American Lands Alliance ● Center for International Environmental Law ● Consumer's Choice Council ● Defenders of Wildlife ● Earthjustice Legal Defense Fund ● Friends of the Earth ● Institute for Agriculture and Trade Policy ● National Wildlife Federation ● Pacific Environment and Resources Center ● Sierra Club ● World Wildlife Fund (WWF-US)

COMMENTS ON GUIDELINES FOR IMPLEMENTATION OF EXECUTIVE ORDER 13141 ("ENVIRONMENTAL REVIEW OF PROPOSED TRADE AGREEMENTS")

Overview

These comments are made in response to the request from the Office of the United States Trade Representative (USTR) and the Council on Environmental Quality (CEQ) for public comment on issues relevant to the implementation of the November 16, 1999 Executive Order on the environmental review of trade agreements (EO 13141).

Effective implementation of the EO is a critically important test of the Clinton-Gore Administration's ability and commitment to "put a human face" on trade. Thorough consideration of the environmental implications of trade policy is critical for achieving healthy and balanced international markets. In recent years, however, US trade policy seems to be principally driven by the lobbying efforts of multinational corporations in combination with a steady tendency by key policymakers to view trade liberalization as an end in itself. Thus, other values and policy goals that might be served or affected by trade policy have been marginalized or excluded altogether from the policymaking process, either because they are considered threats to trade liberalization, or because they are simply not considered at all.

Trade liberalization is an instrument intended to produce benefits to society as a whole. Crafting policies to meet this goal must involve consideration of the full range of values important to American citizens, such as the environment, quality of work conditions, health, and so on. In other words, environmental protection and sustainable development are essential elements at the starting point, not side issues to be added late in the process. The denial of this reality is largely to blame for the public dissatisfaction that contributed so heavily to the successive defeats of this Administration's trade policy efforts, culminating in the dramatic failure in Seattle.

Remedying the problem in a credible way will require significant changes in the structure of the U.S. trade policy-making process. The stated objective of EO 13141 is to accomplish this. In his public remarks at the announcement of the Order, Vice President Gore promised that the EO will "revolutionize the way the environment is dealt with in all future trade talks."[1] The President's statement on the same day noted that EO 13141 is meant "to fully integrate environmental considerations into the development of U.S. positions in trade negotiations."[2]

[1] As quoted in the *Washington Post* ("U.S. to Give Trade Pacts Eco-Review", November 17, 1999, p. E1)
[2] Statement by the President, November 16, 1999 (available at http://www.whitehouse.gov).

But past practice suggests that reaching these goals will not be easy. To make a real difference, EO 13141 will require broad interpretation and vigorous application—in short, the political will to make good on the clear and now frequently repeated promises of the President and the Vice President. The following specific suggestions, we think, help point the way forward.

1. Implementation of EO 13141 should be guided by the EO's objective of fully integrating environmental considerations into trade policy decision-making and outcomes.

Section 1 of the EO commits the US government to a policy of "careful assessment and consideration of the environmental impacts of trade agreements." Pursuant to this policy, the government will "factor environmental considerations into the development of its trade negotiating objectives." The mechanism for achieving these goals will be "a process of ongoing assessment and evaluation" of environmental implications of trade negotiations. As part of this mechanism, some trade negotiations will include the preparation of "written environmental reviews."

As this language makes clear, the overarching purpose of the EO is to integrate environmental concerns into policy-making, and to ensure that environmental considerations are taken into account in the negotiating process, and in the contents of resulting agreements (including any non-trade measures needed to address environmental implications of those agreements). Our organizations will judge the Administration's success in implementing the EO by the extent to which it results in real changes in US negotiating positions, the final text of trade agreements, and other US policies or programs advanced simultaneously with the negotiation of trade agreements. Achieving this overarching objective should guide the development of each provision of the guidelines the Administration is preparing.

By the same token, the production of high quality written reviews is clearly important, but as a means to an end, not an end in itself. The relevance of the EO to a negotiation does not come to an end with the publication of a written environmental review.

2. Implementation of EO 13141 should be guided—but not limited—by the experience developed with implementation of the National Environmental Policy Act (NEPA).

The federal government's experience developed in thirty years of implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, 4331-4347, should serve as one reference point for implementing EO 13141. Indeed, it remains an unresolved legal issue whether NEPA applies to trade agreements.[3] Several of the groups joining in these comments have argued strenuously that it does.

Regardless of the merits of the legal debate over NEPA's application, many elements of NEPA should guide implementation of EO 13141. For instance, NEPA can serve as a guide in terms of its procedural guarantees and requirement that alternatives (including no action) be evaluated. Lessons of this experience are embodied in the regulations promulgated by CEQ, 40

[3] The one court that reached a decision on the merits found that NEPA is applicable to trade agreements, however that decision was reversed on other grounds. *Public Citizen v. Office of the United States Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd on other grounds*, 5 F.3d 549 (D.C. Cir. 1993). By suggesting that NEPA be looked to for guidance in elaborating the EO process, we do not mean to suggest that we believe NEPA inapplicable.

CFR Parts 1500-1508. Note should also be taken of the aspirations of the Act to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." *Id.* at § 4332(2)(A).

It should be noted, however, that in the context of trade negotiations, implementation of EO 13141 calls for a process that examines the formulation of policy objectives at an earlier phase, and in a more fundamental and iterative manner, than commonly holds for routine applications of NEPA. Thus, while NEPA should serve as a guide to implementation of EO 13141, it should not be viewed as limiting the Order or its application.

3. Successive stages of environmental assessment and review should be triggered at each significant step in negotiations.

The governmental process of considering environmental implications must begin simultaneously with the decision to consider launching negotiations. The exact number and timing of key stages will depend on the twists and turns of each negotiation, but typically will include the following:

a. Contemplation of possible negotiation
b. Declaration of intent to launch negotiation
c. International agreement on elements of proposed agreement
d. Development of positions on specific issues
e. Development of draft (bracketed) text
f. International agreement on text and presentation of agreement to Congress
g. Ongoing review during implementation.

Each stage must involve consideration of environmental implications, but the level of analysis and the process involved may vary. In all cases, however, conducting effective environmental assessment will require an examination of the baseline conditions–what are the environmental effects of or conditions associated with current policies and market behaviors. In the following discussion, we seek to identify likely triggers for various levels of review. Flexibility will be important, as the need to intensify—or diminish—environmental evaluation through a written review or other means may be triggered at almost any stage of negotiations if negotiating objectives change significantly.

To simplify matters, most of the elements of public participation are detailed in this Part, in the context of the negotiating stage in which they occur. General principles and rationales for public participation are discussed in Part 4.

a. Contemplation of possible negotiation

At this stage, the government typically engages in a discussion of the pros and cons of a possible negotiation through the Trade Policy Staff Committee (TPSC), and by reaching out to relevant Congressional committees as well as the public through the advisory committees, informal hearings, and in some cases public hearings and Federal Register notices. Internally, the TPSC's trade and environment subcommittee should be convened to consider whether there are environmental implications.

Externally, for agreements clearly necessitating an environmental review under section 4(a) of the EO, this stage should involve a Federal Register notice, a section of which offers the framework of considerations and issues defined in Part 4 below as a (non-exclusive) basis around which the public can structure its input. Such an announcement at the outset should help establish the common ground of language and categories needed to increase the substantive quality of the debate on trade and environment.

For an agreement possibly, but not clearly, requiring environmental reviews under Section 4(c) of the EO, the government should publish a notice—again including the framework for analysis discussed in Part 4 of these comments—in the Federal Register and consult with relevant advisory committees as the TPSC evaluates whether to conduct a review. The public input received can be useful whether or not an agreement necessitates a written review, since the need for "ongoing assessment and evaluation" extends beyond cases in which written reviews are prepared, as reflected in the language of Section 1 of the EO. The TPSC may make a preliminary determination whether an environmental review is required at this point, or may decide to seek public comment at the next stage, assuming the government decides to go forward with negotiations.

In either case, the starting point for analysis ought to be an examination of the current environmental status of commerce in relevant sectors, and of the environmental dimensions of existing regulatory and institutional arrangements. The goal is to move beyond the past practice of starting with pre-set trade policy proposals as the starting point for environmental analyses. By beginning with an inquiry into the *status quo*, existing environmentally relevant market and policy failures can be identified. Trade policies—along with companion environmental policies—can then be developed in part with the objective of correcting these failures. (This approach is not, of course, meant to suggest that specific trade policy proposals should be exempt from environmental review.)

b. Declaration of intent to launch negotiation

This stage is typically accompanied by the publication of a Federal Register notice. If the agreement is one covered by section 4(a) of the EO, the notice should outline proposed terms of reference for an environmental review reflecting the framework discussed on Part 4 of these comments, as well as a summary of the TPSC's evaluation to date of the environmental implications of the proposed agreement. The notice should also include a proposed schedule for public comment. In effect, this constitutes the "scoping" stage of environmental assessment.[4]

For agreements falling under Section 4(c), the notice should seek comments on whether an environmental review is appropriate. The notice should contain a framework for analysis combined with the TPSC's preliminary determination as to whether a review is needed, if it has made one, and any other relevant considerations or findings of the TPSC. To strengthen the EO's commitment to a qualitative change in the policy making process, the presumption should be in favor of an environmental review. Any determination <u>not</u> to do a review should be based on interagency consensus.

[4] As discussed in current CEQ regulations, scoping involves a determination of the "scope of issues to be addressed" and an identification of "the significant issues" relating to the proposed action, as well as those to be excluded as irrelevant. *See* 40 C.F.R.§ 1501.7.

c. International agreement on elements of proposed agreement

For agreements under section 4(a), the routine practice should be to publish preliminary results of the environmental review for public comment. A notice of the publication should be placed in the Federal Register, and relevant documentation made available on the web sites of USTR and CEQ. The publication should outline and explain the basis for any preliminary findings on the environmental dimensions of the proposed agreement, including how the agreement helps address environmentally-relevant market or policy failures, and whether any terms of the agreement are associated with potentially negative environmental impacts (and, if so, the recommendations for responding to them). It should explain the governments' reasoning in accepting or rejecting public comments received so far. It should also outline a proposed schedule for further ongoing consideration of environmental issues. Additionally, it should outline the ways in which environmental considerations have been factored into the government's negotiating objectives to date. In essence, this stage sets the policy benchmarks against which successive versions of the proposed agreement will be measured.

For agreements under 4(c), a notice should be published of the TPSC's determination whether a review is necessary. The notice should explain the basis for the decision and the government's response to public comments received. If the decision is to conduct a review, it should outline a framework for analysis, proposed methodologies, and a proposed schedule for producing results and receiving public comment.

d. Development of government positions on specific issues

Where a review is being conducted, it will typically be useful at this stage to repeat some version of the procedure outlined in sub-section (c) above, involving the preparation and release of a more advanced draft of the review. For all agreements involving environmental reviews, the announcement should explain how the government's position on each element of the negotiations takes into account environmental considerations raised in earlier review drafts. If no earlier decision to conduct a written review has been taken, the announcement should explain the state of the government's thinking on whether a review is necessary, and should discuss any environmental factors considered at this stage. At this stage and in later stages, changes in the government's position could conceivably trigger a change in the level of environmental review, including a decision at this stage to initiate the written review process.

e. Development of draft (bracketed) text

If the government's position changes substantially from its position in sub-section (d), it will be necessary to publish a revision or supplementary review—or initiate a review—that considers changes in possible environmental implications, and changes in complementary measures taken to deal with those impacts. The details of proposed language can frequently affect the nature of environmental implications. Typically, there should be a Federal Register notice seeking comment on the proposed text with the text made readily available through mechanisms such as the web.

Where legitimate government secrecy strictly requires that negotiating texts be kept from public view, the environmental implications of varying negotiating options should be discussed in a detailed and timely manner with relevant advisory committees, including ACTPN and TEPAC. The fact that such discussions are taking place should be disclosed to the public, with as much detail as can be reasonably supplied. (In addition, we believe the intent of EO 13141

requires—at every stage, but particularly where the public is excluded—substantially strengthening the interagency deliberations on trade-related environmental issues.)

f. International agreement on text and presentation of agreement to Congress

The final version of a review should be released during this stage and should include consideration of any necessary implementing legislation. In this manner, the review can be considered by Congress during its deliberations on whether to approve the agreement. The text of the agreement should be published, consistent with principles of democratic lawmaking involving accountability to voters which militate against secret legislative deliberations.

g. Ongoing review during implementation.

Only by an ongoing process of assessing and reviewing the environmental dimensions of agreements as they are implemented can the EO achieve its ultimate goal of ensuring that trade policy serves to advance the goal of sustainable development. Moreover, such ongoing assessment and review of current policies and agreements is critical to the conduct of future trade policies, particularly where current policies and agreements are having unintended negative impacts on the environment.

4. The process should seek to maximize public participation in each step of the process.

Openness is critical for improving the information base on which the government makes trade policy as well as public understanding of the real implications of that policy. An open process with repeated back and forth between government and the various interested constituencies is essential for building a sensible, balanced trade policy in the context of a global economy. The linkages between trade and environment are complex and not yet fully understood. An open process of assessing these linkages in specific cases will help to increase the substantive quality and balance of governmental negotiating positions and public debate on trade liberalization.

Openness is also essential to maintain a healthy democracy. In recent years trade policy has evolved to encompass a growing number of issues previously the exclusive province of national legislatures and regulatory agencies. Trade agreements have been brought to the legislature under fast track authority, which prevents the legislature from amending the agreement. As a result, key policy decisions have been made in international diplomatic negotiations—a context that has traditionally been secretive and closed—even as the public stakes in trade agreements has risen. While these tensions will remain to some degree unavoidable, the lessons of the past decade clearly teach that trade policy formulation has moved much too far from a functioning democratic model. EO 13141 should be implemented with strong emphasis on restoring a more durable model of public participation.

5. USTR and CEQ should outline an analytical framework to guide future environmental reviews.

Guidelines for the EO should include a framework of analysis for carrying out the ongoing environmental assessment and written reviews envisioned by the EO. Definition of a framework for analyzing environmental considerations will serve as useful reference points, clarifying the terms of debate and making both internal and external discussions more

productive. The framework will help direct public comments to key issues as well as establish terms of debate by which members of the TPSC can find common ground.

There have been a number of efforts to define principles for conducting environmental assessment of trade agreements, including initiatives involving the OECD, the EU, the Commission on Environmental Cooperation (CEC), and the World Wildlife Fund (WWF). The analytic approach developed under EO 13141 should draw on these efforts, while recognizing that they all tend to begin with a given trade policy proposal as their starting point. As suggested above, full implementation of EO 13141 will require an approach that gives more evenhanded consideration to environmental objectives at the outset of the policymaking process. Thus, existing methodologies should be viewed as useful principally for that portion of an assessment process that takes place once a set of trade policy objectives has been tentatively agreed. At such a point, drawing primarily on elements of OECD's discussions, as well as some elements of the EU methodology,[5] we believe that the following typology of impacts may be useful.

1. Identify the types of trade and investment measures being considered (e.g., reduction of environmentally damaging subsidies; imposing obligations on international investors; tariff reduction; or elimination of non-tariff measures).

2. Identify likely economic effects
    a. identify products, processes, sectors or regions that may be affected by the trade measures
    b. identify changes in type of goods and services, including environmentally superior products
    c. identify structural changes, i.e. expansion or contraction of a sector (potentially beneficial if trade liberalization enhances internalization of environmental costs, as could happen with removal of damaging subsidies; harmful if trade liberalization expands the market advantage of producers that externalize higher environmental costs)
    d. identify technology effects involving changes in the process of production, either positive or negative
    e. compare these changes to the projected baseline absent the proposed policy

3. Identify potential regulatory effects
    a. potential for rule clashes
    b. potential for downward pressure on standards[6]
    c. extent to which regulatory and institutional capacity is adequate to manage possible environmental effects

4. Identify reasonably foreseeable environmental effects (both direct and indirect due to potential economic and regulatory effects described above)
    a. review the "baseline", i.e. the status of the affected environment and projected trends absent the trade policy change
    b. discuss magnitude of effects
    c. discuss scope of effects (national, transboundary, global)

[5] These are summarized in WWF, *Background Material Prepared for the International Experts Meeting on Sustainability Assessments of Trade Liberalisation, 6-8 March 2000, Quito, Ecuador.*

[6] *See* World Trade Organization, *Special Studies: Trade and Environment*, p. 43, 46 (Geneva: WTO, 1999), which finds significant though inconclusive evidence that "race to the bottom" effects of trade liberalization are possible (available at http://www.wto.org/wto/environ/environment.pdf).

d. discuss extent to which areas or resources affected are already under environmental stress
e. consider the nature of the linkage between environmental and economic effects (i.e. do not assume a simple linear correlation)

5. Consider impacts of the trade agreement not in isolation but in the context of cumulative impacts of overall trade policy developments – both past and reasonably foreseeable future developments.[7] The USTR has negotiated nearly 300 trade agreements since 1993; given this level of activity consideration of the cumulative impacts is essential to guiding sound trade policy.

6. Consider Alternatives: The analytical framework for reviews must reflect the EO's objective of "factor[ing] environmental considerations into the development of [US] trade negotiating objectives" (section 1). It must also reflect the provision in section 2 that "[t]rade agreements should contribute to the broader goal of sustainable development." Consistent with this, section 2 provides that environmental reviews are important tools "to help facilitate consideration of appropriate responses to [potential environmental effects of trade agreements] whether in the course of negotiations, through other means, or both." Again, NEPA provides a useful reference point in this respect. The CEQ regulations state that the comparison of projected impacts to the impacts of alternatives is the "heart" of an EIS. The regulations specify that the government must consider policy alternatives and mitigating measures, including the no-action alternative. Considerations must include:
    a. an objective evaluation of all reasonable alternatives, including the no-action alternative.
    b. identification of the preferred alternative.
    c. identification of appropriate mitigation measures.

A distinctive feature of the EO is that unlike NEPA it envisions an interagency process of decision-making rather than an action by a single agency. Consistent with this, the EO makes clear that the range of possible alternatives may include measures that are within the mandate and jurisdiction of agencies other than USTR or CEQ. Only in this way can trade be combined with other governmental policies and programs to contribute to the broader goal of sustainable development as envisioned by section 2 of the EO.

6. The guidelines should provide for the full and effective participation of federal, state and local agencies whose technical expertise is relevant to environmental considerations, and whose mandates are potentially affected by proposed negotiations.

The EO provides that its implementation will be overseen by CEQ and the USTR in consultation with appropriate foreign policy, environmental and economic agencies. The EO emphasizes the role of the TPSC, both in determining whether an environmental review is required in uncertain cases and in conducting each environmental review. The limitations of USTR's capacity for environmental assessment and review is explicitly acknowledged in the section calling for other agencies to provide analytical and financial resources to USTR in the course of interagency conduct of the assessment and review process.

The EO clearly contemplates a process that is a joint enterprise among relevant agencies. Interagency cooperation under the EO will take several forms. It is critically important that the

[7] This is consistent with NEPA. 40 CFR §1508.7.

interagency process mobilize the full range of agency expertise and authority needed to ensure that trade policy takes account of environmental concerns and contributes to sustainable development. Environmental agencies whose mandates are implicated by potential effects of a proposed agreement must play a major role in the review process if the EO's objectives are to be achieved. In addition, given that trade rules will affect the regulatory responsibilities of state and local governments and that such authorities represent significant sources of expertise on environmental issues, representatives of these interests must also be included in the assessment process. In light of the foregoing, the co-lead role contemplated for CEQ in Section 6 of the EO is particularly important. The guidelines for implementing the EO should ensure the ongoing operational involvement of CEQ as co-manager of the EO process.

In this regard, USTR's responsibility for "conducting" reviews through the TPSC should be interpreted in a manner that leaves principal authority for relevant environmental analyses and proposed actions in the hands of the most competent agencies. For instance, the EO contemplates situations in which a review identifies policy alternatives that involve non-trade measures. Such measures will typically fall outside the jurisdiction of USTR and within the mandate of another agency. Although the review is "conducted" by USTR "through" the TPSC, that agency will have the lead authority to determine the nature of the measure to be taken within its sphere of jurisdiction.

Another example involves the question of whether provisions of a proposed trade agreement could affect US environmental regulations. For instance, could proposed provisions liberalizing investment facilitate a challenge to regulations limiting or banning the use of chemicals as has happened in the MBTE case under Chapter 11 of NAFTA? Or could a proposed provision that prohibited quantitative restrictions on trade lead to a challenge along the lines of the WTO *Shrimp/Turtle* case in which the WTO Appellate Body ruled that the State Department's implementation of a statute prohibiting certain imports violated US GATT obligations?

Consideration of such questions may involve legal interpretations of the meaning of US statutory requirements and mandates of a number of federal agencies, as well as regulations issued pursuant to those statutes. Yet the authority to determine the meaning of these statutes and regulations rests with each agency and cannot be "detailed" to USTR. Thus, in the context of the review process certain aspects of the review must remain under the lead authority of various federal agencies. Any other approach would be contrary to law and inconsistent with the integrated process and outcome envisioned by the EO.

More generally, implementation of the EO will be most effective if it relies upon the agency with the most relevant expertise in making findings on various environmental considerations. USTR has very little capacity to bring to bear on assessments of specific environmental effects. Some capacity can be transferred through staffing details, but certain types of findings will lend themselves better to a determination by the relevant agency. Indeed, some types of environmental determinations are reserved to specific agencies by Congress. For instance, the question whether a species is endangered or threatened by any factor whatsoever, including trade, is one for the Secretary of Interior. The Secretary is also charged with determining the regulations needed to protect the species.

In the context of a trade negotiation, the ultimate policy recommendations will naturally be defined by the White House, based on broad policy considerations. But the integrity of the

specific findings must be maintained, or else the purpose of stimulating a productive, substantive dialogue among agencies with the public will be defeated.

7. USTR and CEQ should define the scope of environmental considerations to be reviewed broadly enough to include international dimensions; as the world's largest national economy, the U.S. has both international environmental interests, and international environmental responsibilities.

The EO states that reviews shall cover "global and transboundary" impacts "as appropriate and prudent." The EO guidelines should make clear that it will be typically be both appropriate and prudent to consider environmental impacts outside its boundaries when defining trade policy. A decision not to consider global and transboundary impacts should only be taken under limited circumstances, and by interagency consensus.

The US is the world's biggest producing, consuming, and trading nation, as well as the biggest source of many pollutants. How the US organizes its trade relations has a tremendous impact on the environment all over the world. The US is the world's largest emitter of anthropogenic greenhouse gases, for example. A change in US trade policy that affected the volumes of fossil fuel imports or exports could have a significant impact on greenhouse gas emissions and thus on stability of the world's climate. The US needs to take responsibility for this in its policy-making. The ATL review which the Administration conducted in 1999 provides precedent in that it considered global impacts of tariff reductions on consumption, production and trade of forest products, including regionalized impacts in specific countries.

Another reason to address impacts outside the US is the existence of extensive cooperative programs authorized by Congress in other countries with whom the US has trade relations. For instance, the US works with other countries to implement and enforce the Convention on International Trade in Endangered Species through the establishment and enforcement of trade restrictions, as well as assistance to protect listed species such as rhinoceroses, elephants and tigers. The National Park Service provides technical assistance to other countries seeking to improve management of their protected areas. The State Department and National Marine Fisheries Service have worked to help other countries use devices to protect endangered sea turtles from harvesting of shrimp, most of which is exported to luxury markets in developed countries including the US, and have also worked to negotiate treaties on the protection of sea turtles. The US Agency for International Development has funded numerous projects to conserve forests in developing countries and countries with economies in transition, including significant efforts to assess the status of forests in those countries. In addition, US voluntary organizations carry out many cooperative projects and US charitable foundations make significant donations to support conservation and environmental protection in other countries with which the US have trade relations.

Where the US has already involved itself in cooperative activities, including environmental and natural resources assessment, there is nothing "imprudent" about evaluating the impacts that US trade policy may have on those very activities. Indeed, where the US government and civil society are already involved in environmental affairs in another country, and have invested in environmental protection there with the cooperation of that country's government and civil society, it would be highly inappropriate and imprudent to ignore the environmental impacts within that country of our trade policy. Limiting assessment to domestic impacts would be inconsistent with the very essence of trade liberalization itself: the reduction

of barriers to international interaction and the stimulation of shared interests and activities that transcend national boundaries.

The U.S. also has legitimate economic interests in the health and availability of transboundary and global resources. Any serious calculation of the economic consequences for the United States of a given trade agreement—particularly with regard to impacts on the Earth's natural resource base—must recognize the interlinked nature of today's environment and economy.

Finally, we note that assessment of the international environmental implications of trade policies, particularly by large powers such as the United States, often raises legitimate sensitivities on the part of governments and citizens of other countries. Our call for the U.S. to include international considerations in its assessments does not contradict our view that the assessment of impacts in other countries is and should remain principally the responsibility of the governments and citizens of those countries. Truly balanced trade policies will not be achieved until participation in the assessment process is undertaken by all affected actors, especially including developing country interests. Indeed, the U.S. should take steps to facilitate assessment processes abroad through technical cooperation and financial support, where needed. Moreover, wherever a foreign government or entity has produced a review touching on areas relevant to a U.S. assessment under EO 13141, the U.S. assessment process should take explicit note of the foreign review, including, where appropriate, through republication of the foreign review itself.

Our view is not that the United States should appoint itself as arbiter of the environmental needs of other countries. On the contrary, we believe the assessment process should be designed to increase sensitivity to those needs, especially as perceived by developing countries themselves. But concern with foreign sensitivities, and the clear need for foreign countries to be masters of their own assessment processes, does not mean the U.S. can legitimately ignore the international environmental implications of its trade policies. The U.S. has a responsibility to conduct its own assessments of those international implications, to foster a well-informed domestic debate about them, and even to share them with the citizens of other affected countries.

8. Interpretation of section 4 of the EO concerning trade agreements subject to environmental review should take a functional approach under which the level of scrutiny is proportionate to the significance of reasonably foreseeable environmental impacts.

Section 4(a) of the EO outlines the categories of trade agreements for which environmental reviews are required. Interpretation of the boundaries of these categories should be based on a functional approach rather than a mechanical reading of the language of the paragraph. That is, wherever trade negotiations are likely to lead to agreements with significant environmental implications, or with significant potential for helping achieve environmental improvements, reviews should be conducted.

For example, the question of whether "comprehensive multilateral trade round" as defined under section 4(a)(i) includes negotiations on the WTO's "built-in" agenda does not depend on whether closing statements in Seattle included the words "round" or "comprehensive" when describing the WTO's next steps. Rather, it depends on whether the "built-in" agenda which WTO Members are currently discussing has the coherent nature of a round such that it can be subjected to a single review, and includes a comprehensive set of issues that together are

likely to pose significant environmental implications. The built-in agenda comprehends a diverse range of issues: agriculture, services and intellectual property. Some estimates suggest that agriculture and services account for as much as one half of the global economy and a quarter of world trade.[8] Agricultural activities have major environmental impacts. Services liberalization could have impacts on national environmental regulation analogous to those that raise concerns about investment liberalization. Trade in environmental services and goods could bring environmental benefits. The case for a review is clear.

Similarly, the question whether the Administration's deal with China falls within the category of "bilateral" agreements does not depend on the legalistic question of whether the outcome of negotiations with China constitutes a legal agreement that must be presented to Congress for its approval. It depends on whether the decision to deepen bilateral economic relations between the world's largest national economy and the world's most populous nation takes the form of a bilateral change in policy that is both comprehensive and discrete, such that it has significant environmental implications and can be examined as a distinct entity. Again, the case for inclusion of such an agreement within the scope of Section 4(a) is clear.

In another example, the determination whether the possible negotiation of a new or amended Softwood Lumber Agreement (SWLA) should provide for an environmental review should not revolve around whether an initiative that emanates from an existing agreement is or is not "new." The SWLA involves large scale trade in a product whose production is having major impacts on a critically endangered and unique ecosystem that contains endangered species, some of whose range extends into the US. Trade in forest products has significant linkages to the health of forests worldwide. At this point the range of possibilities for what should follow the SWLA include many "new" options and an environmental review will clearly be warranted whether the US decides to proceed with negotiations on a new agreement or an extended or amended version of the existing one.

9. Form, content, and publication of written reviews and drafts.

All written reviews and drafts prepared in accordance with EO 13141 should be expressed in language accessible to the lay public. All technical terms should be defined. Economic or other methodologies should be carefully explained. The writings should be comprehensible, and drafted to facilitate understanding. Adequate tables of contents, headings, and (where reasonably necessary) indices should be included as aids to the reader.

To the extent that reviews depend on the manipulation of data (*e.g.*, in econometric models) or the application of technical methods of analysis, the reviews should set forth sufficient data and sufficient explanatory material to allow a general reader to understand in substantial detail how analytic conclusions were reached. A good test is whether a reader could reproduce the analysis based on the information contained in the review. Where the complexity of modeling instruments or the quantities of data do not reasonably permit publication in the body of a review, the full instruments and data sets should be publicly available (preferably through the internet, among other means), and details for gaining access to them should be included in the reviews.

Reviews and draft reviews should also make rigorous use of citations (through footnotes or otherwise) to all materials (secondary or primary) used to arrive at conclusions or claims

[8] WTO Press Release # 167, February 7, 2000 (available at http://www.wto.org/wto/new/press167 html).

contained in the text. As a benchmark, both with regard to factual claims and to interpretations of other writings, the standards for adequate footnoting of legal scholarship should be adopted.

Reviews and draft reviews should be published in a form and through channels that are broadly accessible to the public. Publication should always include posting reviews and drafts on appropriate web sites. Hard copies of the reviews and drafts should be available by post, at no cost.