Statement of Robert Weissman, President, Public Citizen

Note: Today, Greenpeace Netherlands leaked negotiating texts of the Transatlantic Trade and Investment Partnership (TTIP) agreement, the proposed trade deal between the United States and Europe. The leaks include 13 of 17 consolidated texts, as well as a European Union memorandum on the negotiating state of play. This statement provides a preliminary analysis of one of the leaked chapters, Regulatory Cooperation.

Europe, beware. The leaked TTIP text confirms that the United States is trying to export its failed regulatory model. If the United States succeeds in its project, Big Business will gain enormous power to block, slow, undermine and repeal European regulations.

The leaked text makes clear that there are serious issues requiring analysis in particular sectors, but also that the Regulatory Cooperation chapter poses a major threat to health, safety, environmental, labor, consumer, civil and political rights, and other regulatory protections. The U.S. proposals in the Regulatory Cooperation chapter seek to export many of the worst features of U.S. rulemaking.

There is a lot to recommend about the U.S. regulatory process in theory, but in practice, the U.S. rulemaking process now evidences a massive tilt to favor the interests of regulated industries. It is far too slow; regulators are bogged down in seemingly endless analytic requirements that are themselves biased to favor the interests of regulated parties. Its veneration of "cost-benefit analysis" provides a pseudo-scientific cloak to industry's apocalyptic claims about the costs of the next regulation and operates at loggerheads with application of the precautionary principle.

In the days ahead, Public Citizen will issue a more detailed analysis of the draft Regulatory Cooperation chapter. These are among our top line concerns from the U.S. proposals in that chapter:

- **Regulatory Delay – Paralysis by Analysis:** Article X.13 would require parties to provide detailed and expansive justifications for their decision to issue a regulation, including consideration of regulatory alternatives. This is an inherently unequal obligation, because there is no burden to provide justification for doing nothing. In practice, the need to provide detailed justification for issuing a rule dramatically slows U.S. rulemaking.
- **Corporate-Biased Cost Benefit Analysis:** Article X.13.1.c would require parties to conduct detailed cost-benefit studies of regulations and regulatory alternatives. It is important to understand that the U.S. understanding of the phrase "anticipated costs and benefits" is fundamentally different than the European conception of regulatory impact assessment. In the United States, cost-benefit analysis is an extremely technical concept involving extensive data collection and elaborate modeling, and it is generally understood to be a near-absolute decision-making criterion. Its highly technical nature obscures the fact that cost estimates frequently rely on regulated industry-provided data and are excessive, and that non-quantifiable or indirect benefits are frequently not captured.
- **One-Sided Analytic Requirements:** Article X.13.2 would require parties to assess the impact of regulations on small businesses, a formal assessment under U.S. in certain circumstances that imposes extensive delay. It is also a one-sided required analysis, both under U.S. law and the U.S. TTIP proposal, because the specially

required analysis looks to burdens ("adverse economic impacts" in the TTIP proposal) but not pro-competitive or other benefits to small business.

- **Look Back, Not Forward:** Article X.16 would require parties to undertake retrospective reviews of regulations. This is, again, an inherently uneven process, because the instruction is to search for rules to revise or repeal, not for regulatory shortcomings or gaps requiring new initiatives. In practice in the United States, the obligation to undertake regulatory reviews demands valuable time and resources from agencies, and interferes with their ability to conduct forward-looking activity.
- **Trade Over the Public Interest:** Article X.9 would impose a requirement for parties to consider trade effects of proposed regulations, and implicitly to justify any detrimental effects on trade. This is admittedly a soft requirement, but is notable inserting purely commercial considerations into regulatory decision-making and should be viewed as precursor to more robust demands in this area to follow.

Taken in their entirety, the U.S. Regulatory Cooperation proposals are affirmatively hostile to the precautionary principle. The precautionary principle counsels taking protective action in the face of uncertainty. The U.S. cost-benefit standards, demands for consideration of alternative regulatory approaches, and expansive analytic requirements also counsel for inaction in the face of uncertainty. Moreover, U.S.-style cost-benefit analysis places a premium on industry-provided cost estimates while effectively discounting benefits from action to prevent possible harm.

There is no need to overstate this tension; it is in fact possible to take precautionary action in a cost-benefit framework, as the United States sometimes does – but it is also the case that U.S.-style cost benefit is generally discordant with precautionary approaches.

The U.S. proposal notably does not include a requirement for judicial review of regulatory impact analytic requirements. This feature is central to the U.S. rulemaking process, but U.S. negotiators have recognized its incompatibility with European institutional arrangements.

It remains to be seen how a regulatory cooperation chapter will intersect with the investment chapter. But irrespective of the intersection with the investment chapter, Europeans should be aware that, if the U.S. Regulatory Cooperation proposals are accepted and TTIP is approved, it is only a matter of time before the United States and U.S. corporations begin advocating judicial review of European compliance with the provisions of the Regulatory Cooperation chapter.

Judicial review is an inherent part of the logic of the U.S. system, and there is no doubt that U.S. corporate interests will insist that judicial review is required to enforce the terms of the Regulatory Cooperation chapter.

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