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The Hatch-Wyden-Ryan TPA Bill: A Major Step Back on TPP Negotiations

The Trans-Pacific Partnership (TPP) negotiations – the most important trade negotiations in at least 20 years – are at a critical juncture – with many issues unresolved. 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.

Unfortunately, the Hatch-Wyden-Ryan Trade Promotion Authority (TPA) does not move us toward a stronger TPP agreement that will garner broad, bipartisan support in Congress. TPP is not where it needs to be right now, and Hatch-Ryan-Wyden does nothing to change that. On all of the major issues in the negotiations, the negotiating objectives are obsolete or woefully inadequate. We can't expect to get the best deal if we are not asking for the right things.

The Hatch-Wyden-Ryan TPA gives up Congressional leverage at the exact wrong time. Instead of pressing USTR to get a better agreement or signaling to our negotiating partners that Congress will only accept a strong agreement, the Hatch-Wyden-Ryan TPA puts Congress in the back seat and greases the skids for an up-or-down vote after the fact. Real Congressional power is not at the end of the process, it is right now when the critical outstanding issues are being negotiated.

Below is a brief review of the major outstanding issues in TPP, and how the Hatch-Wyden-Ryan TPA bill fails to instruct the Administration on how each issue should be resolved.

How the TPA Bill is a Major Step Back in Improving TPP Negotiations

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.
- **TPA** ↓ The Hatch-Wyden-Ryan TPA bill <u>leaves it up to the Administration</u> to decide how to address currency manipulation, and only lays out options that the President already has to address the issue including things like "monitoring" that are already being done.

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.¹

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.

TPA ↓ The Hatch-Wyden-Ryan TPA bill <u>does not address</u> what Congress believes needs to be done to bring countries like Vietnam and Mexico (as well as Malaysia and Brunei) into

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 property rights and access to affordable medicines.

compliance with international labor standards. It contains only general language in line with the May 10 Agreement.²

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** ↓ The Hatch-Wyden-Ryan TPA bill simply lists the seven multilateral environmental agreements from the May 10 Agreement, which is not consistent with the approach taken in TPP and **is obsolete** in providing instructions since the TPP is already taking a different approach. The TPA bill also does not address whether or how climate change issues should be handled in TPP, an issue raised by other countries in the TPP negotiations.

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, an investor won a NAFTA ISDS case in which the government of Nova Scotia denied a permit to develop a quarry in an environmentally sensitive area. Other investment disputes involve 'plain packaging' of tobacco products in Australia aimed at protecting public health and pharmaceutical patent requirements in Canada. This issue is receiving heightened scrutiny among negotiators and from a broadrange 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 text of the investment chapter in TPP includes ISDS and is basically the same as the model adopted 10 years ago, even though conditions have changed dramatically in the past 10 years, and calls for changes to or elimination of the chapter have intensified. Despite proposals to include new safeguards in the ISDS mechanism, the Administration has not made any attempts to incorporate them.

² The TPA bill lumps together labor and environment into one negotiating objective.

TPA ↓ The Hatch-Wyden-Ryan TPA investment negotiating objective is the same as it was 12 years ago again and **is obsolete**.

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** ↓ The Hatch-Wyden-Ryan bill 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.

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 ↓ The Hatch-Wyden-Ryan TPA bill 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.

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.

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** ↓ The Hatch-Wyden-Ryan TPA bill **provides no guidance** on tobacco control measures, given the Administration the flexibility to include whatever it wants, or nothing at all.

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

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 ↓ The Hatch-Wyden-Ryan TPA bill has as its objective "reducing <u>or</u> 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 <u>this objective is meaningless</u>. 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.

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 ↓ The Hatch-Wyden-Ryan TPA bill 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.

The Basic Structure of Hatch-Wyden-Ryan is Flawed

In addition to the obsolete or weak negotiating objectives, the Hatch-Wyden-Ryan TPA does not strengthen the role of Congress once its power is ceded through TPA.

For example:

- ↓ Hatch-Wyden-Ryan relies on the President to certify whether his negotiators have met the negotiating objectives that Congress set. It is unacceptable to rely upon a President who negotiated the agreement to issue a statement "asserting that the agreement makes progress in achieving" Congressional negotiating objectives.
- Hatch-Wyden-Ryan includes a provision that "creates a new mechanism for the removal of expedited procedures for a trade agreement if, in the judgment of either the House or Senate, that agreement does not meet the requirements of TPA." <u>But this is authority that the House and Senate already holds.</u> We can always change the rules of the House. Indeed, House Democrats did that when we removed the Bush-negotiated Colombia Free Trade Agreement from "fast-track" procedures in 2008. The so-called "third process" would happen after the agreement is finalized and after the implementing legislation is introduced further indicated how meaningless it is in providing Congress a real role in the negotiations.
- ↓ Hatch-Wyden-Ryan leaves it up to USTR "to develop within 120 days of enactment written guidance on enhanced coordination with Congress" which is particularly meaningless given the status of TPP negotiations.