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The New Shape of America's Trade Policy

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After months of rumor and speculation, on May 10, Congress and the Bush Administration finally announced that they have arrived at a compromise deal redefining America's trade policy. The deal may be worth celebrating, but only after the specific language of the agreement is finalized and only if that final language preserves trade freedom. Details regarding the more controversial aspects of the accord have been revealed, giving some insight to the direction U.S. trade policy may now take. It is a direction that may not promote U.S. interests.

Congress and the President must ensure that U.S. trade policy continues to advance the goals of freeing trade and promoting American leadership in trade liberalization around the world. New restrictions on free trade agreements (FTAs) that impose costs on potential partner countries or on the U.S. will hinder the achievement of these goals.

New Provisions. New labor, environment, and intellectual property provisions have been announced as the core elements of the compromise. Unfortunately, implementing language may result in these provisions being contrary to free trade policy:

Labor

- The agreement contains a new, enforceable commitment to the 1998 International Labor Organization "Declaration on Fundamental Principles and Rights at Work." This declaration commits ILO members to endorse policies advancing freedom of association, collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of

employment and occupational discrimination, whether or not they have ratified the relevant ILO conventions.

According to the ILO "Global Report on Discrimination," the U.S. has not ratified many of the associated conventions and is not fully compliant with the Declaration. The report lists examples—mostly provided by the AFL-CIO and the International Confederation of Free Trade Unions—of inadequate U.S. policies regarding each principle. Moreover, the Declaration is legally non-binding—it does not require nations to change national laws in accordance with the stated principles. However, the new FTA provision could make these principles legally actionable through FTA legislation and the dispute resolution process. Including this provision in U.S. FTAs exposes America to legal challenges from trade partners and non-governmental organizations (NGOs) trying to influence U.S. labor laws through trade policy.

- The deal includes new restrictions on enforcement discretion. U.S. FTA partners will no longer be allowed to defend their failure to enforce labor laws due to inadequate resources. This provision will affect developing countries that use

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U.S. FTAs to promote development and reduce poverty. Historically, as prosperity increases, the desire and ability to implement labor protections and enforce them grow. This natural evolution towards protecting workers has been demonstrated in the U.S., Britain, and other developed countries. Forcing trade partners to shift scarce resources toward enforcing a labor regime that they cannot afford will neither promote development nor promote healthy labor markets.

Environment

- The deal includes a new, enforceable commitment to adopt, implement, and enforce seven multilateral environmental agreements according to multilateral treaty guidelines.¹ As with labor regulation, a number of these treaties do not impose obligations that supersede national laws. This new provision, however, dictates that treaty obligations cannot be undermined by FTA obligations. Consequently, this rule may make treaty obligations legally actionable through FTA legislation and trade dispute resolution. Moreover, no guidance is given as to the treatment of disputes that arise between the U.S. and free trade partners that are not signatories to a given treaty. While the U.S. is a signatory to all of these treaties, many other countries remain uncommitted.

Intellectual Property

- The agreement would eliminate the requirement that a country's drug regulatory agency withhold approval of a generic drug until it can certify that no patent would be violated if the generic were marketed.
- In addition, it would alter the general rule by which U.S. FTAs provide five years of data exclusivity for new drugs introduced into a trade partner's market. Under this new provision, a country that relies on the United States FDA for marketing approval and that grants approval within six months of a U.S. firm's application will have to maintain exclusivity for a five-year period begin-

ning when the drug was first approved in the United States, not the foreign market.

These IP provisions are designed to speed the delivery of medicines to developing countries. The new rules are coupled with new provisions for improved patent protection, but many FTA partner countries lack strong intellectual property rights protections under existing FTA requirements, making it unlikely they will be able to support the burden of new requirements. Drugs may get to market sooner, but they will do so at the expense of drug makers. This would seriously impact pharmaceutical companies' ability to recoup research and testing costs, resulting in less investment in future drug research.

Stand Strong for Free Trade. Until the agreement is fleshed out and the FTA language is developed, it will be difficult to pass final judgment on the new trade policy compromise. That said, while this compromise plan is testament to the real willingness of both sides to develop good policy, it falls short of providing the answer—good or bad—as to what shape U.S. trade policy will take.

The Administration has agreed to significant concessions on labor, environmental, and intellectual protection standards in U.S. FTAs, but these concessions do not ensure that pending FTAs with Peru, Colombia, Panama, and South Korea will win Congress's approval. If this agreement does not go far enough to satisfy concerns about the four pending FTAs, then it will probably not address concerns over any future FTAs stemming from the renewal of the President's Trade Promotion Authority (TPA). If the Administration gives up the authority granted by current TPA legislation, this "compromise" agreement could just lead Congress to pick apart the four pending FTAs to incorporate more palatable policy language, without advancing trade in any other way.

Until Congress reaches some consensus over the criteria needed to enable the passage of trade agreements, no progress can be made towards a mean-

1. 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.

ingful compromise that will allow the free trade agenda to move forward. If that criteria is too protectionist, then no compromise would be acceptable. FTA provisions that are too costly for the U.S. or result in new barriers to trade would not be worth the fight. And a TPA hampered by overly restrictive conditions also would be of little value in promoting a free trade agenda.

Defending free trade are central tasks for both Congress and the Administration. Policymakers need to stand firm and reach a compromise that is politically feasible and advances the cause of freer trade.

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