Made in the USA Reports

A Publication of the Made in the USA Foundation

Vol. 27 No. 5 © Made in the USA Foundation--May, 2015

RAMPARTS Breakthrough in California

After blocking legislation for three years that amends California's overly strict 100% Made in the USA standard, the California Senate Judiciary Committee agreed unanimously to reduce the standard to 90%. The Foundation, along with many of its members and the California Retailers Association want a more reasonable standard, or about 75%. The Federal Trade Commission used the 75% standard as a benchmark. It is higher than any other nation in the world for a "Made in" test. Switzerland is the next highest with a 60% standard.

The reason for the seismic shift in the California Senate is Kevin de Leon, the new Senate Pro Tempore and Judiciary Committee member Bob Hertzberg. Hertzberg, who understands that the current standard is harmful to Made in the USA manufacturers, told the Foundation that change is coming. Legislation in the California Assembly will move quickly. It will probably be the 75% standard that will pass there. Our proposed legislation passed unanimously in the Assembly last year. Hopefully a compromise will be worked out and passed next month and signed by Governor Brown.

WTO: World Take Over

By Joel D. Joseph, Chairman, Made in the USA Foundation

The World Trade Organization sounds like a legitimate international organization, but it is not. The WTO operates in secret, by hand-picked delegates from around the world. Cases are determined by "judges" selected for one case even if they have conflicts of interest. WTO decisions make a mockery of U.S. and European laws designed to protect the health of consumers and the environment. The WTO is unfair, unethical and undemocratic and needs to be overhauled.

On May 18, 2015 a WTO panel ruled that the United States Country of Origin Labeling Act (COOL) was an illegal non-tariff barrier. COOL requires grocery stores to label produce, fish and meat with their country of origin. The WTO appointed three "judges" to decide whether the U.S. Country of Origin Labeling Act constitutes a barrier to free trade. The head of the panel was Recardo Ramírez-Hernández, 46, not a disinterested party. Also on the panel with Mr. Ramírez-Hernández was Seung What Chang, 52, a Korean national and Peter Van Den Bossche, a 56-year old Belgian. The panel is relatively young, compared to the United States Senate, and all members are from small nations.

The dispute was brought by Mexico and Canada claiming that by requiring Mexican and Canadian meat to be marked "product of Mexico" or "product of Canada" wrongfully discriminates against those nations. This is a bull-dung of a claim.

The WTO does not have Conflict of Interest or Ethical Rules

WTO court appointees should not be allowed to be partisans who have represented one county involved in the trade disputes. The panel chair was Ricardo Ramírez-Hernández, a Mexican citizen who has represented Mexico in trade matters. Mr. Ramírez-Hernández holds the Chair of International Trade Law at the Mexican National University in Mexico City. He was Head of the International Trade Practice for Latin America of an international law firm in Mexico City. His practice focused on issues related to NAFTA and trade across Latin America, including international trade dispute resolution.

Prior to practicing with a law firm, Mr Ramírez-Hernández was Deputy General Counsel for Trade Negotiations of the Ministry of Economy in Mexico for more than a decade. Mr Ramírez-Hernández represented Mexico in international trade litigation and investment arbitration proceedings. He acted as lead counsel to the Mexican government in several WTO disputes. He has also served on NAFTA panels.

Quite simply Mr. Ramirez-Hernandez should not have been allowed to serve on the appellate panel in a case involving Mexico. The WTO should have a system for parties to raise conflict of interest and ethical matters to disqualify a judge, like the system used by U.S. courts.

Even with a biased group, the WTO appellate panel recognized that the "COOL measure is an ***internal measure*** of the United States, as opposed to a customs or border measure. It requires retailers in the United States to affix labels providing country of origin information on certain products. This obligation applies irrespective of whether the products are imported

or domestically produced." The panel went on over 176 pages of legal gobbledygook to explain how the burden from Canadian and Mexican companies to comply with the U.S. law constituted a barrier to trade.

WTO Courts Should Be Open to the Public

President John F. Kennedy said, "The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings." *The President and the Press: Address before the American Newspaper Publishers Association,* given at the Waldorf-Astoria Hotel in New York City, April 27, 1961.

WTO proceedings are now secret. This is repugnant to those living in free and open societies. No members of the press or outside parties are allowed to watch or listen to court proceedings. WTO proceedings should not be secret, they should be open to the public as court proceedings are in most democracies.

Consumers Have the Right to Know Where Their Food Comes From

U.S. consumers have a right to know where their food comes from for health and other reasons. Congress declared that right when it enacted the Country of Origin Labeling Act. If Canada has mad cow disease, or Guatemala has contaminated raspberries, consumers should have the tools to be able to avoid these products.

The United States should get out of the World Trade Organization, a phony group dominated by small countries with a grudge against the United States. Instead, the Agriculture Committee of the U.S. House of Representatives bowed down to the WTO and voted to repeal the Country of Origin Labeling Act for meat products. I call upon Congress and the President to ignore the WTO ruling and keep the Country of Origin Labeling Act in force.

Trade Promotion Authority is Unconstitutional

By Joel D. Joseph

The Senate passed Trade Promotion Authority (TPA) 62-38 giving President Obama the authority to negotiate the Trans Pacific Partnership and other trade deals. This TPA legislation is clearly unconstitutional. The President of the United States is required to submit

all proposed treaties to the United States Senate for approval under the Constitution and approval must be by a two-thirds vote.

The Constitution provides in Article II, Section 2, Clause 2: "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."

The first question is whether the Trans Pacific Partnership is a treaty. There are some minor international agreements other than treaties that the Supreme Court has allowed. However, these lesser agreements were entered into under the President's power to receive ambassadors. The President's proposed Trans Pacific Partnership does not involve his power to receive ambassadors, nor any other presidential power except the treaty clause and thus cannot be implemented without Senate approval by a two-thirds vote.

Black's Law Dictionary defines a treaty as "an agreement between two or more independent states." By independent states the dictionary means nations. It is hard to imagine agreements that are more important than a trade agreement with 11 nations. If the treaty clause has any meaning left it must be applied to this agreement because they will outlive President Obama's term of office and will affect the nation for decades to come. This is not a simple agreement that the President can enter into by himself, or with a simple majority in Congress.

Agreements involving international trade are no less treaties than those involving war and peace. The first U.S. trade agreement in a treaty was the Jay Treaty, or more formally, The Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and The United States of America entered into in 1795 with two-thirds Senate approval. Since this was enacted soon after the Constitution was approved, the treaty clause was fresh in the country's mind. Two hundred and thirty years later, however, we have disregarded the treaty clause.

Ignoring the Treaty Clause

The North American Free Trade Agreement bypassed the treaty clause because it failed to achieve two-thirds Senate approval. It was signed by President Clinton as simple legislation, not as a treaty. The Made in the USA Foundation and the United Steelworkers Union challenged NAFTA under the treaty clause. The 11th Circuit Court of Appeals found that we had raised a "political question" and would not decide the case. Courts in China often use the "political question" argument to allow the Chinese government to do anything that it wants to.

The U.S. Supreme Court ducked the issue as well by declining to review the case. Mexico, on the other hand, called NAFTA a treaty (tratado) and approved it as such under the Mexican constitution.

The political question doctrine is a judge-made concept. A recent Supreme Court decision (*Zivotovsky v. Clinton*) has severely undermined the political question doctrine paving the way for the courts to review a challenge to a Presidential agreement that is not ratified as a treaty by the Senate. In an eight to one decision the Supreme Court ruled in 2012, "At least since *Marbury v. Madison*, we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.' *INS v. Chadha* (1983)."

Constitutional Framework

Presidents have regarded the Article II treaty process as necessary where an international accord would bind a future president. For example, Theodore Roosevelt explained in his 1913 autobiography:

> The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo (Dominican Republic). But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted; and I would have continued it until the end of my term, if necessary, without any action by Congress. But it was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular executive left office. I therefore did my best to get the Senate to ratify what I had done.

President Obama should follow President Theodore Roosevelt's advice and submit his proposed Trans Pacific Partnership treaty to the United States Senate for its advice and consent as our Founding Fathers wisely engrained into the Constitution of the United States.