No Time for NEPA: Trade Agreements on a Fast Track

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In June 1993, a decision by U.S. District Court Judge Charles R. Richey rocked the U.S. trade policy community.[1] Judge Richey ruled that an environmental impact statement (EIS) had to be prepared for the North American Free Trade Agreement[2] (NAFTA).[3] The decision was seen as being troublesome in several ways. It could have delayed or possibly derailed NAFTA, which was due to roll into force on January 1, 1994. It threatened to interfere with the well-greased fast-track machinery for implementing trade agreements. Moreover, it seemed to legitimize the view that NAFTA might be bad for the environment.

As things turned out, little damage was done.[4] Judge Richey's decision was overruled by the U.S. Court of Appeals.[5] NAFTA was approved by Congress and went into force as scheduled. The environment has not suffered any obvious harm as a result of NAFTA. So what's the problem? This Article argues that the U.S. government does indeed have a problem, because its mechanisms are inadequate for assuring the sensitivity of

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1. Public Citizen v. Office of the U.S. Trade Representative, 822 F.Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *and cert. denied*, 114 S.Ct. 685 (1994). *See generally The National Environmental Policy Act and the North American Free Trade Agreement: Hearing #219 Before the Committee on Environment and Public Works*, 103d Cong., 1st Sess. (July 22, 1993) [hereinafter Senate Hearing].

2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mexico-Canada, *reprinted in* 32 I.L.M. 605 (1993) [hereinafter NAFTA].

3. *Public Citizen*, 822 F.Supp. at 30.

4. Actually, it could be argued that the decision benefited NAFTA by uniting the pro-NAFTA camp for the first time during the Clinton Administration.

5. Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 685 (1994).

trade agreements to environmental and health concerns.[6] This analytical deficiency magnifies in importance when one reflects on the resurgence of protectionism in the United States.[7]

In any mainstream American bookstore today one can find books inveighing against free trade and highlighting the dangers of trade to the environment.[8] This is a new development in the post-World War II period.[9] Of course, for some time there have been books advocating fairer trade (or tougher policies against Japan), but an actual rejection of free trade is a significant departure.[10] Indeed, some authors in this new school are actually proud to identify themselves as "protectionist."[11]

The environmental critique of free trade is of recent vintage. Two decades ago, there was a burst of scholarship about the dangers of economic growth to the environment, but international trade was not cast as a culprit.[12] Today, the impact of international trade and trade rules on the environment is viewed as a major problem.[13] The analyses offered by some com-

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6. *See* AL GORE, EARTH IN THE BALANCE 343 (1992) ("environmental standards must be included among the criteria for deciding when to liberalize trading arrangements with each country").

7. For background on protectionism in general, see JAGDISH BHAGWATI, PROTECTIONISM ch. 3 (1988). For a good review of some trends favorable to trade, see I.M. DESTLER & JOHN. S. ODELL, ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS (1987).

8. *See, e.g.,* RALPH NADER ET AL., THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER (1993); THE POLITICAL ECONOMY OF NORTH AMERICAN FREE TRADE (Ricardo Grinspun & Maxwell A. Cameron eds., 1993); RAVI BATRA, THE MYTH OF FREE TRADE: A PLAN FOR AMERICA'S ECONOMIC REVIVAL (1993). These issues are also covered, on a day to day basis, in two conferences on the Internet.

9. On U.S. trade policy in the post-War period, see generally STEFANIE ANN LENWAY, THE POLITICS OF U.S. INTERNATIONAL TRADE: PROTECTION, EXPANSION, AND ESCAPE (1985).

10. One exception is the work of John M. Culbertson, an economics professor at the University of Wisconsin. *See* JOHN M. CULBERTSON, INTERNATIONAL TRADE AND THE FUTURE OF THE WEST (1984); JOHN M. CULBERTSON, THE DANGERS OF "FREE TRADE" (1985). Culbertson was viewed by many colleagues as offering antiquated views. As it turned out, he anticipated the intellectual reinvigoration of protectionism. *See also* Bruce Stokes, *Debunking Free Trade,* 16 NAT'L J. 1831 (1984).

11. *See* TIM LANG & COLIN HINES, THE NEW PROTECTIONISM: PROTECTING THE FUTURE AGAINST FREE TRADE (1993).

12. *See, e.g.,* ECONOMIC GROWTH VS. THE ENVIRONMENT (Warren A. Johnson & John Hardesty eds., 1971). In a history of the ecological movement, international trade is barely mentioned. *See* ANNA BRAMWELL, ECOLOGY IN THE 20TH CENTURY: A HISTORY (1989).

13. For a discussion of the major issues from diverse perspectives, see TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY (Durwood Zaelke et al. eds., 1993). For a portrayal to generalists, see Monika Bauerlein,

mentators are startling and frightening. For example, Ravi Batra writes that "since trade pollutes the earth, it is essential that it be kept to the minimum. Free trade leads to maximum trade, but environmental considerations call for minimum trade."[14] Lang and Hines point out that the

> historical practice of protectionism we call the old protectionism because it was used by big and powerful interests to pursue *their* goals. The second we call the New Protectionism because it seeks to protect *public* interests, like health or the environment or safety standards or reduction of poverty, against the interests of unrestrained trade.[15]

Herman E. Daly explains that:

> [f]ree trade is likely to stimulate the growth of throughput. It allows a country in effect to exceed its domestic regenerative and absorptive limits by "importing" those capacities from other countries. . . . Measures to integrate national economies further should now be treated as a bad idea unless proved otherwise in specific cases.[16]

Walter Russell Mead states that:

> The parties to both the General Agreement on Tariffs and Trade[17] (GATT) and NAFTA have failed to resist — and have sometimes even encouraged — the development of trade rules that undercut American interests. GATT does not, for example, require companies wishing to participate in international trade to observe the most minimal safety, health, and environmental standards.[18]

Whatever one thinks about the validity of these points, they are noteworthy in being expressed so straightforwardly. It is unclear why such views are flowering at this time.[19] One factor may be the Clinton Administration's rhetoric in favor of managed trade, particularly in early 1993.[20] After all, if trade can be

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GATTzilla: Rethinking the Global Economy, UTNE READER, No. 61, Jan.-Feb. 1994, at 19.

14. BATRA, *supra* note 8, at 245-46. Batra is a professor of economics.

15. LANG & HINES, *supra* note 11, at 6-7.

16. Herman E. Daly, *The Perils of Free Trade*, SCI. AM., Nov. 1993, at 50, 57. In an interesting explication of how comparative advantage works, Daly illustrates that the mobility of capital from Country A to Country B could lead to a situation where Country B produces everything and A produces nothing. *Id.* at 52 (see the empty box). And that in a journal about science!

17. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

18. Walter Russell Mead, *The New Global Marketplace*, *in* CHANGING AMERICA: BLUEPRINTS FOR THE NEW ADMINISTRATION 196, 203 (Mark Green ed., 1992).

19. Other exponents of the new school include Edmund G. Brown, Jr., William Greider, Thea Lee, David Morris, Ralph Nader, Ross Perot, Ian Robinson, Steven Shrybman, and Lori Wallach.

20. *See, e.g.*, *Clinton Chief Economic Adviser Lays Out Two-Track Approach to Trade Policy*, INSIDE U.S. TRADE, Jan. 22, 1993, at 1; *Kantor, Brown Say U.S. Determined to Enforce Chip Deal with Japanese*, INSIDE U.S. TRADE, Mar. 5, 1993 at 1; *Kantor Says U.S., Japan Need to Review Commitments on*

managed for mercantilist purposes, managing it for environmental purposes would seem even better.

This Article discusses the need for environmental assessments of trade agreements and how such assessments can best be carried out. Part I discusses the historical authority of the President to negotiate trade agreements, and how that authority has evolved into and affected fast-track authority. Part II discusses the National Environmental Policy Act (NEPA)[21] and whether it is applicable to trade agreements. Part III discusses how the competing policies of fast track and NEPA played out in the NAFTA debate, specifically in the case of *Public Citizen v. U.S. Trade Representative*.[22] Part IV discusses the reality of how NAFTA affected existing U.S. laws by demonstrating the Agreement's impact on U.S. health laws. Part V concludes that environmental assessments of trade agreements are necessary, and considers how the U.S. government might improve the process of considering the environmental aspects of trade agreements.

I. PRESIDENTIAL AUTHORITY, TRADE AGREEMENTS AND FAST-TRACK

Because of its venerable but peculiar form of government, the United States can have difficulties in making trade agreements. Trade negotiations are an inherently executive function, but the President has no express authority under the Constitution for conducting them. The Constitution gives to Congress the authority "to regulate commerce with foreign nations."[23] Of course, the President is not precluded from conducting negotiations of any kind with foreign sovereigns. If the President makes a treaty, the consent of the U.S. Senate must be obtained,

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Auto Parts Purchase, INSIDE U.S. TRADE, Mar. 5, 1993, at 4; *Trade Officials, Senators Embrace "Results-Oriented" Japan Policy*, INSIDE U.S. TRADE, Mar. 19, 1993, at 6; *Administration Steps Up Pressure on China to Open Services Market to U.S. Firms*, INSIDE U.S. TRADE, Apr. 2, 1993, at 7; *USTR Reviewing Foreign Compliance with Trade Agreements, Eyes 301 Cases*, INSIDE U.S. TRADE, Apr. 16, 1993, at 17.

21. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4321 *et seq.*).

22. Public Citizen v. Office of the U.S. Trade Representative, 822 F.Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *and cert. denied*, 114 S.Ct. 685 (1994).

23. U.S. CONST. art. 1, § 8, cl. 3. There are other countries where trade agreements have to be approved by the legislature — for example, Canada, Japan, Mexico, and Switzerland. Many of these, however, are parliamentary systems.

by a vote of two-thirds, before it can be ratified.[24] If the treaty involves any changes in U.S. tariffs, as many trade accords do, the President must also secure legislation which alters the tariffs or gives him authority to do so.[25] Such legislation must originate in the U.S. House of Representatives.[26]

These Constitutional strictures put the President at a disadvantage vis-a-vis other governments. While the President can negotiate anything with foreign countries, the other countries are not going to negotiate unless they believe that those commitments will be honored. The other countries know that the President's ability to deliver on such promises depends upon Congress. Given this predicament, foreign plenipotentiaries may be wary of making deals with American impotentiaries.

Congress has long recognized this predicament and has taken steps to remedy this Presidential infirmity. Grants of negotiating authority to the President go back at least as early as 1798, when Congress empowered President Adams to terminate the trade embargo against France if a modus vivendi could be reached.[27] Throughout the 19th century, Congress experimented with many different types of authorizations to the President regarding trade. Yet little commercial liberalization eventuated, in part because the grants of authority were too narrow.[28]

In the Reciprocal Trade Agreements Act of 1934, Congress clothed the President with broad authority to negotiate trade agreements and to lower U.S. tariffs.[29] As David Lake has perceptively observed, this law "contained little that had not already been enacted into previous tariff acts. . . . [The Act] is unique, however, in delegating all of these various powers to the president simultaneously."[30] The authority given to the Presi-

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24. *Id.* art. 2, § 2, cl. 2. See SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 195-99 (2d ed. 1916) and references therein.

25. U.S. CONST. art. 1, § 8, cl. 1.

26. For example, Congress enacted a law to implement the Canada-U.S. Reciprocal Tariff Arrangement of 1911. *See* Law of July 26, 1911, ch. 3, 37 Stat. 4 (1911).

27. Law of June 13, 1798, ch. 53, 1 Stat. 565 (1798).

28. For a good study of the late 19th century authorizations, see CAROLYN RHODES, RECIPROCITY, U.S. TRADE POLICY, AND THE GATT REGIME 21-52 (1993). *See also* JOHN M. DOBSON, TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE U.S. INTERNATIONAL TRADE COMMISSION (1976).

29. Law of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. §§ 1351-1354 (1988)). Previously, section 320 of the Tariff Act of 1930 had provided such authority for trade agreements relating to advertising matter. This was trackless authority.

30. DAVID A. LAKE, POWER, PROTECTION, AND FREE TRADE 205 (1988).

dent was plenary. He could proclaim tariff reductions[31] and make other trade commitments without any further action by Congress.[32] One might view this as trackless authority.[33]

With the exception of brief expirations, this authority was continued by Congress until October 1967.[34] At that time, it lapsed until the enactment of the Trade Act of 1974,[35] which provided new trackless tariff-cutting authority for five years.[36] Because the new multilateral trade negotiations (i.e., the Tokyo Round) were to consider a broad range of non-tariff barriers, it was recognized that the traditional authority was not enough. The President needed to be able to show other nations, particularly the European Community, that he could deliver on any commitments to change U.S. law. Policymakers remembered the previous Kennedy trade round in the 1960s, where two agreements had been reached requiring U.S. implementing legislation and both ended in frustration. In one episode involving the anti-dumping code, implementing legislation was enacted that negated the agreement reached in Geneva.[37] In the other, involving the American selling price,[38] the implementing legislation was stalled in a House committee.[39]

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31. In a bow to protectionists, the Act permitted the President to raise or lower tariffs. But, as Cordell Hull noted in his memoirs, "it was obvious that we would reduce them, since no other country would sign an agreement to increase our tariffs." *See* 1 CORDELL HULL, THE MEMOIRS OF CORDELL HULL 359 (1948).

32. This authority was used repeatedly for bilateral trade agreements. From 1947 to 1948, it was also used for the multilateral GATT agreement. *See* DOBSON, *supra* note 28, at 106-14.

33. The President has other trackless authority, not discussed here, to negotiate agreements that limit agricultural and textile imports and authority to enforce those agreements. He also has authority to impose restrictions on non-parties to the agreements. *See* 7 U.S.C. § 1854 (1988).

34. See DOBSON, *supra* note 28, at 144, for a list of the extensions of trade negotiating authority and their dates. *See also* 19 U.S.C. § 1351 (1988) and notes therein. In addition, Pub. L. No. 89-283 § 201 provided tariff proclamation authority for one day (subject to Congressional disapproval) for the Canada-U.S. Agreement Concerning Automotive Products. *See* 17 U.S.T. 1372.

35. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975).

36. This authority was narrower than previous authority in that the proclamation authority did not extend to "other import restrictions." *Compare* 19 U.S.C. § 1351(a)(1)(B) *with* 19 U.S.C. §§ 2111(a)(2), 2115 (1982).

37. THIRTEENTH ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, 1968, H.R. DOC. NO. 204, 91st Cong., 1st Sess. 9 (1969).

38. This was an arcane and unfair procedure, now discontinued, whereby the U.S. tariff was based on the American selling price of a competing good rather than on the landed value of the import. *See* KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 189-92 (1970).

39. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 54 (1989).

To deal with this difficulty, President Nixon proposed that he be permitted to effectuate trade agreements subject to a one-House legislative veto.[40] The idea (surprisingly, in retrospect) passed the House, but stalled in the Senate.[41] Instead, a new fast-track procedure was crafted to assure that the implementing legislation needed for a trade agreement would be voted on by Congress unamended within sixty days in session[42] (or ninety days for a revenue bill) in the form written by the Administration.[43] Of course, there was no guarantee that Congress would pass the legislation[44] — numerous consultation and advisory procedures were written into the law to increase the likelihood that the Executive Branch would stay in sync with Congress.[45]

Fast track has two components: non-amendability, and a guaranteed vote. Non-amendability was designed to deal with the situation exemplified by the implementation of the anti-dumping code.[46] The guaranteed vote was designed to deal with the situation exemplified by the American selling price agreement.[47] Actually, the idea of non-amendability of trade agreements was not new. The Canadian Reciprocity Act of 1911 had

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40. *See* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1973, at 262 (1975).

41. *See* I.M. DESTLER, AMERICAN TRADE POLITICS 62-65 (1986).

42. Session days are neither calendar days nor legislative days. The definition of this "day" is at 19 U.S.C. § 2191(e)(3) (1988 & Supp. 1993).

43. Pub. L. No. 93-618, § 151, 88 Stat. 2317 (codified at 19 U.S.C. § 2191 (1988 & Supp. 1993)). Fast track procedures have been modified over the intervening period, but these changes are not significant for the purpose of this Article.

44. As Judith Bello has observed, however, "[w]ith the fast track procedures, trading partners have at least a reasonable degree of confidence in the President's ability to speak with one voice for the United States in trade negotiations." Senate Hearing, *supra* note 1, at 55 (statement of Judith H. Bello). *See also* Alan F. Holmer & Judith H. Bello, *The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L LAW. 183 (1992).

45. For a discussion of fast track's formal and informal procedures and some thoughtful proposals for reform, see Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 170 (1992). For further background on fast track, see Edmund Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471 (1990).

46. *See supra* text accompanying note 37.

47. *See supra* text accompanying notes 38-39. The guaranteed vote appears to have been unprecedented. In 1979, the Senate Finance Committee characterized it as a "unique Constitutional experiment." S. REP. No. 249, 96th Cong., 1st Sess. 5 (1979). There were about a dozen prior concurrent resolutions that had privilege, some approval and some disapproval, but no guaranteed vote on legislation. *See* JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 416, 93d Cong., 2d Sess., § 1013 (1975).

provided for an up-or-down vote on future trade agreements with Canada.[48] In 1913, the Underwood Tariff had extended this to reciprocal trade agreements with any country.[49]

Although enacted as part of a law, fast track is also a rule of both the House and the Senate.[50] The Senate rule is the procedurally-significant one. Since a majority of the House can always work its will (eventually), fast track serves only a facilitative purpose in the House.[51] It is interesting to note that before considering NAFTA the House passed a new rule that superseded fast track.[52] Its real significance lies in the Senate, where supermajorities are required to forestall amendments or bring legislation to a vote.

The fast track procedure was used successfully in 1979 to make changes in U.S. law necessary to implement the Tokyo Round trade agreements.[53] The trackless tariff authority expired in 1980.[54] The Trade Agreements Act of 1979 extended

48. Law of July 26, 1911, ch. 3, § 3, 37 Stat. 4, 12 (1911) (repealed). The exact language was that "said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection." *Id.*

49. Law of Oct. 3, 1913, ch. 16, § 4, 38 Stat. 114, 192 (1913) (repealed). No trade agreements were submitted under this authority or the 1911 authority.

50. 19 U.S.C. § 2191(a)(2) (1988). One Justice Department brief states that the fast track is a rule "[b]ecause Congress can neither encumber the President's powers to negotiate with foreign governments and transmit legislation to Congress, nor bind a future Congress to particular rules governing its proceedings . . . ." *See* Memorandum of Points and Authorities in Support of the Defendant's Motion to Dismiss or in the Alternative For Summary Judgment at 8, Public Citizen v. Office of the United States Trade Representative, 782 F.Supp. 139 (D.D.C. 1992) (No. 91-1916), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992) [hereinafter Motion in Opposition to Plaintiff's Motion for Summary Judgment]. But neither of these "explanations" clarify why fast track is a rule within a law. First, using a rule makes fast track enforceable within each House. Second, using a rule preserves the prerogative of each House to change the rule independently of the other and independently of the President.

51. It adds nothing to the power of the House majority to pass a rule imposing a fast track, and detracts nothing from the power of the majority to pass a rule negating fast track. *See* JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 405, 102d Cong., 2d Sess., §§ 59, 729a (1992). Of course, fast track can be helpful in the House in moving a bill out of committees.

52. *See* 139 CONG. REC. H9856, 9872 (daily ed. Nov. 17, 1993) (debate on H.R. 311). This rule waived all points of order and limited debate to eight hours.

53. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

54. Pub. L. No. 93-618, tit. 1, ch. 1, § 102(b), 88 Stat. 1978, 1982-83 (1975) (codified at 19 U.S.C. § 2111 (1988)). Some residual authority remained for two years. *See* § 124, 19 U.S.C. 2134 (1988).

fast track authority for non-tariff barriers until 1988.[55] In 1984, Congress added new procedural requirements for the use of this authority for bilateral trade agreements.[56] This 1979 authority (as modified in 1984) was used for the approval of the Israel-U.S. free trade agreement[57] and the Canada-U.S. free trade agreement.[58] The President did not have proclamation authority in either case.

In the Omnibus Trade and Competitiveness Act of 1988,[59] Congress provided new negotiating authority for both bilateral and multilateral agreements. The bilateral authority provided a fast track for the entire package.[60] The multilateral authority provided tariff-cutting authority by proclamation and fast track for the rest of the package.[61] Both authorities expired[62] in March 1991, but were extended by President Bush (in the absence of Congressional disapproval) for two years.[63] The bilateral authority was used in 1992 for entering into NAFTA.[64] On March 2, 1993, both authorities expired.[65] The multilateral authority was later extended to December 15, 1993,[66] but without

55. Pub. L. No. 96-39, tit. XI, § 1101, 93 Stat. 144, 307 (1979) (codified at 19 U.S.C. § 2112 (1988 & Supp. 1993)).

56. Trade and Tariff Act of 1984, Pub. L. No. 98-573, tit. IV, 98 Stat. 2948, 3013 (1984). Some very limited multilateral proclamation authority was provided for five years for certain high technology goods. *Id.* § 308.

57. United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (1985) (codified as amended at 19 U.S.C. § 2112 (1988 & Supp. 1993)).

58. United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) (codified as amended at 19 U.S.C. § 2112 (1988)).

59. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended in scattered sections of 19 U.S.C. (1988)).

60. 19 U.S.C. §§ 2902(c), 2903(a), 2903(b) (1988 & Supp. 1993).

61. 19 U.S.C. §§ 2902(a), 2903(a), 2903(b) (1988 & Supp. 1993). It is interesting to note that this multilateral authority was available for the tariff components of NAFTA, but would not have permitted fully free trade (i.e., zero tariffs) because of the statutory limits on tariff cutting.

62. All dates in this paragraph are the final dates on which the President can notify Congress that he intends to enter into a trade agreement.

63. THE EXTENSION OF FAST TRACK PROCEDURES, H.R. DOC. NO. 51, 102d Cong., 1st Sess. (1991).

64. *See* Letter to Congressional Leaders on the North American Free Trade Agreement, 28 WEEKLY COMP. PRES. DOC. 1689 (Sept. 18, 1992). The President does not actually state whether he was using the multilateral or the bilateral authority. *See supra* text accompanying notes 60-61.

65. 19 U.S.C. §§ 2902(a)(1), 2902(c)(1), 2903(a)(1) (1988 & Supp. 1993).

66. Uruguay Round of Multilateral Trade Negotiations, Pub. L. No. 103-49, 107 Stat. 239 (1993). The President made this notification for the Uruguay Round on December 15, 1993.

trackless (i.e., proclamation) authority for tariffs.[67] In other words, the President's tariff-cutting authority, which had begun in 1934, was discontinued. All fast-track authority for trade negotiations ceased on December 15, 1993.[68]

Since fast track authority is a discretionary act of both Houses of Congress, the legislators may set any condition they want — including preparation of an EIS.[69] The President remains free to avoid such conditions by recommending the needed trade legislation without the procedural advantage of fast track (but a return to the "regular order" would be a very difficult course for the President — and for Congress![70]). The President also remains free to submit any trade agreement to the Senate for consideration as a *treaty*.[71] Of course, any tariff cuts would probably still have to be legislated under the normal legislative process for revenue bills.[72]

In summary, fast track has been the key procedural linchpin of U.S. trade policy since 1974. The President gained the

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67. Pub. L. No. 103-49, 107 Stat. 239 (1993) (codified at 19 U.S.C. § 2902(e)(2) (1988 & Supp. 1993)). The proclamation authority is predicated on the passage of implementing legislation.

68. *Id.* Other trade-related fast track authority exists however. *See, e.g.*, 19 U.S.C. § 2905(c) (1988); United States-Canada Free Trade Agreement Implementation Act of 1985, Pub. L. No. 100-449, § 304(c), 102 Stat. 1851, 1874 (1985). There is some limited proclamation authority in the implementing legislation for the Canada-U.S. Free Trade Agreement and for NAFTA. *See* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, §§ 201, 202(q), 107 Stat. 2057, 2068, 2086 (1993).

69. The Justice Department agreed in 1991 that the Congress could add an EIS requirement to fast track conditions. *See* Motion in Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 50, at 42 n.16. One might also note that the Congress applied the PAYGO rule, which is a rule within a law, to NAFTA. *See* Congressional Budget Act of 1974, Pub. L. No. 93-344, tit. III, § 311, 88 Stat. 297, 316 (1974) (as amended); Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 252, 99 Stat. 1037, 1072 (1985) (as amended). This required that the tariff cuts in NAFTA be offset by tax increases and spending cuts. No one argued that these rules infringed upon the President's Constitutional "powers" in foreign policy or upon his duty to recommend measures to the Congress.

70. The regular order during the Kennedy Round was what led to fast track in the first place. The regular order before the Reciprocal Trade Agreements Act of 1934 had also proved unsatisfactory. *See* E.E. SCHATTSCHNEIDER, POLITICS, PRESSURE AND THE TARIFF (1935).

71. Although the NAFTA is commonly referred to as a U.S. "treaty", it is not. Rather, it is an executive agreement pursuant to Congressional authorization.

72. For a discussion of how treaties that lower taxes interrelate with revenue legislation, see Irwin Halpern, *United States Treaty Obligations, Revenue Laws, and New Section 7852(d) of the Internal Revenue Code*, 5 FLA. INT'L L.J. 1 (1989).

credibility needed to get foreign governments to negotiate and Congress retained a final say on accepting the agreements.[73]

II. THE NATIONAL ENVIRONMENTAL POLICY ACT AND TRADE AGREEMENTS

The Constitution establishes no rules on when federal actions must be accompanied by environmental impact statements. However, in 1969, Congress enacted the National Environmental Policy Act (NEPA) which includes requirements for environmental impact statements.[74] Specifically, the law requires that:

> all agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[75]

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73. One might note that the Justice Department has a different take on the situation. Their brief states that:

> President Bush's negotiation and signing of NAFTA, and President Clinton's transmittal of NAFTA to Congress and conclusion of related agreements . . . [are] undertaken in the exercise of their constitutional authority over international agreements. . . . The Trade Acts, and the fast-track rules they incorporate, recognize the President's primacy in these international negotiations.

Brief for the Appellants at 12-13, Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 114 S.Ct. 685 (1994). The reference to "related agreements" appears to be an assertion of the President's Constitutional authority to conclude executive agreements (i.e., the NAFTA side agreements) with Mexico and Canada.

74. Pub. L. No. 91-190, 83 Stat. 855 (1970) (codified at 42 U.S.C. § 4321 *et. seq*). The law was not signed by President Nixon until 1970.

75. 42 U.S.C. § 4332 (1988). For a discussion of NEPA procedures, see ENVIRONMENTAL LAW INSTITUTE, NEPA DESKBOOK (1989). *See also* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT (1990); David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 396-99 (1991).

For over twenty years, the EIS process has served as one of the cornerstones of U.S. environmental policy.[76] It has added greater objectivity, transparency, and public participation to the decisionmaking process.[77] According to Nicholas C. Yost, NEPA has become the model for environmental impact assessment laws in some eighty-four countries, which may make it the "most imitated law in U.S. history."[78] Although it is not clear how much NEPA has improved policy results, most commentators would view it as a qualified success.[79]

The concept of EIS's has been endorsed in several international fora.[80] For instance, there is a U.N. Convention on Environmental Impact Assessment in a Transboundary Context.[81] The Rio Declaration on Environment and Development also affirms the importance of environmental reviews.[82]

While neither of these U.N. statements expressly addresses trade reviews, the Organisation for Economic Co-operation and Development (OECD) has made recommendations on the trade-environment nexis.[83] Specifically, the OECD Council has recommended that governments

> examine trade and environmental policies and agreements for potentially significant effects on other policy areas early in their development so that the implications for that other policy area may be

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76. In recent years, the U.S. government has pressed for environmental assessments in international financial institutions. *See* 22 U.S.C. § 262m-7 (1988 & Supp. 1993); Silvia M. Riechel, *Government Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115 (1994).

77. *See Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. L. 447 (1990).

78. Senate Hearing, *supra* note 1, at 49-50. *See also* Geoffrey Wandesforde-Smith, *Environmental Impact Assessment, in* TRENDS IN ENVIRONMENTAL POLICY AND LAW 101 (Michael Bothe ed., 1980); DAVID HUNTER ET AL., UNITED NATIONS, CONCEPTS AND PRINCIPLES OF INTERNATIONAL ECONOMIC LAW (1993).

79. *See* Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. 10060, 10062 (1989).

80. For a more detailed discussion, see Peter L. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L ENVTL. L. REV. 519, 552-53 (1993).

81. United Nations: Convention on Environmental Impact Assessment in a Transboundary Countext, 30 I.L.M. 800 (1991).

82. "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." Rio Declaration on Environment and Development, Principle 17, 31 I.L.M. 874.

83. This reflects an evolution in the thinking on the subject. The chapter on environmental assessments in an OECD book in 1986 makes no mention of trade agreements. *See* OECD AND THE ENVIRONMENT 28-33, 156 (1986).

> identified and alternative policy options may be developed for addressing concerns. If the examination or review of a trade or environment policy or agreement identifies concerns, government should act to address these concerns.[84]

In addition, the North American Agreement on Environmental Cooperation (NAAEC) commits parties to "assess, as appropriate, environmental impacts."[85]

Does NEPA apply to trade agreements?[86] The language of NEPA and its legislative history suggest that the focus was mainly — but certainly not exclusively — on physical projects.[87] Still, one should be careful in drawing negative inferences, particularly since no trade agreement authority existed in 1969.

There is little reason to doubt that a trade agreement could affect the quality of the human environment.[88] In the case of NAFTA, no doubt exists.[89] The relationship between NAFTA and the environment had been recognized in varying degrees throughout the process.[90] Since a bilateral agreement requires implementing legislation, it is, by definition, a "proposal for legislation."[91] Thus, there are grounds for expecting the "responsible official" to do an EIS for NAFTA. The Bush Administration, however, refused to prepare an EIS.[92]

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84. INSIDE U.S. TRADE, June 11, 1993, at 18.

85. North American Agreement on Environmental Cooperation, Sept. 13, 1993, art. 2.1(e), 32 I.L.M 1480 [hereinafter NAAEC].

86. Five U.S. Senators and 12 House members filed a brief stating that NEPA required EISs for all proposed legislation, including trade agreements. *See* Brief of Bipartisan Congressional Amici Curiae at 1, Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 114 S.Ct. 685 (1994). The 17 amici offered no evidence in support of their statement. Only one of them was serving in Congress at the time NEPA was enacted.

87. But EISs are required for more than projects. *See* 40 C.F.R. § 1508.18(b) (1993).

88. But it is not clear whether a trade agreement can be a "proximate cause" of a change in the physical environment. *See* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).

89. *But see* Reply Brief for the Appellants at 20, Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 114 S.Ct. 685 (1994) (Public Citizen never responds to the fundamental fact that NAFTA itself has no direct environmental effects). At the same time the Justice Department was arguing this in Court, the Clinton Administration was trumpeting NAFTA for its environmental benefits.

90. *See* GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE 131-53 (1992).

91. *See* 40 C.F.R. §§ 1508.17, 1508.18(b)(1) (1993).

92. *See* Patti A. Goldman, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1279, 1283-85 (1992).

While NEPA may apply to economic or commercial agreements negotiated by various U.S. government agencies, a close reading shows that it does not apply to trade agreements made under the authorities discussed above. The NEPA requirement applies only to "agencies." For trade agreements, however, no agency makes a proposal for legislation.[93] The President makes the proposal, and the President is not an agency.[94]

NEPA probably could have been written more broadly so as to impose such a mandate on the President.[95] After all, Congress imposes numerous informational requirements on the President dealing with submissions of budget requests and other legislation.[96] It can be argued that, given the President's Constitutional authority to recommend legislation to Congress,[97] such requirements are only precatory.[98] However, since the President is seeking support from Congress, he is likely to comply.

In summary, the EIS has been one of the key procedural linchpins of U.S. environmental policy since 1970. It has forced government agencies to incorporate environmental considerations into policymaking. The EIS does not assure that a "correct" decision is made. It may, however, make that outcome more likely.

III. THE PUBLIC CITIZEN LAWSUIT: FAST-TRACK VS. NEPA

In August 1991, Public Citizen filed a lawsuit to compel the U.S. Trade Representative (USTR) to issue an EIS on NAFTA. The case was dismissed by the District Court for lack of standing and by the Court of Appeals as premature.[99] After NAFTA was

93. Any agency can recommend trade legislation, but when fast track is used it is the President who recommends the legislation.

94. 40 C.F.R. § 1508.12 (1993). It is interesting to note that Executive Order 12114 on "Environmental Effects Abroad of Major Federal Actions" also exempts actions taken by the President. *See* Executive Order No. 12114, 3 C.F.R. 356 (1980).

95. Alternatively, NEPA (or the Trade Act) could be written to require the USTR to do an EIS for any trade agreement which is sent to Congress by the President. Such a provision would probably be reviewable by the courts and enforceable on the USTR.

96. *See, e.g.*, 31 U.S.C. § 1105 (1988).

97. U.S. CONST. art. II, § 3.

98. For example, during the Bush Administration, the President issued bill signing statements which characterized certain new requirements as precatory.

99. Public Citizen v. Office of the U.S. Trade Representative, 782 F.Supp. 139 (D.D.C. 1992), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992).

completed in 1992, Public Citizen went back to court to ask for the EIS. This led to Judge Richey's decision on June 30, 1993 that the USTR was required to prepare the EIS.[100] The Clinton Administration appealed, and on September 24, 1993, the U.S. Court of Appeals for the District of Columbia ruled that the EIS was not required.[101] The Supreme Court denied certiorari on the appeal without comment.[102]

Public Citizen recognized that the President was not covered by NEPA and, therefore, based its case on the thesis that the USTR, having done most of the work in negotiating NAFTA, was a responsible agency under NEPA. It seems clear that the USTR is an "agency."[103] In support of this thesis, one might note that the USTR has "lead responsibility for the conduct of international trade negotiations."[104] But lead responsibility is not authority. When it comes to signing trade agreements[105] that qualify for fast track treatment, the USTR lacks such authority.[106] It is the President who has trade agreement authority.[107] The President does not need the concurrence of the USTR to sign an agreement or to transmit it to Congress. Indeed, the applicable sections of the statute do not even mention the USTR. The President could have delegated negotiating authority under the 1988 Act to the USTR, but did not do so.[108] Despite this legal situation, Judge Richey, in ruling at the district court level, subscribed to the thesis that the USTR's role

100. Public Citizen v. Office of the U.S. Trade Representative, 822 F.Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *and cert denied*, 114 S.Ct. 685 (1994).

101. *Public Citizen*, 5 F.3d at 549. For further discussion of the Public Citizen lawsuit, see Wendy Leigh Love, *International Trade Agreements and Domestic Environmental Policy: The NAFTA Example*, 19 N.C. J. INT'L L. & COM. REG. 353 (1994), and Kristin R. Loecke, *The National Environmental Policy Act of 1969 and Its Implications for NAFTA: Public Citizen v. United States Trade Representative*, 23 GA. J. INT'L & COMP. L. 603 (1993).

102. *Public Citizen*, 114 S.Ct. 685 (1994).

103. *See, e.g.*, 19 U.S.C. § 2171(f) (1988) (permitting USTR to use *other* Federal agencies).

104. *See* Reorganization Plan No. 3 of 1979, 93 Stat. 1381 (1979); 15 C.F.R. § 2001.3(a) (1994).

105. This does not include signing ad referendum. *See infra* note 108.

106. For the major USTR duties, see 19 U.S.C. § 2171(c)(1) (1988).

107. 19 U.S.C. §§ 2902(c), 2903(a) (1988 & Supp. 1993).

108. Certain authorities — for example, regarding telecommunications negotiations — were delegated. *See* Executive Order No. 12661, 3 C.F.R. 618 (1989). It is unclear whether the President can delegate his fast track authority.

was significant enough to trigger EIS responsibilities under NEPA.[109]

The Court of Appeals decision hinged on a different (and procedurally prior) question: Does any federal court have jurisdiction to consider such a complaint under the Administrative Procedures Act (APA) based on a "final agency action"?[110] The District Court had concluded that it did have jurisdiction because the USTR was an agency under the APA and had taken the final agency action on NAFTA before transmission by the President.[111] The Court of Appeals reversed on the grounds that the final action for NAFTA would be transmittal to Congress by the President.[112] Yet, since the President is not an agency under the APA, no judicial review would be available.[113] The Court thought it unnecessary to reach any conclusion on other claims, such as the applicability of NEPA to trade agreements.[114] Thus, there has been no authoritative judgment on whether Judge Richey was correct about the obligation of the USTR to complete an EIS.

A. LOOKING BACK: THE COUNTERATTACK ON JUDGE RICHEY'S DECISION

The Clinton Administration, many pundits and editorialists, and the U.S. business community, were displeased with Judge Richey's decision.[115] At the time, NAFTA appeared to be on the verge of political collapse, and it was feared that the decision might push it over the edge. Contrary to many accounts of the decision, Judge Richey had not required the implementing legislation to await the EIS. He said simply that he would order an EIS to be prepared by the USTR "with all deliberate speed" because the "statement is essential for providing the Congress and the public the information needed to assess the present and

109. Public Citizen v. Office of the U.S. Trade Representative, 822 F.Supp. 21, 24-27 (D.D.C. 1993).

110. *Public Citizen*, 5 F.3d at 550-51. *See* 5 U.S.C. § 701 *et. seq.*

111. *Public Citizen*, 822 F.Supp. at 21.

112. *Public Citizen*, 5 F.3d at 551-52.

113. *Id.*

114. *Id.* at 552-53. It is interesting to note that following the Appeals Court decision, Ambassador Kantor unaccountably stated that the Court found that "NEPA does not require the Administration to prepare an environmental impact statement." *See* Statement of Ambassador Kantor, Press Release No. 93-64, Sept. 24, 1993 (on file with the *Minnesota Journal of Global Trade*).

115. *See, e.g.*, George F. Will, *Judicial Exhibitionism*, WASH. POST, July 8, 1993, at A17. *But see NAFTA, Meet the Environment*, N.Y. TIMES, July 12, 1993, at A16 (editorial supporting Judge Richey).

future environmental consequences of, as well as the alternatives to, the NAFTA when it is submitted to the Congress for approval."[116] Nevertheless, there was a fear that if Judge Richey's decision was affirmed by the Court of Appeals, the Administration would be forced into preparing the EIS and would be pressed by Congress not to submit NAFTA before such an analysis was ready. It was assumed that such an analysis would take months to prepare, thus making it impossible to pass implementing legislation before Congress adjourned in November.[117] Without such legislation, NAFTA could not go into force as scheduled. Further, there was apprehension that litigation as to the adequacy of the EIS would be initiated, thus further delaying NAFTA.[118] Many in the trade community were also worried about the implications of Judge Richey's decision for other trade agreements, such as the Uruguay Round, and for other international agreements.[119] Although the U.S. Department of State had prepared EIS's for international agreements in the past[120] without any obvious damage to foreign policy, there existed a dread of new constraints.

In response to the unexpected loss, the Clinton Administration supercharged its defense efforts. The District Court decision was portrayed in apocalyptic terms. Every possible argument was used to overturn Judge Richey's decision.[121] By

116. *Public Citizen*, 822 F.Supp. at 30.

117. *See* Casey Bukro, *Nafta Environment Study May Be Incredibly Complex*, J. COM., July 6, 1993, at 3A. *But see Gore Sees No NAFTA Approval Delay*, WASH. POST, July 3, 1993, at A14 (almost all of the work required for that kind of an EIS has been done, Gore said).

118. *See* Brief for the Appellants at 25, Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-512), *cert. denied*, 114 S.Ct. 685 (1994) (judicial review of the adequacy of an EIS can drag on for over a decade).

119. *See, e.g.*, Brink Lindsay, *Car-Bombing by Court Ruling*, J. COM., July 12, 1993, at 8A.

120. *See* Brief of Amici Curiae Natural Resources Defense Council et al. at 12-13, Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 114 S.Ct. 685 (1994) (listing treaties and other actions which have been accompanied by EISs). *See also* 40 C.F.R § 1508.18(b)(1) (1993).

121. A recent article in *The New Yorker* presents some interesting background. In 1987, Mickey Kantor represented litigants suing the city of Beverly Hills in an effort to overturn a recently passed ordinance banning smoking in restaurants. Kantor's lawsuit invoked every sort of argument that could be advanced to criticize the ordinance to the point where it bordered on parody. The lawsuit stated that cleaning the air in restaurants amounted to "altering the indoor environment," and that would require an environmental-impact statement. *See* Stan Sesser, *Opium War Redux*, NEW YORKER, Sept. 13, 1993, at 78, 83.

contrast, much of the environmental community adopted a low-key response, animated more by hope than by fear. Rodger Schlickeisen, president of Defenders of Wildlife, stated that "[a]t its core, NEPA is about [providing] important information to the Congress and to the public, and at a time when NAFTA is encountering considerable political difficulty, we believe such information could actually save it."[122] Kathryn S. Fuller, president of World Wildlife Fund, suggested that "an EIS on a 900-page omnibus revision of trade between three nations may press the utility of an EIS to its breaking point"[123] Instead, she called for better procedures for future trade agreements.[124] An amicus brief from four other environmental groups suggested that the uncumbersome "legislative EIS" would suffice given the stage of NAFTA at that point.[125]

There were several arguments made against an EIS requirement. First, it was argued that an EIS requirement would be an unconstitutional constraint on the power of the President. Second, it was argued that there was not enough time to complete the EIS before NAFTA implementation legislation had to be approved. Third, it was argued that NAFTA's impact on the environment was too uncertain to do an EIS. Fourth, it was argued that the public participation norms of the EIS are not appropriate for trade agreements. Each of these arguments is briefly discussed below.

1. USTR and the Constitution

In its appeal of Judge Richey's decision, the Clinton Administration argued that presidential prerogatives were impermissibly burdened by the district court order. It argued further that "the President's exclusive powers are not subject to statutory dictates or judicial oversight merely because the President chooses to act through ambassadors or other emissaries."[126] In testimony before Congress against Judge Richey's decision, Professor Laurence Tribe argued that construing an Act of Congress to authorize the actions of the District Court in this case would cause Congress to infringe both on the President's and on its

122. Senate Hearing, *supra* note 1, at 15 (statement of Rodger Schlickeisen).

123. *Id.* at 83 (statement of Kathryn S. Fuller).

124. *See id.*

125. Brief of Amici Curiae Natural Resources Defense Council, *supra* note 120, at 18. For the rules on legislative EISs, see 40 C.F.R. § 1506.8 (1993).

126. Brief for the Appellants, *supra* note 73, at 32.

own institutional roles "by constricting the recommendations which the President could make and which it could consider."[127]

The District Court did order the USTR to prepare an EIS statement on NAFTA,[128] but it did not enjoin the submission of NAFTA to Congress pending the completion of such an EIS. Leaving aside the issue of whether the District Court correctly determined NEPA's meaning, both the government and Professor Tribe argued that Congress cannot enact a statute that requires the USTR to produce an EIS for any trade agreement submitted by the President to Congress. This line of argument seems erroneous.

Congress created the USTR and spelled out its duties in legislation. There is nothing in the Constitution that prevents Congress from adding the preparation of EIS's to such duties, either in the statute creating the USTR or in NEPA.[129] Both the government and Professor Tribe view an analytical assignment to the USTR as a burden or constriction of the powers of the President. This is an inexplicable stance given the common practice of statutory requirements for reports from agencies and from the President. For example, the Omnibus Trade and Competitiveness Act requires the President and agencies to submit a "competitiveness impact statement" to Congress together with certain proposals for legislation.[130] Even if such rules are not judicially enforceable on the President *per se*, they are nonetheless obligations.

2. The NAFTA Clock

In response to the District Court decision, the Clinton Administration argued that the schedule for implementing NAFTA did not provide enough time for the preparation of an EIS. For example, U.S. Trade Representative Kantor portrayed the decision as "creating the potential for protracted litigation and delay in implementing the NAFTA."[131] It is interesting to note that

127. Senate Hearing, *supra* note 1, at 67-68 (*NAFTA, NEPA, and the Separation of Powers,* Prepared Statement of Laurence H. Tribe before the Senate Committee on Environment and Public Works, July 22, 1993).

128. *Public Citizen*, 822 F.Supp. 21, 30-31 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *and cert. denied*, 114 S.Ct. 685 (1994).

129. *See* Kendall v. United States, 37 U.S. 524, 610 (1838) ("it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think fit").

130. 2 U.S.C. § 194b (1988). There is no private right of action, however.

131. Statement by U.S. Trade Representative Mickey Kantor, White House Press Release, June 30, 1993 (on file with the *Minnesota Journal of Global Trade*).

this theme of time-sensitivity was used by the government throughout the litigation. For example, in October 1991, the Bush Administration stated that there was simply not enough time to prepare an EIS.[132]

The notion that the legislative timetable precludes preparation of an EIS is unsettling. It is true that NAFTA was scheduled to go into effect on January 1, 1994. President Clinton could have sent the implementing legislation to Congress as early as January 20, 1993. He was perfectly within his rights to delay submission until November 4, 1993. It seems rather hypocritical, though, to allow more than three-fourths of the year to elapse and then complain that no time remains for completion of an EIS. As Judge Richey pointed out in his decision, the USTR could easily have begun the EIS process at an earlier time in the NAFTA negotiating process.[133] In his opinion, inaction by the prior administration led to the tight timetable for completion of an EIS.[134]

3. EIS Not Doable

In presenting the government's case, Solicitor General Drew S. Days III claimed that NAFTA was so complex and far-reaching that its environmental consequences were too unpredictable to assess.[135] One government brief stated that any conclusions that an EIS could predict regarding the "net environmental effects from the intersection of NAFTA's trade rules with developments in domestic and foreign economic environmental regulation and enforcement" would not be credible.[136] The MTN

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132. Moreover, once negotiations progress, the Trade Acts contemplate that the President will allow only ninety days between conclusion of negotiations . . . and submission of the agreement and implementing legislation to Congress. Ninety days are precious few, and indeed impossibly few, for definition, analysis and prediction of the effects of global changes in commerce on the domestic environment of the United States, even assuming such unlikely predictions could be made. Three months is simply too little time to prepare an EIS . . . .

Motion In Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 50, at 58.

133. *Public Citizen*, 822 F.Supp. 21, 30 n.15 (D.D.C. 1993).

134. *Id. See also* Brief of Amici Curiae Natural Resources Defense Council, *supra* note 120, at 25 (USTR's argument essentially would allow any agency wishing to avoid legal requirements to delay compliance long enough to create an eleventh-hour conflict).

135. *See Environmental Impacts of NAFTA "Impossible to Know," Justice Says*, INSIDE U.S. TRADE, Aug. 13, 1993, at 1; Michael York, *President Wins One on NAFTA*, WASH. POST, Sept. 25, 1993, at A1.

136. Brief for the Appellants, *supra* note 73, at 42.

Coalition, a coalition of corporations and business associations advocating successful completion of the Uruguay Round, in an amicus brief offered to the Court, averred that "while environmental effects ensue from the economic growth spurred by trade agreements, they are unknowable with any precision at this stage.[137]

If true, these would be strong arguments, not against the EIS, but against NAFTA. If the government does not know, or cannot hypothesize, what the environmental impact of NAFTA would be, then maintaining the status quo might be the most prudent course. In reality, the U.S. government did not enter into NAFTA blindly; there was a great deal of analysis of environmental issues.[138] It was not beyond the capacity of human intellect to do an EIS on NAFTA. Certainly, an EIS on NAFTA would have been an imperfect analysis. However, all EIS's are somewhat speculative.

4. Openness of Trade Policy

The Clinton Administration argued that the openness norms of the EIS would conflict with fast track because the process of public participation in the role of advising the President on trade policy, negotiating objectives, and bargaining positions is carefully prescribed by U.S. trade laws, and is accomplished principally through advisory committees with a broad representation of interests.[139] The Bush Administration took a similar line, charging that the plaintiff was actually seeking to "enlarge the avenues of participation established under the Trade Acts."[140]

To its credit, the Environmental Protection Agency in the Bush Administration set up an advisory committee bringing together experts on trade and the environment.[141] Nevertheless, such glasnost did not spread to the official trade policy advisory

137. Amicus Brief of the MTN Coalition at 2, Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-5212), *cert. denied*, 114 S.Ct. 685 (1994).

138. *See, e.g.*, U.S. GOVERNMENT, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES (1992). This review did not meet NEPA requirements. *See* Daniel Magraw, *NAFTA's Repercussions: Is Green Trade Possible?*, ENVIRONMENT, Mar. 1994, at 14, 45 n.21.

139. Brief for the Appellants, *supra* note 73, at 13-14.

140. Motion in Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 50, at 61.

141. For a discussion, see Jan C. McAlpine & Pat LeDonne, *The United States Government, Public Participation, and Trade and Environment*, *in* TRADE AND THE ENVIRONMENT 203 (Durwood Zaelke et al. eds, 1993).

structure run by the USTR. Of the thirty-nine committees, none focuses on consumer or environmental issues.[142] There is "broad participation" of business interests, but not many human rights organizations, public interest groups, and the like.[143] It seems contradictory to say that an EIS is unnecessary because there are advisory committees when no advisory committee exists for the environment.[144]

There is considerable irony in the recent criticism about U.S. trade policy being closed and secretive. When the reciprocal trade agreement program was launched in 1934, it was viewed as providing an unprecedented degree of public participation. Congress required public notice of negotiations and public hearings.[145] President Roosevelt created a Committee on Reciprocity Information to encourage two-way communication with the public.[146] All this was considered a great improvement over the traditional opaque methods used by Congress in setting tariffs. These reforms merited at least one book.[147]

B. AND THE WINNER IS . . .

After Judge Richey's decision, *Public Citizen v. U.S. Trade Representative* began to shape up as a historic clash between two approaches to public policy.[148] On the one hand, there existed the need for speedy and secret negotiations. On the other existed NEPA's policy of "deliberative consideration." As things turned out, the denouement of *Public Citizen v. U.S. Trade Representative* was anti-climactic. The contest between the linch-

142. 19 U.S.C. § 2155 (1988).

143. *See* Lori Wallach, *Hidden Dangers of GATT and NAFTA*, *in* THE CASE AGAINST FREE TRADE 52-53 (Ralph Nader et al. eds., 1993).

144. President Bush did appoint five prominent environmentalists to the advisory groups. *See* REPORT OF THE ADMINISTRATION ON THE NORTH AMERICAN FREE TRADE AGREEMENT AND ACTION TAKEN IN FULFILLMENT OF THE MAY 1, 1991 COMMITMENTS (Sept. 1992), Tab 7, at 2.

145. 48 Stat. 945 (current version codified at 19 U.S.C. § 1354 (1988)).

146. *See* Executive Order No. 6750 (June 27, 1934). The Committee has since been abolished. *See* Executive Order No. 10004, 3 C.F.R. 819 (1948).

147. *See* JOHN DAY LARKIN, TRADE AGREEMENTS: A STUDY IN DEMOCRATIC METHODS (1940).

148. As the Justice Department noted,

> the hallmark of the comprehensive procedures Congress established in the Trade Acts is expedited congressional consideration of trade agreements as submitted, without consideration of alternatives and with specifically limited venues for public participation to protect confidential aspects of trade negotiations. The hallmark of NEPA's EIS process, by contrast, is deliberative consideration of environmental impacts and alternative actions, with opportunities for judicial review.

Brief for the Appellants, *supra* note 118, at 24 (citation omitted).

pins of trade policy and environmental policy was not settled because the Court of Appeals decided on other grounds.[149] In effect, the contest judge disqualified himself. Neither fast track nor the EIS was declared the winner.

Some might object to this characterization and say that fast track won. It is true that Congress approved NAFTA, in effect choosing fast track over NEPA. It is also true that an EIS requirement for trade agreements, if it exists, is not judicially enforceable under the present APA.[150] But the larger questions remain unsettled: Should Congress apply NEPA to trade agreements or otherwise require an environmental review as a condition of fast track? These issues are discussed below.

IV. NAFTA IMPLEMENTATION: PROMISE VS. REALITY

Since NAFTA has been in force only a few months, it is too early to judge its environmental effects. Nevertheless, one can begin to make such judgments about NAFTA's pre-1994 effects. This section examines one episode regarding NAFTA's implementation.

A. The Promise

In presenting NAFTA to the public in September 1992, the Bush Administration declared that pursuant to a Presidential commitment, NAFTA maintains existing U.S. health, safety, and environmental standards, and allows the United States to prohibit the entry of products that do not meet U.S. standards.[151] The Clinton Administration agreed with this characterization. In a major statement on the trade agreement, the Administration declared that "[n]o existing Federal or state regulation to protect health and safety will be jeopardized by NAFTA."[152] A few months later, in Congressional testimony, U.S. Trade Representative Kantor stated that "NAFTA's obligations do not threaten U.S. measures, because our regulatory sys-

149. *See supra* text accompanying note 110.

150. For some suggestions on amending the APA, see Wirth, *supra* note 75, at 418-19.

151. Executive Office of the President, Report of the Administration on the North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments 5 (1992).

152. Executive Office of the President, The NAFTA: Clinton Administration Statement on the North American Free Trade Agreement 8 (1993).

tems already are non-discriminatory or science-based."[153] Because Public Citizen offered a contrary view in its lawsuit, the Justice Department set the record straight for the Court of Appeals by stating that the plaintiffs' assertion of the alleged effects of NAFTA on U.S. law did not take into account the "repeated affirmation of the signatories of their rights to maintain, enforce, and strengthen environmental and health and safety measures."[154]

B. THE REALITY

The promises from the Bush and Clinton Administrations are not in complete accord with reality. Section 361 of the North American Free Trade Agreement Implementation Act[155] (NAFTIA) is entitled "Agricultural Technical and Conforming Amendments."[156] This section amends five health-related laws, in order to conform them to NAFTA so as to avoid potential challenges. Those changes are as follows.

The Animal Diseases Act of 1890 prohibits the importation of diseased cattle, sheep, swine, and other livestock.[157] NAFTIA allows the Secretary of Agriculture to permit such imports from Mexico and Canada.[158] The Diseases Act also requires the Secretary of Agriculture to inspect all imported animals.[159] NAFTIA allows the Secretary to waive this requirement for Mexico and Canada.[160]

A section of the Tariff Act of 1930 prohibits meat imports from countries with foot-and-mouth disease.[161] NAFTIA allows the Secretary of Agriculture to permit such importation from any country upon a determination that the region where the meat originates does not have any disease.[162]

The Honeybee Act prohibits honeybee imports from countries suffering certain parasites or diseases or not maintaining

153. *The Administration's Case for NAFTA*, Testimony of Ambassador Michael Kantor before the Senate Commerce Committee, October 21, 1993, at 10.

154. Brief for the Appellants, *supra* note 118, at 20-21.

155. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

156. *Id.*, 107 Stat. at 2122.

157. 21 U.S.C. § 104 (1988).

158. Pub. L. No. 103-182, § 361(b), 107 Stat. 2057, 2122 (1993).

159. 21 U.S.C. § 105 (1988).

160. Pub. L. No. 103-182, § 361(c), 107 Stat. 2057, 2122-23 (1993).

161. 19 U.S.C. § 1306 (1988).

162. Pub. L. No. 103-182, § 361(d)(1), 107 Stat. 257, 2123 (1993).

proper precautions on honeybee trade.[163] NAFTIA allows the Secretary of Agriculture to waive these requirements for Mexico and Canada upon a determination that the region from which the product originates does not have the parasites or disease.[164]

The Poultry Product Inspection Act prohibits poultry imports from countries that do not have the same poultry sanitary and preparation standards as those in the United States.[165] NAFTIA allows the Secretary of Agriculture to permit poultry imports from Mexico and Canada if either country demonstrates that its standards achieve the level of protection that the Secretary considers appropriate.[166]

The Federal Meat Inspection Act prohibits meat imports produced under standards that do not comply with U.S. regulations.[167] NAFTIA allows the Secretary of Agriculture to permit meat imports from Mexico and Canada if either country demonstrates that its standards achieve the level of protection that the Secretary considers appropriate.[168]

It is not clear whether these changes will impair public health. Perhaps the laws were outdated; perhaps more administrative discretion was warranted; perhaps more deregulation was sensible. What is clear is that the issues surrounding these changes were not aired in public. With an EIS requirement, they would have been. When laws have proven satisfactory for decades, it would be reasonable for Congress to debate such changes. The fact that these laws were changed only for Mexico and Canada contradicts statements made by the Administration that NAFTA and U.S. law were already in conformity, and points to issues that remain publicly unexplored to this day.

There may be nothing wrong with altering these laws from a health perspective. Yet such action is at variance with the repeated assurances of the Bush and Clinton Administrations that NAFTA did not require the United States to change its health laws.[169] Some commentators have suggested that one should

163. 7 U.S.C. § 281 (1988).

164. Pub. L. No. 103-182, § 361(d)(2), 107 Stat. 257, 2123 (1993).

165. 21 U.S.C. § 466(d) (1988 & Supp. 1993). For further discussion of this law, see Robert E. Hudec, *Circumventing Democracy: The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311, 317-20 (1993).

166. Pub. L. No. 103-182, § 361(e), 107 Stat. 257, 2123-24 (1993).

167. 21 U.S.C. § 620(a) (1988).

168. Pub. L. No. 103-182, § 361(f), 107 Stat. 257, 2124-25 (1993).

169. It could be argued that the federal government has maintained its health standards, and that these changes only provide more discretion to health officials in implementation. But discretion can lead to misjudgment, which is apparently why the Congress, before November 1993, had chosen not to grant

not be concerned about these changes since the Clinton Administration is pro-consumer. However, the next President may have different views and could appoint a Secretary of Agriculture who is willing to use his or her new discretion to tilt toward producer interests. The possible ramifications of such administrative discretion seem to have been swept along in the fast track.

C. HOW FAST A TRACK?

Under fast track rules, the House must vote on trade implementing legislation within sixty session days after the transmission of the bill by the President.[170] The House need not wait the full sixty days, however. On November 4, 1993, President Clinton submitted the implementing legislation to Congress.[171] The House voted on November 17, 1993, which was six session days later. The Senate voted on November 20 and the legislation was approved. The adjournment resolution was passed on November 24, 1993.

Was this accomplished too quickly? Not necessarily. After all, NAFTA had been before Congress in one form or another for over three years.[172] There are many ways one might try to answer the "too fast" question, but two will be pursued here: first, whether it was too fast for the public to know what was going on; and second, whether it was too fast for Congress to know what was going on.

Although NAFTA itself had been public for a year, the implementing legislation did not exist in final form until November 4. It took several days for the 146-page bill to be printed. A person requesting a copy from the USTR was told to go the Congressional document rooms. The document rooms staff stated that the bill was being sold at the Government Printing Office. The Government Printing Office did indeed have some copies, but sold out almost immediately and did not restock until after the Senate vote. Therefore, it is likely that many interested

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such discretion. The decision to reverse existing law was significant enough to warrant public discussion.

170. 19 U.S.C. § 2191(e) (1988 & Supp. 1993).

171. H.R. Doc. No. 159, 103d Cong., 1st Sess. (1993).

172. President Bush gave formal notice to Congress on the negotiation with Mexico on September 25, 1990. *See* Letter to the Chairmen of the Senate Finance Committee and the House Ways and Means Committee on Mexico-United States Free-Trade Negotiations, 28 WEEKLY COMP. PRES. DOC. 1451 (Sept. 25, 1990). It is interesting to note that the President's notice does not mention the words "environment" or "jobs."

members of the public had not seen the bill before the House voted.

Normally, when the House enacts legislation, the text of the act is printed in that day's *Congressional Record*. Yet in the case of NAFTA, the text was not printed.[173] Thus, citizens around the country, who have access to the daily *Record* in libraries, were further prevented from seeing the legislation before the Senate voted. Thus, it does seem that the track was a bit too fast for the interested public. The text of the bill, H.R. 3450, was added to the Lexis computer data base on November 16, the day before the House vote.

How about members of Congress? The author has no way of knowing what individual members of Congress knew about the changes in health laws discussed above. One might surmise from what is on the public record that Congress had no knowledge of the changes.[174] The Bush Administration's Report on NAFTA makes no mention of the need for these changes.[175] The Clinton Administration's Report on NAFTA Environmental Issues — of early November 1993 — makes no mention of the need for these changes.[176] Indeed, the Report states that the U.S. sanitary and standards-related measures were "already" in conformance with NAFTA.[177] The Clinton Administration's "Statement of Administrative Action" accompanying the legislation does briefly discuss the changes, but this document is 237 pages long.[178] The information was virtually buried in text.

No hearings were held on these health changes following the submission of the legislation on November 4. The House Committee on Agriculture issued no report on the bill. The Senate Committee on Agriculture did issue a report on November 18, which mentioned the changes, but the report was not imme-

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173. *See* 139 CONG. REC. H10047 (1993). The author inquired of the *Record* clerk and was told that it was omitted through clerical error.

174. On October 5, 1993, the House Ways and Means Committee issued a "NAFTA Draft Implementing Proposal," (at 7-4) which indicated that provisions might be included in the bill to change listed animal, meat and poultry laws. No details on such changes were provided in this 87-page document.

175. *See* REPORT OF THE ADMINISTRATION, *supra* note 144, at Tab 7 (NAFTA and the Environment).

176. *See* EXECUTIVE OFFICE OF THE PRESIDENT, THE NAFTA: REPORT ON ENVIRONMENTAL ISSUES (Nov. 1993).

177. *Id.* at 93 (emphasis added). It also states that the "NAFTA provisions will not require any changes to the U.S. regulatory framework" for sanitary measures. *See id.* at 107.

178. H.R. DOC. NO. 159, 103d Cong., 1st Sess. 552-54 (1993).

diately printed.[179] When the Secretary of Agriculture testified before the Senate Committee on September 21 regarding NAFTA, he made no mention of the need for these changes in his testimony.[180] No newspaper article (contemporaneous with the NAFTA vote) that discusses these issues has come to this author's attention. On November 15, 1993, the Government Accountability Project (GAP) sent a memo to members of Congress warning that these changes threaten the safety of our country's food supply. On November 16, 1993, Ralph Nader issued a statement indicating that the implementing legislation "guts U.S. meat, poultry and live animal inspection statutes."[181] These statements are probably exaggerated. What is noteworthy is that these alarms occurred only one to two days before the key NAFTA vote. The fact that the GAP and Nader groups did not learn of Section 361 until shortly before the NAFTA vote demonstrates the success of those in the Administration who sought to minimize awareness of these changes. One can look in vain at both the House and Senate floor debate for any discussion of these issues.[182] The trusting reader might construe the silence on this issue by vociferous NAFTA opponents in Congress as consent to the necessity or appropriateness of these health policy changes. A more cynical reader might conclude that fast track moved too quickly for Members of Congress to become aware of Section 361.[183]

In conclusion, this case study illustrates four points. First, despite repeated assurances by the Bush and Clinton Administrations that NAFTA would not interfere with U.S. health laws,

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179. S. REP. No. 189, 103d Cong., 1st Sess. 113-15 (1993).

180. *How NAFTA Will Affect U.S. Agriculture: Hearings Before the Committee on Agriculture, Nutrition, and Forestry*, 103d Cong., 1st Sess. 13 (1993) (statement of Secretary Mike Espy). According to Espy, "NAFTA does not require any changes in stringent U.S. standards for food safety, animal or plant health, or environmental protection." *Id.* at 16.

181. *Statement of Ralph Nader: The NAFTA Implementing Legislation Guts U.S. Meat, Poultry and Live Animal Inspection Statutes* (Nov. 16, 1993) (on file with the *Minnesota Journal of Global Trade*).

182. The environmental and consumer groups opposing NAFTA did not publicize these changes. Perhaps they were unaware of them. They were bracing for "attacks" on U.S. standards from Mexico and Canada after January 1. They may not have been prepared for friendly fire.

183. Undoubtedly, some members knew about the changes — for example those on the Agriculture committees. Indeed, the staff in the committees worked to limit the breadth of the changes from what was originally proposed by the Clinton Administration. The point here is that these discussions were *sub rosa*.

five such laws were changed in the implementing legislation.[184] Second, the fast track procedure permitted these laws to be changed without the public becoming aware of it and having time to make their views known. In this one episode, the usual checks of printed bills, public hearings, and informed floor debate were not in place. Third, the implementing legislation was drafted and considered in a process more secretive than normal for U.S. legislation. Ironically, it validated many of the criticisms by public interest groups about the opaqueness of the trade negotiating process.[185] Fourth, a timely and comprehensive EIS on NAFTA might have flagged the changes in the five U.S. health laws, and offered an analysis of the pros and cons. Instead, potentially significant regulatory changes were made in a partially blind manner.

In making these judgments, the author is not implying that members of the public (and even members of Congress) are generally fully informed as to what Congress is voting on. They are not. But in the case of NAFTA, its implementation through fast track exemplified — and actually accentuated — some of the least attractive features of the U.S. legislative process.

V. CONDUCTING ENVIRONMENTAL ASSESSMENTS OF TRADE AGREEMENTS

This section attempts to weave together the previous areas of discussion into specific policy recommendations for assessing the environmental aspects of trade agreements. There are three reasons for developing a new program for such assessments. The first reason is that the "new protectionism" must be challenged if popular support is to be attained for trade agreements. Since many of the complaints about trade are based on environmental concerns,[186] clear analyses are needed in order to inform the public debate and refute misconceptions.[187] Second, President Clinton needs new fast track authority to continue the for-

184. But see the Clinton Administration's "Statement of Administration Action" for NAFTA which lists a series of federal health and environmental measures that NAFTIA does *not* amend. *See* H.R. Doc. No. 159, 103d Cong., 1st Sess. 465-66 (1993).

185. *See* Ralph Nader, *The Corrosive Effects of NAFTA*, Wash. Post, Nov. 15, 1993, at A19 (everything NAFTA touches becomes more autocratic and less democratic).

186. *See supra* notes 13-20 and accompanying text.

187. *See* Steve Charnovitz, *When Trade Meets Environment*, J. Com., July 19, 1993, at 6A.

ward momentum of trade liberalization.[188] Incorporating environmental reviews into this process may be necessary to get the political support needed for fast track.[189] Some procedural reforms are also desirable in order to avoid potential abuses of fast track authority inconsistent with democratic norms. Making such reforms may boost the chances of re-enacting fast track.[190]

Trade agreements can have effects on the environment and public health — both positive and negative. A consideration of these effects should be fully integrated into decisionmaking.[191] As William Snape pointed out after the government appealed Judge Richey's decision, "[r]unning from NEPA is not good public policy. All the statute asks is that we look before we leap."[192]

The simplest option for conducting environmental assessments would be to make NEPA applicable to trade agreements — in effect, legislating the Richey decision.[193] However, the EIS procedure is not well-suited for this purpose. There are several factors which would make an EIS for a trade agreement more difficult than an EIS for projects like a highway or a dam. First, there is a timing problem. Trade negotiations are fluid, making it difficult to evaluate an agreement until the negotiations are concluded. Once they are concluded, it is hard to "reopen" the agreement to fix any environmental problems. Second, there is an information problem. Trade negotiations tend to be conducted secretly, which complicates the evaluation of options chosen in relation to their alternatives. Third, there is a baseline

188. Indeed, it might be desirable to extend fast track for other international agreements. *See* Steve Charnovitz, *Designing American Industrial Policy: General Versus Sectoral Approaches*, 5 STAN. L. & POL'Y REV. 78, 82 (1993).

189. The National Wildlife Federation has made some proposals. *See* NATIONAL WILDLIFE FEDERATION, GREENING WORLD TRADE: ENVIRONMENTAL CONDITIONS FOR THE 1993 UNITED STATES FAST-TRACK REAUTHORIZATION (1993).

190. For a discussion of the politics of fast track renewal, see Bruce Stokes, *Crash! And There Goes Fast Track,* NAT'L J., July 3, 1993, at 1946.

191. It should be noted that Congress has shown a recent interest in environmental analyses of trade agreements. "It is the sense of the Congress that the President, in carrying out multilateral, bilateral, and regional trade negotiations, should seek to . . . (5) include Federal agencies with environmental expertise during the negotiations to determine the impact of the proposed trade agreements on national environmental law. . . ." Pub. L. No. 102-582, § 203, 106 Stat. 4900, 4905 (1992).

192. William J. Snape III, *Trade Pacts Need Environmental Look,* J. COM., Oct. 18, 1993, at 14A.

193. *The Journal of Commerce* has editorialized for the opposite — an amendment to NEPA to exempt trade agreements. *See Legal NAFTA,* J. COM., Oct. 1, 1993, at 6A.

problem. Most of the factors considered in a typical EIS[194] are not the most important questions for trade agreements.[195] While it may be possible, in the abstract, to compare the trade agreement with the option of not consummating the agreement, the ramifications of rejecting a trade agreement also could entail significant environmental impact. In other words, the "no action" option might lead to potentially adverse *reaction* by other countries.[196] Fourth, an EIS is also unsuitable because it is litigable. By providing the possibility of delay, the EIS could undo fast track and reduce the ability of the United States to negotiate future trade agreements.

A better approach would be to incorporate environmental assessments into an extension of fast track. What is needed is an ongoing analytical process, not just a snapshot document. The process should fulfill two needs: (1) giving government officials access to environmental expertise from within the government as well as outside groups; and (2) providing information to the public about the environmental issues being considered. I will first present procedural recommendations for fast track and then discuss some substantive aspects of an environmental assessment. Some of the changes discussed below could be effectuated by the USTR through the rulemaking process in the absence of legislation.

A. AN ENVIRONMENTAL FAST TRACK

It is not possible here to provide a detailed narrative of how the new fast track would operate. Instead, I will highlight the proposed changes or additions to the current system.[197] First, Congress would provide environmental goals to the U.S. negotiators as part of the statutory negotiating objectives that are listed in trade legislation.[198] Some informal objectives on "trade

194. *See supra* note 191 and accompanying text.

195. For example, issues concerning the "short-term uses of man's environment" and "irreversible and irretrievable commitments of resources" seem inapplicable.

196. By contrast, if a dam is canceled, the river does not retaliate. The authors of the EIS might discuss potential foreign reaction, but discussing this could influence foreign reaction.

197. Professor Tribe suggests an innovative alternative: a Congressional Office of Environmental Assessment modeled on the Office of Technology Assessment. *See* Senate Hearing, *supra* note 1, at 13-14, 18, 28. This might be a good idea, but cannot substitute for consideration by negotiators of potential environmental impact.

198. For the Uruguay Round goals, see 19 U.S.C. § 2901(b), 2397 note (1988).

negotiations and the environment" were provided by Congress in 1992, but these are now largely outdated.[199]

Second, the President would establish an Environmental Policy advisory committee on trade. It should operate similarly to (and even more cooperatively than) the Labor Policy advisory committee,[200] by serving as a sounding board for the consideration of policy alternatives. The Environmental Protection Agency would run this new committee in the same way that the U.S. Department of Labor runs the labor committee. The Bush and Clinton Administrations have both resisted this idea.[201] At the beginning of any new negotiation, the President would submit an Initial Review to Congress regarding the environmental consequences of the agreement.[202] The Review would indicate how these consequences will be addressed in the negotiation. This Review would be accompanied by the views of the Environmental Policy advisory committee on the anticipated ecological impact of the proposed Agreement.

Next, as soon as the outlines of a trade agreement are apparent, the President would submit a detailed Environmental Assessment to Congress.[203] At the latest, the Assessment would be submitted thirty days after the President notifies Congress that the intention to enter into a trade agreement exists. The Assessment might be carried out jointly with another country when it would be advantageous to do so, as when it is being negotiated with an adjacent country. If the implementing legislation has any environmental impact not detailed in the Assessment, then the Assessment would be updated no later than the date on which the implementing legislation is submitted.

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199. *See* Pub. L. No. 102-582, § 203, 107 Stat. 4900, 4905 (1992).

200. The Labor Policy Advisory Committee has been very critical of U.S. trade policy in recent years. *See, e.g.*, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS LABOR ADVISORY COMMITTEE, NORTH AMERICAN FREE TRADE AGREEMENT: REPORT OF THE LABOR ADVISORY COMMITTEE (1992).

201. *See* Steve Charnovitz, *NAFTA's Environmental Significance*, ENV'T, Mar. 1994, at 44. As this Article goes to press, President Clinton has announced that he will create an environmental advisory committee on trade. However, no appointments have yet been made. *See* Executive Order 12905 - Trade and Environment Policy Advisory Committee, WEEKLY COMP. PRES. DOC. 639 (Mar. 25, 1994).

202. This would be similar to the "scoping" which is now part of the EIS process.

203. This would be earlier than called for in State Department procedures for submitting EISs on treaties. *See* 22 C.F.R. § 161.5(d) (1993).

The House would not vote on the implementing legislation until at least fifteen calendar days have elapsed after the bill and the accompanying documents (including the updated Environmental Assessment) are printed and publicly available.[204] In addition, the President would not be permitted to initiate the fast track procedures within thirty days of an announced Congressional adjournment.[205] Fast track itself provides sufficient parliamentary grease for legislative wheels. There is no need to tilt the track by scheduling a vote near adjournment.

The current fast-track is a bit ambiguous as to whether implementing legislation may include provisions not required by a trade agreement.[206] It would be useful to clarify this rule to preclude provisions not required by the trade agreement (as is done in Canada).[207] This reform would produce two useful outcomes. First, it would make fast track fairer by denying the President the ability to troll for votes by adding special interest items. Congress should judge an agreement purely on its merits; that is the best way to keep the negotiators accountable. Second, it would reserve the fast track procedure for its intended purpose — implementing the results of international regulations. Under present rules, fast track may be used to raise taxes and cut entitlement programs in order to offset the budget impact of the Uruguay Round tariff reductions.[208]

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204. "Publicly available" means that it is available to anyone at the Congressional document rooms or at the Government Printing Office. The document rooms had copies of the NAFTA legislation, but refused distribution to anyone other than Congressional staff.

205. To operationalize this, there could be a Congressional rule forbidding adjournment within 30 days after trade legislation is introduced (under fast track) if such legislation is approved.

206. Implementing legislation is defined as a bill "which contains . . . *if* changes in existing laws or new statutory authority is *required* to implement such trade agreement or agreements, *provisions*, necessary *or* appropriate to implement such trade agreement. . ." 19 U.S.C. § 2191(b)(1) (1988) (emphasis added). The strict interpretation is that only required changes can be included when they are necessary or appropriate. The lax interpretation is that anything the President considers appropriate can be included. For a discussion, see 139 CONG. REC. S16353-54 (1993) (remarks of Senator Stevens), and 139 CONG. REC. S16359 (1993) (remarks of Senator Danforth).

207. The President might be required to explain why each provision is germane. Ultimately, however, the decision will have to be left to the President. If the House and Senate sought to strip extraneous provisions from the bill, it could pass both houses in a different form. This would defeat the intent of fast track since there is no way of "fast-tracking" a conference report.

208. *See* Steve Charnovitz, *Budget Rules and the GATT*, J. COM., Mar. 7, 1994, at 8A.

B. COMPONENTS OF ENVIRONMENTAL ASSESSMENTS

The Environmental Assessment should take a very broad view of environment issues. Anything relating to public health, renewable or non-renewable resource depletion, or ecological change should be included if the effects are significant. Since there is but one eco-system, the Assessment should not be limited to the environment within the land boundaries of the United States.[209] Nevertheless, the Assessment should focus mainly on issues involving the U.S. economy, domestic health, and trade that are of interest to the American public. While a consideration of short-term effects will be of greatest interest to users, the Assessment should also try to make a long-term projection.[210] Reviews should cover the four potential effects of trade agreements: scale, structure, product, and regulatory.[211] Addressing these points would provide a response to the critics of trade cited in the introduction.[212]

Scale effects refer to the way that trade agreements expand economic activity and growth. Although trade agreements will always expand national income as conventionally measured, one cannot simply translate national income into national welfare because this omits consideration of many negative externalities of production. For example, if as a result of Mexico's greater production and transportation under NAFTA, pollution increased, the costs of the pollution to the United States might outweigh the benefits of the trade. Other scale effects include mining of non-recoverable resources.

Structural effects refer to the way trade agreements change patterns of resource use and investment in each country. For example, if the Uruguay Round leads the United States to stop subsidizing inefficient farming, then soil depletion and excessive water use might be prevented. The United States might also be interested in structural effects in other countries. For example, it might want to avoid a trade agreement which induces Brazil to chop down more tropical timber.

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209. NEPA directs agencies to "recognize the worldwide and long-range character of environmental problems." 42 U.S.C. § 4332(F) (1988).

210. For a discussion of "Intergenerational Conservation Assessments," see EDITH B. WEISS, IN FAIRNESS TO FUTURE GENERATIONS 132-41 (1989) and references therein.

211. *See* Candice Stevens, *The Environmental Effects of Trade*, 16 WORLD ECON. 439 (1993) (discussing scale, structural, and product effects).

212. For a very useful discussion of environmental analysis of trade agreements, see CHRISTINE C. HARWELL ET AL., FREE TRADE AND THE ENVIRONMENT: A PROSPECTIVE ANALYSIS AND CASE STUDY OF VENEZUELA 14-25 (1994).

Product effects refer to the way trade agreements affect the movement of products that have environmental consequences. For example, if NAFTA leads to more shipment of hazardous wastes in the border region, this increases the chances of an accident which could have ecological effects. New trade patterns can also lead to the introduction of harmful non-indigenous species, such as the zebra mussel.[213] The circle of poison regarding pesticides is also a product effect.

Regulatory effects refer to the way trade agreements may prevent domestic regulation from being applied to imports.[214] For example, if a trade agreement dictates the use of international standards, such as the food safety standards promulgated by the Codex Alimentarius Commission, governments might have to lower their current level of protection.[215] Some environmental assessments already consider such issues. For example, the Canadian Government's Environmental Review of NAFTA reports that thirty-nine percent of Canadian pesticide residue limits are more stringent than those of Codex.[216] By contrast, neither the Bush nor the Clinton Administration provided similar U.S. data in their environmental assessments.[217] (This information is conveniently obtainable from the Canadian Review, which reports that sixteen percent of U.S. residue limits are more stringent than those of Codex.[218]) The Clinton Administration's report was especially imbalanced; it is simply a paean to the NAFTA and its environmental side agreement, with virtually no serious analysis.

After considering all four of these effects, the Assessment should make an overall judgment. Ideally, the environmental advantages of a trade agreement should exceed its disadvantages, although non-environmental advantages and disadvantages will also have to be considered and weighed in any overall analysis.

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213. *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, HARMFUL NON-INDIGENOUS SPECIES IN THE UNITED STATES (1993).

214. *See* Steve Charnovitz, *The Regulation of Environmental Standards By International Trade Agreements*, INT'L ENV'T REP., Aug. 25, 1993, at 631.

215. NAFTA does dictate this, but allows considerable flexibility. *See id.* at 633-34.

216. It was 176 out of 451 instances. *See* GOVERNMENT OF CANADA, NORTH AMERICAN FREE TRADE AGREEMENT: CANADIAN ENVIRONMENTAL REVIEW 25 (1992).

217. *See* U.S. GOVERNMENT, *supra* note 138, at 211-17; EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 176, at 92-96.

218. It was 161 out of 941 instances. *See* GOVERNMENT OF CANADA, *supra* note 216, at 25-26.

In summary, a new system of environmental assessments must be crafted for trade agreements. Since many of the effects will be transborder, such assessments should ideally be carried out cooperatively with other countries.[219] Extending fast track as currently written or applying NEPA to trade agreements are both inadequate options. It is hard to imagine how additional assessments of national trade policies could ever be disadvantageous. As the GATT "Wisemen's" report affirmed nine years ago, "Clearer analysis and greater openness in the making of trade policy are badly needed."[220]

VI. CONCLUSION

Conducting environmental assessments can head off conflict between the trade and environment camps. By calling attention to any trade policy that may injure the environment, assessments may lead to a reconsideration of that policy. By demonstrating how freer trade can facilitate environmental improvements, assessments can combat ill-considered tracts against trade. Those who argue that trade agreements are too important, or too time-sensitive, to receive environmental scrutiny are exacerbating the negative perception that many environmentalists have about international trade. The Clinton Administration's battle against the EIS reinforced the view in some camps that the environmental implications of NAFTA could not withstand objective scrutiny.[221]

Environmental assessments are not a panacea. They will not, overnight, lead to smarter trade policies, or smarter environmental policies, or greater public support for international cooperation. They may, however, lead to a better understanding of how environmental improvement depends upon a healthy economy and how economic prosperity depends upon a healthy ecosystem. There is much to learn. Speak to the earth and it shall teach thee.[222]

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219. The North American Agreement on Environmental Cooperation calls on governments to develop recommendations, within three years, on environmental assessments of proposed projects likely to cause significant adverse transboundary effects. *See* NAAEC, Sept. 13, 1993, art. 10.7, 32 I.L.M. 1480.

220. *See* FRITZ LEUTWILER ET AL., TRADE POLICIES FOR A BETTER FUTURE 35 (1985). The report recommends that governments produce a "protection balance sheet" and likens them to the environmental impact statements now required for construction projects in some countries. *See id.*

221. *See, e.g.*, Carl Pope, *Trade Secrets*, SIERRA, Nov.-Dec. 1993, at 36.

222. *Job* 12:8 (King James).