POLICY ESSAY

MOVING FORWARD: A NEW, BIPARTISAN TRADE POLICY THAT REFLECTS AMERICAN VALUES

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U.S. trade policy was approaching a dead end at the end of 2006: there was an increasingly divisive and partisan atmosphere and no progress on several trade initiatives was in sight. "A New Trade Policy for America," first introduced in March 2007, is now moving forward. In this Policy Essay, Congressman Charles B. Rangel, the Chairman of the Committee on Ways and Means of the United States House of Representatives, describes how Congress is crafting and implementing a new trade policy that reflects American values and spreads the benefits of globalization broadly, both in the United States and throughout the world.

From the beginning of my tenure as Chairman of the Committee on Ways and Means of the United States House of Representatives, it was clear to me that the Committee needed to develop a new trade policy that works for working Americans and shapes globalization, to spread its many benefits far more broadly than is currently the case. When I began in 2006, the trade policy developed in the first six years of the Bush administration had stalled, and Democratic and Republican trade policymakers had gone from engaging in bitter, partisan debates to no debates at all. Meanwhile, public support for the existing policy was minimal and dwindling.[1]

On March 27, 2007, I joined with House Democratic leaders to unveil a new trade policy for America.[2] The March 27 Paper called for including enforceable basic labor rights and environmental protections in the text of U.S. free trade agreements.[3] We recognized the need for a more active and assertive approach toward ensuring that the trade agreements the United

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[1] In a NBC/Wall Street Journal Poll taken March 2–5, 2007, respondents were asked: "In general, do you think that free trade agreements between the United States and foreign countries have helped the United States, have hurt the United States, or have not made much of a difference either way?" NBC News/Wall Street Journal Study No. 6071, at 15 (2007), http://online.wsj.com/public/resources/documents/wsj070705_March2007-poll.pdf. Twenty-eight percent said trade helped, while 48% percent said trade hurt the United States. *Id.* In October 1999, 50.9% of respondents to a poll by the Program on International Policy Attitudes thought free trade was a "good idea," while 44.2% said it was a "bad idea." PROGRAM ON INT'L POLICY ATTITUDES (PIPA), AMERICANS ON GLOBALIZATION: A STUDY OF US PUBLIC ATTITUDES 5 (2000), http://pipa.org/OnlineReports/Globalization/AmericansGlobalization_Mar00/AmericansGlobalization_Mar00_quaire.pdf.

[2] Ways and Means Committee Staff, Position Paper: New Trade Policy for America (2007) (on file with author).

[3] *Id.*

States signs are actually implemented and enforced and that U.S. policy effectively addresses our trading partners' unfair trade practices, such as the manipulation of currency values and trade-distorting subsidies.[4] The Paper also called for a stronger role for Congress in the development of U.S. positions regarding World Trade Organization ("WTO") negotiations;[5] a more effective program to educate and prepare Americans for the challenges of globalization, to enable them to take maximum advantage of its benefits, and to help working Americans who are hurt by trade and globalization;[6] and an expanded program to foster economic development in the poorest countries of the world.[7]

Part I of this Essay provides a brief historical overview of U.S. trade policy and Congress's role in its development. Part II describes the situation facing trade policymakers at the beginning of the 110th Congress, and the need for a new direction. Part III describes the "New Trade Policy for America," unveiled in March 2007, and the progress we have made, and continue to make, in implementing it. In Part IV, I offer a few concluding thoughts.

I. An Historical Overview of U.S. Trade Policy

The Constitution of the United States grants Congress the sole power to "regulate commerce with foreign nations," and to "lay and collect . . . [d]uties."[8] The President and his chief trade official, the U.S. Trade Representative, play a crucial role in carrying out the trade policy objectives of Congress and in engaging in face-to-face negotiations with foreign nations.[9] But Congress has the ultimate authority: "The Constitution grants the President no trade-specific authority whatsoever. Thus, in no sphere of government policy can the primacy of the legislative branch be clearer: Congress reigns supreme on trade, unless and until it decides otherwise."[10]

For more than seven decades, Congress has directed the President to negotiate and implement "reciprocal" trade agreements that foster free and fair competition between the United States and its trading partners.[11] Congress recognized in the Reciprocal Trade Agreements Act of 1934 and in subsequent legislation that the elimination of trade barriers and unfair trade practices could contribute to economic prosperity in the United States and

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] U.S. Const. art. I, § 8, cls. 1–2.

[9] *See, e.g.*, Trade Act of 1974 § 141, 19 U.S.C. § 2171 (2000).

[10] I.M. Destler, American Trade Politics 14 (3d ed. 1995).

[11] Under the Reciprocal Trade Agreements Act of 1934, 19 U.S.C. § 1351 (2000), the President was given the authority to reduce any U.S. tariff by up to fifty percent, based upon an agreement from a trading partner to reduce the tariffs it applied to U.S. goods. *See* Destler, *supra* note 10, at 12.

around the world, and that international economic interdependence could help to promote international peace. As President Franklin D. Roosevelt's Secretary of State once said, the expansion of international trade "dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war."[12] In the first half of the 20th Century, Democrats in Congress were far greater supporters of international trade than Republicans were.[13] But after World War II a bipartisan consensus began to develop.

The United States and its trading partners started with the reciprocal reduction of tariffs on imported goods—the most obvious barriers to trade—after Congress passed the Reciprocal Trade Agreements Act of 1934.[14] After significantly reducing tariffs,[15] the United States and its trading partners agreed to tackle non-tariff barriers and address unfair trade practices affecting trade in goods, while continuing to reduce tariffs even further.[16] More recently, with the establishment of the World Trade Organization in 1995[17] and the North American Free Trade Agreement in 1994,[18] the United States and its trading partners have agreed to adopt more specific rules governing trade in goods, trade in services, and trade-related intellectual property rights.[19] These policy decisions, along with the linking of technological ad-

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[12] CORDELL HULL, THE MEMOIRS OF CORDELL HULL 81 (1948).

[13] *See* E.E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF 283 (1935) ("[T]he dominant position of the Republican party before 1932 can be attributed largely to the successful exploitation of the tariff by this party as a means of attaching to itself a formidable array of interests dependent on the protective system and intent upon continuing it."); DESTLER, *supra* note 10, at 31 ("In the early Roosevelt administration, the great majority of Democrats had supported the reciprocal trade legislation, and virtually all Republicans had opposed it. (In 1934, 1937, and 1940, no more than five Republican votes were cast in favor of reciprocal trade in either house.)").

[14] Pub. L. No. 73-316, 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351 (2000)).

[15] From 1934 to 1945, the United States entered into bilateral trade agreements with twenty-seven countries, granting tariff concessions on sixty-four percent of all dutiable imports and reducing rates by an average of forty-four percent. *See* DESTLER, *supra* note 10, at 12 (citing JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RELATIONS 141 (1984) and JOHN W. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT? 7 (1971)).

[16] For example, in 1947, the parties to the General Agreement on Tariffs and Trade—still the bedrock of the multilateral trading system—(1) agreed to accord one another's products "treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use," General Agreement on Tariffs and Trade art. III, § 4, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; (2) recognized "that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned," *id.* art. VI, § 1; and (3) agreed to limit trade-distorting subsidies. *Id.* art. XVI.

[17] Marrakech Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1140 (1994).

[18] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

[19] See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annexes 1A, 1B, 1C, Apr. 15, 1994, 33 I.L.M. 1154 (1994).

vances to international trade, have helped make the economies of nations increasingly interdependent.[20]

The basic objective of Congress has been to provide "an open, nondiscriminatory, and fair world economic system"[21] and to raise standards of living at home and abroad.[22] It is generally recognized that U.S. trade policy in the second half of the 20th century moved in the direction of reciprocal trade liberalization—an "open" international economy, with the reduction or elimination of barriers to international trade.[23] What is often overlooked, however, is that the willingness of Congress to liberalize trade was conditioned on "fair" trade and an assertive trade policy that raised standards of living at home and abroad. This meant, for example, that Congress supported "countervailing" duties to address subsidized and injurious imports, even when those subsidies resulted in less expensive products for U.S. consumers.[24] It also meant that Congress recognized the need for our trading partners to adopt "international fair labor standards," since unfair labor practices can have the same trade-distorting effect as subsidies.[25]

Though countervailing duties and antidumping duties can make imports more expensive, they are thus part of the very same principle that has led to trade liberalization. Congress recognized that U.S. businesses, farmers, and workers can compete and win on a level playing field. Therefore, through these duties, Congress intended to provide for open but fair competition in international trade.

II. Partisan Gridlock and The Need for a New Direction

In the weeks after the 2006 elections, some pundits commented that, with Democrats taking over both houses of Congress on January 4, 2007, U.S. initiatives to open trade with foreign nations would move from "high

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[20] For example, in 1946, U.S. goods trade (exports plus imports) was equivalent to 7.6% of U.S. gross domestic product. By 2006, U.S. goods trade as a percentage of GDP had grown to 21.9%. *See* Council of Economic Advisers, Economic Report of the President 348 (2007).

[21] *See, e.g.*, Trade Act of 1974 § 121(a), 19 U.S.C. § 2131 (2000) (amended 1988).

[22] *See, e.g.*, GATT, *supra* note 16, preamble ("Recognizing that [the contracting parties of GATT's] relations in the field of trade and economic endeavour [sic] should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.").

[23] Destler, *supra* note 10, at 30–32.

[24] *See generally* Trade Act of 1930, 19 U.S.C. § 1677 (2000). A countervailing duty is an import duty imposed in an amount equal to the amount of any trade-distorting subsidy on the imported product. *See, e.g.*, 19 U.S.C. § 1671(a).

[25] Trade Act of 1974, Pub. L. No. 93-618, § 121(a)(4), 88 Stat. 1978, 1986 (codified as amended at 19 U.S.C. § 2131 (2000)). In fact, the recognition that labor practices can constitute an unfair trade practice goes back at least as far as 1890, when Congress enacted legislation to restrict imports produced by prison labor. *See* McKinley Tariff Act of 1890, § 51, 26 Stat. 567, 624 (codified at 19 U.S.C. § 1307 (2000)).

gear" to an abrupt stop.[26] Those observers misunderstood the status of the trade agenda before Democrats took control and the intentions of Congress under a Democratic leadership. "[T]he political base for Bush administration trade policy had in fact crumbled well before the 2006 elections."[27] The Bush administration's Free Trade Agreement ("FTA")[28] program had stalled: in 2006, a very small FTA with Oman was passed by only 16 votes in the House,[29] the lowest margin since the Senate passed the North American Free Trade Agreement ("NAFTA").[30] Furthermore, the Republican leadership in the House, was unable, or unwilling, to bring up the next FTA with Peru.

Those troubles were nothing new to the Bush administration. In 2001, "trade promotion authority" or "fast track" passed the House by one vote.[31] And, in July 2005, the Central American Free Trade Agreement–Dominican Republic ("CAFTA-DR") passed the House by just two votes, despite the presence of eleven more Republicans in the House than in 2001, when Congress considered "fast track."[32] Only 15 of 202 Democrats voted in favor of CAFTA-DR,[33] and—as with the vote over "fast track"—House Republican leaders and the administration had to dole out a number of unrelated promises and apply considerable pressure to get a favorable vote.[34] One Re-

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[26] *See, e.g.*, Stephen Glain, *Booting Trade: The Democrats have Turned on the Global Free Market, and that Spells Big Trouble for Bush Going Forward*, NEWSWEEK, November 27, 2006, at 52, 52.

[27] Policy Brief, I.M. (Mac) Destler, Peterson Inst. for Int'l Econ., American Trade Politics in 2007: Building Bipartisan Compromise 1 (May 2007).

[28] An FTA reduces or eliminates trade barriers between two or more parties while maintaining barriers against imports from countries not party to the agreement. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 447 (4th ed. 2001).

[29] 152 CONG. REC. H5529-30 (2006).

[30] *See* 151 CONG. REC. H11,181 (2005) (United States-Bahrain Free Trade Agreement implementing legislation passed 327-95); 150 CONG. REC. H6649-50 (2004) (United States-Morocco Free Trade Agreement implementing legislation passed 323-99); 150 CONG. REC. H5720 (2004) (United States-Australia Free Trade Agreement implementing legislation passed 314-109); 149 CONG. REC. H7513 (2003) (United States-Singapore Free Trade Agreement implementing legislation passed 272-155); 149 Cong. Rec. H7516 (2003) (United States-Chile Free Trade Agreement implementing legislation passed 270-156).

[31] Bipartisan Trade Promotion Authority Act of 2002, H.R. 3005, 107th Cong. (2001), passed the House by a vote of 215 to 214 on December 6, 2001. 147 CONG. REC. H9044 (2001). Despite its "bipartisan" title, only seven Democrats voted in favor; 201 voted against. *Id.* Under "fast track," Congress considers legislation implementing a trade agreement without the possibility of amending the agreement and within a limited period of time.

[32] Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, H.R. 3045, 109th Cong. (2005). The Act passed the House on July 28, 2005, with 217 votes in favor and 215 votes opposed. 151 CONG. REC. H6927–28 (2005) It passed the Senate by a vote of 55 to 45 on the same day, 151 CONG. REC. S9255 (2005), and was signed into law by the President on August 2, 2005. Pub. L. No. 109-53, 119 Stat.462 (2005).

[33] *See* 151 Cong. Rec. H6927–28.

[34] *See, e.g.*, *Partisanship on Trade*, FT.COM, July 29, 2005, ProQuest No. 875295641 ("The White House and the Republican leadership had to resort to every trick in the book to get the bill passed. Mr. Bush and Dick Cheney, vice-president, worked the Republican caucus in person. House leaders cut side-deals and loaded pork on to [sic] the Highways and Energy bills."); Sylvia A. Smith, *Souder's Deal Shows Refreshing Honesty*, J. GAZETTE (Fort Wayne, Ind.), July 31, 2005, at 15A ("The corridors were thick with Secret Service personnel the rest of the day as Cabinet officers visited wavering lawmakers to see what incentive they could

publican Member reportedly stated that the Republican leadership would "twist some Republican arms until they break in a thousand pieces" to get the votes they needed.[35]

The clearest example of a stalled trade agenda was the trade agreement with Peru. The United States concluded negotiations on a free trade agreement with Peru on December 7, 2005.[36] But House Republican leaders recognized that they could not pass this agreement. As a result, it was never even put to a vote in the Republican-controlled 109th Congress.

These close votes—and the decision to not even consider the Peru free trade agreement—reflected the consequences of excessive partisanship and growing public concerns about trade and globalization. NBC News/Wall Street Journal polls conducted in December 1999, and again in March 2007, found that the percentage of people who think free trade agreements "have hurt the United States" grew from 30% in December 1999[37] to 46% in March 2007.[38] The percentage of people who think trade agreements "have helped the United States" fell from 39% in December 1999[39] to just 28% in March 2007.[40]

This growing unease toward U.S. trade policy is even more pronounced among Republican voters than Democrats. In a March 2007 poll, 54% of Democratic voters said free trade agreements have hurt the United States; 21% said trade agreements have helped.[41] In a September 2007 poll, 59% of registered Republican voters agreed with a statement that "trade has been bad for the U.S. economy, because imports from abroad have reduced demand for American-made goods, cost jobs here at home, and produced po-

promise in exchange for a 'yes' vote on CAFTA. In many cases, we'll never know. For some, it might have been a promise of a presidential visit for a sagging congressional campaign. For others, perhaps it was the inclusion of money for a pet project in the highway bill (which the Republican leadership conveniently arranged to wrap up after the CAFTA vote)."); Stephen J. Norton, *In CAFTA Approval, Promises Traded for Votes*, CQ TODAY, July 28, 2005 (Tim Murphy (R-Pa.) "acknowledged he was aware of a possible connection between his CAFTA vote and his bid to secure $3 million for Pittsburgh's proposed Southern Beltway in the conference report on the surface transportation bill (HR 3)."); Martin Vaughan, *White House, GOP Leaders Doubled-Up Efforts to Win CAFTA*, CONGRESS DAILY, July 29, 2005, at 10.

[35] *Still Considerably Short on CAFTA*, WASH. TRADE DAILY, July 25, 2005 (quoting Rep. Jim Kolbe (R-Ariz.)).

[36] Press Release, Office of the U.S. Trade Representative, United States and Peru Conclude Free Trade Agreement (Dec. 7, 2005), *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2005/December/asset_upload_file744_8518.pdf.

[37] Ronald G. Shafer, *The Wall Street Journal/NBC News Poll: A Special Weekly Report From the Wall Street Journal's Capital Bureau*, WALL ST. J., Dec. 17, 1999, at A1.

[38] John Harwood, *Politics & Economics—Washington Wire*, WALL ST. J., Mar. 9, 2007, at A4.

[39] Shafer, *supra* note 37.

[40] Harwood, *supra* note 38; *see also* Susan Page & David Jackson, *More say U.S. focus should be home,* U.S.A. TODAY, Apr. 14, 2006, at 1A (30% of voters believe increased trade helps American workers; 65% believe it hurts American workers); James Cox, *At what price free trade?,* U.S.A. TODAY, Nov. 26, 1999, at 1B (35% believe increased trade helps American workers; 59% believe it hurts American workers).

[41] Harwood, *supra* note 38, at A4.

tentially unsafe products."[42] Only 32% of those voters agreed with the statement that trade has been good for the U.S. economy.[43]

While Republican and Democratic voters were becoming increasingly united in questioning whether U.S. trade policies were working for the United States, from 1999 on, Republican and Democratic political leaders were becoming increasingly divided over trade. House Republican leaders proclaimed themselves to be "free traders," labeled Democrats as the party of "protectionism," and excluded Democratic Members from the policymaking process.[44]

Economic data may help to explain the public's growing skepticism and unease with U.S. trade policy. This data indicates that international trade, and globalization more generally, may contribute to growing income inequality and real income stagnation in the US, with estimates generally ranging from somewhere between 12% and 33% of the total growth in income inequality.[45] One expert summarized this issue in a House Ways and Means Committee hearing on Trade and Globalization on January 30, 2007:

> There is little question that our nation has benefited enormously over its history from engaging in the free flow of ideas, goods, and services in the global economy. Yet, that same engagement has increasingly become a source of economic anxiety among working families who question whether global economic integration is designed to help the few or the many. . . . One can see the expanded economic anxiety in several trends:
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> WAGE STAGNATION AFTER A PERIOD OF GROWTH: The typical family has not seen [its] income grow in inflation-adjusted terms

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[42] NBC/Wall Street Journal GOP Primary Voters Survey (2007), http://online.wsj.com/public/resources/documents/WSJ-POLL-20071003.pdf.

[43] *Id.*

[44] *See* Congressman Sander Levin (D-Mich.), Using Trade as a Tool to Shape Globalizations Before The Center for American Progress, (Mar. 5, 2007), *available at* http://www.house.gov/apps/list/speech/mi12_levin/morenews/sp_070305_globalization.shtml (noting that the polarizing debate "turned a positive word 'protect' into the totally negative term 'protectionism.' But its robotic use by the Bush administration and others has only served to strangle debate and is a counterproductive response given the fact that congressional opposition to the Administration's policies comes from many of us with a strong record of supporting expanded trade.").

[45] GRANT D. ALDONAS ET AL., SUCCEEDING IN THE GLOBAL ECONOMY 34 (2007) (noting that "[f]rom 1966 to 2001, the median pre-tax inflation-adjusted wage and salary income grew just 11%—versus 58% at the 90th percentile and 121% at the 99th percentile."); s*ee also* JOSH BIVENS, GLOBALIZATION AND AMERICAN WAGES: TODAY AND TOMORROW (2007); EDWARD N. WOLFF & AJIT ZACHARIAS, WEALTH AND ECONOMIC INEQUALITY: WHO'S AT THE TOP OF THE ECONOMIC LADDER? (2006); Ian Dew-Becker & Robert J. Gordon, *Where Did the Productivity Growth Go? Inflation Dynamics and the Distribution of Income*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 67 (2005); Ben S. Bernanke, Chairman of the Bd. of Governors of the Fed. Reserve Sys., The Level and Distribution of Economic Well-Being, Address at the Greater Omaha Chamber of Commerce (Feb. 6, 2007) (noting that the top 1% of the income distribution in the United States held a 14% share of after-tax income in 2004, up from 8% in 1979, and that international trade and other economic forces "grouped under the heading of 'globalization' may . . . have been a factor in the rise in inequality . . . .").

> during the recovery. After increasing 15% between 1993 and 2000, real median household income as calculated by the Census fell 2.7% between 2000 and 2005. Similarly, real wages as calculated by the Department of Labor have been flat for the majority of the recovery. From November 2001 through August 2006, average weekly earnings declined in real terms, and have now risen a mere 2.4% overall in five years.
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> DIVIDE BETWEEN WAGES AND PRODUCTIVITY GROWTH: While productivity and wages grew together during the 1990's, there has been a recent disconnect. Between March 2001 and September 2006, productivity grew at an annual 3.1% rate, while real average hourly earnings grew at an annual 0.5% rate through December, *one sixth as fast.*[46]

Of course, trade is not the only cause of growing inequality and stagnant incomes in the United States. Some policymakers and economists have argued, for example, that "technology" is a more significant factor than trade (and that declines in union membership may be as well).[47] There are at least three responses to this argument. First, even if other factors may contribute as much or even more to inequality and income stagnation, we should hardly ignore the negative effects of trade. Second, trade and increased technology are not mutually exclusive factors: international trade can increase economies of scale, which can lead to greater innovation and technological advances, and more technology can lead to more trade.[48] Finally, as my colleague, Ways and Means Committee Ranking Member Jim McCrery (R-La.), pointed out in our meeting with Ambassador Susan C. Schwab on January 18, 2007, perception is reality: if people oppose trade agreements because they believe—rightly or wrongly—that they lead to inequality and income stagnation, that issue needs to be addressed to rebuild support for trade agreements that both expand trade and address these challenges.[49]

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[46] *Trade and Globalization: Hearing Before the H. Comm. On Ways and Means,* 110th Cong. 1 (2007) (statement of Gene B. Sperling, Senior Fellow, Ctr. for Am. Progress, and Dir., Ctr. for Universal Educ., Council on Foreign Relations), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5407.

[47] *See, e.g.*, Bernanke, *supra* note 45 ("Overall, I read the available evidence as favoring the view that the influence of globalization on inequality has been moderate and almost surely less important than the effects of skill-biased technological change.").

[48] *See, e.g.*, DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 16 (1997) ("The empirical evidence for what is the leading contender for an alternative cause of rising wage inequality—skill-biased technological change—is far from overwhelming. Note, moreover, that it is difficult to treat technological change as being entirely *independent* from trade. Trade may act as a conduit for technology and create pressures for technological change. When Rupert Murdoch goes on a global buying spree and replaces workers with machines at all the newspapers he acquires, it is not at all clear that the resulting labor-market pressures should be attributed to technological change rather than globalization.").

[49] Juliet Eilperin, *How Trade Breakthrough Almost Broke Down in Congress*, WASH. POST, Nov. 22, 2007, at A12.

My colleague, Representative Barney Frank (D-Mass.), recognized the link between rising inequality and the policy "gridlock" in Washington in a speech delivered on January 3, 2007, the day before the official first day of the 110th Congress and the day before he became the Chairman of the House Committee on Financial Services.[50] He noted that, increasingly, the public does not care about "pro-growth" economic policies because most of the public has not benefited from that growth in recent years.[51] He argued that business leaders should care about growing inequality and income stagnation for that reason, if not for others:

> [W]e are now stalled. We can't get any progress on trade, on foreign direct investment, on immigration[.] That's why the business community ought to care [about growing inequality]. . . . [T]hey ought to recognize that we are in gridlock; that we are unable to go forward with policies that many think are pro-growth because there are so many people who see only the short-term pain that those inflict, or even the medium-term pain and don't see any gain.[52]

But the dwindling public support for a trade policy that makes little or no effort to shape globalization and to spread its benefits broadly should not be confused with a lack of support for trade and globalization themselves. At the same time that the American public is skeptical of U.S. trade policy, the public also appears to recognize that globalization is here to stay, and that it has the potential to benefit the United States and the rest of the world. According to a study published on July 11, 2005, by the University of Maryland's Program on International Policy Attitudes ("PIPA") and Knowledge Networks, 56% of respondents "support[ ] the growth of trade in principle, but [are] not satisfied with the way the U.S. government has mitigated the effects of trade on American jobs, on the poor in other countries, and on the environment."[53] Only 23% categorically "[did] not support the growth of international trade;" and only 16% categorically supported the growth of international trade and "approve[d] of the way the US government is expanding international trade."[54]

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[50] Congressman Barney Frank, Remarks on Wages at the National Press Club (Jan. 3, 2007), (transcript available at http://www.rtoonline.com/Content/article/Jan07/BarneyFrankMinimumWageIncrease010707.asp).

[51] *Id.*

[52] *Id.*

[53] Steven Kull, Americans on CAFTA and US Trade Policy 4 (2005), *available at* http://www.pipa.org/OnlineReports/Globalization/CAFTA_Jul05/CAFTA_Jul05_rpt.pdf.

[54] *Id.*; *see also* Chicago Council on Global Affairs, Worldviews 42–43 (2002) (When offered three options about trade—free trade without government programs to help workers who lose their jobs, free trade with government programs to help workers who lose their jobs, and no free trade at all, 73% chose free trade with government programs to help workers, with only 9% saying they did not favor free trade at all. Only 16% chose the pure free trade option.).

More specifically, the public overwhelmingly supports the inclusion of labor and environmental standards in trade agreements. According to the PIPA study:

> Asked simply whether "countries that are part of international trade agreements should or should not be required to maintain minimum standards for working conditions," an overwhelming 90% said that they should. This support is overwhelmingly bipartisan (Republicans 90%, Democrats 88%) and has been very high for some years[.]
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> Filling out the picture of what Americans may have in mind for minimum standards for working conditions, 83% agreed with the statement, "While we cannot expect workers in foreign countries to make the same wages as in the US, we should expect other countries to permit wages to rise by allowing workers to organize into unions and by putting a stop to child labor." Here again there was partisan consensus (Republicans 80%, Democrats 87%).[55]

The PIPA study also found overwhelming and bipartisan support for the inclusion of environmental standards in trade agreements:

> While the US government—during the Clinton as well as the Bush administration—has resisted including environmental standards in trade agreements, an overwhelming majority of Americans favors them. Ninety-three percent endorsed the view that "countries that are part of international trade agreements should be required to maintain minimum standards for protection of the environment." There were no significant differences between Republicans (92%) and Democrats (94%).[56]

Finally, the American public sees the need for trade agreements that pry open foreign markets for U.S. exporters. For example, in an October 1999 poll, 81% of Americans surveyed said the United States is "more open" to imports than other countries are, with 57% of those surveyed saying the United States is "much more open" to imports.[57] The American public is right. The United States imposes some of the lowest duties on imports of any nation and is otherwise remarkably open to trade.[58] As a result, trade agreements that open foreign markets will benefit the United States, and the

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[55] Kull, *supra* note 53, at 6; *see also* Chicago Council on Global Affairs, *supra* note 54, at 42 ("An extraordinarily high 93% say that countries that are part of international trade agreements should be required to maintain minimum standards for working conditions.").

[56] Kull, *supra* note 53, at 7.

[57] Program on Int'l Policy Attitudes, Americans on Globalization: A Study of U.S. Public Attitudes 5 (2000).

[58] *See generally* World Trade Organization, World Trade Profiles 2006 2–7 (2007).

American public understands that. The 2005 PIPA study found that 55% of those surveyed "favor agreements between the US and other countries to mutually lower trade barriers, provided the government has programs to help workers who lose their jobs."[59] Only 27% opposed agreements to lower trade barriers.[60]

To some extent, the decline in public support for U.S. trade policy may reflect the fact that, over the past several years, efforts to liberalize trade have not been matched by efforts to ensure that international competition is fair, or by efforts to shape trade to expand the scope of beneficiaries. Instead, a *laissez-faire*, or "hands off," approach to trade law and policy has taken the place of a more proactive approach.

Thus, it is clear that the American public wants to embrace international trade and globalization and stands ready to meet the challenges that trade and globalization present, provided that U.S. policymakers live up to their responsibilities to do the following: (1) enforce trade agreements and not just announce them; (2) level the playing field for American companies, farmers, and workers; and (3) shape trade so that its benefits and costs are widely spread.[61] As my colleague, Jim McCrery, the current ranking minority member on the Ways and Means Committee, said in a meeting we had with U.S. Trade Representative Susan C. Schwab on January 18, 2007, "[t]here's no question the general level of support for trade in the country has gone down . . . . We need to allow our members, Republican and Democrat, to vote on something that will renew the faith of people who used to have faith in trade and now are having doubts."[62] The American public wants a new, bipartisan, U.S. trade policy.

III. "A New Trade Policy for America"

On March 27, 2007, I joined with other House Democratic leaders to unveil "A New Trade Policy for America."[63] Also called the March 27 Paper, it outlined five fundamental principles for a new trade policy: (1) ensure that U.S. free trade agreements raise standards of living and create new markets for U.S. goods (for example, by including enforceable labor and environmental standards in the core text);[64] (2) stand up for American workers, farmers and businesses (for example, by enforcing existing trade agreements

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[59] Kull, *supra* note 53, at 4.

[60] *Id.*

[61] *See* Dani Rodrik, If Republicans flee the free trade bandwagon, Oct. 4, 2007, http://rodrik.typepad.com/dani_rodriks_weblog/2007/10/if-republicans-.html (Mr. Rodrik, interpreting the 2007 NBC/Wall Street Journal poll showing that 59% of Republicans thought trade is bad for the United States, expressed two concerns: "One is that the U.S. is taken to the cleaners by other nations which are better at playing trade hardball. The other is the unease over the widening income gap and the role that trade is felt to be playing in it.").

[62] Eilperin, *supra* note 49, at A12.

[63] Ways and Means Committee Staff, *supra* note 2.

[64] *Id.*

and taking action to address unfair trade practices);[65] (3) open major markets to create new opportunities, especially through the "Doha Round" of World Trade Organization negotiations;[66] (4) create a "Strategic Workers Assistance and Training Initiative" to provide meaningful support and training for those who are hurt by the effects of increased trade and technology, and to make our communities more competitive;[67] and (5) expand America's diplomacy and strengthen national security by using trade and aid to foster development in the poorest countries in the world.[68]

The March 27 Paper was drafted after it became clear that the Bush administration was serious about finding a way forward with the pending trade agreements[69]—before the "fast track" mechanism expired on June 30, 2007. The Paper was not written overnight. To the contrary, virtually all of it reflected positions developed over more than a decade by many Committee and House Democrats, including, for example, in the "negotiating objectives" for future trade agreements in the fast track bill introduced in 2001 by Congressmen Robert Matsui (D-Cal.), Jim McDermott (D-Wash.), Levin, and myself.[70]

Each of the five components of the March 27 Paper is addressed in detail below. I have focused on the changes to the free trade agreements, because those changes have already been implemented. The other components are in various stages of development and implementation, and are addressed more briefly below.

A. *Free Trade Agreements that Raise Living Standards and Open Markets*

The March 27 Paper proposed six categories of major changes to the text of U.S. free trade agreements. These six categories of changes had one

[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] For example, on January 17, 2007, Deputy U.S. Trade Representative John Veroneau stated that the Office of the U.S. Trade Representative had already informed Peru, Colombia, and Panama that it would have to make "substantive changes" to the labor chapters of the agreements. "It is clear that some adjustments to the [labor chapters] will be made before Congress takes those up." *Schwab Says FTA labor Talks Focused on Substance, Not Form*, Inside U.S. Trade, Jan. 19, 2007; *see also* Rachel Van Dongen, *Schwab Signals Conciliatory Approach on Trade*, CQ Today, Jan. 4, 2007, at 18 (On December 19, after completing trade agreement negotiations with Panama, Ambassador Schwab stated that "we have reached this agreement with the understanding that it is subject to additional discussions on labor."); *see also Deputy USTR Signals Possible Labor Steps to Pass Colombia FTA*, Inside U.S. Trade, Nov. 24, 2006.
[70] Trade Act of 2002, H.R. 3009, 107th Cong. § 2102 (2001). This bill provided for fast track trade negotiating authority with negotiating objectives that closely resemble many of the principles expressed in the March 27 Paper. This bill was an alternative to the bill that Republicans pushed through the House and passed by a single vote in a highly partisan debate. 148 Cong. Rec. H3963–64 (2002).

common goal: to re-instill American values into U.S. trade policy and U.S. trade agreements, so as to shape trade and to spread its benefits broadly.

On May 10, 2007, the Bush administration accepted the positions reflected in the March 27 Paper.[71] The "May 10 Agreement" includes all of the principles articulated in the "FTA component" of the March 27 Paper,[72] but it put flesh on the March 27 skeleton.[73] The May 10 Agreement was a concrete and major first step toward a new congressionally-directed U.S. trade policy that could garner broad support in Congress and with the American public.[74]

The next step in implementing these six categories of changes, of course, was to seek the assent of our trading partners to these new provisions. I never had significant concerns about this step, because our principal opponents had always been the Bush administration and congressional Republicans, not foreign governments.

By the end of June 2007, Peru, Colombia, Panama, and Korea all agreed to the new provisions, and none insisted on any concession from the United States in return.[75] That there was no need to work out such concessions is a good indication that our trading partners may want to shape trade and globalization (through enforceable international labor standards, for example) as much as we do. Indeed, this "smooth sailing" contrasts sharply with the "side deals" on district projects and sectoral protection that had to be worked out with reluctant Republican lawmakers to get CAFTA passed through the U.S. Congress.[76]

On June 27, 2007, the Congress of Peru approved the new trade agreement with the United States by a vote of 79 to 14.[77] On November 8, 2007, the U.S. House of Representatives passed the Peru FTA implementing legislation by a vote of 285 to 132 without the "arm twisting" or side deals that

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[71] Press Release, House Comm. on Ways and Means, Congress and Administration Announce New Trade Policy (May 11, 2007), http://waysandmeans.house.gov/News.asp?FormMode=print&ID=512.

[72] May 10 Agreement, May 10, 2007, *available at* http://waysandmeans.house.gov/MoreInfo.asp?section33.

[73] *See id.*

[74] House Democratic leaders made clear throughout the negotiations, and when we submitted the May 10 Agreement to the President, that major issues still had to be addressed regarding impunity and violence against union leaders in Colombia and non-tariff barriers—particularly in the auto sector—in Korea. *See* Press Release, House Comm. on Ways and Means, Pelosi, Hoyer, Rangel, and Levin Statement on Trade (July 2, 2007), http://waysandmeans.house.gov/News.asp?FormMode=print&ID=536.

[75] *See, e.g.*, United States-Colombia Trade Promotion Agreement, U.S.-Colom., ch. 17, Nov. 22, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Section_Index.html; United States-Peru Trade Promotion Agreement, U.S.-Peru, ch. 16, Apr. 12, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter Peru FTA]; United States-Korea Free Trade Agreement, U.S.-S. Korea, ch. 19., June 30, 2007, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html.

[76] Rick Klein, *House passes free-trade agreement in tight vote*, BOSTON GLOBE, July 28, 2005, at A3.

[77] *Peruvian Congress Ratifies FTA with USA*, LATIN AM. NEWS DIGEST, June 29, 2006.

were necessary to pass the CAFTA.[78] CAFTA garnered only 15 Democratic votes.[79] The Peru FTA had the support of 109 Democrats.[80] The FTA then passed the Senate on December 4, 2007, by a vote of 77 to 18.[81] On December 14, 2007, President Bush signed the legislation into law.[82]

There were six categories of major changes:

1. Inclusion of Enforceable Labor Standards

The main reason that an overwhelming majority of Democratic Members of Congress opposed a number of recent free trade agreements—in particular, CAFTA and the Oman Free Trade Agreement—was that those agreements failed to include meaningful and enforceable commitments to uphold basic, internationally-recognized labor standards. The international community reached a consensus in 1998 on what these standards are, when the International Labor Organization adopted the *ILO Declaration on Fundamental Principles and Rights at Work*.[83] That Declaration recognized five basic rights: (1) freedom of association; (2) the effective recognition of the right to collective bargaining; (3) the elimination of all forms of compulsory or forced labor; (4) the effective abolition of child labor; and (5) the elimination of discrimination in respect of employment and occupation.[84]

For the first time under any trade agreement negotiated by any nation, these rights were incorporated into the text of the agreements that were negotiated (or re-negotiated) following the May 10 Agreement. As a result, the failure to abide by ILO obligations can have exactly the same consequences as violations of any other provisions.[85] The new trade agreements provide that each party "shall adopt and maintain" ILO rights in its laws and practices.[86] The parties agree not to "waive or otherwise derogate from" these rights in a manner affecting trade or investment between the parties.[87] In addition, the parties agreed that they "shall not fail to effectively enforce" these rights—and any laws establishing "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and

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[78] 153 CONG. REC. H13,311 (daily ed. Nov. 8, 2007).

[79] 151 CONG. REC. H6927–28 (daily ed. July 27, 2005).

[80] 153 CONG. REC. H13,311 (daily ed. Nov. 8, 2007).

[81] 153 CONG. REC. S14,727 (daily ed. Dec. 4, 2007).

[82] Press Release, The White House, President Bush and President Garcia of Peru Sign H.R. 3688 (Dec. 14, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/12/20071214-8.html.

[83] INT'L LABOR ORG., ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=en&var_pagename=DECLARATIONTEXT.

[84] INTERNATIONAL LABOR ORGANIZATION, ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK art. 2 (1998), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm.

[85] *See, e.g.*, Peru FTA, *supra* note 75, art. 21.

[86] *See, e.g.*, *id.* art. 17.2.1.

[87] *See, e.g.*, *id.* art. 17.2.2.

health"—in a manner affecting trade or investment between the parties.[88] These obligations are subject to the same enforcement provisions in the agreements as every other obligation in the agreement.[89] As a last resort, the breach of any of these obligations can thus result in the "suspension of concessions" (i.e., retaliatory measures, such as additional duties on imports) against the offending party.[90]

By contrast, CAFTA, the Oman FTA, and other free trade agreements concluded after 2000 but before the May 10 Agreement did little more than pay lip service to labor rights.[91] Essentially, each party is merely required to "effectively enforce" its own labor laws, whatever they may be.[92] In fact, each agreement implicitly allows a party to weaken its labor laws after the agreement enters into force, and contains no hard obligation to adopt and maintain labor laws that meet the minimum standards recognized by the community of nations and expressed in the ILO Declaration.[93] Moreover, in these prior FTAs, the enforcement obligation itself is watered down: the agreements provide that each party "retains 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 matters determined to have higher priority."[94]

Furthermore, even if a dispute settlement panel were to find that a party breached the "enforce your own laws" standard, these agreements establish narrow limits for any potential remedy—limits that do not apply to any of the other provisions of the trade agreement.[95] A "monetary assessment" may be imposed on the party, yet this penalty is capped arbitrarily at $15 million, even if the breach had a far more serious effect on trade.[96] By contrast, if a trading partner were to breach one of the other obligations in the agreement, such as an obligation not related to labor and the environment, the trading partner may "suspend benefits" under the FTA.[97]

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[88] *See, e.g.*, *id.* art. 17.3.1.

[89] *See, e.g.*, *id.* art. 21.2.1.

[90] *See, e.g.*, *id.* art. 21.16.2.

[91] *See* United States-Oman Free Trade Agreement, U.S.-Oman, art. 16, Jan. 19, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html [hereinafter Oman FTA]; United States-Bahrain Free Trade Agreement, U.S.-Bahr., art. 15, Sept. 14, 2004, 44 I.L.M. 544 (2005); Dominican Republic-Central America Free Trade Agreement, Aug. 5, 2004, art. 16, 43 I.L.M. 514 (2004) [hereinafter DR-CAFTA]; United States-Morocco Free Trade Agreement, U.S.-Morocco, art. 16, June 15, 2004, 44 I.L.M. 544 (2005); United States-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, art. 18, 43 I.L.M. 1248 (2004); United States-Chile Free Trade Agreement, U.S.-Chile, art. 18, June 6, 2003, 42 I.L.M. 1026 (2003); United States-Singapore Free Trade Agreement, U.S.-Sing., art. 17, Jan. 15, 2003, 42 I.L.M. 1026 (2003).

[92] *See, e.g.*, Oman FTA, *supra* note 91, art. 16.2(a).

[93] *See, e.g.*, *id.* art. 16.1.

[94] *See, e.g.*, *id.* art. 16.2(b).

[95] *See, e.g.*, *id.* art. 20.12.

[96] *See, e.g.*, *id.* art. 20.12.2.

[97] *See, e.g.*, *id.* art. 20.11.3 to 11.4.

The agreements do contain some soft obligations regarding the content of a party's labor laws. For example, each party "shall strive to ensure" that its laws provide for labor standards consistent with internationally recognized labor rights.[98] However, even these soft obligations cannot be enforced under the agreement; a provision in the labor chapter carves them out entirely.[99]

These agreements are weaker than the trade agreement between the United States and Jordan, signed by the Clinton administration in 2000. While the Jordan FTA included some of the same soft obligations ("strive to ensure"), those obligations were enforceable through the dispute settlement provisions of the agreement.[100] Also, in the Jordan FTA, the dispute settlement process and potential sanctions for breaches of the labor and environmental commitments are the same as those for all other parts of the agreement.

TABLE 1: COMPARING THE JORDAN FTA TO OTHER FREE TRADE AGREEMENTS

	Jordan FTA	2002–2006 FTAs	Post-2006 FTAs
"Hard" Obligation to Adopt Laws Providing Basic Rights?	No	No	Yes
"Adopt Laws" Obligation Enforceable under FTA?	Yes	No	Yes
"Enforce Laws" Obligation Applies to All ILO Declaration Rights and "Acceptable Conditions"?	No	No	Yes
Disciplines on Prosecutorial Discretion?	No	No	Yes
General Dispute Settlement Rules and Sanction Provisions Apply?	Yes	No	Yes

Opponents of including enforceable basic labor standards in trade agreements have made three main arguments. First, they have argued that these standards would be used as a thinly veiled excuse to limit imports from developing countries by "protectionists" in the United States.[101] However, a

[98] *See, e.g.*, *id.* art. 16.1.2.
[99] *See, e.g.*, *id.* art. 16.6.5.
[100] United States-Jordan Trade Promotion Agreement, U.S.-Jordan, art. 17, Oct. 24, 2000, *available at* http://ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf.
[101] *See* Kimberly Ann Elliot & Richard B. Freeman, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 80 (2003).

recent book by economists from Harvard University and the Peterson Institute indicates that history has proven this argument wrong.[102] The authors examined a number of existing "trade-labor linkages," such as workers' rights petitions filed under the U.S. Generalized System of Preferences, and found that "there is little evidence that the United States has implemented existing trade-labor linkages in ways that sacrifice trade goals for labor standards . . . . Globalization enthusiasts can sleep more soundly; their fears that protectionism lurks under the bed are exaggerated."[103]

In any event, the structure of the labor obligations in the FTAs makes it unlikely that import restrictions would be imposed for "protectionist" purposes. For example, only a government—not companies or unions that want protection from imports—may complain when labor obligations are violated.[104] If a government does so by filing a case, an impartial third party (the arbitral panel) must be persuaded that the defending party has breached its obligations in order to impose sanctions.[105] Even if that happens, and even if the defending party fails to comply, the amount of trade sanctions imposed against the defending party cannot exceed the effect of the breach (e.g., the extent to which the breach results in unfair competition, such as through lower-priced imports) on trade and investment between the parties.[106]

Second, opponents have argued that developing countries would refuse to accept labor standards, or at least would require the United States to make major concessions in return.[107] Again, history suggests otherwise. For example, the President of Peru, Alejandro Toledo, offered to incorporate the ILO labor rights into the text of the Peru FTA during the original negotiations with the United States,[108] but *U.S.* negotiators dismissed the offer.[109] Indeed, the fact that Peru, Colombia, Panama, and Korea ultimately accepted the changes to the FTAs that resulted from the May 10 Agreement—without even securing any additional concessions from the United States—demonstrates that the argument that developing countries do not want such standards is greatly overstated and, in many cases, wholly incorrect. A recent multinational poll found that a majority of people in every country surveyed

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[102] *See generally id.*

[103] *Id.* at 83–84.

[104] *See, e.g.*, Peru FTA, *supra* note 75, art. 21.

[105] *See, e.g.*, *id.* art. 21.6.

[106] *See, e.g.*, *id.* art. 21.16.

[107] Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause*, in 2 Fair Trade and Harmonization: Prerequisites for Free Trade? 177, 182 (Jagdish Bhagwati & Robert Hudec eds., 1996).

[108] *House Delegation Warns Andean Countries to Improve FTA Offers*, Inside U.S. Trade, Sept. 23, 2005, at 9 ("To address potential objections over labor rights in the FTA, Toledo offered to incorporate the basic labor rights standards of the International Labor Organization and give the ILO a monitoring role . . . . Toledo said he does not want an FTA that passes with a narrow one-vote margin and that it would be a mistake to rely only on Republicans to pass the trade deal.").

[109] See *Levin Sees Little USTR Willingness to Compromise on Labor in FTAs*, Inside U.S. Trade, Nov. 11, 2005, at 17.

favor the inclusion of minimum standards for working conditions in international trade agreements, with support ranging from 55% in the Philippines and 56% in India to 84% in China and 89% in Argentina.[110]

Finally, opponents have argued that the adoption and enforcement of laws to protect labor rights is a "social" issue that has no place in a trade agreement.[111] The text of the agreements themselves refutes these claims. To establish a violation of the obligation to adopt and enforce labor laws, for example, "a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting trade or investment between the Parties."[112] This same language is used with respect to the "non-derogation" and "effectively enforce" obligations.[113] Furthermore, under the dispute settlement rules in the trade agreement, a breach of an obligation can result in the application of retaliatory duties only if the breach has an effect on trade or investment.[114]

For developing countries like Peru, the inclusion—and enforcement—of these standards will help raise standards of living for workers and help build a middle class. But the United States will also benefit when countries like Peru adopt and enforce basic labor standards, for at least three reasons. First, American workers would not be asked to compete in a "race to the bottom" (i.e., compete with workers whose rights are suppressed). Second, our businesses and our workers need a middle class in other nations to buy U.S. goods and services, and the adoption and enforcement of these standards will help to build a middle class in other nations, just as it did in the United States. Finally, these countries will be less likely to embrace dictatorship and extremism if people have hope and there is a large and stable middle class, which will benefit U.S. national security.

As President Bill Clinton stated toward the end of his presidency, trade agreements should not undermine labor rights; they should enhance them.[115] Our trade agreements should "lift everybody up, not pull everybody down."[116]

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[110] The Chicago Council on Global Affairs & WorldPublicOpinion.org, World Favors Globalization and Trade but Wants to Protect Environment and Jobs 4 (2007), http://www.worldpublicopinion.org/pipa/pdf/apr07/CCGA+_GlobTrade_article.pdf.

[111] *See, e.g.*, Douglas A. Irwin, Free Trade Under Fire 224 (2002).

[112] Peru FTA, *supra* note 75, art. 17.2.1 n.1.

[113] *See, e.g.*, *id.* arts. 17.2.2, 17.3.1(a).

[114] *Cf. id.* art. 21.6 (limiting a party's response to a breach of the FTA to suspension "of benefits of equivalent effect.").

[115] *See* William Jefferson Clinton, President of the U.S., Commencement Address at the University of Chicago (June 13, 1999), *available at* http://findarticles.com/p/articles/mi_m2889/is_24_35/ai_55367224#.

[116] *Id.*

2. *Inclusion of Enforceable Environmental Standards*

The May 10 Agreement creates four new ways for U.S. free trade agreements to address environmental issues:

• A fully enforceable commitment that FTA countries adopt, implement, and enforce in their laws and in practice obligations under seven major common multilateral environmental agreements ("MEAs"),[117] including the Convention on International Trade in Endangered Species[118] and the Montreal Protocol on Substances that Deplete the Ozone Layer.[119]

• Fully enforceable commitments that require FTA countries to enforce their domestic environmental laws and that prohibit FTA countries from lowering their existing levels of environmental protection in a manner affecting trade or investment ("non-derogation").[120]

• A "conflict of laws" provision to ensure that FTA countries do not have to choose between adhering to an obligation under an environmental agreement and an obligation under an FTA.[121]

• In the Peru FTA, an annex specifically aimed at curbing illegal logging in the Peruvian Amazon by requiring Peru to take specific steps to improve its legal and regulatory framework for logging and to strengthen its enforcement efforts, as well as by providing the United States with a role in helping Peru with enforcement.[122]

Two of the enforcement mechanisms described above—an enforceable obligation to adhere to existing domestic environmental laws and the conflict of laws provision—are policy objectives that House Democrats have subscribed to since the 2001 "fast track" debate.[123] The other two proposals—adherence to common MEAs and addressing illegal logging—were developed more recently by House Democrats, based on proposals from the Members of the Ways and Means Committee,[124] and reflect the growing real-

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[117] May 10 Agreement, *supra* note 72, at 1–2.

[118] Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

[119] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 10, 26 I.L.M. 1541 (1987).

[120] May 10 Agreement, *supra* note 72, at 1.

[121] *Id.*

[122] *Id.* at 2.

[123] *See* Comprehensive Trade Negotiating Authority Act of 2001, H.R. 3019, 107th Cong., § 2(c)(10), (d) (2001).

[124] See Letter from Rep. Jim McDermott (D-Wash.) et al. to Ambassador Susan Schwab (Jan. 17, 2007) (on file with the Committee on Ways and Means, Majority Staff) (proposing that pending FTAs be amended to incorporate MEA obligations and address illegal logging).

ization among some environmental groups[125] that in order to prevent environmental abuse as a means to gain an advantage in international trade, development of international environmental standards akin to the ILO core labor standards may be needed.

a. *Initial Efforts to Address the Inadequacy of the Bush Administration Framework*

From 2002 to 2006, House Democrats largely focused on three deficiencies in the environmental chapters of the existing FTAs. First, before the May 10 Agreement, trade agreements required each Party to an FTA to merely "strive to ensure that it does not waive or otherwise derogate from . . . [its environmental] laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another Party, or as an encouragement for . . . investment in its territory."[126] Even this soft obligation was explicitly carved out from the dispute settlement chapter of the agreements.[127] Under this formulation, if a U.S. FTA partner were to lower its standards on air pollution emissions to attract a steel mill investment, the United States could not bring a challenge under the FTA.

Second, substantial limitations were established on the enforcement of the environmental obligations of the trade agreements entered into after 2000 but before the May 10 Agreement. As with the labor chapter, the only environmental obligation in these FTAs that was subject to dispute settlement was the obligation to "enforce its environmental laws."[128] All of the remaining obligations in the environmental chapter were specifically excluded from dispute settlement.[129] Even the one environmental obligation that is subject to dispute settlement cannot be enforced in the same way that other FTA obligations are enforced. If a country fails to effectively enforce its environmental laws, it is subject to a fine.[130] The fine is capped at $15 million[131] (as it is for a similar labor obligation)[132] and is actually paid to the violating country itself.[133]

Third, the pre-May 10 trade agreements do not ensure that legitimate actions taken by an FTA party to protect the environment are effectively

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[125] *See, e.g.*, FRIENDS OF THE EARTH ET AL., TRADE AND ENVIRONMENT: KEY RECOMMENDATIONS FOR FREE TRADE AGREEMENTS (FTAS) (on file with the Committee on Ways and Means, Majority Staff).

[126] *See, e.g.*, DR-CAFTA, *supra* note 91, art. 17.2.2,.

[127] *See, e.g.*, *id.* art. 17.10.7.

[128] *See, e.g.*, Oman FTA, *supra* note 91, art. 17.2.1(a).

[129] *Id.* art. 20.12.

[130] *Id.* art. 20.12.1.

[131] *Id.* art. 20.12.2.

[132] *See supra* note 96 and accompanying text.

[133] *See, e.g.*, Oman FTA, *supra* note 91, art. 20.12.4. The rationale for allowing the offending country to pay the fine to itself is to provide funds to remedy the environmental problem. That rationale has some merit, but it does undermine the deterrent value of the enforcement mechanism.

insulated from challenge if they violate an obligation under the trade agreement, even if such actions are required under a multilateral environmental agreement. Such a "conflict of laws" provision was included in NAFTA[134] but was inexplicably dropped from agreements negotiated by the Bush administration.

Since 2001, House Democrats have proposed specific fixes for these deficiencies.[135] These fixes are: (1) making the non-derogation provision mandatory and fully enforceable under dispute settlement; (2) making all the obligations under the environmental chapter subject to the same dispute settlement mechanism and eligible for the same enforcement mechanisms as other FTA obligations; and (3) including in FTAs a conflict of laws provision protecting environmental actions required by common MEAs[136] from challenge under the trade agreement.

b. A Push Towards Global Standards for the Environment

In the last six years, global environmental awareness has grown significantly. As concern about the environment has risen, so too has the desire to reach multilateral consensus on strategies to protect the environment. That desire reflects in part the understanding that environmental problems have trans-boundary effects, both in terms of the direct impact on the environment and in terms of global competition.

The May 10 Agreement directly responds to the nascent recognition that to prevent environmental abuse as a means to gain an advantage in international trade, development of international environmental standards may be needed. It includes a fully enforceable commitment that FTA countries adopt, implement, and enforce obligations under seven major common MEAs.[137] It also provides an annex specifically aimed at curbing illegal logging in the Peruvian Amazon by requiring Peru to take specific steps to improve its legal and regulatory framework for logging and its enforcement efforts.[138]

c. The Role of MEAs as Common Standards

As indicated above, the environmental chapters of pre-May 10 trade agreements only require that each country effectively enforce its own environmental laws.[139] The trade agreements do not require that the laws meet a

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[134] *See* NAFTA, *supra* note 18, art. 104.

[135] *See, e.g.*, Comprehensive Trade Negotiating Authority Act of 2001, H.R. 3019, 107th Cong. (2001).

[136] "Common" means those MEAs to which both FTA Parties have agreed.

[137] *See* May 10 Agreement, *supra* note 72, at II.A.

[138] *Id.*

[139] *See, e.g.*, Oman FTA, *supra* note 91, art. 17.2.1(a) (stating that "[n]either party shall fail to enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.").

minimum standard or, for that matter, that the country have any such laws at all.

Since at least the beginning of 2006, some environmental groups argued that U.S. trade agreements should require countries to enforce the Convention on International Trade in Endangered Species ("CITES").[140] The immediate impetus behind the proposal was that certain U.S. FTA partners, such as Oman, had not signed and ratified CITES.[141] Furthermore, CITES lacked adequate enforcement mechanisms to force compliance by signatories.[142] The FTAs, therefore, presented an opportunity to force compliance with CITES.

As the proposal was evaluated by the Committee, it became clear that there were reasons other than using the FTA as a vehicle to enforce an external agreement to incorporate certain MEA standards in trade agreements. For example, MEA standards could be used to begin developing a set of international environmental standards akin to the core labor standards. Many House Democrats view core labor standards as an essential tool for preventing the abuse of workers in pursuit of a competitive advantage. Similar standards are necessary to prevent abuse of the environment. In other words, MEAs could provide common international environmental standards in the same way that the 1998 ILO Declaration (and preceding conventions) led to the recognition of five internationally recognized basic workers' rights.

There is one practical problem with using MEAs as common environmental obligations: many countries, including the United States, do not accept some of even the most widely subscribed-to MEAs. For example, the United States is not a party to the Kyoto Protocol.[143] As a result, few, if any, MEAs have the standing that the 1998 ILO Declaration does, and, until recently, I saw no appetite in Congress to use trade agreements to create environmental obligations for either our trading partners or ourselves that were not already accepted.[144]

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[140] Convention on International Trade in Endangered Species of Wild Fauna and Flora, *supra* note 118. One such group was Wetlands Activism Collective. *See* Free Trade Kills Animals, http://freetradekillsanimals.org/?page=OmanAccountable (last visited Mar. 19, 2008).

[141] *See* CITES, Alphabetical List of Parties, http://www.cites.org/eng/disc/parties/alphabet.shtml (last visited Apr. 4, 2008); *see also* Amendment offered by Rep. Lloyd Doggett to the Draft Implementing Proposal for the U.S.-Oman Free Trade Agreement Implementation Act during the informal mark-up on May 10, 2006 (on file with the Committee on Ways and Means, Majority Staff).

[142] *See* Juan Carlos Vasquez, *Compliance and Enforcement Mechanisms in CITES*, *in* The Trade in Wildlife 63, 65 (Sara Oldfield ed., 2002) (noting that about seventy percent of CITES signatories did not adequately enforce the treaty).

[143] *See* United Nations Framework Convention on Climate Change, Parties to the Kyoto Protocol, http://maindb.unfccc.int/public/country.pl?group=Kyoto (last visited Apr. 4, 2008).

[144] For example, Rep. Lloyd Doggett (D-Tex.) offered an amendment to the Oman FTA at the mock mark-up that would have incorporated CITES by reference. The amendment was defeated by a twenty-two to fourteen vote, with unanimous support from Democratic members of the Ways and Means Committee in favor of the amendment. *See* Committee on Ways and Means, Informal Markup of Draft Implementing Proposal of H.R.__, the "United States-Oman

The solution to this problem was to limit the trade agreement obligation to specified common MEAs;[145] FTA partners would have an obligation to effectively enforce in their respective countries only select MEAs that both partners have in common. The specified list prevents either country from being subject to MEAs they have not signed and ratified, while the "common MEA" limitation is necessary to avoid creating asymmetrical obligations under the trade agreement. The United States is a party to fewer MEAs than most of our trading partners. As a result, if enforcement obligations applied to all MEAs to which a country is a party, our trading partners would have more obligations than we would.

This approach, of course, has its limitations. The MEAs included provide only limited environmental standards, and often do not cover the type of environmental standards most likely to be abused to gain a competitive advantage in trade, such as water and air pollution standards.[146] Nevertheless, this approach does create a pathway so that as the environmental movement and countries develop standards in those areas that achieve universal (or near universal) acceptance, trade agreements can include them.

d. Addressing Illegal Logging

During negotiation of the Peru FTA, environmentalists presented strong evidence of rampant illegal logging in Peru, particularly of a species of mahogany covered under CITES as a "potentially endangered species."[147] The evidence included reports from CITES staff, reputable international NGOs, and news reports, some of which suggested that the vast majority of Peruvian mahogany was illegally logged.[148] The illegal logging was not only jeopardizing the survival of a tree species but was also damaging the delicate Peruvian Amazon ecosystem.[149]

Addressing a particular environmental problem in a trade agreement was a somewhat novel concept. In this instance, though, there was a clear nexus between the problem and trade. Nearly all of Peru's mahogany exports

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Free Trade Agreement Implementation Act," May 10, 2006, http://waysandmeans.house.gov/legis.asp?formmode=item&number=481.

[145] The specific MEAs selected for enforcement are: the Convention on International Trade in Endangered Species; the Montreal Protocol Substances that Deplete the Ozone Layer; 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. *See* May 10 Agreement, *supra* note 72, at II.A.1.

[146] *Compare* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *supra* note 118 (prohibiting international trade in endangered species and listed in the May 10 Agreement), *with* United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (limiting carbon dioxide emissions), *and* Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269, 31 I.L.M. 1312 (restricting polluting uses of international waters).

[147] *See, e.g.*, *Greenpeace and Logging*, America Mag., Nov. 12, 2007, at 4.

[148] *Id.*

[149] *Id.*

are logged illegally, and nearly eighty percent go to the United States.[150] Moreover, there was some multilateral guidance on the reforms Peru needed to make to address illegal logging of mahogany: during the years spent identifying Peru's problem, CITES staff had also developed some basic, non-binding recommendations on how to improve the situation.[151]

What was ultimately included in the Peru FTA goes beyond just addressing illegal logging of mahogany. The Peru Logging Annex includes a fully enforceable commitment that Peru takes major specific steps to stop *all* illegal logging and improve forest sector governance.[152] These steps include increasing the number of forestry enforcement personnel, criminalizing associated commercial activity such as processing illegally harvested wood, and reforming the system for administering forest concessions.[153] The Annex also includes an unprecedented provision allowing the United States to investigate all illegal logging in the country and to stop questionable shipments at the border.[154]

I believe that the broader coverage in the Annex was due in part to the recognition that systematic forest sector governance reform was needed to effectively curb trade in mahogany. It was also due to the growing global consensus that illegal logging, because it has trans-boundary effects on the environment and is often driven by demand for wood outside the country of harvest, requires development of an international solution with basic standards to which all countries would ultimately adhere. Many of the proposals included in the Annex are based on private and public sector initiatives from around the globe to develop an international set of standards to govern logging.[155]

3. *Access to Medicines in Developing Countries*

Millions of people in developing countries lack access to life-saving medicines. According to an expert commissioned by the United Nations, "[i]mproving access to existing medicines could save 10 million lives each year. Access to medicines is characterized by profound global inequality: fifteen percent of the world's population consumes over ninety percent of the world's pharmaceuticals."[156]

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[150] *Id.*

[151] *See* CITES, CONSERVATION OF *Swietenia Macrophylla*, REPORT OF THE MAHOGANY WORKING GROUP 1 (2002), *available at* http://www.cites.org/eng/cop/12/doc/E12-47.pdf.

[152] Peru FTA, *supra* note 75, Annex 18.3.4(3).

[153] *Id.*

[154] *Id.* Annex 18.3.4(11).

[155] *Compare id.* Annex 18.3.4, *with* Legal Timber Protection Act, H.R. 1497, 110th Cong. (2007), *and* Trade Act of 2002, H.R. 3009, 107th Cong. § 2102 (2001); *see also* Forest Stewardship Council, Policies and Standards, http://www.fsc.org/en/about/policy_standards (last visited Mar. 19, 2008).

[156] *UN Rights Expert Unveils Draft Guidelines for Drug Companies on Vital Medicines*, UN NEWS SERV., Oct. 25, 2007, http://www.un.org/apps/news/story.asp?NewsID=24423&Cr=Health&Cr1 (discussing the testimony of Professor Paul Hunt).

"Generic" versions of medicines can lead to improved access in developing countries by dramatically lowering costs. For example, a decade ago a year of antiretroviral treatment for HIV infections cost approximately $10,000:[157] roughly two or three times the per capita income in Peru.[158] Once generic alternatives became available, the average cost of treatment dropped dramatically. Today, access to these low-cost generic drugs can lower the cost to less than $100 per patient.[159]

At the same time, pharmaceutical companies need incentives to invest in the research and development necessary to develop innovative products. There would not be a generic version of a medicine if an innovative drug company did not first develop a patented version of the product. Innovative drug companies—many of them headquartered in the United States—are responsible for extraordinary advances in public health. They do incredible work, and they deserve to be rewarded for it.

The health of millions of patients in developing countries thus depends upon striking the right balance between "access" and "innovation." For several years House Democratic leaders have expressed serious concerns to the Bush administration regarding provisions in our trade agreements that tip the scales too heavily against "access" in poor countries. These provisions go beyond the obligations contained in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the so-called "TRIPS Agreement"), which, for example, requires all WTO Members to provide twenty years of patent protection.[160] By going beyond the obligations in the TRIPS Agreement, these provisions are often referred to as "TRIPS-plus."[161]

Four provisions in our trade agreements required changes: patent extensions, "linkage," data exclusivity, and the public health "side letter." Not only did we believe it was necessary to strike a new balance between "access" and "innovation," but in some cases we also thought amendments to the trade agreements could better achieve *both* objectives.

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[157] Medecins Sans Frontieres, MSF Access: What is the Campaign?, http://www.accessmed-msf.org/about-us/what-is-the-campaign (last visited Apr. 11, 2008).

[158] *See* Int'l Monetary Fund, Report for Selected Countries and Subjects, http://www.imf.org/external/pubs/ft/weo/2007/02/weodata/weoselgr.aspx (follow "Western Hemisphere" hyperlink under "Select Country Group"; then follow "Continue >" hyperlink; then select "Gross domestic product per capita, current prices (U.S Dollars)" under "National Accounts"; then follow "Continue >" hyperlink; then select "1997" as "Start Year" and "End Year" under "Date Range"; then follow "Prepare Report >" hyperlink) (last visited Mar. 19, 2008).

[159] Medicins Sans Frontieres, *supra note* 157.

[160] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 33, Apr. 15, 1994, 33 I.L.M. 1197.

[161] *See, e.g.*, Oxfam America, TRIPS-Plus Provisions, http://www.oxfamamerica.org/whatwedo/issues_we_work_on/trade/news_publications/trips/art5391.html (last visited Mar. 19, 2008).

a. From "Patent Extensions" to Expedited Approval

Under the old version of the pending FTAs, each Party would have been required to extend the life of a patent to "compensate for unreasonable delays" in the issuance of the patent[162] or in the marketing approval process (i.e., the process by which a drug is determined to be safe and effective).[163] Many developing countries, and even some developed countries, were notorious for taking a very long time to process these applications, and both patients and innovative drug companies suffered as a result.

House Democratic leaders thought that there was a better way to deal with this issue. Rather than lengthening the term of the patent (which benefits the innovative pharmaceutical companies at the expense of patients), we proposed that this provision, insofar as it relates to pharmaceuticals, be replaced with the obligation to "make best efforts to process patent applications and marketing approval applications expeditiously with a view to avoiding unreasonable delays."[164] This provision, if properly enforced, should improve access to medicines both by ensuring that government agencies process applications more quickly and by avoiding delays that would result from inappropriate patent extensions.

b. From "Linkage" to the Expeditious Processing of Patent Infringement and Patent Validity Claims

In most developed and developing countries, the primary responsibility of drug regulatory agencies is to ensure drug safety and quality.[165] Patent adjudication is left to specialized patent offices or the court system. Under the 2002–2006 FTAs, however, a drug regulatory agency (such as the Food and Drug Administration ("FDA") in the United States) generally must withhold approval of a generic medicine until the agency can certify that no patent would be violated if the generic were marketed.[166] This is known as "linkage," because marketing approval is linked to patent status.

Supporters of this provision claim it is necessary because judicial systems in many developing countries move too slowly and otherwise cannot be

[162] The twenty-year patent term begins to run when a patent application is filed, not when it is issued. *See id.*

[163] *See, e.g.*, Peru FTA, *supra* note 75, art. 16.9.6(c).

[164] *See, e.g.*, *id.* art. 16.9.6(a).

[165] *See, e.g.*, FDA, Mission Statement, http://www.fda.gov/opacpm/morechoices.mission.html (last visited Mar. 19, 2008).

[166] *See, e.g., Implementation of the Dominican Republic-Central American Free Trade Agreement: Hearing Before the H. Comm. On Ways & Means*, 109th Cong. (2005) (statement of Joseph E. Brenner and Ellen R. Shaffer, Center for Policy Analysis on Trade and Health), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=2825 (noting DR-CAFTA provision 15.10.2, which requires a party to "implement measures in its marketing approval process to prevent [generic manufacturers] from marketing a product covered by a patent claiming the product or its approved method of use during the term of that patent . . . .").

relied upon to adjudicate patent infringement claims brought by patent holders.[167] The problem with this provision is that it provides a one-sided fix to a two-sided problem: although it may help to ensure that pharmaceutical patents will not be infringed, it also "locks in" invalid patents. It assumes that every patent is valid and does not require the FTA to mandate prompt processing of patent challenges.

As with the patent extension provision, House Democratic leaders believed that there was a better way to address this issue. Under their new approach, each party to the agreement is required to provide "procedures, such as judicial or administrative proceedings, and remedies, such as preliminary injunctions . . . for the expeditious adjudication of disputes concerning the validity or infringement" of a pharmaceutical patent.[168] This obligation applies not only to cases of alleged patent infringement, which, if successfully litigated, benefit innovative patent holders, but also to cases of alleged patent invalidity, which, if successfully litigated, allow for greater access to generic medicines, thereby providing a better balance between innovation and access.

We also recognized that "linkage" is one permissible way to satisfy the obligation described above, but only if (1) expeditious administrative or judicial procedures are in place to allow a generic manufacturer to "break the link" to successfully challenge the validity (or applicability) of the patent, and (2) the government provides effective rewards for the successful challenge of that patent.[169] Indeed, the United States uses linkage, subject to these two conditions, to satisfy its obligation under the Hatch-Waxman Act of 1984.[170]

c. *Modifying "Data Exclusivity" to Increase Access*

A manufacturer of a new drug must provide extensive clinical data on its safety and efficacy to a marketing approval agency, such as the FDA in the United States.[171] A generic company can apply for permission to market a generic version of the drug after the expiration of the patent by demonstrating that the generic copy is biologically equivalent to the brand-name version.[172] In the absence of a "data exclusivity" rule, the generic manufacturer

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[167] *Cf.* Robert M. Sherwood et al., *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA 473, 479 (1999) ("In many developing countries, the patent office is underfunded, particularly in light of Inflation [sic].").

[168] *See, e.g.*, Peru FTA, *supra* note 75, art. 16.10.3(a).

[169] *See, e.g.*, *id.* arts. 16.10.4(c)–(d).

[170] This legislation, more formally known as the Drug Price Competition and Patent Term Restoration Act of 1984, sets forth expeditious patent procedures for new drugs capable of "breaking the link." 21 U.S.C. §§ 355, 360cc (2000). Further, the legislation articulates drug-specific due diligence standards for patent holders seeking extensions and drug patent infringement standards. 21 U.S.C. § 156, 271, 282. The patent extension and data exclusivity provisions in the old versions of the FTAs also have a basis in the Hatch-Waxman Act.

[171] *See* FDA Investigational New Drug Application, 21 C.F.R. § 312 (2007).

[172] FDA Bioavailability and Bioequivalence Requirements, 21 C.F.R. § 320 (2007).

and the regulatory agency may rely in their application on the safety and efficacy data that formed the basis for the earlier approval.[173]

Under the 2002 to 2006 FTAs, a government was not permitted to authorize a generic manufacturer to rely on the data submitted by the patent manufacturer for at least five years from the date the patented product was approved.[174] This period of "marketing exclusivity" operated independently of patent protection. In fact, given that manufacturers of patented products may wait years before seeking regulatory approval in a country like Peru, the data exclusivity provision meant that a generic drug without independent testing might not be available in a developing country even after the patent expired—and even after it was available in the United States.

Here again, House Democratic leaders believed it was possible to create better and more effective incentives to provide access to medicines in developing countries while maintaining strong protection for innovation. As a general rule, the new FTAs still provide for five years of data exclusivity.[175] But if the foreign country relies on marketing approval granted by the United States FDA, the five-year period begins when the drug is first approved in the United States (i.e., the five-year period runs concurrently in the two countries), so long as the foreign country grants marketing approval within six months after receiving an application.[176] Because the "clock is ticking" under the concurrent period, innovative drug companies have an incentive to market their medicines in developing countries at the same time or soon after they market them in the United States, rather than having a disincentive as under the prior free trade agreements.

d. An Understanding Regarding Public Health

Finally, it was necessary to recognize the importance of public health measures and acknowledge that intellectual property rights generally should not interfere with these measures. The new FTAs therefore include the following understanding:

> The obligations of [the Intellectual Property] Chapter do not and should not prevent a Party from taking measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, and other epidemics as well as circumstances of extreme urgency or national emergency. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each

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[173] FDA New Drug Product Exclusivity, 21 C.F.R. § 314.108 (2007).
[174] *See, e.g.*, Peru FTA, *supra* note 75, art. 16.10.2.
[175] *Id.* art. 16.10.2(b).
[176] *Id.* art. 16.10.2(c).

> Party's right to protect public health and, in particular, to promote access to medicines for all.[177]

Although there was a somewhat similar provision included in "side letters" to the 2002–2006 FTAs,[178] those side letters had no legal effect under the FTAs. Thus, the inclusion of this provision in the text of the FTA provided legal enforceability, a considerable improvement for public health advocates.

4. *Respect for Worker Rights in Government Procurement*

I believe that any time a consumer decides to purchase a good or a service, that consumer should have the right to know whether that good was produced or that service was supplied under labor practices that do not meet basic minimum standards. When the U.S. government acts as a consumer, it should have the right to make that same consideration.

The new FTAs clarify that a government procuring entity is free to require contractors to comply with laws regarding "fundamental principles and rights at work" and "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health" in the territory in which the good is produced or the service is performed.[179] A similar clarification concerning laws that address the "conservation of natural resources and the environment" was already part of these FTAs.[180]

5. *Securing U.S. Ports*

The security of U.S. ports was called into question in January 2006 after the Bush administration approved the sale of a British-owned firm that operated the ports in New York, New Jersey, Philadelphia, Baltimore, New Orleans, and Miami to Dubai Ports World, a ports operator owned by the government of Dubai in the United Arab Emirates.[181] When Members of Congress, including then Senate Majority Leader Bill Frist (R-Tenn.) and Senate Armed Services Committee Chairman John W. Warner (R-Va.), expressed serious concerns, Dubai Ports World agreed to sell its U.S. operations.[182]

The Dubai Ports World episode raised the question of whether a foreign investor (in particular, one with foreign government ownership) covered by a U.S. trade agreement could be denied the right to invest in a U.S. port

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[177] *Id.* art. 16.13.2(a).

[178] *See, e.g.*, Oman FTA, *supra* note 91, art. 15 (including a Side Letter on Public Health).

[179] *See, e.g.*, Peru FTA, *supra* note 75, art. 9.6.7(b).

[180] *See, e.g.*, *id.* art. 9.6.7(a).

[181] *Bush Says He Will Veto Any Bill to Stop UAE Port Deal*, FoxNews.com, Feb. 22, 2006, http://www.foxnews.com/story/0,2933,185479,00.html.

[182] Jonathan Weisman & Bradley Graham, *Dubai Firm to Sell U.S. Port Operations*, Wash. Post, Mar. 10, 2006, at A01.

operation. There was substantial bipartisan concern over this issue. For example, one bill, introduced by then-Trade Subcommittee Chairman Clay Shaw (R-Fla.) and then-ranking Democrat Ben Cardin (D-Md.), would have prohibited any entity owned or controlled by a foreign government from conducting operations, or entering into any contract or other agreement to conduct operations, at any seaport in the United States.[183]

Recent U.S. trade agreements provide that the United States will not discriminate against investors from the other party who wish to invest in "landside aspects of port activities, including operation and maintenance of docks," if the trading partner agrees not to discriminate against U.S. investors supplying these same services in its territory.[184] In fact, Dubai Ports World has investments in Peru,[185] and could be treated as a Peruvian investor with rights under the Peru FTA.[186]

All U.S. trade agreements include an "essential security" exception to all obligations in the agreement.[187] Some commentators and trading partners over the years have called into question whether that exception is "self-judging" (i.e., whether an international tribunal can "second guess" a U.S. decision to invoke the exception).[188] A WTO case filed in 1996 by the European Union against the United States under a similar provision seemed to suggest that the provision was not, in fact, self-judging.[189] Although the United States has long maintained that the exception is self-judging,[190] prior to 2007, the Bush administration refused to consider clarifying the text of the pending FTAs.

The new FTAs now include such a clarification. A footnote to the essential security exception provides that if a party invokes the exception in an arbitral proceeding, "the tribunal or panel hearing the matter shall find that the exception applies."[191] In addition, the specific provision relating to "landside aspects of port activities" now includes a new sentence, recognizing that commitments relating to these activities are subject to the essential security exception.[192]

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[183] H.R. 4839, 109th Cong. (2006).

[184] *See, e.g.*, Peru FTA, *supra* note 75, Annex II (schedule of the United States).

[185] Peru Business News, Dubai Ports World Callao Set to Tap Muelle Sur Terminal Developer, Dec. 18, 2007, http://www.perubusinessnews.blogspot.com/2007/12/dubai-ports-world-callao-set-to-tap.html.

[186] *See* Peru FTA, *supra* note 75, ch. 10, art. 10.28.

[187] *See, e.g.*, *id.* art. 22.2(b).

[188] See Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424 (1999).

[189] *See* Request for the Establishment of a Panel by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38 (Oct. 4, 1996).

[190] *See* Michael J. Glennon, *Protecting the Court's Institutional Interests: Why Not the* Marbury *Approach?*, 81 AM. J. INT'L L. 121, 125–26 (1987) (noting the United States's long history of entering into treaties with an "essential security interest" exception).

[191] *See, e.g.*, Peru FTA, *supra* note 75, art. 22.2(b) n.2.

[192] *See, e.g.*, *id.* Annex II-US-5.

6. *Protecting Legitimate Government Actions from Investor Challenges*

Over the period from 1994 to 2000, arbitrators in investment disputes under the North American Free Trade Agreement issued a number of troubling decisions.[193] In response, I joined with Representatives Matsui, Levin, and McDermott in 2001 to propose changes to the investment provisions of U.S. trade agreements. In part as a result of these proposals, the Trade Act of 2002 included negotiating objectives that addressed the concerns arising from these decisions, and NAFTA was amended.[194] Ultimately, the investment chapters of the 2002–2006 FTAs included substantial improvements to preserve the rights of governments to adopt legitimate and important public welfare laws and policies.[195]

Notwithstanding these changes, concerns remained that the investment chapters of the 2002–2006 FTAs could be interpreted in ways that would provide foreign investors with greater rights than U.S. investors under U.S. law. For example, some argued that the expropriation annex could be interpreted in ways that would give foreign investors greater rights than investors have under the *Penn Central* test under U.S. law.[196]

The new FTAs, therefore, include the following resolution in the preamble:

> 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,

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[193] *See, e.g.*, S.D. Myers, Inc. v. Canada, at 66, ¶ 266 (NAFTA Arbitration Trib. 2000), http://www.appletonlaw.com/cases_myers.htm (finding that, in this case, a breach of the national treatment obligation "essentially establishes" a breach of the minimum standard of treatment obligation). Despite these troubling decisions, it is important to note that the United States has never lost a single dollar in an "investor-state" dispute under NAFTA, or under any other trade agreement or bilateral investment treaty.

[194] *See, e.g.*, Trade Act of 2002, 19 U.S.C. §§ 3803–3805 (Supp. IV 2004).

[195] *See, e.g.*, Oman FTA, *supra* note 91, Annex 10-B, Expropriation, § 4(b).

[196] *See* Peru FTA, *supra* note 75, Annex 10-B; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); *see also* Public Citizen, NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-States Cases, 1994–2005, at 12 (2005), available at http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf. Public Citizen noted that each of the FTAs concluded between 2002 and 2006 included a list of factors, generated by the U.S. Supreme Court in *Penn Central*, to be considered in determining if an expropriation has occurred:

> However, the *Penn Central* factors are relevant only when considered in the context of 25 years of judicial interpretation . . . . Outside of the U.S. jursprudence defining them, terms such as the 'characters of the government action' are meaningless. Unless the FTAs require that U.S. jurisprudence be adhered to, the dispute tribunals will be able to interpret the list of *Penn Central* factors in any number of ways, without being bound by decades of U.S. Court precedence [sic] about what these terms mean.

Id.

> protections of investor rights under domestic law equal or exceed those set forth in this Agreement.[197]

This language may be crucial in interpreting the text of the investment chapter in some cases. Suppose a tribunal is considering two possible interpretations of a provision in the investment chapter of an FTA. One interpretation would provide a foreign investor under the trade agreement with greater rights than the rights of investors under U.S. law, and the other interpretation would provide the investor under the agreement with the same rights, or lesser rights. This language in the preamble would preclude the tribunal from adopting the first interpretation.[198] It would also preserve policy discretion not only for the U.S. Government, but for the governments of our trading partners as well.

B. Ensuring Fair Trade by Enforcing Existing Rules

> Why would we allow foreign governments to get away with subsidizing producers, not enforcing their laws, while turning to the remaining producers here in the United States and saying, we need to make it easier for more imports to come to our markets? Effectively, many of us would tell you we have an eight-lane highway coming into Peoria, only to face a dirt road back to Rio, Jakarta, or Istanbul . . . . [S]upport for further trade liberalization understandably weakens in light of continued foreign unfair trade practices and inadequate enforcement of our laws.[199]

As described in Part I, *supra*, for most of the period following World War II, Congress has sought to establish a fair world economy, through an activist trade policy, whenever necessary. This reflects the view that stakeholders must have confidence that their government will actively ensure foreign governments are playing by the rules.

In recent years, that confidence has eroded. Various efforts to liberalize trade have not been matched by efforts to ensure that international competition is fair, or by efforts to shape trade to expand the scope of beneficiaries beyond the privileged few. Instead, a *laissez-faire*, or "hands off," approach to trade has taken the place of a more proactive approach.

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[197] *See, e.g.*, Peru FTA, *supra* note 75 (preamble).

[198] The preamble of an agreement serves an important role in the interpretation of the obligations in an international agreement. Vienna Convention on the Law of Treaties art. 5, May 22, 1969, 8 I.L.M. 679 ("1. A treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise . . . the text, including its preamble and annexes . . . .").

[199] *Hearing on Trade and Globalization Before the Comm. on Ways and Means*, 110th Cong. (2007) (statement of John Meier, Chief Executive Officer, Libbey Glass, Inc.), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=5408.

One example of this "hands off" approach is currency manipulation. The governments of several countries, most notably China and Japan, have substantially undervalued their currencies over the past several years, reducing the price of their exports to the United States (and other countries) and increasing the price of U.S. exports to those countries. In the case of China, most economists believe the renminbi (RMB) is undervalued in the range of 20-40%.[200] To keep the RMB undervalued, Chinese authorities have intervened substantially in the foreign exchange markets, and, as a result, China's foreign exchange reserves have grown from about $200 billion in 2001,[201] to more than $1.5 trillion by the end of 2007.[202] These currency practices have contributed significantly to the U.S. trade deficit. According to one expert, "a 25% real appreciation vis-à-vis the dollar in China, Japan, and the rest of emerging Asia would probably improve the US current account position by roughly $130 billion to $180 billion"[203]—about 20% of the global U.S. current account deficit.[204]

The Bush administration agrees that China's government currency practices are contributing to the trade deficit. President Bush himself raised this issue with President Hu five years ago.[205] Nevertheless, the administration has repeatedly refused to apply or enforce U.S. laws. The Exchange Rates and International Economic Policy Coordination Act of 1988 provides that the Secretary of the Treasury "shall take action to initiate negotiations" with any country that manipulates its currency "on an expedited basis."[206] As one expert summarized the situation:

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[200] *E.g.*, William R. Cline & John Williamson, Estimates of the Equilibrium Exchange Rate of the Renminbi 1 (Oct. 12, 2007) (unpublished manuscript), http://www.iie.com/publications/papers/cline-williamson1007.pdf.

[201] Guanon Ma & Robert N. McCauley, *Rising Foreign Currency Liquidity of Banks in China*, BIS Q. Rev., Sept. 2002, at 67, *available at* http://www.bis.org/publ/qtrpdf/r_qt0209h.pdf

[202] Int'l Monetary Fund, Time Series Data on International Reserves and Foreign Currency Liquidity (2008), http://www.imf.org/external/np/sta/ir/8802.pdf.

[203] Morris Goldstein, *A (Lack of) Progress Report on China's Exchange Rate Policies* 8 (Peterson Inst. For Int'l Econ., Working Paper No. 07-5, 2007).

[204] According to the IMF's World Economic Outlook 2007, the U.S. Current Account Deficit is estimated at approximately $784 billion in 2007, and is projected to be approximately $788 billion in 2008. Int'l Monetary Fund, World Economic Outlook: Globalization and Inequality 232 (2007).

[205] *See* U.S. Dep't of the Treasury, Office Of Pub. Affairs, Report to Congress on International Economic and Exchange Rate Polices 10 (2003).

[206] 22 U.S.C. § 5304 (2000). In addition, in 1974, Congress granted the President the authority to impose special measures (such as increased duties up to 15%) "[w]henever fundamental international payments problems require special import measures to restrict imports." Trade Act of 1974, 19 U.S.C. § 2132 (2000). In fact, President Nixon had imposed a 10% "additional tax" on all imports on August 15, 1971, to ensure "that American products will not be at a disadvantage because of unfair exchange rates." President Richard Nixon, Address to the Nation Outlining a New Economic Policy: The Challenge of Peace (Aug. 15, 1971) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=3115); *see also* Proclamation No. 4074, 3 C.F.R. 60 (1971–1975), *reprinted in* 85 Stat. 926 (1971), *available at* http://www.wjopc.com/site/constitutional/execorders/Nixon.pdf.

> [T]he role of currency in the US-China relationship has not been handled well over the past five years . . . . The US Treasury's almost exclusive reliance on "quiet diplomacy," the vague pleas for "greater flexibility of exchange rates in countries with large current account surpluses" instead of calls for an immediate and significant appreciation in the real effective exchange rate of the RMB, and the tortured reasoning to justify a conclusion that China has not intended to "manipulate" its exchange rate (when all evidence pointed to the contrary), have sent weak signals to China and have produced meager results.[207]

The administration has also refused—three times since 2004—to initiate a WTO case to address this issue, despite repeated formal petitions from the private sector and Members of Congress to do so.[208]

American jobs—and confidence in trade liberalization—have been lost as a result of this refusal to take action to address currency manipulation.[209] The Committee on Ways and Means expects to consider legislation in the near future, not only to address the immediate problem of China's currency practices, but also to ensure that these problems are addressed promptly and effectively in the future.

Failure to address currency manipulation is just one of many examples of the administration's passive approach. The administration has repeatedly

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[207] Goldstein, *supra* note 203, at 18; *see also* C. Randall Henning, *Congress, Treasury, and the Accountability of Exchange Rate Policy: How the 1988 Trade Act Should be Reformed* 24 (Peterson Inst. For Int'l Econ., Working Paper No. 07-8, 2007) ("[I]t is difficult to reconcile President Bush's Treasury Secretaries' refusal to cite China for manipulation with the letter and spirit of the 1988 act—which raises the question of their accountability to the Congress in this respect.").

[208] *See, e.g.*, Press Release, Office of the U.S. Trade Representative, Administration Declines Section 301 Petition on China's Currency Policies (June 13, 2007), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/June/Administration_Declines_Section_301_Petition_on_Chinas_Currency_Policies.html; Office of the U.S. Trade Representative, Statement from USTR Spokesperson Richard Mills Regarding a Section 301 Petition on China's Currency Regime (May 27, 2005), http://www.america.gov/st/washfile-english/2005/May/20050528140058attocnich0.6939007.html; Office of the U.S. Trade Representative, Statement from USTR Spokesperson Neena Moorjani Regarding a Section 301 Petition on China's Currency Regime (Nov. 12, 2004), http://www.ustr.gov/Document_Library/Spokesperson_Statements/Statement_from_USTR_Spokesperson_Neena_Moorjani_Regarding_a_Section_301_Petition_on_Chinas_Currency_Regime.html.

[209] *See, e.g.*, *Hearing Before the H. Subcomm. on Trade of the H. Comm. on Ways & Means*, 110th Cong. 3 (2007) (testimony of William Hickey, president, Lapham-Hickey Steel Corp.), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/hthickey050907.pdf ("Tens of thousands of manufacturing jobs were disappearing each month. As those jobs vanished, our trade deficit with China exploded, but the value of the Chinese currency did not move. This is when I realized that what China had done in the mid 1990's was to devalue their currency by about 50% against the U.S dollar, and freeze the value at that exchange rate by intervening in the exchange markets. This guaranteed that the Chinese manufacturers could ship massive amounts of products to the United States at 'The China Price.'").

refused to exercise the United States' right under WTO rules[210]—and the administration's responsibility under U.S. law[211]—to address surging imports from China that are causing "market disruption," despite recommendations to do so by the independent U.S. International Trade Commission.[212] Plants have closed and jobs have been lost as a result. For example, the President refused to provide relief in 2002, in a case involving wire hangers.[213] Since then, imports of wire hangers from China surged an additional 800%, and China's share of the U.S. market grew from 15% to 90%.[214] All but two U.S. wire hanger producers stopped producing in the United States, and 2500 jobs were lost.[215]

The Bush administration has also failed to enforce WTO rules. The Clinton administration filed an average of eleven WTO cases each year to enforce trade rules against our trading partners. By the end of 2006, the Bush administration had filed an average of just three cases per year. One might have expected the number of cases filed to have increased, given that China joined the WTO in 2001[216] and is widely believed to be out of compliance on a range of issues.[217]

At the beginning of 2007, the Bush administration also weakened U.S. antidumping laws (which address unfair international price competition) by eliminating a practice known as "zeroing" in antidumping investigations.[218] Zeroing can take a variety of forms, but it generally means treating groups of sales that are above "fair value" as not dumped (i.e., having a dumping margin of zero), rather than allowing the sales above "fair value" to offset the dumped sales. That practice had been in place for more than eighty years

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[210] *See* Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 14, 33 I.L.M. 1125 (1994), available at http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf.

[211] Trade Act of 1974, 19 U.S.C. § 2451 (2006) (amended 1988).

[212] Presidential Determination on Imports of Circular Welded Non-Alloy Steel Pipe From the People's Republic of China, 71 Fed. Reg. 871 (Dec. 30, 2005); Presidential Determination on Imports of Certain Ductile Iron Waterworks Fittings from the People's Republic of China, 69 Fed. Reg. 10,597 (Mar. 3, 2004); Presidential Determination on Pedestal Actuator Imports from the People's Republic of China, 68 Fed. Reg. 3157 (Jan. 17, 2003).

[213] *See* Presidential Determination on Wire Hanger Imports from the People's Republic of China, 68 Fed. Reg. 23,019 (Apr. 29, 2003).

[214] *China Currency Manipulation: Hearing Before the S. Banking Comm.*, 110th Cong. 2 (2007) (statement of John W. Nolan, Vice President and Gen. Manager, Steel Dynamics, Inc.).

[215] *Id.*

[216] Joseph Kahn, *World Trade Organization Admits China, Amid Doubts*, N.Y. Times, Nov. 11, 2001, at A1.

[217] *See, e.g.*, U.S. Trade Representative, 2007 Report to Congress on China's WTO Compliance 6 (2007), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/asset_upload_file625_13692.pdf?ht= ("At present, several specific areas continue to cause particular concern for the United States and U.S. industry, in terms of China's full adherence to its WTO obligations"); Daniel C. Crosby, *Banking on China's WTO Commitments: 'Same Bed, Different Dreams' in China's Financial Services Sector*, 11 J. Int'l Econ. L 75, 104 (2008) (discussing concerns about China's "full implementation of [its] commitments on financial services . . . .").

[218] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 11,189 (Mar. 6, 2006).

in the United States and many other countries.[219] The administration ended this practice to comply with a WTO ruling that the administration itself described as "very troubling,"[220] "fatally flawed,"[221] and "devoid of legal merit."[222]

The administration failed to take advantage of the unique opportunity to eliminate the non-tariff barriers on imported products in Korea during the negotiation of a free trade agreement from 2005–2007. Due to a series of trade-restrictive measures, the Korean auto market remains the most protected market among the advanced nations of the world. For instance, in 2006, Korea exported over 700,000 cars to the United States, while the United States exported just 4556 cars to Korea.[223] But the FTA does not ensure a more open market in the future, and does not address the fact that it can be quite difficult, to say the least, to demonstrate that a Korean measure has created an "unnecessary obstacle to trade."[224]

Despite the administration's poor record overall, it made some progress in 2007. The Commerce Department initiated countervailing duty investigations against planned economies,[225] albeit years after House Democrats introduced legislation to make non-market economies subject to countervailing duty proceedings.[226] The administration also filed a subsidies case in the WTO against China,[227] as well as a WTO case protesting China's lack of

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[219] *See* Anti-Dumping Act of 1921, 19 U.S.C. § 161(a) (repealed 1980) ("[I]f the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, then the cost of production) there shall be levied, collected, and paid, in addition to the duties imposed thereon by law, a special dumping duty." The regulation as a whole makes clear that this occurs on an entry-by-entry basis.); *see also* Gerold Buschlinger & James C. Conner, *The United States Antidumping Act: A Timely Survey*, 7 VA. J. INT'L L. 117, 120 (1966) (stating that appraisers determine which shipments are dumped and by what margin "by comparing the 'foreign market value' with the U.S. import price of each shipment").

[220] Communication by the United States, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 25, WT/DS332, (Feb. 20, 2007), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file208_7838.pdf.

[221] Communication from the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')*, ¶ 3, WT/DS294/18, (June 19, 2006).

[222] *See* Roger Alford, *Reflections on US-Zeroing: A Study of Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196 (2007).

[223] *See* Automotive Trade Policy Council, Data About Asian Auto Markets, http://www.autotradecouncil.org/Upload/Korea%20factsheet%20Sheet1.pdf.

[224] *See* Agreement on Technical Barriers to Trade art. 2.2, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm ("Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to trade.").

[225] *See, e.g.*, Notice of Initiation of Countervailing Duty Investigation: Lightweight Thermal Paper from the People's Republic of China, 72 Fed. Reg. 62,209 (Dep't of Commerce Nov. 2, 2007); Raw Flexible Magnets from the People's Republic of China: Notice of Initiation of Countervailing Duty Investigation, 72 Fed. Reg. 59,076 (Dep't of Commerce Oct. 18, 2007).

[226] *See, e.g.*, H.R. 3306, 109th Cong. § 3 (2005).

[227] *See, e.g.*, World Trade Organization, China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments: Summary of Dispute to Date, Jan. 22, 2008, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds358_e.htm. The

protection for intellectual property rights.[228] These are all issues over which House Democrats had urged action for years.

C. *Opening Major Markets*

In November 2001, the 151 countries that are members of the World Trade Organization launched a new round of trade negotiations.[229] Those negotiations, which are ongoing, have the potential to strengthen the multilateral rule-based system and create substantial new opportunities for U.S. workers, businesses, and farmers. Congressional consideration of any final deal will be guided largely by the same basic principle that has guided it for decades: the outcome should create a more "open, nondiscriminatory, and fair world economic system."[230] Among other things, that means: WTO members must accord non-tariff barriers the same priority as tariffs[231] and, as a consequence, must effectively address them, must restore and strengthen rules against unfair trading practices, and must create commercially meaningful opportunities, not only from the agricultural negotiations, but also through the services and manufactured products negotiations. The Committee on Ways and Means will continue to work with the administration to achieve these results.

D. *Globalization Adjustment Assistance*

A good trade policy should have three dimensions. It should create and preserve jobs and opportunities by opening markets and by establishing and enforcing rules that create and maintain a level playing field for U.S. workers, businesses, and farmers. But a good trade policy also must spread the benefits of globalization more broadly, in part by ensuring that workers have the education, training, and skills they need and, as a last resort, by helping those adversely affected by globalization to overcome its challenges and succeed.

United States requested consultations with China on February 2, 2007. *Id.* On December 19, 2007, China and the United States informed the DSB that they had reached an agreement, in the form of a memorandum of understanding. *Id.*

[228] *See, e.g.*, World Trade Organization, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Summary of Dispute to Date, Jan 22, 2008, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm The United States requested consultations with China on April 10, 2007. *Id.* On August 13, 2007, the United States requested the establishment of a panel. *Id.* On September 25, 2007, the DBS established a panel. *Id.*

[229] Joseph Kahn, *Nations Back Freer Trade, Hoping to Aid Global Growth*, N.Y. TIMES, Nov. 14, 2007, at A12.

[230] Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, § 121 (codified as amended at 19 U.S.C. § 2131 (2000)).

[231] World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 16, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2001), *available at* http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.pdf.

While the Trade Adjustment Assistance ("TAA") program[232] is supposed to provide that assistance, the program has not kept pace with globalization and fails to meet the needs of those it was intended to help.[233] For instance, despite the fact that the service sector employs 80% of the American workforce, TAA does not cover most service sector workers, including information technology workers, accountants, and aircraft maintenance crews, all of whom now face competition from abroad.[234] TAA also excludes many manufacturing workers because of illogical eligibility criteria (for example, a worker whose factory moves to Mexico is guaranteed TAA coverage, while a worker whose factory moves to China is not).[235] TAA is inadequately funded and, as a result, during periods of economic downturn, many eligible dislocated workers are denied access to TAA services.[236] TAA training coverage also has been artificially limited by the Department of Labor and some States' restrictive interpretations of current law.[237] The TAA

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[232] The Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, created the TAA program to assist workers who lost their jobs as a result of international trade. The program was most recently amended in the 2002 conference report extending the President's trade promotion authority. Pub. L. No. 107-210, 116 Stat. 933 (2002). The TAA for Workers program has traditionally applied to dislocated manufacturing sector workers. The program's primary two benefits are extended income support and training. The 2002 changes added a health care tax credit to help workers maintain health coverage while in training, and a wage insurance pilot program for workers over 50 years old. *Id.*

[233] The Government Accountability Office ("GAO") has published a number of reports detailing the problems with the TAA program. *See, e.g.*, U.S. Gov't Accountability Office, Trade Adjustment Assistance: Industry Certification Would Likely Make More Workers Eligible, but Design and Implementation Challenges Exist (2007); U.S. Gov't Accountability Office, Trade Adjustment Assistance: Program Provides an Array of Benefits and Services to Trade-Affected Workers (2007); U.S. Gov't Accountability Office, Trade Adjustment Assistance: Changes to Funding Allocation and Eligibility Requirements Could Enhance States' Ability to Provide Benefits and Services (2007); U.S. Gov't Accountability Office, Trade Adjustment Assistance: New Program for Farmers Provides Some Assistance, but Has Had Limited Participation and Low Program Expenditures (2006); U.S. Gov't Accountability Office, Trade Adjustment Assistance: Labor Should Take Action to Ensure Performance Data Are Complete, Accurate and Accessible (2006); U.S. Gov't Accountability Office, Trade Adjustment Assistance: Most Workers in Five Layoffs Received Services, but Better Outreach Needed on New Benefits (2006); U.S. Gov't Accountability Office, Trade Adjustment Assistance: Reforms Have Accelerated Training Enrollment, but Implementation Challenges Remain (2004).

[234] Trade Act of 1974, 19 U.S.C. § 222 (2000).

[235] *Id.* § 222(2)(b)(i)–(ii).

[236] *See, e.g.*, Gov't Accountability Office, Pub. No. 08-165, Trade Adjustment Assistance: States Have Fewer Training Funds Available than Labor Estimates When Both Expenditures and Obligations Are Considered (2007).

[237] *Compare* 19 U.S.C. § 2295 (2000) ("The Secretary shall make every reasonable effort to secure for adversely affected workers . . . counseling, testing, and placement services, and supportive and other services, provided for under any other Federal law, including the services provided through one-stop delivery systems described in section 2864(c) of Title 29."), *with* Gov't Accountability Office, Pub. No. 04-1012, Reforms Have Accelerated Training Enrollment, But Implementation Challenges Remain 39–40 (2004) (indicating that fourteen states reported requiring that training programs approved for TAA participants must be on the state's WIA-eligible training provider list, and an additional twenty-three states reported that most training programs approved for TAA participants are on the state's list); *see also*

health coverage tax credit, which was introduced in 2002 as a major improvement to the TAA program,[238] has serious design flaws. The credit is not being used by the vast majority of TAA eligible workers, though many of them need it to access affordable health care.[239]

In September 2007, I introduced the Trade and Globalization Assistance Act of 2007,[240] to address these, and many other, problems with the program through a complete overhaul of TAA. The bill expands TAA to cover more workers, including service workers, and improves their training opportunities and their health care benefits.[241] The bill also creates new benefits for industries and communities that have been hit hard by trade.[242] Finally, the bill enacts long-needed reforms to access to TAA's unemployment insurance system, in recognition that all unemployed workers, and not just those whose job loss is attributable to trade and globalization, deserve support in getting back on their feet.[243]

The Committee on Ways and Means reported the bill out of Committee on October 24, 2007, by a vote of 26-14.[244] On October 31, 2007, a bipartisan majority of Members in the House of Representatives passed the Trade and Globalization Assistance Act of 2007 by a vote of 264-157.[245] The bill has been referred to the Senate Committee on Finance, where it awaits consideration. I am hopeful that Congress will enact, and the President will sign, this important legislation into law without delay.[246]

E. Expanding Opportunities in the Poorest Countries of the World

When House Democrats took the majority in January of 2007, we knew that for trade to work, its benefits had to be spread broadly. This must mean two things. First, we would have to change U.S. trade policy so that more American workers, farmers, and businesses could enjoy the benefits of increased globalization. Second, we would have to find new ways to ensure

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Trade Adjustment Assistance for Workers, Workforce Investment Act; Amendment of Regulations, 71 Fed. Reg. 50,760, 50,778–79 (proposed Aug. 25, 2006) (restricting approved training under TAA to only training offered by Workforce Investment Act ("WIA")-eligible training providers).

[238] Trade Act of 2002, Pub. L. No. 107-210, §§ 201–203, 116 Stat. 933, 954–72 (2002).

[239] *See, e.g.*, U.S. Gov't. Accountability Office, Pub. No. 04-1029, Health Coverage Tax Credit: Simplified and More Timely Enrollment Process Could Increase Participation (2004).

[240] H.R. 3920, 109th Cong. (2007).

[241] *See id.*

[242] *See id.*

[243] *See id.*

[244] Press Release, Ways and Means Comm., Ways and Means Passes Trade and Globalization Assistance Act of 2007 (Oct. 24, 2007).

[245] 153 Cong. Rec. H12,337 (daily ed. Oct. 31, 2007).

[246] The rule governing the debate of H.R. 3920 amended the legislation and added, *inter alia*, provisions that amended the Worker Adjustment and Retraining Notification Act ("WARN Act") and the Consolidated Omnibus Budget Reconciliation Act ("COBRA") to expand health coverage. *See* H.R. 781, 110th Cong. (2007). The bill has been referred to the Senate Committee on Finance, where it awaits consideration.

that the benefits of trade were spread across more countries abroad, including the world's poorest countries.

Evaluating, renewing, and, where necessary, reforming U.S. trade preference programs is a necessary step toward achieving this second goal. Such an effort would be especially timely given the expiration in 2008 of three U.S. preference programs: the Andean preference program ("ATPA/ATPDEA"); aspects of the Caribbean Basin Initiative ("CBI") and the Generalized System of Preferences ("GSP").[247]

The trade preference programs have long been a centerpiece of U.S. efforts to extend a hand to the world's poorest countries. As a result of the programs, over 130 developing countries now receive low or no tariffs on exports of their goods into the United States, giving firms and workers in these countries critical access to one of the largest, wealthiest markets in the world.[248]

In 2006, for example, the Caribbean Basin countries were able to export $9.9 billion in goods to the United States under CBI.[249] Imports under CBI preferences increased 12.9% in 2005 and 17.3% in 2006.[250] Beneficiaries of this expanded trade included countries such as Haiti, the poorest country in Western hemisphere,[251] whose exports to the United States under the preference program increased 39% in 2005 and 25.1% in 2006 to $379 million, due largely to CBI's apparel provisions.[252]

Similarly, exports from the Andean countries of Bolivia, Colombia, Ecuador, and Peru to the U.S. amounted to $10.6 billion in 2005, up nearly tenfold from $1.1 billion in 2001.[253] Expanded exports to the U.S. market under ATPA supported job growth in beneficiary countries, in such sectors as agriculture (for example, asparagus and cut flowers) and textiles and apparel, providing critical economic alternatives to coca cultivation and cocaine production consistent with the key goals of the Andean program.[254]

The African Growth and Opportunity Act ("AGOA") provides further examples of the growth opportunities that the U.S. preference programs have

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[247] *See* H.R. 5264, 110th Cong. (2008) (extending all three programs to 2010).

[248] U.S. Gov't. Accountability Office, Pub. No. 07-1209, An Overview of U.S. Trade Preference Programs by Beneficiaries and U.S. Administrative Reviews 1 (2007).

[249] U.S. Int'l Trade Comm'n, The Impact of the Caribbean Basin Economic Recovery Act xiii (2005-06).

[250] Office of the U.S. Trade Representative, Seventh Report to Congress on the Operation of the Caribbean Basin Economic Recovery Act 11 (2007) (adjusting for the migration of some CBI countries to the CAFTA-DR agreement).

[251] *Id.* at 58.

[252] *Id.* at 13.

[253] U.S. Int'l Trade Comm'n, The Impact of the Andean Trade Preference Act 3-3 (2005). This figure includes exports that qualified for preferences under ATPA only, not other preference programs as well (e.g., GSP). The total volume of exports coming in under preference programs must therefore be even higher.

[254] Indeed, in 2005, the U.S. government estimated net coca cultivation in the ATPA countries at 169,900 hectares, representing a nearly 25% decrease from peak production of 221,800 hectares in 2001. *Id.* at 3–4.

provided. Exports to the United States under AGOA, including its GSP provisions, amounted to $44.2 billion in 2006, up 16% from 2005.[255] Moreover, investment in sub-Saharan Africa increased 58.1%, from $12.8 billion in 2004 to $20.2 billion in 2005.[256] AGOA-related investments included the opening of a new clothing factory in Lesotho in April 2006 that aims to employ 3,000 workers in the manufacture of tee-shirts and jeans for export to the United States, plans for a $53.3 million knitting and dye-house factory in Swaziland, and plans for a new flower farm in Uganda that will employ approximately 800 workers to grow flowers for export to the U.S. market.[257]

The U.S. preference programs have thus made important strides toward expanding developing countries' economies and promoting economic development. At the same time, there is still more progress to be made. Startling data shows that the share of world trade accounted for by the least developed countries ("LDCs") has dropped precipitously since 1970, from 1.5% to just 0.9% in 2006.[258] This statistic suggests that many developing countries have yet to participate in the international trading system fully, and up to their potential. For these countries, poverty and economic stagnation remain dire problems. We must continue to search for a solution to these problems.

Toward this end, it is important to evaluate the effectiveness of preference programs to determine where they have succeeded, where they have come up short, and where they must be supplemented to effectuate their development goals more fully. One important issue is the ways in which the preference programs will continue to be valuable in an international trading context in which the benefits under the preference programs are being eroded. For example, in 2005, the phase-out of textile and apparel quotas under the Multi-Fibre Arrangement ("MFA") significantly altered the relative trading advantages for many preference beneficiary countries and resulted in a significant shift towards exports from China.[259] While special U.S. safeguards negotiated with the Chinese helped to mitigate some of the surge in Chinese imports, these safeguards are due to expire in 2008.[260] Once again, therefore, beneficiary countries face potentially significant preference

[255] Office of the U.S. Trade Representative, 2007 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act 25 (2007). Oil imports from countries such as Nigeria and Angola accounted for much of this increase. However, non-oil imports also increased by seven percent to $3.2 billion in 2006, including in such industries as footwear, fruits, nuts, prepared vegetables, and cut flowers. *Id.* at 5.

[256] *Id.* at 26.

[257] *Id.* at 27.

[258] *See generally* World Trade Organization, Trade Profiles, http://stat.wto.org/CountryProfile/WSDBCountryPFHome.aspx?Language=E (last visited Mar. 18, 2008).

[259] *See, e.g.,* U.S. Int'l Trade Comm'n, *supra* note 249, at xv, 3–18; U.S. Int'l Trade Comm'n, Sub-Saharan Africa: Factors Affecting Trade Patterns of Selected Industries xiii, 3–37 (2007).

[260] *See* Paul Blustein, *Deal on Textiles May Only Delay China's Dominance*, Wash. Post, Nov. 9, 2005, at A24.

erosion. The question for Congress is whether something can be done to avoid the harm to lesser developed countries.

Similarly, the data shows that not all beneficiaries are fully using their benefits under the preference programs.[261] We must ask ourselves why this is so and how it can be addressed. In addition, fuel imports now account for more than fifty percent of U.S. preference imports.[262] We need to understand the causes for this trend so that we can help other sectors beyond the fuel sector to reap benefits from the expanded trade opportunities under the U.S. preference programs.

These are only some of the critical questions that House Democratic leaders believe must be asked and answered as part of a serious effort to update and upgrade the U.S. preference programs.

IV. Conclusion

U.S. trade policy is beginning to move again. By working to shape globalization, to spread its benefits, and to level the playing field for American workers, businesses, and farmers, I and other trade policymakers hope to restore the confidence of the public and to put a "human face" on globalization. A "hands-off" approach to the international economy will work no better than the "hands-off" approach to the domestic economy that was in place before the New Deal.

In 2000, Democratic and Republican trade policymakers were beginning to put together a new policy based on the new and challenging realities of globalization. That policy was reflected in the Trade and Development Act of 2000,[263] the granting of "permanent normal trade relations" to China following China's accession to the WTO,[264] and the completion of a free trade agreement, and implementing legislation, with Jordan.[265] Within a year, this reconstruction effort had been superseded by renewed partisanship in trade policy-making, which led Committee leadership to shut down any debate at all on these vital and difficult subjects so important to working people, businesses and farmers.

Now, we are talking, and listening, to one another again—and listening to the public, as well. That is likely to result in a more coherent, unified, and enduring American trade policy. But this more bipartisan atmosphere should not be confused with a new, bipartisan consensus on trade policy. We are still a long way away from achieving that goal. The debate is only just beginning. We still have much work to do in shaping and expanding the bene-

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[261] *See* Gov't Accountability Office, U.S. Trade Preference Programs: An Overview of Use by Beneficiaries and U.S. Administrative Reviews 56-63 (2007).

[262] *Id.* at 26.

[263] 19 U.S.C. § 3701 (2000).

[264] Pub. L. 106-286, 114 Stat. 880 (2000).

[265] U.S.-Jordan Free Trade Area Implementation Act, Pub. L. 107-43, 115 Stat. 243 (2001).

fits of globalization, and in making trade work for working Americans. The "New Trade Policy for America" is not a finished work. But it is an historic first step in a new direction.