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NAFTA Meets NEPA: Trade and the Environment in the 1990s

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CASENOTES

"NAFTA Meets NEPA: Trade and The Environment in The 1990s"

Speaking generally, there is no one so fit to conduct any business, or to determine how or by whom it shall be conducted, as those who are personally interested in it.[1]

INTRODUCTION

Environmental quality has achieved the status of an important value in the United States which can be attributed to both the growth and endurance of the environmental movement itself.[2] This new value is supported by an infrastructure of environmental media positions, organizations, university curricula, and business and legal specialties.[3] As a value, the environment has a long history of profit oriented, market values to "compete" with. As regional initiatives spurred by the recent passage of the North American Free Trade Agreement (NAFTA) develop, it is clear that economic and environmental prerogatives are inextricably linked. It is this link that prompted the recent *Public Citizen*[4] series of cases in which a coalition of environmental organizations filed suit in response to the Office of the United States Trade Representative's (OTR) refusal to file an environmental impact statement (EIS) assessing the environmental effects of NAFTA and insuring the availability of such information to public officials and citizens as required by the National Environmental Policy Act of 1969 (NEPA).[5] The export model of growth will continue to engender divisive debates especially as the environmental effects of such growth continue to become distorted or lost in the crevices.

1. J. Mill, On Liberty, New York: H. Holt and Co (1887).
2. H. Ingram & D. Mann, *Interest Groups and Environmental Policy, in* Environmental Politics and Policy, 133 (J. Lester ed., 1989).
3. *Id.*
4. Public Citizen v. Office of the United States Trade Representative, 782 F.Supp. 139 (D.D.C. 1992). [designated in text as Public Citizen I]; Public Citizen v. Office of the United States Trade Representative, 822 F.Supp. 21 (D.D.C. 1993) [designated in text as Public Citizen II].
5. National Environmental Policy Act, 42 U.S.C. §§ 4321-70 (1988). NEPA "is our basic national charter for protection of the environment. As such, it contains action forcing provisions to make sure that federal agencies act according to the letter and spirit of the Act." Council for Environmental Quality, 40 C.F.R. § 1500.1(a). As one Circuit Judge noted at the outset, "NEPA, like so much other reform legislation of the last 40 years, is cast in terms of a general mandate and broad delegation of authority to new and old administrative agencies. It takes the major step of requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and it prescribes certain procedural measures to ensure that those values are in fact fully respected." Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

This note will examine the *Public Citizen* series and how the environmental values of protection, quality and sustainability collided with economic values of growth, trade, and development. Economic growth provokes continuous discussion about impediments to the flow of goods and services, be they actual or imagined. The environment has moved from being an aesthetic backdrop of the debates to the subject of contention itself. At the heart of the debate are individual and collective rights. Increasingly, the right to a clean environment is being asserted not only for oneself but for one's descendants. Collective development rights, however, are recognized, too. The United Nations General Assembly issued a resolution on the matter: "the right to development is a human right and [sic] equality for development is as much a prerogative of nations as of individuals within a nation."[6] The *Public Citizen* cases are important because they have set the stage for what promises to be a lively debate about the export model of growth and the environment. The series is also important because it represents a new era for trade, growth, and universal environmental values.[7] Because the arguments and issues were, and continue to be, value laden, the courts had no choice but to respond in kind with legal procedural values of finality, ripeness, mootness, and in the end, the sanctity of the doctrine of separation of powers.

A new policy needs to be advanced in the wake of the continued weakening of NEPA. NEPA has not withstood the pressures exerted by the prerogatives of the export model of growth that culminated in the recent passage of NAFTA.[8] The Supreme Court narrowed NEPA's substantive application from the outset by disfavoring its full disclosure aspects.[9] Federal courts have further dismantled NEPA in the two *Public Citizen* cases and their appellate companions. The result renders NEPA virtually impotent and raises questions about the judiciary's "duty" to secure the "promise of this [NEPA] legislation."[10]

6. G.A. Res. 34, U.N. GAOR, 46th Sess., (1979).

7. As John H. Adams, the executive director of the Natural Resources Defense Council noted, "I recognize that this is a complex and difficult issue on which reasonable people with the same values and objectives can differ." quoted in, K. Schneider, *Environmentalists Fight Each Other Over Trade Accord*, N.Y. Times, Sept. 16, 1993 at A1.

8. North American Free Trade Agreement (1993) [hereinafter NAFTA].

9. *L. Wenner, The Courts and Environmental Policy, in* Environmental Politics and Policy, 243 (J. Lester, ed., 1989). See also Andrus v. Sierra Club, 442 U.S. 347 (1979). In which the Supreme Court agreed with the Executive branch that the budget process is exempt from the EIS requirement regardless of the effect on the environment; Kleppe v. Sierra Club, 427 U.S. 390 (1976) in which the Court held that an EIS is not required until there is some final federal agency action.

10. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

BACKGROUND

Both private and public sector decisions which affect the environment are primarily made against the backdrop of traditional consumptive market values.[11] Values need to coexist harmoniously if a society is to prosper and grow. Formulating environmental policy is fundamentally about arriving at collective values.[12] Therefore, sustainable development[13] ultimately rests on political will.[14] The task of ensuring environmental protection in the midst of ongoing trade and development, however, is made more difficult given the fact that environmental values, along with the corresponding discourse, can be broken down into subcategories and concerns because they are shaped by geography and culture. Cultural variables are becoming increasingly acknowledged and accepted as being determinant of behavior, methods, and values. For example, the concept of time is looked upon differently across the world. For Anglos, time runs; for the French, time functions; for the Germans, time marches; and for Latinos, time walks. Cultures value the environment differently, too. One of the greatest challenges is to secure the rights of peoples and cultures within the North American Free Trade area to have their ideas and values pertaining to methods of reconciling their relationship to the land heard.[15] These views share in the formation of the collective value of environmental protection. They are relevant because environmental concerns and possible solutions are becoming increasingly interrelated over both space and time.

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11. *Id.*

12. M. Blumm, *The Fallacies of Free Market Environmentalism, in* 15 Harv. J.L. & Pub. Pol'y. 370 (1992).

13. World Commission on Environment and Development, Our Common Future, New York: Oxford University Press (1987). In 1987, the Commission issued the Brundtland Report, which formally introduced the concept of sustainable development. Sustainable development has become the term of choice among international organizations committed to environmentally sound development. It mandates limits, albeit flexible limits, on economic growth and development in furtherance of environmental protection. The goals of sustainable development include changing the quality of growth, meeting essential needs for jobs, food, water, energy, and sanitation, ensuring stable and sustainable levels of population, conserving and enhancing the resource base, and merging environment and economics in decisionmaking.

14. As Alexis de Tocqueville noted in the 1830s, however, "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." (quoting 1 Democracy in American 280) (1945) quoted in Sierra Club v. Morton, 405 U.S. 727, 740 (1972). Reconciling the export model of growth with environmental protection is a political issue which, upon passage of NEPA, was given to the judiciary with a mandate to protect the promise of the legislation intended to balance the conflicting agendas.

15. "The laws of a country ought to bear reference to its physical character, to the climate, whether warm, cold, or temperate; to the quality of the soil, to its situation, to its size, to the kind of life led by the people, whether farmers, hunters, or laborers." C.L. Montesquieu, The Spirit of the Laws, New York: Hafner Pub. Co (1949).

What we value is not being adequately enforced by the courts despite virtuous legislative expressions and mandates. It is an increasingly complex task given the new regionalism and the corresponding opportunities and constraints imposed by NAFTA. The task involves incorporating environmental values into mature institutions that are still expected to maintain their traditional functions. The need to reconcile environmental policy's value laden goals with our entrenched set of market values is arguably the most challenging issue today. It is also the most economically relevant because countries cannot prosper on any level in the midst of environmental deterioration.

The issues involved in reconciling trade with environmental concerns will continue as the United States, Mexico, and Canada begin the challenge of restructuring their policies, laws, and attitudes in furtherance of the goals of regional free trade. These goals include increasing the wealth of each nation without sacrificing the causes of liberty, and liberty includes the right to self-defined methods of environmental protection.

PUBLIC CITIZEN I

In the first case challenging the steady progression of NAFTA negotiations, Public Citizen v. Office of the United States Trade Representatives,[16] a coalition of environmental organizations filed suit against OTR for failing to prepare an EIS regarding the environmental consequences of NAFTA.[17]

NEPA requires that federal agencies include an EIS "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[18] According to NEPA's implementing regulations promulgated by the Council of Environmental Quality (CEQ),

> the primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government[19]

The statement should include the environmental impact of the proposed action, any nonavoidable adverse environmental effects, and alternatives to the proposed action.[20]

16. Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.D.C. 1992). The non-profit environmental organizations included Public Citizen, the Sierra Club and Friends of the Earth and became collectively known as Public Citizen.
17. *Id.*
18. 42 U.S.C.S. § 4332(c) (1988).
19. Council on Environmental Quality, 40 C.F.R. § 1502 (1993).
20. *Id.*

The framing administrations portrayed NAFTA as the most environmentally sound trade accord ever advanced. Everyone involved agreed that future trade policies should occur in environmentally sound contexts. The United States entered the negotiations confident that it could marshal its environmental values and agendas to work for the good of the whole. The objectives of NAFTA, set forth in Chapter One, are to "eliminate barriers to trade," "promote conditions of fair competition," and "increase substantially investment opportunities in the territories of the Parties."[21]

Environmental regulations, programs, and policies are notorious for their ability to thwart trade, decrease fair competition, and decrease certain investment opportunities. The impending possibility of increased environmental degradation, especially along the United States-Mexico border, prompted Public Citizen and other groups to act. International environmental groups know too well that the enforcement of environmental laws face an uphill battle under one sovereign. Public Citizen foresaw further complications under three sovereigns each faced with their own political and jurisdictional constraints. The drafters of NAFTA attempted to quiet environmental groups on several fronts.[22] The Environmental Side Accord complements environmental dispute resolution under NAFTA.[23] Cost-benefit analyses will undoubtedly come

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21. NAFTA art. 102(a)(b)(c).

22. First, NAFTA secures each country's right to designate its own levels of for the protection of the environment, consumer health, and animal and plant life. art. 601(1) In doing so, the Parties "confirm full respect for their Constitutions."art. 601(1). The fundamental necessity of protecting each country's sovereignty and right to self-determination is thus advanced while comporting with traditional tenets of international law. Second, countries may either adopt or maintain measures that are "necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement." NAFTA espouses to "contribute to the harmonious development and expansion of world trade . . . in a manner consistent with environmental protection and conservation," "strengthen the development and enforcement of environmental laws and regulations," and to "promote sustainable development." *Preamble, vol I.*

23. The Environmental Side Accord signed by President Clinton on Sept. 14, 1993 is designed to prevent each country from lowering environmental standards to gain a competitive edge by

> [r]ecognizing the right of each party to establish its own levels of domestic environmental protections and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations. Part Two, art. 3.

The Accord encourages each Party's right to "exploit their own resources pursuant to their own environmental and development policies." Parties who believe that a NAFTA country is not enforcing its environmental laws can file a complaint with the tri-national Commission on Environmental Cooperation. In addition, a dispute settlement panel will consider possible monetary or trade sanctions if a nation persistently fails to enforce its own environmental laws. Canada has agreed to make all the panel's rulings binding in its courts which eliminates the need for trade sanctions. The Side Accord did not modify NAFTA Chapter 20 dispute resolution provisions which means that the process is still not open to public participation.

The Accord has one last noteworthy provision. If a Party finds the Accord too

into play as they have with NEPA litigation. The goals of environmental protection, however, have been traditionally handicapped by such analyses. The environmental values cannot withstand the pressures exerted by an economic cost-benefit analysis premised on quantified terms, savings, and values. The environmental side of the sustainable development equation invariably collapses.[24]

NEPA does not create a private cause of action. Aggrieved individuals and groups, therefore, must look to the Administrative Procedures Act (APA) for relief.[25] Private persons can bring an action under § 702 of the APA which provides an action for injunctive relief to those "adversely affected or aggrieved by agency action."[26] Judicial review, however, is only available under the APA for "final agency action for which there is no other adequate remedy in court."[27] The final agency action requirement ultimately left Plaintiff Public Citizen little room to maneuver in pursuing a remedy.

In *Public Citizen I*, Plaintiffs asserted the necessity of an EIS due to the broad macroeconomic changes likely to take place which would affect the environment if the Agreement was implemented.[28] Plaintiffs argued that the clear language of NEPA required the preparation and filing of an EIS to inform citizens and possibly avert environmental harms in their early stages.[29] In addition, Plaintiffs questioned NAFTA's

burdensome, it can escape: "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties." Part Seven, art. 50. Daily Rep. Executives, Reg., Econ., & L., BNA, Sept. 10 (1993).

24. In Corrosion Proof Fittings v. EPA, 947 F.3d 1201 (5th Cir. 1991), the Court heard arguments alleging that an EPA rule pertaining to an asbestos ban conflicted with the U.S.-Canada Free Trade Agreement. The Court held that the Canadian petitioners did not have standing, but then proceeded to deconstruct the EPA's methods of arriving at a total ban of asbestos pursuant to its rulemaking procedures. *Id.* at 1210. According to the Court, EPA failed to promulgate its rule in conjunction with the substantial evidence rule. *Id.* The goal of EPA in such matters is to shoot for a minimal reasonable risk, which is determined by identifying acceptable levels of non-zero risks. EPA must give deference to the least burdensome alternative, which in this case involved a balancing of the economic vs. environment equation. The Fifth Circuit expressed disappointment in the EPA's problem solving and further disagreed with EPA's heavy reliance on unquantified benefits along with its heavy reliance on the concept of population exposure.

Corrosion Proof Fittings illustrated an attempt by EPA to unilaterally protect the unquantified benefits of an asbestos free workplace when the known substitutes for asbestos are also toxic carcinogens. The Court remanded the issues in light of a failure to factor in and perhaps give more deference to the politics of cost-benefit analyses, noting that "if we were to allow such cavalier treatment of the EPA's duty to consider the economic effects of it decisions, we would have to excise entire sections and phrases from the language of the Toxic Substances Control Act. Because we are judges, not surgeons, we decline to do so." *Id.* at 1223. NAFTA's dispute settlement officials will not be able to practice semantic surgery either.

25. Administrative Procedures Act, 5 U.S.C.S. § 704 (1989).

26. *Id.* § 702.

27. *Id.* § 704.

28. *Id.*

29. *Id.*

possible preemptive effect on federal and state environmental regulations. In support, Plaintiffs cited a recent GATT dispute resolution panel decision declaring restrictions on tuna imports to be an impermissible restraint on international trade.[30] Similarly, Plaintiffs argued that NAFTA provisions could feasibly be used to challenge national or state environmental laws, which would in turn threaten Plaintiffs' members residing in border areas.[31]

OTR refused to prepare an EIS for NAFTA barring any legal obligation to the contrary.[32] First, OTR claimed the issue was not ripe because NAFTA was still on the negotiating table.[33]

The District Court agreed that Public Citizen's claim was not ripe, or available for review.[34] Agency actions must be sufficiently mature to be deemed a judicable controversy.[35] Only matters which are ripe can marshal enough strength to meet the Constitutional case or controversy requirement.[36] The purpose of the ripeness doctrine is to

> prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[37]

In order for the ripeness requirement to be satisfied, OTR must have taken a final action, which Plaintiffs, as the complaining party, felt in

30. *Id.* The arguments centered around Plaintiff Public Citizen's concern over the possible preemptive effects of the NAFTA echoing the fear over the decision by a GATT resolution panel declaring that the U.S. Marine Mammal Protection Act impermissibly restricted tuna imports. Environmental regulations, programs, and policies have gained notoriety for their ability to thwart trade, decrease fair competition, and decrease certain investment opportunities. See H. French, *The Tuna Test: GATT and the Environment*, Transboundary Resources Rep. at 6.

This phenomenon is already seen along the U.S.-Mexico border. Section 179B of the 1990 Clean Air Act Amendments, for example, allows for less stringent air standards along the international border, which results in less stringent health protections for U.S. citizens residing along the international border. Pub. L. No. 101-549, § 401, 104 Stat. 2399, 2584-631 (1990). Border cities like El Paso do not have to invoke the additional clean air programs that other U.S. cities with similar pollution problems are required to invoke after due to the fact that pollution from across the border effects their ability to comply. El Paso, for example, can take measures to reduce emissions as federally mandated and if EPA still issues a declaration of nonattainment and it is questionable if such status would hold but for pollution from across the border, then El Paso's emission and pollution levels stand and nothing else is required. El Paso thus avoids economic sanctions and severe air pollution control programs.

31. *Id.* at 142.

32. Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139, 141 (D.D.C. 1992).

33. *Id.*

34. *Id.*

35. *See generally*, B. Schwartz, Administrative Law 491 (1991).

36. U.S. Const. art III., §1.

37. Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

an immediate and direct way.[38] Without suffering a direct effect, Plaintiffs would not have standing to sue. Standing addresses the issue of "whether the particular plaintiff then requesting review may have it."[39] Plaintiffs had arguably not identified a particular OTR agency action which affected them in a particular and specified fashion.[40] Plaintiffs failed to plead their case with the required specificity, and therefore, failed to establish standing.[41] Judge June Green granted Defendant OTR's motion to dismiss for lack of standing.[42]

There are two ways in which citizen organizations like Public Citizen could have established standing. The first involves a derivative claim by members who allege an injury to interests.[43] Those interests must be within the realm of interests NEPA seeks to protect.[44] Members of Public Citizen have various environmental and aesthetic interests which rise to the level of protected legal interests if the party seeking review has suffered a sufficient injury in fact.[45] Even if there is a legally protected interest which was violated by an identifiable agency action, the action must affect a particular plaintiff and not just an organization in general. An organization's mere interest in the issue of environmental protection is in sufficient to confer standing.[46] The Supreme Court secured the legally protected status of aesthetic and environmental interests soon after the passage of NEPA.

> Aesthetic and environmental well-being, like economic well-being, are important ingredients in the quality of life in our society, and the fact that particular environmental interests are shared by the many rather then the few does not make them less deserving of legal protection through the judicial process.[47]

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38. *Id.*
39. Association of Data Processing Orgs. v. Camp, 397 U.S. 150, 169 n.2 (1970).
40. Public Citizen v. Office of the United States Trade Representative, 782 F.Supp. 139 (D.D.C. 1992).
41. *Id.* at 143.
42. *Id.*
43. *Id.* at 141.
44. The Court quoted itself in an earlier case: "It is clearly established law that: [t]he procedural and informational thrust of [the] NEPA gives rise to cognizable injury from denial of the explanatory process, so long as there is a reasonable risk that environmental injury may occur." Public Citizen v. Office of the United States Trade Representative, 822 F. Supp. 21, 27 (D.D.C. 1992) (quoting City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 492 (D.C. Cir. 1990)).
45. Sierra Club v. Morton, 405 U.S. 727, 738 (1972); The irreducible constitutional minimum of standing requires that a plaintiff suffer an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetic that there be a caused connection between the injury and conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of some third party who is not before th court; and that it be likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife 112 S. Ct. 2130 (1992).
46. Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987).
47. Sierra Club v. Morton, 405 U.S. at 734.

Standing requires an identifiable agency action that rises above an agency's day to day activities. In *Public Citizen I*, the District Court noted that "formulating negotiating positions, drafting language for proposed terms, and communicating with other negotiating parties do not involve activities outside the realm of the OTR's general mission."[48] Plaintiff Public Citizen appealed to the D.C. Court of Appeals.[49]

In the summer of 1992 the issue before the D.C. Court of Appeals in *Public Citizen I* was again whether OTR was legally required to prepare an Environmental Impact Statement (EIS) for NAFTA.[50] The Court of Appeals wrote that OTR's refusal to issue an EIS was not "itself a final agency action," noting that "these are just drafts."[51] It is true that the language was not in final legal form. Final agency action was also lacking.[52] Premature judicial intervention is improper until the issuance of a final report or recommendation. The integrity of the finality doctrine was appealed to in the Court's reasoning as was the improper nature of judicial interference in the daily decisions of agencies.[53] Agencies are afforded immense discretion by the courts, which is justified by the fact that administrative officials understand both the policy and technical issues better than anyone else.[54] Defendant OTR further argued against Plaintiffs' request for an EIS contending that NEPA was preempted by the fast-track process.[55] The D.C. Court of Appeals affirmed the lower court decision finding that Plaintiffs had not identified the requisite "final agency action" that would steer the matter onward towards judicial review under the APA.[56] In failing to find a final agency action, the Court did not reach the standing issue.[57]

Pursuant to section 10(c) of the APA, only final agency actions are ripe for purposes of judicial review.[58] Judicial review under the APA was Plaintiff's sole remedy because as noted above, NEPA does not provide a private cause of action.[59] For purposes of APA review, Defendant OTR's refusal to prepare an EIS was not a final agency action.[60]

48. Public Citizen v. Office of the United States Trade Representative, 782 F.Supp. 139, 143 (D.D.C. 1992).

49. *Id.*

50. Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916 (D.C. Cir. 1992).

51. *Id.* at 918.

52. *Id.*

53. *Id.*

54. L. Wenner, *The Courts and Environmental Policy, in* Environmental Politics and Policy, 256 (J. Lester, ed., 1989).

55. The fast-track procedures allowed Congress only 60 legislative days to approve or reject NAFTA. In addition, legislative debate was limited to 20 hours in each House after which time Congress is not allowed to alter the legislation. 19 U.S.C. § 2191 (1988).

56. Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916 (D.C. Cir. 1992).

57. *Id.*

58. 5 U.S.C. § 704 (1989).

59. 42 U.S.C. § 4332(C) (1988).

60. *Id.*

For purposes of requiring OTR to file an EIS, the Court of Appeals held NAFTA was not in final agreement form, therefore, an EIS was deemed premature and presumptuous.[61] In response, Plaintiffs argued that an EIS would be helpful in identifying and assessing the environmental effects of NAFTA during negotiations so that possible adverse effects could be anticipated, identified, addressed and perhaps avoided.[62] The underlying policy of such an approach, while progressive and duly appropriate, is not yet well grounded.

Environmental law does not yet have the legal means, garnered and supported by precedent, to justify bold, anticipatory directives. The Court of Appeals in *Public Citizen I*, therefore, reasoned "[b]ut the Supreme Court has clearly stated that judicial intervention is not proper just because the time to start work preparing an EIS has arrived."[63] The arrivals and departures of economic and political imperatives are much more defined and clear than are their environmental counterparts.

Judicial intervention is warranted "when the report or recommendation on the proposal is made . . . ."[64] The Court of Appeals wrote that the "[P]laintiffs must first point to a specific proposal for legislation or other action at least arguably triggering the agency's obligation to prepare an impact statement."[65]

PUBLIC CITIZEN II

NAFTA was signed on December 17, 1992. Public Citizen again filed suit.[66] Final agency action was predicated on the finalization and signing of the NAFTA and was deemed to have been met.[67] By the summer of 1993, Public Citizen had standing, and the District Court had jurisdiction under the APA.[68]

Defendant OTR claimed that the APA did not apply, that Plaintiff Public Citizen had once again failed to establish standing, and that NEPA did not apply to NAFTA.[69] The District Court nodded affirmatively in regard to applicability and standing and further held that NEPA did indeed apply and to the extent that an EIS was required.[70] In reach-

61. *Id.*
62. *Id.*
63. Public Citizen v. Office of the United States Trade Representative, 970 F.2d 916, 918 (D.C. Cir. 1992).
64. *Id.*
65. *Id.* at 918.
66. Public Citizen v. Office of the United States Trade Representative, 822 F.Supp. 21 (D.D.C. 1993).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 22.

ing its decision, the Court looked to NEPA's implementing regulations. Pursuant to the language of the regulations, legislation that was intended to fall within the scope of NEPA

> includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency . . . ." The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source . . . . Proposals for legislation include requests for ratification of treaties.[71]

The CEQ's interpretation of NEPA is entitled to substantial deference.[72] Defendant OTR argued against this clear language and attempted to refocus the inquiry on final agency action. In addition, Defendants asserted that the dual functions of creating, drafting, proposing, submitting, and ultimately ratifying a treaty did not just involve an agency.[73] The President was inherently and fundamentally a part of the process.

The separation of powers doctrine precludes judicial review of presidential action. The Supreme Court recently held in *Franklin v. Massachusetts* that there is no jurisdiction under the APA when the Secretary of Commerce conducts a census and then submits findings to the President, who in turn reports and submits the results of the findings to Congress.[74] In *Franklin*, the Supreme Court held that the President took the final action in reporting the results.[75] Defendants argued that the President's submission of the census findings was the same as the submission of NAFTA to Congress.[76]

In *Public Citizen II*, the District Court believed Defendant OTR had misplaced the focus of the inquiry in its heavy reliance on final action. Quoting *Franklin*, the District Court stressed that "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."[77] The District Court held the decisionmaking process to be complete.[78] More importantly, the Court relied on the clear language of NEPA. "As the NEPA unambiguously requires an EIS on 'proposals for legislation,' 42 U.S.C. § 4332(2)(C), the Court concludes that an EIS on NAFTA is required."[79] Summary judgment was granted in favor of Public Citizen.[80]

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71. 40 C.F.R. § 1508.17 (1992).
72. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).
73. Public Citizen v. Office of the United States Trade Representative, 822 F. Supp. 21, 26 (D.D.C. 1993).
74. Franklin v. Massachusetts, 112 S.Ct. 2767 (1992).
75. Public Citizen v. Office of the United States Trade Representative, 822 F. Supp. 21, 25 (D.D.C. 1993).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 26.
80. *Id.*

OTR appealed the District Court's grant of Plaintiff Public Citizen's motion for summary judgment.[81] The issue before the D.C. Court of Appeals was whether Public Citizen had indeed identified a final agency action for purposes of APA review.[82] Defendant OTR successfully argued that there was no final agency action, and therefore, no obligation to file an EIS.

Case law on final agency actions is not particularly helpful. Actions are not final if they are either the rulings of a subordinate official or if they are tentative.[83] On the one hand, the clear statutory language of NEPA and its implementing regulations mandate an EIS once a legislative proposal is complete.[84] Pursuant to NEPA, an EIS must accompany a legislative proposal.[85] Submission of the proposal to Congress is not a requirement.[86] As such, it arguably should not preclude the filing of an EIS. Citing Frankling, Defendant OTR focused on whether their office, as an agency, had completed its decisionmaking process and whether the result of that process directly affected the parties.[87]Yet, the D.C. Court of Appeals followed defendant's OTR's lead as it continued to discuss whether the results of OTR's decisionmaking process were going to directly affect the parties, which did materially depend on whether NAFTA was submitted to Congress.

The President and not OTR was to submit NAFTA to Congress as required by the Trade Acts.[88] The OTR serves as the President's primary negotiator in trade related matters.[89] The Court held that the President was not required to submit NAFTA to Congress and predicated final action on such submission.[90] It is here that the loophole emerges because after submission to Congress, judicial review under the APA is precluded since submission of NAFTA to Congress was in the executive realm.

Defendant OTR emphasized the fundamental, decisive, and unique role that the President played in the NAFTA negotiating process.[91] Accordingly, his presidential action should be afforded deference, especially by the judiciary. In briefs, NAFTA was referred to as the "archetype of Presidential action."[92] Plaintiff Public Citizen, however, argued

81. Public Citizen v. Office of the Trade Representative, 5 F.3d 549, 550 (D.C. 1993).
82. *Id.*
83. Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967).
84. Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986).
85. 42 U.S.C. § 4332(2)(C); *see also* Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981).
86. *Id.*
87. Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993).
88. Omnibus Trade and Competitiveness Act of 1988, § 1103(a)(1)(B), 19 U.S.C.A. § 2903(a)(1)(B) (1993).
89. Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993).
90. *Id.*
91. *Id.*
92. Brief for Appellee at 5, Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549 (1993) (No. 93-5212).

that because *Franklin* involved Presidential action in which the President retained his power of amendment, which is not permissible under the fast-track process that moved NAFTA forward, *Franklin* could be distinguished from usual types of Presidential action.[93] Application of *Franklin* in this case, Plaintiffs argued, would effectively nullify the EIS requirement of NEPA because there are often other steps to be taken before final agency action.[94] The Court disagreed that *Franklin's* stringent direct effect requirement represented the "death knell" of the legislative EIS.[95] The D.C. Court of Appeals relied on the separation of powers doctrine to effectively sidestep issues of a precise definition of final agency action.[96]

ANALYSIS

The *Public Citizen* dispute was fundamentally about environmental and economic prerogatives, and perhaps because economics is more amenable to legal inquiries than are the more nebulous environmental values, the path was cleared for the economic prerogatives of free trade.

The underlying inquiry in the *Public Citizen* series was who is responsible. NEPA's implementing regulations assign collective responsibility: "The President, the federal agencies, and the courts share responsibility for the enforcing of the Act."[97]

In the final appeal, the D.C. Court of Appeals relied on the integrity of the process and the President's role in maintaining such integrity reasoning that

> the requirement that the President, and not the OTR, initiate trade negotiations and submit trade agreements and their implementing legislation to Congress indicates that Congress deemed the President's involvement essential to the integrity of international trade relations. When the President's role is not essential to the integrity of the process, however, APA review of otherwise final agency actions may well be available.[98]

This language suggests the existence of final agency action. It also affords the President broad powers, the final scope of which may have significant ramifications. Given the new regionalism and NAFTA, there are fewer and fewer areas that do not involve the integrity of international trade relations.

93. *Id.* at 9.

94. Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549, 552 (D.C. Cir. 1993).

95. *Id.*

96. *Id.*

97. 40 C.F.R. § 1500.1 (1993)

98. Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993).

Congress long ago realized that agencies tended to overlook environmental values in their decision making processes. NEPA was passed to address the problem. Structurally, NEPA has two prongs: internal oversight and external oversight. The internal oversight consists of agency written environmental impact statements for government projects. Congress hoped such a requirement would force, and hopefully foster, the incorporation of environmental values into agency decisionmaking processes. External oversight consists of public notice and comment about projects under consideration. The courts enter into the external oversight process as the result of citizen suits. However, the courts are restrained by separation of powers considerations. At the heart of all environmental law disputes is how much judicial oversight should attach to the discretion afforded administrative decisions.[99] The protection of environmental values is thus challenged and impeded on two fronts: a consumptive market tradition currently manifested in an export model of growth and the structural constraints of a political system committed to separation of powers. The *Public Citizen* series suggests questions about what role the judicial branch should play in preserving a system of checks and balances to prevent over concentrations of power.

The integrity of an historically structured separation of powers system was called into play. The *Public Citizen* series could have been analyzed and decided under the growing body of environmental law or under a more traditional, politically safer, constitutional route. The D.C. Court of Appeals would have created an upset, perhaps minor, but significant just the same, in the separation of powers scheme if they had chosen to analyze the *Public Citizen* series under the legislative mandate of NEPA.

The Court's analysis can be likened to a containment strategy. The judiciary exhibited deference to precedent and the political processes. If the D.C. Court of Appeals had affirmed the lower court decision, it would have provided a major opening for environmental case law and perhaps an accurate echo of public opinion. The environmental movement would have succeeded in bringing about policy changes, which suggests some of the contemporary criticisms involving the current state of separation of powers. According to some, separation of powers can be strict and burdensome.

> Part of the attack is based on the perceived inefficiency of the system. The concern is that in light of the existence of powerful checks, it is difficult for the federal government to accomplish anything. Instead it is reduced to a series of stale-

99. *L. Wenner, The Courts and Environmental Policy,* in Environmental Politics and Policy, 256 (J. Lester, ed., 1989).

mates. Sometimes this critique is attached to a belief that the separation of powers interferes with democratic processes by preventing popular majorities from bringing about change. This belief in turn raises the question whether insulation from dramatic change is a good or bad thing.[100]

The appellate decision in *Public Citizen II* preserved a carefully maintained balance. The result reflects widely held interpretations of constitutional law.

> The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-a-vis one another; rather, the ultimate constitutional issues [should] be held nonjusticiable, their final resolution to be remitted to the interplay of the national political process. [The] important message [to] be gleaned from [the] founders' thinking is that the checks and balances on legislative autocracy that they contemplated exist independently of judicial supervision of the constitutionally mandated separation of powers between the President and Congress. . . .[101]

NEPA, however, mandates collective responsibility which need not be held to either implicate or violate separation of powers. Separation of powers only becomes an issue if "final agency action" is broadly construed to include a presidential action so that it can be said that it is the president's action and not the agency's action that will directly affect the plaintiffs. This construction of "final agency action" is misplaced. Such an interpretation wholly frustrates NEPA and derails legitimate claims. By accepting the "clear applicability of the *Franklin* precedent,"[102] the D.C. Court of Appeals may have exercised the equitable discretion afforded the judicial branch in § 702 of the APA, but such discretion should not confer absolute waivers of responsibility. The Court abdicated its responsibility when it noted that "whatever the ultimate result, however, NAFTA's fate now rests in the hands of the political branches. The judiciary has no role to play."[103]

In addition, the President has broad powers in respect to foreign policy and a unique leadership role in the foreign affairs arena. It was long ago noted that if the "maintenance of our international relations, [sic] and success or our aims is to be achieved, congressional legislation [must] often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were

100. G. Stone, et al. Constitutional Law, Second Ed. 365 (1991).

101. J. Choper. Judicial Review and the National Political Process, 263, 269, 275 (1982) (quoted in G. Stone, et al. Constitutional Law, 365 (1991)).

102. Public Citizen v. Office of the United StatesTrade Representative, 5 F.2d 549, 553 (D.C. Cir. 1993).

103. *Id.*

domestic affairs alone involved."[104] But the President's discretion is not absolute. In *Public Citizen II*, the District Court wrote, "In arguing that the EIS requirement will impede the President's power to conduct foreign policy, the Defendant conveniently ignores the fact that power to regulate commerce with foreign nations is given to the Congress under the Constitution."[105]

Our public policy is to protect our national environment "to the fullest extent possible."[106] To comply with legislation to the fullest extent possible is a clear mandate to the courts.[107]

> We must stress that this language does not provide an escape hatch for foot dragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not intend the Act to be a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.[108]

As trustee of NEPA, the judiciary has strained and undermined its efficacy.[109] The courts' focus on final agency action and separation of powers violations is misplaced. NEPA was intended to be used in the planning stages of major federal endeavors as an environmental assessment tool.

If the protection of the environment has indeed become an important value, it has justified the need for an agenda that is judicially enforced and upheld. The separation of powers doctrine is beautiful until this country's bona fide environmental values and concerns fall between the masterfully crafted and vigorously maintained divisions. Public Citizen's claim was not lost on the merits but rather on misplaced reliance on separation of powers considerations and the ambiguity the courts have created in interpretations of final agency actions as they apply to NEPA.

Underlying the ambiguity is the real difficulty of reconciling economics and environmental values in general and an export model

104. United States v. Curtiss-Wright Corporation, 299 U.S. 304 (1936).

105. Public Citizen v. Office of the United States Trade Representative, 822 F. Supp. 21, 26 (D.D.C. 1993); see also U.S. Const. art. 1, § 8, cl.3.

106. 42 U.S.C.A. § 4332 (1988).

107. "The phrase 'to the fullest extent possible' in Section 102 means that each agency shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6 (1993).

108. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

109. "NEPA is a value judgment by Congress that in order to 'foster and promote the general welfare,' each generation of Americans must, beginning now, act as trustee for succeeding generations." Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1326 (D.C. Cir. 1972).

of growth and its environmental consequences in particular. Students and commentators expounding on Supreme Court decisions tend to group them categorically for organization and ease of understanding.[110] Thus, liberal and conservative camps are pinpointed and plotted. Within this division, subgroups concerning civil liberties and economics are both apparent and acknowledged.[111] In addition, civil liberties are often broken down into individual freedoms and equality.[112] Economic regulation, however, has not really been broken down.[113] It is a crucial gap because it is at this decisive juncture that the Supreme Court's environmental cases like the *Public Citizen* series fall.[114] Such cases will continue to serve as the interpretive yardstick for judicial enforcement across the country. In theory, they are in tune with political history and legal precedent, however, in reality, they increasingly do not ring true to America's newly engaged values of environmental protection and quality.

Case law interpreting and applying NEPA started out strong. As D.C. Circuit Judge J. Skelly Wright wrote in 1971,

> NEPA attest[s] to the commitment of the Government to control, at long last, the destructive engine of material 'progress'. But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role . . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.[115]

The new regionalism that prompted NAFTA imposes procedural, jurisdictional, and political constraints. The United States and Mexico, for example, are vastly different on virtually every level. They are fundamentally grounded on different premises. The guiding Constitutions are a potential barrier to reconciling the right to a clean environment with corresponding rights of development and free trade as the U.S. Constitution has a private property focus whereas the Mexican Constitution's focus lies with the social sector.[116]

If the newly formed Border Environment Cooperation Commission and its funding agency, the North American Development Bank are to be effective in reconciling the conflicts of increased trade and environmental protection, then we must also draft a new national envi-

110. L. Wenner, *The Courts and Environmental Policy*, in Environmental Politics and Policy, 238 (J. Lester, ed., 1989).

111. *Id.* at 239.

112. *Id.*

113. *Id.*

114. *Id.*

115. Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

116. Conference Proceedings, *AmerEcology: The Environmental Consequences of Development for the Americas*, Latin American Inst., U. N.M. (Apr. 24-25 1992).

ronmental policy that reflects both the new regionalism and a renewed commitment to enforcement of our environmental values.

CONCLUSION

The environmental movement faces a formidable task in securing the goals of protection and sustainability in the midst of the export model of growth. The task of creating new contexts for the coexistence of environmental protections and economic development newly disguised as free trade is indeed difficult and complex. The virtues of one are often viewed as weapons to be used against the other. In the end, sustainable economic growth is fundamentally about creating and securing options, which is something judges and dispute settlement officials can do, and increased options will facilitiate the necessary transitions.

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