

MEMO

To: Democratic Members of the House Advisory Group on Negotiations
From: Sander M. Levin, Ranking Member, Committee on Ways and Means
Date: September 24, 2015
Re: Meeting with USTR Michael Froman on the TPP

You will be joining USTR Michael Froman as part of the House Advisory Group on Negotiations (HAG) on Friday, September 25 at 7:45 a.m. to discuss the resolution of outstanding issues in the Trans-Pacific Partnership Agreement (TPP), which the Administration is seeking to conclude in principle as soon as possible – and as early as next week. Pursuant to Trade Promotion Authority (TPA), the HAG comprises representatives from the Ways & Means Committee and other committees “that would have . . . jurisdiction over provisions of law affected by a trade agreement negotiations conducted at any time during that Congress.”

This memorandum provides: (A) a summary of the current status of the key outstanding issues in the TPP that Members of the Democratic caucus have been raising with USTR for the past few years and (B) an outline and potential timeline of next steps related to Congressional consideration of the TPP once TPP negotiations are concluded by the Administration.

A. STATUS OF KEY OUTSTANDING TPP ISSUES

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. Many Members and stakeholders have expressed the view that strong and enforceable currency manipulation provisions need to be included in the TPP that are consistent with existing IMF guidelines on what constitutes currency manipulation.

Status: The Treasury Department has been engaging in conversations with TPP countries about currency manipulation and hopes to reach a final agreement in the coming days. The text has not been available for Members to review in the secure reading room. It will not be enforceable and will be a side agreement, not part of the TPP Agreement itself.

2. Labor Rights

Issue: The “May 10th Agreement”¹ requires that U.S. trade agreement parties meet international worker rights standards. TPP needs to: (1) bring Vietnam, Mexico, and other countries with

¹ 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

serious labor deficiencies, such as Malaysia and Brunei, into compliance with international labor standards (as reflected in the May 10 Agreement) **before** Congress votes and (2) ensure compliance **after** the TPP agreement enters into force.

Status: The TPP is expected to include the May 10 labor obligations with enforceability through the basic dispute settlement structure in TPP. However, the TPP does not yet have a mechanism to ensure that certain TPP parties that have labor laws and practices that fall far short of international standards will actually live up to the promises contained in the “May 10th Agreement.”

In **Vietnam** workers 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 or after the TPP agreement enters into force. There is a real concern that the Administration will not insist that Vietnam change its laws and practices to fully implement the obligations in the labor chapter. Specifically, Vietnam may not allow industry-wide unions to form, or allow unions to affiliate with whatever organizations they choose, as required under basic ILO standards.

In **Mexico**, employer-dominated ‘protection unions’ are prevalent, and the arbitration boards responsible for resolving labor disputes are inherently and structurally biased and corrupt, leaving workers who try to organize without any legal recourse when their rights are violated. Mexico is resisting addressing all labor issues within the context of the TPP negotiations. Because of this entrenched system, Mexico falls far short of meeting basic ILO standards, and it remains unclear whether, how, and when the Administration will address these fundamental issues with Mexico. Without their resolution, it will not be possible to say that the problems with NAFTA are being fixed.

In **Malaysia**, human trafficking is a major concern. This remains true even and especially as the 2015 U.S. Trafficking in Persons (TIP) Report issued by the State Department at the end of July upgraded Malaysia from Tier 3, the ranking reserved for countries with the worst record on human trafficking, a decision that has been widely criticized and scrutinized in Congress.

Malaysia’s human trafficking problem – which is a forced labor problem – puts it in direct violation of the ILO’s basic standards and the TPP agreement. Forced labor is an issue in several trade-related sectors including plantation agriculture, fishing, electronics, and textiles and apparel. Foreign workers in those and other sectors are particularly susceptible to debt bondage and passport confiscation. A September 2014 report commissioned by the U.S. Department of Labor² observes that Malaysia’s electronics sector workforce is comprised of hundreds of thousands of foreign migrant workers, many of whom are subject to high recruitment fees,

property rights and access to affordable medicines. The U.S.-Peru trade agreement was the first to include the May 10 standards.

² *Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics* (Verité) September 2014.

personal debt, complicated recruitment processes, lack of transparency about their eventual working conditions, and inadequate legal protections.

There are also concerns regarding **Peru's** compliance with the labor obligations in the US-Peru FTA, which are essentially the same as the obligations likely to be included in the TPP Agreement. Earlier this week, the U.S. Department of Labor accepted a submission from labor rights groups alleging that, by permitting the unlimited consecutive renewal of short-term contracts, Peru has failed to meet its FTA commitment to adopt and maintain in its statutes and regulations, and practices thereunder, the right of freedom of association and the effective recognition of the right to collective bargaining.

Any 'consistency plans' (i.e., agreement on how the labor obligations will be implemented) for these or other TPP countries are not available for Members to review in the secure reading room.

3. Environment

Issue: The May 10 Agreement also provides that U.S. trade agreements provide for a certain level of environmental protection. The May 10 standard for the environment directly incorporated seven multilateral environmental agreements into the text of past trade agreements. TPP needs to ensure a level of environmental protection at least as high as the level provided under the May 10 Agreement, but not necessarily in the same form.

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. Moreover, in Maui, the United States and Peru reached a bilateral agreement that may further weaken Peru's obligations on conservation. Earlier this year, environmental NGOs filed a petition alleging that Peru is in breach of its obligations under the existing U.S.-Peru trade agreement.

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

Issue: U.S. trade and investment agreements almost always 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.

However, 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. In March, 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.

With these growing concerns about the potential for abuse of ISDS, a number of proposals have been tabled for reform. Among them are that TPP needs to: (1) establish a new mechanism to enable TPP parties, the country being sued and the home country of the investor, 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.

Status: Prior to the Maui Round, the TPP investment text was basically the same as the model adopted 10 years ago, even though conditions have changed dramatically in the past 10 years. However, the Maui Round of negotiations resulted in a few meaningful changes to the text. First, the annex on capital controls was resolved, fixing issues identified in a letter to USTR by Mr. Levin and Mr. Rangel (as well as Reps. Waters and Moore). Second, clarifications were added to the minimum standard of treatment (MST) provision to ensure that investors bear the burden of proof and that upsetting an investor's expectations, without any further evidence, is not a violation of the provision. The new MST provisions appear to address some of the shortcomings that were demonstrated in numerous ISDS cases, most recently in *Bilcon v. Canada*. But other serious shortcomings remain. For example, any action that an ISDS tribunal may consider "arbitrary" could still be found to constitute a breach of the MST obligation. Further, the TPP text does not contain a diplomatic screening mechanism of any sort, nor the preambular language on investment agreed to as part of the May 10th Agreement.

5. Access to Medicines

Issue: The May 10 Agreement also requires that U.S. trade agreements ensure a balance between strong intellectual property rights and access to affordable, life-saving medicines. Many stakeholders and Members have expressed the view that TPP needs to adhere to the access to medicines provisions of 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 other developed countries (e.g., by having long periods of data exclusivity for biologic medicines,) and that these disciplines, even if they are consistent with current U.S. law, could make changing U.S. law in the future more of a challenge.

One of the major outstanding issues in the TPP negotiations is the period of exclusivity granted to biologic pharmaceuticals before "biosimilars" may enter the market. Some TPP parties have insisted on zero or no more than five years of exclusivity (like with other pharmaceutical products), while the United States has insisted on twelve years. (Twelve years is consistent with current U.S. law but more than the seven years the President has proposed in his annual budgets.) There is some discussion now of a provision requiring a period of "five plus" years, but the text of such a proposal is not available for Members to review.

6. Automotive Market Access

Issue: 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. Given this history, there is serious concern about the United States opening its market further to Japanese imports, through the phase-out of tariffs, before there is an opportunity to determine whether Japan has truly opened its market.

In my view, TPP needs to ensure that U.S. auto tariffs are not reduced or eliminated unless and until Japan opens its notoriously closed auto market; or, alternatively, that TPP needs to ensure that those tariffs may be eliminated only after the agreement has been in force for 30 years.

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, and there is no text available for Members of Congress to review on this issue. The parties have also been working to address certain non-tariff barriers that Japan utilizes to close their market and to establish rules and procedures for an enhanced automotive-specific dispute settlement mechanism that has more accelerated timelines and more targeted penalties (including, e.g., a tariff delay mechanism where penalties are imposed before the United States begins reducing the tariff on motor vehicles from Japan and a snapback mechanism that re-imposes tariffs to pre-reduction levels when penalties are imposed after the United States begins reducing the auto tariff) than the TPP-wide dispute settlement mechanism.

7. Rules of Origin (ROOs)

Issue: “Rules of origin” define the extent to which inputs from outside the region covered in a trade agreement can be incorporated into an end-product for that product to still be entitled to preferential/duty-free treatment under the Agreement. The concern is whether the TPP will incorporate rules that are strict enough to 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 (e.g., China).

Many stakeholders and Members have expressed the view that TPP needs to establish a rule of origin for automotive products that is at least as stringent as the rule in the North American Free Trade Agreement, especially since the TPP includes 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. These rules have not been included in the documents available for Members to review in the secure facility.

In fact, the automotive rules of origin remain one of the most difficult outstanding issues coming out of the meeting of TPP Ministers that took place in Maui at the end of July. According to press reports, earlier this week, USTR negotiators have been meeting intensively with negotiators from Japan, Canada, and Mexico to come to an agreement on automotive rules of origin. Mexico in particular is pushing for the NAFTA rule of origin on auto parts, whereas the United States is prepared to agree to something less than NAFTA in response to Japanese demands. While those meetings do not appear to have resulted in a resolution of the issue, negotiators will likely reconvene in the next days to attempt again to reach resolution.

8. Tobacco Controls

Issue: A number of recent international disputes have challenged tobacco measures aimed at protecting public health, 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. Whether or not a trade agreement like TPP will compromise or preserve a country's ability to regulate tobacco as a public health matter is a serious concern.

Many stakeholders and Members have expressed the view that TPP needs to provide that non-discriminatory tobacco control measures should not be subject to challenges as being inconsistent with the obligations in the TPP.

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. Although USTR has stated that no new proposals were made on tobacco at the Maui round of negotiations at the end of July, rumors have persisted that the issue was nevertheless discussed among the TPP countries in Maui.

While USTR hopes to reach an agreement in principle as early as next week, USTR staff has informed us that USTR does not yet have a position on this particular issue. In any event, USTR has not shared its bottom line, or even its next move, with Members of Congress or cleared advisors.

9. State-Owned Enterprises (SOEs)

Issue: 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. The concern in TPP is whether the agreement will 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.

It will be important that: (1) the SOE disciplines 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 (2) exclusions from coverage are narrowly tailored.

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 and how SOEs are defined. Negotiations among the TPP parties over their individual, country-specific schedules of exempted entities are ongoing. While significant challenges remain with a handful of countries, progress with Malaysia appears to be particularly slow and difficult. It is difficult to assess the status of these carve-outs, however. Members of Congress and Committee staff do not currently have access to these draft schedules.

Also concerning is the fact that the definition of SOEs (considered by the negotiators to be a closed issue) is very narrow, allowing enterprises that are effectively controlled by foreign governments (but where the government owns less than a majority of the shares) to circumvent the obligations.

10. Agricultural Market Access

Issue: The TPP includes certain countries that have traditionally sheltered substantial segments of their agricultural markets from competition from trade. These countries include Japan and Canada. The concern is whether the TPP will eliminate tariffs on virtually all U.S. agricultural exports given the inclusion in the TPP of these countries.

In my view, the TPP needs to either eliminate tariffs on virtually all products or, in the exceptional circumstances where a product is not subject to full tariff elimination, TPP needs to obtain significant new market access opportunities, substantially equivalent to the opportunities afforded TPP party exporters in the U.S. market.

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. At least as early as the Maui round of negotiations, Canada began exploring with TPP parties access to its dairy market. Nevertheless, the dairy industry remains seriously concerned, as it also remains disappointed with the status of the Japan and Canada negotiations and concerned by increased access to the U.S. market for dairy imports from New Zealand. Earlier this week, the U.S. dairy industry sent a letter to some Members of Congress expressing its alarm that, given the absence of close consultations between USTR and the dairy industry since the Maui round of negotiations, USTR appears to be poised to reach an agreement on dairy market access in TPP that the U.S. dairy industry will not be able to support. Rice producers, and Members with rice interests in their districts, have also expressed serious concerns since Maui.

11. Food Safety Measures

Issue: Trade agreements impose disciplines on the actions of regulators, including food safety regulators, to try to ensure that measures taken in the name of food safety that restrict trade are legitimately aimed at protecting public health and not excuses to protect domestic industries.

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. The concern is whether the TPP will 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.

TPP needs to be accompanied by additional and ongoing funding for food safety regulators to conduct inspections and support robust rules to ensure that other countries do not adopt illegitimate food safety measures designed to keep out U.S. exports.

Status: 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.

12. Copyright

Issue: In the past, U.S. trade agreements have reflected U.S. legal requirements to protect copyrights, including the full set of rights associated with copyright (e.g., rights of reproduction and distribution, etc.) The agreements did not reflect the exceptions to those rights (such as fair use). As stakeholders, such as Google and other Internet companies who avail themselves of those exceptions, have gotten more involved in intellectual property policy, including trade agreements, there has been a push to acknowledge that there need to be exceptions to these rights. As a result, several years ago, the United States was successful in persuading the TPP parties to include language acknowledging that "limitations and exceptions" should be included in each party's law, and the text of this provision was considered "closed." Some Internet groups welcomed this improvement but held the view that the language was not as strong as it should be (i.e., as with the environmental text, the 'verbs' of the commitments were not as strong as with some other obligations in the agreement).

In Maui, there was concern that the TPP parties were considering reopening the copyright text. Stakeholders in favor of stronger language on limitations and exceptions were pressing for the language to be revised, whereas other stakeholders felt blindsided by the reopening of text they considered closed.

Status: The status is unclear. Although discussions occurred in Maui, USTR has indicated that the TPP parties have had no follow up discussions since Maui. While USTR hopes to conclude the negotiations as soon as next week, it does not yet have a position on this issue.

B. POTENTIAL TIMELINE FOR CONGRESSIONAL CONSIDERATION OF TPP

Under Trade Promotion Authority, before the President may sign a final TPP Agreement, he must first notify Congress of his intent to do so 90 days before signing. Within that period, and sixty days before signing an agreement, the draft text must be published. Because the President has not yet notified Congress under this provision, the 90-day clock has not yet started.

The U.S. International Trade Commission, an independent agency, is to publish an assessment of the likely economic impact of the Agreement within 105 days after an Agreement is signed. This is significantly less time than the ITC requested. Specifically, in a November 2013 letter, the Chairman of the ITC indicated the ITC needs “at least 150 days” to complete its analysis from the time the final agreement is submitted to the ITC.

Press reports have suggested, however, that USTR has urged the ITC to expedite its analysis and to complete its assessment more quickly than the 105 days provided in TPA.