

Status of the Free Trade Agreements with Korea, Colombia, and Panama

Basic Info

Critical Questions

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Following his State of the Union speech, President Obama will seek areas where he can work with the new Congress. For its part, the Republican-controlled House is aiming to tie its work more directly to the Constitution. One area where constitutional authority rests with Congress is the regulation of trade with foreign nations. The cooperative working relationship between Congress and the president, which in the past has allowed the United States to bargain with trading partners from a coherent, consistent position, continues to deteriorate.

Both Congress and the president would do well to take a fresh look at the state of U.S. trade relations and the legal authorities surrounding the president's ability to successfully conclude and implement reciprocal trade agreements.

Right now, prospects for three trade agreements are being hampered by partisan political differences. Lack of a bipartisan consensus on how to proceed is exacerbating procedural problems facing implementation of these agreements by Congress. This breakdown in cooperation threatens the president's goal of doubling exports by 2015, as outlined in the National Export Initiative, and continues to erode U.S. influence and credibility with key trading partners.

Q1: In light of President Obama's December 4 announcement that he had reached "successful resolution to outstanding issues" on the U.S.-Korea Free Trade Agreement, what is the status of this agreement and the other two pending free trade agreements (with Panama and Colombia)?

A1: Of the 15 free trade agreements (FTAs) signed by the United States since 1985, 12 are in force and fully operational. Three FTAs have been concluded but not yet implemented by Congress: the Colombia FTA, signed on November 22, 2006; the Panama FTA, signed on June 28, 2007; and the Korea FTA, originally signed on June 30, 2007.

All three agreements were negotiated pursuant to negotiating objectives and legal authority delegated to the president by Congress in the Trade Act of 2002. That law, called trade

promotion authority (TPA) or “fast track,” expired on July 1, 2007, but it remains in force for agreements signed by that date. Trade agreements negotiated according to TPA requirements are entitled to receive up-or-down votes in the House and Senate under somewhat expedited procedures. Passage is not guaranteed, but the drafters of TPA intended that signed trade pacts should be considered on their merits and not held up.

Nonetheless, because of shared authorities on trade and differences of views between successive Congresses and presidents, each of these FTAs, struck with countries that the United States counts as friends and allies, has languished. All three have been signed but not implemented, stuck in a procedural no-man’s land between the White House and Congress. Let me summarize the unique status of each.

- President Bush submitted legislation to implement the Colombia Free Trade Agreement to Congress on April 8, 2008, only to have the Democrat-controlled House pass a rule suspending the application of TPA procedural protections to the Colombia agreement. As a result, congressional consideration of this implementing bill has been postponed indefinitely.
- The U.S.-Panama Free Trade Agreement was signed but never transmitted to Congress, due to the general controversy over trade and the impasse between the House leadership and President Bush on the Colombia agreement.
- President Obama announced on December 4, 2010, that he had obtained supplemental concessions from the South Korean government on autos significant enough to justify his decision to transmit an implementing bill to Congress. This gives the U.S.-Korea Free Trade Agreement renewed political life.

Q2: What are members of Congress and the president saying about these FTAs?

A2: As the 112th Congress begins, the new Speaker, John Boehner, has said that the House intends to move on all three trade pacts. On January 25, the House Ways and Means Committee held a hearing to consider all three FTAs. The president, on the other hand, currently appears focused on implementing only the Korea agreement. In response to the president’s comments on the FTAs in the State of the Union address, Max Baucus (D-MT) of the Senate Finance Committee commented “Our free trade agreements with Colombia and Panama were signed more than three and a half years ago, so it’s extremely disappointing the president did not lay out a timeline for submitting them to Congress... It is time to quickly resolve any outstanding issues and send these agreements to Congress as soon as possible.”

Q3: How is legal authority to manage U.S. trade relations with foreign countries divided between Congress and the president?

A3: The Constitution specifically empowers Congress to “regulate commerce with foreign nations” and to “lay and collect taxes, duties, imposts and excises.” Lacking clear authority to regulate trade to achieve his goals in this area, the president must rely on: (1) authorites delegated and circumscribed by Congress, most recently under the now expired TPA; and (2) his broad power to conduct the nation’s foreign affairs and to negotiate with foreign nations.

Over the years, the unusual split of U.S. governmental authorities on trade has lent itself to a complicated set of procedures to empower the executive branch to negotiate trade deals. The president’s trade negotiating authority, which expired on July 1, 2007, was the result of many years of tug-of-war between Congress and the executive branch over the most productive way to deal with the biggest practical problem the United States faces in conduct of any trade negotiation with a foreign country. All countries want assurances that if they dig down to reach

their bottom line in a trade negotiation, the signed agreement will, in good faith, be accorded an up-or-down vote in the U.S. Congress. No renegotiation or amendments by 535 members of Congress that could unravel the deal would be in order. Our trading partners should be able to count on not being exposed to domestic criticism for caving to successive U.S. demands for more concessions.

Under the procedural arrangement that TPA established, congressional drafters believed U.S. negotiators in the executive branch would be in the best position to secure the strongest trade deals possible for U.S. industry, farmers, and workers.

Q4: Has TPA functioned as Congress intended when it was passed in 2002?

A4: No. The fragile political compact between Congress and the White House on trade has frayed considerably since passage of the Trade Act of 2002. Import competition and the globalized economy have become more controversial. The leadership on trade in the Congress has shifted several times since 2002, and of course, the White House has changed hands. Since 2006, Colombia, Panama, and Korea have all been subject to several different negotiations with respect to their FTAs. The May 10, 2007, congressionally led initiative to incorporate labor and environmental standards into trade agreements is one example where U.S. negotiators had to reopen closed trade agreement negotiations and make new demands of Colombia.

Q5: With the procedural protections and guarantees of an up-or-down vote called into question for Colombia and Korea because they may not meet the strict terms of TPA, how does Congress plan to consider the three pending FTAs?

A5: This is under debate among the House and Senate leadership and among the committees of jurisdiction that drafted the 2002 negotiating authority legislation. Parliamentarians in both houses of Congress, who are charged with interpreting how the original rules apply to the very changed circumstances facing Congress today, will play a role in this debate. For his part, Kevin Brady (R-TX), chair of the House Trade Subcommittee, indicated in a recent speech that his “preference is to move all three together, whether it is all in one vote or in the same time frame.” According to Brady, “it may not be one vote, it may just be a very tight sequence.”

If the fast-track rules for Colombia were “turned off” by the House in 2008, some are making the argument that they could be “turned on” again now that the body is under new leadership. If so, the question then arises, how will the Senate, where the threat of damaging amendments is arguably greater, treat such an implementing bill? On Korea, the agreement President Obama will ask the Congress to implement was not signed by the July 1, 2007, expiration of TPA, so it is unclear exactly how the supplemental changes on auto and pork tariff rates and safeguard measures will be considered by Congress or whether the implementing bill will be open to amendment. TPA protections should apply to the Korea FTA, but we won’t know for sure until the president sends the draft bill to Capitol Hill.

The good news is that the responsible parties in Congress have begun the tough thinking and debate it will take to rescue three good allies from the procedural no-man’s land where our challenging political system has placed them.

Opponents of trade liberalization are strong and can be expected to take full advantage of opportunities to block congressional approval of these agreements if the bipartisan partnership on trade between the White House and the leadership in Congress cannot be reestablished.

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