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*“The Trans-Pacific Partnership and America’s
strategic role in Asia”*

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The stakes for US trade policy have always reached beyond the economic realm...Trade is what most of international relations are about. For that reason trade policy is national security policy.”

Thomas Schelling, Nobel Prize winner

Trade policy stands at the intersection of a nation’s diplomatic and security strategies and its broad economic goals. Decisions regarding trade agreements, with both individual nations and groups of nations, are calculated to advance national strategic interests as well as the fortunes of domestic corporations and workers. Though not necessarily in conflict, security imperatives and economic realities exist in two very different universes, inhabited by very different constituencies and interest groups. With the exception of multilateral negotiations in the World Trade Organization – which deal exclusively with trade issues – bilateral, sub-regional, and regional trade negotiations inevitably are influenced and guided by collateral, compelling national priorities. Thus, in the case of the US, the Executive Office of the President, with input from diverse public agencies and private interest groups – for example, from the US State, Defense, Commerce, and Labor departments, as well as the US Environmental Protection Agency, and from outside groups and industries in manufacturing, services, agriculture, labor unions, and NGOs – calculate the economic and political tradeoffs inherent in the decisions to go forward with a particular bilateral or regional FTA. Though prime responsibility for the nitty-gritty of negotiations is in the hands of the US Trade Representative, these officials fulfill their responsibilities against a background of larger political, diplomatic, and security goals.

Political scientists also often refer to trade policy-making as a two-level game: that is, national leaders strive to forge an internal consensus on US trade negotiating goals and then must further attempt to achieve those goals at the international level. Inevitably, there are compromises in this process, forcing national leaders to return to the domestic level to defend the negotiating package. The recent history of US trade negotiations provides telling examples of the sometimes uneasy juxtaposition of diplomatic/security priorities and the two-level game in which domestic economic interests must be accommodated. For the United States, indeed, the difficult process of completing and ratifying FTAs with Colombia and Korea itself are cases in point. In both instances, there were strong diplomatic/security rationales to buttress an important ally in a dangerous region. Yet in both cases, US domestic conflicts delayed the advancement of US national interests for some years.

US Trade/Security Policy

From 1945 through the end of the 1980s, the US largely adhered to a two-track trade policy: multilateralism, embodied in membership in the GATT; and unilateralism/bilateralism, dictated by the substantive reality that the GATT disciplines did not include important trading sectors and issues. Thus, powerful domestic interests demanded that US policymakers pursue independent bilateral negotiations with key partners such as the European Community and Japan to achieve trade policy goals not covered by multilateral disciplines.

This truncated policy framework broadened greatly during the George H.W. Bush administration, when the end of the Cold War and the rise of regional economies around the EC and Japan produced a rethinking of the boundaries of US international economic policy. Then-Secretary of State James Baker emerged as the driving force behind a major reorientation of US trade and security policy. First, Baker stated that although the GATT would remain the top priority for US trade negotiations, “bilateral and minilateral systems may help move the world toward a more open system.” NAFTA negotiations were the most immediate symbol of this US shift. In Asia, which is the primary focus of this article, Baker quickly responded favorably to a joint Australia-Japan proposal leading to the creation of the Asia-Pacific Economic Cooperation organization, or APEC. And he was immediately hostile to a proposal by then-Malaysian President Mahathir Mohamad for an East Asian Economic Caucus that would include only Asian nations and exclude the United States.

It was in response to Mahathir that Baker famously set forth what became an enduring US strategic position with regard to the region, when he vowed that the United States would oppose any “plan that drew a line down the middle of the Pacific,” with the United States on one side of the line and Asian nations on the other. Baker stated later that while there were no immediate security challenges to US hegemony in Asia, his statement was intended as a declaration and projection of diplomatic and security power as well as a statement of national economic interest. Since Baker’s original pronouncement, US economic and diplomatic/security goals in Asia have been inextricably linked.

The Clinton administration was fortunate to preside over the so-called “unipolar moment” in postwar history. The Cold War had ended; and in Asia, Japan had begun an extended period of stagnation, while China’s subsequent economic and political power was still just over the horizon. In international relations, economic goals took priority, and the United States led in the upgrading of APEC and the establishment of the Bogor goals of free trade in the Asia-Pacific by 2010 for developed APEC nations, and by 2020 for developing APEC nations. It should be noted, however, that in concluding NAFTA and pursuing a Free Trade of the Americas agreement, the Clinton White House espoused strong political aims to buttress economic interests: to wit, supporting the emergence of viable democratic systems, first in Mexico but later throughout Latin America.

For the themes developed in this paper, the George W. Bush administration stands as a central focal point, in that more explicitly than prior administrations (and moreso than the Obama administration that succeeded it), Bush administration trade policy directly and publicly tied trade policy initiatives to broader US foreign policy and security goals. The administration also included Zoellick, who served as the US Trade Representative (USTR) during George W. Bush's first term and was a protégé of James Baker, who naturally viewed trade policy through the wider lens of US diplomatic goals. In speeches and congressional testimony, he candidly stated that in choosing FTA partners, the administration would seek "cooperation – or better – on foreign and security policy...Given that the US has international interests beyond trade, why not try to urge people to support our overall policies." Under President Bush, the US negotiated some 17 FTAs (bilateral and regional), in some cases largely for economic reasons (viz., Chile, Peru, and CAFTA); in other cases, clearly for political/diplomatic purposes (Bahrain, Oman, and Morocco, as well as others for a combination – viz., Singapore and Australia). Three FTAs (Korea, Colombia, Panama)—each of which represented a combined economic/security imperative—were negotiated by President Bush but went unratified by the US Congress at the end of his term.

The Obama Administration and the Asian “Pivot”

Though in many ways the foreign policy of the Obama administration has differed dramatically from that of the Bush administration, in both administrations diplomatic and security considerations played a large role in shaping trade policy. This was underscored by the decision of the Obama White House to assign major strategic and political trade decisions to the National Security Council, and not to the USTR. Further, the role of individual leadership in shaping US Asian policy forms a key element in the Obama administration, with Secretary Hillary Clinton's central focus on Asia providing a bookend to Secretary Baker's guiding vision two decade previously.

Asia: Trade and Economic Policy

As he entered office, President Obama seemed an unlikely candidate to push forward with a bold US trade agenda. Famously, in the campaign he had boasted that he opposed the NAFTA agreement and subsequent bilateral FTAs, and he led a Democratic party deeply divided by trade liberalization and globalization issues. Thus, for almost a year the US in effect had no trade policy. But by the end of 2009, a combination of economic imperatives and foreign policy challenges would impel a major turnaround on the trade front.

Though the financial crisis ebbed during 2009, the recession dragged on; and despite continuing Democratic congressional opposition, Obama turned to trade—and exports—to boost the flagging US economy. This resulted in a major National Export Initiative to boost US

exports around the world, but particularly in the rapidly expanding Asian economies. Under the initiative, the president promised to double US exports over a five-year period.

Asia: The Pivot

Though economic factors were important, what more decisively shaped the course of Obama administration Asia policy was the rapidly shifting diplomatic and security conditions in the region. As former British Prime Minister Harold Macmillan is said to have replied when asked what could steer a government off its current course: “Events, dear boy, events.” “Events” indeed explain the decisive “pivot” by the Obama administration in Asia, as well as the forward movement on the trade and economic front.

Within months after assuming office in 2009, North Korea heightened tension on the Korean peninsula and threatened South Korea, a US treaty ally, by first conducting an underground nuclear test, and then shooting off two rounds of short-range missile across the Sea of Japan. Pressure mounted immediately for a show of support for South Korea, resulting from the administration’s own accounts in a decision by the president to announce a goal of completing negotiations on the stalled KORUS.

On a broader scale, even before the Obama administration took office, mainland China had hardened its attitude and diplomacy on a raft of disagreements and conflicts with its East Asia neighbors. Though not repudiating the mantra of a “peaceful rise,” China’s leaders became much more assertive in their relations with individual nations—as well as ultimately with ASEAN as an organization. In May 2009, just after the administration took office, Beijing published a map of the South China containing nine dashed lines in a U-shape that laid claim to over 80 percent of this maritime area. Subsequently, it clashed repeatedly with its neighbors inside this self-proclaimed perimeter—particularly the Philippines and Vietnam. In addition, the PRC grew bolder in contesting the claims of South Korea and Japan, respectively, in the Japan and East China seas.

The US Response

Secretary of State Clinton’s first trip abroad was not—as had been traditional—to Europe, but to Asia. In speeches and testimony during the first months of the Obama administration, Clinton proclaimed with some bravado that the United States was “back” in Asia, vowing to pursue a “more rigorous commitment and engagement.” To that end, she beefed up the economic resources and mission of the State Department and pressed for forward movement on US regional trade and investment issues. Within months, the US signed the Treaty of Amity and Commerce with ASEAN, paving the way for membership in the East Asian Summit. Since 2009, the secretary has made nine trips to Asia, more than to any other region of the world.

Obama's Trip to Asia

Statements and visits by secretaries of state and defense are important, but both the symbolic and substantive capstone of the US "pivot" came with President Obama's nine-day trip to Asia in November 2011. Starting in Hawaii as host to the APEC Leaders Meeting, the president went on to make major pronouncements and policy advances in Indonesia where he met with ASEAN leaders and became the first American president to join the East Asian Summit.

The president chose Australia to deliver his most important and far-reaching address reaffirming the US commitment to Asia—and to the Australian alliance. "The United States is a Pacific power, and we are here to stay," he averred, adding: "In the Asia Pacific in the 21st century, the United States of America is all in." Later in Darwin, the president and the prime minister announced a new security pact by which the US would deploy a rotating group of 2500 marines, establishing an important symbolic presence in maritime Southeast Asia.

From the outset of the trip in Hawaii, however, it was the TPP that created the "buzz" that would continue throughout remainder of the president's journey. With the (premature) announcement that a "framework" had been agreed to, the TPP moved to center stage as the most concrete symbol of renewed US leadership in the region. As noted above, this symbolism came with high risks. While a framework had been announced, TPP negotiations had yet to tackle the most difficult economic and political negotiating issues. But whatever the future outcome (see below), the president's imprimatur and his repeated reference to the negotiations as a cornerstone of US renewed leadership meant that the success or failure of these negotiations would be taken, for better or for worse, as a central symbol for the success or failure of US leadership and the long-term impact of the "pivot."

TPP

From the outset of the negotiations, however, the trans-Pacific pact has been hailed as the new model for a 21st Century trade agreement. The goal is to negotiate terms that go well beyond traditional FTAs and write rules for major inside-the-border barriers to competition. Thus in terms of the themes developed in this paper, the TPP has large geoeconomic implications: that is, if successful, it will provide the template and model for future FTAs around the world and, ultimately, for multinational negotiations in the WTO.

The most significant new (21st century) issues being debated include: new rules for state-owned- enterprises (SOEs); labor and environmental rules; intellectual property strictures; regulatory reform and coherence; government procurement liberalization; trade facilitation measures; supply chain management; and measures to promote trade by small- and medium-sized businesses. On regulatory reform, the overarching goal is the harmonization (or at least mutual recognition) of regulatory barriers that exert a major influence on international

trade. Among the proposals discussed in the negotiating sessions are procedural rules for transparency; elimination of duplicative or overlapping regulations; restriction on anticompetitive practices; mutual recognition agreements for services and for health and safety measures. On SOEs, the goal is to promote “competitive neutrality” between commercial enterprises and government-owned entities, particularly in the areas of subsidization and regulatory discrimination.

Ironically, some of the most difficult substantive and political issues involve traditional “20th Century” points of contention such as existing tariffs and barriers on textiles and apparel, shoes, sugar, dairy products and cotton. For the big picture, the tradeoffs will consist of balancing 21 century demands by more advanced TPP members against the political needs of the less advanced TPP nations regarding these more traditional trading barriers.

The Strategic Overlay

Over and beyond the fascinating—and necessary—domestic interplay of the two-level game are larger geoeconomic and geostrategic forces, with wide-ranging implications for continued US leadership of both a more liberal trading system and regional order in the Asia Pacific.

RCEP: Geoeconomic Competition

Standing in the wings as competition for the TPP is the Regional Comprehensive Economic Partnership (RCEP), pushed by the PRC as an intra-Asian alternative. Launched in 2013—though negotiations did not begin until well into 2013—RCEP is composed of the ASEAN Plus 6 nations: ASEAN, China, Japan, Korea, India, Australia and New Zealand. There is some overlap in membership with the TPP: Australia, New Zealand, Singapore, Malaysia, Brunei, and Vietnam are participating in both sets of negotiations.

In substance and in negotiating modes, TPP and RCEP stand in contrast to each other. First, unlike the TPP, where individual ASEAN nations negotiating separately, in RCEP ASEAN is represented as a single economic and political entity. Thus, RCEP from the outset will include the less developed ASEAN members (Laos, Cambodia, Myanmar) as well as somewhat more developed members such as Thailand, the Philippines, and Indonesia. In part, this membership difference—as well as the inclusion of ASEAN as a distinct entity—has dictated different negotiating ground rules. First, there will be a great deal of flexibility in the negotiating mode, which will be accomplished in a sequential manner or a single undertaking, or through some other mixed modality. RCEP will also provide special and differential treatment to less-developed ASEAN member states. Finally, in contrast to the TPP, membership in RCEP is fixed and limited to the present 16 members (from outset TPP membership has been open-ended, allowing it to grow from five to the present twelve members).

Substantively, as compared to the deep integration goals of the TPP, the initial aims of RCEP are much less ambitious. Three negotiating subgroups have been established in goods, services and investment; but it is not expected that the agreement will contain many of the “behind the scenes” non-tariff barrier liberalization that are the objects of the TPP negotiators. RCEP nations have pledged to reach agreement on major issues by the end of 2015, though most observers hold that this goal is unrealistic. However, even if real substantive advances only come in later years, RCEP stands as a serious, intra-Asian regional alternative to the TPP should those negotiations falter or fail.

Strategic Challenges

Over the past several years, even as TPP negotiations have deepened and moved toward an endpoint (whether successful or not), the strategic and security situation in East Asia has become ever more fraught. Further, as new challenges have arisen, there have been growing concerns among allies and trading partners regarding US steadfastness and staying power in the region. These fears have stemmed from disparate sources. Despite the vow to “rebalance” US security forces toward the Asia Pacific, with 60 percent of US naval assets in the Pacific by 2020, Asian leaders are fully cognizant that this is 60 percent of a declining US defense budget. They are also aware of the political stalemate that has often produced a paralysis in domestic policymaking.

Beyond this reality, over the past year—and certainly over the past few weeks and months, distractions and crisis in other regions of the world—the Ukraine and Russia, and at this writing direct military actions to counter ISIS in Iraq and Syria—have driven home the fact that US worldwide obligations can overwhelm its strategic regional goals in East Asia.

Meanwhile, in East Asia itself recent, China’s challenges to the existing order have risen sharply. Seemingly unconcerned about its political image and the contradictions to its often proclaimed “peaceful rise,” Beijing has picked or exacerbated quarrels with a number of its East Asian neighbors. Many of these controversies, with accompanying Chinese bullying tactics, have centered on disputed maritime borders and jurisdiction, including jousting with Japan over the Senkaku Islands in the East China Sea; with Vietnam over the Paracel Islands in the South China Sea; with the Philippines, Vietnam, and Malaysia over the Spratly Islands; and with the Philippines over the Scarborough Shoal. In recent months, China has upped the ante by sending a semi-permanent oil rig into waters around the Paracel Islands. Throughout the period, Beijing has adamantly refused to call a halt to development of the disputed maritime territories or to seriously enter into negotiations for a code of conduct or some form of joint development of the disputed areas.

Finally, with the unilateral declaration of an Air Defense Identification Zone in the East China Sea, the PRC has directly thrown down the gauntlet not only to its neighbors in Asia but also to

the United States and its long-standing defense of the doctrine of the freedom of the seas. The US has refused to recognize the Chinese ADZ and declined to notify Beijing of flights across the disputed area.

The point of this brief diplomatic and security rundown is to underscore that, with the TPP as a central and most concrete symbol of the US “pivot” to Asia, the repercussions of a failure to carry the trade agreement to a successful juncture will ripple out well beyond economic consequences.

Singapore and its leaders, going back to Lee Kuan Yew, have always exhibited the most savvy and sophisticated understanding of the US leadership role and the symbolic and concrete importance of the TPP in the East Asian firmament and order. This tradition was carried on several weeks ago, when Singapore Prime Minister Lee Hsien Loong, warned of the consequences of TPP failure. He stated: “We have promised to conclude...three years in a row, I think this is our last chance to fulfill our promise...(or) face further delays of an indefinite nature.” He further stressed that the US Asian pivot must have an economic as well as military component: “If you don’t finish TPP you just giving the game away (to China)...If you don’t promote trade what are you promoting? What does it mean when you say you are a Pacific power? That just does not make sense.”

President Obama understands this; for as he stated in the State of the Union address to Congress: “China wants to write the rules for the world’s fastest growing region. That would put our workers and businesses at a disadvantage. Why would we let that happen? We should write those rules. That’s why I am asking both parties to give me trade promotion authority to protect American workers with strong trade deals from Asia to Europe that aren’t just free, but also are fair.”

Trade Promotion Authority: A winning bargain for Congress and the president

Claude Barfield

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As Congress takes on new legislation to speed up trade agreements, the debate will seek to find a balance between the authority of Congress over trade policy and the necessity that the president craft agreements that further US economic interests. This commentary will attempt to sort fact from fiction and to provide a deeper historical context for the current struggle.

Trade Promotion Authority (or Fast Track Authority, under an earlier name) establishes a co-equal partnership between the president and Congress to expedite passage of legislation implementing trade agreements. The essential bargain goes as follows: the president agrees to negotiate trade agreements pursuant to objectives and priorities established by the Congress; in return, Congress agrees to an expedited up-or-down vote on the agreement and implementing legislation, without amendment. First established by Congress in 1974, the joint procedure has been renewed some six times under both Republican and Democratic presidents, and by Congresses controlled by both Republicans and Democrats, or divided

between the parties. While the specific congressionally mandated objectives and priorities have evolved over time, the basic procedural framework and bargain have remained in place.

A brief history of TPA. Unlike many other governments in which the executive exercises strong or complete control over international economic relations, in the United States it is Congress that is granted full and final authority over trade policy. Article I Section 8 states simply and decisively that Congress shall have the power: “To regulate Commerce with foreign nations.” For 150 years, Congress exercised control of US trade policy through passage of tariff legislation, that is, taxes on foreign goods at the border. In 1934, however, Congress — wanting to rid itself of the endless petty demands on individual tariffs — granted the president authority to reduce tariffs on a reciprocal basis with other nations within pre-approved levels.

All of this worked well during the first rounds of multilateral trade negotiations under the General Agreement on Trade and Tariffs in the 1940s and 1950s. During the Kennedy Round in the 1960s, however, trade negotiators moved beyond tariffs to tackle nontariff barriers to trade such as antidumping and regulatory regimes. This would ultimately force changes in domestic laws, and, at first, Congress balked and refused to act on these US commitments. At that point, US trading partners in turn demanded that the United States establish a system that produced an up-or-down vote on the final terms of future trade agreements (including implementing legislation) negotiated by the president and his team.

Fast Track Authority. In the Trade Act of 1974, Congress established so-called Fast Track (Trade Promotion) Authority. As noted above, the TPA authority has been repeatedly renewed since 1974, and the basic procedural framework has remained largely the same. Over the next few weeks, the Republican congressional leadership has promised to produce the latest version of TPA, hopefully with some support from Democrats. Republican leaders have stated that the new authorization will follow closely the details of last year’s Bipartisan Trade Promotion Act of 2014.

The 2014 BTPA reflected increased congressional demands for greater participation in the FTA negotiating process, without impinging on the president’s broad executive power over foreign economic policy. With regard to consultation and notification, the act provided for:

- 90-day congressional notification before entering into negotiations for a new FTA.
- 90-day congressional notification before concluding negotiations for an FTA.
- Establishment of Congressional Advisory Groups in both houses that would preside over timely briefing during the course of the negotiations and be given access to all relevant documents. Membership would include select members of the Ways and Means and Finance Committees, as well as the chairmen of committees with jurisdiction over laws affected by the FTA.
- Creation of a broader Designated Congressional Advisors group, consisting of members who have petitioned for such a designation and received permission from relevant committee chairmen.
- A mandate to the Ways and Means and Finance Committee to establish a detailed system and timetable for consultation with the US trade representative (USTR).
- Enhanced transparency for the public by directing the USTR to develop specific plans for public outreach and consultation. (It should be noted that the USTR already has conducted some 1,600 briefings and meetings with NGOs, individual companies, and trade associations, and congressional staff.)
- The USTR, upon request of any member of Congress, must provide all pertinent documents in a timely fashion, including when available the final terms of a proposed FTA.

Further, in a January 30 speech at the American Enterprise Institute, Senate Finance Committee Chairman, Orrin Hatch (R-Utah) outlined several additional safeguards that will be included in the 2015 TPA process: implementing bills would include only provisions that are “strictly necessary and proper,” with “strictly” tightening the scope of such legislation; secret side deals

would be outlawed in future trade agreements; and any changes to the agreement made after TPA had expired but before Congress has voted on the agreement would be placed outside the TPA process. He also promised that Congress would continue to insist on transparency throughout the process: there would be no “surprises” to the Congress or the public.

Expedited procedures. As noted above, the administration must give 90 days’ notice to the Congress before concluding an agreement. At that point, the USTR and the Ways and Means and Finance Committees (along with other committee of jurisdiction) begin joint work on crafting implementing legislation, including any changes to US law required by the agreement. The two committees hold so-called “mock markups” of the implementing legislation to work out any differences with the administration; and, should it be necessary, they hold “mock conferences” to iron out any differences between the two houses. There is no statutory time limit on this segment of the process.

With final implementing legislation agreed, the clock starts ticking again when the president formally submits a bill. The two committees have 45 session days to discharge the bill to the floor and the full Congress. Once it reaches the floor of each house, debate is limited to 20 hours, with no amendments allowed.

Mandated negotiating objectives and priorities. Beyond the ultimate ability to reject proposed FTAs, Congress’s most potent power to dictate the substance of future agreements comes through the negotiating mandates it gives to the president when it passes the TPA. At this point in time — with more than a decade having passed since Congress last weighed in — careful attention will be paid to new negotiating objectives that reflect the vastly changed economic and technological landscape that has emerged since passage of the 2002 TPA. The usual format of the TPA is to divide it into categories of general objectives, more specific objectives, and finally other priorities. Some objectives have been included since the advent of the TPA: these include details regarding market access for goods, services, and agricultural products. Within these general categories, Congress often adds specific market access demands: viz., food safety and animal and plant health laws and regulation. Issues related to investment (and investment adjudication) and intellectual property will be updated to reflect current concerns. The TPA will also add a significant number of new issues, including rules for state-owned enterprises, regulatory reform and coherence, rules for an open Internet and freedom of data flows, restrictions on localization, and IP rules for new biologic drugs. The mandates concerning new issues are of paramount importance, as in these areas Congress has previously given no indication of its priorities.

Careful attention will be paid to new negotiating objectives that reflect the vastly changed economic and technological landscape that has emerged since passage of the 2002 TPA.

There is a close and direct link between the objectives Congress mandates in the TPA and the consultation/reporting sections of the bill. In the pending Trans-Pacific Partnership negotiations, the legislators have carefully monitored the progression of the negotiating sessions; and they fully expect that the administration will attempt to bring to fruition the major goals set forth in the TPA — though there is also the (unspoken) knowledge that a final FTA package will contain areas where the United States has had to compromise in order to get a result that all 12 nations can agree to.

Partisan conflicts and the TPA. Since the mid-1990s, partisan conflicts over trade policy have spilled over into the TPA legislative process. It should be noted, however, that these conflicts are not centered on the TPA procedural executive-legislative compromise, but rather on disagreements over what issues and substantive mandates should be included in the TPA and subsequently in future FTAs. The most difficult issues coming forward from the 1990s have concerned the extent to which FTAs will include mandates in the areas of labor rights and environmental protection. Other contentious areas include IP for pharmaceuticals, investor-state dispute settlement, health and safety measures, and currency manipulation. In

the current process, the administration is working to find some accommodation that will (minimally) satisfy various interest groups and constituencies.

For labor and environment, however, a 2007 compromise between the Bush administration and the Democratic Congress will dictate the language. In the so-called May 10th agreement, it was decided that both labor and environmental issues would be included in future agreements and subject to the regular dispute settlement provisions. Further, with regard to labor rights, nations will be expected to live up to the 1998 ILO Declaration on Fundamental Principles of Rights at Work. Unlike actual ILO Conventions on labor rights, the Declaration is not legally enforceable, but merely a hortatory document. Republicans had adamantly opposed obligations related to the ILO Conventions, as those would have forced wholesale revision of US labor laws.

On the environment, the May 10th agreement stipulates that FTA signatories must sign up to a group of UN environmental treaties, including those dealing with ozone depletion, endangered species, marine pollution, wetlands, tropical tuna, and Antarctic marine resources.

Constitutional questions and the executive balance of power.

Controversies over the basic constitutionality of the TPA process, as well as the balance of power between the executive and the legislative branches of government, have been raised from the outset, and are looming again in the current struggle over passage of new TPA legislation. Both representatives from the Democratic left and the Tea Party Republican right have publicly expressed reservations about the legislation and the process. Opposition from the Democratic left wing is actually a cover for larger opposition to trade deals, particularly from labor and environmental interest groups. For conservative Republicans, however, there are real — if rebuttable — constitutional concerns. These Republicans have also been in the forefront of challenging what they consider the overreach of the executive branch under President Obama.

The TPA will add a significant number of new issues, including rules for state-owned enterprises, regulatory reform and coherence, rules for an open Internet and freedom of data flows, restrictions on localization, and IP rules for new biologic drugs.

When the 2002 TPA was being considered, the same questions were raised by some Republicans. At that time, two legal scholars with impeccable conservative credentials, former Attorney General Edwin Meese and Judge Robert Bork, gave opinions supporting TPA constitutionality and the pragmatic balance between the executive and the legislature.

Meese wrote:

[The TPA legislation] is clearly constitutional because Congress retains the right to approve or reject all future trade agreements. It might be unconstitutional if Congress tried to delegate its authority to approve the final deal — but that is not at issue ... The Constitution grants to each house of Congress the authority to establish its own rules of procedure, and it makes perfect sense for Congress to limit itself to straight up-or-down votes on certain resolutions, such as base closures and its own adjournment motions.

US sovereignty. Meese also dealt with questions raised regarding US sovereignty and ruling by international bodies. He noted:

Future trade deals would not be unconstitutional, nor would they undermine US sovereignty, if they contained an agreement to submit some disputes to an international tribunal for initial determination. The United States will always have the ultimate say over what its domestic laws provide A ruling by an international tribunal that calls a U.S. law into question could have no domestic effect unless Congress changes the law to comply with the ruling.

In that regard, every TPA has included clauses that reinforce this sovereignty principle, such as:

No provision of any trade agreement entered into under the TPA that is inconsistent with any law of the United States, or any State, or any locality of the United States, shall have any effect.

Nor shall any provision of a TPA prevent the United States, or any State, or any locality from amending its laws.

Final Thoughts

The congressional fingerprint is on every step in the TPA process, from the framing of mandated trade objectives and priorities, to continuous consultation and feedback, to the crafting of implementing legislation, and finally, to the up-or-down final decision on an FTA.

US sovereignty is closely guarded and reinforced through specific clauses that nullify any section of an agreement that is inconsistent with US law. Further, a congressional vote on TPA is *not* a vote in favor of FTAs pursuant to its mandates. Congress can and will exercise an independent judgment as to whether these agreements reflect its mandates to the president and are in the interest of the American people.

Without TPA, the United States would not be able to achieve its own negotiating goals, as our trading partners would hold back their own bottom-line compromises out of fear that the president and the USTR could not guarantee the steadfastness and good faith of the US political process.

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This article was found online at:

<http://www.aei.org/publication/trade-promotion-authority-winning-bargain-congress-president/>