Delayed Ratification, TPP, and the United States

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In the United States, approval prospects may appear bleak for the Trans-Pacific Partnership Agreement ("TPP") – at least at present. The current political climate appears generally negative on trade, and even Vice President Joe Biden stated recently that he saw "less than an even chance" that TPP would be approved before the new U.S. president takes office in January 2017. Viewed in the context of other trade agreements and treaties, however, TPP's current prospects in the U.S. may not be surprising, and indeed may not prove fatal to the deal. In the past, the United States has delayed adoption of a number of trade agreements and treaties, sometimes for years. Such delay has not ultimately barred the later adoption of the agreement, however, or prevented the United States from at least observing an unratified agreement in practice.

Specifically, a number of trade agreements have faced an initial delay in adoption, but were eventually approved after certain adjustments were made. The United States-Korea Free Trade Agreement ("KORUS"), for example, languished for four years after it was signed, before the agreement finally received approval from the U.S. Congress. As the Office of the United States Trade Representative ("USTR") states, the agreement was signed in 2007 and approved four years later, after "the United States and Korea concluded new agreements . . . that provide[d] new market access and level[ed] the playing field for U.S. auto manufacturers and workers." The agreement finally entered into force the following year, after both parties had reviewed implementation measures.

The Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR") likewise faced a period of delay between signature and entry into force. The United States signed the agreement in 2004, but the agreement did not fully enter into force until 2009. As observed in USTR's 2010 National Trade Estimates Report, in 2008 the parties to this agreement amended several textile-related provisions of CAFTA-DR, "including, in particular, changing the rules of origin to require the use of U.S. or regional pocket bag fabric in originating apparel." The parties also entered into an agreement with Mexico for duty-free treatment of certain apparel goods. Thereafter, the agreement was adopted and entered into force. Thus for both KORUS and CAFTA-DR, an initial delay in adoption did not ultimately bar ratification of the agreement.

This phenomenon of delayed ratification has also affected agreements on topics other than trade and investment. In particular, agreements that are presented as treaties under U.S. law must be adopted by a two-thirds majority of the Senate, rather than the majority vote in both houses of Congress that is usually employed for trade agreements – and reaching the two-thirds majority required for the ratification of treaties can prove particularly difficult. The Convention on the Prevention and Punishment of the Crime of Genocide, for example, was signed by the United States in 1948 – but it was ratified only 40 years later, in 1988.

Indeed, for some agreements this two-thirds majority requirement has proven too much, and the United States has taken the approach of observing at least some provisions of the agreement in practice, even though it remains unratified. The United States has taken this approach with the Vienna Convention on the Law of Treaties ("VCLT"), for example. Although the United States has not ratified the VCLT, the United States considers many of its provisions to be customary international law on the law of treaties. As customary international law, these VCLT provisions would be binding on the United States in the international sphere, even without ratification. In domestic proceedings, the U.S. Executive Branch has referred to the VCLT as "the authoritative guide to treaty interpretation," and the United States has also relied on the VCLT in arguments before international tribunals, including panels of the World Trade Organization.

The United States likewise observes provisions the United Nations Convention on the Law of the Sea ("UNCLOS"), although the U.S. has not yet ratified the treaty. According to the U.S. Department of Defense's 2015 Asia-Pacific Maritime Security Strategy, "the United States operates consistent with" UNCLOS, and UNCLOS "reflects customary international law with respect to traditional uses of the ocean." A June 2015 Department of Defense Instruction regarding the use of international airspace likewise indicates that procedures for U.S. military aircraft operations are also consistent with UNCLOS. In fact, both the U.S. Department of State and the U.S. Department of Defense characterize joining UNCLOS a "top priority" and assert that the treaty would "advance[] a broad range of U.S. interests, including U.S. national security and economic interests." Despite these statements, however, UNCLOS remains unratified by the United States.

Thus, as UNCLOS and the VCLT demonstrate, then, a U.S. failure to formally ratify an agreement does not necessarily mean that the United States will not comply with the obligations in the agreement (and expect other countries to do likewise). It may be difficult to take such an approach in TPP, however, because unlike these other agreements, TPP cannot formally enter into force without adoption by the United States. In addition, because TPP may not largely reflect principles of customary international law that have already crystallized, it may be unlikely that the United States would adhere to TPP without ratifying the agreement. Indeed, without the U.S. Congress passing implementing legislation, the U.S. may not even be able to comply with some TPP provisions.

The possibility remains, however, that the United States could take the same step with TPP that it took with the Rome Statute of the International Criminal Court. The United States signed the Rome Statute on December 31, 2000, but two years later sent a letter to the UN Secretary General stating that it did not intend to become a party to the treaty. Through this action, as Curtis Bradley observed at the time, the United States would not be obligated to refrain from acts which would defeat the object and purpose of the treaty, as provided in the VCLT (and presumably also customary international law). A step such as this one could be a significant blow to the TPP, likely much more significant than if the agreement simply languishes before the U.S. Congress for a period of months or years.

Recent reporting indicates that TPP may ultimately follow the path of KORUS and CAFTA-DR, with adoption delayed until after certain "fixes" are put in place, and politicians such as Secretary of State John Kerry and Ohio Governor John Kasich have recently called for the U.S. to ratify TPP. The current debate does not exclude any outcome, however — and particularly in light of developments in Vietnam, Indonesia, and Australia (among other places) — attention will remain on the United States' handling of the agreement