

OBAMA’S TRADE POLICY: TRENDS, PROSPECTS, AND PORTENDS

*Okezie Chukwumerije**

ABSTRACT

This article evaluates the implications of the emerging trade policy of the Obama administration. The article begins by sketching a picture of the administration’s trade-related initiatives and situating them in the context of the trade objectives articulated by the president during the last presidential election. The article then examines the trade aspects of the administration’s stimulus and economic recovery programs. It focuses on their consistency with U.S. international trade obligations and with the long-standing commitment of the United States to a free and open multilateral trading system. The article further explores the policy and political considerations that would affect the implementation of the trade-related aspects of the administration’s environmental and labor protection initiatives. The article concludes with the caution that Obama’s mixed messages on trade, measured by his rhetoric and policies, are detrimental to the pro-trade reputation of the United States and might embolden protectionists, both within and outside the United States.

INTRODUCTION	39
A. Obama’s Approach to Free Trade During His Presidential Campaign.....	42
I. THE EMERGING PICTURE	45
II. TRADE IMPLICATIONS OF THE U.S. STIMULUS AND ECONOMIC RECOVERY PROGRAM.....	50
A. “Buy American”	50
B. “Cash for Clunkers”.....	55
C. The Auto Bailout	58
III. ENVIRONMENTAL AND LABOR PROTECTION INITIATIVES	65
A. Environmental Protection	66
B. Labor Protection	71
IV. LOOKING AHEAD	76

* Professor of Law, Thurgood Marshall School of Law, Texas Southern University, Houston, Texas.

INTRODUCTION

With the U.S. economy experiencing a severe crisis as he assumed office,¹ President Obama has understandably focused his attention on strategies for reviving the economy and preventing it from sliding into a protracted recession. Although he discussed global trade issues during the 2008 presidential election,² the ongoing economic crisis has so drained the attention of the Obama administration that it has paid scant attention to articulating a coherent trade policy. The president has occasionally intervened in support of open markets, for example, by urging Congress to make the “Buy American” provision of the stimulus package conform with U.S. international obligations,³ and by urging Congress not to use trade sanctions as a means of enforcing provisions of the Climate Bill.⁴ While these interventions are indicative of the president’s appreciation of the importance of free trade principles, he has not always demonstrated an unequivocal support for free trade. If anything, he has consistently sent mixed signals about his commitment to open markets. Observers expect that he will use a forthcoming speech to more clearly address the trade challenges facing the nation and outline his trade agenda more plainly.

Several factors make it necessary for the administration to act quickly in declaring its trade policy goals. First, during the presidential campaign, Obama promised to reshape U.S. foreign policy, in part by moving away from a unilateral strategy to a more multilateral approach for addressing the issues and challenges facing the world community.⁵ The world economic crisis is the most severe financial crisis the world community has faced since the Great Depression.⁶ The *Economist* estimated that world trade would shrink in 2008 for the first time since 1982, and that net private-sector capital investment in emerging economies would fall from \$929 billion in 2007

¹ See Martin Baily & Douglas Elliott, *The U.S. Financial and Economic Crisis: Where Does it Stand and Where Do We Go From Here?*, BROOKINGS INITIATIVE ON BUSINESS & PUB. POLICY, June 2009.

² For a summary of the candidate’s positions, see *McCain, Obama Plans on U.S. Trade Policy*, REUTERS, June 4, 2008, available at http://www.citizenstrade.org/pdf/Reuters_McCainObamaTradePolicy_06042008.pdf.

³ See Editorial, *The Peril of ‘Buy American,’* N.Y. TIMES, June 3, 2009.

⁴ See John Broder, *Obama Opposes Trade Sanction in Climate Bill*, N.Y. TIMES, June 29, 2009, available at <http://www.nytimes.com/2009/06/29/us/politics/29climate.html>.

⁵ Merle Kellerhals, *Obama Emphasizes Multilateral U.S. Foreign Policymaking*, July 25, 2008, available at <http://www.america.gov/st/usnglish/2008/July/20080725162819dmslahre1lek0.840069.html>.

⁶ See United Nations, WORLD ECONOMIC SITUATION AND PROSPECTS 2009 (2009), available at http://www.unctad.org/en/docs/wesp2009pr_en.pdf (stating that “the world economy is now mired in the most severe crisis since the Great Depression”).

to \$165 billion in 2008.⁷ This would represent a considerable reduction in the injection of foreign capital into these economies, a source of capital that has contributed significantly to the revival of these economies.⁸ The economies of Member States of the Organization for Economic Cooperation and Development (OECD) also weakened significantly in 2008,⁹ with the economic decline exacting pressures on both employment and wages. The global nature of the crisis presents an opportunity for the Obama administration to demonstrate how multilateral strategies can be used to effectively tackle global problems.

The second reason the administration must act quickly in declaring its trade policy goals is that the economic anxiety attendant with this recession has contributed to a backlash against globalization, with segments of labor and civil society organizations questioning the benefits of an open multilateral trading system.¹⁰ In the U.S., “[r]ising economic anxiety . . . is stoking a political backlash against free trade, raising worries American workers and businesses aren’t getting a fair shake in the global marketplace.”¹¹ Partly in response to the anxiety of their constituents about the benefits of free trade, some members of Congress, especially Democrats, are becoming “deeply conflicted on trade and globalization.”¹² In fact, some members of Congress are using trade “fairness” as justification for seeking to reengineer U.S. trade policy to more closely conform to their conception of U.S. strategic trade interests.¹³

Leaders in other parts of the world are experiencing similar pressures to restrict open markets. In China, for example, the government is seeking to use the expansion of exports to revitalize its domestic economy. It is doing so by introducing “bans on government agencies using imported products, tax rebates and preferential financing to exporters,” and also by continuing to implement “an exchange rate policy that aims to suppress the Chinese currency, thereby making Chinese goods cheaper on global markets than

⁷ *The Return of Economic Nationalism*, ECONOMIST, Feb. 5, 2009.

⁸ OECD, NEW HORIZONS FOR FOREIGN DIRECT INVESTMENT 4 (2002).

⁹ See OECD, ECONOMIC OUTLOOK, Vol. 2008, Issue 2.

¹⁰ See Nina Easton, *America Sours on Free Trade*, FORTUNE, Jan. 25, 2008, available at <http://money.cnn.com/2008/01/18/news/economy/worldgoaway.fortune/>.

¹¹ Greg Hitt, Christopher Conkey & Jose de Cordoba, *Mexico Strikes Back in Trade Spat*, WALL ST. J., Mar. 17, 2009, available at <http://online.wsj.com/article/SB123723192240845769.html>.

¹² Clause Barfield & Philip Levy, *In Search of an Obama Trade Policy*, AMERICAN ENTERPRISE INSTITUTE OUTLOOK SERIES, Aug. 2009, available at <http://www.aei.org/outlook/100063>.

¹³ See, e.g., Trade Reform, Accountability, Development and Employment Act of 2009, H.R. 3012, 11th Cong. (2009) see *infra* text accompanying note 224 (synopsis of the bill available at <http://www.citizen.org/documents/TRADEActFactSheet2009.pdf>)

they might otherwise be.”¹⁴ As anxiety about the state of the world economy fuels calls for protectionism, the Obama administration needs to articulate a clear trade agenda, with a coherent message on the centrality of open markets to world economic revival and prosperity.¹⁵

Finally, during the presidential campaign, Obama spoke of the need to address the environmental and labor implications of multilateral trade.¹⁶ Given the centrality of these issues to his presidential campaign and the protectionist pressures felt across the globe, it behooves the Obama administration politically to demonstrate how it can advance trade-related labor and environmental protection issues without compromising U.S. commitment to an open and free multilateral trading system.

A. *Obama’s Approach to Free Trade During His Presidential Campaign*

Obama indicated a qualified support for free trade principles throughout the presidential campaign. While recognizing that “[t]rade has been the cornerstone of our growth and global development,” he suggested that “we will not be able to sustain this growth if it favors the few, and not the many.”¹⁷ He cautioned that “we must forge trade that truly rewards the work that creates wealth, with meaningful protections for our people and our planet.”¹⁸ Acknowledging that the tide of globalization could not be turned back, Obama expressed confidence that the U.S. could compete in the global economy of the 21st century. However, he cautioned that “success will depend not on our government, but on the dynamism, determination, and innovation of the American people.”¹⁹

During the campaign, he outlined a three-pronged approach to trade is-

¹⁴ R. Taggart Murphy, *China’s Outward-Swinging Trade Doors – More Lessons from the 1970s?* THE ASIA PACIFIC J.: JAPAN FOCUS, available at <http://www.japanfocus.org/site/view/120>.

¹⁵ Group of Twenty, *The Global Plan for Recovery and Reform*, para. 3 & 22, available at <http://www.g20.org/Documents/final-communique.pdf>. (The Group of Twenty (G20) has cautioned that challenges facing world economy are not cause for retreating from an open multilateral trading system. In fact, it argues that “the only sure foundation for sustainable globalisation and rising prosperity for all is an open world economy based on market principles, effective regulation, and strong global institutions.” The G20 also noted that “[r]einventing world trade and investment is essential for restoring global growth” and pledged that its members “will not repeat the historic mistakes of protectionism of previous eras.”).

¹⁶ Council on Foreign Relations, *The Candidates on Trade*, July 30, 2008, available at <http://www.cfr.org/publication/14762/>.

¹⁷ Barack Obama, CHANGE WE CAN BELIEVE IN: BARACK OBAMA’S PLAN TO RENEW AMERICA’S PROMISE 268 (Three Rivers Press 2008) (citing Obama’s 2008 speech in Berlin).

¹⁸ *Id.*

¹⁹ Barack Obama, President of the United States of America, Speech in Flint, Mich. (June 15, 2008); see CHANGE WE CAN BELIEVE IN, *supra* note 17, at 245-46.

sues: a pledge to improve labor and environmental protections in trade agreements, a pledge to improve adjustment assistance to displaced workers, and a pledge to renegotiate aspects of the North American Free Trade Agreement (NAFTA).²⁰ With respect to labor and environmental protections, he promised to use “trade agreements to spread improved labor and environmental standards around the world,”²¹ and to only sign trade agreements that afford protections for our environment and for American workers.²² Concerned about the enforcement of existing trade obligations,²³ Obama also insisted that enforcement of existing trade agreements should not take a backseat to the negotiation of new agreements.²⁴ His promise to renegotiate NAFTA was motivated by a desire to include stricter labor protection provisions in the agreement.²⁵ He felt that he could use “the hammer of a potential opt-out” of the agreement to leverage Canada and Mexico to agree to the inclusion of enforceable labor protections in the agreement.²⁶ Furthermore, persuaded of the need to address the adverse impacts of free trade on some American workers and communities, Obama promised to broaden the trade adjustment program.²⁷ He planned to accomplish this by extending benefits to workers displaced from the services sector, create education accounts to fund the retraining of workers, and provide assistance to communities adversely affected by global trade.²⁸

Now that he is in office, Obama faces several trade-related challenges. Foremost is how to ensure that his economic stimulus policies are consistent with the longstanding U.S. commitment both to the liberalization of markets

²⁰ NAFTA is a free trade agreement between the United States, Mexico and Canada. *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993).

²¹ Campaign Website, BarackObama.com, “RESOURCE FLYERS” August 2007, *quoted in Barack Obama on Free Trade*, available at http://www.ontheissues.org/2008/Barack_Obama_Free_Trade.htm.

²² Council on Foreign Relations, *supra* note 16.

²³ Obama Campaign Booklet, *Blueprint for Change*, Feb. 2, 2008, at p. 15, available at <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf> (Obama promised to take enforcement seriously and “to make enforcement the top priority of the U.S. Trade Representative (USTR) Office, and [to] increase resources for the USTR so it can carry out its responsibility to protect American interests.”).

²⁴ Obama, *supra* note 17, at 257.

²⁵ 2007 AFL-CIO Democratic Primary Forum, Aug. 7, 2007, *quoted in Barack Obama on Trade*, *supra* note 21. (Obama promised to “Immediately call the president of Mexico and the Prime Minister of Canada to try to amend NAFTA because I think we can get labor agreements in that agreement right now.” *Id.*).

²⁶ Council on Foreign Relations, *supra* note 16.

²⁷ *See* Robert McMahon, *No End of Free Trade*, NEWSWEEK, Dec. 4, 2008, available at <http://www.newsweek.com/id/172072/page/1>.

²⁸ Obama Campaign Booklet, *Blueprint for Change*, Feb. 2, 2008, at p. 15, available at <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf>.

and to an open and free multilateral trading system. The administration has been placed in the awkward position of having to engineer a domestic policy that provides aid necessary to revive the staggering sectors of the economy, while at the same time ensuring that its stimulus policies do not send the rest of the world the wrong signal that it is acceptable for governments to intervene in the market. Hitherto a champion of open markets and limited government intervention, the U.S. cannot now appear to support protectionist policies or extensive government participation in the economy.

Another challenge facing the Obama administration is how to spearhead the revival and conclusion of the Doha Round of trade negotiations²⁹ in a political climate where there has been considerable pushback against open markets. This endeavor is made particularly difficult by the fact that during the presidential campaign, Obama took a hawkish approach to trade by arguing that effective labor and environmental protections must counterbalance trade liberalization. He also advocated providing assistance to those adversely affected by globalization. He cannot now spearhead the conclusion of the Doha Round of negotiations without simultaneously demonstrating a serious commitment to these counterbalancing concerns. Given the increasing backlash against globalization, he must strike a fine balance between advocating free trade and ensuring that his trade policy adequately addresses the concerns of those most directly affected by the adverse consequences of global trade.³⁰ The difficulty with balancing these considerations is that while the benefits of an open multilateral trading system are demonstrable and varied, these benefits are dispersed in the national economy.³¹ In contrast, the adverse consequences of trade liberalization, in terms of job losses and plant closures, are more visible and concentrated in struggling communities.

A certain pragmatism is becoming evident in Obama's approach to trade issues. During the campaign, he expressed support for free trade, but also advocated trade fairness and the inclusion of a social compact in trade

²⁹ The Doha Round was undertaken by the World Trade Organization pursuant to a Ministerial Declaration adopted on Nov. 14, 2001, at a Ministerial Conference in Doha, Qatar, WT/MIN(01)DEC/1 (Nov. 20, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

³⁰ See Bob Davis & Gregg Hitt, *US in Tight Spot on Trade*, WALL ST. J., July 17, 2009, available at <http://online.wsj.com/article/SB124771359831849441.html>. (It has been suggested that to win over a public skeptical about benefits of trade, Obama is "following a course plotted by earlier Republican and Democratic administrations: appear to get tough with trade partners and show that trade deals can boost exports and jobs, and use that credibility to push for a new trade deal.")

³¹ See International Monetary Fund, *Globalization: A Brief Overview*, May 2008, <http://www.imf.org/external/np/exr/ib/2008/053008.htm> (noting that "gains from globalization are more broadly shared across the population").

agreements. During his presidency, he has continued to speak out in support of open markets even though his stimulus program has led to substantial government intervention in the economy and abundant government financial support to private companies. Additionally, he has since tempered his campaign promise to renegotiate NAFTA, perhaps in realization that a reopening of the agreement might lead to its unraveling. The indications are that the president fully recognizes the importance of open markets to global economic prosperity. At the same time, his actions evidence a belief that the practical constraints of politics should dictate the pace and trajectory of trade liberalization.

A picture of Obama's trade policy is slowly emerging. This picture is a collage of his administration's statements on trade issues and his administration's programs that affect trade matters. The implications of this emerging trade agenda on the U.S. economy and on the multilateral trading system deserve evaluation because of the massive and far-reaching scope of Obama's domestic economic policies and the pivotal role the United States has played in advancing the case for trade liberalization.

I. THE EMERGING PICTURE

With the economic crisis and health care policy demanding its full attention, the Obama administration was slow in outlining its trade agenda and goals. This delay in articulating its trade policy, coupled with Obama's qualified support for free trade during the campaign, led some to doubt his free trade credentials. Some viewed his delay in outlining "a pro-trade agenda" as amounting to "de facto protectionism" that "subverts his economic and foreign policy objectives."³² These observers viewed his delay in submitting outstanding trade agreements for Senate approval,³³ and his tepid reaction to the defunding of a NAFTA program that enabled Mexican truckers to ply U.S. roads as evidence of a weak commitment to free markets.³⁴ What is more, his bailout program for the auto industry and the financial sector led some observers to sound an alarm about the direction of Obama's trade agenda.³⁵

No doubt some of Obama's policies – the auto bailout program, for example – suggest a willingness to pursue a strategic trade policy that sits un-

³² Daniel Ikenson & Scott Lincicome, *Paying the Price for Obama's Lack of a Trade Policy*, L.A. TIMES, July 24, 2009, available at <http://articles.latimes.com/2009/jul/24/opinion/oe-ikenson24>.

³³ As of submission of this article, the administration is yet to submit for Congressional approval the FTA with Panama, Colombia, and South Korea.

³⁴ Ikenson & Lincicome, *supra* note 32.

³⁵ Jadish Bhagwati, *Obama and Trade: An Alarm Sounds*, FINANCIAL TIMES, Jan. 8, 2009, available at http://www.cfr.org/publication/18185/obama_and_trade.html.

comfortably with the historical support of U.S. administrations for a free trade system substantially unencumbered by government subsidization of private enterprise.³⁶ However, his failure to act more forcefully against the defunding of the Mexican trucking program, and his delay in submitting pending trade agreements for Congressional approval may only be a tactical decision to use his political capital in Congress following his election to advance his economic stimulus program over other priorities since it is a more pressing national concern. The administration has had to carefully balance its desire to obtain maximum support for its economic stimulus package with a desire to minimize the growing chorus of protectionism that is sweeping the nation. Calls for protectionism have risen partly in response to the ongoing economic crisis, and partly because the Democratic majority in Congress has a vocal group within its membership that is dubious of the benefits of trade liberalization.³⁷

Previous U.S. administrations undertook the responsibility of canvassing the benefit of an open multilateral trading system to countervail the arguments of those whose skepticism about the benefits of free trade fuel calls for protectionism. Obama's assumption of this responsibility is vital in light of the fact that increased global trade would contribute to a speedy global economic recovery.³⁸ Firmly stated reaffirmations of the positive role of free trade in expanding world economic prosperity and reducing global poverty are necessary in this regard. It is regrettable that while the President has occasionally indicated the need to stay clear of protectionist measures in addressing the economic crisis,³⁹ he has not always spoken with the strength,

³⁶ It should be noted, however, that the financial assistance granted to the auto industry in aid of its recovery is not definitionally different from the U.S. subsidization of its agricultural industry, a fact that has contributed to the delay in completing the Doha Round of trade negotiations.

³⁷ See Peter Alpern, *Missing in Action: Where is Obama's Trade Policy?*, INDUSTRY WEEK, July 22, 2009, available at http://www.industryweek.com/articles/missing_in_action_where_is_obamas_trade_policy_19635.aspx (arguing that the administration "is facing a highly skeptical Democratic majority in Congress, politically aligned with labor, wary of free trade agreements signed during the Bush and Clinton administrations"). There is, however, a strand of the Democratic congressional membership that strongly support free trade, as evidenced by the creation of the Congressional Pro-trade Caucus by Rep. Henry Cuellar, a Democrat from Texas.

³⁸ Editorial, *Mr. Obama's Trade Agenda*, N.Y. TIMES, Mar. 11, 2009, available at <http://www.nytimes.com/2009/03/11/opinion/11wed1.html> (As the New York Times rightly notes, "Vigorous trade will help the world recover. For that to happen, the United States will have to provide strong leadership and a clear commitment to fighting protectionism. Any sign of ambivalence from Washington will only make things worse.").

³⁹ Michael Sheer, *Renegotiating NAFTA on Hold, Obama Says*, WASH. POST, Feb. 20, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/19/MNNS16157K.DTL&type=politics> (Sheer notes that "Now is a time where we've got to be very careful

conviction, and clarity he has used in articulating his health and economic stimulus policies.

Nonetheless, the picture emerging of his administration's trade policy is one of pragmatic support for an open and free multilateral trading system, with a focus on including social compacts in trade agreements and a commitment to enforcing trade obligations. The President has toned down some of his campaign rhetoric that tended to suggest an ambivalent attitude towards free trade. During the campaign he opposed the ratification of the free trade agreements that the Bush administration had negotiated with Colombia and South Korea. After assuming office, he promised the Colombian president that his administration would move forward with the agreement.⁴⁰ During the campaign he promised to renegotiate NAFTA to beef up its labor and environmental protection. After assuming office, he told Canadian and Mexican leaders that the agreement could remain as it was for the moment.⁴¹ During the campaign he called for punishment of China for manipulating its currency to boost exports. After assuming office, both Obama and his treasury secretary toned down their allegation of Chinese currency manipulation.⁴²

The administration has chosen to adopt a two-pronged approach to advancing a trade agenda. On the one hand, it wants to quiet anxiety about globalization by improving adjustment assistance to those adversely affected by foreign competition,⁴³ seeking to include labor and environmental protection provisions in trade agreements,⁴⁴ and promising to vigorously enforce trade agreements to ensure that foreign markets remain open to U.S. products.⁴⁵ On the other hand, the administration is advancing its trade agenda by committing itself to pursuing the conclusion of the Doha Round of negotiations,⁴⁶ promising to get Congressional approval for pending trade agreements,⁴⁷ and entering into a Strategic Economic Dialogue with China.⁴⁸

about any signals of protectionism . . . [b]ecause as the economy of the world contracts, I think there's going to be a strong impulse on the part of constituencies in all countries to see if we – they can engage in beggar-thy-neighbor policies.”).

⁴⁰ *Obama and Trade: Low Expectations Exceeded*, ECONOMIST, Apr. 30, 2009.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Tom Barkley, *Obama Budget Funs Reform to Trade-Adjustment Assistance*, WALL ST. J., Feb. 26, 2009, available at <http://online.wsj.com/article/SB123566941801484729.html>.

⁴⁴ United States Trade Representative (USTR), 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 3 (2009) [hereafter 2009 Trade Policy Agenda].

⁴⁵ *Id.* at 205.

⁴⁶ *Id.* at 3.

⁴⁷ Andrew Schneider, *Obama Likely to Push for Approval of Pending Bush Trade Pacts*, KIPLINGER LETTER, May 26, 2009, available at <http://www.kiplinger.com/businessresource/>

The Trade and Globalization Assistance Program Act of 2009⁴⁹ (the “Act”) has substantially expanded the trade adjustment assistance (“TAA”) program. The Act expanded the coverage of workers, increased training funds, increased accessibility and flexibility of TAA programs, and introduced a program for communities affected by trade. The Act also expanded the eligibility of adjustment assistance to include service workers dislocated from their jobs as a result of foreign competition.⁵⁰ This rectifies one of the perennial criticisms of the adjustment program: the fact that it traditionally granted assistance only to those who lost their jobs in the manufacturing sector,⁵¹ a sector that represents an ever decreasing share of the U.S. economy.⁵² Given the scope of the services sector in the U.S.,⁵³ it makes sense that any adjustment assistance to those adversely affected by foreign competition should include this sector of the economy.

Equally noteworthy is that the Act creates a transition adjustment program for communities adversely affected by trade.⁵⁴ Qualifying communities are eligible for strategic grants, community college and career training grants, and sector partnership grants. According to the U.S. Department of Labor, the expansion of trade adjustment assistance “has resulted in more than 1,200 petitions filed since May 18 [2009], compared with 137 petitions filed during the same period in 2008.”⁵⁵

The expansion of benefits under the TAA should help the administration pacify the segments of the community more adversely affected by foreign competition.⁵⁶ Some commentators question the rationale of providing

forecast/archive/Approval_of_Pending_Trade_Pacts_090526.html.

⁴⁸ Hillary Clinton & Timothy Geithner, *A New Strategic and Economic Dialogue with China*, WALL ST. J., July 27, 2009, available at <http://online.wsj.com/article/SB10001424052970204886304574308753825396372.html>.

⁴⁹ Trade and Globalization Assistance Program Act of 2009, Pub. L. No. 111-5; 123 Stat. 115 (2009).

⁵⁰ *Id.* § 1801.

⁵¹ Jessica Schauer, *Federal Trade Adjustment Assistance for Workers: Broken Equipment*, 26 B.C. THIRD WORLD L.J. 397, 404 (2006).

⁵² See Richard McComack, *Manufacturing Continues to Shrink as a Percentage of U.S. Economic Activity*, MFG & TECH. NEWS, June 21, 2006.

⁵³ See DOUGLAS CLEVELAND, U.S. DEP’T OF COMMERCE, OFFICE OF SERV. INDUS., *THE ROLE OF SERVICES IN THE MODERN U.S. ECONOMY* (Jan. 1999), <http://trade.gov/td/sif/PDF/ROLSERV199.PDF>.

⁵⁴ Trade and Globalization Assistance Program Act of 2009, § 1872, *supra* note 49.

⁵⁵ United States Department of Labor News Release, *U.S. Department of Labor Announces 1st Trade Adjustment Assistance Certification under New Law*, June 22, 2009, <http://www.dol.gov/opa/media/press/eta/eta20090711.htm>.

⁵⁶ See 2009 Trade Policy Agenda, *supra* note 44, at 2 (The administration has noted that “trade outcomes do not lift everyone up on the short turn, and cause painful adjustment for some. It is the responsibility of government to ensure that people receive the assistance they

assistance only to those affected by foreign competition, as opposed to across-the-board assistance to unemployed workers. However, the availability of the TAA program helps create a political atmosphere conducive to the marketing of international agreements for the liberalization of global trade. In fact, Congress initially conceived the TAA program as part of a package to win labor support for the 1962 Trade Expansion Act.⁵⁷ The Obama administration recognizes that a revamped TAA program would continue to play the important role of fostering a climate conducive for members of Congress to support the broadening of trade liberalization.

To further quiet anxiety about trade globalization, the administration has reiterated its commitment to using its trade policy to advance the cause of a cleaner environment.⁵⁸ In a recent report released by the Office of the U.S. Trade Representative, the administration committed to ensuring “that the frameworks for trade policy and for tackling global climate complement each other so as to reinforce sustainable economic growth.”⁵⁹ While promising to ensure that its climate policy does not contravene U.S. trade obligations, the administration pledged to “be creative and firm in assuring that trade rules do not block us from tackling this critical environmental task.”⁶⁰ Furthermore, regarding labor protection, the administration has observed that respect for the basic rights of workers benefits the world and enhances fairness for everyone.⁶¹ It pledged that its trade policy would “build on the successful examples of labor provisions in some of our existing agreements.”⁶²

With respect to the second prong of its trade agenda, the administration has reaffirmed its commitment to the World Trade Organization (WTO) and to “a rules-based trading system that advances the well being of the citizens of the United States and our trading partners.”⁶³ The administration also noted that a “strong, market-opening agreement on both goods and services in the WTO’s Doha Round of negotiations would be an important contribution to addressing the global economic crisis, as part of the effort to restore trade’s role in leading economic growth and development.”⁶⁴ However, the administration cautioned that it would seek to “correct the imbalance in the

need for make those adjustments.”).

⁵⁷ See Whitney John Smith, *Trade Adjustment Assistance: An Underdeveloped Alternative to Import Restrictions*, 56 ALB. L. REV. 943, 950 (1993).

⁵⁸ 2009 Trade Policy Agenda, *supra* note 44, at 3.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 3.

current negotiations in which the value of what the United States would be expected to give is well-known and easily calculable, whereas the broad flexibilities available to others leaves unclear the value of new opportunities for our workers, farmers, ranchers, and businesses.”⁶⁵

Thus, the emerging trade agenda of the administration emphasizes the benefits of trade, but also highlights the importance of protecting U.S. expectations in trade agreements, providing relief to those dislocated by foreign competition, and fostering labor rights and environmental protection. The administration appears to have taken a relaxed view to articulating its support for further trade liberalization, while expressing clearer support for advancing policies to promote U.S. strategic trade interests. What is emerging is the administration’s pragmatic approach of cautiously expressing support for an open multilateral trading system, while more actively canvassing a trade policy that promotes the strategic economic interests of the United States. The trade aspects of the administration’s economic stimulus and economic recovery package illustrate this pragmatic approach.

II. TRADE IMPLICATIONS OF THE U.S. STIMULUS AND ECONOMIC RECOVERY PROGRAM

The stimulus package is the central part of the federal government’s effort to use fiscal policy to revive the ailing U.S. economy. The stimulus package includes a mixture of direct and indirect methods of increasing aggregate demand in the economy. As part of the direct strategy, the package provides for increased government spending on goods and services. As part of the indirect strategy, the package includes tax relief provisions. In total, the stimulus package signed by President Obama included \$507 billion in spending programs, a tax relief program of \$282 billion, more than \$150 billion for public works projects, and funding for a state fiscal stabilization fund.

A. “Buy American”

One of the controversial provisions of the stimulus bill requires all public projects funded under the package to use iron and steel produced in the United States.⁶⁶ The inclusion of this “Buy American” provision in the stimulus package stoked fears that Congress was succumbing to protectionism

⁶⁵ *Id.*

⁶⁶ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1605, 123 Stat. 115 (2009). The law enacting stimulus package provided that “[n]one of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.”).

in its effort to revive the U.S. economy. Some questioned the effectiveness of the measure, its consequences in terms of retaliation by U.S. trading partners, and the possibility that it will encourage U.S. trading partners to enact similar protectionist measures as means of stimulating their local economies. Additionally, commentators worried about the negative signal it sends to the global community regarding the seriousness of U.S. commitment to an open and free multilateral trading system.

Although the U.S. has had versions of “Buy American” provisions in other laws,⁶⁷ the inclusion of the provision in the stimulus package created broad concern that it would engender a spread of protectionist measures across the globe. When the idea of including the “Buy American” provision in the stimulus package was first presented, U.S. trading partners spoke out against it. For example, in his letter of complaint to Congressional leaders, the European Union Ambassador John Button summarized the concerns of U.S. trading partners: “The European Commission understands that finding an appropriate response to the economic crisis is the main, and legitimate, objective of the United States Congress. But resorting to measures that may effectively close the markets from foreign operators cannot be considered the right or effective response to the situation.”⁶⁸ Furthermore, he added, “[t]he European Union is particularly concerned about the message such measures would send to the world at a time when most countries are faced with the same situation The United States and the European Union should take the lead in keeping the commitments not to introduce protectionist measures.”⁶⁹

Similarly, a group of leading U.S. multinational corporations and business organizations (including IBM, General Electric, and Intel) wrote to Congressional leaders suggesting that enactment of the “Buy American” provision would “backfire on the United States . . . , harm American workers and companies across the entire U.S. economy, undermine U.S. global engagement, and result in mirror-image trade restrictions abroad that would put at risk huge amounts of American exports.”⁷⁰ The group predicted that the enactment of the measures would “invite our international partners to ex-

⁶⁷ 47 Stat. 1520 (1933) (The U.S. has had a long history of “Buy American” provisions, going back to the Buy American Act of 1933. Federal departments, including the Department of Defense, the Federal Highway Authority, the Federal Transit Authority and the Feral Railroad Administration are authorized by law to implement versions of “Buy American” regulations.).

⁶⁸ Global Business Dialogue, Seminar, *Trade and the Stimulus Bill: A Discussion of the Buy American Provisions of H.R.1*, Feb. 5, 2009, available at http://www.ttalk.biz/pdfs/PDF_Trade_and_the_Stimulus_Bill_20090205.pdf.

⁶⁹ *Id.*

⁷⁰ *Id.* (A copy of the letter is included in materials for the Global Business Dialogue seminar).

clude American goods and services from hundreds of billions of dollars of opportunities” in their stimulus programs, and perhaps raise other barriers to access to their local economies by U.S. goods.⁷¹ The letter also drew attention to how “Buy American” provisions fail to consider the fact that companies now rely on global production chains in their manufacturing processes.⁷²

In response to some of these concerns, supporters of the “Buy American” provision pointed out that the funds dedicated to projects under the stimulus package (approximately \$90 billion) constituted a very small fraction both of the \$2 trillion dollars in goods the United States purchases from the rest of the world in a typical year, and of the larger U.S. economy.⁷³ If, as its supporters contend, this fact so limits the reach of the “Buy American” provision, then it warrants the question of whether enacting the measures was worth the cost in terms of its adverse effects on U.S. reputation for supporting an open and free trading system. Gary Hufbauer and Jeffrey Schott have argued that the provision would “damage the United States’ reputation, with very little impact on US jobs.”⁷⁴ In their view, “[i]n a country of 140 million workers, with millions of new jobs to be created by the stimulus package, the number of employees affected by the “Buy American” provision is a rounding error.”⁷⁵ Moreover, the opponents’ primary concern is not about the provision’s monetary scope, but rather whether the United States considers protectionism a proper response to the global economic crisis.

Supporters of the provision, on the other hand, suggest that the U.S. is not setting a bad example with the provision because some of its trading

⁷¹ *Id.*

⁷² *Id.*

The Buy American-type provisions also [ignore] the complexity and global nature of the United States manufacturing sector. To compete successfully in the international economy, most major manufacturers in the United States increasingly rely on global production chains that source from the United States and around the world. Many domestic companies producing goods here in the United States will find it difficult, if not impossible, to comply with stringent American-only requirements because portions of their content are sourced globally. In essence, these proposals seek to impose a 19th century economic model on a much more modern and international U.S. economy, which will only make the United States, its workers and firms. *Id.*

⁷³ See Alliance for American Manufacturing, *The Facts on ‘Buy American’ and Domestic Sourcing*, Feb. 2, 2009, at 1, http://www.americanmanufacturing.org/wordpress/wp-content/uploads/2009/02/fyi_factonbuyamerica.pdf.

⁷⁴ Gary Hufbauer & Jeffrey Schott, *Buy American: Bad for Jobs, Worse for Reputation*, Policy Brief for the Peterson Institute for International Economics, Feb. 2009, at 8, available at <http://www.iie.com/publications/pb/pb09-2.pdf>.

⁷⁵ *Id.*

partners already “promote their own manufacturing base through closed self-procurement programs.”⁷⁶ While it is true that some U.S. trading partners continue to impose barriers to U.S. manufactured goods, the question remains whether erecting its own trade barriers is an appropriate response, especially when there is an ongoing global economic crisis that could be alleviated by the expansion of global trade.

The controversy surrounding the “Buy American” provision provided an opportunity for the Obama administration to illustrate its commitment to open trade by strongly opposing its adoption. Instead, the administration cautioned against the protectionist implications of a broadly worded “Buy American” provision, but at the same time signaled to Congress its willingness to accept a provision that was consistent with the international trade law obligations of the United States. When asked about the proposal then before the Congress, the president cautioned that the broadly worded provision would be a mistake, and would create a potential source of trade wars that the world can scarcely afford at a time of dwindling global trade.⁷⁷ However, the president later expressed support for the final bill that required implementation of the “Buy American” provision to be consistent with U.S. international obligations. He expressed satisfaction with the final bill as long as it did not precipitate a dangerous downward protectionist spiral.⁷⁸ The White House spokesman Robert Gibbs stated that the “Buy American” provision struck the right compromise that respects the existing “Buy American” laws, while also ensuring that the provision does not engender unnecessary trade friction during a period of global economic crisis.⁷⁹

The compromise engineered by the president was the inclusion of a statement that the “Buy American” provision “shall be applied in a manner consistent with the United States obligations under international agreements.”⁸⁰ These obligations include those under the WTO Agreement on Government Procurement (GPA),⁸¹ NAFTA⁸², and other free trade agree-

⁷⁶ Alliance for American Manufacturing, *supra* note 75, at 2.

⁷⁷ Carol Lee, *Obama Backs Off 'Buy American,'* POLITICO, Feb. 13, 2009, <http://www.politico.com/news/stories/0209/18809.html>.

⁷⁸ *Id.*

⁷⁹ Moira Herbst, *Jobs and Protectionism in the Stimulus Package*, BUSINESS WEEK, Feb. 16, 2009, available at http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db2090216_920561.htm?chan=top+news_top+news+index+-+temp_top+story.

⁸⁰ American Recovery and Reinvestment Act of 2009, § 1605(d), *supra* note 66.

⁸¹ The GPA is designed to open up government procurement to competition from companies of signatory states to the agreement. Article 1 of the GPA provides that the agreement “applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement.” Signatory countries excluded certain areas from coverage under the GPA. For example, the United States excluded from the agreement restrictions attached to federal funds for mass transit and highway projects.

ments signed by the United States. These obligations do not extend to U.S. trading partners that are not signatories to the foregoing agreements. These include major U.S. trading partners such as Brazil, China, India, and Russia.⁸³ The compromise certainly addresses some of the concerns of the critics of the proposed provision who feared that the administration would implement it in a manner that would contravene the international obligations of the United States. However, by not fighting to ensure the complete rejection of the provision, the Obama administration has put the United States in a difficult position. It would be hypocritical for the United States to complain if other countries adopt similar protectionist measures in an attempt to prevent external leakages of their own stimulus packages.

Following the enactment of the “Buy American” provision of the stimulus package, China introduced a similar, but broader, measure as part of its own stimulus initiative. Under the Chinese measures, “[g]overnment investment projects should buy domestically made products unless products or services cannot be obtained in reasonable commercial conditions in China.”⁸⁴ These measures require agencies seeking to use imported products in executing government-sponsored stimulus projects to obtain governmental approval before “purchasing activity starts.”⁸⁵ Responding to the Chinese initiative, a spokesman for the U.S. Embassy in China observed that “President Obama has emphasized the importance of avoiding protectionism in responding to the financial crisis.”⁸⁶ Not surprisingly, the spokesperson did not condemn the measure more directly, a position that the Chinese would have viewed as hypocritical in light of the enactment of similar, albeit narrower, measures by the United States. The fact that foreign businesses operating in China have expressed alarm at being denied fair access to Chinese stimulus projects that represent a substantial proportion of projected Chinese GDP in 2009 highlights the deleterious effect of these measures.⁸⁷ While the U.S. measure may not have directly motivated the enactment of the Chinese measures,⁸⁸ without it, the U.S. would have had stronger moral footing to

⁸² Chapter 10 of NAFTA covers the government procurement obligations of the signatory states. Its coverage is broader than the GPA, but its obligations do not extend to state and provincial government entities.

⁸³ The GPA is not part of the WTO single undertaking accords. Thus, the GPA is binding on, and provides benefits to, only those countries that have signed the agreement.

⁸⁴ Peter Foster, *China's 'Buy Chinese' Decree with £400bn Stimulus Package Risks US Protectionist Row*, TELEGRAPH, June 17, 2009, available at <http://www.telegraph.co.uk/finance/financetopics/recession/china-economic-slowdown/5556913/Chinas-Buy-Chinese-decree-with-400bn-stimulus-package-risks-US-protectionism-row.html>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See id.* (Like the United States, China already has version of “Buy Chinese” provi-

persuade China and other countries not to enact protectionist measures as part of their economic stimulus programs.

B. "Cash for Clunkers"

The Obama administration demonstrated an alternative, more pro-trade, approach to the use of stimulus financing in its implementation of the "Cash for Clunkers" program.⁸⁹ Under the program, certain car owners are eligible to receive instant rebates of up to \$4,500 for the purchase or lease of a new car that is more fuel efficient than the owner's old car.⁹⁰ To get a rebate of \$3,500, the new car must be at least 4 mpg more efficient than the one the car owner is trading in; for a \$4,500 rebate, the improvement requirement is 10 mpg. The Cash for Clunkers program has three objectives: to energize the economy, to boost the sale of automobiles, thereby contributing to the recovery of the auto industry, and to put more fuel-efficient and cleaner vehicles on the roadways.⁹¹ The program ran from July 1, 2009, to August 24, 2009, when the authorized funding ran out.⁹²

Initially funded to the tune of \$1 billion, the program was so successful that it ran out of funds within one month of its inception.⁹³ Congress had to approve the injection of additional funds into the program to extend it.⁹⁴ In a sign that the program is achieving its objective of boosting auto sales, it has helped reduce the inventory of unsold vehicles at many dealerships to their lowest levels in recent years.⁹⁵ For example, as a result of the program, Ford Motors "saw an increase in its July [2009] sales, the first year-over-year jump for the auto maker in almost two years."⁹⁶ There were also indications

sions.).

⁸⁹ The program is formally known as the "CAR Allowance Rebate System" (CARS).

⁹⁰ See Neil King & Andrew Grossman, *New Cash Steered to Clunkers*, WALL ST. J., Aug. 1, 2009, available at <http://online.wsj.com/article/SB124903908261696593.html>.

⁹¹ See Dep't of Transp., "Transportation Secretary Ray LaHood Kicks-off CARS program," July 27, 2009, available at <http://www.cars.gov/files/official-information/July27PR.pdf>.

⁹² See Josh Mitchell & Jeff Bennett, *'Cash for Clunkers' to End Monday*, WALL ST. J., Aug. 21, 2009, available at <http://online.wsj.com/article/SB125079911572147367.html>.

⁹³ Corey Boles, *Senate's 'Clunkers' Vote Coming on Thursday*, WALL ST. J., Aug. 5, 2009, available at <http://online.wsj.com/article/SB124948404586207977.html>.

⁹⁴ See Dana Hedgpeth & Perry Bacon, *With Senate Vote, Congress Refuels 'Clunkers' Program*, WASH. POST, Aug. 7, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080601656.html>.

⁹⁵ *Id.* But see Jeremy Anwyl, *More Cash for Clunkers?*, WALL ST. J., Aug. 3, 2009, available at <http://online.wsj.com/article/SB10001424052970204619004574324350084909302.html> (questioning usefulness of clunkers program and suggesting program should not be renewed).

⁹⁶ Mathew Dolan, *Ford Sees First Monthly Sales Gain in Nearly Two Years*, WALL ST. J.,

that the program was achieving its objective of contributing to the recovery of the U.S. economy. According to the Wall Street Journal, “[o]f the nearly \$800 billion of stimulus funds, the \$1 billion ‘Cash for Clunkers’ program may offer the most bang for the buck in terms of jump-starting the economy.”⁹⁷ Neal Soss, a Credit Suisse economist, has observed that the \$1 billion initially dedicated “for ‘cash for clunkers’ looks dramatically more efficient, dollar for dollar, than anything else the Congress has passed yet.”⁹⁸ Economists are now upwardly revising their 2009 projection of the gross domestic product of the country.⁹⁹

One of the remarkable things about the success of the “Cash for Clunkers” program is that it did not depend on the kind of protectionism that crept into the substantive stimulus package. Unlike the substantive stimulus package, the clunkers program did not contain a “Buy American” provision. Under the program, purchasers could use rebates to purchase either foreign or locally manufactured vehicles that meet the stipulated fuel improvement standards. The program also does not discriminate between vehicles manufactured by U.S. owned automakers and those manufactured by foreign owned automakers. The original clunkers bill sponsored in the House of Representatives by Betty Sutton would have prohibited the use of the rebates for purchase of cars manufactured overseas, and offered higher rebates for cars and trucks built in the United States than those built in Canada and Mexico.¹⁰⁰ Lawmakers stripped these protectionist “Buy American” aspects from the bill as a result of opposition from foreign automakers and trade advocates who expressed concern that it would violate U.S. obligations under the WTO.¹⁰¹

According to the White House spokesman Robert Gibbs, including the “Buy American” provision in the clunkers bill would have created legal and trade problems.¹⁰² Instructively, the explanation by the Obama administra-

Aug. 3, 2009, available at <http://online.wsj.com/article/SB124923308640699551.html>.

⁹⁷ Justin Lahart, *Trade-In Program Tunes Up Economic Engine*, WALL ST. J., Aug. 4, 2009, available at <http://online.wsj.com/article/SB124934426743203057.html>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Angela Keane & Holly Rosenkrantz, *Four of Top ‘Clunkers’ Model Purchases Are Foreign*, BLOOMBERG.COM, Aug. 4, 2009, <http://www.bloomberg.com/apps/news?pid=20601101&sid=aOvqtH88QaJg>.

¹⁰¹ *Id.*

¹⁰² *But see*, Editorial, *Cash for Clunkers*, WALL ST J., Aug. 2, 2009, available at <http://online.wsj.com/article/SB10001424052970204313604574326531645819464.html> (On the contrary, the Wall Street Journal has argued that the program is based on “crackpot economics.” According to the Journal, “The subsidy won’t add to net national wealth, since it merely transfers money to one taxpayer’s pocket from someone else’s, and merely pays that taxpayer to destroy a perfectly serviceable asset in return for something he might have bought anyway.”

tion's spokesperson, Robert Gibbs, for its opposition to a "Buy American" provision in the "Cash for Clunkers" program focused not on the economic arguments against enacting the protectionist measures, but rather on the legal and trade problems it would have caused.¹⁰³ Unlike the "Buy American" provision in the stimulus package, a "Buy American" clause in the clunkers program would certainly have led to a trade complaint before the World Trade Organization. The "Buy American" provision in the substantive stimulus package was concerned with government procurement, which involves procurement of goods and services by the government or its agencies. Within the WTO, government procurement is governed by the WTO Agreement on Government Procurement, which is binding only on those states, including the United States, that have signed it.¹⁰⁴ In contrast, the clunkers program deals with the state providing rebates to individual consumers to purchase automobiles for themselves, an issue governed by the national treatment principle of the WTO GATT agreement.¹⁰⁵ Applicable to all member states of the WTO, the national treatment principle prohibits members states from providing incentives to consumers in their countries to purchase locally manufactured goods instead of imported goods.¹⁰⁶ Structuring the rebate program to encourage consumers to purchase locally manufactured cars, instead of foreign made ones, would clearly have contravened the national treatment principle of the WTO agreement.

Supporters of the inclusion of a "Buy American" provision in the clunkers bill were motivated by the need to prevent "leakages" in the program, that is, preventing the stimulus money from benefiting manufacturers and workers outside the United States. The argument is that "if American taxpayers are footing the bill in order to create American jobs, the jobs should be created . . . here in America."¹⁰⁷ Some of these advocates might feel justified in their position by the finding that "[f]our of the top five mod-

This critique does not take into account consumer confidence the program has injected into economy, neither does it properly recognize the multiplier effect of money spent in purchasing new vehicles under program.).

¹⁰³ *Id.*

¹⁰⁴ See Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), Legal Instruments – results of the Uruguay Round, 33 I.L.M. 1125 (1994).

¹⁰⁵ See The General Agreement on Tariffs and Trade 1994, art. III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1 A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 33 I.L.M. 1154 (1994).

¹⁰⁶ *Id.*

¹⁰⁷ Robert Reich, *The Stimulus and the Auto Bailout: The Perils of Confusing American Companies with American Jobs*, published in Robert Reich's Blog, Feb. 17, 2009, available at <http://robertreich.org/post/257310209/the-stimulus-and-the-auto-bailout-the-perils-of>.

els sold so far under the U.S. ‘cash for clunkers’ program . . . are made by foreign automakers.”¹⁰⁸ Similarly, autos “made by the three largest U.S. automakers – General Motors Co., Ford, and Chrysler Group LLC – were fewer than half of sales under the program through Aug. 1 [2009] The companies accounted for 47 percent of the clunkers transactions.”¹⁰⁹ However, this finding does not indicate where the cars sold were manufactured and, even if they were manufactured in the United States, what percent of the parts used in their manufacture the automakers imported from abroad. The world economy has become so intertwined that most companies use global procurement systems, sourcing their inputs from across the globe. Focusing on the locale of final manufacture often undervalues this important fact. Leakages are unavoidable in an open global economy.¹¹⁰ With respect to structuring a stimulus program, the core focus should be on the range of projects and programs that would best stimulate economic activity in the country, without necessarily seeking to exclude foreign goods and services. The Obama administration took the right step in resisting the inclusion of a “Buy American” provision in the “Cash for Clunkers” program.

C. *The Auto Bailout*

The aspect of the Obama administration’s economic revival program with perhaps the broadest trade implications is the auto bailout program. The administration came into office at a time when traditional U.S. auto manufacturers (GM, Ford, and Chrysler) were facing severe financial crisis.¹¹¹ In October 2008, auto sales declined by 31.9%.¹¹² Although the decline affected foreign auto manufactures, American auto manufacturers were hit particularly hard.¹¹³ Saddled with legacy costs and bloated payrolls, and with their revenues from car sales declining, “they burned through their cash reserves at alarming rates.”¹¹⁴ In the fall of 2008, they went cap in hand to

¹⁰⁸ Keane & Rosenkrantz, *supra* note 100.

¹⁰⁹ *Id.*

¹¹⁰ Henry Chu, *Germany’s ‘Cash-for-Clunkers’ Scheme Fuels Sales of Foreign-made Cars*, L.A. TIMES, June 16, 2009, available at <http://articles.latimes.com/2009/jun/16/business/fi-czech-cars16> (with regard to leakages in German version of clunkers program, “We live in a open economies, and whatever type of fiscal stimulus package that you adopt, you will always have those leakage effects It’s inevitable.”).

¹¹¹ Bill Vlasic & Nick Bunkley, *Hazardous Conditions for the Auto Industry*, N.Y. TIMES, Oct. 1, 2008, available at <http://www.nytimes.com/2008/10/02/business/02sales.html>.

¹¹² Jack Healy, *A Record Decline in October’s Retail Sales*, N.Y. TIMES, Nov. 14, 2008, available at <http://www.nytimes.com/2008/11/15/business/economy/15econ.html>.

¹¹³ See Vlasic & Bunkley, *supra* note 111.

¹¹⁴ *Auto Industry Crisis*, N.Y. TIMES, available at http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/auto_industry/index.html.

the Bush administration, pleading for financial assistance to enable them both to weather the storm of the declining economy, and to provide them room to restructure their businesses to better compete with foreign automakers.

This was not the first time U.S. automakers had sought the protection of the U.S. government. There have been several government efforts to aid the auto industry. Perhaps the best example was during the Reagan administration when the United States and Japan, in an effort to protect U.S. automakers, entered into voluntary export restraint agreements limiting the export of Japanese vehicles into U.S. markets.¹¹⁵ As a result of the prior history of unsuccessful government attempts to assist U.S. automakers in adjusting to foreign competition, there was significant opposition to providing them further assistance.¹¹⁶ The fact that many of the foreign automakers had since established auto manufacturing plants in the United States only exacerbated existing displeasure with the inability of U.S. automakers to successfully restructure to compete against foreign automakers.¹¹⁷ Because foreign automakers employ Americans in their U.S. plants, lawmakers could no longer justify support for financial assistance to U.S. automakers merely on the basis of protecting American jobs. While U.S. automakers continue to employ thousands of Americans, so do some foreign automakers that have established manufacturing plants in the United States.¹¹⁸

Nonetheless, owing in large part to political pressure by the Detroit automakers and their supporters, both the Bush and Obama administrations decided to provide direct financial assistance to U.S. automakers. Instructive in terms of the trade implications of this financial assistance are the scope of the assistance provided by the government, the depth of government participation in the management of the affected companies, and the signal government intervention in the auto industry sends about the Obama administration's conception of the appropriate role of governments in private enterprise

¹¹⁵ See Steven Berry, James Levinsohn & Ariel Pake, *Voluntary Export Restraints on Automobiles: Evaluating a Trade Policy*, 89 AM. ECON. REV. 400 (1999) (discussion of economic implications of voluntary restraint agreement).

¹¹⁶ See David Herszenhorn, *Chances Dwindle on Bailout Plan for Automakers*, N.Y. TIMES, Nov. 13, 2008, available at <http://www.nytimes.com/2008/11/14/business/14auto.html> (Senator Richard Shelby of Alabama quoted as saying, "The financial straits that the Big Three find themselves in is not the product of our current economic downturn, but instead is the legacy of the uncompetitive structure of its manufacturing and labor force.").

¹¹⁷ See Hannah Elliott, *America's Foreign Automaker Capitals*, FORBES, Jan. 6, 2009, available at http://www.forbes.com/2009/01/06/foreign-automaker-towns-forbeslife-cx_he_0106cars.html (noting that "[m]ore than half of all vehicles sold by foreign automakers in the United States are made in the U.S.").

¹¹⁸ See *id.* (Manufacturing plants and research centers in the United States owned by foreign automakers employ 92,700 Americans with a total payroll of \$6.3 billion.).

in a free market.

The level of financial support both the Bush and Obama administrations provided to General Motors (GM) illustrates the extent of the government's bailout of U.S. automakers. Between December 2008 and February 2009, GM received approximately \$13 billion in bailout loans from the federal government.¹¹⁹ In return, the Obama administration required GM to produce a strategic plan demonstrating how it would attain long-term profitability.¹²⁰ The government required GM to extract concession from unions, creditors, suppliers, and dealers to help in reducing its operational costs. The plan submitted by GM in February 2009 included proposals to cut its workforce and drastically scale down its global operations. Dissatisfied with the progress being made by GM in restructuring its operations, the Obama administration, in March 2009, forced out the company's then chief executive, Rick Wagoner, and threatened to withhold further government assistance. This would force the company to slide into bankruptcy unless it met the renewed White House conditions for additional financial assistance within 60 days. The White House task force on auto bailout made it clear that GM had to make more job cuts, shut down more plants, and further shrink its operations in order to be eligible for further support.¹²¹ GM submitted an additional plan providing for further job cuts and dealership closures. It also reached an agreement with the United Automobile Workers of America (U.A.W.) to reduce some of its legacy expenses.

However, GM was ultimately unable to reach an agreement with its bondholders, and on June 1, 2009, it filed for bankruptcy protection.¹²² The shrunken General Motors Company that exited from the bankruptcy proceedings will initially be 60% owned by the federal government in return for the funds the government injected into the company.¹²³ The government has also promised "to provide at least \$30 billion more on top of the more than \$20 billion handed to the company already."¹²⁴ During the restructuring program, the government promised to "guarantee warranties on General Motors . . . vehicles to help mitigate any drop in sales that could occur as they undergo the tough restructuring measures recommended by the government."¹²⁵

¹¹⁹ See *Auto Industry Crisis*, *supra* note 114.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Neil King Jr. & Sharon Terlep, *GM Collapses Into Government's Arms*, WALL ST. J., June 2, 2009, available at <http://online.wsj.com/article/SB124385428627671889.html>.

¹²³ *Auto Industry Crisis*, *supra* note 114.

¹²⁴ *Id.* (Canadian government will take a 12 percent interest in company, with U.A.W. taking up to 20 percent.).

¹²⁵ Neal E. Boudette, *U.S. to Guarantee GM, Chrysler Warranties Amid Restructuring*,

The Obama administration's appointment of an auto czar demonstrated the extent of its entanglement in the affairs of the struggling U.S. automakers. Although the auto czar, Steven Rattner, resigned six months after taking office,¹²⁶ he was instrumental in overseeing the restructuring of both GM and Chrysler. Speaking after Rattner's resignation, Treasury Secretary Timothy Geithner noted that the administration was entering into "a new phase of government's unprecedented and temporary involvement in the automotive industry."¹²⁷

All told, the government sunk more than \$60 billion into the auto industry between fall 2008 and spring 2009,¹²⁸ and the bill might well increase.¹²⁹ Given the longstanding precarious health of the U.S. automakers, it remains an open question whether the government will ever recover the funds it injected into the U.S. automakers.

The substantial entanglement of the Obama administration in the auto industry raises the question of whether the administration has decided to implement an activist industrial policy,¹³⁰ something that has been controversial in U.S. politics.¹³¹ With the exception of involvement in the defense industry and long-standing subsidization of the agricultural sector, U.S. administrations have been reluctant to accept a model of extensive government intervention in the market in support of particular sectors of the economy.¹³² Viewed broadly, U.S. administrations have "followed the principle

WALL ST. J., Mar. 30, 2009, available at <http://online.wsj.com/article/SB123838536264268763.html>.

¹²⁶ Neil King Jr., *Auto Czar Quits Post Six Months Into The Job*, WALL ST. J., July 14, 2009, available at <http://online.wsj.com/article/SB124751573500734529.html>.

¹²⁷ *Id.*

¹²⁸ See John Reed, *Back On The Road*, FINANCIAL TIMES, June 17, 2009, available at http://www.ft.com/cms/s/0/0f821d34-5b64-11de-be3f-00144feabdc0.html?ncllick_check=1.

¹²⁹ Neil King Jr., *supra* note 126.

¹³⁰ See European Economic Advisory Group (EEAG), *Report on the European Economy 2008* at 105, available at http://www.cesifo-group.de/pls/guestci/download/EEAG%20Report%202008/eeag_report_chap4_2008.pdf (Industrial policy has been defined as "the set of government actions affecting companies in different productive sectors in a country . . . and, more specifically, affecting their ability to compete both domestically and abroad." Industrial policy includes microeconomic policies, the provision of broad infrastructure and sector-based aid to companies.)

¹³¹ See Michael Moran, *The Rebirth of Industrial Policy*, Council of Foreign Relations, Dec. 19, 2008, http://www.cfr.org/publication/17978/rebirth_of_industrial_policy.html. Steve Lohr, *In U.S., Steps Toward Industrial Policy*, N.Y. TIMES, May 20, 2009, available at <http://www.nytimes.com/2009/05/20/business/20policy.html> (According to Steve Lohr, "[i]n the United States, industrial policy has long been viewed with suspicion by many policy makers and economists, who consider it government meddling in the private sector and a violation of free-market principles.").

¹³² William Cline, *U.S. Trade and Industrial Policy: The Experience of Textile, Steels, and Automobiles*, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 211

of free trade to avoid active industrial policy that seeks to favor some sectors (at the explicit or implicit cost of others).¹³³

Despite this historical reluctance to implement industrial policy, there remains considerable support among segments of the population for an industrial policy in which the government plays a more assertive role in influencing the industrial structure of the economy. Concerns about the gradual decline of the manufacturing sector in the U.S. partly motivate the movement for more government involvement in industrial policy. For example, in their book *The Deindustrialization of America*, economists Barry Bluestone and Bennett Harrison, lament what they see as the ongoing disinvestment in productive capacity in the United States. They argue that without a vibrant core set of industries, the U.S. economy will lose its place as the engine of the world economy, with attendant downward pressure on employment opportunities and wages in the country.¹³⁴ Persuaded by such arguments, proponents of National Industrial Policies (“NIP”) in the 1980s made the case for the government to get more directly involved in establishing and implementing national industrial goals.¹³⁵ Proponents of the NIP were often sympathetic to the use of government subsidies and other protectionist measures where necessary to aid particular sectors of the economy.¹³⁶

In contrast, opponents of an activist industrial policy premise their case on the benefits of free markets, and the belief that competitive U.S. companies will be able to adapt to the changing dynamics of the market. As Charles Schultze has observed:

The United States does have some old-line heavy industries with deep-seated structural problems – especially the steel and automobile industries – but they are not typical of American industry generally. There is no evidence that in periods of reasonably normal prosperity, American labor and capital are incapable of making the gradual transitions that are always required in a dynamic economy, as demand and output shift from older industries to newer ones at the forefront of technological advances One does not have to be a cynic to forecast that the surest way to multiply unwarranted subsidies and protectionist measures is to legitimize their existence under the rubric of in-

(Paul Krugman, ed., 1986).

¹³³ *Id.* at 232.

¹³⁴ See Barry Bluestone & Bennett Harrison, *THE DEINDUSTRIALIZATION OF AMERICA* (1982).

¹³⁵ See Richard McKenzie, *Industrial Policy*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS*, available at <http://www.econlib.org/library/Enc1/IndustrialPolicy.html>.

¹³⁶ *Id.*

dustrial policy.¹³⁷

By the early 1990s, support for the NIP had died down.¹³⁸ However, the recent economic crisis has led to a revival of aspects of the movement. Writing in *The Nation*, Max Fraser argued that the country needs “a bold industrial policy aimed at bridging the gap between older industries and emerging ones, revitalizing the moribund manufacturing sector, supporting an economy based on high-wage union jobs and attending to the crucial climate concerns.”¹³⁹ He laments the free market ideology that “has made the very idea of a national industrial policy infeasible (if not vaguely treasonous) for much of the past half-century.”¹⁴⁰ Similarly, Robert Kuttner noted with derision that “[w]hile other nations care about what they produce, the U.S. disdains having industrial policies, in order to set a good example.”¹⁴¹ According to him, the U.S. has been the principal architect of the WTO, an organization that, in his view, frowns on government involvement in economic development as inimical to free trade.¹⁴² He expressed the view that the time has come to use industrial policy to rebuild struggling U.S. industries, even if at the expense of the WTO.¹⁴³ Acknowledging the difficulty of reconciling an activist industrial policy with the pursuit of free market principles, Kuttner concluded that “Obama has to decide which path to follow: either the pursuit of his industrial policy or the advancement of free trade principle.” In his view, one path precludes the other.¹⁴⁴

If an activist industrial policy is incompatible with the pursuit of free trade principles, it becomes necessary to examine how Obama can reconcile his auto bailout program with the historical U.S. advocacy of free trade principles. Industrial-policy-type initiatives in support of private enterprise – such as certain funding for research and development activities to stimulate or hasten technological shifts, as advocated by Obama – may be structured to comply with international trade rules. However, the provision of more direct subsidies for the operation of failing businesses and active government participation in the day-to-day operations of these businesses raise more difficult questions. First, Obama must defend the legitimacy of such

¹³⁷ *Id.*

¹³⁸ *See id.* (discussion of why movement did not get much traction).

¹³⁹ Max Fraser, *Who's Afraid of Industrial Policy?*, *NATION*, May 13, 2009, available at <http://www.thenation.com/doc/20090601/fraser>.

¹⁴⁰ *Id.*

¹⁴¹ Robert Kuttner, *Will Barack Obama Commit Industrial Policy*, *HUFFINGTON POST*, Dec. 21, 2008, available at http://www.huffingtonpost.com/robert-kuttner/will-barack-obama-commit_b_152725.html.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

interventions in light of longstanding U.S. trade posture. Second, the possible adverse effects on trade relations between the U.S. and its trading partners must be addressed.

Even President Obama realizes that the government bailout of the U.S. automakers sits uncomfortably with the free trade principles canvassed by his and prior U.S. administrations. This explains why the president has “cast himself as a reluctant interventionist,” insisting that federal assistance to the auto industry “is a financial bridge to a post crisis future and the hand-holding will be temporary.”¹⁴⁵ Having consistently advocated free market principles, having regularly spoken out against government subsidization of the manufacturing sector,¹⁴⁶ and having occasionally filed WTO complaints against countries that subsidize their manufacturing industries, the U.S. now has to justify engaging in practices it has hitherto condemned. For example, in May 2005, the U.S. requested the establishment of a WTO panel to hear a dispute against the European Communities for their subsidization of Airbus.¹⁴⁷ The alleged subsidies to Airbus included “the provision of loans on preferential terms; the assumption and forgiveness of debt resulting from launch and other large civil aircraft production and development financing; [and] the provision of equity infusions and grants.”¹⁴⁸ The subsidies that galvanized the U.S. to file a WTO complaint are not much different from the U.S. auto industry subsidies in the stimulus package. As some observers have rightly noted, if the U.S. auto bailout program has significant adverse effects on the auto industries of other countries, the measures may not pass WTO scrutiny if those countries file a complaint against the U.S.¹⁴⁹

¹⁴⁵ See Lohr, *supra* note 131.

¹⁴⁶ James Bacchus, *After the Bailout, Tariffs?* FORBES.COM, Dec. 19, 2008 (In June 2007, then-U.S. Trade Representative Susan Schwab supported prohibition of additional subsidies under WTO rules:

It’s time to take the next step in the development of stronger WTO rules that will rein in the use of industrial subsidies. In an increasingly global economy, foreign government subsidies provide a distinctly unfair competitive advantage. The subsidies we want to prohibit maintain inefficient production capacity in industries . . . Stronger rules for these types of subsidies would address significant trade-distorting practices of many of our trading partners that often lead to unfair trade. *Id.*

The subsidies she spoke out against included subsidies covering operating losses, lending to ‘uncreditworthy’ companies and equity investment in ‘unequityworthy’ companies.)

¹⁴⁷ WTO, European Communities – Measures Affecting Trade in Large Civil Aircraft, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm (summary of dispute to date).

¹⁴⁸ *Id.*

¹⁴⁹ See e.g., Claire Brunel & Gary Hufbauer, *Money for the Auto Industry: Consistent with WTO Rules?*, Policy Brief of the Peterson Institute for International Economics, Feb. 2009, at

Quite apart from its consistency with WTO rules, the auto bailout program would also make it difficult for the U.S. to complain if other countries enact similar measures in support of their favored industries. The Obama administration may believe that the ongoing economic crisis and danger of severe job losses in the U.S. auto manufacturing industry justified the intervention. However, other countries could now justify their own interventionist policies by reference to similar arguments, an outcome that would provide comfort to protectionists.¹⁵⁰ As one commentator has cautioned, the scope of the auto bailout program has the potential “to be the torch that lights the fuse of a general resort to protectionism among America’s trading partners and the beginning of a downward spiral that undermines the world trading system.”¹⁵¹

The serious weakness of the U.S. economy as the Obama administration assumed office certainly warranted the enactment of a stimulus and economic recovery program to help revive the economy. However, the structure and implementation of the program have in some cases sent worrisome signals about the seriousness of the Obama administration’s commitment to free trade principles. Although the president did not support the “Buy American” provision of the stimulus package, he elected not to expend political capital in removing it from the program. What is more, his administration’s auto bailout program signals his belief in an activist industrial policy, at least in cases where major American industries are under severe financial strain. This kind of activist intervention portends ill for the ability of the United States to continue to play its leadership role in advancing the case for an open and free multilateral trading system and resisting attempts by other countries to enact protectionist or market interventionist measures.

III. ENVIRONMENTAL AND LABOR PROTECTION INITIATIVES

During the last presidential election, Obama promised to fight for the inclusion of stronger labor and environmental standards in new trade agreements.¹⁵² Since his election, the president and his administration have con-

7-8, available at <http://www.iie.com/publications/interstitial.cfm?ResearchID=1124>.

¹⁵⁰ See Philip Levy & Michael Moore, *Driving Toward A Trade War*, AMERICAN, Feb. 19, 2009, available at <http://www.american.com/archive/2009/february-2009/driving-toward-a-trade-war> (arguing that “a renewed push for a U.S. industrial policy supporting the auto industry virtually guarantees extensive help from other nations in their manufacturing industries, likely to the detriment of competitive U.S. exporters.”).

¹⁵¹ Michael Moran, *Picking Winner*, NEWSWEEK, Dec. 15, 2008, available at <http://www.newsweek.com/id/175062> (quoting Joe Guinan, policy analyst at The German-Marshall Fund); see also Matthew Slaughter, *An Auto Bailout Would be Terrible for Free Trade*, WALL ST. J., Nov. 20, 2008.

¹⁵² Obama “Resource Flyers,” Aug. 26, 2007, available at BarackObama.com (According

tinued to express their interest in enhancing and enforcing the labor and environmental protections in trade agreements. So far, apart from broad declarations of intent, it remains unclear what concrete steps the administration would take to realize this objective. In particular, given the president's backtracking on his promise to renegotiate NAFTA, it is uncertain whether the administration will have the will to revisit other existing international agreements in an effort to strengthen their labor and environmental protection provisions.

A. *Environmental Protection*

With respect to environmental protection, the Obama administration has pledged to "aim to make trade a part of the total kit of solutions for addressing international environmental challenges."¹⁵³ In the administration's view, it is vital to "assure that the frameworks for trade policy and for tackling global climate complement each other so as to reinforce sustainable growth."¹⁵⁴ However, the administration has also cautioned that it would be "creative and firm in assuring that trade rules do not block [it] from tackling this critical environmental task."¹⁵⁵

The administration's promise to use trade as a tool for ensuring environmental protection tracks the commitments made in the Bipartisan Agreement on Trade Policy between the Bush administration and Congressional Democrats in 2007.¹⁵⁶ The agreement, designed to provide a new trade policy template that would allow for the passage of pending trade agreements and clear the way for new ones, required the administration to incorporate an enumerated list of environmental standards into future free trade agreements signed by the government.¹⁵⁷ The agreement also called for rigorous enforcement of environmental obligations contained in free trade agreements, and mandated that these obligations "be enforced on the same basis as the commercial provisions of [trade] agreements – same reme-

to Obama campaign flyers, "Obama . . . will use trade agreements to spread improved labor and environmental standards around the world and stand firm against agreements . . . that fail to live up to those important standards.").

¹⁵³ 2009 Trade Policy Agenda, *supra* note 44, at 2.

¹⁵⁴ *Id.* at 3.

¹⁵⁵ *Id.* at 3.

¹⁵⁶ See Office of the US Trade Representative, *Bipartisan Agreement on Trade Policy*, May 2007, http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf [hereafter *Bipartisan Agreement*].

¹⁵⁷ The list of agreements to be included in future trade agreements included the Convention on International Trade in Endangered Species, Montreal Protocol on Ozone Depleting Substances, Convention on Marine Pollution, International Whaling Convention, and the Convention on Conservation of Antarctic Marine Living Resources; *See id.* at 2.

dies, procedures, and sanctions.”¹⁵⁸ The agreement reflected the broad consensus of Congressional democrats on the importance of using trade agreements to pursue legitimate environmental objectives. The Congressional democratic leadership was concerned that the Bush administration was not as committed to pursuing environmental protections objectives as it was to advancing its trade liberalization agenda. The agreement was, therefore, a means of extracting from the Bush administration a commitment to pursue these environmental objectives in return for a promise by the Congressional leadership not to obstruct the implementation of already signed trade agreements. With a democrat now in the White House, many expect that the democratic majority in Congress will continue to press for the strengthening, and rigorous enforcement, of environmental standards in trade agreements, a commitment shared by the Obama administration.

The Obama administration has demonstrated its commitment to heightening environmental standards by supporting the “cap and trade” initiative.¹⁵⁹ While this initiative demonstrates the shared commitment of both Congress and the Executive towards carbon reduction measures, it also reveals areas of tension between the two regarding the proper role of sanctions in the implementation of the administration’s climate change policy.

The U.S. administration has received significant criticism for not signing the Kyoto Protocol¹⁶⁰ on the reduction of green house emissions.¹⁶¹ For example, both French and Canadian officials have considered imposing taxes on imports from the United States as a means of forcing it to join the Kyoto Protocol.¹⁶² The condemnation of the U.S. failure to join the Protocol was not confined to non-American commentators. Even the celebrated American Nobel Prize winning economist Joseph Stiglitz argued that trade sanctions might be appropriate against the U.S. since its failure to join the

¹⁵⁸ *Bipartisan Agreement*, *supra* note 156. (Agreement noted that in the past “environmental dispute settlement procedures focused on the use of fines, as opposed to trade sanctions.”).

¹⁵⁹ See Darren Samuelsohn, *Climate Bill Needed to ‘Save Our Planet,’ Says Obama*, N.Y. TIMES, Feb. 25, 2009, available at <http://www.nytimes.com/cwire/2009/02/25/25climatewire-emissions-bill-needed-to-save-our-planet--oba-9849.html>.

¹⁶⁰ See Kyoto Protocol to the United Nations Framework Convention on Climate Change, 3d Sess. (Dec. 10, 1997), U.N. Doc. FCCC/CP/1997/7/Add.2, 37 I.L.M. 22 (1998) [hereafter Kyoto Protocol], available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

¹⁶¹ See *e.g.*, Greg Kahn, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: ENVIRONMENT: The Fate of the Kyoto Protocol Under the Bush Administration*, 21 BERKELEY J. INT’L L. 548 (2003) (noting that Bush’s stance on environment, notably his opposition to the Kyoto Protocol, has not made him popular among Europe’s press or its leaders).

¹⁶² See Andrew Greens & Tracey Epps, *Is There a Role for Trade Measures in Addressing Climate Change?* 15 U.C. DAVIS J. INT’L L. & POL’Y 1 (2008).

Protocol amounted to an unfair subsidy to U.S. manufacturers.¹⁶³ The Obama administration has decided not to press for the ratification of the Kyoto Protocol. In the president's opinion, "[i]t doesn't make sense for the United States to sign the Kyoto protocol because Kyoto is about to end [in 2012]. So instead what the administration is doing is preparing for the next round"¹⁶⁴ He added that "what we want to do is to prepare an agenda both in the United States and work internationally so that we can start making progress on these issues."¹⁶⁵

Part of what the administration has done in regards to the American agenda is to champion a new energy bill that implements a cap-and-trade system designed to help reduce carbon dioxide emissions.¹⁶⁶ The bill limits the total volume of carbon dioxide that U.S. companies can emit each year and establishes a program for issuing permits required for each ton of carbon dioxide a company emits. The goal is to establish a system of market pricing for carbon dioxide emissions and a clearinghouse where companies can trade their permits. Companies that do not fully utilize their permits would be able to sell them to those who find it cheaper or more efficient to purchase a permit than to make the technological changes necessary to eliminate their carbon dioxide emissions to the level reflected in the permits they purchase.

One of the problems with a national cap-and-trade system that is not tied to a multilateral environmental agreement signed by major trading partners is that other nations may free-ride on the benefits of the carbon dioxide emission program, without imposing similar emission reduction targets on their local manufacturers. Absent a binding international agreement on emission caps, countries that have not independently introduced such caps would continue to pollute, while leaving the burden of emission reduction to those who have independently introduced such caps. This free-rider problem makes it difficult to properly address the issue of carbon dioxide emissions on a global basis. "[I]f big emitters do not cut back, atmospheric concentrations of greenhouse gases will continue to rise dangerously no matter what the rest of the world does."¹⁶⁷ Furthermore, the free-rider problem makes it difficult for governments to market emission control initiatives to the public and local manufacturers.

¹⁶³ *Id.*

¹⁶⁴ The White House, Office of the Press Secretary, *Remarks of President Barack Obama at Student Roundtable*, Istanbul, Turkey, Apr. 7, 2009, available at http://hongkong.usconsulate.gov/uscn_wh_2009040701.html.

¹⁶⁵ *Id.*

¹⁶⁶ American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

¹⁶⁷ Editorial, *Trade and Climate*, N.Y. TIMES, July 19, 2009, available at <http://www.nytimes.com/2009/07/19/opinion/19sun1.html>.

This free-rider problem creates a variety of trade-related difficulties for the U.S. First, there is the fear that domestic caps on carbon dioxide emissions would put U.S. companies at a competitive disadvantage when competing against foreign manufacturers who are not hamstrung by similar caps.¹⁶⁸ Compliance with emission caps, by either making technological changes necessary to reduce emissions or purchasing emission permits, increases the cost of doing business. This cost is then passed on to the consumer in terms of higher prices. Manufacturers located in countries without emission caps do not bear similar costs, leading to the possibility that their products may become more competitive than those of their U.S. counterparts.¹⁶⁹ Second, there is concern that unless the U.S. countervails the benefits of manufacturing in countries without emission controls, U.S. emission standards that adversely affect the competitiveness of U.S. manufacturers might tempt them to relocate their manufacturing facilities to those countries.

These concerns have prompted debate about the role of trade in implementing emission control initiatives.¹⁷⁰ Advocates of cap-and-trade measures recognize the adverse effects it might have on the competitiveness of some U.S. businesses. Consequently, some of them view international trade-related agreements as “the best method to counteract the loss of competitiveness that such environmental regulations would impose on U.S. businesses.”¹⁷¹ The expectation is that these trade measures would compel the affected countries to enact similar climate regimes.¹⁷²

This internationally-minded approach was adopted in the new energy bill passed by the House of Representatives. A last-minute amendment to the bill provides for the imposition of trade penalties on countries that do not accept limits on carbon emissions.¹⁷³ The provision calls for the imposition of taxes on goods imported from countries that have failed to adopt carbon-reducing measures:

[I]t is envisaged to link an emission trading scheme to certain requirements on imports from countries that do not impose simi-

¹⁶⁸ See WTO-UNEP, REPORT ON TRADE AND CLIMATE CHANGE 98-99 (2009) (discussion of factors determining effect of climate change measures on competitiveness).

¹⁶⁹ See Daniella Markheim, *Energy Cap and Trade Threatens American Prosperity*, HERITAGE FOUNDATION, June, 16, 2009, at 1, available at <http://www.heritage.org/Research/Energyandenvironment/wm2488.cfm> (arguing that U.S. businesses would “find it hard to compete against foreign rivals whose governments have opted against environmental policy restraints”).

¹⁷⁰ See generally Green & Epps, *supra* note 162.

¹⁷¹ Markheim, *supra* note 169, at 2.

¹⁷² *Id.*

¹⁷³ See H.R. 2454 § 766, *supra* note 166 (The International Reserve Allowance Program).

lar emission reduction obligations on their industries. In such cases, importers would have to submit emission allowances or certified emission credits to cover the emission created during the manufacturing process of the imported good; or they would be allowed to purchase allowances in the domestic emission trading markets on equal terms with domestic industries.¹⁷⁴

The bill forced the Obama administration to explain whether it was willing to use unilateral trade sanctions as a means of promoting its climate change policies. Although an ardent supporter of the cap-and-trade program, the president spoke out against the trade sanctions component of the bill. According to the president, “[a]t a time when the economy worldwide is still deep in recession and we’ve seen a significant drop in global trade, I think we have to be very careful about sending any protectionist signals out there.”¹⁷⁵ He felt that there were less trade distorting ways of addressing the underlying environmental concerns.¹⁷⁶

Obama’s position demonstrates sensitivity to the need to resist using unilateral energy policies in a manner that might undermine the multilateral trading system. Although he did not express which less trade distorting alternatives he preferred, it is suspected that Obama wants to first explore the possibility of reaching a multilateral solution to the problem before resorting to unilateral measures that may put strain on the global trading system. As the *New York Times* noted, while “tariffs must be part of an international agreement on climate change,” unilateral measures “against fast-growing polluters like China and India would be seen as illegitimate and could easily backfire, scuttling chances of an agreement on climate issues.”¹⁷⁷

Obama’s anti-sanction position has not been well received. Nobel Prize winning economist Paul Krugman articulated a typical critique of the president’s position. Krugman argued that Obama is making a mistake by rejecting the “border tax adjustment” component of the energy bill. Border taxes represent tariffs on goods originating from countries without stipulated emission controls. In Krugman’s view, border adjustments are supported by sound economics, and these adjustments, far from being protectionist in character, are a means of leveling the playing field.¹⁷⁸ According to him, eco-

¹⁷⁴ WTO-UNEP, *supra* note 168, at 101.

¹⁷⁵ Broder, *supra* note 4.

¹⁷⁶ *Id.*

¹⁷⁷ Editorial, *Trade and Climate*, *supra* note 167.

¹⁷⁸ Paul Krugman, *Climate, Trade, Obama*, June 29, 2009, N.Y. TIMES, <http://krugman.blogs.nytimes.com/2009/06/29/climate-trade-obama/>; See WTO-UNEP, *supra* note 168, at 100 (It is true that one objective of Border Tax Adjustment is to “level the playing field between taxed domestic industries and untaxed foreign competitors by ensuring that internal taxes on products are ‘tax-neutral.’” However, the contentious issue here is whether emission

conomic theory suggests “that incentives should reflect the marginal cost of greenhouse gases in all goods, wherever produced – which in this case happens to imply border adjustment.”¹⁷⁹ He is of the view that the shibboleth “free trade good, protection bad” unduly influenced the anti-border tax adjustment position.¹⁸⁰ However, it would seem that such a dogmatic belief about the benefits of free trade did not motivate the president’s opposition to the trade-sanctions aspects of the bill. Rather, his aim was to avoid unnecessary strain in the multilateral trading system resulting from the enactment of such measures without first attempting a multilateral solution, especially amidst an ongoing global economic crisis.¹⁸¹

The plight of developing countries, many of which cannot afford the cost of the technological improvements necessary to significantly reduce their carbon dioxide emissions, supports the case for being cautious about using unilateral trade measures to implement climate change initiatives. These trade measures may adversely affect their economies unless the final bill contains exemptions for goods originating from these countries. As Daniella Marheim has rightly observed, with respect to “developing countries – those that would likely be hardest hit by trade restrictions in climate legislation – the economic stress will be particularly great. This, perversely, will likely increase the harm done to the environment rather than reduce it.”¹⁸² Rather than using trade measures against these countries, a better alternative would be a strategy of technological assistance and incentives for them to reduce their carbon emissions.¹⁸³

President Obama was right in opposing the trade measures aspects of the climate change bill. It remains to be seen what steps the president will take to fulfill his campaign promise of ensuring more stringent environmental protection in trade agreements.

B. *Labor Protection*

The Obama administration has expressed the intention to make labor

caps imposed on local manufactures would qualify as an adjustable tax within the border tax adjustment regime.).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See H.R. 2454 §766, *supra* note 166 (It is instructive to note that house bill provides that one of the negotiating objectives of United States with respect to multilateral environmental negotiations is “to reach an internationally binding agreement in which all major greenhouse gas-emitting countries contribute equitably to the reduction of global green house gas emissions.”).

¹⁸² Markheim, *supra* note 169.

¹⁸³ See Alex Evans, *How Cap-and-Trade Could Replace Foreign Aid*, FOREIGN POLICY, Feb. 2007, www.cic.nyu.edu/internationalsecurity/docs/FPCapandTrade.pdf.

protection one of the cornerstones of its trade policy. In the President's Trade Policy Agenda, the Office of the United States Trade Representative noted that free trade is "more beneficial to the world, and fairer to everyone, if it respects the basic rights of workers."¹⁸⁴ It further stated that the administration's commitment to social accountability "means working with our trading partners to improve the status, conditions, and protections of workers."¹⁸⁵ In the administration's view, one of the ways to advance the goal of labor protection is to build on the labor provisions contained in free trade agreements signed by the United States.¹⁸⁶

The U.S. has a long history of seeking to use its trade laws to enforce labor standards. These measures range from unilateral laws and policies to bilateral measures contained in trade agreements between the U.S. and some of its trading partners. The first such unilateral measure, the McKinley Tariff Act of 1890, prohibited the import of goods produced with convict labor.¹⁸⁷ Although subsequently declared unconstitutional, the National Industry Recovery Act of 1933 sought to extend this prohibition of imports to goods "that impair codes of fair competition, including the right to organize and bargain collectively, the right to join, organize or assist a labor organization, and compliance with maximum hours of work and minimum rates of pay."¹⁸⁸

More recently, the Caribbean Basin Economic Recovery Act of 1983 conditioned access to its preference program on a determination by the President that the recipient country is taking appropriate measures to provide workers "with internationally recognized worker rights."¹⁸⁹ The access provisions of the U.S. Generalized System of Preferences mirror those of the Caribbean Basin initiative.¹⁹⁰ Lawmakers designed both of these access provisions to provide incentives to the affected developing countries to improve their labor protection regimes. It was felt that access to U.S. markets would motivate their enactment of measures to protect labor rights in their respective jurisdictions.

The U.S. has also used free trade agreements to pursue the adoption and enforcement of labor standards in countries with which it trades. The first agreement to incorporate labor standards was the United States-Jordan Free

¹⁸⁴ 2009 Trade Policy Agenda, *supra* note 44, at 2.

¹⁸⁵ *Id.* at 2-3.

¹⁸⁶ *Id.* at 3.

¹⁸⁷ See William Clatanoff, *Labor Standards in Recent U.S. Trade Agreements*, 5 RICH. J. GLOBAL L. & B. 109 (2005) (Expanded to include goods produced with convict, forced and/or indentured labor by Smoot-Hawley Tariff Act of 1930, the measures remain part of U.S. law.).

¹⁸⁸ *Id.*

¹⁸⁹ Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 284 (1983).

¹⁹⁰ Clatanoff, *supra* note 187, at 110.

Trade Agreement,¹⁹¹ signed during the Clinton Administration. The agreement provided that the parties recognize the inappropriateness of using the relaxation of their domestic labor law as a means of encouraging trade.¹⁹² The parties pledged to “strive to ensure that [their] laws provide for labor standards consistent with the internationally recognized labor rights” outlined in the agreement.¹⁹³ The labor rights enumerated in the agreement are the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children; and acceptable conditions of work with respect to minimum wages, hours of work, and occupation safety and health.¹⁹⁴

More recent free trade agreements signed by the U.S. go beyond merely requiring the other country to “strive to ensure” the enshrinement and enforcement of labor standards. These agreements actually require the enactment of such measures, with some providing incentives for compliance.¹⁹⁵ For example, the United States-Colombia Free Trade Agreement, which is pending Congressional approval, requires each of the parties to “adopt and maintain in its statutes and regulations, and practices” the labor rights stipulated in the ILO Declaration on Fundamental Principles and Rights of Work.¹⁹⁶ The parties agreed not to fail to effectively enforce their labor laws “through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the parties.”¹⁹⁷ The agreement also obligates the parties to provide appropriate access to tribunals where affected persons may enforce their labor rights.¹⁹⁸ Finally, the agreement contains an institutional arrangement for the parties to oversee the implementation of their labor rights commitments.¹⁹⁹

The Bipartisan Agreement on Trade Policy²⁰⁰ also requires that trade agreements signed by the U.S. incorporate the basic principles contained in

¹⁹¹ Agreement between U.S. and Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, *available at* http://www.ustr.gov/webfm_send/1041 [hereafter Agreement].

¹⁹² *Id.* at art. 6(2).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at art. 6(6).

¹⁹⁵ See Michael Hecker, *A Lesson from the East: International Labor Rights and the U.S.-Cambodia Trade Agreement of 1999* 26 *BUFF. PUB. INTEREST L.J.* 39 (2007).

¹⁹⁶ U.S.-Colombia Free Trade Agreement, art. 17.2, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta>. The enumerated rights are broadly similar to those contained in the U.S.-Jordan Free Trade Agreement. See Agreement, *supra* note 191.

¹⁹⁷ *Id.* at art. 17.3(1)(a).

¹⁹⁸ *Id.* at art. 17.4(1).

¹⁹⁹ *Id.* at art. 17.5.

²⁰⁰ *Bipartisan Agreement*, *supra* note 156.

the ILO Declaration of Fundamental Principles and Rights at Work.²⁰¹ It mandates that these obligations be “subject to the same dispute settlement procedures and remedies as commercial obligations,” with available remedies such as “fines and trade sanctions.”²⁰²

As the foregoing survey indicates, the U.S. has increasingly sought to use its trade policy as a means of ensuring that its trading partners enforce minimum labor standards in their territories. It is unclear precisely how the Obama administration would advance this U.S. practice. However, it is vital that the administration carefully evaluate the interests that these labor protection provisions serve in crafting their approach going forward.

It is often unclear whether advocates of the incorporation of labor standards in trade agreements are concerned more about the adverse consequences on U.S. workers of competing for jobs with people in countries with relatively low labor standards than they are with the welfare of workers in the exporting, often developing, countries. For example, in justifying the inclusion of labor protection provisions in U.S. trade agreements, former Assistant United States Trade Representative for Labor, William Clatanoff, observed that these provisions “help protect American workers from unfair competition by workers who are denied fundamental labor rights.”²⁰³ If indeed “unfair competition” is the motivating concern, one wonders whether relatively weak labor standards in some developing countries really amount to unfair competition. There is little concrete evidence that competition with goods originating from countries with relatively weak labor standards accounts for any significant reduction of earning capacity in the manufacturing sector in the U.S.²⁰⁴ or substantially contributes to job losses for U.S. workers. Segments of the local population that seek protection against foreign competition often use the fair competition argument to mask protectionist tendencies. As Jadish Bhagwati has rightly observed, “labor union lobbies and their political friends have decided that the ideal defense against competition from the poor countries is to raise the cost of production by forcing their standards up, claiming that competition with countries with lower standards is ‘unfair.’”²⁰⁵ He added that “‘free but fair trade’ becomes an exercise in insidious protectionism that few recognize as such.”²⁰⁶

If the interest of workers in developing countries is the factor motivat-

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Clatanoff, *supra* note 187, at 116. (Clatanoff also states that these provisions also ensure workers of U.S. trading partners benefit from trade liberalization.)

²⁰⁴ See Michael Trebilcock & Robert Howse, *Trade Policy and Labor Standards*, 14 MINN. J. GLOBAL T.R. 261, 267-68 (2005).

²⁰⁵ Jadish Bhagwati, *supra* note 35.

²⁰⁶ *Id.*

ing the commitment of the Obama administration to using trade agreements to promote labor standards in developing countries, the administration should be careful to ensure that those seeking to limit access of foreign goods into U.S. markets do not use the labor standard provisions in these agreements for other purposes. For example, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has on occasion sought to use Section 301 of the Omnibus Trade and Competitiveness Act of 1988²⁰⁷ (Omnibus Act) as a basis for the U.S. to impose sanctions against China.²⁰⁸ Section 301 authorizes the President to impose trade sanctions against countries that impose “burdens” on U.S. commerce by violating trade agreements or by engaging in other unreasonable trade practices.

Failure to enforce any of the enumerated “internationally recognized worker rights” would amount to “unreasonable trade practice” under the Omnibus Act. These include workers’ freedom of association, rights of organizing and collective bargaining, freedom from forced or compulsory labor, freedom from child labor, and standards of minimum wages, maximum work hours, and occupational safety and health. In a petition filed against the Chinese government, the AFL-CIO sought sanctions against China on grounds that “it violates workers’ rights by suppressing strikes, barring independent unions and letting factories ignore laws on minimum wages and child labor.”²⁰⁹ On July 21, 2006, the Bush administration rejected the petition. While recognizing that there were real problems with labor protection in China, the Bush administration felt that “an investigation will neither shed more light on this problem nor lead to a more effective approach for addressing Chinese workers’ rights and labor conditions.”²¹⁰ This explanation for the rejection of the petition encapsulated the Bush administration’s perspective that unilateral trade sanctions were perhaps not the most effective and politically sensitive way of addressing labor rights issues in China.

One expects that the Obama administration, while pursuing an agenda of gradual improvement in labor standards in developing countries, would be

²⁰⁷ See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 1301, 102 Stat. 1107, 1164 (1988) (amending 301-309 of the Trade Act of 1974, 19 U.S.C.A. 2411-2419 (West 1978 & Supp. 1989)).

²⁰⁸ See Steven Greenhouse, *A.F.L.-C.I.O. Files a Trade Complaint against China's Labor Practices*, N.Y. TIMES, June 9, 2006; see also Mark Barenberg, *Section 301 Petition against the Chinese Government*, executive summary prepared for the Executive Council, AFL-CIO, available at http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/china_execsum.pdf.

²⁰⁹ *Id.*

²¹⁰ Office of the United States Trade Representative, *Statement from the USTR Spokesman Regarding China Labor Petition*, July 21, 2006, http://ustraderep.gov/Document_Library/Press_Releases/2006/July/Statement_from_USTR_Spokesman_Regarding_China_Labor_Petition.html.

equally sensitive to the need to prevent labor protection issues from becoming the justification for unfairly restricting access of goods originating from developing countries to U.S. markets. If the welfare of U.S. workers is the factor driving the incorporation of labor protection in trade agreements, there is little evidence that labor conditions in developing countries amount to unfair trade.²¹¹ Further, the imposition of trade sanctions on the goods produced in developing countries would only worsen their material conditions by shutting off their access to the markets they need.²¹²

IV. LOOKING AHEAD

The Obama administration has thus far sent mixed signals about its willingness to champion the cause of free trade.²¹³ Although the president and officials in his administration have pledged to continue the longstanding U.S. commitment to an open and free multilateral trading system, their actions have not always demonstrated a desire to use their political capital in championing this cause. For example, although President Obama expressed reservations about the “Buy American” provision of the stimulus package,²¹⁴ he did not actively fight to eliminate the provision from the package.²¹⁵ Instead he settled for a compromise that required the operation of the provision to comply with U.S. trade commitments.²¹⁶ This of course meant that government agencies could potentially use the provision against strong U.S. trading partners – like China, India, and Brazil, for example – to whom the U.S. does not owe any international obligation to accord national treatment in government procurement matters. In defense of the provision, Obama has explained that “[i]t was not something I thought was necessary, but it was introduced at a time when we had very severe economic situation.”²¹⁷ De-

²¹¹ See Tebilcock & Howse, *supra* note 204, at 269.

²¹² See Terry Miller, *Trade and Election Promises: Does the Rhetoric Match the Facts*, Heritage Lecture # 1072, Apr. 1, 2008, <http://www.heritage.org/research/tradeandeconomicfreedom/hl1072.cfm> (“If we make another country artificially increase the cost of labor in industries producing tradeable good above its real wage rates, employment will go down in those industries and in the foreign country overall. The unemployed will suffer as a result. Poverty will increase.”).

²¹³ See John Miller & Peter Fritsch, *Few Expect Progress on Doha at WTO Talks*, WALL ST. J., Sept. 3, 2009, available at <http://online.wsj.com/article/SB125191118222880191.html> (noting that the administration’s “reticence to pursue a free-trade agenda in the face of domestic opposition has become the main obstacle to moving forward on global trade talks”).

²¹⁴ See *supra* text accompanying note 76.

²¹⁵ In contrast, his opponent during the last presidential elections, John McCain, had proposed an amendment that would have stricken the provision from the stimulus package.

²¹⁶ See *supra* text accompanying note 79.

²¹⁷ Elizabeth Williamson, *Obama Defends ‘Buy American’ Program*, WALL ST J., Aug. 11, 2009.

spite the caveat about his opposition to the provision, Obama's attempt to justify the protectionist measure by reference to the depressed economic conditions in the U.S. may provide fodder for other countries that may also seek to erect protectionist measures during times of economic hardship.

The administration was similarly unwilling to expend political capital to fight the Congressional decision to halt a NAFTA program that allowed, on a trial basis, transborder trucking between the U.S. and Mexico. Although the president promised to address the issue by creating another program that would satisfy Congressional concerns,²¹⁸ his administration has not yet unfolded a plan. Meanwhile, Mexico has retaliated by imposing new tariffs worth up to \$2.4 billion on U.S. goods.²¹⁹ Opposition of labor groups to the transborder trucking initiative makes it doubtful that a revival of the program would be high on the administration's agenda.

The administration is certainly operating against significant constraints with respect to pursuing an activist free trade agenda. To gain the support of labor organizations and the wing of the Democratic Party that is dubious about the benefits of free trade, Obama had to adopt a hawkish trade posture during the early stages of the presidential campaign. His promise to renegotiate NAFTA,²²⁰ and his excoriation of China for currency manipulation, evidenced this hawkish posture.²²¹ Although he moderated his position closer to the general elections and has continued this moderation since assuming office,²²² it has been necessary to carefully balance his promises to his labor and democratic constituency with the pursuit of an activist free trade agenda.

Obama's position is made more difficult by the fact that among the new Democratic majority in Congress, there are a substantial number, often from swing constituencies, who campaigned on antiglobalist platforms.²²³ In fact,

²¹⁸ See Barfield & Levy, *supra* note 12.

²¹⁹ See Mica Rosenberg, *Mexico Tariffs Hit a Diverse List of U.S. Goods*, REUTERS, Mar. 18, 2009, available at <http://www.reuters.com/article/politicsNews/idUSTRE52H1BQ20090318>.

²²⁰ See Ewen MacAskill, *Obama Raises NAFTA Renegotiation During First Official Visit to Canada*, GUARDIAN, Feb. 19, 2009, available at <http://www.guardian.co.uk/world/2009/feb/19/barack-obama-stephen-harper-canada-visit>.

²²¹ Doug Palmer, *Obama Says China Must Stop Manipulating Currency*, REUTERS, Oct. 30, 2008, available at <http://www.reuters.com/article/vcCandidateFeed7/idUSN2949036520081030>.

²²² See Deborah Solomon, *Obama Administration Softens Its Stance on China Currency*, WALL ST. J., Apr. 16, 2009, available at <http://online.wsj.com/article/SB123982680459622079.html> (Obama has since relaxed his position on Chinese currency issue.).

²²³ Claude Barfield & Philip Levy, *In Search of an Obama Trade Policy*, AM. ENTERPRISE INSTITUTE: INT'L ECON. OUTLOOK, Aug. 2009, at 4, available at <http://www.aei.org/outlook/100063>.

some Congressional Democrats are sponsoring a new bill aimed at substantially overhauling U.S. trade law. If passed, the Trade Reform, Accountability, Development and Employment Act of 2009 (the Trade Act)²²⁴ would significantly increase Congressional oversight of trade policy. Among other things, the bill would require that all future trade agreements signed by the United States include enumerated provisions relating to matters such as environmental and labor standards, food product and safety, and currency anti-manipulation. The Trade Act would also mandate comprehensive review of major U.S. trade agreements to ensure that they comply with a list of required items in the bill. If the review reveals any gaps, the Trade Act would require the president to submit a plan to Congress to remedy them. Finally, the bill would require that before the U.S. signs any future trade agreement, Congress must certify that such an agreement satisfies the stipulated Congressional objectives. Thus, the sweeping provisions of the Trade Act are an indication of the considerable anti-globalist tendencies among the Democratic majority in Congress, and are a signal of the strength of opposition the Obama administration would face if it attempted to promote an activist free trade agenda.

It is understandable that the President may not want to battle with the anti-globalist wing of the Congressional delegation of his party at a time when he needs their support for his economic stimulus initiatives, as well as for passing his health care reform proposal. However, as he makes more progress in the execution of his domestic agenda, the president needs to demonstrate his free market credentials. So far, his record has been one of passive support for free trade. As Craig VanGrasstek has noted, the Obama administration “has shown that it will take action to avoid being labeled protectionist, but it has yet to demonstrate any eagerness to make trade liberalization an important part of its economic recovery program.”²²⁵

The indications are that Obama is adopting a pragmatic approach to trade. While recognizing the obvious benefits of free trade and trade liberalization to both the U.S. and world economies, he is cautious to acknowledge the anxiety of those concerned about the local distribution of the benefits of free trade, and those interested in ensuring that the administration pursues the trade liberalization agenda consistently with the goal of sustainable development. These latter objectives are not necessarily inconsistent with the prosecution of an active free trade agenda. The trade adjustment assistance reform enacted by the administration, and its commitment to search for

²²⁴ Trade Reform, Accountability, Development and Employment Act of 2009, http://www.citizen.org/documents/TRADEAct2009_Final_House.pdf.

²²⁵ Craig VanGrasstek, *Building without BRICs: Lessons from the 'Buy American' Debate*, 13:1 BRIDGES 3 Feb./Mar. 2009, available at http://ictsd.net/downloads/bridges/bridges_13-1.pdf.

WTO-consistent methods of advancing environmental protection through the use of trade rules, are examples of the proper methods of addressing the legitimate concerns of these groups.

What is worrisome about the Obama administration's trade posture is its hesitation to stand strongly against those fanning the embers of protectionism in the country. It is not sufficient merely to make broad declarations of support for free trade, while making weak compromises that limit the reach of protectionist policies that restrict open markets. Much more is required of the head of a country that has played a leading role in advancing the cause of trade and economic liberalization across the globe. Over the years, U.S. presidents have been called upon to restrain protectionist tendencies in Congress and make the moral case for an open and free multilateral trading system. The world is a better place for U.S. leadership in opening global markets and in advancing the case for economic freedom and liberty. It is Obama's historic responsibility to ensure that the U.S. remains in the vanguard for trade liberalization. Sending mixed signals about the benefits of free trade would only embolden parochial protectionists, both within and outside the U.S.