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"Alongside" the Fast Track: Environmental and Labor Issues in FTAA

Charles Tiefer*

Fast track authority\(^1\) allows the President to negotiate, within certain Congressionally-established parameters, international trade agreements which are then submitted for Congressional approval on a strictly up-or-down basis, preventing Congress from amending the agreements.\(^2\) In 1997, Congress balked at renewing the President’s fast track authority.\(^3\) This non-renewal came just when momentum was building for the proposed Free Trade Area of the Americas (FTAA) agreement.\(^4\)

President Clinton will have to proceed with FTAA negotiations in the face of sharp Congressional division, as manifested by the House’s refusal to extend fast track in November 1997.\(^5\) Environmental and labor issues have mattered crucially in recent debates, suggesting that these issues will go “alongside” the fast track, carried along with it although not entirely aboard it. This represents the culmination of the late-1990s legislative-executive debate over which issues are appropriate to address in

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1. See infra Part I.


5. See Yang & Neal, supra note 3, at A11.
the context of trade agreements, as well as a more fundamental long-term evolution in the United States "trade constitution."  

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

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

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


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

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

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

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

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

\begin{enumerate}
\item Robert Putnam has argued that trade negotiators must simultaneously play two "games," one at the international bargaining table, and one with the legislative branch. See Robert Putnam, \textit{Diplomacy and Domestic Politics: The Logic of Two-Level Games}, 42 INT'L ORG. 427, 434 (1988).
\item Until recently, negotiations and Congressional implementation addressed "non-tariff barriers" to trade. This term is used to denote a host of matters from subsidies to procurement favoritism. Only in the past decade have environmental and labor issues become the most important particular subset of non-tariff barriers. See Phillip R. Trimble, \textit{Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy}, 95 MICH. L. REV. 1944, 1945 (1997).
\item See \textit{JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS} 464-65 (3d ed. 1995).
\item See WTO Trade and Environment Committee to Look at Several Issues, \textit{Official Says}, Int'l Trade Daily (BNA), Apr. 25, 1997, available in Westlaw, BNA-BTD Database; \textit{Environment Committee Stalled over Language on WTO Standards}, 13 Int'l Trade Rep. (BNA) No. 44, at 1707 (Nov. 6, 1996); Committee
larly, Latin American negotiating partners in FTAA resist inclusion of environmental and labor issues.

Hence, the treatment of these issues in the 1997 debate over fast track extension marks a significant turn in the evolution of the “trade constitution” by which the President and Congress exercise together the trade agreement power. In a number of ways, the precise terms of the 1997 debate registered how these issues have consolidated their distinct, if limited, hold on the trade negotiation agenda. After the 1994 election, control of Congress swung to the party opposed to what it considered excessive inclusion of environmental and labor issues in trade agreements. From a different direction, public sentiment backlashed against trade agreements as a result of many factors, including practical impairment of United States goals on environmental and labor issues, and symbolic impairment of United States sovereignty. In response to the tension caused by these conflicting currents, the importance that the trade constitution allocates to environmental and labor issues could shift radically in either of two opposite ways. In one direction, Congress could follow partisan preferences manifested immediately on Trade and Environment Report, WTO Doc. PRESS/TE 014 (Nov. 14, 1996), discussed in Steinberg, supra note 16, at 242-44; Jennifer Schultz, The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform, 89 Am. J. Int’l L. 423 (1995). For a broad and not unsympathetic review of the potential for a better relation of the WTO and environmental issues, see Thomas J. Schoenbaum, International Trade and Protection of the Environment: The Continuing Search for Reconciliation, 91 Am. J. Int’l L. 268 (1997).

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

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

20. See infra Part II.


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


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

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

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

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

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

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


31. See generally Frederick M. Abbott, Foundation-Building for Western Hemispheric Integration, 17 NW. J. INT'L L. & BUS. 900, 916-23 (1996) (describing labor standard challenges faced during the passage of NAFTA, especially with regard to union organizing) [hereinafter Abbott, Foundation-Building].
ence standards in other countries, without causing a breakdown over these issues in efforts to have an FTAA at all. Finally, in addressing domestic environmental regulations, Part IV discusses the United States commitment to including safeguards against other nations' efforts to invalidate American domestic protections.

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

A. THE RISE OF FAST TRACK

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

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

34. See Robert A. Pastor, Congress and the Politics of U.S. Foreign Economic Policy 1929-1976 at 84-122 (1980); Carrier, supra note 6, at 698.
A key problem faced at that time, and resolved in the Trade Act of 1974, concerned implementing legislation for agreements to reduce non-tariff barriers. Congress would not simply delegate to the President the power to change domestic non-tariff statutes. At the same time, Congress could not move such legislation through the House and Senate using its old mechanisms of internal restraint on amendment and debate because these mechanisms had broken down.

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

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37. Notably, the historic power of the House Ways and Means Committee to move legislation on matters like tax and tariffs unchanged through the House floor, personified by Committee Chairman Wilbur Mills (D-Ark.), had given way in the late 1960s and early 1970s to a wave of reform in Congress that had subjected such matters to more open processes. See I.M. Destler, American Trade Politics 67-71 (3d ed. 1995).
39. As one commentator put it, under the new procedure, "Congress now had to pass legislation at both ends of a negotiation," with the Tokyo Round GATT Agreement needing the Trade Act of 1974 to give the President negotiating authority, and the Trade Agreements Act of 1979 to implement the deal. Destler, supra note 37, at 75.
40. Before submission of an implementing bill, the Senate Finance and House Ways and Means committees would separately consider the proposed implementation bill, in a procedure known as "nonmarkups." The term refers to the stage in committee consideration of a bill, called "markup," when a committee considers amendments to the bill before deciding whether to vote to report it to the floor of the chamber. See Charles Tiefer, Congressional Practice and Procedure 167-170 (1989). The committees would then resolve their differences, in a procedure called a "nonconference." See Destler, supra note 37, at 73-75. These committees, in turn, made arrangements with other committees that had jurisdiction over other titles. See id. at 76. Only when the committees finished would the President submit the bill as changed by the committees, for the Congress's up-or-down vote.
By comparison, the Constitution itself, without a "fast track" statute, merely allows the President to engage in a two-phase process—negotiation and subsequent Congressional approval—for reaching trade agreements such as FTAA.\(^41\) First, the President negotiates an agreement with Latin American countries, formulating objectives himself without necessarily receiving input from Congress.\(^42\) Then, once the international negotiators reach a proposed agreement, the second phase, Congressional approval, consists of ratification by two-thirds of the Senate or a majority of Congress.\(^43\) Debate in the Senate or the Congress might produce outcomes besides outright approval or rejection, namely, delay (by Senate filibuster) or amendments, possibly necessitating renegotiation.\(^44\)

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

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

\(^{41}\) See U.S. Const. art. II, § 2, cl. 2.
\(^{42}\) See id.
\(^{43}\) See id.
\(^{46}\) See Carrier, supra note 6, at 696-97.
\(^{47}\) See id.
\(^{49}\) The term covers agencies like the Environmental Protection Agency ("EPA") and the Department of Labor ("DOL") which are oriented toward the missions—environment and labor, respectively—in which they specialize. This same term may be used at the White House ("mission-oriented" staff), at the USTR level ("mission-oriented" subordinates), and in Congress ("mission-oriented" committees such as Senate Environment and Public Works).
sentatives on issues including the environment and labor.\textsuperscript{50} Hence, environmental and labor organizations face an interesting challenge: to maximize their leverage, by participating in the negotiation, while retaining the option to oppose the ultimate agreement. Administrators and NGOs with environmental and labor concerns can positively influence the content of the agreement.\textsuperscript{51} Conversely, the trading interests can hope that such an agreement will have a greater chance of approval, in the final phase, as a result of such consultation and participation.

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

\textbf{B. THE EMERGENCE OF ENVIRONMENTAL AND LABOR ISSUES ON THE FAST TRACK}

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

\textsuperscript{50} See Carrier, supra note 6, at 703-04.
\textsuperscript{51} See generally Abbott, Foundation-Building, supra note 31, at 916-942 (describing the success of NGOs in influencing the negotiation and implementation of NAFTA, and their goals with regard to the FTAA).
\textsuperscript{52} See 19 U.S.C. § 2191.
\textsuperscript{53} See id. § 2191(e)(1).
\textsuperscript{54} Id. § 2191(f), (g) (1994).
\textsuperscript{55} See supra text accompanying notes 46-47.
\textsuperscript{56} See O'HALLORAN, supra note 35, at 160.
\textsuperscript{57} Even these had weakened public support for trade liberalization, as some of the problems of the U.S. manufacturing economy seemed to relate to unfair Japanese trade advantages that persisted through years and even decades of negotiations. See, e.g., Penny L. Turner, Note, The Feasibility of a United States-Japan Free Trade Agreement, 26 Tex. Int'l L.J. 275, 297-98 (1991) (discussing Congress' protectionist reaction to Japanese competition).
ALONGSIDE THE FAST TRACK

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

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

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

60. See generally Audley, supra note 58, at 50-62 (describing the success of NGOs in bringing attention to these issues).
61. See id. at 52-53. The EPA Administrator served at this time as a conduit to environmental groups, negotiating with them what it would take for at least some to support fast track. See id. at 53-56.
62. See id. at 56-57.
64. See id.
Following up his new campaign approach, 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.

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

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

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

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

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

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


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

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


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

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

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70. See Part I.D. infra.
72. Id. §§ 2(a), 2(c)(5), H.R. Doc. No. 105-130 at 3,4.
73. Id. § 2(b)(7).
74. Id. §§ 3, 4.
75. Id. §§ 3(c)(3), 4(c).
76. See generally Talks on Nafta Side Deals to Start Week of March 15, supra note 9, at A3 (describing possible enforcement measures). Much debate has concerned this matter of placement of terms in "side agreements" rather than the "core" or "main body" of the agreement. For NAFTA, this had a concrete historical origin: President Bush had completed negotiation of the main body of the agreement, and when then-candidate Clinton made his 1992 North Carolina speech, placement of newly negotiated environment and labor terms in the "main body" would have required renegotiation. There is no particular reason that this sequence or something like it would occur for FTAA. That does not mean that other methods, besides placement in a side agreement, will not put environment and labor terms in a separate, and potentially lesser, category.
Assuming the Administration reaches an agreement in the form of a main agreement and side agreements, it then would engage in a process of devising, in consultation with Congressional committees, the implementing bill that makes the necessary changes in U.S. law.\textsuperscript{77} Congressional committees have the power, if opposed to the agreement, to have either the House or Senate vote on whether to preclude the implementing bill from receiving "fast track" treatment.\textsuperscript{78} Assuming Congress allows fast track procedures to remain in place, the Administration would then submit the implementing bill. It would receive an up-or-down vote, without amendments and without filibuster, in the House or Senate.\textsuperscript{79} Everything depends upon Congressional approval of the implementing bill. Hence, the entire trade negotiation process of an issue depends on how the "fast track" procedure treats that issue.

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

D. THE REJECTED ALTERNATIVES

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

\textsuperscript{78} See 19 U.S.C. § 2191(e).
\textsuperscript{79} See id. § (f), (g).
\textsuperscript{80} See Export Expansion and Reciprocal Trade Agreements Act, H.R. Doc. No. 105-30, § 3(b)(3)(B).
debate proposals, best illuminates the form that the “alongside” approach ultimately is taking.

1. 1995 Republican Congressional Position: “Off” the Fast Track

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

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

81. See Maggs, supra note 11, at 3C.
83. Fast Track Issues Hearing, supra note 69, at 276 (statement by Speaker Gingrich); see also Gingrich Urges Adoption of Fast-Track Authority, Excluding Labor, Environment, Int'l Env't Daily (BNA), May 24, 1995, available in Westlaw, BNA-IED Database (reporting an address by the Speaker in which he indicated that “[t]he House is willing to authorize fast-track as long as it does not have provisions linking trade benefits to labor and environmental issues”).
85. See Trade Agreements Authority Act of 1995, H.R. 2371, 104th Cong. §§ 2 (trade objectives) and 3(b)(3)(A)(iv) (fast track implementation bill “consisting only of . . . provisions necessary for the operation or implementation of such trade agreement”); see also Ways and Means Reports Fast Track Without Bipartisan Backing, Int'l Trade Daily (BNA), Sept. 22, 1995, available in Westlaw, BNA-BTD Database; Kantor Says Talks Will Continue on Ways and Means' Fast-Track Bill, 12 Int'l Trade Rep. (BNA) No. 38, at 1593 (Sept. 27, 1995).
jecting the previously used broader formula of “necessary or appropriate.”

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

Thereafter, the issue became one for the 1996 presidential campaign. Senator Dole repeated opposition to “adding ‘extraordinary’ issues such as labor and environmental protection to trade agreements.” Nothing further happened in 1996, as ob-

87. See id. § 3(b)(3)(A)(iv).


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

90. See id. at 154-55.


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

93. The sharp differences were reported as follows:

Labor and Environment Stalemate

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

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

Block & Herrup, supra note 67, at 221.

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

With President Clinton’s victory in the election, Congressional Republicans effectively abandoned the position they had maintained since 1995. In 1997, the Clinton Administration made clear that it would insist on inclusion of such issues in fast track trade negotiations, notably through the President's statements during a May 1997 trip to Mexico. In May 1997, and again in July 1997, Congressional Republicans floated, but pulled back from the formula ultimately used, in which they relented to allow inclusion of trade and environmental issues that

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

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


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

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

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


99. Speaking in Mexico City, “Clinton repeatedly highlighted the importance of labor and environmental protections which are built into the NAFTA.” Clinton Hails NAFTA, Calls for Expanded Free Trade, Int’l Trade Daily (BNA), May 8, 1997, available in Westlaw, BNA-BTD Database.
were "trade-related."\(^\text{100}\) The fast track debate that ensued further illuminates how Congress and the Clinton Administration resolved the issue of fast track.

2. 1997 Debate on Fast Track Extension

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

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

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

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


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


\(^{104}\) For a modest defense of the provision as reported by the Senate Committee, see 143 CONG. REC. S11633 (daily ed. Nov. 4, 1997) (statement of Rep. Roth) (arguing that free trade does not necessarily result in fewer jobs for American workers).
(B) To ensure that foreign governments do not derogate from or waive existing domestic environmental, health, safety or labor measures. 105

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

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

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

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

110. See, e.g. id. H10410 (daily ed. Nov. 8, 1997) (statement of Rep. Pascrell) (noting that bill as reported only prevents derogation from “existing” environmental and labor protections, and does not allow the United States to negotiate for higher standards); id. E2141 (daily ed. Oct. 30, 1997) (statement of Rep. Waxman) (noting that it constrains the President’s ability to negotiate environmental and labor concerns).
gress being very clear about what we expect in macro terms to be in
these agreements. I did that once; I do not want to do that again. . . .
I do not want the Brazilians to be misled as to what we will require in
the Congress in these treaties. We want labor and environmental en-
forcement of their laws in the core trade treaty with trade sanctions in
order to enforce it.111

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

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

Gephardt).
112. See Peter Baker & Helen Dewar, 'Fast Track' Backers Switch to High
Gear: Clinton Mixes Concessions, Warnings on Trade Measure, WASH. POST,
113. See DOL Official Says Child Labor Issue To Be Addressed Under Fast-
Track Bill, 14 INT'L TRADE REP. (BNA) No. 43, at 1866 (Oct. 29, 1997); Child
Labor's Impact on Free Trade: Hearing Before the Subcomm. on INT'L Econ.
Policy and Trade of the House Comm. on INT'L Relations, available in
1997 WL 664834 (F.D.C.H.) (Oct. 22, 1997) (testimony of Andrew J. Samet, Acting De-
puty Under Secretary for International Affairs, U.S. Department of Labor).
114. See Clinton Administration's Statement of Executive Initiatives Accom-
panying Fast-Track Legislation, Released Nov. 3, 1997, 14 INT'L TRADE REP.
(BNA) No. 44, at 1933 (Nov. 5, 1997) [hereinafter Statement of Executive
Initiatives].
115. The House Committee on Rules held hearings, the last stage before
floor consideration. See Fast-Track Trade Agreement Procedures: Hearing on
H.R. 2621, the Reciprocal Trade Agreement Authorities Act, Before the House
Comm. on Rules, available in 1997 WL 702862 (F.D.C.H.) (Nov. 6, 1997) (testi-
116. For a description of the countdown toward the scheduled, but canceled,
climactic House floor vote, see Andrew Taylor, Clinton Sways Few Democrats as
House Sets Fast-Track Vote, 55 CONG. Q. WKL. REP. 2663 (Nov. 1, 1997); An-
drew Taylor, Clinton Loses First Opportunity After All-Out Fast-Track Push, 55
CONG. Q. WKL. REP. 2751 (Nov. 8, 1997); Andrew Taylor, Trade Agenda Left in
Limbo by Failure of Fast Track, 55 CONG. Q. WKL. REP. 2828 (Nov. 15, 1997).
the long run. In December 1997, House Minority Leader Gephardt, the leader of the 1997 opposition, attempted to negotiate an agreement on fast track.117 Moreover, while some bill proponents thought further efforts unlikely, President Clinton pledged to pass the measure in 1998.118 Thus, the 105th Congress might simply consider, later in 1998, some form of fast track extension. However, assuming Congress bypasses such consideration in 1998, it would become a priority for the 106th Congress in 1999 after the 1998 election. This would mirror the manner in which the 1996 election presaged the 1997 debate on fast track extension.119 Either way, when Congress faces the issue again, the treatment of environmental and labor issues will be of great importance.120 Likewise, these issues will play an important role in upcoming FTAA negotiations.

II. ENVIRONMENTAL AND LABOR ISSUES IN FTAA

A. THE FREE TRADE AREA OF THE AMERICAS AGREEMENT

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

119. See supra text accompanying notes 64-67, 95.
120. See Lewis, supra note 25, at A-26.
123. See International Agreements: Trade Ministers to Meet in Denver for June Ministerial to plan FTAA, 12 Int’l Trade Rep. (BNA) No. 7, at 7 (Feb. 15, 1995).
124. See Andersen, supra note 122, at 6.
Although the economic opportunities from further economic integration are substantial, the path to achieving such integration is complex. The Summit of the Americas did not actually begin FTAA negotiations, but instead began a process intended to eventually lead to FTAA negotiations. An early concept of simply expanding NAFTA by admitting other Latin American countries has lost ground. Instead, the FTAA process proposal has advanced on three levels: through a series of international conferences at the ministerial and sub-ministerial levels; through working groups on particular areas; and through extensive debate in each country about various ways to proceed. The United States has participated intensively in these international meetings and working groups. At the same time, other regional and bilateral trade agreements have evolved, such as MERCOSUR in Latin America. As a result, competing agendas, both political

125. See Brevetti, supra note 121, at 49.
126. Id.
and substantive, are developing as preparation is made for FTAA negotiations.\textsuperscript{132}

In May 1997, participating trade ministers at the Belo Horizonte meeting recommended that formal negotiations of FTAA begin at the Santiago summit in early 1998.\textsuperscript{133} Thus, as countries are preparing for the fast approaching formal negotiations of the FTAA, the United States and other countries are strategically planning how to control the agenda and process of the negotiations.\textsuperscript{134}

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

B. COMMON ASPECTS OF ENVIRONMENTAL AND LABOR ISSUES

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


\textsuperscript{135} Mechanically, the lapse eliminated the only way an agreement could likely win approval. Moreover, the lapse inspired doubt, both domestically and internationally, that sufficient support existed in the U.S. Congress to approve an ultimate agreement. Still, such doubt always exists. Narrow votes to extend fast track authority do not remove uncertainty; nothing removes it until the final vote on approving and implementing an agreement.
tion of how the FTAA should cause other countries to maintain or to raise their environmental standards and environmental enforcement. Domestic concerns involve the goals the agreement should accomplish, or at least not undermine, in the United States. A trade agreement promises trading partners a limit on federal and state "protectionist" legislation in the United States. A chief domestic concern is ensuring that the anti-protectionist limitation does not preclude appropriate American environmental and labor regulation that protects the quality of domestic conditions. The fourth issue is what form the inclusion of environmental and labor matters should take in the agreement itself and in the subsequent implementing legislation.

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

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

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

136. See Abbott, Foundation-Building, supra note 31, at 941-43.
139. Foreign challenges to state practices under trade agreements such as GATT have created concern that new trade agreements such as FTAA could challenge such state and local environmental protections. Accordingly, sub-federal entities usefully play a role in the development of trade agreements. See Housman, NAFTA's Lessons, supra note 137, at 386-88.
play an important background role in the working groups that develop trade standards, environmental and labor NGOs can play an important background role on environmental and labor issues, as long as they struggle, with Presidential assistance, to attain that role. The diligence of the United States in pressing for NGOs to participate in FTAA negotiations will be of great importance in the next few years.

2. External Concerns

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

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

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


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


143. See generally Jack Garvey, Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment, 89 AM. J. INT'L L. 439 (1995); Kevin W. Patton, Note, Dispute Resolution Under the North American Commission on Environmental Cooperation, 5 DUKE J. COMP.
cult to impose sanctions on Mexico for non-compliance. As a result, the subsequent record under NAFTA has included disappointments on both environmental and labor issues. Some commentators have praised Mexican efforts at promulgating standards and improving enforcement, while others have criticized NAFTA as lacking effectuating “teeth.”

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

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


In the 1980s, Congress pioneered the “Super 301” provision which statutorily forces the President to impose unilateral sanctions upon our trading partners for unfair practices. See 19 U.S.C. § 2420 (1994). While this mechanism started with a concern for purely economic practices, Congress can adapt the mechanism for other issues such as labor and the environment. For example, child labor could be made, statutorily, an “unfair trade practice” for purposes of Super 301.
such as the avoidance of tropical deforestation. Latin American negotiating partners may oppose the United States' exercise of such types of unilateral powers, deeming this inappropriate protectionism inconsistent with the multilateral thrust toward free trade. Yet, inclusion of environment and labor objectives in the fast track legislation weighs heavily toward preservation of the U.S. unilateral capabilities on these issues.

3. Domestic Concerns

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


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

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

C. Specific Aspects of Environmental Concerns

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

1. External

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

156. See id.
157. For example, business interests in Congress have opposed environmental measures such as constraining timber harvesting on public lands, and labor measures such as a ban on striker replacements. Some in Congress might fear that the President could put provisions of that kind — if not so broad, then leaning in such directions — into the unamendable implementation bill for a free trade agreement, making the implementation bill more palatable to moderate Democrats while forcing pro-business Republicans to swallow unpalatable measures in order to get a desired trade agreement.
that produce them, such as untreated process wastewater. It is the process concerns that raise the more interesting question, since the processes of production for what FTAA will cover can occur in other countries.158 The "Tuna/Dolphin" controversy illustrates this tension.159 In Tuna/Dolphin, the United States was not concerned with the quality or safety of the product, that is, the content of the canned tuna, but rather with the environmental harm which the production process caused, namely the consequences of certain tuna-fishing methods that resulted in excessive dolphin capture.160

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

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

158. Within the United States, federal and state environmental agencies impose regulations that protect the environment by regulating the processes for production, and the United States has various reasons for concerning itself with overseas production processes. For a discussion of this issue, see John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?, in Trade and the Environment: Law, Economics, and Policy 219, 226-29 (Durwood Zaelke et al. eds., 1993).
163. For the spectrum of approaches from total harmonization on down, see Daniel C. Esty & Damien Geradin, Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements, 21 HARV. ENVTL. L. REV. 265, 283-94 (1997).
result in total harmonization of other countries' standards with U.S. standards. A low level consists of nothing more than precluding opportunistic lowering of standards deliberately to obtain relocating of industries for which pollution control strongly affects profit levels.\textsuperscript{164} The bottom would be leaving the matter to WTO rules, since the WTO has applied little to no pressure on developing countries on the issue of environmental standards or enforcement.\textsuperscript{165}

2. Domestic

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

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

\begin{itemize}
\item \textsuperscript{164} See id. at 303-04.
\item \textsuperscript{165} See Schultz, supra note 17, at 429.
\item \textsuperscript{166} See Armin Rosencranz et al., \textit{Rio Plus Five: Environmental Protection and Free Trade in Latin America}, 9 GEO. INT'L ENVTL. L. REV. 527, 533 (1997).
\item \textsuperscript{167} See id. at 534.
\item \textsuperscript{169} Mexico brought the first tuna/dolphin challenge to regulations under the U.S. Marine Mammal Protection Act. See \textit{Tuna I}, supra note 159; see also generally Don Mayer & David Hoch, \textit{International Environmental Protection and the GATT: The Tuna/Dolphin Controversy}, 31 AM. BUS. L.J. 187 (1993). The EC followed up with a second tuna/dolphin challenge that produced a 1994 panel report. Both reports went against the United States. See Yechout, supra note 160, at 262-68. Congress finally moved in 1997 to loosen the definition of "dolphin-safe" for tuna sold in the United States. See Deidre McGrath, \textit{Writing
fuel economy. FTAA could threaten to open the door to successful challenges against domestic U.S. product standards on issues such as U.S. rules on pesticides.

D. LABOR CONCERNS

FTAA negotiation on the fast track also raises the question of just how strongly the United States will condition its trade concessions upon Latin American compliance with standards of labor rights that have support in International Labor Organization (ILO) conventions and in U.S. legislation and policy, but which some Latin nations themselves intensely oppose. Even the original Plan of Action for FTAA committed the participants to “further secure the observance and promotion of worker rights, as defined by appropriate international conventions.” Albeit with limited effectiveness, the ILO has promoted labor standards since its inception after World War I. Furthermore, as the worldwide GATT trade agreements evolved, the United States has attempted to obtain implementation of labor rights through the World Trade Organization (WTO) as recently as 1996.


174. A major Clinton Administration effort in this regard showed the American policy still had strong life in it, though it did not achieve success. The Administration pushed hard to establish a WTO working party on Trade and Core Labor Standards, or at least to enhance cooperation between WTO and the ILO. However, the other WTO members, particularly developing countries, resisted. For a description of both the Administration initiative and the resistance by other WTO members, see Steve Charnovitz, Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor
Frustration in the GATT/WTO arena has forced the United States to explore alternatives to promote labor standards. In the 1970s, the GATT allowed developed countries to give trade preferences to developing countries, and Congress effectuated this in the United States by the General System of Preferences (GSP). Five general rights constitute the heart of the GSP conditionality system: the right of association; the right to organize and bargain collectively; prohibition against forced labor; protection against child labor; and acceptable conditions of work, such as those concerning wages, hours, and occupational safety and health. American labor rights advocates have been disappointed that the GSP system has not advocated further-reaching standards. Still, the GSP has produced improvements, compared to previous conditions, in a number of Latin American countries, such as Chile, Paraguay, Guatemala, and the Dominican Republic.

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


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


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


179. See id. at 343.


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

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


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

189. See id. at 370.

190. See id. at 370-71.

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

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

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

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

A. ECONOMIC DIMENSION

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

192. See Bierman & Gely, supra note 187, at 569 ("the highest level of enforcement for purported violations [of the NAALC] . . . is simply that of 'ministerial consultations.' Moreover, the U.S. NAO [National Administrative Office] has to date been somewhat reluctant to recommend that cases proceed even to this level").
trade barriers, which would amount both to inefficient protectionism and interference into other countries' internal affairs.\textsuperscript{193}

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

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


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

B. POLITICAL DIMENSION

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

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

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

198. See C. O'Neal Taylor, supra note 59, at 32-53.
related' standard could increase the President's ability to include issues and policies in trade bills.199

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

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

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

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

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

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

202. When the House Ways and Means Committee reported its 1995 Republican proposal, which omitted the term "appropriate," dissenting Democratic views explained what the missing term encompassed, explaining:
The reported bill would no longer permit "appropriate" measures to be included in fast track bills. Provisions regarded as "appropriate" to implement trade agreements were included in previous fast track bills both to gain political support and to enable proper administration of the trade statutes and Congressional oversight. These provisions have had bipartisan support in the Committee on Ways and Means. Why would we want to reduce that support, both within the Committee and for passage in the House, as well as to reduce the ability of agencies to administer the laws effectively or for Congress to oversee their implementation?


203. For example, under Congressional budget rules, an implementing bill that moderately reduces revenue by lowering some tariffs may need provisions to raise revenue, so that the bill as a whole is deficit-neutral. Since these provisions do not require international negotiation, some object to fast track treatment on the rationale that the President should not be able to make revenue-raising decisions that are not subject to Congressional debate and amendment. Still, such provisions are not "necessary" to an implementation bill, since other
shows how environmental and labor matters which actually were the subject of international negotiation and actually were in the international agreement are clearly "necessary and appropriate." "Trade-relatedness" does not exclude any environmental or labor issue that has appeared, or has a prospect of appearing, in trade negotiations. Rather, it aims to exclude completely extraneous provisions that an Administration might put into a trade agreement implementation bill simply to win domestic support.204

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

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

A. Process Issues

As previously described, the United States has been in the forefront of having its mission-oriented agencies, its states, and above all the NGOs,205 participate in negotiation and implementation of trade agreements. In contrast, the Latin American FTAA negotiating partners have resisted this. For example, in the 1997 preparatory process for FTAA, labor organizations sought official recognition for their own forum, but vetoes from nations do not negotiate an agreement on the domestic question of revenue-raising. Such provisions are, however, "appropriate" to an implementation bill, since Congressional budget rules require revenue-raising to make the bill deficit-neutral while other nations do not require similar action.

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

205. The United States pressed for its NAFTA environmental side agreement to provide for a role for NGOs in presenting issues to the dispute resolution process. See supra note 141 and accompanying text.
other countries prevented this. Latin American FTAA negotiating partners greeted coolly the U.S. attempts to create study groups on trade/labor and trade/environment issues.

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

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

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


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


209 See Audley, supra note 58, at 88-93.

210 It is significant that President Clinton's "Executive Initiatives" in November 1997, in the final push for a fast track extension, recalled his commitment to opening the WTO's dispute resolution mechanisms to NGO roles. See Statement of Executive Initiatives, supra note 114.
that if they close the door on environmental and labor NGO participation, they will in effect, be telling environment and labor groups to work as early and as hard as possible to block approval of a final FTAA which might otherwise have a fair chance of success. NGO participation also provides a response to the commonly voiced critiques of the trade agreement process that it lacks transparency, and denies "democracy," on issues of vital concern to the U.S. public.

B. EXTERNAL ISSUES

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

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

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

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

212. Id. at 32.
"Alongside" the Fast Track

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

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

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


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


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

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

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

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

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


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

221. See Statement of Executive Initiatives, supra note 114.
Finally, the United States might attempt to introduce dispute resolution efforts tailored specifically for labor issues. In NAFTA, the United States took a graduated approach to labor issues, providing a more labor-friendly enforcement mechanism for three issues, including child labor, and a less labor-friendly mechanism for two other issues, including the key issue of union organizing. The use of a similar technique which might pave the way for graduated treatment of labor issues might have two manifestations. First, the United States could use labor issues as tiered readiness criteria for the admission of particular FTAA countries to particular levels of trade benefits. Second, it could provide for sanctions such as partial "snap-backs,"—re-raising of U.S. tariff barriers upon determinations of shortfalls on particular labor issues.

C. Domestic Issues

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

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

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


225. Perhaps the single most symbolically important NAFTA issue regarding lowering of United States' domestic standards concerned allowing Mexican truck drivers who had not gone through the equivalent of state licensing procedures in the United States to haul cargo. President Clinton backed away from forcing this change, even though NAFTA had seemed to anticipate it. President Clinton deferred immediate action of the kind desired both by Mexico and by industry-allied state governors. See supra note 153.
offer such a proposal during FTAA negotiations. If Latin American trade partners desire a kind of market access that can be achieved only by invalidation of domestic standards, they will have to deal with the frank disbelief in U.S. public opinion that its high environmental and other standards actually amount to protectionism.

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

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

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

Other environmental and labor issues do not travel so easily. Within the United States, the relative fortunes of the two major political parties affect attitudes toward environmental and labor issues. Presidents of different parties treat them differently; Congressional majorities of different parties treat them differently. To some extent, the trade negotiating process operates as an intermediary, while developments can occur in other contexts. On domestic issues, environmental and labor regula-
tion creates potential barriers to foreign trade that the trade negotiation process can only deal with gingerly. On external issues, the United States pushes its views through multilateral negotiation of IEAs and, sometimes, through unilateral legislation.

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