About Karen Hansen-Kuhn

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This commentary incorporates comments from Karin Ulmer (APRODEV) and Manuel Perez Rocha (Institute for Policy Studies). This commentary is intended to stimulate further discussion. Please send comments to khk@iatp.org.

About IATP

Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems. IATP is headquartered in Minneapolis, Minnesota with an office in Washington D.C.

Trading away localization in TTIP

WASHINGTON D.C., MAY 1, 2014 – All over the world, communities and nations are developing new ways to rebuild local economies. In the U.S. and Europe, a growing number of people are taking a look at the processed foods at the supermarket and opting instead for healthier choices: foods that are local, in season and grown with fewer pesticides. In emerging economies like Brazil, policies favor local farmers growing sustainable foods for school lunch programs and in doing so have lowered hunger rates dramatically. Perhaps most importantly, these policies haven't solely focused on individual consumer choices. People are using their rights as citizens to make sure governments from local to national support localization. Now, an unprecedented new proposal in the U.S.-EU trade agreement seeks to target localization, particularly in emerging economies around the world.

Free trade agreements, by nature, constrain the ability of governments to implement rules and programs that favor local producers over foreign companies. Part of the reason trade agreements are thousands of pages is that the governments' role is to balance commercial pressure for unfettered markets against larger societal goals for sustainable and equitable development. The principle of National Treatment, for example, whether at the WTO or in a bilateral or regional trade deal, requires the trading partners to treat foreign firms the same as national firms (even though in many cases it's difficult to pin down a multinational corporation as pertaining to any particular country). Investor-State Dispute Settlement (ISDS) rules, which allow companies to sue governments over laws that undermine their expected profits, arguably give foreign companies an edge over local firms. For the most part, though, these rules only bind the parties to the agreement.[1]

National Treatment and ISDS have been inserted in trade agreements for several decades. Now, trade bureaucrats, facing tariffs that are in many cases already quite low, are thinking outside the box for new ways to eliminate pesky trade "irritants" like national or local sovereignty. For example, in both the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), the U.S. has pushed for "regulatory coherence," a new process that could constrain how governments set rules on such issues as food safety, chemical policy and financial reforms. These evolving rules set new standards for what is considered acceptable in future trade agreements. ISDS, for example, has now spread to a complex web of more than 3,000 trade and investment agreements. Governments have been caught up in challenges brought by corporations or financial firms to every kind of public policy, ranging from a Mexican municipality's decision not to reopen a toxic waste dump, to dozens of companies demanding compensation over Argentina's devaluation in the wake of its 2001 financial collapse.[2]

Tobacco giant Phillip Morris, operating through its Hong Kong subsidiary, has sued the Australian government over new rules on cigarette labels that highlight the health dangers of smoking. When the Australian government signed a free trade agreement with the United States, it refused to include ISDS, saying its legal system was perfectly able to handle any disputes. But Australia was already bound by an investment pact with Hong Kong, so the company raised the case utilizing that deal instead. Even when they win these cases, governments spend millions of dollars in legal fees, a fact that undoubtedly influences the development of public policies designed to benefit local economic development.

The latest New Idea targeting localization would actually go beyond the indirect route of setting new standards through a web of bilateral deals to formally commit the U.S. and EU governments to work together to pressure other countries to eliminate rules designed to favor local economic development. A leaked report on the December 2013 round of TTIP negotiations includes a new approach to what it calls "Localization Barriers." The push for this dubious idea begins with the assertion that, "The starting point is the observed trend in many emerging countries to introduce barriers of this kind as part of their industrialization strategies. Sector-by-sector cooperation to tackle these barriers has not been very successful. A more strategic and centralized approach addressing the motivation behind these barriers is needed. The U.S. has already individually taken this approach, but sees an opportunity in the TTIP to develop systemic cooperation with the EU.[...] The U.S. envisages a rather specific, formal, third-country cooperation mechanism, involving a committee which will be part of the institutional architecture of the TTIP."

The U.S. Trade Representative's (USTR) office defines localization barriers to trade as, "measures designed to protect, favor, or stimulate domestic industries, service providers, and/or intellectual property (IP) at the expense of goods, services, or IP from other countries." They include local content requirements, subsidies available only to locally produced goods (not unlike Buy America rules), rules to require technology transfer or even locally specific standards.[3] The agency's 2013 report on Technical Barriers to Trade listed such measures as Malaysia's culturally specific certification process for *halal* beef and its procurement preferences for marginalized ethnic minorities. It also lists a new labeling program in Chile that would put a "Stop" sign on processed foods that exceed nutritional recommendations for fat and salt.[4]

U.S.-based corporations' challenges to localization measures go well beyond rules on culturally and nutritionally appropriate foods. USTR issued a request for comments on trade barriers in August 2013. Some 55 companies and trade associations submitted comments focused on localization barriers in agriculture and food, manufactured goods, intellectual property and natural

Leaked text from the December 2013 round of TTIP negotiations

Localization Barriers

MOTIVATION: The U.S. acknowledged that the idea for a third-country cooperation chapter on various localization barriers is new and specific to TTIP. The starting point is the observed trend in many emerging countries to introduce barriers of this kind as part of their industrialization strategies. Sector-by-sector cooperation to tackle these barriers has not been very successful. A more strategic and centralized approach addressing the motivation behind these barriers is needed. The US has already individually taken this approach, but sees an opportunity in the TTIP to develop systemic cooperation with the EU. The EU and the U.S. mostly agree on the harmfulness of these policies, and their economic weight means they could jointly exercise effective influence on third countries. Existing cooperation has been rather ad hoc, and the TTIP should make it more consistent, as well as broadening and rationalizing it. The US is not considering the same provisions with other partners (e.g. TPP) but is looking at other ways to bring them on board in this effort.

SCOPE: The U.S. reassured that the scope of the third country cooperation would be limited to only those localization issues on which the U.S. and EU will negotiate bilateral disciplines elsewhere in the TTIP. In other words, the EU and the US would commit to cooperating in relation to third countries only in so far as the practices concerned will also be illegal for the EU and U.S. under the TTIP. The US is open to make that clear by means of a cross-reference to the relevant TTIP disciplines.

COOPERATION MECHANISM: The U.S. envisages a rather specific, formal, third-country cooperation mechanism, involving a committee which will be part of the institutional architecture of the TTIP. The work would be pursued on a country basis and focus primarily on advocacy activities (rather than WTO dispute settlement), possibly involving the field level.

CONTENT OF THE PROVISIONS: The U.S. proposed the following components: a statement of shared vision concerning localization policies (what localization barriers are and why we want to tackle them); an agreement to set up a cooperation mechanism (committee); an illustrative list of types of cooperation activities and a definition of the scope (either by stating what we would cover, or making a reference to relevant localization-related disciplines in the TTIP).

PLACEMENT IN THE AGREEMENT: The EU placed a reservation on a stand-alone cooperation chapter on localization barriers. We raised alternative architecture options, such as a broader third country cooperation mechanism including other issues such as energy and SOEs. The U.S. noted that the idea of third-country cooperation specifically on localization barriers was important for the U.S.

resources. For the most part, the industry submissions focus on the largest emerging economies, especially China, Brazil and India, both because of the size of their markets and because of the nature of rules they are already implementing that challenge the notion that deregulating markets is always the best solution for local development.

The submissions provide a useful overview of the kinds of issues that could emerge for "cooperation" on localization.[5] While many corporate submissions focus on tariff barriers to exports of their products, there were also specific challenges to several countries' programs to balance exports of raw materials with programs designed to promote domestic processing and local industry. These include Argentina's use of export taxes and other restrictions on grain exports (cited by the National Feed and Grain Association, North American Export Grain Association, U.S. Grains Council, National Oilseed Producers Association and the American Soybean Association). The joint submission from the National Feed and Grain Association and North American Grain Association complained that the export taxes favor local processing of soy, rather than direct exports of the raw material. A submission by the American Iron and Steel Institute cites China, India and Argentina's restrictions on exports of natural resources, and complain about those countries' and Brazil's local content requirements are designed to promote national industries.

Submissions from the pharmaceutical and biotechnology industries focus on local content requirements and compulsory license programs such as India's programs designed to favor generic production of medicines. The BSA/The Software Alliance comment targets local content requirements in software and other information technology procurement processes in Brazil, India and China. The challenges to patent, copyright and other intellectual property rules were the subject of the most comprehensive complaints, including a 500-page submission from the International Intellectual Property Alliance and a 200-page comment from PhRMA.

The National Association of Manufacturers (NAM) complains bitterly about what it calls "forced localization requirements in India, Russia and China. "China," it says, "continues to discriminate against imports of automotive, steel, telecommunications and other products through investment restrictions, subsidies and de facto local sourcing and technology transfer requirements. *Many other emerging markets are watching and learning from these discriminatory barriers, including Indonesia and South Africa. If allowed to stand, NAM members are concerned that they may well spread quickly to other sectors and countries.*" [emphasis added]

There is nothing surprising about corporations complaining about rules that limit their ability to sell or produce their goods in other countries. EU companies undoubtedly also pressure their trade negotiators to open up developing country economies to their goods and services. Reports of pressure to ban export taxes in the Economic Partnership Arrangements negotiated by the EU with developing countries is consistent with that idea. But the governments' role, in both cases, should be to balance those commercial interests against larger goals for sustainable and equitable development.

Subsidiarity, the idea that decisions should be made at the smallest, lowest or least centralized level of decision making possible, was a central topic of debate in the formation of the European Union. Article 4 of the founding Treaty of Maastricht establishes that principle as a key element in the balance between the authorities of the Member States and the EU as a whole. In the U.S., that issue, while not usually described with that term, has long been a subject of tension between states' rights and federal authority. The current moves for GMO labeling laws and toxic chemical reforms at the tate level may eventually come into conflict—or ultimately influence—federal policy on these issues. In both the EU and U.S., that tension, and the grounding in the democratic concept of subsidiarity, reflects the conflict between local level innovations and commercial pressures.

The new anti-localization proposal heads firmly away from local level decision-making in emerging economies. It is unclear what a "formal, third-country cooperation mechanism" would be. It could mean joint diplomatic pressure on specific trade issues, or even coordinated efforts to remove tariff preferences under both regions' Generalized System of Preferences (GSP) programs. That program allows for duty-free exports of designated products from developing countries. In 2012, President Obama suspended Argentina's benefits under GSP because of its refusal to compensate two U.S. companies in ISDS cases that arose in the aftermath of its financial crisis.[6]

The U.S. GSP program expired on July 31, 2013, pending renewal by Congress,[7] but there is still an active debate about how the program should be utilized. A coalition of businesses has called on USTR to designate India as a major violator of intellectual property rights and thus subject to suspension of GSP benefits.[8] India and Brazil are among the largest beneficiaries of U.S. GSP preferences, with duty-free exports to the U.S. of $4.4 and $2.3 billion in 2012, respectively.[9] These are both countries that have led challenges to U.S. and EU led proposals at the World Trade Organization (WTO), and both countries mentioned repeatedly in the corporate submissions on trade barriers. While it would not be legal for the U.S. and EU to raise tariffs on imports of goods from those countries in retaliation for localization programs (at least not outside of a formal WTO dispute process), they could remove the preferential access granted those countries as part of GSP benefits.

The TTIP proposal on localization would take this pressure outside of the WTO to a more political—but institutionalized—level of "advocacy" on the ground with developing-country governments. The WTO process, despite its many limitations, is a multilateral body that at least gives all developing countries a voice in decisions in a relatively transparent process.

The corporate submissions on this issue complain that localization measures distort markets and economic decision-making. While clear economic signals are necessary for producers and service providers, sometimes that distortion is exactly what is needed. Both the U.S. and EU, for example, support farm-to-school programs that favor locally produced foods in school lunch programs, even if the cost is somewhat higher. In the wake of the recent financial crisis, the two governments spent billions of dollars to stimulate local investment and job creation, as well as to bail out banks deemed too big to fail.

"Free markets" do not exist anywhere in the world. Decisions are shaped by the very unequal power of corporations versus local businesses, massive economies such as the U.S. and EU versus emerging economies such as Brazil and India. This is true within the U.S. and EU, but also within developing countries, especially the emerging economies whose own transnational corporations are entering into this complex arena. The danger is that if this coordinated attack on localization were formalized in TTIP, along with the broader protections for corporations embedded in provisions on investment, intellectual property rights, and public procurement, it would further tilt the scales in favor of corporate interests. This would create one more obstacle to national or local governments' efforts to channel economic activity towards broader social goals.

Upsetting that balance, and consciously steering economic policies in the direction of democratically determined local priorities, is at the heart of sustainable and equitable development. That process works best when it happens in a transparent process with active public participation by the broadest possible range of stakeholders. The proposal for a chapter on localization barriers appears to be at an early stage. The U.S. and EU should discard this dubious proposal and instead find ways to embrace localization, rather than embarking on this dangerous new path.

Endnotes

1. Under the principle of Most Favored Nation, parties also commit to grant terms to one party to an agreement no less favorable than those granted to others to that same agreement.
2. The Mexican government paid Metalclad $13.4 million in compensation over the community's decision. The Argentine government paid a total of $1.4 billion in response to 40 lawsuits. http://www.bigissueinthenorth.com/2014/01/labours-energy-price-freeze-plan-could-face-legal-challenge/9425
3. http://www.ustr.gov/trade-topics/localization-barriers
4. 2013 Report on Technical Barriers to Trade, p. 73 and 52.
5. All comments are available at http://www.regulations.gov/#!docketBrowser;rpp=100;so=DESC;sb=docId;po=0;dct=PS;D=USTR-2013-0027
6. Embassy of the United States in Argentina, GSP Factsheet, http://argentina.usembassy.gov/gsp2.html.
7. Congress has allowed GSP to expire several times in the past. In each case, benefits were awarded retroactively when it was renewed. It is possible that GSP reauthorization will be attached to a bill granting Trade Promotion Authority (Fast Track), which is currently stalled in Congress.
8. Business Coalition Seeks PFC Designation For India In Special 301 Report, Inside U.S. Trade, February 14, 2014.
9. Vivian Jones, Generalized System of Preferences: Background and Renewal Debate, Congressional Research Service, July 24, 2013, p. 29.