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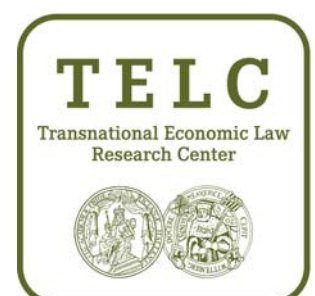
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The TPA in 2015: A Quick Look at the Latest Incarnation of the U.S. President's "Fast Track" Trade Negotiation Authority

Since 1974, Congress has enacted Trade Promotion Authority ("TPA") legislation that defines U.S. negotiating objectives and priorities for trade agreements. Also known as "fast track negotiating authority," TPA legislation accords the U.S. President a temporary authority to negotiate trade agreements on behalf of the United States. It also establishes consultation and notification requirements for the President to follow throughout the negotiation process. At the end of the negotiation and consultation process, the President submits the agreement to Congress, and Congress gives the entire agreement an up or down vote, but Congress is prohibited to amend or veto specific parts of the agreement.

This power is wrought somewhat with controversy, largely due to the fact that the authority "to regulate commerce with foreign Nations" is one of the enumerated powers vested in the legislative branch by Article I, Section 8 of the U.S. Constitution. Thus, while TPA proponents (and a majority of Congress) view the legislation as an affirmation of Congress's traditional role in the oversight and development of U.S. foreign trade policy, many advocacy groups, particularly trade unions, view TPA legislation as an unwarranted (if not unconstitutional) expansion of the executive powers.

Despite this controversy, the fast track authority has been instrumental to sev-

eral of the U.S.'s most significant international trade agreements over the past four decades. The first incarnation of the TPA passed pursuant to the Trade Act of 1974 and remained in effect from 1975 to 1994 (it was originally set to expire in 1980, but Congress twice extended the authority). During that period, Congress enacted implementing legislation for agreements negotiated under five consecutive U.S. presidents, including the U.S.-Israel Free Trade Area, the U.S.-Canada Free Trade Agreement, the regional North American Free Trade Agreement ("NAFTA"), and the initiation of the global Uruguay Round, being conducted within the framework of the General Agreement on Tariffs and Trade ("GATT").

Not least significantly, the first incarnation of the TPA expired on 16 April 1994, which was one day after the Uruguay Round concluded in the Marrakech Agreement, and that Agreement transformed the organizational-judicial component of the GATT into the World Trade Organization ("WTO"). And pursuant to that incarnation of the TPA, Congress considered and passed the implementing legislation for the Marrakech Agreement, namely the Uruguay Round Agreements Act.

The fast track authority seemingly perished, however, during the second half of the 1990s, as opposition from House Republicans kept the executive power to negotiate trade agreements subdued. Nevertheless, in 2002, after extensive and vocal support from prominent Republican leaders such as President George W. Bush and busi-

ness leaders such as David Rockefeller, House Republicans again accepted the fast track authority as a valuable (if not essential) component of the executive power, especially with respect to international trade negotiations. Thus, Congress revived the TPA pursuant to the Trade Act of 2002, and extended the same presidential procedures and many of the same guidelines that existed under the original fast track authority granted by the Trade Act of 1974.

Under the revived fast track authority, in a span of just five years, President Bush negotiated and Congress enacted free trade agreements with Chile, Singapore, Australia, Morocco, the Dominican Republic, Bahrain, Oman, and Peru. Before his fast track authority expired in 2007, Bush also signed agreements with Colombia, South Korea, and Panama, all of which President Obama enacted in October 2011. Shortly after these enactments, the Obama Administration described a resurrection of the fast track authority as “essential” to the conclusion of pending free trade agreements, most notably the Trans-Pacific Partnership (“TPP”).

The current pending incarnation of the TPP is the product of several years of negotiations involving twelve countries: the U.S., Brunei, Chile, New Zealand, Singapore, Australia, Peru, Vietnam, Malaysia, Mexico, Canada, and Japan. Four other countries have announced interest in joining the agreement, and several more send representatives to contribute to negotiations. All of the negotiations involving the U.S. have been predicated, as a matter of course, upon the working

assumption that the TPA was in effect. That is, the executive office has negotiated as if the office had the authority to bind the country to the terms of the treaty without Congressional debate on the terms—an assumption that was not technically a reality until the latest incarnation of the TPA passed both houses last week. Thus, without the 2015 incarnation of the TPA, the U.S.’s involvement in the negotiations over the past several years could have been rendered meaningless.

Against that backdrop, one can easily see why it was immensely important to the Obama Administration to rally the votes necessary to pass the current incarnation of the TPA. And that may likely explain the unusually proactive approach the President took in ensuring Congressional support and the wild changes of opinion seen by several Senators over the course of the previous month (see, e.g., Senator John Barrasso’s (R-Wyo.) 11th hour “turn around” for the 60th essential vote). Traditionally (or at least over the past four decades), support for agreements such as the TPP has flowed largely from Republicans in Congress, and unsurprisingly, so has support for fast track authority legislation. The 2015 incarnation of the TPA is no different in this regard, with only 13 Democrats voting for the renewed authority out of the 60 votes garnered in the Senate. The legislation to renew the TPA—the Bipartisan Congressional Trade Priorities Act of 2015 (“BCTPA”)—was introduced in the House and in the Senate on April 16, 2015. It passed the house on June 18, 2015 (218-208 vote), and it passed the Senate on June 24 (60-38 vote). The legislation reauthorizes TPA for four years with the

possibility of a three-year extension; it largely reflects the basic structure of previous TPA/fast-track authorizing legislation.

All of the primary versions of the TPA are strikingly similar in content. They allow the executive branch to select countries for, set the substance of, negotiate and then sign trade agreements without prior congressional approval. They also allow the executive branch to negotiate trade agreements covering more than just tariffs and quotas. While they empower the executive branch to author an agreement's implementing legislation without Congressional input, the executive branch must notify Congress 90 days before signing and entering into an agreement. Nevertheless, the executive is granted unlimited time for the implementing legislation to be submitted (hence Obama's delay in implementing the agreements signed by Bush in 2007). The TPA bills also limit the potentialities of Congress to allow matters to "die in committee" by forcing floor votes and eliminating several floor procedures, including unanimous consent, debate, and cloture rules. Most importantly, as mentioned above, each version abolishes Congress's ability to amend the legislation. The most notable procedural difference contained in the 2002 incarnation is a 90-day notice requirement that the executive is obligated to give to Congress before free trade negotiations begin.

The current incarnation includes several minor changes, such as expanding executive branch requirements to consult with Congress and private sector advisers, but nothing strikingly differ-

ent procedurally or substantively. The 2015 incarnation also includes new objectives reflecting trade policy issues that are the subject of current negotiations, including "digital trade in goods and services and cross-border data flows, state-owned and state-controlled enterprises, and localization barriers to trade."

The BCTPA specifies the parameters of the 2015 TPA. After setting out its basic purpose in Section I, Sections II through V deal with the core substantive and procedural aspects of the fast track authority. Section II sets out the overall trade negotiating objectives of the U.S. with respect to any agreement with a foreign country to reduce or eliminate existing tariffs or nontariff barriers of that country or the United States that are unduly burdening and restricting U.S. trade, including more open, equitable, and reciprocal market access; the reduction or elimination of trade barriers and distortions that are directly related to trade and investment and that decrease market opportunities for U.S. exports or otherwise distort U.S. trade; stronger international trade and investment disciplines and procedures, including dispute settlement; enhanced U.S. competitiveness; protection of the environment; respect for worker and children rights consistent with International Labor Organization ("ILO") core labor standards; and equal access of small businesses to international markets.

Section II also sets out the principal trade negotiating objectives of the U.S. with respect to goods and services; agriculture; foreign investment; intellectual property; digital goods and services,

including cross-border data flows; regulatory practices; state-owned and -controlled enterprises; localization barriers to trade; labor and the environment; currency; the WTO and multi-lateral trade agreements; trade institution transparency; anti-corruption; dispute settlement and enforcement; trade remedy laws; border taxes; textile negotiations; commercial partnerships (particularly with Israel); and good governance and transparency principles.

Section III authorizes the President to enter into trade agreements with foreign countries for the reduction or elimination of tariff or nontariff barriers before July 1, 2018, or before July 1, 2021, if trade authorities procedures are extended to implementing bills (congressional approval) with respect to such agreements.

Section IV subjects trade agreements to congressional oversight and approval, consultations, and access to information requirements. It also requires the convening each Congress of the House and the Senate Advisory Groups on Negotiations to consult with and advise the United States Trade Representative (“USTR”) regarding the formulation of specific objectives, negotiating strategies and positions, the development of the applicable trade agreement, and compliance and enforcement of the negotiated commitments under the trade agreement. One significant difference here is that Section IV amends the Trade Act of 1974 to establish within the Office of the USTR the position of “Chief Transparency Officer”. The Transparency Officer consults with Congress on

transparency policy, coordinates transparency in trade negotiations, engages and assists the public, and advises the USTR on transparency policy. Thus, Congress has a slightly larger hand in shaping transparency policy than it did in previous incarnations of the TPA.

Finally, Section V sets out additional requirements for presidential notifications, consultations, reports, and other actions that must take place for any trade agreement to enter into force. It also sets out specific requirements for negotiations regarding agriculture, the fishing industry, and textiles.

Most of the changes to the 2015 TPA, it would seem, are of a technical nature. However, one important substantive difference in the newest incarnation is the inclusion of provisions on human rights as a “principal trade negotiating objectiv[e].” It also includes a category of trade negotiating objectives called “capacity building and other priorities.” Both categories set out broad goals rather than specific requirements.

The Office of the United States Trade Representative describes the key elements of the 2015 TPA as follows:

- (1) TPA outlines Congressional guidance to the President on trade policy priorities and negotiating objectives.
- (2) TPA establishes Congressional requirements for the Administration to notify and consult with Congress, with the private sector and other stakeholders and with the public

during the negotiations of trade agreements.

(3) TPA defines the terms, conditions and procedures under which Congress allows the Administration to enter into trade agreements, and sets the procedures for Congressional consideration of bills to implement the agreements.

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Opposition to the TPA is largely rooted in three types of concerns: (1) that the legislation unconstitutionally expands the executive power; (2) that the legislation does not provide sufficient transparency requirements, both with respect to Congress's access to trade negotiations and with respect to the public's access at large; and (3) that eliminating Congressional debate with respect to free trade agreements will result in more outsourcing and will harm the U.S. by opening barriers to outsourcing, cheapening and depleting the labor market in certain U.S. industries.

Nevertheless, after more than four decades, the fast track authority (or something similar) still appears necessary to avoid political halts and obstructions in the U.S.'s international trade negotiations—perhaps it is even “essential,” as the Obama Administration claimed. Because of the myriad difficulties that would accompany acquiring Congressional approval in many cases, the fast track authority has proven to be an effective authorization tool, granting the U.S. executive branch the power to negotiate with similar powers to those vested in the executive branches of a majority of the nations with which the U.S. negotiates.