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Concerns Regarding Labor and Environmental Provisions In the Trade Promotion Authority Bill *-- A Summary and Discussion --*

The Trade Promotion Authority bill reported by the Ways and Means Committee has three major components. First, the bill establishes the objectives the President is directed to work towards in the negotiations of any agreement to which he wishes to apply trade promotion authority. Second, the bill establishes Congressional notice and consultation requirements, which the President must follow for any agreement to which he wishes to apply trade promotion authority. Finally, the bill permits the President to utilize trade promotion authority (fast track authority) for agreements entered into before July 1, 2005 (with a possible extension to July 1, 2007).

Negotiating Objectives:

The bill establishes six **overall negotiating objectives**, which summarize the conceptual approach to trade promotion authority. Specifically, those six general objectives are:

1. more open, equitable, and reciprocal market access;
2. reduce or eliminate barriers to trade that decrease market opportunities for U.S. exports;
3. further strengthen the system of international trading disciplines and procedures;
4. foster economic growth;
5. ensure that trade and environmental policies are mutually supportive and protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources; and
6. **promote respect for worker rights and the rights of children consistent with the core labor standards of the International Labor Organization.**

The bill also includes **principal trade-negotiating objectives**. Principal trade negotiating objectives are those objectives that are targeted for inclusion in trade agreements. The principal trade-negotiating objectives are divided into 13 general areas with specific objectives detailed under each area. The 13 principal trade-negotiating objectives are:

1. Trade Barriers and Distortions
2. Trade in Services
3. Foreign Investment
4. Intellectual Property
5. Transparency
6. Anti-Corruption
7. Improvement of the WTO and Multilateral Trade Agreements
8. Regulatory Practices
9. Electronic Commerce
10. Reciprocal Trade in Agriculture
11. **Labor and the Environment**

12. Dispute Settlement and Enforcement

13. WTO Extended Negotiations

The Committee-Reported Bill specifically states that Trade Promotion Authority only applies to trade agreements "...if such agreement makes progress in meeting the applicable [overall negotiating and principal trade negotiating] objectives..." (Sec. 3 (b)(2))

The determination as to whether an agreement "makes progress in meeting the applicable objectives," is largely left up to the Administration. However, the bill does require that the President provide notice and consult with the Congress at least 90 days before initiating negotiations with a foreign country. This notice must include the specific U.S. objectives for negotiations. In addition, before an agreement is entered into the President must consult with the relevant Congressional Committees and a specially created Congressional Oversight Group. These consultations must include the nature of the agreement and the extent to which it achieves applicable objectives. Congress can deny TPA authority to any agreement if both the House and Senate agree to a procedural disapproval resolution "for lack of notice or consultations."

Concerns Regarding Negotiating Objectives:

Concerns have been raised by many Members regarding the inclusion of labor and environmental objectives.

Text Of Principal Objectives as Included in the Ways and Means Reported Bill

(11) LABOR AND THE ENVIRONMENT- The principal negotiating objectives of the United States with respect to labor and the environment are--

(A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;

(B) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources;

(C) to strengthen the capacity of United States trading partners to promote respect for core labor standards (as defined in section 10(2));

(D) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;

(E) to reduce or eliminate government practices or policies that unduly threaten sustainable development;

(F) to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services; and

(G) to ensure that labor, environmental, health, or safety policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade.

In particular Senator Phil Gramm and others have raised two specific concerns related to the environmental and labor objectives:

1. Labor & Environmental Provisions May be Inserted into a Trade Agreement or Implementing Bill

The inclusion of environmental and labor objectives could lead to a situation where a President either:

- (a) submits fast-tracked implementing legislation to Congress that contains extraneous provisions dealing with labor and the environment or
- (b) enters into a trade agreement that imposes new labor and environmental standards on the United States.

Senator Gramm has proposed that we could address concern (a) by withholding fast-track treatment from labor and environmental provisions by providing for a point of order striking those provisions from the bill (without removing fast-track procedures on the overall bill). We could further address concern (b) by withholding fast-track treatment from the implementing bill for any agreement that imposes labor or environmental standards by providing for a point of order removing fast track from the bill.

2. Enforcement Process Could Threaten US Sovereignty over Labor & Environmental Laws and Practices

The Ways and Means bill also includes as a principal negotiating objective directions related to dispute settlement and enforcement. Specifically the bill directs the President “to seek provisions that treat United States principal negotiating objectives equally with respect to—

- (i) the ability to resort to dispute settlement under the applicable agreement;
- (ii) the availability of equivalent dispute settlement procedures; and
- (iii) the availability of equivalent remedies.” (Sec. 2(b)(12)(F))

Senator Gramm and others have raised concerns that the combination of this language and the environmental and labor objectives effectively directs the President to enter into agreements that allow international dispute resolution boards to pass judgment on whether the U.S. is failing to effectively enforce its environmental and labor laws and if such failure effects trade, to authorize retaliation. In particular, there is concern that environmental and labor groups will actually push foreign countries into pursuing complaints that force a judgment and action from a dispute resolution board.

Senator Gramm has proposed addressing this concern by including specific language providing that environmental and labor complaints are not subject to retaliation and removing trade-promotion authority from any trade agreement or implementing bill that includes provisions permitting retaliation.

Response to Concerns:

Some Members have responded to the concerns outlined above by asserting that the principal negotiating objectives for labor and the environment are so narrowly drafted that the problems contemplated by some are simply not likely. Specifically, these Members point out that the objectives are strictly limited to ensuring that a party “does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a

manner affecting trade...” In other words, a country would have to continually over time fail to enforce laws already in effect (not new laws) in a manner that affects trade.

In addition, these Members point out that the objectives also direct the President to seek agreements that recognize and protect sovereignty. Specifically, agreements should “recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.”

Finally, while there has been some indication that proponents of the Ways and Means bill might be able to accept language addressing the first concern raised by Senator Gramm and others (by including a point of order against provisions changing U.S. environmental and labor laws), there is strong opposition to including the proposed solution to the second issue. Specifically, proponents of the Ways and Means bill have argued that including a provision providing that labor and environmental provisions of an agreement are not subject to retaliation constitutes a mandate on the President’s negotiations which would disadvantage the U.S. during negotiations (i.e. the U.S. comes to table with mandatory provisions that the other country must accept, thereby increasing the other countries ability to trade accession to the mandate for provisions they desire). Furthermore, some Members are concerned that including any mandate would open the bill up to the inclusion of further mandates, which would further disadvantage the pursuit of free trade.

Precedents:

The Democrat sponsored Fast-Track bill enacted in 1988 included as a principal negotiating objective “to promote respect for worker rights.” (Section 1101 of Public Law 100-418) It was under this 1988 Fast-Track Authority that NAFTA was negotiated and enacted. After the conclusion of NAFTA, the Clinton Administration entered into several NAFTA side agreements, including an agreement covering labor issues and an agreement covering environmental issues. The NAFTA Labor Agreement establishes 11 principles, which the parties to NAFTA agreed to promote in the long run and in the short-run to comply with their own labor laws and standards related to these 11 principles. Only three of these principles, however, are subject to review by an arbitration panel, which has the power to implement sanctions. The three principles are (1) labor protections for children and young persons; (2) minimum employment standards pertaining to minimum wages; and (3) prevention of occupation injuries and illnesses.

In 1997, both the House and Senate Republican sponsored Fast-Track Reauthorization bills contained a much more limited negotiating objectives related to labor issues. Specifically each bill limited the objectives to those provisions aimed at preventing governments from lowering or derogating from their existing domestic labor standards in order to attract investment or gain an advantage in international trade. Neither the House nor Senate bill was enacted into law.

RSC Staff Analysis:

While the proponents of the Ways and Means bill have clearly attempted to limit the principal negotiating objectives in such a way as to prevent the type of problems envisioned by Senator Gramm and others, without the specific points of order suggested by Senator Gramm, the ability to avoid these problems largely depends on three factors.

- First, the trust that the President will not negotiate an agreement that includes changes to U.S. labor and environmental laws or that opens the door for the review of either the substance or enforcement of U.S. environmental and labor laws by arbitration boards. (It should be noted, however, that if labor and environmental provisions are included in an agreement, it is one of the principal negotiating objectives that the agreement will treat all objectives equally in terms of enforcement.)
 - Second, that if an agreement did include review of the enforcement of U.S. environmental and labor laws, such review would be strictly limited to the objectives outlined in the bill and that under no circumstances would an arbitration board consider U.S. actions to constitute a failure to effectively enforce our current environmental or labor laws, through a sustained or recurring course of action or inaction in such a manner as to affect trade.
 - Third, that if the President submitted an agreement that includes changes to U.S. labor and environmental laws or that opens the door for the review of either the substance or enforcement of U.S. environmental and labor laws by arbitration boards, Congress would consider it a violation of the negotiating objectives of TPA and vote the agreement down.
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