Insight

PRIMER: TRADE PROMOTION AUTHORITY

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Trade promotion authority (TPA), also known as fast track, is a cooperative tool between the legislative and executive branches to facilitate free trade agreements with foreign governments. Congress cedes some of its authority over trade to the president in order to facilitate trade negotiations, but it outlines trade agreement objectives and retains the right to accept or reject any agreement the president negotiates.

Through TPA, Congress can empower the executive branch to negotiate free trade agreements that include Congress's trade policy priorities and trade objectives. Congress can also use TPA to limit the executive branch and protect its constitutional authority by requiring regular consultations and final approval of any trade agreement.

Congress has delegated a limited amount of trade authority to the President since 1934, but this delegation expanded dramatically during the Nixon administration. TPA used to have strong bipartisan support, but the most recent renewal in 2002 passed mostly along party lines. TPA expired in 2007, and renewal has not been a legislative priority during the Obama presidency. However, a bipartisan effort to renew TPA is under negotiation in Congress, although renewal legislation has not yet been filed.

CONSTITUTIONAL FOUNDATIONS OF TRADE PROMOTION AUTHORITY

The Constitution grants Congress the express authority to regulate foreign trade.[1] The Constitution does not grant the president any responsibility for trade, but it does give the executive broad authority over foreign affairs, including negotiating treaties and other international agreements.[2] While for some this is an obstacle to TPA,[3] there are no constitutional impediments to Congress coordinating with other branches to accomplish its duties.[4] Further, Congress is not in fact delegating its authority to regulate foreign trade. It merely is delegating the negotiations. Congress retains the ability to approve or disapprove all trade agreements.[5] Congress often sets the terms by which it wants the President to negotiate, setting the stage for the kind of trade agreement Congress would have negotiated if it had not authorized the President to do so on its behalf.

THE EVOLUTION OF PRESIDENTIAL TRADE AUTHORITY

For much of U.S. history, trade agreements dealt exclusively with tariffs. Congress set tariffs on all foreign imports, and the President negotiated and implemented "general bilateral treaties of friendship, commerce, and navigation."[6]

The Great Depression ushered in the most protectionist era in U.S. trade with the passage of the Smoot-Hawley tariff bill.[7] With Smoot-Hawley, Congress set every tariff level.[8] These high tariffs prompted our trading partners to retaliate with high tariffs of their own.[9] The Smoot-Hawley disaster prompted Congress to pass the

Reciprocal Trade Agreements Act of 1934, legislation that gave the President approval to enter into trade agreements that reduced tariffs within pre-defined levels.[10]

The next big development in trade was the General Agreement on Tariffs and Trade (GATT), which ushered in multilateral negotiations and nontariff barriers (NTBs).[11] Including NTBs in trade agreements caused new issues to arise. Implementing GATT trade agreements often required changes to U.S. law beyond tariff reduction, something that was not included in the President's negotiating authority.[12]

This development ultimately forced Congress to grant new, broader trade agreement authority for the President. In the 1970s, Congress passed fast track trade negotiating authority, allowing the President to negotiation within predefined objectives and to submit them to Congress for an up or down vote.[13]

GATT was eventually succeeded by the World Trade Organization (WTO) in 1995. While GATT is still the treaty that governs the trade negotiations, the WTO facilitates the negotiations.

ELEMENTS OF TRADE PROMOTION AUTHORITY

TPA legislation has three key elements. TPA outlines Congress's trade policy priorities and negotiating objectives, establishes requirements that the executive branch notifies and consults with Congress during trade negotiations, and defines the terms that must be met for the administration to enter into trade agreements as well as the expedited legislative procedures used to implement those agreements.

Trade Negotiating Objectives

Congress asserts itself the most in TPA through trade negotiating objectives. Using its constitutional authority to regulate foreign trade, Congress defines the objectives the President must follow when negotiating trade agreements. These objectives "are definitive statements of U.S. trade policy that the Administration is expected to honor…."[14]

Negotiating objectives can be very broad, such as enhancing the domestic economy, or more focused, such as reducing trade barriers and protecting intellectual property rights. These negotiating objectives form the structure of any trade agreement the administration negotiates and are subject to intense debate in Congress. In 2002, controversy over the negotiating objectives led to a narrow, mostly partisan victory in the House of Representatives.[15]

Notification and Consultation

The notification and consultation requirements in TPA are important provisions that ensure Congress's interest in and control over trade policy. Consulting Congress on trade negotiations is "a long-standing precedent and an integral part of TPA."[16] The Administration must follow the notification and consultation procedures for Congress to use the expedited legislative procedures to implement a trade agreement.[17]

The implementing provisions of 2002's TPA legislation were extensive. The bill required the president to notify Congress 90 days prior to signing any trade agreement and to provide to Congress a list of required changes to

U.S. law within 60 days of signing the agreement.[18] The president was also required to transmit to Congress, on a day when both chambers are in session, a copy of the final text of the agreement, a draft implementing bill, a statement describing the administrative actions needed to implement the agreement, and statements describing how the agreement meets Congress's trade priorities and objectives.[19]

Expedited Legislative Procedures

Expedited legislative procedures are one of the most important components of TPA. These procedures ensure quick passage any trade agreement that meets the statutory requirements outlined by Congress. The implementing bill must be introduced in each chamber and immediately referred to committees of jurisdiction.[20] These committees have a limited time to hold hearings and conduct other business on the bill before it is automatically discharged for a vote.[21] Floor debate is limited.[22] No amendments are allowed, and each chamber must hold a straight up or down vote on the implementing legislation.[23] Passage occurs with a simple majority.[24]

Prohibiting amendments is very important to facilitating trade agreements. Foreign trade partners have confidence negotiating with the U.S. when they know that Congress may not amend the agreements they reach with the executive branch.

CURRENT DEVELOPMENTS

There is no current legislation on file to extend TPA to President Obama, but there is a bipartisan effort to renew TPA so that U.S. trade officials can complete current trade negotiations. Senator Max Baucus (D-MT) and Representative Dave Camp (R-MI) are reportedly near an agreement to renew TPA legislation in time for the Trans-Pacific Partnership (TPP) agreement, which is due before the end of 2013.[25]

Recent news reports suggest that the renewal process will not necessarily be smooth, however, as both Democrats and Republicans have expressed reservations at various elements of TPA. Democrats are concerned with inserting labor protections such as trade adjustment assistance[26], and some House Republicans want Congress to reassert authority over trade and refrain from giving Obama more power.[27] Members of both parties have expressed that currency manipulation needs to be addressed in any trade negotiation.[28]

[1] U.S. Const. art. I, § 8