

INTERNATIONAL ECONOMIC LAW

Congress Approves U.S. Free-Trade Agreements with Colombia, Korea, and Panama, Utilizing Unusual Procedure for Korea Agreement¹

In early autumn of 2011, agreement was reached to end a protracted standoff between Congress and the successive administrations of Presidents George W. Bush and Barack Obama regarding the fate of bilateral free-trade agreements between the United States and Colombia, Korea, and Panama.² Early in October, President Obama transmitted legislative packages required for congressional approval and implementation of the three agreements with Colombia,³ Korea,⁴ and Panama.⁵ Acting under the “fast-track” procedures for expedited congressional consideration of trade agreements concluded before July 1, 2007, available under the Trade Act of 2002 (discussed below), Congress rapidly passed legislation approving and implementing the three agreements.⁶ The agreement with Colombia was the most controversial because of concerns about threats to unions and union organizers there; the implementing legislation passed the House of Representatives by a vote of 262-167. The economically much more significant agreement with Korea was approved by a vote of 278-151.⁷ President Obama promptly signed the legislation approving and implementing the three agreements.⁸

The agreements were concluded during the administration of President George W. Bush, but they were not approved and brought into force because of concerns, primarily on the part of Democratic members of the House of Representatives, that the agreements would result in loss of U.S. jobs.⁹ Opponents also raised concerns about attacks on labor organizers

¹ The editor records his appreciation to Professor Steve Charnovitz, of the Board of Editors, who guided and coauthored this item.

² For White House summaries of the agreements, see White House Press Release, Statement from President Obama on the Submission of the Korea, Colombia, and Panama Trade Agreements (Oct. 3, 2011), at <http://www.whitehouse.gov/the-press-office/2011/10/03/statement-president-obama-submission-korea-colombia-and-panama-trade-agr>.

³ White House Press Release, Messages from the President to Congress Regarding Trade Agreements—U.S.-Colombia (Oct. 3, 2011), at <http://www.whitehouse.gov/the-press-office/2011/10/03/messages-president-congress-regarding-trade-agreements-us-columbia>.

⁴ White House Press Release, Messages from the President to Congress Regarding Trade Agreements—U.S.-Korea (Oct. 3, 2011), at <http://www.whitehouse.gov/the-press-office/2011/10/03/messages-president-congress-regarding-trade-agreements-us-korea>.

⁵ White House Press Release, Messages from the President to Congress Regarding Trade Agreements—U.S.-Panama (Oct. 3, 2011), at <http://www.whitehouse.gov/the-press-office/2011/10/03/messages-president-congress-regarding-trade-agreements-us-panama>.

⁶ The three implementing acts are H.R. 3078, the United States–Colombia Trade Promotion Agreement Implementation Act, H.R. 3079, the United States–Panama Trade Promotion Agreement Implementation Act, and H.R. 3080, the United States–Korea Free Trade Agreement Implementation Act.

⁷ Felicia Sonmez & Zachary A. Goldfarb, *Senate Deal Reached on Trade Pacts*, WASH. POST, Aug. 5, 2011, at A15; Jennifer Steinhauer, *Washington Impasse Traps Trade Deals*, N.Y. TIMES, Aug. 26, 2011, at A9; Binyamin Appelbaum & Jennifer Steinhauer, *Trade Deals Pass Congress, Ending 5-Year Standoff*, N.Y. TIMES, Oct. 13, 2011, at A1.

⁸ White House Press Release, Statement by the Press Secretary (Oct. 21, 2011), at <http://www.whitehouse.gov/the-press-office/2011/10/21/statement-press-secretary>. In addition to the acts approving and implementing the three agreements, the president also approved H.R. 2832, the Trade Adjustment Assistance Extension Act of 2011, reauthorizing the Trade Adjustment Assistance program through December 31, 2013.

⁹ Binyamin Appelbaum, *Textile Makers Struggle to Be Heard on South Korea Free Trade Pact*, N.Y. TIMES, Oct. 12, 2011, at B3.

and unions in Colombia¹⁰ and Panama's perceived lack of cooperation in combating tax evasion.

Seeking to meet opponents' concerns, the Obama administration entered into further negotiations with all three countries. Key aspects of the agreement with Korea (known as KORUS) were renegotiated in December 2010, leading the United Automobile Workers and the United Food and Commercial Workers to endorse the deal.¹¹ In response to concerns about the killing of labor activists in Colombia, the United States and Colombia concluded side arrangements in the spring of 2011, which were intended to strengthen protection of labor and human rights.¹² In response to U.S. concerns about Panama's cooperation with U.S. tax authorities, Panama passed a law authorizing greater tax transparency.¹³

The agreements were then caught up in a dispute over whether to extend the Trade Adjustment Assistance program, which provides training and other assistance to U.S. workers displaced by foreign competition.¹⁴ Eventually, a deal was struck between the White House and congressional leaders, and the president submitted the authorizing legislation for the three agreements to Congress, which quickly approved it.¹⁵ In each case, Congress acted under the "fast-track" procedure available under the Trade Act of 2002, which sets rigid timetables for congressional action and requires "up or down votes" on the agreements as submitted.

Fast-track authority has expired for agreements concluded after July 1, 2007.¹⁶ U.S. and Korean officials originally signed the KORUS in June 2007, before that authority expired.¹⁷ However, important elements of the agreement were renegotiated in December 2010,¹⁸ with the revisions consummated through a formal exchange of letters between the two governments on February 10, 2011.¹⁹ Because this process resulted in changes to both parties' obligations under the KORUS, Congress utilized an unusual procedure in the legislation approving and

¹⁰ Howard Spencer, *U.S.-Colombia Trade Pact Faces Hurdles*, WASH. POST, Mar. 30, 2011, at A15; *Levin Opposes Colombia Trade Deal*, WASH. POST, June 28, 2011, at A10.

¹¹ Sewell Chan, *South Korea and U.S. Reach Deal on Trade*, N.Y. TIMES, Dec. 4, 2010, at B1; Steven Greenhouse, *2 Unions' Backing Helps Chances of Trade Pact with South Korea*, N.Y. TIMES, Dec. 9, 2010, at B1; Howard Schneider, *Some Unions Say Trade Pact with South Korea Will Cost U.S. Jobs*, WASH. POST, Dec. 10, 2010, at A15.

¹² Howard Schneider, *Senators Threaten to Hold Up Korean Pact*, WASH. POST, Mar. 10, 2011, at A17; Helene Cooper, *U.S. and Colombia Said to Reach Trade Deal*, N.Y. TIMES, Apr. 6, 2011, at B10; Helene Cooper & Steven Greenhouse, *Colombia Trade Deal Advances*, N.Y. TIMES, Apr. 7, 2011, at B1; Howard Schneider & Juan Forero, *Colombia Agrees to Protect Unions*, WASH. POST, Apr. 7, 2011, at A14; Editorial, *The Trade Trade*, WASH. POST, May 1, 2011, at A22; *Gains on Colombia Send Trade Pacts to Congress*, N.Y. TIMES, May 5, 2011, at B6.

¹³ Jackie Calmes, *Trade Deal with Panama Clears Hurdle over Taxes*, N.Y. TIMES, Apr. 20, 2011, at B4; *Gains on Colombia*, *supra* note 12.

¹⁴ Binyamin Appelbaum, *Ultimatum Holding Up Trade Deals*, N.Y. TIMES, May 17, 2011, at B1; Zachary A. Goldfarb, *Low-Key Nominee, High-Intensity Fight*, WASH. POST, June 1, 2011, at A15; Binyamin Appelbaum, *Free Trade Standoff Is Resolved*, N.Y. TIMES, Oct. 4, 2011, at B1; Editorial, *A Deal for the Deals: Expanding Trade and Helping Displaced Workers Are Both Good for the Country*, N.Y. TIMES, Oct. 10, 2011, at A20.

¹⁵ Zachary A. Goldfarb & Lori Montgomery, *Congress Approves 3 Trade Accords*, WASH. POST, Oct. 13, 2011, at A1.

¹⁶ 19 U.S.C. §3803(a)(1).

¹⁷ John R. Crook, *Contemporary Practice of the United States*, 101 AJIL 866, 881 (2007).

¹⁸ Chan, *supra* note 11; Schneider, *supra* note 12.

¹⁹ Office of the United States Trade Representative Press Release, *Legal Text Reflecting December, 2010 Agreement* (Feb. 10, 2011), at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/legal-texts-reflecting-december-3-2010-agreement>; see also Chan, *supra* note 11; Amy Tsui, *USTR Issues Final Texts on Korea Pacts, Setting Stage for Legislative Consideration*, 28 INT'L TRADE REP. (BNA) 272 (Feb. 17, 2011).

implementing the agreement.²⁰ The Obama administration and the Korean government both recognized that if formally amended, the KORUS would no longer be eligible for the fast-track expedited procedures for approval of free-trade agreements, since these procedures are available only for agreements signed before July 1, 2007. To get around that roadblock, the two governments agreed to keep intact the Agreement as signed in 2007, but then to supplement it with the February 2011 exchange of letters that, in effect, revise the obligations in the KORUS.

Substantively, the December 2010 supplemental agreement reflected in those letters slows down the pace of liberalization in some areas and expands market access in others. For example, the United States is allowed to keep its 25 percent tariff on Korean trucks for eight years longer than under the original agreement, and Korea was permitted to delay for two years a reduction in tariffs on some cuts of pork. On the other hand, both countries agreed to eliminate electric car tariffs by the fifth year of implementation. In addition, the exchange of letters makes clear that the parties shall apply the relevant KORUS dispute settlement procedures to this new “understanding.”²¹ The letters further state that these exchanged letters “constitute an agreement between our two Governments, which shall enter into force on the date that the KORUS enters into force and terminate on the date that that KORUS terminates.”²²

The U.S.-Korea Free Trade Implementation Act approves the free-trade agreement (as originally written) and contains provisions to “secure the benefits of the agreement entered into pursuant to an exchange of letters between the United States and the Government of Korea on February 10, 2011.”²³ These benefits are secured by writing the lessened U.S. obligations into the new U.S. legislation.²⁴ The House Committee report accompanying the Act notes that the KORUS as approved in 2007 was “modified by a later agreement on December 3, 2010,” but the report does not otherwise discuss the innovative procedure used by the Congress to approve a trade agreement revised after the negotiating deadline had passed.²⁵

The KORUS has been controversial in Korea. It was approved by the Korean parliament in November 2011 in an acrimonious session during which a member of parliament discharged a tear-gas grenade.²⁶

USE OF FORCE AND ARMS CONTROL

United States Ceases Performance of CFE Treaty Obligations in Response to Russia's Nonperformance

In November 2011, the U.S. Department of State announced that the United States would cease to perform certain obligations under the Conventional Armed Forces in Europe (CFE) Treaty with regard to Russia because of Russia's nonperformance of its CFE obligations. While

²⁰ United States–Korea Free Trade Implementation Act, Pub. L. 112-41, 125 Stat. 428 (2011).

²¹ Office of the United States Trade Representative Press Release, *supra* note 19, at 1, 5.

²² *Id.* at 6.

²³ Pub. L. 112-41, §2.

²⁴ *See, e.g., id.*, §§201, 321.

²⁵ H.R. REP. NO. 112-239, at 24, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt239/pdf/CRPT-112hrpt239.pdf>.

²⁶ Chico Harlan, *S. Korea Aims to Ratify Trade Deal Soon After U.S. Does*, WASH. POST, Oct. 8, 2011, at A9; *South Korea Ratifies Long-delayed US Trade Deal*, BBC NEWS, Nov. 22, 2011, at <http://www.bbc.co.uk/news/world-asia-15832451>.