. MEMORANDUM

TO: USTR Agency Transition Team
FR: Lori Wallach, Public Citizen
DT: December 9, 2008
RE: **Urgent matters facing incoming USTR**

Following is a summary of the issues I raised at our meeting, plus a few more items regarding your question about urgent pending matters that will greet the new USTR operation. Many issues loom large, including China, the WTO Doha Round, NAFTA renegotiation and food and product import safety problem. Many of these issues will require intensive policy discussions and extend beyond what I understand is the remit of your committee's agency review.

For instance, at our meeting I discussed how an Obama administration initiative to transform the beleaguered WTO Doha Round talks would provide a tremendous opportunity to begin repairing President Bush's damage to our nation's reputation and a means to reform the current WTO rules. I am unclear about the line between policy and agency-related inputs, but a priority view of ours is that <u>the administration should spend no political or staff resources trying to complete the Doha Round agenda so many nations oppose, but rather should focus on building consensus on an agenda aimed at repairing the WTO's existing problems and rebuilding support for multilateral trade rules.</u> A majority of WTO countries sought a negotiating agenda aimed at repairing overreaches and imbalances in the *existing* WTO agreements instead of the Doha Round's more-of-the-same agenda. As noted below, removing the many *existing* WTO constraints on procurement policy, service sector regulation, food and product safety, access to affordable medicines and more is vital to create the political space for many of President-elect Obama's priority *non-trade* policy goals to succeed, such as regarding health care, climate change, energy independence, more. Moreover, the Doha Round agenda is dated – it represents an approach to globalization that the intervening years have shown needs review and revision.

On more narrow issues, starting on the next page, I describe seven matters that now have a somewhat lower public profile, but significant policy and/or political importance that will become immediate hot potatoes for the incoming USTR leadership. As well, the three Bush hangover FTAs with Korea, Panama and Colombia pose significant policy and political problems. I discuss the FTAs below in some detail, although there certainly is no urgency for USTR to deal with these pacts and in fact doing so would cause significant negative political fallout. Implementation of the Peru FTA will also be a serious challenge. Peru rolled back its labor laws and forestry protections after U.S. passage of the pact, as described by the Sierra Club representative at our meeting. Some of the few labor and environmental groups who had remained neutral in the Peru FTA congressional debate have called for the pact not to be implemented. The seven lurking urgent matters facing the incoming USTR include:

- FTA and BIT negotiations that the Bush administration launched in the fall of 2008;
- an array of WTO service sector offers that the administration has tabled (but that have not yet been locked in) that conflict with energy, higher education, domestic R&D promotion and other high profile policies promoted during the campaign by President-elect Obama;
- interventions needed by USTR prior to next April 30, 2009 G-20 financial crisis summit;
- several imminently pending WTO cases or rulings with broad implications; and
- the Bolivia ATPDEA decertification.

1. **Bush administration compensation offers in WTO Internet gambling case – which new administration can still withdraw – would create new conflicts with various Obama positions and proposals.**

This issue could erupt immediately, even before January 20. From a distance, this issue may look arcane and not important, but in fact how this is handled will have serious consequences after the Obama administration takes office. The Bush administration is trying to lock in new last minute GATS commitments that would undermine important domestic policy space or that actually conflict with various positions and policies President-elect Obama has enumerated. The Bush administration has been negotiating terms of compensation for six WTO member countries which was required after it gave notice in May 2007 under GATS Article XXI of its intent to remove gambling services from the U.S. schedule of GATS commitments.[1] To date, the Bush administration reached a compensation agreement with the EU that would subject various new U.S. service sectors - including U.S. domestic R&D - to comply with GATS' market-access (cross-border offshoring) and national treatment (no preference for U.S firms) and domestic regulatory policy limits. This EU-U.S. deal had not been adopted. (Under WTO rules, settlements must be reached with all Article XXI demander nations before new concessions are notified and the U.S. schedule changed.)

Thus thankfully, the incoming Obama administration can reopen these compensation talks. However, to safeguard the political space to do so after January 20, signals must be sent now that this issue will be reviewed by the new administration. The Bush administration has only consulted informally with the trade committees on the proposed new commitments, and has not consulted the committees under whose jurisdiction the proposed new restrictions on service sector regulation would fall. Further, had a six-country deal been reached, the Bush administration intended to unilaterally alter the U.S. WTO commitment without congressional approval, creating a conflict with U.S. WTO obligations authorized under the 1994 Uruguay Round Agreements Act. Among the U.S. sectors that the Bush administration has tentatively agreed with the EU to bind to WTO (which would apply on an MFN basis to all WTO nations):

- **Proposed Bush pending WTO commitments in "research and development" remove critical policy tools promoted by President-elect Obama for creating high-wage jobs at home:** A new WTO commitment in this area would mean that federal and state policymakers would lose important tools to incentivize R&D here and create new R&D jobs. What the Bush administration has agreed with the EU is to submit R&D (covered by UN CPC prov 851, 852, 853) to all GATS constraints. This means the preferences existing in current tax credit policies for *domestic* R& D would become WTO violations. The Bush offer covers R&D in physical sciences, chemistry and biology, engineering and technology, agricultural sciences, medical sciences and pharmacy, natural sciences, and more, including research and experimental development services on environmental sciences. This could significantly undermine the incoming administration's stated intention to invest "in a skilled research and development workforce and technology infrastructure to be supported *here in America* so that American workers and communities will benefit."

  The U.S. now has no specific commitments in R&D, and specifically excluded R&D subsidies from its schedule of WTO GATS commitments under Mode 3 when the WTO was established. The proposed R&D commitment excludes "R&D financed in whole or in part by public funds" but otherwise binds the entire sector with *no further limitations* under

Mode 1, 2, and 3! Thus, while R&D that is directly publicly financed is excluded, other forms of government subsidy that are more likely given fiscal constraints – such as existing tax credits – would be newly subject to GATS National Treatment rules. (For instance the significant tax credit for R&D referred in IRS Code Sec. 41 that President-elect Obama has stated that he seeks to make permanent.) As well, the recent Emergency Economic Stabilization Act of 2008 included a *retroactive* two-year extension of the tax credit, as a means of stimulating R&D job growth *in the United States*. This tax credit is applicable to firms that use domestic in-house research and firms that contract out for their research, *but firms cannot seek the credit for "foreign research"* conducted outside of the U.S.. Many states have similar R&D tax credits. (CA, LA, AZ, CO, NY, ME, MA, CT, MD all require research activities to take place *in the state* in order for firms to be eligible for state-based R&D tax credits.) if the Bush offer were allowed to be locked in, the offshore R&D powerhouses in Asia and elsewhere could newly challenge such national and state tax credits for domestic research as obvious National Treatment violations.

- **Proposed commitments in "storage and warehousing services" may include LNG terminals and would implicate environmental and safety laws**: The proposed commitment applies to UN CPC code 742, which includes bulk storage of liquids or gases. This subsector covers not only hazardous "tank farms" for gas, oil, and chemicals, but most analysts believe controversial offshore liquid natural gas ("LNG") terminals. The location of LNG terminals is enormously controversial – from the risk of presenting a target for terrorism, to the significant dangers inherent in the operation of an LNG facility. If this sector were newly committed to GATS, federal or state laws banning establishment of LNG facilities, tank farms or hazardous chemical storage facilities near major population centers, or other sensitive locations would be considered a GATS Article XVI Market Access violation (as regulatory bans establishing a forbidden zero numerical quota).

2. Doha Round GATS offers and demands in higher education, energy, financial services and more (*now* in play in December Doha Round push) conflict with proposed Obama policies; existing GATS commitments must be changed to create policy space for health-care, climate proposals.

The problems facing the incoming administration regarding the on-going WTO GATS negotiations merits its own memo given the scope of issues implicated.[2] The urgency of this matter relates to the fact that various outstanding GATS offers and demands could be locked in if/when a modalities agreement is reached in the Doha Round in December. If WTO DG Lamy's last-minute push fails, the new administration will face these Bush hangover GATS offers on January 20. Meanwhile, there are various changes to *existing* GATS commitments that an incoming administration should make part of on-going WTO GATS negotiations so that these changes do not occur in the more 'costly' context of free-standing GATS Art. XVI compensation talks. That is say that if a modalities agreement is reached in the coming weeks, the Obama administration could get locked into various damaging positions of the Bush administration:

- **Subjecting U.S. higher education policy to comply with GATS constraints**: As part of 2005 U.S. revised GATS offers, the Bush administration listed higher-education services (i.e. colleges and universities) to be bound to GATS. This crazy idea is strenuously opposed by the Association of American University professors, NEA and others. Among other serious problems, the offer would require government education funding to be shared on an equal basis between foreign institutions and domestic ones. The Bush administration says that a broadly-worded footnote to its offer safeguards certain domestic subsidies, but various education-related professional associations and their lawyers disagree.

- There are demands from other countries – regarding energy, financial services and more – that if accepted by the United States would conflict with various critical energy efficiency, climate and financial re-regulation proposals; and
- The GATS Working Group on Domestic Regulations is developing a new set of extreme disciplines on domestic regulation of all service sectors, including those not GATS bound (i.e. top down). The draft text included application of a 'necessary' test on all regulations, *including non-discriminatory standards*, licensing qualifications, conformity assessment systems and more that would severely limit policy space in an array of critical issues.

We have created a searchable database of existing and offered U.S. GATS commitments. (See www.citizen.org/trade/forms/gats_search.cfm.) The Bush administration offers are in red in the database, which separates out the commitments and offers by subject. An immediate means to safeguard the Obama administration's policy space regarding the past administration's GATS offers and demand positions is to issue a statement giving notice that the past positions will be reviewed by the new administration. This would inform other countries that the U.S. GATS positions are not locked regardless of representations by the Bush administration during the prospective Doha Round ministerial level talks later in December.

The GATS issues also pose significant political problems. Few in Congress even reviewed the hundreds of pages comprising the 1994 Uruguay Agreements Act that implemented the WTO. With one lame-duck session, Fast Tracked vote, Congress bound nearly 100 sectors of the U.S. service economy to GATS constraints with little understanding. Unless USTR gets ahead of the GATS problem, a political mess is foreseeable. When various congressional Democrats -- who finally have a partner, not a roadblock in the White House -- begin moving some of the reasonable, non-discriminatory service-sector-related policies Bush has jammed for years, USTR will have to deal with both Congress and other governments when the nasty *demarches*, press attacks and WTO dispute notices start. It is critical to note that unlike some WTO agreements, GATS extends significantly beyond non-discrimination to simply ban certain common service sector policy tools, so the array of common existing and foreseeable reasonable non-trade policies that could conflict with GATS constraints is large.[3] FYI : Other WTO signatory nations have revised their GATS offers and demands as new governments have come into office.

Meanwhile, to implement key domestic campaign policy priorities on health care and climate change, the Obama administration must alter existing U.S. trade-agreement commitments. For instance, existing U.S. GATS commitments include - and thus constrain policy options regarding many health services, including health insurance; health services provided by hospitals, HMOs and other health-care facilities; distribution services, including wholesale and retail prescription drugs; and data processing services, including medical records and insurance-claim processing. Common health-care cost containment proposals based on risk pooling (such as those described in President-elect Obama's "National Health Insurance Exchange") could well be WTO violations. This is because the GATS national-treatment rules are so expansive – beyond forbidding specific discrimination to ban policies which 'modify the conditions of competition,'[4] – and the market-access rules forbid policies that establish "exclusive supplier" arrangements – which is a natural effect of many risk pooling schemes. Among the other Obama health-care reform proposals that could run afoul of existing GATS rules: reduction of pharmaceutical prices through establishment of formularies, requiring electronic medical record-keeping, a proposal to expand coverage by requiring large employers to provide health insurance, and a proposal to establish tax credits for small employers as an incentive to provide health insurance.

In addition, proposals that address climate policy, such as increasing CAFE (Corporate Average Fuel Efficiency) standards, banning incandescent light bulbs, establishing new regulation of coal-fired electric plants and establishing national renewable portfolio standards (RPS), green procurement proposals and green industry subsidies come under the jurisdiction of existing U.S. WTO GATS and Technical Barriers to Trade Agreement commitments.

Trying to work within the extremely limited policy space permitted by existing WTO rules could well result in the challenges surrounding America's health-care debacle and the global climate crisis being defined so narrowly as to ensure real redress is impossible. Indeed, even the WTO's own Director General, Pascal Lamy, has recognized that existing WTO rules may need to be "adapted" to create policy space needed to address major challenges like climate change.[5]

3. Reversing ATPDEA – Bolivia decertification slated to start in January before trade flows shift

The Bush administration terminated Bolivia's Andean Trade Promotion and Drug Eradication Act (ATPDEA) preferences effective December 15, 2008. <u>This decision can be reversed immediately by executive order by the incoming Obama administration.</u> The basis for the Bush administration's action was ostensibly Bolivia's failure to limit coca production. However, ATPDEA recipient Colombia's coca production (both its level and *growth*) is significantly greater than Bolivia's, and Colombia was not listed for removal from the program. To the extent that the Obama administration is interested in rebuilding relationships in Latin America generally and with Bolivia specifically, reversing what was seen as a politicized and punitive ATPDEA decertification is an important step. (The Bolivian government was not even formally notified of the Bush administration's November 25 proclamation suspending Bolivia's trade preferences, but learned of the decision the next day in the press.) As well, at issue in Bolivia are tens of thousands of jobs mainly occupied by indigenous-women workers who have moved into the sprawling mega-settlement of El Alto outside of La Paz. If U.S. apparel importers no longer consider Bolivia a reliable duty-free supplier, they will shift sourcing and once gone are unlikely to return if other countries preference program problems are any indicator. Even with preference programs in place, the elimination of the WTO's Multi-Fiber Arrangement has already decimated Latin American textile and apparel industries (with China mainly taking up that region's past share of the U.S. market.) Thus the urgency of the matter: once these orders go to China, they are not coming back. The lasting economic fallout in Bolivia from this Bush administration slap at President Morales would then flavor the foreign policy of the incoming administration -- as well as worsen economic and social conditions in one of the Americas' poorest nations.

4. Inserting USTR into G-20 Financial Crisis Summit process prior to next meeting (i.e. before April 30, 2009)

To date the G-20 process on establishing international and domestic financial service regulation has proceeded with a seeming total lack of awareness that most of the world's countries are bound to expansive WTO financial services deregulation requirements. Deregulation (not only liberalization) of the financial service sector – including banking, insurance, asset management, pension funds, securities, and more – has been among the most important, but least discussed, aspects of the WTO. The November G-20 Declaration said the next meeting of the G-20 heads of state will occur by April 30, 2009.

Leading up the D.C. November G-20 Global Financial Crisis Summit and since, the only trade-related focus has been to the perils of countries lifting tariffs to block imports in response to dire economic conditions. To our knowledge, this is something no country has proposed. However, the Bush administration and the EU have taken various measures (and propose further measures) to counter the crisis that contradict the fundamental precepts of the current globalization model – and in some cases violate WTO financial services rules. While the U.S. and EU seem to have an agreement not to attack each other's financial crisis-related WTO violations, this may not be the end of the story. There are numerous other countries' firms and sovereign wealth funds now involved in the U.S. financial services sector. The incoming USTR team must insert itself into this process with proposals to adjust the WTO's GATS and specifically its 1997 Financial Services Agreement (FSA) so as to effectively remedy the financial crisis and counter the prospects for further such crises. This is both a policy and a political matter. Absent action to head off the foreseeable WTO challenges, the Obama administration will have to face the public outrage when some reasonable new domestic crisis-redress policy gets attacked as a WTO violation, even though the Obama administration did not create the problematic WTO rules.

The WTO's FSA locks in domestically and exports worldwide the extreme financial services deregulatory agenda that is rightly being blamed for fostering the crisis. The U.S. WTO FSA commitments to stay out of regulation of "banking," "other financial services" and "insurance" are extremely broad.[6] Consider just one sector that has been a focus of considerable attention: "Trading of Securities and Derivative Products and Services Related Thereto." The only limit in the U.S. GATS securities and derivatives schedule – and thus the only issue on which we have regulatory space - is onion futures, no kidding.[7] Plus, the United States signed on to extra WTO obligations, in the Understanding on Commitments in Financial Services" that was agreed by OECD nations. The Understanding includes a "standstill" commitment that forbids rolling back deregulation (or liberalization) for financial service sectors bound to comply with WTO.[8] Again, consider regulation of or banning of certain forms of derivatives. In addition ot the standstill agreement, under the Understanding, the United States is also bound to ensure that foreign financial service suppliers are permitted to "offer in its territory any new financial service" – a direct conflict with the various proposals to limit various risky investment instruments. The Understanding also includes elimination of non-discriminatory domestic regulatory policies that meet GATS rules, but that may still "*adversely affect the ability of financial service suppliers of any other (WTO) Member to operate, compete, or enter*" the market.[9]

Meanwhile, the list of reasonable financial service regulations that actually do *not* meet even the core GATS requirements is lengthy. This is why it is necessary to alter the agreement to remedy the current crisis. For instance, consider the use of "firewalls" between various financial services, designed to ensure that trouble in one sector does not contaminate the entire system. The Glass-Steagall Act of 1933 – which forbid bank holding companies from operating other financial services – applied such firewalls as to avoid a repeat of the financial collapse that occurred during the Great Depression. While the law applied to domestic and foreign banks alike, it had the effect of preventing foreign banks that combined commercial and investment banking services from entering the U.S. market. Various U.S. GATS "market access" commitments in banking services guarantee such access. The Clinton administration, which conducted WTO FSA negotiations, recognized this conflict and indeed made a commitment listed in the U.S. GATS schedule to "fix" this problem.[10] The provisions of Glass-Steagall that prohibited a bank holding company from owning other financial companies were repealed with passage of the Gramm-Leach-Bliley Act in 1999, the year the WTO's FSA went into effect. Altering the WTO financial services rules is critical for creating domestic policy space to address the crisis, but it will require USTR's expertise to raise this issue and see it through.

5. Political hot potato: Mexico's WTO challenge of U.S. dolphin protection law with DSU action likely in February

In late October, Mexico initiated a WTO Dispute Settlement Understanding (DSU) consultation against the U.S. International Dolphin Conservation Program Act (IDCPA), arguing that it illegally prevents Mexico's tuna exports from securing the U.S. "dolphin safe" label and creates an unnecessary obstacle to trade. This is the latest twist in the "GATTzilla Ate Flipper" follies that started with a successful 1991 GATT challenge by Mexico and other countries of the Marine Mammal Protection Act (MMPA). This case launched environmentalists' antipathy towards GATT (and then WTO) and first awakened numerous members of Congress that our trade agreements were no longer just about tariffs and quotas.

<u>This will be a very hot case politically, and how it is handled will shape environmental groups' views of Obama trade and environment policies. It could also could intensify anger about the WTO</u>.[11] At a meeting we had with USTR, we were informed that the first meeting with Mexico will be this week. Mexico's Ministry of Economy said in a statement October 24 that it hoped to reach a negotiated settlement. However, it is unclear how the Bush administration could "fix" the problem by weakening the standard through administrative action if it were so inclined given the domestic court rulings noted below. And, with time having run out for the Bush administration to try to get Congress to weaken the standard, the incoming administration will inherit this problem.

<u>Mexico can file 60 days after the consultation meeting this week, so as soon as the second week in February.</u> Congressional reaction to the formal filing will likely be intense, as the 1997 IDCPA that Mexico is challenging was in itself a weakening of the previous MMPA (itself brought on by two years of struggle by the Clinton administration and a narrow vote related to bringing U.S. law into conformity with the earlier GATT cases.) The challenged 1997 legislation changed the MMPA ban on U.S. sale of tuna caught through the encirclement of dolphins with huge purse-seine nets (whether domestic or foreign) to allow importation of tuna caught using such nets if no observed mortality occurred. However, in 2007, the 9th Circuit ruled that the qualifier "dolphin-safe" in the 1997 statute must be interpreted to mean that the tuna was not harvested with purse-seine nets, and that no dolphins were killed or seriously injured when the tuna were caught (See, *Earth Island Institute v. Hogarth,* 484 F.3d 1123 (9th Cir.)). Mexico argues that the 1990 Act and the 2007 court decision resulted in Mexican tuna exports being treated less favorably than U.S. tuna, in violation of WTO rules.

In addition, there are several other WTO cases with pending rulings and some newly filed cases the Obama administration will inherit, including a new Canadian challenge to the new U.S. country of origin (COOL) food labeling requirements, that will have broad political ramifications.

6. Last minute Bush administration launch of a Trans-Pacific FTA (next meeting is March 2009)

On September 22, 2008 USTR notified Congress of new trade-agreement negotiations with the nations comprising the Trans-Pacific Strategic Economic Partnership, which includes Brunei, Chile, New Zealand and Singapore. **Allocating limited resources to negotiation of any new FTA prior to rebuilding consensus in Congress and among the public on a winning trade agreement model would be a mistake – even without considering specific labor and human-rights issues regarding Brunei and agricultural issues related to New Zealand.** The four TPP countries have an FTA which entered into force in 2006, however this agreement did not include financial services and investment. Prior to notifying Congress, the Bush administration had been participating in financial services and investment negotiations with the TPP countries. **The next scheduled negotiation is in March 2009.** Australia has indicated its interest in joining these regional FTA negotiations if they continue, although the government has questioned the seriousness of the effort given the last minute notice to Congress, among other factors.

7. China Bilateral Investment Treaty (BIT)

The Bush administration launched a bilateral investment treaty with China on June 18, 2008 at the summer U.S. China Strategic Economic Dialogue (SED). Congressional Democrats on the trade committees voiced objections to the decision to launch talks, and also raised concerns about specific aspects of the proposed BIT, including in a June 18 letter. Various Democratic base civil society groups, including labor, also objected to the proposal. Among the concerns raised in Congress and outside regarding ways that the BIT would benefit China, but not the United States:

- <u>The BIT would promote further U.S. investment and job offshoring</u> by providing new protections for U.S. firms seeking to relocate to China. (And indeed in a letter supporting the BIT, various business interests cited "allowing U.S. companies to invest more freely in China as a critically important driver of economic growth and productivity for the United States.")
- <u>The BIT would empower Chinese firms, including state-owned firms, to increase purchases of U.S. assets without review (beyond existing CFIUS processes), and would provide new rights to challenge U.S. regulatory policies through the investor-state mechanism.</u>
- <u>The model BIT accords foreign investors greater rights than U.S. investors in the United States,</u> both substantively and through access to investor-state extra-judicial enforcement.
- The BIT would "reward" China with increased U.S. foreign investment and new freedoms for Chinese investors here despite China's refusal to address currency manipulation, subsidy, intellectual property, and other existing issues.

Allocating limited resources to negotiation of a new U.S.-China BIT should not be a priority of the new administration, given the many outstanding problems demanding resolution under *existing* U.S.-China agreements and trade practices. Indeed, absent significant revisions to the U.S. model BIT, a U.S.-China BIT would be counter-productive. The Obama administration could easily halt the process just started by the Bush administration altogether. First, the process has not gained institutional momentum. The first formal negotiating round was only held in early September and this involved an initial exchange and review of proposed negotiating documents. (USTR Director for Investment Affairs Daniel Bahar and Wes Scholz of State's Office of Investment Affairs headed the U.S. delegation.) Second, deep differences emerged immediately between the parties. The Bush administration advocated the model U.S. BIT finalized in November 2004 as the negotiating document. China rejected major aspects of that proposal, including use of a negative list (a core element of the model BIT.) China also called for the BIT to recognize the two countries' different levels of development, for instance adamantly rejecting application of the BIT pre-establishment (i.e. eliminating existing Chinese pre-approval processes and conditions for foreign investors), but insisted that only the existing CFIUS process should be listed as an exception to pre-establishment national treatment for Chinese firms here. China also favors aspects of the model BIT that conflict with candidate Obama's call to reform foreign investor rights and enforcement to safeguard domestic regulatory policies. The next meeting of the U.S.-China Strategic Economic Dialogue will be early summer 2009, following on last weeks' winter meeting from which no BIT news emerged. (The BIT was launched at the June 2008 U.S.-China Strategic Economic Dialogue.)

Hangover Bush administration Colombia, Panama, Korea FTAs

How the Obama administration handles the Bush NAFTA-style FTAs with Colombia, Panama and Korea will have enormous political and policy ramifications. Moving any of these agreements is a terrible idea on both policy and political grounds.

As a policy matter, each of the three pending FTAs require significant renegotiation. Plus, even the 'prefect' Colombia FTA must not be considered unless and until there are dramatic and sustained improvements in human rights conditions in Colombia and the prosecution of hundreds of outstanding murder cases involving unionists, Afro-Colombian, indigenous people and human rights advocates. (The Colombia FTA is the only trade pact Human Right Watch has opposed.) President-elect Obama's comments on the Colombia FTA cheered many here and in Colombia.

Politically, many congressional Democrats and the Democratic base of labor, human rights, faith, environmental, consumer, family farm and other civil society groups view these pacts as representing more-of-the-same past trade-agreement model promoted by the previous administration. The election demonstrated a relentless demand from the American public for a turn away from this model and towards a new trade agreement model that would benefit more people. From both chambers of Congress and from traditionally "free trade" Oregon and Florida to Colorado and New Mexico, successful candidates in 2008 election races ran on a platform of fundamental overhaul of U.S. trade and globalization policies, including a growing number of Republicans. Over 140 paid campaign TV ads were run against NAFTA, CAFTA and those who voted for those pacts, with ads being run by candidates and the DCCC and DSCC. In 2008, 41 new representatives and senators were elected that committed to changing our past trade model. Over 2006-08, a combined net 71 fair-trade congresspeople *replaced* those who had supported the NAFTA/CAFTA model. During the campaign, President-elect Obama described changes to NAFTA and the NAFTA model FTAs that he sought to achieve through renegotiation of some existing pacts. Many of the issues he raised have already galvanized congressional opposition to NAFTA-style agreements: excessive foreign-investor privileges and private enforcement systems, and limits on domestic procurement policy, food-safety protections and more.

Where the politics and the policy come together is with President-elect Obama's promises to renegotiate NAFTA, CAFTA and other pacts. These pledges and the longstanding interest by many in Congress to improve the U.S. trade agreement model, provides a long-overdue opportunity for in-depth reviews of the existing FTAs, and the much-needed debate about what policies all U.S. agreements should and should not include. Getting the rules right is critical before considering any future agreements, much less before negotiating additional pacts.

Despite past improvements, many serious problems of the NAFTA/CAFTA model are replicated within the three Bush FTAs. These must be addressed. The failure to remove these problematic provisions means these pacts do not pass the most conservative *"do no further harm"* test. Some of the most problematic language replicated from the NAFTA/CAFTA model include:

Foreign-Investor Rights. The investment chapters of the three Bush FTAs still afford foreign investors greater substantive and procedural rights than those enjoyed by U.S. investors. These three pacts' foreign investor chapters contain the same provisions in CAFTA that led many Democrats to oppose that pact, and that President-elect Obama cited as problematic during the campaign. Such provisions promote offshoring, and subject our domestic environmental, zoning, health and other public-interest policies to challenge by foreign investors in foreign tribunals.

Food-Safety Provisions. The Bush FTAs still contain terms requiring the United States to limit import inspection and accept imported food that does not meet our domestic safety standards.

Procurement Provisions. The Bush FTAs procurement rules subject many common federal and state procurement policies to challenge and directly forbid other common procurement policies. These procurement rules continue the NAFTA/CAFTA ban on anti-off-shoring and *Buy America* policies and expose U.S. renewable energy, recycled content and other environmental safety requirements to challenge. These terms must be changed to provide the policy space for the many exciting Green Economy proposals President-elect Obama promoted during his campaign.

Agriculture Provisions. The FTAs contain the NAFTA-style agriculture trade rules that have simultaneously undermined U.S. producers' ability to earn a fair price for their crops at home and in the global market place. Multinational grain trading and food processing companies have made enormous profits, while farmers on both ends have been hurt. If this model continues, it is projected to increase hunger; illicit drug cultivation; undocumented migration; and continue the race to the bottom for commodity prices. This pits farmer against farmer and country against country to see who can produce food the cheapest, regardless of standards on labor, the environment or food safety.

Access to Medicines. While the most egregious, CAFTA-based, provisions limiting the access to affordable medicines have been removed from the Bush FTAs, the texts still includes NAFTA-style provisions that undermine the right to affordable medicines for poorer countries contained in the WTO's Doha Declaration.

In addition to the NAFTA-style provisions contained in Bush's Colombia, Panama and Korea FTAs, each agreement poses its own considerable problems. Given the worsening labor and human rights conditions in Colombia – where the rate of unionist assassinations is up relative to last year – and the growing revelations about the Uribe administration's links to rightwing paramilitaries responsible for assassinations of unionists and Afro-Colombian and indigenous community leaders, it would be outrageous to implement any trade agreement or otherwise signal a closer U.S. connection to Colombia. During the Uribe administration (August 7, 2002 – present), 434 unionists have been murdered. More than 2,590 Colombian trade unionists have been killed since 1986. Since President Uribe took office five years ago, convictions have been reported in only 59 of the 458 trade-union homicide cases and only 55% of those convicted are in custody.

It is critical to send a signal to the world that the United States has a zero-tolerance policy regarding assassination of people seeking to exercise their basic labor and human rights.

Meanwhile, Panama's 'comparative advantage' is banking secrecy and money laundering. Panama's corporate and banking laws have made it a haven for U.S. companies seeking to set up to create subsidiaries for the purpose of dodging taxes. With 400,000 registered corporations, Panama is now second only to Hong Kong as a venue for multinational firms to set up shell subsidiary corporations. The FTA's investor rights would confer on these run-away U.S. corporations greater substantive property rights and extra procedural rights superior to those available to tax-paying U.S. corporations operating from here under our Constitution. Plus, the FTA's procurement rules' National Treatment requirements would allow these run-away firms access to Buy America contracts. Plus, unlike all of the other U.S. FTA partner-countries, Panama has no tax transparency treaty with the United States. Panama has been targeted by both the OECD and the G7-created Financial Action Task Force for resisting international norms in combating tax evasion and money laundering. Since the 1990s, the U.S. has expressed serious concern about the murkiness of the Panamanian banking sector and the country's loose corporate accountability standards. Despite the international pressure, the Government of Panama has refused to sign the standard Tax Disclosure treaty with the United States, which allows for exchange of tax-related information between countries to catch tax cheats and prevent money laundering and funding for terrorists. With the November 2008 G-20 communiqué from the Washington Financial Crisis Summit even calling for strong actions against the outlier countries, such as Panama, that refuse to meet basic banking and tax transparency norms, providing Panama the new commercial rights and favorable optics of a U.S. FTA is a terrible idea.

In addition to lopsided auto provisions, the Korea FTA includes major financial service sector deregulation and liberalization which contradicts the global and domestic congressional efforts to re-regulate this volatile sector.

Getting the underlying model right, through a process involving diverse stakeholders in reviewing what changes are needed to NAFTA– and also addressing the issues specific to each of three pacts – is critical to ensuring U.S. trade agreements deliver the benefits of expanded trade without undermining key social, economic and environmental justice goals. Building consensus about a better trade agreement model – and then conforming the Bush hangover FTAs to this model – is critical to rebuilding consensus in this country in support of trade expansion.

ENDNOTES

[1] In 2005, the WTO Appellate Body issued a final ruling against the United States in a challenge brought by Antigua against the U.S. ban on Internet gambling. The ruling implicated large swaths of state and federal gambling law unrelated to online gaming as potential WTO violations because it determined that the entire U.S. "gambling service sector" was bound to WTO rules. Thus, the ruling exposed to WTO challenge an array of common state gambling regulations, such as gambling bans, state lotteries or exclusive Indian gaming rights (which have the unintended effect of keeping out private European lotteries and casinos). A group of state attorneys general asked the administration to remove the entire gambling sector from WTO jurisdiction, a dramatic move that no WTO country had previously attempted. The Bush administration initially refused. When the United States did not change its laws as ordered by the WTO, Antigua brought a compliance case. In March 2007, the United States lost that case, and Antigua was authorized to begin imposing sanctions. Antigua's lawyers raised the option of lifting Antiguan compliance with WTO copyright rules relating to U.S. music and software. In response, and with growing threats from other countries concerning WTO challenges to U.S. gambling policies, the United States gave notice to the WTO in May 2007 that it sought to withdraw "gambling and betting services" from WTO jurisdiction. Under WTO rules, a country may withdraw a service sector committed to WTO jurisdiction only with the authorization of other

WTO signatory countries interested in the sector. WTO rules require that compensation must be offered to such interested countries. Antigua is seeking compensation worth $3.4 billion with additional demands for compensation requested by five other countries including the European Union, Canada, Japan, Costa Rica and Macao.

[2] The GATS rules cover every conceivable way that a service might be delivered, including granting foreign corporations the right to buy or establish new service-sector companies within the territories of other countries (Mode 3) and by sending people across borders to perform services (Mode 4 – under which the U.S. has already bound a minimum guarantee of 60,000 H1B visas with not exception for changed domestic circumstances.) WTO labelled the GATS the world's first "multilateral investment agreement" because it creates pre-establishment commercial presence rights and then limits a wide array of common domestic policies from being applied to GATS-committed sectors, including needs tests. Negotiations to expand GATS coverage and requirements were launched in 2000 as part of the Uruguay Round built-in agenda and then were folded into the Doha Round when it was launched in 2001. In May 2005, the United States released its negotiating proposal for these on-going GATS talks. This "2005 United States Revised Offer" document includes the list of service sectors that the United States previously committed to comply with GATS' extensive rules, as well as *additional* services that U.S. negotiators are now offering to subject to GATS. The potential effects of the 2005 Revised Offer on federal, state and local authority to regulate services are enormous. You can see the U.S. offers at http://www.ustr.gov/Trade_Sectors/Services/2005_Revised_US_Services_Offer/Section_Index.html.

[3] The WTO Secretariat was unusually direct in describing the operation of the GATS: "*Governments are free in principle to pursue any national policy objectives provided the relevant measures are compatible with the GATS.*" (WTO Secretariat. Trade in Services Division, "Everything You Wanted to Know about GATS but Where Afraid to Ask," October 1999, at 5.) The regulatory limits imposed by GATS rules cover not only all actions taken by all levels of government – "central, regional, or local governments or authorities" – but also actions of "non-governmental bodies in the exercise of powers delegated by" any level of government. (WTO, GATS, Art. I-3-a-i.10) Thus GATS regulatory constraints cover private-sector bodies that have a role delegated by or approved by government, such as professional associations or industry bodies whose professional qualifications or voluntary "code of conduct" rules are recognized by governments. GATS' rules extend far beyond limits on domestic policies that discriminate against foreign service-sector firms. The GATS – through its "Market Access" rules – creates certain absolute rights for foreign investors who acquire, invest in or establish service-sector operations within the United States in sectors covered by U.S. GATS commitments. These market-access requirements are extraordinary, as they simply ban certain types of policies – unless a country originally listed them as exceptions in their GATS schedules in the 1990s – even when they are applied equally to foreign and domestic services or suppliers. The following are forbidden: "*limits on the number of service suppliers, including through quotas, monopolies, economic needs tests or exclusive service supplier contracts; limits on the total value of service transactions or assets, including by quotas or economic needs tests; limits on the total number of service operations or the total quantity of a service; limits on the total number of natural persons that may be employed in a particular service sector; policies which restrict or require specific types of legal entity or* joint venture through which a service supplier may provide a service." (GATS Art. XVI)

[4] WTO, General Agreement on Trade in Services, Article XVII:3. "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

[5] "The WTO tool-box of rules can certainly be …'adapted' if governments perceive this to be necessary to better achieve their goals" [quotes in original]. *See* "Lamy: Bali UN Climate Conference speech, WTO Secretariat Press Release, Dec. 9, 2007, at http://www.wto.org/english/news_e/sppl_e/sppl83_e.htm.

[6] Under WTO definitions "other financial services" include trading in foreign exchange, derivatives and all kinds of securities, securities underwriting, money broking, asset management, settlement and clearing services, provision and transfer of financial information, and advisory and other auxiliary financial services. "Banking" covers all traditional services provided by banks – acceptance of deposits, lending of all types, and payment and money transmission services. The FSA contains an exception that supposedly ensures that the agreement will not undermine domestic laws or regulations – such as those designed to protect investors, depositors, and policyholders, or to ensure the safety and integrity of the financial system. However, this ostensible guarantee is largely eviscerated by several significant loopholes. First, the putative carve-out contains a classic circumvention clause that negates the ability of countries to actually safeguard a domestic policy that conflicts with WTO obligations. The clause starts by

noting that countries shall not be prevented from establishing financial service regulatory policies for “prudential reasons,” but then continues by stating: “Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.” That is to say that even if regulatory measures are taken for prudential reasons, they are subject to challenge if they in effect undermine the constraints otherwise established in the agreement. Moreover, the definition of “prudential” is not defined in GATS. Thus the question of what constitutes a “prudential” regulation is subject to interpretation by WTO dispute resolution panels were a domestic law challenged. Moreover, the financial service industry has been lobbying in the context of ongoing GATS negotiations for a narrow interpretation that would limit “prudential” measures to regulations concerning only solvency and financial disclosure.

[7] GATS/SC/90/Suppl.3, at C-26. “Federal law prohibits the offer or sale of futures contracts on onions, options contracts on onions, and options on futures contracts on onions in the United States, and services related thereto.”

[8] WTO, *Understanding on Commitments in Financial Services,* A. “Any conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures.” (The Understanding is a supplemental agreement to the FSA which governs all U.S. GATS financial service commitments.)

[9] WTO, Understanding on Commitments in Financial Services, B-10(d).

[10] WTO, *United States of America Schedule of Specific Commitments Supplement 3*, Additional Commitments Paper II, WTO document GATS/SC/90/Suppl.3.

[11] The environmental issue relates to the use of purse seine nets by the Mexican fishing fleet to capture yellowfin tuna off Mexico’s Pacific coast. The nets can be up to a mile long and are used to encircle schools of yellowfin tuna. But because yellowfin tuna swim under dolphin pods, the practice has led to the killing of hundreds of thousands of dolphins each year. The political issue in trade jurisprudence is the ability of countries to set process and production method (PPM) standards. The Appellate ruling in the Shrimp-Turtle case partially reversed past GATT jurisprudence that PPM-based market access conditions are never permitted, and rather ruled that under certain circumstances such measures can be WTO legal. This case will be the first test of WTO flexibility regarding PPM measures, which extend beyond environmental measure to include existing U.S. (now largely unenforced) bans on imported products made by child labor.