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Memo to Reporters Covering Atlanta TPP Negotiations and Ministerial

Administration Desperate for Trans-Pacific Partnership Deal: There May Be an Announcement, But a Real Deal? One that Could Pass in an Election Year?

After Spectacular “Maui Meltdown” Fails to Conclude Talks in July, TPP Ministers Gather for “Hail Mary” Attempt in Atlanta: USTR Still Has Little Room to Concede on Autos, Dairy, Rice, Textile, Sugar, Other Market Access Items; Key Meds Access, Investment, Other Policy Issues Remain Deadlocked

The Obama administration’s goal of holding a U.S. congressional vote on TPP before the politically perilous 2016 presidential election year evaporated when the last “final” Trans-Pacific Partnership (TPP) Ministerial, in July, yet again ended with no deal. As this [memo](#) explains, under the Fast Track grant passed in June, various congressional notice and report filing requirements consume about four and one half months between notice of a final deal and congressional votes being taken. However, even if congressional leaders were inclined to allow the Obama administration to waive these requirements and past practice, simply complying with the 90 day notice before a deal can be signed would mean that *if* the administration had a final TPP text to notify Congress of on October 1, there is no way that a congressional vote can now happen in 2015.

Yet completing a deal during this next “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, five ministerials [three 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.)

The all-out deadlocks at the July Ministerial meeting – centering primarily around how much value of autos and auto parts would need to be from TPP countries to gain duty-free access (rules-of-origin); market access (tariffs, tariff-rate-quotas) for dairy, sugar and a few other goods; and monopoly periods for biologic medicines – meant that other controversial, still-contested issues remain outstanding as well. As the chart below shows, several TPP chapters still have unresolved provisions relating to access to affordable medicines, investor-state dispute settlement, capital controls and other macro-prudential financial regulations, labor compliance and more. Plus, exceptions for tobacco 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, additional market access 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 the schedule of exceptions and commitments for state-owned enterprises remains contested.

Whether or not any real deal is made, TPP countries are desperate to announce a “breakthrough”. 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. They are already facing the nightmare of a U.S. congressional TPP vote in a U.S. presidential year with both Democratic and Republican presidential candidates attacking the TPP and all of the House of Representatives – that narrowly passed Fast Track – also facing the electorate. Ten Presidential candidates have pushed anti-TPP messages in their campaigning, stoking voters’ ire about the pact. Senator Bernie Sanders, running for President on the Democratic ticket, has repeatedly said that [“The TPP must be defeated.”](#) Donald Trump, Republican frontrunner, has also repeatedly slammed the TPP, stating [“It’s a horrible deal for the United States and it should not pass.”](#)

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.

The corporate lobby and TPP-country negotiators missed their last do-or-die moment to inject momentum into the TPP process at the July ministerial, so now, despite a failure to resolve the deadlock on rule-of-origin on autos, they are trying again. And, 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 increasing ire coming from the rice, sugar and other business sectors that did not oppose Fast Track 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 July, in just three days, [160 House members](#) (including a bloc of Republicans and 13 representatives who supported Fast Track) 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. The Administration’s cynical move to upgrade Malaysia so that the TPP could be subject to Fast Track has drawn continued outrage from Congress, including from [Senate Republican Bob Corker](#), chair of the Foreign Relations Committee (and Fast Track supporter), during a Senate hearing and from a growing number of House members who are cosponsoring a bipartisan [House resolution](#) condemning the Administration’s move. 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 monopolies, including through long new exclusivity periods for biologic medicines marketing and data that would keep more affordable “bio-similar” medicines off the market. Indeed, the deadlock over monopoly periods for biologic medicines was a key factor in the failure of the Maui ministerial. Other TPP countries have also opposed the U.S. proposals for new monopoly patents for new uses of already-patented drugs that would promote patent evergreening, longer patents 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 *permanently* 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 letter over the summer, 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.

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 enforcers" (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. Congress insists on this process to ensure that U.S. trade partners are complying with pacts' terms. But for the other countries, it means that 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. They oppose this process, which also often delays implementation of agreements. It is unclear how this thorny issue can be resolved in a way that will not create enormous political backlash in the U.S. or the other TPP countries.

Sensitive Market Access Issues

- **Autos:** Objections by Canada and Mexico to the rules-of-origin for autos and trucks and auto parts that had been agreed in closed-door bilateral talks between the United States and Japan blew up the July ministerial meeting. The NAFTA countries rejected a deal that would require

just 45 percent of the value of finished automobiles and 30 percent of the value of auto parts to be made with “regional value content” (content from any of the 12 TPP countries) to qualify for preferential TPP access. In stark contrast, NAFTA required 62.5 percent regional value content for autos and light trucks and 60 percent for other auto parts. Over 20 years, those NAFTA rules of origin have transformed Mexico into the world’s [seventh largest producer of cars](#) and [the fifth largest producer of auto parts](#) as tens of thousands of high-wage U.S. auto sector jobs were lost. Now even after the Obama administration took aggressive action to [save the U.S. auto sector](#), it was willing to agree with Japan to TPP rules of origin that would flood the U.S. market with autos and parts with high Chinese and Thai content – killing more U.S. jobs in that sector, hurting supplier industries such as steel, and slamming Mexico and U.S. border states that support the NAFTA auto trade by eroding the NAFTA preferences. While negotiators from the four countries have met repeatedly in the intervening weeks, they [have not yet reached](#) a compromise. If they do, the political costs of those deals will be extremely high. A flotilla of recent letters from [U.S. auto parts makers](#), auto parts makers in [Canada and Mexico](#), and the [steel industries](#) from all three countries highlight those political costs. Key [senators also urged USTR](#) to take a hard line in the auto talks. As well, just this week, [labor union confederations](#) of Canada, Mexico and the United States stated their staunch opposition to relaxing the rules of origin below the level already in NAFTA. Meanwhile, the politically powerful U.S. auto firms have [demanded the inclusion of strong, enforceable disciplines on currency](#) in the TPP.

- **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, but [the U.S. rice industry](#) recently made clear its displeasure with a potential deal that does not go far enough. 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 suggested that Canada should be left out of the TPP if it does not grant significant dairy access. Meanwhile, just days before the Atlanta meeting, New Zealand’s trade minister was threatening not to attend, stating [“what is on the table \[for dairy\] is, in our opinion, completely inadequate.”](#)
- **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.
- **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 Republican 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. Ministers may make try to make final trades in this area, which could lead to immense political backlash in the U.S. (where 90 percent of Americans support Buy America laws) and in Malaysia.

□ **Compliance with Enforceable Labor and Environmental Standards:** While the Obama administration continues to promise that environment and labor chapters will be enforceable and subject to the same dispute resolution system as other TPP chapters. Whether or not this is the case, it is unclear how 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. With respect to the environment chapter, if any final TPP deal does not include a legally enforceable full prohibition on trade in illegally harvested timber and illegally taken fish and wildlife or include a specific list of seven multilateral environmental agreements (MEAs), it will face serious problems in the U.S. congress. [Nineteen House Democrats](#) – all of whom voted for Fast Track – made those demands in a July letter.

□ **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. China’s and Vietnam’s currency devaluation in August sparked another round of demands to address currency manipulation in the TPP by many Members of Congress in individual statements and in a [bipartisan Senate letter](#) from seven key Senators including five Republicans, four of whom supported Fast Track. In the House, [Rep. Sander Levin](#), top Democrat of the House trade committee, doubled down in his demand for enforceable disciplines on currency in TPP after the China devaluation, and [158 House members](#) just sent another bipartisan letter to Ambassador Froman on the subject.

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