PRESIDENTIAL TRADE PROMOTION AUTHORITY

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ABSTRACT

This commentary traces the historical origin and nature of presidential trade promotion authority in the context of the GATT and later through the aegis of the WTO and its relationship to congressional authority under the Commerce Clause. The paper looks at issues relating to "fast track authority" [so-called "Fast Track I"] in the context of NAFTA and the use of "Fast Track II" authority in conjunction with other trade agreements. The paper analyzes TPA/Fast Track procedures and focus on the 2007 Congressional "grand Bargain" under which authority which had technically expired, was used in some recent trade negotiations.

1. INTRODUCTION

On October 30, 1947, delegates from twenty-three countries signed a monumental international trade agreement, *The General Agreement on Tariffs and Trade,*[1] known as the GATT. The actual agreement came into force on January 1, 1948. The drafters of GATT primarily addressed five types of border barriers to imports: tariffs, quotas, subsidies, "state" trading, and customs procedures. The GATT was intended to operate as a provisional agreement—in effect, a bridge between the immediate period following World War II and a date in the future in which the *Charter for the International Trade Organization* or ITO would be adopted. Because the framework negotiations for the creation of the ITO were concluded in Havana, Cuba, that document is often referred to

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[1] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. Negotiations for the original GATT involved 45,000 tariff concessions and $10 billion of trade, measured by pre-war 1938 prices. But for the fact that the Soviet Union withdrew from the GATT for ideological reasons, there would have been 24 original contracting parties.

as the "*Havana Charter*."[2] The GATT itself had been negotiated in two separate sets of meetings which took place in 1946-1947. These meetings included:

- The First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, held in London, from October 15 to November 2, 1946, also known as the *London Preparatory Conference*;
- The Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, held in Geneva, from April 10 to October 30, 1947, also known as the *Geneva Preparatory Conference*.

From the outset, presidential leadership in the United States—or sometimes a lack of it—has been evident in international trade matters. The ITO never came into existence, "largely because President Harry S. Truman elected not to submit it to the Senate for advice and consent. GATT was left to govern that system."[3] Professor Raj Bhala notes that adherents to a view of a more limited role of the United States in world affairs "had little interest in, and considerable suspicion of, committing America to yet another international organization (in addition to the Bretton Woods institutions, the International Monetary Fund, and the World Bank)."[4] Thus, from the outset of the

[2] *See* Havana Charter, www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm (last visited Dec. 20, 2011).

[3] RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 6 (2008). In fact, by the end of 1950, President Truman had announced that he would no longer seek congressional approval of the ITO, even though the United States had been the leading country in taking the initiative to develop the ITO, as well as the GATT. *See generally* SUSAN A. AARONSON, TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY (1996).

[4] BHALA, *supra* note 3. The Bretton Woods Agreement itself was negotiated in July of 1944 in Bretton Woods, New Hampshire, and came into effect on December 27, 1945. The GATT itself was not formed at the Bretton Woods Conference, however, "the participants at the conference nevertheless contemplated the necessity of an international trade organization, or ITO." JOHN H. JACKSON, *The Bretton Woods System and Its Context*, *in* THE WORLD TRADING SYSTEM 31 (3d ed. 1997).

Concerning the issue of presidential authority in international trade matters, it is interesting to note that in 1936, the United States Supreme Court propounded a theory that the President of the United States possessed certain "inherent powers" over foreign affairs that do not depend on the Constitution. "A significant question that arises in the affairs arena is whether the President has powers as head of state that are independent of those powers derived from the Constitution." *See* RUSSELL L. WEAVER, ET AL., CONSTITUTIONAL LAW: CASES, MATERIALS, & PROBLEMS 283 (3d ed. 2011). *See also* United States v. Curtiss Wright Exp. Co., 299 U.S. 304 (1936) (concluding that there was a distinction *where* the President was acting, stating that the President's role in foreign affairs was both plenary and inherent, with the President serving as the representative of the entire nation). This view, however, is not universally appreciated. *See* Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972). For example, in 1953, the Fourth Circuit Court of Appeals held that the Executive Branch had exceeded presidential authority in entering into an agreement with Canada concerning the importation of potatoes into the United States. United States v. Guy Capps, Inc., 204 F.2d 655 (4th Cir. 1953). The United States Supreme Court affirmed the decision, but did so on other grounds. Professor Bernard Schwartz suggests that there is historical evidence that the Supreme Court intended to avoid taking a direct position on the issue of presidential power in the context of this case. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—JUDICIAL BIOGRAPHY 165-66 (1983).

creation of the GATT, international trade has often been embroiled in a sometimes toxic mixture of economic and domestic political concerns.

Under the United States Constitution, found in Article I, Section 3, Clause 8, Congress has the power to regulate foreign trade.[5] Because of the practicalities of negotiating a detailed bilateral or multilateral trade agreement, Congress has delegated this authority to the President of the United States. As noted by Theresa Wilson:

> Congress has explicit power regarding foreign commerce under Article I, Section 8 of the Constitution. The President's authority in this area, constitutionally speaking, is limited to treaty making and the execution of laws relating to foreign commerce. Yet Presidents throughout the nation's history have exercised some powers within the area of foreign commerce, thanks to the delegation of foreign commerce power by Congress and the sympathetic ears of the Supreme Court.[6]

As a result, the process of negotiating international trade agreements with the United States as a participant involves a delicate balancing of the prerogatives of both the Executive and Legislative branches of the United States government. Professor Jackson states it in this way: “The power struggle between the branches of the U.S. government, however is precisely what the Founding Fathers contemplated. They viewed it as a system of ‘checks and balances’ that would prevent any one branch from becoming too powerful.”[7] In typical fashion, the authority to negotiate a bilateral or a multilateral trade agreement is constrained by a finite *time limit*, and by specific *negotiating objectives* or conditions set by the legislative branch. In return for this delegation of the authority to negotiate trade agreements to the President, the President receives a binding commitment from the Congress that it will consider the outcome of any such negotiations under special procedural rules.

Trade Promotion Authority

Trade Promotion Authority, also known as TPA, is the construct under which trade agreements have been negotiated. Trade Promotion Authority is also called “fast track” authority. The statutory authority for the creation of “fast track” may be found in sections 151 through 154 of the Trade Act of 1974, as amended.[8] Congress first

[5] This provision is referred to as the Foreign Commerce Clause or the Interstate Commerce Clause. It gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, [and with the Indian Tribes]." U.S. CONST. art III, § 8.

[6] Theresa Wilson, *Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*, 47 DRAKE L. REV. 141, 146 (1998).

[7] JACKSON, *supra* note 4, at 81.

[8] 19 U.S.C. §§ 2191-94.). Sections 2103 through 2105 of the Trade Act of 2002 extended and conditioned their application. *See* 19 U.S.C. §§ 3803-05.

enacted a variant of fast track authority in the Trade Act of 1974. Pursuant to this grant of authority, Congress then enacted implementing legislation for the Trade Agreements Act of 1979, the United States-Israel Free Trade Area, the United States-Canada Free Trade Agreement, the North American Free Trade Agreement (NAFTA), and the Uruguay Round Agreements Act (URAA).[9] Congress used the Trade and Tariff Act of

[9] The Uruguay Round was perhaps one of more critical series of negotiations. Broadly speaking, the Uruguay Round tackled four priority subjects: trade in services; trade-related intellectual property measures (TRIPS); trade-related investment measures; and trade in agricultural goods. The Uruguay Round involved 118 contracting parties and covered $3.7 trillion in trade. It was launched in 1986 and the last day of substantial negotiations took place on December 15, 1993. These negotiations led directly to the creation of the World Trade Organization or WTO. The following are the main points of the Uruguay Round:

- All developed countries met the overall target percentage reduction of 33 1/3 percent, and some developed countries exceeded this target;
- Developed countries cut tariffs on industrial products from all sources [developed, developing, or least developed countries] by 40 percent, from a pre-Uruguay Round trade-weighted average of 6.3 percent to a post-Round trade-weighted average of 3.8 percent;
- Industrial products imported by developed countries from developing countries would be cut by 37 percent, from a pre-Uruguay Round trade-weighted average of 6.8 percent to a post-Round 4.3 percent;
- For such products from least developed countries, the cut was 25 percent, from a pre-Uruguay Round average of 6.8 percent to a post-Round average of 5.1 percent;
- Developed countries reduced tariffs on clothing and textiles, fish, and fish products—all exports from developing and least developed countries—by lower average amount than on other products;
- Developed contracting parties extended the scope of duty-free treatment for industrial products from 20 percent of these goods to 44 percent of these goods;
- Developed contracting parties agreed to reduce, *but not to eliminate*, tariff peaks above 15 percent; [In a tariff schedule, a single tariff or a small group of tariffs that are particularly high, often defined as greater than three times the average nominal tariff];
- Developing countries agreed to increase the scope of product categories subject to ceiling bindings [upper limitations] in key sectors such as clothing and textiles, and to narrow the gaps between bound [scheduled] and applied rates;
- Specifically, developing countries increased from 21 to 73 percent the number of industrial tariff lines subject to bound rates [maximum tariff rates], and transition economies agreed to increase this number from 73 to 98 percent.

For a discussion of the various classifications of countries, see Lynge Nielsen, *Classification of Countries Based on their Level of Development: How it is Done and How it Could be Done* (Feb. 2011), www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf. (last visited Dec. 20, 2011).

The World Bank notes:

> For operational and analytical purposes, the World Bank's main criterion for classifying economies is gross national income (GNI) per capita. In previous editions of our publications, this term was referred to as gross national product, or GNP…. Based on its GNI per capita, every economy is classified as low income, middle income (subdivided into lower middle and upper middle), or high income. Other analytical groups based on geographic regions are also used.

See World Bank, *How We Classify Countries*, http://data.worldbank.org/about/country-classifications (last visited Dec. 20, 2011). According to the World Bank, countries are classified as follows: low income; middle income (lower middle income and upper middle income); law and middle income; and high income.

1984[10] to revisit fast track. The fast-track procedures were amended to include the House Ways and Means Committee and the Senate Finance Committee, effectively as "gatekeeper committees."[11] The change required the President to provide notice to these committees of jurisdiction and to consult with them sixty days *prior* to entering into any free trade agreement.[12] Congress modified fast-track procedures yet again with the Omnibus Trade and Competitiveness Act of 1988.[13] The 1988 Act allowed Congress to "manipulate" extensions of fast track and to terminate fast-track procedures once they were already underway.[14]

The authority granted to the President was permitted to expire in 1994. Congress had extended the authority during the critical Uruguay Round of Trade negotiations, conducted under the aegis of the GATT[15] until December 15, 1993. President Clinton, who successfully championed NAFTA[16] in the face of substantial opposition from within

[10] Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948.

[11] *Id.* § 401(a).

[12] Professor Harold Koh argues that the 1984 Act significantly increased Congress's control over foreign commerce in three ways.

> First, either committee could take trade agreements off fast track or, in the alternative, kill the agreement, so the President had 'incentives to consult with the committee's members at each step of the process.' Second, the President was virtually required to keep the committees informed throughout the process, lest they should become unhappy with the final product. Finally, either chamber could vote down the agreement regardless of the committees' positions.

WILSON, *supra* note 6, at 171-72 (citing Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L 143, 146, 149 (1992)).

[13] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

[14] Koh, *supra* note 12, at 151.

[15] *See* Peterson Institute for International Trade, *NAFTA, GATT Uruguay Round and Fast Track 1998: A Brief Legislative History*, http://www.iie.com (last visited Dec. 20, 2011).

[16] The North American Free Trade Agreement or NAFTA is an agreement signed by the governments of Canada, Mexico, and the United States, creating a trilateral trade bloc in North America. The agreement came into force on January 1, 1994. NAFTA replaced the Canada–United States Free Trade Agreement between the U.S. and Canada. The stated goal of NAFTA was to eliminate barriers to both trade and investment between the US, Canada, and Mexico. The implementation of NAFTA brought the immediate elimination of tariffs on more than one half of U.S. imports from Mexico and more than one third of U.S. exports to Mexico. The agreement provided that within 10 years of the implementation of the agreement, all US-Mexico tariffs would be eliminated, except for some U.S. agricultural exports to Mexico that were to be phased out in 15 years. At the time NAFTA was enacted, most US-Canada trade was already duty free. NAFTA also sought the elimination of non-tariff trade barriers relating to product standards and purported environmental concerns. Non-tariff barriers include quotas, licenses, registration requirements, restrictive technical and sanitary standards, restrictive trading rights, restrictive distribution rights, and investment restrictions. For a full discussion of issues surrounding tariff and non tariff barriers,

his own Democratic Party (led, most especially, by Rep. Marcy Kaptur of Toledo, Ohio), and other "skeptics" of "free trade," tried unsuccessfully to win the renewal of trade negotiating authority in 1997 with Senate Bill 1269 and House Resolution 2621. In 1998, Senate Bill 2400 once again failed to secure passage.

"Fast track" authority became quite controversial in the decade of the 1990s—most especially after the passage of NAFTA. It quite literally became the "bête noire" of American trade unions and many environmental groups and agricultural organizations. However, presidential candidate George W. Bush highlighted "fast track" as an important part of his campaign platform in 2000. In May 2001, as then President, Bush argued strenuously that it was vital that the authority be renewed.

The passage of the renewal legislation in 2002 resulted from high political drama. Under extreme pressure from the Republican leadership in the House of Representatives, at 3:30 am on the morning of July 27, 2002, the House of Representatives narrowly passed the Trade Act of 2002 by a 215 to 212 vote, with 190 Republicans and 27 Democrats making up the majority. The bill passed a more-friendly United States Senate by a vote of 64 to 34 on August 1, 2002.[17]

2. FAST TRACK II

Under the second iteration of fast-track authority, Congress enacted implementing legislation for the United States-Chile Free Trade Agreement, the United States-Singapore Free Trade Agreement, the United States-Australia Free Trade Agreement, the United States-Morocco Free Trade Agreement, the Dominican Republic-Central America-United States Free Trade Agreement, the United States-Bahrain Free Trade Agreement, and the United States-Oman Free Trade Agreement. Ironically, even though fast track authority no longer exists, several other agreements have or may come to Congress under fast track under *prior* statutory authority, including the Peru Trade Promotion Agreement (Peru ratified on 28 June 2006), the Colombia Trade Promotion Agreement (President Bush notified Congress of his intent to ratify this agreement on 24 August 2006), a potential agreement with South Korea (the fourth round of talks is scheduled for Oct. 23-27, 2011), a potential agreement with Malaysia (the first round of talks were held in June 2006), and the US-Thailand Free Trade Agreement (on which negotiations have been on hold since January 2006).[18]

see, e.g., Richard J. Hunter, Jr. & Hector R. Lozada, *A Primer on Issues in International Trade*, 47 INT'L RES. J. FIN. & ECON. 99 (2010).

17 19 U.S.C. §§ 3801-13 (2002).

18 The authority to consider legislation will cover any implementing bills with respect to trade agreements entered into before July 1, 2007. *See* 19 U.S.C. § 3803(c)(1)(B). FTAs In Force: Australia,

Fast track authority again expired on July 1, 2007, without being renewed by Congress. A wide variety of groups joined in a pointed critique of fast track renewal. These groups included a collection of 713 environmental, farm and labor groups (most prominently, the AFL-CIO).

Fast Track Procedures

What were the main points of the now-defunct trade promotion authority authorized under the 2002 renewed legislation? The President, or more aptly his Trade Negotiator or Trade Representative,[19] negotiates a bilateral trade agreement. The

Bahrain, Chile, Colombia, DR-CAFTA, Israel, Jordan, Korea, Morocco, NAFTA, Oman, Panama, Peru, and Singapore.

Colombia's Congress approved the agreement and a protocol of amendment in 2007. Colombia's Constitutional Court completed its review in July 2008, and concluded that the Agreement conforms to Colombia's Constitution. The United States Congress then passed it on October 12, 2011. The agreement went into effect on May 15, 2012.

The United States-Korea Free Trade Agreement entered into force on March 15, 2012. At that point, nearly 80 percent of U.S. industrial goods exports to Korea are duty-free. These include aerospace equipment, agricultural equipment, auto parts, building products, chemicals, consumer goods, electrical equipment, environmental goods, travel goods, paper products, scientific equipment and shipping and transportation equipment. The United States sees benefits to it from the following:

- Nearly two-thirds of U.S. agricultural exports products will be duty-free including wheat, corn, soybeans for crushing, whey for feed use, hides and skins, cotton, cherries, pistachios, almonds, orange juice, grape juice and wine.
- Stronger protection and enforcement of intellectual property rights in Korea.
- Increased access to Korea's $580 billion services market for highly competitive American companies.

[19] The key agency in this regard, the Office of the U.S. Trade Representative [USTR], is one attached to the Executive Office of the President. Originally created in the 1962 Trade Expansion Act, the Office was upgraded to cabinet status in 1974. The office of USTR chairs many of the important intergovernmental committees and working groups which are responsible for formulating U.S. trade policy and for negotiating positions for the United States. These include the Trade Staff Committee and the cabinet-level Trade Policy Committee. The Office of the Special Trade Representative was created by Congress in the Trade Expansion Act of 1962 (19 U.S.C. § 1801) and implemented by President John F. Kennedy in Executive Order No. 11,075 on January 15, 1963 (28 Fed. Reg. 473). The Office of the USTR is authorized to negotiate all trade agreements under the Tariff Act of 1930 (19 U.S.C. § 1351) and the Trade Expansion Act of 1962. In 1980 the Office of the Special Trade Representative was renamed the Office of the U.S. Trade Representative [USTR]. As a general rule, the term USTR refers both to the agency and to the agency's head, who is designated as the U.S. trade representative. *See also* Executive Order No. 12,188 of January 4, 1980 (45 Fed. Reg. 989) (authorizing the USTR to set and administer overall trade policy and designating the USTR as the nation's chief trade negotiator and as the representative of the United States in major international trade organizations).

See also JOHN H. JACKSON, JEAN-VICTOR LOUIS & MITSUO MATSUSHITA, IMPLEMENTING THE TOKYO ROUND 172-73 (1984). Under the 1974 Trade Act, the USTR was charged with the responsibility

President must decide on the most opportune time to present any agreement to the Congress. If the President transmits a trade agreement to the Congress, then the majority leaders of the House and Senate or their designees or obligated by statute to introduce the implementing bill submitted by the President on the first day on which their House is in session.[20] The bill, however, as introduced, is not open to any change or amendment either in the relevant committee of jurisdiction or on the floor of the Senate or House.[21]

The committees of jurisdiction to which the bill has been referred have 45 days after its introduction to report the bill, or the committee will be automatically discharged. Both the House and the Senate must vote within 15 days after the bill is reported or discharged.[22] Since most trade legislation implicates tariffs or other revenue matters, the bill will be considered as a revenue bill. Thus, the bill must originate in the House of Representatives under the United States Constitution.[23] As such, the bill will be referred to the House Committee on Ways and Means.

Assuming that the implementing legislation originated in the House of Representatives, and after the Senate received the House-passed bill, the important Senate Finance Committee—the Senate committee of jurisdiction—has another 15 days to report the bill or be discharged. At that point, the Senate would have another 15 days to pass the bill.[24] The bill is debatable on the floors of both the House of Representatives and Senate floors for no more than 20 hours. As result, the bill is not subject to a filibuster in the United States Senate. The bill is subject to a simple majority vote on its final passage.[25] Thus, the entire period of consideration by the Congress should take no longer than 90 days.

3. THE MAY 2007 AGREEMENT

In May of 2007, a deal was struck between Democrats and Republicans in Congress—not on the core issue of renewal of TPA—but on several collateral matters: bilateral free trade agreements (FTAs) would be considered with Panama and Peru—but

of investigating allegations that U.S. commercial interests had been harmed by illegal or unfair actions of foreign governments, trying to obtain redress for U.S. citizens, and in the last instance, recommending any retaliatory actions to the president that were authorized by the statute. The 1974 statute was amended by the 1979 Trade Agreements Act, the 1984 Tariff and Trade Act, and the 1988 Omnibus Trade and Competitiveness Act.

[20] 19 U.S.C. § 2191(c).

[21] 19 U.S.C. § 2191(d).

[22] 19 U.S.C. § 2191(e)(1).

[23] *See* U.S. CONST. art I, § 7.

[24] 19 U.S.C. § 2191(e)(2).

[25] 19 U.S.C. §§ 2191(f)-(g).

not necessarily with Columbia or South Korea. The agreement is sometimes called the *Bipartisan Agreement on Trade Policy*.[26]

In addition, Congressional leaders agreed to include the following terms in the core text of all trade agreements:

- A commitment by each signatory to a FTA to "adopt, maintain, and enforce" in its domestic law the five International Labor Organization [ILO] core labor standards set forth in the 1998 ILO *Declaration on Fundamental Principles and Rights at Work*,[27] which include: (1) the freedom of association (including the right to organize); (2) the right to bargain collectively; (3) elimination of all forms of compulsory or forced labor; (4) effective elimination of child labor; and (5) elimination of employment and occupational discrimination.

- Authorization for a FTA party to condition central or sub-central government procurement contracts on adherence to the ILO Declaration.

- A commitment by each FTA party to "adopt, implement, and enforce" in its domestic laws the obligations contained in seven major multinational environmental agreements, including the *Convention on International Trade in Endangered Species* (CITIES)[28] and the *International Whaling Convention of 2nd December 1946.*[29]

- Enforcement of labor and environmental obligations through governmental action under regularized FTA dispute settlement provisions. In such cases, the burden of proof will be placed on a complaining government to demonstrate that the respondent has engaged in a "substantial or recurring course of action

[26] *See* Peter Tillman, *Partisanship in U.S. Trade Policy* (Jan. 23, 2008), www.policyinnovations.org/ideas/briefings/data/000024**.**

[27] *See Declaration*, INT'L LABOUR ORGANIZATION, http://www.**ilo**.org/**declaration**/lang--en/index.htm (last visited Dec. 20, 2011). *See also* Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *International Labor Standards and Trade: A Theoretical Analysis, in* FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 227-72 (1996).

[28] Convention on International Trade in Endangered Species [CITES] [of Wild Fauna and Flora, March 3, 1973, *available at* http://www.cites.org (amended June 22, 1979). *See also* Richard J. Hunter, Jr., Mark S. Blodgett & Hector R. Lozada, *A Primer on International Environmental Law: Sustainability as a Principle of International Law and Custom*, 15 ILSA J. INT'L & COMP. L. 15 (2008); Mark S. Blodgett & Richard J. Hunter, Jr., *The Environment and Trade Agreements: Should the WTO Become More Actively Involved?* 33 HASTINGS INT'L & COMP. L. REV. 1 (2010).

[29] *See* International Convention for the Regulation of Whaling, Dec. 2, 1946, *available at* http://www.iwcoffice.org/_documents/commission/convention_status.pdf.

or inaction"[30] with respect to any labor or environmental obligation having an impact on trade or investment.[31]

- A prohibition against any FTA party using inadequate resources or alternative priorities as a defense in a case in which it has been accused of failing to enforce labor laws relating to the core ILO *Declaration*.

- A "conflict of laws" provision that bars an FTA party from using as a defense an FTA provision in order to undermine any Multilateral Environmental Agreement (MEA) obligations, in a case in which an MEA affects performance of an FTA obligation.

- A prohibition against any FTA party lowering labor or environmental laws.

- Use of penalties for violations of labor or environmental obligations that are the same as for breaches of other FTA duties.

- Allowing for faster access to certain generic medicines, especially for residents of poor or developing countries which are parties to an FTA.[32] This will be accomplished by:

    1. modifying data exclusivity period, defined as the period during which the manufacturer of a generic drug is barred from using clinical test data from the innovating company, to five years in most cases;
    2. ensuring data exclusivity rules do not prevent a party from taking a measure to protect public health, or to invoke relevant WTO authorizations;
    3. eliminating any requirement that a drug regulatory agency withhold approval of a generic drug until it certifies marketing of the generic would not violate any existing patent; and

[30] *See* www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file73 (last visited May 18, 2011).

[31] For example, the Office of the United States Trade Representative (USTR) provided notice that on July 30, 2010, pursuant to the Labor Chapter (Chapter 16) of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), the United States requested consultations with the Government of Guatemala to discuss Guatemala's apparent failure to meet its obligation under Article 16.2.1(a) to effectively enforce its labor laws. *See* Letter from Ron Kirk, U.S. Trade Rep., to Erick Haroldo Coyoy Echeverria, Guatemala Minister of Economy (July 30, 2010), *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/kirk-solis-le. *See also* Notices, 75 Fed. Reg. 51869-70 (Aug. 23, 2010).

[32] For a discussion of the issues concerning compulsory licensing in developing countries, see, e.g., Richard J. Hunter, Jr., Hector R. Lozada, Frank Giarratano & Daniel Jenkins, *Compulsory Licensing: A Major IP Issue in International Business Today?* 11 EUR. J. SOC. SCI. 370 (2009).

4. removing any rules that obligate any FTA party to extend the term of a patent on a pharmaceutical product to account to delays in the process of approving the patent.

- Clarification that the United States has the full authority to bar a foreign company from operating an American port, based on national security considerations, and that the exercise of this authority may not be challenged under any FTA.[33]

It should also be noted that the deal struck between Congressional Democrats and Republicans included a substantial and detailed Strategic Worker Assistance and Training (SWAT) Initiative. SWAT extends beyond Trade Adjustment Assistance[34] and encourages education, training, and the portability of health and pension benefits for communities who have been injured by the effects of trade liberalization, trade agreements, and advances in technologies which have resulted in major employment dysfunctions for American workers.

IV. SOME TENTATIVE OBSERVATIONS

The May 2007 "deal" between Republican and Democratic members of Congress, enacted in the last two years of the Bush Administration, indicated that Congress clearly intended to reassert its Constitutional duty to regulate significant aspects of foreign trade. The agreement also referenced the declining authority of the Executive Branch over such matters. President Obama has indicated that he will not submit several important FTAs to the Congress unless his administration can certify compliance with the elements of the 2007 "Grand Bargain" struck in the Congress. With the great emphasis on international trade, it will be most instructive to see whether the delicate balance between the Executive and the Legislative branches will tip in favor of one side in the future. It is interesting to note that the issue of international trade was hardly mentioned during the presidential campaign of 2012.

[33] *See* Eben Kaplan & Lee Hudson Teslik, *Foreign Ownership of U.S. Infrastructure*, COUNCIL ON FOREIGN RELATIONS (Feb. 13, 2007), http:// www.cfr.org/business-and-**foreign**-policy/**foreign**-ownership-us-infrastructure/p10092.

[34] As found on the Department of Labor website: "Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) help trade-affected workers who have lost their jobs as a result of increased imports or shifts in production out of the United States. Certified individuals may be eligible to receive one or more program benefits and services depending on what is needed to return them to employment." *See Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) Services and Benefits*, U.S. DEP'T LAB. (Apr. 25, 2011), www.doleta.gov/tradeact/benefits.cfm. Benefits under TAA include: Rapid Response Assistance; Reemployment Services; Job Search Allowances; Relocation Allowances; Training; Training Waivers; and Health Coverage Tax Credits. Benefits under ATAA include: Rapid Response Assistance; Reemployment Services; Wage Subsidies for certain workers over age 50; and Health Coverage Tax Credits.