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The Trans-Pacific Partnership Negotiations: The Need for Congress to Get Fully in the Game

**Congressman Sander Levin (D-MI)
Ranking Member, Ways and Means Committee**

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INTRODUCTION

The Trans-Pacific Partnership (TPP) is the most significant multilateral international trade agreement we have negotiated since the Uruguay Round 20 years ago. The 12 parties to these TPP negotiations (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam) account for about 40 percent of world GDP and represent some of its fastest growing markets.

They include a vast array of economies, ranging from some of the world's largest, most developed, and market-oriented economies to some of the smallest, least-developed, and command economies. They include Japan, a country with which we have never been able to establish a level competitive playing field in key areas like automotive and agriculture, and other countries where there exists grave concerns about working conditions, human rights and the rule of law.

The negotiations also cover an exceptionally far-reaching range of subject matters. In important respects they go beyond the scope of the never-completed Doha World Trade Organization (WTO) negotiations – covering everything from tariffs to intellectual property rights, the Internet, labor and environmental protections, cross-border data flows, and state-owned enterprises.

And finally, they occur against a backdrop of China's active desire to increase its influence in the region both economically and otherwise.

These are very important negotiations that deserve the full attention and active involvement of Congress. They have the potential to result in significant economic opportunities for U.S. businesses, workers and farmers. Or they have the potential to lock in uncompetitive practices, weak standards and a system that does not spread the benefits of trade.

The following presents some of the areas that must be confronted and effectively resolved within the TPP negotiations in order to meet the challenges and seize the opportunities.

WORK TO BE DONE

1. New Rules for a 21st Century Trade Agreement.

The so-called “May 10” agreement negotiated in 2007 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 granting developing countries better access to affordable medicines. That agreement is – and must remain – a bedrock principle within trade agreements.

- Worker Rights. TPP must include the May 10 labor provisions, subject to the same dispute settlement mechanism as the other provisions of the agreement. These obligations must also be fully implemented – an area that the parties are only beginning to tackle in the negotiations. That task will be challenging with several TPP countries – particularly Vietnam, a communist country under which the government, not independent labor unions chosen by the workers, is deemed the best representatives of workers in the workplace. Before Congress considers TPP, Vietnam’s labor laws and regulations must be amended to implement the labor obligations in the agreement, and a special monitoring and enforcement structure put in place to ensure compliance going forward.
- Environmental Protections. The TPP parties are considering a different structure to protect the environment than the one adopted in the May 10 Agreement, which directly incorporated seven multilateral environmental agreements into the text of past trade agreements. While the form is less important than the substance, the TPP must provide an overall level of environmental protection that upholds and builds upon the May 10 standard, including fully enforceable obligations. But many of our trading partners are actively seeking to weaken the text to the point of falling short of that standard, including on key issues like conservation.
- Access to Medicines in Developing Countries. TPP also must incorporate the May 10 provisions on access to medicines, which seek to better ensure that developing countries have access to affordable medicines, while still strengthening intellectual property rights over what is required under WTO rules. There had been some effort to move away from the careful balance struck in the May 10 Agreement, worrying Members of Congress, public health and development NGOs, and other TPP trading partners. That work to preserve the May 10 Agreement has had some real success. But now some are once again trying to upset the balance in a way that would limit access to medicines. For example, there is a push to apply the May 10 standard for developing countries only for a very limited “transition period” inconsistent with the May 10 Agreement.
- Human Rights. Free trade agreements like TPP establish a very close economic relationship between the partner countries. Most Members of Congress, and the American public, don’t want to establish such relationships with countries that deny their own people basic human rights. More must be done to ensure that our trading partners are committed to those rights.

2. **Reciprocity: Ensuring that Trade is a Two-Way Street.**

Whereas the United States has one of the most open economies in the world, many of our TPP trading partners have notoriously closed markets and manipulate the flow of trade in their favor. The TPP presents an enormously important opportunity to transform the trading relationship between the United States and those partners from something that in some cases looks like a one-way street to a fully reciprocal one with healthy flows that go both ways and create opportunities for everyone – the way trade is supposed to.

- **Currency Manipulation.** 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 current or former currency manipulators, such as Japan. The Administration has not yet formally broached the subject in the TPP negotiations. The issue must be addressed. The TPP parties could agree to take the existing IMF disciplines, build upon them, and make them actionable in TPP. The IMF already prohibits currency manipulation and has developed guidelines to define when it occurs. The problem is that the IMF lacks an enforcement mechanism.

Some suggest that U.S. monetary policy (“quantitative easing”) would be challenged under any enforceable currency obligation in TPP. But there is a clear distinction between interventions in the foreign exchange markets and expansionary domestic monetary policies. The factors the IMF considers under its current guidelines – which have been endorsed by the TPP parties, all of whom are Members of the IMF – do not support a finding of currency manipulation by the U.S. For example, the United States does not engage in “protracted large-scale intervention in one direction in the exchange market” and it does not hold “excessive and prolonged official or quasi-official accumulation of foreign assets.” (Indeed, countries such as Algeria, Italy and Thailand each hold more in reserves than does the United States, and China holds roughly 20 times more in reserves than does the United States.) Moreover, if the United States was engaging in currency manipulation, the U.S. dollar would be *undervalued*. However, the IMF staff recently concluded that the dollar is *overvalued*.

- **Japan Autos.** U.S. auto manufacturers are determined to compete in the Japanese market. But before investing heavily in the Japanese market, they will need to see fundamental, structural economic changes in Japan that truly and irreversibly open the automotive sector. Japan is the most closed automotive market of any industrialized country, while the Japanese auto industry has long enjoyed a very open U.S. market.

An emphasis on non-tariff barriers (other than currency manipulation) has not led to a basic change in Japan’s closed market. Key to the U.S. ensuring that necessary changes take place in Japan is a provision relating to U.S. tariffs on vehicles and trucks. To date, the Administration’s approach is that any reduction to the U.S. auto tariff will be tied to the longest period negotiated on any other product line between any two TPP parties, whether that tariff relates to automotive products or not. The Administration has not stated a specific period of time for when the phase-out would begin or when it would end. The TPP must also address trade in auto parts, which account for a significant portion of the automotive imbalance between the United States and

Japan. This is one of the biggest challenges in bringing Japan into the TPP and one of the areas that will require the most work between our two countries.

- Agricultural Market Access. U.S. agricultural exports exceeded \$140 billion last year – and they would be even greater if we could eliminate the substantial market access barriers in foreign markets. But Japan is seeking to carve out nearly 600 agricultural products from tariff elimination far more carve-outs than the United States has ever negotiated in a free trade agreement. Other countries, such as Canada, are also not engaging fully in agricultural market access negotiations at this time. In July, 140 Members of the House wrote to the President expressing deep concern over the status of the agricultural market access negotiations, for good reason. This is another immense challenge in bringing Japan into the TPP and, as with autos, Japan must open its markets.
- State-Owned Enterprises. The disciplines on state-owned enterprises (SOEs) are expected to go far beyond anything ever included in any past trade agreement reflecting the challenge of including non-market economies. Those disciplines are of high interest to business and labor stakeholders and to Democratic and Republican Members alike. The Administration’s proposal has faced significant resistance from some TPP partners, many of whom employ significant numbers of SOEs and would benefit from a weakening in the text. While it appears that the parties are beginning to coalesce around the text of the general obligations, some of the parties now appear to be pushing for exceedingly broad country-specific carve-outs for particular SOEs. Our businesses and workers need to compete on a level playing field with respect to enterprises that are controlled by foreign governments.

3. **National Sovereignty: Preserving Our Right to Regulate.**

Reaching for a high bar to increase standards of living, improve worker rights and strengthen environmental protections, and ensure that trade opportunities are reciprocal does not mean the United States gives up its right to regulate in all of the vitally important areas that affect our interests. The rules and implementation plans that are being negotiated in the TPP will seek to prevent partner countries from using domestic regulations as a bogus excuse for distorting or blocking trade. However, those rules need to be carefully crafted to preserve the right of the United States – and each TPP country – to appropriately regulate.

- Food Safety Measures. Past U.S. FTAs have not included new sanitary and phytosanitary (SPS) disciplines, instead reaffirming the commitments in the WTO SPS Agreement. Exporters are frustrated by the sometimes indefensible barriers abroad that prevent them from getting their goods into foreign markets. As a result, they have pushed for greater SPS disciplines in TPP. At the same time, we know that ours is the most lucrative market in the world, and exporters in other countries want access to that market. We have to be sure that any new disciplines do not put our own regulatory sovereignty at risk, especially with the array of conditions in the different countries involved in TPP. That means that the TPP rules have to protect our agencies’ discretion and that we, as a government, provide our agencies – USDA, FDA, and CBP – with the tools and resources they need to protect us from unsafe imports. Achieving the right outcome requires an approach that draws on the expertise of relevant Committees, key Members who have led efforts in this area, and stakeholders.

- Investment and Dispute Settlement. Investor-state disputes have proliferated in recent years and involve increasingly novel and costly challenges to public welfare and environmental regulations. It's important that the next stages in the negotiation of these provisions in the TPP focus on addressing the concerns and mitigating the risks involved in this area. One avenue could involve clarifying some key obligations (e.g., the 'minimum standard of treatment') in an agreement. The parties should also provide some degree of flexibility to enable countries to impose capital controls where necessary to prevent or mitigate financial crises, which the IMF staff has supported, as have some Members of Congress.
- Tobacco Controls. A number of recent international disputes have challenged tobacco measures (including one against the U.S. clove cigarette ban). In 2013, the Administration decided not to pursue a safe harbor for tobacco that it had originally supported and instead tabled a proposal that merely clarifies that tobacco measures may be subject to the normal public health exception in our trade agreements. A more robust approach is needed in TPP and awaits action from the Administration.

4. Additional Vital Issues.

TPP also needs to address a range of other issues, including: (1) the treatment of cross-border data flows, and the related issues of consumer privacy and national security; (2) "rules of origin" that determine how much content can be accepted from outside of TPP (e.g., China) for a good to be eligible for preferential treatment; (3) how to treat sensitive industries while ensuring new export opportunities.

CONCLUSION AND NEXT STEPS

As described above, numerous key elements being negotiated in TPP remain outstanding.

Because of the breadth and scope of TPP, whether and how these issues are resolved can have a major impact on the lives and livelihood of our constituents, and the ability of U.S. businesses to compete on a level playing field in the increasing flow of globalized trade.

As such, in order for these negotiations to achieve their expectations and address broad-based concerns, Congress must be much more of an active partner. To date, far too many have focused on the process not the substance.

"Fast Track," or Trade Promotion Authority, is traditionally designed to be in place from the start of negotiations – to ideally give Congress a role in picking negotiating partners, to set out negotiating objectives, to establish full transparency, to provide an active role for Congress throughout the negotiations, to judge if the objectives have been achieved, and then to set procedures for legislative consideration. No matter one's view of the status of the TPP negotiations, whether in their "end game" or with much work remaining (as I believe), after four years, these negotiations clearly are not at the beginning.

Chairman Camp and other Republicans on Ways and Means wrote in July that they “will not support TPP if the agreement, even an agreement in principle, is completed before TPA is enacted.”

Yet many of the negotiating objectives in the Camp, Baucus, Hatch TPA provide no real guidance to the outstanding issues we now face in TPP. Take, for example, the issue of currency manipulation. The Baucus-Camp-Hatch TPA bill simply lays out options already available to the President to address currency manipulation – some of which, like “reporting, monitoring, and transparency,” have already been tried and have failed. These options fall far short of the enforceable disciplines sought by bipartisan majorities in the House and Senate.

Agricultural market access is another example of how TPA can’t effectively address current negotiations. The Baucus-Camp-Hatch TPA bill has as its objective “reducing or eliminating” tariffs that decrease market access opportunities for U.S. exports. Japan, in essence, has proposed new market access for U.S. exporters by reducing – but never eliminating – its tariffs on roughly 600 “sacred” product lines. That may conform to the negotiating objective in the Baucus-Camp-Hatch TPA bill, but many agricultural groups – and even Chairman Camp himself – have said they don’t believe it is satisfactory in these negotiations.

And, finally, the Baucus-Camp-Hatch TPA bill merely codifies existing practices regarding Congressional consultation mechanisms – and then calls on the Administration to decide how to enhance those mechanisms four months after TPA becomes law.

The Baucus-Camp-Hatch TPA bill may be a tool to speed consideration of a trade agreement, but it is not a tool to effectively shape the TPP currently being negotiated.

The full focus must now be on TPP, not TPA.

What is needed now is a clear, focused, and structured involvement of Congress on the issues now under negotiation and their disposition, including effective transparency available to interested groups and the public as to how the negotiations are proceeding. That cannot be accomplished through work on a TPA.

Just because we are leaving D.C. doesn’t mean we leave our Congressional responsibilities behind. I believe that Members, especially those on Committees with trade or other related jurisdictions, should use this time to become more immersed in the status of negotiations. With high-level TPP negotiating meetings expected for October and early November, when we return to D.C. we should establish an intensive bipartisan consultative process to determine how we address both pending issues and shortcomings.

Congress should not abdicate its vital responsibilities over international trade either by failing to participate actively in the shaping of major ingredients of the TPP or by agreeing to a fast track up or down vote before it knows the major ingredients of the TPP, the most immediate subject of a TPA.

A full partnership between USTR and Congress will send our negotiating partners a strong signal that the Administration is proceeding with active Congressional consultation in seeking a high-standard agreement. If and when that point approaches, a decision can be made on passage of TPA to help finalize the effective deal with our negotiating partners.