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NAFTA and the FTAA: Regional Alternatives to Multilateralism

By
Laura Altieri*

Free markets and open trade are the best weapons against poverty, disease, and tyranny. And democracy is the nonnegotiable demand of human dignity. The future of this hemisphere depends on the strength of three commitments: democracy, security, and market-based development. These commitments are inseparable, and none will be achieved by half-measures.¹

—President George W. Bush

I believe strongly in trade. I believe not only is trade in my Nation's interests; I think trade is in the interest of those nations who struggle with poverty, that desire a route out of poverty.²

—President George W. Bush

As the above quotes indicate, the Bush administration places great emphasis on trade, viewing it not only as a means to economic strength, but also as a way to promote national security. While past presidents have also touted the benefits of trade, Bush is in a unique position to make trade liberalization a reality. First, Bush was recently granted Trade Promotion Authority³ (TPA) or "fast track." With TPA, presidents can negotiate trade deals that Congress must then ratify or reject, but which they cannot amend. TPA makes enacting trade agreements much easier. Second, after the September 11, 2001 terrorist attacks, Bush enjoys tremendous power over all matters relating to foreign policy. By linking trade to U.S. security, Bush has effectively silenced Congressional dissent on the issue by making it much more difficult for Congress to reject such deals.

Trade liberalization, therefore, should be within Bush's reach. After all, Bush's predecessor, Bill Clinton, led a multi-year WTO Round and helped bring about two large multilateral agreements without TPA and despite facing the

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1. Remarks to the World Affairs Councils of America Conference, 38 WEEKLY COMP. PRES. DOC. 77, 78 (Jan. 16, 2002).

2. Remarks on Trade Promotion Authority Legislation and Extension of the Andean Trade Preference Act, 38 WEEKLY COMP. PRES. DOC. 563, 563 (Apr. 4, 2002) [hereinafter Remarks on Trade Promotion Authority].

3. Fast-track gives the president the authority to negotiate a trade agreement as he sees fit, without standard Congressional oversight. The agreement is subject to an up or down vote in each chamber, with no amendments allowed.

prickly barbs of organized labor and intra-party dissent. As the leader of the pro-trade Republican Party, and with the full weight and bargaining power of TPA behind him, Bush could have sponsored an accelerated trade round within the World Trade Organization (WTO), for example, or unilaterally lowered tariffs. But Bush has not acted on his free trade rhetoric. Instead, he has advocated expanding trade primarily to a select group of countries bound to the United States by geography and politics rather than by existing trade flows.⁴ More importantly, his proposed agreements include none of the primarily-Muslim countries his "weapon of trade" would be hoped to affect.

While the disconnect between Bush's rhetoric and actions on trade is surprising, one could perhaps dismiss it as simply a case of the president's reach exceeding his grasp. What is much harder to explain, however, is why Bush is undercutting existing bilateral and regional agreements. Although Bush contends that trade "is in the interest of those nations who struggle with poverty,"⁵ he signed into law the largest U.S. agricultural subsidies this nation has ever seen. Like tariffs, these subsidies raise barriers to foreign agricultural producers and the developing nations for which agriculture is the primary export. If the administration believes its rhetoric that trade brings freedom and defeats terrorists, it is hard to see how undercutting that trade does not necessarily also undercut its battle on terror. This article examines why a president might pursue a regional rather than multilateral trade strategy, the domestic fight over TPA, Bush's association of terrorism with the inability to trade, and the administration's progress toward a Free Trade Area of the Americas ("FTAA"). In sum, it addresses how the Bush administration has talked the talk of trade liberalization, without walking the walk.

I.

THE ADVANTAGES AND DISADVANTAGES OF MULTILATERAL VERSUS REGIONAL AGREEMENTS

The United States does not have to approach its trade relations the way a smaller country does.⁶ When the United States negotiates a trade deal, it is the most powerful negotiator at the table. Almost every country seeks access to the U.S. market and most would be willing to accept it on uneven terms. Bilateral and regional agreements are attractive to the United States because it can negotiate them much more quickly than an entire multilateral trade round. By first seeking individual states with which to negotiate a trade agreement, and then allowing neighboring states to join on condition that they accept the terms of the existing agreement, the United States places itself at the center of a trade bloc.

4. The U.S.'s largest hemispheric trade partners, Mexico and Canada, have been in a free trade area with it for several years.

5. Remarks on Trade Promotion Authority, *supra* note 2, at 563.

6. See generally JOANNE GOWA, *Allies, Adversaries, and International Trade* (1994) (suggesting that the play of great power politics in trade can succeed only if a state can affect its terms of trade, that is, only if it has some monopoly or monopsony power in world markets).

In essence, the terms of the regional bloc are shaped in the negotiations between the first entrants: the United States and a smaller, weaker country.

The fiercest opposition to American desires comes from the European Union.⁷ If the United States is one party to a multilateral agreement, the EU—with lucrative markets of its own—can serve as a counterbalance and prevent the United States from exacting the preferential terms it wants.⁸ When the United States negotiates a multilateral agreement, it has to contend with and concede some points to the EU.⁹ When the United States negotiates regional Western Hemisphere trade agreements, on the other hand, the EU is largely a non-factor. It is not a coincidence that U.S. regional talks gain steam as the EU does as talks between the EU and target states heat up.¹⁰

A. Multilateral Trade

While multilateral trade—actual “free” trade—enables the greatest total benefit to the greatest number of people in each of the states trading,¹¹ multilateral agreements can be politically unfeasible. Politics are local and most political decision makers pursue short term benefits. Accordingly, for the United States to agree to any regional or multilateral trade agreement, Congress and the president have to see that their political interests, meaning their constituents’ interests, are served by the agreement.¹² To convince voters that a trade agreement is good news, a politician must point to the salient economic benefits his constituents stand to reap from it.¹³ Multilateral trade benefits a wide swath of citizens, but pointing out noticeable benefits to any single voting block may not be easy.¹⁴ As a result, trade policy tends to reflect complex maneuvers among

7. See EUROPEAN UNION, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT (2001); see also Gary Hufbauer & Frederic Neumann, *Conflict and Cooperation: The State of US-EU Trade and Investment Relations*, 2002 SAIS WORKING PAPER SERIES, at 5-6, at <http://www.sais-jhu.edu/pubs/workingpapers/series> (last visited Apr. 1, 2003).

8. See Hufbauer & Neumann, *supra* note 7, at 6 (noting that the United States and EU have commercial conflicts in three primary categories: “market access, industrial policy and ideology”; negotiating the flow of imports and exports are issues of market access, but trade agreements also reach the other two areas).

9. See John Jackson, *Role and Effectiveness of WTO Dispute Settlement Mechanism*, in BROOKINGS TRADE FORUM: 2000 (Susan M. Collins & Dani Rodrik eds., 2001), especially at 191-194, available at <http://brookings.nap.edu/books/0815715730/html/>.

10. The U.S. did not join any FTA until 1985 (with Israel), when the Europeans were voting on a unified market.

11. See generally PAUL KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* (2002); see also JACOB VINER, *STUDIES IN THE THEORY OF INTERNATIONAL TRADE* 527-593 (1965); Cf. Alan Deardorff & Robert Stern, *Current Issues in U.S. Trade Policies: An Overview*, in U.S. TRADE POLICIES IN A CHANGING WORLD 37-38 (Robert Stern ed., 1987) (discussing optimal tariffs).

12. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INTL. ORG. 427-460 (1988).

13. See Remarks on Signing the Trade Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1317 (Aug. 6, 2002). [hereinafter Trade Acts Remarks]. See also Remarks in a Telephone Conversation with Senate Leaders, 38 WEEKLY COMP. PRES. DOC. 1295, 1296 (Aug. 1, 2002) (President Bush stating that the bill will benefit “workers and farmers and ranchers.”).

14. See Joanne Gowa, *Public Goods and Political Institutions: Trade and Monetary Policy Processes in the United States*, in THE STATE AND AMERICAN FOREIGN ECONOMIC POLICY 15-32 (John Ikenberry et al. eds., 1988).

interest groups.¹⁵ To expend political capital in support of a multilateral trade deal, a politician needs to have either long-term vision or enough constituents that no single group that opposes the agreement can force his hand by threatening his political base. Representing limited geographic areas, senators and especially, representatives are unlikely to be so free.¹⁶ The president, however, is unique; because his constituents are disbursed across the country and across industries,¹⁷ he cannot be voted out for having displeased any single interest group.

Multilateralism is based on reciprocity and non-discrimination; it means working together to create mutually beneficial arrangements through which each country concedes something, such as a tariff barrier, in order to create a more open system in which citizens of every state gain by having access to products imported and exported without tariffs or incentive-changing subsidies.¹⁸ A multilateral agreement, such as the Uruguay Round of the WTO, leads to more open trade in goods, services and technology transfers by reducing tariffs, as well as by lowering non-tariff barriers such as quotas and domestic content requirements. The fundamental aspect of this opening is that it is available to all.¹⁹ For example, the United States abandons its wool quota not vis-à-vis one state, but vis-à-vis all WTO wool-producing states. As a result, multilateral opening is not easily targeted toward any specific industry or interest group. As a political tool, therefore, it is a very blunt instrument; any tariff reduction benefits all producers of a good equally and producers compete by being the lowest cost, or highest quality, supplier. Multilateralism thus creates trade, but does not direct it.

B. The Regional Option

Regionalism is quite different. Whereas multilateralism creates trade, regionalism diverts and restricts trade.²⁰ In a tariff-free world, low cost goods flow freely to areas of demand. In contrast, a regional trade arrangement allows free movement of goods only within the region. Goods produced more cheaply outside the area cannot have access to buyers on the inside. Shielded in this way

15. "American and European trade officials essentially act as brokers between member states, legislative bodies, and interest groups. Rarely do they have the luxury of conducting transatlantic negotiations with a free hand to decide issues on their legal and economic merits." Hufbauer & Neumann, *supra* note 7, at 6.

16. In one district a single industry can be so concentrated that for a Congressman to represent the district, he has to represent the interests of that industry, which may be counter to freer trade.

17. See Gowa, *supra* note 14.

18. See WORLD TRADE AFTER THE URUGUAY ROUND 19 (Harald Sander & Andras Inotai eds., 1996).

19. Economists Brown, Deardorff and Stern estimate the global benefit of a world of barrier-free trade could be \$600 billion. Marc Gersen, *Anti-Free-Traders Have Globalization All Wrong*, Hous. Chron., Nov 5, 2001, at 27.

20. Jagdish Bhagwati & Arvind Panagariya, *Preferential Trading Areas*, in THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS, at 5-9 (Jadish Bhagwati & Arvind Panagariya eds., 1996); see also Richard Baldwin, *Regulatory Protectionism, Developing Nations and a Two-Tier World Trading System*, in BROOKINGS TRADE FORUM 2000 (suggesting the WTO fight the creation of two-tier systems where rich countries create preferential trade agreements they can dominate).

from lower-cost competition, higher-cost producers within the area can survive and even thrive.²¹ A recent study suggests that this type of trade diversion has plagued Mexico since its entry into NAFTA.²² From 1993 to 1996, U.S. exports to Mexico increased by 45 percent, or by about \$18 billion.²³ This means Mexicans spent \$18 billion on U.S.-produced goods that they used to buy from other, primarily Central American, countries. Based on the fact that goods from its former trading partners were often cheaper, one economist calculated that this trade distortion cost Mexico \$3 billion annually.²⁴ In an open multilateral system, on the other hand, Mexico would buy from the lowest cost producer, not be artificially induced to buy from higher-cost producers in the United States and Canada.²⁵

Despite the advantages of multilateral trade, the Bush administration has said it will pursue regional openings.²⁶ But regional agreements are not a close substitute for multilateral opening. Before the WTO, regional agreements were necessary steps on the way to paving a multilateral free trade round. Now, however, such agreements represent a step backward.²⁷ Although regional trade may satiate some powerful industries' interests by opening developing countries' labor and resource markets, consumers do not feel the benefit from trade until competition exists intra-industry and between the United States and other developed countries. In spite of this, the administration has devoted few resources to a new round of WTO talks, while avidly pursuing a Free Trade Area of the Americas.²⁸ Furthermore, while the United States may be able to credibly engage in simultaneous regional, bilateral and WTO negotiations, small countries often lack the expertise and resources to engage in three sets of talks. As a result, countries contending for FTAA accession or a bilateral agreement may be

21. Another considerable trade block is created by the rules of origin that accompany trade areas. See Paul Wonnacott, *Beyond NAFTA—The Design of a Free Trade Agreement of the Americas*, in ECONOMICS, *supra* note 20, at 79; see also OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, NAFTA WORKS FOR AMERICA (5 Year Report—July 1999), at <http://www.ustr.gov/naftareport/intro.htm> ("NAFTA countries now account for over one-sixth of [U.S.] textile and apparel imports. Before NAFTA, [the U.S.] relied on Canada and Mexico for just one-twelfth of [its] imports.").

22. See JAGDISH BHAGWATI, WIND OF 100 DAYS 230-31 (2000).

23. *Id.*

24. *Id.*

25. Similarly, in 1998 the World Bank released data showing how NAFTA had harmed Caribbean countries excluded from the area, saying "Mexico could grab as much as one-third of the Caribbean's \$12.5 billion in exports to the United States." See Peter Passell, *Trade Pacts by Region; Not the Elixir as Advertised*, N.Y. TIMES, Feb. 4, 1997, at D1.

26. See Trade Act Remarks, *supra* note 13, at 1318 (stating that "[t]he United States will negotiate a Free Trade Area of the Americas and pursue regional agreements").

27. See Bhagwati & Panagariya, *supra* note 20, at xix. Even Renato Ruggiero, Director General of the WTO in the 1990s, endorses the idea that the WTO adopt a target date for PTAs to be completely phased out. Some economists argue that regional trade regimes represent a coordination failure, in which the anticipation that the world will break into regional trade blocs induces sunk private-sector investments that then lead to a demand for regionalism. See JOHN HARPER, AMERICA AND THE RECONSTRUCTION OF ITALY, 1945-48 xix (1986).

28. See *All in the familia*, THE ECONOMIST, Apr. 21, 2001, available at 2001 WL 7318628.

forced to choose which path to pursue, leaving the comprehensive negotiations at the WTO shortchanged.²⁹

C. *Who Benefits From a Free Trade Area?*³⁰

Although multilateral free trade benefits the United States as a whole, particular constituencies may prefer more limited bilateral or regional agreements. In particular, domestic producers who potentially face increased competition from their lower-cost foreign counterparts may oppose opening U.S. markets, preferring instead to maintain protective tariffs. For a denim producer seeking to locate a plant cheaply, for example, NAFTA provides the best of all possible worlds. The producer has access to cheaper Mexican labor, pays no tariff on the clothes' re-entry into the United States, and is shielded by tariffs from competitive countries outside of NAFTA.³¹ Multilateralism, on the other hand, would remove all such tariffs and expose the denim producer to competition from potentially lower-cost producers. Similarly for U.S. oil and television companies, an arrangement opening the previously closed Mexican oil and media markets and placing Spanish companies behind a tariff barrier is a substantial benefit.

As is clear, multilateral free trade creates winners and losers. While some industries gain access to lucrative markets, others fail to survive increased competition in their home markets. After a round of multilateral trade opening, the many winners—consumers and producers who can buy goods and raw material more cheaply—are generally very diffuse, and thus do not form effective lobbies. In contrast, producers often feel the effects of trade barriers and agreements more acutely; a single producer who supplies the U.S. market feels a much more concentrated hit when it has to open up to competition under a multilateral treaty. An example illustrates the difference. If all U.S. consumers pay \$1.05 for a pound of sugar because the United States has a trade barrier blocking \$1.00 pound sugar from Tobago, U.S. consumers probably will not notice and thus not complain, even though they are overpaying by \$.05 a pound. The domestic sugar producers gaining \$1 million for every 20 million pounds of sugar sold, however, will lobby their Congressmen vigorously to prevent open markets. As a result of such disbursed benefits and concentrated harm, a country generally negotiates treaties that preserve its existing income distribution, as any change to it causes the “losers” to object.³²

29. See Daniel Altman, *Global Trade Looking Glass*, N.Y. TIMES, Nov. 9, 2001, at C1 (“[I]t could also deflect attention from the overall effort to improve the living standards of the poorest countries by bringing them more fully into the global trading system.”).

30. Bhagwati and Panagariya suggest three types of “agents” are likely to support free trade areas. First, governments of large countries look regionally for trade partners because it is politically easier to say “our market is large enough” and avoid the unpopular aspects of multilateral trade negotiations. Second, exporting firms seek to expand their trade area to countries with industries that will use their goods, while opposing entrance to the area of countries whose firms export products similar to theirs. Third, a nation outside the initial PTA may seek to join the area if it fears trade diversion. Bhagwati & Panagariya, *ECONOMICS*, *supra* note 20, at 48-49.

31. Open multilateralism would mean labor, the third pillar of the economic triangle with free-flowing capital and goods, would flow to the United States as well.

32. See MAX CORDEN, *TRADE POLICY AND ECONOMIC WELFARE* 107-08 (1974).

Furthermore, multilateral opening is more painful to U.S. industries because it involves direct competition from competitive advanced countries that produce many of the same goods and services as U.S. companies. Bilateral agreements, on the other hand, involve mostly developing countries with different industries or raw materials. This means that opening bilaterally is less painful because U.S. industries run into less direct competition. Fewer industries will thus lobby against a particular bilateral treaty because fewer industries will be threatened by lower-cost competition; any one country being considered for a trade agreement only threatens producers of the same goods in the United States that are produced in that country. When the "losers" are limited to one or two industries, those affected producers can be compensated or the affected industry can be exempted from the trade agreement, such as the citrus and sugar industries in NAFTA.³³

With regional agreements, the United States chooses specific countries among whom trade is barrier-free. The United States can choose on economic or political grounds. Choosing on political grounds creates broad economic losers (domestic and foreign citizens not paying the lowest prices for goods) as well as political resentment. "Most favored nation" status originated as an effort to bury such preferential treatment, as it was understood to create losers as well as winners. "[B]ecause of the bilateral special deals that inevitably made other nations unhappy, we came around to most-favored nation treatment and GATT negotiations."³⁴

By using trade agreements to reward political friends and punish slow reforming countries, Bush is taking U.S. trade policy in a direction opposite from the advances pursued by the WTO. The USTR said the United States could cherry-pick countries on the right road: "We will reward good performers, and while we want to bring on others in the region, we won't wait forever."³⁵ The United States plans to put itself in the center of a trade area and to dominate the group. As USTR Zoellick explained in October, "Our idea is to create a web of mutually reinforcing trade agreements in which success in one can be translated into progress elsewhere. Working on multiple fronts enables [the United States] to create a competition in liberalization, with the U.S. as a *nucleus* for the network."³⁶

33. Mary Anastasia O'Grady, *Clinton's Sugar Daddy Games Now Threaten NAFTA's Future*, WALL ST. J., Dec. 20, 2002, available at 2002 WL-WSJ 103129311.

34. Keith Bradsher, *Quandary on Trade*, N.Y. TIMES, May 21, 2002, at W1 (quoting William Cline, a senior economist at the Institute for International Economics in Washington).

35. Quoted in *All in the familia*, *supra* note 28.

36. Robert Zoellick, *Globalization, Trade, and Economic Security*, Remarks at the National Press Club, Oct. 1, 2002 (emphasis added), at http://www.ustr.gov/speech-test/zoellick/zoellick_26-npc.PDF.

II.

THE DOMESTIC FIGHT OVER TRADE

A. *Whose interests count?*

It is easy for the administration, or a critic, to say that the United States acts multilaterally only when it serves U.S. interests. But what are U.S. interests? For example, on the domestic front, the steel lobby might want high steel tariffs, whereas the car industry, which uses steel as an input, would not. Carl Lindner, CEO of Chiquita, sought special treatment for his Central American bananas,³⁷ but the average U.S. consumer would be better off without such protection. In distinguishing among these competing interests, a politician hears the cries (and donations) of a concentrated industry, but is unlikely to hear the diffused complaints from consumers who pay an extra \$.10 per banana bunch. Negotiating a multilateral agreement is more difficult because more industries are affected and because those industries lobby more vociferously than do disbursed consumers. The role of the president is to distinguish immediate versus long term interests, as well as wide versus interest-group specific benefits.

Faced with the political difficulty of enacting multilateral agreements, why should the United States pursue such agreements if it can create more selective agreements with tailored benefits? The answer is that only a long-term vision that global free trade is good for the greatest number of Americans would support such a strategy.³⁸ Some political scientists suggest that countries demonstrate this vision, or “invest in future gains,” primarily through the creation of international (multilateral) institutions.³⁹ By creating such institutions, states “are in effect using power assets to secure agreements that obligate states to act in certain ways in the years ahead.”⁴⁰ The institutions and the agreement to act multilaterally bias state policies in certain directions and constrain state actions, creating more predictability about what states will do in the future because they are bound to take certain actions. For example, a country that agrees to participate in the WTO agrees to submit trade disputes to the WTO dispute body and not to unilaterally increase tariffs or block imports.⁴¹

B. *Trade-Making Power: Congress versus the Executive*

In recent years, Congress and the president have fought over Trade Promotion Authority (“fast track”) authority, with Congress refusing that power as recently as 1995. Despite its reluctance to cede trade making authority to the executive branch, Congress granted President Bush fast track authority to negotiate trade deals in 2001. Although this decision was based largely on Con-

37. The banana dispute is an example of how desires of the United States and EU might diverge. See Hufbauer & Neumann, *supra* note 7, at 7.

38. See John Ikenberry, *Distant Gains: When Do States Make Choices for the Long Term?*, COLUMBIA WORKING PAPERS (1997), at <http://www.ciaonet.org/wps/ikg01/>.

39. *Id.*

40. *Id.*

41. See EUROPEAN UNION, EU REPORT ON U.S. TRADE BARRIERS (2002), at http://europa.eu.int/comm/trade/bilateral/usa/pr201102_en.htm (last visited Apr. 1, 2003).

gress's reluctance to withhold anything from President Bush after the September 11 terrorist attacks, there are sound political reasons for vesting trade authority in the executive rather than legislative branch.

Presidents tend to support free trade more than congressmen do, as presidents do not have concentrated constituencies demanding protection of their local industry.⁴² They can look to the economic benefits that accrue to the entire nation and find that freer trade creates a general net gain. Presidents do not get voted out if one industry suffers, but a congressman who allows his district's denim plant to close down will have to pay for casting a vote against protection.

In many ways, Bush has kept to the path of presidents before him. Since the repeal of the Smoot-Hawley tariffs in 1934, Congress has gradually ceded the politically tricky duty of making trade policy to the executive branch precisely because the President is in a role to act multilaterally, to act for the greater good, and in this way can act differently from a congressman, who has a mandate to vote only for the well being of the limited number of people in his district.⁴³ Understandably, Congress votes for the most obvious domestic benefits. It is the president's job not to fall into this same trap. Trade Promotion Authority,⁴⁴ or "fast track" authority, is designed to remove Congress from the politically unpopular aspects of trade liberalization.⁴⁵ With trade-making power no longer impeded by local constituencies, fast track allows (or is supposed to allow) the president to act in a way that benefits the entire United States over the long term.

Seeking protection from political fallout, Congress itself sought to remove trade protection decisions from its own purview, putting them under the control of administrative and statutory remedies.⁴⁶ Fast-track is designed to remove the impediment that pork-barrel politics can pose to trade, by giving the president almost total power to negotiate trade agreements.⁴⁷ Fast-track takes away Congressional power to act, or demand rewards for votes, and gives the president the power to make trade agreements. The president is in a better position to act in the long run interests of the country and to consider the benefits of a stable international system.⁴⁸

42. Michael Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INTL ORG. 669, 672 (1999), available at <http://www.people.fas.harvard.edu/%7Ehiscox/researchpage.html>.

43. *Id.*

44. "The law authorizes special trade promotion authority, formerly known as fast-track procedures, for legislation to implement trade agreements entered into before July 1, 2005. Once such legislation is introduced, Congress has 90 days to complete work; the bill is subject to up or down votes in each chamber with no amendments. Trade promotion authority may be extended to cover agreements entered into before July 1, 2007, if the president requests it and neither chamber adopts a resolution of disapproval before June 1, 2005." *See Provisions of the Trade Bill*, CQ WEEKLY, Aug. 10, 2002.

45. *See* Hiscox, *supra* note 42, at 673.

46. *Id.*

47. *See, e.g.,* Karen Masterson, *Budget covers \$20 billion in pork*, Hous. CHRON., Feb. 20, 2003, at 19.

48. For instance, there is evidence that congressmen in mostly unskilled districts, whose constituents would be in competition with child labor, did not vote for the ban on child labor. This

Initially, this meant establishing automatic triggers to determine when a case could be sought, as well as relying on escape clause provisions. After the Trade Act of 1964, it meant periodically surrendering to the executive the power to set trade treaties through fast track.⁴⁹ This served to divert the pressure from congressmen; “rather than trying to arbitrate the many trade claims, legislators could point to ‘the rules’ under which firms and workers were entitled to relief.”⁵⁰ The removal of trade protection functions from Congress has a side effect of limiting societal access to the decision-making channels, as they have far less of a chance to make themselves heard by the president than they do by their own representatives. On the other hand, it allows the president to make long-term calculations for the country and the world trading order’s best interests.

Past U.S. presidents recognized the opportunity and responsibility inherent in the executive’s power to make trade agreements. Ronald Reagan, George H.W. Bush, and Bill Clinton all sought free trade areas and open financial markets. They too settled for smaller regional agreements, but fewer such agreements that affected less trade. This pattern can be traced to 1982, when the Reagan administration, frustrated by Europe’s resistance to a broad GATT round, reversed traditional U.S. opposition to regional trade agreements and began pursuing such trade treaties with any willing partner.⁵¹ These years saw the birth of the U.S.-Israel and U.S.-Canada free trade areas, as well as the start of talks on NAFTA. Europe countered with its own Single European Act, precursor to the EU, in 1987.

After the Clinton administration secured passage of NAFTA, Congress refused to approve fast track authority for the rest of Clinton’s term.⁵² Both parties voted against it, but it is noteworthy how many free trade Republicans did so. In 1998, 71 Republicans voted against, while under Bush in 2002, only 21 did.⁵³

The 2002 battle over fast-track authority aligned along familiar lines. Republicans not from heavy agriculture areas supported it. Most Democrats and labor unions opposed it. One Senator, Ernest Hollings (D-SC), wrote an editorial in the *New York Times* framing the argument over TPA as one of executive versus legislative prerogative: “cries [for free trade and fast-track] are not really for making trade free—they are for transferring power over trade to the execu-

suggests that the revulsion to child labor resides with those who are not in competition with it. Put differently, one should not expect congressmen to choose the moral high road if doing so does not benefit constituents. See ANNE O. KRUEGER, *AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING* (1995).

49. See Hiscox, *supra* note 42.

50. *Id.*

51. See Jeffrey Frankel, *The Crusade for Free Trade: Evaluating Clinton’s International Economic Policy*, *FOREIGN AFF.*, Mar.-Apr. 2001, at 155.

52. Elizabeth Becker and Larry Rohter, *U.S. and Chile Reach Free Trade Accord*, *N.Y. TIMES*, Dec. 12, 2002, at C1.

53. *Nobody looking at the road*, *THE ECONOMIST*, Dec. 1, 2001, available at 2001 WL 7320952.

tive branch and favored corporate interests. This should not be the way economic policy works in a democracy.”⁵⁴

Senator Hollings cited a trend in U.S. politics: Since reducing the Depression-era tariffs in 1934, which ended the Smoot-Hawley tariffs and first gave power over trade to the president, free trade deals have increased.⁵⁵ Trade is easier for a president to endorse than it is for a Senator, for whom it is easier than for a Representative, as he is less prey to a specific constituency and that constituency’s industry. Hollings voiced the argument over fast track in terms of whose role it is to safeguard U.S. citizens or, in other words, who safeguards economic sovereignty. Hollings pointed out that U.S. use of tariffs to protect developing domestic industries ended after World War II, when the executive started using foreign trade as foreign aid.⁵⁶ He suggests that since 1979, the United States has lost 20 percent of its manufacturing work force as a result.⁵⁷

Indeed, the change in presidential party from Republican George H.W. Bush, to Democrat Clinton to Republican George W. Bush has affected U.S. trade relations much less than has the shift from legislative to executive control of the trade agenda. That is because Congress, not the White House, has been the primary obstacle to international freer trade.⁵⁸ A recent example of this was Congress’s refusal to allow Mexican trucks to cross into the United States—which, under NAFTA, they had a right to do—in a thinly veiled protectionist measure couched in terms of road safety. Bush vetoed Congressional attempts to keep the border closed, thus choosing the letter of NAFTA over domestic interests. There were, of course, also domestic interests in getting the goods over from Mexico. In contrast, Bush did not do this with regards to the recently passed 2002 Farm Act, containing \$180 billion in U.S. agriculture subsidies.⁵⁹

C. Comparing Administrations: Distinguishing Bush from Clinton

President Clinton negotiated the last truly multilateral agreements the world has seen: TRIPs, Uruguay and Telecom.⁶⁰ Yet Clinton was the first to abandon further talks after the Uruguay Round, ignoring calls for an expanded “Clinton Round.”⁶¹ Dissent within the Democratic Party over trade liberalization limited his freedom to act. That dissent reflects a fundamental difference between Democratic and Republican approaches to multilateral trade. Representing labor and environmentalists, Democrats do not want their hands tied by treaties that limit their freedom to compensate the domestic losers from trade, that is, U.S. labor-

54. Ernest Hollings, *The Failures of Free Trade*, N.Y. TIMES, Apr. 25, 2002, at A31.

55. See also Stephen Haggard, *The Institutional Foundations of Hegemony: Explaining the Reciprocal Trade Agreements Act of 1934*, 42 INT’L ORG. 91 (1988).

56. Hollings, *supra* note 54.

57. *Id.*

58. *Id.*

59. The Farm Security and Rural Investment Act of 2002 “could increase federal spending on agriculture by 70 percent over the next six years, to as much as \$180 billion, potentially violating limits for farm support set during the last round of global trade talks.” Altman, *supra* note 29. Note that even this bill is cast in terms of farm “security.”

60. See “World Trade Organization” at <http://www.wto.org>.

61. See BHAGWATI, *supra* note 22, at 228.

ers when, for example, the United States drops tariffs on Mexican products and manufacturing jobs move to Mexico. They further seek content-heavy treaties with labor and environmental regulations included. Republicans, on the other hand, tend to champion business interests and are keen to seek the negative integration required by trade rules that reduce a government's ability to make domestic laws that impinge on the "free" flow of goods. Allowing their hands to be tied by a trade agreement, Republicans are delivering the goods to their constituents, creating an open foreign market, and limiting "big government."

Of course, it would be incorrect to categorize any administration as completely "multilateral" or "protectionist." Nevertheless, one can say, that Democratic presidents tend to support multilateral expansion whereas Republican presidents do not. Presidents often have to play against type, however, in order to broaden their appeal at election time. Clinton pushed for NAFTA largely to show he was a "new Democrat"—neither hostile to business nor captive to labor unions. Clinton could do this because labor union voters were not likely to switch their vote to Republican based on that issue alone. Similarly, free traders supported Reagan from the start, and they did not defect to Walter Mondale after Reagan's protectionist maneuvers. "Playing to type keeps voters you've already got; playing against type can add new voters without driving off the old ones."⁶²

Although a NAFTA champion, Clinton lost his free trade credentials six years later at the Seattle WTO Ministerial Conference when he said that there should be a "social clause" inserted into WTO agreements so as "to put a human face on the global economy."⁶³ His speech in Seattle suggested he wanted to add environmental and labor standards to future free trade agreements.⁶⁴ While Clinton tried to bring labor and environmental arrangements into WTO discussions, and thus move the entire WTO forward in a way U.S. protestors and Democratic Party stalwarts found acceptable, Bush seeks to stick to the traditional procedural rules or to avoid the WTO all together.

With trade policy this administration repeats the "take-it-or leave it attitude" it has toward foreign relations.⁶⁵ Forgoing Clinton's conciliatory rhetoric, the Bush administration has adopted a more unilateral attitude toward its trading partners. To both foreign countries and internal dissent, Bush repeats his main foreign policy mantra: You are with us, or you're against us.⁶⁶

62. See Steve Chapman, *If You Love Free Trade Elect a Democrat President*, SLATE, Mar. 20, 2002, available at <http://slate.msn.com/id/2063391/> (interesting explanation of how, as president, Democrats and Republicans tend to stick to party line rhetoric, but act contrarily).

63. *Words of Clinton: 'Three Resolutions for the New Millennium'*, N.Y. TIMES, Sept. 22, 1999, at A18.

64. See *A global disaster*, THE ECONOMIST, Dec. 11, 1999, available at 1999 WL 29811933. Clinton had already promised to issue an executive order adding labor rights violations as an explicit cause of action which could trigger trade sanctions under Section 301 of the U.S. trade law in a 1993 letter to Congresswoman Nancy Pelosi in exchange for her yes vote to NAFTA. See PUBLIC CITIZEN, *THE RECORD ON DEALS FOR TRADE VOTES: DON'T GET FOOLED AGAIN* (2001), at <http://www.citizen.org/publications/release.cfm?ID=7136>.

65. *All in the familia*, *supra* note 28.

66. *Id.* Unfortunately, where the United States stands is not always clear. As Kevin Ho discusses in his article, the recent Bush decision on steel imports suggests even to potential FTAA

The main difference between Bush and his Democratic predecessor is Bush's use of regional agreements to bolster U.S. influence—often based on political rather than economic motives—and his belief in the power of procedural rules over the type of content-heavy trade agreements favored by Democrats and the EU. Another important distinction is the Bush administration's immense freedom in setting the political agenda following the terrorist attacks of September 11. Since the attacks, Bush has faced very little Congressional opposition on any foreign policy matter, including trade. Had Bush wanted to open a new round of multilateral talks or stop protectionist impulses, he could have done so by equating those actions with the war on terror. Instead, he is using terrorism as a reason for increasing preferential trade agreements. He also has neglected to veto acts of Congressional protectionism, such as the 2002 Farm Bill subsidies to agriculture and the steel tariffs.

III.

"TRADE AS A WEAPON AGAINST TERROR" AND TERROR AS A WEAPON TO PURSUE TRADE

"The terrorists deliberately chose the World Trade towers as their target. While their blow toppled the towers, it cannot and will not shake the foundation of world trade and freedom."⁶⁷

Prior to the September 11 attacks, Bush discussed the importance of expanded free trade throughout the Americas (FTAA) in terms of trade functioning as a third pillar of democracy and freedom:

Freedom is not only a right, it is also our best weapon against tyranny and poverty. Free and open trade creates new jobs and new income. It lifts the lives of all people, applying the power of markets to the needs of the poor. It spurs the process of economic and legal reform and open trade reinforces the habit of liberty that sustains democracy over the long haul.⁶⁸

In October 2002 Bush released his vision in the National Security Strategy of the United States, in which he articulated the connection he sees between trade agreements and U.S. security, explaining that "national security" will be enhanced if "other countries" are convinced to adopt "lower marginal tax rates" as well as "pro-growth legal and regulatory policies."⁶⁹ Trade agreements can be used to encourage these economic changes. In Bush's words, "The concept of 'free trade' arose as a moral principle even before it became a pillar of economics."⁷⁰ And if the administration is to choose a moral principle to pursue,

countries that this administration expects support on its painful "free trade" decisions. See Kevin K. Ho, *Trading Rights and Wrongs: The 2002 Bush Steel Tariffs*, 21 BERKELEY J. INT'L L. 825 (2003).

67. Robert B. Zoellick, *Countering Terror with Trade*, WASH. POST, Sept. 20, 2001, at A35.

68. Remarks at the Summit of the Americas Working Session, 37 WEEKLY COMP. PRES. DOC. 640, 641 (Apr. 21, 2001).

69. National Security Strategy of the United States of America (2002), at 6, available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Jan. 3, 2003).

70. *Id.*

the ability to trade “is real freedom, the freedom for a person—or a nation—to make a living.”⁷¹

In a speech shortly after the September 11 attacks, USTR Robert Zoellick said enemies of the United States attacked the World Trade Center because they recognized “the ties of free trade and free societies.”⁷² A week earlier, Zoellick delivered a rousing endorsement of trade agreements as the elixir against terrorism: “America’s trade leadership can build a coalition of countries that cherish liberty in all its aspects.”⁷³ The administration sees trade as a tool through which it can pursue its security by tying other countries to the United States.

Since September 11, the president and USTR Zoellick have phrased their “fight” to expand “free trade” in terms of a battle. While the administration refuses to equate poverty with terrorism, it does link terrorism with the inability to trade and to that end has spent the second year of the administration pursuing trade agreements that contain market-liberating mechanisms on the part of the foreign partner. In the words of Zoellick: “Free trade is about more than economic efficiency. It is about openness, about the rights of individuals and associations to make choices . . . Free trade is about freedom.”⁷⁴

To the Bush administration, the root of terrorism is not poverty, but rather the lack of economic freedom.⁷⁵ That means that the enemy in this fight is not terrorists so much as it is political resistance to implementing business-friendly policies.⁷⁶ This extends to domestic enemies. Speaking to a business group in Chicago, Zoellick described lawmakers and lobbyists who opposed fast-track as “xenophobes and isolationists.”⁷⁷ The administration further sees a connection between free trade and more liberal economic regimes. The United States wants to export its values with its goods; Washington views trade agreements as the first step in the broader liberalization it would like to see in Latin America:

Free trade agreements can help establish the basic building blocks for sustainable development, including private property rights, competition [and] the rule of law. Most importantly, free trade is about freedom and open societies. These values are at the heart of America’s larger reform and development agenda.⁷⁸

71. *Id.* It is unclear whether Bush is implying that trade freedom is more “real” than the freedoms of thought, religion or expression.

72. Zoellick, *supra* note 36.

73. Zoellick, *supra* note 67.

74. *U.S. Trade Representative Lauds Economic Progress in Latin America*, U.S. DEP’T OF STATE, INT’L INFO. PROGRAMS, May 7, 2002, at <http://usinfo.state.gov/regional/ar/trade/02050741.htm>.

75. Robert Zoellick asserted the role of trade in preserving U.S. economic security and resoundingly rejected any connection between terrorism and poverty. In his words, “to believe that [poverty causes terrorism] is an insult to poor people all over the world. Terrorism’s roots lie in a deep evil. But there is no doubt that societies that fragment, that are poor, that have no sense of hope, become fertile grounds in which terrorists can burrow . . . America’s Trade Agenda will drive a . . . plan for harnessing the power of openness to grow America’s economy, safeguard security, and promote development and democracy.” Zoellick, *supra* note 36.

76. See Trade Act Remarks, *supra* note 13.

77. See, e.g., PUBLIC CITIZEN, QUOTATIONS FROM CHAIRMAN ZOELICK, at <http://www.citizen.org/trade/fasttrack/opposition/articles.cfm?ID=6441> (quoting Inside U.S. Trade, Oct. 26, 2001).

78. Zoellick, *supra* note 36.

Indeed, "From Johannesburg to San Salvador, America is opening a new pathway to promote prosperity, the rule of law, and liberty."⁷⁹

A. Trade not Aid

Trade agreements are convenient political carrots. Seeking Congressional approval of FTAA in October 2002, Zoellick reiterated that the trade agreement would bring U.S.-style capitalism to Latin America: "The FTAA agreement will also strengthen the rule-of-law, solidify economic reform throughout the hemisphere, and reinforce the democratic principles that unite FTAA countries."⁸⁰ He also suggested the administration would use trade agreements as a tool for broader political purposes than just freeing the movement of goods. Citing a possible trade agreement with Morocco, he said: "The connection between trade and America's security is often better understood overseas. An FTA with Morocco would strengthen our economic and political ties to the region" and would "send[] a signal throughout a tempestuous region of America's support of tolerant, open, and more prosperous Muslim societies."⁸¹ Indeed, the 2002 Trade Act guarantees a special role for civil society groups.⁸²

One drawback to this approach is that it puts all U.S. ally-strengthening carrots and sticks into one tool, that is, trade treaties. Rather than create other sorts of multilateral or regional pacts, Bush is concentrating on freer trade as a way to make allies and keep poor farmers not from poverty, but from the inability to trade. Given Bush's emphasis on trade, one might ask whether aid has gone up,⁸³ and whether cross-regional initiatives of other sorts have advanced. Taking Mexico as an example, the answer is clearly no. Given that Bush made Mexico a priority upon entering office, the neglect of Mexico indicates strongly that trade by itself is not going to prevent poverty or divert future terrorists. When Bush came into the White House, his first state dinner was with Mexican President Vincente Fox. There, the two presidents promised to broaden and strengthen NAFTA. A deal legalizing the status of illegal immigrants in the United States was close to being completed in September 2001, as were energy

79. *Id.*

80. Robert Zoellick, *Zoellick Tells Congress It's Crucial We Move Forward on FTAA*, Press Release, Oct. 3, 2002, at <http://www.ustr.gov/releases/2002/10/02-93.pdf>.

81. Zoellick, *supra* note 36.

82. See Trade Act of 2002, 19 U.S.C.A. § 3801 (2002).

83. Bush tends to present regional trade agreements as alternatives to aid or other direct assistance, something akin to "workfare, not welfare." The argument is that because freer trade will lead to the preservation of democracy and development, the countries benefiting hardly need aid hand-outs in addition. As the president said upon signing the Andean Trade Preference Act, "by providing trade preference for products from four Andean democracies, we will build prosperity, reduce poverty, strengthen democracy, and fight illegal drugs while expanding economic opportunity." Trade Act Remarks, *supra* note 13, at 1318. All that just by letting them trade more freely with the United States. Why the United States does not want to give this benefit multilaterally is an interesting question. By controlling the individual countries to which the United States opens its markets, it can wield significant influence. It can tell a country that the United States will negotiate a trade agreement once they open up their banking sector (as was the case with China), or once they let U.S. investment into a previously forbidden industry (as was the case with Mexico).

and water deals. After September 11, the Bush administration has left such non-trade deals entirely uncompleted, focusing its attention purely on trade.

In the administration's rhetoric, it is a straight line from lower trade barriers to the very preservation of democracy and human dignity itself. Since September 11, Bush rarely mentions free trade without uttering "democracy" or "freedom" in the same sentence,⁸⁴ and indeed it seems he wants the ideas to be linked. A January 2002 speech to the Organization of American States provides a good example:

Some question the fairness of free and open trade, while holding out the false comfort of protectionism. And there is an even greater danger—that some may come to doubt democracy itself. Our answer to these questions and doubts must be clear and it must be consistent: The hopes of all our peoples, everybody who lives in this hemisphere, no matter where they live—lie in greater freedom. Free markets and open trade are the best weapons against poverty, disease and tyranny.⁸⁵

Yet Bush has effectively undercut any economic relief that might be hoped for in trade liberalization. For example, as mentioned earlier, Bush failed to veto (or even convey displeasure about) the 2002 Farm Act that provided subsidies to U.S. agriculture.⁸⁶ By keeping U.S. prices artificially low on the type of agricultural goods that developing countries produce, Bush renders toothless U.S. trade agreements. Consider, for example, the trade agreement the United States signed with Africa allowing so-called duty free access of African goods to the United States.⁸⁷ The \$19 billion a year in subsidies to American farmers competes directly with the \$15 billion a year in foreign aid that Mr. Bush proposes to spend on Africa.⁸⁸ The new farm law is seen by some to be a betrayal of those promises and of these developing countries' attempts to beef up their own agriculture and feed their people. The United States, Europe and Japan spend \$1 billion a day to support their farmers or about six times the aid payments they send to the developing world, which is desperate for help to build up its agriculture.⁸⁹

B. *Terror and the TPA*

Bush continued to use the rhetoric of trade as a weapon against terror in his fight to win TPA. Arguing that he needed trade as a tool to promote democracy, he succeeded in convincing Congress to support TPA in August 2002, some-

84. See, e.g., Trade Act Remarks, *supra* note 13.

85. Remarks by the President to the World Affairs Council National Conference, Jan. 16, 2002, at <http://www.americas-society.org/coa/advocacy/Bush-PR.html>.

86. In fact, Zoellick defended the farm bill, saying: "The new Farm Bill should not raise any questions about our common aims to eliminate export subsidies and substantially improve market access." Zoellick, *supra* note 74.

87. Elisabeth Bumiller, *Bush says He will Ask Congress to Extend Trade Africa Trade Benefits*, N.Y. TIMES, Jan. 16, 2003, at A4.

88. *Id.*

89. Elizabeth Becker, *A New Villain in Free Trade: The Farmer on the Dole*, N.Y. TIMES, Aug. 25, 2002, at section 4 page 10; see also Bumiller, *supra* note 87 (quoting Muna B. Ndulo, professor of law and the director of the Institute for African Development at Cornell, as saying: "[Y]ou don't even need to give aid. You need to reduce subsidies.").

thing that seemed very unlikely a few months earlier. Starting immediately after September 11, the administration couched its battle for TPA as a fight against terrorists, rather than against legislative prerogative.⁹⁰ In October 2001, Bush called the terrorist attacks on New York a reason to grant him TPA, saying "the terrorists attacked the World Trade Center, and we will defeat them by expanding and encouraging world trade. In order to help me expand world trade, I've asked Congress to give me what's called trade promotion authority—the ability to seek America's interests around the world."⁹¹ He spoke of TPA as a weapon and himself as the general in whom such power should reside.⁹² Furthermore, he linked TPA not only to a righteous fight against terror, but also to the pursuit of U.S. interests.⁹³ "Our campaign against them and others should employ economic and trade policies to underpin America's long-term security."⁹⁴

Such rhetoric proved powerful. The administration successfully wooed traditionally anti-trade Republican lawmakers who had never before voted for a free trade agreement. One California Republican, Duncan Harper, said: "'I don't like fast-track and I don't like free trade. But I like less the idea of weakening my president [during wartime]. So, for that reason, and that reason only, I'm voting, just this once, in favor of fast track.'" ⁹⁵

According to Mac Destler, a trade expert at the University of Maryland, at least 50 Republicans have voted against every major trade agreement since the NAFTA vote in 1993. The last fast-track vote in 1998 had 71 Republicans vote against it.⁹⁶ In 2001, 197 voted for it.⁹⁷

The mechanics of the House vote give a good sense of how U.S. trade policy is made:

With five minutes to go in the House vote, the vote stood at 215 against, and 210 for the measure. Toward the end, Democrats started chanting "Regular Order!" in a bid for Republicans to close the vote.

Running on fumes, GOP leaders went to, of all places, the heavily protectionist textile states for their last needed votes. Over the furious objections of the fast-track bill's sponsor, Rep. William Thomas (R., Calif.)—who flashed a red vote card to signal his opposition—House Speaker Dennis Hastert of Illinois, Majority Leader Richard Armitage of Texas, and Whip Tom DeLay of Texas signed a letter promising South Carolina Republican Jim DeMint additional protection for textile

90. See Zoellick, *supra* note 67; see also United States Trade Representative Robert Zoellick, The WTO and New Global Trade Relations: What's at Stake, Address Before the Council on Foreign Relations (Oct. 30, 2001), http://www.ustr.gov/speech-test/zoellick/zoellick_10.pdf. (Zoellick suggested that free trade could have stopped World War II: "The Great Depression, fed by virulent protectionism and parochial isolationism, led to an age of dictators, another devastating war, and even a Holocaust.").

91. *Bush Links Terror Attacks to Trade Bill*, N.Y. TIMES, Oct. 18, 2001, at C6.

92. *Id.*

93. *Id.*; see also Zoellick, *supra* note 67.

94. Zoellick, *supra* note 36.

95. Helene Cooper et al., *House Votes Wide Trade Powers for Bush*, WALL ST. J., Dec. 7, 2001, at A3.

96. Quoted in *Nobody looking at the road*, *supra* note 53.

97. *Id.*

dyeing and finishing companies. Mr. DeMint then switched his "no" vote to "yes."

Next, three Republican fence-sitters voted "yes," and the vote was tied. Finally, a visibly shaken North Carolina Rep. Robin Hayes, who had publicly announced his opposition but withheld his vote until the last minute, punched yes. At 4:38am, about 10 seconds after they received the 215-214 majority, Illinois Republican Ray LaHood pounded the gavel closing the vote.

In addition to special protection for textiles, Bush officials promised lawmakers special deals on everything from oranges to protein milk concentrate in order to get the vote. They also used national security, in a strategy that largely failed with Democrats, but worked with Republicans.⁹⁸

The irony is that the vote was for TPA, the measure that takes trade legislation out of reach of precisely this kind of pork barrel politics.

1. *Using Fast-Track*

Although the administration's stated goal is freer trade across the globe, it is willing to settle for regional progress when the multilateral path is blocked by trade-linkages such as environmental and labor concerns, by European disagreement, or by domestic protectionist interests that render liberalization politically unfeasible. The United States is less susceptible to such blockages when the president has fast-track, which effectively stops members of Congress from feeling forced to protect their constituent interests that stand to lose from an agreement, because members of Congress must simply vote yes or no to a trade agreement and cannot attach riders or side agreements. Fast-track is designed to give the president the power to negotiate in the interests of the entire country, as that is his constituent base.

But what has Bush done for free trade since being granted TPA? How has his overall stated commitment to trade been realized through this expanded power? Given his handling of the softwood lumber dispute with Canada,⁹⁹ the tariff protection afforded the steel industry, and the recent multi-billion dollar subsidy to U.S. agriculture, it is hard to say that he is using it to push through any such commitment.¹⁰⁰

Now that Bush has been granted TPA,¹⁰¹ he primarily plans to use it not to promote multilateral trade liberalization, but to create a larger regional trade

98. Cooper et al., *supra* note 95.

99. The U.S. imposed a 19 percent countervailing duty on timber imports in August 2001. See *Stump War*, THE ECONOMIST, Sept. 1, 2001, available at 2001 WL 7320270.

100. *Accord Promoting the Noble Cause of Commerce*, THE ECONOMIST, Aug. 3, 2002, available at 2002 WL 7246987 (pointing out that the Trade Act granting Bush TPA also enshrined existing protectionist anti-dumping rules, despite all protests from our existing and potential new FTAA partners). See, e.g., Hufbauer & Neuman, *supra* note 7, for a discussion of the WTO banana fiasco, and the Multi-fiber Agreement.

101. 19 U.S.C. § 3804. After losing the support of many Democrats early in the legislative process, House Republican leaders eked out a one-vote victory on their fast-track bill (HR 3005) on December 6, 2001. When the bill hit the Senate, the White House and Senate Republicans were forced to compromise. Senate Democrats insisted that any fast-track bill include a \$12 billion expansion of the Trade Adjustment Assistance (TAA) program, which provides benefits to workers laid off because of foreign competition. The conference report was adopted on a 215-212 vote by the House and 64-34 in the Senate.

block.¹⁰² He further aims to use trade agreements as a political reward for specific countries. One example of his TPA plans came on January 16, 2002, when he announced that his administration intended to pursue a Central American Free Trade Area (CAFTA).¹⁰³ The USTR has said that CAFTA will boost FTAA negotiations, since it will largely set forth the goals for Central America under an FTAA and thus, when successfully concluded, represent one less piece of the puzzle in FTAA negotiations.¹⁰⁴ In other words, the reason the president needs TPA is to promote free trade, and the reason the United States needs to promote a small regional trade agreement is to spur a large regional trade agreement, all to avoid pesky and slow multilateral trade talks.

The president negotiates internationally to establish the procedural rules of a trade agreement. Congress then provides content. That is, the president participates in the creation of an international rule-based system and Congress represents individual interests by creating legislation that covers specific areas, such as health, welfare and environmental protections.¹⁰⁵ This is understood by the business community, which voiced its support of TPA in procedural terms of "streamlining" the trade agreement process. Two hundred large U.S. business leaders signed a letter in the *Wall Street Journal* supporting TPA, claiming that "other countries don't want to negotiate deals with the U.S. that Congress could later amend."¹⁰⁶ Corporate America often views the Congressional ability to set trade as a pesky Constitutional power¹⁰⁷ that forces businesses to sit on "the sidelines while competitors in the EU woo Latin American countries."¹⁰⁸

Corporate America couched the fight in terms of Congress giving the president the power to put "America"—or American corporations, at least—in a position to compete with their European counterparts. Zoellick himself "has pointed enviously to TPA-like powers TPA-like powers vested in the European Union's trade commissioner," and credited that streamlined power with the fact that "the EU has signed 20 substantial pacts since 1990, and has 15 more on the way; over the same period the United States has ratified only two, with four more in the works."¹⁰⁹ Bush as well has said that TPA will "giv[e] other countries the confidence to negotiate with [the United States]."¹¹⁰

102. See Trade Act Remarks, *supra* note 13, at 1318 ("The United States will negotiate a Free Trade Area of the Americas and pursue regional agreements.").

103. See *Bush Declares Free Markets Are Essential For Americas*, N.Y. TIMES, Jan. 17, 2002, at A9.

104. See "Americas Program: A New World of Ideas, Analysis, and Policy Options" at <http://www.americaspolicy.org>.

105. Bush's veto of the bill that sought to stop "unsafe" Mexican trucks from crossing beyond the border zone could be an example of procedure winning out over domestic safety concerns. See Steven Greenhouse, *Suit Seeks to Halt Bush Plan On Entry of Mexican Trucks*, N.Y. TIMES, May 2, 2002, at A21.

106. Helene Cooper, *Firms Rethink Hostility to Linking Trade, Labor Rights*, WALL ST. J., Feb. 2, 2001, at A12.

107. U.S. CONST. art. 1, § 8.

108. Cooper, *supra* note 106.

109. See *All in the familia*, *supra* note 28.

110. Trade Act Remarks, *supra* note 13, at 1318.

While confidence in trade negotiations is one issue, the desire to negotiate at all is another matter that should not be discounted. A prominent fear in South and Central America regarding regional trade is the extension of investment protections of NAFTA's Chapter 11 provision, which deals with expropriation and investment protections. In other words, those regions worry that FTAA would cover more than trade. It would also require state parties to adopt U.S. rules for doing business, such as sanitary regulations for food imports and enforcement of labor and environmental rules. "Many Latin Americans fear that the United States wants to impose its system on them, and they are correct."¹¹¹

IV.

COUNTERING THE EU WITH A LARGER NAFTA

The main objective for which Bush sought TPA was creation of an FTAA. As with NAFTA, one of the selling points of the FTAA is that it will help the United States preserve its access to neighboring countries' markets, while keeping the Europeans and Japanese out.¹¹² It thus locked Canada and Mexico into America's net and out of the reach of the Europeans. In that way, NAFTA has served American interests by creating a regional block that, if united, could become powerful enough to take on competition, primarily from the EU.¹¹³ Such angling to position itself in a block against someone else, however, embodies the opposite of multilateral liberalization. Furthermore, once the United States was wrapped in a larger NAFTA, it became a bully versus the EU and then toward its NAFTA partners regarding, for example, soft lumber, trucks, and orange juice.¹¹⁴ The same could happen with FTAA.

A. Why an FTAA?

Bush campaigned on a pro-Latin America platform. In August 2000, he promised that the region would play a starring role in American foreign policy were he to become president.¹¹⁵ While no starring role has materialized, the one area in which the Bush administration has remained engaged with Latin America is trade.

The administration wants an FTAA to create largely tariff-free trade across thirty-four countries. Such a trade area would force "Latin America [to] face

111. Edmund Andrews, *Outside Halls Of Power, Many Fear Free Trade*, N.Y. TIMES, Nov. 3, 2002, at section 3, page 4.

112. "While the United States idled its free trade negotiations, others did not. The European Union now has 29 free trade or special customs agreements . . . and is in process of negotiating with 12 more countries." Robert Zoellick, *Falling Behind on Free Trade*, N.Y. TIMES, Apr. 14, 2002, at section 4, page 13.

113. See Paul Krugman, *The Uncomfortable Truth about NAFTA: It's Foreign Policy, Stupid*, FOREIGN AFFAIRS, Nov. 1993, at 13 (claiming that the primary motivation for NAFTA was foreign policy, not economics).

114. See, e.g., O'Grady, *supra* note 33; see also *The geopolitics of orange juice*, THE ECONOMIST, Sept. 14, 2002, available at 2002 WL 7247404.

115. See *But Does He Really Love Her?*, THE ECONOMIST, Mar. 23, 2002, available at 2002 WL 7245598.

stronger competition;" as trade moves forward, the United States and its trading partners "can topple the walls of prejudice, poverty and protectionism."¹¹⁶

Economically, the likely gains to the United States from the proposed FTAA are "considerably smaller than those resulting from multilateral trade liberalization, even comparing the complete elimination of regional and bilateral tariffs to reduction of multilateral tariffs by one-third."¹¹⁷ Perhaps it is more honest to say that with so little engagement in other aspects of foreign policy, trade is all the United States is willing to offer its neighbors to the South—neighbors that are already looking to the EU and Asia for trade and assistance. For example, when Argentina's economy experienced a melt-down in December 2001, the administration did nothing, even going so far as to veto an IMF loan. Bush took a year to choose the State Department official responsible for the region,¹¹⁸ and is widely charged with supporting an unsuccessful coup to overthrow President Hugo Chavez in Venezuela.¹¹⁹

In pushing for the creation of an FTAA, Bush repeats the pro-regional arguments used for NAFTA: Together the United States can combat EU progress in signing bilateral agreements and lock in liberal reforms in the joining countries.¹²⁰ "We want to offer the Americas the first choice. With China . . . now in the WTO, Latin America will face stronger global competition. We want the Americas to be moving ahead, not standing still, or worse, falling behind."¹²¹ One of the "Americas" the administration is most keen on helping face stronger global competition is the United States. As Zoellick said soon after the September 11 attacks, "America cannot lead effectively if it slips in international markets." He sees America's missing out on regional and bilateral trade agreements as causing just such a slip:

The United States is a party to only two of the more than 130 free trade agreements in the world; the United States belongs to only one of the 30 free trade agreements in the Western Hemisphere. When multiplied across products and countries, the cost to America's strength . . . of falling behind on trade soars exponentially.¹²²

116. Robert Zoellick, *Trading in Freedom: The New Endeavor of the Americas*, Address at Miami Herald Conference on the Americas, Oct. 14, 2002, at <http://usembassy.state.gov/managua/www/hucfte2.html>.

117. See David Crane, *We should lead fight for global trade talks*, TORONTO STAR, June 27, 2001, at E2.

118. *But Does He Really Love Her?*, *supra* note 115.

119. See Michael Shifter, *Democracy in Venezuela, Unsettling as Ever*, WASH. POST, Apr. 21, 2002, at B2. Minutes after the September 11 attacks, Secretary of State Colin L. Powell, speaking at a special session of the Organization of American States in Lima, Peru, eloquently defended a new democratic charter—which called for hemispheric responses to interruptions of constitutional rule. That instrument was used for the first time to help bring Chavez back to power after a botched attempt to oust him on April 12, 2002.

120. See The President's 2001 International Trade Agenda, available at <http://www.whitehouse.gov/news/releases/2001/05/20010511.html>.

121. Zoellick, *supra* note 116.

122. Zoellick, *supra* note 67. Yet note that nearly 300 separate trade agreements were negotiated by the Clinton administration. Of these, only the Uruguay Round Agreement and NAFTA were submitted to Congress under fast-track procedures. Despite the mantra that every president since Ford has "had" fast-track authority, in fact, it has only been used five times: the GATT Tokyo Round, U.S.-Israel FTA, Canada-U.S. FTA, NAFTA and the GATT Uruguay Round.

This desire to use trade agreements to help the United States competitively vis-à-vis “global competition” reflects the protectionist impulses animating the desire for a larger “free trade” area.

On the one hand, if regional blocks allow the United States to protect its interests, as well as to reward political friends in the United States and abroad, why would it seek any other road to trade expansion? Even more than NAFTA, the FTAA will create a huge free trade area without labor and environmental side agreements where a likely extended investment protection clause will ensure U.S. investment throughout the hemisphere. It will allow the United States to set the terms of an agreement, namely, the degree to which it extends beyond trade into areas such as financial liberalization. It will also allow U.S. businesses to “compete” with EU firms, by locking all of Latin America into a trade area with us, leaving the Europeans peering in from behind a common external tariff wall.

Bush was able to overcome the traditional House resistance to TPA, and virtually assure U.S. entrance into an FTAA, because of September 11. Touting U.S. security and “our duty to succeed where the terrorists try to bring the United States down” he could both cast the TPA debate as a chance for the country to “stand behind the president” and equate trade with the fight on terror. Nonetheless, when the president couches his desire for a FTAA in terms of “the power of free trade to stomp out poverty and terror,” he confuses free trade with strategic trade. A regional free trade area does not create free trade; it creates preferential or discriminatory treatment between certain countries. Whereas multilateral free trade might allow poor farmers in countries that are potentially incubate terrorists to get their products into the vast U.S. market, an FTAA will keep others out.

Take, for example, the recent expansion of preferential trade status to the Andean nations.¹²³ Bush presented the act as an effort to help Andean countries wean their economies off coca production, thus reducing the strength of drug traffickers there.¹²⁴ One aspect of this agreement is that it will eliminate most tariffs on canned tuna from Ecuador and Colombia, but will not reduce the 35 percent tariffs currently levied on tuna from the Philippines.¹²⁵ Access to the huge U.S. market likely will increase the size of employment in Colombian tuna ships and raise export earnings, thus helping Colombia switch from coca production. Yet by giving this preferential treatment to Colombia, fishermen in the Philippines now have to face much stiffer competition and likely will see their tuna employment and earnings shrink. Increasing the number of out-of-work, Muslim, Filipino fisherman may create exactly the type of susceptible recruits for terrorist cell organizers that Zoellick’s “trade to combat terrorism” rhetoric was created to combat.

123. Elisabeth Bumiller, *Bush Signs Trade Bill, Restoring Broad Presidential Authority*, N.Y. TIMES, Aug. 7, 2002 at A5.

124. Trade Act Remarks, *supra* note 13, at 1318.

125. Keith Bradsher, *U.S. Trade Bill Could Hurt Philippine Tuna Industry, Officials Will Tell Powell in Manila*, N.Y. TIMES, Aug. 1, 2002, at A12.

B. United States-Chile Trade Agreement

Another example of how the United States counters EU influence is the 2002 agreement with Chile. Although discussions with Chile about an agreement began in 1990 under the first Bush administration, it was not until Chile reached an agreement with the European Union in early 2002 that the United States finally signed a trade agreement.¹²⁶ In the meantime, “[a]s Washington wavered . . . , Chile negotiated free trade accords with several other countries, including Canada and Mexico, the United States’s partners in NAFTA.”¹²⁷

The EU agreement “will immediately lift all tariffs on nearly 90 percent of Chilean exports” as of January 1, 2003. “In contrast, it would take up to 12 years before all tariffs with the United States are lifted.”¹²⁸ Zoellick praised the agreement, saying it “would be a boon for American farmers and ranchers who have been kept out of the Chilean market by European and Canadian farmers whose countries already have a free trade agreement with Chile.”¹²⁹

Exporters said it appeared that tariffs on many of Chile’s principal products would be eliminated gradually. A former Chilean minister of foreign relations, Hernan Errazuriz, questioned whether the accord should even be called a “free trade agreement,” given that it “contains quotas for many products, allows the United States to retain broad antidumping attributes and does not control the damage of billions of dollars in distorted agricultural subsidies.”¹³⁰

“Measured in absolute terms, the lowering of bilateral trade barriers is likely to have little impact on the American economy.”¹³¹ That is because Chile “accounts for less than 1 percent of total global commerce: it exported about \$3.3 billion in goods to the United States last year and imported \$2.9 billion.”¹³² The USTR “cited a study that said a U.S.-Chile free-trade accord would add \$4.2 billion to the U.S. gross domestic product by increasing the exports of American firms. That figure, while large in absolute terms, is about 0.04 percent of U.S. output.”¹³³ Clearly, the deal is not important purely for economic goals, but is also an important political symbol, showing that the United States has its eye on the Southern Hemisphere and will reward countries disciplining their economies. In that way, it is a bargaining chip for broader trade discussions with reticent larger countries. Zoellick claimed “countries will be more willing to join broader deals if rival nations sign free-trade pacts with Washington, because they will fear losing access to the lucrative U.S. market.”¹³⁴ After meeting with Brazil’s president in December 2002, Zoellick “was convinced”

126. Becker & Rohrer, *supra* note 52.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Paul Blustein, *U.S., Chile Agree on Free Trade; Bilateral Pacts Are Special Focus of Bush Administration*, WASH. POST, Dec. 12, 2002, at A42.

132. *Id.*

133. *Id.*

134. *Id.*

that the agreement with Chile gave the United States “‘a leg up’ in the broader negotiations” with Brazil.¹³⁵

C. NAFTA's Chapter 11

Much of the concern about extending NAFTA to cover the entire Western Hemisphere springs from uncertainty about the scope of NAFTA's Chapter 11 provision, which deals with investment protection, and whether Chapter 11 would extend to all countries in the FTAA. Preliminary versions of an FTAA contain a copy of NAFTA's Chapter 11.¹³⁶ The controversy over Chapter 11 stems from its expansive definition of “expropriation.” Before NAFTA, “expropriation” in international agreements usually “meant the taking of property without the owners’ consent for a public purpose.”¹³⁷ NAFTA requires compensation for indirect expropriation as well as for measures “tantamount to” expropriation.¹³⁸ This phrase has allowed corporations domiciled in one country to sue foreign governments for regulations that affect the corporation's investment in the foreign country, even where that regulation would not allow a domestic investor to sue. Two recent examples are *Methanex*¹³⁹ and *Metalclad*.¹⁴⁰

In *Methanex*, a Canadian manufacturer of the gasoline additive MTBE sued the United States for \$970 million in “future lost profits” after the California state legislature banned MTBE from gasoline because it was contaminating the water supply. In *Metalclad*, Mexican efforts to protect itself from hosting an expanded toxic dump were deemed “tantamount to expropriation,” and the Mexican government was forced to pay \$15 million to Metalclad. These types of public interest regulations restricting some uses of private property are not compensable under U.S. law because regulations do not constitute takings unless they amount to a “total taking,” leaving no residual value in the property.¹⁴¹

Similarly, Article 1105 of NAFTA, also included in the FTAA draft, states that governments must treat investors in accordance with international law, including fair and equitable treatment and full protection and security. This section has proven helpful to corporations seeking to expand the reach of investor-state claims. Originally under NAFTA, the right of foreign investors to sue was designed to reach only violations of NAFTA investment rules. Yet in *Metalclad*,¹⁴² the NAFTA tribunal hearing the dispute found Mexico liable for violating 1105 because the Mexican regulatory regime was not adequately

135. *Id.*

136. See Hemispheric Social Alliance, *NAFTA Investor Rights Plus*, at 5, at <http://www.asc-hsa.org/>.

137. *Id.*

138. See NAFTA Article 1110, available at <http://www.nafta-sec-alena.org/english/nafta/chap-111.htm> (last visited Apr. 1, 2003).

139. *Methanex Corp. v. United States* (NAFTA Arb. Trib. 2000), at <http://www.nafta-claims.com/> (last visited Apr. 1, 2003).

140. *United Mexican States v. Metalclad*, [2001] 95 B.C.L.R. 3d 169 (B.C. Sup. Ct.).

141. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992).

142. In *Metalclad*, a national court with the power to review the tribunal's decision, the British Columbia Supreme Court, disagreed with the tribunal's incorporation of transparency into Article

transparent. In that case, the Mexican government tried to protect itself against toxic dumping by blocking the company's expansion plans. The transparency provisions of NAFTA have nothing to do with the investment procedures of Chapter 11, yet the tribunal used Article 1105 as a device to import into the scope of foreign investor claims substantive obligations on national regulatory mechanisms that had been hitherto outside the scope of such investor claims. In essence, the tribunal hijacked the limited powers originally designed for foreign investors and further shrunk the sovereignty surrendered by joining NAFTA.

Nonetheless, in the *Metalclad* case, the U.S. Attorney General submitted a brief supporting "the protection of assets from direct or indirect expropriation to include protection from regulations that diminish the value of investor's assets."¹⁴³ Thus, by embracing this reading of the Chapter 11 reach, the United States is further trying to render itself (and the 50 states) unable to make policy that contains any costs to anyone. In other words, any regulation will be, not forbidden, but exceedingly costly, if it has any potential of affecting any non-U.S. investor or individual. It is hard to square the current U.S. conviction that more directed trade increases American security (with increased trade coming concurrent) with Chapter 11 infringement of sovereignty, restricting government ability to invoke eminent domain or capital controls.

D. The Costs of Chapter 11

"Taxpayers for Common Sense estimates that Chapter 11 cases under international trade agreements could expose U.S. taxpayers to claims totaling \$32 billion each year," which is "the equivalent of three-fourths of the annual federal block grants to state and local governments."¹⁴⁴ "To date, Chapter 11 cases have allowed foreign businesses to claim \$1.8 billion from U.S. taxpayers."¹⁴⁵

Another controversial element of Chapter 11 involves capital controls. A draft analyzed by the Hemispheric Social Alliance suggests that the FTAA would go even further than NAFTA in preventing governments' use of capital controls. Generally, large institutional investors dislike capital controls, as they prevent the quick withdrawal of money and thus speculative gambles. Recently, the IMF supported the use of capital controls in Tunisia and Russia. Many scholars credit Chile's successful boom of the 1990s to its use of such controls, and in its being the only shining star in South America in a position to join a trade agreement with the United States in 2002.¹⁴⁶ Jagdish Bhagwati goes so far as to suggest that by denying the Asian countries access to capital controls in 1997, the IMF and U.S. Treasury "presided over the largest man-made disaster in the world economy since Smoot-Hawley!"¹⁴⁷

1105 and partially set aside the ruling. That court's decision, however, has no binding effect on subsequent NAFTA tribunals and it is possible the avenue opened by *Metalclad* could be trod again.

143. *Metalclad*, *supra* note 139.

144. Eric Rubin, *The Case Against Globalization*, TAMPA TRIB., July 22, 2002, at 9.

145. *Id.* (citing a study by Taxpayers for Common Sense).

146. Marc Cooper, *Many Latin Americans Oppose Trade Deal*, L.A. TIMES, Feb. 10, 2002, at M3.

147. BHAGWATI, *supra* note 22, at 57.

In large part, the language of NAFTA Chapter 11, repeated in the FTAA draft, echoes the language of the discarded Multilateral Agreement on Investments (MAI) treaty.¹⁴⁸ The MAI was rejected because of concerns that it would put large, powerful countries in a position to force open smaller economies before they are ready, leaving smaller countries with little power to regulate their economies or protect their citizens. Even worse, it was seen by some as a bill of rights of multinational corporations.¹⁴⁹

Given the administration's emphasis on security, it is hard to see how the surrendering of domestic control over eminent domain, regulatory power or financial flows reflects any of the current climate's concerns. For example, how will abandoning capital controls enable the United States to monitor where suspected terrorist funds flow? How will the inability to regulate any area which may impinge on foreign investors affect the ability to construct a border, survey traffic, or even direct trade to certain friends?

E. Brazil

In Brazil, concern that U.S. corporations would use the FTAA to exploit the Amazon basin became so contentious that Brazil's lower house of Congress unanimously passed a resolution calling for withdrawal from discussions on the FTAA, and the presidential race was cast in terms of pro- or anti-FTAA. In February of this year Brazil's Worker's Party candidate for president, Luis da Silva, led a rally against the FTAA, calling it not "a trade pact, but a policy of annexation of Latin American by the United States."¹⁵⁰ He vowed "we will fight it every possible way and we will defeat it." Two Worker's Party mayors have been assassinated in what are regarded as attempts to intimidate the Worker's Party candidate from running for president on his anti-FTAA platform. Da Silva won the election for president on October 27, 2002, and it will now be interesting to see how he handles the FTAA issue. It appears Bush plans to use the steel tariffs as a way to pressure reluctant countries, namely Brazil, to join an unwanted trade agreement. An example of American "with us or against us" rhetoric was presented by the Assistant Secretary of State for Western Hemisphere Affairs, Otto Juan Reich, in a retort to Brazil's concerns over the U.S. steel tariffs. Reich said that rather than worry about tariffs, Brazil should simply join the FTAA and benefit from insider trading status.¹⁵¹ Brazil had hoped to counter U.S. dominance in FTAA negotiations by leading a strong Mercosur block in the talks, but Argentina's collapse has reduced Mercosur's relevance and decreased the EU's interest in making a deal with the region.¹⁵² In addition, Chile's separate agreements with the U.S. and the EU have further weakened Brazil's bargaining position.

148. Hemispheric Social Alliance, *supra* note 135, at 13.

149. BHAGWATI, *supra* note 22, at 313.

150. Cooper, *supra* note 145.

151. *Castro's Shadow: America's Man in Latin America*, THE NEW YORKER, Oct. 14, 2002, at 101. Neither Bush nor Cheney attended Lula's inauguration. See *Brazil's great expectations*, CHICAGO TRIB., Jan. 3, 2003, at 24.

152. *The Geopolitics of Orange Juice*, *supra* note 114.

If it's with the United States or against it, what is the benefit of being with it? Latin American countries ought to see what NAFTA has done for Mexico before making any decisions.

F. America's NAFTA Relationship

Countries inside the potential FTAA need to examine carefully the benefits accruing to U.S. partners in NAFTA before deciding if they want a similar relationship. The problem for America's NAFTA neighbors has been that the administration ignored them because it assumed they were fierce allies which it did not need to placate in order to count on. Now, any new concession by the United States toward other NAFTA parties is approached through the rhetoric of "necessarily" closed doors. Not only has the exchange of goods and services been hampered by border slowdowns, but so have all other types of agreements, except for the expansion of free trade into the future. From Mexico's point of view in particular, the Bush administration abandoned it when it should have sought Mexico's support.

1. Mexico's path: from los dos amigos to quien es?

The seemingly warm relations between the United States and Mexico have chilled since September 11. As mentioned above, when Bush came into the White House, his first state visit was to Mexico and his first (and only) state dinner was given in honor of President Fox, on September 6, 2001. At that dinner, Bush announced that "Mexico is our most important foreign relation." By all accounts, a landmark immigration agreement legalizing millions of Mexican immigrants was just around the corner.¹⁵³ By March 2002, however, the only scrap of that agreement remaining was a "smart border" initiative providing laser-scan identification cards for frequent border crossers and special express lanes for pre-inspected vehicles. This initiative was touted as a step forward in reducing the bottlenecks blocking commerce between the United States and Mexico, when in fact the greatest bottleneck had come not from September 11 at all, but from protectionist U.S. impulses in the summer of 2001 that stopped Mexican trucks from entering the United States without a long border inspection.¹⁵⁴ In August 2001, the House voted to keep a ban that forbids Mexican trucks from going more than twenty miles over the frontier. The Senate approved tough new safety standards as a condition for allowing Mexican trucks beyond the border zone. In February, a NAFTA arbitration panel upheld Mexico's complaint.

153. Bill Sammon, *Bush urges legalizing aliens; Sees no harm if they do work others won't*, WASH. TIMES, Sept. 7, 2001, at A1.

154. See Bob Egelko, *Federal court halts trucks from Mexico*, S.F. CHRON., Jan 17, 2003, at A5 (saying "Mexican long-haul trucks have not had full access to U.S. roads for more than 20 years. But a NAFTA arbitration panel ruled two years ago that the ban violated the treaty, a decision that potentially subjected U.S. products to billions of dollars in trade sanctions from Mexico.").

Fox raised the immigration question again at the October 25, 2002 meeting of APEC leaders in Cabo San Lucas.¹⁵⁵ Fox linked immigration directly to U.S. agriculture policy and argued that the United States should recognize that increasing the subsidies to U.S. agriculture induces increased Mexican immigration.¹⁵⁶ Not only do the subsidies create lower prices for Mexican farmers, but they further create more farm work in the United States—both ingredients for increased migration. In 1999, Mexico removed its tariff on corn, a crop that used to cover 60 percent of Mexico's cultivated land. As a result, American corn poured in. The United States subsidizes corn production so that U.S. corn hits other markets at 20 percent less than its actual cost of production.¹⁵⁷ Small farmers cannot compete and, according to a national association of *campesino* cooperatives, 500,000 farmers have left their land and moved to Mexican cities or tried their luck crossing the border.¹⁵⁸

Another problem Mexico had hoped to address with Bush was a water sharing scheme along the Rio Grande. Rainfall has been very low for a decade and the border area population has been growing quickly since NAFTA's entry into force in 1994. In addition, on the Mexican side, farmers have shifted towards more profitable, but thirstier, crops such as pecans and alfalfa. Mexicans and Americans have long managed border water resources through peaceful cooperation. But as water supplies deteriorated, so did relations between the two countries. In particular, the United States puts much of the blame for the plight of Texan farmers on Mexico. In early September 2001, a deal was on the table but nothing has emerged.

Nonetheless, after September 11, security became the shibboleth allowing any politician who uttered it to defend whatever trade protection he or she wished. All cooperative or concessionary deals were off the table, and only security was discussed between the countries. One example of this change in direction is that out of \$27 billion in emergency funding Bush requested from Congress, \$5 billion was for US-Mexican border policing.¹⁵⁹ That is equal to the entire amount allotted to the recovery of New York; of 1600 National Guard troops deployed, 950 went to the Mexican border.¹⁶⁰

Fox has bristled over the Bush administration's treatment of him a number of times, starting with a last-minute cancellation of a visit to the Bush ranch after Bush refused to ask Texas Governor Rick Perry to block the illegal execu-

155. Bush gave Fox only thirty-five minutes of his time, disappointed in Fox's firm resistance to lending support to the U.S. resolution on Iraq in the U.N. See Tim Weiner, *Threats And Responses: The U.N. Debate; Holding Swing Vote, Mexico Tells Bush It Won't Support Iraq Resolution U.S. Favors*, N.Y. TIMES, Oct. 28, 2002, at A11.

156. See *Half an enchilada—Mexico's relationship with the United States*, THE ECONOMIST, Jan. 25, 2003, available at 2003 WL 6244708.

157. Tina Rosenberg, *Globalization*, N.Y. TIMES, Aug. 18, 2002, at section 6, page 28.

158. *Id.*

159. See Elisabeth Bumiller, *White House Announces Security Pact With Mexico*, N.Y. TIMES, Mar. 22, 2002, at A18.

160. *Id.* See also Edward Wyatt et al., *After 9/11, Parcels of Money, and Dismay*, N.Y. TIMES, Dec. 30, 2002, at A1; David W. Chen & Raymond Hernandez, *State Misses 2 Deadlines On Security Plans*, N.Y. TIMES, Jan. 19, 2003, at section 1, page 1).

tion of a Mexican national in Texas.¹⁶¹ Fox canceled the visit when Perry refused to take his call pleading for the prisoner's life. Perry soon afterward became the U.S. Ambassador to Mexico. Fox then withdrew from the Rio Treaty on the one year anniversary of the September 11 attacks¹⁶² and has now refused to support the U.S. resolution on Iraq, due in part to his frustration over Washington's myopia.¹⁶³

2. Reading the NAFTA Tea Leaves

If U.S. trade with Mexico is any sign of what the rest of Latin America has to look forward to, Latin America may want to examine how Mexico has fared since 2001. As the biggest power in the room, the United States rarely feels any need to stick to its word in free trade agreements. The recently passed 2002 Farm Act contains billions in U.S. agriculture subsidies. Administration officials claim they are not using tariffs to block foreign imports of agriculture or anything else. Technically that is correct. The average U.S. tariff is 1.7 percent, far below the WTO requirement or the level of most other countries. Nonetheless, the United States can achieve the same protection effect by subsidizing U.S. producers and setting its trade rules so as to protect powerful domestic industries. Rules on intellectual property, technology transfers, local content requirements and subsidizing America's own industries effectively pulls the rug out from developing countries as they try to comply with our trade agreements. The best they can do is supply raw materials that the United States does not produce itself. For Central America, this means coffee, tin and sugar. Yet the average price for those goods has dropped 60 percent since 1980 because of oversupply.¹⁶⁴ Accordingly, Central and South American countries may not benefit from an FTAA. In fact, given that the main trading partners of the United States are the EU and Japan (clearly not potential members of an FTAA) as well as Mexico and Canada (already in NAFTA), it is not clear at all how much economic benefit the FTAA will bring the United States either.

Measuring the total benefit from eight years of NAFTA is not easy. In the United States, the USTR suggests that NAFTA has increased household income by \$1,300 to \$2,000 annually, and that since NAFTA was signed, U.S. manufacturing has added over 400,000 jobs.¹⁶⁵ Nonetheless, the USTR "has failed to provide documentation pursuant to a Freedom of Information Act request for 'substantiation of the USTR figure.'"¹⁶⁶ Public Citizen estimates NAFTA has

161. Jenalia Moreno & Ed Asher, *Execution puts brakes on visit to Texas by Fox / Mexico's leader opposed lethal injection of killer*, HOUS. CHRON., Aug. 15, 2002, at 1 (noting that "[u]nder the Vienna Convention of Consular Relations, detained foreigners must be told of their right to contact their consulates.").

162. Mary Anastasia O'Grady, *Americas: A Low Blow From Mexico, Badly Timed*, WALL ST. J., Sept. 13, 2002; see also Mark Matthews, *Fox's snub called more gesture than rift; Cancellation of trip to Bush ranch provides political capital at home*, BALT. SUN, Aug. 16, 2002, at 1A.

163. See Wiener, *supra* note 156.

164. Rosenberg, *supra* note 156; see also Baldwin, *supra* note 20.

165. NAFTA Works for America, *supra* note 21.

166. See Public Citizen, *White House Touts Trade Gains But Refuses Freedom of Information Act Request for Substantiation*, at <http://www.citizen.org/pressroom/release.cfm?ID=675> (last vis-

caused the loss of 1.7 million U.S. manufacturing jobs and a surging \$450 billion U.S. trade deficit.¹⁶⁷ Global Exchange says more than 765,000 U.S. jobs have disappeared as a result of NAFTA. "When these laid off workers find new jobs, they earn 23 percent less on average than at their previous employment."¹⁶⁸ "In Mexico, manufacturing wages fell 21 percent from 1995 to 1999, and have only started to recover. The percentage of Mexicans living in poverty has also grown since NAFTA went into effect."¹⁶⁹

Mexican farmers have suffered, but not as much as they will following the January 1, 2003 expiration of all Mexican tariffs against U.S. agriculture except corn, beans, sugar and powdered milk. Mexican farmers cite the \$180 billion U.S. 2002 Farm Bill to argue that they face unfair competition because of U.S. subsidies and should thus be entitled to receive anti-dumping protection like that used in the United States against foreign steel.¹⁷⁰ Probably not coincidentally, the day before the tariffs were to expire the U.S. Commerce Department ruled that mile-wide nets used to catch tuna do not significantly harm encircling dolphins, clearing the way for Mexico to market its tuna in the United States as "dolphin-safe." Environmental advocates said the ruling contradicted "the department's own scientific findings and appeared to be little more than a political gift to Mexico."¹⁷¹

On January 10, 2003, Mexican Foreign Minister Castaneda resigned, disappointed in his country's relationship with the United States. He has been replaced by a critic of NAFTA, Luis Ernesto Derb  z.¹⁷²

V.

CONCLUSION

As a single player in the multilateral system, the United States has to engage in prolonged negotiations with 130 countries in order to complete a WTO trade round. On contentious issues where the United States faces opposition, usually from the EU, the task can take even longer, or prove impossible.¹⁷³

ited Apr. 1, 2003). A U.S. District Court ordered the Bush administration to make public by January 17, 2003 documents revealing U.S. and foreign government positions in trade negotiations with potential impacts on domestic public health, labor, and environmental laws.

167. *Id.*

168. Global Exchange, *Top Ten Reasons to Oppose the Free Trade Area of the Americas*, at <http://www.globalexchange.org/ftaa/topten.html> (last visited Apr. 1, 2003).

169. *Id.*

170. Elisabeth Malkin, *Mexican Leader Aims to Offset Tariff Cuts*, N.Y. TIMES, Nov. 19, 2002, at A15. Article 131 of the Mexican Constitution allows the president to impose protective tariffs in cases where Mexican production is threatened by imported goods. CONSTITUCI  N POL  TICA DE LOS ESTADOS UNIDOS MEXICANOS art. 131, reprinted in XIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Release 98-4 (Gisbert H. Flanz ed., 2000). Invocation of article 131 could probably be overruled by a NAFTA dispute panel.

171. Christopher Marquis, *U.S. Rules That Foreign Fleets' Use of Tuna Nets Is Safe for Dolphins*, N.Y. TIMES, Jan. 1, 2003, at C4.

172. Tim Weiner, *Mexican Foreign Minister Quits; Critic of NAFTA Replaces Him*, N.Y. TIMES, Jan. 11, 2003, at A3.

173. See Trade Act Remarks, *supra* note 13.

In contrast to its stated goals, the emphasis for trade policy in the Bush administration has been to seek individual allies with whom to negotiate trade agreements. The individual countries are relatively small and for the United States the trade agreements are relatively unimportant in terms of their economic impact.¹⁷⁴ The administration nonetheless aggressively pursues them in order to create political ties with certain countries. By forming a bilateral or regional agreement, the smaller country gains preferential access to the U.S. market and the United States gains a protective cocoon in which it can bully other members and which it can use to counterbalance larger opponents at the multilateral level. The United States can both buffer itself in a larger trading group and procure preferential access to the partner countries' markets, thus assuring itself insider status while guaranteeing that Asian and European competitors remain outside. Further, through bilateral and regional agreements, the United States can insert economic liberalization measures that are not limited to trade terms and which would not be possible in a multilateral agreement.¹⁷⁵

Negotiating a bilateral agreement, given the imbalance in power of the negotiating parties, the United States can ask for "pro-business" economic and regulatory liberalization inside the partner country. This administration has explicitly stated such liberalization abroad is essential to American national security and will be pursued as part of the U.S. National Security Strategy.¹⁷⁶

By using trade agreements to reward political friends and punish slow reforming countries, Bush is taking U.S. trade policy in a direction opposite from the advances pursued by the WTO. Making agreements selectively permits the United States to choose the terms on which it will allow certain countries access to its market. In the words of USTR Zoellick:

Working on multiple fronts enables us to create a competition in liberalization, with the U.S. as a nucleus for the network." Once the United States has become the nucleus of a large enough network, and shaped the domestic policy of the countries inside the net, "[the United States] will reach with [the chosen] to make this hemisphere a model for the world."¹⁷⁷

174. See, e.g., Blustein, *supra* note 132.

175. See, e.g., David Crane, *We should lead fight for global trade talks*, *TORONTO STAR*, June 27, 2001, at E2 (quoting economist Robert Stern as saying: "Successfully concluding and implementing an FTAA will require that participants accept obligations that go well beyond their WTO negotiations.").

176. See *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES*, *supra* note 69.

177. Zoellick, *supra* note 116.

