



# Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties

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November 3, 2011

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

97-896

## Summary

U.S. trade agreements such as the North American Free Trade Agreement (NAFTA), World Trade Organization agreements, and bilateral free trade agreements (FTAs) have been approved by majority vote of each house rather than by two-thirds vote of the Senate—that is, they have been treated as congressional-executive agreements rather than as treaties. The congressional-executive agreement has been the vehicle for implementing Congress’s long-standing policy of seeking trade benefits for the United States through reciprocal trade negotiations. In a succession of statutes, Congress has authorized the President to negotiate and enter into tariff and nontariff barrier (NTB) agreements for limited periods, while permitting NTB and free trade agreements negotiated under this authority to enter into force for the United States only if they are approved by both houses in a bill enacted into public law and other statutory conditions are met; implementing bills are also accorded expedited consideration under the scheme.

Congress most recently granted the President temporary trade negotiating authority utilizing this approach in the Bipartisan Trade Promotion Authority Act of 2002 (BTPAA), contained in Title XXI of the Trade Act of 2002, P.L. 107-210. Although the authority expired during the 110<sup>th</sup> Congress, agreements entered into before July 1, 2007, remained eligible for congressional consideration under the expedited procedure. The President had entered into free trade agreements with Colombia, Korea, and Panama before this date, each of which awaited congressional approval at the time. In October 2011, Congress approved the three pending agreements, making a total of 11 free trade agreements approved under the BTPAA process.

In addition, the United States Trade Representative (USTR), on behalf of the President, notified the House and Senate in December 2009 by letter that the President intended to enter into negotiations aimed at a regional, Asia-Pacific trade agreement, known as the Trans-Pacific Partnership (TPP) Agreement. Notwithstanding the expiration of BTPAA authorities, the USTR has stated the Administration was observing the relevant procedures of the act with respect to notifying and consulting with Congress regarding these negotiations.

A federal appeals court held in 2001 that the issue of whether the NAFTA should have been approved as a treaty was a nonjusticiable political question (*Made in the USA Found. v. United States*, 242 F.3d 1300 (11<sup>th</sup> Cir. 2001)). The U.S. Supreme Court denied review in the case.

**S. 98** (Portman) would amend Section 2103 of the BTPAA, 19 U.S.C. Section 3803, to authorize the President to enter into trade agreements with foreign countries on or after the date the bill is enacted into law and before July 1, 2016, with a possible extension of this authority through June 30, 2018. The bill would in effect permit implementing legislation for agreements covered by the bill to be considered under expedited legislative procedures. **S.Amdt. 626** (McConnell), an amendment to H.R. 2832, would amend the BTPAA to provide trade promotion authority for the Trans-Pacific Partnership Agreement and other trade agreements entered into before June 1, 2013, extendable to December 31, 2013. While H.R. 2832 was enacted into law (P.L. 112-40), the proposed amendment was not adopted.

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## Statutory Authority for Trade Agreements

The broad-gauged trade agreements entered into by the United States in the 1990s—the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO) Agreement, and the multilateral trade agreements that a country must accept as a condition of WTO membership—were negotiated by the President and submitted to Congress under the terms of the Omnibus Trade and Competitiveness Act of 1988 (OTCA) and the Trade Act of 1974. The OTCA provided the President with authority to negotiate and enter into tariff and nontariff trade barrier (NTB) agreements until June 1, 1993, authority that was later extended to April 15, 1994, in order to complete the GATT Uruguay Round (P.L. 100-418, §1102, 19 U.S.C. §2902, as amended by P.L. 103-49).

The OTCA also provided that NTB agreements negotiated under the statute could not enter into force for the United States unless, among other things, the agreements were submitted to Congress along with an implementing bill and the bill was enacted into law (P.L. 100-418, §1103, 19 U.S.C. §2903). Such legislation was entitled to so-called fast track or expedited consideration; expedited procedures are set forth in Section 151 of the Trade Act of 1974, 19 U.S.C. Section 2191. Section 151(a) defines “implementing bill” as a bill that contains, inter alia, a provision approving the trade agreement or agreements and, if changes to existing laws are needed, provisions “necessary or appropriate to implement such trade agreement or agreements, either repealing or amending existing laws or providing new statutory authority.” It is the provision approving the agreement or agreements, once enacted, that makes the Uruguay Round agreements, as well as the NAFTA, other free trade agreements and earlier GATT-related agreements, congressional-executive agreements.<sup>1</sup>

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<sup>1</sup> Note *Canadian Lumber Trade Alliance v. United States*, 425 F.Supp.2d 1321, 1359-63 (Ct. Int’l Trade 2006), where the court distinguished between approval of a trade agreement, described as an action “approving the United States’ international legal obligations specified by the Agreement,” and the amendment of statutes to conform U.S. law to agreement obligations.

The negotiation, entry into, and implementation of trade agreements implicates the President’s Article II authority to negotiate treaties and international agreements and to conduct foreign affairs, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 319 (1936), and Congress’s express power to impose duties and tariffs and to regulate foreign commerce. U.S. Const., Art. I, §8, cls. 1, 3. Because of Congress’s express power in this area, the President may not impose, reduce, or effect any other change in existing duty rates through an executive agreement unless he has been delegated the authority to do so by Congress. See *United States v. Yoshida Int’l Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975)(“no undelegated power to regulate *commerce*, or to set tariffs, inheres in the Presidency”)(emphasis in the original); *Canadian Lumber Trade Alliance*, 425 F.Supp.2d at 1357 (“Indeed, when the President exercises authority in regulating foreign commerce, he or she does so as Congress’ ‘agent.’”); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4<sup>th</sup> Cir. 1953)(“Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone.”). Regarding the President’s authority to enter into agreements involving foreign commerce, see *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975)(mandatory or enforceable, but not voluntary agreements limiting exports to the United States are superseded by trade laws).

## Development of the Statutory Trade Agreements Program

The trade agreement authorities and requirements embodied in the OTCA reflect a congressional approach to international trade policy that evolved over a number of years.<sup>2</sup> As early as 1890, Congress delegated tariff bargaining authority to the President and authorized him to suspend existing duty-free treatment on particular items by proclamation. The Supreme Court subsequently held that the authorizing statute, Section 3 of the Tariff Act of 1890, 26 Stat. 612, did not unconstitutionally delegate either legislative or treaty-making authority to the President.<sup>3</sup> In the Reciprocal Trade Agreements Act of 1934, as amended and extended, Congress authorized the President, for limited periods, to enter into reciprocal tariff agreements with foreign countries and, within a designated range, to proclaim tariffs needed to implement these agreements without subsequent congressional approval. This authority was used to enter into numerous reciprocal trade agreements, to proclaim new tariffs as a result, and to enter into the General Agreement on Tariffs and Trade (GATT). The President's modification of tariffs under this statute was likewise held to be valid under the Treaty Clause, federal courts having acknowledged that not all international undertakings of the United States are concluded as treaties and that congressional-executive trade agreements could find a constitutional basis in the joint exercise of Congress's tariff and commerce authorities and the President's foreign affairs power.<sup>4</sup>

As GATT parties began to negotiate more extensively to eliminate nontariff trade barriers in a number of areas, Congress enacted legislation that would both provide the President with negotiating credibility and ensure that Congress carried out its constitutional responsibilities regarding legislative implementation of the agreements. Since NTB agreements could address a variety of regulatory matters (e.g., subsidies, government procurement, product standards), these agreements might require more elaborate changes in federal law than tariff agreements, which for the most part could be implemented through a pre-authorized presidential proclamation reducing tariffs on particular items. In contrast, if legislation were needed to implement NTB agreements,

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<sup>2</sup> The use of the congressional-executive agreement in the trade area has been viewed as a recognition of the House's constitutional role in revenue raising. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §303, Reporters' Note 9 (1987). Senate deference to the use of the congressional-executive agreement for the Uruguay Round agreements may arguably be inferred from its 76-16 vote to amend the OTCA to extend the date by which the President could enter into the agreements pursuant to this statute, the yeas constituting more than two-thirds of that body. 139 Cong. Rec. 14805 (1993).

<sup>3</sup> *Field v. Clark*, 143 U.S. 649 (1892). In denying a motion for a temporary restraining order against tariff reductions on electronic equipment, the U.S. Court of International Trade ruled that plaintiffs were unlikely to prevail in their argument that the tariff proclamation authority used was an unconstitutional delegation of legislative authority. *Kemet Electronics Corp. v. Barshefsky*, 969 F.Supp. 82, 86 (Ct. Int'l Trade 1997). While the court viewed the principles by which the President was to be guided as "allow[ing] a great deal of discretion," it did not find them to be "unintelligible." *Id.* at 86; see also *Kemet Electronics Corp. v. Barshefsky*, 976 F.Supp. 1012, 1019 (Ct. Int'l Trade 1997)(motion for preliminary injunction denied). The statute at issue was §111(b) of the Uruguay Round Agreements Act, 19 U.S.C. §3521(b), under which the President could modify tariffs in order to implement certain trade agreements whose negotiation had begun but had not concluded during the Uruguay Round provided he first consult with Congress. The President proclaimed WTO-agreed tariff reductions on information technology, distilled spirits, pharmaceuticals, and chemical products under this authority. Pres. Proc. 7011, 62 Fed. Reg. 35909 (1997); Pres. Proc. 6982, 62 Fed. Reg. 16039 (1997).

<sup>4</sup> *Star-Kist Foods, Inc. v. United States*, 169 F.Supp. 268 (Cust. Ct. 1958), *aff'd* 275 F.2d 472 (C.C.P.A. 1959). See generally Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Senate Comm. on Foreign Relations* 76-86 (2001)(S. Prt. 106-71).

Congress could choose not to vote on such legislation or could add amendments that might be viewed as inconsistent with agreement obligations. At the same time, overly broad delegations of authority to the President to implement NTB agreements or legislative vetoes of executive implementing actions might not comport with constitutional requirements regarding the passage of legislation. In the Trade Act of 1974, Congress provided the President with new authority to negotiate multilateral trade agreements for a limited period of time, allowing him to proclaim certain tariff reductions and modifications but requiring him to submit NTB agreements to Congress, which would vote on their approval and on legislation necessary or appropriate to implement them.<sup>5</sup> Because of the complexities of multilateral negotiation, Congress sought to provide the President with a sound negotiating posture by providing that it would consider trade agreement implementing legislation submitted under the terms of the statute (including requirements that the President notify and consult with Congress) within a prescribed period of time and without amendment.<sup>6</sup> To this end, Section 151 of the act sets out procedural rules according an introduced bill expedited consideration and ensuring a final floor vote.

The fast-track procedure in the 1974 act was first used with respect to the GATT Tokyo Round Agreements, which were approved and implemented in 1979 (P.L. 96-39). Temporary statutory authority for bilateral free trade agreements (FTAs) was added in the Trade and Tariff Act of 1984 (P.L. 98-473, §401) and was again provided for in the OTCA. Congress approved bilateral FTAs with Israel and Canada, the NAFTA, and the GATT Uruguay Round agreements under one or the other of these authorities (P.L. 99-47, P.L. 100-449, P.L. 103-182, P.L. 103-465). The FTA with Jordan was statutorily implemented in 2001, though not under a fast-track authorizing statute and without an express approval provision (P.L. 107-43).

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<sup>5</sup> Modifying an Administration proposal, the House in 1973 approved legislation that would have authorized the President to negotiate tariff and nontariff barrier (NTB) agreements for a given period. Once the agreements were concluded, the President would submit them to Congress along with any needed draft implementing orders and proclamations. The agreements and orders and proclamations would become law (thus superseding inconsistent prior statutes) provided neither House had passed a resolution of disapproval by majority of those present and voting within 90 days. See H.Rept. 93-571, at 6, 23-34, 41-42. The Senate, whose Finance Committee viewed the veto approach to be of doubtful constitutionality, prevailed in the adoption of the current requirement for two-House legislative approval of NTB agreements and enactment of implementing legislation on a fast-track basis. See S.Rept. 93-1298, at 14-15, 22, 76, 107. Objections to the one-House veto procedure had also been raised earlier in dissenting views in the House report. H.Rept. 93-571, at 199. The Supreme Court eventually held legislative vetoes unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

<sup>6</sup> S.Rept. 93-1298, at 77, 107. While these agreements could be submitted to the Senate as treaties (see H.Rept. 93-571, at 24; S.Rept. 93-1298, at 86), neither the agreements nor their implementing legislation would be entitled to expedited legislative consideration. Moreover, while the House would have a role in approving any implementing legislation, it would not expressly approve the agreements, that is, it would not vote on whether the United States should accept the international obligations therein. The United States has assumed trade obligations in treaties, specifically its bilateral friendship, commerce and navigation (FCN) treaties, which require parties to accord most-favored-nation tariff treatment and other trade benefits to each other's goods. With the conclusion of many bilateral tariff agreements under reciprocal trade agreements legislation, the development of GATT agreements, and the entry by the United States into WTO and free trade agreements, trade obligations between the United States and its trading partners are now primarily defined by these more recent undertakings.

Some have suggested using a statute providing a legislative framework for international negotiations and procedures for expedited legislative consideration of any resulting international agreement and its implementing legislation in areas of international concern other than trade. See, e.g., Nigel Purvis, *Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority* (Resources for the Future 2008), at <http://www.rff.org/documents/RFF-DP-08-09.pdf>.

Renewed trade negotiating authority was granted the President in the Bipartisan Trade Promotion Authority Act of 2002 (BTPAA), contained in Title XXI of the Trade Act of 2002, P.L. 107-210. Although the authority expired during the 110<sup>th</sup> Congress, implementing bills for trade agreements entered into before July 1, 2007, remained eligible for expedited legislative consideration.<sup>7</sup> Eligibility continued because only the agreement needed to be entered into before July 1, 2007, for its implementing legislation to qualify for consideration on an expedited basis. The 2002 act did not require that implementing legislation for any such agreement be submitted to Congress by a given date. Agreements that had been entered into before July 1, 2007, but that had not been approved by that date, included U.S. free trade agreements with Colombia, Korea, and Panama.<sup>8</sup> Congress approved the three agreements in October 2011 under the expedited BTPAA procedures. Agreements with Chile, Singapore, Australia, Morocco, Bahrain, and Oman, the Dominican Republic-Central America-United States FTA (DR-CAFTA), and Peru had been approved earlier under this process.

Additionally, in December 2009, the United States Trade Representative (USTR), on behalf of the President, notified the House and Senate by letter that the President intended to enter into negotiations aimed at a regional, Asia-Pacific trade agreement, known as the Trans-Pacific Partnership (TPP) Agreement.<sup>9</sup> Notwithstanding the expiration of BTPAA authorities, the USTR stated in a December 2009 *Federal Register* notice that “USTR is observing the relevant procedures of the Bipartisan Trade Promotion Authority Act of 2009 (19 U.S.C. 3804), which apply to agreements entered into before July 1, 2007, with respect to notifying and consulting with Congress regarding the TPP trade agreement negotiations.”<sup>10</sup> Along with the United States, TPP negotiating parties currently include Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.<sup>11</sup>

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<sup>7</sup> The procedures, referred to in the Bipartisan Trade Promotion Authority Act (BTPAA) as “trade authorities procedures,” originally applied to bills for agreements entered into before July 1, 2005, but could be extended to bills for agreements entered into before July 1, 2007, if the President requested an extension and neither House of Congress adopted an extension disapproval resolution before July 1, 2005. P.L. 107-210, §2103(c), as amended, 19 U.S.C. §3803(c). No such resolution was voted upon. The President’s authority to negotiate and enter into agreements addressing both tariffs and nontariff barriers is set out at §2103(b) of the act, 19 U.S.C. §3803(b). The BTPAA required the President to notify Congress at least 90 days before he entered into an agreement.

<sup>8</sup> Although implementing legislation for the U.S.-Colombia agreement was introduced in April 2008 (H.R. 5724, 110<sup>th</sup> Congress), House leadership considered that President Bush had submitted the bill without sufficient coordination with Congress, and the House subsequently voted 224-195 that rules in §151 of the Trade Act of 1974 providing for automatic committee discharge, a deadline for a vote on final passage, as well as motions to proceed to House floor consideration, would be inapplicable to the legislation (H.Res. 1092, 110<sup>th</sup> Congress). *Bush Sends Up U.S.-Colombia FTA Bill; House Speaker Seeks Timetable Change*, 25 INT’L TRADE REP. (BNA) 510 (April 10, 2008). Questions had arisen whether the expedited procedures provided for in the BTPAA would apply to the U.S.-Colombia agreement’s implementing bill if the legislation were to be introduced in the 111<sup>th</sup> Congress. Reportedly, the House Parliamentarian concluded in 2006 that a trade agreement implementing bill may only be introduced once under the BTPAA process, while the Senate Parliamentarian informally advised in 2008 that the Senate may continue to apply expedited procedures to a reintroduced bill. *Free Trade Agreements*, 26 INT’L TRADE REP. (BNA) 123 (January 22, 2009); *Senate Parliamentarian Says Colombia FTA Has Fast-Track Next Year*, INSIDE U.S. TRADE, August 8, 2008, at 1; *Implementing Legislation Can Only Be Submitted Once under Fast Track*, INSIDE U.S. TRADE, November 10, 2006, at 5. Ultimately, however, another implementing bill for the agreement with Colombia was introduced in October 2011 and was considered and passed by both the House and the Senate under expedited BTPAA procedures.

<sup>9</sup> Text of letters at [http://www.ustr.gov/webfm\\_send/1559](http://www.ustr.gov/webfm_send/1559).

<sup>10</sup> Request for Comments Concerning Proposed Trans-Pacific Partnership Trade Agreement, 74 Fed. Reg. 66720 (December 16, 2009); see also Request for Comments Concerning an Environmental Review of the Proposed Trans-Pacific Partnership Trade Agreement, 75 Fed. Reg. 14479 (March 25, 2010).

<sup>11</sup> Office of the United States Trade Representative, Trans-Pacific Partnership, at <http://www.ustr.gov/tpp>. For further information on the Trans-Pacific Partnership negotiations, see CRS Report R40502, *The Trans-Pacific Partnership* (continued...)

## Constitutionality of the Congressional-Executive Trade Agreement: Judicial Views

The question whether trade agreements could constitutionally be entered into as congressional-executive agreements rather than treaties emerged during consideration of Uruguay Round implementing legislation. The question originally was posed because of the perceived effect of the agreements on states.<sup>12</sup> The issue also arose in a judicial challenge to the NAFTA, in which it was alleged that the failure to use the treaty process rendered the agreement and its implementing legislation unconstitutional. In *Made in the USA Foundation v. United States*, an Alabama federal district court held in July 1999 that “the President had the authority to negotiate and conclude NAFTA pursuant to his executive authority and pursuant to the authority granted to him by Congress in accordance with the terms of the Omnibus Trade and Competitiveness Act of 1988 ... and section 151 of the Trade Act of 1974 ... and as further approved by the [NAFTA] Implementation Act.”<sup>13</sup> In the court’s view, the Foreign Commerce Clause, combined with the Necessary and Proper Clause and the President’s Article II foreign relations power, provided a constitutionally sufficient basis for the agreement. The court preliminarily held that institutional, but not individual plaintiffs, had standing to sue, and that the political question doctrine did not bar it from ruling on the merits.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit, while agreeing that appellants had standing, held that the issue of whether an international commercial agreement such as the NAFTA is a treaty that must be approved by two-thirds of the Senate was a nonjusticiable political question.<sup>14</sup> The court dismissed the appeal and remanded to the district court with instructions to vacate. The Supreme Court denied certiorari (534 U.S. 1039 (2001)). Under the political question doctrine, a court will decline to rule on the merits if it finds that the underlying matter is committed to the discretion and expertise of the legislative and executive branches. In the case at hand, the Eleventh Circuit applied a tripartite inquiry that it said was suggested by Justice Lewis Powell in *Goldwater v. Carter*, 444 U.S. 996 (1979), a distillation of criteria for determining justiciability originally identified in *Baker v. Carr*, 369 U.S. 186 (1962). The three questions posed by the court were: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?”

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(...continued)

*Agreement*, by Ian F. Fergusson and Bruce Vaughn.

<sup>12</sup> See *Special Report*, INSIDE U.S. TRADE, July 22, 1994. Legal arguments and discussion may be found in “Memorandum to Ambassador Michael Kantor, U.S. Trade Representative, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Treaty Ratification of the GATT Uruguay Round: Additional Memorandum” (November 22, 1994), at <http://www.usdoj.gov/olc/1994opinions.htm>. See also *S. 2467, GATT Implementing Legislation: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 285-381 (1994).

<sup>13</sup> *Made in the USA Found. v. United States*, 56 F.Supp.2d 1226 (W.D.Ala. 1999). Note also *Ntakirutimana v. Reno*, 184 F.3d 419 (5<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000), where the federal appeals court upheld U.S. entry into the 1995 extradition agreement between the United States and the International Criminal Tribunal for Rwanda by means of a congressional-executive agreement rather than by treaty.

<sup>14</sup> *Made in the USA Found. v. United States*, 242 F.3d 1300 (11<sup>th</sup> Cir. 2001).

Regarding the first question, the court 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,” pointing to the “vast” express constitutional grants of power conferred upon the political branches in foreign affairs and commerce, and the Supreme Court’s long-standing recognition of the power of the political branches to conclude “agreements that do not constitute treaties in the constitutional sense.”

Regarding the second question, the court concluded that a ruling on the merits would require it to consider areas beyond its expertise, noting, *inter alia*, that the Treaty Clause did not set forth circumstances under which Clause procedures must be followed when approving international commercial agreements, and that having to determine the “significance” of an international agreement as the key factor in determining whether it should be a treaty or not would “unavoidably thrust [the court] into making policy judgments of the sort unsuited for the judicial branch.”

Addressing the third question, the court cited, *inter alia*, the need for the nation to speak with uniformity in the area of foreign affairs and commerce, and the fact that a judicial order declaring the NAFTA invalid “could have a profoundly negative effect on this nation’s economy and its ability to deal with other foreign powers,” noting that such an order “would not only affect the validity of NAFTA, but would potentially undermine every other major international commercial agreement made over the past half-century.”

## 112<sup>th</sup> Congress Legislation

**S. 98** (Portman) would amend Section 2103 of the Bipartisan Trade Promotion Authority Act of 2002 (BTPAA), 19 U.S.C. Section 3803, to authorize the President to enter into tariff barrier agreements and agreements addressing both tariff and non-tariff barriers with foreign countries on or after the date the bill is enacted into law and before July 1, 2016, with a possible extension of this authority through June 30, 2018. The bill would in effect permit implementing legislation for agreements covered by the bill to be considered under expedited legislative procedures. **S.Amdt. 626** (McConnell), an amendment to H.R. 2832, legislation to extend the Generalized System of Preferences and to authorize trade adjustment assistance, would amend the BTPAA to provide trade promotion authority for the Trans-Pacific Partnership Agreement and other trade agreements entered into before June 1, 2013, extendable to December 31, 2013. While H.R. 2832 was enacted into law (P.L. 112-40), the proposed amendment was not adopted.

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