



## **Analysis of the European Commission proposal for the Sanitary and Phytosanitary Measures (SPS) Chapter of the Transatlantic Trade and Investment Partnership Agreement (TTIP) (January 7, 2015)<sup>i</sup>**

By Dr. Steve Suppan

February 4, 2015

### *Introduction*

The European Commission decision to publish on January 7, 2015 negotiating proposals for a third of TTIP's proposed 24 chapters is to be welcomed and congratulated. Along with the proposed draft negotiating texts, the Commission has published corresponding brief fact sheets and position papers.<sup>ii</sup> The European public will now, at long last, be able to evaluate the terms of negotiations purportedly undertaken for their benefit.

By contrast, the U.S. Trade Representative's (USTR) most recent claim that its negotiations process is transparent—but without publishing the negotiating texts available to its hundreds of corporate advisors—rings very hollow.<sup>iii</sup> The Obama administration has prosecuted with impunity more whistleblowers than all other previous U.S. administrations combined.<sup>iv</sup> The likelihood is very small that there will be enough leaked U.S. drafts to prompt the USTR to follow the European Commission's example.

In July 2014, IATP published an analysis of the leaked Commission-proposed TTIP SPS chapter.<sup>v</sup> The version of the chapter released on January 7 contains some new features, changes in chapter organization and slight changes of emphasis.<sup>vi</sup> The following review is not, for the most part, a side-by-side comparison that attempts to summarize the evolution of the Commission's SPS proposal. Rather, it is an attempt to evaluate this latest version of the Commission-proposed SPS chapter, partly in the context of a leaked and yet-to-be published draft of the proposed Chapter on Regulatory Cooperation (RC).<sup>vii</sup> The Commission has promised to release the RC and other negotiating texts, presumably shortly after the next negotiating session, February 2–6, in Brussels. According to prefatory notes to the RC, “there is a need to consider the relationship [of the RC] with the TBT [Technical Barriers to Trade] and SPS chapters, as well as with sectoral provisions, including those on Financial Services” (paragraph 1).

Furthermore, our evaluation still assumes that the Commission (and the USTR) will succeed in retaining some form of an Investor State Dispute Settlement (ISDS) mechanism in TTIP, to enable private foreign investors to sue governments for violations of those investors' “rights” to least trade-restrictive regulation in the TTIP.<sup>viii</sup> The conservative European People's Party, the largest bloc in the European Parliament, has declared its support for the ISDS. However, on December 18, the European Union Court of Justice (Opinion 2/13) ruled that the ISDS was inconsistent with EU law on treaties.<sup>ix</sup> The battle over TTIP is far from limited to governing institutions.

Despite the 97 percent disapproval of the ISDS by respondents to a European Commission consultation, there is no sign yet that the Commission will abandon giving U.S. investors the right to sue it or EU member states for TTIP violations, as determined by a private tribunal of trade lawyers.<sup>x</sup> Instead, the Commission is hoping that by expanding United Nations arbitration measures to make ISDS procedures more transparent to the public in 3,000 existing investment treaties, the public will accept the binding measures of the ISDS in TTIP.<sup>xi</sup> However, most ISDS disputes are reviewed in a World Bank-hosted ISDS

process, where there are no due process or transparency requirements to make the ISDS less opaque to the public.<sup>xii</sup>

Whether or not the ISDS is applied to all the TTIP chapters is a matter of controversy among U.S. TTIP proponents. As reported in IATP's analysis of the leaked SPS text, the U.S. Trade Representative is thus far reluctant to apply the ISDS to the SPS chapter, despite intense pressure from the food and agribusiness industry and members of the U.S. Congress to make the SPS chapter "fully enforceable."<sup>xiii</sup> Part of that controversy is over proposals to make the SPS chapter enforceable through a state-to-state dispute settlement mechanism established within TTIP, but there is also concern that "fully enforceable" is very likely a euphemism for "by-means-of-the-ISDS." (The North American Free Trade Agreement allows for SPS disputes to be settled by a five-person arbitral panel, if NAFTA's government-to-government dispute settlement process fails to resolve an SPS dispute.<sup>xiv</sup>)

### *Regulatory Cooperation and the SPS chapter*

One of the purposes of the RC, Article 5, "Early information on planned acts," is to preempt the need for ISDS or government-to-government dispute litigation by ensuring that both the EU and U.S. can influence the development from inception of any "regulatory act," particularly by means of a trade and investment impact assessment before a regulation is implemented: "For planned regulatory acts at central level undergoing impact assessment each Party shall make publicly available, as early as possible, information on planning and timing leading to their adoption, including planned stakeholder consultations and potential for significant impacts on trade or investment." (Article 5.2) Regulatory cooperation will require an early warning to industry about any regulation that might impair the investor's trade or investment interests. This preemptive approach to regulation has a parallel track in bills before the U.S. Congress.<sup>xv</sup>

The Commission proposes in the RC to apply TTIP to U.S. sub-federal, as well as EU member state, rules. Article 12, a placeholder in brackets (brackets signify lack of agreement among negotiators) outlines the intent to table a proposal "for exchanges on planned or existing regulatory acts of US States and of the central national authorities of EU Member States on a reciprocal basis, in areas where such acts have or are likely to have a significant impact on trade and investment between the EU and the US" (Article 12.1). Given the breadth of application of this placeholder provision, U.S. States will be under pressure to ensure that their regulatory innovations and divergences do not come under review to determine if they have a "significant impact." The Commission will be obliged by the Treaty of Amsterdam to demonstrate that allowing the U.S. and its investors to threaten litigation concerning EU member state regulations and laws does not violate the principle of subsidiarity that governs EU decision-making.<sup>xvi</sup>

Article 6 of the RC on "Stakeholder Consultations" would require the U.S. and EU to "take into account" the views of "any interested natural or legal person" at any stage of development of a "regulatory act." It is not unreasonable to assume that "interests" concerning potential trade and investment impacts would prevail in stakeholder consultation about a trade and investment agreement. However, in Article 15, "Participation of stakeholders," non-industry representatives will be able to participate in an at least once a year meeting to discuss the "Annual Regulatory Co-operation Program." Furthermore, "Participation of stakeholders shall not be conditional on them being directly affected by the items on the agenda of each meeting" (Article 15.2).

In sum, the ambition of the RC is to exchange information and "pre-normative research" and science (Article 11.4), in order to preempt regulatory conflict, so as to prevent "significant impacts on trade or investment" and litigation about regulatory differences. As noted above, in the prefatory remarks to the RC, the approach to regulatory cooperation that provides an early warning system to industry about regulation that may have a "significant trade and investment impact" will be applied to SPS issues.

### *Objectives of the SPS chapter and "necessary" resources for its implementation (or not!)*

The proposed Article 3 of the SPS chapter would require the EU and U.S. to “avail themselves of the resources necessary to implement this Chapter.” However, it is not clear that this provision will be enforceable for the purpose of protecting human, plant and animal health. The primary purpose of the chapter is to expedite trade “to the greatest extent possible while preserving each Party’s right to protect human, animal or plant life and health in its territory” (Article 2.1). However, the kind and amount of resources (budgetary, human and technical) “necessary” to maximize trade in food and agriculture products are not always the same in quantity or kind as what are required to ensure the protection of human, plant and animal health.

For example, under proposed Article 8, “Elimination of redundant control measures,” re-inspection of food and agriculture products at the port of entry, a traditional food safety management tool, is banned as “redundant” to export safety controls. Under Article 8, provision of resources for re-inspection of imported food or agricultural products would not be “necessary.” However, inspections may be carried out “in exceptional cases” (Article 13.7), according to the article on Import Checks and Fees. But how will competent authorities determine what is exceptional, given the ban on product re-inspections at port of entry in Article 8.2?

Save for “exceptional” inspections, import controls appear to be a review of exporter paperwork, without the verification supplied by import product re-inspection and testing. Banning food and agriculture re-inspection as “redundant” to the food safety controls at the exporting facility presumes U.S. capacity to ensure that unsafe food and agricultural inputs to exported products could be detected and traced back from the certified export facility to the origin of unsafe or otherwise unfit ingredients or inputs.

However, according to a 2009 report by the U.S. Department of Health and Human Services, U.S. food companies have very poor food traceability capacity.<sup>xvii</sup> How does TTIP protect European consumers in the event of U.S. traceability failures, given the TTIP ban on re-inspection as a “redundant” food safety control? The U.S. Department of Homeland Security is funding research into computer software that could be applied by the National Center for Food Protection and Defense to trace the origins of food and food ingredients that are intentionally contaminated or adulterated.<sup>xviii</sup> But this software has yet to be tested, much less applied successfully, to the vastly larger supply chains of unintentionally contaminated, adulterated or inaccurately labeled food.

Budget- and policy-diminished U.S. food import inspection capacity has allowed contaminated imported meat to remain in U.S. supply chains for up to a year, according to a Food and Water Watch letter on January 20 to the U.S. Department of Agriculture, citing a recall of 170,000 pounds of imported pork products.<sup>xix</sup> The elimination or even reduction of re-inspection expedites trade, but it does not realize the otherwise abstract goal of “preserving each Party’s right” to enable and enforce regulatory protections.

Members of both the U.S. Congress and food industry oppose providing resources for implementation and enforcement in the form of fees for auditing and certifying the capacity of export food facilities to trade safely.<sup>xx</sup> A proposed hike in fees for treatments on imported agricultural products to prevent invasive species is strongly opposed by U.S. industry.<sup>xxi</sup> However, a strong anti-tax and anti-regulatory Republican majority in Congress<sup>xxii</sup> seems unlikely to provide the “necessary resources” for TTIP or any other trade agreement in the form of a tax increase.

Even if SPS measures were to be made “fully enforceable” and subject to dispute settlement within the agreement, it is unlikely that the EU or the U.S. would sue for failure to provide adequate resources for “preserving the right to protect.” TTIP is a trade facilitation agreement and not a public health, plant protection or animal health and welfare agreement. Under trade agreements, including TTIP, SPS regulations must be justified as “least trade restrictive.” The public health, animal health or environmental health failure of a “least trade restrictive” measure is not a grounds for an ISDS lawsuit. TTIP provides for

no legal redress for anyone other than investors, and now governments, with the January 7 release of the proposed government-to-government dispute settlement chapter.<sup>xxiii</sup>

### *Once approved, accepted everywhere*

Article 6 of the SPS chapter fulfills the long-time industry demand that once an SPS measure is approved by a competent authority of the importing territory, products to which the measure are applied must be accepted everywhere in the importing territory.<sup>xxiv</sup> The only exemption from this rule is the Article 10 “Adaptation to regional conditions” of plant and animal diseases, which may allow import rejections from food and agriculture products from the afflicted regions, according to criteria adapted from the World Animal Health Organization and the International Plant Protection Convention.

How does the “once approved” measure apply, if one Party is lax in the enforcement of the measure, or if the scientific basis underlying the measure is shown to be shoddy or subject to conflict of interest among the scientific experts, regulatory authorities and applicant for commercialization of products subject to the SPS measure? The European Commission’s revision of regulation concerning chemicals has been rife with controversy, particularly concerning conflicts of interest among scientists who have been critical of the Commission’s precautionary approach to regulating chemicals.<sup>xxv</sup> If a U.S. state or an EU member state has an SPS measure that differs from that of the EU or the U.S., is the U.S. state or EU member state nonetheless obliged to allow import of products to which the EU-wide or U.S. federal SPS measure applies?

According to the Center for International Environmental Law, under TTIP, “Sub-regional and sub-federal authorities will be substantially restricted in their ability to enact more protective pesticide regulation. Existing regulatory authorities of the states and Member States are likely to be usurped by these proposals, given the lack of clarity on the role state and Member State authorities will have within the proposed institutional framework for regulatory cooperation.”<sup>xxvi</sup> Currently, the United States allows the use of 82 pesticides that are banned in the European Union. TTIP would require the EU to “harmonize” its precautionary framework, which allows for the banning of chemicals deemed too hazardous for commercial use as pesticides on food, with the U.S. approach, which sets human “tolerance” levels and which ban almost no chemicals.<sup>xxvii</sup>

More stringent EU member state and U.S. state standards are vulnerable to challenge as not “least trade restrictive” under TTIP. For example, the European Food Safety Authority has given a positive risk assessments for an Acceptable Daily Intake of Bisphenol A (BPA) a chemical used in food packaging, most frequently in plastic liners of metal cans.<sup>xxviii</sup> Nevertheless, a few U.S. states, most recently California, have banned BPA as an endocrine disruptor that damages childhood brain development and may be carcinogenic.<sup>xxix</sup> Although the U.S. Food and Drug Administration bans the use of BPA in sippy-cups and baby bottles, it allows its use in food contact surfaces.<sup>xxx</sup> Denmark, France, Belgium and Sweden have banned BPA in all food containers for children under three.<sup>xxxi</sup> Under Article 6, regulatory cooperation could lead to a harmonization of BPA standards so that California and other U.S. state could be obliged to allow European Union imports packed in materials containing BPA. Similarly, Denmark and other EU member states could find their bans on BPA in food containers for children under three years of age forcibly harmonized with a U.S. federal tolerance for BPA to enable trade.

### *Trade facilitation and “new trade”*

The objective of Article 7, “Trade facilitation/conditions” is to “minimise negative trade effects and to simplify and expedite the approval and clearance process while ensuring the fulfillment of the importing Party’s requirements” (Article 7.1). One of the ways to simplify and expedite trade facilitation is to require that the U.S. and EU adopt in their regulations the “tolerances and maximum residue levels” of pesticides, veterinary drugs and food additives of the Codex Alimentarius Commission “within 12 months after their adoption” at Codex (Article 7.4). The sole caveat to this trade-expediting rule is if the U.S. or the EU files

a “reservation;” i.e. an objection to the Codex standard, such as the EU’s reservation against the very controversial Codex standard for ractopamine, a failed asthma drug repurposed as a veterinary drug to produce lean pork in hogs.<sup>xxxii</sup> But if this TTIP proposal is accepted, the EU and the U.S. will have to enforce all Codex standards, save for the ones “reserved,” even if the scientific basis of the standard is subsequently shown to be inadequate to protect human health. Historically, due to resource constraints, Codex has been slow to agree on new international risk assessment to enable revision of an agreed standard.

So confident of the scientific integrity and adequacy of the Codex standards are the U.S. and EU that approval of the food export facilities by the importing competent authority adopting these standards is almost a formality. The importing competent authority must approve within “[one month]” (the brackets signify disagreement within the Commission in a chapter remarkably free of brackets) the food export facilities of the U.S. and EU member states “without prior inspection of individual establishments or facilities . . .” (Article 7.11). No facilities inspection of any individual facility can be required prior to review of documentation to ensure that all export facilities meet the importing country’s requirements. After the “if” comes a list of conditions in the yet-to-be-negotiated Annex VI of the chapter.

Perhaps the greatest challenge to the rules for minimizing negative trade effects and simplifying and expediting trade are the import control measures allowed temporarily for “new trade” (Article 7.12 A.). “New trade” is not defined, but presumably includes foods derived from novel (and patented) technologies, such as agri-nanotechnology and plant synthetic biology. For example, the Center for Food Safety (CFS) has documented that nano-silver, an anti-microbial, has been incorporated into 60 foods or food contact surfaces, according to manufacturer claims.<sup>xxxiii</sup> The atomic-to-molecular size of nanomaterials results in chemical, biological and physical properties of interest to industry, but also results in toxicological and mutagenic risks not present in the macro counterparts of those materials. Yet none of these food products or claims about them are regulated, although the Food and Drug Administration has advised industry to consult with the FDA when incorporating nanomaterials into their products.<sup>xxxiv</sup>

According to CFS, the European Food Safety Authority’s survey of food safety authorities in other countries suggests that 120 foods and food contact surfaces have entered into international trade.<sup>xxxv</sup> There are no Codex maximum residue levels or tolerances of nanomaterials for the EU or U.S. to adopt to minimize negative trade impacts or to simplify and expedite import of nano-food or agricultural products, including nano-pesticides. Indeed, in the United States, NGOs have litigated to require regulation of nano-pesticides that takes into account the unique properties, relevant metrics and risks posed by nanomaterials.<sup>xxxvi</sup> Both U.S. and EU NGOs have evaluated some of the public, environmental and worker safety health risks of nanomaterials and have made some proposals for regulation.<sup>xxxvii</sup> Yet despite the laboratory-tested evidence of nanomaterials in commercialized food products,<sup>xxxviii</sup> there are no MRLs or tolerances, much less regulations, which could facilitate new trade safely in agri-nanotechnology products.

Food products derived from synthetic biology, which creates and manipulates DNA sequences not found in nature, are beginning to be commercialized in the United States under the more than 30-year-old deregulatory Coordinated Framework Agreement for the Regulation of Agricultural Biotechnology.<sup>xxxix</sup> Product developers using a new generation of gene modification techniques are taking advantage of a loophole in the U.S. Department of Agriculture’s rules for GMOs to demand immediate deregulation of their products. As a result of the USDA’s erroneous claim that it has no legislative authority to regulate the new generation of genetically engineered crops, the Center for Food Safety’s Dr. Doug Gurian-Sherman has written, “the trickle of GE crops escaping regulation is threatening to become a flood.”<sup>xl</sup>

Although the TTIP SPS chapter recognizes that the U.S. and EU have the right to protect themselves from “regulated pests” (Article 10.7 and Article 13.5), it is not clear if invasive species are among the regulated pests. The deregulation of products derived from new plant genetic modification techniques will allow open field trials of Synthetically Modified Organisms that could become invasive species and unregulated pests. Under the “new trade” facilitation provision, it is not clear that even temporary import controls could be applied to the exports of products derived from plant synthetic biology.

### *Auditing and verification of the efficacy of SPS controls*

TTIP trade facilitation requires that the U.S. and the EU determine that their respective SPS measures, whether for a single standard or a whole system of food safety management, can be shown to be equivalent. Determining whether an exporting Party's SPS measure provides "the importing Party's appropriate level of sanitary protection rests solely with the importing Party acting in accordance with its administrative and legislative framework" (Article 9.3). Following "a positive equivalence determination," the U.S. and EU would implement the determination "normally within six months" (Article 9.4). Whether or not the USTR agrees with this ambitious proposed timeline for implementation, any determination of equivalence will be subject to document and facilities auditing and verification.

One of the more controversial issues about the "nature and frequency of audits and verification" by the importing Party's competent authorities will be to agree on "the inherent risks of the product" exported, whose SPS measures' implementation will be subject to audit and verification (Article 11.2). To some extent, the determination of "inherent risks" are defined by agreement on standards for that product, e.g. agreement on a Codex maximum residue level for a pesticide. As noted above, there are implicit disputes about "inherent risks," e.g. the 82 pesticides banned in the EU but currently allowed for use in the United States. But even within governments there are disagreements about extent and kind of risks. For example, Dr. Gurian-Sherman reported above that scientists advising the Environmental Protection Agency found environmental risks and human health concerns in a gene-silencing process, RNA interference.<sup>xli</sup> The USDA's Animal and Plant Health Inspection Service is apparently ignoring these concerns and risks in granting open field trial permits for plant synthetic biology varieties under their interpretation of their legislative authority.

The apparent lack of communication between the EPA and the USDA about RNA interference issues is part of a broader problem of uncoordinated U.S. food safety management that may make it more difficult to audit and verify the efficacy of U.S. implementation of SPS measures for exported foods. The U.S. General Accountability Office (GAO) reported that the Food Safety Working Group, which was supposed to have coordinated food safety management across U.S. federal agencies, no longer meets. While there is cooperation among some offices within U.S. agencies, GAO's past recommendations to develop a federal food safety performance plan to better coordinate food safety among all agencies and enable more efficient use of resources remain to be implemented.<sup>xlii</sup> Designating a competent authority in a trade agreement to resolve an auditing and verification problem may not suffice if the problem requires interagency coordination for which there is no adequate coordination mechanism. Democrats in the U.S. Congress have proposed the "Safe Food Act of 2015" to create an independent food safety authority to reduce the conflicting and duplicative authorities and expenses of 15 offices with SPS responsibilities. However, the Republican majority is not expected to allow a vote on the bill.<sup>xliii</sup>

Another form of evidence proposed for use in auditing and verification of the implementation of the SPS measures to provide the "appropriate level of sanitary protection" for importing country consumers is not the results of import re-inspection and testing (banned in Article 8, as noted above). Rather, it is the documentation on "audits and inspection by competent authorities of the exporting party" (Article 11.2). Since documentation is crucial to auditing and verification, one might assume that competent authorities would be obliged to publish the results of their auditing and verification procedures, if only to assure the public that auditing and verification are protecting human, animal and plant health. But one would be wrong to assume so. Instead, Article 11.9 merely states: "Each Party may publish the results and conclusions of its verification procedures." Or they may not, and leave the public none the wiser.

### *Import checks and fees*

Article 13 on import checks and fees presents challenges to interpretation for several reasons. First, as noted above, U.S. industry and some members of the U.S. Congress are opposed to paying fees for SPS regulatory and trade expediting services. The U.S. Congressional majority is opposed to general tax increases. As a result, negotiating Annex IX, concerning “principles and guidelines for import checks and fees, including the frequency of rate for import checks” (Article 13.1) will be difficult. How can negotiators propose principles for frequency of import check rates when it is uncertain whether there will even be the resources necessary to provide a rate of frequency of import checks that will fulfill the importing country’s requirement for an “appropriate level” of SPS protection?

It appears that import checks will largely concern a review of documentation, since inspections “shall only be conducted in exceptional cases and with the understanding that they are temporary measures to build confidence” (Article 13.7). However, it is clear that import checks may also include inspections for “regulated pests” (Article 11.5) in food and agriculture. In the event of an import consignment rejection, the importing competent authority is to provide “all appropriate information, including laboratory results and methods” (Article 11.4), which likewise assumes inspection, however exceptional.

Article 13 provides for a procedure to appeal decisions of import non-compliance and, as always, any SPS measures required of the exporting party to bring a food or agriculture product shipment into compliance must not be “more trade restrictive than necessary” (Article 11.2). In sum, while product “re-inspection” is banned as “redundant” (Article 8), Article 13 would allow import inspection as part of an import check—provided, of course, that governments have the resources to carry out the import checks at a rate of frequency sufficient to provide the “appropriate level” of human, animal and plant health protection.

### *Transparency*

There is a disjuncture about the kinds of SPS information that the EU and U.S. are required to provide in Article 14.1 and what they “will endeavor to exchange” in Article 14.2. The “shall notify” kinds of information include “significant changes in pest/disease status”; “findings of epidemiological importance with respect to animal diseases”; and “significant food safety issues relating to products traded between the Parties.” All of these types of information certainly must be exchanged among competent authorities “without undue delay.” But the kinds of information exchange classified as “will endeavor” are no less necessary to providing the “appropriate level” of protection,” e.g. “the results of a Party’s official controls and a report concerning the results of the controls carried out”; “the results of import checks” etc.

Why would it be necessary for competent authorities to know about “significant changes in disease status” but optional to know about the results of SPS measures to control those significant changes? While it very likely will require more time and resources to produce a report on the efficacy of SPS controls than to identify a “significant change in pest/disease,” we see no reason why competent authorities should merely endeavor to exchange information about the results, effective or not, of the controls applied to prevent or remedy human, animal or plant health harm related to a traded food or agricultural product.

### *Animal welfare*

The animal welfare provisions are non-binding “best endeavor,” save for a very important one: “The Parties will strengthen their research collaboration in the area of animal welfare to develop adequate and science-based animal welfare standards related to animal breeding and the treatment of animals on the farm, during transport and at slaughter.” (Article 17.3) This binding commitment will prove to be a major challenge for the United States, insofar as the U.S. Department of Agriculture’s Meat Research Center is reported to have supported experiments in animal breeding that are unethical, though legal, violations of animal welfare. The U.S. Animal Welfare Act of 1966 exempts farm animals used in experiments from animal welfare rules, so animal abuse in the service of research to increase commerce and trade is legal in the United States.<sup>xiv</sup> How will the European Commission harmonize its own laws with the U.S. law that

exempts government research from animal welfare law? Will such an exemption include research done by a university or private firm under a government contract or grant?

It is conceivable that U.S. authorities can persuade European authorities that U.S. animal breeding techniques are “science-based” and therefore comply with the TTIP animal “science-based” welfare requirements. (Ethical foundations of animal welfare currently have no legal status in trade policy.) However, convincing European consumers to eat pork, beef and lamb produced as a result of a U.S. government meat research program that runs horrifying experiments to produce more meat for trade will be exceptionally difficult, no matter how low the price of such meat is driven by U.S. economies of scale in the meat and feed grains industry. Justifying animal welfare measures as not “least trade restrictive” could be difficult insofar as such measures likely will have to conform to the World Animal Health Organization (OIE in the French acronym) standards. Whereas OIE animal health standards often have a scientific basis, animal welfare at OIE and the recognition of animal welfare abuse as a harbinger of and contributor to animal health problems does not have a strong body of standards. OIE, which was founded in 1924, convened its first conference on animal welfare in 2004, and since then has developed an animal welfare work program toward standards-setting.<sup>xlv</sup>

How will OIE standards affect U.S. state animal welfare laws if OIE standards are used in a TTIP dispute to try to overturn those laws? For example, California laws require adequate space in cages for hens to lay eggs, and U.S. egg producers exporting to California have to obey those laws. The California laws have survived a challenge in U.S. federal courts by producers using inhumane “battery cages.”<sup>xlvi</sup> Would the California laws survive the judgment of an ISDS private tribunal in a case brought by a foreign investor whose products included ingredients derived from battery cage eggs?

#### *The Joint Management Committee for SPS Measures*

The functions of this Committee are primarily to manage the exchange of information and “provide direction for the identification, prioritization, management and resolution of issues” (Article 18.2 b). However, the Committee may also act as an early warning system for industry, per the proposed Regulatory Cooperation chapter, to “identify and discuss, at any early stage, initiatives that have an SPS component and would benefit from cooperation” (Article 18.3 b). When the Committee requires additional expertise “to address specific SPS issues . . . participants from non-governmental organizations may be included, with the agreement of the parties.” Insofar as the purpose of the chapter is to “ensure that the Parties’ sanitary and phytosanitary (SPS) measures do not create unnecessary barriers to trade,” it is reasonable to infer that the vast majority of non-governmental experts invited to join the Committee for discussion of specific SPS issues will be industry experts and/or academic experts with industry ties.

#### *Conclusion*

Following the transatlantic economic carnage that resulted from the deregulation of the financial services industry—an estimated \$12.8 trillion in the United States alone<sup>xlvii</sup>—the haste with which U.S. and EU negotiators are seeking to conclude TTIP negotiations, which put every regulation under “least trade restrictive” pressure, is very difficult to understand. It is true that a few industries stand to profit, such as the U.S. pesticide industry, if the European Commission harmonizes its pesticide residue rules downward to allow in commerce 82 pesticides that it currently bans.

However, TTIP proponents, even using econometric projections based on idealistic and counter-factual modeling assumptions (for example, no net employment loss), forecast negligible benefits for the economy as a whole. For example, one review found TTIP attributed increases in EU Gross Domestic Product to range from .5 percent to .7 percent by 2027 in the case of two studies.<sup>xlviii</sup> One NGO evaluation of TTIP forecast GDP increases has dismissed them as a “rounding error.”<sup>xlix</sup> Using more realistic policy assumptions and partial equilibrium modeling, Jeronim Capaldo found that over a decade under TTIP, the European

Union members states would experience losses of net exports, Gross Domestic Product, labor income and government revenue, with a loss of 600,000 jobs adding to the current high EU unemployment rate, particularly among youth.<sup>i</sup>

Officials with statutory obligations to protect human, animal and plant health, and the environment must stay above the fray of macroeconomic predictions to consider how to respond to trade negotiators' proposals for expediting trade with least trade-restrictive SPS measures, while government austerity budgets make SPS resources for implementation and enforcement ever scarcer. European Commission SPS officials and EU member state officials should ask whether harmonizing their standards and implementation practices with those of the United States will serve the cause of European integration in a Single Market. European Union member state citizens should ask their SPS officials about some of the textual inconsistencies in the Commission-proposed SPS chapter, as well as about EU and U.S. capacity to protect human, animal and plant health. The many regulatory problems raised by "new trade" of novel food and agricultural products should be the subject of a specific and thorough dialogue between citizens, scientists and their governments.

Without such dialogue, based in part on a careful analysis of the draft TTIP negotiating texts, the unhappy future under TTIP forecast in Capaldo's study could be worse in terms of the costs of SPS regulatory failure.<sup>ii</sup> In a 2010 study, a former Food and Drug Administration economist estimated the annual health-related costs of acute (requiring hospitalization) foodborne illness in the United States at \$152 billion. This estimate does not break out the costs of trade-related foodborne illness, in part because the U.S. attempts to apply its SPS laws to domestic and foreign products without discrimination, per its trade agreement obligations. Yet it would be unrealistic to think that an increase in imported food and agricultural products, anticipated by TTIP proponents, would not also bring an increase in foodborne illness costs for which authorities must budget.

A 2014 scoping review of 84 studies on the cost of foodborne illness estimated the annual cost of foodborne illness in Sweden at \$171 million and \$2 million in Croatia.<sup>iii</sup> The review's authors report that there is a great deal of diversity in cost-of-illness estimating methodologies and data collection practices, to say nothing of demographic and economic differences among countries surveyed. Therefore, the authors do not and should not draw country-to-country comparisons. Nevertheless, as part of work to estimate the costs of foodborne illness in all EU member states with a consistent methodology, EU SPS officials should add a chapter that would outline the implementation challenges and resources required to prevent an increase in trade-related foodborne illness and associated costs. To sell TTIP to the public by publicizing forecasted benefits without also investigating and publicizing the costs of TTIP could be hazardous to European Union health, both economic and public.

---

<sup>i</sup> The European Commission discussed the proposed SPS chapter with U.S. authorities on September 29–October 3, 2014.

<sup>ii</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

<sup>iii</sup> "Transparency and the Obama Trade Agenda," Office of the U.S. Trade Representative, January 2015. <http://www.ustr.gov/about-us/press-office/fact-sheets/2015/January/Transparency-and-the-Obama-Trade-Agenda>

<sup>iv</sup> "Obama administration tightens grip on intelligence," *The New York Times*, April 22, 2014; Norman Soloman and Marcy Wheeler, "The Government's War on Whistleblowers," *The Nation*, October 27, 2014 and Tim Shorrock, "Obama's Crackdown on Whistleblowers," *The Nation*, April 15, 2013.

- 
- <sup>v</sup> Steve Suppan, “Analysis of the draft Transatlantic Trade and Investment Partnership (TTIP) chapter on food safety, and animal and plant health issues (proposed by the European Commission, as of June 27, 2014),” Institute for Agriculture and Trade Policy, July 23, 2014. [http://www.iatp.org/files/2014\\_09\\_02\\_TTIP\\_SPS\\_Analysis.pdf](http://www.iatp.org/files/2014_09_02_TTIP_SPS_Analysis.pdf)
- <sup>vi</sup> [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153026.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf)
- <sup>vii</sup> <https://stop-ttip.org/wp-content/uploads/2015/01/TTIP-EC-text-regulatory-cooperation-28.01.2015.pdf>
- <sup>viii</sup> Glyn Moody, “European Commission’s Clever Ruse to Introduce Corporate Sovereignty Regardless of Ratification Votes in EU,” January 22, 2015, [www.techdirt.com](http://www.techdirt.com)
- <sup>ix</sup> Ante Wessels, “EU Parliament Group EPP in favor of ISDS,” Foundation for a Free Information Infrastructure, January 25, 2015. <http://acta.ffii.org/?p=2297> and <https://www.vrijsschrift.org/serendipity/index.php?archives/172-Do-Opinions-109-and-213-Spell-the-Death-of-ISDS-in-the-EU.html>
- <sup>x</sup> “Commission consultation on investor rights in TTIP makes a mockery of democracy,” Corporate European Observatory, January 13, 2015. <http://corporateeurope.org/pressreleases/2015/01/commission-consultation-investor-rights-ttip-makes-mockery-democracy>
- <sup>xi</sup> “European Commission pushes for full transparency for ISDS in existing investment treaties,” European Commission press release, January 29, 2015. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1247> and <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1246>
- <sup>xii</sup> The Convention establishing the World Bank Group International Centre for the Settlement of Investor Disputes has no transparency rules; indeed, no evidentiary rules, no system of jurisprudential precedent and no appeals process. <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm> Also see Ben Beachy and Lori Wallach, “Myths and Omissions: Unpacking Obama Administration’s Defenses of Investor-State Corporate Privileges,” Public Citizen, October 2014, at 22-23. <http://www.citizen.org/documents/ISDS-and-TAFTA.pdf>
- <sup>xiii</sup> “Ways & Means and Ag members press Froman for Enforceable SPS Measures,” Inside U.S. Trade, August 27, 2013, cited in Suppan, “Analysis . . .”, 7.
- <sup>xiv</sup> See Chapter 20 of the North American Free Trade Agreement. <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions#chap20>
- <sup>xv</sup> E.g. “House Bill Lets Big Business Write the Rules and Secretly Block Them,” Coalition on Sensible Safeguards, press release, January 30, 2015. <http://www.sensible safeguards.org>
- <sup>xvi</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0017\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0017_en.htm)
- <sup>xvii</sup> <http://oig.hhs.gov/oei/reports/oei-02-06-00210.pdf>
- <sup>xviii</sup> Allison Sherry, “U.S. zeroes in on U software,” *Minneapolis Star Tribune*, January 15, 2015.
- <sup>xix</sup> “Imported Pork Recall Highlights Failures of Food Import Inspections,” Food and Water Watch, January 20, 2015. <http://www.foodandwaterwatch.org/pressreleases/imported-pork-recall-highlights-failures-of-food-import-inspections/>

---

<sup>xx</sup> Lydia Zuraw, “Congress Wants FDA to Drop Agency’s Push for FSMA User Fees,” *Food Safety News*, August 29, 2014.

<sup>xxi</sup> Joan Murphy, “APHIS says controversial inspection fee increases in final review,” *Food Chemical News*, January 14, 2015.

<sup>xxii</sup> James Goodwin, “Your Up-to-Date Ten Day Forecast for Capitol Hill: A Blizzard of Antiregulatory Bills,” Center for Progressive Reform, January 28, 2015.  
<http://www.progressivereform.org/CPRBlog.cfm?idBlog=F015C4BE-C064-A608-D41EA2BAB7B12331>

<sup>xxiii</sup> [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153032.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf)

<sup>xxiv</sup> E.g. “TABD [Transatlantic Business Dialogue] Final Recommendations,” *Inside U.S. Trade*, November 17, 1995.

<sup>xxv</sup> Stephane Horel and Brian Biankowski, “Scientists Who Are Critical of EU’s Draft Chemical Regulation Policy Have Industry Ties,” *Food Safety News*, September 26, 2013.

<sup>xxvi</sup> Erica Smith with Baskut Tuncak and David Azoulay, “Lowest Common Denominator: How the proposed EU-US Trade deal threatens to lower standards of protection from toxic pesticides,” Center for International Environmental Law, January 2015, at 19. (Declaration of interest: IATP provided comments on a draft of this report.) [http://ciel.org/Publications/LCD\\_TTIP\\_Jan2015.pdf](http://ciel.org/Publications/LCD_TTIP_Jan2015.pdf)

<sup>xxvii</sup> *Ibid.*, 6-10.

<sup>xxviii</sup> “EU’s food safety agency gives green light to Bisphenol A,” *EurActiv*, January 21, 2015.

<sup>xxix</sup> Stephen Clapp, “California Court Would Return BPA to Prop 65 List of Harmful Chemicals,” *Food Chemical News*, December 24, 2014.

<sup>xxx</sup> “FDA Says BPA in Food Containers Is Safe, But New Study Raises Concerns,” *Food Safety News*, December 11, 2014.

<sup>xxxi</sup> Karen Hansen-Kuhn and Steve Suppan, “Promises and Perils of the TTIP: Negotiating a Transatlantic Agricultural Market,” Institute for Agriculture and Trade Policy, October 2013, at 10-11.  
[http://www.iatp.org/files/2013\\_10\\_25\\_TTIP\\_KHK.pdf](http://www.iatp.org/files/2013_10_25_TTIP_KHK.pdf)

<sup>xxxii</sup> “An Exceptional Vote of the Codex Alimentarius Commission: the fallout to come,” *Global Food Safety Monitor*, October 1, 2013. <http://us5.campaign-archive1.com/?u=26fee7f7d268bc1c653da5892&id=5d37c1767e>

<sup>xxxiii</sup> “Nano-silver in Food and Food Contact Products,” Center for Food Safety, December 15, 2014.  
[http://www.centerforfoodsafety.org/files/nano-silver\\_product\\_inventory-in-food-12514\\_66028.pdf](http://www.centerforfoodsafety.org/files/nano-silver_product_inventory-in-food-12514_66028.pdf)

<sup>xxxiv</sup> Steve Suppan, “FDA to industry: Please call us if you put nanomaterials in food,” Institute for Agriculture and Trade Policy, August 20, 2014. <http://www.iatp.org/blog/201408/fda-to-industry-please-call-us-if-you-put-nanomaterials-in-food>

<sup>xxxv</sup> <http://www.centerforfoodsafety.org/fact-sheets/3661/nano-silver-in-food-and-food-contact-products>

<sup>xxxvi</sup> “Non-profits Sue EPA for Failure to Regulate Novel Pesticide Products Created with Nanotechnology,” Center for Food Safety, December 17, 2014. <http://www.centerforfoodsafety.org/press-releases/3664/nonprofits-sue-epa-for-failure-to-regulate-novel-pesticide-products-created-with->

---

[nanotechnology](#) (Declaration of interest: the Institute for Agriculture and Trade Policy is a co-plaintiff in this lawsuit.)

xxxvii David Azoulay and Baskut Tuncak, “Managing the unseen: opportunities and challenges with nanotechnology,” Swedish Society for Nature Conservation, May 2014.

[http://www.ciel.org/Publications/SSNC\\_Nano\\_May2014.pdf](http://www.ciel.org/Publications/SSNC_Nano_May2014.pdf)

xxxviii E.g. Andrew Behar, Danielle Fugere and Michael Passoff, “Slipping Through the Cracks: An Issue Brief on Nanomaterials in Foods,” As You Sow, 2014. <http://www.asyousow.org/wp-content/uploads/2014/reports/SlippingThroughTheCracks-2014.pdf>

xxxix Steve Suppan, “From GMO to SMO: How Synthetic Biology Evades Regulation,” Institute for Agriculture and Trade Policy, July 2014. [http://www.iatp.org/files/2014\\_07\\_18\\_Synbio\\_SS\\_0.pdf](http://www.iatp.org/files/2014_07_18_Synbio_SS_0.pdf)

xl Doug Gurian-Sherman, “The Next Phase of Genetic Engineering: A Flood of New Crops Evading Environmental Regulation,” *Civil Eats*, January 27, 2015. <http://civileats.com/2015/01/27/the-next-phase-of-genetic-engineering-a-flood-of-new-crops-evading-environmental-regulation/>

xli Gurian-Sherman, Ibid. and <http://www.epa.gov/scipoly/sap/meetings/2014/january/012814minutes.pdf>

xlii “Federal Food Safety Oversight: Additional Actions Needed to Improve Planning and Collaboration (Highlights),” General Accountability Office, December 18, 2014. GAO-15-180.

<http://www.gao.gov/products/GAO-15-180>

xliii Lydia Wheeler, “Democrats call for new food safety agency,” *The Hill*, January 28, 2015.

<http://thehill.com/regulation/231000-democrats-call-for-an-independent-food-safety-agency>

xliv Michael Moss, “U.S. Research Lab Lets Animals Suffer in Quest for Profit,” *The New York Times*, January 20, 2015.

xlv “OIE’s achievements in animal welfare,” World Animal Health Organization, September 10, 2014.

<http://www.oie.int/en/animal-welfare/animal-welfare-key-themes/>

xlvi Cally Carswell, “When California Changes Its Chicken Laws, It Affects Everybody,” *Modern Farmer*, November 5, 2014. <http://modernfarmer.com/2014/11/egg-law/>

xlvii Dennis Kelleher, Stephen Hall and Katelynn Bradley, “The Cost of the Wall Street-Caused Financial Collapse and Ongoing Economic Crisis Is At Least \$12.8,” Better Markets, September 15, 2012.

[http://www.bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis\\_0.pdf](http://www.bettermarkets.com/sites/default/files/Cost%20Of%20The%20Crisis_0.pdf)

xlviii Jeffrey Schott, “Broad Objectives and Prospects for TTIP,” Peterson Institute, May 1, 2014, slide 5.

<http://www.piie.com/publications/papers/schott20140501ppt.pdf>

xlix Werner Raza et al., “TTIP—A Good Deal?” The New School, December 2014.

[http://www.economicpolicyresearch.org/images/docs/research/globalization\\_trade/Taylor\\_Policy\\_Note\\_1.9\\_15\\_FINAL.pdf](http://www.economicpolicyresearch.org/images/docs/research/globalization_trade/Taylor_Policy_Note_1.9_15_FINAL.pdf)

<sup>1</sup> Jeronim Capaldo, “Transatlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability,” Global Development and Environment Institute, Working Paper 14-03, October 2014, executive summary. <http://ase.tufts.edu/gdae/Pubs/wp/14-03CapaldoTTIP.pdf>

---

<sup>li</sup> Robert Scharff, “Health-Related Costs from Foodborne Illness in the United States,” The Pew Charitable Trust, March 2010, Summary. <http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/healthrelated-costs-from-foodborne-illness-in-the-united-states>

<sup>lii</sup> Taylor McLinden et al., “Component costs of foodborne illness: a scoping review,” *BCM Public Health*, May 26, 2014. <http://www.biomedcentral.com/1471-2458/14/509>