



## Will the Trans-Pacific Partnership Force Us to Fund the Paris Climate Agreement?

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In a commentary in the American Spectator on December 16, "[No one is Going to Enforce The Paris Climate Treaty through TPP](#)," K. William Watson of the Cato Institute contributed to the ongoing discussion of the Trans Pacific Partnership (TPP). Watson addressed two of the arguments that we had made in our American Thinker commentary "[What's Actually in the Trans Pacific Partnership?](#)" Although Watson made some useful points that highlight important nuances, at best, he defeated a straw man that was not our argument.

### TPP Amendment Process

According to our reading, the TPP pact could be amended by the U.S. administration with the approval of the TPP Commission even without congressional consent. We based our conclusion upon the enumerated powers of the TPP Commission from Chapter 27 of the TPP agreement:

The Parties hereby establish a Trans-Pacific Partnership Commission (Commission) which shall meet at the level of Ministers or senior officials, as mutually determined by the Parties. Each Party shall be responsible for the composition of its delegation. ... The Commission shall: ... (c) consider any proposal to amend or modify this Agreement; ... (f) issue interpretations of the provisions of the Agreement; ... (h) take such other action as the Parties may agree[.]

Watson focused on the brief discussion of amendment procedures in Chapter 30. He wrote:

[T]he "TPP Commission" is not a powerful legislative body that can alter the TPP agreement. It is just a name for a meeting of the members' representatives. Chapter 27 of the TPP envisions the Commission meeting regularly to discuss certain topics. It is not and will never become a supranational government unaccountably changing U.S. laws.

Specifically, Article 30.2 states:

The Parties may agree, in writing, to amend this Agreement. When so agreed by all Parties and approved in accordance with the applicable legal procedures of each Party, an amendment

shall enter into force 60 days after the date on which all Parties have notified the Depositary in writing of the approval of the amendment in accordance with their respective applicable legal procedures, or on such other date as the Parties may agree.

According to Watson, this provision clearly means that TPP cannot be amended without Congress's approval. He states:

Chapter 30 of the agreement explains that any amendments must be "approved in accordance with the applicable legal procedures of each Party." That means it must be ratified by Congress. The TPP doesn't enter into force for the United States until it's ratified by Congress, and amendments must follow the same procedures.

While Watson is quite right that the TPP ratification procedure does involve Congress (albeit not ratification as a treaty), it is a gross distortion of current U.S. constitutional practice to claim that that this is the only recognized way in U.S. law for an agreement to be reached. Daniel Bodansky writes:

Historical practice and case law have firmly established the constitutionality of congressional-executive, treaty-executive, and presidential-executive agreements (CRS 2001, 77). The United States has adopted more than 18,000 treaties as "executive agreements," approximately 95 percent of all international agreements to which the United States is a party (Garcia 2015, 5).

The vagueness of the agreement concerning what constitutes "applicable legal procedures" and the long history of U.S. entry into agreements without congressional involvement of any kind mitigates strongly against any supposition that the only way to modify TPP is through a process directly involving ratification by Congress. Ultimately, whether amendments required the involvement of Congress would be a political and legal question contingent upon the specific circumstances and subject to multiple interpretations. Here Watson, perhaps, plays to the uninformed intuitions of those who assume that all agreements involve Congress. Many don't.

### **Climate Change and TPP**

Second, we had written that Chapter 20, the environmental chapter of the TPP, requires compliance with previously negotiated Multilateral Environmental Agreements. We correctly anticipated that the Paris Climate Agreement, which has since been negotiated, would consider itself a Multilateral Environmental Agreement. We quoted Article 20.4, which states:

1. The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.

2. The Parties emphasise the need to enhance the mutual supportiveness between trade and environmental law and policies, through dialogue between the Parties on trade and environmental issues of mutual interest, particularly with respect to the negotiation and implementation of relevant multilateral environmental agreements and trade agreements.

Watson sees this language as mere "hortatory fluff." He writes:

Article 20.4 in the Environment Chapter does not require the United States to abide by any international environmental agreements. It merely states that each party "affirms" its commitments under such agreements. The provision is legally meaningless hortatory fluff. In fact, one of the biggest complaints about the TPP from environmental activists is that it does not do what this theory claims. The last four U.S. free trade agreements before the TPP did require parties to abide by their environment commitments under other treaties subject to dispute settlement. The TPP intentionally does not.

Indeed, the agreement does little to establish any concrete environmental standards, defaulting to provisions related to the enforcement of existing environmental laws and agreements. Hence, environmentalists rightly note that it will do little to eliminate unequal environmental legislation between signatories.

But our point was not, and never was, a claim that TPP was a strong environmental agreement. Instead, our argument focused on the way that TPP could be hypothetically used to enforce compliance by the U.S. with unequal environmental standards such as the dramatically unequal reductions in CO2 emissions discussed in the Paris conference.

The Commission could issue an interpretation that this provision of TPP includes the Paris Agreement. The Environment Chapter of TPP begins with a definition that explicitly includes regulations promulgated pursuant to an international agreement as part of the environmental law that this chapter of TPP focused on enforcing. Specifically, Article 20.1 states:

For purposes of this Chapter: environmental law means a statute or regulation of a Party, or provision thereof, including any that implements the Party's obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health[.]

And Article 20.23 of the Environment Chapter explicitly provides for dispute resolution:

If the consulting Parties have failed to resolve the matter under Article 20.20 (Environmental Consultations), Article 20.21 (Senior Representative Consultations) and Article 20.22 (Ministerial Consultations) within 60 days after the date of receipt of a request under Article 20.20 (Environmental Consultations), or any other period as the consulting Parties may agree, the requesting Party may request consultations under Article 28.5 (Consultations) or request the establishment of a panel under Article 28.7 (Establishment of a Panel).

Any country that is a party to TPP can charge any other country with violating TPP. After evidence is presented to an arbitration panel and after due deliberations, the panel would issue a final report, which would determine whether the charged country was out of compliance. Article 28.18 specifies:

If in its final report the panel determines that: (a) a measure at issue is inconsistent with a Party's obligations under this Agreement; (b) a Party has otherwise failed to carry out its obligations under this Agreement; or (c) a Party's measure is causing nullification or impairment in the sense of Article 28.3(c) (Scope); the responding Party shall, whenever possible, eliminate the non-conformity or the nullification or impairment.

If the charged party fails to come into compliance with TPP, Article 28.19 specifies that the panel can levy fines. Specifically:

If a monetary assessment is to be paid to the complaining Party, then it shall be paid in U.S. currency, or in an equivalent amount of the currency of the responding Party or in another currency agreed to by the disputing Parties in equal, quarterly installments[.]

We appreciate Watson's response to our reading of the 5,544-page TPP agreement. Unfortunately, his discussion of the amendment provision, while it does contribute to public understanding to a degree, obscures the obvious fact that many times, the legal process used by the U.S. to ratify agreements is for the president to do so on his or her own authority without any recourse to Congress.

Furthermore, his discussion of our analysis of the environmental provision confuses our argument for one that claims that the TPP provides strong cross-TPP environmental rules. Our point was much narrower – that unequal environmental agreements such as the vastly disproportionate reductions in CO2 being discussed in Paris could be enforced through TPP dispute resolution procedures, such as those indicated in Article 20.23 of the environment chapter.

We hope that the Cato Institute takes time to discuss the other five arguments that we made in our American Thinker commentary. We argued that TPP included: (1) Increased legal immigration, (2) Reduced patent protection for U.S. pharmaceuticals, (3) Quotas on U.S. agricultural exports, (4) Increased currency manipulation, and (5) Reduced U.S. power. A public discussion of these issues would benefit the American people as Congress prepares for its up-or-down TPP votes in 2016.