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Memo to Reporters Covering Hawaii TPP Negotiations and Ministerial

Administration Desperate to Announce Deal on Trans-Pacific Partnership: There May Be an Announcement, But a Real Deal? One Congress Would Approve?

Close Fast Track Vote Means Little Room for USTR to Concede on Textile, Dairy, Sugar, Other Market Access Items; List of Deadlocked Meds Access, Investment, Other Policy Issues Largely Unchanged Since 2/14 Last "Final" Ministerial in Singapore

Unless the Obama administration can not only announce a final Trans-Pacific Partnership (TPP) deal by the start of August, but also by then complete a TPP text and give notice to Congress of intent to sign it, a U.S. congressional vote on TPP almost certainly will be pushed into the politically perilous 2016 presidential election year. This is the case because, as this memo explains, under the Fast Track grant passed last month, various congressional notice and report filing requirements add up to about four and one half months between notice of a final deal and congressional votes being taken.

Yet completing a deal during the latest "final" TPP negotiating round and latest "final" ministerial is a tall order. (The first "final" TPP negotiating round announced by the U.S. Trade Representative [USTR] was in August 2013 in Brunei. Since then TPP countries have had two heads-of-state summits, four ministerials [two others dubbed "final"], nine Obama bilateral TPP-nation heads-of-state meetings, 12 rounds with chief negotiators and full negotiating teams, dozens of plurilateral chapter-specific intersessionals and innumerable U.S.-Japan bilateral negotiations.)

As the chart below shows, several TPP chapters still have controversial, contested provisions relating to access to affordable medicines, investor-state dispute settlement, capital controls and other macro-prudential financial regulations, environmental standards and fisheries subsidies, labor enforcement, and more. Plus, exceptions for tobacco, culture and other sectors remain contested. Given the direct, damaging impacts some TPP proposals on these most sensitive issues could have for each of the TPP countries' populations, the resolution of these issues will determine if a final pact is politically viable. Whether all TPP nations will end up in a final deal remains to be seen.

As well, key market access (tariffs, tariff-rate-quotas) and rule-of-origin issues remain unresolved. This includes demands that the U.S. provide more duty-free access for sugar from Australia, clothing from Vietnam made with Chinese fabric, and Japanese auto parts, and that the U.S. back down on agricultural market access demands on Canada and Japan. There are additional demands that Malaysia, Singapore, Vietnam and other nations limit subsidies to state-owned enterprises and demands that Malaysia roll back its procurement preferences for ethnic Malays. Also contested are schedules of exceptions and commitments for the Investment, State Owned Enterprises, Services, Procurement and E-Commerce chapters**.**

Whether or not any real deal is made, a "breakthrough" likely will be announced. But for whom would it be a breakthrough? The TPP-country negotiators are well past their worst-case-scenario deadlines and more than ready to be done. The corporate representatives comprising most of the 600 official U.S. trade advisors want a deal now, because the current text largely reflects their demands – and depending on how the most controversial outstanding issues are resolved could represent roll backs of past trade pact reforms on access to medicines, environmental standards and more. But for many people in the TPP countries, a deal based on the current text would not be good news.

Still, the Maui ministerial is viewed as a do-or-die moment to inject momentum into the TPP process. But because the margin of passage for Fast Track was so narrow, the Obama administration has little latitude to make concessions to get a deal. Many of the 28 House Democrats that supported Fast Track authority for Obama explicitly said their support for TPP relied on certain goals being met, including strong enforceable labor and environmental standards and not rolling back past patent rule reforms relating to access to medicines – terms meeting the "May 2007" standard that elements of the TPP seem to fail. And, many of the conservative Republicans that opposed Fast Track for Obama or who were convinced to support it at the last moment are the same representatives for whom the sugar and textile issues will decide their TPP position. Thus, concessions on these items mean less support.

This dynamic, and the small flotilla of angry congressional letters on the TPP in the past ten days, have cast doubts among U.S. TPP partners about whether the Obama administration can deliver a House majority to pass the TPP even with Fast Track authority in place. In just three days, 160 House members signed a letter calling on the Obama administration not to remove TPP nation Malaysia from the State Department's worst category of human trafficking violators. If Malaysia remains on this list, then a TPP including Malaysia cannot be subject to Fast Track. Protestors in cages in front of Malaysia's embassy in Washington spotlighted the issue this week, as did a mock graveyard outside the House office buildings for the 139 trafficking victims found in shallow graves in Malaysia two months ago. This letter included a bloc of GOP and 13 representatives that supported Fast Track. Other representatives are suggesting that Canada should be excluded from the TPP because it refuses to make certain agriculture concessions. Yet, if any country is jettisoned, the whole deal becomes harder to complete.

A checklist of the unresolved issues is included below. Despite the unprecedented secrecy surrounding the TPP negotiations, leaks of TPP documents are fueling opposition in many TPP countries as the pact's prospective threats are revealed. As a result, the other TPP nation governments face considerable domestic political liability for acceding to various U.S. TPP demands.

TPP deal checklist: These issues must be resolved to get a deal, but if these deadlocks are resolved against the public interest, would a final deal be politically viable?:

☐ **Intellectual Property Chapter Patent and "Transparency" Text on Medicine Pricing Rules**
Most other TPP countries have continued to oppose U.S. proposals to expand pharmaceutical patenting, including through long new exclusivity periods for biologic medicines marketing and data that would keep more affordable "bio-similar" drugs off the market, through new monopoly patents for new uses of already-patented drugs that would promote patent evergreening and through "linkage" rules that burden government drug-safety agencies with responsibilities to investigate patent status of medicines. These terms would deliver on Big Pharma's demands that the TPP grant new monopoly powers that raise medicine prices. Representatives of the powerful American pharmaceutical industry have threatened to oppose the TPP if the pact includes reforms made in 2007 that remedied extreme

provisions in past U.S. Free Trade Agreements (FTAs). A sizeable bloc in Congress has stated that it will oppose the TPP if the reformed provisions are not included, as well as additional medicine access terms. TPP countries also still cannot agree on a mechanism to determine if and how the medicine patent rules will apply differently to different countries based on their level of development. U.S. officials are demanding that eventually the same extreme patent terms would apply to all of the developing countries in the TPP. This would reverse the past U.S. approach, which allowed poorer countries more flexibilities to ensure their populations had access to affordable medicine.

Another contested issue is the U.S. proposal for a cynically dubbed "Annex on Transparency and Procedural Fairness for Healthcare Technologies" that would allow drug firms to challenge medicine formulary reimbursement decisions about both price levels and whether to include a specific drug for use in government programs. These are the provisions that have led U.S. seniors' organizations, such as AARP, to engage in the TPP debate, because they would raise the prices of drugs seniors obtain through various U.S. government programs. The target of these terms demanded by the brand-name drug industry ostensibly was the national health care systems in New Zealand, Australia and other TPP nations that use formulary lists to reduce health care costs. There, public and legislator opposition to the U.S. proposal is virulent, making concessions politically perilous. But, an increasing number of U.S. state officials, Democratic congressional supporters of the Affordable Care Act, and seniors groups also oppose these terms, which could raise prices here.

☐ **Investor-State Dispute Settlement (ISDS)**

Australia is demanding a broad exception to ISDS, which elevates individual corporations to equal status with sovereign nations and allows them to enforce a public treaty by "suing" national governments for compensation before international tribunals comprised of private-sector attorneys over claims that government actions undermine their expected future profits. The National Conference of State Legislatures, the body representing the 50 U.S. state legislative bodies, has adopted a policy of opposing any trade agreement with investor-state enforcement. The United States is demanding all countries submit to this system. Even those TPP nations that have agreed to investor-state enforcement oppose the U.S. demand that government natural resource concessions, private-public-partnership utility management contracts and procurement contracts be subject to such extra-judicial processes. And, the United States has consistently opposed an exception supported by most other TPP nations that would safeguard domestic environmental, health and other policies from the TPP tribunals.

☐ **State Owned Enterprises**

After years of deadlock during which countries could not even agree on a text from which to negotiate, rules were finally agreed to, in part by use of ambiguous language. That makes the definitions of what activities are covered and the lists of covered entities and exceptions especially critical and these issues remain unresolved. To complete a deal, either the United States will have to roll back its demands, which would be extremely unpopular in Congress, or a bloc of TPP countries with numerous state-owned enterprises could have to make major concessions.

☐ **Financial Regulation and Capital Controls**

With the International Monetary Fund endorsing the use of capital controls to avoid floods of speculative capital that cause financial crises, it's no surprise that a U.S. demand that the TPP include a ban on the use of various commonsense, macro-prudential measures, including capital controls and financial transaction taxes, has sparked broad concern. Other TPP countries have rejected a U.S. proposal that would do little to protect capital controls used to prevent financial crises. In a recent letter, the Democratic leaders of the House trade and finance committees warned USTR against concluding any TPP that undermines the ability to impose capital controls to prevent or mitigate financial crises.

E-Commerce, Internet Governance, Access to Information and Copyright Extensions

Hollywood- and recording industry-inspired proposals that would greatly extend copyright durations, limit innovation, restrict access to educational materials and force Internet providers to act as "copyright police" by cutting off people's Internet access (think of the SOPA/PIPA debacle) have triggered public outrage in numerous TPP countries, which led to a negotiation stalemate for years. The United States has continued to demand that the TPP be used to require countries to adopt domestic copyright terms beyond international norms and aggressive copyright and enforcement provisions that would limit the public domain and Internet freedoms. There remains disagreement about whether copyright should be able to keep works of art and literature out of the public domain for 70 years after death of the author.

The Battle over "Certification" and a Mechanism for the TPP to Go into Effect

Agreement on the legal mechanisms required for implementing the TPP has proven extremely elusive. A standard provision in the implementing legislation of past U.S. trade agreements requires that, after the U.S. Congress ratifies the pact, the president withhold formal written notification of that approval from partner countries until the president certifies that the partner countries have altered their own laws and policies to comply with the trade deal. That is to say, even after both the United States and its trade partners have ratified an agreement, it takes effect only after the United States unilaterally certifies that its partners have changed domestic laws according to U.S. demands. TPP nations argue the certification process gives the U.S. government and corporations enormous leverage to force them to conform to American interpretation of trade agreement terms – some of which are often deliberately vague, opaque and contentious. This process also often delays implementation of agreements.

<u>Sensitive Market Access Issues</u>

- **Agriculture:** Japan's parliament has listed five "sacred" commodities that must be excluded from TPP tariff-zeroing: rice, beef/pork, wheat, sugar and dairy. The United States reportedly had backed down on its demand, also pushed by New Zealand and other TPP nations, that Japan agree to zero tariffs for all of the hundreds of product lines under those categories. A deal that falls short of tariff zeroing but allows more U.S. rice imports is rumored. Meanwhile, Australia wants U.S. access for its sugar exports, a demand that the United States rejected in its bilateral FTA with Australia. However, USTR has declared it will not "undermine the sugar program" of the United States – in no small part to avoid the wrath of the politically powerful U.S. sugar industry, which has strong support among Democrats and Republicans in Congress. New Zealand's main TPP demand is increased access to American and Canadian markets for its massive dairy export industry. But the U.S. dairy industry, which represents farmers and processors in numerous congressional districts, strongly opposes this demand unless Canada provides significantly more dairy access. This would require Canada to weaken or dismantle its supply management system for dairy. Indeed, many Republican and Democratic members of Congress with dairy farmers in their districts recently suggested that Canada should be left out of the TPP if it does not grant significant dairy access. But the United States was unable to secure this condition in the 1993 NAFTA, and Canada has rejected outright a weakening of its politically sensitive supply management system in an election year.
- **Autos:** The U.S. Congress insists that Japan remains subject to a special bilateral pre-agreement that provided certain additional concessions to the U.S. relating to auto trade, insurance and access for U.S. beef. While the Abe administration agreed to this demand, the bilateral pact – a U.S. condition for Japan being included in a final TPP deal – has not been finalized, with negotiations on auto trade issues in this pre-deal and extending beyond it still unresolved. Outstanding issues include a Japanese demand, which the U.S. has refused, to zero out tariff on

auto parts immediately, the rules of origin for autos and trucks, dispute settlement for auto-related disputes, and a safeguard mechanism to protect against surges of auto imports.

- **Government Procurement:** The United States wants national government contracts above a set threshold be made available to firms from all TPP countries on equal terms. But many Democratic and GOP members of Congress oppose any waiver of Buy American preferences, which would be required to implement this rule. The U.S. demand has also raised broad opposition in Malaysia, where its "**bumiputera** policy" – which guarantees a portion of government procurement contracts go to ethnic Malays – is key to preventing a recurrence of violent attacks against the country's ethnic Chinese population, which dominates its business sector. Other TPP nations have maintained that the United States should guarantee that their firms will get the same access to the 50 U.S. states' procurement activities as they would provide to U.S. firms, which U.S. negotiators have refused.
- **Apparel and Shoes**: Vietnam has insisted on duty-free access for its clothing made with inputs from China and other non-TPP nations, and the elimination of U.S. tariffs on footwear. The "rule of origin" Vietnam requests would reverse a long-standing "yarn forward" rule included in past U.S. pacts to support U.S. jobs. If honored, Vietnam's demand would increase the uncertainty that Congress would approve the TPP.

☐ **Enforceable Labor and Environmental Standards**

As a January 2014 text leak revealed, all other TPP nations opposed many TPP Environment Chapter terms that the United States demands. Several of these issues remain unresolved. Among the most controversial issues are provisions related to the conservation challenges of the region, including the protection of marine mammals and illegal trade in flora and fauna, and enforceable disciplines on fishery subsidies. Japan has led unwavering opposition to disciplines on fishery subsidies, including in the context of the World Trade Organization. Other key sticking points are whether and how the TPP would include language to address climate change, biodiversity, and obligations related to multilateral environmental agreements. More broadly, the administration continues to promise that environment and labor chapters will be enforceable and subject to the same dispute resolution system as other TPP chapters. However, such promises remain unconvincing to a substantial bloc in Congress, given that countries such as Vietnam, Mexico, Brunei and Malaysia – all of which have been cited by members of Congress and the Obama administration for systematic labor abuses – would be allowed to enter the TPP without being in compliance in the first place. Democratic congressional leaders have made clear that USTR's current proposal to address such widespread labor abuses among TPP member countries "falls far short". Unless USTR requires much more fundamental changes, adamantly opposed by other TPP members, it could lose almost all Democratic congressional support for the TPP.

☐ **Disciplines Against Currency Manipulation** – **the elephant in the room …**

A TPP without binding currency provisions could be dead on arrival in Congress. The other TPP nations know this but still oppose such terms. Since the passage of Fast Track, eight members of the Senate Finance Committee, half of whom supported Fast Track, wrote demanding such terms. Among others, U.S. Sen. Lindsey Graham (R-S.C.), a prominent supporter of past pacts, announced he would oppose the TPP if it does not include enforceable currency disciplines. In the House, strong bipartisan demand for current terms remains.

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