

NATIONAL REVIEW

Why I'm Not Sorry to See TPP Go

The agreement was too protectionist, and it had too much potential to undermine American sovereignty.

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I'm not as sorry as the editors to see the Trans-Pacific Partnership laid to rest. Because I agree with our editorial on a number of points, and because I fear that what I dislike about TPP is actually appealing to President Trump (and likely to recur in any bilateral deals his administration strikes), it is worth adding a few thoughts of my own.

1. The manner in which the Obama administration went about negotiating TPP has been wrongly maligned, undoubtedly because of (and contributing to) the distaste in which international trade is held these days. I have negotiated about a million plea agreements, some of them quite complicated. Had they been negotiated out in the open, with running commentary on the possible terms by non-parties or agencies whose interests might be affected, they would never have been consummated. The moving parts of an international trade deal — even a bilateral one — make it infinitely more complex than a plea deal.

While Congress has a critical constitutional role in reviewing international agreements, it is the president's job to conduct international relations and make treaties. Eleven other countries cannot be expected to negotiate with 535 legislators plus the executive branch. Thus, the complaint about Obama's having conducted secret negotiations with foreign governments in order to spring a damaging agreement on the United States was meritless in the case of TPP. (It is an apt complaint in the case of the Iran nuclear deal, which Obama never intended as a treaty.)

While TPP could have been damaging, that is because of its terms, not the secrecy in which they were negotiated. The question was not whether Congress should have had the opportunity to review aspects of the deal while it was being negotiated. (Lawmakers did in fact have that opportunity, under conditions of confidentiality that were appropriate no matter how much Congress complained about them.) The question was whether Congress was given an opportunity for meaningful review after the agreement was finalized by the countries taking part. There is no doubt that legislators had that opportunity — and, indeed, that TPP could not have been imposed on the U.S. without their consent.

2. Which brings us to Trade-Promotion Authority — the “TPA” that, regrettably, was conflated with TPP in the public debate. I continue to believe that TPA, which obliges Congress to give the president an up-or-down vote without amendments after the president has negotiated an international agreement, not only makes eminent sense but is the best way to avoid bad international agreements.

If you look at the recent history of treaties, you find that the Senate tends not to vote down bad agreements but to consent with caveats and reservations, basically saying, “We’re approving this, but X, Y, and Z provisions are not applicable, or are applicable only insofar as they do not conflict with the U.S. Constitution.” Sounds great, except then what I call “the international-law game” kicks in: Other countries, outfits such as the U.N., and international-law experts claim that the treaty *as written* (not as Congress thought it was modifying it) has transmogrified into binding international law. The State Department goes along. In the end, Congress would have been far better off rejecting the whole agreement because of the bad terms rather than consenting to it in the dubious belief that it was purging the bad terms.

TPA essentially takes away the Senate’s option to delude itself into believing it can effectively modify bad agreements into good ones. It forces the Senate to vote the agreement up or down. *That makes a no vote on a bad treaty more likely.* Since I am in the camp that believes in preemptive opposition to international agreements unless they are obviously in America’s interest, I am in favor of anything that makes a “no” vote more likely.

3. It should be noted that, once he was determined to reject TPP, it was important for Trump to withdraw from it expressly. As I’ve recently explained, the Vienna Convention on the Law of Treaties — which the State Department regards as binding international law in at least some respects, even though the United States has not ratified it — holds that once a country’s government signs an agreement (or otherwise conveys assent to it), that country is obliged not to take measures that would frustrate the agreement even if it has not been ratified. Consequently, when the United States rejects a treaty, it should formally withdraw any prior presidential signature or exhibition of assent to the treaty.

4. I am not persuaded by the argument that the decision not to proceed with TPP creates a void that will be filled by China. This seems to me an extension of the conventional wisdom that the carnage in Syria and the rise of ISIS resulted — at least in part — from American passivity that left a void in which bad actors flourished. I have always believed this is a fairy tale with respect to Syria, but a multilateral trade agreement does not, in any event, operate like a multilateral war. Trump is not abandoning the Pacific Rim; he is abandoning TPP. We will still have robust trade with the region. Whether the United States continues to be a central player there will depend on what actions the Trump administration takes in terms of confronting Chinese aggression and engaging with our allies and potential trade partners, either on a bilateral or a multilateral basis. I am not convinced that pulling out of TPP cedes America’s sphere of influence to Beijing. I agree it is something to be concerned about, I just don’t think abandoning TPP does it.

5. I am more troubled than the editors about the fact that TPP is a 5,554-page agreement. I do not dispute that trade agreements are complicated, but *free trade* — which simply involves removing impediments to the cross-border movement of goods — is not the reason they are complicated; protectionism is. True, TPP has many solid free-trade provisions, and potentially opens trade in markets that were not hospitable in the past. These benefits have to be balanced, though, with TPP’s considerable downsides, including its protectionist provisions.

Ironically, many of those provisions must be appealing to the Trump administration, even though I find them objectionable. If, as it is promising to do, the administration does reengage in search

of bilateral agreements, I imagine we will see many of the same protectionist terms — probably even more of them.

In any event, my default position is that when binding law is memorialized in statutory schemes or multilateral agreements that span hundreds — or, in this case, thousands — of pages, no one is able to say with confidence what the law is. That is especially the case when, as with TPP, many particulars are ambiguous and will have to be sorted out in litigation and by rulings of an unaccountable international commission — on which more momentarily. That kind of law-making should be discouraged.

6. One of my principal objections to TPP is the extent to which it is not a trade agreement. You had to figure there were reasons why TPP was so strongly supported by transnational progressives in the Obama mold. Those reasons involve its global-governance components, which the international Left gives pride of place over the anti-trade misgivings of progressives in the Bernie Sanders mold.

There is, for example, a [TPP chapter on labor](#). As a very useful [summary of TPP from the Cato Institute](#) relates, this section requires countries to adopt and maintain various labor rights, including minimum-wage regulations — notwithstanding our ongoing domestic debate over the harm minimum-wage laws do to entry-level workers. Another example: There is a [chapter on the environment](#), which requires countries (among other things) to control substances that are said to deplete the ozone layer, promote corporate social responsibility, and continue “transitioning to a low-emissions economy.” (As the [transies](#) put it in Article 20.15: “The Parties acknowledge that transition to a low emissions economy requires collective action.”) As observed by Cato, which tepidly supports TPP as a net positive for free trade despite acknowledging many downsides, the environmental provisions “also reinforce the myth that trade harms the environment and that no cost is too high — even for developing countries — to mitigate threats and potential threats to environmental quality, even if the measure would provide only a marginal benefit.”

These provisions, and many others like them, are hostile to free trade. That is, they make trade a mere pretext for promoting the pieties of the post-sovereign Left. Trade agreements should stick to trade.

7. TPP’s promotion of the transnational-progressive agenda is not merely hortatory. [Chapter 27](#) would establish an oversight entity, the “Trans-Pacific Partnership Commission,” with sweeping powers. It would be composed of unelected bureaucrats appointed by member countries and given jurisdiction over “any matter relating to the implementation or operation of this agreement” — including amendments or modifications of the agreement; the issuance of interpretive guidance on what provisions of the agreement mean; the establishment of tribunals and rules of procedure for resolving TPP disputes; and even the admission of new member states to the agreement.

That is to say, the Commission would be empowered to turn the TPP into something different — even drastically different — from the deal to which the United States agreed. It is true that, when it comes to any modifications or additions of new members, the agreement nods to the right of TPP countries to “complete their respective applicable legal procedures.” This means, at least in

theory, that if drastic changes effectively transformed TPP into a different agreement, Congress could get to vote on it again. Nevertheless, even without such U.S. constitutional compliance, the changes would be deemed to “enter into force” if six TPP countries approved them.

To be sure, a TPP country would have the option of disregarding the entry into force of a modification it had not approved, or of withdrawing from the agreement. That said, the Commission would still be wielding significant powers with no meaningful democratic accountability to the American people. Perhaps that would be sensible — at least arguably — if TPP were truly limited to international trade. But as we’ve seen, TPP would implicate matters well beyond the scope of trade — e.g., immigration, environmental, and labor policies. That is to say: Because TPP is such a vast proposition, the degree of self-governance the United States could potentially cede to an unaccountable international commission would be impossible to quantify.

What principles would the Commission use to resolve disputes? The editors suggest that TPP would place “the United States and its humane democratic norms at the center of Pacific affairs.” I’m not so sure. TPP provides (in [article 8.5](#)) that “the Parties recognise the important role that *international* standards, guides, and recommendations can play in supporting greater regulatory alignment, good regulatory practice, and reducing unnecessary barriers to trade.” It elaborates that member countries must *encourage the adoption of international standards, guidelines, and recommendations*— not only at the central government level, but also at the level of “regional or local government bodies,” which in the case of our country means the states and municipalities.

I do not doubt that the United States exerts significant influence over the development of international standards. But there is also significant resistance to — even animus toward — our country in many quarters. One need not buy into the conspiracy theories that TPP is a scheme to enmesh the United States in a European Union–style confederation in order to appreciate the potential perils for sovereignty. We have just witnessed eight years of Obama-administration collusion with multilateral foreign entities (the Organization of Islamic Cooperation, the Organization of American States, the European Union, the G-7, the United Nations and its Security Council, the Asia-Pacific Economic Cooperation, etc.) to ignore the Constitution, bypass Congress, and impose new arrangements and obligations on the United States under the guise of international law — on such matters as free speech, gun rights, environmental regulation, border enforcement, the Iran nuclear deal, immigration and refugee policy, and the Israeli–Palestinian standoff. The TPP Commission, armed with vague, broad jurisdiction and express American consent to promote international standards, would inevitably mean more of the same.

The editors argue that the complexity inherent in multilateral international trade agreements is also a feature of the bilateral pacts preferred by the Trump administration. True enough, but bilateral agreements do not require the kind of extensive bureaucratic infrastructure that multilateral arrangements do. Such infrastructures are the foundation on which transnational progressives build their global-governance schemes. And it is that combination of sprawl and the lack of political accountability that tends to make international bureaucracies distant, inept, hyperpolitical, authoritarian, and corrupt. I do not see the benefits of TPP as worth the risks.

