THE JOURNAL OF COMMERCE, Monday, July 19, 1993

# When Trade Meets Environment

By STEVE CHARNOVITZ

The recent federal court decision to require an environmental impact statement for the North American free-trade agreement presents another obstacle to the already beleaguered trade pact.

Yet a reversal of this decision may prove to be a pyrrhic victory if the result is to heighten the distrust between the commercial and environmental camps. Now that the Clinton administration has achieved a trade "framework" agreement with the Japanese, it should seek a similar understanding with American environmentalists.

It seems likely that Round 2 in the lawsuit will go to the government. Perhaps the weakest link in Judge Charles Richey's decision is the issue of who is responsible for the trade pact. The National Environmental Policy Act imposes a requirement for an environmental impact statement on "all agencies of the federal government." But the president is not an "agency" under the law. In an odd twist, Judge Richey suggests the "responsible official" regarding the trade agreement is the Office of the U.S. Trade Representative, rather than the president. Yet the decision does not explain how the trade representative got that responsibility.

Under the Omnibus Trade and Competitiveness Act of 1988, it is the president who enters into trade agreements and the president who decides when (and whether) to send the implementing legislation to the Congress. The president does not need the concurrence of the trade representative to carry out these actions. During the 1991 debate on fast-track legislation for the trade agreement, the all-important "Exchange of Letters" was between President Bush and Congress.

It is true that then-Trade Representative Carla Hills initialed the pact last October. But that Texas ceremony was a political, not a legal, act. Thus, it is hard to understand how the court can characterize the trade representative as the responsible official.

Some observers have tried to impart constitutional significance to the case by arguing that environmental impact statements intrude on the president's foreign policy authority. The president's capacity to enter into trade agreements comes from the Congress. While the president has the constitutional authority to negotiate anything he wants with foreign countries, other nations will not negotiate with him unless they believe he can fulfill his promises.

The fast-track process was designed to empower the president; it assures other nations that trade agreements will not face procedural hurdles in the Congress.

Since fast-track authority is a discretionary act of both Houses of Congress, they may set any condition they want — including preparation of an environmental impact statement. The president would remain free to avoid such conditions by recommending the needed trade legislation without the advantage of fast track. But that would be a very difficult course for the president — and for the Congress. Thus, those who suggest that the Congress cannot require an environmental impact statement for a trade agreement are barking up the wrong tree.

Doing such an environmental analysis for the Nafta would be counterproductive. While a short delay in beginning Nafta would not be fatal, the problem with the environmental analysis is that its timetable is open-ended. Since no such analysis has ever been filed for a trade agreement, there would be difficult conceptual and methodological problems that could take many months to resolve.

Against these costs would be little gain. The Nafta has been extensively, and exhaustively, examined over the past 30 months. Environmentalists critical of the agreement will have further opportunities to point out the pact's foibles during anticipated congressional hearings. Given all this, it seems doubtful there would be much benefit in a federally funded study of Nafta's environmental impact.

It will be several weeks before a ruling from the Court of Appeals. Now is a good time for the administration to start working with environmentalists to design a framework for environmental reviews of prospective trade agreements. Many environmentalists agree that an environmental impact statement would be a poor format. But right now, the present law is all there is.

Conducting environmental reviews can serve to head off future conflict in two ways: First, by calling attention to any trade policy that may injure the environment so this policy can be reconsidered; and, second, by assessing mechanisms to assure that freer trade will facilitate conservation and environmental remediation. Those who argue that trade agreements are too important to receive environmental scrutiny are only confirming the negative perception that many environmentalists have about global commerce.

Good trade agreements can survive environmental scrutiny. Indeed, good trade agreements can withstand scrutiny on any dimension, be it the impact on wages, prices or jobs. The more information the public has about the benefit and cost of trade, the better U.S. trade policy can become.

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