Trade Promotion Authority and the Korea Free Trade Agreement

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Summary

On June 30, 2007, U.S. and South Korean officials signed the Korea Free Trade Agreement (Korea FTA or KORUS FTA) for their respective countries. It is one of three free trade agreements currently awaiting submission to Congress for approval and implementing legislation. In June 2010, the Obama Administration announced plans to seek Congress's approval for the Korea FTA after first engaging in talks with South Korea over U.S. concerns with the agreement as signed, particularly over its provisions involving market access for U.S. autos. These talks were concluded on December 3, 2010 with a text that has been referred to as a "supplemental agreement" or "supplementary deal" to the 2007 Korea FTA.

The Executive, in consultation with Congress, is expected to draft legislation approving and implementing the Korea FTA and submit the resulting "implementing bill" to Congress during the first session of the 112th Congress. This legislation will be entitled to consideration in Congress under expedited ("fast track") legislative procedures if it satisfies the requirements of the Bipartisan Trade Promotion Authority Act of 2002 (Trade Act of 2002). In particular, the implementing bill must: (1) approve the agreement "entered into" in 2007; and (2) include provisions enacting, amending, or repealing existing U.S. laws only to the extent that the provisions are "necessary or appropriate" for the implementation of the agreement "entered into" in 2007. Each chamber of Congress, acting independently of the other, has the authority to determine for itself whether the Korea FTA implementing bill conforms with these requirements. In each chamber where the bill is found to satisfy the terms of the Trade Act of 2002, the bill will be entitled to receive an up-or-down vote without amendment and with limited debate.

It is difficult to predict with certainty how the 2010 changes and the late date at which they were concluded might affect Congress's decision to consider the Korea FTA implementing bill under the fast track procedures. However, the effect of side agreements on the fast track eligibility of the implementing legislation for the North American Free Trade Agreement (NAFTA) may be instructive. In that case, the Executive concluded supplemental agreements to the trade agreement after the agreement was signed and trade promotion authority had expired. These agreements were treated as executive agreements, circumventing the need for their express approval by Congress, but the implementing bill nevertheless authorized U.S. participation in the two agreements. Arguably, the NAFTA supplemental agreements may be characterized as having received congressional approval.

Although members expressed concern about the use of the fast track procedures to consider the NAFTA implementing bill, no member formally challenged the bill's eligibility for fast track consideration. To challenge the use of the fast track procedures to consider the Korea FTA implementing bill, a member must raise an objection. The bill's eligibility for fast track consideration will then be resolved by the chamber in which the objection was raised. Either chamber may also decide, as an exercise of its rulemaking power, to waive, suspend, or repeal its grant of fast track authority.

If the Korea FTA implementing bill is deemed ineligible for—or otherwise denied—fast track consideration, the bill, in its entirety, may be considered under the regular procedures of each chamber. Under these procedures, the bill, like other pieces of legislation, might not be brought up for a vote or might be passed with amendments. The Jordan Free Trade Agreement was statutorily implemented under regular procedures.

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Introduction

A free trade agreement is an agreement involving two or more trading partners under which tariffs and trade barriers are reduced or eliminated. Today, the United States has free trade agreements with 17 countries, including nations in Asia, the Middle East, South and Central America, and Africa. Historically, these agreements 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.[1] In a succession of statutes, Congress has authorized the President to negotiate and enter into agreements reducing tariff and nontariff barriers for limited periods, while permitting trade agreements negotiated under this authority to enter into force for the United States once they are approved by both houses and other statutory conditions are met.

The most recent of these statutes is the Bipartisan Trade Promotion Authority Act of 2002[2] (Trade Act of 2002) in which Congress authorized the President to negotiate and enter into trade agreements before July 1, 2007 so long as the agreements satisfied certain conditions and were subject to congressional review. Acting on that authority, the Executive negotiated several trade agreements, including the Korea Free Trade Agreement (Korea FTA or KORUS FTA), which was signed by officials for the two countries on June 30, 2007. The Korea FTA is one of three agreements that were negotiated under the terms of the Trade Act of 2002 but have yet to be submitted to Congress for approval and implementation.[3]

Under section 2105 of the Trade Act of 2002,[4] the Korea FTA will enter into force for the United States "if (and only if)" the four conditions stated in section 2105(a) of the statute are satisfied. Broadly described, these four requirements are as follows:

- The President, at least 90 calendar days before entering the trade agreement, notifies Congress of the President's intention to enter into the agreement;
- The President, within 60 days after entering into the agreement, submits to Congress a description of the changes to U.S. law that the President considers required to bring the United States into compliance with the agreements;
- The President submits to Congress a copy of the final legal text of the agreement, a draft of the implementing bill, a statement of administrative action, and certain supporting information; and
- The implementing bill is enacted into law.

[1] For more on congressional-executive agreements, see CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties*, by Jeanne J. Grimmett.

[2] P.L. 107-210, 116 Stat. 993, 19 U.S.C. § 3801 *et seq*.

[3] The two other agreements are the U.S.-Panama Free Trade Agreement and the U.S.-Colombia Free Trade Agreement. Unlike the Korea FTA and the Panama FTA, implementing legislation for the Colombia FTA was submitted to Congress in April 2008. H.R. 5724/S. 2830, 110th Cong. At that time, the House voted to make fast-track authority inapplicable. H.Res. 1092, 110th Cong. ("[S]ection 151(e)(1) and section 151(f)(1) of the Trade Act of 1974 shall not apply in the case of the bill (H.R. 5724) to implement the United States-Colombia Trade Promotion Agreement.").

[4] 19 U.S.C. § 3805.

Moreover, once the implementing bill is introduced in Congress, it must meet additional requirements to be considered under the expedited ("fast track") procedures. Although a range of measures have historically been eligible for similar expedited procedures under other statutes, when an implementing bill for a trade agreement is statutorily authorized for fast track consideration, the bill is known as having Trade Promotion Authority (TPA), a label that reflects the short title of the 2002 Act. One of the purposes of these expedited procedures in the trade area is to ensure that Congress will be able to consider and vote on the implementing bill regardless of the congressional leadership's position on the agreement. A second purpose is to prevent the legislation from being blocked by filibuster or amended to an extent that forces the two countries to reenter negotiations.[5]

As signed on June 30, 2007, the Korea FTA was entered into before the July 1, 2007, deadline. Therefore, assuming that its implementing bill satisfies the remaining statutory requirements, it will be eligible for consideration under the fast track procedures. However, the bill's eligibility for TPA may be complicated by changes to the agreement that were only recently negotiated.

2010 Changes to the Korea FTA

In the summer of 2010, the Obama Administration announced plans to reengage in talks with South Korea over aspects of the Korea FTA, particularly its provisions involving market access for U.S. autos.[6] These talks concluded on December 3, 2010 when the two sides agreed to make certain additions and modifications to the 2007 agreement. The media has referred to these changes collectively as a "supplementary agreement" or "supplementary deal" to the Korea FTA. U.S. and Korean trade officials were scheduled to craft the legal text of this "supplementary deal" during December 2010 meetings.[7] To date, that text has not been released.

Reports of the deal, however, suggest that the changes primarily modify Korea's obligations and clarify the time frames under which the United States must make the tariff reductions that were required by the original agreement.[8] These reports also indicate that the United States has agreed to extend certain L-visas for Korean workers dispatched to offices in the United States, delay the date by which Korea is obligated to eliminate its tariffs on certain pork products, and expand the so-called "snapback" clause under which either party may suspend automobile tariff concessions following certain outcomes in a dispute settlement proceeding.[9]

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[5] *See* HOUSE COMMITTEE ON WAYS AND MEANS, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, Part I of II 258 (2005) (Ways and Means Comm. Prt. 109-4); Hal Shapiro and Lael Brainard, *Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT'L L. REV. 1, 5 (2003).

[6] *Obama Wants to Move Ahead on KORUS*, WASH. TRADE DAILY, 1 (Jun. 28, 2010). *See* Remarks by President Obama and President Lee Myung-Bak of the Republic of Korea After Bilateral Meeting (June 26, 2010).

[7] *U.S., Korea to Meet in Seattle Dec. 17-19 to Work on Legal Text of Deal*, INSIDE U.S. TRADE (Dec. 15, 2010).

[8] *See The KorUS Supplemental Agreement*, WASH. TRADE DAILY, 1-3 (Dec. 6, 2010) (stating that, among the changes contained in the supplemental deal, are an increase in the number of cars U.S. automakers are permitted import into the Korean market, a provision making all US cars compliant with Korea's environmental standards if the cars achieve certain targets, and a delay of the dates by which the United States must reduce its tariffs for Korean car imports and Korean truck imports).

[9] *Id.* at 2-3; *U.S. Offered Korea Visa Concessions to Cement Supplemental FTA Deal*, INSIDE U.S. TRADE (Dec. 9, 2010). For an explanation of the snapback clause, see CRS Report R41389, *Pending U.S. and EU Free Trade Agreements with South Korea: Possible Implications for Automobile and Other Manufacturing Industries* , by Michaela D. Platzer, and CRS Report RL34330, *The Proposed U.S.-South Korea Free Trade Agreement (KORUS*

(continued...)

Typically, an implementing bill sets two tasks before Congress. First, in order for the terms of a free trade agreement to "enter into force"—that is, constitute binding international commitments—for the United States, Congress must vote to approve the agreement.[10] Second, for those commitments to have legal effect domestically, Congress must "implement" them by repealing or amending relevant U.S. law or enacting new statutory authorities to ensure U.S. comply with the agreement. Accordingly, as a result of the newly negotiated changes to the Korea FTA, two questions arise. First, can these changes enter into force for the United States, that is, create an international obligation, without congressional approval? In order to do so, Congress must treat the "supplementary agreement" as an executive agreement that does not need to be submitted for its consideration.[11] Second, can the changes carry the force of law domestically absent congressional action? To do this, the "supplementary agreement" must be characterized as self-executing—that is, requiring no changes to the U.S. code to become enforceable in court by private parties or capable of being performed by U.S. agencies—and therefore not need to be submitted to Congress for implementation.[12]

Ultimately, if, in its entirety, the "supplementary agreement" constitutes a self-executing executive agreement, the 2010 changes may have no implications for the fast track consideration of the Korea FTA because they would not be included in the implementing bill. However, in the absence of the text of the changes to which U.S. and Korean officials agreed, it is difficult to predict the extent to which the changes might require congressional approval or implementation. Accordingly, this report assesses the fast track eligibility of an implementing bill for the Korea FTA that either treats the 2010 changes as part of the agreement that was "entered into" in 2007 or effectively includes them in the provisions implementing the 2007 agreement.

Fast Track Consideration of the Implementing Bill

Trade agreements are not the only type of measure to traditionally receive consideration under the expedited legislative procedure known as "fast track." For example, House and Senate consideration of budget resolutions and reconciliation bills are also generally governed by fast track procedures.[13] However, the authority to apply fast track procedures to legislation approving and implementing a free trade agreement often goes by the name "Trade Promotion Authority" (TPA).

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FTA): Provisions and Implications, coordinated by William H. Cooper.

[10] *See* STAFF OF S. COMM. ON FINANCE, 96[TH] CONG., REP. ON AGREEMENTS BEING NEGOTIATED AT THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA, 37 (Comm. Print. 1979) (stating that the process by which the United States undertakes obligations expressed in international trade agreements is the provision of the implementing bill "approving" the agreement at issue).

[11] For a fuller discussion of executive agreements, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia. Congress could also treat the "supplementary agreement" as a voluntary agreement that does not require congressional approval, but the commitments contained therein would then be considered *voluntary* rather than internationally binding for the United States. *See infra* note 23 and accompanying text.

[12] For a fuller discussion of self-executing—and non-self-executing—agreements, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law,* by Michael John Garcia.

[13] For more information on fast track generally, see CRS Report RS20234, *Expedited or "Fast-Track" Legislative Procedures,* by Christopher M. Davis, and CRS Report RL30599, *Expedited Procedures in the House: Variations Enacted Into Law,* by Christopher M. Davis.

Fast track procedures promote timely committee and floor action of the legislation at issue. The Trade Act of 2002, for example, mandates that legislation approving and implementing a free trade agreement that is entitled to consideration under the fast track procedures receive an up-or-down vote in Congress without amendment and with limited debate.[14] However, the Trade Act of 2002 conditions a bill's eligibility for fast track consideration on its satisfaction of certain statutory requirements.[15] In particular, to satisfy the act's definition of an "implementing bill," the legislation must contain three components:

- a provision approving a trade agreement "entered into" in conformity with the Trade Act of 2002;
- a provision approving a statement of administrative action, if any, proposed to implement that agreement; and
- if changes to U.S. law are required to implement the trade agreement, provisions "repealing or amending existing laws or providing new statutory authority" that are "necessary or appropriate to implement" the agreement.[16]

In light of the 2010 changes to the Korea FTA, questions have arisen over whether legislation containing those changes will meet these requirements for fast track consideration. The two requirements that may have the greatest negative implications for the fast track consideration of the Korea FTA and its implementing bill are: (1) the requirement that the bill approve an agreement that was "entered into" before the July 1, 2007 deadline for fast track consideration; and (2) the requirement that any bill provisions repealing, amending, or enacting U.S. law be "necessary or appropriate" for the implementation of the 2007 agreement.

Does the Bill Approve an Agreement "Entered Into" in 2007?

As mentioned above, an implementing bill is entitled to receive fast track consideration only if, *inter alia*, it includes a provision approving a trade agreement that was "entered into" in conformity with the Trade Act of 2002. The phrase "entered into" has generally been understood to mean "signed," rather than "implemented," by the parties. Furthermore, to be in conformity with the Trade Act of 2002, that agreement must have been "entered into" before July 1, 2007.[17]

The 2010 changes to the Korea FTA were not "entered into" before the deadline for fast track procedures authorized by the Trade Act of 2002. However, the Trade Act of 2002 seems to draw a

[14] 19 U.S.C. § 3803(b)(3) (stating that the "trade authorities procedures" described in 19 U.S.C. § 2191 apply to a bill of either chamber which satisfies the Trade Act of 2002's definition of an implementing bill); *id.* at § 2191(d) (prohibiting amendments to a trade agreement's implementing bill or approval resolution and prohibiting motions to suspend this prohibition by unanimous consent); *id.* at § 2191(e) (stating that, at the close of the 45th day after the implementing bill's introduction, the bill is automatically discharged from any committee to which it was referred); *id.* at § 2191(f), (g) (stating that an amendment to a motion to proceed to the consideration of an implementing bill shall not be in order in either chamber and the floor debate in either chamber may not exceed 20 hours).

[15] 19 U.S.C. § 3805.

[16] *Id.* at § 3803(b)(3). *See also* 19 U.S.C. § 3805(a)(1)(C) (stating that the implementing bill that the President submits to Congress must satisfy the description contained in 19 U.S.C. § 3803(b)).

[17] 19 U.S.C. §§ 3803(b)(1)(C). *See also id.* at § 3805(a) (stating that for an "agreement entered into under section 3803(b)" to enter into force, a description of the changes to existing laws that the President considers to be required to bring the U.S. into compliance with that agreement must be submitted to Congress within 60 days after the agreement is signed, and, at some point thereafter, a "copy of the final legal text of the agreement" must be submitted to Congress with, *inter alia*, a draft of an implementing bill.)

distinction between the agreement that was signed—which must be the one being approved by Congress—and the "final legal text" of that agreement—which is the one that the President must submit to Congress with the implementing bill.[18] This distinction suggests that the text of the agreement that was signed and the agreement that is submitted to Congress for approval need not be identical, and, in turn, some changes may be made to the original agreement without disqualifying the implementing bill from fast track consideration.[19]

In the absence of the text of the 2010 changes, it is difficult to predict whether members are likely to view them as falling within this category of acceptable changes to a trade agreement. The question may hinge on whether those changes can "enter into force" for the United States absent congressional action. In other words, it could depend on whether some or all of the terms of the "supplementary deal" can be treated by Congress as an executive agreement or otherwise become binding for the United States without receiving congressional approval.[20]

Absent congressional approval or authorization, the "supplementary deal" could qualify as an executive agreement if it was entered into under either (1) an earlier agreement that received congressional approval, either prospectively or retroactively; or (2) the President's sole constitutional authority.[21] Although the Constitution is understood to vest the President with the authority to conduct foreign relations and, as part of that, negotiate international agreements,[22] it is unclear whether—and to what extent—these powers might encompass some degree of executive authority related to foreign commerce.[23] Congress, on the other hand, has express constitutional authority to (1) "lay and collect taxes, duties, imposts, and excises;" (2) "regulate

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[18] *See* 19 U.S.C. §§ 3803(b)(3); 3805(a)(1)(C).

[19] *See id.* at § 3805(a)(1).

[20] *See* Senate Committee on Finance, *supra* note 10, at 34 (indicating that the purpose of the approval provision is to permit "the agreement to enter into force with respect to the United States in accordance with the terms of the agreement").

[21] For more information on executive agreements, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia.

[22] U.S. CONST. art. II, § 1; *American Ins. Assn v. Garamendi*, 539 U.S. 396, 414 (2002); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); Saikrishna B. Prakash and Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231, 234 (2001).

[23] *Compare e.g.,* Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert denied*, 421 U.S. 1004 (1975) (finding that the Executive has the authority to enter into *voluntary* agreements that limit exports to the United States) *with* United States v. Guy W. Capps Inc., 204 F.2d 655, 660 (4th Cir. 1953) ("Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned by Congress alone. The [E]xecutive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports."). In *Consumers Union*, the question facing the D.C. Circuit was whether the Executive's negotiation of voluntary import restraints with Japanese and European steel producer associations constituted an unconstitutional regulation of foreign commerce. *Consumers Union*, 506 F.2d at 138-39. The court found that the Executive had not regulated foreign commerce so much as received "assurances of voluntary restraint" from foreign producers, and therefore the court held that the Executive's negotiation of *voluntary* import restraints did not conflict with Congress's exclusive authority over "*enforceable* import restrictions." *Id.* at 143. In other words, the President may have the authority to enter into *voluntary* trade agreements absent congressional authority, but the obligations contained therein will not be binding for the United States. *See id.* In *Guy W. Capps Inc.*, the Fourth Circuit considered whether the Executive's powers included the authority to enter into an "executive agreement" under which Canada would refrain from placing certain permitting restrictions on potato exports to the United States and the United States would refrain from imposing quantitative limitations or fees on Canadian potato exports. *Guy W. Capps Inc.*, 204 F.2d at 657. The court ruled that the President lacked the authority to enter this "executive agreement" because entering an international agreement under which a foreign country agrees to regulate imports is the same as regulating imports directly, and, therefore, an exercise of Congress's exclusive constitutional authority over foreign commerce. *Id.* at 660.

commerce with foreign nations;" and (3) "make all laws which shall be necessary and proper" to carry out these specific powers.[24] Accordingly, it seems unlikely that the "supplementary deal" could qualify as an executive agreement on the grounds that the President has the sole constitutional authority to enter into it.

However, to the extent that the 2010 changes primarily *clarify* the text, by, for example, providing time frames and guidelines for the implementation of the current provisions of the 2007 agreement, the "supplementary deal" may well be amenable to treatment as an executive agreement—particularly if the original 2007 trade agreement receives congressional approval.[25] If, on the other hand, the implementing bill approves substantively new U.S. commitments—particularly those that fall within the scope of one of Congress's explicit constitutional powers—that were agreed to after the original text was signed, the bill would most likely be ineligible for fast track procedures because these changes could not be treated as an executive agreement.[26] Therefore, once the text of the "supplementary deal" is released, provisions whose substance resembles fundamentally new U.S. obligations—and not mere clarifications of the content of, or schedule for, achieving a pre-existing U.S. commitment—may warrant close scrutiny to assess the Executive's authority to commit the United States to those terms.[27]

There is historical precedent for treating supplemental agreements to a trade agreement as executive agreements when the supplemental agreements were signed after the expiration of TPA.[28] The George H. W. Bush Administration signed the North American Free Trade Agreement (NAFTA) on September 18, 1992. In doing so, NAFTA was "entered into" before the legislative authority for its fast track status, the Omnibus Trade and Competitiveness Act of 1988 (Trade Act of 1988, P.L. 100-418, 102 Stat. 1107), expired on June 1, 1993. However, having indicated during his campaign that he would not sign legislation implementing NAFTA until new "supplemental agreements" on labor and the environment had been negotiated,[29] President Clinton commenced side agreement negotiations with Mexico and Canada after the 1992 signing of NAFTA. Ultimately, two side agreements, the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC), were signed by officials for the United States, Mexico, and Canada on September 14, 1993, more than three months after the expiration of TPA. The United States Trade Representative (USTR) released a letter stating that these supplemental agreements were not "trade agreements for purposes of fast track procedures"[30] and referred to the NAAEC and NAALC as executive

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[24] U.S. CONST. art.. I, § 8.

[25] *See USTR Examining Side Letter Legal Implications for Korea FTA Changes*, INSIDE U.S. TRADE, July 23, 2010, at 3; Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 288 (1994).

[26] *See USTR Examining Side Letter Legal Implications for Korea FTA Changes*, *supra* note 25, at 3; Charnovitz, *supra* note 25, at 288 (stating that because a side agreement was not signed until after the expiration of TPA, it was not eligible for fast track status).

[27] *See USTR Examining Side Letter Legal Implications for Korea FTA Changes*, *supra* note 25, at 3; Charnovitz, *supra* note 25, at 288.

[28] Other trade agreements, including the Peru Free Trade Agreement and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR or CAFTA) have been modified after they were "entered into," but few have been modified after the expiration of the legislative authority for the fast track status of the agreement's implementing legislation.

[29] Bill Clinton, Expanding Trade and Creating American Jobs, at North Carolina State University (Oct. 4, 1992) *in* 23 ENVTL L. 683, 684 (1993).

[30] 139 CONG. REC. H9,928-29 (daily ed. Nov. 17, 1993) (letter from U.S. Trade Representative to the House Committee on Energy and Commerce).

agreements instead.[31] In accordance with this view, the President submitted these supplemental agreements to Congress in simultaneity with the text of NAFTA but only to *inform* congressional consideration of the implementing bill.[32] The President did not seek—and did not receive—congressional approval of the two agreements. Instead, the provision of the implementing bill that approved NAFTA stated that Congress approved the agreement that was "entered into on December 17, 1992."[33]

Although the Executive's characterization of the NAFTA side agreements was ultimately successful, it did not go unchallenged in the Senate. In particular, the late Senator Ted Stevens expressed strong concerns that, by considering the implementing bill under the fast track procedures, Congress was permitting the Executive to usurp unconstitutionally broad authority to enter into and participate in international agreements. He said:

> We are setting a precedent—at the request of the Executive—giving the Executive broad, broad authority to negotiate nontrade agreements under protections of the fast track procedure. As I remember my constitutional history, the Framers of our Constitution had deep fears of a runaway Executive, an Executive that might go off and make agreements with foreign nationals, foreign governments, contrary to the best interests of our people.[34]

However, the President did not leave the side agreements out of the implementing bill entirely, which may have lessened the persuasiveness of Senator Stevens's argument for some members. Specifically, the NAFTA implementing bill included a provision authorizing U.S. participation in the supplemental agreements.[35] Although Senator Stevens disapproved of that provision as well,[36] Congress enacted the bill in its entirety, which may permit a characterization of the NAAEC and NAALC as having received congressional approval after all.[37]

The treatment of NAFTA's side agreements may illustrate how Congress and the Executive have approached substantive changes to a trade agreement that were negotiated after the expiration of TPA. However, the Korea FTA may also provide the President with even greater authority than NAFTA did to commit the United States to a changed version of the underlying trade agreement without obtaining congressional approval. The Korea FTA expressly permits its parties to modify the agreement without abiding by their "applicable [domestic] legal procedures."[38] NAFTA does not include this language. Consequently, NAFTA could not be altered without Congress's

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[31] Charnovitz, *supra* note 25, at 291 (citing Letter from U.S. Trade Representative Kantor to U.S. Rep. George Brown, (Oct. 8, 1993)). *See also North American Free Trade Agreement Implementation Act*, H.Rept. 103-361, at 8 (1993) (calling the side agreements "Executive agreements that do not require [c]ongressional approval ..."); 139 CONG. REC. S16361-62 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee) ("These are the types of agreements that the Executive of the United States can enter into, and he enters into numerous executive agreements every year.").

[32] H.Rept. 103-361, at 8 (1993).

[33] *See* North American Free Trade Agreement Implementation Act, P.L. 103-182, § 101(a)(1), 107 Stat. 2057 (1993) (codified at 19 U.S.C. § 3311).

[34] 139 CONG. REC. 30,644 (1993). Senator Stevens also entered into the record prepared material arguing that U.S. participation in the side agreements could not be authorized without the side agreements themselves first obtaining congressional approval. *Id.* at 30,642.

[35] North American Free Trade Agreement Implementation Act, P.L. 103-182, §§ 531, 532 (codified at 19 U.S.C. §§ 3471, 3472).

[36] *See infra* note 45 and accompanying text.

[37] *See* Charnovitz, *supra* note 25, at 293.

[38] *Compare* Korea FTA, Art. 22.2.3(c) *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited July 29, 2010) *with* NAFTA, Art. 2202.2.

approval even after the text of NAFTA was approved and implemented by Congress.[39] To a limited extent, the opposite is true of the Korea FTA, which states that officials of both parties may, by consensus, "make modifications to the commitments."[40] This difference has two possible implications for the modification of the Korea FTA. First, the United States and Korea may be able to bring the 2010 changes into force without congressional approval as soon as the agreement that was "entered into" in 2007 enters into force. The second implication is that *because* the 2010 changes can enter into force without congressional action once the 2007 agreement enters into force, the Executive may seek to characterize the 2010 "supplementary deal" as an executive agreement authorized by the earlier agreement.[41] However, this characterization of the agreement would not be controlling for the purposes of the fast track procedures. As described below, if a member objects to considering the Korea FTA implementing bill under the fast track procedures, the bill's eligibility for TPA will be determined under the chamber's procedural rules and not by the Executive Branch.

Does the Bill Make "Necessary and Appropriate" Changes?

The second condition that the Korea FTA implementing bill must satisfy in order to be entitled to fast track consideration is the Trade Act of 2002's requirement that provisions in the bill that repeal, amend, or enact U.S. law must be "necessary or appropriate" to implement the 2007 agreement.[42] The legislative history of the Trade Act of 2002 suggests that the phrase "necessary or appropriate" should be strictly interpreted, but it is unclear whether it has, in practice, been narrowly construed.[43] In particular, when other trade agreements have been modified after they were signed, some members of Congress have questioned whether the modifications are "necessary or appropriate" and therefore warrant treatment under the same fast track procedures as the rest of the implementing bill.

For example, the definition of "necessary or appropriate" was discussed during the floor debates on the NAFTA implementing bill. As mentioned above, although the Clinton Administration did not seek congressional approval of the NAFTA side agreements in the implementing bill, it did include a provision in the bill seeking congressional authority to "participate" in the agreements.[44]

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[39] Absent a provision to the contrary, agreements are amended by the same procedures under which they were approved. 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 178 (2001) (S. Prt. 106-71). Accordingly, a trade agreement that is treated as a congressional-executive agreement could generally be amended only if Congress approved of the amendment. *See id.*

[40] Korea FTA, Arts. 22.2.3(c), 22.7. However "amendments" to the agreement, as opposed to "modifications," are still subject to the parties' "respective applicable legal requirements," which is the same requirement placed on amendments under NAFTA. *See* Korea FTA, Art. 24.2; NAFTA, Art. 2202.2. As the word "modifications" in the Korea FTA is undefined, it is unclear from the text what changes would constitute modifications rather than amendments.

[41] The opposing perspective, however, is that until Article 22.2.3 of the Korea FTA is approved by Congress, it has no legal bearing on the agreement's fast track status.

[42] 19 U.S.C. § 3803(b)(3).

[43] *See* H.Rept. 107-249, pt. 1, at 39-40 (stating, in part, that the House Committee on Ways and Means "believes that every attempt should be made to use TPA only for those provisions in the implementing bill that are strictly necessary or appropriate ... the Committee takes a strict interpretation of this language."); S.Rept. 107-139, at 43. *But see* S.Rept. 103-189, at 130 (stating that the Senate Foreign Relations Committee considered labor and environmental side agreements to the North American Free Trade Agreement to be "important and integral" but failing to use the words "necessary" or "appropriate.").

[44] *See* North American Free Trade Agreement Implementation Act, P.L. 103-182, §§ 531, 532.

On the floor, some members suggested this authorization of U.S. participation in the side agreements was not "necessary or appropriate" to the implementation of the original NAFTA and therefore was not eligible for fast track consideration. Perhaps the most vociferous advocate of this view was Senator Ted Stevens, who argued:

> The "necessary and appropriate" language is only involved if changes in existing law or new statutory authority are *required* to implement such trade agreements. There is no authority whatsoever in the law to include separate executive agreements in this legislation. And they should not be here ... There is no legal authority for these side agreements to be before the Congress under the fast-track procedures.[45]

Senator Baucus sought to rebut Senator Stevens's arguments on the grounds that the President has broad constitutional authority to execute agreements and the "fast track statutory authority gives the President the ability to negotiate agreements and provisions *appropriate* to trade laws,"[46] a much broader term. The debate illustrates different opinions as to which standard in the Trade Act of 2002's "necessary or appropriate" clause should carry greater weight. Because the NAFTA implementing bill was ultimately enacted, one could argue that its passage set a precedent for broad interpretations, like the one offered by Senator Baucus, of the "necessary or appropriate" clause. This view would support the position that even if the Korea FTA includes provisions implementing the 2010 changes, the bill is nevertheless eligible for fast track consideration under the terms of the Trade Act of 2002.

Options Available to Congress

Although legislative procedure is most often dictated by the standing rules of the House and Senate, Congress generally enacts fast track procedures into law instead of amending either body's standing rules. However, the statutory grant of TPA to a trade agreement's implementing bill remains "an exercise of the rulemaking power of the House of Representatives and the Senate, respectively."[47] Accordingly, Congress retains the same authority over TPA as it has over other rules of legislative procedure, and each chamber may waive, suspend, or repeal fast track authority for legislation implementing the Korea FTA.[48] The Trade Act of 2002 authorizes either chamber to pass a resolution making the fast track procedures inapplicable to an implementing bill on the grounds that either the Executive failed to follow certain procedures[49] or the agreement "fail[s] to make progress in achieving the purposes, policies, priorities, and objectives" specified by the Trade Act of 2002.[50]

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[45] 139 CONG. REC. 30,641 (1993) (statement of Sen. Stevens) (emphasis added).

[46] *Id.* at 30,644-45 (emphasis added).

[47] 19 U.S.C. § 3805(c)(1).

[48] *See* U.S. CONST. art. I § 5 ("Each House may determine the Rules of its Proceedings ...").

[49] 19 U.S.C. § 3805(b)(1)(B)(ii)(I)-(III). These procedural requirements are: (1) the requirements in 19 U.S.C. § 3804 that the President consult with Congress before commencing negotiations or entering into agreements; (2) the development and/or satisfaction of the guidelines prescribed in 19 U.S.C. § 3807(b) to facilitate the exchange of information between the Executive and Legislative branches about the trade negotiations and resulting agreement; and (3) the requirement in 19 U.S.C. § 3807(c) that the President meet with the Congressional Oversight Group upon its request.

[50] 19 U.S.C. § 3805(b)(1).

Most likely, the Senate and House parliamentarians will be consulted about the Korea FTA implementing bill before it is introduced in either chamber. If an implementing bill is introduced and a member is concerned that it not entitled to receive fast track consideration, the member may raise an objection. At that point, the bill's eligibility for fast track status will be resolved under the chamber's procedural rules. In the House, the presiding officer will rule on the availability of fast track procedures for the implementing bill with the guidance of the House parliamentarian.[51] A similar procedure would be followed in the Senate if a member there raised a point of order. In principle, a decision on the availability of the fast track procedures could be appealed to the full body. Ultimately, a chamber's decision as to whether the implementing bill qualifies for fast track consideration will be made independently of any decision reached in the other chamber.

In the context of the NAFTA implementing bill, Senator Stevens strenuously argued against the bill's eligibility for fast track consideration, but he did not raise a point of order.[52] Instead, he proposed an amendment to strike the language in the NAFTA implementing bill that authorized U.S. participation in the NAAEC and NAALC.[53] The amendment could not be considered, however, because amendments are not permitted for bills considered under the fast track procedures.[54] As a result, it appears that neither the House nor the Senate was asked to formally determine the NAFTA implementing bill's eligibility for fast track consideration.

If a member in either chamber raises an objection to the fast track consideration of the Korea FTA and the bill is deemed ineligible for TPA under the Trade Act of 2002, then the bill will be considered under the regular procedures of that chamber. Under these procedures, the bill, like other pieces of legislation, might not be brought up for a vote or it might be amended. In addition, the chamber could grant fast track authority to the bill even though it was deemed ineligible under the terms of the Trade Act of 2002. Although some believe that political hurdles will prevent a trade agreement's implementing bill from being passed without the fast track procedures, implementing legislation for the U.S.-Jordan Free Trade Agreement was enacted under regular procedures after fast track authorities added in the Omnibus Trade and Competitiveness Act of 1988[55] expired. On the other hand, Congress may have treated the Jordan agreement with unusual deference because of Jordan's unique geopolitical role in the Middle East peace process.[56] It is

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[51] For more information on raising and appealing points of order in the House, see CRS Report 98-307, *Points of Order, Rulings, and Appeals in the House of Representatives,* by Valerie Heitshusen.

[52] 139 CONG. REC. 30,641 (1993).

[53] *Id.*

[54] *Id.* Following the Chair's ruling on Senator Stevens's proposed amendment, Senator Stevens argued that he was being denied his constitutional right to offer an amendment to a revenue bill. *Id.*

[55] P.L. 100-418, 102 Stat. 1107.

[56] For example, in the Senate Finance Committee's hearings on the Jordan Free Trade Agreement, the Chairman began his opening statement by characterizing the Jordan FTA as a "profound partnership with America's most reliable friend and ally" and praising the Jordanian king's "vision and personal commitment" to "comprehensive regional peace in the Middle East." *Jordan Free Trade Agreement*, 107th Cong. 1 (2001) (statement of Senator Charles Grassley, Chairman, S. Comm. on Finance). Only after identifying the geopolitical significance of the agreement did Senator Grassley add that the agreement was "significant for another reason," that of removing impediments to free trade and maturing the economic relationships between the two countries. *Id.* The ranking member of the committee, Senator Baucus, echoed these sentiments in his own opening statement and again in the floor debates. *Id.* at 4 (statement of Senator Max Baucus, ranking member, S. Comm. on Finance) (describing the agreement as serving "U.S. geopolitical interests")/ *See e.g.,* 147 CONG. REC. H4875 (statement of Sen. Levin) ("[T]his agreement indeed is an important one. It is important in terms of national security. Jordan is important in the quest for peace and security in the Mideast."); 147 CONG. REC. H4877 (statement of Sen. Knollenberg) ("[T]his agreement will help to strengthen our association with a key ally in the Middle East. Jordan is a trusted friend and ally of the U.S.").

difficult to predict whether Congress would feel that diplomatic reasons warrant affording the Korea FTA similarly deferential treatment.[57]

Conclusion

In order for the Korea FTA to enter into force for the United States, the agreement must receive congressional approval. In turn, for the commitments contained in the Korea FTA to have legal effect domestically, Congress must implement the agreement—that is, repeal or amend current U.S. law or enact new statutory authority. The Korea FTA, which is expected to develop out of consultations between the Executive and Congress, will be designed to achieve these goals. Once the bill is formally submitted to Congress, it will be entitled to fast track consideration if it satisfies the requirements of the Trade Act of 2002. In particular, the implementing bill must: (1) approve the agreement that was "entered into" in 2007; and (2) include provisions enacting, amending, or repealing existing U.S. laws to the extent "necessary or appropriate" for the implementation of that agreement that was "entered into" in 2007.

It is difficult to predict whether Congress will view the "supplementary deal" reached in December 2010, as disqualifying an implementing bill from fast track consideration. Because the "supplementary deal" was agreed upon several years after the expiration of TPA, it could present two problems for the fast track eligibility of implementing legislation. First, the implementing bill could be disqualified from fast track consideration on the grounds that it approves an agreement that was not entered into in conformity with the Trade Act of 2002. Second, the bill could be disqualified from fast track consideration because it effects changes to U.S. law that are not "necessary or appropriate" for the implementation of the Korea FTA that was entered into in 2007.

However, the enactment of the NAFTA implementing bill provides historical precedent for congressional approval and implementation of a free trade agreement that was modified after the expiration of TPA but was nevertheless considered under the fast track procedures. In that case, the two NAFTA side agreements were characterized as executive agreements, and, accordingly, the implementing bill did not express approval for them. Some members disapproved of this approach, arguing that by not approving the side agreements Congress gave the Executive unconstitutionally broad authority to enter into international agreements. The NAFTA implementing bill did, however, include a provision authorizing U.S. participation in those side agreements. Some members protested this move as well, arguing that the authorization was not "necessary or appropriate" for the implementation of the original NAFTA, but Congress passed the implementing bill in its entirety. As a result, one can characterize the two side agreements as having ultimately received congressional approval.

Although members expressed concern about the use of the fast track procedures to consider the NAFTA implementing bill, no member formally challenged the bill's eligibility for fast track consideration. To challenge the use of the fast track procedures in the consideration of the Korea

[57] *But see* President Barack Obama, Remarks by the President at the Announcement of a U.S.-Korea Free Trade Agreement (Dec. 4, 2010) (characterizing the agreement in part as "a win for the strong alliance between the United States and South Korea, which for decades has ensured that the security that has maintained stability on the peninsula continues.... At a time in which there are increasing tensions on the Korean Peninsula, following the North's unprovoked attack on the South Korean people, today we are showing that the defense alliance and partnership of the United States and South Korea is stronger than ever.").

FTA implementing bill, a member must raise an objection. At that point, the bill's eligibility for fast track consideration will be resolved by the chamber in which the objection was raised. If one of the chambers deems the Korea FTA implementing bill ineligible for fast track consideration under the Trade Act of 2002, then it will be considered under the regular procedures of that chamber.

In addition, Congress retains substantial authority over whether to grant fast track consideration to the Korea FTA implementing bill. Each chamber may waive, suspend, or repeal fast track authority for legislation implementing the Korea FTA. Each chamber may also pass a resolution making the fast track procedures inapplicable to an implementing bill if the measure is deemed procedurally or substantively deficient under the terms of the Trade Act of 2002.

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