



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

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Summary

On July 1, 2007, Trade Promotion Authority (TPA—previously fast track), expired. TPA is the authority Congress grants to the President to enter into certain reciprocal (free) trade agreements (FTAs), and to have their implementing bills considered under expedited legislative procedures, provided he observes certain statutory obligations in negotiating them. TPA defines how Congress has chosen to exercise its constitutional authority over a particular aspect of trade policy, while presumably giving the President added leverage to exercise his authority to negotiate trade agreements by effectively assuring U.S. trade partners that final agreements will be given swift and unamended consideration.

TPA reflects years 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 core provisions of the fast track legislative procedures have not changed since first enacted in 1974, although Congress has expanded trade negotiation objectives, oversight, and presidential notification requirements. While early versions of fast track/TPA received broad bipartisan support, renewal efforts have become increasingly controversial as fears have grown over the negative effects of trade, and as the trade debate has become more partisan and constituent driven, culminating in a party-line vote on the 2002 renewal. Debate on TPA renewal may center on clarifying key aspects of: the congressional role in making trade policy; Congress's oversight of trade negotiations; trade agreement enforcement; and further refinement of trade negotiation objectives on labor, environment, and public health issues, among others.

A congressional decision on TPA renewal could affect multiple trade negotiations and pending agreements. The 112th Congress has inherited agreements with Colombia, Panama, and South Korea that were signed in time to be considered under the 2002 TPA. In the cases of Panama and South Korea, it appears that implementing legislation, should it be introduced, would still be eligible for fast-track expedited procedures. Colombia, however, presents a different scenario because implementing legislation was introduced in the House during the 110th Congress, only to be denied such expedited procedures by a House-passed resolution. Because subsequent Parliamentary rulings in the House and the Senate differed on the possible future use of fast track for the Colombia FTA, an initial debate may involve clarifying the rules under which an implementing bill might be considered. In addition, the status of TPA renewal could affect or be influenced by progress made toward the Trans-Pacific Partnership (TPP) Agreement or the World Trade Organization (WTO) Doha Round of multilateral negotiations.

The prospects for renewing TPA are unclear and depend on one's perspective as to whether having TPA in place benefits the U.S. negotiation position. Technically, TPA is not necessary to begin or even conclude trade negotiations, but it is widely understood to be a key element of getting a trade implementing bill passed in Congress, and so its renewal can be construed as signaling U.S. support for moving ahead with trade negotiations. When Congress decides to consider the issue, it has many options including: take no action; extend temporarily; revise and renew; grant permanent authority; or devise some hybrid solution. How this issue plays out depends on a host of political and economic variables, including congressional action on restoring a "political compact" that sits at the center of a functioning TPA process.

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On July 1, 2007, Trade Promotion Authority (TPA—previously fast track) expired, and with it the authority that Congress grants to the President to enter into certain reciprocal (free) trade agreements, and to have the requisite implementing legislation considered under expedited legislative procedures. Although the President has the authority under the Constitution to negotiate free trade agreements (FTAs), typically implementing legislation and thus congressional action are required to bring them into force. This report presents background and analysis on the development of TPA, a summary of the major provisions under the recently expired authority, and a discussion of the issues that have arisen in the debate over TPA renewal. It also explores the policy options available to Congress and will be updated as the congressional debate unfolds.

Introduction

The 112th Congress will inherit a number of trade issues. Among them are reciprocal trade agreements with Colombia, Panama, and South Korea, which were negotiated and signed during the 110th Congress, but have as yet to be approved. Each was signed prior to the expiration of TPA authority, and in the cases of Panama and South Korea, are likely to be eligible for consideration under TPA rules. Colombia, however, presents a different scenario because implementing legislation was introduced in the House during the 110th Congress, only to be denied such expedited procedures by a House-passed resolution. Parliamentary determinations since then differed in the House and the Senate as to whether the fast-track procedures will be available for a future implementing bill, should one be introduced. Other pertinent trade issues related to the possible need for TPA are the prospect for passage of either the Doha Development Round of World Trade Organization (WTO) multilateral negotiations, and the Trans-Pacific Partnership (TPP) Agreement.¹ Although both are still far from complete, congressional approval likely would require renewed TPA.

For over 30 years, Congress has granted the President TPA/fast track authority, agreeing to consider trade implementing legislation expeditiously and to vote on it without amendment, provided the President meets certain statutory negotiating objectives and consultation requirements. 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 trade partners that a final agreement will be given swift and unamended consideration by Congress.² Earlier incarnations of TPA, although controversial, were adopted with substantial bipartisan majorities. Over time, however, trade negotiations have become more complex. Congress has insisted on tighter oversight and consultation requirements, and the trade debate has become more partisan in nature, making congressional renewal of TPA even more controversial.

A future discussion of the parameters of renewed TPA will likely center on clarifying key aspects of the congressional role in (1) making trade policy, (2) overseeing trade negotiations, (3) defining trade agreement enforcement, and (4) further refining labor, environment, and public health trade negotiation objectives, among others. The last issue remains perhaps among the most controversial areas of policy debate, as reflected in the bipartisan agreement reached on May 10,

¹ CRS Report R40502, *The Trans-Pacific Partnership Agreement*, by Ian F. Fergusson and Bruce Vaughn

² Such a presumption has come under question since the three negotiated FTAs have languished for over three years without congressional action.

2007. The so-called “New Trade Policy for America,” crafted jointly by congressional leadership and the Bush Administration, incorporates important changes, some with broad social implications. These have already altered the language of the FTAs with Peru, Colombia, Panama, and South Korea. Among important changes from previous FTAs, signatories must now (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.³

The expiration of TPA raises the central question of whether, when, and in what form TPA should be renewed, including to what degree, if any, provisions of the “New Trade Policy America” might be incorporated. Congressional interest in moving ahead with one or more of the outstanding FTAs could be one catalyst for action. Progress on the TPP or Doha Round could also lead to renewed interest in TPA, but there is no sense that a conclusion to either of these negotiations will materialize in the near future. Without a clear need for TPA, it may not rise to the top of the legislative agenda in the 112th Congress, even if there is interest in revamping this statute.

A Brief History of TPA

TPA is the product of many years 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 trade agreements credibly. The evolution of TPA to date shows, among other things, that the Congressional-Executive partnership on trade policymaking can be strained as it adjusts to evolving political and economic conditions and shifting priorities of the two Branches.

The U.S. Constitution and Foreign Trade

The U.S. Constitution assigns express authority over 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.⁴ 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 and trade policy.

³ Available at: http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf

⁴ Destler, I. M. *American Trade Politics*. Fourth Edition. Institute for International Economics. Washington, DC. 2005. p. 14.

The Evolution of the Congressional-Executive Partnership

For roughly the first 150 years of the United States, the 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 raw material exporting regions, who lobbied for 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 provided nondiscriminatory or most-favored-nation (MFN) treatment to the goods of the parties to those treaties with United States; that is, reductions in tariffs on imports from one trade partner applied to imports from all other countries with which the United States had such trade agreements.⁵

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 during the height of the Great Depression. The tariffs led to retaliatory tariffs from the major U.S. trading partners, severely restricting trade, thus deepening and prolonging the 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 negotiate reciprocal 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 major trade negotiating authority. In so doing, it is argued, Congress aimed to lessen the protectionist pressure on itself.⁶
- The Smoot-Hawley tariff was the last general tariff legislation passed by Congress. While still on the books, the Smoot-Hawley tariffs are only applied to imports from those few countries, namely Cuba and North Korea, not receiving MFN status, now called normal trade relations status (NTR) in U.S. trade laws.
- While *delegating* some authority, Congress in no way *surrendered* its trade authority. Congress subjected the tariff negotiating authority to periodic review.

Congress renewed presidential reciprocal trade authority eleven times until 1962 through trade agreement extension acts. General tariff levels declined and their significance as a trade barrier lessened.⁷ In addition, with the establishment of the General Agreement on Tariffs and Trade

⁵ 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). 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.

⁶ Destler, *American Trade Politics*, pp. 14-15 and Pastor, Robert A. *Congress and the Politics of U.S. Foreign Economic Policy 1929-1976*. University of California Press. Berkeley, 1980. pp. 79-80.

⁷ Shapiro and Brainard, *Trade Promotion Authority Formerly Known as Fast Track*, p. 11.

(GATT) in 1948, the major forum for trade negotiations shifted from bilateral to multilateral negotiations, and trade negotiations were eventually expanded beyond tariffs.⁸

Under the Trade Expansion Act of 1962, Congress granted the President authority for five years to negotiate the reduction or elimination of tariffs and expanded its role in the 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 concluded. It allowed the President to negotiate the GATT Kennedy 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 Congress authorized the President to implement by proclamation), the GATT countries reached agreements in two areas related to non-tariff 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.⁹ Because U.S. adherence to these agreements required changes in U.S. law or regulations beyond tariff modifications, many in Congress concluded that the President had exceeded his authority. In fact, Congress passed a resolution in 1966 opposing “nontariff commitments” made by the Johnson Administration that had not been approved by Congress, setting up the debate that would eventually be resolved with the creation of the fast track authority for trade agreements.¹⁰

The Creation of Fast Track Trade Authority

The results of the Kennedy Round made evident that non-tariff barriers would increasingly dominate the agenda of future multilateral trade agreements, and would 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.

After the expiration of the tariff modification authority in the Trade Expansion Act of 1962, the 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 negotiate and implement the reduction and elimination of tariffs within certain parameters. To address the issue of agreements that required changes in U.S. law beyond tariff modifications, the act stipulated that non-tariff barrier agreements entered into under the statute could only enter into force if Congress passed implementing legislation.

It was argued that subjecting implementing legislation to ordinary congressional debate and amendment procedures would defeat the purpose for delegating trade negotiating authority to the President in the first place—to reduce the parochial pressures implicit in trade policymaking.

⁸ The General Agreement on Tariffs and Trade (GATT) went into effect in 1948 as a set of rules governing international trade. Over time, the number of GATT signatories grew and the body of rules were expanded in a series of negotiations called rounds. During the Uruguay Round, the signatories agreed to establish the World Trade Organization (WTO) to administer the GATT and other multilateral trade agreements. The WTO now has 153 members.

⁹ Destler, I. M. *Renewing Fast-Track Legislation*. Institute for International Economics. Washington, DC. September 1997. p. 6.

¹⁰ Destler, I. M., *American Trade Politics*, pp. 71-72.

Many Members also recognized that trade partners would not be willing to negotiate agreements that would be subject to unlimited congressional debate and amendments. 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.¹¹

As a solution, Congress agreed that each Chamber would suspend its ordinary legislative procedures and give trade agreements expedited treatment, which became known as “fast track.” 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.) *Thus, fast track for trade agreements was born!*

With the trade “negotiating” authority and the “fast track” provisions of the Trade Act of 1974, the United States participated in the Tokyo Round (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 Trade Agreements Act of 1979 (P.L. 96-39) was the first trade agreement bill implemented by Congress under fast track procedures.

Subsequent Renewals of Fast Track Trade Authority

The core provisions of the fast track procedures have remained virtually unchanged since they were first enacted. (The next section of this report examines fast track procedures and the trade agreements authority in more detail.) These provisions are enconced 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 initial grant of 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. A residual presidential authority to proclaim tariff modifications expired 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 non-tariff barriers but made no other changes to the original authority. The act did not extend presidential tariff modification authority.

¹¹ 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 Trade and Tariff Act of 1984

This act amended the Trade Act of 1974 to provide for the negotiation and implementation of bilateral free trade agreements that both reduce or eliminate tariffs and address non-tariff 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 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 Committee and the Senate Finance Committee of his intention to begin FTA negotiations 60 days prior to entering the negotiations and provided for denial of fast track consideration if either Committee disapproved of the negotiation within 60 days after receiving the notification. The act also required that agreements that lead 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 extended the president's authority to enter into trade agreements before June 1, 1993, but extended the application of fast track 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 fast track 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 USTR had failed to consult with Congress adequately during the trade negotiations. Under the OTCA provisions, Congress passed implementing legislation for the North American Free Trade Agreement (NAFTA) in 1993 (P.L. 103-182).

However, negotiations under the Uruguay Round of the GATT were not going to finish in time to meet the June 1, 1993 expiration deadline. Congress, therefore, 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, for the Uruguay Round agreements. The votes reflected strong congressional support for extending the authority 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 fast track 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 the failure of the Clinton Administration and Congress to get fast track procedures re-authorized. For one, although both the Republican congressional leadership and the Clinton Administration wanted fast track authority, the two sides could not agree on how labor and environmental issues should be addressed in trade agreements negotiated under

renewed authority. Republicans wanted limited coverage while the Clinton Administration and many Democrats in Congress preferred broader coverage. In addition, the WTO failed to launch a new round of negotiations at the 1999 Ministerial meeting in Seattle, and therefore, no *major* trade negotiations were underway that might have made the adoption of a fast track statute a political priority.

The Bipartisan Trade Promotion Authority Act of 2002

In 2001, President Bush requested a renewal of fast track authority, which was renamed in the legislation “trade promotion authority (TPA),” in part to counter a negative connotation associated with the fast track name. The renewed authority is contained in the Bipartisan Trade Promotion Authority Act (BTPAA) 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 negotiating authority. It included labor and environmental provisions as “principal negotiating objectives,” but did not mandate the inclusion of minimal enforceable labor standards in trade agreements.¹² The lack of a mandate to include such standards was the source of much of the opposition from labor groups and many Members of Congress. 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 have been 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 BTPAA (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 the 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 FTAs with Chile, Singapore, Australia, Morocco, the Dominican Republic, the Central American countries, Bahrain, Oman, and Peru. In addition, the United States signed FTAs with Colombia, Panama, and South Korea just before TPA expired on July 1, 2007. The United States was also interested in FTA negotiations with Malaysia, Thailand, the United Arab Emirates, and the members of the South African Customs Union (SACU), which are currently suspended and would have to be taken up under some future TPA authority for legislation to be considered under expedited procedures.

The United States and more than 150 other members of the WTO are also engaged the Doha Development Agenda (DDA), a protracted round of multilateral negotiations set to revise and expand rules for conducting trade in agriculture, manufactured goods, and services, with an emphasis on meeting the needs of developing countries.¹⁴ In addition, negotiations on the TPP

¹² Devereaux, Charan, Robert Z. Lawrence, and Michael D. Watkins. *Case Studies in US Trade Negotiation, Volume 1: Making the Rules*. Institute for International Economics. Washington, DC. September 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.

¹⁴ For more information on current U.S. trade negotiations, see CRS Report RL33463, *Trade Negotiations During the* (continued...)

may become a compelling reason to reconsider the need for TPA. Although many argue that TPA is necessary for the U.S. bargaining position to remain credible, others note that TPA is not required to complete the negotiations (as the example of the Uruguay Round discussed above suggests). Should a breakthrough be made on an agreement that the U.S. Congress would approve, Congress could extend TPA exclusively for the TPP or Doha Round at any time.

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; (3) to define the terms, conditions, and procedures under which trade agreement implementing bills will 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.

Negotiating Objectives

Congress exercises its trade policy role, in part, by defining trade negotiation objectives in TPA legislation. In the 2002 TPA, Congress 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 the trade legislation to be considered under expedited rules. For this reason, trade negotiating objectives stand at the center of the congressional debate on TPA.

Congress establishes trade negotiating objectives in three categories: (1) overall objectives; (2) principal objectives; and (3) other priorities. These begin with broadly focused goals that encapsulate the "overall" direction trade negotiations are expected to take, such as enhancing U.S. and global economies. Principal objectives are far more specific and provide detailed goals that Congress expects to be integrated into trade agreements, such as reducing barriers to various types of trade (e.g., goods, services, agriculture, electronic commerce); protecting foreign investment and intellectual property rights; encouraging transparency, fair regulatory practices, and anti-corruption; ensuring that countries protect environment and labor conditions and rights; 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 highly contested, contributing to the 2002 renewal controversy in which TPA passed virtually along partisan lines and by only

(...continued)
110th Congress.

the narrowest of margins. This controversy reflects the importance of TPA negotiating objectives as a template for future trade agreements negotiated under these guidelines. For example, if the language of a TPA objective is highly contentious, it stands to reason that the same issue may prove even more acerbic when a specific trade agreement is brought before Congress for approval. The labor provisions, which are emphasized repeatedly in all three groups of negotiating objectives, provide the best illustration. In particular, the decision not to include minimal enforceable standards anywhere in TPA caused acrimonious debate over both TPA and the FTAs that later adopted the TPA language on labor. This issue was perhaps most evident in the debate on the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).

Because the structure of trade agreements mirrors TPA objectives, and highly disputed agreements based on those objectives brought before Congress under TPA have so far survived, often narrowly, all challenges from opponents, the vote on renewing TPA/fast track authority is among the most critical trade votes Congress takes. In the aftermath of the CAFTA-DR and Peru FTA votes, however, Congress has not taken up any of three remaining FTAs. This impasse is, in part, the result of broad dissatisfaction in the way TPA defined negotiating objectives, and by extension, related language in the FTAs themselves. It also reflects a growing skepticism in Congress and the public at large over the net benefits of trade. Future discussions on TPA may include options for addressing these concerns.

Notification and Consultation

The trade agreements authority is extended to the President provided he consults regularly with Congress, including the Congressional Oversight Group (COG) created in the 2002 trade act, whose members are accredited as official advisors to the trade negotiation delegations. Notification and consultation requirements have been expanded in each renewal of authority. Most of these requirements are found in their own section within the TPA statute. The timing of these notifications is detailed in the time line presented in **Appendix A**. 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 COG on the nature of the negotiations; and
- 3) providing special consultations on agriculture, import sensitive agricultural products, fishing and textile industry 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 COG 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;¹⁵
- 5) providing the U.S. International Trade Commission (USITC) with trade agreement details at least 90 days before entering into an agreement; and
- 6) presenting to Congress no later than 90 calendar days after the President enters into the agreement, the USITC report on the impact of the agreement on the U.S. economy.

The congressional consultation process is a longstanding precedent and 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.¹⁶

A majority of congressional staff, however, indicated that despite the frequency and high quality of information conveyed, the meetings with USTR officials often did not allow for sufficient time to provide input into the negotiation process, were often cast more as briefings than true consultations that imply an exchange of views, and did not always include last minute changes to draft FTA texts. In short, there was ongoing concern expressed that the congressional consultation process did not satisfy many in Congress and may need to be amended to allow for greater congressional input into the crafting of FTAs.¹⁷

Trade Agreements Authority and Implementation

As discussed above, when the statutory authority to negotiate 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 non-tariff barriers (NTBs). These more complex agreements led Congress to tighten its control over trade policy by establishing fast track trade negotiating authority. As set out in the Trade Act of

¹⁵ The private sector advisory system was established by Congress in 1974 to ensure that U.S. trade policy and 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. USTR. *2009 Trade Policy Agenda and 2008 Annual Report of the President of the United States on the Trade Agreements Program*. Washington, DC. March 2009. pp. 237-240.

¹⁶ United States General 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

¹⁷ *Ibid.*, pp. 29 and 43-46.

1974, NTB agreements could enter into force for the United States only with passage of implementing legislation.¹⁸

At the heart of what is now called TPA are the expedited rules for moving such trade implementing legislation through Congress, which have been used for nearly all reciprocal trade agreements.¹⁹ Importantly, the fast track procedures are rules of the House and Senate. Either may change them at any time with a majority vote.²⁰ Congress makes these expedited procedures available for a trade implementing bill provided the President uses the trade agreements authority granted to him to the satisfaction of Congress, first by entering into agreements that meet TPA's overall and principal negotiating objectives, and second by satisfying the notification and consultation requirements. In addition, under the "trade agreements authority" section, Congress requires that the President:

- 1) as mentioned above, at least calendar 90 days prior to signing the agreement, notify Congress of his intention to do so (to provide opportunity for congressional input before the agreement is signed, at which point it can no longer be changed);
- 2) within 60 calendar days of signing the agreement, provide Congress with a list of required changes to U.S. law needed for the United States to be in compliance with the agreement; and,
- 3) on a day Congress is in session, send a copy of the final legal text of the trade agreement, a draft implementing bill, statement of administrative action proposed to implement the agreement, and supporting statements on how the agreement meets congressional objectives, changes existing agreements, and serves the purpose of U.S. commercial interests.

As an important caveat, the TPA expedited procedures are extended only to implementing bills with provisions limited to those "necessary or appropriate" to implement the trade agreements, either repealing or amending existing laws, or providing new statutory authority. This requirement presumably limits the implementing bill to provisions related to the pending trade agreement, although the meaning of "necessary or appropriate" has been subject to debate.

Should these requirements be fulfilled to the satisfaction of Congress, it has agreed to follow certain expedited legislative procedures. 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

¹⁸ Under TPA, reciprocal FTAs and multilateral NTB 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 the *executive agreement*, requiring only presidential action, and the *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 as Treaties*, by Jeanne J. Grimmer; and Shapiro, Hal S. *Fast Track: A Legal, Historical, and Political Analysis*. Ardsley, NY, Transnational Publishers. 2006. p. 22.

¹⁹ The U.S.-Jordan free trade agreement is the exception.

²⁰ Indeed, the House actually did just that on April 10, 2008, when it approved H.Res. 1092 (224-195). That measure stated that sections 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.

ordinary legislative procedures. The rules are defined below (see **Appendix B** for greater detail) and involve:

- 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 possibly others);²¹
- 2) automatic discharge from House and Senate Committees after a limited period of time;
- 3) limited floor debate; and
- 4) no amendment, meaning that Congress must vote either up or down on the bill, which passes with a simple majority.

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:

Side Agreements and Letters

Outside of formal TPA statutory requirements, Congress has insisted on or agreed to 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.²² Side letters, by contrast, generally act as clarifying devices, usually applied to a very specific issue. 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 neither changes 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..

Hearings and Mock Markups

Congress has insisted on reviewing the negotiated 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 informal or “mock” markup on an informal draft

²¹ Additional referrals depend on whether there are provisions in the agreement that require changes in law under the jurisdiction of other committees.

²² 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.

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 mockup is, in effect, a test run of congressional response to the trade 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 comment on the draft trade agreement, as well as the informal draft implementing legislation, and offer amendments that serve as important signals to the Administration of changes to the implementing bill they would like to see made. The two revenue committees may also decide to hold a mock conference to reconcile any differences in their mock markups.

Although the agreement at this point has already been concluded, a clarification or “translation” of key points that do not alter the basic agreement can be made in the final implementing bill.²³ 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 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 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.²⁴

Informal Agreements

Some Members of Congress have also relied on promises from the Administration 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 Administration. 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.²⁵

Limiting Trade Agreements Authority

Congress adopted TPA rules 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 unraveling due to 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.

²³ This idea is elaborated in: VanGrasster, Craig. *Is the Fast Track Really Necessary?* *Journal of World Trade*. Vol. 31, No. 2. April 1997. p. 106.

²⁴ Inside Trade. *Grassley Presses USTR To Improve Consultations on FTAs*. July 7, 2006.

²⁵ For details, see CRS Report RL31870, *The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, by J. F. Hornbeck.

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. The 2002 statute made these procedures available for trade agreements entered into before July 1, 2007. Importantly, however, the act provides no deadline for submitting implementing legislation for the agreement if it is entered into before the July 1 deadline.

Extension Disapproval

TPA legislation requires that the President request an extension of the TPA authority after a certain period of time. The extension is granted unless either House of Congress adopts 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 Committee. 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.

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.”²⁶ That is, Congress reserves its constitutional right to withdraw or override the fast track rule, which can take effect with a vote by either House of Congress.²⁷

This summary suggests that in addition to binding rules, the long-term success of TPA rests on a cooperative spirit and partnership between the Legislative and Executive Branches of government, and by extension, between the two major political parties.²⁸ Many have noted that the sense of such cooperation was absent under the previous TPA, placing a strain on the trade legislative process in recent years. In fact, 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 highly

²⁶ Section 151(a)(2) of the Trade Act of 1974 (P.L. 93-618).

²⁷ See Shapiro, *Fast Track: A Legal, Historical, and Political Analysis*, p. 28.

²⁸ See Carrier, Michael A. *All Aboard the Congressional Fast Track: From Trade to Beyond*. *George Washington Journal of International Law and Economics*. Washington, D.C. 1996.

partisan passage of the 2002 TPA renewal. The current dissatisfaction with TPA results from philosophical differences that have developed, in part, along partisan lines and raises the distinct possibility that TPA, now lapsed once again, may not be renewed.

Issues for Congress

TPA expired on July 1, 2007, and the decision to defer TPA renewal rests with a number of concerns. First, increasingly Congress is focused on addressing the negative effects of trade policy and, more broadly, “globalization,” particularly in light of the devastating economic consequences of the 2008 global financial crisis. Second, many Members are also displeased with the perceived inadequate enforcement of trade obligations undertaken by China and other U.S. trade partners. Third, TPA renewal may require lengthy deliberations to craft a new model for future U.S. trade policy.

The Need for TPA

A recurring question is whether TPA is really necessary. One way to explore this issue is to consider the alternatives. First, given the breadth and scope of modern trade accords, executive agreements are generally an insufficient means for fully implementing trade agreements where the amendment, repeal, or enactment of new laws is required. Second, the treaty approach presents two problems: the high hurdle of a two-thirds vote of approval in the U.S. Senate and lack of House action for an agreement involving revenue.²⁹ Further, Congress has long considered U.S. trade agreements to be non-self-executing, that is, requiring implementing legislation if existing law is insufficient to carry out agreement obligations.³⁰ Because legislative action involving both Houses of Congress is needed, the options appear limited to either a TPA approach, or relying on ordinary rules of procedure to consider trade implementing legislation.

If the success of TPA were to be measured simply by the number of trade agreements that have been approved and implemented under its authority, then it might be argued that TPA has proven its merit. Many Members of Congress, however, have complained that in recent years the TPA process has failed, demonstrating that binding congressional rules of procedure are not sufficient to guarantee a consensus position or even a cooperative working arrangement on trade. In the words of one analysis still relevant today, “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.”³¹ Addressing congressional concerns, therefore, is likely to be critical for TPA renewal.

Complaints point to multiple problems: (1) trade negotiation objectives that do not include all key concerns of Congress (e.g., enforceable labor standards) and are open to interpretation by the Executive Branch; (2) an Executive Branch consultation process, including the COG, denounced

²⁹ See Article 1, Section 7, of the U.S. Constitution, which requires that all bills for raising revenue originate in the House.

³⁰ See U.S. Congress, 103rd Cong., 2nd sess., House, *Uruguay Round Agreements Act*. (H.Rept. 103-826) October 3, 1994. p. 25.

³¹ 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

as superficial and unresponsive to congressional input; (3) the passage of widely unpopular FTAs negotiated under TPA authority; and (4) ineffectiveness of procedures for deterring the use of TPA (e.g., the extension disapproval resolution and repeal of fast track rules) because power has at times been held closely through partisan control of committee chairs.³² In short, there has been a growing sense for the need to rekindle trust between the Executive Branch and Congress, as well as ensure greater bipartisan cooperation within Congress on trade matters.

Options for Congress and Prospects for Renewal

With the expiration of TPA on July 1, 2007, Congress has a number of options with respect to its possible renewal. Four that span the spectrum are:

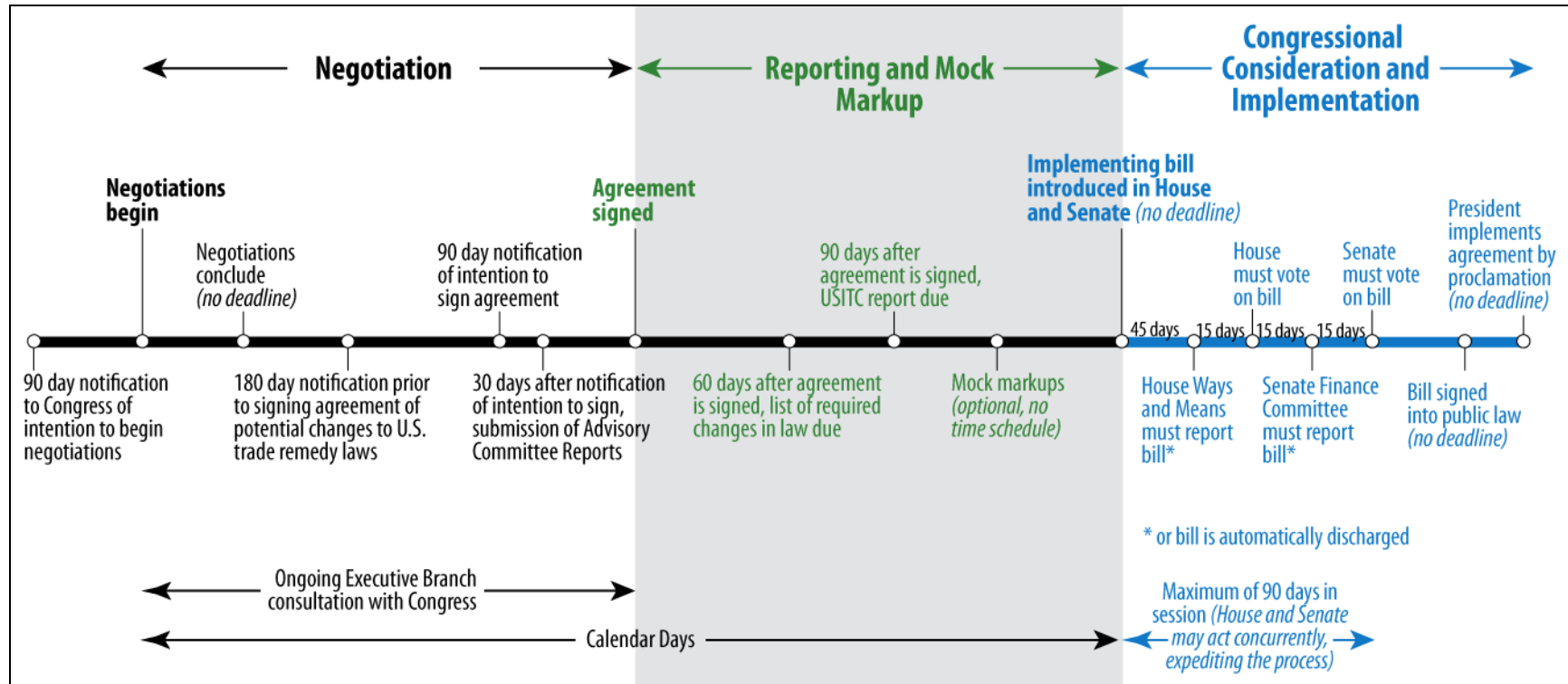
- **No TPA Renewal.** Although the lack of TPA may delay action on future reciprocal trade agreements, many sector-specific and other more narrowly targeted agreements have been concluded in the past without TPA. The United States has also launched trade negotiations prior to having TPA authority in place.
- **Extend TPA Temporarily.** Congress could extend the current TPA with few or no revisions long enough to allow the United States to complete a specific agreement such as the TPP or the WTO Doha Round agreement.
- **Renew TPA Authority.** Under this option, Congress could grant the President new authority with or without major changes in its structure, and without restricting it to specific agreement negotiations.
- **Grant Permanent TPA Authority.** Congress could grant the President a form of permanent fast track/TPA in a two-tier procedure: (1) Congress would enact into law permanent fast track procedures; and (2) before specific negotiations can begin, both Houses of Congress would have to pass a resolution approving the negotiations and objectives designed for the specific set of negotiations.³³

Whether TPA will be a top trade issue for the 112th Congress is unclear at this time. Trade adjustment assistance, trade enforcement legislation, concerns about global imbalances in trade and investment, and consideration of pending reciprocal trade agreements with Colombia, Panama, and South Korea have much more visibility. It is generally understood, however, that TPA is likely to be necessary to pass a TPP or a multilateral agreement, should either come to fruition. It has also been argued that TPA is necessary to increase U.S. negotiating credibility with these two agreements.

³² Reuters. *Bush's Trade Authority Renewal: Dead on Arrival?* October 19, 2006 and Vaughn, Martin, *What If: Trade. The Congressional Daily.* October 17, 2006.

³³ See for example, Destler, I. M. *Renewing Fast-Track Legislation.* Institute for International Economics. Washington. September 1997. pp. 41-43, and Mastel, Greg and Hal Shapiro. *Fast Track Forever? The International Economy.* Summer 2006. pp. 54-55.

Appendix A. Congressional Timeline Under TPA



Source: CRS

Appendix B. A Short Guide to the Expedited Legislative Procedures for Passage of Trade Implementing Bills Under TPA³⁴

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 the last opportunity to make recommendations to 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 any 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.³⁵

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.³⁶ 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).³⁷ This procedure ensures that both Houses will ultimately act on the same measure, thereby clearing it to

³⁴ Title XXI of the Trade Act of 2002 (P.L. 107-210) and section 151 of the Trade Act of 1974, as amended.

³⁵ For example, the U.S.-Chile Free Trade Agreement contained a provision affecting immigration law, requiring the implementing bill to be referred to the House and Senate Judiciary Committees.

³⁶ Cumulatively, the whole process can take as long as 90 in session days, potentially lasting many months.

³⁷ 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.

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.

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