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SUSTAINABILITY IMPACT ASSESSMENT OF TRADE AGREEMENTS IN THE AMERICAS: A TOOL FOR SUSTAINABLE DEVELOPMENT

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Introduction

Impact assessments are an integral part of environmental policymaking and increasingly also address social concerns, such as health impacts.[1] Originally, the whole terrain of environmental impact assessments (EIA) centred upon the risks engendered by specific development projects for the natural, biophysical environment.[2] Principally required by national (or sub-national) laws, the prototypical EIA procedure involves a preliminary scientific or information-gathering phase and a report, which is then followed by a decision to proceed with the activity or undergo a full assessment. The full assessment includes more comprehensive investigations and studies, public meetings or consultations and the publication of more in-depth studies supplemented with recommended mitigation and enhancement procedures.[3] As with other emerging themes in contemporary international law, the contours of national EIA policy and law have gained increasing normative resonance in the international arena.[4] As a consequence, at the international level, EIAs have been included in both multilateral environmental agreements and trade agreements at the global and regional levels.

One of the first international organisations to discuss impact assessment of trade agreements was the Organization for Economic Cooperation and Development (OECD). In 1993, Ministers endorsed *Procedural Guidelines on Trade and Environment,* one of which pinpointed trade and environment assessments:

> "Governments should examine or review trade and environmental policies and agreements with potentially significant effects on the other policy area and identify alternative policy options for addressing concerns. Governments may co-operate in undertaking such examinations and reviews. Governments should follow-up as

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[1] For further information on the evolution from environmental to sustainable development assessment, see MC Cordonier Segger & A Khalfan, *Sustainable Development Law* (Oxford: Oxford University Press, 2004) 175 pp.

[2] See M. Gehring and MC Cordonier Segger, "Sustainable Development through Process in World Trade Law" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 191, 192.

[3] Ibid., 194 pp.

[4] After a certain amount of international consensus about the necessities of EIAs, norms associated with the assessment policy have 'filtered back' from international to national and regional laws in three manners: through the influence of 'soft law'; under state obligations to implement specific international obligations; and under obligations in customary international law. See M Gehring & MC Cordonier Segger, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005). 194 pp.

> appropriate: to implement policy options, to re-examine the policy agreements and any measure in place; and to address any concerns identified in the conclusion of such re-examinations."[5]

In 1994, the OECD proposed a complete methodology[6] which has had a substantive influence on the development of impact assessment tools in many countries.[7]

The requirement to conduct an impact assessment has rapidly become quite commonplace in international law. The *Espoo Convention* specifically contains such obligations for its parties. Such international environmental law obligations in relation to areas beyond the limits of national jurisdiction has similarly led to EIA obligations when activities are proposed to take place in areas of 'common concern' or 'common heritage' of humanity. In this vein, duties to conduct a variety of EIA procedures are found in the *1991 Protocol to the Antarctic Treaty on Environmental Protection*,[8] and under the 1982 *UN Convention on the Law of the Sea* (UNCLOS).[9] Recently, the International Tribunal on the Law of the Seas concluded that the United Kingdom had breached its obligations under UNCLOS in relation to the authorisation of the MOX plant, *inter alia* by refusing to carry out a proper environmental assessment of the impacts on the marine environment of the MOX plant.[10] In a recent ITLOS case involving a proposed development in a disputed area between Singapore and Malaysia, the judges also imposed provisional measures that included an impact assessment.

Indeed, the International Court of Justice has also found a duty to conduct EIAs before proceeding with serious transboundary projects under customary international law as well as treaty law, in the case concerning the Danube Dam.[11] As such, it can now be persuasively argued that there are customary obligations to consult and co-operate in implementation of

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[5] OECD, *Procedural Guidelines on Trade and Environment*, 1994.
[6] OECD, *Methodologies for Environmental and Trade Reviews*, OCDE/GD(94)103.
[7] C Tebar Less, "The OECD Methodology for the Environmental Assessment of Trade Policies and Agreements: Types of Effects to Evaluate", in WWF & Fundación Futuro Latinoamericano, *The International Experts' Meeting on Sustainability Assessments of Trade Liberalisation – Quito, Ecuador 6-8 March 2000, Full Meeting Report* (Gland: WWF, 2000) 82.
[8] See the *Antarctic Environmental Protocol*, 30 I.L.M. 1461 (1991), article 23(1). Nine parties have ratified the Protocol to date but all Antarctic Treaty Consultative Parties, amounting to 26, are required to bring it into force. See also *Convention on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, T.I.A.S. No. 10240, 1329 U.N.T.S. 48 (1980).
[9] *UNCLOS*, *supra* note 154, preamble, arts. 192, 194. See also *Straddling Stocks Agreement*, *supra* note 305, preamble and arts. 2, 5 addressing issues such as the inadequate management of high seas fisheries, the over-utilization of fishing resources, and the inadequate regulation of fishing vessels. UNCLOS States, at Art. 206: "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205."
[10] ITLOS, *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, [2001] ITLOS 10 (Order of 3 December 2001).
[11] For an expression of the customary principle, see *Gabčíkovo-Nagymaros*, at 206. Judge Schwebel, speaking for the majority, took judicial notice of the vulnerability of the environment and the importance of having risks assessed on a continuous basis. These provisions were construed by Judge Weeramantry in a minority opinion as "building in" the principle of EIA. He added that a duty of EIA is to be read into treaties whose subject can reasonably be considered to have a significant impact upon the environment. See also the discussion of the Court in the *1995 Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 Case Concerning Nuclear Tests (New Zealand v. France)* [1995] 106 I.L.R. 1 [hereinafter *Nuclear Tests II*]. In the earlier dispute in 1973, France publicly declared its intention to cease atmospheric tests, which led to a resolution of their dispute with New Zealand and Australia concerning the legality of the tests in the South Pacific. See *Nuclear Tests I*. The Experts Group on Environmental Law of the World Commission on Environment and Development then identified EIA as an emerging principle of international law. For examples of treaty obligations in this respect, see the *Watercourses Convention*, *supra* note 98 and the *Transboundary Waters Convention*, *supra* note 180 at art. 3 (1)(h), where States are required to develop, adopt, implement, and, as far as possible, render compatible relevant measures to ensure that an EIA is applied. See also the International Law Commission (ILC) D*raft Articles on the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/46/10 (1991) at 161 and U.N. Doc. A/CN.4/L492 & Add. 1 (1994).

projects that might affect other States interests. Indeed, the weight of evidence has led many legal scholars to suggest that there is now a customary international law requirement to do an EIA where transboundary impacts could result from a proposed course of action.

However, real questions remain as to whether and how impact assessment might be applied to broader development policies and plans, rather than simply transboundary development projects. In particular, can impact assessment instruments be applied to trade policy and specifically, to new trade agreements? This chapter looks forward in this regard. 'Section 1' will elaborate the rules concerning the basic structure and methodologies of impact assessments as they are presently being used, across jurisdictions. 'Section 2' will then consider existing impact assessment mechanisms with relevance to trade in specific jurisdictions such as the NAFTA, other processes used by the U.S. and Canada, procedures used by the EU, and by other international organizations. 'Section 3' will then provide some conclusions on the existing mechanisms, their rules, and their potential contributions to sustainable development.

At this point, a quick explanatory note about use of impact assessment terminology is appropriate. There are several 'impact assessment' instruments that are currently being applied to evaluate proposals for trade liberalization and new trade law. However, within this category of tools, there is significant range. Trade impact assessments have distinct scope, requirements, attributes and legal foundations in different national, regional and international contexts. The first of this type of impact assessment, typically found at the national level, were wholly concerned with the environmental effects of trade. As a result the description often only contained environmental considerations and much less reference to social issues (i.e. health, poverty, development). Examples of terms under this category include the Canadian EAs (Environmental Assessments), and US ERs (Environmental Reviews) of new trade agreements. On the other hand, more recent impact assessment instruments aimed at sustainable development integrate elements of economic, environmental *and* social concerns. Not surprisingly, the 'sustainable' aspect of these assessment tools is evident in the title of the mechanism: SIA (Sustainable Impact Assessment), employed by the EU, is one example. These distinctions are important – certain states, regions and international organizations are undertaking broader sustainability assessments of trade policies, while others are more focused on simply evaluating national or international environmental effects of their potential trade policies. These terminological differences are, at least in part, a reflection of the diversity of contexts and origins of existing assessment methods and mandates. In this book, whenever distinctions between the environmental and sustainable types of impact assessment are not relevant, the generic term IA (Impact Assessment) is used.

1. Rules Governing Impact Assessments of Trade Agreement across Jurisdictions

The following basic structure is shared by all impact assessment mechanisms. However, differing timeframes and degrees of integration among environmental, economic and social considerations exist. The following section briefly describes the analytical framework and methodology of environmental assessments of trade negotiations on a general level.

Impact assessment normally follows four main steps. First, scoping, second, initial review, third, the publication of a preliminary assessment (which informs negotiators), and last, a final assessment is prepared. Sometimes, ongoing reviews are mandated as follow-up.

In the scoping phase, expert meetings and various levels of public consultations assess the range of potential issues. Information-gathering and scientific studies typify the process at this point.[12] The majority of impact assessments work to ascertain the economic and environmental effect of the negotiations, as well as the significance of impact and enhancement and mitigation options. Conversely, impact assessments that are oriented towards sustainable development objectives, like those undertaken by the EU, investigate environmental as well as the social implications of the upcoming trade negotiations. The context of trade negotiations with applicable impact assessments is manifold, potentially ranging from a simple single tariff negotiation with little environmental consequences to a full-blown economic cooperation agreement in which services, IP, investment, competition and special trade in goods provisions should be negotiated and several environmental and social impacts can be identified. In case of the U.S. ER only negotiations that reach a certain magnitude are subject to the next phase. In most other countries the assessment could be halted in the initial review phase if no significant environmental impacts can be foreseen.

The objective of the initial review is to identify the potential impact of the trade negotiations on the environment. The level of analysis is variegated and depends on the mandate of the impact assessment: some merely inquire into the effects wrought on a domestic level (Canada); others investigate transboundary impacts once a certain threshold is crossed (U.S.) and still others use a global perspective to analyse the impacts (EU). The exact shape of the issues and areas of further investigation is achieved through a broad consultation process that engages expert groups as well as public stakeholders and civil society organizations.

In most cases the preliminary assessment document will inform the negotiators about the projected impacts of trade liberalization in certain areas and may even contain mitigation proposals. Some instruments also consider a 'zero-line approach' when appropriate: the preliminary

[12]See M. Gehring and MC Cordonier Segger, "Sustainable Development through Process in World Trade Law" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 194.

assessment will suggest ceasing negotiations on trade liberalization in a specific product area.

All IAs also contain an *ex post* final assessment, prepared after the negotiations have been concluded and the final text has been approved. The closing assessment illustrates how some negotiation positions might have changed due to the content of the preliminary assessment. Further, the final report may illuminate the trade-offs and balancing between economic liberalization and environmental protection, thereby explaining the motives behind decisions that potentially have adverse environmental effects but were accepted for other benefits.

2. Rules Governing Impact Assessments of Trade Agreement by Jurisdiction

Section 1 clarified the main procedural components shared by most impact assessments of trade agreements. This section draws on that foundation and elaborates specific jurisdictions to provide an illustrative overview of methodologies and practical applications of impact assessments (primarily environmental) at the national and regional level. Beyond the foundational work of the OECD and others, there are several examples of practical applications. Each case study mentioned below includes the legal foundation of the instrument (and political context where pertinent); the evolution of IA's scope and methodological content; a brief step-by-step outline of how the IA functions in practice; modes of public participation and consultation; and a concrete example in which the IA was applied to trade negotiations.

2.1 Environmental Review in the North American Free Trade Agreement (NAFTA)

The Environmental Side Agreement to the NAFTA, the *North American Agreement about Environmental Cooperation,* between Canada, Mexico and the United States contains the obligation to assess environmental effects of the NAFTA. Although the Commission on Environmental Cooperation (CEC) is institutionally autonomous from the NAFTA Commission, Art.10.6 d) of the NAAEC specifies that the Council of Ministers of the CEC is responsible for "considering on an ongoing basis the environmental effects of the NAFTA" in cooperation with the NAFTA Commission. Given the dearth of extant methodologies to implement this obligation,[13] the development of a regional methodology was the principle aim of the CEC Secretariat. The CEC planned to finalize a *Final Analytical Framework* for these assessments within five years by undertaking a project with two phases. The first phase consisted of discussions weighing abstract methodological approaches.[14] The second phase applied the derived methodologies to actual case studies. The culmination of the

[13] J. *Barr*, "Final Analytical Framework to Assess the Environmental effects of NAFTA", in WWF & Fundación Futuro Latinoamericano, *The International Experts' Meeting on Sustainability Assessments of Trade Liberalisation – Quito, Ecuador 6-8 March 2000, Full Meeting Report*, (Gland: WWF, 2000), 100.
[14] CEC, *Building a Framework for Assessing NAFTA Environmental Effects - Report of a Workshop held in La Jolla, California, on April 29 and 30, 1996* (Montreal: CEC, 1996).

second phase was a detailed methodological proposal and three case studies testing the contours of the methodology.[15]

The CEC ministerial council adopted the final CEC methodology in 2000. The *Analytic Framework for Assessing the Environmental Effects of the North American Free Trade Agreement*[16] was particularly innovative in ensuring broad public participation in the development of the framework and can be considered the first RTA methodology enacted outside of the European Community.[17] The framework contains the following six hypotheses designed to focus the analysis of environmental impact:

> "1) Does NAFTA reinforce existing patterns of comparative advantage and specialization to the benefit of efficiency?
> 2) Does NAFTA trade liberalization lead to a regulatory/migratory 'race-to-the-bottom'?
> 3) Does NAFTA give rise to competitive pressures for capital and technological modernization?
> 4) Do liberalized rules under NAFTA serve to increase the use of environmentally friendly products?
> 5) Does NAFTA lead to upward convergence of environmental practice and regulation through activities of the private sector?
> 6) Does NAFTA lead to upward convergence of environmental practice and regulation through activities of the various levels of government, and if so, how?"[18]

After analysis in all six domains has begun, indicators are chosen to investigate one or more of the hypotheses on a quantitative level. The CEC secretariat expressed the hope that the hypotheses "[…] will aid the analyst to tie together the particular variables and relationships identified in the framework, and address important areas of possible environmental effects."[19] Another reason for delving into quantitative measurements (disentangling linkages among variables from exogenous effects is an intricate process, as is the mere operationalization of variables) is the desire to do justice to the inherent complexity of the environmental effects caused by the trade generated by a single liberalization agreement.[20]

The *Analytical Framework* follows a linear approach also promulgated by the OECD. The framework suggests temporal sequencing: the first period of interest is 1985-1990 -- prior to NAFTA's inception. At this juncture, the investigation focuses on economic and other consequences surrounding NAFTA's entry into force, in particular: "NAFTA Rule Changes, NAFTA's Institutions, Trade Flows, Transborder Investment Flows, Other Economic Conditioning Factors."[21] Of particular interest is the analytical combination

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[15] CEC, *Assessing Environmental Effects of the North American Free Trade Agreement (NAFTA) - An Analytic Framework (Phase II) and Issue Studies* (Montreal: CEC 1999).
[16] CEC, *Analytic Framework for Assessing the Environmental Effects of the North American Free Trade Agreement* (Montreal: CEC 1999), online: CEC <http://www.cec.org/files/pdf/ECONOMY/Frmwrk-e_EN.pdf> (Aug 2006).
[17] *Id.*, p. iii pp.
[18] *Id.*, p. 3-4.
[19] *Id.*, p. 3.
[20] Jane *Barr*, Final Analytical Framework to Assess the Environmental effects of NAFTA, in *WWF & Fundación Futuro Latinoamericano*, The International Experts' Meeting on Sustainability Assessments of Trade Liberalisation – Quito, Ecuador 6-8 March 2000, Full Meeting Report, Gland 2000, S. 100.
[21] *CEC*, Analytic Framework for Assessing the Environmental Effects of the North American Free Trade Agreement, Montreal 1999, S. 8.

of quantitative factors for trade and investments with environmental factors: production, management and technology, physical infrastructure, social organization, and government policy. It is worth noting the pliable nature of the instrument; the authors of the *Analytical Framework* intentionally refrained from making final determinations about the relative weighing and assessment of environmental data. The epilogue clarifies the rationale behind such open-endedness: "This framework is offered to individuals, institutions and governments to assist in understanding the linkages between environmental and trade policies."

Since its codification, the *Analytical Framework* has since been applied in three case studies: an examination of Mexican corn; beef production in the both the United States and Canada; and the electricity market in all three countries.[22]

2.2 United States' Environmental Review of Trade

In 1991, the U.S. conducted pilot assessments on an aspect of the NAFTA negotiations.[23] Several years later, on 16 November 1999[24], President Bill Clinton signed Executive Order (EO) 13.141 codifying Environmental Reviews as internally binding assessment obligation for trade negotiations. The terminology was chosen to avoid confusion with EIS but also to prevent litigants from using ER results in litigation against the government.[25] The first attempt to apply general environmental impact assessment laws to trade negotiations failed in U.S. courts. An NGO demanded that the office of the United States Trade Representative (USTR) should conduct an Environmental Impact Statement (EIS) of its negotiation positions for NAFTA under the U.S. National Environmental Policy Act (NEPA) and litigated for such assessment.[26] Yet, because the final decision as to whether to sign a trade agreement rests with the U.S. President, the Court of Appeals found that the trade agreement could not be considered an 'action of an agency' and as such, dismissed the request.[27]

The political context pervading the EO is significant. In preparation for the upcoming Seattle WTO Ministerial Conference, the administration sought to strengthen the inclusion of civil society into trade negotiations. The EO 13.141 contains essentially the same process phases as required under NEPA and as such belongs to the same family of legal instruments as the EIS. As the terminology suggest, the ERs are primarily an instrument to assess environmental impacts:

> "[t]he United States is committed to a policy of careful assessment and consideration of the environmental impacts of trade agreements. The United States will factor environmental

[22] CEC, *Assessing Environmental Effects of the North American Free Trade Agreement (NAFTA) - An Analytic Framework (Phase II) and Issue Studies*, (Montreal: CEC, 1999), p. 65 pp.
[23] USTR, *Draft review of U.S.-Mexico Environmental Issues (1991).* For a full account of the history see J Salzmann, "Executive Order 13.141 and the Environmental review of trade agreements" 95 [2001] American Journal of International Law 368.
[24] *Federal Registry* Vol. 64 No. 222 of 18.11.1999 page 63.169 p.
[25] As such section 7 of EO 13.141 contains the usual disclaimer for executive orders: „This order is intended only to improve the internal management of the executive branch and does not create any right, benefit, trust, or responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person."
[26] *Public Citizen v. Office U.S. Trade Representative*, 822 F. Supp. 21 (D.D.C. 1993).
[27] *Public Citizen v. Office U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993).

> considerations into the development of its trade negotiating objectives. Responsible agencies will accomplish these goals through a process of ongoing assessment and evaluation, and, in certain instances, written environmental reviews."[28]

If the environmental effects (distinctively including positive and negative impacts) are determined to be transboundary in nature and but still have ramifications for the U.S., the assessment may take on a global complexion.[29]

Edicts within the ER procedures insist on building the capacity of trading partners for environmental protection in order to ensure "the promotion of sustainable development."[30] Governmental actions that may impede sustainable development are prohibited. Coordination between the administration and Congress as well as encouragement towards participating in international environmental agreements is included in the Trade Act of 2002. The ER – an *ex ante* procedure laden with public participation requirements -- is tripartite in character and avoids imposing any conditions on the trade negotiation process. The first phase is initiated by a notice in the Federal Register describing the proposed trade agreement and soliciting public comments and statements about the scope of the ER, (Section 5 (a) (ii) EO). In the second phase, the ER is be published where practicable and further comments are encouraged. The final phase constitutes the final ER, the content of which contains a compendium of public concerns that were given due consideration by the drafting body.

At the time of publication, the six U.S. ERs have taken place. The ER for the *Central American Free Trade Agreement* (CAFTA)[31] featuring the impact of including the Dominican Republic in the RTA was published in February 2005.[32] The disclosure reiterated an interim review in 2003[33] and pronounced that the modified membership of the RTA

> "may have relatively greater effects on the economies of Central America and the Dominican Republic. In the near term, however, net changes in production and trade are expected to be relatively small because exports to the United States from these countries already face low or zero tariffs. Longer term effects, through investment and economic development, are expected to be greater

[28] EO 13.141, Section 1.

[29] USTR, *Guidelines for implementation of EO 13.141* (Washington: USTR, 2001) Appendix C.G: "Transboundary and global impacts may include those on: Places not subject to national jurisdiction or subject to shared jurisdiction, such as Antarctica, the atmosphere (including ozone and climate change features), outer space, and the high seas; Migratory species, including straddling and highly migratory fish stocks and migratory mammals; Impacts relating to environmental issues identified by the international
community as having a global dimension and warranting a global response; Transboundary impacts involving the boundaries of the United States; Environmental resources and issues otherwise of concern to the United States." Online: USTR < http://www.ustr.gov/assets/Trade_Sectors/Environment/Guidelines_for_Environmental_Reviews/asset_upload_file556_5734.pdf > (Aug 2006).

[30] Sec. 2102(b)(11)(d) Trade Act of 2002.

[31] USTR, *Interim Environmental Review of the U.S.-Cental America Free Trade Agreement (CAFTA),* 22 August 2003, online: USTR< http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/asset_upload_file946_3356.pdf > (Aug 2006).

[32] USTR, *Final Environmental Review of the Dominican Republic – Central America – United States Free Trade Agreement* (Washington: USTR, 2005), online: USTR <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/asset_upload_file953_7901.pdf>.

[33] USTR, *Interim Environmental Review of the U.S.-Cental America Free Trade Agreement (CAFTA),* 22 August 2003, online: USTR< http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/asset_upload_file946_3356.pdf > (Aug 2006), p. i.

but cannot currently be predicted in terms of timing, type and environmental implications."[34]

2.3 Canada's Environmental Assessments of Trade

In 1994, Canada carried out an *ex post* environmental review of the WTO Uruguay Round agreements.[35] Increasing domestic pressure from several agencies, civil society groups and others, led the Liberal government to introduce the internally binding 'Strategic Environmental Assessment of Plans and Policies (SEA)' in 1999.[36] This 1999 Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals[37] mandated that every governmental policy should be assessed as to its environmental impact. Trade policy was listed (Annex 1 of the Cabinet Directive) because the Canadian Environmental Assessment Act (CEAA) is not applicable to trade policy.[38] Binding guidelines[39] were adopted which detailed all necessary assessments and regulated public participation. After a positive experience with introducing an informal EIS framework in the 1980s before formally adopting the CEAA in 1992 (in force since 1995), the Canadian government followed the same approach here and thus avoided formal regulation.[40]

At the beginning of 1999, the newly consolidated Department of Foreign Affairs and International Trade (DFAIT) agreed to assess the outcomes of the Uruguay Round agreements anew in their first four years of operation in order to prepare for the expected millennium round (the round of negotiations which was later postponed by the Seattle Ministerial of 2000). This *Retrospective Analysis of the 1994 Canadian Environmental Review of the Uruguay Round of Multilateral Trade Negotiations*[41] was published in November 1999. Building upon these experiences, the Canadian government prepared for an analysis of the new WTO negotiations. Later, this framework was expanded to bilateral, regional and multilateral trade negotiations. All provinces and territories, representatives from the First Nations and other civil society representatives were consulted. The *Environmental Assessment of Trade Negotiations* was adopted through a Decision of Cabinet in February 2001.[42] The framework of these assessments was also codified and implementation of the Cabinet Directive on SEA in the area of trade policy was allocated to DFAIT.

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[34] *Id*., para. 4.
[35] DFAIT, *1994 Canadian Environmental Review of the Uruguay Round of Multilateral Trade Negotiations*, DFAIT online <http://www.dfait-maeci.gc.ca/sustain/EnvironA/strategic/urugay-en.asp> (Dec 2006).
[36] See M. Gehring and MC Cordonier Segger, "Sustainable Development through Process in World Trade Law" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 206.
[37] Canadian Environmental Assessment Agency (ed.), *Strategic environmental assessment - the 1999 Cabinet directive on the environmental assessment of policy, plan and program proposals; guidelines for implementing the Cabinet directive = Evaluation environnementale stratégique*, CEAA online: <http://www.ceaa.gc.ca/016/directive_e.htm> (Aug 2006).
[38] For its history see Canadian Environmental Assessment Agency, *The Canadian Enviornmental Assessment Act - Introduction*, CEAA online <http://www.ceaa.gc.ca/013/intro_e.htm> (Aug 2006); complete text see CEAA online <http://www.ceaa.gc.ca/013/ceaa-2003.pdf>.
[39] *Guidelines for implementing the cabinet directive on the environmental assessment of policy, plan and program proposals*.
[40] See M. Gehring and MC Cordonier Segger, "Sustainable Development through Process in World Trade Law" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 206.
[41] See DFAIT online <http://www.dfait-maeci.gc.ca/tna-nac/documents/retrospective-e.pdf> (Dec 2006).
[42] DFAIT, *Framework for Conducting Environmental Assessments of Trade Negotiations*, February 2001, DFAIT online: <http://www.dfait-maeci.gc.ca/tna-nac/EAF_Sep2000-en.asp> (Aug 2006).

The Canadian EA consists of three primary phases. In an initial Environmental Assessment, the ministry analyses the scope of the negotiations and range of potential environmental effects. Only if these are found to be minimal, will a formal assessment halt at this stage.[43] The second phase is the elaboration of a draft EA study, and the third phase is a final EA. The draft EA is intended to assist the Canadian trade negotiators. The final EA describes the result of the trade negotiations and speculates on the role EAs played in reaching the conclusion. All stages contain extensive public participation requirements including information provision involving the publication of drafts; a website interface designed for interested stakeholders to comment on the assessment; interdepartmental and multi-level government consultation and an explicit feedback loop in which concerns that have arisen are factored into the investigation. *Ex post* monitoring and *ex post* assessment might be recommended but are not mandatory.[44]

As the terminology suggests the Canadian EAs focus almost exclusively on environmental issues. Despite the narrow focal point, the Canadian government refers to the assessment instrument as an indispensable decision making tool for promoting sustainable development. EAs are seen to contribute to the enhanced transparency and good governance principles of sustainable development by encouraging "more open decision making within the federal government by engaging representatives from other levels of government, the public, the private sector and non-governmental organizations in this process."[45] The EA guidelines succinctly summarise these objectives:

> "- to assist Canadian negotiators integrate environmental considerations into the negotiating process by providing information on the environmental impacts of the proposed trade agreement; and
> - to address public concerns by documenting how environmental factors are being considered in the course of trade negotiations."[46]

The Canadian assessment thus seems to strike the right balance between public participation and innovation for the negotiation, i. e. the question as to how the assessment results influence the negotiations.

However it does not assess social and developmental concerns explicitly, only environmental impacts within Canada are being assessed (even though some health issues are being considered). Moreover, the procedure eschews any investigation of environmental impacts on the trading partner or potential implications on a global level.

In the current context, it is fascinating to note the commonalities among the environmental impact assessments employed to investigate RTAs by the U.S. and Canada. The *2003 Initial Strategic Environmental*

[43] See M. Gehring and MC Cordonier Segger, "Sustainable Development through Process in World Trade Law" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 208.
[44] Ibid. 208 pp.
[45] DFAIT, *Framework for Conducting Environmental Assessments of Trade Negotiations*, February 2001, DFAIT online: <http://www.dfait-maeci.gc.ca/tna-nac/EAF_Sep2000-en.asp> (Aug 2006).
[46] Id. p. 4.

Assessment Report of the Canada-Central America Four Free Trade Negotiations (El Salvador, Guatemala, Honduras and Nicaragua)[47] concluded that the small quantity of trade flows overall would have negligible environmental consequences for Canada. Even in those limited areas of increased exports such as high value paper and plastics, the C4 negotiations were deemed preclude any adverse environmental effects. The assessment did not consider effects of the negotiations on the C4 countries, nor was a more regional approach to an EA considered. This out of respect for the sovereignty of the C4 countries makes good sense. An international coordination of assessment efforts could enable Canada to also address impacts with regard to the trading partners.

2.4 European Union's Sustainability Impact Assessments on Trade

The European Union, in accordance with the Agenda 21 and the 1992 Rio Declaration, has established Sustainability Impact Assessments (SIA); mechanisms crafted to mainstream environmental and social concerns into policies with a view to promoting sustainable development.[48] Since the 1990s, the Commission has developed processes implementing the 'precautionary principle'[49] with the goal to "better understand the benefits and costs of its policies and to manage risk, including ex-ante assessment of policies (i.e. assessment in advance of implementation)." As such, SIAs seek to identify potential social, economic and environmental impacts using indictors from all three 'pillars' of sustainable development. In the quest for fully developed and rigorously defined SIA methodology, indicators and measurements have both quantitative and qualitative attributes.[50] Today the SIA is at the vanguard of holistic impact assessment tools, showing evidence of being a fully integrated instrument and including recommendations for enhancement and mitigation where relevant.

NGO demands leading up to the 1999 Seattle Ministerial prompted the DG Trade to commission the first expert study, conducted by a research team affiliated with the University of Manchester. This team was tasked with developing a methodology for an *ex ante* Sustainability Impact Assessment (SIA). After the methodology was formalized (with degrees of context-specific flexibility), the DG Trade inaugurated several studies using the framework for assessing the impact of trade policy on sustainable development. After refining, the SIA consisted of four main phases:

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[47] DFAIT, *Initial Strategic Environmental Assessment Report of the Canada-Central America Four Free Trade Negotiations (El Salvador, Guatemala, Honduras and Nicaragua)* (Ottawa: DFAIT, 2003). Online: DFAIT < http://www.dfait-maeci.gc.ca/tna-nac/documents/ea0423-en.pdf>.

[48] European Commission, DG Trade, *Draft Handbook for Sustainability Impact Assessment* (Brussels: European Commission, 2005) 1, online: European Commission < http://trade-info.cec.eu.int/doclib/docs/2005/april/tradoc_122363.doc>.

[49] The 'precautionary principle' is at the intersection of three areas of law (economic, social and environmental) within the broad rubric of international sustainable development law. The precautionary approach to risk management commits states, IGOs and civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems including in the face of scientific uncertainty. See MC Cordonier Segger & A Khalfan, *Sustainable Development Law* (Oxford: Oxford University Press, 2004) 100.

50 While the Commission currently proposes to determine the methodology for each SIA, it considers the incorporation of a mix of qualitative and quantitative methods, such as case studies, modeling, statistical estimation and expert opinion to be beneficial.

- "*screening:* to determine which measures require SIA because they are likely to have significant impacts,
- *scoping:* to establish the appropriate coverage of each SIA,
- *preliminary sustaimability assessment:* to identify potentially significant effects, positive and negative, on sustainable development, and
- *mitigation and enhancement analysis:* to suggest types of improvements which may enhance the overall impact on sustainable development of New Round Agenda measures"[51]

These phases are infused with avenues of public participation and consultation with civil society organizations. Numerous workshops and consultations, both formal and informal, are held at each phase of the report derivation process. Intermittently, a website provides public access to reports and timely publications.

One of the more unconventional and controversial features of the SIA methodology is the investigation of the impact on the European Union as well as its trading partner(s) in the particular negotiations. Unfortunately research collaboration with trading partners is not always reciprocal: in the Mercosur and Mediterranean studies, cooperation was fruitful; but the study on the EC -Cooperation Council for the Arab States of the Gulf negotiations did not unfold as envisioned.[52] Public participation in these expert studies varied from extensive debates and consultations to merely an administered website. As one private consultancy noted in their study: "The NGO world did not show a big interest in the topic, nevertheless engagement was done at several moments. NGO from the GCC have not even replied to our requests to get their view, input."[53] Despite the lack of legal framework, arguably an impediment to further progress of the SIA, there is a *de facto* requirement for the Commission to observe outcomes.

2.5 Environmental Assessments of Trade Policies in the 2001 WTO Doha Declaration

WTO 'Development Agenda' negotiations have left the sustainable development provisions of the 'Doha Declaration'[54] unfulfilled. Unfortunately, the WTO and its Members have not yet acted on the specific sustainable development mandates and substantively link trade negotiations to the *World Summit for Sustainable Development* (WSSD). The Trade Ministers supported such a connection in their Ministerial declaration of November 2001 in Doha, Qatar: "We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the *World Summit on Sustainable Development* to be held in

[51] See M. Gehring and MC Cordonier Segger, "Sustainable Development through Process in World Trade Law" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 211.
[52] See PriceWaterhouseCoopers, *Sustainability Impact Assessment (SIA) of the negotiations of the trade agreement between the European Community and the Countries of the Cooperation Council for the Arab States of the Gulf (GCC)* (Brussels, PWC 2004). Available online: DG Trade < http://trade-info.cec.eu.int/doclib/docs/2005/january/tradoc_121208.pdf>.
[53] Id. p. 36.
[54] Ministerial declarations are fundamentally just political declarations and thus not legally binding. One exception of this rule are ministerial declarations laying out multilateral trade negotiations. In this case the ministerial declaration is of quasi-legal character, since every formulation can contain a negotiation mandate and the declaration also sets the limits in scope of the new negotiations.

Johannesburg, South Africa, in September 2002."[55] Despite these shortcomings, it is suggested that a binding, more integrated legal framework towards sustainable development is readily available to both the WTO as a whole as well as individual Members.

Several parts of the Doha Ministerial Declaration recognize that broader participation and information exchange can drive legal innovation. Two procedural provisions of the Doha Ministerial Declaration are particularly interesting in this context. The first is a preambular encouragement of "national environmental assessments of trade policy on a voluntary basis."[56] This support is reiterated in para. 33, where Ministers "also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level." Evidently, WTO members are persuaded to study the environmental effects of trade on the national level and well as to pursue collaboration with other Members in this domain.

A second provision seeks to expand national environmental assessments into the sustainable development realm (i.e. integrating social and development concerns into the subject matter investigated): para. 51 of the Doha Ministerial Declaration augments the mandate of WTO Committees on Environment and Development (CTE and CTD, respectively) to *ex ante* surveillance of trade negotiations. Such collaboration may include working to identify and debate the developmental and environmental aspects of the negotiations thereby properly reflecting the notion of sustainable development. The current 'forum approach' lacks the use of an available legal tool kit – the caveat of 'receptive mandates' precludes universality -- and falls short of incepting the crucial principles mentioned above.

2.6 The World Bank's Pre-loan Environment Assessments

The World Bank has long adopted a policy in which recipients of loans must adhere to certain minimum standards for the impact assessment of their projects. Simultaneous to these exogenous studies, the Bank devises an internal investigation of the potential impact of the proposed project. The *Operational Directive 4.00, Annex A: Environmental Assessment* (October 1989) regulates the obligation to conduct an EA for projects financed by the World Bank.[57] The directive was amended in January 1999 by Operational Policy (OP) 4.01 and Bank Procedures (BP) 4.01.[58] The main purpose of the OP, akin to the earlier directive, is to codify the minimum standards and formalize the impact assessment for all World Bank financed projects.[59] The EAs continue to be conducted under the national authority of the loan-taking country, but a World Bank task team advises and oversees the progress of as stipulated in §2 BP 4.01. Only large projects have Environmental Advisory Panels that review the content of the assessment and supervise implementation. An obligation "to take

[55] Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 14 November 2001, para. 6.
[56] *Ibid*.
[57] *Weltbank*, Environmental Assessment Source Book, Volume 1, Policies' Procedures and Cross Sectoral Issues – Environment Department, Washington 1991, 5 ed. June 1998, p. 27.
[58] Ibrahim F. I. *Shihata*, The World Bank in a Changing World, Vol. III., Den Haag 2000, p. 491.
[59] Ibrahim F. I. *Shihata*, The World Bank in a Changing World – Selected Essays, Amsterdam 1991, S. 143.

the views of affected groups and local NGOs fully into account in project design and implementation and, in particular, in the preparation of the environmental assessments" is part of the rules regulating the proceedings.

There are several other countries and NGOs that have conducted impact assessments; however, in most cases methodologies and terminologies greatly resemble the examples mentioned above.[60] The growing use of these instruments in one form or another demonstrates increasing acceptance for institutionalised assessments of trade policy.

3. Lessons Learned in Impact Assessments of Trade Agreements

Previous sections expounded on similarities and divergences between various trade-related impact assessment tools. At this juncture, there will be a synopsis of these attributes.

Economic considerations are a central element of trade-related impact assessment instruments

At a fundamental level, each of the instruments considered -- the U.S., Canada, the EU, NAFTA and the nascent WTO mechanisms -- require economic analysis designed to assess the likely economic impact of the proposed liberalization step. Relative consensus surrounds simple cases (i.e. tariffs) requiring commonly acknowledged econometric calculations. However, debates persist regarding the global equilibrium model used by the USTR. The prevalence of impact assessments extends beyond pure trade issues and includes infrastructure projects (harbours, roads, airports) as well as facilities for trade in services.[61]

Public participation is central a central element but implementation is inconsistent

Most mechanisms rely mainly on domestic public input to direct the extensiveness of the study of the environmental impact of trade. Expert groups work parallel to the public and civil society organizations, but are expected to investigate the validity of concerns raised through consultation feedback loops. At minimum, initial impact assessment reports are published or available on government websites and solicitation of comments occurs. Final drafts of IAs incorporate issues deemed material that have arisen through public participation. Enforcing participation (but falling short of justiciablity) the U.S. ERs and the Canadian EAs have a binding obligation to assess the outcome of the negotiation and justify deviation from the recommendations in the initial assessment. The U.S. ERs have a formalised process for information and participation, which has to be followed by the USTR. There is also a

[60] An overview provides the WTO, *Environmental (Sustainability) Assessments of Trade Liberalization Agreements - Note by the Secretariat*, WTO Document WT/CTE/W/171 of 20.10.2000 and WWF, online: WWF <http://www.balancedtrade.panda.org/approaches.html> (Aug 2006).

[61] A new CISDL research project assesses all areas of national policy which are already covered by national or international impact assessment obligations.

movement within the EU's DG Trade to formalise the process as described in the SIA Draft Handbook.[62] Impact assessments that integrate sustainable development concerns, like the EU's much-touted SIA, necessarily have a broader range of participation instilled into the methodology. To reiterate, the SIAs often facilitate cross-boundary consultations with a coordinated structure of trans-frontier public discussion.[63] Numerous workshops and consultations are held at each phase of the report on both formal and informal levels.

The EU: sui generis in its application of developmental and social concerns into trade-related EIAs

The United Nations Environment Program (UNEP) gives special recognition to the EU for its fully integrated impact assessment instrument. While most environmental impact assessment tools fail to explicitly consider social and developmental issues, the EU's SIAs amalgamate economic, social and environmental issues using a mix of measurements and indicators constantly undergoing refinement. The EU methodology handbook enunciates the virtues of a flexible, context-specific methodological approach to sustainability impact assessment. In keeping with its cutting-edge status in impact assessment innovation, the EU is currently mulling over proposals to extend SIAs to human rights.

Regulatory Reviews are a fundamental aspect of EIAs, less applicable to SIAs

Chiefly in the case of Canada and the United States, regulatory reviews are an integral part of the assessment exercise. The Canadian EAs make regulatory assessment a key part of the analysis. In contrast, the SIA Draft Handbook has no provisions mandating the analysis of regulations. Indeed, EU consultants rarely give regulatory analysis a central role in the studies undertaken. Assessing the regulatory impact of trade liberalization is interesting to lawyers specifically because of the need harmonize international commitments into the national legal framework. Not surprisingly, the majority of studies undertaken merely reiterate that trade positions requiring negative modifications to national environmental regulatory configurations are untenable. However, the dominance of this trend may be diminishing; due to increased public awareness concerning investment arbitration, the recent U.S. ERs had to repeatedly rebuff the argument that investor-states arbitration could negatively influence U.S. environmental laws.[64]

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[62] European Commission, DG Trade, *Draft Handbook for Sustainability Impact Assessment* (Brussels: European Commission, 2005) 21pp.

[63] While admirable, in most cases transboundary consultations have outstanding issues that need to be addressed. The allocation of responsibilities for facilitating these international discussions have jurisprudential issues attached that need clarification. In addition, substantive discrepancies that may exist in the scoping process, related to substantive and temporal issues, need to be assuaged.

[64] The case in question was the ER assessing the Australia-U.S. FTA. The USTR took the position that regulatory alterations were not intrinsically detrimental to US interests in the case of an "open economic environment and the shared legal traditions and the confidence of investors in the fairness and integrity of their respective legal systems". See for further discussion M Kerr, "Sustainable Development in the Australia-US Free Trade Agreement" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 499, 510.

[64] See lengthy discussion in USTR, *Final Environmental Review of the Dominican Republic – Central America – United States Free Trade Agreement* (Washington: USTR, 2005) 29 pp. and USTR, *Final Environmental Review of the United States - Morocco Free Trade Agreement*, July 2004, 18 pp. online: USTR <http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/asset_upload_file569_5831.pdf> (Aug 2006).

Support to trade negotiators varies among diverse impact assessment mechanisms

The comprehensiveness of SIA expert studies, taking into account sustainable development concerns in addition to potential environmental ramifications of trade, could potentially be more 'negotiator-friendly' than results of broad consultations. On the other hand, the fact that the same in-house team in the USTR and the Canadian Department of Foreign Affairs is responsible for each consecutive assessment adds a layer of neutrality to the assessment exercise and facilitates knowledge accumulation, understanding the needs of the negotiators better than external consultants.

4. A Systemic Challenge: The limiting effects of national sovereignty on trade impact assessments

Despite the differing methodologies and applications of impact assessment tools, one can decipher several systemic deficiencies inhibiting progression into a universally utilized instrument that integrates principles of sustainable development.

First, the locus of the instruments – principally national -- has a very limiting effect on applicability. This defect is in clearest relief in the case of Canada, where global environmental impacts of trade negotiations only enter the analysis if they affect Canada. The national nature, even though endorsed by the WTO Doha Ministerial Declaration, could potentially lead to imbalances in scenarios where bilateral trade negotiations take place among trading partners with disparate resources and stringency of regulation. This situation can be even less representative if parties to an existing RTA enter into a FTA with a third country which then assesses the impact in a necessarily narrow way (for example, the case of the US-Andean FTA).

One potential solution to the paucity of impact assessments with a global perspective is embodied in the framework of the EU SIA, which mandates a reciprocal impact assessment on its trading partner. Employing regional impact assessments to overcome the lack of parity among trading partners is an alternative answer involving methodological and structural innovation. However, attempts by NAFTA trading partners to initiate an integrated assessment process at the regional level have not progressed beyond discussions about abstract methodology issues. In fact, the EU is the sole region to produce a self-reflective environmental assessment. The multilateral forum of the WTO provides another potential solution to the inadequacies of national and bilateral impact assessments. Innovations within the WTO institutional structure will be mentioned below in a section dedicated to this analysis.

5. Prospects for Innovation: Fostering a transition from EIAs to SEAs by subscribing to obligations outlined by international conventions

2003 Kiev 'SEA' Protocol of the Espoo Convention

Moving beyond the project-based focus of common impact assessments of trade, there is potential for applying Strategic Environmental Assessments (SEA) to negotiations. When environmental impact assessments are applied to projects, target-related indicators (performance-based, specific timeline) limit the reach of enhancement and mitigation recommendations. Conversely, strategic level assessments incorporate process-related indicators such as the soundness of institutional planning as well as management processes and mechanisms. Indeed, SEAs have already been formulated and implemented in most states for analysis of land use plans or policies. Broadly defined in Article 2.6 of the 2003 *Kiev Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context,*[65] SEAs are operationalized as

> "the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme."

Thus, the Kiev Protocol explicitly regulates the impact assessment of plans and programmes, but is not binding at the policy level. Trade policy and negotiations are not covered under the protocol, which nevertheless mentions the importance of assessing the environmental and developmental (particularly health) impact of plans and programmes. The Kiev Protocol limits the prescribed assessment of plans and programmes to the following areas: agriculture; forestry; fisheries; energy; industry including mining; transport; regional development; waste management; water management; telecommunications; tourism; town and country planning or land use.

UNEP espouses an integrated IA framework

The Kiev Protocol to the Espoo Convention is an international treaty designed to mitigate the tension between internationally delimited impact assessment procedures and the state freedom to govern the exploitation of their environment. Other international cooperation has moved forward on from the foundations laid out in the Protocol. Indeed, the United Nations Environment Programme (UNEP) adopted a more inclusive approach to impact assessments, fabricating an expanded definition that considers

[65] It has not yet entered into force. In August 2005 only Finland and the Czech Republic had ratified the protocol. It was negotiated in the context of the 1991 *Espoo Convention*, 30 I.L.M. 800, for more information see online: UNECE components of strategic assessment, see online: UNECE < http://www.unece.org/env/eia/sea_protocol.htm>.

> "the economic, environmental and social effects of trade measures, the linkages between these effects, and aims to build upon this analysis by identifying ways in which the negative consequences can be avoided or mitigated, and ways in which positive effects can be enhanced."[66]

The UNEP has avoided proposing a single methodology but rather suggests that countries carefully tailor their assessments to the specific sector of trade and potential impacts at hand. After UNEP testing and refining integrated assessment methods through various country studies,[67] the UNEP has developed considerable analysis which can be used by developing countries and others seeking to undertake specific studies, but no rules. Indeed, the scope for these studies was necessarily national in character.

6. Opportunities for Progress: Institutional reconfiguration across the Americas, broadening the purview of public and international stakeholder participation

As the chapter has indicated thus far, the inconsistencies and patchiness of the current international impact assessment regime has plenty of room for improvement in order to galvanize environmental protection and to graft sustainable development issues firmly onto trade negotiation proceedings. Given that the current scale and scope of any of the described assessments is restricted, a genuinely collective review mechanism would be advisable. Broader participation is possible and necessary. Multilateral – or at least multilaterally coordinated – assessment could provide superior results because the impact on all participating members would be simultaneously explored. Akin to the case of transnational projects, broader information and participation can drive legal innovations as ameliorative results feed more easily into the negotiation process.

An expanded commitment to the precautionary principle of world trade could be procedurally met by some form of impact assessment adopted at the institutional level of the WTO,[68] at the level of the Americas, or in each sub-region (North America, Central America, Andes, South America and the Caribbean). The obligation to perform an impact assessment can be called 'precaution through process.'[69] Conducting simultaneous assessments among several countries can overcome resource and regulatory imbalances because the institutional structure prohibits a one-sided review of proposals. Multi-lteral processes operate on a *do ut des* basis, precluding any single country from swaying the outcomes of

[66] UNEP, *Reference Manual for the Integrated Assessment of Trade-Related Policies*, (Genva: UNEP 2001), online: UNEP <http://www.unep.ch/etu/etp/acts/manpols/refmania_final.pdf> (Aug 2006).
[67] *UNEP Economics and Trade Programme*, Country Projects on Trade Liberalisation and the Environment and on the Design and Implementation of Economic Instruments, online: UNEP <http://www.unep.ch/etu/etp/acts/capbld/cp.htm> (Aug 2006).
[68] See M. Gehring and MC Cordonier Segger, "Sustainable Development through Process in World Trade Law" in M Gehring & MC Cordonier Segger, Sustainable Development in World Trade Law (The Hague: Kluwer Law International, 2005) 191, 192.
[69] See M. Gehring, *Nachhaltigkeit durch Verfahren im Welthandel* (Diss. Hamburg, 2005), see also C. Weeramantry's separate opinion; he saw the obligation to perform an environmental impact assessment as ancillary to precautionary principle, ICJ Decision of 22 September 1995, ICJ Request for an examination of the situation in accordance with paragraph 63 of the Court's judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, ICJ Reports 1995, 344.

negotiations. A full WTO review, comprising of all the negotiations and impact assessments on the 148 member states would probably be untenable; but Americas or sub-regional subsets of the membership might be able to undertake such a task. As discussed, there are already indications that such an assessment could be possible. However, the dearth of commitment on devising a coherent methodological framework has obstructed fruitful progress on this front.

Amalgamating national and regional impact assessments with the TPRM
Arguably, the best place for coordinating assessment efforts within the WTO would be the Trade Policy Review Mechanism (TPRM). The rationale for embedding multilateral impact assessments in the TPRM is tripartite: congruencies in the objectives and outcomes of the tools, adherence to comparable principles and feasibility within the established institutional arrangement. Furthermore, discussion on such an innovation may not be politically charged to a debilitating extent; as information provided in a Trade Policy Review (TPR) is barred from applicability in dispute settlements, this might be particularly attractive for countries that already voluntarily undertake impact assessment studies. An incipient WTO Strategic Impact Assessment Body[70] is much more likely to receive widespread acclaim if it is molded from existing institutional structures. There are myriad parallels in the nature of impact assessments and the current TPR mechanisms. On a fundamental level, both instruments are designed to exchange and obtain information, but are not teleological toward results rendered.[71] Moreover, both TPRs and impact assessments adhere to analogous principles: TPRs scrutinize the degree to which WTO members fulfill their WTO commitments and final stages of impact assessments analyse the extent to which states pondered the multifarious implications of new areas of trade liberalization. As such, impact assessments could already be considered part of the WTO pledge to support sustainable development initiatives and policies of its Members. Further, the formidable transparency attribute of TPRs is shared by impact assessments, making IAs relevant in different stages of the current TPR process. One prospective offshoot of this coherence would be enabling Members to include their latest national trade impact assessments in their mandatory country reports. As the TPRs are currently configured, national impact assessments are considered extraneous: Switzerland included sections on trade and the environment in its 2000 TPR Country Report, but the WTO Secretariat was unable to review those aspects.[72] Another point of connection resulting in improved complementarity between nationally derived impact assessments and TPRs could be the augmented range of information gathering executed by the WTO Secretariat. Conceivably, the Secretariat could extend its focus on other international financial institutions to embrace environmental or developmental (including human rights – an integral aspect of sustainable development) organisations. Finally, the publication requirements of the TPRM are also very much in line with common impact assessment tools. Concerns arising

[70] Proposal by *Santarius*/*Dalkmann*/*Steigenberger*/*Vogelpohl*, Balancing Trade and Environment - An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance, Wuppertal Papers 133, Februar 2004, p. 46.
[71] A similar proposal is made by *Santarius*/*Dalkmann*/*Steigenberger*/*Vogelpohl*, Balancing Trade and Environment - An Ecological Reform of the WTO as a Challenge in Sustainable Global Governance, Wuppertal Papers 133, February 2004, p. 45.
[72] See *Trade Policy Review Body Joint Trade Policy Review Switzerland and Liechtenstein*, 4 and 6 December 2000, Minutes of Meeting, WTO-Dokument WT/TPR/M/77/Add.1 vom 24. Januar 2001.

from the impact assessment consultation process could be tabled at the multilateral level to abet coordination. Participation in these debates should be extended to NGOs, similar to the multifaceted consultation requirements of extant impact assessments. At a fundamental level, a 'truly multilateral' hemispheric impact assessment regime would have to ensure broad developing country participation to countervail perceptions that the innovation is yet new way to proceed with disguised protectionism. Some fear that impact assessments could become a pre-condition for trade agreements,[73] or could consume the diminutive resources of strained environmental ministries. Further substantive inclusion of other international stakeholders, or transferring elements of the process to competent international organisations such as UNEP and UNDP are alternatives worthy of in depth examination.

Instituting a joint strategy with holistic, integrated linkages between the CTE and the CTD

Paragraph 51 of the Doha Declaration is the wellspring of another prospective WTO institutional innovation to reconcile and universalize impact assessments on trade. Proposed expanded mandates for the Committee on Trade and the Environment (CTE) and the Committee on Trade and Development (CTD) are just a starting point in furbishing procedures to make WTO law more sustainable. National policy instruments remain indispensable in raising awareness among negotiators and will complement institutional alterations at the multilateral level. Indeed, sustainable development follows the principle of subsidiarity, as a result, SIAs are a powerful national policy tool for honing negotiating positions. Despite the domestic utility of impact assessments on trade, many serious international sustainable development problems can only be suitably addressed in a process enshrined at the international level. In the formulation of an integrated mandate between the CTE and the CTD, it is crucial that the two WTO Committees adopt a holistic and integrated discursive process attuned to the dictates of para. 51 of the Ministerial Declaration. The holistic aspect of this process implies the concurrent exploration of social, environmental and economic implications of international trade rules as opposed to relegating treatment to hermetically sealed themes. In the interests of legitimacy, the process should be inclusive, transparent, and participatory. There is emerging international consensus that norms generated through inclusive processes of decision-making are perceived to be more legitimate and therefore experience a greater degree of compliance. Hence, in an optimal scenario, the two Committees should work in partnership on a 'Committee on Trade and Sustainable Development' (CTSD) that includes diverse representatives (public, private and civil society-based groups) from both industrialized and developing countries. Acknowledging the positive contributions of assorted stakeholders in national and regional impact assessments; the CTSD's proceedings should be open to, and benefit from appropriate participation and consultation. In particular, reciprocal relationships should be galvanized with international organizations

[73] In fact, in the environmental review for the US – Jordan Free Trade Agreement, USAID provided funding for the Jordanian side of the Impact Assessment process.

oriented towards environment and/or development issues. Examples of likely candidates for cooperation with the CTSD are elucidated by para. 6 of the Doha Ministerial Declaration and include UNCTAD, UNEP, the World Bank and UNDP. Many expert civil society organisations and individuals could also offer advice and expertise on matters for which the WTO lacks specific capacity. In actuality, the CTE is already benefiting from such heterogeneous collaboration. These suggestions for greater internal and external transparency and public participation are consistent with many provisions of the Uruguay Round Agreements, para. 10 of the Doha Ministerial Declaration and the practice of the CTE. In carrying out the task conferred by the Doha Declaration, the CTE and the CTD would, in effect, be considering and debating the potential impacts of trade law and policy on the environment, societies, communities, and upon people. Given the gravity of the potential outcomes, this process could most effectively be carried out through a transparent, participatory and integrated process involving a variety of stakeholders to make the trade negotiation process more legitimate and more acceptable to a broader spectrum of international society.

In interests of providing a balanced account of the suggestions explored, the limits of the CTSD policy tool should be duly noted. Unfortunately, in the absence of genuine political will, strengthening the impact assessment regime does not automatically render international trade law more sustainable. Nonetheless, the malleable role of the CTD and the CTE is conducive to incorporating the growing volumes of impact assessment experiences and the successful methodologies of efficacious investigations into the recommended new competencies. From an international sustainable development law perspective, the most important advice is that the two Committees develop a joint strategy that leads to a robust sustainable development analysis. If both Committees work against each other, WTO would remain bereft of a constructive process to contribute to its international sustainable development goals.[74]

7. Conclusion

There are many imperative lessons to be learned from national and regional environmental assessments in order to facilitate innovation and participation. This paper has indicated that the framework encompassing current national impact assessments is conducive to participation, but useful enhancement and mitigation recommendations are limited by the national scope of the mechanism. Moreover, integrated impact assessments are indicative of substantive advances, but have uneven sway on the outcomes of national negotiation positions. To overcome these defects – part of a necessary incremental evolution – two proposals have been outlined: abetting the coordination efforts at the regional level for Regional Trade Agreements, at the hemispheric level or at the global multilateral level for the World Trade Organisation. Inherent difficulties exist in efforts to innovate existing multilateral organizations and to open up proceedings and decision making to heretofore excluded participants.

[74] Alhagi Marong & Markus Gehring, "Sustainability Challenges of Paragraph 51 of the Doha Declaration" (2002) 6 BRIDGES at 17, online ICTSD: <http://www.ictsd.org/monthly/archive.htm>, last accessed December 2006.

Attempts by the WTO to replicate impact assessment strategies from other sources (i.e. the World Bank) have been condemned by developing countries. Thus, any innovation in institutional mandate and avenues of participation within the fledgling impact assessment regime need to ensure broad ownership. Indeed, a participatory regional approach might provide an opening for this type of cooperation. The long-term premise of sustainable development as well as notions of intra-generational and inter-generational equity necessitates a high threshold of consensus and proactive commitment.

Centre for International Sustainable Development Law (CISDL)

The Centre for International Sustainable Development Law (CISDL) is an independent legal research institute that aims to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

As a charitable foundation with an international Board of Governors, CISDL is led by 2 Directors, and 9 Lead Counsel guiding cutting-edge legal research programs in a fellowship of 120 legal researchers from over 60 developing and developed countries. As a result of its ongoing legal scholarship and research, the CISDL publishes books, articles, working papers and legal briefs in English, Spanish and French. The CISDL hosts academic symposia, workshops, dialogues, and seminar series, including legal expert panels parallel to international treaty negotiations, to further its legal research agenda. It provides instructors, lecturers and capacity-building materials for developed and developing country governments, universities, legal communities and international organisations on national and international law in the field of sustainable development. CISDL members include learned judges, jurists and scholars from all regions of the world and a diversity of legal traditions.

With the International Law Association (ILA) and the International Development Law Organization (IDLO), under the auspices of the United Nations Commission on Sustainable Development (UN CSD), CISDL chairs a Partnership on 'International Law for Sustainable Development' that was launched in Johannesburg, South Africa at the 2002 World Summit for Sustainable Development to build knowledge, analysis and capacity about international law on sustainable development. Leading CISDL members also serve as expert delegates on the International Law Association Committee on International Law on Sustainable Development. For further details see www.cisdl.org.