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Hillary E. Maki

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NOTES

TRADE PROTECTION VS. TRADE PROMOTION: ARE FREE TRADE AGREEMENTS GOOD FOR AMERICAN WORKERS?

HILLARY E. MAKI*

INTRODUCTION

Millions of Americans fear losing their jobs due to outsourcing.¹ According to a poll concerning Americans' attitudes toward international trade that was completed in early 2004, forty-one percent of respondents viewed the process of increasing international trade through reduction of barriers as proceeding too quickly; this number had increased from thirty percent in 1999.² However, some studies show that trade protectionism, particularly the Section 201 steel tariffs imposed in March 2002, as well as the longstanding sugar tariff program, have resulted in the loss of American jobs in sectors that consume a protected product.³ One study claimed that more American workers lost their jobs in 2002 to higher steel prices than the total number employed by the U.S. steel industry itself.⁴ Additionally, barriers

* J.D. Candidate, University of Notre Dame Law School, 2006; Thomas J. White Scholar 2004–2006; B.S. in Foreign Service, Georgetown University, 2002. The author would like to thank her parents, David and Judith Maki, and her brother, Joshua Maki, for their love and support. She would also like to express appreciation to Professor Frank Snyder and to members of the *Notre Dame Journal of Law, Ethics & Public Policy* for their helpful comments.

1. See Gary C. Hufbauer & Yee Wong, *Grading Growth: The Trade Legacy of President Bush*, HARV. INT'L REV., Summer 2004, at 76.

2. STEVEN KULL ET AL., PIPA/KNOWLEDGE NETWORKS, AMERICANS ON GLOBALIZATION, TRADE, AND FARM SUBSIDIES 9 (2004), available at http://www.pipa.org/OnlineReports/Globalization/GlobalTradeFarm_Jan04/GlobalTradeFarm_Jan04_rpt.pdf.

3. See generally JOSEPH FRANCOIS & LAURA M. BAUGHMAN, CITAC FOUND., THE UNINTENDED CONSEQUENCES OF U.S. STEEL TARIFFS: A QUANTIFICATION OF THE IMPACT DURING 2002 (2003), available at http://citac.info/remedy/2002_Job_Study.pdf.

4. *Id.* at "Executive Summary" ("187,500 Americans were employed by steel producers in December 2002," while "200,000 Americans lost their jobs to higher steel prices during 2002.").

to international trade increase the cost of goods and decrease the standard of living for all American consumers, disproportionately lessening spending power for the poorest Americans.⁵ According to a recent study by the U.S. International Trade Commission, trade liberalization in various sectors would reduce the prices of common household goods like sugar, apparel, footwear, and leather products.⁶

The free trade debate is nothing new to business, labor, environmental, and academic groups. Despite the dangers of protectionism in destroying jobs in “downstream” sectors⁷ and leading to large, inequitable payouts to a small number of domestic producers,⁸ opponents of free trade dubbed the 2003 round of trade negotiations on the proposed Free Trade Area of the Americas (FTAA) “Miami Vice”⁹ and warned that it “would expand the failed NAFTA model.”¹⁰ Although the FTAA negotiations stalled from late 2003 through mid-2004, a WTO accord in August 2004 breathed life back into negotiations for a trade area encompassing Alaska to Argentina.¹¹ While FTAA proponents had hoped to finish negotiations on the agreement by January 2005, the talks will probably not conclude until at least 2007.¹² The idea for the FTAA, which would unite the economies of North, Central, and South America into a single free trade agree-

5. See generally EDWARD GRESSER, PROGRESSIVE POLICY INST., TOUGHEST ON THE POOR: TARIFFS, TAXES, AND THE SINGLE MOM (2002), http://www.ppionline.org/documents/Tariffs_Poor_0902.pdf [hereinafter GRESSER, TOUGHEST ON THE POOR]; Roger W. Ferguson, Jr., Vice Chairman, Federal Reserve, Remarks at the Conference on Trade and the Future of American Workers (Oct. 7, 2004), available at <http://www.federalreserve.gov/boarddocs/speeches/2004/20041007/default.htm>.

6. U.S. INT’L TRADE COMM’N, PUBL’N NO. 3701, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS: FOURTH UPDATE 2004, at 20, 76, 81 (2004), available at <http://hotdocs.usitc.gov/docs/pubs/332/pub3701.pdf>. According to the study, sectoral trade liberalization would lower the price of sugar for U.S. consumers by eight percent, apparel by five percent, and footwear and leather products by four percent.

7. Downstream sectors are those sectors that use protected goods as input in making other goods, such as a company that manufactures metal stampings. See Ferguson, *supra* note 5.

8. See *id.*

9. Aziz Choudry, *Miami Vice: The FTAA Returns to Florida*, NEW ORLEANS INDEP. MEDIA CTR., Nov. 12, 2003, <http://neworleans.indymedia.org/news/2003/11/620.php>.

10. AFL-CIO Executive Council, *Free Trade Area of the Americas Ministerial in Miami: An Action Plan to Oppose the FTAA*, AFL-CIO, Feb. 27, 2003, <http://www.aflcio.org/aboutus/thisistheaficio/ecouncil/ec02272003k.cfm>.

11. Stephen Temple, *WTO Result Breathes New Life into Free Trade Area of the Americas*, WORLD MARKETS ANALYSIS, Aug. 4, 2004.

12. *Id.*

ment (FTA), began back in 1994, at the Summit of the Americas, which was held in Miami.¹³

Proposals seeking to free trade in the Middle East¹⁴ and Asia,¹⁵ which have received less press than the FTAA, have also floundered. Such proposals, which could be linked to improving democracy in countries seeking preferential trade status with the United States, would assist countries left off the list of FTA contenders.

This Note assesses the prudence of using FTAs, particularly the proposed FTAA, and other proposals that reduce barriers to free trade despite some negative immediate impacts on American jobs. Retaining current jobs, particularly in the manufacturing industry, has an intrinsic value because it lessens disruptions to not only workers, but also their families and sometimes their entire communities. Therefore sectors that could be harmed by a proposed FTA should be allowed some meaningful contribution to the negotiations. Nevertheless, this Note concludes that most of organized labor's concerns with FTAs are overstated and misplaced, as productivity growth, not trade, is the more likely cause of job losses in the hardest-hit sectors of the American economy.

Part I of this Note explains the recent history of FTAs negotiated by the U.S. Trade Representative (USTR) and the impact of these agreements on liberalizing trade in protected sectors of the American economy. Part II studies the effects of trade protectionism and its harmful impact on certain sectors. Part III discusses the implementation of the FTAA and its likely positive impact on overall job growth and creation in the United States. Part IV addresses the proposed FTAA and other free trade proposals from an ethical standpoint, analyzing the value of workers retaining their current jobs and the desirability of better-paying jobs and lower consumer prices. Part V explains why the FTAA and other trade proposals should strive to eliminate protectionist barriers on sensitive products, such as certain agricultural goods, in order to create a more uniform trade policy for the United States.

13. NOZOMI SAGARA, RES. INST. OF ECON., TRADE & INDUST., PROVISIONS FOR TRADE REMEDY MEASURES (ANTI-DUMPING, COUNTERVALUING AND SAFEGUARD MEASURES) IN PREFERENTIAL TRADE AGREEMENTS 20 (2002), <http://www.rieti.go.jp/jp/publications/dp/02e013.pdf>.

14. *See, e.g.*, Middle East Trade and Engagement Act, S. 1121, 108th Cong. (1st Sess. 2003).

15. *See, e.g.*, Nepal Garment Act, S. 662, 108th Cong. (1st Sess. 2003).

I. AN OVERVIEW OF RECENT U.S.-NEGOTIATED FREE TRADE PROPOSALS

The WTO allows its members to form preferential trade agreements, namely customs unions¹⁶ and free-trade areas,¹⁷ to complement the WTO's multilateral trade regime.¹⁸ Although the United States has not attempted to form any customs unions, it has focused on creating FTAs. The U.S.-Israel Free Trade Area was the first FTA the United States negotiated, and it entered into force in 1985.¹⁹ The FTA "provide[d] for the elimination of duties for merchandise from Israel entering the United States."²⁰ The historic U.S.-Canada FTA,²¹ which went into effect in 1989, significantly liberalized trade between the world's largest trading partners and set the stage for the passage of the North American Free Trade Agreement (NAFTA) five years later.²² After the passage of Trade Promotion Authority in 2002, U.S. FTA negotiations have significantly increased.

Following NAFTA's macroeconomic successes in increased exports and investment flows, increased total trade, and increased productivity in all three member states, the USTR has successfully negotiated other FTAs with countries hoping to gain the same benefits that Mexico and Canada have gained from NAFTA. Since the year 2000, the USTR has concluded bilateral FTAs with Jordan, Singapore, Chile, Australia, Morocco, Bahrain,

16. General Agreement on Tariffs and Trade, art. 24, ¶ 8(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. In a customs union: duties and other restrictive regulations of commerce . . . are eliminated with respect to *substantially all* the trade between the constituent territories of the union," and "substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

Id. (emphasis added).

17. *Id.* at ¶ 8(b). A free-trade area is defined as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on *substantially all* the trade between the constituent territories in products originating in such territories." *Id.* (emphasis added).

18. See World Trade Org., Regionalism: Friends or Rivals?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/beyl_e.htm (last visited Mar. 19, 2006).

19. See Office of the U.S. Trade Representative, Israel FTA, http://www.ustr.gov/Trade_Agreements/Bilateral/Israel/Section_Index.html (last visited Mar. 19, 2006).

20. *Id.*

21. Canada-U.S. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (entered into force Jan. 1, 1989).

22. Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States-Canada Free Trade Agreement: Did the Parties Get What They Bargained For?*, 31 STAN. J. INT'L L. 275, 275 (1995).

and Oman.²³ Additionally, the United States, five Central American countries, and the Dominican Republic signed the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR), which was approved in 2005 by the U.S. Congress.²⁴ The USTR is also negotiating FTAs with Malaysia, Panama, the Republic of Korea, the Southern African Customs Union, Thailand, and the United Arab Emirates.²⁵ It is too early to tell exactly what impact the recently concluded trade agreements have had on American workers. However, recent data on the Chile FTA show favorable export increases for both countries,²⁶ so the United States and potential FTA partners will likely rely on this data in negotiating more FTAs around the globe in the coming years.

Although the WTO would ultimately be the best forum for addressing trade disparities because it can provide blanket proposals that involve a large number of countries, the Doha Round's²⁷ prospects are complex, as tariff reform is almost always linked to agricultural subsidy cuts, services trade policy, and other issues.²⁸ Nevertheless, limited steps can be taken that may lead to FTAs in the future. For instance, in May 2003, Sens. Max Baucus (D-MT) and John McCain (R-AZ) proposed the Middle East Trade and Engagement Act,²⁹ which would have authorized the president to extend duty-free treatment to countries of the "greater Middle East," thereby eliminating tariffs on reforming

23. Office of the U.S. Trade Representative, *Bilateral Trade Agreements*, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Mar. 19, 2006) [hereinafter *Bilateral Trade Agreements*].

24. Press Release, Office of the U.S. Trade Representative, *Statement of USTR Spokesman Stephen Norton Regarding CAFTA-DR Implementation* (Dec. 30, 2005), available at http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html.

25. See *Bilateral Trade Agreements*, *supra* note 23.

26. Office of the U.S. Trade Representative, *The U.S.-Chile Free Trade Agreement: An Early Record of Success* (June 4, 2004), http://www.ustr.gov/Document_Library/Fact_Sheets/2004/The_US-Chile_Free_Trade_Agreement_An_Early_Record_of_Success.html.

27. The Doha Development Round began with the November 2001 declaration of the WTO's Fourth Ministerial Conference in Doha, Qatar, which provided the mandate for negotiations among WTO members about a range of subjects, including agriculture and services, as well as issues regarding the implementation of current WTO agreements. World Trade Org'n, *DOHA Dev. Agenda: Negotiations, Implementation and Development* http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Mar. 2, 2006).

28. EDWARD GRESSER, *PROGRESSIVE POLICY INST., HOOVER'S LAST LEGACY: TIME TO FIX AMERICA'S TARIFF SYSTEM* 6 (2005), http://www.ppionline.org/documents/hoovertariff_0113.pdf [hereinafter *GRESSER, HOOVER'S LAST LEGACY*].

29. *Middle East Trade and Engagement Act*, *supra* note 14.

Muslim-world nations.³⁰ Sen. Dianne Feinstein (D-Cal.) proposed a similar measure for Nepal, legislation that would have granted duty-free status to Nepalese textile and apparel imports in the United States, thereby giving Nepal the same status granted to participating countries under the African Growth and Opportunity Act (AGOA).³¹

Besides AGOA, the United States has two other regional trade-preference programs that provide duty-free access to the U.S. market: the U.S.-Caribbean Basin Trade Partnership Act and the Andean Trade Preference Act.³² According to economic analyst Edward Gresser, “[t]hese programs have limitations, but all attempt to eliminate tariffs on clothes and some agricultural products.”³³ However, no serious effort has been made for Asia or the Muslim world.³⁴ The U.S. interest in promoting growth in the Muslim world and Asia should be just as strong as its interest in encouraging economic development in the Western Hemisphere and Sub-Saharan Africa, especially with respect to American political aims in fomenting support for the war on terrorism.³⁵

II. A STUDY OF THE CONSEQUENCES OF PROTECTIONISM

In 1930, the U.S. Congress passed the infamous Smoot-Hawley Tariff Act of 1930,³⁶ which many commentators have proposed led to reactionary increases in tariffs, causing the Great Depression.³⁷ In more recent economic history, according to the

30. *Id.*; BRINK LINDSEY, CATO INST., *THE TRADE FRONT: COMBATING TERRORISM WITH OPEN MARKETS* 10 (2003), available at <http://www.freetrade.org/pubs/pas/tpa-024.pdf> [hereinafter LINDSEY, *THE TRADE FRONT*]; GRESSER, HOOVER'S LAST LEGACY, *supra* note 28, at 6.

31. Nepal Garment Act, *supra* note 15; GRESSER, HOOVER'S LAST LEGACY, *supra* note 31, at 6; Press Release, Office of U.S. Senator Dianne Feinstein, Senator Feinstein Introduces Legislation to Promote Economic and Political Stability in Nepal, Mar. 19, 2003, available at <http://feinstein.senate.gov/03Releases/r-nepal.htm>.

32. LINDSEY, *THE TRADE FRONT*, *supra* note 30, at 10.

33. GRESSER, HOOVER'S LAST LEGACY, *supra* note 28, at 3.

34. *Id.*

35. LINDSEY, *THE TRADE FRONT*, *supra* note 30, at 10.

36. The Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930).

37. See STEPHEN D. COHEN ET AL., *FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY* 32 (1996); ROBERT A. PASTOR, *CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY, 1929-1976*, at 79 (1980); Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1194-95 (1986); Mario J. Crucini & James Kahn, *Tariffs and Aggregate Economic Activity: Lessons from the Great Depression*, 38 J. MONETARY ECON. 427 (1996); Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J.

current Vice Chairman of the Federal Reserve, "the record of Latin America, India, and other regions that experimented with 'import-substituting industrialization,' point to the deterioration in economic performance that occurs when countries erect barriers to trade."³⁸ Vice Chairman Ferguson sums up the drawbacks of protectionism as follows:

Because they inhibit free trade, protectionist actions have an array of adverse consequences that one would expect: They reduce variety and raise costs for consumers; they distort the allocation of resources in the economy by encouraging excessive resources to flow into protected sectors; and they foster inefficiency by reducing the extent of competition.³⁹

These consequences can be seen in the aftermath of the 2002 steel tariffs, in the longstanding protectionism of the sugar industry in the United States, and in the protection of other goods like inexpensive shoes and apparel.

A. *The 2002 Steel Tariffs and their Unintended Results*

In March 2002, the Bush administration enacted steel tariffs with the purported expectation of protecting the U.S. steel industry and its workers from foreign dumping.⁴⁰ The administration imposed an average thirty-percent tariff on selected foreign steel entering the United States.⁴¹ By April 2002, many major American trade partners filed charges with the WTO's Dis-

INT'L LAW 193, 201-02 (1987); John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. 203, 210-11 (1995); C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 G.W. J. INT'L L. & ECON. 2, 17 & n.62 (1994); Theresa Wilson, Note, *Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*, 47 DRAKE L. REV. 141, 166 (1998); Laura L. Wright, Note, *Trade Promotion Authority: Fast Track for the Twenty-first Century?*, 12 WM. & MARY BILL RTS. J. 979, 983 & n.39 (2004); Ferguson, *supra* note 5.

38. Ferguson, *supra* note 5 (citing JAGDISH BHAGWATI, *INDIA IN TRANSITION: FREEING THE ECONOMY* (1993); DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* (2002); Alan M. Taylor, *Three Phases of Argentine Economic Growth, published at 12 REVISTA DE HISTORIA ECONOMICA* 649 (1994)).

39. *Id.*

40. Kevin K. Ho, Comment, *Trading Rights and Wrongs: The Bush 2002 Steel Tariffs*, 21 BERKELEY J. INT'L L. 825, 825 (2003); see also Proclamation No. 7529, 67 Fed. Reg. 10553 (Mar. 5, 2002). "Dumping" is said to occur when "a company exports its product at a price lower than the price it normally charges on its home market." World Trade Org., Anti-dumping, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Mar. 19, 2006).

41. Ho, *supra* note 40, at 826; see also Payment of Duties on Certain Steel Products, 67 Fed. Reg. 12860 (Mar. 20, 2002) (codified at 19 C.F.R. pt. 141).

pute Settlement Body in Geneva, asking for mandatory consultations.⁴² In August 2002, the Bush administration nearly crippled the tariffs by allowing over seven hundred exclusions.⁴³ After an adverse WTO decision and the threat of European sanctions, the United States revoked the steel tariffs in December 2003.⁴⁴

Critics of the steel tariffs, such as U.S. Senator John McCain, estimated that for every steel-producing job the tariffs attempted to save, thirteen others in steel-consuming industries were endangered by the tariffs.⁴⁵ The steel tariffs, along with other marketplace difficulties, increased steel costs for American companies utilizing steel as part of the production of goods. Researchers for the Consuming Industries Trade Action Coalition (CITAC) Steel Task Force set out to ascertain exactly how many American jobs were affected by the 2002 steel tariffs. CITAC announced the results in early 2003, which showed that nearly 200,000 jobs in steel-consuming industries were lost in 2002, caused in large part by the Section 201 steel tariffs.⁴⁶ The researchers assert that “[s]teel consumers have lost more jobs to higher steel costs than the total number employed by steel producers in December 2002 (187,500).”⁴⁷

According to the President of the Precision Metalforming Association, more than twelve million Americans work in steel-consuming jobs.⁴⁸ Hence, although the tariffs were effectively rolled back in August 2002, the steel-consuming industry suffered serious job losses due to the price hike of the steel tariffs. Further, the recent steel tariff program evidences the often inequitable results of protectionism, as the program led to very large payouts to a small number of producers. For instance, even as late as August 2004, two years after the major dismantling of the 2002 steel tariffs, over one-half of the antidumping⁴⁹ and coun-

42. Ho, *supra* note 40, at 838.

43. *Id.* at 827.

44. Hufbauer & Wong, *supra* note 1.

45. Ho, *supra* note 40, at 833. Sen. McCain and other Republican senators relied on a Brookings Institution analysis that found that higher steel tariffs could eliminate 86,000 jobs at U.S. steel-using companies. *Senate Leaders Would Support Steel Tariffs*, CNN, Mar. 4, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/03/04/bush.steel/index.html>.

46. See FRANCOIS & BAUGHMAN, *supra* note 3, at 12.

47. *Id.*

48. Press Release, CITAC Study Shows 200,000 Jobs Lost Nationwide from High Steel Prices in 2002—Steel Tariffs an Important Cause (Feb. 4, 2003), available at http://citac.info/release/2003/02_04.html. Steel users and others whose jobs depend on steel “claim to represent 12.8 million people.” Kristine Henry, *Steel Tariff Imports to Cut Both Ways*, BALTIMORE SUN, Mar. 3, 2002, at 1C.

49. The WTO Anti-Dumping Agreement permits governments to counteract dumping, when there is genuine (defined as “material”) injury to

tervailing duty⁵⁰ orders in place were on iron and steel-related products alone; by contrast, less than one-half of one percent of total private non-farm employment is accounted for by iron and steel producers.⁵¹

B. *Protecting Sugar and Orange Juice from Lower Prices*

U.S. protection of the domestic sugar industry dates from the Sugar Tariff of 1789,⁵² which was implemented as a revenue-raising measure.⁵³ For over two decades, a protectionist quota/tariff regime and loan program have propped up U.S. sugar prices compared to the rest of the world.⁵⁴ Presidential Proclamation 6179⁵⁵ lays the basic framework for the current quota/tariff regime in setting up a two-tiered tariff system, replacing the previous absolute quota system.⁵⁶ The primary instruments of the U.S. sugar program, sugar import restrictions imposed by the President and domestic sugar price supports established by Congress, have long been attacked as contrary to both domestic and international interests.⁵⁷

While many Americans are sympathetic to policies designed to help the small farmer, the gains of the sugar program are concentrated among a small number of producers.⁵⁸ A 1993 General Accounting Office (GAO) study showed that forty-two percent of the benefits from sugar protection accrued to a mere

the competing domestic industry. World Trade Org., Anti-dumping, Subsidies, Safeguards: Contingencies, Etc., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (last visited Mar. 19, 2006) [hereinafter WTO, Anti-dumping].

50. The WTO allows its members in certain circumstances to impose countervailing duties, or extra duties, on subsidized imports which, after investigation, are found to be damaging domestic producers. World Trade Org., Subsidies and Countervailing Measures, http://www.wto.org/english/tratop_e/scm_e/scm_e.htm (last visited Mar. 19, 2006).

51. Ferguson, *supra* note 5.

52. Tariff Act of 1789, ch. 2, 1 Stat. 24.

53. Katherine E. Monahan, Note, *U.S. Sugar Policy: Domestic and International Repercussions of Sour Law*, 15 HASTINGS INT'L & COMP. L. REV. 325, 327 (1992).

54. Aaron Schwabach, *How Free Trade Can Save the Everglades*, 14 GEO. INT'L ENVT. L. REV. 301, 306 (2001).

55. Proclamation No. 6179, 55 Fed. Reg. 38, 293 (Sept. 13, 1990). See 15 C.F.R. §§ 2011, 2015 (2001); 19 C.F.R. § 132.17 (2001).

56. See Schwabach, *supra* note 54, at 309 & n.59 (detailing the history of changes to the quota/tariff regime).

57. Monahan, *supra* note 53, at 325.

58. Ferguson, *supra* note 5.

one percent of growers.⁵⁹ Additionally, sugar protectionism saves a small number of jobs at the expense of risking a great deal more jobs in sugar-consuming industries. A U.S. International Trade Commission (USITC) study reveals that there are approximately 61,000 full-time-equivalent jobs in the U.S. sugar-producing industry.⁶⁰ However, in 2002, the Commerce Department counted approximately 987,810 Americans working in sugar-using industries.⁶¹ As the U.S. sugar program makes it less expensive to manufacture sugar-containing products abroad for export to the United States, more than ten times as many Americans face possible job cuts because of the U.S. sugar program than are assisted by it.⁶² The U.S. sugar program, according to studies cited by the Commerce Department, assists in keeping about 2260 sugar industry employees, many of whom work in growing and harvesting jobs, at an annual cost per job saved of \$826,000.⁶³

By contrast, a study commissioned by the Sweetener Users Association calculated that between 7500 and 10,000 jobs in sugar-using industries have been lost since 1997 due to artificially high sugar prices.⁶⁴ Moreover, the USITC recently conducted a

59. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-84, SUGAR PROGRAM: CHANGING DOMESTIC AND INTERNATIONAL CONDITIONS REQUIRE PROGRAM CHANGES 3 (1993), available at <http://archive.gao.gov/+2pbat6/149198.pdf>.

60. AARON LUKAS, CATO INST., A STICKY STATE OF AFFAIRS: SUGAR AND THE U.S.-AUSTRALIA FREE-TRADE AGREEMENT (2004), available at <http://www.free-trade.org/pubs/FTBs/FTB-008.html> (citing U.S. INT'L TRADE COMM'N, INVST'N No. 332-325, PUBL'N No. 3519, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS: THIRD UPDATE 2002, at 75 (2002)). The figure includes all farm jobs involved in the growing and harvesting of sugarcane and sugar beets. See also INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, EMPLOYMENT CHANGES IN U.S. FOOD MANUFACTURING: THE IMPACT OF SUGAR PRICES 4 (2006), available at <http://www.ita.doc.gov/media/Publications/pdf/sugar06.pdf> [hereinafter EMPLOYMENT CHANGES].

61. EMPLOYMENT CHANGES, *supra* note 60, at 4.

62. LUKAS, *supra* note 60.

63. EMPLOYMENT CHANGES, *supra* note 60, at 4 (citing GARY CLYDE HUFBAUER & KIMBERLY ANN ELLIOTT, MEASURING THE COSTS OF PROTECTION IN THE UNITED STATES (1994); FED. RESERVE BANK OF DALLAS, THE FRUITS OF FREE TRADE, 2002 ANNUAL REP.).

64. LUKAS, *supra* note 60 (citing *Food & Beverage Jobs Disappearing Due to Sugar Program*, PROMAR INT'L REP., Dec. 2003). The same Sugar Users Association study was cited by the Fraser Institute, which noted that the U.S. sugar program was a factor in Kraft Foods' decision to relocate its Life Savers plant, which employed about six-hundred people, from Michigan to Quebec, saving an estimated US \$10 million per year in sugar costs alone. See Todd Gabel et al., *Mr. President, Tear Down This Wall: How Trade Barriers Burden Businesses, Consumers, & the Economy*, FRASER FORUM, June 2004, at 15, available at <http://www.fraserinstitute.ca/admin/books/chapterfiles/Jun04ffGabel.pdf>.

study that indicated that trade liberalization would lower the price of sugar for American consumers by eight percent.⁶⁵ Americans have often paid twice the world price for sugar,⁶⁶ with the effect of saving a minimal amount of American jobs at the expense of many more jobs in sugar-consuming industries.

Concerning sugar protectionism's effect on the U.S. economy, the GAO estimated that the sugar program cost domestic sweetener users \$1.9 billion in 1998.⁶⁷ The USITC separately concluded that abolishing the U.S. sugar program would result in a net annual welfare gain to the U.S. economy of \$986 million.⁶⁸ Another study by the Australian Bureau of Agriculture and Resource Economics claimed that if the United States unilaterally removed its sugar trade barriers, American consumers would save about \$1.6 billion per year, and the U.S. economy as a whole would gain an additional net \$456 million per year.⁶⁹ Hence, the U.S. sugar program results in a net loss of welfare for the U.S. economy, money that could be spent on worker training programs, discussed *infra* in Part IV.C.

The U.S. tariff rate system puts up barriers to trade on another staple product in most American households—orange juice—by means of a specific tariff.⁷⁰

To protect Florida citrus and orange juice production, imports from outside NAFTA have to pay a specific tariff rate of \$0.297 per Single Strength Equivalent (SSE) gallon for frozen concentrated orange juice (FCOJ) and \$0.175 per SSE gallon for not-from-concentrate (NFC) orange juice, corresponding to an equivalent ad valorem tariff rate of 56.7% and 13.7% respectively.⁷¹

Mexican processing companies, as part of NAFTA, benefit from preferential tariff rates, corresponding to an equivalent *ad valorem* tariff rate of 30.7 percent for FCOJ and 6.4 percent for

65. U.S. INT'L TRADE COMM'N, *supra* note 6, at 20.

66. Schwabach, *supra* note 54, at 308; LUKAS, *supra* note 60.

67. MARK A. GROOMBRIDGE, CATO INST., AMERICA'S BITTERSWEET SUGAR POLICY 3 (2001), available at <http://www.freetrade.org/pubs/briefs/tpb-013.pdf>. The GAO defines "users" as sugar cane refiners, food manufacturers, and consumers. *Id.*

68. *Id.*

69. *Id.*

70. PAULO F. AZEVEDO ET AL., INTER-AM. DEV. BANK, THE FOOD INDUSTRY IN BRAZIL AND THE UNITED STATES: THE EFFECTS OF THE FTAA ON TRADE AND INVESTMENT 42 (2004), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=548054>.

71. *Id.* at 53 (citing M.F. Neves et al., *Cadeia: Citros, in ESTUDO DA COMPETITIVIDADE DE CADEIAS INTEGRADAS NO BRASIL: IMPACTOS DAS ZONAS DE LIVRE COMÉRCIO* (L. Coutinho ed., 2002)).

NFC orange juice.⁷² Although the Mexican tariff rate is still high, the comparatively preferential rate has partially caused the decline in Brazilian FCOJ exports to the U.S.⁷³ Hence, the astronomically high tariff rates placed on orange juice from Brazil and other non-NAFTA countries have kept competition from the Brazilian orange juice industry, which is the largest in the world,⁷⁴ down to an artificially low level and in effect created higher prices for all U.S. consumers without seriously protecting U.S. jobs.

C. *The Surgical Protection of Other Goods*

In addition to steel, sugar, and orange juice, the United States seems to have carved out other specific goods and placed extremely high tariffs on them in an effort to protect domestic industries. Although the United States does tend to be more open to international trade, especially relative to developing countries, the United States also has the tendency to heavily protect selected goods from foreign competition.⁷⁵ While some authors conclude that "US tariff rates are selectively used to protect specific domestic industries,"⁷⁶ a closer look at some heavily protected products reveals that U.S. employment in the production of such goods appears to be nearly non-existent.

Consider the case of cheap sneakers. According to analyst Edward Gresser, concerning sneakers costing less than three dollars, U.S. "tariff policy combines high taxes with selective effects on the poor and failure to protect jobs."⁷⁷ Such shoes have a tariff rate of forty-eight percent, which is one of the highest in the U.S. tariff schedule, and there appears to be no American employment in their production.⁷⁸ The average cost per pair of such imported shoes in 2001 was \$2.20.⁷⁹ However, the U.S. Customs Service added \$1.06 per pair in tariffs on these sneakers, which retailers passed on, along with markups and state sales taxes, increasing the final price in stores by about \$1.60 per pair.⁸⁰ Unfortunately, such tariffs hit maids and secretaries

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 42.

76. *Id.*

77. GRESSER, TOUGHEST ON THE POOR, *supra* note 5, at 2.

78. *Id.* at 2-3. Gresser notes that only approximately "3000 Americans are now employed making sneakers, and apparently none make very cheap sneakers." *Id.* at 12.

79. *Id.* at 3.

80. *Id.*

harder than company vice presidents because “[t]ariffs are highest on the goods important to the poor.”⁸¹

Another U.S. domestic sector protected by high tariffs is the apparel industry. Women’s apparel accounts for almost fifty percent of a single-parent family’s tariff bill, but employment in this area has dropped rapidly.⁸² The United States now employs fewer than 30,000 workers in making girls’ and children’s blouses and dresses, women’s underwear, women’s shirts, and women’s shoes.⁸³ Employment declines in other protected sectors like watches, luggage, handbags, drinking glasses, and plates have also been comparably fast.⁸⁴ Research done by the USITC indicates that removing trade barriers may mean no overall loss of jobs and could actually lead to a net increase in employment.⁸⁵

III. THE IMPACT OF FTAs ON JOB FLUCTUATION

A. NAFTA and Its Effect on U.S. Employment

Although the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and its supporters have continuously argued that NAFTA failed to meet its promises and contributed to the loss of hundreds of thousands of U.S. jobs,⁸⁶ the Office of the USTR portrays a different view of NAFTA as a success story with respect to the American economy and job creation. The USTR claims that U.S. employment grew by twenty million from 1993 to 2000.⁸⁷ Between these opposing claims lies a more nuanced picture of job fluctuation and non-trade-related causes for job losses and gains.

81. *Id.* at 1.

82. *Id.* at 4.

83. *Id.* According to Gresser, who cited numbers from the U.S. Bureau of Labor Statistics in 1992, the U.S. had 21,400 jobs in girls’ and children’s blouses and dresses, but in 2002, there were only 4800 jobs. Similarly, employment in women’s underwear went down in the same period from 48,500 to 10,400 jobs; in women’s shirts from 37,400 to 8900 jobs; and in women’s shoes from 23,700 to 3400 jobs.

84. *Id.* at 3–4.

85. U.S. INT’L TRADE COMM’N, PUBL’N NO. 3519, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS: THIRD UPDATE xix (2002), available at <http://hotdocs.usitc.gov/docs/pubs/332/pub3519.pdf>.

86. AFL-CIO, TIME TO CHOOSE: GOOD JOBS AND STRONG COMMUNITIES OR NAFTA TIMES TEN? (2003), http://www.aflcio.org/issues/jobseconomy/global_economy/upload/Time-to-Choose-Good-Jobs-and-Strong-Communities-or-NAFTA-Times-Ten.pdf.

87. OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS (Nov. 2003), available at http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2003/asset_upload_file962_3466.pdf.

While the USTR gives a great deal of credit to NAFTA for job creation over the last ten years, in the large scheme of the economy international trade only modestly contributes to the frenetic job turnover of the United States.⁸⁸ In any event, total U.S. private-sector jobs increased by 17.8 million between 1993 and 2002, so NAFTA cannot be blamed for causing net job losses.⁸⁹ Concerning individual components of employment, although the manufacturing sector has experienced some hard hits in recent years,⁹⁰ it is difficult to find any direct link to NAFTA as a cause of the decline in manufacturing jobs. Between 2000 and 2003, while manufacturing employment fell by almost 2.8 million, imports of manufactured goods increased a mere 0.6 percent.⁹¹

Research on the effects of NAFTA has admittedly been plagued by non-methodological limitations and the complexities of undertaking such research.⁹² Some major extraneous issues that have affected research results include the following: anticipation of NAFTA began in 1990, affecting trade relations between the three countries before the Agreement came into force; the fact that not all tariffs were removed upon enactment due to phasing-in periods on many categories of products from between ten and fifteen years; and the increase in trade with other nations, e.g., China, which had labor market effects on NAFTA countries.⁹³ As far as overall trade goes, however, the consensus among most post-NAFTA econometric studies is that the Agreement had a minimal effect on overall U.S. trade, which had been predicted by studies prior to NAFTA.⁹⁴

Pre-NAFTA studies differed on predictions as to NAFTA's potential effects on employment, and similarly, post-NAFTA research has not come to any consensus because of the difficulties associated with attributing employment gains or losses solely

88. BRINK LINDSEY, CATO INST., JOB LOSSES AND TRADE: A REALITY CHECK 1 (2004), available at <http://www.freetrade.org/pubs/briefs/tbp-019.pdf> [hereinafter LINDSEY, JOB LOSSES].

89. *Id.*

90. Kate Bronfenbrenner & Robert Hickey, *Winning is Possible: Successful Union Organizing in the United States—Clear Lessons, Too Few Examples*, MULTINAT'L MONITOR, June 2003, at 9.

91. LINDSEY, JOB LOSSES, *supra* note 88, at 1.

92. See generally MICHAEL ABBOTT, COMM'N FOR LABOR COOPERATION, THE IMPACTS OF INTEGRATION AND TRADE ON LABOR MARKETS: METHODOLOGICAL CHALLENGES AND CONSENSUS FINDINGS IN THE NAFTA CONTEXT 3 (2004), available at http://naalc.org/english/pdf/WP_Eng.pdf.

93. *Id.* at 6–7 (citing Anne O. Krueger, *NAFTA Effects: A Preliminary Assessment*, 23 WORLD ECON. 761–75 (2000)).

94. *Id.* at 8.

to NAFTA.⁹⁵ Studies that give a negative view of NAFTA's effects on employment are hindered due to the fact that employment in the United States has experienced strong gains since 1994, as discussed above.⁹⁶ One method for locating NAFTA-related job loss is via certified NAFTA-Trade Adjustment Assistance Program (NAFTA-TAA) petitions,⁹⁷ and such petition and certification numbers have been low in relation to the size of the U.S. economy.⁹⁸ As of July 1999, there had only been a total of 238,051 certifications, and the yearly average has been declining since NAFTA's enactment.⁹⁹ In any event, many researchers note that the effect of NAFTA on U.S. employment has been "miniscule" because of the size of the U.S. economy coupled with its many non-NAFTA trade partners.¹⁰⁰ Another analyst states, in reference to the U.S. economy:

Even if understated by a factor of two or three, job losses due to NAFTA are dwarfed by other developments in the U.S. economy. The same would be true for job gains as a result of NAFTA, if we tried to measure these. This is the main reason why job measurement is a faulty criterion for evaluating NAFTA. Job creation and loss are overwhelmingly a function of conditions in the U.S. economy. Foreign trade with a single country is marginal in this respect.¹⁰¹

Perhaps we can expect the FTAA to have more of an impact than NAFTA on employment because the FTAA concerns trade with more countries, but it is still important to keep in mind the basic fact that the U.S. economy is so large and diverse that even an FTA involving almost the entire Western Hemisphere is unlikely to have a huge impact on net job creation or loss. Further, the

95. *Id.* at 12–13.

96. *Id.* at 13.

97. The U.S. government set up the NAFTA-TAA assistance program in order to extend benefits, e.g., training and additional income, to workers whose jobs have been displaced by imports from Canada and Mexico. *Id.* at 11.

98. *Id.*

99. *Id.* (citing Raul Hinojosa-Ojeda et al., *The U.S. Employment Impacts of North American Integration after NAFTA: A Partial Equilibrium Approach* (2000) (unpublished manuscript, North American Integration and Development Center, School of Public Policy and Social Research, UCLA)). Nevertheless, Abbott notes that the numbers are likely underestimated because not all U.S. NAFTA-induced job losers are aware of the program. *Id.*

100. *Id.* (citing Sandra Polaski, *Jobs, Wages, and Household Income*, in *NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE* (Audley et al. eds., 2004)).

101. *Id.* at 9–10 (quoting SIDNEY WEINTRAUB, *THE CTR. FOR STRATEGIC & INT'L STUDIES, NAFTA AT THREE: A PROGRESS REPORT 12*(1997)).

United States has already significantly liberalized trade with Central America, the Dominican Republic, Chile, and the Caribbean countries in the last few years.

B. *The FTAA's Impact on Job Loss and Creation of New Jobs*

Despite the claims of U.S. labor unions, international trade is actually a minimal factor in job loss in the United States, as discussed in the previous section.¹⁰² Instead of blaming trade for job loss, labor interests in the United States have greater hurdles with which to contend. The most important factor that has affected loss of jobs in the last half century has been productivity growth, not trade, outsourcing, or any of the other popular villains of late.¹⁰³ According to one economist, "trade is only one element in a much bigger picture of incessant turnover in the U.S. job market."¹⁰⁴

1. Trade as a Source of Shifting Jobs

One of the great strengths of the U.S. economy is its flexibility, especially when compared with European countries.¹⁰⁵ Because of this flexibility, some commentators predict that, despite some job losses in the information technology (IT) sector that can be attributed to off-shoring and trade, the resulting price falls will promote the further spread of IT in important sectors like health services and construction.¹⁰⁶ Further, even despite the new off-shoring trend, the Department of Labor is forecasting almost a thirty-five percent increase in computer and mathematical operations from 2002 to 2012.¹⁰⁷ Also, the United States often gains jobs through what is referred to as "in-sourcing," or performing service jobs for other countries.¹⁰⁸ The

102. Martin Baily, Address at the Joint Conference of the Cato Institute and *The Economist* on Trade and the Future of American Workers (Oct. 7, 2004), available at <http://cato.org/events/tradeconference/index.html> (offering audio and video of this address).

103. Greg Mankiw, Address at the Joint Conference of the Cato Institute and *The Economist* on Trade and the Future of American Workers (Oct. 7, 2004), available at <http://cato.org/events/tradeconference/index.html> (offering audio and video of this address).

104. LINDSEY, JOB LOSSES, *supra* note 88, at 2.

105. See generally *Danger Time for America*, *ECONOMIST*, Jan. 12, 2006, at 15.

106. LINDSEY, JOB LOSSES, *supra* note 88, at 2.

107. *Id.*; Bureau of Labor Statistics, U.S. Dep't of Labor, Table 2. Employment by Major Occupational Group, 2002 and Projected 2012, available at <http://www.bls.gov/news.release/ecopro.t02.htm> (last modified Dec. 5, 2005).

108. Ferguson, *supra* note 5.

United States has consistently run a surplus in categories of the balance of payments associated with trade in business services.¹⁰⁹

2. Trading Up for Jobs

While the most recent recession has been especially difficult for the manufacturing sector, now is not the time to look to protectionist trade measures in the hope of saving jobs.¹¹⁰ Protectionist measures, such as the aforementioned steel tariffs enacted by President Bush, serve to assist a very small segment of the U.S. economy at the expense of American consumers as well as industries in foreign countries.¹¹¹ Protectionism has the detrimental effect of leading to retaliation and increased tariffs abroad. Instead, promoting FTAs such as the FTAA will serve to increase the U.S. gross domestic product, as NAFTA has done, which on a basic macroeconomic level will decrease unemployment.¹¹² Additionally, it is necessary to look at the long-term economic gains of free trade separately from short-term downward business cycles. Some commentators have stated that trade and outsourcing will lead to better jobs for American workers, just as the computer revolution led the United States from agriculture into better, higher-skilled service jobs.¹¹³

As for specific potential consequences of the FTAA, one comprehensive study of the effects of the proposed FTAA on the U.S. and Brazilian food industries concludes that food manufacturing companies in the United States might have a competitive advantage over similar companies in Brazil,¹¹⁴ which is a major player in FTAA negotiations. The U.S. food system plays an important role in the U.S. national economy and totaled \$804 billion in the year 2000, accounting for 8.1 percent of U.S. GDP and employing 12 percent of the American labor force.¹¹⁵ The 22,000 U.S. food processors in the year 2000 employed almost 1.5 million workers.¹¹⁶ If the FTAA is approved, some analysts believe that U.S. food processors will be better placed than European firms to acquire food assets in Brazil.¹¹⁷ Depending on the

109. *Id.*

110. *See* Mankiw, *supra* note 103.

111. Ferguson, *supra* note 5.

112. *See* Mankiw, *supra* note 103.

113. *See generally* Ferguson, *supra* note 5.

114. AZEVEDO ET AL., *supra* note 70, at 22.

115. *Id.* at 3 (citing J.M. HARRIS ET AL., U.S.D.A. ECON. RES. SERV., AGRIC. ECON. REP. NO. 811, THE U.S. FOOD MKTG. SYS., 2002: COMPETITION, COORDINATION AND TECHNOLOGICAL INNOVATIONS IN TO THE 21ST CENTURY (2002)).

116. *Id.* at 57.

117. *Id.* at 58.

complete elimination of trade barriers, two economists estimate that tariff elimination under the FTAA or another free trade proposal would increase U.S. agricultural exports to the Western Hemisphere by twelve percent.¹¹⁸

However, with respect to trade between two of the largest countries in the proposed FTAA, there may be less “changes in trade barriers in the sectors particularly affected by tariff elimination, inasmuch as important Brazilian export products—such as sugar and orange juice—are significant domestic products in the United States and receive ‘chirurgical protection’ by means of quotas and specific lump-sum tariffs.”¹¹⁹ Because the sugar and orange juice sectors are organized by private interest groups in a more effective way than consumers, American and Brazilian conflicting negotiating positions on market access for such goods will likely arise in the FTAA talks.¹²⁰

Nonetheless, the effective removal of trade barriers under the proposed FTAA would encourage trade flows, foreign direct investment, and specialization in the affected countries.¹²¹ As a result, consumers would gain from lower food prices and higher quality products.¹²² Instead of propping up domestic industries that are simply not as efficient as their foreign competitors, the solution seems to be creating new sources of employment and assisting affected workers through the Trade Adjustment Assistance Act, as discussed *infra* in Part IV.C.

IV. ARE FREE TRADE AGREEMENTS ETHICAL?

In view of the economic arguments available to contest or support FTAs, a fundamental question remains: Is the formation of an FTA, such as the Free Trade Area of the Americas, ethically right? To answer this question, one must first decide whether the retention of current American jobs, particularly in the manufacturing sector, is valuable in keeping some American communities viable despite economic downturn. If the answer is yes,

118. *Id.* at 42 (quoting J. MONTEAGUDO & M. WATANUKI, INTER-AM. DEV. BANK, IMPACT OF AGRICULTURAL REFORM IN THE WESTERN HEMISPHERE AND THE EUROPEAN UNION ON LATIN AMERICA: BRIGHT PROSPECTS OR DISTANT ILLUSIONS? (2003)). U.S. exports would increase mostly to non-NAFTA partners. *Id.* at 43.

119. *Id.* at 59.

120. *Id.*

121. *Id.* See generally Jacqueline Granados, *Investor Protection and Foreign Investment Under NAFTA Chapter 11: Prospects for the Western Hemisphere Under Chapter 17 of the FTAA*, 13 CARDOZO J. INT'L & COMP. L. 189 (2005) (arguing that the FTAA could bring a substantial increase in foreign direct investment to Latin American countries).

122. AZEVEDO ET AL., *supra* note 70, at 59.

then one must ask whether there are other interests that retaining these jobs will affect and, if so, whether the importance of these interests overshadows the benefits of retaining current jobs. If enforcing an FTA does have a direct negative impact on employment in certain communities, how can the U.S. government alleviate the pain of displaced workers and make sure that they get back on track?

A. *The Value of Retaining Current Jobs*

Many in the United States, especially those affiliated with trade unions, argue that increased trade liberalization, by way of FTAs, has contributed to the fall in U.S. manufacturing jobs.¹²³ Supporters of this view argue that FTAs have enabled producers to find less expensive foreign labor for manufacturing jobs.¹²⁴ Probably the most avid defense of curtailing trade in the expectation of keeping current American manufacturing jobs comes from an AFL-CIO report:

Some economists attempt to blame the job decline on productivity growth and the normal business cycle. They discount or ignore growing evidence that the real roots of the problem lie in the massive, steady exporting of U.S. manufacturing jobs to low-cost offshore labor markets and the low-road business practices that drive this movement.¹²⁵

While free trade proponents concentrate on the economic benefits of international trade, most unions express concern about quality of life and U.S. domestic employment issues.¹²⁶ A majority of Americans expresses concern about the impact of trade on American workers, according to a poll completed in early 2004. Even when poll-makers emphasized that trade may generate new jobs with higher wages, fifty-nine percent did not feel that the

123. See generally AFL-CIO Home Page, <http://www.aflcio.org> (last visited Mar. 14, 2006); The Institute for Food and Development Policy/Food First Home Page, <http://www.foodfirst.org> (last visited Mar. 14, 2006) (concerning issues involving free trade and trade liberalization's effect on U.S. manufacturing and labor unions).

124. See Indiana AFL-CIO, House-Passed Trade Deal Bad for U.S. Workers (July 29, 2003), <http://inaflcio.org/documents/news030729badtradedeal.pdf>.

125. JOEL YUDKEN & BOB BAUGH, AFL-CIO INDUS. UNION COUNCIL, WISCONSIN JOB EXPORTS: AN ANALYSIS OF THE ROLE TRADE PLAYS IN MANUFACTURING JOB LOSS 13 (2004), http://www.aflcio.org/issues/jobseconomy/manufacturing/iuc/upload/wi_jobexports.pdf.

126. See generally AFL-CIO Homepage, *supra* note 123.

creation of new jobs offsets the disruption for workers who lose their jobs.¹²⁷

B. *The Counter Values of Better-Paying Jobs and Lower Prices*

One economist has noted that "regardless of whether economic times are good or bad, some amount of job turnover is an inescapable fact of life in a dynamic market economy."¹²⁸ This observation brings to mind the lessons of history in the U.S. each time one doomsayer group or another warns of the threat of chronic job shortages. Looking back at the last fifty years, many key developments slashed demand for particular types of labor, including the deregulation of transportation, energy, and telecommunications, as well as labor-saving technological innovation, such as containerization replacing longshoremen, factory-floor robots trading places with assembly-line workers, computers supplanting back-office clerks, and voice mail taking the place of receptionists.¹²⁹ However, despite all of this fluctuation in jobs, no chronic shortage of jobs ever materialized in the U.S.¹³⁰

Moreover, lowering tariffs on consumer goods would assist all American consumers, with a proportionately beneficial impact on the poorest consumers. If one of the goals of the Anglo-American legal system is to protect the weakest in society,¹³¹ and poor, disparate consumers have much less bargaining power than organized laborers in narrow segments of the U.S. economy, then it seems that decreasing protectionism would assist those consumers who are unable to organize themselves to protest increased prices for basic consumer goods.

According to economist Edward Gresser:

At first glance, proposals for tariff reform thus raise a complex ethical question. Should a relatively small number of light manufacturing workers bear a special burden as the country raises living standards for the poor by cutting tariffs? Alternatively, should millions of single mothers and their children—maids, secretaries, restaurant cashiers—

127. KULL ET AL., *supra* note 2, at 13. This majority increased from a fifty-six percent majority answering the same question in 1999.

128. LINDSEY, JOB LOSSES, *supra* note 88, at 11.

129. *Id.* at 3.

130. *Id.*

131. "[T]he law is the surest sanctuary, that a man can take, and the strongest fortress to protect the weakest of all; *lex est tutissima cassis*" EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND 55 (F. Hargrave & C. Butler eds., 19th ed. 1832) (1642).

pay to protect relatively few light manufacturing jobs if tariffs stay in place?¹³²

Nonetheless, Gresser goes on to explain that tariffs are not actually protecting jobs, as manufacturing employment in the U.S. seems to be going through a permanent shift, rising in semiconductors, medical technologies, auto manufacturing, and construction equipment, but declining in light industry.¹³³ In the apparel industry, for instance, despite the persistence of high tariffs, employment has been falling since the 1970s.¹³⁴ The million-plus jobs that existed in shoe and clothing production in 1992 were cut in half in the next ten years.¹³⁵ This leads to Gresser's conclusion that "[c]hoices between the jobs of workers and the living standards of welfare leavers are thus meaningless—the current tariff system is failing to protect jobs even as it depresses living standards."¹³⁶

Although there is no point in denying the difficulties that some American workers face in losing their jobs, protectionism will do little to save many at-risk jobs at the expense of allowing the American economy to create new jobs. In contrast to the fears of outsourcing, it is important to remember that the U.S. gains jobs through the insourcing that is associated with trade in business services.¹³⁷ Finally, according to the WTO and its members, "trade is not a zero-sum game."¹³⁸ It is not the case that an individual is being harmed just as an individual is being helped by free trade. The Vice Chairman of the Federal Reserve has noted the following in regard to free trade being one of many factors impacting the quality of American jobs:

[I]t is doubtful that changes in the pattern of wages in the U.S. economy can be explained by any single factor—trends in trade, in population and immigration, in unionization and labor market competition, in minimum wage

132. GRESSER, *TOUGHEST ON THE POOR*, *supra* note 5, at 3.

133. *Id.* Light manufacturing industries include, *inter alia*, food processing and parts of the textile industry.

134. *Id.*

135. *Id.*

136. *Id.* at 4.

137. Ferguson, *supra* note 5.

138. Pascal Lamy, Director-General, WTO, *The Doha Development Agenda: Sweet Dreams or Slip Slidin' Away?*, Address Before the International Institute of Economics (Feb. 17, 2006), available at http://www.wto.org/english/news_e/sppl_e/sppl19_e.htm; see also OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 TRADE POLICY AGENDA ch. II (2005), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/asset_upload_file191_7311.pdf.

policy, in the skill mix of the labor force, and in technology all play a role.¹³⁹

As economist Brink Lindsey has noted, job turnover cannot be undone with trade restrictions.¹⁴⁰

C. *Training Better Workers*

Instead of creating trade barriers, it has often been suggested that the appropriate response to the disruptions associated with trade is to lessen the pain associated with trade disruptions through enhanced assistance and retraining for displaced workers.¹⁴¹ Public policy can ameliorate the pain of economic change in the following ways: "It can ease workers' transitions from one job to another; it can produce better educated and better trained workers who are capable of filling higher-paying, more challenging positions; it can promote sound growth and avoid, or at least minimize, economy-wide slumps."¹⁴²

The federal Trade Adjustment Assistance Act of 1974 (TAA),¹⁴³ designed for dislocated workers who can show that their loss of employment is directly trade-related, has been a targeted program with income maintenance for up to a year beyond the expiration of unemployment compensation benefits.¹⁴⁴ The Trade Adjustment Assistance Reform Act of 2002¹⁴⁵ has expanded the TAA and provides for payments, allowances and other benefits for workers and firms who can demonstrate that they have been adversely impacted by the FTAA and other FTAs. According to Senator Max Baucus (D-Mont.), a sponsor of the 2002 TAA Reform Act, "Under the expanded TAA program, the budget has nearly tripled and for the first time workers who lose their jobs will have help in meeting the cost of maintaining healthcare coverage."¹⁴⁶

139. Ferguson, *supra* note 5.

140. LINDSEY, *JOB LOSSES*, *supra* note 88, at 11.

141. Ferguson, *supra* note 5.

142. LINDSEY, *JOB LOSSES*, *supra* note 88, at 11.

143. 19 U.S.C. §§ 2101-2495 (2004).

144. Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 933 (1994).

145. Pub. L. No. 107-210, 101, 111-125, 131, 141-143, 151, 201-203, 116 Stat. 933, 935-72 (2002) (to be codified in scattered sections of 19 U.S.C., 26 U.S.C., & 42 U.S.C.); see also Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 543 n.161 (2003).

146. U.S. Senator Max Baucus Website, <http://baucus.senate.gov/issues/trade.cfm?view=OPportunities> (last visited Feb. 23, 2006) (commenting on the expanded TAA program and protection of workers).

President Bush's FY 2005 budget proposed \$23 billion for job training and employment assistance as part of a comprehensive plan to better prepare American workers for high-skilled jobs.¹⁴⁷ The President proposed to double the number of workers in federal job training, which is the largest job training program in the country.¹⁴⁸ Additionally, President Bush proposed to provide \$250 million for community colleges that train workers for high-growth jobs.¹⁴⁹ Further, the current administration tripled the amount of Trade Adjustment Assistance to \$1.1 billion per year in FY 2005 for training and cash benefits for workers dislocated by increased imports or a shift of production to certain foreign countries.¹⁵⁰ Workers are additionally eligible to receive a Health Coverage Tax Credit covering sixty-five percent of the premium for qualified health insurance.¹⁵¹

The main advantage of assistance programs as opposed to protectionism is that they moot many of the harshest arguments against free trade. First, they pinpoint the industries that need the most help due to the recent economic recession. Although the steel-producing industry has mainly technological advances to blame for its continuous decline in jobs, steel producers typically blame trade for job losses, with severe results. Removing the blame from trade by alleviating steelworkers' concerns may enhance public support for free trade, which would create a win-win situation for American consumers and steelworkers alike. Second, the protectionism argument would lose its force because more new jobs would be available in sectors opened up to freer trade. Third, more jobs in industries that consume currently protected products would be saved, and the U.S. economy would receive net benefits from freer trade, which would free up resources for such worker assistance programs.

V. THE ALTERNATIVE TO PROTECTIONISM: IMPROVING FTAs

The FTAs that the United States signs should strive to eliminate protectionism, particularly in the agricultural and manufacturing sectors. The USTR's capitulation to the domestic sugar industry in negotiating the U.S.-Australia FTA in 2004 caused American negotiators to have to overlook Australian protection-

147. Office of the U.S. Trade Representative, *Free and Fair Trade: Real Results in Leveling the Playing Field*, http://www.ustr.gov/Document_Library/Fact_Sheets/2004/Benefits_of_Trade_to_States/Section_Index.html (last visited Mar. 28, 2006).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

ism on wheat, broadcasting, audio-visual services, and other areas.¹⁵² The current draft of the FTAA does not include any provisions on sugar or steel.¹⁵³ However, it is highly likely that both the sugar-producing and steel-manufacturing industries will attempt to place some exceptions in the FTAA in order to protect their products from foreign competition. Such provisions would be a mistake for American workers in industries that consume these products and would also keep prices artificially high for all American consumers. Hence, negotiators should strive to keep steel and sugar on the table during the next round of FTAA negotiations rather than allow a small group of beneficiaries of protectionist programs to hijack American progress in opening markets.

Another way to improve future FTAs is to eliminate the possibility of using trade remedy measures, such as anti-dumping,¹⁵⁴ countervailing duties,¹⁵⁵ and safeguard measures,¹⁵⁶ which reduce many of the positive aspects of free trade. Many recently negotiated trade agreements around the world have begun to limit the use of such measures within the FTA or customs union. One analyst notes the following with respect to this trend:

Although imposition of trade remedy measures are legally allowed under the relevant WTO Agreements if certain criteria are met, it also has been widely acknowledged that, on one hand, they can protect the domestic industries damaged by foreign imports, and, on the other hand, *they harm domestic consumers, domestic downstream industries, and foreign exporting industries*, by increasing the commodity price and by creating an unstable trade environment and trade distorting effects.¹⁵⁷

In NAFTA, each member country has the ability to apply its anti-dumping and countervailing duty laws to goods imported from

152. LUKAS, *supra* note 60.

153. Free Trade Area of the Americas Draft Agreement, ch. IX, sec. B, art. 6 (Nov. 21, 2003), available at http://www.ftaa-alca.org/FTAADraft03/ChapterIX_e.asp. Article 6.1 states: "The Parties agree that, as of the entry into force of this Agreement, they shall not apply the special safeguard measures for agricultural products referred to in Article 5 of the WTO Agreement on Agriculture." *Id.* Article 6.3 states: "Only the Parties with small economies in the hemisphere may apply special safeguard mechanisms for agricultural products." *Id.*

154. *See supra* note 40.

155. *See supra* note 50.

156. "Safeguards" are generally defined by the WTO as "emergency measures to limit imports temporarily." WTO, Anti-dumping, *supra* note 49.

157. SAGARA, *supra* note 13, at 4 (emphasis added).

the territory of any other party.¹⁵⁸ Some researchers have noted that the United States has used anti-dumping measures to protect domestic industries in NAFTA, and, similarly, Brazil has utilized anti-dumping as a trade measure in the MERCOSUR customs union.¹⁵⁹ According to the third draft text of the FTAA, Chapter XV on subsidies, anti-dumping and countervailing duties contains an option for the abolition of anti-dumping measures for intra-trade,¹⁶⁰ which is a positive step in the direction of truly liberalizing trade and not allowing countries to impose arbitrary protectionist restrictions on trade.

CONCLUSION

The USTR should utilize free trade agreements such as the proposed FTAA to open trade in protected sectors in order to allow more Americans to retain their jobs in industries that consume protected goods as well as lower prices for all American consumers. FTAs have the potential to consolidate the benefits of true free trade for consumers in the U.S. and abroad by lowering barriers that lead to artificially high prices. The proper response to the latest recession should not be to close our doors to outside trade but to embrace the benefits that free trade can bring, especially in regard to shifting the flexible U.S. labor market to other, more profitable sectors for the long-run. Currently, the USTR is negotiating FTAs with Malaysia, Panama, the Republic of Korea, the Southern African Customs Union, Thailand, and the United Arab Emirates, in addition to the sporadic negotiations of the FTAA as well as the broader Middle East Free Trade Initiative.¹⁶¹ By negotiating more liberal FTAs, the USTR can save current American jobs as well as create new ones through the process of insourcing. Current USTR Robert Portman has shown a willingness to use FTAs to lower barriers.

Because the debate surrounding free trade is relevant, the negotiators of the FTAA have expressed a willingness to listen to all sides of the debate and take views from labor groups and envi-

158. *Id.* at 15–16.

159. AZEVEDO ET AL., *supra* note 70, at 60.

160. See Free Trade Area of the Americas Draft Agreement ch. XV, art. 13 (Nov. 21, 2003), available at http://www.ftaa-alca.org/FTAADraft03/Chapter_XV_e.asp.

161. Office of the U.S. Trade Representative, Middle East Free Trade Area Initiative, http://www.ustr.gov/Trade_Agreements/Regional/MEFTA/Section_Index.html (last visited Apr. 21, 2006).

ronmentalists, among others, into account.¹⁶² Although reducing barriers to protected sectors may hasten the process of inevitable job losses in those sectors, FTAs can save jobs in sectors that use those formerly protected goods as well as create new jobs in other growing fields of the U.S. economy. Additionally, opening trade across the board rather than creating a patchwork of protected and non-protected goods will end the perceived American hypocrisy on trade,¹⁶³ which occurs when U.S. trading partners question U.S. commitment to free trade after seeing U.S. protectionism of certain industries. An understanding of the relationship between successful FTAs and the American labor market can inform future policymaking and ensure that the American economy continues to grow and compete at the global level.

162. See Free Trade Area of the Americas Homepage, http://www.ftaa-alca.org/alca_e.asp (last visited Apr. 21, 2006) (encouraging discussion with various groups).

163. Leaders of the developing world often bring this charge against the United States and Europe because of their protection of agricultural goods. See Marian L. Tupy, Letter to the Editor, *Who Pays for Farm Subsidies?*, WASH. TIMES, Nov. 25, 2005, at A23.