

Power & Legitimacy in Trade Agreements



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Power

“The Congress shall have power...to regulate commerce with foreign nations...” US Const. Art. I, Sec. 8

“[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur;”
Art. II, Sec. 2.

Authority

- FTAs are not treaties
- Executive agreements negotiated under Trade Act of 2002 (fast track)
- Ratified by Congressional legislation signed by the President

A foggy landscape with a single tree in the center and a field of tall grass in the foreground. The text is overlaid on the image.

Problems

Legitimacy & transparency

Lock-in

State law

Extra-textual agreements



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ITACs

- Overwhelming industry representation
- Missing:
 - Transparency
 - Consumer representatives
 - Public health
- Ellen Schaffer & Joe Brenner - CPATH;
Globalization & Health listserve

Dispute Resolution

- MOUs in JFTA make the dispute resolution more transparent
 - Party submissions public within 10 days
 - Oral presentations public
 - Amicus submissions accepted
 - Report released to public “at the earliest possible time”
 - Par. 3: Broad exception protecting all “confidential information”

A photograph of a landscape shrouded in fog. In the center, a single, leafless tree stands prominently. The foreground is filled with a field of tall, golden-brown grass. The background shows rolling hills and more trees, all obscured by a thick layer of white fog. The overall mood is quiet and somewhat somber.

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Lock-In: Australia

- Subsequent adjustments to PBAC (side letter)
- Web-based DTC (Annex 2C, par. 5)
- Hatch-Waxman (17.9.8; 17.10.4)
- 5-year data exclusivity (17.10.1(a))
- Cmp. Peru/Panama amendments May 2007
- Peter Mansfield - Healthy Skepticism

Lock-in: US

- S.242 v. AUSFTA

- S.242 Senators Dorgan & Snowe introduced this year's parallel trade import bill, S.242 ...this bill specifies Australia as a country from which the US would allow parallel imports of drugs. Sec. 4(d)(1)(B) says: "Exhaustion... it shall not be an act of infringement to use, offer to sell, or sell within the United States any patented invention under section 804 of the [FDA Act] that was first sold abroad by or under authority of the owner or licensee of such patent."
- Global exhaustion rule

Palmedo M (IP-Health, 1/18/2007)

AUSFTA v. S.242

- Article 17.9(4):
 - “Each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory, at least where the patentee has placed restrictions on importation by contract or other means.”
 - IE - domestic exhaustion rule

AUSFTA v. S.242

- Sen. Grassley (then Chair of SFC) was privately assured by USTR that AUSFTA would not impede US imports under S.242
- Practical effect is modest, since AUS is unlikely to enforce against S.242
- Legal effect as precedent

Inconsistent Messages

- US:
 - USTR Zoellick
 - DOC 2004 Report
 - Senator Kyl & then-Speaker Hastert
- Australia
 - Trade Minister Vaile
 - MWG member

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Government Procurement

- CAFTA-DR IGPAC report: 22 states are covered (no cities or counties)
- Thresholds: \$477,000 goods & services; \$6.7 million for construction
- Better State coordination expected in future, but state legislation generally not required to consent

AUSFTA

- Concerns raised that procurement provisions intended for the PBS might also affect US states ability to negotiate for lower drug prices under Medicaid
- Assurances have been given that this is not the case, but doubts remain
- Peter Riggs - Forum on Democracy & Trade
- Sharon Treat - NLARx
- Sean Flynn - Am. University / Washington College of Law

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Various Forms

- Side letter - “integral part” of the agreement (ISP side letter in Peru TPA; PBS side letter in AUSFTA)
- Signed ancillary document (Biodiversity-TK Understanding - Peru TPA; IP Understanding on Public Health - CAFTA-DR)
- Interpretive note (AUSFTA)

NAFTA

- NAFTA side letter restricting Mexican exports of sugar to USA
- Mexico later “rejected the validity of the side-letter agreement,[but] the United States maintains that the side letter provisions supersede those of the original NAFTA.” S. Haley, Economic Research Service/USDA, Sugar and Sweetener Situation & Outlook/SSS-231/May 2001, at 13.
- Related WTO panel decision [WT/DS308/15](#)

JFTA

- USTR's Final Environmental Review & Congressional Record speech by Sen. Levin referred to a side letter which weakened environmental and labor language in response to concerns from US Congress

Anderson A, Brooklyn J Int'l Law 29:1221 (2004).

- I could not find this side letter on the USTR JFTA website

JFTA

- Sen. Levin's statement could be viewed as ambiguous on the legal effect of side letters:
“I think that this exchange of letters was unfortunate. I continue to support the agreement, though, because the letters did not affect the text of the agreement.” 147 Cong. Rec.S9679, at 9691 (2001)
- Levin probably intended to say these particular letters didn't alter any specific text, but compare the public health side letters

TPA expired June 30, 2007

- **H Res 525 (Allen): honor Doha**
- **HR 3204 (Van Hollen & Waxman): reform ITACs**
- **CIEL Aug. 2007 report**
- **GAO Sept. 2007 report**

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