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Bipartisan Trade Deal

Late Thursday, U.S. Trade Representative Susan Schwab, House Speaker Nancy Pelosi, Ways and Means Chairman Charles Rangel, and ranking Republican Jim McCrery announced a bipartisan trade deal that paves the way for congressional approval of bilateral free trade agreements (“FTAs”) with Panama, Peru, Colombia, and Korea. Both the Administration and the Democratic congressional leadership agree that the terms of the bipartisan deal are sufficient to win broad congressional support for the Panama and Peru FTAs. With respect to the Colombia and Korea FTAs, Democrats have intimated that additional issues will need to be addressed before those deals can move forward. Specifically, concerns remain regarding anti-union violence in Colombia and market access for U.S. beef and autos in Korea.

The cornerstone of the bipartisan trade deal is a focus on strengthened labor provisions, including a groundbreaking commitment to include core international labor standards in the FTA text. The deal also includes significant and important changes in the intellectual property and environment provisions, as well as changes related to port security and investment. With respect to labor, intellectual property, and the environment, Democrats obtained changes that represent a significant departure from past FTAs.

Below is a summary of the key provisions of the bipartisan trade deal:

Labor. Under the bipartisan trade deal, significant changes will be made to the current FTA labor provisions. Both the United States and FTA partner countries agree to adopt, maintain, and enforce the core labor standards set forth in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*. These core labor standards are: freedom of association; the right of collective bargaining; elimination of forced or compulsory labor; elimination of child labor; and the elimination of discrimination in employment. It has long been a Democratic goal to insert these core labor standards in the FTA text. This Democratic demand initially met resistance when some U.S. industry groups expressed concern that U.S. labor laws would be vulnerable to challenge, since the United States has not ratified all of the specific ILO Conventions. Ultimately, both sides agreed that the core ILO labor standards set forth in the ILO Declaration, rather than the ILO Conventions, would be referenced in the FTA text, thus allowing the bipartisan trade deal to go forward.

Significantly, this new obligation is subject to dispute settlement, and will be enforceable under the same dispute settlement rules as commercial disputes. At the same time, only sovereign governments – not non-governmental organizations, labor unions, or import-sensitive companies – can initiate disputes under the FTA. Challenges also are limited to violations of the ILO principles that impact trade or investment between the United States and its FTA partner. For these reasons and others, we do not expect that the new, stronger labor provisions will lead to a proliferation of labor-related FTA disputes. Finally, there is also a clarification that in the area of government procurement, governments may require contractors to comply with core labor standards.

Intellectual Property. The bipartisan trade deal includes changes to the FTA provisions that relate to patent protection and the protection of pharmaceutical company test data submitted to regulatory authorities as part of the drug marketing approval process (often referred to as “data exclusivity”). While the core obligations of patent protection and data exclusivity remain in place, significant changes to these provisions may limit the intellectual property protection available to pharmaceutical companies seeking to market their drugs in FTA partner markets.

Specifically, drug regulatory authorities are no longer required to extend the term of patent protection to compensate an intellectual property owner for unreasonable administrative delays in the patent or marketing approval process. In addition, there is no obligation for drug regulatory agencies to coordinate with patent authorities to ensure that marketing approval is not granted for an infringing product. Instead, FTA partners will need to provide procedures that ensure that a patent holder has sufficient time and opportunity to effectively enforce its patent rights and seek appropriate remedies for infringement prior to a grant of marketing approval. A third change alters the way in which FTA partners can calculate the 5-year term of data exclusivity and is likely to lead to a shorter period of protection in FTA partner markets. Finally, regarding access to medicines, the parties will now explicitly reference in the text of the FTA that nothing in the intellectual property provisions of the FTA prevents countries from utilizing the WTO TRIPS public health solution or taking necessary measures to protect public health, in particular concerning HIV/AIDS and other epidemics.

Environment. With respect to the environment, the FTAs will incorporate a specific list of multilateral environmental agreements (“MEAs”), to which both FTA partners are signatories. These MEAs include the Convention on International Trade in Endangered Species and the Montreal Protocol on Ozone Depleting Substances. This is a significant departure from past policy and the first time that MEAs have been incorporated into an FTA in this manner. As a result of these new provisions, a dispute concerning implementation of an MEA obligation potentially could be brought under the FTA dispute settlement process. The bipartisan trade deal also strengthens an existing FTA provision to ensure that FTA partners do not weaken their environmental laws to attract trade or investment.

As with the labor provisions, environment disputes will be subject to the same dispute settlement mechanism as commercial disputes under the FTA. At the same time, only violations that impact trade and investment between the United States and an FTA partner can be brought before a dispute settlement panel, and only sovereign governments may bring such disputes. Consistent with the approach taken in the North American Free Trade Agreement, there also is a provision stating that in the event of a conflict between FTA and MEA obligations, a party may implement its MEA obligations as long as the measure is not a disguised restriction on trade. Finally, with respect to Peru, additional steps will be taken to address illegal logging and illegal trade in endangered species.

Investment and National Security. Regarding investment and the issue of port security, the bipartisan trade deal clarifies two key issues that were implicit, rather than explicit, in the current FTA text. Regarding port security, the FTAs will now clarify that the essential security exception in the FTA can be invoked by the United States, including in the sensitive area of providing services related to the operation of U.S. ports. Regarding investment, there is recognition that under the FTA foreign investors will not be given greater substantive rights than U.S. investors with respect to investments made in the United States. This language is based on current TPA negotiating objectives.

While this bipartisan trade deal is not directly linked to Democratic support for an extension of President Bush's trade promotion authority ("TPA") due to expire at the end of June, we believe this current bipartisan deal will serve as an important precedent for a constructive dialogue between Democrats and Republicans on TPA extension. In a briefing Friday afternoon in which we participated, USTR Susan Schwab and Secretary of the Treasury Henry Paulson emphasized that they see the bipartisan trade deal as a significant breakthrough and as a foundation for continued bipartisan cooperation on other trade issues, including TPA.

At the present time, there appears to be an emerging consensus to extend TPA in order to conclude the Doha Round, provided that the Administration is able to show progress on the agriculture negotiations. With respect to TPA for bilateral FTAs, we would anticipate that any TPA legislation would be consistent with the terms of the bipartisan trade deal, at least with respect to developing country partners.

Please let us know if you have any questions regarding these important developments. You also may be interested in reading a recent article by Stuart Eizenstat and Marney Cheek in *Foreign Affairs* that places the labor deal in historical and political context. You can access that story on our website by clicking [here](#).

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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