

TPP Faces Uncertain Future, With No Signing Date, Objections In Congress

Inside US Trade

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The fate of the Trans-Pacific Partnership (TPP) remains up in the air as the new year begins, with no signing date confirmed, Republican members of the U.S. Congress calling for changes or clarifications to certain provisions, and Australia making clear it will not agree to reopen the controversial language on biologic drugs.

All of these factors raise serious doubts about whether Congress can approve the TPP agreement in 2016 as President Obama has said is his goal. On top of that, Senate Majority Leader Mitch McConnell (R-KY) has directly called on the president not submit TPP to Congress before the November 2016 election, although he has held open the possibility it could come up during the lame-duck session of Congress after the election.

The Obama administration has already started to engage with Senate Finance Committee Chairman Orrin Hatch (R-UT) and House Ways & Means Committee Republicans about their objections to TPP, which have mainly focused on the provisions on biologics, financial services and tobacco.

But it remains unclear whether and how the administration will address these objections, and how it would overcome opposition from other TPP countries toward making changes or clarifications to the deal.

One observer said the U.S. would likely have to offer additional concessions to compensate TPP countries for any potential changes, as the U.S. did when it renegotiated the U.S.-Korea free trade agreement.

There is no roadmap yet for how or when Republican objections will be addressed, but congressional staff expect one to emerge in the coming weeks. The U.S. Chamber of Commerce and the National Association of Manufacturers have both held off on coming out with a formal position on TPP in order to see whether and how their members' objections to the trade deal are addressed by the administration.

Some Republican congressional staff have urged the administration not to rush forward with signing the TPP until it is clear how their objections will be addressed.

These staff were dismayed to learn in November that TPP countries were leaning toward signing the deal in New Zealand on Feb. 4, which would be immediately after the 90 day congressional review period expires. Similarly, one TPP government source suggested that the signing might be delayed until the administration can address the objections of members of Congress.

But moving forward with the signing would require the completion of the legal scrub, which is still ongoing. TPP countries were unable to complete the legal scrub at a meeting in an early December in New Zealand as they had hoped, sources said. Efforts are focused on the

painstaking task of checking parties' tariff schedules and lists of non-conforming measures in services and investment.

Some sources have said Japan in particular has taken a hard line by insisting on certain wording during the legal scrub process. One source with experience in legal scrubbing said it is typically hard to wrap up the process until there is a firm date for signing, as one side can always make an argument that further checking and correction is needed.

On biologics, Ways & Means Republicans have asked U.S. Trade Representative Michael Froman whether it would be possible to further define the "other measures" that TPP countries are supposed to provide in addition to five years of market exclusivity in order to deliver a comparable outcome to eight years of protection. This could be done through a side letter or an implementation plan, they have suggested.

But Australian Trade Minister Andrew Robb in a Dec. 19 interview rejected the idea of changing the biologics provisions. He defended the biologics outcome as balanced and argued that Australia's current system provides an equivalent level of protection to eight years.

Robb is one of the few TPP ministers who has publicly responded to the Republican demands for changes on the biologics provisions, although Chile and Peru are likely to take a similar stance. The Obama administration has made clear to some TPP officials that commenting on controversial issues like biologics at this time would only complicate its discussions with congressional Republicans about advancing TPP.

On financial services, U.S. banks and insurances companies along with their supporters in Congress have objected to two provisions in the TPP.

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

Resolving the latter issue would require securing more concessions from Malaysia, where the prospects of ratification of TPP are so uncertain that the Malaysian trade minister explicitly held open the possibility in a side letter with the United States that his country may never become a party to the deal.

By contrast, the major hurdle to resolving the server localization issue is the U.S. government rather than objections by other TPP partners.

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

Proponents of banning localization requirements in the financial services sector are seeking to change that provision in TPP as well as to secure such a ban in the Trade in Services Agreement (TISA) and the Transatlantic Trade and Investment Partnership (TTIP) deal with the European Union.

But some advocates of quick congressional action on TPP have suggested that financial services companies should settle for the issue being addressed in TISA and TTIP.

The tobacco issue revolves around language in the TPP agreement that allows governments to block investor-state challenges of their anti-tobacco measures. This language is opposed by tobacco companies, their allies in cross-sectoral business associations and lawmakers from tobacco-producing states.

Thus far, all three major U.S. business associations that have come out with a formal position on TPP have implicitly flagged the tobacco issue as a problem. They are the National Foreign Trade Council, the Emergency Committee for American Trade and the U.S. Council for International Business.

All of these groups have endorsed TPP but noted that the objections flagged by members of Congress will have to be addressed before the deal can be approved.

Similarly, even some of the biggest business cheerleaders for the TPP agreement say that the deal in its current form would be unlikely to garner sufficient votes to secure congressional passage, given the objections from Republican members.

**Trading Down:
Unemployment, Inequality and Other Risks of the
Trans-Pacific Partnership Agreement**

Jeronim Capaldo and Alex Izurieta

with Jomo Kwame Sundaram

GDAE Working Paper 16-01

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The Trans-Pacific Partnership (TPP) now awaiting ratification in the U.S. Congress may result in job losses and rising inequality, weakening rather than strengthening economic growth in the United States, according to a new [GDAE Working Paper](#) by GDAE Research Fellow Jeronim Capaldo, Alex Izurieta, and Jomo Kwame Sundaram. The authors also project employment losses and negligible benefits for growth in other participating countries.

These findings contrast with widely cited projections of TPP's effects which suggest GDP gains for all countries after ten years, varying from less than half a percentage point in the United States to 13 percent in Vietnam. However, those projections are based on unrealistic assumptions such as full employment and constant income distribution. Here, the authors employ a more realistic model that incorporates effects on employment and income distribution.

The authors highlight the following effects of TPP:

- TPP would generate *net losses of GDP in the United States and Japan*. For the United States, GDP is projected to be 0.54 percent lower than it would be without TPP, 10 years after the treaty enters into force. Japan's GDP is projected to decrease 0.12 percent.
- *Economic gains would be negligible for other participating countries* – less than one percent over ten years for developed countries and less than three percent for developing countries. These projections corroborate previous findings that any TPP gains would be small for many countries.
- *TPP would lead to employment losses in all countries*, with a total of 771,000 lost jobs. The United States would be the hardest hit, with a loss of

448,000 jobs. Developing economies participating in the agreement would also suffer employment losses, as higher competitive pressures force them to curtail labor incomes and increase production for export.

- *TPP would lead to higher inequality*, as measured by changes in the labor share of national income. Competitive pressures on labor income, combined with employment losses, can be expected to push labor shares lower, redistributing income from labor to capital in all countries. In the United States, this would exacerbate a multi-decade downward trend.
- *TPP would lead to losses in GDP and employment in non-TPP countries*. In large part, the loss in GDP (3.77 percent) and employment (879,000) among non-TPP developed countries would be driven by losses in Europe, while developing country losses in GDP (5.24%) and employment (4.45 million) reflect projected losses in China and India.

These results come from the innovative, and more realistic, United Nations Global Policy Model (GPM), which GDAE operates in collaboration with UNCTAD, the UN body specialized in international trade and finance. A previous Working Paper employed the GPM to project the effects of the Trans-Atlantic Trade and Investment Partnership, raising concerns about the proposed agreement's effects on employment and inequality. The TPP results contrast with mainstream models because those generally use versions of Computable General Equilibrium models (CGE) that exclude by assumption effects on employment.

This study contributes a much-needed economic assessment to the coming debates on TPP.

Empty Promises and Missed Opportunities: An Assessment of the Environmental Chapter of the Trans-Pacific Partnership

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About the Author

Professor Chris Wold has taught International Environmental Law, Trade and the Environment, and other courses since 1994 at Lewis & Clark Law School, home of the country's top-ranked environmental law program. He also directs the International Environmental Law Project, a legal clinic that provides students with practical experience in international environmental law, particularly with respect to climate change, international biodiversity conservation, and issues at the nexus of trade and environmental law. He has been the legal advisor to the Convention on Migratory Species in 2014 and the United Kingdom for the 2001 meeting of the International Whaling Commission. He has also worked with the Ministries of Environment in Bulgaria and Ukraine to review their environmental laws for consistency with their international obligations. In Mauritius, he developed legislation to protect environmentally sensitive areas.

He was appointed to the National Advisory Committee to provide the Environmental Protection Agency with advice on environmental cooperation among the three North American governments. He continues to provide legal and technical advice to small island developing states in the climate change negotiations and to numerous nongovernmental organizations on issues concerning the World Trade Organization, regional free trade agreements, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity, and the Convention on Migratory Species, among other treaties and international institutions. He is the author of the law school textbook, *Trade and the Environment: Law and Policy* (2d. ed. 2011) and numerous articles exploring the relationship between trade and the environment.

I. Introduction

At the adoption of the Trans-Pacific Partnership (TPP)¹ the Office of the United States Trade Representative (USTR) championed the agreement as “the most robust enforceable environment commitments of any trade agreement in history.”² The USTR hailed the Environment Chapter as an “historic opportunity to advance conservation and environmental protection across the Asia-Pacific”³ and claimed that the TPP “establish[es] pioneering new commitments,” including commitments to prohibit harmful fisheries subsidies and to take

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¹ Trans-Pacific Partnership, signed October 4, 2015, available at <https://ustr.gov/tpp/>.

² USTR, The Trans-Pacific Partnership, Preserving the Environment, 1 (undated) available at <https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf>.

³ *Id.* at 2.

“enhanced actions” to combat wildlife trafficking.⁴ Environmental groups have challenged those statements, describing the TPP’s Environment Chapter as “toothless,”⁵ “largely unenforceable,”⁶ and “weak and fails to provide the necessary requirements and stronger penalties desperately needed to better fight poaching, protect wildlife habitat and shut down the illegal wildlife trade.”⁷

A good faith interpretation of the TPP’s Environment Chapter based on the ordinary meaning of the words and provisions used in the chapter,⁸ indicates that the TPP’s environmental provisions are, indeed, weak and unlikely to address the problems of illegal wildlife trade, overfishing, and other environmental concerns described, but not meaningfully addressed, in the TPP. Moreover, the history of previous regional free trade agreements, in which similar issues have been addressed and not enforced, further suggests that the Environment Chapter may be full of empty promises. With weak and largely unenforceable provisions, the TPP also represents a missed opportunity to address some of the region’s significant environmental problems.

This article assesses five of the main substantive issues of the TPP’s Environment Chapter on which environmental groups have commented: the provisions relating to multilateral environmental agreements; illegal, unreported, and unregulated fishing; illegal trade in wildlife; protection of marine animals such as sharks and whales; and climate change. It also analyzes the provisions for enforcement because the USTR has frequently noted the enforceable nature of the substantive provisions.

II. Multilateral Environmental Agreements

The provisions relating to environmental law generally and multilateral environmental agreements (MEAs) specifically are weak in several respects. Generally, the “Parties recognize the need to enhance the mutual supportiveness between trade and environmental law and policies.”⁹ This provision merely restates public discourse concerning trade and environment issues from the previous 20 years. Indeed, the *Rio Declaration on Environment and Development* from 1992 already calls for States to “cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all

⁴ USTR, Environment (Nov. 5, 2015), available at <https://medium.com/the-trans-pacific-partnership/environment-a7f25cd180cb#.olc9466pz>.

⁵ Sierra Club, TPP Text is “Concrete Evidence” of Toxic Deal, at 1 (Nov. 5, 2015), available at <http://content.sierraclub.org/press-releases/2015/11/sierra-club-tpp-text-concrete-evidence-toxic-deal>; Rodrigo Estrada Patiño, Greenpeace Response to the Trans-Pacific Partnership Text (undated), available at <http://www.greenpeace.org/usa/news/greenpeace-response-to-the-trans-pacific-partnership-text/>.

⁶ Friends of the Earth, Press Release, (Nov. 5, 2015), available at <http://www.foe.org/news/news-releases/2015-11-trans-pacific-partnership-text-exposes-threat-to-environment>.

⁷ Defenders of Wildlife, Press Release, Trans-Pacific Partnership Falls Short for Wildlife (Nov. 5, 2015), available at <https://www.defenders.org/press-release/trans-pacific-partnership-falls-short-wildlife>.

⁸ The Vienna Convention on the Law of Treaties (Vienna Convention) provides the fundamental rules of treaty interpretation. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The most fundamental of all rules of treaty interpretation is the principle that a treaty must be “interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.” *Id.* at art. 31(1).

⁹ TPP, *supra* note 1, at art. 20.4(2).

countries, to better address the problems of environmental degradation.”¹⁰ *Agenda 21*, also adopted in 1992, states that governments “should continue to strive ... to promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive.”¹¹

More specifically, the TPP Parties “affirm” their commitment to implement their MEA obligations.¹² In other provisions, the Parties state that they “shall” take measures to implement measures with respect to specific MEAs; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),¹³ the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),¹⁴ and MARPOL.¹⁵ MEAs, however, already include legally binding international commitments that Parties to those MEAs must adopt and implement.¹⁶ Thus, affirming a commitment to implement those obligations or even obligating Parties to implement those MEAs adds nothing to the quality or nature of those obligations.

Provisions that require TPP Parties to adopt and implement their MEA obligations could be meaningful if supported by meaningful dispute settlement when the relevant MEA does not have its own compliance mechanism or that compliance mechanism is weak. As described in Section VI, however, while the TPP includes dispute settlement provisions, these are highly unlikely to be used; they have never been used in any of the other regional free trade agreements to which the United States is a Party.

¹⁰ Rio Declaration on Environment and Development, UN DOC A/CONF.151/5/Rev. 1, Principle 12, June 13, 1992, available at <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163>.

¹¹ U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26, Chapter 2, para. 9(d) (1992).

¹² TPP, *supra* note 1, at art. 20.4(1).

¹³ *Id.* at art. 20.17(2) (stating that “each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora.”). For the provisions of CITES, see Convention on International Trade in Endangered Species of Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087; 993 U.N.T.S. 243 (entered into force on July 1, 1975) [hereinafter CITES], available at www.cites.org.

¹⁴ TPP, *supra* note 1, at art. 20.5(1) (stating that “each Party shall take measures to control the production and consumption of, and trade in, [ozone depleting] substances” covered by the Montreal Protocol on Substances that Deplete the Ozone Layer. For the provisions of the Montreal Protocol, see Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY DOC. NO. 10, 100th Cong. 1st Sess. (1987), (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol], available at <http://ozone.unep.org/en/treaties-and-decisions>.

¹⁵ TPP, *supra* note 1, at art. 20.6(1) (stating that “each Party shall take measures to prevent the pollution of the marine environment from ships” as regulated by the agreements collectively referred to as MARPOL). Notably, the TPP omits a commitment to “adopt, maintain, and implement” laws and regulations to reference to four MEAs referenced in prior free trade agreements: the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention), the Convention on the Conservation of Antarctic Living Marine Resources, the International Convention for the Regulation of Whaling, and the Convention for the Establishment of an Inter-American Tropical Tuna Commission. See, e.g. Trade Promotion Agreement, U.S.-Peru, art. 18.2, Annex 18.2, Apr. 12, 2006, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf [hereinafter U.S.-Peru FTA]. Presumably these MEAs have been omitted because one or more Parties have not become a Party to the MEA. For example, Brunei Darussalam and Singapore are not Parties to the Ramsar Convention. Ramsar, Country Profiles, available at <http://www.ramsar.org/country-profiles>.

¹⁶ See, e.g. Frederic Kirgis, *Treaties as Binding International Obligation*, ASIL INSIGHTS (May 14, 1997) (explaining why “[t]reaties, including the United Nations Charter, are binding instruments under international law, subject to limited grounds much like those in domestic contract law for invalidating or terminating them.”), available at <http://www.asil.org/insights/volume/2/issue/4/treaties-binding-international-obligation>.

In addition, the TPP's standards for bringing a claim for not implementing MEA obligations are weaker than those found in CITES, the Montreal Protocol, and perhaps in MARPOL. For example, to establish a violation of a TPP Party's obligation to "adopt, maintain, and implement" laws relating to CITES,¹⁷ the challenging Party "must demonstrate" that the failure to adopt, maintain, or implement such laws "affect[s] trade or investment between the Parties."¹⁸ Moreover, the TPP limits the dispute settlement procedure to violations of the obligations of CITES, leaving out the failure to comply with resolutions and other recommendations directed to the Parties.¹⁹

In contrast, the CITES Parties have developed mechanisms for imposing trade sanctions on Parties for failure to implement the provisions of the treaty itself,²⁰ but also failure to adequate national implementing legislation,²¹ failure to comply with recommendations of the Standing Committee,²² or for other reasons;²³ resort to the compliance procedures does not require a demonstration of an impact on trade or investment. In March 2015, for example, the CITES Standing Committee recommended that the Parties suspend trade in CITES-listed species with the Lao People's Democratic Republic because it had failed to develop a national ivory action plan.²⁴ Significantly, the Standing Committee took this action even though the requirement to develop such an action plan is not found in the text of CITES itself; it was based on a recommendation of the Standing Committee.²⁵ No demonstration of a trade impact was required. Clearly, the TPP's provisions to enforce CITES are considerably weaker than those of CITES itself.

Similarly, the TPP requires the Parties to take measures, consistent with the Montreal Protocol, to control the production and consumption of ozone depleting substances (ODSs).²⁶ A footnote then provides that a TPP Party will be in compliance with this requirement if

¹⁷ TPP, *supra* note 1, at art. 20.17(2)

¹⁸ *Id.* at art. 20.17(2), fn. 23.

¹⁹ Footnote 23 stipulates that a violation must relate to a failure to adopt, maintain or implement laws or other measures to fulfill an *obligation* of CITES. Article 20.17(3)(a) then provides that TPP Parties "shall endeavor to implement, as appropriate, CITES resolutions."

²⁰ CITES, *supra* note 13, at art. XIII (establishing a compliance procedure when "the provisions of the present Convention are not being effectively implemented" by a Party).

²¹ CITES, *National Laws for Implementation of the Convention*, Resolution Conf. 8.4 (Rev. CoP15) ("Instruct[ing] the Standing Committee to determine which Parties have not adopted appropriate measures for effective implementation of the Convention and to consider appropriate compliance measures, which may include recommendations to suspend trade, in accordance with Resolution Conf. 14.3.").

²² CITES, *Review of Significant Trade in Specimens of Appendix-II Species*, Resolution Conf. 12.8 (Rev. CoP13) (stating that, "when the Secretariat, having consulted with the Chairman of the Animals or Plants Committee, is not satisfied that a range State has implemented the recommendations made by the Animals or Plants Committee in accordance with paragraph n) or o), it should recommend to the Standing Committee appropriate action, which may include, as a last resort, a suspension of trade in the affected species with that State. On the basis of the report of the Secretariat, the Standing Committee shall decide on appropriate action and make recommendations to the State concerned, or to all Parties.").

²³ *See generally*, CITES, *CITES Compliance Procedures*, Resolution Conf. 14.3 (establishing procedures for assessing compliance with the Convention and for recommending trade sanctions for non-compliance).

²⁴ CITES, Notification to the Parties No. 2015/013, *Recommendation to Suspend Trade* (Mar. 19, 2015).

²⁵ CITES Standing Committee, *Elephants*, SC65 Com. 7, at 1 (2014).

²⁶ TPP, *supra* note 1, at art. 20.5(1).

“maintains” its current implementing measures listed in an Annex.²⁷ The use of “maintain” is concerning because it suggests that the TPP Parties do not actually need to implement those measures. In contrast, the TPP text relating to CITES requires Parties to “adopt, maintain, and implement” laws relating to CITES.²⁸ Treaty interpreters are directed to assume that drafters intended differences in meaning when different terms are used.²⁹ Since “implement” is used with respect to CITES but not with respect to the Montreal Protocol, one must assume that the drafters did not intend to make failure to implement the obligations of the Montreal Protocol subject to dispute settlement under the TPP.

A second footnote further weakens dispute settlement with respect to the Montreal Protocol. That footnote provides that a violation of this obligation only occurs when a Party has not “maintain[ed]” its measures identified in Annex; in addition, another Party “must demonstrate” that the other Party has failed to take measures to control the production and consumption of, and trade in, ODSs “in a manner that is likely to result in adverse effects on human health and the environment, in a manner affecting trade or investment between the Parties.”³⁰ In other words, to violate the TPP’s requirement to implement the Montreal Protocol, a Party must not simply be in violation of its obligations under the Montreal Protocol; the violation must *likely* affect human health and the environment *and* affect trade or investment among the Parties. In contrast, Parties to the Montreal Protocol may become the subject of a non-compliance proceeding under the Montreal Protocol simply for failing to comply with one of its obligations,³¹ including obligations relating to reporting of data³² that may not have any impact on human health and the environment and are certainly not going to have any impact on trade and investment. Thus, a violation of the TPP relating to the Montreal Protocol will occur long after a party is subject to the Montreal Protocol’s non-compliance procedure.

The TPP Parties also agreed to take measures to prevent pollution from ships consistent with MARPOL.³³ As with the TPP’s provisions relating to the Montreal Protocol, a Party is

²⁷ *Id.* at art. 20.5(1), fn. 4, Annex 20–A.

²⁸ *Id.* at art. 20.17(2).

²⁹ See, e.g., Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted May 20, 1996) (using the “ordinary language” rule of interpretation to overturn previous rulings that interpreted the phrase “relating to” as equivalent to “necessary”); Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 528, WT/DS320/AB/R (adopted Nov. 14, 2008) (concluding that “based on” and “conform to” have distinct meanings).

³⁰ TPP, *supra* note 1, at art. 20.5(1), fn. 5.

³¹ Montreal Protocol, Non-compliance Procedure of the Montreal Protocol, Decision IV/5, as amended by Decision X/10, available at <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/1555>. The full text can be found at Montreal Protocol, Non-compliance Procedure (1998), available at <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/2117>.

³² At its most recent meeting, the Parties requested the Implementation Committee to review the failure to provide data on consumption and production of ODSs from Democratic Republic of Congo, Dominica, Somalia and Yemen. Decision XXVII/9: Data and information provided by the parties in accordance with Article 7 of the Montreal Protocol, *in Advance*, unedited compilation of the decisions adopted by the Twenty-Seventh Meeting of the Parties to the Montreal Protocol, 9 (Nov. 10, 2015), available at <http://ozone.unep.org/en/focus>.

³³ TPP, *supra* note 1, at art. 20.6(1). Footnote 6 clarifies that

this provision pertains to pollution regulated by the *International Convention for the Prevention of Pollution from Ships*, done at London, 2 November 1973, as modified by the *Protocol of 1978*

considered in compliance with this provision if it “maintains” its current implementing measures identified in an Annex.³⁴ Consequently, the TPP Parties appear to have exempted failures to implement those measures from the TPP’s dispute settlement provisions.³⁵ Also like the provisions relating to the Montreal Protocol, the TPP sets a high bar for alleging a violation of the duty to “maintain[]” measures to control and prevent vessel pollution. To establish a violation of this obligation, a Party “must demonstrate that the other Party has failed to take measures to prevent the pollution of the marine environment from ships in a manner affecting trade or investment between the Parties.”³⁶ But MARPOL already requires a number of compliance strategies, such as the International Air Pollution Prevention Certificate³⁷ and the International Oil Pollution Prevention (IOPP) Certificate.³⁸ Moreover, several TPP Parties already have rigorous provisions for ensuring compliance with MARPOL, including the United States.³⁹ The threshold for investigating and bringing an action are significantly lower than the TPP’s standards. For example, the United States may inspect and take enforcement action against ships to determine compliance with Annex VI of MARPOL, which addresses air pollution from ocean-going ships,⁴⁰ as well as Annexes I and IV.⁴¹ The provisions of U.S. law do not require a showing of harm to trade or investment.

Moreover, unlike prior bilateral and regional trade agreements the TPP does not carve out an exception for environmental measures adopted pursuant to MEAs. For example, the U.S.–Peru Free Trade Agreement,⁴² the U.S.–Colombia Free Trade Agreement,⁴³ and others⁴⁴

relating to the International Convention for the Prevention of Pollution from Ships, done at London, 17 February 1978, and the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973 as Modified by the Protocol of 1978 relating thereto, done at London, 26 September 1997 (MARPOL), including any future amendments thereto, as applicable to it.

³⁴ *Id.* at art. 20.6(1), fn. 7, Annex 20–B.

³⁵ See *supra* notes 28–29 and accompanying text.

³⁶ TPP, *supra* note 1, at art. 20.6(1), fn. 8.

³⁷ Ships larger than 400 gross tons must obtain an International Air Pollution Prevention Certificate (IAPP Certificate), which verifies compliance with vessel air pollution standards. See Det Norske Veritas, MARPOL 73/78 ANNEX VI: REGULATIONS FOR THE PREVENTION OF AIR POLLUTION FROM SHIPS 4 (2009).

³⁸ MARPOL, Annex I- Regulations for the Prevention of Pollution by Oil, Regulation 7, available at http://www.marpoltraining.com/MMSKOREAN/MARPOL/Annex_I/r7.htm.

³⁹ Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901–1912. Section 1907(f) authorizes the U.S. Coast Guard to inspect ships to determine compliance with Annex VI of MARPOL.

⁴⁰ *Id.* (proving that “[t]he Secretary may inspect a ship to which this chapter applies as provided under section 1902(a)(5) of this title, to verify whether the ship is in compliance with Annex VI to the Convention and this chapter.”).

⁴¹ *Id.* at §1907(c).

⁴² The U.S.–Peru Free Trade Agreement provides as follows:

In the event of any inconsistency between a Party’s obligations under this Agreement and a covered agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade

U.S.–Peru FTA, *supra* note 15, at art. 18.13(4).

⁴³ Trade Promotion Agreement, U.S.–Colom., arts. 18.13(4), Nov. 22, 2006, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file644_10192.pdf [hereinafter U.S.–Colombia FTA].

specifically provide that in the event of an inconsistency between a Party's implementation of its trade obligations and its obligations under seven specified MEAs,⁴⁵ the Party is not precluded from complying with its MEA obligation provided the intent is not to impose a disguised restriction on trade.⁴⁶ Without a similar provision in the TPP, a TPP Party has greater leeway to challenge another TPP Party for trade restrictions adopted to implement the provisions of an MEA. Such an outcome is inconsistent with the TPP's call to "enhance the mutual supportiveness between trade and environmental law and policies."⁴⁷

The TPP's MEA provisions would have been stronger, and worthy of being called historic, if they had done two things. First, they could have included a binding commitment to implement resolutions adopted by the Parties. Resolutions are the "soft law" of conventions and are considered non-binding. Nonetheless, Parties frequently adopt key definitions, develop new implementation mechanisms, or establish terms of reference for subsidiary bodies necessary for the effective implementation of an MEA. For example, the CITES Parties have defined the phrase "personal and household effects" to harmonize implementation of an important exception to the rules for trade in protected species.⁴⁸ They have also developed rules for issuing permits for trade in specimens taken on the high seas.⁴⁹ The Montreal Protocol Parties have established criteria and a procedure for requesting and considering requests to use an ozone depleting substance for an "essential use."⁵⁰ By harmonizing the rules relating to these and other issues, the Parties create a predictable and accountable regime for trade—the very predictability that the TPP seeks to achieve.⁵¹ Parties are expected to implement these resolutions. Rather than bind the TPP Parties to implement these and other important resolutions, the TPP directs the Parties to "endeavor to implement, as appropriate, CITES resolutions that aim to protect and conserve

⁴⁴ See, e.g., Trade Promotion Agreement, U.S.-Pan., arts. 17.13(4), June 28, 2007, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file314_10400.pdf [hereinafter U.S.-Panama FTA].

⁴⁵ The specified MEAs, described as "covered agreements," are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling, and the Convention for the Establishment of an Inter-American Tropical Tuna Commission. U.S.-Peru FTA, *supra* note 31, at Annex 18.2.

⁴⁶ U.S.-Peru, *supra* note 15, at art. 18.13(4).

⁴⁷ *Id.* at art. 20.4(2).

⁴⁸ CITES, *Control of Trade in Personal and Household Effects*, Resolution Conf. 13.7 (Rev. CoP16), available at <https://cites.org/eng/res/13/13-07R16.php>.

⁴⁹ CITES, *Introduction from the Sea*, Resolution Conf. 14.6 (Rev. CoP16), available at <https://cites.org/eng/res/14/14-06R16.php>.

⁵⁰ Montreal Protocol, *Essential Uses*, Decision IV/25, available at <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/1166>.

⁵¹ The TPP's preamble states that one goal of the TPP is to "establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules. TPP, *supra* note 1, at preamble, para. 7. Similarly, the Understanding on Dispute Settlement of the World Trade Organization, for example, provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. . . . [I]t serves to preserve the rights and obligations of Members under the covered agreements." Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 3.2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 354 (1999), 1869 U.N.T.S. 401.

species whose survival is threatened by international trade.”⁵² As weak as this commitment is, it is stronger than for other MEAs; the TPP is silent with respect to implementing decisions of the Montreal Protocol or other MEAs.

Second, the TPP could have engaged in a review of the adequacy of implementing legislation and then used the results of these analyses to focus capacity-building efforts and, as a last resort, sanction a non-complying Party that does not improve its inadequate legislation. The CITES national legislation project provides an excellent example of how to direct capacity-building support to specific Parties to improve implementation of an MEA and help conserve public resources.⁵³ When a Party’s legislation has been found inadequate, the Secretariat provides legislative drafting assistance or other capacity-building support. In this way, Parties are able to receive exactly the kind of support they need.

III. IUU Fishing

As noted in the introduction, USTR has praised the TPP’s “pioneering commitments” to combat illegal fishing and prohibit some of the most harmful fisheries subsidies, such as those given to fishermen engaged in illegal, unreported, and unregulated (IUU) fishing.⁵⁴ Like the provisions relating to MEAs, however, these provisions are weak; they are also inadequate to meet the challenges of IUU fishing.

For example, the TPP prohibits fisheries subsidies to any fishing vessel listed by the flag State or an RFMO for engaging in IUU fishing.⁵⁵ Many RFMOs, however, already implicitly require the elimination of such subsidies or impose stricter requirements vis-à-vis IUU vessels. The Western and Central Pacific Fisheries Commission, the Inter-American Tropical Tuna Commission, and the Indian Ocean Tropical Tuna Commission, three RFMOs managing and conserving tuna and other fish stocks,⁵⁶ require their members to “take all the necessary measures to eliminate IUU fishing activities, including, if necessary, the withdrawal of the registration or the fishing licenses of these vessels.”⁵⁷ They must also, among other things, refuse to allow such vessels to fly their flags, prohibit these vessels from engaging in commercial transactions, and prohibit these vessels from importing, landing, and transshipping of species.⁵⁸

⁵² TPP, *supra* note 1, at art. 20.17(3)(c) (emphasis added).

⁵³ See Resolution Conf. 8.4 (Rev. CoP15), *supra* note 21.

⁵⁴ The Trans-Pacific Partnership, *supra* note 2, at 2; USTR, Environment, *supra* note 4.

⁵⁵ TPP, *supra* note 1, at art. 20.16(5)(b).

⁵⁶ Australia, Canada, Japan, Mexico, New Zealand, United States, and Vietnam are members or cooperating non-members of the WCPFC. See WCPFC, About WCPFC, at <https://www.wcpfc.int/about-wcpfc>. Canada, Japan, Mexico, Peru, and the United States are members of the IATTC. See IATTC, Inter-American Tropical Tuna Commission, at <http://www.iatcc.org/HomeENG.htm>. Australia and Malaysia are members of the IOTC. See

⁵⁷ WCPFC, Conservation and Management Measure to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported, and Unregulated Fishing Activities in the WCPO, Conservation and Management Measure 2010-06 ¶ 21(b) (2010); Inter-American Tropical Tuna Commission, Amendment to Resolution C-05-07 on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Activities in the Eastern Pacific Ocean, Resolution C-15-01, ¶ 15 (2015); Indian Ocean Tropical Tuna Commission, Resolution 11/03 on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence, ¶ 15 (2011).

⁵⁸ WCPFC, CMM 2010-06, *supra* note 16, at ¶ 22; IATTC Resolution C-15-01, *supra* note 16, at ¶ 16; IOTC Resolution 11/03, *supra* note 44, at ¶ 16.

While these provisions do not expressly call for the removal of subsidies, it is highly unlikely that a member of an RFMO would provide subsidies to a vessel it does not flag (unless the subsidy is carried in the below-market cost of fuel or is otherwise generally available to all fishing vessels, in which case the subsidy may not be covered by the TPP because it would not be considered “specific” within the meaning of the WTO’s Subsidies and Countervailing Measures Agreement).⁵⁹

These RFMO measures also show how members of relevant RFMOs already cooperate with respect to IUU fishing. Thus, the TPP’s call for TPP Parties to “endeavor” to improve cooperation to address IUU fishing⁶⁰ has, in many respects, already been accomplished, particularly since the TPP does not direct the TPP Parties to cooperate through the TPP’s Environment Committee to address IUU fishing. As a consequence, the TPP Parties will endeavour to improve cooperation through competent international organizations,⁶¹ such as the WCPFC, IATTC, and IOTC.

Other activities relating to IUU fishing simply do not go far enough and will be difficult, if not impossible, to enforce. To combat IUU fishing and deter trade in products from species harvested from IUU fishing, for example, the TPP Parties must “strive” to act consistently with the rules of RFMOs of which it is not a member.⁶² They must also “endeavor” not to undermine catch or trade documentation schemes operated by RFMOs, as well as intergovernmental organizations whose scope includes the management of shared fisheries resources.⁶³ At a time when some countries such as Palau and Indonesia are burning or sinking vessels of TPP Parties such as Vietnam and Malaysia for engaging in IUU fishing,⁶⁴ obligations to “strive” for and “endeavor” to undertake certain activities are inadequate to meet the challenges of IUU fishing. In addition, obligations qualified by words such as “strive” and “endeavour” are likely impossible to enforce. The plain language of such words only requires the Parties to exert some

⁵⁹ The WTO’s Agreement on Subsidies and Countervailing Measures limits its applicability by distinguishing subsidies of general applicability from those that are “specific.” Subsidies that are generally available to the public, such as public education and fire protection, are not subject to trade discipline and cannot be countervailed. Specific” subsidies, however, are covered. To be “specific,” the subsidy must be conferred on an identifiable enterprise or group of enterprises. More concretely, Article 2.1(c) of the SCM Agreement provides that a subsidy may be specific if “there are reasons to believe that the subsidy may in fact be specific.” *De facto* specificity may be found where: 1) the actual recipients are limited in number; 2) an enterprise or industry is a predominant user of the subsidy; 3) certain enterprises receive a disproportionately large amount of the subsidy; and 4) the manner in which the granting authority exercises discretion to grant a subsidy indicates that an enterprise or industry is “favored over others.” Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 231 (1999), 1869 U.N.T.S. 14

⁶⁰ TPP, *supra* note 1, at art. 20.16(13).

⁶¹ *Id.* The TPP Parties have a duty to cooperate with each other concerning IUU fishing but only to “identify needs and to build capacity to support implementation” of efforts to combat IUU fishing. *Id.* at art. 20.16(14).

⁶² *Id.* at art. 20.16(14)(d).

⁶³ *Id.* at art. 20.16(14)(e).

⁶⁴ Associated Press, *Moving to Preserve Fisheries, Palau Burns Vietnamese Boats Caught Fishing Illegally*, (June 11, 2015) (noting that Palau burned four Vietnamese fishing vessels fishing illegally in Palau’s waters and that Indonesia blew up and sank 41 foreign fishing vessels from China, Malaysia, the Philippines, Thailand and Vietnam), available at <http://www.foxnews.com/world/2015/06/11/moving-to-preserve-fisheries-palau-burns-vietnamese-boats-caught-fishing/>.

energy.⁶⁵ In legal terms, obligations qualified by such terms only require a Party to “act diligently in order to achieve the object of the obligation.”⁶⁶

The only unqualified obligation relating to IUU fishing is the obligation to implement port State measures.⁶⁷ Even here, however, the obligation is inadequately framed. Unlike other TPP provisions that frame obligations in terms of specified MEAs, the requirement to implement port State measures does not do so, even though a relevant MEA exists—the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement). The FAO adopted the Port State Measures Agreement in 2009.⁶⁸ Although it has yet to enter into force, FAO has produced a number of guides to support implementation of port State measures.⁶⁹ Nonetheless, the TPP does not reference the Port State Measures Agreement or any of these implementation documents with respect to the duty to implement port State measures.⁷⁰ As such, the reference to “port State measures” is not tied to any specific legal or technical document, and the Parties have no specific commitments to implement specific port State measures.

IV. Conservation and Trade in Wildlife

The USTR has also hailed the provisions relating to wildlife trade as “pioneering”⁷¹ and “enforceable.”⁷² Here, too, USTR overstates the TPP’s provisions, which fall short of what is necessary to meet the challenges of illegal wildlife trade.

In the TPP, the Parties acknowledge that poaching and illegal trade in wildlife undermine efforts to conserve and manage those resources.⁷³ To that end, they commit to taking “appropriate measures” to protect and conserve wildlife it has identified as “at risk” within its

⁶⁵ “Endeavour” means “to attempt by exertion of effort.” Merriam-Webster Dictionary Online, at <http://www.merriam-webster.com/dictionary/endeavor>. “Strive” means “to devote serious effort or energy.” *Id.* at <http://www.merriam-webster.com/dictionary/strive>.

⁶⁶ RENÉ LEFEBER, *TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY* 71 (1996).

⁶⁷ TPP, *supra* note 1, at art. 20.16(14)(c).

⁶⁸ FAO Conference Resolution 12/2009 approving the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. For more on the Port State Measures Agreement, see FAO, *Port State Measures Agreement*, available at <http://www.fao.org/fishery/psm/agreement/en>.

⁶⁹ See, e.g., *Implementation of Port State Measures Volume 1: Technical Guide to Port Inspection of Fishing Vessels* (FAO, 2013), available at <http://www.fao.org/3/13a91774-6816-5262-92e1-654e2b8b9740/i3508e.pdf>; Steve Dunn et al., *Implementation of Port State Measures Volume 3: Port Inspections—Guide to Activities and Tasks* (FAO, 2013), available at <http://www.fao.org/3/3b45c6e9-52e1-50ed-8b7e-bf184108c9e3/i3510e.pdf>.

⁷⁰ The TPP does reference the Port State Measures Agreement in Article 20.16(13), in which the “Parties recognize the importance of concerted international action to address IUU fishing as reflected in regional and international instruments.” Regional and international instruments include the Port State Measures Agreement. TPP, *supra* note 1, at 20.16(13), fn. 20.

⁷¹ The Trans-Pacific Partnership, *supra* note 2, at 2.

⁷² USTR, *Environment*, *supra* note 4.

⁷³ TPP, *supra* note 1, at art. 20.17(1).

territory.⁷⁴ Because each TPP Party already has domestic wildlife legislation—either as CITES implementing legislation⁷⁵ or other legislation⁷⁶—it is not clear what this adds.

Similarly, each Party commits to “maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management” and wildlife conservation.⁷⁷ By definition, an obligation to “maintain” does not require improvements, and some TPP Parties clearly need to improve their capacity to manage forests sustainably and conserve wildlife. Vietnam, for example has been at the center of the illegal rhino horn trade. In fact, TRAFFIC, a non-governmental organization that assesses wildlife trade,⁷⁸ has stated that Vietnam is believed to be driving the “rapacious illegal trade in rhino horn”⁷⁹ with Vietnamese nationals at the center of the illegal trade.

Peru continues to struggle to stop the flow of illegally harvested timber from indigenous lands and national parks, and yet the TPP and Peru itself have turned a blind eye to these problems. Prior to the U.S.–Peru FTA, the World Bank estimated that 80% of Peruvian timber exports stem from illegal logging.⁸⁰ As a consequence, the U.S.–Peru FTA specifically requires Peru to take certain steps to control the illegal harvesting and illegal trade in timber.⁸¹ For example, the U.S.–Peru FTA requires Peru to increase the number and effectiveness of personnel dedicated to enforcement of laws relating to harvest of and trade in timber products,⁸² conduct comprehensive inventories of tree species listed by CITES,⁸³ establish an export quota for bigleaf mahogany,⁸⁴ and conduct period audits of timber producers,⁸⁵ among many other things.

⁷⁴ *Id.* at art. 20.17(4)(a).

⁷⁵ See, e.g., CITES Standing Committee, *National Laws*, SC65 Doc. 22, at Annex, p. 1, 6 (stating that Australia, Brunei, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States have legislation that adequately implements CITES (“Category 1”), with Chile having legislation that partially implements CITES (“Category 2”).

⁷⁶ See, e.g., Environment Protection and Biodiversity Conservation Act 1999 (Australia), available at <https://www.environment.gov.au/epbc>; Wild Animals and Birds Act (Singapore), Cap. 351, 2000 Rev. Ed. Sing., available at <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%0719c63-6c52-4222-b991-3804d749ea36%20%20Status%3Ainforce%20Depth%3A0;rec=0>; Wildlife Act 1953 (New Zealand), available at <http://www.legislation.govt.nz/act/public/1953/0031/latest/DLM276814.html>; Wildlife Conservation Act of 2010 (Malaysia), Act 716, available at <http://www.gunungganang.com.my/pdf/Malaysian-Legislation/National/Wildlife%20Conservation%20Act%202010.pdf>; Endangered Species Act (United States), 16 U.S.C. §§1531–1544; Law 20.380, Protección de los Animales (Chile), available at <https://www.globalanimallaw.org/database/national/chile/>.

⁷⁷ TPP, *supra* note 1, at art. 20.17(4)(b).

⁷⁸ TRAFFIC, <http://www.traffic.org/overview>.

⁷⁹ TOM MILLIKEN & JO SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS: A DEADLY COMBINATION OF INSTITUTIONALIZED LAPSES, CORRUPT WILDLIFE INDUSTRY PROFESSIONALS AND ASIAN CRIME SYNDICATES 14 (TRAFFIC, 2012), available at http://static1.1.sqspcdn.com/static/f/157301/19987722/1345739024283/traffic_species_mammals66.pdf?token=YpfXekwfyCSD8VGrTQBez2jQMZw%3D.

⁸⁰ MARILYNE PEREIRA GONCALVES ET AL., JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING, 3, fn. 10 (World Bank, 2012) (citing estimates from 2006), available at <http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8978-2>.

⁸¹ U.S.–Peru FTA, *supra* note 15, at Annex 18.3.4.

⁸² *Id.* at Annex 18.3.4, ¶ 3(a).

⁸³ *Id.* at Annex 18.3.4, ¶ 3(d).

⁸⁴ *Id.* at Annex 18.3.4, ¶ 3(f).

⁸⁵ *Id.* at Annex 18.3.4, ¶ 6(a).

Nonetheless, the situation appears much the same; Peru's governmental agency to help oversee the timber industry, OSINFOR,⁸⁶ found in 2014 that 78% of the wood inspected at 115 concessions was illegally harvested but nonetheless transported with documents.⁸⁷ Remarkably, Peru brought no prosecutions against anyone, imposed no significant penalties, and returned the confiscated timber to the companies that illegally harvested and transported the timber.⁸⁸ These provisions of the U.S.–Peru FTA are significantly more precise and better targeted towards specific problems than anything found in the TPP. Yet, because the United States has not sought to enforce these provisions, many of them have gone unimplemented.⁸⁹

Notably, the TPP's bilateral understanding between Peru and the United States does not address concerns relating to illegal harvest and illegal trade in timber from Peru. Instead, the two Parties “recognize” 1) that Peru's Forest and Wildlife Law requires proof of legal origin for wild fauna and flora, and failure to provide such proof is subject to penalties in accordance with that law and 2) that Peru has established procedures and legal requirements for wild fauna and flora produced and exported from Peru.⁹⁰

The Parties also “commit ... to combat the illegal take of, and illegal trade in, wild fauna and flora.”⁹¹ Rather than identify specific cooperative efforts the Parties will take to fulfill this obligation, the TPP directs the Parties to exchange information and experiences, undertake, as appropriate, joint conservation activities, and endeavor to implement, as appropriate, CITES resolutions.⁹² These are not the type of provisions likely to change enforcement and prosecution of wildlife crimes.

The most interesting, but perhaps also the most ambiguous, provision relating to wildlife conservation is the duty of each Party to take measures “to combat, and cooperate to prevent,” the trade in wildlife that was taken or traded in violation of “that Party's law or another applicable law.”⁹³ A footnote explains that the phrase “another applicable law” means “a law of the jurisdiction where the take or trade occurred.”⁹⁴ Presumably this phrase means “the law of another State” and cannot be interpreted as subnational law.⁹⁵ If so, then this provision has the

⁸⁶ Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre, at <http://www.osinfor.gob.pe/osinfor/>.

⁸⁷ Bob Abeshouse & Luis Del Valle, *Peru's Rotten Wood*, AL JAZEERA (Aug. 12, 2015), available at <http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html>.

⁸⁸ *Id.*

⁸⁹ Environmental Investigation Agency, *Implementation and Enforcement Failures in the US--Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue* (June 2015), available at [http://eia-global.org/images/uploads/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_\(FTA\)_Allows_Illegal_Logging_Crisis_to_Continue.pdf](http://eia-global.org/images/uploads/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_(FTA)_Allows_Illegal_Logging_Crisis_to_Continue.pdf).

⁹⁰ *Bilateral Understanding between the U.S. and Peru on Conservation and Trade*, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-US-PE-Understanding-regarding-Conservation-and-Trade.pdf>. The provision appears more likely to assist U.S. officials seize illegal shipments of timber from Peru under the U.S. Lacey Act, 16 U.S.C. §§ 3371–3378.

⁹¹ TPP, *supra* note 1, at art. 20.17(3).

⁹² *Id.* at art. 20.17(3)(a)–(c).

⁹³ *Id.* at art. 20.17(5).

⁹⁴ *Id.* at art. 20.17(5), fn. 26.

⁹⁵ The TPP defines “Party” to mean “any State or separate customs territory for which this Agreement is in force.” *Id.* at art. 1.3. Typically a reference to “State” or “party” includes subnational levels of government. Moreover,

potential to helpfully combat illegal wildlife trade by allowing a TPP Party to prosecute under its own laws violations of another State's laws. The United States has had great success with the Lacey Act,⁹⁶ which makes it unlawful to import, export, sell, acquire, or purchase fish, wildlife, or plants taken possessed or sold in violation of State or foreign law.⁹⁷

As written, however, the provision depends on the individual implementation by the TPP Parties. This is because the measures for combatting such trade "include sanctions, penalties, *or* other effective measures." It is rather inexplicable why such measures do not "include sanctions, penalties, *and* other effective measures." As a consequence, TPP members could opt to return the illegally traded specimens to the country of origin, sell the confiscated specimens, or take other measures that do not sanction or penalize such trade.

Moreover, the TPP establishes broad discretion in the ways that Parties implement the duty to combat and prevent illegal wildlife trade. The TPP recognizes that each Party "retains the right to exercise administrative, investigatory and enforcement discretion" in its implementation of this obligation.⁹⁸ They also retain "the right to make decisions regarding the allocation of administrative, investigatory and enforcement resources."⁹⁹ While agencies and law enforcement personnel traditionally have broad discretion to choose which cases to investigate and prosecute, Parties to other free trade agreements have used similar language to excuse broad failures to enforce environmental law. For example, the United States has never enforced the Migratory Bird Treaty Act, which prohibits the taking of migratory birds,¹⁰⁰ against loggers. When submitters challenged that failure under the North American Agreement on Environmental Cooperation,¹⁰¹ NAFTA's "side agreement," the United States claimed that it used its enforcement discretion to investigate and enforce activities involving pollution or energy production facilities.¹⁰² It also stated that it had *bona fide* reasons for allocating enforcement resources to investigating other matters, but then referred to a range of initiatives completely unrelated to enforcement, such as monitoring the population status of migratory birds, public outreach, and implementing a permit program for hunting.¹⁰³ Yet, the Agreement's secretariat concluded that the United States had failed to describe why its enforcement choices were reasonable; for example, the United States did not provide information on the number of birds killed through intentional activities such as hunting versus incidental activities such as logging.¹⁰⁴ In addition, the secretariat found the U.S. response lacking because it did not, for example, describe why monitoring a hunting program might be easier than monitoring a logging

other parts of the TPP specifically refer to "the central, regional or local governments or authorities of that Party," indicating that where Party is used, it refers to all levels of government. *See, e.g., id.* at art. 9.2(2).

⁹⁶ 16 U.S.C. §§ 3371-3378.

⁹⁷ *Id.* at § 3372(a)(2).

⁹⁸ TPP, *supra* note 1, at art. 20.17(6).

⁹⁹ *Id.*

¹⁰⁰ 16 U.S.C. §§ 703-712, § 703.

¹⁰¹ North American Agreement on Environmental Cooperation, art. 14.1, U.S.-Can.-Mex., Sept. 14, 1993, *available at* <http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567> [hereinafter NAAEC].

¹⁰² Response of the United States, Migratory Birds, A14/SEM/99-002/05/RSP, 14 (Nov. 19, 1999) (SEM 99-002), *available at* http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=548&BL_ExpandID=502.

¹⁰³ *Id.* at 15-21.

¹⁰⁴ Article 15(1) Notification to Council that Development of a Factual Record is Warranted, Migratory Birds, A14/SEM/99-002/05/ADV, 19 (Dec. 15, 2000) (SEM 99-002), *available at* http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=548&BL_ExpandID=502.

operation, as claimed.¹⁰⁵ Overall, the United States failed to “provide a careful identification of the reasons why it chose to follow one course rather than another.”¹⁰⁶ The TPP, however, does not have any secretariat to assess the claims of a Party to determine whether it provided the careful identification of the reasons for choosing one enforcement strategy over another.¹⁰⁷ Without that independent arbiter, claims of enforcement discretion will go unchallenged.

A stronger provision would have prohibited the trade in illegally taken or previously illegally traded plants and animals, except for *bona fide* scientific, enforcement purposes, or related, non-commercial purposes. Otherwise, illegally obtained and illegally traded specimens will enter the market, feed demand, and continue the decline of species. The example of illegal timber from Peru highlights this; by returning the illegally-taken specimens to the very companies involved in the illegal trade, it is very likely that those companies will profit from the return of the timber rather than be deterred by prosecutions and stiff penalties.

V. Protection of Marine Animals

The provisions relating to the protection of marine animals, including fish, are long on aspiration but short on obligation. While the Parties “acknowledge” that “the fate of marine capture fisheries is an urgent concern”¹⁰⁸ and that inadequate fisheries management contributes to the problem, the Parties are only required to “seek” to operate their fisheries management systems to prevent overfishing and overcapacity.¹⁰⁹

The provisions also single out sharks, marine turtles, seabirds, and marine mammals.¹¹⁰ That attention is well deserved, particularly the attention given to sharks, because populations of many shark species are declining due to shark-finning for shark fin soup. In fact, roughly 100 million sharks are killed each year, with the shark fin trade a primary reason.¹¹¹ An analysis of the conservation status of 1,041 shark, ray, and closely related species by the International Union of the Conservation of Nature (IUCN) shows that 25% are threatened with extinction and only 23% are of “least concern.”¹¹² Because sharks grow slowly and have low reproductive rates, they are “highly susceptible to extinction, and it is difficult for many shark species to replenish their populations as quickly as they are being diminished. Many species of sharks are currently in danger due to shark finning.”¹¹³ Even as trade in shark fins has declined “slightly” since the early 2000s, trade in shark meat has increased 42%.¹¹⁴

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 18.

¹⁰⁷ See *infra* Section VII.A (describing the TPP’s citizen submission process).

¹⁰⁸ TPP, *supra* note 1, at art. 20.16(1).

¹⁰⁹ *Id.* at art. 20.16(3).

¹¹⁰ *Id.* at art. 20.16(4).

¹¹¹ Katy Fairclough, Shark Finning: Sharks Turned Prey, Smithsonian Institute, Museum of Natural History, available at <http://ocean.si.edu/ocean-news/shark-finning-sharks-turned-prey>.

¹¹² IUCN, A Quarter of Sharks and Rays Threatened with Extinction (Jan. 21, 2014), available at <http://www.iucn.org/?14311/A-quarter-sharks-and-rays-threatened-with-extinction>.

¹¹³ Fairclough, *supra* note 111.

¹¹⁴ FELIX DENT & SHELLEY CLARKE, STATE OF THE GLOBAL MARKET FOR SHARK PRODUCTS 3 (FAO Fisheries and Aquaculture Technical Paper No. 590, 2015), available at <http://www.fao.org/3/a-i4795e.pdf>.

To combat this trade and the practice of shark finning, 25 states and countries now have laws that ban the possession, sale, and trade of shark fins.¹¹⁵ TPP Parties Japan, Malaysia, Singapore, and Vietnam are not among those that have banned shark finning or banned possession, sale, or trade in shark fins. Rather, those States in addition to other TPP Parties are among the main exporters, importers, and consumers of shark fins and other shark products. For example, Mexico and Malaysia are among the ten States responsible for more than 25% of global shark catches between 2002 and 2011.¹¹⁶ Meanwhile, Singapore was the fourth largest exporter of shark fins between 2000 and 2009; it reported imports and exports of approximately 20,000 tonnes of meat and 10,000 tonnes of fins.¹¹⁷ Peru and Chile are also significant exporters of various shark products.¹¹⁸ Singapore, Malaysia, and Vietnam are among the six nations consuming the “vast majority” of shark fins.¹¹⁹ Nonetheless, the TPP does not ask Parties to take any specific measures to conserve sharks, although Parties should, “as appropriate,” collect data or impose catch limits, mitigation measures, or ban finning.¹²⁰

More positively, the TPP prohibits fisheries subsidies that “negatively affect fish stocks that are in an overfished condition.”¹²¹ Even this provision, however, is limited in its effectiveness because the subsidies must “negatively affect fish stocks” that are already “overfished.” With 28.8% of fish stocks fished at a biologically unsustainable level, the provision will have some impact,¹²² but it does not apply to the 61.3% of fish stocks that are fully fished with “no room for further expansion in catch.”¹²³ Subsidies, however, frequently cause overfishing and overcapacity.¹²⁴ In 2006, a global study of the period from 1995-2005 estimated fisheries subsidies at \$30–34 billion.¹²⁵ In 2010, the United Nations Environment Program valued fisheries subsidies at \$27 billion, with “only around \$8 billion . . . classed as ‘good’ with the rest classed as ‘bad’ and ‘ugly’ as they contribute to over-exploitation of

¹¹⁵ S. WHITCRAFT ET AL., EVIDENCE OF DECLINES IN SHARK FIN DEMAND: CHINA, 14–16, Tbl. 3 (WildAid, 2014), available at

http://wildaid.org/sites/default/files/resources/SharkReport_Evidence%20of%20Declines%20in%20Shark%20Fin%20Demand_China.pdf.

¹¹⁶ VICTORIA MUNDY-TAYLOR & VICKI CROOK, INTO THE DEEP: IMPLEMENTING CITES MEASURES FOR COMMERCIALY-VALUABLE SHARKS AND MANTA RAYS 3 (TRAFFIC, 2013), available at http://static1.1.sqspcdn.com/static/f/157301/23202911/1375133237910/traffic_pub_fisheries15.pdf?token=kW21ajdN%2FrWycJaflegAVoIsWY%3D. India and Indonesia are responsible for 20% of the global catch, while Argentina, Mexico, Malaysia, Pakistan, Brazil, Thailand, Nigeria, Iran, Sri Lanka, and Yemen are responsible for 20%. *Id.*

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.* at 5.

¹¹⁹ DENT & CLARKE, *supra* note 114, at 3.

¹²⁰ TPP, *supra* note 1, at art. 20.16(4)(a).

¹²¹ *Id.* at art. 20.16(5)(a).

¹²² FAO, THE STATE OF WORLD FISHERIES AND AQUACULTURE 7 (2014).

¹²³ *Id.*

¹²⁴ See, e.g., Peter Manning, *World Inventory of Fisheries: Subsidies in Fisheries: Issues Fact Sheets*, in FAO FISHERIES AND AQUACULTURE DEPARTMENT (updated May 27, 2005) (stating that “it is accepted that these subsidies speed up the development of overcapacity and consequently threaten the continued well being of wild fish stocks, in the absence of effective fisheries management.”), available at <http://www.fao.org/fishery/topic/13333/en>.

¹²⁵ CATCHING MORE BAIT: A BOTTOM-UP RE-ESTIMATION OF GLOBAL FISHERIES SUBSIDIES, Fisheries Centre Research Reports, Vol.14 No. 6, 2 (eds. Ussif Rashid Sumaila & Daniel Pauly, 2d vers. 2007), available at <http://www.fisheries.ubc.ca/node/3786>.

stocks.”¹²⁶ By not eliminating fisheries subsidies that contribute to overexploitation and overcapacity, the TPP has missed an extraordinary opportunity. As a consequence, the TPP’s provision on fisheries subsidies must be viewed as inadequate to meet the challenges of fisheries management, particularly since Parties have three years to bring non-existing, non-complying subsidies into conformity with this prohibition.¹²⁷

The United States also states that the TPP provides “specific protections for ecologically critical and iconic marine species, such as whales,”¹²⁸ but the Environment Chapter includes no concrete obligations relating to whales and other marine mammals. The one provision relating to conservation of marine mammals vaguely directs Parties to adopt measures, which “should include, as appropriate . . . conservation and relevant management measures, prohibitions, and other measures in accordance with relevant international agreements, to which the Party is a party.”¹²⁹ As Japan has indicated that it will defy¹³⁰ an order of the International Court of Justice to prohibit the issuance of permits to conduct whaling in the Southern Ocean,¹³¹ the statement of the United States is both wrong and another missed opportunity to improve conservation outcomes.

VI. Climate Change

The TPP contains some odd language that presumably refers to climate change while avoiding any mention of climate change or even carbon dioxide. In the TPP, the Parties

¹²⁶ UNEP, Press Release, Turning the Tide on Falling Fish Stocks—UNEP-Led Green Economy Charts Sustainable Investment Path, 2 (May 17, 2010). The estimates of fisheries subsidies vary largely due to differing definitions of “subsidy.” As the FAO notes,

there is no universally accepted definition of exactly what government actions (or inaction) are to be considered as subsidies. The term subsidies can be broadly applied to a wide range of government interventions, or to the absence of correcting interventions, that reduce costs and/or increase revenues of producing and marketing of fish and fish products in the short-, medium- or long-terms. “Government interventions” include financial transfers or the provision of goods or services at a cost below market prices. “The absence of correcting interventions” includes failure by government to impose measures that correct for external costs (externalities) associated with fishing.

Manning, *supra* note 121. They also vary due to the “difficulties in measuring the magnitude and effects of fisheries subsidies given the lack of available data, information and empirical studies on its use and effects.” *Id.*

¹²⁷ TPP, *supra* note 1, at art. 20.16(6). Vietnam has five years to bring its subsidies into conformity. *Id.* at art. 20.16(6), fn. 18. The Parties must make “best efforts” to refrain from introducing new, or existing or enhancing existing, subsidies that contribute to overfishing or overcapacity. *Id.* at art. 20.16(7). They have an ongoing duty to review subsidies that contribute to overfishing and overcapacity “with a view to achieving the objective of eliminating” them. *Id.* at art. 20.16(8).

¹²⁸ USTR, Environment, *supra* note 4.

¹²⁹ TPP, *supra* note 1, at art. 20.16(4)(b).

¹³⁰ *Japan Plans Unilateral Restart to Antarctic Whaling in 2015, Says Official*, THE GUARDIAN (June 20, 2015), available at <http://www.theguardian.com/environment/2015/jun/20/japan-plans-unilateral-restart-to-antarctic-whaling-in-2015-says-official>.

¹³¹ Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), 2014 I.C.J. Rep. __, ¶ 245 (Mar. 31, 2014).

acknowledge that a “transition to a low emissions economy requires collective action,”¹³² but it does not identify the kind of emissions economy that requires collective action. A subsequent provision asks the Parties to cooperate to address areas of joint or common interest that “may include” energy efficiency, clean and renewable energy sources, and other issues¹³³ that indicate the Parties are, in fact discussing climate change. In light of the ongoing negotiations to reach agreement on a new climate change regime in Paris at the end of 2015, the Parties may have been understandably hesitant to include mitigation and adaptation commitments in the TPP. Nonetheless, they could have used the TPP to create more specific cooperative frameworks for addressing the transition to a low *greenhouse gas* emissions economy. They could have agreed to a timetable for reducing and eliminating fossil fuel subsidies.

Neither of these ideas would have affected the Parties negotiating positions in Paris. A concrete, binding strategy for eliminating fossil fuel subsidies would have been consistent with the pledges made by members of the G-20 and the Asia-Pacific Economic Cooperation (APEC) forum, which includes all TPP Parties.¹³⁴ Both the G-20 and APEC have called for eliminating fossil fuel subsidies.¹³⁵ And for good reason: the International Energy Agency (IEA) estimated fossil fuel consumption subsidies at \$548 billion in 2013.¹³⁶ Fossil fuel production subsidies are estimated to be *at least* \$100 billion.¹³⁷

Fossil fuel subsidies increase consumption of fossil-fuel, increase emissions of carbon dioxide, and thus undermine global efforts to mitigate climate change. Assessing the removal of fossil fuel subsidies in just 8 non-OECD countries, the IEA predicted that global energy consumption would drop 3.5%, global carbon dioxide emissions would decline 4.6%, and GDP would increase by an average of 0.73% in the eight countries.¹³⁸ Focusing solely on coal

¹³² TPP, *supra* note 1, art. 20.15(1).

¹³³ *Id.* at art. 20.15(2).

¹³⁴ APEC comprises the following member economies: Australia, Brunei Darussalam, Canada, Chile, People’s Republic of China, Hong Kong (China), Chinese Taipei, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore, Thailand, United States, and Vietnam. *See Member Economies*, APEC, <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

¹³⁵ The G-20 agreed to “rationalize and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption.” 3rd G-20 Summit Meeting, Pittsburgh, U.S., Sept. 24–25, 2009, *The Pittsburgh Summit Declaration*, ¶ 24, available at <http://www.g20.org/images/stories/docs/eng/pittsburgh.pdf>. APEC did the same. 17th APEC Economic Leaders’ Meeting, Sing., Nov. 14–15, 2009, *Singapore Declaration- Sustaining Growth, Connecting The Region*, APEC Doc. No. 2009/AELM/DEC (stating “We also commit to rationalise and phase out over the medium term fossil fuel subsidies that encourage wasteful consumption, while recognising the importance of providing those in need with essential energy services.”); *see also* 9th APEC Energy Ministers Meeting, Fukui, Japan, June 18–20, 2010, *Fukui Declaration on Low Carbon Paths to Energy Security: Cooperative Energy Solutions for a Sustainable APEC*, ¶ 11, APEC Doc. No. 2010/EMM9/002 (June 19, 2010) (“We remain committed to the 2009 Leaders’ Declaration to rationalize and phase out over the medium term fossil fuel subsidies that encourage wasteful consumption, while recognizing the importance of providing those in need with essential energy services.”).

¹³⁶ International Energy Agency, *World Energy Outlook, Energy Subsidies*, available at <http://www.worldenergyoutlook.org/resources/energysubsidies/>.

¹³⁷ *See* Global Subsidies Initiative-U.N. Environment Programme Conference, Oct. 14–15, 2010, Geneva, Switz., *GSI-UNEP Conference Report, Increasing the Momentum of Fossil Fuel Subsidy Reform: Development and Opportunities*, at 14-15, available at www.globalsubsidies.org/files/assets/ffs_conference.pdf.

¹³⁸ INTERNATIONAL ENERGY AGENCY, *WORLD ENERGY OUTLOOK 1999, LOOKING AT ENERGY SUBSIDIES: GETTING THE PRICES RIGHT* 10, 64 tbl. 6 (1999). The eight countries studied were China, India, Indonesia, Iran, Kazakhstan, Russia, South Africa, and Venezuela.

subsidies, others concluded that removing all coal subsidies would reduce global carbon dioxide emissions by 8% from the business-as-usual baseline.¹³⁹ Fossil fuel subsidies also aggravate local pollution problems by increasing emissions of sulphur dioxide (SO₂), nitrogen oxides (NO_x), and particulate matter, pollutants that cause respiratory and other human health problems.¹⁴⁰ With so many climate gains to be made, the failure to reduce fossil fuel subsidies as part of the TPP is another missed opportunity.

VII. Enforcement

Regional free trade agreements involving the United States beginning with NAFTA have typically included two types of enforcement mechanisms for environmental matters: citizen submissions and State-to-State dispute settlement provisions.¹⁴¹ The TPP is no different, except that its enforcement mechanisms are likely to be even more ineffectual than those of prior agreements.

A. The Citizen Submission Process

The citizen submission processes of NAFTA, incorporated into the NAAEC,¹⁴² U.S.–CAFTA,¹⁴³ and others¹⁴⁴ allow citizens to allege that a Party “is failing to effectively enforce its environmental law.” The NAAEC Parties, acting through the agreement’s Commission for Environmental Cooperation, have shown little interest in implementing that process effectively. For example, the United States has never attempted to enforce the provisions of the Migratory Bird Treaty Act (MBTA), despite the CEC’s Secretariat finding that the allegations of the submitters were consistent with a failure to enforce the MBTA.¹⁴⁵ Moreover, the Parties have narrowed the scope of factual records¹⁴⁶ from that requested by submitters¹⁴⁷ and beyond that

¹³⁹ Kym Anderson & Warwick J. McKibbin, *Reducing Coal Subsidies and Trade Barriers: Their Contribution to Greenhouse Gas Abatement*, 5 ENV'T. & DEVELOPMENT ECON. 457, 477 (2000).

¹⁴⁰ 4th G-20 Summit Meeting, Toronto, Can., June 26–27, 2010, *Analysis of the Scope of Energy Subsidies and Suggestions for the G–20 Initiative*, at 25 (June 16, 2010), available at [http://www.iea.org/weo/docs/G20 Subsidy Joint Report.pdf](http://www.iea.org/weo/docs/G20%20Subsidy%20Joint%20Report.pdf).

¹⁴¹ The TPP also includes provisions for investor-state dispute settlement. TPP, *supra* note 1, at Chapter 9, available at <https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.vewtvh5ns>.

¹⁴² NAAEC, *supra* note 101, at art. 14.1.

¹⁴³ Dominican Republic–Central America–United States Free Trade Agreement, art. 17.7, Aug. 5, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter DR–CAFTA].

¹⁴⁴ U.S.–Peru, *supra* note 15, at art. 18.8; U.S.–Panama, *supra* note 44, at art. 17.8; U.S.–Colombia, *supra* note 43, at art. 18.8.

¹⁴⁵ Final Factual Record, Migratory Birds, 63 (CEC Apr. 24, 2003) (SEM-99-002), available at http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=250&BL_ExpandID=.

¹⁴⁶ The Council has narrowed the factual record of other submissions. See Final Factual Record at 23, BC Logging, (CEC Aug. 11, 2003) (SEM-00-04), available at http://www.cec.org/files/pdf/sem/00-4-FFR_en.pdf (excluding information regarding Canada’s enforcement of the *Fisheries Act* against logging operations). See also Final Factual Record at 18-19, (CEC Aug. 12, 2003) (SEM-98-004), available at http://www.cec.org/files/pdf/sem/98-4-FFR_en.pdf (excluding information regarding the lack of enforcement of the *Fisheries Act* in regards to mining operations in British Columbia); Final Factual Record at 17-18, (CEC Aug. 11, 2003) (SEM-97-006), available at http://www.cec.org/files/pdf/sem/97-6-FFR_en.pdf (excluding prosecutions as a tool for enforcement of the *Fisheries Act* and the basis for Canada’s assertion that voluntary compliance of the *Fisheries Act* represents legitimate use of discretion of enforcement powers).

recommended by the CEC's Secretariat.¹⁴⁸ More recently, the Parties rejected a request to prepare a factual record under questionable circumstances.¹⁴⁹

Much has been written about the ineffectiveness of the NAAEC's submission process¹⁵⁰ and yet the TPP submission process is weaker. The process begins on a positive note by allowing written submissions "regarding [a Party's] implementation of this Chapter."¹⁵¹ The range of claims is thus broader than found in the NAAEC, U.S.–CAFTA, and other free trade agreements,¹⁵² which limit submissions to those alleging a failure to enforce environmental law effectively. However, unlike the NAAEC and U.S.–CAFTA, submissions do not go to an independent commission. Instead, they will first go to the Party whose implementation of the Environment Chapter is being challenged.¹⁵³ The lack of an independent third party to assess the allegations and a Party's response is an obvious hindrance to effective implementation of the submission process. Moreover, in establishing the process, the Party may require that a submitter "explain how, and to what extent, the issue raised affects trade or investment between the Parties."¹⁵⁴ If a Party avails itself of that provision, the submission process will be difficult to invoke because assessing whether a particular policy has specific impacts on trade or investment is challenging. In fact, due to the challenges of linking a policy or measure to trade impacts, WTO dispute settlement panels have refused to impose such a duty on WTO Members as a condition of showing a violation of the General Agreement on Tariffs and Trade.¹⁵⁵

For those submissions asserting a Party's failure to enforce environmental law effectively, another Party must request that the TPP's Committee on Environment discuss the

¹⁴⁷ See e.g., Alliance for the Wild Rockies, et al., Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, Migratory Birds, A14/SEM-99-002/01/SUB (Nov. 17, 1999) (SEM 99-002).

¹⁴⁸ See e.g., Migratory Birds, Article 15(1) Notification, *supra* note 104, at 27.

¹⁴⁹ Article 15(1) Notification to Council that Development of a Factual Record is Warranted, BC Salmon Farms, A14/SEM/12-001/62/ADV (May 12, 2014) (stating that the Secretariat believes the preparation of a factual record is warranted); Council Resolution 14–09, Instruction to the Secretariat of the Commission for Environmental Cooperation with regard to submission SEM-12-001 (*British Columbia (BC) Salmon Farms*) asserting that Canada is failing to effectively enforce the *Fisheries Act* (Dec. 9, 2014) (rejecting the Secretariat's recommendation to prepare a factual record); Statement of the United States of America Explaining its Position and the Reasons for its Vote Regarding Submission SEM-12-001 (*British Columbia (BC) Salmon Farms*) (Dec. 9, 2014) (explaining that the United States disagrees with the reasons for rejecting the Secretariat's recommendation to prepare a factual record.). All documents relating to this submission can be found at

http://www.cec.org/Page.asp?PageID=2001&ContentID=25165&SiteNodeID=1088&BL_ExpandID=

¹⁵⁰ See e.g., John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*; 47 TEXAS INT'L L. J. 505 (2012), available at <http://www.tilj.org/content/journal/47/num3/Knox-Markell505.pdf>; Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1572&context=ilr>.

¹⁵¹ TPP, *supra* note 1, at art. 20.9(1).

¹⁵² NAAEC, *supra* note 101, at art. 14; DR–CAFTA *supra* note 143, at art. 17.7; U.S.–Peru, *supra* note 15, at art. 18.8; U.S.–Panama, *supra* note 44, at art. 17.8; U.S.–Colombia, *supra* note 43, at art. 18.8.

¹⁵³ *Id.* at art. 20.9(1).

¹⁵⁴ *Id.* at art. 20.9(4).

¹⁵⁵ See, e.g., United States–Sections 301–310 of the Trade Act of 1974, Panel Report, WT/DS/152/R, ¶¶ 7.83–7.85 (adopted Jan. 27, 2000).

submission and any written response.¹⁵⁶ In other words, submitters have no authority to bring even these types of submissions to an independent third party. The process, unlike the NAAEC and U.S.–CAFTA, is entirely in the hands of the Parties and does not even result in the preparation of a factual record, as under the NAAEC,¹⁵⁷ DR–CAFTA,¹⁵⁸ and other free trade agreements.¹⁵⁹ For those watching the transformation of the citizen submission process over time, this weakening of the process is not surprising; it is, in fact, totally expected. Nonetheless, it is a missed opportunity to shine a light on the enforcement practices of Parties that struggle to enforce their environmental laws.

B. State-to-State Dispute Settlement

The TPP's provisions for State-to-State dispute settlement compound the problem of vague and weak obligations by establishing a multi-step process that makes resort to actual dispute settlement highly unlikely. First, a Party may request consultations with any other Party on "any matter arising under this Chapter."¹⁶⁰ If the consulting Parties are unable to reach a "mutually satisfactory resolution,"¹⁶¹ one of the Parties may then move to the second step: requesting the Environment Committee to help resolve the matter.¹⁶² If the consulting Parties have failed to resolve the matter through the Environment Committee, then a consulting Party may move to step three: Ministerial consultations.¹⁶³ Finally we reach step 4: Barring resolution through Ministerial consultations, a consulting Party may seek dispute settlement.¹⁶⁴ Given this multi-step process, it is difficult to conceive a dispute actually reaching dispute settlement. This conclusion is supported by the fact that no dispute under an environment chapter of any free trade agreement involving the United States has ever reached binding dispute settlement. This includes more than 20 years of the NAAEC, which includes a much less intensive process for binding dispute settlement than the TPP.¹⁶⁵ As indicated by the *Migratory Birds* submission and the failure of Peru to implement the obligations relating to timber harvesting and trade, opportunities to use these mechanisms exist. Governments simply choose not to use them regardless of whether they are included in a "side agreement," as with the NAAEC, or the trade agreement's core dispute settlement provisions, as with the U.S.–Peru Free Trade Agreement¹⁶⁶ and others.¹⁶⁷

¹⁵⁶ TPP, *supra* note 1, at art. 20.9(4).

¹⁵⁷ NAAEC, *supra* note 139, at art. 15.

¹⁵⁸ DR–CAFTA, *supra* note 143, at art. 17.8.

¹⁵⁹ U.S.–Peru, *supra* note 15, at art. 18.9; U.S.–Panama, *supra* note 44, at art. 17.9; U.S.–Colombia, *supra* note 43, at 18.9.

¹⁶⁰ TPP, *supra* note 1, at art. 20.20(2).

¹⁶¹ *Id.* at art. 20.20(5).

¹⁶² *Id.* at art. 20.21.

¹⁶³ *Id.* at art. 20.22.

¹⁶⁴ *Id.* at art. 20.23.

¹⁶⁵ NAAEC, *supra* note 101, at arts. 22–36.

¹⁶⁶ U.S.–Peru FTA, *supra* note 15, at art. 18.12(6).

¹⁶⁷ DR–CAFTA, *supra* note 143, at art. 17.10(6); U.S.–Panama, *supra* note 44, at art. 17.11(6); U.S.–Colombia, *supra* note 43, at 18.12(6).

VIII. Conclusion

Despite the statements of USTR, the TPP's Environment Chapter is neither pioneering nor an historic opportunity to advance conservation and environmental protection across the Asia-Pacific region. It is, in fact, a document filled with vague and empty promises. It includes obligations that are highly qualified with phrases such as "strive", "endeavour," or "promote." Parties may implement other obligations "as appropriate." It diminishes a potentially vital citizen submission process and it makes State-to-State dispute settlement so cumbersome and the obstacles to bringing a claim so high in some circumstances as to be illusory.

As a consequence, the TPP's Environment Chapter is a missed opportunity to tackle some of the region's most serious environmental issues through concrete domestic legal obligations and international cooperative action. Significantly, many of these environmental issues have trade as a central component, making them ideal for addressing as part of a trade agreement. Trade in shark fins and other shark products is decimating shark populations all over the world, with several TPP Parties at the center of that trade. Plants and animals illegally taken are frequently illegally trade. The failure of the Environment Chapter to benefit these efforts seems quite clear.

Levin To Lay Out Demands For ITC's TPP Report During Three-Day Hearing

Inside US Trade

Posted: January 07, 2016

House Ways & Means Committee Ranking Member Sander Levin (D-MI) on Thursday (Jan. 7) said he will testify at the U.S. International Trade Commission's upcoming hearing on the economic effects of the Trans-Pacific Partnership (TPP) and request that the ITC incorporate a number of factors into its economic analysis of the trade deal.

Although Levin -- speaking to reporters after a House Ways & Means minority forum on currency manipulation and TPP -- did not detail what his request would specifically consist of, he did lay out a list of demands for the report in testimony submitted to the Nov. 17, 2015 ITC hearing on the economic impact of past U.S. FTAs.

Those demands include an analysis of how TPP will affect wages and income inequality; an examination of whether the ITC's economic model should assume full employment; an analysis of who will experience gains or losses as a result of TPP; an economic evaluation of TPP's non-tariff provisions; consideration of elements left out of TPP, such as enforceable currency disciplines; and an evaluation of the impact increased imports may have on the U.S. economy.

The ITC hearing was originally slated to last only one day, but has been extended to take place over three days due to the number of requests to testify received by the trade agency, according to an ITC spokeswoman.

Michael Wessel, a congressionally appointed commissioner on the U.S.-China Economic and Security Review Commission, told reporters on a press call Jan. 6 that, in his view, it would be problematic for the ITC to deliver its report ahead of the anticipated date of May 18 because of the broad interest in the report as well as its complexity.

"If you look at the interest in next week's hearing where the ITC has expanded the hearing to three days because of the interest it would, I think, concern me and many others if they short-circuited the process when not only is there so much interest in testifying," Wessel said.

U.S. Trade Representative Michael Froman in February of last year urged members of the ITC to accelerate their economic impact assessment of the TPP -- long before the deal was concluded (*Inside U.S. Trade*, Feb. 13, 2015).

The timing of the ITC's report on TPP's potential economic effects is a variable in determining when Congress will likely take a vote on the trade pact. FTA implementing bills are typically only considered once the ITC has issued its assessment, although this is not a legal requirement.

The ITC is anticipated to release its report on May 18 and Congress is scheduled to go on summer recess on July 15, which leaves a short window for approving TPP before the November elections. Once the administration submits an FTA implementing bill to Congress there is a

maximum of 90 legislative days -- which can stretch to five months -- during which the bill must be voted on under the Trade Promotion Authority procedures.

Levin, when asked Thursday if a vote on TPP was likely to only occur in the lame duck due to the timing of the report said, "anything is possible."

The public hearing will start Jan. 13 at the ITC building and end Jan. 15. The ITC has published pre-hearing briefs and statements from about 45 businesses, business groups, advocacy organizations, unions, and academics. An ITC spokeswoman could not provide numbers on how many requests to testify the trade agency had received or how many entities are slated to testify at the three-day hearing.

<http://www.sierraclub.org/compass/2016/01/corporation-behind-keystone-xl-just-laid-bare-tpo-s-threats-our-climate>

January 7, 2016

The Corporation Behind Keystone XL Just Laid Bare the TPP's Threats to Our Climate

By Ben Beachy

TransCanada, the notorious fossil fuel corporation behind the ill-fated Keystone XL tar sands pipeline, just made abundantly clear the threats that the controversial Trans-Pacific Partnership (TPP) trade deal would pose to our communities, our climate, and our clean air and water, if approved.

Just two months after the Obama administration rejected TransCanada's bid to build the dangerous Keystone XL tar sands pipeline – a landmark victory for the movement to keep fossil fuels in the ground – the Canadian corporation announced it will retaliate by using a TPP-like trade deal.

Specifically, TransCanada plans to ask a private tribunal of three lawyers to order the U.S. government to hand more than \$15 billion of our tax dollars to the corporation as “compensation” for the Keystone XL decision that spared us the threat of increased climate disruption and spills of dirty tar sands oil.

How can TransCanada make such an audacious demand? By using a provision called “investor-state dispute settlement” in the North American Free Trade Agreement (NAFTA), which gives foreign corporations, including fossil fuel firms, expansive rights to challenge U.S. environmental protections in unaccountable trade tribunals.

The TPP, a U.S. trade deal with 11 Pacific Rim countries that could come before Congress this year, would expand these corporate rights more than any past U.S. trade deal by extending them to more than 9,000 additional foreign-owned firms. In one fell swoop, the TPP would roughly double the number of foreign corporations that could follow TransCanada's example and challenge U.S. climate and environmental safeguards in private tribunals. The corporations that would gain this power include Australian and Japanese fossil fuel firms that are currently drilling for oil in the Gulf of Mexico and fracking for natural gas on U.S. public lands.

To be clear, TransCanada's NAFTA case will not reverse the Keystone XL decision – Keystone is dead, thanks to years of organizing by a diverse and dogged movement. However, the case could put taxpayers on the hook for the Keystone XL rejection. Even more, it offers a clarion warning that the TPP, by multiplying our exposure to costly cases from the likes of TransCanada, could undermine our most important environmental achievements and imperil climate leadership from future administrations. By helping to defeat the TPP, the movement that defeated Keystone XL can help safeguard future environmental victories.

5/4/16

Like NAFTA, the TPP would give foreign corporations like TransCanada the power to demand compensation for environmental policies that do not conform to their “expectations.” In other words, when the government takes an unexpected step to protect our air, our water, our economy, or the health of our families from dangerous projects like Keystone XL, corporations can ask a tribunal to order the government to pay. Indeed, TransCanada argues that it “had every reason to expect that its application [for the pipeline] would be granted.” The corporation states that its expectation was thwarted, and thus its special trade pact rights were violated, because the decision was made to “appease those who held a view on the environmental impact of the Keystone XL Pipeline.”

While a judge in a U.S. court might toss out such a desperate argument, TransCanada is not taking its case to a court, but to a trade tribunal not accountable to any domestic legal system. Instead of a judge, three private lawyers will issue a binding ruling that cannot be appealed. Neither NAFTA nor the TPP has meaningful rules requiring these lawyers to be impartial. Indeed, under existing trade and investment deals, many such tribunal lawyers actually rotate between acting as tribunal “judges” and representing corporations in cases against governments.

Like NAFTA, the TPP would empower tribunal lawyers to order a government to pay a corporation for the profits it hypothetically would have earned in the absence of the government decision being challenged. Indeed, TransCanada’s notice indicates that it is demanding more than \$15 billion from the U.S. government to cover not only its pipeline preparation costs, but also its “expected revenues” from the canceled project. The \$15 billion sum is one of the largest compensation demands that the United States has ever faced under a trade deal.

However, TransCanada’s case is not, unfortunately, an anomaly. It is part of a rising trend of fossil fuel corporations using trade and investment deals to attack environmental victories in private tribunals. For example, after Quebec enacted a moratorium on fracking under the St. Lawrence River (akin to New York’s fracking ban), a U.S. oil and gas company named Lone Pine Resources asked a NAFTA tribunal to order compensation from Canadian taxpayers. A Swedish energy firm named Vattenfall has similarly responded to Germany’s decision to phase out nuclear energy, demanding \$5 billion from Germany in a private tribunal. Chevron, meanwhile, is using another tribunal to try to evade a landmark court ruling requiring the oil giant to pay for the mass contamination of Ecuador’s Amazon rainforest.

Amid this surge in trade tribunal attacks on environmental achievements, it’s absurd that the TPP would go beyond any existing U.S. trade pact in exposing our safeguards to more greedy corporate challenges.

To protect our communities and the climate, we cannot allow TransCanada’s \$15 billion demand to inhibit our efforts to keep dirty fossil fuels in the ground. Nor can we allow the TPP to further undermine those efforts.

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Inside US Trade

Final TPP Auto ROO Package Differs From Expected Outcome In Two Ways

Posted: January 07, 2016

The final automotive rules of origin in the Trans-Pacific Partnership (TPP) as detailed in the text released this past November differ in two key ways from how TPP officials and other sources described the rules immediately after the talks concluded -- both of which effectively allow for the use of more content from non-TPP countries.

The first difference is that the regional value content (RVC) threshold for some key auto parts made in North America is 35 percent, as calculated under the so-called net cost method. By contrast, officials and some auto industry sources had previously signaled that all of the most sensitive parts for North American manufacturers would require either 40 or 45 percent TPP content. Under the TPP, auto parts must meet either 35, 40 or 45 percent RVC threshold under the net cost method to qualify for tariff benefits, depending on the part. Finished vehicles must meet an RVC of 45 percent under net cost.

The second previously undisclosed aspect of the TPP's rules of origin is that a special methodology for calculating the RVC applies not only to finished automobiles, but to auto parts as well. Informed sources said this alternative methodology had initially been described to them as only applying to finished vehicles.

Critics of these developments fear that they will effectively weaken the rules of origin and allow more content from countries outside the TPP region like China, and argue this could have a negative impact on automobile-related jobs in the region. But they also concede that the full impact of the alternative methodology is difficult to project.

Japan had originally sought lower RVC thresholds than the U.S. was willing to accept, but ultimately backed the alternative methodology as a compromise. It argued this methodology would ease the paperwork burden of applying for tariff benefits for parts that are typically produced near automobile production plants anyway for logistical reasons -- rather than opening the door to sourcing these parts from outside the TPP region. Some sources familiar with the auto industry said they were skeptical of this reasoning, however. Examples of key auto parts made in North America that ended up with a 35 percent RVC are certain auto bodies, mufflers, radiators and engine parts.

Flavio Volpe, president of the Canadian Automotive Parts Manufacturers Association (APMA), said in an interview with *Inside U.S. Trade* that this outcome came as a surprise to his group. Volpe said some of the auto parts that have an RVC of 35 percent under TPP are made by a large number of Canadian companies, and that this contradicts earlier assurances he had received from the Canadian government that such parts with the highest concentration of Canadian producers would get the 40 or 45 percent RVC.

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For instance, there are 26 Canadian companies currently producing auto bodies for motor vehicles other than passenger cars that are classified under tariff heading 8707.90, and 18 Canadian firms producing certain engine parts classified under 8409.91, according to APMA. Both of these auto parts ended up with an RVC of 35 percent.

Similarly, U.S. steel industry representatives serving on the Industry Trade Advisory Committee for their sector (ITAC-12) complained in their report on the TPP deal released on Dec. 5 that many steel-intensive auto parts require an RVC of 35 percent or 40 percent rather than the 45 percent. For instance, body stampings require 40 percent regional content to qualify as originating, while mufflers and radiators ended up with the lowest 35 percent, the report noted.

The alternative methodology for calculating the regional content value of autos and auto parts is laid out in Appendix 1 to Annex 3-D of the TPP's chapter on rules of origin. This alternative methodology -- described by some sources during the negotiations as the "flexibility mechanism" -- effectively makes it easier to meet the designated RVCs for vehicles and auto parts by providing a shortcut for counting some constituent materials as originating. Specifically, if certain materials have undergone one or more production processes listed in Table B of the appendix, they can be counted toward the originating value of the vehicle or auto part into which they are incorporated. This makes it easier to meet the RVC for that vehicle or auto part than the normal method, which would require such materials to meet their own product-specific relevant rule of origin specified in the TPP agreement.

The 11 processes listed in Table B are complex assembly, complex welding, die or other casting, extrusion, forging, heat treating including glass or metal tempering, laminating, machining, metal forming, moulding, and stamping including pressing.

But there are important differences in the way this flexibility mechanism functions for finished vehicles and auto parts. For vehicles, there is a finite list of seven products that can qualify as originating using the flexibility mechanism, listed in Table A of the appendix. These are tempered safety glass; laminated safety glass; auto bodies for passenger cars; auto bodies for other vehicles; bumpers; body stampings and door assemblies; and certain drive axles. This finite list places a limit on the extent to which vehicle producers can take advantage of the flexibility mechanism to qualify materials as originating.

The ability of companies to use the flexibility mechanism for auto parts is limited in a different way. First, it can only be used to help qualify materials going into 14 specific auto parts, including engines, bumpers, seat belts, brakes, steering wheels and airbags, which are listed in Table C of the appendix.

Second, the appendix states that the materials for which the flexibility mechanism is used can only account for a specified percentage of the total value of the listed auto part. For example, the regional value content requirement for bumpers is 45 percent under the net cost method. Materials that go into that bumper can be qualified using the flexibility mechanism, but such materials can only account for 10 percent of the total value of the bumper. The remaining 35 percent of the value of the bumper needed to meet the RVC must use the standard methodology for qualifying materials as originating.

Ten out of the 14 auto parts in Table C require an RVC of 45 percent, and for all of these parts the limit on the value of materials that can qualify using the flexibility mechanism is 10 percent. The four remaining auto parts require an RVC of 40 percent, and on these the flexibility mechanism can only be used to qualify materials making up 5 percent of the value. After TPP was concluded, sources had described a similar cap on the use of the flexibility mechanism for vehicles, but that was not borne out by the text released on Nov. 5 (*Inside U.S. Trade*, Oct. 9).

The ITAC-12 report said it was unclear to what extent this flexibility mechanism would allow more content from outside the TPP region to be included into qualifying goods. Apart from this mechanism, the TPP already provides two options for many auto parts to qualify as originating -- either meeting the RVC or undergoing a change in tariff classification.

"It is not known how this alternative system system differs from existing rules regarding a tariff classification change following a substantial transformation, and how it might ultimately result in more non-TPP content becoming deemed as originating in a TPP country," the report said.

ITAC-12 recommended that, in order to provide more clarity, the production processes listed in Table B of the appendix be defined in the Statement of Administrative Action that will accompany the TPP implementing bill.

Overall, ITAC-12 said it was "very concerned" that the TPP auto rules of origin are "likely to lead to greater use of non-U.S. and non-TPP steel in vehicles and automotive goods, which is a negative result for both U.S. steel companies and U.S. manufacturing in general."

That assessment was more critical than that of ITAC-2 covering automotive and capital goods, which was internally divided over whether to support the auto rules of origin (*Inside U.S. Trade*, Dec. 25, 2015). Neither ITAC-12 nor ITAC-2 took a firm position on whether to support or oppose the TPP overall.

Critics of the flexibility mechanism argue that it further weakens the TPP RVC thresholds, which are already lower than those included in the North American Free Trade Agreement, thereby opening the door for more content from non-TPP countries to be included in originating vehicles and auto parts.

They provided two counterarguments to Japan's assertion that the materials in Table A are typically sourced from close to the vehicle assembly plant and therefore are not likely to be imported from outside the TPP region anyway. The first is that Japan had claimed the flexibility mechanism was necessary in order to allow it to maintain its current supply chain, which includes non-TPP countries like Thailand and China. If that is true, then the flexibility mechanism must somehow allow the continued utilization by Japanese companies of non-TPP inputs, they reasoned. Second, these critics argue that some of the products in Table A -- such as bumpers -- are indeed traded internationally, and that others may become more feasible to trade in the future because of advancements in materials and shipping technology. One source noted that the only way for auto manufacturers to meet new higher emissions standards required by the U.S. and European Union is to incorporate lighter materials, which could make these materials more tradeable.

Despite these worries, Volpe said some Japanese companies have expressed an interest in investing in auto parts production in Canada in part to diversify their supply chain away from

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China. He said this was counterintuitive since the TPP's rules allow Japanese automakers to continue sourcing from non-TPP countries. "In spite of all this academic discussion of what the end result would be, I've been surprised to hear about the interest of Japanese capital coming into the Canadian manufacturing landscape," he said. "That would be counterintuitive ... and it would be an unexpected benefit." -- *Matthew Schewel*

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January 26, 2016

Political Timing Cramping TTIP

Given the volatile political environment in the country, unless a TransAtlantic Trade and Investment Agreement is at least signed by the end of the year, completing the pact will have to wait another four years, commented a senior US trade official Friday (WTD, 1/28/16).

The official – who spoke to an informal meeting on TTIP at the Swedish Embassy – indicated that negotiations have sped up since the last formal negotiating round last October in order to get to the end-game.

But European Union Ambassador David O’Sullivan, at the same forum, said there are a lot of tough issues to be resolved yet – such as agricultural tariffs, audio visual trade, open government procurement, Geographical Indications and services market access. He expressed hope that a final accord could be signed by the end of the year.

Deputy US Trade Representative – and US ambassador to the World Trade Organization – Michael Punke is in Brussels to take stock of the status of the negotiations and possibly address some of the toughest issues in advance of the next round of talks in Brussels starting February 22.

By the time of the October round in Miami, both sides had at least tabled initial offers. Inter-sessional talks since then have been frequent and comprehensive, the US official said. Negotiators were instructed to get enough on the table over the next few months to see an end point.

But should the TTIP negotiations fall through, the biggest losers will be the small- and medium-sized businesses on both sides, according to the US official. Existing nontariff barriers – including varying product standards and certification procedures – can be addressed without much bother by big companies, but they often are crippling for smaller firms, he pointed out.

Window Glass, Underwear and Mushrooms

Some tariffs on important products also are high on both sides, the official commented. He cited 8-percent tariffs on window glass, 18 percent levels on certain sports underwear, similar levels on imports of plywood from the United States – and an astonishingly 193 percent in the EU on imports of canned mushrooms.

Last October both sides agreed to eliminate tariffs on 97 percent on traded goods – but getting them all to zero will not be easy, the official commented.

Failure to reach agreement on time would be particularly disappointing because the small business chapter in TTIP is nearly complete – and could be considered an early harvest aspect of the grander trade and investment pact.

Also on hand for the discussion was Sweden’s Minister for Enterprise and Innovation Mikael Damberg, who emphasized the negotiations must be as transparent as possible to put to rest growing anxiety by the European public. Without public involvement in the negotiations it will be difficult to thwart opinions that the US-EU accord will lead to a “race to the bottom” when it comes to consumer protection and safety.

Mr. Damberg also said the final TTIP must be a “living” agreement, which is reviewed and updated regularly.

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Peterson Institute Study Shows TPP Will Lead to \$357 Billion Increase in Annual Imports

<https://medium.com/@DeanBaker13/peterson-institute-study-shows-tpa-will-lead-to-357-billion-increase-in-annual-imports-ac6b432cff23#.om1f2vff4>

January 26, 2016

A new study published by the Peterson Institute projects that the TPP will lead to an increase of \$357 billion in annual imports when its effects are fully felt in 2030. This increase in imports will be equal to 1.4 percent of projected GDP in that year.

You probably didn't see this projection in the write-ups of the analysis in the Washington Post, NYT, or elsewhere. That is likely because the study's authors chose not to highlight it. Instead, in their abstract they told readers that they projected the TPP would increase exports by \$357 billion. If you were curious about what happened to imports you had to go to page 7 to find:

"The model assumes that the TPP will affect neither total employment nor the national savings (or equivalently trade balances) of countries."

In other words, by design the model assumes that trade balance for the United States is not changed as a result of the TPP. This means that whatever changes we see in exports, according to the model, will be matched by an equal change in imports. Unfortunately the implied projection for imports is never mentioned in the study, so some reporters may have missed this implication of the model.

There are several other important issues that may have been missed. First, the model is quite explicitly a full employment model. This means that, by assumption, the model rules out the possibility of the TPP leading to a larger trade deficit that reduces output and increases unemployment.

In prior decades most economists were comfortable with this sort of full employment assumption since it was widely believed that economies quickly bounced back from recessions or periods of less than full employment. In this view, if a trade agreement led to a larger trade deficit it would soon be offset by lower interest rates, which would provide a boost to investment and consumption.

Alternatively, a trade deficit would lead to a lower value of the dollar. A lower valued dollar would make our exports cheaper to people in other countries, leading them to buy more of them. At the same time, it would make imports more expensive for people in the United States, leading us to buy fewer imports. The net effect would be to lower the size of the trade deficit, bringing us back towards full employment.

Unfortunately, in the wake of the 2008 crash, fewer economists now believe that the economy has a natural tendency back to full employment. Many of the world's most prominent economists (e.g. Larry Summers, Paul Krugman, Olivier Blanchard) now accept the idea of "secular

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stagnation.” This means that economies really can suffer from long periods of inadequate demand.

From the perspective of secular stagnation, if the TPP does lead to a larger trade deficit, then there is no automatic mechanism that will offset the lost demand and jobs. In this respect it is important to note that the TPP does nothing to address issues of currency management. This would mean that if one or more of the countries in the TPP began running larger trade surpluses with the United States, and then bought up large amounts of dollars to prevent an adjustment of their currency, there is nothing the United States could do within the terms of the agreement.

Unfortunately, the Peterson Institute’s model tells us nothing about whether the TPP is likely to lead to a growing trade deficit for the United States. It has ruled this possibility out by assumption.

There are some other items that are worth noting about the models assumptions. It assumes that 75 percent of the non-tariff barriers that are eliminated through the TPP will be protectionist in nature rather than welfare enhancing consumer, safety, or environmental regulation. That may prove to be to be correct, but it is very big assumption. This means that we will not see many cases where the investor-state dispute settlement (ISDS) mechanism is used to overturn (or more correctly impose penalties) for laws that allow consumers to purchase products they consider safe, such as country of origin labeling for meat. It means that the ISDS will not be used to overturn state or local bans on fracking, even if the purpose is to ensure safe drinking water. And, it means that the TPP will not make it more difficult to impose rules that prevent predatory lending by large financial institutions that happen to be based in other countries.

It is important to note that the bulk of the gains rest on this assumption about the nature of the non-tariff barriers that are overturned. Less than 12 percent of the projected gains are attributable to the reduction in tariff barriers in the TPP (page 15).

It is also worth noting that the study does not appear to factor in the losses associated with higher prices for the items that will be subject to stronger and longer patent and copyright protection. Stronger intellectual property protections were quite explicitly one of the main goals of the deal and were one of the last major issues to be resolved. As a result of the TPP, the countries that are party to the agreement will be paying more for prescription drugs and other protected products. The effect of longer and stronger IP rules is the same as a tariff, except we are talking about raising the price of protected items by many times above their free market price. This is equivalent to a tariff of several thousand percent on the protected items.

It does not appear as though the study has taken account of the losses associated with these implicit tariffs. There may be some offset if greater protection is associated with more innovation, but it would be a heroic assumption to assume this is automatically the case. Furthermore, even if innovation did offset the losses, it would not be done instantly, since there is a long lead time between when research is undertaken and when there is a product brought to market, especially with prescription drugs.

It is also worth noting, in the context of the balanced trade assumption of the Peterson Institute model, if the United States gets more money for its drugs patents and video game copyrights, then it gets less for its manufactured or agricultural goods. The greater income for drugs companies, the software industry, and other gainers from stronger IP protection imply less income for other exporters or import competing industries.

Finally, it is important to put the projected gain of 0.5 percent of GDP as of 2030 in some context. The Post article told readers:

“If those projections [from the Peterson Institute study] are correct, that additional growth would help a domestic economy that has struggled to regain the growth rates of previous decades in the wake of the Great Recession.”

The study’s projection of a cumulative gain to GDP of 0.5 percent by 2030 implies an increase in the annual growth rate of 0.036 percentage points. This means that if the economy was projected to grow by 2.2 percent a year in a baseline scenario, it will instead grow at a 2.236 percent rate with the TPP, assuming the Peterson Institute projections prove correct.

The projections imply that, as a result of the TPP, the country will be as rich on January 1, 2030 as it would otherwise be on April 1, 2030. Of course, other things equal, this would clearly be a positive story, but as noted above, there are reasons for believing that other things may not be equal and that these projections may not prove correct.

Economists Sharply Split Over Trade Deal Effects

By JACKIE CALMES

FEB. 1, 2016

http://www.nytimes.com/2016/02/02/business/international/economists-sharply-split-over-trade-deal-effects.html?_r=0

WASHINGTON — Lawmakers and presidential candidates are having their say about the 12-nation Pacific Rim trade accord that is President Obama's top economic priority in his final year in office. But lately the liveliest debate over the deal is among blue-ribbon economists.

On Monday, it was the critics' turn: Economists from Tufts University unveiled their study concluding that the pact, called the Trans-Pacific Partnership, would cause some job losses and exacerbate income inequality in each of the dozen participating nations, but especially in the largest — the United States.

Supporting the authors at the National Press Club was Jared Bernstein, who was the top economic adviser to Vice President Joseph R. Biden Jr. during Mr. Obama's first term.

The Trans-Pacific Partnership Trade Deal ExplainedMAY 11, 2015 Trans-Pacific Partnership Text Released, Waving Green Flag for DebateNOV. 5, 2015 Trans-Pacific Trade Pact Would Lift U.S. Incomes, but Not Jobs Overall, Study SaysJAN. 25, 2016 Obama Pushes New Pacific Trade Pact Ahead of Asia TripNOV. 13, 2015 The conclusions of the Tufts economists contradict recent positive findings from the Peterson Institute for International Economics and the World Bank about the trade pact, which would be the largest regional accord in history and would bind nations including Canada, Chile, Australia and Japan.

Each side in the economists' debate has criticized the economic model that the other used to reach its results, while opponents and supporters of the trade accord have quickly seized upon whichever analysis buttressed their own views.

Michael B. Froman, Mr. Obama's trade representative, plans to join other trade ministers in Auckland, New Zealand, on Thursday for the formal signing of the trade deal, which they finished in October after years of negotiations.

The future of the deal, however, depends on the approval of a sharply divided Congress. The administration is believed to lack enough support for passage, though votes are not expected until after the November election. Some other nations are delaying their own ratification processes pending American action.

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Election-year pressures are not helping the president's cause, as leading candidates in both parties are opposing the trade agreement.

Donald J. Trump, the leading Republican candidate, told the conservative website Breitbart News over the weekend that as president he would stop what he called "Hillary's Obamatrade."

Hillary Clinton, the leading Democratic contender, has criticized the final agreement after praising it while it was being negotiated. She continues to be assailed by her main rival for the nomination, Senator Bernie Sanders of Vermont, for her early support.

Against this backdrop, the economists from prestigious universities and research institutions have been providing their takes and debating their differences just as intensely, though with more scholarly reserve.

The analysis from the Global Development and Environment Institute at Tufts was titled "Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement," and was written by the economists Jeronim Capaldo and Alex Izurieta, with Jomo Kwame Sundaram, a former United Nations economic development official.

The authors wrote that they used "a more realistic model" for their analysis, and that previous reports that projected economic benefits from the trade accord were "based on unrealistic assumptions such as full employment" and unchanging income distribution.

The Tufts report projected that incomes in the United States would decline by a half-percentage point compared with the change expected without the Trans-Pacific Partnership. The Peterson Institute's report, by economists from Brandeis and Johns Hopkins universities, projected that incomes would rise by half a percentage point.

The Tufts paper also projected that the overall economies of the United States and Japan would contract slightly. Employment in the United States would decline by 448,000 jobs; total job losses in the dozen nations would be 771,000 — a small share of the nations' total work forces, yet hardly a selling point for leaders seeking to ratify the trade agreement.

The Obama administration has acknowledged that some jobs would be lost, especially in manufacturing and in industries that employ workers with lower skills, but it has said that those losses would be offset by new jobs created in export-reliant industries that pay more on average. The Peterson Institute report offered evidence for that argument, while concluding that there would be no net change in overall employment in the United States.

The other parties to the pact are Mexico, New Zealand, Peru, Malaysia, Vietnam, Singapore and Brunei.

"Economic gains would be negligible for other participating countries — less than one percent over 10 years for developed countries, and less than three percent for developing countries," the Tufts report said.

It also had bad news for countries, including China, that are not parties to the Trans-Pacific Partnership, whose participants account for nearly 40 percent of the world economy.

“We project negative effects on growth and employment in non-T.P.P. countries,” the report said. “This increases the risk of global instability and a race to the bottom, in which labor incomes will be under increasing pressure.”

The authors’ explicit criticism of models and data used by other economists provoked swift counter-criticism. Robert Z. Lawrence, a professor of international trade and investment at the Kennedy School of Government at Harvard, and a senior fellow of the Peterson Institute, wrote a blog piece on Monday expounding on why the institute’s analysis was “superior on all counts” and better suited to specifically gauging the impact of megatrade agreements.

Portman to oppose trade deal as opposition back home builds

By Paul Kane and Kelsey Snell

February 4, 2016

<https://www.washingtonpost.com/news/powerpost/wp/2016/02/04/portman-to-vote-no-on-trade-deal/>

Sen. Rob Portman, a former U.S. trade ambassador, announced Thursday that he opposes a sweeping 12-nation Pacific Rim trade agreement, dealing a setback to a deal that is seen as a key part of President Obama's economic legacy.

The Ohio Republican is facing a difficult re-election campaign against Ted Strickland, an anti-trade former Democratic governor, in a state that has seen a steep decline in manufacturing as a result of companies moving operations overseas. The announcement is a significant but not fatal blow to the Trans Pacific Partnership (TPP) agreement, which is protected by fast-track rules that ensure it cannot be filibustered in the Senate.

"I cannot support the TPP in its current form because it doesn't provide that level playing field," Portman said in a statement. "I will continue to urge the Obama administration to support American workers and address these issues before any vote on the TPP agreement."

Portman, who served as the top U.S. trade official under President George W. Bush, was seen as a potential ally for the Obama administration. Last year he voted for legislation to grant Obama fast-track trade negotiating authority. That bill, considered a bellwether of support for the trade agreement itself, passed on a 62 to 37 vote in May.

Strickland used Portman's announcement as an opportunity to knock his past support for trade deals.

"The difference between Senator Portman and myself when it comes to trade is clear: he voted for 8 trade deals and I opposed them," he said in a statement. "He voted to make permanent most favored nation status for China, and I opposed it."

The TPP agreement was signed Wednesday in a ceremony in New Zealand but has not yet been transmitted to Congress for official consideration. Support for the agreement has waned in recent months and Senate Majority Leader Mitch McConnell (R-Ky.) said Tuesday that he does not expect to consider the deal before the November election.

[U.S., 11 nations formally sign largest regional trade deal in history]

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“It’s pretty obvious to anybody who will state the obvious that with both the Democratic candidates for president opposed to the deal and a number of the presidential candidates of our party opposed to the deal, it’s my advice that we not pursue that, certainly before the election,” McConnell said.

Portman left open the possibility that he could change his position and support the deal if changes are made to better protect U.S. workers. He announced last year that he was skeptical of the deal for failing to prevent countries like Vietnam and Japan from artificially devaluing or otherwise manipulating the value of their currency. He drew criticism from his Republican colleagues for supporting a currency amendment to the fast-track bill.

The statement also listed concerns with the complex rules of origin that are used to determine how countries can source parts for major exports like automobiles. Many U.S. companies worry that the TPP makes it too easy for countries like Japan to undercut U.S. automakers by buying cheap parts from China to build inexpensive cars destined for U.S. dealerships.

The fight over rules of origin has plagued the deal throughout negotiations as have concerns that it doesn’t do enough to protect U.S drug innovations. U.S. pharmaceutical companies wanted data and research on complex biologic drugs to be protected for 12 years, a measure Portman and other Republicans supported. The final deal cut the protections to five years.

[In a setback for Obama, negotiators fail to wrap up Pacific trade pact]

The Obama administration has hailed the TPP as the most extensive trade expansion in a generation. Supporters of the agreement originally hoped the bipartisan vote on the fast track bill was a signal that the trade deal would have an easy path in Congress despite election year politics.

Hopes fizzled in December when McConnell announced in an interview with The Washington Post that he thought it would be a mistake for Obama to try to pass the deal in an election year. Nearly every presidential candidate in both parties oppose the deal as do many House Democrats.

[McConnell warns that trade deal can’t pass Congress before 2016 elections]

Fast-track legislation lays out a strict timeline that requires Congress to vote on the legislation within 90 days of the signed agreement being transmitted for their consideration. Transmission could take time and there is a chance that Obama could work with Congress to slow-walk the process long enough for deal to come up after the November election.

McConnell and House Speaker Paul D. Ryan (R-Wisc.) are both in favor of expanding U.S. trade and Ryan is credited with carefully persuading House Republicans to back fast track while he was chairman of the House Ways and Means Committee.

"The speaker's a free trader. I'm a free trader, and obviously, the president is as well,"
McConnell said earlier this week. "There are a number of flaws here. We're gonna keep on
talking about it and see if there's a way forward."

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February 4, 2016 5:31 pm

As Pacific trade deal is signed pharma holds key to US ratification

Shawn Donnan in Gaithersburg

US President Barack Obama's plan to get a vast Pacific Rim trade deal through Congress this year is taking flak from the presidential campaign trail, where disdain for the pact appears to be one of the rare unifying themes for almost everyone from Donald Trump to Hillary Clinton.

But a more immediate obstacle to the Trans-Pacific Partnership signed by the US, Japan and 10 other countries on Thursday lives in Jan Kempner's laboratory an hour's drive from the White House. It can be found in the finicky Chinese hamster ovary cells in the glucose-rich sludge at the bottom of bioreactor BRX-099 — part of a biological assembly line for a new generation of drugs to fight everything from asthma to cancer.

"Cells get very cranky when they don't get enough sugar," says Ms Kempner, a researcher. "Just like people."

The cells are part of biotech company Medimmune's research and development programme for medicines known as biologics — complex molecules built out of biological material rather than chemicals, like most traditional drugs.

They represent the cutting edge of treatment for all manner of diseases and a future that the pharmaceuticals industry is betting on. Biologics now make up half the pipeline of medicines being developed by parent AstraZeneca, which bought Maryland-based Medimmune in 2007.

What makes them a threat to Mr Obama's efforts to get the TPP, which covers 40 per cent of the global economy, through a Republican-controlled Congress is that key GOP leaders such as Utah Senator Orrin Hatch, chairman of the Senate Finance Committee, do not like the intellectual property protections his administration negotiated for biologics in the TPP. They have vowed to block ratification until something changes.

US law calls for 12 years of exclusivity for biologics, something Washington sought to have replicated in the TPP. But, backed by campaign groups such as Médecins Sans Frontières who argue that such long periods help inflate drug prices by preventing generic competitors, Australia, Peru and other countries pushed for a five-year period. Under a fudge reached at the end of marathon negotiations in Atlanta in October, the deal eventually called for a period of either five or eight years depending on circumstances.

The compromise drew the ire of the pharmaceuticals industry, which has been lobbying heavily since for

a change. It managed to have a caveat added to endorsements of the TPP from major business groups in recent weeks, who have urged the administration to resolve "outstanding issues" with Congress.

Trade is a good thing. But trade has got to be fair. And the TPP is anything but fair

Bahija Jallal, Medimmune's top executive, says it takes an average of 10 years to bring a biologic to the market, and without intellectual property protections the incentives to pour millions into research are not there.

"Someone didn't just wake up and say 12 years," she says. "There is solid research behind that."

Administration officials insist they will not renegotiate the TPP, which took five years of discussions to get done. But they have begun talks with members of Congress that are set to intensify in the coming weeks.

"I'm confident at the end of the day because of the strong benefits to the US economy . . . that members of Congress will see the benefits for their constituents, and we'll have the necessary bipartisan support to be approved," Mike Froman, the US trade representative, told reporters at the TPP signing ceremony in New Zealand on Thursday.

Transpacific ambivalence

In TPP deal, what's good is very good and what's bad is very bad

The goal, officials say, is to find another compromise with Congress in the coming weeks that would allow the TPP to be presented for ratification as soon as May or June, a plan already complicated by the fact that Mitch McConnell, the Republican leader who controls the Senate, does not think the trade deal should be voted on until after November's presidential elections.

Possible solutions suggested by administration officials range from a promise that future trade deals would include a longer exclusivity period to a simple promise not to pursue any change in the 12-year period now in US law.

Any pledges the Obama administration makes now are complicated by the fact that the president has less than a year left in office and both Democrats and Republicans running to succeed him are sceptical of the TPP.

"Trade is a good thing. But trade has got to be fair. And the TPP is anything but fair," says Bernie Sanders, the Vermont Senator challenging Mrs Clinton from the left for the Democratic Party's presidential nomination. Among the reasons for his opposition: "Skyrocketing drug prices".

US business groups insist a deal will be done and that the TPP is more likely than not to be ratified

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before Mr Obama leaves office in January 2017. "I'm very confident that they are going to work this out," says John Engler, who heads the Business Roundtable.

But for Mr Obama, his economic legacy, the TPP and the Chinese hamster cells in Medimmune's bioreactors there are still significant hurdles to get over in the months ahead.

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<http://thehill.com/policy/finance/trade/268693-obama-trade-deal-taking-a-hit-in-presidential-race>

Obama trade deal taking a hit in presidential race

By Vicki Needham - 02/09/16 06:00 AM EST

Lawmakers say harsh criticism leveled against President Obama's Pacific Rim trade agreement from presidential candidates in both parties is further complicating its passage.

The stinging rhetoric against the 12-nation Trans-Pacific Partnership (TPP) comes on top of other challenges and could stifle what is already expected to be a difficult process.

"We knew once we got into the primary season both for members running in their primaries and the presidential primaries that it was going to make it difficult politically," said Rep. Charles Boustany Jr. (R-La.), a member of the House Ways and Means Committee who backs the deal.

"So we have that and we have the problems we're trying to resolve in the finalized agreement so it's all going to delay things," he added.

Rep. Gerry Connolly (Va.), one of the two dozen or so House Democrats backing the deal, also said the rhetoric from the 2016 field is complicating progress on the TPP.

"If we had people out there campaigning in favor of it, it would provide some protective cover here, give us a little safe place to go now and then," Connolly told The Hill.

"Beating the drums in opposition out there in any way, shape or form certainly doesn't help the climate here," he said.

The United States and 11 partner nations signed the TPP in Auckland, New Zealand, last week, but it is unclear if the deal will be considered by Congress this year.

Senate Majority Leader Mitch McConnell (R-Ky.) and Senate Finance Committee Chairman Orrin Hatch (R-Utah) say the sweeping agreement probably won't come up for consideration until after the November elections, and could even get pushed into 2017.

Hatch argued the TPP's legislative process will be lengthy regardless of the opposition rippling through the electoral landscape.

"It's always been hard, there's nothing easy about that [passing trade deals]," Hatch told The Hill.

"So we'll just have to when we can do it. It's always going to be hard because the vast majority of Democrats are against this even though it's their president."

Democrats are under pressure to oppose the deal because of opposition from unions and other liberal groups.

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A number of business constituencies, including pharmaceutical companies, also have deep reservations about the deal. That has left Republicans lukewarm at best toward the agreement.

The fiery backlash against the president's trade agenda coming from the 2016 field only makes a congressional fight less attractive. Opponents are arguing that the controversial trade deal would lower U.S. jobs and wages, a message that is resonating with some voters.

Republican presidential hopeful Donald Trump has vowed to kill the TPP, calling it a "terrible one-sided deal," while Ted Cruz, the winner of the Iowa caucuses, has recently ramped up his anti-trade rhetoric. Marco Rubio, who has railed against the president's economic policies, has yet to take a position on the TPP, although he did back fast-track authority last summer.

On the Democratic side, Bernie Sanders has pledged to dismantle Obama's trade agenda if elected.

"As your president, not only will I make sure that the TPP does not get implemented, I will not send any trade deal to Congress that will make it easier for corporations to outsource American jobs overseas," he said last week during an event in New Hampshire.

Hillary Clinton also opposes the TPP, even though she supported it as Obama's secretary of State.

Rep. Dave Reichert (R-Wash.), chairman of the House Ways and Means Committee Trade Subcommittee, chalked up most of the critical trade talk to election-year political posturing.

He said he's convinced that the next president can be persuaded to back a robust trade agenda.

"I'm hopeful that whoever is elected that when they come into office, we can sit down with the Ways and Means Committee, the [trade] ambassador and the new president and I'm sure we'll be able to convince them the importance of trade and how important it is to the economy and how it does grow jobs," he told The Hill.

In the meantime, however, lawmakers wanting to move the TPP this year will have to endure criticism from the campaign trail.

Sen. Rob Portman (R-Ohio), a former U.S. Trade Representative who faces a tough reelection campaign, said Thursday that he "cannot support the TPP in its current form because it doesn't provide that level playing field."

Portman's opposition is perhaps the best symbol yet of the difficulty faced by trade supporters. That a former U.S. trade representative is opposing the deal speaks volumes to the perceived dangers of tackling the issue this year.

Kevin Madden, a former adviser to Republican presidential campaigns, is urging pro-TPP candidates to get out front and tout the economic and national security benefits of the deal in an effort to better navigate any potential congressional complications.

"In this environment right now we're combating the anti-trade talk with the facts," he said.

US TRADE Daily News

White House Predicts TTIP Will Not Conclude Under Obama Administration

February 09, 2016

White House Press Secretary Josh Earnest on Monday (Feb. 8) said that although the Transatlantic Trade and Investment Partnership (TTIP) is a priority for the Obama administration, he does not envision the deal wrapping up while President Obama is in office.

"I do not believe that we're going to reach a TTIP agreement before the president leaves office, but he's certainly interested in moving those negotiations forward and in a direction where we can be confident that the economy of the United States will be enhanced through the completion of an agreement hopefully under the leadership of the next U.S. President," Earnest said at the daily press briefing.

This is the first time an administration official has publicly said that concluding the TTIP before Obama leaves office is unlikely, although officials have acknowledged that it would be difficult to do so.

The Office of the U.S. Trade Representative, meanwhile, has stressed that the two sides should push to reach a deal before Obama leaves. A USTR spokesman deferred a question on Earnest's comment to the White House.

The briefing came the same day that Obama met with Italian President Sergio Mattarella at the White House and signaled that the administration was still keen on concluding TTIP in 2016.

"And from the work we're doing together in Afghanistan ... to the opportunities that present themselves in finalizing a trade agreement through the TTIP process, we agreed that joint and common action between the United States and Italy not only serves the interest of both our countries, but the broader transatlantic relationship that has underwritten so much peace and prosperity over the last several decades," Obama said.

The meeting between Obama and Mattarella comes just two weeks ahead of the next TTIP negotiating round, slated for Feb. 22-26 in Brussels. But while U.S. trade officials have been publicly stressing the

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message that the talks must wrap up under Obama or else risk drifting for years, the U.S. has showed reluctance to make key concessions on issues like government procurement that the EU has said it needs to conclude a deal.

Mattarella, in his remarks after the meeting, said that TTIP could be used to prevent future economic and financial crises. Speaking through interpreter, he made the case that this would be good for developing countries as well, as they would also be impacted by any economic downturn in the U.S. or EU.

“We also talked about our transatlantic economic and trade partnership, and this of course is a very important approach because it can help us to avoid in the future additional, new economic and financial crises, because they would, of course, jeopardize the prosperity that has been achieved in the developing world and perhaps ward off or prevent any prosperity from being achieved in developing nations,” he said.

Prior to the meeting, a White House notice said the two presidents would discuss “the importance of concluding the Transatlantic Trade and Investment Partnership.”

Mattarella, as the president, is the Italian head of state. The head of government is Prime Minister Matteo Renzi.

POLITICO

Levin on TPP: 'I cannot support it' in current form

By Doug Palmer

02/18/2016 10:05 AM EDT

The top Democrat on the House Ways and Means Committee said today that he can't support the Trans-Pacific Partnership in its current form, another sign of the difficulty the White House is having building support for the pact.

The 12-nation agreement, as negotiated, "is short of acceptable, and I cannot support it," Rep. Sander Levin said at a breakfast hosted by The Christian Science Monitor. "There are four key areas - worker rights, currency manipulation, the rules of origin and investment - where the results are wholly inadequate."

Levin, a veteran of many trade battles during his decades in Congress, has supported some trade deals in the past and opposed others. However, last year he voted against giving President Barack Obama trade promotion authority to complete the TPP and other trade deals.

The White House is pushing for a vote on TPP this year but continues to face resistance from top Republicans. Levin said he hoped his opposition would prompt the administration to address his concerns to build more support on the Democratic side of the aisle for pact.

<http://insidetrade.com/daily-news/ryan-raises-possibility-tpp-will-never-pass-congress-details-objections>

Ryan Raises Possibility TPP Will Never Pass Congress; Details Objections

February 19, 2016

House Speaker Paul Ryan (R-WI) over the weekend held open the possibility that Congress will never pass the Trans-Pacific Partnership (TPP) by saying he does not know if and when there will be enough votes to pass it. He also publicly spelled out his problems with the agreement for the first time, citing provisions on cross-border data flows, dairy and biologic drugs.

In a Feb. 14 interview on Fox News, Ryan reiterated his previous statements that there are currently not enough votes to pass TPP in Congress. "And I don't see where these votes are right now and I'm just being honest with people about that, and I don't know if and when that's going to change," he said.

He said the votes are not there at the moment because the administration negotiated an agreement with "flaws" in it. "They're going to have to figure those out and work those out if they want to get the votes to pass in Congress, which I don't see the votes there right now," he said.

Ryan stressed that he would not bring up TPP if the votes are not there because he is not the "dictator of the House" or the "micromanager of the House."

When pressed on what exactly needs to be changed in TPP, Ryan said: "I think there are things that need to be addressed. I won't go into all the details, but cross-border data flows, dairy, there are biologics, intellectual property rights protection."

Cross-border data flows likely refers to the exclusion of the financial sector from a general ban in TPP on government requirements that data be stored on local servers.

U.S. financial services companies and their congressional allies have been pressing the administration to change that provision in TPP and future trade agreement. Treasury Secretary Jack Lew last week said his department is talking with financial services firms and independent U.S. financial regulators to work through the industry's objections to that exclusion.

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<http://www.politico.eu/article/5-things-to-watch-on-ttip-eu-us-trade-european-commission/>

5 things to watch on TTIP

Whether the EU and the US can reach a deal before the end of the Obama administration hinges on their resolution.

By

Hans von der Burchard

2/25/16, 5:30 AM CET

Updated 2/25/16, 5:55 AM CET

Negotiations for an ambitious EU-U.S. trade deal had a bumpy start this week, with Greenpeace activists blocking the entrance. This was just a blip for the 12th round of negotiations on the Transatlantic Trade and Investment Partnership (TTIP) this week in Brussels. It's crunch time for European Commissioner for Trade Cecilia Malmström: She hopes to reach a compromise by the end of 2016, before President Barack Obama's term ends in January 2017, and U.S. officials say they share the same goal.

Here are five potential sticking points:

1. Regulatory cooperation

Backers say harmonizing regulatory standards would allow manufacturers of products from chemicals to cars to minimize compliance costs.

"This is one of the main objectives of TTIP," Malmström said Monday.

Critics, however, are concerned that such an alignment "bears the risk of introducing U.S. regulatory standards that could lower our level of consumer protection," said Johannes Kleis from the European Consumer Organization BEUC.

Malmström, for her part, said, "no EU trade agreement will ever lower the level of protection of consumers or food safety or of the environment."

To keep this promise, her negotiators need to convince the U.S. to accept a more "precautionary" approach to assess the risk of pesticides, hormones or other potentially harmful substances in food or chemical products.

While EU legislation requires producers to prove that all substances in their products are safe before they get market approval, the U.S. does not have such a legal obligation. Critics say the U.S. applies exactly the opposite principle — products get approved unless it is proven that their ingredients can do harm.

CEA

2. Investor-state arbitration

One of the most controversial clauses would allow foreign investors to sue governments over regulations if they allegedly harm their investments. This has been a part of over 3,000 international agreements since the 1950s, with almost half of them including EU member countries.

The European Commission took this investor-state dispute settlement, or ISDS, off the negotiating table in January 2014 amid growing opposition in Europe. Then, the European Parliament demanded last July that ISDS be replaced “with a new system for resolving disputes between investors and states” — otherwise, it would reject the whole deal when it is time for ratification.

In a bid to appease critics, Malmström revamped the investor court system in September, turning it into a permanent dispute settlement court with 15 independent judges, an appellate mechanism of six judges, and more transparent procedures.

This week, negotiators will for the first time exchange their views on the new proposal, but there are signs that the U.S. is not very enthusiastic.

For Malmström, this is an essential point: If she can't convince the U.S. to accept her court idea, the whole plan risks falling apart and drawing even more criticism of TTIP. Some say it isn't worth killing the deal, and call for the arbitration system to be carved out completely.

3. Buy (not just) American

“This is another potential deal breaker,” said Bernd Lange, chair of the Parliament's international trade committee and a member of the Socialist & Democrats party.

At issue is the opening of the world's two largest public contract markets to each other's companies.

The EU, which says it is already very much open to U.S. firms, is pressuring Washington to lower restrictions, most notably the Buy American Act. The law requires the U.S. government to, in most cases, prefer American products or offers whenever they buy equipment or award a contract.

“This is one of the major benefits we could get out of TTIP,” said Markus Beyrer, director-general of Business Europe, a major business lobby. “We need a comprehensive agreement giving both sides new market opportunities.”

Although the issue is not on the table this week, both sides will exchange offers next Monday and discuss them during follow-up talks in Washington in two weeks. It will be a tough negotiation.

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“We have never expected that the Buy American Act would be abolished, especially not in an election year,” Malmström told POLITICO last Thursday. “But there are ways to make waivers and exceptions, and this is what we hope we can achieve.”

Another problem: Even if the U.S. federal government were to open its procurement market, this would not include contracts issued by the 50 U.S. states.

Expanding the commitments to the state level “is something where we are very much insisting [on],” a Commission source said.

The American Chamber of Commerce to the EU is backing the Commission’s demand.

“Ideally, the state level should be included at the negotiation table to open up the whole U.S. public procurement market,” said Hendrik Bourgeois from the business lobby. “However, enlarging the negotiations to all U.S. states will be a very difficult step to undertake.”

4. Financial services

Defining common standards for banks, traders and rating agencies is another priority of the EU.

“It would be good if the EU and the U.S. could set joint standards, to raise the bar globally,” said Marietje Schaake, an MEP from the Alliance of Liberals and Democrats. “International cooperation and oversight are crucial to avoid a future financial crisis.”

At the last TTIP round in October, the U.S. had been reluctant to approach financial services, arguing TTIP would not be the right format. Ahead of this round, U.S. officials declined to comment.

The only point on which both sides seem to agree so far is a “prudential carve-out” provision, which would allow governments to protect their financial systems during times of crisis.

5. Protecting (European) food names

These so-called geographical indications – for example, Parma ham or Roquefort cheese – are a top issue for the EU. It maintains U.S. companies should be forbidden to sell imitations of such food under the same name. But so far Washington has shown little interest to give in.

“I’m afraid we are still not there,” the Commission source said. “We will still need to have a lot of discussions with the United States.”

If the two sides can’t agree on this point, it would further jeopardize the ratification of a finalized TTIP deal: The Greek government has already threatened to veto a different EU trade deal with Canada as long as it does not protect its Feta cheese from foreign imitations.

With these five major points unsolved, and differences remaining in some others as well, the goal of concluding negotiations in 2016 seems ambitious — unless both sides manage to drastically speed up the negotiations.

“By the end of this round, or shortly thereafter, we anticipate having specific agreement language under discussion in nearly all areas,” said Trevor Kincaid, a spokesperson for the U.S. Trade Representative.

The Commission said it wants to have compromises in place by the end of July, with only some minor questions remaining open.

“We are still very far away from an agreement,” Lange said. “In the most sensitive areas, nothing has happened. The EU has presented its proposals, it’s now the U.S.’s turn to come forward so that we can make a deal.”

<http://www.theguardian.com/business/2016/feb/26/ttip-eu-and-us-vow-to-speed-up-talks-on-trade-deal>

TTIP: EU and US vow to speed up talks on trade deal

Negotiators confirm they hope to reach agreement on Transatlantic Trade and Investment Partnership by end of year

Senior European and US officials have vowed to accelerate talks on a controversial trade deal that critics say would weaken environmental and consumer standards, while giving too much power to companies to sue governments.

Negotiators from the EU and the United States confirmed they were hoping to secure agreement on the Transatlantic Trade and Investment Partnership by the end of the year. TTIP, which the EU trade commissioner once described as “the most contested acronym in Europe”, is a sweeping plan to harmonise regulatory standards, cut tariffs on thousands of items and help companies do more transatlantic business.

Talks began in July 2013, but rapidly became bogged down amid widespread public protest, with disputes breaking out over issues ranging from the French film industry to feta cheese.

Now the two sides are racing to strike a deal before Barack Obama leaves presidential office in January 2017.

On Friday, the EU’s chief negotiator, Ignacio Garcia Bercero, said it was time to pick up the pace. “We are ready to seek to conclude negotiations in 2016 provided that the substance is right.” He told journalists that the latest round of negotiations – the 12th – were being extended into next week to intensify talks on sensitive areas.

His US counterpart, Dan Mullaney, said: “We still have a lot of work to do but if we can sustain our current intensified engagement we can finish negotiations this year.”

The two sides will hold two further rounds of talks in the coming months, with the aim of getting a draft deal by July, leaving the most contentious areas to be resolved in the second half of the year.

The drive to strike a deal was underlined by the relaunch of talks this week on one of the most contentious aspects of TTIP, a special court for settling disputes between governments and investors.

The European commission wants to establish an exclusive trade court to replace the Investor-State-Dispute Settlement, a system for resolving trade disputes that has existed since the 1960s.

This system is written into thousands of investment contracts, including 1,400 involving EU countries, but has aroused growing concern.

Critics say ISDS tribunals give private companies too much power to sue governments for lost profits.

Tobacco company Philip Morris used ISDS in an attempt to overturn Australia's plain-packaging laws. Although the challenge failed, the Australian government spent an estimated A\$50m (£26m) of taxpayers' money defending the 2011 law.

More recently, TransCanada announced it was suing the US government for \$15bn, after the Obama administration rejected on environmental grounds the Keystone XL pipeline, which was designed to pump oil from the tar sands of Canada.

Earlier this week, one of the UK's leading QCs warned that TTIP would make it easier for private companies providing services to the NHS to sue the government through the special trade court.

Garcia Bercero confirmed the special court was discussed this week, having been frozen out of the negotiations in March 2014.

In response to widespread criticism, his boss, the EU trade commissioner Cecilia Malmström, last year proposed a new kind of special court for resolving disputes – the investment court system. Under the revised proposals, an international court of 15 judges and six appeal judges would be created with judges appointed by the US and the EU, rather than disputing parties, as under the current system.

The commission says this is more transparent and efficient, but critics argue it is no better than the system it replaces. In a recent report, a coalition of NGOs, including Corporate Europe Observatory and War on Want, described the new court as a “zombie ISDS”, back from the dead.

Although they concede it does contain procedural improvements, such as the appointment of judges, they argue the court still allows companies too much leeway to sue governments.

“Some of the reforms are nice – more transparency is always good – but it is not really a complete reform,” said Ska Keller, a German Green MEP who sits on the European parliament's trade committee. “It is setting up a parallel justice system for companies. Companies of course should be able to go to court, but a normal court, as anyone else.”

Business groups are also unhappy with the commission's proposals. “We feel it would be very difficult for companies to launch a complaint,” said Luisa Santos, director of international relations for pan-European lobby group Business Europe. She is concerned that many governments would use “the umbrella of public interest” to shelter state-owned companies from competitors.

The commission argues it has struck the right balance. "Investors have a way of ensuring their rights are properly protected," said Garcia Bercero, "but in no way can this create any interference with the right of public authorities to regulate."

<http://myinforms.com/en-af/a/26693134-malmstrom-seeks-ttip-deal-this-year-but-says-it-must-deliver-on-eu-priorities/>

Daily News

Malmstrom Seeks TTIP Deal This Year, But Says It Must Deliver On EU Priorities

March 10, 2016

European Union Trade Commissioner Cecilia Malmstrom on Wednesday (March 9) emphasized that efforts to conclude a Transatlantic Trade and Investment Partnership (TTIP) this year cannot be successful without securing some of the key EU priorities, such as more access to the U.S. government procurement market, **more protection for food names known as geographical indications (GIs)**, and an innovative regulatory cooperation chapter.

She also said that any future trade agreement must include investor protections reflecting the EU proposal for an investment court that ensures additional transparency, an appeal mechanism and a government right to regulate more than the investor-state dispute settlement mechanism.

This is what the EU obtained in its trade deals with Canada and Vietnam, and what it is pursuing in all future trade agreements.

“It is in our interest to complete [a TTIP deal this year], but not at any price,” Malmstrom said at a press briefing immediately after her arrival in Washington, DC. “We do not want TTIP light.” She said she has to come as close as possible to meeting her mandate from member states demanding a strong deal.

Malmstrom spoke before her March 10 meeting with U.S. Trade Representative Michael Froman that will be focused on regulatory cooperation. The two will discuss both sectoral cooperation as well as horizontal issues like good regulatory practices, she said.

She acknowledged that progress on the priorities she identified has been at best slow in the TTIP negotiations. She said the two sides are still in the phase of discussing and analyzing offers on government procurement, and that no negotiations have taken place on the controversial EU investor protection proposal. She also signaled the same was true for EU demands on **GIs, an issue “very important” to member states.**

But she said the two sides made progress on potential goals for regulatory cooperation in specific sectors, particularly autos and pharmaceuticals, during the last negotiating round in Brussels in late February. In those two areas, she cited the possibility to “harmonize” respective standards on seat belt anchors and a recognition of each other's inspections on good manufacturing practices (GMP) for pharmaceutical manufacturers.

One informed source said that the Food and Drug Administration (FDA) continues to insist that any cooperation has to be conducted on its own terms and not as part of TTIP.

That is consistent with the message of a senior FDA official who said last May the agency is actively assessing whether it can rely more on EU regulators in inspecting the manufacturing

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practices of EU pharmaceutical firms. But he made clear that the timeline and ultimate result of these efforts will not be influenced by the broader TTIP talks, and would be strictly a “regulator-to-regulator” dialogue.

Malmstrom noted that for a TTIP agreement to be concluded this year, the “end-game” phase of the negotiations have to begin by the summer. She said this can be done, but that the two sides have to work “really hard” and that is why they are maintaining very close political contact regarding the negotiations.

Malmstrom said that work on regulatory cooperation in other sectors has not reached “the same level of concreteness” as autos and pharmaceuticals. Other sources familiar with the negotiations said that in the other sectors, the work on objectives remains exploratory, identifying possible options. The seven other sectors are medical devices, chemicals, cosmetics, information and communications equipment, engineering, textiles and pesticides.

Malmstrom cited the possibility of agreeing on the same apparel labeling that provides care and handling instructions, and traceability of medical devices. According to Malmstrom, these options are “basically agreed” but the details must still be worked out in various agencies. These are the things the EU side will discuss with Froman, she said.

She insisted that these issues are not “politically controversial,” and expressed the hope that the two sides “could finalize these chapters during the next negotiating round” to be held in mid-April in New York City.

On investment protection, she said the EU “presented” its proposal to the U.S. during the February round in Brussels. The two sides went through all the elements of the proposal and the U.S. asked questions. “But it was not a clear negotiation,” she said.

Malmstrom made clear that she did not expect the negotiations to go smoothly and that the two sides will have to “sit down at the political level” to consider this issue. Informed sources said earlier this week that the EU considers the U.S. government procurement offer insufficient to advance the negotiations toward the end game, and that it must be improved in order for the EU to consider concessions on its most sensitive agriculture tariffs. In addition, the EU has linked its tariff offer to progress on GIs and expanding a bilateral wine agreement in TTIP.

Asked whether the EU is dissatisfied with the U.S. offer because it does not lift the Buy American restrictions, Malmstrom only said that the EU has been very clear it is not seeking an elimination of such restrictions but “possible exceptions and waivers.” She also signaled that there may be a second round of offers on government procurement, by noting that in many areas there have been revised offers following the initial ones.

She said that the two sides will hold two more negotiating round before the summer in April and July, and hold intersessionals. She said the political oversight will continue with a March

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18meeting focused on market access, and a meeting in April when President Obama visits Germany accompanied by Froman and Commerce Secretary Penny Pritzker.

She also said that she and Froman will meet "probably" in May, though no date has been set, as well as towards the end of June. They will also both participate in the OECD meetings in early June, and may also meet at the G20 in Shanghai.

Short Takes

Mexico Seeks To Retaliate On \$472.3 Million In Trade With U.S. In Tuna Dispute

March 15, 2016

Updated: Mexico has announced it will ask the World Trade Organization for the right to hike tariffs on \$472.3 million annually in trade with the United States over the latter's failure to comply with multiple Appellate Body and panel rulings faulting its dolphin-safe labeling requirements for tuna.

In a [communication circulated](#) to WTO members on March 11, Mexico said it would make its request at the next meeting of the Dispute Settlement Body (DSB), which is slated for March 23. A spokesman for the Office of the U.S. Trade Representative said the U.S. intends to object to the retaliation amount requested by Mexico, thereby referring the matter to an arbitrator to determine the appropriate amount.

"We would note that Mexico's request for authorization to affect \$472.3 million in U.S. exports annually appears to be substantially inflated," the spokesman said in a March 15 emailed statement.

Mexico said it is seeking to suspend the application to the United States of tariff concessions and other related obligations in the goods sector under the General Agreement on Tariffs and Trade (GATT) in the amount of \$472.3 million, but did not say the specific products on which it plans to raise tariffs.

"Mexico will implement the suspension of tariff concessions and other related obligations by imposing additional tariffs on a list of U.S. products to be established by Mexico in due course," it said in the communication. Mexico emphasized that the amount is equivalent on an annual basis to the level of nullification or impairment of its benefits due to the U.S. failure to bring its tuna-labeling requirements into line with the earlier WTO rulings. It also said it had applied the general principle set out in Article 22.3(a) of the Dispute Settlement Understanding (DSU) in determining what concessions and obligations to suspend. Article 22.3(a) states that the complaining party should first seek to suspend concessions in the same sector as that in which the violation occurred.

In its Nov. 20, 2016 ruling, the Appellate Body [found that the U.S. tuna labeling rule](#) as amended in 2013 still violates Article 2.1 of the Agreement on Technical Barriers to Trade (TBT), as well as Articles I:1 and III:4 of the GATT. Article 2.1 of the TBT Agreement requires members' technical regulations to accord treatment "no less favorable" to the products of other WTO members as to their own products or products of third countries. Article I:1 of the GATT requires countries to grant most-favored nation treatment to all parties, while Article III:4 requires countries to provide national treatment.

The Appellate Body found the 2013 U.S. dolphin-safe labeling rule violated TBT Article 2.1 by setting more stringent requirements for tuna caught in the Eastern Tropical Pacific ocean, where the bulk of the Mexican fishing fleet operates, to garner the label compared with tuna caught in other fisheries. It applied a similar logic in finding the GATT violations.

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<http://mobile.nytimes.com/2016/03/16/business/economy/on-trade-angry-voters-have-a-point.html? r=0>

On Trade, Angry Voters Have a Point

March 15, 2016

Eduardo Porter

ECONOMIC SCENE

Were the experts wrong about the benefits of trade for the American economy?

The nation's working class had another opportunity to demonstrate its political clout Tuesday, as primary voters went to the polls in Illinois and Ohio, Rust Belt states that have suffered intensely from the loss of good manufacturing jobs. Last week, the insurrection handed Michigan's Democratic primary to Bernie Sanders while continuing to buoy the insurgent Republican candidacy of Donald Trump.

Voters' anger and frustration, driven in part by relentless globalization and technological change, may not propel either candidate to the presidency. But it is already having a big impact on America's future, shaking a once-solid consensus that freer trade is, necessarily, a good thing.

"The economic populism of the presidential campaign has forced the recognition that expanded trade is a double-edged sword," wrote Jared Bernstein, former economic adviser to Vice President Joseph R. Biden Jr.

What seems most striking is that the angry working class — dismissed so often as myopic, unable to understand the economic trade-offs presented by trade — appears to have understood what the experts are only belatedly finding to be true: The benefits from trade to the American economy may not always justify its costs.

In a recent study, three economists — David Autor at the Massachusetts Institute of Technology, David Dorn at the University of Zurich and Gordon Hanson at the University of California, San Diego — raised a profound challenge to all of us brought up to believe that economies quickly recover from trade shocks. In theory, a developed industrial country like the United States adjusts to import competition by moving workers into more advanced industries that can successfully compete in global markets.

They examined the experience of American workers after China erupted onto world markets some two decades ago. The presumed adjustment, they concluded, never happened. Or at least hasn't happened yet. Wages remain low and unemployment high in the most affected local job markets. Nationally, there is no sign of offsetting job gains elsewhere in the economy. What's more, they found that sagging wages in local labor markets exposed to Chinese competition reduced earnings by \$213 per adult per year.

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In another study they wrote with Daron Acemoglu and Brendan Price from M.I.T., they estimated that rising Chinese imports from 1999 to 2011 cost up to 2.4 million American jobs.

“These results should cause us to rethink the short- and medium-run gains from trade,” they argued. “Having failed to anticipate how significant the dislocations from trade might be, it is incumbent on the literature to more convincingly estimate the gains from trade, such that the case for free trade is not based on the sway of theory alone, but on a foundation of evidence that illuminates who gains, who loses, by how much, and under what conditions.”

Global trade offers undeniable benefits. It helped pull hundreds of millions of Chinese out of poverty in a matter of a few decades, an unparalleled feat. It ensured Apple could benefit from China’s ample supply of cheap labor. Consumers around the world gained better-priced, better-made goods.

Still, though trade may be good for the country over all — after netting out winners and losers — the case for globalization based on the fact that it helps expand the economic pie by 3 percent becomes much weaker when it also changes the distribution of the slices by 50 percent, Mr. Autor argued. And that is especially true when the American political system has shown no interest in compensating those on the losing side.

The impact of China’s great leap into the market economy — which drew hundreds of millions of impoverished peasants into the manufacturing sector, mostly making goods for export to the United States and other wealthy nations — is waning. China’s wages are rising fast. Its exports and economy are slowing.

Trade with other parts of the world has not been as disruptive. For all the criticism of Nafta, most economists assess its impact on American workers as modest. Trade flows with Mexico were smaller and more balanced than those with China. American manufacturing employment remained fairly stable in the years after Nafta came into force in 1994, plummeting only after China entered the World Trade Organization in 2001 and gained consistent access to markets in the United States.

The Chinese export onslaught, however, left a scar on the American working class that has not healed. That disproportionate impact suggests Washington officialdom might do well to reassess its approach to future trade liberalization. Most important, it points to reconsidering how policy makers deal with trade’s distributional consequences.

It doesn’t mean walling off the United States from the rest of the world, but it does mean learning from the experience of other advanced nations that had a much healthier response to China’s rise.

Germany, for example, not only received a surge of Chinese imports, but also experienced an onslaught of imports from Eastern European countries after the collapse of the Soviet bloc. But it managed to maintain a more balanced trade because German manufacturers increased their exports to all these countries too, offsetting the job losses from import competition.

Mr. Autor suggests that Americans' low savings rate was a big part of the story, coupled with foreigners' appetite for accumulating dollar assets, which helped keep American interest rates low and the dollar strong, in that way fueling a persistent trade deficit.

But other factors were at work. Robert Gordon of Northwestern University suggested to me that Germany's highly skilled workers were harder to replace with cheaper Chinese labor, limiting though not totally eliminating outsourcing. Germany's stronger labor unions also put up more of a fight.

Washington played its part, too. In their new book "Concrete Economics" (Harvard Business Review Press), Stephen S. Cohen and J. Bradford DeLong of the University of California, Berkeley suggest that ultimately, it was the fault of American policy choices.

The United States might have leaned against China's export-led strategy, they argue, perhaps by insisting more forcefully that Beijing let its currency rise as its trade surplus swelled. It might have tried to foster the cutting-edge industries of the future, as government had done so many times before, encouraging the shift from textiles to jumbo jets and from toys to semiconductors.

What Washington did, instead, was hitch the nation's future to housing and finance. But Wall Street, instead of spreading prosperity, delivered the worst recession the world had seen since the 1930s. Even at best, they write, the transformation of banking and finance has "produced nothing (or exceedingly little) of value."

So where should policy makers go from here?

There are no easy answers. Tearing up existing trade agreements and retreating behind high tariff barriers — as Mr. Trump, and perhaps Mr. Sanders, would have it — would be immensely unproductive. It would throw a wrench into the works of a wobbly world economy. And renegeing on international treaties would vastly complicate the international coordination needed to combat climate change.

But in any future trade liberalization — including the Obama administration's pending Trans-Pacific Partnership deal, if it is to go forward at all — policy makers must be much more careful about managing the costs. Mr. Autor suggests any further deals to increase trade should be gradual, to give much more time for exposed companies and their workers to retool and shift into other jobs and sectors.

Perhaps most important, the new evidence from trade suggests American policy makers cannot continue to impose all the pain on the nation's blue-collar workers if they are not going to provide a stronger safety net.

That might have been justified if the distributional costs of trade were indeed small and short-lived. But now that we know they are big and persistent, it looks unconscionable.

Assuming Away Unemployment and Trade Deficits from the TPP

By Timothy A. Wise and Jomo Kwame Sundaram

GDAE Globalization Commentary

March 20, 2016

In an old joke, a shipwrecked economist is asked for his counsel on how the stranded group can be rescued. "Assume we have a boat," he begins.

Robert Lawrence and Tyler Moran, writing for the Peterson Institute for International Economics, seem to have missed the joke in their recent repeat of the same flawed assumptions of their colleagues' hugely optimistic assessment of the Trans-Pacific Partnership (TPP) Agreement which prompted our own paper, "Trading Down: Unemployment, Inequality, and Other Risks of the Trans-Pacific Partnership."

Claiming to address contrarian findings that the TPP may well cause job losses and increase income inequality, Lawrence and Moran assume away the causes – downward pressure on wages and employment due to the consequent "race to the bottom" – which have made free trade agreements so controversial.

Assume we create jobs

To recap, in January, the Peterson Institute published new TPP estimates, updates by Peter Petri and Michael Plummer of an earlier 2012 paper. The update reiterated their claim of significant income gains from the agreement, 0.5% for the United States after fifteen years, with minimal job displacement, and with new jobs in growing industries absorbing displaced workers in declining activities.

In "Trading Down", we pointed out that the study was flawed because it assumed full employment and unchanged national trade and fiscal balances, among other things. We applied the United Nations macroeconomic Global Policy Model to their estimated trade impacts from the TPP dropping the full employment assumption.

Even without adjusting for the assumption of fixed trade balances, we found that if one does not assume away job losses, there will be some permanent job loss, there will be downward pressure on wages, and economic growth will be slowed by the consequent decline in aggregate demand.^[1]

Congressman Sander Levin (D-MI) highlighted the problems with the kind of modeling the Peterson Institute offered, calling on the International Trade Commission, in its

TPP assessment for the U.S. government due in May, to stop using models that assumed away the problems. As *Inside U.S. Trade* reported, the new paper is the Institute's attempt to respond to that criticism:

"Levin in February at a U.S. International Trade Commission (ITC) hearing on the economic impact of TPP argued that its analysis must include an examination of how TPP will affect wages and income inequality; a review of whether the ITC's economic model should assume full employment; and an analysis of who will experience gains or losses as a result of TPP and other factors. Lawrence said that his and Moran's paper aimed to answer Levin's demands for a more holistic analysis of TPP."

Holistic analysis? Or filled with holes?

It does nothing of the sort, offering a misleading analysis instead. Consider:

- The new study is based on the earlier Petri-Plummer model, claiming to take those results to estimate the "adjustment costs" for workers displaced by the agreement. But the same assumption, that the TPP causes no long-term job loss, underlies the analysis. So *permanent job loss is excluded by assumption*, with all displacement assumed to be temporary.
- Nor do the new findings allow for trade deficits. The authors assume that TPP does not cause long-term trade surpluses or deficits, in fact, that trade itself is not a major determinant of current account balances. This, of course, flies in the face of large and persistent U.S. trade deficits, including with partners such as Korea, with whom the U.S. has seen its bilateral trade deficit nearly double since the Korea-U.S. Trade Agreement took effect four years ago. Again, the Peterson modeling assumes away the possibility of trade deficits and associated job losses.²
- With no trade-deficit-related job losses, Lawrence and Moran only estimate "adjustment costs" for the remaining few displaced workers awaiting new jobs assumed for them, offering three scenarios, each smaller than the previous.
- The first mischaracterizes our paper, suggesting that we assume that no displaced workers get new jobs. We simply do not assume that they are fully absorbed into growing industries. They estimate 1.69 million U.S. workers could be displaced over ten years.
- The second drastically reduces that total to 278,000, by invoking the full-employment assumption that rising demand will generate new jobs and limit job loss. They acknowledge, however, that the displaced workers are nearly all in manufacturing.
- The third reduces this to 238,000 workers who voluntarily leave manufacturing jobs, so the TPP can't be blamed for that.
- They then apply a formula to estimate the temporary adjustment costs (essentially lost wages) from those "displaced". They compare these to Petri and Plummer's reported TPP gains for the United States of \$131 billion. The

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resulting cost-benefit calculation does not report the costs, just the ratios, for the three scenarios. The authors report that for their "most realistic" scenario (#3), with the least displaced jobs, the benefits are 18 times the costs over the 10-year "adjustment period" (2017-26).

- Then, remarkably, when they add in the "post-adjustment years" 2027-2030, the ratio skyrockets to 115:1. Why? Presumably because with the full-employment assumption all displaced workers are, by then, happily employed in their new post-TPP jobs.
- Finally, Lawrence and Moran claim that the TPP will be mildly progressive for U.S. income distribution. Basically, they argue that the assumed income gains will be very much the same for each quintile of U.S. income distribution, with the bottom quintile seeing a percentage increase 0.007 of a percentage point higher than the top quintile. Technically, that is mildly progressive.
- But it certainly does not look that way when one looks at the absolute gains. The bottom 40% sees just \$8 billion in income gains, while the top quintile would get \$48 billion. That is more in absolute terms than the bottom 80% combined.
- The authors also make the unfounded assumption that U.S. wages will increase at the same rate as productivity, though that has not happened for decades. This misleadingly raises most workers' incomes in their analysis.

Full-employment models? Abandon ship!

It is not surprising that Lawrence and Moran find that the benefits of the TPP far exceed the adjustment costs. They employed the same study with the same flawed assumptions of full employment and fixed trade balances. With such assumptions, wage and employment losses are written off as temporary adjustment costs on the path back to full employment. These are significantly understated if the TPP results in large and persistent trade deficits, an outcome they assume away.

The resulting cost-benefit calculations are misleading. First, the costs are minimized as outlined above. Second, the benefits are overstated, taking Petri and Plummer's estimates at face value, with all their flawed growth-boosting assumptions (surge in foreign investment, most growth gains from non-trade measures).

Finally, the gains are simply asserted to be large, when even the recent Petri-Plummer estimates of gains are incredibly small, just 0.5% of GDP for the United States in 2030, i.e. a paltry 0.029% per year on average over 15 years. How small is that? *For the bottom 40% of the U.S. income distribution, the gains amount to just \$62 per person, in 15 years.*

Those concerned that TPP modeling needs to take better account of the real implications of such agreements should not be satisfied with the Peterson Institute's

latest offering. It does little more than reiterate flawed assumptions, which understate costs and overstate benefits, besides misrepresenting them as serious cost-benefit analysis.

Before the U.S. Congress approves the TPP, the public deserves the kind of robust economic analysis that Rep. Levin has called for, that does not assume away employment losses or trade deficits and offers realistic estimates of the TPP's impacts on wages, employment, and inequality.

[1] For the United States, we estimated that in 2025 the TPP would generate a 0.5% slowing in economic growth, 448,000 job losses, and rising inequality, as measured by a 1.31% decline in labor's share of national income.

[2] It is worth quoting the paper's own acknowledgment of these assumptions (from p. 3): "For analyzing the long-run impact of the TPP, it is reasonable for Petri and Plummer to assume that the agreement is unlikely to permanently affect the level of employment or the trade balance[...] Assuming normal employment levels is justified not because changes in imports and exports have no impact on employment in the short run-obviously import growth can cause job loss and exports can generate job growth-but rather because the size of the annual impact of the TPP will be smaller than the many other shocks that will occur every year[...] Moreover, over a longer period macroeconomic policies and wage and price adjustments are likely to restore the economy to the same employment level as the baseline."

<http://www.bloomberg.com/politics/articles/2016-03-22/trade-backers-pin-pacific-pact-hopes-on-lame-duck-u-s-congress>

Trade Backers Pin Pacific-Pact Hopes on Lame-Duck U.S. Congress

March 22, 2016 05:00AM ET | Bloomberg Government

(Bloomberg) – Election-year protectionism has trade supporters and some lawmakers eyeing the lame-duck session of Congress late this year as the last chance for the U.S. to approve the Trans-Pacific Partnership before a new administration waters down or scuttles a deal.

Opposition to trade has emerged as a rare area of bipartisan agreement in the 2016 election campaign, with leading candidates opposing or criticizing a pact that would boost trade among nations making up 40 percent of the global economy. A tough battle for congressional seats in states where economic concerns loom large makes supporting deals such as TPP a political liability.

In such a hostile environment, where anti-trade rhetoric resonates among voters in key manufacturing regions, congressional leaders point to the legislative session just after the Nov. 8 election as the earliest a deal could be considered.

"I think we'll probably get it through, but it's shaky," Senate Finance Committee Chairman Orrin Hatch, a Utah Republican, said in an interview. "It will probably have to be after the elections. I think we have a better chance to passing it after, but we'll see" what Senate Majority Leader Mitch McConnell wants to do, he said.

McConnell, a Republican from Kentucky, has indicated plans not to pursue it "certainly before the election," leaving the door open to a vote in the lame-duck session, according to trade analysts. A spokesman for McConnell said the senator has nothing to add to his previous comments on TPP, and has not announced a schedule for consideration yet.

GOP leaders' support is critical to the deal's passage. President Barack Obama is counting on them to mobilize the same coalition of lawmakers that helped give the president fast-track authority in June to conclude the 12-nation deal. This time around, Republicans are less committal, having raised opposition to some of the provisions in the newly signed deal.

Presidential Campaign

Presidential politics complicates the picture. Hillary Clinton, the front-runner on the Democratic side, said she no longer supports it. Donald Trump, who leads the race to be the Republican nominee, has slammed the agreement and called for 45 percent tariffs on Chinese imports.

Thomas Donohue, chief executive officer of the U.S. Chamber of Commerce, said in an interview Friday on Bloomberg Television that such tariffs would backfire politically and ultimately hurt "the citizens that go to Wal-Mart and Target."

The hyperbole against trade has helped fire up crowds and rack up primary victories, but it's heightening anxiety among multinational companies dependent on exports and global supply chains. So they're mounting a push on Capitol Hill to get it done as soon as possible.

Expeditious Passage

Business groups are "going to put a lot of pressure on McConnell to make sure this doesn't fall through, and they have influence," said Julian Zelizer, a presidential historian at Princeton University.

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After the 12 nations signed the trade deal in early February, five major American business groups joined the leadership of the U.S. Coalition for TPP -- whose members include Apple Inc., Microsoft Corp. and Wal-Mart Stores Inc. -- to push for passage.

"Our intention is certainly to push as far and fast as we can on the agreement now and work with Congress and administration to get a vote as soon as we possibly can to make sure we get this turned into law in 2016," Doug Oberhelman, CEO of Caterpillar Inc., who serves as chairman of the Washington-based Business Roundtable, one of the co-leaders of the coalition, said on a conference call March 15.

Obama said on Feb. 22 that the administration plans to present the TPP formally to Congress "at some point this year and my hope is that we can get votes."

Senate Elections

Republicans have their own calculation to make as they try to retain control of both chambers in Congress. While the GOP has a firm hold on the majority in the House, it's defending 24 seats in the Senate this year. Democrats need a net gain of five seats to win outright control of the Senate.

"They don't want to do anything that might jeopardize their majority in the Senate in the upcoming elections," said Joshua Meltzer, a senior fellow at the Brookings Institution in Washington and a former Australian trade negotiator. Republicans need to work out what a TPP vote would be for them, and "that's the key political issue which will sort of determine ultimately whether they do move forward with this or not," he said.

Lawmakers fearing a voter backlash may be more apt to stay quiet on the issue through Election Day and take controversial votes during the lame-duck session, which can last as long as a month after the election and before a new Congress convenes in January, according to Bloomberg Intelligence.

Lame Duck

But history shows mixed results. Congressional Research Service records show that only three trade-related bills have been voted on in a lame duck.

The Trade Act of 1974 created fast-track authority for the president to negotiate trade agreements that Congress can approve and disapprove without amendments.

The Uruguay Round of 1994, which led to the creation of the World Trade Organization, was approved by a Democratic Congress in the 1994 lame duck session, after Republicans won control of both the House and Senate in the November elections.

During the 2006 lame-duck session, a Republican House defeated a measure backed by President George W. Bush to normalize trade relations with Vietnam. The bill was cleared a month later, however, and allowed Vietnam to join the WTO in 2007.

For a TPP vote in the lame duck, "a lot of work would have to be done between now and then," Meltzer said. "But trade has been done in the lame duck -- it's definitely doable."

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Administration Faces April 3 Deadline For Submission Of TPP Legal Changes

March 29, 2016

The Obama administration is facing an April 3 deadline to submit to Congress a description of the changes that will be required to U.S. law in order to implement the Trans-Pacific Partnership agreement, which is one of several outstanding procedural steps required under the 2015 fast track law that are listed below.

This list of changes would lay the groundwork for the administration and Congress to work together in drafting an implementing bill for trade agreements subject to fast track.

Specifically, the requirement laid out in Section 106(a)(1)(c) is that "within 60 days after entering into the agreement, the President submits to Congress a description of those changes to existing laws that the President considers would be required in order to bring the United States into compliance with the agreement." The TPP was signed on Feb. 3 U.S. time.

The fast-track law does not explicitly require this document to be made public, as it does for some other documents it requires for free trade agreements. But a congressional source said he expects the document to be made public.

The Office of the U.S. Trade Representative did not respond by press time to a question on whether it planned to publish the description of legal changes required under TPP.

One issue that is sure to be addressed in the document is the Obama administration's plan to restructure the main U.S. customs user fee -- the merchandise processing fee (MPF) -- in order to comply with the TPP's obligation that it not be applied on an ad valorem basis. This change must be made through legislation, and is expected to be addressed as part of the TPP implementing bill.

The April 3 submission and other procedural steps would prepare the groundwork for a potential lame-duck vote on TPP, which at this point is not certain for a number of reasons, including the outcome of the presidential and congressional elections.

Apart from the steps required under fast track, the administration is also working politically to appease the congressional critics who have flagged various problems with TPP, including a market exclusivity period for biologics that they view as too short.

International Trade Commission Report: The only other outstanding requirement under fast track for which there is a set date is for the ITC to conclude its economic assessment of the TPP agreement within 105 days of signature. This would be May 18, and the ITC has said it expects to deliver the report on that date.

After that, the timing depends on when the administration formally submits the draft TPP implementing bill to Congress. The administration has indicated it will work with Congress to determine the most appropriate time for congressional consideration of TPP, which at this point seems to be after the November election.

30-Day Deadline: Thirty days prior to formal submission of the draft TPP implementing bill, the president must submit to Congress a copy of the final legal text of the agreement; a draft statement of administrative action (SAA) proposed to implement the agreement; and a plan for implementing and enforcing the agreement.

At the same time, he must also submit to the House Ways & Means and Senate Finance committees three reports that spell out how the deal will impact U.S. employment, labor rights in the U.S. and FTA partners, and the environment. USTR has said these reports will promptly be made available to the public "to the maximum extent possible."

Mock Markups: Historically, prior to formal submission of the draft implementing bill, Ways & Means and Finance have held so-called "mock markups" where they consider a preliminary version of the draft implementing bill. During these sessions, members can consider amendments to the preliminary version of the implementing bill, although any amendments approved are not directly binding on the administration.

The mock markup process is not required under the 2015 fast-track legislation, although both the Finance and Ways & Means reports accompanying the bill indicate their preference for having them on future FTA implementing bills. The reports do not explicitly lay out a timetable for when the mock markups would take place, although the Ways & Means report implies that it intends to hold its mock markup after the president submits the final legal text and draft SAA but before he formally submits the draft implementing bill.

It does so by saying that the 30-day advance submission of the final legal text and draft SAA "is intended to provide the Committee with the information necessary to conduct its mock-mark-up. It also allows Congress as a whole to review the materials with adequate time before the implementing bill is transmitted for consideration pursuant

to this bill."

Formal Submission: After the mock markups take place, the president during a day in which both chambers are in session must formally submit the draft TPP implementing bill with three additional documents. These include another copy of the final legal text of the agreement, as well as the final SAA.

The fourth document is known in the law as "supporting information" and consists of two elements. The first is an "explanation as to how the implementing bill and proposed administrative action will change or affect existing law."

The second element is a statement that itself consists of two parts. The first part asserts "that the agreement makes progress in achieving the applicable purposes, policies, priorities, and objectives" of the fast-track law.

The second part sets forth the reasons of the president regarding how and to what extent the agreement makes progress in achieving the applicable purposes, policies, and objectives of the fast-track law; whether and how the agreement changes provisions of an agreement previously negotiated; how the agreement serves the interests of United States commerce; and how the implementing bill meets the fast-track standards, including that it only contain such provisions that are "strictly necessary or appropriate" to implement a trade agreement.

TPP Consideration: Once the implementing bill is introduced, Congress has up to 90 legislative days to consider it. Specifically, the Ways & Means Committee must act by the 45th legislative day or the bill is automatically discharged. A full House vote on passage must happen by the end of the 15th legislative day after that.

Senate Finance has until the later of the 45th day of session after the Senate bill is introduced or the 15th day of session after the Senate receives the House bill. After the bill is discharged from Finance, a full Senate vote must take place by the end of the 15th legislative day after the bill is discharged.

Based on the House legislative calendar circulated by House Majority Leader Kevin McCarthy (R-CA), the Obama administration has already missed the date by which it would need to submit a TPP implementing bill in order to guarantee a vote by the end of the lame-duck session of Congress. That would be Feb. 26, which is 90 legislative days before Dec. 16, the last day Congress is scheduled to be in session in 2016.

Similarly, May 18 is the day which the Obama administration would need to submit the TPP implementing bill if it wanted to lock in a House vote on the legislation, as that is 60 legislative days prior to the end of the session.

But a vote is still possible during the lame duck because the fast-track bill only sets out the maximum number of days for consideration; an implementing bill could move much faster if the congressional leadership makes it a priority.

McCarthy's calendar states that the post-election schedule is subject to change, and some sources have held open the possibility that there may not even be a lame-duck session at all.

