When President Bush signs the U.S.–Singapore Free Trade Agreement (FTA) in May 2003, he will present Congress with the first trade agreement subject to review under the terms of U.S. Trade Promotion Authority (TPA). For the first time in U.S. trade history, Congress will judge a trade agreement in which the environment was a principal subject of negotiation. Special attention to environment in these negotiations is, therefore, warranted, because the way in which Congress evaluates this agreement using TPA’s provisions will establish a standard for future trade agreements.

BACKGROUND

Although TPA had not yet been passed when formal negotiations of the U.S.–Singapore FTA began in November 2000, U.S. President Bill Clinton and Singaporean Prime Minister Goh Chok Tong agreed to include labor and environment as part of the negotiating agenda. Taking this step was politically dangerous for both leaders. As a leader among developing nations, Singapore’s decision to include labor and environment in the negotiations represented a break from developing countries’ steadfast opposition to the trade and environment linkage. Similarly, President Clinton included environment over the opposition of leading Republican congressional leaders as well as some members of the business community. His decision to do so was later upheld by U.S. President George W. Bush, when U.S. Trade Representative Robert Zoellick resumed negotiations in May 2001 without changing the agenda. Yet opposition to environment in trade negotiations still compelled the Office of the U.S. Trade Representative (USTR) to postpone offering any language on the environment until after TPA provided congressional guidance—nearly two years after negotiations began.

Bilateral negotiations on the U.S.–Singapore FTA were concluded in December 2002. On February 27, 2003, the Trade and Environment Policy Advisory Committee (TEPAC), a “tier two” private advisory committee to the...
USTR, submitted its report on the FTA to the president and Congress. A majority of TEPAC members concluded that the FTA meets Congress’s negotiating objectives as they relate to the environment. However, a sizeable TEPAC minority disagreed with that conclusion, focusing most of its criticism on the TPA’s investment chapter and dispute settlement procedures. The Intergovernmental Policy Advisory Committee (IGPAC), which represents the views of state and local governments, echoed similar concerns regarding the investment language. The differences of opinion among advisory committee members are well documented in the TEPAC and IGPAC reports and will not be reproduced here.

If TPA instructions regarding the environment are to have the impact on U.S. trade policy envisioned by its congressional supporters, then it is important to evaluate the U.S.–Singapore FTA’s adherence to these directives, especially as this is the first trade agreement to be considered by Congress under the new TPA rules. For example, the level of disagreement regarding investment rules expressed by TEPAC and IGPAC members should signal Congress to remain diligent in this area of trade policy. The FTA also raises a number of environmental issues, many of which the TEPAC report did not cover in any detail. This brief examines these issues more fully.

**Upholding Domestic Environmental Protection Policy**

TPA Section 2102(a)(7) states that negotiators will “ensure that domestic environmental protection policies are not weakened or reduced to encourage trade,” which raises two important issues: rules of origin and ambiguous language.

**Rules of Origin**

In a related Trade, Equity, and Development Issue Brief, Sandra Polaski identifies a serious loophole in the FTA’s rules of origin’s chapter that, if left as negotiated, enables Singapore to export products made in the Indonesian islands of Bintan and Batam into U.S. markets without adherence to the FTA’s instructions regarding environmental protections, labor laws, and other provisions of the trade agreement requiring effective law enforcement. No other U.S. trade agreement provides similar preferential market access to a nonsignatory.

While perhaps logical on trade grounds, including two Indonesian islands as beneficiaries of the trade agreement creates two problems in terms of the environment. First, the Government of Indonesia is not a party to the FTA and is not bound by its environmental obligations. Second, trade-related environmental problems arising from production practices on the islands would most likely involve process and production methods (PPMs)—one of the most contentious trade and environment issues.

In theory, the FTA’s Joint Committee, established in Chapter 20, was designed to consider implementation issues such as these. Moreover, at its first meeting the Joint Committee will be tasked with considering each party’s environmental review of the FTA and then providing the public an opportunity to offer views on the agreement’s environmental effects. Under the terms of the environment chapter’s public participation provisions, it is also possible for both U.S. and Singaporean citizens to voice, on an ongoing basis, their concerns over possible environmental harm caused by manufacturing or other export-related economic activity. However, while the Joint Committee may invite Indonesia to join them in a discussion or even engage Indonesia in consultations regarding the text, it ultimately has no authority over Indonesia. Furthermore, public petitions regarding production practices likely would not result in PPM-based trade restrictions, given the historically
controversial nature of such measures. In fact, neither the United States nor Singapore is likely to use General Agreement on Tariffs and Trade (GATT) Article XX to restrict product trade on environmental grounds, even though it is referenced in Article 21.1(1).

Agreeing to allow a third party to enjoy the benefits of an FTA without accepting its obligations is a troublesome precedent. Theoretically speaking, this preferential market access could be awarded to any manufacturing facility in the world owned or operated by Singapore-based companies. If the labor and environment chapters are to have meaning, their obligations must extend to all the beneficiaries of any FTA.

**Ambiguous Language**

Article 18.10 defines the terms *statutes or regulations* as “an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable, in the first instance, by action of the federal government (emphasis added),” a definition borrowed from the U.S.–Jordan FTA. This definition was not repeated in the U.S.–Chile Free Trade Agreement.

Although the meaning of the phrase *in the first instance* was not defined by the negotiators, based on conversations with U.S. legal scholars it seems to refer to tensions among federal, state, and local governments over whether or not a federal government can insist that a subnational authority enforce its own laws. Tensions between trade disciplines and state and local regulatory authority have been debated in the United States for a number of years; clarifying the relationship between disciplines and subfederal authority in an FTA is one way to set the record straight regarding the effect that international trade rules exert on subnational regulatory authority.

**Creating a Positive Agenda for Trade and Environment**

TPA Article 2101(b)(11)(D) instructs negotiators to pursue “strengthening the capacity of U.S. trading partners to protect the environment.” FTA Article 18.6(1) indicates that the parties “shall, as appropriate, pursue cooperative environmental activities, including those pertinent to trade and investment and to strengthening environmental performance, such as information reporting, enforcement capacity, and environmental management systems, under a Memorandum of Intent on Cooperation in Environmental Matters to be entered into between the Government of Singapore and the United States and in other fora.”

In March 2003, U.S. and Singaporean negotiators began working on the parallel agreement to address the environment. While negotiations remain secret, Singapore–U.S. trade and environment interests are—in contrast to U.S. negotiations with Central or North America—likely to reflect more global interests, and Singapore’s desire to expand its technological capacities to promote green production. Despite the secrecy surrounding negotiations, it is possible to surmise the probable subjects of negotiation from a number of documents, including the draft U.S. and Singapore environmental reviews of the proposed FTA. Such issues might include:

- Trade in endangered species
- Invasive species
- Ornamental fish/coral reef protection
- Building Singapore’s capacity to act as a regional “green” technology hub.

Addressing environmental issues arising from trade negotiations through parallel policy instruments has become an important part of the U.S. trade policy tapestry, dating back to the parallel agreements in the North American Free
Trade Agreement (NAFTA) on U.S.–Mexico border infrastructure and North American environmental cooperation.20

However, there are two main problems with the negotiation approach on environmental cooperation being employed in the U.S.–Singapore FTA. First, as yet there is no discussion of the resources required to realize any of the collaborative commitments reached. Congress has not been fully informed of the content of negotiations, and there is no evidence that U.S. federal agencies with jurisdiction over relevant policy areas are amending their own budgets to support this agenda. Furthermore, with the exception of the U.S.–Asia Environmental Partnership, there are no reliable existing funding sources to support collaborative trade and environment work.21 In its report, TEPAC members expressed concern over funding: “…the Group has concerns about the future of capacity building projects and the achievement of the Congressional mandate in this area.”22 Second, negotiations over such subjects do not require secrecy; there are no trade secrets under negotiation. The failure of both parties to include the interested public jeopardizes public support for the final negotiated agenda, perhaps even robbing the countries of important technical and financial support from nongovernmental organizations and the private sector.

TRADE AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

TPA Section 2102(c)(10) outlines an important goal for U.S. trade policy: “Promote consideration of multilateral environmental agreements (MEAs), in negotiations on the relationship between MEAs and trade rules, especially as they relate to GATT Article XX exceptions for the protection of human health and natural resource conservation.” FTA Article 18.8 references the World Trade Organization (WTO) negotiations on the relationship between WTO rules and specific trade obligations set out in MEAs, instructing the parties to “consult on the extent to which the outcome of those negotiations applies to this Agreement.” In Article 21.1(1), the United States and Singapore reinforce the legitimacy of GATT Articles XX(b) and XX(g) to protect human, animal, or plant life or health. Recognizing the role played by GATT Article XX in conservation efforts is important, especially given Singapore’s longstanding reluctance to accept this interpretation. However, the weak reference to ongoing WTO consultations and GATT Article XX fails to ensure that both parties will use this opportunity to provide better guidance regarding the relationship between WTO rules and the use of trade measures in MEAs.

Bilateral negotiations can create unique opportunities to forge allies at the WTO on subjects of particular importance to the United States. For example, the U.S.–Jordan FTA was used to strengthen the U.S. efforts to make WTO dispute proceedings more transparent.23 The United States could use these current negotiations to accomplish a similar objective with regard to the MEA/WTO relationship by signing a Memorandum of Understanding with Singapore stating that WTO rules and MEA obligations are not in conflict.24

“COURT OF APPEALS” IN INVESTOR-TO-STATE DISPUTES

TPA Section 2102(b)(3)(G)(iv) instructs negotiators to “[seek] to improve mechanisms used to resolve disputes between an investor and a government through . . .[the] establishment of a single appellate body to review decisions in investor-to-government disputes and thereby provide coherence to the interpretations of investment provisions in trade agreements.”
In a side letter signed by both parties, the United States and Singapore agree that “within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 15.25 in arbitrations commenced after they establish the appellate body or similar mechanism.”

TPA instructions stipulate that the United States should encourage the establishment of a single appellate body for investor-to-state disputes. That said, because investor-to-state disputes are not part of WTO rules, the WTO would not be the appropriate place to establish this body. If the United States decides not to make changes in dispute settlement procedures in each of its bilateral and multilateral negotiations, then it should make a concentrated effort to make changes in the arbitration rules followed by the UN Commission on International Trade Law (UNCITRAL) and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID)—the two bodies most often used to settle disputes. Without changing the arrangement at ICSID and UNCITRAL, agreeing to consider whether or not to establish an appellate body falls short of TPA instructions to establish an appellate body to provide coherence to the interpretations of trade disputes.

TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS AND PUBLIC HEALTH

TPA section 2102(b)(4)(C) instructs negotiators to “respect the Declaration on the TRIPS [trade-related aspects of intellectual property rights] Agreement on Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14th, 2001.” In its advisory report to the president, the Industry Functional Advisory Committee (IFAC) praised the intellectual property rights chapter because it clarifies and improves on the standards for patent protection contained in the WTO Agreement on TRIPS. Some industry representatives may view this as an important victory, but limiting a country’s ability to issue compulsory licenses that would enable them to manufacture life-saving medicines for use in poor countries is inconsistent with the spirit of the WTO TRIPS declaration. In December 2002, the United States was the lone defector from an otherwise unanimous decision among WTO members regarding new rules that would allow countries to source the manufacture of generic copies of patented drugs abroad.

NEXT STEPS FOR CONGRESS

Most experts expect that the U.S.–Singapore FTA will meet with little opposition in Congress. Singapore is the eleventh largest U.S. export market worldwide. According to the U.S.–Association of South East Asian Nations (ASEAN) Business Council, two-way trade between the United States and Singapore last year totaled $33 billion, and Singapore enjoys $27 billion in U.S. direct investment, with more than 1,300 American companies with some presence in Singapore. At the launch of the U.S.–Singapore FTA Congressional Caucus, co-chairman U.S. Representative Solomon Ortiz (D-TX) stressed the important role Singapore plays in U.S. counter terrorism efforts. And negotiating an FTA with Singapore marks an important improvement in U.S. trade negotiations in the region, since efforts to stimulate trade under the Asia Pacific Economic Cooperation framework have not proved concrete. With advisory reports that side with the administration’s final product but also with important TPA instructions still clearly not addressed, what should Congress consider as it deliberates the agreement?
First, Congress can address some of these issues in the implementation legislation and statement of administrative action. Once the agreement is submitted, the White House will work with the House Ways and Means Committee and the Congressional Oversight Group to craft these two documents that make the terms of the U.S.–Singapore FTA part of U.S. law and set out the U.S. interpretation of the agreement. In particular, Congress could clarify the ambiguities surrounding the relationship between federal action and enforcement of state and local laws. It could also underscore the U.S. position regarding the compatibility of MEA and WTO rules and the U.S. desire to ensure that poor citizens worldwide have access to life-saving drugs.

But while this approach helps clarify the U.S. understanding of the FTA, it has no legal impact on the Government of Singapore. Therefore, the second thing that Congress should do is to advise the administration to fix the rules of origin loophole in collaboration with Singapore.

Third, Congress should fund the positive environment agenda outlined in the environment cooperation agreement. If the implementing legislation requires action by the appropriations committees, then Congress could stipulate funding at that time. Another approach would be to instruct the Department of State, Department of Interior, Environmental Protection Agency, and U.S. Agency for International Development to fund and staff these projects.

Fourth, as mentioned earlier, Congress should instruct the USTR and the Department of State to lead an effort to negotiate changes to ISCID and UNCITRAL arbitration rules. It is wise to avoid creating a series of appellate bodies; therefore, the United States should correct the errors with regard to public participation in dispute settlements and the use of an appellate procedure to ensure legally sound outcomes.

Fifth, during hearings to review the agreement, Congress should be prepared to ask the administration to explain why it did not adhere more closely to some of TPA's environment instructions. Perhaps U.S. negotiators tried to convince Singapore to take a stronger position with regard to MEAs and WTO rules, or perhaps they tried to negotiate a stronger reference to GATT Article XX. The administration’s responses to questions such as these should be a matter of public record, and congressional members should use these responses to judge the overall merits of the agreement itself.

More generally, Congress should reconsider the degree to which it allows the USTR to negotiate trade agreements in relative secrecy. Inconsistencies between TPA guidelines and the provisions found in a trade agreement can often be traced back to the secretive nature of these negotiations; for example, had state and local governments been better involved in negotiations, perhaps the ambiguities with regard to the definition of an environmental regulation would have been caught and corrected before the agreement was concluded. In addition, Congress should take a close look at the membership of the advisory bodies used by the USTR and other federal agencies to ensure that all relevant views are represented on the committees. Finally, Congress could improve oversight of environment and trade policies by expanding the membership of the Congressional Oversight Group to include representatives from committees with jurisdiction over national and international environmental policy.


When the Clinton administration initiated talks with Singapore, both sides agreed to use the U.S.–Jordan FTA as a model, which allows for trade sanctions against one of the signatories if it persistently violates its own labor or environmental laws. After President Bush took office, Singapore signaled its willingness to take the new administration’s lead on trade-related environment and labor issues. Throughout bilateral negotiations, however, Singapore remained opposed to the inclusion of environment and labor in the multilateral arena. See Inside U.S. Trade, March 16, p. 11.


Advisory committee rules only allow 30 days for cleared advisors to review an FTA. President Bush appointed his TEPAC members just prior to submitting the agreement to his advisory committees. That meant that 17 of the 29 advisors had not attended the regular meetings with USTR held during the negotiations and could not rely on information obtained during those meetings for their review. In their report, TEPAC members complained that the limited time for review, combined with the document’s confidential status, made it difficult for them to render a full opinion on time.


Taken together, Articles 18.1, 2, and 4(1) state that a party to the agreement has the right to establish its own levels of domestic environmental protection, that it will enforce its own laws so as not to create trade or investment advantages, and that it will ensure that its laws provide for high levels of environmental protection. These commitments do not extend to the Government of Indonesia.

Article 3.2(2) indicates that the parties will regularly review the products listed under Annex II to consider the addition of goods. Singaporean Trade Minister George Yeo said that the agreement could be extended to other countries as well as to other sectors; see “Yeo Lays Out FTA Rules of Origin,” Inside U.S. Trade, March 22, 2002.

U.S.–Jordan Free Trade Agreement, Article 18.5 requires each party to develop and maintain procedures for dialogue with its respective public concerning the environment provisions of the agreement.


Subject to the terms of the agreement, GATT Articles XX(b) and XX(g) allow countries to restrict trade to protect human, animal, or plant life or health, or when related to the conservation of exhaustible natural resources.

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15 The U.S.–Chile Free Trade Agreement defines the term as “an act of Congress or regulation promulgated pursuant to an act of Congress that is enforceable by action of the federal government” (Chapter 19, definitions). The complete draft FTA is available at: <http://www.ustr.gov/new/fta/Chile/text/index.htm>.

16 The Tenth Amendment to the U.S. Constitution reserves the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, to the states respectively, or to the people.


18 Executive Order No. 13277, Delegation of Certain Authorities and Assignment of Certain Functions Under the Trade Act of 2002, and Department of State Delegation of Authority 250, Further Assignment of Functions Under the Trade Act of 2002 (Federal Register/Vol. 67. No 243, December 18, 2002). In accordance with this order, the president assigned the joint authority to establishing consultative mechanisms to the Department of State, the Department of Labor, and the USTR. The Department of State’s Office of Environmental Policy (OEI) works jointly with USTR’s Office of Environment and Natural Resources on environmental matters.


21 The U.S.–Asia Environmental Partnership (AEP) was founded in 1994 and has projects in India, Indonesia, the Philippines, Sri Lanka, Thailand, and Vietnam. Singapore does not receive direct support but instead acts as a center for work training for the U.S.–AEP countries. See: <http://www.usaep.org>.

22 TEPAC Report, page 2.

23 In the “Memorandum of Understanding on Transparency in Dispute Settlement Under the Agreement Between the United States and Jordan on the Establishment of a Free Trade Area,” the United States and Jordan agree to adhere to the same dispute settlement transparency goals outlined in TPA in any dispute to which they are a party. Available at: <http://www.ustr.gov/regions/eu-med/middleeast/memodis.pdf>.

24 The U.S. Declaration of Principles on Trade and the Environment outlines the overall U.S. position on trade and environmental policy. Regarding the MEA/WTO relationship, it states, “Trade measures in MEAs are broadly accommodated by the WTO.” Available at: <http://www.ustr.gov/environment/finpol.pdf>, p. 7.

25 The joint letter is attached to the end of the U.S.–Singapore FTA investment chapter.

26 TPA Section 2102(b)(3)(G)(iv) instructs the USTR to “[establish] a single body to review decisions in investor-to-government disputes.”

