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August 2007

Brave New Deal?

Assessing the May 10th U.S. Bipartisan Compact on Free Trade Agreements[1]

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Introduction

On May 10, 2007, House Speaker Nancy Pelosi and Ways and Means Committee Chairman Charles Rangel, powerful members of the newly-ascendant U.S. Democratic Party, announced that they had negotiated a compromise agreement with the Bush administration and leading Congressional Republicans on critical changes to pending free trade agreements with Peru and Panama. Until that time, there had seemed to be slim hope that either agreement would win approval from a Congress dominated by Democrats, many of whom had been elected on promises to rein in what their constituents saw as a harmful proliferation of flawed trade deals.

The new compact spawns a number of questions for those focused on U.S. trade policy: will its provisions become the new template for bilateral and regional trade agreements? Will it influence the granting of fast track negotiating authority (Trade Promotion Authority – TPA) to the administration? Will it even help in the passage of the two agreements to which it applies, given substantial dissatisfaction with the deal within the Democratic caucus? And does Congress's intervention in a negotiated trade deal spell the end of TPA as it was formerly understood?

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The interesting question for those *not* steeped in the Byzantine U.S. political process is: to what extent does this deal offer a useful model for the international community? Does it pioneer approaches that will do better than the status quo at harnessing trade agreements for sustainable development? This brief note examines the new model, and assesses it in this light. It discusses the key elements of the agreement, weighing each for its potential merits, and then concludes with a broader assessment of the overall package.

The Substance of the Agreement

The innovations contained in the compact fall into six themes, each of which is discussed below in turn:

- labour;
- environment;
- patents and IPRs/access to medicines;
- government procurement;
- investment; and
- adjustment assistance.

1 This note was written with the financial support of the Swiss Agency for Development and Cooperation. The author is grateful to Kevin Gallagher, Mark Halle and Cristina Tebar-Less, who provided valuable comments. Any errors or omissions remain the responsibility of the author.

Labour

The compact commits Parties to enshrining the ILO's core principles into national law. The principles (taken from the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*) are as follows:

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

This commitment is made enforceable in a rather limited way. It is, in the first instance, limited to applying to federal-level, not state-level, laws. In the second instance, complaints can only be made about non-compliance if it occurs "in a manner affecting trade or investment between the parties," and "through a sustained or recurring course of action or inaction."

Two questions are salient here: to what extent does this break new ground in U.S. practice? And, to what extent is it a useful provision?

The most recent U.S. FTA precedent, the CAFTA, also had labour provisions. Rather than using the ILO core labour standards as a focus, the focus there was on enforcement of existing national labour laws ("A Party shall not fail to effectively enforce its labor laws"), and a best-effort commitment not to waive or derogate from existing laws in order to attract trade or investment—a commitment that is made mandatory in the new compact. Like the new agreements, CAFTA also contained significant provisions for capacity building, and obligations to provide effective legal redress for citizens complaining of breaches in national labour law. A trade-distorting breach in the obligation to enforce domestic laws effectively could lead to dispute settlement under the FTA's Chapter 20.

All of this is also found in the Peru and Panama agreements, and was there before the new compact amendments. The key difference is that in previous FTAs there were special provisions for dispute settlement in Chapter 20. For conventional breaches of obligations under the FTA, a successful complainant could eventually

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The U.S. compact on free trade agreements shares the International Labour Organization's aim of achieving the "effective abolition of child labour…"

be allowed to suspend trade benefits or demand a monetary assessment. For an unresolved breach under the labour Chapter, the transgressor would pay a penalty (up to US$15 million) into a fund established for the purpose of increasing capacity to implement and enforce labour standards. The new compact does away with this two-track treatment of disputes and sees labour disputes settled in the same way as are all other forms of dispute, with the possibility of suspension of benefits or an annual monetary assessment.

The key element of novelty in the compact's labour provisions lies with the inclusion of the ILO's core labour standards as obligations, and in the hard law commitment not to waive or derogate from existing laws to attract trade or investment. In effect what the compact does is to force Parties to enact law that they should have already on the books, as signatories to the ILO Conventions.

How useful is this feature? Clearly the key U.S. motivation here is avoiding "unfair" competition from countries with labour laws that are lax or unenforced, and that do not follow internationally agreed core labour standards. Taken as a whole—including the old and the new labour provisions—this is not a bad feature, particularly as it also involves an element of capacity building. To the extent that it helps improve the well-being of workers in Party states it is pro-development.

This assessment must be qualified, however. First, it should be noted that the much-vaunted parity of dispute settlement may not be such a desirable change. If we imagine that breaches of obligations stem from a lack of capacity to enforce labour laws, then a penalty

paid to a fund aimed at solving that problem is probably a better solution than a punitive suspension of trade benefits, or an annual monetary assessment. Only if we imagine such a breach of obligations to be strategic does a punitive system make sense.

Another concern is that this type of agreement is somewhat coercive, imposed on the developing country party by a partner with significant market power. As such, absent any real domestic buy-in, it can be argued that reforms will be half-hearted, and will only be carried out to the extent necessary to avoid penalty. As to how likely penalty will be, it should be noted that the state-to-state mechanisms for labour law enforcement have not to date been used in any of the U.S. FTAs that contain them. Invoking them would undoubtedly be a confrontational act, and would need to be considered worthwhile in a broader foreign policy calculus. In the final event, use of the state-to-state dispute mechanism for enforcement of labour provisions is not particularly likely.[2]

Finally, as a model for the rest of the world these provisions may prove problematic. Even though they aim solely to ensure that Parties uphold commitments they have already made in domestic and international law, they will be considered intrusive. It would probably be extremely difficult for any country other than the U.S. (and perhaps the EU, were it so inclined) to convince a partner to enter into discussions on such obligations.

Environment

The environmental provisions in the new compact fall into two areas. First, there is a commitment to put in place national laws that effectively enforce existing commitments under seven multilateral environmental agreements. These are:

- Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES);
- Montreal Protocol (Ozone treaty);
- Convention on Marine Pollution;
- Inter-American Tropical Tuna Convention;
- Ramsar Convention on Wetlands of International Importance;
- International Convention on the Regulation of Whaling; and
- Convention on the Conservation of Antarctic Marine Living Resources.

The second important element is the commitment not to waive or derogate from existing national environmental laws in order to attract trade or investment. As in the labour context, this commitment is hard law under the new compact, whereas it was a best-effort soft law commitment under the U.S.'s other recent FTAs.

The compact makes these commitments—actually, all commitments in the Chapter—subject to dispute settlement (after, of course, having exhausted the conciliatory procedures meant to avoid that eventuality). This is another innovation; previous agreements had made dispute settlement available only with respect to the key commitment to enforce domestic laws ("A Party shall not fail to effectively enforce its domestic laws").[3]

As in the labour context, the old model had established a two-track system for dispute settlement. Conventional disputes could end up awarding the complainant the right to suspend trade benefits or be paid an annual monetary assessment, while unresolved environmental disputes would funnel a payment of up to US$15 million into a fund established for environmental capacity building. The new compact establishes parity, with environmental disputes potentially treated not much differently from conventional disputes.

The environmental innovations have to be seen in the context of the existing model for recent U.S. FTAs. In the Peru and Panama FTAs, like the CAFTA before them, there is in addition to the state-to-state mechanism a mechanism for public submissions. Any citizen can allege failure to effectively enforce environmental laws. If the complaint is found to have merit, it can result in an investigation and the publication of a factual record—a potentially embarrassing written account of the failure in question.

Does the new compact increase the effectiveness with which the traditional model aims at ensuring enforcement of existing environmental laws? Probably

2 In fairness, the mechanism was never seen as something to which there would be frequent recourse, and there are a number of provisions aimed at conciliatory resolution that precede any final descent into dispute settlement—the worst-case scenario.

3 Unlike in the context of labour, there is no requirement that the failure in question be trade or investment distorting.

not. The citizen submission procedures are used to some extent in existing agreements, though mostly in the NAFTA where they have slightly more teeth. But the state-to-state mechanisms have never been used and, for the reasons elaborated in the labour context, they probably never will be. Indeed, some developing country negotiators have reported being calmed by assurances that these penalties would, in the normal course of events, not be resorted to—that they were only in the agreement to appease the U.S. Congress.[4]

The commitments with respect to multilateral environmental agreements suffer from several shortcomings. First, there can only be a breach if a Party, in failing to comply, does so in a manner affecting trade and investment between the Parties. This considerably narrows the scope for complaint and thus the effectiveness of the commitment. Second, they are only subject to state-to-state dispute procedures that will probably never be invoked. Finally, as a route to address the basic tension between trade and environmental law, they suffer from irrelevance. They address only those agreements to which both Parties are signatory, whereas the real controversy (also dodged in the Doha negotiations) is what happens when a signatory to an MEA enacts an environmental measure that violates the trade rights of a non-signatory? It is noteworthy that the list does not include the UNFCCC and its Kyoto Protocol, which the U.S. has not ratified and which arguably holds as much or more potential for trade disruption as any of the covered agreements. Neither does it include two other agreements with high potential for conflict that might be unfavourable to the U.S.: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the Convention on Biodiversity (with its Cartagena Protocol on Biosafety).

Another positive feature of the compact is the Annex addressing Peru's forestry sector, in which the U.S. pledges significant capacity building as a complement to Peru's commitment to strengthen its forest sector regime. This is not so much an innovation, however, as a continuation of the basic sorts of commitments made under previous agreements in the context of Environmental Cooperation Agreements (ECAs). If any environmental good is likely to come out of FTAs, it is probably going to come out of this sort of cooperation. But as a *sui generis* feature, this element of the compact is perhaps not as useful as a model for the world than would be a more systematic capacity building approach.

A caveat is in order here, however. The U.S. has now ratified 11 FTAs with environmental components, all of which have something like an ECA, accompanied by a workplan or plan of action to attain the objectives set out in the agreement.[5] But NAFTA is the only one of them with a sustained source of funds to support its workplan; a number of others either never had much money, or have now run through what they were allotted. Environmental cooperation and capacity building do not come cheap, and without sustained, regular and adequate budgets, they do not come at all.

As with the labour provisions, it is pertinent to ask whether these sorts of innovations could serve as a model for other countries. It is likely that only a bargaining partner with enormous market power could insert these sorts of provisions in an FTA, and the dearth of such provisions in agreements that the U.S.'s bargaining partners have concluded after signing off with the U.S. gives this argument some weight. The only other likely user of such provisions—the EU—is in the process of negotiating a raft of new FTAs in which it is considering including binding provisions insisting that its partners either sign specific MEAs, or implement domestic laws with equivalent effect.

Patents and IPRs/Access to Medicines

The new compact makes four important changes to the old model in this area. In the area of *data exclusivity*, it lessens the pain somewhat for developing countries and generic manufacturers. Data exclusivity is the practice whereby safety and efficacy test data that manufacturers use to gain marketing approval cannot be used as the basis for approval of generic versions of the same product. In the old model, this exclusivity was granted for five years following initial marketing approval, delaying the onset of generic approval and/or increasing expenses by requiring testing to be duplicated.

Under the new compact if a manufacturer seeks marketing approval in a second country within six months of seeking approval in a first country, the exclusivity in the second country will not extend for

4 See *L'Environnement dans l'Accord de Libre Echange entre le Royaume du Maroc et les Etats-Unis d'Amerique*. Ministere de l'Amenagement du Territoire, de l'Eau et de l'Environnement. September 2004, p. 15. http://www.minenv.gov.ma/dwn/ale.pdf.

5 The Agreements in question were signed with Australia, Bahrain, Chile, Colombia, Jordan, Morocco, Oman, Peru and Singapore, as well as two regional agreements: CAFTA-DR and NAFTA.

the full five years, but will expire at the same time as it does in the first country—a potential reduction of six months exclusivity. This provision only applies in cases where test data from the first country are acceptable as a basis for approval in the second country, a situation that often does not exist.

While it is a good thing from a development viewpoint that data exclusivity should be limited—it helps speed the advent of cheaper generic drugs—this innovation should not be seen as a model for the rest of the world. It has merely succeeded in offering a limited degree of relief from provisions that are above and beyond what is required in the WTO TRIPS Agreement.[6] Far preferable, from a development perspective, would be to dispense with data exclusivity altogether.

In the area of *patent extensions*, the new compact does away with a feature of the old model that required countries to extend the term of any patent to compensate for "unreasonable delays" in the granting of approval.[7] This is replaced with a best-effort commitment to expedite the approval process, and a commitment to cooperation in achieving this aim. Given the realities of the patent regimes in many developing countries, and the root cause of most delays—lack of capacity—this is a welcome change. Again, however, the basic obligation that the new compact modifies is absent in the TRIPS Agreement.

The compact also does away with what is known as *patent linkage*. The old model required regulators, before registering any generic product, to certify that in doing so there was no violation of existing patents. This was an onerous requirement, and arguably not the appropriate responsibility of the patent office but rather of the holder of any patent so violated. The new compact commits the Parties to establishing an effective system that would allow patent holders advance notice and opportunity to raise claims of violation, which should be dealt with expeditiously. Again this is a welcome change, but again it does away with a WTO-plus requirement and is thus hardly a pioneering change to be widely emulated.

Finally, the new compact amends previous practice by including in the body of the agreement what used to be relegated to a *side letter on public health*. In essence the side letter affirmed the Parties' existing rights under the TRIPS Agreement, and as clarified by subsequent declarations on TRIPS and Public Health.[8]

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The compact limits "data exclusivity," which will help speed up the advent of cheaper generic drugs, but doing away with data exclusivity altogether would be a better direction from a development perspective.

Of particular importance is the right of Parties to issue compulsory licences (in effect revoking patent privileges) in cases of extreme urgency or national emergency. The side letter, not being part of the text, was always on uncertain ground from a legal perspective. So, though all it does is affirm existing WTO rights, it is a good thing to have this provision in the text of the agreement.

Note, however, that WTO rights notwithstanding, the U.S. is alleged to have threatened states that exercise those rights. For example, in 2007, the U.S. placed Thailand on its priority watch list for serial violators of intellectual property rights after that country issued compulsory licences for the AIDS drug Kaletra (opinavir/ritonavir) and for Plavix (clopidogrel), an anti-clotting agent. While these specific actions were not specifically cited in the USTR's determination, it is widely believed that they played a key role. As such, it cannot be assumed that provisions of this sort in the FTAs will prevent similar threats and coercion.

6 The TRIPS Agreement does not contain any provisions mandating data exclusivity.

7 An illustration of "unreasonable delays" in the old model was a delay in issuance of more than five years from the date of filing, or three years from a request for examination of the application (provided the delays were not due to actions of the applicant).

8 These are: the Decision of the General Council of 30 August 2003 on the Implementation of Paragraph Six of the Doha Declaration on the TRIPS Agreement and public health (WT/L/540) and the WTO General Council Chairman's statement accompanying the Decision (JOB(03)/177, WT/GC/M/82).

Government Procurement

The old model FTA contained provisions on technical specifications in the process of government procurement, the key obligation of which was not to "prepare, adopt, or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade between the Parties." A subsequent provision made it clear that requirements intended to promote conservation of natural resources and the environment would not be considered unnecessary obstacles.

The new compact adds to this provision, clarifying that technical specifications in the area of labour are also considered legitimate.

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Specifically, it is permitted to require a supplier to comply with generally applicable laws regarding the ILO core principles, and regarding what are termed "acceptable conditions of work," including specified minimum wage, hours of work and occupational health and safety.

This is a useful clarification, in part made necessary as a complement to the new compact's focus on the ILO core principles.

Investment

Treatment of investors under U.S. FTAs has been a controversial topic since NAFTA's Chapter 11 gave foreign investors legal rights, including the right to compel states into binding arbitration where the protective provisions of the Chapter are alleged to be violated. The perceived special treatment for foreign investors was seen as important enough that U.S. legislators were compelled to include in the Trade Act of 2002 the objective: "ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States."

The new compact puts this objective into the preamble of the FTAs, as follows:

> "*AGREE* that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement;"

This is a curious formulation. It alters neither the existing treaty protections for foreign investors, nor the existing remedies available to U.S. investors within the U.S. But it asserts that the substantive rights available under the two regimes are equivalent. In other words, it addresses the critics' argument by decreeing that they are wrong. It will be interesting to see whether domestic investors use this provision to argue that they are due more rights than otherwise would be the case.

The intent of this provision is praiseworthy; there is no convincing argument for foreign investors to have privileged status over domestic investors. But it is a patch by nature rather than a fundamental repair, and it remains to be seen what sort of final impact it will have.

Adjustment Assistance

As with the other provisions in the new compact, this one needs to be seen in the context of what already exists. The 2002 Trade Act was accompanied by the Trade Adjustment Assistance Reform Act, which set up a system of support to workers who could prove that their jobs were lost due to trade liberalization. Among other things, the TAA offers certified workers:

- assistance in finding new jobs;
- job search allowances;
- relocation allowances;
- training; and
- income support.

The new compact proposes another regime with similar aims: the Strategic Worker Assistance and Training Initiative (SWAT). It is not yet clear to what

extent this will be an improvement over the existing support regime, or how the two regimes will interact. This uncertainty has led some to speculate that the initiative is more of a public relations exercise than a serious effort to improve existing services.

That said, the idea of adjustment assistance for those who are thrown out of work by trade liberalization's structural changes is an excellent one, and should probably be emulated by those states with the resources to do so. The current TAA may provide important lessons in this regard.

One final word on the political significance of this bipartisan deal affecting the Peru and Panama FTAs. In agreeing what are essentially new requirements for bilateral trade agreements with the U.S., Congress has effectively reopened agreements on which the negotiation process had been concluded—thus apparently invalidating the purpose for which Trade Promotion Authority exists. While from a strictly legal point of view, it could be argued that Congress has not challenged provisions of treaties formally submitted to it for an up-or-down vote, the precedent is a worrying one and could lead other countries to question the fundamental premise of TPA, considered up to now an essential requirement for negotiating trade deals with the U.S.

Conclusions

The new compact is a marked improvement over the old model used in agreements such as the CAFTA-DR. That said, as noted above, a number of the purported improvements may end up having no real impacts. The parity of dispute settlement treatment for labour and environmental disputes is one such "improvement," given the unlikelihood that state-to-state disputes will ever arise. In fact, it can be argued that parity in this case is a step backwards, if we assume that breaches of obligations are due to capacity constraints rather than to strategic intent.

Still, a number of features are welcome, such as the scaling back of the rights of patent holders and the emphasis on core labour standards. As models for the rest of the world, where bilateral and regional trade agreements are flourishing at an astounding pace, such provisions leave something to be desired, however. In the first place, many of them simply remedy highly problematic provisions in the old U.S. model—a model that few others follow as a matter of course. In the second place, some of the more interesting provisions on environment and labour would be rejected out of hand by negotiators in many developing countries were they not seated across from a superpower such as the U.S. In other words, even where they provide useful precedents, they may not be replicable. The many elements of capacity building in the compact are also promising, but this type of cooperation is already practiced extensively by others, including particularly the EU in its RTAs.

In the end, if we are looking for new ways to harness free trade in the service of sustainable development, the value of this compact for the rest of the world is somewhat meagre, amounting to useful clarifications such as the note on government procurement and the attempt to offer equal treatment to domestic investors. While these are valuable, the main value of the compact seems to not be exportable—it resides firmly within the U.S.

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