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US Policy Makers Now Closer on Trade Issues?

The Issue at Hand

On 10 March 2007 US Republican and Democrat leaders reached a compromise on trade policy issues that would, inter alia, insert stricter labour and environmental rules into future US trade agreements, a concession that has been demanded by the Democrat controlled US Congress. The immediate effect is on the bilateral trade front. The arrangement makes it possible to now conclude bilateral free trade agreements with Peru and Panama. The greater question is of course whether this arrangement could evoke new energy into the multilateral efforts to conclude the Doha negotiations.

Commentary

The newly agreed provisions will be incorporated into the texts of future free trade agreements (FTA's), rather than as parallel agreements. The reasoning behind the inclusion of these issues is to effectively 'export' US policy into other parts of the world. This gives rise to the concept of extra territorial application of US legislation with the concession of trading partners agreeing to US FTA's. The underlying concern that the Democrat Caucus has is that other countries lower their standards and thus gain a competitive advantage over the US. Now this practice would be subject to trade sanctions. On the positive side, especially for Africans that embark upon the FTA route, there are intellectual property provisions making it easier to produce generic drugs.

It is interesting that Bush has been resistant to including the labour standards in trade agreements without safeguards that the legal language would not be used to influence the US's own labour laws. It is ironic that the US has itself not signed several treaties of the International Labour Organization (ILO), and some US

labour laws may even violate ILO standards. By way of example prison labour in the US is considered a form of forced labour contrary to the ILO standards. Because of this US industry groups have lobbied the government to obtain a clause that prevents the international standards from being used to reinterpret US labour law. There is certainly some irony in this – what the US considers as good for its trading partners is not considered as good for the US itself it would seem. It is however difficult from an international law perspective to see how foreign governments could bring claims against the US to change domestic law based upon a bilateral FTA text. A summary of the key provisions of the deal are set forth in an annex at the end of this report.

Trade Promotion Authority

The USTR and President Bush are hoping that the agreement also will pave the way for renewal of Presidential Trade Promotion Authority (TPA), scheduled to expire at the end of June 2007. However this is not a foregone conclusion based upon the present compromise. The compromise does not apply to Bush's need for the extension of his 'fast-track authority'¹. This uncertainty of renewal is presently holding up the Administration in efforts to restart the Doha talks. The Democrats have proven reluctant to give an 'unpopular' Bush renewed trade authority, particularly in a time of US public disenchantment with the effects of WTO compliance and a lack of US successes under the WTO's dispute settlement system.

The US lawmakers seem to see no reason to extend TPA unless there is a break through in the WTO's Doha Development Agenda talks. This is somewhat iterative as the hold up in the talks is at least partially caused by the inability of the US to negotiate with confidence due to a lack of legislative certainty. In addition, the present deal is not applicable to FTA's generally, but very specifically only to smoothing the passage of 2 out of 4 currently pending FTA's. The Panama and Peru FTA's will now pass, Colombia is still stalled because of continued civil violence (trade union members are frequently murdered there) and Korea is stalled because of that country's continued bans on imports of US beef

¹ The President's right to negotiate trade pacts and submit them to Congress for simple up-or-down votes, without amendments.

and cars. None the less the direction is the correct one and will certainly be raised in relation to future imminent engagement on trade promotion authority. This view was openly expressed by USTR Susan Schwab subsequent to the announcement, using the words 'opens the way'. So potentially this agreement generates some theoretical momentum for the possible revival of the Doha talks. In addition the leading Democrat in this process of debate, Charles Rangel, has said that the Democrats do not want the US to be seen as the primary reason (obstacle) that the Doha Round is not completed. This may be interpreted to mean that while a broad and comprehensive extension of TPA could still be withheld, there may be a less ambitious and simpler extension of the present TPA, limited in scope just to complete the Doha negotiations. This however is speculative analysis and remains to be officially declared or agreed, but has been voiced as a likely compromise by several commentators.

Closing Observation

The US administration has had to face the political reality of the Democrats' control of the US Congress and hence compromise on trade policy rather than see its proposed trade deals fail to come to fruition. The present compromise is highly specific and has a definite bilateral effect. It is not designed to address the required June 2007 extension of trade promotion authority, but the engagement is certainly a positive precursor to another engagement process and a possible compromise in achieving TPA extension. For the moment the passage of 2 US free trade agreements is not going to provide the necessary impetus needed to progress Doha in Geneva, with or without revised Chairman's texts.

" We hope that we can improve the image of trade by creating new jobs and forging a partnership with the private sector to ensure that at the end of the day we're advancing a policy that makes trade work, not just for shareholders, but for all Americans."

(House Ways and Means Committee Chairman: Charles Rangel (Democrat))

Annexure: Summary of the Agreement

Labour Standards

- A fully enforceable commitment that FTA countries will adopt, maintain and enforce in their laws and practice the five basic international labour standards, as stated in the 1998 International Labour Organization *Declaration on Fundamental Principles and Rights at Work*.

[These principles are: the freedom of association; the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour and a prohibition on the worst forms of child labour; and the elimination of discrimination in respect of employment and occupation.]

- A new, fully enforceable, binding commitment prohibiting FTA countries from lowering labour standards.
- New limitations on “prosecutorial” and “enforcement” discretion - FTA countries cannot defend the failure to enforce laws related to the five basic standards due to resource limitations or decisions to prioritize other enforcement issues.
- Same dispute settlement mechanisms/penalties as other FTA obligations.

Environmental Issues

- A fully enforceable commitment that FTA countries adopt, implement and enforce in their laws and practice obligations under seven common major multilateral environmental agreements (MEAs), including CITES and the Montreal Protocol.

[The MEAs are: the Convention on International Trade in Endangered Species; the Montreal Protocol on Ozone Depleting Substances; the Convention on Marine Pollution; the Inter-American Tropical Tuna Convention; the Ramsar Convention on the Wetlands; the International Convention for the Regulation of Whaling; and the Convention on Conservation of Antarctic Marine Living Resources.]

- A binding commitment is undertaken prohibiting FTA partner countries from lowering existing environmental standards.
- Same dispute settlement mechanisms/penalties as other FTA obligations.
- A new “conflict of laws” provision - where a covered MEA obligation affects an obligation under an FTA, the FTA cannot be used to undermine the MEA obligation.
- For Peru, a fully enforceable Annex requiring Peru to take major specific steps to crack down on all illegal logging, and additional action to stop illegal logging of mahogany. A provision is included allowing the United States to investigate illegal logging of mahogany in-country, and stop questionable shipments at the border.

² Annex summary acknowledged to: Trade Reports International Group Volume 16 No. 94.

Generic Medicines

- A change to the “data exclusivity” provision (period in which a generic manufacturer may not use clinical test data of an innovative drug manufacturer) is present to allow generics to enter the market more quickly than under the old provision (by having “concurrent period” of data exclusivity).
- Include exception in FTAs that the “data exclusivity” provision does not preclude FTA countries from taking measures to protect public health and from utilizing the WTO “health solution.”
- Eliminate requirement that a drug regulatory agency withhold approval of a generic until it can certify that no patent would be violated if the generic were marketed; strengthen and expedite judicial processes in countries to ensure patent rights of innovative drug companies are respected.
- Eliminate requirement that an FTA country extend the term of a patent on a pharmaceutical product for delays in the patent and regulatory approval process. Instead, ensure expeditious patent and regulatory approval process.

Government Procurement

- Groundbreaking provision that allows US Federal and State governments to condition government contracts on contractors adhering to the five basic labour standards and acceptable conditions of work and wages.

Port Security

- Clarify that the US has full, non-challengeable authority to prevent foreign companies from operating US ports, based on national security concerns.

Investment

- Explicitly state that foreign investors in the United States will not be accorded greater substantive rights with respect to investment protections than US investors in the United States.

Worker Assistance

- Congress and the Administration will develop and implement the Strategic Worker Assistance and Training (SWAT) initiative to promote education and training, as well as portable health and pension benefits. The concrete and comprehensive program will: include public-private partnerships to educate youth; update and upgrade workers’ skills on the job; stimulate science education and research; provide meaningful health and pension benefits and income support; as well as going beyond the current TAA system to provide meaningful support, training and revitalization programs for entire communities hurt by the effects of trade and technology.

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