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U.S. Trade Regulations

Cast an Eye to the Environment

Can free trade and environmental protection coexist in a global economy? If you were a protester in the streets of Seattle, Washington, during the November 1999 meeting of the World Trade Organization, you would probably answer no. But if you were the President of the United States, you might opt for a broader view and suggest that they could. If pressed for answers on how to achieve this coexistence, you might turn to two agencies with a great deal of expertise on the issues—the Office of the U.S. Trade Representative (USTR) and the White House Council on Environmental Quality (CEQ)—and let them negotiate with the stakeholders on how to work environmental concerns in to U.S. trade proposals. Once the smoke cleared, you would have a set of guidelines for environmentally friendly commerce.

This scenario describes the events of the last 13 months. On 16 November 1999, just weeks before the violence in Seattle put the issue on the evening news,

President Clinton issued Executive Order 13141, Environmental Review of Trade Agreements, and directed the USTR and the CEQ to develop guidelines for its implementation. John Audley, the trade policy coordinator at the U.S. Environmental Protection Agency, says the Clinton administration believed the time was right for a formal process for addressing environmental issues during trade negotiations. “We had been working on developing a policy since the year before,” he explains, “and the idea had matured to the point that we were ready to do it.”

According to Audley, the administration’s seat-of-the-pants experience performing environmental reviews during the North American Free Trade Agreement in 1992–1993, the General Agreement on Tariffs and Trade in 1994, and an initiative for accelerated tariff liberalization in the forest products sector in 1999 highlighted a need for a formal, structured approach to assessing environmental risks from trade. The environmental review stipulated by the

executive order is designed to accomplish that goal: specifically, to inform negotiators about the environmental implications of reducing barriers to trade.

You Can’t Please Everyone

On 11 July 2000, the USTR and the CEQ unveiled a set of proposed guidelines for implementing Executive Order 13141. Agency officials predict the finalized guidelines, which were still undergoing public comment as of November 2000, will be published in the *Federal Register* by the end of the year.

Stakeholders speaking off the record concede it would have been impossible to devise guidelines that please everyone. And as expected, the proposed guidelines have been sharply criticized by industry, agricultural organizations, and environmental nongovernmental organizations (NGOs) alike. Industry and agricultural organizations believe that the guidelines impose an inappropriate and excessive burden of proving no environmental harm, while NGOs

insist the guidelines don't provide a clear mechanism for public involvement in the review process.

The challenge to the USTR and the CEQ has been to accommodate a plethora of sharply diverging views regarding an appropriate role for environmental concerns in the trade negotiating process. Says one senior official with the USTR who did not want to be identified, "The comments are all over the place. Some of them totally counterbalance each other. Many of the views expressed are diametrically opposed."

Officials at the USTR and the CEQ maintain that the guidelines were developed through consultation with relevant federal and independent entities, and that public comments are being carefully considered. While unwilling to discuss planned changes between the draft and final versions, Jennifer A. Haverkamp, assistant administrator for environment and natural resources at the USTR, says that that agency was "discussing the comments with the participating agencies, and that changes would be made available to the public when the final guidelines are published in the *Federal Register*." Meanwhile, the guidelines have already been factored in to the recently completed free trade agreement between the United States and Jordan. It is anticipated they will arise again during negotiations for the Free Trade Area of the Americas, a hemispheric free trade zone extending from Canada through South America due for completion in 2005.

The Nuts and Bolts

According to the draft guidelines, the overarching goal of an environmental review is to ensure that environmental concerns are factored in to U.S. positions in trade negotiations. Consistent with Executive Order 13141, these reviews apply to three types of agreements: comprehensive multilateral trade rounds (negotiations in which all economic sectors are on the table), bilateral or plurilateral free trade agreements (trade agreements between two or more countries that aim to reduce trade tariffs in all sectors to zero), and major new trade liberalization initiatives in natural resource sectors (negotiations to liberalize trade for specific sectors such as forestry or fisheries). Other types of agreements may also come up for review on a case-by-case basis.

The executive order states that environmental reviews should generally be limited to potential impacts within the United States. Furthermore, it stipulates that the

review process should solicit public comment early in the process, and that reviews should be made available to the public in draft form where practicable.

The guidelines that the USTR and the CEQ have produced are, for the most part, consistent with these mandates. Developed through an interagency process with representatives from relevant foreign policy, environmental, and economic agencies participating in their preparation, the guidelines place responsibility for performing environmental reviews in the hands of the USTR through an interagency Trade Policy

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American Farm Bureau
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Staff Committee. This committee is made up of senior-level civil servants, and its work is performed by a network of staff-level subcommittees.

The review begins with what the guidelines call "scoping." Through the scoping process, the significant issues are identified and then prioritized, with the aim of effectively targeting government resources. Scoping should draw on the expertise of both relevant agencies and the public, the latter being alerted through a *Federal Register* notice of initiation. According to the guidelines, the scoping process should consider three types of information: the objectives of the trade agreement, a range of alternative methods for achieving these objectives, and any reasonably foreseeable positive and negative environmental impacts. Although the emphasis is on impacts within the United States, the guidelines also direct that global

and transboundary issues be considered when "necessary and prudent."

Public participation is described as an essential component of the review process, and procedures for including such participation should be "flexible, not excessively burdensome, and responsive to the needs for expedited action and confidentiality." Public participation is invited at several points before and during the scoping process and then during the comment period for the published draft.

Review conclusions are reached using an evolving science the guidelines call environmental impact modeling. This kind of modeling depends on multiple streams of information, including documented experience and objective data, as well as scientific assumptions, while taking into account uncertainty in the

data and methodologies used to obtain it. Some critics fault the modeling process for not relying exclusively on peer-reviewed data.

But these critics also acknowledge that peer-reviewed data for environmental effects can be hard to obtain, particularly in developing countries.

The guidelines identify two types of impacts to be considered. The first are regulatory environmental impacts, for example, impacts on the ability to enforce laws for protecting health, safety, and natural resources. Second are economically driven impacts, which are economic changes resulting from the trade agreement that may spawn environmental harm or benefit. For example, tariff elimination for an industrial commodity with toxic by-products could result in increased production of that commodity, with commensurate increases in hazardous waste.

If and when potential impacts are identified, the guidelines direct reviewers to analyze options to mitigate them and to "create and enhance positive impacts." The guidelines recommend that mitigation may include changes in negotiating positions or changes to relevant U.S. environmental laws.

Conflicting Points of View

According to Timothy Deal, senior vice president of the U.S. Council for International Business, a private-sector trade organization based in Washington, D.C., the directive to explore mitigating options is but one example of how the guidelines extend the environmental review's reach beyond the intent of the executive order. Deal claims that data requirements in the

draft review process could set the bar so high as to be a potential barrier to furthering trade liberalization—a suggestion dismissed by USTR officials.

Deal's organization is one of the few industry members of the Trade and Environment Policy Advisory Committee, a nongovernmental group that advises the USTR regularly and provided comments on the draft guidelines. "We question whether the people conducting the environmental reviews should have the authority to recommend changes," he says. "The role of the environmental review is to conduct impact analysis and not second-guess the officials with responsibility for the negotiating process."

Audrae Erickson, director of government relations in international trade policy at the American Farm Bureau Federation, a Washington, D.C.-based trade organization, agrees. "The executive order called for an environmental review of trade agreements," she says. "But if those reviews recommend policy changes, or if as a result of the review the trade agreement becomes a catalyst for changing environmental laws, then that's going too far."

Haverkamp disputes the notion that the language on mitigating options goes beyond the executive order, and counters that the purpose of the review is to provide information that helps policy makers decide how to factor environmental concerns in to the trade negotiating position. "I don't see how information generated by an environmental review is different from any other source of information that highlights a problem and inspires policy makers to respond," she says. In addition, she adds, proposed changes to an environmental law resulting from the trade agreement would still have to go through the full legislative process.

The guidelines have also been criticized for a lack of clarity as to when in the process the environmental review should be conducted (industry favors doing the review after the terms of the negotiation have been established, whereas the NGOs favor initiating the review at the outset of the negotiations). NGOs in particular resent what they see as closed-door negotiations with only limited opportunities for public involvement. In this last case, the challenge to the USTR is to maintain sufficient public involvement in the process while protecting the need for a certain measure of secrecy when dealing with sensitive economic issues during the negotiations.

But one of the greatest areas of disagreement concerns the manner in which the guidelines deal with transboundary and global effects. On this issue, industry and the NGOs are at opposite ends of the spectrum. David Waskow, trade policy coordinator for Friends of the Earth, an environmental NGO represented on the Trade and Environment Policy Advisory Committee, says the guidelines don't deal effectively with the issue and aren't sufficiently clear about when and how transboundary and global effects should be considered. According to Waskow, most

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environmental impacts have global repercussions—for example, he says, industrial discharges in China affect air quality in the United States—and the guidelines should therefore have a clear policy for evaluating them.

But both the U.S. Council for International Business and the American Farm Bureau Federation disagree that the emphasis on global effects should be increased. Rather, they feel that the intent of the executive order is to evaluate domestic effects primarily and global effects on a strictly limited basis. As it is, they say, the emphasis on global effects in the guidelines is too strong. "There are lots of sectoral [business] deals which have limited or no environmental impacts," says Deal. "These guidelines reinterpret the language in the executive order in a way that appears to leave open the possibility for reviews at almost every instance."

These differences can be attributed to a basic philosophic difference over the role of the United States in foreign environmental policy. Waskow suggests that the experience and resources of the United States should be used to perform environmental reviews even within the other countries with which trade is being negotiated if an effect is potentially global or transboundary in nature. Erickson counters, "We shouldn't impose our views on appropriate environmental practices and begin making choices for other countries, because we wouldn't want the same done to us. Other countries will resist this; they want the autonomy to make their own decisions."

Haverkamp says that the executive order mandates that global and transboundary effects be considered when it is appropriate and prudent to do so. Consistent with that directive, the guidelines make provisions for evaluating such effects in the scoping process. Specifically, the guidelines recommend basing the decision to examine transboundary and global effects on the magnitude of the impact, on the implications for U.S. international commitments and programs for international cooperation, and on data and resource availability. Alluding to progress made toward finalizing the guidelines, Audley concludes, "We responded to public comments pertaining to transboundary and global impacts. As a result of public input on the draft, we have a much improved set of final guidelines."

Ultimately, with a new administration, the United States is heading into uncertain political waters. Whereas an executive order is a powerful legal instrument, it doesn't carry the rule of law—and it can be revoked at will by future presidents, although doing so can be politically risky.

As of late autumn, bipartisan support for the executive order was described by numerous stakeholders as shaky at best. Charles Lenchner, director of Friends of the Earth Middle East in Washington, D.C., says, "We're impressed by what the USTR is doing to handle environmental concerns. The biggest barrier to the guidelines is congressional opposition. We've heard through the grapevine that some officials don't want the language of the guidelines to be addressed with the [U.S.–Jordanian] free trade agreement." He concludes, "At this point, the goal is to simply retain the language that's now in the guidelines, even if you want it to be stronger."

Charles W. Schmidt