

(Re)negotiating the Environment: Implications of Trade Promotion Authority

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INTRODUCTION

Negotiation of a trade agreement is a game with two levels. On one level, trade negotiators engage and bargain with their foreign counterparts; on the other, they must contend with the domestic politics that give them their mandate to negotiate in the first place.¹ Since the middle of the twentieth century, the ambit of trade agreements has ballooned, and with the growing scope has come growing controversy. The task of negotiation has only become more complicated at both the international and domestic levels.

When it first went into force in 1994, the North American Free Trade Agreement (“NAFTA”) was among the most comprehensive free trade agreements (“FTA”) in existence, and it included many novel provisions.² It was the first U.S. FTA to include provisions on the environment through a side agree-

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1. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 436 (1988).

2. M. ANGELES VILLARREAL & IAN F. FERGUSON, CONG. RESEARCH SERV., R 42965, THE NORTH AMERICAN FREE TRADE AGREEMENT, Summary (2017).

ment called the North American Agreement for Environmental Cooperation (“NAAEC”).³ These environmental provisions, as well as labor provisions included in the North American Agreement on Labor Cooperation (“NAALC”), were essential to securing the political consensus that enabled NAFTA to make it through Congress during the Clinton administration.⁴ These environmental provisions also ushered in a new era of policy-making and advocacy on “trade and environment.”⁵

In many ways, the NAAEC is a story of domestic U.S. politics—of the second level of the negotiation game. U.S. institutions, rules, and interest groups together influenced the ultimate content of its rules concerning the environment, and the relationship between these elements was structured by a statutory framework known as “fast track” or Trade Promotion Authority (“TPA”).⁶

TPA is essentially a conditional delegation of authority from Congress to the President to negotiate trade agreements.⁷ The legislation modifies congressional procedures such that a bill implementing a trade agreement negotiated by the President is considered by Congress under an expedited process in which the bill may come to the floor without action by the leadership and can receive a guaranteed up-or-down vote with no amendments, as long as certain requirements are satisfied.⁸ These requirements are that (1) the trade agreement was negotiated during the limited time period for which TPA is in effect; (2) the agreement advances the various negotiating objectives specified in the TPA statute; (3) the relevant agencies complied with required notifications to and consultations with Congress and other stakeholders; and (4) the President submits to Congress a draft implementing the bill and certain required supporting information.⁹

A form of TPA was in place as NAFTA was implemented and earlier iterations of the legislation go back to the 1960s.¹⁰ Since the original NAFTA was negotiated, TPA has again been reworked, and in 2015, Congress passed its current manifestation as the Bipartisan Congressional Trade Priorities and Accountability Act (“TPA 2015”).¹¹ This statute was extended to trade agreements entered into before

3. *Id.* at 9, 30.

4. Karen Hansen-Kuhn, *Clinton, NAFTA, and the Politics of U.S. Trade*, 31 NACLA Report on the Americas 22, 23 (1997).

5. For more information on the ever-growing field of trade and environment research and policy, see, e.g., *Environment and Regional Trade Agreements*, OECD, ISBN 978-92-64-00665-2 (2007), http://www.oecd.org/env/environmentandregionaltradeagreements.htm#How_to.

6. The type of legislation discussed in this Note was originally called “fast track” until it was changed to “Trade Promotion Authority” in 2002. This Note uses only the term “Trade Promotion Authority” (“TPA”) for the sake of consistency.

7. RICHARD S. BETH, CONG. RESEARCH SERV., R 44584, IMPLEMENTING BILLS FOR TRADE AGREEMENTS: STATUTORY PROCEDURES UNDER TRADE PROMOTION AUTHORITY 4–5 (2016).

8. *Id.* at para. 1–3 (Summary).

9. *Id.*

10. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

11. Bipartisan Congressional Trade Priorities and Accountability Act, Pub. L. No. 114-26, 129 Stat. 319 (2015) [hereinafter BCTPAA].

July 1, 2021, when President Trump requested an extension and Congress did not pass a disapproval resolution by July 1, 2018.¹²

Under the current form of TPA, requirements in each of these categories are used to promote environmental protection. Now, as NAFTA is being renegotiated, it is worth assessing the implications of these TPA requirements on the ultimate content of this agreement's and other agreements' environmental provisions.¹³

The very concept of TPA has been heavily criticized by some NGOs, including some that advocate for environmental protection.¹⁴ These critiques raise important concerns; yet, this Note ultimately concludes that TPA is not necessarily incompatible with a progressive environmental agenda. It is important, however, that advocates understand the distinctive mechanisms and responsibilities for policymaking in this field. Thus, this Note's primary aim is to provide a framework for understanding how trade and environmental policymaking, as manifested in FTAs, is currently managed by the executive and legislative branches. TPA 2015 provides the blueprint. This is not to suggest that the statute in its current form is perfect. When this version of TPA expires in 2021, it is crucial that environmental advocates have constructive proposals to strengthen further iterations. To this end, this Note concludes with a few questions and considerations for reform.

This Note begins in Part I by providing a background on TPA and explaining the rationale underpinning this form of congressional-executive coordination. Some elements of modern TPA are identical to the form that was passed in 1974, but others have evolved. The historical discussion tracks the evolving structure of TPA as a whole. After considering the overarching history, the Note then focuses in on environmental issues. In Part II, this Note considers the question of why environmental issues have found their way into trade agreements in the first place. This Note does not exhaustively survey the debates about the extent of the impacts of international trade on the environment or whether environmental provisions are the optimal tool to manage those impacts. Instead, it highlights some of the proposed linkages between international trade and environmental, which help to explain the different environmental approaches that are used in trade agreements. In Part III, the environmental provisions of the current TPA are considered in detail. Finally, Part IV makes an argument for using reform of TPA as a tool to further incorporate environmental goals into trade policymaking.

12. BCTPAA § 103(a)(1)(A)(ii).

13. BCTPAA applies to renegotiation of existing agreements in addition to negotiation of new agreements. § 105(a)(1)(A).

14. See *Fast Track: An Undemocratic Path to Unfair "Trade,"* PUBLIC CITIZEN, <https://www.citizen.org/our-work/globalization-and-trade/alternatives-corporate-globalization/fast-track-presidential-trade> (last visited Nov. 18, 2018).

I. BACKGROUND ON TRADE PROMOTION AUTHORITY

Traditionally, trade policy was about tariffs—in other words, about the amount of tax the U.S. would apply to imports at the border. Leading up to and during the Great Depression, the U.S. and other countries engaged in retaliatory hikes in tariffs rates, which culminated in very high average tariff levels.¹⁵ Many policy-makers believed that these tariffs exacerbated the Great Depression and were eager to decrease tariffs—both U.S. and foreign.¹⁶ Ideally, the U.S. would lower tariffs in tandem with other countries, which would help offset the political opposition from domestic industries that benefited from protectionist tariffs with those domestic industries that benefited from increased access to foreign markets.¹⁷

The solution—negotiation of international agreements on synchronized tariff reductions—was complicated by the fact that the authority for such agreements is split between Congress and the President. The power to set tariffs is ultimately held by Congress, per Article I of the Constitution, and Congress also has the authority to regulate commerce with foreign nations.¹⁸ However, it is the President who is tasked with negotiating treaties.¹⁹ The mechanism through which Congress and the President cooperated on this issue was a precursor to the concept of TPA. In the Reciprocal Tariffs Act of 1934, Congress delegated authority to the President to negotiate mutual reductions in tariffs within prescribed constraints.²⁰ The scope and processes prescribed in the Reciprocal Tariffs Act have little in common with today's TPA, but that statute served as important precedent for congressional-executive agreements on trade.

The modern TPA approach, at the time referred to as “fast track,” was first established by the Trade Act of 1974.²¹ “Fast Track” came about in the context of the Tokyo Round of negotiations pursuant to the Generalized Agreement on Tariffs and Trade (“GATT”), the precursor to the World Trade Organization (“WTO”).²² The Tokyo round was the first to address so-called *non-tariff barriers* (“NTBs”).²³ These are domestic policies that are not tariffs but nonetheless constitute impediments to international trade. The concept of NTBs is broad, and implementing the new provisions from this negotiating round would require significant legislation passed by Congress. This necessity highlighted the key challenge that TPA is intended to address.

15. IAN F. FERGUSSON, CONG. RESEARCH SERV., RL 33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 3 (2015).

16. *Id.*

17. JOOST PAUWELYN, ANDREW GUZMAN & ROBERT HILLMAN, INTERNATIONAL TRADE LAW (2016).

18. U.S. CONST. art. I, § 8, cl. 1 and 3.

19. U.S. CONST. art. II, § 2, cl. 2.

20. Reciprocal Tariffs Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934).

21. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975).

22. FERGUSSON *supra* note 15, at 4.

23. *Id.*

A. THE PURPOSE OF TRADE PROMOTION AUTHORITY

At the risk of stating the obvious, trade agreements are the product of negotiations. Two or more countries engage in bargaining—one party making concessions in exchange for concessions from another. Many factors influence relative bargaining power, one of which is the level of confidence parties have that their counterparts will hold up their end of the deal. That factor is especially relevant in treaty negotiations with the United States because negotiations are carried out by the President and the executive branch, whereas implementation depends on the complex, highly political legislative process. The U.S. institutional context raises the question: how can another country be sure that a long-negotiated text is not going to be reopened through the various amendment or committee processes? This uncertainty is costly, and in exchange, the negotiating partner may not be willing to make as many concessions as they would otherwise. President George W. Bush, pressing for TPA reauthorization in 2001, explained:

[I]n order for me to be effective on trade, I need trade promotion authority. I need the ability to speak with a single voice for our country. I need to have the capacity as an administration to negotiate free trade agreements without the fear of them being undermined. Otherwise, our trading partners are going to be confused and concerned about an honest and open dialog.²⁴

To address this challenge, TPA creates modified procedures, which are discussed in subsection I.c., to pass legislation implementing trade agreements. The implementing bill is required to be put to a vote, cannot be held up in committees, and is subject to a simple yes or no vote without amendment. However, to be eligible for these expedited procedures, the agreement must fulfill certain objectives described in the TPA statute and comply with procedural, reporting, and consultation requirements, which have evolved over time.

B. THE EVOLUTION OF TRADE PROMOTION AUTHORITY

The 1974 Act's TPA provisions included a sunset provision, and every version since has also been time-limited.²⁵ With each reauthorization of TPA, the expedited procedures have remained the same, but the eligibility requirements have changed significantly.²⁶ In its initial form, TPA simply required the executive branch to consult with relevant committees, to allow certain Members of Congress to serve as advisors during negotiations, and to notify Congress ninety days before signing an agreement.²⁷ TPA was originally focused on multilateral negotiations under the GATT, but in the 1984 renewal, the TPA was extended to

24. Quoted in Steve Charnovitz, *Using Framework Statutes to Facilitate U.S. Treaty Making*, 98 AM. J. INT'L L. 696, 697 (2004).

25. FERGUSSON, *supra* note 15, at 5–8.

26. *Id.* at 5.

27. Trade Act of 1974, *supra* note 21.

cover the negotiation of bilateral free trade agreements (“FTAs”).²⁸ The Trade and Tariff Act of 1984 also added the requirement that the President notify the congressional committees with jurisdiction over trade—the Senate Finance Committee and the House Ways and Means Committee—of its intention to enter into negotiations of an FTA, and the expedited procedures could be denied if either committee disapproved.²⁹

The Omnibus Trade and Competitiveness Act of 1988 included the version of TPA that was in place when NAFTA was signed and implemented.³⁰ This TPA included more trade negotiation objectives than previous versions.³¹ These objectives did not, however, include any environmental provisions; the only mention of the environment is that “[i]n pursuing the negotiating objectives [related to trade in services and foreign direct investment] United States negotiators shall take into account legitimate United States domestic objectives including, but not limited to, the protection of essential . . . environmental . . . interests and the law and regulations related thereto.”³²

TPA lapsed in 1994, after it was used to implement the Uruguay Round of negotiations under the GATT. This was the negotiation round that established the World Trade Organization—a robust international organization with legislative, adjudicative, monitoring and administrative functions.³³ Among the tensions between the Clinton administration and Republicans in Congress that prevented reauthorization was the role of environmental and labor protections.³⁴

TPA was not renewed until the Bipartisan Trade Promotion Authority Act of 2002 (“TPA 2002”), which included additional language on the environment and labor.³⁵ Though this was the most recent TPA legislation enacted before the current version, one other historical development is important to note. The vote on the 2002 bill was largely split along party lines, particularly in the House, with most Republicans in favor and most Democrats opposed, and TPA 2002 was used to implement several controversial FTAs.³⁶ Partisan trade tensions grew over the years, until TPA 2002 was “modified” by the May 10, 2007 bipartisan “Understanding,” which called for, *inter alia*, more robust environmental provisions in trade agreements.³⁷ These provisions ultimately entered into statutory law through inclusion in TPA 2015.

28. Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948 (1984).

29. *Id.*

30. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

31. *Id.* § 1101.

32. *Id.* § 1101(b)(9)(b), (11)(B).

33. ABOUT WTO, https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Nov. 18, 2018).

34. FERGUSSON, *supra* note 15, at 7.

35. *Id.* at 8.

36. These were FTAs with Chile, Singapore, Australia, Morocco, the Dominican Republic, a group of Central American countries, Bahrain, Oman, Peru, Colombia, Panama, and South Korea. FERGUSSON, *supra* note 15, at 7.

37. *Id.* at 10.

C. TRADE PROMOTION AUTHORITY'S PROCEDURES AND REQUIREMENTS

There are general procedural requirements that must be fulfilled for the bill implementing a trade agreement to receive expedited consideration and the mechanics of that expedited process. First, the President must notify Congress at least ninety days before beginning negotiations. The notification must include a description of the objectives of the negotiations.³⁸ Once an agreement has been reached, the President must notify Congress at least ninety days prior to signing.³⁹ The President must also submit, within sixty days of signing the agreement, a description of changes in existing U.S. law that are considered necessary pursuant to the agreement.⁴⁰ At least thirty days before submitting the draft implementing bill, the President must submit a copy of the final legal text of the agreement and a draft "statement of any administrative action" proposed to implement it.⁴¹

When the President ultimately submits the draft implementing bill, it must be accompanied by a copy of the final legal text of the agreement, the final statement of administrative action, an explanation of how the implementing bill and the statement of administrative action change existing law, and an explanation of how the implementing bill complies with the various negotiating objectives and other content requirements under TPA.⁴² This statement must assert "that the agreement makes progress in achieving the applicable purposes, policies, priorities, and objectives of the Act," explain how, clarify whether the agreement changes provisions of "an agreement previously negotiated," and explain how the agreement "serves the interests of United States Commerce."⁴³

Several additional reports and notifications are also required:

- To Congress as a whole
 - A plan for implementing and enforcing the agreement and describing the impact of increases in trade on state and local governments⁴⁴
 - At least thirty days before the agreement enters into force, a determination that the other country or countries have taken measures to be in compliance with the agreement when it comes into force⁴⁵
- To the Senate Finance and House Ways and Means Committees
 - A report on environmental reviews of future trade and investment agreements⁴⁶

38. BCPTAA § 10 5(a)(1)(A).

39. *Id.* § 106(a)(1)(A).

40. *Id.* § 106(a)(1)(C).

41. *Id.* § 106(a)(1)(D).

42. *Id.* § 106(a)(1)(E), (2).

43. *Id.*

44. *Id.* § 105(e)(2)(D).

45. *Id.* § 106(a)(1)(G).

46. *Id.* § 105(d)(1), (2).

- Reviews of the impact of future trade agreements on U.S. employment, including labor markets⁴⁷
- A report on the “content and operation” of consultative mechanisms established to promote capacity to address environmental and health issues⁴⁸
- A report on labor rights in the countries participating in the trade agreement and on changes in U.S. labor laws required by the agreement⁴⁹
- To the International Trade Commission
 - At least ninety days before entering into the agreement, “the details of the agreement as it exists at that time,” after which the President is to “keep the Commission current” on the matter⁵⁰
 - The International Trade Commission must then, within 105 days after the agreement is signed, report to Congress and the President on the likely impact of the agreement on the U.S. economy “and on specific industry sectors,” including a review of “empirical literature . . . regarding the agreement”⁵¹
- To the public
 - At least thirty days before the start of negotiations, a statement of the objectives of the negotiations⁵²
 - At least sixty days before entering into the agreement, the text of the agreement⁵³
- To the President, Congress and the U.S. Trade Representative
 - The Advisory Committee for Trade Policy and Negotiations must report “to what extent it promotes the economic interests of the United States and achieves the applicable . . . objectives”⁵⁴

There are also consultation requirements with various congressional committees, advisory groups, and the public.⁵⁵ As is clear, these procedural requirements are extensive, and Congress’ main check on the President is the ability to withhold the expedited procedures if it determines that these reporting requirements are not satisfied.⁵⁶ Accordingly, the impact of TPA is likely to vary depending on the relationship between Congress and the executive branch at the time.

If the various requirements are deemed by Congress to be satisfied, the implementing bill is automatically introduced in both chambers and referred to the House Ways and Means Committee and the Senate Finance Committee.⁵⁷ The

47. *Id.*

48. *Id.* § 105(d)(1)(B).

49. *Id.* § 105(d)(3).

50. *Id.* § 105(c)(1).

51. *Id.* § 105(c)(2)–(4).

52. *Id.* § 105(a)(1)(D).

53. *Id.* § 106(a)(1)(B).

54. *Id.* § 105(b)(4).

55. *Id.* §§ 104, 105.

56. *Id.* § 106(b)(1)(A).

57. Trade Act of 1974, *supra* note 21, § 151(c).

committees have forty-five session days to report the bill back to the floor and may not amend it or recommend amendments.⁵⁸ If either committee does not report after forty-five days the bill is automatically made available for floor action.⁵⁹

Once the bill is made available, it may be called up for consideration by a non-debatable motion by any Member.⁶⁰ This means that, in the House, no special rule from the Committee on Rules is necessary in order to bring the bill to the floor and, in the Senate, Senators need not defer to the majority leader to call up the bill, and no super-majority vote is needed to limit debate on a motion to consider the legislation.⁶¹ The bill is passed by a majority vote of both houses.

II. LINKING TRADE AND THE ENVIRONMENT

As discussed above, the requirements to be eligible for this expedited process have evolved over time to incorporate environmental provisions. The connection between trade and the environment was and remains controversial. This Note does not attempt to enter into the debates about the extent of the impacts of international trade on the environment or whether environmental provisions are the optimal tool to manage those impacts. However, the gradual strengthening of environmental provisions in TPA is an acknowledgement that some impacts do exist, and environmental provisions in trade agreements are at least one tool among many with which to address those impacts.

Peter Lallas has provided a useful typology of the different categories of environmental impacts from trade.⁶² These categories are (1) regulatory effects, (2) life-cycle product effects, (3) economic development effects, (4) pollution havens and competitiveness effects, and (5) effects of intergovernmental cooperation.⁶³

Regulatory effects refer to the potential for trade agreements to weaken or be used to challenge domestic environmental rules.⁶⁴ Trade agreements have, in fact, been used to challenge domestic environmental laws.⁶⁵ With that possibility comes the risk of a regulatory chilling effect, where regulation that otherwise would have been created is not because of the fear of violating a trade

58. *Id.* § 151(e)(3).

59. *Id.* § 151(e)(2).

60. *Id.* § 151(f), (g).

61. *Id.* § 151.

62. Peter M. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L. ENVTL. L. REV. 519 (1993).

63. *Id.* at 524.

64. *Id.*

65. See, e.g., Panel Report, *United States-Restrictions on Imports of Tuna*, GATT Doc.DS21/R (Sept. 3, 1991) (not adopted by the GATT Council) (determining that U.S. import restrictions on tuna to protect dolphins from incidental kill during purse seine fishing operations violated the GATT).

agreement.⁶⁶ In addition, many modern trade agreements espouse the goal of regulatory harmonization, and it may be that the only way to harmonize environmental rules is for the member countries to adopt those of the “lowest common denominator.”⁶⁷

Life-cycle product effects are “the effects on health or the environment that result from the physical characteristics of a product per se (for example, risk of cancer from a pesticide).”⁶⁸ Increased trade can increase the harms originating from a product if they are not effectively managed by the domestic regulation of member states.⁶⁹ It may also be that the production processes have their own set of impacts beyond the product itself.⁷⁰ Again, increased trade in that product increases the strain on the relevant domestic regulatory systems.⁷¹

Economic development effects are “the environmental, health and ecosystem impacts associated with scale and structural changes in economic development resulting from trade and investment rules and activities.”⁷² Increased trade has impacts on different sectors in an economy and can promote growth in the economy as a whole. Economic development effects are especially difficult to assess, and there is not necessarily either a positive or negative correlation between economic development and environmental impacts.⁷³

Pollution havens and competitiveness effects relate to the potential that liberalized trade may “encourage industries in more regulated jurisdictions to migrate to the ‘pollution havens’ of less-regulated jurisdictions as a means of reducing compliance costs.”⁷⁴ Relatedly, governments may be tempted to reduce environmental regulations to attract industries.⁷⁵

Finally, trade agreements may create mechanisms for intergovernmental cooperation that have positive effects on the environment. These mechanisms may provide for knowledge sharing, capacity building, environmental monitoring, and policy coordination. The environmental side agreement of NAFTA created one of these mechanisms for international cooperation: the Commission for Environmental Cooperation.⁷⁶

66. Lallas, *supra* note 62, at 524.

67. *Id.* at 525.

68. *Id.* at 526.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 530–31.

73. The Kuznet’s curve hypothesis suggests that environmental harms increase to a point as an economy develops and then taper off as increased wealth is used to manage environmental harms.

74. Lallas, *supra* note 62, at 534.

75. *Id.*

76. COMMISSION FOR ENVIRONMENTAL COOPERATION, <http://www.cec.org> (last visited Nov. 18, 2018).

Because of this variety in the types of impacts international trade can have on the environment, there is no one-size-fits-all approach to policymaking in this area. Current requirements under TPA begin to address some of these linkages.

III. HOW TRADE PROMOTION AUTHORITY ADDRESSES THE ENVIRONMENT

TPA 2015 addresses the environment through three main categories of environmental provisions. These are (1) negotiating objectives related to the environment, (2) environmental reviews, and (3) consultation requirements. These categories are discussed in this Part.⁷⁷

A. NEGOTIATION OBJECTIVES ON THE ENVIRONMENT

The Trade Negotiating Objectives in TPA 2015 are divided into Overall Trade Negotiating Objectives,⁷⁸ Principle Negotiating Objectives,⁷⁹ and Capacity Building and Other Priorities.⁸⁰ The Overall Negotiating Objectives on the environment are “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,”⁸¹ and “to seek provisions in trade agreements under which parties to those agreements ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade.”⁸²

The first of the Principle Negotiating Objectives is “to ensure that a party to a trade agreement with the United States . . . adopts and maintains measures implementing . . . its obligations under common multilateral environmental agreements (as defined in section 11(6)).”⁸³ The agreements include the following:⁸⁴ The Convention on International Trade in Endangered Species of Wild Fauna and Flora; The Montreal Protocol on Substances that Deplete the Ozone Layer; The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships; The Convention on Wetlands of International Importance Especially as Waterfowl Habitat; The Convention on the Conservation of Antarctic Marine Living Resources; The International Convention for the Regulation of Whaling; and The Convention for the Establishment of an Inter-American Tropical Tuna Commission.

77. It is important to note that these provisions are not the only ones that have potential environmental implications. Measures on agriculture, health and safety standards, and many other issues have important environmental consequences. These consequences are, however, very complex and are beyond the scope of this Note. These issues fall under the general TPA framework already discussed, but particular provisions of the TPA on these issues should be examined in more detail.

78. BCTPAA § 2(a).

79. *Id.* § 2(b).

80. *Id.* § 2(c).

81. *Id.* § 2(a)(5).

82. *Id.* § 2(a)(7).

83. *Id.* § 2(b)(10)(A)(i).

84. *Id.* § 11(6)(B).

The US and the other parties can also agree to include “any other multilateral environmental or conservation agreement to which they are full parties.”⁸⁵

Taken together, the next two Principle Negotiating Objectives are arguably the most practically significant. They require provisions

to ensure that a party to a trade agreement with the United States . . . does not waive or otherwise derogate from, or offer to waive or otherwise derogate from . . . its environmental laws in a manner that weakens or reduces the protections afforded in those laws and in a manner affecting trade or investment between the United States and that party, except as provided in its law and provided not inconsistent with its obligations under common multilateral environmental agreements . . . or other provisions of the trade agreement specifically agreed upon.⁸⁶

They also require provisions

to ensure that a party to a trade agreement with the United States . . . does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the United States and that party after entry into force of a trade agreement between those countries.⁸⁷

These two objectives, read together, are important because they give teeth to the requirement to implement the various multilateral treaties, and they also directly address two concerns related to the pollution haven and competitiveness effects discussed in Part II of this Note. In effect, these provisions make clear that under-protective environmental laws are not a permissible comparative advantage in international trading relationships.

There are also several additional objectives related to increased environmental protection, including “to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;”⁸⁸ “to reduce or eliminate government practices or policies that unduly threaten sustainable development;”⁸⁹ and “to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services.”⁹⁰

These objectives are limited, however, by objectives that aim to circumscribe the reach of environmental regulations. For example, set against the requirement for enforcement of domestic environmental laws is the requirement

85. *Id.* § 2(b)(11)(6)(C).

86. *Id.* § 2(b)(10)(A)(ii)(II).

87. *Id.* § 2(b)(10)(A)(iii).

88. *Id.* § 2(b)(10)(C).

89. *Id.* § 2(b)(10)(D).

90. *Id.* § 2(b)(10)(F).

to recognize that . . . with respect to environment, parties to a trade agreement retain the right to exercise prosecutorial discretion and to make decisions regarding the allocation of enforcement resources with respect to other environmental laws determined to have higher priorities, and a party is effectively enforcing its laws if a course of action or inaction reflects a reasonable, bona fide exercise of such discretion, or results from a reasonable, bona fide decision regarding the allocation of resources.⁹¹

There must also be provisions “to ensure that labor, environmental, health, or safety policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade,”⁹² and “to ensure that a trade agreement is not construed to empower a party’s authorities to undertake labor or environmental law enforcement activities in the territory of the United States.”⁹³

Most dramatically, Republicans in the House of Representatives successfully added an objective “to ensure that trade agreements do not require changes to U.S. law or obligate the United States with respect to global warming or climate change, other than those fulfilling the other negotiating objectives.”⁹⁴ The U.S. negotiating partners in FTAs have often been developing countries, which might not be expected to prioritize climate commitments. However, this might be an important limitation in future negotiations with partners like the European Union, Japan, and the United Kingdom.

Finally, the U.S. must also “seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of United States trading partners to develop and implement standards for the protection of the environment and human health based on sound science,”⁹⁵ “to provide technical assistance to that country if needed,”⁹⁶ and “promote consideration of multilateral environmental agreements and consult with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing environmental exceptions under Article XX of GATT 1994.”⁹⁷

All of these objectives are underpinned by the requirement that environmental obligations be subject to the same dispute settlement system as the other obligations in trade agreements.⁹⁸ This requirement came about as a result of dissatisfaction with the alternative procedures under NAAEC.⁹⁹ Enforceability has

91. *Id.* § 2(b)(10)(B)(i).

92. *Id.* § 2(b)(10)(G).

93. *Id.* § 2(b)(10)(I).

94. IAN F. FERGUSSON & CHRISTOPHER M. DAVIES, CONG. RESEARCH SERV., RL 43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 15 (2018).

95. BCTPAA § 2(c)(2).

96. *Id.* § 2(c)(1)(B).

97. *Id.* § 2(c)(3)(A).

98. *Id.* § 2(b)(10)(H).

99. North American Agreement on Environmental Cooperation, art. 14, Sept. 8, 9, 12 & 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480.

become a crucial principle for environmental, as well as labor, norms and was prioritized in TPA 2015.

B. IMPACT ASSESSMENTS

The next set of requirements are those relating to impact assessments of potential trade agreements. Impact assessments have been an important tool in U.S. environmental policymaking since the passage of the National Environmental Policy Act (“NEPA”) in 1970.¹⁰⁰ Environmental impact assessments have also become ubiquitous at the international level and have been explicitly recognized in international instruments, including in the Rio Declaration on Environment and Development.¹⁰¹

However, in the early 1990s, the D.C. Circuit determined, in *Public Citizen v. United States Trade Representative*, that NEPA did not apply to the negotiation of trade agreements.¹⁰² For some, this was a welcomed decision, but, for many in the Democratic party, the decision only further exacerbated their skepticism of trade liberalization.

Despite the outcome of *Public Citizen v. United States Trade Representative*, an environmental impact assessment was, in fact, prepared for NAFTA.¹⁰³ Although the review was not as extensive as an environmental impact statement prepared pursuant to NEPA, it did identify “opportunities and vulnerabilities we could address in the context and framework of the negotiations. It gave [the EPA] a chance to highlight issues for the negotiators at a time in the process where something could still be done about them.”¹⁰⁴ The environmental review allowed for “integration of environmental concerns into a trade policy process traditionally dominated by commercial concerns” and “meaningful public involvement in the negotiation process.”¹⁰⁵

Recognizing the usefulness of environmental impact assessments, President Clinton issued Executive Order 13141 in 1999 requiring them in future trade negotiations.¹⁰⁶ The Executive Order announced that “[t]he United States will factor environmental considerations into the development of its trade negotiating objectives.”¹⁰⁷ It made impact assessments the joint responsibility of the United States Trade Representative (“USTR”) and the Council on Environmental

100. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

101. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf.151/26, ¶ 17 (Aug. 12, 1992).

102. 5 F.3d 549, 551–553 (D.C. Cir. 1993).

103. James Salzman, *Seattle’s Legal Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501, 509 (2001).

104. *Id.* at 510 (quoting a letter from Dan Etsy, Professor, Yale Law School (Sept. 15, 2000)).

105. *Id.* at 504.

106. Exec. Order No. 13,141, 64 Fed. Reg. 63169 (Nov. 16, 1999), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=56947> (last visited Nov. 18, 2018).

107. *Id.* § 1.

Quality (“CEQ”) and required that they be conducted early enough in the process so they would inform negotiations.¹⁰⁸ It also required that the USTR and the CEQ issue guidelines detailing the process for reviews.¹⁰⁹

The review begins with a scoping process. The two components of the scoping process are (1) identification of issues and (2) selection and prioritization of issues for review.¹¹⁰ Reviews are typically focused on environmental impacts within the United States, but during the scoping process, the reviewer may also determine if it is appropriate to consider global or transboundary impacts.¹¹¹

With the complexity of environmental impacts, an environmental review is never going to be able to perfectly quantify the impacts or even give a comprehensive qualitative description. Nevertheless, reviews offer value by forcing attention on these environmental issues as part of the policymaking process.¹¹² In recognition of their value, TPA 2002 and then TPA 2015 made the executive order and the implementing guidelines statutory law.¹¹³

C. CONSULTATION REQUIREMENTS

TPA 2015 includes a number of consultation requirements with various members of Congress, advisory bodies, and the public at large.¹¹⁴ The USTR was also required to issue guidelines for consultation with these groups, and it did in a combined document, *Guidelines for Consultation and Engagement*.¹¹⁵ The consultation processes with each group are discussed below.

1. Consultation with Congress

Consultation with Congress is facilitated by a dedicated advisory group on negotiations in each house—the House Advisory Group on Negotiations, chaired by the chairman of the Ways and Means Committee, and the Senate Advisory Group on Negotiations, chaired by the chairman of the Finance Committee.¹¹⁶ The USTR must conduct consultations with these committees at various stages of the negotiation process.¹¹⁷

108. *Id.* §§ 3, 5(a)(iii).

109. Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements, 65 Fed. Reg. 79,442 (Dec. 19, 2000).

110. *Id.* at 79,445.

111. Exec. Order No. 13,141, *supra* note 106, § 5(b).

112. Salzman, *supra* note 103, at 509–10.

113. Trade Act of 2002, Pub. L. No. 107-210, § 2102(c)(4), 116 Stat. 933, 994 (2002); Defending Public Safety Employees’ Act, Pub. L. No. 114–26, § 105(d)(1), 129 Stat. 319, 349 (2015).

114. Defending Public Safety Employees’ Act, *supra* note 113, at § 104(a)–(d).

115. OFFICE OF THE U.S. TRADE REPRESENTATIVE, GUIDELINES FOR CONSULTATION AND ENGAGEMENT (2006), (hereinafter GUIDELINES FOR CONSULTATION AND ENGAGEMENT), available at <https://ustr.gov/sites/default/files/USSTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf>.

116. FERGUSSON & DAVIES, *supra* note 94, at 17.

117. Defending Public Safety Employees’ Act, *supra* note 113, § 105(a)(1).

Several additional requirements are used to increase congressional engagement with the negotiation process. For example, five members of the House Ways and Means Committee and five members of the Senate Finance Committee are designated by the Speaker of the House and the President Pro Tempore of the Senate respectively as advisors for negotiations.¹¹⁸ Also, TPA 2015 expressly requires that the USTR, upon request, provide Members and their appropriate staff as well as committee staff, access to pertinent documents relating to trade negotiations, including classified materials.¹¹⁹

2. Consultation with Advisory Bodies

The Trade Act of 1974 established a system of advisory bodies to consult on trade negotiations and policy, the idea being to receive input from subject matter experts.¹²⁰ TPA 2015 and the USTR's *Guidelines* describe schedules for consultation and other issues related to advisory body involvement in negotiations. Notably, all members of advisory bodies receive access to U.S. proposals and the negotiating text.¹²¹ The most important advisory body is the Advisory Committee for Trade Policy and Negotiations, whose members are appointed by the President.¹²² Unfortunately, the current Advisory Committee for Trade Policy and Negotiations does not include any members that could be considered representative of environmental interests.¹²³

There are also several policy and technical advisory bodies whose members are appointed by the USTR.¹²⁴ Today, there are five policy advisory committees focused on the environment, labor, agriculture, Africa, and state and local issues.¹²⁵ Technical advisory groups represent a "specific sector, commodity group, or functional area and provides technical advice concerning the effect that trade policy decisions may have on its respective sector or set of issue."¹²⁶ There are sixteen technical advisory committees focused on industry¹²⁷ and six focused

118. FERGUSSON & DAVIES, *supra* note 94, at 116.

119. Defending Public Safety Employees' Act, *supra* note 113, §104(a)(1)(B).

120. 19 U.S.C. § 2171(e)(2) (2012).

121. GUIDELINES FOR CONSULTATION AND ENGAGEMENT, *supra* note 115, at 10.

122. 19 U.S.C. § 2155(b).

123. OFFICE OF THE U.S. TRADE REPRESENTATIVE, ADVISORY COMMITTEE FOR TRADE POLICY AND NEGOTIATIONS MEMBERS (2018), <https://ustr.gov/about-us/advisory-committees/advisory-committee-trade-policy-and-negotiations-actpn>.

124. 19 U.S.C. § 2155(c).

125. Respectively, the Trade and Environment Policy Advisory Committee, the Labor Advisory Committee for Trade Negotiations and Trade Policy, the Agricultural Policy Advisory Committee, the Trade Advisory Committee for Africa, and the Intergovernmental Policy Advisory Committee. GUIDELINES FOR CONSULTATION AND ENGAGEMENT, *supra* note 115, at 11.

126. *Id.*

127. Aerospace Equipment; Automotive Equipment and Capital Goods; Chemicals, Pharmaceuticals, Health/Science Products and Services; Consumer Goods; Distribution Services; Energy and Energy Services; Forest Products; Information and Communication Technologies Services and Electronic

on agriculture.¹²⁸

3. Consultation with the Public

The principles for public engagement fall into two main categories: transparency and participation. A central tension defines the policies for each:

The Administration's objective is to provide for timely disclosure of information in forms that the public can readily find and use and to provide timely opportunities for public input. At the same time, the United States must maintain an appropriate level of confidentiality during negotiations to create the conditions necessary for negotiators to communicate with a high degree of candor and creativity and to execute on the most effective negotiating strategies.¹²⁹

In order to increase transparency, the USTR's *Guidelines* commit to timely release of information, public release of various reports, online publication of the negotiated text no later than sixty days before signature, publication of negotiation objectives at least thirty days before negotiation begins, and ongoing engagement with the press.¹³⁰ In order to increase participation, the *Guidelines* commit to soliciting public comment through *Federal Register* notices at various stages, holding ongoing hearings, conducting stakeholder events, using various mechanisms of digital outreach, and publishing a schedule of USTR events.¹³¹

IV. THE CASE FOR PRESERVING AND REFORMING TRADE PROMOTION AUTHORITY

Trade promotion authority was created to facilitate the execution of trade agreements, which are, by definition, aimed at increasing trade. For those who consider trade necessarily antithetical to environmental protection and who privilege environmental goals above other policy objectives that might be achieved through a trade agreement, such as economic development, environmental provisions in TPA will always be insufficient. However, for those who believe that it is possible for productive trade and environmental policy to be created by and pursuant to a trade agreement, TPA offers important benefits relative to the default of treaty ratification with the advice and consent of the Senate and subsequent passage of implementing legislation.

Commerce; Non-Ferrous Metals and Building Materials; Services and Finance Industries; Small and Minority Business; Steel; Textiles and Clothing; Customs Matters and Trade Facilitation; Intellectual Property Rights; and Standards and Technical Trade Barriers. *Id.*

128. Animals and Animal Products; Fruits and Vegetables; Grains, Feed, and Oilseeds; Processed Foods; Sweeteners and Sweetener Products; and Tobacco, Cotton, Peanuts, and Planting Seeds.

129. GUIDELINES FOR CONSULTATION AND ENGAGEMENT, *supra* note 115, at 5.

130. *Id.* at 6–7.

131. *Id.* at 7–8.

First, and in the face of critiques that consider TPA undemocratic,¹³² TPA is arguably more democratic than the treaty ratification process. Both houses of Congress are given the chance to be consulted and vote on agreements. There are also built-in avenues for public participation. Finally, Congress has the opportunity, through the standard legislative process, to continuously refine negotiating objectives as TPA is periodically reauthorized.

Second, the treaty ratification process often fails to effectuate international agreements.¹³³ Agreements signed by the President can be and often have been held up indefinitely in the Senate or implementing legislation might never be passed. Steve Charnovitz explained,

[T]he Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 1989 . . . was consented to by the Senate in 1992 but remains unratified by the United States because . . . Congress has not approved implementing legislation A more common outcome is for the Senate to withhold consent while awaiting the adoption of such legislation. That is the predicament of the Stockholm Convention on Persistent Organic Pollutants of 2001 and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade of 1998. In other instances, an environmental convention is sent to the Senate for consent but never brought to a vote. That happened to the Convention on Biological Diversity of 1992, a widely ratified treaty with 188 state parties.¹³⁴

Third, TPA requires the implementation process to be incorporated into the negotiation process. Members of Congress, the President, the agencies, and the public have access to information about how the trade agreement will change U.S. law and administrative processes before the agreement is even signed. With treaty ratification, implementing legislation can and often is passed well after the agreement is signed.

These benefits are not the end of the story, however. The inclusion of environmental issues in trade agreements and their negotiation can be invoked by policy-makers for legitimacy, so it is crucial that this legitimacy is warranted. In other words, the provisions that are included in the name of environmental protection must be effective to deserve the support of environmental advocates. There is simply not enough evidence-based research to say whether the current negotiating objectives are useful or whether an alternative set of norms would have a greater impact. This is a crucial question that scholars and advocates should consider as TPA 2015 expires in 2021.

Similarly, the complex and dynamic impacts of trade liberalization on the environment need to be rigorously assessed and modeled. To what extent have past

132. *Fast Track*, *supra* note 14.

133. Steve Charnovitz, *supra* note 24, at 697.

134. *Id.* at 698.

trade agreements had detrimental consequences on the ability to regulate in the public interest? How exactly does trade liberalization affect the environmental impacts of products and their production? Does increased economic development increase or decrease environmental harms? Or does it depend? If it depends, what does it depend on? To what extent has the desire to attract industry encouraged regulators, at home and abroad, to erode environmental standards?

As in any policy space, good environmental outcomes require proactive engagement.¹³⁵ The answers to these questions need to be made accessible to trade policymakers in understandable forms. This suggests one specific area for reform: environmental reviews.

James Salzman has identified several helpful criteria with which to evaluate environmental reviews of trade agreements. These include timing of the environmental review, agency responsibility and resources, public participation, scope of impacts, and whether reviews are proactive or reactive.¹³⁶ Each of these aspects involve agency decisions that influence the effectiveness of a review.

For some of these criteria, existing USTR practice is relatively effective. For example, timing. Executive Order 13141 called for environmental reviews to be conducted “sufficiently early in the process to inform the development of negotiating positions.”¹³⁷ USTR has typically issued both interim and final reviews. As part of the initial scoping process and after the release of interim reviews, USTR solicits public comments.¹³⁸ As with the phased consultation process under NEPA, staged consultation in environmental reviews of trade agreements allows for information-sharing and adaptation.

Two related criteria against which USTR has been less successful are the scope and posture of reviews. Environmental reviews have been resistant to address global or transboundary impacts, in part out of concern that it is the negotiating partner that is responsible for assessing and making determinations about the environmental impacts in its territory that it considers tolerable. It is most certainly true that trade negotiators are ultimately not responsible for making decisions for their counterparts. However, the drive to include environmental provisions in trade agreements is evidence that environmental impacts abroad matter to domestic constituencies. A more comprehensive, forward-looking and collaborative environmental review process need not be an affront to the sovereignty of the United States’ negotiating partners but would instead be an acknowledgement of the global interconnectedness that trade agreements respond to and seek to extend.

135. See Salzman, *supra* note 103, at 504.

136. *Id.* at 524–35.

137. Exec. Order No. 13,141, *supra* note 106.

138. Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements, 65 Fed. Reg. 79,442, 79,445 (Dec. 19, 2000); *see, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINAL ENVIRONMENTAL REVIEW OF THE UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT (2004).

The current TPA blueprint for negotiation objectives, environmental reviews, and consultation requirements provides a strong framework. Before another version of TPA is passed by Congress, it is crucial to critically evaluate current practice in each of these mechanisms to identify meaningful options for improvement.

CONCLUSION

In 1999, the biennial World Trade Organization Ministerial Conference was derailed by fierce protests, many of whom were environmental advocates concerned about the impact of international trade and globalization more generally on the environment. Robert Zoellick, who would become the U.S. Trade Representative in 2001, recalled,

Clinton wanted us to “listen” to the demonstrators. I did. It turns out that the protestors’ arguments were contradictory: They wanted both to blow up the WTO and to have the WTO establish a host of global rules to dictate social, economic, political and environmental conditions around the world. They have managed, astonishingly, to combine the aims of the unilateralists—who believe the United States can order everyone else in the world to do what we want—with those of the globalists—who believe national governments are illegitimate and must be superseded by “wise” nongovernmental organizations.¹³⁹

Zoellick was very likely caricaturing a group of advocates, each of whom had likely come to different conclusions about the proper balance between “unilateralism” and “globalism.” However, his apparent frustration raises an important point: trade policymakers are often unable to discern clear positions and demands from environmental advocates. Advocates need to be able to communicate objectives in a manner that is comprehensible to and actionable upon by negotiators. This Note has examined an array of mechanisms for such engagement with trade negotiations. Each presents opportunity to ensure that “trade and environment” policy-making actually achieves environmental protection.

139. Morton K. Kondracke, *Battles in Seattle Make Free Trade an Election Issue*, ROLL CALL, Dec. 9, 1999.