



# Free Trade Bulletin

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## Stay Off the Fast Track: Why Trade Promotion Authority Is Wrong for the Trans-Pacific Partnership

by K. William Watson

### Introduction

The Obama administration has asked Congress to reinstate trade promotion authority in hopes that it will enable passage of the Trans-Pacific Partnership (TPP), a trade agreement being negotiated by 12 countries in the Asia-Pacific region. Advocates of free trade generally support trade promotion authority, because it eases the passage of trade agreements through Congress by guaranteeing an up-or-down vote with no amendments. While trade promotion authority can be useful, the current political climate in Washington reduces its benefits, and the late stage of the TPP negotiations raises the risk that trade promotion authority will do more harm than good.

Free trade agreements are an important tool to improve U.S. trade policy, and “fast track” trade promotion authority has been helpful in securing the completion and passage of those agreements. But, contrary to the assertion of many trade advocates, trade promotion authority is not a necessary prerequisite to passing trade agreements.

Trade policy has become much more partisan than it was when fast track was invented 40 years ago.<sup>1</sup> With Republicans controlling the House of Representatives and a Democrat in the White House, the TPP has excellent prospects for passage even without trade promotion authority.

While the benefits that stem from granting fast track are currently weak, the costs are still very real. In exchange for promising expedited procedures, Congress sets negotiating objectives in the trade promotion authority statute that the president is expected to adopt if he wants an agreement to receive fast track treatment. If the TPP negotiations are as far along as the administration claims, adding

new negotiating objectives will delay or possibly even prevent completion of the agreement.

If trade promotion authority is to be useful in facilitating the TPP negotiations, it must subtract rather than add negotiating objectives. The TPP, as envisioned by U.S. negotiators, will push forward a lot of unpopular, new U.S. demands as a condition for access to the U.S. market. None of these “ambitious” goals—like stricter intellectual property enforcement, investment protections, and regulatory good governance—helps American consumers or furthers the goal of trade liberalization. They do, however, attract substantial political opposition at home and abroad.

Unless trade promotion authority is used to make the TPP a better agreement, there is little point in pursuing it now. The battle over trade promotion authority will likely involve a divisive debate about the value of trade in which support from individual members is bought with guarantees of protection or favor for special interests. Such a debate will surely occur again when Congress votes to pass a completed TPP agreement, so why have it twice? Unless trade promotion authority can be used to simplify the trade debate and improve trade agreements—to make them more about free trade—the American people will be better off without it.

### What Is Trade Promotion Authority?

There are a lot of myths about what fast track is and how it works. A grant of trade promotion authority establishes an agreement between Congress and the president over how trade agreements should be negotiated and ratified. Both the president and Congress take on obligations. Congress agrees to hold an up-or-down vote on trade agreements submitted by the president within established time limits. In exchange for this promise, the president agrees to consult with congressional leaders throughout the

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negotiations and to adopt a variety of negotiating objectives dictated by Congress.<sup>2</sup>

After negotiations are completed, the “fast track” component of trade promotion authority kicks in. Under the 2002 Trade Promotion Act, the president was required to notify Congress 90 days before signing any agreement. Then the president would submit the agreement to each house of Congress in the form of a bill implementing the treaty’s obligations. The House and Senate then had a total of 90 days to pass the bill out of committee and hold a floor vote.<sup>3</sup> During this time, no amendments could be attached to the bill, and Senate filibuster rules didn’t apply.

Trade promotion authority can be very helpful in securing ratification and implementation of trade agreements. By simplifying and streamlining the approval process, and by giving congressional leaders influence over the negotiations from the beginning, trade promotion authority greatly reduces the potential for unhelpful disruption by Congress after an agreement is completed. The procedural restrictions prevent the agreement from being picked apart by every member of Congress whose district is home to an uncompetitive business.

Indeed many proponents of trade promotion authority claim that fast track is necessary to get trade agreements through Congress, and with good reason. Trade historian Craig VanGrasstek notes that between 1789 and 1933, the president submitted 27 tariff reduction treaties to the Senate for ratification, and only five of those were approved.<sup>4</sup> Most of those that did not pass died after the Senate simply refused to hold a vote on them. Trade promotion authority removes that possibility.

The benefits of trade promotion authority, however, come with a substantial cost. Congress generally sees trade promotion authority as a way not only to expedite the passage of trade agreements but also to influence their content.<sup>5</sup> Any agreement that receives fast track treatment is expected to conform to demands imposed by Congress in the trade promotion authority statute.

The 2002 Trade Promotion Act, in particular, laid out extensive and detailed negotiating objectives. Topics covered in the objectives included investment protection, intellectual property laws, administrative law, labor law, and environmental protection.<sup>6</sup> These objectives are mostly export-oriented and reflect the interests of certain U.S. business interests in foreign markets. Their inclusion may garner additional political support for the agreement, but they also attract opposition.

Most importantly, achieving these negotiating goals will not liberalize trade. Nevertheless, these non-trade issues are often the most politically contentious aspect of trade agreements. At the same time, they distract negotiators from the legitimate goal of lowering U.S. trade barriers and fighting protectionism.

### **Trade Promotion Authority Is Unnecessary**

The conventional wisdom, among trade advocates and opponents alike, is that fast track is necessary to get agreements through Congress. But the most recent experiences with trade promotion authority following the Democratic

takeover of the House of Representatives in 2007 aptly demonstrate how ineffective it can be. At the same time, trade policy has become increasingly partisan in recent decades so that trade promotion authority is now neither necessary nor sufficient to pass free trade agreements.

### **Partisan Congress**

In theory, trade promotion authority works well to enable the president to pursue an ambitious trade policy despite a typically trade-skeptic Congress. The negotiating objectives Congress includes in trade promotion authority serve as politically necessary restrictions on the president’s power to open the U.S. market. According to conventional wisdom, accepting the need for a watered-down agreement in advance is the only way to avoid having an agreement rejected or delayed after years of difficult negotiations.

But support for and opposition to free trade agreements has become especially predictable and partisan over the last few decades. Indeed, the trade policy divide in Congress may be more partisan now than at any time since the 1920s, when protectionist Republicans imposed high tariffs that helped plunge the country into economic depression and war. Today, anti-trade sentiment has become quite powerful within the Democratic Party. The Republican Party, while certainly not dominated by free traders, is strongly committed to reciprocal liberalization through trade agreements.

The result of this dynamic is that trade agreements are passed largely along party lines, regardless of what’s in them. For example, the last time there was a Democrat in the White House and Republicans in charge of Congress, controversy over labor and environment issues prevented Congress from approving fast-track legislation for President Clinton in 1998 despite support from Republican leadership. But while Republicans opposed including strong labor and environment objectives in a grant of fast track authority to a Democratic president in 1998, they had no trouble approving three agreements in 2011 that included such provisions.

Democrats, on the other hand, have recently demonstrated their willingness to oppose agreements without strong labor and environment provisions, even if the agreements are consistent with agreed upon fast-track objectives. In 2007 when the Democratic Party took control of the House of Representatives, the new leadership reneged on the 2002 fast track grant and demanded that already-completed agreements be renegotiated to include stronger obligations on labor and the environment before holding a vote.<sup>7</sup> Even then, three of the agreements weren’t taken up by Congress until Republicans took back the House four years later.

Ironically, securing trade promotion authority can end up being politically more difficult than passing trade agreements. In 1998 the House voted 243–180 against granting fast-track authority to President Clinton. One third of the Republican majority joined the bulk of the Democratic members to defeat the bill. In 2002 a Republican House and Democratic Senate approved trade promotion authority for President Bush. The House voted along partisan lines, but the administration had to lobby Democrats in the Senate to secure passage. The 2002 Trade Promotion Act passed the Senate 62–34, a closer mar-

gin than all but one of the free trade agreements submitted to Congress under that bill's procedures.

The lesson we should learn from fast track's recent history is that ideological and partisan differences may be more toxic to trade promotion authority than to gaining approval of completed agreements. While trade agreements offer concrete, measurable benefits, the debate over fast track takes place in the abstract.<sup>8</sup> Trade promotion authority is an opportunity for members to score points with constituents and special interests without much consequence. Once a completed agreement is on the table, members of Congress will face much greater pressure to avoid making parochial demands.

There's little purpose in having a divisive debate about trade policy now and then another one when the TPP is complete, especially when the agreement is likely to pass even without trade promotion authority.

### **President Obama's Trade Politics**

Adding to Congress's predictability, President Obama's tepid approach to trade policy also counsels against the need for trade promotion authority.

The president's trade policy has been fully focused on promoting exports since the beginning of his first term. Rather than seeing increased exports as a way to gain political support for reducing barriers to imports, President Obama has used the promise of increased exports to gain political support for his presidency. Past presidents have certainly viewed trade in a similar way, but President Obama seems especially disinterested in expending political capital, even on major trade initiatives like the TPP.

In late October 2013, U.S. Trade Representative Michael Froman made the administration's position clear when he expressed a desire for a trade promotion authority bill as soon as possible with "broad bipartisan support."<sup>9</sup> The administration has been lobbying for trade promotion authority, but there is little indication that they care what's in it, leaving all the details to Congress.<sup>10</sup>

All in all, the president's attitude toward trade promotion authority demonstrates a keener interest in trade *politics* than trade *policy*. That is, President Obama sees the trade policy debate and ongoing international negotiations as a tool for managing political constituencies, not as part of a genuine agenda to liberalize trade. There's little reason to believe, therefore, that the president will negotiate a TPP agreement that lacks the support necessary to succeed even without trade promotion authority.

With this political dynamic at work in Washington, trade promotion authority is simply not as important as its supporters claim it to be. Republicans will vote for the TPP because it is a free trade agreement. Many Democrats will oppose it for the same reason, but partisanship and active lobbying from the White House will push plenty of them to support President Obama's politically palatable signature trade initiative.

### **Now Is Not the Time**

Not only is trade promotion authority not necessary, at this late stage in the TPP negotiations it is potentially quite harmful. By pushing its weight around now, Congress could reduce the quality of the TPP as a free trade agree-

ment without alleviating the problems of delay and disruption that trade promotion authority is meant to address. Adding new negotiating objectives after years of diplomatic work poses the risk that U.S. negotiators will have to backtrack on their proposals, renege on promises of flexibility, or even ask to rework completed texts.

The TPP negotiations have been going on for over three years now, and the time for an ambitious fast track bill has long passed. Trade promotion authority works because it allows Congress to exert influence at an earlier, less-disruptive stage in the process. But with TPP negotiations entering their final stage, that benefit has all but disappeared.

This problem is most apparent in the debate over whether to include currency manipulation restrictions in the TPP. Dire warnings over the specter of misaligned currency have become a mantra for American protectionists and industries that compete with Asian imports. It appears quite likely at this point that any bill providing trade promotion authority will insist that the TPP and any other trade agreement include a provision addressing the use of monetary policy or other methods to promote exports through currency manipulation.

Numerous governments participating in the TPP negotiations have already taken a strong stance against the inclusion of any provision on currency, and the Obama administration is on record opposing the rules for that reason.<sup>11</sup>

Without the bounds of trade promotion authority, the president could negotiate an agreement free of currency manipulation rules. Most if not all of the Republicans that are demanding currency rules in the TPP, would vote in favor of the agreement either way. If action on currency is needed to secure enough Democratic votes in the Senate, the president, not encumbered by the mandatory objectives of trade promotion authority, would have more flexibility to assuage their concerns in a way that doesn't jeopardize the quality and viability of the TPP.

### **Consider Alternatives: A Cleaner Trade Promotion Authority Bill**

Supporters of the TPP in Washington have labeled the budding trade pact an ambitious, high-standards agreement for the 21st century.<sup>12</sup> What this really means is that the TPP will push forward a lot of unpopular, new demands as the condition for access to the U.S. market. None of this "ambition" helps American consumers or furthers the goal of trade liberalization. It does, however, make achieving freer trade more difficult.

Opening up foreign markets for U.S. companies is an essential part of trade agreements—but only for political reasons. Lowering U.S. trade barriers is politically quite difficult because those barriers benefit specific industries and companies that will lobby hard to keep out foreign competition. By promising foreign market access in return for lowering U.S. barriers, trade agreements garner support from other business interests.

It's a messy but practical way to reduce the harm caused by U.S. trade barriers to economic growth and consumer welfare. But this paradigm is endangered when policymakers begin to think that securing favorable market conditions abroad is their primary goal.

The TPP agreement seeks to bring this aberrational approach to perfection. Negotiators have been working on chapters that cover topics like intellectual property, regulatory coherence, labor laws, and environmental protection. Not all of these are new to free trade agreements, but they seem to be the administration's primary focus in the TPP.

Trade promotion authority could be very useful if, rather than adding extraneous objectives, it instead insisted on their exclusion. A "clean" trade promotion authority bill that demanded "clean" trade agreements would do a lot to reduce friction in trade politics and speed the negotiations along significantly.

There is precedent for using trade promotion authority to rein in harmful presidential priorities. In 1998 congressional Republicans proposed fast track objectives on labor and environment that were less stringent than those already agreed to in NAFTA.<sup>13</sup> The Democrats' demands in 2007, though on the whole more onerous, did include instructions to limit intellectual property and investment rules.

Unfortunately, most often the debates surrounding trade promotion authority are about the value of trade generally or about the propriety of granting powers to the president. Either of those is a distraction from the valuable debate we could be having over what trade agreements ought to look like.

### Leave Your Options Open but Pay Attention

Pursuing the TPP without trade promotion authority doesn't mean ignoring Congress. Indeed, the president will need the support of congressional leaders with power over the legislative schedule if he is going to get the TPP through Congress. Trade promotion authority is one way to do that, but there are other less formal avenues.

Despite not having trade promotion authority, the Obama administration has been following many of its rules throughout the TPP negotiations. In particular, the president informed Congress before initiating negotiations with Mexico, Canada, and Japan after those countries joined the TPP talks, and negotiators even waited the requisite 90 days.<sup>14</sup> He has not, however, provided the same level of consultations with key congressional members that would be required under trade promotion authority.

The administration should increase its interactions with key Senate and House committee members as the negotiations go forward. This will enable policymakers in both branches to work together toward reaching a completed TPP agreement that Congress will approve.

Taking this approach foregoes trade promotion authority's promise that Congress won't delay or disrupt the agreement after it is completed, but it also avoids legally binding negotiating objectives that could not only delay the agreement but reduce its value. Since fast track isn't necessary to pass the agreement through the current Congress, the benefits of fast track do not outweigh the costs.

### Conclusion

Many will argue that you need fast track to pass free trade agreements, but right now trade promotion authority

is largely useless and unacceptably costly. Recent history with fast track shows that the obstacles to passing free trade agreements depend more on the partisan and ideological balance of Congress. Imposing Congress's policy objectives into the negotiations at this stage won't help get the TPP accomplished any sooner, and will surely reduce the value of the agreement as a vehicle to liberalize trade.

A clean fast track bill that reduces the role of controversial non-essential objectives in the TPP negotiations would do wonders for the U.S. trade agenda. Unfortunately, Congress seems poised to insist on making the TPP an even more "ambitious" agreement.

The president has options to get the TPP through Congress that don't involve the risks that come with a formal grant of trade promotion authority. If he wants support for the TPP, President Obama should listen to congressional leaders, adapt his negotiating goals accordingly and then lobby Congress to pass the agreement once it's completed.

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### Notes

1. Fast track was first conceived in the Trade Act of 1974. Between 1934 and 1974, the Reciprocal Trade Agreements Act empowered the president to lower tariffs by decree in conjunction with a reciprocal treaty.
2. Bipartisan Trade Promotion Act of 2002, 19 USC §3802.
3. 19 USC §3804.
4. Trade Promotion Authority, Part I," *Washington Trade Report* 29, no. 29 (August 5, 2013): 3–5.
5. Vicki Needham, "Fast-track authority, currency manipulation remain top trade issues amid TPP delay," *The Hill*, December 10, 2013.
6. 19 USC §3802(b)(3)-(17).
7. Bipartisan Agreement on Trade Policy, May 2007, [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf).
8. Hal Shapiro and Lael Brainard, "Fast Track Trade Promotion Authority," *Brookings Policy Brief* no. 91, December 2001.
9. Doug Palmer, "USTR Froman presses for trade bill 'as soon as possible,'" *Politico*, October 24, 2013, <http://www.politico.com/story/2013/10/ustr-froman-presses-for-trade-bill-as-soon-as-possible-98797.html>.
10. A notable exception has been currency manipulation, an issue that Congress is sure to include in a trade promotion authority bill but that the president opposes.
11. "Froman Warns Currency Provisions in TPP Could Affect U.S. Monetary Policy," *Inside U.S. Trade*, November 19, 2013; Kevin Carmichael, "Leave Currency Manipulation out of Trade Talks, Ed Fast Urges," *Globe and Mail*, September 27, 2013.
12. Office of the U.S. Trade Representative, "The United States in the Trans-Pacific Partnership," <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>.
13. I.M. Destler, *American Trade Politics*, 4th ed. (Institute for International Economics, 2005), p. 261n15.
14. Office of the U.S. Trade Representative, "U.S. Trade Representative Kirk Welcomes Canada as a New Trans-Pacific Partnership Negotiating Partner," June 19, 2012, <http://www.ustr.gov/about-us/press-office/press-releases/2012/june/ustr-kirk-welcomes-canada-as-new-tpp-partner>.