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Trade Promotion Authority and the Trans-Pacific Partnership: What Lies Ahead?

by Daniel Ikenson

Introduction

On May 22, 2015, the U.S. Senate passed the Bipartisan Congressional Trade Priorities and Accountability Act, better known as Trade Promotion Authority (TPA), by a vote of 62–37. At the same time—and in the same vote—the Senate passed the Trade Adjustment Assistance Enhancement Act (TAA). The bills were passed, respectively, as Title 1 and Title 2 of H.R. 1314, or the “Trade Act of 2015.”¹

In light of what appeared to be formidable opposition, passage of the bill in relatively short order is a credit to the commitment of Majority Leader Mitch McConnell, Finance Committee Chairman Orrin Hatch, and Finance Committee Ranking Member Ron Wyden to getting it done. But the road to securing TPA, finalizing the Trans-Pacific Partnership (TPP), and implementing the agreement remains long and uncertain.

Getting enough votes in the House of Representatives will test the persuasive powers and political acumen of Ways and Means Chairman Paul Ryan, Speaker John Boehner, and President Obama, who need to woo Democratic support without losing Republican support, or vice versa. The numbers are uncertain and subject to change, as House leadership maneuvers to adjust to actions already taken in the Senate. Meanwhile, with progress on TPA, the TPP talks have begun to move into the “end-game” phase. Although it is uncertain how long this phase of the negotiation will last, it is apparent that the soonest Congress could vote to implement the TPP is early 2016, with the distinct and growing possibility that the matter will fall to a lame duck session or to the next president and the 115th Congress.

This bulletin describes the status of TPA and TPP, provides some background, and fleshes out some of the issues

that could impact the trade agenda in the weeks and months ahead.

Politics and Schisms

The axiom that trade divides Democrats and unites Republicans helps explain President Obama’s reluctance, over the past six years, to push for Trade Promotion Authority legislation. Although it would have made sense to obtain TPA at the outset of the TPP negotiations, the president was intent on avoiding a fight with—and between—congressional Democrats at that time. He also thought that if he first brought Congress a new kind of trade agreement that fixed every alleged shortcoming in past deals, Democrats would have no bases for objecting to TPA, and the intraparty squabble would be avoided. So he chose to defer the pursuit of TPA.²

With time running out on his watch, and finally recognizing that finishing TPP would be impossible without a grant of TPA first, the president could defer no longer. As he began to advocate for TPA and the TPP soon after the 2014 elections, a Democratic rift—and possible schism—emerged.³

At the moment, the president is in lockstep with a large majority of congressional Republicans, who support trade liberalization and see TPA as essential to the process. But some Republicans, who are wary of giving *this* president any more power, have joined ranks with the vast majority of congressional Democrats in opposition to TPA.⁴ Meanwhile, hyperaware of the politics, Democratic presidential frontrunner Hillary Clinton—and potential heir to the trade agenda—has refused to take a position.⁵

TPA and TPP in Perspective

Over the past few months, the public has been fed a smorgasbord of hyperbole, misinformation, and subterfuge about both TPA and TPP. The quality of the discourse has at times been appalling. Commentators on the left and the right have described TPA as an executive power grab, a congressional

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abdication, and an arrangement to enable the president to sneak secretly negotiated provisions into U.S. law.

But TPA is nothing of the sort. It is a compact between the two branches, which essentially deputizes the president to negotiate trade agreements on behalf of Congress. Those agreements must meet parameters and fulfill objectives spelled out by Congress. Before any agreement is put to a vote in Congress, the final details of the agreement are published and made available to the public for a minimum of five months, and possibly as many as nine months. If the concluded trade agreement meets Congress's parameters and fulfills its objectives, legislation to implement the agreement is considered without amendments on an expedited timetable by an up-or-down vote. If the agreement fails to meet Congress's parameters or fulfill its objectives, it can be taken off the so-called fast-track through a resolution of disapproval. And, ultimately, members and senators can vote "no" if they don't like the contents of the agreement.

The TPP is a long-gestating trade negotiation between the United States and 11 other nations.⁶ The United States first expressed interest in the TPP in the final year of the George W. Bush administration. But officially joining what was then called the "P4," changing its name to the Trans-Pacific Partnership, encouraging other countries to join, expanding the coverage of the negotiations, and making it the economic centerpiece of the U.S. "pivot to Asia" was the work of the Obama administration—including Secretary of State Hillary Clinton (an architect, as well as a potential heir).

The TPP would reduce tariffs and other barriers to trade in goods and services between 12 countries on four continents. The final agreement would presumably include 29 chapters with rules governing various aspects of trade and trade-related policies, such as labor standards, environmental standards, government procurement, intellectual property, investment rules, supply chains, state-owned enterprises, and more. The agreement likely would include provisions for the accession of other countries, several of which have already expressed interest in joining. Ultimately, as some TPP architects and other trade-policy watchers have suggested, the TPP could eventually evolve into a larger Free Trade Area of the Asia Pacific.

Historically, trade agreements have expanded Americans' economic liberties, even though that outcome has never been the principal objective. It happens residually. Trade negotiators prioritize the export-oriented goals of their business interests and, in the process of reaching those objectives, make Americans more economically free. The domestic-market access offered to induce foreign-market openings to U.S. exporters is what delivers those benefits to U.S. consumers, taxpayers, and businesses. However, trade agreements also include terms that explicitly protect domestic producers from competition, and those provisions reduce—or at least impede—economic freedom. A final TPP agreement will include terms that are both liberalizing and protectionist, so the answer to the question of whether the agreement should be supported would seem to depend on the specifics of its provisions.⁷

Yet, without those specifics available, the TPP has been characterized by detractors as a sellout to multinational corporations that will destroy U.S. manufacturing; ship millions of jobs abroad; create health crises by impeding access to medicines; destroy the globe's water and air quality; poison the U.S. food supply; gut domestic health, safety, environmental, and banking regulations; and usurp U.S. sovereignty. Meanwhile, proponents assert with equal confidence that TPP will grow the economy, create jobs, reduce trade deficits, reassert U.S. economic leadership, curb China's unfair economic practices, and ensure greater opportunities by solidifying ties with the world's most robust economic region.

The TPP has yet to be concluded and only a select few people have access to the draft text of the negotiations, so claims of specific outcomes should be met with skepticism. Indeed, unless one is professionally or ideologically predisposed to supporting or opposing trade agreements regardless of their terms and, thus, regardless of the facts, it is premature to render judgment about the TPP. But render judgment we must.

It is broadly understood that the TPP negotiations cannot be concluded without a formal grant of TPA. Without TPA, the president could not be sure that any trade deal struck and brought home for ratification reflected the official wishes of Congress, and the likelihood that foreign negotiators would put their best and final offers on the table—knowing that Congress could unravel the terms—is close to zero. So if there is going to be an honest assessment of the contents of the TPP and an informed debate about its costs and benefits, Congress must pass, and the president must sign into law, TPA legislation first.

Congressional TPA Action

The Senate passed the Trade Act of 2015 by the comfortable margin of 62–37 on May 22, 2015. But getting to that point required some agenda management and deal-making that will impact congressional actions in the weeks ahead.

In late April, the Senate Finance and House Ways and Means Committees conducted markups of four pieces of trade legislation: the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA 2015); the Trade Adjustment Assistance Enhancement Act of 2015 (TAA 2015); the Trade Facilitation and Trade Enforcement Act of 2015 (Customs Reauthorization); and the African Growth and Opportunity Act Extension and Enhancement Act of 2015 (AGOA 2015).

The TPA 2015 would guarantee expedited ("fast track") congressional consideration of trade deals negotiated by the president that meet congressional objectives and priorities (as described earlier) through July 1, 2018, with extensions possible through July 1, 2022.

The TAA 2015 would expand and extend the Trade Adjustment Assistance program, which is a federal entitlement program that offers training and financial assistance to U.S. workers who claim to have been adversely impacted by imports or outsourcing. The bill authorizes \$450 million of annual appropriations through June 30, 2021.

As has been the case historically, the TPA and TAA bills were packaged together as the Trade Act of 2015, a move assumed necessary to permit enough Democrats to support TPA.⁸ But there may be stronger opposition to TAA now than ever before, as the program's purpose, cost, and efficacy are increasingly in doubt among Republicans and many Democrats dislike the fact that the budget offsets come primarily from other entitlement programs.⁹

Ultimately, the packaging of TPA and TAA in the Trade Act has created some hurdles for House consideration of the bill. Since most House Republicans support TPA but not TAA, and since most House Democrats support TAA but not TPA, leadership is considering a parliamentary procedure known as "dividing the question," which would allow members to vote on each title (TPA and TAA) separately. The hope and expectation is that both titles would get enough votes for passage (TPA from most Republicans and some Democrats; TAA from most Democrats and some Republicans) without members being on the record supporting legislation they oppose. This would also avoid the need to have a conference committee reconcile differences between the Senate and House versions of the bill, which would subject the Trade Act to another controversial vote.

More problematic, logistically, is that the Senate TPA bill includes a provision that would deny fast-track consideration of trade agreements between the United States and countries identified as "Tier 3" countries under the Trafficking Victims Protections Act.¹⁰ The provision would seem to imperil the TPP, as Malaysia—a TPP party—is currently classified as a Tier 3 country. Although Senator Robert Menendez (D-NJ), who offered the amendment creating this provision, later sought to modify the language by providing for exemptions in cases where the Secretary of State confirms that the Tier 3 country "has taken concrete actions to implement the principal recommendations in the most recent annual report on trafficking in persons," the changes never made it into the final bill. To save TPP from fast-track disqualification, then, the trafficking language must be amended somehow.

This problem raises the profile of the Customs Reauthorization bill, which would reauthorize various operations of U.S. Customs and Border Protection and create new rules for enforcing U.S. trade laws. The Senate version includes some controversial language that does not appear in the House version, which will have to be reconciled if the bill is to pass in both chambers. Specifically, the Senate bill includes provisions sponsored by Senator Sherrod Brown (D-OH), which would amend U.S. trade remedy laws in a manner favorable to domestic protection-seekers in anti-dumping and countervailing duty cases. It also contains an actionable currency manipulation provision.

Although the most contentious currency manipulation provision—the so-called Portman-Stabenow Amendment—failed to be adopted as a principal negotiating objective in the Senate TPA bill, the Customs Reauthorization bill includes language that would require the Commerce Department to treat currency manipulation as a subsidy under the U.S. Countervailing Duty law.

The Senate bill also includes language that would reform the Miscellaneous Tariff Bill process—an issue that has divided Republicans in recent years over the question of what constitutes an "earmark," which the caucus has pledged to oppose. This language could present an obstacle to passage of Customs Reauthorization in the House—but it is less of an obstacle than currency and trade remedies.

With leadership in both chambers averse to conferencing the Trade Act, there has been talk of having the House vote (and pass) the Senate version of the Trade Act, which would be modified retroactively by passage of a Customs Reauthorization bill that would include human trafficking exemption language introduced during a conference to reconcile differences in the House and Senate Customs Reauthorization bills. Though achievable, that strategy is risky, given the possibility that reconciliation of the two versions might fail. That would leave Congress with a TPA bill that is unusable for the TPP, given Malaysia's Tier 3 status. The less attractive alternative is to conference the TPA bill.

Finally, the idea of amending the Trade Act with a provision to reauthorize the Export-Import Bank was floated, but failed to materialize. However, after Senators Maria Cantwell (D-WA) and Lindsey Graham (R-SC) threatened to vote against the Trade Act without a vote on Ex-Im, Majority Leader McConnell agreed to make room for a vote on Ex-Im's reauthorization sometime this month. For the moment, the Ex-Im issue has no direct bearing on the outcome of the Trade Act, but it shouldn't be dismissed as a potential wildcard that could influence the TPA debate this month.

How Soon Can the TPP Negotiations Wrap Up?

With the Trade Act and the Customs Reauthorization bills now under consideration in the House of Representatives, it is likely that TPA will either become law or be rejected by the end of June. If it becomes law, the focus of the trade agenda will shift to wrapping up the TPP. The absence of TPA has been cited often as the main obstacle to concluding TPP, but other potential impediments loom.

The final stage of trade negotiations tends to reveal distance where previously agreement had been assumed. It also features unexpected demands that threaten to reverse progress and unravel the whole deal. And it is usually the case that the hardest issues to resolve are shunted to the end. So it is reasonable to assume that a 29-chapter trade agreement negotiated for nearly a decade between 12 countries at different levels of development will generate some sticking points that will take some time to resolve.

What is the status of the Investor-State Dispute Settlement provision? What ever happened to the so-called "tobacco carve-out"? Will the agreement include language that expressly excuses discrimination against tobacco products for purposes of ensuring public health and safety? Will the agreement provide for a single set of tariffs and rules for all countries, or will it amount to a less liberalizing series of bilateral agreements? Will Malaysia be permitted its government procurement preferences for indigenous populations? Will the United States insist on,

and other countries submit to, the U.S. process of certification, which conditions entry-into-force of the agreement on the president's certification that the trade partner's laws are in compliance with the terms of the agreement? Will Japan, Canada, and the United States open their various agricultural markets enough in Australia's and New Zealand's estimations? These and other questions still loom.

Are We There Yet?

According to the timelines established in the TPA bill, if TPA were to become law by June 30 and the TPP were to conclude by July 31, the agreement couldn't be signed before November 1 because the president is required to give notification of his intention to sign 90 days prior to signing the agreement. The administration would then have as many as 60 days to prepare a list of changes to U.S. laws required by TPP and the U.S. International Trade Commission would have up to 105 days to produce an economic impact assessment. Then, 30 days prior to introducing the deal's implementing legislation, the administration would be required to publish the final text of the deal. After introduction of the implementing legislation, the House would have to hold a vote within 60 days and the Senate would have to vote no more than 30 days after the House. If the bill is passed by Congress, the president can then sign it into law and implement the agreement by proclamation.

So, if the TPP is signed on November 1 and every subsequent phase in the process is completed by the earliest possible date, the TPP could be implemented by December 1, 2015. But that assumes that the administration and the International Trade Commission have their reports ready to go on the date of signing and that Congress doesn't spend a single day debating the agreement or the implementing legislation—all unlikely. A more reasonable estimate is 90–120 days between signing the TPP and introducing its implementing legislation, and another 60–90 days before both chambers vote. Under that timeframe, an agreement could be ready for implementation between May and July 2016. But that assumes getting TPP done by July 31, 2015, which is also unlikely.

What is more likely is that it will take longer than one month to finalize the TPP. But how long—two months? Three? Six? That means a vote in Congress, which will be bound by the TPA timetable, could arrive on the eve of the November 2016 election. Considering how that timing could imperil the vote count, the president might decide to hold off on submitting the final TPP text so that the vote is timed for the lame-duck session.

Conclusion

There have been twists and turns in the road for trade policy during the Obama administration. Expect several more in the weeks and months ahead. Although the likelihood that TPA will pass and the TPP will be completed and successfully implemented remains uncertain, it is clear that trade policy will be a ripe and contentious issue throughout the 2016 election year.

Notes

1. Because the Trade Act is legislation that would affect U.S. revenues, the bill must originate in the House of Representatives. The Senate considered and amended H.R. 1314 to include the two trade bills.

2. For a more detailed analysis on this point, see Daniel J. Ikenson, "Does President Obama Support His Own Trade Agenda?" *Forbes.Com*, January 13, 2015.

3. For a more detailed analysis on this point, see Daniel J. Ikenson, "President Obama Finally Challenges His Party's Trade Skeptics," *Forbes.Com*, April 27, 2015.

4. For a more detailed analysis on this point, see Daniel J. Ikenson, "Republicans Should Welcome Trade's 'Burgeoning Bromance'," *Cato at Liberty* (blog), May 28, 2015, <http://www.cato.org/blog/republicans-should-welcome-trades-burgeoning-bromance>.

5. For a more detailed analysis on this point, see Daniel J. Ikenson, "Time for Hillary to Speak Up on Trade," *Cato at Liberty* (blog), May 15, 2015, <http://www.cato.org/blog/time-hillary-man-trade>.

6. Negotiating partners in TPP include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

7. For a more detailed analysis on this point, see Daniel J. Ikenson, "Should Free Traders Support Free Trade Agreements?" *Cato at Liberty* (blog), January 23, 2014, <http://www.cato.org/blog/should-free-traders-support-free-trade-agreements>.

8. Trade Adjustment Assistance was first authorized with the Trade Expansion Act of 1962.

9. For an in-depth assessment of TAA, see Sallie James, "Maladjusted: The Misguided Policy of 'Trade Adjustment Assistance'," Cato Institute Trade Briefing Paper no. 26, November 8, 2007.

10. "Tier 3" countries are those whose governments are alleged to be out of compliance with minimum standards associated with the prevention of human trafficking and are not making "significant efforts" to bring themselves into compliance.