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“Alongside” the Fast Track: Environmental and Labor Issues in FTAA

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Fast track authority¹ allows the President to negotiate, within certain Congressionally-established parameters, international trade agreements which are then submitted for Congressional approval on a strictly up-or-down basis, preventing Congress from amending the agreements.² In 1997, Congress balked at renewing the President’s fast track authority.³ This non-renewal came just when momentum was building for the proposed Free Trade Area of the Americas (FTAA) agreement.⁴

President Clinton will have to proceed with FTAA negotiations in the face of sharp Congressional division, as manifested by the House’s refusal to extend fast track in November 1997.⁵ Environmental and labor issues have mattered crucially in recent debates, suggesting that these issues will go “alongside” the fast track, carried along with it although not entirely aboard it. This represents the culmination of the late-1990s legislative-executive debate over which issues are appropriate to address in

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1. See *infra* Part I.

2. See Trade Act of 1974, Pub. L. No. 93-618, §§ 102, 151, 88 Stat. 1978, 1982-84, 2001-04 (1974) (codified as amended at 19 U.S.C. §§ 2112, 2191 (1994)).

3. See John E. Yang & Terry M. Neal, “Fast Track” Defeat Illustrates Division That Could Block Clinton Agenda, WASH. POST, Nov. 16, 1997, at A11; see generally I.M. DESTLER, RENEWING FAST-TRACK LEGISLATION (1997).

4. See generally Frank J. Garcia, “Americas Agreements”—An Interim Stage in Building the Free Trade Area of the Americas, 35 COLUM. J. TRANS-NAT’L L. 63 (1997) [hereinafter Garcia, *Americas Agreements*].

5. See Yang & Neal, *supra* note 3, at A11.

the context of trade agreements, as well as a more fundamental long-term evolution in the United States "trade constitution."⁶

In the 1990s, the existence of a political balance between supporters and opponents of the fast track, both on the North American Free Trade Agreement (NAFTA) and on the FTAA, resulted primarily from core issues of job and general economic insecurity linked to the trend towards globalization.⁷ The single largest legal controversy affecting the wavering votes in Congress, however, concerned the treatment of environmental and labor issues.⁸ From 1991 through 1993, public insistence on inclusion of environmental and labor issues in NAFTA culminated in the execution of NAFTA side agreements addressing those issues.⁹ Since 1994, as the negotiation of the FTAA became entwined with the extension of fast track legislation, inclusion of environmental and labor issues in trade negotiations has remained one of the largest legal controversies in Congress.¹⁰ In 1995 and 1996, the new Republican Congressional majority fought against what it considered excessive inclusion of such issues.¹¹ Then, in 1997, the strength of Congressional resistance to fast track extension clearly made the point that such issues had to be included to a high degree.¹² Consequently, the key

6. The phrase "trade constitution" is used to describe the set of constitutional, statutory, rule, and precedential prescriptions that allocate authority and direct the interactions between the three branches of government as they make trade policy. See generally Michael J. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687 (1996); Natalie R. Minter, Article, *Fast Track Procedures: Do They Infringe upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL'Y 107 (1995); Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699 (1994); Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631 (1994) (all discussing topics related to the composition of the "trade constitution").

7. See Robert S. Greenberger, *As U.S. Exports Rise, More Workers Benefit, and Favor Free Trade*, WALL ST. J., Sept. 10, 1997, at A1 (noting that as the economy strengthens, and these fears lessen, opposition to free trade agreements has been weakening).

8. See David A. Gantz, *The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. L. 381, 396 (1997).

9. See *Talks on NAFTA Side Deals To Start Week of March 15*, WALL ST. J., Feb. 18, 1993, at A3.

10. See Gantz, *supra* note 8, at 396.

11. See John Maggs, *Chile's Move to Mercosur May Pave Its Way into NAFTA*, J. COM., July 8, 1996, at 3C.

12. See Bob Davis, *Pledges Made to Democrats on Fast Track*, WALL ST. J., Nov. 4, 1997, at A4.

point of inflection in the debate has become the degree of inclusion of environmental and labor issues.

Beyond the recent legislative-executive debate, fast track treatment of environmental and labor issues represents the culmination of a more fundamental long-term evolution in the "trade constitution." Executive Branch trade negotiation involves two interrelated processes: the Congressional-Presidential interaction and the international negotiations themselves.¹³ Since the 1974 Trade Act, Presidential trade negotiations, and Congress' role in them, have focused on issues other than simple reciprocal tariff reduction.¹⁴ The newer, more complex issues require a quality of Congressional-Presidential interaction heretofore unknown. Moreover, as the emphasis in trade agreement negotiations shifts to participation in regional trading blocs, integration among national participants deepens,¹⁵ which brings to the fore environmental and labor issues that developed and developing countries handle differently. The environmental and labor law of advanced countries like the United States becomes more internationally oriented because of this increasing shift toward economic globalization and regional integration.¹⁶ Thus, these issues become central for negotiations toward the FTAA.

Moreover, resolution of these issues becomes increasingly dependent on how aggressively the United States advocates international progress on them. The unresponsiveness of the WTO's Committee on Trade and Environment has disappointed hopes of environmental proponents that the United States might find ready international support on their issues.¹⁷ Simi-

13. Robert Putnam has argued that trade negotiators must simultaneously play two "games," one at the international bargaining table, and one with the legislative branch. See Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988).

14. Until recently, negotiations and Congressional implementation addressed "non-tariff barriers" to trade. This term is used to denote a host of matters from subsidies to procurement favoritism. Only in the past decade have environmental and labor issues become the most important particular subset of non-tariff barriers. See Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1945 (1997).

15. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 464-65 (3d ed. 1995).

16. See Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 233 (1997).

17. See *WTO Trade and Environment Committee to Look at Several Issues, Official Says*, Int'l Trade Daily (BNA), Apr. 25, 1997, available in Westlaw, BNA-BTD Database; *Environment Committee Stalled over Language on WTO Standards*, 13 Int'l Trade Rep. (BNA) No. 44, at 1707 (Nov. 6, 1996); Committee

larly, Latin American¹⁸ negotiating partners in FTAA resist inclusion of environmental and labor issues.¹⁹

Hence, the treatment of these issues in the 1997 debate over fast track extension marks a significant turn in the evolution of the "trade constitution" by which the President and Congress exercise together the trade agreement power.²⁰ In a number of ways, the precise terms of the 1997 debate registered how these issues have consolidated their distinct, if limited, hold on the trade negotiation agenda.²¹ After the 1994 election, control of Congress swung to the party opposed to what it considered excessive inclusion of environmental and labor issues in trade agreements.²² From a different direction, public sentiment backlashed against trade agreements²³ as a result of many factors, including practical impairment of United States goals on environmental and labor issues, and symbolic impairment of United States sovereignty.²⁴ In response to the tension caused by these conflicting currents, the importance that the trade constitution allocates to environmental and labor issues could shift radically in either of two opposite ways. In one direction, Congress could follow partisan preferences manifested immediately

on Trade and Environment Report, WTO Doc. PRESS/TE 014 (Nov. 14, 1996), discussed in Steinberg, *supra* note 16, at 242-44; Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423 (1995). For a broad and not unsympathetic review of the potential for a better relation of the WTO and environmental issues, see Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268 (1997).

18. For simplicity, this Article will refer to the FTAA negotiating partners as "Latin American," without in any way intending to slight the English and French-speaking countries involved, from Canada to the Caribbean.

19. *Compare Bolivian President Urges Omitting Labor/Environment from FTAA*, 14 Int'l Trade Rep. (BNA) No. 19, at 803 (May 7, 1997) (opposing the inclusion of such issues) and *Trade Ministers Defer Decision on FTAA Negotiating Timetable Until Early 1998*, Int'l Trade Daily (BNA), May 21, 1997, available in Westlaw, BNA-BTD Database (deferring the inclusion of these issues for further consideration) with *Chile Willing to Accept Labor Accord to Join NAFTA, USTR Official Says*, Int'l Trade Daily (BNA), Mar. 11, 1997, available in Westlaw, BNA-BTD Database (accepting the inclusion of these issues).

20. See *infra* Part II.

21. Leading casebooks on international trade law already feature these issues. See JACKSON ET AL., *supra* note 15, at 559-95, 998-1009; RAJ BHALA, *INTERNATIONAL TRADE LAW: CASES AND MATERIALS* 1183-1360 (1996).

22. See Maggs, *supra* note 11, at 3C.

23. See generally Nancy Dunne, *U.S. Rallies for Uruguay Round Vote*, FIN. TIMES (London), Nov. 29, 1994, at 6 (discussing controversy over passage of Uruguay Round agreements).

24. See Michael Sznajderman, *Trade Pact Still Hangs in Balance: A Few Days Could Derail 7 Years of GATT Talks*, RICHMOND TIMES-DISPATCH, Nov. 24, 1994, at E1.

after the 1994 election and exclude environmental and labor issues as extraneous interferences with trade agreements—much as our negotiating partners, particularly developing countries, seem to wish. In quite the opposite way, the combination of all the public frustrations with globalization, especially on the perceived inadequacy of environmental and labor protections in agreements with developing countries, could result in a long lapse of fast track authority, and an extended hiatus in facilitative negotiation authority for the FTAA.²⁵ These powerful thrusts from opposite sides have brought environmental and labor issues "alongside" the fast track. Recognition of this "alongside" status makes it possible to foreshadow the future of the emerging field of environmental and labor law in trade agreements such as FTAA.

After a brief history of the fast track procedure and the emergence of its use in connection with environmental and labor issues, Part I of this Article discusses how the 1997 debate placed these issues "alongside" the fast track. The 1997 debate treated environmental and labor matters together with other aspects of trade agreements that go down the fast track, although in ways that set them somewhat apart—in a word, not on, but "alongside," the fast track. This is most clearly illustrated by comparing the rejected alternatives for treatment of these issues with the accepted "alongside" procedure.²⁶ Most significantly, President Clinton, with eventual Congressional acquiescence, rejected the 1995 Congressional alternative to get environmental and labor issues completely "off" the fast track.²⁷ The strong intention to include such issues at least "alongside" is also apparent in the 1997 Congressional denial of the extension of fast track authority. Such resistance overwhelmingly articulated Congress' desire to exert even more pressure upon negotiating partners on these issues.²⁸

With that foundation in the debate on fast track extension, Part II of the Article analyzes the upcoming environmental and labor issues in FTAA. Although ever since Congress added

25. See Finlay Lewis, *Trade Bill's Future Not Promising Despite Clinton Pledge*, SAN DIEGO UNION-TRIB., Nov. 23, 1997, at A-26.

26. See discussion *infra* Part I.D.

27. See *Fast Track Talks Fail, Ways and Means Markup Set*, NATIONAL JOURNAL'S CONGRESSDAILY, Sept. 21, 1995, available in LEXIS, News Library, Arcnws File.

28. Doreen Hemlock, *U.S. Making a Big Trade-Off: Fast-Track's Defeat May Delay Free Trade Process*, SUN-SENTINEL (Fort Lauderdale, FL), Nov. 18, 1997, at 1H.

these issues to the fast track in 1991, this subject has evolved rapidly, a generalized treatment of these issues is now possible. Considered first are those aspects common to both environmental and labor issues, such as the United States' push for nongovernmental organizations devoted to such issues to be allowed to participate in trade negotiations, and the United States' policies regarding both external and domestic handling of such issues in the ultimate FTAA.²⁹ Part II then discusses the particular environmental and labor issues individually. Particular environmental issues include process standards and the prevention of inappropriate comparative advantage as a result of weak environmental standards enforcement. Particular labor issues include the FTAA labor standards, from opposition to child labor³⁰ to freedom of union organizing.³¹

With these issues laid out, Part III addresses the flexible nature of "trade-relatedness," which is the standard proposed in the 1997 extension language, and thus the central concept of the debate. "Trade-relatedness" determines whether and how an issue enjoys coverage under the fast track authority. Part III charts the dimensions of the debate, proposing a more refined approach to determining "trade-relatedness."

Finally, Part IV attempts a synthesis regarding the prospects for environmental and labor issues "alongside" the fast track for FTAA. In the two-level "games" of near-simultaneous international and domestic negotiating, the United States must now take Congress' position that these issues must be included in negotiations, and effectuate it even when dealing with trade partners who are relatively reluctant to include them. Part IV first discusses how the United States and interested entities can influence the process of negotiating an FTAA agreement. Next, in addressing the external environmental and labor issues, Part IV discusses how the United States can use a variety of trade-related approaches, both multilateral and unilateral, to influ-

29. See generally Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996) (arguing that nongovernmental organizations should be allowed to participate in international trade negotiations).

30. See, e.g., Robert Weissman, *Stolen Youth: Brutalized Children, Globalization and the Campaign to End Child Labor*, MULTINATIONAL MONITOR, Jan./Feb. 1997, at 10; Breen Creighton, *Combating Child Labour: The Role of International Labour Standards*, 18 COMP. LAB. L.J. 362 (1997).

31. See generally Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900, 916-23 (1996) (describing labor standard challenges faced during the passage of NAFTA, especially with regard to union organizing) [hereinafter Abbott, *Foundation-Building*].

ence standards in other countries, without causing a breakdown over these issues in efforts to have an FTAA at all. Finally, in addressing domestic environmental regulations, Part IV discusses the United States commitment to including safeguards against other nations' efforts to invalidate American domestic protections.

I. 1997 DEBATE ON FAST TRACK EXTENSION: "ALONGSIDE" THE FAST TRACK, AND THE REJECTED ALTERNATIVES

A. THE RISE OF FAST TRACK

The history of the fast track system can be divided into three stages: 1934-74, 1974-91, and 1991-today. It deals with the central tension of post-Depression U.S. trade history: how to give the President the authority to negotiate trade agreements, but still keep a large enough role for Congress so that the pace and scope of trade expansion satisfy the business sectors looking to benefit from them while meeting the public's concerns about various potential problems.³²

As part of the New Deal reforms, Congress shifted toward giving the President advance approval to negotiate tariff-reduction agreements with other countries, starting with the 1934 Reciprocal Trade Agreements Act.³³ Delegation of such authority to the President continued by periodic extensions of authority, with modifications, through 1967.³⁴ As the domestic implementation of trade agreements became increasingly controversial, a seven-year stalemate occurred in the Johnson and Nixon admin-

32. See generally CHARLES K. ROWLEY ET AL., *TRADE PROTECTION IN THE UNITED STATES* (1995) (describing this tension).

33. Ch. 474, 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. §§ 1351-1354 (1994)). Between the Depression and the enactment of the Trade Act of 1974, the United States shifted away from the use of two mechanisms that had kept most of the power in Congress: unilateral tariff legislation and treaty-making. But see Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 244 (1987) (noting that more recently, Congress has been more active in shaping policy). Unilateral tariff legislation had led to excessively high protective tariffs, the ultimate expression of which was the disastrous Smoot-Hawley Tariff Act of 1930, ch. 497, 46 Stat. 590. Treaty-making, by requiring two-thirds of the Senate for ratification, allowed a small group of Senators to defeat agreements. The fullest recent discussion of this evolution is Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

34. See ROBERT A. PASTOR, *CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 1929-1976* at 84-122 (1980); Carrier, *supra* note 6, at 698.

istrations.³⁵ The key problem faced at that time, and resolved in the Trade Act of 1974, concerned implementing legislation for agreements to reduce non-tariff barriers.³⁶ Congress would not simply delegate to the President the power to change domestic non-tariff statutes. At the same time, Congress could not move such legislation through the House and Senate using its old mechanisms of internal restraint on amendment and debate because these mechanisms had broken down.³⁷

Therefore, in the 1974 Trade Act, Congress ushered in the "fast track" arrangement, which is described in more detail below, using the anticipated steps for the FTAA as an example.³⁸ Under this arrangement, Congress periodically grants the President an extension of negotiating authority; after negotiation of an agreement, the President submits an implementing bill to Congress; and, finally, the House and Senate adopt or reject the bill, without amendments or delays, in single up-or-down votes.³⁹ In practice, Congress has had subtle but significant procedural ways to make changes.⁴⁰

35. See SHARYN O'HALLORAN, *POLITICS, PROCESS, AND AMERICAN TRADE POLICY* 95-96 (1994); BARBARA HINCKLEY, *LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS* 62-63 (1994).

36. See Trade Act of 1974, 19 U.S.C. § 2435(b)(1)(B) (1994).

37. Notably, the historic power of the House Ways and Means Committee to move legislation on matters like tax and tariffs unchanged through the House floor, personified by Committee Chairman Wilbur Mills (D-Ark.), had given way in the late 1960s and early 1970s to a wave of reform in Congress that had subjected such matters to more open processes. See I.M. DESTLER, *AMERICAN TRADE POLITICS* 67-71 (3d ed. 1995).

38. See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 *BROOK. J. INT'L L.* 143, 143 (1992); Alan F. Holmer & Judith H. Bello, *The Fast Track Debate: A Prescription for Pragmatism*, 26 *INT'L LAW.* 183, 184 (1992).

39. As one commentator put it, under the new procedure, "Congress now had to pass legislation at both ends of a negotiation," with the Tokyo Round GATT Agreement needing the Trade Act of 1974 to give the President negotiating authority, and the Trade Agreements Act of 1979 to implement the deal. DESTLER, *supra* note 37, at 75.

40. Before submission of an implementing bill, the Senate Finance and House Ways and Means committees would separately consider the proposed implementation bill, in a procedure known as "nonmarkups." The term refers to the stage in committee consideration of a bill, called "markup," when a committee considers amendments to the bill before deciding whether to vote to report it to the floor of the chamber. See CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE* 167-170 (1989). The committees would then resolve their differences, in a procedure called a "nonconference." See DESTLER, *supra* note 37, at 73-75. These committees, in turn, made arrangements with other committees that had jurisdiction over other titles. See *id.* at 76. Only when the committees finished would the President submit the bill as changed by the committees, for the Congress's up-or-down vote.

By comparison, the Constitution itself, without a "fast track" statute, merely allows the President to engage in a two-phase process—negotiation and subsequent Congressional approval—for reaching trade agreements such as FTAA.⁴¹ First, the President negotiates an agreement with Latin American countries, formulating objectives himself without necessarily receiving input from Congress.⁴² Then, once the international negotiators reach a proposed agreement, the second phase, Congressional approval, consists of ratification by two-thirds of the Senate or a majority of Congress.⁴³ Debate in the Senate or the Congress might produce outcomes besides outright approval or rejection, namely, delay (by Senate filibuster) or amendments, possibly necessitating renegotiation.⁴⁴

The Trade Act's "fast track" component modifies the two-phase Constitutional process to a more elaborate three-phase process: pre-authorization, shaped negotiation, and "fast track" Congressional approval.⁴⁵ First, Congress gives pre-authorization for agreements such as the FTAA by enacting an extension of the "fast track" legislation.⁴⁶ During this stage, Congress establishes objectives in advance of negotiations.⁴⁷ These objectives may concern environmental and labor issues.

Second, the President negotiates with the other countries involved.⁴⁸ In contrast to the President's freedom of action without a fast track statute, the statute shapes the negotiating process. It provides for Congressional consultation during the negotiations, and for participation by "mission-oriented"⁴⁹ administrative and non-governmental organization (NGO) repre-

41. See U.S. CONST. art. II, § 2, cl. 2.

42. See *id.*

43. See *id.*

44. For an example of the delay caused by such a filibuster, see Eric Phillips, *World Trade and the Environment: The CAFE Case*, 17 MICH. J. INT'L L. 827, 857 n.153 (1996).

45. See Trade Act of 1974, Pub. L. No. 93-618, §§ 102, 151, 88 Stat. 1978, 1982-84, 2001-04 (1974) (codified as amended at 19 U.S.C. §§ 2112, 2191 (1994)).

46. See Carrier, *supra* note 6, at 696-97.

47. See *id.*

48. See 19 U.S.C. § 2112(e) (1994).

49. The term covers agencies like the Environmental Protection Agency ("EPA") and the Department of Labor ("DOL") which are oriented toward the missions—environment and labor, respectively—in which they specialize. This same term may be used at the White House ("mission-oriented" staff), at the USTR level ("mission-oriented" subordinates), and in Congress ("mission-oriented" committees such as Senate Environment and Public Works).

sentatives on issues including the environment and labor.⁵⁰ Hence, environmental and labor organizations face an interesting challenge: to maximize their leverage, by participating in the negotiation, while retaining the option to oppose the ultimate agreement. Administrators and NGOs with environmental and labor concerns can positively influence the content of the agreement.⁵¹ Conversely, the trading interests can hope that such an agreement will have a greater chance of approval, in the final phase, as a result of such consultation and participation.

The third phase of fast track, Congressional approval, begins once the President reaches an agreement.⁵² Approval consists of Congress enacting an implementing bill.⁵³ The fast track legislation prescribes that the approval must occur by one up-or-down vote in the House and in the Senate, without opportunity for filibuster or amendment.⁵⁴ The President formulates the implementing bill in a process involving Congress. The types of provisions the implementing bill may or may not carry have been dictated beforehand, during the fast track extension stage.⁵⁵ This includes what types of provisions regarding environmental and labor issues can go on that bill.

B. THE EMERGENCE OF ENVIRONMENTAL AND LABOR ISSUES ON THE FAST TRACK

The 1974 arrangement lasted through the 1970s and 1980s, until the rise of new trade problems and a third phase of trade agreement structuring. When Mexico proposed negotiation of NAFTA in 1990,⁵⁶ new, sensitive issues were raised. Previously, the major trade agreements had largely concerned relationships between developed countries.⁵⁷ Creating a trade agreement between the developed United States and the less-developed Mex-

50. See Carrier, *supra* note 6, at 703-04.

51. See generally Abbott, *Foundation-Building*, *supra* note 31, at 916-942 (describing the success of NGOs in influencing the negotiation and implementation of NAFTA, and their goals with regard to the FTAA).

52. See 19 U.S.C. § 2191.

53. See *id.* § 2191(e)(1).

54. *Id.* § 2191(f), (g) (1994).

55. See *supra* text accompanying notes 46-47.

56. See O'HALLORAN, *supra* note 35, at 160.

57. Even these had weakened public support for trade liberalization, as some of the problems of the U.S. manufacturing economy seemed to relate to unfair Japanese trade advantages that persisted through years and even decades of negotiations. See, e.g., Penny L. Turner, Note, *The Feasibility of a United States-Japan Free Trade Agreement*, 26 TEX. INT'L L.J. 275, 297-98 (1991) (discussing Congress' protectionist reaction to Japanese competition).

ico, however, posed new tensions. For example, members of Congress, particularly House Democrats from "rust-belt" states, believed that the relocation of assembly plants to Mexico under the maquiladora program would hurt their constituents unfairly.⁵⁸

The Bush Administration initially opposed inclusion of environmental and labor issues in the negotiations.⁵⁹ In 1990-91, however, these issues achieved prominence in Congressional hearings.⁶⁰ The chairs of the House Ways and Means and Senate Finance Committees formally wrote President Bush in March 1991, asking him to comment on environmental and labor issues before Congress voted on fast track.⁶¹ President Bush's formal response proposed a "parallel track" for environmental issues related to NAFTA,⁶² thereby partly ushering in the current era of including such issues alongside, if not entirely on, the fast track system.

The second development in the emergence of environmental and labor issues on the fast track occurred the following year. President Bush had been accused of insensitivity to environmental issues concerning the Western Hemisphere.⁶³ In submitting the main body of NAFTA to Congress in August 1992, President Bush had demonstrated only limited concern with environmental and labor issues.⁶⁴ In contrast, then-candidate Clinton elaborated a new approach in a key campaign address in October 1992 in North Carolina. He advocated a middle path between the two extremes of completely accepting the NAFTA main body as negotiated by President Bush, and calling for its renegoti-

58. See JOHN J. AUDLEY, *GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS* 46 (1997).

59. See C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 *GEO. WASH. J. INT'L L. & ECON.* 1, 45-46 (1994).

60. See generally AUDLEY, *supra* note 58, at 50-62 (describing the success of NGOs in bringing attention to these issues).

61. See *id.* at 52-53. The EPA Administrator served at this time as a conduit to environmental groups, negotiating with them what it would take for at least some to support fast track. See *id.* at 53-56.

62. See *id.* at 56-57.

63. The United Nations Conference on Environment and Development in Rio de Janeiro in June 1992 had boosted environmental-mindedness in Latin American development. President Bush had taken an unsupportive stance toward the Rio Conference. See Ambler H. Moss, Jr., *Free Trade and Environmental Enhancement: Are They Compatible in the Americas?*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY* (Durwood Zaelke et al. eds., 1993), at 109, 110.

64. See *id.*

ation.⁶⁵ Following up his new campaign approach, President Clinton asked his trade representative to negotiate stronger environmental and labor protections in side agreements,⁶⁶ which allowed him to win Congressional approval of NAFTA in 1994.⁶⁷

The new position of including these issues, but addressing them in side agreements, remained the consistent Administration position through the upheavals of the subsequent few years.⁶⁸ For example, Clinton's trade representative, at a key 1995 hearing on consideration of a Congressional alternative to exclude such issues from trade agreement negotiations, stated the President's position:

As a candidate, he spoke at North Carolina State University to endorse the NAFTA, but insisted that we negotiate agreements on labor and environment as they intersect and interact with trade. . . . At the historic Summit of the Americas last December, the nations of this hemisphere agreed to recognize the link between trade and the environment, as well as trade and improving working conditions.⁶⁹

The Presidential-Congressional debate that came to a conclusion in 1997 continued to unfold this position.

Thus, the fast track legislation shapes the inclusion of environmental and labor issues in complex and profound ways. Such shaping occurs at all three phases: negotiating objectives, negotiating process, and "fast track" approval. The 1997 debate over fast track extension pointed toward a particular set of orientations regarding environmental and labor issues during each of the three phases. This Article has termed this the "alongside" orientation, which is discussed in subsection C.

The "alongside" orientation manifests itself most clearly by comparison to Congress' rejection of alternative orientations regarding environmental and labor issues for each of the three

65. The speech was entitled "Expanding Trade and Creating American Jobs," and was delivered at North Carolina State University, Raleigh, North Carolina, on October 4, 1992. For a description of the speech and the process of developing this position, see AUDLEY, *supra* note 58, at 69-70.

66. See Steve Charnovitz, *The Nafta Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 257, 258 (1994).

67. See *id.* at 258-59. See also Joseph G. Block & Andrew R. Herrup, *Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT'L L. 221, 221-26 (1995) (explaining the Congressional debate).

68. See Charnovitz, *supra* note 66, at 257-58.

69. *Fast Track Issues: Joint Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means and the Subcomm. on Rules and Org. of the House Comm. on Rules*, 104th Cong. 146 (1995) [hereinafter *Fast Track Issues Hearing*] (testimony of U.S. Trade Representative Mickey Kantor).

phases.⁷⁰ This Article terms the prime rejected orientation the "off" the track orientation. Subsection D discusses how President Clinton and Congress devised the "alongside" orientation in 1995-97 by both rejecting the "off" the track orientation in 1995-96 and criticizing as inadequate the 1997 proposed orientation.

C. HOW "ALONGSIDE" WORKS: THE 1997 PROPOSED LEGISLATION FOR INCLUSION OF ENVIRONMENTAL AND LABOR ISSUES

In 1997, the Clinton Administration proposed legislation to Congress that would provide for environmental and labor issues to be included in the creation of trade agreements.⁷¹ Section 2(a) of the proposed legislation calls for the establishment of "overall trade negotiating objectives," which include "those aspects of foreign government policies and practices regarding labor, the environment, and other matters that are directly related to trade"⁷² Similarly, section 2(b) requires that the President establish "principal trade negotiating objectives," relating to the World Trade Organization and the International Labor Organization (ILO), as to "worker rights and protection of the environment."⁷³

Pursuant to this proposal, the Administration would inform and consult with Congressional committees before and during the negotiations.⁷⁴ Participation of NGOs, administrative bodies with environmental and labor specializations, and business groups, was also anticipated.⁷⁵ In NAFTA, some of the environmental and labor requirements were placed in side agreements rather than in the body of the trade agreement.⁷⁶

70. See Part I.D. *infra*.

71. Export Expansion and Reciprocal Trade Agreements Act of 1997, H.R. Doc. No. 105-30 (1997).

72. *Id.* §§ 2(a), 2(c)(5), H.R. Doc. No. 105-130. at 3, 4.

73. *Id.* § 2(b)(7).

74. *Id.* §§ 3, 4.

75. *Id.* §§ 3(c)(3), 4(c).

76. See generally *Talks on Nafta Side Deals to Start Week of March 15*, *supra* note 9, at A3 (describing possible enforcement measures). Much debate has concerned this matter of placement of terms in "side agreements" rather than the "core" or "main body" of the agreement. For NAFTA, this had a concrete historical origin: President Bush had completed negotiation of the main body of the agreement, and when then-candidate Clinton made his 1992 North Carolina speech, placement of newly negotiated environment and labor terms in the "main body" would have required renegotiation. There is no particular reason that this sequence or something like it would occur for FTAA. That does not mean that other methods, besides placement in a side agreement, will not put environment and labor terms in a separate, and potentially lesser, category.

Assuming the Administration reaches an agreement in the form of a main agreement and side agreements, it then would engage in a process of devising, in consultation with Congressional committees, the implementing bill that makes the necessary changes in U.S. law.⁷⁷ Congressional committees have the power, if opposed to the agreement, to have either the House or Senate vote on whether to preclude the implementing bill from receiving "fast track" treatment.⁷⁸ Assuming Congress allows fast track procedures to remain in place, the Administration would then submit the implementing bill. It would receive an up-or-down vote, without amendments and without filibuster, in the House or Senate.⁷⁹ Everything depends upon Congressional approval of the implementing bill. Hence, the entire trade negotiation process of an issue depends on how the "fast track" procedure treats that issue.

The 1997 proposal takes an important position regarding how environmental and labor requirements get implemented. Section 3(b)(3)(B) provides that the implementing bills can include provisions "which are necessary or appropriate to implement such trade agreement . . . and which are related to trade."⁸⁰ Thus, the proposal gives "fast track" treatment to environmental and labor implementing provisions which are "trade-related." One of the main goals of this Article is to explore the meaning of "trade-related," and examine the reason the term encompasses as much inclusion of environmental and labor issues as could occur in any event. This flexible interpretation of trade-relatedness is discussed in Part IV. At this point, however, comparing the rejected alternatives to Clinton's proposal better illuminates how "alongside" developed.

D. THE REJECTED ALTERNATIVES

The "alongside" orientation is best understood by comparison with the alternatives rejected on the way to the 1997 debate and beyond. More specifically, comparing the "alongside" orientation with the rejected "off" the fast track approach, as proposed by the 1995 Republican Congress, and the recent 1997

However, this Article declines to speculate about the packaging of terms into one or more agreements, and instead addresses the other ways in which those terms will be included to a greater or lesser extent.

77. See Trade Act of 1974, 19 U.S.C. § 2112(e) (1994).

78. See 19 U.S.C. § 2191(e).

79. See *id.* § (f), (g).

80. See Export Expansion and Reciprocal Trade Agreements Act, H.R. Doc. No. 105-30, § 3(b)(3)(B).

debate proposals, best illuminates the form that the "alongside" approach ultimately is taking.

1. *1995 Republican Congressional Position: "Off" the Fast Track*

When the 1994 elections produced a Republican majority in both the House and the Senate, the new Congress opposed fast track treatment of environmental and labor matters.⁸¹ From the start of the 104th Congress, the new majority expressed a desire for "avoidance of the use of environmental objectives as a protectionist device."⁸² In a famous statement, House Speaker Newt Gingrich declared that "[f]ast track was not designed to circumvent regular legislative procedures with respect to matters unrelated to trade agreements."⁸³

At a House hearing in May 1995, the House majority party clashed with the Administration on this point. House Republicans persisted in developing a draft fast track bill with "a restrictive approach to the trade and labor/environment link."⁸⁴ In September 1995, the House Ways and Means Committee reported a fast track bill supported by committee Republicans over the objections of the Administration and committee Democrats.⁸⁵ As reported, the negotiating objectives listed in the bill omitted mention of environmental and labor goals.⁸⁶ The bill only allowed the fast track procedure to be used to implement provisions "necessary" to carry out the trade agreement, re-

81. See Maggs, *supra* note 11, at 3C.

82. *Rep. Crane Says Trade Panel Agenda Includes Chile, NAFTA, China, Fast Track*, 12 Int'l Trade Rep. (BNA) No. 2, at 53 (Jan. 11, 1995) (quoting memorandum by subcommittee staff director).

83. *Fast Track Issues Hearing*, *supra* note 69, at 276 (statement by Speaker Gingrich); see also *Gingrich Urges Adoption of Fast-Track Authority, Excluding Labor, Environment*, Int'l Env't Daily (BNA), May 24, 1995, available in Westlaw, BNA-IED Database (reporting an address by the Speaker in which he indicated that "[t]he House is willing to authorize fast-track as long as it does not have provisions linking trade benefits to labor and environmental issues").

84. *Fast-Track Draft Bill Stalls as Members Get More Time to Consult*, 12 Int'l Trade Rep. (BNA) No. 31, at 1306 (Aug. 2, 1995).

85. See Trade Agreements Authority Act of 1995, H.R. 2371, 104th Cong. §§ 2 (trade objectives) and 3(b)(3)(A)(iv) (fast track implementation bill "consisting only of . . . provisions necessary for the operation or implementation of such trade agreement"); see also *Ways and Means Reports Fast Track Without Bipartisan Backing*, Int'l Trade Daily (BNA), Sept. 22, 1995, available in Westlaw, BNA-BTD Database; *Kantor Says Talks Will Continue on Ways and Means' Fast-Track Bill*, 12 Int'l Trade Rep. (BNA) No. 38, at 1593 (Sept. 27, 1995).

86. See Trade Agreements Authority Act of 1995, H.R. 2371, § 2.

jecting the previously used broader formula of "necessary or appropriate."⁸⁷ Deadlock on the issue persisted.⁸⁸

Chile provided a concrete focus for the issue.⁸⁹ In December of 1995, Congress considered the plan of renewing fast track just for Chile's accession to NAFTA.⁹⁰ Since the new majority in Congress opposed the inclusion of environmental and labor concerns, this plan did not get presidential support, and fell through.⁹¹ Chile had indicated willingness to join NAFTA if the United States had fast track ready, but its hopes were dashed when Congress and Clinton were unable to reach an agreement on fast track authority.⁹²

Thereafter, the issue became one for the 1996 presidential campaign.⁹³ Senator Dole repeated opposition to "adding 'extraaneous' issues such as labor and environmental protection to trade agreements."⁹⁴ Nothing further happened in 1996, as ob-

87. See *id.* § 3(b)(3)(A)(iv).

88. At that time, there was some expectation that the fast track authority, excluding labor and environment matters, would be addressed in the 1995 budget reconciliation bill. However, that effort foundered. See *Legislation to Implement OECD Pact Will Be Introduced Soon, Staffer Says*, 12 Int'l Trade Rep. (BNA) No. 47, at 1975 (Nov. 29, 1995) (discussing the movement in September and October 1995 of the budget reconciliation bill from the Ways and Means Committee to passage on the House floor). See also Charles Tiefer, "Budgetized" Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle, 33 HARV. J. ON LEGIS. 411, 433-35 (1996).

89. See, e.g., Melissa Ann Miller, *Will the Circle Be Unbroken? Chile's Accession to the NAFTA and the Fast-Track Debate*, 31 VAL. U. L. REV. 153 (1996) (explaining that Chile refused to negotiate on joining NAFTA unless the President had fast track powers).

90. See *id.* at 154-55.

91. See Beth Ann Bivona, *What Price Are We Willing to Pay for Our Environment?*, 5 J. INT'L L. & PRAC. 161, 171 (1996).

92. See *id.* See also Block & Herrup, *supra* note 67, at 221 (highlighting the negotiations surrounding NAFTA and Chile).

93. The sharp differences were reported as follows:
Labor and Environment Stalemate

In an election year, partisan politics have made the fast-track extension even more problematic, with the administration and the GOP majority staking out diametrically opposed positions on the treatment of labor and environmental issues.

The administration has stuck to its position—which goes back to Clinton's 1992 campaign position—that labor and environmental issues are valid negotiating objectives in trade talks. In contrast, the GOP largely believes that these issues should be dealt with on a separate track.

Block & Herrup, *supra* note 67, at 221.

94. *Id.*

servers noted, because the two sides had to see who would become President.⁹⁵

With President Clinton's victory in the election, Congressional Republicans effectively abandoned the position they had maintained since 1995.⁹⁶ In 1997,⁹⁷ the Clinton Administration made clear that it would insist on inclusion of such issues in fast track trade negotiations,⁹⁸ notably through the President's statements during a May 1997 trip to Mexico.⁹⁹ In May 1997, and again in July 1997, Congressional Republicans floated, but pulled back from the formula ultimately used, in which they relented to allow inclusion of trade and environmental issues that

95. Had former Senate Majority Leader Robert Dole been elected, according to Rep. Robert T. Matsui (D-Calif.), Republicans "probably could have gotten a fast-track through that would have prohibited labor and the environment for any negotiating purposes whatsoever. So it was probably in their political interests to slow fast-track down and find out who was going to be the next President." Ben Wildavsky, "Trade Fatigue," *NAT. J.*, Jan. 18, 1997, at 116, 117.

96. The strategic positions of the two parties were explained as follows:

For more than two years, [Representative] Crane and Ways and Means Chairman Bill Archer, R-Texas, have sought to grant Clinton broad fast-track power. . . . But Clinton rejected the committee's 1995 bid, on a party-line vote, to give him fast-track authority. His reason: The legislation lacked assurances that labor and environmental protections would be written directly into future trade agreements—a key demand of many Democrats and their allies.

Richard E. Cohen, *Ways and Means' Fast-Track Slowdown*, *NAT. J.*, Sept. 13, 1997, at 1792.

97. Both sides kept their freedom of action, as the possibility of admitting Chile to NAFTA was floated but not consummated. Neither the administration nor Congressional Republicans put definite language forward regarding environment and labor issues. The Administration floated the proposal to have fast track legislation drop all its negotiating objective language, including environment and labor language; however, this proposal simply failed. See *Administration Floats Dropping Environment, Labor from Fast Track*, *Int'l Trade Daily* (BNA), Apr. 3, 1997, available in Westlaw, BNA-BTD Database.

98. A report on a Center For Strategic and International Studies forum on NAFTA related:

The administration will continue to pursue labor and environmental issues in the context of trade agreements, [Deputy Assistant U.S. Trade Representative for the Western Hemisphere Jon] Huenemann said, adding that progress had been made in this area in both the FTAA context and in the World Trade Organization. Chile is ready to adopt NAFTA's side agreements on labor and environment, he remarked.

USTR Official Stresses Importance of Fast-Track Ability for U.S. Trade, *Int'l Trade Daily* (BNA), Mar. 10, 1997, available in Westlaw, BNA-BTD Database.

99. Speaking in Mexico City, "Clinton repeatedly highlighted the importance of labor and environmental protections which are built into the NAFTA." *Clinton Hails NAFTA, Calls for Expanded Free Trade*, *Int'l Trade Daily* (BNA), May 8, 1997, available in Westlaw, BNA-BTD Database.

were "trade-related."¹⁰⁰ The fast track debate that ensued further illuminates how Congress and the Clinton Administration resolved the issue of fast track.

2. 1997 Debate on Fast Track Extension

In September 1997, President Clinton submitted his formal request regarding fast track extension, with the proposed bill language previously described.¹⁰¹ After hearings, Senate and House committees reported their own versions, which subtly drew back from the level of inclusion of environmental and labor issues which the Administration proposed.¹⁰² The Committee Reports provided some detail on environmental and labor issues which helped concretize what the term "trade-related" would mean. The Senate committee reported a negotiating objective opposing "the use of foreign government regulation and other government practices, including the lowering of, or derogation from, existing labor (including child labor), health and safety, or environmental standards, for the purpose of attracting investment or inhibiting United States exports."¹⁰³ While such an objective did provide a way for the trade agreement to address environmental and labor issues,¹⁰⁴ it fell short of the variety of goals which advocates desired to strive for in such agreements. The House committee reported a similar negotiating objective:

regarding labor, the environment, and other matters that are directly related to trade:

(A) To ensure that foreign labor, environmental, health, or safety policies and practices do not arbitrarily or unjustifiably discriminate or serve as disguised barriers to trade.

100. This period essentially ended with President Clinton's last address on the subject before his formal request for the fast track renewal, in August 1997, in which he reiterated his position of promoting labor and environmental protections as part of fast track. See *Clinton Reiterates Importance of Labor/Environment Link in Trade*, Int'l Env't Daily (BNA), Aug. 26, 1997, available in Westlaw, BNA-IED Database.

101. See Export Expansion and Reciprocal Trade Agreements Act of 1997, H.R. Doc 105-130 (1997). See *supra* notes 71-80 and accompanying text.

102. All sides put great importance on the precise language used to describe how environment and labor protection would be dealt with. See Peter Baker & Paul Blustein, *Clinton Searches for Middle on "Fast Track,"* WASH. POST, Sept. 11, 1997, at A8.

103. S. 1269, 105th Cong. § 2(b)(15)(B) (1997). See also S. REP. NO. 102-105, at 8-9 (1997) (committee report discussing the language of the bill).

104. For a modest defense of the provision as reported by the Senate Committee, see 143 CONG. REC. S11633 (daily ed. Nov. 4, 1997) (statement of Rep. Roth) (arguing that free trade does not necessarily result in fewer jobs for American workers).

(B) To ensure that foreign governments do not derogate from or waive existing domestic environmental, health, safety or labor measures
¹⁰⁵

Both committees also reported complex proposals regarding the language, beyond the minimum "necessary," that could go in an implementing bill.¹⁰⁶ Although these proposals tightened the scope from the previous standard of "necessary or appropriate," they did not cut back as much as the 1995 Congressional proposal.

As the matter moved from the Congressional committees to the floor, the Senate critics of the proposed legislation attempted a filibuster.¹⁰⁷ Among other arguments, they faulted its failure to include sufficiently strong environmental and labor protections.¹⁰⁸ They also cited the opposition position of national environmental groups.¹⁰⁹ The Senate ultimately overcame the filibuster, but the much needed boost that Senate approval was expected to provide the legislation in the House never developed.

Rather, House critics of the fast track extension maintained a steady drumbeat of opposition on many grounds, including, as in the Senate, its failure to include sufficiently strong environmental and labor protections.¹¹⁰ As Minority Leader Gephardt stated:

Now, right now, the President is asking us for fast track negotiating authority to get new free trade agreement with, say Brazil or Argentina or Chile or other countries across the world, and just as in 1991, I voted for fast track for then-President Bush, I am quite prepared to vote for fast track for President Clinton because obviously I think he shares my values on these issues much more than President Bush did, but I do not want again to go to a set of negotiations without the Con-

105. H.R. 2621, 105th Cong. § 102(b)(7) (A-B) (1997), available in LEXIS, Legis Library, Bills File.

106. See *Administration and Archer Agree on Fast-Track Measure's Language*, 14 Int'l Trade Rep. (BNA) No. 40, at 1706 (Oct. 8, 1997).

107. See 143 CONG. REC. S11859 (daily ed. Nov. 6, 1997) (statement of Sen. Leahy); *id.* S12252 (daily ed. Nov. 9, 1997) (statement of Sen. Harkin); *id.* S11737 (daily ed. Nov. 5, 1997) (statement of Sen. Hollings); *id.* S11727 (daily ed. Nov. 5, 1997) (statement of Sen. Feinstein); *id.* S11719 (daily ed. Nov. 5, 1997) (statement of Sen. Kennedy).

108. See *e.g.* 143 CONG. REC. S11859 (daily ed. Nov. 6, 1997) (statement of Sen. Leahy); *id.* S12252 (daily ed. Nov. 9, 1997) (statement of Sen. Harkin).

109. See 143 CONG. REC. S11716 (daily ed. Nov. 5, 1997) (statement of Sen. Wellstone).

110. See, *e.g.* *id.* H10410 (daily ed. Nov. 8, 1997) (statement of Rep. Pascrell) (noting that bill as reported only prevents derogation from "existing" environmental and labor protections, and does not allow the United States to negotiate for higher standards); *id.* E2141 (daily ed. Oct. 30, 1997) (statement of Rep. Waxman) (noting that it constrains the President's ability to negotiate environmental and labor concerns).

gress being very clear about what we expect in macro terms to be in these agreements. I did that once; I do not want to do that again. . . . I do not want the Brazilians to be misled as to what we will require in the Congress in these treaties. We want labor and environmental enforcement of their laws in the core trade treaty with trade sanctions in order to enforce it.¹¹¹

The Clinton Administration attempted to respond to this criticism with efforts that would complement the provisions on environment and labor in the fast track legislation and demonstrate that the Administration would promote protection of the environment and worker rights.¹¹² To this end, a high labor official testified in late October on initiatives to oppose child labor.¹¹³ Further, the Administration released a statement of "Executive Initiatives" that were to accompany fast track legislation in November.¹¹⁴ As the informal vote counts remained close in the House, the Administration and the House leadership scheduled formal floor consideration,¹¹⁵ but decided on November 9 to give up.¹¹⁶ Thus, to be precise, the House did not vote to reject fast track extension in 1997, it simply did not take the question to a floor vote.

Although Congressional resistance to fast track extension in 1997 marked a short-term setback for FTAA negotiations, it heightened the importance of environmental and labor issues in

111. 143 CONG. REC. H88031 (daily ed. Sept. 26, 1997) (statement of Rep. Gephardt).

112. See Peter Baker & Helen Dewar, *'Fast Track' Backers Switch to High Gear: Clinton Mixes Concessions, Warnings on Trade Measure*, WASH. POST, Nov. 4, 1997, at A4.

113. See *DOL Official Says Child Labor Issue To Be Addressed Under Fast-Track Bill*, 14 Int'l Trade Rep. (BNA) No. 43, at 1866 (Oct. 29, 1997); *Child Labor's Impact on Free Trade: Hearing Before the Subcomm. on Int'l Econ. Policy and Trade of the House Comm. on Int'l Relations*, available in 1997 WL 664834 (F.D.C.H.) (Oct. 22, 1997) (testimony of Andrew J. Samet, Acting Deputy Under Secretary for International Affairs, U.S. Department of Labor).

114. See *Clinton Administration's Statement of Executive Initiatives Accompanying Fast-Track Legislation*, Released Nov. 3, 1997, 14 Int'l Trade Rep. (BNA) No. 44, at 1933 (Nov. 5, 1997) [hereinafter *Statement of Executive Initiatives*].

115. The House Committee on Rules held hearings, the last stage before floor consideration. See *Fast-Track Trade Agreement Procedures: Hearing on H.R. 2621, the Reciprocal Trade Agreement Authorities Act, Before the House Comm. on Rules*, available in 1997 WL 702862 (F.D.C.H.) (Nov. 6, 1997) (testimony of Rep. Cliff Stearns).

116. For a description of the countdown toward the scheduled, but canceled, climactic House floor vote, see Andrew Taylor, *Clinton Sways Few Democrats as House Sets Fast-Track Vote*, 55 CONG. Q. WKLY. REP. 2667 (Nov. 1, 1997); Andrew Taylor, *Clinton Loses First Opportunity After All-Out Fast-Track Push*, 55 CONG. Q. WKLY. REP. 2751 (Nov. 8, 1997); Andrew Taylor, *Trade Agenda Left in Limbo by Failure of Fast Track*, 55 CONG. Q. WKLY. REP. 2828 (Nov. 15, 1997).

the long run. In December 1997, House Minority Leader Gephardt, the leader of the 1997 opposition, attempted to negotiate an agreement on fast track.¹¹⁷ Moreover, while some bill proponents thought further efforts unlikely, President Clinton pledged to pass the measure in 1998.¹¹⁸ Thus, the 105th Congress might simply consider, later in 1998, some form of fast track extension. However, assuming Congress bypasses such consideration in 1998, it would become a priority for the 106th Congress in 1999 after the 1998 election. This would mirror the manner in which the 1996 election presaged the 1997 debate on fast track extension.¹¹⁹ Either way, when Congress faces the issue again, the treatment of environmental and labor issues will be of great importance.¹²⁰ Likewise, these issues will play an important role in upcoming FTAA negotiations.

II. ENVIRONMENTAL AND LABOR ISSUES IN FTAA

A. THE FREE TRADE AREA OF THE AMERICAS AGREEMENT

In December 1994, at the Summit of the Americas, the United States and thirty-three other Western Hemisphere countries announced their commitment to establishing a vast, hemisphere-wide free trade zone known as the Free Trade Area of the Americas.¹²¹ The FTAA is expected to create an integrated economy with a GNP of \$9 trillion.¹²² Both the United States and Latin America are expected to benefit substantially from this agreement: the United States will get increased access to the fast-growing markets of Latin American countries,¹²³ and Latin American countries will get significant increases in their already high-level of exports to the United States.¹²⁴

117. See A.B. Stoddard, *Gephardt Plans Fast-Track Bill Despite House Dems' Opposition*, THE HILL, Dec. 3, 1997, at 3, available in LEXIS, News Library, Papers File.

118. See *Clinton Concedes Defeat on Fast Track; Pledges to Pass Legislation Next Year*, 14 Int'l Trade Rep. (BNA) No. 45, at 1944-46 (Nov. 12, 1997).

119. See *supra* text accompanying notes 64-67, 95.

120. See Lewis, *supra* note 25, at A-26.

121. See Rossella Brevetti, *Trade Policy: Americas Summit Leaders Back Historic Trade Declaration*, 11 Int'l Trade Rep. (BNA) No. 49, at 49 (Dec. 14, 1994).

122. See John M. Andersen, *Hemispheric Commercial Integration Accelerates Toward 2005*, 117 BUS. AM. 6 (Aug. 1, 1996).

123. See *International Agreements: Trade Ministers to Meet in Denver for June Ministerial to plan FTAA*, 12 Int'l Trade Rep. (BNA) No. 7, at 7 (Feb. 15, 1995).

124. See Andersen, *supra* note 122, at 6.

Although the economic opportunities from further economic integration are substantial, the path to achieving such integration is complex.¹²⁵ The Summit of the Americas did not actually begin FTAA negotiations, but instead began a process intended to eventually lead to FTAA negotiations.¹²⁶ The process of arriving at an FTAA agreement has evolved considerably since early proposals.¹²⁷ An early concept of simply expanding NAFTA by admitting other Latin American countries has lost ground.¹²⁸ Instead, the FTAA process proposal has advanced on three levels: through a series of international conferences at the ministerial and sub-ministerial levels; through working groups on particular areas; and through extensive debate in each country about various ways to proceed.¹²⁹ The United States has participated intensively in these international meetings and working groups.¹³⁰ At the same time, other regional and bilateral trade agreements have evolved, such as MERCOSUR in Latin America.¹³¹ As a result, competing agendas, both political

125. See Brevetti, *supra* note 121, at 49.

126. *Id.*

127. See Hon. Brian E. Morrissey, *Building the Free Trade Area of the Americas: A Proposal by Canada*, 14 ARIZ. J. INT'L & COMP. L. 299, 299-300 (1997) (reviewing progress of negotiations to date).

128. See, e.g., Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT'L L. 539 (1995).

129. See generally FREDERICK M. ABBOTT, *LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 179-80* (1995) (FTAA proposal has been "the subject of extensive discussion and reporting"); Frank J. Garcia, *New Frontiers in International Trade: Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357, 3386-87 (1997) (discussing the efforts of ministerials and working groups).

130. See *FTAA CVD/AD Working Group is Formulating Recommendations*, 13 Int'l Trade Rep. (BNA) No. 49, at 1906 (Dec. 11, 1996) (working group on countervailing and antidumping duties meeting in Washington D.C.); *FTAA Procurement Group Eyes Divergence/Convergence*, 13 Int'l Trade Rep. (BNA) No. 45, at 1755 (Nov. 13, 1996) (United States chairs working group on government procurement); *FTAA Dispute Settlement Working Group Has Been Under Discussion, Sources Say*, 13 Int'l Trade Rep. (BNA) No. 12, at 478 (Mar. 20, 1996) (United States hosted first ministerial meeting, set goals for next meeting, and proposed four new working groups); Rossella Brevetti, *Chairs of 11 FTAA Working Groups Meet to Improve Coordination, Private Sector Input*, 13 Int'l Trade Rep. (BNA) No. 33, at 1305 (Aug. 14, 1996) (meeting of working group leaders convened in Washington, D.C.).

131. See generally Richard L. Bernal, *Regional Trade Arrangements and the Establishment of a Free Trade Area of the Americas*, 27 LAW & POL'Y INT'L BUS. 945 (1996).

and substantive, are developing as preparation is made for FTAA negotiations.¹³²

In May 1997, participating trade ministers at the Belo Horizonte meeting recommended that formal negotiations of FTAA begin at the Santiago summit in early 1998.¹³³ Thus, as countries are preparing for the fast approaching formal negotiations of the FTAA, the United States and other countries are strategically planning how to control the agenda and process of the negotiations.¹³⁴

The expiration of fast track authority and the recent failure to reinstate it, however, casts a pall on U.S. efforts in several respects,¹³⁵ particularly with the lack of guidance from Congress about what terms the FTAA must include in order to achieve ultimate U.S. acceptance. Perhaps the principal issue on which guidance is needed is how to best deal with labor and the environment. An understanding of the detailed sub-issues on which Congressional guidance is necessary requires an analysis of the common aspects of those issues, followed by analysis of those aspects specific to environmental and labor issues.

B. COMMON ASPECTS OF ENVIRONMENTAL AND LABOR ISSUES

Trade negotiators dealing with the common aspects of environmental and labor issues can break them into four general categories. First, they must develop a process for negotiating environmental and labor issues, particularly concerning how to incorporate administrators and NGOs focusing on those issues into the dialogue. The next two groups of concerns can be simply described as "external" and "domestic." External concerns involve what the agreement should accomplish in the other Western Hemisphere countries. A prime example is the ques-

132. See Rossella Brevetti, *International Agreements: Vice Ministers Need Additional Meeting to Reach Consensus On FTAA Issues*, 15 Int'l Trade Rep. (BNA) No. 7, at 283 (Feb. 18, 1998).

133. See Ed Taylor, *International Agreements: Trade Ministers Defer Decision of FTAA Negotiating Timetable Until Early 1998*, 14 Int'l Trade Rep. (BNA) No. 21, at 896 (May 21, 1997).

134. See Rosella Brevetti, *International Agreements: MERCOSUR suggests Three Stages for FTAA's Negotiating Process*, 13 Int'l Trade Rep. (BNA) No. 38, at 1491 (Sept. 25, 1996).

135. Mechanically, the lapse eliminated the only way an agreement could likely win approval. Moreover, the lapse inspired doubt, both domestically and internationally, that sufficient support existed in the U.S. Congress to approve an ultimate agreement. Still, such doubt always exists. Narrow votes to extend fast track authority do not remove uncertainty; nothing removes it until the final vote on approving and implementing an agreement.

tion of how the FTAA should cause other countries to maintain or to raise their environmental standards and environmental enforcement. Domestic concerns involve the goals the agreement should accomplish, or at least not undermine, in the United States. A trade agreement promises trading partners a limit on federal and state "protectionist" legislation in the United States. A chief domestic concern is ensuring that the anti-protectionist limitation does not preclude appropriate American environmental and labor regulation that protects the quality of domestic conditions. The fourth issue is what form the inclusion of environmental and labor matters should take in the agreement itself and in the subsequent implementing legislation.

1. *Process: Participation of Federal and Sub-Federal Mission-Oriented Agencies, and a Large Role for NGOs in Negotiations and Implementation*

"Process" aspects concern which actors will participate from the United States in the negotiation and implementation of FTAA. Obviously, the United States Trade Representative (USTR) leads the negotiation,¹³⁶ and American business groups provide the most prominent non-governmental effort. To ensure a more comprehensive airing of environmental and labor issues, broader participation must occur.

One concern is the role of other federal agencies that have a primary focus on environmental and labor concerns, such as the Environmental Protection Agency (EPA) and Department of Labor (DOL).¹³⁷ The EPA Administrator has already played a visible role in steps toward FTAA.¹³⁸ A second concern is the participation of sub-federal entities—state and local governments—which often provide the strongest environmental protections in the United States.¹³⁹ Third, just as business interests

136. See Abbott, *Foundation-Building*, *supra* note 31, at 941-43.

137. During NAFTA consideration, the EPA and the FDA served as co-chairs of the U.S. delegation to two of the three standards-negotiating sub-groups. See Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 385 (1994) [hereinafter Housman, *NAFTA's Lessons*].

138. See U.S., *Central American Countries Sign Sustainable Development Pact*, 17 Int'l Env't Rep. (BNA) No. 25, at 1025 (Dec. 14, 1994).

139. Foreign challenges to state practices under trade agreements such as GATT have created concern that new trade agreements such as FTAA could challenge such state and local environmental protections. Accordingly, sub-federal entities usefully play a role in the development of trade agreements. See Housman, *NAFTA's Lessons*, *supra* note 137, at 386-88.

play an important background role in the working groups that develop trade standards, environmental and labor NGOs can play an important background role on environmental and labor issues,¹⁴⁰ as long as they struggle, with Presidential assistance, to attain that role.¹⁴¹ The diligence of the United States in pressing for NGOs to participate in FTAA negotiations will be of great importance in the next few years.

2. *External Concerns*

When negotiations actually produce an agreement, the United States can view what that agreement prescribes as covering either "external" or "domestic" matters. If it involves the U.S. stance toward environmental and labor matters in other countries, it is an "external" concern. If it involves matters within the United States, it is a "domestic" concern.

The United States can further divide the external concerns into three levels: the standards, dispute resolution, and continuation of unilateral powers. Addressing the standards first, one significant U.S. "external" concern is that weak environmental and labor requirements, or weak enforcement, in other countries will create an inappropriate competitive disadvantage for U.S. businesses.¹⁴² This subject receives closer attention in the following sections that separately address environmental and labor standards.

A second external concern is over the agreement's sanctions, which will be used to make the participating countries implement environmental and labor standards. The most important aspect of these is the manner in which the dispute-resolution process treats these issues.¹⁴³ Under NAFTA, it has been diffi-

140. See generally William M. Reichert, Note, *Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations*, 5 MINN. J. GLOBAL TRADE 219 (1996).

141. As part of his NAFTA environmental package, President Bush placed five representatives of national environmental groups on committees within the Private Sector Advisory Committee system. In 1994, the Clinton Administration lobbied unsuccessfully for environmental NGOs to have observer status in the WTO Committee on Trade and Environment; the other countries rejected the proposal. See *U.S. Fails to Bring NGOs into Talks with WTO's Environmental Committee*, 17 Int'l Env't Rep. (BNA) No. 19, at 762 (Sept. 21, 1994).

142. See Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1, 1 (1996).

143. See generally Jack Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439 (1995); Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP.

cult to impose sanctions on Mexico for non-compliance.¹⁴⁴ As a result, the subsequent record under NAFTA has included disappointments on both environmental and labor issues.¹⁴⁵ Some commentators have praised Mexican efforts at promulgating standards and improving enforcement,¹⁴⁶ while others have criticized NAFTA as lacking effectuating "teeth."¹⁴⁷

A third external concern for the United States is the preservation of the right to use unilateral trade pressures upon partners. Congress has enacted provisions to take away favorable trade treatment from developing countries that violate core workers' rights.¹⁴⁸ The same mechanism has been proposed to promote the U.S. environmental concerns in Latin America,

& INT'L L. 87 (1994); Robert Housman et al., *Enforcement of Environmental Laws Under a Supplemental Agreement to the North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 593 (1993).

144. See Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 64-65 (1994) (explaining that a 1993 side agreement to NAFTA limits trade sanctions that can be imposed for a country's failure to enforce environmental regulations).

145. See generally Laura Okin Pomeroy, *The Labor Side Agreement Under the NAFTA: Analysis of Its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated with Developing Countries*, 29 GEO. WASH. J. INT'L L. & ECON. 769 (1996); Symposium, *The North American Agreement on Labor Cooperation: Linking Labor Standards and Rights to Trade Agreements*, 12 AM. U. J. INT'L L. & POL'Y 815 (1997) (describing a panel discussion which addressed both labor and environmental problems).

146. See, e.g., Aaron Holland, Note, *The North American Agreement on Environmental Cooperation: The Effect of the North American Free Trade Agreement on the Enforcement of United States Environmental Laws*, 28 TEX. TECH. L. REV. 1219 (1997); Noemi Gal-Or, *Multilateral Trade and Supranational Environmental Protection: The Grace Period of the CEC, or a Well-Defined Role?*, 9 GEO. INT'L ENVTL. L. REV. 53 (1996).

147. See, e.g., Joel Millman, *Nafta's Do-Gooder Side Deals Disappoint: Efforts to Protect Labor, Environment Lack Teeth*, WALL ST. J., Oct. 15, 1997, at A19; Robert Collier, *NAFTA Labor Problems Haunt New Trade Debate*, S.F. CHRON., Sept. 10, 1997, at A1.

148. See Juli Stensland, Note, *Internationalizing the North American Agreement on Labor Cooperation*, 4 MINN. J. GLOBAL TRADE 141, 151 (1995).

In the 1980s, Congress pioneered the "Super 301" provision which statutorily forces the President to impose unilateral sanctions upon our trading partners for unfair practices. See 19 U.S.C. § 2420 (1994). While this mechanism started with a concern for purely economic practices, Congress can adapt the mechanism for other issues such as labor and the environment. For example, child labor could be made, statutorily, an "unfair trade practice" for purposes of Super 301.

such as the avoidance of tropical deforestation.¹⁴⁹ Latin American negotiating partners may oppose the United States' exercise of such types of unilateral powers, deeming this inappropriate protectionism inconsistent with the multilateral thrust toward free trade.¹⁵⁰ Yet, inclusion of environment and labor objectives in the fast track legislation weighs heavily toward preservation of the U.S. unilateral capabilities on these issues.

3. Domestic Concerns

Free trade agreements pose a potential threat to the U.S. domestic system of health, safety, and environment regulations. A trade agreement results from trading partners' skepticism, if not hostility, towards U.S. state and local regulations which may inhibit access by foreign producers to the U.S. market. The day has long passed in which the largest barriers around the U.S. market consist of simple tariffs; now, non-tariff barriers have much more importance.¹⁵¹ Accordingly, foreign governments and foreign producers perceive trade agreements, such as FTAA, primarily as a means to assure that non-tariff barriers will not reduce their access to the U.S. market. To them, such non-tariff barriers include what they consider protectionist components of the United States' domestic system of health, safety, and environmental regulations.¹⁵² Hence, trade agreements can provide tools against U.S. domestic labor, safety, and environmental regulations on both the state and federal levels.¹⁵³

149. See Mara Kimmel Hoyt, Note, *Breaking the Trade Barrier: Common Property Solutions to Tropical Deforestation*, 5 MINN. J. GLOBAL TRADE 195, 215-16 (1996).

150. See Stensland, *supra* note 148, at 157.

151. See A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209, 218 (1994); see also generally Kenneth A. Votre, *Trade in Services: Proposals for the Liberalization of International Trade in Insurance*, 13 BRIDGEPORT L. REV. 537, 549-50 (1993) (GATT has been effective in reducing tariffs but not non-tariff barriers).

152. See Aseem Prakash, *Green and Global*, 5 IND. J. GLOBAL LEGAL STUD. 575, 582 (1997) (book review).

153. For example, one of the most prominent issues under NAFTA has been Mexico's effort to break down barriers to Mexican truck drivers carrying cargo into the United States. This has implicated both safety and labor concerns in the United States, which has tougher licensing standards and largely unionized drivers. See John Nagel, *Mexican Trucks and Drivers Are Safe for NAFTA Implementation, Experts Contend*, 14 Int'l Trade Rep. (BNA), No. 10, at 408 (Mar. 5, 1997); *Trucking Provision Implementation Urged by Industry, State Officials*, 14 Int'l Trade Rep. (BNA), No. 1, at 27 (Jan. 1, 1997).

4. *Agreement and Implementation Mechanisms*

The role of environmental and labor issues in fast track brings to the fore several aspects of the form and implementation of trade agreements. The key question here is the inclusion of environmental and labor matters in the implementing bill by which Congress approves and makes the requisite changes in U.S. law to implement the trade agreement.¹⁵⁴ This is part of a larger controversy regarding the contents of the "fast track" implementation bill. Because the implementation bill does not travel through normal Congressional procedures of amendment and potential Senate filibuster, Congress, and to some extent the public, have special sensitivity about the contents of the implementation bill.¹⁵⁵ To some critics, this process of precluding amendments and limiting debate seems "undemocratic."¹⁵⁶ More speculatively, some in Congress may fear that a Democratic President could conciliate environmental and labor critics of a free trade agreement by placing provisions into an implementing bill unnecessary for the agreement itself.¹⁵⁷

C. SPECIFIC ASPECTS OF ENVIRONMENTAL CONCERNS

Purely environmental concerns can also be categorized as either "external" or "domestic." External concerns include process and product standards, while domestic concerns primarily focus on the maintenance of United States domestic standards.

1. *External*

Process standards have remained a prominent subject of debate in the realm of external environmental standards. Environmental concerns can arise either from problems in products, such as excessive pesticide residues in food, or by the processes

154. See C. O'Neal Taylor, *supra* note 59, at 46-47 (supporters of fast track stated labor issue would be addressed in implementing legislation).

155. See John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 169 (1997).

156. See *id.*

157. For example, business interests in Congress have opposed environmental measures such as constraining timber harvesting on public lands, and labor measures such as a ban on striker replacements. Some in Congress might fear that the President could put provisions of that kind — if not so broad, then leaning in such directions — into the unamendable implementation bill for a free trade agreement, making the implementation bill more palatable to moderate Democrats while forcing pro-business Republicans to swallow unpalatable measures in order to get a desired trade agreement.

that produce them, such as untreated process wastewater. It is the process concerns that raise the more interesting question, since the processes of production for what FTAA will cover can occur in other countries.¹⁵⁸ The "Tuna/Dolphin" controversy illustrates this tension.¹⁵⁹ In Tuna/Dolphin, the United States was not concerned with the quality or safety of the product, that is, the content of the canned tuna, but rather with the environmental harm which the production process caused, namely the consequences of certain tuna-fishing methods that resulted in excessive dolphin capture.¹⁶⁰

A related issue concerns standards for labeling products regarding the claimed environmental virtues of the production processes, often called "green labeling" or "eco-labeling,"¹⁶¹ which may well become an issue within FTAA.¹⁶² Because production and labeling occur in the producing country, the extent to which the United States can influence standards and enforcement in the Latin American producing countries becomes an issue in negotiating the FTAA.

The external environmental standards issue then becomes a question of degree: how much can the United States influence its trading partners regarding standards and enforcement of them, whether for product or process? Possible answers to this question vary widely.¹⁶³ The highest degree of influence would

158. Within the United States, federal and state environmental agencies impose regulations that protect the environment by regulating the processes for production, and the United States has various reasons for concerning itself with overseas production processes. For a discussion of this issue, see John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY* 219, 226-29 (Durwood Zaelke et al. eds., 1993).

159. See GATT Dispute Settlement Panel, *United States—Restrictions on Imports of Tuna*, BISD 39th Supp. 155 (1991) reprinted in 30 I.L.M. 1594 (1991) (unadopted) [hereinafter *Tuna I*].

160. See Paul J. Yechout, Note, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards*, 5 MINN. J. GLOBAL TRADE 247, 250 (1996).

161. See generally Elliot B. Staffin, *Trade Barrier or Trade Boon?: A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205 (1996).

162. See generally Anahi Rama, *Environment-Mercosur: "Duped" by Trade-Driven Green Ads*, INTER PRESS SERVICE, Apr. 28, 1997, available in LEXIS, News Library, Wires File (describing the increasing use, and misuse, of eco-labeling in the four Mercosur countries).

163. For the spectrum of approaches from total harmonization on down, see Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 283-94 (1997).

result in total harmonization of other countries' standards with U.S. standards. A low level consists of nothing more than precluding opportunistic lowering of standards deliberately to obtain relocating of industries for which pollution control strongly affects profit levels.¹⁶⁴ The bottom would be leaving the matter to WTO rules, since the WTO has applied little to no pressure on developing countries on the issue of environmental standards or enforcement.¹⁶⁵

2. Domestic

A separate problem concerns the maintenance of high domestic U.S. environmental product standards, such as barriers against the importation of Latin American products that cannot demonstrate equivalent environmental standards to domestic products.¹⁶⁶ To Latin American negotiating partners these standards seem like protectionist barriers;¹⁶⁷ to environmentalists, however, the existence of a dispute-resolution mechanism that could second-guess U.S. environmental product standards makes globalization a serious threat to their hard-won domestic gains.

The seriousness and impact of this issue is evident from the history of GATT/WTO proceedings against the United States, and from comparable proceedings in the European Union, regarding gasoline,¹⁶⁸ the tuna/dolphin issue,¹⁶⁹ and automobile

164. See *id.* at 303-04.

165. See Schultz, *supra* note 17, at 429.

166. See Armin Rosencranz et al., *Rio Plus Five: Environmental Protection and Free Trade in Latin America*, 9 GEO. INT'L ENVTL. L. REV. 527, 533 (1997).

167. See *id.* at 534.

168. See GATT Dispute Settlement Panel, *United States—Standards for Reformulated and Conventional Gasoline*, reprinted at 35 I.L.M. 274 (1996). Venezuela and Brazil brought the GATT case against the United States reformulated gasoline regulations issued under the 1990 Clean Air Act. See Steve Charnovitz, *The WTO Panel Decision on U.S. Clean Air Act Regulations*, 19 Int'l Env't Rep. (BNA) No. 5, at 191-92 (Mar. 6, 1996). The 1996 WTO decision found the U.S. regulations on gasoline cleanliness in violation of WTO national treatment provisions, and in 1997, the EPA finally rewrote its rules. See *EPA Bows to Pressure on Gasoline Requirements*, WALL ST. J., Aug. 21, 1997, at A4.

169. Mexico brought the first tuna/dolphin challenge to regulations under the U.S. Marine Mammal Protection Act. See *Tuna I*, *supra* note 159; see also generally Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187 (1993). The EC followed up with a second tuna/dolphin challenge that produced a 1994 panel report. Both reports went against the United States. See Yechout, *supra* note 160, at 262-68. Congress finally moved in 1997 to loosen the definition of "dolphin-safe" for tuna sold in the United States. See Deidre McGrath, *Writing*

fuel economy.¹⁷⁰ FTAA could threaten to open the door to successful challenges against domestic U.S. product standards on issues such as U.S. rules on pesticides.

D. LABOR CONCERNS

FTAA negotiation on the fast track also raises the question of just how strongly the United States will condition its trade concessions upon Latin American compliance with standards of labor rights that have support in International Labor Organization (ILO) conventions and in U.S. legislation and policy, but which some Latin nations themselves intensely oppose. Even the original Plan of Action for FTAA committed the participants to "further secure the observance and promotion of worker rights, as defined by appropriate international conventions."¹⁷¹ Albeit with limited effectiveness, the ILO has promoted labor standards since its inception after World War I.¹⁷² Furthermore, as the worldwide GATT trade agreements evolved, the United States has attempted to obtain implementation of labor rights through the World Trade Organization (WTO)¹⁷³ as recently as 1996.¹⁷⁴

Different Lyrics to the Same Old Tune: The New (and Improved) 1997 Amendments to the Marine Mammal Protection Act, 7 MINN. J. GLOBAL TRADE, ____; Robert Collier, *Mexican Fishermen Relieved by Tuna Deal: U.S. Embargo to Save Dolphins Cost Them Dearly*, S.F. CHRON., July 30, 1997, at A8.

170. The European Union successfully challenged automobile fuel economy regulations under the Clean Air Act. See GATT Dispute Settlement Panel, *United States—Taxes on Automobiles*, GATT Doc. DS31/R, Oct. 11, 1994, reprinted at 33 I.L.M. 1374 (1994). See also Steve Charnovitz, *The GATT Panel Decision on Automobile Taxes*, 17 INT'L ENV'T REP. (BNA) No. 22, at 921-25 (Nov. 2, 1994).

171. Jorge F. Perez-Lopez, *The Promotion of International Labor Standards and NAFTA: Retrospect and Prospects*, 10 CONN. J. INT'L L. 427, 472 (1995).

172. See generally ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996) (describing the efforts of the ILO and other organizations concerned with labor standards).

173. See Robert T. Stranks, *The New Jerusalem: Globalization, Trade Liberalization and Some Implications for Canadian Labour Policy*, in NEW DIRECTIONS: ENVIRONMENT, LABOUR AND THE INTERNATIONAL TRADE AGENDA 137, 164-65 (Keith H. Christie ed. 1995).

174. A major Clinton Administration effort in this regard showed the American policy still had strong life in it, though it did not achieve success. The Administration pushed hard to establish a WTO working party on Trade and Core Labor Standards, or at least to enhance cooperation between WTO and the ILO. However, the other WTO members, particularly developing countries, resisted. For a description of both the Administration initiative and the resistance by other WTO members, see Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor*

Frustration in the GATT/WTO arena has forced the United States to explore alternatives to promote labor standards. In the 1970s, the GATT allowed developed countries to give trade preferences to developing countries, and Congress effectuated this in the United States by the General System of Preferences (GSP).¹⁷⁵ Five general rights constitute the heart of the GSP conditionality system: the right of association; the right to organize and bargain collectively; prohibition against forced labor; protection against child labor; and acceptable conditions of work, such as those concerning wages, hours, and occupational safety and health.¹⁷⁶ American labor rights advocates have been disappointed that the GSP system has not advocated further-reaching standards.¹⁷⁷ Still, the GSP has produced improvements, compared to previous conditions, in a number of Latin American countries, such as Chile, Paraguay, Guatemala, and the Dominican Republic.¹⁷⁸

NAFTA represented the first major opportunity to transfer the unilateral GSP conditionality system into a multilateral context,¹⁷⁹ and its significance as a predecessor, for FTAA has been recognized.¹⁸⁰ NAFTA took on a particularly hard challenge, since labor abuses in Mexico are widespread and the enforcement of labor laws is weak.¹⁸¹ NAFTA's labor side agreement, the North American Agreement on Labour Cooperation

Standards Debate, 11 TEMP. INT'L & COMP. L.J. 131, 154-58 (1997) (book review).

175. The United States has established and strengthened over the years a set of potentially powerful conditions on each developing country's GSP treatment. Interested parties can ask the U.S. interagency review panel handling this subject to withdraw a country's GSP treatment for failing to afford internationally recognized worker rights. See JACKSON ET AL., *supra* note 15, at 1126-36.

176. See JACKSON ET AL., *supra* note 15, at 998-1007; see also Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361, 368 (1997) (listing the five rights in the context of possible models for enforcing international human rights).

177. See Iglesias, *supra* note 176, at 370.

178. See Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 348-49 (1995).

179. See *id.* at 343.

180. See Betty Southard Murphy, *NAFTA's North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT'L L. 403, 419-26 (1995).

181. See Christos C. Paraskevopoulos, *NAFTA and Social Protection in North America*, in ECONOMIC INTEGRATION IN THE AMERICAS 182, 184-85 (Christos C. Paraskevopoulos et al. eds., 1996).

(NAALC), created a Commission for Labor Cooperation to work cooperatively on labor issues.¹⁸² Each party has a National Administrative Office (NAO) to investigate allegations that another party is not enforcing its domestic labor law in the areas of the five labor rights.¹⁸³

The NAALC's functioning has received close scrutiny.¹⁸⁴ Some have applauded its actions, such as in its first case, which considered inadequacies in the U.S. protection of labor rights,¹⁸⁵ while others have commented on its ineffectiveness.¹⁸⁶ The more knowledgeable analysis, however, focuses on NAALC's inadequacy.¹⁸⁷ While the NAFTA labor accord had recognized all five of the "core" labor rights, as they are generally called, it distinguishes among them in terms of its procedures.¹⁸⁸ Two of the rights, notably the right of association, which would protect union organizing efforts, cannot trigger procedures leading to sanctions at all.¹⁸⁹ Only the three other labor rights, notably including the protection against child labor, even lead into the sanction system, which itself is quite limited.¹⁹⁰ Critics charged that the Mexican government, tilting strongly toward business interests in the wake of the crushing blow of the peso crisis, has squelched union organizing efforts, and that the NAFTA labor accord did little to blunt this.¹⁹¹ Moreover, the limited sanction

182. *North American Agreement on Labor Cooperation, opened for signature* Sept. 8, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (1993).

183. See Stensland, *supra* note 148, at 158-61.

184. For a defense of the NAALC, see *The North American Agreement on Labor Cooperation: Linking Labor Standards and Rights to Trade Agreements*, 12 AM. U. J. INT'L L. & POL'Y 815, 837-41 (1997).

185. See, e.g., Sarah Lowe, Comment, *The First American Case Under the North American Agreement for Labor Cooperation*, 51 U. MIAMI L. REV. 481 (1997).

186. See generally, e.g., Roy J. Adams & Parbudyal Singh, *Early Experience with NAFTA's Labour Side Accord*, 18 COMP. LAB. L.J. 161 (1997); Fredrick Englehart, Note, *Withered Giants: Mexican and U.S. Organized Labor and the North American Agreement on Labor Cooperation*, 29 CASE W. RES. J. INT'L L. 321 (1997); Jason S. Bazar, Comment, *Is the North American Agreement on Labor Cooperation Working for Workers' Rights?*, 25 CAL. W. INT'L L.J. 425 (1995).

187. See Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533, 561 (1995) (observing that NAALC is "a sort of administrative agreement, with no real force of law").

188. See Iglesias, *supra* note 176, at 361-70.

189. See *id.* at 370.

190. See *id.* at 370-71.

191. See *id.*

system has not actually produced even the sanctions which in theory it could.¹⁹²

Understanding the environmental and labor issues facing negotiators and interested parties in developing the FTAA is not enough. As discussed in Part II, for any issue to be included in fast track legislation, it must be "trade-related." Only by understanding trade-relatedness can one understand how to place important U.S. concerns "alongside" the fast track.

III. "TRADE RELATEDNESS" AND FAST TRACK: THE FLEXIBLE CONCEPT OF TRADE-RELATEDNESS

As previously noted, the 1997 President's fast track extension proposal introduced the key language that fast track treatment should cover "trade-related" environmental and labor matters. In other words, to determine whether and how an issue enjoys coverage under the fast track authority, one must first determine if it is "trade-related." Based on the foregoing discussion, the flexibility of the concept of "trade-relatedness" appears in two dimensions: economic and political. Each warrants separate discussion.

A. ECONOMIC DIMENSION

When considering the economic dimension of "trade-relatedness," the enormous debate over trade and the environment in the past two decades defies easy summation, but two polar views bear noting. The "free trade" extreme pole in the debate emphasizes the general efficiency benefits of free trade demonstrated by trade growth generally in recent years and, more particularly, the economic liberalization-based expansion in Latin America. In this view, each country best makes its own near-term tradeoffs between economic welfare and environmental and labor improvements. Trade growth, in the long term, can pay both for higher welfare and for enhanced environmental and labor conditions. Developing countries like Latin America might make a pro-development near-term tradeoff, while more developed countries like the United States would weigh environmental and labor improvements more heavily. Nevertheless, advanced countries should not try to make their standards into

192. See Bierman & Gely, *supra* note 187, at 569 ("the highest level of enforcement for purported violations [of the NAALC] . . . is simply that of 'ministerial consultations.' Moreover, the U.S. NAO [National Administrative Office] has to date been somewhat reluctant to recommend that cases proceed even to this level").

trade barriers, which would amount both to inefficient protectionism and interference into other countries' internal affairs.¹⁹³

The opposite "sustainable development" pole in the debate emphasizes the environmental and labor harms from uncontrolled globalization, particularly noting the ultimate limits of what world ecology can bear and the numerous possibilities for international effects of a nation's excesses. As regional integration, in general, and FTAA, in particular, take center stage in trade negotiation, this view points to the imbalance between the high-safeguards U.S. system and the low-safeguards system of developing Latin American countries.¹⁹⁴

For example, the United States has a concrete interest in ensuring that U.S. businesses (and their employees) are not inappropriately disadvantaged by their obedience to the comparatively high standards the United States has created in environmental and labor matters. The reduction of other trade barriers exposes United States businesses to competition from Latin American businesses subject to less regulation. Of course, Latin American negotiating partners can argue that letting their own businesses have the competitive advantage of lesser regulation in these matters is a legitimate example of the general economic thrust that drives trade.¹⁹⁵

193. Classic pro-free trade economic analysis, not reaching this extreme pole yet exploring some of its points, can be found in such works as MICHAEL RAUSCHER, *INTERNATIONAL TRADE, FACTOR MOVEMENTS, AND THE ENVIRONMENT* (1997); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *RECONCILING TRADE, ENVIRONMENT AND DEVELOPMENT POLICIES* (1996); KARL W. STEININGER, *TRADE AND ENVIRONMENT: THE REGULATORY CONTROVERSY AND A THEORETICAL AND EMPIRICAL ASSESSMENT OF UNILATERAL ENVIRONMENTAL ACTION* (1995); Jagdish Bhagwati, *Trade and the Environment: The False Conflict?*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY* 159 (Durwood Zaelke et al. eds., 1993); Ursula Kettlewell, *GATT—Will Liberalized Trade Aid Global Environmental Protection?*, 21 *DENV. J. INT'L L. & POL'Y* 55 (1992).

194. Classic pro-environment and labor economic analysis, not reaching this extreme pole yet exploring some of its points, can be found in such books as THOMAS ANDERSSON ET AL., *TRADING WITH THE ENVIRONMENT: ECOLOGY, ECONOMICS, INSTITUTIONS AND POLICY* (1995); DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* (1994); OFFICE OF THE U.S. TRADE REPRESENTATIVE, *THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES* (1994); Herman E. Daly, *Problems with Free Trade: Neoclassical and Steady-State Perspectives*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY* 147 (Durwood Zaelke et al. eds., 1993).

195. See Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 *AM. U. J. INT'L L. & POL'Y* 719, 768 (1993).

In any event, whatever the outcome of the debate about what is or is not an appropriate competitive advantage from lesser regulation, typically economists would deem provisions that sort out appropriate from inappropriate competitive advantages to be "trade-related."¹⁹⁶ What these diverse economic theories indicate is not the precise content of the concept of "trade-relatedness," but its flexibility. When the 1997 debate in Congress came to focus on this concept, Congress simply was not elevating one economic school or the other; rather, it was weaving a path toward a compromise between narrow and broad views.¹⁹⁷

B. POLITICAL DIMENSION

The political dimension consists of reviewing the 1995-97 political process that led to elevation of the concept. During this time, the various environmental and labor issues discussed in Part II figured prominently in the national debate between proponents of what the 1997 extension law ultimately chose, and proponents of the chief alternatives. Here "trade-relatedness" is defined by contrast with the 1995-96 Republican Congressional alternative of excluding environmental and labor issues from trade talks altogether. There is little basis to believe that "trade-relatedness" excludes any of the issues discussed in Part II. The Administration, which won this battle, has adhered throughout to the position introduced at President Clinton's 1992 North Carolina address and continued through NAFTA's approval, namely, that the United States can include serious environmental and labor positions in regional trade agreements with developing Latin American partners—first Mexico, and now the whole FTAA.¹⁹⁸ During consideration of the 1997 Act, Senator Phil Gramm (R-Tex.) noted that the use of the 'trade-

196. A key provision in NAFTA's text speaks in a limited way to the concern over inappropriate competitive advantage. Article 1114.2 provides that "[t]he Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures." North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605, 642 (1993).

197. Had the differing blocs on this issue achieved a precise agreement on the subject, Congress would have used a more precise set of terms, or provided more definitions. For example, it could easily have referenced the relatively restricted view of trade-relatedness that developing countries have pushed in the WTO, in which they assert that inclusion of environment and labor issues in trade negotiation amounts to disguised protectionism.

198. See C. O'Neal Taylor, *supra* note 59, at 32-53.

related' standard could increase the President's ability to include issues and policies in trade bills.¹⁹⁹

As far as what would not be trade-related, the USTR gave this example: "The example used in 1993 was pension reform, would not be appropriate add-ons to a fast track bill."²⁰⁰ In this regard, it matters that the 1997 debate suggested basically retaining, with some modification, a version of the traditional formulation that the implementation bill could contain matters "necessary or appropriate."²⁰¹ The 1995 debate had clarified what the term "appropriate" signifies.²⁰²

That example of what is budgetarily "appropriate" to an implementation bill, even though it was not the subject of international negotiation and is not in the international agreement,²⁰³

199. Senator Gramm stated:

It would give the president license to negotiate agreements that would impose labor standards in the United States, not just around the world, and he could bring such an agreement to the floor of the Senate and the House without our having any ability to amend it whatsoever.

Fast Track Trade Authority: Hearings before the Senate Comm. on Finance, 105th Cong. 18 (1997) [hereinafter Senate Finance Comm. Hearings]. Senator Gramm further noted that "labor and environmental conditions" could be included "under code name words like 'sustainable growth' to set limits that would have the effect of domestic law in imposing constraint on American industry and agriculture . . . Obviously, something that reduces trade is trade-related." *Id.*

200. *Id.* at 35. The USTR continued, "We have added a limitation on that whatever else was appended to the fast track legislation would also have to be trade related because of concerns two years ago that pension reform had been on a fast track bill and that seemed germane." *Id.* at 39.

201. See *supra* notes 86-87 and accompanying text.

202. When the House Ways and Means Committee reported its 1995 Republican proposal, which omitted the term "appropriate," dissenting Democratic views explained what the missing term encompassed, explaining:

The reported bill would no longer permit "appropriate" measures to be included in fast track bills. Provisions regarded as "appropriate" to implement trade agreements were included in previous fast track bills both to gain political support and to enable proper administration of the trade statutes and Congressional oversight. These provisions have had bipartisan support in the Committee on Ways and Means. Why would we want to reduce that support, both within the Committee and for passage in the House, as well as to reduce the ability of agencies to administer the laws effectively or for Congress to oversee their implementation?

H.R. REP. NO. 104-285, at 29 (1995).

203. For example, under Congressional budget rules, an implementing bill that moderately reduces revenue by lowering some tariffs may need provisions to raise revenue, so that the bill as a whole is deficit-neutral. Since these provisions do not require international negotiation, some object to fast track treatment on the rationale that the President should not be able to make revenue-raising decisions that are not subject to Congressional debate and amendment. Still, such provisions are not "necessary" to an implementation bill, since other

shows how environmental and labor matters which actually were the subject of international negotiation and actually were in the international agreement are clearly "necessary and appropriate." "Trade-relatedness" does not exclude any environmental or labor issue that has appeared, or has a prospect of appearing, in trade negotiations. Rather, it aims to exclude completely extraneous provisions that an Administration might put into a trade agreement implementation bill simply to win domestic support.²⁰⁴

IV. SYNTHESIS: PROSPECTS FOR ENVIRONMENTAL AND LABOR ISSUES "ALONGSIDE" THE FAST TRACK FOR FTAA

In sum, the 1997 debate signals that environmental and labor issues will become part of the United States' negotiating objectives, which would open the way for their inclusion in implementing legislation: these issues are "alongside," not "off," the fast track. Any viable FTAA negotiations will have to satisfy the political realities demonstrated in the 1997 debate. The question thus becomes what approaches the United States might take in FTAA negotiations to include these issues without undermining FTAA. These approaches include affecting the process of FTAA negotiations, as well as addressing the external and domestic concerns the United States has.

A. PROCESS ISSUES

As previously described, the United States has been in the forefront of having its mission-oriented agencies, its states, and above all the NGOs,²⁰⁵ participate in negotiation and implementation of trade agreements. In contrast, the Latin American FTAA negotiating partners have resisted this. For example, in the 1997 preparatory process for FTAA, labor organizations sought official recognition for their own forum, but vetoes from

nations do not negotiate an agreement on the domestic question of revenue-raising. Such provisions are, however, "appropriate" to an implementation bill, since Congressional budget rules require revenue-raising to make the bill deficit-neutral while other nations do not require similar action.

204. See *supra* note 157 (discussing such potential Administration legislative proposals that would "sweeten" a deal for environment and labor supporters as curbing timber harvesting on public land or banning striker replacement).

205. The United States pressed for its NAFTA environmental side agreement to provide for a role for NGOs in presenting issues to the dispute resolution process. See *supra* note 141 and accompanying text.

other countries prevented this.²⁰⁶ Latin American FTAA negotiating partners greeted coolly the U.S. attempts to create study groups on trade/labor and trade/environment issues.²⁰⁷

The role of these entities has significance, both on the specific issues that NGOs might press, and for the possibility that the globalization of business organizations might be counter-vailed by a globalization of advocates of environmental and labor interests.²⁰⁸ In 1997, labor unions and environmental organizations worked intensively to defeat the extension of fast track. Since they opposed authorization for an FTAA, it may be argued that they should not participate in its negotiation and implementation.

A look back at NAFTA's passage, however, suggests the contrary. Environmental and labor groups that campaigned against extension of fast track in 1991 created leverage for other groups to argue from "within" that NAFTA should include such issues. Once President Clinton, by commencing negotiation of a supplemental NAFTA environmental agreement, showed he seriously intended to increase the inclusion of environmental issues, environmental groups re-positioned themselves. At that point, they formulated requests for negotiations that were politically feasible.²⁰⁹

The narrow margin of the informal House vote-counts in 1997 on extension of fast track reflects the necessity that FTAA's negotiating process demonstrate to the press, the public, and to moderate members of Congress that sensitive U.S. concerns are being taken into account. President Clinton can legitimately argue to Latin American FTAA negotiating partners²¹⁰

206. See Mario Osava, *Unions Charge They Are Kept Out of FTAA Negotiations*, INTER PRESS SERVICE, May 15, 1997, available in LEXIS, News Library, Wires File.

207. See Rossella Brevetti, *Vice Ministers Discuss Structure of FTAA Talks*, 14 Int'l Trade Rep. (BNA) No. 44, at 1912 (Nov. 5, 1997).

208. See generally Jay Tutchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does It Work?*, 26 ENVTL. L. REP. 10,031 (1996); Frona M. Powell, *Environmental Protection in International Trade Agreements: The Role of Public Participation in the Aftermath of NAFTA*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 109 (1995); Mark J. Spaulding, *Transparency of Environmental Regulation and Public Participation in the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127, 1131-41 (1995).

209. See AUDLEY, *supra* note 58, at 88-93.

210. It is significant that President Clinton's "Executive Initiatives" in November 1997, in the final push for a fast track extension, recalled his commitment to opening the WTO's dispute resolution mechanisms to NGO roles. See *Statement of Executive Initiatives*, *supra* note 114.

that if they close the door on environmental and labor NGO participation, they will in effect, be telling environment and labor groups to work as early and as hard as possible to block approval of a final FTAA which might otherwise have a fair chance of success. NGO participation also provides a response to the commonly voiced critiques of the trade agreement process that it lacks transparency, and denies "democracy," on issues of vital concern to the U.S. public.

B. EXTERNAL ISSUES

The U.S. position on external environmental and labor issues will certainly begin with an attempt to reduce inappropriate competitive advantage for Latin American countries resulting from lower standards. In 1997 hearings, both the USTR and the Treasury Secretary testified about the inclusion of an explicit negotiating objective addressing these issues. Although the bill establishing the WTO included such an objective, the objective applies equally, if not more so, for FTAA, where the United States has greater leverage to achieve it. Secretary of Treasury Rubin explained the importance of including such an objective when negotiating the WTO agreement.

[W]e have an enormous economic self-interest . . . that through workers' rights and collective bargaining and whatever other mechanisms may be and also through appropriate focus on the environment, that the labor and environmental standards increase as well as the productivity. Otherwise, we will find that we are at increasing competitive disadvantage because of a suppression, if you will, of wages and environmental standards in these developing countries.²¹¹

The USTR stated: "And this objective as it is reflecting of the WTO jurisdiction attempts simply to indicate that we intend to pursue vigorously in the WTO issues that pertain to the environment. Issues that pertain to worker rights, including child labor."²¹²

In FTAA negotiations, the United States may look for a variety of solutions, including foreshadowing, but not completing, a basis for progress on other fronts, both multilateral and unilateral. It may achieve more success where it finds approaches that protect environmental concerns while appealing to Latin American countries on one of several grounds: recognition of their sovereignty, matching their own environmental move-

211. *Senate Finance Comm. Hearings, supra* note 199, at 31.

212. *Id.* at 32.

ment,²¹³ or providing "carrots" as well as "sticks." One key possibility consists of emphasizing the enhanced enforcement of whatever standards the producing countries adopt. This approach, which was taken by NAFTA toward Mexico, is easy on the sovereignty concerns of the other countries, but still capable of yielding tangible benefits.²¹⁴

A particularly promising approach is drafting trade agreements so that they accord recognition to international environmental agreements (IEAs).²¹⁵ In this way, FTAA could link up with implementation efforts for a number of international environmental agreements, such as the convention to combat desertification.²¹⁶ As with placing an increased emphasis on enforcement, rather than on changing standards, this approach goes easier on sovereignty concerns, to the extent that Latin American countries have already agreed to these IEAs and need only give them the priority that goes to implementing economic programs of which the other trade agreement provisions are a part.

Another approach, the key aspect of which has been called "transboundary remediation," is to use trade agreements to accord recognition to international financing and aid on environmental projects. For example, NAFTA's side agreement established a complex system for financing environmental projects in the border region of the United States and Mexico, including the creation of a North American Development Bank. The Inter-American Development Bank has an environment division that provides loans for environmental projects.²¹⁷ An arrangement by which FTAA materially helps in financing the environmental infrastructure of Latin American countries is a practical way to unify the arguments of both free traders and environmental advocates—trade is used to help developing

213. See, e.g., Jonathan Friedland, *Green Chile: Across Latin America, New Environmentalists Extend Their Reach*, WALL ST. J., Mar. 26, 1997, at A1.

214. See PIERRE MARC JOHNSON & ANDRE BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* 48-49 (1996).

215. For example, section 104 of NAFTA provides that obligations under several such agreements prevail in the event of any inconsistency with NAFTA. Housman, *NAFTA's Lessons*, *supra* note 137, at 398-400.

216. See *Regional Desertification Unit for Caribbean, Latin America to Be Set Up in Mexico City*, Daily Env't Rep. (BNA), June 26, 1997, available in LEXIS, BNA Library, BNAEVR File.

217. See *Development Bank's Environment Chief Declares Commitment to Loan Expansion*, Daily Env't Rep. (BNA), Apr. 10, 1996, available in LEXIS, BNA Library, BNAEVR File.

countries become able to afford environmental protection, while simultaneously directly responding to the concerns of environmentalists.

A great deal will depend on the extent to which the United States offers to trade off acceptance of other countries' positions in particular business sectors for their acceptance of environmental and labor safeguards. This, in turn, will adumbrate possibilities during Congressional consideration of implementation legislation for FTAA.²¹⁸ Just as President Clinton "sweetened" the NAFTA deal for Congressional approval by negotiating new environment and labor side agreements, so FTAA negotiations may anticipate not only the acceptability of FTAA's own treatment of these issues, but the direction of follow-on efforts by the President and Congress.

Perhaps the most head-on confrontations will occur regarding labor issues. For example, Chile has resisted any change in its antiunion legislation, despite the adverse effect this has had on its trade negotiations with the United States.²¹⁹ Moreover, the recently created MERCOSUR conspicuously does not cover labor issues.²²⁰

A potentially effective approach for dealing with labor issues might be to emphasize that Latin American trading partners are already subject to some existing U.S. laws and ILO conventions. The United States could start from a refusal to yield on its existing laws, such as the GSP, and from the position that Latin American signatories to ILO conventions have accepted those conventions. One of President Clinton's November 1997 "Executive Initiatives" complementing fast track was to conduct reviews of the labor laws and practices of prospective partners in free trade agreements.²²¹ From this, the United States could add, as with NAFTA, that if its trading partners attempt to woo investment or trade by reducing their labor stan-

218. For example, an FTAA will face some of the same National Environmental Policy Act (NEPA) hurdles that NAFTA did. See generally Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 MINN. J. GLOBAL TRADE 195 (1994) (describing operation of NEPA and need for environmental assessments in general).

219. See Matt Moffett, *Pinochet's Legacy: Chile's Labor Law Hobbles Its Workers and Troubles the U.S.*, WALL ST. J., Oct. 15, 1997, at A1.

220. See Marcelo Montenegro, *Labor and Mercosur*, in FREE TRADE AND ECONOMIC RESTRUCTURING IN LATIN AMERICA 181 (Fred Rosen & Deidre McFadyen eds., 1995).

221. See *Statement of Executive Initiatives*, supra note 114.

dards or failing to enforce them, they would be acting inappropriately.²²²

Finally, the United States might attempt to introduce dispute resolution efforts tailored specifically for labor issues. In NAFTA, the United States took a graduated approach to labor issues, providing a more labor-friendly enforcement mechanism for three issues, including child labor, and a less labor-friendly mechanism for two other issues, including the key issue of union organizing. The use of a similar technique which might pave the way for graduated treatment of labor issues might have two manifestations. First, the United States could use labor issues as tiered readiness criteria for the admission of particular FTAA countries to particular levels of trade benefits. Second, it could provide for sanctions such as partial "snap-backs,"—re-raising of U.S. tariff barriers upon determinations of shortfalls on particular labor issues.²²³

C. DOMESTIC ISSUES

Regarding domestic issues, the 1997 debate seemed to lead to a clear conclusion that the United States will not allow agreements such as FTAA to force a lowering of United States' domestic standards. As the USTR testified: "[W]e must be mindful of the fact that we preserve the right to set our own health and safety standards, however high we wish those standards to be, and this is also a principle enshrined in the WTO."²²⁴

Here, again, the political background to the 1997 extension provides important negotiating guidance.²²⁵ Any suggestion of lowering U.S. domestic standards would have stirred up intense opposition to trade agreements. Thus, the United States cannot

222. As the USTR testified in 1997: "With respect to the question of specific barriers to trade . . . we see the very important principle, that foreign countries should not lower their existing health and safety standards, should not lower their existing environmental standards to attract investment." *Senate Finance Comm. Hearings, supra* note 199, at 29.

223. Approaches such as tiered readiness criteria and snapbacks are discussed in Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 *CONN. J. INT'L L.* 301, 330-35 (1995).

224. *Senate Finance Comm. Hearings, supra* note 199, at 30.

225. Perhaps the single most symbolically important NAFTA issue regarding lowering of United States' domestic standards concerned allowing Mexican truck drivers who had not gone through the equivalent of state licensing procedures in the United States to haul cargo. President Clinton backed away from forcing this change, even though NAFTA had seemed to anticipate it. President Clinton deferred immediate action of the kind desired both by Mexico and by industry-allied state governors. *See supra* note 153.

offer such a proposal during FTAA negotiations. If Latin American trade partners desire a kind of market access that can be achieved only by invalidation of domestic standards, they will have to deal with the frank disbelief in U.S. public opinion that its high environmental and other standards actually amount to protectionism.

V. CONCLUSION: THE FUTURE OF THE EVOLVING FIELD OF ENVIRONMENTAL AND LABOR ISSUES ON THE FAST TRACK

The 1997 fast track debate brought environmental and labor issues to the center of trade agreement decision-making for FTAA. A polarized Congress, which initially pushed one way and then the other, did not extend fast track, in part, because of the fear that strong environmental and labor standards would not be included in negotiations. This debate has locked inclusion of environmental and labor issues into international negotiation. The integration of the U.S. economy with those of its less developed trading partners makes these issues a central focus of public concern over the effect of globalization. Only inclusion of the issues assuages this concern. Whatever the basis on which FTAA negotiations proceed—whether with the expectation of fast track extension in 1998, or on some other basis—it must take into account these issues to achieve ultimate Congressional approval of any FTAA agreements.

Various groups and trends will influence exactly how labor and environmental issues will be dealt with in the formation of the FTAA. The system of trade agreement negotiation, and fast track approval, does best at those environmental and labor issues which starkly pose the issue of inappropriate competitive advantage for other nations. Since negotiation and approval centrally concern how other nations, and how the U.S. public, perceive what the agreement does to the U.S. trading position, the issue of inappropriate competitive advantage translates readily from the national to the international agenda and back.

Other environmental and labor issues do not travel so easily. Within the United States, the relative fortunes of the two major political parties affect attitudes toward environmental and labor issues. Presidents of different parties treat them differently; Congressional majorities of different parties treat them differently. To some extent, the trade negotiating process operates as an intermediary, while developments can occur in other contexts. On domestic issues, environmental and labor regula-

tion creates potential barriers to foreign trade that the trade negotiation process can only deal with gingerly. On external issues, the United States pushes its views through multilateral negotiation of IEAs and, sometimes, through unilateral legislation.

The trade negotiation process accomplishes a good deal merely by keeping trade agreements from undermining what occurs on these issues in other contexts. Ideally, however, it does more. It provides a series of ways that the Congressional-Presidential interaction can take readings of the temper of the U.S. public on these issues, and effectively translate them into negotiating positions at those key moments in trade negotiations when the nations have each other's attention. If so, then FTAA negotiations will yield tangible progress in the Americas in the important sphere of trade-related environmental and labor issues.

