

**The London School of Economics and Political Science**

*Environmental Assessment of Trade: Origins and Critiques of  
Effectiveness*

Aleksandra Stipanovich

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## **Abstract**

Environmental assessment (EA) of trade negotiations was born of political and public unrest about the unaccounted-for environmental impact of trade. As a legally mandated policy tool, EA offered the promise of innovating environmental governance which would contribute towards environmental protection efforts. This dissertation reviews EA of trade models in the United States and the European Union. It reveals that the assessment model has not realized its full potential as an asset in the fight against environmental harms and has, at times, been relegated to the role of a box-ticking exercise. It argues that many of the observed shortcomings in principle could be addressed and that EA of trade can deliver on its potential and serve as a medium to engender participatory and collaborative efforts to encourage cohesion and steer environmental decision making in trade. In a world where the threat of environmental crises, such as climate change, is becoming increasingly real, EA of trade must be reclaimed and used as the innovative tool that was promised when it was created.

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To my family and friends, thank you for your support throughout the years and for sharing this journey with me.

## List of Acronyms and Abbreviations

CBA	Cost Benefit Analysis
CCA	Causal Chain Analysis
CEC	Committee on Environmental Cooperation
CEPR	Centre for Economic Policy Research
CEQ	Council on Environmental Quality
CETA	Comprehensive and Economic Trade Agreement
CGE	Computable General Equilibrium
DAG	Domestic Advisory Group
DEIS	Draft Environmental Impact Statement
DICE	Dynamic Integrated Model of Climate and the Economy
EA	Environmental Assessment
ECA	Environmental Cooperation Agreement
EESC	European Economic and Social Committee
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
ENR	Office of Environmental and Natural Resources
EO	Executive Order
EP	European Parliament
EPA	Environmental Protection Agency
ER	Environmental Review
EU	European Union
FOIA	Freedom of Information Act
FAO	Food and Agriculture Organization
FTA	Free Trade Agreement
FTAA	Free Trade Areas of the Americas
GAO	United States Government Accountability
GATT	General Agreement on Tariffs and Trade
GTAP	Global Trade Analysis Project
IA	Impact Assessment
IAIA	International Association for Impact Assessment
IWC	International Whaling Commission
LSE	London School of Economics and Political Science
MEP	Member of the European Parliament
NAFTA	North American Free Trade Agreement
NEPA	National Environmental Policy Act
NGO	Non-Government Organizations
OECD	Organisation for Economic Cooperation and Development
PTPA	United States-Peru Free Trade Agreement
SCC	Social Cost of Carbon
SDS	Sustainable Development Strategy
EA	Strategic Environmental Assessment
SEM	Submission on Enforcement Matters
SIA	Sustainability Impact Assessment
TEPAC	Trade and Environment Policy Advisory Committee
TEU	Treaty of the European Union

TTIP	Transatlantic Trade and Investment Partnership
TNC	The Nature Conservancy
TPP	Trans-Pacific Partnership Agreement
TPSC	Trade and Policy Staff Committee
TSD	Trade and Sustainability Development
UN	United Nations
UNEP	United Nations Environment Programme
US	United States
USMCA	United States-Mexico-Canada Agreement
USTR	United States Trade Representative
WTO	World Trade Organization
WWF	World Wildlife Fund

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“Nothing in nature lives for itself. Rivers don’t drink their own water. Trees don’t eat their own fruit. The Sun doesn’t shine for itself. A flower’s fragrance is not for itself. Living for each other is the rule of nature”.

-Unknown<sup>1</sup>

## I. Introduction

This thesis takes a back-to-basics approach with environmental assessment (EA) of trade.<sup>2</sup> Although EA of trade is a relative newcomer to the field of assessment, its usage over the years already puts this assessment model at risk of falling into the category of a box-ticking exercise or glorified marketing tool, utilised by governments to push forward their trade agendas under the guise of ensuring environmental protection.<sup>3</sup> This thesis strips back EA of trade to its historical point of creation, to examine why this instrument was developed in the first instance. It will examine how EA of trade models was influenced by the development of previous EA models and whether this led to embedded bias within EA of trade models. It will then question the intended purpose of these models to explore whether that most basic of goals has been achieved, and to explore whether more can be accomplished. At its heart, this thesis seeks to question and clarify the flaws that underpin EA of trade as any efforts made to reform these models must confront these issues.

Inspiration for this research stems from a simple question, which led to an in-depth examination of the model of EA of trade: as the world becomes more globalised, particularly through freer trade, is there any policy tool or legislation that can be used by governments to ensure the protection of the environment? As there is no specific agreement which addresses

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<sup>1</sup> Although this quote has been attributed by some sources to Pope Francis, this is debated. It has also been claimed this derives from a Sanskrit proverb.

<sup>2</sup> This is inspired by the approach of Tate (1994) in assessing the concept of sustainability and Cashmore (2004) 416, 422, who also discusses an extension of this approach for research into assessment instruments, with respect to the role of science. The author has been inspired by this work and uses back-to-basics to mean a questioning of the underlying purpose, principles and assumptions of EA of trade, which in turn should be used to drive how the assessment is applied in practice.

<sup>3</sup> Regarding terminology, the term “environmental assessment” will be used when referring to both “environmental impact assessment” (EIA), which assess the environmental impact of projects in national jurisdictions, and “strategic environmental assessment” (SEA), which assess the environmental impact of policy and plans in national jurisdictions. When discussing EA in the context of trade, the term “EA of trade” will be used. This approach to terminology has been followed by other academics, including Holder (2006) 1 and Jones *et al* (2007) 17.

the environment under the rules of the World Trade Organization (WTO) and as a World Environment Organization does not yet exist,<sup>4</sup> governments are left to develop their own measures for protecting the environment. In addressing what tools governments have at their disposal to address environmental challenges in the context of trade, the WTO has raised the usefulness of EA of trade models, and in 2001, the Doha declaration further highlighted the importance of these assessments in trade negotiations.<sup>5</sup> The United States (US), Canada and the European Union (EU) emerged as three WTO members that require that assessments to be conducted on all trade negotiations and although the WTO cannot mandate EA of trade, it in turn encourages that members share their experiences. In short, EA of trade models have emerged as a proposed solution to the challenge of ensuring that trade and the environment support one another, and significant resources have in turn been dedicated to these models.

Inspired by real-world examples of communities impacted by environmental damage, such as the Indigenous Awá tribe in Brazil, this thesis thus seeks to examine whether EA of trade has been useful in confirming that trade and the environment are mutually beneficial.<sup>6</sup> In the case of the Awá, this tribe continues to be impacted by deforestation in the Amazon, which is aggravated by the practices of illegal loggers.<sup>7</sup> These illegal loggers have in turn been emboldened by the demand for lumber that has resulted from increased trade. Although Brazil does not require EA of trade prior to entering into trade agreements, the US, Canada and the EU have all negotiated agreements with Brazil, which provides an opportunity for the issues of deforestation to be addressed during the assessment process. This thesis thus strips back EA of trade, beyond its procedural steps to explore how these models truly operate in practice when applied to lived experience such as that of the Awá, and on the basis of this analysis, discusses what this means for the future of EA of trade.

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<sup>4</sup> See the research of Charnovitz (2002) and Biermann and Bauer (2005). Discussion of the reasoning for and against a World Environment Organization (WEO) is outside the scope of this thesis, but it should be noted that the concept of creating a WEO is disputed.

<sup>5</sup> Doha Declaration, paragraph 6 states “We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis”.

<sup>6</sup> Abaza and Hamwey (2001) 495 raised the importance of finding that trade and the environment support one another.

<sup>7</sup> For a discussion of the Awá tribe and the issues they are facing, see Forline (2015).

This introduction seeks to position the research of this thesis. The historical placement of both EA and EA of trade will briefly be addressed to explain the genesis of these models in the global context and provide framing for the historical narrative. The next section will then address the methodology utilised throughout and explain the placement of this thesis within the literature. The introduction will conclude with an overview of the structure of the thesis.

#### A. Historical Placement of Environmental Assessment

Concern about the global environment has become more pressing in recent years. In a 2022 survey, climate change was viewed as a top global concern by 19 nations within North America, Europe and the Asia-Pacific area.<sup>8</sup> In that same month, environmental officials from the G20 met in Indonesia to discuss the state of the global environment, with Siti Nurbaya Bakar, the Indonesian Environment and Forestry Minister, proclaiming that the world “is in a climate crisis position, no longer just climate change”.<sup>9</sup> The messaging is clear, global leaders must mobilise and work towards environmental protection. It is in this context that the importance of EA and specifically EA of trade is raised, as EA is often at the forefront of environmental protection for nations. Further, EA has become more meaningful in a global environment which is in recovery following the COVID-19 pandemic, as nations look to spur their economic recovery through various plans, projects and trade agreements. EA and EA of trade are at the vanguard in evaluating whether these proposed recovery packages and trade talks are environmentally sound.<sup>10</sup>

Although EA is now a ubiquitous policy tool, it only came into existence a little over 50 years ago, when it was introduced in environmental legislation in the United States under the National Environmental Policy Act of 1969 (NEPA).<sup>11</sup> This concept was developed as a political response to civil society unrest about environmental concerns. Since its creation, it has become widespread in a short time frame, with over 120 nations currently employing an EA

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<sup>8</sup> Poushter *et al* (2022).

<sup>9</sup> Karmini (2022). At this meeting, representatives for the G20 nations discussed synchronization of environmental targets, and steps they would take in tackling climate change.

<sup>10</sup> UNECE (2020).

<sup>11</sup> NEPA §§ 4321-4347.

model.<sup>12</sup> This instrument was relatively unknown within the context of trade until the 1990s, when the environmental impact of trade became increasingly debated. At that time, governments looked to the model of EA to gain clarity on the relationship between trade and the environment and subsequently developed EA of trade models. EA of trade, in turn, became the new frontier of assessment models.

Before EA models were utilised during trade negotiations, NEPA's assessment model inspired action within the international community. In assessing the development of EA models globally, it becomes apparent that these models are sensitive to the public's rising interest in environmental protection and their desire to balance environmental, social and economic goals. For instance, in 1972, the United Nations (UN) Stockholm Conference created the United Nations Environment Programme (UNEP) and promoted the concepts of sustainability and EA, without specifically using the terms "sustainable development" or "environmental assessment".<sup>13</sup> Nations in turn began to develop their own EA models, with Canada implementing EA guidelines in 1973,<sup>14</sup> Australia in 1974,<sup>15</sup> and New Zealand in 1979.<sup>16</sup> In 1985, with the European Union (EU) Directive on Environmental Impact Assessment, the EU required the use of EA.<sup>17</sup> The philosophy behind EA continued to spread, with the World Bank recognising the need for integration of environmental concerns with development in 1987<sup>18</sup> and the Brundtland Report essentially declaring that it was necessary to anticipate and prevent environmental problems in order to achieve sustainable development.<sup>19</sup> By 1991, the World Bank began to employ the terminology of "environmental assessment"<sup>20</sup> and required that this instrument be employed for relevant lending operations, particularly applying this to funding for projects having "significant environmental impacts that are sensitive, diverse, or unprecedented".<sup>21</sup> Further, in 1992, 20 years after the Stockholm Conference first promoted the idea of EA, the United Nations held a Conference on Environment and

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<sup>12</sup> Sadler (1996).

<sup>13</sup> Stockholm Declaration (1972) principles 13, 15.; See Gilpin (2000) 9.

<sup>14</sup> Environmental Assessment Review Process (EARP) 1973.; See Mehta (2003) 115-118.

<sup>15</sup> Environment Protection (Impact of Proposals) Act 1974.; See Cocks (1994) 163.

<sup>16</sup> National Development Act (1979).; See Elliott and Thomas (2009) 105-06.

<sup>17</sup> EC Directive 85/337 (1985).; See Bond and Wathern (London 1999) chapter 12.

<sup>18</sup> Jones *et al* (2005) 15.

<sup>19</sup> See Brundtland Commission (1987) part 1, section 2.

<sup>20</sup> World Bank Operational Directive 4.01 (1991).

<sup>21</sup> World Bank Operational Policy 4.01 (1999).; See Mercier (2008).

Development and formerly utilised the terminology of “environmental impact assessment” (EIA). The Conference’s Rio Declaration stipulated that this EA model, as a national instrument, “shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”.<sup>22</sup> In short, an EA revolution was occurring globally.

The concept of EA was also addressed judicially, most notably in 2010 by the International Court of Justice. In the *Pulp Mills* case, the Court discussed the concept of EIA when examining an environmental dispute over Uruguayan pulp mills.<sup>23</sup> Notably, the Court found that EIA was a practice that had “gained so much acceptance among States that it may now be considered a requirement under general international law” for projects or activities that have transboundary effects.<sup>24</sup> To appreciate the significance of the Court’s stance on EA, it should be noted that the Court did not find the precautionary principle, a widely used and well-established principle of International Environmental Law, to have become a customary international law norm. However, although the Court declared EIA to be a customary international law norm, it refused to specify the core requirements of this instrument, instead ruling that each State needed to specify the content of its own EIA.<sup>25</sup> This ability of States to create tailor-made EA models, which address their specific concerns, has been imperative to the expansion of this instrument.

Although EA models vary in practice, they have essentially maintained similar core features, as inspired by the assessment created under NEPA, namely public participation and consultation.<sup>26</sup> Most of these models are also employed for similar reasons as NEPA, in that they strive to have decision makers take environmental factors into account, to prevent

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<sup>22</sup> Rio Declaration (1992) principle 17.

<sup>23</sup> *Pulp Mills* (2010).

<sup>24</sup> *Id* at paragraph 204.

<sup>25</sup> *Id.*; See also McIntyre (2010) 486.

<sup>26</sup> Further, most EA models mirror the key steps found in the EIS procedure, in that they typically have: 1. A screening stage, to determine if environmental concerns are present; 2. A scoping stage, to determine the extent of the environmental concerns to be considered; 3. A drafting stage, in which an initial EA is drafted and opened to public opinion; 4. A consultation stage, in which public comments on the EA process are encouraged; 5. An analysis stage, in which public comments are analysed and responded to in light of findings from the EA process; 6. Final report stage, in which a final EA report is released to the public, which summarises the decisions of the EA process. Jorissen and Coenen (1992) 4-12.

environmental damage.<sup>27</sup> This, in short, is the history that preceded the development of EA of trade, and which impacted the creation of EA of trade models in the US and EU. As the new frontier of assessment, EA of trade was shaped by this legacy. Given the environmental challenges facing the global community, this thesis builds from this historical narrative and focuses specifically on EA of trade, to determine whether this model is fit for purpose, especially in a post-pandemic world which seeks economic growth while needing to balance environmental concerns. The global environmental outlook is unsettling, and this thesis will question what role, if any, EA of trade can play in addressing environmental harms and what the future holds for this assessment model.

#### B. Methodology and Relationship to Literature

The overarching research question which drives this thesis is: what is EA of trade meant to achieve and what is this model capable of achieving? This research question stems from an examination of the literature on EA of trade, finding that it fails to adequately flesh out the limitations of this assessment model beyond procedural concerns and that it fails to question the innovative nature of this assessment. In essence, the literature has focused on procedural concerns at the expense of fully exploring what EA of trade must achieve and is capable of achieving. The underlying theory of this thesis is that the intended and potential purpose of a policy tool must be understood to be able, at the outset of that tool's implementation, to achieve expected goals.

As will be further explored in the first chapter, as the usage EA of trade has grown, a body of literature has also emerged questioning the “success” of these instruments. Sadler has extensively evaluated the notion of success in EA,<sup>28</sup> identifying “effectiveness and performance [as] interlocking concepts of success in [EA] implementation”.<sup>29</sup> Performance focuses on the assessment in practice, measuring the outcomes and results of the EA process,

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<sup>27</sup> Glasson, Therivel and Chadwick (2005) 50.

<sup>28</sup> Sadler (1996) chapter 3. Alternative approaches to judging the success of the EA process, such as that posited by Elling (2009) 121-31, have been considered. However, the author has rejected this approach because Elling rejects “effectiveness” as the basis for critique, choosing to instead critique the EA process based on the “truthfulness” of the actions. The theories applied by Elling are based in sociology and are difficult to apply in practice, which is why the author has chosen to adhere to Sadler’s approach.

<sup>29</sup> Sadler (2004) 249.

explicitly what environmental goals have been realised, and what did the assessment practically achieve.<sup>30</sup> Performance of EA of trade models will be discussed throughout the thesis and particularly in examining case studies within the US and EU. Effectiveness relates to the method of performance and focuses on whether the EA process has fulfilled its procedural and substantive criteria.<sup>31</sup>

The procedural criterion evaluates whether the EA has satisfied established procedural provisions, by examining the stages of the assessment process, whereas the substantive criterion analyses whether the EA has fulfilled its purposes and objectives, focusing on what this assessment is meant to achieve.<sup>32</sup> Examination of the procedural criterion has been discussed at length within the current body of literature that has emerged on EA of trade. However, there has been a distinct lack of examination of the substantive criterion of effectiveness, as discussions around what the intended and potential purpose of assessment is have not been fleshed out, and have been superficial at best.<sup>33</sup> This is problematic because, as explained by Doyle and Sadler, “[e]stablishing a clear purpose, with explicit goals is an essential prerequisite for effective EA”.<sup>34</sup> It is unrealistic to expect EA of trade to achieve a specific goal if the processes of this instrument were not established with that respective goal in mind.<sup>35</sup> By focusing on assessing the procedure EA of trade without first examining the substantive purpose of these instruments, the current body of literature has, at best, only partly dealt with the concept of effectiveness, and, at worst, has discussed these assessments without a context, thus making it practically impossible to improve these instruments in practice.

In recognising that the substantive criterion of EA of trade models has not been adequately addressed, this thesis is inspired by problematization theory, as opposed to simply gap-spotting, in regard to how to approach this research area. Problematisation differs from gap-spotting in that the latter identifies issues that may be absent, whereas the former pushes

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<sup>30</sup> *Id.*; See also UNEP (2002) 408.

<sup>31</sup> Sadler (1996).; Sadler (2004) 249.; See generally Cashmore *et al* (2004) 296.

<sup>32</sup> Sadler (1996).; See also Sadler (1998).

<sup>33</sup> Petts (1999) 7.; Bond *et al* (2004) 38.; Orellana (2010) 1.; Cashmore *et al* (2004) 296 for a list of scholars who also raised the issue that the EA literature has failed to adequately assess the purposes of these instruments.

<sup>34</sup> Doyle and Sadler (1996) 26.

<sup>35</sup> Cashmore *et al* (2004) 296.

the researcher to turn concepts upside down and think about it differently. Problematization has its roots within the writings and lectures of the philosophers Paul-Michel Foucault<sup>36</sup> and Gilles Deleuze.<sup>37</sup> In essence, problematization is a process through which assumptions are questioned and ideas which may be considered long established truths are examined. It is recognised that gap-spotting is a more commonly used method as it permits the researcher to identify an under-researched area and is more straight-forward. However, in taking inspiration from problematization theory, there is an opportunity to not only identify the under-researched area but to also question and challenge the foundations of that topic and any assumptions on which it was based.<sup>38</sup> Assumptions are consistently made throughout the EA of trade process, and these assumptions are rarely questioned. It is suggested here that an opportunity has been missed in challenging some of the more commonly held beliefs of these assessment models. This thesis will thus question the assumptions underlying EA of trade models, with the goal of determining what these assessments can achieve and to further consider whether EA of trade models should continue to persist. In light of recent trade negotiations in the US and EU considering global environmental concerns, such as climate change, now is an opportune moment to reflect on this assessment model and investigate the long-held assumptions that underpin it.

In examining the research question, this thesis has adopted a pluralistic approach to research methodologies. As this thesis analyses EA of trade, which is an area dominated by legislation and very little case law,<sup>39</sup> it will adopt a mixed methodology approach, relying on discussion of both “black-letter law”, where applicable, and primarily “law in context”.<sup>40</sup> In relying on a “law in context” approach, the research will focus on issues within society related to EA of

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<sup>36</sup> Foucault first mentions the term “problematization” in Foucault (1975).; Foucault (1998) 111-119.; Foucault (1996) 420.

<sup>37</sup> See Marshall (2006).

<sup>38</sup> Sandberg and Alvesson (2011) 32.

<sup>39</sup> For instance, the Environmental Review model in the US was formalised with Executive Order 13,141 and Environmental Assessment was formalised in Canada with *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposal*. See EO 13,141 (1999) and CEAA (1999) respectively.; See Frarier (1999) who explains that a “law in context, or law in society” approach is suitable when the area of law being studied is dominated primarily by legislation and policy.

<sup>40</sup> McConville and Chui (2007) 1.; See Travers (2010) 6-10 for a discussion of different approaches to studying law.; See also Frarier (1999) and Chynoweth (2008) chapter 3.

trade models, analysing how legislation and policy operate in practice.<sup>41</sup> This thesis will also employ traditional comparative research and doctrinal analysis methods.

The thesis will primarily analyse the EA of trade models employed in the US and the EU, as they are the best-established EA of trade models currently in use.<sup>42</sup> The thesis will begin by exploring “what is the law” of EA of trade in each jurisdiction. Doctrinal analysis is useful when trying to determine the law on a specific issue, as this form of research analyses how the legal doctrine has developed and been applied.<sup>43</sup> The thesis will pursue a doctrinal analysis approach by first analysing the legal documents that were the precursors to the EA of trade models, that in essence were the inspiration or motivation for these instruments. The purpose behind evaluating these legal documents is to understand the backdrop against which EA of trade was developed. It is theorised that by performing a doctrinal analysis of these materials, this thesis will be able to present a clearer understanding of why EA of trade was developed and what EA of trade is meant to achieve, thus putting the results and outcomes of the assessment process into context.

After analysing these foundational texts, the doctrinal analysis will then proceed to evaluate the legislation that established the EA of trade models in the US<sup>44</sup> and the EU.<sup>45</sup> This analysis will then proceed to examine the actual texts of the assessments, including interim and final assessment reports, to determine what environmental concerns were raised in the documents and what the outcome of each assessment was. This thesis will also consider secondary sources, such as textbooks and journal articles, which have critiqued and discussed the development of this legislation and how assessment instruments have operated in practice.<sup>46</sup> Through the doctrinal analysis of these various sources, it is anticipated that this

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<sup>41</sup> Frarrier (1999) 64.

<sup>42</sup> See WTO (2018).

<sup>43</sup> Razak (2009) 20.

<sup>44</sup> EO 13,141 (1999).

<sup>45</sup> EC Handbook (2006). It should be noted that unlike the frameworks in the United States or Canada, the SIA methodology was never legally codified as part of European Union trade policy. However, there is essentially a *de facto* commitment to undertake SIAs for all trade negotiations, thus enshrining SIAs as part of the EU’s broader commitment to sustainable development. See Gehring and Cordonier Segger (2005) 212.; Alf *et al* (2008) 3.; George and Kirkpatrick (2006) 326.

<sup>46</sup> Such as Salzman (2001a) for the United States, Gehring and Cordonier Segger (2005) for Canada and George (2010), Ekins and Voituriez (2009) for the EU.

thesis will be able to present a detailed understanding of how EA of trade developed, how it was meant to be applied and what outcomes have resulted through the assessment process.

In conjunction with doctrinal analysis, comparative research will also be employed. It is noted that a universally accepted approach to comparative legal research does not exist.<sup>47</sup> This method of research includes “a variety of methods for looking at law”.<sup>48</sup> but in essence it consists of comparing legislative texts and legal doctrines across various jurisdictions with the intent to understand how law develops and operates globally. As this thesis will compare the legislative texts in establishing EA of trade models across two jurisdictions, a comparative research approach will be prevalent throughout. The goal of the comparative analysis is to create scholarship that compares and explains the origins of each EA of trade model, why the respective EA of trade legislation was created, what each model was intended to achieve and what are its outcomes. This form of comparative research has been labelled by some academics as “juxtaposition” as legislation from different States is compared side by side.<sup>49</sup> In juxtaposing EA of trade legislation, it is anticipated that similarities, differences, and themes amongst these assessment models will arise, resulting in an improved understanding of the outcomes of the EA process.

This thesis strives to provide a detailed and well-informed response to the question: what is EA of trade meant to achieve and what is this model capable of achieving? This research question has not been adequately addressed in the current body of scholarship, primarily because much of the focus has been placed on procedural concerns. In pursuing a pluralistic approach to research methodologies, it is expected that this thesis will be able to determine whether the frameworks of the various EA of trade models are able to realise their intended purposes or whether there is cause for reform in EA of trade.

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<sup>47</sup> Alterman (2010) 11.

<sup>48</sup> Glendon (2007) 13 as quoted in Alterman (2010) 11.; See also Palmer (2004).

<sup>49</sup> Alterman (2010) 12.

### C. Overview of the Structure of the Thesis

This thesis is arranged over six chapters, with the first two chapters focusing on the creation of EA of trade and a discussion of the importance of these assessment models, and the final four chapters focusing exclusively on the US and EU models, with case studies of recent assessments. The thesis is organised this way because in stripping down EA of trade models back to their origins and then examining the process as it developed, including through recent assessment examples, the author is able to take a granular approach and ask difficult questions that have not been adequately raised about these models: How did the basic principles of EA of trade develop? Why is there an emphasis on the public in these models and how are stakeholders engaged? What is the relationship between EA of trade models? Why are so many resources directed to EA of trade when trade negotiators are not required to enforce assessment findings? What changes can be made to EA of trade to ensure improved engagement with environmental issues? Through this thesis, questions like these are examined to engage the reader in exploring the usefulness of EA of trade, identifying both its limitations and potential promise.

The first chapter examines the formation of EA and EA of trade models, and it positions these models against the stimulus of public outcry and demand for change. It explains that due to the way these models were created, inherent flaws have become embedded within the assessment process. This is further exacerbated by the linear nature of EA of trade models, in that each step of the process builds on the previous, meaning that if you start with a flawed model, that carries throughout the process. The first chapter thus establishes the baseline shortcomings of EA of trade, which in turn ties into the second chapter, and explains that it is important to understand and address these flaws because EA of trade can be a useful tool for environmental governance. The second chapter situates EA of trade within the discussions of environmental governance and economic theory to highlight the important role that EA of trade can play in determining environmental valuation. This chapter explains the role that EA of trade can have going forward, particularly considering concerns surrounding climate change.

After having examined the fundamental flaws with assessment models and explaining why EA of trade has an important role to play in the future in addressing environmental harms, the next four chapters focus on real world examples of these models in practice to identify what changes can be made. The third and fourth chapters focus on the North American experience through the examination of the US environmental review (ER) of trade models. The third chapter will explore the development of ER of trade in general to identify paradoxes and challenges which have emerged. The fourth chapter will build on this analysis by exploring a case study of the US-Mexico-Canada (USMCA) trade negotiations and offering suggestions on changes that can be made to the US model. The fifth chapter will in turn focus on the European experience by analysing the EU's sustainability impact assessment (SIA) of trade model and identifying the baseline challenges associated with that example. The sixth chapter will analyse the recent EU-Mercosur trade negotiations to advance what was learned from the previous chapters and offer insight into what needs to be addressed in the SIA model. The thesis will conclude by reflecting on what was learned through the examination of the EA of trade models, finding that greater stakeholder collaboration, working towards a form of environmental allyship, is what is needed for the future of EA of trade models.

## II. Chapter 1: Environmental Assessment of Trade: The Fallacy of Perfected Practice

### A. Introduction

Environmental assessment (EA) evaluates the potential environmental impacts of a proposed project, plan or policy prior to the respective action being sanctioned. EA was the inspiration for the development of EA of trade and similarly, this model employs an *ex-ante* approach in assessing the anticipated environmental impacts of trade agreements. EA of trade applies a systematic process for assessing significant environmental impacts, which generally requires a public consultation period and publication of a report, both at an initial and final stage, detailing the anticipated environmental consequences.<sup>50</sup> Consultation and public participation are essential features of the EA of trade process, which has resulted in these assessment models being described as an “anticipatory, participatory environmental management tool”.<sup>51</sup> At its heart, EA models are meant to encourage a collaborative process.

As EA of trade continued to develop, researchers and stakeholders began to question the practice of this instrument, the challenges experienced and whether these instruments are successful in providing environmental protection. The term “effectiveness” emerged as a standard by which to measure the success of this instrument.<sup>52</sup> Discussions around the effectiveness of assessment began to focus on procedural and substantive criterions. The procedural criterion is examined by focusing on whether the assessment instrument satisfies its procedural framework in practice. The substantive criterion is evaluated by determining whether the instrument has satisfied its proposed objectives.

Examination of scholarship on EA of trade models reveals a bias towards the analysis of procedural aspects, as greater focus lies on how assessment reports are prepared versus how these respective reports influence decision makers. Such is the interest in procedural

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<sup>50</sup> Lawrence (2003b) 7.

<sup>51</sup> Jay *et al* (2007) 288.

<sup>52</sup> Sadler (1996) 251.; Cashmore *et al* (2004) 296.

concerns that a body of literature offering advice on how to improve EA practice has also emerged. The general impression is that perfected practice would result in effectiveness.

However, it is suggested here that perfected practice is a fallacy, and that EA of trade should be viewed as part of a continuous process of policy formation, versus a linear approach. It is argued that the traditional view towards EA of trade is problematic in that analysis tends to be static by focusing on the standardised steps of the assessment process. This chapter argues that EA of trade is more than the procedural steps of the assessment process. This chapter seeks to identify the weaknesses in the scholarship on EA of trade scholarship by explaining that there has been a failure to evaluate this assessment model through a more critical lens and to dig deep.

In examining what has been problematic with the analysis of EA of trade to date, this chapter will be arranged in three sections. The first section will assess the history of EA of trade to explain how these assessments emerged from public demand for change and how that shaped their creation. This section will identify the perceived purpose and objective of EA of trade, and the ethos of this tool, as understood by stakeholders who would be utilising it. The second section will then centre the analysis on how EA of trade has been treated in scholarship, with there being a focus on the procedural criterion that fails to consider more substantive aspects. It will be argued that the focus on the procedural criterion is problematic because there has been a failure to question and examine the perceived purpose of EA of trade, as understood through its formation. The third section will challenge the concept of policy formation under EA of trade, as this assessment model generally follows a traditional linear decision-making model.<sup>53</sup> This section will assert that EA of trade should be considered as part of a continuous process of policy formation and as such, EA of the trade process has the potential to take advantage of windows of opportunity during the trade negotiation process, through the promotion of incremental improvements in policy and engagement with

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<sup>53</sup> See Feldman and Khademian (2008) for a discussion of the spectrum of decision-making models in policy formation. Although their research focused on Strategic Environmental Assessment (SEA) models, this author found their work applicable to EA of trade models, as many of the same challenges that SEA experienced in following a rational decision-making approach hold true for EA of trade.

multiple stakeholders.<sup>54</sup> This chapter will conclude by highlighting that EA of trade needs to be explored through a different lens going forward and this will be followed by a discussion in the next chapter of the importance of this assessment model to governments as they work towards tackling global environmental harms.

#### B. Environmental Assessment of Trade: The New Frontier of Assessment

Two historical trajectories resulted in the genesis of EA of trade: the origins of EA and the development of the trade-environment debate. In evaluating both trajectories, it becomes clear that although EA and EA of trade developed at different points in history, they essentially resulted from similar beginnings, as a response to public unease about environmental issues. These models developed as political responses to civil society unrest and as a result, public participation and consultation have become entrenched features of these models.

This section will begin by focusing on the development of EA from environmental legislation in the US, which in turn led to the expansion of assessment models globally. It will explore how public demands, which resulted in political pressure, created an opportunity for policy formation, resulting in the development of EA. Understanding how EA came about provides clarity as to innate flaws that are embedded in this model, which have in turn carried over into EA of trade. The historical development of EA of trade will then be explored to posit how this model was created and the requisite expectations placed upon this model by stakeholders. In exploring the history that underpins EA of trade, this section will thus highlight the key driver of this assessment model.

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<sup>54</sup> This relates back to the discussion put forward by Feldman and Khademian about the adaptive management model (continuous improvements) and the inclusive management model (stakeholder involvement), as explained in the context of SEA. See Feldman and Khademian (2008) 37-39 and Ahmed and Sánchez-Triana (2008) 185.

## 1. Creating an Opportunity: The Birth of Environmental Assessment

The concept of EA was first introduced in the US, as a legislative requirement under the National Environmental Policy Act of 1969 (NEPA).<sup>55</sup> NEPA was developed at a historically significant time: scientific literature increasingly recognised the link between environmental damage and human actions,<sup>56</sup> and the publication of this scientific data resulted in greater environmental awareness amongst Americans. This confluence of increased data and public awareness resulted in rising public demand for the federal government to create legislation to address environmental damage.<sup>57</sup> American politicians took notice of public unease surrounding environmental harm and enacted NEPA in direct response.<sup>58</sup> NEPA's creation is an example of "creating an opportunity to effect reform".<sup>59</sup> Public policy and legislation creation and reform can have different results, but as explained by Ahmed and Sánchez-Triana, there is typically a continuum for their design, which can include taking advantage of opportunistic timing or creating opportunities.<sup>60</sup> NEPA arose from a created opportunity owing to public efforts: it was a political response to public demands for change due to the public's increased environmental awareness.

It is significant to note the foundation of NEPA's creation and the role of the public because this in turn has shaped the perceived purpose of this legislation. As NEPA was developed by politicians in response to public pressure, the wording of the legislation is deferential to the public and their concern for the environment. For instance, section two of NEPA explains its purpose: "to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere".<sup>61</sup> Another objective of NEPA was to "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfil the social, economic, and

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<sup>55</sup> NEPA §§ 4321-4347.

<sup>56</sup> See Caldwell (1998b) 26 for a list of this literature.; See also Lindstrom and Smith (2001) 34-52 for a discussion of NEPA's origins.

<sup>57</sup> Andrews (2006) 285.

<sup>58</sup> Caldwell (1998a) 213.; See Thatcher (1990) 612.

<sup>59</sup> Ahmed and Sánchez-Triana (2008) 182.

<sup>60</sup> *Id.* Ahmed and Sánchez-Triana explain that policy reform requires champions to move it forward. In the case of NEPA, these champions could be found in external public efforts calling for change.

<sup>61</sup> NEPA Section 2.

other requirements of present and future generations of Americans".<sup>62</sup> This aspect of NEPA has been described as having aspirations of achieving sustainable development.<sup>63</sup> This is noteworthy in that it illustrates the progressive nature of this legislation. The concept of sustainability did not fully emerge until the mid-1970s,<sup>64</sup> and sustainable development only gained currency in the 1980s after it was defined at the Brundtland Commission, as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".<sup>65</sup> To achieve long-term development, economic growth must be balanced with social and environmental priorities because when one of these three principles is disproportionate to the others, sustainable development is not feasible.

In order to achieve the goals of preventing environmental damage, NEPA employed "action-forcing" provisions to ensure that environmental factors were considered by federal decision-makers.<sup>66</sup> It was in this context that EA emerged, as these provisions required that all federal agencies conduct an assessment, obliging each agency to analyse the potential environmental impact of their respective actions when such actions may result in a change to the natural or physical environment.<sup>67</sup> The EA was essentially a screening exercise, as it determined if an environmental impact statement (EIS) was needed.<sup>68</sup> An EIS was only required when the environmental impacts of the respective activity were considered "significant", with discretion being left to the federal agency in defining the term "significant".<sup>69</sup> To put into perspective how this discretion was utilised, in the 1990s, the majority of federal actions were not considered "significant" and federal agencies typically completed 50,000 EAs per year compared with only 500 EISs annually.<sup>70</sup> It is worthwhile to highlight this soft paradox as the beginning of various inconsistencies in the history of EA and EA of trade, as it illustrates a distinction between what happens in theory versus in practice. It is suggested that by having federal agents decide what is significant, they in turn become gatekeepers, with the ability to pick and choose what passes through. This in turn could lead to a situation where

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<sup>62</sup> NEPA Section 101(a).

<sup>63</sup> Jay *et al* (2007) 289 described this aim as a "prescient sustainable development aspiration".

<sup>64</sup> See Stockholm Declaration (1972) principle 13 and Voigt (2009) 9-34.

<sup>65</sup> Brundtland Commission (1987).

<sup>66</sup> Yost (2003) 6.

<sup>67</sup> Council on Environmental Quality (2007) 4.

<sup>68</sup> *Id* at 11.

<sup>69</sup> Karkkainen (2007) 57.; See Farber (2007) 225-226.

<sup>70</sup> Karkkainen (2002) 909-910.; CEQ (1997) 19.

stakeholders on the ground view an environmental issue as significant, but that issue could potentially not make it into the EIS if it does not pass beyond the federal agents. EA was meant to be a response to public unrest, but this assessment's ability in practice could thus be restricted at the early stage of the creation of an EIS, as the federal agency, and not the public, has input over what they consider to be significant activity which warrants progression of the assessment process.

Assuming there are grounds for an EIS, the assessment would proceed in a prescribed and lateral manner, generally consisting of the pattern of notice, feedback, and response. The assessment developed in this fashion to allow for stages of public involvement, which is reflective of NEPA's origins as emerging from public pressure. It is useful to briefly review the phases of an assessment under NEPA, as this procedure created the model that was followed by subsequent assessment models, including EA of trade. If significant environmental impacts have been identified in the first instance, then the EIS begins by publishing a public notice of intent in the Federal Register, which is followed by a scoping stage, which identifies the environmental issues. The agency then files a draft environmental impact statement (DEIS), which is opened to public comment.<sup>71</sup> The agency evaluates public comments made to the DEIS, responding to any substantive comments, and releases a final environmental impact statement.<sup>72</sup> The agency then publishes a "record of decision", as a final step in the process. The record of decision is a public document which summarises the decision, identifies environmentally friendly options that may have been considered and outlines whether mitigating factors have been employed.<sup>73</sup>

It is significant to note that the EIS process was unique in its design, as it emphasised public participation and consultation through various steps of the process. In theory, the public was made aware of the EIS process at the notice of intent stage, when the DEIS was opened to comments and when public input was solicited through various meetings and hearings. The EIS process was meant to reflect a back-and-forth model of cooperation between the public and the agency; it was to provide an opportunity for public input on environmental concerns

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<sup>71</sup> Council on Environmental Quality (2007) 16.

<sup>72</sup> *Id* at 18.

<sup>73</sup> *Id* at 19.

to be introduced into federal planning. EIS is a systematic process, meaning that each stage of this linear model is based on assumptions from the previous stage: assumptions are made as to significance, which then feeds into assumptions that are made at the scoping stage, which in turn feeds into analysis of potential impacts, which then flows into the agency's recommendations. As noted in the research of Feldman and Khademian in discussing policy formation, this linear approach makes sense in the abstract, but becomes more questionable in practice when decisions are made, due in part to the assumptions that were made and are implicit throughout the model.<sup>74</sup> These include assumptions that the decision makers have complete information and are unitary actors with clear preferences, versus various actors with various conflicting goals, and assumptions that the problems are well defined.<sup>75</sup>

Analysis of EA's historical growth reveals a foundation influenced by public pressure. Awareness of public concerns is a common thread in EA's development and is reflected in the procedural steps of assessment. Yet, there are inherent issues to how EA was designed as a linear model which moves to the next step based on assumptions made in the previous step. It is important to highlight that challenges can result in practice due to reliance on these assumptions, as flawed suppositions can lead to flawed results. Awareness of this historical foundation is important because this model has served as inspiration for subsequent EA of trade models. Understanding the basis of EA leads to greater clarity when assessing the foundations of EA of trade and dissecting embedded flaws.

## 2. Developing the Opportunity: The Birth of Environmental Assessment of Trade

As EA of projects, policies and plans continued its unprecedented expansion across States, EA within the context of trade was virtually non-existent. This started to change when the environmental impact of trade agreements began to be debated after the 1991 *Tuna-Dolphin* case, which was brought by Mexico against the US under the General Agreement on Tariffs

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<sup>74</sup> Feldman and Khademian (2008) 39-40. Feldman and Khademian were discussing SEA models, but their general theory is also applicable to EIS.

<sup>75</sup> *Id* at 40-43.

and Trade (GATT), a precursor to the World Trade Organisation (WTO).<sup>76</sup> This case resulted from a dispute over an American embargo on Mexican tuna. In accordance with domestic environmental legislation, the Marine Mammal Protection Act, the US banned tuna that had been harvested in a manner that failed to take precautions against killing dolphins.<sup>77</sup> However, the *Tuna-Dolphin* decision found the American environmental law to be inconsistent with obligations under the GATT. As a result of this decision, “environmentalists awoke to the possibility that trade tribunals could decide that domestic and international environmental laws were inconsistent with trade agreements”.<sup>78</sup> *Tuna-Dolphin* was a turning point for stakeholders with environmental interests. This case became “a symbol, of the clash between trade and environment constituencies”.<sup>79</sup> After the *Tuna-Dolphin* decision, greater attention began to be focused on the linkage between the environment and trade liberalisation.<sup>80</sup> This case resulted in an environmental awakening about the impacts of trade, akin to the environmental awakening that happened in the US after the publication of Rachel Carson’s research on the environmental impact of pesticides.<sup>81</sup>

Trade liberalisation is one of the driving factors behind economic globalisation, which in turn has led to a world economy that has become progressively integrated.<sup>82</sup> Goods and capital are no longer restricted to specific geographic regions, as trade barriers have been reduced. Trade Agreements negotiated in the WTO and at regional and bilateral levels seek to further reduce existing barriers to trade, thus making the global economy even more interdependent.<sup>83</sup> However, increasing economic globalisation has also led to growing environmental interdependence and vulnerability among countries. Natural resources are being spread amongst an ever-increasing consumer base<sup>84</sup> and economic growth has resulted in increased production of goods and services, some of which are pollution intensive. Rising economic trends have in turn led to increased cross-border transport of goods and services, which may also result in negative environmental impacts, such as increased greenhouse gas

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<sup>76</sup> GATT *Tuna-Dolphin I*.

<sup>77</sup> Knox (2004) 2-5.

<sup>78</sup> *Id* at 4.

<sup>79</sup> Lowenfeld (2008) 392.

<sup>80</sup> Charnovitz (2008) 238.; See Copeland and Taylor (2003) for analysis of the trade-environment debate.

<sup>81</sup> Carson (1962).

<sup>82</sup> ILO (1999) paragraph 2.

<sup>83</sup> George (2010) 7.

<sup>84</sup> United Nations ECLAC (2003) 259.

emissions.<sup>85</sup> As the world became more open, researchers took notice of these issues and questioned the relationship between trade and the environment.<sup>86</sup>

As research continued to focus on the links between trade liberalisation, globalisation and the environment, three dimensions began to emerge by which the literature judged the environmental effects of trade: *scale effect*, *technology effect* and *composition effect*.<sup>87</sup> The *scale effect* signifies an environmental impact of increased economic activity resulting from freer trade.<sup>88</sup> The general assumption is that increased trade leads to increased economic output and energy usage, thus resulting in pollution.<sup>89</sup> However, the *scale effect* may be offset by the *technology effect* and possibly the *composition effect*. The *technology effect* reflects the fact that freer trade may result in the adoption and diffusion of environmentally friendly technologies.<sup>90</sup> The *composition effect* shows how trade changes the economic structure of a country so that it specialises in production in which it has a comparative advantage.<sup>91</sup> If a nation has a comparative advantage in an environmentally friendly product, then it would offset any negative environmental impacts resulting from the *scale effect*. However, if the comparative advantage lies in an industry that is pollution intensive, then this would not hold true. Although useful in adding depth to the trade-environment debate, these dimensions have not led to general agreement over the environmental consequences of freer trade. Empirical studies have also failed to elucidate this issue, as they essentially conclude that freer trade may or may not result in negative environmental consequences.<sup>92</sup> Although, considering the complexity of these issues, it is not surprising that theoretical and empirical research have been unable to agree on the environmental impacts of trade.<sup>93</sup> Nonetheless, it is imperative to recognise the benefits and limitations of this research. It has resulted in a greater understanding amongst trade and environmental officials of the environmental effects of trade policy and of the trade impacts of environmental law.<sup>94</sup> Yet, this enhanced

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<sup>85</sup> OECD (2010) 250.

<sup>86</sup> See generally Antweiler, Copeland and Taylor (1998) and Irwin (2020).

<sup>87</sup> See Schaper (2002) 248, Copeland and Taylor (2003) 1-11, Steininger (2002) 421, Ferrantino and Linkins (1999) 129 and Grossman and Krueger (1991) 3-5.

<sup>88</sup> Tamiotti *et al* (2009) xi.

<sup>89</sup> Antweiler, Copeland and Taylor (1998) 10-15.

<sup>90</sup> Reppelin-Hill (1999) 283-85.

<sup>91</sup> Cole and Elliott (2003) 363-65.; Tamiotti *et al* (2009) xi.

<sup>92</sup> Copeland and Gulati (2006) 196-97.

<sup>93</sup> Mehra and Das (2002) 21.

<sup>94</sup> Charnovitz (2008) 238.

understanding has not resulted in a clear consensus over the environmental consequences of freer trade. Further, enhanced understanding of the environmental impacts of freer trade will not in and of itself resolve underlying environmental problems.<sup>95</sup> As explained by Charnovitz:

Environmental problems will always be a challenge on a planet where governmental units do not exactly match ecosystems. Another way of saying this is that so long as the policies in one country can impose externalities on others, and so long as prices in the market are not fully reflective of environmental costs, there will be a need for international governance to manage the transborder conflicts that will inevitably ensue.<sup>96</sup>

Thus, it can be concluded that although it is useful to develop an understanding of the environmental impacts of freer trade, this needs to be done in conjunction with addressing transborder environmental impacts, which can only be achieved through global governance. Pascal Lamy, Director-General of the WTO, has defined governance as a “decision-making process that — through consultation, dialogue, exchange and mutual respect — seeks to ensure coexistence and, in some cases, coherence between different and sometimes divergent points of view”.<sup>97</sup> In trying to achieve “good” global governance, which offers a balance between legitimacy and efficiency, Lamy explained that transparency and public involvement are key, as the government must represent the demands of society.<sup>98</sup> The view that public participation is a fundamental component of good global governance is also supported in the body of research exploring governance.<sup>99</sup> It is thus in the context of public participation and the desire of decision makers to represent the views of society that the development of EA of trade can be explained.

The public has placed free trade within the context of the WTO and bilateral trade agreements under increased scrutiny in recent years, due in large part to the trade-environment research of the 1990s.<sup>100</sup> The mobilisation of civil society in this regard is indeed comparable to how increased research into environmental degradation in the 1960s in the US prompted public

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; Lamy (2006).; See also Weiss (2000) 795-814.

<sup>98</sup> *Id.*

<sup>99</sup> See Steiner, Martonakova and Guziova (2003) 16.; Fall and Cassar (2005) 218-19.; United Nations (2004) 12.

<sup>100</sup> Esty (2001) 126-127.

calls for environmental reform. Civil society groups have not only sought to understand the relationship between trade and the environment, but they have also tried making trade institutions “green”, that is environmentally aware.<sup>101</sup> It is within the context of making trade green that EA of trade ultimately began to develop. Various stakeholders, including citizens’ organisations, international organisations, national governments and research institutions, became increasingly interested in this instrument.<sup>102</sup> For instance, although the terminology of EA was not explicitly used, beginning in 1993, the Organization for Economic Cooperation and Development espoused the philosophy of EA in suggesting that governments examine trade and environmental policies to mitigate negative impacts.<sup>103</sup> The US also recognised the importance of addressing environmental concerns in trade agreements while negotiating the North American Free Trade Agreement (NAFTA). Then President Clinton, who had just come into office, recognised that he would be unable to obtain Congressional approval for NAFTA unless this agreement addressed environmental concerns.<sup>104</sup> He thus negotiated a supplemental agreement to NAFTA, which in turn established the Committee on Environmental Cooperation (CEC) to address environmental issues.<sup>105</sup> By 1999, the CEC expanded its mandate and developed an environmental assessment framework for NAFTA. Unlike EA, which is an *ex-ante* or forward-looking instrument, CEC’s assessment model is *ex-post* and analyses environmental effects after the trade agreement has been implemented.

Drawing on the experience of the *ex-post* assessments of NAFTA and in anticipation of the upcoming WTO Ministerial Conference in Seattle, the US, Canada and the EU each embarked on developing an EA of trade model, similar to the models being employed for local projects and policies.<sup>106</sup> The US formerly institutionalised its EA of trade model, known as environmental review (ER), within US trade policy with Executive Order 13.141 in November 1999, one month before the Seattle Ministerial Round.<sup>107</sup> The ER framework was created to “woo” environmentally concerned citizens and to encourage their support for the upcoming

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<sup>101</sup> For a discussion of “greening” trade see Esty (1994) and Esty (1996).

<sup>102</sup> FAO (2004) 172-76.

<sup>103</sup> OECD (1993).

<sup>104</sup> Knox and Markell (2003) 7-9.

<sup>105</sup> See Mayer (1998) chapter 6.

<sup>106</sup> George and Kirkpatrick (2009) 63-64.

<sup>107</sup> EO 13,141 (1999).

negotiations.<sup>108</sup> In conjunction with issuing the Order, the US also released a “Declaration on Environmental Trade Policy”, which promised to pursue trade liberalisation in an environmentally friendly manner.<sup>109</sup> Around the same time, Canadian ministers, who were aware of citizens’ environmental fears regarding free trade and globalisation, passed the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposal*, which explained that a strategic environmental assessment was required for any governmental proposal that may result in environmental impacts.<sup>110</sup> In accordance with this directive, Canada developed a framework to assess the environmental impacts of trade, known as environmental assessment (Canadian EA). The Canadian EA was developed in consultation with civil society groups, such as Non-Governmental Organizations (NGOs) and academics, and was specifically designed to assess the domestic environmental impacts of the upcoming WTO negotiations.<sup>111</sup> In the months before Seattle, the then EU Directorate General of Trade was also keen to respond to public concern and unlike the US and Canada, who developed their models internally, authorised external consultants to develop an EA of trade model.<sup>112</sup> The EU model, sustainability impact assessment (SIA), was created as an integrated approach, in that it assessed economic and social impacts in addition to environmental implications.<sup>113</sup> It is important to note that although all three models were created immediately prior to the Seattle Conference, they were all essentially in their formative stages and were eventually finalised in the years following the negotiations.<sup>114</sup>

Although the US, Canada and the EU had developed EA of trade models prior to Seattle, they initially failed to engender public support for trade policy, as mass protests against the WTO and trade liberalisation were staged during the Seattle Ministerial Conference. The protests, which became known as the “Battle in Seattle”, were on such a massive scale and received such immense media coverage, that they essentially motivated the US, Canada and the EU to continue refining and employing their respective EA of trade models.<sup>115</sup> It is imperative to

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<sup>108</sup> Salzman (2001) 503.

<sup>109</sup> *Id* at 503-04.

<sup>110</sup> CEAA (1999) 2-3.

<sup>111</sup> DFAIT (2001); Gehring and Cordonier Segger (2005) 206-08.

<sup>112</sup> See Kirkpatrick, Lee and Morrissey (1999).

<sup>113</sup> Kirkpatrick and George (2006) 325 and EC Handbook (2006) 7.

<sup>114</sup> *Id.*; See also Lee and Kirkpatrick (2001) 405-409.

<sup>115</sup> Salzman (2001) 503.

note that the development of EA of trade is not as widespread as the usage of EA generally, as the US, Canada and the EU are currently the only three jurisdictions that employ this instrument prior to all trade negotiations and between all three models, they have only completed or are in the process of completing 60 assessments. This is a stark contrast to the thousands of assessments that have been completed for projects, plans and policies since EA models were developed in the 1970s.<sup>116</sup>

Although the three EA of trade models were tailor-made to assess trade negotiations, they were nonetheless inspired by EA models and as a result, share common features, such as the core requirements of public participation and consultation throughout the process. Further, while they vary in practice, the underlying basic procedure employed for each EA of trade echoes the linear process utilised in NEPA's EIS and EA in general, in that they have a screening stage, scoping stage, drafting stage, consultation and analysis stage and final report issuance stage.<sup>117</sup> EA of trade's reliance on a linear problem-solving model thus exposes this model to the weakness of faulty assumptions, as discussed. Flexibility is meant to be a key feature of EA of trade and each assessment is conducted independent of prior assessments. In theory, when the US enters new trade negotiations, the EA of trade process starts afresh, and trade negotiators can utilise this tool as they see fit. Yet, although each assessment is an independent process, it is noted that this model is still influenced by its historical origins: public pressure led to its creation and public participation is meant to be a paramount feature.

### C. The Growth of Assessment Culture

After EA was established and its usage was expanded, an assessment culture developed, as other assessment tools, such as health impact assessment and social impact assessment, were created in its wake.<sup>118</sup> The popularity of this instrument is such that it has even been described as having resulted in an "impact assessment epidemic".<sup>119</sup> In conjunction with the widespread usage of this instrument, scholarship has emerged, questioning and critiquing the

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<sup>116</sup> See Glasson, Therivel and Chadwick (2005) chapter 10.

<sup>117</sup> Tamborra (2003) 3-4.

<sup>118</sup> Benson (2003) 261.

<sup>119</sup> *Id.*

practices of EA, which branched into EA of trade, and whether this instrument satisfies its full potential.<sup>120</sup> The term “effectiveness” was used in judging the success of assessments. In discussing whether an assessment was effective or not, the literature tends to focus on procedural and substantive views, which emerged as a yardstick by which to measure assessments in determining whether this instrument is achieving its aims.<sup>121</sup>

This section thus follows on from the previous section which explored the history and foundational values of assessment, by scrutinising the treatment of this tool in scholarship for the purpose of presenting perspectives that have been identified, but also highlighting what has not been thoroughly explored. This section will proceed to analyse how existing literature has examined EA and EA of trade models from the view of procedural and substantive goals. It will begin by delving further into the discussion around perfecting procedural practice as a means towards achieving effectiveness, identifying paradoxes that have become embedded in the models. This section will then explore the substantive criterion within the context of proximate and substantive purpose, to examine what has and has not been evaluated to date.

### 1. Seeking Procedural Perfection

In assessing the procedural criterion, the literature focuses on whether the procedures of the assessment process are fulfilled. Under this view, there is a perception that failure to adequately follow the procedural steps of the model is what leads to deficiencies in ensuring that environmental factors are reflected in decision making.<sup>122</sup> As a result, analysis tends to gravitate around the steps of the EA process. Case studies of EA over various jurisdictions have been mixed, with some studies finding that results were unsatisfactory<sup>123</sup> and others finding that satisfaction with the process has slowly increased over the years.<sup>124</sup> Significantly, the discussion around “success” in these studies tends to focus primarily on the procedures

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<sup>120</sup> Glasson, Therivel and Chadwick (2005) 21. As EA of trade is a relative newcomer to the world of assessment, this thesis refers to the academic literature which discusses both EA and EA of trade, as the body of literature on EA is more developed and common themes are shared by both models.

<sup>121</sup> Sadler (1996) 251.; Cashmore *et al* (2004) 296.

<sup>122</sup> Jones *et al* (2007) 38.

<sup>123</sup> Morgan (2002) 4-5.

<sup>124</sup> Barker and Wood (1999) 387-404.

employed.<sup>125</sup> This in turn has led to a narrative that improved procedure leads to improved assessment and much of the research into EA thus focuses on enhancing best practice.

The view that good procedure produces effective results has been a common theme in assessment scholarship and has also progressed into global views on assessment practice. For instance, in 1994, the International Association for Impact Assessment (IAIA), in conjunction with various governments,<sup>126</sup> responded to criticism that the EA process was unsatisfactory by launching a study into the effectiveness of this instrument.<sup>127</sup> As part of this research, the IAIA commissioned the *International Study of the Effectiveness of Environmental Assessment* which lasted approximately two years and evaluated the status of EA globally.<sup>128</sup> The report produced in response to this study focused overwhelmingly on EA procedure and on ways that States could improve the EA process. For example, the report indicated that the scoping stage is the foundation of the EA process and suggested ways to improve this step.<sup>129</sup> It also suggested that practitioners review the EA report prior to submitting it to ensure that the procedure has been adequately followed.<sup>130</sup> As explained by the report, “integrity or unity of the EIA process is seen as an important determinant of its effectiveness”.<sup>131</sup>

The belief that EA can be improved or made more effective by strengthening EA processes thus began to permeate studies in this field.<sup>132</sup> In response, a body of research which provided practitioners with guidance on how to execute an EA also began to emerge.<sup>133</sup> These guides typically offer advice on how to perform scoping, identify cumulative environmental effects and prepare EA reports. As EA practice is not uniform, it is difficult to identify all the procedural problems raised in all jurisdictions.<sup>134</sup> Generally, in critiquing the effectiveness of EA, literature typically focuses on procedural issues such as scoping and roles of participants in the EA process.<sup>135</sup> Similarly, research critiquing the effectiveness of EA of trade also tends

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<sup>125</sup> Wood (2003) 7-8.

<sup>126</sup> This included the US, UK and Canada. See Sadler (1996) 2.

<sup>127</sup> Morgan (2002) 5.

<sup>128</sup> Sadler (1996).

<sup>129</sup> *Id* at 113-117.

<sup>130</sup> *Id* at 122-124.

<sup>131</sup> *Id* at 110.

<sup>132</sup> Lawrence (2003b) 217.

<sup>133</sup> See generally Carroll and Turpin (2003) and Marriott (1997).

<sup>134</sup> Rzeszot (1999) 129.

<sup>135</sup> See Glasson, Therivel and Chadwick (2005) 21-23.

to focus on these same procedural concerns. In reviewing assessment literature, it is striking how much focus is on assessment practice and its preparation.<sup>136</sup> This is notable because if there are fundamental issues embedded in the assessment instrument, and these flaws are not addressed, perfected practice of a flawed tool will never be a solution.

As mentioned, research on assessments tends to focus on the procedural steps, such as how to improve the scoping stage. Scoping sets the tone for the assessment and what will be evaluated; it is intended to identify if the proposed action will result in environmental impacts and if a full EA is required.<sup>137</sup> It is often considered to be the most important stage of the EA process, having been described as the “key” to EA success.<sup>138</sup> It is commonly believed that efficient scoping, which identifies potentially significant environmental concerns early on in the process, results in fewer delays and costs later on.<sup>139</sup> In conducting a scoping stage, two factors are often considered: what stakeholders are involved in this process and whether there are other concerns, beyond environmental issues, also evaluated. Regarding EA models, scoping procedures are not uniform amongst all jurisdictions, which means these factors can be handled differently. Some nations, such as the US and the Netherlands, have formal procedures in place for public participation and consultation throughout the scoping stage, whereas others, such as Australia, do not.<sup>140</sup> EA of trade models, as found in the US and EU, adopted the former approach, and have formalised processes to include the stakeholders during the scoping stage.

Regarding what issues should be considered during the scoping stage, this point has also been debated. For instance, in EA models, some stakeholders favour widening the subject matter of the scoping stage, so that economic and social impacts are also considered in addition to environmental concerns, to promote sustainability. Conversely, it is argued that environmental concerns may be marginalised if other factors are considered. Likewise, the literature on EA of trade also debates what subjects should be considered during the scoping

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<sup>136</sup> Ahmed and Sánchez-Triana (2008) 185 point out, regarding SEA, that there is greater focus on how to prepare a report rather than influencing decision makers.

<sup>137</sup> Wood (2003) 159.

<sup>138</sup> Weston (2000) 198.

<sup>139</sup> Gilpin (2000) 19.

<sup>140</sup> *Id* at 163-69.

stage. For instance, the American and Canadian models focus exclusively on environmental issues.<sup>141</sup> However, the European model employs an *integrated* approach to scoping, choosing to identify economic and social impacts, in addition to environmental concerns.<sup>142</sup> The benefits and drawbacks of each approach are highlighted in the literature when discussing the effectiveness of these instruments. For example, the American and Canadian approaches are considered to be beneficial in that by focusing solely on environmental concerns, they are able to produce more focused reports, which are concise and manageable for stakeholders to review.<sup>143</sup> Conversely, in focusing on the three pillars of sustainable development,<sup>144</sup> it is argued that the European model may dilute environmental concerns at the expense of social and economic issues, and that the reports take longer to produce, and are complex and lengthy, which in turn may alienate stakeholders.<sup>145</sup>

In analysing this literature, the focus on ensuring proper practice in scoping is abundantly clear, but it is suggested here that this approach and way of thinking has been flawed from the outset. Firstly, there are different approaches in EA and EA of trade models on what information is even considered when scoping begins. This relates back to the paradox that was identified above when discussing EIS under NEPA, as that process begins when significant environmental impacts are considered, but it was left up to the federal agency to determine what was or was not “significant”. It is unclear how these “significant” impacts were determined. This same inconsistency applies to the scoping stage of certain EA models, as it is discretionary, in some models, as to who is included in this stage and how their input is accrued and considered. For instance, under the EA of trade model in the US, the public is included in the scoping stage, but there is little publicly available data to determine how the public was engaged during the scoping stage or how their input shaped the assessment approach. Beyond challenges with respect to transparency regarding how or what information is utilised in the scoping stage, there is a secondary, more macro-based concern: the focus on perfected practice of scoping can result in the boxing in of the assessment. By focusing on how to accomplish the perfect scoping stage, policy makers may miss the

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<sup>141</sup> Gehring and Cordonier Segger (2005) 206-209.

<sup>142</sup> *Id* at 210-212.

<sup>143</sup> Alf *et al* (2008) 45-46.

<sup>144</sup> Voituriez *et al* (2009) 89.

<sup>145</sup> Alf *et al* (2008) 45-46.

opportunity to absorb a broader understanding of the situation and to account for future environmental concerns that may arise but are perhaps not evident at that initial scoping stage, that is to think of the bigger picture. The scoping stage, in essence, limits the assessment to consider certain environmental issues at the outset, which then sets the tone for the remaining assessment procedure. In the example of EA of trade models in the US and EU, it is noted that other environmental issues can be raised throughout the assessment process, but in reading those assessments, many of the environmental issues that are considered throughout are established primarily during the scoping stage. This is not to say that policy makers are limited to what is found at the scoping stage, it is simply an observation that by its very nature, the process of scoping can be limiting in tone setting as there is not a focus to reassess the environmental situation throughout, with the focus resting on following the procedural stages of the assessment process.

Beyond critiquing the scoping stage, the role of the “actors” within the EA process is also heavily examined in assessment literature as part of perfected procedure, particularly in regards to the party responsible for conducting the assessments.<sup>146</sup> Much of the focus centres on whether the EA is prepared internally or externally.<sup>147</sup> In the UK, EA reports are either prepared by the developers themselves or by consultants chosen by the developers.<sup>148</sup> These internal assessments are advocated for their efficiency, as it is argued that they are completed by individuals who have direct knowledge of the issues being raised in the assessment procedure, and are thus best placed to respond to these concerns.<sup>149</sup> However, internally prepared reports can also be viewed as biased, as the credibility of the information produced in the report is questioned, in turn impacting public confidence in the process and perceptions of effectiveness.<sup>150</sup> As Glasson explains, exerting strict internal control often leads to claims that the process is “too developer-oriented” as the developer is “unlikely to predict that the project will be an environmental disaster”.<sup>151</sup> The assessment report is typically perceived to be more objective and, in turn effective, if an external, independent body carries out the

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<sup>146</sup> Glasson, Therivel and Chadwick (2005) 22.

<sup>147</sup> Rzeszot (1999) 131-32.

<sup>148</sup> Glasson, Therivel and Chadwick (2005) 22.

<sup>149</sup> Alf *et al* (2008) 47.

<sup>150</sup> Morgan (2002) 31.

<sup>151</sup> *Id.*

process.<sup>152</sup> There will always be some underlying bias in the EA process, which may impact perceptions of effectiveness; however, bias can be moderated and in pursuing this aim, perceptions of effectiveness can be increased.<sup>153</sup> Lawrence and Beder discuss various ideas for reducing bias, but the underlying philosophy in their arguments is that this process should involve stakeholders throughout to ensure that their interests are expressed and taken into account.<sup>154</sup>

Similarly, the literature on EA of trade also discusses the issue of internal versus external consultants. Both the American and Canadian models prefer to keep the process internal and employ members of their respective trade departments to carry out the assessments.<sup>155</sup> It is argued that permitting trade-negotiators to carry out the assessments can lead to more effective assessments because they have first-hand knowledge of the environmental issues being raised during the assessment process. As a result, they are more likely to incorporate these issues into the assessment, as opposed to external consultants who are more removed from the process.<sup>156</sup> However, in a similar way to the arguments raised in the literature about EA, the main drawback to internally directed assessments is that it leads to perceptions of bias. Due in large part to concerns over stakeholder confidence in the assessment process,<sup>157</sup> the EU developed its EA of trade model to be employed by external consultants.<sup>158</sup> It is argued that this approach encourages perceptions of transparency and legitimacy in the assessment process, which in turn impacts opinions about the instrument's effectiveness. As with the discussions for EA, there are benefits and drawbacks to both approaches in EA of trade. Regardless of which approach is employed, it is apparent in evaluating the research that stakeholder perception is emphasised. Yet, this emphasis on stakeholder perception does not translate into examinations of whether decision makers seek to truly address stakeholder interests or how they are utilised throughout the assessment process. In a similar way to the focus on a perfected scoping stage, there is a focus on what actors are involved in running the assessment and the proper methodology to be followed, but this focus ultimately lacks depth.

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<sup>152</sup> *Id.*

<sup>153</sup> Lawrence (2003b) 104.; Beder (1993) 28-30.

<sup>154</sup> *Id.*; See Lawrence (2003a) 94-96.

<sup>155</sup> USTR Guidelines (2000) 4 and DFAIT (2001).

<sup>156</sup> Alf *et al* (2008) 47.

<sup>157</sup> George (2010) 16-17.

<sup>158</sup> EC Handbook (2006) 8, 15.

This in turn leads to the perception that decision makers desire that stakeholders perceive the process as effective, but it is unclear what is done to ensure this perception is realized.

In examining the procedural criterion, the literature generally agrees that EA and EA of trade reports can often be overly descriptive and have unfocused data<sup>159</sup> and that the assessment process can last too long and utilise too many resources.<sup>160</sup> At the same time, shorter and simplified reports are often critiqued for being of poor quality<sup>161</sup> and practitioners find it difficult to complete the process in a timely manner, as they are often conflicted about which issues the EA should focus on<sup>162</sup> and who should carry out the assessment. All of these concerns are thus raised in explaining how EA and EA of trade could be improved and made more effective, which tends to focus on improving the practical steps of conducting the assessment. As research continues to point out practical deficiencies and as practitioners strive to improve the assessment process, an underlying question remains: why is there such a focus on perfected practice? It has been argued that “[t]he contribution of [EA] to more environmentally sound decision making and to a more sustainable environment is more often an assumption than a demonstrated outcome”.<sup>163</sup> Herein lies the crux of the issue with assessment scholarship, as too often the focus rests on assumptions and fails to consider what happens in real life to reassess the results of the assessment.

It is thus argued that the focus on improved practice is misplaced. Firstly, focusing on aspects such as perfected scoping or what actors lead the assessment overlooks broader issues and fails to question embedded paradoxes. A step back needs to be taken to assess how decision makers are influenced, how they determine significant impacts and how they ensure that stakeholder's perceptions of legitimacy are realised. Moreover, in the case of EA of trade models, this needs to be done each time an assessment is completed, and the information obtained through this process should be utilised in guiding the approach to future assessments. As noted by Lawrence and Cashmore, a preoccupation with procedure has marginalised the research community's understanding of the substantive purposes and

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<sup>159</sup> Lawrence (2003b) 215.

<sup>160</sup> Sadler (1996) 127

<sup>161</sup> Wood *et al* (1996) 21-22, 59.

<sup>162</sup> Lawrence (2003b) 215. Sadler (1996) 50.

<sup>163</sup> Lawrence (2003b) 215.; See also Andrews (2006) 316.

outcomes of EA.<sup>164</sup> Although this point was made in regard to EA in general, it also holds true and is applicable to the scholarship on EA of trade. This failure to question the purposes of this instrument and the end results<sup>165</sup> has thus resulted in an assessment process that does not realise its full potential. It is argued that focusing solely on assessment practice without regularly questioning and understanding the underlying substantive purposes is counterproductive.<sup>166</sup> In order for EA and EA of trade models to be effective, the purposes and objectives of these instruments need to be clarified and reaffirmed with each new assessment that is completed.<sup>167</sup> Further, EA practice needs to be guided by these respective purposes.<sup>168</sup>

## 2. Seeking Purpose

As EA has been employed regularly since its origins in 1970, there are well established assumptions in regards to its purported purpose.<sup>169</sup> The widely accepted immediate purpose of EA and EA of trade is to provide decision makers with information about the likely environmental impacts of a proposed action before that action is sanctioned.<sup>170</sup> It is expected that decision makers take into consideration the assessment data when determining whether the proposed project, policy or trade agreement should be authorised and if mitigating measures to reduce the environmental impact should be instituted. The aim is to ensure environmentally informed decisions are being made, resulting in development proceeding in an environmentally suitable manner.<sup>171</sup> This widely accepted aim, to make environmentally informed decisions, has been described as the “proximate purpose”<sup>172</sup> of EA, and can also be considered as such for EA of trade. A second purpose, which has been described as the “ultimate goal”, is for the assessment instrument to serve as a major contributor towards

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<sup>164</sup> Lawrence (1997) 80.

<sup>165</sup> Frost (1997) 141.

<sup>166</sup> Lawrence (1997) 80.; Lawrence (2003b) 215.; See also Lee (2004) 25-26.

<sup>167</sup> Cashmore (2004) 422.

<sup>168</sup> *Id.*

<sup>169</sup> Cashmore *et al* (2004) 296 raises this point.

<sup>170</sup> *Id.* Jones *et al* (2007) 18.; Wood (2003) 1.

<sup>171</sup> Jay *et al* (2007) 288.

<sup>172</sup> Glasson, Therivel and Chadwick (2005) 8.; Sadler (1996).

achieving sustainable development.<sup>173</sup> Cashmore *et al* and Jay *et al* refer to this long-term goal as the “substantive purposes” of EA.<sup>174</sup> It is suggested here that the understanding of the purposes of assessment, particularly in the context of EA of trade, is superficial because although the literature often identifies these purposes, it rarely evaluates whether these purposes are realised in practice and whether the framework of these instruments is suitable for achieving these respective purposes.

Essentially, two theories have been discussed in explaining how EA achieves its proximate purpose of environmentally informed decision making: 1. the “information theory” and 2. the “culture theory”.<sup>175</sup> The first theory centres on the belief that EA is a “decision-aiding tool” that is meant to inform decision makers about potential environmental impacts of their respective actions.<sup>176</sup> Sadler explains that the process can provide “clear, well organised information on the environmental effects, risks, and consequences of development options and proposals”.<sup>177</sup> It is argued that in offering decision makers such information, they are encouraged to make environmentally informed decisions, which may *possibly* result in environmental protection.<sup>178</sup> The second theory centres on the belief that EA has resulted in a cultural change amongst decision makers. Holder and Lee explain that the EA process changes the rules in terms of how knowledge is generated and used thereby leading to changes in the “intellectual and political culture of decision making so that decision makers become generally more aware of the environmental consequences of their decision”.<sup>179</sup>

The information theory emphasises that EA is effective as it serves as a “conduit” through which data about the likely environmental impacts of an action is able to reach decision makers.<sup>180</sup> This instrument allows for the exchange of extensive information, both qualitative and quantitative, from various sources, such as environmentalists, the public and industries, with decision makers, thereby providing decisions makers with data that they would not

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<sup>173</sup> Cashmore *et al* (2004) 296.; Jones *et al* (2007) 18.; Wood (2003) 1.; Jay *et al* (2007) 288.; Sadler (1996) 13.; Glasson, Therivel and Chadwick (2005) 8.

<sup>174</sup> Cashmore *et al* (2004) 296.; Jay *et al* (2007) 287-88.

<sup>175</sup> Holder (2006) 22.

<sup>176</sup> Stakhiv and Winslow (1997) 168.

<sup>177</sup> Sadler (1996) 13.

<sup>178</sup> Holder and Lee (2007) 550.

<sup>179</sup> *Id.*

<sup>180</sup> *Id* at 551.

normally have had access to.<sup>181</sup> Scott and Holder explain that by allowing outside groups to comment throughout the process, EA is essentially permitting “a broad constituency of people and groups to become informed and to some extent engage in the decision making process”, which in turn leads to increased perceptions of the legitimacy of the process and could lead to new forms of governance.<sup>182</sup>

The culture theory builds upon the information theory in that it emphasises that decision makers fundamentally change once they are exposed to environmental data through the EA process. Bartlett has described EA as a “worm in the brain” strategy that impacts upon the individual values of a decision maker, encouraging them to be more environmentally aware.<sup>183</sup> Thus, it is claimed the EA process imbues environmental values in decision makers, which in turn leads to decision makers who are more environmentally aware and self-regulating. In this respect, as explained by Holder, the cultural theory complies “with a basic idea of reflexive environmental law, the encouragement of internal self-critical reflection within institutions about their environmental performance”.<sup>184</sup>

Similarly to EA, EA of trade models also advocates the usage of this instrument as a conduit through which environmental information can be provided to trade negotiators. For instance, American EA of trade models are viewed as a “tool to help identify potential environmental effects of trade agreements”, and as a medium for discussing these effects within the government and amongst the public, so as “to help facilitate consideration of appropriate responses”.<sup>185</sup> Likewise, Canadian assessments are viewed as a medium through which environmental concerns can be identified and incorporated into the trade negotiation process and as a means through which public concerns are addressed.<sup>186</sup> EU assessments also seek to identify the impacts of trade agreements so as “to inform the public debate on trade liberalisation and, through that debate, provide objective information to decision makers to enable them to integrate sustainable development more fully into trade policy”.<sup>187</sup>

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<sup>181</sup> Scott and Holder (2006) 212-213.

<sup>182</sup> *Id* at 213.

<sup>183</sup> Bartlett (1990) 82 as quoted in Holder and Lee (2007) 552.

<sup>184</sup> Holder (2006) 23.

<sup>185</sup> EO 13,141 (1999) section 2.

<sup>186</sup> DFAIT (2001).

<sup>187</sup> Kirkpatrick and George (2006) 327.

Although it is argued that EA and EA of trade models *may* assist decision makers by serving as a conduit for information, and possibly altering their way of thinking, it is difficult to prove if these instruments do result in environmentally informed decisions.<sup>188</sup> As explained by Holder:

[Q]uestions have arisen about the type and quality of information elicited by the procedures and the use to which the information might be put. One concern is that the environmental assessment process constitutes no more than a balancing act. The absence of clear, positive, environmental standards means that, understandably, the ultimate decision whether or not to proceed with a development project will depend on economic judgements and political perspectives, as well as environmental factors.<sup>189</sup>

As discussed above, EA and EA of trade models are meant to contribute to the decision-making by providing information that is expected to *influence* the final decision, but these instruments are not meant to *direct* the process. Holder rightly points out that information obtained through this process can be questionable and it is difficult to determine how decision makers process and utilise this data, and to what extent, if any, environmental values pervade their decision-making approach. These instruments do not have a framework in place to indicate how the environmental information should be used, nor do they require that decision makers provide detailed feedback on how this data is incorporated into decision-making.<sup>190</sup> Essentially, the assessment process leaves it to the discretion of the decision maker as to how to utilise the outside information. This deference to the decision maker in terms of how to utilise data relates back to the deference given in determining whether significant environmental issues exist in order to proceed with the assessment. There is a common theme that the decision maker has the authority and is firmly in charge of the assessment process. As a result, these instruments have been criticised as being ineffective as they fail to specify what impact, if any, assessment data has had on the decision-making process. This in turn has led to disillusionment amongst certain stakeholders, as they become increasingly concerned that their input makes little difference, leading to reduced perceptions of

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<sup>188</sup> Howarth (2007) 160.

<sup>189</sup> Holder (2006) 24.

<sup>190</sup> Knigge (2005) 9.

legitimacy. For instance, NGOs, including the World Wide Fund for Nature and Friends of the Earth Europe, have expressed this criticism about EA of trade models, indicating that it needs to be clear how assessments inform the decision-making process.<sup>191</sup> By failing to clarify how the EA process impacts upon decision making, the current framework results in uncertainty as to whether environmentally informed decisions are being made.

Another viewpoint is that the EA process may lead to false perceptions of legitimacy. For instance, an action may result in irreparable environmental damage, but the assessment process may nonetheless identify mitigation measures, in an effort to disguise these severe environmental concerns, thereby overcoming any objections to the action.<sup>192</sup> Thus, the assessment process may be used to understate or mask environmental concerns so that an action may be presented favourably to the public in an effort to garner perceptions of legitimacy.<sup>193</sup> In essence, the assessment process may be used so as to appear as if environmentally informed decisions are being made, when actually that is not the case. As long as it remains difficult to determine whether and how the assessment process results in environmentally informed decisions, these criticisms will continue to be raised and debated, making it difficult to determine if the proximate purpose of EA is realised. Howarth notes that the only way to quell such concerns is to show that the assessment process is driven by and incorporates substantive objectives and standards, meaning that the purposes of this instrument need to be clearly understood and the assessment models need to be designed to achieve these respective goals.<sup>194</sup> Further, in examining the challenges of achieving the proximate aim, it also becomes clear that lack of stakeholder involvement further aggravates the issue.

Beyond the proximate aim, an “ultimate purpose” of having EA serve as an instrument for sustainable development has also emerged in the literature.<sup>195</sup> As discussed, the link between EA and sustainable development can be traced back to NEPA, in that this legislation promoted

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<sup>191</sup> *Joint NGO Statement* (2002).

<sup>192</sup> Holder (2006) 285.

<sup>193</sup> Holder and Lee (2007) 564.

<sup>194</sup> Howarth (2007) 160.

<sup>195</sup> Glasson, Therivel and Chadwick (2005) 8.

the philosophy of sustainable development, without using that specific terminology.<sup>196</sup> In 1987 the Brundtland Report also identified the link between EA and sustainable development, essentially claiming that sustainability could only be achieved if environmental concerns were assessed.<sup>197</sup> In 1992, the Rio Declaration further emphasised the connection between EA and sustainable development.<sup>198</sup> As a result, research has increasingly focused on the link between EA and sustainability and EA began to be seen as a vehicle to promote sustainable development. Sadler describes EA “as an important tool for giving effect to sustainable development objectives in planning and decision making”.<sup>199</sup> Glasson, Therivel and Chadwick<sup>200</sup> and Holder and Lee<sup>201</sup> further support this view.

The concept of sustainable development is further emphasised in EA of trade models. The US explicitly affirms that “[t]rade agreements should contribute to broader sustainable development”, with the government viewing its EA of trade model as an important tool for achieving that goal.<sup>202</sup> The Canadian government has also affirmed its commitment to sustainable development in its assessment framework.<sup>203</sup> The Canadians view their model as “an important decision-making tool for promoting sustainable development” due to its ability to “contribute to more open decision making within the federal government by engaging representatives from other levels of government, the public, the private sector and nongovernmental organizations in this process”.<sup>204</sup> Sustainable development is also a fundamental goal for the European model. Such is the concern for this concept that, unlike the US and Canada, which tend to focus solely on environmental issues, the EU developed its model with all three pillars of sustainability in mind, focusing on the environmental, and the social and economic impacts of trade negotiations. The EU model was thus created to integrate sustainable development into the trade negotiation process.<sup>205</sup>

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<sup>196</sup> NEPA Section 101.

<sup>197</sup> Brundtland Commission (1987) part 1, section 2.

<sup>198</sup> Rio Declaration (1992) principle 17.; See also Craik (2008) 77-81.

<sup>199</sup> Sadler (1996) iv.

<sup>200</sup> Glasson, Therivel and Chadwick (2005) 8, 13.

<sup>201</sup> Holder and Lee (2007) 562.

<sup>202</sup> EO 13,141 (1999).

<sup>203</sup> DFAIT (2001).

<sup>204</sup> *Id.*

<sup>205</sup> Kirkpatrick and George (2006) 327.

It is therefore evident that EA and EA of trade models are upheld for their ability to promote sustainable development. However, in evaluating the literature it becomes clear that it fails to thoroughly explain the implications of this concept on EA practice and to clarify whether these instruments are effective in achieving this aim.<sup>206</sup> As aptly stated by Cashmore, Bond and Cobb, “sustainable development has been employed in environmental assessment more as a ‘catch phrase’ than a purposeful goal”.<sup>207</sup> In examining why this is the case, it becomes apparent that as with other “catch phrases”, the concept of sustainable development has a strong emotional draw, as it represents an idealised normative belief.<sup>208</sup> In practice, it is difficult to precisely define and implement this concept, which in turn makes it problematic when trying to identify the role of assessment in achieving sustainability.<sup>209</sup> Despite the fact that sustainability is difficult to define, this alone does not mean that EA and EA of trade could not contribute to and promote the underlying philosophy behind this concept, namely to balance environmental, social and economic concerns. Cashmore, Bond and Cobb conducted an empirical study into the outcomes of EA processes in the UK to determine whether in practice this instrument contributed to sustainability. Essentially, their research found the link between EA and the promotion of sustainability to be uncertain, at best. Their study found that EA “has the potential to contribute to sustainable development”.<sup>210</sup> They found that in effect, there needs to be an understanding of potential sustainability outcomes and the EA process needs to be redesigned so as to address these respective outcomes. They recognised that there needs to be future research to develop a “detailed causal understanding of potential sustainability outcomes”, but besides that issue, their underlying point, that the EA process needs to be developed with a specific purpose in mind, is imperative to note.<sup>211</sup>

In discussing the substantive criterion, the literature explains that EA and EA of trade have a proximate aim of achieving environmentally informed decision-making and a substantive aim of promoting sustainable development. However, the understanding of these purposes is superficial in that the literature discusses and names these purposes without meaningfully

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<sup>206</sup> Cashmore *et al* (2004) 298.

<sup>207</sup> Cashmore, Bond and Cobb (2007) 517.

<sup>208</sup> Fisher (1995) 446.

<sup>209</sup> *Id.*; Cashmore *et al* (2004) 298.

<sup>210</sup> Cashmore, Bond and Cobb (2007) 528.

<sup>211</sup> *Id.*

debating whether they are realised in practice and, more fundamentally, whether the assessment framework can even support these purposes. Developing a detailed understanding of the proximate aim and whether this purpose is realised is further complicated by the fact that EA and EA of trade have their origins in rationalist decision theory as assessment models were developed at a time when rationalist thinking was widespread.<sup>212</sup> This paradigm indicates that “decision makers would give objective consideration to an issue, taking into account all possible alternatives, each of which would be assessed on the basis of the technical information available, and would come to a decision that was in the best interests of society as a whole”.<sup>213</sup> In keeping with this theory, EA and EA of trade literature thus tends to promote the belief that as environmental impacts are identified, decision makers will in turn take this information into consideration when choosing the option that best suits their goals, leading to a better or “rational” conclusion.<sup>214</sup> The supposition behind this model of thinking is that as decision makers become increasingly aware of environmental concerns, then there will be a trend towards their wanting to become more environmentally responsible and they will thus choose the alternative which permits them to realise this aim. Koronov and Thissen accurately explain that rationalist decision-making is a normative model, as “its proponents believe that it should be applied as it will lead to improvement in real-world decision making over present practice”.<sup>215</sup> However, empirical studies indicate that decision-making often does not follow rationalist ideals, and that there is a divergence between the normative model and actual practice<sup>216</sup> Thus, it is often difficult to prove whether the EA process results in environmentally informed decisions, and therefore whether the proximate aim is realised. Similarly, it also difficult to develop a detailed understanding of the substantive aim and whether its purpose is also realised. Like the proximate aim, the substantive aim is based on a normative model, that of sustainable development. Although EA and EA of trade both emphasise their commitment to sustainability, it becomes clear that in practice this has been difficult to realise and there is again divergence between the normative model and actual practice.<sup>217</sup>

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<sup>212</sup> See Weston (2000) 185.

<sup>213</sup> Jones *et al* (2007) 35.

<sup>214</sup> Koronov and Thissen (2000) 191-92.

<sup>215</sup> *Id.*

<sup>216</sup> *Id* at 192.

<sup>217</sup> Cashmore, Bond and Cobb (2007) 528.

It is therefore imperative to ask, why is there this divide and how does one bridge this gap between the normative models and actual practice? As a starting point, it could be suggested that this divide exists because there is a fundamental lack of understanding as to the purposes of EA and EA of trade and how to realise these respective purposes. The above analysis indicates that these tools are viewed as having a proximate purpose, as a decision-aiding tool, and a substantive purpose, as an instrument to promote sustainable development. In framing the discussion along these lines, the literature assumes that the proximate and substantive purposes are easily identifiable. However, it is argued that this is not the case, as the purposes of these instruments are disputed.<sup>218</sup> There is a need to identify the various stakeholders in the assessment process and to analyse their desired aims for these instruments. By doing this, the literature can meaningfully discuss the various viewpoints concerning the purposes of these instruments. The literature needs to move beyond simply stating purposes and needs to significantly critique and analyse these instruments to determine whether the purposes are realised in practice, and more fundamentally, if the assessment framework is designed to achieve these respective aims. To simply promote a stated purpose without evaluating whether it is achieved is problematic because it could result in a flawed framework continuing to be employed. This is particularly worrisome within the context of EA of trade because that is the new frontier of EA, in that these assessment models are relatively new and are in the process of growing.<sup>219</sup> Once the substantive purposes are identified, then the framework of EA and EA of trade needs to be designed with these purposes in mind. This will assist in ensuring that actual practice realises stated goals, thus improving perceptions of effectiveness.

#### D. Embracing Windows of Opportunities Throughout the Assessment

Examination of the conception of EA of trade reveals that this model was a created opportunity and that policy formation under this model follows a linear approach. Both factors result in implications regarding how EA of trade operates in practice, which can lead

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<sup>218</sup> Cashmore *et al* (2004) 307.

<sup>219</sup> New Zealand and Japan have considered employing EA of trade models. Gehring (2009) 385.

to limitations. It is important to recognise the “how” of policy formation under EA of trade because it guides the “why” of practice under this model and clarifies avenues for change.

Environmental reforms can happen because there is a driver for change, who happens to be in the right place at the right time and can capitalise on that opportune moment to push through reform, or it can result from created opportunity, in which information is produced, leading to debate and ultimately pressure for change.<sup>220</sup> Ahmed and Sánchez-Triana explain that in the former, seizing an opportunity, the framework for reform is already in place and then an opportunity to effect reform occurs. This is different from the latter, a created opportunity, which is more akin to a grass-roots effort, as public information, and debate results in political pressure, which in turn leads to reform. As discussed above, NEPA resulted from a created opportunity, and similarly, EA of trade also resulted from a created opportunity.

In the instance of EA of trade and the models developed by the US, Canada and the EU, the impetus for the creation was to increase public support for and improve perceptions of the legitimacy of trade policy, in preparation for the Seattle Ministerial Conference. Civil society unrest was the catalyst for the development of these EA of trade models; this movement resulted in the created change. It is imperative to understand that EA of trade resulted from a created opportunity, and to recognise civil society’s role in this development, because this in turn leads to questions about how decisions are created under these trade models.

As EA of trade was a created opportunity due to civil society pressure, there is an expectation by these respective stakeholders that they would be able to engage with these models and have their interests represented. Yet, these models follow a linear approach in practice, which in turn limits their ability to adequately represent the interest of stakeholders. In short, the means by which EA of trade came to fruition, as a created opportunity, is not well reflected in the way these models operate in practice, which is through a linear process.

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<sup>220</sup> Ahmed and Sánchez-Triana (2008) 182.

This section will argue that EA of trade models should continue to embrace “windows of opportunity” throughout the assessment process, to better reflect and engage with the group that was key to its creation.<sup>221</sup> This section will begin by explaining the linear model of decision making and relate it to stakeholder engagement, identifying the limitations that can in turn result. This section will then proceed to identify alternative decision-making practices that can be utilised to better reflect EA of trade’s history as a created opportunity.

### 1. The Limitations of Linear Decision Making

Policy formation under EA of trade follows a linear and systematic approach, which is the most understood approach to policy development.<sup>222</sup> The linear approach follows a dichotomous process, consisting of two sequential stages: the decision-making stage and the implementation phase.<sup>223</sup> The decision-making stage relates to the scoping stage of EA of trade, where the environmental issue is recognised, examined and ultimately identified. This in turn leads to a phase where various options and measures for mitigation are considered and additional information may be gathered to assist in determining the course of action. This is reflected in the draft reports of EA of trade models. Finally, the implementation stage would be represented within the final assessment reports and trade documentation, as it would indicate what decisions have been made and how the issues have been addressed. Each stage of the linear model builds off assumptions from the previous stage.

Although the linear model may make sense in theory, it falters in practice in the context of decision making under EA of trade.<sup>224</sup> The linear approach faces challenges in application because implementation of the assessment findings could be too far removed from the decision-making stage and this approach is based on too many assumptions. By following a linear approach, an assessment is essentially being made at a specific moment in time versus on an ongoing and continuous basis, which in turn results in embedded limitations. These

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<sup>221</sup> This was a phrase utilized by *Id.*

<sup>222</sup> This has also been referred to as common sense, mainstream and rational models of policy formation. Clay and Schaffer (1984) 3, 5 raised this point in the 1980s regarding agricultural policy formation, but their observation is still relevant to and prevalent in other practices of policy formation; see also the research of Feldman and Khademian (2008) on this specific point in relation to assessments.

<sup>223</sup> Clay and Schaffer (1984) 3.

<sup>224</sup> Ahmed and Sánchez-Triana (2008) 184 and Feldman and Khademian (2008) 38.

limitations are first realised in splitting the decision making and implementation stages, as this can be problematic because implementation often changes the findings of policy or decision making,<sup>225</sup> which means policies are not always implemented with the empathy intended.<sup>226</sup>

In addition to challenges with implementation, a further issue that faces the linear model is that this approach is based on assumptions that decision-makers are unitary actors, who have complete access to all of the information about the situation at hand and are fully aware of the problems being addressed.<sup>227</sup> Yet, as explored above, EA of trade models are applied to complex trade negotiations, which also involve various parties, with altering viewpoints. Interestingly, in reviewing the history of completed EA of trade agreements, when the assessment has not been successful in mitigating environmental damages, the focus tends to fall on procedural practices and how that can be improved, as discussed in the previous section, as opposed to reflecting on the linear model for decision making and its limitations.

In reflecting on the linear model, it is useful to further explore the assumptions on which it is based. Firstly, there is the assumption about the unitary nature of decision-makers. In the US, their assessments are conducted internally and involve representatives from the Department of Trade. Within the EU, their assessments are conducted by outside consultants and involve a consulting team. In both instances, there are multiple actors involved in the decision-making process. For the linear approach to decision making to hold true, these decision-makers are assumed to have clear and consistent preferences and that they in turn make decisions in line with these respective preferences. Feldman and Khademian address this by explaining “the evidence is overwhelming, however, that policy-making entities are not unitary actors but are constituted of multiple actors with multiple and often conflicting goals”.<sup>228</sup> By being aware that the decision-makers are unlikely to always be on the same page and act accordingly, it identifies an embedded challenge within the linear approach. This notes that decision-makers have innate bias, which can in turn impact their decision making. As explained by Miles,

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<sup>225</sup> Lindblom and Woodhouse (1992) 65.

<sup>226</sup> Gathercoal (1991) 47.

<sup>227</sup> Feldman and Khademian (2008) 39.

<sup>228</sup> Feldman and Khademian (2008) 41.

“where you stand depends on where you sit”, which in turn means that an individual’s perspective is impacted by the position they hold.<sup>229</sup>

Another assumption relates to how decision-makers engage with and process information, as it is assumed they have complete information about the situation at hand. This assumption is problematic in that humans are inherently flawed and have limited cognitive capabilities in regard to how they process information, which in turn feeds into a secondary issue that all of the alternatives may not have been reviewed, as judgments are made based on limited information.<sup>230</sup> This phenomenon of limited information processing is called bounded rationality, and it explains that the output of the decision-making process is a compromise “between accuracy of the output and the difficulties involved in processing”.<sup>231</sup> In essence, the final decision may not in fact be the best decision, because individuals are influenced by their personal bias, so they may choose an option without being aware of viable alternatives or they may believe that a decision is beneficial, when it is not in practice.

Identifying these limitations of the linear approach, that decision-makers are not unitary, make decisions based on their own experiences and have a certain cognitive capacity to process limited information, highlights underlying impediments that current EA of trade models face. Expanding opinions and perspectives on the issues at hand and the best means to tackle these respective problems can compensate for these limitations. Multiple opinions will dilute cognitive bias and provide perspective into additional alternatives so that a beneficial decision could be made. In the case of EA of trade models, the inclusion of stakeholders in decision-making and enhancing participatory approaches, to amplify their voices “will increase the likelihood that policies that are responsive to many different segments of society are designed and implemented”.<sup>232</sup> Ahmed and Sánchez-Triana emphasize the importance of participatory practices with stakeholders as they raise the issue of elite capture, meaning that individuals in positions of power, decision-makers in the case

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<sup>229</sup> Miles (1978) 399-400. Miles made this observation regarding the decisions of federal employees, based on their positions within bureaucratic institutions. He noticed that individuals cannot make decisions independent of the position they hold, as that provides an innate bias for their decision making.

<sup>230</sup> Feldman and Khademian (2008) 41-42.

<sup>231</sup> Lipman (1995) 43.; The concept of bounded rationality was coined by Simon (1957).

<sup>232</sup> Ahmed and Sánchez-Triana (2008) 189.

of EA of trade models, have partial or total control over the process at the expense of the stakeholders impacted by the decisions they make. Consulting alone with these stakeholders does not sufficiently ensure that policy is influenced. Instead, a more collaborative and engaging process is needed. As explained by Ahmed and Sánchez-Triana, when commenting on how to constrain the problem of elite control:

Transparency and information disclosure, data collection, and analysis, including analysis of the distributional impacts of institutional reforms, are key. Opening up decision-making processes to public scrutiny...are important tools for achieving social accountability.<sup>233</sup>

In recognising that EA of trade models follows a linear decision-making approach, the respective limitations have been identified. Meaningful engagement with stakeholders which in turn incorporates various viewpoints, is a means to overcome these limitations. This goes beyond the current approach followed by most EA of trade models, which emphasises stakeholder consultations; but, as will be explored in subsequent case studies, fails to provide measures for meaningful engagement. There is a distinction between consultations and meaningful engagement which leads to collaborative practices. Understanding the origins of EA of trade as a created opportunity, which was created due to the catalyst of civil society unrest, shines further light on the importance of this issue and why it is necessary to be aware of the limitations under the current linear approach, as the impact assessment models should reflect the goals of the groups that inspired its creation.

## 2. The Importance of Continuous Engagement

EA of trade models follows a linear decision-making approach, which is at odds with the view that this model was a created opportunity, born from the catalyst of public unrest. The reason why EA of trade was created does not connect with how this model regularly operates in practice. It is argued that limiting EA of trade models to a linear decision-making approach, as reflected in the procedural steps of the EA of trade process, hinders the intended ability of

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<sup>233</sup> *Id* at 186.

these models. This section will consider whether EA of trade should incorporate aspects of a continuous model of decision making into its practice.<sup>234</sup>

In reviewing how decisions are made in the context of EA of trade, it is clear that trade negotiators must balance numerous inputs, as they are dealing with complex trade negotiations that touch upon complex environmental concerns. No two assessments are identical, as they are dealing with different negotiating parties. As a result, whatever model decision makers follow must be flexible. As EA of trade was inspired by EA models, the approach to decision making fell on the linear model, but that model is too structured for EA of trade, as different inputs enter at various points during the decision-making process. Trade negotiators and decision makers do not have all the information at hand when they begin the assessment process. The assessment is meant to reveal this data through various methods, such as engagement with stakeholders. As a result, decision makers must be able to embrace that information as it arrives in the decision-making process and then adapt the process accordingly; the information will guide the approach. In other words, “the emphasis needs to move away from decision making toward action as part of a continuous process”; decision making and implementation should not be dichotomous, they should flow naturally together.<sup>235</sup> Too much of EA of trade focuses on completing the assessment and the trade negotiations; the focus is on getting the deal done. The assessment does not lead or, in many cases, even follow the trade negotiations; it follows behind. There is too much focus on completing the deal and very little focus or reflection on how the assessment has been implemented.<sup>236</sup>

This in turn leads to exploring how decision making and implementation can become more streamlined, how the process can be continuous. Feldman and Khademian explain that uncertainty and ambiguity are two intertwined factors which impact the ability of decision makers to act. They state:

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<sup>234</sup> Feldman and Khademian (2008) raised the prospect of a continuous model for Strategic Environmental Assessment (SEA) models. The author found their work applicable to EA of trade models, as many of the same challenges that SEA experienced in following a rational decision-making approach hold true for EA of trade.

<sup>235</sup> Feldman and Khademian (2008) 47.

<sup>236</sup> See Feldman and Khademian (2007), where they emphasise the need to be able to implement policy.

Under uncertainty decision makers may know what they want to accomplish, but they may not know what effects their actions will have. Under ambiguity, they may not know what effects they want their actions to have or even what effects it would be appropriate for them to have.<sup>237</sup>

It is argued that although ambiguity and uncertainty are intertwined, in the context of EA of trade, the issue of ambiguity should be addressed in the first instance, as there is lack of clarity on what is meant to be accomplished.<sup>238</sup> At the heart of addressing ambiguity, there needs to be a focus on participatory approaches, as multiple perspectives are needed from the individuals who are engaged and view each other as having legitimacy in working towards the problem at hand. In the context of EA of trade, by working together collaboratively, there can be clarity in regard to the desired impacts of decision making and what impacts are needed in the situation to address current environmental issues. An inclusive model has been suggested as the means to manage ambiguity, the desired outcome of this model being:

The creation of an inclusive community of participation (in which a wide range of perspectives involved in a process of policy making and implementation is viewed as having a legitimate role to play) is an essential outcome of inclusive management. It is achieved through the engagement of participants in specific projects.<sup>239</sup>

The key to the inclusive model is the creation of a collaborative community, which has the capacity building ability to drive the decision-making process. In the context of EA of trade, this inclusive model could be employed as follows: the assessment process would flag ambiguity in relation to environmental issues, this would in turn engage a participatory approach from stakeholders and the community who have a vested interest in the issues at hand to work towards finding what impacts the assessment process should have in addressing these issues, and decisions on implementation would be made through this method of continuous engagement. This method of continuous engagement in turn provides “windows of opportunity” throughout the assessment process where decisions and implementation are made.<sup>240</sup>

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<sup>237</sup> Feldman and Khademian (2008) 48.

<sup>238</sup> This was discussed above in the context of seeking purpose, section (C)(2).

<sup>239</sup> Feldman and Khademian (2008) 50.

<sup>240</sup> Ahmed and Sánchez-Triana (2008) 185.; Feldman and Khademian (2008).

## E. Conclusion

Within a relatively short time, EA has become a ubiquitous policy tool, which has in turn bled into the context of trade negotiations. This chapter has explored the historical origins of EA and EA of trade to determine the catalyst for their creation. In exploring the fact that public unrest and political pressure resulted in the creation of EA of trade, this chapter then examined the perceived purpose of this tool, as stakeholders have varying views on what it is meant to achieve. There needs to be clarity on the substantive purpose of EA of trade and that purpose, in turn, should be a guiding principle in regard to how decision makers approach the assessment process.

It is argued that the way in which EA of trade came about, as a created opportunity, should be recognised because some of the challenges that this model is experiencing in practice can be addressed if the foundation on which this model was formed is considered. EA of trade, influenced by its historical linkages to EA models, follows a linear problem-solving approach and that dichotomous model of decision making and implementation does not produce effective results. It is argued that by recognising why EA of trade was created in the first instance and appreciating the role that civil society has played, it follows that this model should be viewed through a different lens.

### **III. Chapter 2: The Importance of Environmental Assessment of Trade**

#### **A. Introduction**

The previous chapter explored the history of environmental assessment (EA) of trade, explaining that this instrument emerged because of public desire to create an opportunity for change. It was argued that historically, analysis of EA of trade focuses on the procedural elements of this tool and fails to consider whether and how EA of trade influences decision makers. As discussed, the EA of trade process has the potential to take advantage of windows of opportunity during the trade negotiation process through the promotion of incremental improvements in policy and engagement with multiple stakeholders.<sup>241</sup> This chapter seeks to focus on why the failure to seize opportunities and explore the influence of EA of trade models is a worrisome trend by examining the importance of EA of trade, particularly within the context of environmental governance.

EA of trade can be utilised by governments, who currently face significant environmental challenges, as a component of environmental governance, to protect natural resources during trade negotiations. In analysing environmental concerns, current governmental policy is often based on traditional economic analysis, which is ill-equipped to fully account for the challenges of environmental issues, such as climate change, as it tries to quantify the unquantifiable. The state of the environment is an incredibly complex and debated issue. There is tension between short-term and long-term views with respect to what environmental impacts can occur today versus the impact in the future. Public knowledge of environmental concerns and resulting public pressure have driven awareness for the need for a broader perspective in how to tackle these challenges. It is suggested here that in taking a broader approach, the use of EA of trade should be examined. This chapter will explore whether EA of trade has the potential to assist governments in understanding priceless

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<sup>241</sup> This relates back to the discussion put forward by Feldman and Khademian about the adaptive management model (continuous improvements) and the inclusive management model (stakeholder involvement), as explained in the context of SEA. See Feldman and Khademian (2008) 37-39.; Ahmed and Sánchez-Triana (2008) 185.

environmental resources and working towards achieving balance between economic growth today and environmental protection for the future as trade policy is developed.<sup>242</sup>

In examining why EA of trade is an important tool that requires further consideration, this chapter is arranged in three sections. The first section assesses the threat of environmental harm, exploring the link between freer trade, environmental impacts and what role EA of trade can play as a policy tool. The second section analyses the economic tools traditionally utilised by governments in tackling environmental harms and contrasts the role for EA of trade in amassing qualitative information. The third section examines the need for environmental governance in addressing environmental harm and explores EA of trade's ability to accrue knowledge within the context of governance. This chapter finds a common theme of interconnectedness and surmises that EA of trade's strength stems from its ability to serve as a medium to bring together stakeholder perspectives when addressing a common concern of environmental harm. This chapter thus seeks to centre the importance of EA of trade around the concept of interconnectedness, which will be further explored in the following chapters, which examine the EA of trade models in the United States (US) and European Union (EU).

#### B. The Threat of Environmental Harm

Globalisation has resulted in greater integration of world trade, and freer trade has in turn provided a medium through which increased globalisation can impact the environment. Research indicates that trade has been largely beneficial globally, but there are instances where it has resulted in negative environmental impacts.<sup>243</sup> Regarding benefits, globalisation and increased trade result in economic growth and social and political progress, such as improving efficiency and innovation in industries, which leads to increased job

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<sup>242</sup> The concept of understanding priceless resources and balancing economic growth with environmental concerns is discussed by Burger and Gochfeld (1998) 4-13.

<sup>243</sup> See Cook *et al* (2016) who reviewed the research of climate scientists through six independent studies and found that 97% of that research supported the findings that human actions are resulting in global warming. A full discussion of the link between environmental harm and trade is outside the scope of this chapter. This chapter operates under the assumption that trade has resulted in greater greenhouse gas emissions, and that in its current form, trade may result in sustainable practices in richer nations, but this may not be the case in poorer nations. See the research of Kleemann and Abdulai (2013) for a deeper discussion of this issue.

opportunities.<sup>244</sup> With respect to environmental issues, there is debate as to the long-term environmental impact of freer trade. Some economists have referenced the environmental Kuznets curve hypothesis, which argues that the relationship between economic growth and the environment will follow a U-shape, meaning that freer trade will initially result in environmental deterioration, but as economic growth is achieved, environmental issues will in turn improve.<sup>245</sup> Increased trade can also allow for efficient resource allocation and facilitate the sharing of environmentally friendly technology, promoting a shift towards more sustainable practices.<sup>246</sup> Yet, research also shows that globalisation and freer trade coincide with environmental harm, as carbon emissions have increased due to energy-intensive technologies.<sup>247</sup>

The reality is that while globalisation and freer trade have been beneficial in some respects, there are also instances where the environment has been impacted negatively, which in turn contributes to the overarching global environmental issues of “climate change, biodiversity loss, pollution and waste”.<sup>248</sup> Due to the interconnected nature of environmental harms, the impacts of freer trade cannot be viewed in a vacuum, focusing solely on solitary environmental examples; the bigger picture must also be considered. In this context, EA of trade provides the opportunity to examine these interconnected issues and to understand the bigger picture. When commenting on the environment in 2021, United Nations Secretary-General António Guterres stated: “We are at a crossroads, with consequential choices before us. It can go either way: breakdown or breakthrough”.<sup>249</sup> It will be explored here whether EA of trade can be part of this breakthrough and if so, how that can be achieved.

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<sup>244</sup> For a discussion of the relationship between globalisation and increased trade, see Feachem (2001) 504-506.; Dollar and Kraay (2001).; Erixon (2018) 4-10.

<sup>245</sup> Omri (2013) 657.; Grossman and Krueger (1995) 353-377.

<sup>246</sup> In 2018, the World Trade Organization and United Nations Environment Programme published a joint publication discussing how governments can ensure trade and the environment are mutually beneficial, highlighting the environmental benefits of technological advancements. WTO (2018) 4-8.

<sup>247</sup> Xia *et al* (2022) 219-228.; Ghosh (2010) 3008-3014.

<sup>248</sup> UNEP refers to this as a triple planetary crisis. UNEP, Norway (2022).

<sup>249</sup> Guterres (2021).

## 1. Environmental Harm: Breakdown or Breakthrough

Environmental harm can begin gradually, develop into tipping points and culminate in full blown environmental crises, at which point there is irreversible and catastrophic damage. The key is to stop the cycle of environmental harm, or have a breakthrough, before it leads to complete environmental breakdown. The result of this environmental breakdown is climate change and examples of global environmental harm include ocean acidification, loss of biodiversity, and deforestation, which all contribute towards the implications of a warmer planet. Governments around the world have in turn spent considerable resources developing environmental plans and discussing the state of the global environment to stem this domino effect. In November 2021, the UN Climate Change Conference, known as COP26, brought together 200 countries to discuss urgent climate change action.<sup>250</sup> COP26 was preceded by COP21 in 2015, which culminated in the Paris Agreement on climate change, and will be followed by COP27 in November 2022. The overall message from governments and citizens is clear: action must be taken today to preserve the environment for future generations. Yet, there is disagreement as to what action can and should be taken, and how aggressive governments should be in their approach. The environment is a multifaceted problem, which requires a multifaceted solution. EA of trade can potentially contribute towards the actions that can be taken today in trade negotiations.

The message of environmental harm and the need to act has become more urgent over recent years, which has in turn led to further pressure on governments. Over 20 years ago, the United Nation's Intergovernmental Panel on Climate Change (IPCC) discussed the concept of environmental tipping points,<sup>251</sup> which helped bring environmental harm and climate change to the forefront of discussion. Tipping points are a threshold at which the qualitative structure of a system is transformed;<sup>252</sup> change may have already been happening in the system, but it

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<sup>250</sup>The importance of COP26 is recognised in remarks by Patricia Espinosa, Executive Secretary of the United Nations Framework Convention on Climate Change (UNFCCC): "...[T]he eyes of the world are focused on Glasgow. Glasgow can be the starting point of a new more prosperous era, a greener, more resilient, and sustainable future. One that is more just and more prosperous for all people". Espinosa (2021).

<sup>251</sup> Tipping points originated as a concept in epidemiology, but journalist Malcolm Gladwell popularised the concept in 2000. That idea of a tipping point crossing a threshold, or a point of no return, was then applied to environmental sciences and research into global temperatures. See Watson (2001); Gladwell (2006).

<sup>252</sup> Lenton *et al* (2008) 1786.

is abrupt and irreversible once the tipping point is reached.<sup>253</sup> Examples of environmental tipping points include ice loss in the Greenland and West Antarctic ice sheets, thawing of the permafrost, and deforestation of the Amazon rainforest.<sup>254</sup> A tipping point can be viewed as analogous to a tower made of blocks. The tower would represent an environmental concern, such as the Amazon rainforest, and environmental damage would represent a single block. Over time, single blocks are removed from the tower as harm carries on unchecked. The tower is weakened, but still standing. Then one day, a block is removed, and the tower topples over. That final block is the tipping point.

When a tipping point may happen is debated and research on this issue may vary. This is illustrated in the work of the IPCC: in 2001, the IPCC warned that a tipping point was possible if global warming reached 5° Celsius above pre-industrial levels; in 2021, the IPCC revised this figure, identifying global warming of 2° Celsius above pre-industrial levels as problematic.<sup>255</sup> Although the exact tipping point is debated, governments are nonetheless pressured to achieve reduced greenhouse gas emission, as the Paris Agreement seeks to limit global warming to 1.5° Celsius.<sup>256</sup> Current research indicates that in 2021, surface global temperatures were 1.04° Celsius warmer than the pre-industrial period, and since 1981, the rate of warming per decade has been 0.18° Celsius.<sup>257</sup> Simply put, the science indicates the world is warming and this will have negative environmental impact in the long-term. Although it is difficult to accurately predict when a tipping point will occur, the scientific consensus is that changes should be made as early as possible, because there is a fine balance between being on the edge of a tipping point and toppling over.

The Amazon rainforest is a commonly cited example of a tipping point and illustrates the fine balance between being at the edge of a tipping point and a full-blown breakdown of environmental destruction. Over the years, deforestation within the Amazon has fluctuated. In 2012, Brazil appeared to have control over deforestation, as it was on a downward trend.

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<sup>253</sup> Lenton (2021) 325-326.

<sup>254</sup> Keohane (2009) 54.

<sup>255</sup> AllRise (2021) 74.; IPCC currently suggests that levels should remain at or below 1.5 degree centigrade, Masson-Delmotte *et al* (2021).

<sup>256</sup> 192 States and the EU have ratified or acceded to the Paris Agreement. The combined global output of these States represents 98% of greenhouse gas emissions. Paris Agreement (2015).

<sup>257</sup> 2021 was the sixth warmest year recorded. See NOAA (2021).

Brazil had responded to international pressure and implemented governmental initiatives, such as the annual publication by the Brazilian Ministry of the Environment of a critical county blacklist, which shamed counties into improving their practices.<sup>258</sup> However, since 2013, the Ministry of the Environment's authority has been weakened and climate policies are being disregarded by the government of President Jair Bolsonaro, which has resulted in an upward trend of deforestation. Data from Brazil's National Institute for Space Research indicates that 1,540 square miles have been destroyed over six months, between January to June 2022, which is an increase of 10.6% from the same period last year and is the highest level of destruction recorded since this agency began monitoring the area in 2016.<sup>259</sup> The Amazon rainforest is estimated to consist of 2,300,000 square miles, with 1,540 square miles equating to approximately 0.0007% of the forest.<sup>260</sup> It is difficult to put into context whether deforestation at a rate of 0.0007% in six months is a worrisome figure because the Amazonian tipping point is debated.

There is uncertainty as to the “when” of the Amazon rainforest’s topping point, as there is debate as to whether the ecosystem is in the midst of environmental failings or at the point of complete breakdown. For instance, some scientists consider that the rainforest’s ecosystem is not yet close to reaching a tipping point. They argue that climate models need to be improved, as they oversimplify the rich vegetation of the Amazon basin, which provides a form of ecosystem resilience.<sup>261</sup> Other scientists believe that the precipice for a tipping point is between 20%-25% deforestation and estimate that the Amazon is currently at 17% deforestation, which would indicate the tipping point being reached in as soon as 15 years.<sup>262</sup> There are also concerns that south-eastern parts of the Amazon have already reached a tipping point, as it is currently releasing more carbon dioxide than it is absorbing.<sup>263</sup> The lack of agreement on when a tipping point or breakdown will occur illustrates the complexity of the issue, and it complicates how this problem should be approached. Although the exact

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<sup>258</sup> Blacklisting resulted in reduced deforestation through the stringent monitoring efforts it produced. See Assunção and Rocha (2109) 115-137.

<sup>259</sup> Spring and Kelly (2022).

<sup>260</sup> The figure of 2,300,000 square miles is routinely referenced, with one of the earliest citations dating back to research from the 1920s. Bates and Bruton (1920) xiv.

<sup>261</sup> Hirota *et al* (2021) 17-19.

<sup>262</sup> Lovejoy and Nobre (2018); Lovejoy and Nobre (2019).

<sup>263</sup> Atmospheric chemists have recorded close to 600 air samples to find that the south-eastern portion of the Amazon rainforest is a net producer of carbon dioxide. Gatti *et al* (2021) 392.

moment of a complete breakdown within the Amazon is an unknown, the data indicates the Amazon is in the midst of a negative environmental trend, and that the situation is becoming more urgent, heading towards an environmental breakdown.

The example of the environmental situation in the Amazon is discussed because it is representative of the global environmental trend: scientific data, from the perspective of global warming, indicates that Earth is in the thick of an environmental decline; we are headed towards breakdown. Further, it also illustrates the complexity and uncertainty that accompanies this data, and the difficulty in predicting the timing of environmental harm. Free trade, despite its benefits, contributes towards this negative environmental trend. Although climate scientists recognize the negative trend, the “when” of tipping points or the breakdown happening is unclear, which leads to challenges in the “how” of responding to these environmental trends. It has been suggested here that EA of trade models could be part of addressing this breakdown, as these models allow for the inclusion of more data, through the engagement and interconnectedness of stakeholders, which goes towards determining the “when” of environmental trends and the “how” of responding.

## 2. Breakthrough: The Case for Interconnectedness

Exploration of past practices, which have been successful at averting environmental breakdowns, is useful in determining what action can be taken to achieve a breakthrough. In the Amazon, Brazilian controlled portions of the rainforest have experienced periods of reforestation and reduced destruction; there have been examples of environmental equilibrium and improvement. Analysis of the conditions that were present at the time of such environmental improvement indicate a common theme of interconnectedness, of cooperation between stakeholder groups. This sense of cooperation also coincided with extra enforcement measures from the Ministry of the Environment, which resulted in situations where there were mutual actions between the stakeholders and the government towards common goals. It might be suggested that in addition to the regulation, the aspect of a strong sense of interconnectedness amongst the stakeholders, of being united towards an effort, was a strong contributing factor towards environmental improvements. This theme of interconnectedness forms the basis of the various EA of trade models, as discussed in the first

chapter, and it ties into the goals of transparency and information sharing between interested stakeholders, which ultimately leads to raising awareness and shifting mindsets. The idea here is that in having interested groups work together, and by becoming more environmentally aware, they in turn practice better habits.

In the past, Brazil has responded to international pressure, which focused on its environmental practices, and reduced incidents of deforestation. Brazil acted through the Ministry of the Environment and there was increased cooperation and interconnectedness between the government, private sector and civil society. The recent work of environmental non-profit The Nature Conservancy (TNC) in Brazil also illustrates environmental benefits that can result from the confluence between these groups. In the Brazilian state of Pará, farmers were told by the government to pursue cattle ranching, which ultimately led to high rates of deforestation and greenhouse gas emissions. Since 2012, TNC has worked with local farmers, governmental officials and corporations to discuss the drawbacks of exclusively cattle ranching and worked towards creating sustainable farming practices, focusing on the planting of native cocoa trees in conjunction with cattle production.<sup>264</sup> In working together with TNC, these local groups were able to identify what did and did not work for their community; they were able to share first-hand experience of direct environmental impacts and how the environment responded when changes were made. This approach of interconnectedness between local government, businesses and civil society and their respective efforts ultimately contributed towards reversing deforestation trends within municipalities in Pará. The region reversed their negative environmental trend and is now on a list of areas in Brazil that have proven to be most effective at reducing deforestation.<sup>265</sup>

Interconnectedness between stakeholders is one viable approach, or breakthrough, that can be utilised in working towards avoiding an environmental breakdown. A 2018 paper by the World Trade Organization (WTO) and UN Environment Programme (UNEP) on the issue of trade and the environment provides further support for pursuing an interconnected approach

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<sup>264</sup> TNC also offered technical support to develop a balanced model of cattle farming, such as teaching methods to improve soil conditions through the replanting of local trees.

<sup>265</sup> The Nature Conservancy (2021) explains, “São Félix do Xingu was at the top of Brazil’s “blacklist” of cities with the highest rates of deforestation and greenhouse gas emissions. Today, the city has reversed this trend and is at the top for the highest reduction in deforestation”.

when trying to create an effective balance between economic growth and the environment, advocating for partnership across and amongst stakeholder groups, which in turn raises awareness of the environmental issues being faced.<sup>266</sup> Studies into the link between poverty and the environment also provide insight into the benefits of interconnectedness between groups. Research has indicated that poverty can result in environmental degradation as locals exploit resources to meet their economic needs. This in turn strengthens the argument for economic development because as the financial situation of communities improves, these communities are better able to make the environment a priority. Yet, there have been examples where this traditional view of the link between poverty and the environment is deconstructed, and there is a focus on the connections and relationships between local groups. In one case study in the Philippines, researchers found that locals who lived in poverty became environmental stewards, echoing the example cited above of the work between TNC and Brazilian farmers.<sup>267</sup> This study in the Philippines found that the communities' connection to their environmental resources, perceptions of the future and what the resources meant for their prospects and collective action within civil society all contributed to whether these groups worked towards protecting the environment. There was an underlying sense of interconnectedness and the ability to work together to improve environmental outlook.

This sense of interconnectedness carries over into perceptions of how governments are approaching environmental concerns, as civil society observes and wants to engage in the environmental process. In the lead up to the 2021 UN Climate Change Conference,<sup>268</sup> UN Secretary-General Guterres highlighted the level of attention that the global environmental situation is receiving, explaining: "I cannot emphasize enough that time is running out. Irreversible climate tipping points lie alarmingly close. Civil society is watching closely and is running out of patience".<sup>269</sup> Environmental issues and global warming have reached a ubiquitous level of visibility. Ordinary citizens have become increasingly aware of these concepts and with each election cycle, environmental issues are brought to centre stage and pressure is exerted on local governments. Guterres' statement indicates the frustration

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<sup>266</sup> WTO (2018).

<sup>267</sup> Broad (1994) 811-812.; See also Durning (1992).

<sup>268</sup> Also referred to as COP26.

<sup>269</sup> Guterres, 'Remarks' (2021).

exhibited by environmental groups who are also watching, having invested significant financial resources and time into combating environmental harm that could lead to tipping points but, who have yet to achieve the progress they desire.<sup>270</sup> These groups express perceptions of isolation and exclusion in tackling environmental concerns. Global awareness of these environmental issues is at an all-time high and 2022 has been called a seminal year for the environment as the UN's Stockholm+50 meeting was held in June, celebrating 50 years since the UN's 1972 Conference on the Human Environment. If 2022 is indeed meant to be a pivotal year for the environment and if there is to be an environmental breakthrough, then progress must be made in reconciling the frustrations experienced by stakeholders; interconnectedness between stakeholders should be explored.

EA of trade was created with the concept of interconnectedness in mind. When used according to suggested guidelines, this tool offers a space in which stakeholders, including civil society and businesses, can engage directly with governmental officials. EA of trade can be a platform for interconnected action in tackling environmental concerns with trade. Yet, current research indicates that interactive cooperation is lacking on the global level, while regions are edging towards tipping points. Why is this the case? It is suggested here that the default position taken in tackling environmental issues follows a quantitative, or economic approach, versus a more qualitative and integrative philosophy. Qualitative information is not given enough consideration throughout the process. When dealing with environmental threats, governments consult traditional economic models and philosophies. It is worthwhile exploring the role of economics in tackling environmental issues to better understand the legacy of economic policies and how economic principles have influenced governmental actions so as to explain the role that EA of trade can play in introducing qualitative knowledge.

### C. The Role of Economics in Tackling Environmental Harm

Governments have traditionally turned to economists in addressing environmental issues and developing environmental regulations. Economists have explored how tipping points can lead

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<sup>270</sup> Shellenberger and Nordhaus (2009).

to environmental crises.<sup>271</sup> Environmental crises became a topic of discussion amongst economists due to the research of Martin Weitzman and William Nordhaus. Their work led to debate as to when a crisis could occur and whether climate change could be considered an environmental crisis in the making. An environmental crisis is similar to a tipping point in that it can be rapid, dramatic, difficult to predict and irreversible, but an environmental crisis is much broader in impact, as it could be an extinction level event or total destruction of an ecosystem.<sup>272</sup> An ecological system that exhibits various tipping points is at heightened risk of an environmental crisis.

Weitzman and Nordhaus' work coincided with the research of environmental scientists who were steadily documenting global environmental changes, such as loss of biodiversity and climate change,<sup>273</sup> and who were also warning of the potential for environmental crises,<sup>274</sup> leading to a blending of these research fields and questions about how to handle a small, but credible risk of worst-case environmental damage. Weitzman's research represents a school of thought where an environmental crisis, such as climate change, is such a catastrophic event that there needs to be a significant number of resources dedicated to solving this issue, despite the uncertainties as to when this crisis may occur. Nordhaus, on the other hand, represents a philosophy that where the data indicates there are various potential catastrophes, you cannot dedicate significant resources to the unknown. Herein lies the challenge in determining environmental policies: should governments focus only on what is known and what can be quantified, or should they also consider what is unknown, what is unquantifiable, but potentially catastrophic, and how that can in turn impact the future?

This economic debate over known versus unknown has contributed to the challenges facing the environmental movement. How do you solve a problem when you cannot accurately measure the consequence of actions? Hundreds of millions of dollars and significant hours

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<sup>271</sup> Taylor (2009).

<sup>272</sup> Canadian economist Michael Taylor defined environmental crises "as a dramatic, unexpected, and irreversible worsening of the environment leading to significant welfare losses". Taylor distinguishes crises from an environmental threat, such as the global reduction of a species, in emphasizing the rapid pace and unexpected nature of the crises, which leads to significant welfare loss. Taylor (2009) 1244.; See also Bentley (2013) 108-115 for a discussion of environmental crises and causes.

<sup>273</sup> Ripple *et al* (2017) 1026-1028, which was a notice published by 15,364 scientists from 184 countries.

<sup>274</sup> Houghton *et al* (2001).

have been invested into environmental research and the desired progress is not being achieved. Governments working towards sustainable policies grapple with this issue and they rely heavily on economic analysis as a means by which environmental policies are assessed.<sup>275</sup> Yet, discussing the environment within the context of economics is complicated, as traditional economic models are not well equipped at handling environmental concerns,<sup>276</sup> and economists disagree on how to approach the environment.<sup>277</sup> Should the environment be considered a resource which is priced on the free market? Should a traditional cost-benefit analysis be utilised when considering environmental resources? How is long-term value calculated? Is it even possible to price the environment? These questions illustrate the challenges experienced in meshing the disciplines of economics and environmental research.<sup>278</sup>

These challenges are further compounded when considering the possible environmental impacts of international trade, and it is within this context that making trade sustainable is often raised. In this vein, EA of trade was created as a policy tool available to governments and policy makers in addressing environmental concerns, and which was meant to promote sustainable development. Sustainable development has experienced significant problems in implementation, but in positing EA as a means towards achieving sustainability, economic values are made a part of this tool. This leads to questions of how economic principles synchronize with and influence this assessment tool. In analysing the relationship between economics and EA of trade in exploring environmental harms, the key distinction and potential advantage for these assessment models is their ability to accrue qualitative input, which can possibly address some of the challenges discussed. EA of trade models offers a medium through which knowledge from various sources is able to be considered through the assessment process, which allows for the appreciation of the environment through a different lens than is possible with economic models.

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<sup>275</sup> The Environmental Protection Agency (EPA) relies heavily on economic analysis as part of its decision-making process. For a discussion of the benefits of economic analysis in environmental decision making, see Morgenstern (1997) 25-48.

<sup>276</sup> Environmental economics emerged as a sub-discipline in the 1960s.

<sup>277</sup> See Fullerton and Stavins (1998) 433-434.

<sup>278</sup> Through the research of environmental economists, the issues of sustainability and international trade are now being addressed as serious environmental problems that are international in nature and do not stop at national borders. See generally Perman *et al* (2012).

## 1. Preserving the Global Common Good

Within environmental economics, there is view that without environmental regulation, a free-market economy will not achieve society's desired environmental standards, and it is within this context that the environment as a global public good is discussed.<sup>279</sup> Environmental resources, such as clean air, water and land, are viewed as global public goods. These global public goods are non-rivalrous, as an individual's usage of that good does not hinder another individual's usage, and non-excludable, in that individuals cannot be prevented from enjoying the good.<sup>280</sup> As such, their value is not reflected well in free-market processes; you cannot charge for these goods, which in turn leads to potential market failure. This leads to the question of how you deal with and preserve the environment as a global public good, when you cannot charge for its usage? Traditionally, economic theory has suggested that governmental regulation<sup>281</sup> or privatization are two means through which the environment can be preserved in this context.<sup>282</sup> Recent research also suggests extensive involvement from locally impacted communities as another means to encourage environmental protection. Economists agree that regardless of which approach is followed, environmental resources are finite, and these resources must be managed in some way to avoid environmental overconsumption and the "tragedy of the commons".

Tragedy of the commons is a theory which explores this difficulty in dealing with global public goods, stating that overexploitation of common-pool resources cannot be prevented. Ecologist Garret Hardin popularised this theory in his writings during the 1960s, explaining that individuals with shared resources will always act in their own interests, to the detriment of society at large. Hardin argues:

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which

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<sup>279</sup> Axelrod and Suedfeld (1995) at 189 argue that "In a truly open free-market system, there is no viable mechanism for preventing overexploitation from occurring".

<sup>280</sup> Trommer (2017) 508.; See Kaul *et al* (1999) 3-4 for a discussion of public goods.

<sup>281</sup> This view was made commonplace by the work of Samuelson (1954).; See also Nordhaus (2006) for a thorough discussion of Samuelson's research on this point.

<sup>282</sup> Stroup and Shaw (1989) 30.; See also Stroup and Goodman (1992) 428.

all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.<sup>283</sup>

Freedom, that is, unchecked usage of resources, is therefore the crux of the issue. It is argued that environmental disaster will ultimately result when freedom goes unchecked. In this theory, there is a baseline assumption that individuals are unable to operate as environmental stewards, without outside control. In the past, the commons could be explained in reference to common land. For instance, within a local municipality, all citizens have equal right to enjoy to common land, as it is owned by no one, but free to be used by all. Citizens, focused on short term gains, will in turn utilize this resource as much as desired. They are not checked by the concern of any long-term impacts, because even if they are aware of the negative impact of their actions in the future, immediate concern for short-term competition and missing out on the resource will take precedence. The belief is that citizens are not able to curb their freedom of usage without external intervention, and this freedom must thus be checked through either governmental regulation or privatization.<sup>284</sup> This view on how to preserve the global common good was typically applied to fisheries and grazing land. It is suggested here that this view fails to account for how citizens would react in a more environmentally complex situation. It overlooks the rich dynamic found within communities, societal cohesion, and the interconnected nature between citizens and their local environments. In essence, this view reduces citizens to wealth maximisers and that perspective fails to consider the broader picture.

Economist Elinor Ostrom, however, considered a broad view and offered a different assessment, as she proposed an alternative to governmental control and privatization of the commons, explaining that economic theory differs from the reality of human actions, as communities are adept at managing their collective resources through collaborative

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<sup>283</sup> In explaining tragedy of the commons, Hardin compared the concept of shepherds allowing their animals to overgraze common land to human action. Hardin argued that like the animals overgrazing, humans will always pursue self-interest of common resources to the determinant of all. Hardin (1968) 1243-1244.

<sup>284</sup> In the context of commons discussed in the past, such as local land, the favoured method of restricting usage would be through implementation of regulation by the local government or privatisation of the land, restricting usage under local property laws. For a discussion of the relationship between tragedy of the commons and privatisation see Baland and Platteau (1994).; Hardin (1968) also favoured privatization.

management systems.<sup>285</sup> In essence, common resources are best managed by those groups who are impacted most: the communities that live by the resources and benefit directly from them; governmental intervention should only happen in conjunction with support from these local communities. Ostrom raises the point that the issue of the commons is complex. In modern society, where nations are globally connected, the commons refers to the earth, its atmosphere and oceans; the commons apply to issues as wide ranging as acid rain experienced in Sweden,<sup>286</sup> deforestation experienced in Nigeria,<sup>287</sup> and the general issue of climate change.<sup>288</sup> Given the complexity of potential environmental disaster, Ostrom argues that many solutions exist for these various problems, explaining:

What is missing from the policy analyst's tool kit - and from the set of accepted, well-developed theories of human organization - is an adequately specified theory of collective action whereby a group of principals can organize themselves voluntarily to retain the residuals of their own efforts.<sup>289</sup>

In Ostrom's view, the tragedy of the commons occurs due to the intrusion of external groups who in turn wield power for personal gain. Ostrom advocates a bottom-up approach, where governments support and work with local communities.<sup>290</sup> Ostrom's assessment aligns with the view that interconnectedness between stakeholder groups may result in environmental breakthroughs. The common theme is that those individuals who are directly impacted by the environmental degradation, such as the Brazilian farmers being directly impacted by the effects of deforestation within the Amazon, are best placed to take part in working towards finding a solution. The intrusion of external parties and policies, without including the local populace, will not be as effective in the long term.

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<sup>285</sup> Ostrom based her theory on extensive field research in Maine, Nepal, Kenya, and Indonesia. Ostrom (2015) 24-25.

<sup>286</sup> Oden (1976) argued that acid within Sweden's atmosphere was due to sulphur emissions outside of the country.

<sup>287</sup> Otum *et al* (2017) 1-3.

<sup>288</sup> Nordhaus (1994).

<sup>289</sup> Ostrom offers eight principles for institutions in governing global public goods, which include: setting clearly defined boundaries; proportionality between benefits and costs to ensure use of common goods matches local needs; guarantees that those impacted by the rules are included and can modify the rules; monitoring of the community is done by those with accountability to the local members; graduated sanctions for violation of rules; accessible and low cost means for conflict resolution; ensuring outside authorities respect the rule-making ability of the local community; and governing of the common resources through nested tiers. Ostrom (2015) at 90.; Ostrom (2009).

<sup>290</sup> Bergstrom (2010) 257.

Debate around the best means of controlling global public goods reveals a tension between governments and the private sector, particularly those citizens who have a direct interest in the environmental issues impacting their community. This leads to questions as to whether a balance can be found between economic growth and environmental protection, averting the tragedy of the commons and protection of the environment as a global common good. Further, the varying approaches in how to handle the environment as a global common good demonstrate the challenge the environment, as a finite and global impacting resource, poses from an economic perspective. Ostrom's research was innovative in that her fieldwork illustrated the importance of taking a comprehensive view, of exploring the interconnectedness within communities in dealing with problems posed by the tragedies of the commons. She demonstrated that trust networks developed from social cohesion, which in turn contributed to greater environmental stability and economic growth in an area. Ostrom's work tested the boundaries set by other economists, indicating there are alternate paths that can be explored, and that institutional enforcement alone is not the way forward.

It might be suggested that in this context, EA of trade provides an opportunity to follow this different path when working towards the preservation of the environment as a global common good with respect to trade agreements. Ostrom's research is relevant to EA of trade because this assessment model considers environmentally complex scenarios which involve local communities. EA of trade can follow Ostrom's approach as it provides the opportunity for engagement across stakeholder groups. In theory, through this assessment model, stakeholders could pursue a collaborative process in identifying environmental issues, highlighting instances where current regulations may be failing, offering insight into local experiences of what has and has not worked and affording monitoring opportunities. EA of trade offers the opportunity to follow a bottom-up approach, stakeholders can work within the assessment's framework to promote societal cohesion and interconnectedness, countering the threat of inappropriate application of uniformed external authority. The strength of this assessment model thus lies in its ability to open trade negotiations to the local community, to invite them into the process and to encourage a collaborative approach towards preserving the environment as a global common good.

## 2. Quantifying the Unquantifiable Global Common Good

To address the challenges associated with the environment as a public good, governments traditionally look to environmental regulations to provide solutions, and utilise economic valuation to determine the value or weight of an environmental resource for purposes of conducting a cost benefit analysis (CBA) of the regulations and their potential outcomes. Once a government assigns values to the cost of the environmental regulations and the potential benefits, a CBA allows for the weighing of the pros and cons of the planned action. Supporters of CBA highlight this tool's ability to offer quantitative results, which, it is claimed, leads to more objectivity and transparency.<sup>291</sup> CBA offers the promise of promoting governmental efficiency by ensuring that only those regulatory interventions which yield the most benefits are adopted, thereby driving down costs and increasing efficiency.<sup>292</sup> There is also the view that CBA results in greater public accountability as decisions would be based on objective standards, meaning governments would not be making politically-motivated judgments.

The simplicity, in theory, that CBA offers in being able to weigh the pros and cons of a proposed environmental regulation to avoid a tragedy of the commons appeals, but the economic valuation that is needed to conduct the CBA provides a stumbling block. CBA works when used by governments to determine whether spending for policies for potential public investments make sense when those economic figures are easily determined, but it does not work when applied to environmental policy decisions or policies dealing with climate change because it is notoriously difficult to assign an economic value to these issues. It is suggested here that CBA, in its current form, is an inadequate tool for analysing environmental issues because foundationally, the economic models used in providing environmental data for the CBA are not sound and secondly, CBA cannot quantify the unquantifiable nature of environmental resources. CBA tends to focus on short-term costs and tangible benefits, which in turn means that it fails to adequately account for indirect benefits of environmental regulations and long-term costs of environmental impacts.

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<sup>291</sup> Ackerman and Heinzerling (2001) 1562.

<sup>292</sup> *Id* at 1560.

The social cost of carbon (SCC) is calculated to quantify climate change's economic impact, for the purposes of conducting a CBA, but the foundations of the models utilized to calculate the SCC are flawed.<sup>293</sup> Three statistical models, with the Dynamic Integrated Model of Climate and the Economy (DICE) being the most popular, are utilized in quantifying the SCC.<sup>294</sup> These models are only as good as the assumptions they are based on and researchers have found that the SCC can vary widely due to small tweaks in the underlying assumptions,<sup>295</sup> such as assumptions on the climate's sensitivity to CO<sub>2</sub> emissions.<sup>296</sup> Changes to the underlying assumptions of these models thus make them susceptible to manipulation, as the assumptions made by the modelers themselves dictate the results.<sup>297</sup> These models, which factor into the CBA analysis, are suspect, as they are filled with value laden premises, and their reliability is not established, which leads to a further need to question CBA and governmental reliance on this tool when developing environmental policies.

Beyond these issues with the models, CBA also lacks the ability to robustly quantify environmental benefits. There is a distinction in the values between economic goods and environmental resources. Rationalising an environmental resource as having economic value can be problematic. As explained by George, when “all environmental qualities are valued in economic terms, the environmental pillar of sustainable development becomes redundant”, which in turn leads to the argument that “while it is appropriate for some environmental qualities to be valued in economic terms, others should not be”.<sup>298</sup>

Environmental resources are not a standard commodity that fits easily within the realm of economic tools, and as such, alternative models for assessing environmental value should be considered. In applying CBA to environmental protection, governments must grapple with determining the costs and benefits for the respective policies, which is difficult due to unknown and excluded data inherent when analysing environmental concerns. Although it is

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<sup>293</sup> Tol (2019) 555 defines the SSC as “the incremental impact of emitting an additional tonne of carbon dioxide, or the benefit of slightly reducing emissions”; IWG (2013) 2.

<sup>294</sup> DICE was originally developed by Nordhaus (1994).

<sup>295</sup> Dayaratna *et al* (2017) 1750006.

<sup>296</sup> For a discussion on the level of uncertainty surrounding assumption on climate sensitivity, see Chandler (2022).

<sup>297</sup> See Dayaratna and Kreutzer (2013) for a thorough discussion of the shortcomings of the DICE model.

<sup>298</sup> George (2006) 5.

easier to consider the cost of an environmental policy, it is much trickier to consider the monetary value of the social and environmental benefits. Ackerman and Heinzerling highlight this problem, explaining that evaluation of the environment is problematic from the start because economists must assign a monetary value to items which are not being sold; natural prices for a clean environment do not exist. This in turn leads to the creation of artificial pricing within an artificial market, which results in reliance on outdated or inappropriate valuations.<sup>299</sup> If valuations are not available, then economists will create opinion polls to determine what individuals would pay to preserve a specific environmental resource.<sup>300</sup> Ideally, these opinion polls and valuations would be updated on a regular basis, which requires significant time and resources, but ultimately such constant updating of the data is not done. Environmental concerns are also associated with non-quantifiable aspects, such as the prevention of environmental related illness, and the reality is that these non-quantitative issues are not properly considered during the discussions on environmental policies.<sup>301</sup>

In addition to the difficulty of valuing an environmental asset for a CBA, individuals and governments tend to undervalue these assets in the short term, in line with an economic concept known as discounting.<sup>302</sup> George explains this issue in relation to biodiversity concerns. For instance, it is possible to buy and sell portions of the Amazon rainforest, but this resource is not valued highly enough in the short term to buy it for preservation, as individuals and governments opt to use it for timber or agriculture for immediate financial return.<sup>303</sup> This undervaluation stems from the temporal nature of cost and benefits, as the population must incur the costs of any preservation in the present, whereas benefits will only be realized in the future. Economists discount these future costs and benefits, meaning that future value is worth less than present value, as they operate under the assumption that individuals are typically wealth maximisers, as individuals prefer present day consumption

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<sup>299</sup> Ackerman and Heinzerling provide an example where the EPA utilized valuations from a study on chronic bronchitis when attempting to value a revised standard for arsenic in drinking water. The two studies were not related, but for purposes of time and savings, the EPA looked to the bronchitis study for guidance. Ackerman and Heinzerling (2001).

<sup>300</sup> This is known as contingent valuation. An example of a contingent valuation is an estimated \$25 billion for the protection of bald eagles across 100 million US households. See Ackerman and Heinzerling (2001) 1557-1558.

<sup>301</sup> *Id* at 1579.

<sup>302</sup> See Livingstone and Tribe (1995) 71-76 for a detailed discussion of discounting and the discount rate that is applied to environmental issues.

<sup>303</sup> George (2006) 5.

versus future consumption.<sup>304</sup> Discounting, as a concept, works within a model that accounts for the maximization of economic growth, but it fails to consider the finite nature of environmental resources.<sup>305</sup> Discounting neglects to account for the possibility of irreversible events such tipping points and environmental crises, and places environmental harm at the foot of future generations.<sup>306</sup> The view that it is better suffer a harm later rather than sooner is at odds with the argument that you must protect the present and future found within environmental law.

In discussing CBA and discounting, it becomes clear that at its heart, these economic concepts fail to account for the way people view the world in reality and do not consider the distinction between the individual as a consumer and the individual as a citizen who is integrated in their local society. Basing environmental policy primarily on a CBA is problematic because the environment does not fit easily into a box for purposes of valuation and the environment's value is not static. Environmental preservation is fostered when there is interconnectedness between stakeholder groups, and when the government is able to promote environmental regulation that is supported by its citizenry. For instance, in the case of the Amazon rainforest, preservation is more likely when stakeholders are convinced of the importance of this resource from a biodiversity perspective, versus its economic value as a source of timber. In monetizing the environment, CBA disrupts the ability to persuade stakeholders of the importance of environmental resources as the true value of these environmental resources is obscured.

It is suggested here that in the context of international trade, when developing environmental policies, governments should not rely solely on CBA, and its requisite valuation methods, but should increasingly look to tools such as EA of trade, which presents a broader view of the value of the environmental resources at risk. It is recognised that, as highlighted by George, in promoting sustainability, the lines between the environment and economic principles

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<sup>304</sup> Lyon (1996) 254.

<sup>305</sup> This is because economic growth cannot continue in perpetuity at the expense of resource exhaustion, without action. In theory, it is possible to have economic growth, even with finite resources, if decoupling is utilised, where economic growth is separated from unsustainable resource consumption. There is a distinction between relative decoupling, where consumption of natural resources happens at a rate slower than economic growth, and absolute decoupling, where environmental impacts decrease or do not increase.

<sup>306</sup> Ackerman and Heinzerling (2001) 1570.

within an assessment itself becomes blurred and further, in conducting an EA of trade, governments often use the data from a CBA and economic models to guide the assessment process, which can make these assessment models prone to the same critique of failing to fully appreciate environmental harms. Yet, these assessment models are flexible, and can be adapted to account for the inherent issues that stem from economic influences. It is argued that in recognizing the role that these economic tools and models play, their shortcomings can be addressed, and the assessment can account for this. EA of trade has the potential to offer a medium through which local stakeholders can engage and provide input, to bring together information from a variety sources, including the qualitative, in a cohesive manner, so that the worth of the environmental resource both in the present and the future can be better assessed.

When preserving the global common good, it was argued that EA of trade provides an alternate path for protection by bringing together the local community as environmental stewards, as they would be engaged through the assessment process. Likewise, when determining environmental valuation of the global common good, EA of trade can once again be utilised by tapping into the knowledge of the environmentally aware local community, to better understand short-term and long-term benefits. Economic principles and models can be useful, but they have limitations for understanding environmental value. In this regard, it is argued that collaboration with local stakeholders can offer valuable insight into environmental valuation and EA of trade models offers a platform through which this local knowledge can be engaged.

#### D. The Role of Assessment in Environmental Governance

Environmental harm, particularly climate change, has become a ubiquitous issue for governments, and as global environmental concerns are interlinked, there has been greater focus on environmental governance and new approaches to governance in tackling environmental harm.<sup>307</sup> Climate scientists provide data on ever increasing environmental

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<sup>307</sup> See Falkner (2011), which explains how environmental governance is in a state of change and has become transnational, as non-state actors are becoming involved in creating and implementing policies at local and global levels.

issues, but it is left to governments and policy makers to find a balance in making decisions which promote economic activities and minimize environmental impact. The key role of these decision-makers is particularly evident in global trade, as trade agreements impact the structure and direction of trade, which in turn effect the consumption of environmental resources, which can place strains on local ecosystems. Effective governance is thus key to ensuring environmental quality.<sup>308</sup>

Traditionally, in formulating the laws and policies that promote environmental protection, governments have relied on economic tools to guide their response, but as discussed, these economic methods fall short in adequately assessing environmental value. Understanding environmental value, the impact of environmental harm today and potential implications for the future, is key to governance. Additionally, this appreciation of environmental value must be dispersed throughout the local communities as consensus-oriented policies are also vital to governance. Policy decisions cannot be made in a vacuum, and there needs to be commonality amongst societal actors to ensure they work towards suggested environmental policies, which relates back to the concept of interconnectedness.

It is in this context, within the framing of interconnectedness of the local community who would be impacted by environmental outcomes, that EA of trade is raised. When EA of trade models was first developed, they were viewed as an innovation within environmental governance.<sup>309</sup> EA of trade offered the prospect of bridging the roles between governmental actors and the policies they developed and societal actors and their respective understanding of governmental institutions. It is suggested here that as practices in environmental governance shift, there should be renewed focus on EA of trade models and the role this tool can play in tackling environmental harms. This section will highlight what governance can achieve in tackling environmental harm and the role that EA of trade can play as a tool of environmental governance.<sup>310</sup> In doing so, this section will underscore the importance of EA of trade as a form of environmental governance, which will provide a basis for how EA of

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<sup>308</sup> Gök and Sodhi (2021) 32996. Gök and Sodhi reviewed 115 countries to determine the impact of governance on environmental impacts, highlighting the importance of this discussion.

<sup>309</sup> Arts *et al* (2012) 3.

<sup>310</sup> For a detailed discussion of environmental governance and the surrounding environmental policy, see Evans (2012).

trade should operate in practice when utilised by countries in the negotiation of trade agreements.

### 1. Knowledge Creation as a Principle of Environmental Governance

The status of the environment, including breaching tipping points and the threat of environmental crises, such as climate change, can be viewed as a failure of environmental governance.<sup>311</sup> The example of deforestation in the Amazon illustrates this point, as damage to that ecosystem is not due to technological challenges or failures, but instead stems from political, social and economic challenges. The local community, which struggles with socioeconomic burdens, is motivated by the short-term economic return that agricultural practices and illegal logging can produce, and the current political climate under President Bolsonaro fails to tackle this threat by refusing to punish violators. As was explored when discussing the work of TNC with local cattle farmers in Brazil, efforts need to be made to ensure interconnectedness between local citizens, businesses, and governments to work towards a common environmental goal. To curb poor environmental outcomes, the local government needs to be able to enact environmentally relevant policies, which are in turn supported by rules and regulations, which are further reinforced by societal actors.<sup>312</sup> The example of illegal logging in Brazil illustrates what happens when there is a breakdown in these roles: environmental policies may be in place, but if local citizens disregard these environmental goals and policies, particularly for short-term economic gain, and if the rule of law does not enforce these violations, by fining, arresting or banning violators, then you have a system where there is ineffective environmental governance.

In identifying that environmental harms result from deficiencies in governance, this in turn leads to questions around what governance is and how successful governance is ultimately achieved.<sup>313</sup> Governance is distinct from governmental action, as it incorporates actions from both the state and non-state actors. Governance, as a general concept, developed in the social sciences and is subject to ambiguity and open to interpretations. Kaufmann, Kraay and

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<sup>311</sup> Evans explains that in an IPCC assessment report, climate change was referred to as a crisis of governance, not a crisis of the environment. Evans (2012) 2.

<sup>312</sup> Gök and Sodhi (2021) 32997.

<sup>313</sup> This relates back to chapter 1, and the discussion of the importance of governance when EA models were developed.

Mastruzzi define governance as the “the traditions and institutions by which authority in a country is exercised” which includes how governments are chosen, the ability of governments to create policies and the respect that citizens have for these governmental institutions and policies.<sup>314</sup> Kooiman described governance as the totality of social and political interactions that are needed in terms of achieving a shared goal.<sup>315</sup> Kooiman explains that governance “can be seen as purposeful efforts to guide, steer, control or manage (sectors or facets) of societies”.<sup>316</sup> Environmental governance, which became popular as a term after the 1972 United Nations Conference on the Human Environment in Stockholm, developed in relation to policy surrounding environmental justice and sustainability.<sup>317</sup> It refers to the attempts of governing institutions to resolve environmental conflicts.<sup>318</sup> Although various actors, with differing views and interests, are involved in the process of governance, the overarching principle is working towards a common objective.

With environmental governance, there is a focus on the devolution of decision-making power from governments towards local communities and institutions for purposes of increasing accountability and accessibility. This focus on shifting power and providing a voice to the local people in environmental decision-making links back to the research of Ostrom, as discussed above, in relation to alternative strategies in managing the environment as a global common good. Yet, the success of these devolution efforts can vary, which has in turn led to discussions around the promotion of best practice.<sup>319</sup> How to achieve effective governance is debated, but Lockwood suggests seven commonly accepted principles: legitimacy, transparency, accountability, inclusivity, fairness, connectivity, and resilience.<sup>320</sup> In reviewing Lockwood’s principles, there is an underlying theme of cohesion and interconnectedness between actors, as it is suggested that interested parties have a voice and are able to visibly engage in the process, developing a common sense of purpose amongst those involved. Gök and Sodhi also

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<sup>314</sup> Kaufmann, Kraay and Mastruzzi (2010) 4.

<sup>315</sup> Kooiman (2003) 4.

<sup>316</sup> Kooiman (1993) 2.

<sup>317</sup> Batterbury and Fernando (2006) 1856.

<sup>318</sup> Davidson and Frickel (2004) 471.; See also Paavola (2007) 101.

<sup>319</sup> See Richardson and Cashmore (2011) for a discussion of the “good governance” checklist approach as suggested by the World Bank.; See also Gisselquist (2012) which explains that the promotion of good governance is a key part of the agenda of almost all major development institutions and that this term can be elusive, meaning different things to different institutions.

<sup>320</sup> Lockwood (2010) 758-762.

discuss good environmental governance and its relation to positive environmental outcomes but highlight the distinctions between high- and low-income nations. They explain that stronger governance results in better environmental outcomes in high income nations, but poorer environmental outcomes in middle to low-income nations. The distinction is that, to begin with, high income nations prioritize environmental outcomes in their governance structures, so stronger governance solidifies that. Conversely, the governance structures of middle to low-income countries focus on economic outcomes. To overcome this, the governance structure needs to be changed to give priority to environmental outcomes over economic priorities; so environmental goals must be the guidepost.<sup>321</sup> In suggesting how to achieve effective governance, Gök and Sodhi advise that educating citizens as to the benefits of environmental quality is key: this goes towards societal cohesion and finding a common ground for working towards positive environmental outcomes. If citizens are fully engaged and knowledgeable as to environmental impacts, then they are more likely to assume ownership of their actions and be concerned as to how their local environment is impacted.<sup>322</sup> Analysis of this research reveals an underlying theme that environmental goals must lead governance approaches to achieve effective results. Further, there needs to be interconnection between all the relevant actors involved and impacted by the governance structures to ensure engagement and support. What is the link between establishing these environmental goals and developing a sense of interconnectedness? It is suggested here that knowledge, and the creating, mobilizing, and utilizing of knowledge, is the link and a key component which is needed to achieve effective governance.<sup>323</sup> This component of knowledge links back to EA of trade, as this assessment model, in its base form, is meant to be a medium for information, or knowledge, as it is designed to gather and disseminate data throughout the assessment process.

Knowledge refers to diverse forms of input; it can be data obtained through traditional scientific disciplines and through stakeholders and their respective tacit experience.<sup>324</sup>

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<sup>321</sup> Gök and Sodhi (2021) 33002-3304.

<sup>322</sup> Hungerford and Volk (1990) discuss the effectiveness of environmental education amongst citizens and explain that there are entry-level, ownership and empowerment variables. Stern (2000) also explains that citizens need to be educated about the value of environmental protection, take ownership of these issues and that they can effect change.

<sup>323</sup> Van der Molen (2018) 18.; See also Taylor and de Loe (2012).

<sup>324</sup> Burns and Stöhr (2011) 237-238.

Extraction of tacit knowledge in particular, which is typically inherent and personal to stakeholders, as it has not been explicitly written down, is one of the benefits of accruing knowledge.<sup>325</sup> Knowledge does not stem from one source or group, but is spread throughout the community and effective governance would tap into this knowledge base and then disseminate it widely to encourage action towards a common goal.<sup>326</sup> The value of knowledge thus relates back to this ability to obtain information, particularly from unique sources, and feed that back into governance approaches.

Scholarship on environmental governance focuses on the boundaries between knowledge and governance, such as cultural and social, and how these boundaries can hinder effectiveness.<sup>327</sup> Different actors will offer varying knowledge perspectives and these knowledge disputes can result in conflicts and tension within the respective governance system, which in turn drives the exercise of power or even results in changes to the system of governance.<sup>328</sup> To overcome boundaries and disputes, it is key to recognise that there are different forms of knowledge and to engage with that knowledge in a relevant manner, such as developing specific institutions and processes to ensure the various forms of knowledge are able to effect decision making.<sup>329</sup> The example cited above of Brazilian cattle farmers and their engagement with TNC illustrates the diversity of interests and worldviews, and that there is not a standardized approach that can be applied. In that example, there was interactive engagement between the various groups and the process was and is ongoing. Successful governance thus requires the management of these connections between experts, decision-makers, institutions, and societal actors.<sup>330</sup>

Yet, knowledge is more than just the collaborative process of amassing information from governmental and non-state actors towards the goal of developing environmental regulations. Knowledge in governance is an epistemological process, as “environmental

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<sup>325</sup> See Polanyi (2009) 135-142 in which the importance of tacit understanding is discussed, explaining that this sort of knowledge presents a valid understanding of the problems being faced.

<sup>326</sup> Bremer and Glavovic (2013) 48.; See also Hastings (2011) 331 who examined a case study in Brazil and discussed the importance of engaging with the local community’s knowledge and transitioning that to dissemination of knowledge through public engagement and collaborative partnerships.

<sup>327</sup> Clarke *et al* (2013) 97.; Van der Molen (2018) 18

<sup>328</sup> Burns and Stöhr (2011) 256.

<sup>329</sup> Clarke *et al* (2013) 97.

<sup>330</sup> Van der Molen (2018) 24.

governance encompasses various forms of knowledge, various ways of knowing, and various knowledge-related dynamics and processes".<sup>331</sup> Beyond ensuring collaboration between relevant groups, it is important that knowledge guides the approach to governance and be present throughout the relevant institutions. There is no single best approach to governance, but by ensuring collaboration and interconnectedness of actors and that the knowledge obtained through these connections guides the approaches to governance, there is a greater probability of achieving intended goals. This sense of knowledge permeation can be realized by active use of EA of trade models. These assessments are meant to be a tool which obtain knowledge through a collaborative effort which in turn is meant to steer the decision makers, based on this knowledge, towards an environmentally sound approach. In short, if used in accordance with its baseline design, EA of trade can be a means to ensure knowledge infuses environmental governance approaches.

## 2. Environmental Assessment of Trade and Knowledge Creation

EA of trade models, as developed in the US and EU, share a common foundation: to provide a medium through which environmental information can be obtained and in turn shared with trade negotiators and decision-makers. The way EA of trade models developed, as a response to public protests and political pressure, is reflected in this common foundational purpose. EA of trade's role positions it to be a means through which environmental information can be fostered, opening the door for knowledge creation. As discussed, knowledge creation is important to effective environmental governance. Yet, this knowledge cannot simply be accrued, it must also be promoted and incorporated. Interconnectedness and cohesion amongst actors are important components of the integration of knowledge and it is for this purpose that EA of trade will be explored.

Knowledge creation is a vital step towards effective environmental governance, and this in turn needs to be followed by the reconciliation of differing knowledge systems. The use of knowledge within governance is not straightforward or formulaic because not all knowledge is equal with respect to reliability and relevance. Bremer and Glavovic explore the issue presented by disparate knowledge systems when discussing the management of coastal

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<sup>331</sup> *Id.*

environmental issues and consider how to incorporate various perspectives into a common view.<sup>332</sup> Their research is relevant because it highlights that further action needs to be taken beyond simply obtaining information that is scattered throughout a local community in various forms, such as scientific and tacit, when tackling environmental issues. Knowledge-building must go hand in hand with meaningful engagement and interaction with the relevant communities to ensure that ultimately there is a shared objective. Bremer and Glavovic identify four steps for the conversion of this knowledge into meaningful action: 1. Encourage quality dialogue to mobilize knowledge; 2. Provide the means for all stakeholders to contribute so that all knowledge perspectives can be included; 3. Bring together contrasting knowledge perspectives and try to reconcile views; and 4. Ensure a focus on quality with regards to how knowledge is obtained and mobilized.<sup>333</sup> In examining this research, there is an underlying theme of interconnectedness, which is needed to create a self-perpetuating model of effectiveness. It is suggested here that widespread public awareness is the first step towards achieving interconnectedness and ultimately knowledge creation. Once public awareness is achieved, this must feed into accessible and effective participatory practices, which need to be further supported by governance structures. It is in this context that EA of trade, as a vehicle for participatory action, can thus serve a bridge between knowledge creation and its ultimate application towards effective governance.

Analysis of EA of trade documentation reveals that knowledge creation, by way of increasing public awareness and public consultation is given significant weight. Reflective of the guidelines provided by Bremer and Glavovic, a well-run assessment would convert that knowledge into action by ensuring widespread public awareness of negotiations, varied opportunities for stakeholders to contribute, reconciliation of conflicting views and ensuring the quality of stakeholder knowledge by providing opportunities for worthwhile dialogue and cross-checking stakeholder input to address discrepancies.<sup>334</sup> Public awareness, participation and consultation are entrenched features of EA of trade models as found in the US, EU and Canada and have heavily influenced the procedures employed for these instruments. Terms such as improved quality, legitimacy, efficiency, and meaningful results are frequently used

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<sup>332</sup> Bremer and Glavovic (2013) 54-55.

<sup>333</sup> *Id* at 52-55.

<sup>334</sup> *Id*.

to describe the roles of raising public awareness of and participation in the EA of trade process.<sup>335</sup> Throughout each phase of the assessment process, there are required public consultation periods and reports are meant to reflect those consultations. Guidelines for implementation of these EA of trade models underscore that the public needs to be made aware of the assessment process, to be able to participate, and that therefore, information needs to be made accessible, to facilitate their understanding and involvement.<sup>336</sup> Public outreach efforts, within trading partners, have also become common practice, to further raise awareness of negotiations and seek input.<sup>337</sup> Public consultation and outreach is meant to provide a forum through which experts can explain technical legal language and details of the trade agreement to ensure non-experts are made aware and can fully engage throughout.<sup>338</sup> Scholarship on effective environmental governance highlighted that knowledge creation was important because of the usefulness of the tacit knowledge of local stakeholders. This same view is expressed within literature discussing EA of trade, as it is recognised that local stakeholders alone can provide knowledge of certain issues to be able to incorporate this expertise into the trade negotiation process.<sup>339</sup> Knowledge gives power to stakeholders.

It thus follows that interaction and engagement contribute towards the mobilization of knowledge that is gained, and that imposition of ideals or information on stakeholders is counterproductive; interaction and not imposition is what is needed.<sup>340</sup> This relates back to interconnectedness, as collaboration is key; knowledge creation and its mobilization is a collective activity that cannot be done behind closed doors. George addresses this view when writing about the importance of public awareness in tackling environmental harm and effective governance. He explains that growing public awareness not only contributes towards preventing environmental harms, but it can “elevate enlightened co-operation to a

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<sup>335</sup> Dietz and Stern (2008) 226.; The US, Canada and the EU provide online guides, which highlight the benefits of public awareness and participation, utilizing many of these same keywords. See US EPA PPG, CEAA PP, and EC Trade: Public Consultation.

<sup>336</sup> USTR Guidelines (2000) 11.; Canadian EAs of trade also hold a commitment to communicate with the public and raise public awareness that is reflected at each phase of the assessment. Under Canada's framework, which can consist of up to six phases, stakeholders are meant to be consulted at each stage and reports from each stage are meant to respond to public feedback. See DFAIT (2001) and (2020). In the EU, the EA of trade model also emphasises consulting the widest possible range of stakeholders throughout each phase to ensure that the public is aware and involved in the assessment process. See EC Handbook (2006) and (2016).

<sup>337</sup> Alf *et al* (2008) 20. This is common practice for US and EU EA of trade models.

<sup>338</sup> Ackerman and Heinzerling (2001) 1562

<sup>339</sup> Knigge (2005) at 3.

<sup>340</sup> Clarke *et al* (2013).

new plane”, meaning that stakeholders begin to make decisions with the environment as a priority, as well as engaging in the process of environmental decision making.<sup>341</sup> George confronts an uncomfortable truth in his writings, explaining that futures are not common, meaning that certain populations will suffer negative environmental impacts, while others do not.<sup>342</sup> George suggests that global society can work towards a common future, such as environmental stability, by working together, towards a common goal of sustainability and environmental protection. Modern forms of communication further increase accessibility to cooperative practices and interconnectedness. In effect, greater awareness results in revolutionary environmental thinking, which leads to greater environmental governance and potential change.

The importance of knowledge creation and how this can in turn lead to greater environmental governance has been discussed, but this ideal has not been achieved to date on a widespread basis. EA of trade was born from the public’s desire for transparency, awareness, and interaction. This assessment model was created to promote environmental thinking amongst trade negotiators and for that environmental awareness to spread. Given the history of its formation, as discussed in the previous chapter, EA of trade is the suitable medium through which environmental knowledge can be produced and disseminated. Yet, the goals of enhanced awareness, knowledge creation and mobilisation are complicated and in practice, EA of trade models are proving to be expensive and time-consuming tools.<sup>343</sup> If EA of trade models are an ideal medium for knowledge creation, then it is important to ask what is hindering this realization on a widespread basis and what can be done to foster their full potential.

It is suggested here that EA of trade’s potential inherent strength, the promotion of awareness and interconnectedness, by way of public participation, could also be its greatest weakness if a connection with the public is not realised. In short, if EA of trade models fail to advance public awareness and involvement, then knowledge creation will not have the medium to flourish. As a policy tool, EA of trade models do not have a legal provision which requires negotiators to rely on the assessment when negotiating the final trade agreement;

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<sup>341</sup> See George (2006) 10.

<sup>342</sup> This relates back to the discussion of the tragedy of the commons, as explored earlier.

<sup>343</sup> Knigge (2005) at 3.

information obtained from the assessment is utilised at the discretion of trade negotiators.<sup>344</sup> Stakeholders, particularly civil society, have taken issue with the lack of clarity on how their input or knowledge has impacted the practicalities of trade negotiation positions or outcomes. They argue that the results of the assessment, and the information that was shared with trade negotiators, should be at the heart of the trade negotiation process.<sup>345</sup> When there is a perception that the information they share is not being utilised, that their knowledge is not being mobilised, this leads to decline in stakeholder interest.<sup>346</sup> Instead, there has been a trend amongst NGOs to focus their resources on larger environmental policy concerns, such as climate change. It is suggested here that when this situation arises, when the groups which are a source of the knowledge turn away from the process because they feel their contribution is not valued, then this is a lost opportunity which hinders the innovative ability of EA of trade.

#### E. Conclusion

Environmental law is unique in that it focuses on the future. This is illustrated in language from NEPA, which explains that this legislation is meant to “fulfil the responsibilities of each generation as trustee of the environment for succeeding generations”.<sup>347</sup> Fundamentally, the concept of trusteeship, of protection of the environment for the future, is at the heart of environmental legislation and policy work. It was in this context, when civil society became concerned about the future environmental impact of trade negotiations, that EA of trade models was developed in the US, Canada and the EU and instituted as a legal requirement whenever trade negotiations were initiated. EA of trade is meant to contribute towards the protection of the environment, to help facilitate the current generation’s role as trustee of the environment.

The reality is that the global environment is under enormous stress. This chapter discussed the status of environmental harm, explaining the concerns surrounding tipping points and environmental crises, such as climate change. We are on the edge of an environmental

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<sup>344</sup> Alf *et al* (2008) 8.; *See also* Collins *et al* at 202.

<sup>345</sup> *Joint NGO Statement* (2002).

<sup>346</sup> Alf *et al* (2008) 20.

<sup>347</sup> NEPA § 4332.

breakdown or breakthrough; 2022 is viewed as a pivotal year for the environment. It is suggested here that changes can be made towards a breakthrough, and that collaboration and interconnectedness between governments, private organizations and civil society are key. EA of trade models, as an existing policy tool, are well placed to be utilised in contributing towards this environmental breakthrough.

It was also argued that the traditional approach followed by governments in relying on economic theory when developing environmental policies is lacking, as the value of the environment as a global common good cannot be properly quantified. The economic approach of CBA further highlights the shortcomings of economic models when applied to environmental concerns, as this method primarily fails to account for the desires of individuals as citizens and their long-term concerns for the natural environment. It is suggested here that in the context of evaluating the environmental impact of trade, the shortcomings of the economic theory should be recognized within EA models, and there needs to be greater focus on the qualitative data and information that can be obtained from stakeholders through the assessment process.

At its inception, EA of trade was viewed as an innovative form of governance that could be utilised to tackle environmental concerns. It is argued that EA of trade still offers the promise of successful environmental governance. EA models have the advantage of being a vehicle through which various actors can contribute to the trade negotiations process, which permits the accrual of knowledge from these various groups. If effectively utilized, this knowledge can be shared amongst the various groups to promote collaborative efforts and capacity building efforts towards common goals of minimizing environmental harm.

The previous chapter examined the foundation on which EA of trade was created and highlighted inherent flaws embedded within the models. That chapter explained that EA of trade was marketed to the public as a tool of hope and inclusion. This chapter explains why it is important to overcome these flaws as it illustrates what EA of trade could achieve, particularly in terms of environmental governance. Greater public awareness and involvement, working towards a form of allyship, could be realised. The next chapters will centre this discussion by evaluating EA of trade in the context of the US and EU to analyse

what has been achieved in practice, providing real world insight to distinguish theory from lived experience and to discuss practical ways in which EA of trade can become an interactive process.

## IV. Chapter 3: The US: Environmental Review of Trade Agreements

### A. Introduction

Trade negotiations are an inherently political process, which are complicated and secretive at times.<sup>348</sup> In the US, environmental review (ER) of trade agreements was developed as a salve to the opacity of trade negotiations regarding environmental concerns. ER of trade's foundation emerged from the National Environmental Policy Act (NEPA) and is based on two main principles: engaging stakeholders in the assessment process and amassing data to feed back to the trade negotiators.<sup>349</sup> In theory, ER of trade provides the possibility of a symbiotic relationship between trade negotiators, stakeholders, and the accrual of environmental information, and this trade model was promoted as promising this during its formation.

The previous chapters discussed the historical development of EA of trade models, explaining how the way these models emerged predisposed them to inherent flaws, and it also considered why EA of trade is an important tool for purposes of environmental governance, to justify why these models require further examination. This chapter seeks to position the American ER of trade model within this discussion to further explore how these challenges and promises are realised in practice. The creation of ER of trade was a historic moment in both US and global environmental policy; this instrument held the promise of being an important part of the trade negotiation process, which opened the door to the public. It was heralded that trade talks would no longer be inaccessible; the public now had a medium through which they can take part in trade talks. Beyond being a pathway to public involvement, there was also hope that ER of trade could be an innovative tool, that it could develop each time it was utilised during trade negotiations. It was hoped that ER of trade could be mobilised to play a part in addressing global environmental issues, as the

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<sup>348</sup> See Zartman (1974) and Milner and Rosendorff (1997) for detailed discussions about the relationship between trade negotiations and politics.

<sup>349</sup> NEPA.; See also the discussion of NEPA in chapter 1(B).

assessment process presents the opportunity to bring concerns, such as global climate change, into trade negotiations.

It is thus argued that ER of trade offers various options as an environmental tool, and it is within this context that this chapter will discuss this assessment model: to assess what it is meant to do and what it should do. This chapter will be arranged into two sections. The first section will analyse the historical development of ER of trade and explain how in its development, three inherent paradoxes have emerged. The second section will then explore the main challenges that this instrument has in practice, which were driven by these inherent paradoxes. This chapter will conclude by discussing what this means for the future of ER of trade, which will be followed by a case study discussion of the 2020 trade agreement between the United States, Mexico, and Canada in the following chapter.

## B. The Paradox of Environmental Review of Trade

Examination of the historical development of American environmental policy and legislation illustrates that it has grown in response to public opinion, protests, and political will. The creation of environmental law lags in relation to policy and there is also a significant delay in the development of environmental regulations for trade. Few studies have examined shifts in American public policy in response to public opinion and protests, but research on the American environmental movement found that public opinion, in conjunction with public protests, resulted in the greatest impact on policy outcomes.<sup>350</sup> This historical discussion is important, particularly when raised in the context of assessments of trade agreements; it provides a clear understanding of the baseline development of assessment models. The historical reality is that but for public outcry and protests, NEPA and then ultimately ER of trade would not have developed in the form that we know today. Public outcry and protests were the drivers for the creation of the ER of trade model; they created the opportunity of an assessment of trade.<sup>351</sup>

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<sup>350</sup> Agnone (2007) 1597 explains that beyond their current study, the only other empirical studies within the US that explore the impact of public opinion and protests on policy relate to the Vietnam War and the Civil Rights movement.

<sup>351</sup> See the examination about the relevance of a created opportunity, as discussed in chapter 1(B) and (D).

It is significant to note ER of trade's history and that it emerged due to public pressure because the marker by how it was established in turn guides what this assessment model should in theory achieve, or at the minimum, what it is expected to achieve. Herein lies the heart of the issue with ER of trade, the public that this model was created to appease has a different perception than what trade negotiators may have regarding what this assessment model is meant to accomplish. There is a difference in opinion of what it is meant to do and what it offers the promise of doing. This is not surprising given the discussed history of the development of EA and EA of trade models, there is a common theme of wanting to respond to public concerns within these models, but in practice, that may turn into appeasement versus actual change, which is what the stakeholders desired.<sup>352</sup> This can lead to paradoxes, and it is necessary to be mindful of this when discussing the future use of ER of trade agreements.

This section thus examines whether ER of trade is prone to being paradoxical. Using the history of how this trade model was developed, this section will in turn identify three paradoxes: impact, pressure and internal. These paradoxes emerged as the foundation of ER of trade developed and as will be discussed, they also impinge upon the practical application of this assessment. By identifying these paradoxes, it sheds light on the challenges of EA of trade, which will be further explored in the next section.

### 1. The Birth of Environmental Review of Trade and The Pressure Paradox

The road to ER of trade was not straight forward; it developed due to public and political pressure which in turn impacted the fundamental nature of how this assessment was applied. NEPA set the stage for environmental impact assessments, as they became engrained as a procedural requirement for proposed federal policies and projects, but assessments did not yet apply to trade agreements until the 1990s.<sup>353</sup> It was perceived as a failure that assessments of trade agreements did not exist, which resulted in legal challenges.<sup>354</sup> Public

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<sup>352</sup> See chapter 1(B).

<sup>353</sup> *Public Citizen* (1993).; Salzman (2001) 368, fn 9 explained how the *Public Citizen* case held that trade agreements were not subject to judicial review, which precluded the application of NEPA.

<sup>354</sup> The courts further refused to apply NEPA to federal actions which resulted in exclusively foreign impacts. Salzman (2001a) 507.

outray for the development of an assessment of trade increased in response to the negotiations of the North American Free Trade Agreement (NAFTA) and culminated with the 1999 protests during the preparation for the Seattle World Trade Organization (WTO) Ministerial Conference. ER of trade was ultimately born from this tension between the desire for free trade and political and public opposition which in turn resulted in a pressure paradox.

A pressure paradox refers to the inconsistency that public pressure was the catalyst for change but after governments take actions to satisfy that pressure, the opposite goals as envisioned by the groups calling for change may be realised, meaning that their perceived outcome may not be what happens in practice. This links back to the discussion in chapter one about how EA of trade models was a created opportunity, but despite being created in response to public pressure, the linear model of decision making that is employed during the EA of trade process is at odds with achieving the goals as envisioned by the catalyst of its creation. This inconsistency is the heart of the pressure paradox: creation in response to a political cycle and once the political pressure point is ameliorated, the process falters. To better understand the pressure paradox in practice, it is useful to further examine the development of ER of trade.

Just as the 1970s was the decade of environmental impact assessment, the 1990s was the decade of assessment of trade agreements.<sup>355</sup> Within the US, environmental policy and legislation has been reactionary in nature: environmental outrage surfaces and a political response and environmental legislation follows. Environmental concerns surrounding trade were ignited in the autumn of 1990, with President George Bush's proposal of NAFTA with both Mexico and Canada. President Bush negotiated NAFTA via a Congressional Fast Track Mechanism,<sup>356</sup> which in turn led to public outcry and pressure from environmental groups who were concerned about environmental degradation at the border and Congress' inability to discuss it. Environmental groups were also put on edge during this same time period due

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<sup>355</sup> Antonello (2020) 80.

<sup>356</sup> Bello and Holmer (1993) 170-171. President Bush informed committees within both the Senate and House of his intention to enter negotiations with both Mexico and Canada. The resulting inaction from both committees triggered a Congressional Fast Track mechanism. Under Fast Track, the President is granted the authority to negotiate trade agreements, whereas Congress is restricted in debate and is only permitted an up or down vote, without the ability to amend the agreement.

to the General Agreement on Tariffs and Trade (GATT) Tuna-Dolphin disputes,<sup>357</sup> as environmentalists became increasingly concerned about the potential implications of this agreement.<sup>358</sup> The US Trade Representative (USTR), who is responsible for negotiating trade agreements, was aware of the potential political fallout surrounding the NAFTA negotiations and in response, it was announced that there would be a voluntary environmental review on the US-Mexico relationship, with an emphasis on the potential implications of NAFTA. As explained by a representative from the EPA, this review was carried out to assuage public and Congressional concern in relation to the environmental issues of NAFTA.<sup>359</sup> The resulting review was produced by the USTR, in partnership with other federal agencies,<sup>360</sup> with a final version published in February 1992.<sup>361</sup> But for public pressure, it is unlikely that this review would have been conducted.

Although this review was not an official NEPA sanctioned environmental impact statement, the USTR looked to NEPA in developing its approach, following similar procedures such as seeking public input and releasing draft reports open to public feedback. This review was reactionary, as it was conducted in response to rising unrest, but with this review, USTR demonstrated that environmental assessments could run alongside trade negotiations. However, this review was ultimately viewed as inadequate, and it was labelled a political document meant to simply sway public opinion and not actually achieve anything, which was evidenced in how it identified and responded to certain environmental issues.<sup>362</sup> As explained by an attorney for Sierra Club, the review “never acknowledged that NAFTA could have any

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<sup>357</sup> GATT *Tuna-Dolphin I* (1991).; GATT *Tuna-Dolphin II* (1994). The GATT Panel’s refusal to uphold an American ban on imports of Mexican tuna that was caught through a method which put Eastern Pacific Tropical dolphins at risk of death mobilized the American environmental community and put them on alert to the potential environmental implications of trade agreements.

<sup>358</sup> Some areas of concern included the potential environmental degradation of the US-Mexico border area because of increased industrial activity, and the environmental and health implications of imported Mexican goods which may have been produced under lax health and safety standards. Feeley and Knier (1992) 269, 271 reference *maquiladoras*, which are factories run in Mexico due to cheap labor costs.; See also Salzman (2001a) 508 for a list of other environmental concerns, including pressure on US wildlife laws and race-to-the-bottom worries.; For a historical discussion of NGOs’ involvement in NAFTA see Johnson and Beaulieu (1995) 28-30.

<sup>359</sup> Montgomery (2000) 49.

<sup>360</sup> This included the Departments of Commerce, Treasury, Justice, Labor, Health and Human Services, Agriculture, and Transportation amongst others. The EPA also participated in the USTR hearing and contributed to the review.

<sup>361</sup> NAFTA negotiations concluded in September 1993.; Montgomery (2000) 49.; See USTR Mexico (1991) and USTR Mexico (1992).

<sup>362</sup> Goldman (1994) 669.; Housman and Orbuch (1993) 783-784.

adverse effects on environmental protections, sustainable development, or energy and other natural resources".<sup>363</sup> The primary motivator of this review was to ensure that NAFTA was adopted.

Environmental groups continued to demand a formal review requirement for trade agreements, akin to what was required under NEPA.<sup>364</sup> They were dissatisfied by the difficulty in obtaining information throughout the negotiation process, they wanted transparency and the opportunity to be involved.<sup>365</sup> USTR, cognisant of these concerns, proceeded to conduct its second environmental review of the GATT Uruguay Round Negotiations,<sup>366</sup> but this review did not satiate the desires of environmentalists, as it failed in affording them with the opportunity to become meaningfully involved, primarily due to the timing of when the review was conducted. USTR sought for this review to demonstrate a commitment to environmental protections while also expanding trade and promoting sustainable economic development.<sup>367</sup> Unlike the NAFTA review, which presented environmental information to trade negotiators before the agreement was completed, the timing of the GATT review was such that any information obtained during the review could not be used to inform the final agreement: the USTR issued a request for public input on the review on 1 March 1994, approximately two weeks before the Uruguay Round Agreements were signed.<sup>368</sup> As a result, information attained through the assessment process could not be relied upon by the negotiators or influence the text of the agreement. Regarding environmental concerns, the review provided limited analysis and instead focused on environmental regulations as a means through which environmental concerns would be addressed. The GATT review came across as defending GATT versus providing a means to truly assess environmental concerns.<sup>369</sup> It was a step back

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<sup>363</sup> Goldman (1994) 668.; Despite the review's shortcomings, it "proved an important watershed in U.S. trade policy because it showed that reviews could inform and promote deals rather than obstruct them". Salzman (2001a) 509.

<sup>364</sup> Salzman (2001a) 508 explains that "[w]hile this exercise demonstrated an unprecedented consideration of environmental issues, the environmental community wanted more—a formal review requirement".

<sup>365</sup> Housman and Orbuch (1993) 782-783.; This frustration resulted in a 1992 lawsuit brought by Public Citizen, the Sierra Club and Friends of the Earth against the USTR to force the office to produce a formalized environmental impact statement, in accordance with NEPA, but the case was ultimately dismissed due to lack of standing. Silverman (1994) 359, fn 67.; *Public Citizen* (1993).

<sup>366</sup> USTR, Uruguay Report (1994).

<sup>367</sup> Montgomery (2000) 51.

<sup>368</sup> Partidario and Clark (2000) 106.

<sup>369</sup> The review has been described as having a "tone' ... of 'defending' or 'selling' GATT, rather than systematically evaluating environmental issues and public concerns". *Id* at 106-107.

in the development of impact assessment of trade which led to further public unrest about the link between trade and the environment.

Increasing public unease around trade and environmental concerns gave way to elevated political pressure and the USTR, which was especially cognisant of planned political protests during the 1999 Seattle Ministerial Conference, attempted to get ahead of this swelling unrest by formalising the process of environmental assessment of trade. In the summer of 1999, the text of what would become Executive Order (EO) 13,141 was produced, which would require an ER for trade negotiations.<sup>370</sup> ER of trade was targeted at currying favour with environmentally concerned citizens and to encourage their support for the upcoming negotiations.<sup>371</sup> In conjunction with issuing the EO, the US also released a Declaration on Environmental Trade Policy, which promised to pursue trade liberalisation in an environmentally friendly manner.<sup>372</sup> Approximately three years after EO 13,141 was enacted, Congress passed the Trade Act of 2002, which formalised the legal requirement to conduct environmental reviews of trade agreements and reaffirms that reports must be made available to the public.<sup>373</sup>

ER of trade thus ultimately developed from a pressure paradox, which also impacts trade negotiations: this instrument was created in response to public and political pressure; it is subject to the trends of this respective pressure; and this pressure may have the unintended effect of hindering the aims of ER of trade. As ER of trade began to be applied to all new trade negotiations, the pressure paradox became noticeable, as political wrangling and public pressure would influence timing of negotiations and ultimately the agreement. For instance, the US originally entered negotiations with Peru and other Andean countries in 2004, but concluded bilateral negotiations with PERU in December 2005, signing the Peru Trade Promotion Agreement (PTPA) in April 2006.<sup>374</sup> The US and Peru entered direct negotiations

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<sup>370</sup> See Salzman (2001).; The term environmental review was chosen instead of the environmental impact statement, as used by NEPA, to distinguish the two instruments. However, the process required by the ER framework is similar to NEPA.

<sup>371</sup> Salzman (2001a) 503.; EO 13,141 (1999). On November 16, 1999, President Clinton officially formalized the environmental assessment process of trade agreements and signed EO 13,141.

<sup>372</sup> See Fletcher (1999) for a detailed commentary on the Declaration on Environmental Trade Policy.

<sup>373</sup> Trade Act (2002) passed by a slim margin of only three votes in the House. See section 2102 (c)(4)-(5).

<sup>374</sup> By 2005, negotiations with the Andean countries began to splinter, as Colombia and Ecuador were concerned about issues such as biodiversity, agriculture and intellectual property rights, with critics citing USTR's

because of political pressure, both governments had political parties currently in power who were amenable to the trade agreement, but were facing elections which could disrupt this balance. Within the context of the ER, stakeholders had been given the opportunity to comment on the Andean trade negotiations in 2004 and 2005, but, other than public outreach efforts made directly in Peru, stakeholders were not given opportunity to comment directly on bilateral negotiations before they concluded in 2006. Negotiations, and in turn the ER process, followed the timeline of upcoming elections and were completed before the US and Peruvian governments experienced changes within office. This is significant because it indicates that the ER process did not play out organically, as the timeline of the negotiations appears to have instead been influenced by the election cycle, which is representative of the pressure paradox.

This paradox indicates that elections and political pressure can be a driver for these assessments and motivation to complete trade deals. Negotiators are working against a political clock, which in turn means that they are engaging with the public and moving the process forward, but on an artificial timeline. The assessment is run against political calendars when there is concern that a regime change will make the deal no longer viable, as opposed to engaging with stakeholders and allowing the assessment to follow a timeline that is most useful for informing negotiations. This in turn ultimately influenced stakeholder outreach efforts, which in turn hampered stakeholder involvement in the PTPA negotiations. The reality is that ER of trade is meant to run alongside trade negotiations, but these negotiations often happen when outside events, such as party politics and election cycles, bear upon timing, which in turn influences the ability for stakeholder involvement. This is a challenge of ER of trade: it was created to assuage unrest, but its timing and process is in turn subject to this unrest, which in turn hampers its effectiveness. Being aware of this paradox and how it influenced ER of trade's development provides insight into challenges that face the assessment process and related trade agreements in practice.

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inflexibility throughout the negotiations as being cause for concern. With elections looming in 2006 in Colombia, Ecuador and Peru, the USTR set a 20 November 2005 deadline for the signing of the trade agreement. Colombia and Ecuador held reservations about the agreement and would not sign. The PTPA was presented for Congressional consideration in 2007 and ultimately went into effect on 1 February 2009.

## 2. The Legacy of NEPA and The Impact Paradox

ER of trade has its foundations in NEPA, which developed from a pattern of public outcry, political pressure, and environmental legislation.<sup>375</sup> NEPA is significant because it requires federal agencies to evaluate environmental impacts, providing a medium for public involvement. Ultimately, debate over NEPA and its reach led to restrictions on the practical impacts of what this environmental legislation could achieve, resulting in an impact paradox. It is argued that NEPA, as the precursor of ER of trade, left a legacy which directly influenced the development of this model, including the vestige of the impact paradox.

NEPA was the direct result of an environmental revolution that took over the US in the 1960s, as the public became aware of issues surrounding the indiscriminate use of pesticides.<sup>376</sup> American Biologist Rachel Carson's research highlighted the link between the pollution of nature and the damage to human health.<sup>377</sup> She emphasised this viewpoint before Congress, explaining: "Now we are receiving sharp reminders that our heedless and destructive acts enter into the vast cycles of the earth and in time return to bring hazard to ourselves".<sup>378</sup> Her research galvanized the nation to demand environmental reform and legislation, which culminated in the passage of NEPA in 1969.<sup>379</sup> NEPA was meant to "encourage productive and enjoyable harmony between man and his environment".<sup>380</sup> NEPA's passage, although historic for the development of environmental law, was nonetheless reactionary legislation to the political climate.<sup>381</sup> It was pushed through Congress by politicians who saw the need for environmental policies and recognised the time was ripe to enact it. It is significant to recognise that the most important environmental legislation in the US came to fruition due to political timing; it indicates that environmental progress in the US is a balancing act.

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<sup>375</sup> See Smythe (1997) 3-14 for a discussion on this point.

<sup>376</sup> Particularly the chemical compound dichlorodiphenyltrichloroethane (DDT).

<sup>377</sup> Carson (1962). Carson's book is viewed as a tipping point within the US, when the public became environmentally aware.

<sup>378</sup> Carson (1963).

<sup>379</sup> NEPA was signed into law in 1970.

<sup>380</sup> NEPA Section 2.

<sup>381</sup> NEPA's passage was the direct result of early works of American political scientist Lynton Caldwell, an early and vocal advocate of establishing environmental policies.

NEPA ultimately served two important purposes: as a method through which environmental data could be obtained via an environmental review process and providing a means, via the review, through which public participation became viable. NEPA is foundational, having been called the “Magna Carta” of federal environmental laws<sup>382</sup> and has been pivotal to all subsequent US environmental legislation, including ER of trade agreements.<sup>383</sup> NEPA opened the door for environmental scrutiny of trade by way of ER. Without NEPA, it is unlikely ER of trade would exist. As explained by Salzman: “The fountainhead of environmental reviews springs from the 1969 National Environmental Policy Act”.<sup>384</sup>

It should be noted that there is a distinction between how NEPA was envisioned versus how it developed: the architects of this legislation wanted it to have more direct impact in influencing decisions, but it ultimately became an exploratory tool, via the process of its environmental impact statement (EIS).<sup>385</sup> Herein is where the difficulty of the balancing act of creating environmental legislation and managing politics becomes obvious: the preferred purpose of this legislation had to be paired back to satisfy political differences. NEPA could not pass within Congress in the form that it was originally envisioned. There was a desire for NEPA to have “teeth”, as NEPA’s creators emphasised the need for action-forcing provisions, which in turn led to the creation of impact assessments, setting the stage for ER of trade.<sup>386</sup> NEPA’s environmental policy stems from a 1968 Congressional White Paper which “argued that new approaches to environmental management are now required, and urged ... ‘action-forcing’ processes that could be put into operation”.<sup>387</sup> This discussion around action-forcing processes in turn provided the inspiration for what would eventually become the requirement for EIS.<sup>388</sup> The politicians who were advocating for stronger environmental laws recognized that without action-forcing provisions for environmental policy, their environmental goals would just be lofty declarations of environmental intent.<sup>389</sup> Yet, the

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<sup>382</sup> Rychlak and Case (2010) 111.

<sup>383</sup> See Caldwell (1998) and CEQ (1997).

<sup>384</sup> Salzman (2001) 367.

<sup>385</sup> Holder and McGillivray (2007) 48.

<sup>386</sup> US White Paper (1968).

<sup>387</sup> *Id* at 9.

<sup>388</sup> Luther (2005) 4.

<sup>389</sup> *Id.*; Senator Henry Jackson engaged in political wrangling and proceeded to introduce Senate Bill No. 1075 (18 February 1969), while Representative John Dingell introduced H.R. 12549 (17 February 1969) in the House of Representatives, which were precursors to NEPA. Jackson explained that 1075’s purpose was to “lay the framework for a continuing program of research and study which will ensure that present and future

original intended reach of NEPA was ultimately limited due to legislation, and NEPA's action forcing provision, in turn, became in essence, an information gathering tool.

The creation of NEPA's EIS was not straightforward, it too resulted from political conflicts and disagreements about the fundamental purpose of environmental policy.<sup>390</sup> There was debate over whether environmental issues could be identified and addressed internally by federal agencies<sup>391</sup> versus the ability of federal agencies to enforce self-compliance.<sup>392</sup> Ultimately, through these debates, EIS emerged as the central element of NEPA compliance. Yet, when examining the legislative history, it is doubtful whether Congress had ever actually intended EIS to be the central driver of NEPA legislation.<sup>393</sup>

The EIS thus became NEPA's action-forcing provision and is required by all federal agencies. The EIS must be made available to the public and must be a "detailed statement" outlining the "environmental impact of the proposed action", and "alternatives to the proposed action".<sup>394</sup> The EIS is viewed as a procedural requirement which could not be challenged in courts.<sup>395</sup> Proponents of EIS have highlighted that this focus on procedure forced federal agencies to seek out information on the environmental impacts of their actions, which had never been required prior to NEPA.<sup>396</sup> Yet, federal agencies are not obligated to act upon the information obtained during the EIS.<sup>397</sup> This examination of the historical development of EIS is noteworthy because it shows the back and forth negotiations with politicians, and it reveals that although EIS ultimately became the central action-forcing tool within NEPA, that was most likely the result of compromises to make this environmental legislation a reality. As a

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generations of Americans will be able to live in and enjoy an environment free of hazards to mental and physical well-being".

<sup>390</sup> Liroff (1976) 18.

<sup>391</sup> This was the belief of Senator Henry Jackson.

<sup>392</sup> This was the concern of Senator Edmund Muskie, Charmian of the Senate's Public Works Committee.

<sup>393</sup> Luther (2005) 5.

<sup>394</sup> NEPA.

<sup>395</sup> Holder and McGillivray (2007) 47.; See also Silton (1990) and Lazarus (2012) for detailed discussions of NEPA's judicial history.; Against this threat of judicial enforcement, federal agencies complied with the procedural requirement, focusing on the EIS. Caldwell (1998b) 68.

<sup>396</sup> Karkkainen (2002) 910.

<sup>397</sup> This was reaffirmed in the US Supreme Court Case *Robertson v. Methow Valley* (1989) 350-352, which held that "it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed-rather than unwise-agency action".

tool that emerged from compromise, EIS was in turn not as forceful of an instrument that some of the architects of NEPA had envisioned it to be.

Therein lies the difficulty with the EIS of NEPA, which has carried over into other assessment tools which were inspired by it, including ER of trade: federal agencies are required to gather information through this process, but they are not required to act upon it. As explained by Caldwell, this legislation was never intended to be a purely procedural statute, it only became an “informational technique” because of intervention by the courts.<sup>398</sup> In effect, NEPA was created with a specific environmental purpose in mind, but its impact became something different in practice.

This in turn results in an impact paradox, which developed due to limitations of the original aims of NEPA: environmental research can highlight a potential impact but there is no legal duty to prevent that highlighted impact, resulting in the potential contradictory situation that a stakeholder could raise a harm, but no one is required to address said harm; the harm could go unchallenged. How can there be balance between the approach of identifying harm, but not being required to act upon that respective harm, with the goals of gathering environmental research and providing the public with a means through which they can become involved? Is there not a sense of futility to the process of gathering environmental information, including involving stakeholders, but not acting upon it? Understanding these challenges faced in the development of NEPA provide context to the issues that face ER of trade today.

ER of trade is a descendent of NEPA and its EIS. That environmental legislation was formative both in the US and globally and was used as the inspiration when the ER of trade model was created. It is argued that both the innovative nature of NEPA and EIS, in providing outreach to the public, and its drawbacks, such as its impact paradox, have thus shaped ER of trade. The ER of trade process, like EIS, requires the identification of potential environmental impacts, but beyond that, there is no legal requirement to prevent said impacts. Further, similar to how the federal agents who conduct the EIS have control over what they consider

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<sup>398</sup> Caldwell (2000).

is a significant environmental issue for purposes of inclusion in the environmental statement, the agents who run the ER of trade also have discretion when determining what warrants an environmental concern for purposes of inclusion in the assessment. In turn, the way that ER of trade model is thus constructed can lead to a situation in which environmental issues are uncovered but are not required to have a response because either they are not included in the assessment, or they are not considered impactful enough within the US to warrant a response. This can further aggravate the environmental situation in that, in practice, you can have an example where stakeholders have raised an environmental concern that exists in real life, but for policy purposes, it does not exist because it was not considered to meet the bar for inclusion in the assessment, whether due to the subjective analysis of the agents running the assessment process or because it was not deemed to result in impacts on the US. In this situation, the ER of trade can legitimize a trade agreement, which does have very real-world environmental impacts, and so in that example, instead of reducing the environmental impacts, they are in fact aggravated, which is at odds with the purpose of why ER of trade was created in the first instance. This relates back to earlier discussion in the previous chapters where there is a distinction between lived experience and theoretical experience.<sup>399</sup>

The legal obligation enshrined in the ER procedure of requiring an assessment but no legal duty to act upon the findings thus leads to open application of ER by the trade negotiators, using it as they see fit on an individual basis. In its current form, ER is unable to avoid the impact paradox. USTR needs ER to be a flexible tool because of the nature of trade negotiations. Assessment of trade negotiations is a moving target, which means that the ER must assess circumstances that are rapidly changing, with the full subject matter only becoming clear when the trade agreement is completed.<sup>400</sup> As a result, there are environmental impacts which may or may not be identified in early stages of the negotiations which may change by the final stages, leading to situations where impacts are identified and not addressed or not identified but which are later revealed as a concern.<sup>401</sup> This in turn has resulted in a trend in which the ER of trade model has not led to any

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<sup>399</sup> See chapter 2(D) and the discussions surrounding Ostrom's work.

<sup>400</sup> Plijter (2000) 85 discusses this point in relation to EU negotiations, but it is applicable to US ER of trade as well.

<sup>401</sup> This moving target situation arose in the case of the Peru free trade agreement as USTR started the negotiations under the umbrella of the larger Andean negotiations and then changed to focusing on Peru.

remarkable changes to negotiating positions or final texts.<sup>402</sup> Instead, information obtained from the ER is more likely to result in policies that encourage environment-related capacity building. For instance, because of the information gathered during the ER of the trade negotiations with Morocco, the US Environmental Protection Agency provided seminars and training courses within Morocco on the topic of environmental enforcement and provided capacity building with local NGOs.<sup>403</sup>

ER of trade must find a balance between the realities of the negotiation process and the desired goals of the assessment process. Given ER of trade's historical development and due to the influence of the impact paradox, in its current form, this assessment cannot legally require changes to negotiating agreements. This leads to challenges in practice from stakeholders, as civil society push back against the trade negotiation process due to perceptions that their input has not been considered sufficiently. This is problematic because when there is a perception that their feedback does not have a tangible impact, these civil society groups will not continue to engage in the process in the future. ER of trade is a resource heavy process, and these groups will focus their time and means to other projects, which is a worrisome trend.

### 3. Environmental Review of Trade in Practice and the Transparency Paradox

In the US, ER of trade is an internal process that is run by the USTR,<sup>404</sup> but this internal process is exposed to external forces by way of the impact assessment and its reach to stakeholders. This results in a transparency paradox, as ER of trade, in theory, provides the opportunity to open an inherently protected and secret process, trade negotiations, to public scrutiny. US trade agreements can take years to come to fruition and often these deals are the result of apt political timing and concessions which have been made. The process of how

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<sup>402</sup> OECD (2007) 57 is a study into the trends of environmental provisions and remarked upon this point.

<sup>403</sup> As recently as 2019, the EPA met with local Moroccan NGOs to discuss collaborative capacity building efforts regarding solid waste management. See EPA Morocco.

<sup>404</sup> See EO 13,141 (1999) section 3. USTR and the Chair of the Council on Environmental Quality (CEQ), which was established under NEPA and coordinates federal environmental efforts, were directed to oversee the implementation of EO 13,141 and run the ER process. CEQ is a division of the Executive Office of the President.

these trade agreements come to the table bleed into the environmental review process; this is illustrated in the transparency paradox, when the assessment process does not adequately involve the public throughout the ER process due to rushed assessments or insufficient consultations. In practice, ER of trade is meant to be flexible and due to the secretive nature of trade negotiations, this means the negotiation process can happen rather quickly, which would in essence not allow for the external involvement of the public in a timely manner. As the ER of trade model has developed, the US continued to extend its public outreach efforts by seeking to include comments from civil society groups within trading partner countries.<sup>405</sup> The usage of qualifying terminology such as “when possible”, “is meant to be” and “seeking” in conjunction with obtaining public comments hints at the tension present with the ER of trade process and the involvement of stakeholders, further highlighting the transparency paradox. The US has completed 14 Free Trade Agreements (FTA), with 20 countries,<sup>406</sup> and in reviewing the ERs, there is trend which shows that it has been challenging for the USTR to find a balance between stakeholder involvement and the negotiation process, particularly regarding timing of the negotiations and the assessment process.

In conducting an ER of trade, the USTR needs to consider the external demands of the assessment, such as public participation, with the internal limitations of the confidentiality of trade negotiations and environmental data. Public participation is emphasised within the formalised methodology of ER of trade through all three phases of the assessment: the initial review, draft review, and final review. However, the crux of the transparency paradox stems from the fact that public involvement is suggested and not mandated, meaning situations can arise when the assessment process is not able to include the public as expected. The USTR is encouraged to be transparent with stakeholders but when they are not able to adequately abide by this suggestion in the ER of trade process, this leads to opacity. The process of conducting an ER is laid out in the EO 13,141 guidelines for implementation, but each ER is unique as this review process is meant to be adaptable.<sup>407</sup> In formalizing the ER process, these

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<sup>405</sup> See USTR, Public Outreach.

<sup>406</sup> Of those agreements, one FTA, US-Israel, predated EO 13,141, and the remaining FTAs have been covered by ERs of trade which have been carried out by the USTR. This figure does not account for trade agreements which have been withdrawn. Two FTAs, between Canada and Mexico, fell under the NAFTA assessment, which no longer exists and the negotiations on the Trans-Pacific Partnership Agreement (TPP) concluded on 5 October 2015, with an ER conducted. However, Trump pulled out of the TPP and that is no longer applicable.

<sup>407</sup> USTR Guidelines (2000).

reviews must be written and initiated through a notice in the Federal Registrar, which summarizes the proposed agreements and officially puts the public on notice about the agreements by soliciting their comments on the scope of the ER.<sup>408</sup> When possible, the draft of the ER should be made available for public comments, as well as the final version: there was no clarification as to what situations would make it impracticable to present a draft to the public in a timely manner.<sup>409</sup> This lack of a definitive approach to ensure that public participation is guaranteed leads to an uneasy relationship between the USTR and civil society, as the latter may view the trade process as secretive. It should also be noted that stakeholders desire a minimum of open and transparent negotiations, but some researchers have suggested that this alone is not enough. There are calls that stakeholders with a relevant interest should also be actively involved in closed door negotiations.<sup>410</sup>

The tension between internal government processes and external demand of the public was evident within the USTR even before it began to formally employ ER of trade and this tension only become more pronounced as the transparency paradox with the formal application of the assessment model. For instance, this internal and external tension was evident throughout the now defunct Free Trade Areas of the Americas (FTAA) negotiations, which began in 1998 and ended when trade deadlines were not met in 2005. The USTR had not proceeded to the stage of conducting a full ER of trade of the FTAA, but some public outreach efforts had been made during these negotiations,<sup>411</sup> which revealed that civil society viewed the negotiation process as overly secretive.<sup>412</sup> The FTAA negotiations exposed the inherent mistrust between civil society and the government; it revealed that strain between public and private sector. Suggestions on how to rectify this were made to Congress and the USTR, including publicly releasing draft text of the negotiations more often, funding civil society participation in partner countries, and providing clear guidance on how trade decisions are ultimately made.<sup>413</sup> As FTAA never materialised, the USTR proceeded to negotiate bilaterally

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<sup>408</sup> EO 13,141 (1999) section 5.

<sup>409</sup> USTR Guidelines (2000) stresses the necessity of public involvement through each phase, explaining that “sufficient information needs to be provided to the public to facilitate their understanding and involvement” in the ER process.

<sup>410</sup> See Limenta (2012).

<sup>411</sup> It should be noted the US had pushed for formal means for public comments but was blocked by Mexico in its efforts. Audley Testimony (2003) 6

<sup>412</sup> *Id* at 7.; For the perspective from environmental organisations, see Sierra Club (2000).

<sup>413</sup> Testimony (2003) 8-9.

with Chile in 2004, Peru in 2007, Colombia in 2011 and Panama in 2011. For each of these trade agreements, USTR conducted an ER of trade, and there was pushback from civil society through each of these assessments; internal and external tension was apparent throughout the negotiations.

As a result of the transparency paradox, the ER of trade process for the US-Chile trade negotiations was impacted in that the final review did not fully address environmental issues that were raised. During these negotiations, the USTR released an interim review for comments in 2001,<sup>414</sup> and a final review in 2003. Comments on the interim and final reviews expressed concern that the assessment did not properly account for the marginal environmental impact associated with the marginal economic benefits of the trade agreement.<sup>415</sup> For instance, with respect to mining, the ER did not consider the relationship between the contraction of mining in the US with the expansion of mining in Chile or the environmental impact that increased investment, by way of the trade agreement, would have on the Chilean mining sector.<sup>416</sup> The final ER recognised that civil society expressed concern about the environmental impact of increased investment in Chilean mining, but based on their analysis, the USTR indicated it would be difficult to distinguish increases in investment in Chilean mining from the trade agreement versus other sources and the USTR also did not expect the trade agreement to significantly change US investment in Chilean mining. In reviewing the ER and the concerns raised by civil society, it leaves the distinct impression that the USTR did not fully expound upon the issue of mining.

The environmental impact of Chilean mining has been an ongoing concern, particularly regarding untreated copper mine tailings and marine dumping.<sup>417</sup> Chile is a leading producer of copper in the global market and approximately 90 percent of their trade is within free trade agreements.<sup>418</sup> Given the ongoing issue of marine degradation and mining, Chile's prominence as a global copper producer and the fact that civil society expressed concern

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<sup>414</sup> USTR, Chile Draft Report (2001).

<sup>415</sup> Gallagher *et al* (2001).

<sup>416</sup> Audley Testimony (2003) 24.

<sup>417</sup> See Castilla and Nealler (1978) 67-70.; For a discussion of concerns about copper mining and marine dumping, see Aguilera (2019) 673-677.

<sup>418</sup> Ghorbani and Kuan (2016) 18.

about this issue in the ER process, the final ER should have spent more time explaining the data that it relied upon to come to the conclusion that the trade agreement would not result in significant change in US investment in the mining sector.<sup>419</sup> In analysing the interim and final ER, the divide between the internal processes of USTR and the external outreach to civil society is apparent due to the generalised language that is utilised. To fulfil the assessment goals of public involvement and information gathering, the Chilean ER should have been transparent as to what groups expressed concerns in the ER process, what environmental data was presented, and how that data was considered, with an explanation of the USTR's response; this is ultimately lacking.

Civil society was not content with the USTR's handling of the Chilean trade negotiations and pushed to make the process more transparent, but the USTR resisted these actions. In response to what was viewed as lack of public disclosure on the Chilean trade negotiations, environmental groups brought a federal court case against the USTR requesting release of negotiating positions under a Freedom of Information Act (FOIA) request.<sup>420</sup> The USTR argued that "once the public sees the preliminary proposals, public pressure might preclude any deviation from them",<sup>421</sup> but the court held that this concern did not outweigh the purpose of public disclosure under an FOIA, finding in favour of the environmental groups. In response to this case, the USTR began to classify negotiation documentation, on grounds of national security, thereby restricting the flow of information.<sup>422</sup> This case is interesting on two grounds: it illustrates the pressure paradox, in that the USTR feels compelled to respond to public and political pressure during negotiations and this pressure may result in unintended results and it also demonstrates the transparency paradox in the USTR's desire to protect their internal decision making above external transparency. The USTR had an opportunity to embrace openness and engage with stakeholders during the trade negotiation process, with the ER of trade being the medium through which this could be accomplished. Instead, the

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<sup>419</sup> It is noted that in June 2003, the US signed the Environmental Cooperation Agreement (ECA), as part of the Free Trade Agreement. In 2013, the US and Chile also signed a memorandum of understanding to also promote sustainable development and preserve the environment. See Ghorbani and Kuan (2016).

<sup>420</sup> *Center for International Environmental Law* (2002).

<sup>421</sup> *Id* at 34.

<sup>422</sup> *Inside Trade* (2003).

USTR demonstrated its reluctance to do so and further fuelled the perception that trade policies were secretive.

The ER of trade process tries to open an internal process to external scrutiny, which in turn has led to a push and pull between civil society and the USTR that is reflected in the ER documentation. In theory, information from a variety of sources is to be considered at each stage of the assessment, and in a nod towards transparency, both the interim and final reviews include annexes which list the groups that have commented on the previous stage of the review. However, there is lack of clarity as to what specific feedback or data has been provided by these groups and it is impossible to determine the direct response of the USTR to this feedback. In their response to the Chile trade negotiations and requests for information, the USTR indicated early on that they wanted to protect the internal processes of what is negotiated behind closed doors. Yet, it is argued that a better balance can be found in managing the confidential nature of negotiating positions and the demands from civil society. The US could look to the example set by the EU in their stakeholder engagement practices, which although have been problematic at times, generally provides greater opportunities for engagement than the US approach.<sup>423</sup> Further, the USTR could also set the tone early in the assessment process by explaining to stakeholders what information can be shared and offering justifications for what cannot be shared. In doing so, the USTR would promote a sense of collaboration, as opposed to the current perception of keeping stakeholders, and civil society, at arm's length.<sup>424</sup>

### C. Challenges of Environmental Review of Trade

Approximately 30 years after the environmental impact statement of NEPA became standard, and after years of advocacy by environmental groups and environmentally minded politicians, the US formalised the legal requirement to conduct environmental assessments of trade negotiations.<sup>425</sup> The creation of ER of trade was an opportunity in which environmental concerns and public input could now be brought into the trade negotiation process. Like

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<sup>423</sup> See chapter 5.

<sup>424</sup> See chapter 1(D) for a discussion of why continuous stakeholder engagement is so important.

<sup>425</sup> With the signing EO 13,141 (1999) on 16 November 1999 by President Clinton.

NEPA, ER of trade was sold as a means through which stakeholders would have the opportunity to be involved and as a medium which would produce environmental data and research. ER of trade is a distinct assessment tool from reviews conducted under NEPA, but like NEPA, ER does not provide mechanisms for legal enforcement of its findings.<sup>426</sup> In that vein, from the point of its creation, the impact paradox applied to ER of trade: a trade agreement could result in real-world environmental impacts, but in not requiring a legal duty to act upon all environmental findings, for purposes of the ER of trade, those environmental impacts would not exist if they were not addressed in the assessment. Further, by the nature of its own creation, ER of trade is subject to a pressure paradox: public pressure, within the context of political cycles, resulted in the creation of ER of trade, but once this catalyst for creation was satisfied and political pressure eased, decision-makers would not have the same motivation to allow the assessment process to organically inform negotiations, which could lead to a situation where the perceived outcome as envisioned by the groups that sought change may not happen in practice. Given the challenging nature of how ER of trade developed, it leads to questions over how this instrument operates in practical terms.

Impact, pressure, and transparency paradoxes emerged through ER of trade's development, but the conflicts resulting from these paradoxes are also evident in the practical application of ER. ER is an instrument of various contradictions: it identifies a concern but does not have to act upon that concern; it is subject to public and political pressure to achieve a result, but in the end, the pressure may hinder, not advance aims; it tries to balance an inherently private process with open public scrutiny. Do these paradoxes negate the value of ER of trade; should ER of trade continue to persist?

When you strip away all the nuances of these paradoxes, the fundamental basis of ER centres on two points: public involvement and environmental information. Examination of the founding documentation of ER, the assessments themselves and the respective free trade agreements, along with public commentary, related stakeholder assessments and academic literature reveals that the concepts of public participation and environmental

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<sup>426</sup> However, with NEPA, courts can launch judicial review under the Administrative Procedure Act, APA (2000), whereas EO 13,141 (1999), which established ER of trade, utilised language which specifically protects ER of trade from judicial review.; See Czarnezki (2006) for a discussion of the NEPA's history with judicial review.

data are fundamental themes of this instrument. How are the inherent paradoxes of ER, which developed through its formation, balanced with these driving concepts of stakeholder involvement, and obtaining environmental data? What can be done to overcome these paradoxes?

To answer these questions, this section will thus examine three challenges which have arisen in ER of trade in practice considering the paradoxes which have been discussed: stakeholder, enforcement and data challenges. These challenges are reflected in the real-world usage of ER of trade; this is an examination of lived experience. By identifying and examining these challenges, this section will be able to assess inherent weaknesses within this model and examine next steps for this assessment model.

### 1. The Stakeholder Challenge

Stakeholder involvement is a founding principle of ER of trade, but in reviewing these assessments, there are examples where the voices of stakeholders are not being sufficiently amplified through this process. The failure of the stakeholder to be heard is a significant challenge to ER of trade and this results due to influences of the pressure paradox: there is a cycle where the trade negotiators are subjected to political pressure to get the deal done and in that process of responding to this heightened pressure to make things happen, there is a higher likelihood of the failure to properly take on board stakeholder involvement throughout the assessment process. Effectively, the circumstances which give rise to the pressure paradox in turn cause the stakeholder challenge.

Ultimately, there is tension between politicians, the USTR, and stakeholders: these are politically sensitive situations with many moving parts and that provides motivation to accomplish these deals quickly, but stakeholders desire patience and that can be in short supply for these fast-moving deals. It is ironic that stakeholder pressure was a catalyst for the creation of ER of trade, but instead of allowing the assessment process to flow organically to run alongside and inform trade negotiations, which is what is meant to happen, the pressure paradox can result in the trade negotiators rushing through the process and completing negotiations in satisfaction of political timetables, to get the deal through. In this instance,

the ER of trade does not play out naturally and the role of the stakeholder is not as envisioned when this model was created. This gives the impression that stakeholders are not prioritised. That is problematic because not only was ER of trade created with the desire for stakeholder input as a founding principle, but without stakeholder involvement, ER of trade becomes a tool that lacks accountability and is more likely to fail.

Unsatisfactory stakeholder involvement is evident through the example of the US-Peru Free Trade Agreement (PTPA) negotiations, which entered into force on 1 February 2009. These negotiations were not straightforward: they changed from multi-state to bilateral. Further, political pressure due to upcoming elections and party politics influenced the speed with which the trade agreement was ultimately accepted. In reviewing the assessment and trade negotiation documentation, stakeholders were relegated to the sideline throughout this process. They were not treated as being part of a collaborative decision-making approach; there was no engagement or mobilisation of this group. The voice of stakeholders was not amplified through this ER of trade process, and they had to utilise other avenues to make their opinions known, such as through NGO press releases.<sup>427</sup>

The negotiations for the PTPA were concluded by 2006, and stakeholders were afforded the ability to comment on the trade negotiations in 2004 and 2005, within the context of when the ER of trade was assessing a potential Andean free trade agreement between the US and Bolivia, Columbia, and Peru. Stakeholders were first able to comment on the Andean negotiations beginning on 12 April 2004, when they had approximately one month to return comments on the scope of the assessment.<sup>428</sup> On 3 March 2005, stakeholders were again invited to comment on the interim ER for the Andean negotiations, within a time frame of approximately three weeks.<sup>429</sup>

Within the context of just seeking comments solely on negotiations with Peru, USTR indicated that public comments were obtained through outreach events in Peru. Specific details about

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<sup>427</sup> Oxfam (2007).

<sup>428</sup> Public comments were to be received no later than 14 May 2004. Federal Register (2004).

<sup>429</sup> “Comments requested by April 15, 2005 to inform negotiations. Comments received after this time would be considered for review of the final agreement”. Federal Register (2005).

the Peruvian outreach events, who hosted them, where and when were they hosted, how they were advertised to the public, how long the public had to comment, what comments were received and details about attendance, are not publicly available.<sup>430</sup> On 7 December 2005, approximately eight months from when the first call for stakeholder comments was published, the US and Peru had concluded negotiations and the PTPA was signed on 12 April 2006. This timeline illustrates that the official avenues opened to stakeholders to provide input about the agreement during the negotiation process was within a limited window. Moreover, at the stage when stakeholders were commenting, it was within the context of a larger trade agreement, including other Andean nations, meaning that the focus, at that stage, was not solely on Peru.

Environmental groups and public interest groups continued to express their view on the PTPA prior to the agreement entering into force on 1 February 2009; but significantly, these comments, and any relevant environmental data being offered, were made after negotiations for the PTPA were completed. Any input received beyond April 2006, when negotiations concluded, would not reach the negotiators, and would therefore not be considered when the final text of the PTPA was drafted. This is significant when considering that the overall public response to PTPA was not positive. Concerns had been raised about illegal logging and deforestation, and these concerns had not been adequately addressed in the PTPA. Ultimately, political pushback, not the stakeholder commentary through the ER of trade process, resulted in some direct action. The US Democratic party had campaigned on a platform of changing America's trade policy to better protect the environment and jobs.<sup>431</sup> The US government was aware of the political pushback to the PTPA negotiations and trade agreements in general, and this ultimately led to negotiations between the White House and Congress,<sup>432</sup> resulting in the 10 May 2007 agreement called "A New Trade Policy for America",

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<sup>430</sup> Efforts were made to obtain this information via emailing NGOs within Peru and contacting USTR, but no responses were received to this request.

<sup>431</sup> Yet, some questioned why the Peru FTA did not face greater opposition and debate amongst Democrats. Despite pressure from Democratic leadership, when the Peru FTA was presented to the House of Representatives in November 2007, the majority of House Democrats, 116, opposed the agreement, particularly newly elected Representatives, who appeared to break rank from the view held by the party establishment. Ultimately, the agreement passed through the House, as 109 Democrats and 176 Republicans voted in its favour.

<sup>432</sup> For a discussion of how Democrats and Republicans disagreed over labour and environmental issues within FTAs, see Destler (2007).

(hereinafter May 10 Agreement).<sup>433</sup> The May 10 Agreement sets out the language and obligations that should be found within pending free trade agreements before they reach Congress, stipulating that environmental and labour must be included.<sup>434</sup>

The concerns from stakeholders about environmental issues within Peru, such as illegal logging, were not addressed by the negotiators because of the ER of trade assessment process but were instead addressed because of the May 10 Agreement. The PTPA was revised on 25 June 2007, six weeks after the May 10 Agreement, as USTR negotiated a 22-page annex to the Peru FTA focusing on forest governance and illegal logging.<sup>435</sup> The annex was nonreciprocal, placing the onus on Peru to take various measures to combat illegal logging within a time frame of 18 months from when the PTPA entered into force. Peru also had to conduct internal audits of timber producers and exporters to ensure that the timber that was sent to the US under the trade deal was not harvested illegally. However, there was no oversight by the US on this process to ensure Peru was complying.

Regardless, US politicians regarded the inclusion of this annex as a historic breakthrough. They viewed the annex as having the ability to ensure that Peru would strengthen its environmental and labour laws and expressed their desire to support trade agreements which included these additional environmental provisions in the future.<sup>436</sup> The PTPA was a turning point for Democratic leadership, they were now more likely to support trade agreements if the agreement contained these cursory environmental provisions. Consumer rights groups questioned why politicians did not push back or debate the PTPA further before approving this agreement, especially as the PTPA did not have public support; the inclusion of the environmental annex was, in their view, in and of itself not going far enough to promote the issue of sustainability.<sup>437</sup> Democrats had to balance supporting the views of their constituents, which included stakeholders who opposed the PTPA and commented on the process, with political pressure from the President to approve the trade deal and pressure

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<sup>433</sup> May 10 Agreement (2007).

<sup>434</sup> See also Lim *et al* (2012).

<sup>435</sup> Peru, Chapter Eighteen, Annex 18.3.4.

<sup>436</sup> Ways and Means Committee (2007).

<sup>437</sup> Wallach (2007).

from their own financial backers, as sizable campaign contributions were coming in from industries who favoured free trade.<sup>438</sup>

After the PTPA was revised to include the environmental chapter, stakeholders utilised other avenues to make their voices heard about the trade agreement. In September 2007, environmental organisations such as Friends of the Earth and Sierra Club expressed that they were concerned that the PTPA opened the door to the ability of foreign corporations to challenge domestic environmental laws, explaining that “[t]he investment provisions in the FTA also allow foreign investors to bring suits before tribunals challenging the government’s implementation of natural resource contracts or leases, potentially threatening vulnerable resources in areas in both the [US] and Peru”.<sup>439</sup> In a letter from 5 November 2007, American consumer-rights advocacy group Public Citizen also raised concerns about the ability of foreign firms to challenge domestic environmental and health laws and argued that the widely touted improvements to the PTPA’s environmental and labour chapters “does not pass the most conservative ‘do no further harm’ test”.<sup>440</sup>

By 2007, the ER of trade process had been completed and the official avenues of stakeholder involvement were now closed off, but since the PTPA was not yet in force, environmental groups continued to express their concerns surrounding deforestation and illegal logging. At this stage, the political will was on the side of ensuring the PTPA would be enacted before President Bush, who supported this agreement, left office, which meant mobilising the Peruvian government.<sup>441</sup> After Congress ratified the PTPA, and to comply with the May 10 Agreement, Peruvian President Alan Garcia passed 102 Legislative Decrees during the first half of 2008. These decrees were issued in a hasty fashion, as it was argued “that a number of Garcia’s decrees actually weakened Peru’s environmental and labor protections and were detrimental to the agriculture industry along with [I]ndigenous people” and 40% of the

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<sup>438</sup> When the Peru FTA reached the Senate in December 2007, the debate within the Senate was not extensive. As the debate within the House, and it was supported by the majority of Democratic Senators, with 29 voting in favour and 17 voting against. See Weisman (2007).

<sup>439</sup> Sierra Club (2007).

<sup>440</sup> Public Citizen Letter (2007).

<sup>441</sup> The push to put PTPA into effect went down to the political wire, as the Republican administration was eager to ensure that PTPA went into force before President Bush left office on 20 January 2009.

decrees were ultimately declared to be unconstitutional.<sup>442</sup> Many of these reforms were not extensively debated within the Peruvian Congress and the legal frameworks were of questionable quality. For instance, amendments were proposed to the highly criticised Forestry Law, which was viewed as complex and creating incentives for deforestation. Overall, these amendments failed in addressing the problems, and they created new issues.<sup>443</sup> Yet, Garcia was put into a position to issue these decrees quickly and on such a large scale because of political pressure from the US, in an effort to satisfy the May 10 Agreement. The political pressure to act ultimately resulted in action which was not successful or environmentally advantageous in Peru.

Environmental and labour organizations took issue with Peruvian laws and whether they followed the environmental and labour standards that were set out in the PTPA, putting pressure on political groups.<sup>444</sup> In January 2009, Democrats advised caution as there were concerns surrounding Peru's ability to comply with the regulations in the trade agreement.<sup>445</sup> Echoing concerns raised by stakeholders during the assessment process, environmental groups also continued to urge patience before implementation, to verify that environmental provisions would be upheld.<sup>446</sup> Ultimately, implementation of the Peru FTA was not delayed, as it went into effect on 1 February 2009. Support for implementation fell along political lines, with the majority of Republicans and the business community in favour whereas social justice organizations and some Democrats were in opposition.<sup>447</sup> Implementation of this FTA also opened the door for Peru to carry on negotiating other FTAs with Canada, the EU and China,

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<sup>442</sup> COHA (2009).

<sup>443</sup> WOLA (2009).

<sup>444</sup> Oxfam was unsupportive of this FTA as it "believes that a core objective of US trade policy should be to promote sustainable development in our trading partners" and that this FTA did not promote stability within Peru. Oxfam (2007).; WOLA (2009) also explained their reservations: "This is not what will happen if Peru rushes through flawed laws at the 11<sup>th</sup> hour. We need sufficient time and a transparent process to ensure that Peru's law and regulations fully comply with the letter and spirit of the agreement".

<sup>445</sup> Ways and Means Committee (2009).

<sup>446</sup> Ani Youatt, of the American environmental action group Natural Resources Defense Council, also urged patience, explaining: "While a number of positive reforms have been enacted, the necessary debates in Peru are still playing out and certification at this point would be premature. ...We hope to work with the Obama Administration to ensure environmental safeguards laid out in the FTA are indeed realized in both law and in practice". WOLA (2009).

<sup>447</sup> See USTR, Schwab Statement (2009).

as there was concern amongst the Peruvian government that delay of the PTPA agreement would have a knock on effect on its other trade negotiations.<sup>448</sup>

The assessment of the PTPA illustrates that in this instance, stakeholder voices were not adequately considered or amplified. Direct change to the negotiated agreement was made because of power politics in the US and not due to stakeholder feedback received through the ER process. Further, in assessing the reviews, it is unclear how trade negotiators responded to the feedback they did receive. Power politics also resulted in pressure on the Peruvian government, which led to environmental legislation meant to satisfy the trade agreement, but which was shown to be ultimately ineffective. Deforestation was one of the primary concerns raised during the ER and this is still an ongoing issue that has been identified today, with 1,100 square miles of Peruvian forests cut down annually, and 80% of them illegally. A 2019 study into Peru has found that deforestation has increased since the trade agreement has gone into effect, in-line with other nations in the region.<sup>449</sup> Given the unreliability of data, it is difficult to directly link the PTPA with increased deforestation, but this example illustrates that environmental concerns raised through the ER process are still ongoing, despite promises made in anticipation of political concessions.

Patience before implementation is needed to ensure the cooperation of the stakeholders and their support. Without this, transparency of the process suffers as negotiations are rushed and a full picture of the issues are not made available to stakeholders. Beyond hindering the involvement of stakeholders in the process, the failure to have patience before implementation of the trade agreement will also lead to partner nations enacting environmentally inadequate legislation, as they are rushing to meet the demands of the trade negotiations, and it will legitimize that nation to other potential trading partners. On the back of the PTPA, Peru signed other trade agreements, despite the outstanding environmental concerns. In the letter they sent to Senators prior to the Peru FTA's ratification, Friends of the Earth and Sierra Club urged that it was "time to take a step back and reflect on the impacts

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<sup>448</sup> The issue of stability and whether this FTA promoted it is further echoed in COHA's observation that "[t]here appears to be a good bit of evidence that "A New Trade Policy for America" was undermined due to Bush and Garcia's political goals". COHA (2009) 9. Garcia saw this trade agreement as a means towards more trade deals.

<sup>449</sup> Peinhardt *et al* (2019).

these agreements have had on people and the environment worldwide".<sup>450</sup> This analysis also demonstrates the differing views and assumptions that are being made about the ER process: the negotiators and politicians are working to make the deal happen as quickly as possible whereas stakeholders, such as environmental groups, want to engage in the assessment process and prefer to have enough time to be able to examine the relevant data.

This analysis reveals the stakeholder challenge, in that there have been instances where stakeholders have not been treated as part of the collaborative effort in contributing knowledge to the assessment of the trade negotiation process. If there is pressure from a political calendar or agenda, stakeholders could effectively be frozen out of the assessment. To combat this issue in future ER of trade agreements, the stakeholders, and not politics or the need to get the deal done, must be a guiding factor of the assessment process. Afterall, stakeholder involvement is one of the foundational principles of EO 13,141, which created ER of trade.

Effectively, the assessment needs to be cleaved from concerns about timing of trade negotiations. As ER of trade is an internal process, it is recognised that it is difficult for the USTR, who must balance concerns about timing and political pressure, with the need to allow the ER of trade to run organically and inform the negotiation process. The internal bias of the trade negotiators will be a stumbling block on this front. Yet, if no effort is made to address this, then ER of trade, as a tool meant to promote environmental protection, will effectively be neutered.

As a starting point, the USTR can make efforts to ensure stakeholder involvement by being aware that this has been a challenge in assessments in the past. The USTR can reflect on previous assessments, survey past stakeholders to get their feedback on avenues of involvement and if they felt their input was received. The USTR could also construct a database of recurrent stakeholders and reach out to them in the first instance when they begin a new ER of trade, bringing them into the process as early as possible. It is recognised

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<sup>450</sup> Sierra Club (2007) explained: "While a well-crafted trade policy has the potential to contribute to protecting our natural resources and improving our environment, the current model of trade has failed to fulfil those objectives".

that each ER of trade is independent from one another, but particularly in regard to environmental concerns, certain NGOs, such as Sierra Club, have a broad interest across trade agreements. They can engage with stakeholders on this ongoing basis to form a more collaborative relationship. In this instance, the fact that assessments are controlled internally can be used as an advantage, as there can be continuity within the USTR regarding how they reach out and mobilise the knowledge of stakeholders in future assessments.

## 2. The Enforcement Challenge

ER of trade is not a static method of analysis, it is meant to evolve and be flexible.<sup>451</sup> Yet, this flexibility has in turn led to debate over what role ER of trade agreements should play: is it a screening tool or a shaping tool? The assessment model can be either framed as reactive or proactive, and these differing views have influenced the perceived purpose of ER of trade. ER of trade has also struggled with the impact paradox, as there is no legal obligation for trade negotiators to act upon data obtained during the assessment process, additionally clouding perceptions of legitimacy. It is argued that differing views on the purpose of ER of trade and the influence of the impact paradox to the practical application of this assessment have in turn resulted in an enforcement challenge, meaning that environmental knowledge is not being acted upon which furthers dissatisfaction with the ER of trade model.

Lack of clarity as to the purpose of ER of trade is problematic; if stakeholders have different views as to what ER should achieve, then ER is already at a disadvantage: it cannot be all things to all people. This results in a perception of inaction and problematically this leads to reduced involvement from stakeholders, particularly environmental groups who then opt to apply their limited time and resources to other projects that they view as being more impactful.<sup>452</sup> When stakeholders diminish their involvement in the ER of trade process, that is a setback. A foundational principle of ER of trade is public participation and this instrument cannot be viewed through the lens of inefficiency because it leads to lagging community and public involvement, which in turn leads to less environmental feedback being directed

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<sup>451</sup> Flexibility is one of the underlying principles of ER of trade, as found in the USTR Guidelines (2000).

<sup>452</sup> This is based on discussions the author has had with NGOs who have been involved in the assessment process.

towards the trade negotiators, which then leads to an assessment that has not realised its full potential. The previous section discussed the stakeholder challenge, explaining how knowledge could be minimised if the assessment process does not make public participation and feedback a priority through trade negotiations. The enforcement challenge would compound that situation because it leads to deflated stakeholder interest: they do not share their environmental knowledge because they do not feel that it will result in any change.

At its core, ER of trade is meant to inform trade negotiators and the policy process, but this assessment can be viewed as either a reactive or proactive model and these differing views lead to ambiguity. In the reactive model, which is reflective of NEPA, and the approach set forth in EO 13,141, the goal is to further trade liberalisation while minimising environmental impact. Under this model, the assessment narrowly focuses on whether the trade agreement results in environmental impacts and if said impacts are discovered, then mitigation measures would be discussed. The USTR's guidelines for the implementation of EO 13,141, which provides the blueprint on how to conduct ER of trade agreements, reflects this reactive model, indicating that this assessment should be applied consistently, to provide timely information to negotiators and policymakers so that they can understand environmental implications and determine courses of action.<sup>453</sup> In the reactive model, trade objectives determine environmental realities, as the boundaries of the review are set by the trade agreement. Regarding the core purpose of ER of trade, the reactive model serves as an analytic tool which provides information that can be considered, as the negotiators deem appropriate; the trade policies of the negotiators are driving the environmental response. The reactive model is the reality of the approach relied on by the USTR and the American negotiators, but this model is at odds with what environmental groups desire of ER of trade, which would be a proactive approach.

In the proactive model, the assessment promotes trade liberalisation, but it flags environmental practices that could lead to environmental harms and suggests alternative approaches. In this model, economic interests are advanced, but the negotiators start with an environmental reality, such as climate change, and determine trade practices that would

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<sup>453</sup>USTR Guidelines (2000) III(A)(2).

work with that reality. The proactive model advocates ER as an advocacy tool, which presents environmentally preferable solutions; they ask how trade rules can be adjusted to meet environmental goals. It is asserted that ER of trade is an evolving tool. Although it was created as a reactive instrument, with the goals of furthering public participation and providing information to trade negotiators, that does not limit its ability to evolve into more of a proactive tool over time. As ER of trade is applied, this has coincided with progressive changes in trade agreements. It is argued that these changes are moving towards a more proactive trend.

Lack of clarity on the role of ER is further complicated by the impact paradox, as trade negotiators are not mandated to act upon data obtained via the assessment process. As discussed above, the impact paradox results when environmental knowledge, which exists in real life, is not addressed in the negotiations, for various reasons, and is therefore not mitigated; for purposes of the assessment procedure, this environmental issue does not exist. This can in turn lead to a situation which ultimately results in an environmental issue, even though the assessment was meant to prevent this.

From the perspective of environmental groups and the public that participates in the assessment process, this results in opacity as to how their environmental input is utilised, causing unrest. This unrest has led to an ongoing cycle of pushback followed by change within trade agreements. This further links back to the pressure paradox, in which there is a situation where political and public upheaval leads to change, but this change may not be what was originally desired or envisioned by stakeholders. In its current form, ER of trade still cannot mandate change in the trade agreement, but there is progressive change towards the trade agreement being more impactful in preventing environmental damage, as is illustrated by the inclusion of environmental chapters in trade agreements, which will be explored further.

The influence of the impact paradox, together with the pressure paradox, has resulted in a timeline in which ER of trade was implemented, followed by the increased usage of environmental terminology in trade agreements, and culminated in the inclusion of environmental chapters, but without mandated enforcement mechanisms. The USTR first began to use environmental terminology within trade agreements post the ER of trade

process, but this language was open ended, qualifying that parties “shall strive” to provide environmental protection, further clouding perceptions as to what was trying to be achieved.<sup>454</sup>

ER of trade was implemented for the first time during the negotiations between the US and Jordan in 2001, and one of the most noticeable changes was the amplified use of environmental terms, such as control of pollutants, toxic chemicals and protection of flora and fauna.<sup>455</sup> Changing the environmental language alone was not the desired end goal of environmental groups participating in the ER process, but it was seen as a starting point. They viewed the assessment and the resulting trade agreements as an evolving process and were hopeful of what could be achieved in future agreements. The US-Jordan trade agreement asked parties to strengthen environmental laws, but there was no consensus on what environmental issues should be included,<sup>456</sup> how to effectively enforce environmental laws or who was responsible for determining such failures.<sup>457</sup> It is noted that the environmental language was also not enforceable. For example, Jordan enacted new environmental laws, establishing an environmental ministry, but enforcement of Jordan’s environmental provisions is still lacking. This is illustrated in environmental concerns about textile manufacture, water pollution and mitigation efforts, which were raised during the ER process.<sup>458</sup> Jordanian enforcement of provisions protecting water supplies has been weak and US assistance in enforcement was limited, as the USTR failed to regularly monitor and ensure compliance within the region.<sup>459</sup> Use of environmental language within the trade agreement was not enough to prevent ongoing environmental issues, but changes made to the US-Jordanian trade agreement after the ER of trade process was viewed as an incremental step towards merging trade and environmental policy with public interest.<sup>460</sup>

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<sup>454</sup> USTR, Jordan FTA, Article 5.2.

<sup>455</sup> *Id* at Articles 5.3 and 5.4.; Jinnah and Morgera (2013) 328.

<sup>456</sup> US Committee on Finance Hearing (2001) 9.

<sup>457</sup> *Id* at 10. Without clear answers to these issues, Michael Smith, a former Deputy USTR, labelled the Articles as “largely fluff, open to widely differing interpretations”.

<sup>458</sup> Schyns *et al* (2015).

<sup>459</sup> GAO Report (2009) explains: “However, partner officials report that enforcement remains a challenge, and U.S. assistance has been limited. Elements needed for assuring partner progress remain absent. Notably, USTR’s lack of compliance plans and sporadic monitoring, State’s lax management of environmental projects, and U.S. agencies’ inaction to translate environmental commitments into reliable funding all limited efforts to promote progress”.

<sup>460</sup> US Committee on Finance Hearing (2001) 27.

There was pressure for further proactive change, for continued opportunities for public participation and for the input provided through this participation to be reflected in trade agreements, which ultimately led to environmental language being moved from side agreements, as was the case with NAFTA, to becoming formalised within an environmental chapter. This cycle of pushback and action was evident during the trade negotiations with Peru, as the USTR introduced an environmental annex to the PTPA in response to ongoing political pressure.<sup>461</sup> Peru's assessment identified illegal logging, smuggling of fossils fuels and wildlife, air and water pollution and unsustainable fishing practices as environmental concerns.<sup>462</sup> The environmental annex highlighted opportunities for public participation and reflected issues raised in the assessment and included a section on forest sector governance, which addressed illegal logging.<sup>463</sup>

On the surface, the annex is indicative of progress in the trade agreement towards enforcing the rule of law and combating illegal logging. It also illustrates that the trade agreements may be moving towards a more proactive approach. Yet, words on the page of the agreement differ from the actual reality of what happens on the ground, as illegal logging is an ongoing issue in Peru.<sup>464</sup> The experience in Peru illustrates the dilemma of ER of trade and the resulting trade agreement: input from the assessment highlighted environmental issues, but environmental violations still occurred due to lack of enforcement measures.<sup>465</sup> From the experience in Peru, post implementation weaknesses includes the failure to adequately monitor the region for violations of environmental standards and the failure to hold anyone accountable for these violations.

In response to the push for greater visibility of environmental issues, the USTR transitioned from an environmental annex, as seen with Peru, to the inclusion of standardised environmental chapters within trade agreements with the completion of the Chile and

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<sup>461</sup> Peru, Final ER 13.

<sup>462</sup> *Id* at 4.

<sup>463</sup> Peru, Chapter Eighteen.

<sup>464</sup> Environmental Investigation Agency Report 17.

<sup>465</sup> USTR, Environment Report (2015) 47.

Singapore free trade agreements in 2004.<sup>466</sup> The environmental chapter was created based on the foundational principles of ER of trade, as it emphasises the importance of environmental information and public participation, and it also provided dispute settlement options, which have not been tested to date.<sup>467</sup> As such, these chapters provide the opportunity to include environmental data that was gathered during the assessment. This could potentially give greater visibility to stakeholder involvement, but crucially these chapters do not indicate if they resulted directly from all the issues that were raised in the ER of trade process. It is unclear what environmental knowledge was considered and included and what was found to be irrelevant to the trade negotiations.

Although, environmental chapters offered the promise of being the gateway for data obtained from the ER of trade process, their shortcomings include generic language and lack of enforcement. An examination of US trade agreements finds that although some issues raised throughout the ER have been mentioned in environmental chapters, passive language is often used when discussing these issues and some environmental concerns, such as biodiversity concerns<sup>468</sup> or concerns over climate change,<sup>469</sup> were never mentioned in the environmental chapter, despite being raised during the assessment process. Analysis of environmental chapters indicates that early on, these chapters also used the same language between trade agreements,<sup>470</sup> which questions how genuine the early versions of these environmental chapters were.<sup>471</sup> Beyond broad language and the failure to fully address what was raised during the assessment process, the key difficulty with these chapters is the absence of action to date in enforcing environmental measures.

In accordance with the 2015 Trade Promotion Authority Act,<sup>472</sup> the USTR's Office of Environmental and Natural Resources (ENR) considers stakeholder and public comments, and negotiates, monitors, and is meant to ensure the compliance of environmental chapters in trade agreements. The ENR has, to date, not taken specific measures to ensure compliance

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<sup>466</sup> Jinnah and Morgera (2013) 328, 329.; Chile, Chapter Nineteen (2004).

<sup>467</sup> Hradilová and Svoboda (2018) 1033.

<sup>468</sup> In the context of TPP.

<sup>469</sup> In the context of USMCA

<sup>470</sup> As is found in the environmental chapters for trade agreements with Colombia, Panama and Korea.

<sup>471</sup> Condon (2015) 109-110.

<sup>472</sup> Trade Promotion Authority Act (2015).

with environmental chapters. To ensure compliance, the environmental chapters also require both parties to implement multilateral environmental agreements they joined.<sup>473</sup> These multilateral environmental agreements are labeled “the main vehicle for environmental obligations”.<sup>474</sup> Sanctions are meant to be the primary tool to ensure compliance with the environmental chapter, which, up until recently, differed from the EU approach via their trade and sustainable development chapters, which did not employ sanctions.<sup>475</sup> Yet, research on the effectiveness of sanctions have found them to not be an effective approach.<sup>476</sup> In practice, if environmental norms within the environmental chapter are violated, this in turn leads to a consultation procedure, typically resulting in numerous consultations with little to no recourse to sanctions. The US has never employed any sanctions for violation of an environmental chapter to date.<sup>477</sup>

In their current form, environmental chapters have led to frustration from environmental organisations, leading to questions about legitimacy.<sup>478</sup> In the case of Chile and Singapore, these chapters failed to build on the environmental progress made by previous free trade agreements,<sup>479</sup> or even the NAFTA assessment, by failing to include something akin to NAFTA’s citizen submission process, which would provide citizens with the opportunity to challenge whether environmental laws are being implemented appropriately.<sup>480</sup> For instance, concerns about salmon farming in Chile were raised during the ER process, but as Chilean farm-raised salmon already entered the US duty free, the USTR did not find that the free trade agreement would impact upon that trade.<sup>481</sup> A July 2009 report from the US Government Accountability Office (GAO) found that environmental conditions in Chile worsened after the trade agreement went into force, with a particular focus on salmon farming.<sup>482</sup> A 2014 follow-

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<sup>473</sup> For the US, this includes CITES; Montreal Protocol Banning Chlorofluorocarbons; Convention on Marine Pollution; Ramsar Convention on Wetlands; International Whaling Convention.

<sup>474</sup> Gresser (2010).

<sup>475</sup> See chapter 6(C)(1) for a discussion of the EU’s trade and sustainable development chapters. In June 2022, the EU recently changed their approach to enforcement of these chapters, and sanctions will now be considered as an option. To date, sanctions have not been employed.

<sup>476</sup> See Hradilová and Svoboda (2018).

<sup>477</sup> Cima (2021) 240

<sup>478</sup> Friends of the Earth, Sierra Club and the National Wildlife Federation have expressed these frustrations.

<sup>479</sup> Such as the Jordan FTA.; CIEL, Letter (2003) 2.

<sup>480</sup> CIEL, Letter (2003) 1.; For a detailed discussion of the citizen submission process see Todd (2017) 133 and generally.

<sup>481</sup> Chile, Final ER (2003) 21.

<sup>482</sup> GAO Report (2009).

up report from the GAO<sup>483</sup> found that Chile passed a new environmental law in 2010, which would tackle these concerns by establishing new environmental ministries. However, an independent 2019 review of Chilean salmon farming has found environmental issues to be ongoing.<sup>484</sup>

Environmental groups continued to question the ability of environmental chapters to meaningfully implement environmental provisions given that this was not done to date. The experience of environmental groups during the US-Panama trade negotiations illustrates this point, as these groups, such as Amazon Watch and Rainforest Action Network, questioned the ability of environmental chapters to meaningfully implement environmental provisions, given that this was not done based on the feedback they provided in the interim review.<sup>485</sup> Further, as evidenced by the Peruvian chapter and the inclusion of the term deforestation, key language and select terminology from the assessment process may appear in the environmental chapter, but that simply illustrates that the chapter will enact wording that should be utilized; that these chapters are being used as a tool to use choice language from the ER and incorporate it into the trade agreement.

This analysis reveals that as a flexible tool, ER of trade has evolved over time, most notably with the resulting inclusion of the environmental chapter in trade agreements. These changes have been a response to dissatisfaction with the ER of trade process, amid perceptions that this assessment is not being proactive enough and that real-life environmental impacts are not being fully addressed, as reflected in the impact paradox. In its current form, ER of trade cannot legally mandate implementation of its findings, and the USTR is not moving towards making legal implementation of ER a reality. Although best practice indicates that there needs to be legal implementation of recommendations from the assessment, that is not realistic in the current climate within the USTR. Further, the environmental chapter in trade agreements,

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<sup>483</sup> GAO Report (2014).

<sup>484</sup> Quiñones *et al* (2019).

<sup>485</sup> In 2009, another non-profit, Global Justice for Animals and the Environment, also expressed concern about this. See Ross (2009). There was concern about the failure to address environmentally harmful practices such as wildlife trade and increased soil erosion.; Concerns were also raised about reports detailing widespread corruption within Panama and whether the local government would be able to ensure environmental protections. See COHA (2011).

in its current form, is too far removed from the assessment process and it cannot be considered a medium through which ERs are enforced.

Given this, the ER of trade model is facing a serious enforcement challenge and this needs to be addressed. The USTR's focus on the inclusion of an environmental chapter, in its current application, is not the answer. To make the environmental chapter fall in line with the ER of trade, there needs to be a stronger focus on participation of civil society; there needs to be cooperation, dialogue and capacity building, as identified through the assessment process. Stakeholders need to be viewed as a partner throughout the process, so that they do not become disengaged. Even if the ER is not as proactive as envisioned by stakeholders, by actively involving this group throughout the assessment, that would encourage engagement. Further, steps need to be taken to explicitly reflect environmental knowledge that was received and how it was responded to in both the assessment process and the environmental chapter, if the USTR chooses to use the chapter as method of enforcement going forward. To encourage a rich and collaborative assessment process and to counteract the impact paradox, stakeholders need to be made aware of how their input is utilised and how environmental knowledge, in general, was considered throughout the ER of trade process.

### 3. The Data Challenge

Environmental knowledge, or data, is the heart of the ER of trade process; this assessment model was created for the purpose of accruing data. The previous sections focus on challenges facing stakeholders, from providing adequate opportunities for their involvement, as explained in the stakeholder challenge, to ensuring that stakeholders do not become disengaged from the process due to perceptions environmental input accrued during the assessment is not utilised, as explained in the enforcement challenge. This section will in turn focus on challenges facing the accrual and analysis of data, as the assessment process is only as strong as the data upon which it is based, that guides the decisions that are being made. The transparency paradox, as discussed, further aggravates the data challenge, as the internal nature of the assessment process is at odds with being able to explore and understand the data.

In examining previous ER of trade assessments, three data approaches are prevalent throughout the assessment documentation: quantitative computable general equilibrium (CGE) modelling, reliance on the environmental Kuznets curve and qualitative data gathered via stakeholders. In analyzing USTR's usage of CGE in trade agreements, such as the Free Trade Area of the Americas (FTAA) and Korea, three main points arise: 1. CGE only provides analysis of the situation at hand at a specific point in time; 2. CGE is a data hungry tool and is costly to implement; 3. The data relied on is kept confidential. The environmental Kuznets curve, which has been utilized in FTAs, such as Peru, relies on an economic theory that environmental standards increase as wealth increases.<sup>486</sup> Research indicates that the Kuznets curve holds true in long run scenarios, meaning that for this economic theory to prevail, the increased wealth and corresponding focus on environmental standards would need to be well established, which fails to account for short term irreversible environmental damage. The third approach to obtaining data is via stakeholder input and local assessments, also known as consultative processes. In the context of ER, this can provide the most fertile ground for data. Consultative processes are the most user-friendly and accessible of methodologies because it incorporates lived experience of impact and illustrates directly how environmental issues may impact an area or community.<sup>487</sup> It brings the data to life, making it easier for the trade negotiators and the stakeholders to be able to relate to and engage with the ER process. This section will examine each of these approaches, to explore how they have been employed in ER of trade to date.

To calculate economic and ensuing environmental impacts, the USTR primarily relies on data produced by CGE modelling. To present a quantitative picture, this economic model relies on numerous simplifying assumptions and produces results based on data from two points in time: either before or after the trade policy is implemented. As discussed in the second chapter, the environmental estimates produced by this model are limited to the validity of the assumptions upon which it is based.<sup>488</sup> The results of this model are complicated and need interpretation from an expert. This model also requires a significant amount of information

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<sup>486</sup> For a detailed explanation of the Kuznets curve, see Saqib and Benhmad (2021).

<sup>487</sup> For a discussion of the importance of insight from lived experience in environmental decision making, see chapter 2(D).

<sup>488</sup> Gallagher (2003) 2-4.

to produce results, is time intensive, costly and opaque. Further, the data and assumptions initially utilised by this model are confidential, meaning that it cannot be scrutinized at any stage. In essence, the results of CGE cannot be openly debated because it is not possible to analyse the source data. CGE models were also utilized in the NAFTA assessments and were later found to inaccurately predict environmental impacts.<sup>489</sup> Yet, despite these criticisms, USTR opted to employ CGE in the FTAA assessment, and in later assessments for the Australia, Singapore, and Chile trade agreements.

The repeated usage of CGE demonstrates that the USTR did not evaluate previous assessments to determine what practices worked in accurately determining environmental effects. This is particularly worrisome in that a 2003 NAFTA study, produced by the North American Commission for Environmental Cooperation, NAFTA's environmental enforcer, found that trade from NAFTA directly resulted in air pollution in key transportation zones; the CGE model for the NAFTA assessment never predicted such a result.<sup>490</sup> Yet, in the majority of early assessments,<sup>491</sup> they found the same conclusion, "that the effect on the U.S. environment would be small given the insignificant effect on the U.S. economy of trade liberalization with these countries".<sup>492</sup> By basing results on such a large aggregate level of impact, these reviews have failed to take into account marginal environmental costs which may result.

Some US ERs have also relied on an environmental Kuznets curve theory, which posits that increased economic development results in environmental benefits.<sup>493</sup> In theory, as nations become wealthier, they will require higher environmental standards, but researchers explain that the environmental benefits of an environmental Kuznets curve lacks evidentiary support in practice, particularly due to the irreversible impact of some environmental concerns.<sup>494</sup> The issue of irreversible environmental impacts, in particular, is especially worrisome, in that the ecosystem will not be able to recover, regardless of enhanced environmental techniques

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<sup>489</sup> Panagariya, and Duttagupta (2001) 51.

<sup>490</sup> *Id* at 3.

<sup>491</sup> Jordan, Chile, Singapore

<sup>492</sup> Gallagher (2003) 2.

<sup>493</sup> Stern (2004).

<sup>494</sup> Shaw (2005).

that may be introduced as a result of increased economic growth. Despite the debate surrounding the reliability of the environmental Kuznets curve in practice, this theory was utilised by the USTR in the assessment of the US-Peru negotiations to make the case that the trade agreement would not result in negative environmental impacts. The Interim Review of the US-Peru FTA links economic development with environmental protection.<sup>495</sup>

The failure of these assessments to produce actionable environmental data was illustrated in scientist David Pimentel's research into invasive species. In 2000, Pimentel found that a large percentage of American endangered species were at risk from alien invasive species. Pimentel assessed that invasive species cost the US economy \$137 billion per year and that 90 percent of alien species were introduced into the US via trade.<sup>496</sup> Pimentel's research was significant, but despite the threat which he and his colleagues highlighted, none of the USTR's completed assessments have identified invasive species as a significant threat to the US that needs to be dealt with or mitigated.<sup>497</sup> As this environmental issue has not dissipated since 2000, it is curious that none of the assessments produced by the USTR have addressed this concern in any meaningful way. This leads to questions over the efficacy of ER of trade, particularly whether these assessments simply justify predetermined trade positions.<sup>498</sup>

Given the challenges with economic modelling in providing data for assessment, it is useful to examine how the USTR sources data from stakeholders. The assessment of the Peru negotiations and the issue of illegal logging provides useful insight into the USTR's methods. While conducting the assessment for the PTPA, the USTR relied on various sources when identifying and examining possible environmental effects, including comments received to public notices in the Federal Register, comments received from public outreach efforts in Peru, information from published sources and environmental expertise provided by federal agencies. Based on the information received throughout the assessment, the USTR "concluded that changes in pattern and magnitude of trade flows attributable to the PTPA

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<sup>495</sup> Peru, Interim ER.; Reynaud (2013) 211.

<sup>496</sup> Gallagher (2003) 5-6.

<sup>497</sup> NCEE (2005).

<sup>498</sup> Gallagher (2003) 1 raised this same question in 2003 and it still has not been adequately addressed.

will not have any significant environmental impacts in the United States" and that "the PTPA is not expected to have significant direct effects on the US environment".<sup>499</sup>

The USTR initially received comments related to Peru during the initial assessment in 2004, which was published within the interim ER for the US-Andean FTA, which assessed the overall environmental implications of the US entering into trade negotiations with the Andean Countries of Colombia, Peru, Ecuador and Bolivia.<sup>500</sup> In regard to the comments received to the assessment process, the USTR specified that two written submissions were received, one from Natural Resources Defense Council, Center for International Environmental Law, Defenders of Wildlife, Friends of the Earth, and Oxfam as a joint submission and the second from the American Sugar Alliance.<sup>501</sup> Although the text of these comments was not made available, USTR did briefly summarize the comments and it focused on issues such as biodiversity and concerns with mahogany and illegal logging. Beyond summarizing the comments, the interim ER does not specify what environmental data, if any, was provided in these comments, or how the USTR incorporated the comments when putting together the interim ER or how it influenced trade negotiations.

The USTR goes on to explain that another source of environmental information used for the interim ER resulted from public meetings held in each of the Andean countries.<sup>502</sup> In describing these meetings, the interim ER explained that these were outreach efforts, which were meant to improve communication on trade-related issues.<sup>503</sup> The USTR does not specify when these meetings were held, how they were advertised to civil society, how the environmental information obtained from these meetings was recorded, the quality of the data received or how it was utilized. In addition to public comments received in response to the publicised notices and outreach efforts, the USTR also relies on internal information provided by the advisory committee on trade and environment issues, the Trade and Environment Policy Committee, to determine the scope of the assessment and further inform

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<sup>499</sup> Peru, Final ER.

<sup>500</sup> Peru, Interim ER.

<sup>501</sup> *Id.*

<sup>502</sup> *Id* at 20.

<sup>503</sup> *Id.*

the negotiation process.<sup>504</sup> Beyond mentioning the governmental sources of information, the USTR does not elucidate what environmental issues were raised or what data, if any was provided to support that respective input. Further, as was the case with the public comments and public outreach efforts, there is no guidance on how the USTR utilized this information when producing the interim ER for the PTPA.

In producing the final ER for the PTPA, the USTR followed the same approach towards sourcing environmental data that was followed for the interim ER: they relied on comments received to notices in the Federal Register, comments obtained from public outreach events in Peru, and the environmental expertise from federal agencies. The final ER briefly describes the public outreach efforts in Peru, specifying that the “U.S. Government held a public meeting in [Lima,] Peru with [over 200 participants from] environmental organizations, the private sector and leaders of indigenous groups”.<sup>505</sup> The USTR did not elaborate what environmental information was raised in this meeting or how it was utilized by the trade negotiators. Regarding the various sources of published information, the USTR does not specify the origins of this published data or what specific information was provided; neither does it explain the quality of the information obtained from federal agencies. An annex within the ER does list the organizations that provided comments, but beyond that, it is difficult to locate the actual documentation that was provided by these organizations to the USTR.<sup>506</sup>

As the USTR does not provide details on the data it uses, it is useful to look to other sources that were also researching environmental issues within Peru around the same time that the assessment was conducted, to see what information they were relying on. Doing so provides a benchmark from which further analysis can result. A report published in 2007 from the Environmental Investigation Agency relied on data obtained prior to implementation of the Peru trade agreement. It found that in 2006, the US was a major exporter of Peruvian timber, with over 40% of Peruvian wood products going to the US.<sup>507</sup> Mahogany was chief amongst

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<sup>504</sup> *Id* at 19.

<sup>505</sup> Peru, Final ER 17.

<sup>506</sup> *Id* at 34. These include American Bird Conservancy; American Sugar Alliance; Government of Colombia; Humane Society International; and a joint submission from Defenders of Wildlife Friends of the Earth, Sierra Club, Center for International Environmental Law, Earthjustice

<sup>507</sup> Environmental Investigation Agency Report 16.

these wood exports, with Peru exporting 89% of its mahogany to the US.<sup>508</sup> In 2001, Brazil outlawed the export of mahogany making Peru the primary global exporter. The trade in illegal mahogany is a grave concern, as reflected in the Convention on Trade in Endangered Species.<sup>509</sup> The statistics in the Environmental Investigation Agency report on mahogany are contemporaneous to those that should of have been utilised when putting together the ER, yet the final ER does not mention such figures. The final ER acknowledged that “[p]ublic comments drew particular attention to concerns about the effectiveness of Peru’s implementation of the listing of big-leaf mahogany” and that there is concern over the threat of logging.<sup>510</sup> The ER does not mention what specific environmental data it was referencing when discussing the issue of illegal logging and mahogany in Peru, nor does it discuss how USTR considered that data when producing the ER or if it impacted negotiations. In regard to enforcement provisions, the final ER relies heavily on enforcement measures found in the trade agreement’s environmental chapter as justification that environmental issues will be addressed, as needed, in the future. As discussed previously, reliance on environmental chapters as an enforcement measure has not been tested in practice.

In exploring CGE modelling, the Kuznets curve and information obtained from stakeholders, it is apparent that a mixed methods approach of qualitative and quantitative data is best suited for policy issues, such as ER.<sup>511</sup> Each of the individual data approaches in and of themselves have drawbacks, but taken as a whole, they provide a clearer picture of the issues and in the context of the assessment, the qualitative data obtained provides the best overall picture. Data obtained via the consultative process is impactful in the assessment because the civil society groups that engage in the process are motivated to do so due to a feeling of ownership of the assessment process and a great sense of transparency and accountability. Research on the issue of civil society engagement and the data obtained through such an engagement indicates it is only effective “if it occurs within a favourable political, legal and social context”.<sup>512</sup> Without this context, civil-society participation and data obtained will not be effective in the information-feedback role as envisioned. Simply put, stakeholders need to

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<sup>508</sup> *Id.*

<sup>509</sup> NRDC (2006).

<sup>510</sup> Peru, Final ER 21.

<sup>511</sup> See Shaffer (2018).

<sup>512</sup> Shaffer (2012) 36.

be actively engaged to take full advantage of their environmental knowledge; it needs to be a collaborative process. As explained in the discussion of the assessment of Peru, the USTR did not effectively engage with stakeholders. The transparency paradox was also evident throughout, due to the lack of clarity on how the USTR obtained and utilised environmental data, which in turn makes it difficult to question the findings of the assessment.

This analysis thus illustrates some of the issues that result from the data challenge. As discussed in the second chapter, economic modelling has its challenges and the usage of these models within ER of trade reveals how those challenges present in practice. A mixed methods approach to data analysis is best, with an emphasis on qualitative input. Yet, examination of stakeholder feedback in US ER of trade reveals lack of clarity. There is obscurity with respect to the exact data that is received from stakeholders and how trade negotiators utilise that information. In exploring ER of trade in practice, there is a distinct impression that stakeholders are not being fully engaged.

To overcome the data challenge and maximise the usefulness of ER of trade, there needs to be greater focus on the qualitative element of assessment and more engagement with stakeholders. There needs to be transparency on what information is received and how it is responded to, to keep stakeholders fully involved and encourage participation in future assessments, as appropriate. USTR can reflect on previous assessments to see what has and has not worked, but most importantly, going forward, they can simply create an easily accessible online database which lists all the data that was obtained throughout the assessment process.<sup>513</sup> This database can be accessible to stakeholders and can provide clarity on what knowledge trade negotiators are relying on throughout the assessments. This would in turn promote a more participatory assessment environment.

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<sup>513</sup> It is noted that USTR now uses [www.regulations.gov](http://www.regulations.gov), to allow civil society to upload comments during an ER process and to view current comments. However, this website differs from the suggested database as comments can only be found if a researcher has the specific federal register number affiliated with the document. The suggested database would be easier to navigate and more accessible to stakeholders as they could search by trade agreement.

#### D. Recommendations and Conclusion

This chapter has sought to explore the US ER of trade assessment model to explain what this tool is expected to do in theory and compare that with what has been accomplished in practice. In doing so, this chapter has identified how three paradoxes, pressure, impact, and transparency, have emerged in ER of trade. These paradoxes have in turn resulted in three challenges, stakeholder, enforcement and data. In reviewing this analysis, a common theme throughout, which is foundational to the practical issues that have emerged, is poor stakeholder engagement. Essentially, these paradoxes and in turn challenges arise because ER of trade does not place enough value on stakeholder involvement and the knowledge that these stakeholders can provide throughout ER of trade practice. In order to preserve something, it must be protected, and in reviewing ER of trade in practice, there is a distinct impression that this relationship has not been protected.

When ER of trade was created, there were two inherent objectives: stressing the importance of public consultation and stakeholder involvement throughout the assessment process and an emphasis on the gathering of information about reasonably foreseeable environmental impacts, ensuring negotiators and stakeholders are aware of such impacts. On its face, it is stipulated that ER is a policy tool, which is meant to harness environmental data from stakeholders that can be used by trade negotiators. However, it is argued that ER of trade is much more than a simple assessment tool, in that, like NEPA, it has a larger role to play in environmental planning and governance.

Suggestions were made throughout on what USTR can do to counteract these challenges, but the biggest change that can be made is awareness, self-reflection, and the recognition of the key role that stakeholders play throughout. It should be noted that effective stakeholder participation does not simply equate with more stakeholder input or more data; the approach is more nuanced.<sup>514</sup> The goals are to improve the quality and legitimacy of the assessment, which in turn leads to greater understanding of the issues at hand for all

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<sup>514</sup> See the discussion on knowledge creation in chapter 2(D).

the actors involved, resulting in more effective implementation of the assessment findings.<sup>515</sup>

To counteract the stakeholder challenge, ER of trade must make engagement of stakeholders the rule, not the exception. Stakeholder participation must become a mandatory aspect of ER of trade that is enforced at each stage of the assessment.<sup>516</sup> The assessment must follow the negotiations, while also engaging with stakeholders. Assessments cannot be rushed at the expense of stakeholders. To counter the impact challenge, trade negotiators must make it clear how stakeholder input has been utilised to avoid disengagement or disinterest in future assessments. If stakeholders perceive that their knowledge is not valued, they will not engage and USTR loses a collaborative partner. Finally, to overcome the data challenge, ER of trade data must be made accessible. Further, the importance of qualitative data, through meaningful engagement with stakeholders, has also been raised.

As discussed in chapter two, successful stakeholder engagement can lead to greater capacity building within local communities to raise and manage environmental concerns, which can in turn lead to greater environmental governance practices. ER of trade has the potential to bring together stakeholders and promote a more collaborative relationship. The next chapter will focus on the 2020 trade agreement between the United States, Mexico and Canada to explore how a recent ER of trade has been carried out and to discuss what this means for the future of this model.

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<sup>515</sup> Dietz and Stern (2008) 225.

<sup>516</sup> *Id* at 226-227 explains that ineffective participation can actually cause harm as it “can decrease, rather than increase, the quality and legitimacy of an assessment or decision and damage capacity for future processes”.

## V. Chapter 4: Case Study: US-Mexico-Canada Agreement

### A. Introduction

The previous chapter examined the United States' (US) environmental review (ER) of trade model, exploring its development as a legal requirement for trade agreements, which is meant to "contribute to the broader goal of sustainable development".<sup>517</sup> That chapter identified three inherent paradoxes, pressure, impact, and transparency, which in turn have resulted in challenges when this assessment model has been applied in practice. This chapter seeks to examine the US-Mexico-Canada (USMCA) trade agreement, which is a renegotiation of the 1994 North American Free Trade Agreement (NAFTA), to analyse how the ER of trade process was applied. USMCA has been called the "New NAFTA"<sup>518</sup> and "NAFTA 2.0",<sup>519</sup> but the office of the US Trade Representative (USTR) has sought to distinguish USMCA from its predecessor. The USTR has touted USMCA for its contributions to sustainable development, labelling this trade agreement as having the "most comprehensive set of enforceable environmental obligations"<sup>520</sup> of any US trade agreement. With the USMCA signed in December 2019 and then ratified in March 2020<sup>521</sup> and given its projected importance for environmental standards, it is an ideal case study for examining how the ER of trade process was applied in practice.

USMCA is also a politically important trade agreement, as it builds upon a US approach which seeks to position the US as a global leader in trade. It is in this vein that the concept of a North American free-trade area has become foundational to American trade policy. In examining the historical development of trade within the US, it is difficult to envisage a world in which the US would not have a trade agreement with its neighbours, Canada and Mexico. Both NAFTA and the subsequent USMCA send out the political message that the US aims to remain

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<sup>517</sup> EO 13141 (1999) section 2.

<sup>518</sup> Waldron (2020-2021)

<sup>519</sup> Laurens *et al* (2019); Tienhaara (2019)

<sup>520</sup> USTR, Final ER of USMCA (2019) 3.

<sup>521</sup> This is the second time the USMCA was signed, with the first signing having occurred on 30 November 2018. Disputes over labour rights, steel and aluminium led to a revised agreement, which was signed in December 2019.

competitive in the realm of trade and that borders between all three nations will remain open.

It was hoped that the USMCA, as the largest multilateral trade agreement entered by the US since NAFTA, could address NAFTA's perceived shortcomings in ensuring labor safety and environmental protection, setting a new standard for environmental goals in US trade negotiations.<sup>522</sup> This chapter thus seeks to examine whether the ER of trade process has been influential in positioning the USMCA to achieve these environmental aims. In examining the role of ER within the USMCA, this chapter will be arranged in three parts. The first section will examine the politicization of NAFTA to explore how trade negotiations have become an inherently political process in the US. The second section will explore the USMCA negotiations and analyse how the ER process was realised in practice. The third section will examine the environment chapter of the trade agreement, to assess whether information obtained through the assessment process was reflected in the trade agreement. The goal of this chapter is to contribute towards the debate about the usefulness of ER of trade as an assessment and mitigation tool, by analysing the underlying issues with this assessment and the USTR's approach to using it and thereby exploring the future potential of ER of trade.

## B. The Politicization of NAFTA

An examination of the historical growth of trade in the US illustrates an underlying drive for economic gain and political power as motivating factors, and it is important to bear this history in mind when examining the events that resulted in the USMCA trade negotiations and agreement. Since NAFTA's inception in 1994, debate has followed about the economic and environmental impacts of this agreement. NAFTA became a point of contention during political campaigns and this all came to a head during the 2016 US Presidential election, when then candidate Donald Trump vowed to withdraw from NAFTA. Once elected, the Trump Administration was able to push through negotiations for USMCA, as a replacement to NAFTA. At the time of signing of USMCA, politicians and trade negotiators from the US,

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<sup>522</sup> For detailed discussions of the environmental and labour challenges within NAFTA, see Deere and Esty (2002), Gladstone *et al* (2021), Timmons (2003) chapter 2, Scott (2003), and Mann (2000).

Canada and Mexico were placed in a precarious political situation, either sign onto and support USMCA or deal with the Trump Administration's full withdrawal from NAFTA, with no contingency plan.

The USMCA trade agreement has since been heralded by the US government as a 21<sup>st</sup> century, high standard trade agreement; it would be setting the bar for the future of American trade.<sup>523</sup> Considering this, it is suggested here that the USTR, who is responsible for conducting the ER, was in a unique position when carrying out this assessment and in essence, had the opportunity to turn the ER of the USMCA into a potential gold standard. In short, the ER of USMCA was setting the stage for the future of impact assessments in the US.

The development of trade policy in the US can be juxtaposed to the development of respective policy in Europe. When the USTR was created in 1963 from a trade and common market perspective, the US was playing catch up with Europe, as the European Economic Community was initiated with the signing of the Treaty of Rome in 1957. Inspired by Europe's success in eliminating tariffs and increasing trade, then presidential hopeful Ronald Reagan declared his desire to create a North American agreement with both Mexico and Canada in his 1979 Presidential Candidacy announcement.<sup>524</sup> Throughout his presidential campaign, Reagan promoted the creation of a North American common market as the key to future success of the US, with the underlying message being that the US could compete and even outperform against its European counterparts in the realm of trade.

During the 1980s, the US presented an image of embracing trade,<sup>525</sup> with Congress passing the Trade and Tariff Act of 1984, affording bilateral trade negotiating authority. By 1985, the US and Canada began discussing a trade agreement, negotiations started in 1986 and in 1988, the Canada-US Free Trade Agreement was signed, going into effect in 1989.<sup>526</sup> This FTA was the precursor to NAFTA. Mexico expressed interest in a free trade agreement with the US and

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<sup>523</sup> See USTR, Fact Sheet.

<sup>524</sup> Reagan (1979) stated: "A developing closeness among Canada, Mexico and the United States a North American accord would permit achievement of that potential in each country beyond that which I believe any of them strong as they are could accomplish in the absence of such cooperation".

<sup>525</sup> Reagan (1984) commented: "This Trade and Tariff Act of 1984 signals to the world that America does not fear free trade because the American people can produce and compete on a par with anybody in the world".

<sup>526</sup> Sources on the US-Canada FTA can be found at US-Canada FTA (1988).

negotiations began in 1990 for liberalised trade between the US, Canada and Mexico. NAFTA was signed in 1992, ratified in 1993 and came into effect on 1 January 1994. The negotiations and later ratification of NAFTA occurred against the backdrop of the creation of the European Union (EU). NAFTA afforded the US with the ability to remain competitive in trade as its European counterparts also expanded in trade. The concept of a North American trade bloc was thus born from this political desire to dominate or at least be equal to global counterparts and became foundational to American trade policy, with the primary driver for NAFTA being economic success. This agreement opened the markets between the US, Canada and Mexico, eliminating all tariffs and most non-tariff barriers, resulting in a tripling of trade within this trade bloc, reaching a \$1 trillion threshold.<sup>527</sup>

NAFTA took years of negotiations and was signed into office during the final month of then President George Bush's political term. NAFTA left an indelible mark on American trade as it was the template for subsequent US trade agreements. NAFTA was the largest American trade deal at that time, and it opened Mexico to trade, which until that point had been a closed economy, thus knitting together the economies of US, Mexico and Canada into a unified trading bloc. The 1992 NAFTA negotiations also marked the first time that the US conducted a dedicated environmental review of a trade agreement. The USTR was essentially learning on the job with NAFTA; the review provided the opportunity to identify environmental vulnerabilities throughout the negotiations. That ability to highlight issues for the trade negotiators was novel at the time, but the NAFTA review was critical of its role beyond identifying environmental concerns.<sup>528</sup> It is precisely this tension, between the ability to simply highlight environmental issues versus the ability to identify and in practice mitigate environmental concerns that is a fundamental point of discussion with the American ER of trade process, and in EA of trade models in general.<sup>529</sup> The crux of this debate, which started with NAFTA, explores what the ER is and should be capable of, particularly when discussing how green or environmentally friendly a trade agreement is.<sup>530</sup>

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<sup>527</sup> Congressional Research Service (2017) 11.

<sup>528</sup> The quality of this environmental review has been criticised, as discussed. See chapter 3(B)(2).

<sup>529</sup> See chapter 1(B).

<sup>530</sup> See chapter 1(C).

Beyond NAFTA's economic impacts, there has also been debate about this agreement's environmental impacts and shortcomings. Broadly speaking, during NAFTA's tenure from 1994 to 2021, the measure of atmospheric carbon dioxide in North America increased by 16 percent<sup>531</sup> and the measure of biodiversity loss within this same region also worsened.<sup>532</sup> Although these environmental impacts cannot be solely attributed to NAFTA, they are mentioned to illustrate the broader North American environmental outlook which was present during NAFTA's existence. It is significant to note that NAFTA's perceived environmental success, such as the creation of its environmental side agreement, and its perceived environmental failures, such as the environmental impacts resulting from the construction of manufacturing plants along the border between the US and Mexico, ultimately became political flashpoints.<sup>533</sup> In the politicization of NAFTA, debates about these issues became less accurate and relied on selective or inadequate data.<sup>534</sup>

Ultimately, from its inception, NAFTA was viewed through a political lens, and this agreement became a key talking point of various American presidential campaigns, with candidates either running on platforms in support of or against it. For instance, in a 1992 Presidential debate, candidate Ross Perot emphatically voiced his opposition to NAFTA and vowed to ensure the trade agreement did not pass, if elected.<sup>535</sup> Although NAFTA did pass, Perot's opposition to it and the ensuing media coverage and public attention surrounding his debate performance was significant in that it illustrated how easily a trade agreement could become politicized. It has been argued that had "Perot not made such an attention-getting fuss about the treaty, it is possible the American public would have paid little heed to the matter and that the Congress would have approved the treaty almost as a matter of course".<sup>536</sup>

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<sup>531</sup> See CO2 Measurements for data.

<sup>532</sup> Almond, Grooten and Peterson (2020) 28.

<sup>533</sup> Feeley and Knier (1992) 269, 271 discuss the environmental impact of these *maquiladoras* along the border.; Gladstone *et al* (2021) 18 highlights the support that the environmental side agreement had.

<sup>534</sup> Gladstone *et al* (2021) 18-19 raises this point in relation to the research on the environmental impact of NAFTA and questioned: "Can these diverging perspectives be resolved through a more systematic exploration of available data, literature and expert judgment on the environmental impacts of NAFTA?"

<sup>535</sup> Perot famously stated "there will be a giant sucking sound going south" in relation to American jobs and industry moving to Mexico, due to perceived lax environmental and labor standards. The New York Times, Transcript (1992).; President Bush was a supporter of NAFTA and on its ultimate signing, he stated: "If democracy is to be consolidated, the gulfs that separate the few who are very rich from the many who are very poor, that divide civilian from military institutions, that split citizens of European heritage from indigenous peoples, these gulfs must be bridged". Bush (1992).

<sup>536</sup> Berens (1999) 90.

NAFTA was again brought to the political stage during the 2016 Presidential elections, as Trump ran a campaign which criticised the trade deal's impacts on the American labor market, claiming it to be "a total disaster".<sup>537</sup> It should be noted that the majority of the debates and comments around NAFTA during the 2016 Presidential campaign focused on the agreement's economic impact with respect to employment in the manufacturing industry and that environmental concerns were a peripheral issue. Even though research found that the "net overall effect of NAFTA on the US economy appears to have been relatively modest", the political debate surrounding this agreement became contentious and reduced to soundbites, with little discussion of the actual data.<sup>538</sup> It was against this heavily politicized backdrop that the groundwork for USMCA was being laid.

In November 2016, then newly elected President Trump indicated his first actions after the inauguration would be to address NAFTA, with the goal of either withdrawing from the agreement or renegotiating it, ultimately opting for the latter. The political timing for these negotiations was delicate, as it was uncertain whether the US would have the bipartisan support to step away from NAFTA. The preparations for USMCA ultimately began in May 2017, when Trump informed Congress of his intention to renegotiate NAFTA.<sup>539</sup> The negotiations between Mexico, Canada and the US for the USMCA were fraught and at times it was unclear whether a deal would be made; they lasted over 13 months and ultimately ended in uniting three economies whose combined global gross domestic product is approximately 30%.<sup>540</sup> The discussions surrounding the USMCA were bookended by the Trump Administration, which was the driving force behind the USMCA, first labelling NAFTA as "the worst trade deal maybe ever",<sup>541</sup> which was the impetus for the start of the USMCA trade negotiations, and then declaring USMCA as a "wonderful new trade deal".<sup>542</sup>

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<sup>537</sup> Jagannathan (2017).; It should be noted that Hilary Clinton and Barack Obama, both Democrats, also campaigned against NAFTA, but Trump's stance on NAFTA was remarkable as he was campaigning as a Republican and his rhetoric on the trade agreement brought it to the attention of global media.

<sup>538</sup> Congressional Research Service (2017) summary.

<sup>539</sup> A notice was also published in the Federal Register notifying the public of a hearing to be held on 27-29 June 2017 and requesting comments about the negotiating objectives. See Federal Register (May 2017).

<sup>540</sup> Brodzicki (2021).

<sup>541</sup> Politico, Presidential Debate (2016).

<sup>542</sup> Partington (2018).

The timeline for the negotiations officially began on 16 August 2017 and ended on 30 September 2018. USMCA was signed on 30 November 2018 and after being approved by Congress, it was signed into law on 29 January 2020 and entered into force on 1 July 2020.

The initial versions of the USMCA, from the first 2017 proposal, to the initial deal from 30 September 2018, were viewed as flawed and in need of improvements and led to debate both politically and amongst stakeholders. Labour, consumer, and environmental groups, such as the American Federation of Labor and Congress of Industrial Organizations<sup>543</sup> and the Sierra Club, advocated for an improved USMCA and through the actions of Democrats, concessions were eventually achieved and on 10 December 2019, the US, Canada and Mexico agreed to an amended text of the original USMCA.<sup>544</sup>

The USMCA was born out of political wrangling and these political and economic forces, which bound the US, Canada and Mexico initially to NAFTA, were the same forces that carried over into the negotiations for USMCA: Canada and Mexico's desire for US market penetration and the desire of the US to obtain certain concessions, such as with the automotive manufacturing. Trump's success in the renegotiation of NAFTA and the emergence of USMCA was viewed as a political "win",<sup>545</sup> and American trade can now be framed temporally as the NAFTA years and post-NAFTA. USMCA falls within the post-NAFTA period, but the political climate of when this trade agreement came into fruition is significant, particularly regarding the ER process, as it emerged from this political rhetoric.

### C. Post-NAFTA: The Rise of USMCA and the Environmental Review

The negotiations for USMCA are noteworthy for two reasons: they were framed against Trump's "Make America Great Again" narrative, as Trump himself was the public face of the renegotiations, and environmental issues were not a primary focus.<sup>546</sup> At the time of the negotiations, the United States Trade Representative was John Lighthizer and the chief negotiator was John Melle, but both rarely spoke publicly, which left Trump as the main voice

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<sup>543</sup> AFL-CIO, Press Release (2019).

<sup>544</sup> See a timeline of USMCA at Congressional Research Service (2022).

<sup>545</sup> USDA, Press Release (2022).

<sup>546</sup> For an examination of Trump's political rhetoric, see Edwards (2018).

for America's stance on USMCA. Trump's approach to the negotiations was to portray it as freeing the US of the "contamination" of NAFTA and its negative implications for American jobs and to "redeem" US trade policy, by ensuring fair trade, that placed America first; Trump did not focus on environmental issues.<sup>547</sup> On the point of the environment, Gladstone *et al* contrasted the USMCA negotiations with the original NAFTA negotiations, and remarked that "little publicity was generated around environmental concerns", as "sticking points centered instead on industry and labor issues, for example, origin rules for auto part raw materials".<sup>548</sup>

In examining the final ER report produced by the USTR, there is little indication of the political rancour surrounding the negotiations. This ER labels USMCA as a modernization of NAFTA that brings it into the 21<sup>st</sup> century, which will "play a pivotal role in addressing ... environmental issues".<sup>549</sup> The USTR specifics that the aim of the ER is "to inform policymakers and the public about reasonably foreseeable environmental impacts of trade agreements...and help shape appropriate responses"<sup>550</sup> and that "[r]eviews are one of the tools we use to integrate environmental information and analysis into the fluid, dynamic process of trade negotiations".<sup>551</sup> The public messaging from the USTR is clear: they are working on a historic trade agreement and environmental issues will be brought in via the ER process.

In line with the EO 13,141 guidelines, the USTR, together with Trade and Policy Staff Committee (TPSC), began its scoping stage on 26 September 2017, through a publication in the Federal Register Notice, which requested written comments, either by mail or online, by 27 November 2017 and mandated that they be in English.<sup>552</sup> The instruction for comments in English only is noted because as the negotiations involved Mexico, a Spanish speaking nation, there could be an expectation that some stakeholders would be based in Mexico and this requirement could in turn limit the involvement of any civil society organisations without the

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<sup>547</sup> Lilly (2022), chapter 5.

<sup>548</sup> Gladstone *et al* (2021) 29.

<sup>549</sup> USTR, Final ER of USMCA (2019)

<sup>550</sup> *Id* at 7.

<sup>551</sup> Federal Register (September 2017) 44868.

<sup>552</sup> *Id.*; USTR and the Council on Environmental Quality (CEQ) oversee the implementation of EO 13,141 whereas USTR and TPSC conduct the reviews. The primary medium to receive comments was via the governmental website, [www.regulations.gov](http://www.regulations.gov), which is only available in English.

resources for translation services. In reviewing the comments that were submitted in response to USTR's earlier request for input on negotiating objectives, it is noted that although a similar requirement was made for comments to be in English, numerous submissions in Spanish were made and it is unclear if they were considered by the trade negotiators.<sup>553</sup> This approach to engagement is indicative of the US ER of trade approach to solely analyse environmental impacts within the US, which can in turn be contrasted with the European Union's (EU) approach to sustainability impact assessment (SIA) of trade which examines impacts both locally and within its trade partners.<sup>554</sup> It is suggested here that the lack of inclusivity, even at this early stage of the ER process, reflects some of the stakeholder challenges identified in the previous chapter.<sup>555</sup>

It should be noted that before the scoping stage was started or even completed, that USTR was already active in the renegotiations with Mexico and Canada, having held five rounds of negotiations by 22 November 2017, in which the US had "put forward substantially all of the initial U.S. text proposals, including new text in 27 chapters of NAFTA" and which primarily focused on concerns related to agriculture and industry.<sup>556</sup> On 17 November 2017, the USTR also released an updated summary of objectives for the trade renegotiations, which addressed environmental concerns, but did not mention greenhouse gasses or climate change.<sup>557</sup> Before the ER of trade's official scoping exercise had even begun, USTR was already fairly advanced in regards to its renegotiation agenda and priorities. This in turn leads to questions about how much consideration the trade negotiators were giving to the ER of trade process, considering the speed at which all of this was happening and the overarching political narrative which focused on the issue of American jobs. One of the stakeholders involved in the scoping stage commented on the fact that USTR was already actively involved in renegotiations before even involving stakeholders, stating: "Given that USTR is reportedly deep into this negotiation, there is valid concern these scoping comments are addressing a train that has already left the station".<sup>558</sup> This mismatch in timing between the request for

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<sup>553</sup> Federal Register (May 2017).

<sup>554</sup> See chapter 5(B) for a more detailed discussion on the EU approach.

<sup>555</sup> See chapter 3(C)(1).

<sup>556</sup> USTR, Press Release (2017). The other negotiation rounds happened on 1 September 2017, 6 September 2017, 22 September 2017, 11 October 2017, 22 November 2022.

<sup>557</sup> USTR, Renegotiation Objectives (2017).

<sup>558</sup> Center for Biological Diversity (2017) 1-2.

comments in the ER process and the advanced nature of the negotiations illustrates the tension between stakeholders and perceptions of transparency with the process and how their input is being utilised.<sup>559</sup> Even at this early stage of the ER process, some of the stakeholders were expressing concern that their involvement would be fruitless. This is problematic because it can cause these respective stakeholders to disengage through the remainder of the ER process or in future assessments and can in turn harm capacity building efforts.<sup>560</sup>

The scoping stage considers any economically driven environmental impacts,<sup>561</sup> and is meant to be an “early and open process”.<sup>562</sup> However, in the case of USMCA, it can be debated as to whether the scoping qualified as “early” considering the discussed issues on timing and negotiations. In determining the scope of the ER, the USTR and TPSC rely on three primary sources of information: 1. Data obtained through the public comments, 2. Responses from internal federal agencies’ experts and 3. Consultations from the Trade and Environment Policy Advisory Committee (TEPAC). TEPAC was created for purposes of providing advice to the USTR and it currently consists of 15 representatives from civil society organisations, academia, and consumer interest groups, with six of the current members having specific environmental interests.<sup>563</sup> The scoping stage resulted in seven comments, with five comments focusing on environmental issues,<sup>564</sup> and two of those five comments came from members of the Advisory Committee for TEPAC.<sup>565</sup> It should be noted that USTR stated they would also consider comments that had been received in response to a May 2017 request for input on the renegotiation objectives, and that this requested garnered over 1,450 comments,

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<sup>559</sup> See chapter 3(B)(2), (B)(3) and (C)(1).

<sup>560</sup> See chapter 1(D)(2) for a discussion of the importance of continuous engagement and capacity building.

<sup>561</sup> In line with USTR Guidelines (2000) Section V and VII.

<sup>562</sup> NEPA § 1501.9.

<sup>563</sup> See TEPAC Charter (2017). Current environmental members of TEPAC include Humane Society International, International Fund for Animal Welfare, The Nature Conservancy, Oceana, Environmental Defense Fund, and Environmental Investigation Agency.

<sup>564</sup> These comments came from: the Wildlife Conservation Society, who has experience in wildlife trade and works in the US, Canada and Mexico; Center for Biological Diversity, whose work regularly deals with the link between the environment and international trade issues; a private citizen, who works in water quality concerns for a Washington State based law firm; Oceana, the world’s largest ocean conservation organization; and Humane Society International, which promotes the protection of animals.

<sup>565</sup> Oceana and Humane Society International.

including feedback on environmental issues.<sup>566</sup> However, it is unclear how these comments were considered by the USTR and TPSC when conducting the ER or if they were related back to the negotiators because the final ER does not list any commentators, outside the ones received specifically for the assessment, in the commentators annex and the “summary of public comments” does not summarise any material outside of what was listed in the seven received comments.<sup>567</sup>

Usefully, through the US governmental website regulations.gov, which allows civil society to engage with and upload documentation for federal agencies, the USTR has now made publicly available all the comments and attachments that had been received during the USMCA ER process. In crosschecking the uploaded comments and USTR’s summary within the final ER report, it is noticeable that the summary does not recognise all the comments received. For instance, one comment directly states that ER is a key means to find vital information, explaining that “the ‘environmental review’ must address NAFTA’s contribution to climate change” and that “[t]he contributions of the US/Mexico/Canada to greenhouse gas emissions must be assessed since 1994”.<sup>568</sup> The final ER and USMCA agreement make no mention of climate change, greenhouse gasses and carbon emissions. In reviewing USTR’s summary of the comments, it appears that their synopsis of this commentator’s submission was to state: “Another commentator underscored the importance of the Environmental Review to reflect on the impacts of NAFTA on biodiversity conservation and loss, urging the Environmental Review include specific ways to address these issues in the United States, Canada, and Mexico”.<sup>569</sup> The USTR’s summary noticeably does not mention the primary theme of this commentator’s submission, which was climate change. Further, the comment submitted by the Center for Biological Diversity contains an entire section on global warming, which goes unaddressed.<sup>570</sup> Comments submitted by Sierra Club<sup>571</sup> and Center for International Environmental Law,<sup>572</sup> in response to the May 2017 request for comments, which should have

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<sup>566</sup> See the request in Federal Register (May 2017).; The responses can be found at USTR, Related Comments (2017).

<sup>567</sup> USTR, Final ER of USMCA (2019) 24, annex II.

<sup>568</sup> Ortman, Comments (2017)

<sup>569</sup> USTR, Final ER of USMCA (2019) 24.

<sup>570</sup> Center for Biological Diversity (2017) 2.

<sup>571</sup> Sierra Club, Comments (2017).

<sup>572</sup> CIEL, Submission (2017).

been considered during the ER, also raised the issue of climate change and the need to include the Paris Agreement within USMCA's list of multilateral environmental agreements, but this feedback also received no mention. The ER does acknowledge concerns raised about wildlife trafficking,<sup>573</sup> illegal, unreported, and unregulated fishing,<sup>574</sup> and the need to eliminate NAFTA's Chapter 11, Investor-State Dispute Settlement (ISDS) provision.<sup>575</sup>

Beyond the scoping stage, the USTR also considers input from TEPAC, who produce a report commenting on a draft text of the final agreement, and economic data and analysis. An examination of TEPAC's report shows it to be generally favourable to USMCA, finding that "the agreement as a whole will contribute to improved environmental outcomes by building on the environmental provisions of NAFTA 1994".<sup>576</sup> The TEPAC report points out that USMCA misses the opportunity to advance sustainable development, but states that otherwise, "the text we have examined largely meets the environmental objectives established by Congress", and "includes several welcome new environmental initiatives e.g., to reduce marine litter, a prohibition on commercial whaling, enhanced language on [illegal, unreported and unregulated] and sustainable fisheries management".<sup>577</sup> The TEPAC report recognises that stakeholders and trade partner Canada, wanted climate change to be directly addressed in USMCA,<sup>578</sup> and the TEPAC members express their "regret" in the text's failure to do so or to find common ground with Canadian negotiators.<sup>579</sup>

With respect to the economic data that was utilised for this ER, the report explains that it would base its results on economic modelling and analysis, but then does not specify what model, if any, was utilised. The ER report does reference statistics from the US Department of Commerce in an annex on data tables in regards to exports and imports for agricultural products, forest products, and energy related products.<sup>580</sup> During the scoping stage, one of the commentators had suggested that data sources should include: "data compiled by the

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<sup>573</sup> Wildlife Conservation Society, Comments (2017) 2-3.; Humane Society International, Comments (2107) 3-6.

<sup>574</sup> Oceana (2017) 7.

<sup>575</sup> Center for Biological Diversity (2017) 3.

<sup>576</sup> TEPAC Report (2019) 2.

<sup>577</sup> *Id.*

<sup>578</sup> Friedman (2018).

<sup>579</sup> TEPAC Report (2019) 10-11.

<sup>580</sup> USTR, Final ER of USMCA (2019) 45-47.

[Environmental Protection Agency], state environmental agencies, NGOs and any other entity conduct[ing] climate-related research".<sup>581</sup> In examining the final report, USTR does not clarify when or if data from these sources has been utilised and appears to primarily rely on the TEPAC report. There is a distinct lack of transparency as to what sources of data the USTR was relying on throughout the negotiations, particularly economic, and in reviewing the ER report, the USTR provides generalised summaries of the environmental issues and does not fully present the data that was relied upon to draw these conclusions. The data presented in the ER report lacks depth.<sup>582</sup>

It should be noted that other than comments received in the call for comments to the negotiating objectives, in May 2017, and for the scoping stage of the ER, in September 2017, USTR does not make any mention about further stakeholder engagement or outreach efforts. In examining the USMCA negotiations, it was clear that there were perceptions of lack of transparency about this trade deal amongst stakeholders, who labelled the closed nature of the negotiations as "completely unacceptable".<sup>583</sup> In this instance, when trade negotiations are confidential to secure negotiating positions, the ER process would typically provide another point of engagement for stakeholders, as the ER was created as the medium for public participation. However, engagement efforts during the USMCA were sorely lacking, which further fed into perceptions of the secrecy of this trade agreement. This is also illustrated in the fact that the USTR never prepared nor provided a draft ER to the public for comments; USTR went straight from the scoping stages in 2017 to the release of a final ER report in 2019.<sup>584</sup>

Throughout the USMCA negotiations, there is a disconnect between politics, expectations of the stakeholders and reality. The reality is that the Trump administration was working with the Democratic party to secure enough backing to have a bipartisan deal, so that each political party could hail it as a respective victory. Meanwhile, environmental organisations were

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<sup>581</sup> Humane Society International, Comments (2107) 12.

<sup>582</sup> See chapter 3 B(3) and C(3) for a discussion of the challenges that arise when the data is not transparent.

<sup>583</sup> Comments made by Ben Beachy, from Sierra Club, Mufson (2017)

<sup>584</sup> The USTR Guidelines (2000) VII(B)(3) states that a draft ER "shall normally be prepared and provided to the public" but recognizes that "in unusual circumstances, such as when a trade agreement is to be completed under a compressed negotiating schedule, it may not be possible to produce a Draft ER document".

hopeful that these negotiations were an opportunity to start afresh and truly tackle concerns with climate change and trade, as they expressed that “climate change—cannot be ignored by modern trade agreements”.<sup>585</sup> This disconnect thus illustrates the varying expectations held by different groups: varying from piecing together a deal sufficient to muster political support to a deal that could be transformational to the 21<sup>st</sup> Century. These varying expectations and assumptions carried over into this agreement’s environmental review process. Those groups who expected the USMCA to address all the previous environmental criticisms of NAFTA viewed the ER as a means through which environmental concerns could be properly raised, which would in turn translate to impacting upon the trade negotiations. Meanwhile, the USTR was facing pressure from the Trump administration to ensure that a deal was completed and was working in accordance with that political timeline.

In analysing the timeline of the negotiations and the ER process, it is questionable how impactful the assessment was on the negotiations, particularly input from stakeholders outside of TEPAC. The negotiations were well under way, with most of the trading objectives already stated before the ER process had even begun.<sup>586</sup> With respect to opportunities for stakeholder engagement during the ER, they were given the ability to submit comments at the scoping stage, but not beyond as USTR did not release a draft ER prior to releasing the final report. As a result, stakeholders, particularly civil society organisations, were essentially locked out of the process after the scoping stage. It is noted that TEPAC was given access to a draft negotiation agreement, upon which they based their report, but although their 15 members consist of experts from environmental, academic and business interests, their involvement is but one aspect of the ER process and does not negate USTR’s lack of rigorous collaboration with stakeholders throughout the assessment. In this regard, the stakeholder experience in the USMCA should be contrasted with the stakeholder experience during the European Union’s (EU) Mercosur trade negotiations. The EU sustainability impact assessment (SIA) of Mercosur was conducted by external consultants, but in those negotiations, the stakeholders were afforded the opportunity to communicate with the consultants via dedicated in-person and virtual stakeholder meetings and were able to comment on a draft of the SIA. Although the EU approach also had limitations in practice, there were more

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<sup>585</sup> Sierra Club *et al* (December 2019).

<sup>586</sup> USTR, Renegotiation Objectives (2017).

opportunities for meaningful engagement than in the US ER.<sup>587</sup> As discussed in the stakeholder challenge, effective stakeholder participation improves the quality of the assessment and perceptions of legitimacy, but to accomplish this, decision-makers must recognise the importance of this participation and actively incorporate it throughout the assessment process.<sup>588</sup> This has not been achieved in the USMCA ER.

The final ER was unequivocally supportive of the renegotiated trade agreement, stating: “Based on available information, including economic modelling and analysis...the estimated increase in trade that will result from the USMCA is unlikely to cause significant adverse environmental impacts in the United States” and that “No specific, significant negative environmental impacts for...other USMCA countries have been identified in the course of this review”.<sup>589</sup> In making these findings, with closed door trade negotiations and an ER process that did not actively engage with stakeholders, it appears as if the ER was confirming a pre-determined conclusion. The ER process was not thorough, did not engage with all the relevant environmental impacts that had been raised by stakeholders, such as climate issues, and failed to meet an important objective of conducting an assessment, which is to include environmental analysis from stakeholders in the negotiations. The ER report was labelled a “pro-USMCA public relations pamphlet”.<sup>590</sup> Reaction to both the assessment and subsequent trade agreement was mixed, as it was supported in political circles which had pushed the deal through but faced opposition from environmental groups who criticised the lack of consideration of climate issues and lack of a quality assessment. It is worthwhile to note that previous environmental debates about NAFTA focused on border related environmental issues, but this issue did not receive as much attention during the renegotiations or the assessment, as the focus was squarely on climate change. The view of stakeholders was that USMCA had presented a “golden opportunity”<sup>591</sup> to allow for the USTR to work collaboratively with stakeholders, but in examining the ER process, this opportunity was not realised, as stakeholders had been largely shut out of the process. The USTR was going through the

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<sup>587</sup> The topic of stakeholder engagement in Mercosur is thoroughly discussed in chapter 6.

<sup>588</sup> Dietz and Stern (2008) 226.; See chapter 3 (C) (1).

<sup>589</sup> USTR, Final ER of USMCA (2019) 4.

<sup>590</sup> Garver (2021) 50.; It should be noted that Mexico did not conduct an EA of trade, and that Canada’s EA of trade was also criticised for failing to properly explain its findings and was published after the trade agreement was already approved, which calls into question the timing of its findings.

<sup>591</sup> Humane Society International, Comments (2107) 4-5.

motions of the mandated review process, without taking advantage of the ability to work with stakeholders towards meaningfully identifying issues that should be addressed.

Examination of the USMCA timeline also reveals that changes to the text of the trade agreement resulted primarily from political actions taken by the US Democratic party, which further calls into question how impactful the ER process was on the negotiations. After multiple rounds of tri-lateral negotiations in 2017 and 2018, the US, Mexico and Canada had agreed upon a deal in principle on 20 September 2018. In April 2019, US Speaker of the House of Representatives explained that her party would not support ratification based on concerns over the enforcement of environmental issues and workers' rights.<sup>592</sup> House Democrats also wanted USMCA to "meaningfully address climate change", which was viewed as "one of the most pressing challenges we face".<sup>593</sup>

Although Pelosi was accused of political theatre for delaying USMCA's passage, the pressure exerted by the Democrats resulted in changes to the agreement, such as allowing federal inspections of Mexican factories<sup>594</sup> and enhanced environmental rules and monitoring.<sup>595</sup> Some of the environmental changes that resulted from Democratic intervention include the commitment of the US, Canada and Mexico to the adoption of seven multilateral environmental agreements, with the option, through the agreement of all parties, to add to this list in the future.<sup>596</sup> This was an improvement from the 2018 draft of the trade agreement, as that version had only mandated the inclusion of three multilateral environmental agreements. Although this was seen as a victory for the Democrats, examination of previous US trade agreements reveals that that this list of seven multilateral environmental agreements has been standard since 2010 and was included in the last three trade agreements, so the Democrats' intervention had simply reinstated that standard.<sup>597</sup> Despite significant input from stakeholders, particularly green groups, and even pressure from House

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<sup>592</sup> Reuters, New NAFTA (2019).

<sup>593</sup> This sentiment was expressed in a letter signed by over 100 House Democrats Raskin, Press Release (2019).

<sup>594</sup> USTR, USMCA (2020) Article 23.5.

<sup>595</sup> For a complete list of the changes pushed through by Democrats, including in relation to pharmaceuticals and dispute resolution, see Ways and Means, Improvements (2019).

<sup>596</sup> USTR, USMCA (2020) Article 24.8 (4) lists all seven of the multilateral agreements.; The 2018 USMCA draft had originally only contained three of these agreements.

<sup>597</sup> This includes the US-Panama Trade Promotion Agreement (2012), US-Columbia Free Trade Agreement (2012), and the US-South Korea Free Trade Agreement (2010).

Democrats to add the Paris Agreement to this list, there was not enough bi-partisan political support to make it happen, and the qualification that future agreements could be added to the trade agreement was seen as a compromise.

Environmental organisations viewed the ER process, the USMCA negotiations and the final agreement as missed opportunities. USMCA was the first new American trade agreement since 2012; this agreement was announcing to the world stage that the US was revamping its trade policy. As the future of US trade, USMCA could have revised NAFTA and set a new environmental standard. In December 2019, just prior to the signing of USMCA, representatives for Sierra Club, League of Conservative Voters and the Natural Resources Defense Council sent a joint letter explaining that “addressing climate change in modern trade agreements is a top priority for our organizations”, and stressed that they had been active throughout the negotiations in releasing statements, but essentially felt shut out by the process, and a lack of consideration for their position, which meant that they could not support USMCA for fear that this agreement would actually contribute to climate change.<sup>598</sup> In response to the Democratic induced revisions, Michael Brune, then Executive Director for Sierra Club, voiced the view that “today’s deal appears to fall far short of the fundamental changes that Democrats and environmental groups have consistently said are needed to curb NAFTA’s environmental damage”.<sup>599</sup>

One of the earlier versions of the National Environmental Policy Act (NEPA), which provided inspiration for the ER of trade model, included a section which discussed the importance of alternatives and the need for decision-makers to be aware of all the options and potential issues, stating that alternatives are “the heart of the environmental impact statement”.<sup>600</sup> It is clear that the USMCA assessment process did not allow for the meaningful consideration of alternatives. It is suggested here that USMCA, as the successor of NAFTA, was politicised even before its creation and that political rhetoric and deals was a compelling force in these negotiations and not the considerations of stakeholders or the ER process. This relates back to the discussion of the pressure paradox, as the political cycle was the driver for the ER and

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<sup>598</sup> Sierra Club *et al* (December 2019).

<sup>599</sup> Sierra Club (December 2019).

<sup>600</sup> NEPA § 1502.14.; Ortman, Comments (2017) also raises this point.

the completion of the trade deal, so much so that negotiations and the trade agenda had already been agreed to behind closed doors, with the ER process then being activated to meet the requirement under EO 13,141.<sup>601</sup> The USTR was bound to the political clock of the trade negotiations, and not the organic timeline of the ER process.

#### D. USMCA and the Limitations of the Environment Chapter

USMCA is an extensive agreement, consisting of 34 chapters, including a dedicated environment chapter<sup>602</sup> and 12 side agreements. The USTR and the Trump Administration have portrayed USMCA as taking a tougher stance on environmental issues than NAFTA or any other previous US trade agreement, as reflected in the focus on its environmental chapter. In a May 2019 version of USMCA, the agreement set out parameters for protection of the ozone layer,<sup>603</sup> protection of the marine environment from ship pollution,<sup>604</sup> air quality,<sup>605</sup> and addressed concerns with overfishing.<sup>606</sup> There was political pushback against this 2019 version of the deal, as various environmental groups and Democrats expressed that baseline environmental criteria were still not being met and that this deal “would perpetuate NAFTA’s legacy of exacerbating pollution and the climate crisis”.<sup>607</sup> Ultimately, environmental groups, the Democrats and the Trump Administration all had differing views on what environmental protection was sufficient and that was illustrated by what was included in the environment chapter and the exclusion of climate change principles from the agreement.

Over the years, USTR had transitioned from including environmental provisions in side agreements, as was the case with NAFTA in 1994, to including dedicated environment chapters within the trade agreements. Akin to the bombastic language used by the Trump Administration to describe the rest of the USMCA agreement, its environmental chapter, Chapter 24, was labelled by the USTR as the “the most advanced, most comprehensive, highest-standard chapter on the Environment of any trade agreement”.<sup>608</sup> As such, one would

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<sup>601</sup> See chapter 3(B)(1) for a detailed discussion of the pressure paradox.

<sup>602</sup> USTR, USMCA (2020) Article 24.

<sup>603</sup> *Id* at Article 24.9

<sup>604</sup> *Id* at Article 24.10

<sup>605</sup> *Id* at Article 24.11

<sup>606</sup> *Id* at Article 24.18

<sup>607</sup> Sierra Club *et al* (December 2019).

<sup>608</sup> See USTR, Fact Sheet.

anticipate that there would be significant changes, beyond what has been discussed, or that the language within the chapter would be specific and forceful. However, in examining the text, the language used is in line with previous trade agreements and it is generalised and open to interpretation, using qualifying terminology such as “shall strive”<sup>609</sup> Chapter 24 has been described as “boilerplate” and “largely unenforceable”,<sup>610</sup> which in turn promulgates the perception that USMCA’s ability to result in environmental change is questionable.

Cooperative measures found within Chapter 24 are meant to reinforce the US, Mexico and Canada’s abilities for environmental protection.<sup>611</sup> In short, this chapter formalises how the environmental goals of USMCA will be carried out. It is expected to reflect the issues raised in the ER and provide measures to ensure compliance. These cooperative measures are undertaken pursuant to the legally binding Environmental Cooperation Agreement (ECA),<sup>612</sup> which is in turn reviewed by USMCA’s Committee on Environmental Cooperation (CEC).<sup>613</sup> CEC was originally established under NAFTA and consists of a Council, a Secretariat and a Joint Public Advisory Committee, who is responsible for stakeholder engagement.<sup>614</sup> The ECA was signed in parallel to the USMCA and the preamble emphasises “the importance of green growth...in achieving a competitive and sustainable North American economy”.<sup>615</sup> The concept of green growth, as in economic growth that achieves economic protection, has historically been used in reference to climate change mitigation, but is now applied more broadly.<sup>616</sup> It is debated whether green growth is achievable, as “wonderful slogans [do not] necessarily lead to wonderful actions”<sup>617</sup> and it has been labelled as “business as usual”.<sup>618</sup> The ECA’s Work Program also establishes specific goals for cooperation, such as

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<sup>609</sup> USTR, USMCA (2020) 24.24(2) and 24.3(2).

<sup>610</sup> Tienhaara (2019) 2.

<sup>611</sup> USTR, USMCA (2020) Article 24.25(2) specifies that the Parties “are committed to expanding their cooperative relationship on environmental matters, recognizing it will help them achieve their shared environmental goals and objectives”.

<sup>612</sup> *Id* at 24.25(3).

<sup>613</sup> *Id* at Article 24.26-24.27.

<sup>614</sup> The Council consist of Mexican, Canadian and American environmental ministers.

<sup>615</sup> ECA, Agreement (2020) Preamble.; Th ECA went into force on 1 July 2020.

<sup>616</sup> Jacobs (2013) 198-199.; The OECD has defined green growth as “fostering economic growth and development while ensuring that natural assets continue to provide the resources and environmental services on which our well-being relies”. See OECD, Green Growth.

<sup>617</sup> Schmalensee (2017) 52.

<sup>618</sup> Tienhaara (2019) 1.

“strengthening environmental governance” and supporting sustainable development.<sup>619</sup> The Work Program’s proposed activities are not binding, but they illustrate the spirit of the updated ECA in relation to USMCA. However, there is a distinction between intentions and what happens in practice and USMCA has not been in force long enough to determine whether these stated goals coincide with realisation.

There are some notable firsts within this chapter, such as the prohibitions on shark fining<sup>620</sup> and commercial whaling,<sup>621</sup> and the treatment of the intentional, transnational trafficking of protected wildlife as a serious crime.<sup>622</sup> The chapter also contains an obligation for the reduction and removal of marine litter,<sup>623</sup> requires parties to make data about their ozone layer programs<sup>624</sup> and air quality publicly available,<sup>625</sup> and to commit to the promotion of sustainable forest management.<sup>626</sup> In the first instance, it appears that USTR has responded to some of the input received from NGOs during the ER process, particularly from those organisations who supported wildlife and marine interests.<sup>627</sup> Yet, in examining the concerns raised by these organisations during the scoping stage, they not only wanted to raise awareness, but they wanted to ensure that USMCA would be able to enforce these environmental provisions.

Under the CEC, which has been preserved and modernised under Chapter 24, the submission on enforcement matters (SEM) process provides stakeholders the opportunity to seek accountability and enforcement of environmental matters. Any stakeholder can file a complaint with the CEC Secretariat, explaining how a party to the trade agreement is not upholding its environmental obligations. The CEC Secretariat will then determine if the submission meets basic criteria under Chapter 24, such as “promoting enforcement rather

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<sup>619</sup> ECA, Agreement (2020) Article 10.

<sup>620</sup> USTR, USMCA (2020) Article 24.18(2)(b).

<sup>621</sup> *Id* at Article 24.19(2).

<sup>622</sup> *Id* at 24.22(6)(b). This is the first time this provision has appeared in a US trade agreement, and it carries a penalty of four years.

<sup>623</sup> *Id* at Article 24.12.

<sup>624</sup> *Id* at Article 24.9(2).

<sup>625</sup> *Id* at Article 24.11(3).

<sup>626</sup> *Id* at Article 24.23(4)(a).

<sup>627</sup> See Oceana (2017) and Wildlife Conservation Society, Comments (2017).

than at harassing industry”,<sup>628</sup> and whether the submission should receive a response.<sup>629</sup> There are some guidelines that the CEC Secretariat must consider, such as that the submission cannot be based solely on media coverage and that “private remedies” have been pursued first,<sup>630</sup> but otherwise the Secretariat has discretion in determining whether it forwards the submission to the accused party, who in turn has 60 days to respond. Based on this response, the CEC Secretariat will determine whether a factual record is merited, which is an independent investigation based on information from experts, publicly available data and government documentation.<sup>631</sup> If the environmental complaint is not resolved in response to the factual record, then an Environment Committee, consisting of senior government representatives from the US, Mexico and Canada will consider the complaint and must inform the CEC of its progress.<sup>632</sup> If the environmental dispute is still not resolved, it will then proceed to ministerial consultations<sup>633</sup> and finally end in the trade agreement’s dispute settlement process, which could in theory apply sanctions; but as discussed in the previous chapter, this has not been applied in practice.<sup>634</sup>

Historically, the CEC has been underfunded and overlooked due to perceptions it lacks enforcement powers, as it was primarily a forum to raise and discuss environmental matters.<sup>635</sup> Even though the CEC has been revamped with the USMCA, the 2014 reduction in annual party contributions from \$3 million to \$2.55 million has been maintained, forcing the CEC Council to tap into its reserves to maintain initiatives.<sup>636</sup> Yet, despite being underfunded, the primary power that the CEC has had over the years was “as an authoritative voice on a number of important issues”, as it called for environmental improvements, and in this regard, the value of the CEC lies in its ability to adequately examine and question issues, while working towards trying to find a solution.<sup>637</sup> A strong link between the CEC and the public has thus been key to its success in raising awareness and working collaboratively towards a

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<sup>628</sup> USTR, USMCA (2020) Article 24.27(2)(d).

<sup>629</sup> *Id* at Article 24.27(3).

<sup>630</sup> *Id* at Article 24.27(3)(c)-(d).

<sup>631</sup> *Id* at Article 24.28(4).

<sup>632</sup> *Id* at Article 24.26.

<sup>633</sup> *Id* at Article 24.31.

<sup>634</sup> *Id* at Article 24.32.

<sup>635</sup> Charnovitz, *Reflections* (2002) 492 commented on this point in regard to the Commission under NAFTA.

<sup>636</sup> CEC, *Operational Plan* (2021) 6.

<sup>637</sup> Block (2003) 35-36.

solution. NAFTA's CEC has been described as bringing that trade agreement "closer to society" and "fostering local innovation and education" in working to achieve environmental protection.<sup>638</sup> When concerns have been raised about the integrity, fairness, or effectiveness of the CEC, that has in turn impacted stakeholder involvement, which is problematic.<sup>639</sup> This relates back to the previous discussion about stakeholder involvement in the ER process, and it further underscores the importance of that collaborative relationship, illustrating how both the assessment process and the stakeholders themselves can benefit from effective engagement.<sup>640</sup>

Some of the qualifying language used in Chapter 24 about the SEM submission process, such as the guidance that a submission must not harass an industry or be based solely on media reports,<sup>641</sup> have sparked concerns that these caveats are "pro-industry", which suggests a bias against stakeholders.<sup>642</sup> This in turn raises questions as to how effective the revamped CEC will be at enforcing Chapter 24 provisions and carrying out this process. There are currently eight open submissions for purported environmental violations, with seven against Mexico and one against the US. For instance, a submission was filed on 11 August 2021 by the Center for Biological Wildlife against Mexico.<sup>643</sup> This submission was regarding the endangered vaquita porpoise, of which there are only 10 left in the world, alleging that Mexico was in violation of the 2020 Gillnets Order and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) by failing to prevent illegal totoaba fishing and trade and ensuring a gillnet free zone for the protection of the vaquita.<sup>644</sup> On 8 September 2021, the CEC Secretariat found that the complaint satisfied the criteria under Chapter 24, and merited a response, giving Mexico 60 days to respond. In response to the submission, Mexico seized illegal totoaba, fined illegal fishers and seized illegal gillnets.<sup>645</sup> Based on Mexico's response, on 1 April 2022, the preparation of a factual record was recommended with a

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<sup>638</sup> Khan (2017) 4.

<sup>639</sup> Knox (2014) 92.

<sup>640</sup> See chapter 3(B)(1) and (C)(1) and chapter 2(D)(1) on the importance of knowledge creation.

<sup>641</sup> USTR, USMCA (2020) Article 24.27(2)(d).

<sup>642</sup> Gladstone *et al* (2021) 29.

<sup>643</sup> This was a joint submission. The submitters were the Animal Welfare Institute, Natural Resources Defense Council, and Environmental Investigation Agency.

<sup>644</sup> Vaquitas have steadily declined over the years, going from 97 in 2013, to 50 in 2015, to 10 in July 2017. CEC Secretariat, Submission (August 2021) 13.; See also Center for Biological Diversity, Press Release (2021).

<sup>645</sup> CEC, Press Release (2022).

finding “that a factual record could provide information on Mexico’s efforts to implement strategies and the effectiveness of its measures ... to effectively control illegal traffic in totoaba within the CITES framework”.<sup>646</sup> As of September 2022, the CEC Secretariat’s work on the factual finding is ongoing amid concerns about Mexico’s enforcement measures.

It is noteworthy that in the past, efforts to save the vaquita found success not by engaging directly with the Mexican government, but through direct engagement with local fisherman and instructing them on how to use vaquita-safe nets.<sup>647</sup> Environmentalists stress that working with local communities is crucial to ensuring these environmentally safe practices. In reviewing the timeline of this claim, which started in August 2021 and is still unresolved over a year later, as of September 2022, it raises questions as to the practicality of the CEC as an enforcement mechanism for the environment chapter and its ability to achieve meaningful results in a timely fashion.

Of the seven other open submissions, the CEC Secretariat has recommended that five of those warrant a factual record, the Secretariat is currently examining a governmental response to determine if another submission should move to the factual record stage and it has denied a submission, notifying the submitter that they can revise their claim and apply again. Analysis of the USMCA SEM process reveals that, similar to the experience under NAFTA, it does afford stakeholders, particularly those organisations that have a vested interest and bring the claim, a direct medium through which they can engage, and these civil society organisations have welcomed this opportunity.<sup>648</sup> Yet, in comparing this revamped CEC with the original version created under NAFTA, these changes are incremental improvements, as the CEC is still underfunded, it lacks direct authority to enforce change as the factual records have historically rarely provided an actionable plan for improvement, and the bureaucratic nature of filing submissions is resulting in a lengthy process to challenge environmental issues.<sup>649</sup> As

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<sup>646</sup> CEC Secretariat, Notification (April 2022).

<sup>647</sup> Vernimmen (2022).

<sup>648</sup> See Liang (2022) in which a representative for Oceana expressed satisfaction with the CEC Secretariat’s consideration of a submission they made against the US stating: “We applaud the CEC Secretariat for taking the first step in the USMCA process to hold the United States accountable to protect critically endangered North Atlantic right whales”.

<sup>649</sup> Knox and Markell (2012) 520, see also 529-540 for a detailed discussion of factual records and how to improve them.; USTR, USMCA (2020) 24.28(7) explains that “the Environment Committee shall consider the final factual record in light of the objectives of this Chapter and the ECA and may provide recommendations to

a result, at this stage, it is questionable how effective USMCA's version of the CEC will be at preventing environmental violations, but it can be argued that this modernised CEC appears to offer much of the same as its predecessor.

During the early stages of the negotiations, there was concern that the CEC would not make it into the final agreement, despite feedback from stakeholders during the ER process that they saw value in its inclusion.<sup>650</sup> Once the CEC was a part of the negotiations, USTR could have realised that opportunity and modernised CEC by taking a much more progressive approach to its functionality. Given the political nature of the negotiations and once it was clear that climate change concerns would not factor in the trade agreement, negotiators could have focused on making the CEC more impactful, by increasing its funding and resources for purposes of supporting its investigations into environmental challenges and mandating environmental data collection and monitoring on issues already covered in Chapter 24, such as air quality, ozone protection and marine pollution to ensure that over time, there would be a source for quality longitudinal data<sup>651</sup> Gladstone *et al.* noted the challenges in assessing the effectiveness of NAFTA, particularly along the border, was due to the lack of quality, long-term data, and that debates and studies thus relied on generalisations and were ultimately inaccurate.<sup>652</sup> The CEC could work collaboratively with local scientists and NGOs to build this database, which could in turn be utilised to monitor if environmental regulations, as set out in the environment chapter, are being met, thus contributing towards sustainability efforts.<sup>653</sup> It is suggested here that this was a missed opportunity to take a progressive approach with the renewed CEC which could have contributed towards making the environment chapter truly advanced and comprehensive.

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the Council on whether the matter raised in the factual record could benefit from cooperative activities", but this language is not bold enough to indicate that the factual record will offer specific recommendations.

<sup>650</sup> Vaughan (2018).

<sup>651</sup> Khan (2017) 4.

<sup>652</sup> Gladstone *et al* (2021) 30.

<sup>653</sup> *Id* at 29 and Khan (2017) 4 also raise this point.

## E. Conclusion

This chapter has examined ER of trade through the lens of the USMCA trade negotiations and agreement to demonstrate how politicised trade negotiations could in turn impact upon the quality of the assessment process. Before USMCA, the US had last successfully ratified a trade agreement in 2012. Beyond modernising NAFTA and making it more appropriate for current needs, USMCA was a pronouncement of America's new approach to trade policy; it was introducing the future of US trade and its values. Although NAFTA was due for an update, the Trump Administration instead used the renegotiations as an opportunity to rebrand US trade policy in line with Trump's political rhetoric, which in turn made the goal of the USMCA negotiations about getting the deal done versus consideration for what was being accomplished in the trade agreement and what was enforceable. The catchy expressions and rhetoric should have been replaced by more meaningful analysis, particularly regarding the ER process.<sup>654</sup>

The previous chapter had examined the internal paradoxes of the ER of trade process and identified how this has resulted in limitations in practice. ER of trade was created as a means to engage stakeholders and in so doing, gather environmental knowledge that could be utilised throughout the trade negotiations. As a flexible tool, the ER can adapt and change with each new assessment that it is applied to, and it is hoped that the assessment process would continue to evolve and improve each time, with the prospect that it could become a tool of environmental governance.<sup>655</sup> It was suggested in improving the ER process, there needs to be a greater focus on stakeholder engagement and that the assessment should be run with that in mind.

An examination of the ER of USMCA has further illustrated these limitations, particularly as the role of stakeholders was marginalised and negotiations were being directed by political interests, as opposed to encouraging stakeholder cooperation. The USMCA negotiations were a missed opportunity to use the ER process to meaningfully engage with stakeholders and to work towards fostering collaborative relationships, which could ensure that sustainable goals

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<sup>654</sup> Schmalensee (2017) 56.

<sup>655</sup> See the discussion on this point in chapter 2(D).

were being met in the future. In identifying how the USMCA became politicised and how that in turn impacted the assessment process, it is hoped that this same situation could be recognised and avoided in future assessments.

## **VII. Chapter 5: The EU: Sustainability Impact Assessment of Trade Agreements**

### **A. Introduction**

In the European Union (EU), Sustainability Impact Assessment (SIA) of trade negotiations was developed in anticipation of public unrest to increased trade.<sup>656</sup> In preparation for the World Trade Organisation (WTO) Ministerial meeting in Seattle in 1999, then European Commissioner for Trade, Pascal Lamy, explained that SIA was created as an awareness to three specific pressures: the EU was opening its markets to trade and becoming more globalised, the concept of sustainable development was part of EU policy objectives, which meant that a balance needed to be found between economic goals and environmental realities, and the EU realised that it needed stronger governance in trade policy, which in turn led to a need for improved exchange between decision makers and civil society.<sup>657</sup> As the EU was entering into the 2000s, the European Commission (EC) emphasised that it would lead by analysing the impacts of trade policy and promoting sustainable development. SIA was seen as an integral tool to ensure that civil society was consulted, while trade policy was constructed to align with environmental and social concerns.

Previous chapters discussed the evolution of EA of trade models, explaining how their emergence predisposed them to inherent issues such as lack of clarity on objectives in practice, while also arguing why EA of trade could be an important tool for environmental governance, if its strengths were realized. In light of that discussion, the American ER of trade model was examined, to explore the North American experience and identify challenges facing that model. This chapter thus seeks to situate the EU SIA of trade model within this discussion to explore the European experience and examine the challenges this model has faced and compare that with the US experience. Significantly, in comparison to the US, which exclusively focuses on environmental issues within its own borders, the EU model emphasises a more macro approach to assessment in embracing sustainable development and seeking to

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<sup>656</sup> The EU first launched its model in 1999, in comparison to the US and Canada, who conducted environmental assessments of trade in 1992 and 1994 respectively.

<sup>657</sup> Lamy (2003).

identify both impacts internally and within its trading partner. The EU follows a more expansive approach to assessment. Lamy explained that the European approach was unique because it reflected Europe's collective preferences for good governance and collaborative decision making. Lamy further clarified that the EU's negotiating positions were in turn constrained by these preferences.<sup>658</sup> This is distinct from the US, which highlights the benefits of ER of trade, but does not explicitly state that negotiating positions are checked by the foundational principles of that model.

When SIA of trade was first created for the Seattle Ministerial meeting, the EU looked to the US and Canada to develop its initial assessment model. The initial SIA model was basic in that it did not proceed beyond a scoping stage, it simply confirmed whether there were environmental issues that required further investigation.<sup>659</sup> SIA was further developed when it was employed by the EC in 2001 for the Doha Development Agenda.<sup>660</sup> This assessment model was then utilised in all regional, bilateral and multilateral trade negotiations on a regular basis. By 2006, the EC developed a handbook on SIA, to provide best practice and make the process more uniform.<sup>661</sup> In 2016, a second edition of this handbook was released, which included lessons learned from previous SIA experiences and provided a methodological foundation for the SIAs to follow.<sup>662</sup> As of August 2022, the EC has concluded 33 SIAs, with two current ongoing assessments.<sup>663</sup>

Since its creation in 1999, SIA has been regularly assessed and refined and from 2012, it now incorporates human rights impact assessments.<sup>664</sup> Throughout this model's development, the EC has continued to emphasise the importance of three main points: the role of SIA in achieving sustainability, in feeding into the work of negotiators and the significance of a solid relationship with stakeholders. The strength of the relationship with stakeholders and their engagement is viewed as foundational to the success of this model. Former European

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<sup>658</sup> *Id.*

<sup>659</sup> George and Kirkpatrick (2006).

<sup>660</sup> *Id.*; See Kirkpatrick and Lee (2002).

<sup>661</sup> EC Handbook (2006).

<sup>662</sup> EC Handbook (2016).

<sup>663</sup> This total also includes SIAs of Economic Partnership Agreements.

<sup>664</sup> The EU presented a *Human Rights and Democracy: EU Strategic Framework and EU Action Plan* in June 2012, which proposed the incorporation of human rights into all impact assessments. EU, Human Rights Action Plan (2012) 11.; See Bürgi (2014).

Commissioner for Trade Cecilia Malmström also highlighted the potential of SIA in 2016 and the importance of collaboration, explaining that there needed to be a joint effort between stakeholders, external experts and the Commission to ensure SIA resulted in more responsible trade.<sup>665</sup> It is argued that the emphasis on SIA throughout various Commission documentation and political speeches elevates the concept of the assessment and of its perceived importance. In touting this perception of importance, in particular the emphasis on civil society involvement and a collaborative approach, the SIA has become an instrument of promise to those involved in the assessment process.

In line with holding up SIA as an important tool, the EC, through its stocktaking seminars, and commentaries has debated the effectiveness of this assessment since its inception. Why do it again? Over twenty years after SIA was launched and particularly considering the recent increase in completed trade negotiations, it is an apt time to take stock and question the underlying assumptions of this instrument to determine future practice. It is also particularly pertinent to assess SIA now given ever increasing concerns over global environmental issues, such as climate change.<sup>666</sup> Moreover, considering the June 2019 European parliament elections, where Green party candidates succeeded in the polls,<sup>667</sup> the political atmosphere throughout Europe is sensitive to environmental concerns and ideals now more than ever.

It is asserted there is an underlying assumption that SIA effectively engages with civil society while promoting sustainable development. This chapter will challenge this assumption of SIA. On its face, the EU SIA model appears to be an enhanced version of the of the US environmental review (ER) of trade model, which has faced issues in meaningfully engaging with stakeholders, in that from the start, the SIA model was constructed to operate with civil society involvement as a guiding principle. Engagement and working together with stakeholders are supposed cornerstones of this model. This focus on stakeholder exchange is emphasised throughout the EC's stocktaking seminars and reflections on the importance of SIA. On paper, the SIA model sounds promising, but this chapter questions what is realised in practice.

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<sup>665</sup> EC Handbook (2006).

<sup>666</sup> See NOAA (2017) and NOAA (2021).

<sup>667</sup> Graham Harrison (2019).

This chapter will be arranged into two sections. The first section will examine three underlying expectations that have resulted from the assumption that SIA actively engages stakeholders to achieve sustainable development: the expectation of achieving principles of sustainable development in practice, the expectation of stakeholder involvement and the expectation of transparency. The second section will further flesh out these expectations by examining the challenges SIA has experienced in practice: the limitations caused by innate biases, the limitations of stakeholder engagement and the limitations of timing and integration. This chapter will ultimately explore the difference between SIA in theory and the realisation of SIA in practice for purposes of identifying strengths and limitations of this model, particularly in comparison to the US ER of trade. The challenges of SIA will be further explored in the next chapter, in the context of the recent EU-Mercosur trade agreement.

#### B. The Assumptions of Sustainability Impact Assessment

In assessment literature, when compared with other EA of trade models, SIA is presented as an ambitious model, which is illustrated in its approach to sustainability and to exploring impacts within its trade partners.<sup>668</sup> To have successful trade agreements, the EC views three elements as being intertwined: trade policy, natural resources and civil society.<sup>669</sup> When one element is engaged, the others must be as well; the process works together. SIA was created as a means through which the EC would be able to interact with all these elements.

In engaging these elements, the EC relies on external consultants, who steer the SIA process. SIA differentiates itself from other EA of trade models through the usage of these external consultants, who are not affiliated with the EC. When the EC pushed for the development of SIA, it was an external consultant, the Institute for Development Policy and Management and Environmental Impact Assessment Centre at the University of Manchester that assisted in developing the SIA methodology.<sup>670</sup> The consultants signalled the challenges in developing this methodology, stating “[SIA] is a relatively new concept for which, previously, there was

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<sup>668</sup> Gehring *et al* (2013) 9.

<sup>669</sup> Lamy (2003).

<sup>670</sup> See Kirkpatrick, Lee and Morrissey (1999).; Kirkpatrick and Lee (1999) 2-3.

no established methodology and little practical experience, particularly relating to international trade policy".<sup>671</sup> The consultants were faced with developing an assessment model that covered a broad geographic scope and a lack of examples on how to integrate the three distinct assessments of economic, social and environmental issues into one assessment framework.<sup>672</sup> From the perspective of these consultants, they were creating an assessment model from the ground up.

In developing the SIA methodology, the consultants began by conducting a literature review, to explain the current understanding of assessments, and then proceeded to examine other assessments of trade agreements, such as those conducted by the US and Canada of the North American Free Trade Agreement. Based on this analysis, between 1999 to 2002, the consultants created SIA Phase One, Phase Two and Phase Three reports, which provided guidance on the assessment process and also provides insight into the foundational principles of this instrument. The SIA Phase One and Phase Two reports proposed a methodology for conducting a SIA of the EU's New Round negotiations at Seattle. The Phase One report concluded that the assessment framework's "aim is to be balanced in its coverage of economic, social and environmental impacts (both positive and negative) as well as being practical and transparent in its approach".<sup>673</sup> The Phase One and Two reports proposed a *preliminary* SIA methodology, whereas the Phase Three report proposed a *full* SIA methodology that could be applied at varying phases during the assessment.<sup>674</sup> The Phase Three report, which builds on the work of previous reports, clearly explains that SIA is a process that needs to be adaptable to the issues being discussed, so no two SIAs will necessarily be the same.<sup>675</sup> Although SIA is meant to be flexible and no two will be the same, in analysing the Phase Three report, key factors are emphasised which are meant to be inherent to all conducted assessments: the participation in dialogue with stakeholders throughout the process and the commitment to sustainable development, the importance of which as a goal in trade negotiations was confirmed by the Doha Ministerial Declaration.<sup>676</sup>

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<sup>671</sup> Kirkpatrick and Lee (1999) 2.

<sup>672</sup> *Id.*

<sup>673</sup> Kirkpatrick, Lee and Morrissey (1999) 61.

<sup>674</sup> Kirkpatrick and Lee (1999) 2

<sup>675</sup> Kirkpatrick and Lee (2002) 2.

<sup>676</sup> Doha Declaration paragraph 6.

The purpose and methodology of SIA was further explored in 2003, at a seminar sponsored by the EC in Brussels to reassess the SIA process. Like the Phase Three report, the Brussels seminar highlighted the importance of stakeholder dialogue and sustainable development.<sup>677</sup> Based on the reports from the external consultants, the SIA seminar in Brussels and the EC's own experience, the EC proceeded to issue handbooks on best practice in 2006 and 2016, which further emphasised stakeholder exchange. This development of SIA of trade resulted in the assumption that the EC viewed civil society as a key partner and that this model would engage collaboratively with stakeholders while working towards sustainable development goals.

This brief examination of the history of SIA of trade reveals a trifecta of themes that are central to the foundation of this instrument: sustainable development, stakeholder involvement and transparency. These terms are used repeatedly throughout the EC's SIA documentation, resulting in the perception of their significance and expectations of what will happen in practice. This section thus seeks to examine the expectations surrounding these three themes.

### 1. The Expectation of Sustainable Development

As the history of SIA shows, there is a clear expectation that this assessment model will promote the principles of sustainable development, which is in turn expected to influence trade negotiations. Yet, the trade negotiation process is a highly charged setting: negotiations are political, negotiating positions can change quickly and alliances can form and fall apart throughout.<sup>678</sup> This is the reality of what trade negotiators face, as they try to get the deal done. A country's negotiating position is guided by its negotiation mandate, which is kept confidential to maintain the country's competitiveness during the trade negotiation process.

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<sup>677</sup> Lamy (2003).

<sup>678</sup> George and Kirkpatrick (2009) 66.

In the context of the EU, the EC carries out an Impact Assessment (IA) to guide the trade mandate, and this IA is distinct from the public SIA, in that it is an internal process. The IA has been described as an “arena for negotiation”, which is dynamic.<sup>679</sup> The IA starts the assessment process, identifying potential economic, social, and environmental impacts, in line with sustainable development concerns. When the IA is initiated, the appropriate EC departments then become involved in the assessment process. After the IA, if the Council of the EU provides the EC with a mandate to proceed with trade negotiations, then the process of SIA of trade will formally begin and it should commence no later than six months after trade negotiations have started.<sup>680</sup> The IA thus sets the tone for the negotiations and the SIA process, as it is the first time that all three dimensions of sustainable development are explored. SIA in turn carries over this focus on the elements of sustainability throughout its own assessment process.

SIA was crafted as an ongoing process which occurs simultaneous to the trade negotiations, and there are at least three basic stages: inception phase, interim phase and final phase. At the onset of the SIA, an inter-service steering group is created, for the purpose of engaging with the EC, consultants and stakeholders throughout the assessment process. At each stage of the process, consultants are meant to seek stakeholder involvement and publish comments of draft reports. The inception phase dictates the approach that has been proposed by the consultants to ensure a comprehensive assessment and it begins with various inputs, such as consultations, meetings with EC officials, stakeholder workshops and civil society meetings. After these various meetings, the consultants will review relevant documentation, develop a methodological and conceptual framework, conduct preliminary screening and scoping and assess stakeholder feedback. This will in turn lead to a draft inception report, which is opened to public comments. Together with civil society stakeholders, the inter-service steering group discusses the draft inception report, and then provides further feedback. Based on this feedback, the consultants proceed to produce a final inception report, which is made available online. The inception phase is identified as an important point through which stakeholders can initially become involved in the SIA process and through which the dimensions of sustainable development are reaffirmed.

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<sup>679</sup> Bäcklund (2009) 1084.

<sup>680</sup> EC Handbook (2016) 11.

The purpose of promoting sustainable development was mentioned throughout the various consultant reports discussed above, but the EC directly addressed the question of the “why?” of SIA in a 2004 consultation paper<sup>681</sup> and then later reaffirmed this position in the 2006 SIA handbook. Two primary reasons for why are outlined: “trade policy should promote sustainable development” and the use of “SIA as a tool for sustainable development and better governance”.<sup>682</sup> Sustainable development first became enshrined in EU law with the signing of the Maastricht Treaty in 1992 and was later affirmed in the Amsterdam Treaty in 1997. In 2001 at the Gothenburg Summit, the EU committed to a Sustainable Development Strategy (SDS). The SDS proposed greater integration in policymaking and impact assessments were mentioned as one of the regulatory tools to achieve this aim. The EU also committed to sustainable development at the 2002 World Summit on Sustainable Development in Johannesburg. The EU has further committed to the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.<sup>683</sup>

The EU’s commitment to sustainable development is evident. In light of this commitment, the EC focused on the link between sustainable development and trade liberalisation. Trade liberalisation was viewed as a driver which could create opportunities, such as economic growth, but it could also result in negative impacts, as evidenced in environmental issues such as overexploitation of resources.<sup>684</sup> This link between trade and sustainable development lead to the EU’s reliance on SIA as a means through which to promote sustainability. The EC committed to impact assessment, generally, as a tool at the Gothenburg Summit. In its 2006 Handbook, the EC further explained why SIA was needed, stating that SIA afforded the Commission the opportunity to measure non-trade impacts arising from trade, such as environmental issues, and that it also helped satisfy civil society’s desire for increased public debate on trade policy.<sup>685</sup>

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<sup>681</sup> EC Consultation Paper (2004).

<sup>682</sup> *Id* at 3.

<sup>683</sup> EC 2030 Agenda.

<sup>684</sup> EC Consultation Paper (2004) 3.; See also EC, Communication (2002).

<sup>685</sup> EC Handbook (2006).

Although the 2016 handbook does not have a specific section on why the SIA is carried out, the purpose and rationale behind SIA is discussed throughout. This handbook explains that transparency is essential to SIA and this assessment is a means through which stakeholders both inside and outside the EU can become involved, and that SIA feeds into and guides the negotiations.<sup>686</sup> The language on “why” or “purpose” provided throughout EC documentation is not legally binding, but it is nonetheless useful to examine this usage to develop an understanding of how SIA was marketed as an instrument, to appreciate both the stated and unstated intent behind this tool.

Based on the EC documentation, there is a clear perception that this assessment’s objective is to unequivocally promote sustainable development, while actively involving stakeholders throughout. It is argued that in questioning this assumption as to SIA’s objective, limitations begin to appear. For instance, SIA consultants Kirkpatrick and George, who were part of the Institute for Development Policy and Management at the University of Manchester, which assisted in creating the original SIA model, wrote that “[t]rade negotiators are not responsible for halting climate change”.<sup>687</sup> In essence, they were tempering the expectations of this model in practice and what it would be able to achieve in influencing trade negotiations, even if this was not being expressed overtly throughout the SIA documentation. They further explain that “SIA studies have yet to have a major direct influence on the EC’s negotiating positions”.<sup>688</sup> In chapter one, the challenges of achieving sustainable development goals were also discussed, as sustainable development has become more of a buzzword than an attainable reality in practice.<sup>689</sup> Bearing all this in mind, it is worthwhile to question the expectations placed on SIA.

Minimally, SIA is meant to provide stakeholders with an opportunity to engage in the assessment process through consultations. This in turn results in an assumption that this would lead to transparency with the trade negotiation process. Stakeholder feedback and other information obtained during the assessment process provide negotiators with guidance

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<sup>686</sup> EC Handbook (2016) 5-16.

<sup>687</sup> George and Kirkpatrick (2009) 79.

<sup>688</sup> *Id* at 78.

<sup>689</sup> See chapter 1(C)(2).

in support of their decision making, but there is lack of clarity on how that information is utilised by the trade negotiators in practice. There is an underlying assumption by some stakeholders in the process, including those who provide the feedback, that this information would filter back into the negotiation process. However, like the US ER of trade model, there is no legal requirement which dictates how the results of the assessment are to be utilised through the trade negotiation process. In theory, the trade negotiators could disregard these results, if they are not compatible to their trade mandate or negotiating goals. This leads to criticism about the lack of a clear legal requirement to implement the assessment results, which in turn leads to perceptions of ineffectiveness.<sup>690</sup>

It is argued that without a legal mandate that requires the implementation of the assessment findings, expectations of SIA achieving sustainable development are just that: they are a view of what SIA is meant to achieve in theory, but they are not a reflection of reality. It is important to address this reality, because as discussed in chapter two when addressing the issues of stakeholder engagement and allyship, for SIA to be a truly collaborative process, there needs to be clarity on the objective of this assessment and what realistically can be achieved in practice. The usage of untested buzzwords is not a means to promote meaningful stakeholder cooperation.

## 2. The Expectation of Stakeholder Involvement

There is no “one-size-fits-all” approach to SIA, as each assessment is unique to the trade negotiations, but all SIA models have an underlying expectation of active stakeholder involvement. There is a *methodological framework* that is shared between SIAs, which includes basic stages such as screening and scoping.<sup>691</sup> This framework is distinguishable from the *methodological approach*, which are various techniques, such as economic modelling, utilized by the external consultants in analysing a specific issue within the trade agreement.<sup>692</sup> The actors involved in the SIA process include the EC, consultants and stakeholders. These three distinct groups must work together, as their cooperation is viewed as vital to ensuring

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<sup>690</sup> Gehring, Stephenson and Cordonier Segger (2017) 187.

<sup>691</sup> EC, Note (2003).

<sup>692</sup> EC Handbook (2016) 9, fn 14.

quality assessments which feed into the trade negotiations, with a particular emphasis on stakeholder involvement.

The EC is meant to be informed throughout of the assessment's progress, supplying the respective information into the negotiations, and the EC also serves to provide guidance, when needed. Consultants are encouraged to interact frequently with EU officials, providing EU negotiators with frequent updates on the assessment. Ideally, the consultants would provide input on the SIA process and then EU officials would respond with updates on the negotiations, resulting in a back-and-forth collaboration which would in turn facilitate stakeholder involvement. In practice, there is not much clarity on the collaborative nature of the relationship between the EC and the consultants.

Consultants are the independent external player in the SIA process. This can vary between SIAs, as they are selected on an assessment-by-assessment basis via a public tendering procedure. In a public consultation on updating the SIA handbook, the European Economic and Social Committee asked for clarity on the public tendering procedure. The Directorate-General for Trade responded that a call for tender is launched with the goal of establishing a minimum of three and a maximum of five consultants to be considered for an assessment, and that there is a framework for the re-opening of the competition for tender to ensure that each assessment has the best suited experts.<sup>693</sup> It is worthwhile to note that beyond this information, the specifics of the competitive tendering procedure are not readily available, making it difficult to analyse this procedure and to fully understand how consultants even reach the point of consideration. As a result, there is lack of clarity on how the consultants are initially identified. It is argued in relation to the expectation of stakeholder engagement, this lack of clarity is frustrating because it makes it difficult to determine who the consultants are and whether they are best suited to engage with stakeholders.

Examination of the tendering process does, however, identify some obstacles. A potential challenge of the competitive tendering process could be the inherent pressure of timing associated with the impact assessment process. Stakeholders, primarily civil society, and

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<sup>693</sup> EC Summary of Responses (2015) 3-4.

NGOs are keen for the SIA to take place as early as possible, so that it affords the opportunity for data from the assessment to be utilised during the trade negotiation process. Stakeholders want to see the assessment run alongside negotiations, as is the intention of this assessment model as reflected in EC documentation. A competitive tendering process can be inherently time sensitive, as the SIA process needs to continue moving along, which means the EC does not have an extended time frame within which to vet bids from external consultants during the tendering process. Further, the consultants themselves will possibly be feeling the time crunch as they need to put forward their bids for the assessment process and historically, “competitive tendering processes and commercial confidentiality considerations encourage proponents to adopt quick, cheap and minimal approaches to keep bids as low as possible”.<sup>694</sup> It is suggested here that the time pressures of the SIA, negotiations and consultations could in turn result in marginalizing stakeholder involvement or minimising the absorption of their feedback.

Concerns about the effectiveness of consultants and their involvement with stakeholders is not limited to SIA. It should be noted that in 2017, with respect to Environmental Impact Assessment (EIA) of projects, plans or programmes in the United Kingdom, amendments were made to EIA legislation to address the issue of competency of the parties involved. In preparing the environmental statement, the new EIA Regulations stipulate changes to the way in which the statement is prepared and what information is to be included and that decision-makers must ensure that a “competent expert” prepares the statement.<sup>695</sup> To ensure the “completeness and quality of the Environmental Statement”, it must further include a statement which explains the “relevant expertise or qualifications of such experts”.<sup>696</sup> This expert must also have “sufficient expertise” or have access to such expertise to be able to take into consideration current knowledge and methods of assessment so as to reach a “reasoned conclusion” of the effects the plan or project will have on the environment.<sup>697</sup> The introduction of this amendment suggests that there was an issue with quality control of impact assessments, particularly in regards to the experience of consultants,

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<sup>694</sup> Hughes (1998) 7.

<sup>695</sup> UK, EIA Amendment (2017) 14(4)(a).

<sup>696</sup> *Id* at 14(4)(b).

<sup>697</sup> *Id* at 21(1)(b).

which in turn was addressed with the requirement of a competent expert. Although EIA is a distinct tool from SIA of trade, SIA has taken inspiration from EIA, and it is probable that pervasive issues that impact EIA could in turn be issues within SIA as well. Although SIA does not require the inclusion of a competent expert statement to assessments of trade, the experience in EIA highlights an area which has been problematic in the assessment culture, which ties into the above discussion.

While certain aspects of the SIA tendering process are unknown and although the EC does not use the terminology of a “competent expert” as found in EIA, it is known that the consultants are expected to have baseline competence in environmental, social, human rights and economic impact methods. Further, consultants are expected to have knowledge of “areas such as international trade policy and trade negotiations, quantitative analysis and modelling in economic and social sciences, quantitative and qualitative analysis of complex matters such as trade rules, competitiveness and environmental, social, consumer and human rights issues”.<sup>698</sup> Yet, in reflecting on these requirements, there is more of an emphasis placed on understanding trade versus understanding environmental impacts. This is reflective of some of the points raised in chapters one and two, where the focus on issues such as economic modelling was argued to be misplaced, as it did not adequately valuate environmental impacts. Similarly, the EC’s list of competencies for consultants does not focus on their tested ability to analyse environmental impacts or significantly, their ability to engage with stakeholders. In addition to stipulating what knowledge is expected of these consultants, there should also be a clear focus on how they utilise their professional experience, how it is utilised to evaluate environmental impacts and how they have collaborated with stakeholders or plan to cooperate with them on assessments. As was explored in discussing the US ER of trade model, a disjointed relationship between the actors who run the assessment process and stakeholders can result in disengagement from those respective stakeholders, as they do not feel their knowledge is being utilised and they opt to dedicate their resources elsewhere.

After the tendering process is completed and the consultants are selected, they are then tasked with carrying out the assessment transparently and independently; no other

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<sup>698</sup> EC Handbook (2016) 10

restrictions are placed on them. Lamy stressed that outside consultants should carry out the assessment process with little interference from the EC, stating: “The only conditions we impose on our consultants is that they make a rigorous analysis, take a balanced approach to problems and work transparently”.<sup>699</sup> Of the 33 SIAs of trade negotiations that have been completed to date, approximately 25 different consultants have participated in the process, with six of these consultants participating in multiple SIAs.<sup>700</sup>

Although these consultants are selected via a public tendering procedure, it is necessary to question and reflect on the background of the consultants even after selected to ensure their competencies will align with the expectations of stakeholder involvement. For instance, the Centre for Economic Policy Research (CEPR), based in London, was directly involved in three SIAs and their research<sup>701</sup> also provided the basis for the EU-USA *Transatlantic Trade and Investment Partnership* (TTIP) SIA conducted by another consultant.<sup>702</sup> A research and campaign group, the Corporate Europe Observatory, has questioned the neutrality of CEPR, as a significant portion of its funding comes from global banks such as JP Morgan, Santander, Deutsche Bank and Citigroup.<sup>703</sup> The financial support of corporations to external consultants does not in and of itself mean they are biased, but it does indicate that questions must be answered as to how the consultants are chosen during the public tender process, and what interests, if any, they may represent and if they conflict with stakeholder expectations. In the US, the USTR runs the assessment internally, which means that stakeholders have consistency regarding who they deal with throughout subsequent assessments; stakeholders always know that USTR is the point of contact, and they have a basic understanding of how they will run the assessment process. In the EU, as each SIA could potentially be run by a new external consultant, stakeholders do not have this same inherent consistency, which makes it even more important that there be transparency on the tendering process to ensure expectations of stakeholder involvement are realised.

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<sup>699</sup> Lamy (2003).

<sup>700</sup> ECORYS (United Kingdom) has completed 10; Development Solutions (Brussels and United Kingdom) has completed 6; IDPM (United Kingdom) has completed 6; (CEPR) Centre for Economic Policy Research (United Kingdom) has completed 3; (CASE) Center for Social and Economic Research (Poland) has completed 3; PricewaterhouseCoopers (PwC) has completed 2; BKP Economic Advisers (Germany) has completed 1; LSE Consulting (United Kingdom) has completed 4.

<sup>701</sup> See Francois *et al* (2015).

<sup>702</sup> It was utilised in the report by ECORYS.

<sup>703</sup> CEPR, Supporters.; Corporate Europe Observatory (2016).

Stakeholders consist of public and private interest groups such as NGOs, businesses, academics and national administrations. The assessment literature promotes stakeholder involvement as being paramount for purposes of transparency. To ensure stakeholder knowledge is utilised by trade negotiators to inform the negotiations, the assessment process is expected to include extensive consultation and participation with stakeholders.<sup>704</sup> Stakeholders are meant to be involved at each stage of the assessment: inception, interim and final. For instance, the feedback from the EC, stakeholders, consultations and civil society obtained throughout the inception stage are combined and then fed into the interim phase analysis. During this stage, country case studies are conducted, further screening and scoping is carried out, the main impacts of the assessment should be identified, and mitigation and enhancement measures are developed. An open dialogue and consultations with stakeholders guides the interim stage of the assessment and this is when the majority of consultations occur, as is evidenced “through various channels established for this purpose [of stakeholder engagement], such as the dedicated SIA website, digital media, specific questionnaire(s), targeted interviews, meetings or workshops, which may take place in the EU and/or partner countries”.<sup>705</sup> Based on the feedback obtained during the interim stage, a draft interim report is opened to comments and this information is again presented to the SIA inter-service steering group, who are meant to relate it back to the trade negotiators before the final report is released.

Leading up to final phase, stakeholder workshops and public meetings are again held, the EC evaluates previous findings and discussions with civil society may be ongoing. During the final phase, all the previous information from the other two phases is considered and *methodological approaches* appropriate for the respective SIA are utilised, such as quantitative and qualitative assessment of the identified impacts. Assessment of mitigation and enhancement measures, finalisation of the mitigation and enhancement proposals and the recognition of any ground for further analysis also take place.<sup>706</sup> A draft final report is then opened to comments and presented to the SIA inter-service steering group. After all this

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<sup>704</sup> George and Kirkpatrick (2006) 327.

<sup>705</sup> EC Handbook (2006) 12.

<sup>706</sup> EC Handbook (2006) 12, chart 1.

information is evaluated, a final SIA report, with potential recommendations, is released online. Stakeholders' comments are expected to be summarised transparently in the final report, along with an examination of how effective the consultation process has been.<sup>707</sup> At this stage, the consultants have fulfilled their role within the SIA. Following the SIA process, the EC produces a position paper, which clarifies "how the SIA findings have or will contribute to decision-making" and explains "its own views on the identified impacts and the policy measures proposed to address them".<sup>708</sup> The position paper is also published online and with its publication, the SIA is completed.

This examination of the phases of the SIA reveals that on paper, public consultation is central to the SIA process. Yet, it is suggested here that in practice, the effectiveness of stakeholder involvement cannot be assumed, as factors such as timing of the assessments and competencies of the consultants must be considered. The final SIA report lists an annex with the stakeholders involved in the assessment process and it also lists conclusions, which identify the challenges that were raised during the assessment with respective responses. Yet, in reviewing this information, one cannot determine if all the stakeholder input has been addressed, and whether stakeholders are satisfied with the response they received and if they are willing to take part in future SIAs. The last question is probably the most pertinent because if unrest amongst stakeholders is detected, then that is indicative of a flaw that must be addressed.

### 3. The Expectation of Transparency

SIA is meant to be flexible regarding the *methodological approach* that consultants can utilise, but the EC places a strong emphasis on clarity and transparency, the SIA must be clear, objective and based on evidence. To amass and analyse environmental data, the consultants can use causal chain analysis (CCA), quantitative and qualitative analysis, case studies and stakeholder input. Akin to other EA of trade models, such as the US ER of trade, SIA faces problems with availability of data and the inherent difficulty in quantifying the unquantifiable

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<sup>707</sup> EC Handbook (2006) 13 and 26.

<sup>708</sup> *Id* at 13.; See also EC Handbook Draft 7.

nature of environmental damages.<sup>709</sup> As SIA also analyses impacts within the borders of its trading partner, there is an added layer of complexity with respect to data accrual.

CCA forms the basis of SIA analysis, as its goal is to recognise the impacts from a particular trade measure on economic, social, and environmental indicators.<sup>710</sup> In conducting a CCA, the consultants must formulate a baseline scenario, which analyses the situation without the trade agreement in place, and then assesses economic, social, environmental and human rights concerns. This baseline can then be utilised as the consultants evaluate these same concerns, but in the context of the trade negotiations taking place. Consultants need to clearly identify their source of inputs for the CCA, which should have a solid factual basis and can include quantitative analysis and case studies.

Economic modelling, specifically computable general equilibrium (CGE), input-output and econometric models can be utilised as methods of quantitative analysis, as the usage of the respective model depends on available data and the issue being assessed. Qualitative analysis includes methods such as case studies and stakeholder consultations and is meant to complement quantitative models, particularly when those models are struggling with lack of data.<sup>711</sup> The EC encourage a dual use approach of both quantitative and qualitative methodologies, particularly when data is limited. As discussed in chapter two, there are limitations to quantitative and qualitative models, but being aware of their strengths and limitations will permit the consultant to use the mixed methods approach that is most suitable to the assessment.

In conducting quantitative and qualitative analysis of SIA, consultants are expected to utilise Eurostat, the EU's statistical office, in obtaining economic, social, human rights and environmental data. The 2016 handbook also recommends the use of Eurobarometer, a database of public opinion surveys, the EU Open Data Portal, which contains data published by European bodies,<sup>712</sup> and data from international organisations such as the United Nations

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<sup>709</sup> See the discussion in chapter 2.

<sup>710</sup> Blobel, Görlich and Ingwersen (2009) 106.

<sup>711</sup> EC Handbook (2016) 15.

<sup>712</sup> See EU Data.

(UN) and World Bank.<sup>713</sup> Although consultants are expected to face challenges, such as gaps in data, there is a view that such data issues will be highlighted within SIA reports, along with an explanation of how that data limitation may have impacted the report. The SIA of trade is unique when compared to the US ER of trade in that the EU has amassed a body of data for purposes of the assessment process, which it has in turn made accessible online. However, it is worth noting that under the SIA model, consultants are being steered in the direction of relying on data from EU sources to filter into EU produced assessments. It is argued that the use of EU driven data to produce EU reports should be questioned. In reviewing the data online, it is noticeable that information from alternative sources, such as environmental groups working in the respective trade region, do not appear within this database. It is recognised that the EU pulls data from sources that it accepts as verifiable, and it is perhaps considered outside their remit to include data from alternative sources. Nonetheless, it is suggested here that the EC's direction to consultants to utilise EU produced data is at odds with the EU approach of engaging autonomous consultants.

Stakeholder input and involvement is viewed as another significant part of the SIA, as it provides practical experience and data to consultants which may not have been accessible via other sources, and which contributes to higher quality evaluations. Consultants are responsible for engaging the stakeholders during the SIA process; but they can refer to the EU's "Better Regulation 'Toolbox,'" which provides guidance on stakeholder consultation tools.<sup>714</sup> Stakeholder consultations should be timely, easily accessible, comprehensive and balanced in coverage of interested stakeholders.<sup>715</sup> The 2016 handbook further explains that "inputs received should be summarised in a dedicated section of the SIA website and, where relevant, integrated and addressed in the analysis".<sup>716</sup>

The phrase "where relevant", indicates that consultants weigh the input that is provided throughout the SIA process and then choose what to utilise in the assessment. Assessment reports do not clarify how the consultants pick and choose what input to utilise, as this

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<sup>713</sup> EC Handbook (2016) 15-16.

<sup>714</sup> EC Toolbox (2021) 442-458.

<sup>715</sup> EC Handbook (2016) 26.

<sup>716</sup> *Id.*

process is subjective. It is argued that this is in essence the ultimate criticism of SIA that has been raised since this assessment process came into fruition and challenges expectations of transparency. Stakeholders have little understanding of how consultants use the data derived from their involvement in the assessment process to produce the final trade agreement.

### C. The Realities of Sustainable Impact Assessment

The EC has demonstrated its reflexivity towards SIA since its inception, which is exhibited in the various stock-taking seminars that have been held over the years. In comparison to the US ER of trade model, the SIA appears as a more comprehensive model which is perceived to be more successful at addressing sustainable development concerns.<sup>717</sup> Further, the EC offers the impression that it is consciously seeking to improve SIA practices to ensure more effective assessments.

Approximately five years after SIA was launched, the EC held a seminar in Brussels to re-examine the SIA process [hereinafter the 2003 Brussels seminar]. This seminar provided an opportunity for the EU and the seminar's participants to reflect on SIA, question whether it promoted sustainability and debate its effectiveness. In 2004, considering the 2003 Brussels seminar and completed assessments, the EC produced a paper to codify SIA methodology and opened the paper to comments in preparation for publication of the 2006 SIA handbook.<sup>718</sup>

Approximately two years later, in 2006, the EU held an SIA stocktaking conference, again in Brussels, to assess the completed trade SIAs and discuss how to improve assessments to ensure their results are reflected in policy making. There were over 250 international participants at this conference, and they included various governmental ministries, embassies, academics, the Office of the US Trade Representative, Foreign Affairs Canada, various NGOs, including the World Wildlife Fund (WWF) and Greenpeace.<sup>719</sup> This event was the elite of EA of trade consultants and participants; it was trying to tap into the experience of anyone who had been involved with this model to date. The EC, specifically the EC's

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<sup>717</sup> Reynaud (2013) 242.

<sup>718</sup> See EC Consultation Paper (2004).

<sup>719</sup> EC Participant List (2006).

DIRECTORATE-GENERAL FOR RESEARCH, also funded research into SIA after being approached by noted environmental academic Konrad von Moltke, who encouraged the EC to examine the effectiveness of SIA.<sup>720</sup> This funding was utilised for the SIAMETHOD project, which researched developing assessment methodologies.<sup>721</sup>

This timeline illustrates that the EC has been active in regularly reflecting on SIA. The EC has engaged with stakeholders to question the perceived purpose of assessment, consider criticisms, respond to concerns, and review what changes, if any, should be made in future assessments. The EU's approach in this respect is contrary to how the US handles its ER of trade model, as the US has not, to date, held similar stocktaking sessions with stakeholders to reflect on its model. The EU, in this respect, has made efforts to make SIA a collaborative process; but it is unclear how the EC adapts to the criticism it receives. SIA is a living instrument that adapts and changes with each use; it is not a static methodology; this is reflected in the development of a revised, second edition, SIA handbook in 2016. In that vein, it is argued that the challenges and limitations of SIA must be frequently questioned, as each assessment provides a new opportunity for a fresh approach. There is a distinction between what SIA is hoped to achieve and what is realised in practice.

The first section examined the expectations of SIA in theory. To highlight some of the challenges that may not have been fully addressed throughout these stocktaking exercises, this section seeks to examine the issues encountered by SIA in practice. It is suggested here that by having a clear understanding of the limitations of this model, tensions can be resolved and a path to resolving any issues can be determined and applied to future SIAs.

### 1. The Limitation of Personal Bias

A striking distinction between the EU SIA of trade and the US ER of trade is the usage of independent consultants. This in turn leads to the perception that autonomous consultants, without interference from the EC, are well placed to implement the SIA for purposes of

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<sup>720</sup> Hirschfeld, König and Bachurova (2009) 131-133.

<sup>721</sup> See IDBRI (2007).

promoting sustainability, and that independent judgments and analyses are more likely to be expressed.<sup>722</sup> The SIAs are viewed as more comprehensive than other EA of trade models, which thus makes them more likely to promote sustainable development through trade.<sup>723</sup> This section seeks to challenge that perception and identify some limitations of the usage of these consultants to explain why sustainable development may not be adequately addressed through this model in practice.

As argued in chapter one within the examination of non-linear decision making, decision-makers typically have an innate bias, as an individual's position influences their perspective.<sup>724</sup> The EC's approach to seeking consultants via public tendering is a commonly used procurement method outside of EA of trade. Competitive tendering is regularly used within governments and the private sphere, as it encourages bidders to compete with one another, resulting in a cost-effective approach. This bidding process is often utilised because it is argued that it encourages competition in the market, results in a more transparent process and, in theory, provides any potential consultant with the opportunity to have their bid considered and possibly chosen.

However, as discussed, the EC's competitive tendering process is not transparent, as there is lack of clarity on how the external consultants are specifically chosen. It is argued that this opacity can be challenging in practice. For instance, a 2011 report commissioned for the EU's Programme for Employment and Social Solidarity examined their competitive tendering process. That report found the tendering process could be problematic in that it could make it difficult for social partners from developing countries to compete.<sup>725</sup> Similar logic could also be applied to the competitive tendering process for SIAs. In examining the available information, it is not possible to determine if the EC makes the process equitable so that consultants from various backgrounds can bid for the assessment. In reviewing the available data, past consultants have all been located within Europe, primarily the United Kingdom. Further, a review of the SIA process illustrates that the same external consultants have been

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<sup>722</sup> Reynaud (2013) 232.

<sup>723</sup> *Id* at 241-242.

<sup>724</sup> Miles (1978) 399-400.

<sup>725</sup> Ergon (2011) 105.

used across multiple assessments. The critique can be made that repeat usage of consultants could be indicative that other potential external consultants, particularly within trade partners, are possibly locked out of the process due to current logistical or economic issues with the tendering process.

An in-depth critique of SIA's competitive tendering process has not been conducted. To gain some insight into potential criticisms of this approach, it has been useful to look to similar tendering processes. Within the Netherlands, there has been ongoing detailed analysis about the concept of public tendering in urban public transport, which reveals that stakeholders want clarity on what external consultants can achieve.<sup>726</sup> The Dutch study illustrates that initially, the competitive tendering process would result in positive feedback, which in this case was increased satisfaction amongst public transport customers due to perceptions of greater transparency. However, over time, this measured beneficial impact of the tendering process would be either minimal, at best, or neutral when compared with other procurement methods because of perceptions of effectiveness related to practice. An interesting observation from this study relates to perceptions of deliverables; there was a strong view that measures needed to be taken to ensure that consultants did not overbid on what they could deliver and that there was a precise understanding of what could be achieved. This critique could also be applied to SIA, as there needs to be clarity with regards to what consultants can achieve in practice.

The greatest perceived strength of EC's use of external consultants is the perception of greater impartiality during the assessment process.<sup>727</sup> The EC Directorate-General for Trade funds the consultants and provides dates for delivery of assessment reports, but otherwise the EC is removed from the process. It is noteworthy that the use of external consultants leads to this view of unbiased practices and greater transparency because this in turn leads to an assumption that internal assessments are not able to achieve this same standard. This could lead to perceptions that the EC, as a public body which is meant to promote the interests of the EU, is thus not able to carry out assessments as a neutral party. Considering that the SIA process begins with an IA, which is carried out internally by the EC and which lays the

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<sup>726</sup> See van der Velde and Beck (2010) and Mouwen and Rietveld (2013).

<sup>727</sup> Dias Simões (2017) 121.

foundation for the SIA, this perception can be problematic. It is thus argued that the usage of interval versus external consultants is more nuanced, simply using external consultants does not guarantee greater neutrality or technical abilities in addressing sustainable development concerns and using internal consultants does not equate with bias. Both methods have strengths and weaknesses, which need to be sufficiently understood.

In challenging the easy assumption that external consultants are best practice, it is useful to examine viewpoints from stakeholders involved in the assessment process. During the 2003 Brussels seminar, Lawrence Pratt, an Associate Director from a research centre studying sustainable development in Latin America, addressed the usage of external consultants and raised concerns about this point. Pratt recognised budgetary and staff constraints within the EC, but he explained that the SIA process should remain internal to either the Directorate-General for Trade or another EU body. Pratt explained:

The incentives for the consultant and DG-Trade are so misaligned that they cause a nearly complete loss of credibility among stakeholders. The process looks like it is a bureaucratic requirement that all are trying to fulfil and get rid of. It looks like DG-Trade is passing it off to contractors because it is "not important enough for them to address themselves" (a nearly exact quote from a number of participants). The current lack of clear direction or commitment as to the uses of the analysis only serve to reinforce the perception of a "marginal, feel-good effort" (sorry, another direct quote from a knowledgeable participant).<sup>728</sup>

In addition to viewing SIA as a "feel-good effort" for the Directorate-General for Trade, this participant also commented that consultants work as quickly and cheaply as possible and consequently, ignore feedback from locals, which may only further lengthen the assessment process. There was a distinct impression that external consultants did not have ownership of the process, that they were not sufficiently engaged. Instead of being a means through which collaborative relationships would be fostered, which could promote knowledge towards addressing sustainability concerns, the role of these consultants was counterproductive.

Further, the experience from the 2002 EU-Chile Association Agreements Negotiations was referenced, as Chilean sustainability experts were concerned by the work of the consultants,

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<sup>728</sup> EC Participants Comments (2003) 6.

which was deemed to be haphazard and misrepresentative of local input. The attitude of the consultants was also called into question, as it was described as “negative and even haughty” and it was further claimed that “low-level staff [were] sent to do field work and consultations”.<sup>729</sup> For instance, concerns were raised about the Indigenous Mapuche communities and their respective forests, which included sacred ancestral lands. The forestry industry had already taken control of many of these lands prior to the introduction of the EU-Chile agreement, resulting in forest fires and forest degradation. The Mapuche were so concerned about the impact of the trade agreement that in September 2002, Mapuche NGOs launched an international campaign against the trade negotiations.<sup>730</sup> The final SIA report on the trade agreement recognized that Mapuche’s traditional way of life relied heavily on the native forests, but the SIA did not project a significant increase in forest production as a result of trade agreement. In the view of the SIA, the environmental and social impact on the Mapuche was projected to be minimal. However, the SIA concluded that if logging did increase, then the Mapuche would continue to suffer both socially and environmentally.<sup>731</sup>

Ultimately, logging continued within Chile and the tensions between the Mapuche people and Chile have increased over the years. In 2013, Chile used anti-terror laws to prosecute the Mapuche, the UN swiftly condemned these actions.<sup>732</sup> The Mapuche and the local government continued to be at odds over forest land and in 2017, the Chilean President publicly apologised to the Mapuche;<sup>733</sup> but the Mapuche were dissatisfied with this response as the forestry and hydroelectric industries continued to operate on their ancestral lands.<sup>734</sup> The Mapuche-Chilean conflict has been ongoing for decades and was most recently addressed in September 2022, when Chilean voters rejected a proposed new constitution which would have recognised Indigenous people, such as the Mapuche, as part of plurinationalism and in turn granted them ecological protections.<sup>735</sup>

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<sup>729</sup> *Id.*

<sup>730</sup> Mapuche (2002).

<sup>731</sup> EU-Chile, Final SIA Report (2002) 187.

<sup>732</sup> UN News, Chile (2013).

<sup>733</sup> teleSur (2017).

<sup>734</sup> IPS (2017).

<sup>735</sup> Plurinationalism has evolved in the context of Indigenous movements, and it refers to the concept of many nations within a single state. See Burns (2022).

This example illustrates that SIA consultants were made aware of the social and environmental concerns of the Mapuche, but the final SIA did not adequately address these issues. Taking into consideration that logging did in fact increase after this trade agreement went into effect and that the social and environmental concerns raised by the Mapuche NGOs are still an ongoing concern as of 2022, it is suggested here that there needs to be greater reflection on the use of external consultants and whether they sufficiently promote sustainability and reflect stakeholder interests. In this instance, it appears that these consultants did not adequately take into consideration the respective environmental impacts raised by this group, and that is problematic, as it is at odds with what SIA is meant to achieve.

In reflecting on why this is problematic and what could be done to avoid such issues as experienced in the EU-Chile SIA, a 2015 report by the International Association for Impact Assessment (IAIA) offers some guidance on how to conduct social assessment that can be applied to SIA generally. The IAIA advise the profiling of communities that will be impacted, to truly understand how they are affected, explaining that it is essential to understand local cultural context, societal values and insights into how things are handled regionally. The IAIA report raises the point of internal bias of consultants, explaining that consultants “tend to presume that local people value the same things they (the outsiders) do” and that locals have a shared interest, with this “mismatch” of perceptions being exacerbated through the usage of quantitative models, due to the ideological foundations of these models.<sup>736</sup> If the misrepresentation between local and consultant views is not addressed, this can in turn lead to an inadequate assessment that fails to accurately assess impacts or account for mitigation efforts.<sup>737</sup> The IAIA raises a valid point which is transferable to assessment of trade, for both external and internal consultants: assessment experts need to be aware of internal biases and prejudices when analysing impacts and they must also appreciate local cultural groups and concerns.

The EU SIA has set out an ambitious task in seeking to assess trade impacts both locally and within its trading partner. Promotion of sustainability is the goal and as the EU has committed to this concept, the EC has a responsibility to ensure that cultural biases are minimised and

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<sup>736</sup> IAIA (2015) 36.

<sup>737</sup> *Id.*

that the assessment results are as accurate as possible. This carries through to the selection of external consultants, but based on the available data, it does not appear that this issue is directly addressed in the selection criteria during the tendering process. As they are the representatives in the field working with stakeholders in trading partners, these consultants must have a clear understanding of the background of the groups they are working with. For instance, in the EU-Chile SIA, it does not appear that the consultants underwent any sort of training to develop a cultural understanding of Chile, particularly of the Mapuche people. The handbook and other SIA documentation does not mention what sort of training, if any, consultants receive before engaging with trading partners. Further transparency is needed to understand how engaged the consultants are throughout the process, and what concerns, if any, stakeholders have in regard to their interaction with consultants.

In addition to concerns about whether external consultants have an appreciation for the cultural and environmental impacts in the trading partner, it is also necessary to question whether repeat consultants can remain impartial and adequately address sustainability concerns. As indicated above, some external consultants have been used on more than one SIA. If consultants know that they can bid on future assessments, it is necessary to consider whether that will impact their ability to be impartial and critical of the current project. This issue was raised as a concern in analysis of the Environmental and Social Impact Assessments in Cambodia, as it was explained that there was a dilemma of consultants to maintain impartiality while also having hope of being hired again for future work.<sup>738</sup> When applying this critique to SIA, it is unclear what the EC does, if anything, to ensure impartiality amongst repeat consultants. The EC literature maintains that its consultants are impartial and in speaking directly with a repeat external consultant, they also highlighted their impartiality throughout the assessment process.<sup>739</sup> This leads to the question of what does impartiality mean? Within the world of private consultants, there is a debate about whether consultants are salespeople and whether they can maintain impartiality when they have a vested interest to please their client and be re-hired. The counter argument to this, which could also be applied to SIAs, is that consultants in most fields, build a reputation and the incentive to

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<sup>738</sup> See Chanthy and Grünbühel (2015).

<sup>739</sup> This is based on conversations the author had with an individual who has worked on multiple SIAs as part of a consulting team.

maintain a reputation as an unbiased expert subjugates any short-term gains.<sup>740</sup> This discussion highlights that impartiality cannot be taken at face value and should be questioned throughout the SIA process and reflected upon after the assessment is complete.

A research association focusing on European transport and environmental policy also remarked on the issue of consultants in comments it provided during the EU's public consultation on the 2016 SIA handbook. Beyond requiring transparency and technical expertise of the consultants, it was suggested that "the revised handbook should set guidelines to ensure that consultants are insulated against corrosive influence".<sup>741</sup> Essentially, to root out potential bias amongst consultants, it was proposed that the consultants be reviewed throughout the assessment, to maintain ethics and impartiality.<sup>742</sup> In essence, this is a concept of monitoring the monitors, and this concept could be viewed negatively, as it is adding another layer of complexity to an already lengthy and costly assessment process. However, the rationale behind this suggestion is valid in that those individuals responsible for carrying out the assessment, regardless of whether they are internal or external consultants, should be held to a higher standard and their actions should be subject to scrutiny because they are carrying out a process which has significant potential, a process which could prevent and balance out negative environmental, social and economic impacts, which can promote sustainability.

## 2. The Limitations of Stakeholder Engagement

The importance of public participation was explicitly recognized under principle 10 of the Rio Declaration. The Rio Declaration recognised the link between sustainable development and good governance, detailing that public participation was a fundamental element of good governance.<sup>743</sup> Principle 10 explains that "each individual shall have appropriate access to information concerning the environment that is held by public authorities...and the

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<sup>740</sup> See Cadman, Carter and Hillegeist (2010). This article explains that even cross-selling consultants, who are motivated to sell additional services to a client, have a strong incentive to maintain their reputation as unbiased experts.

<sup>741</sup> Transport & Environment (2015) 4.

<sup>742</sup> *Id.*

<sup>743</sup> Banisar *et al* (2012) 8.; Rio Declaration (1992) Principle 10.

opportunity to participate in decision-making processes".<sup>744</sup> The Aarhus Convention, which entered into force in 2001, and which the EU has ratified, also established public participation rights, including access to environmental information and the right to participate in decision making.<sup>745</sup> The EU further emphasised the importance of participation when discussing good governance in a 2001 white paper, explaining that better public participation leads to greater confidence in the results and the relevant institutions.<sup>746</sup>

SIAs of trade are meant to provide yet another opportunity through which the public can demonstrate their voice, and the EC has consistently emphasised the importance of public and stakeholder engagement throughout the assessment process; it is considered foundational. Researchers from the EC funded the SIAMETHOD project further explained that "credibility, legitimacy, trust, ownership and improved policy performance" are the leading goals of public participation and that effective public participation is vital.<sup>747</sup> The main takeaway from their research is that active public participation results in increased credibility and wider acceptance amongst those citizens who were engaged with the process; it leads to a collaborative relationship and is fundamental for success of the assessment process.<sup>748</sup>

The EU further emphasised the importance of civil society involvement after the new generation of FTAs, which began with the EU-Korea FTA in 2008. These FTAs moved beyond simple tariff negotiations and focus on other trade provisions, such as competition, intellectual property and sustainable development. They include dedicated chapters on trade and sustainable development (TSD), which established civil society meetings, providing organisations with the opportunity to engage in the process on a standardised basis.<sup>749</sup> The EC's concerted efforts to stress the importance of these civil society meetings, in conjunction with the emphasis placed on public participation during the assessment process, results in the perception that the EU SIA of trade model is setting the standard for public participation within trade agreements, but the reality is that public participation does not occur as

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<sup>744</sup> Rio Declaration (1992) Principle 10.

<sup>745</sup> Aarhus Convention (1998) Articles 3-4.

<sup>746</sup> EC White Paper (2001) Section II.

<sup>747</sup> von Homeyer, Collins and Ingwersen (2009) 190.

<sup>748</sup> *Id* at 190-193.

<sup>749</sup> See Orbie, Martens and Van den Putte (2016) 37-45 for a discussion of the different forms of civil society involvement.; For a discussion of EU TSD chapters, see Hradilová and Svoboda (2018).

smoothly as is hoped. In examining the assessment and trade documentation to determine what causes these limitations, three leading factors, which are interlinked, are evident: uncertainty in identifying target groups, difficulty in engaging with respective target groups and lack of clarity on the aims of public participation.

As a starting point, it is useful to analyse how stakeholders and citizens in general are contacted and brought into the SIA process. SIA documentation provides guidance on how to identify potential stakeholders within the private sector, including businesses and think tanks, public sector, including international bodies and governmental employees, and civil society, including NGOs and advocacy groups.<sup>750</sup> In EC communication documentation, minimum standards for identifying target groups are listed, which include: the potential impact of trade policy on stakeholder interests, relevant expertise and experience, examination of previously held consultations and the track record of stakeholders, and equitably considering the needs of specific target groups.<sup>751</sup> The onus is put on the consultants to reach out to national human rights institutions with regional links, as identified by the United Nations,<sup>752</sup> to identify potential stakeholders who may be excluded from the process. Yet, in reviewing completed SIAs, the consultants do not state how, if at all, any effort was made to reach out to potential excluded groups.

This first step of successful stakeholder engagement is thus foundational in that it not only identifies target groups who can contribute to the assessment process, but it sets the stage in developing an understanding of those respective stakeholders within the areas impacted by the trade agreement. It is the start towards collaboration and capacity building within those communities. After identifying target groups, developing an understanding of their needs is key to meaningfully engaging with them. As explained in research from the SIAMETHOD project, without a comprehensive understanding of the stakeholders, “it is impossible to select appropriate participation techniques or sequence and schedule them effectively”.<sup>753</sup> Yet, in examining the SIA and EC literature, other than providing basic guidance

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<sup>750</sup> EC Handbook (2006) 25.; The updated EC Toolbox (2021) 365-366 also provides guidance on how to identify sources, which reaffirms what was stated in the Handbook.

<sup>751</sup> EC, Communication on Consultation (2002) 19-20.

<sup>752</sup> GANHRI (2019).

<sup>753</sup> von Homeyer, Collins and Ingwersen (2009) 191.

on how to identify stakeholders as mentioned, there is little information on how consultants should engage with stakeholders and citizens to ensure they have developed an understanding of these key groups in practice, particularly any applicable social and cultural factors that are relevant.<sup>754</sup>

For instance, in reviewing the SIA documentation for the EU Eastern and Southern African negotiations, the consultant leading the assessment clarifies their approach to stakeholder identification and mapping: they explain that they will be contacting a large range of organisations and institutions within the EU and trading partner; they clarify that these groups will then be identified as public sector, private sector, social partners and civil society organisations to ensure they have reached all the relevant groups; and they explain that interviews, workshops and roundtables, both in Brussels and in the trading partner, will be used to engage with the stakeholders.<sup>755</sup> This approach is more or less common amongst all of the SIAs completed to date. Yet, beyond mentioning the workshops and roundtables, this report fails to explain how the consultants meaningfully engaged with these stakeholders on the ground, how the consultants gained their trust and developed an in-depth understanding of the needs of these groups and how they determined that groups were not missed. If the interviews, workshops, and roundtables were the best means to accomplish this goal, then there is an expectation to address this aspect more fully and in more detail in the report, to better explain how stakeholder relationships were fostered.

Consultants are thus provided these guidelines on how to identify potential stakeholders, but ultimately, it is at the discretion of the consultant as to how they go about engaging with stakeholders throughout the assessment process, and this is handled uniquely to each individual SIA. It is argued that the identification and engagement of stakeholders is vital to a successful SIA and that this needs to be addressed in more explicit detail throughout the assessment documentation. With repeat consultants, there is an expectation that perhaps there would also be repeat stakeholders that have been engaged throughout multiple

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<sup>754</sup> It is noted that the EC Toolbox (2021) 306-307 provides guiding questions for targeted consultations that could be applied to stakeholders, but these questions are generalised and not suited for developing a unique understanding of a specific stakeholder group within a region.

<sup>755</sup> EU-ESA, Final Inception Report (2020) 25-29.

assessments, that the consultants develop a relationship with these respective groups and can tap into this resource during SIAs. The author crosschecked SIA reports to determine repeat consultants and repeat stakeholders to enquire about this issue. When a consultant was asked about this, they expressed that they have a good working relationship with stakeholder groups and that the usage of interviews, workshops and roundtables is effective.<sup>756</sup> Yet, when the stakeholder, who had been very active in the early days of SIAs, was approached, they explained that they had been hopeful and very involved early on with SIAs, but although they still attend workshops and meetings for SIAs, they are no longer as actively involved in this medium and had assigned their staff to other projects.<sup>757</sup> They had become disengaged from the SIA process; they were disillusioned with how their input was utilised. In short, a strong working relationship with this repeat stakeholder was not fostered, they perceived their views as either not understood or appreciated, and that stakeholder pulled its resources and disengaged from the SIA model.

Stakeholder engagement and the relationship between key actors has been an ongoing concern. For instance, at the 2006 stocktaking conference, participants argued that there was a need for closer collaboration between negotiators and stakeholders, particularly in developing countries and the EU's trading partners in general.<sup>758</sup> With respect to accessibility of EU trading partners, another criticism was raised regarding the language barriers and the lack of translated assessment documentation, as English is the working language of assessments. Disparity can also exist if the trading partner has different capabilities, such as the ability for monitoring and regulating environmental issues, or expectation for public participation.<sup>759</sup> To overcome these issues, and encourage more effective stakeholder engagement, greater collaboration is needed, which can be achieved through the fostering of networks of local experts.<sup>760</sup>

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<sup>756</sup> The author was not able to secure permission to directly quote this consultant, as they were expressing their general outlook on the approach to SIA and were not stating official policy in their capacity as a consultant. The author was advised to refer to the handbooks and EC documentation.

<sup>757</sup> The author was not given permission to directly quote this stakeholder as it was explained that there is no agreed official stance on these issues. This discussion reveals the backroom discussions and negotiations that happen during the SIA and trade negotiation process that are difficult to penetrate.

<sup>758</sup> EC Stocktaking, Key Outcomes (2006) 1.

<sup>759</sup> von Homeyer, Collins and Ingwersen (2009) 193.

<sup>760</sup> EC Stocktaking, Key Outcomes (2006) 2.

The issues of stakeholder identification and engagement are interwoven, but ultimately, the core of these issues relates to a lack of clarity on the aims of public participation. It is suggested here that to promote relationships within trading partners and amongst stakeholders, fundamentally, there needs to be transparency on public participation goals. This lack of clarity is first illustrated in the expectations of participation set at each stage of the assessment process. SIAs use terminology such as “raising awareness” and “capacity building”, but fail to explain how proactive stakeholders should be at each stage of the assessment, or what is expected from their engagement.<sup>761</sup> To counter this, there needs to be more clearly defined participation goals, while simultaneously offering appropriate opportunities for participation; consultants should be clear with stakeholders what is expected of them and how they can engage to assist in the SIA process.<sup>762</sup> Ambiguous participation goals can lead to varied expectations amongst participants, which could in turn lead to dissatisfaction if perceived goals are never met. This can then lead to a vicious cycle in which participants, upset by perceived unfulfilled participation aims, become indifferent to participating in future SIAs.

Lack of clarity during the SIA can in turn carry over into civil society meetings, which have now become commonplace in trade agreements because of the TSD chapters. In theory, these meetings are meant to provide fertile ground for engagement and offer the opportunity to raise instances when standards for sustainable development are not being met.<sup>763</sup> In reality, these meetings have been labelled by some as “talking shops”, which are viewed as irrelevant, or a “fig leaf”, which secured the trade agreement.<sup>764</sup> Despite having become common practice since the EU-Korea trade agreement, there is still a lack of understanding behind the purpose of these meetings, which in turn relates back to lack of clarity on public participation goals. It is unclear whether these meetings are meant to simply monitor the implementation of the TSD chapter or whether they are meant to be information gathering sessions or whether they are meant to influence policy.<sup>765</sup> These civil society meetings are meant to be straightforward and reflective of the work from the SIA process, but they can be confusing

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<sup>761</sup> von Homeyer, Collins and Ingwersen (2009) 197.

<sup>762</sup> *Id* at 197.

<sup>763</sup> Orbis, Martens and Van den Putte (2016) 47.

<sup>764</sup> *Id* at 46.

<sup>765</sup> *Id* at 25-36.; See also Martens *et al* (2016).

and ineffective in practice, which in turn relates back to the how the assessment was run: uncertainty on the aims of public participation will have knock on effects throughout.

To expound upon these challenges with public participation, it is useful to examine the EU-Japan free trade agreement (FTA), which has been heralded as an ambitious trade agreement with respect to sustainable development goals, as it includes an obligation to follow the Paris Agreement.<sup>766</sup> This FTA had been viewed as having the potential to possibly set a gold standard for future international trade agreements with respect to promoting sustainable growth.<sup>767</sup> Given the promise surrounding the EU-Japan FTA and its generally favourable reception post implementation, it is a useful example to analyse with respect to stakeholder engagement. In the final SIA report of the EU-Japan FTA, the consultants explicitly state that stakeholder input was considered in the assessment's methodology<sup>768</sup> and there is also a chapter within the final SIA report on stakeholder consultation.<sup>769</sup>

It is thus worthwhile to briefly review how stakeholder engagement for the EU-Japan FTA was executed in practice. With respect to in-person civil society meetings, where there could be open discussions with stakeholders, there were three meetings held over a period of nine months in 2015<sup>770</sup> in Brussels and each meeting lasted approximately two hours. Each meeting had between 61 to 64 participants, but the first meeting had the largest representation from NGOs, and civil society organizations. In reviewing the participant list for each of the meetings, the majority seemed skewed towards business interests, based on the participant representation. Further, various stakeholder roundtables were also held throughout 2015 with various sectors, with the environmental analysis roundtable taking place in September 2015 in Brussels with eight participants, none of whom were from the civil society organisations.<sup>771</sup> Beyond in person meetings, the consultants offered a dedicated EU-Japan SIA webpage, which is now defunct, that listed the documentation and current news, a Facebook page and twitter presence. Beyond a social media presence, there was also

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<sup>766</sup> The EU-Japan FTA entered into force on 1 February 2019.

<sup>767</sup> Pereira 23.

<sup>768</sup> EU-Japan, SIA Final Report (2016) 23.

<sup>769</sup> *Id* at 32.

<sup>770</sup> 5 February 2015, 25 June 2015, and 20 November 2015.

<sup>771</sup> EU-Japan, SIA Final Report (2016) 311.

a dedicated email address that stakeholders could reach out to. Information about the SIA process and the reports were readily available on both the consultants' webpage and via the EC. This would lead to a cursory analysis and a basic assumption that stakeholders were given the opportunity to give their feedback and engage. Yet, not all issues were readily explored to the satisfaction of all stakeholders, such as the issue of commercial whaling. Further, when one spends the time sifting through the documentation and reviewing participant lists, civil society stakeholder engagement, particularly by way of NGOs, is not very well represented. This is illustrated in the frustration expressed by some NGOs, such as Greenpeace, with the process and their refusal to engage beyond initial civil society meetings. It is impossible to know how many comments were received by the consultants from civil society organisations by way of private messages on social media or email, but an analysis of the EU-Japan FTA documentation illustrates that it is a meticulous and difficult task to try and build up a picture of how stakeholders engaged and what was said in practice.

For instance, Greenpeace EU attended the EU-Japan stakeholder meetings and raised concerns from the start of the assessment but opted to no longer participate in later stages due to concerns over lack of transparency about the process. In their feedback, Greenpeace commented on the case studies chosen by the SIA consultants, which focused on liberalisation of the fisheries and timber trades,<sup>772</sup> stating that "the EU and Japan are major importers with low bilateral trade volumes in both sectors chosen for the case studies of the environmental analysis" and they requested another case study.<sup>773</sup> Greenpeace expressed frustration at what they perceived as lack of transparency over the EU-Japan process and proceeded to release 205 pages of undisclosed documents dated between 2016 to 2017, ahead of the 18<sup>th</sup> round of negotiations, from the trade agreement.<sup>774</sup> This in turn led to tensions between the NGO and then European Commissioner for Trade Commissioner Malmström, who commented that "Greenpeace is not known as a trade promoter, whatever it is in any trade agreement they will be against it".<sup>775</sup> Greenpeace highlighted two main issues with the EU-Japan FTA process, notably concerns over the timber and whaling industries.

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<sup>772</sup> LSE Consulting, EU-Japan Draft Inception Report Presentation (2015).

<sup>773</sup> EC, EU-Japan Civil Society Dialogue (2015) 2.

<sup>774</sup> Greenpeace (2017).

<sup>775</sup> Valero (2017).

With respect to whaling, in a 2016 European Parliament (EP) resolution,<sup>776</sup> the EP called on Japan to stop its whaling practices and follow the conclusions of the International Whaling Commission (IWC), which in 1982 put into place a moratorium, which came into effect in 1986, on all commercial whaling. The EP's stance on whaling is noted because the EP is meant to be consulted during the ratification of trade deals. This moratorium is still in force and three nations, Japan, Iceland and Norway, continue their whaling practices despite the IWC's ban and Japan, notably, whales outside its own waters. With respect to Japan, the issue of whaling as an environmental concern was raised by stakeholders throughout the SIA process. At a 25 June 2015 civil society dialogue meeting, Humane Society International/Europe raised the issue of whaling. In response to the interest of stakeholders in whaling, the SIA interim technical report noted that the topic of whaling did not require further discussion as "[t]here is currently no trade in this area between the EU and Japan and it is unforeseen that the EU-Japan FTA will change this fact".<sup>777</sup> The Humane Society's comments on whaling were again brought up in the SIA final report<sup>778</sup> and in response, Antonio Parenti, of the EC and Deputy Head of Unit, Trade Relations with the Far East, and one of the lead speakers for the impact assessment's civil society dialogue, replied that whaling was not covered by the FTA. Approximately five months after the EU-Japan FTA came into force, the EP discussed the issue of Japan's resumption of commercial whaling. The EP noted that it had requested the EC to engage on the issue of whaling with Japan, but there had been pushback from the EC as they had determined the IWC to be the most appropriate forum to deal with Japan's whaling practices and that whaling would not be covered by the FTA. As such, the final FTA that entered into force did not have any provisions on whaling, and Japan subsequently withdrew from the IWC and resumed its whaling practices. The EP pointedly asked "[d]oes the Commission acknowledge that it was unwise to conclude a free trade agreement with Japan that contained no provisions on whaling and that, because of Japan's withdrawal from the IWC, Europe has less scope for halting Japanese whaling?"<sup>779</sup> From the EP's view, after the FTA came into force, the EC now has less capability to act on Japan's whaling violations. The

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<sup>776</sup> EP, 2016/2600(RSP).

<sup>777</sup> LSE Consulting, EU-Japan Draft Inception Report Presentation (2015) 101.

<sup>778</sup> EU-Japan, SIA Final Report (2016) 284.

<sup>779</sup> EP, E-002295/2019.

experience in the EU-Japan FTA thus demonstrates the tensions with consultants and stakeholders throughout the SIA process and reveals the challenges experienced in practice.

The SIA process indicates that it received comments on whaling but did not explore this issue further because there would not be trade in this area. This leads to questions about whether the issue of whaling should have been moot or whether it should have been considered dealt with once it was clarified that the FTA would not trade in whale products. A formalist interpretation of the FTA would assume the latter, that as whale products were not being traded, there was no need for the SIA or negotiations to address whaling. However, from the view of stakeholders, Japan's historically tenuous relationship with whaling and its refusal to follow the IWC moratorium are of such serious environmental concern that the EU, who touts the importance of sustainable development, should have utilised its unique position as a trading partner to push this issue within the trade negotiations. Parallels can be drawn to the 2021 debates in the United Kingdom (UK) surrounding the Government's decision to not include a "Genocide Amendment" within the UK Trade Bill.<sup>780</sup> This amendment would have permitted a Parliamentary Judicial Committee to investigate and report allegations of genocide within trading partners for purposes of triggering future action which could have resulted in the potential withdrawal of the UK from trade agreements.<sup>781</sup> Supporters of the Amendment viewed it as filling an important legal gap and providing the opportunity for the UK government to use its considerable position as a trade partner to effect social change. Opponents viewed this amendment as judicial activism, and as tackling issues outside the remit of the Trade Bill. Ultimately, the Genocide Amendment did not pass, but the debate surrounding it echoes the debates surrounding SIA and how these legal and policy tools should be utilised: should a formalist approach be followed or should these tools be viewed as a medium through which to effect change.

This analysis illustrates that when executing SIAs, consultants have grappled with difficulties in identifying and engaging with stakeholders. It is further submitted that these underlying issues stem from lack of clarity on the goals of public participation. This was fully examined through analysis of the EU-Japan SIA. That example illustrates that stakeholders held

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<sup>780</sup> The Genocide Amendment (2021).

<sup>781</sup> Leigh Day (2021).

legitimate environmental concerns that they wanted to introduce into the SIA and trade negotiating process but were refused because it was deemed that trade would not occur in that area. This demonstrates differing views on the extent of stakeholder engagement and differing perspectives on the goals of participation. From the perspective of some stakeholders, the goal was to raise sustainability concerns and environmental issues, no matter how wide in scope; the goal was to effect change to support the goals of sustainable development. From the perspective of the trade negotiators, their focus remains on the trade mandate and the consideration of trade-related environmental issues; the goal was to garner data related to trade induced environmental impacts. It is important to note that, as illustrated in the EU-Japan FTA, if an environmental issue, within the region of the trade partner, but not directly addressed by the trade agreement, is not adequately addressed in the SIA, it will cause tension and a perception of stakeholders not being effectively engaged. It is suggested here that to counter this, there needs to be greater transparency throughout stakeholder engagement and clearer parameters on the goals of stakeholder participation throughout the SIA.

### 3. The Limitations of Timing and Integration

Within SIA, to promote principles of sustainability, public participation is key, but to ensure active public participation, the timing and integration of data obtained throughout the assessment is also vital. Moreover, effective timing and data integration supports greater transparency throughout the SIA process. Although the importance of effective timing and integration of assessment results are highlighted throughout SIA documentation and stock-taking seminars, in practice, there have been challenges.

With respect to timing, the importance of early assessments has been noted since around the time that SIA was developed. The Organisation for Economic Cooperation and Development (OECD) discussed this issue at a workshop in 2000, stating that early assessments allow for negotiations to take into consideration knowledge gained throughout the assessment process.<sup>782</sup> Assessments can take place before, during or after the negotiations. The EC

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<sup>782</sup> OECD (2000) 312.

conducted IA is a complete *ex-ante* approach, whereas the SIA, although it is labelled as an *ex-ante* assessment, technically takes place during the negotiations.

Ideally, the SIA is meant to run parallel to the trade negotiations, so that negotiations can be informed by the data that is uncovered.<sup>783</sup> There should be a back and forth between the SIA and the negotiations, a constant feedback loop. However, in practice, the trade negotiations can be rather advanced before the SIA process has even been instigated, as the trade mandate is set during the internal IA process. Concerns over the timing of SIA have been raised since this assessment came into practice. For instance, the question of timing was a key theme raised at the EC's 2006 stocktaking conference. Participants discussed when trade SIAs were useful and how assessment results were integrated into trade negotiations.<sup>784</sup> Some comments made during the proceedings include: "timing of Trade SIAs is critical: they must be completed early enough to influence the negotiations"<sup>785</sup> and an analogy was drawn between the SIA being a tortoise, as "slow and cumbersome creatures" and the trade negotiations being the hare, as "fast and furious affairs".<sup>786</sup> At the same conference, the EC emphasised that efforts needed to be made to ensure that assessments produced results parallel to the negotiations, delivering results in "real time".<sup>787</sup>

Yet, issues with timing of assessments are still ongoing. In 2006, Caroline Lucas, a then Member of the European Parliament, commented that SIAs had not impacted trade negotiations, explaining that SIA's were not central to policy-making, they were essentially "bolted on".<sup>788</sup> In 2015, an NGO researching transport and environmental issues commented on the time restrictions of the negotiation timetable, which limited the abilities of stakeholders to offer in-depth replies, and further observed that "studies have come too late to have a real influence".<sup>789</sup> In 2016, the Macroeconomic Policy Institute, an academic institute with connections to trade unions, presented on the issues of SIA and specifically

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<sup>783</sup> EC Handbook (2016) 5 explains that SIA "feed into and steer negotiations".

<sup>784</sup> EC Stocktaking, Key Outcomes (2006).

<sup>785</sup> EC Stocktaking (2006) 11.

<sup>786</sup> *Id* at 16. Comments by Laurence Tubiana, Director of the Institute for Sustainable Development and International Relations (IDDRI).

<sup>787</sup> EC Stocktaking, Key Outcomes (2006) 2.

<sup>788</sup> EC Stocktaking (2006) 12.

<sup>789</sup> T&E, Response to SIA (2015).

highlighted the issue of timing as being problematic. They observed that SIA is often delayed, meaning that assessment feedback cannot feed into the negotiations.<sup>790</sup> It was in this context that the TTIP negotiations were raised. TTIP negotiations began with the first round in July 2013 stalled in October 2016, with the fifteenth round.<sup>791</sup> Regarding assessments, the final inception report was published in April 2014, the final interim technical report was published in July 2016 and the final report was published in March 2017.<sup>792</sup> In comparing the negotiation timeline against the assessment timeline, they do not coincide; they are not parallel. Prior to the final inception report's publication, four rounds of negotiations had already taken place. By the time the final interim technical report was released, a further ten rounds of negotiations had taken place. This timing leaves one to question how much of the assessment feedback was utilised by the trade negotiators, as the timetable indicates that it would be limited.

There is a disconnect with the assessment moving slowly, whereas negotiations can move rapidly. Negotiations could have progressed with little to no information from the assessment being presented to the negotiators. This is not the situation that was envisioned when the 2006 and 2016 Handbooks were drafted. There is a downside to rushing the assessment process, in that it could lead to hurried or fewer consultations, potentially resulting in missed data. To realise the usefulness of SIA, it is imperative to obtain as accurate data as possible.

Further, there appears to be an inherent assumption that consultants will have access to most or all necessary data that is needed to produce the impact assessment. However, the SIA process occurs as negotiations are ongoing, which leads to a question of how an assessment can be accurately completed when the consultants do not know what is going to happen.<sup>793</sup> If the consultants do not know what tariffs will be removed, then how can they correctly predict impact on the environment. To overcome this issue, the timing of these assessments need to be done to ensure that feedback is obtained throughout the process from the negotiations. There needs to be a continuous loop between the consultants and the

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<sup>790</sup> See Stephan (IMK, 2016).

<sup>791</sup> EC, Press Release (2019). In 2019, the Council of the EU declared the trade mandate for TTIP “obsolete”.

<sup>792</sup> EC, SIA.

<sup>793</sup> This issue was also discussed in chapter 2.

negotiators, which makes it even more necessary to be clear on how the assessment process feeds into the negotiation process and vice versa.

Yet, the realisation of these aims is complicated by the inherent tension with the confidentiality of the negotiation process. Negotiation mandates and positions are confidential to ensure that trading positions are not compromised. Regarding the US ER of trade model, as the assessment is conducted internally by trade negotiators, they are privy to these trade positions and can adequately account for these issues in the assessment process. With respect to the EU, the usage of external consultants adds an extra layer of distance, and the need for confidentiality to ensure negotiating advantage can potentially impact the timing of an uninterrupted feedback loop between consultants and negotiators. If the assessment and the aim of preventing environmental issues is paramount to the negotiators, then timing will not be an issue, as the focus would be on making trade more rational and knowledge based. However, trade's goal of economic development results in a power struggle, and the success of the negotiations and maintaining an advantageous negotiating position ultimately prevails, as "political questions are always political".<sup>794</sup>

Besides the issues of timing within SIA, there is also the challenge of the lack of clarity with regards to the integration of assessment data. Integration of SIA into trade negotiations was a common theme at the EC's 2006 stocktaking conference. In her opening comments, then French Trade Minister, Christine Lagarde, called for "full integration" of SIAs into the trade negotiation process.<sup>795</sup> Tom Compton, then head of the WWF's Trade and Investment Programme, which is no longer operational, commented that SIAs must be integrated into policy in order to be effective, they must bring about "actual changes".<sup>796</sup> Compton also remarked on the role that NGOs and civil society could play in legitimising the process of trade liberalisation, but key to their involvement was an understanding of how the knowledge they provided was integrated. Hussein Abaza, then affiliated with the United Nations Environment Programme, also commented that it was necessary to integrate SIA outcomes into policy.<sup>797</sup>

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<sup>794</sup> Bäcklund (2009) 1084.

<sup>795</sup> EC, Lagarde Speech (2006), translated from French.

<sup>796</sup> EC Stocktaking (2006) 18.

<sup>797</sup> *Id* at 45.

Although it has been generally agreed, since SIA was created, that assessment results must be integrated to achieve best practice, integration of knowledge obtained throughout the SIA into the negotiations is problematic. Nishant Pandey, a representative for the NGO Oxfam, commented there was lack of clarity on how the assessments findings impact EU trade policy.<sup>798</sup> Pandey referenced the example of the SIA of the EU's negotiations with 77 developing countries in Africa, the Caribbean and Pacific (ACP), known as the EU-ACP Economic Partnership Agreements. In this example, the preliminary SIA findings highlighted some environmental concerns, such as deforestation, but these results did not result in policy change,<sup>799</sup> and the EC's position paper on this SIA did not directly respond to any concerns about deforestation.<sup>800</sup> Once the issue of deforestation was raised, in examining the assessment and trade documentation, it is unclear how it was dealt with throughout the negotiations. Pandey further observed that participants had spent a great deal of time discussing the issue of integration, yet the SIA Handbook had a small section dealing with this issue, which did not explain in any detail how assessments were utilised or relied upon.<sup>801</sup>

The 2006 SIA handbook addresses the issue of SIA integration into EU policy by explaining that the EC is committed to integration, and that the "credibility of the EU's pursuit of sustainable development goals depends on how the Trade SIA analysis is used to influence trade policy making and trade negotiations".<sup>802</sup> The 2016 SIA handbook further explains that consultants should strive to ensure stakeholder input is considered.<sup>803</sup> Stakeholder feedback has consistently demanded that there be greater transparency on how assessment data is integrated into negotiations, yet neither version of the SIA handbook directly addresses this issue in detail. There is no explanation of how integration happens in practice. For instance, in reading the handbooks and guidance on integration of data, there is lack of clarity on the direct impact that assessment data has on negotiations and the final trade agreement or to what extent the EC is accountable with respect to adhering to assessment findings. There is

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<sup>798</sup> *Id* at 13.

<sup>799</sup> PwC, SIA (2004).

<sup>800</sup> EC, EU-ACP SIA Position Paper (2007).

<sup>801</sup> EC Stocktaking (2006) 45.

<sup>802</sup> EC Handbook (2006) 13.

<sup>803</sup> EC Handbook (2016) 26.

no indication to what extent the negotiators are even required to consult assessment data. These is a distinct impression that it is left to the negotiators to determine how to manage assessment data on a case-by-case basis.

The EC's position paper at the end of each SIA could potentially serve as another means through which integration of assessment data is monitored, as this paper provides the EC with the opportunity to comment on and respond to the consultant's findings, explaining "how the SIA has and will contribute to the negotiations" and "how the SIA findings have or will be used".<sup>804</sup> In theory, the position paper is a useful mechanism which could provide insight into how assessment results are incorporated but the reality is far murkier. Firstly, environmental concerns are sometimes raised in assessment reports, but are not responded to in position papers, as was illustrated in the EU-ACP position paper. Secondly, an environmental issue may have been raised by a stakeholder but not directly addressed by the assessment reports, which means the EC would not have had the opportunity to respond to it in the position paper.

This discussion examines the ultimate tension between the principles of effective assessment timing and data integration that the EC promotes and the reality of what is happening on the ground when these assessments are carried out. This disconnect between theory and reality leads to the perception amongst stakeholders and civil society organisations that SIA is experiencing issues with policy relevance. This also links with the above discussion about the expectations on transparency of data and the realities that in practice, there is lack of clarity. This is problematic because it will ultimately lead to the disengagement of stakeholders, and lack of public involvement stymies the probability of good environmental governance. What may have initially been labelled as growing pains when SIA first came into practice has been an ongoing issue, which has not been directly addressed, with plans on how to resolve these issues in practice.

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<sup>804</sup> *Id at 30.*

#### D. Recommendations and Conclusion

The above analysis reveals that in establishing SIA, the EU embarked on an ambitious exercise. SIA has been marketed as a tool which could produce results, meaningfully identifying negative impacts and proposing solutions. Yet, for an instrument which should have sparked relief amongst the public, and which could have been viewed as opening a door into the notoriously secretive world of trade negotiations, the usefulness of this tool is still debated some 20 years after its birth. The EC has reflected on SIA since its creation and has been open to criticism and feedback, but SIA is still not a perfected model, as one sole criticism that has been raised since SIA's foundation is still being raised today: there is lack of certainty as to how assessment results impact trade negotiations and this hinders effective stakeholder engagement. On further examination, all the criticisms about SIA and concerns about this process, which have been raised, relate back to this core criticism.

SIA is cyclical, in that information is presented to trade negotiators, use of this information increases public ownership of the assessment process and this in turn encourages future involvement which feeds into information being presented to negotiators during future assessments. If one of these steps breaks down, then the cycle falters and you have a situation where SIA is not living up to the full potential that it has been promoted as having. The relationships between the stakeholders, consultants and the EC do not move back and forth as efficiently as they should. This in turn leads to a situation where the assessment findings do not feed into the negotiations as hoped, leading to a breakdown in perceptions of transparency and lack of ownership. This then results in reduced public participation and this cycle is propagated in future assessments. It is thus suggested here that when SIA falters, it is because the relationships of the assessment process do not operate as anticipated; the cycle is broken. This is in fact the current situation with SIA, and it has resulted in the disengagement of key stakeholders, as they no longer view SIA as having the capability to adequately address trade related environmental concerns.<sup>805</sup>

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<sup>805</sup> For years, the WWF, via the Trade and Investment Programme, was one of the most active participants in the assessment process. The Trade and Investment Programme ultimately closed, and the researchers left for different projects, which would provide them other opportunities to deal with trade concerns and effect change.

To assess the current state of SIA, this chapter explored three inherent expectations that follow SIA, based on its historical development and foundational documentation: achieving sustainable development, stakeholder involvement and transparency. In exploring these expectations, this chapter sought to expose issues surrounding easy assumptions that these expectations would be realised in practice. This chapter then highlighted three distinct challenges that have been experienced by SIA in practice: limitations with inherent biases, stakeholder engagement and the timing and integration of knowledge accrued during the assessment process. This analysis has revealed a common theme that underlies all the criticisms that have been made of SIA, there is a lack of clarity on the aims of this assessment which in turn impacts upon knowledge accrual and engagement and hinders SIA's ability to be a collaborative tool.

Chapter one laid the foundation by explaining some core issues with EA of trade in general, namely that critiques of these models tend to focus on procedural issues and fail to examine how they operate in practice and that construction of these models as tools of linear decision making are problematic, as continuous engagement is necessary to achieve their aims of sustainability. Chapter two in turn explained the importance of EA of trade as a tool of environmental governance, due to its unique potential to be able to engage stakeholders towards determining environmental valuation. This chapter thus sought to posit the European experience with EA of trade and in doing so expose the challenges and limitations of this model. The EU has asserted that its approach towards assessment reflects a collective preference for good governance and collaborative decision making,<sup>806</sup> and central to achieving these aims is stakeholder engagement and participation in the decision-making process. It is recognised that SIA is a flexible tool, it is meant to be adaptable, meaning that the failures of past assessments can be addressed and mitigated or avoided in future assessments. It is suggested here that SIA has the potential to be a tool of good-governance and collaborative decision making, as envisioned, if some of the issues identified throughout this chapter are recognised and addressed in practice.

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<sup>806</sup> See da Conceição-Heldt, and Meunier (2014) 973 and generally for a discussion of the EU's normative power.

This chapter has demonstrated that the foundational issue with SIA, which leads to many of its other challenges, is the lack of clarity on its purpose. SIA can be either recognised simply as an instrument that provides the opportunity for public dialogue or it can be recognised as an adaptable tool that is meant to promote principles of sustainability. Given the historical development of SIA and this chapter's examination of its expectations and limitations, it is suggested here that the latter is more in line with the intended purpose. On that basis, it is argued that SIA must address the limitations of bias, stakeholder engagement and timing and integration, with the common theme being the promotion of collaborative relationships in support of capacity building.<sup>807</sup>

With respect to bias, the greatest perceived strength of SIA is perhaps its greatest weakness: the reliance on external consultants. Together with its comprehensive approach in analysing impacts within its boundaries and its trading partner's boundaries, the use of external consultants is what sets SIA apart from the US ER of trade model. In identifying that there are nuances to the usage of either external or internal consultants and that both have limitations, these challenges can be addressed in practice. It was argued that ineffective experiences with consultants throughout the SIA could in turn result in missed opportunities for knowledge accrual, which could hinder efforts at promoting sustainable practices. The potential challenges with external consultants have been identified as lack of transparency regarding how they utilise the information they receive throughout the assessment, questions about their internal bias and technical abilities and questions about their engagement with stakeholders. The root of the challenges associated with these external consultants stems from their engagement with stakeholders, which in turn impacts their ability to obtain the knowledge that is needed within the assessment. As a starting point, it must be recognised that knowledge accrual is vital to the SIA process and as discussed in chapter two, stakeholder knowledge is key. In current SIAs, there is an assumption that consultants try to provide every opportunity for stakeholders to become involved. Yet, as explained above, there are concerns over whether environmental interests in the trading partners are properly explored and there are issues surrounding appropriate representation at in-person stakeholder meetings. Given the current post-Pandemic cultural climate for remote meetings, the increased comfort with

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<sup>807</sup> See the discussions on this point within chapter 2.

this technology could be viewed as having the potential to engage with even more stakeholders in future SIAs on a regular basis. There can be an option to teleconference in interested parties or to have more informal meetings on a regular basis, at varied times. To better engage with locals and encourage their involvement throughout, consultants must foster relationships with networks of local experts, which can engage local stakeholders throughout and involve them through regular meetings. This in turn provides the opportunity to challenge any internal and unintentional biases that may be held by the consultants and make the process more equitable. Further, this approach also encourages continuous engagement throughout the SIA, permitting greater opportunities for environmental issues to be addressed.<sup>808</sup>

The discussed limitations of stakeholder engagement overlap with some of the issues experienced with innate biases. It is suggested here that at its core, the importance of stakeholder engagement must be held as a starting point for SIA, as active public participation results in wider acceptance amongst stakeholders and encourages the likelihood of future engagements. In addressing internal biases and working towards making the process more equitable, consultants are better positioned to understand stakeholder expectations, clarify the aims of engagement and develop appropriate methods. To keep stakeholders involved throughout current and future SIAs, consultants must also provide greater clarity on how the data they have accrued is being utilised. This is a balancing act, as negotiations are meant to be confidential, but consultants can at a minimum, simplify the process by providing easier access for any stakeholder group wanting to be involved, and in turn creating a database of stakeholder knowledge, which is made accessible to all interested stakeholders. This database can list what information was submitted and explain how the consultants utilised that information throughout the assessment process. The current model of burying responses and feedback within assessment reports and meeting minutes for stakeholder consultations can be overwhelming for stakeholders with limited time and resources. The format of such a database could be as simplistic as having a tab on the consultant's respective SIA webpage which would lead to a document that lists, except for any feedback that has been shared confidentially, the stakeholders that have commented to date, what concerns were raised

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<sup>808</sup> See chapter 1(D)(2).

and how these concerns were responded to. By presenting stakeholder engagement in such a straightforward manner, it would make this information much more accessible to a wider audience. This in turn ties into the limitations discussed about timing and integration. By having clear engagement goals and communicating it more simply and effectively to stakeholders throughout, this will in turn have knock-on effects with respect to issues of timing. Greater transparency and collaboration between consultants and stakeholders will combat these tensions between theory and practice.

The EU SIA is touted as the most comprehensive EA of trade model, but comprehensive does not equate with effective and that has been illustrated by the identified challenges that have been experienced. In recognising SIA's strengths and simplifying the approach to realise those strengths, some of these challenges can be addressed. These recommendations are a starting point to illustrate that the easy assumptions of SIA must be challenged and that the limitations of this model should be addressed in future assessments. The next chapter will analyse a recent SIA process, in the context of the EU-Mercosur trade agreement for purposes of examining whether the general limitations identified in this chapter were realised in a recent SIA and to further assess how the recommendations identified throughout this chapter could have been implemented. By doing this, the next chapter will provide a reflective space, that recognises SIA is living tool that can constantly be challenged and adapted for purposes of promoting best practice in the future.

## **VIII. Chapter 6: Case Study: EU-Mercosur Association Agreement**

### **Negotiations**

#### **A. Introduction**

The previous chapter explored the European Union's (EU) global commitment to sustainable trade and positioned sustainability impact assessment (SIA) as a vital tool of EU trade policy, which is meant to promote transparency and stakeholder involvement. This chapter seeks to examine the SIA of the EU and Mercosur trade negotiations to explore the assessment process at a granular level and to analyse the issues raised in the previous chapter through the lens of this trade agreement. As the EU's largest trade deal with respect to tariff reduction, the EU-Mercosur trade agreement is an ideal case study as these negotiations and accompanying SIA process have faced challenges, raising governance concerns, which should be addressed for purposes of future practice.

Trade negotiations between the EU and the South American nations of Argentina, Brazil, Paraguay and Uruguay, collectively known as the Mercosur trade bloc, began on 28 June 1999 and were completed 20 years later on 28 June 2019 at the G20 summit in Osaka, Japan. The EU-Mercosur trade deal must still be signed and ratified by the European Parliament and by the national parliaments of the Mercosur nations. Ratification is currently pending due in part to environmental concerns surrounding the Amazon rainforest and pesticide usage, with the EU proposing an addendum to the trade agreement which would in turn promise environmental safeguards.<sup>809</sup> At the time of signing, it was hoped that ratification of this deal would be swift, but as of 2022, the parliaments of Austria,<sup>810</sup> Ireland,<sup>811</sup> and the Netherlands<sup>812</sup> have voted against the trade agreement, while France<sup>813</sup> and Luxembourg<sup>814</sup> have also expressed their lack of support for the trade agreement in its current form, with

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<sup>809</sup> Efforts by President Jair Bolsonaro to try and open more Indigenous lands to mining have further aggravated these environmental concerns. See Brazil PL 191/2020 (2020).; See Spring (2022) for further details about the addendum, as proposed by EU Commissioner for the Environment, Virginijus Sinkevicius.

<sup>810</sup> DW (2019).

<sup>811</sup> In June 2019, Reuters (2019).

<sup>812</sup> In June 2020, translated from original Dutch text. Tweede Kamer der Staten-Generaal (2020).

<sup>813</sup> French Republic (2020).

<sup>814</sup> Arellano (2020).

Luxembourg requesting additional commitments against deforestation. On 7 October 2020, in what was considered an unprecedented, but also largely symbolic move, the European Parliament passed a non-binding resolution which “emphasises that the EU-Mercosur agreement cannot be ratified as it stands”.<sup>815</sup> Rejection of this trade agreement is equally rooted in local political concerns, such as unrest amongst French and Belgian farmers about the agreement, and distress about climate change, particularly Brazil’s lacking climate change mitigation efforts. The catalyst which ultimately resulted in lack of political support for this FTA seems to have been the 2019 fires in the Amazon and the respective international news coverage it received.<sup>816</sup>

In August 2022, in light of global supply chain disruptions due to political and post-pandemic issues, the EU approached Brazilian officials to revisit the status of the trade agreement.<sup>817</sup> This in turn became a politically charged issue during the 2022 Brazilian presidential elections, with candidate Luiz Inacio Lula da Silva vowing to have the trade deal ratified within the first year of his Presidency and current President Jair Bolsonaro taking the position that the agreement should not be reopened.<sup>818</sup> Once this agreement enters into force, it would be one of the largest trade agreements for both the EU and the Mercosur nations. The negotiations lagged for years but finally gained momentum following recent political changes, notably post the 2016 election of Donald Trump in the United States and his subsequent freezing of trade talks with the EU, which in turn pushed the EU to look to other trade partners. As explained by Brazil’s foreign minister, Ernesto Araújo, there was a “political drive we haven’t seen in a long time” in the lead up to the completion of this deal.<sup>819</sup> These negotiations, which have been amongst the longest running to date, and the subsequent achievement of an EU-Mercosur deal have been viewed as a “landmark” achievement<sup>820</sup> and a “truly historic moment”.<sup>821</sup>

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<sup>815</sup> EP, 2019/2197 (INI) point 36.

<sup>816</sup> Ghiotto and Echaide (2019) 7.

<sup>817</sup> Ayres, Boadle and Caram (2022).

<sup>818</sup> Paraguassu (2022). Bolsonaro views the EU’s actions as protectionist.

<sup>819</sup> As quoted in Schipani and Harris (2019).

<sup>820</sup> As quoted in Kostaki (2019), former European Commissioner of Trade Cecilia Malström stated: “They have been long negotiations – tough, difficult, and at least I have said many times ‘we are almost there.’ Now we are. This is a landmark agreement”.

<sup>821</sup> Jean-Claude Juncker, former European Commission President, stated: “I like to use words with care but this is truly a historic moment”. Juncker (2019).

The completion of these long-standing negotiations has resulted in the EU's most far-reaching trade agreement; it has now opened a market for trade in goods and services to 800 million people, offering approximately a quarter of global domestic product.<sup>822</sup> It will reduce tariffs by approximately €4 billion annually, eliminating tariffs on 93% of exported goods from Mercosur to the EU and on 91% of EU exported goods.<sup>823</sup> The significance of this agreement is further underscored by the vast political concerns that were raised during the negotiations, including the apprehension of EU beef farmers about increased competition and that of the automotive industry within the Mercosur bloc, and which were subsequently overcome to achieve completion of the deal.

Notably, prior to this agreement, the notoriously insular Mercosur bloc had not entered into a trade agreement with outside parties since its creation in 1991. This deal affords Mercosur the opportunity to access and offer their goods, particularly agricultural products such as beef and sugar, to the EU market. It should be noted that both beef and sugar are environmentally problematic products to cultivate in the first instance. The beef cattle industry is considered the most harmful meat from an environmental perspective,<sup>824</sup> as it generates 59.30 kilograms of greenhouse gas emissions per kilogram of viable product.<sup>825</sup> Sugar crops result in overuse of water, intensive use of pesticides and can also lead to soil erosion, leading to excess carbon emissions.<sup>826</sup> The EU benefits from more favourable export terms for its industrial sectors, such as cars, machinery, chemicals and pharmaceuticals, and agri-food sector, such as wines and dairy products,<sup>827</sup> allowing it to compete against global partners who still face high and sometimes prohibitive tariffs from the Mercosur bloc.

This deal sends out two important political messages: that the EU will promote trade, possibly as a global leader, and the Mercosur bloc is open for business. With a trade agreement of such scale being finalized, it is imperative to assess the agreement within the scope of the SIA

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<sup>822</sup> Brunsden, Schipani, Harris and Mander (2019).

<sup>823</sup> *Id.*

<sup>824</sup> Lamb production is also equally harmful.

<sup>825</sup> See the charts in CarbonBrief (2022).

<sup>826</sup> WWF, Sugar 14, 26.

<sup>827</sup> EC, Mercosur Press Release (2019).

and to analyse what impact may or may not result from this level of increased trade. This chapter will be arranged into two sections. The first section will explore how EU-Mercosur came to fruition, it will identify the difficulties that have been experienced throughout this trade agreement's SIA process and it will reflect how these challenges relate to the issues identified in the previous chapter about SIA in general. The second section will explore responses to these limitations and explore alternatives to the SIA model. The goal of this chapter is to ultimately contribute towards the discussion of whether SIA is fit for purpose, by exploring whether there are underlying fissures of the SIA process and if they are endemic or unique to individual assessments and whether any action should or can be taken to address these issues.

#### B. The EU-Mercosur Negotiations: The Realities of a Sustainability Impact Assessment

The EU was drawn to Mercosur as this trading bloc has 260 million consumers and represents the seventh largest economy and fifth largest market outside the EU.<sup>828</sup> Mercosur provides a potential market for 65,000 EU businesses with the removal of high tariffs such as 35% on cars, 14% on pharmaceuticals and 35% on clothing.<sup>829</sup> The European Commission (EC) highlighted that this deal would afford the EU with first-mover advantage, as they would have access to the Mercosur market before anyone outside the EU.<sup>830</sup> As explored throughout chapter one, trade agreements oftentimes follow political cycles, and this was reflected in the EU-Mercosur negotiations, as the trade talks for this deal, 20 years in the making, were essentially finalised after three intensive days in June of 2019.<sup>831</sup>

Idling negotiations were reenergized following the 2015 election of Argentinian President Mauricio Macri, the election of Donald Trump in 2016, an outspoken critic of free trade, and the 2018 election of Brazilian President Jair Bolsonaro. Ministers were motivated to act quickly and decisively as there was a perfect storm of political motivation behind this deal,

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<sup>828</sup> The annual gross domestic product of Mercosur is €2.2 trillion. EC, Factsheet (2017).

<sup>829</sup> *Id.*

<sup>830</sup> *Id.*

<sup>831</sup> Brunsden, Schipani, Harris and Mander (2019).; See chapter 1(B)(2).

and they sought to seize this “window of opportunity”.<sup>832</sup> The October 2019 presidential elections in Argentina provided further impetus to close the deal as quickly as possible, in light of concerns that conservative and pro-trade Macri may lose the election to left-leaning Alberto Fernández, an outspoken critic of the EU free trade deal.<sup>833</sup>

Ministers were able to ride the political momentum at the time and push the EU-Mercosur agreement through, despite concerns being raised about the potential environmental impact of this agreement. These Ministers were not blind to environmental issues, but their actions illustrate the tension that exists between trade and the environment. As explored in chapters one and two, the relationship between international trade and the environment has been explored in depth over the years, with differing views on the environmental impact of trade.<sup>834</sup> To those stakeholders within the Mercosur bloc that could potentially face negative environmental impacts because of this agreement, these negotiations became contentious and there was pushback.

The EC was aware of the unrest this deal would cause in those environmental circles and sought to promote its potential environmental benefits. In their 2017 fact sheet, the EC highlighted that the trade deal would contribute to sustainable production, as both the EU and Mercosur are implementing the Paris Agreement on Climate Change and that the agreement would include a trade and sustainable development (TSD) chapter to “strengthen investment and trade relations whilst also fully respecting the environment”.<sup>835</sup> Despite the EC’s claims of commitment to environmental protection, there is nevertheless a disconnect between those in favour of this agreement and those groups who oppose it on the basis of environmental concerns, such as fears that it would increase deforestation.

This disconnect illustrates the ultimate challenges of SIA and the different assumptions made throughout this process. Groups concerned about environmental impacts assume that SIA can and should prevent negative environmental issues and promote sustainable

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<sup>832</sup> Wagner Parente, the CEO of a Brazilian consulting firm specializing in international trade, as quoted in *Id.*

<sup>833</sup> In light of the economic crisis in Argentina, Macri suffered a heavy defeat and free trade critic Fernández gained control.

<sup>834</sup> See chapter 2(B).

<sup>835</sup> EC, Factsheet (2017).

development.<sup>836</sup> They view SIA as a medium through which they can raise environmental concerns that can be addressed, and ultimately as a means through which the trade negotiations can and should be revised in light of these respective concerns. The trade negotiators and the external consultants who run the SIA view the assessment as part of the trade negotiation process, as a means through which additional information can be gathered to inform their work. As a baseline, the various assumptions about SIA of trade all agree that this tool affords the opportunity to gather information about environmental concerns. The challenge with SIA of trade centres around the projected goals and assumptions surrounding this baseline of information gathering, and this is reflected throughout the experience of the EU-Mercosur negotiations and related assessment.

This examination of the history of the EU Mercosur reveals that this trade deal was highly polarising throughout, but the rushed timeframe for negotiations in 2019 was viewed as particularly objectionable. As was illustrated by the speed with which the EU-Mercosur FTA was signed, the political appetite for such agreements can change swiftly, which makes it worthwhile to explore the status of the SIA process as this assessment is meant to offer a means through which environmental concerns can be raised and addressed during the negotiations. This section will identify the challenges experienced throughout the EU-Mercosur SIA: specifically focusing on the problematic timing of the assessment process, exploring the concrete impacts of mismatched timing and examining the issues that arise from complicated data.

### 1. Missing the Mark: The Outpacing of the Assessment Process

Prior to the signing of the EU-Mercosur agreement, opponents raised concerns that it would increase greenhouse gas emissions, leading to degradation of the Amazon rainforest and harming local communities. Concern had been raised about Brazilian President Bolsonaro and his environmental and human rights record, such as his pledge to remove the country from the Paris Climate Agreement.<sup>837</sup> Brazil's perceived lack of commitment to the environment

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<sup>836</sup> See chapter 5(B)(1).

<sup>837</sup> Statements made at his campaign launch. Independent.ie (2018). Bolsonaro ultimately retracted this pledge.

was also highlighted through its handling of wildfires in the Amazon. There are also concerns about the EU's desire to open markets for automobiles and energy companies, while at the same time offering greater market access to the Mercosur bloc for beef products. As Brazil is the world's biggest beef producer, it is argued that the opening of European markets to Brazil would directly impact European beef producers and lead to environmental damage as Brazil increased production to meet demand. From an environmental perspective, the largest contributor of deforestation is the cattle industry, as 5,800 square kilometres of the Brazilian Amazon is felled annually to support this industry.<sup>838</sup>

It is further important to note there are political differences between two main groups in the EU, those that are interested primarily in exports and see the economic benefit of this agreement, such as Germany, the Netherlands, Sweden, Spain, Portugal, the Czech Republic and Latvia, and those that are primarily agricultural and are concerned about the economic impact on their industries, such as France, Belgium, Ireland and Poland. As it stands, the EU's commitment to sustainable development and its 2030 climate goals are at odds with Brazil's environmental principles, which makes this agreement untenable in its current form. In August 2020, German Chancellor Angela Merkel expressed "considerable doubts" over the trade agreement, in light of environmental threats such as deforestation, but the German Chamber also offered hope of a path forward, explaining this agreement "could provide the urgently needed boost to the economy, during the current crisis".<sup>839</sup> In short, given its long negotiation history, the expressed reservations about environmental issues and the rushed negotiations to finalise the deal, there was a perception amongst stakeholders that this trade agreement was problematic and not embodying the expected EU approach to trade negotiations. Before the SIA was even launched, there were reservations about this deal, and external consultants would have been aware of these concerns.

As mentioned, the timeline for these negotiations have been protracted, beginning in 1999. This extended timeline has in turn impacted the SIA process. The first EU-Mercosur SIA was

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<sup>838</sup> Based on research that NGO Trase shared with the Guardian. Phillips *et al* (2019).

<sup>839</sup> MercoPress (2020).

published in 2009, 10 years after negotiations began.<sup>840</sup> This report identified both positive and negative environmental impacts of the trade agreement, with the positive benefits focusing on increased opportunities for environmental regulation and services. With respect to negative environmental impacts, this report highlighted: water pollution resulting from increased mining production and agricultural practices; natural gas exploitation, which could result in negative carbon emissions and biodiversity risks; and the dangers of deforestation.<sup>841</sup> To counter these environmental issues, this SIA suggests stronger environmental regulation and capacity building within the Mercosur nations.<sup>842</sup> Ultimately, the suggestions of this SIA did not move beyond the assessment process as negotiations stalled and then regained impetus, due to political influences, starting in 2016. It was at this stage of relaunching the negotiations that the SIA process started anew, and a public tender resulted in the external consultant being chosen.<sup>843</sup> It should be noted that the EC has not made available details about the public tender: who bid for the project and whether consultants with an EU and Mercosur connection bid.<sup>844</sup>

The consultant refers to the 2009 SIA throughout their reports and builds upon the issues addressed in that original SIA, but their work is an entirely new assessment, and afforded a new opportunity for stakeholders to engage in the negotiations at a point in time when the trade agreement was being solidified. In September 2017, the consultant officially began the stakeholder consultation process for the relaunched EU-Mercosur SIA. In total, there were eleven civil society dialogue meetings held in Brussels, with five in 2017, two in 2018, three in 2019 and one 2020.<sup>845</sup> These civil society meetings were the primary medium through which interested stakeholders could give input and be kept up to date on the SIA process, as

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<sup>840</sup> This SIA was conducted by the the Institute for Development Policy and Management and Environmental Impact Assessment Centre (IARC) at the University of Manchester. See EU-Mercosur, Final SIA Report (2009).

<sup>841</sup> *Id* at 97, 53-68.

<sup>842</sup> *Id* at 97-99.

<sup>843</sup> The consulting arm of the London School of Economics and Political Science (LSE) was chosen as the external consultant [hereinafter “the consultant”] and they also completed the SIA of the EU-Japan FTA, see EU-Japan, SIA Final Report (2016) and the final inception report of the EU-Eastern and Southern Africa (ESA) – Deepening of the Economic Partnership Agreement (EPA) see EU-ESA, Final Inception Report (2020).

<sup>844</sup> See the discussion on this issue in chapter 5(C)(1).

<sup>845</sup> 17 January 2017; 4 July 2017; 6 September 2017; 13 October 2017; 22 November 2017; 20 March 2018; 6 September 2018; 15 January 2019; 15 July 2019; 15 October 2019; 22 July 2020.

the negotiations for the EU-Mercosur FTA ended on 28 June 2019, predating publication of the final SIA report, which was released publicly on 29 March 2021.<sup>846</sup>

In addition to these meetings, for two weeks after the in-person meetings, stakeholders were afforded the opportunity to respond and issue official statements and register concerns via the EU-Mercosur SIA email address.<sup>847</sup> The consultants also established a dedicated webpage for the SIA, which contained details about the assessment and consultations. In analysing the minutes of the in-person meetings, where made available, and participant lists, two points become clear: civil society organisations representing environmental concerns are in the minority, as agricultural and business groups are the majority of the participant list, and environmental concerns do not appear to be a primary topic of discussion. Examination of the comments received by email equally reveal limited involvement of environmental stakeholders. The SIA only summarised the comments that were received via email, which makes it difficult to examine the data that had been submitted via this method. However, based on available information, approximately 12 stakeholders commented via email throughout the SIA process and four of these stakeholders represented environmental concerns.<sup>848</sup> Considering the scope of this trade agreement and its significance both within the EU and Mercosur, this level of engagement is on a lower scale. This in turn leads to questions about and further examination of the timing of the civil society dialogue meetings and engagement of stakeholders, to understand why there was not more robust feedback. The timeline, which is useful to examine, begins in 2017, when the external consultant was appointed, and ends in December 2020, when the final SIA report was produced.<sup>849</sup>

Civil society dialogue meetings were first held on 17 January 2017,<sup>850</sup> to provide an opportunity for discussion with civil society organisations and give an update on the state of

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<sup>846</sup> EU-Mercosur, Final SIA Report (2020).

<sup>847</sup> *Id* at 327.

<sup>848</sup> The Veblen Institute commented that the SIA seemed to minimize the impacts of deforestation.; Climate Action Network (CAN) commented on greenhouse gas emissions, deforestation, and climate change.; Greenpeace commented on deforestation.; Fern, ClientEarth and Conservation International submitted a joint report listing environmental concerns and their ability to comment given the timing of the SIA. *Id* at 330-333 and annex 5.

<sup>849</sup> It was not published and made publicly available until March 2021.

<sup>850</sup> EU-Mercosur, Civil Society Meeting (January 2017).

play of the negotiations. At this stage, no SIA documentation had been released and trade negotiations were ongoing. At this January meeting, 108 organisations participated, with heavy representation from the agricultural sector. With respect to environmental organisations, Humane Society International/Europe and the WWF European Policy Programme were present. The next stakeholder meeting and update on state of play was held on 4 July 2017.<sup>851</sup> At this meeting, the only civil society organisation in attendance was Humane Society International. On 6 September 2017,<sup>852</sup> there was another meeting, where the Humane Society International and Eurogroup for Animals were in attendance, with the rest of the participant list primarily representing agricultural and business interests. At the 13 October 2017 stakeholder meeting, approximately nine months after the SIA process had begun, the presentation on the draft inception SIA report was presented to stakeholders.<sup>853</sup> This meeting was primarily attended by stakeholders with agricultural concerns, but it had the largest representation to date of environmental civil society groups, as Greenpeace, Fern, Humane Society International and Eurogroup for Animals were in attendance. The draft inception report was presented as a PowerPoint and generally outlined the SIA process but did not make any mention of current environmental concerns that had been raised or were being reviewed. This PowerPoint was the first time that the consultants had presented assessment findings to stakeholders.

Additional civil society consultations were held on 22 November 2017,<sup>854</sup> with Fern and Humane Society International/Europe in attendance. By 24 January 2018, the final SIA inception report had been released, and opened to comments. With the data of this report available to stakeholders, another civil society meeting was held on 20 March 2018,<sup>855</sup> with Fern, Greenpeace, Humane Society International/Europe in attendance. At these consultation meetings, questions were raised about whether the TSD chapter would include provisions against the illegal wildlife trade and the promotion of sustainable fishing.<sup>856</sup> The final TSD chapter did address both the issues of illegal trade in wildlife (Article 7) and the promotion of

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<sup>851</sup> EU-Mercosur, Civil Society Meeting (July 2017).

<sup>852</sup> EU-Mercosur, Civil Society Meeting (September 2017).

<sup>853</sup> EU-Mercosur, Civil Society Meeting (October 2017).

<sup>854</sup> EU-Mercosur, Civil Society Meeting (November 2017).

<sup>855</sup> EU-Mercosur, Civil Society Meeting (March 2018).

<sup>856</sup> EU-Mercosur, Civil Society Meeting Minutes (March 2018).

sustainable fishing practices (Article 9), suggesting that this feedback was taken on board.<sup>857</sup> Another civil society consultation was held 6 September 2018,<sup>858</sup> environmental groups Both ENDS, Fern, Humane Society International/Europe were in attendance, and the meeting minutes indicate that concerns over deforestation were raised by Both ENDS. EU Chief Negotiator, Sandra Gallina, who was also present at the meeting, responded to these concerns, stating “that the governments of the Mercosur countries are committed to address the issue of deforestation”.<sup>859</sup> It should be noted that Gallina did not outline specifics as to how this issue would be addressed in practice. At this stage of the assessment process, stakeholders had been given access to both the draft inception report, via PowerPoint, and the final SIA inception report. They had not seen a draft interim SIA report or final interim SIA report, which are the next stages of assessment after the inception report, and before the final SIA report is released.

The next civil society meeting was held on 15 January 2019,<sup>860</sup> with Humane Society International/Europe being the sole environmental civil society organisation present and where concerns were raised about the status of the TSD chapter and what was perceived to be the Brazilian government’s hostile stance on sustainability. On 28 June 2019, the EU revealed that an agreement in principle had been achieved.<sup>861</sup> At this stage of the SIA process, neither the draft interim report, nor the final interim report had been published. The trade negotiations had officially concluded before the SIA process was close to completion.

Six months later, on 15 July 2019, and roughly three weeks after the trade negotiations concluded,<sup>862</sup> there was another civil society meeting. This meeting was also the first to be web streamed, with the stream made available indefinitely for viewing.<sup>863</sup> It is important to note that at this meeting, stakeholders were aware that negotiations had concluded, but they still had not seen or commented on the draft interim report or final interim report. Yet, the stakeholders had access to the trade agreement in principle and were able to comment on

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<sup>857</sup> EU-Mercosur, TSD Chapter (2019).

<sup>858</sup> EU-Mercosur, Civil Society Meeting (September 2018).

<sup>859</sup> EU-Mercosur, Civil Society Meeting Minutes (September 2018).

<sup>860</sup> EU-Mercosur, Civil Society Meeting (January 2019).

<sup>861</sup> EU-Mercosur, Agreement in Principle (2019).

<sup>862</sup> EU-Mercosur, Civil Society Meeting (July 2019).

<sup>863</sup> EU-Mercosur Webcast (July 2019).

that. At this meeting, in examining the minutes, there is a marked difference in approach from the stakeholders, as the focus is not on the SIA documentation that had been presented to date, but is instead on the trade agreement documentation, particularly the TSD chapter, in relation to concerns over deforestation and the Paris Agreement.

The role of civil society was also directly addressed in this meeting, as the European Economic and Social Committee (EESC)<sup>864</sup> expressed a desire for civil society to be involved throughout the process and questioned how the TSD chapter would be enforced to ensure the Brazilian government follows the rules. Chief Negotiator Gallina responded that they need vibrant civil society engagement on both sides to monitor the agreement.<sup>865</sup> Gallina did not expound upon this statement or discuss the means through which civil society would be engaged in either the EU or Mercosur. Fern and Humane Society International/Europe were also present at this meeting and commented, voicing disappointment over the TSD chapter, considering how concerns over this chapter were expressed in previous civil society meetings. They also commented that they felt the TSD language was vague, which they agreed opens the door for certain types of cooperation, but the ambiguity of the text, particularly when comparing the text on biodiversity and illegal, unreported and unregulated fishing to TSD chapters in other free trade agreements, such as Vietnam, resulted in frustration.<sup>866</sup> In response to concerns over the TSD chapter, Gallina explained they were starting from a point of nothing and that having the TSD chapter is an improvement, and that the TSD chapter had the strongest legal language possible and explained that any disputes would be handled in accordance with the TSD dispute settlement mechanism.<sup>867</sup> Gallina did not explain how the TSD dispute settlement mechanism would operate in practice. The Irish Farmer's Association also raised concerns over Brazil's commitment to reforestation and the Paris Agreement. In response, Gallina commented that with respect to concerns over deforestation, Brazil had committed to the Paris Agreement and to re-forest 12 million hectares by 2030 and to work towards ending illegal deforestation, but she did not specify how Brazil planned to accomplish this goal.<sup>868</sup> In examining the minutes of this meeting, there is a pattern where stakeholders raise a specific

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<sup>864</sup> *Id* at 46-minute mark of the meeting.

<sup>865</sup> *Id* at 60-minute mark of the meeting.

<sup>866</sup> *Id* at 61-minute mark of the meeting.

<sup>867</sup> *Id* at 74-minute mark of the meeting.; EU-Mercosur, Civil Society Meeting Minutes (July 2019).

<sup>868</sup> EU-Mercosur Webcast (July 2019) at 73-minute mark of the meeting.

concern, which is followed by a general reply, but the response does not lay out specifics about how the anticipated goals will actually be achieved in practice.

Post the completion of the negotiations, there were two additional civil society dialogue meetings: on 15 October 2019, to discuss the draft interim report, which was released on 3 October 2019,<sup>869</sup> and eight months later on 22 July 2020, to discuss the draft final report, which was released on 9 February 2020.<sup>870</sup> The most recent civil society meeting had the largest representation from environmentally focused groups, with participants from Both ENDS, ClientEarth, Eurogroup for Animals, Fairwatch, Fern, Greenpeace and Humane Society International/Europe. Comments at the last meeting focused on concerns over the TSD chapter, deforestation, and worries over enforcement measures. ClientEarth questioned whether the SIA appreciated the full scope of deforestation issues and how enforcement of the TSD chapter would be implemented.<sup>871</sup> Fairwatch commented, in the context of human rights concerns, that it is a clear shortcoming of the SIA to have recommendations without any legal enforcement mechanism for implementation.<sup>872</sup> Eurogroup for Animals also commented that there was inadequate focus on how the agreement would be enforced.<sup>873</sup> These comments illustrated the frustration of these groups throughout the assessment process and it also highlighted the differing views on what stakeholders expected from the assessment process: they wanted their involvement to contribute towards the enforcement of environmental protections, and not just be limited towards the creation of information to be supplied to negotiators.

Examination of stakeholder engagement thus reveals frustration with the SIA process, and the perception that stakeholder knowledge was not properly considered. It also reveals particular unease with the timing of the SIA, as there was a mismatch with the assessment and negotiations, and this further fed into stakeholder frustrations. It is worthwhile to revisit the timing of this SIA to illustrate how off target the assessment process was, and to contrast that with the expectations of stakeholders. When negotiations began and the assessment

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<sup>869</sup> EU-Mercosur, Civil Society Meeting Draft Interim Report (October 2019).

<sup>870</sup> EU-Mercosur, Civil Society Meeting Draft Final Report (July 2020).

<sup>871</sup> EU-Mercosur, Civil Society Meeting Draft Final Report Minutes (July 2020) 2.

<sup>872</sup> *Id* at 3.

<sup>873</sup> *Id* at 2.

process was launched, stakeholders were told that the target date for the final interim report was within five months of October 2017 (by March 2018) and a draft final SIA report was targeted to be delivered within 10 months (by August 2018). Stakeholders were only presented with a final inception SIA report on 24 January 2019, which is the first report of the SIA process.<sup>874</sup> The negotiations for the EU-Mercosur trade agreement were closed on 28 June 2019 and the draft interim SIA report was published approximately three months later, on 3 October 2019, well behind the target of March 2018. The final interim SIA report was published on 9 February 2020 and the final SIA report, which closes out the assessment process, was completed in December 2020, but not published until March 2021. From the perspective of stakeholders involved, this assessment did not match with the expectation of an assessment process that runs alongside negotiations.

## 2. The Impacts of Missing the Mark

There is an expectation that SIA of trade will be run in a timely manner, so that negotiations can benefit from the knowledge accrued during the assessment process. This expectation is not unique to just SIA, as ER of trade is also expected to be run in a timely manner. However, what is unique to SIA and ER of trade, and EA of trade models in general, is the expectation that these assessments must keep up with the evolving pace of trade negotiations. EA of trade differs in this regard from the general EIA model, which reviews projects and plans, and which inspired the development of EA of trade, as completion of the EIA is a perquisite before the assessed programme begins. It is suggested here that the lack of enforcement measures, with respect to timing of EA of trade can thus result in the issues that have been discussed. Two perspectives emerge when analysing the consequences of ineffective assessment timing: that of the consultants, who justify the assessment process and delays, and that of the stakeholder, who becomes disillusioned with the SIA process.

As discussed, stakeholders expressed reservations about how the environmental issues they raised during the assessment process, such as the issue of deforestation, would be addressed or enforced in practice. In response to these qualms, the final SIA report refers to the

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<sup>874</sup> EU-Mercosur, SIA Final Inception Report (2018).

commitments of the Mercosur nations and the EU to the Paris Agreement, explaining “that the analysis conducted shows that the agreement will commit Mercosur countries to the effective implementation of the Paris commitment, especially due to the concrete commitments on deforestation”.<sup>875</sup> In short, enforcement of the Paris Agreement was seen as the means to meet environmental standards. The final SIA report indicates that the consultants had done an extensive analysis of deforestation, explaining: “that based on our analysis the expected expansion in agriculture and animal production is expected to have limited effects in virtue of the reduced impact on output of the most critical products in Mercosur”.<sup>876</sup> It is noted that in regards to timing issues and how that would impact the relevance of stakeholder recommendations, the consultant recognised that timing was an issue, but did not directly engage on how it was problematic from the perspective of the stakeholder. They explained that timing issues could not be helped as the scope of this SIA was complex, involving four partner countries with different sustainability issues, and that data and input from various stakeholders was received, and they needed time to implement that fully. The consultant also noted that comments received at later stages, even after the trade agreement was agreed to in principle, were not futile, because the EU Directorate-General for Trade would be able to consider that stakeholder input when implementing the agreement.<sup>877</sup>

In examining the consultant’s response, it is suggested here that their view is at odds with the discussion of how SIA was created and the expectations of what this tool should achieve, particularly a collaborative relationship with stakeholders.<sup>878</sup> By analysing the civil society meetings, outlining the timing of them, questioning who attended and examining what was said in the meetings, it is argued that there were missed opportunities throughout the assessment process and that it did not align with the expectations of an SIA, as discussed in the previous chapter. For instance, there was lack of clarity on the timing of the assessment process, as it was not sufficiently communicated to stakeholders that the negotiations were outpacing the SIA process.<sup>879</sup>

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<sup>875</sup> EU-Mercosur, Final SIA Report (2020) 392.

<sup>876</sup> *Id* at 390.

<sup>877</sup> EU-Mercosur, Final SIA Report (2020) 404.

<sup>878</sup> See chapter 5(B)(2).

<sup>879</sup> See chapter 5(C)(3).

A review of the SIA documentation reveals that the consultant received input from various stakeholders, including agricultural and business interests, such as the automotive industry. Yet, the representation from environmental civil society groups is not as high as what would be anticipated from a deal of this magnitude. It is noted that the full extent of stakeholder input is not able to be examined, as the SIA summarises stakeholder input and does not provide access to any direct data that may have been provided. The consultant was not able to hit initial timing target goals for the various SIA stages, but at a July 2020 civil society dialogue meeting on the final SIA report, which was yet to be released, they “explained that in 2019 at some point the pace of negotiations mismatched the work on our study at the same time we had provided input to DG Trade negotiators early on”.<sup>880</sup>

This statement is noteworthy because it illustrates two points: that the consultants were aware that they could not keep pace with the negotiations, and it illustrates how divergent the consultants’ views are from that of the stakeholders, particularly green groups, regarding the purpose of the SIA process. With respect to the understanding that the negotiations could outpace the assessment, this leads to questions about what plans, if any, did the consultants have in place to account for this and if there were any contingency plans to this effect. In examining the assessment documentation, it appears as if the consultants planned to keep pace and were caught out by the timing of the negotiations. This in turn leads to questions about how often the consultants updated the trade negotiators to account for this scenario. As mentioned in the previous chapter, there is an expectation that the EC and consultants have a close working relationship, which, in theory, results in in a feedback loop. In analysing the assessment reports and consultation minutes, it is unclear the extent of input that the consultant was able to provide to the trade negotiators before negotiations concluded. The consultants did not specify when they provided updates or what information was shared. The second point relates to differing views on purpose, as discussed in the previous chapter. The statement from the consultants indicates that their perspective of the SIA is markedly different from some of the stakeholders, who view this process as vital for purposes of effecting change within the negotiations. The consultants indicate satisfaction with the

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<sup>880</sup> EU-Mercosur, Civil Society Meeting Draft Final Report Minutes (July 2020) 2.

process, even though the majority of the assessment took place after the negotiations had been agreed, because they had provided some input to negotiators early in the assessment process.

Although this SIA process had not run smoothly and stakeholders had expressed frustrations throughout, via the civil society meetings and direct letters, the consultant justified the amount of feedback that had been received throughout the assessment, commenting that they “received a lot of input from stakeholders”.<sup>881</sup> Yet, this consultant failed to account for the fact that their approach to an SIA, which was not timed in conjunction with negotiations, would potentially hinder opportunities for additional feedback, particularly from environmental groups. As discussed in the previous chapter, when stakeholders perceive that their input is not considered, they disengage and apply their resources elsewhere. With regards to this assessment, in seeing that the trade negotiations had been completed, there is an increased likelihood of stakeholder disengagement from the SIA process, and that was revealed in the fact that stakeholders focused on the TSD chapter, as opposed to the content of the SIA documentation, in the civil society meetings post 28 June 2019. Lastly, in regard to the response that the Directorate-General for Trade will “continue taking on board stakeholder recommendations on the implementation of the agreement”,<sup>882</sup> this was not explained how this would function in principle: if addendums would be made to the trade agreement or if this would result in heightened focus on local environmental regulations. In short, an examination of this SIA process leaves the impression that the consultant was content to provide some feedback to the trade negotiators during the process, was satisfied that any feedback obtained after the negotiations had been completed was not a waste as they could be presented to the Directorate-General for Trade after the fact, and accepted that the assessment may mismatch with the negotiations because of the complex nature of what is being reviewed. It is suggested here that this perspective is at odds with stakeholder expectations.

Further analysis of the timing and content of the EU-Mercosur civil society dialogue meetings is useful in that it provides some insight into what the process is like for the stakeholders

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<sup>881</sup> EU-Mercosur, Final SIA Report (2020) 404.

<sup>882</sup> *Id.*

involved and their expectations. From the perspective of the stakeholders, particularly the environmental organisations, this SIA was unacceptable and was at odds with foundational principles upon which SIA of trade was built. They had the impression that the SIA does not impact upon, or effect change within the negotiations. This is problematic because when stakeholders become disillusioned with the assessment process, they will no longer take part and that negates a core purpose of SIA, stakeholder involvement and collaboration.

Dissatisfaction with the timing of the assessment is apparent when reviewing commentary on the negotiations and this became a contentious point throughout the SIA process, as most of the environmentally focused civil society organisations were critical of whether their input was passed on to the trade negotiators. In April 2018, during the SIA process, 24 stakeholder organisations wrote a joint letter to the EC, calling on the EU to put issues of sustainability at the front and centre of the negotiations, to raise the issue of timing and stakeholder involvement during the negotiations, and to address the challenges they experienced in engaging with the stakeholders. This letter is notable because it was a joint effort between EU, international organisations and national organisations within the Mercosur nations; of the 24 stakeholders that signed the letter, significantly the majority, 14, were representatives from national groups. In this letter, these stakeholders commented that the SIA was “characterised by a lack of inclusive consultation” and failed to place sustainability concerns and public interest at the core of the SIA, noting that this SIA was not following the rules set out within the assessment handbooks and that it was in violation of Article 21 of the Treaty of the EU (TEU).<sup>883</sup>

Stakeholders continued to reach out and express their dissatisfaction with the SIA process. As is noted in correspondence dated 30 October 2019, ClientEarth, Fern and Conservation International questioned the 28 June 2019 timing of the trade agreement in principle and sought clarity on whether there was sufficient time for the SIA process to contribute to the

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<sup>883</sup>Fournier *et al* (2018).; The letter does not reference specifically which aspect of Article 21 these organisations felt was violated, but it could perhaps be referencing Article 21(2)(f): That the EU will “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development”. TEU (1992).

work of the trade negotiators.<sup>884</sup> They questioned the brevity of the environmental analysis within the SIA, explaining that “the absence of preliminary findings in these regards severely restrains the stakeholders’ possibility to respond to proposed recommendations before the SIA is finalized”.<sup>885</sup> In January 2020, recently elected Member of the European Parliament (MEP), Saskia Bricmont, also commented on the atypical timing of the SIA report, explaining that the pace at which the talks increased prior to the agreements signing was such that the impact assessment was non-existent, and the negotiators were unable to refer to it, as needed, and as would be expected.<sup>886</sup> Given the timing of the negotiations ending in June 2019, the final stakeholder consultations, which went into 2020, and the final SIA report, which although was complete in December 2020, was not published until March 2021, the stakeholders were left with the distinct impression that their input was not fully considered. Further, in discussing the issue of timing with some of these NGOs, they also commented that they felt rushed by the consultant, as requests for extra time to provide comments in response to the SIA draft reports was reportedly denied.<sup>887</sup> In essence, the stakeholders did not feel engaged in the SIA process or that this assessment was a collaborative effort, as is expected of an SIA. The stakeholders’ expectation of their involvement was to provide knowledge and for that knowledge to be passed on to the negotiators before the conclusion of the negotiations, and possibly effect change. This expectation is not only significantly off point with what happened in practice with the EU-Mercosur SIA, but significantly, it varies greatly with the perspective of the consultant, who appeared content to provide *some* input to the trade negotiators before the agreement was finalised. It is suggested here that missing the mark in this manner is consequential because it dampens perceptions of legitimacy and transparency, it damages the reputation of SIA and makes it less likely that stakeholders will engage in future assessments.

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<sup>884</sup> ClientEarth, Fern and Conservation International Comments (2019). The critique is raised that the interim draft report briefly examines environmental impacts.

<sup>885</sup> *Id.*

<sup>886</sup> Bricmont (2020), translated from French.

<sup>887</sup> This was information obtained by the author after reaching out to FERN.

### 3. The Impacts of Relying on Disputed Knowledge

Examination of EA of trade and SIA of trade in general identified that stakeholder involvement and knowledge accrual are the heart of this tool and when done effectively, contribute towards the potential for practices of good governance. The underlying foundation of assessment is knowledge: timely assessments provide opportunities for involvement, stakeholder involvement results in increased knowledge, and effective integration of this knowledge can be utilised by trade negotiators. As discussed above, when assessments are not timely and stakeholder involvement is marginalised, this impacts the knowledge that negotiators have access to, particularly regarding perspectives on environmental valuation.<sup>888</sup> It has been argued that the value of stakeholder input in EA of trade has not been given enough weight by consultants, as they typically rely on economic models and theories to guide the assessment process, despite the inability of these tools to adequately account for environmental issues.<sup>889</sup> These economic models work well in theory, but in reality, they can promote myopic policies which fail to account for the human element of environmental issues. Examining the EU-Mercosur SIA presents an opportunity to scrutinise the role of economic modelling in practice, to take it out of the theory which has been discussed, and to explore why their usage has become standardised, and to analyse how this impacted the effectiveness of the assessment process.

The EU-Mercosur agreement proposes to offer Argentina, Brazil, Paraguay and Uruguay the opportunity to further integrate into the world economy, thus accelerating economic growth while reducing poverty. Economic growth is the carrot that has long been dangled throughout the Mercosur negotiations, yet data analysis of this growth is complex and somewhat mystifying to the lay individual. Mercosur negotiations began in 1999, and throughout this time, barring any studies commissioned by local governments, the economic impacts of this agreement have been evaluated by a limited number of researchers within the academic sphere, and generally not communicated in an easy to absorb format to interested stakeholders. The economic analysis favoured by these researchers tends to be a computable

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<sup>888</sup> See chapter 2(C)(2) for a discussion of the importance of stakeholder knowledge for determining environmental valuation.

<sup>889</sup> See chapter 2(C).

general equilibrium (CGE) model, which is a model that has been utilised by most other EA of trade approaches, including the US ER of trade.<sup>890</sup> CGE was first developed in the 1960s<sup>891</sup> and applied to policy issues, such as international trade, starting in the 1970s.<sup>892</sup> It has been noted that no one model fits all the requirements of SIA, due to the assessment's comprehensive nature, but CGE is viewed as a "flexible backbone tool" that can be utilised with SIA.<sup>893</sup>

CGE has also been utilised by the International Monetary Fund, World Bank, Organisation for Economic Cooperation and Development,<sup>894</sup> the US Environmental Protection Agency and various research organizations. CGE is favoured because it is viewed as being theoretically consistent, flexible enough to assess interregional, intersectoral and intertemporal data, and providing the foundation upon which economists and policy makers can communicate and assess issues. Simplistically, CGE is an input-output model. Three essential components to the CGE are: data, how are things at present and how will it respond to change; theory, how was the data generated; and shocks, exploring what will change.<sup>895</sup> Within the context of trade and SIA in particular, the CGE model that is most widely utilised is the Global Trade Analysis Project (GTAP), which is described as a multiregional and multisector model that provides constant returns to scale.<sup>896</sup> A 2004 discussion paper by the non-profit Leibniz Centre for European Research, which had been funded by the EC, described CGE as an adaptable tool, that is central to SIA because it can "incorporate several key sustainability indicators" into a single and consistent framework.<sup>897</sup> With respect to the EU-Mercosur trade negotiations, CGE has consistently presented results that indicate this agreement will be economically beneficial to all nations involved, resulting in a "win-win" scenario.<sup>898</sup>

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<sup>890</sup> See chapter 3(C)(3); Monteagudo and Watanuki (2003).

<sup>891</sup> Norwegian economist Leif Johansen first developed the CGE model in 1960. See Dixon and Rimmer (2016).

<sup>892</sup> CGE was used by the Environmental Protection Agency in the US.

<sup>893</sup> Böhringer and Löschel (2004) 8.

<sup>894</sup> In 2016, there was an OECD working paper evaluating trade liberalisation in Brazil utilising a CGE model. Araújo, and Flaig (2016).

<sup>895</sup> Gilbert (2017).

<sup>896</sup> Corong *et al* (2017).

<sup>897</sup> Böhringer and Löschel (2004) 3.

<sup>898</sup> See Latorre, Yonezawa and Olekseyuk (2020) 16 and Boyer and Schuschny (2010).

It is suggested here that this reliance on CGE should be questioned because its results are central to the SIA process and are relayed to the trade negotiators. In scrutinising the use of CGE, it is necessary to explore whether this model is simply a technocratic exercise or whether it results in practical data that can meaningfully contribute towards the analysis of the consultants. As explored when discussing CGE in the US ER of trade model, usage of this economic model has become the *de facto* data analysis standard for trade assessments, but it is crucial to raise the question whether CGE is even the best model to use, as there is concern over the reliability of the data it produces. The question of should CGE be used is not raised enough throughout the assessment process. CGE models have been labelled as a “powerful instrument of analysis” that allow economists to explore “complex interconnections across industries, sectors and income groups”, while also producing results that are not very reliable.<sup>899</sup> In essence, CGE has the benefit of being able to look at multifaceted issues and produce a response to a question that is very difficult to address, but the complexity of the issue in turn muddles the accuracy of the results.

Theoretically, this economic model can be sound, but, there is discontinuity between the theory and its respective results.<sup>900</sup> As explained, it “is quite possible that the predictions of a model that is antecedently credible will nonetheless be wide from the mark”.<sup>901</sup> To a certain degree, economists expect that CGE will miss the mark and produce unreliable results, because they recognise that this model is a simulation; it is hypothetical. To account for these irregularities, the analysts need to compare the simulated data against actual data; compare what was predicted to happen against what actually happened. Yet, this verification process cannot happen in SIA because the analysis of data is happening alongside the trade negotiations, it too is a speculative process. SIA, by its very nature of being an *ex-ante* assessment, relies on predicted data, on expectations of what impacts tariff reductions will have in practice, and then the consultants use this predicted data to inform trade negotiations. As a result, it is not possible to verify CGE data against actual, real-world figures during the assessment process. It is thus submitted that confidence in the information

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<sup>899</sup> Little (1995) 266.

<sup>900</sup> *Id.*

<sup>901</sup> *Id.*

produced by this economic model should be tempered.<sup>902</sup> For instance, in discussing the uses and abuses of economic modelling, a practitioner in this field raised a unique point which could also apply to CGE:

[T]hey believe the model not because they understand how it works, but because they don't understand it; the model derives its authority in their eyes from being opaque and mysterious. And over the longer run this could lead to trouble, if users become disillusioned and realize that their belief in the model had no rational basis.<sup>903</sup>

The potential problems posed by CGE in relation to trade agreements has been recognised. For instance, the usage of CGE methodology has been criticised in the Comprehensive and Economic Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership with the USA (TTIP),<sup>904</sup> as this model tends to promote positive impacts which are not realised in practice.<sup>905</sup> An analysis of CETA found that the CGE analysis predicted small but significant gross domestic product gains, giving the impression of a positive outcome of the agreement. However, it was argued that these positive outcomes are in fact a mirage, as “they are determined by a few critical, and unrealistic, modelling assumptions” and fail to account for larger macroeconomic risks associated with trade liberalisation.<sup>906</sup>

Despite that CGE results can be opaque, difficult to understand and unreliable, this model became a default tool utilised in trade deals by consultants.<sup>907</sup> In regard to the EU-Mercosur negotiations, the consultant opted to utilise the GTAP CGE model while conducting the SIA as it allowed for examination of economy-wide effects in the EU and Mercosur.<sup>908</sup> The consultant relied on GTAP version 9.2, which was released in 2015, and which has data from 2011 as the base year for analysis. This model was applied to 57 sectors, such as wood and sugar, and 140 regions. This model accounts for all trade agreements that have been implemented in the EU and Mercosur nations to date, besides the proposed EU-Mercosur

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<sup>902</sup> *Id* at 267.

<sup>903</sup> McDougall (1993) 5.

<sup>904</sup> See Kohler and Storm (2016).

<sup>905</sup> Ghiotto and Echaide (2019) 9.

<sup>906</sup> Kohler and Storm (2016) 284.

<sup>907</sup> For a discussion of why CGE should be used by consultants within SIA, see Böhringer and Löschel (2004).

<sup>908</sup> EU-Mercosur, Final SIA Report (2020) 20.

negotiations, and establishes a baseline which outlines the main environmental, social and economic policies that would expect to be in force until 2032. As mentioned, the GTAP relies on 2011 data, and therefore fails to consider policy developments between 2011 and 2017, when the SIA process began. The GTAP is updated every few years and the most recent model, version 10, was released in 2019, which relies on 2016 base data.<sup>909</sup> When the 2019 version was released, the consultant was already two years into the assessment process and could not switch its analysis to the new dataset. Instead, the consultants accounted for the lag in data by making changes to their dataset, such as changes on tariffs for sugar and beef and the removal of EU export subsidies.<sup>910</sup>

The consultant further justified its usage of GTAP, explaining that the SIA is meant to establish “a baseline scenario and a range of liberalisation scenarios”; it is not meant to measure exact impacts of the negotiated agreement.<sup>911</sup> The SIA essentially analyses long-term developments, and the consultants consider these broader trends, in conjunction with qualitative analysis, such as stakeholder input, to provide further depth to their conclusions, which is argued to still be relevant, despite relying on outdated data for the GTAP. Yet, the above discussion has revealed how problematic the timing of the assessment was and that this in turn could have resulted in missed opportunities for richer stakeholder involvement and data being shared. The consultant’s justification of its reliance on GTAP fails to recognise the problems encountered during stakeholder consultations and does not reflect on any inherent issues within the qualitative data. It is suggested here that if the qualitative analysis is lacking, then the ability of the consultants to form a comprehensive view of the data and to consider the GTAP data in light of qualitative assessments, is hampered. This is problematic because the SIA could report findings which are not realistic in practice and the reliability of the findings will be questioned.

As explored above, the negotiations outpaced the SIA, leading to the perception that the assessment did not guide the negotiations and decision-making process. One of two assumptions can be inferred from this timing issue and the CGE analysis of the EU-Mercosur

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<sup>909</sup> See GTAP History (2022).

<sup>910</sup> EU-Mercosur, Final SIA Report (2020) 23 and 404.

<sup>911</sup> *Id* at 404.

negotiations: 1. That the CGE analysis was expected to result in a pre-determined outcome, that the trade impact would be positive overall, as most CGE analysis relying on GTAP results in this outcome or 2. That the reliability of the CGE results is suspect and have little bearing on trade negotiations in practice. It is suggested here that the first assumption is unlikely considering the number of resources that the EC has dedicated to developing and supporting the SIA process in general, and the consultant has put forward, throughout the SIA documentation, the efforts it made to conduct the assessment. It is argued that the second assumption is more likely. This view is supported by the fact that various stakeholders have also raised concerns over the use of CGE within this SIA, and the reliability of its data, as was illustrated in an open letter from 192 economists from Europe and the Mercosur bloc discussing the quality of the economic modelling.<sup>912</sup>

Two main arguments against the data in this SIA have been raised: 1. That the data is outdated and recent changes in environmental conditions, particularly regarding deforestation, have not been taken into account and 2. The CGE model is inherently flawed due to assumptions it relies on, as it assumes “that all markets are in equilibrium and perfectly competitive” and it presupposes that trade liberalisation results in gains.<sup>913</sup> In regards to criticism about the CGE relying on missing and outdated data, this issue was addressed directly by NGOs ClientEarth, Fern and Conservation International in a 2019 letter. These NGOs highlighted the problem with the CGE analysis, explaining that the SIA could produce incorrect and biased results because of the inability to account for recent data and events, which were “particularly critical across the different parts of the environmental analysis” and failure to account for future risk.<sup>914</sup> This inability to account for recent data is apparent when analysing the issue of deforestation in the Mercosur bloc. For instance, the interim SIA referred to an increase of deforestation in 2019, which was based on data from 1988-2008, and it referred to an outdated 2016 report from the Food and Agriculture Organization (FAO).<sup>915</sup> It is argued that the usage of outdated data resulted in a minimised appreciation for issues of deforestation.<sup>916</sup>

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<sup>912</sup> Cantamutto *et al*, Open Letter (2020).

<sup>913</sup> See chapter 2(C) for a discussion related to the issue of underlying assumptions and how that impacts economic models.; *Id.*

<sup>914</sup> ClientEarth, Fern and Conservation International, Comments (2019). The critique is raised that the interim draft report briefly examines environmental impacts.

<sup>915</sup> Cantamutto *et al*, Open Letter (2020).

<sup>916</sup> *Id.*

In response to these criticisms about CGE, the consultant commented in the final SIA that the assessment report had been modified to account for “the latest trends, and the reference to FAO 2016 has been removed”.<sup>917</sup> They remarked that their overall assessment findings were a relevant “discussion about long term trends in deforestation”, explaining that with the proper policies in place, increased production from trade can occur without resulting in increased deforestation.<sup>918</sup> The consultant stated that their SIA statements are “factually correct and based on past data” and that they “prefer to abstain from commenting about future trends as this would require some form of a judgement call”.<sup>919</sup> The EU Commissioner for Trade, Valdis Dombrovskis, also responded to claims that the SIA data was biased and outdated by rejecting these views and highlighting that the consultants worked with the data that was readily available. Dombrovskis explained: “the interim report did not include full data on 2019 rates of deforestation in Brazil as they were not yet available” and he emphasised that these results were included in the final SIA report.<sup>920</sup>

In analysing the stakeholder concerns to CGE and comparing that with the response of the consultant and the Commissioner for Trade, it illustrates the splitting of views between these two groups, their expectations of the SIA and what they deem acceptable. Stakeholders expect that their input be utilised throughout the SIA; they view this as a collaborative process, which would allow for relevant and timely knowledge to be shared with the consultants and trade negotiators. Stakeholders expect that the SIA will account for impacts of the trade agreement so that mitigation measures can be employed to ensure enforcement of principles of sustainability. The consultant, however, views the process as a broader endeavour, as developing an understanding of long-term trends, not making judgment calls, and not simply measuring the exact impacts of the negotiated agreement. When comparing these views, they are at odds, and this relates back to the above discussion about the diverging views on what the SIA is meant to achieve. It is suggested here that this failure of

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<sup>917</sup> EU-Mercosur, Final SIA Report (2020) 408.

<sup>918</sup> *Id.*

<sup>919</sup> *Id.*

<sup>920</sup> EC, Dombrovskis Reply (2020) 6.

congruency with respect to what the SIA data is meant to assess and what the SIA in turn is meant to achieve does not promote good practice.

Concerns over the reliability of the EU-Mercosur assessment were so heightened that the French Government took the unprecedented step to commission its own expert report in 2020.<sup>921</sup> Notably, the French report came to different conclusions from the data of the official SIA report. For instance, in reviewing the link between deforestation and increased exportation of beef, the French report found that over a period of six years, deforestation could increase between 5% to 25%.<sup>922</sup> It is recognised that the French report relied on additional sources of data than the consultant, but this report is raised to indicate how the data used can lead to such different results. It provides further support for the argument that the quality of CGE data must always be questioned. CGE is state-of-the-art in SIAs, its continued usage will most likely remain unchanged. The main takeaway from this analysis is that the reliability of CGE models, particularly the GTAP model so widely used by SIA consultants, have not been tested or questioned enough. This analysis further emphasises the importance of qualitative data obtained from stakeholder involvement as a check to this quantitative approach.

### C. The EU-Mercosur Negotiations: Solving for Problematic Realities

The previous section outlined the realities of the EU-Mercosur SIA in practice. It examined how stakeholders reacted to this assessment and identified what went wrong between the theory of the SIA and its execution. The underlying issue with the SIA process was its engagement with the knowledge that was meant to be accrued throughout the assessment: the timing of the assessment was off, limiting the ability to properly accumulate and deliver data to the trade negotiators during the negotiations; the engagement with stakeholders was off and their input was fraught at times; and the economic data that was utilised and relied on for the SIA findings was suspect. In short, the EU-Mercosur SIA demonstrated in practice the limitations of bias, engagement, timing and integration, as discussed throughout chapter

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<sup>921</sup> Ambec *et al*, French Report (2020).

<sup>922</sup> *Id* at 133.; Cantamutto *et al*, Open Letter (2020).

five. Further these limitations and problems in execution demonstrate the diverging views between stakeholders and consultants on what they are trying to achieve: there is not a common plan.

This in turn leads to questions about what should be done to account for these problematic realities that have arisen in the execution of the SIA, to better determine recommendations for the future of this assessment model. This section will review different approaches to account for the limitations of the EU-Mercosur SIA as discussed, including the reliance on the TSD chapter and the consideration of alternative models. In examining these approaches, this section will assess what good practice for SIA could mean and how that can be applied to future SIAs.

### 1. Reliance on the Trade and Sustainable Development Chapter

The EU has heralded the importance of SIA because this assessment process is meant to ensure that sustainable development principles are promoted throughout trade agreements. As the SIA does not have an enforcement measure, once the assessment is complete, the focus turns to the trade agreement's TSD chapter, which lists the agreement's sustainability commitments.<sup>923</sup> The TSD chapter is meant to account for any labour and environmental issues that were found during the assessment process, essentially making the chapter a *de facto* enforcer of some aspects of the SIA. Regarding the EU-Mercosur agreement, the TSD chapter was viewed as the primary means through which to address the agreement's environmental and social issues.

TSD chapters have become standard within EU trade agreements since first being introduced in the EU-Korea free trade agreement (FTA) in 2011. The inclusion of TSD chapters within trade agreements has been held up by the EC as an example of their commitment to sustainability, particularly to increase the visibility of environmental issues within FTAs. In adhering to multilateral standards, such as the International Labour Organization

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<sup>923</sup> For a full discussion of TSD chapters, see Zurek (2020). This section is not meant to present a full critique of TSD but is meant to explore TSD within the context of SIA, and as a potential solution for the failings of SIA.

Conventions and multilateral environmental agreements, TSD chapters are meant to address labour and environmental concerns.<sup>924</sup> Unlike SIAs, TSD chapters are binding and have a dispute settlement mechanism, which is meant to offer the possibility of civil society involvement throughout. Historically, the dispute settlement mechanism has been largely non-punitive: in the first instance, parties would enter good faith consultations; if consultations failed, then a panel of three independent experts would be established to draft an interim and then a final report, which dictates compliance measures.<sup>925</sup> In June 2022, the EC made changes to the enforcement measures and sanctions will now be considered, as a last resort. To date, the TSD chapter dispute settlement procedure has found a violation of the EU-Korea FTA, in relation to TSD labour law obligations, and Korea is currently amending its laws.<sup>926</sup> The TSD chapter has not yet been used to enforce environmental obligations which have been violated.

Like the foundational principles for SIA, the EC documentation on TSD chapters highlights the importance of civil society's involvement. Through the creation of Domestic Advisory Groups (DAGs), the chapter is meant to afford civil society with the ability to play a role in monitoring the implementation of the trade agreement.<sup>927</sup> In theory, TSD chapters set out the aims of the trade agreement, but in practice, these chapters have not been sufficiently evaluated to determine how effective they have been at enforcing the sustainability commitments listed within the chapter.<sup>928</sup> TSD chapters are still an adolescent approach as they are entering into their eleventh year of implementation. The efficacy of these chapters has been questioned by EU Member States, civil society, and academics.<sup>929</sup> Concerns have been raised about the scope of TSD chapters, whether they sufficiently address sustainability concerns and whether they adequately monitor violations after the trade agreement goes into force.<sup>930</sup> For instance, criticisms were made about the EU-Mercosur TSD chapter, as it failed to identify concerns

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<sup>924</sup> EC, TSD Non-paper (2017) 2.

<sup>925</sup> *Id* at 3-4.

<sup>926</sup> Bronckers and Gruni (2021) 26-27.

<sup>927</sup> *Id*.

<sup>928</sup> George and Yamaguchi (2018) 14 explain that there have been little ex-post studies on the effectiveness of these chapters.; ClientEarth, Fern and Conservation International, Comments (2019) reference page 67 of the SIA.; Harrison *et al* (2019) 644.

<sup>929</sup> *Id*.

<sup>930</sup> Harrison and Paulini (2020).

about Indigenous rights and was lacking in addressing environmental issues, such as deforestation related to land use and allocation.<sup>931</sup>

Without effective implementation, the benefits of the TSD chapter as an enforcer of SIA findings would be null. Suggestions on ways to improve enforcement and implementation focus on increasing transparency throughout the process and working with local actors to improve their understanding of the TSD chapters, so that they can be part of collaborative enforcement efforts. For instance, in a May 2017 letter to then European Commissioner for Trade Malmström, Ministers for Belgium, Finland, Luxemburg, Sweden and the Netherlands, provided four suggestions on improving the implementation of labour and environmental provisions in TSD chapters: consistently reporting on the implementation across all FTAs; stronger collaboration and information sharing with multilateral organisations; increasing awareness amongst local actors of monitoring mechanisms and detailing how their respective contribution is utilised; and improving the links between EU trade policy and relevant EU policy to promote sustainable development.<sup>932</sup> An EC non-paper from 2017 also touched upon these issues. The EC explains that EU trade partners are still unfamiliar with the TSD chapter and experience difficulties in implementing them. Consequently, there has been a focus on institutional structures and monitoring practices, whereas the dispute settlement mechanism has not been employed.<sup>933</sup> This non-paper led to debate in how to optimise TSD chapters, resulting in the EC's publication in 2018 of a 15-Point Action Plan to revamp and make TSD chapters more effective, which centred on four principles: working together; enabling civil society; delivering; transparency and communication.<sup>934</sup>

In February 2018, the Trans European Policy Studies Association, a non-profit research network of 44 institutes from 37 European countries, highlighted that the EU's approach to TSD chapter implementation followed a "one-size fits all rationale", which was problematic due to the reduced capacity for civil society engagement in partner countries, meaning that these groups do not have the resources to adequately engage in the dispute mechanism's

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<sup>931</sup> *Id* at 7.

<sup>932</sup> Reynders *et al* (2017).

<sup>933</sup> EC, TSD Non-paper (2017) 4.

<sup>934</sup> EC, Non-paper (2018) 3.; The EC also commissioned an external consultant, LSE Consulting, to conduct a study on best practice for TSD, which was released in February 2022. See LSE Consulting, TSD Report (2022).

procedure.<sup>935</sup> The main takeaway from this research is that the process needs to be made more accessible to accommodate for this and to ensure local civil society engagement. The EC continued to review its sustainable development practices and conducted an open public consultation<sup>936</sup> and commissioned an independent comparative study on sustainable development practices in trade agreements, which was released in 2022.<sup>937</sup>

Similar to their approach with SIA, the EC has demonstrated reflexivity to TSD chapters, in an effort to develop best practice with respect to implementation and enforcement. Based on the results of the public consultation and the 2022 comparative study, the EC will be making changes to future TSD chapters which include improved opportunities for civil society participation, such as greater transparency of the DAGs and enhancing the ease with which civil society can lodge complaints via a Single Entry Point system,<sup>938</sup> and strengthened enforcement measures, such as sanctions, as a last resort, for violations of the Paris Climate Agreement.<sup>939</sup> As these changes to TSD chapters are just being made, their efficacy in strengthening implementation has not been tested. These changes will also not be applied retroactively to agreements such as the EU-Mercosur trade agreement. Yet, the EC's focus and willingness to invest into the TSD chapter illustrates its importance and the view that this is the means to enforce goals of sustainable development. It is suggested here that in achieving this aim, the TSD chapter must go hand in hand with the SIA, as it must properly reflect assessment findings.

The importance of the TSD chapter is stressed throughout the EU-Mercosur SIA documentation. The SIA reaffirms the view that increased cooperation through TSD provisions is necessary to implement the assessment's environmental goals. The final SIA report recognises stakeholder concerns about the enforceability of the TSD chapter and calls for stronger civil society mechanisms, such as the DAGs, to improve trust and enforcement of the chapter.<sup>940</sup> Examination of the SIA consultations and comments from stakeholder

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<sup>935</sup> Füller (2018) 1.

<sup>936</sup> EC, Public Consultation on TSD (2021).

<sup>937</sup> LSE Consulting, TSD Report (2022).

<sup>938</sup> EC, Press Release 2020. All EU-based stakeholders can lodge a complaint via this method.

<sup>939</sup> EC, Press Release 2022.

<sup>940</sup> EU-Mercosur, Final SIA Report (2020) 105.

engagement indicates that civil society groups view the actual terms of the trade agreement via the TSD chapter to be of paramount importance. Although there has been criticism of TSD chapters and their effectiveness in practice, these chapters are still viewed as significant and relied upon in principle.

When the negotiations outpaced the assessment and the trade agreement became publicly available, the focus of civil society turned to the TSD chapter of the EU-Mercosur agreement. Stakeholders questioned whether the input from the assessment process was reflected in the chapter, voiced concerns about enforcement measures and wanted clarification on ex-post monitoring processes. In reviewing stakeholder feedback and comments from the consultant about the chapter, three points become apparent: 1. The chapter is viewed, by the EC, the consultants, and the stakeholders, as the enforcement arm of the trade negotiation; 2. Some of the findings of the SIA are meant to be reflected in the TSD chapter, and 3. There is a desire for ex-post monitoring processes. As mentioned, efforts by the EC reveal a current focus on how to improve implementation and enforcement measures of the TSD chapters. It is suggested here that before implementation and enforcement can be of value, at a baseline level, the TSD chapter will only be as strong as the quality of the provisions that it contains. In short, in order for the chapter to be impactful, as a first step, the SIA needs to produce accurate data and useful knowledge which can be used to identify problematic issues which can in turn be reflected in the TSD. During the EC's open public consultations on TSD chapter, various NGOs and environmental citizen organizations commented to this point, indicating that an effective TSD chapter must be preceded by a strong SIA, which allows for the timely and comprehensive involvement of stakeholders, and that these "findings and recommendations can guide/support negotiations positions".<sup>941</sup>

In that vein, it is ineffectual to rely on the agreement's TSD chapter when the SIA has been problematic, as was the case in the EU-Mercosur agreement.<sup>942</sup> In essence, what has been suggested to strengthen the SIA will also strengthen the TSD chapter: developing a strong knowledge of sustainability issues within a trading partner and engaging with stakeholders

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<sup>941</sup> Institute Veblen *et al* (2021) 8.

<sup>942</sup> EU-Mercosur, Final SIA Report (2020) 99-105. LSE Consulting refers to the TSD chapter for enforcement measures.

for purposes of capacity building, which will further implementation and enforcement efforts. Robust civil society involvement is key to both effective SIAs and the implementation of TSD chapters, particularly in ex-post monitoring efforts. It is noted that monitoring of TSD chapters has been problematic and that a methodology for such practices is not well-established, but as a starting point, active civil society involvement is viewed as vital.<sup>943</sup>

Although the proposed changes to implementation and enforcement measures for the TSD chapter cannot be applied to the EU-Mercosur chapter, it is suggested that this example illustrates the important relationship that should exist between the SIA and TSD chapter. The focus to have a more effective TSD chapter should in turn result in greater focus on improving SIA of trade agreements. If the SIA can promote collaborative relationships within trade partners, accrue accurate data and local knowledge about sustainability concerns, such as environmental issues, through these local connections, provide feedback to negotiators in a timely fashion, then all of this can be used when drafting the TSD chapter. Further, the trade negotiators would be able to tap into relationships that have been fostered during the SIA process for purposes of ex-post monitoring efforts. This would in turn result in the potential for the TSD chapter to ensure that the sustainability goals, as listed in the SIA and as reflected in the chapter, are being met when the trade agreement becomes active. It is argued that the SIA process and TSD chapter should be viewed as having a symbiotic relationship, and as the EC is currently working towards improving the TSD chapter in future trade agreements, it would also be an ideal opportunity to reflect on SIA practices.

## 2. Consideration of Alternative Approaches

Examination of the EU-Mercosur SIA reveals an underlying theme of diverging views: there is a distinct difference in what the external consultants find as acceptable to the process and what stakeholders find as acceptable. This inability to find a common path has been illustrated in the discussion on timing, the views on the data utilised in the assessment and the amount of weight given to the TSD chapter, when the SIA itself has been plagued with difficulties. It is suggested here that these differing views on what SIA, at a baseline level, is meant to achieve

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<sup>943</sup> Harrison and Paulini (2020) 12.

has in turn driven the problems experienced in its implementation. Stakeholders expressed their frustration to the EU-Mercosur SIA by filing a complaint to the European Ombudsman, whose purpose is to promote good administration and investigate complaints within the EU, and by demonstrating that they can conduct their own version of an impact assessment, which promoted stakeholder engagement and data collaboration. Effectively, reaction to the EU-Mercosur SIA was that alternative approaches should be considered.

In June 2020, approximately four months after the final SIA report was published one year after the EU-Mercosur trade negotiations were agreed in principle, five civil society organisations, Veblen Institute, the Nicolas Hulot Foundation, ClientEarth, Fern and the International Federation for Human Rights, filed a complaint with the European Ombudsman over the EC's negligence in completing the assessment before the trade negotiations were concluded.<sup>944</sup> The Ombudsman provides the unique opportunity for civil society organizations to challenge the actions of the EC and to hold it accountable for perceived failures. This complaint takes issue with the EU's approach that trade decisions are determined by value-based preferences, arguing that trade policy is not based on preferences but is dictated by specific legal obligations under the TEU, specifically Articles three and twenty-one.<sup>945</sup> It is argued that the EU has an obligation to "contribute to peace, security, [and] the sustainable development of the Earth".<sup>946</sup> To ensure that these obligations are achieved, trade agreements should not be completed without conducting a proper assessment to determine whether the trade agreement would result in the violation of these values. The complaint argued that the EC failed in meeting these obligations because of the mismatch in timing between the SIA and the trade agreement, as the negotiations ended before the interim and final SIA reports were complete. Essentially, the view of these organisations is that the EU is obligated to pursue sustainable trade, that trade negotiations are subject to an SIA and that through the SIA procedure, stakeholders are meaningfully consulted, and that the SIA results are timely and can be utilised to influence the trade negotiations. Three basic assumptions underly their view: timely assessment, engagement of stakeholders where their input is

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<sup>944</sup> Ombudsman Complaint (2020).

<sup>945</sup> *Id* at 1.; EC Communication, *Trade for All* (2015) 14-15. The EC comments that part of their trade policy is "based on values", which includes a "trade agenda to promote sustainable development, human rights and good governance".

<sup>946</sup> TEU (1992) Article (3)(5).

thoughtfully considered and this input in turn influences trade negotiations and would thus be reflected in the final trade agreement.

The Ombudsman complaint process revealed that the stakeholder's assumptions on how the SIA process should be carried out differed greatly from the EC. Herein lies the root of the disagreement, the EC feels that there is flexibility on timing of the SIA and that as long as some information is obtained from the early stages of the SIA during the negotiations, that is adequate to satisfy the assessment obligations. However, the NGOs felt that the final report is also needed to be considered in the negotiations. In response to this complaint, in July 2020, the Ombudsman opened an inquiry into why the SIA was not finalised before the negotiations were concluded in June 2019.<sup>947</sup> On 26 October 2020, the EC responded to the inquiry by stating that there is in fact no legal requirement to finalise the SIA process before the trade negotiations are concluded, explaining that the SIA handbook "does not require in any way that the Commission finalises the SIA before the conclusion of negotiations".<sup>948</sup>

In reviewing the NGOs' complaint filed with the Ombudsman and the subsequent response from the EC, there is clearly a disconnect on the views of the SIA process. The EC views the SIA an *ex-ante* tool,<sup>949</sup> based on hypothetical scenarios, which is not meant to be an assessment of the actual terms of the FTA. In their view, the SIA runs parallel to the negotiations, providing information to the negotiators, but the SIA does not need to be completed before the negotiations end. This view is questionable in that *ex-ante* by translation means "before the event", so by its very nature an *ex-ante* assessment should be completed before the negotiations are finished. In the view of the EC, this *ex-ante* aspect of the SIA is achieved at the beginning of the SIA process, as the hypothetical scenarios that the SIA relies on are "elaborated once and for all at the beginning of the SIA process and do not subsequently change: this allows the SIA to retain a high degree of coherence throughout the process".<sup>950</sup> In the view of the EC, the SIA process has served its purpose through the civil society meetings and information gathered during the inception and interim report stages. The NGOs, on the other hand, view the completion of the negotiations before the SIA process

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<sup>947</sup> European Ombudsman, Decision (2021).

<sup>948</sup> EC, Dombrovskis Reply (2020) 3.

<sup>949</sup> EC, Dombrovskis Reply (2020).

<sup>950</sup> *Id* at 6.

has been finished as rendering the entire SIA process as meaningless, as they view the results in the final SIA report as being needed for purposes of being incorporated into the negotiation process. The NGOs contend:

[I]t is important to consider the information available to the Commission during the negotiations of the Agreement, which concluded on 28 June 2019. The content of the Inception Report, Draft Interim Report and Interim Report clearly show that these were incapable of feeding into the negotiations in any meaningful way.<sup>951</sup>

Ombudsman Emily O'Reilly examined the EC's reply, and in a decision, published on 17 March 2021, found the Commission's actions to be maladministration, for its failure to complete the SIA in good time. It was noted that there is no legally binding requirement to complete an SIA before trade negotiations have been finalised, but the Ombudsman explained that the principles of Article 21 of the TEU<sup>952</sup> apply to trade policy and that "SIAs are one of the Commission's most important tools to ensure that the principles set out in Article 21 TEU are respected in trade agreements".<sup>953</sup> In her conclusion, the Ombudsman commented that for all future trade negotiations, the EC will ensure SIAs are completed before negotiations are finalised. In a press release issued the day after the judgment, the Ombudsman further explained:

The EU projects its values through its trade deals. Concluding a trade agreement before its potential impact has been fully assessed risks undermining those values and the public's ability to debate the merits of the deal. It also risks weakening European and national parliaments' ability to comprehensively debate the trade agreement.<sup>954</sup>

The Ombudsman's message was clear, the EU opened itself to criticism that it was not genuinely taking on board issues brought up throughout the SIA process leading to negative perceptions of the final agreement.<sup>955</sup> Without public debate throughout the entirety of the negotiations, the quality of the trade agreement is called into question. Both the complaint and the Ombudsman findings consider the SIA to be a vital tool to the European trade policy, through which the EU's goals of sustainability can be promoted. This view is also reflected in

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<sup>951</sup> Ombudsman Complaint (2020) 5.

<sup>952</sup> TEU (1992).

<sup>953</sup> European Ombudsman, Decision (2021) paragraph 39.

<sup>954</sup> European Ombudsman, Press Release (2021).

<sup>955</sup> *Id.*

the SIA's own handbooks and foundational documents, as discussed in chapter five. The EU-Mercosur SIA and trade negotiations became problematic because the consultants and the EC did not hold the SIA process to this standard, they were flexible in its application, to the detriment of the integrity of the process.

Beyond filing a claim with the Ombudsman, stakeholders also demonstrated their frustration with the SIA process by conducting their own assessment studies. For instance, studies were carried out by the French government<sup>956</sup> and Green MEPs.<sup>957</sup> Both of these assessments were a more streamlined approach, they actively incorporated stakeholder feedback and they ultimately disagreed with some of the findings of the SIA, particularly regarding deforestation. These assessments also demonstrate that quantitative models can reflect different findings based on the assumptions that the analyst makes.<sup>958</sup>

After the EU and Mercosur announced that a trade agreement had been reached in principle in June 2019, the French government appointed a commission of ten independent experts, from various backgrounds, to assess the trade agreement for purposes of informing the public debate.<sup>959</sup> The commission released their study in September 2020, six months before the final SIA report was released in March 2021. The study was led by environmental economist Stefan Ambec and the assessment was meant to particularly focus on "the treaty's effects on greenhouse gas emissions, on deforestation and on biodiversity".<sup>960</sup> The commission reached out to European governments and to the EC to discuss their data, it also relied on the consultant's quantitative assessment and consulted with stakeholders such as NGOs and business groups. Where data was missing, the commission conducted its own assessment. For instance, they examined the expected increase in beef exports under the trade agreement to determine the associated risk of deforestation with land use for cattle. The committee found that it was theoretically possible for deforestation to not be aggravated from increased beef production, as demanded by the trade agreement, but that would only happen in limited

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<sup>956</sup> Ambec *et al*, French Report (2020).

<sup>957</sup> Ghiotto and Echaide (2019).

<sup>958</sup> See chapter 2(C)(2).

<sup>959</sup> The commission consisted of experts in law, agriculture, business, social policy and the environment.

<sup>960</sup> NRAE (2020).

circumstances and it does not account for cattle farming on land converted from forests.<sup>961</sup> Ultimately, this study differed from the findings of the official SIA in that it found there was increased risk of deforestation due to the trade agreement's beef quotas, concluding that "the net balance between economic gains and climate costs would be negative".<sup>962</sup>

Green MEPs came together, under the leadership of German environmentalist Anna Cavazzini, to commission a study led by researchers based in Argentina at the University at Buenos Aires, which was made public in December 2019.<sup>963</sup> The study was produced over a period of six months, was based on the trade agreement documentation, SIA documentation and stakeholder input. This study did not rely on the typical CGE economic modelling utilised within the SIA process, but instead focused on the chapters of the trade agreement and discussed possible environmental consequences based on that. This study highlights the imbalance between the trade partners, with the economic weight of the EU being ranked as four times higher than that of the Mercosur bloc, leading the researchers to express concern whether the four Mercosur nations would bend rules to satisfy EU trade demands and that relations between the Mercosur nations themselves could be eroded, due to a reduction in customs tariffs, as Brazil could rely on cheaper European products at the expense of Argentina and Uruguay.<sup>964</sup> This study differs from the final SIA report in that it places greater focus on climate change, and the seriousness of that issue is an underlying theme throughout. The final SIA report addressed climate change within the context of obligations under the Paris Agreement but did not explore the issue in greater depth.<sup>965</sup> This study also found a higher likelihood of environmental harms, such as increased greenhouse gas emissions and deforestation due to changing land use patterns for products such as soybeans and meat.<sup>966</sup> The final SIA report found that emissions were of minimal concern because there would be a decrease in CO<sub>2</sub> which would be offset by increased greenhouse gasses, and it did not consider land use changes linked with agricultural production.<sup>967</sup>

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<sup>961</sup> *Id.*; Ambec *et al*, French Report (2020) 141

<sup>962</sup> Ambec *et al*, French Report Recommendations (2020) 4.

<sup>963</sup> Ghiotto and Echaide (2019).

<sup>964</sup> Ghiotto and Echaide (2019) 119.

<sup>965</sup> EU-Mercosur, Final SIA Report (2020) 68.

<sup>966</sup> Ghiotto and Echaide (2019) 122.

<sup>967</sup> EU-Mercosur, Final SIA Report (2020) 13.

In examining the studies carried out by the French government and the Green MEPs, two points can be made: 1. There are alternative approaches to conducting an assessment, with the potential to make the process more streamlined, and 2. The assessment is only as accurate as the data it is based upon and in this regard, stakeholder input is important. The consultant was hampered by its usage of quantitative models that relied on stale data. To account for this, it is necessary to incorporate input from as many sources as possible. The French and Green MEPs studies demonstrated that it is possible to do this, and that having a rich and collaborative assessment will result in deeper knowledge of the issues at hand.

#### D. Conclusion

This chapter has examined the EU-Mercosur trade negotiations to demonstrate the implications that a protracted and complex trade agreement can have on the SIA process. The EU-Mercosur SIA demonstrated the difference between SIA theory and practice. As discussed in the previous chapter, the SIA is touted as key to EU policy to achieving sustainable development goals. Due to how this assessment tool was created, there are expectations that it would increase transparency and promote active stakeholder involvement. Yet, in execution of SIA, limitations have appeared such as issues with stakeholder engagement and timing. The EU-Mercosur SIA demonstrated these limitations and it further revealed how a problematic SIA could lead to a problematic trade agreement and TSD chapter.

Analysis of the EU-Mercosur SIA revealed that an important aspect of this assessment model is relationships: relationships between the actors involved in conducting the assessment, relationships between trading partner governments and relationships between consultants and local groups within the trade partner. SIA is cyclical and each of these relationships support one another: a collaborative relationship between consultants and local networks in the trade partner could lead to useable data during the SIA and these same groups can assist in ex-post monitoring of the TSD chapter after the SIA is complete. Key to achieving these solid relationships is to ensure that everyone involved in the SIA is on a common path with regards to the goals of the assessment.

In examining the EU-Mercosur SIA, it was revealed how a mismatch in timing and inaccurate data can negatively impact the assessment results. In solving for these problematic realities, stakeholders have revealed that they can create their own, more stream-lined assessments, which reflect the reality of the issues at hand because through active stakeholder engagement, they are able to incorporate relevant data. The assessment is only as good as the data that it relies upon.

Based on this examination of SIA in general and specifically of the EU-Mercosur SIA, it is suggested here that SIA, as an assessment tool, can be useful, despite its flaws. Each SIA is independent from one another and with each new trade agreement, is a fresh opportunity to conduct an assessment that will provide useful insight to trade negotiations. It is recognised that trade negotiations themselves are motivated by economics and are oftentimes a political question, motivated by political factors,<sup>968</sup> and that an SIA may not carry as much political capital. Yet, the EC has demonstrated reflexivity to SIA over the years, seeking external feedback, and committed to implementing the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.<sup>969</sup> In that vein, SIA looks to be a valuable tool in the EC's arsenal of policy tools and in light of recent efforts by the EC to improve the implementation and enforcement of TSD chapters in future trade agreements, it is argued that there also needs to be an effort to continue to learn from these past missteps with SIA and continue to improve that model going forward.

In recognising the value of SIA and the sources of its limitations, chapter five made some recommendations for change which focused on improving engagement and transparency throughout the process.<sup>970</sup> It is asserted that the EU-Mercosur SIA has illustrated how useful those changes could have been, as it goes to the heart of the issue, which is that the actors involved in the SIA are not on a common path. They have diverging views as to what this tool is meant to accomplish, differing perspectives on how flexible the SIA process can be and opposing stances on what constitutes acceptable results.

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<sup>968</sup> “[P]olitical questions are always political”. Bäcklund (2009) 1084.

<sup>969</sup> EC 2030 Agenda.

<sup>970</sup> See chapter 5(D).

As a starting point, the SIA must be clear in what it is trying to achieve and to effectively communicate that to everyone involved. The historical development of SIA, the EC handbooks and documentation, the academic commentary, and the experience with previous SIAs demonstrate that this tool is meant to promote sustainable development. As such, it is asserted that SIA is not simply an information gathering tool that collects data and does nothing with it. This analysis has demonstrated that SIA is meant to provide the opportunity to gather knowledge, which can in turn be used to assist the EU in projecting its values through its trade negotiations.<sup>971</sup> Any external consultant must recognise that stakeholders, to remain involved, want clarity on their input and to understand how it is reflected in trade agreements. This in turn will contribute towards building stronger relationships between the stakeholders and consultants.

In setting the goal of stakeholder engagement and ensuring clarity of both assessment results and how it is utilised, future SIAs can be adapted accordingly. For instance, a future SIA would benefit from: a stakeholder database, that contains easily accessible data from other stakeholders throughout the assessment process; greater transparency and communication from external consultants, which can be achieved through frequent and more informal meetings, both virtually and in person; and varied approaches to data accrual, which could potentially include open-source options. In recognising that the goal is continuous and active engagement that results in collaborative relationships, external consultants can adapt the SIA process accordingly.<sup>972</sup>

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<sup>971</sup> See chapter 2(D) and the discussion about the importance of knowledge creation in environmental governance.

<sup>972</sup> See chapter 1(D)(2) for a discussion of the importance of continuous engagement.

## IX. Thesis Conclusion

This thesis was inspired by communities that experience hardship because of environmental damage and by concerns about the environmental threats that face humanity.<sup>973</sup> As explained by UN Secretary-General António Guterres, “Our world faces a triple planetary crisis of climate change, nature loss and pollution. This triple crisis is our number one existential threat. We need an urgent, all-out effort to turn things around”.<sup>974</sup> In exploring what can be done to “turn things around”, this thesis sought to examine environmental assessment (EA) of trade agreements. This policy tool has its origins in the environmental justice movement, as it emerged from public unrest about the connection between freer trade and the environment, and as the world has become progressively more globalised. EA of trade was a created opportunity, as it developed from public demands for change.<sup>975</sup> These demands for change translated into EA of trade being offered as a medium to promote sustainable development, public participation and transparency. EA of trade was meant to be the connection between decision-makers and stakeholders, to encourage a collaborative approach in working towards achieving environmental goals. Considering the commitment to the 2030 Agenda for Sustainable Development and the Sustainable Development Goals, and as Nations are negotiating significant trade deals, EA of trade has become even more relevant.

This thesis began by examining how and why EA of trade was created and explored why critiques of these assessment models tend to focus on procedural issues, rather than focusing on understanding the purpose of this tool and what it achieves in practice. The first chapter found that as a created opportunity, which resulted from public unrest and political pressure, EA of trade should eschew its history as a linear decision-making tool and should instead embrace continuous engagement, where decisions and implementations are made throughout the assessment.<sup>976</sup> The first chapter also found that a lack of appreciation and clarity on why EA of trade was created in the first instance and the failure to appreciate the role that stakeholders, particularly civil society, has played in its creation, has in turn resulted

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<sup>973</sup> The Indigenous Awá tribe in Brazil was a point of inspiration.

<sup>974</sup> Guterres (2021).

<sup>975</sup> See chapter 1(B) for a discussion of created opportunity.

<sup>976</sup> See chapter 1(D).

in challenges in practice. It is necessary to recognise the reasons why this tool was created and its foundational principles for purposes of guiding what should be achieved in practice, as that has been somehow lost in modern application of these assessment models.

The second chapter found that like other principles of environmental law, EA of trade is unique in that it ultimately focuses on protection of the environment for future generations, which ties into the concept of current society serving as a trustee of the environment. This chapter explained the significant role that EA of trade could play in achieving a breakthrough in tackling environmental harms and that as a tool which can promote the interaction between stakeholders and decision-makers, it can in turn lead to collaborative decision-making, which can support local capacity building efforts. EA of trade has the potential to be an effective tool of environmental governance, if in practice it is applied with its foundational principles in mind, through the engagement of stakeholders, to tap into local qualitative knowledge for purposes of determining environmental valuation and of creating ownership of the environmental issues within the local communities. The strength of EA of trade relates back to its origins as a created opportunity that emerged from protests and political pressure, and the promise that it offered to the public as a tool of hope and inclusion, which can provide real world insight to distinguish theory from lived experience.

The third and fourth chapters focused on the American experience with EA of trade, through the examination of the environmental review (ER) of trade model, which was created around the same time as other EA of trade models, in response to civil society unrest in the lead up to the 1999 WTO Ministerial Conference. As a legally mandated requirement for trade agreements, ER is meant to contribute towards the goal of achieving sustainable development by engaging with the public and identifying potential environmental impacts for purposes of creating mitigation efforts.<sup>977</sup> This thesis examined the development of ER of trade and in doing so, identified three inherent paradoxes: pressure, impact and transparency. As a result of these inherent paradoxes, there have been challenges with stakeholder engagement, enforcement of the suggested environmental provisions and concerns about the transparency of data.

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<sup>977</sup> EO 13,141 (1999) Section 2.

The case study of the USMCA trade negotiations and agreement further examined the American model to demonstrate the divergence between the intended goals of ER of trade and the reality. USMCA illustrated that there has been a recent trend towards the politicization of trade agreements, which in turn has resulted in the trade negotiations being directed by the political agenda and has relegated environmental goals and the respective ER to a box-ticking exercise. In the US, more weight was given to soundbites and media appeal for purpose of ensuring the trade agreement was accomplished and less attention was focused on analytic substance. To counter these challenges, it was suggested that there needs to be greater recognition of the importance of stakeholder engagement and collaborative efforts, as discussed in chapters one and two, and that changes to the ER process need to be made with that in mind. These changes include the mandating that stakeholder participation is carried out at each stage of the assessment process, including the requirement to release a draft ER, which would be open to comments, making ER-related data and comments more readily accessible, as it is currently hidden within bureaucratic websites, and clarifying at the outset how the trade negotiators will utilise input to ensure a common path.

The fifth and sixth chapters focused on the European experience in examining the sustainability impact assessment (SIA) of trade model, which has been lauded as the most comprehensive EA of trade model. The EU has demonstrated a collective preference for good governance and collaborative decision-making, which is illustrated in the intended approach that the EU has taken with its SIA of trade model.<sup>978</sup> This thesis examined the development of SIA of trade and analysed three inherent expectations of this model, which are achieving sustainable development goals, ensuring stakeholder involvement and greater transparency. While analysing these expectations and comparing that with what happens in practice, this thesis identified three distinct challenges, which are the limitations of inherent biases, challenges with stakeholder engagement and problems experienced with timing and integration of knowledge accrued. This thesis found that to overcome these challenges, there needs to be greater clarity on the role that SIA is meant to play and what it is meant to achieve, particularly as a medium for collaborative decision-making, and that SIA must be implemented with these goals in mind.

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<sup>978</sup> See da Conceição-Heldt, and Meunier (2014) 973.

The case study of the EU-Mercosur negotiations and agreement was then discussed to illustrate how the identified challenges have presented in a recent SIA of trade process. During the execution of this SIA, the discussed limitations were prevalent, due in large part to the outpacing of the negotiations from the assessment process, which in turn impacted stakeholder engagement, perceptions of transparency and integration of knowledge accrued during the assessment process. Suggestions were made to overcome these challenges, which include addressing internal biases to make the SIA process more equitable and far-reaching, providing greater interactions between stakeholders and the consultants to ensure that limitations and expectations are communicated clearly in an effort to find a common path and varied approaches to knowledge accrual throughout the assessment, including the creation and use of an easily accessible database.

In exploring the American and European approaches to EA of trade, this thesis has identified their strengths and weaknesses. Both models aim to contribute towards sustainable development through stakeholder engagement efforts. In practice, the difference between these models varies between the usage of internal consultants in the US and external consultants in the EU and in the comprehensive approach of the EU to evaluate impacts both locally and within its trade partners, whereas the US limits its assessment to local impacts. On a procedural level, both models are similar in the stages of the assessment due to their common origins. The EU approach has, however, distinguished itself from the American model by being open to self-reflection and having a desire for feedback on the assessment process, as has been illustrated through its numerous stock-taking seminars over the years. This sense of reflexivity has not been demonstrated within the US and sets apart the EU.

This thesis has found that ultimately, despite varied approaches to EA of trade, there is an underlying limitation which is apparent throughout these models: the failure to meaningfully engage with stakeholders and in turn maximise their knowledge for purposes of identifying and mitigating environmental challenges. There is nuance to this approach, as it does not simply mean more stakeholder feedback or data, it focuses on the quality of that feedback and decision-maker's ability to engage and use that input accordingly. This relates back to an underlying theme to Ostrom's research, which explores how interconnectedness between

stakeholder groups and a collaborative relationship with decision-makers can in turn lead to meaningful environmental breakthroughs.<sup>979</sup> In that vein, the goal of stakeholder engagement, wider accessibility to encourage better quality input and making the process more equitable to ensure that those groups who are most impacted by environmental issues are guaranteed a voice, should guide the assessment process. This will in turn support the cycle of assessment: information relayed to trade negotiators, the engagement with and use of this information furthers public ownership which in turn contributes to mitigation efforts and future assessment efforts.

This thesis contributes to knowledge in the area of EA of trade by challenging the easy assumptions of this model, exploring its foundational purposes and proposing a new way to think of how EA of trade should be applied: as a tool that seeks to achieve sustainable development goals, but with stakeholder engagement, which creates collaborative relationships and interconnectedness at its heart. In working together towards a common path, there is a need to make the assessment process more accessible and less bureaucratic. As explained by Sheila Jasanoff: “[W]e must avoid abdicating responsibility in favour of complete reliance on experts and remind ourselves that expertise—legal or scientific—should be questioned and tested by democratic participation”.<sup>980</sup> It is suggested here that this “democratic participation” or collaborative network of engaged stakeholders is key to making progress in tackling environmental challenges that result from trade.

The excitement and promise of EA of trade models has worn off over these years, as they have become less interactive and treated more as a necessity to ensure the trade agreement is adopted. It is suggested, however, that there is a future for EA of trade models. They can reclaim this promise, but only if there is a change in approach to how they are applied, which should be as a tool that is meant to build interactive and collaborative relationships and produce environmental knowledge that can be used to promote sustainability goals.

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<sup>979</sup> See Ostrom (2015) and Ostrom (2009).; See also chapter 2(C).

<sup>980</sup> Jasanoff (2013) 439.

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