

## Implications for Agriculture and other Products of a TPP “Safe Harbor”

In the one-page explanation of the “Draft Tobacco Proposal” that the Administration released in May 2012, the Administration stated that it planned to introduce language in the “general exceptions” chapter of the Trans-Pacific Partnership (“TPP”) agreement that would allow “health authorities in TPP governments to adopt regulations that impose origin-neutral, science-based restrictions . . . .”

The Administration insists that it can confine this approach to measures affecting tobacco. Once the US Government has introduced the “safe harbor” concept, however, our trading partners will almost certainly follow suit and insist on the creation of similar “safe harbors” to protect sensitive industries. And as the Administration will limit the “safe harbor” to action by administrative agencies, and exclude action by legislatures, US farmers and agricultural processors would be sure to face a narrow, parochial set of regulatory interests in overseas markets.

What would be the impact of a “safe harbor” approach in the TPP on different types of regulatory measures that confront US agricultural products, and in what way would the result be worse for US agriculture than under existing US international agreements? Here are some examples:

- **Hormone ban** – In 1997, a WTO dispute settlement panel found that the European Union’s import ban on meat from animals treated with certain growth-promoting hormones was a violation of the EU’s obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”). The Panel had found that even if the precautionary principle could be considered as part of customary international law, this principle would not “override” the obligations contained in the specific SPS Agreement provisions at issue.

A safe harbor (assuming it would eventually be applied beyond tobacco products) would reverse that. It would effectively set the precautionary principle above SPS rules, so that, if a TPP party were to adopt a hormone ban on a precautionary basis, and if it were challenged under the TPP, the measure would be upheld.

- **Moratorium on genetically modified organisms** – In 2006, another WTO dispute settlement panel found that the European Union’s moratorium on the approval of new GMO traits in agriculture, and individual member states’ bans on GMOs already approved in the EU, violated the EU’s obligations under the SPS Agreement.

Here again, a safe harbor would presumably switch the result. A TPP Party that maintained a similar barrier to GMO crops could hide behind the safe harbor even though the same measure would be found to violate WTO rules.

- **Restrictions on infant food labels** – The Philippines Department of Health prohibits multinational firms that manufacture infant milk and other nutrition products in the country from using registered trademarks that may erode the efforts of the government to promote breast-feeding. The Philippines also has in place restrictions on advertising for infant formula to dissuade women from being influenced to avoid breast-feeding. Assume that the Philippines were to add additional restrictions on the labels that infant food manufacturers could use, such as prohibiting the use of images of babies on labels. Such an unjustified encumbrance on the use of a registered trademark would violate Article 28 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). In addition, a US trademark holder could also take advantage of protections afforded by the investment chapters of most of our free trade agreements.

The safe harbor approach would deny those protections to the United States Government or to a US trademark holder.

- **Ingredient ban** – To address the risk presented by candy-flavored tobacco products targeted at children, the Canadian Parliament imposed a ban on the use of a long list of ingredients in tobacco products. The list has no rational connection to tobacco control – the Parliament incorporated by reference hundreds of “flavoring agents” and “flavoring substances” that were approved as safe for consumption by an FAO/WHO Expert Committee or generally considered to be safe in foods. (In contrast, the United States banned cigarettes containing an additive that provide a characterizing flavor of the tobacco product or tobacco smoke.) It was well understood by the Parliament that the ban would discriminate against traditional American blend cigarettes,<sup>1</sup> which include banned ingredients even though the ingredients do not provide the characterizing flavor (i.e., traditional American blend cigarettes taste to smokers like tobacco products).

Tobacco exporters would be protected under the WTO Agreement on Technical Barriers to Trade (“TBT Agreement”), as the measure would likely be found to be in violation of Canada’s commitments under Article 2.1 of the TBT Agreement, which prohibits discrimination.

But the situation would be reversed in the TPP. The Administration has indicated that the safe harbor would not apply to legislation, but if a Canadian agency such as Health Canada were to have imposed the ingredient ban rather than the Parliament, then the TPP safe harbor would presumably ensure that Canada could use the ban to protect its market, even though it would run afoul of Canada’s WTO obligations.

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<sup>1</sup>[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills\\_ls.asp?lang=E&ls=c32&Parl=40&Ses=2&source=library\\_prb#tpcata](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c32&Parl=40&Ses=2&source=library_prb#tpcata)

## But It Would Not Achieve the Administration's Stated Goal

The Administration explained in its one-page description that it was seeking to create “a safe harbor for FDA tobacco regulation, providing greater certainty that the provisions in the TPP will not be used in a manner that would prevent FDA from taking the sorts of incremental regulatory actions that are necessary to effectively implement the Tobacco Control Act. . . .”

But by its terms, the Administration's proposal would affect only the governments that are parties to the TPP and only their rights and obligations under the TPP. All of those governments, however, are WTO Members and their laws and regulations would continue to be subject to challenge under the WTO agreements.

So a TPP “safe harbor” would be an empty gesture.

- An FDA regulation that is **justified** under current WTO exceptions for public health measures would already be “safe” – no new exemption in the TPP would be needed.
- An FDA regulation that is **not justified** under current WTO exceptions could be successfully challenged by our trading partners under the WTO agreement, regardless of what the TPP did or did not provide.