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Q&A on US 'certification' of compliance with trade agreements

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A country negotiating a free trade agreement (FTA) with the United States usually comes under pressure from the US to undertake onerous commitments to open up its markets and implement other liberalisation and deregulation measures. On top of this, there is another hurdle it has to face before the FTA can come into effect – a requirement for it to be certified by the US as being in compliance with what the US deems to be that country's obligations under the FTA. Concerns surrounding this requirement under US law have heightened in light of difficult talks now taking place among the US and 11 other Pacific Rim nations to craft a wide-ranging FTA known as the Trans-Pacific Partnership Agreement (TPPA).

This briefing paper seeks to shed more light, through a question-and-answer format, on the hitherto little-known US practice of certification and how it could impact on sovereign countries' laws and law-making processes.

What does certification involve?

The US President withholds formal written notification to another party to a free trade agreement that the US has satisfied *its* domestic approval processes until the US certifies that *the other party* has altered that party's domestic laws and policies to satisfy *US expectations* of what is needed to comply with the FTA.

This means that, even if the US Congress has approved an FTA *and* that other country has satisfied its own domestic approval processes, it won't come into force between the US and that country unless and until the US certifies the other country's implementation.

This certification process potentially gives the US leverage to rewrite the bargain the parties reached during the negotiations on the agreement and secure additional concessions *after* the pact has been signed.

When was certification introduced and why?

Certification language has been included in legislation to implement US trade pacts since the US Congress began approving 'trade' agreements that contained terms that extended beyond matters of tariffs and quotas. It was first used for the Canada-United States Free Trade Agreement (CUSFTA) in 1988, and the North American Free Trade Agreement (NAFTA) in 1993.[1] The language of the certification provision has remained largely the same. Despite its weighty implications, this US practice of

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certification is not well known, except in countries that have been on the receiving end.

Why has the certification process caused longer delays more recently?

Chile faced pressure from the US over compliance with what the US considered were Chile's obligations on intellectual property in the US-Chile FTA. Chile refused to make such changes after its US FTA had come into effect. There were also reported concerns from the US that Australia did not meet the obligations of its US FTA with respect to pharmaceuticals and intellectual property rights.[2] Since then, there has been a lot more focus on getting the changes demanded by the corporations up front, which has caused the long delays discussed below.

What is the legal authority for certification?

Certification is a legally binding obligation on the US President. It has been contained in the legislation passed through the US Congress to implement each US free trade agreement over the past 26 years. A recent example is the implementing legislation for the US-Korea FTA, which specified:

'Conditions for entry into force of the agreement: At such time as the President determines that Korea has taken measures necessary to comply with those provisions of the Agreement that are to take effect on the date on which the Agreement enters into force, the President is authorized to exchange notes with the Government of Korea providing for the entry into force, on or after January 1, 2012, of the Agreement with respect to the United States.'[3]

Would a similar legal requirement apply to the TPPA?

The same unilateral certification requirement can be expected for the TPPA. Indeed, new and additional requirements for the Office of the US Trade Representative (USTR) to consult with Congress about whether certification requirements have been met were included in the proposed legislation to give Fast Track authority to the President. The Bipartisan Trade Priorities Act of 2014 (also known as the Camp-Baucus bill), which was introduced in January 2014 to establish a new grant of Fast Track authority for the TPPA, includes Sec. 4(a)(2):

'CONSULTATIONS PRIOR TO ENTRY INTO FORCE – Prior to exchanging notes providing for the entry into force of a trade agreement, the United States Trade Representative shall consult closely and on a timely basis with Members of Congress and committees as specified in paragraph (1), and keep them fully apprised of the measures a trading partner has taken to comply with those provisions of the agreement that are to take effect on the date that the agreement enters into force. '

How does certification differ from Fast Track?

Certification is a separate process from Fast Track (or Trade Promotion Authority). Fast Track is the process whereby the US Congress grants the US President authority to negotiate, sign and enter into an agreement before Congress votes on it, and then guarantees a vote within 90 days through which Congress must accept or reject the FTA *in toto*. Fast Track not only forbids any amendments, but also limits the permitted hours of Congressional debate on a pact, so as to ensure its speedy passage.[4]

Could Congress change a final TPPA text, even if the President had Fast Track authority?

A majority of members of the US Congress could insist on changes to the TPPA, even with Fast Track. They did that, for example, with the US-Korea FTA, which President George W. Bush signed in 2007. When it became evident in 2011 that the deal as signed could not be passed by Congress, President Barack Obama demanded additional concessions from South Korea related to trade in auto and agriculture products.[5] If Korea had not agreed, it could have faced renewed pressure to make those changes as a precondition for certification.

How would rules on something like currency manipulation be included in the TPPA?

If the TPPA is signed without the inclusion of rules on so-called currency manipulation that have universal application to all parties, it is likely that the US would make additional demands to add such terms post-signing. As occurred four years after the signing of the US-Korea FTA, US officials could announce they could not get the signed deal through Congress without additional concessions. Additional US-defined rules could be added through a side agreement providing new language that is explicitly incorporated into the core text of the TPPA with full enforceability upon implementation of the underlying side agreement.

Can members of Congress deal directly with the trade partner government?

Officially, the executive branch represents the US in negotiations with foreign governments. Practically, however, members of Congress have also engaged directly with other governments to demand further concessions as a condition for their supporting an FTA's implementing legislation.

For instance, after forcing then-President Bush to go back to add new labour and environmental language to the Peru FTA text, years after it had been signed, the Democrats on the House Ways and Means Committee submitted written demands to Peru for specific changes to labour, forestry and other laws and practices that they deemed were needed to comply with the FTA. These demands were the price for their supporting the Peru-US FTA. Peru's government apparently indicated that it would do those things and implemented some of them, and the agreement was then passed. However, the Committee members insisted that President Bush should not certify Peru's compliance with the FTA until the full list was satisfied.

President Bush insisted that Peru make the changes the pharmaceutical lobby had sought to intellectual property provisions as a condition of certification, but ultimately did not require the full list of labour and environment/forestry changes demanded by the Ways and Means Committee to be enacted before certification. As a result, there is now bipartisan support for any future trade authority to include even stronger certification requirements before an agreement can be brought into force.

If the President was granted Fast Track, and Congress then approved the TPPA, would that automatically justify certification?

No. Even after an agreement is passed by the US Congress, it cannot go into effect until the US has certified that trade partners have satisfied US notions of compliance. Certification provides *additional* leverage to the US Congress and US industry to require partner countries to enact additional concessions, even after a pact is signed and passed.

What happens if the President does not have Fast Track authority?

President Obama does not currently have Fast Track. Indeed, in the past 20 years Congress has only granted the extraordinary authority for a total of five years, from 2002 to 2007. Without Fast Track, normal Congressional voting procedures apply. First, House and Senate committees could propose an amendment to the TPPA's implementing legislation, making enactment of the pact conditional on additional features being included in the text or US concessions being removed. Or they might simply refuse to approve aspects of the signed pact, which would mean that it would not have force of law with respect to the United States.

Then, with respect to consideration on the floor of the Senate, simply to end the debate and move to a vote a supermajority of 60 out of 100 Senators would have to agree. If that hurdle is overcome, any Senator can also offer floor amendments in the Senate. In the House, the Rules Committee determines how many amendments will be permitted during floor consideration.[6]

The certification process would be *on top of all this*.

How does certification work in practice?

The US officials transmit a list of the changes to the other country's domestic laws and policies that the US government requires before it will allow the pact to go into force. US government officials then monitor compliance, and pressure the government of the trade partner country to alter its laws and policies until they satisfy the

US view of the changes required. The Office of the US Trade Representative noted in 2009 that it had 'been very cognizant of our statutory obligation not to certify compliance until there is compliance with the FTA.'[7]

What has this meant in practice for countries that are parties to US FTAs?

There is a common pattern that the US requires the other country to send all its proposed implementing laws to the US government so it could scrutinise and comment on them. That is followed by months of negotiations with the US government on the implementing laws. These rounds of negotiations take place in the home country and in the US.

There are many reported examples. El Salvador had to hold at least three rounds of negotiations (two in the US). That included sending a high-level delegation, plus the agriculture and economy ministers, to the US over a demand to accept US meat and poultry inspections that was not included in the text of the Central America Free Trade Agreement (CAFTA) (discussed below).[8]

The US government approved the language of seven laws *before* they were adopted by Costa Rica. The laws related to intellectual property rights, copyright, telecommunications, customs, agriculture, penal procedure, and distribution arrangements for foreign companies. The US reviewed the final versions to ensure there were no changes.[9]

Nicaragua sent the law that would implement CAFTA to the US for review before Nicaragua's President signed it. The US demanded that the law be published to ensure Nicaragua had completed the entire implementation process. The US apparently sought clarification of a number of administrative measures in the bill.[10]

Panamanian officials referred to 'working closely' with the Office of the USTR.[11]

For the Dominican Republic's CAFTA certification, the US government pre-approved the language of seven CAFTA implementing laws and then reviewed the final legislation again to ensure no changes had been made before agreeing to certification.[12]

Guatemala passed its legislation to implement CAFTA in late May 2006 after intensive consultations with the USTR but waited for months to receive an assurance from the USTR that the legislation met US conditions.[13]

Are US officials really involved in drafting the other party's laws?

The best documented example of this involved Peru. Media coverage reports that the Deputy USTR travelled to Peru in 2008 'to help the administration finalize 35 new laws' that the US required. In addition, two teams of US government lawyers assisted Peru on drafting environmental and business laws.[14] The 35 laws reportedly included laws on data protection for pharmaceuticals, investor arbitration, changes to indigenous land ownership and the education system.[15]

Documents released under the US Freedom of Information Act provide much more detail.[16] Annex A sets out excerpts from these documents citing communications between USTR staff, staff of the US Embassy in Lima, other US government officials and Peruvian government officials that occurred during 2008 and 2009 when Peru was making changes to its domestic laws and regulations to satisfy US expectations of what was required from Peru by the US FTA. The changes were made to gain the US government's unilateral certification that Peru had satisfied its obligations as a prerequisite for the FTA coming into effect, which occurred on 1 February 2009.

Most of the communications concern a particularly controversial legislative decree adopted by Peru to comply with the USTR's interpretations of the FTA's requirements – DL 1090, Peru's Forestry and Wildlife Law.

What role do US corporations play in the process?

Media reports show that US corporate interests drive US government demands during the certification process, in addition to the particulars of the US legislation to approve any FTA. These interests have included the US rice and pork industries,[17] National Council of Textile Organizations,[18] Chevron,[19] alcohol industry,[20] International Intellectual Property Alliance,[21] Pharmaceutical Research and Manufacturers of America,[22] and the National Cattlemen's Beef Association, National Pork Producers Council and poultry exporters.[23]

Does US civil society also influence the process?

US unions sought additional changes to Peru's labour laws beyond what the US officials considered was necessary to comply with the FTA. Both the unions and environmental NGOs argued against certification until the laws were changed to meet their interpretation of the FTA.[24]

President Obama certified compliance with the Colombia-US FTA even though Colombia had not fully implemented the agreed labour action plan. That is one reason why the Democrats are as determined as the Republicans to use certification to secure what they see as compliance with the TPPA.

Is the US's intervention in drafting other countries' laws made public?

It is difficult to find formal records. Most of the information available is in the media, principally the *Inside US Trade* newsletter. They report comments either from US industry, or from officials and politicians in the US or the target country. Communications between the US and another TPPA government could also fall within the secrecy provisions that prevent the release of background documents to the TPPA until four years after the agreement comes into force. It is impossible to tell with certainty because the classification of documents to which this applies is also secret.

In some TPPA countries, communications between governments are subject to strict confidentiality and protected even from disclosure under freedom of information laws. It may therefore be impossible even for other legislators in the other TPPA country, let alone the public, to know that the US is and has been involved in writing their laws and policies, what different interpretations were proposed, and whether their government gave way.

How long can the certification process take?

As Table A shows, certification can extend for years after each country has fulfilled its constitutional requirements for ratification. Panama's legislature approved the US-Panama FTA in 2007, and the US Congress eventually approved it more than four years later. But the US withheld notification for another year because Panama had not changed all of its laws

Table A

FTA partner country	Date of partner's legislative or other means# of approval	Date of US legislative approval	Date FTA went into effect	Delay*
El Salvador	17 December 2004	28 July 2005	1 March 2006	7 months
Honduras	3 March 2005	28 July 2005	1 April 2006	8 months
Nicaragua	9 October 2005	28 July 2005	1 April 2006	6 months
Guatemala	10 March 2005	28 July 2005	1 July 2006	11 months
Dominican Republic	6 September 2005	28 July 2005	1 March 2007	18 months
Costa Rica	7 October 2007	28 July 2005	1 January 2009	15 months
Peru	28 June 2006	4 December 2007	1 February 2009	14 months
Panama	11 July 2007	12 October 2011	31 October 2012	12 months
South Korea	22 November 2011	12 October 2011	15 March 2012	3 months^

For Costa Rica, the date listed is for a referendum required for final domestic approval.
* Calculated as the time between the most recent legislative approval (whether in the US or the partner country) and the date the FTA went into effect.
^ The US-Korea FTA was signed on 30 June 2007, and the main delay was to negotiate the extra market access for US autos in Korea that the US Congress insisted on before approving the FTA and passing the implementing legislation, even with Fast Track.[25]

and policies on patents, copyright, finance, telecommunications, procurement, customs and trade remedies, among others, to the satisfaction of the US.

Indeed, the construct of the certification obligation in legislation implementing US FTAs contemplates the prospect that enactment of a pact could be withheld indefinitely. A May 2014 letter signed by 154 Congressional Democrats and Republicans calls for just such treatment with respect to Vietnam, Brunei and other countries regarding their prospective TPPA labour rights obligations: 'The Administration must refrain from validating such woefully inadequate labor norms and the final agreement should be withheld until these countries embrace the need to reform their labor laws and move aggressively to implement them.'[26]

Does certification only apply to formal legislation?

No, it applies to a much broader range of measures. Examples that have been reported also relate to regulations,[27] institutional and regulatory arrangements,[28] and executive decrees.[29]

What if the text is vague and open to different interpretations?

It is common for parties to agree to FTA provisions precisely because they are vague and provide opaque compromises on matters that were heavily contested which allow each party some room to interpret them in their favour. The US insists that its interpretation of such provisions and terminology must prevail.

How does certification address different systems for receiving treaties into domestic law?

With great difficulty. In 2006 the ranking Democrat member of the House Ways and Means Committee Charles Rangel pointed out that the delay in implementing CAFTA 'hinges partially on a fundamental difference in legal interpretation between the USTR and CAFTA countries. USTR insists that signatory countries must change their domestic laws to reflect the obligations of the deal on a range of issues from IPR [intellectual property rights] to agriculture market access. In contrast, the CAFTA signatory countries have argued that the agreement is a treaty which trumps domestic law under their legal system'.[30]

The USTR's position varied according to the issue: it demanded that CAFTA countries change their domestic law in areas such as intellectual property, but it said that merely ratifying international labour conventions was enough to incorporate them into CAFTA countries' domestic laws.[31]

Does the US make demands that go beyond the actual text?

Absolutely. The US has required other parties to comply with what it believes was agreed, even if it is not written in the text.

CAFTA countries were required to recognise US inspection standards for food production facilities which were not in the text, but which the USTR said they had agreed to. The USTR claimed that the other countries understood they would need to recognise US standards prior to the agreement going into effect. He reportedly said 'the lesson to be drawn from CAFTA-DR implementation difficulties is to make the commitments countries have to take on more clear, including getting them in writing'.[32]

The Republican chair of the Senate Finance Committee, Charles Grassley, likewise acknowledged there was no such obligation in the text, but said 'countries recognized they had to accept the equivalence' prior to implementation. Grassley said 'I see no need for you to rush the implementation of the CAFTA-DR until this pending matter is resolved.'[33]

In the past, the USTR has refused to certify compliance in order to try to obtain concessions that unquestionably were not included in the trade pact and to which the USTR alleged no verbal commitment. One example of using the certification process for such 'rough bargaining' was the requirement that Guatemala give three years of data exclusivity on medicines that was not an obligation in the CAFTA text and that Guatemala had certainly never agreed to.[34]

Does there have to be independent evidence to support the US claims?

It does not seem that the US needs to produce any corroborating evidence to support its professed expectations or claims that there were additional oral agreements and commitments that extend beyond the FTA texts. In the past, US officials have decided unilaterally that a commitment was made. For instance, to support such claims in relation to CAFTA, Grassley pointed to the US statement of commercial interest that is required by Fast Track legislation for all FTAs. According to Grassley, the statement said the equivalence determination by signatories was 'imminent' when the implementing legislation was introduced in June 2005. Therefore, said Grassley, the vote of Congress to approve the CAFTA-DR was based 'in part upon the expectation that the CAFTA-DR countries would recognize the equivalency of the US meat inspection system'.[35]

What about TPPA countries that were not at the negotiating table when such commitments were supposedly made?

This US practice is especially problematic for countries that joined the TPPA negotiations part way through. They were apparently required to accept everything that had been agreed to date. But they will not know what discussion has taken place regarding the meaning of the provisions that had already been agreed to. It is not clear how extensive the minutes are and whether there is any formal record (*travaux preparatoire*); even if there is, the US practice would seem to include a wide range of oral communications.

Could the US use commitments it says a TPPA government made during negotiations to accede to the TPPA talks?

A party that joined the TPPA talks part way through should expect discussions during the accession process to become part of the conditions for certification. That could apply, for example, where the US considers commitments the other country made in a written agreement were not fully addressed by the TPPA, or where there is ambiguity about what that country would do and that country has not implemented the changes *as the US interpreted them*. Examples might include food safety standards, vehicle emissions standards, reforms to state-owned enterprises and other aspects of competition law, and telecommunications regulations.

Might parallel negotiations between the US and another TPPA country be included in certification?

Yes. The rules on sanitary and phytosanitary (SPS) measures that required Central American countries to recognise US food inspection were not part of the CAFTA agreement, but were addressed in a parallel negotiation on SPS.[36]

This raises serious problems for Japan in the TPPA. There are major differences between the USTR and Japan over the terms of the parallel negotiations that were agreed as conditions for the US endorsing Japan's accession. These include non-tariff protections for Japan's five sacred agricultural products and automobiles, food and consumer safety standards, intellectual property, state-owned enterprises (especially Japan Post), investment and domestic regulation.

What if the other country rejects the US position?

Every state party retains its sovereign right to decide its own laws and policies, and stand by its interpretation. But exercising its sovereignty may come at a price. If the US refuses to certify compliance in a bilateral FTA, the other country is unable to enjoy any benefits it secured from the US, such as lower tariffs.

However, the situation is more complicated with the TPPA. If the agreement comes into force between parties other than the US, all those countries will need to comply with the generic rules, such as on intellectual property or state-owned enterprises. By refusing to certify compliance, the US could deny the most prized market access opportunities on offer in the TPPA, while countries would still be required to change their domestic laws and policies when the TPPA comes into effect as between the non-US parties. Most of those laws and policies will become generally applicable – the new law of the land – so the US would *de facto* get the benefits, without making any concessions.

What happens if the other country's legislature refuses to pass the law that the US requires?

The US President can refuse to certify compliance and the TPPA would not go into effect between that country and the US.

How has US leverage affected the democratic process in countries that signed recent US FTAs?

Peru's President was granted special authority for 180 days to enact laws through special decrees without Congressional approval.[37] Ninety-eight laws were issued under special authority by 4 July 2008.[38] The government was accused of using the power to make changes not required by the FTA.

Panama implemented a number of measures through executive decrees.[39]

Can the other party seek to reopen the negotiations in response to US demands?

The US would have to agree, and additional negotiations would have to be allowed under whatever US trade authority rules might then be in effect. Presumably, if the US did agree, the other country would be required to make further concessions to compensate for changes; that would potentially allow the US to make other new demands as well. Significant changes would require an additional Congressional vote to approve them.

Depending on the nature of any new concessions, the other TPPA countries with whom the agreement has not yet come into force might seek to enjoy the added concessions as well.

Doesn't this process run a serious risk of domestic backlash against US interference?

The fallout from the certification process is treated as a domestic political issue that the government is left to manage. In Peru, for example, leading opposition parties and civil society groups called for a nationwide work stoppage to protest the special authority for the President to make laws and bypass Congress. Indigenous peoples took a constitutional challenge to land laws that would reduce their controls over mining and deforestation. Unions objected that changes to the small and medium enterprise law removed workers' entitlements.[40]

Peru also enacted investment rules regarding oil, gas and logging in the Amazon basin as part of conforming to the US FTA requirements. On 5 June 2009 Peruvian security forces attacked several thousand indigenous Awajun and Wambis protestors, including many women and children; more than 30 people were killed in what became known as the Bagua massacre.[41] They had been blocking the highway to support demands for revoking the decrees that implemented the laws. Cables published by WikiLeaks show warnings from the US four days before the massacre that Peru's government was being too lenient and that giving in to indigenous pressures would have 'implications' for the FTA.

The Supreme Court in Costa Rica ruled against a new intellectual property law affecting biodiversity, which had been introduced without consulting the country's indigenous peoples, in violation of ILO Convention 169. But the ruling was viewed as a technicality, unlikely to hinder passage of the law.[42] The Court was petitioned to reconsider a revised bill and held it was constitutional.[43]

In Guatemala the generic drug industry opposed controversial changes to the intellectual property laws.[44]

How does certification of individual parties affect a plurilateral agreement like the TPPA?

As Table A above shows, the US certified compliance with CAFTA at different times for different countries, depending on their willingness to accede to US demands. The same would happen with the TPPA.

What if rules of origin rely on inputs from a party that is not certified?

This problem arose under CAFTA where countries that had implemented the agreement wanted to take advantage of textile cumulation provisions, but could not include content from parties that the US had not certified as compliant.[45] They had to comply with the agreement, without being able to access the benefits they expected because the US was withholding certification from some CAFTA countries.

Can the US change its own TPPA commitments through certification?

These changes usually occur during the US Congressional approval phase, rather than certification. For instance, when it became apparent that the House of Representatives would not approve CAFTA, the USTR demanded changes to the rules of origin in CAFTA to prevent fabric from third countries being used for pockets in apparel. These changes were at the behest of the National Council of Textile Organizations.

Under the agreement, an amendment to the rules of origin had to be agreed by all parties to CAFTA. The USTR negotiated concessions with countries individually. Guatemala agreed, but then had difficulty negotiating compensatory commitments from the US.[46] The Dominican Republic agreed to less compensation than was given to the other parties, on the understanding it would receive additional concessions for the country's trouser and suit manufacturers at a later date. That also proved difficult.[47]

Could other parties apply their own version of certification to the US?

Technically another TPPA party could refuse to bring the TPPA into effect in relation to the US by challenging the US interpretation of US obligations. However, in reality only the major players, notably Japan, would have the political leverage. Even for Japan, the US is the major market that it wants to access through the TPPA. It seems inconceivable that the US would make any concessions, because it would have to secure agreement of its Congress. The likely result of reciprocal certification rules would be either a standoff or a backdown by the non-US party.

It could also be argued that some aspects of the TPPA are designed to conform to existing US law or require minimal changes; to the extent that this is true, it would make certification an ineffectual tool.

As a practical matter for countries that do not already have a US FTA, withholding ratification or enactment of the TPPA would mean forgoing the access to the US market that has been claimed as the main benefit of the TPPA.

What kinds of rules have been targeted by the US for compliance?

Import licences for rice and pork (Guatemala, El Salvador): The US rice and pork industries wanted to move away from traditional importers to maximise the potential purchase of products through tariff rate quotas, by new rules on allocation of import licences or the right to sell directly to large retailers.[48]

Equivalence of meat and poultry certified by US plants (Guatemala, El Salvador): The US insisted that an unequivocal acceptance of shipments of meat and poultry inspected and certified in US plants replace the policy of requiring plant-by-plant inspections to qualify plants for export.[49] This was not explicit in the SPS chapter. A government official was quoted as saying the demands 'pose a political problem for El Salvador because it shows the US as exacting new concessions at will.'[50] The USTR acknowledged the equivalence demands were not part of CAFTA but said 'signatory countries had made commitments they have to keep'.[51]

The demand was so controversial that El Salvador's president called a meeting of all the other presidents to discuss the SPS issue and a follow-up meeting with all countries' economy ministers.[52] In the end El Salvador agreed to recognise the equivalence of the US food safety and inspection system for meat, poultry and dairy products, thereby eliminating its requirement to inspect US meat, poultry and dairy plants.[53]

The US had successfully demanded similar recognition as a condition for signing the FTA with Peru, and that became one of the disputed items that held up the publication of the agriculture chapter.[54]

The US did not propose reciprocal recognition of meat shipments from plants in the treaty partner countries, claiming they currently failed to meet US standards.[55]

Additional period of data exclusivity (Guatemala): CAFTA requires five years of data exclusivity and only for a new product that does not contain a chemical entity previously approved in the territory. The US demanded an additional three-year monopoly for clinical trial data for a new use of an existing medicine, even when there is no patent.[56] This would effectively prevent generics from being able to be sold during this monopoly period for the new use, even if there is no patent. The US proposed this during the CAFTA negotiations but it was rejected due to tough resistance by the Central American negotiators. [57] Guatemala was nevertheless required to give this extra three-year monopoly.[58]

Data exclusivity for more medicines (Dominican Republic): Despite it not being in the CAFTA text, the US pushed the Dominican Republic during certification to allow data exclusivity, even on medicines that had almost all old ingredients. The Dominican Republic agreed to this.[59]

Easier to obtain data exclusivity (Guatemala): In the certification process, the US pushed Guatemala to not have any time limit on when a brandname drug producer can register for marketing approval and still be able to enjoy data exclusivity.[60] This would result in more medicines in Guatemala being under the data exclusivity monopoly and Guatemalans having to wait longer for new medicines.

Universal recognition of patents (Guatemala): In the certification process, the US pushed Guatemala to give automatic recognition of patents filed in the US or another country without there having even been an application in Guatemala, even though this was not required in the CAFTA text.[61] This change would remove an important safeguard available in international patent rules: a country's right to set its own standards for what must be granted a patent and to set those standards high.[62]

Second-use patents (Guatemala): In the certification process, the US pushed Guatemala to allow patents on a new use of an old medicine and on existing chemical products, even though this was not required in the CAFTA text.[63] The United Nations Special Rapporteur on the right to health has warned against this practice of 'evergreening' and other stronger intellectual property protections on medicines.[64]

Fuel distribution contracts (Dominican Republic): US company Chevron objected to two Dominican Republic resolutions, claiming they prohibited US companies from supplying the service of fuel transportation and were not protected by non-conforming measures (NCM) in the US FTA. One froze the volume of fuel transported by each local fuel transporter; the other capped the total number of trucks at the current level, which limited the ability of US companies to renegotiate fuel transportation contracts at a time Chevron wanted to terminate such contracts.[65]

The Dominican Republic did not consider these measures to violate CAFTA and argued they were necessary for national security.[66] It reportedly 'asked the US to be flexible on this issue, especially because the Dominican Republic has accommodated repeated US demands for legislative changes even after the formal review of domestic legislation for CAFTA compatibility has been completed'. It was speculated that one reason the government may have been resisting the changes could be 'fatigue with the CAFTA implementation process, where new problems have arisen as soon as old ones are fixed'.[67]

Under continued pressure from the US, the Dominican Republic agreed to annul both resolutions and days later the USTR announced that the Dominican Republic had met all the requirements for CAFTA to go into force.[68]

ANNEX A

Excerpts from documents relating to certification of Peru's compliance with US interpretations of Peru's obligations under the US-Peru FTA

These excerpts are from documents released under the US Freedom of Information Act.[69] They involve communications within the Office of the USTR unless otherwise indicated.

***June 2008**:* The USTR met with Peruvian officials to 'discuss modifications to the Wildlife and Forestry Law … These modifications became DL 1090.'[70]

***26 September 2008**:* 'Today is the last day of our discussions with the Peruvians this week.

Yesterday we agreed to send them comments on the regulations to DL 1090 (Forestry and Wildlife Decree) as soon as possible … [T]he Peruvians need to have our comments as soon as possible so they can make the necessary changes to the regulations. We also agreed to return to Lima the week of October 27 for a week of meetings … The purpose of this trip is to finalize all of the revisions to the regulations.'[71]

27 October 2008*:* A member of the House Ways and Means Committee wanted to discuss with the Deputy Assistant USTR 'implementation and in particular the status of the provision that Peru added to 1090 without telling USTR that you have now asked them to remove'.[72]

29 October 2008*:* 'My colleagues from the Forest Service and USAID (forest experts) are going to put together language on DL 1090 … All in all if the Peruvians accept our language as we propose it we still have the possibility of wrapping everything up the week of November 10. If the Peruvians try to negotiate then all bets are off.'[73]

11 November 2008*:* ' … The Peruvians included a modification authorizing No-Bid Concessions (the government could award a concession to an individual/company without going through a competitive bidding process). We expressed concern about including this provision … We agreed to include this provision only after we were assured that it would be applied in these limited circumstances and would be subject to the same open and transparent process as other concession bidding processes.'[74]

18 November 2008*:* Talking points prepared by USTR staff for USTR Susan Schwab to convey to Peruvian officials: 'We need to confirm that the concession by private initiative in DL 1090 – as expanded now to apply to all forestry concessions – will through the law or its regulations meet Peru's obligations to have a transparent and competitive system for awarding forestry concessions. We also need to analyze a number of other regulations, but your team keeps sending us revised draft regulations to review, even as of this week. These additional changes have delayed the process.'[75]

18 November 2008*:* 'We still have outstanding issues in the other regs – small issues. The biggest issue is the law DL 1090 and the private concession issue. We have to redraft the regs and the law – Peru needs to accept them w/o changes.'[76]

December 2008: From the Deputy Assistant USTR to an official in Peru's Trade Ministry: 'We think it is important for DL 1090 to include the hectare amounts for each mechanism. The hectare amount should be included in DL 1090 for private initiative before it goes to your Congress.'[77]

5 December 2008*:* Communications between Peruvian official and Deputy Assistant USTR: 'Do we understand that with this amendment, the proposal for modifying DL 1090 is OK with you?' … 'Could you send me the final version of the law? It would be helpful to review it one last time before you send it forward.' … 'Of course …, I'm attaching hereto the final version of the law in Spanish. I will request the correspondent translation and send it you as soon as I get it.'[78]

7 January 2009*:* 'Peru made additional changes to DL 1090 that the US never agreed to or saw and then published it as a done deal in July. We told Peru that the changes they made were unacceptable as they undermined the letter and spirit of the Forest Sector Annex. They agreed to make changes and we agreed to those specific changes in November. We gave them the go ahead to move DL 1090 through their Congress weeks ago. I do not understand why this has been delayed and why we weren't notified of the delay. They need to move the modifications to DL 1090 through their Congress asap but we also need to make sure additional changes are not made to DL 1090. I am not sure the Peruvians can assure us that their Congress will not make additional changes.'[79]

8 January 2009*:* 'The Peruvians told us that President Garcia sent DL 1090 as well as the other outstanding legislative items to the Peruvian Congress today. Their Congress has scheduled a special session for Monday, Jan. 12, to deal with all US-Peru TPA [Trade Promotion Agreement] legislative issues. They could not guarantee that there would be no changes to DL 1090 but said they would contact us if there were any significant changes so we could weigh in before the law was passed.'[80]

12 January 2009*:* From US Embassy in Lima to USTR staff: 'I wanted to make sure you have the attached versions (in Spanish) of the Forestry

(1090) Bill and Omnibus Bill as introduced to Peru's Congress for approval (hopefully) tomorrow afternoon. Although the message that changes should be avoided has been clearly delivered, we'll do our best to quickly report any changes that do emerge.'[81]

13 January 2009: From US Embassy in Lima to USTR staff: 'Enviro law passed with 58-7 votes (apparently only need majority of those present, sorry for earlier error) with president of congress stressing "as presented by executive". We watched the whole debate, and there were no changes.'[82]

13 January 2009: USTR official to Peruvian trade official: 'We just learned that several of the Supreme Decrees were recently published. While we appreciate the need to move quickly it is very important that our technical experts have time to review the final decrees before they are published. If a significant problem arises after publication, it could impede entry-into-force of the agreement. Our technical teams are reviewing the decrees as quickly as possible. We will be communicating with you as those reviews progress.'[83]

February 2009: The US-Peru FTA took effect after the US government granted its unilateral certification that Peru had made the desired changes to its domestic laws.

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Notes

1 See, e.g., the US North American Free Trade Agreement Implementation Act, Sec. 101(b): 'CONDITIONS FOR ENTRY INTO FORCE OF THE AGREEMENT — The President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force, on or after January 1, 1994, of the [North American Free Trade] Agreement for the United States with respect to such country at such time as— (1) the President— (A) determines that such country has implemented the statutory changes necessary to bring that country into compliance with its obligations under the Agreement and has made provision to implement the Uniform Regulations provided for under article 511 of the Agreement regarding the interpretation, application, and administration of the rules of origin, and (B) transmits a report to the House of Representatives and the Senate setting forth the determination under subparagraph (A) and including, in the case of Mexico, a description of the specific measures taken by that country to— (i) bring its laws into conformity with the requirements of the Schedule of Mexico in Annex 1904.15 of the Agreement, and (ii) otherwise ensure the effective implementation of the binational panel review process under chapter 19 of the Agreement regarding final antidumping and countervailing duty determinations; and (2) the Government of such country exchanges notes with the United States providing for the entry into force of the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation for that country and the United States.' (H.R. 3450 (103rd), signed by the President on 8 December 1993) Similar language was included in the 1988 Canada-United States Free Trade Agreement Implementation Act, Sec. 102(b).

2 'USTR Increases Pressure on Guatemala to Drop Data Protection Law', *Inside US Trade*, 14 January 2005

3 United States-Korea Free Trade Agreement Implementation Act, Sec. 101(b) (H.R. 3080 (112th), signed by the President on 21 October 2011)

4 'The TPP and the US Congress – without Fast Track Authority', Third World Network, 21 November 2013, http://www.twnside.org.sg/title2/FTAs/General/TPP&USCongress-withoutFastTrackAuthority_21%20Nov2013.doc

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sg/title2/FTAs/General/TPP&USCongress-withoutFastTrackAuthority_21%20Nov2013.doc

7 'Democrats Urge Caution on Implementing FTA After Peru Passes Legislation', *Inside US Trade*, 16 January 2009

8 'US Demands on SPS Pose New Obstacles to CAFTA Implementation', *Inside US Trade*, 20 January 2006; 'Grassley Backs USTR in SPS Fight with CAFTA Countries', *Inside US Trade*, 27 January 2006

9 'Dominican Republic Moves Closer to CAFTA Implementation', *Inside US Trade,* 1 December 2006

10 'Honduras, Nicaragua May Implement CAFTA Next Month as Guatemala Lags', *Inside US Trade,* 31 March 2006

11 'Panama Moves Ahead with FTA Implementation as October Goal Nears', *Inside US Trade*, 7 September 2012

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13 'USTR Calls for Further Steps After Guatemala Approves CAFTA Bill', *Inside US Trade,* 26 May 2006

14 'New Peru FTA Decrees Anger Civil Society over Labor, Environment', *Inside US Trade*, 4 July 2008

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16 Email communications between staff of the Office of the US Trade Representative, the US Embassy in Lima, other US government officials, and officials of Peru's Trade Ministry (MINCETUR), July 2008-January 2009. Obtained via US Freedom of Information Act request, March 2010

17 'US, Guatemala Fight on CAFTA TRQ Allocations for Rice, Pork Exports', *Inside US Trade,* 3 February 2006

18 'NCTO Steps Up Pressure for Legislation Implementing CAFTA Fixes', *Inside US Trade,* 26 May 2006; 'US, Dominican Republic Fail to Agree on New CAFTA Pocketing Concessions', *Inside US Trade,* 2 February 2007

19 'Dominican Republic Continues to Work for CAFTA Implementation', *Inside US Trade,* 12 January 2007

20 'Dominican Republic Continues to Work for CAFTA Implementation', *Inside US Trade,* 12 January 2007

21 'Industry Highlights CAFTA Implementation Problems in Costa Rica, DR', *Inside US Trade,*16 February 2007

22 'Industry Highlights CAFTA Implementation Problems in Costa Rica, DR', *Inside US Trade,*16 February 2007

23 'US Demands on SPS Pose New Obstacles to CAFTA Implementation', *Inside US Trade,* 20 January 2006

24 'Democrats Urge Caution on Implementing FTA After Peru Passes Legislation', *Inside US Trade*, 16 January 2009

25 USTR, 'New Opportunities for US Exporters Under the US-Korea Trade Agreement', http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta

26 Letter to USTR Michael Froman from 153 House Democrats, 29 May 2014, http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/5.29.14-TPPLettertoFroman.pdf

27 'New Peru FTA Decrees Anger Civil Society over Labor, Environment', *Inside US Trade*, 4 July 2008

28 'USTR Calls for Further Steps After Guatemala Approves CAFTA Bill', *Inside US Trade,* 26 May 2006

29 'Panama Moves Ahead with FTA Implementation as October Goal Nears', *Inside US Trade*, 7 September 2012

30 ‘USTR Announces Delay in CAFTA Implementation’, *Inside US Trade*, 6 January 2006; see also ‘Honduras, Nicaragua May Implement CAFTA Next Month as Guatemala Lags’, *Inside US Trade,* 31 March 2006

31 ‘USTR Announces Delay in CAFTA Implementation’, *Inside US Trade*, 6 January 2006

32 ‘US Demands on SPS Pose New Obstacles to CAFTA Implementation’, *Inside US Trade,* 20 January 2006

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41 ‘On the Fifth Anniversary of Peru FTA Bagua Massacre of Indigenous Protestors, State Department Cables Published on Wikileaks Reveal US Role’, Amazon Watch/ Public Citizen, 9 June 2014, http://www.citizen.org/documents/press-release-peru-bagua-massacre-amazon-watch.pdf

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47 ‘US, Dominican Republic Fail to Agree on New CAFTA Pocketing Concessions’, *Inside US Trade,* 2 February 2007; ‘US Says Dominican Republic Fuel Resolution Violates CAFTA’, *Inside US Trade,* 16 February 2007

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53 USTR, *National Trade Estimates Report*, 2007, http://www.ustr.gov/archive/assets/Document_Library/Reports_Publications/2007/2007_NTE_Report/asset_upload_file13_10942.pdf

54 'US Demands on SPS Pose New Obstacles to CAFTA Implementation', *Inside US Trade,* 20 January 2006

55 'US Demands on SPS Pose New Obstacles to CAFTA Implementation', *Inside US Trade,* 20 January 2006

56 For example, aspirin was used as a painkiller and then it was found to be useful in thinning the blood to prevent strokes. The use of aspirin to prevent strokes is a 'new use' of an old medicine.

57 'US, Guatemala Fight on CAFTA TRQ Allocations for Rice, Pork Exports', *Inside US Trade,* 3 February 2006

58 'Bush Announces Start of CAFTA Implementation for El Salvador', *Inside US Trade,* 3 March 2006

59 'Dominican Republic Moves Closer to CAFTA Implementation', *Inside US Trade*, 1 December 2006

60 'Portman Says CAFTA Implementation by Guatemala Months Away', *Inside US Trade,* 7 April 2006; 'USTR Announces Delay in CAFTA Implementation', *Inside US Trade,* 6 January 2006

61 'US, Guatemala Fight on CAFTA TRQ Allocations for Rice, Pork Exports', *Inside US Trade,* 3 February 2006

62 The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) allows member countries, including Guatemala, to define what constitute the patentability criteria of new, inventive and industrially applicable (http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm). The standard can be set high (as countries such as India have done), which means that fewer patents are granted, so fewer medicines and other technologies are available only at the monopoly prices during the patent term.

63 'US, Guatemala Fight on CAFTA TRQ Allocations for Rice, Pork Exports', *Inside US Trade,* 3 February 2006

64 http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/11/12

65 'Dominican Republic Continues to Work for CAFTA Implementation', *Inside US Trade,* 12 January 2007; 'New Fuel Transportation Resolution Possible CAFTA Violation in DR', *Inside US Trade,* 26 January 2007

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69 Email communications between staff of the Office of the US Trade Representative, the US Embassy in Lima, other US government officials and officials of Peru's Trade Ministry (MINCETUR), July 2008-January 2009. Obtained via US Freedom of Information Act request, March 2010

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71 Mara Burr (Deputy Assistant USTR for Environment and Natural Resources) to USTR and other staff from the inter-agency team, 26 September 2008

72 Alex Perkins, House Ways and Means Committee, to Mara Burr (Deputy Assistant USTR for Environment and Natural Resources), 27 October 2008

73 Mara Burr (Deputy Assistant USTR for Environment and Natural Resources) to USTR staff, 29 October 2008

74 Mara Burr (Deputy Assistant USTR for Environment and Natural Resources) to other USTR staff, 11 November 2008

75 Talking points prepared for Ambassador Susan Schwab 'on Peru FTA Implementation', 18 November 2008

76 Mara Burr (Deputy Assistant USTR for Environment and Natural Resources) to USTR staff, 18 November 2008

77 Mara Burr (Deputy Assistant USTR for Environment and Natural Resources) to Peru's Trade Ministry, December 2008 (Identity of the recipient and exact date were redacted)

78 Emails between Jaime Dupuy, Vice-Minister of Trade, Peru, and Mara Burr (Deputy Assistant USTR for Environment and Natural Resources), 5 December 2008

79 Mara Burr (Deputy Assistant USTR for Environment and Natural Resources) to other USTR staff, 7 January 2009

80 Mara Burr (Deputy Assistant USTR for Environment and Natural Resources) to other USTR staff, 8 January 2009

81 Marcos Mandojana (Economic Section, US Embassy in Lima) to USTR staff, 12 January 2009

82 Marcos Mandojana (Economic Section, US Embassy in Lima) to USTR staff, 13 January 2009

83 Everett Eissenstat (Assistant USTR for the Americas) to Silvia Hooker (Peru's Trade Ministry), 13 January 2009