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Promises and Perils of the TTIP

Negotiating a Transatlantic Agricultural Market

By Karen Hansen-Kuhn and Dr. Steve Suppan

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Executive summary

Still reeling from the devastation of the global financial crisis, the EU and U.S have embarked on an ambitious set of trade talks for a Transatlantic Trade and Investment Partnership (TTIP), intended to jump-start fragile markets and spur economic growth and job creation in both regions.

Tariff barriers between the U.S. and EU are already low. The bigger challenge—and the real target—is the very different approaches of the U.S. and EU to regulation. Negotiators intend to overcome these barriers through efforts to achieve "regulatory coherence." Regulatory coherence, like expanded trade, appears to be a neutral term, but the political context is not neutral at all. Industry lobby groups and their political allies continue to launch strident attacks on both sides of the Atlantic on rules that limit their ability to buy and sell goods and services. As leaders from both regions have made clear, the terms of this trade agreement will set the standard for future free trade agreements.

TTIP affect a broad range of issues, from energy to the environment, and intellectual property rights to labor rights. The agreement could also have a significant impact on the evolution of agricultural markets and food systems in the U.S. and EU. Unfortunately, little concrete information is known about the content of the TTIP proposals, since the governments involved have stated that they will not publish draft text.

It is likely that investor-state dispute resolution (ISDR), which gives investors the right to sue governments for compensation over rules that affect their expected profits, will be included in TTIP as well, despite the fact that there is no doubt that the U.S. and EU legal systems are entirely up to the task of resolving such complaints by foreign investors without resort to a trade mechanism. It is also reasonable to assume (based on numerous corporate submissions to USTR) that the EU's reliance on the Precautionary Principle will be squarely on the agenda in discussions on food safety, environmental protection and public health.

In both the U.S. and EU, the time to influence the substance of the agreement is before it is completed and submitted to the relevant legislative bodies for their votes for or against ratification. That's a tricky task, since the negotiations are happening behind closed doors, but it means that civil society groups and legislators need to pay close attention to what is on the agenda, even without complete information.

In this paper, we outline some of the concerns for healthier, more equitable and sustainable agriculture and food systems:

- **FOOD SAFETY:** Differing food safety standards have been the subject of trade disputes between the U.S. and EU for years. Complaints lodged at the World Trade Organization (WTO) by the U.S. government have focused on EU restrictions on genetically modified organisms (GMOs) and veterinary growth hormones that are deemed safe in the U.S. but are banned in some EU member states. TTIP proposals on Sanitary and Phytosanitary standards (SPS) and Technical Barriers to Trade (TBT), such as product labeling, seek to go beyond WTO commitments and include pressure to subject SPS and TBT standards to Investor-State Dispute Resolution. There is also pressure to lower EU standards on meats and poultry, including those on hormone-treated beef, controversial growth promotion hormones, such as ractopamine and chlorinated rinses of poultry carcasses. The EU, for its part, is seeking to overturn limits on its exports of beef despite concerns over EU member state controls to prevent Mad Cow Disease.

  This deregulatory approach could carry over into emerging technologies, such as the use of nanotechnology in food and agriculture, even though there are no clear U.S. regulatory definitions of nanomaterials, and much less risk assessment of the impacts of nanomaterials on human health and the environment. The TTIP negotiators are tasked to provide a least–trade restrictive framework for harmonizing SPS regulations on nanotechnology, when specific regulations do not yet exist.

- **CHEMICAL POLICY REFORMS:** Rules on the use of potentially toxic chemicals will be negotiated in the TBT chapter. Of particular concern are chemicals that disrupt the delicate hormone balance in the human body. The EU's Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) is a process firmly grounded in the Precautionary Principle. To the contrary, in the U.S. the outdated Toxics Substance Control Act of 1976 (TSCA) puts pressure on the Environmental Protection Agency to prove that chemicals are unsafe, rather than on the industries producing the chemicals to prove that they are safe before they enter the market. USTR has been pushing back against REACH since its inception, citing its approach as TBT at the WTO.

- **PROCUREMENT POLICIES AND LOCAL FOODS:** As part of the global movement towards healthier foods, new governmental programs, such as the U.S. Farm to School programs and similar initiatives in Italy, Denmark and Austria, include bidding contract preferences for sustainable and locally grown foods in public procurement programs. Food Policy Councils are also bringing people together to generate locally grounded proposals for healthier, more sustainable foods and agriculture.

One of the most ambitious, the Los Angeles Food Policy Council, has made procurement a central element of their programs. Both the U.S. and EU have criticized "localization barriers to trade." The EU, in particular, has been insistent on the inclusion of procurement commitments in TTIP at all levels of government, for all goods, and in all sectors—potentially including commitments on these public feeding programs.

- **FINANCIAL SERVICE REFORMS:** The links between agriculture, food security, financial services and commodity market regulation are multifaceted. New rules being developed under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in the U.S., and the EU's revised Markets in Financial Instruments Directive (MiFID) process seek to increase the transparency and comprehensiveness of reporting to regulators by market participants and prevent market disruption by unregulated, dark-market trading. Efforts are underway to ensure that the rules on both sides of the Atlantic are consistent. Upward harmonization of financial and commodity market regulation could be derailed by proposals to include them in the TTIP financial services chapter and to make financial reform rules subject to investor-state dispute resolution.

While there may be legitimate reasons for and benefits from regulatory coherence between the U.S. and EU, those discussions of public rules need to happen under conditions of full transparency and should not be subsumed within a trade agreement. The TTIP negotiations should result in an agreement that prohibits—rather than promotes—efforts by corporations to play off regulatory standards in one jurisdiction against the other. Those dialogues should hold open the possibility that the best avenues for progress could be outside the constraints of trade rules, as happened with the recent U.S.-EU agreement on organic standards. Proposals to broaden the definition of investment to apply to SPS and financial market regulations, making them subject to challenge under investor-state dispute resolution, should be firmly rejected.

If this is truly to be a "high standards" agreement, and if there is any hope that "harmonization" does not mean shifting standards towards the lowest common denominator, then the U.S. and EU governments need to start from a thorough redefinition of "regulatory coherence" that prioritizes human and environmental well-being over market openings. That seems entirely improbable given statements made by the governments up to this point. Improbable isn't the same thing as impossible though. The current approach is a political choice; alternatives are entirely possible. If not, and the talks are to continue along the lines of other recent trade agreements, then civil society and policymakers should seriously consider putting a halt to the TTIP.

Introduction

Still reeling from the devastation of the global financial crisis, the U.S. and EU have embarked on an ambitious set of trade talks intended to jump start fragile markets and spur economic growth in both regions. In his 2013 State of the Union Address, U.S. President Barack Obama announced that, "we will launch talks on a comprehensive Transatlantic Trade and Investment Partnership [TTIP] with the European Union, because trade that is fair and free across the Atlantic supports millions of good-paying American jobs." At the opening of the talks in July, European Commission President José Manuel Barroso stressed the urgency of the talks, saying that, "we intend to move forward fast. The current economic climate requires us to join forces and to do more with less. More importantly, in doing so, we will remain strong global players who set the standards and regulations for the 21st century."

Why are the talks so urgent, and what does it mean for the world's two largest economies to set the standards? How would the trade agreement affect farmers, workers, consumers and those who care about the environment in both regions? What about efforts to reshape agricultural production to produce healthier, more equitable and sustainable food systems?

Trade barriers between the U.S. and EU are already remarkably low, with weighted tariffs for U.S. agricultural exports to the EU averaging just 4.8 percent, and 2.1 percent for EU exports to the U.S.,[1] differences that could vanish with minor fluctuations in exchange rates one way or the other. The bigger challenge—and the real target—is the very different approaches to regulation. Regulatory coherence, like expanded trade, is in itself a neutral term but appears to be gaining specific meaning in the context of this and other recent trade agreements. Leaked versions of the regulatory coherence chapter of the Trans-Pacific Partnership (TTP), for example, reveal a strong emphasis on the use of U.S.-style cost-benefit analyses to regulations, an approach that is much too limited for rules on such issues as the environment, public health and food systems.[2] Recent statements by U.S. Trade Representative Michael Froman urge the EU to be more like the U.S. in setting such standards. EU Trade Commissioner Karel de Gucht said "I would like to see a set of horizontal rules to guide regulatory co-operation—and what I mean by that is we should ultimately strive for the mutual recognition of our regulations across a broad range of sectors."[3] Mutual recognition, like regulatory coherence, has the potential to lower standards, depending on the process used and the political context.

The political context is not neutral at all. Industry lobby groups and their political allies continue to launch strident attacks on both sides of the Atlantic on rules that limit their ability to buy and sell goods and services. As leaders from both regions have made clear, the regulations set in this trade agreement will set the standard for free trade agreements of the future.

The trade agreement could affect a broad range of sectors, from energy to environment, intellectual property rights and labor rights. TTIP could also have a significant impact on the evolution of agricultural markets and food systems in the U.S. and EU. Unlike the global World Trade Organization (WTO), there is no specific chapter in TTIP on agriculture. Instead, the rules affecting agriculture, food safety and food systems are woven throughout the texts. Also unlike the WTO, which publishes negotiating proposals on its website, little is known about the content of the TTIP proposals, since the governments involved have stated that they will not publish draft text.

That lack of transparency is already a major issue of concern for legislators and civil society. The office of the United States Trade Representative (USTR) and the EU Directorate General of Trade convened a stakeholder event at the start of the talks in July in Washington, D.C. It also issued public requests for written submissions. But so far, those have been one-way conversations, with some 300 representatives of civil society and businesses testifying on the basis of general statements like the EU-U.S. High-level Working Group report and the specific contents contained in leaked texts on negotiating proposals. A briefing for stakeholders at the end of the talks provided general feedback, not specific information, on the concerns and proposals raised during the sessions.[4]

It is reasonable to assume that the proposals advanced in these negotiations will be consistent with those in the Canada Europe Trade Agreement (CETA), the Trans-Pacific Partnership (TPP) and other bilateral trade agreements negotiated by either side. It is to be expected (although probably not reasonable), for example, that investor-state dispute resolution, which gives investors the right to sue governments for compensation over rules that affect their expected profits, will be included in TTIP as well, despite the fact that there is no doubt that the U.S. and EU legal systems are entirely up to the task of resolving such complaints by foreign investors without resort to a trade mechanism.

It is also reasonable to assume that the EU's reliance on the Precautionary Principle will be squarely on the agenda in discussions on food safety, environmental protection and public health. Numerous submissions to USTR by corporations have attacked the Precautionary Principle (a basic principle enshrined in the EU's founding Treaty of Lisbon) as unscientific and grounded more in politics than sound policy. Their insistence on "sound science" glosses over the fact that all too often, the full extent of the risks of new chemicals

and technologies are not known nearly as quickly as regulators allow their commercialization. This is especially true for emerging technologies and food safety, in which new research demonstrates real reasons for concern about unexpected consequences of food additives, both for human and environmental health.

We should not assume that these are the only possible options for better economic ties between the U.S. and EU. For example, common standards for organic foods negotiated between the U.S. and EU offers an alternative approach to rigid trade deals. The carefully crafted Organic Equivalency Arrangement incorporated input from farmers, businesses and civil society. The arrangement, which began in 2012, recognizes certification by the USDA National Organic Program as equivalent to the EU Organic Program. It provides for periodic reviews and establishes a work plan to exchange information on emerging issues.[5] It provides a flexible basis for mutual learning and expanded trade in those goods. The fact that this bilateral arrangement was negotiated on its own, outside the "horse trading" inherent in any trade negotiations, created the conditions for a reasonable approach that can also be reopened should conditions change in the future.

The process of negotiating and ratifying the TTIP commitments is almost as important as the content. In the United States, only members of the Trade Advisory Committees have access to negotiating texts and open dialogues with negotiators at all stages of the negotiations. Those committees are overwhelmingly dominated by corporations.[6] Once the agreement has been completed (and only at that point publicly available) and signed by the president, it would be submitted to Congress for ratification. President Obama will request Fast Track Authority (formally known as Trade Promotion Authority) from Congress, most likely in the fall of 2013, so that the resulting agreement (and others, probably including the Trans-Pacific Partnership) can be submitted without the possibility of amendments and with strictly limited floor debates in Congress. Fast Track is widely criticized as an outdated, undemocratic procedure and will itself be the subject of intense lobbying and debate in the U.S. this fall.

In the EU, the agreement would be initialed for consideration by the European Council, which at that point would publish the completed text in all official EU languages. After signature by the president, it would be submitted for ratification by the European Parliament. As in the U.S., no amendments are permitted at that stage. If the agreement includes provisions that are the responsibility of Member States (rather than the EU as a whole) it would also be submitted for ratification in those parliaments.[7]

In both the U.S. and EU, the time for input on the substance of the agreement is before it is completed and submitted to the relevant legislative bodies for their votes for or against ratification. That's a tricky task, since the negotiations are happening behind closed doors, but it means that civil society groups and legislators need to pay close attention to what is likely to be on the agenda, even without complete information. It is not clear, for example, that local foods systems could be subject to procurement commitments under TTIP, but that is entirely consistent with EU calls for the inclusion of all goods and all sectors, at all levels of government.

In this paper, we attempt to outline some of the concerns around topics that are key for healthier, more equitable and sustainable agriculture and food systems: food safety and additives, chemical policy, procurement rules, and financial and commodity market reforms. This list is certainly not exhaustive, but we are troubled by how strongly this trade agenda represents almost exclusively the interests of multinational corporations and financial institutions to the detriment of other concerns. We hope this analysis will stimulate more questions, and perhaps some answers on what's really at stake in the TTIP before the agreement is completed and proceeds to ratification.

Food safety, livestock and plant health in the TTIP

Differing food safety standards have been the subject of trade disputes between the U.S. and EU for years. Complaints lodged at the WTO by the U.S. government have focused on restrictions on genetically modified organisms (GMOs) and food additives that are deemed safe in the U.S, but are still questioned and even banned in some EU member states. Up to this point, those issues have been debated at the WTO and at Codex Alimentarius (Codex), a standards-setting body housed at the United Nations with the participation of more than 180 countries. Codex standards form the basis for the WTO's agreement on Sanitary and Phytosanitary Standards (SPS), which in turn is the reference point for bilateral trade and investment agreements. Agreements in bilateral or regional trade agreements like TTIP can either refer to the WTO agreement or "go beyond" it to loosen its restrictions on food safety.

The origin for the TTIP proposal to seek a chapter on trade-related SPS that "goes beyond" the WTO's SPS agreement is a recommendation of the U.S. EU High-level Working Group on Jobs and Growth.[8] This recommendation is founded on econometric projections that increasing agricultural trade will result in economic growth and job creation, and that domestic food safety, animal health and plant health measures can be "disguised trade barriers." So, for example, the U.S. Trade

Representative's (USTR) report on SPS barriers to trade states, "Overall, U.S. farm exports totaled $145.2 billion in 2012. According to the U.S. Department of Agriculture's Economic Research Service, each $1 billion in agricultural exports supports approximately 6,800 jobs on and off the farm [down from 8,400 jobs in the 2012 report]. At the same time, however, SPS trade barriers prevent U.S. producers from shipping hundreds of millions of dollars' worth of goods, harming farms and small businesses. The elimination of unwarranted foreign SPS trade barriers is a high priority of the U.S. Government."[9]

In reality, farmers and ranchers sell their raw materials to and buy inputs from U.S. agribusiness firms at the prices those firms stipulate (with some exceptions for small niche markets). SPS related trade disputes concern the agricultural chemicals, veterinary drugs and genetically modified seeds, food additives, processed foods and other products manufactured and/or traded by transnational agribusiness. Bulk commodities comprise less than 20 percent of the value of U.S. agribusiness exports.[10] USTR interest in SPS issues is a function of increasing market access for these products. It is no surprise that the lead U.S negotiator for agriculture market access is also the lead negotiator for SPS issues.[11] Despite the trade negotiators' repeated promises to protect public and environmental health in the agreement, the bottom line of TTIP is to increase exports and imports for the companies and sectors represented by trade advisors.

We should also take the econometric claims made for jobs created from trade with a huge grain of salt, not only because they ignore the jobs lost as a result of imports and incentives to outsource production to non-U.S. facilities, but because year in and year out, these claims have been flat out wrong,, e.g. by about $10 billion in the case of the U.S.–South Korea Free Trade Agreement, with a net loss of 40,000 jobs.[12]

Seventy-six members of the U.S. Congress, representing their agribusiness constituents, are lobbying the USTR to make SPS standards "fully enforceable" in TTIP through a dispute settlement mechanism that would "go beyond" the dispute settlement mechanism of the WTO. Though the design of the mechanism is not stipulated in the congressional letter, it presumably would give agribusiness companies the right to sue EU member state governments (or the U.S. government) over SPS regulations and implementation measures through the investor-state mechanism, a right they currently do not enjoy. Thus far, the USTR has been unwilling to apply an investor state mechanism to SPS disputes in other trade agreements.[13]

If investor-state does apply to SPS issues in the TTIP, U.S. investor lawsuits and threats thereof will find a varied reception among EU member state governments. For example, in Italy, the Minister of Agriculture is seeking to ban the planting of GM crops, even while acknowledging that such a ban might be illegal under EU law.[14] EU member states are required to accept the scientific opinions of the European Food Safety Authority (EFSA) as binding, unless a government can show that EFSA failed to consider relevant science. NGOs and some EU member states have argued that EFSA risk assessments are incomplete, since they do not review the ecological effects of GMOs, such as the rise of pesticide-resistant "superweeds," but instead only review toxicological literature and biotech-company supplied data.[15]

Countries such as Italy and Austria, which have invested heavily in certified organic agriculture, worry that those investments will be undermined by the failure of the European Commission and the United States to develop enforceable rules to ensure that organic crops will not be contaminated by transgenic ones. At the other end of the spectrum is the United Kingdom, whose Minister of Environment (!) urged the commercialization approval of GM varieties, arguing that "The use of GM could be as transformative as the original agricultural revolution."[16]

Since the failure in 2011 of the European Commission, the European Council of Ministers and the European Parliament to agree on the terms to revise the 1997 Novel Foods Regulation, EU law on new food technologies food has been fractured between the positions of agribusiness and consumer group interests.[17] Perhaps as a result of this division, the commission has not advanced any product specific SPS related offensive agricultural interests.[18] Rather, the commission's strategy appears to be to use "horizontal" SPS rules applying to all products to circumvent the Novel Foods debate for transatlantic agribusiness firms.

In the U.S., food safety is regulated by a patchwork of over 30 laws administered by 15 agencies. Because of the inefficiencies and vulnerabilities of that patchwork, the General Accountability Office (GAO) has made scores of recommendations for consolidating the system to reduce U.S. vulnerability to foodborne illness.[19] Recommendations for consolidating all food safety authority in an agency with no statutory authority for marketing have been staunchly resisted.

The U.S. Department of Agriculture (USDA) is home both to various offices that support U.S. agricultural exports and the Food Safety Inspection Service (FSIS), which has authority over the safety of meat and poultry products. The Food and Drug Administration (FDA) regulates a broad array of foods, food ingredients, food contact surfaces, veterinary drugs and other products. However, for imported foods, under the

authority of the Food Safety Modernization Act, the FDA will be delegating its authority to private third-party certifiers of food export facilities.[20]

Another industry potentially affected by the negotiations is dairy. While the EU wants to lower tariffs to increase dairy exports, European offices of global agribusiness firms, like their U.S. counterparts, are demanding the removal of non-tariff barriers.[21] In any case, the historic deadlock between U.S. and EU trade negotiators will almost certainly make discussions on SPS a central point of contention in the TTIP negotiations. The most salient topics in these talks include:

Genetically modified organisms (GMOs)

The Coordinated Framework for Regulation of Biotechnology of 1986 remains the basis for the regulation of U.S. agricultural biotechnology. The policy assumed, nearly a decade before any GMOs were commercialized, that GMOs were "substantially equivalent" to their traditional counterparts and posed no risks that would require specific legislation or risk assessments. As a result there is no required pre-market safety testing, and no applications to commercialize GMOs have been rejected.[22] Although the 1986 policy is supposed to be "science-based" and the scientific basis of the policy is now 30 years old, nearly a decade of efforts to revise the policy to take into account new science, e.g., in targeted gene modification and synthetic biology, have floundered.[23] There is likely great concern among U.S. and industry officials that the legal premise of "substantial equivalence" cannot hold up in light of subsequent scientific publication.

U.S. crop exporters and seed companies are relying on removal of SPS barriers on GMOs to increase exports under TTIP. A U.S. Grains Councils letter to USTR notes the wide variability in the tonnage of U.S. feed grain exports to European Union member states, e.g., "6,000 tons in 2008 to 944,000 tons in 2011."[24] Remarkably, the letter characterizes the primary reason for this variability not as a result of falling demand or of price increases and volatility resulting from bank and hedge fund speculation in commodity markets,[25] but as a result of "asynchronous biotechnology policy" and asynchronous commercialization approvals that "prevent market access." They assert that, "This variability in exports can be tied to [the] timing of EU approvals of GM corn traits." This remarkable explanation for export variability is buttressed with anecdotal claims, not export figures to EU member states that could have been readily cited from Department of Commerce statistics. The explanation also fails to take into account longer-term competition from countries that have expanded their feed grain acreage and exports.[26]

Given the Grains Council's single-factor understanding of export variability, it is no surprise that it urges USTR to negotiate the TTIP SPS chapter so as to make the EU regulatory review system for GMOs just like the U.S. commercialization approval system. The Grains Council notes that more and more GMO varieties approved by U.S. agencies are multi-trait "events," e.g., a trait to allow application of a certain pesticide with a trait claiming that to confer drought tolerance. The Council letter then states "in the United States, when a single event is approved, any combination of that event with other approved single events is automatically approved (or is approved thereafter with a fast-track procedure). The EU conducts a separate risk assessment for stacked events [multi-trait varieties]."[27] The U.S. approval system assumes that there will be no environmental or public health risk from the interaction of approved single trait varieties. The EU risk assessment system makes no such assumption. The Grains Council looks to the USTR to negotiate an SPS chapter that will synchronize the EU risk assessment process with the U.S. automatic approval process in order to expedite U.S. exports.

Livestock growth hormones, poultry carcass rinses and mad cow disease

Industry letters concerning the use and levels of livestock growth hormone residues in meat and poultry carcass rinses in poultry processing are indicative of the SPS barriers to trade in meat and poultry that the USTR will seek to remove in the TTIP. In addition, the North American Meat Association invokes a recently approved standard of the Codex Alimentarius Commission for ractopamine as demonstrating that the failed asthma drug, used in the U.S. for about 20 years to increase livestock growth before slaughter, is "safe."[28] Ractopamine has been banned in many countries, including the EU, both because of its impacts on animal health, and due to concerns that the accumulated consumption of ractopamine in meat could interfere with the control of asthma by other medications. The extremely controversial Codex vote on a ractopamine standard, approved by a margin of two of the more than 180 government members, was based on a literature review of six studies, three furnished by the ractopamine manufacturer. The EU strongly opposed the standard and fought back a U.S. attempt to pass a standard for recombinant Bovine Growth Hormone, on similarly limited and outdated studies.[29]

Chlorine rinses of poultry are also a subject of controversy. Under a proposed USDA rule to privatize poultry carcass inspection (HACCP Inspection Model Project - HIMP), plant employees would have only about a third of a second to "inspect" the carcass for fecal matter and deformities that are not classified as "contaminants" under USDA rules.[30] Rinsing the carcasses with various diluted chemicals is the only way

to maintain the line speeds, despite myriad worker injuries, and have not have systemically contaminated poultry products. Despite the excoriation of HIMP by the General Accountability Office,[31] the USDA and poultry industry continues to insist on the efficacy of privatized inspection and the safety of the poultry rinses.[32] The U.S. made acceptance of the poultry rinse a top priority in the Transatlantic Economic Council[33] and will very likely use the TTIP as another forum for exporting poultry with fecal matter decontaminated with the rinses.

Mad cow disease: a bargaining chip?

A May 10 letter from the National Cattleman's Beef Association (NCBA) to the USTR indicates that the U.S. regulatory regime for preventing Bovine Spongiform Encephalitis disease (BSE, popularly known as mad cow disease) may become part of the TTIP bargaining process. The risk of BSE, a fatal neurological disease in livestock that is acquired by humans through the consumption of meat from infected animals, is deemed by the World Animal Health Organization (WHO) to be "negligible" in the United States.[34] The USDA characterized the last reported instance of BSE in U.S. herds, in April 2012, as "atypical" and not tied to the most likely vector of infection, the beef cattle consumption of animal feed containing rendered bovine products.[35] As a result, the U.S. "negligible" status was not down graded to "under control," the status of BSE risk in several EU member states, above all the United Kingdom, the epicenter of BSE infection in the 1980s and 1990s.

NCBA claims that "certain European Union member states continue to link their support for approval of lactic acid to the publication of a comprehensive BSE rule."[36] In February, The European Commission approved a rule to allow lactic acid rinse to decontaminate beef carcasses.[37] However, rule approval is not tantamount to EU member state implementation of the rule.

The USDA has had a draft rule under consideration since 2008 for the import of bovines and bovine products from countries that have had BSE. One factor delaying publication of a final rule is that the United States might have to allow beef imports from countries in the EU that have a BSE surveillance inspection rate of cattle similar to that used in the United States (40,000 post mortem inspections out of a herd of 35 million in 2012). The draft rule has been the subject of a lawsuit, for failure to protect U.S. cattle, domestic cattle producers and U.S. beef consumers.[38] EU member states wanting to export their beef to the United States might litigate under the TTIP if the USDA's final BSE import rule required more stringent surveillance inspection of EU herds than of U.S. herds.

Human tolerance for agricultural pesticides on agricultural crop exports

The regulatory metric for human tolerance to pesticide residues in agricultural crops is Maximum Residues Levels (MRLs). In lobbying letters to the USTR, both pesticide manufacturers and crop exporters complain that EU import MRLs are too stringent, too costly and require too much information to satisfy EU member state import authorities. The U.S. Hop Industry Plant Protection Committee proposes a typical, if generic, solution to this complaint: "In the TTIP, establishing a way to streamline import tolerances in the EU and harmonizing MRLs with U.S. levels would be very much appreciated."[39]

Nanotechnologies and nanomaterials

Nanotechnology involves the synthesis, visualization and manipulation of materials at the atomic to molecular-sized level for use in industrial, consumer and agricultural products and processes. The size, shape and configuration of Engineered Nanoscale Materials (ENMs) confer material properties that are of great commercial interest to a broad range of industries. For example, nanoclays and and nano-titanium dioxide incorporated into food packaging biopolymers would retard oxidation and allow meats, fruits and vegetables wrapped with such bio-polymers to appear to be fresher for a longer period.[40]

However, the manufacture of ENMs and their incorporation into consumer and industrial products is not regulated either in the EU or the U.S. The TTIP negotiators are tasked to provide a least trade restrictive framework for harmonizing SPS regulations on nanotechnology, when regulations do not yet exist. According to some advisors to USTR, the TTIP should be negotiated to prevent regulatory divergence that would impede trade in products with ENMs. For example, the American Chemical Council advocated to the USTR that the EU should drop its particle count based definition of nanomaterials and adopt a weight-based definition supported by the ACC in the International Council of Chemicals Association as a "solid basis for Transatlantic cooperation" to remove non-tariff trade barriers to ENMs.[41]

It is a matter of considerable controversy as to whether a weight-based definition of ENMs would be a practical definition for regulators, especially for import inspection and testing.[42] While there are several means to visualize nanoparticle count for the purpose of determining the properties of an ENM or ENM compound, a weight-based ENM definition could prove to be impracticable for the purpose of determining whether environmental health or safety risks were significant in a product incorporating ENMs. For example, the amount of nanosilver in a pesticide product would be less relevant to judging its safety and efficacy than the mass to

surface ratio that enables nano-enabled pesticides to apply to more of the surface of the target pest than macro-counterparts to those pesticides. However, a potential controversy over the scientific bases for a regulatory definition of ENMs is just one of many that TTIP negotiators will try to head off in the generic SPS legal framework.

The EU rules targeted by U.S. agribusiness and industry go well beyond those outlined here. To avoid creating public controversy, it is very unlikely that EU laws or even regulations will be challenged directly. However, to judge by the agribusiness rejection of the USTR proposal for an SPS consultation mechanism in the Trans-Pacific Partnership agreement negotiations, it is unlikely that agribusiness will be satisfied until all EU food safety, animal health and plant health laws, regulations and implementing and enforcement measures are subject to an investor-state dispute settlement process.[43] They are apparently unconcerned that U.S. SPS standards could be overturned by challenges emanating from the European affiliates of U.S. agribusiness firms.

Chemical policy reforms and TTIP*

While trade agreements tend to focus on removing barriers to the free flow of goods and services, including regulatory barriers, that impulse must be tempered by broader social and public health goals around our food system. Rules on the use of potentially toxic chemicals fall under what are called Technical Barriers to Trade, and will undoubtedly be on the agenda in the TTIP negotiations. Because the EU takes a very different approach to regulating toxic chemicals than the U.S., how these rules are negotiated could have important ramifications for environmental and public health.

The growing movement for healthier, more sustainably produced foods around the world focuses not only on how foods are grown, but also on what happens between the points when they leave the farm and arrive on our plates. There is growing recognition of the downside of processed foods, including the role of questionable additives used as preservatives or flavor enhancers. It is not only what's in the food itself, but also how it is packaged that matters, especially when potentially toxic chemicals leach out of those containers and into our foods and our bodies.

We are only now coming to understand the full impacts of the use of industrial chemicals in and on our food.[44] Their use in both agriculture and consumer products results in daily exposure to an array of chemicals that builds up in the food chain. We are also exposed to some of these same chemicals from other consumer products and building materials. Of particular concern are chemicals recognized as hormone disrupters that impact the delicate hormone balance in the human body.

Hormone disrupters are especially harmful because they can exert health impacts even at minute levels of exposure and exposures in the womb can have lifelong impacts. Emerging science points to their role as obesogens. A 2011 U.S. National Institute of Environmental Health Sciences (NIEHS) expert workshop concluded that the scientific literature supports a link between certain environmental chemicals and increased risk for obesity as well as Type 2 diabetes.[45]

These chemicals can affect the size and number of fat cells or the hormones that regulate appetite and metabolism. They can also cause changes in gene expression, or epigenetic changes, which can have intergenerational impacts. Prenatal and early life exposures to chemical obesogens are especially impactful, as they may alter metabolism and development of fat cells over a lifetime.

Bisphenol A (BPA), to cite just one example, is a chemical component of polycarbonate plastic used in many food and drink containers and in epoxy resins used as coatings in food cans. The U.S. Centers for Disease Control (CDC) biomonitoring program has detected BPA in the urine of 93 percent of adults sampled.[46] Scientists have measured BPA in the blood of pregnant women, in umbilical cord blood and in the placenta.[47] BPA disrupts hormones in the human body and animal studies show that low-dose early life exposure is linked with reproductive and developmental problems, genetic damage[48] and cancer.[49] There is growing evidence from both animal and human studies of BPA's obesogenic effects.

In addition, exposure to phthalates, which are hormone-disrupting chemicals commonly found in plastics and fragranced personal care products, has been linked to liver and thyroid toxicity, reproductive abnormalities and adverse effects on the respiratory system, including asthma.[50] There is also evidence that DEHP, a phthalate used in PVC, is an obesogen.

Unfortunately, despite these risks, the regulation of these chemicals is at an early stage in both the U.S. and EU. There are no limits in the U.S. on the use of BPA at the federal level, but 12 states (California, Connecticut, Delaware, Illinois, Maine, Maryland, Maine, Minnesota, New York, Vermont, Washington and Wisconsin) have banned BPA in baby bottles and cups. The bans in Vermont, Connecticut, Minnesota and Maine also include baby food and formula containers.

While the EU has not banned endocrine disruptors, Denmark, France, Belgium and Sweden have each banned the use of BPA in all food containers used by children under three

*Chemical policy reforms and TTIP was written with Kathleen Schuler, IATP.

years old. Denmark is phasing out the use of four phthalates (DEHP, DBP, DIBP and BBP) in shower curtains, table cloths and other consumer goods because of their impacts as endocrine disruptors. In March, the European Parliament approved a resolution introduced by Swedish Member Asa Westlund calling for the EU to designate endocrine disruptors as "substances of very high concern" under its Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) process.[51]

Designating a chemical as a "substance of very high concern" puts it on a fast track for serious review within the REACH process. REACH, which was established in 2006, puts the burden of proof on companies to establish the safety of the chemicals they use. It establishes a process of registration, evaluation and, if harm is established, restriction of those chemicals.[52] It is firmly grounded in the precautionary principle to ensure that chemicals are safe before they enter the broader environment. Using a hazard-based approach, it identifies unacceptable properties, establishes a process to generate information about whether particular chemicals cause those impacts, and encourages the substitution of chemicals deemed hazardous with safer alternatives (which, in many cases spur innovation within those industries).[53] Companies are required to develop and submit information on the safety of both new and existing chemicals.[54]

In the U.S., chemical safety is regulated under the Toxic Substances Control Act of 1976 (TSCA). In contrast to REACH, TSCA grandfathered in thousands of chemicals. The EPA has required safety testing on just 200 of the over 80,000 chemicals used in commerce. It utilizes a "risk-based" approach, which requires a complete risk assessment by government authorities before any regulations are enacted. In practice, this puts the burden of proof on the US Environmental Protection Agency (EPA) to prove that chemicals are unsafe, rather than on the industries producing the chemicals to prove that they are safe before they enter the market.[55]

TSCA requires the EPA to consider the economic impacts of restricting a chemical in addition to environmental health and safety considerations. To illustrate TSCA's failings, after ten years of rulemaking, the EPA's proposal to ban asbestos was shot down by the courts because the economic burden on industry threshold was not satisfied. Efforts to reform TSCA so that it better regulates toxic chemicals in consumer products, including chemicals that might be used in food packaging, are underway, with important votes in the U.S. Congress taking place in 2012 and 2013, but no changes have been enacted yet, and current prospects for change seem slim.

The presidential office of the U.S. Trade Representative (USTR) has been pushing back against REACH since its inception, citing its approach as a Technical Barrier to Trade (TBT). In its yearly report on TBTs, USTR states that it has raised concerns about REACH at nearly every meeting of the WTO's committee on TBTs since 2003, saying that its stricter process unfairly limits U.S. exports.[56]

The conflicts between those very different regulatory approaches will likely be on the agenda in the TTIP negotiations. In the report of the joint High-level Working Group on Jobs and Growth, both the U.S. and EU point to the need to lower "behind the border" barriers to trade, i.e., regulatory issues that constrain the free flow of goods, services and investment. Rules on chemicals would be dealt with in the Technical Barriers to Trade chapter, which would "go beyond" disciplines agreed to at the World Trade Organization, "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."[57]

This point is echoed in submissions to USTR by the American Chemistry Council, United States Industrial Fabrics Institute, Transatlantic Business Council, Dow Chemical Company, National Foreign Trade Council and DuPont, among others. The American Chemistry Council specifically cites objectives on endocrine disrupters, saying, "A lack of regulatory compatibility with respect to endocrine disrupting chemicals could have a significant impact on trans-Atlantic trade, on agricultural as well as industrial goods."[58]

It may be that these differences really are too big to bridge in the trade talks. In its position papers developed in preparation for the first round of TTIP in July, the European Commission Trade Policy Committee recognizes that the fundamental differences between TSCA and REACH means that, "neither full harmonization nor mutual recognition seem feasible on the basis of the existing framework legislations in the U.S. and EU." It prioritizes cooperation in identifying chemicals for assessment, promoting alignment in classification and labeling of chemicals, cooperation on emerging issues (including endocrine disruptors), and enhanced information sharing, particularly how to exchange data obtained from reports including confidential business information.[59]

Both the U.S. and EU have expressed interest in exploring mutual recognition agreements that would recognize results of safety assessments in one country being treated as valid in other parties to the agreement. In his testimony to the

U.S. Congress, Carroll Muffett, President of the Center for International Environmental Law, stresses that, "Mutual recognition in the chemical sector and other sensitive sectors involving public health, safety or the environment is wholly inappropriate. For chemicals, mutual recognition provisions would essentially erase the measures for chemicals that are restricted in only one jurisdiction[...]Such provisions could subject European citizens to the inability of U.S. regulators to take meaningful steps toward chemical safety under a deeply flawed TSCA."[60]

There is also a risk that these provisions, as well as the drive for "regulatory coherence" at the sub-federal level that runs throughout the TTIP objectives, could limit the progress of locally driven initiatives to move up the ladder to federal or EU-wide regulations. In the cases of endocrine disruptors such as BPA and phthalates, real progress is starting at the state level in the U.S., and at the member state level in the EU, and then building up toward meaningful change at the federal levels. The science on the impacts of these harmful chemicals in our foods is evolving, both on recognized hazards contributing to reproductive problems and cancer and in their role as obesogens. Any agreement reached in TTIP should be firmly grounded in the precautionary principle and strive to achieve the highest possible level of harmonization, rather than putting up new roadblocks to progress in removing harmful chemicals from our food systems and environments.

Procurement policies and local foods

Efforts to promote healthier, more sustainably produced foods span the entire food chain, from farm to table, and increasingly, from farm to school, hospital or other public institution. These programs recognize the value of fresh, healthy foods, and contribute to making connections between urban consumers and farmers, thereby promoting sustainable livelihoods. There are thousands of farmers markets, farm-to-supermarket efforts and other voluntary initiatives along those lines throughout the United States and Europe.

As part of this movement toward local foods, new governmental programs are emerging that include bidding preferences for sustainable and locally grown foods in public procurement programs. In the United States, the 2008 Farm Bill specifically authorized public schools to include geographic preferences for locally grown unprocessed foods in their purchasing decisions.[61] This goes beyond the Buy America provisions for those programs that for the most part require purchases of U.S. foods (allowing, of course, for imports of fruits and other foods not produced in the United States). The Farm to School programs (which are funded through USDA and state governments) take those kinds of preferences a step farther, including bidding criteria for fresh foods that are sustainably produced and grown locally. Chicago Public Schools even included preferences for antibiotic free, locally grown chicken in its school lunch program, which reaches students in 473 schools.[62]

These programs now reach almost six million students in all 50 states. These popular initiatives have been successful both because they help the school systems to source fresher, healthier foods at fair prices and because they support urban to rural connections that build communities and encourage local economic development. New proposals to broaden that approach to foods for hospitals and other public institutions have emerged in Minnesota, Oklahoma, Vermont and other states.[63] In 2013, lawmakers in Oregon approved $1 million for a new program that couples food and garden education programs with purchases of healthy and sustainable foods for school lunches from local farmers.[64]

Similar initiatives in Europe also encourage local preferences for school lunch programs. In Italy, for example, schools consider location, culture and how foods fit into their educational curriculum in making purchasing decisions.[65] As of 2010, 26 percent of school food purchases in Rome were from local farmers and 67.5 percent were organic. EU procurement rules seem to limit such preferences, but Denmark, Austria and other countries have interpreted those rules liberally to allow for sustainable and locally procurement of food in various public programs.[66]

In the United States, Food Policy Councils are also emerging to bring together farmers and gardeners, restaurateurs and wholesalers, food workers and local government representatives and other stakeholders to generate locally grounded proposals for healthier, more sustainable foods. The programs they develop run the gamut from purely private, voluntary initiatives to public procurement programs for local schools and public feeding programs. One of the most ambitious, the Los Angeles Food Policy Council, has made procurement a central element of their programs. They developed the Good Foods Purchasing Pledge (GFFP):

> The program promotes increasing levels of achievement in five crucial categories: (1) local economies, (2) environmental sustainability, (3) valued workforce, (4) animal welfare, and (5) nutrition. A tiered, points-based scoring system allows participants to choose which level of commitment best suits the Good Food goals of their organization. Participants are then awarded one to five stars based on their total score. To encourage participation, our program provides technical assistance in sourcing, monitoring progress, and measuring and recognizing success.[67]

The City of Los Angeles and the Los Angeles Unified School District adopted the GFPP in October 2012. Together, their programs and facilities provide some 750,000 meals a day, creating new opportunities for local consumers, farmers and communities. Similar initiatives are under discussion in various cities around the country.

Unfortunately, these exciting examples of participatory food democracy could be at risk under TTIP. Both the U.S. and EU have criticized "localization barriers to trade." The EU, in particular, has been insistent on the inclusion of procurement commitments at all levels of government, for all goods and in all sectors.

This kind of initiative on sub-federal procurement commitments is relatively new in trade agreements. The original General Agreement on Tariffs and Trade (GATT) of 1947 explicitly excluded government procurement from national treatment. National treatment requires that foreign firms be treated like domestic firms and is a core tenet of the post–World War II international trade system. Government procurement was also excluded from the market access commitments of the General Agreement on Trade in Services (GATS), although Article XIII:2 of GATS led to a working party that is negotiating procurement within services at the WTO.

Procurement was one of the four so called Singapore Issues (along with investment, competition policy and trade facilitation), meaning it was added to the trade agenda after the creation of the WTO, at the first Ministerial, held in Singapore in 1996. New parties continue to join the agreement but there has been little enthusiasm from the General Council to add procurement as an issue for all members.

The main component of the WTO's work on government procurement is carried out in the plurilateral (rather than global) Agreement on Government Procurement (GPA). The GPA was first agreed to during the Tokyo Round in 1981 and significantly expanded as part of the Uruguay Round, which was concluded in 1994. The expansion extended to services not just goods, to sub-national levels of government (not just national government) and to public utilities (such as energy, water and public transport). The most recent changes to the agreement, further expanding its reach, were made in 2011. The GPA has 42 WTO members but only 15 parties, as the EU is a single party at the WTO, representing its 27 member countries. As with most WTO agreements, it has two parts: the rules and obligations, and the schedules of the individual members.[68]

Thirty-seven of the 50 U.S. states are part of the GPA. Governments at every level jealously guard their government procurement rights. The issue is already one that is expected to generate tension in the TTIP negotiations. The EU outlined its general objectives on public procurement in a "non paper" prepared in advance of the first round of negotiations for TTIP. It states that,

> 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.

In addition to that long-term ambition to build on commitments in TTIP at the WTO, the non paper describes the EU's intention to include U.S. states not already covered by the GPA and bilateral arrangements, as well as 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.[69]

The U.S. agenda on procurement is not as clear (as that text hasn't yet been leaked), but some indications emerge from a review of other recent bilateral trade agreements. Article 17.7 of the U.S.-Korea FTA, for example, specifies that Parties may include procurement criteria designed to conserve natural resources or protect the environment, or to ensure compliance with labor laws, which would seem to provide room to expand those criteria for other social goals. That agreement applies only to federal-level entities, and specifically excludes agricultural goods from procurement commitments. On the other hand, the U.S.-Peru FTA includes coverage of 30 branches of the Peruvian Universidad Nacional, 25 Peruvian provincial governments, eight U.S. states and Puerto Rico. So far, the FTAs negotiated by the United States have not included commitments on public feeding programs, but those commitments are re-negotiated with each specific agreement.

Both the USTR and the EU's Directorate of Trade have asserted that one of the major objectives in the TTIP (and other current trade negotiations) is to eliminate localization barriers to trade, including local content requirements. The EU has emphasized limits on Buy America programs, while the U.S. has produced an exhaustive list of what it considers problematic programs in its annual report on Non Tariff Barriers. This expansion of previous efforts to reduce local content preferences in government procurement contracts is relatively new,

which also means that civil society, local governments and legislators need much more information on exactly which sectors are at stake and how bidding criteria that include social, environmental and public health goals could be either threatened or accommodated in the trade commitments.

In a letter sent to USTR Michael Froman and EU Trade Commissioner Karel deGucht, some 34 food, farm and other civil society groups from the EU and U.S. laid out a number of concerns on the potential impact of the trade agreement on more sustainable food systems. Those concerns, along with the possible inclusion of farm to school and similar programs in the trade agreement, were also raised at the stakeholder event held during the first round of negotiations in July in Washington, DC. While the U.S. and EU trade officials did send written responses to the civil society concerns, they have been silent on this point. Instead, both the U.S. and EU should embrace this experience and develop new rules to facilitate its expansion to other initiatives.

TTIP and financial services

Financial firms on Wall Street and in European financial centers are paying close attention to TTIP negotiations on financial services. Of course, in the wake of the recent financial meltdown, the ramifications of a new regime for financial market regulation affect more than just the banks. The links between agriculture, food security, financial services and commodity market regulation are multifaceted. Financial services are, of course, necessary for a broad range of agricultural investments that contribute to the production and distribution components of food security. Farmers and ranchers, who often forward contract part of their anticipated crops to local elevators or sell livestock at auction, rely on commodity derivatives contracts to provide forward pricing benchmarks. Derivatives contracts include those traded on regulated exchanges, such as the Chicago Board of Trade, and the yet to be regulated over-the-counter (OTC) market of bilateral trades among financial institutions and their corporate clients.

But financial and commodity market rules, with relatively few exceptions, are written to be applied systemically, and not specifically to agriculture. There are a few exceptions, such as the Commodity Futures Trading Commission (CFTC) position-limit rule to limit financial speculation on agricultural and non-agricultural commodities. That issue has received considerable support from NGOs in favor of tighter regulations and strident opposition from the financial and non-financial firm members of the International Swaps and Derivatives Association, who have sued to prevent the implementation and enforcement of the CFTC rule.[70] However, commodity derivatives contracts comprise less than one percent of the value of all derivatives contracts, so regulators' focus has been squarely on systemic rules and their cross-border application.[71]

Following the near bankruptcy of the global financial system in 2008-2009 resulting from losses in OTC derivatives contracts by banks without reserves to cover these losses, the Group of 20 industrialized country leaders committed in September 09 to prevent future default cascades by requiring that all "standardized OTC derivatives" be paid for through central clearing houses. Centralized clearing, complete reporting of OTC trades and increased capital reserve required for the banks and other major financial institutions are supposed to prevent the contagion of bilateral OTC defaults to the entire financial system.[72]

In the U.S., that process played out through the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which passed Congress in 2010. The CFTC is charged with developing the specific rules and regulations needed to implement Dodd-Frank provisions on derivatives trading and commodity markets. Rulemaking has been completed on position limits and definitions of trading entities and commodities covered under Dodd-Frank, although legal challenges continue to arise. CFTC rules to enable trade data surveillance on the foreign affiliate trades of U.S. OTC dealer brokers have brought harsh criticism from foreign, particularly European, bankers and regulators.

At the same time, the regulatory process for the European Markets in Financial Instruments Directive (MiFID) has unfolded along related, but somewhat different, lines. The draft MiFID would allow each EU member state to establish position limits for the share of commodity derivatives contracts that a financial entity can control.[73] The draft also allows an option for EU member states to allow a continuation of the current practice of "position management," in which the trading venues, not government regulators, "manage" contract position. Since trading venues benefit in fees by maximizing the volume of trade, this form of "self-regulation" has been ineffective in preventing excessive financial speculation in commodity contracts.

The draft MiFID would exempt OTC derivatives contracts from position limit reporting, a direct conflict with the CFTC position limit rule, which requires positions taken in OTC contracts, as well as currently regulated futures and options contracts, to be aggregated to determine the position limit for a given contract. Setting ex-ante position limits requires regulators to collect and analyze data to determine a position limit that would allow commercial hedgers to manage commodity price risks, while allowing enough speculative capital to enable commercial hedgers to trade their positions.[74]

While the MiFID process has not yet dealt with the aggregation of all positions (including OTC), in position limits as mandated in the Dodd-Frank legislation and subsequent CFTC rule-making, it has led the way on other important issues, notably high -frequency trading (HFT).[75] Those trades, carried out electronically in microseconds, have enormous potential to amplify distortions in commodity prices, since agricultural contracts are often bundled in with energy, metals and other commodities.[76]

Cross-border rules continue to be a difficult area for U.S. and EU regulatory agendas. In the U.S., the CFTC recently extended the deadline for compliance with its cross-border rules, following a joint communiqué with the European Commission that outlined a "Path Forward" toward resolving differences in OTC derivative regulation.[77] However, the regulatory cooperation plan announced in the "Path Forward" will not suffice for the European Commission.[78] And the Office of the U.S. Trade Representative, loathe to exclude any sector from the TTIP lest the EC demand its own sectoral exclusions, has agreed to include negotiations on financial services, and announced that one person from USTR and another from the Department of the Treasury will lead those negotiations.[79]

On July 15, Michel Barnier, director general for internal markets of the European Commission, put his marker down at the outset of the TTIP negotiations: "It's impossible and it won't work," if financial services are excluded from the TTIP. He characterized some U.S. financial regulations as "discriminatory" against European financial institutions, pointing to a proposed Federal Reserve Bank rule that would require non-U.S. banks with significant activity in the U.S. to set greater capital reserves to cover losses of those banks in U.S. markets. Indeed, Commissioner Barnier threatened to recommend to EU member-state banks capital reserve requirement retaliation if the Fed passed the rule.[80] (A new Commission will be selected in 2014, so it is not clear that Commissioner Barnier will able to make this recommendation himself.) A financial services chapter in the TTIP, according to Barnier, should enable a "general framework" of mutual recognition of U.S. and EU regulatory regimes as equivalent, rather than the side-by-side comparison of rules that would take place in a CFTC or European Securities Market Authority comparability determination. Barnier's position reflects that of the Transatlantic Business Council.[81]

However, the Fed is also pressuring U.S. banks to set aside more and more secure reserves (Tier One capital) to cover trading losses.[82] If the Fed reserves rule applies to U.S. banks as well as to foreign ones, any retaliation could be directed at the Fed rule within the framework of a TTIP investor-state dispute settlement process, e.g., Deutsche Bank suing the U.S. government. The Fed loaned European private banks and the European Central Bank about $16 trillion at ultra-low interest rates between 2007 and 2010 to save the transatlantic financial institutions from bankruptcy.[83] It seems unlikely that the banks would sue under the Fed capital reserve rule. But they well might sue under the TTIP due to the implementation of a CFTC rule that they claim had impaired anticipated bank profits.

According to a recent U.N. Conference on Trade and Development (UNCTAD) briefing note, at least part of investor claims were granted in 70 percent of 31 publicly disclosed investor-state cases in 2012. Nine cases awarded damages to the private investor, the largest, in Occidental Petroleum v. Ecuador for $1.77 billion.[84] In comparison, U.S. banks reported $7.5 billion in derivatives trade revenues in the first quarter of 2013 alone, and four banks are counterparties to 93 percent of all derivatives trades.[85] Given the scale of these revenues, it is probable that an investor-state lawsuit by one of the European banks could seek the largest damage awards by far of any investor-state dispute. The prospect of such a lawsuit might cause a government to refrain from issuing a rule.

Current proposed U.S. legislation would require federal financial regulators to specify the costs to industry of each and every rule prior to issuing it. One industry study estimated the initial cost to industry of complying with the Dodd-Frank implementation at $3–5 billion, with some companies purportedly losing 20–30 percent of their profits to Dodd-Frank compliance costs.[86] Allowing the definition of investment included in investor-state dispute settlement to apply to financial services would enable industry complaints about compliance costs to be used as evidence of "nullification and impairment" of anticipated benefits from TTIP. There is a large and growing international law practice eager to argue before private arbitration tribunals, rather than public courts of law, that the government regulations are taking billions of dollars from their corporate clients.[87]

Text-based TTIP negotiations will begin in October 2013 in Brussels.[88] Nobody will know the specific content of those negotiating texts, save for the negotiators and the security cleared advisors of the advisors, mostly lobbyists for transnational corporations. The opacity of trade negotiations and the USTR "listening sessions" for NGOs without feedback contrast markedly with the relatively transparent financial and commodity market ruling making process. Effective implementation of transatlantic agreements on OTC derivatives regulation could well be short circuited by the investor state litigation opportunities offered by the "general framework" on TTIP financial services advocated by Commissioner Barnier and the Transatlantic Business Council.

In general, U.S. and EC negotiators' insistence that neither regulation, legislation nor the public interest will be compromised by the threat of investor-state litigation under the TTIP and other free trade agreements is unconvincing.[89] The FTA current impasse of the EU-Canada over financial services[90] may well be the future of the TTIP negotiations, as proposals for financial service market access contain embedded prohibitions against specific kinds of rules.

How might a financial services chapter affect the cross-border regulation of agricultural derivatives? If the final MiFID exempts OTC derivatives from position limit calculations, the European affiliates of U.S. OTC dealers and European headquartered OTC dealers would continue business as usual to the detriment of commercial hedgers and consumers, unless the CFTC barred them from U.S. markets due to the OTC exemption in MiFID. How long would it take a large European OTC dealer broker, such as Barclays, to sue the CFTC for violating the "general framework" of mutual recognition of market rules under a TTIP financial services chapter? Because there is so much at stake, NGOs will raise such questions about a TTIP financial services chapter and agricultural commodities even in the absence of access to the negotiations text. Adding a financial services chapter that is "fully enforceable" by investor-state lawsuits, will change the balance of power among the economic sectors in the U.S. and the EU. The financialization of the global economy, i.e., the dominance of goods and services provision by mega-banks, arguably has triggered the Great Recession in which we still live.[91]

Conclusions

While there may be legitimate reasons to develop regulatory coherence between the U.S. and EU, those discussions need to happen under conditions of full transparency and should not be subsumed within a trade agreement. They should aspire to prohibit—rather than promote—efforts by corporations to play off regulatory standards in one jurisdiction against the other.

Any efforts to develop coherent approaches need to achieve a delicate balance on at least three dimensions: the appropriate level of decision-making (subsidiarity); the right risk assessment and technical capacity; and fair and sustainable livelihoods and prices for farmers and consumers. Achieving the right balance among those complex topics within the context of a trade agreement, in which proposals on any one of those issues could be traded off for market access or other proposals on entirely different issues, seems fraught from the outset. This is a risky approach in any element of the trade agreement, but is especially problematic in the arena of food and agriculture, which touches on public health, rural and urban economies and environmental protection.

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 move for GMO labeling laws at the state level may eventually come into conflict—or ultimately influence—federal policy on that issue, and will undoubtedly raise the public profile of GMO safety across the country. 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 such as farm to school programs or restrictions on food additives or technologies based on emerging science, and the economic pressures driving commercialization even when the risks are not fully understood.

There is ample room for cooperation among regulators in the U.S. and EU on issues related to food safety and food markets. Discussions on the implementation of commodity market reforms and more coherent definitions on position limits and swaps dealers, for example, hold real potential to calm turbulent markets into a more sensible and transparent system of price formation. Similarly, discussions of locally appropriate standards for chemicals or food additives or technologies benefit from shared knowledge across the Atlantic. On the other hand, the pressure for mutual recognition agreements in TTIP on chemical policy and financial reforms, among others, creates the conditions for a push to the lowest standards prevalent in either jurisdiction.

Those discussions always reflect pressures from competing interests, but they are also always enhanced when they take place under conditions of transparency and full information. That will not be possible in TTIP as long as the negotiations remain shrouded in secrecy. This is a general problem that runs throughout the trade agreement. As an example, a starting point for discussions focused on food systems would be for governments to publish information, including submissions from industry, civil society and governments, on:

1. Approaches to food safety, GMOs and food additives within the chapter on SPS.

2. Proposals to protect or weaken the EU's use of the Precautionary Principle in setting food and chemical safety standards.

3. Definitions of the goods and services to be included in discussions on procurement, and whether emerging

preferences for locally and sustainably grown foods will be protected in those accords.

4. Proposals to harmonize Dodd-Frank rules on commodity markets with rules authorized under the Market in Financial Instruments Directive, the Market Abuse Directive and other EU wide legislation.

Governments should engage in meaningful discussions with all stakeholders (not just cleared advisors) on these and other issues before each negotiating session and upon its conclusion. Those dialogues should also include frank discussions on the potential tradeoffs among sectors and hold open the possibility that the most productive avenues for progress could be outside of the trade talks, as happened with the agreement on organic standards. Careful discussions of appropriate rules for financial reforms, for example, should take place outside of the trade agreement to avoid derailing those complex and critical regulatory processes. Similarly, proposals to broaden the definition of investment to include SPS and financial market regulations, making them subject to challenge under investor-state dispute resolution, should be firmly rejected.

If this is truly to be a "high standards" agreement, if there is any hope that "harmonization" does not mean toward the lowest common denominator, then the U.S. and EU governments need to start from a thorough redefinition of "regulatory coherence" that prioritizes human and environmental well being over market openings. This could be an opportunity to recast the public debate in the United States (and perhaps even in the EU) on the Precautionary Principle as a sensible, scientific, and democratic approach to technologies that are advancing much more rapidly than knowledge on their safety.

This transparent and flexible approach seems entirely improbable given statements made by the governments up to this point. Improbable isn't the same thing as impossible though. That current approach is a political choice; alternatives are entirely possible. If not, and if the talks are to continue along the lines of other recent trade agreements, then civil society and policymakers should seriously consider putting a halt to the TTIP until a different approach is underway.

Endnotes

1. From World Trade Organization database on International Trade and Market Access Data.

2. See William Waren, "Is the Trans Pacific Partnership trade agreement draft chapter on regulatory coherence an environmental hazard?" Friends of the Earth Issue Brief, 2013 for more on this issue.

3. "Froman Calls On EU Regulators To Be More Like Their U.S. Counterparts," Inside US Trade, October 1, 2013.

4. Since the July talks, the EU published versions of some of its initial position papers (which has already been leaked), along with contact information for negotiators. It is not yet clear if they will continue to provide updated summary information along those lines.

5. http://www.usda-eu.org/trade-with-the-eu/trade-agreements/us-eu-organic-arrangement/

6. According to Rep. Alan Grayson, who was allowed to view but not copy edited versions of the text for the Trans Pacific Partnership, 500 of the Trade Committee Advisors represent corporations or trade associations, and 100 represent unions, farmers and other civil society groups.

7. DG Trade: Trade Negotiations Step by Step, September 2013. http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf.

8. "EU initial position paper on SPS matters for the TTIP negotiations- Without prejudice," June 20, 2013. http://www.iatp.org/documents/european-commissions-initial-position-papers-on-ttip.

9. 2013 Report on Sanitary and Phytosanitary Measures, Office of the U.S. Trade Representative, March 2013, at 5. http://www.ustr.gov/sites/default/files/2013%20SPS.pdf.

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