP negotiations. However, each group asserted that Japan would have to address issues that have plagued relations with member companies, including regulatory barriers, favored treatment of insurance and express delivery subsidiaries of Japan Post, and government procurement, among others.³⁷

Some Members of Congress have weighed in on the issue. For example, in a November 8, 2011, bipartisan letter to USTR Ron Kirk, the Chairmen and Ranking Members of the House Ways and Means Committee and the Senate Finance Committee stated that Japan's participation "would represent an opportunity for much needed change in Japan's approach to international trade." They assert that, while Japan is a long-time U.S. ally and friend in Asia,

paramount considerations in evaluating a request relating to a trade agreement must be whether Japan is willing and able to meet the high standard commitments inherent in U.S. free trade agreements and whether inclusion would truly open this historically closed market to the benefit of our companies, workers, and farmers.

These comments and others from stakeholders suggest that the debate within the United States and negotiations with Japan on the TPP will be difficult and complex. The legacies of a sometimes contentious bilateral economic relationship have carried over into the TPP negotiations.

Outlook, Possible Outcomes, and Consequences

Japan's negotiations with the United States, as well as its negotiations with Australia and New Zealand, continue with no publically announced deadline or timeframe. The Obama Administration has stated that it wants to take as much time as necessary but would not let these negotiations interfere with the pace of the negotiations among the current TPP countries.

If Japan enters the TPP, it could represent a major change in the shape and dynamic of the U.S.-Japan economic relationship. Over the years, trade policymakers, business representatives, and regional specialists in both countries have floated the concept of a U.S.-Japan FTA. Until the TPP talks began in earnest, the idea had not gained traction because the hurdles—Japanese agricultural policy, problems in auto trade, government regulations and practices—have been too high to

³⁵ AFL-CIO, Comments in Response to "Request for Comments on Japan's Expression of Interest in the Proposed Trans-Pacific Partnership Trade Agreement."

³⁶ Caterpillar's Views Regarding Expanding Trans-Pacific Partnership Negotiations to Include Japan, Mexico, and Canada, January 11, 2012, Submission to the Office of the USTR.

³⁷ U.S. Chamber of Commerce January 13, 2012, letter to USTR and U.S.-Japan Business Council, Public Comment, *Japan's Expression of Interest in the Proposed Trans-Pacific Partnership Negotiations*.

overcome. These same hurdles would need to be overcome if Japan and the United States are able to work successfully in the TPP.

The outlook for Japan's entry into the TPP negotiations remains unclear at this time and depends on a number of factors. Perhaps the most critical factor is whether Japanese political leaders can reach a political consensus on whether to proceed with the negotiations and then whether Japan can reach agreement with the TPP partners on conditions of its entry. The timing of Japan's decision on whether to proceed has likely been delayed by domestic politics. Recently, in return for the LDP and the New Komeito Party agreeing to a vote on the consumption tax, Prime Minister Noda promised to dissolve the Lower House "at an early date." As a result, new elections for the lower house would be called, possibly resulting in changes in control of the legislature. Therefore the decision on TPP will likely not be before this December at the earliest but most likely later. Japan expert Ed Lincoln has suggested the decision will likely be pushed even farther out.³⁸

The outcome of this issue could have implications for the U.S.-Japan bilateral trade relationship, the overall alliance, and the TPP. The TPP issue presents opportunities and challenges for the United States and Japan. On the one hand, if successful, it could reinvigorate an economic relationship that has remained steady but stagnant, by forcing the two countries to address long-standing, difficult issues, and allowing them to raise their relationship to a higher level. On the other hand, failure to do so could indicate that the underlying problems are too fundamental to overcome and could set back the relationship. It could signify the failure of the United States and/or Japan to deal with domestic opposition to a more open trade relationship.

The implications for the overall U.S.-Japanese alliance are less certain. While the TPP would likely be viewed as strengthening the alliance and failure of the negotiations could be considered a setback, the alliance is also built on common national security concerns, such as North Korea's nuclear program and the economic and military advancement of China, which could well trump trade problems.

Furthermore, Japan's possible entry into the TPP is largely viewed, on the one hand, as an important step in forming a wider Asia-Pacific regional trade arrangement. On the other hand, the absence of Japan could undermine the credibility of the TPP as a viable regional trade arrangement and a setback for Asia-Pacific economic integration.

Author Contact Information

William H. Cooper
Specialist in International Trade and Finance
wcooper@crs.loc.gov, 7-7749

Mark E. Manyin
Specialist in Asian Affairs
mmanyin@crs.loc.gov, 7-7653

³⁸ *World Trade Online*, August 9, 2012.

THE AUSTRALIAN

Japan wins spot in mega trade pact

AAP APRIL 20, 2013 9:53PM

JAPAN has won its bid to enter talks on a massive Pacific trade pact that includes Australia.

The Trans-Pacific Partnership (TPP) would account for more than 40 per cent of the global economy.

Japan had to win over Canada to be included in the US-driven partnership, which also includes Brunei, Chile, Canada, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

Canada had been the sole nation of the 11 in the proposed agreement that still opposed Tokyo's participation.

"These consultations have been informed by a robust and ongoing engagement with Canadian stakeholders, and it's that engagement that helped inform this process," Canadian Trade Minister Ed Fast said.

"We look forward to continuing to work together (with Japan) to deepen our trade and investment relationship in a manner that will generate significant benefits for hard-working people in both our countries."

Canada's approval came after bilateral talks on the sidelines of an Asia-Pacific Economic Cooperation trade ministers' meeting in Surabaya.

Washington earlier this month gave Japan the thumbs-up for talks on the free-trade agreement despite opposition from Japanese farmers and some US labour groups and manufacturers.

President Barack Obama has championed the TPP as a way to boost the US economy through trade and to build a US-driven order in a fast-growing region where China - which is not part of the talks - is gaining clout.

To allay concerns of higher competition in the US automotive industry, Japan, the world's third-largest economy, agreed that US tariffs on its cars would be phased out at the latest possible time allowed by a future accord.

Japan's Ministry of Economy APEC office director Ken Sasaji said Japan's participation in the talks was a major step toward the TPP's aim to create a free-trade zone among nations on the Pacific rim.

"As APEC leaders agreed, our final destination is FTAAP - a free-trade agreement in the Asia-Pacific," Sasaji told reporters.

"Now Japan is promoting various efforts to promote economic integration and economic partnerships, especially the trans-Pacific partnership, which is one of the most important efforts."



FOR IMMEDIATE RELEASE

April 24, 2013

Contact: Sean Neary/Meaghan Smith
(202) 224-4515

BAUCUS SEES TRANS-PACIFIC PARTNERSHIP TRADE AGREEMENT AS MAJOR SPARK TO U.S. ECONOMY

Finance Chairman Sets June Target to Introduce Fast Track Authority and Job Training Bill

WASHINGTON – At a Senate Finance Committee hearing today, Chairman Max Baucus (D-Mont.) said Congress must capitalize on the Trans-Pacific Partnership (TPP) trade agreement to benefit from the fast pace of economic growth in many Asian economies, boost U.S. exports and create jobs in Montana and across the country. Senator Baucus also said he is working to renew Trade Promotion Authority and the critical job training program Trade Adjustment Assistance and set a target to introduce a bipartisan bill by June.

“The TPP presents tremendous opportunities to expand U.S. exports and support hundreds of thousands of good-paying jobs here in America. The Asia-Pacific economies are some of the fastest growing in the world, and Asia is importing more and more goods from around the world. The United States needs to share in that growth, and the TPP offers the way to do so,” Senator Baucus said. **“I am also looking forward to working to renew Trade Promotion Authority and Trade Adjustment Assistance this year. Fast track authority will help us conclude the TPP negotiations, and that will bring concrete benefits for American ranchers, farmers, businesses and workers.”**

In 2011, the GDP of nearly all of the Asia-Pacific economies grew faster than the U.S. growth rate of 1.8 percent. More than half of them enjoyed growth above the world average of 3.8 percent. And Asia’s share of world imports grew from 18.5 percent in 1983 to 30.9 percent in 2011. Senator Baucus said the TPP is the best way for the U.S. to share in that growth.

Senator Baucus said Japan’s inclusion in the TPP talks represents a significant step towards a more unified Pacific region and an opportunity to build on recent progress breaking down Japan’s barriers to trade. Earlier this year, Japan lowered its age-based restrictions on U.S. beef exports and began accepting them in much larger quantities. Japan is also the top market for U.S. pork products, importing more than the second- and third-ranking markets combined.

Senator Baucus also said the TPP agreement must address unscientific barriers to U.S. agriculture products, issues with state-owned enterprises and intellectual property protection and enforcement.

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Safeguards for Tobacco Control: Options for the TPPA

*For full analysis, see American Journal of Law and Medicine,
2013 Symposium Issue, by Robert Stumberg
April 13, 2013 – v5c*

TPPA threats to tobacco control

The tobacco industry uses an international campaign of litigation and lobbying to chill, divert or delay tobacco-control policies. Existing flexibilities in trade agreements might enable countries to defend their measures, but the multi-year, multi-million dollar cost of doing so is daunting. The tobacco industry seeks to reinforce its strategy in trade negotiations to expand market access, strengthen trade rules, and expand investor rights. The industry stands to benefit from at least six chapters of the proposed Trans-Pacific Partnership Agreement (TPPA). Based on publicly available drafts, these chapters add WTO-plus rules that could be used in later rounds of litigation or to bolster industry threats in lobbying:

- (1) *Investment chapter* – expands investor-state arbitration. Philip Morris International uses investment agreements to challenge tobacco-control measures; PMI argues that the measures frustrate their expectations and ability to market tobacco products.
- (2) *Intellectual property chapter* – adds a new right to use a trade name that indicates a location even if the product does not originate from it (e.g., Parmigiano or Marlboro). This proposal excludes wine and spirits, but it still applies to tobacco.
- (3) *Cross-border services chapter* – expands the service sectors to which trade rules apply (e.g., tobacco distribution, packaging, and advertising); it potentially limits domestic regulation of such services. It could be used to challenge restrictions on advertising, promotion, or sales as “zero quotas.”
- (4) *Regulatory coherence chapter* – promotes industry stakeholder participation in decision-making; promotes regulatory impact assessments, which the tobacco industry has used to generate evidence to support its litigation.
- (5) *Technical barriers to trade chapter* – potentially limits how governments cooperate to set standards or guidelines for tobacco control.
- (6) *Tariff schedules* – expand market access in countries with high tobacco tariffs (notably Vietnam). Studies show that after high tariffs are reduced, prices go down, marketing increases, competition increases, and smoking rates go up in the range of 10%, often double that increase among women and girls, who are specifically targeted.

Intersecting frameworks: trade promotion and tobacco control

The Framework Convention on Tobacco Control requires 176 parties to fill the regulatory framework by exercising their regulatory powers. The WTO agreements require 157 members to refrain from exercising regulatory powers that restrict trade.

The trade and tobacco frameworks have overlapping coverage. The following chart maps where six chapters of the TPPA intersect with types of tobacco-control measures. At most of these intersections, the tobacco industry litigates or lobbies in its campaign to shrink the policy space available for regulation. In the TPPA negotiations, the industry expects to benefit from WTO-plus elements such as expanded coverage (e.g., regulation of services), stronger trade rules (e.g., use of trademarks), and investor protection (e.g., expanded opportunities to litigate).

Intersecting Frameworks

Tobacco Control: Selected FCTC measures	Trade Promotion: Selected TPPA chapters					
	Goods, tariff reduction	Goods, technical barriers	Intellect. property	Cross- border services	Regulatory coherence	Investment
6. Price & tax measures 2b. Restrict duty-free sales	N	N			N	N
Product contents 9. Regulate (or ban) 10. Disclose	N	N			N	N
11. Packaging & labeling 1a. Misleading 1b. Warnings 2. Constituents & emissions		N	N	N	N	N
13. Advertising 1. Comprehensive ban 2. Restrictions 3. Minimum 4. Eliminate cross-border 5. Eliminate sponsorship		N	N	N	N	N
5. General 3. Protect from commercial interests					N	N

Limits of the GATT/GATS health exception

If a country is challenged under the TPPA, it might be able to defend a tobacco-control measure under a health exception, which typically incorporates the GATT/GATS exception (WTO exception) by reference. Six elements of an exception create a complex formula for defending tobacco measures:

- (1) *Scope* – Based on the model of U.S. free trade agreements, the baseline health exception applies to selected chapters of the agreement but not to specific rules being used to litigate against tobacco-control measures (including the investment chapter, among others).
- (2) *Protection* – Tobacco investors use MFN to incorporate rules from outside the primary agreement that provide more favorable treatment. The draft TPPA investment chapter excludes procedural treatment from MFN, but MFN would still apply to substantive investor rights.
- (3) *Deference* – The WTO agreements have no terms of deference to non-WTO treaties.
- (4) *Nexus* – The necessity test creates uncertainty with stages of analysis that enable litigation to challenge the contribution of a measure, weigh that contribution against trade restrictiveness, and identify less-restrictive alternatives. Some scholars predict that investment arbitrators would apply the necessity test with less deference than trade panels.
- (5) *Objective* – Some measures serve multiple purposes, including non-health purposes like revenue or business licensing; their connection to protecting health may be indirect.
- (6) *Additional restrictions* – Even a “necessary” measure can be challenged as having a discriminatory effect in the market as applied. This works against incremental change or measures that freeze the market at its current stage of development.

Win or lose, the threat of costly litigation has long been part of the tobacco industry's strategy to chill, divert or delay implementation of tobacco-control measures. Each of the exception's six elements provides an opportunity to litigate, and together they create uncertainty of outcomes. The most certain litigation threat is not that tobacco companies or their allies will win; it is the likely litigation costs of one to two million USD per year for several years – more than the tobacco control budget for most developing countries.

U.S. proposal for a TPPA tobacco exception

Anticipating potential litigation, the United States has vetted a narrowly crafted TPPA exception for regulation of tobacco products. But this does not protect legislation or measures adopted by tax, licensing or customs authorities. In place of the necessity test, it requires scientific evidence, a burden of proof that the GATT/GATS exception does not require. The U.S. proposal would not have protected against the clove cigarette dispute that the United States lost, the WTO claims against Australia, or the investment claims against Australia or Uruguay.

The U.S. proposal is in the form of a summary that has not been tabled. What follows is the original summary with each key term noted to show, first, the shortcomings of that term, and second, stronger alternatives for that term. The alternatives are also compared in the chart below, so the notes are keyed to columns of that chart.

Original summary of the U.S. proposal

“^[1] Language in the general exceptions chapter that ^[2a] allows health authorities ^[2b] to adopt ^[2c] regulations ^[2d] on specific tobacco products/classes ^[3a] that impose origin-neutral, ^[3b] science-based restrictions ^[4] ^[5] in order to ^[6] safeguard public health.”

Column 1: Scope

1. U.S. proposal – “*Language in the general exceptions chapter*”

1. *Shortcoming* – It is not clear whether the U.S. proposal applies to all chapters or whether it applies to selected chapters or rules, excluding those that contain rules that are being used to challenge tobacco control-measures.

1. *Alternatives* – Make clear that the tobacco exception applies generally: “*Nothing in this agreement [prevents] or [applies].*”

Column 2: Protection

2a. US proposal – “*allows health authorities in TPP governments*”

2a. *Shortcoming* – By covering only health authorities the U.S. proposal leaves out non-health authorities that are often involved in tobacco control, e.g., licensing, taxation, and customs authorities.

2a. *Alternatives* – Stronger protection would provide that nothing “*prevents a party.*” Note that the U.S. government takes the position that the “nothing prevents” language does not apply to the investment rule that requires compensation for expropriation. An exception that does not apply to expropriation would be significantly compromised. A stronger alternative that works on expropriation would be: *Nothing in this Agreement “applies” to measures [covered by the exception].* Alternatively, an interpretive clause could be added: For greater certainty, this exception applies to any duty to compensate for direct or indirect expropriation.

2b. U.S. proposal – “to adopt”

2b. *Shortcoming* – The GATT/GATS exception covers measures that a party adopts or enforces. To cover only measures that a country *adopts* appears to leave out existing measures that a country enforces.

2b. *Alternatives* – Use the GATT/GATS language: “*adopting or enforcing*.”

2c. U.S. proposal – “regulations”

2c. *Shortcoming* – By covering only regulations, the U.S. proposal appears to not cover legislation, which is how most governments establish their tobacco-control measures.

2c. *Alternatives* – Use the GATT/GATS exception, which applies broadly to “*measures*.”

2d. U.S. proposal – “on specific tobacco products/classes”

2d. *Shortcoming* – Covering only regulations on tobacco products appears to not cover measures that apply to tobacco-related services (e.g., distribution, packaging, advertising) or investments (e.g., trademarks).

2d. *Alternatives* – Use “*measures*.” The scope of measures could be limited to “*tobacco-control measures*,” but the clearest way to limit the class of measures is in the objective (see column 6 below).

Column 3: Additional restrictions

3a. US proposal – “that impose origin-neutral,”

3a. *Shortcoming* – “Origin-neutral” is a synonym of national treatment; a measure can be a de facto violation of either.

3a. *Alternatives* – Use “*facially origin-neutral*.” A stronger alternative is to delete “origin-neutral” as an additional restriction.

3b. U.S. proposal – “science-based restrictions”

3b. *Shortcoming* – Proving that restrictions are “science-based” is a heavier burden than the GATT/GATS health exception, which requires only a qualitative, logical rationale. The tobacco industry has a long history of generating scientific evidence to counter a defending government’s science. For example, in the *Cloves Cigarettes* case, some science was not enough.

3b. *Alternatives* – A stronger alternative is to delete “science-based” as an additional restriction.

Column 4: Deference

4. U.S. proposal – none

4. *Shortcoming* – Without terms of deference, the threat of extended litigation to defend a measure based on this exception is more likely.

4. *Alternatives* – Terms of deference would be: “*that a party considers appropriate*.”

Column 5: Nexus

5. U.S. proposal – “in order to”

5. *Comment* – This is an appropriate nexus from a health perspective; it requires a rational connection between a measure and its health objective.

5. *Alternatives* – An alternative nexus would be: “*that contribute or aim to.*” This would cover measures that are either (a) designed to achieve health objectives, or (b) make a contribution to achieving health objectives, even if they serve multiple purposes.

Column 6: Objective

6. U.S. proposal – “*safeguard public health*”

6. *Comment* – This is a broad health objective, which is good. A reason to consider alternatives is this: If the prior elements of the U.S. proposal are strengthened, negotiators may want to narrow the objective of safeguarding public health in order to avoid “slippery slope” opposition from other sectors such as alcohol and processed food products.

6. *Alternatives* – If the strongest objective, protecting public health, is too broad to address “slippery slope” concerns, an alternative is “*reduce use of tobacco products or its harms.*”

Examples of how alternatives can be combined

The alternatives can be mixed and matched in various combinations. For example:

“Nothing in this Agreement prevents a party from adopting or enforcing ...

... measures that it considers appropriate for science-based protection of public health.”

... measures that contribute or aim to reduce use of tobacco products or its harms.”

... measures that it considers appropriate to reduce use of tobacco products or its harms.”

“Nothing in this Agreement applies to measures that contribute to or aim to reduce tobacco use or its harms.”

Additional interpretive clauses:

For greater certainty,

... this exception applies in addition to other exceptions; it has no effect on operation of those exceptions.

... this exception applies to any duty to compensate for direct or indirect expropriation.

... if this exception applies to a measure, it is consistent with MFN treatment.

The clearest and strongest alternative – Use an exclusion

The more elegant alternative to a complex exception is to simply exclude tobacco-control measures. An exclusion provides better protection than a defense; it contains litigation at the initial stage of determining whether a treaty applies to a measure. If the political will is lacking for a full exclusion, there are several ways to draft a partial exclusion.

See the next page for a chart that summarizes the alternatives noted above.

Alternatives to the U.S. Proposal for a Tobacco Exception

1. Scope	2. Protection	3. Additional restrictions	4. Deference	5. Nexus	6. Objective
U.S. Proposal					
[¹] Language in the general exceptions chapter: <i>Unclear whether it applies to all chapters and articles.</i>	[^{2a}] allows health authorities in TPP governments [^{2b}] to adopt [^{2c}] regulations [^{2d}] on specific tobacco products/ classes	that impose [^{3a}] origin-neutral, [^{3b}] science-based restrictions	[⁴] <i>none</i>	[⁵] in order to	[⁶] safeguard public health
First alternative for key terms ... read columns as better to best protection					
[¹] <i>Add to the chapters covered by the exception: For purposes of [listed chapters plus] ... investment, intellectual property, regulatory coherence, etc.</i>	[^{2a}] [nothing] prevents a party [^{2b}] from adopting or enforcing [^{2c}] measures [^{2d}] <i>none</i>	[^{3a}] [that are] facially origin neutral [^{3b}] <i>none – see “contribute to” as a nexus</i>	[⁴] <i>none</i>	[⁵] to	[⁶] reduce use of tobacco products or its harms
Second alternative for key terms					
[¹] Nothing in this Agreement	[^{2a}] prevents a party [^{2b}] from adopting or enforcing [^{2c}] measures	[^{3a}] <i>none</i> [^{3b}] <i>none</i>	[⁴] <i>none</i>	[⁵] that contribute or aim to	[⁶] reduce use of tobacco products or its harms
Third alternative for key terms					
[¹] Nothing in this Agreement	[^{2a}] applies to [^{2c}] measures	[^{3a}] <i>none</i> [^{3b}] <i>none</i>	[⁴] that a party [it] considers appropriate	[⁵] to	[⁶] protect public health

Examples of how alternatives can be combined

Nothing in this Agreement prevents a party from adopting or enforcing ...
 ... measures that contribute or aim to reduce use of tobacco products or harms.
 ... measures that it considers appropriate for science-based protection of public health.
 ... measures that it considers appropriate to reduce use of tobacco products or harms.
 Nothing in this Agreement applies to measures that contribute to or aim to reduce tobacco use or its harms.

Interpretation clauses: For greater certainty, ...
 ... this exception applies in addition to other exceptions; it has no effect on operation of those exceptions.
 ... this exception applies to any duty to compensate for direct or indirect expropriation.
 ... if this exception applies to a measure, it is consistent with MFN treatment.

> **Inside U.S. Trade - 04/12/2013**

> **With TPP Tobacco Proposal On Hold, Stakeholders Eye Impact On EU FTA**

> **Posted: April 11, 2013**

>

> Although the United States continues to hold off on tabling a draft proposal in the Trans-Pacific Partnership (TPP) talks that would establish a special "safe harbor" for tobacco regulations, members of Congress and U.S. stakeholders are already beginning to think through what this potential new development in U.S. trade policy would mean for the forthcoming U.S.-European Union trade negotiations.

>

> Industry sources opposed to the draft proposal concede that, if the White House ultimately goes ahead with it in the context of TPP, that will set a precedent and would likely mean that the Office of the U.S. Trade Representative would then look to table the same proposal in the context of talks with Europe. "You can't do it in TPP and not do it in the EU FTA," one industry source lamented.

>

> This source said that, if the U.S. goes ahead with its tobacco proposal in TPP, business groups opposing it would likely demand that the U.S. completely reverse course in the EU FTA talks. However, this outcome would probably be unrealistic, this source conceded, and U.S. business groups will end up focusing on ensuring that the U.S. and EU do not agree to anything that would be even more far-reaching than the outcome on tobacco in the TPP context.

>

> Conversely, sources on both sides of the issue agreed that if the opposition to the U.S. proposal from the business community and members of Congress is so strong that the administration abandons it in the TPP context, it would appear to make little sense for the administration to reopen this issue in the talks with Europe. Either way, then, TPP could set an important precedent for what position the U.S. takes in the trans-Atlantic talks, sources agreed.

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> Of course, it is entirely possible that the EU would reject the tobacco proposal even if the U.S. were to table it in the bilateral trade talks. Although the EU typically takes a more cautious approach than the U.S. when it comes to health matters -- for instance, the EU is much slower to approve genetically modified organisms (GMOs) for consumption -- some trade officials in Europe believe that the U.S. proposal is misguided and would likely oppose it, sources said.

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> Overall, many trade lawyers have joined with U.S. tobacco companies and business groups in criticizing the U.S. proposal. They argue that World Trade Organization rules already provide sufficient leeway to governments to implement measures meant to promote public health, including in the area of tobacco control, and some fear that special rules for tobacco could lead to the misguided perception that general WTO rules are too weak.

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> Several opponents to the U.S. tobacco proposal added that it would be ironic for the U.S. to demand a specific "safe harbor" for tobacco litigation while simultaneously urging the EU to speed up GMO approvals, for instance, in the context of the FTA talks. One industry source warned that if the U.S. demanded a tobacco exemption, the EU would surely demand a similar exemption for the beef hormones issue, or some other sensitive topic.

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> But U.S. anti-smoking advocates are hoping that the European Commission as a whole will decide to push for special tobacco provisions in a U.S.-EU trade deal, regardless of which position the U.S. takes. They note that European countries are already strong proponents of tobacco control, and the European Commission last January published a draft revision to its Tobacco Products Directive (TPD) that would further restrict the way tobacco

products can be sold.

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> In the TPP context, the U.S. is the most powerful negotiator and will likely have a large say over what special language, if any, is ultimately included in a TPP deal, one anti-smoking advocate noted. In the trans-Atlantic talks, by contrast, the two negotiating partners are more evenly paired, meaning that an EU decision to push tobacco control in the bilateral talks could carry real weight and may be difficult for the U.S. to dismiss, the advocate said.

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> In an interview, Rep. Henry Waxman (D-CA) -- a major proponent of tobacco control and a supporter of the USTR draft TPP proposal -- underscored the fact that Europe is a proponent of tobacco control, and hinted that he would like to see the administration move ahead with its "safe harbor" proposal in both trade contexts.

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> "As the administration lays the groundwork for negotiations of an EU-U.S. FTA, I will continue to advocate for protecting the authority to regulate tobacco products under the Tobacco Control Act," he said. At its core, the U.S. draft proposal is an effort to ensure it can regulate on tobacco pursuant to that act. The WTO's Appellate Body ruled that the legislation is discriminatory, and the U.S. has until July 24 to comply with the case findings.

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> "The EU has taken strong action to regulate tobacco products, and there is great opportunity for collaboration in an EU FTA to protect public health measure in Europe and the United States," Waxman added. The California congressman is not only urging USTR to go forward with its proposal in TPP, but has even argued that it should strengthen the proposal by excluding tobacco products from tariff cuts (Inside U.S. Trade, June 29).

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> A U.S. tobacco control advocate was similarly optimistic. "We are gearing up for the EU-U.S. agreement," he said. "The EU has a major change to their tobacco policies working its way through the system, so they should be sensitive to this issue." This advocate stressed that civil society groups are "still developing our strategy and building partnerships." This source also emphasized that strategy in the EU FTA context "will depend on the lessons of the TPP."

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> Both anti-smoking advocates and business representatives said it remains unclear why USTR publicly described its draft TPP proposal last May but has continually held off on tabling it. However, many speculated that the administration must have been surprised by the level of opposition, and subsequently decided to hold off on doing anything with the proposal until the end of the negotiations in order to avoid confronting opponents unnecessarily over the issue.

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> One industry source said it is still a bit unclear whether and how the TPP negotiations will come together, meaning it would make little sense for USTR to insist on its tobacco proposal at this point. Sources on all sides of the debate said the administration is not actively engaging with the private sector on its proposal at this time. Anti-smoking advocates, and even some industry sources, believe the administration will still ultimately table its proposal in the TPP talks.

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> Still, anti-smoking advocates appear to be getting a bit nervous. In a March 28 letter to Deputy National Security Adviser Michael Froman, five major health groups urged the administration to formally table the proposal at the next round of negotiations, which is taking place in mid-May in Peru.

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> "We urge the United States to offer the tobacco proposal during the upcoming round of negotiations in Peru," they wrote. "Since the goal is to conclude the TPP agreement later this year, there is increasing urgency to put forth the tobacco language." The groups expressed their disappointment that, 10 months after USTR posted the

outlines of the proposal on its website, negotiators have still not formally tabled it.

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> That letter also notes that Secretary of State John Kerry, who previously served as chairman of the Senate Foreign Relations Committee, has urged USTR to move ahead with the TPP tobacco proposal. Kerry did so in a separate letter dated June 7, 2012, that was sent to then-USTR Ron Kirk. In that letter, Kerry not only supported the proposal but argued that USTR should completely exclude tobacco products from the confines of a TPP deal.

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> The new letter sent last month by anti-smoking groups was signed by the American Academy of Pediatrics; Cancer Action Network; American Heart Association; American Lung Association; and the Campaign for Tobacco-Free Kids.

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> In the interview, Waxman said he continues to urge USTR "to table it at the earliest possible opportunity." Last year, many observers said the proposal had been given the "green light" for inclusion in the TPP talks by the White House despite facing some skepticism from officials in USTR. The proposal was championed by the Department of Health and Human Services (HHS), they said, which favored special treatment for tobacco in a final TPP deal.

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> Inside U.S. Trade - 04/12/2013, Vol. 31, No. 15

> **Inside U.S. Trade - 04/12/2013**

> **Larsen: USTR Still Mulling Two Possible Approaches For Next TPA Bill**

> **Posted: April 11, 2013**

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> After meeting this week with Acting U.S. Trade Representative Demetrios Marantis, Rep. Rick Larsen (D-WA) told Inside U.S. Trade that USTR appears to still be working out which approach it prefers when it comes to the renewal of Trade Promotion Authority (TPA). Republicans in Congress, as well as some Democrats, are eager to start the conversation on TPA in order to help facilitate passage of new trade deals and set the direction of U.S. trade policy.

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> "I get the impression that USTR is trying to engage Congress on what is the best approach," the congressman said. The two options that USTR is considering is whether to take a "TPA timeline" approach, under which Congress would provide the administration with TPA for a set period of time -- as has been done in the past -- or whether TPA should be tethered to individual trade agreements, Larsen said.

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> "It sounds like there is still some deliberation on which approach would be better, and USTR is still very open to congressional input on that question," he said.

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> Larsen said he had not made up his mind yet on which approach would be preferable. Providing TPA for a set number of years would "put pressure on the administration and negotiating partners to get something done" before the authority expires because only those agreements concluded while TPA was still in force would enjoy the guarantee of an up-or-down vote in the U.S. Congress, he explained.

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> On the other hand, the congressman conceded that by tying TPA authority to individual agreements, the U.S. could avoid potentially awkward situations where Congress is faced with the prospect of passing a trade agreement that does not enjoy TPA protections. This problem is not insurmountable -- especially in the House, where the leadership can craft a closed rule to ward off amendments -- but it can add legislative complications in the Senate.

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> Larsen said he was glad that Marantis was discussing the issue of TPA with members of Congress, but hinted that the conversation may stay at a fairly preliminary level until the next USTR is in place. "Right now, I'm glad Demetrios is on the Hill, but he is still acting USTR," Larsen pointed out.

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> The congressman, as well as other members of the New Democrat

Coalition, met with Marantis on April 10 in order to discuss U.S. trade policy. That conversation covered topics like TPA, the Trans-Pacific Partnership (TPP) negotiations and the upcoming trade talks between the United States and European Union. However, Larsen said that the conversation was fairly general on many of these topics.

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> When it comes to Japan -- which is vying to join the ongoing TPP talks -- Marantis provided few details on whether and how this will occur. "With regards to Japan, no, there is nothing specific on when and how, except that what the negotiating countries have made clear is that if and when Japan comes in, they need to be able to be able to come in on the same timeline as the negotiations are moving on," he said.

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> According to Larsen, current TPP partners "want to conclude these negotiations, and delaying them for the sake of a new country probably is not a top priority," he said.

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> Inside U.S. Trade - 04/12/2013, Vol. 31, No. 15

U.S. struggles with pharmaceutical goals in Asia trade talks

By Doug Palmer
WASHINGTON | Thu Mar 28, 2013 5:31pm EDT

(Reuters) - The United States is striving to find an appropriate balance in Asia-Pacific free trade talks between providing strong patent and data protections for U.S. drug manufacturers and ensuring poor people have access to medicine, a U.S. trade negotiator said on Thursday.

"We're looking to promote innovation and R&D (research and development) that results in the development of new medicines. But we are also - and this is just as important - we are trying to promote access to medicines for all," Deputy Assistant U.S. Trade Representative Probir Mehta said.

The remarks at a discussion organized by the Washington International Trade Association show the conflicting pressure on President Barack Obama's administration in talks on the Trans-Pacific Partnership (TPP), a proposed free trade agreement between the United States and ten countries in the Asia-Pacific region that negotiators hope to conclude this year.

Mehta said the United States would not make a new proposal on pharmaceuticals when TPP negotiators meet in Peru <<http://www.reuters.com/places/peru>> in mid-May for their 17th round of talks but would continue to exchange information on each country's policies "with a view to finding possible common ground."

U.S. drug manufacturers want the strongest possible intellectual property rights (IPR) protections in the pact, but advocacy groups such as Oxfam and Doctors Without Borders are warning TPP countries such as Vietnam and Malaysia that such terms threaten to raise the price of medicines in the region by restricting production of generic drugs.

Former U.S. Trade Representative Ron Kirk summarized the situation at a meeting of the President's Export Council shortly before he left office this month.

"It is very difficult to convince (other TPP countries) of the need to embrace, accept, and implement robust IPR chapters when, many times, we have NGOs (non-governmental organizations) from here in the United States that are sitting there and giving them contrary information," Kirk said.

The tension is illustrated in the area of "biologic medicines," where U.S. drug companies such as Pfizer and Eli Lilly (and many members of Congress) want test data for new drugs protected for 12 years in the TPP pact to delay the development of generic versions.

Congress provided 12 years of data protection for biologics in Obama's healthcare reform legislation, the Affordable Care Act, in line with what many experts say is needed to recoup the average \$1.2 billion cost of developing the drugs.

But in annual budgets, the White House has proposed lowering the period of data exclusivity to seven years to encourage faster development of generic versions of the drugs and to save billions in Medicare and Medicaid costs.

So far, U.S. negotiators have not asked for 12 years of data exclusivity for biologics in the TPP, prompting Senator Orrin Hatch, the top Republican on the Senate Finance Committee, to recently ask whether the Obama administration was trying to change U.S. law to the lower standard through the TPP talks.

On Thursday, Mehta said "biologic medicines are clearly the future of the biopharmaceutical industry and certainly a very important area of innovation in the United States. But at this point, we are still reflecting on input and discussing this issue with our trading partners."

Although that stance might seem encouraging for groups that favor early availability of generic medicines, Stephanie Burgos, a senior policy adviser at Oxfam America, said she fears the Obama administration is simply waiting until the end of the negotiation to press its demands, forcing poorer TPP countries such as Vietnam and Malaysia to decide whether to accept tough intellectual property provisions or walk away.

"Instead of a compromise, it's like 'let's put this on hold until everything else is agreed' in the hope that countries that are objecting to the provisions won't have the wherewithal to continue objecting," Burgos said.

Jay Taylor, vice president for international affairs at Pharmaceutical Research and Manufacturers of America, said generic versions of most drugs are already available in TPP countries and shouldn't be affected by the pact.

"The TPP, if done correctly, should reduce tariffs and extra additive costs to medicines that ultimately hurt patients," Taylor said.

By lifting incomes in the region, it also should make medicines relatively more affordable, he said. (Reporting by Doug Palmer; Editing by Jim Loney)

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Where lawmakers come to blog

Free trade versus food democracy

By Jim Harkness, president, Institute for Agriculture and Trade Policy, Minneapolis, Minn. - 04/16/13 01:20 PM ET

There has been a quiet revolution going around the world, as communities and nations retake control of their food systems. In the U.S., more people are taking a look at processed foods at the supermarket and opting instead for healthier choices, grown locally with fewer pesticides. People in Cambodia have taken a hard look at what's happening to their climate, soil and seeds, and figured out a new, low-cost way to produce rice, increasing production and putting farmers in charge. Brazilians are favoring local farmers growing sustainable foods for school lunch programs, lowering hunger rates dramatically as a result.

This trend is larger than individual choice: people are using their rights as citizens to make sure governments, from local to national, support these innovations. Unfortunately, U.S. trade policy seems wedded to a discredited notion of how we should get our food and who should benefit.

These local shifts involve choices, and in many cases choices that favor local producers over transnational corporations, local markets over imports; it seems that the U.S. Trade Representative (USTR) has a problem with that. In its latest report, the agency highlights what it calls the growing problems of "localization barriers to trade," and vows renewed vigilance against these barriers to the free flow of goods and services. A free flow to where? And for whose benefit?

In the U.S., local food is sometimes dismissed as an elite niche market, but in the rest of the world it has another meaning entirely. For decades, Western aid and trade officials have told poor countries to rely on international markets to feed their people; governments were forced to cut support for "inefficient" things like local food production and emergency grain reserves; domestic farming was undermined as cheap imports flooded in. When the price of internationally traded food spiked in 2007-08, and again in 2011, the poorest couldn't afford staples like wheat and rice, and global hunger soared. The developing countries that fared best were those that built domestic production and insulated themselves from volatile global markets. So while the USTR attack on all things local may be great for the U.S. food giants, it pushes an economic model that has been discredited by actual events.

Talks for a Trans-Pacific Partnership (TPP) that would unite markets of 11 countries have been going on for several years. Japan just announced it will enter the talks, despite the vigorous opposition of local farmers concerned about what such an agreement could mean for cherished local rice varieties and rural livelihoods. U.S. dairy farmers, already weakened by rising feed prices, worry that opening the U.S. market to imports from New Zealand will devastate local farms and cooperatives in favor of processed milk solids imports.

Now, President Obama has announced that he will launch new talks for a Transatlantic trade deal uniting the troubled economies of the EU and the United States. As we've seen before, instead of creating new opportunities for growth, this further "competition" will only serve to drive standards down to the lowest common denominator to the benefit of multinational corporations.

For years, the U.S. government has acted on behalf of agribusiness and large pharmaceutical companies to challenge EU bans on GMO foods and limits on the use of antibiotics and dubious drugs like ractopamine and bovine growth hormone in meat and dairy production. Those limits are the result of hard-fought battles by European farmers, scientists and consumers to slow the advance of questionable technologies and instead embrace the precautionary principle, which compels governments to make sure food additives are safe before putting them in our crops and on our plates. Instead, the U.S. government continues with recklessly lax regulation of such emerging technologies as nanomaterial coatings on fruits and vegetables, and synthetically engineered food flavorings.

Lowered standards like these could wipe out local efforts to rein in corporate power and rebuild food systems along more democratic lines, setting a poor precedent — and that's the point. As Vice President Biden said of these trade deals earlier this month, "What we're talking about is shaping a new standard that then becomes the metric by which all future trade agreements are measured."

Let's not start down that path. Instead of doubling down on bad ideas of the past, we must insist on a 21st-century trade system designed to improve food security and affirm democratic control of our food system.

Harkness is the president of the Institute for Agriculture and Trade Policy in Minneapolis, Minn.

Source:

<http://thehill.com/blogs/congress-blog/foreign-policy/294179-free-trade-versus-food-democracy>

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Energy

India Takes Aim at U.S. State, Local Incentives for Renewable Energy Sector

By *Daniel Pruzin*

GENEVA—India April 17 took aim at credits, rebates and other incentive programs for the renewable energy sector provided by state and local authorities in the United States, which New Delhi suggests may be in violation of global trade rules.

In a communication forwarded to the World Trade Organization, India charged that some of the incentive programs in question make the availability of incentives contingent upon the use of domestic or state-specific products.

This “raises concerns about their compatibility with the obligation of the United States” under Article 2 of the WTO's Agreement on Trade-Related Investment Measures (TRIMs) and Article III:4 of the General Agreement on Tariffs and Trade, India said. “There are issues of consistency with relevant provisions of (WTO's) Agreement on Subsidies and Countervailing Measures as well.”

Article 2 prohibits investment measures that are in violation of the national treatment principle established under Article III of GATT. Article III:4 in particular requires WTO members to provide imported goods with the same treatment afforded domestically produced goods with respect to all laws, regulations and requirements affecting their internal sale.

The Indian communication follows the Feb. 6 announcement by the United States that it was initiating WTO dispute settlement proceedings to address what it charges are illegal domestic content requirements in India's national solar energy program.

Five State, Local Programs Cited

India in particular cited five programs at the state and local level which raised concerns: the state of Michigan's 2008 Clean, Renewable, and Efficient Energy Act (Public Act 295); the Los Angeles Department of Water and Power's Solar Photovoltaic Incentive Program; the state of California's Self Generation Incentive Program (SGIP); and the Commercial Solar Photovoltaic Performance-Based Incentive Program as well as the Residential Solar PV Rebate Program offered by Austin Energy, a publicly-owned power company and a department of the City of Austin, Texas.

According to India, the Michigan program grants renewable energy credits to electricity providers for each megawatt hour of electricity generated from a renewable energy system constructed using equipment made in the state, or for each megawatt hour of electricity from a renewable energy system constructed using a workforce composed of residents from the state.

Under the Los Angeles program, payment credits are provided for photovoltaic and solar power equipment where at least 50 percent of the components are manufactured or assembled within the city limits, or where at least 50 percent of the wholesale value of the product is derived from the use of local labor or locally manufactured components.

California's SPIG program, which offers incentive payments to producers of wind turbine, fuel cell, and other environmentally friendly energy sources, provides an additional 20 percent incentive payment for the installation of equipment or technologies from a California supplier, India noted, while the two programs operated by Austin Energy offer higher rebates and higher payments for solar power generated from equipment which is at least 60 percent manufactured or assembled in Austin Energy's service area.

India asked the United States to provide details on the current status for each of the targeted programs in terms of their duration. It also asked the United States to provide details on any other state, regional or local level renewable energy programs where incentives or benefits are granted contingent upon compliance with domestic content requirements.

U.S. Has Similar Complaint Against India

The U.S. complaint against India focuses on domestic content requirements under the Jawaharlal Nehru National Solar Mission (JNNSM).

According to the Office of the U.S. Trade Representative, India initially required that developers of solar photovoltaic (PV) projects employing crystalline silicon technology use solar modules manufactured in India. India later expanded the domestic sourcing requirement to cover crystalline silicon solar cells as well.

India has also drafted new provisions that might expand the scope of the domestic content requirements to include solar thin film technologies, which comprise the majority of U.S. solar exports to India, USTR charged. India also offers solar energy developers participating in the JNNSM a guarantee that the government will purchase a certain amount of solar power at a highly subsidized tariff rate, provided that they use domestically manufactured solar equipment instead of imports.

The United States may request the establishment of a WTO dispute panel to rule on its complaint if WTO-required consultations between the two sides fail to produce a settlement.

- VTDigger - <http://vtdigger.org> -

Tar sands oil pipeline bill advances in Vermont Senate, in spite of warning from petroleum industry

Posted By [Andrew Stein](#) On March 24, 2013 @ 4:10 pm In [Energy & Environment](#) | [6 Comments](#)



[1]

Despite legal pressures from the petroleum industry, the Vermont Senate advanced a bill on Friday designed to enhance state oversight of oil transmission pipelines.

Senators on the floor overwhelmingly supported S.58, which was freighted by concerns over Canadian tar sands oil being potentially pumped through the northeast region of Vermont. The 40-mile pipeline in question runs through the Northeast Kingdom, and has been in use for lighter crude since the 1940s. Critics say tar sands oil is more corrosive, has a higher risk of leaking from old pipelines and is harder to clean up in the case of a spill.

The voice vote moves the bill to a third and final reading of the legislation in the Senate this week.

According to Rep. David Deen, D-Westminster, if the Senate does not approve the bill, the House will not take it up. Deen, who chairs the House Fish and Wildlife Committee, [introduced parallel legislation to S.58 in the House.](#) ^[2] and his committee heard weeks of testimony on the issue. He told VTDigger that his committee recently dropped the bill to focus on a shoreline protection bill.

If S.58 were signed into law, it would add review by Act 250 environmental commissions in case of any "cognizable physical change to the pipeline or associated facilities, unless the change is solely for the purpose of repair." While natural gas pipelines fall under the direct purview of the quasi-judicial Public Service Board, an oil pipeline would only trigger review if it met the development review criteria of Act 250.

Act 250 is the state's governing land-use law, which regulates large-scale commercial developments. Regional Act 250 commissions determine whether proposed developments should receive permits.

Although the Senate voted in favor of the bill on Friday, the body sent the bill to the Judiciary Committee just a day before to address some legal concerns raised by lobbyists. After testimony from legal experts, the committee changed the bill's language.

A lobbyist, legal concerns and a warning letter

The decision to send the bill to Judiciary followed a letter from Downs Rachlin Martin lobbyist Joseph Choquette, who represents the American Petroleum Institute. He sent senators a letter on behalf of the Portland Pipe Line Corp., raising legal questions about S.58.

The Portland Pipe Line Corp. owns the Portland-Montreal pipeline, which connects Montreal oil refineries to Portland, Maine. The pipeline, which cuts through a northern slice of Vermont, is the only current entity that would be subject to S.58, and Portland Pipe Line CEO Larry Wilson told legislators in February that he opposes any added regulations on the line.^[3]

Choquette's letter defended the current Act 250 process. He argued that there's no need to go down a road that could lead to legal issues with potential federal pre-emption. He said Act 250 already applies.

"We understand that any cognizable physical change to this pipeline would require a permit under existing law if such change may have a significant adverse impact on the environment," Choquette wrote. "To that end, there is a process already under way with full participation by environmental advocacy groups."

Choquette called on the Senate to send the bill to the Judiciary Committee for review, and he cautioned that the bill might violate the Vermont and U.S. constitutions.

"Treating this pipeline facility and company differently than all other regulated projects and entities that operate in Vermont would arguably run afoul of federal pre-emption principles that explicitly bar states from regulating oil pipeline safety; potentially constitute an impermissible attempt to nullify the President's exercise of his foreign affairs power under the U.S. Constitution as reflected in the Presidential Permits issued to Portland Pipe Line and potentially impose an unconstitutional burden on foreign or interstate commerce," he wrote.

Before the Senate took up the bill on Thursday, Choquette sent the letter to Sens. Dick Sears, D-Bennington, and Kevin Mullin, R-Rutland.

Sears, who chairs the Judiciary Committee, told VT Digger that Choquette's suggestion to bring the bill into his committee wasn't motivated by the letter so much as by the recognition that the bill affected one company.

"I don't think we should not do something because there's a threat of a lawsuit, but I think we should make ourselves fully aware of what we're up against," he said. "If the committee of jurisdiction thinks it's good public policy to pass a bill, I don't want to be in a position of killing it. But I do want to be in a position of making it the least risk-adverse as we can."

The committee that moved the bill to the floor is the Senate Natural Resources and Energy Committee.

Attorneys, competing views and a change of language

Friday morning, Sears and his committee met with legislative counsel and attorneys from Downs Rachlin Martin (DRM).

Peter Van Oot, a veteran environmental attorney with DRM, previously chaired the very Act 250 commission that would be charged with overseeing changes to the pipeline. He has also represented Portland Pipe Line for more than a decade.

He told the committee that the Choquette letter was not a threat of litigation from his client.

"They are trying to protect their business interests ... but I want to make it very clear that they have not asked us to threaten litigation, and we have not threatened litigation," he told the committee – a comment which was greeted with gesticulated signs of incredulity from the panel's members.

Van Oot did, however, raise concerns about potential targeting of Portland Pipe Line, if the bill were passed.

"This would dramatically change the rules and it would dramatically change the rules for one and only one facility and for one and only one entity, at least currently," he said. "When you look at that context, that suggests to me that this entity is being singled out and discriminated in that anyone else would play by very different rules under Act 250."

Robert Luce, another DRM attorney who testified, won a major case in the U.S. court of appeals that found railroads in Vermont were federally exempt from Act 250.

The bill, he said, "would create a very different standard for a particular industry, which distinguishes it from all other industries. ... The question that comes up from a constitutional perspective ... is why are you singling this particular industry out for this treatment."

Luce said that the bill would conflict with the White House and could violate the dormant commerce clause under the U.S. Constitution.

"Requiring that (regulation) would delay, restrict or prohibit the use of the pipeline for certain business purposes, and doing that directly interferes with presidential powers," he said. "This pipeline is operating under a presidential permit issued by the president or the State Department."

Legislative counsel, on the other hand, advised the committee that the presidential permits only apply to portions of the pipeline by the borders, not the entire pipeline.

There is also language in the bill that stipulates regulation of safety issues falls under the strict purview of the federal government. It is a provision meant to avoid a federal lawsuit, like the one the state currently finds itself embroiled in with Entergy Corp. over regulating the Vermont Yankee nuclear plant. ^[4]

The Legislature's legal team told the committee that changing the bill's language from requiring Act 250 review for "a change to the pipeline" to "a cognizable physical change to the pipeline" was more in line with existing case law and thus "more defensible."

The language also echoes the wording used in Choquette's letter.

The committee supported the language and so did the Senate in its second reading, but there was no discussion about whether the new language would trigger Act 250 review if Portland Pipe Line Corp. pumped tar sands oil through Vermont – which is the very notion that prompted the bill's creation.

Portland Pipe Line's Larry Wilson previously told legislators that he's "aggressively" seeking new opportunities for his company's line. Such opportunities include contracts with oil companies that want to distribute petroleum products from Alberta's tar sands region.

The Senate's decision comes two weeks after the Canadian government ^[5]voiced concern that Vermont towns were approving resolutions opposing the movement of tar sands oil through the state.

The bill is "basically unnecessary"

Jim Murphy, senior counsel for the National Wildlife Federation, and Sandra Levine, senior attorney for the Conservation Law Foundation, say that while they appreciate legislators' efforts, the state already has Act 250 jurisdiction over any such changes to the pipeline.

Joined by a coalition of environmental groups and Northeast Kingdom residents, the two attorneys asked the Northeastern Act 250 commission in January to verify that the state's

governing land-use law has authority over potential changes to the Portland-Montreal Pipeline. ^[6] The request is still pending.

"We've testified in the Senate about this, that it's basically unnecessary," Levine said. "If you're buying yourself a lawsuit, which clearly the pipeline company seems to be threatening, I think one should be thinking about whether it makes sense or not."

At the same time, she said, the Legislature can't back down from large corporations.

"Clearly the Legislature needs to be more careful, considering the litigation that came out of the Vermont Yankee vote," she added. "But the Legislature has a lot of authority, and it shouldn't let threats from corporations necessarily guide its actions."

Murphy said he has concerns about the new language in the bill, and he said that the previous language would not pre-empt federal authority.

"If you actually look at ... a presidential permit ... there is no basis, I believe, for determining that it would pre-empt the clear ability of states to regulate siting, routing and land-use issues, which is what Act 250 does," Murphy said.

DRM Letter to Senators on S.58



DRM Letter to Senators on Pipeline Bill

1 document

6 Comments To "Tar sands oil pipeline bill advances in Vermont Senate, in spite of warning from petroleum industry"

#1 Comment By John Greenberg On March 25, 2013 @ 9:58 am

The article makes several references to the Vermont Yankee preemption lawsuit.

I therefore think it is only fair to note that nothing in that suit pertained to the PRODUCTS the Vermont legislature created: namely, Acts 74 and 150. No one suggested in that case that there was anything in the texts of the laws themselves which unconstitutionally entered the field preempted by the federal government.

Instead, Entergy focused on the legislative discussions which preceded the bills, and Judge Murtha found that legislators were "motivated" by safety considerations.

If Murtha's decision stands, then legislators would be ill-advised to pass ANY law at this point, if similar comments can be found anywhere in the legislative record. However free of preempted language the text of the law as passed might be, that fact could easily be ignored. It certainly was in the VY case. On the other hand, if there are more than one or 2 legislators who uttered the word "safety" in front of a microphone, the actual word of the law adopted will make little difference to judges who follow Murtha's decision. The Murtha precedent ALREADY pertains if there's any such language in the record.

Indeed, that's precisely why Murtha's decision is so disastrous: it would make it virtually impossible for a citizen legislature to do its business.

#2 Comment By Peter Romans On March 25, 2013 @ 7:52 pm



Testing the Right to Frack

NAFTA investor lawsuit against shale gas moratorium adds reason to fear FIPA.

[View full article and comments:](#)

The controversial Canada-China Foreign Investment Promotion and Protection Agreement, or FIPA, is still not ratified. It's hard to know exactly why that is given the Conservative government's enthusiasm for these corporate rights treaties. But the surprising strength and size of the public backlash to the China FIPA surely played a role.

One big reason people are so worried about this specific treaty (versus Harper's FIPAs with Tanzania, Cameroon, Zambia, etc) is how it will empower corporations from the world's largest consumer of energy and natural resources to sue Canada for hundreds of millions of dollars for delays in getting oil, gas and minerals out of the ground. Delays like a moratorium or ban on hydraulic fracturing, for example, or stricter environmental rules that make projects more expensive, will be vulnerable to investor-state lawsuits that can cost hundreds of millions if not billions of dollars at the end of the day.

This becomes a bigger problem for Canada as the China National Offshore Oil Corporation (CNOOC) operations in northern British Columbia and a desire to expand them. But public [fracking](#) is leading to calls for action against the environmentally risky drilling technique. It's not a matter of if but when CNOOC would file a FIPA challenge against any crackdown on fracking. The absurd scenario is playing out right now in Quebec.

Demanding \$250 million from Canadians

Last year, a U.S.-owned energy firm Lone Pine Resources sued Canada using investment rules in the North American Free Trade Agreement (NAFTA). The firm is challenging Quebec's 2011 moratorium on fracking in the St. Lawrence Valley, which was extended indefinitely by the new Parti Quebecois government. Lone Pine wants \$250 million in compensation for [what it calls](#) the "arbitrary, capricious, and illegal revocation of [its] valuable right to mine for oil and gas."

Fracking uses massive amounts of water, thousands of litres of chemicals, and thousands of pounds of sand. This toxic stew is forced into the ground at high pressure in order to fracture the rock, allowing gas to flow up the well. Fracking fluid can contaminate drinking water with substances that cause cancer and organ damage, and affect neurological, reproductive and endocrine systems. Safely disposing of fracking wastewater is incredibly difficult. The process has been linked to earthquakes.

Despite these risks, Lone Pine's NAFTA claim says the Quebec government acted "with no cognizable public purpose," even though there is broad public support for a precautionary moratorium while the environmental impacts of fracking are studied. Milos Barutciski, a lawyer with Bennett Jones LLP, which is representing Lone Pine in the arbitration, [says the moratorium](#) "was done for purely political reasons -- exactly what the NAFTA rights are supposed to be protecting investors against."

How level?

The investment chapter in NAFTA, like the FIPA with China, is often described as a way to level the playing field between national and foreign firms. But scratch the surface and you find that

the non-discrimination rules are the least important part. The treaties actually give foreign firms more rights and legal protection than local companies.

As a Canadian firm, Nexen would have to challenge a hypothetical freeze on fracking in B.C. before a provincial or federal court. New company owners CNOOC can bypass the courts to challenge B.C. or Canadian policies in front of largely unaccountable, paid arbitrators deciding the matter behind closed doors at the World Bank or elsewhere. Arbitrators have leaned heavily in favour of companies over governments in disputes related to energy and mining projects. Even when cases don't reach a final decision, there can be high costs to governments for getting in the way of mega-projects.

On March 8, the Canadian government announced it had settled outside of arbitration in another NAFTA investment claim from St. Marys Cement. The formerly Canadian (now Brazilian) cement and aggregate company had challenged a decision to rezone a large section of farmland in the province of Ontario so that a highly controversial quarry could not be built. The rezoning decision was celebrated by the nearby community but St. Marys claimed it violated NAFTA's minimum standards of treatment guarantee, and the treaty's prohibition on so-called indirect, or regulatory, expropriation.

The firm retracted its claim but only after the Ontario government announced that it would pay its stated \$21-million investment in the quarry to date. In the middle of a recession, Ontario taxpayers basically paid St. Marys to not dig a quarry. That looks more like extortion than respecting minimum standards of treatment. The club these treaties give to investors to bully governments over conservation and environmental measures why Canada's mining sector is one of the recent FIPAs with African countries where they are currently invested or interested in expanding.

The club swings both ways. Of the 100+ cases filed against Canada, which total more than \$5 billion in corporate claims, all involve reported breaches minimum standards of treatment, and most involve claims of indirect expropriation without compensation. It is a sad record that shows just how broadly investors will interpret their rights in treaties like the FIPA. Even where Canada wins a case, we have still paid sometimes millions of dollars defending it.

In the Lone Pine case, as with the *Exxon* case, the *Investor-State Dispute Resolution* (ISDR) company says that Quebec failed to provide a "stable business and legal environment." But there is nothing in NAFTA or the FIPA with China on minimum performance requirements for corporations – no way to hold investors accountable for environmental, human rights and other violations. In fact performance requirements are banned outright, as Newfoundland and Labrador learned after Exxon Mobil and Murphy Oil successfully sued Canada under NAFTA to get out of a profit-sharing plan for offshore oil development.

Resistance to FIPA with China

For these reasons, and in particular the way investment treaties give foreign firms greater rights than national firms, the Australian government has *resisted* the *pressure* of including investor-state dispute settlement in its trade agreements. Like Canada, Australia loves its mining companies. But it doesn't feel the need to socialize the risk they take when they invest at home or abroad. In Australia's 2011 trade policy, the government says Aussie companies should find other ways, outside of investment treaties, to secure their investments.

In B.C., resistance to the FIPA with China is very strong. The Hupacasath First Nation has filed for an injunction against the treaty, to stop the Harper government from ratifying until it has consulted with First Nations as the Constitution requires. The impact of the FIPA on Indigenous and Treaty rights could be pronounced, especially if it creates added pressure to approve unpopular tar sands, fracking, mining or pipeline projects containing Chinese investment. The Hupacasath will go to court for the first time in early April and are looking for support at

It was clear before the Lone Pine lawsuit against Quebec's fracking ban that the investment protections in NAFTA and Canada's many FIPAs were excessive. But the case brings new

urgency to the need to drastically reform or abolish the investor-state dispute settlement process. This is even more important as leaks from the ongoing Canada-European Union free trade negotiations show the Harper government entertaining ~~more~~ ~~new~~ ~~protectionist~~ rules for European firms in Canada than the FIPA granted Chinese firms.

The chill effect from investor-state arbitration -- the worry in government that a policy will attract a lawsuit -- can be enough to deter strong public health and environmental protections. We have to be able to say "no" to fracking and other destructive mega-projects without paying hundreds of millions to oil, gas and mineral companies. If Harper ratifies the FIPA with China, or signs an even worse investment treaty with Europe, it will be much more difficult to do that.

Then again, with this government, that might be the treaty's biggest selling point.

Stuart Trew is the Council of Canadians' trade campaigner.

