Sharon Treat
9-19-13 CTPC meeting update – Report on IGPAC and recent developments from trade press, stakeholders

US-EU (TTIP) negotiations:

- Next round of negotiations (the 2nd) will be in Brussels week of Oct. 7th. As US did in July, EU will have opportunity for stakeholder presentations. Negotiating rounds will be approximately every 6-8 weeks alternating between D.C. and Brussels, with an accelerated schedule.
- IGPAC chair Kay Wilkie (NY) has asked that US negotiators consult with states on "regulatory coherence". USTR has no specific plans to do so outside of IGPAC. We have asked for detailed briefing to discuss concerns with "harmonizing downward" and potential challenges to state regulations by foreign companies through the investor-state arbitration process.

Enforcement issues:

- Indonesia has requested retaliation in the case involving Indonesia's successful challenge of the US ban on flavored tobacco products aimed at children, including clove flavored cigarettes. This will go to arbitration (WTO case).
- Ukraine and Honduras are reviving a dispute at the World Trade Organisation (WTO) challenging Australian laws that impose uniform drab green packaging and large graphic health warnings for cigarettes (Sept. 13 news report).
- Mexico and Canada continue to object to US COOL (country of origin) labeling standards for meat, another challenge to US regulation that succeeded. The US revised its regulations on this but the revised regs did not do anything to change the position of Mexico and Canada.

Trade Promotion Authority (TPA) / Fast Track:

- President Obama has officially requested Congress pass TPA. USTR says that there are a lot of new members of Congress of both parties who have questions and that there has been a lot of "misinformation" about TPA. The Administration is working on a bipartisan TPA bill and "has a real sense of urgency." TPA is part of the President's economic agenda.
- Congress has a "full schedule" in September and October so unclear how fast this will move.
- In the past, TPA has been linked to reauthorization of Trade Adjustment Assistance (retraining and other assistance to workers when plants are shut down due to trade agreements – Maine has received funds for numerous facilities). Republican House members are objecting to reauthorization and any linkage to TPA.

Trade in Services Agreement:

- This involves all services – USTR plans to offer text (table) on banking and other financial services in November. Other issues include Internet services, professional licensing. USTR expects negotiations to intensify in 2014.

Trans-Pacific Partnership:

- **Schedule of negotiations:** 19th round in Brunei is completed. No formal negotiating rounds planned but multiple negotiations are, in fact, taking place behind closed doors in September and October, without any stakeholder briefings or presentations, including on tobacco, pharmaceuticals, intellectual property, financial services, in various locations, including D.C. and Mexico. USTR wants to finish negotiations before the APEC (Asia-Pacific Economic Cooperation (APEC) is a forum for 21 Pacific Rim countries that seeks to promote free trade and economic cooperation throughout the Asia-Pacific region and includes all of the TPP countries) meeting in Bali in early October or the WTO ministerial conference, also in Bali, in early December. TPP negotiations are described as being in the "end game".
- **Tobacco**: Instead of getting rid of loopholes in USTR's May 2012 tobacco proposal (the "safe harbor" language that CTPC objected to as too weak), USTR tabled even weaker language. At the same time, Malaysia has table a complete carve-out. Both proposals are under consideration.
- **Pharmaceutical "transparency" (pricing) proposals:** No new proposals have been offered by the US. This week, PhRMA has been pushing to re-start these discussions and seeking members of Congress to push the Administration to act on this issue. The other countries in the TPP negotiations were very negative about earlier proposals so this appears to have been on a back burner so far.

Summary of EU TTIP position papers
Citizen Trade Policy Commission
September 19, 2013

Introduction: In July of 2013, the Institute for Agriculture and Trade Policy, located in Washington D.C. and Minneapolis, Minnesota, posted on their website (http://www.iatp.org/documents/european-commissions-initial-position-papers-on-ttip) a series of leaked position papers on the TTIP from the European Union. Since these leaked papers are now publicly available on the internet and have a direct bearing on topics to be negotiated in the TTIP, the CTPC Chairs, Senator Troy Jackson and Representative Sharon Anglin Treat have asked that this summary of the various EU position papers be developed for review by the CTPC. The original downloaded document is 65 pages in length and will be available on the CTPC website soon after today's meeting. A single copy of the entire downloaded document is available for review during today's meeting.

Initial Position Paper: Motor vehicles in TTIP

- EU position should be one of promoting regulatory compatability/convergence in the motor vehicles (MV) sector while at the same time achieving desired levels of public health and safety;
- Avoiding regulatory divergences would result in substantial efficiency gains and cost savings;
- EU goal is two-fold:
    i. Recognition that the manufacture of MV parts in one country will meet the technical regulatory requirements of another country; and
    ii. The need to adopt Global Technical Regulations that will be adopted into national legislation for each member nation.
- The current level of MV regulations in both the US and EU are comparable in ultimate outcome and purpose; technical divergence in regulations should not be the focus but rather the equivalence of outcome;
- The assessment of the desired level of overall level of protection to public health and safety should be based on relevant information provided by EU and US MV industry and should be based on a data-driven analysis;
- If regulatory equivalence cannot be achieved on a particular MV topic then the focus should be on identification of those areas that need further regulatory convergence.

Initial position paper: Chemicals in TTIP

- Ultimate goal is to promote regulatory convergence and recognition in the chemical industry;
- Full regulatory harmonization is probably not possible due to significant differences between the EU approach as represented by REACH and the US approach as represented by TSCA;

- Realistic goal is to focus on those areas of each regulatory approach that offer the opportunity for regulatory conformance;
- Four areas of commonality provide the best opportunity for regulatory conformance:
    - Cooperation in prioritizing the assessment of chemicals;
    - Promoting alignment in the classification and labeling of chemicals;
    - The importance of mutual cooperation in identifying new and emerging issues will reduce "trade irritants"; and
    - The enhancement of information sharing and protection of confidential business information.

Initial position paper: Pharmaceuticals in TTIP

- The current level of existing cooperation between US and EU regulators with respect to pharmaceuticals should be maintained;
- The current collaborative process could be reinforced by the following steps;
    - The establishment of a bilateral authorization process;
    - The furthering of bilateral harmonization of technical requirements;
    - Continuing the efforts to establish joint scientific approaches concerning advice and evaluation.
- Improving the mutual recognition of Good Management Practices (GMP) processes used by TTIP members in US, EU and other non-TTIP nations;
- Provide for the exchange of confidential and trade secret information;
- Achieving regulatory convergence on the topic of biosimilars; biosimilars are pharmaceutical products that are similar to previously patented products but are not identical to the original biologic products and thus significant differences in terms of unanticipated side effects and medical consequences may occur;
- Develop common requirements for pediatric clinical design studies and the mutual acceptance of the same;
- Implement a harmonized terminology for pharmaceutical products;
- Work towards the harmonization of assessment approaches.

EU Initial position paper on SPS matters for the TTIP negotiations

- To build upon WTO SPS (Sanitary & Phytosanitary) agreement, the High Level Working Group on Jobs and Growth (HLWG) recommended the inclusion of an ambitious SPS-plus chapter in the TTIP;
- Whenever possible, SPS chapter should be built upon the use of science and international standards but also recognize the rights of individual nation states to enforce and adopt measures deemed necessary to protect the public health and welfare;
- SPS chapter will be part of a broader move to promote regulatory convergence and non-tariff barriers;
- Goals of SPS chapter should include:
    - Minimize negative effects of SPS measures on trade;

    - Respect legitimate objectives to safeguard human, animal or plant health measures in order to prevent and eliminate unnecessary trade barriers; and
    - Improve transparency of SPS measures thought he use of certainty and consistency;
- SPS chapter should be legally binding at all administrative levels; and
- Member states should strive for early warning of proposed legislative changes to help ensure regulatory convergence.

EU Initial position paper on Trade and Sustainable Development

- EU is committed to the concept of sustainable development (SD); i.e. meeting the needs of the current generation without jeopardizing the needs of future generations;
- TTIP should reflect EU goals for SD;
- Envisions a need for a separate chapter on SD which addresses labor, environment and climate change within a trade context;
- SD chapter should reflect internationally agreed upon rules and principles;
- SD chapter should not infringe upon member's rights to develop regulations to reflect its own SD priorities;
- SD chapter should promote the following:
    - Trade and investment in environmental goods and services; addressing non-technical trade barriers;
    - Use of voluntary tools on environmental sustainability and fair trade initiatives;
    - Use of corporate social responsibility practices;
    - Emphasize commitment towards conservation and sustainable management of biodiversity and ecosystems
- SD chapter should reflect importance of using international guidelines and principles on the use of scientific and technical information; and
- SD chapter should feature a strong monitoring and follow-up mechanism;

Initial position paper on Technical Barriers to Trade

- Technical Barrier to Trade (TBT) chapter should reflect the following:
    - Greater openness, transparency and convergence in regulatory and standards development approaches;
    - Reduce redundant testing and certification requirements;
    - Promote confidence in respective conformity assessment bodies; and
    - Enhance cooperation on conformity assessment and standardization issues.
- TBT chapter should remove unnecessary TBTs;
- Regardless of the need for compatibility, it is necessary to recognize that standards of one nation cannot be imposed upon another;
- Measures of regulation should not be any stricter than necessary to achieve the public interest objectives;
- Products that are lawful in one country should be able to be traded in other countries; the mutual importance of reasonable market access for all parties;

- TTIP commitments should apply to both sub-regional (EU) and sub-federal (US) levels of regulation;
- TTIP should remove all TBT barriers to transatlantic trade; removal of all duplicative compliance requirements is important;
- TTIP should reflect the harmonization of all technical requirements;
- TTIP should include voluntary standards of regulation which will be established by industry;
- TTIP should include a mutual recognition of conformity assessment mechanisms; however, mutual recognition of conformity measures is not a substitute for a convergence of substantive requirements;
- TTIP should limit the use of compulsory labeling requirements; and
- TTIP should include a mechanism that deals with trade irritants arising from TBTs

Initial position paper on Anti-Trust & Mergers, Government Influences and Subsidies

- In some nations, trade tariffs have been replaced by behind the border barriers such as anti-competitive practices;
- TTIP should include provisions with anti-trust and merger disciplines:
    - Recognition of benefits of free and unfettered trade and investment relations;
    - Consideration and use of generally accepted best practices;
    - Commitment to active enforcement of antitrust and merger laws;
    - Commitment to implementation of transparent and nondiscriminatory competition policy;
    - Clearly stated provisions dealing with the application of antitrust laws to state owned enterprises (SOEs) and enterprises that are granted exclusive rights or privileges (SERs).
- TTIP should reflect the need for a convergence of antitrust and merger regulations;
- The EU perspective reflects a need for a level playing field with respect to SOEs/SERs and the private sector;
- TTIP should reflect a distinction between entities that have been granted SERs and those entities controlled by the government but fairly compete with the private sector;
- The use of subsidies by SOEs and SERs also distort a level playing field with the private sector;
- The use of subsidies should be addressed by the TTIP by the following provisions:
    - Mechanisms to improve transparency;
    - Consultation mechanisms that provide for the mutual exchange of information about the threat that one nation's use of subsidies might pose to another nation; and
    - A recognition of the most abusive and damaging forms of subsidies.

Initial position paper on TTIP: Cross-cutting disciplines and Institutional provisions

- HLWG also recommended that the TTIP include a 'horizontal" chapter (cross cutting chapter that applies to all chapters) dealing with cross cutting disciplines and institutional issues such as the need for procedural rules;
- The elimination, reduction and prevention of unnecessary regulatory barriers should be the biggest benefit of the TTIP;
- New and innovative approaches will be necessary in the TTIP to help ensure that unnecessary regulatory trade barriers are removed;
- TTIP regulatory provisions in the horizontal chapter will need to be applied broadly to all measures including legislative and implementing acts irrespective of the governing body which adopts them;
- The horizontal TTIP chapter must contain principles and procedures which apply to the entire treaty;
- The objective of the TTIP horizontal chapter is to go beyond the regulations and provisions of the WTO agreements on SPS and TBT;
- Ultimate goal of TTIP is an integrated market where goods/services could be marketed without changes in regulatory environment;
- Cross cutting regulatory disciplines should focus on 3 areas:
    - Regulatory principles which reflect best practices such as bilateral consultation mechanism, improved feedback mechanism, cooperation in collecting evidence and data and exchange of data and information;
    - Strengthening the assessment of potential regulations and their effect on international trade;
    - Improving regulatory cooperation regarding convergence in specific topic areas; and
    - Developing an institutional framework for future cooperation.

EU-US FTA negotiations: Non paper on Public Procurement

- TTIP chapter on Public Procurement (PP) should supersede and improve upon the PP provisions of GPA (Government Procurement Agreement) adopted by the WTO in 1996;
- PP chapter should seek to remove barriers to cross-border procurement and to procurement with established companies;
- PP chapter should remove existing "carve-outs"
- PP chapter should supersede all Buy America and other SER policies;
- PP chapter should cover and be applied to all levels of government including central and sub-central; and
- PP chapter should be extended to apply to all Public Private Partnerships (PPP).

Initial Position Paper on Trade and Investment in Raw Materials and Energy for the TTIP Negotiations Between the EU and the US

- Current WTO rules are tough on import barriers but weak on export barriers resulting in a disproportionate effect on energy and raw materials;
- Coverage of raw materials should extend to those materials used in the manufacturing of industrial products and should exclude processed fishery products and energy products;
- Raw materials and energy provisions of TTIP should reflect increasing transparency and predictability;
- These provisions should seek to eliminate export restrictions;
- Nations should retain the right to determine whether exploitation of raw materials and energy should be permitted and, if so, such rules should be nondiscriminatory and access should be ensured;
- Competitiveness in the trade of raw materials and energy should be improved by:
    - Limiting government intervention in the form of price setting; and
    - Develop specific rules for SOEs and SERs
- A rules-based, open international market is needed for trade in sustainable energy;
- Non-tariff barriers need to be eliminated;
- There is a need for a convergence of international standards on energy performance products, appliances and processes; and
- With respect to the security of energy supplies, there is a need to anticipate supply bottlenecks and how to handle supply crisis and disruptions.

EUROPEAN COMMISSION
Directorate-General for Trade

Directorate E
Unit E1, Trade relations with the United States and Canada

Brussels, 20 June 2013

CONSILIUM	COUNCIL OF THE EUROPEAN UNION
Trade Policy Committee	
m.d. :	**238/13**
source :	**Commission**
for :	**Information**
date :	**21 - 06 - 2013**

LIMITED

NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE

SUBJECT: **Transatlantic Trade and Investment Partnership (TTIP*)***

***ORIGIN*:** **Commission, DG Trade, Unit E1**

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OBJECTIVE: ***For information***

REMARKS: ***Please find attached the following papers that will be sent to the US side ahead of the first round. Additional papers could follow subsequently.***

Initial position papers on:	***Regulatory Issues - Cross-Cutting Disciplines and Institutional Provisions; Technical Barriers to Trade; Regulatory Cluster: automotive sector, chemicals, pharmaceuticals; Sanitary and Phytosanitary issues (SPS); Trade and Sustainable Development; Anti-Trust & Mergers, Government Influence and Subsidies; Trade and Investment in Raw Materials and Energy.***
Non-paper on:	***Public Procurement***

* * *

Initial position paper

Limited

Without prejudice, 20 June 2013

Subject: TTIP; regulatory cluster; initial position papers for discussion at the first round

Please find enclosed in the annex three distinct sectoral initial position papers on the automotive sector, on chemicals and on pharmaceuticals, which we suggest to discuss at the first negotiating round, in addition to the ones on cross-cutting disciplines and TBT. These sectoral papers contain the Commission's initial reflections on a number of joint submissions received from stakeholders on both sides of the Atlantic in response to the public consultations on TTIP.

The Commission is still in the process of analysing these submissions and preserves the right to present, ahead of the next negotiating round, additional initial position papers in other goods and services' sectors, including in areas where there are no (joint) submissions.

Please note that the regulatory component of TTIP is meant to cover both goods and services. Regulatory issues pertaining to the financial services sector will be discussed within the services' cluster but this is without prejudice as to where the provisions covering these issues will ultimately be placed in the agreement.

Annex I

Initial position paper
Motor vehicles in TTIP

The purpose of this paper is to outline the main elements of a possible approach under the TTIP to promote regulatory compatibility/convergence and recognition in the motor vehicles sector, while achieving the levels of health, safety, and environmental protection that each side deems appropriate. These elements build on the ideas put forward jointly by the motor vehicles and parts and components industries from the EU and the US as well as the need and the duty of regulators to achieve the necessary health, environmental and safety protection levels.

1. Objectives

A high level of ambition in this sector is warranted not only by the expectations of the EU and US industries, but also by the very substantial efficiency gains and cost-savings that would arise from addressing regulatory divergences in addition to eliminating tariffs , without lowering safety, health or environmental protection levels. Furthermore, a joint EU-US approach would create a basis for genuine international leadership on motor vehicle standards and regulations.

Accordingly, the ultimate goal pursued in the TTIP negotiations would be twofold:

- firstly, the recognition of motor vehicles (and their parts and components, including tyres) manufactured in compliance with the technical requirements of one party as complying with the technical requirements of the other. Such an ultimate objective would be pursued in stages: it is expected that substantial results should already be reached at the time the negotiations are concluded (i.e. recognition of equivalence for regulations deemed to have similar test and in-use effects), and that a built-in agenda for further regulatory convergence would be defined with, insofar as possible, concrete timelines.

- secondly, a significant strengthening of EU-US cooperation also in the framework of UNECE 1998 Agreement, especially on new technologies. This process should lead in the near future to the adoption of Global Technical Regulations (with a limited number of options and modules) subsequently incorporated in the national legislations – see built-in agenda below.

2. Methodological approach

EU and US motor vehicle regulations, even though they contain diverging technical requirements, provide for a high level of safety and environmental protection. Overall, there is little doubt that the levels of safety required by both sides are broadly comparable. In fact, some motor vehicles manufactured according to the US specifications can already drive legally in the EU under the individual approval system.

Thus, in principle, the technical divergences between both regulations are not a sufficient reason to stand in the way of recognition of each other's regulations: equivalence of outcome is a more relevant consideration. Methods can be devised to make possible the assessment of equivalence, which would open the way to recognition. Assessing the equivalence of the environmental performance of certain motor vehicle categories may warrant adapted methods.

If the overall level of protection is comparable, the main concept and starting point in such a methodological approach – as proposed by ACEA and AAPC - could consist in a presumption that the regulations of one side should be considered as equivalent (i.e. having the same effect) to those of the other side, unless it can be established that the regulations of the other side do not offer a comparable/similar level of protection as that provided for by the domestic regulations. Such a presumption would not be a legal presumption – i.e. a legal requirement that equivalence exists unless proven otherwise -, but would form part of a methodological approach in order to facilitate the task of assessing equivalence of regulations, to be conducted by regulators.
Such an approach would require the contribution of industry and, as appropriate, of other relevant stakeholders. The EU and US industry would be requested to provide, as an input to the TTIP discussions, relevant information to help conduct such an assessment: this would include as much evidence and data as possible (including on the economic value of establishing the

equivalence) in support of the request for consideration of equivalence. Pending a more detailed data-driven analysis, the lists of matching regulations submitted by the industry in their joint contributions, already provide a valuable indication of industry's expectations for this negotiation. As a starting point, it would be appropriate to focus on a first batch of regulations on which work would begin immediately. This could concern regulations which have important economic value and indeed presumed similar effect, be it on safety or on the environment. This approach would allow the Commission and the US agencies to test and refine the methodology for the examination of equivalence in the remainder of the regulations. The data for these first cases should be provided in the shortest possible timeframe.

Importantly, as absence of recognition of any individual regulation could imply important additional costs, the examination of equivalence should be comprehensive and extend to all relevant technical regulations applicable to motor vehicles – going even beyond the list proposed by the industry so far. Other stakeholders would also be able to provide input.

Regulators would conduct such an equivalence assessment based on emission levels and data provided by the industry as well as on the data used in the legislative process (e.g. cost-benefit analysis and health data). If regulators establish that there is no equivalence, the reasons for this conclusion should be identified as well as the means that would enable recognition of equivalence for future standards.

It will be critical that such an evaluation focuses on the outcome of the regulations, i.e. their effects in terms of protection of safety and the environment. Therefore, differences in specific technical requirements or testing methods would not per se constitute a proof of absence of equivalence, unless it is determined that such differences have a significant material impact in terms of protection.

3. Possible deliverables during the negotiations

In the course of the negotiations, both sides would identify the areas where there could be recognition of equivalence between the EU/UNECE and FMVSS and other regulations relevant for safety and the protection of the environment. The objective would be to establish a list in the TTIP agreement

covering a high number of matching EU/UNECE-FMVSS and other regulations, both in the field of safety and the environment. For areas where there is recognition of equivalence, such recognition would mean in legal terms that compliance with the relevant regulations of the other TTIP partner would have the same legal effects as compliance with domestic regulations, and therefore be considered for all purposes (although with limitations with respect to conformity assessment, see below) as compliance with the relevant corresponding domestic regulations.

Such recognition would concern the technical requirements applicable to motor vehicles and their parts and components, and cover the technical specifications, how they are measured (i.e. tests carried out to assess compliance), and marking requirements. Such recognition could not be extended to conformity assessment, in view of the wide divergence between conformity assessment systems (prior type approval in the EU, in accordance with the UNECE system, and self-certification with market surveillance in the US). However, in order to facilitate trade and the recognition of the substantial technical requirements, EU type-approval authorities would be required to test US vehicles destined for the EU market against US regulations using US testing methods, while US bodies would, in their market surveillance activities, test EU vehicles against EU/UNECE regulations and their testing methods. The agreement would have to specify how to make the two systems work smoothly alongside each other, and reduce paperwork as much as possible, whilst respecting their integrity.

4. Built-in agenda

For cases where equivalence cannot be established during the negotiations because of important differences in the effects of technical requirements, the agreement should identify those areas where further convergence would be necessary. It should also define how and when to achieve it: the gaps should be specified and a clear process and timeline (in-built agenda) would be agreed. This should be complemented by a strengthening of EU-US cooperation in the framework of UNECE 1998 Agreement.

Reinforced cooperation in the context of the UNECE 1998 agreement would

also be the central element to cover new technologies and lead to the adoption of EU-US and ultimately of Global Technical Regulations, in areas such as hydrogen and electric vehicles, test-cycle on emissions, and advanced safety technologies. The objective would be for a quick incorporation of the resulting GTRs in national legislation, insofar as possible abstaining from options, exemptions and modules - or otherwise providing for recognition of the options that the other party may have chosen. Progress in this work would be regularly monitored under the relevant bodies of TTIP at the highest level.

Insofar as possible, some outcomes on these topics could be achieved during the timeframe of the negotiations and reflected in the resulting texts.

5. Future convergence

In addition to the areas identified for further work, there could also be a provision concerning other future regulations, according to which whenever either side considers that a new regulation is required they will consult the other and commit to work together in order to establish common rules, in principle in the framework of the 1998 Agreement.

6. Practical considerations – work organisation

The next step would be to agree on a work plan and concrete steps to be carried out during the negotiations, in particular during the course of 2013. Stakeholders would be invited to provide the necessary information to support the process. On the EU side, Member States (which are responsible for type-approval activities) will need to be consulted regularly.

Within the framework of the TTIP negotiations, regulators from both sides would develop the methodology and identify areas and questions requiring further work.

Annex II

Initial position paper

Chemicals in TTIP

The purpose of this paper is to outline the main elements of a possible approach under TTIP to promote regulatory convergence and recognition in the chemicals sector. These elements build on the ideas put forward jointly by Chemicals Industry Associations of the EU and US.

1. Overall objectives

Both industry associations and governments are aware that neither full harmonisation nor mutual recognition seem feasible on the basis of the existing framework legislations in the US and EU: REACH (Regulation (EC) 1907/2006) and TSCA (Toxic Substances Control Act) are too different with regard to some fundamental principles. The recently completed REACH Review concluded that REACH should not be amended, while in the US a bipartisan proposal to amend TSCA has been introduced into Congress in May 2013. However, the draft legislation does not foresee any general registration obligation for substances as a condition for their marketing (a fundamental requirement under REACH), nor elements comparable to authorisation, while it would give the EPA new and easier possibilities to conduct chemical assessments and adopt risk management measures such as restrictions. The objective of the negotiations, therefore, must be to find and agree on all possibilities for regulatory co-operation/convergence within the limits of the existing basic frameworks – details are set out below. Some of these objectives could already be achieved at the time the negotiations are concluded, while for others only adherence to certain regulatory principles and mechanisms for further work might be feasible.

2. Detailed objectives

Four main areas have been identified in which a higher degree of convergence may be sought to increase efficiency and reduce costs for economic operators:

2.1. ***Co-operation in prioritisation of chemicals for assessment and assessment methodologies:*** prioritisation happens in the US in the framework of the so-

called Chemicals Management Plans of the EPA as well as through the selection of chemicals for the so-called 'Reports on Carcinogens' by the National Toxicology Programme (NTP), and in the EU through (a) the establishment of the Community Rolling Action Plan (CoRAP) for Evaluation under REACH drawn up by ECHA (***to note***, though: evaluations under REACH are expected to be much more targeted and limited in scope than the full assessments made by the EPA under its chemicals management plans), as well as (b) in a much less formalised and purely voluntary risk management option analysis followed by proposals for restrictions, substances of very high concern (SVHC) identification (candidate list), authorisation and proposals for harmonised classification and labelling under Regulation (EC) No 1272/2008 on Classification, Labelling and Packaging (CLP). None of these processes in the EU and US, respectively, currently foresees the consultation or involvement of authorities of the other, but TTIP could be an opportunity to develop relevant mechanisms. Methods for assessment/evaluation are also an area where EPA and ECHA already co-operate and this can be intensified – in particular in the development/integration of new scientific developments. The already existing Statement of Intent[1] signed between EPA and ECHA could be a good basis for developing further co-operation activities. The US Agencies should also accept to monitor the activities of individual States in this regard and inform the EU about all draft measures envisaged at sub-Federal level.

2.2. ***Promoting alignment in classification and labelling of chemicals:*** this is an area with great potential, because an international standard exists, which is essentially a 'fusion' of the earlier EU and US systems. In the EU the CLP Regulation constitutes a comprehensive implementation of the UN GHS, whereas in the US, only OSHA has implemented the GHS for chemicals used at the workplace. EPA (and possibly also the Consumer Product Safety

[1] The European Chemicals Agency has already a cooperation agreement with the US EPA. This agreement on technical and scientific cooperation is underpinned by revolving work plans. The interaction with the peer organisation includes regular director level meetings and technical dialogue between experts when topics of mutual interest to share information and best practice on the regulatory science, IT tools and databases relevant for sound management of chemicals. The cooperation under the current agreement does not include the exchange of confidential business information.

Commission CSPC) would have to also implement the UN GHS for legislation under their responsibility if this objective were to be reached. The EU and US authorities could also commit to implement the regular updates of the GHS and, in areas, where a certain flexibility is allowed, to work towards convergence. ACC/CEFIC also called for a common list of chemicals with agreed classifications, which fits with an initiative in the UN GHS promoted by the US for a global list of agreed GHS classifications. The EU already maintains a list of binding harmonised classifications in Annex VI to the CLP Regulation, and an inventory of all existing industry self-classifications – which are not fully harmonised yet - has been established in the C&L Inventory maintained by ECHA. An enhanced EU-US co-operation on agreeing classifications for chemicals could become a good basis for a global list.

2.3. ***Co-operation on new and emerging issues:*** Co-operation on new and emerging issues in a forward looking manner has the greatest potential to avoid trade irritants in the future. Current topics of interest would be endocrine disruptors (where contacts between the Commission and EPA are already established), nanomaterials (contacts also already established) and mixture toxicity. Mutual consultation as of an early stage, whenever US agencies or the Commission start developing new criteria or new legislation, could relatively easily become part of the preparatory processes conducted by both.

2.4. ***Enhanced information sharing and protection of confidential business information (CBI):*** this has been proposed by ACC/CEFIC, including also a call to identify 'existing barriers for exchanging information'. The US EPA and OSHA (mainly to obtain full test study reports from the EU) as well as ECHA (mainly to receive full information about substance identities from the US authorities, e.g. in the Chemical Data Reporting scheme) have also expressed interest. In addition, several animal welfare organisations have called on the authorities to increase data exchange to avoid duplication of tests involving animals. While it is undoubtedly important that the EU and US authorities exchange information, both sides also make vast and increasing amounts of data publicly available. Therefore, several elements would require additional

consideration before deciding what further steps could be taken or what benefits an agreement on sharing CBI would bring. For example, the US EPA is content with working with robust summaries (and does not require full study reports) in the context of the OECD HPV Programme. Also, neither ECHA nor the Member States authorities do normally receive full study reports as part of REACH Registration or even evaluation – these are owned by the industry and shared between the registrants via Substance Information Exchange Fora (SIEFs) which could be approached directly by the EPA. It also has to be ascertained that information exchange would be mutual, which raises the question of the limits on the US authorities to give any confidential information to other authorities under Section 8 of TSCA. This analysis should also include to what extent the definitions of CBI is equivalent in the EU and in the US.

3. Possible deliverables during the negotiations

Realistically achievable deliverables during the course of the negotiations will differ for the specific objectives set out in section 2, as detailed in the following. It should also be noted that both for the negotiation and later implementation the relevant US agencies need to cooperate internally to avoid diverging developments on the US side, which would make convergence with developments in the EU impossible.

For objective 2.1: agreement on a mechanism for mutual consultation on prioritisation of chemicals for assessment/risk management and for co-operation in the development of assessment methodologies, which could be described in an article in the relevant sector annex for chemicals. commitment by both sides to inform about activities at sub-Federal level in the US and Member State activities in the EU, respectively.

For objective 2.2: commitment to implement the UN GHS for a broad range of chemicals by a certain date and to implement the regular updates of the GHS. There could also be agreement on a mechanism for mutual consultation and involvement in processes for classification and labelling of substances (i.e. harmonised classification in the EU under CLP – NTP reports on cancer in the US), or on other ways of establishing a common list of classifications for substances (e.g. reviewing existing lists and identifying commonalities, working through the OECD or others). These elements could be described in an article in

the relevant sector annex for chemicals

For objective 2.3: agreement on a mechanism to regularly consult with each other on all new and emerging issues – in particular those of regulatory relevance, which could be described in an article in the relevant sector annex for chemicals. Commitment to consult and respond to comments/questions from the other side and undertake efforts to work towards common criteria/principles/measures on such new and emerging issues, where feasible.

For objective 2.4: completion of a full analysis on the expectations of each side, possible obstacles to exchange of (confidential) data, possible benefits of such exchange and perspectives for reciprocity. If considered worthwhile, commitment to undertake negotiations on a relevant mechanism with an objective to conclude them within X years.

4. Built-in agenda

The sector annex could contain a provision to periodically review the functioning of the mechanisms developed for each of the above objectives and their revision as appropriate. Furthermore, both sides could commit to periodically examine whether additional and new objectives could be covered and the sector annex be amended accordingly.

5. Future convergence

The horizontal chapter of TTIP would have provisions concerning an effective bilateral cooperation/consultation mechanism and an improved feed-back mechanism, for both parties to get sufficient time to comment before a proposed regulation is adopted and to receive explanations as to how the comments have been taken into account. For the chemical sector, this would include in particular risk management proposals for prioritised substances at Federal/EU level and US State/Member State level.

6. Practical considerations – work organisation

The next step would be to establish a work plan and concrete steps to be carried out during the negotiations and in particular during the course of 2013. This would include in particular the identification of all relevant actors (i.e. agencies on the US Side, COM and ECHA on the EU side). Stakeholders would be invited to provide proposals to support the process.

Annex III

INITIAL POSITION PAPER

PHARMACEUTICALS IN TIIP

INTRODUCTION

The final report of the US - EU High Level Working Group on Jobs and Growth (February, 2013) highlights that as regards regulatory aspects TTIP should contain in addition to cross-cutting disciplines and TBT plus elements provisions concerning individual sectors.

The purpose of this paper is to present some possible elements for a TTIP annex on pharmaceutical products. It is based on ideas put forward by EU and US industry and builds on existing cooperation between EU and US regulators in this area. It is anticipated that stakeholders will continue to support the process and could play an active role towards the implementation of some of the identified objectives.

Regulatory cooperation between EU and US in the pharmaceutical area supported by existing confidentiality arrangements is very well established both at bilateral level as well as at multilateral level via ICH (International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use).

TTIP could reinforce existing collaborative processes on pharmaceuticals by:

- establishing bilateral commitments that would facilitate pharmaceutical products authorization processes and optimise agencies resources (notably with respect to reliance on each other's GMP inspections results and exchange of confidential information),

- fostering additional harmonization of technical requirements in new areas or in areas where the need to improve harmonization at bilateral or international level has been identified (e.g. biosimilars, paediatrics, generics, terminology),

- reinforcing joint approaches on scientific advice and evaluation of quality by design applications).

POSSIBLE ELEMENTS FOR A PHARMACEUTICALS ANNEX IN TTIP

GMP inspections

Both Parties could explore possibilities for the improvement of the recognition of each other's GMP inspections carried out in third countries and inspections carried out in EU and US territory.

An advantage of this approach would be that FDA and EU Member States would be able to focus their resources on inspecting high risk areas (which are located outside EU and US) instead of spending resources on inspecting third countries facilities and EU and US facilities which have been already inspected by one of the Parties. In addition, this approach would entail significant cost savings for the industry.

Although the EU has functional MRAs or equivalent in place with Canada, Japan, Switzerland, Australia, New Zealand and Israel, between the EU and US a more flexible approach could be taken.

Therefore, in TTIP, a system based on mutual reliance on each other's GMP inspections (instead of legally binding mutual recognition) could be envisaged. Such approach should include progressive targets that would contribute to confidence building.

Provisions on the exchange of confidential/trade secret information should be in place for such approach to function.

Exchange of confidential information and trade secret information

Both Parties should explore possibilities for allowing the exchange of confidential information and trade secret information between EU Member States/EU institutions and FDA. This approach would apply not only to GMP and other inspection reports but also to data and information on marketing authorizations applications.

TTIP could entail legal provisions allowing the exchange of confidential information in the horizontal chapter as well specific confidentiality provisions in the pharmaceuticals annex.

Innovative approaches from industry could greatly contribute to the realisation of this objective.

Establishing functioning systems for the authorisation of biosimilars

Both Parties could commit on establishing functioning systems for the authorisation of biosimilars. The FDA could benefit from the experience of EMA that has already completed opinions on 16 biosimilars. FDA and EMA are expected to pursue their scientific exchanges which contribute to the development or review of their respective guidelines. In particular, a formal acceptance of comparative clinical trials based on reference medicines sourced in the EU or US or in third countries should be envisaged.

An advantage of this approach would be the potential increase of approved biosimilars in both markets. In addition, US and EU could shape the international approach for the review/authorization of biosimilars.

Revising requirements for Paediatrics authorization

Both Parties could work towards the revision of ICH guidelines on paediatrics in particular by agreeing on clinical studies design (paediatric investigation plans) and by mutually accepting clinical studies. In addition, both Parties should agree on the timing for data submission.

Terminology for pharmaceutical products

Both Parties could work towards the implementation of a harmonized terminology for pharmaceutical products (unique identification of medicinal products and substances, pharmaceutical forms, routes of administration, etc.).

This approach would improve the information flow between enterprises and regulators and between regulators of both Parties.

Bilateral cooperation on joint assessment approaches

Both Parties could commit to continue existing cooperation on 'parallel scientific advice' (joint discussion between EMA, FDA and applicant/sponsor of scientific issues during the development phase of a new product) and existing cooperation on 'parallel evaluation on quality by design applications' (joint list of questions to the applicant and harmonized evaluation of the applicant's responses).

This approach would have the advantage of optimizing product development and avoiding unnecessary clinical trials/testing replication, optimising agencies

resources (sharing assessment reports/authorisation decisions) as well as important costs savings for industry.

Provisions on the exchange of confidential/trade secret information or industry readiness to allow such exchange should be in place to allow such approach to function.

NEXT STEPS

Taking into account that the objective of the current paper is to present a first analysis of possible elements for a TTIP annex on pharmaceutical products, the first negotiation meetings could aim at:

- discussing how to combine health regulators' agendas (focus on protecting human health) with more general competitiveness objectives (increased trade, growth and jobs);
- calling on stakeholders to see how they can best support these objectives;
- identifying common goals and possible scope of commitments;
- deciding on whether the identified goals should be achieved at bilateral level or at multilateral level (e.g. ICH) and within which time frame;
- discussing the best tools to achieve in a pragmatic way the goals (e.g. GMP recognition vs. reliance on GMP results);
- determining what type of deliverables can be expected within TTIP in the short and medium term;
- discussing implementing measures and what type of resources (financial, human, legal) will be necessary to put in practice TTIP commitments.

EU initial position paper on SPS matters for the TTIP negotiations – Without prejudice, 20.6.2013

In its Final Report, the High Level Working Group on Jobs and Growth (HLWG) recommended that the United States of America and the European Union (hereinafter "the Parties") should seek to negotiate an ambitious "SPS-plus" chapter. To this end a mechanism to maintain an improved dialogue and cooperation should be established to address bilateral sanitary and phytosanitary (SPS) issues. The chapter will seek to build upon the key principles of the World Trade Organization (WTO) SPS Agreement .

This chapter – as part of the FTA discussions within the TTIP - will seek to build upon the key principles of the World Trade Organization (WTO) SPS Agreement, including the requirements that each side's SPS measures be based on science and on international standards where these exist, while recognising the right of each Party to appraise and manage risk in accordance with the level of protection it deems appropriate and with the objective of minimising negative trade effects. Measures taken, in particular, when relevant scientific evidence is insufficient, must be applied only to the extent necessary to protect human, animal, or plant life or health, must developed in a transparent manner and must be reviewed within a reasonable period of time.

This chapter should seek to address market access issues and to facilitate the resolution of differences. It should be without prejudice to the right of the EU and Member States to adopt and enforce, within their respective competences, measures necessary to pursue legitimate public policy goals such as public health and safety in accordance with the WTO SPS Agreement.

The SPS chapter will form part of a broader move to also address regulatory issues and non-tariff barriers. In this context, the two sides should also seek to strengthen upstream cooperation by regulators and to increase their cooperation on standards setting at an international level. Regulatory convergence shall be without prejudice to the right to regulate in accordance with the level of health, safety, consumer and environmental protection that either Party deems appropriate, or to otherwise meet legitimate regulatory objectives.

At present, the 1999 *Agreement between the United States of America and the European Community on sanitary measures to protect public health and animal health in trade in live animals and animal products* (the so-called Veterinary

Equivalence Agreement or VEA) aims to facilitate trade in animals and animal products by offering a framework for establishing the equivalence of EU sanitary measures relative to the US level of protection and vice-versa, for US sanitary measures relative to the EU level of protection. The VEA also provides for recognition of the animal health status of the exporting Party, the recognition of the regionalisation, guidelines for border checks, procedures for the conduct of verification visits, improved information exchange and transparency, amongst other things.

The new SPS chapter should build upon the existing VEA and make it part of the overall architecture of any future comprehensive Free Trade Agreement. In particular it should take into account the experienced gained thus far, maintaining those elements of the VEA that have worked well and improving on those that have done less well.

Other existing forms of cooperation like the EU-US technical working groups on animal and plant health, or existing ad-hoc cooperation for example in multilateral fora or standard setting bodies, should be examined and updated in the same way, to reflect the overall experience gained to date.

Overall, the new SPS chapter should in particular seek to:

1. minimise the negative effects of SPS measures on trade through close regulatory, confidence building and technical cooperation,

2. respect legitimate objectives to safeguard human, animal and plant health measures applicable to trade in order to prevent and eliminate unnecessary barriers,

3. improve transparency by bringing certainty and consistency to the adoption and application of SPS measures.

To this end existing sanitary and phytosanitary measures should be revisited in a collaborative manner and with the aim to remove unnecessary barriers

Special focus should also be given to trade facilitation measures where a number of areas can be potentially benefit (e.g. approval and/or authorisation procedures where the administrative burden, redundancies, etc could be reduced).

In summary, the SPS component of the overall agreement should seek to achieve full transparency as regards sanitary and phytosanitary measures applicable to trade,

establish provisions for the recognition of equivalence, implement a 'pre-listing' approach for establishments, prevent implementation of pre-clearance, provide for the recognition of disease-free and pest-free health status for the Parties and recognise the principle of regionalisation for both animal diseases and plant pests.

In order to achieve these objectives, the EU proposes, *inter alia*, to cover the following elements:

- Scope and definition: the future chapter should apply to all SPS measures that directly or indirectly affect trade. It should complement and build upon the WTO SPS Agreement. To this end, the rights and obligations under the WTO SPS Agreement should be re-affirmed. The definitions established in the WTO SPS Agreements and by relevant international standard setting bodies should be used.

- Competent authorities: The chapter should be legally binding for both Parties and applicable to the Parties' territories at all administrative levels in order to ensure its maximum efficiency and effectiveness. It is paramount in this regard, that the Parties recognise each other as single entities for SPS purposes.

- Reducing administrative burdens, excessive bureaucracy or adherence to needless rules and formalities and replacing them by transparent, slim and predictable processes in order to allow real trade in due time: It is, in particular, essential to include predictability and transparency into the approval and/or authorisation procedures applicable to imported products, including risk assessments, timelines and technical consultations where necessary.

- Privileged Relationship - It should provide for the elements to set up a privileged relationship between the Parties, including e.g. a pragmatic and open approach for a more efficient recognition of equivalence. Consultations along the adoption of SPS measures or the import authorization process together with an early warning of upcoming legislative changes would also allow convergence among the two systems.

- Trade facilitation provisions: an ambitious set of trade facilitation measures should include, among other things, a clear and streamlined procedure for the listing of establishments based on an audit approach, whose frequency is risk- and performance-based. There should also be a procedure for the determination of equivalence. The EU is keen to discuss provisions on equivalence (comparability) assessments for systems or a certain category of goods, or alternative specific measures.

- Trade conditions: SPS related import requirements and certification conditions for all commodities should be available upfront, grounded in scientific evidence or the relevant international standards and apply to the entire territory of the exporting Party. Among other issues, it is paramount to set up a clear procedure which will include timelines for the recognition of animal health status, pest status and regional conditions, in line with international standards. Provisions on safeguard measures or emergency measures should ensure that trade is not unnecessarily or unjustifiably restricted. Pragmatic and open procedures should be established to recognise alternative measures.

- Fees and Charges: Among the trade facilitations measures, reciprocal treatment as regards fees and charges imposed for the procedures on imported products is of key importance. Both Parties commit to bear their own costs related to imports from the other Party namely with regard to the procedures of registration, approval authorisation, inspections or audits.

- Transparency and information exchange on key areas such on the verifications/audit activities, non-conformities at the border inspections post, new scientific developments, early consultation procedure of upcoming legislative changes and changes on the import conditions, etc.

- Enforcement: The establishment of a Committee with sufficient tools to monitor and ensure the implementation of the chapter.

- Cooperation: The SPS chapter should also include provisions to develop the cooperation on animal welfare aspects and to facilitate the exchange of information, expertise and experiences in this field. Cooperation in other areas of common interest, including in the WTO SPS Committee and in relevant international standards setting bodies should be also explored.

A possible skeleton of the Agreement related to the SPS+ issues should at least address the following points

The part of the agreement:

1. Objective;
2. Competent Authorities
3. EU and US as single entities for SPS purposes
4. Reaffirmation of multilateral obligations
5. Scope
6. Definitions
7. Trade facilitation
8. Animal Health
9. Plant health
10. Animal welfare
11. Equivalence
12. Verification (audit)

13. Export certification

14. Import checks/fees

15. Transparency/Information exchange

16. Notification/Consultation

17. Safeguard and emergency measures

18. Collaboration in international fora (multilateral and bilateral)

Transatlantic Trade and Investment Partnership
Without prejudice, 20 June 2013

EU INITIAL POSITION PAPER ON TRADE AND SUSTAINABLE DEVELOPMENT

I. Introduction

1. Sustainable development is an overarching policy objective of the international community. It stands for meeting the needs of present generations without jeopardising the needs of future generations. It offers a model of progress that reconciles immediate and longer-term needs. Social development, economic growth and environmental protection are inter-related and mutually reinforcing components of sustainable development. Sustainable development aims at bringing about economic prosperity through and with a high level of environmental protection and social equity and cohesion.

2. The EU is committed to furthering these objectives, both by an active engagement with its partners in the international arena and through the design, adoption, and implementation of its internal policies. The Treaty of Lisbon, establishing the core EU rules, enshrines sustainable development as a fundamental principle of the EU action, both domestically and in its relations with the wider world – be it political partnerships, trade relations, international cooperation, or external representation. Sustainable development therefore informs and guides the EU policy-making process and is high on the agenda of the EU institutions and key constituencies, including the European Parliament.

3. As part of this overall framework, maximising the important contribution that trade can make to sustainable development is a key objective that the EU consistently pursues both multilaterally and in all its bilateral and regional trade negotiations. In this context, the launch of the Transatlantic Trade and Investment Partnership (TTIP) negotiations presents opportunities and challenges in respect of sustainable development

4. The EU sets out on the path towards the TTIP with the US in the firm belief that our aspirations and objectives are based on a common overarching objective of sustainable development. Notably, the EU believes that, by building on the EU and the US commitment to high levels of protection for the environment and workers, including in their trade agreements, as also reflected in the HLWG's report, the TTIP negotiations will pave the way for a comprehensive and ambitious approach to trade and sustainable development issues – thereby responding to expectations on a true "21st century deal" in this area.

5. In addition to the recognition of sustainable development as a principle that should underlie the TTIP in all areas, we envisage an integrated chapter specifically devoted to aspects of sustainable development of importance in a trade context - more specifically, on labour and environmental, including climate change aspects, as well as their inter-linkages.

II. Trade and Sustainable Development (TSD) Chapter

6. The EU has developed a consistent practice of including chapters on Trade and Sustainable Development in its FTAs, aiming at ensuring that increased trade is mutually supporting environmental protection and social development, and does not comes at the expense of the environment or of labour rights. Building on this experience, the EU would consider the following areas as building blocks for the TTIP negotiations.

a. Internationally agreed sustainable development objectives and commitments

7. The EU believes that the TTIP should reflect the Parties' commitments regarding a set of internationally agreed principles and rules, as a basic framework underlying our economic and trade relations. In the labour domain, the starting point for discussions should be the Parties' existing commitments in relevant areas, including the ILO 1998 Declaration on Fundamental Rights and Principles at Work, as well as its follow-up, and the 2008 ILO Declaration on Social Justice for a Fair Globalization, which applies to all ILO members. In respect of environmental issues, the starting point should be the recognition of the importance of global environmental governance to tackle environmental challenges of common concern, whereby Multilateral Environmental Agreements (MEAs) are of critical importance to deliver global benefits.

8. On that basis, the TTIP negotiations should reflect the Parties' commitments in the labour area with respect to ILO principles and rules. In this regard, the EU considers that ILO core labour standards, enshrined in the core ILO Conventions and internationally recognised as the fundamental labour rights, are an essential element to be integrated in the context of a trade agreement, and could be further complemented by other ILO standards/conventions of interest, as well as by a resolve to promote the ILO Decent Work agenda. A similar approach should be followed regarding adherence to core MEAs and other environment-related bodies as internationally recognised instruments to deal with global and transboundary environmental challenges, including the fight against climate change. Due to their subject matter and cross linkages with trade aspects the EU considers the following MEAs to be of particular importance in trade negotiations: the Convention on International Trade in Endangered Species of Wild Fauna and Flora and its amendments, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Convention on Biological Diversity and its Protocols, the United Nations Framework Convention on Climate Change, the Stockholm Convention on Persistent Organic Pollutants, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

9. Our common commitment to the effective domestic implementation of these labour and environmental standards and agreements should also be an important element to emphasise.

b. Levels of labour and environmental protection

10. The integration of environmental and labour considerations in the TTIP is without prejudice to each Party's right to regulate in order to reflect its own sustainable development priorities. This means recognising in the TSD chapter each Party's right to define and regulate its own domestic levels of environmental and labour protection at the level deemed necessary, consistently with internationally agreed standards and agreements, as well as to modify its relevant laws and policies accordingly, while pursuing high levels of protection.

11. Furthermore, the overarching aim of the TSD chapter should be to ensure that trade and economic activity can expand without undermining the pursuit of social, and environmental policies. On the other hand, domestic labour and environmental standards should not be used as a form of disguised protectionism, nor lowered as a means of competing for trade or investment. Accordingly, the TSD chapter should expressly reflect the fact that the respective domestic authorities will not fail to enforce, and will not relax, domestic labour or environmental domestic laws as an encouragement of trade and investment.

c. Trade and investment as a means to support and pursue sustainable development objectives

12. In order to promote a greater contribution of trade and investment to sustainable development, it is important to discuss initiatives in areas of specific relevance. In this regard, the TSD chapter should promote, for instance:

- trade and investment in environmental goods and services and climate-friendly products and technologies. Moreover, further reflection could also be undertaken on other related trade actions which could be pursued under other chapters of the TTIP (e.g. frontloading liberalisation of such products, addressing NTBs in the renewable energy sector, consider environmental services);
- the use of sustainability assurance schemes, i.e. voluntary tools on environmental sustainability or fair and ethical trade initiatives;
- corporate social responsibility practices, further supporting relevant principles endorsed by both the EU and the US (e.g. international guidelines, bilateral joint statement of shared principles for international investment within the framework of the Transatlantic Economic Council).

13. Similarly, the TSD chapter should emphasize the Parties' commitment towards the conservation and sustainable management of biodiversity and ecosystems, the sustainable use and management of natural resources, and the role that trade could play in this regard. These considerations would apply to areas such as forests, fisheries, wildlife, and biological resources. The promotion of trade in legally obtained and sustainable products should thus be a key area to be covered, against the background of internationally recognised instruments, as well as the common determination of the EU and the US to address in their FTAs issues related to trade in such resources obtained or produced illegally.

d. Good administrative practices

i) Scientific information

14. The TSD chapter should recognise the importance of taking into account international guidelines and principles on the use of scientific and technical information as well as on risk management, when preparing and implementing measures aimed at protecting the environment or labour conditions which may have an impact on trade and investment.

ii) Transparency

15. Transparency is of particular relevance in the context of trade and sustainable development, in order to ensure that stakeholders, particularly non-state actors, can be informed about, and provide views and inputs on, the development, introduction, and application of measures related to labour or the environment. This also applies to measures concerning the implementation of the TSD chapter. Therefore, the TSD chapter should foresee appropriate channels for engaging with the public.

iii) Review and assessment

16. Appropriate recognition should also be given to the fact that, once the TTIP is in force, it will be important for the Parties to have an active policy of review and assessment of the effects of the agreement on sustainable development objectives.

e. Working together

17. The TTIP could also establish priority areas for share of information, dialogue, and joint initiatives on the trade-related aspects of sustainable development, such as:

    - Cooperation in international fora responsible for social or environmental aspects of trade, including in particular the WTO, ILO, MEAs and UNEP;

- Strategies and policies to promote trade contribution to green economy, including eco-innovation;

- Trade-related aspects of the ILO Decent Work agenda and, in particular, on the impact and inter-linkages of trade and full and productive employment, labour market adjustment, core labour standards, labour statistics, human resources development and lifelong learning, social protection floors and social inclusion, social dialogue and gender equality;

- Trade impacts of labour or environmental protection and, *vice versa*, the impacts of trade on labour or environmental protection;

- Trade-related aspects of natural resources and the protection and use of biological diversity, including ecosystems and their services, such as measures to enhance trade in legal and sustainable timber, fish, or wildlife products as well as other issues related to biodiversity and ecosystems;

- Trade-related aspects of the climate change strategy, including consideration of how trade liberalisation or trade-related regulatory cooperation can contribute to achieving climate change objectives and more generally to ensure increased production of renewable energy, implemented in a sustainable manner and increased energy efficiency.

f. Implementation, monitoring, and enforcement

18. In order to ensure an appropriate implementation of the TSD chapter, in the EU's view it is crucial to incorporate a strong monitoring and follow-up mechanism. The EU is convinced that an effective mechanism should be based on transparency, regular dialogue, and close cooperation between the Parties, and provide for effective channel of communications and means for reaching mutually agreed positions on any matter related to the TSD Chapter.

19. In this context, the EU sees an essential role for civil society, both domestically and on a bilateral basis, in ensuring that sustainable development considerations are brought to the attention of the Parties to the TTIP, as well as in providing advice and follow-up on the implementation of the TSD chapter and related matters.

20. Finally, it is important to ensure that there are channels for the Parties to deal effectively with disagreements on any matters which might arise under the TSD chapter, such as government consultations and independent and impartial third-party assessments to facilitate the search for and implementation of solutions.

Without prejudice, 20 June 2013

Initial position paper

Technical Barriers to Trade

1. Introduction

The final report of the HLWG refers to five basic components of TTIP provisions on regulatory issues, as follows: cross-cutting disciplines on regulatory coherence and transparency; provisions concerning technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS); provisions aimed at promoting (greater) regulatory compatibility in individual sectors; and a framework providing an institutional basis for future cooperation.

With respect to the horizontal TBT Chapter, the HLWG specifically recommends the following:

"An ambitious "TBT-plus" chapter, building on horizontal disciplines in the WTO Agreement on Technical Barriers to Trade (TBT), including establishing an ongoing mechanism for improved dialogue and cooperation for addressing bilateral TBT issues. The objectives of the chapter would be to yield greater openness, transparency, and convergence in regulatory approaches and requirements and related standards development processes, as well as, inter alia, to reduce redundant and burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally."

This draft presents some elements that could be contained in the horizontal TBT Chapter of the future TTIP.

In particular, this paper addresses general issues concerning technical regulations, standardization, conformity assessment and transparency. It is limited to aspects covered by the WTO TBT Agreement. It therefore does not cover issues related to services, public procurement, and aspects covered by the WTO SPS Agreement.

As indicated above, it is envisaged that separate provisions will be made for specific product sectors. Many technical sectors have regulatory peculiarities arising either from their nature, or for historical reasons, and where such peculiarities exist, or where the economic importance of a sector is such as to justify it, specific measures will be considered in a separate sectoral annex, limited to that set of products. It is the purpose of this discussion to address the general case, i.e., where sectoral measures are not, or not yet, envisaged for the TTIP as a whole, or where sectoral measures are intended to complement measures of general application.

2. Principles

The EU considers that transparency and predictability of the regulatory and standard-setting process is key to trade and growth in general. It has therefore been a strong advocate, both in the SPS and TBT Committees, for improving regulatory and standardization practices of WTO Members, in particular through the application of principles of transparency and good

regulatory practice at all stages of the regulatory and standard-setting process as well as convergence to international standards.

The EU views for the TBT component of the TTIP are based on a number of guiding principles.

First, as far as possible, measures should *aim at removal of unnecessary barriers to trade* arising from differences in the content and application of technical regulations, standards and conformity assessment procedures.

Second, although compatibility is important, it must be recognised that the systems of the two regions are different, both to meet the specific needs of their economies and for historical reasons, and *it is not possible for one side to impose its system on the other*; *nor can either side be expected to treat its partner more favourably than its own side*.

Third, while the need for a high level of protection remains, measures should aim for *methods* of regulation, standardisation andconformity assessment that are *not more trade-restrictive than necessary* to achieve the relevant public interest objective, while taking into account the need to give preference to internationally harmonized methods.

Fourth, closer co-operation between the EU and the US *should not result in new hindrances to their trade with the rest of the world*.

Finally, it should be recognised that there are existing voluntary instruments of transatlantic co-operation in or related to TBT matters, arising from earlier sectoral or general trans-Atlantic initiatives, *and that the results of such initiatives should not be compromised* in any new Agreement.

3. Understanding the functioning of the EU and US internal markets – Improving framework conditions for market access

As a scene-setter, it is proposed to gain a better understanding of the principles governing inter-State commerce in the US and free movement of products in the EU internal market, i.e. the conditions under which products lawfully placed on the market of any US State or EU Member State can benefit from free circulation within the respective internal markets.

A shared objective should be to look into ways to improve framework conditions for market access on both sides (for the benefit of products and suppliers of both Parties), regardless of the actual level of compatibility of the substantive regulatory requirements and standards.

This involves consideration of basic issues concerning the functioning of the EU and US internal markets and pertaining, *inter alia*, to:

(i) the overall predictability and transparency of the EU and US regulatory systems and whether the rulebook is easily accessible and understandable, having regard in particular to the needs of Small and Medium-Sized Enterprises (SMEs);

(ii) scope of sub-regional (in the EU) and sub-federal (in the US) TBT-related measures, and their relevance in connection with market access requirements;

(iii) available mechanisms in either system to prevent the erection of / eliminate barriers to trade as a result of sub-regional (EU) or sub-federal measures (US);

Any agreement must take account of any divergences with regard to the above aspects, with the aim of maintaining an overall balance of commitments in the TBT area. From an EU perspective, it would be important for such an overall balance that the commitments to be agreed in the TTIP apply also to both the sub-regional (in the EU) and the sub-federal level of regulation (in the US).

4. Transparency

The WTO Agreement on Technical Barriers to Trade (TBT) already provides for a system of notifications of new draft technical regulations and conformity assessment procedures, and the EU and the US both participate actively in this. The EU and US sides have in the past been working on a draft understanding aimed at improving transparency in the TBT (and SPS) notification procedures. The parties could not agree on a common approach as their notification practices differ significantly.

Although it is not proposed to duplicate notifications already made in the context of the WTO, there is an interest in providing for improved transparency through a dialogue of regulators with regard to notification of draft legislation and replies to written comments received from the other party. In this context, notification of all draft technical regulations and conformity assessment procedures (including proposed new legislation), regardless of the initiator of the proposal in compliance with Articles 2.9 and 5.6 of the TBT Agreement, as well as the possibility to receive feedback and discuss the written comments made to the notifying party in compliance with Articles 2.9.4 and 5.6.4 of the TBT Agreement shall be ensured. Of particular importance will be the possibility to receive written replies to comments and the ability of regulators to communicate with each other during the comments procedures.

The possibility to provide for an advanced information exchange between regulators, before the TBT notifications are carried out, may also be examined in this chapter or the context of cross-cutting disciplines. The Agreement might make it possible to identify sectors that would be of interest for such an exchange to take place at a preliminary stage.

5. Technical regulations

Divergent technical regulations act as barriers to transatlantic trade. Clearly, there is a gain from removing unnecessary duplicative compliance costs in the

transatlantic market. There is also a potential gain to be had through measures such as improvements in information transfer and regulatory co-operation, and where possible through measures towards convergence – or at least, compatibility - of the parties' regulations themselves. This Section outlines some mechanisms and tools that could contribute to achieving this goal

5.1 Harmonisation or acceptance of technical regulations

Addressing potential differences at the source is more effective than removing barriers that have found their way into our respective regulatory systems. Where neither side has regulations in place, the making of common – or at any rate coherent – technical regulations may be considered by the Parties. Wherever appropriate, consistent with Article 2.8 of the TBT Agreement, consideration should be given to basing such common / coherent regulations on product requirements in terms of performance rather than detailed design prescriptions. The EU's positive experience of the "New Approach" as a method of regulating based on setting "essential requirements" for health and safety without prescribing specific technical solutions, which themselves are laid down in supporting voluntary standards, shows that this is, for large industrial product sectors, a very efficient, flexible and innovation-friendly regulatory technique.

Wherever possible, global harmonization of technical requirements should be pursued in the framework of international agreements / organisations in which both the EU and the US participate. This would then allow both sides to recognise each other's technical regulations as equivalent, as was done for instance with the 2004 Mutual Recognition Agreement on marine safety equipment, where equivalence rests on the parties' legislations being aligned with certain International Maritime Organisation Conventions).

Another practical example is the area of electric vehicles (EVs) where EU and US collaborate closely in UNECE on global technical regulations (GTRs) relating to safety and environmental aspects. Such an approach is perhaps difficult to achieve in the general case; but there may be sectors – particularly related to the regulation of innovative technologies, or where international regulatory activity exists or is planned – where it might be found profitable. Provision for such a process might be included.

5.2 The reference to standards in technical regulation

Standards are often referenced in legislation, as a means of determining compliance with technical regulations. Such standards ought in principle to be left voluntary, in order to allow sufficient flexibility for industry to choose the technical solution that best fits its needs, thus also stimulating innovation. In general, consistent with Article 2.8 of the TBT Agreement, which favours the use of performance-based technical requirements, mandatory legislation should neither copy nor reference standards (thereby making them mandatory themselves); ideally, mandatory legislation should only set general requirements (e.g. health, safety, and the protection of the environment) and then leave flexibility to the market as to how compliance should be assured.

5.3 Sub-regional and sub-federal technical legislation

Both the EU and the US have decentralised structures in which the States or Member States have some freedom to regulate.

As regards placing of products on the market, the EU is a single entity: on the one hand, compliance with harmonised technical requirements at EU level gives full access the whole EU market while, on the other hand, for those products / risks where national requirements apply in the absence of EU legislation, effective circulation throughout the EU is ensured by the application of the principle of mutual recognition of national requirements derived from the case-law of the European Court of Justice interpreting the EU Treaty provisions on free movement of goods. Strict procedures safeguarding the rights of economic operators apply when EU Member States intend to restrict the free movement of products. In addition, Member States are not permitted to erect new national barriers to trade and a specific notification procedure for draft national technical regulations has been in place for almost 30 years, effectively preventing new intra-EU obstacles to trade as a result of national regulations.

It is understood that the scope of the federal US Government is analogously limited, insofar as some States are permitted to make autonomous technical regulations for application on their own territory. Several submissions received in response to the various public consultations on the TTIP report on EU exporters' difficulties with accessing and understanding the rules they have to comply with to gain access to the US market, in particular where multiple layers of regulation (federal/ state / municipality) coexist.

As stated under Section 3 above, while taking into account any divergences with regard to the above aspects, the EU considers that the aim of maintaining an overall balance of commitments in the TBT area can only be achieved if both the sub-regional (in the EU) and the sub-federal (in the US) regulations are covered.

5.4 The TBT Agreement

All of what is proposed here is considered to be consistent with, and supplementary to, the WTO TBT Agreement, to which both EU and US are signatories. Consideration should be given to incorporating the TBT Agreement into this agreement, in order to make its terms part of the agreement, and to allow disputes arising out of its terms to be dealt with bilaterally.

6. Standardisation

6.1 The EU and US approaches to standard setting and international standards

The convergence of standards and technical regulations on the basis of the use of international standards is one of the most significant tools to facilitate trade. This is acknowledged by the WTO, which puts significant emphasis on international standards (e.g. in the TBT or SPS Agreements). The EU is therefore a major supporter of the international standard-setting system. Agreeing on common standards at international level is the best way to avoid costs related to differences in product development and proliferation of different (often conflicting) technical requirements.

Although in some areas (such as electronics), the use of international standards is widespread in both Parties, there are a number of sectors where differences resulting from their different standard setting practices may create unnecessary barriers to trade. Efforts to reconcile these diverging views and systems have been high on the bilateral agenda for years. Further consideration should be given to improving links between the systems, while allowing each to maintain its distinctive character. This may offer an opportunity for progress in specific areas such as innovative products and technologies (e.g. electric vehicles, IT, green chemistry, bio-based products, cloud computing).

6.2 Implementing the "bridge-building" document

In a joint document adopted in November 2011, entitled “Building bridges between the US and EU standards systems”, the EU and the US agreed on specific actions to improve each side’s processes for the use of voluntary standards in regulation. Mechanisms should be created to promote cooperation and coherence in this area, in view of minimizing unnecessary regulatory divergences and better aligning the respective regulatory approaches.

The EU side has given a political commitment that in its standardisation requests to the three European Standardisation Organisations (ESOs) (European Committee for Standardization - CEN, European Committee for Electrotechnical Standardization - CENELEC and European Telecommunications Standards Institute - ETSI) the European Commission will instruct them to consider, as a basis for EU regional standards, "consensus standards developed through an open and transparent process and that are in use in the global marketplace".

The US side has given a political commitment to instruct federal agencies to consider international standards when developing regulatory measures, consistent with law and policy.

Furthermore, both sides gave a political commitment to encourage the ESOs and the American National Standardisation Institute (ANSI) to strengthen transparency and facilitate comments by stakeholders on draft standards.

6.3 Improving cooperation on common standards to further the development of international standards

Improved cooperation between US and EU standardisation bodies should be sought, including the development of joint programmes of work, and the use – or potential use – of the resulting common standards in connection with legislation. The results of bilateral cooperation should be also used to further global harmonization through the development of international standards.

There may be areas in which the development of common or technically equivalent standards could be considered. A mechanism by which the EU and

US standards systems could – by common agreement – work on common standards, for transposition in both economies, might be developed (maybe in the form of a common web-based standardisation platform).

Clearly the preference would be for such common standards to be developed by international standardisation organisations and such a bilateral approach could not apply in the general case, but the possibility should be considered in some areas of mutual interest. At any rate, exchange of technical information between expert committees in the development of standards, while leaving the possibility for each side to provide standards to the market later on, should be considered and encouraged.

6.4 Co-operation in international standards bodies

The Parties are both members of several international standardisation organisations, and as developed economies, share an interest in the development of coherent and advanced standards that are acceptable world-wide to their trade partners. Consideration could be given to systematic co-operation in the context of such bodies, possibly with exchange of technical data, common actions within such bodies, and commitment to transposing the results.

6.5 Specific technical areas

The above is intended to address the general case. There are a number of distinct technical areas in which the Parties already co-operate more closely, such as in motor vehicles, pharmaceuticals and medical devices. The Agreement should encourage the development of similar sectoral mechanisms, and be flexible enough to take into account the specific nature of the products, and the existing and planned standardizing and regulatory structures.

7. Conformity assessment

7.1 Similarities and divergences in the systems of the Parties

Although the desired level of consumer and other users' protection might be considered broadly similar in the parties, regulators on either side of the Atlantic have developed different approaches to the conformity assessment of specific products and risks. For example, the US requires third party testing or

certification for a number of products for which the EU requires only a suppliers' declaration of conformity (SDoC), e.g., safety of electrical products, and machinery. In other sectors, different conformity assessment requirements apply owing to the differences in the classification of the product; for example, in the EU there is a specific regulation for cosmetic products, while the US either does not specifically regulate them or classifies them as Over the Counter Drugs (OTCs), which sometimes implies a stricter regulatory regime.

While differences of this kind should of necessity be respected, some attempts to reduce the obstacles to trade arising from such differences between the respective systems should be considered.

7.2 The level of conformity assessment applied to products

The EU largely does not require mandatory third party certification for many products considered of low risk, and instead relies on more trade-facilitative solutions, such as manufacturers' self-declaration of conformity, with a freedom to perform any necessary testing in a laboratory of the manufacturer's choice.

Deeply rooted regulatory traditions may be difficult to change. While we should not abandon hopes to achieve greater compatibility of our conformity assessment regimes in those areas over time, we should pragmatically acknowledge that prospects for substantial convergence will generally be less promising than in new areas linked to innovative technologies or emerging risks.

However, as both the US and EU regularly re-evaluate the regulations applicable to different industrial sectors over time, some re-evaluation might be possible on a common basis when it is prompted by the same reasons (such as significant but similar market changes in both the EU and the US, changes in technology or supply chain management, or major safety issues such as the parallel substantial revision of both EU and US toy safety legislation triggered by similar concerns regarding gaps in legislation and supply chain control). These opportunities should not be missed to explore potential convergence not only as regards the technical product requirements but also in the level of certification required. Where there is demand in the market for such regulatory revision, it might be made a priority.

A future commitment might be explored by which regulators on both sides, when introducing new rules, agree in principle (as set out in the TBT agreement) to apply common criteria with a view to identifying the least trade restrictive means of conformity assessment, commensurate with the relevant risks..

In areas where registration / authorisation procedures and similar requirements apply in both Parties, approaches could be devised to make such procedures as compatible as possible and identify opportunities for administrative simplification that would alleviate burdens for manufacturers and facilitate their business under both systems.

7.3 Mutual recognition of conformity assessment

In situations where there is a valid case for mutual recognition (e.g., where the Parties both require third party conformity assessment), experience has shown that the application of mutual recognition is much more successful when based on similar requirements, usually based themselves on an international standard and/or an international agreement / scheme; furthermore, it is preferable from a trade-facilitation perspective if the agreement / scheme is not closed or applied bilaterally only, but open to several partners who apply the international standard and wish to be part of the agreement / scheme (e.g. the UN 1958 Agreement on harmonization of technical requirements for motor vehicles, the OECD Mutual Acceptance of Data system for chemicals, the IECEE CB scheme for electronics, etc.).

Usually, the concept of 'mutual recognition' is applicable to conformity assessment procedures (e.g. testing, certification). Mutual recognition of conformity assessment, in the absence of convergence of the substantive requirements underlying conformity assessment (i.e. similar technical requirements or standards) delivers limited market access benefits – such agreements are cumbersome and onerous to apply, and do not offer any incentive for the partners in question to bring their systems closer together. Furthermore, in cases where there may be differences between the level of development or regulatory rigour of the partners, there is also a basic issue of confidence in each other, undermining the commitment to mutual recognition.

The 1998 Mutual Recognition Agreement has been successful only in two areas: telecommunications, and electromagnetic compatibility (though in the

latter the EU no longer applies third party certification). It is therefore not proposed to consider extending the 1998 MRA in its present form to new areas. In the other areas that it nominally covers as well in any additional specific, mutually agreed sectors, other approaches to facilitate conformity assessment may be considered at a sectoral level.

7.4 Accreditation

Both the EU and the US rely to some extent on accreditation as a means of determining the competence of conformity assessment bodies, though their systems are different. Arrangements for mutual recognition between accreditation bodies exist through organisations such as the International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF); there may be some merit in encouraging greater use of these agreements to facilitate the mutual recognition of accreditation certificates.

7.5 Marking and labelling

Marking and labelling are mentioned briefly in the TBT Agreement, but it is suggested hat some disciplines be added for trade between the Parties, so that compulsory marking requirements are limited as far as possible to what is essential and the least trade restrictive. This may include origin marking where obligatory requirements are made for such marking, in which case it would be appropriate to enable EU manufacturers to mark their products as originating in the EU. Furthermore, consideration should be given to measures to inhibit the use of markings that may mislead consumers.

8. Irritants

A mechanism to cover trade irritants arising from the application of technical regulations, standards and conformity assessment procedures should be included as part of a common system under the Agreement as a whole.

9. *Sectoral measures*

As indicated above, this outline is intended to cover only the general case. A number of sector specific initiatives are already in place, with the participation both of the EU and the US. These should not be affected, nor – as indicated above - should any new sectoral initiatives for enhanced co-operation be inhibited.

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Initial position paper

Limited

TTIP – Rules Group Without prejudice, 19 June 2013

Anti-Trust & Mergers, Government Influence and Subsidies

I. Anti-trust & mergers

Objectives

The report of the EU-US High Level Working Group on Jobs & Growth concludes that a "comprehensive and ambitious agreement that addresses a broad range of bilateral trade and investment policies, including regulatory issues" could generate substantial economic benefits on both sides of the Atlantic.

Trade liberalisation has led to the globalisation of the markets. In some instances, however, traditional tariff barriers have been replaced by behind-the-border barriers such as anti-competitive practices by private and public enterprises. Such practices may have serious adverse impacts on international trade and can often be addressed in an effective manner through a proactive enforcement of competition laws.

The EU considers competition policy an essential element to ensure well-functioning markets, both domestically and abroad, and an important part of its trade relations. Although the EU and US competition systems have developed at different times and under different conditions, both partners share a belief in the need for impartial and proactive competition enforcement, subject to the rule of law and the control of the courts. The shared objective of promoting open, fair and competitive international markets have allowed effective cooperation in practice, bilaterally and in the framework of multilateral forums such as the International Competition Network (ICN) and the OECD Competition Committee (OECD CC). The relationship between the EU and the US in competition matters is the bedrock on which global competition enforcement is based.

The TTIP therefore provides the parties with a unique opportunity to jointly articulate the shared values and affirm the existing practices and procedures which they adhere to. Both the EU and the US have consistently sought to include ambitious competition related provisions in their respective bilateral negotiations with other important trading partners. Drawing from the two partners' special relationship in the field of competition enforcement, the TTIP's competition provisions would set a benchmark and send a strong message to trading partners around the world for future negotiations.

Proposed content

In light of the global context and the objectives set out above, the TTIP should include provisions with anti-trust & merger disciplines. These provisions should reflect the shared global interests and concerns and thereby constitute a platform for further development of competition disciplines and cooperation of interest also for other economies and markets. In this context, the EU and the US may wish to address anti-competitive behaviour that should be disciplined, the legislative and institutional framework for the enforcement of these disciplines that contain provisions on cooperation and exchange of information. The TTIP could also address rules and principles aiming at ensuring competitive neutrality by envisaging enforcement of competition laws on all enterprises. More specifically, the provisions on antitrust and mergers could address the following issues:

- Recognition of the benefits of free and undistorted competition in the trade and investment relations;
- Consideration of best practices and of the possibility to consolidate some of them;
- A commitment to maintain an active enforcement of antitrust and merger laws, with a generally worded description of the types of anti-competitive behaviour it should cover;
- A commitment to ensure that competition policy is implemented in a transparent and non-discriminatory manner, in the respect of the principle of procedural fairness, irrespective of the ownership status or nationality of the companies concerned;
- Provisions regarding the application of antitrust and merger rules to state owned enterprises (SOEs) and enterprises granted special or exclusive rights or privileges (SERs), save for narrowly defined legitimate exceptions (e.g. "Services of General Economic Interest" in the EU);
- Moreover, to address specifically the bilateral cooperation aspects between the EU and the US, the TTIP could include provisions on cooperation between the competition agencies of the parties, reflecting and building on the current practice under the existing EU-US cooperation agreements. In addition, it could be explored whether the parties could address the possibility for a further deepening of the cooperation arrangements in case related work in the future, such as creating a framework allowing for the exchange of confidential information in the absence of confidentiality waivers between competition authorities when they are investigating the same or related cases (while barring the use of this information for criminal sanctions). The TTIP could include a basis for developing such arrangements in a separate arrangement.

- A commitment to cooperate in multilateral forums with the aim of promoting convergence of antitrust and merger rules at a global level.
- Provisions on antitrust/mergers shall not be subject to the general dispute settlement mechanism of the agreement.

II. Government influence and subsidies

II.1. *State-owned enterprises (SOEs) and enterprises granted special or exclusive rights or privileges (SERs)*

Objectives

The EU is increasingly concerned about the discriminatory behaviour and the subsidization of state owned, controlled and influenced companies around the world. Overall, state presence in the global economy remains significant and has even increased in recent years. State involvement and influence can extend to all levels of government and to different sectors of the economy.

Various types of advantages and privileges that governments grant to companies can in some cases unjustifiably disadvantage EU and US companies. The EU and the US could therefore identify and discuss the concerns they have in this respect and identify issues that should be tackled in a global context.

The EU concerns regarding state ownership or influence extend to enterprises granted special and exclusive rights or privileges (SERs). State ownership, control and influence can take various forms, ranging from designating monopolies to SOEs but also include companies that have been granted special rights or privileges, regardless of ownership. The EU considers that it is important to cover those companies that can otherwise escape competitive pressures of the market as a result of government action, save for narrowly defined legitimate exceptions (e.g. "Services of General Economic Interest" in the EU).

The EU Treaties are neutral as to the ownership of companies and competitive neutrality between public and private actors is ensured in the EU legislation. Therefore, the EU is not against public ownership in itself, provided that publicly owned or controlled enterprises are not granted a competitive advantage in law or in fact. In certain circumstances, however, advantages that SOEs/SERs enjoy may hinder market access, distort market conditions and affect export competition. Governments may interfere with the competitive process by

inducing or ordering SOEs/SERs to engage in anti-competitive behaviour, by taking regulatory measures favouring these companies, or by granting subsidies (or measures which have similar effects) to them. The same could apply to some formally private sector companies.

SOEs/SERs may therefore enjoy privileges and immunities that are not available to their competitors, thereby giving them a competitive advantage over their rivals. In the absence of a framework to ensure that such instances occur only under strict conditions, such state intervention can distort the level playing field between SOEs/SERs and companies which do not benefit from the same privileges and immunities. This may even have negative effects on global markets. For these reasons, the EU considers that rules should be developed to ensure a level playing field between state-owned or influenced companies and their competitors at all levels of government.

The TTIP should therefore serve as a platform to address issues where government interference is distorting markets, both at home and in third countries at all levels of government. The objective of the EU is to create an ambitious and comprehensive global standard to discipline state involvement and influence in private and public enterprises, building and expanding on the existing WTO rules. This could pave the way for other bilateral agreements to follow a similar approach and eventually contribute to a future multilateral engagement.

Proposed content

The parties should jointly seek to identify the types of companies and behaviour that need to be addressed with a view to creating fair market conditions between private and public companies.

This could cover monopolies and state enterprises but also address enterprises granted special rights or privileges (SERs). Definitions should be sufficiently broad to catch all the relevant market players and to ensure that rules are comprehensive and not easily circumvented. In the case of state enterprises, the parties could consider a definition which rests both on ownership but, alternatively, also on effective control, aiming at capturing the possibility of the state to exercise decisive influence over the strategic decision making of the enterprise.

The distinction should effectively be made between those companies (public or private), which have been afforded a special or exclusive right or privilege, and those where the government has a controlling interest but which compete on the market. Provisions would cover all levels of government in order to catch the important SOEs/SERs that might exist at sub-central levels. Both existing and designated enterprises should be covered.

In view of the above, the following provisions on SOEs/SERs could be considered:

- Rules that address discriminatory practices of SOEs/SERs when selling and purchasing (while leaving government procurement issues to be addressed in the relevant chapter of the TTIP). SOEs/SERs which provide a distribution/transmission network to competitors should also follow these rules.

- An obligation for SOEs/SERs to act according to commercial considerations. However, enterprises would not necessarily need to meet the obligation to act according to commercial considerations when fulfilling the specific purpose (e.g. universal service obligation) for which they have been granted a special or exclusive right or privilege.

- A prohibition to cross-subsidise a non-monopolised market, similar to that contained in GATS Article VIII, should be considered also for goods.

- Transparency is the starting point for levelling the playing field between private and public enterprises. This calls for rules based on the relevant international best practices. These rules could aim at fostering transparency related to e.g. ownership and decision making structures, links with other companies, financial assistance received from the state, and regulatory advantages such as exemptions, immunities and non-conforming measures.

II.2 *Subsidies*

Subsidies may distort competition and may contribute to disruption in global markets and the terms of trade. Subsidization can artificially shift competitive advantage to the subsidizing countries. Subsidies to SOEs/SERs may further distort the level playing field between these enterprises and companies that do not benefit from such subsidies. The EU is concerned about the subsidization not only of SOEs/SERs but also of the private sector in some situations, e.g. by direct grants, below-market interest rates on loans or unlimited guarantees.

The WTO Agreement on Subsidies and Countervailing Measures (ASCM) disciplines the use of subsidies, and regulates the actions countries can take to counter the effects of subsidies. Also GATS stipulates that negotiations will be held with a view to developing necessary disciplines to avoid the trade-distortive effects of subsidies that may arise in certain circumstances and to address the appropriateness of countervailing procedures. It also requires members to exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

Subsidy disciplines in a bilateral context are aimed at preventing trade distortions and nullification of the commitments negotiated in the agreement. The TTIP would provide an important opportunity to explore the shared concerns in this area, taking the already binding WTO disciplines, in particular those foreseen in the ASCM, as a starting point to improve the global approach.

Improved transparency and cooperation, in line with but not necessarily limited to the existing requirements of the WTO regarding subsidies, could be a first step. Such combined efforts could have a demonstration effect on other WTO members subject to the same WTO transparency requirements. The TTIP also provides an opportunity to develop consultation mechanisms related to subsidies affecting trade between the EU and the US.

In view of the fact that services form an important part of trade between the EU and the US, the parties could analyse the impact of related subsidies and consider if there could be a shared interest in addressing them. In general, disciplining the most important and distortive types of subsidies could contribute to meeting the objective of the TTIP to reach a more ambitious level of trade and economic integration between the EU and the US.

Proposed content

In the context of the TTIP, which aims at creating a more integrated EU-US market, the EU considers it appropriate to include provisions on subsidies, including subsidies to SOEs/SERs and financing to and from SOEs/SERs, and subsidies to services.

More specifically, the following provisions on subsidies could be considered:

- Mechanisms to provide improved transparency (subsidies to goods and services).
- Consultation mechanisms to allow for an exchange of information on subsidies to goods and services that may harm the other party's trade interests, with the view of finding a mutually acceptable solution.
- Addressing the most distortive forms of subsidies.

Without prejudice, 20 June 2013

TTIP: Cross-cutting disciplines and institutional provisions

INITIAL POSITION PAPER

I. Introduction

A. The five regulatory components of TTIP and purpose of this paper

The final report of the High Level Working Group on Jobs and Growth of 11 February 2013[1] refers to **five basic components of TTIP provisions on regulatory issues**: the SPS plus component would build upon the key principles of the WTO SPS Agreement, and provide for improved dialogue and cooperation on addressing bilateral SPS issues; the TBT plus component would build on provisions contained in the WTO TBT Agreement as regards technical regulations, conformity assessment and standards; sectoral annexes would contain commitments for specific goods and services sectors.

The other two components, which are the focus of this paper, consist in:

i. "Cross-cutting disciplines on regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices."

ii. "A framework for identifying opportunities for and guiding future regulatory cooperation, including provisions that provide an institutional basis for future progress."

This paper is meant to provide elements for a reflection on component i) which would be part of a horizontal chapter, as well as on component ii). In line with the usual practice for trade agreements, the main provisions pertaining to component ii), e. g the substantial tasks and competences of the regulatory cooperation body or committee, would be outlined in the horizontal chapter, while the procedural rules (e.g. how this body operates, and its composition, terms of reference, etc.) would be placed in the institutional chapter of TTIP (see further section II C point 4). Although the horizontal chapter would apply to all goods and services sectors, specific adaptations for certain sectors (e.g. financial services) could be envisaged.

[1] http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf

B. Rationale for an ambitious approach

Elimination, reduction and prevention of unnecessary regulatory barriers are expected to provide the biggest benefit of the TTIP[2]. But far beyond the positive effects on bilateral trade the TTIP offers a unique chance to give new momentum to the development and implementation of international regulations and standards (multilateral or otherwise plurilateral). This should reduce the risk of countries resorting to unilateral and purely national solutions, leading to regulatory segmentation that could have an adverse effect on international trade and investment. Joint EU and US leadership can contribute to such an objective.

New and innovative approaches will be needed in order to make progress in removing unnecessary regulatory complexity and reducing costs caused by unnecessary regulatory differences, while at the same time ensuring that public policy objectives are reached.

C. Scope of the horizontal chapter

The ultimate scope of the TTIP regulatory provisions – i.e. the precise definition of the regulations/regulators to which TTIP will apply - will need to be determined in the course of the negotiations in the light of the interests and priorities of both parties. In principle, the TTIP regulatory provisions would apply to regulation defined in a broad sense, i.e. covering all measures of general application, including both legislation and implementing acts, regardless of the level at which they are adopted and of the body which adopts them. A primary concern when defining the scope will be to secure a ***balance in the commitments made by both parties***.

Disciplines envisaged

The horizontal chapter would contain principles and procedures including on consultation, transparency, impact assessment and a framework for future cooperation. It would be a "gateway" for handling sectoral regulatory issues between the EU and the US but could in principle also be applied to tackle more cross-cutting issues, e.g. when non-sector specific regulation is found to have a significant impact on transatlantic trade and investment flows. Further commitments pertaining specifically to TBT, SPS or various product or services sectors (e.g. automotive, chemicals, pharmaceuticals, ICT, financial services etc.) would be included respectively in the TBT and SPS chapters and sectoral annexes/provisions. Disciplines envisaged should not duplicate any already existing procedures under the TBT and SPS Agreements.

[2] According to the study "Reducing Transatlantic Barriers to Trade and Investment" (http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf, Table 17), reduction of non-tariff measures under an ambitious scenario would provide for ***two thirds of the total GDP gains of TTIP*** (56 % coming from addressing NTBs in trade in goods and 10 % in trade in services).

Coverage of products/services

The rules and disciplines of the horizontal chapter would in principle apply to regulations and regulatory initiatives pertaining to areas covered by the TTIP and which concern product or service requirements. The objective should be to go beyond the regulations and aspects covered by the WTO TBT and SPS Agreements. The precise elements determining coverage will need to be discussed, but it is understood that there will be a criterion related to the significant impact of covered regulations on transatlantic trade and investment flows. To the extent necessary, some specific aspects may be addressed in other chapters (e.g. trade facilitation, competition).

II. Possible outline and structure of a horizontal chapter

A. Underlying principles

Certain basic principles underlying the regulatory provisions of TTIP need to be highlighted, including the following:

a) The ***importance of regulatory action to achieve public policy objectives***, including the protection of safety, public health, the environment, consumers and investors, at a level that each party considers appropriate. TTIP provisions should contribute to such protection through more effective and efficient regulation by the application of best regulatory practices and improved cooperation among EU and US regulators. Insofar as possible, priority should be given to approaches and solutions relying on international (multilateral or plurilateral) disciplines whose adoption and application by the EU and the US would encourage other countries to join in.

b) TTIP provisions shall ***not affect the ultimate sovereign right of either party to regulate*** in pursuit of its public policy objectives and shall not be used as a means of lowering the levels of protection provided by either party.

c) ***The tools used to achieve the regulatory objectives of TTIP will depend*** on the issues and the specificities of each sector. The general instruments available include consultations and impact assessment. Other instruments may be developed in the context of sector specific regulatory cooperation.

B. Overall objectives

The overall objective of the regulatory provisions of the TTIP will be to **eliminate, reduce or prevent unnecessary "behind the border" obstacles to trade and investment**. In general terms (although this may not be applicable in all cases), the ultimate goal would be a more integrated transatlantic market where goods produced and services originating in one party in accordance with its regulatory requirements could be marketed in the other without adaptations or requirements. Achieving this long-term goal will entail:

- **Promoting cooperation between regulators** from both sides at an early stage when

preparing regulatory initiatives, including regular dialogue and exchange of information and supporting analysis as appropriate.

- **Promoting the adoption of compatible regulations** through prior examination of the impact on international trade and investment flows of proposed regulations, and consideration of common/convergent or compatible regulatory approaches where appropriate and feasible.
- **Achieving increased compatibility/convergence in specific sectors, including through recognition of equivalence, mutual recognition or other means as appropriate.**
- **Affirming the particular importance and role of international disciplines** (regulations, standards, guidelines and recommendations) as a means to achieve increased compatibility/convergence of regulations.

C. Substantial elements

Cross-cutting regulatory disciplines would concentrate on three main areas: first, regulatory principles, best practices and transparency; second, assessment of the impact of draft regulations or regulatory initiatives on international trade and investment flows; and third, cooperation towards increased compatibility/convergence of regulations. Some institutional mechanisms will also be necessary to provide a framework for delivery of results and enable for necessary adjustments to ensure the effectiveness of the agreement in practice (see section II C point 4).

1. Regulatory principles, best practices and transparency

The TTIP could take as a starting point the 2011 Common Understanding on Regulatory Principles and Best Practices endorsed by the US government and the European Commission at the June 2011 meeting of the HLRCF[3]. The TTIP would incorporate the basic principles and main elements. The outcome should be a comparable level of transparency applicable on both sides along the process of regulation.

The main provisions would include:

- An effective bilateral cooperation/consultation mechanism. A commitment of both sides to keep each other informed in a timely manner on the main elements of any forthcoming regulatory initiatives covered by this chapter. This could be complemented with a strengthening of contacts, in any format, between both sides' regulators, so that each side can have a good understanding of the regulations or regulatory initiatives being considered or prepared by the other, in a way that they can share with the other side any relevant considerations (see next point). Note that early consultations may not be feasible where urgent problems of health protection arise or threaten to arise.

- An improved feedback mechanism:

    - Both parties should have the opportunity to provide comments before a

[3] http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?order=abstract&sec=146&lev=2&sta=41&en=60&page=3

proposed regulation is adopted in accordance with the respective decision-making processes and should be given sufficient time for doing so. They should also receive explanations within a reasonable timeline as to how these comments have been taken into account.

- This should be done without duplicating the activities under the WTO TBT and SPS Agreements in a manner consistent with the parties' respective decision-making processes.
- For example, the TBT Agreement already introduces a system of notification of new draft technical regulations and conformity assessment procedures, in which the EU and the US actively participate. An improved bilateral mechanism for comments and replies in the context of the WTO TBT Agreement would provide for enhanced transparency and would allow for a dialogue between regulators with regard to the notified draft measure. Consistent with Article 2.9.4 and 5.6.4 of the TBT Agreement, this should enable both parties to provide feedback to each other, regardless of the initiator of the proposal. Of particular importance will be the possibility to receive replies to comments and to have a bilateral exchange on notified draft measures with the ability for regulators to communicate with each other during the comments procedures. As for the SPS Agreement, there is a mirroring notification system in place consistent with article 7 on Transparency and Annex B of the WTO SPS Agreement.

- Cooperation in collecting evidence and data. Regulatory compatibility and convergence of regulations could be enhanced through the collection and use by the parties, to the extent possible, of the same or similar data and of similar assumptions and methodology for analysing the data and determining the magnitude and causes of specific problems potentially warranting regulatory action. Such exchange would be of particular interest regarding best available techniques and could lead to convergence of requirements and provide inspiration to third countries.
- Exchange of data/information: Effective cooperation requires regulators to exchange information, which may be protected and subject to different and sometimes conflicting legal requirements. While multiple approaches will continue to exist in areas such as data protection and privacy, a process could be put in place to facilitate data exchange, without prejudice to any sector-specific provisions.

2. Assessment of the impact of draft regulations or regulatory initiatives on international trade and investment

Both the Commission and the US Administration have different systems in place to assess the impacts of regulations and regulatory initiatives. As part of the TTIP both sides should agree to strengthen the assessment of impacts of regulations and regulatory initiatives on international trade and investment flows on the basis of common or similar criteria and methods and by way of closer collaboration. In their assessment of options, regulators from each side would for example be invited to examine impacts on international trade and

investment flows, including on EU-US trade as well as on increased compatibility/convergence.

TTIP could also include provisions furthering transatlantic cooperation on ex-post analysis of existing regulations that come up for review with a view to examining whether there is scope for moving toward more compatibility and coherence including towards international standards/regulations and removing unnecessary regulatory complexity.

3. Regulatory cooperation towards increased compatibility/convergence in specific sectors

Preparatory work on sectors has started with strong support from stakeholders on both sides of the Atlantic. Many organisations contributed to the Joint EU-US Solicitation on regulatory issues of September 2012 and explained their suggestions to EU and US regulators at the stakeholder meeting of the April 2013 EU-US High Level Regulatory Cooperation Forum. These suggestions form an important input into TTIP regulatory work on sectors.

By the time the TTIP is concluded, it is expected that a number of specific provisions will have been agreed as part of various sector annexes, the TBT or the SPS chapters and other parts of the agreement. Some of these provisions will be implemented either upon entry into force or, as necessary, at a later fixed date. Other issues will have been identified on which the parties will continue to work with the aim of achieving increased compatibility/convergence, including by way of recognition of equivalence, , mutual recognition, or other means as appropriate, and with fixed objectives and timetables where possible. Other provisions will strengthen EU-US cooperation and coordination in multilateral and plurilateral fora in order to further international harmonisation. As regards future regulations, there should also be provisions and mechanisms to promote increased compatibility/convergence and avoid unnecessary costs and complexities wherever possible.

However, there will remain a number of areas warranting further work, which will be either identified when the TTIP negotiations are finalized or subsequently ("inbuilt agenda"). For those areas the TTIP should provide regulators with the means and support they need to progressively move towards greater regulatory compatibility/convergence and make TTIP a dynamic, 'living' agreement sufficiently flexible to incorporate new areas over time. Regulators need to have clear authorization and motivation to make use of international cooperation in order to increase efficiency and effectiveness when fulfilling their domestic mandate and TTIP objectives.

From this perspective the TTIP could include:

- Provision of a general mandate (understood as a legal authorization and commitment) for regulators to engage in international regulatory cooperation, bilaterally or as appropriate in other fora, as a means to achieve their domestic policy objectives and the objectives of TTIP.
- Provision to launch, upon the request of either party, discussions on regulatory differences with a view to moving toward greater compatibility which would enable the

parties to consider recognition of equivalence in certain sectors, where appropriate. The request could be based on substantiated proposals from EU and US stakeholders.

Flexible guidance could be provided for the examination of these proposals, including on the criteria for the assessment for functional equivalence or other concepts and scheduling of progress towards regulatory greater compatibility/convergence.

4. Framework and institutional mechanisms for future cooperation

An institutional framework will be needed to facilitate the application of the principles of the five regulatory components as described under I. A, including the provisions of the horizontal chapter laid out in section II C 1, 2 and 3.

Essential components of such a framework include:

- A **consultation procedure** to discuss and address issues arising with respect to EU or US regulations or regulatory initiatives, at the request of either party.
- A **streamlined procedure to amend the sectoral annexes** of TTIP or to add new ones, through a simplified mechanism not entailing domestic ratification procedures.
- A **body with regulatory competences** (a regulatory cooperation council or committee), assisted by sectoral working groups, as appropriate, which could be charged with overseeing the implementation of the regulatory provisions of the TTIP and make recommendations to the body with decision-making power under TTIP. This regulatory cooperation body would for example examine concrete proposals on how to enhance greater compatibility/convergence, including through recognition of equivalence of regulations, mutual recognition, etc. It would also consider amendments to sectoral annexes and the addition of new ones and encourage new regulatory cooperation initiatives. Sectoral regulatory cooperation working groups chaired by the competent regulatory authorities would be established to report to report to the regulatory cooperation council or committee. The competences of the regulatory cooperation council or committee will be without prejudice to the role of committees with specific responsibility on issue areas such as SPS.

Non-Paper

Limited

Without Prejudice

20 June 2013

EU-US FTA negotiations

Non paper on Public Procurement

1 Preliminary remarks

The EU suggests devoting the discussions in the first meeting/round to operational issues related to the negotiations on Public Procurement (PP). This implies that the discussion would focus on seeking a common view both on the overall substantive approach and the concrete organisation and sequencing of the negotiations.

In this initial process, the EU would like to emphasize the particular weight to be given to the understanding reached in the context of the High Level Working Group on Jobs and Growth with a view to achieving the goal of enhancing business opportunities through substantially improved access to government procurement opportunities at all levels of government on the basis of national treatment.

It is of utmost importance to make sure that both rules and market access issues are thoroughly dealt with in the course of the negotiations, with a view to reach as substantial result bilaterally as possible.

This approach does not preclude that the Parties would discuss issues in the course of the negotiations that prove relevant for the overall objective of further global liberalisation of trade in procurement.

First section: Substantive approach proposed by the EU

2 Overall architecture and scope of application of the PP chapter

2.1 Text structure

This negotiation would present an important opportunity for the EU and the U.S. to develop together some useful "GPA plus" elements to complement the revised GPA disciplines, with a view to improve bilaterally the regulatory disciplines. A model text agreed between the EU and the U.S., being the two largest trading partners in the world, could thus possibly set a

higher standard that could inspire a future GPA revision and where appropriate serve as a basis for the works conducted under the work program outlined in the WTO GP committee's decisions adopted on the 31st of March 2012. Beside this aspect the main focus of these negotiations will be to ensure better market access terms for EU and U.S. companies.

Two drafting options could be considered for the text of the PP Chapter:

- A PP Chapter comprising only "GPA plus" rules but which will incorporate the revised GPA text by reference, or
- A PP Chapter directly taking over the revised GPA text, including the amendments required to achieve the "GPA plus" outcome targeted.

The extent to which improved rules compared to the revised GPA text are required, should be an important factor in deciding whether the second option (improved revised GPA text as a whole) would be necessary to bring sufficient clarity and legal certainty to the agreed provisions of the PP Chapter.

It would be useful if the PP Chapter would also include rules allowing the Parties to take into account possible changes in the GPA disciplines, including, if appropriate, the outcome of the works conducted under the Work Program outlined in the WTO GP committee's decisions adopted on the 31st of March 2012.

2.2 Scope of application

The EU proposes that, to the extent possible, the improved rules negotiated bilaterally would apply to the entire scope of the GPA commitments undertaken by both Parties, as well as to additional market access commitments undertaken under the bilateral FTA, at federal as well as at state level.

3 Improved rules to be developed in the PP Chapter

3.1 Remedies to address existing trade barriers linked to the existing domestic regulations or domestic practices at central as well as at sub-central levels

The EU would suggest to include the following topics for negotiations – without prejudice to others that may be deemed relevant to address at a later stage:

- Definitions
- Removal of barriers to cross-border procurement and to procurement via established companies

- Consolidate and further improve the level of access to procurement-related information (transparency)
- Alleviate administrative constraints
- Make sure that the practical application of the e-procurement rules in the EU and the U.S. are not creating additional barriers to trade
- Make sure that the size of procurement contract is not used with a view to circumvent the market access commitments under the Chapter
- Ensure that technical specifications do not constitute an artificial barrier to trade.
- Provisions relating to qualitative award criteria
- The domestic challenge mechanisms

In addition, in certain other areas such as green procurement, rules could be examined and if need be improved.

3.2 Coverage-related disciplines

Besides the removal of the notes describing carve-outs in the Parties' schedules, we would propose to also make adequate provisions on coverage in the text. The EU would suggest to include the following topics for the negotiations for coverage–related disciplines - without prejudice to other topics that may be deemed relevant to address at a later stage:

- Ensure that rules on off-sets/set asides or domestic preferences such as, but not limited to, Buy America(n) and SME policies, do not restrict procurement opportunities between the EU and the U.S.
- Ensure committed coverage at federal level extends to cover also federal funding spent at the State level.
- Ensure the removal of possible discriminatory elements for example related to procurement by public authorities and public benefit corporations with multi-state mandates, interagency acquisitions, task and delivery order and in the field of taxation.

Moreover, discussions on additional elements of coverage, such as state-owned enterprises, public undertakings and private companies with exclusive rights may require the introduction of additional definitions and related rules.

Provisions should also be made for a mechanism for adjustments related to modifications and rectifications to coverage.

3.3 Horizontal disciplines

In the EU's views, the PP Chapter should as noted above under 2.2. also include rules allowing the Parties to take into account possible changes in the GPA disciplines.

4 Market Access discussions

4.1 Scope of market access discussions

4.1.1 Improvement of GPA market access schedules

Both Parties have accepted to enter into discussions affecting all the elements of their schedules at central as well as sub-central levels.

This implies that the negotiations should look for an expansion of coverage, to the extent possible, for all these schedules, by the removal of existing carve-out and by the offer of additional commitments.

In concrete terms, Parties should seek to improve access to and/or expand the coverage of:

- Central Government entities
- Sub-central entities
- Other entities with a view to specific sectors*
- Services
- Construction services
- Information society services, in particular cloud-based services

**including market access negotiations on transit/railways, urban railways and urban transport.*

The EU suggests - without prejudice - that the discussions on coverage would include:

For Annex 1, all central government entities and any other central public entities, including subordinated entities of central government.

For Annex 2, all sub-central government entities, including those operating at the local, regional or municipal level as well as any other entities whose procurement policies are substantially controlled by, dependent on, or influenced by sub-central, regional or local government and which are engaged in non-commercial or non-industrial activities.

For Annex 3, all entities governed by public law, state owned companies and similar operating in particular in the field of utilities.

The elements required are here presented in the form of positive lists, but for the actual commitment the EU expects this to be done in the form of negative lists. It would also include procurement currently subject to restrictions related to domestic preferences programmes for example linked to federal funding or procurement pursuant to multi-jurisdictional agreement.

For the US system this would imply:

Annex 1 For example entities not yet covered such as the Federal Aviation Administration. It would also cover procurement currently subject to restrictions or domestic preferences related to federal funding as well as procurement regulated by specific policies and rules, such as those related to Buy America(n) provisions as well as those related to SMEs. The coverage would follow the projects funded by FAA even if they were channelled to a sub-federal level for actual spending.

Annex 2 It would concern all those States that are neither covered by the GPA nor by our bilateral agreement, such as Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, South Carolina, and Virginia. It would also imply an upgrading to GPA standard of the access to North Dakota and West Virginia. Furthermore, it would imply a substantial upgrading of the coverage in the States currently covered in general by way of addressing current derogations as well as to include for example also larger cities and metropolitan areas such as New York, Los Angeles, Houston, Philadelphia, Phoenix, San Diego, San Jose, Jacksonville, Austin, San Francisco, Columbus, Fort Worth, Charlotte, El Paso, Memphis, Seattle, Denver, Baltimore, Washington, Louisville, Milwaukee, Portland and Oklahoma City.

Annex 3 For example entities not yet covered by neither the GPA nor by our bilateral agreement, such as procurement currently subject to restrictions or domestic preferences related to federal funding or procurement currently restricted by requirements for example decided by the Board of Directors of the Ports of New York and New Jersey.

Annex 4 All related **goods** not yet covered by the GPA or our bilateral agreement.

Annex 5 All **services** procured by entities listed in Annexes 1 through 3 in the coming

EU/US agreement.

Annex 6 All **construction services** not yet covered by the GPA or our bilateral agreement, including for example transportation services that are incidental to a procurement contract.

The above given examples are indicative – the EU reserves the right to revise the list and any listing would be for illustrative purposes only.

To ensure a uniform and extensive coverage:

- all entities falling under the "catch-all-clauses" as defined in Annex 1 to 3 would be covered by the Agreement.
- a system based on definition: an entity will be captured by the criteria laid down in the definitions.

4.2 Coverage related approach

For the purpose of these negotiations on improved schedules, the Parties will discuss the potential inclusion of new entities and sectors plus revised thresholds.

The EU suggests enlarging this approach to the expansion of coverage via discussions on **public private partnerships** (PPP). It is worth exploring what can be achieved in this domain to obtain a more comprehensive coverage of PPPs/and or a better clarification on the rules to be applied to such contracts, including contracts related to BOTs and similar set ups.

4.2.1 Systemic linkages with other FTA chapters

As made clear by several GPA parties under their respective schedules for services, market access commitments on services under the GPA do not concern the modes of supply of the services offered. Therefore, in the FTA context, it important to establish a proper linkage between the schedules in the Services Chapter or the Investment Chapter and the schedules of the PP Chapter, to ensure, that economic operators can actually benefit in practice from concessions made in another Chapter.

Both parties should also explore how to bridge the PP Chapter with the Competition Chapter when dealing with the categories of SOEs, public undertakings and private companies with

exclusive rights. Issues relevant to investment in goods may also require similar considerations.

Second section: Organisation and sequencing of the negotiations

5 Organisation of the negotiations

5.1 Text proposals for the PP chapter as a whole

Subject to the decision at the Chief Negotiator level, the EU is willing to submit text proposals on the PP Chapter, in parallel or not to a submission by the U.S. Texts could for example be exchanged at the second round.

5.2 Market access discussions

As for other Chapters, market access discussions should at points in time to be determined result in formal exchanges of requests and offers.

5.4 Organisation of intersessional discussions

The EU is open to the possibility of intersessional discussions.

Initial position paper

Limited

Without prejudice, 17.06.2013

INITIAL POSITION PAPER ON TRADE AND INVESTMENT IN RAW MATERIALS AND ENERGY FOR THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) NEGOTIATIONS BETWEEN THE EU AND THE US

Introduction

This paper aims to identify common ground between the EU and the US regarding the treatment of raw materials and energy in the context of the EU–US Transatlantic Trade and Investment Partnership (TTIP) negotiations.

Non-discriminatory access to raw materials and energy and their subsequent trade across borders has remained at the margins of international trade and investment rules over the last decades. Yet forecasts suggest demand will continue to grow across sectors and countries as the world population grows and living standards improve. In parallel, efficient distribution has also become more pressing in particular for EU and US companies as production processes rely on a wider variety of critical inputs, some of which can be found only in a limited number of locations.

Although the US's energy landscape is changing, US and EU companies will remain dependent on open markets to source significant parts of their raw material and energy needs far into the future. Our companies operate complex raw material and energy supply chains, with varying dependences as processors, suppliers, importers and exporters, and as consumers too. Downstream companies depend on inputs of energy and raw materials from third countries, while upstream companies compete for access to resources abroad.

World Trade Organisation (WTO) rules have largely remained at the margins of international production and trade in raw materials and energy, as reflected in the WTOs 2010 annual report which was devoted to this issue. The WTO rulebook contains tough rules to tackle import barriers, and weaker concomitant rules to address export barriers. This has affected energy and raw materials disproportionately, insofar trade restrictions in this area are more pertinent on the export side. Other examples are the lack of definition of energy services in GATS, an absence of effective rules on international transit of energy goods transported by pipeline, prevalent trade and distribution monopolies in countries where domestic production is not monopolised, widespread use of local content requirements imposed on the equipment of foreign companies when they operate large scale projects in third countries, and insufficient transparency in regulatory processes pertaining to the granting of licenses for exploitation or trade in energy products.

The EU and the US have worked closely together over the past years and sent a strong signal in support of open trade and non-discriminatory access for raw materials and energy. Some of the above shortcomings have been partially addressed in the WTO accession protocols of countries like China or Russia, and in FTAs negotiated by the EU and the US. Some progress has also been achieved through the dispute settlement process. The multilateral trade system would however benefit from a stronger set of rules in the area of energy and raw materials. Indeed, international trade agreements have made only a modest contribution to promoting the application of market principles in this area regarding access, distribution, trade and sale.

The TTIP could therefore make an important contribution to the development of that process, within limits agreed by both sides. It could provide a basis to take the issues forward in a more comprehensive manner by providing an open, stable, predictable, sustainable, transparent and non-discriminatory framework for traders and investors in raw materials and energy, in a way that also serves our wider shared geo-strategic and political objectives for the longer term.

Disciplines agreed in the transatlantic context could serve as a model for subsequent negotiations involving third countries. It also sends a powerful signal to other countries that trade in raw materials and energy can be and will be subject to global governance, including the fundamental principles of transparency, market access and non-discrimination. In addition, agreed rules on trade and investment in raw materials and energy would also contribute to developing and promoting sustainability.

Approach

It is understood that general disciplines and commitments concerning trade in goods and services, and investment, negotiated in the TTIP will apply to raw materials and energy, including e.g. non-discrimination, the elimination of import and export duties and other restrictions relating to import or exports.

It is also understood that where the general rules do not address certain energy and raw materials related issues, these should be covered by energy and raw materials specific rules. Such rules would go beyond existing WTO provisions and in particular beyond the provisions in GATT and GATS. There are precedents as both the EU and the US have negotiated such specific rules with third countries.

Disciplines for the template

Scope

In principle, the scope of the specific rules could include measures related to trade and investment in raw materials i.e. raw materials used in the manufacture of industrial products and excluding e.g. (processed) fishery products or agricultural products, and energy products, i.e. crude oil, natural gas electrical energy and renewable energy.

The following areas have been identified around which specific raw material and energy provisions could be developed.

Transparency

Increasing transparency and predictability is the first and most important step towards a better (global) governance of trade in raw materials and energy. Transparency improves investment opportunities, facilitates continued production, and improves the functioning and expansion of infrastructure, including for transportation. The agreement should encourage **transparency** in the process of licensing and allocation conditions of licences that could be required for trade and investment activities in this area.

Market access and non-discrimination

In line with this objective, the elimination of export restrictions, including duties or any measure that have a similar effect should be ensured.

As regards exploration and production of raw materials and energy, it is important to confirm that the parties should remain fully sovereign regarding decisions on whether or not to allow the exploitation of their natural resources. Once exploitation is permitted **non-discriminatory** access for exploitation, including for corresponding trade and investment related opportunities, should be guaranteed by regulatory commitments. In terms of regulatory commitments related to exploration and production of energy, the US and EU should also have an interest in developing further common standards as regards off shore safety, on the basis of their respective domestic legislation. Additionally, it should be assessed how to incorporate elements related to the Extractive Industry Transparency Initiative (EITI), which reflects both the EU and US domestic legislation.

The EU and the US should consider rules on transport of energy goods by natural gas pipelines or electricity grids, which would be particularly relevant in countries with monopolized pipelines. In this context, there should be regulation of transport and transit. The agreement could provide that if private construction of infrastructure is not allowed or not economically viable, Third Party Access (TPA) should be mandatory, subject to regulatory control by an independent regulator vested with the legal powers and capacity to fulfil this function. Transit rules should be compatible with - and at least as favourable as - the transit rules defined in the Energy Charter Treaty. They should be established in a manner to avoid or mitigate an interruption of energy flows.

Competitiveness

There are at least two different areas where **competiveness** in the raw materials and energy markets can be improved.

Government intervention in the price setting of energy goods on both the domestic market and of energy goods destined for export purposes should be limited. A prohibition on dual pricing should further limit the possibility for resource rich countries to distort the market and subsidize sales to industrial users thus penalising foreign buyers and exports. Whereas further reflection is needed, precedents like WTO Accession commitments (by Russia and Saudi Arabia) or relevant provisions from the NAFTA Agreement (Article 605(b)) could possibly be used to explore possible avenues in this respect.

As regards State Owned Enterprise (SOE) and enterprises granted Special or Exclusive Rights (SER) specific rules for raw materials and energy could be discussed. Although these rules should in principle be of a general nature, it could appear necessary during the negotiation process to agree on rules specifically for companies active in the raw materials and energy sector, especially in so far as they benefit from special or exclusive rights, in coordination with the horizontal rules.

Trade in sustainable energy

The EU and the US have a shared interest in improving global governance in the area of renewable energy. Liberalisation of trade in green goods and services would bring considerable environmental, social, economic and commercial benefits to the US and the EU. A rules-based, open international market would promote more cost-efficient and more widely available green goods and services (including green technologies). It would also foster innovation as well as create jobs and bring an important contribution to the achievement of environmental objectives and the fight against climate change.

The TTIP could build on the APEC agreement on environmental goods. The parties could agree on commitments to address non-tariff barriers which cause specifically in this area many trade irritants. In terms of concrete provisions, a confirmation of prohibition of local content requirements for goods, services and investments could be introduced. Commitments related to subsidies contingent on local content requirements and prohibitions on forced transfer of technology or set offs could also be included.

Energy efficiency and the promotion of renewable energies are a fundamental aspect of the energy policy of the EU and the US. They are being promoted through various policy measures, for instance regulatory measures, standards and incentive programmes. The TTIP should promote the objective of renewable energy and energy efficiency and should guarantee the right for each party to maintain or establish standards and regulation concerning e.g. energy performance of products, appliances and processes, while working, as far as possible, towards a convergence of domestic EU and US standards or the use of international standards where these exist.

Security of energy supply

The secure and reliable supply of energy is of crucial importance for any country. Consideration could be given to developing provisions on the security of energy supply designed, inter alia, to identify existing and upcoming supply and infrastructure bottlenecks that may affect energy trade, as well as mechanisms to handle supply crises and disruptions, taking into account and promoting multilateral obligations in this field (notably in the context of the International Energy Agency).

APPROVED | CHAPTER
JULY 19, 2013 | 427
BY GOVERNOR | PUBLIC LAW

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND AND THIRTEEN

H.P. 816 - L.D. 1151

An Act Regarding the Administration and Financial Transparency of the Citizen Trade Policy Commission

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Citizen Trade Policy Commission through Public Law 2011, chapter 468 acquired ongoing funding to contract for qualified year-round administrative support staff and the commission contracted for such qualified staff; and

Whereas, it is important to ensure that all funding provided to the commission remains available to the commission and does not lapse, including funding that would lapse at the end of the current fiscal year, so that the commission can continue to function appropriately and efficiently with the limited resources available to it; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 10 MRSA §11, sub-§8, as enacted by PL 2003, c. 699, §2, is repealed and the following enacted in its place:

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

Sec. 2. 10 MRSA §11, sub-§10, as enacted by PL 2003, c. 699, §2, is amended to read:

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

Sec. 3. Transfer of unspent funds. At the end of fiscal year 2012-13, the Executive Director of the Legislative Council shall calculate the amount of unexpended funds appropriated, allocated or otherwise provided or made available to the Citizen Trade Policy Commission in fiscal year 2012-13 and shall transfer those unexpended funds to the account established for the commission by this Act.

Sec. 4. Appropriations and allocations. The following appropriations and allocations are made.

LEGISLATURE

Citizen Trade Policy Commission N151

Initiative: Reflects the transfer of funding for a biennial citizen trade assessment from the Legislature to a newly created, separate Citizen Trade Policy Commission program.

GENERAL FUND	**2013-14**	**2014-15**
All Other	$10,000	$0
GENERAL FUND TOTAL	$10,000	$0

Citizen Trade Policy Commission N151

Initiative: Reflects the transfer of on-going funding from the Legislature program for the Citizen Trade Policy Commission to a newly created, separate program for the commission and provides additional funding for the commission above the amounts transferred.

GENERAL FUND	**2013-14**	**2014-15**
Personal Services	$1,320	$1,320
All Other	$26,300	$26,300
GENERAL FUND TOTAL	$27,620	$27,620

Legislature 0081

Initiative: Reflects the transfer of funding for a biennial citizen trade assessment from the Legislature to a newly created, separate Citizen Trade Policy Commission program.

GENERAL FUND	**2013-14**	**2014-15**
All Other	($10,000)	$0
GENERAL FUND TOTAL	($10,000)	$0

Legislature 0081

Initiative: Reflects the transfer of on-going funding from the Legislature program for the Citizen Trade Policy Commission to a newly created, separate program for the commission.

GENERAL FUND	**2013-14**	**2014-15**
Personal Services	($1,320)	($1,320)
All Other	($24,800)	($24,800)
GENERAL FUND TOTAL	($26,120)	($26,120)

LEGISLATURE DEPARTMENT TOTALS	**2013-14**	**2014-15**
GENERAL FUND	**$1,500**	**$1,500**
DEPARTMENT TOTAL - ALL FUNDS	**$1,500**	**$1,500**

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

FOR IMMEDIATE RELEASE **CONTACT:** Kaelan Richards
September 7, 2011 (202) 225-3661

DELAURO: FOOD SAFETY CRITICAL ISSUE IN UPCOMING TRADE TALKS

New Haven, CT — Congresswoman Rosa DeLauro (CT-3), Ranking Member of the Appropriations Subcommittee on Labor, Health and Human Services, Education, called upon the United States Trade Representative, Ambassador Ron Kirk, the U.S. leader of the ongoing negotiations of the proposed Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA), today to ensure that meaningful food safety measures are included as part of the final agreement.

With 84 percent of the seafood consumed by Americans imported, including a substantial amount from TPP countries, Congresswoman DeLauro urged Ambassador Kirk to make food safety a top priority in the negotiations, specifically calling for American food safety standards to be maintained for all imported foods.

"The food safety issues raised by the TPP FTA negotiations are expansive and in many instances already controversial. Failure to deal with these issues during the negotiations will only create more opposition to a prospective agreement," said Congresswoman DeLauro. "I therefore urge you to act in the interest of public health and maintain the United States' strong leadership on food safety by making the health of Americans our top priority in this week's negotiations in Chicago and beyond."

The text of the letter is below.

September 7, 2011

The Honorable Ron Kirk
Ambassador
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Kirk:

As you lead another round of negotiations over the proposed Trans-Pacific Partnership (TPP) Free Trade Agreement (FTA), I write to urge you to ensure that the safety of food consumed by Americans is a top priority in any concluded agreement. I believe this issue is of critical importance, particularly as certain TPP countries have major seafood export industries with whom significant food safety issues have already arisen.

As the Food and Drug Administration's (FDA) recent report on the safety of imported food emphasizes, the increasing globalization of America's food supply is posing difficult challenges to both our regulatory system and public health. In 1994, the year Congress voted for United States membership in the World Trade Organization (WTO), half of the seafood consumed by Americans was imported. Today that figure is 84 percent.

Yet, our regulatory capacity has not kept up with the Government Accountability Office (GAO) recently concluding in a report that the FDA currently has only limited oversight, a reliance on the review of paper and not actual production facilities, and an "ineffectively implemented" sampling program that looks for only 16 drugs, compared to other countries that look for up to 57 drug residues. According to the GAO, FDA tests only 0.1 percent of all imported seafood products for only a few drug residues. Simultaneously, the food-safety related provisions of past U.S. trade agreements have imposed constraints on signatory countries' domestic food safety standards and import protocols.

Accordingly, a TPP FTA has the potential to undermine the broadly supported public health goal that the food Americans consume must be safe. The FDA, for example, has already issued 25 import alerts for Vietnam this year with Vietnamese seafood detained for misbranding, E. coli and more. Seafood imports from Vietnam are plagued by unusually high levels of antibiotic residues, microbial contamination, and other serious food safety concerns confirmed by FDA laboratory testing. Between 2003 and 2006, more than one-fifth of all veterinary drug residues that FDA identified in imported seafood were in imports from Vietnam even as less than 4 percent of all imported seafood in the time period was shipped from that country.

At the same time, another TPP country, Malaysia is now the seventh largest exporter of fresh shrimp and sixth largest of prepared shrimp to the United States. The concern with Malaysia rests with the growing illegal transshipment schemes that avoid U.S. food safety and trade laws occurring in that country. Specifically, following the imposition of antidumping duties in 2005 and an FDA Import Alert on Chinese shrimp in 2007, the volume of frozen shrimp imported from China to the United States dropped significantly. Chinese shrimp exports to Malaysia, however, jumped from an annual average of 2.3 million pounds to 66 million pounds in 2008 while imports to the United States of frozen shrimp from Malaysia skyrocketed from an annual average of 1.9 million pounds to 66.2 million in 2008 suggesting that Chinese shrimp is being transshipped through Malaysia to avoid U.S. antidumping duties.

We know from available data on past U.S. trade agreements that a TPP FTA would result in further increases in U.S. imports of seafood. Although most seafood is already duty-free under the WTO's Most Favored Nation tariff bindings, FTAs have led to further increases in U.S. seafood imports. For instance, in 2006 the U.S. International Trade Commission predicted only a 1.5 percent increase in U.S. seafood imports from Peru once our FTA with that country

was fully-phased in, a 20 year process. Yet, seafood imports to the United States from Peru have surged 16 percent each year since the 2009 implementation of that deal. Under a TPP FTA, the same trend should be expected with countries with which the United States current has no FTA and that are already major seafood producers, namely Vietnam and Malaysia.

I am therefore deeply concerned that you may be using the North American Free Trade Agreement (NAFTA) template, which overlaps with problematic principles from WTO agreements with respect to imported food safety standards and inspection protocols, in negotiations over the TPP FTA. I believe such an approach is misguided and that it is in the best U.S. public health interest to use the current negotiations as an opportunity to remedy the food safety-related shortcoming identified by the GAO and numerous others. Absent changes to past FTA provisions on food safety standards and inspection, the foreseeable increase in seafood imports under a TPP FTA will lead to more unsafe imports reaching American consumers.

First, past FTAs incorporate the WTO's sanitary and phytosanitary (SPS) and technical barriers to trade rules, which are deeply problematic. These rules set ceilings on signatory countries' domestic food safety standards. As a result, WTO panels have ruled against the U.S. meat country-of-origin labeling requirements and voluntary dolphin-safe tuna labels in challenges brought by other WTO countries. We must learn from the record of WTO implementation and modify the food safety-related rules of U.S. trade pacts to best protect the public health, starting with a TPP FTA.

The FDA has also engaged in extensive harmonization of food safety standards, as required by the WTO SPS rules and our past FTAs. If a TPP FTA is to include food safety harmonization, then it must ensure existing U.S. standards are not weakened. I believe this should include requiring that harmonization may only be conducted on the basis of raising standards toward the best standards of any signatory country and that, with respect to the United States, such international-standard setting should provide the public an opportunity to comment while maintaining an open and transparent process.

In addition, the past FTA model includes the establishment of new SPS committees to speed up implementation of mechanisms to facilitate increased trade volumes, including "equivalence" determinations. The equivalence rule requires the United States to permit imports of meat, poultry and now possibly seafood products that do not necessarily meet U.S. food safety standards. I firmly believe that all food sold to American consumers must be required to meet U.S. safety standards, and that a TPP FTA should not include equivalence rules as the basis for the United States accepting food imports.

Finally, past FTAs allow for private enforcement of extensive foreign investor rights. Under these rules, foreign food corporations operating within the United States are empowered to demand compensation from the U.S. government in foreign tribunals established under the United Nations and World Bank if U.S. regulatory actions undermine their expected future profits. Even when the United States successfully defends against such attacks, such as in the NAFTA investor-state case brought by the Canadian Cattlemen for Fair Trade over the U.S. ban on imports of live Canadian cattle after the discovery of a case of mad cow disease in Canada, the initial filing of the challenge has a chilling effect on policymaking and the U.S. government

must spend millions on a legal defense. Accordingly, I believe a TPP FTA must not include investor-state rules that would allow corporations to weaken U.S. food safety in foreign tribunals thereby unnecessarily placing American consumers at risk.

The food safety issues raised by the TPP FTA negotiations are expansive and in many instances already controversial. Failure to deal with these issues during the negotiations will only create more opposition to a prospective agreement. I therefore urge you to act in the interest of public health and maintain the United States' strong leadership on food safety by making the health of Americans our top priority in this week's negotiations in Chicago and beyond.

Thank you for your consideration. I look forward to your response and working with you on these critical issues as the TPP FTA negotiations continue.

Sincerely,

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U.S., Europe Trade Deal A Challenge for Agriculture

Farm Foundation forum participants outline hurdles for TTIP, remain positive it can provide freer trade between U.S. and EU

Janell Baum

Published: Jul 18, 2013

As the first round of talks on the Transatlantic Trade and Investment Partnership kicked off Friday, agricultural trade experts say it marks the beginning of a challenging but hopefully rewarding process that could result in the largest trade deal in the world.

At present, the United States and the EU have about $2.7 billion of trade daily, and nearly $4 trillion is invested each other's economies, said J.B. Penn of Deere and Co., moderator of a Wednesday Farm Foundation discussion panel comprised of agricultural trade experts.

Penn noted that the already significant trade relationship between the U.S. and the EU represents an opportunity for the U.S. to expand trade for many products, but a special opportunity for agricultural products, which account for the largest sector exported.

Farm Foundation forum participants outline hurdles for TTIP, remain positive it can provide freer trade between U.S. and EU

But as panelist said, there are hurdles to expanding trade and negotiating a trade deal. Specifically, regulations for biotech crops and food safety expectations, along with differences in production and processing methods will require participation from the ag community and special consideration from negotiators.

Read more: U.S., EU Begin Trade Negotiations

Many have noted the non-tariff trade barriers represent one of the biggest concerns for the agriculture and food industries.

"We believe TTIP offers a genuine opportunity to expand dairy exports," said Sue Taylor, Leprino Foods Company. She noted that elimination of tariffs and regulatory barriers are the top priority for the dairy industry.

We want to "ensure that our products have access to the EU market without unwanted burdens. Unfortunately, this is currently not the case," Taylor said.

Among the trade issues, Taylor said, are somatic cell count limits and bans on the use of generic food names.

Along with issues on the food safety and dairy front, biotechnology has gotten a good look from both sides of the negotiation as an expected sticking point.

But Matt O'Mara, Director of International Affairs for Food and Ag at the Biotechnology Industry Organization, said the biotech industry largely sees a potential FTA as a positive way forward for biotech.

He said biotech is growing in the U.S., but there's rapid adoption of technology is outside of the U.S., too. He estimated that more than 17 million farmers are using biotechnology, and 90% are resource-poor. That figure, he noted, shows the need for across-the-board adoption of technology in trade.

If the technology is employed in the exporting country but not in importing there's a disruption in trade, he said, speculating that it will take management of the global regulatory process and major import markets coming to a decision on the product all around the same time.

"It's critical that we get these timelines to be as synchronous as possible – when this doesn't happen there's trade disruption," O'Mara said.

While he believes ag and related industries – including manufacturers of technology-rich farming equipment – want to see a "rational discussion" between negotiators to move forward, he doesn't anticipate a "complete nirvana as a result of the TTIP."

"We need to be realistic here," he said. "We need technology. We need to use existing resources in a more efficient way."

O'Mara said one of the things that many stakeholders are talking about now is food labeling and genetically modified organisms. The EU implemented labeling of GMOs in 2004.

We're not seeking to change their approach to labeling – that's not our desire with this agreement. We want to find ways to facilitate trade," O'Mara said.

Point blank, O'Mara said his organization sees biotechnology only getting bigger and the EU FTA an opportunity to cooperate on that trend.

"Agriculture and technology is synonymous at this point, and we need to embrace that," he said.

Read more: EU Energy, Biotech Policies Cast Doubt on Trade Agreement

American Farm Bureau trade specialist Dave Salmonsen Monday shared a similar outlook on the trade deal in an AFBF interview, but he explained further the outlook from the EU side.

"They want better access for their beef products—we have some restraints against that that they want looked at," he said.

EU also has an issue called "geographic indications," Salmonsen explained, where they want to have recognition of their system in the U.S. of relating food products to a specific region of Europe.

That's where common names of food products come into play – parmesan cheese, for example, originates from the Parma region of Italy. "We have a disagreement of how those trademarks are going to be used," Salmonsen said.

Despite the seemingly steep road that's ahead, negotiations will continue this fall on the TTIP during a second round.

"These same people have been working on this issue and the run up to this over the last two years and they will continue to work in contact with each other throughout this period of a few months between rounds," Salmonsen said. "And then when the next round happens they'll have more new papers, new ideas in front of them, and they'll see if they can make progress on these."

TAFTA: Corporations Express Fear of Democracy

Public Citizen; July 19, 2013

The Trans-Atlantic Free Trade Agreement (TAFTA) negotiations have only just begun, but already hundreds of corporations are weighing in to let negotiators know what they hope to get out of the agreement. In many cases, multinational corporations submit their views to both sides, and one shudders to imagine teams of European and U.S. negotiators lining up with identical talking points representing the views of "their" corporations, and speedily agreeing on "uncontroversial" sections that favor the interests of corporations over consumers.

Many of the large corporations use their comments to signal their support of "science-based regulation" over "political" considerations (read: support for a weakening of safeguards, such as labels for genetically-modified food, over popular backing for those safeguards). Here is a selection of some official corporate statements to that effect on TAFTA and food and product safety, submitted either to the U.S. Trade Representative or the Joint EU-U.S. Solicitation on Regulatory Issues:

Food Safety

- **"Science-based** risk assessment, as the foundation for regulatory decisions, must not be overruled by an incorrect (and **politically** driven) application of the precautionary principle, as currently applied by the EU**"** (*Croplife America*, a lobbying group of U.S. pesticide corporations that includes genetically-modified-organism (GMO) giant Monsanto)
- **"**Finally, the EU's **political** approach in regulating crops enhanced with traits achieved through modern biotechnology procedures is a concern to U.S. wheat producers. The EU biotechnology approval process is slow and often influenced more by **politics** than **science**, creating uncertainty and deterring new investment in wheat research… **Science** and market preferences, not **politics**, should be the determinants.**"** (*U.S. Wheat Associates*)
- **"**The current 'asynchronous approval' situation is caused by many factors, including risk assessment guidelines that are not aligned and increasing **politically**-motivated delays in product approvals.**"** (*National Grain & Feed Association and North American Export Grain Association*, lobbying groups comprised of the largest U.S. agribusinesses, such as Cargill and Archer Daniels Midland)
- **"**International trade rules fully support trade in products of biotechnology for planting, processing and marketing, subject to **science**-based regulation… **Politically** motivated bans or moratoria by WTO member states are not consistent with members' WTO obligations.**"** (*National Corn Growers Association*)
- **"**The implementation of production standards based on **politics** or popular thought instead of **science** will do nothing more than eliminate family operations and drive up costs to consumers.**"** (*National Cattlemen's Beef Association*, a factory-farm-supporting lobbying group for the beef industry)

- **"**What is deeply concerning about the EU's overall approach to SPS [sanitary and phytosanitary] issues, however, is that its **political** body is frequently given the ability to override the EU's own **scientific** authority's findings to instead establish restrictions on products based typically on animal welfare or consumer preferences.**"** (*National Milk Producers Federation & U.S. Dairy Export Council*)

Product Safety

- **"**Significant barriers to further alignment, namely **politics** and differences in regulatory approach, remain on both sides of the Atlantic. Our experience has also shown that **politics** and differences in regulatory philosophy are fundamentally the root causes for differences in toy safety standards… Frequently, standards that are stricter than their international counterparts are promulgated due to **political** influence or the (often unstated) desire to erect technical barriers to trade, and not predicated by **science** or risk factors.**"** (*Toy Industry Association and Toy Industries of Europe*)
- **"**We would like to highlight the fact that these regulatory differences are often **politically** motivated… We regret that the differences in regulations in the EU and US are often caused by the result of **politics** rather than a different approach to ensuring safety.**"** (*Toy Industries of Europe*)
- **"**Such discussions need to take place between technical, not **political** or administrative, entities and need to make business sense for the organizations involved.**"** (*ASME,* a lobbying group for engineers -- the first U.S. "non-profit" entity convicted for violating antitrust laws)

But what do these corporations mean when they use the word "political?" One possibility is anything they happen to disagree with.

But let's give them slightly more credit than that –- what happens if we substitute the words democracy/democratic for politics/political? After all, the "political" bodies the corporations fear are the democratically elected representatives of the people.

Now we see:

- Croplife (i.e. Monsanto) complaining about the European Commission's **democratically** driven application of the precautionary principle, which restricts GMOs.
- U.S. agribusinesses decrying **democratically**-motivated delays in approving GMOs and other products that raise food safety concerns.
- The beef industry worrying about production standards based on **democracy** or "popular thought."
- Big Dairy concerned that the EU's **democratic** body prioritizes "animal welfare [and]consumer preferences."
- Toy corporations fearing that **democratically** motivated regulations will lead to stricter "toy safety standards."
- ASME wanting to keep **democratic** entities out of the room so that regulation "makes business sense for the organizations involved."

The idea that we can choose science over democracy when making our regulations is, of course, nonsense. Science doesn't tell us how we should decide between safer toys and cheaper toys (or larger profits for toy companies). Science doesn't tell us how cautious we should be about eating food that has been genetically modified to increase farm industry profits. Science doesn't tell us how to value cheaper meat and milk versus safeguards that limit the use of antibiotics or acidic carcass cleaning and that allow animals to live in a cage large enough to turn around in.

Science can inform the unavoidable trade-offs in our policy choices. But in the end we, the people, not they, the unelected trade negotiators and their corporate advisors, must decide how to strike the balance.

As the TAFTA negotiations get underway, this attempt by industry insiders to concoct an argument that they should be involved in writing regulation, but our democratically elected bodies should not, is yet another reminder of the danger of allowing an agreement to be negotiated behind closed doors, with hundreds of corporate "advisors," and without transparency to the public or even our democratically elected representatives.

Statement on the 18th Round of Trans-Pacific Partnership Negotiations

USTR; 07/25/2013

TPP Negotiators Press Ahead in Malaysia, Welcome Japan's Entry

Kota Kinabalu, Malaysia – Officials reported today that they achieved further strong progress at the 18th round of Trans-Pacific Partnership (TPP) negotiations, which ended today, keeping their eyes fixed on the goal set by President Obama and the other TPP Leaders of concluding a high-standard, comprehensive agreement this year, while welcoming Japan's entry into the negotiations. Through the TPP, the United States is seeking to advance a 21st-century trade and investment framework that will boost competitiveness, expand trade and investment with the robust economies of the Asia Pacific, and support the creation and retention of U.S. jobs, while promoting core U.S. principles on labor rights, environmental protection, and transparency.

Following the guidance of the trade ministers from the United States and the other TPP countries prior to this round – Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam – the negotiating groups covering market access, rules of origin, technical barriers to trade, investment, financial services, e-commerce, and transparency reached agreement on a wide range of technical issues in the legal texts of these chapters, which set the rules that govern the conduct of their trade and investment relations. They also found common ground on issues that allowed them to make progress in the negotiating groups covering intellectual property, competition, and environment. In addition, each group developed a detailed plan for closing remaining issues and completing their work.

The negotiators also moved ahead in their efforts to construct the ambitious packages that will provide access to their respective markets for industrial, agricultural and textile and apparel products, services and investment, and government procurement. They agreed on next steps and an overall plan for achieving these market access outcomes in the timeframe agreed by Leaders.

Throughout the talks, negotiators reflected the wide range of views provided to them by their stakeholders on the best pathway to promote trade and investment, regional integration, and jobs in the United States and the other TPP countries. The TPP negotiations were temporarily adjourned on July 20 so the delegates could listen to and share information with more than 200 stakeholders from the United States and across the TPP region. Stakeholders also met informally with U.S. and other negotiators to provide further detailed information. U.S. chief negotiator Barbara Weisel and her fellow TPP chief negotiators also briefed stakeholders on the status of the negotiations and responded to their questions on specific issues and the process going forward.

On July 23, the United States and the other TPP countries welcomed Japan as the 12th member of the negotiations, following the successful completion of the respective domestic procedures of the United States and the other existing TPP members. Japan received detailed updates on the

status of the negotiations and participated actively in the work of the negotiating groups that were meeting on those dates, expressing its commitment to integrate quickly and smoothly into the process. With Japan's entry, TPP countries now account for nearly 40 percent of global GDP and about one-third of all world trade.

Ministers from the TPP countries have been in close touch on TPP over the past month. Over the past week, USTR Froman met in Washington with Vietnamese Trade Minister Hoang, Bruneian Trade Minister Pehin Lim, and Japanese Minister for the Economy, Trade and Industry Motegi, and spoke by phone with Director General Jana of Chile's trade ministry (DIRECON) and Mexican Economy Minister Guajardo. Additionally, Ambassador Froman met with Vietnamese President Truong Tan Sang during President Sang's visit to Washington, D.C. this week.

Ambassador Froman and the other TPP ministers plan to engage regularly in the coming weeks ahead of the next round to find solutions to the sensitive issues that remain, guide the work of negotiators, and keep the negotiations moving expeditiously toward a high-standard outcome the TPP Leaders agreed to seek.

The 19th round of TPP negotiations will be held in Brunei from August 22-30.

United States and Vietnam Agree to Intensify TPP Engagement, Aim to Reach Comprehensive Agreement This Year

Ambassador Michael Froman meets with Vietnam's President Truong Tan Sang

USTR; 07/25/2013

July 24 - Ambassador Michael Froman met today with Vietnam's President Truong Tan Sang and Minister of Industry and Trade Vu Huy Hoang to discuss the Trans-Pacific Partnership (TPP) negotiations. They reaffirmed the objective of concluding the Trans-Pacific Partnership (TPP) this year as a shared priority for both countries. All welcomed the significant progress being made during the round of TPP negotiations in Malaysia this week, and agreed to direct their negotiators to intensify engagement on a range of market access and rules issues with a view to resolving outstanding matters as quickly as possible.

"Vietnam has come a long way in addressing its own challenges to meet the high standards of the TPP, but we still have work to do together," said Ambassador Froman. "I expect that the discussion over the coming weeks leading up to the APEC Leaders' Meeting in October will be crucial in this process, and the United States is committed to continuing its close engagement with Vietnam to reach an ambitious, high-standard agreement with all our TPP partners."

The ministers agreed that successful completion of a comprehensive TPP would strengthen economic ties between the two countries, promoting economic growth and development and supporting creation and retention of jobs.

Webcast Summary
Trans-Atlantic Trade Symposium
Washington D.C.
Sponsored by the Sierra Club
July 9, 2013

Introduction:

On Wednesday, July 9, 2013, the Sierra Club sponsored a symposium in Washington D.C. on the proposed Trans-Atlantic Free Trade Agreement (TAFTA). This symposium was broadcast live over the Internet and featured three different panels regarding different aspects of TAFTA and each of the panels was comprised of speakers from various interest groups.

The Chairs of the CTPC, Senator Troy Jackson and Representative Sharon A. Treat, requested that CTPC staff person Lock Kiermaier view this symposium and prepare a written summary for use by the CTPC.

The complete webcast is available for viewing at the following address:
http://www.youtube.com/watch?v=aqNf2vHTdvw&feature=c4-feed-u

Please note that in previous written documents prepared for the CTPC, TAFTA was referred to as the Transatlantic Trade and Investment Partnership (TTIP) which appears to be the formal name of the proposed treaty used by USTR. For convenience, this summary will make use of the TAFTA moniker.

Opening Panel: What's At Stake?

- **Virginia Robnett, Coalition for Sensible Safeguards (Moderator)**
- **Lori Wallach, Public Citizen (TAFTA context)**
- **Natacha Cingotti, Friends of the Earth Europe (European perspective)**
- **Celeste Drake, AFL-CIO (Labor perspective)**

Ms. Robnett opened the first panel discussion by identifying 5 matters of concern regarding TAFTA:

1. Democratically elected officials must be allowed to protect the safety and well being of citizens through regulation; the stated goals of TAFTA seek deregulation;
2. Trade treaties such as TAFTA must be negotiated in public so as to ensure necessary transparency; in the recent past, corporations and industry have been the only entities allowed to have access by the USTR to negotiated treaty text; elected officials and the public have been denied access to these documents;
3. The use of a regulatory ceiling with a lowest common denominator as the basis for negotiating TAFTA must be avoided;
4. The use of the Investor State Dispute Resolution (ISDR) mechanism is a threat to the sovereignty of the laws and judiciary of nation states and should be avoided in TAFTA; and

5. Much of what will be proposed for TAFTA will seek to replace regulations with cost benefit requirements which favor industry and corporations and should thus be avoided.

Ms. Robnett then introduced Lori Wallach from Public Citizen who provided a PowerPoint presentation that made the following points about the context in which TAFTA is being negotiated;

- TAFTA is a longstanding project and goal of large U.S. and European corporations;
- A stated goal of the Trans-Atlantic Business Dialogue, recently renamed as the Transatlantic Business Council, is to eliminate trade irritants (i.e. national regulations) and to promote "regulatory convergence" (i.e. lowest common denominator of regulatory standards);
- Most European Union (EU) members have consumer, environmental and labor standards/regulations which are higher than U.S. counterparts; the use of regulatory convergence would use U.S. benchmarks and thus reduce existing standards in much of Europe;
- Contrary to popular belief, treaties like TAFTA are not really about free trade or the reduction of trade tariffs but rather exist to lower regulatory standards set by sovereign governments;
- Trade agreements like TAFTA are really delivery mechanisms for a package of non-trade policies that can't be achieved legislatively within sovereign states;
- TAFTA is not a trade agreement but is more properly described as a system of enforceable global governance that is not designed for modification by members of the public who will experience the results;
- Once implemented, these treaties are relatively permanent and are enforced and adjudicated by ISDRs which offer no appeals or due process; and
- ISDRs make use of a small universe of corporate lawyers who have the ability to override federal, state and local law and have been used with significantly increasing frequency since the mid-1990s.

The next panelist was Ms. Natacaha Cingotti, Friends of the Earth Europe, who provided the following points regarding the European context for understanding TAFTA:

- TAFTA is being promoted in EU countries as a way out of the massive financial crisis of recent years and a possible end to the resulting austerity measures that have been imposed;
- The secrecy surrounding Free Trade Agreements (FTAs) like the TPPA and TAFTA raises suspicions in the civil society about the question about who will really benefit from TAFTA; members of the public are only informed through the use of leaked text; elected officials have no meaningful access to proposed treaty text;
- The intent of reducing and nullifying existing regulatory standards of sovereign states in the EU is of paramount public concern; and
- Within the civil society of EU nations there is a desire for a truly fair and transparent trade agreement that promotes better rights and standards for all citizens.

The final panelist for the first session was Ms. Celeste Drake from the AFL-CIO who commented on TAFTA from a labor perspective:

- The labor perspective on TAFTA is slightly more optimistic than previous two speakers; the basis for optimism is simply because not one word of text has been agreed to yet so the opportunity for meaningful input still exists;
- AFLCIO position: TAFTA offers the possibility of increased trade and an improved U.S. economy but USTR needs to fundamentally change its negotiating stance to foster transparency and public discussion;
- Labor and its allies have previously been able to win or persevere on certain trade treaties and related issues; for example, these groups were able to stop the Free Trade on the Americas agreement in the early 2000s;
- Who do the FTAs benefit; the corporations or the working public?;
- Since the advent of recent FTAs dating back to the mid-1990s and as a consequence of these FTA's, the real value of working wages have declined by nearly 50% as opposed to soaring corporate profits during that same time period;
- ISDR mechanisms put private interests on a parallel with public interests; the interest of one foreign company can overturn domestic law of a sovereign nation like the U.S.;
- The labor chapter of TAFTA is a concern because EU members tend to have non-enforceable labor pacts; USTR will need to negotiate for enforceable labor contracts; and
- The Buy American issue is crucial; the WTO already has certain avenues open to allow the procurement non-American goods. Does TAFTA need to open up more avenues?

<u>Environment Panel</u>

- **Carroll Muffett, Center for International Law (Moderator)**
- **Ilana Solomon, Sierra Club (Investor-state, energy & climate)**
- **William Waren, Friends of the Earth U.S. (downward harmonization)**

Carroll Muffett initiated this panel discussion on the environmental perspective of TAFTA by stating that after years of experience of working with FTAs, he is convinced that TAFTA and other FTAs are not about free trade. Instead, FTAs are about unfettered and unregulated trade. Mr. Muffett went on to make the following points:

- Recommends reading the USTR 2013 publication entitled , <u>Technical Barriers to Trade</u>; this document offers profound insights as to exactly what trade barriers the USTR and American industry are concerned about such as "excessive" domestic standards on food, chemical and toy safety;
- ISDRs have gone beyond having a chilling effect on meaningful domestic environmental standards and now have a breaking effect on these standards;
- Several decades ago, the U.S. was a leader in regulating chemical safety with the Toxics Substances Control Act (TOSCA); however, the state of chemical safety has changed dramatically and TOSCA has not and the EU nations have adopted a much higher standard of chemical and environmental safety through the EU REACH program; *(<u>Staff Note</u>: REACH (Registration, Authorization and Restriction of Chemical Substances) is*

the European Community regulation on chemical safety and became effective in 2007. The purpose of REACH is the proactive identification of the intrinsic properties of chemical substances.);

- REACH offers a hazards based framework for evaluating chemical safety as opposed to the out-dated risk based approach of TOSCA; REACH is the new standard for global negotiations;
- TAFTA seeks to force a lower standard of regulatory coherence such as TOSCA and then override REACH through the use of ISRDs; and
- TAFTA is likely to push for the same efforts for regulatory coherence through clean energy, food safety and GMOs.

The next speaker on the Environment Panel was Ilana Solomon from the Sierra Club. Ms. Solomon made a PowerPoint presentation which emphasized the following points:

- The practice of "eco-labeling" (Energy Star designations etc.) can be an efficient tool to help consumers make informed choices but may be at risk under TAFTA; eco-labeling is cited by the USTR in their 2013 publication "Technical Barriers to Trade";
- The decreased price of natural gas is due in significant part to the practice of fracking which is very harmful to the environment. The EU approach to fracking is much more cautious than in the U.S. and fracking is banned in many EU countries. The natural gas industry is anxious to increase exports to Europe and as a consequence many natural gas export terminals are being developed on the east coast of the U.S.;
- Recent FTAs exempt the export review of natural gas;
- The use of ISDRs provide industry with the right to sue government and their use is proposed in TAFTA; and
- There is a significant difference in the way that FTAs have been formulated; U.S. FTAs tend to be enforceable through the use of ISDRs whereas FTAs agreed to by EU nations tend not to make use of ISDRs.

The next presentation from the Environmental Panel was from Mr. William Waren of Friends of the Earth U.S. Mr. Waren emphasized the following points:

- The U.S. approach to chemical safety represented by TOSCA is inferior to the European approach represented by REACH;
- REACH is cited as a technical barrier to trade in the 2013 USTR report on that subject;
- TAFTA is likely to use TOSCA to effect a measure of deregulation and to achieve "regulatory coherence"; and
- REACH has several features that are superior to TOSCA: first, the burden of proof is on the chemical company to prove that a chemical is safe; second, unlike TOSCA which grandfathered in thousands of chemicals without a safety review, REACH does not grandfather in chemicals; third, REACH makes use of a strict federal review process; and fourth, REACH provides a substantive review of chemicals based on a cautionary approach whereas the emphasis is TOSCA is reactive and places the burden of proof on outside sources other than the chemical industry.

Food Panel

- **Kathy Ozer, National Family Farm Coalition (Moderator)**
- **Alexis Baden-Mayer, Organic Consumer Association (GMOs)**
- **Karen Hansen-Kuhn, Institute for Trade & Agriculture Policy (emerging technologies)**

In her introductory comments as Moderator for the Food Panel, Ms. Kathy Ozer stated that many of the EU member nations have appropriate regulatory standards in place to safeguard food and overall farm safety. However, these regulatory standards are at risk through various proposals made for TAFTA which would "harmonize regulation" to a lower standard. In addition, the commonly held assumption that increased farm exports are necessary for farm prosperity is a myth. Instead, the direct opposite is true: farm prosperity is largely dependent on the internal regulatory and environmental standards of a particular nation and does not rely on exports.

Ms. Ozer then introduced Alexis Baden-Mayer from the Organic Consumer Association who made a PowerPoint presentation which emphasized the following points:

- TAFTA presents another backdoor opportunity for a large international corporation like Monsanto to sidestep national standards which discourage the use of GMO (genetically modified organisms) seed products;
- Currently the EU bans the use of GMO products;
- The USTR negotiating position is to eliminate or modify the current EU ban on the use of GMO products and this factor is cited in the USTR 2013 publication "Technical Barriers to Trade";
- Through various embassies in different EU countries , the U.S. State Department is working with Monsanto and other corporations to lessen public resistance in Europe to GMO products; and
- The Chief Agricultural Negotiator for the USTR, Ambassador Islam Siddiqui, is a former VP of a major GMO trade manufacturing group, and while serving in the Clinton administration in the USDA advocated for the use of sewage sludge and irradiation to qualify as organic.

The final presentation for the Food Panel was from Karen Hansen-Kuhn, Institute for Trade & Agriculture Policy. Ms. Hansen-Kuhn made the following points via a PowerPoint presentation:

- The use of nanotechnology (*Staff Note: Nanotechnology is defined as is the manipulation of matter on an atomic and molecular scale*) in agriculture is becoming prevalent but without any documented review of the effect on food safety and human health; like other topics discussed earlier, TAFTA is likely to be used to circumvent and avoid existing regulation pertaining to the use of nanotechnology in agriculture;
- FTAs like TAFTA tend to avoid the proper use of the Precautionary Principle (*Staff Note: The precautionary principle or precautionary approach states if an action or policy has a suspected risk of causing harm to the public or to the environment, in the absence of*

scientific consensus, that the action or policy is harmful, the burden of proof that it is not harmful falls on those taking an act.);

- Existing regulatory standards for food safety in the U.S. avoid use of the Precautionary Principle and have a bias towards evaluating economic benefits;
- It is also likely that TAFTA will be used to end-around existing regulatory standards with regards to controversial and largely untested food additives; and
- TAFTA is also likely to be used to circumvent or weaken procurement standards and requirements pertaining to food including farm to school programs and buy local programs.

The web seminar closed with a discussion in which panelists strongly urged members of the public to oppose the proposed "fast track authority" legislation that President Obama is requesting with regards to approval of FTAs like the TPPA and TAFTA.

Deregulatory Disappointment:

Transatlantic Free Trade Agreement Negotiations

Trade negotiators from the United States and the European Union on July 8 2013 opened the first round of talks for a Trans Atlantic free trade agreement -- or, as it is formally known, the Transatlantic Trade and Investment Partnership. Because tariffs are already quite low on both sides of the Atlantic, it unfortunately appears that TAFTA negotiations will focus on lowering regulatory "barriers" to transatlantic trade and investment.[1] Such "barriers" include environmental and public health protections -- such as those related to food safety, genetically-engineered organisms, and toxic chemicals, among many others. In the alleged interest of making trade easier, environmental and public health regulations are at risk of being "harmonized down" to the lowest common denominator.

Based on the model of past U.S. trade agreements, statements by officials, and published documents (including a U.S.-E.U. "High Level Working Group" report outlining the objectives for negotiations), it appears that the goal of TAFTA negotiations is to grant transnational corporations and trade bureaucrats expanded "rights" to challenge the policies of democratic governments before international tribunals. For example, in its short report, the Working Group proposes an agreement that would focus on environmental and other regulations that allegedly interfere with free market efficiency, rather than traditional trade issues such as lowering tariffs. In some areas, such as sanitary measures (which governs food safety and genetically modified organisms), services (which can cover water sanitation and energy), and so-called "technical barriers to trade" (read: regulations), the HLWG report explicitly recommends going beyond even World Trade Organization provisions that already threaten to vitiate environmental protections.

Friends of the Earth - U.S. strongly believes that TAFTA negotiators must:

- *End the Secrecy.* Secret negotiations prevent a meaningful public debate. The TAFTA negotiating text must be released to the public on a timely basis throughout negotiations.
- *Provide more certainty in exclusion of environmental measures from coverage.* Rather than making TAFTA apply to all environmentally-sensitive economic sectors and governmental measures (unless they are specifically excluded on a "negative list"), TAFTA should only apply to only those sectors and measures which governments commit to on a "positive list."

[1] According to a European Commission statement on the launch of U.S.-E.U. trade talks: "In today's transatlantic trade relationship, the most significant trade barrier is not the tariff paid at the customs, but so-called "behind-the-border" obstacles to trade, such as, for example, different safety or environmental standards for cars." European Commission, European Union and United States to Launch Negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, available at, http://trade.ec.europa.eu/doclib/press/index.cfm?id=869.*See generally*, Final Report of the U.S.-E.U. High Level Working Group on Jobs and Growth, February 11, 2013,hereinafter HLWG, available at http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg.

- *Provide across the board environmental exceptions.* The TAFTA should not prohibit governments from taking measures that protect the climate, natural resources, public health, and the environment.

As elaborated in the following sections, Friends of the Earth-U.S. has the following recommendations:

- *Investment chapter.* Including investor-state arbitration in TAFTA is unnecessary given the robust legal systems in the U.S. and Europe. It would also be dangerous, creating a separate and biased "court" for wealthy investors.
- *Environment chapter.* An environment chapter, based on the U.S. model, should be incorporated into TAFTA. The U.S. and the E.U. should be required to enforce domestic environmental laws and multilateral environmental agreements.
- *Services chapter.* The High Level Working Group recommendation that "in the services area the goal should be to bind the highest level of liberalization that each side has achieved in trade agreements to date" greatly concerns Friends of the Earth.[2] The HLWG seems to be encouraging deregulation and privatization of services related to the environment based on broad ideological criteria.
- *Sanitary and phytosanitary chapter.* The High Level Working Group has called for "SPS-plus" provisions in the U.S.-E.U. agreement, making it easier to challenge safeguards related to food safety and genetically-modified organisms.
- *Technical barriers to trade chapter.* Recent WTO decisions on country of origin labeling, and dolphin-safe tuna labels pose risks to important environmental and public health labeling measures. The HLWG call for "TBT-plus" obligations in the TTIP text ignores these risks, and also poses a serious threat to the effective European system of toxic chemicals regulation.
- *Regulatory coherence chapter.* TAFTA regulatory coherence provisions are likely to encourage regulatory impact assessments which will stymie the promulgation of environmental and public health regulations.
- *Intellectual property chapter.* The IP chapter text should not cover and protect patents on plants, animals, or other life forms.
- *Government procurement chapter.* Government green purchasing preferences should not be limited by TAFTA rules that force governments to buy goods and services based almost exclusively on product cost and performance.
- *Chapter on trade in goods,* Any TAFTA language on trade in goods should be carefully drafted to discourage green energy trade wars, fossil fuel exports, and the commoditization or privatization of water.

General concerns about the TAFTA

Secrecy/transparency. As trade negotiators on both sides of the Atlantic hammer out the details on the transatlantic trade agreement, one problem is salient: the negotiating process must be transparent and the negotiating text must be made public. This has not been the practice in the

[2] HLWG, p.2.

U.S.'s other major regional trade pact, the proposed Trans Pacific Partnership. Most of the TPP negotiating materials[3] are kept secret from the public, but not from the official corporate advisors who are pushing hard for this "NAFTA of the Pacific." While the majority of the public is barred from knowing what is taking place in TPP negotiations, approximately 600 corporate representatives have been named "cleared advisors" for the United States, giving them regular access. This disgraceful secrecy must not be replicated in TAFTA negotiations.

Provide more certainty in exclusion of environmental measures from coverage. In assessing the environmental impact of a particular chapter, the first question is whether a specific environmental measure (law, regulation, or enforcement action) is covered -- in other words, whether the rules and obligations of that chapter apply at all to the environmental measures in question. There are two ways the environment could be covered by a trade chapter: under either a positive or negative list of commitments.[4]

A negative list approach means that the "default position" is that all government measures in all economic sectors are covered under TAFTA (such as non-discrimination, for example), unless a specific reservation is listed for a specific sector (water transport, for example) or government measure (Maryland's regulation of toxic chemicals in toys, for example). By contrast, under a positive list approach, such as that used under much of the WTO services agreement (GATS), specific economic sectors or government measures are voluntarily listed on a national schedule.[5]

The positive list approach should be used in TAFTA chapters, especially those that are most likely to generate conflicts with environmental and climate measures, including the chapters on services, procurement, investment, sanitary and phyto-sanitary measures, and technical barriers to trade, among others. Only a positive list of commitments provides reasonable certainty about which green policies are covered and which are not. It also provides far more policy space for the adoption of new measures and amendments to existing environmental policies. Finally, it is just more practical: it is a monumental task to list every measure conceivably subject to inappropriate trade agreement litigation on a negative list.

Across-the-board environmental exceptions. Across-the-board exceptions should be included in TAFTA to better ensure that environmental laws, regulations, and enforcement actions are not undermined. The World Trade Organization GATT article XX exception[6] related to trade in

[3] Except for leaked documents including the investment chapter, regulatory coherence chapter, and provisions of the intellectual property chapter.

[4] One must also look at the definitions section of the chapter to see if a specific measure is covered by definition: for example the definition of "investment" in an investment chapter.

[5] See generally, Organization of American States, Foreign Trade Information System, Dictionary of Trade Terms, 2013, http://www.sice.oas.org/dictionary/SV_e.asp.

[6] GATT article XX provides an exception to the overall agreement on trade in products "**necessary** to protect human, animal or plant life or health" and "related to conservation of exhaustible natural resources" (provided that they are linked to domestic resource conservation measures). The article XX "necessity" test can be hard to meet. Alternative regulatory schemes for addressing environmental problems in less burdensome ways for international trade can always be hypothesized. A necessity test, also, inappropriately reverses the deference that domestic courts

goods and the GATS article XIV[7] exception for trade in services are frequently seen as models for environmental exceptions in other free trade agreements. However, they are flawed models that are stingy in carving out policy space for essential government action related to climate, natural resources, public health, and other environmental policies. Furthermore, trade agreements generally do not provide across-the-board exceptions to all relevant chapters. In particular, the failure to provide strong environment exceptions in international investment agreements and agreements on technical barriers to trade has opened the floodgates to damaging lawsuits challenging sound environmental policies.

Concerns about specific TAFTA chapters.

Environment chapter. A TAFTA environment chapter should do more than simply establish, in theoretical legal principle, an obligation to enforce domestic environmental measures and abide by multilateral environmental agreements. Friends of the Earth believes that the environment chapter must itself be enforceable through dispute resolution.[8]

The core provision of a TAFTA environment chapter should be an obligation for countries to enforce their domestic environmental laws and all multilateral environmental agreements which they have joined and are on the list of multilateral environmental agreements[9] covered in the chapter. The environment chapter also should address, for example, issues of biodiversity conservation, illegal logging, illegal wildlife trade and economic subsidies that lead to overfishing and illegal fishing more generally.

The TAFTA environment chapter should also include robust provisions on public participation in the implementation process. This would include provision for public access to information about enforcement and a process for environmentalists and other members of civil society to communicate their concerns. This process should include a formal administrative mechanism for citizen and civil society submissions regarding enforcement of environmental laws, compliance

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give to economic regulations. In addition to that, the "chapeau" or introductory clause of Article XX requires that application of a measure, such as a fossil fuel export regulation, must not be a **"means of arbitrary or unjustifiable discrimination**," or a "**disguised restriction** on international trade." Terms of art such as "unjustifiable discrimination" and "disguised restriction" are vague and subjective.

[7] GATS article XIV excuses conflict with services chapter trade rules if a necessity test is met and the purpose of the government measure is to protect public morals, to protect human or animal health, to protect privacy or prevent fraud, or to safeguard essential security interests. Significantly, the exception does not cover natural resources, plant or other life forms, and the climate in general.

[8] In the same way, a TAFTA labor chapter should provide for obligations to enforce domestic labor laws and labor rights protections established by the International Labor Organization that are themselves enforceable by dispute resolution.

[9] The list of MEAs covered by the TAFTA environment chapter should include but not be limited to the Convention on International Trade in Endangered Species (CITES); Montreal Protocol on Ozone Depleting Substances; Convention on Marine Pollution; Inter-American Tropical Tuna Convention; Ramsar Convention on Wetlands; International Whaling Convention; and Convention on Conservation of Antarctic Marine Living Resources

with multilateral environmental agreements, and initiation of dispute resolution against other TAFTA parties.

Investment chapter.[10] The U.S. Trade Representative's office has confirmed press reports that it will seek to include investor-state arbitration in the TAFTA, presumably based on the flawed template of the U.S. Model Bilateral Investment Treaty.[11] Under the U.S. model, investors may seek awards of money damages, of unlimited size, in compensation for the cost of complying with environmental and other public interest regulations, including climate change measures. A large portion of suits brought under existing trade agreement investment chapters and bilateral investment treaties involve challenges to environmental policy, in particular cases related to mining, oil production and water policy.

The U.S. model would allow foreign investors to bypass domestic courts and bring suit before special international tribunals designed to encourage international investment.[12] Arbitrators in these cases are typically international commercial lawyers who may alternately serve as arbitrators one day and return as corporate counsel the next, thus raising questions of conscious or unconscious bias.

Investor rights are broadly and imprecisely defined in the U.S. Model BIT. They include the designation of expected future profits as a property interest and provide procedural rights that are unavailable under domestic law. Also, the substantive rights such as "expropriation" and especially the "minimum standard of treatment under international law" are vague and have been read broadly and narrowly by different tribunals. The broad readings go considerably beyond the general practice of nations for protecting property rights and due process.

Friends of the Earth believes that it is unnecessary to provide for investor-state arbitration in TAFTA. The U.S. and E.U have well-developed and generally fair court systems to resolve allegations of property rights and due process violations resulting from environmental and public health violations.

Services chapter. Services provisions in trade agreements broadly affect the environment, including services related to wastewater, solid waste, hazardous waste, electricity, pollution control, transportation, oil/gas pipeline transportation, and other energy services, to name a just a few. As a consequence, the High Level Working Group recommendation that "in the services

[10] For background see, Robert Stumberg, Professor of Law, Georgetown University, "Reform of Investor Protections," Testimony before U.S. House Ways and Means Subcommittee on Trade, May 14, 2009. http://waysandmeans.house.gov/media/pdf/111/stumberg.pdf.

[11] 2012 U.S. Model Bilateral Investment Treaty, available at, http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

[12] See generally, Sarah Anderson et al, The New U.S. Model Bilateral Investment Treaty: A Public Interest Critique, Institute for Policy Studies, May 2012, http://www.ips-dc.org/reports/the_new_us_model_bilateral_investment_treaty_a_public_interest_critique

area the goal should be to bind the highest level of liberalization that each side has achieved in trade agreements to date" greatly concerns Friends of the Earth.[13]

The HLWG seems to be encouraging deregulation and privatization of services related to the environment based on broad ideological criteria. This could lead to implementation of TAFTA services provisions that ignore appropriate distinctions between what economists call public goods, such as mass transit systems, and true private goods. In particular, given the experience with some existing trade agreements, in cases where the privatization of public services (such as water services) has gone badly wrong, it could hinder governments from returning service provision to the public sector.

Furthermore, heavy government regulation, rather than "the highest level of liberalization," would appear to be appropriate given the mixed public-private or even the monopolistic character of some services, such as electric and water utilities. In the same way, the cost of serious environmental externalities, in the case of some private services, argues for government regulatory intervention, rather than "leaving it to the market to decide."

Finally, problems with the "commoditization of the commons" could arise. The essential nature of water and sanitation for human health and survival sets this area apart from other sectors. The human right to water and sanitation, recognized by the United Nations General Assembly in July 2010[14], means that extra care must be taken before water policy in any form is subject to services chapter obligations.

Sanitary and phytosanitary measures chapter. The U.S.-E.U. High Level Working Group has called for "SPS-plus" provisions in the TAFTA.[15] Friends of the Earth is concerned that this nomenclature suggests that TAFTA provisions would make it easier to challenge safeguards that fall into the categories of sanitary measures related to food safety, such as bacterial contamination, and phyto-sanitary measures related to animal and plant health, such as animal diseases.

The history of successful U.S. suits in the WTO challenging European policies on genetically engineered organisms and food safety under the SPS agreement should be a warning.[16] The broad concept of SPS-plus is even more of a threat to GE and food safety regulations than WTO rules.

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[13] HLWG, p.2.

[14] United Nations, The Human Right to Water and Sanitation, Media Brief, 2010, http://www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf.

[15] HLWG, p.4.

[16] Public Citizen, Backgrounder: The U.S. Threats Against Europe's GMO Policy and the WTO SPS Agreement, http://www.citizen.org/documents/GMObackgrndr.pdf; Doug Palmer, US farmers urge sanctions against EU's GM crop ban, Reuters, July 26, 2010, available at http://in.reuters.com/article/2010/07/27/idINIndia-50441920100727.

Friends of the Earth believes that genetic engineering of commercial products presents many known and suspected risks to people and nature that require government regulation based on the precautionary principle: in other words, the burden of proof for demonstrating a new product's or technology's safety should fall on those who would introduce it into the marketplace. The SPS-plus concept could limit the ability of governments to appropriately implement the precautionary principle in regulating GE products and technologies. Friends of the Earth also is concerned that the U.S. Trade Representatives' 2013 Report on Sanitary and Phyto-Sanitary measures targets E.U. measures related to GE products as "substantial barriers to trade."[17]

Similarly, we are concerned about how other food safety disputes would be treated under an SPS-plus regime. Among the many areas of our concern are E.U. food safety measures targeted as trade barriers in the USTR 2013 SPS report, including restrictions on imports of beef treated with growth hormones, chicken washed in chlorine, and meat produced with growth stimulants (rectopamine). The 2013 USTR SPS report targets France in particular for its 2012 ban on use of materials produced using Bisphenol A (which is linked to brain and hormone problems in fetuses and children) in food contact surfaces for food products designed for infants, pregnant women or lactating women.

Technical barriers to trade chapter. Several TBT challenges in the WTO have succeeded in undermining important environmental and public health measures, particularly those related to product labels. For example, the WTO Appellate Body found that the U.S. dolphin safe labeling program violates the WTO TBT agreement.[18] Similarly, plaintiffs have recently succeeded in a WTO TBT challenge to U.S. measures related to country of origin labeling.[19] The dolphin safe and COOL labeling cases suggest that environmental and public health labeling measures, more generally, could be at risk of a TBT-plus challenge, including government measures related to eco-labels and labels for energy efficiency, organic food, and sustainable agriculture. The text of any TAFTA chapter on technical barriers to trade should preclude tribunal decisions similar to the WTO decisions in *US – Tuna II* and *US-COOL*.

Toxic chemicals regulation such as the European REACH (Registration, Evaluation, Authorization and Restriction of Chemicals) system similarly is put at risk. The U.S. Trade Representative has already targeted REACH[20] in a 2013 USTR report on Technical Barriers to

[17] Available at, http://www.ustr.gov/sites/default/files/2013%20SPS.pdf.

[18] *US-Tuna II*, available at, http://www.worldtradelaw.net/reports/wtoab/us-tunamexico(ab).pdf

[19] *US-COOL*, available at, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm.

[20] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1907:EN:NOT

Trade, which particularly names important elements of REACH as trade barriers.[21] The United States also raised objections to REACH at the time the program was developed[22], as well as more recently in the World Trade Organization Committee on Technical Barriers to Trade[23] and in other fora. Advocates for U.S. chemicals companies argue that registration, data gathering and notification requirements under REACH impose higher costs on chemical products imported into the E.U., and they have prepared detailed analyses that, in effect, lay out the argument for why major elements of REACH are illegal trade barriers under international trade law.[24]

All this would strongly encourage the downward harmonization of E.U. toxic chemicals regulation toward the lowest common denominator -- namely, the U.S. Toxic Substances Control Act. TSCA has been characterized by the President's Cancer Panel as perhaps "the most egregious example of ineffective regulation of chemical contaminates."[25] Similarly, the bi-partisan compromise bill, introduced in May by U.S. Senators Lautenberg and Vitter, allegedly makes some improvements in TSCA but falls far short of the European standard for safeguarding the public from dangerous toxic chemicals.

Regulatory coherence chapter. The HLWG report calls for the TAFTA to include a cross-cutting discipline on regulatory coherence "for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services."[26] In all probability, this

[21] U.S. Trade Representative, 2013 Report Technical Barriers to Trade, available at, http://www.ustr.gov/sites/default/files/2013%20TBT.pdf.

[22] The Congressional Research Service reports that:' The U.S. Government was actively engaged throughout the development of REACH. The Bush Administration expressed concerns about its trade implications for U.S.-produced chemicals. Specific concerns included, increased costs of and time lines for testing chemicals exported to the EU; placement of responsibility on businesses (as opposed to governments or consumers) to generate data, assess risks, and demonstrate the safety of chemicals; possible inconsistency with international rules for trade adopted by the World Trade Organization (WTO); and the effect of the legislation on efforts to improve the coherence of chemical regulatory approaches among countries in the Organization for Economic Cooperation and Development (OECD).Some U.S. chemical industry representatives believe that REACH is "impractical." Industry has expressed objections to the proposed list of "high concern" chemicals, some of which are essential building blocks for the manufacture of other chemicals." Linda-Jo Schierow, Chemical Regulation in the European Union: Registration, Evaluation, and Authorization of Chemicals, Congressional Research Service, March 1, 2012, p.3, available at,. http://www.fas.org/sgp/crs/row/RS22673.pdf

[23] USTR, 2013 Report TBT, supra, p. 62-64

[24] Lawrence Kogan, Is REACH a Trade Barrier? Chemical Watch, Global Business Briefing, December 2012-Janusry 2013, pp 20-21, available at. http://www.koganlawgroup.com/uploads/CW53_December12_Kogan.pdf; Lawrence Kogan, REACH Revisited: A Framework for Evaluating Whether a Non-Tariff Measure Has Matured into an Actionable Non-Tariff Trade Barrier, American University International Law Review, Vol. 28, No. 2, September, 2012, available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149756.

[25] The President's Cancer Panel Report, available at, http://www.saferchemicals.org/resources/presidents-cancer-panel.html

[26] HLWG, p.3.

recommendation by the HLWG contemplates something similar to the draft regulatory coherence chapter of the Trans Pacific Partnership agreement.

The leaked draft of the regulatory coherence chapter of the Trans Pacific Partnership trade agreement[27] encourages countries to conduct regulatory impact assessments when developing regulations, including environmental regulations, which have more than a minimal cost burden on business and the economy. The draft specifically encourages the use of cost-benefit analysis to determine the net benefit of environmental regulations.

In the view of Friends of the Earth, the cost of environmental and other government regulations should not be ignored, but it ought to be looked at with a wider perspective. And, seemingly definitive "ratios of benefit to costs" should be considered with balanced skepticism. Identifying and quantifying the costs of environmental regulation can be inflated by assumptions, analyst bias, and flaws in data gathering. Quantifying the benefits of environmental regulation can be difficult, for example, because public health data is not as comprehensively collected as economic data. Or, it can be impossible: an attempt to attribute a price to the intrinsic value of human life, living things and nature itself. In our view, cost-benefit analysis, in many circumstances, can be at odds with a fundamental principle of environmental regulation: application of the precautionary principle in the face of an immeasurable environmental risk and inescapably uncertain outcomes.[28]

An excellent example of an environmental issue involving uncertain outcomes -- that requires application of the precautionary principle, not cost-benefit analysis -- is regulation of synthetic biology. While genetic engineering involves the exchange of genes between species, synthetic biology involves artificially creating new genetic code and inserting it into organisms. Synthetic organisms self-replicate. No one knows how they will interact with naturally occurring organisms or the consequences for the ecosystem as a whole. Standard forms of risk assessment and cost-benefit analyses used by current biotechnology regulatory approaches are inadequate to guarantee protection of the public and the environment.[29]

Intellectual property chapter. Intellectual property issues, related to patents, trademarks, and copyrights, will be among the most technically complex under consideration in TAFTA negotiations. Friends of the Earth fears that U.S. negotiators will propose, as they have in Trans

[27] Available from Public Citizen at, http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf

[28] The Wingspread Consensus Statement on the Precautionary Principle is available at: http://www.sehn.org/wing.html.

[29] See a landmark report published by Friends of the Earth, the International Center for Technology Assessment, and the ETC group, The Principles for the Oversight of Synthetic Biology, available at http://libcloud.s3.amazonaws.com/93/ae/9/2287/1/Principles_for_the_oversight_of_synthetic_biology.pdf.

Pacific Partnership trade negotiations, IP chapter text that covers and protects patents on plants, animals, and other life forms.[30.]

Friends of the Earth supports a ban on gene patenting, including not only human genes but also all the genes that occur naturally on the planet. Gene patents are dangerous and unfair, in our view. They give corporations monopolies over the use of parts of the genetic code that have evolved naturally and are part of our common natural and human heritage.

Government procurement chapter. Procurement chapters in free trade agreements generally forbid local preferences in government purchasing and require market access for foreign bidders on public contracts. Although some environmental exceptions have been granted in recent U.S. agreements, there is a danger that TAFTA rules on government procurement will require that decisions about the award of public contracts must be almost exclusively based on product cost and performance, even when the contract bidding process is open to foreign firms.[31]

Friends of the Earth believes that green purchasing preferences should not be limited by government procurement rules based almost exclusively on product cost and performance or any other similar basis. For example, a TAFTA procurement chapter should allow governments to impose procurement rules that require products to be made with recycled or organic materials or meet energy efficiency standards. And, governments should be able to discriminate against products made with environmentally destructive methods. In addition, trade agreement prohibitions on "buy local" purchasing policies should not undercut government policies intended to encourage the growth of green industries, such as solar and other renewable energy ventures that provide green jobs to local workers who may be displaced by government policies disfavoring carbon intensive industries that contribute to global warming. Similarly, school lunch programs that favor healthy food produced by local farmers, rather than giant agribusiness, should not be endangered.

Chapter on trade in goods. Friends of the Earth is concerned about TAFTA provisions on trade in goods that may conflict with important areas of environmental policy, such as renewable energy, fossil fuel exports and water law.

- *Green energy trade wars.* In the past two years, we have witnessed an alarming rise in the number of international trade disputes related to renewable energy and climate policies, including a WTO Appellate Body ruling that the Ontario's "feed-in tariff" program for clean generation of electricity violates international trade law.[32] The WTO decision comes at a time when a trade war on solar energy policy is well under way. The United States has imposed a 31 percent tariff on solar panels imported from China, alleging violation of U.S.

[30] Available from Public Citizen at http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf.

[31] Harrison Institute for Public Law, 2012 Trade Policy Assessment, prepared for the Maine Citizen Trade Policy Commission, June,25, 2012, pp. v-vii, available at, http://www.maine.gov/legis/opla/CTPC2012finalassessment.pdf.

[32] World Trade Organization, Dispute DS 426, Canada – Measures Relating to Feed in Tariff Program, May 6, 2013, available at,. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds426_e.htm.

law on unfair subsidies and "dumping" of excess inventory on the U.S. market.[33] China has retaliated by threatening to impose tariffs on poly-silicon imported from the U.S. used to make solar energy products[34], and by bringing a World Trade Organization complaint against U.S. imposition of countervailing duties on a number of Chinese products, including solar panels. [35] Similarly, the U.S. has threatened a WTO suit challenging domestic content provisions in Indian renewable energy programs, and India has suggested the possibility of retaliatory suits challenging similar programs in U.S. states.[36]

This alarming trend of international trade disputes poses significant risks to global efforts to curb climate change. Trade tribunals that focus on theoretical free market efficiency are becoming the de facto forums for resolving international disputes over climate policy. Long delays and ambiguous results in trade litigation of this character can dry up both private and public investment in clean energy. Investors of both kinds need substantial certainty and stability in international trade rules before they commit the billions of dollars needed to build a green energy economy. Nor can delay be justified. The global atmosphere is warming rapidly.

Climate policy should not be decided by TAFTA, WTO or similar dispute resolution panels, based on trade law. The last thing we need is an expanded and long-lasting green energy trade war. Solar and other renewable energy products must be excluded from coverage under any TAFTA chapter on trade in goods and must not be incorporated by reference of WTO obligations on trade in goods. [37]

- *Fossil fuel exports.* A boom in oil, coal and natural gas exports is fueling climate change, but international trade and investment agreements generally treat these high carbon products the same as other goods. Friends of the Earth believes that TAFTA negotiators should steer a different course: one that leaves enough policy space for bold governmental action on fossil fuel exports by governments in future years.

[33] Keith Bradsher, Diane Campbell, "US Slaps High Tariff on Chinese Solar Panels, New York Times, May 17, 2012, available at, http://www.nytimes.com/2012/05/18/business/energy-environment/us-slaps-tariffs-on-chinese-solar-panels.html?pagewanted=all&_r=0.

[34] Ray Yu, Chinese Polysilicon Makers Come Back to an Uncertain future, Solar PV Investor News, April 23, 2013, available at http://solarpvinvestor.com/spvi-news/480-chinese-polysilicon-makers-come-back-to-uncertain-future

[35] WTO establishes panel to examine US countervailing duties against China, Global Times, September 29, 2012, available at http://www.globaltimes.cn/content/736060.shtml.

[36] Kavitha Rao, India's Grand Solar Plans threatened by Ugly U.S. Trade Spat, The Guardian, April 23, 2013, available at, http://www.globaltimes.cn/content/736060.shtml

[37] Comprehensive exclusions of coverage of climate measures and strongly worded exceptions for such measures should also be part of any transatlantic agreement.

As a result of environmentally-destructive hydraulic "fracking" and other new technologies, the fastest-growing natural gas and oil producer on the planet is now the United States.[38] U.S. energy companies are seeking new liquefied natural gas terminals for export to global markets,[39] where they can demand higher prices for LNG (a far more potent contributor to global warming than ordinary natural gas). As the U.S. dependence on coal slackens, the coal industry is attempting to export it abroad.[40] Meanwhile, Canada wants to transport tar sands oil through the Keystone XL pipeline to refineries in Texas and then ship it overseas where they can sell it far more profitably than in the United States.[41]

All of this is terrible news for an overheated planet. The ongoing expansion of international trade in these fossil fuels promises to sharply increase greenhouse gas emissions, potentially pushing global warming to a catastrophic tipping point. Friends of the Earth believes that swift and strong action is necessary to mitigate the worst impacts of climate change, including rising seas, melting ice, superstorms and crippling drought. This will require an end to the "all of the above" energy policy of the United States and more regulation of fossil fuel exports. Currently, fossil fuel export regulation in the U.S. is limited to oversight of natural gas exports -- and even those provisions of the Natural Gas Act do not apply to countries with which the United States has a free trade agreement.[42]

Unfortunately, TAFTA provisions on market access and trade in goods, if modeled on the WTO General Agreement on Tariffs and Trade, might unnecessarily chill future legislative action on fossil fuel exports, if the claims of some industry lobbyists are accepted. Some apologists for fossil fuels argue that GATT article XI:1 on "General Elimination of

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[38] International Energy Agency, World Energy Outlook 2012, available at, http://www.iea.org/publications/freepublications/publication/English.pdf; Mark Mills, Unleashing the North American Energy Colossus, Manhattan Institute, July 2012, available at http://www.manhattan-institute.org/html/pgi_01.htm.

[39] U.S. Department of Energy, Applications Received by DOE/FE to Export Domestically Produced LNG, available at, http://www.fossil.energy.gov/programs/gasregulation/reports/summary_lng_applications.pdf.

[40] Thomas K. Grose, "As U.S. Cleans Its Energy Mix, It Ships Coal Problems Abroad," National Geographic News, March 15, 2013, available at, http://news.nationalgeographic.com/news/energy/2013/03/130315-us-coal-exports/.

[41] Oil Change International. Exporting Energy Security: Keystone XL Exposed.September 2011. pp. 7-9. http://dirtyoilsands.org/files/OCIKeystoneXLExport-Fin.pdf.;Natural Resources Defense Council, The Keystone XL tar sands pipeline will hurt not help job creation in America." available at http://www.nrdc.org/energy/files/keystonejobs-4pgr.pdf.

[42] 15 U.S.C. 717b(c); Note that the Natural Gas Act requires natural gas exporters to get a permit from the Energy Department. The Act further provides that DOE must approve an application for a permit to export natural gas to countries with which the U.S. does not have a free trade agreement, unless there is a finding that it would be inconsistent with the "public interest." The department also is authorized to attach terms and conditions to the export permit, which it finds are appropriate to protect "the public interest." A number of factors are considered in the DOE public interest review including environmental considerations.

Quantitative Restrictions" prohibits restrictions on the export of products[43], including fossil fuels, to another WTO member, other than duties, taxes or other charges.[44]

Friends of the Earth, therefore, recommends that TAFTA negotiators reject any incorporation of GATT Article XI: 1 on export controls into the U.S.-E.U. agreement: directly, by reference, or by implication. In light of approaching climate calamity, democratic institutions must have the "policy space" to act in the future, without the article's chilling effect. Ideally, it would be useful to exclude fossil fuels from the definition of a good or product altogether, to ensure they are not covered and subjected to export control obligations. Also as noted above, a general exception for climate, environmental, natural resources and public health measures must apply to TAFTA chapters and certainly to any chapter or provision related to trade in goods or market access. Finally, this general environmental exception must be drafted in more clear and certain terms than GATT article XX.[45]

- *Water*. Freshwater resources are in danger. Reckless industrial pollution, corporate agricultural practices, global warming, and commercial exploitation are degrading the quality and availability of fresh water. The time for treating water as an abundant and endlessly available resource is long past. Some international water firms and investors recognize this, but rather than calling for water to be managed as a common resource, they aspire to take ownership of water resources and turn water into a tradable commodity, perhaps on a very large scale in future years. Peter Brabeck, the former CEO of Nestle, has stated bluntly that access to water should not be a public right.[46]

[43] This claim, of course, may overlook GATT article XX, which provides an exception to the overall agreement on trade in products "**necessary** to protect human, animal or plant life or health" and "related to conservation of exhaustible natural resources" (provided that they are linked to domestic resource conservation measures). Article XX is not as strongly worded as a should be, but if there were ever a measure that falls under the exception, it ought to be a climate change measure, such as a control on fossil fuel exports. The very survival of the life on the planet as we know it is at stake. Certainly, such export controls are not disguised protectionist measures. Friends of the Earth, nonetheless, believes that if the TAFTA incorporates all or part of the GATT Article XI:1 even indirectly, by implication, or by reference, then the article XX "necessity" test might be unnecessarily hard to meet, especially as interpreted by an unsympathetic dispute resolution panel. Alternative regulatory schemes for addressing the climate crisis in less burdensome ways for international trade can always be hypothesized. A necessity test, also, inappropriately reverses the deference that domestic courts give to economic regulations. The "related to conservation" test could also be problematic. In addition, the "chapeau" or introductory clause of Article XX requires that application of a measure, such as a fossil fuel export regulation, must not be a **"means of arbitrary or unjustifiable discrimination**." The term "unjustifiable" is vague and subjective.

[44] Article XI: 1 of the WTO General Agreement on Tariffs and Trade (General elimination of quantitative restrictions), available from the WTO at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_05_e.htm.

[45] Although beyond the jurisdiction of the U.S. Trade Representative's office, Friends of the Earth also recommends that Congress amend the Natural Gas Act so that LNG export regulations apply when exporting to a country with which the U.S. has a trade agreement.

[46] Robyn Pennacchia, "Nestle CEO: 'Access to water should not be a public right," available at, http://www.deathandtaxesmag.com/197822/nestle-ceo-access-to-water-should-not-be-a-public-right/

The threat of widespread commoditization of water should not be dismissed as theoretical. Massive international trade and transport of bulk water on the model of the oil transport and distribution system is admittedly a long-term prospect, not a current, large scale reality in most places. In decades to come, however, as water shortages increase and conditions of absolute water scarcity expand in more places around the globe, multinational corporations will have a huge incentive to control the supply of fresh water and build a global transportation network for its distribution (at their asking price).

Now is the time to firmly establish in the text of TAFTA and in international law on trade in goods generally that water is part of the public commons. Bulk water should not be considered a good or product subject TAFTA or any other trade agreement provisions on trade in goods.[47]

In sum, it is essential that nations that are parties to TAFTA negotiations retain authority to adopt water policy measures that:

- Protect the public health and the environment;
- Ensure sustainable supplies of water at a fair price for individual consumption and commercial use;
- Regulate or prohibit groundwater extraction for export to internal and international markets;
- Keep water in the public domain to preserve the right of access to water; and
- Stop any attempt by international corporate and financial interests to turn water into a mere commodity owned by investors and traded on international markets.

TAFTA is about so much more than trade

A key reason why TAFTA has significant environmental implications is the changing nature of trade agreements. Prior to 1994, trade agreements dealt primarily with issues of discrimination against foreign imports in the form of tariffs, quotas, customs duties and other "at the border" measures. And like most international agreements, they were enforced primarily by diplomatic suasion.

The post-1994 agreements, starting with the NAFTA and WTO agreements up to and including TAFTA deal not only with "at the border" discrimination, but also impose rules related to government regulation, taxation, purchasing, and economic development policies that are

[47] In the same way, TAFTA chapters on services and investment should reflect the principles that water is part of the public commons and that access to water is a human right. With respect to a TAFTA services chapter, the omission of any exception for natural resources and water in particular in the WTO General Agreement Trade in Services should not be replicated. And, the lack of a strong environmental, natural resources, and water exception in the U.S. model investment agreement should be avoided at all costs. Indeed, water services, water transport services, and sanitation are so essential to human survival and the health of ecosystems that they should be excluded altogether by definition, reservation, or schedule of commitments from coverage under TAFTA services and investment chapters.

regarded as potential non-tariff barriers to trade by the drafters of the agreements. These rules related to non-tariff barriers to trade seek to encourage international commerce by promoting deregulation, expansion of property rights, and principles of what might be described as market fundamentalism. In other words, the agreements regulate governments -- based on the assumption that government stands in the way of global prosperity that will result from relatively unfettered markets and capital accumulation. Plus, violations of post 1994 agreements are enforceable by sanctions such as higher tariffs or money damages in investment cases.

In the coming months and years of negotiations, the United States is expected to push for a TAFTA deal that not only integrates the trade policies of Atlantic nations, but also deregulate their economies. The U.S. negotiating agenda, with its laissez-faire approach, would limit the role of governments in environmental protection. The question is whether this is what the public wants.

One step towards answering this question would be for negotiators to release the negotiating text of TAFTA as it develops. In that way, the public, in the United States and Europe, could make an informed judgment.

Contact: Bill Waren, Trade Policy Analyst, Friends of the Earth, wwaren@foe.org

July 2, 2013

TOP NEWS

After long buildup, U.S.-EU free trade talks finally begin

Mon, Jul 08 00:59 AM EDT

* World's biggest trading partners aim for deal by end of 2014

* Pact could boost U.S., EU GDP by more than $100 bln/year

* Long-running Boeing-Airbus spat lurks in background

* NSA revelations are poorly timed

By Doug Palmer

WASHINGTON, July 8 (Reuters) - The United States and the European Union, after nearly two years of preparation, start talks on Monday aimed at securing a free-trade agreement to squeeze new economic growth out of the world's largest trade and investment relationship.

"We go into these negotiations with the goal of achieving the broadest possible, most comprehensive agreement that we can," U.S. Trade Representative Mike Froman told Reuters.

But in the months since President Barack Obama and European leaders announced a decision to pursue a landmark trade deal, revelations about U.S. government surveillance of phone and Internet records have cast a shadow over the start of talks.

Charges that Washington was spying on the 28-nation EU soured the atmosphere further, with France suggesting the opening round be delayed for two weeks before softening its stance so talks could proceed.

The United States and the European Union are already each other's top trade and investment partners, with two-way trade that totaled more than $646 billion last year.

The proposed Transatlantic Trade and Investment Partnership pact would be the world's biggest free-trade deal, covering about 50 percent of global economic output, 30 percent of global trade and 20 percent of global foreign direct investment.

The Centre for Economic Policy Research in London has estimated an ambitious agreement that eliminates tariffs and reduces regulatory barriers, once fully implemented, could boost U.S. and EU economic growth by more than $100 billion a year.

ONE TANK OF GAS

This week's talks, led by Assistant U.S. Trade Representative Dan Mullaney and his EU counterpart, Ignacio Garcia Bercero, are expected to be mainly organizational, with negotiators split up into 15 different groups to deal with issues ranging from agricultural market access to electronic commerce to investment and competition policy.

One big EU interest is getting exemptions from U.S. "Buy American" requirements on public works projects, while the United States wants the EU to reduce barriers to genetically modified crops that have frustrated U.S. farmers for years.

Former EU Trade Commissioner Leon Brittan called for a U.S.-EU free trade agreement in 1995, but it took the rise of China, the death of world trade talks and the havoc of the global financial crisis to make the time finally right.

Even then, the two sides have tiptoed up to the talks. A high-level working group examined the issue for more than a year before releasing its recommendation in February for negotiations on a comprehensive trade and investment agreement.

U.S. officials, chastened by a decade of fruitless negotiations in the Doha round of world trade talks, said they wanted to be certain of reaching a deal, and reaching it quickly, before launching talks with the EU.

"If we're going to go down this road, we want to get it on one tank of gas," Froman said earlier this year when he was Obama's international economic affairs adviser. "We don't want to spend 10 years negotiating what are well-known issues and not reach a result."

For now, one tank of gas for both sides means reaching a deal before the current European Commission, the executive branch of the EU, finishes its term at the end of 2014.

SENSITIVITIES

But many trade experts believe the talks could stretch into 2015, requiring at least one refill along the way.

Since tariffs across the Atlantic are relatively low, much of the negotiations will be focused on reducing and preventing regulatory barriers to trade in areas ranging from agriculture and autos to chemicals and pharmaceuticals.

"There are sensitivities on both sides that will have to be addressed. But we think the prospect of a broad and comprehensive agreement gives us our best opportunity for achieving something that has eluded us before," Froman said.

U.S. companies such as Google Inc and Facebook Inc also want Washington to tackle EU privacy and data protection rules that put them at a disadvantage in the EU market for cloud computing, social media, mobile apps and other Internet services.

But that goal has been complicated by the revelation that the U.S. National Security Agency uses customer data from many Internet companies to identify potential threats to the United States.

"It's made a difficult negotiating issue even harder," although the gains from a potential overall agreement are so big that they still favor the two sides reaching a deal, said Jeffrey Schott, a senior fellow at the Peterson Institute for International Economics, a Washington think tank.

Meanwhile, lurking in the background of the talks is the world's largest trade dispute over billions of dollars in subsidies for U.S. aircraft manufacturer Boeing Co and its EU rival, Airbus, which is continuing to grind its way through the World Trade Organization dispute settlement system.

Schott said the two sides should move quickly to settle that dispute "out of court," rather than continue to fight it out at the World Trade Organization. Otherwise the United States and the EU could find themselves slapping retaliatory duties on each other's goods at the same time they are negotiating to eliminate tariffs and other trade barriers across the Atlantic, he said.

Bloomberg

Treaty Disputes Roiled by Bias Charges

By Andrew Martin - Jul 10, 2013 3:02 PM ET

When Swiss law professor Gabrielle Kaufmann-Kohler joined the board of UBS AG, she was sitting on international tribunals judging whether Vivendi Universal SA and another company whose shares UBS held were entitled to damages from Argentina in investment disputes.

After Argentina learned about her UBS role in 2007, it sought to have Kaufmann-Kohler removed from the tribunals and to overturn a $105 million judgment in favor of Vivendi, the French media company. She was one of three arbitrators in the cases.

World Bank rules say an arbitrator must be “relied upon to exercise independent judgment,” and those issued by the UN say arbitrators should disclose circumstances that might “give rise to justifiable doubts” about their impartiality or independence.

Pedestrians walk by the World Bank headquarters in Washington, D.C. World Bank rules say an arbitrator must be “relied upon to exercise independent judgment,” and those issued by the UN say arbitrators should disclose circumstances that might “give rise to justifiable doubts” about their impartiality or independence. Photographer: Brendan Smialowski/AFP via Getty Images

Argentina’s efforts failed. That’s not unusual in treaty-based investor-state disputes, which are settled by arbitrators governed by rules that critics say are too tolerant of potential bias and make challenging arbitrators too difficult.

Kaufmann-Kohler declined to comment. She said at the time that she wasn’t aware of any conflicts and wouldn’t allow her UBS directorship to affect her impartiality. She still sits on arbitration panels that are weighing damages against Argentina, and is no longer on the UBS board.

Concerns about objectivity and accountability have prompted calls for tougher ethical guidelines as caseloads have exploded. The stakes are high, with some claims asking for more than $1 billion and some attacking sovereign nations' laws and policies, even court decisions.

"It is undeniable that the typical conditions that assure impartiality in the judicial sphere are lacking in arbitration," said Sundaresh Menon, then Singapore's attorney general and now its chief justice, in a speech last year.

Power 'Unprecedented'

Arbitrators can keep their day jobs, even as lawyers in the kinds of cases they referee. Some write papers with opinions on issues similar to those on which they pass judgment.

"The power they have over the purse strings of countries is unprecedented," said Gus Van Harten, an associate professor at Osgoode Hall Law School in Toronto who recommends a court with tenured jurists be created to erase "lingering blemishes" left by the questions raised about arbitrators' independence. "They are kind of like the supreme court judges of the world."

The disputes they resolve rise out of clauses in treaties that allow foreign investors to challenge government actions affecting their interests. The original idea was chiefly to give a company recourse if its assets were nationalized.

Now the clauses are being interpreted to challenge public policy, including Germany's ban on nuclear power, Australia's attempts to limit smoking and Canada's process for upholding drug patents. A company controlled by U.S. billionaire Ira Rennert is demanding $800 million from Peru over what it claims are onerous demands to clean up pollution from a smelter complex in a town where children have elevated lead levels. Rennert's company has said it isn't responsible for their ailments.

Superior System

Arbitrators have been coming under scrutiny as the treaty-based disputes have rapidly grown. The first case was in 1987, and for the next 12 years the average number brought

annually was three. A record 62 publicly disclosed actions were filed last year, bringing the total to 480 since 2000, according to the United Nations Commission on Trade and Development.

Treaty based investor-state arbitration has backers around the world. A majority of the 3,000-plus investment pacts contain arbitration clauses. Supporters, including the administration of U.S. President Barack Obama, portray it as superior to the old way of settling differences: relying on local courts or diplomats to hash it out.

The arbitrations could continue to multiply, as the U.S. is negotiating trade pacts with the European Union and Pacific Rim countries that are expected to include the clause.

Disclosing Conflicts

Investors won 70 percent of known cases last year, according to the UN. Since 1987, states have won 42 percent of the time, and investors 31 percent, with the rest settled.

Today most of the disputes are considered by three-member tribunals under procedural rules issued by the World Bank or UN, according to Luke Eric Peterson, publisher of the Investment Arbitration Reporter. While the World Bank makes some information about cases public, most forums, including those governed by UN rules, leave it up to the parties to decide whether to disclose details, he said.

The warring sides pay the arbitrators -- who can earn $3,000 a day or more, plus expenses -- and each picks one. The third, who chairs the tribunal, is selected by mutual agreement or an independent party.

There's no one code for all tribunals. World Bank rules say an arbitrator must be "relied upon to exercise independent judgment," and those issued by the UN say arbitrators should disclose circumstances that might "give rise to justifiable doubts" about their impartiality or independence.

Exclusive Club

The requirements aren't exacting or demanding enough, according to Van Harten, the law professor. "There's too much riding on the individual sense of integrity, he said. "We need institutional safeguards like we have in courts."

Hundreds of arbitrators are available for hire around the world, some of them academics and former government officials, most of them lawyers in private practice. For critics, the exclusivity of that club is one of the main shortcomings.

Just 15 people -- all but one from the U.S., Canada or Western Europe -- have served on 55 percent of known investor-state tribunals, according to a November 2012 report by two nonprofits, the Brussels-based Corporate Europe Observatory and the Transnational Institute in Amsterdam. The report called arbitrators "the epitome of a close-knit community."

While only 6 percent of cases adjudicated to date under World Bank rules have been against countries in Western Europe and North America, about 68 percent of panel members came from those regions, according to data from the bank's International Center for Settlement of Investment Disputes. About three quarters of those cases were treaty based investor-state disputes, and the rest were over laws or contracts.

Lawyers' Ties

Guido Santiago Tawil, a Buenos Aires lawyer who had worked for years with attorneys at U.S. law firm King & Spalding LLP, was picked by one of the firm's clients in 2010 to sit on a tribunal to decide whether Venezuela should pay the client for property the government seized from it.

Venezuela's lawyers objected to Tawil's selection by Universal Compression International Holdings, a Spanish subsidiary of U.S. oil and gas services supplier Exterran Holdings Inc. (EXH) They said that Tawil had recently worked with King & Spalding as co-counsel on two major cases. They questioned whether he could be impartial because of his ties to the U.S. firm, noting that one of the attorneys arguing for the company used to work for him. None of it disqualified Tawil.

Two Hats

Universal Compression had brought the case after Venezuela expropriated foreign energy assets in a drive to bring the economy under state control. The case was suspended last year after Venezuela agreed to compensate the company.

Tawil said in an e-mail that the objection to his serving on the panel didn't have any grounds. He declined to elaborate.

What many critics -- and some arbitrators -- zero in on is that they may wear two hats, as lawyers arguing cases and as tribunal panelists deciding them.

"Has one ever seen a referee in a soccer game entering the playing field" as a member of one of the teams, asked Brigitte Stern, a French law professor, in a recent issue of the Arbitration Trends newsletter. "This problem has not yet been seriously dealt with by the investment arbitration community."

Stern's neutrality has been questioned as well, after Venezuela selected her as an arbitrator in the Universal Compression complaint.

Not Compatible

Even as Venezuela sought to disqualify Tawil, the company objected to Stern because the country had picked her as an arbitrator in three other previous cases; Venezuela had won two of them, with the third not yet resolved. The challenge was rejected. Stern didn't respond to requests for comment.

Even as it ruled against Argentina's attempt to unseat Kaufmann-Kohler because of ties to UBS, a committee appointed by the World Bank's International Center for Settlement of Investment Disputes mentioned the conflict created by arbitrators' varying roles.

"The positions of a director of such a bank, and that of an international arbitrator, may not be compatible," the ruling said.

Argentina tried to remove Kaufmann-Kohler from other tribunals as well as the Vivendi case; she wasn't disqualified in either. The companies prevailed, with Argentina ordered to pay more than $200 million in one; damages haven't been assessed yet in two others.

‘Idiotic’ Criticism

U.S. lawyer Stephen M. Schwebel was a co-counsel for Vivendi in its Argentina complaint -- which was being adjudicated at the same time as an action Dutch insurer Eureko BV filed against Poland in which Schwebel was an arbitrator.

Both countries challenged his neutrality: He co-authored a decision in favor of Eureko and against Poland while he was working for Vivendi, and then cited the decision to bolster his arguments for Vivendi in its case against Argentina.

Schwebel, former president of the UN’s International Court of Justice, said attacks on the investor-state arbitration system are being driven by anti-business academics and activists, and that most conflict-of-interest allegations are “flimsy or tactical.” He called those lodged against him, which weren’t successful, “defamatory and idiotic.”

The decision he helped write in granting Eureko an award against Poland “was in the public domain” and one of dozens of arbitral rulings mentioned in pleadings, Schwebel said. “I would have been lax in not citing the award.”

‘Problematic’ Proceedings

According to World Bank data, of 63 proposals to disqualify arbitrators to date, one has been upheld; 42 were rejected, and in 16 instances the arbitrators resigned before rulings were made. Two were withdrawn and two haven’t been decided.

In cases heard under World Bank rules, the two others on the panel usually determine whether objections about a colleague have merit. That’s “problematic” because “not only do they know each other from that proceeding, but because it’s a small club, they also know each other from the other proceedings they have done together,” said Karel Daele, a London-based arbitration attorney who wrote a 2012 book on challenges.

Daele recommends that a third party, rather than two arbitrators, decide whether a challenge is valid. That’s how it works under UN rule and at the International Chamber of Commerce’s International Court of Arbitration, where Daele said objections tend to have a higher success rate.

In arbitrations carried out under UN rules, the suitability of at least 21 arbitrators has been challenged to date, with six disqualified and three others agreeing to end their conflicts so they could remain on the tribunal, according to Daele, who compiled the statistics.

Peterson, the arbitration newsletter publisher, said governments that include investor-state arbitration in treaties could force higher ethical standards.

“Self-policing and peer review are not enough to eliminate some of the key ethical problems,” he said.

FYI, from IUST. Letter from environment organizations here: http://www.sierraclub.org/trade/downloads/NGO-Letter-Ambassador-Kirk-TPP.pdf

Environmental Groups Urge USTR To Not Back Down From TPP Proposal

Posted: July 11, 2013
Ahead of the 18th round of Trans-Pacific Partnership (TPP) negotiations that kicks off next week in Malaysia, eight U.S. environmental groups are urging U.S. Trade Representative Michael Froman to ensure that the United States does not back down from its wide-ranging environmental proposals in TPP even as it faces strong opposition from other countries participating in the talks.

The groups conveyed that message in a July 11 letter to Froman that largely mirrored one they sent in August 2012 to then-USTR Ron Kirk. The new letter was sent after USTR officials held a briefing last week with environmental groups to update them on the status of the TPP environment negotiations, although sources said the officials provided few details other than saying they continue to make progress in this challenging area of the talks.

Even in private briefings with stakeholders, U.S. negotiators have provided little information on the status of the more controversial sections of the U.S. environment proposal. These include the core commitments for countries to enforce their environmental laws and uphold their commitments under multilateral environmental agreements (MEAs); binding provisions on the conservation of plants and wildlife; and the U.S. demand that the environment chapter be subject to the normal TPP dispute settlement mechanism.

A USTR official said TPP countries continue to discuss the more controversial environment issues alongside other ones, and "are making progress." USTR is aiming to reach agreement on as much of the environment text as possible at the upcoming Malaysia round, according to the official, who added that this is the goal for every round.

This official said the environmental group has been engaged in work in between the May TPP round and the upcoming Malaysia round. This work has been conducted in various configurations, including "small groups of partners focused on specific issues of interest," the official said. There have been a combination of teleconference and in-person meetings, according to the official.

U.S. officials have told environmental groups that countries made progress at the last round of TPP talks in Peru on less controversial, procedural elements of the environment chapter, which include institutional arrangements and so-called voluntary market mechanisms, according to one informed source.

Voluntary market mechanisms, which have been included in past U.S. free trade agreements, refer to mechanisms put in place by governments that facilitate voluntary action to protect the environment, including through business partnerships and market-based incentives to encourage conservation and other environmental goals.

In the past, TPP countries have focused on less controversial issues in the environment chapter in the hope that this would move the overall talks forward. Earlier this year, the U.S. worked with Chile and Peru to combine separate proposals laying out a framework for how TPP countries should cooperate on environmental conservation issues moving forward (*Inside U.S. Trade*, Jan. 25).

But on the most controversial issues, there are signs that the talks may get even harder rather than easier. Japan, for instance, will formally enter the TPP negotiations in the final days of the Malaysia round, and environmental groups like Oceana are worried that Tokyo may oppose the push by the U.S. and some other TPP countries for disciplines on fisheries subsidies.

Oceana has raised this issue with U.S. negotiators in the wake of a June press report by Japan's Kyodo News Agency, which cited unnamed government officials as saying that Tokyo would oppose a ban on fisheries subsidies in TPP, or at least work to ensure that such a ban is limited to subsidies that would unquestionably lead to overfishing.

The U.S. proposal in TPP would place disciplines on fisheries subsidies that contribute to overcapacity and overfishing. The USTR official said the agency is aware of these Japanese press reports, but declined to comment further other than saying that the U.S. looks forward to "working with Japan on this and other issues when they formally join the negotiations."

In their July 11 letter, the environmental groups urged Froman "to oppose efforts to weaken environmental objectives" in TPP. They said that while they appreciate the ambitious, binding and enforceable

environment chapter put forth by the U.S., they understand that “large gaps still remain between the U.S. position and that of other TPP partners.”

The letter to Froman, like the one sent last year to Kirk, urged USTR to "stand strong and ensure" that a final TPP agreement includes the four key elements of the U.S. environment proposal. Among these are that the chapter be subject to the same dispute settlement mechanism as commercial chapter; include commitments for countries to uphold their domestic environmental laws and obligations under MEAs; and have robust public participation provisions.

The fourth element of the U.S. proposal that the environmental groups want to see maintained in a final TPP deal is binding conservation provisions, including fisheries subsidies disciplines and a requirement for countries to ban trade in illegally obtained plants and wildlife.

NEW: TTIP FAQ: the negotiation phase – events, updates, key positions and docs

21.06.2013**Posted in:** Blog, EUROPA, International Trade, Policy Map, Timeline, Top Stories, US Delegation

TTIP FAQ – Negotiation phase

(Transatlantic Trade and Investment Partnership)

- Latest update: 12 July 2013 -

- The pre-negotiation phase TTIP FAQ can be accessed here -

1. Upcoming meetings and events

- **On 16 July 2013** the European Commission hosts an "ad hoc meeting" to update on the Transatlantic and Investment Partnership – First Negotiation Round.
- **On 18 July 2013** a hearing on the US President's Trade Policy Agenda is scheduled by the House Ways and Means Committee, this hearing might give more info on preparations for Trade Promotion Authority (TPA).
- **On 4 September 2013** the US Monitoring Group of the International Trade Committee of the European Parliament will meet with Commission negotiators to reflect on the first negotiation round that took place from 8-11 July in Washington DC. This meeting is not open for the public.
- On **26 September 2013** the US Congress International Trade Committee (US ITC) is expected to deliver its impact assessments.
- A second negotiation round is envisaged for **mid-October 2013** in Brussels, a third round is expected to be held in December 2013 in Washington DC.
- The US ITC will also investigate and produce a **report on trade-related barriers that US small-and-medium enterprises perceive as disproportionally affecting their exports to the EU**; this report should be prepared **by January 2014**.

2. Past meetings and events

- From **8 to 11 July 2013 in Washington DC** US and EU negotiators met for the first round of formal negotiations. The first round was likely to focus on the framework of the negotiations and the scope of TTIP.
- On **25 June in Brussels**, the European Commission informed the 'US Monitoring Group' about the upcoming round of negotiations. This group was set up specifically to deal with TTIP and consists of delegates from the International Trade Committee ("**INTA"**) of the European Parliament. The meeting was not open to the public. The Commission will report on the first round of negotiations at the beginning of September. INTA will receive

all the documents that the member states receive. In this way, the Parliament will remain involved and informed.

3. First negotiation round: 8-11 July, Washington DC

- EU and US negotiators met in Washington DC from **8-11 July**. A joint press release was issued on the first day. The opening remarks by the United States Trade Representative (USTR), Mr. Michael Froman can be read here. A joint USTR, Commission update was published on **10 July**. A joint press conference took place on **12 July** (link).
- According to the Lithuanian Presidency of the European Council 24 working groups have been established to streamline the negotiations. So far the names of the negotiating team of the EU have not been published, it is expected these will be disclosed in the coming days. USTR has already published a list of lead negotiators.
- Negotiators discussed the following topics on **8 July**: investment, government procurement, cross-border services, textiles, rules of origin, energy and raw materials and legal issues (source: USTR).
- Negotiators discussed the following topics on **9 July**: sanitary and phytosanitary (SPS) measures, market access and industrial goods, government procurement, cross-border services, investment, and energy and raw materials. The negotiating groups on labor and environment also will hold a joint session (source: USTR).
- Negotiators have met several times to discuss investments (daily), labor and SPS measures.
- According to negotiators the talks so far have been of a technical nature, in terms of exchanging factual information, common practices on each side and how to streamline the negotiating process.
- Both U.S. Trade Representative Michael Froman and Trade Commissioner Karel De Gucht will stay closely involved, while giving the negotiators space to do their job.
- According to trade info portal insidetrade.com talks on detailed matters such as how to schedule trade liberalization commitments were also included. On services for example the US favors the "negative list" approach while the EU favors the "positive lists" approach, explicitly stating which areas are included in a final deal.
- Regulators from US sides were involved in the talks: Food and Drug Administration, the Environmental Protection Agency, the Federal Telecommunications Commission and the Department of Transportation (source: insidestrade.com), from the EU side the DG's Health and Consumers, Agriculture and Rural Development, Internal Market and Services, and Enterprises and Industry took part in the talks.
- On **10 July** an open stakeholder meeting was organized by USTR, attended by both the EU and US top negotiators.

4. State of play

The first phase – or 'pre-negotiation phase' is concluded with the granting of a negotiating mandate by the European Member States to the European Commission, and by the **expiration of the 90-day consultation period** (on 18 June 2013) of the US Congress after the Obama administration formally notified it of its intend to engage in trade negotiations with the EU. The second phase – or 'negotiation phase' is about to start with the first talks on July 8th in

Washington DC. The US side is not yet allowed to hold 'market access' discussion until the US International Trade Committee ("**ITC**") publishes its impact investigation (upon request of the United States Trade Representative ("**USTR"**), the US negotiator) on **26 September 2013.**

The European Commission, as the exclusive negotiator for the European Union, has a binding **obligation to duly inform the European Parliament** before and after the negotiation rounds and will also share the final negotiating mandate with the INTA committee and other key documents, provided that the EU's strategic position will not be undermined.

In the US the White House has indicated it intends to request so-called "Trade Promotion Authority" ("**TPA"**) or "Fast Track", from the US Congress (where the House Ways and Means Committee is in the lead), by which the Congress agrees to a simplified consideration procedure for the negotiated trade deal, meaning that no amendments can be made and it has a limited amount of time to approve or reject the agreement.

5. Key figures/data

Data: CEPR

- Total bilateral trade in goods between the EU and US in 2011 amounted to €455 billion, with a positive balance for the EU of just over €72 billion.
- The US was the EU's third largest supplier, selling it €192 billion of goods (representing around 11% of total EU imports) and the EU's main export market, buying €264 billion of EU goods (representing around 17% of total EU exports).
- Top sectors for trade in goods for the EU were machinery and transport equipment (some €71 billion of imports and €104 billion of exports), followed by chemicals (roughly €41 billion of imports and €62 billion of exports).
- In 2011 trade in commercial services was worth €282.3 billion (according to the latest available figures from Eurostat) with a positive balance for the EU of €5.5 billion.
- The US was the EU's top partner for trade in commercial services, with its imports reaching €138.4 billion (around 29% of total EU imports) and its exports €143.9 billion (around 24% of total EU exports).
- In total, the commercial exchanges of goods and services across the Atlantic average almost €2 billion per day.
- In 2008 around 5 million jobs across the EU were supported by exports of goods and services to the US market.
- In 2011, US companies invested around €150 billion in the EU and EU firms some €123 billion in the US. In the same year, the US stock of investments in the EU reached over €1.3 trillion and the total of EU stock of investments in US over €1.4 trillion.

An ambitious and comprehensive TTIP could generate 119 billion Euros in economic gains for the EU as a whole every year. This translates on average to 545 Euros of disposable income each year for a family of four in the EU. A Comprehensive TTIP would also structurally increase salaries for both skilled and unskilled workers by 0.5% on average. Aside from wages, the agreement would also stimulate the growth of jobs due to the increased output in most industry sectors.

The TTIP would boost exports in almost all sectors, but would be especially beneficial to certain sectors in both the EU and the US. In the motor vehicles sector, EU imports are expected to go up by 42% and exports by 43%. EU exports of motor vehicles to the US would increase by 149%. Other EU sectors that have a lot to gain from the TTIP by increased sales to the rest of the world would be the metal products (+12%), processed foods (+9%), chemicals (+9%), other manufactured goods (+6%) and other transport equipment (+6) sectors.

6. Transparency

Based on **Article 207 (3) and Article 208 of the Treaty on the Functioning of the European Union** ("**TFEU**") the European Parliament has to give its consent to any international agreement, including trade agreements, before these can enter into force. While the Parliament is not officially engaged in the negotiations with the US the European Commission has a binding obligation to fully inform the Parliaments about the progress and process of the negotiations (before and after each negotiation round). The Parliament has made it very clear in its two resolutions of October 2012 and May 2013 that **maximum transparency** and involvement of all stakeholders is required in orde to build trust and legitimacy of both the negotiations and the outcome:

"*Recalls the need for proactive outreach and continuous and transparent engagement by the Commission with a wide range of stakeholders, including business, environmental, agricultural, consumer, labour and other representatives, throughout the negotiation process, in order to ensure fact-based discussions, build trust in the negotiations, obtain proportionate input from various sides, and foster public support by taking stakeholders' concerns into consideration; encourages all stakeholders to actively participate and to put forward initiatives and information relevant to the negotiations*;"

7. Bottlenecks

SPS measures, food & product safety regulation

Both the EU and the US have high standards for food and product safety regulation. The EU treaty includes the so-called **'precautionary principle'** (Art. 191 TFEU) that seeks to enable a rapid response by authorities in case of a direct danger to human, animal or pant health, or to protect the environment. The principle leads to preventive decision-making ('better safe than sorry') in the case of risk, which means that certain products are not allowed to be exported to the EU. The EU can invoke the principle if a scientific "evaluation does not allow the risk to be determined with sufficient certainty", and puts the burden of proof on the manufacturer of the product to show there is no danger. The EU has invoked the precautionary principle to ban the import of US hormone-treated beef. Other areas of concern are chlorine-washed chicken, cherries, molluscan shellfish, tallow, raw milk and genetically modified/engineered crops (GMO/GE). High levels of consumer protection and current practices will make it difficult for both sides to compromise or adapt standards on these highly sensitive issues.

Public procurement

The EU and the US (except for 13 of the 50 individual States) have both signed up to the revised Agreement on Government Procurement ("**GPA**"), currently being implemented. The GPA rules and coverage will be the baseline for the procurement chapter in TTIP. Public procurement in the US is not a competence of the Federal Government, which cannot bind public procurement markets of the individual States. This is a concern for the EU which has a major interest in the opening up of US State procurement markets and wants TTIP to be **binding on all levels of government**. The EU is specifically worried about existing "Buy America (n) clauses which excludes EU companies from tendering. The US also maintains a preferential regime for national SME's (Small and Medium seize Enterprises). Under the revised GPA commitments (yet to be implemented) only 32% (178 bln. EUR) of the US procurement market is open for EU businesses (source: EC estimates). The new GPA has not changed the current commitments of the US at state level, with the coverage in the 37 States varying but excluding the procurement of cities, municipalities (in charge of procurement in the domain of utilities). The EU's public procurement market is de jure open.

Air and maritime transport

While it is impossible for EU airlines to hold more than 25% of an US carrier and the US cabotage market is totally closed to EU business both in air and maritime transport, the reverse does not hold for the EU. This has serious negative effects also on the EU express and courier services industry. Many of the additional regulatory barriers stakeholders brought to the attention of the Commission are on the US sub-federal (i.e. state) level. For the maritime sector the US Jones Act establishes the biggest barrier. **The Jones Act** (formally The U.S. Merchant Marine Act 1920) is a 1920 law that protects the U.S. maritime industry from competition. It also raises costs for many other industries, keeps foreign ships from helping when disasters like the BP oil spill strike. The Jones Act requires all waterborne shipping between US ports to be carried out by vessels built in the US and these vessels have to be owned, registered and operated by Americans. As a consequence of the Jones Act and its subsequent revisions, the European shipbuilding industry including ship repair and maintenance has been effectively excluded from selling vessels to be used in American coastwise trades. If the Jones Act would be partially lifted for European ship types, the European shipbuilding industry (including ship maintenance and repair, marine equipment) will be able to enter a new 'market' and to compete with the US industry on a fair level playing field.

8. Intellectual Property Rights

TTIP will inevitably include provision on Intellectual Property Rights (IPRs) in order to protect the interests of European businesses in the United States and vice-versa. You can watch a recording of **an event I hosted on May 15th** in the European Parliament on "What role for IPR in TTIP" via this link. The European Commission has made it clear it does not want to include online copyright enforcement provisions in TTIP. An official summary of a so-called 'civil society dialogue' on IPRs in trade negotiations with the US (and Japan) can be read here.

European Trade Commissioner De Gucht has made the following statements in the International Trade Committee on TTIP and ACTA:

"ACTA, one of the nails in my coffin. I'm not going to reopen that discussion. Really, I mean, I am not a masochist. I'm not planning to do that."

"If the Commission advances new basic legislation, which I think she should, we will revisit the question, but I'm not going to do this by the back door".

The approved negotiating mandate explicitly states in paragraph 30 that:

"The Agreement shall not include provisions on criminal sanctions".

9. Key positions

EU:

Full list of contributions submitted to a public consultation round by the European Commission following the HLWG – http://trade.ec.europa.eu/doclib/docs/2012/july/tradoc_149761.pdf

Association for Ships and Maritime Equipment, SEA Europe – http://www.marietjeschaake.eu/wp-content/uploads/2013/06/20130405-SEA-Europe-position-paper-for-TTIP-on-the-Jones-Act.pdf

FoodDrinkEurope – 'Europe's Food Manufacturers welcome EU – USA trade talks. http://www.fooddrinkeurope.eu/news/press-release/europes-food-manufacturers-welcome-eu-usa-trade-talks/

European Chemical Industry Council CEFIC – 'Kick-off of EU-US Free Trade Agreement at G8 summit' http://www.cefic.org/newsroom/top-story/20121/Kick-off-of-EU-US-free-trade-negotiations-at-G8-Summit/

Medica Technology Industry (AdvaMed, COCIR, Eucomed, EDMA, MITA) http://insidetrade.com/iwpfile.html?file=apr2013%2Fwto2013_1148a.pdf

IATP (Institute for Agriculture and Trade Policy) position: http://www.iatp.org/files/2013_06_25_US_EU_letter.pdf

Orgalime (European Engineering Industries Association): http://www.orgalime.org/position/negotiations-comprehensive-transatlantic-trade-and-investment-partnership

(Something missing? Please send your suggestions to marietje.schaake@europarl.europa.eu)

US:

American Federation of Labor and Congress of Industrial Organizations AFL-CIO – http://www.aflcio.org/content/download/83241/2300531/AFL-CIO+Comments+on+TTIP+%26+Request+to+Testify+May13.docx.pdf

National Association of Manufacturers, NAM – http://www.nam.org/~/media/26CB9C76E98C4284A9D45AEF21849587/JT_Letter_to_POTUS_on_EU.pdf

Business Coalition for Transatlantic Trade (BCTT) – http://insidetrade.com/iwpfile.html?file=apr2013%2Fwto2013_1127a.pdf

Medical Technology Industry (AdvaMed, COCIR, Eucomed, EDMA, MITA) http://insidetrade.com/iwpfile.html?file=apr2013%2Fwto2013_1148a.pdf

American Automotive Policy Council (AAPC) – http://insidetrade.com/iwpfile.html?file=apr2013%2Fwto2013_1151a.pdf

U.S. Food and Agricultural Groups – http://insidetrade.com//index.php?option=com_iwpfile&file=apr2013/wto2013_1196.pdf

Manufacturers Alliance for Productivity and Innovation – http://insidetrade.com/iwpfile.html?file=apr2013%2Fwto2013_1266a.pdf

Financial Services Sector – http://www.sifma.org/workarea/downloadasset.aspx?id=8589943558

(Something missing? Please send your suggestions to marietje.schaake@europarl.europa.eu)

10. Short history of TTIP

In 2011 the U.S. and the EU jointly established a High Level Working Group on Jobs and Growth (HLWG) tasked with a scoping exercise into measures and sectors that could strengthen and optimize the transatlantic economy in order to create new jobs and economic growth. As the world's largest trading partners (50% of world GDP) with bilateral trade flows representing 33% of world trade the benefits were expected to be huge and could alleviate the burdens of the financial and economic crisis that hit both the EU and the US. Moreover, in rapidly changing world with emerging economies displaying a more active role in global trade and politics a deepened transatlantic partnership also brings strategic benefits and robustness. The HLWG issued an interim report of the scoping exercise in June, reporting good progress, and recommended to transatlantic political leaders to launch formal negotiations as soon as possible. During his state of the Union address on February 12th President Obama politically endorsed the talk. On March 20th the US Administration formally notified the US Congress of its intend to start negotiations with the EU on a trade and investment agreement, kicking of a 90-day consultation allowing formal negotiations to start upon its expiry. On June 14th the 27 EU Trade Ministers handed gave the European Commission a broad mandate to negotiate on their behalf with the Americans. The European Parliament has adopted two political resolutions to feed into the final mandate. After the conclusion of the talks all EU Member States and the European Parliament have to approve the agreement. In the US the deal is subject to Congressional approval.

11. Official documents

June 2013 – approved negotiating mandate for the European Commission of 14 June 2013 – http://www.marietjeschaake.eu/wp-content/uploads/2013/06/TTIP-mandate.pdf

May 2013 – Commission Memo on the audiovisual sector and TTIP – http://blogs.r.ftdata.co.uk/brusselsblog/files/2013/06/non-paper-guarantees-of-the-treatment-of-AV-in-TTIP-1.pdf

May 2013 – European Parliament Resolution on draft Commission Mandate – http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0227&language=EN&ring=B7-2013-0187

April 2013 – European Parliament impact assessment of Commission Impact assessment of TTIP – http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=92710

March 2013 – European Commission – Staff Working Document – Impact Assessment Report on the future of EU-US trade relations – http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf

March 2013 – Notification letter to the US Congress by the United States Trade Representative – http://www.sice.oas.org/TPD/USA_EU/Negotiations/03202013_TTIP_Notification_Letter.PDF

February 2013 – Final report of the High Level Working Group on Jobs and Growth – http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf

October 2012 – European Parliament Resolution on report High Level Working Group on Jobs and Growth – http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0388&language=EN

June 2012 – Interim report of the High Level Working Group on Jobs and Growth – http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149557.pdf

12. Studies on the impact on TTIP

(Something missing? Please send your suggestions to marietje.schaake@europarl.europa.eu)

June 2013 – 'A Transatlantic Corporate Bill of Rights', Corporate Europe Observatory & The Transnational Institute – http://corporateeurope.org/publications/transatlantic-corporate-bill-rights

June 2013 – 'TTIP, Who Benefits From A Free Trade Deal?', Bertelsmann Foundation, – http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-05089388-192802B3/bst_engl/xcms_bst_dms_38065_38066_2.pdf

2013 – ‘EU policies on online entrepreneurship. Conversations with U.S. venture capitalists’, ECIPE – http://www.ecipe.org/media/publication_pdfs/OCC22013.pdf

March 2013 – ‘Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment’, Centre for Economic Policy Research – http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf

March 2013 – ‘Crafting a Transatlantic Trade and Investment Partnership: What can be done?’, Peterson Institute for International Economics – http://insidetrade.com/iwpfile.html?file=mar2013%2Fwto2013_0813.pdf

February 2013 – ‘Dimensions and Effects of a Transatlantic Free Trade Agreement Between the EU and US, Ifo Institut – http://insidetrade.com//index.php?option=com_iwpfile&file=mar2013/wto2013_0979.pdf

October 2012 – ‘Study on EU-US High Level Working Group’, ECORYS – http://english.ecorys.nl/dmdocuments/EU-US%20HLWG%20Ecorys%20Final%20report.pdf

2012 – ‘A New Era For Transatlantic Trade Leadership’, ECIPE – http://www.ecipe.org/media/publication_pdfs/TATF_Report_2012__PDF.pdf

2012 – ‘Regulatory Cooperation in the EU-US Economic Agreement’, BusinessEurope, U.S. Chamber of Commerce – http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/jobs-growth/files/consultation/regulation/9-business-europe-us-chamber_en.pdf

2012 – ‘Jobs and Growth Through a Transatlantic Trade and Economic Partnership’, BusinessEurope – http://www.businesseurope.eu/Content/default.asp?pageid=568&docid=30028

Tags: EU, International Trade, TTIP, US

See below. This is the event I'd like to seek funding to attend. I would present the same testimony as was endorsed before, but this time instead of addressing the USTR it would be attended by negotiators from the other countries (the EU). I will pay my own way if necessary but hope to get CTPC funding. The cost would not exceed $350.

Sharon Anglin Treat
satreat@gmail.com
Sent from my iPad

From: FN-USTR-IAPE <IAPE@ustr.eop.gov>
Date: June 21, 2013, 12:29:37 PM EDT
To: FN-USTR-IAPE <IAPE@ustr.eop.gov>
Subject: Transatlantic Trade and Investment Partnership Stakeholder Events

Hello,

The Office of the United States Trade Representative will host a Direct Stakeholder Engagement event in conjunction with the first round of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, scheduled to take place from **Monday, July 8 – Friday, July 12, 2013** in Washington, D.C.

Registration: Direct Stakeholder Event, Stakeholder Presentations
The Direct Stakeholder Engagement event will be held on Wednesday, July 10th from 11:30am – 2:30pm in Washington, D.C. at a TBD location and will be open to U.S. and EU stakeholders. This event will provide stakeholders with the opportunity to speak directly with TTIP negotiators. In addition, stakeholders will have an opportunity to give presentations to negotiators as well as other interested stakeholders.
To register for this event, please click here. Please also use this link if you would like to give a presentation. **Only individuals registered to make a presentation will be permitted to do so.**

Registration: Stakeholder Briefing
On Wednesday, July 10th from 4:30 – 5:15pm, USTR will host a separate stakeholder briefing in Washington, D.C. at a TBD location. During this briefing, the U.S. and EU chief negotiators will brief stakeholders and stakeholders will be given the opportunity to ask questions. Due to limited spacing, USTR registration for this event is on a first come, first serve basis.
To register for this event, please click here.

The **registration deadline for both stakeholder events is Friday, June 28th at 5:00pm EST**. We will be unable to accommodate any registrations received after this time. Due to security concerns, we will not be able to allow access to anyone who is not registered.

Confirmation of Information
Following the close of registration, we will follow up with confirmation of your participation and to provide further logistical details for the day of the event. For those registered to give presentations, you will also receive information regarding timing. Your registration will not be

confirmed until you receive the final confirmation email from us following the close of registration.

If you have questions about your registration, please email iape@ustr.gov. More information is posted on our website.

We look forward to hearing from you.

Sincerely,
Office of Intergovernmental Affairs and Public Engagement
Office of the United States Trade Representative

Stakeholder Presentation Schedule
Wednesday, July 10, 2013

	Wilson Room	Jackson Room	Lincoln Room	Eisenhower Room
11:35 - 11:45am	**Sierra Club** Ilana Solomon	**U.S. Chamber of Commerce** Marjorie Chorlins "Presentation on behalf of the U.S. Chamber of Commerce"	**Public Citizen's Global Trade Watch** Lori Wallach "TAFTA's Anti-Consumer Agenda: An Analysis of U.S. and EU Corporate Demands on Financial Deregulation, Investment Privileges, and Food Safety Rollback"	**CropLife America** Douglas Nelson "TTIP Regulatory Coherence: A dream or nightmare?"
11:47 - 11:57am	**Friends of the Earth** William Waren "TTIP, Harmonization, and Chemicals Regulation"	**Squire Sanders** Shanker Singham "Impact of Anti- Competitive Market Distortions on Transatlantic Trade"	**American Medical Student Association** Reshma Ramachandran "The Impact of Free Trade on Medical Practice: Input from the International Federation of Medical Students' Associations"	**American Meat Institute** William Westman "The TTIP Negotiations Must be Comprehensive"
12:00 - 12:10pm	**The Humane Society of the U.S. /Humane Society International** Andrew Lurie "Animal Welfare Priorities for the TTIP Negotiations"	**National Electrical Manufacturers Association** Gene Eckhart "Role of the Marketplace on Electrical Production Certification"	**Campaign For Tobacco Free Kids** Susan Liss and Matthew Myers	**American Farm Bureau Federation** David Salmonsen "Agricultural Outcomes for the Transatlantic Trade and Investment Partnership"
12:12 - 12:22pm	**UL (Underwriters Laboratories)** Ann Weeks "TTIP Standards and Conformity Assessment Considerations"	**Coalition of Services Industries** Peter Allgeier “Traversing the New Services Frontier”	**Action on Smoking and Health** Chris Bostic "Tobacco as a Unique Product in International Trade"	**U.S. Grains Council** Floyd Gaibler "Regulatory Harmonization: A Pathway to Global Food Security"

Stakeholder Presentation Schedule
Wednesday, July 10, 2013

	Wilson Room	Jackson Room	Lincoln Room	Eisenhower Room
12:25 - 12:35pm	**American Association for Laboratory Accreditation** Peter Unger "ILAC and IAF to Facilitate Trade"	**Amway** Richard Holwill "Amway Goals for TTIP"	**International Association of Machinists and Aerospace Workers** Owen Herrnstadt "Shared Prosperity Through a 21st Century Trade Agreement"	**American Soybean Association** Lorena Alfaro and Janae Brady "Soybean Farmers' Priorities in TTIP"
12:37 - 12:47pm	**MITA** Andrew Northup “EU and US Medical Technology Regulatory Compatibility”	**American Fuel & Petrochemical Manufacturers** David Friedman "Trade Impacts of the Proposal to the EU Fuel Quality Directive"	**AFL- CIO** Celeste Drake "Ensuring Shared Gains from Trade"	**American Pistachio Growers** Robert Schramm “U.S. Pistachio TTIP Objectives”
12:50 - 1:00pm	**Sidley Austin LLP** Alan Raul "Digital Trade and Privacy"	**American Automotive Policy Council** Matt Blunt	**Transatlantic Consumer Dialogue** Robert Weissman "Transatlantic Consumer Dialogue Perspective on TAFTA"	**Grocery Manufacturers Association** Sean Darragh and Carmen Stacy "Grocery Manufacturers Association's TTIP Goals"
1:02 - 1:12pm	**Steptoe & Johnson LLP** Markham Erickson "Incorporating Internet Policy in TTIP"	**Alliance of Automobile Manufacturers** Mitch Bainwol	**Consumer Federation of America** Susan Grant and Chris Waldrop "Consumer Perspective on the TTIP"	**Public Citizen's Global Access to Medicines Program** Burcu Kilic "10 Reasons why IP should be excluded from TAFTA"

Stakeholder Presentation Schedule
Wednesday, July 10, 2013

	Wilson Room	Jackson Room	Lincoln Room	Eisenhower Room
1:15 - 1:25pm	**Center for Digital Democracy** Jeff Chester "Ensuring Consumers are Protected in a Digital Era"	**eBay** Brian Bieron "Global Trade for Everyone"	**Organic Consumers Association** Alexis Baden-Mayer "Potential Impact of the TTIP on Food Safety and Sovereignty"	**Knowledge Ecology International** Krista Cox "IP Issues for TTIP"
1:27 - 1:37pm	**BioTechnology Industry Association** Lila Feisee	**ASTM International** James Thomas "Technical Barriers to Trade and Role of Standards"	**Institute for Agriculture and Trade Policy** Karen Hansen-Kuhn "Food, Emerging Technologies and the Precautionary Principle"	**Computer & Communications Industry Association** Jonathan Band "The Legal Framework Necessary to Promote Electronic Commerce"
1:40 - 1:50pm	**Information Technology Industry Council** Ken Salaets "Tech Priorities for TTIP"	**Maine Citizen Trade Policy Commission** State Representative Sharon Treat "View From Maine: Preserving Domestic Regulatory Space to Protect the Public Interest"	**Center for Science in the Public Interest** Caroline Smith DeWaal "Trade and Consumer Concerns"	**Center for the Protection of Intellectual Property, George Mason School of Law** Mark Schultz "Intellectual Property Protection as an Essential Driver of Trade"
1:52 - 2:02pm	**TechAmerica** Kevin Richards	**American Association of Exporters & Importers** Marianne Rowden "Hollistic Risk Management for TTIP"	**National Family Farm Coalition** Katherine Ozer "Family Farmer Concerns on the TTIP Negotiations"	**PhRMA** Neil Pratt
2:05 - 2:15pm			**European Union of Wholesale with Eggs, Egg Products, Poultry and Game (EUWEP)** Mark Williams "Competitiveness of the EU Egg Industry"	**ATLA France (French Dairy Processors)** Ralph Ichter

JOINT RESOLUTION MEMORIALIZING THE PRESIDENT OF THE UNITED STATES, THE UNITED STATES CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE REGARDING STATES' RIGHTS IN FUTURE INTERNATIONAL TRADE POLICY

WE, your Memorialists, the Members of the One Hundred and Twenty-fifth Legislature of the State of Maine now assembled in the First Regular Session, most respectfully present and petition the President of the United States, the United States Congress and the United States Trade Representative as follows:

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

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

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

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

WHEREAS, the current process of consultation with states by the Federal Government on trade policy fails to provide a way for states to meaningfully participate in the development of trade policy, despite the fact that trade rules could undermine state sovereignty; and

WHEREAS, under current trade rules, states have not had channels for meaningful communication with the United States Trade Representative, as both the Intergovernmental Policy Advisory Committee on Trade and the state point of contact system have proven insufficient to allow input from states and states do not always seem to be considered as a partner in government; and

WHEREAS, the President of the United States, the United States Trade Representative and the Maine Congressional Delegation will have a role in shaping future trade policy legislation; now, therefore, be it

RESOLVED: That We, your Memorialists, respectfully urge and request that future trade policy include reforms to improve the process of consultation between the Federal Government and the states; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the President of the United States, the United States Congress and the United States Trade Representative seek a meaningful

consultation system that increases transparency, promotes information sharing, allows for timely and frequent consultations, provides state-level trade data analysis, provides legal analysis for states on the effect of trade on state laws, increases public participation and acknowledges and respects each state's sovereignty; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the Federal Government reform the system of consultation with states on trade policy to more clearly communicate and allow for states' input into trade negotiations by allowing a state to give informed consent or to opt out if bound by nontariff provisions in a trade agreement and by providing that states are not bound to these provisions without consent from the states' legislatures; to form a new nonpartisan federal-state international trade policy commission to keep states informed about ongoing negotiations and information; and to provide that the United States Trade Representative communicate with states in better ways than the insufficient current state point of contact system; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that state laws that are subject to trade agreement provisions regarding investment, procurement or services be covered by a positive list approach, allowing states to set and adjust their commitments and providing that if a state law is not specified by a state as subject to those provisions, it cannot be challenged by a foreign company or country as an unfair barrier to trade; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the United States Congress fund a center on trade and federalism to conduct legal and economic policy analysis on the effect of trade and to monitor the effectiveness of trade adjustment assistance and establish funding for the Department of Commerce to produce state-level service sector export data on an annual basis, as well as reinstate funding for the Bureau of Economic Analysis's state-level foreign direct investment research, both of which are critical to state trade offices and policy makers in setting priorities for market selection and economic impact studies; and be it further

RESOLVED: That suitable copies of this resolution, duly authenticated by the Secretary of State, be transmitted to the Honorable Barack H. Obama, President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, to the United States Trade Representative Ambassador Ron Kirk and to each Member of the Maine Congressional Delegation.

CTPC International Trade Agreement Policy

WORKING DOCUMENT

July 16, 2010

The Citizen Trade Policy Commission believes that Maine must be able to compete successfully in the global economy in order to realize its full economic potential. The commission supports efforts to foster and increase the export of Maine's products and services around the world. International trade agreements are indispensable tools that enable the expansion of global trade and can level the economic playing field between nations and sub-national governments. The commission favors international trade agreements that:

1. Recognize and maintain the state's sovereign right to govern its domestic affairs;
2. Enhance the ability of Maine businesses to export and import goods and services;
3. Create new employment opportunities in the state without compromising labor standards in Maine or abroad;
4. Does not provide foreign-investors special privileges or a private enforcement system;
5. Does not encourage development or trade that is not environmental sustainable or that may compromise or violate a national or sub-national environmental law or regulation;
6. Fosters access to affordable healthcare and affordable pharmaceuticals for everyone; and

Additionally, the commission supports increased transparency in trade agreement negotiations and enhanced federal-state consultation regarding those negotiations.

The Citizen Trade Policy Commission has voted to confirm this set of policies on July 16, 2010 and grants the chairs of the commission the authority to apply and communicate these policies to others and in the interest of Maine's citizenry and environment.

Senator Jackson, co-chair

Date 7/16/10

Representative Rotundo, co-chair

Date July 16, 2010

THE POTENTIAL IMPACT OF INTERNATIONAL TRADE AGREEMENTS ON GROUND WATER WITHDRAWAL REGULATIONS

REPORT TO THE JOINT STANDING COMMITTEE ON NATURAL RESOURCES

BY THE

WATER RESOURCES PLANNING COMMITTEE

AND THE

CITIZEN TRADE POLICY COMMISSION

FEBRUARY 2010

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Executive Summary

Introduction: International trade policies and agreements are complex and developed through lengthy negotiations at the national level. Currently, they are negotiated without meaningful consultation with the states. Their focus is to open trade opportunities and to limit barriers to trade in the global economy. Some aspects of trade agreements may affect state sovereignty and regulatory authority.

The 124th Legislature passed Public Law 2009, chapter 132, which directed the Water Resources Planning Committee, in coordination with the Office of the Attorney General and the Citizen Trade Policy Commission, to conduct an examination of the potential legal impacts of international trade agreements on the State's ability to manage its ground water resources, including, but not limited to, the potential consequences of permitting foreign companies to extract ground water.

The *Citizen Trade Policy Commission (CTPC)* was established by the Legislature in 2003 to provide an on-going state-level mechanism to assess the impact of international trade policies and agreements on Maine's state and local laws, business environment, and working conditions. The *Water Resources Planning Committee (WRPC)* was established by the Legislature under the Land and Water Resources Council in 2007. The overarching charge to the WRPC is to plan for sustainable use of water resources. The Office of Attorney General is also involved in this review effort due to the complexity of legal issues involved in trade agreements and water law. A representative from the Office of Attorney General also sits on the CTPC.

Study process: The WRPC and the CTPC held five joint meetings from July through December 2009 to discuss various aspects of international trade agreements and ground water. Included in these discussions were an overview of Maine's ground water resources, a review of Maine's current regulatory environment for ground water withdrawals, a review of Maine ground water law, and an overview of international trade agreements.

The WRPC and CTPC were fortunate to have Mr. William Waren (Adjunct Prof., Harrison Institute for Public Law, Georgetown University and Policy Director, Forum on Democracy & Trade) participate in several meetings. He agreed to develop an overview paper focused on our question of the potential impact of international trade agreements on ground water regulations.

The CTPC and WRPC held a public hearing on October 15, 2009 at the State House for the purpose of receiving public input to the discussion on the potential impacts of international trade agreements on the State's ability to regulate ground water withdrawals. About thirty people attended the hearing and twenty-one people spoke, presenting a broad spectrum of interests and concerns on the topic. Some key points expressed at the hearing were: 1) continue to carve water out of international trade agreements; 2) concern about dispute resolution through tribunals; 3) a view that the State would be better positioned to protect ground water resources if ground water were placed within the public trust; 4) support for economic development through international investment agreements; 5) the view that current state regulations are adequate to protect resources and existing uses.

The WRPC and CTPC also reviewed several timely articles and legal briefs focused on international trade and water resources.

Conclusions and recommendations:

The following recommendations and conclusions received the unanimous consent of the members of the Citizen Trade Policy Commission and the members of the Water Resources Planning Committee.

The Maine Legislature should continue to make decisions regarding ground water and other natural resources using a transparent process with opportunity for public input, and state agencies should continue to apply the law in a manner consistent with due process. International trade agreements, which are currently negotiated without sufficient consultation with states, contain provisions that could expose Maine laws to challenges in international tribunals whose decisions take precedent over state and federal law. There is potential for these treaties to undermine our state's capacity to put laws into place that protect the health and well being of our citizens. The Legislature and the CTPC should take action to monitor these trade negotiations and agreements. They should further take action to seek to change this undemocratic system in which agreements are negotiated without transparency and without meaningful consultation with the states.

1) In future policy deliberations, the Legislature should consider that the best defense against challenges under international trade agreements is to continue its existing process of adopting regulations that are clear, reasonable, have a sound basis, are applied equitably, and that are established through due process.

   Articles and legal briefings by attorneys from diverse backgrounds all confirm this view. Maine's current regulatory framework for ground water withdrawals evolved over years of public debate, and focus on impacts of withdrawals on other water-dependent resources and activities, rather than discriminating against particular uses of ground water, and thus position the State well against challenges under international trade agreements.

2) The Legislature should encourage the development of a better system for consultation between the State and the U.S. Trade Representative (USTR) as future trade agreements are negotiated.

   Currently, states have little input as trade agreements are negotiated. The negotiating process lacks transparency and precludes states from any meaningful participation in the negotiations even though the agreements have significant potential impact on state regulatory authority. The Legislature should encourage our Congressional Delegation to establish a more inclusive and transparent process for USTR consultation with states on trade matters that have the potential for impacting states.

3) The Legislature should encourage Maine's Congressional Delegation to insist on the codification of these two specific tribunal decisions regarding certain disputes under international trade agreements:

   a. *Methanex* decision. The NAFTA tribunal in *Methanex v. United States* soundly rejected Vancouver-based Methanex Corporation's claim for nearly a billion dollars in compensatory damages for California's phase-out of the gasoline additive MTBE because it was polluting lakes and ground water and was endangering the public health.

      i. Specifically, narrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award. In other

words, establish that the adoption or application by any national or sub-national government of any bona fide and non-discriminatory measure intended to serve a public purpose shall not constitute a violation of an expropriation article of an investment agreement or treaty.

b. *Glamis* decision. The tribunal ruled for the U.S. when a Canadian corporation sued under NAFTA for actions taken by the Department of Interior and the State of California, imposing environmental and landuse regulations on Glamis's proposed open-pit gold mine.

i. Specifically, narrow the minimum standard treatment to the elements of customary international law as explained in the U.S. brief in *Glamis*, in which the State Department argued for a reading of MST confined to three elements: (1) compensation for expropriation, (2) "internal security," and (3) "denial of justice" where domestic courts or agencies (not legislatures) treat foreign investors in a way that is "notoriously unjust" or "egregious" such as a denial of procedural due process. Further, the expectation of a stable or unchanging legal environment is not to be understood as part of customary international law.

4) The Legislature may wish to consider requiring that future contracts between governmental units in Maine and private investors include a waiver of any right by investors to seek compensation through international investment arbitration.

The lack of clarity, certainty, and predictability in international trade and investment law allows international arbitration tribunals broad discretion. While some tribunals have used their discretion wisely and prudently, the precedents of past decisions do not bind future tribunals.

Requiring such a waiver in governmental contracts would move dispute resolution from international arbitration tribunals to U.S. courts, where precedential actions are an important foundation of the judicial process. Some consideration should be given, however, to whether such action would put Maine at a competitive disadvantage for international investment and whether such a waiver could be used to show discrimination against a certain class of private investors.

5) Because of the potential impact of international trade agreements on state sovereignty and state regulatory authority, the Legislature should provide adequate support for the CTPC so that it can do the work with which it is charged by statute. While the Commission has received national recognition for its work since its inception and has served as a model for other states wishing to establish similar citizen commissions, recent funding cuts have left the CTPC without any staff assistance and it currently lacks the capacity to adequately monitor, assess and respond to the complex and complicated issues involving international trade agreements and their consequences to the people of Maine. The Legislature should therefore consider establishing a position that would:

a. Support the Maine Citizen Trade Policy Commission in monitoring negotiations on international trade agreements and case law from tribunal settlements and support it in providing input to the Legislature, Governor, Maine Congressional

Delegation and the U.S. Trade Representative on international trade issues and their impact on the people and economy of Maine.

b. Assist the CTPC with reviewing the potential impacts of international trade agreements on state regulatory authority and support the CTPC in advising the Legislature and legislative policy oversight committees when considering such impacts in policy decisions.

c. Assist in communicating concerns and needed actions to the Legislature, Governor, Congressional Delegation, U.S. Trade Representative, and others.

6) a. We recommend that the Legislature encourage the U.S. Trade Representative and Maine's Congressional Delegation to continue to carve water out of future international trade agreements and existing agreements that may be renegotiated.

b. The research undertaken for this report did not identify any decisions that shed light on the specific issue of whether a legislative change to a public trust rule governing ground water would improve the chances of a Maine regulatory statute withstanding a challenge based on a trade treaty.

Some members of the public supported taking steps to protect Maine's ground water due to its importance and the potential impacts of world shortages and global warming. These measures included continuing to carve water out of international trade agreements, and changing the standard governing the use of Maine's ground water to a public trust.

Many of the speakers at the public hearing expressed concern about the impact of treaty provisions on Maine's system of regulating the use of ground water. Several speakers emphasized that water is different from the vast majority of products that are subject to trade agreements, and even other natural resources in that it is necessary to life. The importance of water is reflected in existing state and federal regulation, designed to ensure both its safety and continued availability.

For these reasons, water should continue to be carved out of international trade agreements. As treaties are negotiated, the parties decide which products and services should be covered, and bargaining determines those that are included. The unique nature of water makes it ill-suited for this type of decision making, i.e., extending treaty coverage to water in return for coverage of some sought after product(s) of the bargaining partner. Water is not a good or a product in the common usage of those terms. While there are serious shortages of water in parts of the world, and even in parts of the United States, resolution of this issue should not be determined by private investors exercising rights that they believe are conferred on them by trade treaties.

The concept that Maine should change the doctrine governing ground water to one of public trust is a more complex issue. The substantial research that has been conducted for this report did not identify any decisions made under the provisions of any trade treaty that address the concept that moving to a public trust rule would improve the likelihood of withstanding a trade treaty challenge.

However, there are potential legal consequences under state and federal law if the Legislature were to adopt a public trust rule. Litigation in state or federal court challenging the impact of the specific changes upon ownership interests would be likely. The legal issues involved in resolving such a challenge are complex, and the outcome cannot be predicted with certainty,

but if such a challenge were successful, it seems likely that the potential damages that could be awarded would be high.

As the Maine Law Court noted in declining to judicially abrogate the absolute dominion rule, there are "heavy policy considerations" involved in making such a change that render it more suitable for legislative study and decision. *Maddocks v. Giles*, 1999 ME 63, 728 A.2d 150, ¶ 12. Such a study and recommendations concerning the policy and regulatory implications of changing the absolute dominion rule are beyond the scope of the charge to this group, and are clearly material to any decision that a different rule would lead to a better water policy for the State. As emphasized in our first recommendation, the best protection against treaty challenges is the establishment of sound regulatory measures, grounded in science and facts, developed through a legislative and rulemaking process that encourages public input, and that are applied to all, consistent with due process. Maine has a thorough regulatory system for water resources that meets this standard.

THE POTENTIAL IMPACT OF INTERNATIONAL TRADE AGREEMENTS ON GROUND WATER WITHDRAWAL REGULATIONS

Introduction

International trade policies and agreements are complex and developed through lengthy negotiations at the national level. Currently, they are negotiated without meaningful consultation with the states. Their focus is to open trade opportunities and to limit barriers to trade in the global economy. Several aspects of international trade agreements should be of concern to the Maine Legislature.

- The U.S. Trade Representative negotiates trade agreements at the national level. State views on the potential impacts of agreements may not always be well represented during those negotiations, involving little consultation with the states and inadequate information about the agreements on state sovereignty and regulatory authority.
- In certain circumstances, regulations in Maine intended to protect public health and/or the environment may be viewed by some as "barriers to trade" and may be the target of challenges under trade agreements.
- Disputes under trade agreements are resolved through international arbitration tribunals rather than courts.
- Additional trade agreements are the subject of on-going negotiations.

All of these may affect state sovereignty and the ability of the State to govern itself through democratic processes. This report specifically examines the State's ability to manage ground water resources in the arena of international trade.

The 124th Legislature passed Public Law 2009, chapter 132, which directed the Water Resources Planning Committee, of the Land and Water Resources Council, in coordination with the Office of the Attorney General and the Citizen Trade Policy Commission, to conduct an examination of the potential legal impacts of international trade agreements on the State's ability to manage its ground water resources, including, but not limited to, the potential consequences of permitting foreign companies to extract ground water. The examination was to include a review and assessment of the following subjects as they relate to or impact international trade agreement issues and the State's regulation of its ground water:

1. Property rights related to the ownership of ground water.
2. The various common law doctrines relating to the use of ground water, including the absolute dominion rule and the reasonable use rule.
3. Natural resources other than ground water.

Our review focused on the first two points. We did not specifically address the third point on resources other than ground water, but the results of our work can be instructive in considering these other resources.

The *Citizen Trade Policy Commission (CTPC)* was established by the Legislature in 2003 to provide an on-going state-level mechanism to assess the impact of international trade policies and agreements on Maine's state and local laws, business environment, and working conditions. The 22-member Commission includes six Legislators, an Attorney General designee, representatives from the Department of Labor, the Maine International Trade Center, the Department of Environmental Protection, the Department of Agriculture, Food, and Rural

Resources, and the Department of Human Services, and ten public members representing business, labor, health, government, and environmental interests.

The *Water Resources Planning Committee (WRPC)* was established by the Legislature under the Land and Water Resources Council in 2007. The WRPC draws its membership from state agency ground water professionals, water utilities, agricultural water users, the bottled water industry, other commercial water users, private well drillers, and a water advocacy organization. The overarching charge to the WRPC is to plan for sustainable use of water resources. This is accomplished through scientific investigations and improved water resource data in watersheds deemed potentially at risk from overuse of water resources, and to convene planning groups in watersheds where cumulative use approaches unsustainable conditions.

The Office of Attorney General is also involved in this review effort due to the complexity of legal issues involved in trade agreements and water law. A representative from the Office of Attorney General also sits on the CTPC.

Appendix A includes membership lists for the WRPC and the CTPC.

Background

Water policy has been an important focus of the Maine Legislature over the past several decades. We provide here a summary of key efforts. The Appendix contains a thorough review.

Ground Water Protection Commission – 1978-1980. This Commission made broad recommendations regarding investigations and mapping of the State's aquifers, most of which has been accomplished in the succeeding decades.

Water Transport Law, 1987. Facing the threat of large-scale water transport to southern New England, the Legislature passed this law to prohibit transport of water across town lines in containers larger than 10 gallons. Through appropriate regulatory review, exempts are permitted for three-year terms.

Water Supply Study Commission, 1987-1990. This effort focused on the adequacy of the State's water supply for all uses, potential impacts from water export, and adequacy of regulations. The Water Resources Management Board established through this effort.

Water Resources Management Board, 1989-1990. This stakeholder board recommended several changes to water policy. The Legislature should:

- adopt the "reasonable use" doctrine for ground water;
- establish priorities for use where supplies are limited;
- replace the Water Transport Law with a permitting process;
- encourage water conservation;
- implement a strategy for collecting water supply and use data.

Sustainable Water Use Policy Process, 2000-2002. This stakeholder process focused on water use information and policies related to in-stream flows, and marked the beginning of a lengthy process that culminated in the Chapter 587 in-stream flow rules administered by the Maine DEP.

Water Use Reporting Law, 2002. This law grew from the previous process and requires all major surface and ground water users to report volumes to the State annually.

Review of Ground Water Regulations Working Group, 2005-2007. This stakeholder group conducted a comprehensive review of the then current regulations governing withdrawals of ground water. Among the chief work done by this group was a systematic review of water supply and demand in watersheds statewide. This effort revealed that Maine does not have a statewide crisis with regard to water use, but that there are some watersheds that should be the focus of additional investigations. The Working Group recommended:

- addressing water issues through a watershed approach;
- establishing a Water Committee to oversee water information and investigations;
- establishing a permitting process for significant wells under the Natural Resources Protection Act.

Water Resources Planning Committee, 2007 – to-date: This Stakeholder Committee is charged with coordinating agency water information, conducting water investigations in watersheds where demand is a high percentage of supply, and convening planning groups in watersheds as needed.

Significant Ground Water Well Permit, 2007: The Legislature established the Significant Well Permitting Program within the Natural Resources Protection Act for high-volume wells – those pumping at least 50,000 gallons per day within 500 feet of water bodies, and those pumping at least 144,000 gallons per day more than 500 feet from a water body.

124th Legislature, First Regular Session, 2009: The Legislature debated fourteen bills dealing with ground water, most of them focused on concerns with bottled water. Several of these bills grew from two recent events: exploration for a potential bottled water source in Shapleigh; a potential long-term contract for water between the Kennebunk-Kennebunkport-Wells Water District and a commercial bottler.

A more complete historical perspective is offered in Appendix B.

Domestic Legal Context

1. Common Law Doctrines Governing Use of Ground Water[1]

Ground water law has developed on a state by state basis, typically separate from the law governing the use of surface water. States now recognize several different common law ground water doctrines, and most, including Maine, have also enacted statutes that significantly modify these common law principles. Bulk sales of ground water for bottling purposes can be conducted under any of these doctrines, provided that any regulatory requirements applicable to extraction (which may differ from state to state) are satisfied.

In *Maddocks v. Giles*, 1999 ME 63, 728 A.2d 150, the Maine Law Court rejected the argument that Maine's version of the absolute dominion rule had become outdated and should be judicially abrogated, concluding (among other things) that the "heavy policy considerations" involved in this issue made it more suitable for legislative study and decision. ¶ 12. Such a study and recommendations concerning the policy implications of changing the absolute

[1] The information in this section of the Report is derived from Assistant Attorney General Paul Gauvreau's paper, "Review of International Trade Agreements and the Management of Groundwater Resources: a Review of Maine Groundwater Regulation," dated September 11, 2009. It can be found at: http://www.maine.gov/legis/opla/ctpcadditionalmtmatsept112009.pdf, pp. 18-28.

dominion rule are beyond the scope of the charge to this group, and would appear to be material to any decision that a different rule would lead to a better water policy for the State.

(a) Absolute Dominion Rule: For over 130 years, Maine has relied on the absolute dominion rule to govern ownership of ground water by common law. The absolute dominion rule is based on the premise that that the owner of the surface land above ground water owns the water, much like the soil and rocks. However, unlike the soil and rocks, the amount of water existing under a defined parcel of land will rise and fall, depending on the usage of other landowners and relevant weather conditions such as (most obviously) rainfall. Generally the restrictions imposed by statute on the absolute dominion rule concern the *use* of groundwater rather than its *ownership.* For example, while the amount of water extracted may be subject to limitations, its ownership remains with the owner of the land.[2]

There are a number of regulatory statutes that apply to ground water, which are listed below (see page 10). As a result, Maine's rule would more accurately be described as a modified absolute dominion rule.

(b) Reasonable Use Rule: This rule provides that a landowner's use of ground water must bear a reasonable relationship to his or her use of the land above the ground water. It gives courts the authority to restrict uses which cause unreasonable harm to other users within an aquifer, which the absolute dominion rule would not support. As a result, the reasonable use rule may require balancing between competing uses from the same aquifer.

As hydrogeological principles became better understood, and competing societal needs for ground water developed, the trend has been away from the concept that the owner's right to sub-surface waters is unqualified. Thus, the reasonable use rule replaced the absolute dominion rule in many jurisdictions.

(c) Correlative Use Rule: The owners of overlying land and the non-owners or water transporters have correlative or co-equal rights in the reasonable, beneficial use of ground water, and the authority to allocate water is held by the courts under this rule. If an aquifer cannot accommodate all ground water users, the courts may apportion the uses in proportion to their ownership interest in the overlying surface estates.

A disadvantage of this rule is that litigation is required on a case by case basis to apportion uses; however, the judicial power to allocate water rights protects the public interests as well as the rights of private users.

(d) Prior Appropriation Rule: Under this rule, the first landowner to beneficially use or divert water from a water source is granted priority of right. Rights are obtained by putting the water to a beneficial use, and new users are not allowed to interfere with existing senior rights. The amount of groundwater that senior appropriators may withdraw can be limited based upon reasonableness and beneficial purposes. Some states that rely upon this rule have adopted a regulatory permitting system.

While prior appropriation is relatively easy to apply to surface waters where unappropriated waters are visible and available, it is difficult to apply with ground water, where intensive, deliberate study is necessary to assess the quantity and availability of ground water.

[2] The concept of ownership is sometimes difficult to apply to ground water, for example, ground water taken from an aquifer that lies under several parcels of land.

(e) Restatement of Torts Rule: Under this rule, a landowner who uses ground water for a beneficial purpose is not subject to liability for interference with another's use unless the withdrawal: unreasonably causes harm to a neighbor by lowering the water table or reducing artesian pressure; exceeds a reasonable share of the total store of ground water; or creates a direct and substantial effect on a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

(f) Public Trust: The Hawaii Constitution states that "all public resources are held in trust by the state for the benefit of its people." Haw. Const. art. XI, § 1. It further establishes a public trust obligation "to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." Haw. Const. art. XI, § 7. Hawaii is an example of a state that follows this rule for ground water.

2. Current regulatory framework governing water withdrawal

- *Water Use Reporting:* The Maine Department of Environmental Protection, in coordination with other state agencies, maintains a water use-reporting program. All water users above 20,000 gallons/day are required to report their usage.
- *Site Location of Development regulations*. Any major new facility that disturbs at least 3 acres of area must get a Site Location permit from the Maine DEP. The applicant must show that the development will not have an adverse impact on the environment. If the facility involves water extraction, such as a bottling facility, geologists at the DEP require a thorough analysis of the water resources and impacts of any proposed withdrawals on other resources. Permittees are required carefully monitor water usage and to submit reports of water usage.
- *Bottling facility license*. The Maine Department of Health and Human Services licenses water bottlers in Maine. The DHHS must approve any new source for human consumption. As part of their analysis, geologists at DHHS also review the impact of withdrawals on other water uses in the area.
- *Bulk Water Transport.* If a water developer wishes to move water in bulk (containers larger than 10 gallons) across a town line, say from a wellhead to a bottling facility, they need approval from the Maine DHHS under the Bulk Water Transport law. Geologists at DHHS, the Maine Geological Survey, and the Maine DEP rigorously review applications for water transport.
- *Wells in LURC jurisdiction*. In areas of the state regulated by LURC, permits are required for any large-scale ground-water extraction. The applicant must show that the development will not have an adverse impact on the environment. Staff from LURC and the Maine Geological Survey rigorously review these applications. Permittees are required to carefully monitor water usage and to submit reports on water usage to LURC. Permits are conditioned and withdrawals may be limited based on resource conditions.
- *Significant Well permit.* Any well within 500 feet of surface water producing 50,000 gallons or more per day (144,000 gpd if more than 500 feet) must be permitted under the Natural Resources Protection Act by the Maine DEP. Exceptions for irrigation wells. This includes wells previously permitted under Bulk Water Transport. The applicant must show no adverse impact on ground water, surface water, water-related natural resources, or existing uses. Permittees are required carefully monitor water usage and to submit reports of water

usage. Permits are conditioned and withdrawals may be limited based on resource conditions.

- *Chapter 587 In-stream flow rules.* Wells may not be pumped in such volumes as to reduce flows in nearby streams below seasonally defined threshold flows.

3. Constitutional protections against taking property without just compensation: the takings clause as it applies to possible ownership changes.[3]

Both the U.S. and Maine Constitutions prohibit the taking of private property for public use without just compensation. A legal challenge to any statutory change in the ownership rights of a landowner in ground water could be brought on the basis of a complete loss of the use of the property (a *per se* claim) or on a fact-based case-by-case basis (an *ad hoc* claim). Absent a physical occupation of land or a complete denial of all economically beneficial use of the land, the courts are more likely to apply the *ad hoc* fact-based analysis.

There is no bright-line test for what constitutes an *ad hoc* taking, and careful examination of all relevant facts and the application of the specific regulatory requirement at issue is necessary. The three-part test applied by a court when a fact-based takings claim is made includes:

(a) The economic impact on the property owner. A court would examine the value of a landowner's property in light of the challenged regulation and compare it to the value without the new requirements, and then determine whether the value of the property has been so severely diminished that it has been rendered substantially valueless. Mere diminution in value, even if significant, has been found insufficient; the inability to put property to its most profitable use has also been found insufficient where the property retains some value under permitted uses.

(b) Legitimate investment backed expectations. The U.S. Supreme Court has said that a landowner does not have a constitutional right to a frozen set of laws and regulations. For example, a landowner cannot rely on the maintenance of the same zoning. Facts regarding a landowner's knowledge of actual or potential regulations when the property was bought or developed will be relevant to whether his expectations are reasonable.

(c) The character of the government action. The courts will also look at the legitimacy of the government regulation when analyzing its restriction on the use of property. If the purpose of a statute or regulatory system is to protect the environment, it will likely be upheld as a legitimate exercise of the state's police power.

[3] The material in this section of the Report is taken from Assistant Attorney General Peggy Bensinger's paper, "The Takings Clause of the U.S. and Maine Constitutions: How They Might Impact Legislation Modifying Groundwater Ownership," dated September 11, 2009. It can be found at: http://www.maine.gov/legis/opla/ctpcadditionalmtmatsept112009.pdf, pp. 29-32.

Brief Review of International Trade Agreements[4]

General. A description of how trade treaties operate will put the question of their impact on ground water in context. To begin with, there are numerous treaties to which the U.S. is a party that can potentially apply to any particular good or service. The General Agreement on Tariffs and Trade, or the "GATT," and the General Agreement on Trade in Services, or the "GATS," are administered by the World Trade Organization ("WTO"), which has 153 member countries. There are also regional trade treaties, such as NAFTA and CAFTA. Finally, there are bilateral trade agreements between two countries; if they contain investment agreements they may also be referred to generally as "IIAs." The U.S. is a party to numerous bilateral agreements, and new ones are always in development.[5] Some bilateral trade agreements are bilateral investment treaties ("BITS"), which are specifically designed to protect investments in countries where typical legal protections for business are not otherwise in place.

The parties to a treaty will negotiate the products or services that are covered, referred to as "commitments," frequently by identifying "sectors," which are related goods or services. Within these commitments countries may identify exceptions, which are called "carve-outs." The U.S. has committed more than ninety different service sectors under the GATS, and these will likely differ from the service sectors committed to coverage by other countries. The parties will also establish the legal requirements that apply to trade under the treaty, which generally contain substantive and procedural protections for the participants, as well as certain very limited exceptions to the coverage of these rules. These rules are the primary reason why international trade treaties have potential effects on state laws and regulations, in that they focus on the type of regulation perceived as non-tariff barriers to trade. And in the case of the GATS, the most far-reaching of all the WTO agreements, the detail of these trading rules continues to be a subject of negotiation. None of the current commitments by the U.S. or any other country has identified water as a sector.[6]

Claims that a country has violated a treaty are brought country to country (or, in the case of investor claims, discussed below, by an investor against a country). So for example, if a claim were brought asserting that a Maine law violates a particular treaty obligation, the claim would be brought against the U.S. and defended by the U.S. Department of State with support from the State of Maine. Claims are litigated through an arbitration process rather than by the courts, resulting in a decision that is binding only on the parties to the dispute. Damages may be awarded to a prevailing country or investor.

Investment provisions. NAFTA's Chapter 11 gives investors the right to bring treaty challenges against a country in which they have a presence and are doing business, as do other international investment agreements and the BITS. The GATT and GATS do not permit investor challenges.

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[4] The material in this section of the Report is largely taken from the "Final Report on Water Policy and International Trade Law," by William Waren, Policy Director of the Forum on Democracy and Trade, and Adjunct Professor, Harrison Institute for Public Law, Georgetown University, dated December 8, 2009, and referred to herein as "the Waren Report."

[5] A list of countries with which the U.S. has bilateral trade agreements, and the text of those agreements, can be found on the USTR's web site at http://www.ustr.gov/trade-agreements/free-trade-agreements.

[6] Waren report, page 4.

A. Expropriation. Member nations are required to compensate investors if national, state or local governments "directly or indirectly nationalize or expropriate" an investment of the other countries' investors in its territory. The definition of investment is broader than that of constitutionally protected property rights in this country. The substantive standards are also more generous. By way of comparison, unconstitutional regulatory takings must effectively deprive the owner of all uses of the property.

In *Methanex v. U.S.*, California's ban on methanol, the key ingredient in the gasoline additive MTBE, was challenged under NAFTA as an expropriation of property by a Canadian company that was its largest producer through two of its U.S. based subsidiaries. The ban was based on the unique threats that MTBE posed to the environment and public health in the state, where a number of public water supplies were contaminated with the water-soluble substance. A number of other states had enacted laws requiring phase-out and ban of MTBE.

The arbitration tribunal concluded that a nondiscriminatory regulation for a public purpose, enacted in accordance with due process and which affects a foreign investment among others does not constitute expropriation in the absence of specific commitments to refrain from regulation were made to the investor. This interpretation of the expropriation rule not only clarifies it, but does so in a manner that accommodates much of what American courts would determine to be within the scope of governmental regulatory authority. Because the lack of precedential status of arbitration decisions means that government cannot rely on this interpretation for protection (when, for example, crafting legislation), a number of parties have advocated for the codification of the Methanex rule in treaties with investor rights.

B. Minimum standard treatment. International investment agreements also require member nations to provide foreign investors with a "minimum standard of treatment" under international law. This standard includes a right to "fair and equitable treatment and full protection and security." While the concept embedded in this general standard can be read to approximate due process, it can also be read more broadly to permit an aggressive review of economic regulation.

As a result, certain of the decisions interpreting minimum standard treatment have found that it imposes a duty on government to maintain a stable and predictable legal environment together with consistent behavior and transparent requirements. Such broad protections of investors make it difficult to establish bona fide regulatory requirements to address new developments, something that the Legislature is often called on to do and which comports with due process as state and federal courts have interpreted it.
For this reason, the successful defense of *Glamis Gold v. United States* was especially significant. In *Glamis*, a Canadian company made a claim under NAFTA seeking $50 million in compensation based on the actions of the federal and California governments in imposing environmental and land use regulations on Glamis' proposed open pit gold mining operation in an area that is sacred to the Quechen Indian Nation. In declining to adopt the "stable regulatory environment" standard, The tribunal concluded that the stable regulatory environment was not supported by international law, and that to violate the fair and equitable treatment standard, an action by a nation-state must be either 1) sufficiently egregious and shocking as to be a gross denial of justice, or 2) creation by the state of objective expectations in order to induce investment followed by repudiation of

those expectations. Again, given the lack of precedential effect of this decision, codification of this standard would provide needed guidance. One of the proposals is to codify the MST standard along the lines that the U.S. argued in its Glamis brief, so that it covers three elements: 1) compensation for expropriation; 2) a lack of internal security sufficient to protect foreign businesses according to accepted international law standards; and 3) denial of justice by courts or agencies in a manner that is notoriously unjust.

Other relevant standards established by treaties. As can readily be seen by the extensive analysis in the Waren Report that addresses the extent to which bottled water and bulk water sales may be covered by existing trade agreements, it is a complex task to simply determine whether a product or service is covered. It is not practical to assess each proposed regulatory measure, whether legislative or administrative, for possible treaty implications. Such an approach would require the following steps: 1) identifying the trade agreements that cover the product or service; 2) determining what, if any, standards might be used to challenge the regulation; 3) if a potential violation is identified, determining whether any exceptions in the agreement might apply; and 4) in the case of agreements that allow investors to bring challenges, analyzing their potential claims.

Not only would such an approach be burdensome and impractical, it would detract from the long established legislative and administrative processes that are based on regulating in the public interest based on facts elucidated in a public process according to well developed case law outlining rights conferred by statute and constitution. Rather, as we recommend below, government should continue to operate as it has, but with awareness of the most prominent of the treaty standards, as outlined herein.[7]

In addition to the investment agreement standards of expropriation and minimum standard treatment discussed above, the following standards are commonly relied upon.

A. GATT Rules:

1. Most favored nation: any advantage granted to any product originating in or destined for any other country shall be accorded to the like product originating in or destined for the territories of all other contracting parties.
2. No restrictions other than duties, taxes or other charges: prohibits restrictions on importation of any product from another party's territory through quotas, import or export licenses or other restrictions.

B. GATS Rules:

1. National treatment: prohibits discrimination in favor of domestic suppliers, including laws that change conditions of competition;
2. Market access: prohibits quantitative limits on service suppliers or volume of service.

C. GATS Exceptions: conflict with a trade rule is excused if a necessity test is met and the purpose of the measure is 1) necessary to protect public morals; 2) necessary to

[7] The WTO's continuing efforts to negotiate standards specific to the "domestic regulation" of its member countries is of course a significant potential source of new requirements, but there are also treaties in negotiation at any point in time as well as negotiations to clarify or adjust existing treaty commitments and standards. In short, this is not a closed process.

protect human or animal health; 3) necessary to protect privacy or prevent fraud; 4) necessary in the view of each country to safeguard essential security interests.

Study process

The process for this study consisted of joint meetings of the CTPC and WRPC, a public hearing, and development and review of various reports.

Summary of meetings of the CTPC and WRPC. The CTPC and the WRPC held joint meetings on five occasions from July through December 2009.

July 24, 2009: This was an organizational meeting where the CTPC and the WRPC considered the questions that should be the focus of our investigations/discussions, an outline of the review process, and preliminary planning for a public hearing. The CTPC was able to engage Mr. William Waren of the Forum on Democracy & Trade to develop a report on international trade agreements and ground water regulations specific to Maine.

September 11, 2009: At this meeting, the CTPC and WRPC heard several presentations.

- Background on Maine's ground water resources Carol White, C.A. White Associates.
- Overview of Maine's regulation of ground water withdrawals, Robert Marvinney, Maine Geological Survey.
- Background on international trade agreements given by Sarah Bigney, Maine Fair Trade Campaign.
- Legal review of Maine's ground water regulation and ground water ownership, Paul Gauvreau and Peggy Bensinger, Office of the Attorney General.
- Preliminary report on water policy and international trade agreements, William Waren, Forum on Democracy & Trade.

October 30, 2009: Mr. Waren presented an overview of his revised report (discussed below).

November 20, 2009: The CTPC and the WRPC discussed preliminary actions to recommend to the Joint Standing Committee on Natural Resources in January.

December 11, 2009: The CTPC and WRPC discussed and approved revised recommendations.

Public hearing. The CTPC and WRPC held a public hearing on October 15, 2009 at the State House for the purpose of receiving public input to the discussion on the potential impacts of international trade agreements on the State's ability to regulate ground water withdrawals. The CTPC and WRPC announced the date and time of the hearing well in advance via press release and information on the CTPC website. Various interest groups also posted the announcement for this hearing on their websites. About thirty people attended the hearing and twenty-one people spoke. Several groups were represented at the hearing, including Protect our Water and Wildlife Resources, Defending Water for Life, and Save Our Water. Economic and commercial interests were also represented at the hearing. Unaffiliated individuals also spoke. The full summary of the hearing is in Appendix C. Some key points expressed at the hearing:

- Carve water out of international trade agreements: Many members of the groups and some individuals expressed concerns that water should not be treated as a commodity and should be carved out of international trade agreements. Some expressed the concern that the "global water crisis" would put increasing pressure on Maine's water resources through these agreements.

- Tribunals: Disputes under international trade agreements are resolved through tribunals. Some hearing participants expressed concerns that such tribunals are not democratic, and are not open, transparent processes. Decisions from tribunals have the potential to undermine state and local regulations and democratic processes.
- Public trust/Absolute dominion rule: Some hearing participants expressed their view that placing ground water in the public trust and/or abolishing Maine's absolute dominion doctrine with regard to ground water would enable the State to better protect these resources from challenges under international trade agreements.
- Economic support: Several hearing participants expressed the views that Maine needed more foreign investment, that "water in its natural state" is not a good, that the United States has never lost a NAFTA challenge, and that reasonable regulations that are fairly applied form the best defense against challenges under international trade agreements.

Reports considered in the review. As part of our process, the CTPC and WRPC reviewed and discussed several important legal articles that presented a broad variety of opinions regarding the potential impact of international trade agreements on a state's ability of regulate ground water withdrawals.

1. Waren report. Mr. William Waren (Adjunct Prof., Harrison Institute for Public Law, Georgetown University and Policy Director, Forum on Democracy & Trade) participated in several CTPC/WRPC meetings and agreed to develop an overview paper focused on our question of the potential impact of international trade agreements on ground water regulations (Appendix D). His report also provides many policy options, some of which have been adopted in the section on recommendations. Some key points from his report:
    a. "Water in its natural state" is not a commodity under international trade agreements. Bulk water may be considered a commodity, and bottled water certainly is a commodity under trade agreements.
    b. Although water is currently held out from many international trade agreements, through negotiations on future agreements and tribunal decisions, water and water services could be included.
    c. Disputes under international trade agreements are decided by tribunals, not U.S. courts. Tribunals work independently, drawing no precedent from past tribunal decisions. Although recent tribunal decisions have been favorable to U.S. interests, past decisions do not necessarily provide guidance to future tribunals.
    d. A strong policy position for defense against challenges under international trade agreements is to ensure that regulations are reasonable, have a sound basis, are applied equitably, and a developed through due public process.

2. Slater article.[8] Published in the Wayne Law Review (2007), this article by Scott Slater (private attorney specializing in water) is narrowly focused on the nature of property interests in water and the limits of trade laws in the context of water resource management.
    a. Water rights are an interest in real property to which trade laws do not apply.

[8]Slater, S. S. 2007, State water resource administration in the free trade agreement era: as strong as ever: Wayne Law Review, v. 53, p. 649-714. http://orgs.law.wayne.edu/lawreview/doc/recent%20issues/53.2.pdf http://www.bhfs.com/NewsEvents/Publications?find=23155

b. Ground water regulations will prevail against investor protections as long as regulations are non-discriminatory, are not applied arbitrarily, and established through due process in the public interest. Regulations that arbitrarily discriminate against certain products made from water would weaken this defense.

3. Hall article.[9] Published in the University of Denver Water Law Review (2010), this article by Noah Hall (Prof., Wayne State University Law School) uses the example of bottled water to examine the protection of freshwater resources in the arena of global water markets. Prof. Hall represented several environmental organizations in the *Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc.* case.
    a. "Water in its natural state" is not a good, but at some point in its extraction, use, and incorporation into a product, water becomes a good subject to trade agreements. States can protect water in its natural state without running afoul of NAFTA and, likely, GATT.
    b. States may regulate and restrict bottled water to the extent necessary to conserve their water resources. Thinly disguised protectionism and outright discrimination against the use of water for bottled water would run afoul of NAFTA and GATT.
    c. States have ample authority to protect ground water and ground water-dependent natural resources without the ground water itself being subject to the public trust doctrine. State constitutions, statutes, and the police power allow states to regulate water use, include ground water withdrawal, without expanding the public trust to ground water.

Conclusions and recommendations

The following recommendations and conclusions received the unanimous consent of the members of the Citizen Trade Policy Commission and the members of the Water Resources Planning Committee.

The Maine Legislature should continue to make decisions regarding ground water and other natural resources using a transparent process with opportunity for public input, and state agencies should continue to apply the law in a manner consistent with due process. International trade agreements, which are currently negotiated without sufficient consultation with states, contain provisions that could expose Maine laws to challenges in international tribunals whose decisions take precedent over state and federal law. There is potential for these treaties to undermine our state's capacity to put laws into place that protect the health and well being of our citizens. The Legislature and the CTPC should take action to monitor these trade negotiations and agreements. They should further take action to seek to change this undemocratic system in which agreements are negotiated without transparency and without meaningful consultation with the states.

2) In future policy deliberations, the Legislature should consider that the best defense against challenges under international trade agreements is to continue its existing process of adopting

[9] Hall, N. D., 2010, Protecting freshwater resources in the era of global water markets: Lessons learned from bottled water: Denver Water Law Review. Professor Hall represented several environmental and conservation organizations as *amici* in the *Michigan Citizens for Water Conservation v. Nestlé Waters North America Inc.*

regulations that are clear, reasonable, have a sound basis, are applied equitably, and that are established through due process.

Articles and legal briefings by attorneys from diverse backgrounds all confirm this view. Maine's current regulatory framework for ground water withdrawals evolved over years of public debate, and focus on impacts of withdrawals on other water-dependent resources and activities, rather than discriminating against particular uses of ground water, and thus position the State well against challenges under international trade agreements.

2) The Legislature should encourage the development of a better system for consultation between the State and the U.S. Trade Representative as future trade agreements are negotiated.

   Currently, states have little input as trade agreements are negotiated. The negotiating process lacks transparency and precludes states from any meaningful participation in the negotiations even though the agreements have significant potential impact on state regulatory authority. The Legislature should encourage our Congressional Delegation to establish a more inclusive and transparent process for USTR consultation with states on trade matters that have the potential for impacting states.

3) The Legislature should encourage Maine's Congressional Delegation to insist on the codification of these two specific tribunal decisions regarding certain disputes under international trade agreements:

   c. *Methanex* decision. The NAFTA tribunal in *Methanex v. United States* soundly rejected Vancouver-based Methanex Corporation's claim for nearly a billion dollars in compensatory damages for California's phase-out of the gasoline additive MTBE because it was polluting lakes and ground water and was endangering the public health.

      i. Specifically, narrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award. In other words, establish that the adoption or application by any national or sub-national government of any bona fide and non-discriminatory measure intended to serve a public purpose shall not constitute a violation of an expropriation article of an investment agreement or treaty.

   d. *Glamis* decision. The tribunal ruled for the U.S. when a Canadian corporation sued under NAFTA for actions taken by the Department of Interior and the State of California, imposing environmental and landuse regulations on Glamis's proposed open-pit gold mine.

      i. Specifically, narrow the minimum standard treatment to the elements of customary international law as explained in the U.S. brief in *Glamis*, in which the State Department argued for a reading of MST confined to three elements: (1) compensation for expropriation, (2) "internal security," and (3) "denial of justice" where domestic courts or agencies (not legislatures) treat foreign investors in a way that is "notoriously unjust" or "egregious" such as a denial of procedural due process. Further, the expectation of a stable or unchanging legal environment is not to be understood as part of customary international law.

4) The Legislature may wish to consider requiring that future contracts between governmental units in Maine and private investors include a waiver of any right by investors to seek compensation through international investment arbitration.

   The lack of clarity, certainty, and predictability in international trade and investment law allows international arbitration tribunals broad discretion. While some tribunals have used their discretion wisely and prudently, the precedents of past decisions do not bind future tribunals.

   Requiring such a waiver in governmental contracts would move dispute resolution from international arbitration tribunals to U.S. courts, where precedential actions are an important foundation of the judicial process. Some consideration should be given, however, to whether such action would put Maine at a competitive disadvantage for international investment and whether such a waiver could be used to show discrimination against a certain class of private investors.

6) Because of the potential impact of international trade agreements on state sovereignty and state regulatory authority, the Legislature should provide adequate support for the CTPC so that it can do the work with which it is charged by statute. While the Commission has received national recognition for its work since its inception and has served as a model for other states wishing to establish similar citizen commissions, recent funding cuts have left the CTPC without any staff assistance and it currently lacks the capacity to adequately monitor, assess and respond to the complex and complicated issues involving international trade agreements and their consequences to the people of Maine. The Legislature should therefore consider establishing a position that would:

   b. Support the Maine Citizen Trade Policy Commission in monitoring negotiations on international trade agreements and case law from tribunal settlements and support it in providing input to the Legislature, Governor, Maine Congressional Delegation and the U.S. Trade Representative on international trade issues and their impact on the people and economy of Maine.

   d. Assist the CTPC with reviewing the potential impacts of international trade agreements on state regulatory authority and support the CTPC in advising the Legislature and legislative policy oversight committees when considering such impacts in policy decisions.

   e. Assist in communicating concerns and needed actions to the Legislature, Governor, Congressional Delegation, U.S. Trade Representative, and others.

7) a. We recommend that the Legislature encourage the U.S. Trade Representative and Maine's Congressional Delegation to continue to carve water out of future international trade agreements and existing agreements that may be renegotiated.

   b. The research undertaken for this report did not identify any decisions that shed light on the specific issue of whether a legislative change to a public trust rule governing ground water would improve the chances of a Maine regulatory statute withstanding a challenge based on a trade treaty.

   Some members of the public supported taking steps to protect Maine's ground water due to its importance and the potential impacts of world shortages and global warming. These

measures included continuing to carve water out of international trade agreements, and changing the standard governing the use of Maine's ground water to a public trust.

Many of the speakers at the public hearing expressed concern about the impact of treaty provisions on Maine's system of regulating the use of ground water. Several speakers emphasized that water is different from the vast majority of products that are subject to trade agreements, and even other natural resources in that it is necessary to life. The importance of water is reflected in existing state and federal regulation, designed to ensure both its safety and continued availability.

For these reasons, water should continue to be carved out of international trade agreements. As treaties are negotiated, the parties decide which products and services should be covered, and bargaining determines those that are included. The unique nature of water makes it ill-suited for this type of decision making, i.e., extending treaty coverage to water in return for coverage of some sought after product(s) of the bargaining partner. Water is not a good or a product in the common usage of those terms. While there are serious shortages of water in parts of the world, and even in parts of the United States, resolution of this issue should not be determined by private investors exercising rights that they believe are conferred on them by trade treaties.

The concept that Maine should change the doctrine governing ground water to one of public trust is a more complex issue. The substantial research that has been conducted for this report did not identify any decisions made under the provisions of any trade treaty that address the concept that moving to a public trust rule would improve the likelihood of withstanding a trade treaty challenge.

However, there are potential legal consequences under state and federal law if the Legislature were to adopt a public trust rule. Litigation in state or federal court challenging the impact of the specific changes upon ownership interests would be likely. The legal issues involved in resolving such a challenge are complex, and the outcome cannot be predicted with certainty, but if such a challenge were successful, it seems likely that the potential damages that could be awarded would be high.[10]

As the Maine Law Court noted in declining to judicially abrogate the absolute dominion rule, there are "heavy policy considerations" involved in making such a change that render it more suitable for legislative study and decision. *Maddocks v. Giles*, 1999 ME 63, 728 A.2d 150, ¶ 12. Such a study and recommendations concerning the policy and regulatory implications of changing the absolute dominion rule are beyond the scope of the charge to this group, and are clearly material to any decision that a different rule would lead to a better water policy for the State. As emphasized in our first recommendation, the best protection against treaty challenges is the establishment of sound regulatory measures, grounded in science and facts, developed through a legislative and rulemaking process that encourages public input, and

[10] Such a change could also generate treaty challenges by affected investors. Those who were able to do so might take advantage of treaty provisions such as those authorizing compensation for expropriation (which is somewhat analogous to confiscation) or violations of minimum standard treatment provisions. A successful treaty based claim could result in damages against the federal government and an obligation to take steps necessary to eliminate the Maine law provision that resulted in the award. This is not to conclude that such a challenge would be successful, but rather to point out the consequences in such event.

that are applied to all, consistent with due process. Maine has a thorough regulatory system for water resources that meets this standard.

Appendix A

Citizen Trade Policy Commission and Water Resources Planning Committee members

Citizen Trade Policy Commission
Membership

Rep. Margaret Rotundo – Chair
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mrotundo@bates.edu

Term: Reappointed 01/15/09

Sen. Troy Jackson, Chair
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Term: Appointed 01/15/09

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Ex-Officio – DA

Sarah Bigney
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Representing Nonprofit Human Rights Organizations
Term: 12/04/07 – 12/03/2010

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Ex-Officio – DEP

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Representing Economic Development Organizations
Term: 11/26/07 – 11/25/2010

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Term: Appointed 12/08

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Representing Healthcare Professionals
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Represents DECD

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Representing Maine based Corporations Active in International Trade
RESIGNED 2/11/09
Term: 10/09/07 – 10/08/2010

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Representing Organizations Promoting Fair Trade Policies
Term: Appointed 02/25/09

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Representing Organized Labor
Term: 12/04/07 – 12/03/2010

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Representing Small Farmers
Term: 12/17/07 – 12/16/2010

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Representing ME-based Manufacturing Business
with more than 25 employees
Term: Appointed 02/17/09

Governing Statute: Title 10 MRSA, Chap. 1-A, §11

Membership: 3 senators representing at least 2 political parties, appointed by the President of the Senate;
3 members of the House Representative representing at least 2 political parties, appointed by the Speaker of the House;
4 members of the public, appointed by the Governor as follows:
- Small business person;
- Small farmer;
- Representative on nonprofit organization that promotes fair trade policies;
- Representative of a Maine-based corporation active in international trade.

3 members of the public appointed by the President of the Senate as follows:
- Healthcare professional;
- Representative of Maine-based manufacturing business with 25 or more employees;
- Representative of economic development organization.

3 members of the public appointed by the Speaker of the House as follows:
- Person active in organized labor community;
- Member of a nonprofit human rights organization;
- Member of a nonprofit environmental organization.

Ex-Officio non-voting Membership:
- Department of Labor;
- Department of Environmental Protection;
- Department of Agriculture, Food and Rural Resources, and
- Department of Human Services.

Term: Except for Legislators, Commissioners and the Attorney General, members are appointed for 3-year terms. Appointed members may not serve more than 2 terms. Members continue to service until their replacements are designated.

Duties: Shall hold twice public hearings twice annually;
Shall conduct an assessment every 2 years on the impacts of international trade;
Shall submit an annual report.

Quorum: For purposes of holding a meeting, a quorum is 11 members. For purposes of voting, a quorum is 9 voting members.

Rev. 03/27/09

Water Resources Planning Committee

Public Members

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Appendix B

Water Use Policy Background
Previous State Efforts in Water Use Policy

Compiled by
Robert G. Marvinney, State Geologist
Maine Geological Survey
Department of Conservation

September 2004
Amended January 2010

Water Use Policy Background
Previous State Efforts in Water Use Policy
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This compilation provides an outline of water policy efforts carried out during the past several decades. While this summary addresses highlights in water policy with some detail, it is not comprehensive, and makes no attempt to address efforts before the 1980s. Several agencies contributed to this summary including the Departments of Environmental Protection, Human Services, and Agriculture.

Groundwater Protection Commission, 197x-1980. Broad review of groundwater quality and quantity issues. Groundwater Quantity Subcommittee report recommendations:

1) Maine Geological Survey (MGS) and U.S. Geological Survey (USGS) continue to map gravel and bedrock aquifers. *Status*: gravel aquifer mapping nearing completion, bedrock information collected but no direct mapping.
2) Continue observation well network with USGS. *Status*: currently 23 groundwater observation wells in Maine maintained through the cooperative stream gaging program.
3) MGS and USGS prioritize future aquifer studies. *Status*: while there has been no prioritization per se, aquifer characteristics are reported as part of MGS's aquifer mapping, and ad hoc studies have been conducted.
4) Aggressive steps be taken to protect groundwater quality. *Status*: substantial rules regarding water quality protection administered by MDEP.
5) Maine agencies participate in USGS water use data program. *Status*: serious effort to collect better water use information for Maine was begun in 2003 at the direction of the Legislature.

Water Transport Law, 1987

This law and the commission described below were initiated by the Legislature in response to concerns about wholesale export of water from "water-rich" Maine.

Legislative Finding: The Legislature finds that the transport of water for commercial purposes in large quantities away from its natural location constitutes a substantial threat to the health, safety and welfare of persons who live in the vicinity of the water and rely on it for daily needs. If the transportation occurs, persons who relied on the presence of water when establishing residences or commercial establishments may find themselves with inadequate water supplies. In addition, the Legislature finds that the only practicable way in which to prevent the depletion of the water resources is to prohibit the transport of water in large quantities away from the vicinity of its natural location. The purpose of this prohibition is, however, not to prevent the use of such supplies for drinking and other public purposes in the vicinity of the natural location of the water.

Provisions: Restricted transport across municipal borders of water in containers greater than 10 gallons for commercial purposes. Water utilities (and some other uses) are specifically exempted and other water transporters can appeal for a three-year exemption.

Water Supply Study Commission, 1987-89

This Commission included membership from the Legislature, State Planning Office, Departments of Conservation and Human Services, the PUC, two major water districts, and a water engineering consultant.

The commission was charged with studying:

1) the adequacy of water supply for both commercial and noncommercial use;
2) impacts on the state from exportation of water;
3) adequacy of current regulation of the state's water supply;
4) a review of the appeals process regarding restrictions on water transport.

Recommendations:

1) State government should begin the process of developing a water resource management strategy in order to ensure adequate future supplies of water for domestic, commercial and industrial needs of the citizens of the state. *Status*: We've been discussing this ever since.
2) The Legislature should establish a multi-interest board to recommend the structure for Maine's future water management activities. *Status*: temporary Water Resource Management Board established to make recommendations. (see next section)
3) The Water Resource Management Board should analyze current state water management activities and issues of concern and make recommendations to the Legislature by January 1, 1991 regarding the appropriate State role in managing water supplies and the institutional structure necessary for efficient and effective State involvement. *Status*: Recommendations made in January 1991.
4) In order to begin identifying the role of state agencies in water resource issues, the Water Resource Management Board should request that copies of all applications for licenses or permits having an impact on water resources filed with other agencies of State government be sent to the Board. *Status*: Since the Board was not reauthorized, no action taken.

Water Resource Management Board, 1989-90

This temporary board was created in 1989 through legislation recommended by the Water Supply Study Commission. This Board had representation from state agencies involved in water issues (State Planning, PUC, Agriculture, Conservation, Fisheries, Economic and Community Development, Environmental Protection, Human Services) as well as water utilities, municipal governments, commercial users, hydropower producers, federal natural resources agencies, and the general public. The following summary of recommendations of this Board is organized according to the mandates in the Board's enabling legislation.

Water Use Rights: Review methods by which water rights are obtained under the existing law and recommend appropriate changes.

1) The Legislature should adopt a general definition of "reasonable use" that includes all socially and economically beneficial uses of water. *Status:* not adopted.
2) The Legislature should extend the reasonable use rule to groundwater resources. *Status*: not adopted.
3) The Legislature should provide additional guidance to be used in resolving conflicts among competing users. Beneficial uses of both surface and groundwater should be judged reasonable based on their impacts on the sustainability of the water source, impacts on other legitimate uses, as well as other factors. *Status*: not adopted.

Water Use Priorities: Recommend priority uses for preferential access to water supplies when supplies are inadequate to meet all demands.

Same recommendations as above.

Water Diversions: Recommend a policy regarding water diversion which addresses the implications of diversion from the State and the regions and sub-basins within the State.

4) Replace the Water Transport law with a permitting process for all inter-basin diversions in excess of 500,000 gallons per day. Status: not adopted.
5) An applicant for transport of water between 500,000 and 1,000,000 gallons per day should be entitled to the permit as long as it:
    a. Furnished public notice of the diversion;
    b. No evidence is produced to show that this diversion, in addition to current uses, could potentially exceed safe yield or otherwise be unreasonable.

    Status: not adopted.

Water Conservation: Recommend ways to improve and encourage conservation of water resources.

6) State agencies continue to encourage cost effective conservation measures by individuals, commercial and industrial interests. *Status*: state regulatory agencies routinely review conservation options with commercial and industrial water users. Some information on conservation practices available from some agencies.

New Permanent Structure: Recommend a permanent structure for centralized and coordinated conduct of the role of the State in water supply management.

7) Create a new water resources management board comprised of a citizen's board and supporting staff. Responsibilities:
    a. Assist in the development of water management policies;
    b. Map water basin divisions to be used in planning;
    c. Determine and designate areas of limited local water supplies and establish priorities for undertaking water resource planning;
    d. Develop, review, adopt and amend as necessary local water basin management plans;
    e. Approve or deny water withdrawal permits for large diversions or any water withdrawal permits required as part of management plans;
    f. Provide a forum for the resolution of water-related disputes;
    g. Foster cooperation among federal, state, regional and local agencies;
    h. Collect, develop, evaluate, manage and disseminate water resource data;
    i. Provide assistance to other entities preparing study and action plans related to water resources.

    Status: Board not created. Some responsibilities proposed for this Board are carried out by state agencies.

Collection of Data: Implement a strategy for coordinated collection of water supply and use data and compile that data in a readily accessible form.

8) Designate hydrologic management units within the state. *Status*: partially completed. MGS and USGS developed detailed digital drainage divide maps that have been used and enhanced by other agencies.
9) Standardize data collection among state agencies for collection and storage of water data. *Status:* partially completed. GIS serves as a common platform for collection and sharing of water data among state agencies, but there has been little effort in standardizing formats.
10) Water users of over 50,000 gallons per day should be required to report withdrawals. *Status:* Not adopted. (see Water Use Reporting law below)
11) Support the MGS/USGS water data collection project. *Status:* Water Use position at MGS cut in 1991, USGS/state water cooperative budget reduced. (see Water Use Reporting law below)
12) Develop a list of priority research needs and produce an annual report on water-related studies. *Status:* state agencies have considered priority research needs and report on water-related studies although not in the annual report format envisioned here and not in a coordinated fashion.

Technical Assistance: Develop technical assistance programs for municipalities, communities, or individuals adversely affected by water use decisions.

13) Board should coordinate water management activities among state agencies, provide technical support. *Status:* Not adopted in this form. State agencies provide considerable technical assistance to communities and individuals with regard to water problems.

Agency Coordination: Develop a strategy for coordination of all state and local agencies involved in water supply management.

14) Board should provide a single point of contact for water resource issues. *Status*: Not adopted.
15) Board should sponsor biennial exchange conference. *Status:* Not adopted in this format, but the annual Maine Water Conference accomplishes much of this recommendation.

Dispute Resolution: Recommend a process for adjudication of disputes over the right to use water and over the establishment of water levels for water supply ponds.

16) The state should modify responsibilities as necessary to achieve a complete and coordinated state agency approach to water-related dispute resolution. *Status:* not adopted.

Aroostook Water Use Policy, 1996

The Aroostook Soil & Water Management Board was established by the Legislature in 1987 to coordinate an Army Corps of Engineers irrigation and conservation research demonstration project in the St. John River basin. This project studied the impacts of irrigation and conservation practices. Although the Legislature did not pass the water policy reforms recommended by the Water Resource Management Board, the Legislature did recognize the Aroostook Soil & Water Management Board as a legitimate organization to serve as a conflict-resolution agency for northern Aroostook County. Through a series of meetings, the Board made a number of recommendations:

1) Inventory Aroostook County irrigators. *Status:* Completed.
2) Institute a process to address water withdrawal complaints. *Status*: largely implemented.
3) Work with farmers to assess irrigation needs. *Status:* in place.
4) Establish a direct withdrawal limit of 7Q10 and develop long-term Aquatic Base Flow (ABF) limits for withdrawals on streams where aquatic habitat is threatened. *Status:* in place for Aroostook County.
5) Encourage wetland use and impoundments on streams as alternatives to water withdrawal from streams. *Status:* Agricultural irrigation pond exemption and general permit process for dammed streams in place.
6) Financing for reservoir development. *Status:* Some funds available through Legislative bonds.
7) Educational program to encourage adoption of whole farm plans and to clarify the low flow plan to farmers. *Status:* in place but limited funding.

Downeast Rivers Water Use Management Plan, 2000

This effort was initiated as part of the Maine's Atlantic Salmon Conservation Plan and focuses on the important salmon rivers of eastern Maine. The plan has many elements and recommendations that are being pursued as resources permit. Those recommendations include:

1) Maintain USGS Gages on the Downeast Rivers, low-flow studies, monitoring strategies. *Status:* mostly in place.
2) Integrate Water Withdrawal Source Selection Hierarchy into State Policies. *Status:* done on an ad hoc basis.
3) Technical Assistance to Farmers -To ensure water resources are used as efficiently as possible, growers need technical assistance in implementing "best practices" for water management. *Status:* Guidance document to be completed by September 2004.

4) Cost Share Assistance- Cost share programs should be created to assist growers develop water sources that reduce current withdrawal impacts on Atlantic Salmon Habitat *Status:* New bonds passed for agricultural source development – See Agricultural Water Management Program below.

Agricultural Water Management Program

The Department of Agriculture established a new Agricultural Water Management Program in 1999 in response to the Governor's request to solve drought related losses by farmers in 1999. The Department convened a committee to develop a plan of action, the "Blueprint", which was completed in 2000. The Blueprint was updated in March 2003 as the Sustainable Water Source and Use Policy and Action Plan. The plan has a number of recommendations and actions to reduce drought related losses:

1) Continued funding of the successful State cost share program for sustainable water source development including engineering design and offset of permitting costs. *Status:* New Bonds passed in 2001.
2) Change LURC regulations for water source development to mirror DEP regulations regarding well and pond development and seasonal agricultural use. *Status:* Considerable debate during Sustainable Water Use Policy Process (see below), but without consensus.
3) Study ways to reduce or eliminate the requirement for federal and state (LURC) mitigation of wetland impacts for agricultural pond development. *Status:* draft recommendations developed.
4) Add seasonal water use for agriculture as a high priority use in Maine law. *Status:* Law passed establishing Agricultural as a priority water user in DEP water quality regulations.
5) Support non-regulatory solutions to water withdrawal complaints during low flow periods while maintaining traditional, longstanding riparian rights of users. Utilize the successful Aroostook Water and Soil Management Board low flow policy as a model. *Status:* No action to date.
6) Fund more research studies on economics of supplemental irrigation and alternative methods to increase soil water holding capacity and create water use conservation and efficiency. *Status:* Potato and Blueberry research accomplished.
7) Fund low flow studies to establish realistic limits on withdrawal to water bodies in regions where irrigation is likely to continue with direct withdrawals. *Status:* Low-flow study completed Downeast.
8) Fund increased technical assistance from the Department, Cooperative Extension, Soil and Water Conservation Districts, and USDA-Natural Resources. *Status:* Extra funding made available through NRCS in 2003 and 2004.

Sustainable Water Use Policy Process, 2000-2002

This process was initiated by several state agencies following a DEP draft proposal in 1999 for rules governing in-stream flows and water withdrawals. This effort was organized under the SPO's Land & Water Resources Council and involved state and federal agencies, water suppliers, irrigators, industrial water users, ski resorts, commercial bottlers, environmental organizations, and other interested parties. Considerable impetus for this process came from the perceived or potential conflict between Atlantic salmon habitat and water withdrawals in eastern Maine rivers. However, the process was established to consider water use policy statewide. The goal of the process was to develop a prioritized set of recommendations to establish sustainable water withdrawal policies for Maine's public water resources. The process involved several roundtable meetings with numerous participants, regular working group meetings, and subcommittee meetings.

Participants in the process agreed that solutions to water use challenges would contain many components:

- Improved storage options.
- Flow standards.

- Water conservation and efficiency of use.
- Eliminating regulatory discrepancies.
- Monitoring and research.
- Public education.
- Capacity to implement the strategy.
- Periodic assessment of effectiveness of strategies.

Subcommittees addressed storage needs, aquatic ecosystem requirements, water conservation, consumptive use, and research and monitoring. Though in the end final consensus was not reached on the recommendations, the water use reporting law which was subsequently adopted by the legislature was based largely on the work of the Sustainable Water Use Policy Process. That new law, which is further described below, also directs the DEP to undertake rulemaking to adopt water use standards.

Water Use Reporting Law 2002

Title 38, Article 4-B was adopted by the Maine Legislature in 2002. An outcome of the Sustainable Water Use Policy process, the new law established the Water Use Reporting Program. The DEP submitted the first report of the Water Use Reporting Program to the legislature in January, 2004. The major provisions of the law are:

1) Non-consumptive use of water defined.
2) Reporting thresholds defined (paraphrased here). Users of 20,000 gallons or more per day on small streams need to report annually. This threshold increases on larger flowing water bodies based on the flow. Users that withdraw from lakes must report based on a sliding scale of weekly withdrawal vs. lake size. Groundwater users with 500 feet of a surface water body must report according to the same requirements for that surface water body.
3) Individual water reports are confidential.
4) Reports go to various state agencies that aggregate them by watershed for inclusion in a master database.
5) Non-consumptive and many other uses are exempt from reporting.
6) Requires DEP to develop rules for "maintaining in-stream flows and GPA water levels that are protective of aquatic life and other uses and that establish criteria for designating watersheds most at risk from cumulative water use." These will be major substantive rules, submitted to the legislature for consideration in 2005.
7) Requires the DEP to "encourage and cooperate with state, regional or municipal agencies, boards or organizations in the development and adoption of regional or local water use policies that protect the environment from excessive drawdown of water sources during low flow periods," as done in the Aroostook Low Flow Policy.

Review of Ground Water Regulations Working Group, 2005-2007.

This stakeholder group conducted a comprehensive review of the then current regulations governing withdrawals of ground water. Among the chief work done by this group was a systematic review of water supply and demand in watersheds statewide. This effort revealed that Maine does not have a statewide crisis with regard to water use, but that there are some watersheds that should be the focus of additional investigations. The Working Group recommended:

- addressing water issues through a watershed approach;
- establishing a Water Committee to oversee water information and investigations;
- establishing a permitting process for significant wells under the Natural Resources Protection Act.

Water Resources Planning Committee, 2007 – to-date

This Stakeholder Committee is charged with coordinating agency water information, conducting water investigations in watersheds where demand is a high percentage of supply, and convening planning groups in watersheds as needed.

The WRPC draws its membership from state agency groundwater professionals, water utilities, agricultural water users, the bottled water industry, other commercial water users, private well drillers, and a water advocacy organization.

The committee is charged with:

1) gathering and otherwise improving water resource data and using these data in an analysis of "watersheds at-risk." Prior to establishment of the WRPC, the Maine Geological Survey conducted a preliminary analysis of "watersheds at-risk" using available data as part of a comprehensive review of groundwater withdrawal regulations. The map produced through this process identifies a number of watersheds in which cumulative withdrawals in combination with in-stream flow requirements might be a large percentage of available water resources.
2) convening planning groups in watersheds where additional data gathering and analysis indicate that cumulative water use, including demands for in-stream flow, approach unsustainable conditions.
3) making recommendations to the Legislature on options to address oversubscribed watersheds where the planning efforts of the second phase have failed.

Significant Ground Water Well Permit, 2007

The Legislature established the Significant Well Permitting Program within the Natural Resources Protection Act for high-volume wells – those pumping at least 50,000 gallons per day within 500 feet of water bodies, and those pumping at least 144,000 gallons per day more than 500 feet from a water body. This includes wells previously permitted under Bulk Water Transport. The applicant must show no adverse impact on ground water, surface water, water-related natural resources, or existing uses. Permits require monitoring of water resource and water dependent resources. Permits are conditioned and withdrawals may be limited based on resource conditions.

124th Legislature, First Regular Session, 2009

The Legislature debated fourteen bills dealing with ground water, most of them focused on concerns with bottled water. Several of these bills grew from two recent events: exploration for a potential bottled water source in Shapleigh; a potential long-term contract for water between the Kennebunk-Kennebunkport-Wells Water District and a commercial bottler.

The Potential Impact of International Trade Agreements on Ground Water Withdrawal Regulations, 2009

The 124th Legislature passed Public Law 2009, chapter 132, which directed the Water Resources Planning Committee, of the Land and Water Resources Council, in coordination with the Office of the Attorney General and the Citizen Trade Policy Commission, to conduct an examination of the potential legal impacts of international trade agreements on the State's ability to manage its ground water resources, including, but not limited to, the potential consequences of permitting foreign companies to extract ground water. The examination was to include a review and assessment of the following subjects as they relate to or impact international trade agreement issues and the State's regulation of its ground water:

1. Property rights related to the ownership of ground water.
2. The various common law doctrines relating to the use of ground water, including the absolute dominion rule and the reasonable use rule.
3. Natural resources other than ground water.

Appendix C

Citizen Trade Policy Commission
Water Resources Planning Committee

International Trade Agreements and Ground Water Regulations

Public Hearing
State House Room 228
Augusta, Maine
October 15, 2009
Summary

Citizen Trade Policy Commission
Water Resources Planning Committee
International Trade Agreements and Ground Water Regulations
Public Hearing
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Summary

Introduction to the hearing by Robert G. Marvinney, State Geologist.

Linda Pistner, Deputy Chief Attorney General, provided an overview of Maine's legal setting for ground water and an outline of the current regulations that govern the withdrawal of ground water.

Sarah Bigney, Commission member, outlined the major international trade agreements and potential impact to state and federal sovereignty. She provided several examples from cases in other states.

David Webster, Maine Representative from District 106, reviewed Resolve 132 that initiated this analysis of the potential impacts of international trade agreements on the state's ability to regulate ground water withdrawals.

Groups

Shelly Golbiel, Chairperson, Protecting Our Water and Wildlife Resources (POWWR), a grassroots organization founded in 2007: The organization was founded by the townspeople of Shapleigh and Newfield to raise awareness of the water testing by Poland Spring, a division of Nestle Waters North America. She related her town's experience in dealing with potential ground water extraction by Poland Spring. Ms. Golbiel stated that the already-existing local and state-level water laws will not hold in court in their current state. Ms. Golbiel used the Maine shoe industry as an example of the previous statement. The state needs to take lessons from the past and think about future generations. The chair of the POWWR recommended trade and investment agreement reform as well as stricter provisions on policies.

Martin and Barbara Britten, POWWR: The Brittens specifically called for water resources to be carved out of international trade agreements and that Maine's ground water be placed in the public trust. Ms. Britten is concerned that NAFTA and GATT commodify water resources on a global scale. Ms. Britten said, "With the world water crisis and global international agreements, Maine's water is left vulnerable." Ms. Britten also noted that other states, like Vermont, New Hampshire and Massachusetts have recognized the limitation of their water resources and made efforts to protect them. She expressed concern that under NAFTA, Maine is required to give all NAFTA signers the same benefits and deals as the United States. Both of the Brittens seconded the recommendations made by Mrs. Golbiel.

Ben Chin, Maine Peoples' Alliance: The Alliance focuses on laws that benefit the population's well-being. The availability of water for drinking and recreation is of particular concern as it pertains to the well-being of the people of Maine. Mr. Chin stated that the provisions of NAFTA give foreign investors rights and liberties that could potentially "trump" state and national sovereignty. The organization has specific concerns with Chapter 11 of NAFTA. Under this Chapter, for example, the Kids Safe Law could be challenged as too burdensome to a company. With the belief that the power to make legal decisions should be made in Maine and not in international tribunals, Maine People's Alliance also supports the removal of water from international trade agreements.

Bonnie Preston, The Alliance for Democracy: The Alliance for Democracy had specific issues with Article 6 of the GATS of the World Trade Organization, namely Domestic Regulation. Local and state regulations such as "goals to ensure qualifications and standards" could be deemed too burdensome if they hindered a company's profits or services. "National measures shouldn't hinder" these profits or services in anyway. The organization is concerned that basic human needs and drinking water standards could be determined too burdensome. The United States has opposed changes to the agreements under the World Trade Organization and the organization noted that there have been no new disciplines or changes made to article 6.

Stephan Donnell and Daphne Loring, Maine Fair Trade: Maine Fair Trade is comprised of 55 member organizations. Both Donnell and Loring reiterated risks of international trade agreements, namely that they threaten state sovereignty and circumvent local policies that are meant to benefit the public, like those pertaining to the environment and public health. They also recommended that water be carved out of all international trade agreements and specifically the GATS, along with the establishment of investment disclosure, and the protection of sovereignty and local control by enforcing the hearing of conflicts in domestic courts. Ms. Loring also described the experience of Bangor's sister city in El Salvador – Carasque. PacificRim, a Canadian corporation (Canada is not a signatory to CAFTA), used a U.S. subsidiary to sue El Salvador over permits to mine gold. Mr. Donnell and Ms. Loring used this as an example of potential abuses of the international trade agreements to which Maine may be vulnerable.

Betsy Anderson, Steering Committee of Save Our Water from Wells: Ms. Anderson seconded POWWR's concern that if challenged through international trade agreements through an international tribunal, Maine would not succeed. Water is an essential element and Ms. Anderson, along with her organization, does not think it should be treated like oil or pharmaceuticals. Save Our Water also calls for the removal of water from all free trade and investment agreements, specifically the GATS. The economy depends on a clean and safe environment. Ms. Anderson hopes that the legislature will "think globally and act locally, keeping the "Maine" in Maine by refusing to be enslaved by Nestle."

Herbert Hoffman, Ogunquit, co-chairman of Save Our Water: Mr. Hoffman called for the abolishment of absolute dominion. He believes that the role of water is too precious not to be in a public trust. Mr. Hoffman is concerned that international corporations have been given rights, constitutional and otherwise, similar to those of individual people. His concern is that this "person-status" gives companies the potential to make decisions outside of the local, state and even federal domain. He called for Maine to defend its water.

Emily Posner, from Sheepscot River represented the Defending Water for Life Campaign: This organization also recommends that water be carved out of the GATS and all trade agreements. Ms. Posner expressed her organizations' concerns r specifically with articles 11 and 20 of GATT. Article 20 allows for a country to restrict access to a resource in order to protect human life and conserve the environment. The Defending Water for Life Campaign focuses on the protection of life and health and question the overall root cause of the global shortage of water which seems to have resulted in Maine's water becoming such a desired commodity. The Campaign is also concerned about the effects of bottled water, for example the cancerous effects of plastic manufacturing, aquifer destruction, and effects on other organisms besides humans. Ms. Posner also wanted it to be clear that Maine's water has yet to be determined inexhaustible, with particular concern for the world water shortage and the impacts of climate change.

Economic Supporters

Chip Ahrens, representing Poland Spring, part of the international Nestle company: Mr. Ahrens made it clear that the GATT specifically regulated the trade of *goods* (emphasis from hearing material). Groundwater, or water in its natural state, is not technically regulated under the GATT. Bottled water is, however, regulated by the GATT. Mr. Ahrens also wanted to make that distinction that any disputes over WTO agreements would be heard member nation versus member nation. The WTO also cannot rewrite laws or order any state to change their regulations. International Investment agreements (IIA) under NAFTA, according to Mr. Ahrens, are different from the WTO agreements. The United States, not individual states, can initiate cases. The United States has yet to lose a IIA challenge, although the IIA outcome do not include rewriting any regulations. "Buy American" procurement provisions, "Mad Cow" disease quarantines, and others have all been upheld. IIA only consider monetary damages. Mr. Ahrens also made it clear that nondiscriminatory regulations for public purposes enacted through due process cannot constitute an expropriation.

Chris Jackson, The Maine State Chamber of Commerce: . The Chamber represents at least five-thousand businesses. Mr. Jackson noted that water extraction is already heavily regulated in Maine. The Chamber is also concerned that the state needs more foreign investment. For every single growing local business, there are four or five that are struggling. Unemployment as increased 50% statewide to about 8.5% statewide, and bankruptcies have increased 33%. The Chamber of Commerce noted that Poland Spring employs about 800 people in-state and pays vendors and contractors. The official position of the Chamber is that water replenishes naturally and these types of businesses should be encouraged as long as they are sustainable and reasonable.

Rick Knowlton, Vice President of Aqua Maine: Aqua Maine, a division of Aqua America, an investor- owned company, has served twenty municipalities, some for over fifty years.. Mr. Knowlton expressed concerns with Mr. Waren's draft report and reviewed existing regulations. There is already a bulk water law. Mr. Knowlton referred to a legal article by attorney Scott Slater. He also stated that water is a property under the absolute dominion rule and therefore the GATT and other international trade agreements do not apply. Mr. Knowlton also referred to the Public Utilities Commission and Title 35A which restricts return on a company's investment. Aqua Maine believes, similar to the Chamber of Commerce, that the focus should be on reasonable regulations of water resources before water can be considered goods, products, or services regulated by GATT.

Individuals

Denise Carpenter, Newfield planning board member, a woodlot owner and cattle farmer: Ms. Carpenter reiterated the same information as Shelly Golbiel. . All resources are interrelated. Ms. Carpenter referred to the borders being closed to Mad Cow importation and international companies owning logging in Northern Maine as examples of the effects international policies and agreements have at the state and local levels. She recommends that town-level provisions should be stricter than the state, or "life as we know it will change."

Charles Mullins, Shapleigh: Mr. Mullins does not want domestic regulations to be subject to international policy and believes "there will only be political compromise if the legislature lets it." The goal of the state should be to represent the needs of the people.

Gloria Dyer, Newfield: Ms. Dyer reiterated Hoffman's concern over the constitutional rights given to companies, the threat to state sovereignty, and lack of transparency. Investor's rights give companies power to challenge policies and agencies that interfere with economic profits (including local businesses). In the Newfield-Nestle case, Nestle acted for three years without public notice. Dyer called for laws that would protect Maine's state sovereignty. She also called for water to be removed from the GATT and placed in a public trust for future generations. She recommended that states should be represented in NAFTA and CAFTA negotiations if they are to be affected, directly or indirectly.

Rick Burns: Mr. Burns is an advocate for democracy, private property and fair trade. He noted that there are an increased number of citizens fighting multinationals. Mr. Burns came to the hearing as a supporter for the townspeople of Newfield and Shapleigh. He believes that companies are granted a privilege to use resources and should not undermine municipal ordinances. He also stated his belief that absolute dominion is a product of times past that has eroded and needs to be abolished or rebuilt. "Reasonable Use" has a much better sound than "Absolute Dominion" Mr. Burns also referenced the court case of *Lucas vs. South Carolina Coastal Council* as an example in which regulations were established and businesses had to expect that subsequent regulations would affect the way they do business. He also quoted a former Attorney General, who stated that international tribunals threatened democracy. Consider the rights based ordinance such as that passed by Shapleigh.

Eileen Hennessey: Ms. Hennessey is simply concerned for all natural resources. Everything needs water to survive. Ms. Hennessey is particularly concerned that the 2006 installment of eminent domain allows a company to come onto private land and take ground water for profit.. Water should not be a commodity. She further reiterated the recommendation for the removal of water from the GATT and the creation of a public trust for the natural resource. Ms. Hennessey also noted that foreign companies control Maine's wood and electricity.

Jim Freeman, Verona Island: Mr. Freeman raised awareness for the East-West Highway, a 1000ft swath including road, rail, a utility and water pipeline. Maine would be exporting water in pipes. Gravel would go to Europe for roads, and trees would go to Europe for wood pellets to lower carbon dioxide emissions. Both would leave Maine with no value added. This is another example of already-existing economic relationships between Maine and international companies.

Grace Bradley: Ms. Bradley emphasized her concern over the legislature's "potential overconfidence or complacency." Ms.. Bradley hopes the legislature will not lose sight of the larger picture, the broader and long-term implications the GATT for Maine. She referred to her own personal experience working with the GATS in Mexico.

Appendix D

Final Report on Water Policy and International Trade Law

William Waren

December 8, 2009

Forum
on democracy & trade

Final Report on Water Policy and International Trade Law

William Waren

December 8, 2009

Short Summary of Report

- ***Importance of the issue.*** The question is whether international trade and investment law might thwart Maine should the state adopt new groundwater policy measures. NAFTA, the WTO and subsequent trade agreements impose rules related to government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade.
- ***Trade agreements.*** The World Trade Organization (WTO) agreement on trade in goods clearly covers trade in bottled water, but there are two schools of thought on whether trade in bulk water is covered. Opinions also differ about whether the WTO agreement on trade in services covers groundwater measures, although a strong argument can be made that regulation of transportation or distribution of water is covered. WTO suits may be brought by nation-states that are parties to the agreement, and WTO tribunal decisions are effectively enforced by retaliatory trade sanctions, such as authorization of punitive tariffs on U.S. exporters.
- ***Investment agreements.*** Chapter 11 of the North American Free Trade Agreement (NAFTA), bi-lateral investment treaties (BITS), and similar international investment agreements (IIAs) cover groundwater measures. IIAs also are the most likely source for an international lawsuit. Indeed, IIA suits seeking compensation for government water policy measures are quite common. This is because:
  - The definition of "investment" is broad;
  - The standards regarding investor rights are vague; and
  - Foreign investors can directly sue the United States for money damages, without the need for another nation-state to bring suit.
- ***The need to provide for predictability in international trade and investment law.*** The solution is to reform international trade and investment agreements to, in the place of vague text, substitute:
  - Specific language protecting the authority of local democratic institutions and local courts to act in the public interest; and
  - Specific language in new general exclusions in trade and investment agreement coverage of key areas of state regulatory authority, including regulation and protection of freshwater resources.

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Final Report on Water Policy and International Trade Law

Summary of Report

- ***Why analyze how international trade and investment agreements may impact Maine's management of groundwater resources?***

Under U.S. domestic law, Maine has authority to adopt water policy measures in order to protect the public health and the environment and to ensure sustainable supplies of water at a fair price for individual consumption and commercial use.

In pursuit of these policy goals, Maine may be asked to consider, for example, new measures to regulate groundwater extraction for export to internal and international markets.

The question is whether international trade and investment law, either already adopted or likely to be considered for adoption in the future, might thwart Maine should the state adopt such water policy measures.

It is a good question because the World Trade Organization, NAFTA, and similar international agreements are designed to limit the authority of state legislatures, agencies, and courts in the interest of maximizing the volume and value of international commerce.

NAFTA, the WTO, and subsequent trade agreements, adopted since 1994, place limits on state government.

Prior to 1994, states had little reason to monitor the course of trade negotiations closely because they focused on tariffs, quotas and similar "at the border" discrimination against foreign products, almost always the business of the federal government.

The post-1994 agreements deal not only with "at the border" discrimination, but also impose rules related to government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade by the drafters of the agreements. Maine's policy space is now affected by international law.

- ***Bottled water is clearly covered by the WTO General Agreement on Tariffs and Trade (GATT), which regulates international trade in goods.***

  Except in unusual circumstances, it is unclear how regulation of groundwater extraction would violate "most favored nation" or other obligations under the GATT (such as export restrictions under GATT article XI).

  Even then, the groundwater regulation might be permissible under Article XX or some other exemption.

- ***There are two schools of thought about whether bulk water is covered by GATT.*** Nonetheless, an expansive interpretation of GATT by a future tribunal, extending coverage to regulation of trade in bulk water, cannot be ruled out.

  Assuming that bulk water is covered by GATT, an argument for GATT violation involving bulk water might be made in circumstances:

  - Where governments violate article XI export restriction obligations, or

  - Where governments allow one firm to export bulk water and then change the rules to restrict or stop large-scale groundwater pumping and transfers across national borders by a firm from a second country, thus violating a GATT principle of non-discrimination, such as the "most favored nation" obligation.

- ***It is unclear whether the WTO General Agreement on Trade in Services (GATS) covers groundwater regulation. An arguement, can be made that some forms of distribution services affecting water policy are covered by GATS, even if regulation of drinking water utilities remains beyond the scope of the agreement. In any case, the biggest concern should be the on-going WTO negotiations on GATS obligations related to "domestic regulation."***

The World Trade Organization secretariat strongly denies that the GATS covers public water services or public interest regulation of privately-supplied water services. But, there are several reasons to remain concerned:

- While no country has made a commitment on water services per se, the United States and other countries are free to do so in the future.

- The United States has made or in the future may make commitments on distribution services, transport services and other service sectors that might result in GATS litigation affecting regulation of groundwater pumping and transport.

  In other words, the WTO statement can be read to only apply to drinking water services provided as a public utility, which is not relevant to the issue of whether regulation of large-scale groundwater pumping and cross-border transportation violates other GATS obligations of the United States related, for example, to transportation services (such as rail transport).

- A government might intentionally or unintentionally surrender its right to regulate water under a contract.

- The WTO statement on water services is only the view of the secretariat and is not legally binding or even certain to be persuasive with a WTO tribunal deciding an actual case.

Regardless of the current sectoral coverage of the GATS, the biggest concern should be the on-going WTO negotiations on GATS obligations related to "domestic regulation."

The potential intrusiveness of obligations covering domestic regulations will depend on the test for when they constitute a barrier to trade. It was originally proposed that standards, requirements and procedures for domestic regulation should be "not more burdensome than necessary." Such a necessity test could have put a range of water policy measures and a range of other regulatory measures in the State of Maine and in other jurisdictions at considerable risk of conflict with GATS obligations.

The chairman's most recent draft of proposals (March 20, 2009) for the WTO Working Party on Domestic Regulation did not include a "necessity test." Unfortunately, the

draft retains substantive and procedural disciplines from the prior drafts that create a spectrum of possible meanings. These meanings could be consistent with constitutional authority to regulate in the United States, but they could also be interpreted as an obligation to regulate in the least-burdensome way.

Like prior versions, the chairman's March 2009 draft recognizes the "right to regulate" in order to meet national policy objectives. To come within the GATS right to regulate, states would have to seek an endorsement of state policy from the federal government

- ***NAFTA chapter 11, bi-lateral investment treaties, and similar international investment agreements (IIAs) cover groundwater measures. Water policy measures are a frequent topic of international investment litigation.***

  As state and local officials from across the country have recognized for many years, IIAs raise serious sovereignty and federalism concerns.

  Also, IIAs are a more likely basis for a suit than WTO agreements.

  Among other reasons, these problems arise because of:

  - Broad IIA definitions of "investment;"
  - Vague IIA obligations regarding "indirect expropriation."
  - Vague IIA obligations regarding "minimum standard of treatment under international law."
  - Broad reading of vague IIA text by some tribunals; and
  - Authorization for foreign investors to sue the United States directly.

Despite the fervent support for international investment agreements by corporate lobbyists in Washington D.C., state and local officials across the country have for many years been concerned about the potential for NAFTA chapter 11 and similar IIAs to intrude on state sovereignty and inappropriately constrain state legislative, regulatory, and judicial authority.

Given the broad definition of investment in IIAs, many water policy issues are covered by the agreements.

Not surprisingly, water policy measures are a frequent topic of IIA litigation.

Most of these cases deal with challenges to governmental authority to regulate threats to health and safety resulting from pollution of groundwater or surface water (for example *Methanex v. United States* and *Metalclad v. Mexico*) or water utility privatization (for example *Azurix v. Argentina*, *Aquas del Tunari v. Bolivia*, and *Biwater v. Tanzania*). There is at least one example of a bulk water transport case being filed under NAFTA chapter 11, although that claim has been alleged to be frivolous and never went to arbitration (*Sun Belt Water v. Canada*).

So, a challenge under an international investment agreement or bilateral investment treaty to Maine's authority to regulate its water resources is possible. Such an international investment claim might be made even if Maine regulates in the public interest and without the intent to discriminate against a foreign firm.

- **International trade and investment agreements should be reformed to provide greater clarity and certainty with respect to potential conflicts with state law and state water law in particular?**

The language of international trade and investment agreements is characteristically vague and subject to multiple interpretations, particularly as it relates to potential conflicts with state water law.

In the end, the lack of clarity, certainty, and predictability in international trade and investment law allows tribunals excessive discretion. While tribunals in the *Methanex* and *Glamis* investment cases used their discretion wisely and prudently declined to find that California had violated international law, other tribunals appear intent on expanding the scope of international property rights protections to limit the authority of local democratic institutions.

The solution is to reform international trade and investment agreements to, in the place of vague text, substitute:

- Specific language protecting the authority of local democratic institutions and local courts to act in the public interest; and

- Specific language in new general exclusions in trade and investment agreement coverage of key areas of state regulatory authority, including regulation and protection of freshwater resources.

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Final Report on Water Policy and International Trade Law

Preface:
What is the scope of this analysis?

With respect to the risk of an international trade or investment law challenge to Maine's authority to adopt policies and legal measures related to groundwater, this paper provides a general analysis of how the World Trade Organization agreement on trade in goods (GATT), the WTO agreement on trade in services (GATS), and international investment agreements (NAFTA chapter 11 and similar agreements) might apply.

The first step in such an analysis is to determine whether a groundwater measure is even covered by the agreement. Much of the analysis in this paper focuses on the coverage issue because some conclusions can be reached at least in general terms without reference to the facts of a particular case and to the detailed language of the specific law, regulation, administrative decision, or domestic court opinion that is being challenged.

The next two steps in analyzing the potential risk of a successful international lawsuit are to determine whether a specific rule or "obligation" has been violated and even if there is a violation whether an exclusion, an exception, or an annex reservation (grandfathering particular existing measures) applies regardless of the violation of an obligation. It is difficult or more often even impossible to determine whether an obligation has been violated or whether an exception applies without reference to the facts of a specific case or the detailed language of the government regulation or other government measure being challenged. Nonetheless, this paper includes some limited discussion of general and hypothetical situations where an obligation is violated or an exclusion applies.

Finally, this paper provides no analysis of Maine water law. The Maine Attorney General's office is preparing such an analysis. Any hypothetical scenarios regarding future groundwater regulation are included strictly for purposes of illustrating points of international trade law, and are not intended to imply support for or opposition to any

new water law or regulation. Keep in mind that international trade and investment tribunals do not apply United States or Maine domestic law when making a decision. Although of course, domestic law may be part of the factual background of a case, and may be analyzed for its conformity to international law. But, international tribunals decide cases based on the text of the relevant international agreement and international law.[1] The Vienna Convention on the Law of Treaties provides that a breach of international agreements cannot be justified or excused by provisions in domestic law.[2]

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[1] For example, NAFTA chapter 11 on investment provides at article 1131that " A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law," *available at* http://www.nafta-sec-alena.org/en/view.aspx?x=343); Article 38 of the Statute of the International Court of Justice identifies the following sources of international law: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. *Available at, http://www.icj-cij.org/documents.*

[2] *Vienna Convention on the Law of Treaties* (1969), article 27 (A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

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Final Report on Water Policy and International Trade Law

William Waren[3]

December 7, 2009

1. **Introduction: Why is it important to analyze how international trade and investment agreements may impact Maine's management of groundwater resources?** Under U.S. domestic law, Maine has authority to adopt water policy measures in order to protect the public health and the environment and to ensure sustainable supplies of water at a fair price for individual consumption and commercial use. In pursuit of these policy goals, Maine may be asked to consider, for example, new measures to regulate groundwater extraction for export to internal and international markets.

   The question is whether international trade and investment law, either already adopted or likely to be considered for adoption in the future, might thwart Maine should the state adopt such water policy measures. It is a good question because the World Trade Organization, NAFTA, and similar international agreements are designed to limit the authority of state legislatures, agencies, and courts in the interest of maximizing the volume and value of international commerce.

   NAFTA, the WTO and subsequent trade agreements adopted since 1994 agreements, place limits on state government. Prior to 1994, states had little reason to monitor the course of trade negotiations closely because they focused on tariffs, quotas and similar "at the border" discrimination against foreign products, almost always the business of the federal government. The post-1994 agreements deal not only with "at the border" discrimination, but also impose rules related to government regulation, taxation, purchasing and economic development policies that are regarded as non-tariff barriers to trade by the drafters of the agreements. Many state measures are now covered.

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In addition, the pre-1994 agreements had no effective enforcement mechanism. But NAFTA, the WTO agreements and other post-1994 agreements (in combination with federal implementing legislation) do. International tribunals created by these agreements have the power to enforce the obligations of the agreement against parties through retaliatory trade sanctions[4] or in the case of investment disputes through awards of uncapped money damages for any state or local government measure[5], including any groundwater policy measure, deemed to violate international trade and investment law.

As a policy resolution adopted by the National Conference of State Legislatures states, "NCSL also believes that these [trade] agreements must be harmonized with traditional American values of constitutional federalism...[measures] are necessary to ensure that international trade agreements do not adversely impact state budgets or constrain state regulatory authority."[6] Certainly, NCSL's principle applies to state groundwater

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[4] WTO tribunal decisions can be effectively enforced even though under U.S. implementing legislation for the Uruguay Round agreement private parties do not enjoy a private right of action in U.S. courts to enforce WTO tribunal decisions. The effectiveness of retaliatory trade sanctions as an enforcement mechanism is illustrated by the dispute over the 2002 U.S. steel tariff. President George W. Bush on March 5, 2002 imposed temporary tariffs on imported steel of 8 to 30 percent. No tariffs were imposed on Mexican and Canadian steel imports because of the threat of retaliatory trade sanctions under NAFTA. The European Union and most other major trading partners filed a complaint with the WTO. In 2003, the WTO ruled against the U.S., authorizing $2.2 billion in retaliatory trade sanctions potentially including higher tariffs on imports on Florida citrus, on rice, tobacco, clothing, paper, and pleasure boats produced in the South, and steel products, watches, and hand tools produced in the Midwest (Florida and Midwestern states were very much in play in the upcoming U.S. presidential elections). President Bush ultimately backed down and withdrew the steel tariffs well before the 2005 expiration date. BBC News, "Q & A: US-EU Steel Dispute, December 4, 2003, *available at* http://newsvote.bbc.co.uk/2/hi/business/3391675.stm.

[5] International investment tribunals can also effectively enforce their judgments in most cases by demanding payment of money damages to compensate the foreign investor. Nonetheless it must be kept in mind that even if the foreign investor is awarded damages, the NAFTA panel ruling does not automatically result in preemption of state or local law. Nor is there any right of action for private parties to enforce panel rulings in U.S. courts. 19 U.S.C. §3312(c). If U.S. state or local officials are unwilling to amend policies that are popular with the public, federal officials may simply leave the local policy in place, pay damages to the investor, and hope the issue never arises again as an IIA case. In the alternative, the federal government may seek to quietly resolve the issue. For example, federal officials acting behind the scenes might apply political or economic pressure on state officials to "voluntarily" bring state policy in line with the panel ruling. If the investor wins, the United States also has the option of suing to preempt the state law. Unlike private investors, the federal government can sue a state or locality at any time and seek the preemption of state or local measures that do not comply with an international investment agreement. In this connection, state law is in an inferior position to federal law under NAFTA chapter 11 and similar IIAs. If a dispute resolution panel finds that a federal law violates NAFTA's investment chapter, an act of Congress is required to comply with the ruling. North American Free Trade Agreement Implementation Act, Title I, §102 (a), 19 U.S.C.§3312 (1993). In addition to that, state and local governments have repeatedly asked for assurances from Congress and several presidential administrations that if money damages are assessed against the U.S. Treasury as a result of an international investment judgment in which a state and local measure is found to be in violation of international law, the federal government would not seek to directly or indirectly recoup those costs from the state or locality. Neither the Clinton nor the Bush Administration would promise not to try to recoup the cost of an IIA money damages award from state or localities.

[6] NCSL policy on Free Trade and Federalism (policy resolutions under the jurisdiction of the Labor and Economic Development Committee), *available at* , http://www.ncsl.org.

regulation in Maine and across the country.

2. Why should Maine closely monitor the WTO General Agreement on Tariffs and Trade (GATT) as it applies to trade in water?

Analytic framework: As noted above, the first step in this analysis is to determine whether a groundwater measure is even covered by the GATT agreement on trade in goods.[7] The GATT does not clearly define the term "good." But it is generally agreed that a "good" is "a product that can be produced, bought, and sold, and that has a physical identity."[8]

The next step in analyzing the potential risk of a successful international lawsuit is to determine whether a specific rule or "obligation" has been violated. The relevant provisions here are:

- GATT article I on "most favored nation" treatment ("...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties")[9]; and

- GATT article XI provides that, "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."[10]

Even if there is a violation of a specific rule (obligation), the third step in the analysis is to determine whether an exclusion, an exception, or an annex reservation (grandfathering particular existing measures) applies regardless of the violation of an obligation.

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[7] The text of the GATT may be found at http://www.wto.org/english/docs_e/legal_e.htm.

[8] Definition of good, Deardorff's Glossary of International Economics, *available at* http://www-personal.umich.edu/alandear/glossary/g.html; For published book, see Alan V. Deardorff, Terms of Trade: Glossary of International Economics, World Scientific Publishers, October 2006.

[9] Available at at http://www.wto.org/english/docs_e/legal_e.htm. GATT article III on national treatment is also just as likely to apply in a case of discrimination.

[10] Available at at http://www.wto.org/english/docs_e/legal_e.htm.

Particularly relevant in this case are the general exceptions at article XX (b) (life and health of humans, animals and plants) and article XX (g) (conservation of natural resources).[11]

Bottled water: Trade in bottled water is covered by the GATT.[12] Bottled water is produced (bottled), and it enters into the stream of commerce; it is 'bought and sold." According to Howard Mann, a leading expert on trade and the environment, "It is well understood that bottled water, for example, is covered by trade law, and that restrictions on exports of bottled water are, therefore, significantly limited."[13]

Given that bottled water is covered by the GATT and similar agreements on trade in goods (or products), the next question is what "disciplines" or limitations on government action are imposed. As noted above, in the case of the GATT, the "most favored nation" discipline at article I requires governments that accord "any advantage, favor, privilege or immunity" to any product destined for one country must accord that same benefit to like products destined to all countries belonging to the World Trade Organization. Similarly, article XI of the GATT bars governmental measures, other than taxes, duties, or similar charges, on the "exportation or sale for export of any covered product, absent an exemption."

So, what exemptions in the GATT would allow application of a government measure to a

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[11] GATT Article XX. General Exceptions. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (*b*) necessary to protect human, animal or plant life or health; ... (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; World Trade Organization, Legal Texts: GATT 1947, *available at,* http://www.wto.org/english/docs_e/legal_e/gatt47_02#articleXX.

[12] *For general background,* Edith Brown Weiss, *Water Transfers in International Trade Law, in* Edith Brown Weiss, Laurence Boisson de Chazournes, & Nathalie Bernasconi-Osterwaler, Fresh Water and International Economic Law. Oxford University Press, 2005.

[13] Howard Mann, "Implications of International Trade and Investment Agreements for Water and Water Services: Some Responses from Other Sources of International Law," a paper prepared for Agua Sustentable and funded by the International Development Research Center, Ottawa, Canada, May 2006, p. 9 (on file); According to Alix Gowlland Gualtieri, "The most common form in which water can be traded occurs after its transformation or removal from a natural or bulk state. This concerns most prevalently bottled water and other drinks containing water such as soft drinks and juices. An increasingly lucrative international market in bottled water has emerged as a consequence of growing demand for the good, with Nestlé, Danone, Coca Cola and Pepsi Cola as leading corporations in the field."Legal Implications of Trade in 'Real" and 'Virtual" Water Resources, IELRC Working Paper 2008-02, International Environmental Law Research Center, Geneva, Switzerland, p.2., *available at* http://ielrc.org/content/w0802.pdf.

covered good or product such as bottled water in spite of the disciplines imposed by article XI, article III, and/or article I? Again, articles XX(b) and XX(g), for example, allow governments to impose measures that would otherwise be prohibited if the measures are "necessary to protect human, animal, or plant life or health" or if they relate to "the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." These two exceptions in article XX, however, are available only where governmental measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

In parsing the text of articles XX (b) and (g), it becomes clear that article XX(b) is more narrow and subjective in many respects than article XX(g). For example, a WTO tribunal will decide when a measure to protect human, animal, or plant life is "necessary" under article XX (b). Does that mean the measure must be no more trade restrictive than necessary? Furthermore, under both XX (b) and XX (g), a tribunal will make the subjective judgment about when a measure is a disguised restriction on international trade.

In summary, bottled water is clearly covered by the GATT. What is unclear is how a groundwater measure would violate "most favored nation" or other obligations under the GATT (such as export restrictions under GATT article XI or a de facto violation of article III) with respect to trade in bottled water. It might well require strong evidence that groundwater regulation was intended to operate as a disguised or discriminatory restriction trade in bottled water. And even then, the groundwater regulation might be permissible under an Article XX general exemption.

Bulk Water: Commentators disagree about whether bulk water exports are covered by GATT and by trade in goods chapters in free trade agreements such as NAFTA. One school of thought is that bulk water is not a covered good or product. The other school of thought is that while the language of the agreements may not be specific about whether bulk water is covered, given the modern commercial practice of treating water as a commodity, the logic of the GATT agreement leads to the conclusion that bulk water is covered.

The traditional view is that bulk water, in its "natural state," is not a good or product. For

example, with respect to trade – but not investment issues – the parties to NAFTA (Canada, Mexico, and the United States) issued a joint statement in 1993 declaring that "water in its natural state…is not a good or product, is not traded, and therefore is not and never has been subject to the terms of any trade agreement."[14] With respect to the GATT, the argument is that bulk water is not a good or product to which the agreement applies.[15] Water in its natural state, it is argued, is not "produced." As one commentator argues, the GATT implies that "something must be done to water to make it a product, and that mere diversion, pumping, or transfer does not suffice."[16] Mere water use rights, by this view, do not confer ownership of a product.

Dissenters from this view ask how is it that water does not fit under the GATT definition of a product, when the common practice is to regard other unrefined natural resources as products and goods in international trade.[17] They also argue that as a matter of recent commercial practice, water is being exported as a commodity, just like crude oil, and that tribunals could find this to be a commercial reality that must be recognized. As a report of the International Environmental Law Research Centre notes, "New bulk storage and transfer technologies have now been developed to make it possible to move large volumes of water across long distances for commercial purposes, including trough massive pipelines, supertankers, or giant sealed water bags."[18] In other words, a distinction must be made by an international tribunal between "water in its natural state" and "bulk water." The process of transferring or transporting bulk water in large containers like tanker trucks, rail cars, ships, or maybe even pipelines might be regarded as the equivalent of a production process, with the result that bulk water that is in the stream of commerce and that has been transported in this way is a product covered by GATT. According to Matthew Porterfield, Senior Fellow at Georgetown's Harrison Institute, it is significant that "water is included within the tariff classification system

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[14] 1993 Statement by the Governments of Canada, Mexico, and the United States (on file).

[15] Bryant Walker Smith, "Water as a Public Good: The Status of Water Under The General Agreement on Tariff and Trade, 2009, *available at* : http://works.bepress.com/bryant_walker_smith/2 pp.4-6

[16] Smith, pp.4-6.

[17] Smith, *pp.4-6.*

[18] Gualtieri, p.4; the author also notes on p.6, that "There is no information on the intent of the parties when negotiating the GATT relevant to the applicability of the [GATT] Agreement to bulk transfers of water, and this question has indeed never been discussed in the framework of the WTO. Indeed, the absence of an explicit exclusion of water from the GATT has been read as arguing for the applicability of the Agreement to trade in this resource. On the other hand, water might not be mentioned because trading large amounts of water between states was not envisaged until recent years."

used by the WTO."[19] And if water is a "product," then government groundwater regulation in certain fact situations might violate GATT obligations related to nondiscrimination and export restrictions, unless article XX applies.

As Howard Mann explains," while common sense and some history indicates trade law cannot compel the trade in freshwater resources, the matter is not without doubt, doubt created at least in part by the trade lawyers themselves. This doubt can be compounded if a first export is allowed to occur, as additional limitations or conditions on exports subsequent to a first export may become more difficult to apply due to non-discrimination requirements under trade law."[20]

In summary, it is uncertain whether bulk water is covered by GATT. Nonetheless, a more expansive interpretation of GATT coverage by a future tribunal cannot be ruled out, particularly in circumstances where governments violate article XI export restriction obligations or allow one firm to export bulk water and then change the rules to restrict or stop large-scale groundwater pumping and transfers across national borders by a second foreign firm, thus violating a GATT principle of non-discrimination, such as the article I "most favored nation" obligation.

3. Why should Maine closely monitor water services issues raised by the General Agreement on Trade in Services (GATS)?

Coverage. GATS covers measures that affect trade in services, except services supplied under "government authority." Only some government services are excluded: specifically, those that are neither commercial nor in competition with another supplier. Some GATS trade rules cover measures in all sectors, and some cover measures in selected sectors ("commitments").[21] As Global Trade Watch explains, "GATS is

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[19] "The General Agreement on Tariffs and Trade is the centerpiece of the WTO system. It covers trade in goods. There's been a vigorous debate whether water in its "natural state" -- lakes, streams, aquifers -- constitutes a good or "product" and is therefore covered under the GATT. Water is included within the tariff classification system used by the WTO.", *available at,http://forumdemocracy.net/article.*

[20] Mann, *above,* p. 10.

[21] The full text of the General Agreement on Trade in Services is posted on the WTO website, at http://www.wto.org/englis/docs_e/legal_e/26-gats.pdf. Essential to understanding the coverage of specific sectoral commitments is the classification scheme of the United Nations Statistics Division, *available at,* http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1; Global Trade watch provides an excellent database on GATS sectoral commitments made by the United States, *available at, http://www.citizen.org/trade/forms/gats_sector_list.cfm.* ;The Coalition for Services Industries website has posted the 2005 United States Revised Offer of sectoral commitments, *available at* http://www.uscsi.org/pdf/US revised offer.pdf.

structured as a "bottom up" agreement. This means that most GATS requirements only apply to service sectors [that] countries specifically agree to open up to competition by foreign corporations...a "schedule of commitments" for each WTO signatory government...lists the specific service sectors each nation has signed up to the terms of the agreement."[22]

The first GATS commitments took effect in 1995. GATS builds in successive rounds of "progressive liberalization," which are negotiations to expand the number of sectors that are covered by Market Access and National Treatment. (article XIX). GATS also authorizes negotiations to create new "disciplines" on domestic regulation. (article VI). Negotiations on these domestic regulation disciplines began in 2000 and continue up to today; domestic regulation rules will apply to those sectors where there is a commitment under market access or national treatment.

Rules. The most significant GATS rules are:

- National Treatment: prohibits discrimination in favor of domestic suppliers, including laws that change conditions of competition, even if they do not formally discriminate. (committed sectors, article XVII); and

- Market Access: prohibits quantitative limits on service suppliers such as monopolies, number of suppliers, volume of service (committed sectors, article XVI).

Exceptions. GATS article XIV excuses conflict with a trade rule if a "necessity test" is met and purpose of the measure is:

- Necessary to protect public morals;

- Necessary to protect human or animal health;

- Necessary to protect privacy or prevent fraud;

- Necessary (in the view of each country) to safeguard essential security interests.

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[22] Global Trade Watch, WTO General Agreement on Trade in Services (GATS) Glossary, *available at,* http;//tradewatch .org/trade/wto/gats/articles.cfm?ID=15071.

The secretariat of the World Trade Organization strongly denies that GATS restricts public water services or public interest regulation of privately-supplied water services: "The number of Members which have so far made GATS commitments on water distribution services is zero. If such commitments were made, they would not affect the right of governments to set levels of quality, safety, price, or any other policy objectives as they see fit, and the same regulations would apply to foreign suppliers as to nationals. A foreign supplier which failed to respect the terms of its contract or any other regulation would be subject to the same sanctions under national law as a national company, including termination of the contract... It is of course inconceivable that any government would agree to surrender the right to regulate water supplies..."[23]

The WTO statement, itself, reveals reasons not to be entirely reassured.

First, while no country has made a commitment on water distribution services *per se*, they may choose to do so in the future.

Second, the United States has made or in the future may make commitments for distribution services, transport services and other service sectors that might result in GATS litigation *affecting* regulation of groundwater pumping and transport.[24] In other words, the WTO statement can be read to only apply to drinking water services provided as a public utility, and to be irrelevant to the issue of whether regulation of large-scale groundwater pumping and transportation violates other GATS obligations of the United States (rail transport of freight or distribution services related to wholesale trade).

Third, it is entirely conceivable, contrary to the WTO secretariat's expectation, that a government might intentionally or unintentionally surrender its right to regulate water

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[23] WTO, "GATS: Fact and Fiction: The WTO is not after your water,"' *available at,* http://www.wto.org/english/tratop_e/serv_e/gats_factfiction8_e.htm.

[24] For example, the United States has made a GATS sectoral commitment for rail freight transport, *available at* *http://www.citizen.org/trade/forms/gats_sector_list.cfm*.. The U.S. sectoral commitment for rail freight transport is to be understood in light of the services classification scheme of the United Nations Statistics Division, which at subclass 71122 includes transportation by railway of bulk liquids under class 7112 freight transportation, *available at*, http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1&Co=71122. With respect to distribution services at wholesale trade, Global Trade Watch appropriately notes that, "The WTO Secretariat explains that 'Wholesale trade services consist in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers;' and notes further that "[the United Nations]CPC 6222 covers wholesale trade in mineral water and corresponds to ISIC code 5122, which covers: "Bottling and labelling simple (tap) water (Wholesale of food, beverages and tobacco),if performed as a part of buying and selling at wholesale, and in class 7495 (Packaging activities), if performed on a fee or contract basis." The United States has committed both wholesale distribution services and packaging services." Available at, http://www.citizen.org/trade/forms/gats_results.cfm?s_id=91.

supplies, as a result of a public-private relationship between government officials and the foreign suppliers or simply as a result of being unfamiliar with international trade law or of being "out-lawyered" by the foreign supplier.

Finally, the WTO statement on water services is only the view of the secretariat and is not legally binding or even certain to be persuasive with a WTO tribunal deciding an actual case.

Andrew Lang, a GATS scholar at Cambridge University in England, observes, "...one can attempt the difficult task of assessing the risk of claims against water sector regulation will be successful. There is no doubt that, at times, this risk has been overstated by GATS critics. But, this analysis suggests that one must approach with caution claims that the risk is nothing more than minimal."[25]

At the very least, the capacity of Maine to adopt groundwater measures and manage water resources in light of potential conflicts with the GATS bears watching. In particular, GATS negotiations on domestic regulation and the future interpretations of U.S. commitments related to distribution and transportation services that might *affect* trade in water should be monitored closely.

This is despite the European Union's decision not to seek inclusion of "water for human use" as a sector of economic activity that should come under the scope of GATS regulation of wastewater services and despite the fact that the United States has not made a commitment to subject drinking water services to GATS disciplines, up to this point.[26] The United States Trade Representative (USTR) has assured states that the United States has no current plans to make a commitment on water services. But, could those plans change if such a compromise could restart Doha Round negotiations in ways that would be favorable to the United States in other sectors? Moreover as noted above, "water distribution services" might be understood narrowly to cover only drinking water utilities.

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[25] Andrew Lang, "The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry," Journal of International Economic Law. 2004 7(4), Oxford University Press, pp. 836-837, *Available at,*http;//jiel.oxfordjournals.org/cgi/reprint 7/4/801.

[26] According to the European Federation of Public Service Unions, "In its recent plurilateral requests on environmental services, EC [European commission] and other demandeurs have categorically excluded "water for human use" as a result of strong civil society pressure. However water is still involved in many other areas of WTO negotiations that can be of equal threat to our demand for access to water as a basic human right. This is of concern to waste water treatment for example." *Available at,* http://www.epsu.org/a/1865.

Of even greater concern to Maine should be the on-going WTO negotiations on GATS obligations related to "domestic regulation." The potential intrusiveness of obligations covering domestic regulations will depend on the test for when they constitute a barrier to trade. It was originally proposed that these standards, requirements and procedures should be "not more burdensome than necessary.[27]" Such a necessity test could have put a range of water policy measures and a range of other measures in the State of Maine and in other jurisdictions at risk of conflict with GATS obligations.[28]

The chairman's most recent draft of proposals (March 20, 2009) for the WTO Working Group on Domestic Regulation[29] does not include a "necessity test" but "[i]n place of ensuring "necessity," the draft states that one purpose is to ensure that regulations "do not constitute disguised restrictions on trade in services." This purpose would inform how dispute panels interpret the disciplines. In recent disputes, the WTO has found disguised restrictions when countries have failed to consult and seek less-trade-restrictive alternatives in response to complaints that measures violate trade rules." Avoiding "disguised barriers" if interpreted in this way could establish a standard that is similar to the necessity test."[30]

Also, the draft retains 48 paragraphs of substantive and procedural disciplines from the prior drafts. ... Among the most significant proposals, several create a spectrum of

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[27] "The chairman's fourth draft continues to leave out the proposal from Australia, Hong Kong and New Zealand that requires domestic regulations to be "no more burdensome than necessary to ensure the quality of a service." This is no doubt due to resistance from the United States, Brazil and other nations who view the necessity test as incompatible with domestic regulatory authority. The strongest statement to date on this issue has been the March 2007 outline of negotiating principles by the United States Trade Representative (USTR)." Memorandum to Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC) from: Robert Stumberg, February 12, 2008, re: WPDR chairman's fourth draft on domestic regulation, dated 23 January 2008, p3 , *available at,* http://www.forumdemocracy.net/downloads/Stumberg/WPDRdraftJan-08.

[28] If something similar to the necessity test is agreed upon in Geneva, the Center for International Environmental Law identified several areas where water policy could be threatened, including among others: qualifications of water service providers; the use of licenses, permits, and technical regulations and standards related to pollution discharges, operating permits, and other water policy measures; the use of environmental criteria related to water services in awarding concession contracts or assessing licensing fees; and requirements for water sustainability impact assessments before issuing licenses. CIEL (document on file, Harrison Institute for Public Law, Georgetown University Law Center) p. 2.

[29] Working Party on Domestic Regulation (WPDR), Revised Draft, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, 23 January 2008 (Room Document), available at http://www.tradeobservatory.org/library.cfm?refID=101417 .

[30] Memorandum to Kay Wilkie, p.3. "Another change in the fourth draft is where it defines an obligation on governments to publish 'detailed information' on regulations. Mandatory details include applicable technical standards, appellate process, monitoring, public involvement, exceptions and normal time frames."

possible meanings. These meanings *could be* consistent with constitutional authority to regulate in the United States, but they *could also be* interpreted as an obligation to regulate in the least-burdensome way. For example, under article 11:

- *A relevance test* ... could exclude criteria that are external to the quality of a service being supplied, criteria such as environmental, historical or aesthetic impacts.

- *A pre-established test* ... could affect the law of when development rights or property rights vest, meaning at what point in time regulatory changes are applicable.

- *An objectivity test* ... could exclude subjective standards such as "just and reasonable" authority that legislatures delegate to public utility commissions to regulate in the public interest.

WTO dispute panels would have to interpret this array of tests, which are neither simple nor objective. Not only are they novel, thus lacking in precedents, but one test is likely to influence interpretation of another.

"Like prior versions, the chairman's ... draft recognizes the "right to regulate ... in order to meet national policy objectives." However, the ... draft did not include language that referred to sub-national governments, and the previous drafts had weakened the right to regulate in order to meet "domestic" policy objectives. "To come within the GATS right to regulate, states would have to seek an endorsement of state policy from the federal government."[31]

As Stumberg notes, the disciplines proposed in the chairman's draft, "would cover U.S. commitments and offers in over 90 service sectors, many of which are regulated by states or operated by local governments ... [including distribution and transportation services,

[31] Memorandum to Kay Wilkie, p.3-4.

among many others]... Many of the proposed GATS disciplines reflect best practices. Yet neither Congress nor state legislatures have imposed such disciplines on regulatory agencies, primarily owing to the complexity of regulating service industries. If proposed as domestic law, the disciplines as proposed by the chairman would be controversial. Lawyers will recognize some proposed disciplines as variations on substantive due process, one of the most contentious areas of constitutional law. Other disciplines, if adopted as domestic law, would be changes in the federal or state administrative procedure acts."[32]

The outcome of negotiations within the Working Group on Domestic Regulation will be vital for Maine and all other U.S. states and localities engaged in water policy and other forms of natural resources, public health, and public utility policy. [33]

In summary, whether groundwater regulation and related water policies are covered by GATS is uncertain. Rebecca Bates, an Australian trade law scholar observes that, "The existence ... of continuing debate and uncertainty as to the interpretation of the agreement means that the power and impact of GATS will not be wholly known until it is applied to the water and sanitation market in a real world situation ... greater certainty may be achieved through specifically excluding water and sanitation services from the scope of the agreement. The essential nature of water and sanitation for human health and survival sets this service area apart from many others when discussing liberalization of a service area, and the existence of a human right to water means that extra care must

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[32] Memorandum to Kay Wilkie. p. 1-2.

[33] The Intergovernmental Policy Advisory Committee (IGPAC) Services Working Group (representing state and local governments in the USTR advisory process) has highlighted several of these disciplines as posing a significant risk of conflict with state regulations that neither discriminate nor limit market access. For example, the IGPAC group expressed:

(1) "Serious concern [about disciplines that require domestic regulations to be] 'pre-established, based on objective criteria and relevant...' given the potential for unacceptable constraints on the scope and exercise of state/local regulatory authority, particularly related to complex and emerging industries." IGPAC is referring to the fact that a term like "objective" has been interpreted by the WTO in ways that are inconsistent with regulatory practice in the United States, and

(2) "Active opposition to the extremely objectionable omission of any mention of sub-federal policy objectives from [the section that states a principle of deference to legitimate national policy objectives]." Instead, the IGPAC services working group recommends the following language: "National policy objectives include objectives identified at national or sub-national levels."

Memo from Kay Wilkie, chair of the Intergovernmental Policy Advisory Committee, Services Working Group, to Daniel Watson, Office of the U.S. Trade Representative (February 12, 2008).

be taken before water in any form is subject to free trade obligation."[34]

4. Why should the Maine Commission closely monitor international investment litigation?

International Investment agreements (IIAs) place multinational corporations and other investors on an equal footing with nation-states. Investors are allowed to file claims against national governments seeking money damages in compensation for economic regulation and other government measures at the federal, state, or local level. Issues of public policy and even constitutional law are resolved under an investor/state dispute resolution system designed for arbitration of international commercial disputes.[35]

- *Coverage: definition of investment.* Most IIAs signed by the United States contain complex definitions of investment that cover a broad range of economic interests. These international agreements contain definitions of investment that are broader than the constitutional standards used under domestic law in the United States.

  The U.S. Model Bilateral Investment Treaty, for example, includes under the definition of investment: assets having "characteristics of an investment" such as expected profits, assumption of risk, and the commitment of capital.[36]

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[34] Rebecca Bates, 31 Sydney Law Review, 121, 142 (2009).

[35] *See,* U.S. Department of State, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annexes ,September 30, 2009, Annex B: Particular Viewpoints Of Subcommittee Members, A collective statement from Sarah Anderson, Institute for Policy Studies, Linda Andros, United Steelworkers, Marcos Orellana Cruz, Center for International Environmental Law, Elizabeth Drake, Stewart and Stewart, Kevin P. Gallagher, Boston University & Global Development and Environment Institute, Owen Herrnstadt, International Association of Machinists and Aerospace Workers, Matthew C. Porterfield, Harrison Institute for Public Law - Georgetown Law, Margrete Strand Rangnes, Sierra Club, and Martin Wagner, Earthjustice : "We recommend that the administration replace investor-state dispute settlement with a state-to-state mechanism. If the administration continues to include an investor-state dispute settlement mechanism, investors should be required to exhaust domestic remedies before filing a claim before an international tribunal. That mechanism should also provide a screen that allows the Parties to prevent frivolous claims or claims which otherwise may cause serious public harm...Investor-state claims often involve matters of vital importance to the public welfare, the environment, and national security. However, international arbitrators are not ordinarily well-versed in human rights, environmental law, or the social impact of legal rulings. Allowing private foreign investors to bring claims over such sensitive matters to international commercial arbitration tribunals is particularly disturbing when the disputes raise constitutional questions. For these reasons, we feel strongly that the Model BIT should provide only for state-to-state dispute settlement, which guarantees the crucial role of governments in determining and protecting the public interest." *Available at* ,http://www.state.gov/e/eeb/rls/othr/2009/131118.htm.

[36] 2004 U.S. Model Bilateral Investment Treaty, article 1 provides: "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take

- *Rules: expropriation.* International investment agreement (IIA) expropriation obligations are, in some respects, analogous to U.S Fifth Amendment takings law.[37] The question is whether international expropriation law provides foreign investors with greater property rights than U.S. investors enjoy under the domestic 'takings' clause.

  Tribunals set up to hear these investment cases do not agree on the scope of IIA expropriation. The rulings are all over the map. Arbitrators have room to read the vague language of IIAs broadly or narrowly.

- *Rules: minimum standard of treatment.* The "minimum standard of treatment," which includes the right to "fair and equitable treatment," is a vague and evolving standard that permits foreign investors to challenge government actions on the grounds that they are either procedurally or substantively unfair.

  Again, these vague concepts allow international investment tribunals considerable discretion in their deliberations. Because there are no specific criteria underpinning the

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include:
(a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges. *Available at,* http://www.state.gov/documents/organization/117601.pdf.

See also, U.S. Department of State, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annex B, above, " As noted in the Subcommittee report, the definition of "Investment" in Article 1 of the Model BIT is much broader than the real property rights and other specific interests in property that are protected under the U.S. Constitution."

[37] *See* 2004 U.S. Model Bilateral Investment Treaty (BIT), article 6, *available at* , http://www.state.gov/documents/organization/117601.pdf. *See also,* U.S. Department of State, Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty: Annex B, above. " ...the indirect expropriation provision in investment agreements has been interpreted to require compensation based on the impact of the government measure on the value of the investment, regardless of whether there has actually been some appropriation of an asset by the government. This interpretation of the standard for indirect expropriation cannot be justified as reflecting the general practice of states, given that the dominant practice of nations is to provide for compensation only when the government has actually acquired an asset, not when the value of an asset has been adversely affected by regulatory measures."

concept of the "minimum standard of treatment," it is very difficult to predict when a tribunal will find that justice has been denied.[38]

- *Exceptions.* U.S. international investment agreements are extremely broad in coverage and provide very few general exceptions. The U.S. Model BIT provides exceptions only for essential security interests and for disclosure of confidential information. A diplomatic screen is provided to exclude most taxation measures. A diplomatic screen is also provided for prudential measures related to regulation of financial institutions, but its convoluted wording brings into question its effectiveness.[39]
- *Dispute settlement.* Perhaps the most important thing to know about international investment agreements is that they are not administered in national courts.[40] International investment agreements entered into by the United States such as NAFTA chapter 11 do an 'end-run' around the U.S. courts. It is also noteworthy that arbitrators are, often, international commercial lawyers. A lawyer who sits 'in judgment' on a tribunal can act as 'plaintiff's counsel' in another case.

Despite the fervent support for international investment agreements by corporate lobbyists in Washington D.C.[41], state and local officials across the country have for many years been

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[38] *See* 2004 U.S. Model Bilateral Investment Treaty (BIT), article 5, *available at* , http://www.state.gov/documents/organization/117601.pdf.

[39] *See* 2004 U.S. Model Bilateral Investment Treaty (BIT), articles 18, 19, 20, and 21, *available at* , http://www.state.gov/documents/organization/117601.pdf.

[40] *See* 2004 U.S. Model Bilateral Investment Treaty (BIT), articles 23-29, *available at* , http://www.state.gov/documents/organization/117601.pdf.

[41] Business groups that want to expand investor rights include:
U.S. Council for International Business. USCIB is the American affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organisation of Employers (IOE). USCIB now supports expansion of investor-state arbitration to Brazil, India and China, and in the Korea FTA negotiations, urged U.S. negotiators to "return to the provisions of the model BIT," rather than crafting exceptions to deal with sensitive sectors such as government services. USCIB, Recommendations on Objectives for the U.S.-Korea FTA (March 24, 2006) 9, available at http://www.uscib.org/index.asp?documentID=829 (viewed May 10, 2009).
National Association of Manufacturers. NAM supports a multilateral agreement on investment under the OECD and expansion of BITs to include Russia, China, Brazil, India, the EU and Japan. NAM, 2.01 International Investment , available at http://www.nam.org/policypositions/ (viewed May 10, 2009).
U.S. Chamber of Commerce. The Chamber also supports trans-Atlantic investment negotiations through the OECD. Its goals are to limit "increasingly burdensome" investment regulations and standards on technology, environment, health and safety. U.S. Chamber of Commerce, Unleashing Our Economic Potential: A Primer on the Transatlantic Economic Council (2008), Appendix II.E, available at http://www.uschamber.com/publications/reports/0804econ_potential.htm (viewed September 7, 2008); U.S. Chamber of Commerce, Global Regulatory Cooperation Project, available at http://www.uschamber.com/grc/default (viewed September 7, 2008).
Emergency Committee for American Trade. In principle, ECAT supports the negotiating objective of "no greater substantive

concerned about the potential for NAFTA chapter 11 and similar international investment agreements[42] to intrude on state sovereignty and inappropriately constrain state legislative, regulatory, and judicial authority.[43] Given the broad definition of investment in IIAs, these sovereignty concerns clearly apply to groundwater policy issues. Not surprisingly water policy measures are a frequent topic of international investment litigation.[44]

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rights" for foreign investors. However, it opposes interpretive notes or congressional action to clarify open-ended language on expropriation and the minimum standard of treatment, saying that these terms "should properly be an issue for the investor-state tribunal."About ECAT, available at http://www.ecattrade.com/about/ (viewed May 10, 2009); ECAT, Bulletin #15: Bipartisan TPA Act v. Kerry Amendment (2002).

[42] The modern model for protecting foreign investments, embodied in NAFTA chapter 11, has its origins in the 1970s when the United States concluded bi-lateral investment treaties (BITS) with several developing countries. Among the distinguishing features of BITS are: (1) broad and largely undefined provisions for protecting the property rights of foreign investors, such as "indirect expropriation," (2) an investor-to-state dispute resolution mechanism, which provides standing for an individual foreign investor to invoke international arbitration against a nation-state, based on allegations that a governmental measure violates treaty provisions protecting foreign property rights, and (3) enforcement of international tribunal decisions with awards of money damages to foreign investors in compensation for such treaty violations. *See,* Matthew C. Porterfield. "International Expropriation Rules and Federalism," Stanford Environmental Law Journal, Vol. 23, No. 1, January 2004, pp.36-39.

[43] State government groups that call for reform of international investment agreements in order to protect state sovereignty, include:
Intergovernmental Policy Advisory Committee. IGPAC, the state and local advisory committee to USTR, filed its most recent comments on investment under the pending Colombia FTA. IGPAC urges U.S. negotiators to codify the holding of the *Methanex* panel to limit expropriation, limit the minimum standard of treatment to procedural due process and reject substantive due process, require investors to exhaust judicial remedies, and reimburse the states (CA, MA, MS, VA) that have been "heavily taxed" in defending investor-state disputes. IGPAC, *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-Colombia Trade Promotion Agreement*, September 15, 2006, 3 and 20-22.
National Conference of State Legislatures. NCSL opposes investor-state arbitration: "Trade agreement implementing language must include provisions that deny any new private right of action in U.S. courts or before international dispute resolution panels based on international trade or investment agreements." NCSL also calls for U.S. negotiators to: (1) "carve out" state laws that might be subject to challenge, (2) use a "positive list" approach to defining the scope of covered investments, and (3) enable states to "make adjustments" to limit coverage of state policies. NCSL, Free Trade and Federalism, 2008 - 2009 Policies for the Jurisdiction of the Labor and Economic Development Committee, available at http://www.ncsl.org/standcomm/sclaborecon/sclaborecon_Policies.htm#FreeTrade .
Conference of Chief Justices. CCJ is concerned that investor-state arbitration "can undermine the enforcement and finality of state court judgments." CCJ, Resolution 26, adopted as proposed by the International Agreements Committee at the 56th Annual Meeting on July 29, 2004.
Cities, mayors CSG. National League of Cities, U.S. Conference of Mayors, Council of State Governments and National Conference of State Legislatures, joint letter to Ambassador Robert Zoelleck (September 23, 2003).
National Association of Attorneys General. NAAG asked Congress to "ensure that ... foreign investors shall receive no greater rights to foreign compensation than those afforded to our citizens." NAAG, Resolution, Spring Meeting, March 20-22, 2002, Washington, DC.
Association of Towns and Townships. Tom Haliki, Executive Director, NATaT, letter to U.S. Senators (April 4, 2002).

[44] Argentina alone has been sued in at least 8 different water cases: (1) *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina Republic* (ICSID Case No. ARB/97/3); (2) *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) ; (3) *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/03/30) ; (4) *SAUR International v. Argentine Republic* (ICSID Case No. ARB/04/4) ; (5) *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) ; (6) *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentina Republic* (ICSID Case No. ARB/03/19) consolidated with AWG Group plc v. Argentina (UNCITRAL); (7) *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17) ; (8)

Most of these cases deal with challenges to governmental authority to regulate threats to health and safety resulting from pollution of groundwater or surface water (for example *Methanex v. United States* and *Metalclad v. Mexico*[45]) or water utility privatization (for example *Azurix v. Argentina, Aquas del Tunari v. Bolivia,* and *Biwater v. Tanzania*[46]). There is at least one example of bulk water transport case being filed under NAFTA chapter 11, although that claim has been alleged to be frivolous and never went to arbitration (*Sun Belt Water v. Canada*[47]).

So a challenge under an international investment agreement or bilateral investment treaty to Maine's authority to regulate its water resources is always possible.

Such an international investment claim might be made even if Maine adopts measures in the public interest and without the intent to discriminate against a foreign firm. For example, in *Metalclad v. Mexico*, an international tribunal found a violation of NAFTA's chapter 11 on investment when state and local governments took regulatory action to stop operation by U.S.-based Metalclad Corporation of a hazardous waste disposal facility believed to be a threat to drinking water safety and the environment. *See appendix II.*

This suggests that Maine may want to work with the U.S. Trade Representative's office and with the Maine congressional delegation to seek an official interpretation of NAFTA chapter 11 and clear language in future agreements and treaties that will codify parts of the *Methanex* and *Glamis Gold* decisions and otherwise protect bona fide government regulations, including water regulations, from any *Metalclad*-type claim that might be based on the actions of the

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Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26) . Information on ICSID cases *available at,* http://icsid.worldbank.org/ICSID/Index.jsp.

[45] *Metalclad v. Mexico, available at,* http://naftaclaims.com/Disputes/Mexico/Metalclad/Metalcladfinalaward.pdf; Award, *Methanex v. United States, available at,* http://naftaclaims.com/disputes_us_methanex.htm.

[46] *Azurix, above.* Investment Treaty News, 'Azurix Wins Claim Against Argentina ," International Institute for Sustainable Development, July 26, 2006, *available at* http://www.iisd.org/investment/itn.; Jim Schultz, "Bechtel v. Bolivia: The People Win" (Bechtel settles for only symbolic damages), Latin America Solidarity Centre, January 19, 2006, *available at,* http://www.lasc.ie/news/bechtel-vs-bolivia.html.;Award, *Biwater Gauff Ltd. v. Republic of Tanzania, available at* http://www.worldbank.org/icsid/cases/awards.htm#awardarbo0522; Epaminontas E. Triantafilou, "No Remedy for an Investor's Own Mismanagement: The Award in the ICSID Case Biwater Gauff v. Tanzania,"International Disputes Quarterly, White & Case, Winter 2009, *available at,* http://www.whitecase.com/idq/winter_2009_4/.

[47] Notice of Intent to Submit a Claim to Arbitration, November 27, 1998 and Notice of Claim and Demand for Arbitration, *Sun Belt Water v. Canada*, October 12, 1999, *available at,* http://sunbeltwater.com/docs.shtml.

State of Maine. Codification of the favorable decisions in *Methanex* and *Glamis Gold* is essential because there is no rule of precedent or *stare decisis* in customary international investment law.[48] Nor is there even an authoritative appellate body to reconcile conflicts between different tribunal rulings. Unfortunately powerful business lobbies and corporate lawyers in Washington D.C. oppose such reform measures and codification of the rules in *Methanex* and *Glamis Gold* in particular.[49]

In contrast to the narrow construction by U.S. courts of analogous property rights protections in the Fifth Amendment "takings" clause and the even more narrow construction of constitutional property clauses in other legal systems,[50] international arbitrators have room to read the vague expropriation language of international investment treaties and agreements broadly or narrowly. The arbitrators in *Methanex v. United States* interpreted NAFTA's expropriation rule narrowly, but the tribunal in the earlier case of *Pope & Talbott* gave the same language a broad construction.[51] Accordingly, the construction of the expropriation

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[48] For example, article 1136(1) NAFTA provides that: "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." *available at* http://www.nafta-sec-alena.org/en/view.aspx?x=343. Moreover, case law is not supposed to be a source of customary international law. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

[49] Objecting to the proposal to codify the rule in *Methanex,* Linda Menghetti, from the Emergency Committee for American Trade writes, "Professor Stumberg proposes that the U.S. should "[n]arrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award." *Methanex* provides, in pertinent part, that "a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable . . . ."Professor Stumberg's proposal would significantly narrow an investor's rights and would be inconsistent with international law." Additional Views Submitted on Behalf of the Emergency Committee for American Trade, Hearing on "Investment Protections in U.S. Trade and Investment Agreements," held by the Subcommittee on Trade of the House Committee on Ways and Means on May 14, 2009, *available at,* http://ways andmeans.house.gov/hearings. For objections from the international business community and bar regarding the award in *Glamis Gold v. United States, see* Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, U.S. Department of State, September 30, 2009, pp. 3-4, pp.18-19; statement appended to the Report from Steven Canner, U.S. Council for International Business, Jennifer Haworth McCandless, Sidley Austin LLP, and Linda Menghetti, Emergency Committee for American Trade, pp.19-20; statement appended to the Report from Shaun Donnelly, National Association of Manufacturers, p. 20; statement appended to the Report from Sean Heather, U.S. Chamber of Commerce ; statement appended to the Report from Judge Stephen Schweibel, independent arbitrator p. 34. (on file Forum on Democracy & Trade).

[50] While U.S. constitutional case law construes the analogous Fifth Amendment Takings Clause narrowly compared to the construction of "expropriation" by many international investment tribunals, U.S. courts do recognize "regulatory takings" when the regulation eliminates all or substantially all economic value, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 at 1019 n.8, (1992) ("It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full"), thereby providing in the U.S.A. greater protection of property rights than is the norm in other legal systems around the world. *See* A.J. Van der Walt, Constitutional Property Clauses: A Comparative Analysis, (1999) p.17 ("the distinction between police-power regulation of property and eminent-domain expropriation of property is fundamental to all [constitutional] property clauses, because only the later is compensated as a rule. Normally, there will be no provision for compensation for deprivations or losses caused by police-power regulation of property.").

[51] The NAFTA tribunal decision in *Methanex v. United States* reads the rule relatively narrowly, concluding that:"as a matter of

article of IIAs in future cases is unpredictable, particularly given that there is no rule of precedent or *stare decisis* in international investment law. Unless IIA expropriation articles are reformed by codifying the *Methanex* rule or by otherwise reflecting the international legal norm that police-power regulations are not compensable, some IIA tribunals will bestow greater rights to foreign investors than U.S. investors enjoy under one of the more 'property-rights friendly" constitutions in the world (and thereby radically depart from the norm under domestic law in legal systems around the world).

The obligation on parties to provide a minimum standard of treatment (MST) including "fair and equitable treatment" under international law is also vague and subject to being read broadly or narrowly.[52] International investment tribunals are not in agreement on the scope of MST rules. In contrast to the consistently narrow construction by modern U.S. courts of analogous "substantive due process" obligations, many international investment tribunals give a broad construction to the minimum standard of treatment obligation. On the other hand, a NAFTA tribunal in the recently decided case of *Glamis Gold v. United States* read it more narrowly.

One line of tribunal decisions, for example, has indicated that the minimum standard of treatment imposes a duty on governments to change maintain a stable and predictable legal environment.[53] By contrast, under U.S. substantive due process analysis and presumably

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international law, a nondiscriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects...a foreign investor or investment is not deemed expropriatory or compensatory," unless specific commitments to refrain from regulation were made to the investor. *Methanex v. United States,* Final Award, part IV, chapter D, paragraph 7 (2005). In sharp contrast, the NAFTA panel in *Pope & Talbot,* although it ultimately rejected Pope and Talbott's expropriation claim, said economic regulation, even when it is an exercise of the state's traditional police powers, can be a prohibited indirect or "creeping" expropriation under customary international law if it is "substantial enough." *Pope & Talbot v. Canada,* Interim Award by Arbitral Tribunal, In the Matter of an Arbitration Under Chapter Eleven of The North American Free Trade Agreement Between Pope & Talbot Inc. and The Government of Canada (April 10, 2001), pp. 33-34, *available at* http://www.naftaclaims.com.

52 *See generally* Matthew C. Porterfield, *An International Common Law of Investor Rights?* 27 U. Pa. J. Int'l Econ. L. 79 (2009).

53 For example, Azurix, a U.S. water services company won a multi-million dollar award against Argentina under the US-Argentina Bilateral Investment Treaty (BIT), based on the finding of the arbital tribunal that Argentine water regulators had violated the "fair and equitable treatment" provisions of the minimum standard of treatment article in the U.S./Argentine BIT. Other examples include *Saluka Investments BV v. Czech Republic,* UNCITRAL, Permanent Court of Arbitration, Award (Mar. 17, 2006), available at http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf ; and *Occidental Petroleum Exploration and Production Co. v. Ecuador,* para. 191 (UNCITRAL Arb.) (2004). According to the United Nations Conference on Trade and Development: "On fair and equitable treatment, several recent decisions have upheld and reinforced a broad acceptance of the FET standard in line with the often-cited *Tecmed* award in 2003. In *LG&E v. the Argentine Republic,* for example, the tribunal affirmed that the "fair and equitable standard consists of the host State's consistent and

under due process principles embodied in other legal systems, governments are generally free to change regulatory standards in response to changed circumstances or priorities. Some tribunals have also noted that the minimum standard of treatment is continuing to "evolve," suggesting that the scope of protection that it provides to foreign investors will continue to expand.[54]

This expansive reading of the MST obligation, however, was rejected by the tribunal in *Glamis Gold.* The tribunal ruled for the United States in this landmark case,[55] in which `Glamis, a Canadian corporation, sued under NAFTA's chapter 11, seeking $50 million in compensation for actions taken by the U.S. Department of Interior and the State of California, imposing environmental and land use regulations on Glamis's proposed open-pit gold mine in the Imperial Valley of California. The tribunal decision in *Glamis* may represent an important advance when it comes to preserving governmental regulatory authority in the face of property rights claims based on minimum standard of treatment obligations, depending on the outcome of future cases.[56] Again, the problem is that *Glamis* is not controlling precedent.

Professor Stumberg nicely summarizes the general state sovereignty problems with international investment agreements and the politically-possible IIA reforms that would

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transparent behaviour, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor."This reading is in line with the other awards rendered in 2006 in *Azurix v. The Argentine Republic* and *Saluka v. The Czech Republic.*" UNCTAD, Latest Developments In Investor-State Dispute Settlement, IIA Monitor No. 4, United Nations, New York Geneva, 2006, p. 4 (on file).

[54] Award *Mondev Int'l Ltd. V. United States*, Case No. ARB(AF)/99/2, para. 116, ICSID (W. Bank) (Oct.11, 2002), *available at* www.naftalaw.com.

[55] The United States was the 'defendant' in this case, even though the case concerns California state law and regulation, by virtue of the fact that the US federal government, and not California, is the signatory of the NAFTA treaty.

[56] Transcripts, submissions, and tribunal orders in *Glamis Gold v. United States* may be found at //www.state.g http:oc/s/1/c10986.htm . The *Glamis* tribunal rejected the plaintiff's broad reading of MST, finding that none of the actions of the United States or the State of California violated the obligation to provide "fair and equitable treatment," a standard that must be understood as "customary international law," under the official interpretation of MST by the NAFTA Free Trade Commission. "Custom," the tribunal concluded, is a question of fact that must be found in the "practice of states." The baseline for understanding the customary international law standard for fair and equitable treatment, the tribunal said, was established in the 1926 *Neer* arbitration. The tribunal further determined that no convincing evidence based on the practice of states had been presented by Glamis Gold to show that the *Neer* standard has evolved to encompass a right to a "stable regulatory and business climate" and similar concepts. In other words, just as in 1926 a violation of the standard of "fair and equitable treatment" requires that an act by a nation-state must be: (1) "sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons," or (2)"creation by the State of objective expectations in order to induce investments and the subsequent repudiation of those expectation." Based on its application of the *Neer standard,* the tribunal concluded that none of the acts of the United States and the State of California about which Glamis Gold complained violated the customary international law standard.

substantially mitigate those problems,[57] "To date, the U.S. defense team has successfully defended against NAFTA investor-state claims. Yet behind closed doors, there is significant concern that NAFTA panels will begin to rule against the United States.[58] For example, Abner Mikva, a former congressman and retired federal circuit court judge, was the U.S. government's appointed arbitrator in *Loewen v. United States*. Judge Mikva recounted a meeting with U.S. officials prior to the panel being constituted. 'You know, judge,' they said, 'if we lose this case we could lose NAFTA.' 'Well, if you want to put pressure on me,' Mikva replied, 'then that does it.'[59] As BITS and FTAs multiply, more investors have arbitration rights. The risk grows that arbitrators will start to interpret the ambiguity of investor protections in ways that are unfavorable to the United States. 'No greater rights' is still the right mandate for negotiators. But the language in BITs and FTAs needs to be revised to ensure that it conforms to the conservative interpretation that the United States has used to defend against the investor claims."

5. Conclusion: Why is it important to reform international trade and investment agreements to provide greater clarity and certainty with respect to potential conflicts with state law and state water law in particular?

The language of international trade and investment agreements is characteristically vague and subject to multiple interpretations, particularly as it relates to potential conflicts with state water law. The World Trade Organization (WTO) agreement on trade in goods (the GATT) clearly covers trade in bottled water, but there are at least two schools of thought on whether trade in bulk water is covered. Opinions similarly differ about whether the WTO agreement on trade in services (the GATS) covers groundwater measures, although an argument can be made that some regulations of distribution services that may affect water policy are covered. Because they define investment so broadly, international investment agreements (IIAs) cover state water measures, and are the most likely source

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[57] Robert Stumberg, "Reforming Investor Rights," testimony before the U.S. House Ways and Means Committee, Subcommittee on Trade, May 14, 2009. (on file)

[58] There is considerable speculation about why the United States has not lost any NAFTA cases, including open discussion by arbitrators about the pressures of deciding claims against the United States. *See,* David Schneiderman. "Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes" ExpressO, (2009), available at: http://works.bepress.com/david_schneiderman/1 ("Not so easily explained are conflicting tribunal awards drawing on virtually identical facts, invoking the same treaty text, where arbitrators seemingly change their mind from one case to the next without any explanation.")

[59] Remarks of Judge Abner Mikva, Symposium: The Judiciary and Environmental Law, Panel on Trade, the Environment and Provincial/State Courts, Pace University School of Law, White Plains, New York, (December 7, 2004) (on file).

of an international lawsuit. But, the rules defining when a state water measure violates an IIA are vague, and the key rules related to indirect expropriation and minimum standard of treatment are almost impossibly vague. The results are contradictory interpretations of the rules by different international investment tribunals that are not bound by the principle of *stare decisis* or subject to review by an appellate tribunal. The uncertainty about how investment tribunals will rule is compounded by the relatively small number and the narrow scope of general exceptions in international investment agreements.

Howard Mann concludes, " In short, there remains great uncertainty as to how trade law will or will not constrain governmental ability to prohibit or restrict exports of freshwater resources. This uncertainty is compounded by elements of international investment law which have led to rulings, in at least three cases in recent years, that the right to export products can be seen as part of the set of protected rights of foreign investors.[60]

In the end, the lack of clarity, certainty, and predictability in international trade and investment law allows tribunals excessive discretion. While tribunals in the *Methanex* and *Glamis* investment cases used their discretion wisely and prudently declined to find that the democratically-elected governor and legislature of California had violated international law, other tribunals appear intent on expanding the scope of international property rights protections to limit the authority of local democratic institutions.

The solution is to reform international trade and investment agreements to, in the place of vague text, substitute:

- Specific language protecting the authority of local democratic institutions and local courts to act in the public interest; and

- Specific language in new general exclusions in trade and investment agreement coverage of key areas of state regulatory authority, including regulation and protection of freshwater resources.

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[60] Howard Mann, International Economic Law: Water for Money's Sake?, I Seminaroro Latino-Americano de Politicas em Recursos Hidricos, September 2004, Brazilia, Brazil, pp.7-8, *available at* http://www.howardmann.ca.pdfs/WaterandInternationaleconomiclaw.pdf. Regarding the "right to export products", Mann cites *Pope & Talbot v. Canada, S.D. Meyers v. Canada, and Marvin Feldman v. Mexico,* all available at www.naftalaw.org. But, keep in mind that, the official interpretation of the "minimum standard of treatment" obligation by the parties to NAFTA bars the implied incorporation of treaty law, such as GATT article XI as part of "customary international law."

Appendix I:
Selected Policy Options Worthy of Further Debate

General Water Policy Reforms for International Trade and Investment Agreements

- *Maine may want to consider the pros and cons of petitioning Congress and the President to ensure that all international trade and investment agreements entered into by the United States include the following provisions*:
    - Water, including bottled water, shall not be regarded as a good or a product and shall be excluded from coverage in all international trade and investment agreements;
    - Any bona fide and non-discriminatory regulation adopted in the public interest related to or affecting the drilling for, pumping or extraction of water or related to or affecting the distribution or transportation of water, whether by pipeline, marine, land, or other transport, is excluded from coverage in all international trade and investment agreements;
    - No international trade or investment agreement shall require the privatization of drinking water or sanitation services (or services related to those sectors) or to require the payment of damages or the authorization of retaliatory trade sanctions as a result of either the regulation or the total or partial exclusion of private investors or companies from drinking water and sewerage markets (or by the de-privatization of drinking water and sanitation services).

General Federalism Reforms for International Trade and Investment Agreements

- *Maine may want to reiterate its call to Congress and the President for greater state-federal consultation on trade and federalism issues and for additional protections against federal preemption and unfunded federal mandates resulting from trade and investment disputes*. For example, Congress could enact legislation to forbid U.S. federal agencies from taking any of the following actions on grounds that a state, tribal, or local government measure (or its application) is inconsistent with an international agreement or treaty or award:
    - Initiate legal action to preempt or invalidate a sub-national law or its enforcement or application;
    - Directly or indirectly shift costs to a state or local government in response to an international tribunal decision that the United States must pay compensation to a foreign investor.

Reform of International Services Agreements

Maine may want to reiterate its call for Congress and the President to limit the coverage of state and local measures in international services agreements, in ways that specifically reference water policy. For example:

- All international services agreements entered into by the United States could include provisions that:
  - Preserve the right of federal, state, and local governments to provide and regulate services in the public interest, including water and sewer services, on a non-discriminatory basis;
  - Provide that nothing in any services agreement shall bar measures rolling back service privatization or require the privatization of public services, even when such services are provided on a commercial basis and/or are already partially privatized;
  - Provide that services disciplines shall be based exclusively on a positive list of commitment, each of which is defined in detail;
  - Provide a general exclusion from the agreement for distribution and transportation of water and for drinking water and sanitation services.
- The United States by legislation or executive directive could adopt a policy that:
  - It will never accept a GATS agreement on domestic regulation that requires domestic regulations to meet a "necessity test" even if drafted in language addressing a "disguised barrier to trade," to be "pre-established, based on objective criteria, or relevant;"
  - The section in the proposed agreement on domestic regulation providing for a principle of deference to legitimate national policy objectives shall explicitly state that national policy objectives include objectives identified at both national or sub-national levels.

Reform of International Investment Agreements and Treaties

Maine may want to consider the pros and cons of reiterating its call for Congress and the President to limit the coverage of state and local measures in international services agreements, in the following respects among others:

- *Minimum standard of treatment* – Narrow the minimum standard treatment to the elements of customary international law as explained in the U.S. brief in *Glamis*, in which the State Department argued for a reading of MST confined to three elements: (1) compensation for expropriation, (2) "internal security," and (3) "denial of justice" where domestic courts or agencies (not legislatures) treat foreign investors in a way that is "notoriously unjust" or "egregious" such as a denial of procedural due process.[61] Further,

[61] Counter-Memorial of Respondent United States of America, in Glamis Gold v. USA (September 19, 2006) 221.

the expectation of a stable or unchanging legal environment is not to be understood as part of customary international law.[62]

- *Indirect expropriation* – Narrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award. In other words, establish that the adoption or application by any national or sub-national government of any bona fide and non-discriminatory measure intended to serve a public purpose shall not constitute a violation of an expropriation article of an investment agreement or treaty.[63]
- *Protected investments* – Narrow the definition of investment to include only the kinds of property that are protected by the takings clause of the U.S. Constitution. Exclude from the definition of investment the expectation of gain or profit, the assumption of risk, and intangible property interests other than intellectual property. Acknowledge that property interests are limited by background principles of domestic property, water, and nuisance law.
- *Exhaustion of remedies* – Follow international law and require investors to exhaust domestic remedies before using investor-state arbitration. This recognizes that international investor-to-state arbitration is to be used as a last resort and should not be invoked routinely as a means of circumventing the domestic administrative and judicial processes. This also allows domestic courts and administrative bodies to resolve disputed facts and disputed points of domestic law prior to review by international arbitrators.
- *Waiver of right to file an international investment claim* – Clarify that no international investment tribunal shall find a contract provision in which a foreign investor waives its right to pursue an international investment claim to be unenforceable. *See Appendix III.*

Measures That Might Be Taken By State And Local Governments In Maine

The State of Maine and its subdivisions may want to consider the pros and cons of a:

- *Waiver of right to file an international investment claim* – Require that contracts between governmental units in Maine and private investors include a waiver of any right by investors to seek compensation through international investment arbitration. *See appendix III.*

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[62] Counter-Memorial... at 226, 232.

[63] The Intergovernmental Policy Advisory Committee, which is the formal state and local government advisory body to the U.S. Trade Representative, has recommended codifying the rule in *Methanex v. United States,* "The recent ruling in the *Methanex* dispute established an important precedent for safeguarding important principles of federalism and state sovereignty of concern to this Committee. However, since such tribunal judgments are not formally precedential, IGPAC members recommend that the case's finding that 'as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted with due process and which affects...a foreign investor or investment is not deemed expropriatory and compensable....' be codified as a formal Interpretive Note in NAFTA and other existing FTAs, and that corrected language be added to this TPA and future trade agreements."The US-Peru Trade Promotion Agreement: Report of the Intergovernmental Policy Advisory Committee," Febuary 1, 2006, *available at,* http://www.citizen.org/documents/IGPAC_Peru_Report.pdf.

Appendix II:

Metalclad v. Mexico

What were the facts in Metalclad?[4]

This dispute arose over the use of a plot of land, located near the municipality of Guadalcazar, in the state of San Luis Potosi, Mexico. This plot of land was originally owned originally by a Mexican company, COTERIN. In 1990, the Mexican federal government granted COTERIN a permit to build and operate a hazardous waste landfill on the land. Thereafter, COTERIN applied to the municipality of Guadalcazar for a building permit to construct the landfill. In both 1991 and 1992, the municipality denied COTERIN such a building permit. Despite the municipality's denial, in 1993 COTERIN received three building permits to construct and operate the landfill: two from the Mexican federal government's Secretariat of the Environment, and one land use permit from the state government of San Luis Potosi. But COTERIN still had not received a municipal building permit.

In 1993 the U.S. corporation Metalclad contracted for an option to buy COTERIN and its permits[**5**] . Then—after receiving assurances from federal government officials as well as the Governor of San Luis Potosi[**6**] that all necessary permits for the landfill had been obtained—and that the federal government would secure any further support required from the state of San Luis Potosi and the municipality of Guadalcazar—Metalclad purchased COTERIN, the landfill site, and COTERIN's state and federal building permits.[**7**]

Shortly after Metalclad purchased COTERIN, the Governor of San Luis Potosi publicly denounced the landfill project. Nevertheless, in May 1994, upon securing an extension of the federal building permit, Metalclad began construction of the landfill.[**8**] Then, in October, 1994, the City of Guadalcazar ordered a halt to construction because Metalclad had not obtained proper municipal building permits. Federal officials advised Metalclad to apply for the municipal permit merely "to appease the municipality," allegedly assuring Metalclad that Guadalcazar could not deny the permit. Metalclad therefore applied again for the municipal permit. Immediately thereafter Metalclad resumed construction, and in March 1995 completed the landfill building project.

That same month, Metalclad attempted to open its new facility for operations. But angry local protestors, allegedly with the aid of state troopers, blocked the opening of the new facility. The landfill remained closed until November 1995.

In November, Metalclad entered into an agreement with two federal agencies, and the facility began to operate. The Guadalcazar city council responded in December 1995 by denying Metalclad's last petition for a municipal building permit. Allegedly, the city council acted without granting the Metalclad corporation any notice or opportunity to be heard.

Soon thereafter, Guadalcazar brought action against the federal government to challenge the

agreement the federal agencies entered into with Metalclad. Pending resolution of this suit, Guadalcazar successfully obtained a preliminary injunction barring further operations at the landfill site. While the action was pending, the same federal agencies granted Metalclad a further permit which authorized a substantial expansion of the landfill site.

Finally, in September 1997, the Governor of San Luis Potosi issued a state-level decree which established the landfill site as a protected natural area. Thus, without any reference to the lack of a municipal building permit, the state government entirely prevented the landfill from operating.

What is the history of the Metalclad proceedings?

Nine months earlier, on January 2, 1997, Metalclad had already demanded arbitration under NAFTA's Chapter 11. In its claim against the Mexican federal government, Metalclad argued that the nation of Mexico was responsible under international law for the conduct of its governmental subdivisions, and that both the state of San Luis Potosi and the municipality of Guadalcazar had violated NAFTA section 1105's " minimum treatment" standard, and NAFTA section 1110's "expropriation" prohibition.

As provided for in NAFTA, Article 1120, Metalclad filed its Notice of Claim with the Additional Facility of the International Centre for Settlement of Investment Disputes (ICSID). On January 13, 1997, the Secretary-General of ICSID informed the parties that the requirements for accessing an ICSID tribunal had been fulfilled, and issued a Certificate of Registration of the Notice of Claim. On May 19, 1997 the ICSID Tribunal was constituted, and it held its first session on July 15, 1997.

After extensive review of Metalclad's claims during a period of over three years, in August 2000 the ICSID Additional Facility tribunal issued a two-part decision: (1) Mexico's conduct violated Article 1105(1) of NAFTA, which was intended to ensure the fairness, equity, and "transparency" of domestic investment rules for foreign investors, and (2) Mexico's conduct was deemed to be "a measure tantamount to expropriation" under the language of NAFTA section 1110. For these two violations, the Tribunal found that Metalclad was entitled to monetary relief in the amount of $16.9 million from the nation of Mexico.

Following the August 2000 decision of the arbitration panel, Mexico sought domestic court review in the British Columbia Supreme Court. "Because the parties had designated the place of arbitration to be Vancouver, B.C., the International Commercial Arbitration Act allowed the Supreme Court of British Columbia to [have jurisdiction to] set aside the Tribunal's award under certain limited circumstances"—should the proceeding move to that stage.[**9**]

On May 2, 2001, the British Columbia Supreme Court resolved the question of whether the Metalclad tribunal had exceeded its authority under the B.C. international arbitration statute.[**10**] The decision came down in favor of Metalclad, as the British Columbia Supreme Court agreed with the Tribunal that the Mexican federal government owed Metalclad nearly $16 million US dollars.[**11**]

- Specifically, in his British Columbia Supreme Court opinion, Judge Tysoe delivered a two-part decision which (1) agreed with the ICSID Tribunal's finding that the decree passed by the State government of San Luis Potosi was an expropriation of Metalclad's property; (2) agreed that compensation to Metalclad was thus required by the federal government of Mexico under NAFTA Chapter 11; and (3) disagreed with the Tribunal's finding that the refusal of Guadalcazar to grant a municipal building permit was a violation of NAFTA obligations of "fair and equitable treatment" under article 1105(1) on minimum treatment under international law.and therefore also a violation of article 1110 on expropriation. (Judge Tysoe reached this conclusion because the violation alleged was based on the wrong section of NAFTA[**12**].)

Soon after the British Columbia court reached its result, the Mexican federal government announced that "Mexico's Ministry of the Economy has paid over $16 million U.S. dollars to the United States corporation Metalclad in order to comply with a ruling by a North American Free Trade Agreement (NAFTA) arbitration panel."[**13**]

In sum, following the NAFTA Tribunal decision and the British Columbia Supreme Court decision, the Mexican federal government was required to pay – and did pay – the full costs of the tribunal award.[**14**]

What was the basis for the tribunal and appellate court decisions?

The Tribunal decision: The Metalclad tribunal found that Mexican authorities had violated two important investor rights protected by NAFTA: article 1110 on expropriation and article 1105 on minimum treatment under international law.

- **Compensation for expropriation**. NAFTA requires member nations to compensate investors if national or subnational governments "directly or indirectly nationalize or expropriate" an investment of the other countries' investors in its territory. Expropriation includes measures "tantamount to nationalization or expropriation."[**15**] The Metalclad tribunal had to decide not only the scope of expropriation, but also what the open-ended references to "tantamount to expropriation" and "indirect" expropriation meant.

  The Metalclad tribunal broadly read the term "tantamount to expropriation" and "indirect expropriation" in NAFTA's article on expropriation. This broad reading granted to investors a set of property rights protections that extend beyond the protections granted to property owners under the Fifth Amendment to the U.S. Constitution.

  In interpreting the Fifth Amendment "takings" clause, the U.S. Supreme Court "usually has applied the regulatory takings analysis only to regulations of specific interests in property."[**16**] Expected or future economic benefits are not considered property under the Takings Clause.[**17**] By way of contrast, the Metalclad tribunal read NAFTA's expropriation article to include not merely the seizure of property or its regulation to the point that its economic value is extinguished, but also "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or

significant part, of the use or reasonably-to-be-expected economic benefit of property..."[**18**] In its Metalclad opinion, the " tribunal made it clear...that the relevant 'investment' for purposes of its expropriation analysis was Metalclad's broader interest in operating a particular type of business, not merely its interest in its real property."[**19**]

- **Minimum treatment under international law**. NAFTA article 1105(1) requires member nations to provide other members' investors with treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. Article 1105 is intended to serve roughly the same purpose as "due process" norms in U.S. constitutional law, but because article 1105's terms are largely undefined, especially when compared with the extensive U.S. case law on procedural and substantive due process, international investment tribunals exercise great discretion when they make inherently subjective judgments about when government action violates fundamental principles of procedural or substantive justice.[**20**]

  According to the Metalclad tribunal, Mexico breached article 1105(1) because it "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment."[**21**] The tribunal noted the lack of an "orderly process" in at least three circumstances:[**22**]

  No clear rule or established practice: The tribunal concluded that Mexico did not accord Metalclad "fair and equitable treatment." Fair and equitable treatment was understood to incorporate principles of transparency in NAFTA chapter 18, because there was no clear rule and no established practice with respect to whether Metalclad was required to obtain a municipal permit prior to constructing and operating its hazardous waste facility in San Luis Potosi.[**23**]

  Detrimental reliance on assurances of federal officials: The tribunal similarly concluded that Mexico did not accord Metalclad "fair and equitable treatment" (as interpreted to require transparency and a predictable regulatory environment) because the company relied on representations of federal officials that a municipal permit was not required. But Guadalcazar officials later refused that permit.[**24**] A finding that Mexico had failed to provide Metalclad with "fair and equitable treatment," because of statements made by Mexican federal officials, would be an astonishing conclusion in a U.S. court—where businesses have an obligation to take due diligence in researching the laws and regulations that regulate their economic activities.

  Notice and opportunity to be heard: The tribunal finally concluded that Mexico did not accord Metalclad "fair and equitable treatment" because the municipality of Guadalcazar did not meet its obligation to conduct a transparent regulatory process, when it failed to give Metalclad adequate notice of the meeting where its construction permit application was denied and failed to provide adequate and credible reasons for denying the permit.[**25**]

  Certainly, a U.S. court might find an authentic failure to provide notice and opportunity to be heard to be a violation of procedural due process. The question here is why the

Metalclad panel felt competent to apply Mexican law and make its own findings of fact— rather than requiring Metalclad to pursue its claims using domestic judicial remedies.

- **The appellate court decision.** Because Metalclad v. Mexico was arbitrated under ICSID Additional Facility rules, domestic courts could review the tribunal decision. Those rules allow a party to ask the domestic courts at the "seat" of the arbitration, in this case British Columbia, to set aside an award because of a violation of that jurisdiction's international arbitration statute.[**26**] On this basis Mexico petitioned a British Columbia court to review the award in the Metalclad case to determine its conformity with the B.C. statute governing such arbitrations (which is based on the International Commercial Arbitration Act). The grounds for review under the B.C. statute are: improper constitution of the tribunal, actions taken beyond the jurisdiction of the tribunal, and violations of public policy.[**27**]

  As noted above, the British Columbia Supreme Court in an opinion by Judge David Tysoe agreed with the Metalclad tribunal's finding that the decree issued by the state government of San Luis Potosi, creating an ecological zone and barring Metalclad's waste disposal facility from operating, was an expropriation of Metalclad's property, but it disagreed with the tribunal's findings that the refusal of City of Guadalcazar to grant a municipal building permit for the Metalclad facility was a denial of fair and equitable treatment under international law and an expropriation.[**28**]

  Recall that the Metalclad tribunal interpreted the concept of "fair and equitable treatment" under article 1105(1) in light of the transparency requirements in NAFTA article 102(1), a section of the agreement not located in chapter 11 on investment, but in chapter 18 of the agreement. But, Metalclad's right to arbitrate a claim against Mexico, Judge Tysoe reasoned, is confined to alleged breaches of obligations under section A of NAFTA chapter 11 and two articles found in chapter 15 and do not extend to the transparency obligation in chapter 18 (an obligation that might be the basis of state-to-state arbitration, but not investor-to-state arbitration). Therefore, Tysoe concluded that the Metalclad tribunal was acting beyond the scope of its authority to arbitrate under B.C. international arbitration act, because the tribunal found that the municipality of Guadalcazar—which required, but then refused to issue, a building permit—violated Mexico's article 1105(1) obligation related to "fair and equitable treatment." Also, the tribunal's finding that Guadalcazar's non-transparent permitting process amounted to an expropriation under article 1110, Tysoe concluded, was beyond the scope of its authority under the B.C. arbitration statute.

  In other words, the tribunal's finding of an article 1110 expropriation violation was also beyond the scope of the tribunal's authority under the B.C. statute because it was based entirely on the previous finding of an article 1105(1) violation that inappropriately incorporated transparency obligations from NAFTA chapter 18.[**29**]

  Nonetheless, Judge Tysoe let stand the Metalclad tribunal's finding that the ecological decree of the state of San Luis Potosi was a violation of article 1110 on expropriation

because that finding was based on neither a lack of transparency nor a flawed finding of an article 1105(1) violation.[30]

What are the legal and policy implications of the Metalclad decisions?

The Tribunal decision. State and local officials should be concerned about the Metalclad tribunal decision for at least three reasons:

- **A successful challenge to core functions of state and local government:** The Metalclad case illustrates how NAFTA's investment chapter allowed a transnational corporation to successfully bring a complaint based on state and local governments performance of core governmental functions: protecting public health and regulating land use.

- **A broad reading of NAFTA's investor protection against expropriation:** The Metalclad tribunal read article 1110 on expropriation very broadly to include "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of the property."[31] This broad reading of article 1110 would provide foreign investors with greater rights than U.S. investors in property enjoy under the U.S. regulatory takings doctrine. This broad reading would substantially diminish state and local regulatory authority related to land use and environmental protection. As the U.S. Supreme Court explained in its recent decision in Lingle v. Chevron 125 S. Ct. 2074 (2005), which rejected Chevron's "takings" arguments, the touchstone of regulatory takings doctrine is "to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain."[32]

- **A broad reading of NAFTA investor protection related to minimum treatment under international law:** The Metalclad panel's finding that transparency requirements should be read into the concept of "fair and equitable treatment" parallels the expansive reading of the text of article 1105 by other NAFTA tribunals. For example, a NAFTA tribunal in Waste Management II concluded that "fair and equitable treatment" is violated by government conduct "leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process."[33] No responsible U.S. court would presume to divine natural law in this way.

ENDNOTES

[1] Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/ 97/1, Award (Aug. 30, 2000) (hereinafter Metalclad v. Mexico), at http://www.worldbank.org/icsid/cases/mm-award-e.pdf.

[2] Metalclad Corp., supra, para. 30

[3] Vicki Been, NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls, 32 Envtl. L. Rep. 11001 (Sept. 2002) [hereinafter 'Vicki Been I'].
[4] Metalclad Corp., supra. See Vicki Been and Joel C. Beauvais, The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine, 78 N.Y.U. L. Rev. 30, 72 (April, 2003) [hereinafter 'Vicki Been II'].
[5] Stephen L. Kass and Jean M. McCarroll, The 'Metalclad' Decision Under NAFTA's Chapter 11, New York Law Journal, October 27, 2000, available at **http://www.clm.com/pubs/pub-990359_1.html** (last visited July 10, 2003).
[6] Vickie Been I, at FN 108.
[7] **http://www.rmalc.org.mx/CIADI/reasons_for_judgment.pdf**
[8] NAFTA Summary Reasons of Judge Tysoe on Review of Metalclad v. Mexico BCSC. **http://www.canadianliberty.bc.ca/nafta/nafta_summary.html**
[9] Id.
[10] Mexico Pays $16 Million to Metalclad, Ending First NAFTA Chapter 11 Dispute (Oct. 30, 2001), **http://www.wtowatch.org/News/index.cfm?ID=2963**
[11] The payment for over $16 million was very good news for Metalclad in an otherwise lackluster year. According to its SEC filings, Metalclad made a $7.1 million profit in 2001, but this number was possible only because of the over $16 million payment received from the Mexican federal government. See Metalclad Corporation (MTLC) Annual Report (SEC form 10-K), Item 7: Management's Discussion and Analysis of Financial Condition and Results of Operations (March 29, 2002), **http://biz.yahoo.com/e/020329/mtlc.html**
[12] NAFTA article 1110.
[13] See, Matthew C. Porterfield. "International Expropriation Rules and Federalism," Stanford Environmental Law Journal, Vol. 23, No. 1, January 2004, pp.11-12;E. Enters v. Apfel, 524 U.S. 498,541 (1998).
[14] Id. Also see, Andrus v. Allard,444 U.S. 51,66 (1979) ("[L]oss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to lay a takings claim.")
[15] Metalclad v. Mexico supra, para. 103.
[16] Porterfield, supra, at p 47.See Metalclad v. Mexico, supra, at para 104.
[17] For example, without being totally subjective, the standard of review applied in two NAFTA chapter 11 cases Loewen v. United States (available at **http://www.naftaclaims.com**) and Mondev v.United States (available at **http://www.naftaclaims.com**), echoes the Elettronica tribunal's understanding of a violation of minimum treatment under international law, as encompassing "a willful disregard of due process of law…which shocks or at least surprises a sense of judicial propriety." Electtronica Sicula S.P.A. (SLSI) (U.S. v. Italy), I.C.J. 15 at 76 (July 20). A simple "surprise to judicial propriety" would seem to be subjective and only moderately deferential, at best.
[18] Metalclad v. Mexico supra, para. 99.
[19] Id.
[20] Metalclad v. Mexico supra, para. 88("The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.")
[21] Metalclad v. Mexico supra, para. 89 ("Metalclad was entitled to rely on the representations

of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit would be granted.")

[22] Metalclad v. Mexico supra, para. 91.

[23] See United Mexican States v. Metalclad Corp., 2001 B.C. Sup.Ct. 664 (2001), paras. 39-49 [hereinafter Metalclad Appeal].

[24] See Metalclad Appeal, para. 50.

[25] See Metalclad Appeal, paras. 66-76.

[26] See Metalclad Appeal, paras. 57-80.

[27] See Metalclad Appeal, paras. 81-105.

[28] Metalclad v. Mexico supra, para. 103

[29] 125 S. Ct. 2074 (2005)

[30] Waste Management II, para. 98 (emphasis added), available at **http:// www.naftalaw.com**. See, Mathew Porterfield, "Does CAFTA give greater rights to foreign investors? Roundtable Discussion Outline, March 15, 2005, p. 4 (on file Harrison Institute of Public Law, Georgetown University).

Appendix III

Excerpts from:
"Using Contractual Waiver Clauses to Limit the Jurisdiction of International Tribunals in Investor-State Dispute Resolution"

by

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March 2008
(on file)

In recent years, both the level of international investment and the number of investment-related treaties has increased significantly. Investment agreements typically include not only a set of substantive investor protections but also procedural provisions that permit investors to bring disputes concerning treaty protections before the International Centre for Settlement of Investment Disputes (ICSID), the leading international arbitration institution devoted to investor-State dispute settlement, and/or other international arbitral fora. ...

In response to this increasing litigation...States are looking beyond treaty texts for mechanisms to limit international arbitration. This paper analyzes the potential effectiveness of waiver provisions as indicated by key tribunal decisions. Waivers, which are clauses in various forms built directly into investor-State contracts, offer States an innovative tactic for preserving local jurisdiction, particularly over traditionally municipal matters, which, in turn allow States to exert greater control over the interpretation and execution of domestic law. The effect of waivers seems to hinge on tribunal treatment of treaty language pertaining to contract claims. ...

In the relatively few number of decisions that have addressed waiver provisions, tribunals have not rejected altogether the notion that investors can waive international arbitration, at least not in regards to contract claims. In fact, analysis reveals that treatment of the waiver issue is largely dependent upon whether contractual rights or treaty rights are at issue...

Proponents of waivers have argued—and most tribunals have accepted—the individual-rights paradigm: that one of the primary or "special" purposes of BITs [bilateral investment treaties] is to shift rights from States directly to investors. If BITs reflect States "downgrading" international dispute settlement from state-state level to state-investor level, it is arguable that logically an investor should have the ability reject that dispute settlement mechanism. Opponents contend that even if investors do enjoy individual rights disconnected from any larger State-to-State obligation, such rights cannot be waived before a dispute arises; i.e. investors cannot agree to waive rights before the rights are infringed...

Despite scholarship that seems to validate the notion of individual rights and investors' ability to agree to waivers, tribunals have not looked as favorably on the provisions that reflect and apply this understanding, namely forum selection (exclusive jurisdiction) clauses. ...

Even as some tribunals have refrained from exercising jurisdiction over contractual disputes that are disconnected from specific treaty violations, to date no tribunal has directly upheld a forum clause that waives any treaty-vested right or international arbitration of such rights. Tribunal jurisdiction over treaty-based disputes in the face of forum clauses, although vigorously contested in early disputes, has been widely accepted; however, a recent ICSID decision casts this consensus in doubt...

The majority view: Waivers do not limit jurisdiction over treaty claims

Lanco v. Argentina , the first major ICSID decision to deal with a waiver of investor rights in context of a forum selection clause held what would become an oft-cited premise: that such clauses could not inhibit tribunal jurisdiction over treaty claims. ...

Unlike *Lanco, Azurix v. Argentina*, a more recent ICSID decision, presented the tribunal with an express waiver clause. A U.S. company, Azurix signed a concession agreement for the distribution of potable water in Buenos Aires that required it to waive dispute resolution in any forum other than local administrative courts. ...The tribunal rejected the clause's application to treaty claims...

Together *Lanco* and *Azurix* indicate that, regardless of a tribunal's treatment of waivers over contractual disputes, it will not uphold a forum waiver clause limiting jurisdiction to domestic courts if the clause's terms conflict with treaty guarantees "as the functions of these various instruments are different." Effective waiver texts arguably should acknowledge treaty obligations and focus instead on claims arising directly out of the contractual agreements themselves.

The minority view: impact of Aguas del Tunari v. Bolivia [sometimes referred to as Bechtel v. Bolivia]

On the opposite side of *Lanco* and *Azurix* is *Aguas del Tunari v. Bolivia,* which represents the longest jurisdictional battle in ICSID history. It is a complex case that touches on several central issues in investor-State arbitration, including the ability of States to require investors to waive dispute resolution in international tribunals. The dispute, widely reported and followed around the world, arose out of a water concessions agreement between Bolivia and Aguas del Tunari (AdT). Because Bolivia believed that a concessionaire for a critical natural resource such as water should be subject to Bolivian law and courts, it incorporated a forum selection clause into its agreement with AdT. The text of the exclusive jurisdiction clause reads: "[The Concessionaire] recognizes the jurisdiction and competence of the authorities that make up the System of Sectoral Regulation (SIRESE) and of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws.

Later disregarding the waiver, AdT brought claims before an ICSID tribunal, AdT arguing that the clause only "recognized" the "jurisdictional competence" of domestic courts, rather than limiting AdT to their jurisdiction. Ultimately, the tribunal essentially agreed with AdT. Bolivia pointed to the concession agreement negotiations as evidence that both parties understood the "very carefully constructed" clause to deprive AdT of a right international arbitration. Boliva also argued that "...it was inconceivable, and equally unacceptable, that this company [the Concessionaire] could bring any dispute it had with the Bolivian government outside of Bolivia, or be subject to any law other than the law of Bolivia, consistent with [the Bolivian Constitution]." Citing both *Lanco* and *Vivendi* AdT argued that "even where an explicit and affirmative exclusive jurisdiction clause exists within a concession contract, such a clause does not affect the jurisdiction of an ICSID tribunal in respect to a claim made under a BIT." Since AdT presented its claims as treaty-based rather than based on the concession agreement, the clause would have no effect. The tribunal agreed. ...

Despite ignoring the waiver in the AdT agreement, the tribunal stated in dicta that ICSID jurisdiction can be waived, as long as the waiver is clear and explicit: Assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their dispute other than that of ICSID, it would appear that an investor could also waive rights to invoke the jurisdiction of ICSID. However the Tribunal need not decide on the question in this case.

Unlike the tribunal in *Azurix* which went to great lengths to avoid the topic, here the tribunal addressed the question explicitly. The tribunal also implicitly rejected the argument advanced by AdT that the enormous leverage, or negotiating advantage, possessed by a State should disqualify waivers in which a State could possibly use such pressure improperly. ...

Drafting principles and strategic considerations for future waiver implementation

Analysis of these key tribunal decisions reveals drafting and strategic principles that may inform states in their efforts to craft effective waiver provisions in future contracts. The contract-treaty distinction remains central to any analysis, but it does not necessarily relate significantly to the construction of the waiver clause itself. Several textual principles, however, can be discerned from tribunal decisions, which may guide drafting towards waiver clauses that withstand tribunal scrutiny. States may also consider altering their negotiating strategies when drafting BITs in order to achieve a meaningful limitation on international arbitration and tribunal jurisdiction. Certainly, waiver clauses would stand a better chance of surviving tribunal scrutiny if the implicated BIT contained a dispute settlement provision similar to that in the Italy-Jordan BIT: "In case the investor and an entity of the [CP] have stipulated an investment agreement, the [dispute settlement] procedure foreseen in such investment agreement shall apply." These kind of provisions, despite retaining awkward wording, are arguably uncontroversial. On the other hand, not only are treaty negotiations often heavily politicized affairs, but States have relied on waiver clause precisely in order to avoid complicated, perhaps unobtainable BIT re-negotiations. Given the difficulty of BIT

negotiations and the uneven success of waiver clauses thus far, States may look to different waiver models outside the forum selection paradigm or choose to focus exclusively on seeking alternative BITs...

Waivers that explicitly preclude the jurisdiction of tribunals are more likely to be Effective

The principle of specificity remains important because a tribunal will be forced to address a clause's enforceability more directly if the clause in dispute is tightly constructed; specific, explicit language aids a tribunal in determining the underlying meaning of both BIT and contractual clause. In *Lanco* the disputed waiver clause's lack of specificity represented a significant factor in the tribunal's decision. The text of the clause did not expressly select the national courts to the *exclusion of other forums*. As a result, the clause conceivably could have been interpreted as selecting *either* domestic courts *or* ICSID tribunals. In *Azurix,* the tribunal noted that "the rights under the Concession Agreement and under the BIT are not the same," and acknowledged Azurix's contention that the "generality of the waiver would exclude even the [domestic] courts," indicating that just as in *Lanco,* the waiver language was not sufficiently specific. ...

In *Aguas Del Tunari v. Bolivia,* the lack of specificity in drafting proved fatal to the waiver clause; the tribunal declined to address the clause, finding that the language was not specific enough in any event. Thus, even though the tribunal concluded that a clearly worded, precisely written waiver could theoretically be effective, it noted that the concession agreement signed by AdT was silent about international arbitration and, as a result, could be taken to imply a waiver of the right to invoke ICSID.

Effective waivers should be limited to procedural but not substantive treaty Rights

The *Aguas del Tunari* dicta aside, most tribunals have rejected any interpretation of waiver clauses that limit the ability of investors to seek redress for violations of fundaments treaty rights. Given that international tribunals are viewed as the proper legal forum for making such determinations, scrutiny of jurisdiction clauses has typically focused on whether or not a treaty claim is implicated. The reluctance to uphold waivers typically hinges on the tribunal's desire to protect substantive, fundamental treaty rights; the procedural rights to determine jurisdiction are important insofar as they relate. Therefore, waivers crafted with this distinction are more likely be upheld because its lesser degree of controversy. Even if the procedural right to tribunal adjudication is waived, substantive treaty rights could still be vindicated through state-to-state dispute settlement, or through litigation in a domestic court with jurisdiction. Further, with the expansive interpretation increasingly accorded to umbrella clauses, municipal matters are frequently been "elevated" to treaty status. Thus, a choice of forum waiver must, in a sense, be crafted to be anti-umbrella, specifying that it is the underlying facts or issues that are key, not the manner in which they are pleaded as a breach of treaty or breach of contract....

Including waivers as material conditions of contracts may increase their viability

One innovative waiver mechanism, which remains untested by international arbitration, is the use of an exclusive jurisdiction waiver as a material condition of the contract or concession agreement between a host State and private investor. Under this model, an investor who sought to go outside the contractually specified forum would render the agreement void. Therefore, any litigation of the agreement before international tribunals would be self-defeating...

Whether or not a forum selection clause can comprise a material condition of a contract is unclear. Furthermore, public policy concerns may cause tribunals to disregard the clause altogether and consider claims as if no condition had been set. Moreover, this line of thinking would be consistent with the idea that an arbitration clause is a contractual device that cannot achieve purposes that parties cannot purpose by contract.

Incorporation of an exhaustion requirement may increase utility of waivers

Exhaustion requirements, once a mainstay of customary international law and a component of the Calvo Doctrine, have not received the same level of use or focus as exclusive jurisdiction clauses, possibly because they do not provide the same degree of constraint on international tribunals. Traditionally, an exhaustion of domestic remedies was required in international law as a prerequisite to international dispute resolution. ISCID Article 26 leaves open the possibility of a State imposing an exhaustion requirement....

Conclusion

The cases discussed in this paper signal one of the challenges facing states stemming from the rise of BITs, namely how to contain the reach of international tribunals into municipal legal decisions by way of expansive dispute resolution and umbrella clauses. Waiver clauses represent a potential response; however, given the mercurial treatment international tribunals have accorded them, waivers remain just one of several potential, if not fully vindicated, solutions available. A full accounting of recent decisions does not indicate widespread embrace of waivers, yet certain decisions, such as *Aguas del Tunari,* give hope. With the increased attention on umbrella clauses, States must continue to grapple with and respond to the contract-treaty rights distinction that has determined jurisdictional disputes at the tribunal level over the past two decades, particularly in light of the fact that most tribunals have limited, at a minimum, waiver applicability to contractual violations.

States would be wise to approach the use of waivers with this understanding and to contemplate the suggested waiver modifications in this paper. ...States can continue to look towards other tactics, such as refreshed treaty negotiating strategies, in their attempt to limit tribunals' reach. Some might even follow Bolivia's lead and withdraw from ICSID altogether while scaling back concomitant treaty commitments. Regardless, the march of treaty-related litigation will continue apace--most likely at a faster pace, in fact, if statistics are any indication--and States must similarly continue to

respond to the challenge of retaining sovereign control in the face of expansive international arbitration.....

Appendix E

THE TAKINGS CLAUSE OF THE U.S. AND MAINE CONSTITUTIONS; HOW THEY MIGHT IMPACT LEGISLATION MODIFYING GROUNDWATER OWNERSHIP

Prepared for the Review of International Trade Agreements and the Management of Groundwater Resources

by Assistant Attorney General Peggy Bensinger
Office of the Attorney General
September 11, 2009

THE TAKINGS CLAUSE OF THE U.S. AND MAINE CONSTITUTIONS; HOW THEY MIGHT IMPACT LEGISLATION MODIFYING GROUNDWATER OWNERSHIP

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SUMMARY

The Takings Clause of the Fifth Amendment of the United States Constitution and Article I, § 21 of the Maine Constitution prohibit the taking of private property for public use without just compensation.[1] While the physical occupation of a person's property is the classic taking, the U.S. and the State Constitutions also guard against certain uncompensated regulatory interferences with a property owner's interests in his or her property.

The first question we address is whether Maine's regulation of the quantity of groundwater a property owner may withdraw and use from the property might constitute an unconstitutional taking of property under the Maine or U.S. Constitution. In their consideration of takings claims, the courts have utilized two types of analyses: first, the courts look at whether the governmental action caused a *per se* taking on its face; second, if not, the courts examine, on a case-by-case basis, the facts of a particular case to determine whether a taking has occurred. The short answer here is that such groundwater regulation would not constitute a *per se* taking, and under a fact-based *ad hoc* analysis, while it would depend on the nature of the regulation, the economic impact of the regulation, and the extent to which the regulation interfered with the property owner's investment-backed expectations, it is unlikely that a reasonable regulation of the withdrawal of groundwater would amount to an unconstitutional taking of property.

The second question under discussion by the committee is whether a taking claim could be successfully made if Maine changes from being an "absolute dominion" state to a state in which the "reasonable use" doctrine applies, or some other theory governing ownership and use of groundwater. I believe that the courts would apply the *ad hoc*, fact-based analysis and such an analysis could only be done with the context of the particular law and the particular facts in hand.

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[1] "... [N]or shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Me. Const. art. I, § 21.

OVERVIEW OF TAKINGS LAW

A. *Per Se ("In Itself")* Takings.

The Supreme Court has identified two categories of governmental regulatory action that generally are considered *per se* takings. *Langle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). Where the governmental regulation requires a property owner to "suffer a permanent physical invasion of her property" it must provide compensation or the requirement will be deemed to result in an unconstitutional taking of property. *Id.* A *per se* regulatory taking also will be deemed to have occurred where the government's regulation would completely deprive a property owner of all economically beneficial use of the property. *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Presumably, any regulation of a withdrawal of groundwater being contemplated by the State of Maine would not completely deprive any property owner of all economically beneficial use of the property; nor would the adoption of a "reasonable use" doctrine be likely to do so.

B. *Ad Hoc* (or Fact Specific) Takings.

A more relevant analysis of the constitutionality of the State's regulation of the quantities of groundwater which may be withdrawn by a property owner or of legislation proposing a shift in the ownership or use doctrine would be under what has been characterized by the U.S. Supreme Court as essentially an *ad hoc*, factual inquiry. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). The courts have not adopted any bright line which would guide a determination of whether regulations enacted by governments at any level would cause an unconstitutional taking of private property. When there is no physical occupation of the land, no denial of all economically beneficial use of the land, and the government has merely regulated the use of property, determining whether the regulation rises to the level of a taking requires "complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992) (citing *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 123-125 (1978)). The three factors analyzed by the Courts in the *ad hoc* fact-based analysis are: 1) the economic impact of the action; 2) the extent to which the action interferes with distinct investment-backed expectations; and 3) the character of the governmental action. *Penn Central*, 438 U.S. at 124.

It is not possible to analyze whether a regulatory taking would occur without the context of the actual language of the regulation or legislation at issue, and the facts regarding their impact on a particular landowner, which would allow the necessary "careful examination and weighing of all of the relevant circumstances" (*Franklin Memorial Hospital v. Brenda Harvey*, 2009 U.S. App. LEXIS 17435 (1st Cir. August 5, 2009) (citations omitted)). However, under the three part test set forth in *Penn Central* and its interpretation by means courts, the following considerations are instructive.

1. **The economic impact on the property owner.** The mere diminution in the value of a parcel of property, even a significant diminution, has been found insufficient to demonstrate a taking. *Concrete Pipe and Products of California, Inc. v. Construction Laborers*

Pension Trust for Southern California, 508 U.S. 602, 645 (1993). In *Concrete Pipe*, the U.S. Supreme Court found that the 46 percent diminution of value of a shareholder equity pension plan was not a taking. *Id.* In *Wyer v. Board of Environmental Protection and State of Maine*, the Law Court found that no taking occurred as the result of denial of a permit to build a house even though the property without the permit was worth approximately $50,000 and with a permit it would be worth $100,000. Under *Hall v. Board of Environmental Protection*, 528 A.2d 453, 455 (Me. 1987), a property owner must prove that the application of the regulations to his or her property renders the property substantially valueless.

The fact that a property owner might not make as much profit on his investment as he would have hoped is not a basis for a taking. *See*, *Curtis v. Main*, 482 A.2d 1253, 1258 (Me. 1984); *Seven Islands v. Maine Land Use Regulation Commission*, 450 A.2d 475, 483 (Me. 1982). In *Seven Islands*, the landowner claimed that because the value of the land as timberland had been destroyed, the value of the land was zero. The court found that the land retained some value and that the landowner could not claim a taking of its property simply because it could not use it in the most profitable manner. *Id.* at 482-83. In the *Wyer* case, Mr. Wyer presented evidence that he paid $10,000 for his small beach front lot in 1977 and that it would increase in value to at least $100,000 if a permit could be obtained. With the regulatory denial of his application the property could be sold for $50,000, and the Court found that such a reduction did not require a finding of a taking. As the Law Court pointed out in *Seven Islands*, that "the loss of future profit . . . provides a slender reed upon which to rest a taking claim." *Seven Islands Land Company v. Maine Land Use Regulation commission*, 450 A.2d at 482, n.10.

In a challenge to a new regulatory scheme or a new groundwater ownership/use legal framework, a court would examine the value of a landowner claimant's property in light of the law and compare it to the value of the property without the new restrictions or legal framework and make a determination whether value of the property has been so severely diminished that it has been rendered substantially valueless.

2. <u>Legitimate investment-backed expectations</u>. The U.S. Supreme Court has stated that a landowner does not have a constitutional right to a frozen set of laws and regulations governing his or her property. "It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the state in a legitimate exercise of its police power." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027. Those who do business in an already regulated field, the Court has found, "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 645, quoting *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211, 227 (1968). Likewise, a landowner is not entitled to rely on the maintenance of the same zoning of its property or regulatory status quo. *Board of Supervisors v. Omni Homes*, 481 S.E.2d 460, 465, n.3 (Va. 1997), (*cert. denied*, 522 U.S. 813 (1997)).

With regard to this prong of the three part takings test, the factors which would be considered would include whether the property owner knew of actual or potential regulations which might affect the investment potential when it purchased the property or developed it. One property owner's claim of the legitimate expectation for his development was rejected by the Rhode Island Supreme Court in *Alegria v. Kenney*, 687 A.2d 1249, 1261 (R.I. 1997), with the

Court's determination that the landowner's expectations were not reasonable "[i]n view of the regulatory climate that existed when [the property owner] acquired the subject property."

For this part of the analysis, again the language of the law or regulation and the facts regarding an individual property owner's time of acquisition and investment in the property would be necessary.

3. **The character of the governmental action.** In the analysis of a regulatory restriction on use of property, the courts also examine the legitimacy of the exercise of the government's power. *Penn Central v. New York*, 438 U.S. at 2659-60. The Law Court has repeatedly found that the protection of the environment is a legitimate exercise of the State's police power:

> We consider it indisputable that the limitation of property for the purpose of preserving from the unreasonable destruction the quality of air, soil and water for the protection of the public health is within the police power.

In re Spring Valley Development, 300 A.2d 736, 748 (Me. 1973).

With regard to this last part of the analysis, if the purpose of a legal or regulatory scheme adopted is to protect the environment, the courts are likely to find it is a legitimate exercise of the State's police power.

Appendix F

REVIEW OF INTERNATIONAL TRADE AGREEMENTS AND THE MANAGEMENT OF GROUNDWATER RESOURCES A REVIEW OF MAINE GROUNDWATER REGULATION

Paul Gauvreau, AAG

September 11, 2009

REVIEW OF INTERNATIONAL TRADE AGREEMENTS AND THE MANAGEMENT OF GROUNDWATER RESOURCES

A REVIEW OF MAINE GROUNDWATER REGULATION

Paul Gauvreau, AAG
September 11, 2009

Introduction

- Groundwater a major source of water for domestic, municipal, commercial and agricultural uses.
- 22% of freshwater used in U.S. comes from groundwater
- In Maine sand and gravel aquifers occupy about 1,300 square miles and 40% of State's residents get their household water supply from groundwater wells.
- Another 20% of the Maine population receives its water from community water suppliers which derive their water source from groundwater.
- Maine averages 24 trillion gallons of rainwater annually.
- Water property rights vary, depending upon the particular water source.

A. Surface water law. Generally, Maine law provides that surface water (lakes, ponds, rivers, and streams) is governed by riparian rights, which recognize "the qualified rights of an owner of property bordering a body of water to have access to and make reasonable use of that water and enjoy the use and benefit of that water for all purposes to which it can be reasonably applied...The riparian does not own the water". *Water Law in Maine-1990, Report of Legal Framework Subcommittee, Water Resource Management Board, 1990, p.2.*

B. Great Ponds. Surface water in "great ponds" (10 acres or more in a natural state) and tidal rivers is held in public trust by the State, pursuant to law relating back to the Massachusetts Colonial Ordinance 1641-1647. The Law Court in *Opinion of the Justices,* 118 Me. 503, 504 (1919) has stated:

Individuals owning property on the great ponds own to the low water mark; have a right of access to the pond for bathing, boating, fishing, fowling, agriculture and domestic uses; but may not, without legislative authority, draw upon the water of

the pond below its natural low water mark…In other words, they have reasonable use rights of the surface water.

- Pursuant to the public trust doctrine, the public has a right to use the great ponds. The right is not fundamental; rather it is subject to legislative restraints. *State v. Haskell, 2008* ME 82 ¶8. The only limits on the Legislature's powers in this regard is that they must be exercised reasonably for the benefit of the people, and not be repugnant to the provisions of the Maine Constitution. *Opinion of the Justices,* 437 A.2d 597606 (Me. 1981).

C. Groundwater It has been said that the common law of groundwater is designed "to seemingly confuse law students". (Joseph Sax, Legal Control of Groundwater Resources 395 (4th ed. 2006), note 11 at page 411).

- Groundwater law was developed on a state by state basis, separate from law relating to surface water. (Joseph Sax, Id., note 11 at 411.

- States recognize five common law groundwater doctrines. Within these doctrines, distinctions are made between "percolating" groundwater and underground streams. Modern groundwater law in most states also is subject to statutory provisions which either abrogates or significantly modifies common law groundwater principles. To further complicate matters, some states apply different rules to different geographic areas, leaving some aquifers highly regulated and others without significant regulation. (Tuhholske, Vermont Law Journal, p. 205.)

II. Common law Groundwater doctrines

A. Absolute dominion Rule. Commonly referred to as the English Rule, which is now the minority rule in the U.S. *Allows a landowner to intercept groundwater which otherwise would have been available to a neighboring water user, even if the effect of the use is to effectively control an aquifer without incurring legal liability.*

- For over 130 years absolute dominion rule has governed groundwater ownership in Maine.

- Absolute dominion rule is based upon premise that the owner of the surface land above groundwater owns the water, just as the rocks and soils constituting the overburden

- Adopted in *Chase v. Silverstone,* 62 Me. 175, (Me. 1873), absolute dominion provides:

> One may, for the convenience of himself or the improvement of his property, dig a well or make other excavations within his own bounds, and will be subject to no claim for damages, although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well of spring of his neighbor.

- Absolute dominion stemmed from perception that groundwater was a mysterious resource, whose properties and transmission were not well understood and were not susceptible of rational regulation or allocation.

- Absolute dominion doctrine gained popularity prior to the development of principles of hydrogeology, an informed appreciation of the principles of aquifer recharge, and an understanding of the interconnectivity between surface and groundwater channels of water.

- The established watercourse exception: Most underground water percolates through various substrata and does not flow in an established watercourse. This has led to a judicial presumption that underground water is percolating; the party which asserts the existence of an established watercourse bears the burden of proof on the issue.

- Absolute dominion does not allow an owner to stop or divert the flow of an established watercourse to the prejudice of an adjoining landowner. But to constitute a watercourse, the water must flow in a specific direction, by a regular channel, having a bed with banks and sides, and generally must discharge itself into another body or stream of water. Although it is not necessary for the watercourse to flow continuously, it must have a well defined and substantial existence.

- Maddocks v. Giles, 1999 ME. 63. The Law Court declined an opportunity to jettison the common law doctrine of absolute dominion in the 1999 case of Maddocks v. Giles. In *Giles,* abutting property owners brought suit against Elbridge Giles, the operation of a gravel pit located in Lincoln County. Plaintiffs contended that Giles' excavation activities compromised an underground spring, which they believed was located under their property and yielded a substantial source of groundwater. Plaintiffs claimed that Giles was accountable for damages owing from their underground spring going dry on account of his excavation activities. At trial, each party produced the testimony of hydrogeologists, who offered different opinions on the question of whether an existing watercourse ran under the Plaintiff's property and, if so, whether Giles' excavation activities caused the watercourse to run dry. The Law Court affirmed a jury verdict on behalf of Giles, finding the trial court properly instructed the jury that a property owner could use his land as he pleased, providing that he not interfere with an existing watercourse which benefited an abutter's land. The Court declined to judicially repudiate absolute dominion rule in favor of the groundwater use rules established in the Restatement (Second) of Torts, §858(1979), (which support reasonable use rule) for three reasons:

  (1) *The Court was not convinced that the absolute dominion rule was the wrong rule for Maine.* Although modern science provides enlightenment regarding the properties of groundwater, this does not mean that the common law rule has interfered with water use or caused the development of unwise water policy. There was no evidence that the absolute dominion rule has not functioned well in Maine.

  (2) *For over a century, landowners in Maine have relied upon the absolute dominion rule.* See *Friendship Dev. Co., 576 S.W. 2d at 29* (citing reliance of landowners as a significant factor in upholding the common law rule). Absent reliable information that the absolute dominion rule is counterproductive and a hindrance to achieving justice, Law Court declined to depart from established common law.

  (3) *The Court deferred to the Legislature regarding water law policy in this area.* The Legislature was best situated to study the ramifications of a policy change and can call upon experts to advise as to best water policy for Maine, and it can survey Maine's water needs. The Legislature had taken action in this area, creating the Water Resources Management Board to conduct a comprehensive study of water law in Maine *(See* 5 M.R.S.A. §6301 (Supp. 1989), repealed by 5 M.R.S.A. §6306 (Supp. 1989)). The

Board recommended that the Legislature adopt reasonable use principles. *See* Water Resources Management Board, Board Findings and Recommendations, #5 (Feb. 1991). The Legislature elected to leave the common law undisturbed. The Court noted that the Legislature had, in fact, modified the absolute dominion rule by creating liability when a person withdrew groundwater in excess of household use of groundwater. *38 M.R.S.A. §404 (1) & (2) (1989).*

- Absolute dominion is now the minority rule in the United States. Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, Rhode Island and Texas, Vermont and Maine still recognize the rule.

B. Reasonable Use Rule

- *Limits a landowner's use of water to those uses which bear a reasonable relationship to the use of the overburden.* Commonly referred to as "the American Rule". Rule is similar to absolute dominion, except that it prohibits waste and over site use. Similar to reasonable riparian use for surface waters, the rule requires a balancing between competing uses from the same aquifer. However, unlimited withdrawals, even to the detriment of another groundwater user, may be considered reasonable.

- Courts have authority to restrict uses which cause unreasonable harm to other users within an aquifer. Martin v. City of Linden, 667 So. 2d. 732.736 (Al. 1995). (A waste of water was unreasonable only if it caused harm and any non wasteful use of water that caused harm was nevertheless reasonable if it was made on or in connection with the use of overlying land.)

- The American Rule gained popularity with the development of the high capacity water pump, when cities bought country land or easements for use of municipal water supply, which resulted in a lowering of the water table for adjacent farms. The rule forced the cities to compensate the farmers for their damages and involved the application of tort principles, resulting in the award of damages paid by users who received the benefits of a harmful activity.

- The trend in recent years has been away from the notion that the owner's right to sub-surface waters is unqualified; rather the law has gravitated towards the premise that the use must be limited to purposes incident to the beneficial enjoyment of the land from which it is obtained, and if the diversion or sale to others away from the land impairs the supply of a spring or well on the property of another, such use is not for a 'lawful purpose' within the general rule concerning percolating waters, but constitutes an actionable wrong for which damages are recoverable. While there is some difference of opinion as to what should be regarded as reasonable use of such waters, the modern decisions generally hold that a property may not concentrate such waters and convey them off his land if the springs or wells of another are impaired." Rothrauff v Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87 (1940);

- *The reasonable use doctrine, similar to reasonable riparian use, requires balancing between competing uses from the same aquifer.* However, unlimited withdrawals, even to the detriment of another groundwater user, may be reasonable. But *courts may restrict uses for causing unreasonable harm to other uses within an aquifer, something never permitted under absolute dominion.* Martin v. City of Linden, 667 So.2d 732, 736 (Al. 1995).

- In 1842 New Hampshire became the first state to adopt the reasonable use rule. The rule requires competing uses from the same aquifer to refrain from causing unreasonable harm, with no party enjoying an absolute right to consume an aquifer.
- Reasonable use discourages wastewater water use and requires reasonable use of the groundwater resource. *However, the reasonable use doctrine is said to create a high degree of uncertainty, requiring case by case adjudication, which in turn provides little guidance even to senior users, and fails to provide guidance for new users.* Joseph Dellapenna, Quantitative Groundwater Law, 3 Waters & Water Rights §21.03.

  - Professor Dellapenna explains that abandonment of common law reasonable rights law has often led to abandonment of reasonable use in groundwater. Most riparian rights states adopted a regulated riparian rights approach in the last half of the 20th century, forming the basis for the Riparian Model Water Code.

- 21 States have adopted or indicated a preference for reasonable use rule, four of which adopted the rule in conjunction with the Prior Appropriation Rule: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Ky., Md.,

Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma Pa, South Carolina, Tennessee, Virginia, West Virginia and Wyoming.

C. The Correlative Use Rule

- California, followed by six other states (Hawaii, Iowa, Minnesota, New Jersey and Vermont) has adopted the correlative rights rule, which provides that *the authority to allocate water is held by the courts. The owners of overlying land and the non-owners or water transporters have correlative or co-equal rights in the reasonable, beneficial use of groundwater.* Under this doctrine, adjoining lands may be served by a single aquifer. The judicial power to allocate water rights protects the public interests and the rights of private water users.

- When an aquifer cannot accommodate all groundwater users, courts may apportion such uses in proportion to their ownership interests in the overlying surface estates. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766, 772-73 (Cal. 1903)

- *A disadvantage of the correlative rights doctrine is that litigation is necessary on a case by case basis to establish priority of use*:

  Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. The parties interested in the question are not before us.

  The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for rejecting it and leaving property without any protection from the law

All users of an aquifer are entitled to groundwater use based upon their surface ownership rights regardless of priority of use, with preference given to on-tract uses. The correlative rights doctrine protects all users of an aquifer by empowering courts to prevent uses which are considered detrimental to common use of the water. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766, 772-73 (Cal. 1903)

D. Prior Appropriation Rule

- *Provides that the first landowner to beneficially use or divert water from a water source is granted priority of right. The amount of groundwater which senior appropriators may withdraw can be limited, based upon reasonableness and beneficial purposes.* Some states which adopted prior appropriation rule have migrated to a regulatory permitting system.

- Under prior appropriation, groundwater rights are obtained by putting the water to a beneficial use. New users are not allowed to interfere with existing senior rights. *But whereas Prior Appropriation is relatively easy to use with respect to surface waters (unappropriated water is visible and available for new appropriators), groundwater may not be renewable, making senior rights useless over time.* Furthermore, the interaction between surface water and groundwater uses is now better understood, and some groundwater uses may affect surface uses, creating problems for surface and groundwater appropriators.

- 12 states have adopted Prior Appropriation: Alaska, Colorado, Idaho, Utah, Kansas, Montana, Nevada, New Mexico., North Dakota., Oregon, South Dakota, and Washington.

E. Restatement of Torts Rule

§858 Liability for Use of Groundwater

(1) A proprietor of land or his grantee who withdraws groundwater from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless:

(a) The withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure;

(b) The withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water; or

(c) The withdrawal of ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

(2) The determination of liability under clauses (a), (b), and (c) of Subsection (1) is governed by the principles stated in §§ 850 to 857.

- *Generally, the Restatement rule holds that a landowner who uses groundwater for a beneficial purpose is not subject to liability for interference with another's use of the resource, provided certain conditions are met. The withdrawal may not cause unreasonable harm to a neighbor by lowering the water table or reducing artesian pressure, cannot exceed a reasonable share of the total store of ground water, and cannot create a direct and substantial effect upon a watercourse or lake.*

- 3 states have adopted or indicated a preference for the Restatement of Torts doctrine: Michigan, Ohio and Wisconsin.

- In *Maddocks v. Giles*, the Law Court decided to retain absolute dominion for Maine, and rejected an invitation to adopt the groundwater use principles established in Restatement (Second) of Torts §858 (1977). The Court noted that the Restatement approach abandoned the common law distinction between underground water courses and percolating water. The Restatement position provides that a landowner who withdraws groundwater, whether from a watercourse or percolating water, and uses it for a beneficial purpose, is generally not subject to liability to another, unless the withdrawal unreasonably causes harm to a neighbor by lowering the water table or reducing artesian pressure. The Restatement Rule is derived from principles of reasonable use, but differs from its predecessors by balancing the equities and hardships between competing users. Maddocks v. Giles, 1999 ME 63, note 5, ¶9.

III. Statutory Modification of Absolute Dominion Rule in Maine

- Site Location of Development Act, 38 M.R.S.A. §§ 481-490

  - Development projects involving 20 acres or more require DEP review to ensure no adverse effect on natural environment, including water quality. As part of review process, DEP will review a proposed structure to facilitate the withdrawal of groundwater and determine the effect of proposed withdrawal on the waters of the State, water-related natural resources, and existing uses including public or private wells within the anticipated zone of contribution to the withdrawal. 38 MRSA §484(3) (F).

- Natural Resources Protection Act, 38 M.R.S.A.§480-A

  - Section 480-A (c) (4) requires a DEP permit prior to operation of a significant groundwater well, defined as (1) withdrawals of 75,000 or more gallons per week, or 50,000 gallons per day, if located within 500 feet or less from a water body, or (2) withdrawals of 216,000 or more gallons a week (or 144,000 gallons per day) if located within 500 feet of a body of water. An applicant must demonstrate that the activity will not have an undue adverse affect upon the waters of the state, water-related natural resources, and existing uses including public or private wells within the anticipated zone of contribution to the withdrawal.

- Transport of Water Act, 22 M.R.S.A. §2660-A.

  - No person may transport 10 or more gallons of water across municipal boundaries in which water is naturally occurring without DHHS approval, subject to a wide array of exceptions for agricultural, construction, well drilling, agricultural, manufacturing, water utility and swimming pool operation.

  - The applicant must demonstrate that the transport of water (1) will not constitute a threat to public health, safety or welfare and (2) for a source not otherwise permitted by the Department of Environmental Protection or the Maine Land Use Regulation Commission, the water withdrawal will not have an undue adverse effect on waters of the State, as defined by Title 38, section 361-A, subsection 7; water-related natural resources; and existing uses, including, but not limited to, public or private wells, within the anticipated zone of contribution to the withdrawal. In making findings under this paragraph, the commissioner shall

consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals.

- Groundwater Reporting Program, 38 M.R.S.A. §§470 A-470-H

  Establishes groundwater extraction reporting requirements for any groundwater extraction in excess of certain statutory thresholds between 20,000 – 50,000 gallons. Reports must include gallons withdrawn, anticipated water use, water source, location of withdrawal, and volume of reasonably anticipated withdrawals under maximum high-demand conditions.

- Ground Water Protection Program, 38 M.R.S.A. §401

  Directs the study of groundwater and interagency coordination between state regulatory bodies. *Statute creates a cause of action arising from a withdrawal of groundwater which causes interference with the pre-existing beneficial domestic use of groundwater by another water user.* The statute does not restrict or pre-empt authority of a municipality pursuant to its municipal home rule authority to protect and conserve groundwater quality and quantity.

- Water for Human Consumption Act, Municipal Regulation Authorized, 22 M.R.S.A. §2642

  The municipal officers of each municipality, after notice and public hearing, may adopt regulations governing the surface uses of sources of public water supply, portions thereof or land overlying ground water aquifers and their recharge areas used as sources of public water supply that are located within that municipality in order to protect the quality of such sources of public water supply and the health, safety and welfare of persons dependent upon such supplies.

- Municipal Home Rule, 30-A M.R.S.A. §3001

  - Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power of function which the Legislature has power to confer upon it, which is not denied, either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.

  - Municipalities have the right to exercise any power or function which is not denied them by the Legislature, either expressly or by clear implication. There is

no implicit denial of municipal police power unless the exercise of municipal ordinance would frustrate the purpose of state statute.

- *Compare* Swanda v. Bonney, 418 A. 2d 163,167 (Me. 1980) (municipal firearms ordinance more restrictive than state statutory criteria for issuance of concealed firearms permit, thus subject to state preemption) with Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1171 (Me. 1990) (municipal ordinance regulating use of herbicides in power company transmission corridor not preempted by State Pesticide Board Act, holding that municipal ordinance only subject to preemption if Legislature either expressly prohibited local legislation, or where Legislature has evinced intent to occupy the field, and local ordinance would frustrate the purpose of the state law).