Kluwer Arbitration Blog

U.S. Free Trade Agreements and Bilateral Investment Treaties: How Does Ratification Differ?

Jonathan T. Stoel, Michael Jacobson (Hogan Lovells) · Tuesday, October 28th, 2014 · Hogan Lovells

A lot has been written recently about the importance of Trade Promotion Authority (TPA) in the context of the ongoing Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) negotiations. TPA is the authority Congress grants to the President to enter into certain reciprocal trade agreements that Congress can approve or disapprove but cannot amend or filibuster (i.e., passing an agreement would require solely an "up or down" vote by Congress). Many observers believe that TPA is a necessary piece to the successful conclusion of either agreement—it will be difficult for negotiating parties to put their best offers forward without some assurance that Congress will not renegotiate portions of finished and signed agreements. Achieving TPA in the forthcoming "lame duck" session appears to be an uphill battle, and without TPA the path to finishing TPP and TTIP remains uncertain.

TPA is particularly important because of how the United States treats Congressional-Executive Agreements (CEAs), including comprehensive Free Trade Agreements (FTAs), under U.S. law. CEAs are treated differently than U.S. treaties, such as bilateral investment treaties (BITs), peace treaties, double taxation treaties, and others. The treatment of CEAs is also different than executive agreements, which enter into force with the President's signature, not requiring any legislative approval. Executive agreements are much more prevalent than treaties or CEAs, with the President approving 17,300 executive agreements from 1939-2013 (including CEAs), as compared with approximately 1,100 treaties during that time period.

Customary international law and the Vienna Convention on the Law of Treaties regard each mode of international agreement as equally binding. The distinction between treaties and CEAs therefore, has solely domestic significance and, specifically, how each agreement is ratified.

Article II, Section 2 of the United States Constitution grants the President power to make treaties with the "advice and consent" of two-thirds of the Senate. Bilateral Investment Treaties (BITs) (such as the BIT concluded between Rwanda and the United States in 2008 and ratified in 2012) are treaties as defined in the Constitution. On the other hand, CEAs (e.g., the North American Free Trade Agreement (NAFTA); the recently-ratified US-Colombia, US-South Korea, and US-Panama FTAs; and TPP and TTIP) must be enacted via an implementing law, requiring majority votes from both the Senate and the House and the signature of the President.

The issue of how CEAs (and, specifically, FTAs) may be enacted has been the subject of previous judicial scrutiny. In *Made in the USA Foundation v. United States*, plaintiffs argued that because the NAFTA was made without the advice and consent of two-thirds of the Senate, the agreement and its implementing legislation was unconstitutional. The United States District Court for the Northern District of Alabama disagreed and held that the Foreign Commerce Clause of the U.S. Constitution, combined with the Necessary and Proper Clause and the President's Article II foreign relations power, provide a sufficient constitutional basis for the President and the Congress to have elected to enact the agreement in this manner.

Following plaintiffs' appeal, the U.S. Court of Appeals for the Eleventh Circuit held that the question whether an international commercial agreement such as the NAFTA is a treaty (and therefore requires the advice and consent of two-thirds of the Senate) is nonjusticiable. The Eleventh Circuit stated that "with respect to commercial agreements, we find that the Constitution's clear assignment of authority to the political branches of the Government over our nation's foreign affairs counsels against an intrusive role for this court in overseeing the actions of the President and Congress in this matter." The Eleventh Circuit also pointed to the Supreme Court's long-standing recognition of the power of both the legislative and executive branches to conclude "agreements that do not constitute treaties in the constitutional sense." The Supreme Court subsequently denied certiorari.

The President and Congress thus have significant latitude, subject to very limited judicial oversight, to structure international agreements as either treaties or congressional-executive agreements. The legislative approval processes for CEAs (such as FTAs) and treaties (such as BITs) involve different political calculi, leading to varying probabilities of successful ratification. BITs need only be approved by the Senate, which for the last 25 years has been more supportive of free trade than the House. Notably, the most recent United States BIT (with Rwanda) was approved by the Senate through unanimous consent in September 2011. The October 2011 vote for the most recent United States FTA (with South Korea), which was far more economically and politically significant agreement than the U.S.-Rwanda BIT, included 83 Senators (or 83% of the Senate) who voted to approve the FTA, as opposed to 278 Members of the House of Representatives (or 64% of the House).

However, depending on the context of the international agreement, garnering a 67 vote supermajority of the Senate could pose a higher bar than a simple majority of both chambers of Congress. Some of the more economically significant U.S. FTAs, including the North America Free Trade Agreement in 1993 and the Dominican Republic-Central America-United States FTA in 2005, passed without a supermajority of the Senate's vote. Some important factors include the level of Senate attention and interest surrounding any particular agreement, the country at issue, the foreign policy issues at play, and the essential economic issues relevant to a particular agreement. The balance of power of political parties, the strength of the President's support, and the proximity in time to the next election cycle are important factors that often play a major role in the likelihood of passage of any bill, including a bill implementing an international agreement.

This question is important in light of possible vote on the TPP in 2015. The TPP, like the TTIP, is important to both U.S. strategic and economic interests, and its influence will be greater than all but a handful of past U.S. treaties and other international agreements. Indeed, the TPP and TTIP combined will include four of the five largest trading partners of the United States (the other, China, is a potential future member of the TPP).

Special thanks to David Steenburg, student at the Columbus School of Law, The Catholic University of America, for his assistance with this blog post.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Tuesday, October 28th, 2014 at 7:19 am and is filed under BIT, Free Trade Agreements, NAFTA, Trade Promotion Authority, Trans-Pacific Partnership, Treaty, United States
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.