

Closing Santa's Sweatshop:

**How to Deliver on Obama's and Congress'
Toy-Safety and Fair-Trade Promises**



December 2008

© 2008 by Public Citizen's Global Trade Watch. All rights reserved. No part of this document may be reproduced or utilized in any form or by any means, electronic or mechanical, including photography, recording, or by information exchange and retrieval systems, without written permission from the authors.

Public Citizen is a nonprofit membership organization in Washington, D.C., dedicated to advancing consumer rights through lobbying, litigation, research, publications and information services. Since its founding by Ralph Nader in 1971, Public Citizen has fought for consumer rights in the marketplace, for safe and secure health care, for fair trade, for clean and safe energy sources, and for corporate and government accountability. Visit our web page at <http://www.citizen.org>.

Acknowledgments: This report was written by Todd Tucker. Thanks to Lori Wallach and Brandon Wu for writing and research assistance, along with collaborators from past reports. David Arkush, Tony Corbo, Christine Hines, Graham Steele and Patrick Woodall provided useful guidance. Additional thanks to Angela Bradbery, Michael Crawford, Ann Eveleth, Bill Holland, Joe Newman and James Ploeser.

Additional copies of this document are available from:

Public Citizen's Global Trade Watch
215 Pennsylvania Ave SE, Washington, DC 20003
(202) 546-4996
PC Product ID No: E9032

Other Titles by Public Citizen's Global Trade Watch:

Election 2008: Fair Trade Gets an Upgrade (November 2008)

The Rise and Fall of Fast Track Trade Authority (August 2008)

Federalism and Global Governance: Comparative Analysis of Trade Agreement Negotiation and Approval Mechanisms Used in U.S. and Other Federalist Governance Systems (August 2008)

Prosperity Undermined: Economic Outcomes During Fast Track-NAFTA-WTO Era (Aug. 2008)

Presidential Candidates' Key Proposals on Health Care and Climate Will Require WTO Modifications (February 2008)

Santa's Sweatshop: Made in D.C. With Bad Trade Policy (December 2007)

Trade Deficit in Food Safety (July 2007)

Peru-U.S. "Free Trade Agreement" Would Help Lock-In Failed Social Security Privatization in Peru (June 2007, with Americans for Democratic Action and USAction)

States' Rights and International Trade: A Legislator's Guide to Reinvigorating Federalism in the Era of Globalization (February 2007)

Election 2006: No To Staying the Course on Trade (November 2006)

How Politics Trumped Truth in the Neo-Liberal Revision of Chile's Development (Sept. 2006)

The WTO's Empty Hong Kong "Development Package": How the World Trade Organization's 97% Duty-Free Proposal Could Leave Poor Countries Worse Off (June 2006; with ActionAid)

Whose Trade Organization? A Comprehensive Guide to the WTO (New Press, 2004)

EXECUTIVE SUMMARY

The United States will import an estimated \$23 billion in toys in 2008, 90 percent of that from China. Imports represent 90 percent of U.S. toys, which is the highest toy-import level and share on record. Yet while the production of our children's toys has become globalized, our consumer-safety system and its protections against injury and death have not.

There are extremely lax safety standards and enforcement in many countries now producing our children's toys. Yet, while toy imports exploded by 562 percent from 1980 to 2008, the budget of the U.S. agency responsible for toy safety, the Consumer Product Safety Commission (CPSC), was cut by a fifth in real terms with CPSC staffing levels down by nearly 60 percent.

While the Consumer Product Safety Improvement Act of 2008 represented the most significant improvements of the CPSC since the agency was established in the 1970s, *it failed to sufficiently address import-specific concerns*. Simply put, the new law does little to update U.S. import-safety policies for the 21st century reality that many products are produced offshore. The new law does not provide for more overseas inspection authority or systematic border inspection of imports. Indeed, as of 2007, according to the CPSC, the agency had no staff that work full-time at any of the 326 U.S. ports, and mostly focused part-time energies on Los Angeles and New York, leaving 324 ports virtually unchecked. In 2008, the CPSC claims to be monitoring at least nine ports, but could not confirm if there were full-time safety inspectors present at any of these ports. Moreover, even once the new law's increases in CPSC staffing and budget levels are fully phased in, the agency's staffing levels will actually be *down* 49 percent – relative to 1980 levels.

Meanwhile, policymakers have approved over a dozen trade agreements that impose limits on imported product-safety standards and inspection rates and practices. These agreements, such as the World Trade Organization (WTO) and “Free Trade Agreements” based on the North American Free Trade Agreement (NAFTA) model, have simultaneously promoted and protected the toy industry's “low road” practices by providing expansive foreign-investor protections that promote offshoring of production to developing countries with lax safety standards and low wages. These pacts also establish a system through which U.S. safety and other public-interest policies can be and have been challenged in foreign tribunals as “barriers to trade.” U.S. laws challenged at the WTO have been ruled against over 80 percent of the time. *WTO threats to toy safety are not just hypothetical: the Chinese government has already invoked the WTO to attack U.S. state-level toy toxics bans regarding lead and bisphenol A (BPA).*

To bring U.S. product-safety policy up to date with the realities of globalized production and thus effectively remedy the imported product-safety crisis, Congress and the Obama administration must:

- **Alter various provisions of U.S. trade agreements, whose rules currently encourage the offshoring of manufacturing, and limit border inspection and imported product-safety standards; and**
- **Provide domestic agencies responsible for product safety with new authority to inspect products and facilities overseas (as is the U.S. policy for imported meat and poultry); to temporarily halt suspicious imports via a “hot button” prior to a hearing; to generate**

greater funding to ensure inspection of goods produced offshore; and to require import bonding to fund recalls.

Happily, as we detail in this report, both President-elect Barack Obama and 71 members of Congress elected in 2006 and 2008 campaigned on fair trade, including strengthened imported product safety. In the fourth section of this report, we highlight the commitments made based on our comprehensive analysis of over 130 races with an updated appendix summarizing the import-safety and fair trade-related commitments and campaign ads of over 260 candidates.

- President-elect Obama said, “As president, I’ll work with China to keep harmful toys off our shelves... and will ban “toys that contain more than a trace level of lead, coming from China or anywhere else.” He also said, “we should amend NAFTA to make clear that fair laws and regulations written to protect citizens in any of the three countries cannot be overridden simply at the request of foreign investors. I will only support future trade agreements that support these important principles” And “China’s human rights violations and failure to enforce labor, environment and meaningful product safety standards are unacceptable.”
- Obama’s commitments became part of the Democratic platform, which included a reform agenda not seen in past Democratic platforms, including the position that no future bilateral trade agreements “will stop the government from protecting the environment, food safety, or the health of its citizens; [or] give greater rights to foreign investors than to U.S. investors.”

In the 2008 elections, Obama was joined by 34 new fair traders in the House and Senate that replaced members of Congress who had supported NAFTA, WTO, current China trade policy and other anti-fair measures. This outcome furthers the transformation of Congress’ composition, bringing the total net fair-trade shift in Congress to 71 when the significant gains made in 2006 by fair traders are included. These new fair traders came from both parties, and all regions of the country – especially outside of the Rust Belt, which Beltway pundits have considered the only place trade issues resonate. Among the food- and product-safety commitments of new fair-trade members of Congress who beat or replaced anti-fair traders:

- Import safety was a key theme in the winning campaign of Rep.-elect Jared Polis (D-Colo.). He said, “The Bush administration is asleep at the wheel while multinational corporations are putting profits before safety and products that harm kids are entering our country from China and other nations with poor safety records ... We need to make sure that defects are identified and addressed *before* products reach the shelves and get in the hands of our children.”
- Sen.-elect Jeff Merkley (D) highlighted the need to create a new American trade-agreement model that remedies the many problems, including safety problems, caused by current trade agreements. Among the problems he identified with the current trade model: “Enabling foreign investors to challenge American public health, environmental, zoning and labor protections in foreign courts; Blocking government procurement rules that require the hiring of U.S. workers and ‘Buy American’ provisions; [and] Setting limits on food safety standards that require the U.S. to rely on foreign regulators and inspectors.”

- Rep.-elect Bobby Bright (D) took the seat previously held by anti-fair trader Rep. Terry Everett (R) in a campaign that included the import-safety issue. In a debate, Bright said, “we need to put tougher regulations on the countries that we’re importing from ... And then before we enter into an important agreement with a foreign nation, they should be educated on the requirements of their products being safe and, if they fail to comply and have a consistent record of failure, then our agreement should be terminated. Fast and simple.”
- The campaign of Sen.-elect Mark Begich (D-Alaska) said, “NAFTA, CAFTA and the bilateral free trade agreements negotiated by the Bush administration have helped big business while hurting middle class Americans. Mark believes fair trade policies should include meaningful and fully enforceable consumer, labor, environmental and human rights protections.”
- Rep.-elect Kathy Dahlkemper (D-Pa.) emphasized trade issues to defeat serial anti-fair trader Republican Phil English – who provided one of the votes that passed CAFTA: “What concerns me and many Americans about the topic of free trade is the lack of controls that we are currently experiencing; controls in the form of product safety standards...fair labor practices, to name just a few. Many of our businesses have moved all or a part of their manufacturing operations overseas to take advantage of cheap labor and other costs, and in return we are seeing more and more dangerous products coming into this nation, putting our people, including our children, at risk.”
- Rep.-elect Ann Kirkpatrick (D-Ariz.) criticized offshoring¹ and noted “the disparity between the nation’s dependence on foreign imports (‘oil, toys, pet food, or anything else you can think of, we import it all,’ she says) and the loss of jobs to overseas competitors.”² She replaced Republican anti-fair trader Rick Renzi.

These and other policymakers replaced predecessors who did not prioritize import-safety and other fair-trade policies. It will be up to consumers to hold these officials to their campaign promises.

This 2008 version of “Santa’s Sweatshop” includes analysis of an array of presidential and congressional campaign promises to remedy the import-safety crisis, toy import data and new legislation on product safety. Our 2007 toy safety report, (available at www.TradeWatch.Org) includes additional analysis on the major causes of toy recalls over a ten-year period; how China became the number one source of toys consumed in the United States; how corporations have created global supply chains to avoid product liability laws; and how U.S. CEO pay has skyrocketed over the same time period.

TINY U.S. CONSUMER PROTECTION AGENCY UNABLE TO COPE WITH FLOOD OF IMPORTED TOYS

While toy corporations have systematically offshored their production, public policy has not kept up. America's toy safety policy was designed in 1972, when nearly all toys were "Made in America."³ The Consumer Product Safety Commission (CPSC) – which was created after a considerable struggle on the part of consumer groups – has as its mission to "protect the public against unreasonable risks of injury associated with consumer products."⁴ The agency's brief is enormous, encompassing an incredibly diverse array of 15,000 consumer products including: toys, cribs, sports equipment, fireworks, mattresses, electrical appliances and swimming pools. The CPSC was granted a great deal of statutory authority to set mandatory safety standards, require labeling, order recalls, ban products, collect death and injury data, inform consumers about product safety, and contribute to the voluntary standards setting process.

While the statutory authority for the agency is strong, its ability to act to protect consumers has been eviscerated by two trends: budget cuts and the steady offshoring of production to countries with lax safety standards and enforcement. First, the safety agency has been the subject of a relentless attack by conservative politicians determined to narrow the scope of governmental activities and help political benefactors in manufacturing escape "burdensome" regulation. Starting in 1980 with the anti-government Reagan administration, the CPSC's staffing levels have been chipped away, resulting in the deepest cuts of any U.S. health or safety agency.⁵ Rachel Weintraub of the Consumer Federation of America likened the CPSC's destruction to "death by a thousand cuts."⁶ The CPSC went from having a budget of \$41.4 million and 978 staff (FTE⁷) in 1980 (the equivalent of \$104 million dollars in 2008 terms) to a budget of \$80 million and 420 staff in fiscal year 2008.⁸ And the agency's budget has steadily decreased in inflation-adjusted terms since it began operations in 1974, even as the array and volume of products it was entrusted to keep safe grew. (See Appendix II for a year by year breakdown of budget and staffing levels, compared to import levels and trade-policy changes.)

Second, when the agency was created, most consumer products were made in America. The producers (and their assets and attorneys) were within easy reach of agency investigative and enforcement personnel. The same producers were more mindful of safety issues because they were potentially liable under the U.S. justice system for any defective product. Indeed, the agency was designed to be complimentary to the U.S. tort system, where injured consumers can have their day in court to obtain redress against negligent manufacturers.⁹

The statistics are alarming. During the 1970s, over 80 percent of U.S. toys were produced domestically. U.S. toy manufacturers began sending production to countries with low wages and weak safety regimes, and by the late 1980s, imports overtook domestic toy production. However, as Figure 1 shows, in 1980, when the agency was at its highest staffing levels,¹⁰ the United States only imported \$3.5 billion (adjusted for inflation) worth of toys.

Today, under NAFTA and the WTO agreements, the United States imports an estimated \$23.3 billion worth of toys – a record level of imports, and 90 percent of that from China. Imports now constitute approximately 90 percent of domestic consumption – also a record share. Not only are manufacturers far from U.S. shores and outside the jurisdiction of U.S. civil or criminal courts,

but the decimated agency is simply unable to keep up with the flood of imports being produced in countries with lax domestic-safety standards and enforcement.

Indeed, as of 2007, according to the CPSC, the agency had no staff that worked full-time at any of the 326 U.S. ports, and mostly focused part-time energies on Los Angeles and New York, leaving 324 ports virtually unchecked.¹¹ A *New York Times* exposé put it starkly: “In Los Angeles area ports, through which 15 million truck-size containers move a year, a single agency inspector, working two or three days a week, spot-checks incoming shipments. Agency officials would not permit the inspector to speak with a reporter, but colleagues said her assignment was all but hopeless. ‘It is completely ineffective,’ one agency official said... In New York harbor, a safety commission inspector rarely shows up, said two customs officers who check imports to see if they comply with trade laws. Asked recently when he last saw a commission inspector, Ted Fronckowiak, a customs supervisor, responded: ‘It was around December.’”¹² In our interviews with CPSC staff in December 2008, the agency could still not confirm that a single port had a single dedicated full-time staffer, although they did say that nine of the 326 U.S. ports have some level of staff coverage.¹³

Moreover, unlike the Food and Drug Administration (FDA), the CPSC does not have a “stop button” or “hot button” which allows it to halt trade in dangerous imports at the border without first having to hold a hearing on the matter. Unlike the U.S. Department of Agriculture’s (USDA) Food Safety and Inspection Service, which is responsible for meat and poultry safety, the CPSC does not have authority to only permit imports from producers that it has certified after visiting and inspecting their overseas facilities shipping products to America.

As is graphically demonstrated below, in the era of globalization, the CPSC is overwhelmed with imports and – without a reasonable budget or all necessary authorities – is faced with the impossible task of ensuring the safety of toy imports that have surged over 562 percent. Meanwhile, the CPSC’s budget was cut by a fifth in real terms, and its staff by 57 percent.

FIGURE 1
CPSC BUDGET CUT WHILE TOY IMPORTS SURGE

	1980	2008	Change 1980-2008
Imports	\$3,519,493,921	\$23,284,767,342	562%
CPSC Staff	978	420	-57%
CPSC Budget	\$103,750,087	\$80,000,000	-23%

Source: Consumer Federation of America; News reports; UN Comtrade

Although it is a very small agency, the CPSC generally had been a trusted part of the U.S. consumer safety network. Consumers rely on CPSC recall notices, especially for toys and other important children’s products, such as car seats, strollers and cribs. The combined trends of U.S. toy firms’ offshoring of production and the CPSC’s inability to adequately deal with imports have done significant damage to both the agency’s and the toy companies’ reputations. Flaws in toy design and production generally have been discovered by the toy industry itself – or tragically revealed when children have been injured or killed – leaving the CPSC to basically serve the role as press officer to the flawed attempts by the industry to regulate itself.¹⁴

The Consumer Product Safety Improvement Act (CPSIA) of 2008 did not remedy the import-safety crisis. While the CPSIA represented the most significant improvements to the CPSC since the agency was established in the 1970s, *it failed to sufficiently address many import-specific concerns.*

Before analyzing the CPSIA's failings, it is worth noting some of the policies it got right. Among other provisions, the CPSIA:

- Enacts a mandatory toy-safety standard that was developed by the American Society for Testing and Materials, a voluntary standards development organization;
- Requires manufacturers of certain children's products to obtain certificates from third-party testing facilities certifying that their products comply with applicable product-safety rules;
- Virtually bans lead in children's products, establishes a more stringent lead-paint limit, and also bans (permanently or on an interim basis) six kinds of phthalates. All of these chemicals are associated with safety risks. The ban becomes operational in February 2009;
- Improves enforcement powers by raising the cap on civil penalties, empowering state attorneys general to seek injunctions to halt numerous violations of federal product-safety law, increasing protections for whistleblowers at toy and other companies, and requiring tracking labels on toys that include information about location of production; and
- There are also improvements related to the CPSC's rulemaking process, and public disclosure of information.¹⁵

While these provisions are highly laudable and on paper apply also to imported products, there are a number of practical and legal shortcomings in the CPSIA's import-safety provisions. The CPSIA:

- Does not establish the CPSC's right to inspect foreign manufacturing plants. Dating back to the original Consumer Product Safety Act (Public Law 92-573, Section 16), the CPSC's own inspectors have been "authorized to enter any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce, or any conveyance being used to transport consumer products in connection with distribution in commerce" and inspect the safety of items therein. One obvious problem with this procedure is that the CPSC is not *required* to conduct such inspections, but is merely *authorized* to do so at the discretion of agency political leaders. As noted, this contrasts with USDA's obligations regarding meat and poultry safety, where U.S. government officials must find a country's safety system plants' compliance to meet certain standards;
- Does not provide explicit authorities to bar products from foreign companies or producers that refuse to cooperate with CPSC inspections. Even if the CPSC were inclined to inspect plants overseas, a foreign company or government could simply refuse to allow entry to CPSC inspectors – a problem noted but not resolved in the CPSIA, which simply entrusts this task to the third-party inspectors with no CPSC back-up, much less explicit authority for the CPSC to stop imports from foreign plants or countries that refuse to cooperate with CPSC safety inspections or inspectors – authority possessed by the FDA and USDA;
- Does not require foreign manufacturers to consent to the jurisdiction of U.S. courts with respect to CPSC enforcement actions. By contrast, current motor-vehicle law requires non U.S. manufacturers selling vehicles in the United States to designate a permanent U.S. resident as an agent for service of process as well as judicial proceedings that might result

from defective products. These designations are required to be filed with the highway-safety agency;

- Does not require foreign manufacturers to post a bond to ensure that they can cover the cost of destruction or recalls from defective products.

All but the second of these issues were punted to the Comptroller General for further study, meaning that Congress can and should enact these provisions in the future.

Additionally, the CPSIA:

- Does not require that all imported products be inspected. Instead, the CPSIA requires that the CPSC come up with a risk-assessment methodology by 2010 that would identify imports likely to violate consumer-safety standards. Even if enacted, such a methodology would still leave large gaps in inspection and be subject to any number of methodology design-flaw problems; and
- Does not require that full-time CPSC inspectors be stationed at any of the 326 U.S. ports. Instead, the CPSIA merely requires that a plan on staffing be developed with the U.S. Customs and Border Protection Agency. There are no port personnel targets spelled out in the legislation.

Moreover, even once the CPSC's overall increased staffing and budget authorization levels provided in the new law are fully phased in, the agency's budget will only be up by 31 percent – and its staffing levels actually down 49 percent – relative to 1980 levels.

In sum, while the CPSIA made vital improvements in our consumer-safety infrastructure, these were upon a very low starting point. Although the import-safety scare largely created the political capital for the 110th Congress to overhaul the CPSC, most import-specific measures were punted for future study, and few specific requirements were signed into law. The CPSIA laudably adopted mandatory toy-safety standards and third-party testing and certification requirements that on paper apply to imported products. But absent a mandatory and significant CPSC presence at the U.S. ports and foreign manufacturing facilities, it will likely be difficult to police the new standards.

The same is true for the CPSIA's effective ban on lead and phthalates in toys – a giant leap forward for consumer safety. But this legislative advance is already being undermined by two trends. First, the Bush administration's implementing regulations created a giant loophole that will allow retailers to stockpile toxic toys between now and the February 2009 ban phase-in for sale any time after February. This illegal regulation is now being challenged in U.S. courts.¹⁶ Second, various toxic toy bans are already being challenged as WTO violations, a conflict not addressed in the CPSIA and the subject of our next section.

UNFAIR TRADE AGREEMENTS ALSO NEED REFORM TO ENSURE PRODUCT SAFETY

Toy corporations have systematically pursued a “low road” business strategy of relocating production to countries with cheap labor and lax safety and environmental standards and enforcement. This trend has eviscerated democratic oversight of toy companies’ operations, consumers’ right to seek redress in our court system, and economic security at home and abroad. The toy-safety crisis that has resulted is not some accident of the “market” simply doing its job: it has been enabled directly by a generation of public policy, and in particular, “trade” policies that explicitly promote offshoring of production and limit safety standards and border inspection.

Both the WTO and NAFTA, as well as more recent regional and bilateral trade agreements modeled on NAFTA, contain powerful investor protections that encourage the offshoring of U.S. production by removing various costs and risks otherwise associated with locating production in a developing country. For instance, the WTO’s Trade Related Investment Measures (TRIMs) agreement guarantees that firms interested in offshoring will not be subject to measures such as export restrictions, or local-content or trade-balancing requirements, that poorer countries frequently employed prior to the WTO to assist in their development.

NAFTA’s investor protections – an expanded version of which are also included in the Central America Free Trade Agreement (CAFTA), six additional FTAs passed during the Bush administration, and three FTAs Bush signed by Congress has not approved (Panama, Colombia and Korea) – go even further. The special foreign-investor privileges provided in the NAFTA-style agreements guarantee a “minimum standard of treatment” that “host” countries must provide foreign investors.¹⁷ They also eliminate the uncertainty and costs of having to use “host” country courts to settle many common disputes. These pacts grant foreign investors a private right of action to enforce their “trade” agreement foreign-investor rights. Through these, they can challenge government policies in international tribunals at the World Bank and United Nations and demand host-government compensation for policies that they consider to have impaired their new trade-agreement rights. This includes compensation for lost profits when government regulatory policy undermines their “expectation of gain or profit.”¹⁸ Under NAFTA, around \$35 million has been paid out by governments in corporate challenges against toxic-substance bans, logging rules, operating permits for a toxic-waste site, and more.¹⁹

Not only do the investment provisions in various trade agreements extend strong protections to manufacturers that encourage them to move overseas, but perversely, our current trade agreements *also* impose limits on how signatory countries may regulate product safety. Domestic laws providing a level of safety protection extending beyond that which is allowed in these trade agreements – and that result in imports being kept out of the U.S. market – are subject to challenge in trade-agreement enforcement tribunals as illegal “non-tariff trade barriers.”

Many people are surprised when they first learn that actual *trade between countries* is only one element of the policies established and enforced by NAFTA and the WTO. These “trade” agreements also require that countries alter wide swaths of domestic *non-trade* policy or face economic sanctions for failing to do so. A key WTO and NAFTA provision requires each signatory country to ensure the conformity of all of its laws, regulations and administrative

procedures at every level of government to the agreements' terms.²⁰ If they do not, other WTO and NAFTA signatory nations can challenge U.S. national or local policies before foreign tribunals for failure to comply with the pacts' terms. Nations whose policies are judged to be "non-tariff trade barriers" are ordered to eliminate them or face indefinite trade sanctions.

The United States has been the number one target of challenges at the WTO, where domestic laws are almost always ruled against in tribunal hearings. According to Public Citizen's ongoing tally, the United States has lost over 80 percent of the WTO cases lodged against it. Furthermore, on cases brought against U.S. public-interest policies, ranging from sea-turtle protection to gambling regulation, the United States lost 100 percent of the time. Unfortunately, we are not alone: all WTO defendants lose cases roughly the same percentage of the time. This shows how – globally and systematically – the WTO system pushes deregulation at the domestic level.²¹

While the WTO's Trade Related Aspects of Intellectual Property (TRIPs) agreement *requires* government action to protect the monopoly patent rights of corporations, the WTO's Technical Barriers to Trade (TBT) agreement *limits* governments' ability to protect society's most vulnerable workers and consumers. The WTO's TBT agreement sets the criteria that WTO signatory nations must follow concerning standards, technical regulations, and conformity-assessment rules for most products, including industrial and agricultural products (but not food). The TBT agreement's current rules not only cover toy-safety standards, but (unless they are altered) also pose limits on the options that Congress may pursue to fix the import-safety crisis. NAFTA and other FTAs incorporate the TBT agreement obligations.

- The TBT agreement requires WTO signatory nations to use international standards if such standards "exist or their completion is imminent."²² The only exceptions are for "fundamental climatic or geographical factors or fundamental technological problems." If a member's domestic-safety standard conforms with the relevant international standard, "it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."²³ There is however no requirement that all goods moving under WTO rules meet these international standards. Thus, under NAFTA and the WTO, international standards serve as a *ceiling* which countries cannot exceed, rather than as a floor that all countries must meet. This is the "race to the bottom" that is built into WTO and NAFTA rules.²⁴
- The TBT agreement's "non-discrimination" (or "national treatment") rule requires that the United States treat foreign-produced goods the same as domestically produced goods. For instance, the United States is not permitted under these rules to inspect imported goods at a greater rate than similar domestic goods. Enhanced border inspection may be the only safety check on a wide array of imports produced in countries with lax domestic safety systems. Yet under the current WTO system, exporting nations closely monitor the level of inspection we apply to imports to make sure we only apply the same level of scrutiny applied to domestically made goods, even if imports represent the majority of the problem.
- The TBT agreement also prohibits WTO members from adopting or applying standards and technical regulations in ways that create "unnecessary obstacles to international trade."²⁵ What constitutes an unnecessary obstacle versus a legitimate safety standard is determined by closed-door trade tribunals established in the agreements that hear non-tariff barrier

challenges. These tribunals are staffed by trade lawyers, who generally lack expertise in consumer safety, and do not provide the basic due-process rights guaranteed in U.S. courts regarding conflicts of interest or transparency.

- The TBT agreement requires that countries may only maintain policies that fulfill “legitimate objectives” in the *least trade-restrictive* manner possible (while taking into account the risks that non-fulfillment of such regulations would create).²⁶ Again, tribunals of trade lawyers are left to make the subjective determination about whether a less trade-restrictive option might exist, while the technological or political feasibility of such options is not part of the review.

As Congress considers an array of regulatory measures to address the import-safety crisis, such as mandatory third-party inspection for toys, few congressmembers are cognizant of the fact that these requirements could be the subject of a trade dispute. What would happen if Congress refused to weaken a new imported product-safety law if it were successfully challenged at the WTO? WTO rules allow the winning countries to impose trade sanctions against the United States for the full amount of trade that is affected *until* we change our law as ordered. Alternatively, the United States can offer to negotiate compensation, but the country that has won the challenge must agree to that proposal. That would mean, for instance, if China successfully challenged a toy-safety law at the WTO, the United States would pay China not to send unsafe toys to us, as an alternative to having China simply pick U.S. economic sectors on which to impose trade sanctions. China would get to pick which option it desires.²⁷

In fact, this threat is not just hypothetical. In 2008, James Hubbard, a delegate in Maryland’s House of Representatives, became dissatisfied with the pace of the federal response to the toy-safety crisis that dominated the 2007 year-end news headlines. In April, he was able to pass a bill that would allow Maryland to conduct its own monitoring of toys and children’s products for lead paint. The bill was intended to clear Maryland store shelves of dangerous toys.²⁸ According to the *Washington Post* it also inspired the Bush administration to get involved – not in speeding up the federal response, but by alerting China to the proposal’s possible WTO conflicts. The *Post* reported that: “The Office of the U.S. Trade Representative alerted the Chinese government, which sent a letter from Beijing to protest the bill as a barrier to trade. Lawmakers in Annapolis were unfazed and passed the bill.”²⁹

In delving deeper, Hubbard and other legislators were astonished to learn that the U.S. government regularly “alerts” the WTO to new food and product laws proposed at both the state and federal level that might be considered a “barrier to trade” by foreign trading partners. In other words, federal trade officials act as a type of global informant, “turning in” federal and state legislators that propose cutting-edge consumer-protection, environmental and other measures presumptively considered to be WTO violations in order to give U.S. trading partners an opportunity to *lobby against* these bills while they are still pending. Indeed, this type of notification is *required* by the TBT Agreement.³⁰ There are elaborate procedures and databases to facilitate these communications between the WTO governments and secretariat.³¹

Now on the alert for such missives, Hubbard later received another communiqué from the People’s Republic of China, when he introduced a cutting-edge measure to ban a chemical compound called bisphenol A (BPA), from children’s products and cosmetics.³² Significant

concerns have been raised about the safety of BPA, a chemical used to produce clear, hard plastics. Scientists have linked BPA to early puberty, prostate effects, and breast cancer.³³ New studies showing BPA leaching from heated baby bottles has led many health and consumer groups to call for a complete ban on the use of the chemical in food and beverage containers.³⁴

After introducing his BPA ban legislation, Hubbard promptly receive a four-page missive – in English and Chinese – opposing the measures as a trade barrier under the WTO’s TBT agreement. Chinese officials wrote that there is “no specific scientific evidence” proving that products containing BPA are hazardous to children and that a ban was not the least trade-restrictive policy option Maryland could pursue.³⁵ (As noted, under the WTO’s TBT agreement governments are required to pursue the “least trade restrictive” available policy option.)

In the end, the Maryland BPA bill did not pass. In a National Public Radio interview, Hubbard expressed his consternation: “This was a public health issue, not a trade issue.”³⁶ Fortunately, legislators in California, Connecticut, Hawaii, New Jersey, New York, Maine, Massachusetts, Minnesota, and Pennsylvania have taken up the call and have proposed elimination of BPA from key consumer products. New evidence linking BPA to heart disease may force a reluctant federal government to finally take action as well.³⁷ Such measures would be subject to attack under WTO rules, even though they would apply equally to domestic and foreign products. Hopefully, such WTO threats against reasonable consumer safety initiatives will increase pressure to alter WTO rules rather than chill progress on critically needed improvements. However, when a state law is successfully challenged at WTO, the federal government has an obligation to use all constitutionally available means to force state compliance, including preemptive legislation, law suits and cutting off of federal funds. Thus, changing the unreasonable WTO rules limiting import safety is a vital aspect of protecting our children’s health.

Even though such trade challenges from major importing countries have occurred in the past and are occurring presently, it is possible that diplomatic pressure could keep China or other WTO-member governments from challenging additional U.S. toy-safety laws. But under the aforementioned NAFTA-modeled agreements, investors and corporations can directly challenge government policy to demand taxpayer compensation for safety policies that violate their trade agreement rights. Indeed, corporations are pushing the investor-state private enforcement system further in every U.S. trade pact, to the point where even social-security systems and government natural-resource concessions and procurement contracts are covered.³⁸ These expansive foreign investor rights, which go beyond what U.S. corporations operating in the United States are allowed under U.S. law, are rapidly becoming a global *ceiling* for public regulation of corporations, while there is no global *floor* for safety, labor, or environmental standards in the ongoing, corporate-driven race to the bottom.³⁹

From the Source... WTO Undermines Product Safety

Former U.S. Representative James Bacchus (D-Fla.) noted that three WTO agreements (the General Agreement on Tariffs and Trade (GATT), the Sanitary and Phytosanitary Standards agreement (SPS) and the TBT agreement) would apply to any effort by the United States to improve food and product safety. "If, in their actions on health and safety issues, they choose to ignore their obligations under these three WTO agreements, they could face costly economic sanctions in the form of lost access to the other's market. Such sanctions could range into the billions of dollars in lost sales annually."⁴⁰

While in Congress, Bacchus was a big WTO booster, exuberantly claiming in his floor speech celebrating passage of the WTO that it would lead "to workers' rights and environmental protections and all of the things that all of us in both parties want for the American people."⁴¹ The Democratic leadership of the 103rd Congress, after having just lost control of the House thanks to voter revolt over their support of NAFTA and other middle-class threatening policies,⁴² held the WTO approval vote in a lame-duck session. Bacchus, a Democrat, gave up his House seat and became a WTO tribunalist and a trade lawyer, and his seat was claimed by Rep. Dave Weldon, a Republican who voted against fair trade on 14 out of 17 occasions but who twice voted for U.S. withdrawal from the WTO.⁴³ Interestingly, Rep.-elect Bill Posey (R), who was elected in November to replace the retiring Weldon, made NAFTA opposition a key plank of his platform. He joins a growing number of Republicans who are bucking their party leadership and calling for fair trade.⁴⁴

IMPORTED PRODUCT SAFETY A WINNING ELECTION ISSUE

While the import-safety scene is grim, the recent elections offer opportunity for hope. President-elect Barack Obama's victory represents the first time in modern American history that a candidate advocating a shift in our trade policies in a decisively pro-consumer-safety, pro-worker-rights, pro-environmental-protection direction has been elected president. Among Obama's commitments:

- In December 2007, Obama said: "I would stop the import of all toys from China. Now, I have to say that that's about 80 percent of toys that are being imported right now... We have just a handful of people who are inspecting all the toys that are flooding into the country... The big toy makers now manufacture in China and import here and they have put pressure to resist a strong regulatory system."⁴⁵ (While some press outlets reported that Obama "stepped back" from this commitment in later days, there is no indication that he explicitly retracted this statement. In fact, his campaign merely said "Now, don't get me wrong: As president, I'll work with China to keep harmful toys off our shelves," and will ban "toys that contain more than a trace level of lead, coming from China or anywhere else."⁴⁶)
- In February, Obama said: "we should amend NAFTA to make clear that fair laws and regulations written to protect citizens in any of the three countries cannot be overridden simply at the request of foreign investors. I will only support future trade agreements that support these important principles... [Moreover,] China's human rights violations and failure to enforce labor, environment and meaningful product safety standards are unacceptable."⁴⁷
- Obama's commitments became part of the Democratic platform, which included a reform agenda not seen in past Democratic platforms, including the position that no future bilateral trade agreements "will stop the government from protecting the environment, food safety, or the health of its citizens; [or] give greater rights to foreign investors than to U.S. investors."⁴⁸

In November's elections, Obama was joined by 34 new fair traders in the House and Senate that replaced members of Congress who had supported NAFTA, WTO, current China trade policy and other anti-fair measures. This outcome furthers the transformation of Congress' composition, bringing the total net fair-trade shift in Congress to 71 when the significant gains made in 2006 by fair traders are included. These new fair traders came from both parties, and all regions of the country – especially outside of the Rust Belt, which Beltway pundits have considered the only place trade issues resonate.⁴⁹ Among the food- and product-safety commitments of new fair-trade members who beat or replaced anti-fair traders:

- **Senate - Oregon:** Sen.-elect Jeff Merkley (D) criticized the Peru FTA as a "NAFTA-based plan" whose problems included: "Enabling foreign investors to challenge American public health, environmental, zoning and labor protections in foreign courts; Blocking government procurement rules that require the hiring of U.S. workers and 'Buy American' provisions; [and] Setting limits on food safety standards that require the U.S. to rely on foreign regulators and inspectors."⁵⁰

- **Senate - Alaska:** Sen.-elect Mark Begich (D) defeated anti-fair trader Sen. Ted Stevens in a very Republican-leaning state. Begich’s website included these pledges to fight for consumer safety in U.S. trade agreements: “NAFTA, CAFTA and the bilateral free trade agreements negotiated by the Bush administration have helped big business while hurting middle class Americans. Mark believes fair trade policies should include meaningful and fully enforceable consumer, labor, environmental and human rights protections.”⁵¹
- **House - Alabama 2:** Rep.-elect Bobby Bright (D) took the seat previously held by anti-fair trader Rep. Terry Everett (R) in a campaign that included the import-safety issue. In a debate, Bright said, “we need to put tougher regulations on the countries that we’re importing from. We need to make sure of enforcement by our food inspectors – beef the inspectors up – and have more frequent inspections of the products that come in. And then before we enter into an important agreement with a foreign nation, they should be educated on the requirements of their products being safe and, if they fail to comply and have a consistent record of failure, then our agreement should be terminated. Fast and simple.”⁵²
- **House - Arizona 1:** Rep.-elect Ann Kirkpatrick (D-Ariz.) criticized offshoring⁵³ and noted “the disparity between the nation’s dependence on foreign imports (‘oil, toys, pet food, or anything else you can think of, we import it all,’ she says) and the loss of jobs to overseas competitors.”⁵⁴ She replaced Republican anti-fair trader Rick Renzi.
- **House- Colorado 4:** Rep.-elect Betsy Markey (D) beat 100 percent anti-fair trader Marilyn Musgrave. Markey’s campaign website broadcast her commitment to changing our status-quo trade policies: “At the global level, I believe in fair trade policies that take into account our country’s economic needs and hold partnering countries to the same environmental and labor standards as those that we maintain here at home. This provides a level playing field for American producers to compete in the international market and also protects the quality of food sold to the U.S. consumer.”⁵⁵
- **House - Pennsylvania 3:** Rep.-elect Kathy Dahlkemper emphasized trade issues to defeat serial anti-fair trader Republican Phil English – who infamously provided one of the votes that passed CAFTA in 2005 by a two-vote margin. In addition to several hard-hitting fair-trade TV ads, her campaign website emphasized the issue: “What concerns me and many Americans about the topic of free trade is the lack of controls that we are currently experiencing; controls in the form of product safety standards, proper protection of patented technologies, fair labor practices, to name just a few. Many of our businesses have moved all or a part of their manufacturing operations overseas to take advantage of cheap labor and other costs, and in return we are seeing more and more dangerous products coming into this nation, putting our people, including our children, at risk.”⁵⁶

A whole host of new members who replace retiring fair traders also made similar trade-safety commitments. Among them:

- **House - California 52:** Rep.-elect Duncan Hunter, Jr. (R-Calif.) said, “Our nation needs to adopt a policy of Fair Trade that encourages the development of overseas markets, while protecting our industry and workers from unfair competition from countries like China, that

flood our market with inferior, sometimes dangerous products produced in near-slave labor conditions.”⁵⁷ He takes the seat previously occupied by his father, also a fair trader.

- **House - Colorado 2:** Rep.-elect Jared Polis (D-Colo.) ran a winning campaign that emphasized import-safety issues. He said, “The Bush administration is asleep at the wheel while multinational corporations are putting profits before safety and products that harm kids are entering our country from China and other nations with poor safety records ... We need to make sure that defects are identified and addressed *before* products reach the shelves and get in the hands of our children. Families shouldn’t need to worry about the safety of Curious George dolls, Thomas the Tank Engine, or any other children’s toys sold in this country. But this year’s alarming number of lead-tainted product recalls proves that our product safety system is broken and fails to protect consumers.”⁵⁸ His campaign hosted toy-safety testing parties,⁵⁹ and bashed offshoring of jobs. ⁶⁰ Polis takes the seat previously held by Mark Udall, now a fair-trade senator-elect.
- **House - New York 21:** Rep.-elect Paul Tonko (D) takes the open seat vacated by fair trader Rep. Michael McNulty. Tonko pledged support for a renegotiation of NAFTA “to strengthen its environmental, labor, and consumer safety standards,” and a repeal of tax breaks for companies that offshore jobs.⁶¹

For a detailed analysis of the role of fair-trade issues in the 2006 and 2008 elections, please visit <http://www.citizen.org/trade/politics/>, where you will find our two in-depth reports that include annexes listing the import-safety and other trade commitments made by newly-elected members of Congress. We also link to the 140-plus campaign TV ads run on trade issues in 2008 and the 25 ads run in 2006.

POLICY ANALYSIS AND RECOMMENDATIONS

To effectively remedy the imported toy safety crisis, Congress must act on number of levels, by updating domestic safety statutes, fixing trade-agreement limits on safety standards and inspection, and removing foreign-investor privileges that promote offshoring of production to venues without adequate safety regulations.

Changes Needed to Domestic Policies: Congress must provide new authority for domestic agencies responsible for consumer-product safety and inspection. These changes must bring these agencies' responsibilities and authorities up to date with present realities: namely, that a significant portion of products circulating in the United States are no longer made here, but rather are being produced in developing countries, where product-safety systems are often insufficient to safeguard consumers against even the most egregious hazards.

Remarkably, last year's CPSIA – while taking welcome steps forward on lead standards and other issues⁶² – does not sufficiently address the import-safety crisis with import-specific measures. To give the CPSC a fighting chance of adequately regulating the flood of overseas imports, the following policies must be adopted:

- Creation of an Office of Overseas Compliance within the CPSC. Last year's CPSIA did not do this;
- Creation of a STOP or HOT button for this office that would allow them to temporarily halt unsafe imports at the port of entry on a preliminary determination that they pose an unreasonable risk to public health or safety, without a hearing or other delays required in current law. The products must be allowed to be held, pending a fuller determination regarding the safety of the products and independent third party certification of their safety. The CPSIA did not do this;
- Increasing the amount of bond money required to be posted by importers to ensure that importers are able to pay for any product recall (currently, only bonds to cover customs fees are required). The CPSIA only commits the Comptroller General to study the issue, and establishes no new program to implement this idea;
- Increased and adequate staff and funding for border inspection, and the assignment of a limited number of ports of entry for hazardous consumer products. The CPSIA – even when fully phased in – will still represent a 49 percent decline in staffing levels relative to 1980. According to the CPSC, now only nine of the 326 U.S. ports have any level of CPSC staff coverage, and it does not even know how many if any full-time staff people are assigned to any. Yet, when the new legislation is fully implemented, the CPSC budget authorization will only be 31 percent higher, even though toy imports have soared 529 percent in real terms;
- Requirements that foreign manufacturers consent to the jurisdiction of U.S. courts so that enforcement officers can seek penalties for violations, providing an incentive for more safety on the front end. (As noted, U.S. auto-safety regulations require this of foreign manufacturers

selling in the U.S. market. Foreign manufacturers and importers of potentially hazardous toys should also consent to the jurisdiction of U.S. courts and waive any objection based on forum or jurisdiction in order to gain access to the U.S. market. A standard consent form should be submitted to CPSC for all imported consumer products. Foreign manufacturers profit directly from access to U.S. markets. In a global economy, they also must maintain safety standards consistent with U.S. regulations. CPSC is not designed, however, to be the sole check on the safety of products, nor can it effectively deter negligent design or manufacturing. When injured victims do avail themselves of the courts, too often retailers who lacked a direct role in product design are the sole respondents. To level the playing field between domestic and foreign manufacturers, Congress should create the means to deter harmful conduct by those most responsible for harm). The CPSIA did not do this, but only committed the issue to further study;

- Requirements that all foreign manufacturers seeking to sell in the United States consent to allow CPSC investigators into their plants for inspection or investigation purposes. (As noted, the CPSC currently has authority to enter and inspect any consumer product manufacturing establishment in the United States. But absent consent of foreign producers and governments, it cannot exercise similar mandatory authority in other countries.) The CPSIA did not do this, but only committed the issue to further study; and
- New authority for CPSC to block/penalize bonding agents and importers who are repeat offenders. The CPSIA did not do this.

(As noted above, the CPSIA also does not require 100 percent inspection of imported products, but only commits the CPSC to establish (but not necessarily enact) a risk assessment methodology. Even if enacted, such a methodology would still leave large gaps in inspection and be subject to any number of methodology design-flaw problems. We know of no consumer group that is asking for 100 percent inspection. However, absent the changes to domestic and trade laws that we have specified in this report, the CPSIA's provisions on import risk assessment do not represent the bold steps and targets that the situation demands.)

Senators Sherrod Brown (D-Ohio), Bob Casey (D-Pa.), Byron Dorgan (D-N.D.), and Reps. Rosa DeLauro (D-Conn.) and Linda Sanchez (D-Calif.) and others have introduced various pieces of legislation to establish import stop buttons, bonding requirements, and other consumer-product import-safety protections.

Changes Needed to Trade Agreements: Congress must alter various provisions of U.S. trade agreements, including the WTO's TBT agreement, whose rules currently limit border inspection and the safety standards that signatory countries can require of imported goods. Moreover, NAFTA and its various expansions to countries in Latin America, Asia and the Middle East need to be renegotiated to remove the investor-state system that incentivizes corporations to offshore production and provides a private right of action against domestic safety policies.

Absent such changes in existing trade agreements and rejection of future agreements with such limits, any improvements Congress may make to U.S. policy regarding import safety could be

exposed to challenge as “non-tariff trade barriers” before trade tribunals. With the exception of the recent WTO ruling against the U.S. Internet gambling ban (after which the Bush administration ultimately sought a deal to withdraw gambling from WTO authority and pay compensation to do so), both Democratic and Republican administrations have systematically worked to implement trade tribunal rulings. This includes major political efforts to implement a NAFTA order to allow access to all U.S. roads for Mexico-domiciled trucks, gutting U.S. dolphin protections to meet GATT rules, and implementing WTO orders to weaken Clean Air Act and Endangered Species Act rules, among other examples. This readiness to acquiesce to trade agreement panels’ orders to weaken our domestic public-interest laws must stop.

One clear path forward to addressing the trade-agreement import-safety problems is provided by the Trade Reform, Accountability, Development and Employment Act, or TRADE Act. This legislation was sponsored in 2008 by Sen. Brown and Rep. Mike Michaud (D-Maine) – along with cosponsors representing diverse congressional caucuses and regions of the country. The TRADE Act, which is expected to be reintroduced in the 111th Congress, could pave the way for review and renegotiation of existing agreements to remove the limits on import safety, among other key public interest reforms of current pacts. The legislation sets forth minimum standards of what every U.S. trade agreement must and must not contain. It also lays out the framework of a new trade-agreement negotiating and approval process that could ensure pacts meet the minimum standards. Among the TRADE Act’s provisions regarding import safety are those that:

- establish that food, feed, food ingredients, and other related food products may be imported into the United States from a country that is a party to the agreement only if such products meet or exceed United States standards with respect to food safety, pesticides, inspections, packaging, and labeling;
- establish that nonfood products may be imported into the United States from a country that is a party to the agreement only if such products meet or exceed United States standards with respect to health and safety, inspections, packaging, and labeling;
- allow each country that is a party to the agreement to impose standards designed to protect public health and safety unless it can be clearly demonstrated that such standards do not protect the public health or safety;
- authorize the Commissioner of the Food and Drug Administration and the Consumer Product Safety Commission to assess the regulatory system of each country that is a party to the agreement to determine whether the system provides the same or better protection of health and safety for food and other products as provided under the regulatory system of the United States and if the Commissioner or the Commission determines that the regulatory system of such a country does not provide the same or better protection of health and safety for food and other products as provided under the regulatory system of the United States, prohibit the importation into the United States of food and other products from that country;
- provide a process by which producers from countries whose standards are not found by the Commissioner or the Commission to meet U.S. standards may have specific facilities

inspected and certified so as to allow products from approved facilities to be imported into the United States; and

- provide that if harmonization of food or product health or safety standards is necessary to facilitate trade, such harmonization shall be based on standards that are no less stringent than United States standards.

CONCLUSION

In the past, most American anxiety about trade agreements has focused on jobs, wages and offshoring. And, that anxiety has grown tremendously. Nearly three-quarters of Americans believe that a “free trade agreement” has had a negative effect on their families. Majorities oppose NAFTA across every demographic. **The imported toy-, product- and food-safety crisis has made vividly clear to many Americans that our current trade agreements and policies pose very broad threats to their safety and health – and the ability of their government to act in their interest.** For instance, a Wall Street Journal poll found that GOP voters, by a two-to-one majority, agree that “[f]oreign trade has been bad for the U.S. economy, because imports from abroad have reduced demand for American-made goods, cost jobs here at home, and produced **potentially unsafe products**” [emphasis added].⁶³ The public is increasingly aware that changes to our current trade agreements and policies are needed to ensure real redress to the import safety crisis.

Indeed, as dangerous imported toys become a significant part of the public’s understanding of what our current trade agreements mean, “protectionism” is getting a good name – at least in the sense of the necessity to “protect” our children from unsafe imports. Going forward, policymakers have two options: either the growing public disgust with the damaging outcomes of today’s over-reaching trade agreements’ anti-safety, pro-offshoring provisions get addressed, or public support for trade will get thoroughly undermined.

Four Resources for Concerned Consumers

To remedy our import safety crisis, we need to change our trade agreements and domestic safety laws. However, in the short term, if you are concerned about whether there is lead or other toxins in your toys, you can buy an inexpensive lead testing kit at your local hardware store. However, be aware that these kits do not work on all product types. Consumers Union recently tested lead testing products and found that many do not detect lead below the surface of toys (see <http://blogs.consumerreports.org/safety/2007/10/testing-the-lead.html>). You can also check out *The Consumer Action Guide for Toxic Chemicals in Toys*, produced by the Michigan-based Ecology Center: <http://www.healthytoys.org/home.php>

For an analysis of toy-related hazards and a summary of all CPSC toy recalls for the year, please see *Trouble in Toyland: The 23rd Annual Survey of Toy Safety*, produced by the consumer group U.S. PIRG: <http://www.uspirg.org/issues/toy-safety/trouble-in-toyland-report>

For a full listing of Consumer Product Safety Commission (CPSC) recalls, or to receive recall alerts, you can go to the CPSC webpage: <http://www.cpsc.gov/cpscpub/prerel/prerel.html>

Finally, if you would like to buy toys Made in America, information is available on numerous private web resources including: <http://www.toysmadeinamerica.com/> and <http://www.stillmadeinusa.com/toysngames.html>

APPENDIX I: METHODOLOGY

We took U.S. import and export numbers from the Standard Industrial Trade Classification (SITC) data from the United Nations' Comtrade system.⁶⁴ For 1962-1996 numbers, we used SITC category 8942 (children's toys), which includes:

- [894.21](#) - Wheeled toys designed to be ridden by children (e.g., tricycles, scooters and pedal cars, but excluding bicycles); dolls' carriages
- [894.22](#) - Dolls representing only human beings, whether or not dressed
- [894.23](#) - Parts and accessories of dolls representing only human beings
- [894.24](#) - Construction sets and constructional toys
- [894.25](#) - Toys representing animals or non-human creatures
- [894.26](#) - Toy musical instruments and apparatus
- [894.27](#) - Puzzles
- [894.29](#) - Toys, n.e.s.⁶⁵

For 1997-present, we utilized the roughly correspondent North American Industrial Classification System (NAICS) category 33993.⁶⁶ For domestic production data (including number of jobs, annual wages and value of shipments), we utilized the Census Bureau's Annual Survey of Manufactures' data on domestic product shipments. For 1961-1996, we considered the Standard Industrial Classification's (SIC) categories 3942 and 3944; for 1997-present, the line considered was NAICS 33993.

To determine domestic consumption, we summed the domestic shipments and imports and subtracted the value of exports (since they are not consumed here).

All statistics for past years were inflation adjusted using the CPI-U-RS, which takes into account differing methodologies for considering housing costs. The purpose of this inflation adjustment is to give ballpark estimates of what dollar values would look like in 2008 dollars. The purpose is *not* in every case to adjust specifically for indices relevant to the toy industry or imports. The specific estimates of the CPI-U-RS are taken from the Congressional Budget Office.

All numbers for 2008 are estimated.

APPENDIX II: KEY NUMBERS AND CHRONOLOGY⁶⁷

Year	CPSC staff	CPSC budget (millions)	U.S. toy jobs (1000s)	U.S. toy imports (billions)	Import % domestic market	China % domestic market	Key Events
1974	786	\$138	56	\$1.5	16%	0%	CPSC created; has peak budget
1975	890	\$136	46	\$1.2	14%	0%	Ford gets Fast Track; last year U.S. trade balanced
1976	890	\$137	47	\$1.7	18%	0%	
1977	914	\$130	47	\$2.1	18%	0%	
1978	900	\$124	45	\$2.8	24%	0%	
1979	881	\$120	48	\$3.4	27%	0%	Carter gets Fast Track
1980	978	\$104	44	\$3.5	29%	0%	CPSC's peak staffing
1981	891	\$97	42	\$3.9	28%	0%	China first granted NTR
1982	649	\$70	38	\$4.9	34%	0%	
1983	636	\$71	40	\$3.7	33%	0%	
1984	595	\$70	31	\$4.9	37%	2%	Reagan gets Fast Track
1985	587	\$70	23	\$5.7	46%	4%	
1986	568	\$65	24	\$6.1	48%	6%	WTO negotiations begin
1987	527	\$63	27	\$7.3	55%	10%	
1988	513	\$58	30	\$6.7	51%	14%	Reagan gets Fast Track
1989	529	\$58	28	\$12.1	69%	18%	
1990	526	\$57	24	\$12.5	73%	22%	
1991	514	\$58	23	\$11.0	70%	27%	China #1 toy import source
1992	515	\$61	26	\$13.2	75%	33%	
1993	515	\$72	28	\$14.2	75%	34%	NAFTA passed; Clinton gets Fast Track extension
1994	518	\$61	28	\$13.4	78%	44%	WTO passed; Dems ousted after NAFTA support
1995	487	\$60	30	\$14.6	77%	47%	WTO begins operations
1996	487	\$55	29	\$16.3	80%	51%	
1997	480	\$57	24	\$16.3	76%	47%	Congress rejects Fast Track
1998	480	\$60	23	\$17.3	79%	51%	China 50% of U.S. toy market; Congress rejects Fast Track
1999	480	\$61	20	\$17.1	82%	53%	WTO Seattle protests
2000	480	\$62	19	\$16.9	83%	57%	Congress ok's China PNTR; weak trade position hurts Gore
2001	480	\$64	17	\$17.4	85%	52%	China joins WTO
2002	480	\$67	14	\$18.2	82%	57%	Bush gets Fast Track
2003	471	\$67	13	\$16.7	83%	68%	Congress ok's 2 NAFTA expansions
2004	471	\$69	10	\$16.4	84%	71%	Congress ok's 2 NAFTA expansions; weak trade position hurts Kerry
2005	471	\$69	10	\$18.1	86%	71%	Congress ok's 2 NAFTA expansions; most Dems oppose CAFTA
2006	446	\$67	9	\$18.3	87%	74%	Congress ok's 1 NAFTA expansion opposed by most Dems; Dems campaign and win on fair trade platform
2007 (est.)	420	\$65	n/a	\$22.8	91%	78%	Major toy recalls; Congress strengthens CPSC, but contradictorily ok's NAFTA expansion
2008 (est.)	420	\$ 80	n/a	\$23.3	91% +	80%	Toy imports at record highs; fair-trade candidates sweep congressional and presidential elections

ENDNOTES

¹ http://www.kirkpatrickforarizona.com/news_entry/kirkpatrick_launches_district_wide_tour_for_change

² http://www.emilyslist.org/candidates/ann_kirkpatrick/

³ See Appendix I for a description of methodology for all otherwise unsourced trade numbers.

⁴ Consumer Product Safety Act, 15 U.S.C. 2051, section 2(b)(1).

⁵ Sari Horwitz, “Consumer agency faces an uncertain future after tumultuous week,” *Washington Post*, Jan. 6, 1985.

⁶ Rachel Weintraub, Director of Product Safety and Senior Counsel, Consumer Federation of America, Testimony Before the Appropriations Subcommittee on Financial Services and General Government Committee on Appropriations, U.S. House of Representatives, Hearing on Consumer Protection Issues, Feb. 28, 2007, at 3.

⁷ FTE represents a full time equivalent staffing ratio. Rachel Weintraub, Director of Product Safety and Senior Counsel, Consumer Federation of America, Testimony Before the Appropriations Subcommittee on Financial Services and General Government Committee on Appropriations, U.S. House of Representatives, Hearing on Consumer Protection Issues, Feb. 28, 2007, at 3.

⁸ Figures taken from Weintraub testimony and inflation adjusted. For reports on the CPSC’s early years through 1980, see Burt Schorr, “Consumer product safety commission finds deep hazards in just getting itself rolling,” *Wall Street Journal*, May 6, 1975; Stan Crock, “Product-safety agency fights cuts in budget and power as Congress mulls role of regulators,” *Wall Street Journal*, April 30, 1981.

⁹ While collective liability theories have evolved to better reflect the disperse nature of production in a “contemporary complex industrial society,” many such theories are still “based on a national market.” See John B. Isbister and Jaime W. Luse, “Liability for a product that you did not make,” *Federation of Defense & Corporate Counsel Quarterly*, Vol. 57, Issue 1, Fall 2006.

¹⁰ In inflation adjusted terms, the CPSC’s highest budget level was in its first year – 1974 – when it had a budget authority of \$125.5 million.

¹¹ Scott Wolfson, Deputy Director, Office of Information and Public Affairs, U.S. Consumer Product Safety Commission, communication with Mary Bottari, Public Citizen, Nov. 13, 2007.

¹² Eric Lipton, “Safety Agency Faces Scrutiny Amid Changes,” *New York Times*, Sept. 2, 2007.

¹³ Public Citizen interview with CPSC Spokesperson, Dec. 2, 2008.

¹⁴ A *Wall Street Journal* article reported that “the relentless migration of manufacturing to far-flung factories in China and other developing countries has made it increasingly impractical for Western retailers to rely solely on in-house product testing. As a result, more large chains are outsourcing the task to independent [foreign] specialists... Using independent testers can also *reduce a retailer’s liability if a customer sues*, because it shows a good-faith effort by the retailer to offer safe products” (emphasis ours). The article noted that many such contractors are not testing for everything that they should: in one case, a contractor was “hired to test whether the toys posed a choking hazard, but not whether they posed a suffocation risk.” See Matt Pottinger, “Outsourcing safety tests,” *Wall Street Journal*, Nov. 26, 2004.

¹⁵ For a complete analysis of the bill, see David Arkush and Graham Steele, “The Consumer Product Safety Improvement Act of 2008: A Summary and Analysis,” *Bureau of National Affairs Product Safety & Liability Reporter*, 36: 38, Sept. 29, 2008, at 940.

¹⁶ “Lawsuit Seeks to Enforce Ban on Toxic Toys,” Public Citizen News Release, Dec. 4, 2008.

¹⁷ For instance, NAFTA Article 1105.

¹⁸ For instance, NAFTA Article 1105.

¹⁸ For instance, U.S.-Peru FTA Article 10.28.

¹⁹ Mary Bottari and Lori Wallach, “NAFTA Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005,” Public Citizen’s Global Trade Watch, February 2005.

²⁰ See e.g. Agreement Establishing the WTO, Article XVI-4.

²¹ Public Citizen’s database on WTO win-loss ratios See www.XTXX.

²² WTO TBT Agreement Art. 2.4.

²³ WTO TBT Agreement Art. 2.5.

²⁴ The TBT agreement cites the product standards of the International Organization for Standardization (ISO) in Geneva. The ISO is a private-sector body comprised of industry representatives, and very few public interest organizations are able to sit on its 2500 working groups. Its technical committee 181 sets standards for toys. The current ISO standard for lead in toys is 90 ppm. While this standard is currently stricter than the out-of-date U.S. standard of 600 ppm, it is less strict than the 40 ppm standard supported by the American Academy of Pediatrics and

other health groups in a proposed bill in Congress, HR 3691. If HR 3691 passes, our trading partners could argue that it constitutes a barrier to trade as it is more consumer protective than the weaker ISO standard.

²⁵ WTO TBT Agreement Art. 2.2.

²⁶ WTO TBT Agreement Art 2.2 and 2.3.

²⁷ As examples, the European Community demanded and received cash compensation from U.S. taxpayers for harm to Irish musicians alleged to have arisen from provisions of U.S. copyright law; while Antigua & Barbuda (along with other countries) is currently seeking compensation in the form of trade sanctions on other U.S. industries for harm to Antiguan Internet gambling operators alleged to have arisen from the U.S. Internet gambling ban. *See* World Trade Organization, WT/DS160/23, June 26, 2003; and Gary Rivlin, "Gambling dispute with tiny country puts U.S. in a bind," *New York Times*, Aug. 23, 2007.

¹⁷ House Bill 8, "Lead Containing Products-Prohibition," Delegate Jim Hubbard, Maryland Legislative Assembly, December 3, 2007.

²⁹ Lisa Rein, "Pr. Geo.'s Delegate Rankles Chinese Government," *The Washington Post*, June 23, 2008. Available at http://blog.washingtonpost.com/annapolis/2008/06/pr_geos_delegate_rankles_chine.html?nav=rss_blog.

³⁰ WTO Technical Barrier to Trade Agreement, Article 3.2. Available at:

http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

³¹ For more information on how this notification system works for manufactured products please see the National Institute of Standards and Technology (NIST) webpage at: <http://ts.nist.gov/Standards/Information/tbtmotif.cfm>. NIST is the designated point of contact which generates and receives notifications under the WTO's TBT agreement. The U.S. Department of Agriculture's Foreign Agricultural Services, generates and receives notifications under the WTO's Sanitary and Phytosanitary (SPS) Agreement. More information available at:

http://www.fas.usda.gov/itp/OSTA_IRSD/WTO_SPS_Committee_Enquiry_Point.asp

³² House Bill 56, "Phthalates and Bisphenol-A – Prohibitions – Toys and Child Care Articles," Delegate Jim Hubbard, Maryland Legislative Assembly, Jan. 9, 2008

³³ *See* National Toxicology Program, U.S. Department of Health and Human Services' Center for the Evaluation of Risks to Human Reproduction, "NTP CERHR Monograph on the Potential Human Reproductive and Developmental Effects of Bisphenol A," NIH 08-5994, September 2008. Available at <http://cerhr.niehs.nih.gov/chemicals/bisphenol/bisphenol.pdf>.

³⁴ *See* Work Group for Safe Markets (coalition of U.S. public health and environmental NGOs), "Babies Toxic Bottle: Bisphenol A Leaching from Popular Baby Bottles," Work Group Report, February 2008. Available at http://www.chej.org/BPA_Website.htm.

²⁵ Letter from China WTO/TBT National Notification and Enquiry Center, Standard and Regulation Researching Center "Comments on USA Notification G/TBT/N/USA/346 Phthalates and Bisphenol-A-Prohibitions-Toys and Child Care Articles, HB 56," to Maryland Delegate Jim Hubbard, May 7, 2008.

³⁶ Kojo Nnamdi interview with Maryland Delegate Jim Hubbard, *The Kojo Nnamdi Show*, WAMU 88.15, June 30, 2008.

³⁷ *See* Iain A. Lang, PhD *et. al.* "Urinary Bisphenol A Concentration With Medical Disorders and Laboratory Abnormalities in Adults," *The Journal of the American Medical Association*, Vol. 300 No. 11, Sept. 17, 2008

³⁸ *See* Todd Tucker and Lori Wallach, "Peru-U.S. 'Free Trade Agreement' Would Help Lock In Failed Social Security Privatization in Peru," *Public Citizen*, June 2007; and Letter from AIDSESEP (Peruvian indigenous peoples' organization) to U.S. Congress expressing opposition to the Peru FTA, Oct. 30, 2007.

³⁹ Matthew C. Porterfield, "An International Common Law of Investor Rights?" *Harrison Institute for Public Law*, 2006.

⁴⁰ James Bacchus, "WTO obligations still apply," *National Law Journal*, Sept. 10, 2007.

⁴¹ House of Representatives Debate on Uruguay Round Agreements Act (H.R. 5110), *Congressional Record*, Nov. 29, 1994, at H11484.

⁴² *See* Ruy Teixeira and Joel Rogers, *America's Forgotten Majority*, (New York: Basic Books, 2000).

⁴³ Jerry Jackson, "World Trade Organization Judge Urges Orlando, Fla., To Tap Its Advantages," *Orlando Sentinel*, May 7, 1998.

⁴⁴ Henry A. Stephens, "Congressional hopefuls debate," *Vero Beach Press Journal*, Oct. 9, 2008.

⁴⁵ Josh Rogers, "Obama proposes US ban on China-made toys," *Reuters*, Dec. 20, 2007. Available at: <http://www.reuters.com/article/topNews/idUSN1962534620071219>.

⁴⁶ Jim Wolf, "Obama retreats from call for toy import ban," *Reuters*, Dec. 23, 2007. Available at: <http://www.reuters.com/article/domesticNews/idUSN2327351220071223>

-
- ⁴⁷ Ohio Conference on Fair Trade Questionnaire Response of Sen. Barack Obama (D-Ill.), Feb. 28, 2008. Available at: http://www.citizenstrade.org/pdf/OCFT_%20PresPrimaryTradeQuestionnaire_Obama_022008.pdf. Accessed Oct. 28, 2008.
- ⁴⁸ See excerpts at: <http://www.citizenstrade.org/pdf/PlatformExcerptsOnTrade.pdf>.
- ⁴⁹ Todd Tucker, "Election 2008: Fair Trade Gets an Upgrade," Public Citizen Report, November 2008.
- ⁵⁰ http://www.jeffmerkley.com/2007/11/merkley_peru_de.php
- ⁵¹ <http://begich.com/fairtrade>.
- ⁵² Sebastian Kitchen, "Congressional hopefuls discuss agriculture," *Montgomery Advertiser*, Sept. 28, 2008.
- ⁵³ http://www.kirkpatrickforarizona.com/news_entry/kirkpatrick_launches_district_wide_tour_for_change
- ⁵⁴ http://www.emilyslist.org/candidates/ann_kirkpatrick/
- ⁵⁵ <http://www.markeyforcongress.com/agriculture>
- ⁵⁶ <http://kathydahlkemperforcongress.com/issues/trade>
- ⁵⁷ <http://www.hunterforcongress.com/issues/>
- ⁵⁸ <http://www.polisforcongress.com/issues/safe-consumer-product-act>
- ⁵⁹ http://www.polisforcongress.com/assets/2007/12/19/Lead_Toys1__2_.pdf
- ⁶⁰ <http://www.polisforcongress.com/issues/jobs-economy>
- ⁶¹ Citizens Trade Campaign Questionnaire Response for Paul Tonko, Oct. 30, 2008.
- ⁶² For a comprehensive analysis of the legislation, see David Arkush and Graham Steele, "The Consumer Product Safety Improvement Act of 2008: A Summary and Analysis," *Bureau of National Affairs Product Safety & Liability Reporter*, 36: 38, Sept. 29, 2008, at 940.
- ⁶³ Wall Street Journal-NBC News Poll, September 2007. Available at: <http://online.wsj.com/public/resources/documents/WSJ-POLL-20071003.pdf>. Accessed Oct. 28, 2008.
- ⁶⁴ See <http://comtrade.un.org/db/default.aspx>
- ⁶⁵ See <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=14&Lg=1&Co=894.2>
- ⁶⁶ See <http://www.census.gov/mcd/asmhome.html>
- ⁶⁷ Source: Public Citizen analysis of data from Census Bureau's Annual Survey of Manufacturers (numbers for U.S. toy production jobs and other domestic production data), UN Comtrade (for U.S. imports and exports), U.S. International Trade Commission (for current year imports), Consumer Federation of America (for CPSC budget authority numbers). All dollar values presented in inflation-adjusted terms.