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ANOTHER ATTACK ON THE FAST TRACK

CONSTANCE Z. WAGNER*

I. INTRODUCTION

The North American Free Trade Agreement (“NAFTA”) celebrated its fifth birthday on January 1, 1999.¹ Surprisingly, the event attracted no particular attention in the media.² This was in sharp contrast to the hoopla that surrounded the negotiation of NAFTA and its implementation into U.S. law.³ Public opinion on NAFTA was sharply divided in the United States, and Congressional debate on the trade agreement was heated. The U.S. government and other proponents argued that NAFTA would result in economic gains for the United States.⁴ Opponents attacked the treaty on a number of grounds, raising economic, legal, and moral objections. Perhaps the most memorable comment was made by then Presidential candidate Ross Perot, who referred to a “giant sucking sound” caused by the loss of jobs for U.S. workers as companies moved their operations to Mexico to take advantage of lower wage rates for workers.⁵ Other critics objected to the fact that NAFTA set no minimum labor or environmental standards, arguing that

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1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (effective Jan. 1, 1994).

2. A search by the author of an electronic database for news stories appearing on or near the anniversary date revealed a small number published primarily in regional papers and trade journals. Most major United States newspapers did not mark the event, even in passing. No major newspaper devoted any significant amount of coverage to the event.

3. NAFTA was implemented into U.S. law pursuant to the North American Free Trade Implementation Act of 1993 (“NAFTA Implementation Act”), Pub. L. No. 103-182, 107 Stat. 2060, 19 U.S.C. §§ 3301-3473 (1994 & Supp. IV 1998).

4. See Congressional Research Service, Library of Congress, THE NORTH AMERICAN FREE TRADE AGREEMENT: IMPLICATIONS FOR SELECTED U.S. NONAGRICULTURAL INDUSTRIES (1993).

5. This remark was made during the 1992 Presidential election campaign. See Timothy Noah, *NAFTA: Ross Perot is Edging Back into the Trade Debate*, WALL ST. J., Oct. 28, 1994, available in 1994 WL-WSJ 2050588.

the end result would be a lowering of such standards in all Member countries.⁶ The roll call vote in Congress was a close one. The NAFTA Implementation Act was passed by a vote of 234 to 200 in the House⁷ and 61 to 38 in the Senate.⁸

The absence of media coverage of NAFTA's birthday probably was due to uncertainty about whether the agreement had proven to be a success or a failure. It was unclear whether it was a time for celebration or lamentation. By the time of this writing, one thing is very clear. Opinions on the impact of NAFTA differ, depending on who is evaluating it. According to the U.S. government and business groups, the dire consequences predicted by NAFTA's opponents have not materialized and in fact the volume of trade has increased as a result of the Agreement.⁹ Labor and environmental groups, on the other hand, blame NAFTA for the loss of jobs by U.S. workers and what they perceive as lowered labor and environmental standards.¹⁰

While the political controversy continued, a legal battle was heating up in the form of a lawsuit questioning the constitutionality of NAFTA, which was filed in the federal district court for the Northern District of Alabama. In *Made in the USA Foundation v. United States*,¹¹ the United Steel Workers of America, one of its locals, and several individuals asserted that NAFTA was void because it had been approved as a congressional-executive agreement when it should have been approved as a treaty under Article II, Clause 2 of the U.S. Constitution.¹² Plaintiffs' prayer for relief requested the court to declare NAFTA "null, void and of no effect" and to direct the President to terminate NAFTA.¹³ In a decision issued on July 23, 1999,¹⁴ the court upheld the constitutionality of the process used to negotiate and conclude NAFTA and the NAFTA Implementation Act, stating that the Article II treaty process was not the exclusive means of implementing NAFTA into U.S. law and that the

6. See Public Citizen Global Trade Watch Reports *Backgrounder: Fast Track* (visited Mar. 30, 2000) <<http://www.citizen.org/pctrade/fasttrack/fast.html>> [hereinafter Public Citizen Reports].

7. 139 CONG. REC. D1323-01 (daily ed. Nov. 17, 1993).

8. 139 CONG. REC. S16712-01 (daily ed. Nov. 20, 1993).

9. *NAFTA Trade a Success for Partners*, J. COMMERCE, Jan. 28, 1999, at 4A.

10. See David LaGessee, *Free Trade Debate Focuses on NAFTA*, DALLAS MORNING NEWS, Jan. 17, 1999, at 1H.

11. 56 F. Supp.2d 1226 (N.D. Ala. 1999) (mem.).

12. *Id.* at 1229.

13. *Id.* at 1239.

14. In ruling for defendant on its motion to dismiss and plaintiffs' motion for summary judgment, the court also decided that some, but not all, of the plaintiffs had standing and that the issues presented were not rendered nonjusticiable pursuant to the political question doctrine. See *id.* at 1254-55, 1276-79.

congressional-executive agreement was an alternative route permitted by the Constitution.¹⁵

The constitutional challenge to NAFTA raises issues concerning the appropriate process for concluding the new variety of international trade agreements negotiated in recent years. At the same time, the questions raised by the case highlight ongoing disputes about the overall structure of political deliberations in the United States on international economic matters. Here, the concern shifts from the specific question of what the Constitution permits to broader questions about the virtues of public participation and related democratic ideals. These concerns are not primarily about whether the Senate supermajority voting provision found in the Treaty Clause is applicable, but whether the actual practices of U.S. international trade policy, especially fast track negotiating authority, are consistent with the democratic process.

II. THE CONSTITUTIONAL LAW ISSUE: *MADE IN THE USA FOUNDATION V. UNITED STATES*

The primary legal question raised in the lawsuit was whether the U.S. Constitution's Treaty Clause creates the exclusive means of concluding treaties. If it did, then NAFTA would be unconstitutional, because it was not approved by two-thirds of the members of the Senate, as required by the Treaty Clause. Instead, it was approved as a congressional-executive agreement by a majority vote of both houses of Congress.

First, the court determined whether NAFTA was a treaty covered by the Treaty Clause. By long-standing practice, Congress had delegated authority to the President to negotiate tariff concessions with foreign countries¹⁶ and various presidents had used this power extensively to conclude trade agreements, both bilateral trade agreements as well as the multilateral General Agreement on Tariffs and Trade ("GATT").¹⁷ Plaintiffs argued that, while the Constitution did not define the term "treaty," NAFTA went far beyond the ordinary subject of trade agreements because it also touched on new areas that infringed state and federal sovereignty, such as health and safety standards, trade in services, investment, licensing, and enforcement of arbitral awards, and, therefore, constituted a treaty.¹⁸ Defendant seemingly did not disagree with this characterization, conceding that NAFTA could have been concluded under the Treaty Clause.¹⁹ This highlighted the Government's central argument that the Treaty Clause does not provide the only constitutionally permissible

15. *Id.* at 1322-23.

16. *See* McKinley Tariff Act of 1890, 26 Stat. 567; Trade Act of 1934, 48 Stat. 944.

17. *See* Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking after I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1196-97 (1986).

18. *Made in the USA Found.*, 56 F. Supp.2d at 1283.

19. *Id.* at 1313-14.

means of concluding international trade agreements. While acknowledging that the parties apparently had reached consensus on this issue, the court also noted its doubts about whether NAFTA was a treaty.²⁰ The enumerated powers of Congress, under the Commerce Clause and other clauses, coupled with the broad foreign affairs powers of the President, could be deemed the exclusive authority for entering into commercial treaties like NAFTA, rather than the Treaty Clause.²¹ Alternatively, the termination provision of NAFTA, which permits any Member state to opt out upon six months notice, also undercuts the view that NAFTA should be considered a treaty because the traditional view is that treaties are long-term agreements.²² Notwithstanding these reservations, the court assumed that NAFTA was a treaty for Treaty Clause purposes.

Second, having made this assumption, the court addressed whether the Treaty Clause was the exclusive means of concluding NAFTA. Plaintiffs argued that the Framers intended to craft a provision that would protect minority state interests by placing the exclusive treaty-making power in the hands of the Senate and requiring a supermajority for approval.²³ Plaintiffs also advanced a textually-based exclusivity argument, noting that the Constitution refers to treaties, agreements, and compacts among nations. The use of the term “treaty” in Article II indicates that the Treaty Clause is the exclusive route for concluding an agreement rising to the level of a treaty, including a commercial treaty, while leaving open the possibility that Congress and the President may conclude agreements and compacts using another constitutionally permitted procedure.²⁴

Defendant argued that the text of Article II does not state that it is the exclusive means of concluding international agreements that constitute treaties, nor are there express proscriptions on the use of presidential or congressional powers to conclude international agreements found elsewhere in the Constitution.²⁵ Citing various Supreme Court decisions recognizing the constitutionality of international agreements concluded outside of the Article II

20. *Id.* at 1317.

21. *Id.* at 1316.

22. *Id.* at 1315 & n.340.

23. *Made in the USA Found.*, 56 F. Supp.2d at 1269-70. *But see* Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 409-10 (1989). Rather than entrusting treaty-making to the executive, as in British and European practice, the Framers vested authority in the President acting with the advice and consent of the Senate. This was due, no doubt, to the fear of too much independent power in the hands of the Executive branch. It was intended that the Senate would be acting in a special executive capacity under the Treaty Clause, and not as part of the Legislature. Another reason for including the Senate in the treaty-making process was its traditional role of acting as the guardian of minority state interests. The House, the more representative and more accountable chamber of Congress, was not given a role in treaty-making.

24. *Made in the USA Found.*, 56 F. Supp.2d at 1295.

25. *Id.* at 1293-94.

procedure,²⁶ the court further noted that the congressional authority to regulate foreign commerce and the presidential power to conduct foreign affairs permit the making of international agreements through alternative routes, including the congressional-executive agreement.²⁷ Defendant also relied heavily on historical precedent, noting that the longstanding use of fast track negotiating authority to conclude trade agreements and the well-established use of congressional-executive agreements in general argued in favor of the constitutionality of the procedure used to approve NAFTA.²⁸ Finally, defendant challenged plaintiffs' contention that the Framers' original intent was that the Treaty Clause be an exclusive grant of power protecting minority state interests, arguing that available evidence surrounding adoption of the Treaty Clause did not conclusively support that interpretation.²⁹

The court agreed with defendant on the central issue in the case, noting that Congress has plenary power over foreign commerce under Article I and that the President was acting pursuant to his constitutional authority to conduct foreign affairs as well as pursuant to delegated authority from Congress, so-called fast track negotiating authority.³⁰ The court made clear that it was ruling only on the constitutionality of NAFTA and not on its merits, stating "[o]ne thing is clear. This court does not have jurisdiction to review the wisdom of NAFTA or to determine whether it is in the best interest of the Nation."³¹ Plaintiffs have filed an appeal in the Court of Appeals for the Eleventh Circuit.³²

The congressional-executive agreement has a long history, having been used by the United States to conclude a substantial number of international agreements.³³ It is one type of executive agreement, that is, an international agreement made by the executive branch but not submitted to the Senate for its advice and consent.³⁴ A congressional-executive agreement is either explicitly

26. *See id.* at 1292 (citing, *e.g.*, *Weinberger v. Rossi*, 456 U.S. 25 (1982); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *B. Altman & Co. v. United States*, 224 U.S. 583 (1912)).

27. *Id.*

28. *Id.* at 1296.

29. *Made in the USA Found.*, 56 F. Supp.2d at 1296-97.

30. *Id.* at 1317-1323.

31. *Id.* at 1323.

32. The case has been assigned No. 99-3138; however, no other information on the appeal is available as of this writing.

33. Congressional Research Service, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 14 (1993) (Senate Committee on Foreign Relations, 103rd Cong., 1st Sess., S.Prt. 103-53).

34. Other types of executive agreements are those expressly or impliedly authorized by treaty and sole executive agreements concluded on the basis of the President's independent

or implicitly authorized in advance by Congress or submitted to Congress for approval. Congressional-executive agreements have been used frequently in a number of different areas, including international trade. This practice extends as far back as the McKinley Tariff Act of 1890³⁵ in the case of trade and tariff matters and even further back in the case of other types of agreements, such as postal conventions.³⁶ The constitutional basis for such agreements is unclear, a fact that, although widely acknowledged, has seemed not to trouble legal commentators, at least not until quite recently.³⁷ Notwithstanding such uncertainty about the congressional-executive agreement, its use is “widely accepted” and it is viewed by most commentators as “a complete alternative to a treaty.”³⁸ Some legal scholars take the position that interchangeability between congressional-executive agreements and treaty law should only be extended to situations where the agreement is based on Congress’ lawmaking powers under Article I of the Constitution.³⁹ In any case, it is still unclear which subject matter may be dealt with by congressional-executive agreement rather than exclusively by treaty. This uncertainty has led to friction between the Congress and the President on numerous occasions, sometimes resulting in litigation.⁴⁰

Prior to *Made in the USA Foundation v. United States*, the constitutionality of congressional-executive agreements had never been called into question in a lawsuit in the context of a trade agreement like NAFTA. However, the issue was raised in political debate in Congress over the World Trade Organization Agreement (“WTO Agreement”) in 1994.⁴¹ As in the case of NAFTA, the President did not submit the WTO Agreement for the advice and consent of the Senate under the Treaty Clause. Professor Laurence Tribe, testifying in front of Congress, noted that the WTO Agreement needed to be approved as a treaty.⁴² Several senators questioned the propriety of the President’s action as

constitutional authority and without explicit or implied authorization by treaty or statute. *Id.* at xvii.

35. 26 Stat. 567 (1890).

36. *Made in the USA Found.*, 56 F. Supp.2d at 1298.

37. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 217 (2d ed. 1996).

38. *Id.*

39. Louis Fisher, Congressional Research Service Report for Congress, GATT AND OTHER TRADE AGREEMENTS: CONGRESSIONAL ACTION BY STATUTE OR BY TREATY? (1994) (quoting testimony of Professor Bruce Ackerman before the Senate Committee on Commerce, Science, and Transportation, Oct. 18, 1994).

40. *See supra* note 26.

41. *See* 33 I.L.M. 1125 (1994). The Marrakesh Agreement Establishing the World Trade Organization of April 15, 1994 provided for the creation of the World Trade Organization, the successor organization to the GATT.

42. *See* Prepared Statement of Laurence Tribe Before the Senate Committee on Commerce, Science, and Transportation, The World Trade Organization and the Treaty Clause: The

a result of Tribe's testimony, but the issue was mooted when the Senate approved the WTO Agreement by two-thirds vote.⁴³ Tribe has also taken the position that NAFTA should have been approved as a treaty, stating that "[s]hort of creating a government for the Western Hemisphere, NAFTA does everything else a treaty could do."⁴⁴

The issue of the constitutionality of NAFTA was "litigated" in an academic forum, after the date of its implementation into U.S. law. In a 1995 *Harvard Law Review* article, Bruce Ackerman and David Golove challenged the originalist accounts of the Treaty Clause that suppose it to have a plain meaning that cannot be altered without a formal constitutional amendment.⁴⁵ Employing a self-described "Marshallian" interpretation of Congressional power under Article I, Ackerman and Golove concluded that congressional-executive agreements are constitutional. Additionally, they noted the historical success of the congressional-executive agreement.⁴⁶ Laurence Tribe, responding to Ackerman and Golove, stated that the fact that some trade agreements that should have been approved as treaties have been implemented pursuant to a procedure with fewer safeguards does not justify a continuation of that practice.⁴⁷ Deploying a more structural view of the constitutional text, Tribe concluded that the Treaty Clause provided the exclusive method for approving international agreements that amount to "treaties." He argued that "the American people, . . . are similarly entitled to the safeguards provided by the Senate supermajority requirement of the Treaty Clause" and "[i]n the end, then, historical argument based on the legitimating power of precedent proves unpersuasive . . ."⁴⁸ In one of those seemingly rare instances where litigation is informed by academic debate, plaintiffs in *Made in the USA Foundation v. United States* referred to Professor Tribe's views as support for their position.⁴⁹ Tribe's position seems to be a minority viewpoint, as suggested by Professor Henkin's statement supporting a wide acceptance of the congressional-executive agreement⁵⁰ and as argued by defendant in the case under

Constitutional Requirement of Submitting the Uruguay Round of GATT as a Treaty, Oct. 1, 1994, available in 1994 WL 573902.

43. *Made in the USA Found.*, 56 F. Supp.2d at 1280 n.218.

44. Estella Duran, *NAFTA Unconstitutional, Steelworkers' Suit Says*, BOSTON GLOBE, July 14, 1998, at A4.

45. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 925-27 (1995).

46. *Id.*

47. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1225-26 (1995).

48. *Id.* at 1282.

49. *Made in the USA Found.*, 56 F. Supp.2d passim.

50. See HENKIN, *supra* note 37 and accompanying text.

discussion.⁵¹ However, that fact standing alone does not argue in favor of rejection of his argument. As the Supreme Court has noted: "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."⁵²

III. THE POLITICAL ISSUE: RENEWAL OF FAST TRACK AUTHORITY

While *Made in the USA Foundation v. United States* is framed in terms of a constitutional issue, it highlights the broader political debate about renewal of fast track authority for negotiating trade agreements. NAFTA, a product of the fast track, remains at the center of the debate over free trade. Criticism of the agreement has crystallized opposition to new trade agreements and to the fast track negotiating authority used for the past twenty years to conclude such trade agreements. In Congress, over the course of the past five years, the debate has centered on whether the President's fast track authority, which lapsed in 1994, should be renewed in order to enter into new agreements.

Fast track is an expedited procedure for negotiating international trade agreements and implementing them into U.S. law that was first used in the Trade Act of 1974.⁵³ Under fast track, Congress grants the President authority to negotiate the terms of a trade agreement with a foreign government, but requires the President to notify, consult, and submit the agreement, along with proposed implementing legislation, to Congress for final approval.⁵⁴ Congress is required to vote up or down on the matter within specified time limits and may not alter the terms of the agreement as negotiated.⁵⁵ The result of this process is a congressional-executive agreement that has been approved on an expedited basis, without the opportunity for extended debate and amendment of the terms of such agreement. The procedure was developed in response to criticisms from major trading partners of the United States about Congress' unwillingness to approve international agreements as negotiated and settled upon by the President and foreign governments.⁵⁶ This led to reluctance on the

51. See *Made in the USA Found.*, 56 F. Supp.2d at 1290 (noting statements by Tribe that are inconsistent with his exclusivity argument).

52. *Powell v. McCormack*, 395 U.S. 486, 544 (1942).

53. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. §§ 2101-2495 (1994 & Supp. IV 1998)). See Adam H. Gordon, *The Future of the President's Authority to Negotiate International Trade Agreements After NAFTA and the Uruguay Round: What Would Congress Delegate?*, 88 AM. SOC'Y INT'L L. PROC. 290, 290-91 (1994) [hereinafter Gordon, *What Would Congress Delegate?*] (remarks of S. Bruce Wilson).

54. See 19 U.S.C. § 2112 (1994 & Supp. IV 1998).

55. *Id.* §§ 2112, 2191 (1994 & Supp. IV 1998).

56. Congress was unwilling to enact certain agreements relating to lowering nontariff barriers that were negotiated as part of the Kennedy Round GATT Agreements in the late 1960s. Gordon, *What Would Congress Delegate?*, *supra* note 53, at 290.

part of trading partners to negotiate with the United States until receipt of assurances that the resulting agreement could be implemented promptly.⁵⁷

Fast track authority was renewed in 1979,⁵⁸ 1984,⁵⁹ and 1988,⁶⁰ but expired in 1994. President Clinton attempted to renew fast track negotiating authority in 1995, 1997, and 1998, but was defeated due to disagreement in Congress regarding the extent to which labor and environmental issues should be included in such trade agreements.⁶¹ Recently, the President has voiced his determination to renew fast track negotiating authority.⁶² He has repeatedly maintained that such authority is necessary in order to further the trade liberalization process.⁶³ The absence of fast track authority hampered attempts to negotiate a NAFTA accession agreement with Chile, which was unwilling to deal with the United States in the absence of such authority.⁶⁴ The Clinton administration also maintains that it will be unable to negotiate the Free Trade Agreement of the Americas, an agreement that would link most of the countries in the Western Hemisphere, without such authority.⁶⁵

Numerous arguments support a renewal of fast track.⁶⁶ Unlike the cumbersome supermajority procedure of the Treaty Clause, fast track promotes efficient and expeditious approval of trade agreements. This is accomplished in a variety of ways, including cutting off procedural obstacles and prolonged debate that in the past prevented controversial measures from coming to a vote

57. *Trade Reform: Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, 93rd Cong. 394 (1973) (statement of Deputy Special Representative for Trade Negotiations William R. Pearce).

58. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144.

59. *See* Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948.

60. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1121.

61. In the most recent vote in Congress in September, 1998, the House of Representatives voted 243 to 80 to reject fast track authority for the President, with President Clinton aligned with Republican leadership against his own party and organized labor. *See* Juliet Eilperin, *House Defeats Fast-Track Trade Authority*, WASH. POST, Sept. 26, 1998, at A10.

62. William Claiborne, *Lauding Trade, Clinton Urges 'Fast Track'*, WASH. POST., June 13, 1999, at A05.

63. *See* White House Press Release, *Statement by the President on Traditional Trade Negotiating Authority Legislation*, Nov. 4, 1997 (visited Mar. 30, 2000) <<http://www.pub.whitehouse.gov>> (go to "G. Identify Documents Using Persistent Document Identifiers" and enter "pdi://oma.eop.gov.us/1997/11/5/3.text.1") [hereinafter White House Press Release].

64. *See* Anthony Faiola, *Chile Takes Its Trade Elsewhere; Delay of U.S. 'Fast-Track' Legislation Makes Canadian and Mexican Products More Attractive*, WASH. POST, Dec. 25, 1997, at A29.

65. *See* Anthony Faiola, *Fast Track Fallout Blankets S. America; Region Skeptical Clinton Can Fulfill Vow to Establish Free-Trade Zone*, WASH. POST, Nov. 12, 1997, at A04.

66. *See* HENKIN, *supra* note 37, at 217; Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 148 (1992).

at all. Compared to the process for treaty approval, the likelihood of passage of such measures is increased, due to the simple majority vote requirement in both houses, and the legislative process is simplifying. Such a procedure gives the executive greater credibility in negotiating agreements in the international arena. The successful experience with fast track historically also argues in favor of its extension. The procedure has been used for more than twenty years to conclude several major trade agreements, in addition to NAFTA, between the United States and one or more trading partners, including the Uruguay Round agreements of GATT,⁶⁷ the United States-Canada Free Trade Agreement,⁶⁸ the United States-Israel Free Trade Agreement,⁶⁹ and the Tokyo Round agreements of GATT.⁷⁰

On the other side of the issue, the charge has been raised that fast track undercuts the deliberative processes that should accompany adoption of measures of significant public import. In short, fast track may be considered undemocratic because Congress is permitted only an up or down vote on a completed trade agreement.⁷¹ Congress has amended fast track on more than one occasion to enhance congressional influence over the negotiation of trade agreements, thereby arguably making the process more democratic.⁷² However, this has not served to dampen criticism, which comes largely from public interest groups and representatives of organized labor. Environmental groups and labor unions are still smarting over the failure of the Clinton Administration to fulfill its campaign promise of including environmental and labor protections in NAFTA.⁷³ Perhaps what such groups are complaining about is the absence of effective access by them to the democratic process itself under fast track.

The advocates of fast track often characterize what is at stake in the debate as the continuation of free trade versus the return of protectionism. President Clinton has repeatedly stated that fast track is needed for the United States to continue to exercise global economic leadership and to expand U.S. export

67. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501-3624 (1994 & Supp. IV 1998)).

68. United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (codified as amended at 19 U.S.C. § 2112 (1994 & Supp. IV 1998)).

69. United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (codified as amended at 19 U.S.C. § 2112 (1994 & Supp. IV 1998)).

70. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified at 19 U.S.C. §§ 2501-2582 (1994 & Supp. IV 1998)).

71. See Public Citizen Reports, *supra* note 6.

72. See Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1121.

73. NAFTA contained limited provisions on the environment and no provisions on labor. Weak side agreements on both issues were incorporated after NAFTA was presented to Congress. See C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 85-86, 107-108 (1994).

markets, which will lead to increased employment.⁷⁴ This characterization of the issue is too simplistic. Whether we like it or not, the global economy exists and a return to the mercantilist policies of the past and economic isolationism is simply not possible. Moreover, free trade can still take place without fast track, although it may take longer.

Proponents of labor rights and environmental protection, on the other hand, argue that fair rules for the global economy that take into account human rights and not just property rights must be incorporated into trade agreements. According to one U.S. labor leader, the question is not “whether we are internationalist, but what values our internationalism serves.”⁷⁵ These objections, which run counter to mainstream economic thinking on free trade, have arisen because recent trade agreements, like NAFTA and the WTO Agreement, are quite different in scope than traditional trade agreements, like the pre-Tokyo Round GATT.

The new variety of trade agreements is no longer exclusively about tariff cutting, but currently encompasses rules for international investment, government procurement, intellectual property protection, and trade in services. Additional items, such as competition policy, will be added to the agenda in the near future. Conspicuously absent from this listing are topics involving labor standards, international labor migration, and environmental protection. NAFTA and the WTO Agreement deal with these topics, to the extent they are covered at all, in only a very limited way. The question is whether they should continue to be excluded. The United States, among other nations, has fought hard on a number of occasions to keep such issues out of the negotiations, arguing that trade talks are not the appropriate forum for them. But can a principled distinction be drawn between these issues and other issues that have been incorporated in recent regional and multilateral trade agreements? Why are the rules governing protection of foreign investment an appropriate topic for discussion in a trade forum while migration of labor or labor standards are not? In this writer’s mind, such line-drawing exercises are doomed to failure. Once you open up the door to new topics, you must let them all in if they bear some reasonable relationship to trade. Drawing the line at which topics are politically unpalatable in the United States or some other developed country runs the risk of undermining the legitimacy of the entire trade liberalization process.

What is happening in trade talks is nothing less than a constitutional convention on the rules that will govern the organization and operation of the global marketplace. It is perfectly appropriate, some would say critically

74. See White House Press Release, *supra* note 63.

75. Robert L. Borosage, *On the ‘Fast Track’ to Nowhere; Clinton Has Lost His Way in the Debate Over Trade*, WASH. POST, Sept. 21, 1997, at C01 (quoting AFL-CIO President John Sweeney).

important, that all constituencies should be represented at the table. This was the message delivered at the Seattle ministerial meeting of the WTO that took place in November and December of 1999 and ended abruptly before its conclusion due to violent protests, in part because of the refusal of the WTO to link trade with workers' rights, environmental protection, and human rights.⁷⁶

Even before the debacle in Seattle occurred, the new watchword in trade law had become the need to increase public participation by non-governmental groups as well as by individuals. In the United States, one route to such increased participation would be greater representation of labor and environmental groups on the trade advisory committees that the President is required to consult prior to entering into trade agreements.⁷⁷ An order issued in a lawsuit filed by several environmental groups in federal district court in Seattle in 1999 has forced the Office of the United States Trade Representative ("USTR") to do exactly that.⁷⁸ The USTR recently announced a new initiative to increase opportunities for environmental, consumer, labor, and other non-governmental organizations to provide their views on trade issues.⁷⁹ As part of this initiative, the USTR published a notice in the Federal Register seeking comments on changes to the advisory committee system that would help the executive branch obtain timely trade policy advice from such groups.⁸⁰ This action is a hopeful sign indicating the willingness of the USTR to facilitate broader based public participation in the negotiation of trade agreements.

IV. CONCLUSION

Although styled as an attack on use of the congressional-executive agreement for trade matters, *Made in the USA Foundation v. United States* also represents a new line of attack on fast track. If the basis for the complaint in that case is that the process of NAFTA passage left out critical constituencies

76. See *WTO Chief Calls for Reassessment of Talks*, SEATTLE TIMES, Jan. 19, 2000, available in 2000 WL 5516745.

77. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1996 (1975) (codified as amended at 19 U.S.C. § 2155 (1994)). The committee system is composed of three tiers, with one committee providing general policy advice, several committees addressing specific policy issues, and a large number of groups giving advice on sectoral, technical, and functional issues.

78. *N.W. Ecosystems Alliance v. Office of U.S. Trade Representative*, No. C99CV-1165R (W.D. Wash. Nov. 1999). The court's order required the USTR to appoint a qualified environmental representative to two sectoral advisory groups. The USTR has appealed this ruling.

79. Office of the U.S. Trade Representative, Press Release 00-02, *USTR Barshefsky and Commerce Secretary Daley to Establish New Procedures for Advice from NGOs* (visited Mar. 30, 2000) <<http://www.ustr.gov/releases/2000/01/00-02.html>>.

80. Office of the U.S. Trade Representative, Press Release 00-29, *USTR and Department of Commerce Seek Public Input on Enhancement of Trade Advisory Committee System* (visited Apr. 26, 2000) <<http://www.ustr.gov/releases/2000/04/00-29.html>>; (referring to 65 Fed. Reg. 19423-01 (Apr. 11, 2000)).

in the deliberation process, then the congressional-executive agreement is really not the crux of the issue: The congressional-executive agreement is not undemocratic. In some sense, its use can be viewed as more democratic than use of the Treaty Clause, because it also involves the House, which is the more representative of the two chambers of Congress. The real problem seems to be that fast track does not allow for adequate input by certain types of interest groups. This could be because they are underfunded, and, therefore, do not speak loudly enough to be heard, or because their agendas are incompatible with the speed with which fast track works. A reversal of the district court's decision on appeal, although an unlikely outcome in the case, would have repercussions for the political debate. Even if the constitutionality of NAFTA is upheld on appeal, which is likely to occur given the wide-spread acceptance of congressional-executive agreements in the trade area, fast track should still be reassessed in light of recent debate.

Charges that globalization is leading to increasing inequalities and is ignoring those who are the losers in the trade game of comparative advantage need to be taken seriously. In his recent book on globalization, Thomas Friedman, the Foreign Affairs columnist for the *New York Times*, contrasts the "Fast World" of the global market system, the highly competitive world of fabulous wealth and power made possible by technological developments and facilitated by trade linkages, with the world of the "turtles," those who "got sucked into the Fast World . . . and for one reason or another now feel economically threatened or spurned by it . . . because the jobs they have are being rapidly transformed, downsized, streamlined or made obsolete by globalization."⁸¹ The danger inherent in this gap between the two worlds is that it may lead to backlash by those who feel left out by globalization. Friedman's solution is to integrate the "turtles" into the system. As he notes: "With all due respect to revolutionary theorists, the 'wretched of the earth' want to go to Disney World - not to the barricades. . . . And if you construct an economic and political system that gives them half a sense that with hard work and sacrifice they will get to Disney World and get to enjoy the Magic Kingdom, most of them will stick with the game. . . ."⁸² In the context of fast track, which contributes to the process of globalization, this means listening to all of the voices being raised in the free trade debate. Perhaps it is time to slow the fast track down and take some time to assess exactly where it is taking us.

81. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 270-71 (1999).

82. *Id.* at 294.

