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Trade Promotion Authority: Myths & Facts

By Jeff Okun-Kozlowicki and Gabe Horwitz

There is a \$10 trillion trade prize in Asia. The question is how much of that prize will America claim?

Between 2000 and 2010, America's share of exports to key Asia-Pacific markets fell by 43%.¹ But if we were to regain our historical share of these export markets—which are set to approach \$10 trillion by the end of this decade—it would increase U.S. exports by almost \$600 billion and support over 3 million jobs in 2020 alone.² *The key to this is TPA.*

Trade Promotion Authority (TPA) is the procedural tool that allows the president to negotiate trade deals, Congress to influence the negotiations, and our trading partners to see that we are serious about expanded trade. TPA, however, expired in 2007—leaving the U.S. without a key tool to access foreign export markets.

Trade, in general, is vital for the American economy—for the middle class and our nation as a whole. American exports supported 9.8 million jobs in the United States in 2012³, and these jobs generally pay higher than non-export-oriented jobs.⁴ Trade will also become more vital as developing economies grow.

Seizing the opportunities to access foreign markets directly expands the U.S. economy and creates more employment opportunities for middle-class Americans. But this won't be possible without the procedural tool that policymakers can use to get trade deals done. In the halls of Congress, there are many myths about what TPA does and why it is important. In this memo, we seek to set the record straight.

CLAIM #1: TPA REMOVES CONGRESSIONAL INFLUENCE.

FACT: TPA is a formal, public, and binding opportunity for Congress to guide and shape trade agreements.

By passing TPA, Congress will ensure that they debate and set clear negotiating goals and objectives for trade agreements. For example, in the Bipartisan Trade Promotion Authority Act of 2002 (Trade Act of 2002), Congress explicitly laid out nine overall trade negotiating objectives, from market access to environmental standards. Congress then went on to outline over 50 principal negotiating objectives across 17 categories, ranging from electronic commerce to family farms.⁵ Congress also provided detailed instructions for the Office of the United States Trade Representative (USTR) to seek key goals on trade in services, intellectual property, and other areas—while providing caveats that U.S. interests, laws, and regulations should be respected. TPA and its ancestors also allowed Congress to place specific limitations on how far negotiators could go in cutting tariffs on goods.⁶

These are more than just helpful suggestions—Congressional instruction directly influences the creation and negotiation of agreements. For example, after the North American Free Trade Agreement (NAFTA) came into force, many civil society groups objected to the secrecy of NAFTA’s investor-state dispute settlement process.^{*7} Critics objected that the tribunals’ proceedings took place “behind closed doors” and that only the final judgments were made public.⁸ This outcry led Congress, in designing the Trade Act of 2002, to provide the president with specific instructions that investor-state dispute settlement had to be more transparent in future trade agreements. Congress required that “all proceedings, submissions, findings, and decisions” in dispute settlement should be promptly published and tribunals’ hearings themselves should be open to the public, along with several other requirements.⁹ Because of that, Congress’ instructions can now be found in all U.S. trade agreements signed since 2002.^{**} Similar guidance from Congress has yielded new or improved trade agreement provisions on anti-corruption, labor and the environment, and other key emerging issues.

With a number of trade deals in the works, including the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), Congress can use TPA to weigh in and directly influence the negotiations. If Congress is concerned that TPP or TTIP negotiations will cover trade challenges that will break new ground—such as regulatory cooperation and the digital economy—they can use TPA to set specific objectives for USTR. Without TPA, the formal role of Congress is quite limited.

* Investor-state dispute settlement provides foreign investors with legal protections by creating neutral, non-political tribunals that can redress trade agreement violations.

** In addition, the United States and the other NAFTA parties offered an official interpretation on July 31, 2001 that sought to correct the perceived imbalance on secrecy. This interpretation pushes investor-state dispute settlement toward greater public involvement and transparency, and provides a preview for the more detailed provisions found in subsequent U.S. trade agreements.

CLAIM #2: TPA GIVES TOO MUCH AUTHORITY TO THE PRESIDENT ON TRADE POLICY.

FACT: TPA preserves Congress's ultimate authority over trade policy by subjecting trade agreements to a Congressional vote.

Under TPA, Congress not only has the ability to guide the overall trade negotiations, but also possesses the final yes or no vote on any trade agreement that the president signs. The United States does not formally commit to a trade agreement unless both chambers of Congress vote to approve it.

The modern versions of TPA actually preserve more power than the forerunners. The Reciprocal Trade Agreements Act (RTAA) of 1934 was the first time Congress delegated trade-negotiating authority to the president. The president was permitted to cut tariffs within certain limitations; final agreements did not require Congressional approval. The RTAA was periodically extended in various forms for the next three decades.

Congress has delegated trade-negotiating authority to every president since 1934—except for President Obama.¹⁰

As global trade has grown more complex, so have trade agreements and negotiations. With increasing global supply chains, more sophisticated disciplines and barriers are being identified and discussed. Because of that, modern negotiations have required more Congressional oversight. The Trade Act of 1974, which created TPA as we know it, gave Congress more power than the RTAA. Under the Trade Act of 1974, Congress retained final authority to ratify—through an up-or-down vote—any trade agreement that the president signed.

Importantly, TPA bills typically required the president to notify Congress of the intention to sign any trade agreement 90 days in advance of signing, and to brief relevant Congressional committees. This timeframe allowed Congress to voice any remaining objections and influence the agreement before the text was finalized. If the president had not met these consultation requirements, Congress could remove TPA.

Past TPA bills have also included procedures through which Congress could intervene to pull back trade negotiating authority. Under the Trade Act of 2002, for example, the president had to submit a report to Congress by March 2005 describing the progress that had been made on Congressional trade priorities and why the progress justified an extension of TPA until 2007. Congress also had the opportunity to pass “procedural disapproval resolutions” if they were unsatisfied with the progress or the direction of negotiations or with the extent of the president’s consultations while the

negotiations were underway. If both chambers passed disapproval resolutions, TPA would have been taken away from the president.¹¹

Congress Could Have Picked NAFTA Apart...

When NAFTA was still under negotiation in 1991, Congress had the power to rescind TPA through “procedural disapproval resolutions.” Concerns about the impact of NAFTA and whether the agreement would meet Congress’s negotiating objectives led to heated debate on whether to pass such resolutions. In response, President George H.W. Bush created an Action Plan that promised greater collaboration with Congress, trade adjustment assistance for U.S. workers, and other measures.¹² The House of Representatives and the Senate voted on disapproval resolutions in May 1991; the resolutions failed in both chambers. Congress had the power to pick NAFTA apart, and declined to use it.

CLAIM #3: TPA IS NOT NECESSARY TO COMPLETE NEGOTIATIONS.

FACT: Trading partners—especially important ones—will not sign a trade agreement unless that agreement will be final.

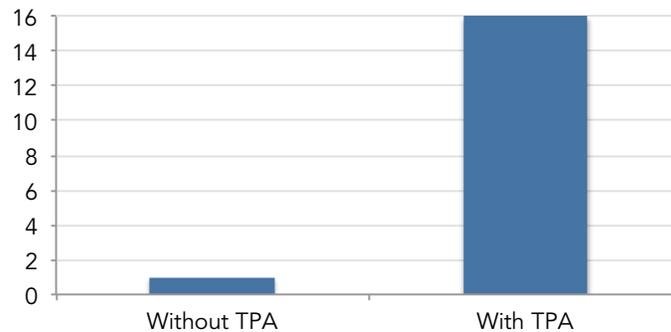
Trading partners need the United States to negotiate in good faith in order to maintain approval by their legislatures and domestic constituencies. Partners need to know that they will not be asked to sign a detailed, complex agreement only to have the United States later twist their arms for selected changes. The Senate Finance Committee stated in 1974 that trade negotiations would be impossible to complete without “reasonable assurances that the negotiated agreements would be voted up-or-down on their merits.”¹³

TPA not only allows Congress to have a public role in the negotiations by setting objectives, it also sends a clear signal to our trading partners. With TPA, other countries clearly know what Congress expects—and what has to be delivered to secure American support. Debate, discussion, and a positive vote strengthen USTR’s hand in negotiating.

This bears out in practice: in the last forty years, the United States has only signed one trade agreement—with Jordan in 2000—when the President did not have TPA. Jordan’s GDP at that time was \$8.46 billion¹⁴—roughly half of the state of Wyoming (\$17.43 billion) in 2000.¹⁵

TPP and TTIP negotiations are proceeding under the assumption that TPA will be in place by the time negotiations finish.¹⁶ If Congress does not renew TPA, it is unlikely that these important negotiations will finish at all.

U.S. Trade Deals Signed Since 1973¹⁷



CLAIM #4: TPA FOSTERS SECRET DEALS MADE IN THE DARK.

FACT: TPA mandates that the president and USTR consult with a diverse cross-section of stakeholders, the public, and Congress throughout trade negotiations.

Since the president will have to seek Congressional approval—and public acceptability—for any trade agreement, there are strong incentives to brief Congress and key stakeholders throughout the process. TPA formalizes these consultations.

Congressional Engagement

Past TPA legislation required the president to notify Congress of intent to start negotiating and to consult with the House Ways and Means and Senate Finance Committees (which have jurisdiction over trade policy) throughout negotiations. Although TPA has not been in place during the TPP negotiations, USTR has acted as though the 2002 provisions were still in effect and has sought input and feedback from Senate Finance and House Ways and Means Committee staff “hundreds of times.”¹⁸ Past TPA bills have also required the president to consult with any committee with “jurisdiction over legislation involving subject matters which would be affected” by the trade agreement under negotiation¹⁹ throughout the process. For TPP negotiations, USTR has consulted with staff from more than 10 relevant committees,²⁰ which amounts to over 25% of all Congressional committees. All told, USTR had engaged in over 350 consultations with Congress over the TPP by March 2012 alone.²¹

Moreover, TPA bills typically require the president to consult with Congress before signing an agreement. Negotiators must discuss how the agreement meets the negotiating objectives—those set by Congress—and must provide details on how the trade agreement would affect existing U.S. laws.²² The Omnibus Foreign Trade and Competitiveness Act of 1988 went further by requiring information on “why and to what extent the agreement does not achieve . . . applicable purposes, policies, and objectives” set by Congress.²³

Further, without TPA, the White House is not required to provide Congress access to negotiating texts.* Renewing TPA would allow Congress to formally require access to negotiating texts—and could give Congress the opportunity to expand such access.

Stakeholder Engagement

With the Trade Act of 1974, Congress built a system of advisory committees where there previously was none. Congress established the Industry Trade Advisory Committees to ensure that trade negotiators were consulting with private sector representatives and would thereby take negotiating positions that were in the country’s best commercial interests. Subsequent legislation created committees of stakeholders with agricultural (1974), labor (1992), environmental (1994), and other interests. Organizations represented on the committees run the gamut from advocacy groups—including the AFL-CIO, the Environmental Defense Fund, Oceana, Consumers Union, and the National Farmers Union—to large U.S. companies like Cargill, General Electric, and Kraft Food.²⁴ USTR is obliged to brief these committees regularly during trade negotiations and to seek their valuable feedback. The committees, in turn, are obliged to report to the President and Congress on their views.

Existing advisory committees draw on a diverse set of stakeholders. If Congress believes that the current structure and representation of advisory committees do not yield the right balance of stakeholder feedback, Congress can use TPA renewal to update the system and create new committees that focus on emerging trade issues.

In addition to formal advisory committees, TPA legislation typically mandates additional public participation. Even without a formal TPA mechanism to govern their efforts on TPP negotiations, USTR has been taking further steps to enhance participation: stakeholders have been invited to attend various sessions at the negotiating rounds and to engage in briefings and discussions with negotiators. Stakeholder engagement has included briefings by chief negotiators, listening

* The Administration has nevertheless sought to follow TPA-style procedures for TPP negotiations in terms of interaction with Congress. See: United States, Library of Congress, Congressional Research Service, “The Trans-Pacific Partnership Negotiations and Issues for Congress,” June 17, 2013. Accessed August 1, 2013. Available at: <http://www.fas.org/sgp/crs/row/index.html>.

to individual organizations' presentations, and meetings with negotiators (one-on-one or in small groups).²⁵ In fact, USTR had over 350 consultations with stakeholders by March 2012 as part of the TPP negotiations, with stakeholders participating as observers as well as negotiating.²⁶

Trans-Pacific Participation

At the July 2013 round of negotiations in Malaysia, over 200 stakeholders joined negotiators for an engagement event.²⁷ In September 2012, over 250 organizations sent representatives to negotiations in Leesburg, Virginia. Organizations participating included the AFL-CIO, the American Civil Liberties Union, Business Software Alliance, Electronic Frontier Foundation, PhRMA, Public Citizen, Sierra Club, the World Wildlife Fund—and even Third Way.²⁸

CONCLUSION

TPA has a proven track record of establishing clear and accountable roles for both Congress and the White House, thus allowing for effective negotiating, robust oversight, and public engagement on trade deals. It needs to be reauthorized.

The stakes could not be higher. Third Way has previously calculated that, in 2020 alone, leading Asia-Pacific economies will import almost \$10 trillion in goods—offering significant new opportunities for American exporters and workers.²⁹ If the U.S. has any hope of tapping into these massive export markets—as well as other markets we are exploring, such as the EU—our policymakers need Trade Promotion Authority to get the job done.

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ABOUT THIRD WAY

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For more information about Third Way please visit www.thirdway.org.

Endnotes

1 Ed Gerwin, "Boatloads of Growth: Recapturing America's Share of Asia-Pacific Trade," Third Way, Report, June 2012. Accessed August 27, 2013. Available at: <http://www.thirdway.org/publications/536>.

2 Ibid.

3 United States, Department of Commerce, Office of Competition and Economics Analysis, "Jobs Supported by Exports 2012: An Update," February 26, 2013. Accessed August 6, 2013. Available at: <http://www.trade.gov/mas/ian/employment/>.

4 "The Facts About Modern Manufacturing," Report, the Manufacturing Institute, 2009, Sec. 1, p. 19. Accessed September 9, 2013. Available at: <http://www.themanufacturinginstitute.org/Research/Facts-About-Manufacturing/Facts-2012.aspx>; See also United States, Congressional Research Service, "Boosting U.S. Exports: Selected Issues for Congress," November 29, 2011, p. 9. Accessed September 9, 2013. Available at: <http://www.hsdl.org/?abstract&did=695436>.

5 United States, Congress, Senate, "Bipartisan Trade Promotion Authority Act of 2002," 107th Congress, 2nd Session, Sec. 2102, introduced October 3, 2001, passed Aug 1, 2002. Accessed August 1, 2013. Available at: <http://www.gpo.gov/fdsys/pkg/PLAW-107publ210/html/PLAW-107publ210.htm>.

6 United States, Congress, Senate, "Omnibus Foreign Trade and Competitiveness Act of 1988," 100th Congress, 2nd Session, Sec. 1102, August 23, 1988. Accessed August 1, 2013. Available at: <http://www.gpo.gov/fdsys/granule/STATUTE-102/STATUTE-102-Pg1107/content-detail.html>; See also United States, Congress, Senate, "Bipartisan Trade Promotion Authority Act of 2002," Sec. 2103 (2).

7 Anthony DePalma, "NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say," *The New York Times*, March 11, 2001. Accessed August 8, 2013. Available at: <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>.

8 Susan L. Karamanian, "Dispute Settlement Under NAFTA Chapter 11: A Response to the Critics in the United States," *The Sword and the Scales: The United States and International Courts and Tribunals*, Cambridge University Press, New York, NY, 2009, pp. 395-418, Print.

9 United States, Congress, Senate, "Bipartisan Trade Promotion Authority Act of 2002," Sec. 2102 (b)(3)(H).

10 United States, Library of Congress, Congressional Research Service, "Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy," August 9, 2012, p. 20. Accessed August 1, 2013. Available at: <http://fpc.state.gov/c55696.htm>.

11 United States, Congress, Senate, "Bipartisan Trade Promotion Authority Act of 2002," Sec. 2103 (c).

12 Melissa Ann Miller, "Will the Circle Be Unbroken? Chile's Accession to the NAFTA and the Fast-Track Debate, *Valparaiso University Law Review*, Fall 1996, pp. 162-164. Accessed August 8, 2013. Available at: <http://scholar.valpo.edu/vulr/vol31/iss1/6>.

13 United States, Library of Congress, Congressional Research Service, "Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy," p. 4.

14 International Monetary Fund, "World Economic Outlook," April 2013 Edition. Accessed August 19, 2013. Available at: <http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx>.

15 United States, Department of Commerce, Bureau of Economic Analysis, "Economies Grow in All States in 2004," News Release, June 23, 2005, p. 4. Accessed August 19, 2013. Available at: http://bea.gov/newsreleases/regional/gdp_state/2005/gsp0605.htm.

16 United States, Library of Congress, Congressional Research Service, "The Trans-Pacific Partnership Negotiations and Issues for Congress," June 17, 2013, Summary. Accessed August 1, 2013. Available at: <http://fpc.state.gov/c55696.htm>.

17 Authors' calculations. Trade agreements are GATT Tokyo Round (1979), Israel (1985), Canada (1988), NAFTA (1992), Marrakesh Agreement establishing the WTO (1994), Singapore (2003), Chile (2003), Australia (2004), Morocco (2004), CAFTA-DR (2004), Bahrain (2004), Oman (2006), Peru (2006), Colombia (2006), Panama (2006), South Korea (2007).

18 United States, Executive Office of the President, Office of the U.S. Trade Representative, "Fact Sheet: The Trans-Pacific Partnership," Press Release, June 2012. Accessed August 6, 2013. Available at: <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/june/transparency-and-the-tpp>.

19 United States, Congress, Senate, "Bipartisan Trade Promotion Authority Act of 2002," Sec. 2101 (d).

20 United States, Executive Office of the President, Office of the U.S. Trade Representative, "Fact Sheet: The Trans-Pacific Partnership."

21 United States, Congress, Senate, Committee on Finance, "President's 2012 Trade Agenda," Statement by Ron Kirk, 112th Congress, 2nd Session, March 7, 2012, page 29.

22 United States, Congress, Senate, "Omnibus Foreign Trade and Competitiveness Act of 1988," Sec. 1103 (a)(2)(A); See also United States, Congress, Senate, "Bipartisan Trade Promotion Authority Act of 2002," Sec. 2104 (d)(1).

23 United States, Congress, Senate, "Omnibus Foreign Trade and Competitiveness Act of 1988," Sec. 1103 (a)(2)(B)(ii).

24 United States, Executive Office of the President, Office of the U.S. Trade Representative, "Trade and Environment Policy Advisory Committee (TEPAC)", Online Resource. Accessed August 6, 2013. Available at: <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/trade-and-environment-policy-advisory-committ>; See also United States, Executive Office of the President, Office of the U.S. Trade Representative, "Agricultural Policy Advisory Committee (APAC)", Online Resource. Accessed August 6, 2013. Available at: <http://www.ustr.gov/about-us/advisory-committees/agricultural-policy-advisory-committee-apac>; See also United States, Executive Office of the President, Office of the U.S. Trade Representative, "Labor Advisory Committee (LAC)", Online Resource. Accessed August 6, 2013. Available at: <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/labor-advisory-committee-lac>.

25 United States, Executive Office of the President, Office of the U.S. Trade Representative, "Round 14: Leesburg," Blog. Accessed August 8, 2013. Available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/round-14-leesburg>.

26 United States, Congress, Senate, Committee on Finance, "President's 2012 Trade Agenda," Statement by Ron Kirk, 112th Congress, 2nd Session, March 7, 2012, page 29.

27 United States, Executive Office of the President, Office of the U.S. Trade Representative, "Statement on the 18th Round of Trans-Pacific Partnership Negotiations," Press Release, July 25, 2013. Accessed August 8, 2013. Available at: <http://www.ustr.gov/about-us/press-office/press-releases/2013/july/statement-18th-round-tpp>.

28 United States, Executive Office of the President, Office of the U.S. Trade Representative, "Round 14: Leesburg."

29 Ed Gerwin, "Boatloads of Growth: Recapturing America's Share of Asia-Pacific Trade," Third Way, Report, June 2012. Accessed August 15, 2013. Available at: <http://www.thirdway.org/publications/536>.