Global Food Safety Monitor

May 2015

Shh! No food safety risks here

For alternative proposals that could strengthen food safety measures in trade agreements to get any traction, you first need to know what's on the negotiating table. You need to know the existing draft text to figure out where to adjust and insert your proposed language. However, U.S. trade negotiating proposals are interpreted by the U.S. Trade Representative (USTR) as "Confidential" national security information, under President Barack Obama's Executive Order 13526, covering all relations of any kind with foreign governments. Since the penalties for violating national security classification include jail time, we cannot access a draft negotiation's text to edit, so proposing alternatives for the TransPacific Partnership Agreement (TPP) or the Transatlantic Trade and Investment Partnership (TTIP) is a hypothetical, not to say utopian, exercise. The Obama administration's Open Government Partnership, launched in 2011 and intended to be a model of transparency in governing for the world, does not apply to trade and investment agreements.

This article makes the case that negotiating trade agreements under the cover of a national security information directive has inhibited a robust debate not only about the terms of food safety and plant and animal health and welfare (the Sanitary and Phytosanitary standards, or SPS in trade jargon) in those agreements, but also about the U.S. budgetary and personnel capacity to implement and enforce them. Also inhibited is a debate on alternative SPS terms for trade agreements that could help develop trade agreements worthy of public support, if and when Executive Order 13526 is revised to exclude and declassify international commerce and investment documents from the national security classification system.

The only food industry issue in which there is a bona fide U.S. national security interest is the food defense program coordinated by the Department of Homeland Security. Food defense has been described as "the efforts to prevent the intentional contamination of

food products by biological, chemical, physical or radiological agents that are not reasonably likely to occur in the food supply." U.S. federal agencies work with the food industry to protect company infrastructure and supply chains from the intentional contamination of food products. The intentional contamination of food does not happen often, but attempts to contaminate happen often enough to merit heightened interagency regulatory initiatives. However, food defense policies and programs remain squarely with U.S. regulatory authorities and have not been proposed as matters for trade negotiations. Presumably, food defense measures are too important to real national security imperatives to subject them to the "least trade restrictive" requirements that are at the heart of controversy in other trade related SPS discussions.

U.S. budgetary capacity to implement and enforce trade-related SPS measures

An April 9 *New York Times* editorial excoriated the refusal of Congress to vote to fund the implementation of the "Food Safety Modernization Act" (FSMA), including its trade-related chapter, and the refusal of the food industry to pay fees for the regulatory services it has demanded to facilitate trade. The FSMA required the inspection of at least 4800 foreign food export facilities in 2014, but according to the Government Accountability Office, only 1,323 were inspected. The editorial noted the logical consequence of treating food safety as an underfunded mandate: "The losers, of course, will continue to be consumers, who will live with the hazards of an unsafe food supply."

IATP has analyzed two European Commission proposals for the SPS chapter of the Transatlantic Trade and Investment Partnership Agreement (TTIP). The first analysis is of a leaked text and the second analysis is of a proposal published on January 7 as part of the Commission's transparency initiative. Both proposed versions of the SPS chapter require that the TTIP Parties "avail themselves of the resources necessary to implement this Chapter." Even with the radical food safety management deregulation that the Commission proposes, e.g. a ban on import re-inspection (Article 8), and the ban's presumed savings for industry and governments, the U.S. would be hard pressed to agree to the EU's binding demand to ensure "resources necessary to implement this Chapter," (Article 3) since Congress and the food industry refuse to fund the implementation of U.S. food safety legislation. Promoters of so-called free trade avoid discussion of both the cost of imports in terms of job loss and the costs of implementing the agreements.

Negotiating SPS measures outside of the national security state model for trade

An April 14 *New York Times* opinion piece on the TPP notes, "Secrecy has real costs. Because the negotiating process combines a shield from the public with privileged access for industry advisors, the substance of American free trade agreement does not represent truly national interests." Instead, as the article notes, the negotiating process represents the interests of the industry advisors. What would truly national SPS interests be and how could they be negotiated if freed from the current national security information classification strait jacket?

Trade related SPS policy should have among its objectives the prevention of the unintentional contamination of food and agricultural products, and regulations to optimize performance standards to judge whether that objective has been met. Here are some ideas that could be debated and eventually written into U.S. proposals for trade related SPS chapters, once USTR negotiating texts are no longer subject to the national security classification system. Declassification and publishing of the draft USTR texts, following every negotiating session, would be a first step towards democratic dialogue about the purpose of trade, a dialogue in which all sectors of society can contribute on a footing that is, at least legally, equal. The following proposals are largely derived from our analysis of the SPS chapter for TTIP published by the European Commission on January 7, since neither the United States nor any of the prospective TPP Parties have published draft negotiating texts for public review and comment.

1. *Ensuring resources to realize the right to regulate:* The primary purpose of the TTIP SPS chapter is to expedite trade "to the greatest extent possible while preserving each Party's right to protect human, animal or plant health and welfare in its territory" (Article 2.1). This purpose, repeated frequently by trade negotiators as "proof" that regulations will not be prohibited, inhibited, weakened, pre-empted or challenged under the terms of the SPS chapter, the Investor State Dispute Settlement (ISDS) chapter and/or the Regulatory Cooperation chapter, is much less balanced than syntax or semantics would indicate.

   To realize the right to regulate, regulators must have adequate resources to implement and enforce rules so that governments and the public are not left to rely on industry self-regulation, voluntary guidance to industry, or underfunded and understaffed mandates to regulate what cannot be effectively implemented and enforced. To preserve the right to regulate, an annex to SPS chapters would

need to be negotiated according to which Parties to a trade agreement would be required to annually notify the budgets, staffing level, training programs and infrastructure dedicated to complying with SPS performance standards along the food and agriculture export and import chain. The notification should include the inspector general and/or other independent auditor reports of the Parties' trade-related SPS performance. Parties would also report a summary of lawsuits and court rulings that will affect the fair and transparent implementation and enforcement of SPS chapter commitments.

2. *Eliminate the Investor State Dispute Settlement chapter:* The USTR has insisted on the inclusion of the ISDS within the TPP but has not publicly discussed the application of "WTO plus" SPS enforcement demanded by the food industry and at least 76 members of Congress. ("Ways and Means, Ag Committee Members Demand SPS Enforceability," Inside U.S. Trade, September 6, 2013. Subscription required.) The USTR should explicitly exclude the application of the ISDS to the SPS chapter, if the ISDS continues to be included in the TPP and TTIP. Our reasons for opposing the ISDS in general include lack of due process; lack of evidentiary standards; lack of prohibition that plaintiffs' lawyers in one case can become "judges" of plaintiffs in a succeeding case; classification of environmental, health and safety data as Confidential Business Information not subject to public and peer scientific review; lack of a conflict of interest policy for expert witnesses etc. The very threat of an ISDS case, at any stage of a "regulatory action" (proposed rulemaking, finalized rule, implementation or even enforcement), could effectively pre-empt the "right to regulate" asserted above. However, it is advisable to have a state-to-state dispute settlement mechanism, independent of that in the WTO Understanding for Dispute Settlement, which would be dedicated to resolving disputes quickly concerning horticultural goods and other perishable food and agricultural goods.
3. *Enhance inspection and testing of food imports and transparency of reporting SPS controls:* Even if the U.S. Congress adequately funds and staffs the inspection of food export facilities and the auditing of food export certification programs, the European Commission proposal to ban port of entry import inspection as a "redundant" food safety control (currently Article 8), and any similar proposal in the TPP SPS chapter, should be deleted. Frequency of import inspection and testing may be reduced on a tariff line basis, as warranted both by inspection and testing results, and by the auditing results of export controls along the supply chain. An annex on initial frequency of inspection and testing for historical product categories and another for inspection and testing of agriculture products, foods and food ingredients derived from new technologies (e.g.

synthetic biology and agri-nanotechnology) should be added.

The current Commission proposal makes optional ("may" in Article 11.9) the publishing of the results, audits and verification procedures for U.S. and EU food and agriculture export facilities. Any finalized agreement should require the publishing of such results with a provision for public comment about them, and how those results may affect continued permissions to export from those facilities. The proposal requires exchange of information about certain kinds of SPS information (Article 14.1) but consigns to "will endeavor to exchange" (Article 14.2) information about the SPS controls and the efficacy of controls applied to plant and animal diseases required to be reported under Article 14.1. By deleting "endeavor to" in Article 14.2, the U.S. and EU would report publicly and with public opportunity to comment on the efficacy of applied SPS controls.

4. *Address trade in horticultural products:* The North American Meat Institute has recently released a video to highlight that produce—contaminated by pathogens mostly of animal origin in non-composted manure spread on fields—and not meat, is the single greatest product category for foodborne illness. The underlying facts of the video, though not the Meat MythBuster spin of deflecting attention about the origin of most of the pathogens, are true. The United States is importing about 50 percent of its horticultural consumption, and this percentage is expected to increase under the TPP. Superficial washing of produce cannot disinfect pathogens that have been taken up into the roots of the vegetables and fruits. Trade rules to remedy this growing SPS problem needs to be negotiated, and there is a good statistical basis, at least for U.S. foodborne illness per commodity, to do so. For example, an annex on a farm to fork cooperative program among the Parties to prevent the contamination of horticultural products by pathogens of animal origin should be included. Failure to comply with the terms of the annex would be a justification for import rejection.

Conclusion: There are many other alternative trade policy proposals that could be formulated, criticized and refined beyond the few represented above. However, it is an academic exercise, in the pejorative sense of the term, to develop and propose alternatives only in response to leaked negotiating texts or even to negotiating proposals published by the European Commission. The U.S. negotiating proposals remain in a black box, until President Obama presents the TPP agreement as a whole for a yes/no vote. If Congress passes the fast track Trade Promotion Authority (TPA) introduced on April 16 forbidding amendments to the agreements and the black box remains closed, alternative trade policy proposals have no place to go except for the USTR "listening

sessions." The USTR's Public Interest Trade Advisory Group, announced with fanfare in 2014, has yet to be formed, because of the refusal of civil society organizations to sign the Non-Disclosure Agreement prohibiting public discussion of the negotiations texts. ("A Year After Unveiling, 'PITAC' Stalled Due to Fight Over Secrecy Rules," Inside U.S. Trade, February 26, 2015. Subscription required.).

Within the next few weeks, the U.S. Congress will consider whether to approve a fast track TPA bill. Fast track will reduce their Constitutional authority to advise and consent on international agreements to a yes or no vote on long and complex texts that neither they nor their staffs will have read entirely in their final form (the numerous annexes of detail historically are released at the last minute), nor, in many cases, in draft form. Industry lobbyists, who in essence have become the congressional staff with golden parachute agreements to return to their seven figure salaries as lobbyists, will tell members of Congress what should be in the TPA, TPP and the TTIP. If Congress votes for fast track TPA, the path is cleared to ensure that only industry interests and not the national interests of the public, will be incorporated into the terms of the trade agreements.

And as the aforementioned New York Times opinion piece noted, the national security state of negotiations that a fast track vote locks in "comes with real costs." In 2012, the U.S. public health costs of acute foodborne illness (incidents requiring hospitalization) was estimated at $77 billion. This estimate does not distinguish between the U.S. and imported sources of foodborne illness. But as U.S. food consumption becomes more dependent on imports, future cost of imported foodborne illness to public health estimates should become a regular feature of congressionally mandated USTR reporting. Since neither U.S. trade negotiators nor their industry advisors want to discuss these costs and negotiate rules to reduce them, continued pressure will need to be applied until President Obama excludes trade negotiations texts from the purview of all Executive Orders on national security.

INSTITUTE FOR AGRICULTURE AND TRADE POLICY
2105 First Ave. S. / Minneapolis, Minnesota 55404
(612) 870-0453 / Fax (612) 870-4846