



TRADE, EQUITY, AND DEVELOPMENT

ISSUE

3

SEPTEMBER
2002

Environment's New Role in U.S. Trade Policy

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On a hot day in August, President George W. Bush signed into law the *Trade Act of 2002*. Months of debate between the administration and members of Congress, their constituencies, and other governments were over; with the stroke of his pen President Bush became the first president in almost a decade to enjoy the benefits of trade promotion authority (TPA).

In another important development, the League of Conservation Voters (LCV) factored trade policy into its measure of elected officials' "greenness." After years of active discussion of the environmental aspects of trade policy, its member organizations unanimously concluded that TPA passage would harm their efforts to protect the environment. Of the House TPA version, the LCV stated, "...[it] did not provide sufficient assurances to Congress that the administration would negotiate trade agreements that meet objectives designed to safeguard the environment."

That the LCV would turn its attention to trade policy is a reflection of the growing public demand for trade agreements that support environmental policy priorities. Ironically, this TPA legislation includes specific instructions to pursue environmental policy priorities, a first for U.S. trade. In fact, when the North American Free Trade Agreement (NAFTA) was negotiated by the administrations of former presidents George H. W. Bush and Bill Clinton, "fast track"—TPA's predecessor—included only minor references to the environment.

What are TPA's green provisions? How can Congress use them to promote trade policy consistent

with the oft-repeated desire to liberalize trade *and* protect the environment? To answer these questions, this paper presents a "road map" of TPA's environmental provisions, discusses the environmental protection issues raised by these instructions, and suggests a number of areas that should be of immediate concern to Congress. While not perfect, TPA's environmental instructions present Congress with numerous opportunities to address environmental issues in U.S. trade negotiations.

What Is Trade Promotion Authority?

As part of the *Omnibus Trade Act of 1988*, Congress agreed to vote "yes" or "no" to a trade agreement presented by the president—without any amendments—if the executive branch agreed to follow negotiation guidelines crafted by Congress. This "fast track" authority—which balanced U.S. negotiation strength with Congress's desire to control trade policy—was used to negotiate NAFTA and complete the Uruguay Round GATT negotiations, but lapsed during President Clinton's first term. In 1997 and 1998, Congress and the administration tried twice to reauthorize fast track; both attempts failed when they could not agree on negotiation instructions. Their disagreement centered on the question of linking trade and environment, which the House Republican leadership steadfastly rejected for years.

It is therefore both surprising and encouraging to find environmental provisions in fast track's successor, TPA, which passed in the House in 2002 under the leadership of House Ways and Means

SUMMARY

The Trade Act of 2002 integrates environmental policy priorities into U.S. trade negotiations. The manner in which resulting tensions between trade and environment are resolved requires greater involvement by Congress. Of particular short-term importance to Congress should be how bilateral negotiations with Chile and Singapore are concluded and regional negotiations with Central America begun. Congress should also use its oversight power to develop clearer instructions regarding a host of environmental policy issues, including investment and services negotiations, environmental reviews of trade agreements, and clarification of U.S. foreign assistance regarding technical assistance and capacity building for our trading partners. In short, TPA presents Congress with the leverage it needs to oversee trade negotiations, an opportunity to work with the administration and win back public support for U.S. trade policy that respects worker rights and protection of the environment.

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Committee Chairman Bill Thomas (R-CA). TPA, like fast track, is an arrangement between the executive and legislative branches designed to facilitate trade negotiation and implementation. But unlike fast track, TPA contains green provisions and these provisions remained largely intact as the bill moved from House to Senate, to conference committee, to the president's desk in August.

TPA's Green Provisions

Section 2102 of TPA begins by stating that the overall objective in trade should be to obtain more open, equitable, and reciprocal global market in goods and services, especially as it pertains to the sale of U.S. products worldwide. However, according to the legislation, expanded trade should also reflect other U.S. policy priorities, including the promotion of mutually supportive trade and environmental policies, respect for worker rights and the rights of children, and a commitment to ensuring that domestic environmental protection policies are not weakened or reduced to encourage trade. The overall objectives contained in this section are considered hortatory, as no administration is obligated to meet them in any specific manner. But like the preface to a book, they set the tone for actual negotiations. More important are the specific instructions outlined by Congress in the next section.

Environment as a Principal Negotiating Objective

In the next section of TPA, entitled "Principal Negotiating Objectives," Congress outlines its trade policy objectives more specifically. For the first time, Congress has given the administration binding negotiating objectives on the environment:

- ensure that U.S. trading partners do not fail to effectively enforce their own environmental laws to gain an unfair trading advantage (2102)(b)(11)(A–B);
- promote the sale of U.S. green products and services (2102)(b)(F);
- strengthen the capacity of U.S. trading partners to protect the environment (2102)(b)(11)(D);
- reduce or eliminate government practices or policies that unduly threaten sustainable development (2102)(b)(E);
- establish consultative mechanisms to strengthen the capacity of U.S. trading partners to develop and implement environment and human health protection standards (2102)(c)(3);
- conduct environmental reviews, consistent with the policy and procedures established during the Clinton administration under Executive Order 13141 (2102)(c)(4); and
- promote consideration of multilateral environmental agreements (MEAs), in negotiations on the relationship between MEAs and trade rules, especially as they relate to GATT Article XX exceptions for the protection of human health and natural resource conservation (2102)(c)(10).

Environment may have achieved the same priority as other trade negotiation objectives with respect to the ability to use dispute settlement and trade remedies to enforce compliance (2102)(b)(12)(G). However, language inserted into the TPA legislation by House Republications states that the United States cannot use punitive trade measures if a trading partner's failure to enforce an environmental or labor law results from a reasonable decision to prioritize other policies ahead of enforcement of these laws (2102)(b)(11)(B). None of the other specific negotiation objectives contains this kind of exemption.

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Investment and Environmental Concerns

During the TPA debate, environmental organizations repeatedly raised concerns that “investor–state” provisions of past agreements, such as NAFTA, have given foreign investors greater rights than domestic companies. Under these provisions, private investors who believe that a government action is inconsistent with the terms of the agreement may initiate binding arbitration to determine whether the investor is due financial compensation. Environmental groups expressed concern that investors might use this system to undermine domestic regulations intended to protect the environment and human health and that the dispute settlement procedures lack adequate transparency to protect the public interest.

In response to these concerns, in section (2102)(b)(3), Congress instructs negotiators to pursue investment agreements in a manner consistent with U.S. legal principles and practice. U.S. negotiators will continue to create opportunities for U.S. investors to seek damages for government violations of the investment agreement, but they will do so without creating “greater substantive rights with respect to investment protections” than those enjoyed by U.S. investors in U.S. courts. To that end, the TPA legislation directs negotiators to develop a mechanism that will screen out frivolous claims, create an appellate process, and ensure appropriate public involvement in dispute hearings. Based upon the joint House–Senate explanatory statement, legislators included the word “substantive” to ensure that foreign investors have recourse to investor–state tribunals without necessarily exhausting domestic legal proceedings, and that the procedures used by a tribunal to screen out frivolous claims or exhaustion of remedies may be distinct from those used in the U.S. legal system. In short, while Congress acknowledges that foreign investors may enjoy a wider range of dispute settlement options, the final settlement outcomes should be the same for domestic or foreign investors alike.

Other Opportunities to Address

Environmental Issues

If put under a microscope, nearly every aspect of a trade or investment agreement could be imbued with environmental significance. However, doing so would have been counterproductive to Congress’s

effort to reconcile the two policy areas, and it would ask trade agreements to shoulder too much responsibility regarding environment and human health policy. That said, five other negotiating objectives stipulated by Congress will likely earn a great deal of attention from environmentalists.

- **SERVICES.** Negotiators are instructed in (2102)(b)(2) to “reduce or eliminate trade barriers to international trade in services, including regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operation of service suppliers.” Numerous environmental NGOs have expressed concern over the impact of liberalizing international trade in services, particularly with regard to a country’s ability to regulate natural resource use. Of particular concern is whether or not regulators have the authority to manage water quality and use.
- **AGRICULTURE.** TPA directs negotiators to develop disciplines for domestic support programs so that production beyond domestic food security needs is sold at world prices (2101)(b)(10)(v). In addition, it instructs negotiators to ensure that food safety and product labeling requirements do not unjustly restrict market access, especially bio-enhanced products (2101)(b)(10)(viii)(II) or food safety restrictions that are not based on scientific principles (2101)(b)(10)(viii)(III). These provisions highlight the contentious debate over how to liberalize trade in agricultural products in a manner that protects food security and biodiversity and increases developing countries’ access to wealthy markets.
- **INTELLECTUAL PROPERTY RIGHTS.** The law instructs negotiators to respect the Doha Declaration on Trade-Related Intellectual Property Rights and Public Health, which clarifies a country’s right to break patents during public health crises (2101)(b)(4)(C).
- **REGULATORY PRACTICES.** TPA instructs negotiators to ensure that foreign regulatory practices are based upon “sound science,” risk assessment, cost–benefit analysis, or other objective evidence.



The practices also must be developed in an open and transparent manner and not used as unfair trade barriers to U.S. products (2101)(b)(8)(B). The emphasis on sound science raises the debate over using the “precautionary principle” in policy making, action taken to prevent environmental or health damage when scientific evidence is uncertain. The U.S. government does not recognize the precautionary principle in international law, but believes that the U.S. practice of taking precaution when regulating is consistent with WTO trade rules.

- **TRANSPARENCY.** TPA charges negotiators to promote openness at the World Trade Organization (WTO) and other international institutions by increasing public access to meetings, proceedings, and submissions, including those related to dispute settlement (2101)(b)(5). Transparency and public participation in policy making has long been considered the linchpin of good environmental policy. The United States and Jordan made a similar commitment to transparency and public participation in their bilateral agreement.

Representative (USTR), the COG must develop written guidelines to facilitate information sharing and consultation.

Environmental Opportunities and Challenges in TPA

The *Trade Act of 2002* reflects an important shift in U.S. trade policy. The argument over whether or not environment belongs in trade negotiations is now over; environmental policy is here to stay as an element of trade negotiations.

In the debate leading up to TPA’s final vote, many critics argued that the instructions lack the specificity necessary to guarantee adequate environmental, worker rights, and public health protection. But the instructions from Congress must walk a fine line: directed enough to end in agreements that protect the environment, worker rights, and other U.S. policy objectives while maintaining the flexibility necessary to accommodate disparate situations. Narrowly drafted objectives would be difficult to fit into bilateral negotiations with Chile and Singapore, Central American regional negotiations, WTO accession for the Russian Federation, and the Free Trade Agreement of the Americas (FTAA) and WTO agendas. More specifically,

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Improvements in Congressional Oversight and Consultation

Previous fast track legislation placed the primary responsibility for congressional oversight with the Senate Finance and House Ways and Means Committees. While these committees will retain jurisdiction over trade policy, legislators incorporated into TPA a Congressional Oversight Group (COG) composed of the chairman and ranking member of the two committees, plus three additional members. These members will have access to all negotiations as official advisors. Before the end of 2002, working with the Office of the United States Trade

demanding that particular environmental outcomes be negotiated by trade delegations is often not the best approach to sound environmental policy.

TPA, in fact, institutionalizes the *consistent* inclusion of environmental objectives in trade negotiations according to congressional guidelines and oversight. Without TPA, the administration is free to negotiate trade agreements it believes serve the best interests of the country. For example, during the China negotiations, the Clinton administration received guidance from its trade policy advisory committees and public responses to Federal Register notices, but it alone chose what to



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negotiate. This approach to policy development enabled the former administration to include the environment in its trade negotiations with Jordan, Chile, and Singapore, but not with China or Vietnam. Whether or not those decisions were appropriate is moot; what is important is that the administration alone determined U.S. trade policy. TPA is an important step towards making USTR and the administration more accountable to public inquiry and congressional oversight as it establishes benchmarks that enable Congress and the public to evaluate the administration's trade policy progress.

TPA does raise environmental policy issues that should be of immediate interest to members of Congress with responsibilities for U.S. environmental policy and appropriations.

Monitor Short-Term Trade Policy: Chile, Singapore, Morocco, and Central America

Of particular concern to Congress should be the manner in which the Chile and Singapore bilateral negotiations are concluded, as well as the start of trade negotiations with Central America and Morocco. The U.S.–Chile negotiations will play an especially important role in the FTAA and Central American negotiations, for Chile is one of the few countries in the Western Hemisphere willing to discuss the environment and labor in trade negotiations. As Singapore is a leading voice among G-77 countries, the outcome of the U.S.–Singapore negotiations will exert a similar impact on positions taken by other G-77 nations.

Under TPA, President Bush is required to provide Congress with at least 90 calendar days notice of his intention to enter into negotiations and also spell out his negotiating priorities. Additionally, he must clarify his negotiation stance regarding Singapore and Chile. If the COG is not fully operational within the coming months, however, the administration may try to finalize its negotiation objectives in the bilateral and regional

trade arenas without TPA's requisite congressional supervision. Congress and the administration should immediately decide upon the COG membership and agree to its operating guidelines *before* the administration attempts to conclude Chile and Singapore or launch new negotiations.

Specifically, Congress must ensure that the COG guidelines guarantee COG members *and* staff access to the development and negotiation of trade agreements. Members and staff who attend negotiations will gain a deeper understanding of how environmental policy fits into the complex nature of trade agreements. The guidelines should also establish direct lines of communication with relevant members of federal agencies, specifically the Trade Policy Staff Committee (TPSC) at the senior staff level and the Trade Policy Review Group (TPRG) for sub-cabinet policy decisions. Understanding how federal agencies produce trade policy positions is critical to winning support from Congress for difficult compromises. Similarly, Congress should develop guidelines for more frequent interaction with private sector trade policy advisory committees. This sends a signal to the administration and the nation that Congress values the current trade policy advisory system. Finally, the House Ways and Means and Senate Finance Committee leadership should ensure that the COG includes representatives from House and Senate environment committees. Including representatives from committees like the Senate Environment and Public Works or House Committee on Resources increases the likelihood that these committees will more closely monitor trade negotiations directly relevant to their jurisdictions.

Know the Specific Implications of Trade Negotiation Issues

While significant, TPA's environmental provisions leave unanswered many important questions regarding U.S. trade policy goals and their effect



on local, state, national, and international environmental protection efforts. It is therefore essential that Congress convene hearings, held by committees with environmental policy jurisdictions, to clarify its intentions regarding this language and to engage the administration and interested public in a discussion of relevant subjects.

Several of TPA's specific objectives already have been well developed through ongoing public discussion. For example, the U.S. position regarding improved transparency in trade institutions like the WTO, a product of public discourse, has remained largely the same since 1999. This position is now accurately reflected in TPA's specific instructions in trade proceedings. On the other hand, some subjects have escaped congressional attention, such as those argued at length among federal agencies. For example, federal agencies have been concerned about investment liberalization for more than four years, but few members of Congress

section above that outlines TPA's green provisions, but they deserve elaboration. What does Congress mean by eliminating government practices or policies that unduly threaten sustainable development? Does this language include climate change, energy policy, and consumption patterns? Do subsidies paid to corporate farmers constitute unsustainable policy? The greater the ambiguity in this language, the greater the risk of uncertainty regarding U.S. trade policy objectives. Such uncertainty, in turn, weakens the foundations for effective oversight by Congress and the interested public.

Developing a clear understanding of the specific U.S. environment and trade policy objectives is especially important within the context of the environment instructions found in the World Trade Organization's Fourth Ministerial (Doha). As with TPA, for the first time, WTO members have articulated an agenda for specific trade and

Congressional recognition of environmental reviews of trade agreements will improve quality of future reviews by encouraging a new analytical field.

are aware of the agencies' different opinions. Given the level of public attention to the investment issue and its potential impact on environmental policy, congressional scrutiny is necessary to clarify investment negotiations. Trade liberalization in services is another important but little understood area: Should the United States consider trade liberalization in services on a case-by-case basis—financial, pollution abatement, or professional services—or apply liberalization across the board? This is an important distinction, especially since we are only beginning to fully appreciate the implications for domestic regulatory policy created by these new disciplines.

Finally, even more issues requiring further development and definition lie at the nexus between trade and environment. Some are mentioned in the

environment negotiations. Congressional committees with environmental jurisdictions should again use committee hearings to develop a better understanding of the domestic policy implications arising from these negotiations.

Learn Where and How U.S. Dollars Are Spent Developing Trade Policy

In 2000, federal agencies spent nearly \$100,000 to conduct an environmental assessment of the proposed accelerated tariff reductions in wood products from Asian Pacific Economic Cooperation (APEC) forum countries. At the end of the Clinton administration, the U.S. Environmental Protection Agency (EPA) allocated \$1 million to develop its capacity to conduct environmental assessments of trade agreements. USTR is currently conducting



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reviews of the FTAA negotiations, and is nearing completion of reviews for Chile and Singapore. Yet, Congress remains largely unaware of such expenditures because beyond the USTR, the State Department's Economic Bureau, and the Commerce Department's Office of Multilateral Affairs, it is very difficult to accurately track federal agency trade policy activity. As Congress more clearly defines the broader social goals associated with trade policy, it must better monitor agency activity and ensure that agencies conventionally not associated with trade policy have the mandate and funding to fulfill their role.

Two TPA instructions in particular require federal agency capacity building: conducting environmental reviews of trade agreements and strengthening the ability of U.S. trading partners to protect the environment. Formal congressional recognition of environmental reviews of trade agreements will improve quality of future reviews by encouraging a new analytical field, particularly important if Congress and the administration wish to earn public support. More direct oversight by Congress will also provide much-needed resources for agencies involved in these reviews.

A final appropriations issue is the need for trade-related technical assistance and capacity building for our trading partners. With the successful conclusion of the WTO Doha Ministerial, technical assistance and capacity building are now intricately woven into nearly every aspect of trade negotiations. For some experts, progress in areas of particular interest to the United States—like investment, competition, and procurement and

the environment—will depend upon the way governments respond to technical assistance and capacity building.

That said, technical assistance and capacity building are poorly understood, and most developing countries do not believe that assistance is adequately tailored to meet their needs. WTO officials are working hard to deliver appropriate officials, but the institution was designed to administer international trade rules, not provide development assistance. Technical assistance and capacity building are areas ripe for oversight by congressional committees with development assistance and international relations jurisdictions.

The Way Forward

The *Trade Act of 2002* formally recognizes that environmental priorities must be addressed as part of any trade negotiation. Resolving the arising complex policy issues requires Congress to become more involved in trade negotiations, and work with the interested public to ensure that U.S. trade policies reflect the broader interests of American society. TPA presents Congress with the leverage its needs to oversee trade negotiations. Working together, Congress and the administration must demonstrate leadership and win back public support for trade agreements that reflect American values, values that include respect for worker rights and protection of the environment. ■

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