

Friends of the Earth Blog

Don't fast track a polluters' bill of rights

Posted Jan. 24, 2014 / Posted by: Bill Waren

Friends of the Earth opposes the “Bipartisan Congressional Trade Priorities Act” (HR 3830/S 1900), so-called “Fast Track” legislation sponsored by Representative Dave Camp (R-Mich.) and Senator Max Baucus (D-Mont.). The Camp/Baucus bill would undercut the constitutional authority of Congress over trade policy and would be used to rush the environmentally hazardous Trans Pacific and Trans Atlantic trade deals past Congress, without amendment or significant debate. The Camp/Baucus bill would amount to a major power shift from Congress to the executive, undermining the founders’ intention to provide checks and balances in our government through the separation of powers.

If approved, The Camp/Baucus bill would expedite, without proper consideration, congressional approval of a massive and controversial trade deal, the Trans Pacific Partnership, as well as a similar deal on the same model now being negotiated with the European Union, the Transatlantic Trade and Investment Partnership (or the Trans Atlantic free trade agreement as it is sometimes called). These trade agreements would allow big corporations and wealthy financiers to sue for millions in compensation for the cost of complying with environmental and other public interest regulations. More generally, the TPP and TTIP (TAFTA) deals could trump sensible safeguards related to food safety, toxic chemicals, and global warming, among many others

TPP & TTIP threaten sound environmental policy

TPP and TTIP would allow foreign investors to seek awards of money damages from business-friendly tribunals in compensation for the cost of complying with environmental and consumer regulations -- even the “cost” of lost opportunities for future profits. Mining, oil drilling and infrastructure construction, like ports and pipelines, are all frequent topics of litigation under existing international investment agreements. For example, La Oroya, Peru, is one of ten most polluted places on earth. Renco, a U.S. company, has repeatedly failed to meet its contractual and legal deadlines to clean up the pollution caused by its metallic smelter at La Oroya. Renco has sued Peru before an international investment tribunal, seeking \$800 million in damages for the cost of complying with Peru’s environmental and mining laws.

Climate measures are also put at risk by the TPP and TTIP investment chapters. A wide array of energy policies could be challenged, conceivably including TPP attacks on any decision to stop construction of the Keystone XL pipeline. In the same way, local efforts to block fossil fuel export terminals in the U.S. might well be challenged before tribunals at the World Bank or the Permanent Court of Arbitration, applying investor rights under TPP or TTIP.

Other provisions in the agreements would undercut essential environmental and climate initiatives. Regulatory coherence and other chapters of the TPP and TTIP encourage inappropriate use of cost-benefit analysis, inhibiting government regulators from applying the “precautionary principle” when assessing the safety of toxic chemicals, food imports and genetically engineered products, among others. Overbroad concepts of “discrimination” could

lead to TTIP challenges to the European Fuel Quality Directive for its unequal treatment of tar sands oil from North America based on its threat to the climate. Regulatory constraints on high carbon exports of oil and liquefied natural gas could run afoul of prohibitions on export controls in international trade law.

The privatization of nature would also be encouraged. As just one example, a leaked version of the TPP chapter on intellectual property provides international legal protections for patents on plants and animals, giving corporations monopolies over the use of parts of the genetic code that are our common natural and human heritage. Corporate control of water resources is another threat.

Fast track undermines the constitutional authority of Congress

Under the Camp/Baucus bill, the TPP and TTIP could be pushed through Congress under rules providing for mandatory and expedited floor votes in the House and Senate, without amendment. Congress would have no authority to approve or veto selection of negotiating partners, even with countries like Vietnam that are repeat violators of labor, human rights and environmental standards. The president and U.S. Trade Representative would also be authorized to finalize the legal text of the TPP and TTIP, regardless of whether negotiating objectives identified by Congress have been satisfied. Congressional negotiating objectives are unenforceable in the Camp/Baucus bill.

Also, the Camp/Baucus bill would empower the executive branch to write domestic legislation implementing trade deals and push it through Congress under fast track rules. Large swaths of federal law would be rewritten and a multitude of state laws would be preempted based on the mere allegation by the U.S. Trade Representative that they are inconsistent with the TPP or TTIP. The likely result would be a roll back of environmental safeguards and other public interest measures at both the federal and state levels.

Fast Track can be stopped

People power is the way to stop the Camp/Baucus bill or any similar Fast Track legislation that may be introduced in the future. Concerned citizens can make a difference by reaching out to friends and neighbors, communicating to the local press and local elected officials, and by sitting down with their members of Congress to talk about the threat that Fast Track poses to the environment and democracy itself.

- See more at: <http://www.foe.org/news/blog/2014-01-dont-fast-track-a-polluters-bill-of-rights#sthash.uTTFPvnY.dpuf>

Commentary: Trade agreements need meaningful congressional review, congresswoman says

Rep. Chellie Pingree believes it is not advisable to fast track two very broad and complicated agreements through Congress.

By Chellie Pingree

WASHINGTON — When the North American Free Trade Agreement was signed 20 years ago, there were many promises of how it would create jobs for U.S. workers, strengthen our trade and lower prices for consumers.

ABOUT THE AUTHOR

Chellie Pingree, a Democrat, represents Maine's 1st District in the U.S. House of Representatives.

Unfortunately, those promises have not come to pass, but some of our worst fears have. In Maine, it has severely weakened manufacturing and has led to the loss of thousands of good-paying jobs. And across the country it has contributed to growing income inequality.

After all that, our country still imports more than we export by about \$40 billion. With NAFTA's track record, it's clear that we need to give trade agreements the utmost review and careful consideration before entering into them, if we do so at all. That's why I have become so worried with recent proposals to fast-track two of these agreements through Congress.

The president's trade representative is currently negotiating two very broad and complicated trade agreements, with Asian-Pacific countries and European Union members, respectively, all with little consultation with Congress and no public disclosure.

I am deeply worried about losing the opportunity to review and consider important nontrade policy provisions that are included in these agreements, since the administration will ask for congressional approval of legal authority to "fast-track" these agreements through the ordinary legislative process.

Under the Constitution, Congress has the exclusive authority to set the terms of trade. Starting in 1974, Congress gave that authority to the executive branch by enacting trade promotion authority, also known as “fast track.” Fast track authority allows the executive branch to negotiate trade agreements on its own, without congressional input or oversight.

Once an agreement has been finalized, it also greatly curtails the normal legislative process in order to expedite congressional approval of the agreement. The deal is put on a “fast track” and provided only a limited amount of time for consideration in the committees of jurisdiction before it is automatically discharged to the floor where debate is limited and we have no ability to amend it.

If these agreements stuck to simply removing taxes on foreign goods, or tariffs, fast track authority would make sense. But, as we saw with NAFTA, modern free trade agreements involve much more than the removal of tariffs.

Modern free trade agreements aim at removing what are called “nontariff barriers” in member countries. That category includes a wide swath of laws and regulations affecting many parts of the economy – from labor and agriculture to natural resources and the environment. In the past, these agreements have resulted in a race to the bottom on rules for workers, consumers and the environment.

The two agreements currently in negotiation include chapters on all of those nontrade policies and more.

Negotiations on the European agreement, known as the Trans-Atlantic Trade and Investment Partnership, are just beginning, and it promises to be the largest trade agreement in history. Negotiations on the Asian agreement, known as the Trans-Pacific Partnership, are in their final stages.

Unfortunately, it seems that these agreements will continue the practices of the past.

The administration’s existing fast track authority expired in 2007. Anticipating the introduction of legislation re-authorizing fast track authority, in October, I joined more than 150 House Democrats in sending a letter to the administration asking that Congress be fully engaged in the final approval process of these agreements.

“Twentieth Century ‘Fast Track’ is simply not appropriate for 21st Century agreements and must be replaced. The United States cannot afford another trade agreement that replicates the mistakes of the past,” we wrote. “We can and must do better.”

I place great value on policies to expand foreign markets for U.S. goods, but strongly believe that Congress should retain its constitutional authority to weigh the policy issues contained in these agreements.

I’ve been a longtime supporter of policies and programs, like the Maine International Trade Center and the U.S. Export-Import Bank, that promote access to foreign markets for Maine companies in order to increase exports from our state and positively affect our trade balance.

However, if the TPP and TTIP trade agreements are going to get expedited consideration, it should come only after Congress has been meaningfully consulted, and after Congress, not the administration, has verified that legal protections for the environment, consumers and workers (to name a few) will not be compromised.

— *Special to the Press Herald*

Citizen Trade
FOR IMMEDIATE RELEASE
Monday, January 27, 2014

Contact: Arthur Stamoulis, (202) 494-8826 or media@citizenstrade.org

SOTU: President's Base Opposes Fast Track for TPP

Over 550 Labor, Environmental, Family Farm & Community Groups Send Letter to Congress Opposing Fast Track Legislation

WASHINGTON, DC — Over 550 labor, environmental, family farm and other organizations traditionally associated with President Barack Obama's political base sent a letter to Congress today opposing Fast Track legislation for the Trans-Pacific Partnership (TPP) and other pending trade agreements. The letter comes just a day before the President's annual State of the Union address. Corporate interests that fought the president's re-election are lobbying for him to use the speech to call on Congress to enact Fast Track authority for the TPP. The President's political base and many congressional Democrats stand in united opposition, emphasizing that the TPP threatens to exacerbate American income inequality.

"Income inequality and long-term unemployment are serious problems that the job-killing TPP would only worsen," said Arthur Stamoulis, executive director of Citizens Trade Campaign, which organized the letter. "Calling for Fast Track in the State of the Union would undercut positive proposals to battle growing income inequality and create middle class jobs which are expected to be the central focus of the President's speech. As short-sighted as such a call would be, even more short-sighted would be for Congress members on either side of the aisle to answer it, as they're the ones who would be dealing with the political repercussions this November."

The 564-organization letter urges Congress to oppose "The Bipartisan Congressional Trade Priorities Act" (HR 3830/S 1900), legislation which would revive the 2002 Fast Track "trade promotion authority" mechanism that expired in 2007. The bill was introduced on January 9 without a Democratic sponsor in the House by Ways & Means Committee Chair David Camp (R-MI), and by outgoing Finance Committee Chair Max Baucus (D-MT) and Ranking Member Orrin Hatch (R-UT) in the Senate.

"After decades of devastating job loss, attacks on environmental and health laws and floods of unsafe imported food under our past trade agreements, America must chart a new course on trade policy," the letter reads. "To accomplish this, a new form of trade authority is needed that ensures Congress and the public play a much more meaningful role in determining the contents of U.S. trade agreements... [The Camp-Baucus bill] is an abrogation of not only Congress' constitutional authority, but of its responsibility to the American people. We oppose this bill, and urge you to do so as well."

Among the signers are labor unions like the AFL-CIO, American Federation of State, County and Municipal Employees (AFSCME), American Federation of Teachers, International Brotherhood of Teamsters, United Autoworkers (UAW), United Brotherhood of Carpenters, United Steelworkers (USW) and Service Employees International Union (SEIU); environmental

organizations like 350.org, Friends of the Earth, Greenpeace, League of Conservation Voters, National Resources Defense Council (NRDC), Rainforest Action Network and the Sierra Club; family farm organizations like the National Family Farm Coalition, National Farmers Union and the Western Organization of Resource Councils; consumer groups like Food & Water Watch, Organic Consumers Association, National Consumers League and Public Citizen; and hundreds of others.

During last year's State of the Union address, President Obama claimed that the TPP would "boost American exports." He made similar claims in his 2011 State of the Union speech with respect to the Korea-U.S. Free Trade Agreement, urging Congress to pass that pact. U.S. exports to Korea *declined* ten percent in the first year of that agreement, while American-job-displacing imports from South Korea increased. The 37 percent increase to the U.S. trade deficit with Korea in the pact's first year equated to a loss of 40,000 U.S. jobs.

Trade negotiators have missed repeated self-imposed deadlines for completing the TPP, and more than three-quarters of House Democrats and a bloc of Republican House members have signed letters expressing their opposition to Fast Track for the agreement.

"Americans cannot afford a 'NAFTA of the Pacific.' Fast Track would ensure that the Obama administration's proposals for the TPP are never exposed to public scrutiny until after the pact is signed, amendments are prohibited and changes become all but impossible," said Stamoulis.

"Rubber stamping such a far-reaching agreement sight unseen is no way for Congress to create public policy."

A PDF copy of today's letter opposing Fast Track can be found online at: http://www.citizenstrade.org/ctc/wp-content/uploads/2014/01/FastTrackOppositionLtr_012714_Congress.pdf

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January 27, 2014

Re: Please Oppose "The Bipartisan Congressional Trade Priorities Act" (HR 3830 / S 1900)

Dear Member of Congress:

The undersigned organizations urge you to oppose "The Bipartisan Congressional Trade Priorities Act" (HR 3830 / S 1900). This legislation would revive the outdated and unsound 2002 "Fast Track" Trade Promotion Authority mechanism.

Indeed, the legislation replicates the broad delegation of Congress' constitutional authorities that was provided in the 2002 Fast Track, undermining Congress' ability to have a meaningful role in shaping the contents of trade agreements.

The legislation includes several negotiation objectives not found in the 2002 Fast Track. However, the Fast Track process that this legislation would reestablish ensures that these objectives are entirely unenforceable. If this bill were enacted, the president could sign a trade agreement before Congress votes on it — whether or not the negotiating objectives have been met. It would also allow the executive branch to write legislation not subject to committee markup that would implement the pact and alter existing U.S. laws so that they come into compliance with the rules of the trade agreement. Additionally, if HR 3830 were enacted, trade pact implementing legislation would be guaranteed House and Senate votes within 90 days, with all floor amendments forbidden and a maximum of 20 hours of debate.

Fast Track was designed in the 1970s when trade negotiations were focused on cutting tariffs and quotas. Today's pending "trade" agreements, such as the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP), are much broader — setting binding policy on Congress and state legislatures relating to patents and copyright, food safety, government procurement, financial regulation, immigration, healthcare, energy, the environment, labor rights and more. Such a broad delegation of Congress' constitutional authorities is simply inappropriate given the scope of the pending "trade" agreements and the implications for Congress' core domestic policymaking prerogatives.

After decades of devastating job loss, attacks on environmental and health laws and floods of unsafe imported food under our past trade agreements, America must chart a new course on trade policy. To accomplish this, a new form of trade authority is needed that ensures that Congress and the public play a much more meaningful role in determining the contents of U.S. trade agreements. Critically, such a new procedure must ensure that Congress is satisfied with a trade agreement's contents before a pact can be signed and subjected to any expedited procedures.

HR 3830 / S 1900 is an abrogation of not only Congress' constitutional authority, but of its responsibility to the American people. We oppose this bill, and urge you to do so as well.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL

For Immediate Release:

January 28, 2013

Contact:

Tim Feeley, 626-8887

Attorney General Mills calls for trade deal to protect Maine's anti-tobacco efforts

AG Mills is working to amend the Trans-Pacific Partnership Agreement to preserve ability tobacco regulation by state and local governments – joins effort with 42 state Attorneys General.

(AUGUSTA) Attorney General Janet T. Mills is troubled by a provision in a proposed international trade agreement that would negatively impact the ability of Maine and other states to protect the public health by regulating tobacco products. Attorney General Mills is calling on the United States Trade Representative to amend a provision that would treat tobacco products like any other product for sale. This provision could open state policies regulating tobacco products to challenge by other countries and ignores the devastating health affects tobacco has on Maine people.

AG Mills is concerned that a provision in the Trans-Pacific Partnership that would treat tobacco like any other product could open the landmark 1998 Tobacco Master Settlement Agreement [MSA], or even Maine's smoke-free workplace law, to challenge by other countries in a legal framework outside of the United States' normal proceedings. The MSA and other state and federal laws place major restrictions on the ability of tobacco companies to market their products and authorize states to enact a number of regulations to impact the sale, taxation and use of tobacco products.

"The MSA severely limited the ability of Big Tobacco to market their deadly products to children in America," said Attorney General Janet T. Mills. "Maine has a strong record of protecting the public health by using a broad strategy to keep products out of the hands of kids and to shield people from second-hand smoke. Despite the great strides Maine has made in cutting smoking rates, too many kids and adults in Maine are impacted by tobacco. We cannot allow our ability to protect the public health to be undermined by a trade agreement."

The American Lung Association's 2014 State of Tobacco Control notes that 20.3% of Maine's adults and 15.2% of Maine youth are smokers. Nearly 2,235 Maine residents die per year due to tobacco-related illness – including 744 smoking-attributable lung cancer deaths and 660 smoking-attributable respiratory disease deaths. Overall, the American Lung Association estimates that tobacco use costs Maine's economy more than \$1 billion a year.

Attorney General Mills joined 42 state attorneys general in sending the letter to Ambassador Michael Froman, the United States Trade Representative responsible for negotiating the Trans-Pacific Trade Agreement. The Attorneys General expressed their collective opposition to any proposals that undermine the ability of states to regulate tobacco or that subject those regulations to challenge under standards and forums that would not be available under United States law.



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January 27, 2014

Ambassador Michael Froman
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20208

Dear Ambassador Froman:

The undersigned Attorneys General write to request that the United States Trade Representative act to preserve the ability of state and local governments to regulate tobacco products to protect the public health. This request is prompted by the negotiations currently underway with respect to the Trans-Pacific Partnership agreement (TPP), but it applies generally to all international trade and investment agreements that the United States is considering or will consider entering into. In particular, we request that any such agreement explicitly provide that it does not apply to trade or investment in tobacco or tobacco products.

While discussion of the TPP's impact on tobacco regulation has focused primarily on regulation by federal agencies under such legislation as the 2009 Family Smoking Prevention and Tobacco Control Act, states and localities also engage in regulation of tobacco products to protect their citizens and their treasuries from the toll of death and disease that those products cause. Indeed, a full decade before the Tobacco Control Act, state Attorneys General entered into the Master Settlement Agreement (MSA) (as well as earlier settlements in four states) with the major tobacco companies, and a number of other domestic and foreign companies are now also parties to the MSA. As a result of the MSA, States enacted new statutes and regulations to enforce certain of the Agreement's terms. The public health achievements in the MSA should not be subject to backdoor attacks on the very legislation used to make those gains.

In addition to the legislation relating to the MSA, existing state and local tobacco regulation includes such areas as tobacco marketing that targets children; taxation; licensing; the minimum age for purchase of tobacco products; Internet sales; advertising (including health) claims and promotional methods; retail display; fire safety standards; minimum prices; and indoor smoking restrictions. Such regulation is specifically recognized and preserved by Congress in the Tobacco Control Act, and plays an important role in combating the health and financial consequences of tobacco use.

An example of this kind of state regulation is the recently settled case that Vermont brought against R.J. Reynolds Tobacco Company, alleging that advertisements for the company's Eclipse cigarette falsely claimed, among other things, that the cigarette "may present less risk of cancer, chronic bronchitis, and possibly emphysema." The trial court held that this claim was

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Re: Attorney General TPP Letter to USTR

deceptive because it was not sufficiently supported by competent and reliable scientific evidence, and therefore violated the MSA and the Vermont consumer fraud statute. The Court enjoined any similar future claims. The parties have settled the case, leaving the trial court's judgment and permanent injunction in place.

As the chief legal officers of our states, we are concerned about any development that could jeopardize the states' ability to enforce their laws and regulations relating to tobacco products.

Experience has shown that state and local laws and regulations may be challenged by tobacco companies that aggressively assert claims under bilateral and multilateral trade and investment agreements, either directly under investor-state provisions or indirectly by instigating and supporting actions by countries that are parties to such agreements. Such agreements can enable these tobacco companies to challenge federal, state, and local laws and regulations under standards and in forums that would not be available under United States law.

A recent example of such a challenge is a NAFTA investor arbitration brought by Grand River Enterprises Six Nations Ltd., a Canadian cigarette manufacturer that challenged certain MSA-related laws in 45 states – laws that have been upheld in every challenge to them in a United States court, including several by Grand River itself. The NAFTA challenge was rejected by an arbitration panel, but only after extensive litigation that consumed significant state and federal time and resources to defend. Other examples include Indonesia's successful challenge to the Tobacco Control Act's ban on flavorings as applied to clove cigarettes, and tobacco companies' challenges to cigarette package warnings in Uruguay, Australia, and Thailand. In sum, provisions in agreements that set forth vague standards and that are left to arbitration panels to interpret can undermine public health regulation by reducing the certainty and stability necessary to such regulation.

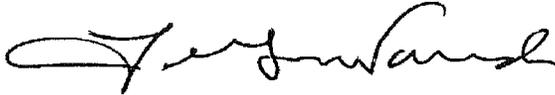
Unfortunately, the "Elements of Revised TPP Tobacco Proposal" that the Trade Representative announced this past August would not adequately protect state and local regulation from these potential adverse consequences of the current draft TPP agreement. As we understand from publicly available information, the August USTR proposal has two elements: first, an "understanding" that a general exception in the TPP agreement for "matters necessary to protect human life or health" applies to "tobacco health measures," and second, a requirement that there be non-binding consultations between the respective public health officials of the concerned parties before formal consultations are initiated with respect to any challenged measure. The USTR proposal, however, fails to recognize the unique status of tobacco as a harmful product; would not eliminate the need for arbitration to determine whether a measure falls within the exception; and in any event would apparently apply only to the TPP trade provisions and thus would have no impact on investor-state arbitration that the tobacco industry uses as a tool to challenge and stymie legitimate measures that countries (including their federal, state, and local governments) adopt to reduce tobacco use.

Based on the history to date with respect to such challenges to regulatory authority, we believe that the only way to avoid the damage to public health posed by a multilateral agreement like the TPP is to carve tobacco out of the agreement entirely, as the Government of Malaysia and others have proposed. Any "slippery slope" argument against such a carve-out should be rejected. Tobacco is the only product that, when used as intended, causes fatal diseases in many of its

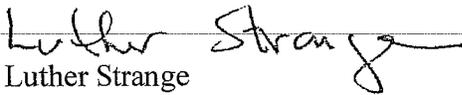
Re: Attorney General TPP Letter to USTR

users without providing any nutritional or other health benefits. It kills 440,000 Americans every year and, at present rates, will kill more than one billion people worldwide in this century. There is no policy justification for including tobacco products in agreements that are intended to promote and expand trade and investment generally.

Sincerely,



Lawrence Wasden
Idaho Attorney General



Luther Strange
Alabama Attorney General



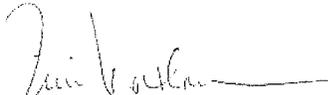
Tom Horne
Arizona Attorney General



Kamala Harris
California Attorney General



George Jepsen
Connecticut Attorney General



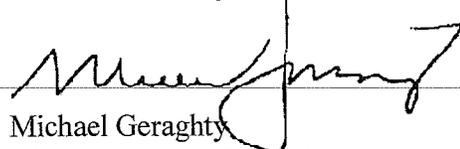
Irvin Nathan
District of Columbia Attorney General



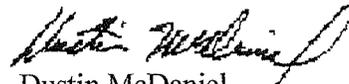
Lenny Rapadas
Guam Attorney General



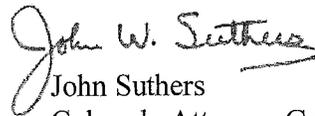
William H. Sorrell
Vermont Attorney General



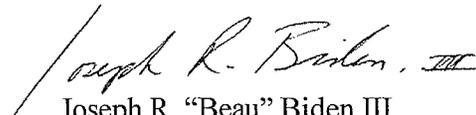
Michael Geraghty
Alaska Attorney General



Dustin McDaniel
Arkansas Attorney General



John Suthers
Colorado Attorney General



Joseph R. "Beau" Biden III
Delaware Attorney General



Samuel S. Olens
Georgia Attorney General



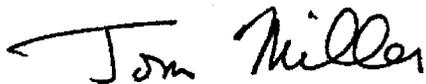
David Louie
Hawaii Attorney General



Lisa Madigan
Illinois Attorney General



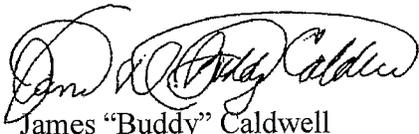
Greg Zoeller
Indiana Attorney General



Tom Miller
Iowa Attorney General



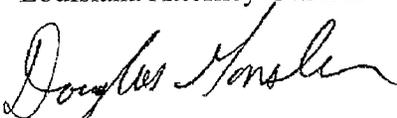
Derek Schmidt
Kansas Attorney General



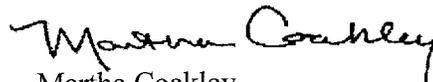
James "Buddy" Caldwell
Louisiana Attorney General



Janet Mills
Maine Attorney General



Douglas F. Gansler
Maryland Attorney General



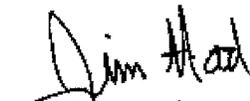
Martha Coakley
Massachusetts Attorney General



Bill Schuette
Michigan Attorney General



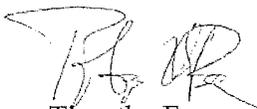
Lori Swanson
Minnesota Attorney General



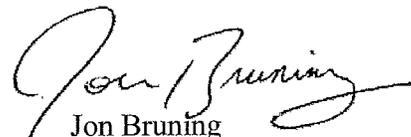
Jim Hood
Mississippi Attorney General



Chris Koster
Missouri Attorney General



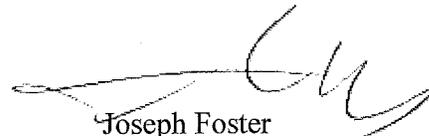
Timothy Fox
Montana Attorney General



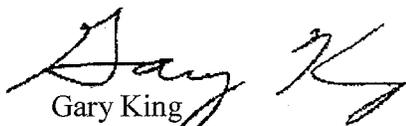
Jon Bruning
Nebraska Attorney General



Catherine Cortez Masto
Nevada Attorney General



Joseph Foster
New Hampshire Attorney General



Gary King
New Mexico Attorney General



Eric T. Schneiderman
New York Attorney General

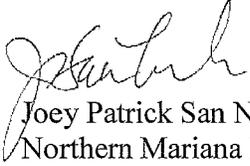
Re: Attorney General TPP Letter to USTR



Roy Cooper
North Carolina Attorney General



Wayne Stenehjem
North Dakota Attorney General



Joey Patrick San Nicolas
Northern Mariana Islands Attorney General



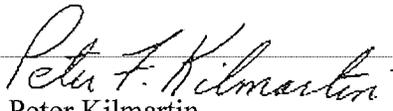
Scott Pruitt
Oklahoma Attorney General



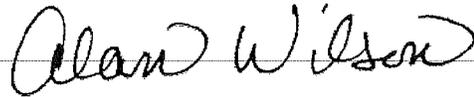
Ellen Rosenblum
Oregon Attorney General



Kathleen Kane
Pennsylvania Attorney General



Peter Kilmartin
Rhode Island Attorney General



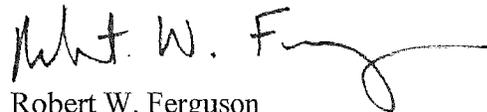
Alan Wilson
South Carolina Attorney General



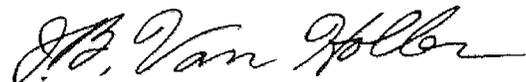
Marty J. Jackley
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Sean Reyes
Utah Attorney General



Robert W. Ferguson
Washington Attorney General



J.B. Van Hollen
Wisconsin Attorney General



Peter K. Michael
Wyoming Attorney General

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Congress

Timing of TPA Depends on Obama, Says Former Chief of Staff to USTR Cato Scholar Says Jettison Investor-State Dispute Settlement

Key Development: Timothy Keeler says the timing of Congress passing Trade Promotion Authority is anyone's guess at this point, but the president must be willing to spend substantial political capital to get it done quickly.

Next Step: Bipartisan Congressional Trade Priorities Act of 2014 is before Senate Finance Committee.

By Brian Flood

Jan. 29 — The largest factor in when Congress will pass Trade Promotion Authority (TPA), also known as fast-track authority, is the president's willingness to expend political capital, the former chief of staff in the Office of the U.S. Trade Representative (USTR) said Jan. 29.

“Anybody who tells you they know what the timing is, is lying at this point,” Timothy J. Keeler said at a panel discussion hosted by the Global Business Dialogue in Washington.

Keeler emphasized that “the timing is as much connected with questions about the administration's—and the president's—commitment to getting it done as anything else. If they want to get it done, then they're going to have to expend a lot of political capital, and I would think it's in their interest to get it done sooner rather than later, but the timing depends on when they make the big push.”

Keeler also said that TPA authorization may be slowed by the transition of the chairmanship of the Senate Finance Committee. Current chairman Max Baucus (D-Mont.) has been nominated as the next U.S. ambassador to China (19 ITD, 1/29/14).

Baucus, along with Senate Finance's ranking member Orrin Hatch (R-Utah), was a co-sponsor of the Bipartisan Congressional Trade Priorities Act of 2014, which would renew the fast-track authorization process. The bill would require up-or-down votes on the implementation of trade pacts and would direct the administration to pursue specific negotiating objectives and delineate the role of Congress in any negotiations (12 ITD, 1/17/14).

Ambassador Alan Wolff, the former U.S. Deputy Special Representative for Trade Negotiations, agreed that the president must get directly involved, in particular to prevent congressional “log-rolling” that would lead to more economic sectors excluded from trade agreements. He said he hoped that U.S. Trade Representative Michael Froman would position the president and his cabinet officers to engage more energetically.

Wolff also said that he hoped the ranking members and chairmen of the relevant congressional committees will act as key players in the discussion, “as opposed to the leadership, who are further from the issues.”

Dan Ikenson, director of the Cato Institute's Herbert A. Stiefel Center for Trade Policy Studies, said that the administration's handling of foreign trade negotiations has been deft but that its domestic negotiations have been wanting.

“The question remains as to whether the president is willing to stand up to some of his traditional domestic constituencies that supported him and to stand with Republicans in Congress,” Ikenson said. So far, he said, there is reason to remain skeptical of the president's commitment to this issue. His remarks at the State of the Union Jan. 28 didn't betray any sense of enthusiasm for the trade agenda, Ikenson said, and may have alienated Republicans on Capitol Hill with its emphasis on administrative action to bypass congressional gridlock.

Scare Tactics

The administration's silence on the importance of trade agreements has allowed certain myths, perpetuated by the “shrill scare tactics” of groups on the political left, to flourish, Ikenson said. Those myths include that trade is an “us versus them” endeavor, trade deficits are necessarily a bad thing, free trade only benefits big businesses and the wealthy, trade agreements have led to a race to the bottom in regulatory standards worldwide and globalization and free trade caused manufacturing in the U.S. to decline, he said.

Ikenson said a few Republicans in Congress want to deny President Obama any success, but the bulk of opposition to TPA comes from Democrats, who fear that labor and environmental provisions in prospective trade deals like the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership are not strong enough, among other complaints.

Critics see such provisions as means to circumvent domestic lawmaking and regulatory procedures and to give large multinational corporations the means to “run roughshod” over domestic law, Ikenson said.

To that end, the surest way to garner enough congressional support for trade agreements would be to jettison the investor-state dispute settlement system, he said. Investment abroad is a risky proposition, but multinational corporations are equipped to deal with such risks, he added.

Cutting out investor-state dispute settlement provisions would “address so many of the arguments, and certainly most of the rhetoric, that comes from the left,” Ikenson said.

From USTR newsletter, 1/31/14

Statement by U.S. Trade Representative Michael Froman on the Bipartisan Congressional Trade Priorities Act of 2014

January 9 - U.S. Trade Representative Michael Froman issued the following statement today regarding the introduction in Congress of the Bipartisan Congressional Trade Priorities Act of 2014:

"I welcome the introduction of the Bipartisan Congressional Trade Priorities Act. We expect to have a robust conversation on the Hill about how trade agreements should be negotiated and the role of Congress in that process. We're eager to engage directly with Members of the Finance and Ways and Means Committees and with all of Congress to pass Trade Promotion Authority legislation that has broad, bipartisan support.

"We need to open markets, support U.S. jobs, increase exports of products Made in America and ensure a level playing field for Americans to compete in the global economy. Trade Promotion Authority will help us accomplish that goal.

TTIP SERIES

Investor-state dispute settlement under TTIP - a risk for environmental regulation?



February 5, 2014

Christiane Gerstetter and Nils Meyer-Ohlendorf

Executive Summary

[CLICK HERE](#) to view the full report (pdf, 25 pages)

The Transatlantic Trade and Investment Partnership (TTIP) could include rules on investment protection, including so called investor– state dispute settlement (ISDS). ISDS is a system that allows private investors to sue a host state for the alleged violation of an international investment treaty concluded between that host state and the investor’s country of origin. The EU Commission’s negotiating mandate for TTIP and the US model bilateral investment treaty both indicate a preference for including ISDS in TTIP.

There are a number of clauses routinely contained in investment treaties that have the potential to restrict the right of governments to take environmental measures: the requirement of “fair and equal treatment” for investors, a prohibition on “(indirect) expropriation”, and the so–called umbrella clause. All of them are often broad and vague in wording, and; the case law interpreting them is not consistent.

Although investment tribunals never invalidate environmental regulations, nor have any similar direct impact on national environmental policies, they have – in some cases – awarded considerable compensatory payments to investors for a violation of the above clauses. The inclusion of any of these norms in TTIP would not automatically prevent the US or the EU adopting environmental measures in the future, nor would they necessarily have to pay compensation to investors whenever doing so. However, the results of ISDS proceedings are unpredictable. Some arbitration tribunals have taken a restrictive approach to governments’ regulatory freedom; others have deemed government regulation not to violate investment law. These uncertainties result in

considerable risks for environmental regulation which are exacerbated by the fact that investment-related provisions tend to be interpreted broadly in ISDS proceedings.

There are no strong arguments for including ISDS rules in TTIP. Both the US and the EU have highly evolved, efficient rule of law legal systems. There is no evidence that investors have ever lacked appropriate legal protection through these systems. There is no bilateral investment treaty between the US and any of the old EU Member States, and yet US and EU investors already make up for more than half of foreign direct investment in each others' economies. This demonstrates that investors seem to be satisfied with the rule of law on both sides of the Atlantic.

ISDS provides foreign investors with an additional judicial remedy that is not available to domestic competitors; this additional avenue of legal redress discriminates against domestic companies and has the potential to distort competition. Furthermore, the sheer size of foreign direct investment could lead to a considerable number of investment disputes. As a consequence, large numbers of disputes that normally would be adjudicated in domestic courts would be subject to international arbitration, bypassing domestic judges that have been elected or appointed by elected officials.

However, in the event that provisions on ISDS are nonetheless included in TTIP, this paper provides suggestions on how to formulate such provisions in order to mitigate the risk to environmental regulations.

Inside U.S. Trade 2/6/14

USTR Calls All-Day Briefing For Cleared Advisers On TPP For Next Week

Posted: February 6, 2014

In an apparent effort to defuse mounting criticism that the Obama administration is being too secretive about the Trans-Pacific Partnership (TPP) negotiations, the Office of the U.S. Trade Representative on short notice has called an all-day briefing for all cleared advisers on Feb. 11, according to sources familiar with a memo sent by USTR announcing the meeting.

The briefing to discuss TPP "landing zones" will begin at 8 a.m. and go until 6:30 p.m. at a location to be announced, according to sources familiar with the memo. The memo acknowledges that the briefing is on short notice, and apologizes if that means out-of-town advisers cannot attend, sources said.

The meeting would bring together all existing advisory committees for a joint session in the morning, when a long list of key TPP topics will be dealt with in short intervals. For example, the memo says the issue of state-owned enterprises will be addressed in a 15-minute segment, as will the complicated issue of rules of origin, sources said.

In the afternoon, the groups will meet separately, and will continue their briefings with USTR officials moving between these sessions, according to these sources.

The announcement comes after AFL-CIO President Richard Trumka rejected USTR's most recent claims to members of Congress that labor unions have been adequately consulted on the TPP. Trumka did so in a Feb. 4 letter to members of the House and Senate, taking issue with letters sent by USTR's congressional affairs office to various lawmakers, including Rep. John Carney (D-DE).

Assistant USTR for Congressional Affairs Hun Quach said in a Jan. 15 letter to Carney that she was responding to his question "on the Administration's efforts to ensure transparency in our trade agreements," according to a copy obtained by *Inside U.S. Trade*. She said she wanted to inform him that cleared advisers on advisory committees "provide advice to the President regarding proposals before text is finalized and tabled in trade negotiations."

The letter did not address the fact that labor advisers are only represented by one committee, the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), and do not sit on any of the 16 industry advisory committees, a point that Trumka highlighted in his Feb. 4 letter. But the USTR letter does note that all advisory committees are provided with the "same access to U.S. proposals."

Criticism of administration secrecy around the TPP was also highlighted in an opinion piece in the Feb. 5 edition of the *The New York Times*, which cites incoming Finance Committee Chairman Ron Wyden (D-OR) as saying that there must be "fundamental

changes" to USTR's approach to transparency and congressional consultation if the president's trade agenda is to advance.

One source familiar with the memo said this briefing to cleared advisers gives USTR the ability to further deflect criticism over TPP secrecy by saying it has devoted an entire day to brief on every single issue under consideration in the TPP.

The Trumka letter criticized the current advisory system for both substantive and procedural reasons. His substantive complaints echo those of LAC chairman Tom Buffenbarger, the president of the International Association of Machinists & Aerospace Workers, who said last year that, because USTR is unwilling to share more than initial U.S. negotiating proposals, advisers are curtailed in providing useful advice on U.S. bargaining positions in trade agreements.

In a June 20 response to Buffenbarger, USTR said it values the views of the LAC and its members and have found them to be critical in developing U.S. negotiating positions.

"In that regard, we share with the LAC and other cleared advisors our negotiating proposals and have made available, as you mention, negotiators to discuss in detail the state of play of any aspect of an ongoing negotiation, including any information regarding the proposals of other governments that might affect our bargaining positions," USTR said.

"Nonetheless, we can always do better. In that regard, we welcome the opportunity for further engagement with the LAC members and liaisons on this issue, including the most effective ways to integrate the input of the LAC and labor representatives into the work of [Industry Trade Advisory Committees]," USTR said.

But Trumka's letter revives the charges that LAC members do not have access to the full negotiating texts, or to information regarding USTR priorities and choices. Therefore, they "cannot effectively influence the inevitable trade-offs in ways that would build the middle class and protect our democratic system," Trumka said.

He said this problem is compounded because advisers are curtailed in their ability to share information with union members or the larger public. Therefore, they cannot use the "traditional tools that civil society uses to offset the power of economic elites: education, organization, and mobilization of the public."

He also said the best illustration that the LAC has not been a "valuable tool" to create people-centered trade agreements is the substance of the deals that have been negotiated based on what Trumka calls a failed model of trade. That model has skewed the benefits of trade to economic elites and "exacerbated trade deficits, wage suppression, the dismantling of our manufacturing sector and income inequality."

Procedurally, Trumka noted that labor unions sit only on the LAC, but not the industry advisory committees. "Although in that capacity labor representatives have access to certain aspects of USTR negotiations, it is important to distinguish between 'access' and meaningful participation and influence," Trumka said in the letter.

The LAC has nominally the same access to initial U.S. negotiating proposals as the ITACs, but it meets less frequently than those committees, which meet an average of six times a year, Trumka said. Members of one ITAC have the opportunity to participate in multiple ITACs as well as in ad hoc working groups on such issues as government procurement, he said.

In contrast, the LAC meets two times a year and its members have not been invited to serve on ITACs related to their industries or sit on ad hoc working groups, Trumka said.
-- *Jutta Hennig*

Inside U.S. Trade - 02/07/2014, Vol. 32, No. 6

POLITICO

USTR cancels TPP briefing over presence of media

2/10/14 12:42 PM EST

U.S. Trade Representative Michael Froman's office had planned to brief Vermont state lawmakers on the state of the Trans-Pacific Partnership negotiations last week.

But when the official from Froman's office discovered that two Vermont State House reporters would be listening in, the briefing was quickly called off, The Associated Press reported.

Reps. Mike Yantachka, Kathy Keenan and Jim McCullough told Rebecca Rosen, the director of intergovernmental affairs and public engagement for the U.S. trade representative's office, that they wouldn't eject reporters from the room despite USTR's insistence that no media members be present. "We don't have a closed-door policy here," Yantachka said, according to The Associated Press's account.

Rosen then called off the conversation and said she'd follow up on whether her office would agree to the lawmakers' terms.

Vermont lawmakers have criticized U.S. trade negotiations over pacts such as the Trans-Pacific Partnership, arguing that they could undercut states' ability to regulate the environment, drug pricing, food labels and more. The state legislature approved a resolution last year urging the USTR to respect state sovereignty.

— *Eric Bradner*

USTR TPP Briefing To Cleared Advisers Reveals Major Outstanding Issues

Posted: February 12, 2014

In a closed-door briefing yesterday (Feb. 11), the Office of the U.S. Trade Representative provided cleared advisers some new details on the Trans-Pacific Partnership (TPP) negotiations, but indicated that negotiators still face a large number of major outstanding issues, such as rules on intellectual property (IP), state-owned enterprises (SOE) and labor rights, according to informed sources.

One source said the sheer magnitude of outstanding issues as well as the fact that they encompass a whole host of sectors makes it difficult to see how TPP countries could conclude the talks at the Feb. 22-25 ministerial meeting in Singapore.

Other sources said that, in light of the information conveyed, it would be a stretch to imagine the TPP negotiations could be concluded by President Obama's trip to Asia in April. The White House announced on Feb. 12 that Obama will travel to Japan during that trip, where he will discuss TPP and other issues with Japanese Prime Minister Shinzo Abe.

Sources said they do not sense a lot of momentum going into the Singapore ministerial meeting. In particular, they noted that closed-door negotiations between the U.S. and Japan on market access for autos and agriculture which have taken place since the December ministerial do not appear to have yielded much progress.

But one source said USTR officials tried to convey a different message at the meeting: that there is a lot of momentum behind the negotiations and that they are moving toward closure. This source said USTR officials were adamant that they plan to make progress on a wide range of outstanding issues in Singapore, to the extent that the meeting felt like a public relations exercise designed to create momentum.

In opening remarks at the all-day meeting, USTR Michael Froman indicated that the U.S. will be working hard to bring the TPP talks to conclusion, sources said. Two sources said Froman appeared to convey the message that TPP countries are close to reaching a deal, but another source said he did not come away with the sense that success is around the corner.

This source said the briefing did not yield any new information about what would be the next steps for the TPP negotiations following the upcoming ministerial meeting.

But other sources said Froman is clearly pushing to conclude the negotiations in the near term because he knows that after Obama's April visit, there will be no real deadline for wrapping them up.

Striking a deal in the near term would require dropping a lot of key U.S. demands -- potentially on issues such as cross-border data flows -- and would require a careful calculation on what

industry priorities need to be met to have sufficient support for getting a deal approved by Congress, sources said.

These sources said they are convinced that Froman has a clear understanding of what a final TPP package must look like to reach the balance between scaling back U.S. demands and retaining sufficient support among the U.S. private sector.

Some key U.S. demands have already fallen by the wayside, one informed source said. For example, the Malaysian government has made clear to the U.S. that it will not drop its policy of extending preferences to ethnic Malays in such areas as government procurement. The U.S. has accepted that stance and is looking for offsetting concessions from Malaysia, according to this source.

One private-sector source following the TPP said that striking a deal is more complicated than the U.S. deciding to drop a demand. For example, this source said, even if the U.S. may agree to back off its demand that Japan open its agriculture market, that may not be acceptable to Australia. Without additional access to Japan's agriculture market, Australia may not be willing to make tough concessions on the TPP rules that the U.S. is advocating, such as free cross-border data flows.

One issue where the Australian government has dropped the outright opposition of its predecessor is the investor-state dispute settlement (ISDS) mechanism, sources said. But Australian negotiators have not yet spelled out what other concessions they would need to see to accept ISDS, they said. In addition, other TPP participants, including Mexico, oppose application of ISDS to the financial services sector.

Separately, one informed source said USTR has been very eager to engage members of Congress on TPP, with Froman meeting with members to discuss the negotiations. In the congressional debate, TPP has been lumped into the debate on whether Congress should extend fast-track negotiating authority to President Obama.

At the Feb. 11 briefing, USTR officials did provide some additional details on the negotiations for the TPP labor chapter, sources said. Specifically, one source said USTR indicated it is willing to incorporate some proposals put forth by Australia and Canada about consultations that would have to precede a dispute settlement case over labor obligations.

At the same time, USTR assured stakeholders that it would be able to achieve full dispute settlement in the labor chapter, including the right to impose trade sanctions in labor disputes, even though Canada has tabled an alternative proposal that would not allow trade sanctions, according to this source. This source said the Canadian proposal appears to have gained support from other TPP countries such as Australia and New Zealand, but USTR stressed at the meeting that it would be able to deliver full dispute settlement for the labor chapter.

Despite providing some additional details on the labor chapter at the briefing, one participant said USTR officials failed to mention a number of provisions in the labor text to which union representatives have raised objections.

In the area of SOEs, U.S. negotiators revealed they have made changes to the definition of an SOE in a way that reflects demands of other countries but still achieves the U.S. goal of

disciplining the commercial operations of SOEs to ensure these companies can fairly compete with private-sector firms. But some sources said that, despite the change, USTR negotiators made clear that a lot of issues remain open on SOEs even though there has been substantive engagement over the last six months.

One of those outstanding issues is whether the new SOE disciplines will apply to state-owned firms at all levels of government, or only to SOEs owned by the central government, as the U.S. has proposed, one source said. USTR officials made clear that some countries are still objecting to the U.S. position, but expressed confidence that the U.S. will ultimately prevail, according to this source.

Froman's opening remarks to the cleared advisers were followed by rapid-fire briefings lasting 15 to 30 minutes each focusing on individual TPP issues. Participants were not allowed to ask questions during those briefings, which lasted until 12:30 pm, sources said.

However, cleared advisers were allowed to ask questions and make comments during the afternoon session, which consisted of one-hour individual meetings of advisory committees that were attended by U.S. negotiators for specific TPP chapters.

These included a joint meeting of all Industry Trade Advisory Committees as well as a joint meeting of the Agricultural Policy Advisory Committee for Trade and all Agricultural Technical Advisory Committees. Also meeting were the Intergovernmental Policy Advisory Committee on Trade; Labor Advisory Committee; Trade Advisory Committee on Africa; and Trade and Environment Policy Advisory Committee, according to an agenda obtained by *Inside U.S. Trade*.

The issues covered during the morning briefings were labor; environment; electronic commerce; financial services; IP and transparency for drug reimbursement programs; SOEs; rules of origin; dispute settlement for sanitary and phytosanitary issues; market access for goods and agriculture; and investment, non-conforming measures and ISDS, according to the agenda.

The Trans Pacific Partnership is in trouble on Capitol Hill. Here's why.

BY ED O'KEEFE

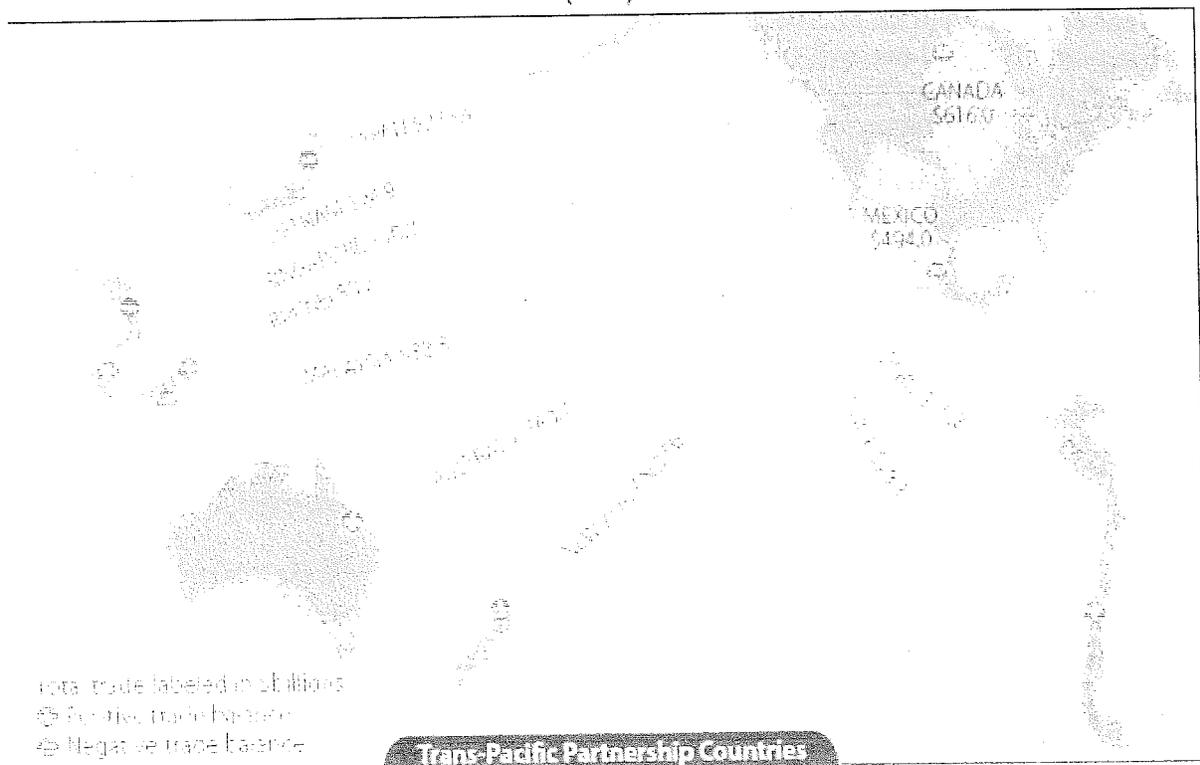
The Washington Post | The Fix (Blog)

February 19 at 2:55 pm

President Obama is meeting Wednesday with the leaders of Mexico and Canada and a major new trade pact with Asian countries is among several important topics of discussion.

The trade agreement, known as the Trans Pacific Partnership, has been in the works for nearly a decade and would more closely align the economies of the U.S., Canada, Mexico and nine other countries in South America and Asia. The deal would eliminate tariffs on goods and services and generally harmonize dozens of regulations that can often complicate doing business across borders. (Everything you need to know about the Trans Pacific Partnership, explained by The Post's Lydia DePillis, can be read here.)

Figure 1. Trans-Pacific Partnership Countries
(2012)



(Image courtesy of the Congressional Research Service)

The White House is eager to finish the talks with its would-be trading partners and has been pushing to earn the authority to bypass Congress and quickly approve the deal. But most Democratic lawmakers don't want to give Obama "fast track" trade authority to quickly negotiate and approve the deal.

The resistance could complicate things for Obama on two fronts. First, any sign of serious opposition in Washington will make countries involved in the talks nervous that the American president can't seal the deal back home. But second -- and more importantly for The Fix's purposes -- Obama has to balance his desire to get a deal with the political needs of congressional Democrats, dozens of whom run the risk of losing their seats in November.

Already, Senate Majority Leader Harry M. Reid (D-Nev.) and House Minority Leader Nancy Pelosi (D-Calif.) are opposed to moving forward with granting Obama fast-track authority.

"Everyone would be well-advised just to not push this right now," Reid said late last month. He's generally opposed to large global trade agreements.

Pelosi doesn't oppose the concept of fast-track, but said last week that she is against a bipartisan measure introduced by Sens. Max Baucus (D-Mont.), Orrin G. Hatch (R-Utah) and Rep. Dave Camp (R-Mich.) that would give Obama the authority.

Resistance from Reid and Pelosi usually would be enough to at least ease the White House push. But Obama and Vice President Biden have also been directly confronted on the issue in recent weeks by rank-and-file members. During a closed-door meeting at the White House, Obama took two questions on the subject, while Biden faced a grilling on the subject at the House Democratic policy retreat last week.

At the White House, Obama heard an earful from Reps. Marcy Kaptur (D-Ohio) and Alan Grayson (D-Fla.), two outspoken liberals with close ties to the labor movement and other liberal constituencies.

Kaptur said she had a simple request for Obama: Let Congress and the public see the details of the TPP before Congress is asked to give him fast track authority.

"He did not say yes," she said in a recent interview. "That means that we would be faced with a fast-track vote that would lock our ability to amend without even knowing what's in the agreement. I can't do that. Not when we have \$9 trillion of accumulated trade deficit, which is the reason for our budget deficit, because we're losing middle-class jobs in our country and we've outsourced millions of our jobs, a third of our manufacturing base is gone."

Grayson said he wanted to remind Obama that the U.S. faces hundreds of billions of dollars in trade deficits with other countries.

In response, Obama "didn't give me any sense that, any reason to believe that these free trade agreements that are being negotiated now are going to be any different than the ones we've negotiated in the past," Grayson said in a recent interview. "They've consistently, and almost to an unbelievable extent, exacerbated our trade problems. I told the president specifically this: That what's actually happening is that we're buying goods and services from foreigners and creating jobs in their countries and they are not buying our goods nor our services. What they are doing is buying our assets and driving us deeper and deeper into debt. So we lose twice, we lose because those jobs go overseas and because we go deeper and deeper into debt."

Despite the Democratic opposition, White House Press Secretary Jay Carney said Tuesday that "we're going to continue to press" for fast-track authority.

But if Obama pushes too hard, he risks upsetting rank-and-file Democrats and key liberal support groups in the labor and environmental communities that always have concerns with major international trade deals. Upsetting those groups might prompt them to sit on their hands or not spend as much money backing Democratic candidates in November.

But if Obama doesn't push hard enough for fast-track, he risks upending an historic trade deal that would help advance his administration's long-sought "pivot" to Asia and upending similar trade talks underway with European countries.

That's why for now, at least, the White House's push for fast-track trade authority has slowed to a crawl on Capitol Hill.

