

American Trade Politics in 2007: Building Bipartisan Compromise

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As Democrats took over the United States Congress in January 2007, many trade advocates trembled. Over the past decade, votes on trade liberalization had broken increasingly along partisan lines. Trade promotion authority (TPA)—indispensable for negotiating new trade agreements—passed by just one House vote in December 2001, with just 21 out of 210 Democrats in favor. In July 2006 the Central American Free Trade Agreement–Dominican Republic (CAFTA-DR) won by just two votes, with a minuscule 15 of 202 Democrats voting “aye.” By one accounting, voters in November 2006 had replaced 16 trade-friendly House Republicans (and five similar Senate Republicans) with trade-skeptical Democrats. No seats in either house moved in the free trade direction (Evenett and Meier 2006).

In the weeks that followed, there were other warning signals. Addressing an audience of “approximately 100” new and old House Democrats in early December 2006, former Treasury Secretary Robert Rubin met “widespread rejection” to his plea for moderation

on trade policy.¹ And just after the new Congress convened, 39 of the 42 new House Democrats led by Representative Betty Sutton (D-OH) wrote to Representative Charles B. Rangel (D-NY), the newly elevated chairman of the House Committee on Ways and Means, calling for a fresh new trade policy approach.

Vital to our electoral successes was our ability to take a vocal stand against the 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.²

From the George W. Bush administration vantage point, such challenges came at a particularly inopportune time: US Trade Representative (USTR) Susan C. Schwab was struggling to revive the multilateral Doha Round of international trade negotiations, which had broken up in disagreement the previous summer. And the administration’s TPA—the round’s domestic political underpinning—was scheduled to expire in mid-2007 unless renewed by Congress. No wonder voices in the trade community warned of a new “protectionist” threat.³

In fact, the situation was both worse and better than these developments suggested. It was worse because the political base for Bush administration trade policy had in fact crumbled well before the 2006 elections. It was better because key House Democrats, with Rangel in the lead, began 2007 by assiduously pursuing a new bipartisan compromise. After four months of good faith (though oft difficult) negotiations with USTR Schwab and ranking Ways and Means Republican Jim McCrery (R-LA), a congressional–executive branch accord was reached on May 10, 2007, on new language for pending free trade agreements (FTAs). This agreement enhances the prospects for bipartisan cooperation across a broader range of trade policy issues.*

The central issue remains TPA, commonly known as fast track: Will a majority of the new Congress agree to legislation that

* In appendix A to this policy brief, Kimberly Ann Elliott analyzes in detail the past and proposed treatment of labor standards in FTAs.

1. “Rubin Advice Rejected by Democrats, Citing China, Manufacturing Problems,” *Inside U.S.–China Trade*, December 13, 2006.

2. Letter of January 17, 2007, to Charles Rangel, quoted in *Inside U.S. Trade*, January 19, 2007, 13.

3. See, for example, Jagdish N. Bhagwati, “America’s Bipartisan Battle Against Free Trade,” *Financial Times*, April 8, 2007.

extends it? It is hard to see how Doha can be completed without such extension, for US trading partners will quite reasonably wonder whether Congress will approve what the administration negotiates. But issues both broader and narrower are shaping TPA's prospects.

On the broader side, Democrats point to growing income inequality in the United States, accompanied by the loss of manufacturing jobs and stagnation in real median household incomes. Some link this inequality to globalization. Many find resonance in the arguments of Representative Barney Frank (D-MA), now chair of the House Banking Committee on Financial Services, that it is wrong to pursue further steps toward globalization without simultaneously acting to reduce inequality within the United States.⁴ There is also major concern about the record \$765 billion trade deficit posted for 2007 and the undervalued Chinese currency, which contributed to this deficit and the \$233 billion bilateral trade imbalance with China.⁵

But the immediate challenge, as the Democrat-controlled 110th Congress assumed office in January, was the issue that had proved most divisive in the decade preceding: the labor rights provisions of FTAs. This policy brief sets forth the political and substantive parameters that have shaped the critical domestic deliberations centering on this and related issues. It concludes with a brief analysis of the May 10, 2007, agreement and suggestions for building on this success.

2006: THE COLLAPSE OF THE PARTISAN BASE

The Bush administration entered office in 2001 with US trade policy pretty much dead in the water. Internationally, attempts to launch a World Trade Organization (WTO) trade round had foundered at Seattle. Domestically, President Bill Clinton had twice failed to win congressional enactment of trade negotiating authority (then known as fast track authority). To its credit, the new administration achieved renewal on both of these fronts. But the means it employed to win at home achieved short-term success but at a substantial long-term political price.

On the global stage, USTR Robert Zoellick played a key role in negotiating the Doha declaration of November 2001, succeeding where his Clinton predecessor had failed. Domestically, Republican House members took the initiative

in crafting the negotiating authority that Zoellick required. Leading the way substantively was Bill Thomas (R-CA), the brilliant, purposive, partisan, personally difficult chairman of Ways and Means.⁶ Leading the way politically was the House majority whip (later elevated to majority leader), Tom "The Hammer" DeLay (R-TX).

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In drafting the legislation, Thomas eschewed the normal committee mark-up process, marginalizing senior committee Democrat Rangel and Sander Levin (D-MI), the ranking member of the trade subcommittee. Instead he reached agreement on what he labeled "bipartisan" legislation with a handful of junior Democrats led by Cal Dooley (D-CA) and then pushed it through the committee on a largely party-line vote. With most Democrats moving into opposition, DeLay built a razor-thin majority by pressuring and cajoling Republicans, securing—in the end—the votes of all but 23.⁷

The Senate process was necessarily bipartisan,⁸ with an expansion of the trade adjustment assistance program helping win substantial Democratic support in that chamber. But the bitter House legacy endured. It festered below the surface through 2004, as the Doha talks moved slowly, and FTAs with relatively advanced nations won relatively broad consensus support.⁹ But it resurfaced with a vengeance when CAFTA-DR was brought up for a vote in July 2005. It energized the concerns of Democratic members and constituencies over deals with countries with poor perceived labor and environmental records, and once again senior Ways and Means Democrats saw their concerns unaddressed. Polarization on the final vote replicated 2001, only more so. With Democratic "ayes" down to 15, Republican leaders had to mobilize even more of their own flock. The final vote was just 217-215, even though there were

4. See, for example, his National Press Club speech of January 3, 2007.

5. On the day the 2006 deficit was announced, Democratic leaders wrote President Bush calling for "a new direction in U.S. trade policy" addressing the "unsustainable U.S. trade deficit" and promoting "broad-based, equitable growth for all Americans." See letter to President Bush from Speaker Nancy Pelosi, Majority Leader Steny Hoyer, Ways and Means Chairman Charles Rangel, Trade Subcommittee Chairman Sander Levin, and eleven other Ways and Means Committee Democrats, February 13, 2007.

6. A July 27, 2003, the *Washington Post* feature would label Thomas as "smart as a whip, and almost as subtle."

7. In the previous seven years, every major House trade-liberalizing vote had found at least 50 Republicans in opposition, including the Uruguay Round in 1994 (56) and permanent normal trade relations with China in 2000 (57). For details on 2001, see the appendix in Destler (2005).

8. Democrats controlled the Senate from June 2001 through 2002. Moreover, unless the majority party has at least 60 votes, a unified minority party can employ unlimited debate to prevent a bill from being brought to a vote.

9. House Democratic "ayes" on these agreements ranged from 75 for Chile and Singapore to 120 (a 60 percent majority) for Morocco.

nine more House Republicans than there had been in 2001.¹⁰

And this was the last such victory. No one recognized this more than Zoellick's successor, USTR Rob Portman, a senior Republican member of the Ways and Means Committee prior to this appointment. Confirmed after the CAFTA battle lines had been set, he privately characterized that process as a "train wreck not of my making" and moved to repair fences with senior Ways and Means Democrats. His successor, Susan Schwab, also recognized the need to move to a more bipartisan base.¹¹

This need was underscored as the Republican House leadership came apart, with DeLay forced to resign under fire, and Majority Whip Roy Blunt (R-MO), the number three leader who had played a central role in managing the CAFTA vote, losing his early 2006 bid to replace the Texan as majority leader. Meanwhile, President Bush's poll numbers were plummeting, and the approaching mid-term elections made Republicans wary of unpopular votes taken on his behalf. So the basic trade-political situation in 2006 was a stalemate. Republicans recognized they could not themselves pass the FTA with Peru signed in December 2005, and Democrats found its labor and other provisions insufficient. So it lay dormant. Meanwhile, the Doha negotiations broke up in Geneva at the end of July 2006.

CHANGE IN THE HOUSE—AND AT WAYS AND MEANS

November 2006 brought the resounding Democratic victory that the polls had predicted for most of the year. At the last recorded vote of the 109th Congress in December 2006 there were 230 Republicans and 202 Democrats. The first vote of the 110th Congress in January 2007 was essentially a mirror image: 233 Democrats and 202 Republicans. Democrats also gained six Senate seats, winning a razor-thin majority in that chamber.

Even greater was the turnaround at the Committee on Ways and Means, the House panel with primary jurisdiction over trade, where the party in power is traditionally granted a greater-than-proportionate majority in a closely divided House. The committee saw a shift from 23 Republicans and 16 Democrats to 24 Democrats and 17 Republicans. This shift was over two-and-a-half times as great as for the chamber as a whole.¹²

10. The vote on TPA in December 2001 was 215-214. Subsequently, there was a 216-215 procedural vote in June 2002 and a 215-212 vote on the conference report in July.

11. Portman's tenure as USTR was cut short when he was elevated in April 2006 to the position of director of the president's Office of Management and Budget.

12. As measured above, Democrats' share of the total House membership rose from 46.8 to 53.6 percent. Their share of Ways and Means seats went up from 41 to 58.6 percent.

Because eight of the old Republican members left the House (five lost reelection, two lost bids for state governorships, and Chairman Thomas retired), no existing members were squeezed out. In fact, two new Republican faces joined the committee. On the side of the new majority, however, there were nine new members, even though only one Ways and Means Democrat departed (Ben Cardin [D-MD] was elected to the Senate).

Through President Bush's first six years, Republican Ways and Means members had voted solidly in support of his trade agenda. But only two Democrats had similar records—John Tanner of Tennessee and William Jefferson of Louisiana—and the latter was removed from the committee in 2006 in the wake of strong allegations of corruption. So the change at Ways and Means seemed to bode ill for further trade expansion. But a closer look suggests a more nuanced situation. Most holdover committee Democrats had voted "aye" for some of the Bush FTAs. And the new members had, on average, records that were more, not less, trade-friendly than their senior counterparts.

Table 1 provides the details. It charts the votes of all current Ways and Means Democrats on 15 trade measures, from the North American Free Trade Agreement (NAFTA) in 1993 to the catch-all trade preference legislation of December 2006. These measures include two votes on fast track authority, plus permanent normal trade relations for China in 2000 and Vietnam in 2006, seven FTAs, the Uruguay Round in 1994, and whether the United States should withdraw from the WTO in 2005. It then gives each member a rough numerical score of zero (least supportive of trade expansion) to 10 (most supportive). Also rated on the same scale are the two top Democratic chamber leaders: House Speaker Nancy Pelosi (CA) and Majority Leader Steny Hoyer (MD). Democrats who voted protrade on all measures except those that divided on a mainly partisan basis were given a score of 8.¹³ In assigning these scores, the author gave relatively greater weight to recent votes.¹⁴

The results are interesting. For holdover Democrats, the average score is 5.7. Only three (Tanner, Xavier Becerra [CA], and Mike Thompson [CA]) have scores of 8 or higher, and leaders Rangel (6) and Levin (7) rank roughly in the middle. Chamber leaders are slightly higher: Pelosi (7) and Hoyer (8). Most interesting is the fact that seven of the nine new members score 8, and their overall average is 7 notwithstanding the inclusion of Bill Pascrell (NJ), the only Ways and Means Democrat to score a perfect zero. *Overall, Ways and Means Democrats are*

13. Four votes fall into this category: fast track authority in 1998 (brought up by Speaker Newt Gingrich over Clinton administration objections), TPA in 2001, CAFTA in 2005, and Oman in 2006. On all of these, Democrats held that their social concerns (especially labor rights) were not adequately addressed.

14. Hence, Chairman Rangel was given a "6" even though he voted against the Uruguay Round as well as NAFTA.

Table 1 Democratic leaders and Ways and Means Committee members: Voting record on trade, 1993–2006

Member	Rating ^a	Trade preferences (12/2006)	Vietnam PNTR (11/2006)	Oman FTA (7/2006)	Bahrain FTA (12/2005)	CAFTA (7/2005)	WTO withdrawal ^b (6/2005)	Morocco FTA (7/2004)	Australia FTA (7/2004)	Chile FTA (7/2003)	Singapore FTA (7/2003)	Trade promotion authority (12/2001)	China PNTR (5/2000)	Fast track (9/1998)	Uruguay Round (11/1994)	NAFTA (11/1993)	
Leaders																	
Pelosi	7	Y	Y	N	nv	N	N	Y	Y	Y	Y	N	N	N	Y	Y	
Hoyer	8	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	Y	N	Y	Y	
Ways and Means members																	
Rangel	6	Y	Y	N	Y	N	N	Y	nv	Y	Y	N	Y	N	N	N	
Levin	7	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	Y	N	Y	N	
Other carryovers																	
Stark	1	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N
McDermott	7	Y	Y	N	Y	N	N	Y	Y	N	N	Y	Y	Y	Y	Y	Y
Lewis	3	N	N	N	Y	N	N	Y	Y	N	N	N	N	N	N	N	N
Neal	7	Y	nv	N	Y	N	N	Y	Y	Y	Y	N	Y	N	Y	N	N
McNulty	3	N	N	N	Y	N	N	Y	Y	N	N	N	N	N	Y	Y	Y
Tanner	10	Y	nv	Y	Y	N	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y
Becerra	8	Y	N	N	Y	N	N	Y	Y	Y	Y	N	Y	N	Y	Y	Y
Doggett	6	Y	nv	N	Y	N	N	N	Y	N	Y	N	Y	N	Y	Y	Y
Pomeroy	7	Y	Y	N	Y	N	N	Y	N	Y	Y	N	Y	N	Y	Y	Y
Jones	2	Y	N	N	Y	N	N	Y	Y	N	Y	N	N	N	Y	Y	Y
Thompson	8	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	Y	N	Y	Y	Y
Larson	3	Y	Y	N	Y	N	N	N	N	N	N	N	N	N	Y	Y	Y
Emanuel	7	Y	Y	N	Y	N	N	Y	N	Y	Y	N	N	N	Y	Y	Y
New																	
Blumenauer	8	nv	Y	N	Y	N	N	Y	Y	Y	Y	N	Y	present	Y	Y	Y
Kind	8	Y	Y	N	Y	N	N	Y	nv	Y	Y	N	Y	N	Y	Y	Y
Pascrell	0	N	N	N	N	N	Y	N	N	N	N	N	N	N	N	N	N
Berkley	7	Y	Y	N	Y	N	N	Y	Y	nv	nv	N	N	N	N	N	N
Crowley	8	Y	Y	Y	Y	N	N	Y	Y	Y	Y	N	N	N	N	N	N
Van Hollen	8	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	N	N	N	N	N
Meek	8	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	N	N	N	N	N
Schwartz	8	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	N	N	N	N	N
Davis	8	Y	Y	N	Y	N	N	Y	Y	Y	Y	N	N	N	N	N	N
Vote	212-184	228-161	228-161	221-205	327-95	217-215	86-338	323-99	314-109	270-156	272-155	215-214	237-197	180-243	288-146	234-200	
Democrats	92-96	90-94	90-94	22-174	115-81	15-187	46-183	120-80	116-84	75-128	75-127	21-189	73-138	29-171	167-89	102-156	

nv = not voting

a. Rating scale from 0 to 10, where 10 is always voting protrade expansion, -8 is protrade if party social concerns are addressed, 5 is mixed, and 0 is entirely antitrade.
 b. Y = antitrade, a vote for US withdrawal from the WTO.

Note: This table presents 15 trade votes in the House of Representatives between 1993 and 2006—December 2006: Trade preferences for Andean nations and Haiti, permanent normal trade relations (PNTR) for Vietnam, among others; November 2006: PNTR for Vietnam (under suspension of the rules: two-thirds majority required for passage); July 2006: Oman-US Free Trade Agreement; December 2005: Bahrain-US Free Trade Agreement; July 2005: Central American Free Trade Agreement-Dominican Republic (CAFTA-DR); June 2005: US withdrawal from the World Trade Organization (WTO); July 2004: Morocco-US Free Trade Agreement; July 2004: Australia-US Free Trade Agreement; July 2003: Chile-US Free Trade Agreement; July 2003: Singapore-US Free Trade Agreement; December 2001: Bipartisan Trade Promotion Authority Act; May 2000: PNTR for the People's Republic of China; September 1998: Renewal of fast track authority for trade agreements; November 1994: Uruguay Round Agreements Act; and November 1993: North American Free Trade Agreement (NAFTA).

significantly more trade-friendly than their counterparts in the Democratic caucus. This is reflected in the fact that of the 15 House votes included in this tally, only 4 (Bahrain, Morocco, Australia, and the Uruguay Round) found a majority of House Democrats voting in favor.

Two important conclusions emerge: First, there is no overall protrade consensus available among House Democrats. Hence, they lack the option—available to Thomas and the Republicans—of legislating a trade expansion policy based on partisan majorities. The second conclusion, however, is that if US trade policy can be redirected enough to satisfy the social concerns of those generally inclined to be positive—those with ratings here in the 6 to 8 range—they might be able to join with Republicans to form a new, *bipartisan* political base. Judging by their records, the new Democratic members of Ways and Means were likely to prove responsive to such an effort. It is unlikely that Pelosi and Rangel were unaware of this when the new members were selected, though other factors were clearly at play as well.

RANGEL THE CONSENSUS-SEEKER, THE “UN-THOMAS”

Charles B. Rangel entered the House in 1971, having defeated the legendary and controversial Adam Clayton Powell, Jr., in the Democratic primary. His upper Manhattan district includes Harlem and Columbia University. His voting record classifies him as a man of the left.¹⁵ Yet in style he is very much the conciliator.

On trade, Rangel played a major role in the enactment of the African Growth and Opportunity Act (AGOA) of 2000 and also backed trade preferences for Caribbean and Andean nations. But generally, Thomas’s partisan, noncooperative style forced the New Yorker to the sidelines. Rangel looked forward to 2007, when Thomas’s term as chair would expire, well before it became clear that Democrats would win back the House. He made it clear that he had a very different model of how a Ways and Means chairman should behave. (He had also been heard to observe that a Democrat in this position would likely have more influence if he served under a Republican president.)

Once it appeared likely that the Democrats would win, he began talking publicly about the politics of the huge public issues within Ways and Means’ jurisdiction. Taxes and Social Security were of central importance; so was health care. But on these issues, partisan lines were very sharply drawn, and he saw little chance of accomplishing things under a Republican administration. Trade, however, might be different, he suggested.

15. For example, the *National Journal* gave his voting record of 2006 an overall liberal rating of 92.7, the 19th highest in the House. “Special Report: 2006 Vote Ratings,” *nationaljournal.com*, March 3, 2007.

He had tried back in 2001 to negotiate a compromise on TPA, only to be rebuffed (see appendix in Destler 2005). But with Thomas gone and the House with a Democratic majority, there would be a new game. And Rangel would be at its center. A reporter from the conservative *Weekly Standard* was not alone in concluding that his elevation might not be bad news for trade policy.¹⁶

Overall, Ways and Means Democrats are significantly more trade-friendly than their counterparts in the Democratic caucus.

Rangel began his new role auspiciously. At the opening session of the new Congress, he declared a “historic opportunity to move beyond partisan gridlock. . .and rebuild the trust between the parties,” at both the chamber and committee levels. He declared himself “excited to work with Ranking Member Jim McCrery and Republicans on the Ways and Means Committee to identify areas where we agree and can make immediate progress.”¹⁷ He did not know McCrery well, he noted later—Republicans and Democrats hadn’t been talking to one another very much in recent years—but he went out of his way to build ties with the Louisiana Republican. He asked his counterpart to join him for his first meeting with USTR Schwab after assuming the chairmanship. And in the weeks ahead, he maintained communication with McCrery even as he pursued negotiations with Democrats on the committee and in the full chamber and with Schwab and the Bush administration. When those negotiations did not bear fruit as rapidly as hoped, he joined McCrery in two “joint statements,” underscoring their determination to persevere.¹⁸

Like his Senate counterpart Max Baucus (D-MT), chair of the Senate Finance Committee, Rangel declared himself in favor of TPA renewal—in principle.¹⁹ The question was the specific terms. Meeting with committee Democrats in early February, he conducted an informal vote. How many would support

16. Duncan Currie, “Learning to Love Charlie Rangel,” *America.com*, November 17, 2006.

17. Statement of January 4, 2007, reprinted on House Ways and Means Committee Web site, <http://waysandmeans.house.gov>.

18. Joint Rangel-McCrery statements of March 29 and May 4, 2007, released by the two members.

19. Baucus endorsed TPA renewal (with “better trade enforcement capability and better environmental and labor provisions”) in “A Democratic Trade Agenda,” *Wall Street Journal*, January 4, 2007. He also called for reforming trade adjustment assistance to make it “more reflective of today’s innovative economy.” Later, however, he indicated he saw no immediate need to act on TPA, since no new trade agreements were imminent. *Inside U.S. Trade* Web site, www.insidetrade.com, April 13, 2007.

extending the current TPA legislation? Just one raised his hand. How many would oppose it whatever changes were made? Again, just one hand. The rest would be supportive if their substantive concerns were addressed.²⁰ Thus, the chairman confirmed what the members' voting records indicated: They were available to support trade compromise. Assuming Republicans stayed on board, and the acquiescence, at least, of the Democratic caucus, such a compromise would win an overwhelming Ways and Means majority and a comfortable margin on the floor.

If procedures or intentions were everything, the story could stop here. Unfortunately, negotiations involve real issues. And the calendar and the actions it forces often determine the agenda. For trade policy, the overwhelming action-forcing event was the expiration of TPA on July 1, 2007.

THE TPA TIMETABLE: PROCESS SHAPING SUBSTANCE

First and most important, its imminent expiration makes renewal of TPA the central trade-legislative goal for the Bush administration in 2007. USTR Schwab is actively engaged in efforts to revive the Doha Round and bring it to a successful conclusion. To maintain US credibility in the negotiations, she needs to assure a fractious set of trading partners—the European Union, Brazil, India, among others—that Congress will vote up or down on whatever final terms the president and the USTR commit to. By the beginning of 2007, it had become impossible to complete a Doha accord under the existing TPA deadline.

House Democrats lack the option of legislating a trade expansion policy based on partisan majorities.

Looking forward, the multilateral round could be reaching a crucial stage just as the old authority is expiring. Unless other nations see credible congressional movement toward renewal at that time, the talks could grind to a halt, with the blame placed squarely in Washington's corner.

But TPA also defined the timetable for other trade issues. To be considered under its expedited, no-amendment congressional procedures, agreements under negotiation as 2007 began needed to be completed in substance 90 days before the current authority expired in order to meet the statutory requirement that Congress and advisory committees be notified and given the opportunity to seek changes. Thus midnight on

April 1 became the “witching hour.” The US-Panama FTA had been left incomplete, leaving labor standards language to be filled in after hoped-for agreement with Congress. The Peru and Colombia accords had been signed, but if their texts were to be changed (as Democrats sought), these changes would need to come in under the deadline as well. So would new FTAs under negotiation with Malaysia and (particularly important) with Korea, the seventh ranking US trading partner.

Finally, Republicans who controlled the final, “lame duck” session of the 109th Congress had insisted that trade preferences for Andean nations be extended for just six months. Their aim was to “rule from the grave,” by creating pressure for rapid congressional action on the Peru and Colombia FTAs, which would replace preferences for those countries. But this would effectively end preferences for Ecuador and Bolivia also, absent new legislation—hence it forced another item onto the crowded congressional trade agenda. In sum, the TPA-generated deadlines shaped a daunting set of conditions:

- Senior trade policy players unaccustomed to negotiating with one another, most of them also unaccustomed to their new roles, and all of them unsure about how the new state of American trade politics would play out, would need to plunge immediately into consensus-seeking talks.
- They would need to start with the matters with the nearest deadlines—which, for Congress and the executive, meant the terms of the three Latin American FTAs.
- To reach consensus on those terms, they would need to find some resolution of substantive issues that had divided congressional trade policymakers for years—above all, what commitments on labor standards would be included in FTAs.
- All this required that they build trust among themselves, after six years of fractious dealings.
- Whether they could succeed in this enterprise would go a long way toward determining whether they could reach agreement on the looming larger issue of TPA extension.

THE CRUX OF THE MATTER: “CORE” LABOR STANDARDS

From the initial debate over NAFTA in 1991, congressional Democrats had been united in the view that US trade agreements should include enforceable commitments to uphold basic labor standards. The Clinton administration took a step in this direction by insisting that NAFTA be accompanied by a “side agreement,” whose primary operative provision was that the parties enforce their own labor laws. Subsequent FTAs included similar provisions in the text, and this criterion became known

20. A more general account of this interchange appears in *Inside U.S. Trade*, February 9, 2007.

as the “Jordan standard” after the agreement negotiated with that nation in 2000 and approved in 2001. This and subsequent FTAs enacted under President Bush also included institutions for bilateral cooperation to strengthen enforcement of labor practices.

In principle, Democrats found this standard inadequate. It was tolerable in cases where partner nations had strong labor laws. Hence many supported the FTAs with Singapore, Chile, and Australia. In at least one case—the FTA with Bahrain approved overwhelmingly in 2005—congressional action was delayed until the partner nation brought its labor laws up to snuff (and House Ways and Means Democrats contributed to this process). But for CAFTA-DR (and Oman), inadequate labor protection was the primary reason for overwhelming Democratic opposition.

Democrats wanted a commitment to enforce “core labor standards” as codified in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work adopted by consensus in June 1998:²¹

- freedom of association and the effective recognition of the right to collective bargaining,
- elimination of all forms of forced or compulsory labor,
- effective abolition of child labor, and
- elimination of discrimination in respect of employment and occupation.

In the alternative TPA legislation proposed by Democrats in 2001, the first principle was split into two, and so they became five, listed (without explicitly naming the ILO) as “the right of association, the right to bargain collectively, and prohibitions on employment discrimination, child labor, and slave labor.”²² In appendix A to this policy brief, Kimberly Ann Elliott provides a substantive analysis of this issue and the labor provisions in recent FTAs.

American public opinion overwhelmingly supports this objective: In a June 2002 poll conducted by the Chicago Council on Foreign Relations, 93 percent of respondents agreed that countries taking part in international trade agreements should be “required to maintain minimum standards for working conditions.” This finding was replicated in subsequent surveys by the Program on International Policy Attitudes (PIPA) and WorldPublicOpinion.Org conducted in 2004 and 2007, respectively. An April 2007 report by the Chicago Council on Global Affairs and WorldPublicOpinion.Org found that this is

not just an American sentiment: Support for including labor standards in trade agreements reaches 84 percent in China, 67 percent in Mexico, and 56 percent in India.²³

However, while the United States endorsed the 1998 ILO Declaration, it has not ratified all of the underlying ILO conventions. Moreover, while there is little opposition in the United States to having partner nations upgrade their labor practices, there are concerns—among Republicans and in the business community—over what some label a “boomerang” effect: that such provisions, in the standard “reciprocal” form embodied in trade agreements, might come home to impact US labor practices. In a March 2007 op-ed, Theodore H. Moran and Gary Clyde Hufbauer offered a dramatic interpretation of the problem:

US labor laws are either openly inconsistent with core ILO standards, or they could be challenged by lawyers if ILO standards trumped established statutes and long-standing interpretations. A trade agreement that enthroned ILO standards would not only alter federal labor law, it would also override state laws—triggering a constitutional howl from Sacramento to Albany. The practical effect would be to stop US trade negotiations. Few legislators would want to subordinate huge swaths of labor law to broad principles enunciated in trade agreements.²⁴

Democrats wanted other substantive changes made to FTAs, involving, among other things, the environment and making sure intellectual property rules did not block developing countries’ access to needed medicines. But from the start, the labor issues were central. If they could be resolved, other matters were expected to fall into place.²⁵

The process began with Schwab meeting Rangel and McCrery on January 18, 2007. The goal, in the words of Deputy USTR John Veroneau, was “to find a new template for these agreements.” Schwab, more cautiously, said they were “talking about substance,” particularly the labor provisions. But an important early difference surfaced about form. Levin, who also met with Schwab, thought it would be necessary to amend

21. For the full declaration, go to the ILO Web site, www.ilo.org.

22. These were to be included in bilateral agreements and the projected Free Trade Area of the Americas but not in the global Doha Round negotiations [HR 3019, 107th Congress, Section 2(c)(9)(A)].

23. Other national majorities in favor include Israel (91 percent), Argentina (89 percent), Poland (88 percent), and the Philippines (55 percent). See “World Public Favors Globalization and Trade but Wants to Protect Environment and Jobs,” WorldPublicOpinion.Org and Chicago Council on Global Affairs, April 26, 2007, at www.worldpublicopinion.org.

24. Theodore Moran and Gary Clyde Hufbauer, “Why a ‘Grand Deal’ on Labor Could End Trade Talks,” *Financial Times*, March 12, 2007.

25. The fact that enforcement of core labor standards abroad would bring little immediate benefit to American workers caused many in the trade policy community to see the demands for such standards as a cover for protectionism. This may well have been true for some Democrats. For trade centrists like Rangel, however, they were essentially the opposite—a necessary condition for them to *support* trade expansion.

the texts of the Peru and Colombia agreements: “I don’t see how there can be legally enforceable changes without renegotiation.” Schwab felt there was no need to reopen the texts. Both sides agreed that, as a first step, the majority and minority staffs of Ways and Means should work to develop a compromise, with an initial target date of February 19.²⁶

By the middle of that month, however, it was reported that staff-level consultations were “stalled.” The aides involved were

Linking labor standards to trade agreements is entirely legitimate in a world where globalization is putting increased stress on domestic economic arrangements.

serious, sophisticated trade policy experts, deeply conversant with both the substance and politics of the issues. But unlike the Ways and Means staff aides of the 1980s or early 1990s, for whom working across the aisle was almost second nature, the current assistants had done remarkably little collaboration and codrafting since the bipartisan process leading to approval of permanent normal trade relations with China in 2000. Recognizing this failure, Rangel asked for a new meeting with Schwab and McCrery. He also asked that USTR provide recommendations to move the process forward.²⁷ Schwab was apparently reluctant to do so, perhaps fearing that premature surfacing of USTR’s idea of a reasonable final compromise might cause its premature rejection. But she reluctantly provided one later in the month. It finessed the “boomerang” problem by allowing parties to FTAs to base their labor laws either on ILO standards or on those reflected in US federal labor law. But this language proved unacceptable to Rangel and Levin. Rangel said there was “no question” but that the new language would have to obligate the United States to meet international labor standards but dismissed the concerns over opening US trade laws to litigation by trading partners: “I am satisfied that by doing this, it would not harm us at all.”²⁸

This was one of Rangel’s relatively few comments on the policy issues at stake, and he typically couched his remarks in a tone that suggested that agreement was within reach. The sharp-edged Levin, by contrast, spoke out regularly, using words that highlighted substantive demands and suggested that

the administration had a long way to go before it could pass congressional muster. He would emerge in spring 2007 as the more demanding of the two, pressing for further administration concessions at points when Rangel felt that Democrats’ essential goals had been satisfied.²⁹ And it was difficult for Rangel to proceed without Levin, for he needed not just the support of his committee but that of the Democratic caucus and leadership, and Levin was anything but a substantive outlier on trade insofar as they were concerned.

Rangel recognized the need to protect his Democratic Party base and consulted carefully with the leadership. Pelosi and Hoyer, in turn, backed Rangel’s efforts, telling President Bush on March 7, 2007 (on the eve of his departure for Brazil and other Latin American nations) that success of the negotiations would allow them to move forward on the FTAs. In a talk later that month, Rangel said that one reason Democrats were insisting that changes be written into the agreements was the persisting “lack of trust” between them and the administration. He was seeking to rebuild that trust, with the implication that issues might be addressed more flexibly in the future.

AGREEMENT DEFERRED

But the April 1 deadline was approaching, and though agreement seemed close, it proved elusive. So after consulting with the leadership and the caucus (and with McCrery), Rangel and Levin released a short statement. “We are on the brink of restoring bipartisanship to American trade policy,” Rangel declared. “The policies we’ve outlined should send a clear message that this Congress wants trade, but we want trade that works for all Americans.” Specifically, they called on USTR to

- require countries to adopt, maintain and enforce basic international labor standards in their domestic laws and practices—not merely “enforce their own laws”;
- promote sustainable development and combat global warming by requiring countries to implement and enforce common multilateral environmental agreements and address illegal logging of mahogany in Peru;
- reestablish a fair balance between promoting access to medicines in developing countries and protecting pharmaceutical innovation;

26. Based on interviews and *Inside U.S. Trade*, January 19 and 26 and February 2, 2007.

27. *Inside U.S. Trade*, February 16, 2007.

28. *Inside U.S. Trade*, March 2 and 9, 2007.

29. “Rangel Struggles to Save Bipartisan Deal,” *CongressDailyAM*, May 3, 2007; Robin Toner, “For Democrats, New Challenge in Age-Old Rift,” *New York Times*, May 8, 2007. Interestingly, though it is common in the trade policy community to view Levin as “protectionist” and Rangel as more positively inclined, their votes were identical on 13 of the 15 trade bills tabulated in table 1; on the other two, the Michigan Democrat voted “aye” with Rangel either negative (the Uruguay Round) or not voting (Australia FTA).

- promote US national security by protecting operations at US ports; and
- ensure that [a] trade agreement accords “no greater rights” to foreign investors in the United States than to US investors.

A larger document developing the concepts behind the proposals was delivered to USTR but not made public.

Press coverage was generally positive: Steven R. Weisman noted in the *New York Times* that the proposed “revisions . . . won guarded praise from both organized labor and the Bush administration.”³⁰ USTR Schwab responded, “This is another step in what has been a good-faith effort in a continuing dialogue by all sides.” And it seemed drafted to allow some leeway—“basic international labor standards” but no specific mention of the ILO; “require countries to adopt” them but no specific reference to the United States. But if the Democrats’ aim was to reach an accord by month’s end, they were unsuccessful. Within two days, Rangel and McCrery issued a joint statement under the large-type heading, “Trade Policy Negotiations Continue”: They remained “in active discussions with the Administration and our fellow leaders in Congress” and would “continue to pursue agreement. . . because re-establishing a bipartisan foundation in trade policy is more critical than meeting a procedural deadline.”

That deadline, however, did generate a flurry of other activity. On March 30, President Bush notified the speaker of the House and the president of the Senate of his “intention to enter into a free trade agreement with the Republic of Panama.” And after intensive eleventh-hour bargaining, Bush, who was in personal contact with Korean President Roh Moo-hyun, sent a similar letter of intention, at literally the eleventh hour on April 1, concerning the just-completed FTA with that country. There was serious controversy about some of its provisions: Korea’s auto concessions, though substantial, did not look sufficient, to some important lawmakers, to break the domestic industry’s hammerlock on the Korean market,³¹ and that nation did not immediately end its embargo on imports of US beef, provoking an outraged protest from Senator Max Baucus. The latter issue was expected to be resolved before the signing of the

agreement at the end of June 2007, but the clash over autos was likely to persist.

As Rangel and McCrery noted, however, the central talks with USTR had failed to reach agreement before the “procedural deadline.” This failure meant that changes in the text of the Peru and Colombia FTAs, on which Democrats were insisting, could not be made in time to be notified to Congress under the expiring TPA. For Panama and Korea, however, the deadline was effectively extended for at least a month. On March 30, Rangel and Levin released a statement that expressed appreciation over the Panama notification and added two pregnant paragraphs:

With the expectation that we could also receive notice on the U.S.–South Korea FTA this weekend, we remind the Administration that we are now entering the congressional review period. This time is specifically designated under the fast track law to provide Congress with an understanding of the agreements and resolve any outstanding concerns.

We expect that any use of the congressional period will focus not only on the completion of the FTAs, but also on incorporating necessary changes on outstanding issues such as labor, environment, and intellectual property, which must be addressed before the bills will receive broad bipartisan support in Congress.³²

The talks were less active in the weeks immediately thereafter. Asked about “those other negotiations” at an early April press conference announcing trade actions against China, USTR Schwab responded, “that’s another topic for another press conference.” She added: “We are still in conversations with key players...I’m looking forward to re-engaging with Chairman Rangel, Chairman Baucus [and ranking Republicans] when I return next week” from a long-scheduled trip to India.³³ Rangel, meanwhile, declared himself “surprised” that the administration seemed to have “lost all [of] its enthusiasm” for the bipartisan effort.³⁴

The Democrats had achieved at least formal unity between committee and caucus and kept committee Republicans within the process. Their privately presented concept paper had generated a dialogue and triggered the drafting of specific

30. Steven R. Weisman, “Break Seen in Logjam Over Trade,” *New York Times*, March 28, 2007.

31. Democratic senators and representatives, headed by Rangel and Senator Carl Levin (D-MI), had sent Bush a proposal to incorporate in the agreement some tough, quid pro quo provisions conditioning US tariff removal on successful opening of the Korean market, as measured by actual trade flows. They not only saw the agreement as failing to achieve this but also criticized the administration for failure to consult with them or US auto industry representatives during the closing days of the negotiation. “Congressional Proposal to Open Korea’s Automotive Market,” attachment to letter to President Bush from Rangel, Senator Levin, and 13 other legislators, March 1, 2007.

32. “Rangel and Levin on Panama FTA Notification,” press release, March 30, 2007. This emphasis on substantive flexibility during the review period stood in contrast with prior congressional insistence that the terms of trade agreements be essentially completed before notification. Legislators had chastised the Reagan administration for its notification of the Canada-US FTA in 1987 when important issues had not yet been resolved. Arguably, the situation here was different because the incomplete negotiation was with Congress, and the 90-day period was in fact designed to allow for changes in response to feedback from legislators and statutory advisory committees representing sectors of the US economy.

33. *The Nelson Report* (distributed via email), April 9, 2007.

34. Comments on April 17, 2007, quoted in *Inside U.S. Trade*, April 20, 2007.

language by staffs at both ends of Pennsylvania Avenue. And specific agreement was reportedly nailed down on all issues save the central matter of labor standards.³⁵

The stage was set, therefore, for three intensive, roller-coaster weeks in which agreement first seemed imminent, then came apart, and finally came together. On Monday, April 23, 2007, Rangel declared his openness to assuring that the United States was “not vulnerable to attack by any foreign country” on its labor laws,³⁶ and met with Schwab and McCrery. Their discussion centered on a formula that included mutual, binding labor commitments based on the ILO Fundamental Principles, with enforcement parallel to that in the agreements’ trade provisions but with language shielding the United States from litigation based on those specific ILO conventions to which this nation was not a party.³⁷ This would seem to satisfy the Democrats’ basic demands, and the three reportedly moved to conclude the agreement on this basis. But “by Friday the effort appeared to have hit a snag,” as Levin argued that it “went too far in attempting to assuage GOP fears.”³⁸ Meanwhile, 70 members of the House Democratic caucus (including a majority of the new members) had written Rangel urging that he “use the proposal” of late March “as the firm bottom line” and “not. . .back down” from any of its goals.³⁹

It was another near miss, like late March. And on Friday, May 4, Rangel and McCrery issued a statement strikingly similar to that of March 29, entitled “Trade Policy Negotiations Continue”: “We are still actively negotiating on trade policy with all parties and all levels. . . We will continue working into the foreseeable future to resolve any remaining differences.”⁴⁰ But this time would prove different. Rangel secured the crucial support of Speaker Nancy Pelosi. The language on labor standards was tweaked once again—with no explicit reference to ILO conventions, and a statement that “the obligations of this agreement, as they relate to the ILO, refer only to the 1998 ILO Declaration on the Fundamental Principles and Rights at Work.” With Levin now on board, Pelosi hosted a news conference at 6:00 p.m. on Thursday, May 10, 2007. Among those joining her were Rangel, Schwab, Treasury Secretary Henry Paulson, Senator Max Baucus, Representative McCrery, and Levin.

35. Apparent administration concessions on balancing “access to medicines in developing countries” with “protecting pharmaceutical innovation” have generated concerns within the intellectual property coalition, an important supporter of previous FTAs.

36. Remarks at the Peterson Institute for International Economics, April 23, 2007, quoted in *Inside U.S. Trade*, April 27, 2007.

37. *CongressDailyAM*, May 3, 2007.

38. *CongressDailyAM*, May 3, 2007.

39. Letter of April 20, 2007, quoted in *Inside U.S. Trade*, April 27, 2007.

40. Ways and Means Committee press release, May 4, 2007.

A NEW TRADE POLICY FOR AMERICA

“Nearly 50 years ago,” Pelosi declared, “President John F. Kennedy advanced a new trade policy that cemented Democrats as the party of free and fair trade. Today, we build on that tradition to announce a new, bipartisan breakthrough for fair trade where we expand opportunities for American businesses, workers, and farmers.” Rangel declared that “today’s agreement signals a new direction and renewed spirit of bipartisanship.” McCrery called it a “good and fair compromise.” Schwab saw “a historic bipartisan breakthrough.” Baucus declared that “trade in America is turning a corner toward more cooperation. . . where more Americans are involved in embracing world change.”⁴¹

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temporarily, globalization’s losers.**

The deal was essentially what the Democrats sought, and it closely tracked their March policy statement. In addition to labor standards and a range of environmental provisions, which would be subject to the same dispute settlement procedures and remedies as the trade commitments, the understanding struck a new balance between intellectual property rights and trading partners’ health needs. It provided a “port security” exception to US obligations under the services chapter, added a provision that foreign investors would not be granted greater rights, within the United States, than US investors, and set forth a multifaceted, albeit general, “strategic worker assistance and training (SWAT) initiative.” The short and extended summaries of this agreement are reprinted in appendix B to this policy brief.

The agreement assured committee and leadership support for the Peru and Panama FTAs, establishing a clear path to their adoption. Its provisions applied also to Colombia and (except the intellectual property rights/pharmaceutical provisions) to Korea as well. But there remained serious issues involving both—human rights violations in the former and market access concerns in the latter. And while Rangel would surely bring the preponderant majority of Ways and Means Democrats with

41. *Congressional Quarterly* transcriptions, May 10, 2007; Rangel-McCrery joint press release, May 10, 2007.

him, the breadth of support among their House counterparts remained unclear. Pelosi had not heeded a call by a few members to bring the accord formally before the Democratic caucus. Rather, she and Rangel locked it by moving immediately from agreement to announcement.

The initial interest group responses were in fact positive, albeit muted. The Business Roundtable, the US Chamber of Commerce, and the National Association of Manufacturers issued statements of support (even though the agreement tilted against their preferred positions). Pharmaceutical manufacturers expressed concern about the potential weakening of intellectual property protection. And AFL-CIO President John Sweeney cautiously “commend[ed] Chairman Rangel for the substantial progress made in improving workers’ rights and environmental standards in the Peru and Panama Free Trade Agreements.”⁴²

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The agreement was labeled “A New Trade Policy for America.” For each of the primary negotiators, it was an enormous personal triumph. Rangel had decided early that bipartisan accord on trade was possible and staked his reputation on bringing it about, working carefully with colleagues of both parties, persisting when hopes receded. When Levin demanded more, Rangel found ways to respond. It was the New Yorker’s persistence, and the support of his committee, that enabled Pelosi to step forward on an issue where her caucus remained divided. And his wisdom in reaching out to McCrery was vindicated as the ranking Republican worked assiduously and effectively to find compromises on the toughest issues. Majority Leader Steny Hoyer was helpful behind the scenes. Levin’s toughness added credibility to the final product. At the staff level, Rangel’s chief trade assistant, Timothy Reif, provided essential support and maintained the faith that agreement would in fact be reached.

On the Senate side, Finance Chair Max Baucus allowed Ways and Means to have the primary action during the process and provided a strong endorsement of the final product. Ranking member Charles Grassley (R-IA) worked to bring his

skeptical Republican flock along, meeting with them just hours before the deal was announced.

The agreement was a triumph also for USTR Schwab. She recognized early that trade policy needed a new bipartisan base and that Rangel offered the only realistic hope of achieving it. She took a serious risk in conceding most issues early: to demonstrate administration seriousness and because she hoped to conclude the deal as early as February. When that proved impossible, she stayed with it, finding additional things she could offer to help Rangel bring the Democrats together. At the same time, she succeeded in her determination to have Colombia covered by the agreement—though she realized that Bogota would also need to address egregious human rights issues.⁴³ She had the essential support of President Bush. And Paulson’s involvement helped to head off any possible resistance from within the administration. Schwab would have liked, of course, to have had support of TPA included in the deal. But she recognized that was impossible at this stage—the only way to make it possible in the future was to resolve the labor and environmental issues that had hitherto proven so divisive.

TOWARD RENEWAL OF TPA: SOME OPTIONS

With the issue of FTA language now resolved, the way was clear for congressional consideration of broader trade issues. Schwab had not expended all that time and energy simply to win approval of the FTAs. Doha remained her primary business, and TPA would be necessary to any Doha agreement.

Yet immediate action on TPA is unlikely. To be sure, the May 10, 2007, agreement has taken two essential steps in that direction. It establishes a bipartisan foundation of confidence and trust. And it provides a template, specific language on labor and environmental issues for inclusion in negotiating instructions for future FTAs. But serious differences remain on the current FTAs with Colombia and Korea. Addressing these will take time and is likely to strain the new cooperative relationships. So members will not move immediately to the broader agenda.

When and if they do, any TPA extension legislation will have its own complications. Other trade proposals are likely to be bundled in: further expansion and reform of trade adjustment assistance, changes in laws regarding China and exchange rates,

42. He added, however, that “we will vigorously oppose the Colombia and Korea agreements and the renewal of Fast Track trade authority” (AFL-CIO statement of May 11, 2007).

43. In a letter to Schwab negotiated just before the agreement, Rangel and Levin declared that the terms “for Peru and Panama. . . must be incorporated into the Colombia FTA” but highlighted “special problems. . . including the systemic, persistent violence against trade unionists and other human rights defenders, the related problems of impunity, and the role of the paramilitaries in perpetuating these crimes.” They concluded, “We are working to assess concrete proposals and undoubtedly will visit Colombia for first hand observations, as we explore a timely and effective solution.”

among others. Expanding the range of trade matters addressed in such legislation can broaden support and reduce the political burden of passing TPA as a “stand-alone” matter. But working out their specifics can also add to the legislative time required. 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 negotiating partners.⁴⁴ On the other hand, they will presumably not set labor rights negotiating objectives for a Doha agreement—though they will insist on applying the agreed labor et al. template to any future FTAs. (In their 2001 legislative proposal, Rangel and his colleagues accepted the exclusion of labor issues from current global WTO negotiations.)

What, then, are the options, and potential political paths, for renewal of TPA in 2007? A prerequisite, of course, is sufficient progress toward a Doha accord to make it seem worthwhile for the president, members of Congress, and the business community to invest the energy and political resources that will be required to move legislation through the House and the Senate in an expeditious manner. If the recent revival of talks peters out, TPA extension will lose its primary rationale. On the other hand, unless there is a clear prospect of congressional action on TPA, US leverage at Doha will be undermined. It is possible, however, that the negotiations could advance enough to offer promising opportunities to US goods and services industries, with TPA required to complete the accord.⁴⁵

Delineating realistic options for TPA renewal is further complicated by the fact that they involve three dimensions: *when* TPA is extended, for *how long*, and for *what range* of trade agreements. Concerning the first, we will assume that enacting a new law by July 1, 2007, is both unlikely and unnecessary but that a successful Doha Round will probably require congressional action by the end of the first session of the 110th Congress—at the very least, a bill reported out by a strong bipartisan Ways and Means Committee majority. Concerning both the second and third, there is a trade-off: The broader the range of possible negotiations covered, and the longer the

time period for TPA extension, the greater the likely detail in negotiating objectives and the stronger the requirements for interbranch consultation.

Option One: Comprehensive, Multiyear Extension. Congress would replicate the form of 2001, enacting a comprehensive bill covering all WTO and FTA negotiations completed over a period of several years—perhaps three, with two more years possible unless blocked by the House or Senate. The new FTA template on labor and environmental standards would be incorporated in the broad legislation. New mechanisms for congressional engagement would need to be negotiated, and USTR would certainly seek to add flexibility to devices, like those noted above, which Democrats are likely to propose.

The problem with this option is that it could take well over a year to negotiate and enact; moreover, Democrats might well be reluctant to grant this much, all at once. A variant of option one would be extension that was comprehensive in coverage but ended on July 1, 2009. Any further action would await the election and inauguration of a new president.

Option Two: TPA Extension for Doha Only. Congress could defer until 2009 the matter of broader TPA extension and act specifically to reinforce the Doha Round. When the fast track timetable ran out in early 1993, Congress extended fast track until April 1994 but limited its applicability to the Uruguay Round/GATT talks. This extension made possible their successful conclusion and also provided a useful de facto deadline of December 15, 1993. Rangel raised the possibility of Doha-specific TPA on January 30, 2007, in a preliminary fashion, in a colloquy with Gene Sperling, former Clinton economic adviser, who was testifying before his committee. He reiterated his willingness to consider such action in a National Press Club speech on April 17.⁴⁶ Such an authorization would likely be for a relatively short period—until the middle or end of 2008, perhaps.

This authorization could be enacted as stand-alone legislation, as in 1993. A variant here might include authorization to negotiate other major agreements specified in the legislation, such as a potential Free Trade Area of the Asia Pacific (FTAAP). This alternative, raised by the administration at the 2006 meeting of the Asia-Pacific Economic Cooperation (APEC) forum, might conceivably enhance US leverage in the Doha Round with those (such as the European Union, Brazil, and India) that would be excluded (Bergsten 2007). A disadvantage, under either of these Doha options, would be that the United States would be unable to respond, in the short run, to others’ FTA initiatives.

44. In their 2001 proposal, Rangel et al. proposed a structured, biennial review of progress in ongoing trade negotiations, with a procedure allowing one-third of House or Senate members to bring a resolution of disapproval to the floor for a vote and a requirement that a group of congressional trade advisers endorse, at the conclusion of negotiations, the president’s required certification that statutory negotiations had been met. (The AFL-CIO released, in March 2007, a particularly stringent [and surely unworkable] proposal including a variant of this last procedure [“Fast Track or the Right Track,” AFL-CIO Executive Council Statement, March 2007, Las Vegas, Nevada].)

45. It is also conceivable—though less likely—that other possible agreements—a Free Trade Area of the Asia Pacific or an FTA with Japan—could provide serious motivation for TPA extension.

46. *Inside U.S. Trade*, February 2, 2007; www.insidetrade.com, April 17, 2007.

Option Three: TPA Extension for Doha Plus FTAs under Negotiation. This option would allow conclusion of agreements (e.g., FTA with Malaysia) under negotiation but not concluded on April 1, 2007. It would plausibly have a concluding date of July 1, 2009. An advantage of this option, from the perspective of congressional Democrats, is that it would facilitate changes in the text of the Peru and Colombia accords—though it might not be necessary for consideration of such changes under TPA.⁴⁷ Option three would exclude, in practice, the launch of new FTA negotiations, weakening the US international hand in the run-up to the 2008 presidential elections. But it may in any case prove impractical to launch new FTA negotiations in that time period.

TWO FINAL OBSERVATIONS

The Rangel-McCrery-Schwab negotiations centered on the issue of labor rights. Many in the US and global trade policy communities consider this focus inappropriate at best and pernicious at worst. A *Washington Post* editorial reflected this view in characterizing the administration's negotiation with Democrats on labor and environmental provisions as "protectionist pandering."⁴⁸ This author does not agree. As argued elsewhere, *linking labor standards to trade agreements is entirely legitimate in a world where globalization is putting increased stress on domestic economic arrangements* (Destler 2005, chapter 10). *To say it is legitimate, of course, does not mean it is effective, at least in the near term. If this author could rewrite history he would have Democrats devoting far less energy to labor practices in other countries and far more to enhancing domestic support for Americans who are, at least temporarily, globalization's losers.*⁴⁹ *But if the current emphasis on basic labor standards ends up facilitating trade agreements rather than blocking them, it will likely have a significant impact on US welfare through trade expansion, a marginal positive impact on labor practices overseas, a minuscule impact at best on workers' welfare within the United States, and no direct impact at all on US labor laws.* So it is clearly preferable to a stalemate.

This discussion brings us to the final point: that there is a real problem of wage stagnation and growing income inequality

within the United States. This problem has persisted for the better part of 30 years, and progressives should be looking for comprehensive means to address it. Trade is, at most, a marginal contributor, and constraining trade is unlikely to improve matters at all. It is highly appropriate for members to include, in trade legislation, measures to expand programs to compensate and re-fit Americans whose economic lives are disrupted by trade and broader economic change.⁵⁰ But if Congress is serious about gaining real traction on the inequality problem, members need to review and refashion a broad range of legislation: on taxes, health care, labor rights, education, pension reform, and so on. Both the substance and the politics of these issues are daunting. But if senators and representatives are serious about repairing America's frayed social compact, these are the issues where they should get to work.

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47. The question is whether Congress could consider, under TPA procedures, an agreement whose text had been altered—as a result of consultations with Congress—from that notified to Congress under the TPA timetable. The law here is at best ambiguous.

48. "Trade Offensive," *Washington Post*, April 12, 2007.

49. The May 10, 2007, agreement did include a sweeping commitment to a "strategic worker assistance and training initiative," with its contents presumably to be developed. And senior Ways and Means Democrat Jim McDermott (D-WA) has introduced legislation to provide wage insurance to American workers displaced by economic change.

50. For a detailed analysis and proposals, see Kletzer and Rosen (2005).

APPENDIX A TREATMENT OF LABOR ISSUES IN US BILATERAL TRADE AGREEMENTS

Kimberly Ann Elliott

While there are minor differences in the text of the labor chapters in recent agreements, the key section is identical in every free trade agreement (FTA) from those with Singapore and Chile to the ones with Peru and Colombia:

A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

An article in each agreement explicitly states that this is the *only* paragraph subject to dispute settlement in these agreements. Moreover, the agreements emphasize that the parties

- may adopt or modify their labor laws and
- retain discretion in enforcement activities and the allocation of resources to enforcement versus other labor priorities.

Flexibility to amend labor laws is needed, especially in developing countries with overly rigid labor regulations, which push many workers into the informal sector, where they receive no protection at all. But this language also creates large loopholes that would make the “enforce your own laws” standards difficult to implement in practice.

In addition, each agreement since the Jordan FTA, negotiated by the Clinton administration and submitted to Congress by President George W. Bush in 2001, also includes *nonbinding* language in which the parties reaffirm their commitment to the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-Up. The language is merely hortatory, however, and calls on parties to

- “strive to ensure” that internationally recognized labor rights are protected by law,
- “strive to ensure” that laws are consistent with internationally recognized labor rights and “strive to improve those standards in that light,” and
- “strive to ensure” that they do not lower or weaken labor

laws as an encouragement for trade or investment involving the other party.

Finally, post-Jordan FTAs limit the potential penalty for labor violations to imposition of a “monetary assessment,” set at a maximum of \$15 million (regardless of the income level of the partner), which can be collected by suspending trade benefits as a last resort. Violations of most other provisions in these agreements, if not rectified, can lead to the suspension of trade benefits.

The “Jordan Standard”

The Clinton administration negotiated an agreement with Jordan that was similar to the above with a couple of important exceptions. First, the language calling on parties to “strive to ensure” that labor laws are consistent with ILO core principles and that those laws are not weakened for competitive reasons is not explicitly excluded from enforcement. Second, the dispute settlement process and potential sanctions for labor (and environmental) violations are the same as for all other parts of the agreement.

Problems with These Standards

The “enforce your own laws” standard used in the post-Jordan agreements makes little substantive sense. It exhorts parties to the agreement to ensure that their laws are consistent with international standards and recognizes that weakening or waiving existing laws to promote trade or attract investment is inappropriate. But the only provision that is *enforceable* discourages countries from failing to enforce their own laws, which creates perverse incentives to avoid raising standards or to lower them if they cannot be effectively enforced. The further a country’s laws are from international norms, the bigger the problem.

The incentives created by the Jordan standard are not as perverse because the language calling on parties to “strive to ensure” the consistency of their laws with international standards is theoretically enforceable. An aggressive executive might use the “strive to ensure” language to successfully challenge derogations from labor laws for competitive reasons. But it seems far less likely that a party could successfully challenge a partner for not sufficiently striving to ensure improvements in its standards.

Finally, all the FTAs that incorporate labor standards in the main text (all since the North American Free Trade Agreement) share the weakness of using a US definition of “internationally-recognized” labor standards. This definition predates the 1998 ILO Declaration on Fundamental Principles and Rights at

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Work, which enunciated a consensus definition of core labor standards. The ILO list includes freedom of association; the right of workers to bargain collectively; freedom from forced labor; the eventual abolition of child labor; and nondiscrimination in employment. The US definition, which goes back to 1984, excludes nondiscrimination and includes “acceptable conditions of work” relating to wages, hours, and occupational health and safety.

Labor Standards under “A New Trade Policy for America”

The compromise reached on labor standards in the pending FTAs requires the parties “to adopt, maintain and enforce in their own laws and in practice the five basic internationally-recognized labor standards, as stated in the 1998 ILO Declaration.”¹ A summary of the agreement released by Ways and Means Committee Ranking Member Jim McCrery states that the obligations refer “only” to the ILO Declaration and does not explicitly mention any role for the legally binding conventions that define the fundamental principles in the ILO context. *Inside U.S. Trade* reports that the deal does not address whether ILO jurisprudence could be used in a dispute settlement case. It is also not clear from the summary whether the compromise changes the traditional US definition of internationally recognized worker rights and whether challenges to the “acceptable conditions of work” standard are still covered.²

The summary of the new approach also says that parties to trade agreements will be prohibited from lowering labor standards for competitive advantage and that this provision will be legally binding and enforceable. The new approach also reduces the flexibility that countries have in choosing how to allocate resources to enforcement and prosecution of labor law violations. Under the compromise, the labor (and environment) chapters will be subject to the same dispute settlement procedures—and potential penalties—as other parts of these trade agreements.

The new formulation removes the incentive to lower labor laws if countries are having trouble enforcing them. But it could also be used to challenge labor law reforms that are needed in some cases to promote employment in developing countries,

and that possibility is troubling from a development perspective. It is also unclear from the available information how adequate enforcement effort will be measured and assessed.

Thus far, the business community response to the announcement of a compromise has been relatively positive, despite the fact that it apparently does not provide an explicit “safe harbor” protecting US labor laws from challenge. The United States has ratified only 3 of the 8 core ILO conventions because of concerns that certain aspects of US labor law are not in full compliance with the terms of some of them. The emphasis on the obligations under the labor chapter referring only to the ILO Declaration is intended to provide assurance on this point, but it leaves unclear how those obligations would be interpreted in practice.

Nevertheless, a successful challenge to US laws seems highly unlikely. First, it should be noted that Congress has determined that trade agreements will not be “self-executing” in US laws, as are some treaties, which means that implementing legislation is needed to make any changes to US law required to come into compliance with trade agreements. In those bills, Congress includes a section stating that nothing in the trade agreement has any effect on US federal or state law, or creates a private right of action (to challenge US government actions under the trade agreement), unless specified in the implementing legislation.

This still leaves the possibility of a challenge to US laws under the dispute settlement provisions of trade agreements. But envisioning a successful challenge that would result in changes to US labor laws is difficult since the trading partner would have to show that inadequate US labor laws affect bilateral trade. Assuming that hurdle can be overcome and a US labor law is found to be inconsistent with its obligations under a trade agreement, US policymakers would have the choice to comply by changing US labor laws—through normal congressional procedures and without a veto from the president—or paying compensation or facing retaliation from, in most cases, a much smaller, weaker country. Indeed, most FTA partners have sought to negotiate trade agreements because they want to solidify relations with the United States, and it is not clear what incentive these governments would have to bring a labor complaint.

A More Radical Change in Direction

It is likely that the agreement reached for revising outstanding FTAs will be used as the template when Congress is ready to revise and renew the president’s trade promotion authority. Nevertheless, there are still problems with the overall approach to labor standards in trade agreements, and policymakers may want to consider alternatives. The current approach incorporates

1. The new template is to be applied in some fashion to all four pending agreements, but congressional Democrats have made it clear that more is required to address their concerns regarding labor rights in Colombia and the auto and other issues in the Korea agreement.

2. As a complement to the new agreement on labor standards, it would be useful for the US Senate to ratify ILO Convention 111 on nondiscrimination, which has been languishing before the Senate Foreign Relations Committee for several years. That would raise the US ratification record to 3 of the 8 core conventions. In contrast, Colombia, Panama, and Peru have ratified all eight.

a broad, positive obligation that requires countries to implement certain labor standards. But this approach raises questions about how intrusive trade agreements should be in areas mainly involving domestic regulation. Moreover, this approach creates a number of practical problems, including how to determine what constitutes a “sustained or recurring course of action or inaction” or how much enforcement is enough.

A simpler approach could be based on Article XX(e) of the General Agreement on Tariffs and Trade, which allows countries to prohibit the import of products made with prison labor. US FTAs incorporate the Article XX exception, and the forced labor language could be expanded to include egregious and trade-related violations of the other core principles. This inclusion would focus attention where it should be in trade agreements:

on practices intended to promote exports or attract foreign investment by illegitimate means. Some are concerned that such a provision would be abused for protectionist purposes. But there is remarkably little evidence of protectionist abuse in existing trade-labor linkages, and safeguards could be designed to avoid it. For example, the current Article XX targets only those exports that are directly implicated in illegitimate labor practices. In addition, it would be important to allow for two separate levels of external review—by the ILO to determine whether labor violations exist in the exporting country and by a dispute settlement panel under the trade agreement to determine whether the actions of the importing party are consistent with the terms of the agreement.

The views expressed in this publication are those of the authors. This publication is part of the overall program of the Institute, as endorsed by its Board of Directors, but does not necessarily reflect the views of individual members of the Board or the Advisory Committee.

APPENDIX B

SHORT AND EXTENDED SUMMARIES OF THE MAY 10, 2007, AGREEMENT

**SHORT SUMMARY
A NEW TRADE POLICY FOR AMERICA**

The policy announced today is a fundamental shift in U.S. trade policy. Pending U.S. free trade agreements (FTAs) will be amended to incorporate key Democratic priorities – priorities that will expand and shape trade in ways that spread the benefits of globalization here and abroad by raising standards.

This policy clears the way for broad, bipartisan congressional support for the Peru and Panama FTAs. Key provisions include:

Core Labor Standards

- A fully enforceable commitment that FTA countries will adopt, maintain and enforce in their laws and practice the five basic international labor standards, as stated in the 1998 International Labor Organization *Declaration on Fundamental Principles and Rights at Work*.¹
- A new, fully enforceable, binding commitment prohibiting FTA countries from lowering labor standards.
- New limitations on “prosecutorial” and “enforcement” discretion – FTA countries cannot defend the failure to enforce laws related to the five basic standards due to resource limitations or decisions to prioritize other enforcement issues.
- Same dispute settlement mechanisms/penalties as other FTA obligations.

Environment

- A fully enforceable commitment that FTA countries adopt, implement and enforce in their laws and practice obligations under seven common major multilateral environmental agreements (MEAs), including CITES and the Montreal Protocol.² Provision to add additional, new common MEAs.
- A new, fully enforceable, binding commitment prohibiting FTA countries from lowering environmental standards.
- Same dispute settlement mechanisms/penalties as other FTA obligations.
- A groundbreaking “conflict of laws” provision – where a covered MEA obligation affects an obligation under an FTA, the FTA cannot be used to undermine the MEA obligation.
- For Peru, a groundbreaking, fully enforceable Annex requiring Peru to take major specific steps to crack down on all illegal logging, and additional action to stop illegal logging of mahogany. Unprecedented provision

¹These principles are: the freedom of association; the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor and a prohibition on the worst forms of child labor; and the elimination of discrimination in respect of employment and occupation.

²The MEAs are: the Convention on International Trade in Endangered Species; the Montreal Protocol on Ozone Depleting Substances; the Convention on Marine Pollution; the Inter-American Tropical Tuna Convention; the Ramsar Convention on the Wetlands; the International Convention for the Regulation of Whaling; and the Convention on Conservation of Antarctic Marine Living Resources.

allowing the United States to investigate illegal logging of mahogany in-country, and stop questionable shipments at the border.

Generic Medicines

- Change the "data exclusivity" provision (period in which a generic manufacturer may not use clinical test data of an innovative drug manufacturer) to allow generics to enter the market more quickly than under the old provision (by having "concurrent period" of data exclusivity).
- Include exception in FTAs that the "data exclusivity" provision does not preclude FTA countries from taking measures to protect public health and from utilizing the WTO "health solution."
- Eliminate requirement that a drug regulatory agency withhold approval of a generic until it can certify that no patent would be violated if the generic were marketed; strengthen and expedite judicial processes in countries to ensure patent rights of innovative drug companies are respected.
- Eliminate requirement that an FTA country extend the term of a patent on a pharmaceutical product for delays in the patent and regulatory approval process. Instead, ensure expeditious patent and regulatory approval process.

Government Procurement

- Groundbreaking provision that allows U.S. Federal and State governments to condition government contracts on contractors adhering to the five basic labor standards and acceptable conditions of work and wages.

Port Security

- Clarify that the U.S. has full, non-challengeable authority to prevent foreign companies from operating U.S. ports, based on national security concerns.

Investment

- Explicitly state that foreign investors in the United States will not be accorded greater substantive rights with respect to investment protections than U.S. investors in the United States.

SWAT

- Congress and the Administration will develop and implement the Strategic Worker Assistance and Training (SWAT) Initiative to promote education and training, as well as portable health and pension benefits. The concrete and comprehensive program will: include public-private partnerships to educate youth; update and upgrade workers' skills on the job; stimulate science education and research; provide meaningful health and pension benefits and income support; as well as going beyond the current TAA system to provide meaningful support, training and revitalization programs for entire communities hurt by the effects of trade and technology.

EXTENDED SUMMARY

5/10/07

I. Provisions on Basic Labor Standards**A. Enforceable Obligation as to ILO Standards**

Countries would be required to adopt, maintain and enforce in their own laws and in practice the five basic internationally-recognized labor standards, as stated in the 1998 ILO Declaration:

1. Freedom of association;
2. The effective recognition of the right to collective bargaining;
3. The elimination of all forms of forced or compulsory labor;
4. The effective abolition of child labor and a prohibition on the worst forms of child labor; and
5. The elimination of discrimination in respect of employment and occupation.

The obligations of this agreement, as they relate to the ILO, refer only to the 1998 ILO *Declaration on the Fundamental Principles and Rights at Work*.

B. Enforcement of Law

A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter. Each Party retains the right to the reasonable exercise of discretion and to *bona fide* decisions with regard to the allocation of resources between labor enforcement activities among the internationally recognized labor rights, provided the exercise of such discretion and such decisions are not inconsistent with the obligations of this Chapter.

There would be a requirement to show that nonenforcement of law occurred “in a manner affecting trade or investment between the parties” and “through a sustained or recurring course of action or inaction.”

C. Enforceable Non-Derogation Provision

Parties cannot derogate from this obligation in a manner affecting trade or investment.

D. Full Parity in Dispute Settlement

Labor obligations subject to same dispute settlement, same enforcement mechanisms (remedies), and same criteria for selection of enforcement mechanisms (remedies) as all other FTA obligations.

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II. Provisions on Environment and Global Warming

A. Enforcement of Multilateral Environmental Agreements¹

1. The Parties must adopt, implement, and effectively enforce laws, regulations and all other measures to fulfill the Parties' obligations under each of the following MEAs, to which they are both parties, subject to existing and future reservations to the MEAs:

Convention on International Trade in Endangered Species
 Montreal Protocol on Ozone Depleting Substances
 Convention on Marine Pollution
 Inter-American Tropical Tuna Convention
 Ramsar Convention on the Wetlands
 International Convention for the Regulation of Whaling
 Convention on Conservation of Antarctic Marine Living Resources

The MEAs listed include current and future mutually-agreed protocols, amendments, annexes, or adjustments to the listed MEAs to which the Parties have agreed.

2. The obligation in (1) is subject to the FTA dispute settlement chapter, and there shall be an inconsistency if the failure to uphold the obligation affects trade or investment.

3. The Parties may agree in writing to modify the list in (1) to include any other environmental or conservation agreement to which they are full parties.

4. In the event of any inconsistency between the FTA and the obligations set out in any MEA listed in (1) a Party shall seek to balance obligations under both agreements, but this shall not preclude a Party from taking a particular measure to comply with its MEA obligations, as long as the measure's primary purpose is not as a disguised restriction on trade. For greater certainty, this is without prejudice to non-covered MEAs.

B. Derogation

1. (a) The FTA Parties cannot waive or otherwise derogate from, or offer to waive or otherwise derogate from, their respective environmental laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment.

¹ This obligation is in addition to the existing obligations to effectively enforce environmental laws, as defined in each agreement (*see e.g.*, Peru Art. 18.2).

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- (b) A Party is in compliance with its obligations under (a) where such waiver or derogation is allowed under its environmental laws and such waiver or derogation is not inconsistent with a covered MEA.
2. Sub-paragraph (b) does not apply to waivers or derogations with respect to Peru's forest sector laws.

C. Dispute Settlement

1. All FTA environmental obligations will be subject to same dispute settlement, same enforcement mechanisms (remedies), and same criteria for selection of enforcement mechanisms (remedies) as all other FTA obligations.
2. In applying the MEA obligation, dispute settlement panels convened under the FTA shall:
- (a) follow (*i.e.*, defer to) all interpretative guidance under the relevant MEA; and
 - (b) given all interpretative guidance, where an MEA obligation is open to more than one permissible interpretation, and an FTA Party has chosen one of those permissible interpretations, accept that interpretation as being in conformity with the MEA obligation. This specific guidance shall prevail over any other guidance.
3. FTA to establish mechanism for the FTA's Environmental Affairs Council (EAC) to coordinate interaction with the relevant MEA body on questions arising with respect to MEA obligations. The mechanism will establish procedures for the following:
- (a) Where the EAC or an FTA panel considers matters related to adoption, implementation, or effective enforcement of laws, regulations and other measures necessary to fulfill obligations under a covered MEA, the EAC or FTA panel shall consult fully with the relevant MEA body(s).
 - (b) In such consultations, the EAC or FTA panel shall accept views of the relevant MEA body(s), including whether laws, regulations and other measures by an FTA Party are in accordance with the MEA.

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4. FTA Parties shall endeavor to first address issues related to MEA obligations through mechanisms established in the relevant MEA. This shall not preclude an FTA Party from raising any matter related to MEA obligations through the EAC or from raising an alleged inconsistency with the obligation to adopt, implement and effectively enforce laws, regulations and all other measures to fulfill a covered MEA obligation, under the dispute settlement chapter, where recourse to the MEA mechanism could result in unreasonable delay, including where the MEA mechanism requires consensus.

D. Logging (Peru)

1. USTR to conclude an Annex to the FTA covering forest sector governance and operations in Peru. Annex shall:

- (a) Provide for coordination of capacity building activities in Peru under the Environmental Cooperation Agreement (ECA) [this can also be through an MOU];
- (b) Provide for cooperation between the respective customs authorities and law enforcement authorities in regard to enforcement of forest sector laws;
- © (I) Provide for steps strengthening Peru's forest sector laws, regulations and other measures in the areas of: (I) forestry sector governance; (II) concession management; (III) related trade activities; and (IV) regulation of harvesting, transport and export of CITES listed tree species;
- (ii) Provide for a reasonable transition for Peru to implement the listed steps; and
- (iii) Ensure that implementation of outlined steps is actionable and fully enforceable under the FTA dispute settlement chapter.
- (d) Establish a fully enforceable obligation for Peru to conduct periodic audits of producers/exporters of CITES listed tree species (audits may be conducted by an agreed third party);
- (e) Establish a fully enforceable right for the USG to request special audits and for verification procedures by U.S. Customs and the Fish and Wildlife Service for CITES listed tree species (audits may be conducted by an agreed third party);
- (f) (i) Provide for restriction on U.S. imports of CITES tree listed species where Peruvian or U.S. verification shows that claim that the CITES listed species was legally harvested is insufficient or the producer/exporter provided incorrect information.
- (ii) Provide for restriction on U.S. imports of CITES tree listed species from a given producer/exporter where request for verification denied or where producer/exporter knowingly provided false information.

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This provision is not intended to limit any existing or future authority under U.S. law for denying entry of shipments of CITES listed species or taking any other actions to enforce CITES.

2. Annex shall be developed by USTR, in consultation with State, the U.S. Forest Service, Fish and Wildlife, and Customs, and WM and Finance.
3. Specify that Peru forest sector laws are covered by definition of environmental laws.
4. Implementing legislation will provide for periodic Administration reports to Congress on relevant activities under the MOU, Annex, and ECA. SAA to list agencies that will be involved in developing the reports. The U.S. Forest Service, Fish and Wildlife Service, Customs, State, USTR and other appropriate agencies will participate in development of the reports.
5. Implementing legislation or other legislative vehicle (considered prior to the Peru implementing bill) to authorize and appropriate funds necessary for Customs and Fish and Wildlife to carry out responsibilities under the Annex, for capacity building money for Peru to implement obligations under the Annex, and to carry out activities of the ECA.
6. Make other changes to FTA text to make Annex workable. *E.g.*,
 - (a) Amend Peru Art. 18.2.3, which states that “nothing in this chapter shall be construed to empower a Party’s authorities to undertake environmental law enforcement activities in the territory of the other Party.” That provision should not apply to the verification procedures outlined above.
 - (b) Clarify that the Annex does not substitute for or amend Peru’s obligations under CITES.

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III. Provisions on Patents/IPR and Access to Medicines**A. Data Exclusivity**

As a general rule, where a marketing approval application includes undisclosed test or other data, the FTA would provide for five years of data exclusivity for new chemical entities, taking account of the nature of the data and the person's efforts and expenditures in producing them. However, if a Party relies on marketing approval granted by the United States FDA, and if that Party grants approval within six months of an application for marketing approval by a person that produced the data, the five-year period begins when the drug was first approved in the United States (a so-called "concurrent period").

B. Patent Extensions

FTAs currently provide that a Party "shall" extend the term of a patent to compensate for any unreasonable delays in the patent or marketing approval process, provided the delay is not attributable to the applicant. "Shall" would be changed to "may" with respect to patents on pharmaceutical products.

FTAs would also provide that a Party shall make best efforts to process patent and marketing approval applications expeditiously with a view to avoiding unreasonable delays. The United States and the trading partner would agree to cooperate and provide assistance to one another to achieve these objectives.

C. Linking Drug Approval to Patent Status

Amend FTA so that there is no "linkage" requirement between drug regulatory agencies and patent issues: in particular, no requirement that the drug regulatory agency withhold approval of a generic until it can certify that no patent would be violated if the generic were marketed.

However, a Party would be required to provide procedures and remedies, such as judicial or administrative proceedings and preliminary injunctions (or equivalently effective provisional measures), for adjudicating expeditiously any patent infringement or validity dispute that arises with respect to a product for which marketing approval is sought. There will be a transparent system to give patent holders sufficient time and opportunity to effectively enforce their rights (e.g., immediate notice sufficient to alert the

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patent holder of submission of applications for marketing approval, such as the approval authority posting any application for marketing approval on its website, so that patent holders have opportunity to discover products that may infringe their patents), and to seek, prior to the grant of marketing approval, available remedies for an infringing product.

A Party could choose to implement the “procedures and remedies” obligation described above through a linkage system, provided that the Party makes available (1) an expeditious administrative or judicial procedure to challenge the validity or applicability of the patent (so as to break the “link” in appropriate cases), and (2) effective rewards for successfully challenging a patent. (U.S. law already meets this test.)

D. Side Letter on Public Health

The “Side Letter” currently included as part of U.S. FTAs should be made a part of the text of the FTA. The Parties (1) would affirm their commitment to the Doha Declaration, (2) clarify that the Chapter does not and should not prevent the Parties from taking measures to protect public health or from utilizing the TRIPS/health solution, and (3) include an exception to the data exclusivity obligation for measures to protect public health in accordance with the Doha Declaration and subsequent protocols for its implementation.

E. Amendments to Chapter based on Economic Development

The FTA could include a provision calling for the periodic review of the implementation and operation of the IPR Chapter, and giving the Parties an opportunity to undertake further negotiations. The Parties could agree to consider, among other things, whether any improvement in the level of economic development in the territory of the other Party would support amendments to the chapter.

IV. Government Procurement

Clarify that “technical specifications” requiring contractors to comply with generally applicable laws regarding fundamental principles and rights at work and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, in the country in which the good is produced or the service is performed, do not create an “unnecessary obstacle to trade.”

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V. Port Security

Clarify in services schedule that the specific commitment is subject to non-challengeable application of “essential security” exception to the FTA.

VI. Provision on Investment

Include provision in Preamble to recognize that foreign investors in the United States will not be accorded greater substantive rights with respect to investment protections than United States investors in the United States.

VII. Strategic Worker Assistance and Training (SWAT) Initiative

To promote education, training and portable health and pension benefits, design and implement concrete and comprehensive program, including public-private partnerships to educate youth, update and upgrade workers' skills on the job, stimulate science education and research, provide meaningful health and pension benefits and income support, go beyond the current TAA system to provide meaningful support, training and revitalization programs for entire communities hurt by the effects of trade and technology.

Note: there may also be private sector initiatives with respect to globalization and competitiveness.