ARTICLES

SEATTLE'S LEGAL LEGACY AND ENVIRONMENTAL REVIEWS OF TRADE AGREEMENTS

BY

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In November 1999, President Clinton issued Executive Order 13,141, committing the U.S. government for the first time to conduct environmental reviews of trade agreements. The Executive Order could trigger an important shift in the trade and environment debate because environmental reviews hold the potential to drive two significant developments. First, reviews can integrate environmental considerations into a trade policy process traditionally dominated by commercial concerns, and second, reviews can provide meaningful public involvement in the negotiation process. This Article recounts the history of environmental reviews of trade agreements, describes the current practice of trade policy development, and examines why integrating reviews into this process will prove politically and analytically challenging. In addition, this Article explores the requirements of the Executive Order, the debates over its implementing guidelines, and the implications of the Executive Order for domestic practice, developing countries, and the WTO. Finally, this Article

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concludes that environmental reviews, such as those required by the Executive Order, are important to the creation of trade policy that truly promotes sustainable development.

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[Executive Order 13,141 will] revolutionize the way the environment is dealt with in all future trade talks.¹

Former Vice President Al Gore

From day one, we will be considering environmental issues, and integrating them throughout.²

Ambassador Susan Esserman
Former Deputy U.S. Trade Representative

[An bad [trade] agreement is likely to be defined in Congress and the media as any agreement that doesn’t have labor and environment in it. The developing world will see that as a threat to its ability to progress and won’t go along. And Republicans in Congress know the provisions will be used for protectionism.³

Ambassador Robert Zoellick
U.S. Trade Representative

I. INTRODUCTION

Expectations ran high last December at the World Trade Organization’s (WTO) ministerial meeting in Seattle. Intent on launching the new Milennial Round, the Clinton administration hoped to set the capstone on its trade legacy. But demonstrators had high hopes, as well, and instead of a bold trade initiative marking the twenty-first century, the event is now remembered as the “Battle in Seattle,” with ministerial statements overshadowed by riots on the streets outside. While reverberations of the protests continue to echo, the most important legal consequence of these events has been overlooked. One month earlier, on November 16, 1999, President Clinton issued Executive Order 13,141 (“E.O. 13,141” or the “Order”), committing the U.S. government for the first time to conduct environmental reviews of trade agreements.⁴

E.O. 13,141 was intended to woo the environmental community in the run-up to Seattle. Indeed the Order was issued the same day as the administration’s “Declaration on Environmental Trade Policy” (Declaration).⁵ The Declaration, music to many environmentalists’

⁵ White House Policy Declaration on Environment and Trade (Nov. 16, 1999)
ears, pledged to:

pursue trade liberalization in the new round of trade negotiations in a manner that is supportive of our commitment to high levels of protection for the environment... by [taking fully into account environmental implications throughout the course of the negotiations, including by performing a written environmental review.]

The Seattle ministerial is now well behind us, yet E.O. 13,141 and the Declaration remain. Perhaps they will be forgotten in a few years—transient political gestures to entice environmentalists' support. Or, as this Article suggests, they may trigger an important shift in the trade and environment debate.

Environmental reviews hold the potential to drive two significant developments. The first is integration of environmental considerations into a trade policy process traditionally dominated by commercial concerns. Reviews can characterize and possibly quantify, the likely environmental impacts of a trade agreement as well as uncover potential environmental opportunities and vulnerabilities. Thus, reviews heighten the environmental awareness of negotiators. Done well, this analysis can also provide practical, constructive options that mitigate or eliminate negative impacts and, better yet, enhance positive ones (so-called "win-win" solutions). These reviews may persuade governments to modify specific provisions of the draft agreement, propose additional domestic policies or institutions, or create entirely separate agreements. In fact, all three occurred in the North American Free Trade Agreement (NAFTA) negotiations. 7

The second goal is more daunting—meaningful public involvement in the negotiation process. The environmental community's traditional distrust and opposition to trade and investment liberalization are no secret. However, the formation of negotiating positions largely is. The creation of U.S. trade policy to date has effectively been a closed process, with little opportunity for direct public participation. 8 Formal reviews could possibly temper environmentalists' opposition by opening up the process. Engaging

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6 Id.
8 See infra Part III.C.
the public in a true dialogue over the environmental consequences of proposed trade rules and their alternatives can allay the fears of hidden deals and policies dictated by powerful economic interests. More important, this constructive partnership creates an alternative to environmentalists' largely binary view of trade—trade as either an unmitigated environmental harm that degrades the environment and promotes the race-to-the-bottom, or trade sanctions as a useful stick to bludgeon undesirable practices of trading partners. Reviews create the space for a third possibility—proactive trade policies that promote environmental protection and increased commerce.

Understanding the history and implementation of E.O. 13,141 is important for trade and environment scholars. Because the United States is a key party in many trade negotiations, its integration of environmental and trade policies will likely influence not only its own final agreements, but trade policy development in other States and international organizations (IGOs) as well. Moreover, any State or IGO attempting to review the environmental impacts of its trade initiatives will surely confront similar policy and methodological choices to those faced by the drafters of E.O. 13,141. Part II of this Article recounts the history of environmental reviews of trade agreements, from the unfulfilled promise of the National Environmental Policy Act (NEPA)\(^9\) to recent reviews both at home and abroad. Part III describes the current practice of trade policy development, examining why integrating reviews into this process will prove politically and analytically challenging. Parts IV and V set out the requirements of E.O. 13,141 and the debates over its implementing guidelines. Part VI explores the implications of the Order for domestic practice, developing countries, and the WTO. This Article concludes that environmental reviews, such as those required by E.O. 13,141, are important to the creation of a trade policy that truly promotes sustainable development. The Annex presents the text of the Order.

II. PAST ENVIRONMENTAL REVIEWS OF TRADE AGREEMENTS

A. NEPA and Its Progeny

The fountainhead of environmental reviews springs from the 1969 National Environmental Policy Act (NEPA). It mandates environmental impact statements (EISs) for major federal actions significantly affecting the quality of the human environment.\(^{10}\) EISs


\(^{10}\) 42 U.S.C. § 4332(c) (1994). Under NEPA, the reviewing agency must first conduct an environmental assessment. If this results in a finding of no significant
have since become a matter of course for federal and many state agency operations, ensuring that environmental impacts of alternative courses of action are considered in agency decisions.

Environmental reviews have become a cornerstone of environmental law, not only in the United States but globally as well. Over seventy percent of the world's nations have now adopted environmental impact assessment (EIA) requirements for certain types of government projects. When one takes into account subnational requirements, well over two hundred governmental authorities mandate reviews. Principle 17 of the Rio Declaration reflects this widespread practice, stating that "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."

Environmental reviews have extended their reach beyond national laws through the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the Convention on Biological Diversity, the Convention on the Law of the Sea, the World Charter for Nature, and other international legal instruments. The World Bank and regional development banks routinely require environmental assessments at the design stage for major development projects. Ideally, this requirement builds environmental management capacity in the host countries, screens out environmentally harmful projects, and provides a means to challenge projects with inadequate reviews. In sum, environmental reviews of State actions have become such a widespread practice that some commentators have argued this now represents customary international law.

impact (FONSI), then no further review is required. 40 C.F.R. § 1501.4 (2000). Otherwise, the agency must develop a draft EIS, distribute it for public comment, respond to classes of comments, and revise and issue the final EIS. Id. § 1502.9.


16 See, e.g., Hunter, supra note 14, at 1473–75 (describing the PLANAFLORO project in Brazil. The review requirement, however, has not led to the capacity-building its proponents hoped for.

17 Id. at 367 (citing UNEP Governing Council Decision, European Community Council Directive, WCED Legal Experts Group); Gray, supra note 11, at 91 (citing the UN General Assembly's Programme for Further Implementation's declaration that EIA
Given the ubiquity of environmental reviews for proposed policies and projects, one might expect they would be routinely undertaken for trade agreements. After all, trade agreements obviously have the potential to increase environmental impacts. The greater flows of investment, goods, and services one might expect from trade liberalization will induce relative price changes, thereby reallocating productive resources from certain sectors to others and influencing the levels and patterns of both production and consumption. Whether this leads to increased pollution, resource extraction, energy consumption, or land development will depend upon the nature of the liberalized commerce and the countries involved, but impacts will surely occur.

Perhaps surprisingly then, while NEPA calls on all agencies to "recognize the worldwide and long-range character of environmental problems," it has not been applied to trade agreements. Case law has affirmed the need for an EIS in situations where extraterritorial activities may have domestic impacts or activities may cause impacts in the global commons. However, courts have not extended NEPA's reach to federal activities with impacts exclusively in foreign jurisdictions, citing foreign policy and treaty concerns. President Carter's Executive Order 12,114 calls for the review of major federal actions significantly affecting the environment of the global commons, natural or ecological resources of global importance, or foreign nations not participating in the action, but its application has been limited as well.

As a result, by 1990, the Office of the United States Trade Representative (USTR) had never prepared an environmental impact statement for a trade agreement. Newly sensitized by the

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is a "principle equivalent with the 'polluter-pays principle,' 'the precautionary principle,' and the 'common but differentiated responsibilities principle'."


19 Some in the Office of the U.S. Trade Representative (USTR) have observed that solely focusing on reviews for trade agreements is unwarranted, since currency devaluations and tax code changes can surely cause significant environmental impacts, as well, but there are no serious non-government organization (NGO) demands that these require an EIS.

20 See, e.g., Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978) (requiring an EIS for the proposed construction of a Panamanian section of the Pan American Highway); Hunter, supra note 14, at 1427-35.

21 See Env'tl. Def. Fund v. Massey. 986 F.2d 528 (D.C. Cir. 1993) (requiring an EIS for federal activities at a research station in Antarctica).


Tuna/Dolphin cases\textsuperscript{24} to the potential significance of trade agreements, however, in 1991 environmental groups lobbied for an EIS of the NAFTA agreement, then under negotiation. This led to the showdown in court over NEPA’s application to trade agreements and the dispositive case, Public Citizen \textit{v.} Office of the U.S. Trade Representative (Public Citizen \textit{v.} USTR).\textsuperscript{25}

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\textbf{B. Public Citizen \textit{v.} USTR}

From the very outset of the NAFTA negotiations, environmentalists had highlighted three areas of concern: exacerbation of environmental problems along the border caused by maquiladoras,\textsuperscript{26} race-to-the-bottom pressures to weaken or chill U.S. protections, and worries that U.S. wildlife laws might be undermined.\textsuperscript{27} Responding to this pressure and seeking to gain fast-track reauthorization from Congress, USTR convened an interagency task force to examine the environmental issues likely to arise in NAFTA.\textsuperscript{28} USTR was very clear that its review was voluntary and not an EIS required by NEPA, although it followed many of the NEPA procedures, including soliciting public comment, holding public hearings in six cities, and issuing a draft report for further comment.\textsuperscript{29} The final version was released in February 1992.\textsuperscript{30} While this exercise demonstrated an unprecedented consideration of environmental issues, the environmental community wanted more—a formal review requirement.\textsuperscript{31} In a suit filed in U.S. district


\textsuperscript{25} 5 F.3d 549 (D.C. Cir. 1993).

\textsuperscript{26} A maquiladora is “a factory run by a U.S. company in Mexico to take advantage of cheap labor and lax regulation.” RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 3.0 (CD-ROM).

\textsuperscript{27} COMM’N FOR ENVT’L. COOPERATION, METHODS AND APPROACHES TO ASSESSING THE ENVIRONMENTAL EFFECTS OF TRADE POLICIES 10 (1999) [hereinafter CEC Report].

\textsuperscript{28} Jay Hair, President of the National Wildlife Federation, explicitly promised his group’s support on President Bush’s “promise that a precedent-setting ‘environmental review’ would be part of NAFTA negotiations.” Jay D. Hair, \textit{Nature Can Live with Free Trade}, N.Y. TIMES, May 19, 1991, at D17.


\textsuperscript{31} While not widely discussed at the time, there was precedent for environmental review of a treaty. Although not a trade agreement, an environmental review had been performed for the Panama Canal Treaty negotiations. As Secretary of State Warren Christopher stated in 1979:

The National Environmental Policy Act has provided useful guidance in drafting the Panama Canal Treaties so as to avoid or mitigate the adverse
court, Public Citizen, Sierra Club, and Friends of the Earth sought to compel USTR to comply with NEPA and prepare an EIS.\textsuperscript{32}

While initially dismissed for lack of standing (by the lower court) and lack of final agency action (by the D.C. Circuit),\textsuperscript{33} the case was refiled after President Clinton signed NAFTA. To the collective gasp of the foreign policy community, the district court granted summary judgment and ordered USTR to prepare an EIS of NAFTA "forthwith."\textsuperscript{34} Faced with the prospect of losing fast-track authority (and most likely NAFTA, as well) before the EIS could be completed, the administration rushed through an appeal of the decision. The D.C. Circuit reversed the lower court on purely administrative law grounds.\textsuperscript{35}

\textbf{C. USTR's Environmental Reviews}

While the \textit{Public Citizen v. USTR} decision ended the possibility of requiring an EIS for trade agreements,\textsuperscript{36} the environmental review of NAFTA proved an important watershed in U.S. trade policy because it showed that reviews could inform and promote deals rather than obstruct them. The review's focus was narrower than a traditional EIS—it tried to identify early on what the real problems were and then crafted specific negotiation positions to address them.\textsuperscript{37} Critics

\begin{quote}
environmental effects which might result from the implementation of the treaties. We recognized the importance of NEPA procedures in formulating environmentally sound policies as well as the value of public participation in the NEPA review process.
\end{quote}


\textsuperscript{32} The suit was filed on August 1, 1991, shortly after USTR had started its environmental review. While often overlooked, the plaintiffs also sought to compel USTR to prepare an EIS for the ongoing General Agreement on Trade and Tariffs (GATT) Uruguay Round negotiations. \textit{Public Citizen v. Office of U.S. Trade Representative}, 782 F. Supp. 139, 141 (D.D.C.), aff'd, 970 F.2d 916 (D.C. Cir. 1992).

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Public Citizen v. USTR}, 822 F. Supp. 21, 31 (D.D.C. 1993).

\textsuperscript{35} \textit{Public Citizen v. USTR}, 5 F.3d 549, 553 (D.C. Cir. 1993) (holding that NEPA's requirements did not apply both because the President's signature of the trade agreement was not a final agency action and because the President is not an agency).


\textsuperscript{37} It is interesting to note that Kathryn Fuller, President of US-World Wildlife Fund, did not favor following NEPA's requirements, arguing that "an EIS on a 900-page omnibus revision of trade between three nations may press the utility of an EIS
denounced the review as little more than a superficial sales job.\textsuperscript{38} Yet in speaking with those involved in the negotiations, the review appears to have significantly influenced the shape of the final agreements.

The review highlighted the likely environmental degradation caused by maquiladoras along the U.S.-Mexico border; and a separate Border Plan and funding mechanism for border area environmental problems were negotiated.\textsuperscript{39} The review discussed concerns over potential race-to-the-bottom pressures, and the side agreement provided mechanisms to ensure parties maintain environmental, health, and safety standards.\textsuperscript{40} The review called for assurances that NAFTA did not undermine international agreements such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or the Montreal Protocol; and this, too, was part of the final agreement.\textsuperscript{41} All of these, in turn, led to the unprecedented requirement that the Commission on Environmental Cooperation periodically review the environmental effects of NAFTA.\textsuperscript{42} The review did not, in itself, cause these developments, but it provided strong support for their realization. As Professor Dan Esty, who headed EPA’s involvement in NAFTA, later observed, “the review identified opportunities and vulnerabilities we could address in the context and framework of the negotiations. It gave us a chance to highlight issues for the negotiators at a time in the process where something could still be done about them.”\textsuperscript{43}


\textsuperscript{38} See id. at 229 ("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."); Goldman, supra note 31, at 668-69 ("Although the USTR prepared a final environmental review at that time, it never acknowledged that NAFTA could have any adverse effects on environmental protections, sustainable development, or energy and other natural resources. In essence, the USTR’s final review was merely a political document designed to sell the NAFTA to Congress and the public in the waning days of the debate."); Robert F. Housman & Paul M. Orbuch, \textit{Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead}, 8 AM. U. INT’L L. & POL’Y 719, 783 (1993) ("[T]he Review . . . fails far short of being the detailed NAFTA environmental impact analysis that would have been required from USTR under the environmental assessment provisions of NEPA.").

\textsuperscript{39} See BECC, supra note 7, at 1548-56 (outlining the Border Environment Cooperation Commission procedure).

\textsuperscript{40} See Environmental Side Agreement, supra note 7, at 1483.

\textsuperscript{41} NAFTA, Article 104(1), supra note 7, at 297-98.

\textsuperscript{42} Environmental Side Agreement, supra note 7, at 1486. The Commission on Environmental Cooperation’s assessment program is now in its second multi-year phase.

\textsuperscript{43} Letter from Dan Esty, Professor, Yale Law School (Sept. 15, 2000) (on file with author). For further background on the NAFTA environmental review, see JOHN J. AUDLEY, \textit{GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL}
The following year, USTR issued an environmental review of the Uruguay Round.\textsuperscript{44} Since the major deals had already been cut, however, the review contained scant analysis and did not focus on policy options. Its purpose, rather, seems to have been to reassure skeptics that the likely impacts of the new Round's agreements would not be significant.\textsuperscript{45} Prior to E.O. 13,141, only one other U.S. environmental review of a trade agreement had been undertaken—the 1999 study of the proposed Accelerated Tariff Liberalization (ATL) initiative with respect to forest products.\textsuperscript{46} Its findings were similar to those of the Uruguay Round review, concluding that the impact on aggregate global levels of forest product production would be minimal.\textsuperscript{47}

\textit{D. International Developments}

U.S. reviews of trade agreements have been part of a larger trend, strongly supported by international organizations. Throughout the 1990s, the Commission on Sustainable Development (CSD) consistently called for development of a framework to facilitate the assessment of the environmental effects of trade.\textsuperscript{48} These declarations have been complemented by development of review methodologies at a series of Organization for Economic Cooperation and Development (OECD) workshops and resulting publications.\textsuperscript{49} United Nations Environment Programme

\textsuperscript{44} Report on Environmental Issues in the Uruguay Round Agreements, 59 Fed. Reg. 9,802 (March 1, 1994).

\textsuperscript{45} The report concluded that while the Uruguay Round would lead to a three percent expansion of GNP, this was "well within the capacity" of existing laws and regulations to address in time. CEC Report, supra note 27, at 22.


\textsuperscript{47} Id. at 14–15.


\textsuperscript{49} In 1993, the OECD Ministerial Council recommended that "governments
(UNEP) and United Nations Conference on Trade and Development (UNCTAD) have also sponsored a series of pilot projects assessing the impacts of trade liberalization in specific sectors. The major trade body, the WTO and its predecessor, General Agreement on Trade and Tariffs (GATT), though, have never undertaken environmental reviews of trade rounds.

The European Union (EU) actively reviewed the environmental implications of trade agreements even earlier than the United States. Building on its 1992 report assessing the environmental impacts of the Common Market, in 1998 the EU launched its "Sustainability Impact Assessment of the Proposed New Round of Multilateral Trade Liberalisation." The Sustainability Impact Assessment will examine the potential environmental and social impacts of the next WTO Round. Its focus on social issues marks a significant contrast with the U.S. reviews' sole focus on environmental impacts. The methodological development and scoping phase of this ambitious program have already been completed. In addition to the United States and the EU, Canada has been a major proponent of IGOs developing review methodologies and sponsoring pilot projects. Like the United States,
Canada also conducted an environmental review of NAFTA and the Uruguay Round, and has committed to conducting a review of the next WTO trade round.\textsuperscript{55}

III. THE CHALLENGE OF REVIEWS

From this brief description of initiatives in the United States, Canada, and Europe, it is clear that E.O. 13,141 sprouted from fertile soil. When one considers the total number of significant trade agreements over the last decade, however, it is equally clear that environmental reviews have been the exception rather than the rule. Given the potential benefits of reviews, this seems odd. If environmental reviews of trade agreements can identify win-win situations for trade and environment, mitigate harms, and transform potential antagonists into partners, why have they been so rare? This Part explores the obstacles to conducting and institutionalizing environmental reviews of trade agreements.

A. Overcoming Inertia

The simplest reason for the paucity of environmental reviews is inertia. Until the Tuna/Dolphin decisions and NAFTA negotiations, the environmental implications of trade agreements simply had not been on NGOs' radar screens. Following the Tuna/Dolphin decision, in the early 1990s, major environmental groups including the World Wildlife Fund, the Sierra Club, and Friends of the Earth hurriedly built up staff expertise to handle this "new" issue.\textsuperscript{56} Prior to that time, however, these groups had not applied any sustained political pressure on USTR or Congress to address the environmental impacts of trade agreements. USTR was in the same position. There had been no pressing reason to consider the environmental implications of trade agreements, and the agency only began to do so when the Bush administration sought to gain political support for the extension of fast-track authority. Indeed, USTR's first environmental office was not created until late 1991.

The lack of reviews was not simply an oversight, though. There has been strong opposition in much of the trade community (both in

\textsuperscript{55} GOVERNMENT OF CANADA, NORTH AMERICAN FREE TRADE AGREEMENT: CANADIAN ENVIRONMENTAL REVIEW (1992); GOVERNMENT OF CANADA, URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: CANADIAN ENVIRONMENTAL REVIEW (1994).

the United States and overseas) to significant engagement with environmental issues. As a recent example, despite the Clinton administration's promotion of environmental issues at the WTO, which was significant and consistent, consider its management of the Industry Sector Advisory Committees (ISACs).57 Seventeen ISACs provide technical advice to USTR on specific sectors such as leather products, paper products, energy, and textiles.58 Until the Northwest Ecosystem Alliance and other NGOs sued in 1999 to force the government to place environmental representatives on the Lumber and Wood Products Advisory Committee and Pulp and Paper Products Advisory Committee, there had never been an environmental representative on any of the ISACs, despite the fact that a number of their trade flows, such as lumber, ferrous ore, and energy cause significant environmental harm.59 As the president of Friends of the Earth bluntly testified before Congress:

Approximately 700 business representatives sit on 30 [sic] industry sector advisory committees that get special access to information and advise USTR. There are no public interest members on these committees. For example, there are two committees advising USTR on the forest product trade. None of the members of the committees are environmentalists, so it is not surprising that USTR has aggressively pursued trade policies that threaten forests worldwide. These committees need to be opened to diverse public interests or abolished.60

Though opposed by the administration, the Northwest Ecosystem Alliance won its case on summary judgment.61 Immediately thereafter, the administration announced it would appeal. Only several months later did it withdraw its appeal, and at the end of the Clinton administration, over two years after the decision, there were environmental representatives on only two of

57 See infra note 75 (explaining the advisory committee structure).
59 Northwest Ecosystem Alliance v. Office of the U.S. Trade Representative, No. C99-1165R, 1999 U.S. Dist. LEXIS 21689 (W.D. Wash. Nov. 8, 1999) (holding that the challenged ISACs did not comply with the requirement of the Federal Advisory Committee Act (FACA) that committees be "fairly balanced").
60 Outcome of the World Trade Organization Ministerial in Seattle: Before the Subcomm. on Trade of the House Comm. on Ways And Means, 106 Cong. 182-64 (2000) (statement of Brent Blackwelder, President, Friends Of The Earth). The administration argued that the ISACs' narrow technical focus required only experts from within the industry sector (and was mandated by the Trade Act of 1974, 19 U.S.C. § 2155 (1994)). USTR likely was also concerned that extending membership in sectoral advisory committees to environmental groups would compromise confidentiality and industry's willingness to share sensitive data.
the ISACs.62

Isolating environmentalists in a small, ineffectual group has been the WTO’s strategy with the Committee on Trade and Environment, but such a tactic is unexpected from USTR, an agency committed to integrating environmental concerns into overall trade policy.63 Even if USTR genuinely tried to incorporate environmental concerns into its work (and it appears that it has), the larger business community remains resolutely opposed. As a Wall Street Journal editorial succinctly declared:

[Al Gore’s trade] policy promises that any new trade pact [will] include “labor” and “environmental” planks. This sounds innocuous, but it’s both big and bad news. . . . Trade, in short, would no longer be about exporting cars or computers, but about the policy preferences of the AFL-CIO and Sierra Club. . . . [T]he GOP sensibly wants trade deals to remain about trade.64

The professional trade community has largely been opposed to explicit linking of trade and environment, as well. The quote at the beginning of this article from Ambassador Zoellick (the current U.S. Trade Representative) reflects this opposition, arguing that a trade agreement with environmental provisions is likely a protectionist agreement.65 Following the Seattle WTO Ministerial, Zoellick further observed that environmental and labor issues have little place at the WTO.

The WTO is not a global government with the power to order new environmental or labor laws—or, for that matter, better tax regimes, pension plans, health programs, civilian control of militaries or a host of other meritorious outcomes. The WTO is a forum where governments can negotiate to reduce barriers to trade and agree to rules to try to resolve disputes. We cannot make the WTO into the organization that will deal with all the problems that elected, national governments struggle with every day.66

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62 A second lawsuit challenging membership on the Chemicals ISAC was settled out of court. The Bush administration has invited environmentalists to join the ISACs, but ironically, it has proven difficult to find NGOs willing to participate. This is likely more due to scarce resources than lack of interest.

63 However, it is not entirely reasonable to blame USTR for the restricted ISAC membership, since the Department of Commerce administers these committees. Indeed, to its credit, USTR has launched a formal review of its advisory committee system and communication with NGOs on trade issues. See USTR Request for Public Views, 65 Fed. Reg. 19,423 (Apr. 11, 2000).


65 Kondracke, supra note 3.

Just recently, President Bush has clearly expressed the view that environmental issues have no place in trade agreements. Speaking before the Business Roundtable, Bush made his views on the perils of linking trade with labor and environmental protections quite clear.

Now, there are some who are legitimately concerned about the environment and labor, but I remind them that if you believe in trade, you believe that prosperity will spread. If you believe in trading with a country, it'll help that country grow economically and a country that is more prosperous is one more likely to be able to take care of their environment. And a one more prosperous is one more likely to take care of their workforce.

And if you believe in improving the environment, in helping the labor conditions in countries, don't wall off those countries. Don't create—don't enhance poverty by refusing to allow there to be trade.

Now, there are some who want to put codicils on the trade protection authority for one reason: they don't like free trade. They're protectionists, and they're isolationists. And we must reject that kind of thought here in America.67

While Bush made these comments as part of the ongoing political minuet over gaining fast-track trading authority, these views accurately portray the belief of many in the trade community over the dangers of linkage.68

B. Public Participation in Trade Policy

The creation of trade policy is an iterative process. As negotiations develop, objectives subtly change. Potential areas of agreement recede while others open. The challenge for USTR lies in trying to move the trade agenda forward with negotiating partners, while remaining responsive to political constituencies in the White House, Congress and, by extension, powerful private economic interests. In recent years, this responsibility has expanded to include engaging the public and other stakeholders.

The U.S. government relies on a closed interagency process, known as the Trade Policy Staff Committee (TPSC), to determine its negotiating positions.69 Chaired by a USTR official, TPSC has

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68 See generally Hunter, supra note 14, at 1167–71, 1178–79 (describing the contours of the trade and environment debate).
representatives from seventeen agencies and offices that oversee the more than sixty subcommittees examining specific issues. If members of TPSC cannot reach agreement, or significant policy decisions need to be made, the contentious issues are then considered by the Trade Policy Review Group, chaired by the Deputy U.S. Trade Representative and staffed by agency undersecretaries. If issues still remain unresolved, the final decision to coordinate the federal government's economic policy-making process, including trade, lies with the National Economic Council (NEC), which is chaired by the President. NEC, for example, delegated responsibility for drafting E.O. 13,141.

Not surprisingly, this process is closed to the public. Indeed, as one commentator has observed, "international trade agreements, with the notable exception of the North American Free Trade Agreement, have historically been negotiated and implemented in relative obscurity, away from public scrutiny." While a Federal Register notice is published at the commencement of trade negotiations, stating the objectives of the negotiation and allowing interested parties to submit comments, there is usually little room for further public participation in the process. Informal consultation, of course, has long occurred with traditional business constituencies and now regularly happens with NGOs as well.

USTR's formal public consultation on environmental issues occurs through the U.S. Trade and Environment Policy Advisory Committee (TEPAC), created in 1994 to provide policy advice on the intersection of trade and environmental policies. Co-chaired by the U.S. Trade Representative and EPA Administrator, TEPAC can have up to thirty-five members. In practice, only about fifteen members have been active, providing advice on issues such as eco-labeling.

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71 Id.
72 See infra note 91. The International Trade Commission can also become involved, when requested to report on the projected impacts of a specific trade issue. The Commission held hearings, for example, on the economic impacts of NAFTA. See infra note 86.
74 One USTR official related that near the conclusion of the Uruguay Round, for example, NGOs were briefed every night and became heavily involved in proposing alternate formulations. This resulted in a number of creative proposals subsequently presented by the U.S. delegation.
75 Created by the Trade Act of 1974, 19 U.S.C. § 2155 (1994), the advisory committee structure has three tiers. The Advisory Committee for Trade Policy and Negotiations (ACTPN) provides overall policy advice. The next tier, with committees such as TEPAC, provide general policy advice. And the third tier includes sectoral or functional advisory committees. Advisory committees have no authority to conclude agreements or make binding decisions. 19 U.S.C. § 2155 (1994).
transparency at the WTO, the Free Trade Area of the Americas agreement, and the Guidelines for E.O. 13,141.\textsuperscript{77} While influential in some instances, the impact of TEPAC has been uneven. Consensus has been difficult to reach on significant issues, resulting in watered-down or separate majority and minority advice. During its early years, the Committee was often approached for post hoc consultation—asked for advice on decisions that had already been made. As described above, however, of more general concern to environmental considerations in trade policy development, has been the small number of environmentalists on the other sectoral advisory committees that have few, or more commonly, no environmental groups represented. Thus the trade policy community's longstanding tradition of closed decision making, absent environmental interests, has meant that formal adoption of environmental reviews would require a significant change to the status quo and by extension, a challenge to parties who would now have to share their insider access.

\textit{C. Analytical Difficulty}

Another reason for the paucity of reviews, perhaps too obvious to mention, is that reviewing prospective trade agreements is difficult. Amidst the heated debate between free traders and environmentalists rests the uncomfortable fact that, after more than a decade, we still do not understand very well the relationship between trade liberalization and environmental protection.

The classic argument of free traders, reiterated in virtually every WTO publication on the subject, relies on the Environmental Kuznets Curve hypothesis—once income reaches a certain per capita level, pollution decreases because additional resources can now be devoted to pollution prevention and control.\textsuperscript{78} Trade liberalization therefore complements environmental protection because it increases \textit{per capita} wealth. In the abstract, this seems obvious. One cannot expect starving people to spend scarce resources on pollution control. But, in the real world, this hypothesis has limitations. The relationship of reduced pollution

\textsuperscript{77} These members come from industry, labor, environmental, and animal rights groups, as well as independent experts from academia. \textit{Id}.

\textsuperscript{78} Research based on "Kuznets curves" has demonstrated an association between an increase in \textit{per capita} wealth and a decrease in some types of pollution. When the amount of pollution is plotted against \textit{per capita} GNP, a curve shaped like an inverted "u" results. As economic activity grows, the argument goes, air and water pollution first increase. Then, possibly because basic needs such as food and shelter have been addressed, pollution control is implemented and pollution decreases. This association has been relied upon by the WTO and other advocates of trade liberalization to support a deregulatory approach to trade liberalization to spur economic growth. \textit{Hunter, supra} note 14, at 50.
with increased wealth has been demonstrated for some pollutants (such as particulates and sulfur dioxide) in some countries, \(^\text{79}\) but there are also counter-examples for these pollutants. \(^\text{80}\) And more importantly, the relationship clearly does not hold for greenhouse gases or hazardous waste—pollutants that are closely linked with economic growth. \(^\text{81}\)

Just as increased production and consumption can degrade land, air, and water resources, economic growth can provide the necessary resources to address these same environmental problems. Hence the environmental implications of liberalized trade may be both positive and negative, direct and indirect, depending on the sector, economy, and trade measure. Given these variables, predicting the consequences of a trade agreement is, to put it mildly, analytically challenging.

As an example, consider a negotiation that will surely take place in the next WTO Round—liberalization of the European agricultural sector. \(^\text{82}\) As the World Wildlife Fund has suggested, this might play out along the following two courses: \(^\text{83}\)

1) Subsidies in cereal production in Europe are removed following a free trade agreement → cereal prices fall in European markets → use of fertilizer declines and land area under cultivation also likely declines → soil erosion decreases and quality of soil improves → agricultural production relocates outside Europe → farmers switch to other activities → economic and social effects result, such as an increase in recreational services with different kinds of environmental impacts and/or increased urban migration → pollution and waste discharge problems increase in urban areas and unemployment rises;

2) Production subsidies in the cereal sector in Europe are removed → market prices fall and price support schemes decrease → extensive cereal system in Portugal is lost because of lack of competition → the habitat and population of the Great Bustard, an already threatened bird species, declines → cultural interest decreases and hence tourist


\(^{80}\) See, e.g., William T. Harbaugh et al., Reexamining the Empirical Evidence for an Environmental Kuznets Curve (unpublished manuscript, on file with author); David Stern et al., Economic Growth and Environmental Degradation: The Environmental Kuznets Curve and Sustainable Development; 24 WORLD DEV. 1151, 1158 (1996).


\(^{82}\) As part of the Uruguay Round, WTO parties agreed that the next round would include negotiations over agriculture and services. This is known as the “Built-in Agenda.” See Mike Moore, The WTO, Looking Ahead, 24 FORDHAM INTL. L.J. 1, 6 (2000).

attraction in the area decreases → unemployment increases.

If Europe's agricultural sector shrinks, what are the consequences for other sectors and the economy-wide implications for resource reallocation? What types of changes could this mean for specific environmental indicators or species? Is it even possible to predict qualitatively the chain of causation from specific trade measures to discrete environmental consequences? And if the nature of the impact is apparent, will the degree of impact be apparent? The U.S. economic growth due to NAFTA, for example, has been small compared to overall changes in gross domestic product (GDP). In a complex system such as the U.S. economy, linking cause and effect—disentangling the relationship between increased trade, economic activity, and ensuing environmental impacts—is dramatically uncertain. As one USTR official described, "we have virtually no experience with environmental modeling or how to limit the scope of analysis. A matrix of the economic and environmental impacts could fill an entire wall."

Our inability to model these systems is not surprising, as little money has been spent in the field, but it makes a daunting methodological task even more challenging. Before throwing up our hands in despair, though, it is important to recognize that the government believes this type of modeling can be done for economic impacts and, in fact, routinely engages in such an examination prior to major negotiations; hence, the oft-heard administration arguments regarding why the Senate should ratify the Uruguay Round or NAFTA: "The proposed trade liberalization will increase GNP by X%." If we have confidence in this type of economic modeling, it seems reasonable to assume we could develop similar expertise and reliability in environmental modeling. By starting now, however, we lack the fifty or more years of experience reflected

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84 The NAFTA review, for example, is firmly agnostic in predicting specific environmental impacts, noting "that as NAFTA obligations alter relative prices in the agricultural sector, changing the use of agricultural inputs such as pesticides, labor and land, as well as the ratio of input mixes... 'can improve or worsen' water quality, soil erosion, soil productivity, biodiversity, wildlife habitat, food safety and worker health." CEC Report, supra note 27, at 28.


87 As TEPAC's recommendation on the Executive Order (submitted as a public comment) explained, there is much more information on the environmental effects of trade policies in government, academia, and research institutes than one might think. The initial challenge lies simply in collecting this data together into a form that is accessible.
in economic forecasters' general equilibrium models and other sophisticated methodologies.

D. The Nature of the Beast

A final challenge, as daunting as the others listed above, is that trade negotiations by their very nature do not lend themselves to thorough reviews. While NEPA provides a useful model for environmental reviews of trade agreements, there are fundamental differences. Most importantly, an EIS generally focuses on a specific, fixed project, whether a dam, mine, or timber sale. When a federal agency or World Bank loan recipient prepares an EIS, the details of the proposed project and its alternatives are known up front. With trade proposals this will rarely be the case. Negotiation, by definition, is fluid, resulting in modified and sometimes drastically different proposals as talks progress. The final positions often are not reached until the negotiating deadline forces movement. As a seasoned USTR negotiator half-jokingly described to the author, the halfway point of the negotiation process may be a good time to do a review, but that is generally forty-eight hours before the final deadline. This not only makes it hard to reopen issues, but also to decide early on which alternatives merit detailed study, when the range of options is still broad.\textsuperscript{88} Added to this is the problem of secrecy. For obvious reasons negotiations are often conducted with positions held close to the chest.\textsuperscript{89} This makes early public review of alternatives problematic.

IV. REQUIREMENTS OF EXECUTIVE ORDER 13,141

These challenges were all on the table as the interagency group drafted the text of E.O. 13,141 in the summer of 1999.\textsuperscript{80} On its face, E.O. 13,141 is ambitious (the E.O. is reprinted in the annex to this Article). It commits the U.S. government to “factor environmental considerations into the development of its trade negotiating objectives [through] a process of ongoing assessment and

\textsuperscript{88} An additional challenge to examining alternatives is that the "no action" option is not the status quo, since breaking off trade negotiations may strain diplomatic relations and make environmental cooperation worse than before. See CEC Report, supra note 27, at 25.

\textsuperscript{89} It is worth noting that the economic modeling of trade agreements described above are generally not published to avoid tipping off negotiating positions.

\textsuperscript{90} The first serious discussions to draft an E.O. had started in 1998, when the U.S. government had to decide whether to endorse an OECD policy paper on environmental reviews. Disagreements over the role of reviews finally made their way up to NEC in 1999, which asked the Council on Environmental Quality (CEQ), USTR, and EPA to write a white paper on the issue. Conflict over the role of reviews continued until the Seattle Ministerial forced action on the issue.
evaluation, and, in certain instances, written environmental reviews.\footnote{E.O. 13.141, supra note 4, § 1.} While USTR and the Council on Environmental Quality (CEQ) have joint responsibility for the Order’s implementation, USTR (working through TPSC) directs reviews of specific agreements.\footnote{Id. § 3.} Upon request by USTR, federal agencies “shall” provide resources and personnel to the extent permitted by law.\footnote{See id. § 6 (request is subject to approval by the Office of Management and Budget (OMB)).}

Each review commences with a scoping process that results in three key decisions. The first determines whether a written review is warranted at all. Written environmental reviews must be prepared for comprehensive multilateral rounds, bilateral or plurilateral free trade agreements, and major liberalization agreements in natural resource sectors.\footnote{Id. § 4(a).} Most other so-called “4(c) agreements” (including most sectoral liberalization agreements), though, presumptively will not require a review unless TPSC determines otherwise, based on “the significance of reasonably foreseeable environmental impacts.”\footnote{Id. § 4(c).} The second decision involves the location of impacts. In general, written reviews will only focus on domestic impacts.\footnote{Id. § 5(b).} While global and transboundary impacts are considered during the scoping process, these will only be examined in the written review if TPSC deems it “appropriate and prudent.”\footnote{Id. The Guidelines define global impacts to include impacts on places not subject to national jurisdiction or subject to shared jurisdiction, impacts on migratory species, and impacts relating to environmental problems identified by the international community as having a global dimension or otherwise of concern to the United States. While quite broad, this definition does not include impacts solely in foreign nations. Guidelines for Implementation of Executive Order 13,141, 65 Fed. Reg. 79,442, 79,446 [December 19, 2000] [hereinafter Implementation Guidelines].} And the third decision involves identifying and prioritizing which impacts to examine.\footnote{Id. at 79,446.}

The written review should take place “sufficiently early in the process to inform the development of negotiating positions” but is expressly not a precondition for negotiation.\footnote{Id. at 79,442.} Failure to complete the review will not prevent USTR from tabling positions. As with NEPA, reviews must consider alternative negotiating positions (as well as possible changes to U.S. laws) and both quantitative and qualitative impacts.\footnote{Id. at 79,449.}

Public comment will be solicited through Federal Register notices at the time TPSC first decides to consider a review, at the
scoping stage, and at the time of the review’s first draft. The final review will also be made public. The Guidelines call for a forty-five day comment period when possible, as well as public hearings, web site postings, engagement with advisory committees (presumably including TEPAC), and other mechanisms to involve public comments. As with all Executive Orders, E.O. 13,141 applies only within the executive branch and does not create any private or public cause of action. To its credit, the Clinton administration immediately took the Executive Order seriously, with intensive interagency negotiation and a commitment to conduct reviews for three negotiations—bilateral agreements with Jordan and Singapore, and the Free Trade Area of the Americas agreement (FTAA).

V. THE HARD METHODOLOGICAL DECISIONS

While the final Guidelines have now been published and reviews are underway, because there is so little experience to guide the environmental review of trade agreements, the Executive Order will surely remain a work in progress for the foreseeable future. Indeed, it is important to recognize that the Order could have taken a very different form, and may still do so in the future. The Clinton administration’s commitment to conduct reviews, while significant in itself, still left the most important issues unanswered. In overcoming the challenges described in Part III above, who would conduct the review? What impacts would it examine? How would these be measured? How would they be integrated into the policy process?

As Part II explained, environmental reviews to date have ranged from the quantitative modeling of the EU’s 1992 analysis of the Common Market to the largely qualitative U.S. review of NAFTA. Any review, whether quick, dirty, and cheap, or lengthy, sophisticated,

101 Id. at 79,448.
102 Id.
103 Id. at 79,447.
104 E.O. 13,141, supra note 4, ¶ 7.
106 Needless to say, there was considerable lobbying by NGOs and industry to influence the Implementation Guidelines. While an oversimplification, industry interests were mostly concerned that the requirements of the review not slow down or obstruct agreements, while NGOs focused on ensuring the reviews had broad coverage and were meaningfully considered by the negotiators.
and costly, must make basic methodological choices concerning timing, scope, advocacy, and participation. Part V explores the range of choices considered during the drafting of E.O. 13,141. Focusing on these is as important, if not more so, than on the final text of the Order and its implementing guidelines because similar conflicts will confront the drafters of any environmental review requirement, whether at the national or international level.

A. Timing

If a key goal of reviews is to inform negotiators by identifying potential opportunities and vulnerabilities prior to final agreement, then presumably the review should take place as early as possible. But when, to allow meaningful analysis, should this be? If NEPA is a guide, review should be early enough for meaningful consideration of alternatives to the negotiating objectives, including a no-action alternative. But should this occur once the parameters of the negotiations have been framed? At the time negotiations have formally commenced? When the likely positions have become clear? At what point will releasing the review to the public for comments be most useful?

Perhaps the timing should depend on the type of agreement—requiring earlier reviews for WTO rounds, where the negotiators could benefit from information on general problem areas and opportunities, and later review for sectoral liberalization agreements, focusing on specific provisions that emerge. The review could take the form of a dynamic, iterative process initiated early in the policy cycle but revisited during the negotiations, or it might be more useful as a thorough, one-off analysis. The resource and timing constraints of the two approaches vary considerably. Compounding the challenge of timing is the overwhelming importance of negotiating deadlines. Should the review be a prerequisite for action? If a negotiation deadline arrives and the review is incomplete, must USTR break off negotiations?

B. Agency Responsibility and Resources

Under E.O. 13,141, USTR both conducts environmental reviews and negotiates the agreement. This is similar to NEPA’s practice

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107 CEQ regulations call for an EIS to be prepared at the time of a proposal—that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23 (2000).

108 The Executive Order provides that a completed review is not a precondition for negotiation. E.O. 13,141, supra note 4, § 5(a)(iii).

109 Id. at § 3.
of having agencies oversee the EIS of their proposed projects, but it creates an obvious potential conflict of interest and the possibility for the exercise to become a post hoc rationalization of a decision already made.\textsuperscript{110} While some agencies have in-house capacity to produce an EIS, most agencies subcontract EIS production to outside consultants. With its confidentiality concerns, could such a model work with USTR? If not, how can USTR, one of the smallest federal agencies with little in-house environmental expertise, oversee, staff, and fund a serious review?

The Order and Guidelines say almost nothing about the interagency process, implying that TPSC will fully consider environmental issues raised by the review. While USTR is now more sensitive to environmental issues than in the past, it has been clear throughout the development of E.O. 13,141 that NGOs suspiciously regard USTR as free-traders at heart. Given the longstanding resistance to environmental representation on the ISACs, this suspicion is understandable. Since the beginning, NGOs have advocated a bigger role for CEQ in overseeing reviews, ideally chairing them. But CEQ and the administration consistently have opposed this level of involvement, arguing that CEQ does not play the role in NEPA that NGOs would like it to play under the Order. CEQ neither carries out project-specific EISs, nor reviews their adequacy.\textsuperscript{111} CEQ is neither staffed (only twelve full time employees at the time) nor funded for this purpose; rather its role is largely one of policy coordination. Indeed the CEQ person responsible for drafting the E.O. Guidelines was not even a full-time employee. While CEQ clearly does not have the capacity to manage complex econometric modeling, one could imagine a key role in informing and shaping a more environmentally active trade policy.

USTR was wary of resource implications from the start and stated throughout the drafting of the Order that it would need significant resources from other agencies. The ATL Forest Products review cost several hundred thousand dollars out of a total agency budget of roughly $26 million. Following the announcement of reviews for the FTAA and Jordanian bilateral free trade agreements, vigorous interagency discussion arose over funds. EPA estimated it would need at least $1 million annually and perhaps more. The Departments of the Interior, Transport, and Energy have important expertise to assist in review, as well, but will need to come forward with their own resources.

\textsuperscript{110} Canada has addressed this potential conflict of interest by having an independent agency responsible for all environmental reviews. Canadian Environmental Assessment Agency, available at http://www.ceaa.gc.ca:80/0003/index_e.htm (last modified Sept. 1, 2000).

\textsuperscript{111} See 42 U.S.C. § 4344 (2000) (absent from the list of CEQ duties are the duties to review or perform project specific EISs).
The draft Guidelines originally sent mixed messages regarding resources. While section 6 of the Order stated that federal agencies shall provide analytical and financial resources and support to carry it out, the Guidelines permitted resource constraints to excuse the review of global and transboundary impacts and section 4(c) trade agreements.**12** NGOs strongly objected to this exemption. Allowing time and resource constraints to justify an abridged review, they argued, would provide recalcitrant agency staff an easy option to avoid thorough reviews. Resources should flow from policy decisions, not the reverse. In response to these comments, and the strong recommendation of TEPAC, the final Guidelines deleted the resource exception.**13**

C. Public Participation

As described in Part III, development of trade policy and negotiating positions has always been a closed process. Environmental reviews have the potential to change this dynamic by formally moving public participation *upstream* in the trade negotiation process. Injecting meaningful public input into the shaping of trade agreements may provide a real voice—not only to established NGOs that have long enjoyed access to decision makers, but also to smaller groups and individuals who have experience and ideas to enrich the development of trade policy. It seems likely, for example, that a review and closer consultation with NGOs prior to negotiation of the ill-fated Multilateral Agreement on Investment (MAI) would have alerted USTR to the hostile reaction that negotiations subsequently engendered.**14**

From the outset, E.O. 13,141 was held out as a means to promote transparency and public participation. But what does that mean in practice? Ensuring the review is transparent—releasing drafts and accepting public comment—does not ensure that the input will be meaningful. Is it enough for the public simply to be informed of the government’s analysis? How can the review process demonstrate that the public’s contributions were considered? And how can this be done in the often very short time frame of negotiating deadlines?

Despite the Clinton administration’s success in granting China permanent normal trading status,**15** the strength of the labor and

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**13** See Implementation Guidelines, supra note 96, at 79,446.


environmental lobbies in blocking trade agreements cannot be underestimated. One of the Clinton administration’s key strategies in meeting these groups’ concerns was to make the trade process more transparent and responsive. Calls for opening up the WTO dispute panel process (through open hearings and amicus briefs) and E.O. 13,141 both sought to legitimize decisions in the trade realm. Indeed most of the administration’s public statements on the Order highlighted its provisions for public participation in the trade policy-making process.116

Public participation in decision making has three components: transparent decisions by the government, dissemination of information justifying the decisions, and meaningful opportunities for the public to influence decisions. The Order provides for a much more transparent and accessible process than in the past, but it lacks a mechanism to ensure that public comments are taken into account. Unlike NEPA, there is no requirement to respond to public comments (a signal that comments have been considered).117 As a result, Public Citizen bluntly predicted at the time of the Order’s issuance that the end product would simply become “a meaningless insider review.”118 Presumably other NGOs don’t share this dour assessment, or they would not have been so active in drafting its Guidelines.

Much of the debate over meaningful participation played out in arguments over the Guidelines’ silence on access to negotiating texts. Beyond releasing the draft reviews and scope of the intended negotiation, there is no obligation to release further information. As the Sierra Club has explained, such access is critical: “since an analysis of regulatory impacts must lie at the heart of an environmental review, USTR must release draft negotiating texts when it releases a draft environmental review.”119 It is hard to imagine how outsiders can meaningfully assess the review if they are unaware of the negotiating positions, but the opposing need for secrecy seems obvious, as well. One can imagine a range of compromises beyond release of the Chairman’s draft. Executive

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116 There is a growing literature on the role of public participation in the trade policy-making process. See, e.g., Daniel Esty, Non-Governmental Organizations at The World Trade Organization: Cooperation, Competition, or Exclusion, 1 J. Of Int’L Econ. L. 123 (1998) analyzing both the benefits of public participation—the role that NGOs can play in bringing new information (collaboration) or in forcing governments to strengthen their analysis and positions (competition)—and the drawbacks of public participation—public choice problems of diffuse versus concentrated interests).

117 See E.O. 13,141, supra note 4, § 5(a) (directing opportunity for public comment but not explicitly requiring a response to public comments).

118 Connolly, supra note 1, at E1.

Order 12,114’s treatment of sensitive information provides one instructive model. When shipping radioactive waste, agencies have written a supplemental EIS but, to avoid disclosing the shipment route, have held it as a classified document until after the shipment. The agency thus considered the impact of alternative actions but provided no opportunity for public comment. One might make use of the fact that advisory committee members have security clearance and provide for limited disclosure to TEPAC and other advisory committees—the broader conflict, however, seems unavoidable. Trade negotiations and full transparency cannot easily coexist.\footnote{See, e.g., Greenpeace USA v. Stone, 748 F. Supp. 749, 754 (D. Haw. 1990) (describing the process of classifying the assessment document).}

\textbf{D. Scope}

The substance of the review depends most upon what is being examined. The scholarship on reviews of trade agreements describes four categories of impacts.\footnote{See, e.g., Peter L. Lallas, \textit{NAFTA and Evolving Approaches to Identify and Address “Indirect” Environmental Impacts of International Trade}, 5 GEO. INT’L ENVTL. L. REV. 523, 524 (2000) (describing effects on intergovernmental regulation).} \textit{Scale impacts} result from increased trade on the overall level of economic activity and growth.\footnote{Id. at 530; see also WORLD WILDLIFE FUND, DEVELOPING A METHODOLOGY FOR THE ENVIRONMENTAL ASSESSMENT OF TRADE LIBERALISATION AGREEMENTS ¶ 3.6 (1998) at http://www.panda.org/Resources/publications/sustainability/wto-papers/method.html (last visited June 8, 2001).} These macroeconomic effects can increase consumption or production, but as the Environmental Kuznets Curve hypothesis suggests, equally provide resources to address environmental harms.\footnote{See Steve Charnovitz, \textit{World Trade and the Environment: A Review of the New WTO Report}, 12 GEO. INT’L ENVTL. L. REV. 523, 532–33 (2000) (explaining that the relationship between national income and pollution control was originally explained by the greater financial capacity of a country to regulate pollution).} \textit{Structural impacts} are more focused, concerning how increased trade influences the patterns of economic growth and investment within specific sectors (as in the analysis of agricultural subsidies excerpted above).\footnote{Lallas, \textit{supra} note 121, at 531; WORLD WILDLIFE FUND, \textit{supra} note 122, ¶ 3.7.} Will lowered tariffs result in different patterns of resource use and investment, in more pollution but less land degradation? Will they induce a flight to foreign “pollution havens”? \textit{Product impacts} result from changes in trade flows.\footnote{Lallas, \textit{supra} note 121, at 526–27; WORLD WILDLIFE FUND, \textit{supra} note 122, ¶ 3.8.} These may be positive—increasing imports of environmentally cleaner technologies and know-how—or negative—increasing trade in hazardous wastes or the potential for greater introduction of
invasive species.\textsuperscript{126} Finally, \textit{regulatory impacts} describe the consequences of trade agreements on domestic environmental laws as well as multilateral environmental agreements.\textsuperscript{127} The creation of disciplines and dispute mechanisms may directly threaten domestic protections and implementation of international commitments or chill new protections. Equally, provisions such as those in the NAFTA environmental side agreement may provide a mechanism to strengthen enforcement of existing protections.\textsuperscript{128} Interestingly, in contrast to environmental reviews in Europe, there was little serious discussion during the drafting of E.O. 13,141 over measuring \textit{social} impacts. This different focus likely reflects the greater influence of development NGOs in Europe.\textsuperscript{129}

Those conducting the review must also determine the assessment technique for each of these impacts. Assessing scale and structural impacts requires economic modeling, projecting rates of economic growth and shifts in trade flows, and then relating these to environmental impacts. Regulatory impacts lend themselves more to qualitative analysis, assessing hypothetical cases of inconsistencies between the proposed trade disciplines and existing laws. The selection of indicators for each of these impacts, while often overlooked, is critically important, as well. Depending on the impacts studied and how those impacts are measured, trade reviews can tell very different stories.\textsuperscript{130}

The geographic scope of review, of course, also matters. Although E.O. 13,141 provides that, "as a general matter, the focus of environmental reviews will be on impacts in the United States,"\textsuperscript{131} TEPAC recommended and environmental NGOs argued that reviews should presumptively examine global and transboundary effects as well. Industry urged the opposite, contending that consideration of environmental effects beyond U.S. borders would create serious

\textsuperscript{126} Lallas, \textit{supra} note 121, at 526; \textit{WORLD WILDLIFE FUND}, \textit{supra} note 122, \S\ 3.9.
\textsuperscript{127} See Lallas, \textit{supra} note 121, at 524–25 (outlining potential conflicts between trade agreements and environmental laws).
\textsuperscript{128} The Annex to the Guidelines elaborates on the requirements in sections VI(B)–(D), detailing the analysis of environmental, regulatory, scale, structural, and product impacts. Implementation Guidelines, \textit{supra} note 98, at 79,449.
\textsuperscript{129} NGOs commenting on the EU’s Sustainability Impact Assessment have called for even more analysis of trade impacts on “special groups such as children, indigenous peoples and women in both developing and developed countries.” \textit{JOINT NGO STATEMENT}, \textit{supra} note 54. As discussed in Part VI.B., developing countries have echoed these calls as well.
\textsuperscript{130} \textit{See} \textit{QUANTITATIVE ANALYSIS WORKING GROUP, REPORT TO THE FTAA INTERAGENCY ENVIRONMENT GROUP} (2000) (methodology for quantitative analysis of the FTAA), available at http://192.239.92.165/environment/analysis.pdf (last visited May 27, 2001). The report is well-written and provides a useful discussion of the different models available for analysis and the challenge of combining their respective strengths.
\textsuperscript{131} E.O. 13,141, \textit{supra} note 4, \S\ 5(b). It is interesting to note that Canada’s draft review procedures are even narrower, focusing only on impacts within Canada.
diplomatic tensions by infringing on trading partners' sovereignty and economic development.\textsuperscript{132} To ignore such impacts, however, risks shielding the most significant consequences of increased trade from review. The Guidelines do ensure that global and transboundary effects will be considered during the scoping phase, when the determination is made whether further study is appropriate and prudent. But upon closer examination the Guidelines stack the deck against considering impacts beyond U.S. borders.

In determining what is "appropriate and prudent," for example, the Guidelines require consideration of the scope and magnitude of global and transboundary impacts, but also the implications for U.S. international commitments and programs, data availability, and "diplomatic considerations."\textsuperscript{133} Most of the factors determining the appropriateness of review 1) are not environmental and 2) discourage review.\textsuperscript{134} Moreover, the definition of "transboundary and global impacts" specifically includes places "not subject to national jurisdiction."\textsuperscript{136} This would clearly seem to exclude impacts in foreign jurisdictions from consideration unless they cause transboundary impacts in the United States.

To be fair, since the Tuna/Dolphin cases, America's trading partners have been particularly sensitive to extraterritorial application of U.S. laws.\textsuperscript{136} What if the trading partner is opposed to reviews of its environmental protection activities? Will the U.S. officials have access to enough foreign data to ensure a credible review? Examining environmental impacts in another country, and presumably crafting trade rules to reduce these impacts, does risk appearing condescending or patronizing—"even though we don't see or feel the impacts in the United States, we still think it is best for you to protect your environment and we'll make sure the trade agreement does so."\textsuperscript{137}

While these concerns merit attention, excluding consideration of environmental impacts in other nations blunts most of the review's potential. As an example, consider the first review


\textsuperscript{133} Implementation Guidelines, supra note 98, at 79,445.

\textsuperscript{134} See id. at 79,444. The Draft Guidelines defined "appropriate and prudent" in terms of resource availability, as well. See Draft Guidelines, supra note 112, at 42,746. This was deleted in the final Guidelines.

\textsuperscript{135} Implementation Guidelines, supra note 98, at 79,449.

\textsuperscript{136} See, e.g., RIO DECLARATION, supra note 13, at Principle 12 (stating that "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided").

\textsuperscript{137} As Part VI explains, though, most developing countries are less concerned with this potential paternalism than the threat of conditionality—of requiring environmental reviews and using their findings as a pretext for protectionism.
conducted under E.O. 13,141—the Jordanian bilateral agreement. The Clinton administration pledged to review this agreement, and did so, but for what purpose? The impacts in the United States of increased trade with Jordan are negligible. USTR, to its credit, took the bold step of pushing for environmental measures in the agreement with the hope of strengthening Jordan's environmental protection efforts. But according to the Guidelines, these would not be considered in the review because the agreement will cause impacts solely in Jordan and its neighbors, not in the United States or in the global commons. As the next section explains, the review could have taken a "proactive engagement" approach, focusing on the nature of environmental problems facing Jordan, examining whether any of them are trade-related and, if so, how the bilateral agreement could assist through cooperative capacity-building or other measures. But reviews will not take this approach if there are narrow provisions for geographic scope.

E. Reactive versus Proactive

While debates over allocation of agency responsibility, public participation, and scope remain significant, the fundamental conflict at the heart of E.O. 13,141's development has been the review's starting point of reference and posture. While everyone agrees that reviews should inform negotiators and the trade policy process, this information could take very different forms. The review might simply present the likely environmental impacts of the various negotiating proposals. This would provide useful data that could be considered as TPSC deems appropriate. Similar to NEPA,


140 Apart from its environmental review provisions, if it is ratified the Jordanian Free Trade Agreement will provide an important precedent for future agreements. It is the first free trade agreement to include provisions on labor and environmental issues. Following the model of the NAFTA side agreement, the agreement states that countries should not fail to enforce their own domestic laws protecting the rights of workers and protecting the environment to attract investment. Persistent failure to enforce environmental laws can trigger binding consultations to resolve the problem. A separate technical assistance agreement creates a joint body to cooperate on environmental issues, providing expertise from U.S. agencies, for example, in controlling pollution. Office of the U.S. Trade Representative, The U.S.-Jordan Free Trade Agreement (October 24, 2000), available at http://www.ustr.gov/region/eumed/middleeast/US-JordanFTA.shtml (last visited May 27, 2001).

141 Implementation Guidelines, supra note 98, at 79,446.
this type of review acts primarily as an analytic exercise. Alternatively, the review might contain a section explicitly recommending environmentally preferable alternatives. If providing advice, the review becomes a much more policy-driven process and arguably, more useful to the trade policy community. Taking a step back from the specifics of E.O. 13,141 for a moment, then, consider the following possible review models.

In the first checklist model, reviews shape the contours of a given trade agreement, narrowing and sharpening the range of specific negotiating positions and objectives. The goal is to further trade liberalization while minimizing environmental harms. This describes the approach of the NAFTA review. The scope of review is limited to the agreement under negotiation and intended to allay the public’s concerns over its environmental impacts. TPSC examines the likely impacts of the agreement; if they are not serious, it checks off the environmental box and moves ahead. If there are environmental concerns, they can be mitigated through changing specific provisions or creating complementary initiatives. This first approach is primarily reactive and narrow—the review is used to show the specific agreement under consideration does not increase impacts or undermine environmental regulation and, in the event that it does, mitigate those impacts.

A second blunt linkages model would use reviews to examine how a trade agreement can be used to push countries toward stronger environmental protection practices. This approach relies on the carrot of increased trade (or, depending on one’s perspective, the stick of reduced trade) with the United States as a means to encourage changes in practices we view as undesirable. This was evident most recently in the opposition of a number of NGOs to granting China permanent normal trading relations (PNTR) without explicit environmental commitments on China’s part. Granting PNTR has little direct impact on the environment, but it gives up an influential means to influence environmental policies in the yearly bargaining of most-favored-nation status renewal.

The third active engagement model identifies trade practices that cause environmental harms and explicitly considers alternative means to reduce these. Traditionally, NGOs have viewed trade as a carrot/stick to change trading partners’ behavior (described above) or as a harm that must be contained (because increased trade, itself, is the cause of environmental problems). One could, however, view trade agreements positively as a direct policy instrument to shape trade flows in an environmentally supportive manner. The

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142 E.O. 13,141, supra note 4, §§ 4–5.
143 Id., §§ 2–3.
current discussions at the WTO over an agreement to reduce fishery subsidies are a perfect example of this.

With the support of many developing countries, Iceland, Australia, New Zealand, the Philippines, and the United States have called for a WTO agreement to reduce fishery subsidies. Reducing overcapacity would arguably lead to higher seafood prices and less pressure on already stressed fisheries. This proposal received strong support at the Seattle Ministerial and may well have been adopted had talks not broken down over agriculture. This strategy is both opportunistic and expansive. One uses such reviews to understand *how* trade agreements can improve the state of the environment while advancing economic interests. As the Friends of the Earth's public comments on the Guidelines concisely described:

> We believe that it is important to take a step back and ask the question: "given the economic and environmental implications of our commercial relations with another country or countries, or in a certain sector, how can we adjust international trade rules in that sector or with that country to better meet our environmental goals and make the commercial relations more sustainable?" 146

The key difference among these three review approaches, then, turns on the proper starting point from which to frame the analysis. Should the review's boundaries be set at the specific agreement, or around the larger sectoral practices underpinning the agreement? Does one start with pre-set trade objectives and then consider the environmental impacts of alternative means to achieve these, or with the commercial and environmental realities and ask what the trade policy can achieve? In the first instance, trade policies drive an environmental response. In the second, environmental considerations help shape the trade policies.

To make this distinction more concrete, consider the ATL initiative review in 1999. Following the decision to liberalize the timber trade by reducing tariffs, USTR, in response to strong NGO pressure, developed an econometric model to assess environmental


147 See generally ATL Study, supra note 46; Request for Public Comment Regarding the Economic and Environmental Effects of Tariff Elimination in the Forest Products Sector, 64 Fed. Reg. 34,304, 34,304 (June 25, 1999).
impacts from increased trade flows.\textsuperscript{148} The model predicted minimal environmental impacts.\textsuperscript{149} This was a responsible, legitimate answer to the question of how accelerating tariffs would affect the environment, but was it the right question?

One could have framed the review by considering the broader question at issue back in 1997—how to liberalize trade in the forest sector among APEC members\textsuperscript{150}—and asking if forests are currently managed sustainably. If not, what are the principal trade-related practices leading to this result? The World Wildlife Fund has argued that approximately sixty percent of logs sold in Indonesia are harvested in violation of local law and that the information on exported timber gathered by customs agents is inadequate to ensure meaningful tracking and enforcement.\textsuperscript{151} Knowing this, one could craft an agreement that not only reduces tariffs \textit{but also} complements these with trade-related measures needed to improve the forestry trade (such as changed customs practices or certifications for export).\textsuperscript{152} Unlike the first \textit{checklist} model, the review's scope is much broader both geographically and substantively. Sustainable forestry issues would never be considered if the analysis focused solely on impacts in the global commons or the United States. Unlike the second \textit{linkages} model, the review suggests measures directly related to the trade flow in question.

Such a broad-scale review will not, of course, always be possible. USTR usually does not commence negotiations with a blank slate. Specific directives from Congress or the White House may effectively proscribe the breadth of the agreement, short-circuiting what could have been a far-ranging review. Nevertheless, starting from a broader frame of reference potentially transforms the negotiation process into a genuine educational experience, calling into question trade-related policies that drive environmental change but often escape notice because they are not implicated by the specific trade rules considered in the agreement.

The debate over the proper frame of reference has played out over interpretation of the Order's requirement that agencies factor

\textsuperscript{148} See ATL Study, \textit{supra} note 46, at ii. iv.
\textsuperscript{149} \textit{Id.} at 14–15.
\textsuperscript{150} The Asia-Pacific Economic Cooperation (APEC) is a forum for Pacific Rim nations to promote open trade and economic cooperation. It has 21 member countries. Univ. of Wash., United States APEC Index. at \url{http://www.apec.org} (last visited May 27, 2001).
\textsuperscript{151} Interview with David Schorr, World Wildlife Fund–US (Aug. 22, 2000); e-mail from Dewi Suralaga, World Wildlife Fund–Indonesia, to James Salaman, Professor, Washington College of Law, American University [May 24, 2001] (on file with author).
\textsuperscript{152} The NAFTA environmental review, for example, revealed the significant problem of air pollution at border checkpoints caused by long lines of idling cars. As a result, the final agreement ensured that border processing would proceed more quickly. Interview with Dan Esty, Professor, Yale Law School (May 15, 2000).
environmental considerations into trade negotiating objectives through "a process of ongoing assessment and evaluation." On its face, this phrase seems to call for active engagement, for a proactive review beyond the specific agreement at issue. Indeed under the Clinton administration, Charlene Barshefsky, U.S. Trade Representative, and George Frampton, Director of CEQ, seemed to support such an approach. In a letter to Congressman Lloyd Doggett sent May 17, 2000, to provide him "additional reassurance about our intentions with regard to implementation of Executive Order 13,141," they stated that:

The guidelines will ensure that the environmental review will not be limited to economic models and conclusions drawn therefrom, but in most cases will include a review of the environmental dimensions of current commercial practices and trade policies and how a given trade agreement might provide improvement thereby.

USTR and CEQ did not subsequently support this interpretation, however. The Guidelines' explanation of ongoing environmental assessment and evaluation is virtually without substance, likely resulting in a checklist model in fact if not in name. USTR is told to facilitate the review process through early consultations with interested agencies, advisory committees, and the public, and agencies are told to bring important environmental issues to the attention of TPSC. But these sparse directions compare poorly to the substantive detail devoted in the Guidelines to how written reviews should be performed.

VI. POLICY IMPLICATIONS FOR INSTITUTIONAL PLAYERS

With the implementation of E.O. 13,141, the EU's Sustainability Impact Assessment, ongoing development of methodologies at OECD, and further sponsorship of pilot studies by UNEP and UNCTAD, it is likely that reviews of trade agreements will become a mainstream practice at least among OECD countries in the next few years. Whether the practice will spread beyond OECD to developing countries or IGOs, however, is

153 E.O. 13,141, supra note 4, § 1.
154 Letter from Charlene Barshefsky, U.S. Trade Representative & George Frampton, Director of CEQ, to Congressman Lloyd Doggett (May 17, 2000) (on file with author) [emphasis added].
155 Implementation Guidelines, supra note 98, at 79,444-45.
156 This is especially ironic since the introduction to the draft Guidelines confidently stated that the "draft Guidelines also clarify the process of ongoing environmental evaluation and assessment applicable to all agreements." Draft Guidelines, supra note 112, at 42,744 [emphasis added].
157 See generally OECD METHODOLOGIES, supra note 49.
158 See generally CSD, supra note 48.
less clear. This is a particularly important issue because developing country practice will largely determine, in turn, the adoption of review procedures by the WTO or UNCTAD. Looking beyond the specifics of E.O. 13,141 and the battles over its drafting and implementation, what are the broader institutional implications of environmental review mechanisms for the conduct of non-state actors, states, and IGOs in international trade negotiations? How does formally involving the public in reviews at the start of negotiations shift the trade and environment debate?

A. Domestic Institutions

1. Non-Government Organizations (NGOs)

   As was evident in the streets of Seattle last December, NGOs have a whole range of concerns over the environmental impacts of trade.159 At times during development of the Order, it seemed as if NGOs were bringing the whole range of their frustrations with U.S. trade policy to the table. Many of these, however, the Order simply cannot address. Reviews of trade agreements will never satisfy, for example, anti-globalization groups who view trade liberalization itself as the problem. Nor will they meet the concerns of those who fear trade policy will, by its very nature, favor commercial over environmental interests.

   By creating a formal mechanism for the environmental community to raise issues at the outset of the negotiating process, the review can help identify the environmental consequences of liberalization agreements. While it may not provide greater access to NGOs that are already well-placed, it should open the door to many in the public who have not enjoyed close relations with USTR. The review should also provide credible data for advocacy. While not often discussed in the debate over E.O. 13,141, this point should not be underestimated. A number of environmental lawyers have credited the creation of accurate data as one of NEPA's most important contributions to environmental protection. The very data

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159 As Ambassador Zoellick noted at the time of the Seattle Ministerial:

   Clinton wanted us to "listen" to the demonstrators. I did. It turns out that the protesters' arguments were contradictory: They wanted both to blow up the WTO and to have the WTO establish a host of global rules to dictate social, economic, political and environmental conditions around the world. They have managed, astonishingly, to combine the aims of unilateralists—who believe the United States can order everyone else in the world to do what we want—with those of globalists—who believe national governments are illegitimate and must be superseded by "wise" nongovernmental organizations.

   Kondracke, supra note 3.
agencies produce to assess their decisions often end up as the basis for citizen suits challenging these decisions. NGOs have scarce resources and the review process can provide much of their information for later campaigns. Moreover, the data will be less suspect than that from an NGO study.\footnote{One of OECD's main strengths, for example, is the credibility antagonists attribute to its widely-accepted reports and the subsequent framing of policy debates. James Salzman, supra note 114, at 840.}

From the perspective of officials in government, involving NGOs earlier rather than later may be preferable to the status quo. It quickly identifies the sources of disagreement. It forces NGOs to prioritize where they will commit their resources. And, although this may reflect more hope on the part of agencies than accuracy, engaging NGOs early in the process may introduce a notion of estoppel in minimizing later opposition and criticism.

2. U.S. Trade Representative (USTR)

The main consequence of E.O. 13,141 for USTR may well be similar to that of NEPA for federal agencies—institutionalization of environmental concerns. The number of NEPA lawsuits has fallen considerably since the 1970s, largely because agencies have internalized the EIS as an accepted way of doing business.\footnote{Robert V. Percival et al., Environmental Regulation: Law, Science and Policy 1179 (2d ed. 1996).} This is a good sign if it indicates agencies now routinely take environmental considerations seriously, or a bad sign if the EIS has simply become an unthinking, routinized rationalization for a decision already made.\footnote{For a positive view of NEPA, see Serge Taylor, Making Bureaucracies Think: The Environmental Impact Assessment Strategy of Administrative Reform (1984). Even if an EIS is not prepared for a project (because the initial environmental assessment leads to a finding of no significant impact), NEPA still may have influenced the initial design to avoid an EIS. On the other side, Joe Sax has memorably observed that "I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of the administrative decisions. I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil." Joseph L. Sax, The [Unhappy] Truth About NEPA, 26 Okla. L. Rev. 239, 239 (1973).} Even if the Order shades toward the latter path, it could still significantly influence the character of USTR.

USTR has been and likely always will be dedicated to trade liberalization. That is what the agency does. The Order will not, indeed cannot, change that. But it may influence how the agency thinks about trade liberalization. A number of staff members at USTR have predicted that simply knowing they have to carry out an environmental review will influence actions at earlier stages, by sensitizing negotiators to environmental issues. More directly, the resource requirements to carry out reviews could be considerable.
While USTR will not fund the entire exercise, environmental commitments will play a much larger role in agency budgeting than in the past. If money talks (and of course it does), the environment and the environmental shop within USTR will soon have a much louder voice.

While difficult to predict, USTR may not only shape its negotiating positions from the review, but also use the review document itself, strategically, in future negotiations. As Robert Putnam has described, diplomacy is a two-level game.\textsuperscript{163} Positions taken at international negotiations reflect both the dynamic at the bargaining table and the preceding (and often concurrent) domestic negotiations within the national government. While the environmental review will likely influence the U.S. negotiators' briefs, situations could arise where the environmental review, itself, is visibly used by USTR in the negotiations. USTR might in many circumstances prefer the review's conclusions to be as broad and uncertain as possible, leaving it a free hand to strike deals. Equally, though, USTR might desire that its hands be visibly tied by the public review in order to justify its intransigency on certain issues. In this manner, the review speaks to multiple audiences—the interagency process, the American public, and our negotiating partners. Indeed it may be naive to think that reviews would only inform domestic negotiating positions. Because reviews can also serve advocacy purposes at the international level, this may result in a feedback effect that, in turn, determines the shape of the review itself, by becoming a justification of negotiation positions intended more for our trading partners than for domestic audiences.

3. Agencies

Depending on how E.O. 13,141 is implemented, it could have a significant influence on other agencies. The Guidelines state that upon the request of USTR and assent of the Office of Management and Budget (OMB), "[f]ederal agencies shall, to the extent permitted by law and subject to the availability of appropriations, provide analytical and financial resources and support" for carrying out reviews.\textsuperscript{164} The resources necessary for a review as comprehensive as the Guidelines envisage will be substantial. Whether other agencies, including explicitly environmental agencies such as EPA and Department of the Interior, will contribute the necessary resources remains to be seen. From USTR's perspective, the review process will force these agencies to prioritize and put their money where their mouths are. Integrating the review into the TPSC


\textsuperscript{164} Implementation Guidelines, \textit{supra} note 98, at 79,442.
process will make it difficult for agencies to be reactive, forcing them to regard the negotiations as a whole rather than breaking off discrete issues. As a USTR negotiator interviewed for this article observed, "the review's key contribution is formalizing a consultation process that already exists. It weaves groups' involvement into the fabric of the process."

4. The Bush Administration

As the Bush administration entered office, there was considerable uncertainty within the NGO community over whether E.O. 13,141 (or TEPAC, for that matter) would continue. As with all executive orders, E.O. 13,141 could be rescinded simply by President Bush's signature. As part of the last-minute flurry of initiatives during the Clinton administration's final days, just two days before the inauguration a notice was sent to the Federal Register commencing an environmental review of the WTO's "built-in" agenda of agriculture and services. As with all of the Clinton administration's actions during the transition period, however, their publication and promulgation were put on hold pending a review by the Bush administration. Given Ambassador Zoellick's previously published comments suggesting opposition to linking trade and environment, there seemed a reasonable basis for concern.

At first, these concerns appeared to be unfounded. Both Ambassador Zoellick and EPA Administrator Christine Whitman quickly met with TEPAC and intend to continue the group's involvement in policy development. Even more significantly, USTR announced in April that it would launch an environmental review of the WTO "built-in" agenda. With U.S. agricultural exports in excess of $100 billion last year and trade in services (excluding military and government) of $430 billion in 1999, the environmental impacts of these trade flows are extremely significant and surely warrant an environmental review. Given their size, however, conducting a meaningful review will be a formidable undertaking. While USTR will lead the review, the administration has announced that relevant agencies, including Agriculture, Commerce, Interior, EPA, and the International Trade Commission will carry out most of the analysis.

Why did Ambassador Zoellick back off his earlier opposition to

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167 Id.
linkage, and why did the Bush administration embrace reviews? One possible explanation is that regarding environmental reviews as a partisan issue is a mistake. The political alliances in today's Congress opposing fast-track authority are no weaker than those that denied Clinton, and his Democratic administration, this authority. Indeed, soon after his confirmation, Zoellick proposed a vote on bundled trade measures—combining the Jordan Free Trade Agreement (with very strong environmental protections), the Bilateral Trade Agreement with Vietnam, and the Andean Trade Preferences Act, among others—in an omnibus bill that also included fast-track negotiating authority. This direct approach was quickly rebuffed. The strategy that has since been developed to gain “trade promotion authority” (the new name for fast-track) includes the commitment to conduct an environmental review of the WTO built-in agenda. The key lesson here is that further liberalizing trade will remain contentious regardless of who sits in the White House. Failure to address labor and environmental issues meaningfully in future trade agreements will certainly make granting of fast-track authority more difficult, if not impossible. The question, then, becomes what USTR can do, before future agreements have been negotiated, to assuage congressional concerns that there will be adequate attention to environmental protection in the agreements. A commitment to robust environmental reviews will almost certainly be part of any compromise package the administration presents; hence the administration’s current and likely future support of E.O. 13,141.

Support of environmental reviews, however, is not the same thing as support of trade and environment linkages, as very recent events have shown. In mid-June, as this Article was going to press, President Bush criticized conditioning trade on environmental and labor protections, stating that “I (want) a trade promotion authority bill, too, that’s not laden down with all kinds of excuses not to trade. . . . I want a bill that doesn’t have these codicils on it that frighten people from trading with us.” With a democrat-controlled

169 Id.
170 Even before the Bush administration took office, in responding to reports that the Bush administration would seek fast-track negotiating authority, Senator Max Baucus, the ranking Democrat on the Senate Finance Committee, flatly stated that Congress will not approve new fast-track authority unless the administration makes efforts to “accommodate labor concerns and environmental concerns in trade agreements. Otherwise, we will never see fast track. This is a statement of fact.” Choice of Zoellick as USTR Sets Up Fight, INTL. TRADE REP., Jan. 18, 2001, at 91.
171 Bush Rallies His Business Troops to Win ‘Fast-Track’ Trade Power, INVESTOR’S BUS. DAILY, June 20, 2001, at A18; see also supra note 67 and accompanying text (President Bush labels some of those pushing the labor and environment agenda as protectionists and isolationists.)
Senate, this confrontational approach seems counterproductive, to say the least. Perhaps the Bush administration has given up on gaining fast-track authority this year and is playing to the free traders in order to counteract their dismay over the administration’s attempts to restrict steel imports; perhaps the administration is staking out an extreme position in advance of congressional negotiations where it intends eventually to soften its stance. In either case, ironically, the administration’s simultaneous embrace of reviews and criticism of linkages may provide a powerful message to developing countries about the benefits of reviews, since as discussed below, developing countries’ mistrust of linkages is as strong, if not stronger, than the Bush administration’s.

B. Developing Countries

Whether trade agreement reviews will spread beyond OECD to developing countries is an important issue because this will determine, in turn, their adoption in the WTO. Developing countries do have experience with EIAs of proposed projects, but the poor history of World Bank environmental reviews illustrates the difficulties in ensuring meaningful public participation and capacity-building. In light of this, one might expect that developing countries would eagerly welcome assistance in reviewing trade agreements. Indeed, Jordan offered to carry out its own environmental review (with technical and financial assistance from USAID) as part of negotiations over the bilateral agreement with the United States.

Almost without exception, however, developing countries have expressed suspicion and in many cases, direct opposition to environmental reviews of trade agreements. Part of this opposition is longstanding. In negotiations over the 1972 Stockholm Declaration, for example, the draft Principle 20’s commitment to EIA faced significant opposition “because it was perceived that any obligation could lead to abuse by developed countries to impede projects in developing countries.” In simple terms, low wage labor and

173 “In a study of 35 EIAs done in Africa after the issuance of [World Bank] Operational Device 4.00, the public participation requirements were not followed in any case and more than one half of the projects failed to allow for public participation.” Gray, supra note 11, at 110 n.141.
175 Gray, supra note 11, at 105-06 ("As a result, a watered-down version was agreed to calling for rational planning to be an essential tool to reconcile development and environment needs.").
abundant natural resources are the two obvious comparative advantages of many developing countries. As anyone familiar with the WTO knows, most developing countries have opposed labor and environmental provisions in trade agreements out of concerns that these threaten their few strengths in the world marketplace.

Recently, at the Commission on Sustainable Development meeting at the UN and at the Committee on Trade and Environment meeting at the WTO, the EU presented a proposal for IGOs to carry out sustainability impact assessments of trade agreements. It, too, met a wall of resistance. At an international meeting sponsored by the World Wildlife Fund and hosted by the government of Ecuador several weeks later, the conference report gave a clear voice to developing countries' suspicions. The direct language of the report is striking, given the understated nature of such documents. The Report notes that:

Some participants emphasized the issue of trust, saying that there seemed to be a certain perception by developing countries that there is a hidden agenda behind sustainability assessment methodology. One group suggested that there exists a large credibility gap and that the debate might still be premature. Others noted that it is necessary to build trust around the development of SA to address, among other things, the concern that SAs may be used as barriers to trade. It was observed that classifying countries' trading behaviour using SA criteria could influence market access and possibly access to credit by developing countries.

Developing countries continue to suspect, after almost three decades, that environmental reviews will develop into a precondition for trade liberalization, linking environmental protection with trade access. One can argue that the review is only that, a review, and will do no more than inform trade negotiators. But as the Report excerpt above makes clear, many developing countries fear that environmental reviews will become the camel's nose under the tent, providing entry for more explicit conditionality at a later point.


177 There was even serious debate at the last CSD meeting over a developing country proposal that the Meeting Communique state that EIAs are controversial and need further study.


179 Id. (emphasis added).

180 In many ways, this conflict parallels the debate over implementation of sustainable development, with developing countries wary of environmental protection at the expense of development. Hence the proposals at numerous international
C. World Trade Organization (WTO)

Concurrent with the increased interest of the United States, the EU, Canada, and OECD in conducting reviews and developing methodologies, the issue has been raised at the WTO. Not surprisingly, though, suggestions that the WTO conduct environmental reviews have gone nowhere.\textsuperscript{181} As discussed above, developing countries suspect that reviews will work against their interests. How will a uniform methodology be developed? Who will develop it? And who will carry out the reviews to ensure trust and objectivity? If done within the WTO, some developing countries have expressed concern that the process will be dominated by powerful OECD countries.\textsuperscript{182}

Most support for reviews at international institutions, such as the WTO’s Committee on Trade and Environment and the Commission for Sustainable Development, has focused on capacity-building and information sharing. In this regard, it is interesting to note that the World Wildlife Fund, the leading NGO behind reviews, has not called for reviews at the WTO. It has focused instead on developing domestic capacity to carry out reviews, hoping that higher visibility and more widespread local use will soften opposition and provide credibility for eventual reviews at the meetings to rename the goal “sustainable economic development.” See Joel B. Eisen, \textit{From Stockholm to Kyoto and Back to the United States: International Environmental Law’s Effect on Domestic Law}, 32 U. Rich. L. REV. 1435, 1462 (1999).

\textsuperscript{181} Consider the following report of a Committee on Trade and Environment meeting in November 1999:

\begin{quote}

The U.S. and Canada recalled that the preamble to the WTO Agreement referred to achieving the goal of trade liberalization in conjunction with an overall commitment to sustainable development. Environmental reviews were an important way in which to develop the necessary information to ensure that this occurred. The U.S. Government had made a commitment to perform a review in the context of a new round. The EC said that it had decided on the methodology which would be used to conduct a sustainability analysis of its position for the next round. Canada would conduct a national Strategic Environmental Assessment of the next round. The U.S., Canada and the EC encouraged all Members to undertake environmental reviews and share these reviews in the CTE.

One member said that the Rio Declaration made it clear that environmental reviews were within the purview of national governments to perform as they deemed appropriate; these reviews were a useful way for national governments to have input from domestic stakeholders upon which to base their national positions. Nevertheless, this was purely a national prerogative.
\end{quote}

\textsuperscript{182} With the exception of Japan, the other Quad countries already conduct reviews.
multilateral level.

Mindful of these developments, the United States has formally proposed to the Committee on Trade and Environment that national governments review trade agreements. But even if the WTO followed this suggestion and required reviews at the national level, it remains an open question whether these would be useful policy exercises or simply serve as environmental justifications for national trade positions. Consider, for example, the agriculture liberalization talks scheduled as part of the next round. One would expect the U.S. review to show that agricultural subsidies are environmentally harmful, increasing pesticide and nutrient loads. Similarly, the EU and Japan's reviews would likely show the opposite, emphasizing the habitat conservation benefits of farms. As the preceding section on USTR discussed, reviews can serve strategic purposes at both the domestic and international levels, informing national positions and communicating these to trade partners. This dynamic interplay surely influences their substance.

While developing countries have largely opposed reviews of proposed trade agreements at the national or multilateral level, they have been responsive. In a clever twist, developing countries have called for retrospective reviews that consider environmental and social impacts. Indeed, this is consistent with developing countries' longstanding concern that developed countries focus too much on the environmental and not enough on the economic aspects of sustainable development. If, as they believe, the Uruguay Round Agreements have harmed their national interests, what better platform to demonstrate this than an international review of the agreements' environmental and social effects? Moreover, because these reviews are retrospective, there is no possibility for conditionalities. Thus, at a 1999 international workshop sponsored by the World Wildlife Fund, for example, delegates from India and Egypt requested the "WTO secretariat to prepare an analytical paper on the impacts of the Uruguay Round Agreements on developing countries, which should refer to the effects on developed countries as well." The conference also called on a variety of UN agencies

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183 In view of the recommendations by international bodies and the experience which has been gained on environmental assessment in general and for trade agreements in particular . . . CTE Ministers should recommend that national governments carry out environmental reviews of trade agreements likely to have significant environmental effects, as part of the process of developing such agreements.

Communication from the United States to the Committee on Trade and Environment, WTO Doc. WT/CTE/W/37 (July 23, 1996) (on file with author).

184 Gray, supra note 11, at 105–06; see discussion supra Part IV.B.

185 WORLD WILDLIFE FUND, INITIATING AN ENVIRONMENTAL ASSESSMENT OF TRADE LIBERALISATION IN THE WTO ¶ 6.5 (1999) (on file with author). NGOs have supported
and the International Labor Organization (ILO) to provide analyses of the environmental, developmental, social, and regulatory effects of the Uruguay Round Agreements.186

VII. CONCLUSION

In recent years, the executive branch has seemed almost schizophrenic toward the intersection of trade and environment. USTR’s vigorous promotion of environmental interests and transparency at the WTO (despite heavy criticism from developing countries) and its rapid implementation of E.O. 13,141 show commitment to changing the status quo. Of course, environmentalists would like USTR to do even more, but these efforts show real progress. At the same time, however, the Clinton administration’s opposition and subsequent foot-dragging to appoint environmentalists in ISACs (and President Bush’s recent comments opposing trade and environment linkages) suggests traditional “free-traders’” unease with nontraditional “special interests,” resolutely buttressing the status quo. It may well be that this split personality reflects the internal tensions within the larger trade policy community as it seeks to redefine its vision of what trade liberalization means in the twenty-first century.

Since before the days of the Corn Laws in Eighteenth century Britain,187 trade policy has largely been driven by economic interests. And overall this has not been a bad thing—what’s good for General Motors often is good for the country. But sometimes it’s not, particularly as society’s appreciation of important values expands beyond the pocketbook to quality of life and conservation of the natural world. If the heated debates over fast-track, China PNTR, the Multilateral Agreement on Investment, and now E.O. 13,141 show anything, it is that the days of national trade policy determined by close-knit insiders solely for the promotion of U.S.

these demands, as well, in commenting on EU’s Sustainability Impact Assessment and at the workshop cited above, calling for examination of:

the product and sectoral levels, the effects of trade liberalisation on employment levels, the mobility and quality of the labour force [e.g. shift between low-skilled to high-skilled employment, increase in child labour], employment patterns and migratory flows, income level and distribution, cultural and gender issues (such as impacts on the sexual division of labour, women’s role in and access to trade).

Id. ¶ 5.6.
186 They called on UNEP, UNCTAD, United Nations Development Programme (UNDP), World Health Organization (WHO), ILO, and CSD to provide analyses. Id. ¶ 6.5.
187 See DONALD GROVE BARNES, A HISTORY OF THE ENGLISH CORN LAWS, FROM 1660-1846 (1930) (discussing laws regulating international trade, exportation, and importation of grain between Britain and the rest of Europe).
economic interests are numbered (indeed may already have passed).

It has become fashionable for political leaders to talk about "putting a human face on trade" and about "promoting sustainable development." The problem lies in going beyond such well-intentioned rhetoric and making these phrases meaningful. In the final analysis, environmental reviews are important precisely because they provide the means to craft a practical, constructive trade policy that seriously engages environmental concerns.

Instituting routine, effective environmental review of trade agreements will surely be difficult. It challenges both the accepted process of setting trade policy based on economic interests and those parties who have benefited from this practice. It seeks to complement a known and tested process with a largely unproven, and still unknown, review mechanism. These difficulties are real and may prove hard to overcome. But the end result, a trade policy that truly seeks to promote sustainable development, has the potential to start shifting the trade and environment debate from conflict to complement.
ANNEX
Executive Order 13,141 of November 16, 1999
Environmental Review of Trade Agreements

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to further the environmental and trade policy goals of the United States, it is hereby ordered as follows:

Section 1. Policy. The United States is committed to a policy of careful assessment and consideration of the environmental impacts of trade agreements. The United States will factor environmental considerations into the development of its trade negotiating objectives. Responsible agencies will accomplish these goals through a process of ongoing assessment and evaluation, and, in certain instances, written environmental reviews.

Section 2. Purpose and Need. Trade agreements should contribute to the broader goal of sustainable development. Environmental reviews are an important tool to help identify potential environmental effects of trade agreements, both positive and negative, and to help facilitate consideration of appropriate responses to those effects whether in the course of negotiations, through other means, or both.

Section 3.
(a) Implementation. The United States Trade Representative (Trade Representative) and the Chair of the Council on Environmental Quality shall oversee the implementation of this order, including the development of procedures pursuant to this order, in consultation with appropriate foreign policy, environmental, and economic agencies.

(b) Conduct of Environmental Reviews. The Trade Representative, through the interagency Trade Policy Staff Committee (TPSC), shall conduct the environmental reviews of the agreements under section 4 of this order.

Section 4. Trade Agreements.
(a) Certain agreements that the United States may negotiate shall require an environmental review. These include:
   (i) comprehensive multilateral trade rounds;
   (ii) bilateral or plurilateral free trade agreements; and
   (iii) major new trade liberalization agreements in natural resource sectors.

(b) Agreements reached in connection with enforcement and dispute resolution actions are not covered by this order.

(c) For trade agreements not covered under subsections 4(a) and (b), environmental reviews will generally not be required. Most sectoral liberalization agreements will not require an environmental review. The Trade Representative, through the TPSC, shall
determine whether an environmental review of an agreement or category of agreements is warranted based on such factors as the significance of reasonably foreseeable environmental impacts.

Section 5. Environmental Reviews.

(a) Environmental reviews shall be:

(i) written;

(ii) initiated through a Federal Register notice, outlining the proposed agreement and soliciting public comment and information on the scope of the environmental review of the agreement;

(iii) undertaken sufficiently early in the process to inform the development of negotiating positions, but shall not be a condition for the timely tabling of particular negotiating proposals;

(iv) made available in draft form for public comment, where practicable; and

(v) made available to the public in final form.

(b) As a general matter, the focus of environmental reviews will be impacts in the United States. As appropriate and prudent, reviews may also examine global and transboundary impacts.

Section 6. Resources. Upon request by the Trade Representative, with the concurrence of the Deputy Director for Management of the Office of Management and Budget, Federal agencies shall, to the extent permitted by law and subject to the availability of appropriations, provide analytical and financial resources and support, including the detail of appropriate personnel, to the Office of the United States Trade Representative to carry out the provisions of this order.

Section 7. General Provisions. This order is intended only to improve the internal management of the executive branch and does not create any right, benefit, trust, or responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

THE WHITE HOUSE,

November 16, 1999.