

**COMMON CAUSE STATEMENT OF PRINCIPLES ON
TRADE PROMOTION AUTHORITY (A/K/A “FAST TRACK”) AND
INVESTOR-STATE DISPUTE SETTLEMENT (“ISDS”)
REGARDING THE TRANS-PACIFIC PARTNERSHIP**

Introduction

International agreements among nations to promote and regulate commerce have a long history and are required in this global economy. Trade agreements can open new markets, stimulate competition, create new and better jobs, encourage investment, spark technological innovation, improve underdeveloped economies and build new forms of international collaboration. Trade agreements can also disrupt some national economies, generate unemployment and lower wages, widen income disparities and affect adversely the environment, health and human rights.

Disputes between investors and nation states also require methods of peaceful resolution. Foreign companies will not invest in nations that arbitrarily appropriate their property, and nations will not open their doors to foreign investors that undermine their health, safety and environmental laws. Methods for enforcing international trade agreements offer benefits and burdens. International arbitration tribunals can offer quicker, more efficient and expert forums for dispute resolution, but they can also deprive participants of appellate oversight and impose significant monetary damages. Absent fair and balanced enforcement mechanisms, international agreements may subject smaller, less economically powerful countries and indigenous populations to oppressive litigation and unreasonable arbitration awards.

Trade agreements therefore critically affect, for better or worse, the wealth of nations, the economic well-being of all Americans and citizens of the global community. The importance of trade agreements to the daily lives of Americans, as well as the fundamental need for democratic oversight of international commitments by the United States government, require the President, the Congress and our trade representatives to follow appropriate safeguards during trade negotiations and congressional review of proposed agreements. These safeguards include transparency, opportunities for comment and due deliberation, and openness to participation. They require the views of citizens to be heard to protect against the disproportionate influence of negotiation insiders with concentrated economic power.

Trans-Pacific Partnership and “Fast Track”

The Administration is currently negotiating the Trans-Pacific Partnership (“TPP”). If enacted, TPP will be the largest trade deal in history, involving 12 countries and two of the largest world economies, the United States and Japan. It will cover over 40 percent of the global economy. Much is at stake for our economy and our democracy.

The Administration has asked Congress to adopt expedited Trade Promotion Authority (also known as “Fast Track”) legislative procedures in its consideration of TPP. A bill was introduced on April 16, 2015. Aside from authorized expert advisors and government officials, no one has

seen the full text of the proposed agreement, only the parts that have been leaked. Members of Congress, who have reviewed the proposal, are unable to share it with constituents or other parties. This raises legitimate questions about the fairness of the negotiations, the processes by which Congress will approve or reject the agreement, the ability of citizens to submit their views and the ultimate impact of the TPP on people's lives.

Although the power to enter into treaties rests with the President (Article II, § 2), the power to regulate trade rests with Congress. Specifically, the Constitution vests in Congress the authority to "regulate commerce with foreign nations" and to "lay and collect taxes, duties, imposts and excises" (Article I, § 8). Fast Track requires an act of Congress, but Congress has wide discretion in establishing the procedures to review trade agreements.

Congress in the past has adopted specific Fast Track procedures to authorize Presidential negotiations, specify trade objectives, review proposed foreign trade agreements and set the procedural protocols by which it will review and vote on the agreement. Fast Track delegates significant power to the President to negotiate an agreement. It accelerates the process of congressional review and removes the ordinary legislative obstacles that could otherwise defeat or delay the United States' participation in a trade agreement.

Fast Track increases the practicality of the President's negotiations, because it assures other countries at the table that a proposal will receive an up-or-down vote within a set period of time. It prevents trade negotiations from "dying by a thousand cuts" from 535 Members of Congress seeking to amend complex international agreements.

Used responsibly, Fast Track can be an important process that will lead to agreement on complex trade negotiations among multiple nations, including the United States.

At the same time, Fast Track surrenders the ability of Members of Congress to amend legislation; limits the time congressional committees have to review the legislation and hear testimony from a wide range of interested parties; curtails floor debate to a certain number of hours; and, mandates an up-or-down, no-amendment floor vote in the House and Senate on the full trade-implementing legislation as introduced. Fast Track, if too narrowly configured, may deny Congress and the public enough time and ability to read, study and review the proposed trade agreement, understand the depth and breadth of the agreement and register thoughtful support or opposition.

This is of particular concern here.

Congress normally enumerates its trade objectives in Fast Track legislation before negotiations take place. In this instance, however, Congress did not authorize Fast Track before the negotiations and did not give the President objectives for the negotiation. Moreover, communications between the President and Congress on the progress of the negotiations have reportedly been limited. The TPP trade negotiations have been closed to the public, and participants have represented primarily private business interests, arguably without sufficient balance from labor, environmental, human rights and other interests.

For these reasons, we believe that the procedural safeguards embodied in Fast Track to review the TPP, after negotiations have been completed, must embrace fully the principles of openness, deliberation, transparency, accountability and access for the wide range of diverse views inherent in and necessary to the democratic legislative process.

We believe that Congress, in enacting Fast Track legislation, must adopt procedures tailored to the special circumstances of the TPP negotiations. It must not follow the traditional approach it has taken in the past. Instead, Congress must give itself ample time to hear the views of interested parties, make certain that its ultimate decision will be thoughtful and considered, and ensure that its trade objectives will be well represented. Only then should it authorize an up-or-down vote on the substance of TPP.

Recommended Fast Track Procedures

Fast Track significantly deviates from ordinary congressional mechanisms for deliberation, including a prohibition on amendments and time limits on debate. Congress should therefore configure its Fast Track legislation for the TPP to ensure that its procedures protect the public interest:

- Congress must give citizens adequate time to comment on the proposed Fast Track bill's procedures, and give itself time to amend, debate and mark-up the bill.
- Congress must also ensure that Fast Track gives citizens and Members of Congress adequate time to review and approve the substance of the complete TPP trade agreement. In particular, Congress must provide ample opportunity for interested parties to comment on the TPP's impact on investments by large and small U.S. businesses, employment and labor practices, worker wages and dislocation, consumer product prices, and health, safety and environmental regulations.
- Congress should modify its traditional Fast Track approach to require, for example, that its committees hold separate hearings on specific sections of the proposed agreement and extend the time for these committee hearings to take place. This would give members of the public, interest groups and other stakeholders an opportunity to register support or disapproval. Congress should also extend floor debates beyond 20 hours and provide sufficient time for all representative views to be heard.
- Pursuant to its constitutional power to regulate trade, Congress should set forth trade objectives in the Fast Track legislation and, when considering the full agreement, assess its consistency with these objectives.
- Congress should thoroughly and transparently consider and debate, pursuant to the trade objectives it includes in Fast Track legislation, how the TPP will affect smaller nations, indigenous populations and others against predation and widening economic inequality.
- While respecting necessary national security interests and acknowledging that trade negotiations cannot be open to participation by all members of the public, Congress must require that trade negotiations adhere to democratic values of accountability and

transparency. All parties in interest should have some fair and significant opportunities to have their views aired. A few corporate and special business interests should not be overly represented in negotiations, and environmental, health, safety, citizen and other interests should not be disproportionately under represented.

- Congress should disclose to the public and make easily accessible all the names of expert advisors or participants who have access to drafts of international trade agreements.
- Decisions to withhold drafts of trade agreements from public scrutiny must meet an exceptionally high threshold of justification, and the reasons for withholding them must be explained in full. A simple recitation of national security should not suffice.
- Fast Track legislation requires meaningful consultation between the executive and the legislative branches, so that Congress is satisfied that the objectives incorporated in the agreement are being met.

ISDS: Investor-State Dispute Settlement Mechanism

According to leaked drafts and public comment from the United States Trade Representative, the Trans-Pacific Partnership agreement will include an Investor-State Dispute Settlement (ISDS) mechanism, a specific arbitration provision for resolving disputes between foreign private investors and nation states. Under ISDS, for example, a foreign private investor can file a complaint against the United States and argue to a three-person international arbitration panel that a new U.S. law or regulation has unfairly or discriminatorily interfered with that investor's reasonable expectation of future profits pursuant to the trade agreement. The arbitration panel can potentially require the U.S. to pay the investor monetary damages amounting to billions of dollars, perhaps as a result of newly enacted U.S. environmental, health or safety laws.

The ISDS procedure would waive the sovereign immunity of the defendant country (for example, the United States and its states, counties, and other local jurisdictions) and subject it to potential damages. ISDS appears to give foreign investors a remedy against the United States and its taxpayers that the United States does not grant to its own citizens and corporations.

Recommended ISDS Procedures

The ISDS provisions of the proposed trade agreement are important, controversial, and far-reaching. The breadth of ISDS and its potential implications warrant special congressional consideration:

- Congress should require that ISDS be enacted separately from the rest of the TPP trade agreement considered under Fast Track. It should give ISDS separate public notice and public hearings and debate it pursuant to separate procedures that allow adequate public comment. Congress should give itself sufficient time to consider the full implications of ISDS, both pro and con. It should publish its hearings in the public record and give ISDS a separate up-or-down vote.

- Congress must critically review ISDS procedures to ensure that they protect sufficiently the commercial, health, safety and environmental interests of all affected parties, including local businesses. It should consider allowing interested parties—including, for example, those who are not direct investors—to contribute their views to arbitration proceedings, either by intervening as a matter of right or as *amicus curiae*. It should consider whether parties should have access to appeals or judicial review. It should require arbitrators to be professionally qualified. It should require that tribunals follow high standards of reasoning, articulate the underlying rationale of their decisions, respect precedent and follow general standards of procedural fairness.
- Congress should carefully consider whether ISDS can be abused by powerful investors, allowing them to make demands for extraordinary compensation against small nations (“mega” complaints), subjecting them to costs and penalties they might not be able to sustain, and pressuring them into concessions they might otherwise not be willing to make.

Conclusion

In sum, before granting Fast Track authority, Congress must satisfy itself and the general public that Fast Track incorporates procedures that are fair and open to all interested parties and allow for sufficiently thoughtful deliberation by members of Congress.

Citizens should hold Congress and the Administration accountable for the public interest protections listed above. If Congress does not consider these factors in authorizing Fast Track legislation, then Fast Track will not serve the best interests of the American people.

With more than 70 years of experience in modern international trade agreements, it may be time for us to understand better their resulting benefits and burdens. We must remain open to the contributions international trade agreements can make to our economy and national welfare. We must also be vigilant, however, to ensure that these agreements are not unduly influenced by an international commercial culture that tilts toward the strong over the weak, that is indifferent to all but business values and that undervalues the health, safety, shared prosperity and environment of the world’s citizens.