

**THE EXECUTIVE TRADE PROMOTION  
AUTHORITY AND INTERNATIONAL  
ENVIRONMENTAL REVIEW IN THE  
TWENTY-FIRST CENTURY**

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## I. INTRODUCTION

The continuing proliferation of international trade agreements is arguably both inevitable and beneficial to the U.S. and global economies.<sup>1</sup> There is even some evidence to suggest that increased global trade can lead to positive environmental changes.<sup>2</sup> Trade promotion authority, sometimes referred to as “fast track,” is one way to facilitate the U.S. role in the global trade process and has been strongly supported by many politicians and economists.<sup>3</sup> After a protracted political

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1. See, e.g., David S. Broder, Editorial, *A Shaky Victory on Trade*, WASH. POST, Dec. 12, 2001, at A35; George William Mugwanya, *Global Free Trade Vis-à-vis Environmental Regulation & Sustainable Development: Reinvigorating Efforts Towards a More Integrated Approach*, 14 J. ENVTL. L. & LITIG. 401, 421 (1999).

2. See, e.g., Gregory Shaffer, *Symbolic Politics and Normative Spins: The Link Between U.S. Domestic Politics and Trade-Environment Protests, Negotiations, and Disputes*, 31 Env'tl. L. Rep. (Env'tl. L. Inst.) 11174, 11177 (Oct. 2001) (supporting the proposition that: “[L]iberalized trade appears to have helped leverage up [environmental] standards, not ratchet them down, through informal means. Moreover, trade-liberals argue that the most sure means to ratchet up standards in developing countries is to foster economic growth, and, in particular, through open trade.”) (footnotes omitted) [hereinafter Shaffer, *Symbolic Politics*].

3. See, e.g., *The Economy: Will Bush Fight for Free Trade?* THE ECONOMIST,

battle, President Bush<sup>4</sup> finally received congressional approval for the latest trade promotion authority bill, which he signed into law on August 6, 2002.<sup>5</sup> It is far from clear, however, whether the President will receive the bipartisan support he needs to use the trade promotion authority effectively.<sup>6</sup> The passage of the bill was narrow and was clearly divided along party lines.<sup>7</sup> The primary obstacles to trade promotion authority were environmental and labor concerns, which many consider to be necessary components of responsible globalization.<sup>8</sup> Environmental lobbyists posed a significant threat to the reauthorization of trade promotion authority.<sup>9</sup> Although the new law incorporates significant political compromises, including certain environmental measures, many critics argue that these are insufficient to unify Congress behind the President in the exercise of his new trading authority.<sup>10</sup>

This Comment argues that the incorporation of environmental review provisions based on principles of the

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June 23, 2001, at 25 [hereinafter *Will Bush Fight for Free Trade?*].

4. As used in this Comment, any reference to President Bush or his administration refers to President George W. Bush, the forty-third President of the United States.

5. See Bart Jansen, *Trade Divides 2nd District Hopefuls*, ME. SUNDAY TELEGRAM, Aug. 4, 2002, at 2C; *Promoting the Noble Cause of Commerce*, THE ECONOMIST, Aug. 3, 2002, at 57 [hereinafter *Promoting the Noble Cause*]; Bob Deans, *Bush Promises Expanded Trade with New Power*, AUSTIN AM. STATESMAN, Aug. 7, 2002, at C1.

6. See Bruce Stokes, *A Victory Yes, but for How Long?*, 34 NAT'L J. 2326, 2326-27 (2002).

7. See *Promoting the Noble Cause*, *supra* note 5, at 57.

8. See *Will Bush Fight for Free Trade?*, *supra* note 3; see also Press Release, State Department, President Signs Trade Negotiating Authority Bill—Andean, GSP Tariff Benefits Reauthorized by Law (Aug. 6, 2002), 2002 WL 25970361 [hereinafter Press Release, President Signs Trade Negotiating Authority Bill]; Leon Hadar, *Bush's Trade Agenda Gets a Boost*, BUS. TIMES (Sing.), Aug. 3, 2002, 2002 WL 22899005 (stating the fast track authority “expired in 1994 during the Clinton administration and hasn't been renewed since then because of opposition by Democrats, many of whom are allied with the protectionist labour unions and the environmentalist lobby”).

9. See Constance Z. Wagner, *Another Attack on the Fast Track*, 44 ST. LOUIS U. L.J. 1047, 1057 (2000); Stokes, *supra* note 6 at 2326-27.

10. See Sue Kirchhoff, *Senate OK's Trade Measure Bill, Expands Power of the President in Negotiating Pacts*, BOSTON GLOBE, Aug. 2, 2002, at E1.

National Environmental Policy Act (NEPA)<sup>11</sup> into the trade promotion authority law would, by addressing environmental concerns, have strengthened the law's success in achieving future international trade agreements. Part II of this Comment discusses the history and current status of the trade promotion authority, including the past effectiveness of fast track and the environmentalist reactions to fast track and to the North American Free Trade Agreement (NAFTA),<sup>12</sup> one of the largest trade agreements negotiated under fast track authority. Part III describes environmental review procedures in an international context, including the extension of National Environmental Policy Act requirements outside the United States. Part IV attempts to show that environmental requirements, partially modeled after NEPA, could be appropriately included in the trade promotion authority legislation. Part IV also argues that such a solution would result in a positive environmentalist response, enhancing the United States' ability to achieve effective international trade agreements under the trade promotion authority.

## II. FAST TRACK AND TRADE PROMOTION AUTHORITY

### A. *The History and Current Status of Fast Track*

Congress first passed trade promotion authority legislation, originally known as "fast track" authority, in 1974.<sup>13</sup> That authority essentially allowed the President to negotiate international trade agreements that were subject to rejection or approval, but not amendment, by Congress.<sup>14</sup> Fast track legislation was enacted in response to conflicts between the

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11. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370e (2000) [hereinafter NEPA].

12. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 605.

13. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 144 (1992).

14. See Eleanor Roberts Lewis, *The North American Free Trade Agreement: Historical Background and Summary of the Fast Track Process*, 653 P.L.I./COMM. 23, 28 (1993).

President and Congress.<sup>15</sup> These conflicts stemmed from the presidential exercise of the executive trade agreement authority and from ordinary congressional approval procedures, which resulted in ongoing amendments and a slower, less reliable trade negotiation process.<sup>16</sup> Fast track procedures were implemented as a “consultative” solution to foreign trade disputes between Congress and the President.<sup>17</sup> The fast track procedure was designed to benefit both branches of government by allowing congressional input into trade agreement negotiations while enabling “the President to guarantee to international trading partners that Congress will decide on the final agreement promptly.”<sup>18</sup>

Under the fast track approach, Congress first set forth negotiating objectives for the Executive and then maintained a monitoring and advising role in the negotiation stage of an agreement.<sup>19</sup> In return, the President was able to assure foreign negotiating partners that congressional review of proposed agreements was subject to strict time limits.<sup>20</sup> Additionally, congressional approval or rejection of a trade agreement implementation bill under fast track did not allow for amendments to that agreement.<sup>21</sup> Fast track procedures were further refined by the Omnibus Trade and Competitiveness Act

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15. See 21A AM. JUR. 2D *Customs Duties and Import Regulations* § 16 (1998).

16. *Id.*; Hongju Koh, *supra* note 13, at 147.

17. 21A AM. JUR. 2D *Customs Duties and Import Regulations* § 16 (1998).

18. Frona M. Powell, *Environmental Protection in International Trade Agreements: The Role of Public Participation in the Aftermath of the NAFTA*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 109, 116 (1995) [hereinafter Powell, *Environmental Protection*].

19. 21A AM. JUR. 2D *Customs Duties and Import Regulations* § 16 (1998).

20. Lewis, *supra* note 14, at 28-30 (describing the limits on congressional review of proposed foreign trade agreements). Once receiving notice from the President of his intent to enter into fast track negotiations, the Senate Committee on Finance and the House Committee on Ways & Means can disallow fast track negotiation procedures within 60 days. *Id.* at 28-29. Once receiving notice of the President's intent to enter into a fast track agreement, the Senate and House can disallow fast track completion of the agreement within 90 days. *Id.* at 29-30. Finally, once receiving the final text of the agreement and the related supporting statements and draft implementing legislation, Congress can approve or disapprove the agreement and legislation, with a simple majority vote and without amendment, within 90 working days if tariffs are involved, or 60 working days if only non-tariff barriers are involved. *Id.*

21. 19 U.S.C. § 2191 (2000).

of 1988,<sup>22</sup> and the presidential functions regarding the negotiation of trade agreements were effectively delegated to the U.S. Trade Representative.<sup>23</sup>

Fast track legislation was renewed approximately once every five years after its inception until it lapsed in 1994.<sup>24</sup> Under 19 U.S.C. § 2903(b), fast track procedures could be re-instituted only by presidential request and if neither the House nor the Senate adopted an extension disapproval resolution.<sup>25</sup> “President Clinton attempted to renew fast track negotiating authority in 1995, 1997, and 1998, but was defeated by disagreement in Congress.”<sup>26</sup> Due to concerns that environmental and labor protections were undermined by presidential fast track negotiating power, the legislation was consistently defeated for eight years after its expiration in 1994.<sup>27</sup>

Soon after his inauguration, President Bush made a request to renew the authority, now called the trade promotion authority (TPA).<sup>28</sup> Despite President Bush’s efforts, little progress was made in the year 2001. Although House Bill 3005 passed the House on December 6, 2001 by the narrowest possible victory—215 to 214 votes—the Senate never approved it.<sup>29</sup> The legislative

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22. 21A AM. JUR. 2D *Customs Duties and Import Regulations* § 16 (1998); see Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903 (1999).

23. See Powell, *Environmental Protection*, *supra* note 18, at 123 (“Although it is the President who enters into trade agreements and sends implementing legislation to Congress, the political reality is that it is the USTR who leads the negotiating delegation and is directly involved in developing national trade and environment policy.”).

24. Wagner, *supra* note 9, at 1055.

25. 19 U.S.C. § 2903(b) (1999); see also 21A AM. JUR. 2D *Customs Duties and Import Regulations* § 16 (1998).

26. See Wagner, *supra* note 9, at 1055.

27. See Press Release, President Signs Trade Negotiating Authority Bill, *supra* note 8; Scott Lindlaw, *In Two States, President Says He’ll Use New Bargaining Power To Knock Down Trade Barriers*, THE STAR-LEDGER (Des Moines, Iowa), Aug. 15, 2002, at 5.

28. See Ian Christopher McCaleb & John King, *Bush Wants Free Rein to Negotiate Trade Pacts*, May 7, 2001, at <http://www.cnn.com/2001/ALLPOLITICS/05/07/bush.trade.02/index.html>.

29. Message Sent to Sierra Club Volunteers and Staff, Stop Fast Track: Sierra Club Put Up a Great Fight But House Approves Fast Track 215-214 (Dec. 6, 2001), at <http://www.sierraclub.org/trade/fasttrack/fight.asp> [hereinafter *Stop Fast Track*]; see S. REP. NO. 107-139 (2002) (showing that the last congressional action relating to House

vehicle that finally carried TPA to success was House Bill 3009, a package of various measures that was passed by the Senate on May 23, 2002.<sup>30</sup> Although reconciliation of the differences between House Bill 3005 and House Bill 3009 was anticipated to be contentious,<sup>31</sup> the House passed the revised House Bill 3009 on July 27 by a vote of 215 to 212.<sup>32</sup> Senate approval quickly followed on August 1, by a vote of 64–34.<sup>33</sup> On August 6, President Bush signed the bill,<sup>34</sup> known as the Trade Act of 2002 and hailed as one of the biggest legislative accomplishments of his presidency.<sup>35</sup>

Division B of the Trade Act, entitled The Bipartisan Trade Promotion Authority Act of 2002,<sup>36</sup> renews the president's authority to conduct trade negotiations that are subject to congressional veto or approval, but are immune to congressional amendment.<sup>37</sup> It provides that the negotiation process will include close consultation with a Congressional Oversight Group and all committees of the House and Senate that have jurisdiction over laws affected by a trade agreement resulting from the negotiations.<sup>38</sup> The trade negotiating process authorized by the Act may be defeated in June, 2005 if either the House or Senate adopts an extension disapproval resolution;

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Bill 3005 was placement on the Senate Legislative Calendar on February 28, 2002).

30. Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 32 *Env'tl. L. Rep.* (Env'tl L. Inst.) 11001, 11016 (Sept. 2002).

31. *See id.*, at 11017; Karen Masterson, *Senate Clears Landmark "Fast-Track" Trade Bill*, *HOUSTON CHRON.*, May 24, 2002, at A1.

32. Mike Allen & Juliet Eilperin, *House Backs Trade Power for President; Narrow Vote Ends 8 Years of Battle over Authority*, *WASH. POST*, July 28, 2002, at A1, 2002 WL 24824077.

33. Editorial, *Feingold Right, Kohl Wrong*, *CAPITAL TIMES* (Madison, Wis.), Aug. 8, 2002, at 14A.

34. Trade Act of 2002, Pub. L. No. 107–210, 116 Stat. 933, 1049 (2002) (to be codified at 19 U.S.C. § 3801).

35. *See* Mike Allen & Paul Blustein, *President Achieves Major Victory with Signing of Trade Bill*, *STAR-LEDGER* (Newark, N.J.), Aug. 7, 2002, 2002 WL 25387735.

36. Trade Act of 2002, Pub. L. No. 107–210, § 2101, 116 Stat. 933, 993 (2002) (to be codified at 19 U.S.C. § 3801).

37. Press Release, President Signs Trade Negotiating Authority Bill, *supra* note 8; Wagner, *supra* note 9, at 1054; *see* Lewis, *supra* note 14, at 29.

38. § 2102, 116 Stat. at 1002-03 (to be codified at 19 U.S.C. § 3802(c)(1), (d)(1)).

otherwise, it is set to expire in 2007.<sup>39</sup>

## B. *Fast Track in Past Trade Agreements*

### 1. *Effectiveness Generally*

Fast track trade agreement authority was subject to both praise and criticism during its first twenty years of existence.<sup>40</sup> Among the positive attributes of the authority is the more efficient and expeditious passage of fast track trade measures. It “gives the executive greater credibility in negotiating agreements in the international arena,”<sup>41</sup> as compared to traditional treaty approval under Article II, clause 2 of the U.S. Constitution.<sup>42</sup> Evidence of successful experience with several major trade agreements, including NAFTA, the Uruguay Round agreements of the General Agreement on Tariffs and Trade (GATT), the United States-Canada Free Trade Agreement, the United States-Israel Free Trade Agreement, and the Tokyo Round agreements of GATT, has also been presented as a favorable argument for legislation to extend fast track.<sup>43</sup> That fast track was instrumental in effecting these agreements is supported by the fact that, after the expiration of fast track in 1994, attempts to admit Chile to NAFTA stalled.<sup>44</sup> Immediately after the renewal of the authority in August 2002, however, the Chilean government expressed optimism regarding the progress of a new trade relationship with the United States.<sup>45</sup> In fact, all

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39. § 2103, 116 Stat. at 1006 (to be codified at 19 U.S.C. § 3803(c)(1)).

40. See Hongju Koh, *supra* note 13, at 148 (referring to fast track as a “remarkable procedural innovation” but acknowledging criticisms of the process); Wagner, *supra* note 9, at 1056 (noting a “successful experience” with fast track, however, acknowledging that “fast track undercuts the deliberative processes that should accompany adoption of measures of significant import”).

41. Wagner, *supra* note 9, at 1055.

42. See *id.*

43. *Id.* at 1056 (footnotes omitted).

44. See *id.* at 1055 (stating that the “absence of fast track authority hampered attempts to negotiate a NAFTA accession agreement with Chile, which was unwilling to deal with the United States in the absence of such authority.”); Lenin Guerra, Comment, *The Use of Fast Track Authority in the Negotiations of the Free Trade Area of the Americas*, 8 KAN. J.L. & PUB. POL’Y 172, 177-78 (1999).

45. Gustavo Gonzalez, *Trade: Enthusiasm in Chile over Fast Track for Bush*,

of the current U.S. international trade agreements, with one exception, were negotiated and passed under fast track authority.<sup>46</sup> Congress is even said to have re-authorized fast track in 1991 for the express purpose of enabling NAFTA negotiations.<sup>47</sup> Without fast track negotiating authority, the President is relatively powerless to participate in meaningful, large-scale trade negotiations with foreign leaders who are authorized to resolve issues as they arise.<sup>48</sup>

Criticisms of fast track have centered on two main issues. The first is the constitutionality of the fast track process itself, which was challenged in federal court in 1999.<sup>49</sup> In *Made in the U.S.A.*, plaintiffs asserted that the Article II Treaty Clause created the exclusive means of effecting treaties and that NAFTA, approved under fast track procedures, was therefore unconstitutional.<sup>50</sup> On appeal, the Eleventh Circuit held that the issue was a non-justiciable political question and “that the Treaty Clause also fails to outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial agreements.”<sup>51</sup> Thus, the fast track process has been accepted as constitutional, because the Treaty Clause is not the only constitutionally permissible means of

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INTER PRESS SERVICE, Aug. 2, 2002, 2002 WL 4914963.

46. Note that the recent U.S.-Jordan agreement, which was passed without fast track authority, was passed under extenuating circumstances in the wake of the September 11 disaster. See *Trade Talks: Looking Hopeful*, THE ECONOMIST, Sept. 20, 2001, at 61 [hereinafter *Trade Talks: Looking Hopeful*].

47. See U.N. Centre on Transnational Corporations, *Foreign Direct Investment and Industrial Restructuring in Mexico*, 18 NCTC CURRENT STUDIES SERIES A 5, 19 (1992).

48. See, e.g., James K. Glassman, *Trade Promotion Authority: High-Tech's Key Component for Competitiveness*, TECH CENT. STATION, July 16, 2001, at <http://www.aei.org/ra/raglas010716.htm> (quoting the U.S. Trade Representative who stated: “I’m at the table now—every day—negotiating with countries from around the world . . . They have the full authority to negotiate for their nations’ interest. I need it, too.”). TPA is considered especially important “because nobody wants to spend months in grueling negotiations to fashion a deal with U.S. trade officials, only to have it sabotaged by a small number of congressional politicians representing special interests.” *Id.*

49. *Made in the U.S.A. Found. v. United States*, 56 F. Supp. 2d 1226, 1228 (N.D. Ala. 1999).

50. *Id.* at 1278.

51. *Made in the U.S.A. Found. v. United States*, 242 F.3d 1300, 1315, 1319 (11th Cir. 2001).

concluding international trade agreements.<sup>52</sup>

The more lasting criticism is that the fast track approach undermines the democratic process in lawmaking<sup>53</sup> and “undercuts the deliberative processes that should accompany adoption of measures of significant public import.”<sup>54</sup> This criticism seems to stem from the concern that the American public and its legislators are marginalized by the streamlined legislative process embodied in fast track.<sup>55</sup> This concern prompted Congress to amend fast track on more than one occasion in the past “to enhance congressional influence over the negotiation of trade agreements, thereby arguably making the process more democratic.”<sup>56</sup> These measures, however, did not prove satisfactory to environmental and labor rights groups,<sup>57</sup> who continued to voice their objections to such accelerated trade agreement processes.<sup>58</sup> Because of the influence exerted by these groups, fast track renewal legislation was consistently defeated for eight years.<sup>59</sup>

Possibly, the power wielded by such public interest groups over the fate of fast track is strengthened by the fact that, while

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52. *Id.* at 1302.

53. Wagner, *supra* note 9, at 1049.

54. *Id.* at 1056; see also Luke Eric Peterson, *Fast Track Pulls a Fast One*, TORONTO STAR, Aug. 7, 2002, at A22 (stating that “fast track, which barely allows U.S. legislators the time to read—let alone appreciate—what they are signing off on, threatens to pull a fast one on the public”).

55. See Wagner, *supra* note 9, at 1056.

56. *Id.*; see also Hongju Koh, *supra* note 13, at 148-49 (stating, for example, that Congress amended fast track in anticipation of the U.S.-Israel and U.S.-Canada trade negotiations, thereby, substantially increasing their influence in the agreement outcomes).

57. Wagner, *supra* note 9, at 1056.

58. See, e.g., C. Gerald Fraser, *NAFTA's Environmental Problems*, EARTH TIMES NEWS SERV., Feb. 1, 1996, at <http://www.hartford-hwp.com/archives/40/022.html> (quoting a representative of the group Public Citizen as saying that NAFTA, which was developed under fast track, “has intensified severe problems of water and air pollution, hazardous wastes dumping and increased the incidence rates of certain diseases and birth defects in the border region”).

59. See Wagner, *supra* note 9, at 1055; Press Release, President Signs Trade Negotiating Authority Bill, *supra* note 8; Scott Lindlaw, *Bush: I'll Be Farmers' Overseas Rep—In Two States, President Says He'll Use New Bargaining Power To Knock Down Trade Barriers*, THE STAR-LEDGER (Des Moines, Iowa), Aug. 15, 2002, 2002 WL 25389688.

modern trade agreements encompass increasingly broad provisions, topics such as environmental protection are considered by many to be “conspicuously absent.”<sup>60</sup> Scholars have pointed out that traditional trade agreements, like the pre-Tokyo Round GATT, focused simply on tariff cutting, while more recent agreements, like NAFTA and the World Trade Organization (WTO) Agreement, include rules for international investment, government procurement, intellectual property protection, and trade in services.<sup>61</sup> While environmental protection and labor standards may also fall within the growing range of topics that bear a reasonable relationship to international trade, NAFTA and the WTO only deal with these topics in a limited way.<sup>62</sup> The perceived absence of adequate environmental provisions in these trade arrangements has been a major factor contributing to the controversy surrounding fast track in the past.<sup>63</sup>

## 2. *Specific Trade Agreements: NAFTA*

One of the largest foreign trade agreements negotiated under fast track authority was NAFTA, signed into effect by all three participating countries on December 17, 1992.<sup>64</sup> While the inception of NAFTA was surrounded by controversy,<sup>65</sup> many have since proclaimed it a success.<sup>66</sup> However, environmental

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60. Wagner, *supra* note 9, at 1057.

61. *Id.*

62. *Id.*

63. See *infra* text accompanying notes 79-85.

64. See Lewis, *supra* note 14; Powell, *Environmental Protection*, *supra* note 18, at 109 (stating that NAFTA “combined the world’s largest, eighth largest, and thirteenth largest economies into a North American market comprising 360 million people with a total purchasing power of \$6.2 trillion”); Fraser, *supra* note 58 (claiming that “NAFTA created the world’s largest low-tariff trading zone.”).

65. Wagner, *supra* note 9, at 1047.

66. See, e.g., *id.* at 1048 (“According to the U.S. government and business groups, the dire consequences predicted by NAFTA’s opponents have not materialized and in fact the volume of trade has increased as a result of the Agreement.”); see also Julie A. Soloway, *The North American Free Trade Agreement: Alternative Models of Managing Trade and the Environment*, in GREENING OF TRADE LAW: INTERNATIONAL TRADE ORGANIZATIONS AND ENVIRONMENTAL ISSUES 181 (Richard H. Steinberg ed., 2002) (stating that while substantive environmental progress may be less than some would like, NAFTA has resulted in significant “harmonization in an upward direction of

concerns that were a major obstacle to the passage of NAFTA are still a source of debate.<sup>67</sup> The influence wielded by environmental groups throughout the development and inception of NAFTA may provide important insight on the likely impact of environmental concerns with respect to the fast track trade agreement procedures addressed by this Comment.

Prior to NAFTA, the major U.S. trade agreements had existed primarily between developed countries and had raised relatively few concerns about environmental and labor issues.<sup>68</sup> During the NAFTA negotiations, however, opponents argued that such trade liberalization between Mexico and the United States would result in significant incremental environmental damage.<sup>69</sup> Environmental issues relating to NAFTA “achieved prominence in Congressional hearings,” despite President George H. W. Bush’s initial attempts to exclude them from the deal-making.<sup>70</sup> In fact, the chairs of the House Ways and Means and Senate Finance Committees asked the President to comment on environmental and labor issues before Congress voted on fast track.<sup>71</sup> President Clinton’s commitment to address environmental and labor concerns may have been the reason NAFTA was finally approved under the fast track process by Congress in 1994.<sup>72</sup>

The solution that was reached for NAFTA environmental issues did not take the form of extensive environmental

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various management and cooperation processes that have laid important groundwork for further achievements”).

67. See Wagner, *supra* note 9, at 1047-48 (pointing out that on the fifth anniversary of NAFTA’s implementation, environmental groups were still claiming the agreement was resulting in lower environmental standards); *House Approves Fast Track Bill*, ENV’T NEWS SERV., July 29, 2002, 2002 WL 24144550 (suggesting NAFTA’s “corporate friendly provisions” compromise even domestic environmental protections) (quoting Carl Pope, executive director of the Sierra Club) [hereinafter *House Approves Fast Track Bill*].

68. See Charles Tiefer, “Alongside” the Fast Track: *Environmental and Labor Issues in FTAA*, 7 MINN. J. GLOBAL TRADE 329, 338 (1998).

69. Powell, *Environmental Protection*, *supra* note 18, at 110.

70. Tiefer, *supra* note 68, at 339.

71. *Id.*

72. See *id.*, at 340 (stating “President Clinton asked his trade representative to negotiate stronger environmental and labor protections in side agreements, . . . which allowed him to win Congressional approval of NAFTA in 1994”).

treatment in the NAFTA agreement itself;<sup>73</sup> rather, it consisted of a “side agreement” entitled the North American Agreement on Environmental Cooperation (NAAEC).<sup>74</sup> The subsequent congressional approval of NAFTA indicated that this side agreement was an important step in addressing environmental concerns.<sup>75</sup> The NAAEC, however, imposes limited environmental requirements that are merely “generalized duties” and “agreements to cooperate on various matters.”<sup>76</sup> Although the NAAEC does contain enforcement provisions, they apply only to each country’s domestic laws and emphasize international cooperation rather than environmental sanctions.<sup>77</sup> Furthermore, the accession provisions for any new country joining NAFTA do not require adherence to the environmental side agreement—or even to all of the NAFTA provisions themselves: “[A]rticle 2204(2) . . . allows the acceding country and the NAFTA countries to apply even the NAFTA agreement selectively, [and] provides a basis for accession sans environmental or labor requirements.”<sup>78</sup>

NAFTA and its environmental side agreement are significant to the future of fast track, or the re-authorized TPA,

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73. See, e.g., Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT’L L. 301, 303, 306 (1995) (stating that the relevant provisions in NAFTA provide “little guidance,” although the environmental debate did result in some inclusion of environmental provisions in the agreement).

74. North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter NAAEC]; see Powell, *Environmental Protection*, *supra* note 18, at 110. Among other things, the NAFTA side agreement “sets up a dispute resolution process if a NAFTA signatory persistently fails to enforce its domestic environmental laws, sets out a plan for coordinating and financing environmental infrastructure, and requires Canada, Mexico, and the United States to inform each other of domestic decisions to ban or severely restrict a pesticide or other chemicals.” *Id.*; see also Soloway, *supra* note 66, at 172 (referring to the NAAEC as the “most significant achievement of NAFTA, from an environmental standpoint”).

75. See Tiefer, *supra* note 68, at 340.

76. Housman, *supra* note 73, at 309.

77. See *id.* at 307–08; see also Frona M. Powell, *The North American Commission for Environmental Cooperation’s San Pedro Report: A Case Study and Analysis of the CEC Process*, 6 ENVTL. LAW. 809, 815 (2000) (“Although NAFTA requires enforceable environmental obligations, those that are mandatory are designed to prevent the use of environmental policy as a disguised barrier to trade.”).

78. Housman, *supra* note 73, at 303.

because NAFTA may be a forerunner for future U.S. participation in international trade pacts<sup>79</sup> and because it has drawn both approval and criticism from environmentalists.<sup>80</sup> Environmental groups resented the lack of environmental review during NAFTA negotiations; in fact, the group Public Citizen brought suit against the U.S. Trade Representative for failing to prepare an environmental impact statement under the NEPA.<sup>81</sup> One representative “tellingly described the drafting process for NAFTA as ‘the most secretive trade negotiations that I have ever monitored.’”<sup>82</sup> Others have countered that while failing to provide adequate environmental enforcement mechanisms, the NAFTA side agreement on the environment was an important step toward increased availability of environmental information and public involvement in the international trade context.<sup>83</sup> The controversy about the environmental effects of NAFTA continues today.<sup>84</sup> Some

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79. See *Transcript from a Panel Session at the Society of Environmental Journalists' 10<sup>th</sup> National Conference*, KING TV SEATTLE, at <http://www.sierraclub.org/trade/articles/debate.asp> (last modified Sept. 26, 2001) (suggesting the Sierra Club's involvement in global trade issues was compelled by the early precedent of NAFTA and the WTO) [hereinafter *Transcript from a Panel Session*]; See also Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, 32 *Envtl. L. Rep. (Envtl. L. Inst.)* 10769, 10771-72 (July 2002) (discussing the development of the trade promotion authority bill).

80. Compare Fraser, *supra* note 58 (stating that after two years of existence, NAFTA had contributed to an “environmental and health calamity” along the U.S.-Mexico border), with Kal Raustiala, *International “Enforcement of Enforcement” Under the North American Agreement on Environmental Cooperation*, 36 *VA. J. INT'L L.* 721, 723 (1996) (pointing out that NAFTA resulted in a “landmark attempt to reconcile trade and environmental concerns through the creation of a new set of supranational institutions”).

81. See, e.g., *Pub. Citizen v. Office of the United States Trade Reps.*, 970 F.2d 916, 917 (D.C. Cir. 1992) (finding that environmental organizations did not present a final agency action upon which the court could rule, when the groups argued that the President must prepare an environmental impact statement).

82. David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?* 1997 *U. CHI. LEGAL F.* 331, 367 (1997) (quoting Representative Richard Gephardt).

83. See Powell, *Environmental Protection*, *supra* note 18, at 110-11.

84. See, e.g., *id.* at 111, 115 (noting that among the shortcomings of NAFTA's environmental side agreement was its failure to provide non-governmental organizations with the right to prosecute an environmental case once it was filed and to grant the environmental council the ability to require a party to enforce its domestic

propose that “[t]he NAFTA debate raised the tantalizing question whether the Fast Track has or will soon outlive its usefulness for U.S. trade policy.”<sup>85</sup> It seems clear that both fast track trading authority and significant environmental compromises were critical to enacting NAFTA, and such considerations may be equally critical for major trade agreements in the future.

### 3. *Arguments for Trade Promotion Authority Today*

The executive fast track negotiating authority, under which NAFTA was approved, is considered essential by the Bush Administration.<sup>86</sup> The U.S. Trade Representative (USTR), Robert Zoellick, who negotiates with foreign trading partners on the President’s behalf, argued forcefully for the passage of TPA legislation.<sup>87</sup> “U.S. leadership in promoting the international economic and trading system,” claimed Zoellick, “is vital.”<sup>88</sup> The office of the USTR also issued such statements as:

The President needs Trade Promotion Authority now.  
The United States enters into global trade negotiations

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environmental laws).

85. Hongju Koh, *supra* note 13, at 144.

86. There are many examples of President Bush’s relentless efforts to achieve renewed trade promotion authority. *See, e.g.*, McCaleb & King, *supra* note 28 (quoting President Bush as criticizing a “new kind of protectionism” in America which “talks of the environment while opposing the wealth-creating policies that will pay for clean air and water in developing nations . . . . Open trade is not just an economic opportunity . . . . It is a moral imperative.”); *All Things Considered: Analysis: Whether to Grant the President Trade Promotion Authority* (National Public Radio broadcast, Nov. 23, 2001), available at 2001 WL 9437378 (stating that Bush Administration officials feel the need for fast track is more critical than ever after November’s WTO meeting in Qatar) [hereinafter *All Things Considered: TPA*]; Mike Allen, *After His Bout With a Pretzel, President Turns to the Issues; Traveling on the Mississippi Bush Presses the Domestic Agenda*, WASH. POST, Jan. 16, 2002, at A4 (quoting a speech by President Bush: “I like to remind people, those who shut down trade aren’t confident. They’re not confident in the American worker; they’re not confident in the American entrepreneur; they’re not confident in American products.”) [hereinafter Allen, *After His Bout With a Pretzel*].

87. *See, e.g.*, Glassman, *supra* note 48.

88. Robert B. Zoellick, American Trade Leadership: What is at Stake, Address at the Institute for International Economics, Washington, D.C. (Sept. 24, 2001), at <http://web.sanet.ge/usembassy/amtrade.htm> [hereinafter Zoellick, American Trade Leadership].

beginning January, 2002. The negotiations can open markets and provide job[-]creating opportunities for every sector of the American economy. Only with Trade Promotion Authority can the President strike the best deal for American workers, families, farmers and businesses. . . . [In international trade opportunities,] the United States has been falling behind: of 150 free trade agreements in the world, the United States is party to only three.<sup>89</sup>

According to another USTR official, "it is good and in the public interest of the United States to have markets abroad for our products. Trade is a big part of the strong economy."<sup>90</sup> Even some environmental proponents explicitly acknowledge the benefits of ongoing international trade.<sup>91</sup>

According to USTR Zoellick, this trade cannot happen without implementing TPA because his foreign counterparts feel they cannot negotiate agreements twice—once with the trade representative and again with Congress.<sup>92</sup> Additional commentators confirm that President Bush needs TPA to complete international trade agreements.<sup>93</sup> As President Bush declared, "free trade talks are being negotiated all over the world, and we are not a party to them. This has got to change."<sup>94</sup>

The September 11 attacks and the subsequent war against terrorism provided further impetus to the push for TPA.<sup>95</sup> USTR

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89. *USTR Resources: Trade Promotion Authority*, <http://www.ustr.gov/new/2001-12-03-tpa-summary.htm> (Dec. 3, 2001) (excludes original bullet point format).

90. Jennifer Haverkamp, Assistant USTR for Environment and Natural Resources, *quoted in Transcript from a Panel Session*, *supra* note 79, available at <http://www.sierraclub.org/trade/articles/debate.asp>.

91. *See, e.g.*, Sanford E. Gaines, *Rethinking Environmental Protection, Competitiveness, and International Trade*, 1997 U. CHI. LEGAL F. 231, 235-36 (1997) [hereinafter Gaines, *Rethinking Environmental Protection*].

92. *All Things Considered: TPA*, *supra* note 86.

93. *See, e.g.*, *Trade Talks: Looking Hopeful*, *supra* note 46.

94. McCaleb & King, *supra* note 28.

95. *See, e.g.*, Highlights from the "Fight Back With Free Trade" Press Conference, What They're Saying About Trade (Sept. 27, 2001), at <http://www.ustr.gov/new/sayings.html> (quoting Michael Armacost, President of the Brookings Institution: "[T]he terrorists have supplied an action-forcing event that impels us, over the midterm, to stimulate additional demand for our exports by further reducing barriers to trade and we can't do this without legislative authority.") [hereinafter What

Zoellick stated that the terrorist attacks increased the importance of lowering trade barriers to strengthen the weakened American economy.<sup>96</sup> “Trade,” stated Zoellick, “is . . . at the heart of this protracted struggle.”<sup>97</sup> Several prominent international economists seemed to agree that terrorism-related economic and political damage may be ameliorated through “international trade [which] promotes both economic growth and more civil relations among nations.”<sup>98</sup> Michael Armacost, President of the Brookings Institution, stated, “I have long believed, as I think all the economists at Brookings have believed, that the case for this—previously called ‘fast-track,’ now ‘Trade Promotion Authority’—was pretty well self-evident, a no-brainer. But in the wake of the terrorist attacks on September 11, it is needed now more than ever.”<sup>99</sup>

Furthermore, the impression prevailed that the international economic community would approve of TPA legislation. “The [Bush] [A]dministration,” wrote London-based *Economist* magazine, “has appealed to Congress to pass trade-promotion authority, which George Bush needs to complete trade deals. With luck, America’s lawmakers will now pay heed.”<sup>100</sup> President Bush promised the international community that “at home, one of my most important legislative priorities will be to secure from Congress trade promotion authority . . . so that when our United States enters into agreements, the countries with whom we’ve agreed to will understand we mean business.”<sup>101</sup> According to Zoellick, “[t]he eyes of the world are on

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They’re Saying About Trade]; Kibel, *supra* note 79, at 10772.

96. *All Things Considered: TPA*, *supra* note 86.

97. Zoellick, *American Trade Leadership*, *supra* note 88.

98. *What They’re Saying About Trade*, *supra* note 95 (quoting William A. Niskanen, Chairman of the Cato Institute).

99. *Id.*; see also *Time to Deal on Trade*, *THE ECONOMIST*, Oct. 6, 2001, at 34 (declaring that Zoellick’s position “should be pretty uncontroversial. The global integration offered by trade promoted the values of ‘progress and pluralism, tolerance and freedom’ that, in the words of George Bush, underpin the anti-terrorist campaign.”) [hereinafter *Time to Deal on Trade*].

100. *Trade Talks: Looking Hopeful*, *supra* note 46.

101. President George W. Bush, Speech at the World Bank (July 17, 2001), <http://www.cnn.com/2001/ALLPOLITICS/07/17/bush.speech.transcript/index.html>.

us; they're on the Congress."<sup>102</sup>

When Congress finally approved the trade promotion authority in August 2002, the President's signing ceremony was "jubilant."<sup>103</sup> As President Bush signed the new bill into law, he proclaimed "America is back at the bargaining table in full force."<sup>104</sup> In the days following the bill's passage into law, the President and others welcomed it as a political triumph.<sup>105</sup> The President

trumpeted his so-called trade promotion authority in a speech at the Iowa State Fair, saying it would help open new markets for Iowa farm products. . . . Other trade specialists and agricultural economists agreed. Long sought by farm and agribusiness lobbyists, the president's new power will help increase U.S. access to foreign markets, they said. Increased trade also will spur economic growth abroad, boosting consumers' buying power.<sup>106</sup>

Many other Americans agreed that the presidential trading power was long overdue and necessary to help protect the United States from an international economic disadvantage; commentators claimed, for example, that "[a]s other trade-expanding measures have repeatedly demonstrated, this will ultimately mean more jobs for American workers and more customers for American businesses."<sup>107</sup> Others confirmed that

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102. *All Things Considered: TPA*, *supra* note 86.

103. Lee Siew Hua, *US Set for Global Trade Push*, STRAITS TIMES (Sing.), Aug. 8, 2002, 2002 WL 24320595.

104. Press Release, President Signs Trade Negotiating Authority Bill, *supra* note 8.

105. *See id.* (quoting President Bush as stating that "[w]ith each passing day, America has lost trading opportunities" and that the country's trade policy was "stuck in park"); Editorial, *Trade Bill Will Boost Global Commerce*, ALBUQUERQUE J., Aug. 14, 2002, at A10 (stating that broad Presidential trading authority was "long overdue"); Congressman Joe Pitts, *Commentary from Congressman: Why Trade Promotion Authority?*, (Aug. 8, 2002), at <http://www.house.gov/pitts/press/commentary/020808c-tpa.htm> (claiming that the Bush Administration's lack of TPA "undoubtedly contributed to the recent recession, as America was left out of many trade deals.") [hereinafter Pitts Commentary].

106. Anne Fitzgerald, *Bush's Trade Powers Show Promise for Farms*, DES MOINES REG., Aug. 15, 2002, at 13A.

107. Editorial, *Fast Track Authority Will End Gridlock on Trade; Maine's*

point by noting that “the U.S. is party to only three of the 131 international trade agreements currently in effect. The result: U.S. exports have suffered, and U.S. jobs continue to be exported abroad to nations that have taken advantage of the system.”<sup>108</sup>

One CEO, who welcomed the new law, stated:

When we talk about trade, we’re really talking about the fabric that binds the global economy together. When trade is allowed to flourish, it promotes closer ties and better understanding between nations. Open trade promotes a higher standard of living for people, especially in developing countries. In the end, it makes the world a better, more secure place. It is a goal that demands no less than our firmest commitment and our most determined efforts.<sup>109</sup>

Even some supporters, who admit that the benefits of free trade are sometimes exaggerated, believe that maintaining a role isolated from the global economy is not a good solution for the problems plaguing the U.S. economy.<sup>110</sup> In the absence of presidential fast track authority over the last eight years, they point out, “globalization marched on without waiting for Congress to act. American workers and businesses lost opportunities for new markets and new jobs.”<sup>111</sup> According to one newspaper editorial,

America, which led the rest of the world into the era of globalization, can’t afford to retreat into protectionism. If this country is to compete on an even playing field, the president must have the power to negotiate bilateral or multilateral trade pacts without the threat

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*Senators Should Make It Clear, However, That Environmental and Labor Standards Aren’t Negotiable*, PORTLAND PRESS HERALD, Aug. 5, 2002, at 8A [hereinafter Editorial, *Fast Track Authority Will End Gridlock on Trade*]; see also Pitts Commentary, *supra* note 105 (declaring that “America can compete, it should compete, and it will come out ahead in any market competition played out on a level playing field.”).

108. Richard S. Dunham, *How Bush Should Push Trade*, BUS. WK. ONLINE, Aug. 12, 2002, at 2002 WL 5146824.

109. Glen Barton, Chairman of Caterpillar, Inc., *quoted in* Paul Gordon, *Barton: U.S. Can’t Lead From Behind*, PEORIA J. STAR, Aug. 14, 2002, at A1.

110. Dunham, *supra* note 108.

111. *Id.*

of congressional tinkering hanging over his head.<sup>112</sup>

In addition, there was significantly favorable international response to the passage of TPA.<sup>113</sup> USTR Zoellick said he received numerous calls and correspondence from foreign trade ministers and other top policymakers when Congress passed the bill. He stated that the new trading authority was viewed internationally as “a real shot in the arm” for trade.<sup>114</sup> The Korea Institute for International Economic Policy issued a statement contending that “if international trade norms and rules are clarified and improved as a result of active U.S. pursuit of multilateral agreements, this will contribute to preventing trade disputes, ultimately benefiting countries like Korea with a high reliance on foreign trade.”<sup>115</sup> According to Singapore Ambassador Chan Heng Chee, “the TPA is useful because we’re coming to the conclusion of the Free Trade Agreement negotiations. The TPA will provide guidance for the language on some issues that are not yet settled in bilateral trade agreements.”<sup>116</sup> The Chilean government and its opposition “called for a concerted effort to achieve a free trade deal with the United States” after the bill received Senate approval, “in what is seen as a major step towards the creation of a Free Trade Area of the Americas . . . .”<sup>117</sup> The leaders of the European Union Trade Commission and the WTO also hailed the congressional approval of TPA, stating that Congress “removed a major hurdle to global trade liberalization.”<sup>118</sup> Other commentators noted that, while President Bush had alienated many countries with protectionist policies on domestic steel tariffs and agricultural subsidies, the new law “may indeed mark a historic turnaround” for the

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112. Editorial, *On the Fast Track to Trade*, HARTFORD COURANT, Aug. 12, 2002, at A6.

113. See *infra* text accompanying notes 114-19.

114. Allen & Blustein, *supra* note 35.

115. *U.S. President's TPA Cause for Concerns*, KOREA HERALD, Aug. 12, 2002, 2002 WL 25233385 (reporting the conclusions of the Korea Institute for International Economic Policy that the TPA presents advantages as well as disadvantages for Korea).

116. Siew Hua, *supra* note 103 (quoting Ambassador Chee).

117. Gonzalez, *supra* note 45.

118. *EU Trade Chief Hails US Fast Track Decision*, AGENCE FRANCE-PRESSE, Aug. 2, 2002, 2002 WL 23571985.

President's foreign relations.<sup>119</sup>

### III. THE NATIONAL ENVIRONMENTAL POLICY ACT AND INTERNATIONAL ENVIRONMENTAL REVIEW REQUIREMENTS

Thus, the Bush Administration, many leading economists, and much of the international community openly welcomed congressional re-authorization of the trade promotion authority.<sup>120</sup> As previously discussed and as illustrated by the controversial ratification of NAFTA, environmental concerns proved a serious impediment to the renewal of TPA and to the approval of trade agreements negotiated under its authority.<sup>121</sup> This Comment proposes that TPA legislation that included more specific environmental provisions—particularly environmental impact review procedures—would help ensure TPA's continued renewal in the future and would strengthen its effectiveness in achieving international trade agreements.

This Part presents a brief background of environmental impact review requirements as introduced into U.S. law by the National Environmental Policy Act. The Part then discusses efforts to extend environmental review requirements abroad and evidence suggesting that, to an extent, international application of these requirements has already taken place. This information is presented to establish the legitimate role of environmental review requirements in the future of U.S. international trade activities. The specific advantages of including such requirements in TPA legislation will be presented in Part IV of this Comment.

#### A. *Environmental Review Requirements in the United States*

When fast track trade agreement legislation was initially passed in 1974, the United States had just begun to make

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119. Jean-Louis Doublet, *Congressional Vote Enables Bush to Fast Track International Trade Deals*, AGENCE FRANCE-PRESSE, Aug. 2, 2002, 2002 WL 23571561; see also James Toedtman, *Bush Gets Fast Track to Trade*, NEWSDAY, Aug. 2, 2002, at A51 (stating that U.S. trade officials would now “have to deflate overseas anger at tariffs imposed by the administration to protect U.S. steel and lumber mills[,]” but that passage of House Bill 3009 put the United States “right back on track”).

120. See *supra* text accompanying notes 103-19.

121. See *supra* text accompanying notes 57-85.

sweeping changes in domestic environmental regulation.<sup>122</sup> In 1969, the first major environmental statute to be passed was the National Environmental Policy Act (NEPA).<sup>123</sup> Although a remarkably simple statute, NEPA established government agencies' substantial obligation to prepare an environmental impact statement, including a detailed assessment of impacts and alternative approaches for all major federal actions significantly affecting the quality of the environment.<sup>124</sup>

The NEPA requirements are primarily procedural, and they include a duty on the part of federal agencies to be responsive to private citizens.<sup>125</sup> NEPA does not establish a level of actual environmental performance or provide for enforcement of environmental decisions.<sup>126</sup> It has been criticized for its decision-making system that is based on a finite set of data rather than adjusting to new data as it becomes available.<sup>127</sup> Nevertheless,

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122. See Robert V. Percival, *Rethinking Environmental Protection for the 21st Century: Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 164 (1997) (citing NEPA).

During the 1970s, an explosion of federal legislation erected the modern federal [environmental] regulatory infrastructure. . . . The national regulatory legislation that transformed American environmental law during the 1970s . . . revolutionized U.S. administrative law by requiring administrative agencies to be more responsive to environmental concerns and by giving citizens access to the courts to ensure that the laws were implemented and enforced.

*Id.* at 164-65 (footnotes omitted).

123. See NEPA, *supra* note 11; ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 840 (3d ed. 2000) (stating that when President Nixon signed NEPA, he inaugurated what would come to be known as "the environmental decade").

124. *Id.* at 841.

125. See *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111, 1129-30 (D.C. Cir. 1971).

126. See, e.g., Kevin R. Gray, *International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 83, 84 (2000) (noting that the "qualitative and quantitative variance of states' EIA requirements, coupled with loosely worded commitments in international agreements, undermines the authority of EIA as a binding legal obligation").

127. See A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1135-36, 1140 (1994) (suggesting that the necessarily ongoing nature of natural resource management decisions is at odds with our current legal system which emphasizes finality; "[f]or example, the premise behind an environmental impact statement is that once

NEPA's enduring contribution has been to establish meaningful environmental reviews that are subject to public comment and agency responsiveness.<sup>128</sup> This contribution has beneficial application for U.S. law in the international trade context.

*B. The Application of Environmental Review Law Abroad*

The application of NEPA environmental review requirements to international activities is not new. In 1974, for example, a U.S. trust territory commissioner's decision to lease public lands for hotel construction without conducting an environmental impact statement was challenged as a NEPA violation in *People of Saipan v. U.S. Department of Interior*.<sup>129</sup> In *People of Saipan*, the court held that, although NEPA is applicable to federal agencies operating in the trust territory of the Pacific Islands, the commissioner's approval and execution of the lease agreement was not a federal action under NEPA.<sup>130</sup>

A later attempt at the international application of NEPA environmental review requirements was addressed in *Environmental Defense Fund, Inc. v. Massey*.<sup>131</sup> *Massey* addressed the National Science Foundation's duty to prepare an environmental impact statement before deciding to incinerate certain wastes in Antarctica.<sup>132</sup> In *Massey*, the court found that an environmental impact statement was required.<sup>133</sup> However, the court narrowed its decision in two important ways: (1) the holding was limited to agency action in Antarctica because of its

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environmental damage has been fully disclosed, a one-time decision can be made on the merits of the activity, and even if the activity will irrevocably alter the environment, the decision is legitimate and final").

128. See Gray, *supra* note 126, at 95.

129. *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 93 (9th Cir. 1974).

130. *Id.* at 96.

131. *Env't Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

132. *Id.* at 529; see also Jeffrey E. Gonzalez-Perez & Douglas A. Klein, *The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act*, 62 GEO. WASH. L. REV. 757, 764-67 (1994) (discussing *Massey*).

133. See *Massey*, 986 F.2d at 532-34 (discussing the unique status of Antarctica and the regulated conduct under NEPA).

unique status as a “sovereignless” global commons<sup>134</sup> and (2) “the presumption against extraterritorial application [of NEPA] did not even apply because the agency decisionmaking that was regulated was within the territory of the United States.”<sup>135</sup> While the opinion’s first limitation seems to diminish the NEPA-imposed duties of U.S. federal agencies with respect to international activities, the second expands them: “Because agency decisionmaking always takes place within U.S. borders, the Massey . . . analysis . . . would lead to application of NEPA in all cases, whether or not the action being taken is within U.S. borders.”<sup>136</sup>

Another landmark case that addressed the issue of NEPA-mandated environmental review for international actions was *Public Citizen v. Office of United States Trade Representatives*,<sup>137</sup> holding that the failure of the USTR to prepare an environmental impact statement for NAFTA did not violate NEPA because there was no agency action.<sup>138</sup> Notably, this case did not eliminate the possibility that NEPA requirements may apply to international trade agreements.<sup>139</sup> In fact, both *Public Citizen* and *Massey* leave open the question of whether NEPA’s environmental assessment requirements apply outside the borders of the United States.<sup>140</sup> Furthermore, the plain statutory language, the legislative history, and agency interpretation of NEPA fail to provide a clearer answer.<sup>141</sup> Despite this lack of

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134. *Id.* at 534.

135. Gonzalez-Perez & Klein, *supra* note 132, at 760.

136. *Id.*

137. *Pub. Citizen v. Office of United States Trade Reps.*, 970 F.2d 916 (D.C. Cir. 1992); *see also supra* text accompanying notes 50-52.

138. *Public Citizen*, 970 F.2d at 917; *see Gonzalez-Perez & Klein, supra* note 132, at 763-64 (explaining that the final action, which was the submittal of the negotiated agreement to Congress, was essentially that of the President, who is not an agency under the APA).

139. Gonzalez-Perez & Klein, *supra* note 132, at 763 (stating that the court “did not reach the merits of whether the language of NEPA requires the Trade Representative to prepare an environmental impact statement for NAFTA”).

140. *Id.* at 760.

141. *See id.* at 777-85; *see also* John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT’L L. 291, 319 n.50 (2002) (questioning the legal effect of the Council on Environmental Quality’s “guidance” to consider transboundary effects in domestic environmental impact reviews when the

clarity, a strong argument for NEPA's extraterritorial application may be made based on the fact that it regulates agency procedures (which only occur inside the United States), rather than substantive outcomes (which may occur elsewhere).<sup>142</sup> This argument, which was a basis for the *Massey* decision,<sup>143</sup> combined with a growing tendency of the United States to emphasize environmental policies in an international context,<sup>144</sup> may indicate that environmental review provisions do indeed have a place in the future of U.S. international trade.

Another example of actual progress made by the United States in the application of general environmental and specific NEPA principles to international trade is NAFTA's environmental side agreement, which resulted from pressure exerted by the United States in negotiations with Canada and Mexico.<sup>145</sup> In addition,

[r]ecently, for the first time in a U.S. trade pact, the United States and Jordan included provisions designed

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State and Defense Departments did not provide concurrences to the "guidance").

142. See Gonzalez-Perez & Klein, *supra* note 132, at 785 (stating: NEPA does not regulate outcomes but only regulates agency procedure. . . . Because agency decisionmaking processes take place within the United States and do not regulate the behavior of private individuals outside the United States (or anywhere), it does not regulate extraterritorial conduct. This quality distinguishes NEPA from other statutes that have substantive requirements that would require enforcement outside the usual territorial jurisdiction of Congress. Such statutes have the potential to present foreign-relations problems because of the potential for conflict with the substantive requirements of the laws of other sovereigns. That concern is one rationale behind the presumption against extraterritorial application of statutes.)

(footnotes omitted).

143. See *id.*; *Massey*, 986 F.2d at 532 (noting that "NEPA is designed to control the decision-making process of U.S. federal agencies, not the substance of the agency decisions.").

144. See Cyril Kormos et al., *U.S. Participation in International Environmental Law and Policy*, 13 GEO. INT'L ENVTL. L. REV. 661, 684-87 (2001) (discussing the famous Tuna-Dolphin and Shrimp-Turtle cases, which dealt with the extraterritorial application of the Marine Mammal Protection Act and the Endangered Species Act, and stating that "[g]iven that no other nation has imposed environmentally-motivated trade bans and defended them . . . to the extent the United States has," it is appropriate to credit the United States for the WTO's increased acceptance of extraterritorial application of national environmental laws).

145. See *id.* at 688.

to foster environmental protection within their bilateral agreement. Pursuant to the accord, environmental provisions will have equivalent status to trade issues, and both countries will be required to enforce their environmental laws.<sup>146</sup>

Hence, it appears that environmental provisions, in general, are taking shape in U.S. trade policy;<sup>147</sup> some commentators point out that they do have a practical effect that often goes unnoticed.<sup>148</sup>

The United States is not the only country to apply environmental reviews internationally. A number of other countries have, through laws and treaties, indicated acceptance of NEPA's environmental impact statement process as a legitimate approach to protect the environment.<sup>149</sup> In global trade generally, transnational environmental impact assessment policies, as embodied in Principle 21 of the 1972 Stockholm Declaration,<sup>150</sup> have been called a cornerstone of international environmental law.<sup>151</sup> The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)<sup>152</sup> is another example of international law that explicitly promotes adherence to environmental review

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146. *Id.*

147. *See, e.g., id.* (noting that in addition to NAFTA and the U.S.-Jordan trade agreement, the United States has successfully included environmental provisions in the preamble of the WTO agreement).

148. *See id.*; *see also* Sanford E. Gaines, *Environmental Effects Abroad of Major Federal Actions: An Executive Order Ordains a National Policy*, 3 HARV. ENVTL. L. REV. 136, 146 (1979) (pointing out that, while NEPA's application to extraterritorial environmental impacts resulting from domestic activities has been ambiguous, a 1979 Executive Order signed by President Carter, addressing international effects of U.S. federal agency action, nonetheless derived its "inspiration and purposes from NEPA").

149. Kormos et al., *supra* note 144, at 668.

150. *Report of the United Nations Conference on the Human Environment*, [1972] 26 U.N.Y.B. 320, U.N. Doc. A/Conf. 48/14/Rev. 1.

151. *See* Knox, *supra* note 141, at 292 (noting that transboundary EIA may be seen as an outgrowth or a special case of environmental impact assessment procedures in domestic legal systems, that the United States was the first country to institute environmental impact assessment procedures under NEPA, and that these procedures now form part of the domestic law of "about a hundred nations, including almost all the developed, and many developing, countries").

152. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 [hereinafter Espoo Convention].

principles without discriminating against those that fall outside domestic borders.<sup>153</sup> In fact, “[s]ome thirty nations, including the European Community, have signed the [Espoo] Convention . . . .”<sup>154</sup> One commentator stated that over seventy percent of the world’s nations have adopted either informal or mandatory environmental impact assessment requirements.<sup>155</sup> The international Organization for Economic Cooperation and Development, for example, has declared environmental impact assessments “to be a lasting tool for environmental management and an obligation that its members should meet, confirming its acceptance by industrialized countries.”<sup>156</sup>

The United States, while ratifying neither the Espoo Convention nor several other international environmental agreements,<sup>157</sup> has nonetheless expressed its intention to extend domestic environmental review principles to international trade agreements.<sup>158</sup> The United States argued, for example, to include environmental language in the preamble of the WTO Agreement and to place environmental trade concerns on the WTO agenda via its Committee on Trade and the Environment.<sup>159</sup> In addition, the executive offices of the USTR and the Council on Environmental Quality (CEQ) have released final guidelines for the environmental review of trade agreements that acknowledge the “broad international acceptance” of such reviews.<sup>160</sup> The guidelines were established as the first formally institutionalized procedures for conducting environmental

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153. Knox, *supra* note 141, at 302-03.

154. Kormos et al., *supra* note 144, at 668; *see also* Gray, *supra* note 126, at 84 (discussing the ascendancy of the environmental impact assessment process at the international level, as “evidenced by the numerous treaty regimes that call for its use as well as certain pronouncements of customary international law. . .”).

155. Gray, *supra* note 126, at 89.

156. *Id.* at 90.

157. *See* Kormos et al., *supra* note 144, at 662.

158. *See, e.g., id.* at 688.

159. *Id.*

160. *Environment: Final USTR/CEQ Guidelines Released on Environmental Review of Trade Pacts*, 17 Int’l Trade Rep. (BNA) No. 50, 1918 (Dec. 21, 2000). These guidelines implement the Executive Order of Environmental Review of Trade Agreements, which demands environmental reviews for certain trade agreements. Environmental Review of Trade Agreements, Exec. Order. No. 13141, 64 Fed. Reg. 63,169, 63,169 (Nov. 16, 1999).

reviews, using relevant federal agency expertise early enough in the negotiating process to help shape U.S. negotiating positions.<sup>161</sup> Such experience confirms the United States' increasing acknowledgement that it is important to develop environmental review principles abroad.

Despite the apparently increasing American and international preference for conducting NEPA-like environmental review procedures outside the United States,<sup>162</sup> many parties oppose this trend.<sup>163</sup> Additionally, some international environmental review supporters deny that the requirements, as they currently exist, are effective in protecting the environment. For example, western non-governmental organizations generally claim that, when a conflict arises, environmental agreements take a secondary position to trade priorities.<sup>164</sup> It is also true that while America's innovative USTR/CEQ environmental review guidelines for trade pacts address the form of trade agreements, they do not clearly control the specific activities conducted pursuant to the agreements.<sup>165</sup>

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161. Steve Cook, *Environment: President Orders Environmental Reviews of Proposed Trade Accords to Shape Policy*, 16 Int'l Trade Rep. (BNA) No. 46, 1901 (Nov. 24, 1999).

162. See *supra* Part III.B.

163. Many developing countries, for example, view the procedures as a form of oppression and hypocrisy by industrialized nations which, until attaining affluence, had exploited their own natural resources with careless abandon. See Kormos et al., *supra* note 144, at 663, 688; see also Gaines, *Rethinking Environmental Protection*, *supra* note 91, at 235 (suggesting that others who oppose the extension of NEPA requirements to the international context may generally include multinational businesses who "couch their resistance to environmentalism in terms of preserving competitiveness. . .").

164. See, e.g., James E. Bailey, *Free Trade and the Environment: Can NAFTA Reconcile the Irreconcilable?*, 8 AM. U. J. INT'L L. & POL'Y 839, 858 & n.94 (1993) (stating that a NAFTA dispute resolution panel "would interpret an environmental treaty from a free trade perspective rather than an environmental one" and that "the theoretical effect is to subordinate the various environmental protection treaties to the goal of free trade").

165. See Environmental Review of Trade Agreements, Exec. Order No. 13141, 64 Fed. Reg. at 63,169-70. This Order requires the USTR to conduct written environmental reviews of certain trade agreements and provides that the proposed reviews will be published in the Federal Register. *Id.* at 63,169. It also states, however, that the reviews "shall not be a condition for the timely tabling of particular negotiating proposals," that the reviews themselves will only be made available for public comment "where practicable," and that the reviews will emphasize environmental impacts in the United States. *Id.* at 63,170.

Because most of the international environmental disputes to date have revolved around such specific activities involving natural resource exploitation,<sup>166</sup> this may be a limitation to the guidelines' practical influence.

NEPA-like environmental impact assessment provisions, as increasingly adopted around the world, are admittedly subject to inconsistency, both with each other and with the original NEPA provisions.<sup>167</sup> Nonetheless, it is probably safe to say that international environmental review procedures are gaining in practical influence as well as in general acceptance. The implications of this phenomenon with respect to the renewed executive trade promotion authority are discussed below.

#### IV. THE ADVANTAGES OF ENVIRONMENTAL REVIEW PROCEDURES IN TRADE PROMOTION AUTHORITY LEGISLATION

As discussed above, environmental concerns are an increasingly important component of U.S. commercial activities abroad, and, as America's global trade expands, they undoubtedly will continue to play an important role. The critical issue explored in this Comment is the tension between free trade advocacy and environmental concerns, particularly as this tension affects congressional action. One way to achieve better integration of these divergent interests is to incorporate clear requirements for environmental review procedures into the TPA law itself.<sup>168</sup> While some argue that the TPA is not the best forum for environmental controls,<sup>169</sup> it is worth considering the potential benefits from both an environmental and a free trade perspective.

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166. See Gaines, *Rethinking Environmental Protection*, *supra* note 91, at 273 (stating that "specific conflicts between governments over the competitive consequences of environmental measures have typically arisen in . . . the conservation of natural resources").

167. See generally, Gray, *supra* note 126 (concluding that the cultural perceptions of different governments have led to inconsistencies in how environmental impact reviews are conducted throughout the world).

168. See *id.* at 120 (discussing the European Community's implementation of environmental review requirements through a directive instead of a regulation due to the procedural aspect of environmental impact assessment (EIA)).

169. See *infra* Part IV.A.2.

A. *Environmental Benefit of Environmental Review Provisions in Trade Promotion Authority Legislation*

To evaluate whether NEPA-like environmental review provisions in the TPA would really advance environmental interests, it is necessary to consider specific aspects of the environmentalist opposition to the TPA and how these concerns may be addressed.

1. *Transparency and Public Participation as a Basis for Opposing Trade Promotion Authority*

It is significant that many environmental advocates do not actually call for a wholesale condemnation of global trade.<sup>170</sup> Dan Seligman, spokesperson for the Sierra Club, stated that “all aspects of globalization are not bad . . . . Some are very good.”<sup>171</sup> A general concern, however, seems to be the perception of losing control to powerful, and often obscure, global economic forces.<sup>172</sup> Greenpeace criticized the WTO for its increasing expansion of its powers to include nontraditional trade issues, such as intellectual property rights, while continuing to sideline environmental policy concerns.<sup>173</sup> Greenpeace also claimed the WTO decision-making process is “hidden from public view and closed to direct public input.”<sup>174</sup> The Sierra Club echoed these views, expressing concern that international environmental

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170. See, e.g., Greenpeace, *Safe Trade in the 21st Century: The Doha Edition, The WTO and Safe Trade*, at [http://archive.greenpeace.org/politics/wto/doha\\_report.pdf](http://archive.greenpeace.org/politics/wto/doha_report.pdf) (last visited Oct. 18, 2002) (noting the importance of sustainable development in respect to trade) [hereinafter Greenpeace, *Safe Trade in the 21st Century*].

171. *Transcript from a Panel Session*, *supra* note 79 (statement of Dan Seligman).

172. See *id.* (statement of Jennifer Haverkamp).

173. Greenpeace, *Safe Trade in the 21st Century*, *supra* note 170; see also Broder, *supra* note 1 (stating that

[t]he reason [House representatives who voted against House Bill 3005] give [for opposing TPA] is that trade agreements now go far beyond tariff reduction and involve tradeoffs on intellectual property rights, environmental standards, basic labor laws and other issues of such importance to their constituents that they are reluctant to delegate sweeping authority to any administration to negotiate them away).

174. Greenpeace, *Safe Trade in the 21st Century*, *supra* note 170.

agreements are subordinated to WTO trade rules,<sup>175</sup> by stating:

We got into globalization, or the trade issue because of a new set of institutions and rules that are propagating global free trade, specifically the WTO, NAFTA, and these other major trade agreements. . . . [T]rade agreements are rules that enhance corporate property rights at the expense of what we have considered here for the last 50 years in the United States, to be government prerogatives: to adopt and implement laws and regulations in the public interest.<sup>176</sup>

Presumably, the laws and regulations referenced by Greenpeace include NEPA, the Administrative Procedure Act of 1946, and other major environmental regulations promulgated in the 1970s and 1980s. As USTR representatives acknowledged, these laws and regulations arguably make up the most sophisticated regulatory environmental protection system in the world:<sup>177</sup>

We have the Administrative Procedure Act, we have ways to challenge our rules and regulations. They have to be rational, reasonable, scientifically based. Many other countries, the way they set their standards and regulations, you don't want to know how they're done. And it's a very political process. And we're willing, in the trading system, to allow a bit of *risk to our regulatory regime*, in exchange for being able to raise questions about some that are done by other countries.<sup>178</sup>

It is this risk that seems to represent, to many environmentalists, the largest threat of globalization: participation in an economic system that can transcend American borders and American standards of environmental regulatory promulgation and enforcement.<sup>179</sup> While express goals

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175. *Transcript from a Panel Session, supra* note 79 (statement of Dan Seligman).

176. *Id.*

177. *See id.* (statement of Jennifer Haverkamp).

178. *Id.* (emphasis added).

179. *See, e.g., id.* (statement of Dan Seligman) (claiming:

We can have a lot of discussion about what trade agreements are, but in the simplest terms, trade agreements are rules that enhance corporate property

of the environmental movement include “improved transparency and access to information regarding the effects of specific conduct on the environment,”<sup>180</sup> international trade activities are often viewed as secretive and unsupervised.<sup>181</sup> The passage of the TPA in August drew concern that “when future trade negotiations are put on a fast track, they can’t possibly be scrutinized adequately by elected representatives.”<sup>182</sup> Carl Pope, Executive Director of the Sierra Club, responded to the House approval of House Bill 3009 with predictions that U.S. environmental oversight would now be subordinate to President Bush’s efforts to create a free trade zone throughout the Americas.<sup>183</sup> He stated, “The House’s capitulation to powerful business interests could jeopardize many of the environmental protections Americans take for granted.”<sup>184</sup> Other environmentalists, similarly, contend that more international trade agreements like NAFTA will lead to greater threats to domestic environmental protections:

Provisions in NAFTA already allow foreign corporations to sue the U.S. government whenever they feel that U.S. federal or state environmental laws affect their profits. Already, a Canadian chemical company has used NAFTA to sue the U.S. government for \$1 billion, jeopardizing a California clean water law banning the

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rights at the expense of what we have considered here for the last 50 years in the United States, to be government prerogatives: to adopt and implement laws and regulations in the public interest.);

*id.* (statement of Jennifer Haverkamp) (acknowledging that transparency is a very real concern in globalization, and that the U.S. government “has been really the leader” in increasing public understanding and involving stakeholders in decision-making).

180. Mugwanya, *supra* note 1, at 420 (adding that this concern is “one of the cornerstones of the emerging principle of a ‘right to environment’”).

181. See, e.g., Gerry Scardo, Editorial, *Fast Track Is Blackmail in Action*, ROANOKE TIMES & WORLD NEWS, Aug. 1, 2002, at A12 (stating that the new trade promotion legislation “provides for a secret tribunal where cases are heard in secret and presided over by trade lawyers”); see also Sierra Club, *Fast Track 2001: No Globalization Without Representation!*, at <http://www.ssc.org/sage> (last updated Sept. 27, 2002) (characterizing TPA as “how President Bush is planning to push new environmentally destructive trade agreements through Congress, by maximizing secrecy and minimizing debate”).

182. Peterson, *supra* note 54.

183. *House Approves Fast Track Bill*, *supra* note 67.

184. *Id.*

gasoline additive MTBE [methyl tertiary-butyl ether]. Extending NAFTA could increase the number of these claims, and threaten enforcement of environmental and public health laws. . . . “Now thanks to the House vote, many more environmental protections across the country could soon be under attack.”<sup>185</sup>

Fear of losing control, in general, and fear of losing procedural transparency and the opportunity to be heard, in particular, are thus among the prevailing themes of the environmental opposition to the TPA.<sup>186</sup>

The connection between these perceived risks and the TPA is simple. Generally speaking, environmentalists in opposition

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185. *Id.* Note that this Comment refers to the right of non-U.S. investors to challenge U.S. environmental regulations for allegedly protectionist characteristics, a major concern to many environment-conscious Americans. *See, e.g.*, MAX BAUCUS, BIPARTISAN TRADE PROMOTION AUTHORITY ACT OF 2002, S. REP. NO. 107-139, at 12-13 (2d Sess. 2002) (commenting that

[t]he growing number of investor-state disputes has caused concern among certain interest groups. In particular, some environmental groups see investor-state dispute settlement provisions as having a potentially chilling effect on the adoption of environmental laws and regulations. . . . Protecting the rights of U.S. investors abroad should not come at the expense of making Federal, State and local laws and regulations unduly vulnerable to challenge by foreign investors.).

While this Comment does not discuss the investor-state dispute issue in detail, it should be noted that the Trade Act of 2002 does address this problem by providing foreign investors in the United States no greater rights than U.S. investors and allowing for appellate review of such disputes. *See Stokes, supra* note 6, at 2326-27.

186. *See, e.g.*, Tiefer, *supra* note 68, at 368 (discussing “the commonly voiced critiques of the trade agreement process that it lacks transparency, and denies ‘democracy,’ on issues of vital concern to the U.S. public”). Note that the USTR-CEQ environmental review guidelines for trade agreements explicitly addressed “reform of the WTO to improve transparency and openness to public participation,” further indicating the executive branch’s acknowledgement of these issues. Cook, *supra* note 161, at 1901. Transparency has been defined as “a buzzword used in public discourse to assess public access—or lack thereof—to deliberations and dispute settlement hearings within the WTO over trade and trade-related policies.” Shaffer, *Symbolic Politics, supra* note 2, at 11174. Note also that Professor Shaffer suggested that, while global trade mechanisms such as the WTO are often criticized for lack of transparency, this critique may in some cases be more convenient rather than accurate. *See id.* at 11174-75. Nonetheless, these positions are effective in mobilizing support against international trade measures. *See Gregory C. Shaffer, The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 69, 81 (2001) [hereinafter Shaffer, *The WTO Under Challenge*].

to the TPA view the U.S. government as a potential agent for, rather than against, global trade's marginalization of the environment.<sup>187</sup> The Sierra Club, for example, described the House approval of House Bill 3005 in December 2001 as a result of "relentless pressure from the White House and severe arm-twisting from the House Republican leadership . . . [representing a corporate campaign] for anti-environmental, anti-labor, anti-democratic fast track trade legislation."<sup>188</sup> To some, then, TPA is simply a fast track to the potential environmental horrors they associate with globalization. As some commentators stated when the bill was finally approved, "[T]he president's new power for proving trade deals muffles the voices of grassroots groups and individual citizens. . . . [S]o-called fast track trade legislation is the latest addition to a growing deficit in American democracy."<sup>189</sup> No wonder so many are "well primed to confront" such legislation.<sup>190</sup>

2. *The Potential of National Environmental Policy Act Principles to Address Transparency and Public Participation in Trade Promotion Authority*

Is it possible that TPA could represent—instead of an acceleration of the environmental pitfalls of global trade—real environmental progress? Perhaps TPA legislation can be an opportunity to implement a degree of consistent environmental policy that actually helps alleviate major problems perceived by environmental groups. Provisions in TPA legislation that require NEPA-based review procedures in the future may help ensure meaningful public participation in trade decisions that affect the environment—a critical point from an environmentalist perspective. It may also ensure that open, public procedures are put in place for the resolution of

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187. See, e.g., *Transcript from a Panel Session*, *supra* note 79 (claiming that the "USTR is becoming an environmental, or in our view an anti-environmental voice for the US government") (statement of Dan Seligman).

188. *Stop Fast Track*, *supra* note 29.

189. Kevin Phillips, *Morning Edition: Commentary: President Bush's New Power Over Trade Deals* (National Public Radio broadcast, Aug. 12, 2002), available at 2002 WL 3189124.

190. See *Stop Fast Track*, *supra* note 29.

environmental review controversies, hence addressing the so-called transparency problem.

The idea to incorporate environmental provisions into the TPA is not new. In fact, in explicit recognition of environmental concerns, House Bill 3005 was itself a “compromise TPA bill,” in which “the Republicans agreed that it should be an American objective to have labour and environment issues that are covered in trade agreements ‘enforced’ just as other provisions are enforced.”<sup>191</sup> House Bill 3009, too, contained environmental provisions in “stronger language than Republicans were previously ready to accept.”<sup>192</sup> The perceived problem with the provisions in the recent TPA bills, however, is their lack of specificity concerning the kind of issues covered and the means of “enforcement.”<sup>193</sup> The Bipartisan Trade Promotion Authority Act of 2002 includes provisions requiring U.S. trade negotiators to consider the environment and labor rights as principle negotiating objectives, but critics contend that the bill’s language is not sufficiently binding.<sup>194</sup> Although the bill requires the President to conduct environmental reviews of trade agreements according to Executive Order 13141, neither the bill nor the Executive Order specifies sanctions for noncompliance.<sup>195</sup>

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191. *Time to Deal on Trade*, *supra* note 99, at 34; *see also* Bob Edwards, *Morning Edition: Senator Graham on Fast Track* (National Public Radio broadcast, July 26, 2001), available at 2001 WL 9328299 (discussing environmental provisions of a predecessor bill introduced by Senator Bob Graham).

192. *Promoting the Noble Cause*, *supra* note 5, at 57.

193. *Time to Deal on Trade*, *supra* note 99, at 34. The bill includes environmental objectives as negotiating priorities, but does not provide, for example, that non-enforcement of environmental standards in other countries are subject to trade sanctions, a serious issue that “blocked congressional passage of fast-track in both 1997 and 1998.” Stokes, *supra* note 6, at 2326-27; *see* Trade Act of 2002, Pub. L. No. 107-210, § 2101, 116 Stat. 933, 993 (2002) (to be codified at 19 U.S.C. § 3801).

194. *Senate Passes Trade Bill: Byrd Warns that Fast Track Hurts U.S Workers*, CHARLESTON GAZETTE, Aug. 2, 2002, at 11A [hereinafter *Senate Passes Trade Bill*]; *Promoting the Noble Cause*, *supra* note 5, at 57; *see also* Jim Lobe, *Economy-U.S.: Bush on Verge of Fast-Track Trade Victory*, INTER PRESS SERVICE, July 29, 2002, 2002 WL 4914876 (stating the new trade bill does call for adherence to international labor and environmental standards, but that it “makes no mention of sanctions in case of non-compliance”); *Congressional Roll Call*, TULSA WORLD (Quincy, Mass.), Aug. 4, 2002, at A5 (stating that opponents to House Bill 3009 argued the bill did not adequately protect workers’ rights and the environment).

195. Trade Act of 2002 § 2012(c)(1).

Furthermore, the Executive Order addresses environmental reviews of proposed trade agreements themselves, rather than specific activities conducted under those agreements.<sup>196</sup>

Specific environmental review provisions in the TPA may help ensure that trade activities falling within the scope of future negotiated agreements would be subject to meaningful assessment requirements. These provisions may include, in particular, the creation of an environmental committee for each trade agreement, whose decisions would be open to the public and subject to open judicial procedural challenges. The TPA legislation should contain requirements that such a committee be established with representation from each participating country;<sup>197</sup> that it conduct reviews of the trade activities taking place under an agreement;<sup>198</sup> that its decision-making procedure be open and subject to public participation;<sup>199</sup> and that it possess identified enforcement powers.<sup>200</sup> Rather than the TPA legislation specifying a committee structure, standards of

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196. Environmental Review of Trade Agreements, Exec. Order No. 13141, 69 Fed. Reg. 63,169, 63,169 (Nov. 16, 1999).

197. Provisions for equal representation may help alleviate trading partners' potential opposition to the review requirements. However, some have noted that a greater public participation in international environmental affairs may actually be disfavored by some developing countries that view the process as a means by which citizens of wealthier, more developed nations are empowered to deprive them of economic opportunities in the form of "green protectionism." See Shaffer, *The WTO Under Challenge*, *supra* note 186, at 18, 32.

198. The TPA law may need to specify that, to provide for effective ongoing environmental management, the reviews be initial and periodic. See Knox, *supra* note 141, at 317 (noting the difficulty in evaluating the effectiveness of existing international environmental impact reviews because few of them provide for ongoing monitoring and reporting).

199. See *id.*

200. See Gray, *supra* note 126, at 120-22. Gray discussed the European Community's implementation of environmental review requirements that were done through a directive instead of a regulation, "because EIA is a procedural measure." *Id.* at 120. This logic should also apply to environmental review provisions in the (procedural) TPA legislation. Accordingly, enforcement measures specified in the TPA may apply primarily to the conduct of the environmental committee to ensure that meaningful reviews are performed and to the agencies authorizing the activities reviewed to ensure that the reviews were considered. See Knox, *supra* note 141, at 297-98 (suggesting that the international environmental impact review process may be improved by requiring decision-makers to consider alternatives and mitigation based on the reviews).

review, and enforcement procedures, the parties to each trade agreement could develop those details. The agreements could allow for renegotiation of such terms as additional countries accede.<sup>201</sup>

The advantages of basing such review requirements on NEPA's environmental impact assessment system are several. First, as noted, NEPA appropriately provides procedural, rather than substantive, review requirements.<sup>202</sup> In other words,

NEPA does not conflict with other nations' sovereignty because NEPA is a procedural statute. Federal agencies are not required to take action as a result of an EIS [environmental impact statement]; they are merely required to compile the EIS. Indeed, one could argue the very opposite, that not conducting an EIS would manifest a lack of respect of another country's sovereignty.<sup>203</sup>

The procedural nature should minimize conflict with substantive laws of the countries with whom the United States negotiates future trade agreements.

Second, the NEPA approach is flexible, as evidenced by its current application in countries around the world.<sup>204</sup> This characteristic allows the review requirements to adapt to the local needs of various places: "Although numerous EIA regimes mirror each other in many ways, they are still tailored to match the jurisdiction's geophysical characteristics, environmental needs, level of socioeconomic development, and cultural and

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201. Note that this Comment focuses on the socio-legal practicability of proposed TPA environmental review provisions, rather than on their detailed form. A more comprehensive comparative and historical analysis of international environmental review assessment would be required to develop more concrete recommendations regarding specific TPA legislative provisions.

202. See Kormos et. al., *supra* note 144, at 668; see also Knox, *supra* note 141, at 291-92 (pointing out that the principle of "nondiscrimination," basic to international law, holds that "countries should apply the same environmental protections to potential harm in other countries that they apply to such harm in their own. Examined closely, each regional transboundary EIA agreement is an application of the principle of nondiscrimination.").

203. See Kormos et. al., *supra* note 144, at 668.

204. See Gray, *supra* note 126, at 84 (stating that "[s]tate discretion, inherent in the EIA process, allows for flexible implementation" of NEPA requirements).

governmental traditions.”<sup>205</sup> Notwithstanding the fact that the NEPA process has not been enthusiastically welcomed in less developed nations, NEPA’s flexible, procedural nature may make it the best suited of any U.S. environmental laws for adaptation to an international community.

Finally, a NEPA-based approach is appropriate because it addresses the specific environmental concerns, discussed above, of public participation and transparency in decision-making. One of the main purposes of NEPA was to encourage public participation in government decisions.<sup>206</sup> In an international context, this implies that decision-making “is returned to the national, regional, and even local level from the international arena far removed from the public.”<sup>207</sup> A more global commitment by the United States to NEPA-based environmental review principles, including transparency of decision-making, could “keep a state’s observance in check”<sup>208</sup> and thus go a long way toward addressing anti-TPA environmentalist concerns.<sup>209</sup>

In addition to the potential advantages of incorporating such environmental review requirements in the TPA, there are, arguably, drawbacks. According to a commonly expressed point of view, international trade works best in the absence of governmental interventions that constrain the international market place.<sup>210</sup> From this perspective, environmental requirements are “negative’ obligations” and, hence, a drawback

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205. *Id.* at 89.

206. Gonzalez-Perez & Klein, *supra* note 132, at 766.

207. Gray, *supra* note 126, at 125.

208. *Id.* at 128; *see also House Approves Fast Track Bill*, *supra* note 67 (quoting the Sierra Club director: “We can have a trade policy that is clean, green, and fair, but not by handcuffing our elected representatives.”).

209. *See, e.g., Knox*, *supra* note 141, at 318 (stating that international environmental impact reviews are popular—despite the lack of proven effectiveness at preventing environmentally harmful projects—because they “aim[] not so much at increasing environmental protection as at improving decision[-]making with environmental effects—that is, . . . not to foreclose trade-offs between environmental protection and other societal goals but, rather, to ensure that those trade-offs are made more intelligently”).

210. Wirth, *supra* note 82, at 333.

to trade that should not be located within trade agreements.<sup>211</sup> The Republican House Ways and Means Chairman, Bill Archer, has stated: "If we expend our energies on labor and environment we may lose opportunities for opening markets."<sup>212</sup>

While it is true that potential trading partners may view environmental provisions as trade impediments and that effective implementation of international environmental reviews may depend on the willingness of those very authorities to prioritize environmental issues,<sup>213</sup> it may also be true that this willingness may be fueled by the simple opportunity to trade with the world's largest economic power. Furthermore, the perceived dichotomy between trade and the environment has been identified, by some, as part of an outdated historical paradigm, the revision of which will benefit both economic and environmental interests.<sup>214</sup> "By rethinking trade and environmental policy from a presumption that no fundamental conflict exists between them, important opportunities for collaboration across these two policy spheres emerge . . . ."<sup>215</sup>

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211. *Id.* at 333, 347-50 (citing, for example, the private, voluntary process of the International Standards Organization (ISO) as an influential means to achieve environmental quality control).

212. Rossella Brevetti, *WTO: Archer Warns Labor/Environment Focus Could Hurt Market Opening in WTO Round*, 16 Int'l Trade Rep. (BNA) No. 46, 1901 (Nov. 24, 1999) (claiming that "there is no global consensus on these issues. . . . [L]abor and environmental issues have 'no business' being on the WTO negotiating table unless they are 'immediately and directly related to trade.'") (quoting House Ways and Means Chairman Bill Archer (R-Texas) and House Ways and Means Trade Subcommittee Chairman Phillip Crane (R-Illinois)).

213. See Gray, *supra* note 126, at 106-07.

214. See Gaines, *Rethinking Environmental Protection*, *supra* note 91, at 288 ("[T]he conflict between environmental advocates and trade/development advocates is rooted in mythology rather than in objective fact. The facts show a solid basis for a convergence of interests, rather than a conflict, between strong environmental protection effort and competitive economic development."); see also Shaffer, *The WTO Under Challenge*, *supra* note 186, at 23 (arguing that it was actually "the forces of trade competition, in reaction to the perception of environmental groups' success in promoting environmental regulation in national and international fora, [that] first brought environmental issues to the GATT and WTO").

215. Gaines, *Rethinking Environmental Protection*, *supra* note 91, at 236. The fact that not all of the environmentalists' and economists' goals are in opposition is evidenced, for example, by Archer's own comment that the transparency issue, in general, is an essential component of international trade. See Brevetti, *supra* note 212,

Resolving dichotomous trade and environmental approaches may lead to broad-based social benefits.<sup>216</sup> From an environmentalist perspective, integrating trade and environmental agreements may better address the concern that separating trade and environmental provisions tends to result in an inadequate emphasis on environmental priorities.<sup>217</sup> For these reasons, the incorporation of an environmental review system into trade agreements developed under the TPA authority may prove to be a feasible solution to environmental concerns.

### 3. *Some Lessons Learned from NAFTA's Approach*

Although specific NEPA-based environmental review systems do not, in theory, appear incompatible with international trade agreements, it is important to consider their effect on a practical level, to the extent that practical examples exist. The NAFTA framework may provide the best opportunity for this evaluation, because NAFTA established an international committee with environmental management responsibilities.<sup>218</sup> Although the NAAEC<sup>219</sup> provisions generally respect state sovereignty regarding environmental issues, they are innovative to the extent they "articulate 'an interest by all parties not only in environmental policies that may affect them through transboundary impacts, but also in what would normally be

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at 1901.

216. See Shaffer, *Symbolic Politics*, *supra* note 2, at 11183. President Bush has also asserted that freer trade creates jobs and reduces poverty in developing countries, making possible more spending for a cleaner environment. Press Release, President Signs Trade Negotiating Authority Bill, *supra* note 8.

217. See, e.g., Mugwanya, *supra* note 1, at 454 (stating that trade and environmental goals should be integrated and criticizing existing trade agreements that impose a "lopsided approach" by favoring trade over environmental regulation).

218. See *supra* Part II.B.2; Soloway, *supra* note 66, at 172 (stating that NAFTA's NAAEC "is one of the world's most far-reaching environmental cooperation agreements linked to an international trade agreement"). Although other international trade institutions include environmental management arrangements, such as the WTO's Committee on Trade and the Environment, see Shaffer, *The WTO Under Challenge*, *supra* note 186, at 2; Espoo Convention, *supra* note 152, this Comment focuses on the NAFTA environmental commission as it may most closely resemble an oversight body created for agreements negotiated under TPA.

219. NAAEC, *supra* note 74, 32 I.L.M. 1480.

considered the purely domestic environmental issues of another state.”<sup>220</sup> These provisions may thus serve as an appropriate comparative model for environmental reviews conducted pursuant to TPA.

Under the NAAEC, a Commission for Environmental Cooperation (CEC) was created.<sup>221</sup> The Commission was not developed solely to conduct environmental reviews, but rather to address a number of issues including conservation, enforcement, and public outreach.<sup>222</sup> The CEC has been involved in several notable environmental review efforts, with arguable degrees of success.<sup>223</sup> Although the CEC’s efforts may have accomplished the goals of (1) “enhancing regulatory compliance and enforcement of environmental laws through cooperative means” (2) heightening public awareness, and (3) achieving positive institutional and political environmental changes, the CEC has also been criticized as “ineffectual” due to its lack of concrete enforcement power.<sup>224</sup> Additionally, questions have been raised regarding the adequacy of enforcement of the CEC’s performance, itself, in “the absence of mechanisms to ensure that the CEC complies with the NAAEC.”<sup>225</sup>

At a minimum, however,

while many of the more pure environmental obligations are indeed soft, the procedural obligations concerning openness, transparency, and the enforcement of existing environmental law are less so and are evidence

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220. Soloway, *supra* note 66, at 174 (citation omitted).

221. SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION, NAFTA’S INSTITUTIONS: THE ENVIRONMENTAL POTENTIAL AND PERFORMANCE OF THE NAFTA FREE TRADE COMMISSION AND RELATED BODIES 12 (1997).

222. See Soloway, *supra* note 66, at 175.

223. See *id.* at 175-77. The author pointed out, for example, that CEC recommendations for improved waste handling procedures were limited in their ability to effect real policy improvements because “as the experts’ work moved up the institutional hierarchy of the NAAEC, it resulted in only further study and ‘best efforts.’” *Id.* at 175. This article also mentioned, however, that others have argued that “the report had significant political impact in Mexico.” *Id.*; see also Secretariat of the Commission for Environmental Cooperation, *supra* note 221, at 6-7 (reporting a CEC-conducted review, not of particular trade-related activities, but of the environmental performance of NAFTA institutions).

224. See Soloway, *supra* note 66, at 177 (citations omitted).

225. Kibel, *supra* note 79, at 10783.

of a powerful harmonization of policy objectives . . . .<sup>226</sup>

A report by the CEC, itself, confirmed its objectives of “transparency, efficiency, and monitoring, [which] are consistent with the views expressed by most environmental groups in North America.”<sup>227</sup> The CEC also incorporated significant public involvement regarding environmental concerns, providing citizens standing to allege noncompliance with national environmental standards.<sup>228</sup> Furthermore, although the CEC may fall short of some expectations for substantive regulatory enforcement, environmental groups have indicated that without an environmental oversight organization, such as the CEC, upcoming proposed trade agreements may face stiff opposition.<sup>229</sup> This political reality indicates that, from an environmental perspective, the CEC is far better than no committee at all.

The CEC, therefore, is an innovative international trade-related organization that has made significant progress toward the desirable objective of transparency in environmental policy.<sup>230</sup> The relevant criticisms indicate that a perceived weakness of the CEC is a lack of environmental enforcement power, which should be carefully considered when developing any procedural requirements for environmental reviews under TPA.<sup>231</sup> While the CEC has a broader environmental mandate than the TPA environmental review committee proposed by this

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226. Soloway, *supra* note 66, at 174.

227. Kibel, *supra* note 79, at 10769.

228. *Id.* at 10773 (discussing citizen enforcement provisions under the NAAEC).

229. *See, e.g., id.* at 10771-72 (stating:

More specifically, the FTAA [Free Trade Area of the Americas] does not create an institution akin to the CEC to help oversee environmental protection policies throughout north, central and southern America. . . . Given the absence of environmental protection rules, institutions and procedures in the Draft FTAA, most environmental groups currently oppose the proposed agreement. In the United States, most of the opposition to date has focused on political efforts to defeat legislation that would provide President George W. Bush with fast-track authority to finalize negotiations of the FTAA.).

Negotiating the FTAA is one of President Bush's biggest priorities under the newly approved TPA legislation. *See* Press Release, President Signs Trade Negotiating Authority Bill, *supra* note 8.

230. *See* Soloway, *supra* note 66, at 174-75.

231. *See, e.g.,* Kibel, *supra* note 79, at 10776.

Comment, the common objectives of transparency and public involvement warrant a thorough consideration of the CEC's strengths and weaknesses in developing environmental review requirements under the TPA.

As this Part has demonstrated, a modern approach that addresses environmental review and trade liberalization simultaneously through TPA legislation may significantly reduce environmental concerns associated with global trading activities. Despite arguments against the incorporation of environmental provisions in trade agreement language, such a direction may prove to be less of a disincentive to trade than many observers fear, and instead provide an incentive for international progress that would be welcomed by environmental groups. According to one writer, "the need for strong and effective leadership to conserve . . . global resources, is greater than ever. A more proactive U.S. commitment to global environmental issues will, therefore, be critical."<sup>232</sup>

*B. Economic Benefit of Environmental Review Procedures in Trade Promotion Authority Legislation*

As discussed above, important environmental benefits may be achieved by including environmental review requirements in TPA legislation. The potential economic benefits may be less obvious, but equally significant. Decreasing environmental opposition to TPA by adding environmental review requirements may promote international trade in two ways: first, by allowing TPA to receive congressional renewal at the end of its authorization periods, and second, by softening congressional resistance to any trade agreements negotiated pursuant to the TPA. Part IV.B.1 asserts the point that fast track renewal was delayed largely by environmental opposition and that its future renewal is similarly threatened. Part IV.B.2. discusses the obstacles a president may face in negotiating successful trade agreements under the newly reauthorized TPA.

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232. Kormos et al., *supra* note 144, at 663.

### 1. *Environmental Obstacles to Trade Promotion Authority Renewal*

There is substantial evidence suggesting that environmental and labor concerns prevented the renewal of the TPA after its expiration in 1994 until its reinstatement in 2002.<sup>233</sup> The efforts to re-implement TPA were hampered by serious environmental controversy. Environmental activism, highly visible at the WTO conventions in Seattle and the Quebec trade summit, represented “public frustrations” with global trade, including its perceived environmental inadequacies, which caused the “long lapse of fast track authority.”<sup>234</sup> Hope was revived for the passage of TPA legislation in the wake of the September 11 disaster, when USTR Zoellick published an article in *The Washington Post* urging congressional approval of TPA.<sup>235</sup> Strong opposition to the issue, however, persisted even during the time of “new bipartisanship” and congressional solidarity that followed the disaster: “Alas, the rising squabble about trade policy shows that real co-operation is limited . . . .”<sup>236</sup>

These struggles continued even as the House narrowly passed House Bill 3005 in December 2001.<sup>237</sup> *One Washington*

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233. See *supra* notes 57-59 and accompanying text; see Wagner, *supra* note 9, at 1055.

234. Tiefer, *supra* note 68, at 333; see also Toedtman, *supra* note 119, at A51 (stating that TPA was only passed in August after “an eight-year campaign that spurred violent protests in Seattle, and included midnight meetings, secret deals and bitter debates over the benefits of global trade . . .”); Editorial, *Trade Authority is Back—It Took Eight Years, but Important ‘Fast-Track’ Clout Was Revived*, OMAHA WORLD-HERALD, Aug. 6, 2002, at 6B (stating that fast track “was one of the issues behind the violent demonstrations that erupted at the 1999 meeting of the World Trade Organization in Seattle. Anti-globalization forces see it as an evil that promotes big business at the expense of the environment and workers.”).

235. *Time to Deal on Trade*, *supra* note 99, at 34 (“It began on September 20th, when Robert Zoellick, America’s top trade negotiator, used a speech and an article in the Washington Post to exhort congressmen to pass Trade Promotion Authority . . .”).

236. *Id.*; see also Norman J. Ornstein, *Congress Inside Out; This Column Is About Trade—and About Politics: Trade-Authority Vote: Is a Shallow Victory Worth the Risk?*, ROLL CALL, Oct. 22, 2001, available at 2001 WL 7040493 (claiming that “seriously bruised feelings and harsh relationships over this issue” have resulted in Congress, from the struggle over the proposed TPA).

237. See Broder, *supra* note 1 (noting that the measure passed by a single vote

*Post* columnist reported,

Never have I seen more lobbyists lined up outside the House chamber and on the sidewalk to the Capitol. Never have I seen a vote held open for more than the extra 23 minutes it took the Republican leadership to corral a reluctant handful of representatives and reverse a looming defeat.<sup>238</sup>

The Sierra Club congratulated its members on the near defeat of House Bill 3005 and vowed to “be back next time, stronger than ever, to fight their agenda of corporate rule disguised as ‘free trade.’”<sup>239</sup> Arguably, the addition of limited environmental provisions was the only reason the House passed the bill.<sup>240</sup> When Congress adjourned for the 2001 holidays, however, “approval remained elusive for . . . ‘fast-track’ trade promotion legislation.”<sup>241</sup> On May 23, 2002, the Senate did pass a version of the bill, but that version differed considerably from the version approved by the House, and the future of TPA remained uncertain until the House vote in July 2002.<sup>242</sup>

As a result, the President and his supporters had to continue fighting for negotiating authority.<sup>243</sup> President Bush’s

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in early December).

238. *Id.*

239. *Stop Fast Track*, *supra* note 29 (taking credit for the decision of “the Congressman from El Paso” to vote against the TPA bill:

They [the local Sierra Club office] had done a mailing to all 500 members a couple weeks back. Then they phone banked. Then they had lit up the listservs. The media team had placed op-eds—in both the Spanish- and English-language papers in town. And, oh, the volunteers found time along the way for a little sit-down chat with the member. Turns out that that Congressman withstood the pressure from the corporate lobby and voted against fast track. I wonder why. Many of you poured your hearts into this one. You’ve breathed new life into the old idea of citizenship. You know who you are. My heartfelt thanks.).

240. *See, e.g., Time to Deal on Trade*, *supra* note 99, at 34 (suggesting that the bill was a “compromise” and a “big concession to the Democrats”).

241. Natural Resources Defense Council, *Environmental Legislation: In Brief: Bulletin: Legislative Watch*, at <http://www.nrdc.org/legislation/legwatch.asp> (Dec. 20, 2001).

242. *See* Been, *supra* note 30, at 11016-17.

243. *See* Stokes, *supra* note 6, at 2326; Michael M. Phillips, *Leading the News: Houses Passes Fast-Track Bill, but Margin of Victory Is Slim*, WALL ST. J., July 29, 2002, at A3 [hereinafter Phillips, *Leading the News*]; *All Things Considered: Analysis:*

efforts to promote TPA were characterized as “the mobile version of the bully pulpit, which [President] Bush is turning to after failing to work his will in the Senate through phone calls, meetings and behind-the-scenes maneuvering.”<sup>244</sup> The deciding vote on House Bill 3009 was a “cliff-hanging 215-212 House victory . . . at about 3:30 a.m. Saturday after a rare personal visit by [President] Bush to Capitol Hill to lobby wavering Republicans.”<sup>245</sup> Environmentalists were present in full force: “in the wee hours of July 27 . . . there were more enviros lobbying [in the halls of the Capitol] than labor people.”<sup>246</sup> Specifically, environmental concerns that future trade agreements might weaken local environmental protections by allowing foreign investors to challenge local rules and regulations was said to be “probably the single most inflammatory issue that arose during the prolonged congressional debate.”<sup>247</sup>

From these comments, it is clear that environmental opposition significantly slowed the passage of TPA legislation.<sup>248</sup>

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*President Bush Signs Trade Promotion Authority Bill* (National Public Radio broadcast, Aug. 6, 2002), available at 2002 WL 3497364 (“[President] Bush had to fight strong opposition from lawmakers, mostly Democrats, who are worried about giving the president too much authority over trade deals that might hurt US workers and the environment.”); Mike Allen & Paul Blustein, *With a Promise that More Jobs and Economic Growth*, THE STATE (Columbia, SC), Aug. 7, 2002, available at 2002 WL 23324438 (noting that President Bush “struggled” and used “administrative heavyweights, such as Secretary of State Colin Powell and National Security Adviser Condoleezza Rice . . . to lobby members of Congress to vote for the controversial fast track authority”); *Morning Edition: Profile: President Bush Ends Two Day Trip in Louisiana Where He'll Deliver a Speech About Trade Issues* (National Public Radio broadcast, Jan. 15, 2002), available at 2002 WL 3186767 (reporting on a speech made by President Bush that suggested national security is linked to his negotiating authority to open up markets around the world to U.S. goods) [hereinafter *Morning Edition*]; *Approved Trade Bill Grants President Broad Negotiating Authority*, 44 GOV'T CONTRACTOR No. 30, Aug. 14, 2002, at 314 (noting the extensive debate and presidential push that was required to pass the TPA bill).

244. Allen, *After His Bout With a Pretzel*, *supra* note 86; see also *Morning Edition*, *supra* note 243 (pointing out that 2002 is a congressional election year and that President Bush is trying to pressure Congress in a year in which both the Senate and House are at stake).

245. Carolyn Lochhead, *Senate Gives Bush Free-Trade Victory, Silicon Valley Scores Key Win*, S.F. CHRON., Aug. 2, 2002, at A1.

246. Stokes, *supra* note 6, at 2327.

247. *Id.*

248. See Editorial, *Fast Track, Slow Approval: Congress Finally Gives Bush*

This opposition may have been reduced by the addition of measures such as environmental review requirements that addressed public concerns in a meaningful way. Furthermore, the negative reaction to Congress' decision to approve TPA in August may mean that future approvals are similarly uncertain. Congressional divisiveness may affect the future of the TPA because, as provided by the 2002 Trade Act, its renewal in 2005 will be possible only if neither house of Congress adopts an extension disapproval resolution.<sup>249</sup> Congressional approval would also be required for the bill's reauthorization in 2007.<sup>250</sup> The likelihood that Congress will allow the President to retain TPA after 2005 is lessened by negative reactions to the TPA bill that was passed: "No longer . . . can Congress attach provisos protecting troubled sectors of the economy or the environment."<sup>251</sup> Another commentator complained that approving TPA "puts us under an agreement that is lawless—no laws to protect the environment."<sup>252</sup> Massachusetts Democratic Senator Edward Kennedy publicly stated that the bill "did not do enough to protect labor rights, human rights, and the environment."<sup>253</sup> In addition, House Democratic Leader Richard Gephardt agreed that "to ensure improved living standards at home and abroad, trade policy needs to enhance human rights, reaffirm worker rights and promote environmental protection. This legislation fails on all counts."<sup>254</sup>

The bill's unpopularity among these voters and representatives does not bode well for TPA's future, at least as

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*Trade Authority*, PITTSBURGH POST-GAZETTE, Aug. 9, 2002, at A16 (stating that "Congressional footdragging was due in part to members' desire to be able to represent their constituents—and, in some cases, their campaign contributors—more attentively.").

249. Trade Act of 2002, Pub. L. No. 107-210, § 2012(c)(1), 116 Stat. 933, 1002 (2002) (to be codified as 19 U.S.C. 3108).

250. *Id.*

251. Editorial, *Fast Track to Where?* GREENSBORO NEWS & RECORD, Aug. 7, 2002, at A12 [corrected 08/08/02]; see also Neil King, Jr. & Shailagh Murray, *Senate Passes New Trade Powers for President*, ASIAN WALL ST. J., Aug. 5, 2002, at A4 (stating that Congress approved TPA despite "growing unease" over free trade by environmentalists and labor representatives).

252. Scardo, *supra* note 181.

253. Kirchoff, *supra* note 10.

254. *House Approves Fast Track Bill*, *supra* note 67.

currently written. As Gephardt added,

Let me just tell you this—if we [Democrats] win the House back, and we're setting the agenda, and I'm Speaker of the House, we will finally put together a trade policy in this country that recognizes both free trade and fair trade, and brings business and labor together on this very important issue.<sup>255</sup>

Other observers noted, "TPA was opposed by nearly all U.S. labor and environmental groups"<sup>256</sup> and may only have passed when it did because of the national economic slowdown at that time.<sup>257</sup> All of these factors indicate that, without a Republican majority in Congress or other favorable circumstances, the executive branch may not enjoy continued trade promotion authority, in its current form, beyond 2005.

## 2. *Environmental Opposition to Trade Measures Under Trade Promotion Authority*

Furthermore, while the bill was successful in overcoming the formidable opposition described above, its proponents may be disappointed to find that the Executive's renewed negotiating power falls short of its full potential to achieve the desired free trade goals. Although the congressional passage was touted as a political coup and a bipartisan consensus,<sup>258</sup> its failure to adequately address concerns, such as environmental protection, may in fact have resulted in more divisiveness than cohesion between congressional parties; in unpopularity among American voters; and even, from some perspectives, in disapproval from foreign trading partners.<sup>259</sup> For reasons such as these, some

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255. Gephardt Remarks at the DLC National Conversation: "Citizen Government: Old Values, New Ideas", U.S. NEWSWIRE, July 31, 2002, 2002 WL 22070102.

256. Press Release, President Signs Trade Negotiating Authority Bill, *supra* note 8.

257. See King & Murray, *supra* note 251.

258. Stokes, *supra* note 6, at 2326-27; Phillips, *Leading the News*, *supra* note 243.

259. See Phillips, *Leading the News*, *supra* note 243; see also *Law Gives Bush Power to Transact Trade Deals*, IRISH TIMES, Aug. 7, 2002, 2002 WL 24082393; Lobe, *supra* note 194; Thomas G. Donlan, Editorial, *Running on the Wrong Track: Trade Promotion Authority Won't Produce the Changes the World Needs*, BARRON'S, Aug. 12,

observers have warned that both the President and his free trade supporters “should be wary of reading too much into their victory.”<sup>260</sup>

For example, the lack of bipartisan unity in Congress may diminish the bill’s effectiveness, because congressional support will be critical to the implementation of the trade authority in the form of new trade agreements,<sup>261</sup> and because the TPA legislation implements a trading process rather than actual trade agreements.<sup>262</sup> Therefore, to achieve international trade deals, the President and the USTR must continue to win House and Senate approval.<sup>263</sup> Unfortunately, debate in Congress over the negotiating authority “failed to re-establish bipartisan agreement on trade . . . . If anything, manipulation of the process by the House GOP leadership deepened party divisions.”<sup>264</sup> *The Economist* magazine confirmed that, despite the compromises built into the new law, “American lawmakers are far from building a new consensus for free trade. The fast track vote was largely along party lines, and even many Republicans, who voted overwhelmingly in favour . . . did so more thanks to Mr. Bush’s arm-twisting and to goodies offered to their districts than out of love for free trade.”<sup>265</sup> Others agreed “evidence of a near party-line split was hard to miss. Only 25 Democrats voted for the measure, and 27 Republicans voted against it. That could make it difficult for the president” to gain approval for the trade deals, which the legislation was intended to facilitate.<sup>266</sup> Trade agreements under TPA will probably be unwelcome in Congress if Democrats retake control of the House in upcoming elections, when “the leftover anger of members whose concerns were largely dismissed in this bill could doom

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2002, at 47.

260. Stokes, *supra* note 6, at 2326-27.

261. See Phillips, *Leading the News*, *supra* note 243.

262. See, e.g., *Promoting the Noble Cause*, *supra* note 5, at 57.

263. See *id.*

264. Stokes, *supra* note 6, at 2326-27.

265. *Promoting the Noble Cause*, *supra* note 5, at 57.

266. Phillips, *Leading the News*, *supra* note 243; see also Lobe, *supra* note 194 (stating that “the administration’s partisan tactics [may] haunt it . . . when it submits a new trade accord for Congressional approval, especially if the Democrats gain control of the House next year”).

future trade deals.”<sup>267</sup>

Many voters also appeared angered by the political maneuvers associated with the trade bill—and gave their elected representatives reason to pay attention.<sup>268</sup> One critic noted indignantly that House Bill 3009 passed the House “only after a pitched battle, at 3:30 in the morning, with Members having had only a few hours to read its hundreds of pages—while debating another bill . . . [and after] many giveaways to specific Members to secure their votes.”<sup>269</sup> Others seemed offended, not only by the political pressure tactics associated with the bill,<sup>270</sup> but also by its timing.<sup>271</sup> The trade bill is generally viewed as being backed by big corporate interests, which has not improved its popular image given the nation’s recent climate of corporate scandal. The activist group Public Citizen, for example, declared that it was “outrageous that, just a week after Congress had passed legislation to crack down on corporate crime, it was ‘approving corporate deregulation across the board on a global basis.’”<sup>272</sup> Such statements as the following echo this sentiment:

The push to negotiate a compromise and then force a vote before most members of Congress have read the fine print is coming from multinational corporations

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267. Stokes, *supra* note 6, at 2326-27; see *Stop Fast Track*, *supra* note 29; Broder, *supra* note 1 (suggesting that environmental interests will prove serious impediments to the passage of trade agreements under TPA authority); Editorial, *Toward Fair Trade*, AUGUSTA CHRON., Aug. 15, 2002, at A4 (suggesting that the passage of TPA was “the easy part” and that the President will need Congress’ support for approval of ensuing trade agreements).

268. See, e.g., Lobe, *supra* note 194 (including a comment that Congressmen may be held accountable in November for their decision to pass TPA legislation).

269. Mary Wildfire, *Filthy Deal Fast Track Not the Answer for US*, CHARLESTON GAZETTE, August 9, 2002, at 5A.

270. See, e.g., Paul Blustein, *WTO Negotiations May Hold Key to Bush’s Legacy on Free Trade*, WASH. POST, July 28, 2002, at A6 (noting that the Administration may ultimately suffer in the long run by “ramming the bill through Congress” without adding stronger environmental and labor provisions); see also Lobe, *supra* note 194 (noting that when the debate on the bill began, Democrats were “complaining bitterly about the length of the document and the hour”).

271. *Senate Passes Trade Bill*, *supra* note 194; Editorial, *Wrong Track for Fast Track*, CAPITAL TIMES (Madison, Wis.), July 26, 2002, 2002 WL 24280067.

272. *Senate Passes Trade Bill*, *supra* note 194.

that have long seen free-trade agreements as vehicles to undermine regulations of corporate behavior—including rules protecting workers, farmers and the environment. . . . Enactment of the [TPA] legislation would jump-start secret negotiations for a hemispheric trade agreement that allows multinational corporations to eliminate regulations, rewrite rules and shed responsibilities.<sup>273</sup>

In response to this perceived threat, many voters called on their representatives to be “extremely vigilant in monitoring future trade talks.”<sup>274</sup> A Portland, Maine editorial stated “Maine’s senators should make clear . . . that environmental and labor standards aren’t negotiable.”<sup>275</sup> The Sierra Club has vowed to “confront and defeat any trade agreement that might be brought back under the ‘fast-track’ rules . . . .”<sup>276</sup> Negative public pressure, such as the kind the Sierra Club and its constituents intend to inflict on Congress, may seriously weaken the potential for a bipartisan approach to international trade.<sup>277</sup> In addition, TPA measures may be a negative factor for many voters in upcoming elections.<sup>278</sup> In other words, pro-trade

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273. *Wrong Track for Fast Track*, *supra* note 271.

274. *See* Editorial, *Fast Track Authority Will End Gridlock on Trade*, *supra* note 107.

275. *Id.*

276. *Stop Fast Track*, *supra* note 29.

277. *See* Broder, *supra* note 1.

278. *See, e.g.,* Wildfire, *supra* note 269 (suggesting that “passing this sweet package of presents for corporations” might make re-election more difficult for some lawmakers); *see also* Lobe, *supra* note 194 (stating that the President’s high-pressure tactics to pass TPA could cost legislators in upcoming elections, “where some Republicans who voted for the bill are in vulnerable districts”). While the Republicans emerged successfully from the November 2002 elections, this may not have indicated voter approval of TPA but rather the strength of other political influences such as (1) President Bush’s aggressive campaign effort, *see On the Web*, THE NATION, Nov. 11, 2002, 2002 WL 2210983; (2) a lack of strong Democratic party leadership, *see, e.g.,* William Greider, *Change the Leadership*, THE NATION, Nov. 11, 2002, 2002 WL 2210978; Howard Fineman, *Jurassic Park, 2002: Politics Needs a Youth Movement*, NEWSWEEK, Nov. 11, 2002, 2002 WL 7295434; Peter A. Brown, *Democrats Need to Figure Out What They Stand For*, ST. PAUL PIONEER PRESS, Nov. 10, 2002, at 23A; and (3) anti-terrorist sentiment, *see* David Broder, *Midterm Elections Legitimized Bush’s Presidency*, WICHITA EAGLE, Nov. 10, 2002 (tying Republican support to “loyalty to the commander in chief of the war on terrorism”).

legislators may not only fail to maintain congressional support for specific trade measures, but may also eventually lose seats in Congress due to the TPA legislation's perceived inadequate environmental and labor provisions.<sup>279</sup>

Some foreign interests may also have been alienated by the protectionist concessions President Bush made in 2002 to overcome domestic opposition to House Bill 3009.<sup>280</sup> These concessions included the Bush Administration's approval of massive steel tariffs and agricultural subsidies prior to the House's TPA vote and minor protectionist measures in the language of House Bill 3009 itself.<sup>281</sup> Such actions may have undermined foreign confidence in the United State's willingness to participate in the global market:

How [President] Bush won may well turn out to be more important—and maybe more damaging—than what he won. To soften up the most rabid opponents before the [TPA] vote, he signed awful bills providing protection for the steel industry and enormous subsidies for agriculture. . . . The protectionist deals made for domestic consumption astounded our trading partners and made them skeptical of the chance of doing real business with the U.S., with or without fast track to smooth the way.<sup>282</sup>

The protectionist concessions, however, were arguably necessary for President Bush to receive the requisite support to pass TPA legislation in the face of protest from environmental and labor interests.<sup>283</sup> Apparently, then, the inadequate environmental provisions of House Bill 3009 may have indirectly

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279. See Broder, *supra* note 1.

280. See Donlan, *supra* note 259, at 47 (stating that President Bush's domestic protectionist actions disturbed our trading partners and that international officials anticipate "very difficult negotiations ahead"); see also *supra* note 119 and accompanying text.

281. Donlan, *supra* note 259, at 47; *Promoting the Noble Cause*, *supra* note 5, at 57.

282. Donlan, *supra* note 259, at 47.

283. See *id.*; see also *Promoting the Noble Cause*, *supra* note 5, at 57 (stating that President Bush's steel and lumber tariffs and farm subsidies were "all to boost votes for fast-track, if you believe some officials. . . . Mr. Bush's victory was narrow, and he paid a protectionist price for it.").

contributed to the bill's weakness, from an international relations perspective, even though it was passed into law.

In summary, environmental problems associated with TPA legislation, as passed in August, may be an important factor in upcoming struggles to achieve trade deals under its authority. Congressional partisanship, voter dissatisfaction, and a degree of international dissatisfaction with President Bush's tactics may result in negotiating obstacles and tough fights on any agreements the Bush Administration brings back to Congress. As *The Christian Science Monitor* noted, "[t]he bill passed the House by only three votes. Any major trade treaty would include controversial concessions."<sup>284</sup> Even whether such concessions are likely to succeed in achieving trade deals under the TPA is uncertain.<sup>285</sup>

## V. CONCLUSION

Increased U.S. involvement in international trade agreements may be both inevitable and potentially beneficial to worldwide economic and social welfare. Unfortunately, the benefits of trade have often been viewed as taking place at the unavoidable expense of environmental protection. This Comment has proposed that participation in international trade is an opportunity for the United States to improve its image as promoting, rather than restraining, global environmental management, while enhancing global economic development. A major step in this direction would be the inclusion of environmental review procedures, modeled after NEPA, in the Executive TPA legislation. Environmentalist opposition to global trade progress in general, and to forerunner trade agreements, such as NAFTA, in particular, emphasizes the perceived need for increased transparency and public participation in trade-

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284. David P. Francis, *Boosting Benefits for Workers Hurt By Trade*, CHRISTIAN SCI. MONITOR, Aug. 12, 2002, at 16.

285. According to Lori Wallich, Director of Public Citizen's Global Trade Watch, trade deals negotiated under the TPA legislation will be "dead on arrival in Congress and in the court of public opinion." Blustein, *supra* note 270; *see also* Broder, *supra* note 1 ("Unless these issues are addressed in a way that gives comfort and confidence to [even] these basically pro-trade legislators . . . the future of U.S. trade policy is in jeopardy.").

related environmental decision-making. NEPA-based environmental review requirements would address these elements of the environmentalist opposition in a way that is likely to be feasible in a broad range of international settings.

For these reasons, the incorporation of such requirements into the TPA would decrease environmentalist opposition to the future renewal of TPA and to trade agreements negotiated under its authority. Armed with TPA and broader bipartisan support from the public and Congress, a president would be in a superior position to effectively negotiate trade agreements in a way that attempts to fulfill both global economic and environmental priorities.

Terese Carr\*

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