

PAST EVENTS

- An event on China (Hong Kong and Shanghai) was hosted at the LA Library on April 17, in continued coordination with the Port of Los Angeles.
- On April 22 and 23, LACBA co-sponsored an event with Arent Fox in Irvine and Redland, respectively, on Export and Import Law Updates. The program featured a catch up on the last two years of Export/Import laws.
- On June 15, the section held the annual end-of-year party. The party celebrated our outgoing officers and welcomed the new. Immediate Past Chair David Griffith thanked the 2014-2015 officers Ismael Bautista, Jr. (First Vice Chair), Charles Pereyra-Suarez (Second Vice Chair), Claire Schmidt (Treasurer), and Lindsay Holloman (Secretary). Incoming Chair Ismael Bautista, Jr. thanked David for his extraordinary service and congratulated the 2015-2016 officers Charles Pereyra-Suarez (First Vice Chair), Lindsay Holloman (Second Vice Chair), Jesus Arias (Treasurer), and Stephanie Macuiba (Secretary).



MEMBERS IN THE MEDIA

Former chair David Griffith has worked hard to maintain a close relationship with the Port of Los Angeles. With his efforts we were able to put on the successful Port of Los Angeles Conference earlier this year. David and Malcolm McNeil are featured in the following video put together by the Port of Los Angeles: <https://www.youtube.com/watch?v=wXX50OZdLsQ>. Catch Malcolm at the 5:30 mark and David at the 7:20 mark.

MEMBER ARTICLES

Update on the Trans-Pacific Partnership

By: Donovan Rinker-Morris*

On June 29, President Obama signed a bill into law conferring trade promotion authority (“TPA” or “fast-track”), clearing the way for concluding negotiations on the Trans-Pacific Partnership (the “TPP”), a massive agreement to create a free-trade region encompassing the U.S. as well as Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Taiwan, the Philippines, and other Asian states have also expressed interest in joining, should the deal go forward.

On July 24, the Senate voted to approve trade promotion authority (“TPA” or “fast-track”), clearing the way for President Obama to conclude negotiations and sign the Trans-Pacific Partnership (the “TPP”), a massive agreement to create a free-trade region encompassing the U.S. as well as Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Taiwan, the Philippines, and other Asian states have also expressed interest in joining, should the deal go forward.

Under fast-track trade negotiations, once the text of the TPP is finalized, the President may sign and present it to the Senate and the House for a straight up-or-down vote without opportunity for Congress to amend the treaty. Japanese diplomats have indicated that the text, which has been under negotiations for nearly a decade, is only a few weeks from completion, pending issuance of ‘fast-track’ authority. However, special rules for the TPP enable the Senate to rescind fast track authority should they conclude the treaty fails to meet a number of objectives on currency manipulation, government sanctioned cyber theft, human rights, environmental protection, and labor rights, among many other factors.

Los Angeles stands to gain – or lose – more from the TPP than most American cities. International trade currently accounts for around 168,000 jobs in Los Angeles County, and an estimated 638,000 jobs in the greater Los Angeles region, according to the Los Angeles County Economic Development Corporation (LAEDC). In 2014, the ports of Los Angeles and Long Beach, handled 15.2 million containers and goods worth \$416.6 billion, amounting to nearly 40% of the total volume of container goods imported into the U.S. Should trade volume with TPP partners increase, the flow of goods through the LA region will doubtless increase with it. As a focus of pan-Asian trade, Los Angeles region may also witness increased flows of foreign direct investment, community redevelopment, and indirect job growth as well. Yet despite the volume of exports from the U.S. through LA area ports, approximately 160,000 container units leave LA ports empty each month, which raises the obvious question: will the TPP facilitate further exports from the U.S., or will it result in still greater imports, particularly if doing so costs more American jobs than it will produce?

The contrasting opinions on this issue are reflected in the highly contentious debate over fast track authority in Congress. On June 12, House Democrats joined with a number of Republicans to block a package of trade bills, which included TPA as well as a bill authorizing Trade Adjustment Assistance, which offers training, insurance, and unemployment benefits to workers displaced as a result of international trade. Many Democrats supported the TAA component, but they voted down the entire package to prevent TPA from passing. House Republicans then dismantled the package and passed the TPA separately.

Although the text of the TPP is not publicly available, three draft chapters on intellectual property protection, environment, and investor protections have been distributed by Wikileaks. If the TPP is concluded and the U.S. joins, certain measures comparable with those in other recent free trade agreements, such as with Korea and Australia, may be extended to Japan, a key trading partner and the largest source of foreign direct investment into Los Angeles according to the Los Angeles County Economic Development Corporation (LAEDC).

Until the text is finalized and made public, close analysis of the terms is premature. Still, the leaked draft texts do not appear to substantially change American law, but they do point towards significant changes to legal practice that may lurk ahead.

1. Investor State Dispute Settlement (ISDS)

The U.S. Trade Representative has described the investment chapter as follows:

Investment. The investment text will provide substantive legal protections for investors and investments of each TPP country in the other TPP countries, including ongoing negotiations on provisions to ensure non-discrimination, a minimum standard of treatment, rules on expropriation, and prohibitions on specified performance requirements that distort trade and investment. The investment text will include provisions for expeditious, fair, and transparent investor-State dispute settlement subject to appropriate safeguards, with discussions continuing on scope and coverage. The investment text will protect the rights of the TPP countries to regulate in the public interest.

The mechanism by which “expeditious, fair, and transparent investor-State dispute settlements” take place is typically arbitration through an Investor-State Dispute Settlement (ISDS) provision. The Wikileaks draft of the chapter on investment contains terms comparable to ISDS procedures adopted in more recent free trade agreements with Australia and Korea; the final text may vary significantly from the measures contained in NAFTA.

ISDS arbitrations are a mechanism by which a foreign investor may challenge a government action before an international tribunal if such action violates public international law. ISDS has become one of the most contentious elements in the TPP and other international treaties. In 2014, 42 ISDS claims were initiated globally, with a record-breaking award of USD \$50 billion in three related energy cases. By 2014, a total of at least 602 ISDS claims have been raised under various international trade agreements, many of which were raised before the International Centre for the Settlement of Investment Disputes (ICSID) or UNCITRAL.

The most common types of ISDS claims involve breach of contract, followed by challenges to the revocation or denial of licenses. Public Citizen, an organization vehemently opposed to free trade agreements and to ISDS, reports 21 claims against the U.S.; the U.S. Trade Representative, using a different methodology, counts 14 claims raised against the U.S. under NAFTA, and notes the U.S. prevailed in each instance.

2. *Loewen v. United States*

The first ISDS arbitration brought against the U.S. arose from *Loewen v. O’Keefe*. Jeremiah O’Keefe, a funeral home and funeral insurance owner, sued the Loewen Group Inc. (“Loewen”), a Canadian-based funeral home chain, in Mississippi for breach of contract and tort claims when Loewen breached exclusive sales agreements to market O’Keefe’s funeral insurance policies. The Mississippi jury awarded O’Keefe \$500 million in damages (\$25 million for the contract claims, \$75 million for emotional distress, and \$400 million in punitive damages).

Loewen Group claimed O’Keefe’s trial lawyer, Willie Gary, inflamed the jury during the trial by means of comments such as asserting that the Loewen Group “was being financed by Japanese bankers, buying funeral homes to control the market, not telling the local people that it was Canadian owned...” and that O’Keefe, in view of his service during World War II, “never wanted to do business with Japan.” Critics of the trial noted the prejudicial comments against foreigners; the foreman was quoted by the *New York Times* as stating that Mr. Loewen “was a rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy.”

Loewen needed to raise a bond for 125% of the award to appeal, which proved impossible in view of the leverage Loewen had taken on to finance its expansion. Loewen settled with O’Keefe, and brought a claim against the U.S. under NAFTA’s investor-state dispute resolution chapter. However, Loewen Group ultimately filed for bankruptcy protection in America before arbitration commenced. The arbitrators dismissed Loewen’s NAFTA claim because

- (1) By settling with O’Keefe, Loewen failed to exhaust its remedies under U.S. law (even if the settlement amount was less than the cost of financing the bond to pursue an appeal); and
- (2) By reorganizing in America under U.S. bankruptcy law, Loewen lost the “diversity of nationalities” required for the arbitrators to obtain jurisdiction.

It’s unclear what effect, if any, the Loewen arbitration has had on investment practices in America. Notably, Toyota opened the Toyota Motor Manufacturing, Mississippi facility in 2011, an \$800 million investment. During roughly the same period, Toyota announced plans to relocate its North American headquarters from Torrance, CA to Plano, TX.

3. Post-Loewen ISDS Arbitration against the U.S.

Loewen remains the only ISDS claim arising under NAFTA in which arbitrators reviewed a jury award. Several other ISDS claims against the U.S. have arisen, including:

- Local zoning ordinances (Mondev)
- Statewide environmental ordinances (Methanex v. U.S., involving California's MTBE phase-out),
- Government procurement (ADF Group. V. U.S., involving domestic preferences for steel; NAFTA includes a provision that exempts government procurement from other investor protections; the precise terms of the TPP with respect to government procurement remain to be determined, but recent free trade agreements have limited government procurement exceptions in at least some cases)
- Anti-Dumping and Countervailing Measures (see the consolidated lumber cases)
- Food and Drug regulations (see Kenex v. U.S., involving U.S. restrictions on imports of hemp foods; see also Grand River Enterprises et. al., v. U.S., in which a tobacco firm challenged state rules in connection with the tobacco Master Settlement Agreement)
- Patents (Baird v. U.S., in which an investor claimed patent rights over nuclear waste disposal processes used in Yucca Mountain)

The issue of patents is particularly active, as American firms have challenged patent decisions in Canada (see *Eli Lilly & Co. v. Canada*). However, an entirely separate chapter of the TPP address intellectual property regime the TPP intends to create for all of the member-states.

4. Intellectual Property Regime

The U.S. Trade representative has represented the intellectual property measures in the TPP as follows:

Intellectual Property. TPP countries have agreed to reinforce and develop existing World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. Proposals are under discussion on many forms of intellectual property, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources and traditional knowledge. TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.

The draft Wikileaks chapter on Intellectual Property suggests this is an area of significant disagreement among the states. Some observers criticize potentially harmful effects of exporting U.S. intellectual property norms to other countries, focusing on threats to civil liberties and privacy as well as increased costs should developing countries apply American pharmaceutical and agricultural patent law. While it appears the U.S. Trade Representative inserted proposals that mirror current U.S. rules, esp. the Digital Millennium Copyright Act (DMCA), measures that failed to pass in America, such as those contained in "Stop Online Piracy Act" (SOPA), do not appear present in the draft.. Many of the Silicon Valley firms that opposed SOPA still appear to support the TPP, though this may change once the text is finalized.

5. Environmental Protections

The U.S. Trade Representative describes the environment section of the TPP as follows:

A meaningful outcome on environment will ensure that the agreement appropriately addresses important trade and environment challenges and enhances the mutual supportiveness of trade and environment. The TPP countries share the view that the environment text should include effective provisions on trade-related issues that would help to reinforce environmental protection and are discussing an effective institutional arrangement to oversee implementation and a specific cooperation framework for addressing capacity building needs. They also are discussing proposals on new issues, such as marine fisheries and other conservation issues, biodiversity, invasive alien species, climate change, and environmental goods and services.

The draft chapter of the TPP on the environment appears to reflect the terms already contained in some recent free-trade agreements, such as those with Korea and Australia, but lacks mechanisms contained in other recent free-trade deals, such as that with Peru. Critics have argued that the draft chapter on the TPP represents a “step backwards” in environmental protection and a missed opportunity. While this is a plausible reading of the draft chapter, until the text is finalized, assessment of the environmental protections is not feasible.

6. China

Although the prospective members of the TPP represent nearly 40% of the global GDP, the largest country that is conspicuously absent from the TPP. Mainland China accounts for 60% of the two-way trade flows with Los Angeles (followed by Japan, South Korea, and Taiwan). Although China might opt to join the TPP at some point in the future, doing so may require a number of substantial reforms in China, particularly if the TPP contains provisions requiring independent labor organizations or concessions with respect to intellectual property or state-owned enterprises.

Still, many of the opponents of the TPP, particularly the labor unions who have expressed the most hostility, might consider that China, even without any specific free trade agreement, has already assumed a commanding presence in manufacturing sectors. In 1992, Ross Perot argued that NAFTA would result in a “giant sucking sound” of U.S. manufacturing jobs moving to Mexico; most economists have concluded in the twenty years since NAFTA entered into effect that it has had a minor effect on jobs. Economists debate the total effect, with some asserting that U.S. manufacturing jobs actually increased in the five years after NAFTA entered into effect, only to fall dramatically since China joined the World Trade Organization in 2001.

*A graduate of Harvard Law School, Donovan Rinker-Morris has been practicing law in the Middle East since 2005, acting as local counsel for a number of law firms, international corporations, government agencies and individuals. He returned to California in 2013 to continue an international practice.

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