The Trade Act Of 2002: The New Fast-track Authority And Its Implications For The WTO E-commerce Negotiations *

Preliminary Draft for Discussion

Work in Progress

- Chapter 4 -

The WTO and the Liberalization of Cross-border Electronic Services: a transatlantic perspective

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* Thanks goes to I.M. DESTLER (Institute for International Economics), CRAIG VAN GRASSTEK (Washington International Trade Reporters / Harvard University), the Trade Counsels of the HOUSE WAYS AND MEANS COMMITTEE (U.S. House of Representatives) and the SENATE FINANCE COMMITTEE, officials from the USTR and the trade policy lobbyists of the major high-technology or service sector associations, notably the INFORMATION TECHNOLOGY INDUSTRY COUNCIL (ITI), the MOTION PICTURE ASSOCIATION OF AMERICA (MPA) and the COALITION OF SERVICE INDUSTRIES (CSI). Their valuable inputs that helped to clarify the concept of fast-track legislation and that helped with the evaluation of the new Trade Promotion Authority was instrumental for the writing of this chapter. The text also benefited from discussions with PIERRE SAUVÉ (OECD), GARY CLYDE HUFBAUER (Institute for International Economics), JEFFREY SCHOTT (Institute for International Economics) and CLAUDE BARFIELD (American Enterprise Institute). Finally, the following conference - American Bar Association (ABA) Section of International Law and Practice Symposium, "The U.S., the Doha Round and the WTO – Where Do We Go From Here?", Segment 9: TPA/"Fast-Track" – Where do we go from here?; September 12-13, 2002, Georgetown University Law Centre, Washington D.C. - and the participation in the USTR public hearing on the GATS offers (Federal Register, Vol. 67, No. 182, September 19, 2002) provided important input.

All points made in this text, however, should not be attributed to any one of the above persons. Moreover, the same points as with respect to the implications of the trade policy framework of the EC (Art. 133) apply. What matters most is how the underlying legal framework will be used in practice. As, at the time of writing, the trade policy framework of the US was very new (August 2002) some of the here-presented interpretations are tentative and must be validated as the Doha Trade negotiations proceed.

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Washington D.C., March 18, 2003

Prelude

This fourth chapter is part of a larger work that analyses the EC's and the American internal negotiation parameters when it comes to the WTO negotiations concerning the cross-border trade of digital products. With digital trade products the author refers to entertainment services (music, audiovisual services, etc.) and IT products (software, entertainment games, etc.) products that derive their trade value from "content" that – in the offline world – was previously delivered on physical carrier media like CDs. It is assumed that in the negotiations digital trade products are mainly considered under the GATS. Due to their full electronic deliverability, digital trade products are also treated as one of the most promising building blocks of electronic commerce. In the WTO member countries have to outstanding tasks: the clarification of the open e-commerce questions (moratorium, classification questions and regulatory discipline for e-commerce) and the entry of further GATS mode 1 commitments in fields like computer and related services, audiovisual services, value-added telecommunication services, etc.).

This chapter assesses in what way U.S. trade jurisdiction will influence the U.S. negotiation position concerning digital trade products and e-commerce in general during the ongoing Doha negotiations.

Chapter 4: The Trade Act of 2002: the Agreement and its Implications on the WTO E-commerce Negotiations

4.1 Introduction

The “Bipartisan Trade Promotion Authority Act of 2002” that is part of the “Trade Act of 2002”[1], in force since August 6, 2002, provides renewed fast-track negotiation authority for trade agreements and thus the new legal basis for the interaction between the U.S. Congress and the President with respect to the Doha and other trade negotiations[2]. As opposed to the EC that has Art. 133 for the division of powers and a separate mandate valid only for the upcoming WTO negotiations, the new fast-track legislation specifies both: the American trade policy objectives for all bilateral, regional and multilateral trade negotiations and the U.S. trade policy jurisdiction until 2005 (2007 if extended). The new delegation of fast-track authority to the President that America has lacked for almost ten years is instrumental for the service and e-commerce negotiations that are part of the larger Doha Development Round.

This chapter shows that the Bipartisan Trade Promotion Authority Act of 2002 will significantly reinforce the U.S. negotiators’ offensive negotiation stance with respect to the WTO negotiations on digital trade products (audiovisual and IT services). With the determined support of U.S. Congress U.S. negotiators will be seeking to agree on the most-trade liberal approach to the WTO e-commerce questions addressed in chapter 2.

This strong mandate for liberalization of electronic services is the result of (i) the very effective lobbying coalition of American IT and content-producing industries in digital trade matters that mobilizes both political parties and (ii) consequent strong congressional interest in the most trade

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1 Public Law 107-210.

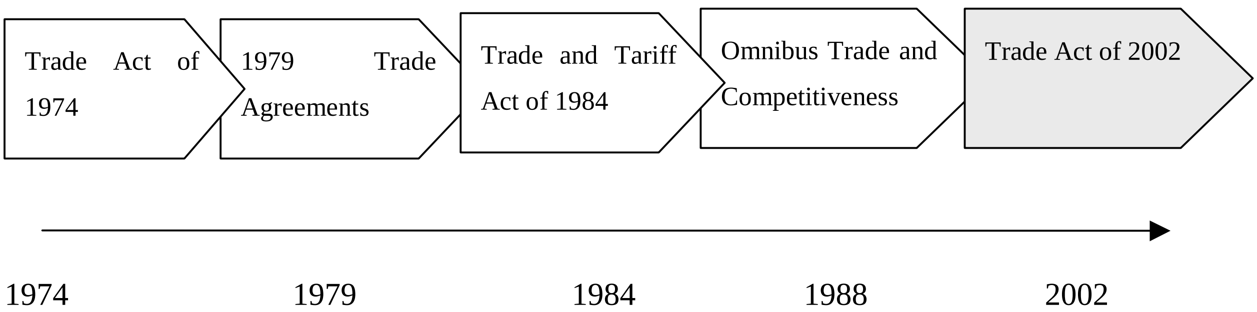
2 This analysis focuses on the Bipartisan TPA Act of 2002. Unless otherwise specified the references to particular treaty sections in the footnotes of this chapter always refer to the Bipartisan TPA Act of 2002. For instance, the following reference would refer to the Bipartisan TPA Act of 2002 Sec. 2101 (b) (1) whereas a reference to a

liberal treatment of electronically delivered services in trade agreements. Both these factors have led to the supportive "Bipartisan Trade Promotion Authority Act of 2002" that specifies demanding principal negotiation objectives for e-commerce and GATS negotiations and that offers Congress increased channels to voice its great interest in the most liberal treatment of digital trade and GATS issues.

The analysis proceeds in four steps. First, in Part 4.2 light is shed on the more general traits U.S. trade policy jurisdiction and its relevance to e-commerce and the GATS negotiations Part After Part 4.3 is used to elaborate on the debate that led to the new fast-track legislation, the actual content of the Bipartisan TPA Act of 2002 is presented in Part 4.4 and evaluated in Part 4.5. In discussing the division of power with respect to US trade policy[3], three important points should be borne in mind:

Point 1: As is the case of the EC, the U.S. distribution of jurisdiction with respect to the conclusion of foreign trade treaties in the US is complex and it evolves (see Figure 1). The original distribution of responsibilities between the legislative branch and the executive branch is anchored in the U.S. Constitution. But Congress delegates its trade agreement authority to the U.S. President via fast-track legislation. The fact that fast-track authorities expire and must henceforth be renewed creates the room for the here-discussed changes in that trade authority delegation.

Figure 1: The evolution of fast-track in the USA



Source: The fast-track legislation granted in 1974 was renewed in 1998, in 1991, 1993 and 2002

similar section in another trade act would read as Sec. 2101 (b) (1), Trade Act of 1974. In the text the act is abbreviated to Bipartisan TPA Act of 2002.

As opposed to the EC, the formal division of powers between the U.S. Congress and the President as manifested in the Trade Act of 2002 are not different for goods or services. However, the different trade negotiation authorities see an evolution in terms of the requirements U.S. Congress poses to the executive branch.

Point 2: From the Trade Act of 1974 to the Trade Act of 2002 there has been a continual strengthening of the legal provisions relating to negotiation objectives and procedural requirements that strengthen the role of Congress in the trade negotiations. This evolution towards more congressional control took a new height in the Trade Act of 2002. Its enactment was the result of a very partisan and divided struggle between promoters and opponents of fast-track legislation that ended in a very small majority for the new trade bill.

Like the mandate and division of powers in the EC, the current U.S. legislation provides US negotiators with negotiation objectives and submits their actions to close and active scrutiny of the U.S. Congress. In comparison to previous fast-track legislations, the Bipartisan TPA Act of 2002 imposes more stringent negotiation objectives with respect to import-sensitive trade items or particular sensitive trade topics (integration of labor and environment standards, etc.) but also sets out demanding negotiation objectives on topics like e-commerce. Furthermore, it increases the congressional role during the negotiations via the imposition of increased consultation and reporting requirements to the executive branch, requests more active involvement of Congress in the negotiations and creates disciplining mechanisms for the performance of U.S. negotiators.

Definitely, Congress has narrowed the margin the USTR has to move through the overall negotiations. It is argued that in some cases the congressional divide on trade issues and its greater means of interference with negotiations may actually hamper the ability of the USTR to reach trade agreements. As the legal language used in the TPA leaves room for interpretation, the political context in which the congressional role is exercised will be of importance.

Point 3: However, it is also stated that for the liberalization of electronically delivered services the increased congressional involvement has totally different implications than for more defensive U.S. trade topics.

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[3] Use this expression for the EC text instead of responsibility.

In fact, the liberalization of e-commerce was one of the most uncontroversial negotiation topics during the drafting of the new fast-track legislation. Unlike on other trade topics, there is a consensus between both the Executive and Congress that it is important to exploit the American comparative advantage in electronically delivered services. Thus, like the USTR both the Democrats and Republicans attach a high priority to the most-liberal approach to e-commerce in the WTO.

Accordingly, the TPA e-commerce mandate imposes very detailed and liberal negotiation objectives. The mandate on services is also extremely relevant to e-commerce. Hence, the current legislation that ties the hands of the U.S. negotiators on the upside in e-commerce matters can work as an important negotiation lever with trade partners. Due to the consensus in Congress changing political majorities does not touch upon this influence.

4.2 U.S. Trade Policy Jurisdiction in the Light of E-commerce and Service Trade Negotiations

In order to describe the state of the US foreign trade jurisdiction first the underlying constitutional basis for the trade policy jurisdiction is described (Part 4.2.1). Then one can analyze how the concept of fast-track legislation and the newer TPA conferred by the Trade Act of 2002 supplement the constitutional basis (Part 4.2.2) and how fast-track legislation applies to e-commerce and service trade negotiations (Part 4.2.3).

4.2.1 Trade Policy Jurisdiction as Anchored in the U.S. Constitution

Contemporary U.S. jurisdiction concerning trade policy and the conclusion of trade treaties does not make a difference between trade in services and trade in goods[4]. U.S. trade law refers to services as economic activities whose outputs are other than tangible goods[5]. The powers to negotiate and conclude international trade agreements are shared between the executive branch (the President and executive agencies like the USTR) and the legislative branch (the Congress).

The President has the right to conduct relations, to negotiate and to conclude treaties with other countries[6]. Under this constellation the U.S. Constitution prescribes that international agreements are under the exclusive power of the federal level[7]. These agreements are then binding upon U.S.

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4 The implementing legislation may be on the state level and then we must note that service regulations are different from other regulations.

5 Sec. 306 (a) (5) Tariff and Trade Act of 1984. This paragraph specifies further that the term “services” includes, but is not limited to, banking, insurance, transportation, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism.

6 See BURNHAM (1995), p. 8, JÄGER & WELZ (1995), p. 159 ff. For a background to the distribution of jurisdiction with respect to trade treaties, the actors involved and the history of fast-track legislation see HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 238 ff., DESTLER (1995), KLUTTIG & NOWROT (2002), pp. 6-10, JÄGER & WELZ (1995), p. XX (cut). International Treaties must then be ratified by the U.S. Senate and not by the U.S. House of Representatives.

7 Art II, Sec. 2, cl.1. of the US Constitution and JÄGER & WELZ (1995), p. 94.

States (the sub federal level)[8]. The States are precluded from any treaty making with a foreign state if they do not have the consent of Congress[9].

With or without fast-track legislation the actual service trade negotiations are conducted by the negotiators of the United States Trade Representative (USTR)[10]. Among other duties, the USTR is (1) to have primary responsibility for developing and coordinating the implementation of U.S. international trade policy – including, through the interagency organization, for trade in services[11]; (2) chief U.S. representative for, international trade negotiations; (3) to coordinate trade policy with other agencies[12]. Via the Trade and Tariff Act of 1984 provisions relating to the trade in services the Department of Commerce is to help raise the competitiveness of the U.S. service industry and help USTR identify trade barriers abroad[13].

When it comes to foreign trade treaties, however, Congress and not the President has the power to regulate commerce with foreign nations and among the several States[14]. To be precise, the respective Subcommittees of Trade of the Finance Committee of the U.S. Senate and of the

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8 Art. VI, cl. 2. of the US Constitution.

9 Source.

10 This is the executive office that represents the U.S. President in the negotiations. The description of this and other U.S. policy actors focuses on the information necessary for the underlying research question of this Thesis, namely cross-border trade in electronic services. See WTO (1999 U.S. tpr), USTR (???)), p. 21, p. XX annual report or HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 269-277 for details on the trade policy formulation process and the actors involved. The more than 1000 page document of the HOUSE COMMITTEE ON WAYS AND MEANS (2001a) is the 2001 edition of the current compilation of U.S. Trade Statutes. Laws come from Sec. 135 of the Trade Act of 1974, as amended**.**

11 Sec. 306 (c) of the Trade and Tariff Act of 1984 (19 U.S.C. 2114b and 2114c; Public Law 98–573, approved October 30, 1984).

12 Sec. 241 of the Trade Expansion Act of 1962 established the precursor of the USTR, the Special Trade Representative (STR). The Reorganization Plan No. 3 of 1979, implemented by Executive Order 12188 of January 4, 1980, authorized certain changes in the trade responsibilities of the STR and renamed it the United States Trade Representative (USTR). For information on USTR's further responsibilities and the legal texts underpinning the role of the USTR, see the Reorganization Plan, HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 271-273, pp. 1144-1148 and the annual reports of the USTR (2000, 2001, etc.). The role of other trade policy actors of the executive branch, like the one of the Department of Commerce or the U.S. International Trade Commission is not treated in this thesis.

13 According to Sec. 306 (a)(1) of the Trade and Tariff Act of 1984 the Secretary of Commerce shall establish a service industries development program designed to develop policies that are designed to increase the competitiveness of U.S. service industries in foreign commerce, and identify foreign government policies that may obstruct U.S. service exports.

14 Art. I, Sec. 8 of the U.S. Constitution and TREBESCH (1973), pp. 23 ff.

Committee on Ways and Means of the U.S. House of Representatives have congressional jurisdiction over international trade matters[15].

However, the ability of U.S. Congress to pass legislation that encroaches on competences reserved to the U.S. states is limited[16]. As the U.S. legal regime for services is a mix of federal and state law whereas state law often predominates[17] and as important sector-specific differences on the level of regulatory jurisdiction exist[18], this division of power is particularly relevant to the GATS and e-commerce negotiations.

For several reasons the executive and legislative branch came up with a legal innovation that does justice to constitutional division of power but that facilitates the conclusion of service or other trade agreements with third countries: fast-track legislation.

4.2.2 Fast-Track Legislation: The Delegation of trade jurisdiction from Congress to the Executive Branch

Until the 1930s when trade policy concerned mostly tariffs the President undertook the negotiations without requesting delegation of powers from the Congress[19]. In 1934 a first delegation of powers to conclude bilateral tariff-reducing agreements was included in the Reciprocal Trade Agreement Act of 1934. It was the legacy of Smoot-Hawley Tariff Act of 1930

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15 The jurisdiction of the House Committee on Ways and Means, for instance, reaches from bills that relate to tariff structures to the maintenance of relations to other U.S. trade policy actors. See HOUSE COMMITTEE ON WAYS AND MEANS (2001b) and www.house.gov for a more detailed explanation of the responsibilities of the House Ways and Means Committee consistent ? and www.senate.finance.com give institution link for more detailed explanations of the responsibilities of the Senate Finance Committee. In some other cases like the negotiation of trade agreements concerning financial services it is the House Committee on Financial Services (www.house.gov/) that has responsibility.

16 See for an introduction on this topic WEILER (1999), pp. 145-149.

17 WTO (1996 TPR U.S.), pp. 151 ff., WTO (1999 TPR U.S), pp. 20, 179-192 and 210 ff., EUROPEAN COMMISSION (2000), pp. 56 ff. and 71 ff., EUROPEAN COMMISSION (2002), pp. 58 and 64-65.

18 WTO (1996 tpr gov report us), p. 22.

19 MEDICK-KRAKAU (1995), pp. 63 ff. See HOUSE DEMOCRATIC TRADE COUNSEL (2001) and SHOCH (2001) pp. 55 ff. for a good overview of the history of the fast-track legislation. For a more detailed background on the fast-track legislation and the U.S. trade policy actors see DESTLER (1995), USTR (2001a) annual report, pp. 223-229 WOLFF (1995), pp. 2-3 and HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 282-293.

that created the post-war environment for bipartisan support for trade liberalism that lasted until 1994[20]. This extension of rights was progressively increased until the Trade Act of 1974 formally introduced the first formal/legal fast-track process[21]. Section 102 of the Trade Act of 1974 resulted from considerable concern about the growing importance and proliferation of the detrimental effect of non-tariff trade barriers and other trade-distorting measures to the detriment of U.S. export trade and the need to develop new trade rules in that respect during the Tokyo Round[22].

Fast track, is a grant of constitutional authority to regulate trade treaties with foreign countries from the Congress to the executive branch. In this legislative procedure, Congress sets formal negotiating goals for major trade agreements and agrees (i) to vote on the results of the negotiations and the proposed implementing legislation (guarantee of the vote)[23] and (ii) to vote only on the agreement (including the implementing legislation) as a whole[24], without amendments and within a limited time period (up-or-down vote in up to 90 legislative days and limited floor consideration)[25].

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[20] The Smoot-Hawley Act that led to a sharp increase in US tariffs and to foreign retaliation is partly held responsible for the economic crisis that gripped the US and the world during the 1930s. See US DEPARTMENT OF STATE (2001), p. 2 and DESTLER (1995), pp. 12 ff. SHOCH (2001) demonstrates that it is a simplification to speak of a bipartisan support for an open trade policy from 1934 to 1994. There have always been phases were either Republicans or Democrats were less open for trade arguments. Often there actually were intra-party divisions on the optimal U.S. trade policy. Nonetheless it is fair to argue, that in comparison to the situation after the mid-1990s bipartisan congressional support existed for trade policy.

[21] Trade Act of 1974, Pub. L. No. 93-618; 88 Stat. 178 (1975). See CRS (2001d) for a chronology of the major votes related to fast-track legislation. According to DESTLER (1995), pp. 65 ff. since 1974 Congress has consistently delegated trade negotiation authority to the executive branch.

[22] Thus the focus of the expedited fast-track processes was the entry into reciprocal non-tariff barrier trade agreements. See HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 242 ff. for more details.

[23] Usually this point concerning the guarantee of a Congress vote is underestimated while more importance is laid on the fact that Congress can make no amendments to trade agreements. However, it is a fact that most bills that fail in Congress do not pass because they are actually never put to a congressional vote. Thanks goes to CRAIG VAN GRASSTEK for this point.

[24] This is the domestic complement of the single undertaking procedure also practiced during the acceptance of WTO agreements.

[25] For a more detailed background on the fast-track legislation and its function see VAN GRASSTEK (1997), pp. 97 ff. Note the parallel of the no amendment strategy to EC The European Union does not have this problem. It is an interesting hybrid, in that the European Commission negotiates trade agreements on behalf of the EU, which must be approved by the European Council. However, the Commission has the sole right of initiative, and the Council cannot adopt amendments to proposals from the Commission except by unanimous consent.

The two main reasons for this legislative innovation are widely recognized and appreciated among U.S. trade partners:

(i) As the number of non-tariff elements of trade agreements rose that require complimentary changes in U.S. legislation, the role of Congress in shaping the implementing legislation increased steadily[26]. Although the President still has the theoretical power to negotiate and conclude treaties without fast-track legislation[27], the risk is great that afterwards Congress will not be willing to pass the necessary implementing legislation without making significant alterations. As a result, foreign negotiators are hesitant or not willing to enter into trade negotiations with the U.S. as long as do not know that trade agreements reached cannot be modified by U.S. Congress[28].

(ii) The fast-track mechanism reduces the vulnerability of trade policy institutions (namely, the Congress) to political pressure from import-competing industries[29]. If U.S. Congress has to vote on trade issues individually it is unlikely to resist narrow alterations of trade agreements that help special interests to maintain trade protection[30]. The President is more accountable to a broader constituency and therefore more insulated from importing-competing producer interests than members of Congress[31]. With fast-track authority, politically difficult reforms of US trade

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26 DESTLER (1995), p. 71 and CRS (2002c), pp. 2-3. DESTLER (1998), p. 2 makes very clear that fast track legislation is only relevant to agreements which require new U.S. legislation.

27 Discussion with Senate Finance Committee and CRS (2001c), p. 19.

28 The failure to implement certain agreements concluded during the Kennedy Round of multilateral trade negotiations is one example of such a situation that has damaged U.S. negotiating credibility (Senate Committee on Finance (2002a), p. 2). See for more details on the importance of fast-track legislation to foreign trade partners PAEMEN & BENSCH, pp. 192 f., DESTLER (1995), p. 71, KLUTTIG & NOWROT (2002), p. 7, BALDWIN & MAGEE (2000), p. 2, FITZGERALD (2001), p. 2 and GRESSER (2001), p. 1. The Chilean government, for example refused to continue negotiations on accession to NAFTA due to a lacking fast-track authority. See WTO (1996b U.S. tpr gov), p. 22. This hesitance of trade negotiators has also been voiced by European Commissioner for Trade PASCAL LAMY before the passage of the Trade Act of 2002, see FITZGERALD (2001), p. 2 and “Zoellick, Lamy Briefing on bananas, new WTO round, China accession, HIV/AIDS, fast-track“, March 09, 2001, US Mission to the EU, downloaded from http://www.useu.be/ISSUES/ZoellickTestimony0309.html in August 2002. zoro

29 and DESTLER & BALINT (1997), p. 6.

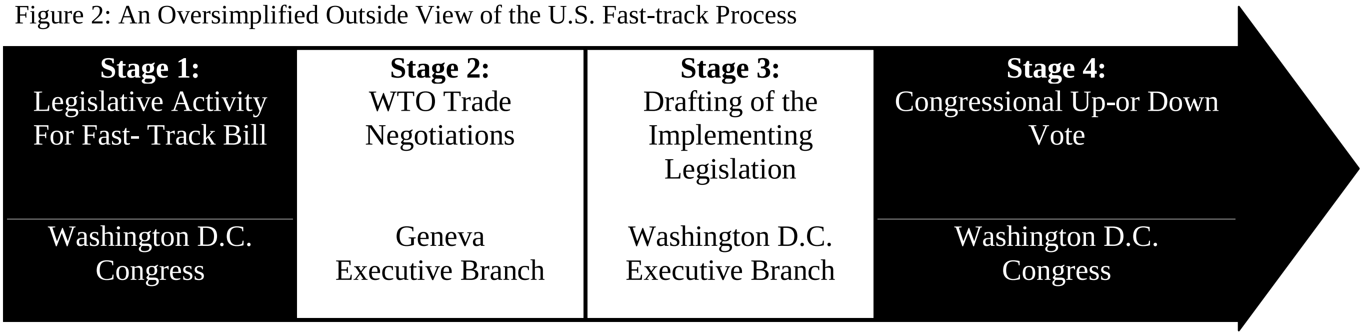
30 GRESSER (2001), p. 1. states that adoption of such amendments without fast-track legislation will inevitably unravel agreements even if a majority agrees they serve the greater good.

31 CRS (2002c), p. 1 and SHOCH (2001), p. 26.

barriers – which would be untouchable if considered in isolation – could be acceptable to the Congress if the final negotiation package is overall beneficial to the U.S. economy[32]. In sum, Congress exercises “voluntary restraint” in trade policy issues that leads to a less protectionist U.S. trade policy[33].

Figure 2 illustrates the process in an oversimplified way that reflects how the fast-track process may be (or: has often been) perceived outside of the USA[34]. In the first step Congress sets out a fast-track bill that is valid for subsequent or ongoing trade negotiations. Once trade agreement authority is delegated Congress retreats from trade policy formulation. In step 2 the USTR takes over the negotiation and conclusion of trade bills. Then the executive offices draft the implementing legislation in step 3. Congress is only involved in the process again when USTR provides it with trade bill and a draft of the implementing legislation in the final step. In this oversimplified example Congress does not get involved in the actual negotiation of trade agreements.

Figure 2: An Oversimplified Outside View of the U.S. Fast-track Process



But the typified trade policy formulation process as in Figure 2 where Congress retreats from any influence on stages 2 and 3 of the process and abdicates congressional power on trade policy does not perfectly reflect reality[35]. To the contrary, it has been argued that the influence of Congress in

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32 SCHOTT (2002), p. 2.

33 DESTLER (1995), p. 66 coined the term “voluntary restraint by the Congress” and considers congressional restraint to be a vital ingredient for U.S. international trade leadership. See also BOARD JIEI (2001), pp. 243 ff. footnote zara.

34 Do I want to give sources?

35 DESTLER (1998), p. 2 and MEUNIER (1998), chapter 1.

trade negotiations has actually increased due to the joint executive-legislative process that follows from fast-track procedures[36].

The first reason for this preserved congressional influence has nothing to do with legal obligations incorporated in the fast-track legislations. Intuitively, the USTR knows that in the end (stage 4) every trade agreement must be voted up or down by Congress[37]. It also knows that fast-track procedures expire and that Congress will only renew if it trusts the executive branch. Independently from any legal cooperation requirements that may exist in the current fast-track procedures, these reasons will always lead the USTR to inform and consult with Congress during stage 2 and 3 on a regular basis[38]. While the administration is the ultimate arbiter of what changes in law are required to carry out an agreement, the congressional role in shaping the implementing legislation in stage 3 has always been significant[39].

The second reason for this preserved congressional influence relates to strictly legal requirements set out in fast-track laws that mirror the just mentioned necessity for executive-legislative cooperation and that streamlined the congressional approval process in return for statutory requirements in the fast-track laws[40].

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36 See DESTLER (1995), p. 75, DESTLER (1998), DESTLER (1997) and GRESSER (2001) who argue that the congressional influence is bolstered through fast-track authority as Congress has used it to shape the trade policy objectives and the subsequent implementing legislation.

37 Stressed also in the Congressional Consultation Guidelines established along Sec. 2107 (b) of the Trade Act of 2002 conveyed to from USTR ZOELLICK to the Chairman of the Senate Finance Committee (MAX BAUCUS) on December 4, 2002. Document Source: USTR. The first page of the consultation guidelines repeat that it is in the "Administration's strong interest to work closely with the Congress to assure that agreements negotiated by the Executive branch will enjoy the support of the Congress. Thus, close coordination between the Executive and Legislative branches is essential to the success of the U.S. trade agenda.".

38 In this case the Congress has "soft power" over the actual negotiations. Thanks goes to Trade Counsels from both congressional trade committees, officials from the USTR, CLAUDE BARFIELD and to CRAIG VON GRASSTEK for this point.

39 See DESTLER (1998), p. 3 who writes that "Congressional fingerprints are everywhere" and DESTLER (1997a) for a congressional hearing making that point. In practice, the congressional committees of jurisdiction and the President collaborate closely on the drafting of implementing legislation before it is formally introduced. See also SENATE COMMITTEE ON FINANCE (2002a), p. 3 and CRS (2002c), p. 3 on this point..

40 BRAINARD & SHAPIRO (2001), p. 1, DESTLER (1995), chapter 2 who stresses that Congress does not adjudicate its constitutional responsibilities through fast-track bills. See HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 269-270 and table 2 in this text for past legal measures to ensure congressional oversight and relevant statutory requirements.

To compensate for the initial loss of congressional discretion over its legislative agenda, fast-track bills included the five following components since 1974[41]: 1) Content-related requirements like the specification of trade negotiating objectives and the type of agreement to which the authority applies; 2) Procedural requirements for the executive branch before and during the negotiating process; like the requirement to the negotiators to consult regularly with Congress and with a network of advisory committees, certain notification requirements and rules concerning what the President must submit to the Congress with the final trade agreement (like the draft implementing bill and supporting documentation to justify the agreement in terms of the original negotiating objectives, etc.), 3) A congressional group to supervise the trade negotiations and the compliance with above content- and process-related requirements, 4) Mechanisms to discipline the executive branch for non-compliance with congressional requirements, 5) A deadline for conclusion of agreements authorized.

In practice, the unwritten constraints mentioned in reasons 1 and the checklist of legal requirements mentioned in reason 2 are very much interrelated.

Experience shows that especially in the final stages of a multilateral trade negotiation there is only one bottom line to U.S. negotiators: Independent from individual content or procedural legal requirements the USTR negotiators must try to obtain a final negotiation package that Congress perceives to be overall beneficial to the U.S. economy[42]. At this stage the fulfillment of content-related requirements is not a center-stage (no checklist approach).

Likewise, it would it would be wrong to qualify the legally prescribed negotiation objectives and procedural requirements as a checklist that acts as pure burden for the U.S. negotiators. To the contrary, the timely views of U.S. Congress help U.S. negotiators to build and successfully execute a negotiation strategy. This is true because during negotiations U.S. negotiators have actually learned to use the pressure of Congress to inspire careful consideration for the U.S. trade

[41] CRS (2001c), p. 20, DESTLER (1998), pp. 1-2 and pp. 6-8 and BRAINARD & SHAPIRO (2001), pp. 1 and 2-4.

[42] Thus the negotiation objectives included in the fast-track bill should, in practice, not be seen as a check-list where each point must be achieved by negotiators. Thanks goes to CRAIG VON GRASSTEK, CLAUDE BARFIELD and I.M. DESTLER for this point. See SCHOTT (2002), p. 2 for a similar points concerning the Doha Negotiations.

policy interests abroad[43]. This holds especially when Congress has spelled out defensive or offensive negotiation objectives that it wants the USTR to achieve.

To conclude, the degree of application of the legal requirements is very much influenced by the individual negotiation context (negotiation items and partners) and the personalities from the USTR and Congress that put the law into practice[44]. As will be seen later, this point applies particularly to the fast-track legislation applicable for the Doha negotiations because Democrats and Republicans of the current U.S. Congress (108th period) have very different stances towards certain US trade policy goals and procedures. Therefore it matters who has political control over the implementation of current U.S. trade laws.

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[43] PAEMEN & BENSCH (1995), p. 192.

[44] Thanks goes to CRAIG VON GRASSTEK and I.M. DESTLER for this point.

4.2.3 The Role of Fast-track Legislation to the Doha E-Commerce and GATS Negotiations

The literature on the merits and mechanics of fast-track and the congressional debates before the enactment of new fast-track legislation almost exclusively deal with its effect on trade topics that are linked to trade in goods (import-sensitive agricultural industries, workers' rights) rather than to trade in services[45]. But this chapter is concerned with the effect of fast-track legislation on the GATS negotiations concerning electronically delivered digital products (mostly services).

The fact that not much light is shed on the relationship between the conclusion of service trade agreements and successful passage of fast-track legislation may be explained by the fact that these agreements are a relatively new phenomenon[46] and that, in the past, GATS negotiations have not yet had a significant impact on the U.S. regulatory systems[47]. Most importantly, it must also be noted that the controversies before the enactment of a fast-track bill rather focus on defensive rather than offensive trade issues. As free trade in services and e-commerce is considered to be an area where the U.S. has a comparative advantage, fast-track procedures for this sector are not an issue in Congress. Moreover, Congress feels confident without very specific mandates on trade in services and usually trusts the USTR with the pursuit of offensive trade interests.

This should not distract from the fact that fast-track legislation is of particular and increasing importance to the GATS and e-commerce negotiations.

Since the Trade Act of 1974 provided the President with the authority to include services in trade negotiations, no difference is made between goods and services when it comes to the application

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[45] DESTLER (1995), GRESSER (2001), FITZGERALD (2001) and other sources on the concept of fast-track legislation quoted so far.

[46] The GATS entered into force in the beginning of 1995.

[47] Sources here.

of fast-track legislation anymore[48]. Since then, subsequent trade acts have increased their attention to trade in services and prepared the ground for the two WTO service negotiations. The Trade and Tariff Act of 1984 was the first U.S. trade act to formally introduce provisions and negotiation objectives relating to the trade in services in U.S. trade law[49]. Since then, all digital service trade transactions are fully covered by fast-track procedures. Later, the OTCA specified a mandate in 1988 to build a multilateral service trade framework (the GATS)[50] and instructed negotiators to establish a trade framework for telecommunication services[51].

Naturally, fast-track authority is very relevant to agreements that relate to e-commerce or services because trade agreements on these topics deal with non-tariff (regulatory) issues that are likely to necessitate implementing legislation and thus changes in U.S. laws[52]. Via fast-track authority the executive branch can – despite of the usual regulatory precaution - rely on Congress to pass the necessary implementing legislation to introduce changes to the current regulatory system.

Also, the GATS negotiations are part of complex multilateral agreements that are concluded as single undertaking, that involve sensitive constituencies and many trade-offs and that are very likely to affect changes in U.S. law in one way or the other. The overall logic of the fast-track authority applies: the elimination of some market access or national treatment limitations that would not have been possible if Congress considered them on their own, become feasible when part of a larger package deal. Fast-track procedures were therefore instrumental to the completion of the two most sophisticated service trade agreements: the North American Free Trade Agreement (NAFTA) in 1993 and the WTO Agreements in 1994[53].

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48 For a good overview on the role of services in U.S. trade law see GATT (1986 tpr us), p. 68.

49 Special provisions on Trade in Services, Sec. 306 of the Trade and Tariff Act of 1984.

50 Sec. 1101 (b) (9) of the OTCA.

51 See the Telecommunications Trade Act of 1988 in part 4 of the OTCA. footnote pedro

52 Tell me some examples of application, law changes, etc.

53 JACKSON (1998), pp. 296 ff. DESTLER (1998), p. 2 notes that the arguments discrediting the importance of the fast-track authority by pointing to many U.S. trade agreements passed without the authority are flawed. According to him, a substantial number were either protectionist in character, agreements where the action was to be taken by our trading partners or agreements including US concessions that Congress had already authorized. Most of these arguments are not tailored to demonstrating the relevance of fast-track legislation for service trade agreements. But the absence of comprehensive service trade agreements in the time when fast-track authority has lapsed between 1994 and 2002 demonstrates its importance for that area. The USTR even waited with the conclusion of bilateral deals with sophisticated language on trade in services and e-commerce until the Trade Act of 2002 was signed (source).

The circumstance that the two most sophisticated service trade agreements of the WTO (Basic Telecommunications Agreement and the Financial Service Agreement) have both been concluded at a time when fast-track authority had lapsed (Post-Uruguay negotiations) fails to discredit the value of fast-track negotiations authority for two reasons[54]. First, the roots for the telecommunication and financial service agreements can be found in the WTO Agreements. Hence, the decision to liberalize these sectors further and the elaborate GATS framework that was a necessary building block for the Post-Uruguay Negotiations were established with fast-track procedures and thus prior congressional consent. Second, most changes in U.S. regulations that opened the telecommunications and financial service market to foreign competition were actually passed by Congress before the conclusion of the according WTO agreements and did thus not require many changes in U.S. laws[55].

However, fast-track authority has some limitations with respect to the negotiation of non-tariff trade barriers that applies rather to service than to the purely e-commerce related matters. Specifically, the U.S. legal regime for services is a mix of federal and state law whereas state law often predominates[56]. As Congress often cannot pre-empt States with respect to their regulatory jurisdiction[57], the fast-track principle does not apply to laws that are under the auspices of regulatory agencies or lawmakers on sub-federal levels[58]. Complicating the matter further, important sector-specific differences concerning the level of regulatory jurisdiction exist[59]. Whereas in areas like the regulation of audiovisual or telecommunication services federal regulation is dominant, the jurisdiction for areas like insurance or professional services may mostly lie on the

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54 See the testimony of MARK WEISBROT, Center for Economic and Policy Research, congressional hearing before the Subcommittee on International Monetary Policy and Trade of the House Committee on Financial Services, U.S. House of Representatives, June 26, 2001 who uses this argument to discredit the importance of fast-track negotiation authority. (format)

55 1996: the telecommunications act, but is it true for financial services ??? you can expand here by mentioning that transposition of regulatory model took place from EC and U.S. to rest of world.

56 WTO (1996), p. 151 ff. TPR of U.S., WTO (1999 TPR of the U.S), p. 20, 179-192 and 210 ff.; EUROPEAN COMMISSION (2000), p. 56 ff. and71 ff., EUROPEAN COMMISSION (2002), p. 58 and 64-65, trade barriers report.

57 See for an introduction on this topic WEILER (1999), p. 145-149.

58 States are not involved in the drafting of fast-track agreements. Thanks goes to officials from the Senate Finance Committee for this point.

59 WTO (1996), p. 22, WT/TPR/G/16, U.S. tpr government report 21 October 1996.

state level[60]. This federal-state division of power may thus actually limit the capacity of the Federal Government to negotiate trade agreements in an international context[61]. In the case of e-commerce regulations this problem does not matter much because regulations are minimal and at federal level.

Despite of the above shortcomings, fast-track authority is very important to the new GATS agreements of the Doha Round. This is true because they will be part of a more classical trade agreement that combines many trade topics that will imply changes of U.S. laws, that is concluded in a multilateral fashion and that is built on the Single Undertaking concept. For these negotiations to proceed well, the EC and U.S. are expected to deepen and widen commitments in untouched or sensitive service sectors (audiovisual, maritime and professional services), in GATS mode 1 and 4, and to eliminate the "regional carve-outs" due to limitations by EC member states and U.S. States described in chapter 2. To go beyond the sometimes ineffective liberalization made by market access and national treatment commitments[62] special horizontal or sector-specific reference papers and changes in domestic law will be needed. More work is also due on the outstanding GATS rules (e.g. horizontal regulatory discipline concerning domestic regulations or subsidy agreement) and the development of least-trade restrictive rule on e-commerce.

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[60] See WTO (1997), p. XX TPR of U.S. and XX and XX for the predominance of state regulation in insurance etc. services. EUROPEAN COMMISSION (2000), p. 56 ff and 71 ff., EUROPEAN COMMISSION (2002), p. 58 and 64-65, trade barriers report. Consequently, the degree of U.S. trade policy coordination also varies with the sector under consideration. Most U.S. GATS offers in the field of telecommunication services, for instance, only have to be coordinated with the responsible federal regulator, the Federal Communications Commission (FCC). Other sectors, like insurance or professional services, with regulatory jurisdiction at the state-level, require extensive coordination between USTR and State regulators / lawmakers. Trade negotiations for financial services, for example, are not even in the main responsibility of the USTR. Whereas the principal negotiation responsibility for banking and securities lies with the Secretary of the U.S. Treasury, USTR is responsible for insurance and other financial services. See "Trade in Financial Services – Current issues and future Developments", congressional hearing before the Subcommittee on International Monetary Policy and Trade of the House Committee on Financial Services, U.S. House of Representatives, 26.6.2001, p. 20.

[61] WTO (1999), p. xx, TPR of U.S. The inability of U.S. trade negotiators to credibly enter commitments for the lower state level strongly resembles the situation of a U.S. negotiators that has not been granted fast-track authority; meaning that U.S. States do not get to vote the whole package up or down but can make own choices in terms of concessions (amendments) and regulatory changes.

[62] GATS Art. XVI and XVII.

It is not very likely that such a complex trade agreement will pass without fast-track authority[63]. The service and high-tech industries have recognized this and lobbied hard for fast-track renewal (see Part 4.3.2).

[63] See SENATE COMMITTEE ON FINANCE (2002a), p. 2, DESTLER (1998), p. 2 and DESTLER (1997a congress).

4.3 From stalemate on renewed extension of fast-track legislation to the new "Trade Act of 2002"

4.3.1 From a Lacking Congressional Majority for Fast-track Legislation since 1994 …

As depicted in Figure 1, fast-track authority has been renewed through Congress several times[64]. The last extension of the fast-track authority expired in 1994 – after the last one was extended twice[65]. In the meantime, fast-track authority was instrumental to the completion of the Tokyo Round of the GATT in 1979, the establishment of a North American Free Trade Agreement (NAFTA) in 1993 and the WTO Agreements in 1994[66].

Since 1994 several tries to reinvigorate the fast-track authority via President Clinton and subsequent Republican majority in Congress took place[67]. All failed and the second half of the 1990s was a display of the erosion congressional support for continued trade liberalization. In 1998, a vote in the House showed that a great majority of Democrats (over 80 per cent) and also a significant amount of Republicans (30 per cent) opposed new fast-track legislation that did not require that trade agreements include strong provisions for labor and environmental standards[68]. In general, Republicans provided stronger support for trade liberalization than Democrats[69].

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64 See LOW (1993), pp. 58 ff., DESTLER (1998), pp. 3-4 for an account of the changes. The Trade Agreement of 1979 simply extended fast-track negotiating authority for agreements covering non-tariff barriers until 1988 and made no substantive changes to fast-track procedures.

65 See BALDWIN & MAGEE (2000), p. 1.

66 JACKSON (1998), pp. 296 ff. In particular the fast-track authority that expired in 1994 was not a comprehensive fast-track authority because it was only valid for the conclusion of the Uruguay Round.

67 See BARFIELD (1998), DESTLER (1995), pp. 261 ff., DESTLER (1997b), CRS (2002c), pp. 3-5 and SHOCH (2001), pp. 4 ff and p. 59 for the controversy over fast-track procedures, the lacking renewal of fast-track legislation and the fading bipartisan support for US free trade policies. BARFIELD enumerates three reasons for the failure to extend fast-track: political and interest group manoeuvring in both parties, but particularly among Democrats and their constituencies; the failure of presidential leadership since 1994; and finally, the existence of honest and unbridgeable differences over the content and future direction of trade policy for the United States—specifically on the question of whether labor and environmental regulations must be included in all future U.S. trade agreements.

68 BALDWIN & MAGEE (2000), pp. 2 and 12-13, BARFIELD (1998) pp. 2-3 and SHOCH (2001), pp. 189 ff.

69 DESTLER & BALINT (1999), p. 7. A striking decline in support from House Democrats for fast-track legislation is acknowledged. Latter tendency can be explained by the close link of Democrats to the labor unions.

An analysis of the voting patterns on trade agreements and fast-track legislation since 1974 shows that the erosion of a strong bipartisan support for free trade has not only been an issue that started during the last years[70]. Doubts over extending fast-track legislation got even more serious in the 80s and early 90s due to the growing trade deficit and concerns with respect to the adverse effects of trade liberalization on constituents who are less educated and on import-competing industries[71]. Still, Congress did not deny extension of fast-track fast track in 1988, 1991 and 1993[72]. Rather it chose to increasingly constrain the flexibility of the executive branch by more detailed demands concerning trade negotiation objectives and procedures[73].

The consensus for fast-track really broke down later when the linkage between trade and other policy concerns, especially labor and the environment, started to drive discussions on U.S. trade policy[74]. The dispute boils down to a fundamental disagreement between Democrats who want provisions of labor and environment in trade agreements and Republicans who prefer to do without[75]. That is because Democratic-leaning constituencies such as environmental and labor groups are especially outspoken in their opposition to TPA. In addition, a congressional uneasiness about the negotiation of new far-reaching multilateral agreements that extend to ever-greater policy issues must be acknowledged[76].

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70 COUNCIL ON FOREIGN RELATIONS (2001), pp. 7-8. This analysis takes all major trade votes into consideration. It shows that Republican majorities for free trade have decreased and that the Democratic majority for free trade was succeded by a Democratic minority for free trade.

71 US DEPARTMENT OF STATE (2001), pp. 1-2, DESTLER (1995), p. 66 and BALDWIN & MAGEE (2000), pp. 38-39.

72 See CRS (2001d vote). This shows that the votes that succeeded in authorizing or extending fast-track negotiation authority were mostly won by large House and Senate majorities. The voting count does not include the Trade Act of 2002 that obviously reverses that pattern.

73 DESTLER (1995), p. 66 mentions that Congresss continued to delegate broad powers to executive but that it did so more grudingly, with more detailed demands and timetables, that constrained administration flexibility.

74 WAGNER (2000), p. 1047, CRS (2002c), pp. 5-10, CRS (2002a), DESTLER (1997b), DESTLER & BALINT (1999), pp. 9-13 and chapter 2 on Trade and Labor and chapter 3 on Trade and the Environment. See also BALDWIN & MAGEE (2000), 12-13.

75 CRS (2002c), p. 4.

76 COUNCIL ON FOREIGN RELATIONS (2001), pp. 7-8.

4.3.2 … to a Weak Congressional Majority for the Passage of the Trade Promotion Authority

When in the year 2000 President George Bush arrived into office the debate on renewed fast-track legislation had reached a political stalemate for some time[77]. Few experts believed that a congressional majority on this topic could be found anytime soon[78].

Still, President Bush made the renewal of fast track authority a top priority on his new agenda[79]. He asked for Trade Promotion Authority (TPA)– a fresh designation for the conflict-ridden term "fast-track authority"- in February 2001[80]. When revealing the new U.S. trade agenda, President Bush mentioned his intention to use the new TPA to pursue a parallel track concerning the negotiations of preferential trade agreements – especially the ones on the Free Trade Area of the Americas (FTAA) and further regional and bilateral trade agreements[81]- as well as the negotiations of further multilateral trade agreements[82]. Interestingly, President Bush stressed that the maintenance of a trade-barrier free e-commerce environment is a top U.S. priority[83]. Various legislative efforts of the U.S. Congress actually mandated liberalizing and far-reaching trade

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77 See BALDWIN & MAGEE (2000), pp. 5-14 for a brief legislative history of the years between the conclusion of the Uruguay round and the last 1998 fast-track proposal of President Clinton. See DEBATES (2001), for an account of roadblocks to new fast-track legislation (TPA), CRS (2002C), WTO (2001 TPR us gov), pp. 15-18 and KLUTTIG & NOWROT (2002), pp. 10-13 for the background and developments in the 107th Congress with respect to the TPA.

78 According to personal interviews, most experts did not believe that the vote could be won in favor of fast-track legislation in the current setting. DESTLER (2002), p. 4, for instance, notes that the results were in doubt until the votes were completed. Points made during the ABA Section of International Law and Practice Symposium, "The U.S., the Doha Round and the WTO – Where Do We Go From Here?", Segment 9: TPA/"Fast-Track" – Where do we go from here?; September 12-13, 2002, Georgetown University Law Center, Washington D.C. and in news articles (see for instance "What's The Mandate? The overriding message for the next President: All roads lead to the center", in: *Business Week*, News Analysis, November 9, 2000; downloaded from http://www.businessweek.com/bwdaily/dnflash/nov2000/nf2000119_121.htm in March 2002 and "2000 Outlook: Fast Track", BNA International Trade Reporter, Vol. 17, No. 3, January 20, 2000.) buttressed this view.

79 See BERGSTEN (2002), pp. 3-4, SHOCH (2001), p. 270, CRS (2002c), pp. 5-6 and the comments of Zoellick in "Daschle Sees Early Vote on Fast-Track TPA", BNA International Trade Reporter, Vol. 19, No. 2, January 10, 2002. The efforts of President Bush are also documented on a special Internet page dedicated to the issue under www.tpa.org and in BRAINARD & SHAPIRO (2001), p. 1.

80 State of the Union Address of the President to the Joint Session of Congress, February 27, 2001, downloaded from www.whitehouse.gov/news/releases/2001/02/20010228.html in December 2002. The term "trade promotion authority" is now widely used interchangeably with "fast-track authority".

81 Here Singapore, Chile, etc.

82 "2001 International Trade Legislative Agenda", source und warum dort unter americas.net, May 10, 2001, downloaded from www.americasnet.net/trade_integration/agenda.pdf in December 2002.

negotiations on e-commerce[84]. Further service trade liberalization also reserved great attention in this new U.S. trade agenda.

Considering the political sensitivity of the issue, President Bush also emphasized that the executive branch was not looking for a “carte blanche” for trade negotiations but that a “new trade partnership between Congress and the President” should emerge that would entail consultation and other congressional oversight procedures[85].

As expected the reluctance in both the Senate and the House of Representatives towards the enactment of fast-track legislation was significant[86]. Moreover, the political power distribution between Democrats and Republicans still in place when the TPA was discussed and passed in Congress – the Democrats controlled the Senate whereas the Republicans controlled the House – added to the pressure to pay respect to Democratic considerations.

The House Committee on Ways and Means agreed on the first version of the TPA bill – the “Bipartisan Trade Promotion Authority Act of 2001 (H.R. 3005[87])” - in October 2001[88]. Despite much pressure from the White House it only passed the Republican-controlled House of Representatives by a narrow and partisan one-vote majority (Yea-Nea: 216-215) on December 6, 2001[89]. The Senate Committee on Finance disagreed with the House bill and introduced a more comprehensive bill - the “Trade Act of 2002 (H.R. 3009)” - that contained a greatly changed version of the House TPA bill (H.R. 3005) and an additional two further trade acts[90]. After many

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83 See the 2001 International Trade Legislative Agenda mentioned in the previous footnote. More!!.

84 Here we must decide how to proceed and to quote.

85 USTR (2001d).

86 See the bill summary and status for the 107th Congress on the Trade Act of 2002 (H.R. 3009) on http://thomas.loc.gov. The legislative activity concerning this bill (including previous) versions went from October 3, 2001 to August 6, 2002. The process of enactment of the current Trade Act of 2002, including the different versions of the fast-track bills under consideration are well-discussed in CRS (2001b), CRS (2001c), CRS (2001d), CRS (2002a), CRS (2002c) and DESTLER (2002).

87 H.R. 3005 stands for trade bill proposal with the number 3005 that has been initiated in the House of Representatives (H.R.).

88 HOUSE OF REPRESENTATIVES (2001d trade bill).

89 CRS (2002c), pp. 6-7.

90 The Trade Adjustment Assistance Reform Act of 2002 and the Andean Trade Promotion and Drug Eradication Act. See CRS (2002c), pp. 8-9 for the Senate bill and CRS (2001b) and CRS (2001c) for an in-depth comparison of the two differing TPA bills of the Senate and the House.

attempts to implement additional worker assistance schemes, to toughen the language concerning labor and environmental standards and to introduce special rules for negotiation on trade remedies[91], H.R. 3009 passed the Democratically-controlled U.S. Senate with a more comfortable but a far from overwhelming majority (Yea-Nea: 66-30) on May 23, 2002[92].

After some mediation between the two different versions in a joint conference report the two congressional houses agreed on a common version on July 25, 2002 and the bill passed first in the House and then in the Senate[93]. In addition to the Bipartisan TPA Act of 2002 the final Trade Act of 2002 includes an extension of the Andean Trade Preferences Act and a Trade Adjustment Assistance Program that lapsed in 2001 and that provides assistance for trade-related unemployment[94]. The very narrow majority in the House of Representatives and the partisan aspect of the vote indicate that – for the first time in U.S. history - no broad congressional consensus existed the enactment of fast-track legislation[95].

Similarly as in December 2001, the House majority for the conference report on the TPA bill on July 27, 2002 was very narrow (Yea-Nea:215-212) and it was cast along partisan lines. The

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[91] The Dayton-Craig Amendment introduced a measure to allow Congress to vote separately on any trade-pact provisions that weaken anti-dumping or other trade-remedy laws. See “The Senate's Trade Torpedo”, in: *Washington Post*; May 13, 2002; Page A14 and “Senate Approves Trade Authority Bill - Adds Billions for Workers Hurt by Foreign Competition”; in: *Washington Post*; HELEN DEWAR; May 24, 2002; Page A01.

[92] “Senate Approves Trade Authority Bill - Adds Billions for Workers Hurt by Foreign Competition”; HELEN DEWAR; in: *Washington Post*; May 24, 2002; Page A01. The vote was conspicuously bipartisan. Forty-one Republicans, 24 Democrats and one independent voted for the bill, while five Republicans and 25 Democrats voted against it. "Senate Clears Trade Bill; Vote A Victory For Bush,"; downloaded from www.cnn.com on May 23, 2002; "Senate Targets Child Labor In Trade Bill," downloaded from www.reuters.com on May 23, 2002 and "Senate Passes Trade Bill", in: *Boston Globe*, 24 May 2002.

[93] For more on the mediation process and the results see Conference Report, House Rpt.107-624, downloaded from frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong-reports&docid=f:hr624.107.pdf in August 2002 and CRS (2002c), p. 10. The Actions related to the bill H.R. 3009 can also be seen under http://thomas.loc.gov. For press coverage see “House Backs Trade Power For President, Narrow Vote Ends 8 Years Of Battle Over Authority”, MIKE ALLEN & JULIET EILPERIN, in: *Washington Post*; July 28, 2002, “Accord Reached On Trade Authority President Would Gain Power to Cut Deals”, JULIET EILPERIN & HELEN DEWAR, in: *Washington Post*; July 26, 2002; Page A01 and “Trade Bill Passes Bush After Lobbying Blitz”; JULIET EILPERIN & MIKE ALLEN; in: *Washington Post*; July 27, 2002, page XX.

[94] The Administration signaled early that it would be flexible to have TPA moving as part of a package with other trade bills. See “Questions and Answers on U.S. TPA”, downloaded from www.TPA.gov/qanda.htm in September 2002.

[95] See CRS (2001d) for a vote chronology concerning all previous fast-track votes. This shows that the votes that succeeded in authorizing or extending fast-track negotiation authority were mostly won by much larger House and Senate majorities. The voting count does not include the Trade Act of 2002 that obviously reverses that pattern.

House Democrats were mostly opposed to the TPA bill (Yea-Nea:25-183) whereas the House Republicans were mostly in favor of it (Yea-Nea:190-27)[96]. The House Democrats that did not manage to include their provisions on worker rights and the environment were considered the losers of the passage of this TPA bill[97]. Importantly, differences on the mandate to include for services or e-commerce did not exist between Democrats, the Republicans, the Senate or the House. Although relatively more Senate Democrats voted for the TPA on August 1, 2002, the slightly more bipartisan vote produced a two to one ratio in favor of the law (Yea-Nea: 64-34; Senate Democrats: 20-29; Senate Republicans: 43:5)[98].

To shift from political stalemate to the realization of presidential priority on renewed fast-track legislation the White House and the USTR used extreme political pressure[99]. From the congressional viewpoint the question was really to weigh the potential benefits (pursuit of U.S. negotiation objectives) against the costs (loss of policy autonomy) of fast-track authority. Thus a two fold strategy - the emphasis on the large benefits of trade negotiations conducted with TPA and promises of special consideration of congressional objectives and limited loss of congressional policy autonomy during trade negotiations – was the determining factor in the successful renewal of fast-track legislation[100].

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[96] See Roll No. 370 (House) and Record Vote Number 207 (Senate), downloaded from http://thomas.loc.gov in August 2002. Independent votes are not presented in the breakdown along Democratic and Republican shares.

[97] According to interviews with the House Democrats, the vote produced a significant amount of alienation and bad feelings among the Democrats with the current fast-track legislation. See also “Let Them Eat Tuna”; authors ? in: *Washington Post*; August 2, 2002.

[98] “Senate Approves Trade Bill, Delivering Victory to Bush”, HELEN DEWAR, in: *Washington Post*; August 2, 2002; Page A04. Historically Republicans in both congressional houses tend to favor free trade more than Democrats but in the past the votes were more divided by regional and economic issues than along partisan lines. See “Accord Reached On Trade Authority President Would Gain Power to Cut Deals”, JULIET EILPERIN and HELEN DEWAR, in: *Washington Post*; July 26, 2002; Page A01. For the fact that traditionally the U.S. Senate is much less inclined to vote along party lines the expressed mixed sentiments of Democratic Senators vis-à-vis the pronounced preference for TPA from Republican Senators is certainly not a sign of a strongly bipartisan vote. The details on the Roll Call Vote Number 207 were obtained from http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?-congress=107&session=2&vote =00207 in August 2002 or www.senate.gov (under Legislation & Records).

[99] During personal interviews with officials from Congress and the USTR, for instance, it was often mentioned that the TPA was “hammered through Congress”. See also “Bush Lobbies House To Pass Trade Bill Before Hill Recess”; JULIET EILPERIN & MIKE ALLEN; in: *Washington Post*; July 27, 2002; Page A01 and “Trade Bill Passes Bush After Lobbying Blitz”; JULIET EILPERIN & MIKE ALLEN; in: *Washington Post*; July 27, 2002, page XX.

On the one hand, the executive branch had to pay a price for the congressional cooperation. Specifically, in the run-up for the final passage of the Trade Act of 2002 Congress managed to push several of its objectives relating to the content and procedures of trade policy through. Firstly, the Trade Adjustment Assistance Program was instrumental in getting congressional consensus on the trade bill[101]. This agreement was used to calm labor unions and therefore also the Democrats who strongly opposed the bill[102]. Secondly, U.S. trade policy experts argue that concessions to protectionist congressional ambitions also took place to win a majority for fast-track legislation in Congress[103]. To the great disappointment of U.S. trade partners, some months before the critical TPA votes, Congress raised steel tariffs and agricultural subsidies significantly with presidential support. Thirdly, Congress was only willing to delegate fast-track authority to the executive branch if it was granted a significant congressional supervision role during the negotiations[104]. The executive branch accepted specific negotiation objectives and procedural requirements that had the goal to limit the loss of congressional legislative autonomy in trade matters and to assuage concerns of labor unions and environmentalists[105]. The Democrats that at this time were much politically stronger than after the November 2002 elections (just three months later after the TPA passage) thus had major influence on the legal text.

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100 Here – in the light of the research question - the analysis concentrates on the most important arguments.

101 "Trade Act of 2002", Keynote Speech by Senator MAX BAUCUS at the conference on "Trade Policy in 2002", February 26, 2002, at the Institute for International Economics, Washington D.C. and "Daschle Sees Early Vote on Fast-Track TPA", in: *BNA International Trade Reporter*, Vol. 19, No. 2, January 10, 2002. The Administration signaled early that it would be flexible to have TPA moving as part of a package with other trade bills. See "Questions and Answers on U.S. TPA", downloaded from www.TPA.gov/qanda.htm in September 2002.

102 The package provides up to $12 billion over the next decade to aid workers displaced by trade, including job training benefits and a 65 percent tax credit to help pay for health insurance.

103 Under the title "One Step Backward, Two Steps Forward", BERGSTEN (2002), pp. 4-7 elaborates on the concessions (rollback of previous textile liberalization for the Caribbean and Central America, the farm bill, the raise of steel tariffs, etc.) President Bush had to make to get the TPA through Congress. See also „A Competitive Approach to Free Trade"; FRED BERGSTEN; in: *Financial Times*; December 5, 2002 (Comment & Analysis) and DESTLER (2002), p. 4.

104 "Trade Act of 2002", Speech by Senator MAX BAUCUS at the conference on "Trade Policy in 2002", February 26, 2002, at the Institute for International Economics, Washington D.C.

105 It did so to purposefully to break the deadlock on renewal of fast-track legislation. See the Statement of U.S. Trade Representative ROBERT B. ZOELLICK before the Committee on Ways and Means of the U.S. House of Representatives, February 7, 2002, p. 2, downloaded from www.USTR.gov/speech-test/zoellick/zoellick_15.html in February 2002. See the 2001 International Trade Legislative Agenda mentioned in footnote XX and BRAINARD &

One the other hand, it was emphasized that without fast-track legislation it would be difficult to pursue U.S. interests with respect to the negotiation of additional preferential trade agreements. U.S. policy-makers and the industry are increasingly worried that the USA is only party to three out of around 130 regional, bilateral free trade and customs agreements[106]. It was also felt that without the TPA the USA would not be a credible negotiation partner to other WTO Members in the Doha Development Round. In the mobilization of congressional support the TPA promoters also appealed to post-September 11th patriotism, the links between security and trade issues and party loyalty in the case of the Republicans[107]. Especially the introductory findings of the TPA bill therefore stress the tight link between national security and trade issues[108].

Finally, U.S. Corporations played a major role in arguing that their interests could only be pursued with passage of new fast-track legislation. Thus a coalition of agriculture, high-tech, manufacturing, and retail organizations created a powerful lobbying movement in favor of the TPA[109].

Interestingly, very active and influential support came from a coalition of two business groups that also fought hardest for the pursuit of free global e-commerce in the WTO: the high-technology (e.g. Internet, computers, etc.) and the other content-producing service sectors (movies, etc.)[110]. As is argued in the next Part, especially the IT industry has emerged as a strong

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SHAPIRO (2001), pp. 5-6.

106 See the statement of U.S. Trade Representative ROBERT B. ZOELLICK before the Committee on Ways and Means of the U.S. House of Representatives, February 7, 2002, p. 2, downloaded from www.ustr.gov/speech-test/zoellick/zoellick_15.html in February 2002 and HOUSE OF REPRESENTATIVES (2001b). Often this small number of U.S. preferential agreements is contrasted to the European Union that is party to around 30 preferential trade agreements. See also HUBBARD (2002), p. 2, FITZGERALD (2001), p. 2 and "Questions and Answers on U.S. TPA" under www.tpa.gov/qanda.htm.

107 See the statement of U.S. Trade Representative ROBERT B. ZOELLICK before the Committee on Ways and Means of the U.S. House of Representatives, February 7, 2002, p. 2, downloaded from www.ustr.gov/speech-test/zoellick/zoellick_15.html in February 2002. more sources on 9 11 trigger.

108 Sec. 2101 (b) (1) to (2).

109 "Promoting the Trade Promotion Bill"; JUDY SARASOHN; in: *Washington* Post; July 25, 2002; Page A19. In fact, all major US agricultural, manufacturing and service industry coalitions merged their lobbying efforts in US Trade (http://www.us-trade.org) for a list of associations promoting fast-track legislation. The Business Roundtable (http://www.brtable.org) that represents several leading U.S. corporations exercised a significant pressure on the vote.

110 "High-Tech Groups Focus on Trade Vote"; DAVID MCGUIRE; in: *Washington Post* (washtech.com); May 14, 2002 and "Tech Groups Like Trade Bill Despite 'Poison' Amendment"; DAVID MCGUIRE; in: *Washington Post* (washtech.com); May 15, 2002.

new U.S. trade policy force in the last ten years that has now significantly helped to convince critics of the benefits of fast-track legislation and free trade.

In the end this two-fold strategy succeeded in creating the necessary majority for the enactment of the fast-track bill. Although most Democrats could not be convinced, in the end the inclusion of the worker-benefits package and the lobbying influence of the high-tech sector contributed to tilt the number of Democratic House votes – five members of the House's moderate New Democrats who voted against the bill last December switched their votes - in favor of the trade legislation[111]. Both elements of the strategy - emphasis on the gains from negotiations with fast-track in areas like e-commerce / services and limited delegation of trade policy autonomy to the President- caused that pro-business arguments won out over the concerns perpetrated by the labor movement.

4.3.3 The Role of the Entertainment and IT Industry in the Campaign for Passage of the Trade Promotion Authority

U.S. firms that produce digital content prone to electronic delivery have substantial influence on U.S. trade policy objectives and contributed significantly to the passage of the TPA.

Whereas associations like the MPA and corporations like AOL Time-Warner, Walt Disney, and Vivendi Universal have a long-standing influence on U.S. Congress[112], the computer and Internet industries (including software) stayed relatively aloof from U.S. politics for many years. But as can be seen from Table 1 the computer industry has translated its driving force in the U.S.

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[111] "Trade: Lobbyists Both Laud, Lament Moderate Democrats' Votes", BARA VAIDA; in: *National Journal's Technology Daily*; July 30, 2002. The two New Democrats who had been expected to vote for the bill but did not were Silicon Valley Representatives ANNA ESHOO and ZOE LOFGREN. Clearly a great majority of the Members of Congress that receive campaign contributions from the computer sector voted for the TPA. This result is obtained if one matches the data of the Top Recipients of contributions from the Computer and Internet industry (source) to the TPA voting patterns log rolls. Out of the top 20 that receive the most contributions from these industries at least 15 voted with yes. When industry contributions are high no partisan split between Democrats and Republicans or a split between the House and Senate exist. Rework.

[112] A 2002 Fortune ranking of the top lobbying groups in Washington D.C. (The Power 25) displays that the Motion Picture Association ranks 16th, the National Association of Broadcasters 17th, Recording Industry Association of America 22nd. Downloaded from www.fortune.com/lists/power25/index.html in March 2002.

economy into major political influence in a few years (from rank 53 in overall campaign contributions in 1990 to rank 8 in 2002)[113]. Especially the computer software industry (Microsoft, Oracle, etc.) has largely gained in importance[114]. These corporations and their associations constantly remind Congress of their economic importance for productivity, growth and employment via their numerous lobbying arms in Washington D.C.

A closer look on the data about these industries' campaign contributions – a reasonably good proxy for their congressional influence – reveals following insights[115]: Despite their more pronounced pro-trade attitude Republicans do not exert more attraction on funds from high-technology and content-producing sector than the Democrats[116]. The Democrats actually receive a disproportional share of funds coming from the entertainment sector (especially the movie-making firms in Hollywood)[117]. When it comes to the computer sector, the IT industry has been scrupulously bipartisan in its contributions, giving nearly equal amounts to Democrats and Republicans, and thus ensuring broad support on both sides of the political aisle in Congress (see

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[113] Studies of the CENTER FOR RESPONSIVE POLITICS show that in 1990, the computer industry ranked 55th out of the roughly 80 industries the Center tracks, with about $1.3 million in contributions to federal candidates and parties. Just 10 years later in the 2000 elections, the industry cracked the top 10 list, with more than $30 million in contributions. Data can be found on the data bank of the CENTER FOR RESPONSIVE POLITICS, downloaded from http://www.opensecrets.org/industries/background.asp?Ind=B12 in November 2002, Data on the 2001-2002 Election Cycle, Industry Communication Technology; Political Money Line Published can be downloaded from www.tray.com/cgi-win/x_ee.exe?DoFn=02C. Comprehensive treatment of the links between campaign financing and specific industries can also be found in MAKINSON & CAMERON (1994), CENTER FOR RESPONSIVE POLITICS (1996) and CENTER FOR RESPONSIVE POLITICS (2002). Additional data can be obtained from www.commoncause.org/publications/april01/softmoney/page2.htm.

In general, all figures on campaign financing from above data banks are drawn from the Federal Election Commission (FEC). In 1975, Congress created the FEC (http://www.fec.gov) to administer the statutes that govern the financing of federal elections and to disclose campaign finance information.

[114] As can be seen from CENTER FOR RESPONSIVE POLITICS (2002), p 8 software firms like Microsoft have gone from negligible donations to becoming the top 50 donors between 1989 and 2002. The same publication (p. 8 and 9) show that the entertainment sector (AOL Time Warner, Walt Disney, etc.) figures prominently in the Top 50 and Top 100 ranking of donations.

[115] The data is taken from CENTER FOR RESPONSIVE POLITICS and is based on the reports to the Federal Election Commission. Special information on the computer and entertainment industry can be downloaded from http://www.opensecrets.org/industries/background.asp?Ind=B12 in November 2002, Data on the 2001-2002 Election Cycle, Industry Communication Technology; the Political Money Line Published on www.tray.com/cgi-win/x_ee.exe?DoFn=02C; downloaded in December 2002 or can be obtained from CENTER FOR RESPONSIVE POLITICS (1996) and CENTER FOR RESPONSIVE POLITICS (2002).

[116] Based on open secrets evaluation for the 2002 Election Cycle on the Top Industries.

[117] As shown in Appendix A.4 the financial support of one specific industry sector is often more skewed to one political party. Whereas the Republicans have strong support from the financial sector (banking and insurance),

Table 1). This assessment shows that both parties are given incentives to address digital trade issues and despite of their dislike of some aspects of fast-track authority – Democrats should generally be at least as supportive of trade measures that boost the content-producing sectors than Republicans.

Table 1: The Campaign Contributions of the Computer Industry to U.S. Congress (1990 – 2002)

Election Cycle	Rank†	Total Contributions	% to Democrats	% to Republicans
2002*	8	$19,416,685	49%	50%
2000	7	$40,831,171	52%	46%
1998	25	$9,830,972	43%	56%
1994	43	$4,228,886	51%	48%
1990	53	$1,497,875	45%	54%
Total	**13**	**$90,349,443**	**49%**	**49%**

Source and Methodology: †These numbers show how the industry ranks in total campaign giving as compared to more than 80 other industries. The numbers on this page are based on contributions of $200 or more from PACs and individuals to federal candidates and from individual and soft money donors to political parties.

The computer industry has quickly joined the entertainment industry[118] when it comes to being a top influence of U.S. trade policy. Due to its trade surplus the IT sector has become a very influential lobby group in matters of U.S. policy since the 1980s and a motor behind the WTO e-commerce work program, the cross-border trade in services and IT product (goods and services) liberalization[119]. Its interests are anchored in U.S. trade treaties at least since 1988 when the OTCA placed specials emphasis on negotiation objectives related to access to high technology[120].

Its increasing interest in non-GATT issues is due to their current evolution from goods to service producing firms[121]. Also, most of their non-hardware products (software, IT services) will profit

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the Democrats have strong support from the entertainment sector, the legal service sector and almost exclusive support from the unions.

118 Center for Responsive Politics, Data for the Movie Production Industry, downloaded from www.opensecrets.org/industries/background.asp?Ind=C2400 and JAROTHE (1999), p. 284 on the long-standing influence of the entertainment sector on U.S. trade policy.

119 LAWRENCE (1984), DESTLER (1995), p. 46, 183 and 192 and SHOCH (2001), p. 65.

120 Sec. 1101 (b) (15). The same treaty also identified the need for negotiations in the for trade in telecommunication services, another technology-intensive export service. See footnote 52 pedro.

121 More detail (from the CSSP project, for ex.).

more from a positive digital trade agenda than any other industry besides entertainment. On the downside their products currently risk a loss in foreign market access due to the various classification questions if no positive digital trade agenda is developed[122]. Thus their stakes are actually higher than the audiovisual content producers (e.g. Hollywood) that– over a time period of almost ten years – have adapted to a low level of audiovisual GATS commitments.

A proof of their influence is the fact that in terms of sector-specific influence the U.S. IT and service sector contributed largely to the existence and efforts made in the WTO e-commerce work program, the U.S. requests and offers in the current GATS round and the drafting and adoption of relevant offensive negotiation objectives mandated in the final TPA bill[123].

On the whole an interesting new coalition of hardware-producing (Computers, telecommunications, etc.) and IT-using / "content"-producing (computer software, movies, etc.) results that share the belief that other industrialized countries like Europe simply do not present serious competition in that field and that therefore the U.S. should push for maximum trade liberalization[124]. Clearly, the MPA welcomes this new ally because in its fight for audiovisual service liberalization during the Uruguay the MPA triggered a lot of resentment from culturally minded WTO member countries (especially in the EC)[125]. Therefore, the fact that now the IT sector takes on the battle for free trade in content services is perceived as fortunate.

Finally, in their quest for liberal answers to the open e-commerce questions the American content producing and IT sectors are also backed by the more heterogeneous and therefore somewhat less influential other service industries[126]. Since initially the American financial service sector was

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122 IT services fall out of computer and related service classification of the GATS to be considered "content" in audiovisual or professional / business service classifications. Software falls out of ITA / GATT provisions to be considered audiovisual or computer and related services under the GATS.

123 See p. XX and Letter of the Information Technology Industry Council to the Honorable J. DENNIS HASTERT (U.S. House of Representatives), December 5, 2001 source info.

124 "High-Tech Groups Focus on Trade Vote"; DAVID MCGUIRE; in: *Washington Post (washtech.com writing);* May 14, 2002.

125 According to interviews, the MPA will try to mostly rely on the IT industry as a strong U.S. voice in e-commerce issues as it believes that the IT sector has more political capital with foreign trade partners.

126 Due to the more heterogeneous nature of the service industry (from accounting to health services), its lobbying efforts are somewhat harder to organize. Interviews in 2002 have confirmed that the service industry does not feel that it gets enough congressional consideration. Despite the fact that services play a dominant role in the U.S.

very successful in pushing for GATS during the Uruguay Round it has significantly increased its congressional influence in the last ten years[127]. Especially the Coalition for Services Industries (CSI)[128] and the regular World Services Congress[129], raised awareness for the importance of the service sector in terms of employment, growth and the benefits from the increasing U.S. service trade surplus[130]. Service industries other than financial services that were reticent vis-à-vis the GATS negotiations (energy, legal services, etc.) or that were simply too small to care (express delivery services) during the Uruguay Round are now more consistently represented by the Coalition of Services Industries that takes a strong stand on e-commerce issues[131]. Thus, the service industry also made a significant lobbying effort for the Trade Act of 2002 (especially in fields like financial, express delivery and professional services)[132].

The influence the IT sector, in particular, has been felt with respect to passage of the TPA bill.

The specially created U.S. High-Tech Coalition on Trade Promotion Authority but also other IT lobbyists pressed hard for the enactment of TPA since February 2001[133]. As announced to most

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economy Congress is said to focus more on traditional trade issues on the one side and high-technology, IT-related interests on the other side.

127 For the influence of U.S. service industry on its American trade policy see SHOCH (2001), p. 114, PAEMEN & BENSCH (1995), p. 163, HEETER (1997) and FREEMAN (2000).

128 elaborate on CSI.

129 Have links to Atlanta and Honk Kong here.

130 MANN (1999), p. 37 and USTR Press Release in office that makes reference to this IIE study.

131 Quote CSI documents.

132 See for example relevant industry interventions during congressional hearings in HOUSE OF REPRESENTATIVES (2001c) or O'HARE, DEAN R. (2002): Introductory Remarks before the Services 2002 Conference, Chairman, Coalition of Service Industries, U.S. Department of Commerce, Washington, D.C., February 5, 2002.

133 Their activities included personal meetings with the President and Congressmen, letters to Congressmen and advertisements. See, for instance, the letter from the U.S. High-Tech Coalition on Trade Promotion Authority to House Majority Leader THOMAS DASCHLE and House Minority Leader TRENT LOTT; January 30, 2002 downloaded from http://www.semi.org/web/wcontent.nsf/url/TPACoalition_-January3002_Letter in March 2002 or “Trade”; in: National Journal's Technology Daily; August 2, 2002.

Information on the high-tech coalition can be found under http://www.aeanet.org/governmentaffairs/gaet_TPA-contacts.asp. Its members include the following associations: AdvaMed AeA, Association for Competitive Technology, Business Software Alliance, Computer & Communications Industry Association, Computer Systems Policy Project, Computing Technology Industry Association, Electronic Industries Alliance, Information Technology Association of America, Information Technology Industry Council, IPC, National Electrical Manufacturers Association, National Venture Capital Association, Semiconductor Industry Association, Semiconductor Equipment & Materials International, Software & Information Industry Association , Telecommunications Industry Association.

Congressmen in person or by letter, the most comprehensive U.S. IT association, the Information Technology Industry Council (ITI), evaluated individual TPA voting behavior of each Congressmen– with their influential High-Tech voting Guide - accordingly[134]. But the high-tech industry that has large interests in e-commerce and trade in services also used larger fora like the Business Roundtable to make its case heard. Their foremost goal was to target undecided House Democrats to vote for the TPA and thereby tip the balance of pro-TPA votes to the majority[135]. Thereby they also tried to prove criticism wrong that argued that the high-tech sector failed to deliver a large majority among Democrats that had other concerns although being totally for free trade[136]. Especially the last day they lobbied hard to get it passed[137].

The executive branch also continually stressed the competitive advantage and trade surpluses of the U.S. in fields like high-technology (including e-commerce), services and others to convince

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[134] The High-Tech Voting Guide from ITI is used by the information technology industry to measure Members' of Congress support for the information technology industry an policies that ensure the success of the digital economy. At the end of the 107th Congress, key votes will be compiled and analyzed to assign a "score" to every Member of Congress. To stress the importance of the TPA vote, ITI announced that it would take the rare step of double-scoring the trade promotion vote in its voting guide. See for example the Letter of the Information Technology Industry Council to the Honourable J. DENNIS HASTERT (U.S. House of Representatives), December 5, 2001, downloaded from XXX in October 2002. For more details on the voting guide see hier fehlen quellen. ITI has the following members: Agilent Technologies, Amazon.com, AOL Time Warner, Apple Computer, Canon U.S.A., Cisco, Corning, Dell, Eastman Kodak, EMC, Hewlett-Packard, IBM, Intel, Lexmark, Microsoft, Motorola, National Semiconductor, NCR, Panasonic, Siebel, Siemens, SGI, Sony Electronics, Sun Microsystems, Symbol Technologies, Tektronix and Unisys.

[135] "High-tech Launches Trade Push As Vote Nears"; CHARLIE MITCHELL, STEPHEN NORTON & BARA VAIDA; in: *National Journal's Congress Daily AM*; December 4, 2001. High-tech lobbyists, stung by criticism from USTR and House Republican leadership in 2001 that they have failed to deliver Democratic votes for presidential trade negotiating authority, have been closely engaged on focusing their efforts on these fringe votes. Undecided Democratic House Representatives included Chet Edwards of Texas, Bob Etheridge of North Carolina, Jane Harman of California, Jay Inslee of Washington, Dennis Moore of Kansas, David Price of North Carolina and Adam Smith of Washington wenn drinnen dann kapitaelchen / wir muessen dann auch sagen wer ueberreedet wurde

[136] "High-tech Launches Trade Push As Vote Nears"; CHARLIE MITCHELL, STEPHEN NORTON & BARA VAIDA; in: *National Journal's Congress Daily AM*; December 4, 2001. The role of high-tech sector is reflected by the circumstance that Republicans, the USTR and the Bush administration have repeatedly urged the high-tech sector for more lobbying to convince House Democrats. After the vote some also voiced disappointment concerning the fact that the high-tech industry did not manage to deliver key swing votes on trade. See "Lobbying: Republicans Give Tech Lobbyists Poor Grade on Trade Bill", WILLIAM NEW; in: *National Journal's Technology Daily*; August 20, 2002.

[137] "Lobbying: Tech Firms Repeatedly Lob Trade Message To Lawmakers", BARA VAIDA; in: *National Journal's Technology Daily*; July 26, 2002 and "Lobbying: Tech Sector Busily Lobbies On Top Trade Issue", BARA VAIDA; in: *National Journal's Technology Daily*; July 12, 2002.

critics of the beneficial aspects of a renewed fast-track authority[138] and the USTR lobbied Congress to pass the TPA while stressing the importance of fast-track for trade liberalization in these sectors.

Right from the start Congress also took the industry input seriously and initiated efforts to confront e-commerce issues in international fora[139]. The industries interested in e-commerce managed to create a noteworthy congressional and presidential resolve to use international negotiations to reduce the impediments to digital trade[140]. Thus trade in services and e-commerce were an important motor for Congress to consider the extension of fast-track legislation[141].

Part 4.4 and 4.5 analyze the TPA in the context of the GATS and e-commerce negotiations of the Doha Round. Part 4.4 sets out the legal details of the TPA. As has been noted before the legal requirements described in Part 4.4 should not be seen in isolation from the broader political context that shapes how the law is put into practice. The fact that since the passage of the TPA Democrats have significantly lost political group due to the Mid-term Congressional Election in November 2002 will certainly influence the implementation of the legal provisions Part 4.5 pays respect to that consideration and evaluates the legal requirements in their new political context.

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[138] President Bush made the elimination of trade barriers to e-commerce his top priority among 13 "Negotiating Objectives to Advance U.S. Priorities" in 2001 International Trade Legislative Agenda, May 10, 2001, downloaded from www.americasnet.net/trade_integration/agenda.pdf in November 2002. See also recent statements of USTR ROBERT B. ZOELLICK before the Committee on Ways and Means of the U.S. House of Representatives, February 7, 2002, p. 2, downloaded from www.ustr.gov/speech-test/zoellick/zoellick_15.html in February 2002, USTR (2001c) and the DEPUTY SECRETARY SAMUEL BODMAN (2002): Remarks to the Services 2002 Conference, February 5, 2002, U.S. Department of Commerce, Washington, D.C. For older comments on the value of e-commerce and service trade liberalization to the U.S. see Barshefsky (1998), Essermann, (1999b), Barshefsky (2000a), and US Department of State (2001), p. 5.

[139] Senate Bill, "Expressing the sense of Congress on the importance of promoting e-commerce, and for other purposes", 107th Congress, 1st Session, S.CON.RES.37, May 10, 2001, Concurrent Resolution submitted by Mr. LIEBERMANN and referred to the Committee on Finance.

[140] In fact, a congressional hearing took place whose sole purpose was to analyze and find ways to eliminate impediments to digital trade. See HOUSE OF REPRESENTATIVES (2001a) for this congressional hearing that prepared much subsequent congressional legislative activity in the area.

[141] BAUCUS (2002), p. 18 and Senate Finance Committee (2002a), p. in services.

4.4 The Bipartisan Trade Promotion Authority Act of 2002: a strong mandate and negotiation lever for WTO negotiations on electronically delivered products[142]

4.4.1 Introduction to the new TPA mindset

After President Bush signed the Trade Act of 2002 (H.R. 3009) it entered into force on August 6, 2002[143]. The included negotiation objectives and procedures apply to all bilateral, regional and multilateral trade agreements that the U.S. may wish to negotiate. As opposed to the EC, a special congressional mandate for the Doha negotiations does not exist[144].

Throughout the presentation and evaluation of this new TPA the two major previous fast-track procedures (Trade Act of 1974 and the Omnibus Trade and Competitiveness Act of 1988 - OTCA) will serve as a benchmark. Table 2 and 3 actually compare the main provisions of the new TPA to the older trade negotiation authorities and relevant provisions of the Act are reprinted in Appendix A.2.

On the whole, comparison of the legal texts behind the old and the new fast-track legislations reveals the following differences: new, more precise and demanding overall and principal negotiation objectives, stricter consultation and notification requirements, stricter links between the achievement of negotiation objectives and the permission to enter into trade agreements and new withdrawal means of expedited procedures if the President fails to meet consultation

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142 Based on personal interviews with the staff of the Senate Finance Committee and the House Ways and Means Committee, I.M. Destler, CRAIG VAN GRASSTEK and CLAUDE BARFIELD. See also CRS (2001c), pp. 4 ff. and pp. 8 ff and the joint explanatory statement on the conference agreement in SENATE FINANCE COMMITTEE (2002). See CRS (2002a) for a discussion of the labor issues, CRS (2001b) for a discussion of the agricultural issues and AUDLEY (2001) for a discussion on the environmental issues involved in the congressional debate leading to the TPA.

143 Public law No. 107-210. Although the Trade Act of 2002 also covers trade adjustment assistance (TAA) and Andean trade preferences and other trade provisions this analysis focusses on the TPA (fast-track procedures).

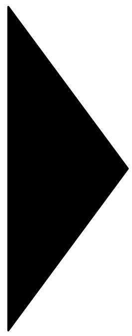
144 CRS (2001c), p. 3.

requirements[145]. Via minor alterations in the legal language as compared to previous fast-track legislations, Congress enshrined in the law that (i) it is not ready to give the President a blank check for negotiations[146], (ii) it wants to play a more active role before, during and after the negotiations and have access to relevant documents and information sources[147], (iii) it thinks that it is important to make TPA as tailored as possible, so as not to unnecessarily intrude on normal legislative procedures[148], (iv) it is ready to withdraw the trade agreement approval procedure if the above requirements are not met[149].

Undoubtedly, congressional considerations vis-à-vis trade in service or e-commerce negotiations are not responsible for the more elaborate rules on executive-legislative cooperation. As explained in Part 4.3.2 increased congressional desire for more oversight is grounded in defensive interests. Nonetheless, both negotiation topics will fully be subject to these TPA rules and the increased gate keeping powers of congressional committees. It is argued that from a U.S. perspective both very offensive and defensive trade issues will actually benefit from added congressional involvement.

Figure 4 illustrates how these changes that were very much influenced by considerations of the Democrats relate to the typified trade policy process that was first depicted in Figure 2.

Figure 4: The Changed Process of US Trade Policy Formulation after the Trade Act of 2002



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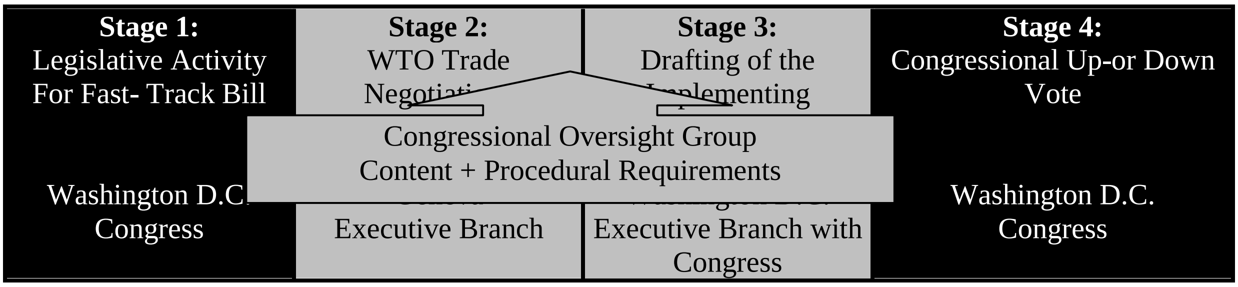
[145] See WOLFF (1995) who argues in favor of a greater congressional involvement.

[146] BAUCUS (2002) and “Trade Bill”, Statement of Chairman MAX BAUCUS (Chairman of the Senate Committee on Finance until December 2002), Committee on Finance; August 1, 2002; downloaded from http://www.finance.senate.gov in August 2002.

[147] Statement of Senator MAX BAUCUS, Committee on Finance, Senate, Markup of Fast Track Legislation, December 12, 2001; http://www.senate.gov/~finance/hearings/statements /121201mb.pdf. In latter statement Baucus makes clear that Congress wants a meaningful oversight of trade negotiations where it will play “a new aggressive role” and SENATE COMMITTEE ON FINANCE (2002a), pp. 52 ff.

[148] SENATE COMMITTEE ON FINANCE (2002a), p. 46.

[149] According to the Senate Finance Committee, “Failure to adhere to the consultation procedures erodes trust between the executive and legislative branches and could lead to withdrawal of trade agreement approval procedures or rejection of trade agreements”. Quoted from SENATE COMMITTEE ON FINANCE (2002a), pp. 52 ff.



As will be shown in parts 4.4.2 and 4.4.3, the content-related and procedural requirements of the Bipartisan TPA Act of 2002 have the effect of softening the clear separation of executive and legislative roles of the typified fast-track procedure. Legally speaking, stage 2 and stage 3 are thus submitted to congressional influence (gray shading indicates increased congressional oversight function as specified by law) and congressional micro-management of certain aspects of trade negotiations is then more likely.

This is in line with previous fast-track legislations and the developments thereof. The typified fast-track procedure without a close working relationship between Congress and the President during the negotiations – as in Figure 2 - has never existed in an unfettered form[150]. Thus, the current TPA bill has the same five standard components of fast-track authorities described in previous Part[151]. Also, the specification of more objectives and the tightening of procedural requirements are in line with the progressive strengthening of congressional supervision from Trade Act of 1974 to the Bipartisan TPA Act of 2002[152].

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[150] It has been demonstrated at length in Part 4.2.2 that Congress has never completely abdicated its power concerning international trade treaties. See also HUBBARD (2002), p. 1 and WTO (1999 tpr usa), p. 25 and CRS (2001c), p. 16. BRAINARD & SHAPIRO (2001), p. 7 stress that it has never been a blank ckeck.

[151] 1) content-related requirements, 2) procedural requirements, 3) a congressional group to supervise the trade negotiations, 4) mechanisms to discipline the executive branch for non-compliance with congressional requirements, 5) a deadline. See CRS (2001c), p. 20, DESTLER (1998), pp. 1-2 and pp. 6-8 and BRAINARD & SHAPIRO (2001), pp. 1 and 2-4 for these standard components and CRS (2001c), p. 4 for this comparison. The USTR also consulted with Congress without fast-track legislation. See USTR (2001annual), p. 223.

[152] HOUSE DEMOCRATIC TRADE COUNSEL (2001), DESTLER (1995), p. 66 and WTO (1996b U.S. tpr govt), p. 22. Here Congress also gives the impression that – like the Member States of the EC - it wants to counteract the “creeping incapacitation” of its control vis-à-vis trade policy.

4.4.2 Content-Related Requirements: The Negotiation Objectives

One of the distinguishing factors of this new trade bill is the fact that many procedural requirements (including the disapproval resolutions) are tightly linked to the achievement of the stated objectives. In addition, many targeted procedural requirements have been introduced to strengthen content-related objectives (like special consulting for negotiations on U.S. trade remedy laws). In that sense, the interrelationship between congressional sector-specific mandates and the congressional willingness to endorse an overall negotiation package is more significant than in previous trade bills.

Three elements of the bill are devoted to content-related negotiation objectives. Unlike initially proposed in the Senate, no separate negotiation objectives for different trade agreements (FTAA vs. WTO, for example) were established[153]. The greater congressional involvement with respect to content-related mandates is demonstrated by the fact the trade bill includes an increased number and more precise overall negotiation objectives than previous fast-track bills (see Table 2)[154].

Nevertheless, it must be noted that the trade bill stopped short of excluding certain negotiation topics from the fast-track agenda[155]. Amendments that tried to exclude negotiations on U.S. trade remedy laws from the application of fast-track authority were dropped at the last minute when the President threatened to veto them[156]. All in all, many of the previous versions of the fast-track bill were much stricter with regard to content-related requirements to be followed and have then be replaced by compromise language that leaves room for interpretation (i.e. labor and

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[153] CRS (2001c), p. 7.

[154] Overall negotiation objectives are more aspirational than the goals mentioned as principal negotiation objectives.

[155] "Bush Loses a Vote on Trade: White House Still Hopes to Kill Curb on Trade Pact Powers"; HELEN DEWAR; in: *Washington Post*; May 15, 2002; Page A08. In an interview, DESTLER confirms this views that BUSH and ZOELLICK got it without major prohibitions.

[156] The major amendment that would have allowed Congress to vote separately on any trade pact provisions that weaken U.S. anti-dumping or other trade remedy laws was the Dayton-Craig amendment. In interviews, it was also called "killer amendment" by several officials. See for more information "Senate approves Trade Bill Amendment That Drew Veto Threat", The United States Mission to the European Union (Brussels, Belgium), May 14, 2002, downloaded from www.useu.be/Categories/Trade/Mar 2202DorganTradeTPA.html (old link update the real one) in April 2002, "Senate Proposal Snags Bush's Bid For Trade Powers"; HELEN DEWAR; in: *Washington Post*; May 14, 2002; Page A19, "The Senate's Trade Torpedo"; author?; in: *Washington Post*; May 13, 2002; Page A14. See also CRS (2002c), pp. 8-9 for more background information on the proposed Dayton-Craig Amendment.

environmental standards)[157]. After the swing to Republicans after the Congressional Midterm Elections this room for interpretation is now likely to work to the benefit of the Republican stance on these issues. Reactions of House Democrats to the final bill also showed that their initial goals on these topics had not been met[158]. In that sense the TPA is not a "watered down version" of previous fast-track bills.

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[157] The comparisons between the different previous versions of the TPA bill is taken from OFFICE OF U.S. SENATOR DICK DURBIN (2002). This internal document was made available to the author in October 2002. The Durbin Bill (S. 2062), for instance, called for other countries to enforce five core ILO standards, demanded tougher language on rights of foreign investors, called for greater enforcement rights for environmental protection, demanded stronger labor and environmental provisions. Moreover, Durbin's version of the bill excludes negotiations that affect US trade laws from fast-track authority, meaning that any agreement of this sort must be brought in via the normal legislative process. CRS (2001c), pp. 6-7 shows that many labor or environment provisions of HR 3019 have not been taken on.

[158] Joint Statement from Trade Bill Conferees Representative CHARLES RANGEL and Senator JAY ROCKEFELLER on Trade Conference Agreement, July 26, 2002, Office of Senator Rangel (check and give website).

Table 2: A Comparison of the Negotiation Objectives of the Trade Act of 1974, the Omnibus Trade and Competitiveness Act of 1988 and the Trade Act of 2002

	Trade Act of 1974	Omnibus Trade and Competitiveness Act of 1988	Trade Act of 2002
Dates covered	1975 –1980. Renewed in 1979 / 1984.	1988 - 1991. Extended twice to June 1993 and then to April 1994 (for Uruguay Round only).	August 6, 2002 – June 1, 2005 renewable until June 1, 2007
Overall negotiating objectives	To obtain more open and equitable market access and reduction of trade distortions in the manufacturing and agricultural sector. Market access to mining and commerce shall also be increased.	To obtain more open equitable and reciprocal market access; the reduction or elimination of barriers and other trade-distorting policies and practices; a more effective system of international trading disciplines and procedures. One of its parts (Telecommunications Trade Act of 1988) focuses on country-specific promotion of U.S. telecommunication service exports.	Emphasis on links between national security and trade. To obtain more open, equitable, and reciprocal market access; to obtain the reduction or elimination of barriers and distortions that are directly related to trade and that decrease market opportunities for United States exports or otherwise distort United States trade; to further strengthen the system of international trading disciplines and procedures, including dispute settlement; to foster economic growth, raise living standards, and promote full employment in the United States and to enhance the global economy; goals for trade and environment and goals related to trade and labor laws; goals for SMEs and goals on child labor.
Principal negotiating objectives	Tariff reduction and elimination of non-barriers to trade in manufacturing and the agricultural sector. No specific mentioning of trade in services	Objectives on (1) improvement of dispute settlement, (2) improvement of the GATT and other multilateral trade negotiation agreements, (3) transparency, (4) developing countries, (5) current account surpluses, (6) trade and monetary coordination, (7) open and fair trade in agriculture, (8) reduction of unfair trade practices, (9) trade in services, (10) intellectual property, (11) foreign direct investment, (12) safeguards, (13) specific barriers, (14) worker rights, (15) access to high technology, (16) border taxes. More open foreign markets for U.S. manufacturing, services and agricultural goods and promotion of foreign direct investment. Detailed new mandate for the service negotiations (especially telecommunication services) and special emphasis placed on high technology products and intellectual property. Special emphasis is also placed on the discouragement of unfair trade practices and the promotion of worker rights	Objectives on (1) trade barriers and distortions, (2) trade in services, (3) foreign investment, (4) intellectual property, (4) transparency, (5) anti-corruption, (6) improvement of the WTO and multilateral agreements, (8) regulatory practices, (9) e-commerce, (10) reciprocal trade in agriculture, (11) labor and the environment, (12) improvement of dispute settlement and enforcement, (13) WTO extended negotiations, (14) trade remedy laws, (15) border taxes, (16) textile negotiations and (17) worst forms of child labor. More open and equitable market access for U.S. manufacturing and services, the promotion of foreign direct investment, the protection of intellectual property rights, Detailed mandate for the e-commerce negotiations, reciprocal trade in agriculture and advice on the use of least-trade restrictive regulatory practices for a given policy objective. Special emphasis is also placed on the protection of environmental and labor standards, greater cooperation between ILO and the WTO, other priorities related to labor issues and the protection of U.S. trade remedy laws.

Sources: Own Table based on information taken from the trade treaties (Trade Act of 1974, Public Law 93/618, OTCA, Public Law 100-418, Trade Act of 2002, Public law 107-210). Additional information obtained from WTO (1999 U.S. tpr), p. 24-25, House DEMOCRATIC TRADE COUNSEL (2001) and all CRS (2001b), CRS (2001c), CRS (2002a), CRS (2002b), CRS (2002c). Voting procedures (prohibition of amendments, mandatory deadlines, etc.) are not compared.

Still, the granting of the fast track procedure was made contingent upon the attainment of specific negotiation parameters, thereby reducing the U.S. negotiators' flexibility. This greater congressional influence of Congress on the actual negotiation items works in two ways:

For a certain group of issues or products, the Bipartisan TPA Act of 2002 limits the flexibility of U.S. negotiators because their hands are either tied on the defensive side or because feasible trade concessions are conditional on other issues (worker rights, etc.). Here the trade bill lacks the broad and permissive language of previous fast-track authorities[159]. This group of issues where the content-requirements limit the flexibility of U.S. negotiators on the downside is: textiles, agriculture, import-sensitive products, labor and environmental standards and trade remedy laws.

The topics for which Congress installed these "safeguard measures" have been at the core of the debate during the legislative process that produced the Trade Act (see Box 1 for more details on the defensive content-related requirements). Especially developing countries will see the labor and environment provisions as protectionist tools[160]. Other countries will consider the limited room for negotiations on U.S. trade remedy laws as ill-founded U.S. negotiation objective that does not reflect the decision of the Doha Mandate to open negotiations on this topic[161]. The content-related requirements with respect to labor and environmental standards are also out of step with the Doha Mandate[162]. It has already been argued that this "straightjacket" will negatively affect the Doha negotiations[163].

Nevertheless, it must be recognized that the chosen compromise language on these defensive provisions is less specific than Democrats had hoped it to be. In fact, it is argued later that the ambiguity of the language that conceals the party divisions on the topic will later lead to significant debate in Congress.

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159 See DESTLER (1998), p. 4 for the point on broad and

160 FITZGERALD (2001), p. 1.

161 Para. 28 of the Doha Mandate calls for negotiations on the Anti-Dumping (GATT Article VI) agreements to clarify and improve disciplines.

162 Compare to Para. 31 of the Doha Mandate on Trade and Environment.

Box 1: Content-Related Requirements of a Defensive Nature

The following rather defensive mandates were a necessary condition for congressional approval of the TPA:

First, the new overall negotiation objectives (see Appendix A.2.1) innovate on the new theme of worker rights (labor standards) and environmental policies[164]. They make clear that the pursuit of trade expansion should not be carried out at the expense of other priorities, such as protection of a sound, sustainable environment and protection of the rights of workers[165]. The principal negotiation objectives and the part on the promotion of certain priorities develop these new notions with respect to labor and the environment further (see Table 1)[166]. Congress thus limits negotiations with third countries that do not enforce specific labor and environmental standards. During the discussion leading to the TPA the Democrats had urged to adopt the language of the earlier Jordan agreement (provisions that ensure that Jordan does not promote exports or attract investment by lowering or relaxing the enforcement of its environmental and labor laws). As Republicans are against this strict link between trade and other standards, the bill accommodated these differences with compromise language[167]. The bill now stops short of mandating the inclusion of enforceable labor and environmental provisions in trade agreements. It focuses on pressing trading partners not to fail to enforce their existing labor and environmental laws.

Second, a new requirement is that the ability of the U.S. to enforce its trade remedy laws must be preserved according to the principal negotiation objectives[168]. Congress earlier unsuccessfully

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163 KLUTTIG & NOWROT (2002), pp. 24 ff. and p. 34.

164 Sec 2102 (a) (5), (6), (7) and (9). The issue of workers rights in U.S. trade acts is not new, however. Sec. 1101 (b) (14) of the OTCA, for instance, encouraged the promotion of respect for workers rights and the review of the relationship between workers rights and GATT articles.

165 Senate Committee on Finance (2002a), p. 9. See AUDLEY (2001) for issues of environmental protections in the fast-track discussion.

166 Sec 2102 (b) (11) on labor and the environment, Sec. 2102 (b) (17) on worst forms of child labor and Sec. 2102 (c) on greater cooperation between the WTO and the International Labor Organization (ILO), the promotion of certain core labor standards, environmental reviews of future trade and investment agreements, etc. See for more details CRS (2001c), pp. 4 ff and CRS (2002c), p. 7. For more details on the labor issues see CRS (2001c), pp. 8-10 and CRS (2002a).

167 "Congress, Administration Wrestle With Guidelines On Consultations", *Inside US Trade*, October 11, 2002.

168 Sec. 2102 (b) (14), Bipartisan TPA Act of 2002. Congress has made very clear that an undermining of U.S. trade law via any trade negotiation will not be tolerated. See "Trade Bill", Statement of Chairman MAX BAUCUS (Chairman of the Senate Committee on Finance until November 2002), Committee on Finance; August 1, 2002; downloaded from http://www.finance.senate.gov in August 2002. Sec. 1101 (b) (8) of the OTCA only placed special emphasis on the discouragement of unfair trade practices. This can be explained by the fact that many U.S. trade remedy laws not under target by its trade partners and the WTO panels were actually enacted by the OTCA.

disapproved the inclusion of negotiations on trade remedy laws in the Doha Mandate[169] and now seeks to tie the negotiators' hands on the defensive side with this restrictive mandate[170]. Because Congress believes that the recent pattern by WTO dispute settlement panels unjustly imposed obligations and restrictions on U.S. trade remedy laws, the findings of the trade act also stress the need for a preservation of the balance of rights and obligations negotiated in trade agreements[171]. Further trade expansion is made conditional on this requirement. This provision constitutes the strictest content-related requirement that Congress has enacted.

Third, the list of principal objectives also includes a great number of defensive points on reciprocal trade in agriculture and special negotiation provisions on import-sensitive products[172]. This becomes very apparent in the limitations placed on trade agreements authority[173]. Any duty reduction below that applicable under the Uruguay Round Agreements on any import sensitive agricultural product is not possible under TPA[174].

But for the group of trade products under consideration in this work – e-commerce and IT services - another logic applies. This is true because the direct implication of Congress that is prone to get captured by special interests (like labor unions or environmental groups) does not results in a more protectionist stance in the case of e-commerce related negotiation items.

Here rather the opposite holds: A Congress influenced by strong industry interests uses its increased means of influence to advance the offensive U.S. digital trade agenda. Thus concerning this negotiation item, the President and the USTR are rather spurred than blocked by congressional activities. This is not surprising as the offensive U.S. position on the WTO

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[169] BAUCUS (2002), p. 19. BAUCUS outlines that U.S. Trade Representative ZOELLICK agreed to put the issue on the WTO negotiation table despite a letter signed by two-thirds of Senate urging not to do so.

[170] The attitude of Congress on the need to preserve U.S. trade remedy laws is also reflected in the initial findings of the trade act that identifies a certain concern that recent panel decisions of the WTO and the Appellate Body may changed the rights and obligations provided in the agreements. In particular, the U.S. worries about the fact that the panels identify restrictions on the use of antidumping, countervailing duty and safeguard measures, which are not found anywhere in the negotiated texts of the relevant WTO agreements.

[171] Sec. 2101 (b) (3).

[172] Sec. 2102 (b) (10).

[173] Sec. 2103 (a) (2).

[174] Sec. 2103 (a) (2) (B) and KLUTTIG & NOWROT (2002), pp. 30-31.

activities on e-commerce is a direct result of congressional legislation[175]. Consequently, the necessity for fast-track authority to conduct offensive trade negotiations on e-commerce and services was the most uncontroversial point in the whole congressional debate leading to the TPA[176]. The interpretation of the e-commerce provisions also do not depend on which party exercises political control over them as the Democrats and the Republicans share the same trade policy stance on this item.

Consequently, the Bipartisan TPA Act of 2002 does not exclude specific negotiation items from fast-track authority that apply to e-commerce, IT products and services[177]. Moreover, contrary to the U.S. mandate concerning trade remedy laws, the current TPA bill is only prescribing what U.S. negotiators "should" do (positive language rather than negative language that states where the negotiators limits are) while setting out demanding offensive negotiation objectives for e-commerce and IT products to be pursued by the USTR[178]. As via this inclusion in the TPA congressional ambitions and procedures can be credibly conveyed to trade partners, it is argued that these three negotiation topics (in order of analysis: e-commerce, IT products, services) will actually benefit from the tightened relationship with Congress.

In the mandate e-commerce has received a strikingly large and detailed TPA mandate that figures prominently in the principal negotiation objectives[179].

> ELECTRONIC COMMERCE.- The principal negotiating objectives of the United States with respect to electronic commerce are:
>
> (A) to ensure that current obligations, rules, disciplines, and commitments under the WTO apply to electronic commerce;
>
> (B) to ensure that
>
> > (i) electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form,

[175] Senate Bill, "Expressing the sense of Congress on the importance of promoting e-commerce, and for other purposes", 107th Congress, 1st Session, S.CON.RES.37, May 10, 2001, Concurrent Resolution submitted by Mr. LIEBERMANN and referred to the Committee on Finance.

[176] See BAUCUS (2002), p. 18 and SENATE COMMITTEE ON FINANCE (2002a), pp. 26-27 who recognize the necessity of fast-track legislation to conduct service trade and e-commerce negotiations. See also one of the congressional hearings in HOUSE OF REPRESENTATIVES (2001c), p. 20 that buttresses this argument.

[177] As seen in chapter 3, Part XX, the delegation of powers from the EC Member States to the EC was limited to certain forms of service delivery and certain service industry sectors.

[178] Services is very very broad. Although to a somewhat lesser degree, the same logic applies to the service trade negotiations.

[179] Sec. 2102 (b) (9).

> (ii) the classification of such goods and services ensures the most liberal trade treatment possible;
>
> (C) to ensure that governments refrain from implementing trade-related measures that impede electronic commerce;
>
> (D) where legitimate policy objectives require domestic regulations that affect electronic commerce, to obtain commitments that any such regulations are the least restrictive on trade, non-discriminatory, and transparent, and promote an open market environment; and
>
> (E) to extend the moratorium of the WTO on duties on electronic transmissions.

With this mandate Congress has issued its first-ever instructions for the administration concerning negotiations on e-commerce in free-trade agreements[180]. It devotes more space to principal negotiation objectives related to e-commerce than for examples to services, regulatory practices, trade remedies, textiles, and worst form of child labor. It is also one of the most narrowly specified negotiation objectives in the TPA and previous fast-track bills that are usually of a rather general nature. Namely, it specifies a very explicit checklist as to what attitude U.S. negotiators should maintain towards the solutions to the open WTO e-commerce questions. This can be explained by the fact that it is the IT industry itself that has successfully lobbied the House Ways and Means Committee where this specific language on e-commerce was initially introduced[181].

Specifically, via Para. (A) Congress wants to ensure that WTO disciplines apply to e-commerce, Para. (B) provides U.S. negotiators with guidance as to how the open classification should be approached and Para (E) seeks the further extension of the e-commerce duty-free moratorium. With this precise mandate Congress instructs U.S. negotiators to ensure that countries are not able to evade core disciplines – such as national treatment and most-favored-nation treatment – or previous commitments on the grounds that e-commerce / trade in digital products does not come neatly within any particular WTO Agreement[182].

Interestingly, Para. (C) and (D) go a long way in mandating a regulatory discipline for e-commerce that was discussed in chapter 2 (Part XX). According to the Senate, "negotiators must guard against regulations and disciplines that would discriminate against electronic commerce in favor of more traditional forms of commerce, or otherwise retard the growth of

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[180] "Trade: Congress Sets Terms On E-Commerce, Intellectual Property", WILLIAM NEW; in: *National Journal's Technology Daily*; August 2, 2002.

[181] According to an interview with the Information Technology Industry Council the e-commerce mandate was actually drafted by the industry association and then handed to the House Committee on Ways and Means.

[182] SENATE COMMITTEE ON FINANCE (2002a), pp. 26-27.

this technologically innovative way of doing business"[183]. As compared to the few discussions on a special regulatory discipline on e-commerce in the WTO or the limited success towards agreements on similar "necessity tests" in the GATS Art. VI discussion this move may have far-reaching implications.

Moreover, Congress devotes special attention to asserting the critical link between national security and other leading high-technology sectors (like the IT industry)[184]. Although high-technology also played a role in the last fast-track legislation of 1988, this link has never been exposed so prominently before. Consequently, in the TPA Congress also pushes an offensive agenda with respect to IT products. It requires the expansion of membership and the enhancement of the Information Technology Agreement[185] and it explicitly mandates the commencement of negotiations on information technology products[186].

Although offensive in nature the principal negotiation objective of U.S. Congress on services is extremely short and broad[187]. Its absence of specificity – it mentions no sector-specific priorities, no priorities with respect to modes of delivery, no priorities as to new methods of liberalization (reference papers, etc.), no specific e-commerce related objectives, - reflects the trust of Congress that its strong interest in service trade liberalization is met by USTR's ambitions (see also Part 4.2.3).

> TRADE IN SERVICES - The principal negotiating objective of the United States regarding trade in services is to reduce or eliminate barriers to international trade in services, including regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operations of service suppliers.

In the run-up for the TPA enactment Congress, however, has made very clear that it has much more detailed views with respect to the U.S. position on trade in services negotiations[188].

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183 SENATE COMMITTEE ON FINANCE (2002a), p. 27.

184 See the introductory findings in Sec 2101 (2). These introductory findings must be seen in the light of the terrorist attacks in September 2001. The time after the attacks have seen an dramatic increase in security issues. Security has become the guideline measure for most governmental policies thereafter (trade, Internet, privacy, etc.). Refer to Findings in inner regulation part: here IT = national security.

185 Sec. 2102 (b) (7) (B).

186 Sec. 2103 (d).

187 Sec. 2102 (b) (2). The service mandate in the OTCA in Sec. 1101 (b) (9) was somewhat longer as it set the stage for the development of internationally agreed rules, including dispute settlement procedures, for the trade in services that eventually led to the GATS

188 Senate Committee on Finance (2002a), pp. 11-12.

In short, according to Congress negotiations should reduce barriers to all modes of supply of services and thereby lead to a major expansion of U.S. services exports. Although some sectors receive special mentioning in the (telecommunications, audiovisual financial, energy services, information technology, express delivery and business services) no sectors are explicitly excluded from the U.S. mandate. Contrary to previous bill versions, the final TPA mandate does not even specify any attitude to be taken towards culturally minded discriminatory measures[189].

U.S. negotiators should pursue liberalization of trade in services and e-commerce relevant topics in bilateral and regional trade agreements, as well as in the WTO. Interestingly, in the non-WTO fora they should seek commitments that go beyond the GATS rules and commitments. In particular, where possible, Congresses expresses itself for a services trade liberalization pursued through a “negative list,” rather than a “positive list” approach[190].

The congressional trade in service considerations are very linked to the e-commerce considerations as they stress the need (i) for liberalization for the cross-border supply of services, (ii) to create a free, open and technology-neutral commercial environment for the development of electronic commerce and (iv) explicitly acknowledge the importance of maintaining free flows of information.

The fact that the core of the e-commerce mandate has hardly changed at all throughout the greatly different versions of the congressional TPA bills underlines the strong overarching and bipartisan interest in the field[191].

Congress has also introduced a strong mandate on regulatory issues that is very relevant to e-commerce and service negotiations. In addition to above-mentioned elements in the e-commerce mandate of it can be found in the service mandate and the separate, horizontal

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[189] See that previous bills included language to oppose any cultural exceptions taken in trade agreements. See OFFICE OF U.S. SENATOR DICK DURBIN (2002) and Section 2(b)(2) of the Durbin Act S. 2062 on services (“Oppose cultural Exceptions to GATS obligations – e.g. a requirement that television stations reserve a certain minimum percentage of their programming time for locally-produced items.”).

[190] Negotiators should seek market-opening commitments that apply across sectors, minimizing exceptions for particular sectors, rather than seeking market commitments on a sector-by-sector basis.

[191] The Sec. 2(b)(17) of the Durbin Act S. 2062 is one proposal that was slight different because it added the objective to “educate WTO Members about benefits of e-commerce and work to liberalize trade barriers that directly impede e-commerce”. This provision has been dropped in the final TPA bill.

mandate on regulatory practices (see the Appendix A2.2)[192]. The e-commerce related mandate on regulation goes furthest when proposing the principle of least-trade restrictiveness for given legitimate policy objectives. The congressional position with respect to service and the mandate on regulatory practices stop short in concentrating on achieving transparency and participation of affected parties in the foreign country development of regulations[193]. The same mandate in relation to goods/products requires that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence[194]. In sectors where appropriate, promote domestic regulatory reform, with the objective of securing "best practices" and committing governments to avoid discrimination against foreign service suppliers in their current and future regulations.

At first sight, it seems as if the current U.S. service mandate does not have the same regulatory safeguards as it did in the OTCA[195]. In fact, no specific regulatory precaution language exists in the U.S. service mandate. A closer look at the trade act reveals that language on regulatory precaution that was specifically for trade in service negotiations in 1988 has migrated to a more horizontal level in the trade bill, namely to the part on the "Promotion of certain priorities"[196]. The service mandate, however, does not exclude or safeguard specific regulatory approaches in the service sector. It also does not exclude heavily regulated service sectors or more sensitive ones (education, etc.) from the U.S. service mandate or the applicability of the fast-track arrangement. It must be noted, however, that the main focus of Congress during the legislative activity for the trade act was definiteley not directed towards service trade issues and that considerations of regulatory precaution will surface at a later stage of the negotiations.

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192 Sec. 2102 (b) (8). Reprinted in the Annex A.2.2. See SENATE COMMITTEE ON FINANCE (2002a), pp. 24-26 for more details on the regulatory mandate.

193 Including rule-making, granting of licenses, setting of standards, and judicial and arbitral proceedings.

194 Eliminating practices that allow governments to set up trade barriers on the pretext of pursuing legitimate public purposes, such as protection of health and safety is an issue. governments use to justify trade-restrictive measures. A law or regulation purporting to serve a legitimate public purpose should not be immune from challenge as a trade barrier if it is not grounded in scientific or other objective data and analysis.

195 According to Sec. 1101 (b) (9) (B) of OTCA, in pursuing the [U.S. negotiation objectives regarding trade in services] the U.S. negotiators shall take into account legitimate U.S. domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, environmental, consumer or employment opportunity interests and the law and regulations related thereto. Changes to the original text in brackets are conducted by the author.

196 According to Sec. 2102 (c) (6) the President shall take into account other legitimate U.S. domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, and consumer interests and the law and regulations related thereto.

Finally, the content-related negotiation objectives also include a detailed mandate for the protection intellectual property rights that devotes great attention updating past IPR-related negotiation objectives to prove strong protection in the context of new technologies like the Internet[197].

[197] Sec. 2102 (b) (4) and "Trade: Congress Sets Terms On E-Commerce, Intellectual Property", WILLIAM NEW; in: *National Journal's Technology Daily*; August 2, 2002.

4.4.3 Specific Procedural Negotiation Requirement[198]

The increased desire for congressional intervention in U.S. trade policy also manifests itself in the procedural negotiation requirements that are mandated by the Bipartisan TPA Act of 2002. Appendix A.2.3 outlines the relevant provisions and Table 3 summarizes the main changes towards previous fast-track legislation and. Latter table yields that the procedural requirements have changed much more throughout the different trade bills than the content-related requirements. They have been strengthened and they compel the executive branch to consult more intensively with Congress at all phases of an agreement's negotiation (even before negotiations are initiated)[199].

Before going into the details of Table 3 it shall be noted that the deadline (June 1, 2005, renewable to June 1, 2007) of the fast-track legislation is a powerful internal procedural tool. As opposed to prior recommendations[200] the fast-track authority has not been made permanent. Thus the executive branch must continuously work on a good relationship with Congress. The fact that after one year an external commission evaluates the functioning of the TPA process adds to the pressure[201]. In addition, the deadline can and did already have important positive effects on the conclusion of international trade agreements[202]. For reasons mentioned in Part 4.2.2, foreign governments understand the advantages of finishing a trade round before fast-track legislation expires. Especially the deadline in 2007 will be an important mark for the Doha negotiations.

Coming to Table 3, the first row shows that the institutional oversight provisions of Congress over the executive branch have been increased[203]. The mandate to set up a new Congressional

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198 CRS (2002c), pp. 7-8,

199 SENATE COMMITTEE ON FINANCE (2002a), p. 3. On the whole the current consultation requirements are also stronger than the refuted proposals on fast-track renewal that were made in the proposals in the 1990s. See DESTLER (1998), pp. 6 f. of these weaker consultation requirements of previous proposals.

200 DESTLER (1997a congressional hearing) and DESTLER (1997b), p. XX.

201 Sec. 2111 (a).

202 PAEMEN & BENSCH (1995), p. 192 underline the importance of the fast-track legislation' deadline for the conclusion of the Uruguay Round.

203 An enhanced consultation process was actually recommended to solve the stalemate on the renewal of fast-track authority. See BRAINARD & SHAPIRO (2001), p. 6, DESTLER (1995), pp. 262-264 and COUNCIL ON FOREIGN RELATIONS (2001), p. 13.

Oversight Group (COG)[204] whose members will be accredited as official advisers to the U.S. delegation in trade negotiations is actually one of the most significant procedural TPA innovations. The COG will exist next to the Group of Congressional Advisors for Trade Policy that was established in 1974 and thus supplements the committee-based consultative process[205]. It has had its first meeting on September 19, 2002[206]. The mandated written guidelines for consultations with the COG were finalized in December 2002 and echo most of the consultation features anchored in the trade act[207].

One major difference to this existing group is that members of any congressional committee with jurisdiction can rather flexibly participate in the COG thereby achieving the participation of a broad, bipartisan cross-section of the House and Senate. Thus the new fast-track procedures open the door to a much wider congressional participation[208]. This change is logical in the context of more complex trade negotiations that touch upon different committee jurisdictions. Especially the e-commerce and cross-border service negotiations are very likely to catch the interest of the non-trade committees (Financial service committee, etc.) for prudential reasons[209]. As expected its standing membership is highly diverse[210]. Another difference to the Group of Congressional Advisors is that the COG is a much more active group than the congressional trade advisors[211].

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204 Sec. 2107.

205 See Sec. 161 of the Trade Act of 1974 as amended [19 U.S.C. 2211; P.L. 93–618, as amended by P.L. 96–39 and P.L. 100–418] and HOUSE COMMITTEE ON WAYS AND MEANS, p. 1118 ff. for the origins of this group of congressional delegates and Sec. 161 of the OTCA for the most recent inclusion of this institutional oversight group in fast-track legislations.

206 "Congressional Oversight Group Eyes First Meeting Next Week", *Inside US Trade*, September 13, 2002.

207 See the Congressional Consultation Guidelines established along Sec. 2107 (b) of the Trade Act of 2002 conveyed to from USTR ZOELLICK to the Chairman of the Senate Finance Committee (MAX BAUCUS) on December 4, 2002 (Document Source: USTR). See also "USTR, Congress to Debate Trade Consultation Guidelines Soon", *Inside US Trade*, October 25, 2002 and "USTR Promises Early Access to Negotiating Proposals For Congress", *Inside US Trade*, January 10, 2003. The guidelines were to be completed 120 days after fast track becomes law, thus on December 6, 2002.

208 See "Congressional Oversight Group Eyes First Meeting Next Week"; in: *Inside U.S. Trade*; Vol. 20.; No. 37; September 13, 2002.

209 As has been noted before, when jurisdiction lies on the sub-federal level states will also want to be involved.

210 "Trade Bill Enables Forward Movement on Negotiations – Congress to Play Key Consultation Role", Press Release of the Committee on Ways and Means, U.S. House of Representatives, September 13, 2002. From the House of Representatives there will be five members of Ways and Means (three Republicans and two Democrats) and two members, respectively one Republican who is the chairman of that committee and one Democrat, of the following committees: Agriculture, Energy and Commerce, Financial Services, Judiciary, Rules, International Relations, Government Reform and Oversight and Resources. House side will also be provided. And note how many issues and people involved. Always the chairmen are involved.

211 CRS (2001c), p. 5 and pp. 15-16.

To avoid a confrontation with the Senate Finance Committee (and especially its outgoing chairman BAUCUS[212]) in the early stage of existence of the TPA[213], the USTR has signaled a great degree of cooperation with the COG in the recently issue consultation guidelines that includes regular exchange of information, adjustment of the U.S. negotiation objectives along congressional inputs, extensive briefings during non-final and final stages of negotiation rounds. Yet the USTR did not commit to specific timelines for the above actions[214]. Moreover, it did not accommodate hard-line demands of Senate Democrats that members of the COG should be able to observe negotiating sessions[215].

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[212] Senator CHARLES GRASSLEY (R-IA) resumed his chairmanship of the Senate Finance Committee in January 2003.

[213] Baucus used great presssure to make sure that the consultation guidelines and the ensuing consultation efforts reflect the greater Congresssional demands on the USTR concerning active consultation. See the Statement of Senator MAX BAUCUS, delivery on the first Congressional Oversight Group Meeting, September 19, 2002, downloaded from www.insidetrade.com in September 2002, "USTR, Congress to Debate Trade Consultation Guidelines Soon", *Inside US Trade*, October 25, 2002, "USTR offers initial language on Trade Consultations To Congress", *Inside US Trade*, November 15, 2002 and "Baucus warns Administration To Cooperate With Congress On Trade Deal Negotiations" and "Baucus Urges Zoellick To Put WTO Agriculture Talks Ahead of Australian FTA", *Inside US Trade*, Vol. 20, No. 37, September 13, 2002.

[214] "USTR Promises Early Access to Negotiating Proposals For Congress", *Inside US Trade*, January 10, 2003.

[215] Democrats and Republicans had very different views on the topic of actual congressional participation in negotiation sessions. Whereas the USTR has signalled early that it would not allow Congressional staff as observers to negotiations (see "Baucus Criticizes USTR handling of Chile FTA Negotiations", Statement by Senator MAX BAUCUS, October 4, 2002 and "US Tables Market Access Offer, Links to Fixing Chile SPS Problems, *Inside US Trade*, October 4, 2002), the Senate Democrats laid much emphasis on the right to have their staff observe trade negotiation sessions. For more details see "Congress, Administration Wrestle With Guidelines On Consultations", *Inside US Trade*, October 11, 2002.

Table 3: A Comparison of the Procedural Requirements of the Trade Act of 1974, the Omnibus Trade and Competitiveness Act of 1988 and the Trade Act of 2002

Congressional Involvement	Trade Act of 1974	Omnibus Trade and Competitiveness Act of 1988	Trade Act of 2002
Institutional Oversight	5 advisers from each congressional trade committees plus other designated members of these committees.	**Increased congressional oversight:** Status quo as in 1974 plus increased consultation requirements between USTR and both congressional trade committees	**Increased congressional oversight that includes the involvement of other congressional committees:** Status quo as in 1988 plus the Congressional Oversight Group (COG) that consists of 10 advisers from both congressional trade committees and chairman and ranking member of House or Senate Committees that have jurisdiction over laws affected by trade agreements.
Notice of Intention to Sign the Agreement **and** **Consultation Prior to Entering into Agreement**	President must consult with Congressional committees of jurisdiction during negotiations and notify Congress at least 90 days before signing the trade agreement. Congressional advisers and other designated members of the congressional trade committees must be currently informed.	**Increased consultation requirements before trade agreement is entered into:** Status quo from 1974 plus - For free-trade agreements, President must notify and consult Congressional trade committees at an early stage of negotiations. - consultations before trade agreements are entered into must now yield how the agreement will achieve the treaty objectives - special consultation requirements with Congress and advisory committees and implication of the Federal Communication Commission with respect to negotiations on telecommunication services	**Increased notification and consultation requirements before negotiation, during negotiation and before trade agreement are entered into. Increased cooperation now begins <u>before</u> negotiations actually start:** Status quo from 1988 plus - new required notification and consultation requirements vis-à-vis Congress and possible compulsory meeting with the COG <u>before</u> negotiations actually start - before negotiations with a specific country are started it shall be taken into account if this country implemented its obligations under the Uruguay Round Agreement - consultations with congressional advisers is enlarged to all committees of the House and Senate with jurisdiction on issues involved / increase in congressional committee staff to meet increased consultation needs - special consultation procedures with the COG that follow special guidelines, that (if necessary) involve various congressional committees, that guarantee timely access to important documents and negotiators on negotiation sites, etc. - special consultation and reporting requirements on agriculture and import sensitive products - special consultation requirements on textiles and on the fishing industry - special reporting requirements concerning trade remedy laws

Supporting Documentation Requirements	After agreement is reached, President must submits a draft bill to Congress, details as how to implement the trade agreement, an explanation how current law is changed or affected and a statement as to how the agreement serves the interest of U.S. commerce.	**Increased requirements on supporting information to be submitted**: Status quo from 1974 plus a statement asserting that the agreement makes progress achieving the objectives of the 1988 Trade Act and explaining why and to what extent the agreement does not achieve other applicable purposes, and others.	**No significant change:** Status quo from 1988 plus - statement as to how the promotion of certain priorities of Sec. 2102 (c) will be reached.
Congressional Involvement	**Trade Act of 1974**	**Omnibus Trade and Competitiveness Act of 1988**	**Trade Act of 2002**
Procedure for withdrawing fast-track procedures	No specific procedure included. Concurrent resolution of the two Houses of Congress can Only be filed after a trade agreement has been submitted to Congress.	**Increased means with which Congress may refuse to extend or withdraw "fast-track" if President fails or refuses to consult with Congress:** Status quo of 1974 plus Trade agreement regarding non-tariff trade barrier can only be entered into if progress is made on negotiation objectives. **Extension disapproval resolution** can be invoked if sufficient tangible progress has not been made in trade negotiations. Report of advisory committee is required to evaluate progress so far and the necessity of extension. **Procedural disapproval resolution** can be invoked if President has failed or refused to consult with Congress in accordance with the treaties provisions. Resolutions can only be introduced by Chairman or ranking minority member of relevant two House and one Senate Committee.	**Increased means with which Congress may refuse to extend or withdraw "fast-track" if President fails or refuses to consult with Congress. Increased means with which Congress may withdraw "fast-track" if President fails or refuses to consult with Congress and if objectives are not achieved:** Status quo of 1988 plus **Extension disapproval resolution:** **Increased reporting requirements:** In addition to Status quo requirements from Trade Act of 1988 report from International Trade Commission on newly enacted trade agreements is required for extension. **Procedural disapproval resolution** Status quo of 1988 plus **but reduced barriers for the introduction of disapproval resolution:** Resolutions can be introduced by any member of the House or Senate. Resolution can be introduced like before (failure to consult) but also for 1) failure to notify, 2) failure to develop or comply with consultation guidelines, 3) failure to meet with COG, 4) the agreement or agreements fail to make progress in achieving the purposes, policies, priorities, and objectives of this title. Resolution **But also new: only one disapproval resolution per trade agreement**

Consultation Requirements with the Private Sector and necessity for Public Hearings	Establishment of the Advisory Committee for Trade Negotiations and public hearings are mandated	**Status quo of 1974 plus more detailed rules on the advice and consultation regarding trade policy, negotiations and agreements.** Explained in part by fact that mandate for this committee was first established in 1974.	**No change: Status quo from 1988**

Sources: Own Table based on same sources as Table 1. Voting procedures (prohibition of amendments, mandatory deadlines, etc.), details concerning the trade agreements authority that are not relevant to services or e-commerce, all duties vis-à-vis the International Trade Commission, details as to the implementation of trade agreements and other issues are not compared.

The second row of Table 2 shows that – in line with the historical trend - the notification and consultation requirements have been somewhat strengthened[216]. According to interviews with both the House and the Senate, the aim is for an ongoing dialogue where USTR actually takes congressional input serious and where USTR explains when it deviates from congressional wishes. Congress has also stressed that these consultation requirements do not fade in the last hours before the conclusion of negotiations when the most important concessions are usually made[217].

In the new trade act this influence is reflected by small but subtle changes towards the last fast-track legislation in 1988[218]. The question how and to what extent the agreement will achieve the applicable purposes receives more consideration[219]. In addition, the consultation requirements are now effective at an earlier stage of the process (before the negotiations are started rather than before an agreement is entered into[220]) and have to be conducted more intensively[221]. Overall the greater intensity mostly results of the added consultation requirements regarding the COG that come without diminishing the consultation requirements vis-à-vis the House and Senate trade committees and the Group of Congressional Advisers[222].

But there also exist new special notice and consultation requirements on particular topics like the environment and labor laws[223], import-sensitive agricultural products[224], fish and shellfish, textiles[225], and trade remedy laws[226] (i.e., antidumping, countervailing duty, and safeguards

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[216] Point buttressed by EVERETT EISENSTAT (Senate Finance Committee) during the ABA Section of International Law and Practice Symposium, "The U.S., the Doha Round and the WTO – Where Do We Go From Here?", Segment 9: TPA/"Fast-Track" – Where do we go from here?; September 12-13, 2002, Georgetown University Law Center, Washington D.C. See also SENATE COMMITTEE ON FINANCE (2002a), pp. 47 ff. and DESTLER (1995), pp. 66 ff. See HOUSE DEMOCRATIC TRADE COUNSEL (2001), p. 1 for a detailed explanation of increased consultation requirements from the Trade Act of 1974 to the OTCA.

[217] SENATE COMMITTEE ON FINANCE (2002a), pp. 52 f.

[218] CRS (2001), p. 16 stresses the similarities in consultation requirements between the new fast-track legislation and the one of 1988.

[219] But CRS (2001c), pp. 5 ff. stresses these requirements are rather similar to the 1988 trade act.

[220] Sec. 2102 (d) (2) and Sec. 2104 (a). Previous fast-track bills only required consultation with Congress before agreements are entered into (Sec. 1102 (d) of the OTCA and Sec. 102 (c) of the Trade Act of 1974).

[221] Sec. 2104.

[222] See for instance Sec. 2107 (c).

[223] See various relevant parts of Sec. 2102 (c).

[224] Sec. 2104 (b) and CRS (200b), p. 7.

[225] 2104 (c).

[226] 2104 (d).

laws)[227]. Thereby, a link between the content-related requirements and the increased procedural requirements has been drawn. To cope with the added workload the bill specifies that congressional staff shall be increased if necessary[228].

In addition to intensified requirements before negotiations with a specific country the USTR must now also take into account if a country implemented its obligations under the Uruguay Round Agreement[229].

Whereas the third row of Table 3 shows that the requirements on supporting documentations have only increased slightly[230], the fourth row demonstrates that the instruments that Congress has at hand to withdraw fast-track arrangements have changed[231]. Like in the OTCA, trade agreement regarding non-tariff trade barrier can only be entered into if progress is made on overall negotiation objectives[232]. Also Congress still has two means to withdraw fast-track procedures: It can either refuse to extend a request to extend the TPA deadline (extension disapproval resolution[233]) or it can withdraw fast-track authority before the actual deadline (procedural disapproval resolution[234]). No notable changes have occurred for the former. It can be invoked if the advisory committee and/or the Congress find that sufficient tangible progress has not been made in trade negotiations.

The new elements of the disapproval resolution are now that its introduction is easier as now any member of the House or Senate can introduce it. Moreover, it can now be justified by insufficient progress in the negotiations (as measured by the U.S. negotiation objectives)[235]. In comparison to OTCA, this link between procedural disapproval and content-related

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[227] See SENATE COMMITTEE ON FINANCE (2002a), p. 4 and CRS (2001c), p. 10 on the greater consultation requirements.

[228] Sec. 2109.

[229] Sec. 2102 (e).

[230] Via Sec. 2105 (a) (2) a new paragraph has been added that requires a statement as to how the promotion of certain priorities of Sec. 2102 (c) that mostly concern labor and environmental laws will be reached.

[231] See CRS (2001c), pp. 21-22.

[232] Sec. 2103 (b) (2) of the Trade Act of 2002 is thus quasi-identical to Sec. 1102 (b) (2) and (c) (3) of OTCA. See also HOUSE COMMITTEE ON WAYS AND MEANS (2001a), p. 229 on the relationship between achievement of U.S. negotiations objectives and the application of fast-track authority. Footnote c-r.

[233] Sec. 2103 (c).

[234] Sec. 2105 (b).

[235] See Sec 2105 (b) (1) (B) (ii) (IV) on the link between content-related negotiation objectives and the introduction of a disapproval resolution. In previous fast-track bills only the Chairmen of the two trade committees could introduce a procedural disapproval resolution. See for example Sec. 1103 (c) (B) (I) of the OTCA.

requirements is one of the central innovations of the new trade bill[236]. Finally, the introduction of a special disapproval resolution linked to negotiations on trade remedy rules works as strong signal to the USTR and to the U.S. trade partners[237]. But the barriers to the use of a disapproval resolution have also been increased by the fact that – to the great discontent of most House Democrats - only one disapproval resolution per trade agreement can be introduced (i.e. one for the whole Doha Development Round!)[238].

Finally, as was common practice under previous fast-track procedures the draft implementing bill and statement of administrative action will be developed by the President in close collaboration with the Committees of jurisdiction in both Houses of Congress[239].

As the final row of table 2 shows that the role of public consultation and the role of the advisory committee system has basically not changed from the 1988 fast-track procedure. In sum, via this formalized mechanism business interests that relate to the e-commerce and service negotiations play a considerable role in the U.S. trade policy formulation process[240]. This larger and more direct venue for influence comes in addition to interests that corporations and interests group can voice to Congress directly[241]. It also goes a long way in explaining the difference to the EC policy-making process that puts more focus on non-business interests than its American counterpart in its stance taken during the WTO e-commerce negotiations.

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236 See for more information on this point CRS (2002c), p. 9. It must be noted that this link between the achievement of U.S. negotiation objectives and the extension of fast-track authority comes on top of the more general requirements of that nature described in Footnote c-r.

237 Sec. 2104 (d) (3) (C).According to CRS (2002c), p. 10, one of the agreements to reconcile Senate and House was to drop the Dayton Craig amendment and replace it with language from the disapproval resolution by the COG.

238 Sec. 2105 (b) (2) (B). According to interviews with the Democratic Trade Counsel this feature was very much disliked by House Democrats. See joint Statement from Trade Bill Conferees Representative CHARLES RANGEL and Senator JAY ROCKEFELLER on Trade Conference Agreement, July 26, 2002, Office of Senator RANGEL (check and give website).

239 SENATE COMMITTEE ON FINANCE (2002a), p. 54.

240 See Trade Act of 1974, HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 282-293, GOA (2002), USTR (1999annual), p. XX and USTR (2001 annual), pp. 224 f. More information can be downloaded from www.ustr.gov/outreach/advises.html.

241 See COFFEY (1993), p. 12 who stresses the importance of lobbies to U.S. trade policies and DESTLER & BALINT (1999), p. 45 who characterize the major influences on the U.S. trade policy formulation processes while stressing that trade policymaking system in Washington centers on producer interests and on the governmental institutions that manage it. But EU more inclusive with respect to data protection, cultural issues, etc.

Specifically, USTR still relies on public hearings, an interagency coordination mechanism and a three-tiered system of advisory committees (see Appendix A.3)– together called the Intergovernmental Policy Advisory Committee (IGPAC) - to inform its trade policy stance[242]. On this advisory committees, the striking importance devoted to e-commerce considerations is mirrored in a specially created Industry Functional Advisory Committee on e-commerce (IFAC-4)[243]. One Industry Sector Advisory Committee (ISAC-13) represents the service industry[244]. The IT industry is also represented by a separate ISAC (ISAC-5 Electronics and Instrumentation).

But at the same time there are efforts in continuation of those in 1988 to improve the advisory system as it has recently been criticized for the fact that it does not correctly reflect the share of U.S. exports and imports in its advisory committees (especially in regard to services[245]) and that its potential to contribute to U.S. trade policy could be increased[246]. The recent new appointments have contributed to increase the share of advisors from the high technology and entertainment companies (notably IBM, eBay and Sony)[247] and to decrease the list of labor or

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242 The USTR heads the three-tiered advisory committees (see figure XX in appendix) in cooperation with the Departments of Agriculture, Commerce, Labor, and other departments. The Advisory Committee for Trade Policy and Negotiations (ACTPN) is a 45-member body composed of representatives of government, labor, industry, agriculture, small business, service industries, retailers, consumer interests, and the general public. The second tier is made up of policy advisory committees representing overall sectors of the economy (e.g., industry, agriculture, labor, services). The third tier is composed of sector advisory committees consisting of experts from various fields. The involvement of the private sector was considered necessary because of complaints from some in the business community about their limited and ad hoc role in previous negotiations. See GOA (2002), p. XX, JÄGER & WELZ (1995), p. 94. and GATT (1986?), pp. 24-25 for details on the advisory committees and see Sec. 135 of the Trade Act of 1974 (19 U.S.C. 2155), Sec. 1631 of the OTCA and HOUSE COMMITTEE ON WAYS AND MEANS (2001a), pp. 275-277 and pp. 1159-1164 for the underlying legal texts.

243 The IT industry has increasingly used that venue to articulate their e-commerce trade policy interests. Part of the congressional efforts, sources and refer to legal bills and parallels to internal group like that advises on taxes, etc. is it the same, that was also created in response to congressional and industry demands.

244 In sum the trade policy interests of high-tech industries that are involved with e-commerce are better represented than general service industries.

245 As it has not changed since the 80s gaps in its coverage of industry sectors, trade issues, and stakeholders has risen. Special emphasis is givento agriculture and the Industry Functional Advisory Committees (ISACs) are heavily weighted towards agriculture and manufacturing whereas service industries are underrepresented. The composition includes fewer than 50 members from service industries and services has only one ISAC whereas there are separate ISACs on individual goods' categories (paper, chemicals or lumber) or special interest groups (small and minority businesses). See for more GOA (2002), pp. 2-4, 29 ff. and figure 5.

246 GAO (2002), pp. 2-4. This point relates to the staffing and consultation procedures that relate to the Advisory Committees. See also "USTR, Congress to Debate Trade Consultation Guidelines Soon", *Inside US Trade*, October 25, 2002. Finance ranking member CHARLES GRASSLEY urged ZOELLICK (USTR) to implement recommendations by the General Accounting Office (GAO) to improve the trade advisory committee system as soon as possible.

247 As can be gleaned from "White House Rewards Donors With Slots on Key Advisory Committee" in: *Inside US*

environmental activists and consumer organizations[248]. In January 2003 the USTR will propose a plan to improve the trade advisory system further and to provide better representation to the service and high-tech sectors[249].

Another important aspect of the advisory committees that is important for services takes up the problems of interagency and state- vs. federal law coordination that are so pertinent to service trade negotiations[250]. By law the President shall consult with State governments on issues of trade policy, including negotiating objectives and implementation of trade agreements, affecting the regulatory authority of non-Federal governments[251]. In compliance with the law, USTR conducts extensive consultations with organizations that coordinate regulatory activities of U.S. States[252].

For services and e-commerce issues the USTR regularly solicits public comment via public hearings[253]. One such meeting took place before the GATS requests were handed in and until now two others were held in preparation for the GATS offers[254]. The high-technology sector has targeted the negotiations on e-commerce and services with several coalitions of industry groups while putting much emphasis on the growing importance of IT services and the most

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Trade, December 13, 2002 the White House has rewarded major supporters of Republican candidates in the 2002 mid-term elections with seats on the trade advisory committee. From high-technology and entertainment industries following advisors were added in the 32 new appointments: Margaret Cushing Whitman, President and CEO, eBay Inc., Samuel Palmisano, President and CEO, IBM, Hector Ruiz, President and CEO, Advanced Micro Devices, Thomas Mottola, Chairman and CEO, Sony Music Entertainment.

[248] For the first time since 1974 the current committee nominees include no representatives of labor, environmental, or consumer organizations. The American Federation Of Labor and Congress of Industrial Organizations filed a lawsuit against the Bush Administration, demanding that the Administration comply with legal requirements to include appropriate non-business representation on the ACTPN. “AFL-CIO to File Lawsuit Against Bush Administration Demanding Fair and Balanced Representation on Trade Advisory Committee (ACTPN)”, Press Release from the American Federation Of Labor and Congress of Industrial Organizations, December 19, 2002, Document Source: USTR.

[249] Based on interviews and “USTR To Report This Month On Reforms To Advisory Committee System”, in: *Inside U.S. Trade*, January 3, 2003.

[250] USTR (2001), ,pp. 225-226.

[251] Sec. 306 (c)(2)(A) of Trade and Tariff Act of 1984.

[252] See WTO (1996), p. U.S. tpr of 1996 for an example of how USTR coordinates its activities with the National Association of Insurance Administrators (NAIC), a body without legislative authority that coordinates and influences state insurance administrators.

[253] WTO (2001), U.S. TPR, government report, S. 18-19.

[254] The United States has issued Federal Register notices seeking public comment on the mandated negotiations services in preparation for the WTO Fourth Ministerial Conference (Federal Register, Vol. 65, No. 60, March 28, 2000, Federal Register, Vol. 66, No. 66, April 5, 2001), before the GATS requests (Federal Register, Volume 67, Number 53, March 19, 2002) and before the GATS offers (Federal Register, Vol. 67, No. 182, September 19, 2002).

favorable treatment of e-commerce[255]. Contrary to before, both the high-tech and content-producing service sector now present very similar proposals to USTR on e-commerce issues (see Part 4.3.3 for more details on the approximation of the two industry sectors)[256].

All these consultation requirements come on top of mandated research activities by the Department of Commerce that have the goal to strengthen the competitiveness of the U.S. service sector and to reduce U.S. trade barriers (see Appendix A.1)[257].

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[255] See the transcripts of the public hearings published in the federal register notes, draw attention to computer paper sent to Catherine here. EDS, Hewlett-Packard, IBM, Intel, Microsoft, Oracle, Sun Microsystems and VeriSign also made a collective submission. submissions by ITI, ITAA and BSA "Trade: Industry Targets Services, E-Commerce In WTO Round", WILLIAM NEW; in: *National Journal's Technology Daily*; May 3, 2002.

[256] Interviews revealed that before they were not and that this disagreement was largely kept secret. Today ITI's submission is identical to that of the collective group of high-tech and service firms and nearly identical to the Software Association (e.g. BSA).

[257] Service Development Program as mandated by Sec. 306 of the Trade and Tariff Act of 1984. Reprinted in the Appendix.

4.5 Critical Appreciation of the Bipartisan TPA Act of 2002 Against the Background of the Political Environment

This final part will offer a critical appreciation of the Bipartisan TPA Act of 2002 done in the light of the Doha Trade Negotiations in general and the e-commerce negotiations in particular. This analysis takes the changed political environment since the Congressional Midterm Elections of November 6, 2002 into account that has brought a landslide victory to the Republicans. The latter are now in the historically seldom position to control the White House and both Houses of Congress (so-called "triple crown")[258]. As the Republicans and the Democrats have different interpretations of the most defensive TPA requirements this change in majorities also has a tangible effect on the implications of the Trade Act of 2002. It is argued, however, that changes in political majorities have no influence on the strong e-commerce mandate.

4.5.1 Implications for the Doha and other trade negotiations

To start with, the importance of a successful passage of new fast-track legislation can hardly be overestimated for the WTO and other free trade negotiations. For nearly 10 years, America has lacked fast-track authority necessary to conduct complex multilateral trade negotiations like the one kicked off in Doha. Clearly, its passage has initiated a new U.S. activism in multilateral and bilateral trade negotiations while providing a framework for a modern commercial policy. Consequently, U.S. trade policy experts[259], policy-makers and trade partners around the world have cherished the new TPA[260].

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[258] KAS (2002).

[259] See SCHOTT (2002), p. 2 who calls it the "crowning achievement of US trade policy in 2002" and BERGSTEN (2002), p. 9 who sees a "Renaissance of U.S. trade policy". See also "Impfstoff gegen den Protektionismus-Bazillus"; NZZ; August 10/11, 2002; Nr. 183.

[260] Policymakers around the world hailed the new TPA. See „Pascal Lamy warmly welcomes adoption of the US Trade Promotion Authority bill, Press Release IP/02/1188 Brussels, 2 August 2002, downloaded from xx in December 2002 and "Director General DG Moore hails final US Congressional approval of TPA", in: *WTO News*: 2002 Press Releases, Press/308, 2 August 2002 and "Trade: Trade Bill's Passage Receives Warm Reaction Worldwide", WILLIAM NEW; in: *National Journal's Technology Daily*; August 3, 2002. Leading U.S. trade partners like European Commissioner PASCAL LAMY had earlier voiced his concern over failing efforts to pass fast-track authority and qualified it as a necessary condition for successful negotiations relating to the Doha Development Agenda. See footnote Zoro for sources.

But the Trade Act of 2002 has also received a number of serious criticisms for its strengthened content-related requirements that are focused on issues deemed as "defensive" by U.S. trade partners. Sources abroad state that the content-related and procedural specificity of the TPA resembles a "straightjacket" that will only leave a narrow margin for maneuvering during negotiations[261]. In general, trade partners seem to be suspicious of too much congressional involvement in trade negotiations. That is because the latter involvement is deemed to make it harder for U.S. negotiators to move away from purely self-interested requests and offers that benefit vested interests well guarded by U.S. Congress. This impression is reinforced by the procedural steps Congress now has at its disposal to micromanage USTR activities[262].

As a result, the question is raised if the burdensome amount of congressional oversight will, in fact, inhibit the ability of the Executive to negotiate free trade agreements[263]. The higher degree of congressional oversight is said to undermine the original idea of fast-track legislation - namely to reduce the political accountability of individual Congressman to U.S. trade policy - and to break with the idea of "voluntary restraint by Congress[264]".

The points made in this chapter that are based on interviews with the stakeholders of the fast-track process partly refute and partly corroborate some of the above criticisms. One of the main results of this chapter is that it does not make much sense to critique the strengthened legal provisions of the TPA in isolation from its broader political context.

(i) Firstly, it has been demonstrated that the passage of the TPA bill seemed very unlikely or at least uncertain even shortly before the final vote went was held. The more onerous language relating to negotiation objectives and procedures that is

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[261] See the initial reaction of Brazilian Ambassador Rubens Barbosa in "Trade: Trade Bill's Passage Receives Warm Reaction Worldwide", WILLIAM NEW; in: *National Journal's Technology Daily*; August 3, 2002. This view has also been corroborated by interviews conducted with the European Commission on the basis of earlier drafts of the TPA legislation. See KLUTTIG & NOWROT (2002), p. 34 for their concept of "straightjacket" and p. 18 for their elaborations on the significant difference between this and previous fast-track legislations.

[262] Especially the simplified process to introduce disapproval resolutions was depicted as powerful congressional disciplining mechanism over the Executive.

[263] See FITZGERALD (2001) for the point on congressional oversight. The point on the limited USTR resources to do justice to all consultation is inferred from the significantly increased consultation requirements described earlier in the chapter and interviews that indicate a lack of manpower to deal with all consultations concerning all bilateral and multilateral negotiations and the negotiations themselves. See also "USTR Defends Choice of Free-Trade Agreement Partners Against Critics", *Inside U.S. Trade*, January 10, 2003.

criticized above was simply necessary to build the political support to enact new fast-track-legislation[265].

(ii) Secondly, it has been shown that – much to the disappointment of House Democrats - the adopted version of the trade bill limits the U.S. negotiators' flexibility significantly less than other initially proposed fast-track bills. As a result, the final TPA version does not exclude particular negotiation items like trade remedy laws. Moreover, the language on other defensive areas like labor standards leaves more flexibility to U.S. negotiators than many Members of Congress had initially hoped for.

(iii) Thirdly, the detailed table comparisons demonstrate that the current fast-track legislation's more demanding requirements blend in with a continued strengthening of oversight provisions rather than constituting a radical break from previous fast-track laws.

(iv) Fourthly, the chapter shows that the legal requirements only spell out negotiation objectives and consultation procedures that the USTR would have respected in a similar way because it understands the crucial role of active partnership with Congress and the importance of paying attention to congressional aspirations with respect to certain trade negotiation topics.

To sum up, any criticism towards the enacted TPA should take into consideration that the two worse alternatives to the current trade bill – no fast-track legislation at all as in (i) or fast-track legislation with much stricter content or procedural requirements as in (ii) – have successfully been avoided by the passage of the Bipartisan TPA Act of 2002 and that any fast-track authority bill with more laissez-faire was simply not realistic in the given political setting.

However, this argument does not change the fact that the margin set by Congress to the USTR for moving through the overall negotiations has been narrowed. But it makes the point that the strengthened legal TPA provisions must be analyzed in the context of the lacking bipartisan

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264 Elected members of Congress thereby face more direct political accountability for U.S. trade policies than is the case for national members of parliament in an EC member state. See footnote zara for the notion of voluntary restraint by the Congress.

265 Thanks goes to I.M. DESTLER for this point.

support for renewed fast-track legislation[266], the failure to rebuild widely shared congressional negotiation objectives and the significant pressure it took to push the new fast-track legislation through Congress.

Accordingly, leading U.S. trade policy experts are more critical of the way the TPA was enacted rather than the actual legal provisions of the fast-track bill per se[267]. Critics of the bill predict that the Executive will suffer in the long run by having pushed the bill through Congress without securing support from alienated Democrats and failing to provide a fertile soil for the ensuing trade negotiations[268]. Taken together, it is really the failure to build the TPA on broad congressional support producing hurt feelings paired with the greater congressional oversight that raises the question whether the ability of USTR to negotiate FTAs will not be negatively influenced. Certainly, this combination of factors makes the congressional influence on trade negotiations more unpredictable and influenced by changing political majorities. This greater volatility in U.S. trade policy influenced by changing political control is particularly worrisome if one considers the above-average length of WTO trade negotiations[269].

The lack of consensus in Congress and the different interpretations of Democrats and Republicans concerning the Bipartisan TPA Act of 2002 have been very visible since its enactment.

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[266] Since 1974 all votes authorizing fast-track authority have actually never seen such lack of bipartisan support See CRS (2001d) for a chronology of the major votes concerning fast-track negotiation authority.

[267] Discussions with MEREDITH BROATBAND (House Ways and Means Committee), DESTLER and VAN GRASSTEK have helped in making this argument more subtle. See for similar concerns "Trade Act of 2002", Keynote Speech by Senator MAX BAUCUS at the conference on "Trade Policy in 2002", February 26, 2002, at the Institute for International Economics, Washington D.C.; downloaded from www.iie.com/papers/baucus0202.htm in March 2002 and DESTLER (2002).

[268] WOLFF (1995), p. 4, DESTLER & BALINT (1999), p. 55 and Senator BAUCUS as quoted in CRS (2002c), p. 9.had actually warned from a fast-track regulation that would not benefit from far-reaching bilateral support for exactly this reason. The House Democrats are seen as the great losers of a poisonous and divisive debate surrounding the TPA. This point was stressed by VIJI RANGASWAMI (Minority Trade Council, House Committee on Ways and Means) and RICHARD COHEN, National Journal during the ABA Section of International Law and Practice Symposium, "The U.S., the Doha Round and the WTO – Where Do We Go From Here?", Segment 9: TPA/"Fast-Track" – Where do we go from here?; September 12-13, 2002, Georgetown University Law Centre, Washington D.C. (abbreviate conference) and was supported by interviews at the House of Representatives and the Senate in October and November 2002.

[269] This argument is buttressed by the fact that the Democrats just elected a new Party Leader, NANCY PELOSI, that voted against fast-track. See KAS (2002), p. 3.

One the one hand, Democratic Senator Baucus, until recently Chairman of the Senate Finance Committee, is the most vociferous defender of congressional oversight and influence on trade negotiations. From the first COG meeting onwards he stressed that Congress will defend and use its TPA-related rights. He demanded that the USTR should grant congressional trade advisors timely access to key negotiating documents and that members and staff be allowed to observe negotiations[270]. Furthermore, he took the notion of congressional influence on trade negotiations seriously[271], he adopted a hard-line position on the interpretation of provisions concerning labor and environmental standards and U.S. trade remedy laws[272] and repeatedly threatened the USTR with the fact that Congress would derail any trade agreement that was not in conformity with content or procedural requirements[273].

On the other hand, the Republicans have indicated that they do not interpret the language on trade remedy laws or on labor and environmental standards in the same strict form as the Democrats[274]. Although the sharing of proposals and other negotiating texts is also particularly important to Republicans, they do not insist on the actual participation of Members of Congress or their staff in actual negotiations[275].

Keeping these notable differences between Democrats and Republicans in mind, it can be expected that the recent overwhelming electoral swing to the Republicans will provide more flexibility to the USTR than initially thought in the months following the TPA enactment. As

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[270] Statement of Senator MAX BAUCUS, delivery on the first Congressional Oversight Group Meeting, September 19, 2002, "USTR, Congress to Debate Trade Consultation Guidelines Soon", Inside US Trade, October 25, 2002, "USTR offers initial language on Trade Consultations To Congress", Inside US Trade, November 15, 2002 and "Baucus warns Administration To Cooperate With Congress On Trade Deal Negotiations", Statement of Senator MAX BAUCUS, September 19, 2002, downloaded from www.insidetrade.com in September 2002.

[271] See "Baucus Urges Zoellick To Put WTO Agriculture Talks Ahead of Australian FTA", in: *Inside U.S. Trade*, Vol. 20, No. 37, September 13, 2002 and "USTR Defends Choice of Free-Trade Agreement Partners Against Critics", *Inside U.S. Trade*, January 10, 2003 as examples.

[272] Baucus made clear that he believes that the TPA prevents U.S. negotiators to make any concessions on U.S. trade remedy laws and to make any trade agreements with countries that do not enforce labor and environmental provisions: "On the topics of protecting US trade laws and addressing investment issues, Congress has given detailed direction in the Trade Act. […] In these areas, a negotiating mistake could doom an agreement.". See statement of Senator MAX BAUCUS, delivery on the first Congressional Oversight Group Meeting, September 19, 2002 and "Baucus Criticizes USTR handling of Chile FTA Negotiations", Statement by Senator MAX BAUCUS, October 4, 2002.

[273] "Trade Bill", Statement of Chairman MAX BAUCUS (then Chairman of the Senate Committee on Finance), Committee on Finance; August 1, 2002; downloaded from http://www.finance.senate.gov in August 2002.

[274] "Grassley Critical Of Efforts to Re-Interpret Fast-Track Labor Provisions", statement submitted to the Senate record by Senator CHUCK GRASSLEY, September 24, 2002.

[275] "Congress, Administration Wrestle With Guidelines On Consultations", in: *Inside US Trade*, October 11, 2002.

the Republicans now also control the Senate, Republican Senator Charles Grassley has resumed his chairmanship over the Senate Finance Committee and displaced Senator Max Baucus from that influential post in January 2003[276]. Consequently, under Republicans many Democratic priorities that are partly mirrored in TPA language– like the inclusion of enforceable labor and environmental provisions or the right of Members of Congress to observe negotiations – will now receive less attention[277]. Whereas some of the concerns of the Democratic Members of Congress may therefore be somewhat marginalized, no mistake should be made concerning the fact that Grassley has indicated active congressional control on the WTO negotiations[278].

On a more practical level, the type and the frequency of congressional consultation requirements may be very burdensome to the USTR that has only limited resources. It is true that the increased congressional involvement comes at a time when Congress in general and different congressional committees in particular grow more and more interested in trade matters[279]. Due to the greater interest and controversies surrounding certain trade topics it is reasonable to expect greater congressional involvement based on the added provisions in the Trade Act of 2002. The fact that Congressional views are very diverse on every trade issue will make it very difficult for USTR to pay respect to all congressional inputs[280]. This holds especially if the COG is used as an umbrella organization within which individual members can pursue issues of concern to them. Moreover, experience with joint House Senate congressional institutions like the COG suggests that it is hard to make them work effectively.

Despite these seeming difficulties the USTR has been extremely active since the TPA was granted. Whereas the USTR has been putting many proposals forward in the WTO (TRIPS,

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[276] "Grassley to Resume As Finance Chair, Seeks to Boost USTR Capacity", in: *Inside U.S. Trade*, November 8, 2002. See also "Possible Republican Rule Change Would Impact Finance Membership"; in: *Inside US Trade*, Vol. XX; No. XX; November 15, 2002 on the new composition of the Senate Finance Committee.

[277] The Consultation Guidelines for the COG that were published in January 2003 already reflect these changes as the issues that Baucus demanded (specific timelines when documents are made available before negotiations and the right of Member of Congress and their staff to observe negotiations) were not granted by USTR.

[278] One of the first things incoming Senate Finance Committee Grassley did was to promise an active oversight role for the committee on U.S. participation in the WTO trade negotiations. See "Grassley Sees Priorities In Chile FTA, Doha Oversight And Tax Laws", in: *Inside U.S. Trade*, January 3,2003.

[279] Thanks goes to RICHARD B. SELF (Akin Gump, Senior International Trade Advisor) for this point.

[280] As Zoellick notes in Point 2 of the official Consultation Guidelines, "The Administration gives great weight to the views of Congress in developing approaches to negotiations and strives to incorporate these views to the extent possible. It is important to recognize that views proposed by any particular member(s) of Congress will often be at odds with proposals from other members. As such, the Administration strives to take into

Agriculture, WTO Proposal to Eliminate Tariffs on Industrial and Consumer Goods by 2015, etc.), it has concentrated its main activity on a great number of bilateral or regional free trade agreements (FTAs)[281]. Far-reaching and comprehensive FTAs with Chile and Singapore that were impossible to conclude without fast-track authority have been finalized. Within five months of the conclusion of the TPA, the USTR has also notified Congress of the intent to conclude a Free Trade Area of the Americas (FTAA), to enter into free trade negotiations with Morocco, Australia, five nations of Central America and the Southern African Customs Union[282].

The two agreements that have already been concluded with Chile in December 2002 and with Singapore in January 2003 followed the model set out by the TPA rather closely. For instance, the two countries agreed that they would enforce their laws on worker rights and environment (with violations potentially punishable by monetary fines paid by the offending government)[283], no changes in US trade remedy laws are necessary, they grant far-reaching access for U.S. consumer, industrial and agricultural products and they entail broad commitments to open service markets and to protect intellectual property rights[284]. As outlined later, the included provisions on e-commerce are groundbreaking. Also, the USTR has in fact already used the procedural requirements of congressional notification to convince one of the two negotiation partners to commitments by a certain deadline[285].

Despite of the many provisions that seem to target the more defensive content-related requirements of the TPA, especially the Chile agreement will lead to much congressional

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account discernable views from Congress, accepting that individual perspectives within Congress may vary widely."

[281] "Bilateral Pacts Are Special Focus of Bush Administration", in: *Washington Post,* by PAUL BLUSTEIN, December 12, 2002; Page A42 and "A Pragmatic Agenda", in: *National Journal*, by BRUCE STOKES, January 4, 2003, Economics Section.

[282] "Zoellick Notifies Congress of U.S. Objectives, Goals for FTAA"; USTR Press Release, October 4, 2002, downloaded from www.ustr.gov in November 2002. The Central American countries are El Salvador, Nicaragua, Guatemala, Honduras and Costa Rica. The SACU members are Botswana, Lesotho, Namibia, South Africa and Swaziland.

[283] "U.S. Chile Agree on Free Trade: Bilateral Pacts are Special Focus of Bush Administration", PAUL BLUSTEIN; in: Washington Post; Page A42

[284] For all other aspects see the two fact sheets on Chile and Singapore that have been issued by the USTR and that can be downloaded from www.ustr.gov.

[285] During the last phase of the two independently negotiated Singapore and Chile Free Trade Agreement (FTA) negotiations (January 2003), Singapore was unwilling to go along with the same language on liberalizing capital controls as Chile. Subsequently, USTR has argued that it will not notify the FTA with Singapore to Congress together with the FTA with Chile by the end of January, if the issue on capital controls was not resolved. See "USTR To Keep Chile, Singapore Deals Confidential After Notification"; *Inside U.S. Trade*; January 10, 2003 for more details.

debate on whether the terms of the fast-track law – especially with respect to labor and environmental rights – have been met[286]. The debates that will take place will be an important first test for the actual willingness of Congress to compromise on some of the TPA language.

It is also clear that – despite of remaining congressional criticism - the style and depth of these bilateral trade models will be hard to achieve in the WTO negotiations. U.S. officials and scholars, however, see the bilateral deals as part of an incremental approach to free global trade[287]. Considering the heterogeneous support for free trade in Congress the bilateral deals are certainly also pursued by the USTR to build a broader congressional free-trade coalition.

4.5.2 Implications for the E-commerce Negotiations

With respect to e-commerce a far-reaching negotiation mandate has been specified by Congress that – together with the consultation requirements – will constrain USTR to make significant negotiation efforts[288].

The liberalization of e-commerce and services was one of the most uncontroversial negotiation topics during the drafting of the new fast-track legislation. Congress and the USTR always agreed that it is important to exploit the great American comparative advantage in electronically delivered services and therefore attach a high priority for the most-liberal approach to WTO agreements or GATS concessions in that field. Most importantly, this congressional determination with respect to e-commerce is very bipartisan and – unlike other negotiation items – unaffected by changes in political majorities[289]. In addition, the powerful industry associations that stand behind the TPA language (content-producing service industries and high-tech coalitions) will watch the negotiations carefully and use both the access to USTR and the increased involvement of Congress to emphasize their interests.

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[286] See "Grassley Sees Priorities In Chile FTA, Doha Oversight And Tax Laws", in: *Inside U.S. Trade*, January 3,2003.

[287] Based on personal interviews with USTR officials, public comments by ZOELLICK and comments of JEFFREY SCHOTT in "A Pragmatic Agenda", in: *National Journal*, by BRUCE STOKES, January 4, 2003, Economics Section. The agreement with Chile also acts as a precedent to the Free Trade Area of the Americas (FTAA).

[288] Moreover, the IT industry lauded the far-reaching negotiation mandate on e-commerce. See"Senate Passes Trade Promotion Authority Conference Report; ITI Lauds Swift Action"; News Release, August 1, 2002; Washington D.C.: Information Technology Industry Council; downloaded from http://www.itic.org/2002prs/020801.htm in December 2002.

[289] In fact the Democrats will seek the support of the entertainment and high-tech industry in the run-up to the Presidential elections in 2004. "Democrats Seek Silicon Valley Support in Presidential Race", In: *National Journal;* by BARA VAIDA, December 16, 2002.

It is argued that the USTR can actually use the explicit pressure from Congress on e-commerce provisions when dealing with third countries[290]. It is also very likely that the USTR will emphasize its achievements in fields like high-technology, services and e-commerce to make overall negotiations packages more appealing to Congress (congressional lens).

U.S. trade partners that are currently completing FTAs with the USA have already felt the pressure with respect to commitments in the field of e-commerce and cross-border services. In the choice of bilateral trade partners, U.S. trade officials have made very clear that it is important that trade partners are willing to negotiate comprehensive trade agreements that include aspects crucial to U.S. interests like e-commerce provisions[291].

With Singapore and Chile this strategy has been highly successful as both agreements contain groundbreaking provisions on e-commerce and commitments on the cross-border trade in services. Interviews and first press releases reveal that the language on e-commerce included in these agreements is more precise than in the Jordan agreement or the TPA mandate[292].

Considering the difficulty of trade partners to agree on e-commerce matters and far-reaching GATS mode 1 commitments in the WTO, the U.S. has – as a first step – opted to forge this type of e-commerce trade agreement in bilateral and regional FTAs. This fits into the larger U.S. strategy to build alliances around its "model of e-commerce liberalization" and to use bilateral deals for negotiation items to break the logjam in WTO negotiations (tactical reason for bilateral deals)[293]. It is also reasonable to assume that individual countries with less bargaining power in the USA are more likely to commit to far-reaching e-commerce provisions and commitments in fields like audiovisual and computer services than if negotiated in the broader WTO forum.

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[290] U.S. negotiators can always exert pressure by referring their foreign counterparts to the demanding mandate and supervision set out by U.S. Congress

[291] "USTR Defends Choice of Free-Trade Agreement Partners Against Critics", in: *Inside U.S. Trade*, January 10, 2003.

[292] "Chile FTA Breaks Ground On Procurement, E-Commerce, Customs", in: *Inside U.S. Trade*, January 17, 2003.

[293] See for similar points relating to agriculture and the negotiations against the EC Zoellick's comments in "USTR Defends Choice of Free-Trade Agreement Partners Against Critics", in: *Inside U.S. Trade*, January 10, 2003. In fact it is congress that is about to set up standards for FTAs. USTR strategy (bilateral vs. multilateral) in question by Congress (Baucus in particular)!

4.5.3 Implications for the GATS Negotiations (to be completed)

As said before, Congress did not devote much attention to regulatory issues at stake during the new GATS negotiations when it drew up the very short and broad service trade mandate of the TPA.

Congress may be very liberal when it comes to opening third markets for US service exports. However, it is very likely that in the course of WTO or regional negotiations Congress is very likely to set limits to negotiators. This is very likely when changes in US service regulations are necessary (prudential supervisory rules for financial services, for example), in the context of GATS mode 1 offers, in the context of GATS mode 4 offers (immigration issues the developing countries will insist on), etc.

In financial services no move from the level reached in the GATS can be seen.

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Appendix

The Appendix presents only the relevant parts of the trade law. Omissions by the author within paragraphs are signaled with the following omission sign […].

A.1 Section 306 Provisions relating to the Trade in Services: Relevant Excerpt of the Trade and Tariff Act of 1984[294]

(a)(1) The Secretary of Commerce shall establish a service industries development program designed to—(A) develop, in consultation with other Federal agencies as appropriate, policies regarding services that are designed to increase the competitiveness of United States service industries in foreign commerce; (B) develop a data base for assessing the adequacy of Government policies and actions pertaining to services, including, but not limited to, data on trade, both aggregate and pertaining to individual service industries; (C) collect and analyze, in consultation with appropriate agencies, information pertaining to the international operations and competitiveness of United States service industries, including information with respect to—(i) policies of foreign governments toward foreign and United States service industries; (ii) Federal, State, and local regulation of both foreign and United States suppliers of services, and the effect of such regulation on trade; (iii) the adequacy of current United States policies to strengthen the competitiveness of United States service industries in foreign commerce, including export promotion activities in the service sector; (iv) tax treatment of services, with particular emphasis on the effect of United States taxation on the international competitiveness of United States firms and exports; (v) treatment of services under international agreements of the United States; (vi) antitrust policies as such policies affect the competitiveness of United States firms; and (vii) treatment of services in international agreements of the United States; (D) conduct a program of research and analysis of service-related issues and problems, including forecasts and industrial strategies; and (E) conduct sectoral studies of domestic service industries.

(2) For purposes of the collection and analysis required by paragraph (1), and for the purpose of any reporting the Department of Commerce makes under paragraph (3), such collection and reporting shall distinguish between income from investment and income from non-investment services.

(3) On not less than a biennial basis beginning in 1986, the Secretary shall prepare a report which analyzes the information collected under paragraph (1). […]

(5) For purposes of this section, the term ‘‘services’’ means economic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism.

[…]

(c)(2)(A) The President shall, as he deems appropriate—

(i) consult with State governments on issues of trade policy, including negotiating objectives and implementation of trade agreements, affecting the regulatory authority of non-Federal governments, or their procurement of goods and services; (ii) establish one or more intergovernmental policy advisory committees on trade which shall serve

[294] 19 U.S.C. 2114b and 2114c; P.L. 98–573.

as a principal forum in which State and local governments may consult with the Federal Government with respect to the matters described in clause (i); and (iii) provide to State and local governments and to United States service industries, upon their request, advice, assistance, and (except as may be otherwise prohibited by law) data, analyses, and information concerning United States policies on international trade in services.

A.2 Relevant Provisions of the Bipartisan Trade Promotion Authority Act of 2002

A.2.1 Overall Negotiation Objectives

Sec. 2102 (a) OVERALL TRADE NEGOTIATING OBJECTIVES.—The overall trade negotiating objectives of the United States for agreements subject to the provisions of section 2103 are—(1) to obtain more open, equitable, and reciprocal market access; (2) to obtain the reduction or elimination of barriers and distortions that are directly related to trade and that decrease market opportunities for United States exports or otherwise distort United States trade; (3) to further strengthen the system of international trading disciplines and procedures, including dispute settlement; (4) to foster economic growth, raise living standards, and promote full employment in the United States and to enhance the global economy; (5) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources; (6) to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO (as defined in section 2113(6)) and an understanding of the relationship between trade and worker rights; (7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade; (8) to ensure that trade agreements afford small businesses equal access to international markets, equitable trade benefits, and expanded export market opportunities, and provide for the reduction or elimination of trade barriers that disproportionately impact small businesses; and (9) to promote universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.

A.2.2 Selected Principal Negotiation Objectives

Sec. 2102 (b)

(8) REGULATORY PRACTICES.—The principal negotiating objectives of the United States regarding the use of government regulation or other practices by foreign governments to provide a competitive advantage to their domestic producers, service providers, or investors and thereby reduce market access for United States goods, services, and investments are—(A) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations; (B) to require that proposed regulations be based on sound science, cost-benefit analysis, risk assessment, or other objective evidence; (C) to establish consultative mechanisms among parties to trade agreements to promote increased transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes; and (D) to achieve the elimination of government measures such as price controls and reference pricing which deny full market access for United States products.

A.2.3 Congressional Oversight Committee and Consultation Requirements

Sec. 2102 (d) (1) CONSULTATIONS WITH CONGRESSIONAL ADVISERS

In the course of negotiations conducted under this title, the United States Trade Representative shall consult closely and on a timely basis with, and keep fully apprised of the negotiations, the Congressional Oversight Group convened under section 2107 and all committees of the House of Representatives and the Senate with jurisdiction over laws that would be affected by a trade agreement resulting from the negotiations.

Sec. 2102 (d) (2) CONSULTATIONS BEFORE AGREEMENT INITIALED

In the course of negotiations conducted under this title, the United States Trade Representative shall—(A) consult closely and on a timely basis (including immediately before initialing an agreement) with, and keep fully apprised of the negotiations, the congressional advisers for trade policy and negotiations appointed under section 161 of the Trade Act of 1974 (19 U.S.C. 2211), the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and the Congressional Oversight Group convened under section 2107; and

Sec. 2104 CONSULTATIONS AND ASSESSMENT

(a) NOTICE AND CONSULTATION BEFORE NEGOTIATION.—The President, with respect to any agreement that is subject to the provisions of section 2103(b), shall—(1) provide, at least 90 calendar days before initiating negotiations, written notice to the Congress of the President's intention to enter into the negotiations and set forth therein the date the President intends to initiate such negotiations, the specific United States objectives for the negotiations, and whether the President intends to seek an agreement, or changes to an existing agreement; (2) before and after submission of the notice, consult regarding the negotiations with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, such other committees of the House and Senate as the President deems appropriate, and the Congressional Oversight group convened under section 2107; and (3) upon the request of a majority of the members of the Congressional Oversight Group under section 2107(c), meet with the Congressional Oversight Group before initiating the negotiations or at any other time concerning the negotiations.

(b) and (c) are special consultation requirements on agriculture (general, import sensitive products and fishing) that are left out here

(d) CONSULTATION WITH CONGRESS BEFORE AGREEMENTS ENTERED INTO

(1) CONSULTATION.—Before entering into any trade agreement under section 2103(b), the President shall consult with—(A) the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate; (B) each other committee of the House and the Senate, and each joint committee of the Congress, which has jurisdiction over legislation involving subject matters which would be affected by the trade agreement; and (C) the Congressional Oversight Group convened under section 2107.

(2) SCOPE.—The consultation described in paragraph (1) shall include consultation with respect to— (A) the nature of the agreement; (B) how and to what extent the agreement will achieve the applicable purposes, policies, priorities, and objectives of this title; and (C) the implementation of the agreement under section 2105, including the general effect of the agreement on existing laws.

SEC. 2105. IMPLEMENTATION OF TRADE AGREEMENTS

(a) IN GENERAL.—

(1) NOTIFICATION AND SUBMISSION.—Any agreement entered into under section 2103(b) shall enter into force with respect to the United States if (and only if)—(A) the President, at least 90 calendar days before Federal Register, the day on which the President enters into the trade agreement, notifies the House of Representatives and the Senate of the President's intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register; (B) within 60 days after entering into the agreement, the President submits to the Congress a description of those changes to existing laws that the President considers would be required in order to bring the United States into compliance with the agreement; (C) after entering into the agreement, the President submits to the Congress, on a day on which both Houses of Congress are in session, a copy of the final legal text of the agreement, together with—(i) a draft of an implementing bill described in section 2103(b)(3); (ii) a statement of any administrative action proposed to implement the trade agreement; and (iii) the supporting information described in paragraph (2); and (D) the implementing bill is enacted into law.

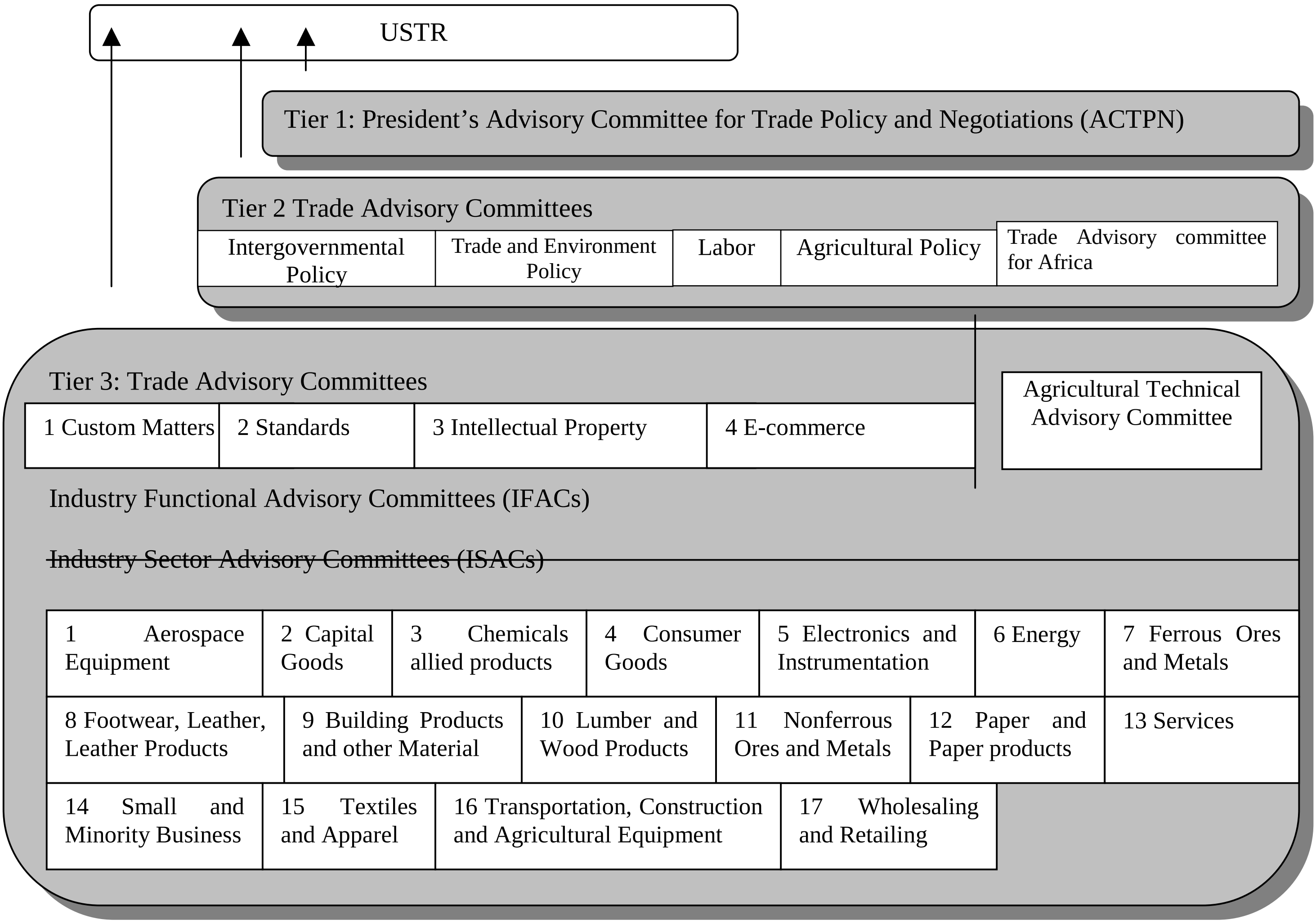
(2) SUPPORTING INFORMATION.—The supporting information required under paragraph (1)(C)(iii) consists of—(A) an explanation as to how the implementing bill and proposed administrative action will change or affect existing law; and (B) a statement—(i) asserting that the agreement makes progress in achieving the applicable purposes, policies, priorities, and objectives of this title; and (ii) setting forth the reasons of the President regarding—(I) how and to what extent the agreement makes progress in achieving the applicable purposes, policies, and objectives referred to in clause (i); (II) whether and how the agreement changes provisions of an agreement previously negotiated; (III) how the agreement serves the interests of United States commerce; (IV) how the implementing bill meets the standards set forth in section 2103(b)(3); and (V) how and to what extent the agreement makes progress in achieving the applicable purposes, policies, and objectives referred to in section 2102(c) regarding the promotion of certain priorities.

(b) LIMITATIONS ON TRADE AUTHORITIES PROCEDURES.—(1) FOR LACK OF NOTICE OR CONSULTATIONS.—

(A) IN GENERAL.—The trade authorities procedures shall not apply to any implementing bill submitted with respect to a trade agreement or trade agreements entered into under section 2103(b) if during the 60-day period beginning on the date that one House of Congress agrees to a procedural disapproval resolution for lack of notice or consultations with respect to such trade agreement or agreements, the other House separately agrees to a procedural disapproval resolution with respect to such trade agreement or agreements.

(B) PROCEDURAL DISAPPROVAL RESOLUTION.—(i) For purposes of this paragraph, the term ''procedural disapproval resolution'' means a resolution of either House of Congress, the sole matter after the resolving clause of which is as follows: ''That the President has failed or refused to notify or consult in accordance with the Bipartisan Trade Promotion Authority Act of 2002 on negotiations with respect to and, therefore, the trade authorities procedures under that Act shall not apply to any implementing bill submitted with respect to such trade agreement or agreements.'', with the blank space being filled with a description of the trade agreement or agreements with respect to which the President is considered to have failed or refused to notify or consult. (ii) For purposes of clause (i), the President has ''failed or refused to notify or consult in accordance with the Bipartisan Trade Promotion Authority Act of 2002'' on negotiations with respect to a trade agreement or trade agreements if—(I) the President has failed or refused to consult (as the case may be) in accordance with section 2104 or 2105 with respect to the negotiations, agreement, or agreements; (II) guidelines under section 2107(b) have not been developed or met with respect to the negotiations, agreement, or agreements; (III) the President has not met with the Congressional Oversight Group pursuant to a request made under section 2107(c) with respect to the negotiations, agreement, or agreements; or (IV) the agreement or agreements fail to make progress in achieving the purposes, policies, priorities, and objectives of this title.

A.3 Advisory Committee



A.4 Campaign Donations of Various Service Sectors, 2002 Congressional Midterm Election Cycle

Rank	Industry	Amount	Dems	Repubs	Contribution Tilt
1	Lawyers/Law Firms	$62,480,988	72%	28%	**Fehler!Fehler! Unbekanntes Schalterargument. Fehler!Fehler! Unbekanntes Schalterargument.**Strongly Democratic
3	Securities/Invest	$42,115,583	46%	54%	**Fehler!Fehler! Unbekanntes Schalterargument.**On the Fence
5	TV/Movies/Music	$29,934,876	78%	22%	**Fehler!Fehler! Unbekanntes Schalterargument. Fehler!Fehler! Unbekanntes Schalterargument.**Strongly Democratic
7	Insurance	$27,482,021	31%	69%	**Fehler!Fehler! Unbekanntes Schalterargument. Fehler!Fehler! Unbekanntes Schalterargument.**Strongly Republican
8	Computer Equip/Svcs	$19,416,685	49%	50%	**Fehler!Fehler! Unbekanntes Schalterargument.**On the Fence
14	Business Services	$16,142,653	45%	54%	**Fehler!Fehler! Unbekanntes Schalterargument.**On the Fence
16	Commercial Banks	$15,204,191	36%	64%	**Fehler!Fehler! Unbekanntes Schalterargument.**Leans Republican

Source: CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/overview/ topcontribs.asp?cycle=2002, based on FEC Data. See table 1 for methodological considerations.

Unions are missing, year is missing