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Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy

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Summary

Legislation to reauthorize Trade Promotion Authority ("TPA"), sometimes called "fast track," was signed by President Obama on June 29, 2015 (P.L. 114-26). It was introduced as the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015; H.R. 1890/S. 995) on April 16, 2015. The legislation was reported by the Senate Finance Committee on April 22, 2015, and by the House Ways and Means Committee the next day. TPA, as incorporated into H.R. 1314 by substitute amendment, passed the Senate on May 22 by a vote of 62-37. In the House of Representatives, the measure was voted on under a procedure known as "division of the question," which requires separate votes on each component, but approval of both to pass. On June 12, TPA (Title I) passed by a vote of 219-211, but Trade Adjustment Assistance (Title II) was defeated 126-302. A motion to reconsider that vote was laid by Speaker Boehner shortly after that vote. On June 18, the House again voted on TPA, in an amendment identical to the Senate version attached to H.R. 2146, an unrelated House bill. This amendment did not include Trade Adjustment Assistance (TAA). This legislation passed the House by a vote of 218-206, and the Senate by a vote of 60-38 on June 24, 2015.

TPA is the process Congress has made available to the President to enable legislation to approve and implement certain international trade agreements to be considered under expedited legislative procedures for limited periods, provided the President observes certain statutory obligations. TPA defines how Congress has chosen to exercise its constitutional authority over a particular aspect of trade policy, while giving the President added leverage to negotiate trade agreements by effectively assuring U.S. trade partners that final agreements will be given timely and unamended consideration. On July 30, 2013, President Obama first publicly requested that Congress reauthorize TPA, and he reiterated his request for TPA in his January 20, 2015, State of the Union address. Legislation to renew TPA was introduced in the 113th Congress (H.R. 3830) (S. 1900), but it was not acted upon.

TPA reflects decades of debate, cooperation, and compromise between Congress and the executive branch in finding a pragmatic accommodation to the exercise of each branch's respective authorities over trade policy. The expedited legislative procedures have not changed since first codified in the Trade Act of 1974 (P.L. 93-618). Congress, however, has required that the authority to use TPA be periodically reauthorized, and at times has chosen to revise trade negotiation objectives, the consultative mechanism, and presidential notification requirements. While early versions of fast track/TPA received bipartisan support, later renewal efforts have been more controversial, culminating in a more partisan vote on the 2002 TPA renewal. Future debates on TPA renewal may center on trade negotiation objectives, congressional oversight of trade negotiations, trade agreement enforcement, and clarifying the congressional authority over approval of reciprocal trade agreements and trade policy more generally, among others.

The passage of TPA may prove significant in the 114th Congress because current trade negotiations on the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Trade in Services Agreement (TISA) are in progress. Technically, TPA is not necessary to begin or even conclude trade negotiations, but it is widely understood to be a key element of defining congressional authority, and of passing trade agreement implementing legislation. Therefore, its renewal can be construed as signaling serious congressional support for moving ahead with trade negotiations. Addressing congressional concerns over the definition and operation of TPA may be a central part of the debate.

This report presents background and analysis on the development of TPA, a summary of the major provisions under the expired authority, and a discussion of the issues that have arisen in the debate over TPA renewal. It also explores some of the policy options available to Congress.

Contents

Introduction 1
A Brief History of TPA 2
The U.S. Constitution and Foreign Trade 2
The Evolution of the Congressional-Executive Partnership 2
Creation of "Fast Track Trade Negotiating Authority" 4
Subsequent Renewals of Trade Agreements Authority 5
The Trade Agreements Act of 1979 5
The Trade and Tariff Act of 1984 5
Omnibus Trade and Competitiveness Act of 1988 (OTCA) 6
A Hiatus 6
The Bipartisan Trade Promotion Authority Act (BTPA) of 2002 6
The Bipartisan Comprehensive Trade Priorities and Accountability Act of 2015 (BCTPA) 7
The Elements of TPA 8
Trade Agreements Authority 8
Implementation of Trade Agreements 9
Expedited Legislative Procedures 10
Negotiating Objectives 10
Notification and Consultation 11
Limiting Trade Agreements Authority 12
Sunset Provision 12
Extension Disapproval 13
Procedural Disapproval 13
Consultation and Compliance Resolution (CCR) 13
Withdrawal of Expedited Procedures 13
Congressional Procedures Outside TPA 14
Hearings and "Mock Markups" 14
Side Agreements and Letters 15
Informal Agreements 15
Possible Issues for Congress 15
The Need for and Timing of TPA 15
Definition and Scope of Negotiating Objectives 16
Consultation and Notification 17
Trade Agreement Enforcement 17
Technical Considerations 17
Options for Congress 18
Current Legislation 19

Figures

Figure B-1. Congressional Timeline 21

Appendixes

Appendix A. Congressional Trade Agreements Authority Requested by and Granted to Presidents Since 1934 20
Appendix B. Congressional Timeline under TPA 21
Appendix C. A Short Guide to the Expedited Legislative Procedures for Passage of Trade Implementing Bills Under TPA 22

Contacts

Author Information 23
Acknowledgments 23

Legislation to reauthorize Trade Promotion Authority (TPA), formerly called fast track, was introduced as the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015) (H.R. 1890/S. 995) in the Senate and the House on April 16, 2015. The legislation was reported by the Senate Finance Committee on April 22, 2015, and by the House Ways and Means Committee on April 23, 2015. The legislation, as reported by the Senate Finance Committee, was joined with legislation extending Trade Adjustment Assistance into a substitute amendment to H.R. 1314 (an unrelated revenue measure), and the legislation passed on May 22 by a vote of 62-37. In the House of Representatives, the measure was voted on under a procedure known as "division of the question," which requires separate votes on each component, but approval of both to pass. On June 12, TPA (Title I) passed by a vote of 219-211, but TAA (Title II) was defeated 126-302. On June 18, the House again voted on TPA, in an amendment identical to the Senate version attached to H.R. 2146, an unrelated House bill. This amendment did not include TAA. This legislation passed the House by a vote of 218-206, and, subsequently, by the Senate on June 24. President Obama signed the legislation (P.L. 114-26) on June 29, 2015.

TPA is the process Congress has made available to the President to enable legislation to approve and implement certain international trade agreements to be considered under expedited legislative procedures for limited periods, provided the President observes certain statutory obligations. Although the President has the authority under the Constitution to negotiate international agreements, typically a reciprocal trade agreement requires an implementing bill and, therefore, congressional action to bring it into force. Many Members of Congress have advocated for renewal of TPA. On July 30, 2013, President Obama first publicly requested that Congress reauthorize TPA. He restated his request for TPA during his January 20, 2015, State of the Union address. Legislation to renew TPA was introduced in the 113th Congress (H.R. 3830) (S. 1900), but it was not acted upon. The previous grant of TPA authority expired on July 1, 2007.

This report presents background and analysis on the development of TPA, a summary of the major provisions under the expired authority, and a discussion of the issues that have arisen in the debate over TPA renewal. It also explores some of the policy options available to Congress.

Introduction

The 112th Congress exercised TPA authority and procedures in passing implementing bills for U.S. bilateral free trade agreements (FTAs) with Colombia, Panama, and South Korea on October 12, 2011, concluding action on the last three FTAs signed prior to the expiration of TPA in 2007. Four other trade negotiations in progress that could result in agreements that would likely require TPA to pass implementing legislation include (1) the multilateral Doha Development Round of the World Trade Organization (WTO); (2) the Trans-Pacific Partnership (TPP); (3) the Transatlantic Trade and Investment Partnership (TTIP); and (4) the Trade in Services Agreement (TISA).

For more than 40 years, Congress has granted the President TPA/fast track authority, agreeing to consider trade agreement implementing legislation expeditiously and to vote on it without amendment, provided the President meets certain statutory negotiating objectives and consultation requirements, and the implementing bill contains the necessary and limited qualifying provisions. TPA strikes a delicate balance by clarifying how Congress chooses to exercise its constitutional authority over a particular aspect of trade policy, while presumably

giving the President additional negotiating leverage by effectively assuring U.S. trade partners that a final agreement will be given timely and unamended consideration by Congress.[1]

Earlier incarnations of TPA, although controversial, were adopted with substantial bipartisan majorities. Over time, however, trade negotiations have become more complex. Congress also has insisted on tighter oversight and consultation requirements, and the trade debate has become more partisan in nature, making congressional renewal of TPA more controversial. The expiration of TPA raises the central questions of whether, when, and in what form TPA might be renewed.

A Brief History of TPA

TPA is the product of many decades of debate, cooperation, and compromise between Congress and the executive branch. At its foundation lie the respective constitutional powers granted to Congress and the President, as well as the pragmatic realization that a certain cooperative flexibility is needed if the United States is to negotiate reciprocal trade agreements credibly. The evolution of TPA to date shows, among other things, that the congressional-executive partnership on trade policymaking can be strengthened or strained as it adjusts to evolving political and economic conditions, as well as shifting priorities of the two branches.

The U.S. Constitution and Foreign Trade

The U.S. Constitution assigns express authority over the regulation of foreign trade to Congress. Article I, Section 8, gives Congress the power to "regulate commerce with foreign nations ... " and to " ... lay and collect taxes, duties, imposts, and excises.... " In contrast, the Constitution assigns no specific responsibility for trade to the President.[2] Under Article II, however, the President has exclusive authority to negotiate treaties and international agreements and exercises broad authority over the conduct of the nation's foreign affairs. Both legislative and executive authorities come into play in the development and execution of U.S. trade agreements.

The Evolution of the Congressional-Executive Partnership

For roughly the first 150 years of the United States, Congress exercised its authority over foreign trade by setting tariff rates on all imported products. The tariff was the main trade policy instrument and primary source of federal revenue. Early congressional trade debates pitted Members from northern manufacturing regions, who benefitted from protectionist tariffs, against those from largely southern commodity exporting regions, who advocated low tariffs. During this period, the President's primary role in setting trade policy was to use his foreign affairs authority to negotiate, bring into force, and implement (with the advice and consent of the Senate) general bilateral treaties of friendship, commerce, and navigation. These treaties "included a U.S. commitment to most-favored-nation (MFN) treatment" or nondiscrimination in the application of tariffs for all treaty partners.[3]

[1] Such a presumption may be questioned given that the three FTAs approved in 2011 languished for over three years without congressional action.

[2] I. M. Destler, *American Trade Politics*, 4th ed. (Washington, DC: Institute for International Economics, 2005), p. 14.

[3] Hal Shapiro and Lael Brainard, "Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change," *The George Washington International Law Review*, vol. 35, no. 1 (2003), p. 6. MFN, also known in U.S. law as normal trade relations (NTR) status, means that the United States would treat the imports from that trading partner no less favorably than the imports from other trading partners.

Two legislative events occurred in the 1930s that radically changed the shape and conduct of U.S. trade policy. The first was the "Smoot-Hawley" Tariff Act of 1930 (P.L. 71-361), which set prohibitively high tariff rates in response to U.S. producers seeking protection at the outset of the Great Depression. The act led to retaliatory tariffs by major U.S. trade partners, which severely restricted trade and contributed to the deep and prolonged effects of the depression.

The damaging effects of Smoot-Hawley prompted the second major trade legislative event in the 1930s. Congress, with the guidance and encouragement of Secretary of State Cordell Hull, himself a former Senator, developed and enacted the Reciprocal Trade Agreements Act of 1934 (RTAA; P.L. 73-316). The RTAA authorized the President to enter into reciprocal trade agreements that reduced tariffs within pre-approved levels. The tariffs were applied on an MFN basis. Under the RTAA, Congress authorized the President to implement the new tariffs by proclamation without additional legislation. The RTAA is important for several reasons:

- For the first time, Congress expressly *delegated* to the President an *expanded* trade agreements authority to reduce tariffs within congressionally predefined ranges. In so doing, some argued, Congress aimed to lessen the political pressure from special interests it often faced.[4]
- The Smoot-Hawley Tariff Act was the last general tariff legislation passed by Congress. While still on the books, the Smoot-Hawley tariffs are now only applied to imports from those few countries, namely Cuba and North Korea, not receiving MFN status, now referred to as normal trade relations status (NTR) in U.S. trade laws.
- While *delegating* tariff-cutting authority, Congress did not surrender broader trade authority and insured legislatively against executive branch overreach by subjecting the trade agreements authority to a limited time period, making such authority subject to periodic review and renewal.[5]

Congress renewed presidential reciprocal trade agreements authority for tariff reductions 11 times until 1962 through trade agreement extension acts (see **Appendix A**). General tariff levels declined and their significance as a trade barrier diminished.[6] In addition, with the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947, the major forum for trade negotiations shifted from bilateral to multilateral negotiations, and trade negotiations were eventually expanded beyond tariffs.[7]

Under the Trade Expansion Act of 1962, Congress granted the President authority for five years to enter into agreements that negotiated the reduction or elimination of tariffs. The act also expanded Congress's role in the negotiating process by requiring the President to submit for congressional review a copy of each concluded agreement and a presidential statement explaining why the agreement was necessary. It allowed the President to conclude the GATT Kennedy

[4] Destler, *American Trade Politics*, pp. 14-15, and Robert A. Pastor, *Congress and the Politics of U.S. Foreign Economic Policy 1929-1976* (Berkeley: University of California Press, 1980), pp. 79-80 and 92.

[5] The original bill sent to Congress by the Roosevelt Administration had no time limit on the delegated authority, which was amended on the House floor to include a three-year authorization. Ibid., pp. 87, 89, and 92.

[6] Shapiro and Brainard, *Trade Promotion Authority Formerly Known as Fast Track*, p. 11.

[7] The General Agreement on Tariffs and Trade (GATT) went into effect in 1947 as a set of rules governing international trade. Over time, the number of GATT signatories grew and the body of rules was expanded in a series of negotiations called rounds. During the Uruguay Round, the signatories agreed to establish the World Trade Organization (WTO), now 155 members, to administer the GATT and other multilateral trade agreements.

Round (1963-1967), *the last round in which tariff reduction was the primary focus of trade negotiations.*

Along with a number of tariff reduction agreements, which were covered by the congressional trade agreements authority, the GATT member countries reached agreements in the Kennedy Round in two areas related to nontariff barriers (NTBs), that is, laws and rules other than tariffs that are used to restrict imports. The first was a customs valuation agreement that would have required the United States to eliminate the American Selling Price method of pricing goods at the border. The second was an antidumping agreement that would have required changes in U.S. antidumping practices.[8] Because U.S. adherence to these agreements would have required changes in U.S. law or regulations beyond tariff modifications, many in Congress concluded that the President had exceeded the authority delegated to him. In fact, Congress passed a resolution in 1966 instructing the Johnson Administration against negotiating "nontariff commitments." When he ignored it, Congress declined to implement the NTB changes, setting up the debate that would eventually be resolved with the creation of the fast track authority for trade agreements.[9]

Creation of "Fast Track Trade Negotiating Authority"

The results of the Kennedy Round made evident that changes in nontariff barrier rules would increasingly dominate the agenda of future multilateral trade agreements, which would also require changes in U.S. law if the United States were to adhere to them. Concern over presidential encroachment on its legislative authority prompted Congress to seek a legislative remedy.

The tariff modification authority in the Trade Expansion Act of 1962 expired on July 1, 1967, but Congress did not renew the authority for seven years as it debated legislative options. The Nixon Administration sought new authority to negotiate the Tokyo Round in the GATT, which Congress granted in the Trade Act of 1974 (P.L. 93-618). As before, the act provided the President with the authority to enter into trade agreements that reduced or eliminated tariffs within certain predefined parameters. To address the critical issue of agreements that required changes in U.S. law beyond tariff modifications, the act stipulated that nontariff barrier agreements entered into under this statute could only enter into force if Congress passed implementing legislation.

Some in Congress, however, argued that subjecting implementing legislation to ordinary congressional debate and amendment procedures would defeat a major purpose for delegating trade agreements authority to the President in the first place—to reduce the special interest pressures inherent in trade policymaking. Many Members also recognized an important potential problem: that U.S. trading partners would be reluctant to negotiate agreements that would be subject to unlimited congressional debate and amendment. As stated in the Senate Finance Committee report accompanying the Trade Act of 1974:

> The Committee recognizes ... that such agreements negotiated by the Executive should be given an up-or-down vote by the Congress. Our negotiators cannot be expected to accomplish the negotiating goals ... if there are no reasonable assurances that the negotiated agreements would be voted up-or-down on their merits. Our trading partners have expressed an unwillingness to negotiate without some assurances that the Congress will consider the agreements within a definite time-frame.[10]

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[8] I. M. Destler, *Renewing Fast-Track Legislation* (Washington, DC: Institute for International Economics, 1997), p. 6.

[9] Destler, *American Trade Politics*, pp. 71-72 and Pastor, *Congress and the Politics of U.S. Foreign Economic Policy 1929-1976*, pp. 120-121.

[10] U.S. Congress; Senate; Committee on Finance; *Trade Reform Act of 1974; Report ... on H.R. 10710* (S.Rept. 93-1298), November 26, 1974, U.S. Govt. Print. Off., 1974. p. 107. The rationale may be traced to the RTAA of 1934. See Pastor, *Congress and the Politics of U.S. Foreign Economic Policy 1929-1976*, pp. 88-89.

As a solution, Congress agreed that each chamber would suspend its ordinary legislative procedures and give trade agreements expedited treatment. The relevant committees would be given limited time to consider implementing bills. Once they reached the floor, the implementing bills would be subject to time-limited debate and no amendments. In exchange, Congress required the executive branch to consult with relevant committees during the negotiations and to notify Congress 90 calendar days before signing an agreement. The act also provided for the accreditation of 10 Members of Congress as advisers to the U.S. delegation of negotiators. (The Trade Act of 1962 had provided for five such advisers.) These provisions rounded out what would become commonly known as "fast track trade negotiating authority."[11]

With the trade "negotiating" authority and the "fast track" provisions of the Trade Act of 1974, the United States concluded the Tokyo Round of the GATT (1973-1979). As expected, this round resulted in a number of agreements on NTBs, such as government procurement practices, product standards, customs regulations, and rules for administering antidumping and countervailing duty procedures. The resulting Trade Agreements Act of 1979 (P.L. 96-39) was the first trade implementing bill passed by Congress under the expanded trade agreements authority and expedited procedures.

Subsequent Renewals of Trade Agreements Authority

The expedited legislative procedures have not changed since first enacted in 1974. These provisions are ensconced in Sections 151-154 of the Trade Act of 1974, as amended, and are not subject to sunset provisions. The ability to use them, however, is subject to time limits, and Congress has revised them over the years. (The next section of this report examines these procedures and trade agreements authority in more detail.) The initial grant of "fast track trade negotiating authority" and the authority to enact tariff modifications by proclamation under the Trade Act of 1974 were in effect for five years ending on January 2, 1980. Congress extended a residual presidential authority to proclaim tariff modifications to January 2, 1982.

The Trade Agreements Act of 1979

Along with implementing the Tokyo Round agreements, the Trade Agreements Act of 1979 extended for eight years, until January 2, 1988, the presidential authority to enter into agreements on nontariff barriers, but made no other changes to the original authority. The act did not extend presidential tariff modification authority.

The Trade and Tariff Act of 1984

This act amended the Trade Act of 1974 by adding trade agreements authority that provided for the "negotiation" and implementation of bilateral free trade agreements that both reduced or eliminated tariffs and addressed nontariff barriers. Congress was taking into account the U.S.-Israel and U.S.-Canada FTAs that were under consideration. The legislation waived for the U.S.-Israel FTA the requirement of a 90-day notification to Congress prior to entering the agreement. However, for negotiations with other countries, it required the President to notify the House Ways and Means and Senate Finance Committees of his intention to begin FTA negotiations 60 days prior to entering the negotiations and provided for denial of expedited procedures if either committee disapproved of the negotiation within 60 days after receiving the notification. The act

[11] This terminology, although widely used, is imprecise. First, the President has standing constitutional authority to negotiate international agreements, so trade agreements authority in statute refers strictly to the authority Congress conveys to the President to "enter into" reciprocal trade agreements, not negotiate them. Second, the term "fast track" became common usage to reference the new expedited legislative procedures, but was not a term used in the act.

also required that agreements that led to tariff modifications beyond a certain threshold be subject to congressional approval via implementing legislation.

Omnibus Trade and Competitiveness Act of 1988 (OTCA)

The OTCA, an extensive trade bill that addressed numerous areas of trade policy, extended the President's authority to enter into trade agreements before June 1, 1993, but extended the application of expedited procedures only for agreements entered into before June 1, 1991. Legislation for agreements entered into after that date, but before June 1, 1993, could be approved under the expedited procedures, if the President requested an extension of such authority and it was not disapproved by either the House or the Senate. (The President requested the extension, which survived proposed House and Senate resolutions of disapproval.) The OTCA also provided that Congress could withhold a trade agreement from fast track consideration by passing a resolution of disapproval, if it determined that the United States Trade Representative (USTR) had failed to consult with Congress adequately during the trade negotiations. Under the OTCA provisions, Congress greatly expanded the trade negotiation objectives and passed implementing legislation for the North American Free Trade Agreement (NAFTA) in 1993 (P.L. 103-182).

Multilateral negotiations under the Uruguay Round of the GATT, however, did not conclude in time to meet the June 1, 1993, expiration deadline. In response, Congress passed H.R. 1876, signed by the President on July 2, 1993 (P.L. 103-49), extending the authority and implementing procedures until April 16, 1994, solely for the Uruguay Round. The votes reflected strong congressional support in the House (295-126) and in the Senate (76-16). The law did not change any other aspects of the fast track authority.

A Hiatus

After the trade agreements authority expired on April 16, 1994, Congress did not approve new authority until the Trade Act of 2002 (H.R. 3009; P.L. 107-210). The eight-year period was the longest hiatus since fast track was initially approved in 1974. In 1997, both the Senate Finance and the House Ways and Means Committees reported out legislation to renew fast track. House Republican leaders pulled it before a floor vote at the request of the Clinton Administration because it lacked sufficient support in the House. In September 1998, the House voted on fast track authority legislation, but the bill failed to pass (180-243).

Several reasons may explain Congress's decision not to enact new trade agreements authority for the Clinton Administration. For one, although both the Republican congressional leadership and the Clinton Administration supported fast track authority, the two sides could not agree on the negotiating objectives for labor and environmental issues under the proposed renewed authority. In general, Republicans wanted more limited coverage than the Clinton Administration and many Democrats in Congress preferred. In addition, the WTO (successor to the GATT) failed to launch a new round of negotiations at the 1999 WTO Ministerial meeting in Seattle, and therefore, no major trade negotiations were underway that might have made renewal of trade agreements authority a political priority.

The Bipartisan Trade Promotion Authority Act (BTPA) of 2002

In 2001, President George W. Bush requested a renewal of fast track authority. It was renamed in the legislation as "trade promotion authority (TPA)," in part to counter what many viewed as a negative connotation associated with the term fast track. The renewed authority is contained in the Bipartisan Trade Promotion Authority Act (BTPA) of 2002, which was enacted as Title XXI of The Trade Act of 2002 (P.L. 107-210).

The structure of TPA was consistent with previous trade agreements authority. It included new language for labor and environmental provisions, defining them as "principal negotiating objectives." TPA did not mandate the inclusion of minimal enforceable labor standards in trade agreements,[12] one reason labor groups and many Members of Congress opposed it. The act also created a new mechanism for congressional consultation, the Congressional Oversight Group (COG), to operate in addition to the congressional trade advisors that were appointed under previous versions. (A more detailed discussion of the notification and consultation requirements appears in the next section.)

The original House version of the BPTA (H.R. 3005) passed by one vote (215-214), largely along party lines, with Republicans mostly supporting the bill and Democrats largely opposing it. The legislation was combined in the Senate with renewal of Trade Adjustment Assistance (TAA), the Andean Trade Preference Act (ATPA), and the Generalized System of Preferences (GSP). It passed 66 to 30. The conference report on the final bill, H.R. 3009, the Trade Act of 2002, was adopted by the House (215-212) and Senate (64-34).[13]

Under the 2002 version of TPA, Congress approved implementing legislation for FTA Free Trade Agreement countries Chile, Singapore, Australia, Morocco, the Dominican Republic, the Central American countries, Bahrain, Oman, Peru, Colombia, Panama, and South Korea.

The Bipartisan Comprehensive Trade Priorities and Accountability Act of 2015 (BCTPA)

The proposed BCTPA was introduced on April 16, 2015, by Senators Hatch and Wyden (S. 995) and Representative Ryan (H.R. 1890). The legislation is modeled on the Bipartisan Comprehensive Trade Priorities Act of 2014 (H.R. 3830, S. 1900) introduced by Representative Camp in the House and Senators Hatch and Baucus, which was introduced but not acted upon. The legislation was reported by the Senate Finance Committee on April 22, 2015, and by the House Ways and Means Committee on April 23, 2015. The legislation, as reported by the Senate Finance Committee, was joined with legislation extending Trade Adjustment Assistance into a substitute amendment to H.R. 1314 (an unrelated revenue measure), and the legislation passed on May 22 by a vote of 62-37.

TPA-2015 contains several differences from the BTPA of 2002. It contains updated negotiating objectives on trade in goods, services, agriculture (especially in the area of sanitary and phytosanitary standards), intellectual property rights, regulatory practices, and on digital trade in goods and services. The negotiating objectives adopt the May 10, 2007, Understanding provisions on labor and the environment, and they adopt new provisions on currency manipulation, localization, state-owned enterprises, and human rights.

If enacted, TPA-2015 will expire on July 1, 2021, provided an extension disapproval resolution is not introduced and passed by either chamber by July 1, 2018 (see below). TPA-2015 may be used to consider potential agreements resulting from several ongoing negotiations, including

- The Trans-Pacific Partnership (TPP), a regional FTA the United States is negotiating with 11 partner countries in the Asia-Pacific.

[12] Charan Devereaux, Robert Z. Lawrence, and Michael D. Watkins, *Case Studies in U.S. Trade Negotiation, Volume I: Making the Rules* (Washington, DC: Institute for International Economics, 2006), p. 229.

[13] For details on votes on this legislation, see CRS Report RS21004, *Trade Promotion Authority and Fast-Track Negotiating Authority for Trade Agreements: Major Votes*, by Carolyn C. Smith.

- The Trans-Atlantic Trade and Investment Partnership (T-TIP) being negotiated with the European Union (EU).
- A Trade in Services Agreement (TISA), a plurilateral trade negotiation to seek expanded commitments in services trade.
- An Environmental Goods Agreement (EGA), a plurilateral agreement being negotiated at the World Trade Organization (WTO) to reduce or eliminate tariff and nontariff barriers on goods to promote the environment.

It may also be used to consider any agreement resulting from the Doha Round of WTO multilateral trade negotiations.

The Elements of TPA

Through TPA/fast track, in its various iterations, Congress has sought to achieve four major goals in the context of supporting trade negotiations: (1) to define trade policy priorities and to have those priorities reflected in trade agreement negotiating objectives; (2) to ensure that the executive branch adheres to these objectives by requiring periodic notification and consultation with Congress; (3) to define the terms, conditions, and procedures under which the President may enter into trade agreements and under which the respective implementing bills may be approved; and (4) to reaffirm Congress's overall constitutional authority over trade by placing limitations on the trade agreements authority. These four goals, and some important procedural precedents that fall outside the formal legal TPA process, are examined below.

Trade Agreements Authority

As discussed above, when the statutory authority to enter into trade agreements was limited to reducing tariffs, the trade agreement was implemented by presidential proclamation and without further congressional action, provided the tariff rate reductions were within legislatively pre-approved limits. This process changed when trade negotiations were expanded to include nontariff barriers (NTBs). These more complex agreements requiring changes to domestic law led Congress to tighten its control over trade agreements negotiation and implementation by establishing "fast track trade negotiating authority." As set out in the Trade Act of 1974, NTB agreements could enter into force for the United States only with passage of implementing legislation.[14]

At the heart of what is now called TPA are the expedited procedures for moving trade implementing legislation through Congress (Section 151 of the Trade Act of 1974—see below), which have been used for nearly all reciprocal trade agreements.[15] Under Section 2103 of the Trade Act of 2002, Trade Agreements Authority, Congress makes these expedited procedures

[14] Under TPA, reciprocal FTAs and multilateral trade agreements that go beyond tariff reductions are treated as *congressional-executive agreements*, which require the approval of both houses of Congress. Such approval expresses Congress' consent to bind the United States to the commitments of the agreement under international law. This type of agreement is distinguished from both an *executive agreement*, requiring only presidential action, and a *treaty*, requiring a two-thirds vote of the Senate. Because reciprocal trade agreements typically result in tariff rate (revenue) changes, the House of Representatives is necessarily involved. For a more detailed legal discussion, see CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties*, by Jane M. Smith, Daniel T. Shedd, and Brandon J. Murrill; and Hal S. Shapiro, *Fast Track: A Legal, Historical, and Political Analysis* (Ardsley: Transnational Publishers, 2006), p. 22.

[15] The U.S.-Jordan FTA is the exception.

available only for a qualifying bill, which is referred to as a trade implementing bill. The bill qualifies only if certain conditions are met. First, the trade agreement entered into must make progress in meeting TPA's negotiating objectives, and the President must satisfy the notification and consultation requirements of the TPA statute (see below). Second, the implementing bill must contain provisions that approve the agreement and the statement of administrative action, and contain only those other provisions changing laws "necessary or appropriate" to implement the agreement ("either repealing or amending existing laws or providing new statutory authority").[16]

Importantly, Congress has been explicit that the expedited procedures "are enacted as an exercise of the rulemaking power of the House and the Senate, with the recognition of the right of either House to change the rules at any time."[17] This provision is one, of many, that conveys a congressional priority in controlling the approval and implementation of trade agreements.

Implementation of Trade Agreements

In a trade implementing bill, Congress conveys to the President the authority to provide for the agreement to *enter into force* by presidential proclamation, after determining that the partner country(ies) has taken measures necessary to comply with the provisions of the agreement. The requirements of this authority are defined in Section 2105 of the Trade Act of 2002 (see **Appendix B** for TPA timeline) under which an agreement may enter into force "if and only if":

1. at least 90 calendar days prior to signing the agreement, the President notifies Congress of his intention to do so (to provide opportunity for congressional review and possibly provide input before the agreement is signed, at which point it ostensibly can no longer be changed);[18]
2. within 60 calendar days of signing the agreement, the President provides Congress with a list of required changes to U.S. law needed to bring the United States into compliance with the agreement;
3. after entering into the agreement, on a day in which both houses of Congress are in session, the President transmits a copy of the final legal text of the trade agreement, a draft implementing bill, a statement of administrative action proposed to implement the agreement, and supporting statements on how the agreement meets various congressional priorities and objectives, changes existing agreements, and serves the purpose of U.S. commercial interests, and on how the implementing bill meets the statute's requirements for being an implementing bill (see section above); and
4. the implementing bill is enacted into law.

[16] These conditions are reinforced in the U.S. Congress, Committee on Conference, *Trade Act of 2002*, Conference Report to accompany H.R. 3009, 107th Cong., 2nd sess., July 26, 2002, H.Rept. 107-624 (Washington: GPO, 2002), p. 161.

[17] In addition to the statute, this rule is reinforced in the conference report, ibid., pp. 166-167. Indeed, the House did change the rules on April 10, 2008, when it approved H.Res. 1092 (224-195). That measure stated that Section 151(e)(1) and Section 151(f)(1) of the Trade Act of 1974 would not apply to H.R. 5724, the implementing legislation for the U.S.-Colombia FTA. Section 151 establishes the expedited (fast track) procedures. Section 151(e)(1) establishes the time limits for committee and floor consideration of the implementing bill. Section 151(f)(1) establishes the procedures for consideration of a motion in the House for consideration of the implementing bill. Other elements of the expedited procedures, for example, the prohibition on amendments to the implementing bill (Section 151 (d)) would still have applied to H.R. 5724. Also, H. Res. 1092 only applied to the U.S.-Colombia FTA.

[18] In fact, Congress has been able to press for changes in FTAs after they were signed, the U.S.-Peru and U.S.-South Korea FTAs being cases in point, perhaps another issue to be considered in a future TPA renewal debate.

Expedited Legislative Procedures

Should the above requirements be fulfilled to the satisfaction of Congress, it has agreed to follow certain expedited legislative procedures as defined in Sections 151-154 of the Trade Act of 1974, as amended. In effect, these rules require that Congress *must* act on the bill sent over by the White House, and in other ways represent a significant departure from ordinary legislative procedures. The major rules are listed below (see **Appendix C** for greater detail):

1. mandatory introduction of the implementing bill in both houses of Congress and immediate referral to the appropriate committees (House Ways and Means, Senate Finance, and others);[19]
2. automatic discharge from House and Senate Committees after a limited period of time;
3. limited floor debate; and
4. no amendment, meaning that each house must vote either up or down on the bill, which passes with a simple majority.

Negotiating Objectives

Congress exercises its trade policy role, in part, by defining trade negotiation objectives in TPA legislation. Through the negotiating objectives, Congress has made clear that trade is an important aspect of U.S. foreign economic and security policy because it generates broad benefits for the United States and the global economy. To take the fullest advantage of these benefits, Congress, drawing on its constitutional authority and historical precedent, defined the objectives that the President is to pursue in trade negotiations. Although the executive branch has some discretion over implementing these goals, they are definitive statements of U.S. trade policy that the Administration is expected to honor, if it expects trade agreement implementing legislation to be considered under expedited rules. For this reason, trade negotiating objectives stand at the center of the congressional debate on TPA.[20]

Congress establishes trade negotiating objectives in three categories: (1) overall objectives; (2) principal objectives; and (3) other priorities. These begin with broad goals that encapsulate the "overall" direction trade negotiations are expected to take, such as enhancing U.S. and global economies. Principal objectives are more specific and provide detailed goals that Congress expects to be integrated into trade agreements, such as reducing barriers and distortions to trade (e.g., goods, services, agriculture); protecting foreign investment and intellectual property rights; encouraging transparency; establishing fair regulatory practices; combating corruption; ensuring that countries enforce their environmental and labor laws; providing for an effective dispute settlement process; and protecting the U.S. right to enforce its trade remedy laws. Objectives also include an important obligation to consult Congress, discussed in detail below.

In the past, language defining trade negotiating objectives has been contested, contributing to the 2002 renewal controversy in which TPA passed largely along partisan lines and by the narrowest of margins in the House. This controversy reflects the importance that TPA negotiating objectives can play as a template for future trade agreements negotiated under these guidelines. For

[19] Additional referrals depend on whether there are provisions in the agreement that require changes in law under the jurisdiction of other committees.

[20] The negotiating objectives for H.R.1890/S.995 may be found in Sec. 2 of the bills. For a discussion of the negotiating objectives in TPA-2015, see CRS Report R43491, *Trade Promotion Authority (TPA): Frequently Asked Questions*, by Ian F. Fergusson and Richard S. Beth.

example, if the language of a TPA objective is highly contentious, the same issue may prove controversial when a specific trade agreement is brought before Congress for approval using that same or similar language. The labor provisions, which are emphasized in all three groups of negotiating objectives, provide the best illustration. In particular, the decision not to include minimal enforceable standards in TPA led to contentious debate over both TPA and the FTAs that later adopted the TPA language on labor. This issue was perhaps most evident in the 2005 debate on passage of the implementing bill for the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).

Because the structure of trade agreements mirrors TPA objectives, and disputes over FTAs based on those objectives brought before Congress under TPA have so far survived all challenges from opponents, the vote on renewing TPA/fast track authority is among the most critical trade votes Congress considers.

Notification and Consultation

The trade agreements authority is extended to the President provided he or his designee consults regularly with Congress. This requirement includes consultation with the Congressional Advisory Groups (CAG) in both chambers, created in TPA-2015, whose members are accredited as official advisors to the trade negotiation delegations.[21] Notification and consultation requirements have been revised in each renewal of authority. The timing of these notifications is detailed in the timeline presented in **Appendix B**. First, the President must conduct certain notifications and consultations **before negotiations begin** that include

1. notifying Congress in writing of his intention to enter into negotiations at least 90 calendar days prior to commencing negotiations;
2. consulting with the House Ways and Means, Senate Finance, other relevant committees, and the CAGs on the nature of the negotiations; and
3. providing special consultations on agriculture, import sensitive agricultural products, fishing and textile industries tariffs, and other issues.

The President must also conduct specific notifications and consultations **before (and after) agreements are entered into (signed)**, to include

1. notifying Congress in writing of his intention to enter into an agreement at least 90 calendar days prior to doing so;
2. consulting with House Ways and Means, Senate Finance, other relevant committees, and the CAGs with respect to the nature of the agreement, how it achieves the purposes defined in TPA, and any potential effects it may have on existing laws;
3. notifying the revenue committees at least 180 calendar days prior to entering into the agreement of any potential changes to U.S. trade remedy laws that may be required;
4. submitting private sector advisory committee reports to Congress, the President, and the USTR no later than 30 calendar days after notifying Congress of his intention to enter into an agreement;[22]

[21] These requirements are found in Sections 4 and 5 of the TPA-2015 and are further described in CRS Report R43491, *Trade Promotion Authority (TPA): Frequently Asked Questions*, by Ian F. Fergusson and Richard S. Beth.

[22] The private sector advisory system was established by Congress in 1974 to ensure that U.S. trade policy and

5. providing the U.S. International Trade Commission (USITC) with trade agreement details at least 90 days before entering into an agreement;
6. presenting to Congress no later than 105 calendar days after the President enters into the agreement, the USITC report on the impact of the agreement on the U.S. economy; and
7. releasing the text of the agreement 60 days prior to entering into an agreement.

The congressional consultation process is a long-standing precedent and an integral part of TPA. It reflects Congress's ongoing interest in ensuring that trade policy remains under the purview of the legislative branch by establishing in law opportunities to affect the nature and direction of trade negotiations. The effectiveness of the consultation process, however, has been questioned. The Government Accountability Office (GAO) evaluated this process based on multiple interviews with current and former congressional staff and executive branch employees. It found that from 2002 to 2007, the USTR had conducted "extensive" consultations with Members and staff of Congress on all FTAs that were to be presented to Congress for approval under TPA.[23]

According to GAO's findings, however, many congressional staff indicated that despite the high quality of information and frequency of meetings with USTR officials, they often did not allow for sufficient time to provide input into the negotiation process, were often cast more as briefings than consultations (implying an exchange of views), and did not always include last minute changes to draft FTA texts. In short, staff expressed concern that the consultation process did not satisfy many in Congress and may need to be amended to allow for greater and earlier congressional input into the drafting of FTAs.[24] Similar concerns have been raised concerning consultation with the Administration over TPP and other pending trade negotiations.

Limiting Trade Agreements Authority

Congress adopted TPA procedures on pragmatic grounds as self-limiting conditions to prevent trade implementing bills from being delayed or obstructed by congressional procedures that can either keep a bill from moving out of committee, or delay it on the floor of the House or Senate with extended debate. Trade agreements can also be the product of a fragile consensus between trade partners, and TPA procedures were designed to protect such a consensus from congressional amendments that would change the basic agreement. In crafting TPA, however, Congress did not agree to surrender its constitutional authority over trade matters and wrote into TPA a number of provisions that can limit the use of the expedited procedures.

Sunset Provision

Each renewal of the trade agreements authority has provided the use of expedited procedures for trade agreement implementing bills for a limited time, a way to ensure congressional oversight over their use. The 2002 statute made these procedures available for trade agreements entered into before July 1, 2007. TPA-2015 makes the procedures available for agreements entered into before

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negotiations benefit from, and reflect, a broad array of private sector U.S. interests. It consists of 28 committees and over 700 advisors, coordinated by the Office of the United States Trade Representative. The USTR also chairs the interagency trade coordinating structure to coordinate U.S. government positions on international trade issues. Office of the United States Trade Representative, *2012 Trade Policy Agenda and 2011 Annual Report of the President of the United States on the Trade Agreements Program*, Washington, DC, March 2012, p. 203.

[23] U.S. Government Accountability Office Report to the Chairman; Committee on Finance; *International Trade: An Analysis of Free Trade Agreements and Congressional and Private Sector Consultations under Trade Promotion Authority;* GAO-08-59; November 2007, pp. 29 and 41-42.

[24] Ibid., pp. 29 and 43-46.

July 1, 2021, provided that an extension disapproval resolution has not been introduced and passed by either chamber by July 1, 2018. Importantly, however, as with previous versions, the act provided no deadline for submitting implementing legislation for an FTA that is entered into before the expiration of the authority. For example, the FTA with Colombia was signed in November 2006 (the 109th Congress) and FTAs with Panama and South Korea were signed in June 2007 (110th Congress), but implementing bills were not passed until October 12, 2011 (112th Congress).

Extension Disapproval

The TPA legislation has required that the President request an extension of the TPA authority after a certain period of time. The extension was granted unless either House of Congress adopted a disapproval resolution. Such a resolution of disapproval may not be considered unless it is reported out of either the House Ways and Means or Senate Finance Committees. Although such resolutions have been reported out of committee in the past, none has been passed in either House of Congress. This process is a reminder to the executive branch that the availability of expedited legislative procedures is a congressional prerogative that can be denied if Congress becomes dissatisfied with how the President has conducted trade agreement negotiations.

Procedural Disapproval

The requirement that the President fulfill consultation and reporting obligations also helps preserve the congressional role on trade agreements by giving Congress the opportunity to influence the agreement before it is finalized. Should Congress determine that the President has failed to meet these requirements, it may decide that the implementing bill is not eligible to be considered under TPA rules. It would implement this decision by adopting a joint "procedural disapproval" resolution in both houses of Congress.

Consultation and Compliance Resolution (CCR)

The CCR procedure, new to TPA-2015, would allow either chamber to withdraw TPA procedures for an implementing bill, solely in that chamber, for failure to notify or consult with Congress on a trade agreement. A CCR is triggered if either committee of jurisdiction reports implementing legislation unfavorably, and different procedures subsequently are followed in each chamber.

Withdrawal of Expedited Procedures

The Trade Act of 1974, as amended, provides that the expedited procedures for consideration of trade implementing bills are enacted as rules of procedures for each house, "with the full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time."[25] Congress reserves its constitutional right to withdraw or override the expedited procedures for trade implementing bills, which can take effect with a vote by either house of Congress.[26]

This summary suggests that in addition to binding rules, the long-term success of TPA rests on a facilitating cooperation and partnership between the legislative and executive branches of government,[27] and by extension, between the two major political parties. Some have noted that

[25] Section 151(a)(2) of the Trade Act of 1974 (P.L. 93-618).

[26] See Shapiro, *Fast Track: A Legal, Historical, and Political Analysis*, p. 28.

[27] Michael A. Carrier, "All Aboard the Congressional Fast Track: From Trade to Beyond," *The George Washington Journal of International Law and Economics*, vol. 29 (1996), p. 735.

the sense of such cooperation was absent under the previous TPA, placing a strain on the trade legislative process in recent years. One could argue that a bipartisan agreement on TPA has been absent since at least 1993, as evident in the eight-year lapse during the Clinton Administration and the largely partisan passage of the 2002 TPA renewal.

Congressional Procedures Outside TPA

In addition to the expedited procedures defined in TPA, Congress, generally with the effective support and consent of the executive branch, has followed certain procedures during the consideration of trade agreement implementing bills that, although not formally defined in TPA, have been integrated into the process of congressional approval of trade agreements. Three in particular stand out:

Hearings and "Mock Markups"

Congress has insisted on reviewing a trade agreement prior to the implementing bill being introduced. This is done first in hearings before the House Ways and Means and Senate Finance Committees, as well as possibly other interested committees. The Ways and Means and Finance Committees typically follow with an "unofficial" or "informal" markup session, which may be followed by a "mock conference" of an informal draft version of the implementing bill, which is sent over by the White House, along with a draft of the final text of the trade agreement.

The informal markup is, in effect, a test run of congressional response to the trade agreement implementing bill. Because it is only an informal draft bill, there is no real legislation to "mark up," but the meetings afford committee members an opportunity to raise concerns on the draft trade agreement, as well as the informal draft implementing legislation, and offer amendments that may serve as important signals to the Administration of changes to the actual implementing bill they would like to see made. The two revenue committees may use the "mock conference" to reconcile any differences in their informal markups to reinforce congressional positions.[28]

Although a trade agreement at this point has already been concluded, a clarification or "translation" of key points that do not alter the basic agreement can and may be made in the final implementing bill.[29] The Administration, however, can exercise discretion in accepting suggested changes from Congress. For example, while the committees offered many changes to the CAFTA-DR agreement that the Bush Administration tried to accommodate, the same Administration declined to include the language of an amendment unanimously supported by the Senate Finance Committee with respect to the U.S.-Oman FTA implementing legislation, citing TPA's own requirement that only legislation "necessary or appropriate" to implement the agreement be included. The Oman FTA implementing bill passed, but a new bipartisan call for better consultation prior to the President entering into a trade agreement arose because of dissatisfaction with both the Oman FTA and the TPA process.[30]

[28] Congressional intent to influence the implementing bill is conveyed in U.S. Congress, Committee on Conference, *Trade Act of 2002*, Conference Report to accompany H.R. 3009, 107th Cong., 2nd sess., July 26, 2002, Report 107-624 (Washington: GPO, 2002), pp. 166-167.

[29] This idea is elaborated in Craig VanGrasster, "Is the Fast Track Really Necessary?" *Journal of World Trade*, vol. 31, no. 2 (April 1997), p. 106.

[30] Inside U.S. Trade, "Grassley Presses USTR To Improve Consultations on FTAs," July 7, 2006.

Side Agreements and Letters

Outside of formal TPA statutory requirements, at times Congress has encouraged or insisted on additions or clarifications to trade agreements, resulting in side agreements or side letters. Side agreements can involve additional obligations accepted by all parties after the original trade agreement has been signed. The most notable examples are the environment and labor side agreements of NAFTA. Their status with respect to being subject to fast track procedures, however, can be less than clear.[31] Side letters, by contrast, generally act as clarifying devices, usually applied to a specific issue and exist for virtually all bilateral FTAs.[32] They can be used to assuage a particular congressional concern. Side letters are typically addressed from and to the top trade negotiating representative (e.g., the USTR, trade minister, or equivalent). Side agreements and letters accompany the agreement, but do not change its text, and both require official signatures of all the negotiating parties to be considered in force, although their enforceability so far has been untested, and so is also unclear.

Informal Agreements

Some Members of Congress have relied on informal commitments from the executive branch to address issues raised in mock markups. These often relate to special interests and concerns, and their fulfillment relies on a measure of good will between Congress and the executive branch. In the case of the CAFTA-DR implementing bill, for example, the Bush Administration made accommodations to sugar, textile, and labor interests to secure congressional support.[33]

Possible Issues for Congress

TPA expired on July 1, 2007. Historically, it has been common practice, although not formally required, to have the President request that Congress provide renewed TPA (see **Appendix A**). Some Members of Congress have criticized President Obama for delaying such a request. The President did ask for TPA renewal in a speech delivered on July 30, 2013,[34] and he reiterated that request at his 2015 State of the Union address. The decision to initiate legislative action on TPA may also be influenced by Congress's desire to revamp parts of the 2002 law, which some view as outdated and which may not reflect all key elements of the emerging debate. Some of the broader policy issues and technical changes that may be contemplated are summarized below.

The Need for and Timing of TPA

From one perspective, it could be argued that TPA has not always operated smoothly and may not be needed if consensus can be built on passage of an FTA. When such a consensus exists, it is common to achieve at least a 60-vote majority in the Senate, and the House need not rely on TPA to adopt a special rule covering expedited legislative procedures. While a technically appealing point, TPA involves more than the exercise of expedited legislative procedures. It can (1) help

[31] For example, while Congress authorized funding for U.S. contributions and for participation in the administrative bodies created by the NAFTA side agreements, it did not expressly approve the agreements themselves. See 19 U.S.C. Sections 3471-3472.

[32] The U.S.-Israel FTA, completed in 1985, appears to be the sole exception.

[33] For details, see CRS Report RL31870, *The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, by J. F. Hornbeck.

[34] Rossella Brevetti, "Obama Calls for Trade Promotion Authority Combined with Trade Adjustment Assistance," Bloomberg BNA, *International Trade Daily*, July 31, 2013, Washington Trade Daily, *President to Request TPA, TAA Package*, July 31, 2013, and conversation with the Office of the United States Trade Representative, August 1, 2013.

build a consensus on trade policy between the executive and legislative branches; (2) be a signal to would-be FTA partners of congressional support for an FTA; and (3) ensure Congress of its role in the trade policy agenda by defining negotiating objectives and insisting on specific consultation and notification, among other requirements.

The timing of TPA renewal is another important question. Some have suggested that the President should put off requesting TPA renewal until negotiations for a specific FTA are near completion, which would provide a compelling rationale and motivation for congressional action. Others argue that Congress would be better served if TPA were addressed early in the negotiation process. Early action would allow Congress to weigh in prior to the end of negotiations on the critical matters of negotiation objectives and consultation discussed above. Congress may wish to consider these and other aspects of TPA in determining whether and how to proceed with a renewed authority.

Definition and Scope of Negotiating Objectives

The scope and content of U.S. trade negotiating objectives have expanded as the structure of trade has changed and the issues have become much more complex, rendering many of the negotiating objectives under prior grants of TPA out of date. Several negotiating objectives in TPA-2015 include topics addressed in a so-called "21st century trade agreement," which reflect objectives not foreseen in previous TPA renewals. Current TPP negotiations, for example, emphasize new or more nuanced issues such as the treatment of state-owned enterprises (SOEs), new regulatory cooperation and coherence, effects of trade on small- and medium-sized businesses (SMEs), and the implications of FTAs on global supply chains, which have come to redefine the nature of global trade. Congress may wish to consider these and other possible new negotiating objectives.

The treatment of negotiating objectives in trade agreements is a primary example and remains perhaps among the most controversial areas for TPA renewal. Many Democrats were dissatisfied with the outcome in the Trade Act of 2002, leading to a largely partisan vote on passage, particularly in the House. Because the issue remained unresolved for many Members, they withheld approval of FTAs at least until after a bipartisan agreement was struck by congressional leadership and the Bush Administration on May 10, 2007. The so-called "May 10th Agreement" incorporated significant changes in labor, environment, and intellectual property rights (IPR) commitments for reciprocal trade agreements already negotiated with Peru, Colombia, Panama, and South Korea, including key elements proposed by House Democrats during the 2002 renewal debate.[35]

These changes have been accepted as a baseline for future trade agreements by many, but not all, Republicans and Democrats. Congress may wish to consider including some or all of the May 10th Understanding commitments as part of the formal trade negotiating objectives in TPA. Some Democrats have raised the issue of whether further improvements might be made to these provisions. Alternatively, some Republicans have responded that they still have serious misgivings with the May 10th Understanding, and that it should not be construed as reflecting "an

[35]Among important changes from previous FTAs, signatories were required to (1) adopt as fully enforceable commitments the five basic labor rights defined in the United Nations International Labor Organization's (ILO) *Fundamental Principles and Rights at Work and its Follow-up (1998) Declaration*, (2) adhere to numerous multilateral environmental agreements (MEAs), and (3) accept pharmaceutical intellectual property rights (IPR) provisions that could expedite that country's access to generic drugs. See U.S. Congress, House Committee on Ways and Means, *Bipartisan Trade Promotion Authority Act of 2001*, 107th Cong., 1st sess., October 16, 2001, Rept. 107-249 Part 1 (Washington: GPO, 2001), p. 54.

agreement on a new trade policy."[36] However, TPA-2015 contains the key provisions of the May 10th Understanding regarding labor and environmental provisions, although it is less clear to what extent TPA-2015 reflects the IPR provisions.

Consultation and Notification

Some Members of Congress have expressed dissatisfaction with executive branch execution of the trade negotiation consultation process required under TPA.[37] The issue is a recurring one, and has gained new life with the TPP negotiations, for which some Members are dissatisfied with the quality of consultation. Key issues include defining procedures that ensure Congress can influence the substance of FTAs early in the negotiation process, and that it is afforded appropriate access to draft texts of agreements as they are being negotiated. Given the evolving nature of this section of TPA, it is possible that Congress may seek to clarify negotiation and consultation procedures. Some staff and Members have argued that they have less access to draft text than representatives of business and nongovernment organizations (NGOs). Members, particularly those sitting on committees with jurisdiction over trade, have repeatedly expressed the importance of being kept current on trade agreement negotiations so as to influence the text of the agreement, and later "to participate meaningfully in the drafting of the implementing bill."[38]

Trade Agreement Enforcement

There is bipartisan interest in ensuring that the United States makes every effort to enforce commitments of its trade partners defined in trade agreements. Separate legislative efforts have addressed the trade enforcement issue, and President Obama has created the Interagency Trade Enforcement Center. Congress, however, may also wish to consider language on trade agreement enforcement in TPA as well.

Technical Considerations

The most recent use of the TPA expedited procedures in the 112th Congress raised a number of technical issues that Congress may wish to reevaluate. A non-exhaustive list might include

1. Necessary or appropriate: Congress has repeatedly emphasized the importance of taking a strict interpretation of using TPA only for those provisions in an implementing bill that are "necessary or appropriate to implement the agreement."[39] TPA-2015 takes this provision a step further by requiring that provisions in implementing legislation be "strictly necessary or appropriate." Yet, at times, there have been attempts to introduce provisions that some have viewed

[36] U.S. Congress, Senate Committee on Finance, *United States-Colombia Trade Promotion Agreement Implementation Act*, 112th Cong., 2d sess., September 20, 2012, Rept. 112-222 (Washington: GPO, 2012), pp. 55-58. For other opinions, see also "Letter to USTR Ron Kirk from Representatives Dave Camp and Kevin Brady, and Senators Orrin Hatch and John Thune, December 21, 2011, and Lucien O. Chauvin, "Trans-Pacific Partnership Talks to Dominate Trade Negotiations Agenda in 2012," *Bloomberg BNA International Trade Reporter*, January 26, 2012.

[37] U.S. Government Accountability Office, *International Trade: An Analysis of Free Trade Agreements and Congressional Private Sector Consultations under Trade Promotion Authority*, GAO-08-59, November 2007 and Inside Trade, "Grassley Presses USTR to Improve Consultations on FTAs," *World Trade Online*, July 7, 2006.

[38] U.S. Congress, House Committee on Ways and Means, *Bipartisan Trade Promotion Authority Act of 2001*, 107th Cong., 1st sess., October 16, 2001, Rept. 107-249 Part 1 (Washington: GPO, 2001), pp. 36, 43, and 55, and in the 112th Congress, S. 3225, "The Congressional Oversight Over Trade Negotiations Act."

[39] U.S. Congress, House Committee on Ways and Means, *Bipartisan Trade Promotion Authority Act of 2001*, 107th Cong., 1st sess., October 16, 2001, Rept. 107-249 Part 1 (Washington: GPO, 2001), p. 39.

as challenging such a "strict" interpretation. Some Members may wish to define the "necessary or appropriate" language more precisely. Others may argue that each Congress is better served by having flexibility to apply this standard as it chooses.

2. Time limitation on introduction of an FTA implementing bill: legislation implementing the FTAs with Colombia, Panama, Peru, and South Korea was not introduced until 3-4 years after the FTAs were signed. In part the delay reflected congressional leveraging of an FTA to press for policy changes in trade partner countries that fell outside the purview of the FTA. This tactic raises the issue of whether Congress might consider a time limit for introduction of an implementing bill after negotiations conclude.
3. Changing FTA text: some argue that text changes in the U.S.-South Korea FTA after the negotiations had concluded were contrary to TPA and so opened up the possibility that approval of the FTA could have been denied on technical grounds. Congress may wish to consider whether TPA renewal should address this issue.

Options for Congress

As noted by two long-time observers of the congressional trade policy process, "The real power of fast track (TPA) is the underlying political compact between Congress and the President rather than its statutory guarantees, which are technically quite fragile."[40] There is an implied extension of "political compact" to relationships within Congress as well. Congress repeatedly seeks to develop the needed consensus on trade policy, with varying degrees of success, but generally with an understanding that a minimal degree of bipartisan understanding is needed to pass trade legislation. TPA has been a key element of this process. In consideration of the current TPA authorization legislation, Congress has a number of options with respect to its possible renewal. Four that span the spectrum are

- **Renew and Revise TPA Authority**. Under this option, Congress could grant the President new authority with revisions to its structure, and without restricting it to specific agreement negotiations. The TPA-2015 legislation follows this option.
- **Extend a Targeted TPA**. Congress could extend TPA to complete a specific agreement, such as the TPP. Representative Levin sought to introduce a modified grant of TPA covering only the TPP negotiations as a substitute amendment during the House Ways and Means Committee markup of TPA-2015.
- **Grant Permanent TPA Authority**. Congress could grant the President a form of permanent fast track/TPA in a two-tier procedure. For example, one expert suggested that (1) Congress could enact into law permanent fast track procedures; and (2) before specific negotiations could begin, both houses of Congress would have to pass a resolution approving the negotiations and objectives designed for the specific set of negotiations.[41]
- **No TPA Renewal**. The lack of TPA could delay action on future reciprocal trade agreements, but trade policy can move ahead in its absence, including

[40] Shapiro and Brainard, *Trade Promotion Authority Formerly Known as Fast Track*, p. 1. See also Gary G. Yerkey, "Renewal of TPA Seen as Highly Unlikely Next Year, Particularly if Democrats Triumph," *International Trade Reporter*, October 26, 2006, p. 1528.

[41] See for example Destler, *Renewing Fast-Track Legislation*, pp. 41-43, and Greg Mastel and Hal Shapiro, "Fast Track Forever?" *The International Economy*, Summer 2006, pp. 54-55.

consideration of Trade and Investment Framework Agreements (TIFAs), unilateral preference arrangements (e.g., the African Growth and Opportunity Act—AGOA), and trade enforcement measures, among others. The United States has also conducted trade negotiations prior to having TPA authority in place. In addition, some Members do not support TPA because they view the expedited procedures as giving up too much congressional authority.

Current Legislation[42]

In the 114th Congress, legislation to renew TPA—the Bipartisan Congressional Trade Priorities Act of 2015—was signed by the President on June 29, 2015. The legislation would reauthorize TPA for four years with the possibility of a three-year extension. The legislation largely reflects the basic structure of previous TPA/fast-track authorizing legislation. However, it makes some changes, such as expanding executive branch requirements to consult with Congress and private sector advisers.

As with previous TPA/fast-track statutes, the two bills also included sets of "overall trade negotiating objectives" and "principal trade negotiating objectives." Included in the latter category were topics that were included in previous TPA statutes, albeit revised in some cases, including trade in goods, trade in services, foreign investment, intellectual property, transparency, regulatory practices, dispute settlement and enforcement, trade in agriculture, labor, environment, border taxes, trade remedy laws, and textile negotiations. The bills include new objectives reflecting new 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 bills included new provisions on currency and human rights as "principal trade negotiating objectives." Currency was previously included in the "promotion of certain priorities" category in the 2002 act. The two bills also included a category of trade negotiating objectives called "capacity building and other priorities."

[42] For specific provisions of TPA-2015, please see CRS Report R43491, *Trade Promotion Authority (TPA): Frequently Asked Questions*, by Ian F. Fergusson and Richard S. Beth.

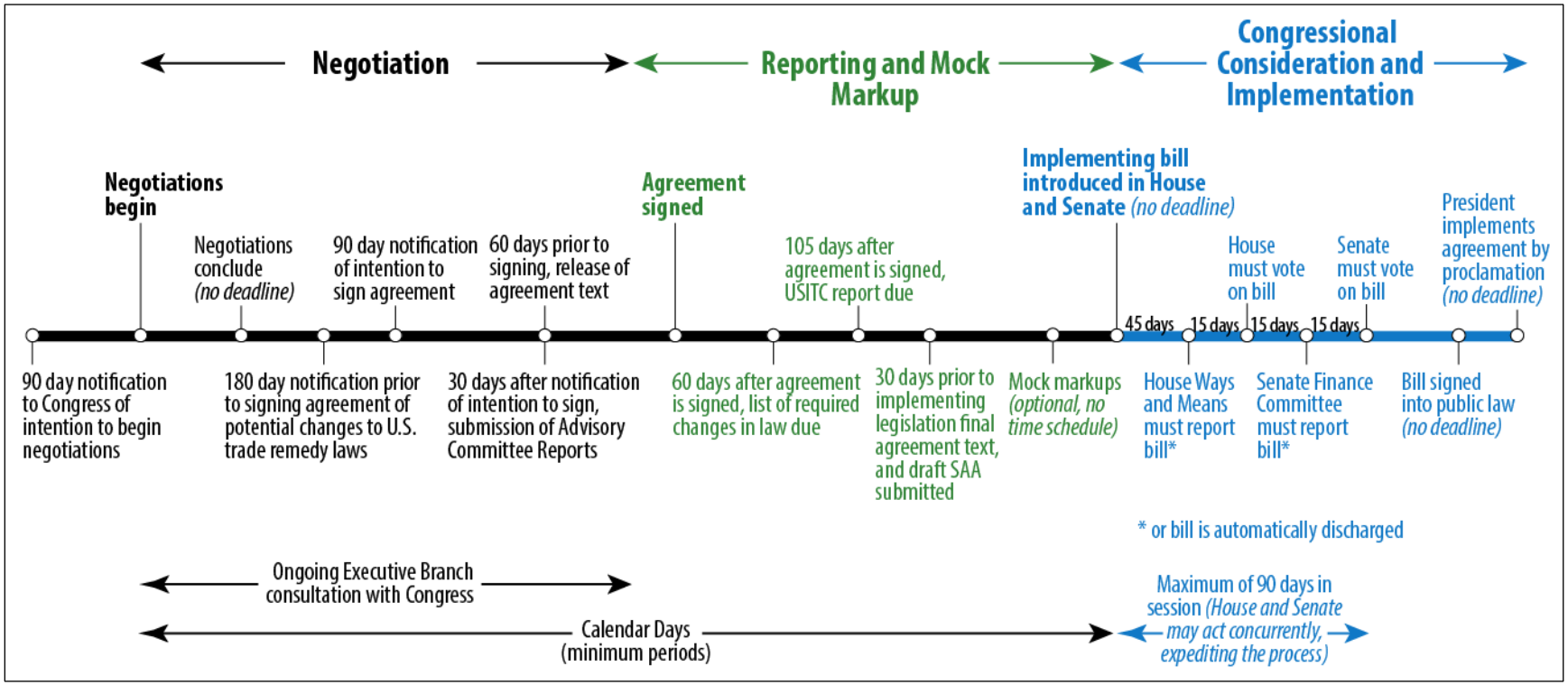
Appendix A. Congressional Trade Agreements Authority Requested by and Granted to Presidents Since 1934

President	Requested Authority	Received Authority	Legislative Authority-Public Law	Negotiations Undertaken or Concluded (Date signifies conclusion)
Roosevelt	Yes	Yes	Reciprocal Trade Agreements Act (RTAA) of 1934 (P.L. 73-316). Renewed 1937, 1940, 1943, and 1945	Bilateral reciprocal tariff agreements with various countries
Truman	Yes	Yes	Trade Agreements Extension Act of 1948 (P.L. 80-792), renewed in 1949 and 1951	General Agreements on Tariffs and Trade (GATT) negotiations: Geneva Round (1947, founding); Annecy Round (1949); Torquay Round (1951)
Eisenhower	Yes	Yes	Trade Agreements Extension Act of 1953 (P.L. 83-215) Renewed in 1954, 1955, and 1958	GATT Negotiations: Geneva Round (1959); Dillon Round (1962)
Kennedy	Yes	Yes	Trade Expansion Act of 1962 (P.L. 87-794)	Kennedy Round
Johnson	Yes	Yes	Trade Expansion Act of 1962 (P.L. 87-794)	Kennedy Round (1967)
Nixon	Yes	No	Trade agreements authority lapsed from July 1, 1967, to January 3, 1975. Nixon resigned on August 9, 1974.	
Ford	No	Yes	Trade Act of 1974 (P.L. 93-618)	Tokyo Round
Carter	Yes	Yes	Trade Act of 1974 (P.L. 93-618)	Tokyo Round (1979)
Reagan	Yes	Yes	Trade Agreements Act of 1979 (P.L. 96-39), Trade and Tariff Act of 1984 (P.L. 98-573)	Uruguay Round; U.S.-Israel FTA (1985); U.S.-Canada FTA (1988)
Bush I	No	Yes	Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418)	Uruguay Round; North American Free Trade Agreement (1993)
Clinton	Yes	Yes	Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418), renewed 1993. Authority lapsed from April 15, 1994, to August 6, 2002	Uruguay Round (1994) Jordan (2001) (not considered under TPA)
Bush II	Yes	Yes	Trade Act of 2002 (P.L. 107-210)	World Trade Organization (WTO) Doha Round; FTAs with Chile (2003), Singapore (2003), Australia (2004), Morocco (2004), Dominican Republic-Central America (2005); Oman (2006), Peru (2007), Colombia (2011), Korea (2011), Panama (2011).
Obama	Yes	pending	Legislation introduced in the 113th Congress	Doha Round; Trans-Pacific Partnership (TPP); Trans-Atlantic Trade and Investment Partnership (T-TIP); Trade in Services Agreement (TISA)

Source: CRS, with information drawn from various issues of three major sources: the *Congressional Quarterly Almanac* (cited as CQ Almanac), Congressional Quarterly, *Congress and the Nation*, and the *Public Papers of the Presidents of the United States*.

Appendix B. Congressional Timeline under TPA

Figure B-1. Congressional Timeline



Source: CRS.

Appendix C. A Short Guide to the Expedited Legislative Procedures for Passage of Trade Implementing Bills Under TPA[43]

I. Before the formal TPA expedited procedures come into play, the House Ways and Means and Senate Finance Committees typically hold "mock markups" on informal drafts of the implementing legislation, voting to approve or disapprove. The vote and any amendments to the draft legislation, however, are not binding on the Administration. These meetings provide an important opportunity for Congress to register specific concerns and/or viewpoints with the Administration before it sends final implementing legislation to Congress, which initiates the expedited procedures.

II. The President sends a final legal draft text of the trade agreement and a draft implementing bill (with supporting materials) to Congress on a day that it is in session. The draft bill may, or may not, reflect some or all of amendments adopted by committees in the mock markup.

III. Identical bills are subject to mandatory introduction in each house of Congress on the day received. The bills are referred to the House Ways and Means and Senate Finance Committees jointly, with others if jurisdiction warrants.[44]

IV. Each committee has 45 in session days to report the bill or it is automatically discharged and the bill is placed on the appropriate calendar.[45] An implementing bill subject to TPA procedures is likely to be a revenue bill, in which case the Constitution requires that the Senate ultimately act on the House bill. Under these conditions, the Senate Finance Committee has until the later of the 45th day of session after the Senate bill is introduced or the 15th day of session after the Senate receives the House bill.

V. In each house, after the implementing bill is reported or discharged, any Member may offer a non-debatable motion to consider it. Debate is limited to 20 hours evenly divided between those for and against. The measure cannot be amended, and a motion or unanimous-consent request to suspend this restriction is not in order. If the chamber has not completed floor action by the 15th day after the bill is reported or discharged, any Member may bring it to a vote.

VI. A bill passes by simple majority under the statute. Whichever House acts second (typically the Senate assuming the bill is a revenue bill) considers and debates its own bill, but takes its final vote on the bill received from the other House (typically the House of Representatives).[46] This procedure ensures that both houses will ultimately act on the same measure, thereby clearing it to be presented to the President (without the need for conference). After the implementing bill is signed, under its terms, the agreement enters into force for the United States when the President implements it by proclamation. This typically occurs after the USTR has assured the President

[43] Title XXI of the Trade Act of 2002 (P.L. 107-210) and Section 151 of the Trade Act of 1974, as amended.

[44] For example, the U.S.-Chile Free Trade Agreement contained a provision affecting the temporary entry of business persons, requiring the implementing bill to be referred to the House and Senate Judiciary Committees.

[45] Cumulatively, the whole process can take as long as 90 "in session" days, potentially lasting many months.

[46] In fact, the Senate can act, and has acted, on its own bill before receiving the House bill. In the case of the U.S.-Chile FTA implementing bill, the Senate Finance Committee reported out first. When the House bill, which was identical, came over, it was put on the Senate calendar directly. For the CAFTA-DR implementing bill, the Senate actually voted first on its own bill, necessitating a later (procedural) vote to substitute the (identical) language of the Senate bill into the House-passed bill when received. These proceedings in the Senate permitted final action to occur on the House measure, as constitutionally required.

that the partner country(ies) has made the legislative and regulatory changes necessary to meet all obligations under the trade agreement, and the President exchanges notes with the trading partner government providing for the agreement's entry into force on or after a specific date.

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