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## U.S.-EU High Level Regulatory Cooperation Forum

### Comments for Stakeholder Session

April 10, 2013

Public Citizen welcomes the opportunity to comment on regulatory cooperation between the United States and EU in the context of the recent decision to launch negotiations for a Trans-Atlantic Free Trade Agreement (TAFTA). Public Citizen is a national, nonprofit public interest organization with 150,000 members and supporters that champions citizen interests before Congress, the executive branch agencies and the courts. We have conducted extensive analysis on the impacts and implications of existing U.S. trade and investment agreements, the expansive model of trade and investment terms that the Obama administration has pursued in the Trans-Pacific Partnership Free Trade Agreement, and the U.S. and EU policies that would be implicated if the TAFTA negotiations were to be based on such an approach.

The TAFTA negotiations will focus primarily on “regulatory and other non-tariff barriers,” according to the joint U.S.-EU announcement of the intent to launch negotiations.<sup>1</sup> The decision to concentrate on “behind-the-border”<sup>2</sup> policies stems from the Parties’ acknowledgement that tariffs between the United States and EU are “already quite low.”<sup>3</sup>

**Public Citizen believes that advancement of consumer well-being must be the primary goal of any U.S.-EU pact.<sup>4</sup> We are skeptical that a deal built on regulatory convergence will serve consumer interests. But if this approach is taken, such convergence must result in a regulatory floor that bolsters consumer interests, not a regulatory ceiling that constrains them.** If uniform standards are adopted, they must reflect a high degree of consumer protection while also preserving governments’ prerogative to establish facially non-discriminatory protections that are stronger than the established minimum standards. A deal that dismantles existing EU or U.S. consumer protections, or that constrains governments’ ability to enact stronger protections, would be unacceptable.

Consumers have different priorities in different countries. Differences in regulatory standards between countries with different constituencies and priorities should be expected and respected as the legitimate outgrowth of trade between democratic nations, such as those contemplating TAFTA.

However, the process leading to the launch of TAFTA negotiations has been dominated by attempts to eliminate regulatory distinctions for the sake of narrow business interests. Industry representatives organized since 1995 as the TransAtlantic Business Dialogue, recently renamed the Transatlantic Business Council,<sup>5</sup> have pushed for “harmonization” of divergent standards and

elimination of “trade irritants” with the singular goal of easing their commercial activities.<sup>6</sup> This framework not only threatens to weaken critical consumer and environmental safeguards, but at its core conflicts with the principle that those living with the results of regulatory standards – consumers – should be able to set those standards through the democratic process, even when doing so results in divergent standards that businesses may find inconvenient.

It is not apparent that any efficiency gains resulting from regulatory convergence would a) significantly accrue to consumers rather than simply increasing the profit margins of business interests, b) outweigh consumers’ loss of ability to set and modify, through democratic processes, the regulations that affect them, or c) justify the considerable expenditure of limited government staff and resources to engage in multi-year negotiations between Parties with already low tariffs.<sup>7</sup> Before adopting a regulatory convergence approach in TAFTA negotiations, the United States and EU should establish a transparent process to study and provide answers to these critical questions, inviting early and consistent input from a diverse array of consumer groups and other stakeholders.

If TAFTA proceeds with the approach of trying to establish uniform standards, then the established standard should be set as a regulatory floor, not a ceiling. Using a floor rather than a ceiling safeguards the ability of a country to maintain or establish stronger standards when consumers demand such. This approach also provides nations the needed policy space to create new regulations in response to emerging policy challenges and crises. Given that trade agreement rules are not easily altered and that negotiators do not have the ability to see into the future, such flexibility is essential. If uniform standards are actually found to provide efficiency gains to consumers that outweigh the above concerns of autonomy loss and resource expenditure, then a common regulatory floor set at the highest standard of any involved country would still provide efficiency gains without sacrificing consumer protections. Providing a quantum of such gains while still maintaining consumers’ rights to higher standards is a balanced approach. The United States and EU should exclude from the pact any sector or regulatory area where they cannot agree on this floor-not-ceiling framework. In addition, some areas should clearly be excluded at the outset.

Any standard-setting terms in TAFTA must strengthen consumer protections in critical policy arenas, including the following:

- **Food Safety:** Any rules on chemical residues, veterinary drugs, additives, contaminants, slaughter and processing, inspection, or labeling must be limited to requiring that policies be non-discriminatory. An agreement must clarify that application of the same standard to domestic and foreign goods meets such a non-discrimination test. Each nation must be allowed to set non-discriminatory standards based on consumer demands and priorities alone. This includes labels providing consumers with pertinent information, such as a product’s country of origin, inclusion of genetically-modified organisms, slaughter standards and more. That is, consumers must be able to express their demands with respect to the appropriate level of protection and provision of information as long as domestic and foreign goods fall under the same standard.
- **Financial Stability:** Any harmonized standards must set a floor of strong financial regulation, based on the most robust U.S. and EU reregulation efforts, to reflect the

lessons of the deregulation-fueled financial crisis of 2007-2009. Countries that wish to go beyond this standard to safeguard financial stability must have the policy space to do so, particularly as new financial products and challenges emerge. Critically, the agreement must clarify that a non-discriminatory regulatory ban of a product or service is not a violation of Market Access terms, nor are facially neutral policies that limit firms' size or the legal forms through which a particular product or service may be offered. The pact should also explicitly safeguard the ability of countries to enact controls on capital inflows or outflows – policy tools now officially endorsed by the International Monetary Fund as legitimate for preventing or mitigating financial crises.<sup>8</sup> In addition, the negotiations must establish a broad exception for prudential measures that improves on the prudential exception in Article 2 of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) Financial Services Annex, which contains language that some have interpreted as eviscerating the defense's practical application.<sup>9</sup>

- **Climate Security:** Any agreement must provide policy space for signatory countries to respond to the emerging climate crisis, affecting all involved nations, with stronger policies to control greenhouse gas emissions. The setting of agreement terms for energy, transportation and other relevant sectors should conform to this goal. Nations must be permitted to go above and beyond any agreed-upon standard to more thoroughly mitigate climate change via policies such as feed-in tariffs, emissions-based taxation and performance standards. Any agreement must clarify that countries may distinguish between forms of energy generation in developing regulatory approaches. Any chapter on technical standards, services, subsidies or investment must explicitly provide policy space to enable or encourage climate-friendly adaptations (e.g. greater energy efficiency, stronger abatement requirements).<sup>10</sup>
- **Internet Freedom and Access to Affordable Medicines:** Overreaching patent and copyright provisions in past "trade" agreements and copyright enforcement proposals such as the Stop Online Privacy Act (rejected by the U.S. Congress) and the Anti-Counterfeiting Trade Agreement (rejected by the European Parliament) have threatened consumers' access to an open Internet and affordable medicines. The United States and EU already provide robust patent and copyright protections without the addition of such sweeping terms. Consumers, meanwhile, must maintain their ability to use the Internet freely without censorship or fear of reprisal, and must not be subjected to increased healthcare costs for the sake of pharmaceutical corporations' narrow business interests. To ensure the protection of these consumer rights, this prospective agreement must exclude intellectual property provisions, including those relating to patents, copyright, trademarks and data protection.<sup>11</sup> If any such intellectual property rights provisions are included despite the threat to consumers' interests, broad exceptions and limitations on intellectual property rights must be included to safeguard consumers' access to affordable medicines and an open Internet. In this scenario, governments must have the policy space to name exceptions or limitations that are stronger than the established minimum to further safeguard their consumers' interests.

**Any agreement must not include the extreme investor-state dispute resolution (ISDR) mechanism, nor the open-ended substantive investor privileges included in past U.S. "Free Trade" Agreements (FTAs) and U.S. and EU Bilateral Investment Treaties (BITs). ISDR**

allows foreign investors to directly challenge sovereign governments over contested public interest policies in tribunals that operate completely outside any domestic legal system. The ostensible premise for such an extreme procedure is that some domestic legal systems are too corrupt, incompetent or ill-equipped to hear foreign investors' claims. Neither the United States nor any EU member state is likely to assert that this description befits the legal system of any nation involved in this agreement. Given the advanced domestic legal systems that exist, the anomalous extrajudicial enforcement provided by ISDR is absolutely unacceptable for TAFTA. Its untenable inclusion would empower foreign firms to attack domestic policies that have been deemed legal under domestic court systems, while empowering tribunals comprised of three private attorneys, who rotate between serving as "judges" and litigating against governments, to order government compensation for the enforcement of those policies.<sup>12</sup>

Were substantive investment rules akin to those found in U.S. FTAs or U.S. and EU BITs to be included in TAFTA, it would establish greater substantive "rights" for foreign investors than those provided to domestic firms by the robust property rights protections of existing U.S. and EU law. Such broad "rights," coupled with the extreme discretion enjoyed by investor-state tribunals, would significantly hamper each government's ability to regulate on behalf of its consumers. Existing FTAs and BITs grant foreign investors sweeping privileges, such as a "minimum standard of treatment" that inventive tribunals have interpreted as investors' right to obtain compensation for any government action or policy that contravenes the investors' expectations.<sup>13</sup> On the basis of such terms, a growing number of costly ISDR cases have been launched against nondiscriminatory consumer and environmental policies, consuming government resources and imposing an unacceptable ceiling on governments' ability to enact policies to achieve the critical public interest goals stated above.<sup>14</sup>

**Given that TAFTA could implicate a wide swath of domestic non-trade policies (e.g. environmental, financial, energy, patent, copyright, procurement, health and product safety policies), the respective legislatures must establish binding goals for the negotiations before talks begin.** The process of establishing goals, in addition to the negotiations themselves, must be open and transparent. After the legislatures set binding objectives for the talks, negotiators must consult throughout the negotiation process with diverse legislative committees, including all those with jurisdiction over any implicated non-trade policies, to ensure those objectives are being fulfilled. Any resulting agreement should not be signed unless and until the U.S. and EU legislatures approve the proposed text through a vote that affirms it has met the established objectives.

The process for establishing any agreement that could impact a broad array of public interest policies must also be open to the public. Negotiating texts and country submissions for TAFTA must be made publicly available. Stakeholder groups, including those not granted preferential access to official trade advisory committees, must be able to review the proposed text if they are to give meaningful input on the critical policy decisions at issue. Consultations with diverse stakeholders should occur early on and throughout the process. The disproportionate consultation with business and industry groups in prior agreements has resulted in a narrow array of input and a deprioritization of consumers' interests, which should stand at the heart of any resulting deal.

## ENDNOTES

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<sup>1</sup> “Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso,” The White House, Feb. 13, 2013. Available at: <http://www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents>.

<sup>2</sup> “Final Report,” High Level Working Group on Jobs and Growth, Feb. 11, 2013. Available at: <http://www.ustr.gov/sites/default/files/02132013%20FINAL%20HLWG%20REPORT.pdf>.

<sup>3</sup> “Obama Administration Notifies Congress of Intent to Negotiate Transatlantic Trade and Investment Partnership,” Office of the U.S. Trade Representative, March 20, 2013. Available at: <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/administration-notifies-congress-ttip>.

<sup>4</sup> This objective and many of the following recommendations echo the TAFTA position statement of the Trans Atlantic Consumer Dialogue. See “EU and US consumer groups’ initial reaction to the announcement of a Transatlantic Trade and Investment Partnership,” Letter from the Trans Atlantic Consumer Dialogue to Ambassador Ron Kirk and Commissioner Karel De Gucht, Mar. 5, 2013. Available at: [http://tacd.org/index2.php?option=com\\_docman&task=doc\\_view&gid=353&Itemid=40](http://tacd.org/index2.php?option=com_docman&task=doc_view&gid=353&Itemid=40).

<sup>5</sup> “History and Mission,” Transatlantic Business Council, accessed Apr. 6, 2013. Available at: <http://transatlanticbusiness.org/history-mission/>.

<sup>6</sup> “The Transatlantic Economic Partnership: Overview and Assessment,” Directorate General for Trade of the European Commission, Oct. 2000, at 5. Available at: [http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc\\_111712.pdf](http://trade.ec.europa.eu/doclib/docs/2003/october/tradoc_111712.pdf).

<sup>7</sup> In a December 2012 survey of U.S. federal agencies, 58 percent of staff in the Office of the U.S. Trade Representative reported that, even without TAFTA, they did not have enough resources to carry out their existing work, while only 12 percent said they did have sufficient resources. “New USTR Will Face Many Challenges, Including Staff Dissatisfaction,” *Inside U.S. Trade*, Feb. 15, 2013.

<sup>8</sup> See “The Liberalization and Management of Capital Flows: An Institutional View,” International Monetary Fund, Nov. 14, 2012. Available at: <http://www.imf.org/external/np/pp/eng/2012/111412.pdf>.

<sup>9</sup> “Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement.” WTO, General Agreement on Trade in Services, Annex on Financial Services, Article 2(a).

<sup>10</sup> An example of one such approach is Article 8.2(c) of the WTO’s Agreement on Subsidies and Countervailing Measures. Such a provision, without the time limit, is one way policy space for climate-related policies could be provided.

<sup>11</sup> For a list of the dozens of other major U.S. and EU organizations supporting this position, see “IP out of TAFTA: A Civil Society Declaration,” Mar. 2013. Available at: <http://www.citizen.org/documents/IP%20out%20of%20TAFTA%20with%20Logos-revisednew.pdf>.

<sup>12</sup> For a summary of ISDR cases and claims brought against public interest policies under U.S. FTAs, see “Table of Foreign Investor-State Cases and Claims under NAFTA and other U.S. Trade Deals,” Public Citizen memo, Mar. 2013. Available at: <http://www.citizen.org/documents/investor-state-chart.pdf>.

<sup>13</sup> See Lori Wallach, “‘Fair and Equitable Treatment’ and Investors’ Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed,” Public Citizen memo, Sep. 5, 2012. Available at: <http://www.citizen.org/documents/MST-Memo.pdf>.

<sup>14</sup> The United Nations Conference on Trade and Development estimates that the cumulative number of ISDR cases ballooned from 50 in 2000 to 450 in 2011. UNCTAD, “Latest Developments in Investor-State Dispute Settlement,” IIA Issues Notice, Apr. 2012, at 3. Available at: [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf).