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Emily Harwood

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THE JORDAN FREE TRADE AGREEMENT: FREE TRADE AND THE ENVIRONMENT

EMILY HARWOOD*

I. INTRODUCTION

Over the last thirty years, concern for, discussion of, and interest in the environment has greatly increased.¹ Traditionally, environmental policy has been conducted on the domestic level.² Today, environmental policy is as likely to be made on the international level as on the domestic level.³ The first environmental agreements were agreements regarding how to deal with particular environmental problems. Now that environmental awareness has reached new heights, environmental provisions are being included in trade agreements as well.⁴ The inclusion of environmental provisions in free trade agreements raises several concerns regarding national sovereignty, effectiveness, and accountability.⁵ Tensions between the goals of trade liberalization and environmental protection have existed for at least a century, but the conflict has only recently moved to the forefront of national issues in the United States.⁶

In the wake of the terrorist attacks of September 11, 2001, Congress passed and President Bush signed implementing legislation for the United

* Emily Harwood is a 2003 J.D. candidate attending the College of William and Mary School of Law. Ms. Harwood received a B.S. from Colorado State University in 2000.

¹ Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555 (1999).

² Prasad Sharma, Comment, *Restoring Participatory Democracy: Why the United States Should Listen to Citizen Voices While Engaging in International Environmental Lawmaking*, 12 EMORY INT'L L. REV. 1215, 1217 (1998).

³ *Id.* at 1215.

⁴ See e.g., North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S.A., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

⁵ See Terry L. Anderson & J. Bishop Grewell, *It Isn't Easy Being Green: Environmental Policy Implications for Foreign Policy, International Law, and Sovereignty*, 2 CHI. J. INT'L L. 427 (2001); Alberto Bernabe-Riefkohl, "To Dream the Impossible Dream": *Globalization and Harmonization of Environmental Laws*, 20 N.C. J. INT'L L. & COM. REG. 205 (1995) (discussing the conflict between free trade and protection of the environment); Sharma, *supra* note 2, at 1233-41 (2001).

⁶ Michael Robins, *The North American Free Trade Agreement: The Integration of Free Trade and the Environment*, 7 TEMP. INT'L & COMP. L. J. 123, 140-41 (1993).

States-Jordan Free Trade Agreement ("JFTA").⁷ Originally negotiated by President Clinton's trade team in October of 2000, it is the first free trade agreement between the United States and an Arab nation. It practically eliminates all tariffs and other trade restrictions between the two countries.⁸ The agreement is significant as it is the first United States trade agreement to contain "binding commitments, enforceable by sanctions, to adhere to environmental and workplace standards".⁹ As such, it could potentially lead to foreign influence over our domestic environmental policies and standards. Yet the agreement will certainly elevate the status of environmental protection efforts made during future trade negotiations.

Following the Introduction, Part II of this Note will briefly discuss the way that environmental law is formed on both the domestic and international levels. Part III will discuss the tenuous relationship between free trade and the environment, including some background on two of the most influential international trade agreements; the North American Free Trade Agreement ("NAFTA") and the General Agreement on Tariffs and Trade ("GATT"),¹⁰ as well as Executive Order 13,141.¹¹ Part IV of this Note will examine the fast track authority sought by President Bush and the debate surrounding it. Part V will outline the newly implemented Jordan Free Trade Agreement ("JFTA") and the environmental provision contained therein. Part V will also include an analysis of the procedures for enforcement of the JFTA and what it means for United States domestic law. Part VI explains why the JFTA is an improvement over past trade agreements that sought to implement environmental aims. The Conclusion suggests that although the JFTA looks like a step in the right direction, it is too soon to tell what influence it will have in future international negotiations.

⁷ Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, 41 I.L.M. 63 (2002) (hereinafter JFTA). The ratification of treaties is discussed in Part III.B.

⁸ Warren Vieth & Janet Hook, *After the Attack; U.S. Policy; Senate Passes Free-Trade Pact with Key Ally Jordan; Mideast: Legislators drop objections against largely symbolic measure to produce a weapon in fighting terrorism*, L.A. TIMES, Sept. 25, 2001, at A8.

⁹ *Id.*

¹⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194 [hereinafter GATT].

¹¹ Exec. Order No. 13,141, 3 C.F.R. 235 (1999), *reprinted in* 39 I.L.M. 766 (2000) (directing environmental review of Trade Agreements).

II. CREATING ENVIRONMENTAL LAW

A. *Domestic Lawmaking*

“Customary international law recognizes the right of sovereign nations to exploit resources and promulgate environmental regulations within the nation.”¹² In the United States, the domestic process involves “1) passage of statutes by Congress; or 2) promulgation of rules and regulations by administrative agencies. Mainly the Environmental Protection Agency (“EPA”)”¹³ Federal agencies must have statutory authority to promulgate regulations.¹⁴ Congress is considered empowered to pass statutes regarding the environment based on its constitutional authority to regulate interstate commerce.¹⁵ The several states may enact local environmental policy as well, but pursuant to the Supremacy Clause of the Federal Constitution, federal law will trump in the case of a conflict.¹⁶

United States environmental laws provide a comprehensive scheme of environmental protection.¹⁷ Their effectiveness is limited, however, when applied to environmental problems that extend beyond national borders, as the United States does not have jurisdiction over the activity of foreign nations.¹⁸ The National Environmental Policy Act (“NEPA”)¹⁹, passed in 1969, may have been the single most important development in domestic environmental protection in the United States.²⁰ The EPA has promulgated regulations implementing NEPA, including a policy aimed at facilitating public participation in decisions involving the environment.²¹ Courts have

¹² Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341, 349 (1996).

¹³ Sharma, *supra* note 2, at 1217.

¹⁴ *Id.*

¹⁵ *See id.*; U.S. CONST. art. I, § 8, cl. 3.

¹⁶ Sharma, *supra* note 2, at 1214.

¹⁷ Robins, *supra* note 6, at 137.

¹⁸ *Id.*

¹⁹ National Environmental Policy Act of 1969, 42 U.S.C.S. §§ 4321-4347 (2003).

²⁰ Robins, *supra* note 6, at 137; *see also* Sharma, *supra* note 2 (discussing how NEPA outlines the federal government's goal of providing every American with healthful and aesthetically pleasing surroundings through the use of federal programs and resources).

²¹ Sharma, *supra* note 2, at 1218-19.

also "contributed to the legitimacy of [domestic environmental] regulations by developing the hybrid rule-making process whereby courts take a 'harder' look at agency decisions and require more elaborate explanations."²²

B. *International Lawmaking*

International law is law between sovereign states.²³ International law is usually created either by treaties (also called conventions or agreements) or custom.²⁴ Relative to domestic lawmaking, opportunities for public involvement in international lawmaking are limited. International law creates obligations only through consent. Thus, a treaty is an agreement voluntarily entered into by the governments of nations.²⁵

Customary international law is based on the practice of nations and is usually formed when a given belief or practice is shared among nations.²⁶ These nations assert that they have acted in accord with that practice or belief because they believe themselves to be bound to do so.²⁷ "Unlike treaties, the form of consent to custom can be either express or implied."²⁸

Binding international rules relating to the environment most commonly take the form of treaties.²⁹ Once a state has signed a treaty it is obliged to do nothing that would defeat the object and purpose of that treaty.³⁰ The treaty will be binding upon the parties once it enters into force. The provisions of each individual treaty determine how and when a treaty enters into force.³¹ Frequently a treaty will enter into force after a certain number of signatories have ratified it.³² The United States considers treaties

²² *Id.* at 1220.

²³ IAN BROWNIE, *PRINCIPLES OF INTERNATIONAL LAW* 289 (1998) [hereinafter BROWNIE].

²⁴ Anderson & Grewell, *supra* note 5, at 433.

²⁵ *Id.* A treaty can also be an agreement between an international organization and a sovereign government. *See generally* BROWNIE, *supra* note 23.

²⁶ "The binding nature of customary international law requires two elements: the state action must be settled and it must be done out of a sense of obligation." Sharma, *supra* note 2, at 1225.

²⁷ *See generally* BROWNIE, *supra* note 23.

²⁸ Sharma, *supra* note 2, at 1225.

²⁹ *Id.* at 1224.

³⁰ BROWNIE, *supra* note 23, at 606-07.

³¹ *Id.* at 611. The terms of a treaty may also "specify the conditions of its termination, and a bilateral treaty may provide for denunciation by the parties." *Id.* at 617.

³² *Id.* at 611-12.

to be non-self executing.³³ Thus, the ratification process in the United States requires the approval of a super-majority (two-thirds) of the Senate.³⁴ In the case of a trade accord that requires a change in United States tariffs, the President must also obtain legislation from Congress that allows him make those changes.³⁵ A duly ratified treaty assumes the status of federal law and trumps any state law or prior inconsistent federal law.³⁶

“The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality.”³⁷ Thus, on the international legal stage states are not qualified as “developed” or “developing,” rather, they all stand on equal footing as sovereigns of their respective territories. Arguments made by a state to the effect that a particular provision of an international agreement should not apply because it deprives that state of its sovereignty in a particular area of law have not been well received by international tribunals.³⁸ It is precisely a state’s sovereignty that allows it to contract out of its rights without the interference of external forces. However, restrictions upon the independence of states will not be presumed.³⁹ “The corollary of the independence and equality of states is the duty on the part of states to refrain from intervention in the internal or external affairs of other states.”⁴⁰ For example, the designation of a state’s territorial sea is a matter that falls within that state’s domestic

³³ In the absence of an express provision, a right of denunciation may be inferred from the intentions of the parties as expressed through the terms of the treaty and its subject matter. However, pursuant to the Vienna Convention, it is presumed that the treaty is not subject to denunciation or withdrawal. *Id.*

³⁴ U.S. CONST. art. II, § 2, cl. 2.

³⁵ Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 MINN. J. GLOBAL TRADE 195, 199 (1994).

³⁶ Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269 (1991). “The Supreme Court has held that treaties are equal in force to federal statutes and that customary international law is comparable, if not superior, to federal common law.” *Id.* at 1269. This integration into federal law raises federalism concerns when discussing the issues surrounding fast-track authority (discussed *infra* Part IV).

³⁷ BROWNLIE, *supra* note 23, at 287.

³⁸ See generally *id.*

³⁹ *Id.* at 289-90.

⁴⁰ *Id.* at 291 (“Matters within the competence of states under general international law are said to be within the reserved domain, the domestic jurisdiction, of states.”)

jurisdiction.⁴¹ But when the issue is enforcement of a state's territorial limit with reference to other states, it is a matter more properly handled on the international plane.⁴² Therefore, in certain situations international law may restrict the domestic territorial competence of states as a result of treaty obligations, or custom.⁴³ According to Professor Brownlie,

The relativity of the concept of the reserved domain is illustrated by the rule that a state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law, and also by the fact that a particular international obligation may refer to national law as a means of describing a status to be created or protected.⁴⁴

Black's Law Dictionary defines "enforcement" as "[t]he act or process of compelling compliance with a law, mandate, or command."⁴⁵ On the domestic level, the law is enforced through the executive and judicial branches of government, usually in the form of sanctions such as fines or incarceration. There are those who feel that the international legal system is not a legal system at all because it lacks such enforcement mechanisms.⁴⁶ This belief rests on the presumption that citizens comply with domestic law because the sanctions exist.⁴⁷ Yet there can be no doubt that we have all obeyed the law at times when we were certain no sanction would result, such as stopping at a stop sign when there is not another car around for miles.⁴⁸ Nevertheless, in an attempt to create some international enforcement institutions, bodies such as the United Nations Security Council and, on occasion, International Criminal Tribunals, have been created.⁴⁹

⁴¹ *Id.* at 292.

⁴² *Id.*

⁴³ BROWNIE, *supra* note 23, at 292.

⁴⁴ *Id.*

⁴⁵ BLACK'S LAW DICTIONARY 549 (7th ed. 1999).

⁴⁶ Mary Ellen O'Connell, *Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 47 (1995).

⁴⁷ *Id.*

⁴⁸ Of course, the compliance in this situation may simply be the learned behavior resulting from fear of sanctions imposed by law enforcement.

⁴⁹ O'Connell, *supra* note 46. The Council has authority to enforce the law only against those states threatening international peace and security. *Id.* at 51. The primary international

There are also courts in the international system, such as the International Court of Justice ("ICJ").⁵⁰ Because states must consent to the jurisdiction of the ICJ, however, it has minimal enforcement capabilities. More often than not, in order to avoid straining diplomatic relations, international legal disputes are resolved through less formal means such as negotiations. The parties to an international agreement may specify in the agreement what dispute resolution mechanism is to be utilized in case of a conflict.

III FREE TRADE AND THE ENVIRONMENT

A. *On the Side of Free Trade*

There are those who feel that the United States' foreign policy should be driven by economic considerations. This movement toward globalization of the economy has recently been pursued through the promotion of trade liberalization.⁵¹ Proponents of free trade agreements argue that "free trade will stimulate trading among nations with different comparative advantages in producing goods, which will bring economic benefit to all nations involved."⁵² Furthermore, they suggest that by encouraging investment in poorer countries, free-trade policies will foster equality among nations.⁵³ They also suggest that creating wider markets will promote more competition.⁵⁴ Increased competition leads to enhanced productivity, technological innovation and, ultimately, more efficient markets.⁵⁵ According to James Holbein,

institution concerned with protecting the environment is the United Nations Environment Programme ("UNEP"). Robins, *supra* note 6 at 132. "UNEP's basic purposes are to disseminate information to expand environmental awareness, to participate in technical cooperation with developing nations, to help improve domestic environmental laws and institutions, to facilitate global and regional agreements on the environment, and to mediate disputes of environmental issues." Robins, *supra* note 6, at 132.

⁵⁰ See generally BROWNLEE, *supra* note 23.

⁵¹ Bernabe-Riefkohl, *supra* note 5, at 207.

⁵² *Id.* at 208.

⁵³ *Id.* at 209.

⁵⁴ *Id.*

⁵⁵ *Id.*

Dismantling barriers to trade and investment increases trade, which in turn spurs economic growth, productivity gains, and job creation. Businesses benefit from predictable rules of doing business across their borders. Consumers benefit from lower prices and a greater variety of products. Businesses and all trading partners realize gains in efficiency. The bottom line is enhanced competitiveness for goods and services traded from liberalized economies in the global marketplace.⁵⁶

It is argued that attaching environmental standards to free trade agreements only creates barriers to free trade by limiting the ability of countries to manufacture goods unencumbered by regulatory restrictions. Some authors suggest that,

the effort to subject future trade agreements to more stringent environmental review risks slowing and even halting future trade agreements altogether, with enormous impacts on trade and world prosperity. The long-term effects of stifling wealth creation will harm environmental quality, as developing countries and former Communist countries take longer to grow wealthy enough to afford improving environmental quality.⁵⁷

Yet, in the extreme, this line of thought would have all countries repealing whatever environmental laws they have on their books in favor of unrestrained production and regardless of short-term negative environmental impacts. In addition, any attempt to draw a line between environmental provisions that are not in some way trade barriers, and those that are, merely creates a false dichotomy. The very purpose of environmental regulations is to restrain processes of manufacturing goods that create environmental

⁵⁶ James R. Holbein, *The Case for Free Trade*, 15 LOY. L.A. INT'L & COMP. L. REV. 19, 20 (1992).

⁵⁷ Anderson & Grewell, *supra* note 5, at 438. "After almost three decades, many developing countries continue to suspect that environmental reviews [*see infra* Part III. C.] will develop into a precondition for trade liberalization that links environmental protection requirements with trade access." James Salzman, *Executive Order 13,141, and the Environmental Review of Trade Agreements*, 95 AM. J. INT'L L. 366, 379 (2001).

hazards and to encourage the development of alternative production methods that contribute to a healthier environment. This usually involves increased cost to the manufacturer and consumer. If a country decided to outlaw the importation of vegetables cultivated with high levels of pesticides, then any foreign vegetable producer who wanted to sell its goods in the United States would have to modify its production methods to accord with the United States standards.⁵⁸ To proponents of free trade this would be a protectionist obstacle to free trade, "because imports from countries that do not meet the regulations could be eliminated."⁵⁹

The bottom line in the argument in favor of free trade policies is that free trade will lead to an increase in the standard of living throughout the world.⁶⁰ This "wealthier is healthier" mantra has developed from "economic research linking wealth to environmental quality."⁶¹ The "Environmental Kuznets Curve hypothesis" says that "once income reaches a certain per capita level, pollution decreases because additional resources can now be devoted to pollution prevention and control."⁶² Yet the hypothesis has limitations.⁶³ While there have been studies that support a finding that there is a relationship between reduced pollution and increased wealth, the results are not uniform as among different nations with the same pollutants, and pollutants most closely associated with economic growth, such as greenhouse gases and hazardous waste pollutants, do not follow the trend at all.⁶⁴ Predicting the consequences of any particular free trade agreement is highly speculative,⁶⁵ which limits the effectiveness and predictive value of environmental impact statements, as discussed below.

⁵⁸ See Bernabe-Riefhohl, *supra* note 5, at 211 ("If foreign producers want to sell their product in the country that has enacted these regulations, they would have to modify their product procedures.").

⁵⁹ *Id.* at 212.

⁶⁰ *Id.* at 209.

⁶¹ Anderson & Grewell, *supra* note 5, at 441.

⁶² James Salzman, *Seattle's Legal Legacy and Environmental Reviews of Trade Agreements*, 31 ENVTL. L. 501, 518 (2001). The Kuznets Curve hypothesis is "[t]he classic argument of free traders, reiterated in virtually every WTO publication on the subject" *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 518-19.

⁶⁵ "Just as increased production and consumption can degrade land, air, and water, economic growth can provide the necessary resources to address these same environmental problems. Hence the environmental implications of liberalized trade may be both positive and negative, direct and indirect, depending on the sector, economy and track measure." *Id.* at 519.

B. *The Argument in Opposition of Free Trade*

Possible consequences of unrestrained free trade include the "deterioration of the ozone layer, global warming, deforestation, water and air pollution, massive oil and chemical spills, acid rain, waste disposal, and nuclear hazards."⁶⁶ These consequences are all inherent in an effort to expand markets because it is more profitable, at least in the short-term, to conduct a business without having to comply with environmental regulations.⁶⁷ In addition, trade agreements may increase adverse environmental impacts because "[t]he greater flows of investment, goods, and services one might expect from trade liberalization will induce relative price changes, thereby reallocating productive resources from certain sectors to others and influencing the levels and patterns of both production and consumption."⁶⁸

The disagreement between proponents of free trade and environmentalists, however, does not seem to be whether trade liberalization threatens to damage the environment, but rather what should be done about it.⁶⁹ More specifically, the argument seems to be over which goal, trade liberalization/globalization or protection of the environment, should carry the most weight in foreign policy decision making. Environmental protection theory is "based on the premise that protecting the environment is 'objectively necessary in itself,'" and thus "it cannot be restricted simply to advance the values of economic development."⁷⁰

⁶⁶ Bernabe-Riefkohl, *supra* note 5, at 210.

⁶⁷ *Id.* at 210-11.

⁶⁸ Salzman, *supra* note 62, at 507.

⁶⁹ None of the debates surrounding the ratification of the JFTA and conflicts between environmental protection and trade liberalization involved discussion of trade promotion without any concern for the environment. It seems as though the opposing factions are not arguing over which side is right but rather, where in the middle they should reach a compromise.

⁷⁰ Bernabe-Riefkohl, *supra* note 5, at 211 (citing Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1374 (1992) (citing ROGER J. SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* 50 (1989))).

C. *NAFTA and GATT*

It is easy to see the conflict between environmental protection and trade liberalization by looking at two major trade agreements: the General Agreement on Tariffs and Trade ("GATT")⁷¹ and the North American Free Trade Agreement ("NAFTA").⁷² NAFTA and Executive Order 13,141,⁷³ issued by President Clinton in 1999, led the way for the integration of environmental considerations into the Jordan Free Trade Agreement.

GATT was created after World War II in order to promote international trade.⁷⁴ The international community created GATT with hopes of avoiding a post-war depression like the one that had followed World War I.⁷⁵ Article I of GATT is the Most Favored Nation ("MFN") provision, which requires that "any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in . . . any other country shall be accorded immediately and unconditionally to the like products originating . . . in all other contracting parties."⁷⁶ Article III mandates national treatment of like products, which essentially requires that imports be treated in the same manner as all other like products.⁷⁷ This treatment standard includes the application of taxes and regulations.⁷⁸ "This requirement that all like products be treated equally limits a GATT contracting party's ability to regulate a product based on its environmental impact."⁷⁹ This, however, is not inconsistent with the policy of the agreement because "GATT does not seek to promote environmental protection or

⁷¹ See GATT, *supra* note 10.

⁷² See NAFTA, *supra* note 4. NAFTA was initiated and negotiated as part of President George Herbert Walker Bush's economic and trade program. During his campaign for the presidency, President Clinton supported the "basic tenets" of NAFTA, but wanted better protection of the environment from increased trade and industrialization. Robins, *supra* note 6, at 123.

⁷³ Exec. Order No. 13,141, *supra* note 11. For an in-depth discussion of the order, see Salzman, *supra* note 62.

⁷⁴ Robins, *supra* note 6, at 123.

⁷⁵ *Id.* at 123-24.

⁷⁶ Fletcher, *supra* note 12, at 350 (quoting from GATT art. 1(1)).

⁷⁷ *Id.* at 350-51.

⁷⁸ *Id.* at 350.

⁷⁹ *Id.* at 351.

sustainable development. In fact, the GATT preamble states that GATT is meant to facilitate the 'full use of the natural resources of the world.'⁸⁰

Article III can create a conflict between obligations under GATT and environmental protection when a country has environmental standards that prohibit a specific manufacturing process.⁸¹ Products manufactured in different ways are still "like products" for the purposes of Article III. This problem arose in the early nineties when, pursuant to the Marine Mammal Protection Act ("MMPA"),⁸² the United States effectively outlawed importation of tuna from Mexico because Mexican fishing techniques caused the incidental killing of dolphins and porpoises.⁸³ Mexico took the issue before a GATT panel,⁸⁴ claiming that the MMPA was an illegal non-tariff trade barrier in violation of GATT obligations.⁸⁵ In other words, Mexico believed that the United States was violating Article III of GATT by treating tuna imported from Mexico differently than tuna imported from other contracting countries. The GATT panel ruled that Mexico's case was valid.⁸⁶ GATT Article XX lists exceptions that justify measures that would otherwise violate a contracting party's obligations.⁸⁷ Specifically, Article XX(b) provides an exception for action necessary to protect the life or health of humans, animals or plants.⁸⁸ The GATT panel, however, found that the exception was meant to apply to efforts at protecting humans, animals or plants found within the territory of the importing country.⁸⁹ Thus, the United States could not use an Article XX exception to effect change in Mexican policy, but Article III effectively allowed Mexico to side-step a United States policy.⁹⁰ The success of Mexico's challenge of the MMPA caught the

⁸⁰ *Id.* at 356.

⁸¹ See Fletcher, *supra* note 12, at 351.

⁸² Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 (1994).

⁸³ Glenn M. Stoddard, *Implications of the North American Free Trade Agreement for U.S. Environmental Law & Policy*, 13 WIS. INT'L L.J. 317, 320 (1994).

⁸⁴ GATT Dispute Panel on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594 [hereinafter *Tuna-Dolphin I*], available at <http://www.worldtradelaw.net/reports/gattpanelstunadolphin1.pdf>.

⁸⁵ Stoddard, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ Fletcher, *supra* note 12, at 352.

⁸⁸ *Id.* at 353.

⁸⁹ *Id.*

⁹⁰ GATT panel reports are binding only when adopted by the GATT Council, and that never happened with the Tuna-Dolphin report. Instead, the United States and Mexico entered into a compromise agreement. Stoddard, *supra* note 83, at 320.

attention of environmentalists⁹¹ and helped to make possible a heightened role for environmental protection in the NAFTA negotiations.⁹²

Subsequently, when the European Community and other nations that were subject to another MMPA boycott, challenged the actions of the United States, a second *Tuna-Dolphin* GATT panel report was issued.⁹³ *Tuna-Dolphin II*, contrary to the first *Tuna-Dolphin* decision, “found that the text of Article XX(b) did not place a limitation on the location of the living things to be protected.”⁹⁴ Instead the panel “found that an action was only necessary when other alternatives which are otherwise consistent with GATT are exhausted.”⁹⁵ More importantly, the panel determined that the United States’ action of placing an embargo on tuna from foreign countries would only effectively protect the life of the dolphins and porpoises if those countries changed their fishing practices, and Article XX(b) “as a matter of policy, could not be interpreted to allow one member nation to force a change in the policies of another member nation.”⁹⁶ During NAFTA negotiations, environmental groups lobbied for an environmental impact statement (“EIS”)⁹⁷ of the agreement.⁹⁸ In response to this pressure, the Office of the United States Trade Representative (“USTR”) prepared a voluntary review of environmental issues likely to arise in NAFTA.⁹⁹ This voluntary review was unprecedented for a trade agreement, but the environmental community

⁹¹ *Id.* at 320.

⁹² See Salzman, *supra* note 62, at 507-08.

⁹³ GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, May 20, 1994, § 5.8, 33 I.L.M. 839, 888 [hereinafter *Tuna-Dolphin II*], available at <http://www.worldtradelaw.net/reports/gattpanels/tunadolpin11.pdf>.

⁹⁴ Fletcher, *supra* note 12, at 353.

⁹⁵ *Id.*

⁹⁶ *Id.* at 354. The report established a three step analysis to use in determining whether an Article XX(b) exception exists. Initially a determination must be made as to whether the challenged policy was in fact designed to protect human, animal, or plant life or health. Second, it must be determined whether the actions taken were “necessary,” as the panel has defined that term. Lastly, a determination must be made regarding whether the measures taken are an arbitrary or unjustifiable discrimination between countries with similar conditions. *Id.* at 353.

⁹⁷ Environmental impact statements attempt to characterize and quantify the likely environmental impacts of specific government actions. NEPA, which was passed by Congress in 1969, requires that an EIS be done for all “major federal actions significantly affecting the quality of the human environment.” Salzman, *supra* note 62, at 505.

⁹⁸ *Id.* at 508.

⁹⁹ The review followed many of the NEPA procedures for E.I.S. *Id.*

wanted a formal EIS. The USTR filed suit in United States District Court after President Clinton submitted the agreement to Congress and signed the Agreement into law.¹⁰⁰ In *Public Citizen v. U.S. Trade Representative*,¹⁰¹ the district court ordered that the USTR prepare an EIS for NAFTA, but the Clinton administration feared losing Fast Track Authority¹⁰² and possibly NAFTA as well, so they appealed the decision and it was reversed on Administrative Law grounds¹⁰³ by the District of Columbia Circuit Court.¹⁰⁴ Despite this loss, the efforts of the environmental groups effected an "important watershed in U.S. trade policy" by pressuring the USTR into doing an independent review that "significantly influenced the shape of the final agreements."¹⁰⁵ The NAFTA review demonstrated that reviews "could inform and promote trade rather than obstruct them."¹⁰⁶

President Clinton issued Executive Order 13,141 ("The Order")¹⁰⁷ in November of 1999, "committing the government for the first time to conduct environmental reviews of trade agreements."¹⁰⁸ The first EIS conducted under the Order was for the Jordan Free Trade Agreement.¹⁰⁹ The effectiveness of this process, however, is questionable because the Order requires an evaluation of only the domestic impact of trade agreements, and "[t]he impacts in the United States of increased trade with Jordan are negligible."¹¹⁰ Furthermore, the EIS takes place during negotiations before

¹⁰⁰ The suit was originally filed prior to implementation of the agreement, but it was dismissed for lack of standing and lack of final agency action. *Id.* at 508-09.

¹⁰¹ 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993).

¹⁰² *See infra* Part V.

¹⁰³ The court found that the "final agency action" challenged was the submission of NAFTA to Congress by the President, and because the NAFTA vested in the President the discretion to determine whether or not to submit the agreement to Congress, it was his action that affected the environmental groups. The court ruled that actions of the President were not Agency action and thus not reviewable by the court. *Pub. Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993).

¹⁰⁴ Salzman, *supra* note 62, at 509.

¹⁰⁵ The environmental side agreement to NAFTA attempts to address the concerns discussed in the review. *Id.* at 509-10.

¹⁰⁶ *Id.* at 509.

¹⁰⁷ Exec. Order No. 13,141, *supra* note 11. The Order "commits the U.S. Government to 'factor environmental considerations into the development of its trade negotiating objectives [through] a process of ongoing assessment and evaluation, and, in certain instances, written environmental reviews.'" Salzman, *supra* note 62, at 521-22 (alteration in original).

¹⁰⁸ Salzman, *supra* note 62, at 503.

¹⁰⁹ *Id.* at 530-31.

¹¹⁰ *Id.* at 531. "As U.S. trading partners go, Jordan barely shows up on the ledger books. Last

the terms of the agreement have even been solidified. Nevertheless, in accordance with the Clinton Administration's Declaration on Environmental Trade Policy,¹¹¹ which pledged to "pursue trade liberalization . . . in a manner that is supportive of our commitment to high levels of protection for the environment,"¹¹² the USTR pushed to include "environmental measures in the agreement with the hope of strengthening Jordan's environmental protection efforts."¹¹³

IV. TRADE PROMOTION AUTHORITY

A. *The Legislation*

The constitutional requirements for treaty ratification can limit the President's ability to negotiate international agreements. Other governments realize that although they may be negotiating with the President, Congress may yet amend the terms or even forego the entire agreement. This is an important democratic safeguard because it serves as a check on the power of the executive.¹¹⁴ Although foreign relations is an area of governance uniquely executive in nature, any binding treaty that results from those relations is legislative in nature and thus must be ratified by the Senate in much the same way as a bill of domestic origin. Unfortunately, this means that the same political pressures, including partisans and lobbyists, that are brought to bear on the President on domestic issues are present on the international plane as well. In order to remedy this "Presidential infirmity" a new "fast-track" procedure was developed.¹¹⁵ "Fast track authority [FTA] allows the President . . . to initiate foreign trade affairs which are automatically discharged from committee review in the Senate and the House of Representatives after a limited period of time, encounter restricted debate on the floor of each

year, it supplied Americans with \$73 million worth of jewelry, clothing, carpets, antiques and other goods and services—a minuscule slice of total U.S. imports of \$1.4 trillion." Vieth & Hook, *supra* note 8.

¹¹¹ White House Policy Declaration on Environment and Trade (Nov. 16, 1999).

¹¹² Salzman, *supra* note 62, at 504.

¹¹³ *Id.* at 531.

¹¹⁴ See Sharma, *supra* note 2. "The President's primacy in the conduct of foreign affairs effectively forecloses the opportunity for meaningful participation by the public—and by Congress to a lesser extent—in the negotiation and formulation of international environmental accords." *Id.* at 1215.

¹¹⁵ Charnovitz, *supra* note 35, at 199.

house, and without being subject to amendments.”¹¹⁶ Fast Track Authority (“FTA”) originated in the Trade Act of 1974¹¹⁷ and was subsequently modified in the Trade and Tariff Act of 1984,¹¹⁸ which expanded the influence of Congress over the negotiation of trade agreements.¹¹⁹ FTA was modified again in the Omnibus Trade and Competitiveness Act (“OCTA”) of 1988,¹²⁰ which further enhanced Congress’s gate-keeping power and added a procedure for terminating the authority, or “reversing” it.¹²¹ The bilateral treaty-making authority provided for by the Trade Act of 1984 and OCTA was used for NAFTA negotiations and had previously been used for approval of the United States-Israel Free Trade Agreement¹²² the United States-Canada Free Trade Agreement.¹²³

The President’s fast track authority for both bilateral and multilateral trade negotiations ceased on December 15, 1993.¹²⁴ Efforts on the part of the Clinton administration to renew fast track authority were derailed by disagreements within Congress regarding the inclusion of labor and environmental issues in agreements approved by the procedure.¹²⁵ Bush and his trade representative Bob Zoellick, have made fast track, dubbed Trade Promotion Authority (“TPA”), one of their top priorities¹²⁶ and on December 7, 2001, the House passed TPA legislation by a narrow one-vote margin.¹²⁷

¹¹⁶ Lenin Guerra, Note, *The Use of Fast Track Authority in the Negotiations of the Free Trade Area of the Americas*, 8 KAN. J.L. & PUB. POL’Y 172, 172 (1999).

¹¹⁷ Trade Act of 1974, 19 U.S.C. § 2111 (2000).

¹¹⁸ Tariff and Trade Act of 1984, 19 U.S.C. § 2112 (2000).

¹¹⁹ Guerra, *supra* note 116, at 172-73.

¹²⁰ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 19 U.S.C. § 2901 (2000)).

¹²¹ Guerra, *supra* note 116, at 173.

¹²² United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (1985) (codified as amended at 19 U.S.C. § 2112 (1988 & Supp. 1993)).

¹²³ United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) (codified as amended in scattered sections of 19 U.S.C. (2000)).

¹²⁴ Charnovitz, *supra* note 35, at 203.

¹²⁵ Guerra, *supra* note 116, at 174.

¹²⁶ J.L. Laws, *Senate Committee Approves Jordan Free Trade Agreement*, ENV’T & ENERGY DAILY, July 27, 2001; Richard W. Stevenson, *Senate Votes to Lift Barriers to Jordan Trade*, N.Y. TIMES, Sept. 25, 2001.

¹²⁷ Joseph Kahn, *House Supports Trade Authority Sought By Bush*, N.Y. TIMES, Dec. 7, 2001, at A1.

There seems to be a consensus that FTA/TPA¹²⁸ has been a useful tool in trade negotiations. The disagreement is over putting limitations on that authority. Those in favor of unrestricted TPA argue that it gives the President more credibility at the negotiating table, which will create more opportunities for American manufacturers and farmers.¹²⁹ Those opposed to TPA are concerned that, without some sort of regulatory scheme, TPA would be used to negotiate deals that benefit business interests at the expense of labor and environmental concerns.¹³⁰ That regulatory scheme comes in the form of labor and environmental provisions like those included in the JFTA. National Wildlife Federation Director, Paul Joffe, says “[f]ast-track legislation [TPA] should ensure that trade agreements support—and do not undermine—environmental protection.”¹³¹

When negotiating a free trade agreement, the President should have the authority contemplated by TPA. Unfortunately, partisan politics often have more influence on policy decisions than doing what is best for the country and the global community. This means that TPA in any given President’s hands can yield widely varying results. Environmental policy may take several steps forward only to suffer a leap backwards. Therefore, TPA will prove most effective if a non-partisan standard of including environmental provisions in trade agreements is set. This precedent may be achieved by the JFTA.

B. *The Debate*

Senate Republican Phil Gramm of Texas says he fears that “including labor and environmental provisions [in all trade agreements] would lead to a loss of sovereignty by the United States and subject the country to penalties for pursuing its economic self-interest.”¹³² Senator Gramm is a staunch supporter of free trade and feels that FTA has been successful at creating healthy world economies in the post-World War II era.¹³³ However, Gramm argues that Congress originally agreed to limit its power under Article I of

¹²⁸ Fast track and trade promotion authority are used interchangeably in this note.

¹²⁹ Laws, *supra* note 126; *see* discussion on FTA *supra* Part IV.B.

¹³⁰ *Id.*

¹³¹ *U.S.-Jordan Trade Agreement a First for Environment*, ENVTL. NEWS NETWORK, Oct. 4, 2001.

¹³² Stevenson, *supra* note 126.

¹³³ 147 CONG. REC. S9679, S9685 (daily ed. Sept. 24, 2001) (statement of Sen. Gramm).

the Constitution because FTA dealt with only external matters, it was not used to create domestic laws that would govern the well-being of American people.¹³⁴ "When you allow the President to negotiate labor and environmental laws, and labor and environmental standards [like those included in the JFTA], under fast-track authority, where the agreement cannot be debated and cannot be amended, what you are literally doing is giving the President of the United States a unilateral power to write domestic law under fast-track authority."¹³⁵ This extension of power, says Gramm, was never contemplated by Congress when they passed FTA, and will serve to limit the effectiveness of FTA when Congress has to vote down an agreement because non-trade matters are included.¹³⁶ Senator Gramm will likely support the TPA bill as long as requirements of including labor and environmental standards in trade agreements are not attached to the authority.

Gramm's second argument is that America would be relinquishing some of its sovereignty to the World Trade Organization and to dispute resolution organizations, allowing third parties to decide whether we can alter our existing domestic environmental standards.¹³⁷ The Senator says that he would have no objections if Americans made the determination of whether the United States was meeting the provisions of the Agreement.¹³⁸ Senator Hagel (Neb.) points out that trade sanctions do not address the root of environmental or labor problems or other such problems, which international organizations such as the United Nations are currently better at handling.¹³⁹ Others simply assert that the grant of presidential authority must be as free and open as possible and unencumbered by regulatory restrictions, like environmental and labor standards, that will only serve to undermine our long-term economic security.¹⁴⁰

Yet Senator Gramm's position seems to side-step the fact that in the past ten years other areas of domestic law, such as patent and copyright, have been included in trade agreements without causing the constitutional

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at S9686.

¹³⁷ *Id.*

¹³⁸ *Id.* at S9687.

¹³⁹ 147 CONG. REC. S9687 (daily ed. Sept. 24, 2001) (statement of Sen. Hagel).

¹⁴⁰ Jack Kemp, *Trade, Terror...and What the Economy Needs*, WASHINGTON TIMES, Oct. 3, 2001, at A16.

dilemma he predicts.¹⁴¹ His only response is that because the United States holds ninety percent of all the patents and copyrights in the world, simply requiring that other countries respect patent and copyright laws has no effect on America.¹⁴² At the very least, the experience with inclusion of patent and copyright issues should justify waiting until the results are in before pronouncing judgment.

If it is fair to say that Senator Gramm is quarterbacking the opposition to the inclusion of environmental protection provisions in free trade agreements, then Senator Baucus (Mont.) is calling the plays for the proponents. Baucus, who supported the JFTA ever since President Clinton negotiated it, calls it “progressive” and characterizes the labor and environmental provisions as “positive developments that point the way toward further progress.”¹⁴³ In response to Senator Gramm’s loss of sovereignty argument, Baucus argues that pursuant to the JFTA, “[n]o arbitrator can order the United States to change its practices. . . .”¹⁴⁴ “Under the agreement,” Baucus says,

dispute settlement will be based on nonbinding mediation—not arbitration but nonbinding mediation. That is very important. In other words, even in the unlikely event that the three conditions [of a violation] are met, and a mediator—not an arbitrator—and a mediator finds against the United States, that determination is purely advisory, intended only to guide the parties in resolving any disputes through consultation.¹⁴⁵

Senator Baucus, in support of his argument, looks to an exchange of letters between Ambassador Zoellick, President Bush’s Trade Representative, and Ambassador Muasher, Jordan’s Ambassador to the United States.¹⁴⁶ The letters, exchanged on July 23, 2001, express an agreement between the two governments that, should a difference of opinion arise as to the proper interpretation of the JFTA, they will make “every effort

¹⁴¹ 147 CONG. REC. S9685 (daily ed. Sept. 24, 2001) (statement of Sen. Gramm).

¹⁴² *Id.*

¹⁴³ *Id.* at S9680 (statement of Sen. Baucus).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at S9680-81.

to resolve them without recourse to formal dispute settlement procedures.”¹⁴⁷ Specifically, the letters refer to using formal dispute settlement procedures to “[block] trade,” a reference to the use of trade sanctions.¹⁴⁸ However, the letters are not an amendment to the JFTA and do not change it in any way.¹⁴⁹ Baucus also urges opponents to consider what might happen if these sorts of provisions are not included in trade agreements.¹⁵⁰ He suggests that, without provisions like Article 5 of the JFTA,¹⁵¹ governments would be free to adjust their domestic laws in order to gain an unfair trade advantage.¹⁵²

V. THE UNITED STATES-JORDAN FREE TRADE AGREEMENT

A. *History and Motivations*

On June 6, 2000, President Clinton and Jordan's King Abdullah II announced that the governments of the United States and Jordan would enter into negotiations on a bilateral free trade agreement.¹⁵³ Clinton and King Abdullah II signed the agreement,¹⁵⁴ the first between the United States and an Arab nation,¹⁵⁵ on October 24, 2000.¹⁵⁶ The agreement is hailed as “groundbreaking” by both sides, potentially “attract[ing] multinational investment to economically ailing Jordan, encouraging economic growth and

¹⁴⁷ Letter from Robert B. Zoellick, U.S. Trade Representative, to Ambassador Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan (July 23, 2001), *reprinted in* 147 CONG. REC. S9681 (daily ed. Sept. 24, 2001). The text of the letter from Ambassador Muasher to Ambassador Zoellick is identical to that of the letter from Ambassador Zoellick to Ambassador Muasher. 147 CONG. REC. S9681 (daily ed. Sept. 24, 2001) (read into the record by Sen. Baucus) [hereinafter Letter].

¹⁴⁸ 147 CONG. REC. S9681 (daily ed. Sept. 24, 2001) (statement by Sen. Baucus).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 9682.

¹⁵¹ Article 5 of the JFTA is the article dealing with environmental standards.

¹⁵² 147 CONG. REC. S9682 (daily ed. Sept. 24, 2001) (statement by Sen. Baucus), *reprinted in* 147 CONG. REC. 9681.

¹⁵³ See Richard Keil, *U.S., Jordan Set to Begin Negotiations on a Trade Agreement*, BLOOMBERG NEWS, June 6, 2000, available at LEXIS, Bloomberg News File.

¹⁵⁴ Where the signature is subject to ratification, acceptance, or approval, as in the United States, the signature does not establish consent to be bound. Signature also does not create an obligation to ratify. Signature does, however, “qualif[y] the signatory state to proceed to ratification, acceptance, or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty.” BROWNIE, *supra* note 23, at 606-07.

¹⁵⁵ Vieth & Hook, *supra* note 8.

¹⁵⁶ JFTA, *supra* note 7.

creating jobs.”¹⁵⁷ Negotiated during the Middle East peace talks, the JFTA is a culmination of the economic and political relationship formed between the United States and Jordan since Jordan and Israel signed a peace treaty in 1994.¹⁵⁸ National Security Counsel spokesman P.J. Crowley says that “[h]aving a stable, prosperous Jordan within the region . . . is important for Middle East peace.”¹⁵⁹ The JFTA was very much a political agreement that has had little economic impact.¹⁶⁰

The Clinton administration promoted the agreement as “a new model for trade agreements—one with the potential to attract union support, because it mandates compliance with international labor and environmental norms.”¹⁶¹ Yet, it is precisely these provisions that stalled the agreement in Congress for a year. As the first American trade initiative to include labor and environmental standards as part of the main text, the JFTA puts the rights of workers and the duty of companies not to pollute on the same plane with tariffs.¹⁶² In a meeting with King Abdullah II in April of 2001, President Bush indicated that the labor and environmental provisions of the agreement might require readjustment.¹⁶³ The White House was concerned “about the precedent that the labor and environmental agreements might have on future trade agreements.”¹⁶⁴

Everything changed after September 11, 2001. Senator Gramm dropped his months-long effort to block the implementation of the JFTA after receiving calls from Secretary of State Colin L. Powell and Condoleezza Rice, President Bush’s National Security Advisor.¹⁶⁵ Senator Gramm explained that he decided not to oppose the agreement because “it was

¹⁵⁷ Joseph Kahn, *Dual Purpose of a U.S.-Jordan Trade Pact*, N.Y. TIMES, Oct. 20, 2000, at A16.

¹⁵⁸ See Vieth & Hook, *supra* note 8. Jordan and the United States worked together to accomplish Jordan’s accession to the World Trade Organization and they have worked together on other matters involving trade and investment. JFTA, *supra* note 7.

¹⁵⁹ Keil, *supra* note 153.

¹⁶⁰ Vieth & Hook, *supra* note 8. “Annual trading between Jordan and the United States, which totaled just over \$300 million last year, is comparatively minuscule. The United States and Mexico trade more with each other on an average day.” Kahn, *supra* note 157.

¹⁶¹ Kahn, *supra* note 157.

¹⁶² Marc Lacey, *Bush Seeking to Modify Pact on Trade with Jordan*, N.Y. TIMES, Apr. 11, 2001, at A7.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Stevenson, *supra* note 126.

important that the United States send a signal of friendship to Jordan, an ally that could be instrumental in building support in the Middle East for military and other action against the terrorists.”¹⁶⁶ Even President Bush, who originally wanted to amend the agreement, was quoted by the Associated Press as having said that “[t]he U.S.-Jordan Free Trade Agreement will promote peace and security in the region, while creating jobs and new investment opportunities in both countries’.”¹⁶⁷ Senator Baucus, Chairman of the Senate Finance Committee, said that implementing the JFTA was a way to reinforce Jordan’s support of the war on terrorism.¹⁶⁸ President Bush signed the implementing legislation on September 28, 2001, and the agreement entered into force on December 17, 2001.¹⁶⁹

B. *Article 5*

The Jordan Free Trade Agreement achieves significant and extensive liberalization of trade issues.¹⁷⁰ The agreement will eliminate all “tariff and non-tariff barriers to bilateral trade in virtually all industrial goods and agricultural products within ten years.” According to former United States Trade Representative, Ambassador Charlene Barshefsky, “[the JFTA] can be a step toward the creation of a future Middle East which is peaceful, prosperous, and open to the world; whose nations work together for the common good; and whose people have hope and opportunity.”¹⁷¹ In addition, the agreement includes environmental standards designed to prevent weak environmental regulations from being used to create trade advantages¹⁷² by requiring that both nations uphold their environmental laws.¹⁷³ Specifically, Article 5 of the Agreement provides that each party shall “strive to ensure” that it does not relax or suspend domestic environmental law in order to

¹⁶⁶ *Id.*

¹⁶⁷ Jim Abrams, *Senate OKs Pact Allowing Jordan-Free Trade Status*, HOUS. CHRON., Sept. 24, 2001, at A6.

¹⁶⁸ *Id.*

¹⁶⁹ *Jordan's Abdullah and Bush Sign Free Trade Agreement*, DEUTSCHE PRESSE-AGENTUR, Sept. 28, 2001, at International News.

¹⁷⁰ See generally JFTA, *supra* note 7.

¹⁷¹ Charlene Barshefsky, Remarks at the Jordanian-American Business Association in Amman, Hashemite Kingdom of Jordan (July 31, 2000), available at <http://usembassy-israel.org.il/publish/press/ustr/archive/2000/August/ot10802.htm> (Aug. 1, 2000).

¹⁷² Joanna Ramey, *Vietnam, Jordan Pacts Progress*, WOMEN'S WORLD DAILY, July 27, 2001, at 11.

¹⁷³ Laws, *supra* note 126.

promote trade with the other party.¹⁷⁴ The second clause of Article 5 reaffirms the discretion that each country has with regard to the establishment of its own laws, and requires that each party “strive” to provide high levels of environmental protection.¹⁷⁵ A failure by a party to enforce its environmental laws must not result from a “sustained or recurring course of action or inaction” and it must affect trade between the parties.¹⁷⁶ However, where a course of action or inaction reflects a reasonable exercise of the party’s discretion, with regard to “investigatory, prosecutorial, regulatory, and compliance matters,” or is the result of a “*bona fide* decision regarding the allocation of resources,” the party has not violated the agreement.¹⁷⁷

For the purposes of the agreement, “environmental laws” means any statute or regulation or any part of any statute or regulation that has, as its “primary purpose,” the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

- a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
- b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or
- c) The protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory . . .¹⁷⁸

Provisions or statutes dealing with worker health or safety do not fall within the definition of “environmental laws” for the purposes of Article 5.¹⁷⁹

JFTA negotiations also resulted in a separate technical assistance agreement (“The Statement”), which creates a joint body to cooperate on environmental issues, providing expertise from United States agencies on problems like waste management.¹⁸⁰ The Statement establishes a Joint Forum

¹⁷⁴ JFTA, *supra* note 7, art. 5(1).

¹⁷⁵ *Id.* art. 5(2).

¹⁷⁶ *Id.* art. 5(3)(a).

¹⁷⁷ *Id.* art. 5(3)(b).

¹⁷⁸ *Id.* art. 5(4).

¹⁷⁹ *Id.*

¹⁸⁰ United-States Jordan Joint Statement on Environmental Technical Cooperation, Office of the United States Trade Representative, ¶¶1,3 (Oct. 24, 2000), *available at* <http://www>.

on Environmental Technical Cooperation ("The Forum").¹⁸¹ The mandate of the Forum is "to advance environmental protection in Jordan by developing environmental technical cooperation initiatives, which take into account environmental priorities, and which are agreed to by the two governments, consistent with the United States country strategic plan for Jordan, and complementary to United States-Jordanian policy initiatives."¹⁸² The Statement anticipates cooperation between the Forum and the Joint Committee,¹⁸³ established under the JFTA in implementation and enforcement of Jordanian environmental laws as defined by Article 5(4) of the JFTA.¹⁸⁴ An annex to the Statement lists programs that "will inform the development of the agenda of the [Forum]."¹⁸⁵ The programs "focus on building human and institutional capacity in environmental management, compliance assurance and enforcement, and conservation of living and non-living natural resources."¹⁸⁶

C. *Environmental Impact: The Review*

On June 15, 2000, the USTR issued a Federal Register Notice announcing the Clinton Administration's plan to negotiate a free trade agreement with Jordan and to conduct an environmental review of the proposed agreement pursuant to Executive Order 13,141.¹⁸⁷ The notice requested written comments from the public to assist the USTR in formulating negotiating objectives.¹⁸⁸ On June 28, 2000, the USTR issued another notice announcing the initiation of the review and requesting public

ustr.gov/regions/eu-med/middleeast/envstmt.pdf [hereinafter the Statement].

¹⁸¹ *Id.* ¶ 3.

¹⁸² *Id.* A country's strategic plan articulates the specific mission, goals, objectives, and program approaches of the United States Agency for International Development's development assistance program in a particular country. *Id.* at n.1. Information on the country strategic plan for Jordan is available at http://www.usaid.gov/regions/ane/newpages/one_pagers/jordan01a.htm.

¹⁸³ See discussion *infra* Part V.C.

¹⁸⁴ Statement, *supra* note 180, ¶ 8.

¹⁸⁵ Selected Environmental Technical Cooperations Programs, *in* Statement, *supra* note 180, annex, at 3.

¹⁸⁶ *Id.*

¹⁸⁷ Public Comments on Proposed United States-Jordan Free Trade Agreements, 65 Fed. Reg. 37,594 (June 15, 2000) (USTR notice and request for comments).

¹⁸⁸ *Id.*

comments on the scope of that review.¹⁸⁹ According to the notice “Jordan ha[d] indicated that it plan[ned] to perform its own environmental review of the free trade agreement.”¹⁹⁰

The USTR environmental review is based on the findings of the United States International Trade Commission (“USITC”) in its investigation of the economic impacts of the JFTA.¹⁹¹ The USITC found that the JFTA would have “no measurable impacts on total U.S. imports, total U.S. exports, U.S. production, or U.S. employment.”¹⁹² “Therefore, the [United States Government] expects that the environmental effects in the United States resulting from the changes in trade flows with Jordan as a result of the [JFTA] will be *de minimis*.”¹⁹³

Section 5(b) of Executive Order 13,141, says that the focus of the Review is supposed to be the possible impacts in the United States,¹⁹⁴ but it also provides that reviews may examine global and transboundary impacts, as appropriate.¹⁹⁵ The review “considered possible transboundary and global environmental effects of the JFTA on trade in endangered species, migratory birds, and protected areas”.¹⁹⁶ With regard to these three areas of concern, the review states that:

¹⁸⁹ Public Comments on Environmental Review of Proposed United States-Jordan Free Trade Agreement, 65 Fed. Reg. 39,976 (June 26, 2000) (USTR Notice of initiation of review and request for comments on scope of review).

¹⁹⁰ *Id.*

¹⁹¹ Economic Impact on the United States of a U.S.-Jordan Free Trade Agreement, USITC, Pub. No. 3340, Inv. No. 332-418 (Sept. 2000), available at <ftp://ftp.usitc.gov/pub/reports/studies/pub3340.PDF>.

¹⁹² Office of United States Trade Representative, Environmental Review of the Proposed Agreement on the Establishment of a Free Trade Area Between the Government of the United States and the Government of the Hashemite Kingdom of Jordan, at 1, 21 (Sept. 2000), available at http://www.ustr.gov/environment/Jordan_environment.PDF [hereinafter The Review].

¹⁹³ *Id.* at 20.

¹⁹⁴ Exec. Order No. 13,141, *supra* note 11, § 5(b).

¹⁹⁵ *Id.*

¹⁹⁶ The Review, *supra* note 192, at 21. The United States and Jordan are both parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), the Convention on Wetlands of International Importance especially as Waterfowl Habitat (“Ramsar Convention”), and the Convention Concerning the Protection of World Cultural and Natural Heritage. *Id.* at 21, 22.

The [United States Government ("USG")] is not aware of any evidence that illegal trafficking in endangered species has been a problem with Jordan, and on that basis, found that nothing in the [JFTA] would increase the possibility that such trafficking would become a problem. The USG focused on proposed tourist services provisions in the [JFTA] as possibly relevant to migratory birds and protected areas. As the proposed [JFTA] provisions liberalize such services only with respect to foreign investment in tourist restaurants, the USG is not aware of any evidence that would suggest that these proposed provisions would have a significant environmental effect on migratory birds or protected areas.¹⁹⁷

D. *Enforcement: Effect on Domestic Law*

As mentioned above, a party violates its obligation under Article 5 of the JFTA if it fails "to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties"¹⁹⁸ Article 17 provides the dispute settlement procedure to be followed should a party feel that the other party has not carried out its obligations under the agreement.¹⁹⁹

The complaining party is required to submit a "request for consultations."²⁰⁰ If the parties, through consultations, have still not resolved the dispute sixty days after the submission of such request, either party may refer the dispute to the Joint Committee,²⁰¹ which shall convene and make an effort to resolve the matter.²⁰² If after the matter has been referred to the Joint Committee, it has not been resolved within a period of ninety days, or within

¹⁹⁷ *Id.* at 22.

¹⁹⁸ JFTA, *supra* note 7, art. 5(3)(a).

¹⁹⁹ *Id.* art. 17(1)(a)(ii).

²⁰⁰ *Id.* art. 17(1)(b).

²⁰¹ The Joint Committee will be composed of representatives of the parties and shall be headed by the United States Trade Representative and Jordan's Minister primarily responsible for international trade, or their designees. The Committee was established to supervise the implementation of the agreement and review relations between the parties. It has its own rules of procedure and decisions are taken by consensus. *Id.* art. 15.

²⁰² *Id.* art. 17(1)(b).

such other period as the Joint Committee has agreed, then either party may refer the matter to a dispute settlement panel.²⁰³

“Unless otherwise agreed by the Parties, the panel shall be composed of three members: each Party shall appoint one member, and the two appointees shall choose a third who will serve as the chairman.”²⁰⁴ Within ninety days after the third member is chosen, the panel will present to the parties a report containing “findings of fact and its determination as to whether either Party has failed to carry out its obligations under the Agreement or whether a measure taken by either Party severely distorts the balance of trade benefits accorded by [the agreement] or substantially undermines the fundamental objectives of [the agreement].”²⁰⁵ Should the panel find that a party has failed to carry out its obligations, it may, at the request of the parties, make recommendations for resolution of the dispute.²⁰⁶ The report of the panel is nonbinding.²⁰⁷ The parties may chose to invoke any applicable international dispute settlement mechanism under any agreement to which they are both parties (e.g., World Trade Organization) should the panel fail for procedural or jurisdictional reasons to make findings of law or fact.²⁰⁸

Once the panel has presented its report, the Joint Committee shall make an effort to resolve the dispute, considering the report as appropriate.²⁰⁹ If the Joint Committee has still not resolved the dispute within thirty days after the panel presents its report, the complaining party is entitled to take “any appropriate and commensurate measure.”²¹⁰ There is no further explanation of what is included in “any appropriate and commensurate measure.”²¹¹

Article 18 of the agreement states that “[n]either Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.”²¹² This means that the provisions of the JFTA and any decisions

²⁰³ *Id.* art. 17(1)(c).

²⁰⁴ *Id.*

²⁰⁵ *Id.* art. 17(1)(d).

²⁰⁶ JFTA, *supra* note 7, art. 17(1)(d).

²⁰⁷ *Id.*

²⁰⁸ *Id.* art. 17(1)(e).

²⁰⁹ *Id.* art. 17(2)(a).

²¹⁰ *Id.* art. 17(2)(b).

²¹¹ *Id.*

²¹² JFTA, *supra* note 7, art. 18(1).

by JFTA dispute-resolution panels are not self-executing and cannot be applied directly by United States courts.

The possibility that Jordan might impose trade sanctions because it felt that the United States was using domestic environmental laws or standards to affect trade left many in Washington feeling uneasy. In order to relieve some of the tension surrounding the issue, United States Trade Representative Robert B. Zoellick and Jordan's Ambassador Marwan Muasher exchanged letters in which the countries state their intention not to apply the agreement's dispute settlement enforcement procedures in a manner that results in blocking trade.²¹³ These letters state that bilateral consultations and other procedures would be appropriate measures that will help secure compliance without recourse to traditional trade sanctions.²¹⁴ These letters, however, do not change the agreement in any way²¹⁵ and were merely political lip service necessary to get the implementing legislation passed. Nevertheless, there is no indication that the parties do not intend to abide by their mutual assurances, and in all likelihood, the desire to continue a mutually beneficial alliance weighs against such contrary intentions.

For example, suppose that Congress decides to open up the Arctic National Wildlife Refuge ("ANWR") to produce domestic oil.²¹⁶ In theory, an international dispute resolution mechanism may determine that the United States has lowered its environmental standards to gain trade advantages and, should the parties fail to come to a mutually agreeable resolution as contemplated by the exchanged letters, Jordan might impose protective tariffs on American products.²¹⁷ It is true that a party has not violated Article 5 of the agreement if the action or inaction in question reflects a "reasonable exercise of such discretion,"²¹⁸ but it fails to give any standard for reasonableness and thus there is plenty of room for interpretational disagreement.²¹⁹ In other words, "Jordan could navigate the [United States]

²¹³ See Letter, *supra* note 147.

²¹⁴ *Id.*

²¹⁵ 147 CONG. REC. S9681 (daily ed. Sept. 24, 2001) (statement of Sen. Baucus).

²¹⁶ This was a particular concern expressed by Sen. Gramm in the Senate debate.

²¹⁷ 147 CONG. REC. S9681 (daily ed. Sept. 24, 2001) (statement of Sen. Baucus).

²¹⁸ JFTA, *supra* note 7, art. 5(3)(b).

²¹⁹ "'Soft law' is the articulation of a norm in a written form, whether it be in the form of codes of practice, recommendations, guidelines, resolutions, or declarations of principles, that leaves 'a considerable degree of discretion in interpretation[,] and . . . how and when to conform to the requirements is left to the participants,'" Sharma, *supra* note 2, at 1226. The flexibility allowed for by soft-law makes it especially attractive when "dealing with

laws to find technical violations and employ those violations as an excuse for sanctions.”²²⁰ Being able to find violations will likely “not be a problem given that a 1993 survey by the *National Law Journal* found that only thirty percent of corporate counsels believe that complete compliance with [United States] environmental laws is even possible.”²²¹

It is also conceivable, since the agreement incorporates Articles III and XX of GATT, that a situation like the one that led to the *Tuna-Dolphin* dispute²²² between Mexico and the United States might arise. This could result in an inability of the United States to effectively enforce its domestic environmental laws, the exact opposite of its Article 5 obligation. Still, it is significant that in Article 12 the parties state that the measures referred to in Article XX(b) of GATT, as exceptions to the like treatment requirement, are understood to include environmental measures necessary to protect human, animal, or plant life or health.²²³ Furthermore, the parties understand that Article XX(g) of GATT “applies to measures relating to conservation of living and non-living exhaustible natural resources.”²²⁴ Perhaps by clarifying those two points the United States was specifically trying to avoid another *Tuna-Dolphin* situation.²²⁵

The bottom line is that assuming Jordan could succeed with an Article 5 challenge, it would be up to Congress to decide whether to pass legislation to change the law/standard (or delegate that authority to the EPA) or face the risk of trade sanctions. Indeed, it is a very slight risk²²⁶ if parties adhere to the statements made in the letters they exchanged in July of 2000.²²⁷

environmental matters that cross state boundaries or affect the global commons.” *Id.*

²²⁰ Anderson & Grewell, *supra* note 5, at 432.

²²¹ *Id.*

²²² See discussion *supra* Part III.C.

²²³ JFTA, *supra* note 7, art. 12(1).

²²⁴ *Id.*

²²⁵ As noted *supra* Part III, however, the MMPA policy was rejected because of a poor means-ends fit, not because of a misunderstanding as to what the Article XX exceptions actually covered.

²²⁶ See *supra* note 219 and accompanying text (commenting on “soft-law”).

²²⁷ See Letter, *supra* note 147.

VI. ANALYSIS

What does this all mean and why does it matter? Trade liberalization is an important mechanism for encouraging economic growth around the world. It is clear that poor countries are hard pressed to devote resources to protecting their environment when they are battling famine, disease, and high unemployment rates. Yet a policy geared solely toward economic growth has the potential to contribute to those same social problems by depleting natural resources and creating widespread pollution.

Good economic policy must be formed with the environment in mind. Before the JFTA, free trade agreements had addressed the environment as an afterthought. Side agreements, such as the one between the NAFTA members, may be a necessary starting point to resolve the conflict between trade liberalization and environmental protection. However, side agreements are ultimately an insufficient and inefficient means of dealing with the conflict between trade liberalization and environmental protection because they treat this conflict as a secondary issue. The JFTA raises the bar a notch by creating precedent for including environmental provisions in the original negotiations and agreement.

With the JFTA, President Clinton avoided criticism "for exporting [United States] environmental and labor standards to a country that could not afford them" by negotiating the agreement to require only that each country enforce its own laws.²²⁸ Many poor countries do not feel they should be held to the same standards as such developed countries as the United States because they have not yet had their "industrial revolutions."²²⁹ Indeed, the EPA was not created until 1970, at least a full one hundred years after America's Industrial Revolution began in the early nineteenth century.

In order to achieve long-term improvements in the environmental protection efforts of developing countries, we should provide incentives for American trade partners to strengthen their environmental regulations. By creating positive reinforcement instead of agreeing to withhold negative

²²⁸ Anderson & Grewell, *supra* note 5, at 432.

²²⁹ Developing nations have few strengths in the marketplace relative to developed countries such as the United States, but two of them just happen to be cheap labor and abundant resources. By including environmental and labor provisions in trade agreements they would be relinquishing any relative negotiating leverage they may have. Salzman, *supra* note 62, at 378. Further, just meeting requirements for environmental reporting often requires more resources than developing countries have at their command. O'Connell, *supra* note 46, at 55.

reinforcement, such as trade sanctions, environmental provisions would be associated with growth instead of disapprobation. Perhaps the rate of reduction in tariffs could be tied to improvements made in environmental regulation, based on the particular conditions of a specific trade partner. Granted, this sounds less and less like free trade, but once societies have recognized that economic growth cannot be separated from negative environmental impacts and other issues such as labor standards, the term “free trade” becomes an oxymoron.

Presumably, the citizens and lawmakers of countries create environmental regulations because they feel that environmental protection is an important part of the political agenda. Thus, there should be internal political pressures that can serve to counteract any incentives to lower standards for economic gain. In addition, external political pressures can serve as a check on policy decisions. This is even more true now, as multinational organizations such as environmental groups, are becoming increasingly influential on the world stage.²³⁰

The enforcement procedures included²³¹ in the agreement would certainly never be confused with swift justice, but when dealing with a dispute between two sovereigns, it is more often about negotiations and compromise than about executive enforcement. Both the United States and Jordan have expressed their intention to make every effort to resolve any

²³⁰ Non-governmental Organizations (NGOs), “which represent a diverse range of interests and are citizen-based, have been the most successful at securing any type of participation in the international environmental lawmaking process.” Sharma, *supra* note 2, at 1231. Some argue that the participation of NGOs in the negotiations of international law “enhances the legitimacy of international decision-making.” *Id.* at 1232.

²³¹ In her symposium article on enforcement and international environmental law, Mary Ellen O’Connell discusses the arguments against using traditional international law enforcement mechanisms to enforce international environmental law. First, she notes, there is often no particular prohibitory rule that is violated when environmental damage occurs. Second, she states that “oftentimes either a state responsible for environmental harm is not a party to a relevant treaty, or the treaty places no binding obligation on the state to prevent the damage.” O’Connell, *supra* note 46, at 54. Third, she suggests that literature often attributes the steady deterioration of our environment to a lack of observation of international environmental rules when really it is due to the fact that our environmental rules are inadequate. O’Connell says that a fourth argument is the expense to governments involved in improving the environment, which is a goal that requires positive action instead of negative action. For the last two arguments she notes that sanctions may not result in the offending country changing their policy, and by inducing compliance (instead of enforcing rules) you don’t have to wait for the violation to occur. O’Connell, *supra* note 46, at 53-57.

disputes in a mutually agreeable way. Congress ultimately retains its power to make all decisions regarding domestic policy. It is unlikely that the concerns expressed by Senator Gramm will prove justified by application of the JFTA. This only serves to highlight the notion that threatening trade sanctions may not be the best way to encourage environmental protection. The JFTA is an important step forward in the continuing harmonization of free trade and environmental protection policy. By including environmental provisions in the text of trade agreements, the JFTA sets a new standard for international trade negotiations. If the JFTA succeeds at improving both the economic and environmental conditions in Jordan, without resulting in challenges to United States domestic laws, then there can be no doubt on the part of Washington politicians that balancing the two agendas is a difficult, but not impossible, task. Further, there is likely no better place to initiate the practice of including environmental provisions, which may or may not prove to be trade obstructing, in trade agreements than the JFTA, which has only minimal economic significance to the United States.

VII. CONCLUSION

By all indications, the JFTA implementation legislation, as well as President Bush's Trade Promotion Authority, have made it through Congress in the last four months because our country is at war. Indeed, from the very beginning, this war has been hailed as a new kind of war, one that uses nontraditional weapons, like asset freezing and sanctions against countries that aid and abet the enemy. Officials in Washington are talking about peace and economic reform in the same sentence.²³²

Unfortunately, the conflict between trade liberalization policies and environmental protection still threatens to derail any progress that ratification of the JFTA may have accomplished. It is too soon to tell what effect the JFTA will have on environmental protection and trade relations between the United States and Jordan. Hopefully, the cooperative spirit exhibited by Congress during a time of crisis will not prove to be only a war-time phenomenon. The greatest advances in international environmental cooperation will only be achievable when we start with domestic cooperation.

²³² See Abrams, *supra* note 167; Stevenson, *supra* note 126.