



CC image courtesy of Flickr user harrington_alison

Five key takeaways from the TTIP leak for food and farming systems

The leaked Transatlantic Trade and Investment Partnership (TTIP) negotiating texts published by Greenpeace Netherlands¹ on May 2 provide a crucial snapshot of the status of the trade talks. While a fair amount of information has either leaked or been published by the European Commission on its positions, this is the first detailed information on U.S. TTIP proposals.² The information is incomplete. Many key chapters, such as those on investment and on energy, remain undisclosed to the public. Annexes that specify exactly which sectors would be affected by a particular chapter are also absent.

Still, these documents confirm many of the most serious concerns civil society organizations have been raising since the inception of the talks. Almost three years into the negotiations, very little is agreed upon in the consolidated text. Instead we see long sections of “bracketed” texts indicating significant differences between the U.S. and EU. However, looking at the U.S. and EU proposals along with an EU “Tactical State of Play” document, the leaked TTIP text provides important insights into the direction of the trade talks, and raises alarm bells for advocates of fair and sustainable food and farming systems, among them:

FIVE TAKEAWAYS

- Secret science would help streamline biotech approvals
- Local governments could be required to abandon buy local requirements
- Tariff reductions could disrupt local farming systems
- Proposals on regulatory cooperation would lower standards
- Coordination on agriculture policy could undermine the interests of developing countries



TAKEAWAY 1

Secret science would be used to streamline “modern agricultural technology” approvals.

Based on its proposals on food safety rules, known as Sanitary and Phytosanitary (SPS) measures, the U.S. Trade Representative (USTR) is seeking to export a flawed regulatory system to the EU based on risk assessments that rely on inadequate, secret data. Risk assessments for imports of products not already approved in the importing Party (United States or EU) would be based on “available data.” In the U.S. experience, this means that regulatory approvals would not be determined on the basis of a weight of evidence in publicly available and peer-reviewed science, but on the basis of what risk managers and assessors—often in response to Confidential Business Information (CBI) claims³—judge to be “reasonably available and relevant” scientific data. Article X.5 of the leaked text declares that, “each Party shall ensure that it takes into account relevant available scientific evidence, including quantitative or qualitative data and information.” This is a near repetition of the standard of evidence that the USTR successfully included in the TPP SPS chapter. (TPP, Article 7.9.5) Leaving aside the question of what are qualitative data, the key loophole in this provision lies in what scientific evidence is “available” for a risk assessment.

In the U.S. regulatory system, it is routine for commercial applicants to claim CBI status for evidence in an application to deregulate a product, and the CBI claim is seldom, if ever, denied. As a result, the data and information are what the commercial applicant wishes to submit, according to broad regulatory requirements, thus preventing a robust and independent risk assessment prior to commercial release. This approach would undermine the EU’s reliance on the Precautionary Principle, under which commercialization applications can be rejected when the science is not yet settled or when data is insufficient to enable a risk assessment.

For example, on April 13, 2016, the U.S. Department of Agriculture (USDA) informed the developer of a genetically engineered mushroom, developed with the CRISPR Cas-9 gene editing technology, that based on information provided by the company, it would not regulate the GE mushroom.⁴ The USDA, rather than performing a risk assessment to determine unintended effects resulting from the CRISPR Cas-9 techniques, simply trusts the information presented by the product developer as the basis for deregulating the gene-edited



mushroom. This deregulatory rationale is similar to that of the proposals from the transatlantic biotech industry group New Breeding Techniques Platform (NBT Platform) to exempt new agricultural technologies from regulation under EU law.⁵ Under the USDA and NBT Platform logic, if the genetic modification of a plant or animal does not result from the insertion of foreign genetic material, it is unnecessary to regulate it.

In addition, the U.S. proposals would require EU authorities to explain not just their risk management decisions but also to discuss alternatives, presented in industry comments, to SPS regulations that are not part of each risk assessment. In essence, every step of regulation is subject to revision or reversal as a result of industry comments. At the same time as the U.S. demands complete risk assessment “transparency,” industry will be able to pick and choose which studies and data it presents for deregulation of its products. In sum, the “Science and Risk” approach, incorporated into the leaked provisions, increases the already steep burden of proof on governments to justify SPS rules while placing no burden on industry to demonstrate that its products, including novel foods and agricultural products, are safe.

The U.S. proposals include a new provision on “Regulatory Approvals for Products of Modern Agricultural Technology.” Article X.12 establishes an approval

process for the sale or use of those products. Products of “modern agricultural technology,” including food and agri-nanotechnology, are not currently regulated and therefore are not approved by government agencies. Instead they are **deregulated** following voluntary

and confidential consultations with industry lobbyists. For example, the Center for Food Safety and five other NGOs sued the Environmental Protection Agency for failure to regulate engineered nanoscale silver in pesticide products.⁶

TAKEAWAY 2

Local governments could be required to abandon local-content requirements on many projects, even if they do not sign on to TTIP.

One of the EU’s key offensive interests in the trade talks has been to open U.S. public procurement programs at all levels of government to bids by EU firms, removing policies that support local employment, local content or portions of contracts set aside for small businesses. As indicated in the Tactical State of Play document, so far, the U.S. has been cool to proposals to commit local governments on procurement. Exactly which state or local governments or institutions would agree to those commitments would be indicated in an annex to the Procurement chapter text. That annex was not leaked, and probably doesn’t yet exist.

In addition to bracketed language in Article X.4.3 that would “immediately and unconditionally” cover both national and local government goods, services and suppliers, the EU is advancing a bold new “flow down” proposal, which would broadly cover local entities. In paragraph 4 of Article X.2 on Scope and Coverage, projects that are more than 50 percent funded or covered by national or local governments that have signed on to TTIP, but are not otherwise directly covered in the text, would be required to follow the rules those agencies have agreed to. This provision appears to be a catch-all that would sweep within its ambit not only state and local government projects but also nonprofit enterprises, utility districts, universities, hospitals and potentially state Medicaid contracts (“project” is not defined in the text, but services are covered). For example, since Medicaid provides medical transportation services to clients, these contracts would be covered by the procurement disciplines if funded more than 50 percent by a covered federal agency.

We do not know the U.S. position on this EU proposal. If the TPP is the model for the U.S. position in the TTIP negotiations, that agreement excludes state and local procurement from the disciplines of the procurement chapter (with the proviso that negotiations to include sub-central procurement must commence



within three years) and did not include provisions that would indirectly bind federally-funded projects. TPP Annex 15-A in Section A, Note 1 exempts USDA funded “procurement of any agricultural good made in furtherance of an agriculture support program or a human feeding program,” which protects many Farm to School local procurement programs.

The leaked TTIP text goes further than the TPP in restricting local development preferences, known as “offsets.” It appears that EU and U.S. negotiators have agreed to a definition of “offset” in Article X.1(o) which is more expansive than that in the TPP. The TTIP text defines offsets as “any condition or undertaking that **encourages** local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, countertrade and similar action or requirement.” In contrast, the TPP definition limits the application of this prohibition to a “condition or undertaking that **requires** the use of domestic content” [emphasis added].

EU negotiators have previously made known their interest in negotiating in TTIP longstanding U.S. procurement policy that provide for set-asides or preferences for small businesses.⁷ The U.S. maintained those preferences in the TPP with language that exempts “any set-aside on behalf of a small- or minority-owned

business” including “any form of preference, such as the exclusive right to provide a good or service, or any price preference” from the procurement rules. The TTIP leak did not include any similar protections. However, annexes and schedules of commitments and exclusions, while referenced, were not leaked.

TAKEAWAY 3

Tariffs on several key agricultural products would be eliminated, potentially disrupting local farming systems on both sides of the Atlantic.

While average tariffs on goods traded between the U.S. and EU are quite low, those figures obscure substantial differences on key products, some of which currently protect vulnerable farming sectors that are already suffering from low prices and unstable markets. In a memo describing tariff reduction offers dated November 20, 2015, the EU notes the intention under TTIP to eliminate tariffs on 97 percent of goods. While exactly how this will play out will only become clear during the final “endgame” of the negotiations, the memo describes substantial, and in many cases, abrupt changes in tariffs on farm goods. As of November, the EU was offering to lower more tariffs than the U.S., but in the latest round of negotiations in April, the U.S. reaffirmed its goal for total tariff elimination. The EU still opposes this position in the interest of its most sensitive agriculture products.

Contrary to what EU negotiators have been saying about such protection, however, the leaks demonstrate that the EU is already willing to reduce—and over three to seven years eliminate—duties on 175 agricultural tariff lines (categories of agriculture products) that include live cattle, goat meat, milk and cream, nuts, fruit jam and fruit juice, animal feeding and glues (although many of the products the U.S. has placed on the seven-year elimination also face non-tariff barriers in the EU). In addition, the EU and U.S. have designated two percent of all their tariff lines in a special “T” category. These tariffs will be eliminated, but over an as-yet undetermined phase out period that could extend beyond seven years. These products for the EU include poultry, ham and swine preparations, barley/maize, wheat and wheat flour, and fertilized eggs (other than chicken eggs). The U.S. has similarly placed certain swine and lamb products, 17 kinds of dairy and cheeses, chocolate and olives in the “T” category.



In a “game of chicken,” the U.S. continues to reserve some tariffs on bovine meat products and 144 kinds of dairy and cheese products (as well as several industrial products such as cars) for less than full tariff elimination in order to push the EU to liberalize more agricultural goods. The EU is protecting 281 agriculture tariff lines that include products made from bovine, swine, poultry, dairy, fertilized chicken eggs, vegetables and fruit, rice, maize flour, starch and sugar). The EU has also indicated that although some tariffs will not be eliminated, tariff rate quotas (set quantities allowed in at reduced tariff rates) for beef raised without the hormones that are banned in the EU are likely to be set.⁸ This will mean much more pressure on the EU’s beef sector.

In many of these cases, the real issue is not just the tariffs. For instance, the EU was expecting the U.S. to abide by certain animal welfare provisions for egg-laying hens on a few tariff lines (for birds other than chicken) and also expecting an “economically meaningful” procurement offer by the February 2016

round before it makes further offers, according to the State of Play memo. The EU prohibition on beef produced with hormones, chlorine-rinsed chicken or sale of cloned animals for meat (to name a few of many examples) are considered non-tariff barriers in TTIP. These measures enhance public health and animal welfare while strengthening local production in Europe from floods of cheap imports produced with lower standards. These are going to be the crux

of heated negotiations during the so-called “endgame” of the talks.

Changes in public support and volatile and plummeting global prices for dairy products have left dairy farmers on both sides of the Atlantic reeling. Meanwhile, the EU and U.S. negotiators are busy horse trading the lives of small dairy and meat producers and processors over the amount of car parts and other goods each side is willing to liberalize.

TAKEAWAY 4

Proposals on regulatory cooperation that would lower standards run throughout the agreement.

Many civil society organizations have indicated the real dangers of increased corporate influence on the development of public health and safety standards posed by the texts on Regulatory Cooperation made by both the U.S. and EU.⁹ The U.S. proposals for cost-benefit analysis of new rules, in addition to putting new burdens on regulatory agencies, would create new possibilities for challenges and new pools of data that could be used as evidence in investor-state cases (which, under the agreement, would allow corporations to sue governments for compensation over rules and regulations). The Regulatory Cooperation chapter is a “horizontal” chapter with application throughout the agreement, but many components of these proposals are also embedded in specific chapters of TTIP.

The second paragraph of the U.S.-proposed “Science and Risk” article in the SPS chapter, for example, would forbid regulators from adopting a food or plant safety regulation until and unless they have evaluated “any alternatives to achieve the appropriate level of protection being considered by the Party or identified through timely submitted public comments, including where raised, the alternative of not adopting any regulation.” This paragraph would enshrine the U.S. practice of allowing an exhaustive process of “timely submitted public comments” by industry to slow down or even stop new regulations, including regulations to protect public and environmental health.

In essence, the U.S. proposes to export the “guilty until proven innocent” burden, imposed on U.S. agencies seeking to enact new rules, to the European Commission and EU member states. European NGOs have rightly recognized that this SPS chapter proposal and other examples of regulatory cooperation in TTIP would essentially result in the corporate takeover of the EU regulatory process.¹⁰



We should not read too much into the fact that the leaked provisions of the EU and U.S. horizontal regulatory chapter are mostly bracketed and thus not agreed to. The Tactical State of Play memo notes “good progress” in the regulatory cooperation negotiations and that the EU and U.S. texts are “complementary in many respects.” Regulatory cooperation proposals publicly released by the EU on March 21, 2016, which are more current than those reflected in the leaked documents, confirm that the EU and U.S. proposals are becoming more similar in approach.¹¹

TAKEAWAY 5

Coordination on agriculture policy could undermine developing country positions in global trade talks.

The EU has proposed an Agriculture chapter in TTIP, something not included in previous bilateral or plurilateral agreements the U.S. has negotiated. It proposes disciplines on agricultural-export credits along the lines agreed to at the Nairobi WTO meeting in December 2015, as well as other changes to subsidies and food aid programs. While progress on those issues could be helpful, TTIP could also be used to ensure that the U.S. and EU present a united front on other issues that have been controversial in global trade talks and overwhelm developing country concerns.

The EU State of Play memo from March notes that, “As regards export competition, the U.S. is opposed to the inclusion of any discipline in TTIP that would go beyond the Nairobi outcome. It pointed to a non-binding language in TPP that resisted calls from [other TPP] members to undertake specific commitments. The U.S. proposed adding to the TTIP the language on export restrictions agreed in TPP and committed to propose an alternative language on cooperation in agriculture.”

The TPP went beyond establishing disciplines on export restrictions to also limit developing countries’ ability to shield sensitive agricultural markets from imports. Article 2.26 of TPP on Agricultural Safeguards



U.S. Trade Representative Ambassador Michael Froman at the Tenth WTO Ministerial Conference in December 2015 in Nairobi Kenya

eliminates the Parties’ rights under the WTO to apply special tariffs in the event of import surges. This issue, as well as establishing developing countries’ rights to exempt key agricultural goods from trade liberalization in order to ensure food security and rural development, has been a key point of contention in the WTO talks. The inclusion of these issues in TTIP would likely mean that two of the world’s largest economies would work together in future multilateral trade talks in ways that override the interests of smaller economies.

CONCLUSIONS

Many of the issues included in the TTIP drafts go far beyond anything negotiated in previous trade deals. They could affect a broad range of national and local efforts to rebuild food systems on both sides of the Atlantic and entrench corporate interests in decision-making processes on chemical, health, consumer safety and environmental standards. And yet the exact nature of these

proposals remain shrouded in secrecy. Full public debates on the content of TTIP should be based on current information and transparent processes at every step along the way, rather than periodic leaks of incomplete bits of text. Only then would it be possible to envision an agreement that serves to advance progress on fair and sustainable economies and food systems.

Endnotes

1. The complete set of leaked TTIP documents are available at <https://ttip-leaks.org/>.
2. Many of the provisions in the Trans Pacific Partnership provide clues to U.S. positions. See Following Breadcrumbs: TPP Text Provides Clues to U.S. Positions in TTIP. <http://www.iatp.org/documents/following-breadcrumbs-tpp-text-provides-clues-to-us-positions-in-ttip>
3. Kaare M Nielsen, “Biosafety Data as Confidential Business Information,” *PLOS Biology* 11(3) (March 2013), 1. <http://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.1001499>.
4. Letter from Dr. Michael Firko, U.S. Department of Agriculture to Dr. Yinyong Yang, Pennsylvania State University, April 13, 2016. https://www.aphis.usda.gov/biotechnology/downloads/reg_loi/15-321-01_air_response_signed.pdf.
5. “The regulatory status of plants resulting from New Breeding Technologies,” NBT Platform, July 11, 2013. <http://www.nbtplatform.org/background-documents/legal-briefing-paper---the-regulatory-status-of-plants-resulting-from-nbts-final-.pdf>

6. E.g. Center for Food Safety et al v. EPA [Environmental Protection Agency, December 16, 2014. http://www.centerforfoodsafety.org/files/aphis-foia-complaint_36583.pdf (IATP is a co-plaintiff)
7. “Note for the Attention of the Trade Policy Committee: Subject: TTIP – Messages on public procurement,” European Commission, March 29, 2016. http://www.iatp.org/files/EU_doc_16-03-29%20TPC%20TTIP%20Procurement%20Messages.pdf
8. “U.S., EU To Increase Tariffs Subject To Immediate Elimination, But Clash On Eliminating All,” *Inside U.S. Trade*, April 29, 2016.
9. “Paralysis by Analysis: Background,” Public Citizen, 2016. http://www.citizen.org/autosafety/article_redirect.cfm?ID=16316
10. “Public Health Concerns on Regulatory cooperation in TTIP,” European Public Health Association, European Heart Network and European Association for the Study of the Liver, March 21, 2016. <http://epha.org/6498>
11. Documents released by the Commission on March 21, 2016 are posted under “Regulatory Cooperation. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#regulatory-cooperation>