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Grading the TPP: Crafting a Good Free Trade Agreement

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With trade ministers and chief negotiators for 12 nations meeting in Atlanta the week of Sept. 28 to Oct. 3 to try and finalize the Trans-Pacific Partnership (TPP) agreement, experts and lawmakers watched to see if the largest-ever U.S. free trade agreement would be concluded. But regardless of the outcome, a more important question remains—is TPP a good free trade agreement?

Free trade agreements are supposed to eliminate (nearly) all trade barriers among their member countries. In fact, the World Trade Organization only allows FTAs when they eliminate tariffs and other restrictions on "substantially all" trade among the parties (GATT Article XXIV.8.b.).

With that in mind, and before any agreement is reached, here is a non-exhaustive list of trade barriers that a comprehensive free trade agreement, and certainly a "gold standard" FTA like the TPP, should eliminate or address:

- **Tariffs and quotas** – quotas and regular customs tariffs on all goods should be eliminated, with virtually no exceptions. For TPP, this includes Japan's import tariffs on beef and rice, which are still subject to very high tariff rates, as well as market access for dairy and poultry products.

Dairy market access has proven to be a particularly difficult issue for four TPP partners: the United States, Canada, Japan, and New Zealand. All four of these countries limit access to their dairy products markets. According to news reports, imports make up 10 percent or less of Canada's markets for cheese, butter and milk powders, and

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imports are an even smaller share of the Japanese and U.S. markets. Japan also maintains a 30 percent tariff on natural cheese. The solutions suggested to date would involve countries adopting a tariff-rate quota (TRQ), whereby imports above a certain amount, or a certain percentage of market share, would be subject to additional tariffs. However, there is no agreement on the amounts of these TRQs.

- **Localization barriers** – an FTA should eliminate preferential treatment for domestic goods and services, as well as any requirements for local manufacture. According to news reports, the U.S. proposal on digital trade for TPP would commit countries to open data flows and prohibit requirements that servers be located (or data be stored) locally. However, the final TPP language will be important, in order to confirm whether any TPP countries receive exemptions from these requirements, and whether TPP countries can challenge such barriers through the use of binding dispute settlement.
- **State-owned enterprises** – TPP and future trade agreements will be judged by how they establish rules for government-owned companies when they compete with private ones, either for investment or the sale of goods and services around the world.

According to news reports and leaked documents from 2013, the provisions in TPP would ensure that SOEs act on the basis of commercial considerations and provide non-discriminatory treatment with regard to sales and purchases of goods. TPP would also establish information-gathering procedures for countries wanting more information on SOEs and their investments. However, open issues include 1) how SOEs are defined, 2) whether SOE requirements will be subject to dispute settlement, and 3) whether countries like Malaysia and Vietnam, where SOEs are prevalent in many industries, will receive exclusions or exemptions for certain market sectors.

- **Services** – as global trade barriers on services are particularly pervasive, FTAs should facilitate trade in telecommunications, express delivery, and professional services (such as lawyers, consultants and accountants) – all of which are on the leading edge of greater market access for all sectors.
- **Customs procedures** – an FTA should speed the procedures for import and export of goods and services, reducing paperwork, fees and requirements that act as trade barriers.
- **Standards** – an FTA should allow for harmonization of standards and testing procedures, for goods and services as well as for foods and agricultural goods. Technical barriers to trade should be eliminated.
- **Trade remedies** – FTAs should not affect WTO rules for unfair trade such as dumping and subsidies, but should enhance how countries work together to enforce these rules, particularly on Customs enforcement and evasion.
- **Currency** – FTAs should address currency manipulation, which subsidizes the exports of the manipulating country. Unfortunately, the United States has not shown real interest in addressing this issue in the TPP, despite the intent of Congress and the clear negative impact on U.S. exports. The Treasury Department has reportedly been pursuing a side agreement to TPP that would establish a committee to address currency issues, but this would fall well short of what many in Congress have demanded – enforceable disciplines on currency manipulation.

- **E-commerce and digital trade** – FTAs must bring trade rules into the 21st century and must prevent forced localization and other trade-limiting restrictions on how digital trade takes place around the globe. According to news reports, the TPP provisions would eliminate prohibitions on cross-border data flows, although the details of (and exceptions to) these provisions are not yet known.
- **Intellectual property** – FTAs must strengthen trade secret protection and find a balance between protecting IP rights and allowing the spread of knowledge to all countries. While most IP issues have been resolved, a key sticking point is the term of patent protection for a new class of pharmaceutical products called "biologics." While the United States is seeking 12 years of patent protection, several other TPP countries are reportedly insisting on a protection period of only six years.
- **Dispute settlement –** As discussed above, a free trade agreement must not only set the rules for trade but also the rules for how to settle disputes. U.S. free trade agreements regularly include provisions for investor-state dispute settlement (ISDS), in order to resolve disputes of companies who feel their investment in another country has been harmed by that country's actions. However, ISDS have been strongly opposed by public interest groups and, until recently, some of the TPP countries. According to news reports, ISDS provisions will likely be included in the final TPP agreement. However, the Obama administration has proposed a "carve-out" that would prohibit tobacco companies from challenging TPP countries' tobacco control laws and regulations that might harm their investments abroad.

While no trade agreement will be perfect, the United States should not accept a free trade agreement unless it is a strong one. Whether it is the TPP, the Trade in Services Agreement, or the U.S.-EU Transatlantic Trade and Investment Partnership (TTIP), an agreement that does not pass most if not all of these tests should not be accepted by U.S. trade negotiators or by Congress.