

# A NEW TRADE POLICY FOR AMERICA: DO LABOR AND ENVIRONMENTAL PROVISIONS IN TRADE AGREEMENTS SERVE SOCIAL INTERESTS OR SPECIAL INTERESTS?

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## I. INTRODUCTION

In April of 2007, the Bush Administration signed a free-trade agreement with Peru (U.S.-Peru FTA) that contained environmental and labor provisions unprecedented in previous U.S. trade agreements.<sup>1</sup> The agreement also included a new annex on forest sector governance meant to address illegal logging in Peru.<sup>2</sup> The environmental chapter of the U.S. - Peru FTA requires the parties to fulfill their obligations under Multilateral Environmental Agreements (MEAs) that have been ratified by both parties.<sup>3</sup> Under the labor provisions of the U.S.- Peru FTA, both parties agreed to adopt and maintain certain labor rights as detailed in the 1998 International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>4</sup> Notably, the labor and environmental provisions in the U.S. - Peru FTA have been elevated to core obligations that are now subject to the same dispute settlement procedures as other core obligations in the agreement.<sup>5</sup>

Labor and environmental provisions in international trade agreements have long been the subject of disagreement between Democrats and Republicans in the United States.<sup>6</sup> Their inclusion in the U.S.- Peru FTA

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1. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS, FREE TRADE WITH PERU: SUMMARY OF THE UNITED STATES - PERU TRADE PROMOTION AGREEMENT 2-3 (2007) [hereinafter PERU TPA SUMMARY], available at [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2007/asset\\_upload\\_file672\\_13066.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file672_13066.pdf).

2. *Id.* at 8; International Centre for Trade and Sustainable Development (ICTSD), *US - Peru Bilateral to Address Illegal Logging, Boost MEA Implementation*, 7 BRIDGES TRADE BIORES, NO. 13, July 6, 2007 [hereinafter *US - Peru Bilateral to Address Illegal Logging*], available at <http://ictsd.net/downloads/biores/biores7-13.pdf>.

3. PERU TPA SUMMARY, *supra* note 1. The MEAs covered include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, the International Convention for the Prevention of Pollution from Ships, the Ramsar Convention on Wetlands, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling and the Convention for the Establishment of an Inter-American Tropical Tuna Commission. *US - Peru Bilateral to Address Illegal Logging*, *supra* note 2.

4. PERU TPA SUMMARY, *supra* note 1, at 8.

5. *US - Peru Bilateral to Address Illegal Logging*, *supra* note 2; PERU TPA SUMMARY, *supra* note 1, at 9.

6. See I. M. DESTLER, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, AMERICAN

reflects a shift in the Bush Administration's trade policy, made in an effort to assuage the Democrats who took control of Congress in January of 2007.<sup>7</sup> Although, at first glance, these provisions might merely seem to reflect an increasing concern for labor and environmental rights, specific protectionist groups also stand to benefit from their inclusion in trade agreements and may advocate their inclusion for reasons completely unrelated to environmental preservation or human rights. First, domestic industries seeking to protect themselves from competition with cheap imports which, they fear, could be "subsidized" by less-restrictive labor and environmental laws, may advocate inclusion of labor and environmental standards to impair the competitiveness of imported goods.<sup>8</sup> Second, international firms or industries hoping to achieve a competitive advantage over more efficient producers from other countries on the international market may advocate labor and environmental standards because they will raise the price of production for their international competitors.<sup>9</sup> Third, proponents of a trade agreement that is unpopular due to its potential to harm to the environment or human rights may actually advocate inclusion of nominal labor and environmental standards in order to pacify the agreement's detractors. Finally, politicians may advocate inclusion of labor and environmental standards as campaigning strategies because of their appeal to the patriotism and sympathies of the American public.<sup>10</sup> At the other end of the spectrum, free-trade proponents fear that stricter labor and environmental provisions are a tool for anti-globalization protectionism that will ultimately hurt the world economy.<sup>11</sup>

This Note will argue that labor and environmental standards in trade agreements are vulnerable to manipulation and exploitation by various protectionist groups that stand to benefit from their inclusion in trade agreements. Relying on economic theory, it will assert that when the primary purpose of these provisions is to benefit specific protectionist special interests, the inclusion of such provisions in trade agreements has a high probability of causing significant harm to overall social welfare in the United States.

This Note will proceed in four parts. Part II outlines historical and current trends in domestic and international trade systems and policy. Part II.A provides an overview of Trade Promotion Authority, the U.S. trade mechanism

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TRADE POLITICS IN 2007: BUILDING BIPARTISAN COMPROMISE 1 (Policy Brief No. PB07-5, 2007), available at <http://www.iie.com/publications/pb/pb07-5.pdf>; see also Robert McMahon, *The 110th Congress: Dems and Trade*, COUNCIL ON FOREIGN RELATIONS, Jan. 4, 2007, available at [http://www.cfr.org/publication/12339/110th\\_congress.html](http://www.cfr.org/publication/12339/110th_congress.html).

7. DESTLER, *supra* note 6, at 1.

8. Interview by Lee Hudson Teslik with Jagdish N. Bhagwati, Senior Fellow for International Economics, *Bhagwati: U.S. Must Rethink Doha Demands* (Feb. 9, 2007), in COUNCIL ON FOREIGN RELATIONS, available at <http://www.cfr.org/publication/12592/>.

9. See JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 280 (Oxford University Press 2007) (arguing that intense international trade competition provides an incentive for domestic industries to seek out protectionist measures in order to increase the costs of production for competitors).

10. See *infra* Part IV.B and accompanying notes.

11. See DESTLER, *supra* note 6, at 1.

through which Congress delegates trade negotiating authority to the Executive Branch. Part II.B describes the formulation of the “New Trade Policy for America,” the bipartisan trade policy compromise adopted in May 2007 - the first trade policy to formally include labor and environmental standards. Part II.C examines the relatively recent shift from multilateralism to bilateralism and regionalism as dominant international trade models, and points out the potential loss of efficiency and the inevitable loss of transparency in bilateral and regional trading systems. Part III then considers changing attitudes about globalization and trade liberalization, noting that U.S. public opinion and U.S. politicians increasingly appear to be adopting protectionist views, but that prominent economists continue to advocate trade liberalization accompanied by institutional adjustments to compensate the “losers” in trade liberalization. Part IV highlights the problem of “capture,” in which legislative measures can be manipulated and exploited by special interests at the expense of the rest of society. Part IV concludes by arguing that labor and environmental provisions are particularly vulnerable to capture because they represent politically and socially desirable goals. Part V argues that three conditions - the rise of bilateralism, the trend towards protectionism in U.S. public and political opinion, and the status of labor and environmental protection as desirable social goals - converge to create an environment that is ripe for exploitation and manipulation by protectionist special interests, at a high cost to U.S. society overall. As a result, Part V concludes that labor and environmental provisions are not an appropriate component of U.S. trade policy at this time and that labor and environmental issues should be addressed in alternative forums.

## II. BACKGROUND: TRENDS IN DOMESTIC AND INTERNATIONAL TRADE

### A. *An Overview of Trade Promotion Authority*

The Constitution dictates that “Congress shall have Power . . . to regulate Commerce with foreign Nations . . . .”<sup>12</sup> In contrast, the President, although having exclusive authority to negotiate treaties and international agreements and broad power over the nation’s foreign affairs under Article II, is assigned no specific responsibility for trade by the Constitution.<sup>13</sup> Congress authorizes the President to enter into agreements that regulate international commerce through a legislative grant of Congressional authority called Trade Promotion Authority (TPA). Congress does not completely surrender its power over international trade, but instead maintains a check on the executive power

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12. U.S. CONST. art. I, § 8, cl. 3.

13. U.S. CONST. art. 2, § 2, cl. 2; J.F. HORNBECK & WILLIAM H. COOPER, TRADE PROMOTION AUTHORITY (TPA): ISSUES, OPTIONS, AND PROSPECTS FOR RENEWAL 2 (updated Jan. 7, 2008) (2006).

through a variety of mechanisms,<sup>14</sup> including, for example, providing for TPA expiration after a specified period.<sup>15</sup> As a result, once the President acquires TPA from Congress, he or she has significant authority over trade. The initial obstacle of procuring TPA, however, must first be overcome.

TPA is an important trade tool for several reasons. First, as a practical matter, it is not feasible for Congress, whose members are motivated by the diverse interests of their constituents, to negotiate complex trade agreements.<sup>16</sup> TPA streamlines the process by transferring most of the trade-negotiating initiative to the President, giving him the authority to conclude trade agreements that will then be presented to Congress for a vote without the possibility of amendment.<sup>17</sup> Second, TPA gives U.S. trade partners assurance that final agreements negotiated by the President will not be bogged down by unlimited congressional debates and amendments.<sup>18</sup> TPA also performs a third, less apparent function: it lessens protectionist pressures on Congress.<sup>19</sup>

Congress first expressly delegated trade-negotiating authority to the President in the Reciprocal Trade Agreements Act of 1934 (RTAA).<sup>20</sup> For the first 150 years of the United States' history, Congress exercised its power to regulate foreign trade by setting tariffs on all imported goods.<sup>21</sup> During the 1930's, producers seeking protection from the effects of the Great Depression motivated Congress to pass the "Smoot-Hawley" Tariff Act of 1930, which set prohibitively high tariffs on imports.<sup>22</sup> The Act was passed in spite of a petition signed by 1,028 noted economists warning that its implementation would result in a world-wide depression.<sup>23</sup> As predicted, major U.S. trading partners imposed retaliatory tariffs. The tariffs resulted in severely restricted trade and ultimately deepened and prolonged the effects of the Depression.<sup>24</sup> In an effort

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14. *Id.* at 15. Congress maintains some authority over trade by requiring that certain trade objectives be included in trade agreements, by requiring periodic TPA reauthorization, and by utilizing various procedural rules and mechanisms. *Id.*

15. *Id.* at 14-15.

16. Clete D. Johnson, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 GA. J. INT'L & COMP. L. 437, 446-47 (2004).

17. *Id.* at 446.

18. HORNBECK & COOPER, *supra* note 13, at 5.

19. *Id.* at 3. The initial delegation of authority in RTAA to reduce tariffs and implement the tariffs by proclamation without additional legislation was motivated in part by Congress' desire to lessen protectionist pressure on itself. *Id.*

20. *Id.*

21. *Id.* at 2.

22. *Id.* at 3.

23. *1,028 Economists Ask Hoover to Veto Pending Tariff Bill*, N.Y. TIMES, May 5, 1930, at 1, available at <http://www.clubforgrowth.org/media/uploads/smooth%20hawley%20ny%20times%2005%2005%2030.pdf>; see also Audio Interview by Lee Hudson Teslik with Amity Shlaes, Council on Foreign Relations Senior Fellow for Economic History, *Shlaes: Putting Protectionism in Historical Context*, Nov. 14, 2007, available at <http://www.cfr.org/publication/14803/shlaes.html> [hereinafter Interview with Amity Shlaes].

24. HORNBECK & COOPER, *supra* note 13, at 3.

to ameliorate the damaging effects of the tariffs, Congress enacted the RTAA, which allowed the President to negotiate tariff-reducing agreements with foreign nations and “implement the new tariffs by proclamation without additional legislation.”<sup>25</sup> Congress renewed presidential reciprocal trade authority under the RTAA model eleven times.<sup>26</sup>

The establishment of the General Agreement on Tariffs and Trade (GATT) in 1947 shifted the major forum for trade negotiations from bilateral to multilateral negotiations and expanded international trade liberalization measures beyond the reduction of tariffs.<sup>27</sup> To accommodate this shift and allow the President to advance trade liberalization, the Trade Act of 1974 gave the President authority to reduce non-tariff barriers (NTBs) but stipulated that agreements involving NTBs could only enter force if Congress passed the implementing legislation.<sup>28</sup> In order to preserve the original goals of efficiency and the diversion of protectionist pressure, however, Congress agreed that if the President met certain procedural criteria, it would suspend its ordinary legislative procedures and give trade agreements expedited treatment.<sup>29</sup> This incarnation of presidential trade authority, which became known as “fast track,” required that congressional approval of a trade agreement be subject to time-limited debate without the possibility for amendment.<sup>30</sup> Thus, fast track gave the President additional trade negotiating authority provided that certain requirements of the authorizing statute were satisfied. Fast track was renewed in 1979 and 1988.<sup>31</sup> After its expiration in 1994, the Clinton Administration was unable to achieve renewal authority from Congress.<sup>32</sup> The hiatus has been attributed in part to disagreement between the Clinton Administration and the Republican congressional leadership “on how labor and environmental issues should be addressed in trade agreements.”<sup>33</sup>

The core provisions of TPA have remained virtually unchanged since their inception. Each renewal of TPA defines Congress’ trade policy priorities and mandates that those priorities be reflected in trade agreements negotiated

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25. *Id.* Prior to the RTAA, the President’s primary role in setting trade policy was exercised under Article II of the Constitution, which states that the President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . . .” U.S. CONST. art. II, § 2, cl. 2. The President entered into treaties requiring the lowering of domestic tariffs, but only with the support of two-thirds of the Senate. HORNBECK & COOPER, *supra*, note 13, at 3.

26. HORNBECK & COOPER, *supra*, note 13, at 4. Congress later expanded its role in the process in the Trade Expansion Act of 1962, by requiring the President to submit a copy of each concluded agreement for congressional review and a presidential statement explaining why the agreement was concluded. *Id.*

27. *Id.*

28. *Id.* at 5 (citing Trade Act of 1974, 19 U.S.C. §§ 2101-2497 (1975)).

29. *Id.*

30. *Id.*

31. *Id.* at 6.

32. *Id.* at 7.

33. *Id.*

by the President.<sup>34</sup> TPA also contains important limiting procedural mechanisms,<sup>35</sup> but congressionally mandated TPA objectives are the primary way that Congress influences the substance of trade agreements. In fact, history suggests that the single most important predictor of whether a trade agreement will survive is the extent to which it mirrors Congress' TPA objectives.<sup>36</sup> Because of their demonstrated significance, the debate as to what should be included in TPA objectives is of vital importance.

### *B. The Formulation of "A New Trade Policy for America"*

When Democrats took over Congress in January of 2007, the outlook for continued trade expansion appeared grim.<sup>37</sup> President Bush's TPA was set to expire in July of 2007, and it appeared unlikely that he would be able to acquire a renewal from Congress due to the unpopularity of the Bush Administration's trade policy.<sup>38</sup> Trade had become an increasingly partisan issue in the previous decades, with major trade votes coming down almost entirely along party lines.<sup>39</sup> In 2001, President Bush secured TPA authorization by a single vote in the House, with only 21 of 210 Democrats voting in favor of the grant.<sup>40</sup> One estimate suggested that sixteen "trade-friendly" House Republicans were replaced with sixteen "trade-skeptical" Democrats in 2007,<sup>41</sup> easily undermining the slim pro-trade majority. No pro-trade seats were added in either house.<sup>42</sup> Trade agenda was touted as one of the central issues motivating the Democratic shift in Congress.<sup>43</sup>

34. *Id.* at 8.

35. All trade agreement authorizations have historically contained "sunset provisions" providing for the expiration of the availability of expedited procedures after a specified time period. *Id.* at 15. TPA legislation also requires the President to request an extension of TPA authority after a certain period of time. *Id.* Either House of Congress can adopt a "disapproval resolution" to deny extension. *Id.* Further, if the President fails to follow the consultation and reporting obligations included in the TPA authorization, Congress can find that the agreement is not eligible for expedited consideration by adopting a joint "procedural disapproval" resolution. *Id.* Finally, either House can withdraw or change its own procedural rules for expedited legislation by a vote. *Id.*

36. *Id.* at 10. "Because the structure of trade agreements mirrors TPA objectives, and highly disputed agreements based on those objectives brought before Congress under TPA have so far survived, often narrowly, all challenges from opponents, the vote on TPA/fast track renewal is among the most critical trade votes Congress takes." *Id.*

37. See DESTLER, *supra* note 6, at 1.

38. *Id.*

39. *Id.*

40. *Id.* The Central American Free Trade Agreement - Dominican Republic (CAFTA-DR), was approved by a scant two votes in July 2006, with only fifteen of 202 Democrats voting in favor. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* House Democrat Betty Sutton, writing to the House Committee on Ways and Means Chairman Charles Rangel on behalf of thirty nine new House Democrats, noted that, "[v]ital to our electoral successes was our ability to take a vocal stand against the

With TPA expiration looming, the Bush Administration prepared to face the daunting task of achieving TPA renewal without the advantage of a Republican Congress, and also faced the challenge of obtaining congressional approval of trade agreements negotiated under existing 2002 TPA authorization.<sup>44</sup> In pursuit of a sufficiently timely compromise, House Ways and Means Committee ranking member Jim McCrery and United States Trade Representative (USTR) Susan Schwab plunged into intensive negotiations meant to resolve, in a matter of months, disagreements over labor and environmental standards that had proved divisive for Republicans and Democrats since the Clinton Administration.<sup>45</sup>

The product of those negotiations, labeled “A New Trade Policy for America,” announced the amendment of pending U.S. Free Trade Agreements (FTAs) to incorporate key Democratic priorities.<sup>46</sup> The Trade Policy contained minimum core labor standards and environmental provisions that would be subject to the same dispute settlement procedures as trade commitments, in addition to several other provisions.<sup>47</sup> Although the Trade Policy technically altered only pending FTAs, the bipartisan compromise on divisive labor and environmental issues cleared a major obstacle from the Bush Administration’s path to TPA renewal.<sup>48</sup> The compromise also suggests that Democrats will likely insist on inclusion of similar labor and environmental provisions among Congress’ negotiating objectives in future TPA renewal legislation.<sup>49</sup> In addition, members of Congress have denounced the consultation process as superficial and unresponsive to congressional input and complained that the procedures for deterring the use of TPA, once granted, are ineffective.<sup>50</sup> Thus, proposals for tightening procedural controls on TPA are also anticipated.<sup>51</sup>

The probable inclusion of labor and environmental provisions among

Administration’s misguided trade agenda, and offer our voters real, meaningful alternatives to the job-killing agreements, such as CAFTA, that the majority of our opponents supported.” *Id.*

44. Even with TPA authority, the narrow passage of CAFTA-DR *before* the democratic shift in Congress strongly suggested that trade agreements would not survive congressional approval without significant alterations. *See id.* (CAFTA-DR passes by only two votes).

45. *Id.*; HORNBECK & COOPER, *supra* note 13, at 6.

46. HOUSE WAYS AND MEANS COMMITTEE STAFF, NEW TRADE POLICY FOR AMERICA <http://waysandmeans.house.gov/media/pdf/NewTradePolicy.pdf> [hereinafter TRADE POLICY] (last visited Dec. 1, 2008).

47. DESTLER, *supra* note 6, at 10. The Policy also contains provisions addressing intellectual property rights in relation to trading partners’ health needs, a “port security” exception to U.S. obligations under the services chapter, a provision stating that foreign investors would not be granted greater rights within the United States than U.S. investors, and presented a “strategic worker assistance and training initiative.” *Id.*

48. *Id.* at 11.

49. *Id.* at 12. However, there are indications that Democrats may not require inclusion of labor and environmental negotiating objectives for the conclusion of the current WTO Doha Round. *Id.*

50. *Id.*

51. *Id.* (stating: “Ways and Means Democrats are also likely to press for new mechanisms for consultation with Congress during negotiations, new procedures enhancing legislators’ leverage in these negotiations, and perhaps involvement of members of Congress in the original choice of FTA negotiation partners”).

congressionally required negotiating objectives, in conjunction with enhanced procedural mechanisms for congressional control over trade negotiations, reveal an overall trend towards Congress tightening its grip on trade policy. Because of the potential ramifications of proposed changes to TPA renewal legislation, the likelihood that the changes will achieve their proposed goals should be carefully considered and weighed against the costs of decreased trade.

### C. *Bilateral Trade Agreements*

#### 1. *The Rise of Regional and Bilateral Free Trade Agreements*

The thirteen years since the creation of the World Trade Organization (WTO) in 1995 have been characterized by a shift away from the multilateral trading system that was implemented with the signing of the GATT in 1947<sup>52</sup> towards trade expansion through bilateral and regional trade agreements.<sup>53</sup> This shift from multilateral to bilateral and regional trade agreements is important for several reasons. First, it represents a significant change in dominant trade policies that may be representative of changing attitudes about globalization and should be examined closely to ensure that overall and long term welfare can be achieved. Second, TPA was formulated primarily during a time period characterized by multilateral trade agreements, and will likely function differently in a trade environment dominated by bilateral and regional FTAs. Third, the proliferation of regional and bilateral FTAs may unintentionally allow the undetected advancement of protectionist interests simply due to the number of agreements reached and the complexity of their administration. Finally, the specific provisions of the Trade Policy are likely more readily manipulated by special interest groups for protectionist and other purposes in the context of multiple FTAs. This may exacerbate already unequal distribution of trade benefits for less powerful groups.

Although the Trade Policy may be incorporated into TPA objectives at some point, it was originally drafted to apply specifically to pending bilateral and regional FTAs.<sup>54</sup> FTAs are created when two or more countries grant preferential treatment in trade<sup>55</sup> to other member countries by eliminating tariffs

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52. HORNBECK & COOPER, *supra* note 13, at 4.

53. Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?* 10 J. INT'L ECON. L. 571, 571 (2007).

54. See TRADE POLICY, *supra* note 47.

55. Preferential trade arrangements (PTAs) encompass other arrangements in addition to FTAs, including customs unions, common markets, and economic unions. WILLIAM H. COOPER, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 2 (Congressional Research Service 2006). FTAs require the least economic integration between member countries. *Id.* Customs unions, in addition to conducting free trade among member countries, maintain common trade policies outside the region. *Id.* In common markets, member countries also eliminate barriers to labor and capital flows within the market. *Id.* Economic unions integrate even further by establishing a common currency. *Id.*



and other non-tariff barriers to trade on goods within the FTA but maintain their respective trade policies outside the FTA region.<sup>56</sup> Although bilateral FTAs are a longstanding part of international trade history,<sup>57</sup> they have only recently emerged as a dominant vehicle for trade.<sup>58</sup> Before World War II, bilateral trading arrangements were common throughout the world, especially in the context of imperial trading systems.<sup>59</sup> In the aftermath of World War II, however, the West adopted multilateralism as the preferred post-war institutional model for international trade.<sup>60</sup> This policy preference for multilateralism was officially established by the signing of the GATT in 1947, and it continues under the governance of the WTO.<sup>61</sup> The growth in WTO membership, which today boasts a membership of 150 countries, attests to the historic prevalence of multilateralism, especially when considered in contrast to the original GATT signatories, which numbered only twenty-three states.<sup>62</sup>

In recent years, however, the proliferation of bilateral and regional FTAs has threatened to displace, or at least impede, the multilateral trading system.<sup>63</sup> For example, in 2001, the United States was a member of only two bilateral/regional FTAs,<sup>64</sup> but by the end of 2007, the United States had concluded a total of eleven such FTAs involving sixteen countries.<sup>65</sup> Further bilateral and regional negotiations are pending or anticipated.<sup>66</sup> The explosion of interest in bilateral/regional FTAs is not confined to the United States. The WTO reports that, as of 2004, more than 300 bilateral/regional FTAs had been notified to the WTO, out of which 176 were notified after January of 1995.<sup>67</sup>

56. *Id.*

57. *Id.* at 1; Abbott, *supra* note 54, at 572.

58. COOPER, *supra* note 56 at 5.

59. Abbott, *supra* note 54, at 572.

60. *Id.*

61. WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 10-11 (2007), [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf) (last visited Dec. 1, 2008) [hereinafter UNDERSTANDING THE WTO]. The WTO was created during the Uruguay Round of GATT negotiations that lasted from 1986 until 1994. *Id.* at 10.

62. *Id.* at title page. This number is current as of January 2007. *Id.*

63. Sungjoon Cho, *Doha's Development*, 25 BERKELEY J. INT'L L. 165, 193 (2007).

64. The United States created its first FTA with Israel in 1985 and concluded its second with Canada in 1989, which was expanded to encompass Mexico under the North American Free Trade Agreement (NAFTA) in 1993. COOPER, *supra* note 56, at 4.

65. At the time of this writing, the United States had completed and implemented bilateral FTAs with Israel, Jordan, Chile, Singapore, Australia, Morocco, and Bahrain. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, BILATERAL TRADE AGREEMENTS, [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html) (last visited Dec. 1, 2008). FTAs with Oman and Peru have been approved but await implementation, while FTAs with Colombia, Panama, and the Republic of Korea await Congressional Approval. *Id.* Regional FTAs in force include the NAFTA (with Canada and Mexico) and the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR) (with El Salvador, Nicaragua, Honduras, Guatemala, and the Dominican Republic). *Id.*

66. *Id.*

67. REPORT BY THE CONSULTATIVE BOARD, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 21 (2004), available at

## 2. *Explaining the Shift From Multilateralism to Bilateralism*

The shift away from multilateralism in favor of bilateral and regional FTAs can be explained by a mix of political and economic factors.<sup>68</sup> Fredrick Abbott, a professor of international law at Florida State University College of Law, suggests that less support for multilateralism now exists among original GATT signatories<sup>69</sup> because their geopolitical interests are no longer most effectively advanced by multilateral trade.<sup>70</sup> After World War II, the GATT nations were united by the common goal of guarding against perceived threats from the ideological and economic enemies of communism and socialism.<sup>71</sup> This created a powerful incentive for cooperation among signatory nations to form a Western bloc that could use its consolidated power to prevail both economically and politically over communist and socialist regimes.<sup>72</sup> The “most-favored-nation” (MFN) principle of multilateral trade was key to achieving cooperation because it eliminated contentions among signatory nations over differential trade preferences between them.<sup>73</sup>

In addition to the benefits of creating a united political and economic bloc to counter the communist threat, the most influential GATT signatories likely stood to make significant economic gains from the original multilateral trade structure and the MFN principle. The majority of original signatories were developed countries whose trade agendas were likely to be similar, meaning that signatory nations were unlikely to face highly objectionable demands from other signatories. Further, because the negotiations depended on economic negotiating leverage, those signatories whose trade agendas did not coincide with the agendas of the economic superpowers generally lacked the necessary leverage to prevail. For example, agricultural products were not included in multilateral trade agreements until 1994, largely because the United States and other developed nations, including those that now comprise the European Union (EU), were unwilling to give up substantial protections for their

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[http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf) [hereinafter THE FUTURE OF THE WTO]. Of the 300 FTAs notified to the WTO, 150 were operational in 2004. *Id.*

68. Abbott, *supra* note 54 at 573.

69. The original GATT signatories included Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States.

70. Abbott, *supra* note 54, at 573-74.

71. *Id.* at 573.

72. *Id.*

73. *Id.* at 572. Note that most of the original GATT signatories were either first world countries, colonizers, former colonizers, or recently decolonized countries with large economies which might have been likely to wield considerable power on the economic/political front. Most of these signatories may have seen particular economic gains to be made from this union, in addition to a united political front for defeating communism. Even those member countries whose interests may not have been consistent with the desires of the superpowers were not likely a threat here because they did not have the negotiating leverage to ensure that their demands were met.

agricultural sectors.<sup>74</sup> This omission was perpetuated despite the fact that many developing-country-signatories' economies were heavily dependent on agriculture and would have benefited considerably from liberalization in that sector.<sup>75</sup> Economic superpowers like the United States and present day EU countries had so much leverage in multilateral trade negotiations<sup>76</sup> that they were able to maintain significant agricultural trade barriers throughout the GATT rounds and even avoided making significant concessions in Uruguay Round's Agreement on Agriculture (URAA) in 1994.<sup>77</sup>

The ability of the economic superpowers to dictate terms in multilateral trade negotiations that overwhelmingly favor developed countries, however, has steadily eroded since the signing of the GATT in 1948 as developing countries have continued to join as member countries.<sup>78</sup> Nearly two-thirds of the WTO's current membership – approximately 100 out of 151 total member countries – are developing nations.<sup>79</sup> Of those, thirty-two are defined as “least-developed countries.”<sup>80</sup> The priorities of the WTO reflect the shifts in its membership. At the November 2001 commencement of the most recent round of WTO talks in Doha, Qatar (the Doha Round), representatives from 142 WTO member nations proclaimed their commitment to serving the interests of developing countries:

We seek to place their needs and interests at the heart of the

74. See Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing countries*, 27 COLUM. J. ENVTL. L. 433, 439-40 (2002).

75. Agriculture accounts for 26% of GDP in developing countries and for more than 50% of GDP in the least-developed countries but for only 3% of GDP among developed countries. THOMAS C. BEIERLE, RESOURCES FOR THE FUTURE, FROM URUGUAY TO DOHA: AGRICULTURAL TRADE NEGOTIATIONS AT THE WORLD TRADE ORGANIZATION 4 (2002), available at <http://www.rff.org/rff/Documents/RFF-DP-02-13.pdf>. In 2007, less than 1% of the U.S. population claimed farming as an occupation. ENVIRONMENTAL PROTECTION AGENCY, DEMOGRAPHICS, <http://www.epa.gov/oecaagct/ag101/demographics.html> (last visited Dec. 20, 2007). Many developing countries also stood to benefit significantly from agricultural liberalization because they were required to reduce trade barriers as conditions on loans obtained from international institutions during the Third World Debt Crisis of the 1980's. BEIERLE, *supra* note 76, at 4. This state of market openness meant that developing countries' domestic markets were flooded with cheap imported food from subsidized agriculture markets but enjoyed little increased market access for their agricultural products in the developed world. See Gonzalez, *supra* note 75, at 447-49.

76. See Gonzalez, *supra* note 75, at 449.

77. See generally Gonzalez, *supra* note 75 (arguing that Uruguay Round rules governing agricultural trade allow the United States and the European Union to continue subsidizing their agricultural sectors while requiring developing countries to open their markets to subsidized products from developed countries).

78. Karen Halverson-Cross, *King Cotton, Developing Countries and the “Peace Clause”*: *The WTO's US Cotton Subsidies Decision*, 9 J. INT'L ECON. L. 149, 190 (2006).

79. WTO.org, Understanding the WTO: Developing Countries, Overview, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm) (last visited Dec. 1, 2008).

80. WTO.org, Understanding the WTO: The Organization, Least-Developed Countries, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm) (last visited Dec. 1, 2008).

Work Programme adopted in this Declaration. . . . [W]e shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.<sup>81</sup>

Developing countries' leverage has not increased solely because of their increase in numbers, however. They have also achieved unprecedented solidarity throughout the course of the Doha Round, indicating their willingness to compromise amongst themselves in order to pursue common goals that would be unattainable for individual developing nations.<sup>82</sup> Indeed, in September 2003, the Doha Round was brought to a grinding halt when a coalition of over twenty developing nations walked out of the September 2003 Ministerial Meeting in Cancun, Mexico because they were unsatisfied with a compromise reached between the United States and the European Union on agriculture.<sup>83</sup> The strong showing made by developing countries during the Doha Round demonstrates the potential for changes in the balance of power in the multilateral trade arena. Faced with the potential inability to dictate the terms of multilateral trade agreements, and in the absence of a threat to democracy and capitalism that calls for a unified front, economic superpowers like the United States have little motivation to pursue multilateralism on a large scale.<sup>84</sup>

Another factor in the shift away from multilateralism may be a decline in the multinational business community's faith in the multilateral system's ability to promote its preferred economic agenda.<sup>85</sup> On one hand, businesses may be skeptical about the likelihood that complex negotiations among 151 member countries can reach satisfactory and timely conclusions on tough and vigorously contested issues.<sup>86</sup> On the other hand, businesses may prefer regional or

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81. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at [http://www.wto.org/English/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm) [hereinafter Doha Declaration].

82. Cho, *supra* note 64, at 180 ("In terms of negotiation dynamics, the developing countries' position was surprisingly united and solidified. The G-20 and the G-90 formed the 'G-110' and issued a joint statement identifying their common objectives. . . .").

83. Johnson, *supra* note 17, at 444-45.

84. Abbott, *supra* note 54, at 573-74.

85. *Id.* at 574.

86. See, e.g. Warren H. Maruyama & Timothy M. Reif, Symposium, Introductory Remarks, *The WTO at 10 and the Road to Honk Kong*, 24 ARIZ. J. INT'L & COMP. L. 1, 2 (2007) (asserting that the U.S. business community has not mobilized fully in support of the Doha Round because of uncertainty about whether an ambitious outcome to the negotiations can be realized). For example, the Multilateral Agreement on Investment (MAI), an important issue for the multinational business community, remains unresolved on the multilateral level, but the United States and the European Union have succeeded to securing higher levels of intellectual property protection in bilateral and regional FTAs. See Abbott, *supra* note 54, at 574-75.

bilateral agreements because they are better able to advance their specific interests in the context of more narrow treaties.

Finally, in the absence of multilateral agreements, countries seek out bilateral/regional FTAs as an alternative for achieving higher growth.<sup>87</sup>

### 3. *The Economic Merits of Bilateral and Regional FTAs as Trade Creating Mechanisms*

#### (a) *The Most Favored Nation Principle*

The increasingly likely prospect that FTAs will become a prominent international trade mechanism has stirred considerable debate over the merits of bilateralism and regionalism as opposed to multilateralism in the international trade arena.<sup>88</sup> One source of contention revolves around the MFN principle that serves as the cornerstone of the multilateral trading system.<sup>89</sup> The MFN principle requires WTO member countries to adhere to a policy of non-discrimination towards all other WTO member countries by awarding the same preferential trade terms to all WTO members as those awarded to the nation receiving the most advantageous terms.<sup>90</sup> According to economic theory, the uniform application of trade preferences among member nations improves the economic welfare of all members by ensuring that a given product is produced by the most efficient producer among member nations. The allocation of resources to their most efficient use allows each member country to maximize production, thereby producing more goods for sale and increasing its overall economic welfare. The MFN principle also allows smaller countries to benefit from advantages enjoyed among larger countries that they typically would not be powerful enough to negotiate. The MFN principle has the further advantage of administrative simplicity and transparency, because member countries have only one set of tariffs for all other countries. Finally, the MFN principle restrains protectionist interests because attempts to implement protectionist measures – raising tariffs, for example – would affect all of a given country's trading partners, including powerful allies, and would result in increased political pressure not to implement them.<sup>91</sup>

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87. COOPER, *supra* note 56, at 3; Abbott, *supra* note 54, at 575.

88. See COOPER, *supra* note 56, at 12-15.

89. Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 134 (2007).

90. COOPER, *supra* note 56, at 11. The MFN provisions of the GATT and the WTO specify that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.* (quoting General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. I [hereinafter GATT]).

91. W. J. Davey & J. Pauwelyn, *MFN-Unconditionality: A Legal Analysis of the Concept*

Regional and bilateral FTAs among WTO member countries violate the MFN principle by definition because they extend preferential trade treatment to products originating with certain members.<sup>92</sup> The original GATT signatories recognized, however, that bilateral FTAs can still be economically beneficial for all members if implemented according to certain conditions that promote overall gains from trade.<sup>93</sup> As a result, bilateral FTAs are generally exempted from the WTO's MFN requirements.<sup>94</sup> Nevertheless, the proliferation of bilateral FTAs has prompted a call from some WTO member countries for clearer rules regarding regional and bilateral FTAs. The failure to reach a conclusion in the Doha Round of WTO negotiations, however, leaves these rules ambiguous.<sup>95</sup>

(b) *Trade Creation and Trade Diversion*

Although the WTO rules do not prohibit or seriously constrain the formation of FTAs, important questions as to their economic and social desirability as a model for international trade remain. Most FTAs involve reciprocal preferential treatment that, at a minimum, eliminates tariff and some non-tariff barriers over a specified period of time.<sup>96</sup> FTAs typically also contain rules of origin that define what constitutes a product manufactured within the FTA - no small challenge given that most products are constructed of components from many different countries - and procedures for dispute resolution and implementation of border controls.<sup>97</sup> Recent FTAs also often contain rules pertaining to economic activities beyond strict trade in goods, including foreign investment, intellectual property rights protection, trade in services, and the labor and environmental provisions at issue in this Note.<sup>98</sup>

The debate about the economic viability of FTAs is based on the economic concepts of "trade creation" and "trade diversion."<sup>99</sup> Trade creation occurs when a domestically produced good is replaced by a more efficiently created imported good.<sup>100</sup> The replacement should improve economic welfare within the importing country because it can shift its resources to more efficient uses, which ultimately allows more productivity for the same amount of effort expended.<sup>101</sup> In contrast, trade diversion occurs when a product that was

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*in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product", in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW: PAST, PRESENT, AND FUTURE (Petros Mavroidis & Thomas Cottier eds., 2000).*

92. COOPER, *supra* note 56, at 11.

93. *Id.*

94. See UNDERSTANDING THE WTO, *supra* note 61, at 11.

95. COOPER, *supra* note 56, at 12.

96. *Id.* at 2-3.

97. *Id.* at 3.

98. *Id.*

99. *Id.* at 8.

100. *Id.*

101. *Id.*

previously imported from an efficient non-FTA member country is replaced by a less-efficiently-produced good from an FTA member country.<sup>102</sup> Here, the replacement is said to reduce economic welfare because resources are being diverted from an efficient producer to a less-efficient producer.<sup>103</sup> Thus, even if two countries enter into an agreement under which they achieve freer trade amongst themselves, the FTA could make member countries and the rest of the world worse off if the FTA diverts more trade than it creates.<sup>104</sup>

Whether an FTA results in net trade creation or net trade diversion is typically determined by the structure of the FTA.<sup>105</sup> Economists estimate that trade creation is relatively more likely to exceed trade diversion in the FTA context under the following conditions:

- 1) where large tariffs or other trade barriers existed among FTA members prior to entering the FTA;
- 2) where low tariffs and trade barriers exist between members and nonmembers;
- 3) where a greater number of countries participate in the FTA;
- 4) where FTA member economies are more competitive or less complementary; and
- 5) where FTA member countries had a close economic relationship prior to FTA formation.<sup>106</sup>

Not surprisingly, these conditions indicate that FTAs can create trade which will increase member and global welfare most effectively when they are structured to facilitate freer trade rather than protectionism goals. In contrast, an FTA that purports to create freer trade, but, for example, actually reduces barriers only nominally or maintains prohibitively high tariffs against nonmember countries, is considerably less likely to create benefits for member or nonmember countries.

The foregoing discussion is particularly relevant to the Trade Policy labor and environmental provisions because the sensitive trade creation/trade diversion balance could be altered by their inclusion in FTAs. This danger is further exacerbated by the potential for FTAs which create freer trade among member countries but, because of their trade diverting effects, have an overall detrimental impact on global trade, global welfare, and even the welfare of one or more FTA members.

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 10.

(c) *Dominant Economic Perspectives on the Value of Regional and Bilateral FTAs*

Economists and trade experts generally follow one of three dominant perspectives on the economic merits of FTAs. The first perspective asserts that FTAs undermine the multilateral trading system and act as a “stumbling block” to trade liberalization.<sup>107</sup> One proponent of this view, Columbia economist Jagdish Bhagwati, argues that FTAs are trade diverting because they are discriminatory by definition.<sup>108</sup> In addition, high tariffs that currently exist on goods imported into many developing countries increase the likelihood of trade diversion.<sup>109</sup> Bhagwati further points out that companies are more likely to prefer bilateral or regional FTAs over multilateral liberalization because they can achieve preferential treatment over non-member country competitors for their products.<sup>110</sup> This point is particularly important because companies may create political pressure in favor of bilateral rather than multilateral agreements even if the overall welfare of the nation will not be enhanced by the agreement. Economist Anne Krueger argues that FTA rules of origin impair efficiency because they encourage member countries to purchase as many inputs as possible from member countries, resulting in detrimental trade diversion from many efficient producers.<sup>111</sup> According to Krueger, stricter rules of origin in a given FTA make trade diversion more likely.<sup>112</sup>

The second prevalent economic perspective asserts that FTAs can act as a “building block” toward multilateral trade liberalization.<sup>113</sup> Proponents of this view often argue that, although multilateral agreements may be more beneficial for trade liberalization, some free trade is better than none.<sup>114</sup> Proponents also point out that FTAs often facilitate more economic integration in areas not covered by the GATT/WTO, including reductions on barriers in services trade, foreign investment, and other economic activities.<sup>115</sup> Further, FTAs may more effectively address difficult trade barriers on which member countries have failed to reach consensus in the WTO.<sup>116</sup> Economist Fred Bergsten argues that the United States must enter FTAs in order to remain competitive as other countries form their own FTAs.<sup>117</sup> Bergsten advocates the creation of FTAs based on models that would eventually engage most WTO members, thus

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107. *Id.* at 12.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 13.

112. *Id.*

113. *Id.* at 12.

114. *Id.* at 13.

115. *Id.*

116. *Id.* at 13-14.

117. *Id.* at 14.



creating a stepping stone towards multilateral liberalization.<sup>118</sup>

A third perspective on the desirability of FTAs opposes trade liberalization in general because of perceptions about the impact on workers in import-sensitive sectors, the environment, or because trade liberalization is thought to undermine U.S. sovereignty.<sup>119</sup> Proponents of this view often include representatives of import-sensitive industries, such as labor unions and representatives of environmental or other social action groups.<sup>120</sup>

### III. SHIFTING OPINIONS ON TRADE LIBERALIZATION: THE AMERICAN PUBLIC, POLITICIANS AND ECONOMISTS

In January of 2008, a *Business Week Magazine* headline proclaimed “Economists Rethink Free Trade.”<sup>121</sup> The article begins by asserting that “ordinary Americans have long been suspicious of free trade, seeing it as a destroyer of good-paying jobs.”<sup>122</sup> However, the article asserts, U.S. Presidents have long pursued a free-trade agenda because the “academic Establishment . . . [has] always told them that free trade was the best route to ever higher living standards.”<sup>123</sup> As the first few lines suggest, the article asserts that economists have traditionally formed the backbone of support for free trade, even when ordinary Americans and politicians have been skeptical of its merits.<sup>124</sup> The article then points out that prominent economists are now “noting that their ideas can’t explain the disturbing stagnation in income that much of the middle class is experiencing” and that “there are broader questions [about free trade] being raised that would not have been asked 10 or 15 years ago.”<sup>125</sup> Although the article does not explicitly state that economists have renounced continued trade liberalization, it not-so-subtly suggests that even economists, the strongest bastion of support for free trade, have finally conceded to what ordinary Americans have known all along: free trade hurts average Americans. The article neatly encapsulates the shifts, whether real or perceived, in opinions about free trade among three groups whose opinions may have a profound impact on the future role of free trade in U.S. trade policy.

#### A. *The American Public on Trade Liberalization*

The American public has become increasingly skeptical about the benefits of international trade in recent years. Among the reasons for shifting

118. *Id.*

119. *Id.* at 12.

120. *Id.* at 14-15.

121. Jane Sasseen, *Economists Rethink Free Trade*, *BUS. WK.*, Jan. 31, 2008, available at [http://www.businessweek.com/magazine/content/08\\_06/b4070032762393.htm](http://www.businessweek.com/magazine/content/08_06/b4070032762393.htm).

122. *Id.*

123. *Id.*

124. *See generally, id.*

125. *Id.*

attitudes about trade is a growing skepticism concerning the ability of globalization to raise domestic standards of living. A poll conducted by the German Marshall Fund in December 2006 revealed that sixty percent of Americans believe that freer trade costs more jobs than it creates.<sup>126</sup> Yale political science professor Kenneth F. Scheve and economist Matthew J. Slaughter assert that the American public is becoming more protectionist as a result of stagnant or falling incomes.<sup>127</sup> According to Scheve and Slaughter, opinions on trade are closely linked to each individual's labor market performance, and because the majority of America's labor force is less-skilled, American public opinion about trade and globalization depends on how the labor market affects less-skilled workers.<sup>128</sup> Although traditional measures of the strength of the U.S. labor market, such as employment growth and unemployment rates, indicate that the U.S. labor market is strong,<sup>129</sup> Scheve and Slaughter point out that real income growth has been extremely skewed in recent years, with only a small number of the highest earners seeing increases while the incomes of the vast majority of workers have stagnated, or even fallen.<sup>130</sup> Despite these dismal statistics, it is estimated that the United States has added between \$500 billion and \$1 trillion to its annual income as a result of trade liberalization, and that further gains of up to \$500 billion could result from a comprehensive multilateral agreement on free trade of goods and services in the Doha round.<sup>131</sup> Falling real incomes among the majority of American workers in spite of significant gains from trade demonstrates that the lion's share of the gains from trade have been enjoyed by a small minority of Americans.<sup>132</sup> However, this realization does not necessarily lead to the conclusion that halting trade liberalization will benefit the majority of Americans.

Prevailing public opinion disfavoring trade has the dual impact of providing incentives for politicians to advocate protectionist policies – their constituents want them – while simultaneously making policymakers more receptive to the lobbying interests of special interest groups whose specific

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126. McMahon, *supra* note 6.

127. Kenneth F. Scheve & Matthew J. Slaughter, *A New Deal for Globalization*, FOREIGN AFF., Jul./Aug. 2007, available at <http://www.foreignaffairs.org/2007/4.html> (follow "A New Deal for Globalization" hyperlink).

128. *Id.*

129. Unemployment in October 2007 was 4.7%, which is generally considered full employment by economists. U.S. Dept. of Labor, Bureau of Statistics, TED: The Editor's Desk, Unemployment in October 2007, <http://www.bls.gov/opub/ted/2007/nov/wk1/art02.htm> (last visited Dec. 1, 2008).

130. Scheve & Slaughter, *supra* note 128. From 2000 to 2005, less than four percent of all workers were in educational groups that experienced increases in mean real money earnings. *Id.* Further, in 2005, the top 1% of earners accounted for a whopping 21.8% share of national income, a level not reached since 1928. *Id.*

131. *Id.*

132. *Id.*

goals can be best achieved through protectionist measures.<sup>133</sup> The danger, according to Scheve and Slaughter, is that “[w]hen most workers do not see themselves as benefiting from the related forces of globalization and technology, the resulting protectionist drift may end up eliminating the gains from globalization for everybody.”<sup>134</sup>

### *B. American Politicians on Trade Liberalization*

The decline in trade liberalization’s popularity with the American people has been mirrored, and perhaps even expanded and capitalized upon, in the political arena. Some policymakers link growing income inequality, loss of manufacturing jobs, and stagnation in real median household incomes to globalization,<sup>135</sup> while others blame globalization outright for the loss of American jobs and declining incomes. Many have also embraced labor and environmental provisions as a way to minimize the negative effects of trade liberalization.

The campaigns of presidential hopefuls leading up to the 2008 presidential election provide some insight into how politicians deal with and – sometimes – perpetuate skepticism about trade. Many Democrats feel that, at the least, globalization should not be pursued further without simultaneously acting to reduce income inequality.<sup>136</sup> More extreme positions seem to suggest that globalization never should have been undertaken in the first place. For example, in a 2007 campaign speech, democratic presidential candidate John Edwards stated:

The negative effects from globalization are ripping through the economy. . . . Globalization has helped stunt the growth in wages for American workers. Workers in America must now compete every day with workers overseas earning miserably low wages with no benefits . . . . Globalization is a major reason why income inequality is at its worst since before the Great Depression.<sup>137</sup>

After placing the blame for the economic situations of many American workers on globalization, Edwards went on to tout labor and environmental

133. *Id.*

134. *Id.*

135. DESTLER *supra*, note 6, at 2. See also HORNBECK & COOPER, *supra*, note 13, at 15 (noting that Congress is increasingly focused on addressing perceived negative effects of trade policy and globalization, including job displacement, falling wages, the growing income gap in the United States (and developing countries), and the U.S. trade deficit).

136. DESTLER *supra*, note 6, at 2.

137. John Edwards, 2008 Democratic Presidential Candidate, Campaign Speech: Smarter Trade that Puts Workers First, (Aug. 6, 2007) [hereinafter Edwards on Trade], available at [http://www.cfr.org/publication/13995/john\\_edwards\\_speech\\_on\\_trade\\_policy.html](http://www.cfr.org/publication/13995/john_edwards_speech_on_trade_policy.html).

standards as part of the solution, advocating a trade plan with “strong protections for labor and the environment” that would “benefit workers, not just big multinational corporations” and “lift up workers around the world.”<sup>138</sup> Further, he advocated the use of environmental provisions as “tools to ensure that poor environmental practices do not create unfair competitive advantages.”<sup>139</sup> Edwards also explicitly linked the absence of labor or environmental protections in the core text of the North American Free Trade Agreement (NAFTA) with growing income inequality in the United States, Mexico, and Canada.<sup>140</sup>

Other presidential candidates also weighed in on the trade liberalization issue. President Barack Obama voiced his commitment to “ensure that trade agreements include strong labor and environmental protections and that all Americans share the rewards of globalization.”<sup>141</sup> 2008 Democratic presidential candidate Hillary Clinton similarly stated that she is committed to “[t]rade that has labor and environmental standards, that’s not a race to the bottom but tries to lift up not only American workers but workers around the world.”<sup>142</sup>

2008 Republican presidential candidate Mike Huckabee’s support for trade has been described as “limited, but positive,” with Huckabee expressing concern that free trade can lead to unfair loss of American jobs.<sup>143</sup> 2008 Republican presidential candidate Ron Paul, although he insists that he supports free trade, has voted against various bilateral trade agreements and supported legislation that would have withdrawn U.S. approval for the WTO because he believes many international trade agreements undermine U.S. sovereignty.<sup>144</sup> Paul also asserts that Congress’ delegation of trade authority to the President under TPA is unconstitutional.<sup>145</sup> In contrast, 2008 Republican presidential candidates Mitt Romney and John McCain have been strong free trade advocates.<sup>146</sup>

The trend among politicians that seems to be moving simultaneously away from further trade liberalization and toward the inclusion of labor and environmental standards in free trade agreements is not surprising. Indeed,

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138. *Id.*

139. *Id.*

140. *Id.*

141. BarackObama.com, Obama’08, Economy, <http://www.barackobama.com/issues/economy/internationaltrade> (last visited Feb. 6, 2007).

142. OntheIssues.org, Hillary Clinton on Free Trade, [http://www.ontheissues.org/International/Hillary\\_Clinton\\_Free\\_Trade.htm](http://www.ontheissues.org/International/Hillary_Clinton_Free_Trade.htm) (last visited Oct. 24, 2008).

143. Council on Foreign Relations, The Candidates on Trade, July 30, 2008, <http://www.cfr.org/publication/14762/#128> (last visited Dec. 1, 2008) [hereinafter *The Candidates on Trade*].

144. *Id.*

145. Ron Paul: CAFTA: More Bureaucracy, Less Free Trade, [http://www.democraticunderground.com/discuss/duboard.php?az=view\\_all&address=114x16424](http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=114x16424) (last visited Dec. 1, 2008).

146. See *The Candidates on Trade*, *supra* note 144.

labor and environmental standards are potentially a political goldmine at a time when the looming possibility of a recession conjures protectionist sentiments among the American people while growing concerns for environmental preservation and human rights stir their socially-responsible sensibilities. Economist Jagdish Bhagwati characterizes the push for inclusion of labor and environmental standards in trade treaties this way:

Such standards may be demanded out of empathy for others or they may be required because of fear and self-interest. The latter motive is clearly at play. It is hoped by those terrified by competition from poor countries that raising standards and therefore costs abroad will moderate the competitive ability of the foreign companies. It is what economists call “export protectionism.”

But, instead of admitting that this is their game, they want to mask their demands behind the language of altruism: oh, we are doing it for your workers. . . . [Y]ou need not feel guilty if you can deceive yourself into thinking you are flogging the foreigner in his own interest.<sup>147</sup>

What most politicians fail to address, however, is whether slowing trade liberalization and imposing trade-inhibiting mechanisms will actually stabilize falling incomes. Even if the gains from trade have been skewed towards a small minority of Americans, even if the average American has not shared in those gains, and even assuming that the average American is actually worse off than he or she would have been if globalization had never taken place, will attempting to take a step backwards in time actually *improve* the quality of life for average Americans or halt the decline in real incomes? Understandably, the gut-level response to this question, especially when accompanied by any indication that globalization could be responsible for the current state of affairs, is that the answer lies in a retreat from further liberalization. The question merits more than a gut-level response, however, lest uninformed actions, taken out of fear, result in further declines in income and standards of living for most Americans.

The current tendency towards protectionism among U.S. businesses and consumers during economic uncertainty bears a striking resemblance to the reactions of U.S. producers during the height of the Great Depression, whose efforts to protect themselves from foreign competition resulted in the enactment of the Smoot-Hawley Tariff Act of 1930.<sup>148</sup> The prohibitive tariffs set by the

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147. Jagdish N. Bhagwati, *America's Bipartisan Battle Against Free Trade*, FIN. TIMES, Apr. 8, 2007, reprinted in COUNCIL ON FOREIGN RELATIONS (2007), available at [http://www.cfr.org/publication/13009/americas\\_bipartisan\\_battle\\_against\\_free\\_trade.html](http://www.cfr.org/publication/13009/americas_bipartisan_battle_against_free_trade.html).

148. HORNBECK & COOPER, *supra* note 13, at 3.

Smoot-Hawley Act severely restricted trade and greatly exacerbated the effects of the Great Depression.<sup>149</sup> One economic historian warns that the American public may be more inclined to adopt protectionist measures today than in the past because it is “too young” to remember the deleterious effects of protectionist measures like those pursued in the Smoot-Hawley Act.<sup>150</sup> The resulting “historyless-ness” that characterizes the current public debate about the ongoing value of uninhibited trade leaves the American public more receptive to the idea of isolationism in times of economic hardship.<sup>151</sup> The American people and their elected representatives alike must examine the implications of trade-inhibiting mechanisms closely before electing to pursue protectionist measures that could shut off potential gains from trade and worsen a deteriorating economic situation.

### C. *Prominent Economists on Trade Liberalization*

Is there any truth to the assertion, as the Business Week headline, “Economists Rethink Free Trade,” implies, that economists are, in fact, wavering in their support of further trade liberalization? Interestingly, the article itself fails to cite a single economist upon whose “doubts” the article is based who advocates that trade liberalization should be slowed or stopped.<sup>152</sup> Instead, most economists favor mechanisms that would serve to more evenly distribute the gains from trade or ameliorate the detrimental effects trade liberalization may have on certain segments of society. For example, Alan S. Blinder, a former vice-chairman of the Federal Reserve and member of the Council of Economic Advisers in the Clinton Administration, advocates an expansion of unemployment insurance and an overhaul of a program meant to retrain manufacturing workers whose jobs disappear.<sup>153</sup> Similarly, Matthew J. Slaughter<sup>154</sup> argues that an income redistribution mechanism is necessary to spread the gains from free trade.<sup>155</sup>

Renowned economist and Massachusetts Institute of Technology professor Paul A. Samuelson’s recent assertion that “sometimes free trade globalization can convert a technical change abroad into a benefit for both regions; but sometimes a productivity gain in one country can benefit that country alone, while permanently hurting the other country by reducing the

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149. *Id.* See also Interview with Amity Shlaes, *supra* note 23 (explaining that in spite of prominent economists’ predictions that a worldwide depression would ensue if the Smoot-Hawley Act was enacted, the Act was uncontroversial politically and signed into law by President Hoover).

150. Interview with Amity Shlaes, *supra* note 24.

151. *Id.*

152. See generally, Sasseen, *supra* note 122.

153. See Sasseen, *supra* note 122.

154. See Part III.A, *supra* for a summary of Scheve and Slaughter’s theory on declining incomes and globalization.

155. Sasseen, *supra* note 122; see also Scheve & Slaughter, *supra* note 128.

gains from trade that are possible between the two countries”<sup>156</sup> has been interpreted by some as a renunciation of free trade principles.<sup>157</sup> Samuelson, however, follows his recognition of potential negative effects of free trade with these observations:

It does not follow from my corrections and emendations that nations should or should not introduce selective protectionisms. Even where a genuine harm is dealt out by the roulette wheel of evolving comparative advantage in a world of free trade, what a democracy tries to do in self defense may often amount to gratuitously shooting itself in the foot. . . .

If the past and the future bring both Type A inventions that *hurt* your country and Type B inventions that help - and when both *add* to world real net national product welfare - then free trade may turn out pragmatically to be still best for each region in comparison with lobbyist induced tariffs and quotas which involve both perversion of democracy and nonsubtle deadweight distortion losses.<sup>158</sup>

Whether Samuelson should be interpreted as advocating protectionist measures in certain circumstances is a matter of some debate.<sup>159</sup> The message that most clearly comes through in his comments, however, is one of caution. Even if protective measures might be appropriate in some contexts, if used inappropriately, they could have a crippling effect comparable to that of shooting oneself in the foot. It is worthwhile to stop and consider the gravity of this analogy. Without two good feet, *all* sectors of the economy could suffer, not just those directly affected by a particular agreement. Notably, Samuelson specifically cites “lobbyist induced” protectionist measures in his illustration of a situation in which free trade is preferable in spite of harms suffered as a result of its pursuit, suggesting that these are *not* a valid justification for protectionism.

The purpose of this discussion is not to argue empirically in favor of continued trade liberalization, but simply to point out that in spite of

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156. Paul A. Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, 18 J. ECON. PERSPECTIVES 135, 142 (2004), available at <http://www.wilsoncenter.org/events/docs/SamuelsongJEP042.pdf>.

157. BHAGWATI, *supra* note 9, at 276 (indicating that new fears of globalization are based in part on arguments made by Samuelson).

158. Samuelson, *supra* note 157, at 142.

159. See, e.g., Sasseen, *supra* note 122 (“Hillary Clinton agreed with economist Paul A. Samuelson’s argument that traditional notions of comparative advantage may no longer apply.”); see also BHAGWATI, *supra* note 9, at 276-77 (noting that while Samuelson’s assertion that external changes, such as the growth of China and India, could be harmful to the United States because they diminish gains from trade, Samuelson “certainly does not advocate protectionism”).

whisperings to the contrary, most economists continue to advocate trade liberalization and discourage protectionism. More importantly, although economists differ on whether a protectionist shift is actually taking place or whether certain measures are, in fact, protectionist, they appear to remain solidified on one point: protectionist measures that are driven by powerful special interests have the potential to cause great harm.

#### IV. LABOR AND ENVIRONMENTAL STANDARDS AND THE PROBLEM OF "CAPTURE"

Economists have long recognized a danger that trade protection would be "captured" by "special interests who would misuse it to pursue their own interests instead of letting it be used for the national interest."<sup>160</sup> When protective measures are "captured" by special interests, society often pays a substantial cost for benefits that accrue only to the special interest.<sup>161</sup>

One cost protectionism places on society is that the consumers in the country imposing it are forced to forgo cheap imports, so the average American pays higher prices but experiences none of the benefits created by the protectionist measure.<sup>162</sup> As an example, economic historian Amity Shlaes describes how consumers in a poor part of Maine pay higher prices for simple items like hairbrushes at Wal-Mart because of Congress' decision not to approve an FTA with Panama.<sup>163</sup> Wal-Mart ability to offer low prices on hairbrushes is dependant in part on trade agreements that allow the United States to ship through the Panama Canal.<sup>164</sup> If Wal-Mart's shipping costs increase, poor Americans suffer because they can no longer afford some basic goods.<sup>165</sup> Shlaes points out that consumers, the "losers" in protectionist trade deals, are typically diffuse, and not represented by any particular candidate or representative.<sup>166</sup> In contrast, specific groups that benefit from protectionist trade deals, such as the textile, furniture, and steel industries, are often organized and readily identifiable.<sup>167</sup> This creates a distortion in perceptions about the value of protectionist measures, because the costs of trade for specific groups are highly visible, but highly diffused gains - in the form of lower prices - are frequently less visible.<sup>168</sup>

Another cost of protectionism involves the lobbying costs incurred by

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160. Jagdish Bhagwati, *Protectionism*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/Protectionism.html> (last visited Dec. 1, 2008).

161. *Id.*

162. *Id.*

163. Interview with Amity Shlaes, *supra* note 24.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*



groups seeking protection.<sup>169</sup> These costs, sometimes described as “directly unproductive profit-seeking activities, . . . are unproductive because they produce profit or income for those who lobby without creating valuable output for the rest of society.”<sup>170</sup> To explain, the value of the market system for society in general is based, in part, on the premise that when firms compete, they have an incentive to maximize efficiency of production because the firm that is able to produce more output for less cost will ultimately prevail on the market. When firms maximize efficiency, society as a whole benefits from lower prices and the availability of resources that previously would have been used in the inefficient production of a particular good. If firms have no incentive to maximize efficiency, gains realized by the firm may not be accompanied by the concurrent gains for society.

Regulations governing market activities, such as trade, sometimes create incentives for firms to generate profits in ways that do not promote efficiency and, consequently, do not advance overall benefits for society. For example, a firm may have a choice between spending its resources on economizing production to maximize its profits or spending its resources on lobbying Congress for laws that protect it from competition. If it is more cost-effective for the firm to lobby Congress for protectionist laws than to maximize efficiency, the firm will do so, and society will not benefit. Thus, the firm’s “profit-seeking” activity is “directly unproductive” for society as a whole.<sup>171</sup> In order for the market to function for the overall benefit of society, regulations of market activities should avoid distorting firms’ incentives to maximize efficiency. In the trade context, this means that legislators should actively strive to preserve incentives for domestic firms to compete internationally by maximizing efficiency, rather than by lobbying for protectionism, which may benefit the firm but does not benefit or, at worst, hurts society.

Most industrialized nations now implement what are commonly known as “fair trade” laws.<sup>172</sup> In theory, fair trade laws are meant to complement free trade by ensuring that market incentives and the resulting efficient allocation of activity among the world’s nations are not undermined by unfair trade practices by trading nations.<sup>173</sup> However, these laws have historically been particularly vulnerable to capture and use as protectionist instruments against foreign competition when protectionist pressures rise.<sup>174</sup> To illustrate, two “fair trade” mechanisms, the countervailing duty (CVD) and antidumping duty (AD), were intended to ensure that foreign nations do not subsidize their exports or dump

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169. Bhagwati, *supra* note 161.

170. *Id.*

171. For a comprehensive discussion of directly unproductive profit-seeking activities, see generally Jagdish N. Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90 J. POL. ECON., no. 5, Oct., 1982, at 988.

172. Bhagwati, *supra* note 161.

173. *Id.*

174. *Id.*

their exports in a predatory fashion.<sup>175</sup> If subsidization or dumping is found to occur, a CVD or an AD can be levied.<sup>176</sup> In the 1980s, however, CVD and AD actions were often started against particularly successful foreign firms to harass them into voluntarily restricting their exports, even if the firm was not actually subsidized or engaged in dumping.<sup>177</sup> Because of their historical susceptibility to manipulation as protectionist instruments, economists have sought to redesign fair trade mechanisms in a way that insulates them from being captured by special interests.<sup>178</sup> In the absence of a workable alternative, however, domestic producers have increasingly labeled a variety of foreign policies and institutions as “unfair trade.”<sup>179</sup>

Labor and environmental standards are among the most recent additions to the catalogue of “fair trade” laws.<sup>180</sup> Like other fair trade laws, because labor and environmental standards can enhance a firm’s competitiveness on the international market, they create an incentive for firms to spend resources on lobbying for their inclusion instead of on increasing efficiency. Similarly, like other fair trade laws, labor and environmental standards are politically popular because they purport merely to advance the politically desirable goal of pursuing free trade in a fair manner.<sup>181</sup> Labor and environmental standards are particularly vulnerable, however, because they garner support from several key groups that might have otherwise mobilized to oppose the passage of laws that solely benefit particular special interest groups, including labor groups, environmental groups, and human rights groups.

Many labor and environmental groups have offered a “qualified” endorsement of the Trade Policy based on the rationale that the implementation of some labor and environmental provisions is a step in the right direction,<sup>182</sup> even if ultimately the provisions do little to advance their interests.<sup>183</sup> These qualified endorsements of the Trade Policy and resulting FTA provisions illustrate and exacerbate the vulnerability of labor and environmental standards to special interests in several ways. First, the inclusion of even relatively

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175. *Id.*

176. *Id.*

177. *Id.* In one instance, the United States imposed a CVD on rice from Thailand by establishing that the Thai government was providing a one percent subsidy for rice exports, even though the government also taxed all exports at a rate of five percent, thereby neutralizing any potential detrimental effects from the subsidy on international trade. *Id.* The United States also accused Poland’s golf cart industry of dumping golf carts on the international market (dumping is generally thought of as selling goods at a lower price on the international market than in its own market) even though it sold no golf carts in Poland. *Id.*

178. *Id.*

179. *Id.*

180. See Bhagwati, *supra* note 148.

181. *Id.*

182. Statement by Center for International Environmental Law, Defenders of Earth justice, Environmental Investigation Agency, Friends of the Earth, Nature Defense Counsel, Sierra Club (Jun. 26, 2007), available at [http://www.ciel.org/Tae/Peru\\_Statement\\_27Jun07.html](http://www.ciel.org/Tae/Peru_Statement_27Jun07.html) [hereinafter Environmental Group Statement].

183. *Id.*

ineffective standards may pacify labor and environmental groups that would have otherwise strongly opposed the agreements. For example, in a joint statement, the Center for International Environmental Law, Defenders of Wildlife, Earthjustice, the Environmental Investigation Agency, Friends of the Earth, the Natural Resources Defense Council, and the Sierra Club proclaimed that “[t]he environmental provisions included in the final text of the Peru Free Trade Agreement mark a significant step forward, and we commend the Democratic leadership for this achievement . . . .”<sup>184</sup> The statement then goes on to say, however, that:

this deal should not be seen as a final template for trade deals generally or for trade negotiation authority. Much work still remains to be done on the investment and other provisions of our trade rules to ensure that they strengthen, rather than undermine, environmental protections at home and abroad.<sup>185</sup>

The statement endorses the Trade Policy but expresses reservations about its ability to achieve environmental goals without further measures. Nevertheless, environmental groups are significantly less likely to oppose an agreement containing environmental protection provisions simply because it represents an advancement of their interests, however small. Thus, by their presence alone, ineffective environmental provisions may serve to undermine environmental protection by neutralizing any opposition from environmental groups.

The Trade Policy provisions may also be vulnerable to manipulation because they are potentially divisive, as illustrated by organized labor’s response to the Trade Policy.<sup>186</sup> Labor unions have taken an ambivalent stance on the Trade Policy and the FTAs that have been amended pursuant to it,<sup>187</sup> with some strongly opposing it on the ground that it is inadequate to protect their interests and others offering limited approval or declining to comment.<sup>188</sup> Like environmental groups, even those labor groups that criticize the Trade

184. *Id.*

185. *Id.*

186. It is worthwhile to acknowledge here that labor groups are often among the special interest groups that support protectionism in order to prevent the loss of American jobs that is perceived to accompany globalization and free trade. The significance of the argument that the Trade Policy standards are vulnerable to manipulation is not only that they may be co-opted for protectionist purposes, but that they may be easily co-opted for any purpose other than that for which they were patently intended. The irony here is that the Trade Policy’s labor standards, which one might logically expect to be motivated by some level of protectionism, may actually be co-opted and manipulated in order to *avoid* opposition from protectionist labor groups that might otherwise pose an obstacle to the passage of a particular FTA.

187. Ian Swanson, *Labor Groups Differ on Peru Free Trade Deal*, THE HILL, Sept. 19, 2007, <http://thehill.com/business--lobby/labor-groups-differ-on-peru-free-trade-deal-2007-09-19.html> (last visited Dec. 1, 2008).

188. *Id.*

Policy as insufficient have declared their support for Trade Policy labor standards to the extent that they represent a step forward, thus weakening opposition to particular agreements containing Trade Policy objectives to a certain extent.<sup>189</sup> The response from labor groups is distinct from that of environmental groups, however, in that the major labor coalitions are divided in their support of the Trade Policy.<sup>190</sup> The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of fifty-four unions, although it denies express support for the U.S.-Peru FTA and the Trade Policy, has not vocally opposed the deal due to a lack of consensus among its labor union members.<sup>191</sup> In contrast, Change To Win, a coalition of seven labor groups that split from the AFL-CIO in 2005,<sup>192</sup> criticizes the terms of the U.S.-Peru FTA and the Trade Policy as insufficient to achieve labor goals.<sup>193</sup> Thus, although many labor unions may strongly oppose the Trade Policy, their effectiveness is undermined because labor is unable to present a unified front on the issue. The division among labor groups may not be a direct result of the standards themselves, but their inclusion does provide an additional opportunity for other special interest groups to co-opt those standards and use them for their own gain.<sup>194</sup>

The vulnerability of labor and environmental provisions to capture is also exacerbated by these “qualified” endorsements from labor and environmental groups because they provide the Trade Policy and resulting FTA provisions with a veneer of credibility as measures taken in the interest of safeguarding labor and environmental preservation. Anyone wishing to justify inclusion of such measures needs merely point to these endorsements to dispel suspicions that the provisions were actually intended to benefit some other interest.

The proposed 2007 Farm Bill,<sup>195</sup> which Congress is expected to pass in

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*; ChangeToWin.org, Change to Win, American Dream for America's Workers, About Us, <http://www.changetowin.org/about-us.html> (last visited Dec. 1, 2008).

193. See Swanson, *supra* note 188 (noting that Change To Win, a coalition of labor unions, opposes the Trade Policy as insufficient because key changes, including changes to investment rules, are not addressed). The president of the International Brotherhood of Teamsters, one of Change to Win's seven member unions, remarked, “[i]t is outrageous that Congress and the Bush administration have approved yet another job-killing trade agreement at a time when American families are seeing their jobs shipped overseas, their food and toys tainted, their wages decline and their houses foreclosed upon . . . .” Press Release, Teamsters, Hoffa Condemns Senate Passage of Peru Free Trade Agreement (Dec. 4, 2007), available at [http://www.citizenstrade.org/pdf/teamsters\\_hoffacondemssenvote\\_12042007.pdf](http://www.citizenstrade.org/pdf/teamsters_hoffacondemssenvote_12042007.pdf).

194. The split among labor coalitions has important implications for the implementation of FTAs generally because it lessens the pressure on the Democrats from organized labor, which tends historically to be skeptical of expanded trade and makes up a significant proportion of the democratic voting base, to oppose trade agreements. See generally, Swanson, *supra* note 188 (describing the implications of a labor union split on trade issues for democratic politicians).

195. “Farm Bill” is “the popular, generic term given to current federal omnibus agricultural legislation, usually enacted every four to seven years.” Chuck Culver, The National Agriculture

2008,<sup>196</sup> provides a striking example of the potential for capture and exploitation of protectionist fears by special interest groups. Interestingly, the Farm Bill, like the Democratic agenda supporting increased legislative control over trade negotiations, gains support from its platform pledging to safeguard the jobs of the American people.<sup>197</sup> The Farm Bill governs federal farm and food policy,<sup>198</sup> including commodity programs that provide income support to growers of selected farm commodities.<sup>199</sup> In theory, these agricultural subsidies are supposed to provide a safety net for U.S. farmers and help keep food prices down.<sup>200</sup> However, the ongoing efficacy of agricultural subsidies in achieving either of these goals has been repeatedly questioned and criticized in the context of a globalizing economy.<sup>201</sup>

Agricultural subsidies have their roots in President Franklin Roosevelt's New Deal, enacted in response to the Depression.<sup>202</sup> The Agricultural Adjustment Act of 1933 was the first legislation providing support in ways similar to current farm bills.<sup>203</sup> From the time of the enactment of the Agriculture Adjustment Act until 1996, farm policy generally aimed to stabilize agricultural commodity prices through production restrictions and price-linked loan and payment programs.<sup>204</sup> In 1994, however, the Uruguay Round negotiations of the GATT created the WTO, which created global trade rules restricting agricultural subsidies.<sup>205</sup> At that point, the United States began to scale back subsidies in order to comply with WTO rules.

Statistics reveal that agriculture today makes up only two percent of the

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Law Center, University of Arkansas School of Law, GLOSSARY OF AGRICULTURAL PRODUCTION, PROGRAMS, AND POLICY (4<sup>th</sup> ed.), <http://www.nationalaglawcenter.org/#> (follow "Glossary" hyperlink, then select "F" hyperlink and scroll down to "Farm Bill") (last visited Dec. 1, 2008).

196. Robert McMahon, *Troubling Harvest for Trade*, COUNCIL ON FOREIGN RELATIONS, Nov. 9, 2007, available at [http://www.cfr.org/publication/14732/troubling\\_harvest\\_for\\_trade.html](http://www.cfr.org/publication/14732/troubling_harvest_for_trade.html).

197. See, e.g., Edwards on Trade, *supra* note 138 ("It hasn't always been this way. Workers for generations were at the heart of our country. Hard-working men and women have made America the strongest, most prosperous nation in the history of the world. But today, Washington has turned its back on our workers and their futures.").

198. RENEE JOHNSON, CONG. RES. SERV., WHAT IS THE "FARM BILL"? 1 (2008), available at [www.nationalaglawcenter.org/assets/crs/RS22131.pdf](http://www.nationalaglawcenter.org/assets/crs/RS22131.pdf).

199. Income support is provided to growers of wheat, feed grains, cotton, rice, oilseeds, peanuts, sugar, and dairy. *Id.* at 2. Commodity support is provided through various payments, as well as government purchases, marketing quotas, and import barriers. *Id.*

200. McMahon, *supra*, note 197.

201. *Id.*

202. Anne B. W. Effland, *U.S. Farm Policy: The First 200 Years*, AGRICULTURAL OUTLOOK, Mar. 2000, at 21, available at <http://www.ers.usda.gov/publications/agoutlook/mar2000/ao269g.pdf>.

203. Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH. L. REV. 345, 350 (2006). The Act's key aspects included income support to farmers and attempts to increase farm prices by controlling production. *Id.*

204. Matthew C. Porterfield, *U.S. Farm Subsidies and the Expiration of the WTO's Peace Clause*, 27 U. PA. J. INT'L ECON. L. 999, 1002 (2006).

205. *Id.*

U.S. national economy.<sup>206</sup> Since 1986, U.S. direct and indirect farm subsidies have cost the American people more than \$370 billion (almost enough to pay for all the farm land in the country).<sup>207</sup> Of the two percent of the national economy that engage in farming, two-thirds of all farmers receive no subsidies under the program, and among the one-third that do receive subsidies, the majority of the subsidies are concentrated in a small number of recipients.<sup>208</sup> During the program years of 2003-2005, the United States spent \$34.8 billion on commodity programs.<sup>209</sup> Nationally, 66% of the subsidies for those years went to only 10% of all beneficiaries.<sup>210</sup> These statistics demonstrate the practical inability of the agricultural subsidy programs, in their current form, to protect the job of the average American farmer. To the contrary, it has been argued that U.S. agricultural support programs actually inhibit even those farmers who do receive subsidies because they provide no incentives for farmers to modernize and adjust to the rapidly changing global market.<sup>211</sup> In the long run, even massive government subsidies will not be able to out-perform vastly superior production methods that are likely to develop as a result of true competition.

Instead of providing job security for America's farmers, the evidence suggests that the existing 2002 Farm Bill and the 2007 Farm Bill slated to replace it serve the interests of protectionist special-interest groups.<sup>212</sup> In the context of popular attitudes about trade, these special interests are less likely to encounter opposition from other members of Congress who know their constituents will likely perceive a vote for agricultural subsidies as a vote for the American worker.

## V. PURSUIT OF A MINDFUL TRADE POLICY AMIDST UNCERTAINTY

The international trade system currently appears to be in a period of transition regarding both the desirability of further trade liberalization in

206. Robert Stumberg, *A Perfect Storm: Trade Pressure on the Farm Bill*, NAT'L ASS'N OF DEV. ORG., (June 5, 2006), available at <http://www.nado.org/legaffair/issupdate/stumberg.pdf>.

207. BRIAN J. FINEGAN, *THE FEDERAL SUBSIDY BEAST: THE RISE OF A SUPREME POWER IN A ONCE GREAT DEMOCRACY* 118 (2000).

208. *Id.*

209. Environmental Working Group, Farm Bill 2007 Policy Analysis Database, <http://farm.ewg.org/sites/farmbill2007/progdetail1614.php?fips=00000&progcode=farmprog&page=conc> (last visited Dec. 1, 2008).

210. *Id.*

211. See generally Interview by Robert McMahon with Ron Kind, U.S. House Representative, *Kind: Let U.S. Farmers Compete in the Marketplace* (Nov. 7, 2007), in COUNCIL ON FOREIGN RELATIONS, available at [http://www.cfr.org/publication/by\\_type/interview.html](http://www.cfr.org/publication/by_type/interview.html) (follow "complete list" hyperlink, then select "By Issue," select "Trade" in "Filter by" field, scroll down to Interview with Ron Kind").

212. *Id.* ([Y]ou've got the inherent status quo on these committees. When [seventy] percent of the agriculture subsidies are going to just thirty congressional districts, and they're well represented on the committee, it's just unrealistic to expect those committees to be agents of change and reform and new ideas.").

general and the designation of a dominant model of international trade for the future. There is a trend toward protectionism in public opinion and within both dominant political parties. In this context of uncertainty, non-trade objectives that are particularly vulnerable to capture by protectionist interests – including the labor and environmental provisions detailed in the Trade Policy – should be excluded from all U.S. international trade agreements, whether multilateral or bilateral. That is, these objectives should not be incorporated into U.S. trade policy objectives for preferential trade arrangements (PTAs), nor should they be adapted and incorporated into future congressional grants of TPA.

*A. Labor and Environmental Standards Should be Excluded from TPA Trade Objectives*

TPA, as it presently exists, was formulated in the context of a multilateral trading system.<sup>213</sup> The multilateral trading system was rooted in the pursuit of trade liberalization that would create overall gains from trade through non-discrimination under the MFN principle.<sup>214</sup> At this stage, it is difficult to determine whether the same goals of broad trade liberalization and overall net gains from trade liberalization will remain important under a predominantly bilateral trading system. As a result, it is difficult to predict whether TPA will continue to function as an effective mechanism for achieving Congress' trade goals. These uncertainties counsel against additional non-trade standards that could be manipulated by special-interest groups. Until more conclusive indicators about the functioning of bilateralism as a trade model are available, the future implications of including non-trade objectives in trade agreements cannot be properly assessed and should be excluded.

At the same time, Congress should avoid protectionist procedural measures, such as tightening controls on TPA and in specific FTAs. Most readily apparent is the danger of a loss in the expediency of the trade agreement approval process. More importantly, constraining executive power may undermine the President's negotiating leverage with foreign trading partners, thereby decreasing their willingness to negotiate with the United States. Finally, increased congressional control throughout the trade negotiation process may have the ultimate effect of increasing pressure on Congress from constituents and special interest groups to push for particular provisions in individual trade agreements, potentially further burdening the process and inhibiting the opportunity for trade.

*B. Labor and Environmental Standards Should be Excluded From Bilateral and Regional FTAs*

Current trends suggest that even if bilateralism does not completely stamp

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213. See *supra* Part II.A and accompanying notes for a summary of the evolution of TPA.

214. See *supra* Part II.C.3.(a) for a description of the non-discrimination principle.

out multilateral trading efforts, bilateral and regional trading systems are most likely here to stay.<sup>215</sup> Unfortunately, it is precisely in the bilateral context that the inclusion of non-trade objectives is most concerning. The bilateral trading system has been aptly termed a “spaghetti bowl” of trade agreements.<sup>216</sup> The name creates a visual of a multitude of agreements, constantly crisscrossing each other as they connect different trading partners on endlessly variable trade terms.<sup>217</sup> Before long, it becomes impossible to identify which agreements connect to which partners and on what terms. As outlined above in Part II.C, a plethora of variable trading terms undermine the non-discrimination principle and significantly impair the gains that characterize true trade liberalization.<sup>218</sup> But the spaghetti bowl trade framework that bilateral FTAs create makes the inclusion of environmental and labor standards particularly problematic for two reasons. As discussed previously, labor and environmental standards can be easily manipulated by protectionist or other special interest groups to achieve individual goals, which may not serve the greater good of the nation.<sup>219</sup> The spaghetti bowl framework compounds this vulnerability by diffusing the effectiveness of less powerful groups whose interests are affected by trade agreements. U.S. trade policy is largely driven by powerful business interests.<sup>220</sup> Business interests, however, may not be representative of the interests of the nation in general, because businesses are generally profit-driven.<sup>221</sup> In multilateral trade negotiations, other groups with a stake in trade are better equipped to effectively provide a “check” on the ability of powerful business interests to dictate the terms of trade agreements. For example, various interest groups (including small businesses and labor, human rights, and environmental groups) are able to concentrate their resources and efforts in the broad multilateral arena for more effective achievement of their goals. In the FTA trade environment, however, these stakeholder groups’ limited resources and energies are stretched thin as they attempt to keep track of every agreement that is signed and analyze how each individual agreement will affect

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215. See *THE FUTURE OF THE WTO*, *supra* note 67, at 21 (reporting that 300 PTAs had been notified to the WTO as of October of 2004, 176 of which were notified after January of 1995).

216. *Id.* at 19.

217. See Bhagwati, *supra* note 147.

218. See *THE FUTURE OF THE WTO*, *supra* note 67, at 19 (“[W]hat has been termed the “spaghetti bowl” of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment.”). See also *supra* Part II.C.

219. See *supra* Part IV (explaining that labor and environmental standards are particularly vulnerable to capture by special interest groups because they neutralize various groups that might otherwise counterbalance special interests).

220. Abbott, *supra* note 53, at 574 (“The difference between the multinational business community and most other stakeholders is that the former can elect to transfer its negotiating agenda to more favorable terms because it generally has the power to direct the focus of trade negotiators.”).

221. See *id.* (“Multinational business enterprises are typically pursuing mercantile agendas designed to enhance their returns on investment.”).



their interests.

Many economically powerful businesses and industries, on the other hand, are primarily interested in only the few specific trade agreements that affect them directly. This allows them to concentrate their already considerable efforts and economic resources on specific trade agendas in particular agreements rather than on broad trade forums.

A second major concern about labor and environmental standards in the spaghetti bowl framework is that the number of PTAs makes the identification of problematic provisions nearly impossible. Although a debate remains as to whether bilateral and regional FTAs are trade-creating or trade-diverting,<sup>222</sup> economists generally agree that FTAs are most likely to generate trade benefits when they are structured in a way that ultimately fosters freer trade.<sup>223</sup> In the FTA context, the necessary conditions combine to create a delicate balance.<sup>224</sup> From an economic perspective, the motivation behind a provision that has the potential to alter this delicate balance may indicate whether the provision is likely to foster or inhibit gains from trade. Put differently, the inclusion of an environmental provision that is ultimately motivated by an industry's desire to protect itself from competition is protectionist by definition, and therefore is highly unlikely to facilitate freer trade and yield overall trade benefits. A provision that is truly motivated by concern for the environment, on the other hand, may impair trade benefits, or it may not, depending on its structure. In short, motivation matters.

As Congresspersons are presented with more and more trade agreements, the task of analyzing the pros and cons of each individual provision in light of the best interests of their constituents, special interests, and the nation, both in the long and short term, may become overwhelming. As a result, Congresspersons may be more inclined to make decisions based on which special interest group makes the most noise, rather than on other considerations, such as the long-term welfare of the nation. Further, as previously pointed out, because of the relatively narrow nature of bilateral FTAs, Congresspersons are more likely to experience significant pressure from fewer groups on particular issues in a given agreement, so Congresspersons are less likely to develop a comprehensive perspective from competing interest groups. Rather, Congresspersons will be making more decisions based on more limited and more biased information.

A third concern about labor and environmental provisions in the bilateral context relates to the loss of sovereignty among developing countries.<sup>225</sup> "When the United States or European Union tenders a draft PTA to a developing country, it expects the basic template of its proposal to be followed, and in some areas . . . , the possibility for effective counterproposal are almost

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222. See *supra* Part II.C.3(b) and accompanying notes.

223. See *supra* Part II.C.3(b) and accompanying notes.

224. See COOPER, *supra* note 55, at 10.

225. See Abbott, *supra* note 54, at 578.

non-existent.”<sup>226</sup> Indeed, the Trade Policy’s labor and environmental provisions have been specifically cited as an illustration of unequal bargaining power in the bilateral trade context.<sup>227</sup> Instead of retaining discretion to allocate limited resources as they see fit to facilitate growth and development, developing countries are likely to have environmental and labor laws dictated to them by the terms of an international trade agreement. Case in point: one expert notes that the U.S.-Peru FTA’s forest sector governance provisions, meant to reduce illegal logging, would require changes in Peruvian legislation, including the penal code, but that Peru currently lacks the necessary capacity to enforce the measures.<sup>228</sup>

### C. Conclusion

In 2004, WTO Director Peter Sutherland, addressing the increasing tendency in bilateral agreements to demand significant labor and environmental protection, wrote, “[w]e would argue that if [labor and environmental standards] cannot be justified at the front door of the WTO they probably should not be encouraged to enter through the side door.”<sup>229</sup> Sutherland’s statement not only reflects the view that these standards are detrimental to the fundamental non-discriminatory goals of multilateralism, it conjures an image of underhandedness in achieving their inclusion, as if the sly side-door entrant has something to conceal. Although Sutherland offers no further explanation of his meaning, the illustration is useful for demonstrating the multiple levels of concealment that facilitate inappropriate labor and environmental standards. The ailing domestic industry, whose attempts to lobby for protection have failed before the WTO, can target those bilateral agreements that are most detrimental to its interests. Such agreements are unlikely to attract much attention from the WTO because they are not formally subject to all WTO rules and because of the sheer number of bilateral agreements in existence. Even if such agreements do not attract attention, by framing their protectionist goals in the socially responsible clothing of labor and environmental standards, the industry’s protectionist measures will generally survive scrutiny, even if they benefit only that industry, provide no effective labor or environmental protection, and cause net harm to society overall.

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226. *Id.*

227. *Id.* at 579.

228. *US - Peru Bilateral to Address Illegal Logging*, *supra* note 2. Indeed, the problem of illegal logging in Peru has been attributed in large part to the existence of massive poverty, which provides incentives for many families engage in illegal logging in order to survive. News Release, International Tropical Timber Organization, *Illegal Logging in Peru blamed on Bureaucracy, Poverty* (July 7, 2003), available at <http://www.itto.or.jp/live/PageDisplayHandler?pageId=217&id=218>. In light of these facts, one might question whether requiring the Peruvian government to spend its resources on policing the activities of its poorest people is morally acceptable and, given the desperation of the people, whether such measures are even likely to succeed.

229. *THE FUTURE OF THE WTO*, *supra* note 67, at 23.

The social goals that labor and environmental standards purport to promote must be decoupled from the convoluting maze of bilateral and regional trade agreements that increasingly characterize the international trade arena. Human rights issues and environmental protection are unquestionably issues of great importance that should be a given high priority by the leaders of nations around the world. These important goals should be pursued directly, however, in a context in which the motivations behind their pursuit are not muddled by the hidden agendas of powerful special interests readily cloaked in a highly un-transparent system of international trade.

In a time when social and political trends suggest a tendency toward protectionism, U.S. lawmakers must be exceptionally vigilant in ensuring that laws cannot be manipulated in ways that could ultimately cause considerable harm to social welfare. We live in a global world, and there are no signs that global integration is slowing, in spite of growing skepticism about the merits of globalization. To be sure, as the global citizenry adjust to living in a global market, institutional adjustments in the interest of social welfare will be necessary. These adjustments, however, must be characterized by innovation and progressive thinking rather than by a fearful retreat towards self-protection.

As the global trading system transitions, it is particularly important to examine the fundamental tools that a nation uses to achieve its international trade goals, and to ensure that those basic tools are insulated from harmful exploitation and manipulation. To that end, all proposed components of future trade policy, especially as they relate to bilateral and regional trade, must be considered critically and honestly. Under such scrutiny, labor and environmental provisions do not pass muster as a sound component of U.S. trade policy. Rather, their vulnerability to manipulation and exploitation threatens to amount to the United States “gratuitously shooting itself in the foot” as protectionist special interests capture and co-opt them for their benefit at the expense of greater society.

