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USTR, NGOs Quick to Respond to Leaked TPP Text

Within minutes of WikiLeaks publishing the leaked text of the intellectual property rights chapter of the Trans-Pacific Partnership (TPP) talks, both nongovernment organizations and Obama administration officials had a response (see story below). The USTR's office was quick to say that negotiation toward the TPP "has not been completed and a final text has not been agreed to," a USTR official told WTTL in an email.

"We are working with Congress, stakeholders, and our TPP negotiating partners to reach an outcome that promotes high-paying jobs in innovative American industries and reflects our values, including by seeking strong and balanced copyright protections, as well as advancing access to medicines while incentivizing the development of new, life-saving drugs," she said.

Public health groups and nonprofits that have opposed the pact blasted the chapter. "The U.S. is refusing to back down from dangerous provisions that will impede timely access to affordable medicines," said Judit Rius Sanjuan of Doctors Without Borders.

The text "reveals a cascade of U.S. proposals that would backtrack on public health and drive up the costs of health care. The U.S. would perpetuate the rights of tobacco and other corporations to challenge public health measures, criminalize reimportation of prescription drugs, patent surgical procedures...and skew access to information," said Ellen Shaffer, Center for Policy Analysis on Trade and Health. The draft "confirms fears that the negotiating parties are prepared to expand the reach of intellectual property rights, and shrink consumer rights and safeguards," said Knowledge Ecology International.

WikiLeaks Releases Draft Text of IPR Chapter in TPP Talks

After months of calls for transparency by nongovernment organizations and even members of Congress about the potential provisions of a Trans-Pacific Partnership (TPP), WikiLeaks, the renegade website that has released thousands of pages of classified information, posted the draft of the deal's intellectual property rights (IPR) section Nov. 13. The leaked text, which WikiLeaks called the "secret negotiated draft text," covers proposed obligations and enforcement mechanisms for copyrights, trademarks and patents. U.S. officials distributed the text to TPP chief negotiators after the 19th round of talks in Brunei in August, WikiLeaks said. Almost the entire text is within brackets

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indicating that there is not final agreement on any of the language in the draft (see related story page 1). The large number of brackets in the text underscores the skepticism that many have about the chances of completing the TPP talks this year.

The draft identifies which of the 12 TPP participating countries proposed specific provisions and which ones opposed the provisions. In several cases, the U.S. and one or two other countries were on opposite sides from most of the other TPP countries over the proposed language. The draft includes provisions on national treatment, most-favored-nation status and transparency. It also addresses the patentability of certain plants, animals and therapeutic and surgical techniques.

The draft calls for basing its rules on pharmaceutical patent protection on the World Trade Organization's (WTO) 2001 compromise agreement amending section six of the Agreement on Trade Related Intellectual Property Rights (TRIPS) to provide access to medicines for public health emergencies. "The Parties affirm their commitment to the *Declaration on the TRIPS Agreement and Public Health* (WT/MIN(01)/DEC/2)," it states.

While the U.S. agreed to apply those exemptions from patent rules for drugs to treat tuberculosis and malaria, it opposed including medicines for chagas, a parasitic disease found mainly in South America and in poor areas of the U.S. "The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, [US oppose: chagas] and other epidemics as well as circumstances of extreme urgency or national emergency," the draft states.

The text shows a major split over protection of geographic indications (GIs). One part of the provisions on GIs says: "[NZ/CL/VN/MY/BN/SG/MX propose; PE/US/AU oppose: 1. Each Party may provide protection to homonymous geographical indications. Where a Party provides protection to homonymous geographical indications, that Party may, where necessary, lay down the practical conditions of use to make a distinction between the homonymous geographical indications, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.]"

Another part states: "The Parties recognize that [US propose; CL/PE/CA/MX/SG/MY/BN/VN/JP oppose:, subject to Article QQ.C.2(1), 61 (*GIs eligible for protection as trade-marks*)] geographical indications may be protected through a trademark or sui generis system or other legal means." In another section, Chile calls for GI protection to protect the name Pisco, a popular grape brandy in Peru, for itself and Peru, but Peru is against the measure. "[CL propose; AU/US/PE/NZ/VN/SG/MY/BN/MX/CA/JP oppose: 2. The Parties recognize the geographical indication *Pisco* for the exclusive use for products from Chile and Peru.]"

On patents: "[US/JP propose; CL/MY/PE/SG/VN/BN/AU/NZ/CA/MX oppose: (b) a Party may not deny a patent solely on the basis that the product did not result in enhanced efficacy of the known product when the applicant has set forth distinguishing features establishing that the invention is new, involves an inventive step, and is capable of industrial application.]" The fight over this provision reflects U.S. complaints against rulings in Canadian courts that have revoked drug patents because the product did not meet the promised usefulness described in the patent application regardless of any other effectiveness it might have. In some cases, every country is on board on some provisions

except the U.S. For example, on the use of country names: “[CL/AU/NZ/SG/BN/VN/MY/PE/CA/MX/JP propose: The Parties shall provide the legal means for interested parties to prevent commercial use of country names of the Parties in relation to goods in a manner which misleads consumers as to the origin of such goods.]”

On the controversial subject of data protection for pharmaceuticals, including biologics, the draft text has not yet set the time period for that protection. A U.S. proposed footnote says:

“[US: Negotiator's Note: For purposes of paragraph 6(e) of Article 8 and paragraphs 4 and 6 of Article 9, the length of the [X]-year period should: enhance certainty regarding access to innovative and generic pharmaceutical products for all; provide incentives for innovation; provide incentives for the diffusion of pharmaceutical products within the TPP region; respect commercial considerations; and account for special challenges in developing and commercializing such products throughout the region (*e.g.*, challenges faced by smaller or less experienced applicants, or the time that an applicant may need to assess additional safety or efficacy implications of marketing a product, such as to assess such implications in jurisdictions where risks may differ from those faced in markets where the product has previously been approved).]”

Bipartisan Opposition to “Fast Track” Raises Hurdle to Deals

Too much coyness about what proponents of fast-track trade promotion authority (TPA) want in a bill may be backfiring and raising the prospects for a tough fight to get a TPA measure enacted to clear the way for major trade deals now being negotiated. In a series of letters, both House Democrats and Republicans complained about the lack of consultation about what might be in a TPA bill and how it would treat such issues as labor, environment, national sovereignty and regulatory authority. TPA could also be threatened by calls from key lawmakers to include provisions against currency manipulation.

U.S. Trade Representative (USTR) Michael Froman has repeatedly said he is consulting with Congress on a fast-track bill but never says what provisions the administration would support. Staffs of the House Ways and Means Committee and the Senate Finance Committee have worked for months on a bipartisan bill for committee leaders and that measure could be introduced by the end of the year. The growing opposition to TPA, however, suggests the White House will need to launch a major lobbying effort in Congress.

Trade observers still offer a more positive view on prospects for a fast-track bill, suggesting that enough Democrats will want to support a bill because President Obama backs it and will join usually pro-trade Republicans to pass the legislation. Based on past experience with trade legislation and trade deals, a majority or near-majority of Democrats are likely to oppose any measure along with a group of Republicans.

Strong concerns about fast-track were seen in a letter that 151 House Democrats sent to Obama Nov. 13, complaining about the administration’s failure to consult about the status of TPP talks. “We remain deeply troubled by the continued lack of adequate congressional consultation in many areas of the proposed pact,” they wrote. “Given our concerns, we will oppose ‘Fast Track’ Trade Promotion Authority or any other mechanism delegating Congress’ constitutional authority over trade policy that continues to

exclude us from having a meaningful role in the formative stages of trade agreements and throughout negotiating and approval processes,” the letter declared.

Although Froman has said every member of Congress has had the opportunity to see draft TPP texts, lawmakers complain about the restrictions placed on their ability to review those documents. Access is limited to members only or cleared staff, meaning their aides can't review the material. USTR staff briefings have been limited and not informative, they also complain.

At a press conference releasing the letter, some Democrats revealed their own splits, with some members totally opposed to TPA regardless of any consultation and others willing to support it if there were more transparency, including public hearings. “I don't think you can report us as all being opposed to everything,” said Rep. Jim McDermott (D-Wash.). “As long as the administration wants to try to run this through and not have any public process, they are going to have an awfully difficult time rounding up the vote for fast track and for the final bill for TPP,” he added.

The day before the Democratic letter, 22 mostly conservative Republicans sent a letter to the president also raising concerns about fast track and the restrictions it places on the ability of lawmakers to amend any implementing legislation. “Given these factors, we do not agree to cede our constitutional authority to the executive through approval of a request for ‘Fast-Track Trade Promotion Authority,’” they wrote in their Nov. 12 letter.

In another letter to Obama Nov. 8, 12 Democratic members of Ways and Means urged the president to include reauthorization of Trade Adjustment Assistance in any TPA bill. They also said the labor and environment agreement from May 10, 2007, between Democrats and the Bush administration “should serve as baseline for future agreements.”

Hopes Fade for Meaningful Offer from China to Expand ITA

There is a growing risk that negotiators won't reach an agreement this year on expanding the Information Technology Agreement (ITA) because of China's failure to deliver a new list of sensitive products during talks in Geneva the week of Nov. 11. Proponents of a new agreement had hoped to propel negotiations toward a meaningful deal to eliminate tariffs on a new range of technology gear in time for the World Trade Organization's (WTO) ministerial conference in Bali Dec. 3-6 (see **WTTL**, Oct. 28, page 6).

A revised Chinese offer is still expected, but China hasn't given the signal that negotiators are looking for, a trade official following the talks told **WTTL**. The question is whether the next offer will have enough market opening to push negotiations over the top, he said. There is a lot of skepticism that it will, he added. Although China is feeling pressure to cut further the long list of products it wants either excluded from ITA treatment or given a long tariff phase-out period, it isn't willing to move, the trade official said. It's not clear whether China's posture is tactics or whether it reflects some negotiating red lines they're not able to cross, he said. China's posture appears to be general in nature rather than associated with a particular product, other sources suggest.

Officials say it remains possible that negotiators will reach an agreement during the Bali meeting and there is a lot of pressure to see a new list from the Chinese before negotiators leave Geneva on Nov. 20. Talks will continue until then. China needs to

look at the ITA negotiations in a broader sense, one official said. Meanwhile, Beijing's inflexibility in the ITA talks may start to bleed into other talks that China wants to join such as the Trade in International Services Agreement (TISA), the official cautioned.

If members of the WTO are serious about delivering a negotiating function in the future, then China needs to show it's part of the solution, not part of the problem, the official said. China is "very, very clearly" causing problems in the ITA talks and needs to look at the systemic implications beyond the ITA, he said.

So far, not enough is on the table to close an ITA deal, John Neuffer, vice president of technology and trade policy at the Information Technology Industry Council, told WTTL. Chinese negotiators went into a huddle on Nov. 14 and emerged with a hard line that showed no significant new ambition, he reported. It's "extraordinary" that one of the major beneficiaries of ITA expansion continues to be one of the biggest roadblocks to an ambitious outcome in Bali, Neuffer said. He said he hope the Chinese move was just tactical. Additional bilateral and group meetings will be held the week of Nov. 18.

Sources contend China's ITA stand contradicts the message that came out of the just completed decennial plenum of the Chinese Communist Party. The plenum urged China to integrate more deeply into the global economy. It called for a stimulation of "the orderly and free flow of international and domestic production factors [and] participation in and development of competitive advantages in international economic cooperation," according to a translation on the China Copyright and Media website.

U.S., Colombia Concede Concerns about Labor Action Plan

As members of Congress raise complaints about the failings of the U.S.-Colombia Labor Action Plan, labor officials from the two countries admit more needs to be done to fulfill the commitments under plan. At a meeting in Medellin, Colombia, Nov. 11, Deputy Secretary of Labor Seth Harris and Colombian Minister of Labor Rafael Pardo Rueda recognized advances under the plan, but highlighted several areas of concern. They agreed "to continue bilateral meetings on the commitments in the Colombian Action Plan Related to Labor Rights through at least 2014," the Labor Department said Nov. 13.

The labor agreement specifies two technical-level meetings and one meeting of senior officials in 2014, with any future meetings to be agreed upon mutually, the department noted. The action plan initially was signed in 2011 as part of the U.S.-Colombia Free Trade Agreement.

According to Labor, the two officials acknowledged concerns about the collection of fines imposed for labor violations; in conducting targeted inspections in the five identified priority sectors (palm oil, sugar, mines, ports and flowers); the investigation and sanctioning of all forms of abusive contracting; the status of hiring labor inspectors in line with Action Plan commitments; and violence and threats against trade unionists and continued impunity for the perpetrators.

The officials met shortly after two House Democrats issued a report claiming the labor action plan is failing to protect workers. Reps. George Miller (D-Calif.) and Jim McGovern (D-Mass.), who visited Colombia in August, issued a report on the findings

from their trip Oct. 29. “The members of the delegation conclude that the Government of Colombia is woefully falling short of compliance with the Labor Action Plan, and in many cases, these shortfalls have made working conditions for workers worse than before it came into effect,” the report said. “Before asking Congress to approve another trade agreement, such as the TPP, which poses similar labor and human rights issues, the Administration must first demonstrate concrete and effective improvements in workers’ rights on the ground in Colombia under the Labor Action Plan,” it added.

Second Round of TTIP Talks Get into “Nitty Gritty” of Issues

The second round of U.S.-European Union (EU) negotiations on a Transatlantic Trade and Investment Partnership (TTIP) agreement in Brussels the week of Nov. 11 got into what Chief EU Negotiator Ignacio Garcia Bercero called the “nitty gritty” of bilateral issues and revealed some of the toughest problems that lie ahead for the talks (see **WTTL**, Nov. 4, page 1). The talks focused on broad issues such as regulations and standards, sanitary and phytosanitary (SPS) rules, and technical barriers to trade (TBT) along with specific sectors such as medical devices, pharmaceuticals, chemicals, pesticides, information technology and automobiles.

At the midpoint of talks, USTR Michael Froman told **WTTL** Nov. 13 that “it’s been a good week there.” He cautioned, however, that talks are still at an early stage. “But I think they are making good progress. The reports I’ve gotten show that there is good engagement on both sides,” he said.

In a briefing for reporters Nov. 15, Garcia Bercero and Chief U.S. Negotiator Dan Mullaney acknowledged several areas where regulatory coherence may be hard to achieve, including in chemicals where the EU and U.S. have two very different sets of laws. Mutual recognition of these chemical regulations “is not an option” Garcia Bercero said. Nonetheless, “we can still take steps to reduce regulatory costs” without putting regulations in question, he said.

Mullaney noted that one goal of the talks is to establish an institutional mechanism after an agreement is completed to carry on the work of negotiations in areas where no deal can be reached. He declined to comment on EU Trade Commissioner Karel De Gucht’s proposal for a transatlantic regulatory council as part of any TTIP deal, saying it was premature to discuss how that mechanism would work.

The two chief negotiators also revealed some sensitivities that have already arisen in the talks. In addition to chemicals, these include differences over cosmetic ingredients, labor qualifications that are regulated by U.S. states and rules on investor-state disputes. “For us it is very clear that investor-state dispute settlement is something that has to be fully in line with respect of the right to regulate, and, indeed, one of the points we have been very much emphasizing in our discussions on this issue with Canada in many discussions is that we need to be sure that any such rules in no way put in doubt the right of a government to make policy choices in the public interest,” Garcia Bercero declared.

Mullaney said the U.S. goal is to achieve the “highest level of protection” for investment while also protecting “legitimate regulatory” actions. That might include mechanisms to ensure transparency, equitable treatment and expeditious decisions, he said. Mullaney conceded that trying to find regulatory coherence on regulations and standards “is a

challenging area to address.” He stressed that nothing in a TTIP will “undermine the high standards” in the U.S. and EU. Where each side has similar levels of protection but different regulations, the goal would be to seek mutual recognition, he said. He pointed to previous deals that achieved that for wine, organic products, information technology and airline safety.

Talks on financial services that will include USTR and Treasury officials will be held later in November and transatlantic teleconferences will be held in the coming weeks on intellectual property rights, market access, competition policy, labor and environment issues and trade remedy rules, the negotiators said. A full third round will be held in Washington the week of Dec. 16. After that third round, the negotiators will present a report on their progress to their political leaders, probably in January, and seek guidance on future negotiations, they said.

Lawmakers Give Advice on Bali as Talks Remain Stymied

Democratic and Republican leaders of the Senate Finance and House Ways and Means committees wrote Nov. 13 to USTR Michael Froman to support deals at the WTO ministerial in December on an Information Technology Agreement and trade facilitation. “In particular, we believe that a commercially significant expansion of the Information Technology Agreement (ITA) and an ambitious trade facilitation agreement are two separate opportunities with enormous potential to increase U.S. exports and U.S. jobs,” wrote Finance Chairman Max Baucus (D-Mont.), Ranking Member Orrin Hatch (R-Utah), Ways and Means Chairman Dave Camp (R-Mich.) and Ranking Member Sander Levin (D-Mich.).

“We urge you to obtain robust agreements in each of these areas as soon as possible, and we stand ready to work with you to accomplish this goal,” they added. On agriculture proposals for inclusion in a Bali Ministerial package, they said they “are wary of efforts in certain recent proposals to roll back existing rules or weaken existing commitments.”

“Those rules and commitments protect well-functioning agricultural markets, which benefit developing, food-importing countries as well as U.S. agricultural producers,” the letter said. “Any outcome in this area must include safeguards to limit the duration of any so-called ‘peace clause’ regarding WTO-inconsistent practices, significantly improve the transparency of existing programs, and ensure that no commercial distortion occurs as a result of these programs,” the lawmakers said. “Any violation of these safeguards should automatically invalidate the restraints that are being discussed,” they added.

Their letter came after WTO Director-General Roberto Azevêdo told the WTO Trade Negotiations Committee Nov. 12 there is still a chance the Bali meeting will fail to agree on many of these issues. “It was my sincere hope that by today I would be in a position to tell you that, although we have some difficulties ahead, we are in pretty good shape,” he said. “But I do not think I can tell you that. I think the risk of failure is still present — particularly in some of the areas that I have outlined,” he said. On trade facilitation, Azevedo said negotiators reached agreement on the customs cooperation section Nov. 10. On another trade facilitation section, “there remain some very hard nuts to crack,” he added. While solutions are on the horizon in most areas, “in the remaining areas where solutions are not yet evident, it is clear that you need to make some tough calls,” he

advised. On agriculture, though there are still disagreements over safeguards and how long measures could stay in place under a “peace clause,” “both sides are working in good faith with a genuine desire to find a solution,” he said. “Tariff rate quota administration is, unfortunately, a different story,” he said. “Despite some genuine attempts at convergence, no material progress has been achieved,” he said.

“But let me be clear: we cannot work right up until the wire. Our deadline cannot be the start of the Ministerial Conference,” he said. “Bali must not be a negotiating conference. The duration of the flight would be enough time for positions to become entrenched. It would be the surest way to kill this agreement. We have to close this in Geneva,” he told negotiators.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Zhifu Lin, Chinese national and resident of West Virginia, was sentenced Nov. 15 in Brooklyn U.S. District Court to 108 months in prison for violating Arms Export Control Act and illegal weapons trafficking. From 2010 to 2012, Lin shipped USML firearms, including pistols, rifles, shotguns and military-style assault weapons, to China without State licenses. He pleaded guilty Oct. 4, 2012 (see **WTTL**, July 29, page 11).

CENSUS: Census in Federal Register Nov. 13, announced delay of effective date of Foreign Trade Regulation changes to April 5, 2014, from Jan. 8, 2014 (see **WTTL**, Sept. 16, page 1).

MSG: In 6-0 preliminary vote Nov. 15, ITC determined U.S. industry may be materially injured by dumped and subsidized imports of monosodium glutamate from China and Indonesia.

TRADE FIGURES: U.S. merchandise exports in September decreased 0.48% from year ago to \$132.1 billion, Commerce reported Nov. 14. Services exports increased 5.0% to \$56.8 billion from same month in 2012. Goods imports went up 0.91% from September 2012 to \$193.4 billion, as services imports gained 1.5% to \$37.3 billion. Release of numbers was delayed due to government shutdown in October.

ANTIBOYCOTT: TMX Shipping Company, Inc., freight forwarder in Virginia Beach, Va., agreed to pay BIS \$36,800 civil penalty Oct. 31 to settle four charges of furnishing information about business relationships with boycotted countries and 11 charges of failing to report receipt of request to engage in restrictive trade practice. TMX included boycott language in shipping certificates and received requests in letters of credit from Bahrain, Kuwait, Lebanon and UAE.

TRADE PEOPLE: American Institute for International Steel (AIIS), which represents international steel firms and steel importers, named Richard Chriss to be its new executive director Nov. 12 to replace retiring David Phelps, who headed AIIS for 17 years. Chriss previously served as international trade aide for Sen. Charles Grassley (R-Iowa) from 1999-2003, senior advisor to under secretary of Commerce and then assistant general counsel in USTR’s office.

LOW-ENRICHED URANIUM: In 3-1 “sunset vote” Nov. 13, ITC determined that ending anti-dumping duty order on low-enriched uranium from France would cause renewed injury to U.S. industry. Commissioners Shara L. Aranoff and F. Scott Kieff did not participate.

SHUTDOWN: One example of impact of government shutdown is seen in BIS handling of export licenses for laser products under ECCN 6A005. From Oct. 1 to Nov. 7, 2013, which included 16-day closure, BIS completed action on 13 applications – approving nine; rejecting one; returning without action (RWA) three. In same period in 2012, it closed action on 50 applications – approving 38; rejecting one and RWAing 11, BIS Licensing Officer Christopher Costanzo reported to BIS Sensors and Instrumentation Technical Advisory Committee Nov. 12.