KEARNS

SUMMARY

Right Track for TPP Act of 2015

The Trans-Pacific Partnership (TPP) negotiations – the most important trade negotiations in at least 20 years – are at a critical juncture. TPP has the potential to raise standards and open new markets for U.S. businesses, workers, and farmers – or to lock in weak standards, uncompetitive practices, and a system that does not spread the benefits of trade.

TPP is not currently on track to gain broad, bipartisan support in Congress. The Hatch-Wyden-Ryan Trade Promotion Authority (TPA) fast tracks TPP, but does nothing to get TPP on the right track. Specifically, it: (1) includes general and vague negotiating objectives – nearly identical to those in the Baucus-Camp-Hatch bill last year – that fail to provide guidance on how to resolve the major outstanding issues in TPP in a way that will garner broad, bipartisan support; (2) leaves it to the President to determine whether the agreement he negotiated "makes progress" in achieving those objectives; (3) leaves it to the President to develop guidelines on how to properly consult with Congress, four months after Congress passes legislation (despite the fact that the TPP negotiators say they are already in the "end game"); and (4) fails to include any meaningful provision to maintain congressional leverage by enabling Congress to remove fast track. In short, the Hatch-Wyden-Ryan TPA bill puts Congress in the back seat and greases the skids for an up-or-down vote after the fact.

The Right Track for TPP Act puts the TPP negotiations on the right track, providing a path forward to an agreement that will garner broad, bipartisan support in Congress.[1] Specifically, the Right Track for TPP Act:

(1) Includes specific negotiating *instructions* on all of the major outstanding issues in the TPP negotiations;

(2) Does not provide for expedited consideration unless and until bipartisan groups of House and Senate trade advisors determine that the instructions were followed;

(3) Has Congress write the consultation procedures, including what negotiating texts must be shared with Congress and stakeholders; and

(4) Includes two useable mechanisms to enable Congress to remove expedited consideration where necessary.

I. TPP Negotiating Instructions

1. Currency Manipulation

Issue: Majorities in the House and the Senate have urged the Administration to include strong and enforceable currency obligations in the TPP, which includes a number of countries that have manipulated their currencies in the recent past, such as Japan. Other alleged manipulators, such as Korea and Taiwan, have also expressed an interest in joining TPP.

Status: The Administration has not made a currency proposal in the TPP negotiations.

[1] The RT Act applies only to the TPP negotiations. After TPP is put on the right track, Congress must consider trade negotiating authority and procedures for other critically important negotiations, such as the Trans-Atlantic Trade and Investment Partnership Agreement.

TPA ↓ **Leaves it up to the Administration** to decide how to address currency manipulation, laying out options the President already has to address the issue – including things like "monitoring" that are already being done.

Right Track for TPP Act Provides that the TPP must include strong and enforceable currency manipulation provisions, consistent with existing IMF guidelines – and spells out what an "enforceable" provision looks like. Congress cannot leave it to an Executive branch to decide how to interpret "enforceable" given that, over the past two administrations, the Executive branch has been unwilling to do what needs to be done on this issue.

2. Labor Rights

Issue: Will all TPP parties meet international worker rights standards?

Status: TPP does not yet have a mechanism to ensure compliance by TPP parties that have labor laws and practices that fall far short of international standards contained in the "May 10th Agreement" even though TPP is expected to include the May 10 obligation with enforceability through the basic dispute settlement structure in TPP.[2]

Vietnam presents the greatest challenge we have ever had in ensuring compliance. Workers there are prohibited from joining any union independent of the communist party. While the Administration is discussing these issues with Vietnam, Members of Congress and stakeholder advisors have not yet seen any proposal to address these critical issues. The Administration also has not committed to ensuring that all changes to laws and regulations are made before Congress votes – or even before the TPP agreement enters into force.

Mexico also presents considerable challenges. Employer-dominated 'protection unions' are prevalent, and the arbitration boards responsible for resolving labor disputes are inherently and structurally biased. It is not clear whether, how, or when the Administration will resolve these and other issues with Mexico. Without their resolution, it will not be possible to say that the problems with NAFTA are being fixed. **U.S. workers and U.S.-based businesses should not be required to compete against workers who are denied their basic labor rights.**

TPA ↓ **Does not address** what needs to be done to bring countries like Vietnam and Mexico (as well as Malaysia and Brunei) into compliance with international labor standards. It contains only general language in line with the May 10 Agreement.

Right Track for TPP Act Describes what needs to be done to bring Vietnam, Mexico, and other countries into compliance with international labor standards (as reflected in the May 10 Agreement) and to help ensure compliance after the TPP agreement enters into force. It also requires that the changes needed to bring our trading partners into compliance occur before Congress votes.

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[2] The "May 10 Agreement" of 2007, as initiated by House Democrats, incorporated for the first time in history strong and fully enforceable labor and environmental obligations in trade agreements and included several other important new rules, including providing a better balance between strong intellectual property rights and access to affordable medicines. The U.S.-Peru trade agreement was the first to include the May 10 standards.

3. Environment

Issue: Will the TPP environmental chapter ensure a level of environmental protection at least as high as the May 10 standard which directly incorporated seven multilateral environmental agreements into the text of past trade agreements?

Status: The TPP environment chapter will look very different from the May 10 Agreement. The environment chapter covers a broad range of subjects, ranging from shark finning, to fish subsidies, to trade in illegally harvested plants and animals. But the obligations themselves – the 'verbs' used – are often weak.

TPA ↓ Simply lists the seven multilateral environmental agreements from the May 10 Agreement, which is not consistent with the approach taken in TPP.

Right Track for TPP Act Instructs the President to ensure a level of environmental protection at least as high as the level provided under the May 10 Agreement. It also recognizes the need to replace weak commitments with strong ones, such as "prohibiting" imports of illegally harvested wildlife products.

4. Investment and Investor-State Dispute Settlement (ISDS)

Issue: Will the TPP include an investor-state dispute settlement (ISDS) mechanism that provides foreign companies a right of action against other governments for infringing on the companies' investment rights? Will the TPP include an ISDS mechanism without incorporating any new, additional safeguards to prevent it from being abused?

There are now more cases of private investors challenging environmental, health, and other regulations in nations – even nations with strong and independent judicial systems and rule of law. Just last month, a NAFTA tribunal granted an award that appears to be inconsistent with the U.S. interpretation of the investment obligations that will be included in the TPP Agreement. Other investment disputes involve 'plain packaging' of tobacco products in Australia and pharmaceutical patent requirements in Canada. This issue is receiving heightened scrutiny among negotiators and from a broad-range of interested parties. Some of our TPP partners do not support ISDS or are seeking safeguards to ensure that nations preserve their right to regulate. The Economist magazine, the Cato Institute, and the Government of Germany (the birthplace of ISDS) have also recently expressed concerns with ISDS.

Status: The TPP text is basically the same as the model adopted 10 years ago, even though conditions have changed dramatically in the past 10 years. Despite proposals to include new safeguards in the ISDS mechanism, the Administration has not made any attempts to incorporate them.

TPA ↓ Is **exactly the same negotiating objective it was over 12 years ago**.

Right Track for TPP Act Instructs the President to: (1) establish a new mechanism to enable TPP parties to agree to dismiss an ISDS case; (2) clarify the vague 'minimum standard of treatment' obligation; (3) allow parties to adopt capital controls to prevent or mitigate financial crises; and (4) clarify that the Agreement is not intended to provide foreign investors with greater substantive rights than U.S. investors under U.S. law, consistent with the May 10 Agreement.

5. Access to Medicines

Issue: Will the TPP ensure a balance between strong intellectual property rights and access to affordable, life-saving medicines, as provided under the May 10 Agreement?

Status: Absent some change in course, the final text is likely to provide less access to affordable medicines than provided under the May 10 Agreement. For example, developing countries will likely be required to 'graduate' to more restrictive intellectual property rights standards before they become developed – a clear inconsistency with May 10. There are also a number of concerns that the TPP agreement will restrict access to medicines in the United States and other developed countries (e.g., by encouraging second patents on similar products, by having long periods of data exclusivity for biologic medicines, by allowing drug companies to challenge government pricing and reimbursement decisions).

TPA ↓ Includes additional language on access to medicines that was not part of the 2002 bill, apparently as a nod to the May 10 Agreement. But it is unclear what this language means. TPA also seeks to achieve "the elimination of government measures such as price controls and reference pricing" – going far beyond the transparency and due process commitments relating to pharmaceutical reimbursement schemes that were negotiated in past trade agreements.

Right Track for TPP Act Instructs our negotiators to adhere to the access to medicines provisions of the May 10 Agreement.

6. Automotive Market Access

Issue: Will the TPP finally open Japan's market to U.S. automobiles and auto parts?

For most of the past 15 years, our trade deficit with Japan has been second only to our deficit with China, and over two-thirds of the current deficit is in automotive products. Japan has long had the most closed automotive market of any industrialized country, despite repeated efforts by U.S. negotiators over decades to open it. At a minimum, the United States should not open its market further to Japanese imports, through the phase-out of tariffs, until we have time to see whether Japan has truly opened its market.

Status: The Administration has not stated a specific period of time for when the phase-out in U.S. tariffs for autos, trucks, and auto parts would begin or when they would end. The parties are also still working to address certain non-tariff barriers that Japan utilizes to close their market.

TPA ↓ Broadly states that the United States should "expand competitive market opportunities for exports of goods." Such a broad negotiating objective **provides no guidance** regarding how to truly open the Japanese automotive market.

Right Track for TPP Act Provides that U.S. auto tariffs should not be reduced or eliminated unless and until Japan opens its notoriously closed auto market; alternatively, those tariffs may be eliminated 30 years after the agreement enters into force.

7. Rules of Origin

Issue: Will the TPP incorporate rules that ensure that the benefits of the tariff cuts flow primarily to the parties to the agreement and not to free-rider third parties that have not signed up for the commitments in the TPP?

"Rules of origin" define the extent to which inputs from outside the TPP region (e.g., China) can be incorporated into an end product for that product to still be entitled to preferential/duty-free treatment under the Agreement. The rule should be restrictive enough to ensure that the benefits of the agreement accrue to the parties to the agreement. Some have argued that the automotive rule of origin in TPP should be at least as stringent as the rule in NAFTA, given that TPP involves all three of the NAFTA countries plus nine others.

Status: There are a number of rules of origin being negotiated in the TPP for different products, including in the sensitive textile and apparel, agricultural, and automotive sectors. Some of the rules are largely settled while others – including the rules for automotive products – remain open and controversial.

TPA ↓ The Hatch-Wyden-Ryan TPA bill **provides no guidance** whatsoever on any rule of origin on any product in the TPP negotiations.

Right Track for TPP Act Instructs the President to negotiate a rule of origin for automotive products that is at least as stringent as the rule in the North American Free Trade Agreement.

8. Tobacco Controls

Issue: Will the TPP safeguard countries' ability to regulate tobacco as a matter of public health?

TPP needs to explicitly preserve the ability to regulate tobacco. A number of recent international disputes have challenged tobacco measures, including multiple disputes (both WTO and ISDS) challenging Australia's plain packaging scheme for cigarettes. A number of public health groups are concerned about the potential of FTAs to roll back legitimate tobacco control measures.

Status: In 2013, the Administration decided not to pursue a safe harbor for tobacco in TPP that it had originally supported. Instead, the Administration tabled a proposal that merely confirms that tobacco measures may be subject to the normal public health exception in our trade agreements – drawing intense criticism from former mayor Bloomberg, the New York Times editorial board, and NGOs.

TPA ↓ **Provides no guidance** on tobacco control measures, given the Administration the flexibility to include whatever it wants, or nothing at all.

Right Track for TPP Act Provides that non-discriminatory tobacco control measures should not be subject to challenges as being inconsistent with the obligations in the TPP.

9. State-Owned Enterprises

Issue: Will the TPP impose rules on companies effectively run and funded by their governments, so that truly private enterprises can compete with them on a level playing field?

In today's global economy, competition is fiercer than ever. Certain countries that rely heavily on state-controlled and state-funded enterprises (also known as state-owned enterprises or SOEs) are able to give those champions an enormous – and unfair – advantage over private companies that compete against them in the marketplace. And, in turn, those SOEs don't always operate based on commercial considerations, but instead may pursue state objectives such as favoring local suppliers over U.S. suppliers.

Status: The TPP will include disciplines on SOEs that are expected in language to go beyond anything ever included in past trade agreements. But the extent to which an SOE provision will help to level the playing field, will be determined by the degree to which parties seek very broad country-specific carve-outs for particular SOEs. As `concerning, the definition of SOEs is too narrow, allowing enterprises that are effectively controlled by foreign governments (but where the government owns less than 50% of the shares) to circumvent the obligations.

TPA ↓ **Provides no guidance** on what an acceptable definition of an SOE is, or on what kinds of carve-outs are acceptable.

Right Track for TPP Act Provides that the SOE disciplines should apply broadly to all enterprises controlled by governments, including where the government owns a controlling interest but less than a majority of the shares, and that exclusions from coverage must be narrowly tailored.

10. Agricultural Market Access

Issue: Will the TPP eliminate tariffs on virtually all U.S. agricultural exports, especially in markets that have been traditionally sheltered from competition from trade like Japan's and Canada's?

Status: It appears that the United States and Japan will agree that Japan will reduce tariffs – but never eliminate them – on hundreds of agricultural products, far more carve-outs than under any U.S. trade agreement in the past. Canada, on the other hand, has not put any offer on the table for dairy products, which is causing some concern in the dairy industry. This concern is even stronger given that the dairy industry is not entirely pleased with the status of the Japan negotiations, plus the fact that the industry is concerned about an increase in dairy imports from New Zealand. Finally, the dairy industry is also closely watching the negotiations over 'geographical indications' as it relates to cheeses and other dairy products.

TPA ↓ Has as its objective "reducing or eliminating" tariffs on agricultural products. (Emphasis added.) Thus, even Japan's opening offer – to reduce but never eliminate tariffs on nearly 600 products – satisfied this objective, demonstrating **this objective is meaningless**. And while former Chairman Camp said that Japanese "exclusions from tariff elimination translate to Congressional opposition," the bill does not mention comprehensive tariff elimination even as a negotiating *objective*, much less as a requirement.

Right Track for TPP Act Instructs the President to "eliminate" tariffs on virtually all products. In the exceptional circumstances where a product is not subject to full tariff elimination, the President is to obtain significant new market access opportunities, substantially equivalent to the opportunities afforded TPP party exporters in the U.S. market.

11. Food Safety Measures

Issue: Will the TPP safeguard the ability of regulators to block unsafe imported food while also ensuring that U.S. agricultural exporters are not subjected to bogus food safety measures?

Status: TPP will be the first U.S. trade agreement that will include restrictions on the kind of measures TPP parties can take to block food imports based on alleged safety concerns, reflecting growing, legitimate concerns of U.S. farmers and ranchers.

We have asked the Administration to confirm that existing U.S. laws, regulations and practices will not be impacted by these obligations. There is also a concern that we do not have adequate resources to monitor the safety of food imports.

TPA ↓ Requires the President to report on any changes to U.S. labor laws or practices necessary to comply with the labor obligations in a trade agreement. It has no similar provision regarding changes to U.S. food safety laws or practices, nor does it ensure adequate resources to monitor the safety of food imports.

Right Track for TPP Act Calls for additional and ongoing funding for food safety inspections, while also supporting robust rules to ensure that other countries do not adopt illegitimate food safety measures designed to keep out U.S. exports.

12. Human Rights

Issue: A number of TPP parties have disturbing records on human rights.

Status: It is unclear how these concerns will be resolved with TPP partner countries.

TPA ↓ Provides no guidance. As a general objective (not a "principal" trade objective), seeks "to ensure implementation of trade commitments and obligations by strengthening good governance, transparency, the effective operation of legal regimes and the rule of law of trading partners of the United States through capacity building and other appropriate means, which are important parts of the broader effort to create more open democratic societies and to promote respect for internationally recognized human rights."

Right Track for TPP Act Provides that each TPP Party is expected to take steps to respect internationally recognized human rights. Also provides that House and Senate TPP Advisory Groups (described below) may recommend provisions to be included in the implementing bill, which could address human rights concerns.

II. <u>TPP Congressional Consultations, Oversight, & Transparency</u>

The Right Track for TPP Act includes the following procedures and requirements:

- *Transparency.* Members and their staff with appropriate security clearances, and the stakeholder advisory committees, shall have access to all negotiating proposals and consolidated negotiating texts, with an indication of which party supports each provision. Member staff shall have access regardless of whether they are accompanied by their Member.

- *House and Senate Advisory Groups Approve New TPP Entrants.* Bipartisan House and Senate TPP Advisory Groups will be established, made up of Members from the committees of jurisdiction and other Members selected by leadership. No country can join the TPP negotiations until the House and Senate Advisory Groups approve.

- *Committee Disapproval Resolution*: After the President notifies Congress of his intent to conclude TPP, either committee of jurisdiction can vote to remove TPP from receiving fast track consideration.

- *Sizeable Minority Resolution*: If one-third of the Members in both Chambers co-sponsors a resolution to remove TPP from receiving fast track consideration, that resolution must receive a

vote in each Chamber. If the resolution passes both Chambers, TPP would not receive fast track consideration.

- *Report on Impact of TPP.* The President shall submit a report 120 days after TPP is concluded that, among other things, describes: (1) the likely economic impact of the agreement (including specific market opportunities U.S. exporters will gain and what imports are expected to increase; impact on employment, the median wage, income disparities; impact on trade imbalance); (2) impact on U.S. regulations; (3) the economic, legal, and institutional framework of each TPP party, including on transparency, and its ability to fully implement the commitments; and (4) an assessment of the environmental impact of the trade agreement.

- *House and Senate Advisory Groups Vote on Compliance with Negotiating Instructions*: **For TPP to receive consideration under fast track procedures, the TPP Advisory Groups must certify that the President has (1) followed the negotiating instructions in the RT Act and (2) adequately consulted with Congress.** While Congress obviously cannot write instructions that dictate the terms of the agreement, and the give-and-take of negotiations may result in some outcomes that do not mirror the instructions, Congress, not the President, should determine whether the instructions have been followed.