Trade Promotion Authority and the U.S.-South 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 (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 KORUS 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. The results of these talks are memorialized in three February 10, 2011, documents, which have been collectively referred to as the "supplemental agreement" or "supplementary deal" to the 2007 KORUS FTA.

The Executive, in consultation with Congress, is expected to draft legislation approving and implementing the KORUS 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 KORUS FTA implementing bill conforms with these requirements. To the extent either the House or the Senate finds that the bill satisfies 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 in that chamber.

It is difficult to predict with certainty how the 2010 changes might affect Congress's decision to consider the KORUS 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 KORUS 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 KORUS 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 treated as congressional-executive agreements rather than treaties. That is, reciprocal trade agreements are traditionally approved and implemented by a majority vote of each house rather than approved by a two-thirds vote in the Senate before being submitted to both houses of Congress for implementation.[1]

In a succession of statutes, Congress has authorized the President to negotiate and enter 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 enter into trade agreements before July 1, 2007 so long as the agreements satisfied certain conditions and were subject to congressional review. Pursuant to that authority, the Executive entered into several trade agreements, including the U.S.-South Korea Free Trade Agreement (KORUS FTA), which was signed by officials for the two countries on June 30, 2007.[3] The KORUS 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.[4]

Under section 2105 of the Trade Act of 2002,[5] the KORUS 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;

[1] LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, 217 (1996) (stating that a congressional-executive agreement simplifies the parliamentary process by obtaining consent and implementation in a "a single action"). 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] For more on the provisions of the KORUS FTA, see CRS Report RL34330, *The Proposed U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications*, coordinated by William H. Cooper; 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 RL34528, *U.S.-South Korea Beef Dispute: Issues and Status*, by Remy Jurenas and Mark E. Manyin. For a comparison of the KORUS FTA with the European Union's pending trade agreement with South Korea, see CRS Report R41534, *The EU-South Korea Free Trade Agreement and Its Implications for the United States*, by William H. Cooper et al.

[4] The two other agreements are the U.S.-Panama Free Trade Agreement and the U.S.-Colombia Free Trade Agreement. Unlike the KORUS 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.").

[5] 19 U.S.C. § 3805.

- 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.

Once the implementing bill is introduced in Congress, it must meet additional statutory requirements to be considered under the expedited ("fast track") procedures. Trade agreements are not the only type of measure to traditionally receive consideration under the expedited legislative procedure often referred to as "fast track."[6] One of the purposes of these expedited procedures in the trade area is to prevent the legislation from being blocked by filibuster or amended to an extent that forces the two countries to reenter negotiations.[7] 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), a label that reflects the title of the Trade Act of 2002.

As signed on June 30, 2007, the KORUS 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 the inclusion of the recently negotiated changes to the agreement.

2010 Changes to the KORUS FTA

In the summer of 2010, the Obama Administration announced plans to reengage in talks with South Korea over aspects of the KORUS FTA, particularly its provisions involving market access for U.S. autos.[8] 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 KORUS FTA.

The "supplementary deal," which was signed on February 10, 2011, is memorialized by an "exchange of side letters" and two "agreed minutes."[9] It modifies a portion of both U.S. and South Korean commitments under the 2007 agreement and adopts new obligations for both

[6] For example, House and Senate consideration of budget resolutions and reconciliation bills are also generally governed by fast track procedures. 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.

[7] *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).

[8] *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).

[9] Press Release, United States Trade Representative, Signed Legal Texts related to U.S.-Korea Free Trade Agreement (Feb. 10, 2011), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/february/signed-legal-texts-related-us-korea-trade-agreeme. The press release contains links to the text of both the side letters and agreed minutes.

parties. For example, the "supplementary deal" modifies three of the 2007 time frames for the elimination of U.S. duties on certain automotive goods and, for some goods, sets a different deadline for elimination.[10] In the "exchange of letters," the United States and South Korea also agreed to establish a special auto safeguard mechanism for unexpected import surges of motor vehicles.[11] Other U.S. commitments contained in the exchange of letters include, *inter alia*:

- preclude any prevention or undue delay of a motor vehicle's placement on the U.S. market on the ground that it incorporates a new, as yet unregulated, technology or feature absent scientific or technical information demonstrating that the technology or feature creates a risk for human health, safety, or the environment;[12]
- provide a year-long grace period between the date a technical regulation or conformity assessment procedure is published and the date on which compliance with the measure becomes mandatory;[13]
- periodically conduct post-implementation reviews of the effectiveness of its significant regulations affecting motor vehicles;[14] and
- resolve matters related to South Korea's publication of "new" fuel economy or motor vehicle emissions based taxation measures through "cooperation and consultations," rather than through dispute settlement.[15]

In the "agreed minutes," the United States promised to increase the L-visa validity period for intracompany transferees to five years for nationals of South Korea, and South Korea promised to deem certain U.S. motor vehicle imports in compliance with its new automobile fuel economy and greenhouse gas emissions regulation.[16] Unlike the exchange of letters, the agreed minutes are framed in hortatory, rather than mandatory, language, do not expressly mention dispute settlement, and segregate each party's commitments into two freestanding documents.[17] While the

[10] Letter from Ron Kirk, United States Trade Representative, to Jong-Hoon Kim, South Korea Minister for Trade (Feb. 10, 2011). U.S. duties on Korean automotive goods under the Harmonized Tariff Schedule (HTS) heading 8703 will all be zeroed out in the fifth year as opposed to some of them being zeroed out on the date the KORUS FTA enters into force and others phased out over the course of three years. *Id.* at § A(1)(a). In addition, U.S. duties on Korean automotive goods under the HTS heading 87039 will be phased out over five, rather than 10, years. *Id.* at § A(1)(b). Finally, U.S. duties on *some* Korean automotive goods under the HTS heading 8704, which generally covers trucks, will be phased out over 10 years beginning in the eighth year, as opposed to the first year, that the KORUS FTA is in force. *Id.* at § A(1) (c).

[11] Letter from Ron Kirk, United States Trade Representative, to Jong-Hoon Kim, South Korea Minister for Trade, § D (Feb. 10, 2011).

[12] *Id.* at § B(5)(a) (Feb. 10, 2011).

[13] *Id.* at § C(1).

[14] *Id.* at § C(2).

[15] *Id.* at § C(3). The 2007 agreement generally exempted taxation measures from dispute settlement for alleged violations of the transparency requirements of Article 21 of the Agreement. KORUS FTA, Art. 23.3. Presumably, this exemption meant that, under the 2007 agreement, disagreements over the consistency of a Party's taxation measure with Article 21 would have been resolved through diplomacy. Therefore, while Section C(3) of the Exchange of Letters adds an express provision for the resolution of disputes over the Article 21.1 consistency of a "new" South Korean taxation measure, its requirement that these disputes be resolved through "cooperation and consultations" may not, in practice, result in the United States using substantially different dispute resolution methods than those it would have pursued under the 2007 agreement.

[16] Agreed Minutes Between South Korea and the United States (Feb. 10, 2011).

[17] *See generally id.*

parties' intention determines whether an agreement is internationally binding, these differences suggest that the United States and South Korea intended for the exchange of letters, but not the agreed minutes, to encompass binding commitments.[18] In turn, if the agreed minutes were intended to be political, rather than internationally binding, commitments, they may not require congressional approval.[19] Moreover, the United States can already fulfill its promise to increase the L-visa validity period for South Korean nationals without changing U.S. law.[20]

Congressional Consideration of Implementing Bills

Trade agreements are traditionally treated as congressional-executive agreements rather than treaties, which means they are approved and implemented by a majority vote of each house.[21] In general, trade agreements are formally presented to Congress as part of an implementing bill. Each implementing bill sets two tasks before Congress. First, for the agreement to "enter into force"—that is, constitute binding international commitments—for the United States, it must receive congressional approval.[22] 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. compliance with the agreement.[23]

On occasion, Congress has approved an international trade agreement without including an express approval provision in the legislation that otherwise implements—or appropriates funds for U.S. participation in—the agreement.[24] However, statutory grants of TPA typically condition a

[18] *See* 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 *58-59* (2001) (S. Prt. 106-71); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 301 (1987). *See also* Daniel Bodansky, The Art and Craft of International Environmental Law 156 n.6 (2010) (indicating that substituting the word "will" for "shall" in an international agreement is generally understood to deprive the agreement of any legally binding effect).

[19] *See* Duncan B. Hollis and Joshua J. Newcomer, *Political Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 545, 546 (2009) (stating that nonbinding agreements lack the domestic legal status of a treaty and have been used as a vehicle to bypass congressional approval). Moreover, while the agreed minutes would create legitimate expectations of performance, they might be terminated more easily than the rest of the KORUS FTA and, accordingly, noncompliance with their provisions might not be grounds for formal dispute settlement. *See id.* at 541; Oscar Schachter, Editorial Comment, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 304 (1977).

[20] *See* 8 C.F.R. § 214.2(l).

[21] Henkin, *supra* note 1, at 217 (stating that a congressional-executive agreement simplifies the parliamentary process by obtaining consent and implementation in a "a single action"). 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.

[22] *See* U.S. CONST. Art. II, § 2, cl. 2 (stating the President "shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"); Congressional Research Service, *supra* note 18, at 12 (stating that an international agreement becomes binding only when it enters into force, which, for a congressional-executive agreement, generally requires congressional consent and ratification by the President); STAFF OF S. COMM. ON FINANCE, 96TH CONG., REP. ON AGREEMENTS BEING NEGOTIATED AT THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA, 36-37 (Comm. Print. 1979).

[23] *See* Congressional Research Service, *supra* note 18, at 240; Staff of S. Comm. on Finance, *supra* note 22, at 40, 42.

[24] Congressional Research Service, *supra* note 18, at 79. Two commonly cited examples in recent history are the implementing bill for the U.S.-Jordan Free Trade Agreement (Jordan FTA), P.L. 107-43, 19 U.S.C. 2112 *et seq.*, which implemented but did not expressly approve the Jordan FTA, and the implementing bill for the North American Free Trade Agreement (NAFTA), P.L. 103-182, § 101(a)(1), 19 U.S.C. § 3311, which appropriated funds for participation in the two commissions established by the side agreements to the original NAFTA. In both of these cases, the Executive determined that by implementing—or appropriating funds for—the agreements, Congress had consented to the agreements, giving the President the constitutional authority to enter the United States into a binding international (continued...)

trade agreement's eligibility for fast track consideration on, *inter alia*, the implementing bill's inclusion of an express approval provision *in addition to* provisions implementing the agreement.[25]

As a result of the newly negotiated changes to the KORUS FTA, two questions arise. First, can any or all of these changes enter into force for the United States without congressional approval? In order to do so, the changes would need to be treated as a type of agreement into which the Executive can constitutionally enter the United States without obtaining congressional consent—that is, an executive agreement[26] or a voluntary agreement that does not bind the United States under international law.[27] Second, can the "supplementary agreement" carry the force of law domestically absent congressional action? To do this, the changes must be treated as self-executing. A self-executing agreement requires no changes to the *U.S. Code* to become enforceable in a U.S. court by private parties or capable of being performed by U.S. agencies, and therefore it does not need to be submitted to Congress for implementation.[28]

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 KORUS FTA because they would not be included in the implementing bill. The Executive and Congress will decide whether to treat these changes as part of an executive and/or self-executing agreement, and their decision is unlikely to be disturbed by a U.S. court.[29] Accordingly, this report is primarily focused on the fast track eligibility of an implementing bill for the

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agreement. *See, e.g.*, U.S.-Jordan Free Trade Agreement, Art. 19 (stating the agreement's entry into force "is subject to the completion of necessary domestic legal procedures" by each party and "written notification that such procedures have been completed"); Letter from Catherine A. Novelli, Assistant U.S. Trade Representative for Europe and the Mediterranean, to Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan (Nov. 27, 2001). In general, U.S. courts defer to the Executive's decision as to the type of congressional consent that an international agreement requires. *See e.g.*, Made in the USA Found. v. United States, 242 F.3d 1300, 1313-15 (11th Cir. 2001), *cert denied sub nom* United Steelworkers of America, AFL-CIO v. United States, 534 U.S. 1039 (2001) (holding that the constitutionality of the Executive's decision to submit NAFTA to Congress as a congressional-executive agreement, rather than a treaty, is nonjusticiable and stating that the judiciary lacks the expertise to determine how an international commercial agreement should be approved).

[25] 19 U.S.C. § 3805(a)(1)(C)(i) (stating that a trade agreement entered into under the Trade Act of 2002 may enter into force with respect to the United States if and only if it is submitted to Congress with an implementing bill that includes the provisions required by 19 U.S.C. § 3803(b)(3)(B)); 19 U.S.C. § 3803(b)(3)(B)(i) (stating that an implementing bill must contain "a provision approving a trade agreement" entered into under the Trade Act of 2002).

[26] 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.

[27] *See also supra* notes 16-20 and accompanying text (describing differences between internationally binding and voluntary agreements in the context of the "agreed minutes" to the KORUS FTA); *infra* note 41 and accompanying text (discussing case law suggesting that the President may enter into agreements under which foreign producers will voluntarily regulate exports to the United States, but it may not enter an enforceable agreement with a foreign country to accomplish the same task).

[28] 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.

[29] *See Made in the USA Found.*, 242 F.3d at 1319-20 (stating that "in the context of international commercial agreements such as NAFTA—given the added factor of Congress's constitutionally enumerated power to regulate commerce with foreign nations" the issue of what kind of congressional approval is required for a particular agreement is nonjusticiable); *Dole v. Carter*, 569 F.2d 1109, 1110-1111 (10th Cir. 1977) (holding that whether an exchange of letters regarding the U.S. return of the crown of St. Stephen to the country of Hungary required the advice and consent of the Senate was a nonjusticiable question and declining "to enter into any controversy relating to distinctions which may be drawn between executive agreements and treaties.").

KORUS 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 KORUS FTA

Fast track procedures ensure timely committee and floor action on a particular piece of legislation. In the context of trade agreements, these expedited procedures are used to prevent an implementing bill from being blocked by filibuster or amended to an extent that forces the two countries to reenter negotiations.[30] Fast track procedures also prevent the use of procedural delaying tactics, including tactics available to congressional leadership to stall or prevent congressional consideration of legislation to which they are opposed.

An implementing bill that is statutorily authorized for fast track consideration may be referred to as having "Trade Promotion Authority" (TPA), a label that reflects the title of the Trade Act of 2002. That act 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.[31] However, the Trade Act of 2002 conditions a bill's eligibility for fast track consideration on its satisfaction of certain statutory requirements.[32] In particular, the President must submit the implementing bill to Congress,[33] and the implementing bill 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.[34]

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[30] *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).

[31] 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).

[32] 19 U.S.C. § 3805.

[33] 19 U.S.C. § 3805(a)(1) ("Any agreement entered into [under the Trade Act of 2002] shall enter into force with respect to the United States *if (and only if)* ... after entering into the agreement, *the President* submits to Congress" the final legal text of the agreement and a draft of an implementing bill as defined in section 2103(b)(3)(B) of the act (emphasis added)).

[34] *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)). Notably, the statute defines an implementing bill as a bill containing a provision approving "*a* trade agreement" and a provision implementing "a trade agreement or *agreements*." *Compare* 19 U.S.C. § 3803(b)(3)(B)(i) (emphasis added) *with id.* at § 3803(b)(3)(B)(ii) (emphasis added). Earlier Trade Promotion Authority statutes, namely the Trade Act of 1974 and the Trade Act of (continued...)

In light of the 2010 changes to the KORUS FTA, questions have arisen over whether legislation containing those changes will meet these requirements for fast track consideration. Two requirements that may have negative implications for the fast track consideration of the KORUS 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," but not necessarily "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.[35]

The 2010 changes to the KORUS 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 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.[36] 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.[37]

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1988, did not have a similar discrepancy in their definition of an "implementing bill." Trade Act of 2002, P.L. 107-210, § 3803(b)(3)(B) (stating that an implementing bill must approve *an* agreement but may implement *multiple* agreements) *with* Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, § 1107(a)(4) ("The term 'implementing bill' has the meaning given such term in section 151(b)(1) of the Trade Act of 1974") *and* Trade Act of 1974, P.L. 93-618, § 151(b) (defining an "implementing bill" as containing "a provision approving such trade agreement *or agreements*" and "provisions, necessary or appropriate to implement such trade agreement *or agreements*" (emphasis added)). A guiding rule of federal statutory construction is, unless the context indicates otherwise, to assume that "words importing the singular include and apply to several." 1 U.S.C. § 1. However, one could argue that the context and legislative history of the Trade Act of 2002 suggests that Congress intended to use the singular form of "agreement" to the exclusion of the plural form. For example, it is worth noting that other provisions of the Trade Act of 2002 besides the provision defining an "implementing bill" also differ from the predecessor TPA statutes by virtue of lacking express language permitting the inclusion of multiple trade agreements in a single implementing bill. *Compare, e.g.*, Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, § 1102(d)(3) (requiring consultation with Congress to discuss the "desirability and feasibility" of bundling trade agreements in a single implementing bill if doing so is proposed) *with* 19 U.S.C. § 3804(d) (using similar language to require consultation with Congress but not mentioning the possibility of bundling trade agreements).

[35] 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.)

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

[37] *See id.* at § 3805(a)(1).

It is difficult to predict whether Members are likely to view the 2010 changes as falling within this category of acceptable changes to a trade agreement. The question may hinge on whether those changes are intended to "enter into force" for the United States, and, if so, whether they can "enter into force" 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 a nonbinding agreement, an executive agreement, or as an agreement than can otherwise become binding for the United States absent congressional approval.[38]

Assuming an intent to be bound by the 2010 changes, 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.[39] Although the Constitution is understood to vest the President with the authority to conduct foreign relations and, as part of that, negotiate international agreements,[40] it is unclear whether—and to what extent—these powers might encompass some degree of executive authority related to foreign commerce.[41] Congress, on the other hand, has express constitutional authority to (1) "lay and collect taxes, duties, imposts, and excises;" (2) "regulate commerce with foreign nations;" and (3) "make all laws which shall be necessary and proper" to carry out these specific powers.[42] 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.

[38] *See* Senate Committee on Finance, *supra* note 22, 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").

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

[40] 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).

[41] *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 with foreign producers 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 exports is the same as regulating imports directly, and, therefore, an exercise of Congress's exclusive constitutional authority over foreign commerce. *Id.* at 660.

[42] U.S. CONST. art.. I, § 8. In addition, the Constitution vests in Congress the power to set rules for which aliens may enter and remain in the United States.

However, to the extent that the 2010 changes primarily *clarify* the text, by, for example, setting a time frame for meeting a tariff elimination deadline that was contained in 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.[43] 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 could be deemed ineligible for fast track procedures because these changes could not be treated as an executive agreement.[44] Therefore, provisions of the "supplementary deal" that represent fundamentally new U.S. obligations (e.g., new or earlier tariff elimination deadlines) or require the enactment of new U.S. laws (e.g., new trade remedies) may warrant close scrutiny to assess the Executive's authority to commit the United States to those terms.[45]

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.[46] 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,[47] 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"[48] and referred to the NAAEC and NAALC as executive agreements instead.[49] In accordance with this view, the President submitted these supplemental

[43] *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).

[44] *See USTR Examining Side Letter Legal Implications for Korea FTA Changes*, *supra* note 43, at 3; Charnovitz, *supra* note 43, 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).

[45] *See USTR Examining Side Letter Legal Implications for Korea FTA Changes*, *supra* note 43, at 3; Charnovitz, *supra* note 43, at 288.

[46] 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.

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

[48] 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).

[49] Charnovitz, *supra* note 43, 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.").

agreements to Congress in simultaneity with the text of NAFTA but only to *inform* congressional consideration of the implementing bill.[50] 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."[51]

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.[52]

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.[53] Although Senator Stevens disapproved of that provision as well,[54] Congress enacted the bill in its entirety, which may permit a characterization of the NAAEC and NAALC as having received congressional approval after all.[55]

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 KORUS 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 KORUS FTA expressly permits its parties to modify the agreement without abiding by their "applicable [domestic] legal procedures."[56] NAFTA does not include this language. Consequently, NAFTA could not be altered without Congress's approval even after the text of NAFTA was approved and implemented by Congress.[57]

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

[51] *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).

[52] 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.

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

[54] *See infra* note 64 and accompanying text.

[55] *See* Charnovitz, *supra* note 43, at 293. Congress's treatment of these side agreements is often cited as support for the proposition that Congress can approve an agreement simply by implementing it. *E.g.*, Congressional Research Service, *supra* note 18, at 79 n.75.

[56] *Compare* KORUS 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.

[57] Absent a provision to the contrary, agreements are amended by the same procedures under which they were approved. Congressional Research Service, *supra* note 18, at (2001). 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.*

To a limited extent, the opposite is true of the KORUS FTA, which states that officials of both parties may, by consensus, "make modifications to the commitments."[58] This difference has two possible implications for the modification of the KORUS 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 congressional approval of earlier agreement.[59] 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 KORUS 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 KORUS 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.[60] The legislative history of the Trade Act of 2002 suggests that the phrase "necessary or appropriate" should be strictly interpreted and, perhaps, more strictly interpreted than it was in the past.[61] However, some perceive Congress's treatment of trade agreements under earlier TPA statutes as precedent for an "open-ended" construction of the "necessary or appropriate" phrase.[62]

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.[63] On the floor, some Members suggested this authorization of U.S. participation in the side

[58] KORUS 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* KORUS FTA, Art. 24.2; NAFTA, Art. 2202.2. As the word "modifications" in the KORUS FTA is undefined, it is unclear from the text what changes would constitute modifications rather than amendments.

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

[60] 19 U.S.C. § 3803(b)(3).

[61] *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 has been concerned that a number of provisions that were not related to implementing the trade agreement at hand have been included in past implementing bills."); S.Rept. 107-139, at 43.

[62] Charnovitz, *supra* note 43, at 294 (stating that changes must "be 'necessary or appropriate to implement such trade agreement ...' and, in practice, this language has been interpreted as open-ended."). *E.g.*, 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.").

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

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.[64]

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,"[65] a much broader term. The debate illustrates different opinions as to which adjective in the Trade Act of 2002's "necessary or appropriate" clause carries 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 KORUS 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."[66] 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 KORUS FTA.[67] 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[68] or the agreement "fail[s] to make progress in achieving the purposes, policies, priorities, and objectives" specified by the Trade Act of 2002.[69]

Most likely, the Senate and House parliamentarians will be consulted about the KORUS FTA implementing bill before it is introduced in either chamber. If an implementing bill is introduced

[64] 139 CONG. REC. 30,641 (1993) (statement of Sen. Stevens) (emphasis added).

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

[66] 19 U.S.C. § 3805(c)(1).

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

[68] 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.

[69] 19 U.S.C. § 3805(b)(1).

and a Member is concerned that it is 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.[70] 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.[71] Instead, he proposed an amendment to strike the language in the NAFTA implementing bill that authorized U.S. participation in the NAAEC and NAALC.[72] The amendment could not be considered, however, because amendments are not permitted for bills considered under the fast track procedures.[73] 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 KORUS 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[74] 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 at that time.[75] It is difficult to predict whether Congress would feel that diplomatic reasons warrant affording the KORUS FTA similarly deferential treatment.[76]

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[70] 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.

[71] 139 CONG. REC. 30,641 (1993).

[72] *Id.*

[73] *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.*

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

[75] 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 (continued...)

Conclusion

In order for the KORUS FTA to enter into force for the United States, Congress must consent to it—either by implementing the agreement or enacting an express statement of congressional approval. Moreover, for the commitments contained in the KORUS 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 as is "necessary or appropriate." The KORUS FTA implementing bill, 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 the agreement that was "entered into" in 2007.

It is difficult to predict whether Congress will view the inclusion of changes made by the 2010 "supplementary deal" in the implementing bill as disqualifying the bill from fast track consideration. Because the "supplementary deal" was agreed upon several years after the expiration of TPA, including it in its entirety in the implementing bill could present two problems for the bill's eligibility for consideration under the fast track procedures. 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 KORUS FTA that was entered into in 2007.

However, the enactment of the NAFTA implementing bill provides historical precedent for fast track consideration—and, ultimately, congressional approval and implementation—of a free trade agreement that was modified after the expiration of TPA. In that case, the two NAFTA side agreements were characterized as executive agreements, and, accordingly, the implementing bill did not express congressional approval of 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, the NAFTA implementing bill is often characterized as both approving and implementing the two NAFTA side agreements.

(...continued)

key ally in the Middle East. Jordan is a trusted friend and ally of the U.S.").

[76] *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.").

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 KORUS 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 KORUS 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 KORUS FTA implementing bill. Each chamber may waive, suspend, or repeal fast track authority for legislation implementing the KORUS 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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