



## **Assessment: Trade deal attack on pollinator protection<sup>1</sup>**

The United States recently wrapped up negotiations on the Trans Pacific Partnership trade agreement with Japan, Canada, and 9 other Pacific nations.<sup>i</sup> At the same time, the U.S. wants to conclude negotiations on the Transatlantic Trade and Investment Partnership agreement with the European Union in 2017 if not earlier.<sup>ii</sup> The primary goals of these two massive trade agreements are: (1) to roll back government regulations on multinational corporations, which are perceived as non-tariff barriers to trade, and (2) to severely restrict the promulgation of new regulations that might cut into the profits of multinational corporations.

Trade associations like CropLife America and the European Crop Protection Associations<sup>iii</sup> are seeking to drive the TPP and TTIP negotiations on chemicals and insecticides with the assistance of manufacturers like BASF, Bayer, Dow, DuPont, Monsanto, and Syngenta.<sup>iv</sup> Hidden in the secret negotiating text of the TPP and TTIP are chapters on so-called Technical Barriers to Trade and Regulatory Cooperation, which could roll back and freeze in place chemical and insecticide safeguards at a very low level, thus protecting current and future corporate profits while threatening pollinators and the planet.

Among the likely U.S. targets for deregulation under the TPP and TTIP are current and proposed safeguards to protect bees. Given that the U.S. Trade Representative has identified Europe's pesticide regulations as a trade barrier that should be rolled back, one may reasonably presume that changing EU policy on bee health is an important U.S. negotiating objective in TTIP talks in particular. For the time being, Europe has restricted the use of three neonicotinoids and subjected another pesticide, fipronil, to restrictions.<sup>v</sup> There is no similar target in existing law in TPP talks, but it can be presumed that USTR will seek to stymie local government efforts in the U.S. to regulate neonics under both the Pacific and Atlantic deals and put in place procedural and substantive provisions in both deals to forestall new measures to save the bees.<sup>vi</sup>

**Technical Barriers to trade chapters.** Global manufacturers seek to use the TPP and TTIP chapters on Technical Barriers to Trade to undercut pollinator protections in Europe and elsewhere and forestall the introduction of such protections in the future.

The goal of TPP and TTIP negotiators is to include "TBT-plus" provisions that are more restrictive of protective regulations than tough World Trade Organization standards.<sup>vii</sup> The TBT rules in the WTO create a ceiling, not a floor for environmental and health safeguards, among others. A challenged regulation on insecticides, for

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example, would require the promulgating jurisdiction to meet a high burden of proof to show that it is not “discriminatory, that it is “necessary,” and that it is the “least trade restrictive,” rather than the most effective means of regulation.

The call for “TBT-plus” chapters in the TPP and TTIP deals is astounding given that several TBT challenges in the WTO, paired with allegations of discrimination under the WTO agreement on Trade in Goods, have already succeeded in undermining many important environmental and public health measures.<sup>viii</sup> For example, the WTO Appellate Body found that the U.S. dolphin-safe labeling program violates the WTO agreements.<sup>ix</sup><sup>[i]</sup>

The impact of TBT-plus chapters in the TPP and especially in the TTIP deal would be profound as it would limit regulators’ access to the tools they need to effectively regulate chemicals (including neonicotinoid insecticides associated with honey-bee colony collapse disorder).<sup>x</sup> This is because tribunal decisions under international trade deals, unlike most other global agreements and arbitration rulings, can be effectively enforced with penalties for non-compliance in the form of retaliatory trade sanctions. Such sanctions may include, for example, higher tariffs on goods and services exported by the offending country or loss of intellectual property protections like patents and trademarks.

**Regulatory review chapters:** Regulatory review chapters in the TTIP and TPP deals would encourage business-friendly, cost-benefit analysis that would hamstring environmental or other public interest regulations. For example, insecticide safety standards would be lowered if the undervalued “benefit” of protecting the bees is outweighed by the “cost” to corporate profits.

Cost-benefit analysis in its pure forms generally involves four steps: (1) identifying and quantifying the costs and benefits of a proposed policy; (2) analyzing risks and probabilities of uncertain consequences; (3) discounting for the “time value of money”; and (5) calculating the “ratio of benefits to costs” in order to make a policy recommendation.<sup>xi</sup>

Such calculations of seemingly definitive “ratios of benefit to costs” in evaluating regulations are easily abused. Identifying and quantifying the costs of environmental and health regulations can be inflated by assumptions, bias of the analyst, and flaws in data gathering. Quantifying the benefits of environmental regulation can be particularly difficult, for example because data on bee population declines may not be as comprehensively collected as economic data. Worse, quantifying environmental benefits in monetary terms in order to compare them to economic costs to business diminishes the perceived importance of maintaining the equilibrium of the global ecosystem. It can be impossible: an attempt to attribute a price to the intrinsic value of living things and nature itself. Moreover cost-benefit analysis is at odds with a fundamental principle of environmental regulation: application of the precautionary principle in the face of an immeasurable environmental risk and inescapably uncertain outcomes.

The TTIP regulatory cooperation chapter promises to be even more dangerous than the TPP chapter. The European Commission's proposed chapter on "regulatory cooperation would provide for a Regulatory Cooperation Council that would allow trade bureaucrats and industry representatives to screen proposed regulations, including those related to neonic insecticides. "It creates a labyrinth of red tape for regulators, according to Paul de Clerck of Friends of the Earth Europe.<sup>xii</sup> It contemplates mutual recognition and harmonization of regulations between the E.U. and the U.S. that would effectively reduce standards to the lowest common denominator.

**Other TPP & TTIP chapters compound the problem.** The TBT and regulatory review chapters of the [Atlantic and Pacific deals will work in tandem](#) with other provisions to heighten the threat of chemical and insecticide pollution. For example, overbroad concepts of "discrimination" in the TPP and TTIP chapters on trade in goods could be used to challenge chemical and insecticide regulations. Similarly, chapters on Sanitary and Phytosanitary measures could be used to force the roll back animal welfare safeguards, including those designed to protect bees, as well as food safety protections such as those regulating the amount of chemical and insecticide residue allowed in food products.

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## SELECTED ENDNOTES

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<sup>i</sup> Friends of the Earth, U.S., The U.S. cuts an ugly deal on Trans Pacific trade agreement, October 5, 2015, <http://www.foe.org/news/news-releases/2015-10-the-us-cuts-an-ugly-deal-on-trans-pacific-trade-agreement>; See generally, Bill Waren, TPP in trouble: Why we can win this fight, Friends of the Earth/Medium. August 21, 2015, [https://medium.com/@foe\\_us/tpp-in-trouble-9bcf36a86095](https://medium.com/@foe_us/tpp-in-trouble-9bcf36a86095); Bill Waren. Stop fast track authority for Trans Pacific trade deal, Friends of the Earth, October 17, 2013. <http://www.foe.org/news/archives/2013-10-stop-fast-track-authority-for-trans-pacific-trade-de>



<sup>ii</sup> See generally, Bill Waren, Corporate capture: Europe trade talks threaten the environment, Friends of the Earth. May, 2014, <http://www.foe.org/news/archives/2014-05-corporate-capture-europe-trade-talks-threaten-enviro>

<sup>iii</sup> CropLife America, Crop Protection Industry Urges Stronger Regulatory Framework Between U.S. and EU, March 13, 2014, "CLA and ECPA strongly support the Transatlantic Trade and Investment Partnership and the potential the agreement has to boost agricultural innovation as well as job and economic growth on a global scale," Nelson said. "The U.S. and EU have the most highly developed pesticide regulatory systems in the world; establishing a stronger, unified regulatory system will ensure the highest levels of consumer and environmental protection while promoting international trade, creating jobs and enhancing social and economic viability." <http://www.croplifeamerica.org/news/cla/Crop-Protection-Industry-Urges-Stronger-Regulatory-Framework-Between-US-EU>

<sup>iv</sup> Earth Watch Media, TTIP: Syngenta calls for harmonized safety standards, April 3, 2014 "In an exclusive interview with viEUws John Atkin, Chief Operating Officer (COO) at Syngenta, talks about agriculture and trade perspectives with AGRA FACTS journalist Rose O'Donovan at the Forum on the Future of Agriculture 2014. Atkin explains that it is no longer necessary to increase inputs in order to grow more food: "new technologies enable farmers even with reduced inputs to maximise their yields". Representing the agro-chemical company active in the marketing of seeds & pesticides, Atkin also discusses the

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European Commission's decision to partially ban the use of certain neonicotinoids used as seed treatments due to harmful effects on bee health. The Syngenta COO argues that different food and health standards in developed regions must be harmonized, as it creates unnecessary burdens to trade. He expects that the future EU-US trade deal would be a solution, reducing the complexity of standards and bringing benefits to consumers. This means one of two things, logically: 1. Syngenta is calling for a trade deal that would lead to the US adopting the EU partial ban on its product. or 2 Syngenta is calling for a trade deal that would lead to the EU abandoning the partial ban on its product. Somehow (2) seems more likely." <http://www.earthwatchmedia.org/tip-syngenta-calls-harmonized-safety-standards/>

<sup>v</sup> In a policy statement the European Union has said that: "Plant protection products, especially insecticides, can be toxic to bees. Existing [legislation on plant protection products](#) clearly mentions that active substances used in these products can only be approved if they are safe for bees. Following recent studies indicating acute risks of certain insecticides (3 neonicotinoids and fipronil) for bees, the [European Commission restricted significantly their use](#). Commission has also taken steps to improve plant protection products authorisation process: requested the European Food Safety Authority (EFSA) to completely review the risk assessment scheme and methodology for effects of plant protection products on bees; defined new data requirements to assess potential effects on bees." European Commission efforts for bee health [http://ec.europa.eu/food/animals/live\\_animals/bees/health/index\\_en.htm](http://ec.europa.eu/food/animals/live_animals/bees/health/index_en.htm); The European Commission further states that: "In 2012, new scientific findings indicate that some insecticides belonging to group of neonicotinoids showed high risks for bees. On Commission's request, [European Food Safety Authority](#) (EFSA) assessed these new studies, reviewed the neonicotinoids dossiers as regard their impact on bees and published [conclusions](#), based on which in 2013 [Commission restricted use of three pesticides](#) . Another pesticide [reviewed by EFSA](#) – fipronil – has also been [subject to restrictions](#) .

<sup>vi</sup> The Center for International Environmental Law reports that, " USTR's 2014 Report on Technical Barriers to Trade explicitly targets stronger EU pesticide measures..." CIEL, The Lowest Common Denominator, : How the proposed EU-US trade deal threatens to lower standards of protection from toxic pesticides, 2015, p.3 at [http://www.ciel.org/wp-content/uploads/2015/06/LCD\\_TTIP\\_Jan2015.pdf](http://www.ciel.org/wp-content/uploads/2015/06/LCD_TTIP_Jan2015.pdf) See also, Lisa Archer, Worst bee die-off in 40 years, Friends of the Earth, U.S. Blog, Posted May. 14, 2013, available at: <http://www.foe.org/news/archives/2013-03-worst-bee-die-off-in-40-years#sthash.Z4Mjppch.dpuf>; Tom Philpott, Europe Bans Bee-Harming Pesticides; US Keeps Spraying, Mother Jones, May. 3, 2013, available at, <http://www.motherjones.com/tom-philpott/2013/05/eu-ban-bee-harming-pesticides-puts-pressure-us-epa>; The Office of the United States Trade Representative (USTR), 2014 Report on Technical Barriers to Trade (April 2014), available at: <http://www.ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>

<sup>vii</sup> World Trade Organization, Technical Information on Technical Barriers to Trade, [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_info\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm)

<sup>viii</sup> For example, , plaintiffs have recently succeeded in a WTO challenge to U.S. measures related to country of origin labeling, or COOL. See, *US-COOL*, available at, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm). According to the WTO, these so-called TBT standards ... "involve significant costs for producers and exporters." See, World Trade Organization, Technical Information on Technical Barriers to Trade, [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_info\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm) ; See generally Bill Waren, Fast Track attack on chemical safety and food labels, Friends of the Earth, March 2015. : <http://www.foe.org/news/archives/2015-03-fast-track-attack-chemical-safety-and-food-labels-un#sthash.0QgeJMaq.dpuf>

<sup>ix</sup> *US-Tuna II*, available at, [http://www.worldtradelaw.net/reports/wtoab/us-tunamexico\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-tunamexico(ab).pdf) (The tuna-dolphin litigation illustrates how insensitive international trade tribunals can be to arguments based on anything other than pure commercial considerations. Mexican fishing ships off the Pacific coast follow

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Pods of dolphins that swim with tuna. Fishers intentionally target dolphins, “setting upon” them to catch the tuna swimming underneath. The ships use dangerous purse seine nets that encircle both the dolphins and the tuna. Mothers can be killed or separated from calves in the chase. Over 6 million of these intelligent, social mammals have been killed in the fishery since the late 1950s. Consumer boycotts and “save the dolphin” demonstrations over the course of many years resulted in a U.S. program for dolphin safe labeling for tuna products. Most Mexican commercial fishing operations, however, continued to ignore U.S. dolphin-safe practices. They can still sell their tuna products in the U.S., but may not display the U.S. Department of Commerce dolphin safe label. But, this modest and humane labeling program has been repeatedly attacked with success before international trade tribunals.)

<sup>x</sup> Chemicals regulation such as the European REACH (Registration, Evaluation, Authorization and Restriction of Chemicals) system and effective schemes in several U.S. states, such as California, are put at serious risk by the TPP and TTIP chapters on Technical Barriers to Trade. The U.S. trade representative has already targeted REACH. See, Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, available at, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1907:EN:NOT>; See generally, Bill Waren, Sinister partners: transatlantic trade agreement & toxic chemicals, Friends of the Earth, June 21, 2013, <http://www.foe.org/news/archives/2013-06-sinister-partners-transatlantic-trade-agreement-tox#sthash.qG8wydci.dpuf>

<sup>xi</sup> Barry D. Friedman, Regulation in the Reagan-Bush Era: The Eruption of Presidential Influence, University of Pittsburg Press, 1995, p. 45.

<sup>xii</sup> Paul de Clerck, Regulatory Cooperation: How an EU-US trade deal risks creating a labyrinth of red tape, Friends of the Earth, Europe, April 2015. [https://www.foeeurope.org/sites/default/files/eu-us\\_trade\\_deal/2015/regulatory\\_cooperation\\_eu-us\\_trade\\_deal\\_risks\\_labyrinth\\_red\\_tape.pdf](https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2015/regulatory_cooperation_eu-us_trade_deal_risks_labyrinth_red_tape.pdf)