

CISDL WTO Public Forum Report (4-5 October 2007)

“How can the WTO help harness globalization?”

*Session Topic: Natural resources, sustainable development and trade rules:
New instruments to promote sustainable development through trade agreements*

Moderator:

Dr. Markus Gehring - CISDL Lead Counsel/Cambridge University Lecturer

Speakers:

Ms. Marie-Claire Cordonier Segger- Natural Resources, Government of Canada,

Ms. Carolyn Deere- Global Economic Governance Programme, University of Oxford

Ms. Tara Laan - Global Subsidies Initiative (GSI), International Institute for Sustainable Development

Mr. Moustapha Kamal Gueye - International Centre for Trade and Sustainable Development (ICTSD)

Ms. Marie-Claire Cordonier Segger:

Ms. Cordonier Segger, though Director of Natural Resources Canada, is speaking in her individual capacity as an expert on international sustainable development law; her remarks do not reflect the Government of Canada's position on the issues discussed. The focus of the presentation is distilling some of the recent, innovative legal mechanisms aimed at achieving sustainable development goals through trade in natural resources. History has proven that trade in natural resources can be a double-edged sword pertaining to sustainable development; it has the potential to buttress the sustainable development of natural resources, or to exacerbate the degradation of resources with little benefit for the stewards of the resources. For forestry, mining and metals, renewable and other energy development, geomatics, agriculture and fisheries, among other natural resources, the terms of a trade agreement may influence the ability of countries to ensure sustainable development. Examples include complications regarding the subsidization of renewable energy projects advocated under the UNFCCC but perhaps technically contravening the WTO regime; the potential for reduced effectiveness of forest certification schemes due to complications with technical barriers to trade stipulations; SPS measures influencing the viability of wild versus farmed fisheries; intellectual property rights enforcement could facilitate or frustrate technology for myriad sustainable development initiatives and government procurement rules could prevent green procurement policies (i.e. selecting winning bids based solely on economic considerations). Aware of these dynamics, states have committed to the promotion sustainable development in trade agreements and begun to include innovative legal provisions to achieve this objective.

I. Substantive innovations: promoting sustainable development within FTA texts and institutional architecture

- *Making sustainable development promotion an explicit objective of FTAs*

On an increasingly frequent basis, the promotion of sustainable development is evident in the 'objectives' section of trade agreements. Not all FTAs contain such a section, but if present, adding language to support

sustainable development would have the effect of integrating the concept within the preamble. Suggested text for insertion in objectives section could be the following phrase: *“To implement the provisions of this Agreement in a manner consistent with the Parties’ commitment to promote sustainable development.”*

- *Ensuring the primacy of MEA obligations in the event of interactions FTAs provisions*

Another way in which FTAs can advance the attainment of sustainable development is through explicit efforts to ensure that the compact conforms and supports (as opposed to obstruct) Multilateral Environmental Agreements (MEA) commitments. In this vein, language clarifying the relationship between the FTA and the MEA helps to mitigate ambiguity. Cordonier Segger provides the illustrative example of the possible interactions between trade in natural resources and obligations for Parties to the *Kyoto Protocol*. Canada’s international obligations to reduce greenhouse gas emissions and to combat global climate change are specified in the text of the *Kyoto Protocol*. For the forestry sector, climate change poses many foreseen and unforeseen impacts (e.g. pine beetle infestation). For the energy, mining, and minerals sectors, the implications are numerous. On the one hand, companies operating in these sectors maybe required to lower their emissions. On the other hand, the *Kyoto Protocol* establishes a framework for emissions trading that could eventually be advantageous for companies operating in these sectors. Since the establishment of international trade agreements, whether under the WTO or a bilateral/regional FTA, legitimate concerns have been raised by governments and NGOs over the potential for conflict between the trade related measures in MEAs and the provisions of international trade agreements.¹ If the Canadian government has sought to support and ratify an MEA, then it would be counterproductive for future FTAs to establish a trading regime that could diminish the effectiveness of an MEA.

In the event of an inconsistency between a trade-related provision of an MEA and the FTA, the MEA shall prevail.

Article 104 of NAFTA provides a suitable precedent for such a provision:

1. *In the event of any inconsistency between this Agreement and the specific trade obligations set out in:*
 - a. *the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,*
 - b. *the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,*
 - c. *the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or*
 - d. *the agreements set out in Annex 104.1,*

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

The Canada-Chile FTA (Article A-04) and the Canada-Costa Rica FTA (Article 1.4) contain almost identical provisions. Since the finalization of NAFTA and the FTAs with Chile and Costa Rica two other trade related MEAs, with implications for the sustainable development of natural resources, have come into effect: the *Cartagena Protocol on Biosafety* (signed but not yet ratified by Canada), and the *Kyoto Protocol*.

- *Solidifying an expropriation and compensation regime in investment chapters of FTAs*

NAFTA began a trend, followed by a large proportion of subsequent regional and bilateral FTAs, to include ‘investment chapters’ in the body of an FTA. Such chapters are designed primarily to protect the

¹ Gary Sampson, *The WTO and Sustainable Development* (New York: United Nations University Press, 2005) at 128.

investments of business enterprises of one Party to an FTA that do business in the jurisdictions of the other Party(s). Investment chapters typically contain provisions relating to, *inter alia*, National Treatment, Most Favoured Nation treatment, Standard of Treatment, Performance Requirements and Expropriation. However, from the perspective of sustainable development, it is the issues surrounding expropriation that have been the subject of the most intense debate and scrutiny. The central issue of concern is that an FTA's investment chapter will require a government Party to pay compensation to an investor in the event they expropriate their investments either directly or indirectly through measures tantamount to expropriation (see for example, Article 1110 of NAFTA or Article G10 of Canada-Chile FTA).

If broadly defined, the definition of indirect expropriation can include regulatory measures that deprive the investors of expected profits, even if the measures are non-discriminatory, and serve a public purpose such as the protection of the environment and human health.² So for example, it is conceivable that (without appropriate safety mechanisms in the FTA) new emissions standards applicable to the energy sector, new logging quotas imposed on forestry companies, or new environmental zoning requirements that impact on a mining lease, might come within the definition of an indirect expropriation (in the event it is broadly defined) and trigger a right to compensation. In the context of sustainable development, NRCan is likely to have offensive and defensive interests arising out of the FTA's expropriation provisions. From an offensive perspective, NRCan might want to ensure that Canadian natural resource companies (e.g. companies operating in the forestry, energy, mining and minerals sectors) do not have their investments expropriated, either directly or indirectly, by the trading partner without payment of compensation. From a defensive perspective NRCan will want to ensure that the FTA's expropriation provisions do not inhibit the ability of Canadian governments to introduce laws and regulations designed to ensure the sustainable development of Canadian natural resources. The task at hand is to find the appropriate balance.

- *Using FTAs to advance corporate social responsibility*

The vast majority of trade and investment between nations is undertaken by and between business enterprises. Accordingly, the way in which business enterprises conduct their activities, for example,

² In the NAFTA case *Metalclad Corporation v Mexico* (2000), the Tribunal provided an extremely broad definition of what constitutes expropriation. In addition to the more conventional notion of expropriation involving the taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. This definition was subsequently upheld on appeal to the Supreme Court of British Columbia in *Mexico v Metalclad Corporation* 2001 BCSC 664 at 35. In contrast, in the more recent decision of *Methanex v United States* 2005, the Tribunal interpreted expropriation in far more narrow terms. It found that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensatory unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation." See *Methanex v United States* 2005 Final Award, Part IV, Chapter D, para 7. Howard Mann, Senior International Law Advisor to IISD, argues that the affect of the Methanex decision, if taken on its face value, is that regulatory measures that are for a public purpose, non-discriminatory and enacted in accordance with due process are not, by definition under international law, expropriations. Not being expropriations or measures tantamount to expropriation, they are not, therefore subject to any compensation. Mann also argues that in light of the Methanex ruling, the "rare circumstances" guidance (e.g. Model FIPA Annex B13(1)) that is creeping into some FTAs might actually be counter productive. He bases his argument on the idea that the Methanex ruling does not even go as far as allowing for "rare circumstances" (*unless specific commitments had been given by the regulating government that it would refrain from such regulation*). But as Mann also points out, just as the Tribunal in the Methanex case rejected the broad interpretation of expropriation sanctioned by the Tribunal in the Metalclad case, future FTA Tribunals are free to reject the Methanex ruling. This sobering reminder suggests that the rare circumstances guidance is still of some value. See Howard Mann, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles* (IISD, August 2005) at 7. Available online: <http://www.iisd.org/pdf/2005/commentary_methanex.pdf>.

whether they undertake their activities in an environmentally and socially responsible fashion – in keeping with the concept of Corporate Social Responsibility (CSR), will be a critical component of any efforts to promote the sustainable development of natural resources through an FTA. The linkages between CSR and sustainable development are borne out of necessity. In the production of goods and services, corporations make a significant contribution to many of the environmental and social problems that the global community is attempting to address through the sustainable development agenda. Paradoxically, due to their size and importance within the global economy, corporations also have a pivotal role to play in achieving sustainable development. Without access to the vast resources, wealth and ingenuity of the corporate sector, the ultimate goal of ‘sustainable development’ might well be beyond reach. In this regard, CSR could rightfully be viewed as a prerequisite for achieving sustainable development.

The important role corporations have to play within the global sustainable development agenda was formally acknowledged through the *Johannesburg World Summit of Sustainable Development (WSSD) Plan of Implementation 2002*. Paragraph 49 encourages action at all levels to: *Actively promote corporate responsibility and accountability, based on the Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries*. Canada was a signatory to the WSSD plan of implementation. Accordingly, the promotion of CSR through the provisions of an FTA, is consistent with the WSSD’s call for the promotion of corporate responsibility and accountability through “intergovernmental agreements and measures.” From NRCan’s perspective, the promotion of CSR through an FTA might also be an acknowledgment of the fact that many Canadian companies, including those operating in the natural resources sectors, are already showing leadership in CSR. Their knowledge and experience in this field, and that of the Canadian government, might prove a valuable commodity to share with a trading partner, particularly developing countries. Furthermore, the promotion of CSR through the FTA may help to create, for Canadian natural resource corporations, a business environment in the jurisdiction of the trading partner that is less exposed to environmental and social risks. This again, is particularly important in developing countries.

There are multiple avenues available for advocating the precepts of CSR within FTAs. One approach would be to support the introduction of text specifying that the Parties have a responsibility to promote CSR. For example: *Recognizing their commitments under paragraph 49 of the Johannesburg World Summit of Sustainable Development Plan of Implementation (2002), the Parties agree to actively promote corporate responsibility and accountability through the full development and effective implementation of public-private partnerships, appropriate national regulations, and voluntary initiatives which support continuous improvement in corporate practices*. A second approach would be to support cooperation between the Parties on issues surrounding CSR. For example, we might wish to support the introduction of text into the FTA as follows: *Recognizing that corporate social responsibility (CSR) has a central role to play in international efforts to promote sustainable development, the Parties agree to develop a program of cooperative activities designed for the purpose of promoting corporate social responsibility*. With this second approach, we could assist in identifying, or even help facilitate, key CSR activities in the area of natural resources. For example, one can envisage a program of action to reduce greenhouse gas emissions amongst energy companies or CSR initiatives to promote sustainable forestry and mining practices. Where this could prove particularly valuable, is in an FTA with a developing country where CSR might not be as widely practiced by companies operating in that jurisdiction. A third approach, tailor-made for an FTA with a developed country, would be to make a formal reference to the OECD Guidelines for Multinational Enterprises within the FTA, via a provision similar to the following: *The Parties reaffirm their commitment to adhere to the OECD Guidelines for Multinational Enterprises and will encourage enterprises operating on their territories to observe these Guidelines wherever they operate*. In summary, there is a place for the promotion of CSR in every FTA.

- *Enshrining the imperative of sustainable development in an Environmental Chapter or Side Agreement*

In a clear acknowledgement of the linkages between environmental protection and trade, many FTAs now contain environmental provisions. There are two major approaches that have been adopted. The first approach is an approach NAFTA pioneered, whereby the FTA is subject to a side agreement on environmental cooperation. In NAFTA's case the side agreement was called the North American Agreement on Environmental Cooperation (NAAEC). This approach has since been replicated in the Canada-Chile and Canada-Costa-Rica FTAs to differing degrees. Important aspects of these side agreements include:

- A range of environmental commitments, including, inter alia, a commitment by the Parties to ensure that their laws and regulations provide for high levels of environmental protection (e.g. NAAEC Article 3), to enforce environmental laws (e.g. NAAEC Article 5), to provide access to remedies for private individuals (e.g. NAAEC Article 6), certain procedural guarantees (e.g. NAAEC Article 7);
- The establishment of an institutional framework (such as a Commission and or Council) to promote environmental protection and facilitate cooperation between the Parties with respect to environmental matters (e.g. NAAEC Part 3);
- The establishment of a citizen's submission process with regard to allegations that the Parties are failing to effectively enforce their environmental laws (e.g. NAAEC Article 14);
- A dispute settlement procedure which can result in a Party being subjected to a "monetary enforcement assessment" (max \$20 million) for failing to effectively enforce its environmental laws (e.g. NAAEC Article 34).

The second approach is, in some respects, a retreat from the NAFTA model. It involves the integration of an environmental chapter within the text of the FTA itself. Examples include post NAFTA US FTAs with: Singapore, Chile, Australia, Bahrain, CAFTA and Morocco. This in-itself is not a negative development. If anything, bringing the environment provisions into the FTA text itself will give them greater prominence. Where the difference lies is in the strength of the approach. For example these FTAs: do not have a citizen submission process and do not establish a comprehensive institutional framework, instead relying on points of contact or a sub-committee on environmental affairs. These departures from the NAFTA model have the potential to weaken the environmental provisions of an FTA. From NRCan's perspective, the integration of strong environmental commitments into the FTA is critical if the FTA is to be used as a vehicle through which to promote the sustainable development of natural resources – both in Canada and the jurisdiction of the trading partner. What's more, the importance of such provisions increases should the potential trading partner not have an effective regulatory framework/capacity to ensure the sustainable management and use of its own natural resources.

In order to make certain that an environmental chapter or side-agreement to an FTA will be effective in promoting the sustainable development of natural resources, we might wish to consider ensuring that the FTA includes the following:

- Environmental commitments by the Parties to ensure that their laws and regulations provide for high levels of environmental protection (e.g. NAAEC Article 3), to enforce environmental laws (e.g. NAAEC Article 5), to provide access to remedies for private individuals (e.g. NAAEC Article 6), certain procedural guarantees (e.g. NAAEC Article 7);
- The establishment of a strong institutional framework (such as a Commission and or Council) to promote environmental protection and facilitate cooperation between the Parties with respect to environmental matters. (e.g. NAAEC Part 3);
- The establishment of a citizen's submission process with regard to allegations that the Parties are failing to effectively enforce their environmental laws (e.g. NAAEC Article 14);

- A dispute settlement procedure which can result in a Party being subjected to a “monetary enforcement assessment” for failing to effectively enforce its environmental laws (e.g. NAAEC Article 34).

With respect to the environmental cooperation, the insertion of specific language into the FTA would be efficacious: *encouraging cooperation aimed at ensuring the efficient use of natural resources, with a view to ensuring sustainable development* (see Chapter 44 of the Euro-Med Agreement with Egypt, which incorporates similar language). Through the framework of the FTA, we could also assist in identifying, or even help facilitate in partnership with CIDA, cooperative activities in the area of natural resources. This was a sentiment expressed by Kenneth Ko of NRCan: “*Through an FTA, Canada could help other nations, particularly developing countries, develop the tools and policies they need to manage their natural resources in a sustainable fashion.*” Opportunities for NRCan to play an active role in FTA cooperative projects exist in all NRCan sectors. NRCan already has considerable experience in international development projects, particularly in the areas of energy, energy efficiency, energy technology and Earth Sciences. However, if NRCan is to play an active role in any cooperative project under an FTA, it is critical that appropriate funding be sought to ensure the effective implementation of the projects concerned.

- *Conducting ex-post sustainable development reviews of trade policy*

Canada, the European Union, and the United States have all developed methods of assessing the impact of trade agreements on the environment and, in the case of the EU, social and economic development. These assessment processes fall into the category of *ex ante* processes. In other words, they are primarily conducted prior to the trade agreement coming into effect. While playing an important role in identifying important sustainable development impacts arising from FTAs, such processes are not ongoing and, therefore, cannot identify or mitigate environmental, social and economic impacts that come to light only after the trade agreement has come into effect. Some FTAs have mechanisms that can partly address this gap. For instance, the Commission for Environmental Cooperation has a mandate under Part 3 Article 10(6)(d) of the NAAEC to consider *on an ongoing basis the environmental effects of the NAFTA*. It would be fair to say, however, that very few FTAs have built in mechanisms of this nature. The lack of precedent in this area should in no way be viewed as supporting a claim that an *ex-post* sustainable development review of an FTA lacks merit. By way of comparison, a practice is emerging within Canada to conduct a comprehensive review and assessment of the provisions and operation of Federal legislation five years after it having come into force. See for example, section 89(1) of the Canada Revenue Agency Act (1999), which mandates a five year review of this nature. Accordingly, integrating a sustainable development review mechanism within the provisions of an FTA (e.g. five years after commencement) would be consistent with current best practice in Canadian domestic legislation and would be an important means of identifying and mitigating sustainable development impacts that only come to light after the FTA comes into force. The phrasing of might be construed as follows: *Five years after the coming into force of this Agreement, a comprehensive review and assessment of the economic, environmental and social impacts arising from the operation of this Agreement must be undertaken by each of the Parties.*

II. Procedural options for the concomitant advancement of sustainable development and trade liberalization

Trade agreements have to potential to promote sustainable development in both general and specific manners. In general terms, TAs can be utilized as an opportunity to promote sustainable development, and therefore enhance the sustainable use of natural resources, environmental protection, corporate social responsibility, human rights and the rights of workers. Specifically, if drafted with the sustainable development ethos in mind, TAs can include appropriate mechanisms (e.g. exclusion clauses) that will ensure that the Parties are not prevented from adopting or enforcing measures designed to promote sustainable development. For example, measures designed to protect human, animal or plant life or health,

or for the conservation of living or non-living exhaustible natural resources. Moreover, the TA may inaugurate mechanisms that will help to eliminate government practices and policies that unduly threaten sustainable development, such as perverse subsidies (e.g. subsidies that harm the environment and the economy).

Ms. Cordonier Segger's team undertakes a sustainable development assessment framework that identifies the key risks and opportunities arising from a trade agreement in the context of sustainable development of natural resources and present a series of 'options'. Although a procedural tool such as this one is currently used by the EU, U.S. and Canada, this particular tool differs in *timing* and *scope* from the existing alternatives. The assessment framework has the following analytical components: 1) Objectives; 2) A Mapping Process to Identify Sustainable Development Interests; 3) A Draft Text Assessment and Options Tool. The final stage of the assessment tool is to draft provisions that promote sustainable development informed by the risks and opportunities set in to relief by the previous steps. Each section will be covered in greater detail below:

Part 1 consists of a list of proposed negotiating objectives, focusing on sustainable development, that could be drawn upon to form recommendations and advice to Canada's negotiating team in the preliminary stages of trade negotiations. Important characteristics of the objectives include:

- Holistic character: other important elements of sustainable development in addition to environmental protection are integrated such as human rights, labour standards, corporate social responsibility, and anti-corruption;
- Promotion of the positive aspects of a TA in addition to minimizing the negative ramifications (these may emerge from public consultations with a diverse set of stakeholders);
- Application at earliest stages in negotiations of a trade agreement. There is little that can be gained by treating objectives relating to sustainable development as a mere afterthought to be pursued once the draft text is already on the table.

Part 2 revolves around seeking the answers to upwards of 40 different questions through a mapping exercise. In this way, the framework considers a number of important 'threshold sustainability issues' – specifically tailored to the interaction between the Parties -- that should be addressed at the very outset of a governmental decision to enter into negotiations with a proposed trading partner. Areas of investigation include but are not limited to:

- Potential for the TA to foster special sustainable economic development opportunities for both Canada and the proposed trading partner.
- Potential environmental impacts (relating to natural resources) on both Canada and the proposed trading partner which could arise out of the TA .
- Could the TA weaken Canadian laws designed to protect natural resources?
- The preparedness of the trading partner to achieve sustainable development of natural resources in its own jurisdiction (e.g. strength of environmental laws, human rights position, labour standards and corruption).

Carrying out a mapping process that assesses the three pillars of sustainable development is an important element of Part 2.

Economic questions may include:

- What is the extent and type of natural resources located within the jurisdiction of the proposed trading partner?

- What are the major trade flows between Canada and the proposed trading partner for natural resource products and services?
- What are the major tariffs and other non-tariff barriers restricting market access within the proposed trading partner for producers/ providers of Canadian natural resource products and services?
- What are the investment (FDI and CDIA) flows between Canada and the proposed trading partner for natural resource products and services?

Social questions may include:

- Has the proposed trading partner ratified the eight fundamental conventions of the international labour organization (ILO)?
- Have corporations (including inter alia Canadian companies) operating in the jurisdiction of the proposed trading partner been cited for significant breaches of internationally proclaimed labour standards?
- Has the proposed trading partner sought to protect human rights through its Constitution or, alternatively, via regulatory means such as a Bill of Rights or other specific human rights legislation?

Environmental questions may include:

- Has the proposed trading partner ratified important multilateral environmental agreements (MEAs) relevant to sustainable development of natural resources?
- Could the trade agreement result in the importation of goods and services from the proposed trading partner with the potential for negative environmental impacts on Canada's natural resources?
- What unique or special environmentally responsible technologies being developed/utilized by the proposed trading partner might be of potential benefit to Canadian natural resource sectors?

The final part of the analytical framework is The *TA (Draft Text) Assessment Tool*. The tool is designed to address a problem that relates to most, if not all trade negotiations: Trade agreements are complex legal instruments yet policy advisors and decision makers at all levels of government, who are often without formal legal training, are somehow expected to arrive at an informed view on the positive and negative ramifications of these agreements. The tool, therefore, creates a framework through which a policy/decision maker (lawyer or non-lawyer) can analyze the draft text of a TA with a view to identifying the key risks and opportunities that might arise in the context of sustainable development.

The tool goes into a level of detail which identifies the key articles of a TA where the risks and opportunities are most likely to arise, citing examples from numerous existing TAs both in Canada and abroad. The tool then presents a series of 'options' to address those risks and opportunities. Options might include examples of 'best practice' articles selected from FTAs from around the world that would best address the opportunities and risks identified. Where no pre-existing article could be located, a draft article is proposed for consideration.

The draft text assessment tool covers key areas/chapters within a standard TA which might have implications for sustainable development:

- Preamble of the TA
- Objectives of the TA
- Consistency with Multilateral Environmental Agreements
- General Exceptions
- Investment
- Services

- Technical Barriers to Trade
- Sanitary and Phytosanitary Measures (SPS)
- Government Procurement
- Environmental Chapter/Side Agreement
- Labour Chapter/Side Agreement
- Dispute Settlement

The tool also addresses sustainability issues that could be addressed in a TA but have not yet made it on to the 'radar screen' of most TAs, e.g.:

- Perverse Subsidies
- Corporate Social Responsibility
- Human Rights
- Corruption
- Ex-Post Sustainability Review (e.g. after five years of FTA being active)

The draft text assessment tool draws on responses from the preliminary assessment questions/mapping tool to assist in identifying and prioritizing appropriate options in trade policy to address sustainability issues. For example, if contemplating the inclusion of Corporate Social Responsibility (CSR) in a TA, the report advises: *if an analysis using the TA mapping tool set out in Part 2 identifies socially or environmentally harmful corporate practices within the jurisdiction of the trading partner, then the promotion of CSR should be viewed as a priority.* It then indicates the appropriate indicators to consider such as:

- Have corporations (including inter alia Canadian companies) been implicated in human rights violations on account of their activities within the jurisdiction of the proposed trading partner?
- What is the level of corruption within the jurisdiction of the proposed trading partner? Does the level of corruption (or lack thereof) create an environment that inhibits or, alternatively, is conducive to maximizing the economic, environmental and social benefits of the free trade agreement for the sustainable development of natural resources?

Concluding thoughts

There is a significant need for 'trade assessment tools' that are designed for policy and decision makers with no formal legal training. Without such tools, how can they be expected to come to a truly informed position on the sustainability impacts and opportunities of legally complex trade agreements? To date, much of the focus of sustainability assessment of trade agreements is on identifying and minimizing negative impacts. There is a need for trade assessment tools that also identify and help realize the opportunities for trade to play a positive role in sustainable development. Consideration of sustainability impacts and opportunities needs to take place at the earliest opportunity in trade negotiations, even before draft text is on the table. Otherwise strategic opportunities are missed and sustainable development is treated as nothing more than an afterthought. The sustainable development agenda is not just about the environment. We continuously have to remind ourselves of this fact. Human rights, corruption, labour standards, poverty, health and corporate social responsibility all need to be given greater prominence in any trade negotiations.

Ms. Tara Laan

Global Subsidies Initiative (GSI) is a program convened by the IISD that aims to illuminate the nature of governmental subsidies provided to various sectors including biofuels, energy and irrigation. The GSI seeks provide detailed information about subsidies so that policy makers can make enlightened choices when selecting strategies in this issue-area. All public expenditures supporting industry cannot be grouped

together and labeled inappropriate; support for research is a prime example of beneficial subsidization. However, perverse subsidies (extending beyond the support for new technologies) proliferate in agriculture, natural resources and the energy sector. Beyond the opportunity costs of allocating public funds elsewhere, perverse subsidies may distort trade and frequently fail to achieve their state objectives. Mechanisms in place to discipline subsidies are often inadequate; the notification system to the WTO omits myriad policies that are technically subsidies.

Subsidies can actually undermine the optimal management of natural resources and sustainable development in general through invoking distortions within the trading system. In this context, Ms. Laan has chosen to focus on the topic of biofuel (ethanol and bio-diesel fuel) subsidization. Biofuels are produced by plant products including crops, grains and soy oil. GSI recently reported that OECD support for the production of biofuel was in excess of 11 billion USD annually. These subsidies are provided on top of existing agricultural subsidies and distortions in the agriculture and energy sectors. Recent efforts to decouple production from subsidies within the agricultural sector have coincided with a new set of subsidies tied directly to production and consumption that are amongst the most trade distorting forms of support. A recent report noted that the 3.7 billion spent on biofuels within the EU (covering less than 2% of the its road and transport needs) has the potential to increase five-fold by 2020 in order to meet the Commission's objectives for expanding the biofuel market. The U.S. provides 6 billion in annual subsidies currently; Congress is mulling over plans to increase this amount six-fold. Moreover, biofuels are covered by high tariffs that exacerbate the trade distorting effects of subsidization. The high tariffs prevent efficient producers in developing countries from competing within the biofuel market. As a consequence, any positive windfalls generated from expanding the use of biofuels are not meaningfully realized by developing countries. For example, Brazil – the world's premier biofuel producer in terms of efficiency and quality (in terms of GHG emissions) -- is locked out of the markets of the U.S., EU and Australian markets due to high tariffs. In summary, key policy objectives underpinning biofuel support in developed countries are undermined by their methods of subsidization.

The tariffs levied on biofuels have another insidious implication: they distort the world food market. The price of staples such as maize has doubled since 2005; the price of vegetables has climbed steeply as has the price of palm oil. Further, food production in many regions has been at an all time low due to droughts. The urban poor of developing states are likely to be the most vulnerable to these price escalations as this group spends a comparatively high proportion of their income on food. The sustainability implications of choosing between planting crops to generate biofuel as opposed to food for consumption are very grave.

To what degree could this negative scenario depicted be remedied by a mechanism that allows for the free trade of biofuels between OECD and developing countries? Could such a mechanism improve sustainable development? Undoubtedly, some biofuel producers such as Brazil would benefit. However, given the long history of subsidization it is debatable whether the industry would survive in the absence of subsidization and tariff barriers. It is also important to assess whether this subsidization is an efficient use of resources. Indeed, the fact that biofuel production has only been possible through subsidization is a testament to the fact that the process is an inefficient one. Thus, the formulation of new trade instruments has to be made with careful analysis that extends beyond strictly economic considerations. A 'carte blanche' opening of trade liberalization might actually have manifold negative consequences and exclude some developing state producers from the market. In advance of altering the subsidy regime surrounding biofuels, a detailed analysis of internationally comparable data is required.

Mr. Moustapha Kamal Gueye

The main theme of the presentation is the interaction between agriculture, desertification and natural resource policy. The UNCCD COP-8 took place in September 2007. One of the results of the discussion was a 10 year strategy plan that set out a framework for the implementation of the Convention over the next decade. Areas of strategic intervention included a trade component that was developed at intersessional meetings with NGO participation. In the context of the UNCCD, the debate surrounds the use and recovery of arid and semi-arid lands which encompasses about 40% of the earth with 2 billion inhabitants. Arid lands are disproportionately located in developing states. Fundamentally, sustainable use and management of arid lands requires preserving the fragile ecosystems and the services they provide whilst ensuring that the livelihoods of local populations are not obstructed. Particular concern needs to be given to agricultural activities (i.e. cotton, millet, maize, livestock) as it is the dominant activity in these regions in developing states. In many states, a significant proportion of the GDP is earned through agricultural exports in arid lands. In addition, a high percentage of the labour force (often in the 50-90% range in Africa) is employed in these activities and food security is predicated on the products produced.

How does trade interact with agriculture in arid regions? If trade facilitates the expansion of revenues, funds are available to re-invest in the vulnerable land. The global mechanism of the UNCCD is designed to find methods to generate greater investment into dry lands in a manner that supports sustainable development. One of the main obstructions to achieving sustainable development is the high concentration of agricultural activity in a few commodities (i.e. cotton in West Africa). Additionally, many of these commodities tend to be subject to trade distortions that magnify vacillations in export earnings and have tremendous social and economic consequences. The UNCCD explicitly acknowledges the role of trade (especially in the realm of market access) in pursuing the objectives of the treaty and gives special consideration to states with a high proportion of dry land. However, the provisions are construed in a general way and require detailed operationalization.

Trade distorting subsidies are rife in agriculture; total funds allocated towards support is thought to be equal to seven times the amount spent on ODA and more than the aggregate GDP of sub-Saharan Africa. The commodities where subsidies are concentrated are frequently produced in dry regions. The stated objectives of the Doha Round regarding domestic support and export subsidies are to phase out both policies, but the specific terms remain highly contentious. Undoubtedly, achieving reforms in these areas would have a tremendous impact on the states heavily dependent on arid agriculture. Trade instruments placed in the 'amber box' (trade distorting production subsidies) are ostensibly going to be cut; using the subsidies located in the 'green box' for sustainable development purposes would be very beneficial moving forward (green box payments are made by both developing and developed states). There is a trend of decline in the former category and recent increases in the funds derived from the latter. However, the increasingly common practice of shifting boxes has ambiguous implications and requires investigation. Another important area of negotiations involves environmental goods and services (para. 31(3)), but agricultural products have not been featured thus far. However, the Doha mandate does not expressly exclude agriculture from the issue-area. The rewarding of farmers that produce goods organically ("environmentally preferable products") with better market access is an example of how trade can facilitate sustainable land use practices. The temporary special products mechanism (self-designation by WTO members is required) could be harnessed to shield some products originating from dry lands (especially from small producers) that may be negatively impacted by fast-track liberalization. Other areas to consider include the special safeguard mechanism; duty free access for LDCs; tropical products liberalization; impeding tariff escalation and addressing questions of supply-side capacity. Agricultural products generated for niche markets (i.e. medicinal plants) are often levied with non-tariff barriers (i.e. SPS).

In summary, an overhaul of trade distorting subsidies; reform of the green box to focus on poverty mitigation; securing the offensive and defensive interests of developing states in terms of environmental goods and services; securing livelihoods through the special products and safeguards mechanisms are all viable options moving forward. However, better coherence and convergence between trade and

environmental policy (especially within the remit of the UNCCD) is a necessary foundation for long-term change.

Ms. Carolyn Deere

Although the application of subsidies is the most contentious trade issue concerning the fisheries sector, Ms. Deere has chosen to focus on mechanisms for promoting sustainable development within fisheries practices both internal and external to trade considerations. The world's fisheries are in a tremendously precarious position; latest scientific evidence gathered by the FAO indicates that 80 % of the world's commercial fisheries are in trouble. Merely 20% of the world's fishes are classified as being "moderately exploited"; only 3% are under exploited. Moreover, 90% of the world's big fish (tuna, marlin and swordfish) have been depleted and 29% of the world's fish species have collapsed. If the rate of exploitation does not change, the population of the entire world's currently fished wild seafood will be exhausted in 50 years.

Many factors contribute to stock depletion. The fact that fisheries are an open access resource contributes to regulatory and enforcement complications. Over fishing is the consequence of inter alia, over capacity stemming from new technologies and unreported, unregulated and illegal fishing. Besides the natural resource and biodiversity implications of depleting fisheries, indirect environmental consequences abound from unsustainable practices. Examples of collateral damage include ecosystem degradation through by catch and habitat destruction (trawling, dynamite and cyanide fishing is particularly problematic). Problems of coastal and marine environment are particularly acute because they support spawning and habitat elements that aren't available elsewhere.

It would be erroneous to construe the plight of fisheries as a pure natural resource predicament; heavy reliance on this sector in developing states makes the problem a sustainable development concern. There are a profusion of policy objectives in the environmental, economic and social domain. Collapsing fisheries mean unemployment, poverty (food security may be in limbo) and lack of revenue to provide public services. From a trade point of view, fishing is a 60 billion dollar export industry, nearly half of which is generated by developing states. The net export of fish is greater than all the other food crops from developing countries and 200 million are employed in the fisheries sector (the majority of which are landless fish workers and artisan fishermen).

The regime governing fisheries is extremely complex and includes environmental conventions (i.e. arrangements dealing with straddling stocks and endangered species); codes of conduct for fisheries management; compacts about illegal, unreported and unregulated fishing and discussions in sustainable development fora. At the regional level, there are 25 different applicable bodies that manage both bodies of water and particular fish stocks. There is also a set of economic fishing agreements (for instance, compacts between the EU and West Africa; Japan and various countries in the Pacific) and regional and bilateral trade agreements. It is also important to consider the impact of loans from global and regional development banks on the viability of fishing in different locations. Within the WTO, beyond subsidies, other applicable areas include tariffs (handled under the non-agricultural market access regime and treated as industrial goods); non-tariff barriers (TBTs and SPS); rules of origin and labeling.

Outside the trade regime there is an assortment of market and regulation based approaches to assist in the management of fish stocks. Eco-labeling initiatives (i.e., the Marine Stewardship Council) certify fish that were captured from sustainably managed fish stocks. Issues remain regarding the disparities in the respective abilities of developed and developing countries to attain certification. There are also efforts to create best practices guidelines for aquaculture and retailer-based initiatives (advocates include Whole Foods, Walmart, Unilever and Sainsburys). Environmental groups publish seafood guidelines with the

objective of informing consumers about the ramifications of their purchasing habits. Tracking all the proliferation of schemes and getting a sense of the various criteria involved is a complicated process and can pose high barriers to entry, especially for developing states. Regulation-based measures are largely regional in scope and fall into three categories: certificate of origin schemes; import bans (used infrequently) and vessel lists. The regime surrounding the fishing of blue fin tuna is the most extensive. Regarding bans, efforts at CITES to ban particular species of fish haven't been successful, at least in part because of the commercial value attached.