obliquely related to the needs of these decision makers. It may be that the current IHL lacunae need to be filled by a separate or supplementary “Red Cross” type of report.

In any event, what is required in substance is a readily accessible, internationally authoritative checklist against which a country’s compliance with the minimum international humanitarian standards can also be readily assessed. Just as such reports currently evaluate and classify by reference to human rights indices (e.g., freedom of assembly and expression), so reports are needed that can identify such matters as the type of armed conflict concerned by reference to the fivefold IHL classification.\(^6\) The need for regular updates, of course, would remain, particularly on those areas of the world involved in “strife” and turmoil.

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**EXECUTIVE ORDER 13,141 AND THE ENVIRONMENTAL REVIEW OF TRADE AGREEMENTS**

In late 1999, as part of the run-up to the Seattle ministerial meeting of the World Trade Organization (WTO), President Clinton signed Executive Order No. 13,141, committing the U.S. government for the first time to conduct environmental reviews of trade agreements.\(^1\) This note traces the development and implementation of EO 13,141, using it as a vehicle to examine the larger implications of environmental reviews for the conduct of states and international organizations (IOs) in international trade negotiations. The first part charts the trend over the last decade in the United States, the European Union (EU), Canada, and a range of international organizations to consider environmental issues more fully early in trade negotiations. Then it describes the requirements of EO 13,141 and the conflicts during its drafting. These same debates over scope, timing, participation, and other issues will probably play out in any state creating a review mechanism. This note concludes by assessing the implications of reviews for the larger trade and environment debate.

I. HISTORY OF ENVIRONMENTAL REVIEWS OF TRADE AGREEMENTS

*Why Reviews?*

To their proponents, environmental reviews create the opportunity to promote two significant developments. The first is integration of environmental considerations into a trade policy process traditionally dominated by commercial concerns. Reviews can characterize, and possibly quantify, the likely environmental impacts of a trade agreement, heightening the environmental awareness of negotiators. Done well, this analysis can also uncover potential environmental opportunities and vulnerabilities, providing practical, constructive options that mitigate or eliminate negative impacts and, better yet, enhance positive ones. These may take the form of modifying specific provisions of the draft agreement, pro-

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\(^6\) See p. 358 *supra*.

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\(^1\) Environmental Review of Trade Agreements, Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 18, 1999) [hereinafter EO 13,141].
posing complementary domestic policies or institutions, or creating entirely separate agreements. In fact, the negotiators of the North American Free Trade Agreement (NAFTA) adopted all three options.2

The second goal is more daunting—meaningful public involvement in the negotiating process. In practice, states and regional organizations have treated the creation of trade policy as a closed process, with little opportunity for direct public participation. Formal reviews hold the possibility of opening up the process, tempering environmentalists' opposition by engaging in a public dialogue over the environmental consequences of proposed trade rules.

NEPA and Its Progeny

The fountainhead of environmental reviews springs from the 1969 National Environmental Policy Act (NEPA). It mandates an environmental impact statement (EIS) for major federal actions significantly affecting the quality of the human environment.3 EISs have since become a matter of course in the operation of federal and many state agencies in the United States, ensuring that the environmental impacts of alternative courses of action are considered in reaching decisions.

Environmental reviews have extended their reach beyond national laws through the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the Convention on Biological Diversity, the Convention on the Law of the Sea, the World Charter for Nature, and other international legal instruments.4 The World Bank and regional development banks routinely require environmental assessments at the design stage for major development projects.5 Ideally, these exercises build environmental-management capacity in the host countries, screen out environmentally harmful projects, and provide a means to challenge projects that were inadequately assessed.6 In sum, environmental reviews of state actions have become so widespread that some commentators have argued that this practice now represents customary international law.7

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3 42 U.S.C. §4332(c) (1994) [hereinafter NEPA]. Under NEPA, the reviewing agency must first conduct an environmental assessment. If this results in a finding of no significant impact, then no further review is required. Otherwise, the agency must develop a draft EIS, distribute it for public comment, respond to classes of comments, revise it, and issue the final EIS.

4 See, e.g., Hunter, Salzman, & Zaelke, supra note 4, at 1472–74 (describing the PLANFLORO project in Brazil). The review requirement, however, has not led to the capacity building its proponents had hoped for. See infra note 45.

5 See, e.g., Hunter, Salzman, & Zaelke, supra note 4, at 366–69 (1998) (citing a United Nations Environment Programme (UNEP) Governing Council decision, a European Community Council directive, the Legal Experts Group of the World Commission on Environment and Development, and precedent); see also Gray, supra note 5, at 91 (citing the declaration in the UN General Assembly's Programme for Further Implementation that environmental impact assessment is a principle "equivalent with the 'polluter-pays principle,' 'the precautionary principle,' and the 'common but differentiated responsibilities principle' ")
Environmental Reviews by Other States and International Organizations

The United States first carried out reviews of trade agreements as part of the NAFTA negotiations. While its focus was narrower than that of an environmental impact statement required under NEPA, the NAFTA review identified the real issues of concern early on and assisted in crafting specific negotiating positions to address them. U.S. reviews of trade agreements have increased in recent years, but it should be recognized that they are part of a larger trend among states and IOs. In parallel with the United States, Canada undertook its own reviews of NAFTA and the Uruguay Round. The European Union was active even earlier, publishing studies in 1990 and 1992 on the likely environmental impacts of the Common Market. In 1998 the union launched its ambitious “Sustainability Impact Assessment of the Proposed New Round of Multilateral Trade Liberalisation,” which is examining the potential environmental and social impacts of the next WTO round. Its inclusion of social issues marks a significant contrast with the sole focus of prior reviews on environmental impacts, probably reflecting the greater influence of development NGOs in Europe.

IOs have been active as well. Throughout the 1990s, the Commission on Sustainable Development consistently called for development of a framework to facilitate the assessment of the environmental effects of trade. These declarations were complemented by workshops organized by the Organisation for Economic Co-operation and Development (OECD). In 2000, the OECD published a report titled “The Environmental Dimension of Trade Policy: Assessing the Environmental Benefits of Trade Liberalization.”


10 NEPA does not require review of trade agreements. Public Citizen v. Office of USTR, 5 F.3d 549, 553 (D.C. Cir. 1995), cert. denied, 510 U.S. 1041 (1994) (holding that NEPA’s requirements did not apply both because the president’s signature of the trade agreement was not final agency action and because the president is not an agency). USTR did, however, follow many of the NEPA procedures, including soliciting public comment, holding public hearings in six cities, and issuing a draft report for further comment.

11 As President Daniel Esty, who headed the involvement of the Environmental Protection Agency (EPA) in NAFTA, later observed, “The review identified opportunities and vulnerabilities we could address in the context and framework of the negotiations. It gave us a chance to highlight issues for the negotiators at a time in the process when something could still be done about them.” Personal e-mail from Professor Daniel Esty, Yale Law School, to author (Sept. 15, 2000). For further background on the NAFTA environmental review, see John Audley, Green Politics and Global Trade: NAFTA and the Future of Environmental Politics (1997); Pierre-Marc Johnson & André Beauregard, The Environment and NAFTA: Understanding and Implementing the New Continental Law (1996).

12 Prior to EO 13,141, USTR had also conducted environmental reviews of the Uruguay Round and the accelerated tariff liberalization initiative with respect to forest products. Commission for Environmental Cooperation, Methods and Approaches to Assessing the Environmental Effects of Trade Policies 10 (1999) [hereinafter CEC REPORT].


15 The methodological development and scoping phases have already been completed. While welcoming the initiative, nongovernmental organizations (NGOs) have called it inadequate and demanded that the review examine the impacts of the Uruguay Round agreements, require assessments for all trade agreements involving the European Union, and provide resources for developing countries to conduct their own assessments. Joint NGO Statement on the EU Sustainability Impact Assessment of WTO Trade Liberalization (Feb. 28, 2000) (on file with author). For executive summaries of the progress to date and the contractor’s reports, see <http://europa.eu.int/comm/trade/envi/en/trs/review.htm> (visited Apr. 19, 2001).

(OECD) to develop a standardized review methodology. Both the United Nations Environment Programme (UNEP) and the United Nations Conference on Trade and Development (UNCTAD) have also sponsored pilot projects assessing the national impacts of trade liberalization in specific sectors. Executive Order 13,141, then, clearly sprouted from fertile soil.

Executive Order 13,141

A United States interagency group drafted the text of EO 13,141 in the summer of 1999. The discussion below sets out the requirements of the order and explains the major conflicts in its crafting. International scholars should take note of this history for two reasons. First, the United States is a key player in many trade negotiations and its integration of environmental and trade policies will likely influence not only final agreements, but also trade policy development in other states and IOs. Second, conflicts similar to those encountered in the development of EO 13,141 will surely arise as other states develop their own review processes.

On its face, Executive Order 13,141 is ambitious. It commits the U.S. government to “factor environmental considerations into the development of its trade negotiating objectives . . . [through] a process of ongoing assessment and evaluation, and, in certain instances, written environmental reviews.” While USTR and the Council on Environmental Quality have joint responsibility for implementing the order, USTR, working through the Trade Policy Staff Committee (TPSC, described below), directs reviews of specific agreements. Upon request by USTR, federal agencies “shall” provide resources and personnel to the extent permitted by law.

Each review commences with a scoping process that makes three key decisions. The first is whether a written review is warranted at all. Written environmental reviews must be prepared for comprehensive multilateral rounds, bilateral or plurilateral free trade agreements, and major liberalization agreements in natural resource sectors. However, most other agreements (including most sectoral-liberalization agreements), will presumptively not require review unless the TPSC determines otherwise, on the basis of “such factors as the significance of reasonably foreseeable environmental impacts.” The second decision is the location of impacts. In general, written reviews will focus only on domestic impacts. While global and transboundary impacts are considered during the scoping process, these will be examined in the written review only if the TPSC deems it “appropriate and prudent.” And the third decision is identifying and prioritizing which impacts to examine.

15 In 1999 the OECD Ministerial Council recommended that governments should "examine or review trade and environmental policies and agreements with potentially significant effects on the other policy area early in their development to assess the implications for the other policy area and to identify alternative policy options for addressing concerns." OECD, Methodologies for Environmental and Trade Reviews, Doc. OCDE/GD(94)105, at 5. See further OECD, ASSESSING THE ENVIRONMENTAL EFFECTS OF TRADE LIBERALISATION AGREEMENTS: METHODOLOGIES (2000) (presenting reports from an OECD workshop on lessons from past reviews, initiatives for future assessments, modeling, timing, participation, and other issues). See generally NORDIC COUNCIL, ENVIRONMENTAL ASSESSMENT OF TRADE AGREEMENTS AND POLICY (1998) (presenting reports on environmental reviews to date and model approaches).

16 For UNEP/UNCTAD projects, see CSD Report, supra note 14, para. 32.

17 The first serious discussions on drafting an executive order had started in 1998, when the U.S. government had to decide whether to endorse an OECD policy paper on environmental reviews. Disagreements over the role of reviews finally made their way up to the National Economic Council in 1999, which asked the Council on Environmental Quality, USTR, and EPA to write a white paper on the issue. Conflict over the role of reviews continued until the upcoming Seattle ministerial meeting forced action on the issue.

18 EO 13,141, supra note 1, §1.

19 Id. §6 (subject to approval by the Office of Management and Budget).

20 Id. §4(c).

21 Id. §§(b), (c). In Appendix C §IV(G), the guidelines define global impacts to include impacts on places not subject to national jurisdiction or to shared jurisdiction, those on migratory species, and those relating to envi-
The written review should take place "sufficiently early in the negotiating process to inform the development of negotiating positions" but is expressly not a precondition for negotiation.\textsuperscript{22} Failure to complete the review will not prevent USTR from submitting positions. As with NEPA, reviews must consider alternative negotiating positions (as well as possible changes in U.S. laws) and both quantitative and qualitative impacts.\textsuperscript{23}

Public comment will be solicited through notices in the \textit{Federal Register} at the time the TPSC first decides to consider a review, at the scoping stage, and at the time the first draft of the review is issued. The final review will also be made public. The guidelines annexed to EO 13,141 call for a forty-five-day comment period when possible, as well as public hearings, Web site postings, engagement with advisory committees, and other mechanisms to involve public opinion. As with all executive orders, EO 13,141 applies only within the executive branch and does not create any private or public cause of action.\textsuperscript{24}

\section*{II. \textit{The Methodological Choices}}

Once the political decision has been taken to review a prospective trade agreement, difficult judgments still remain (often with further political consequences). Any review, whether quick and cheap or lengthy and costly, must make basic methodological choices. What impacts will the review examine? How will these be measured? How will they be integrated into the policy process? What is the public's role in these determinations? The first decision, however, concerns the very purpose of the review itself.

\textit{Reactive or Proactive}

One could imagine three general models for environmental review of trade agreements. In the first, "checklist" model, reviews shape the contours of a given trade agreement, narrowing and sharpening the range of specific negotiating positions and objectives. They aim at furthering trade liberalization while minimizing environmental harms. This description matches the approach of EO 13,141 and all the U.S. reviews to date. The review is limited to the agreement under negotiation and intended to allay the public's concerns over its environmental impacts. The TPSC examines the likely impacts of the agreement; if they are not serious, it checks off the environmental box and moves ahead. If environmental concerns emerge, they can be mitigated by changing specific provisions or creating complementary initiatives. This first approach is primarily reactive and narrow—it uses reviews to show that the agreement under consideration does not increase impacts or undermine environmental regulation and, in the event it does, to find ways to mitigate these effects.

A second, "blunt linkages" model uses reviews to examine how a trade agreement can be used to push countries toward stronger environmental protection practices. This approach relies on the carrot of increased trade as a means to encourage the exporting country to change practices we view as undesirable. From a developing-country perspective, this model smacks of unilateralism and surfaced most recently when various U.S. NGOs opposed granting China permanent normal trading relations unless explicit environmental commit-

\textsuperscript{22} Guidelines, supra note 21, §III(A)(3).

\textsuperscript{23} Id. §V(B)–(D) (for alternatives considered). The guidelines elaborate on this requirement, calling for analysis of environmental, regulatory, scale, structural, and product impacts. Id., App. C §§I–IV.

\textsuperscript{24} EO 13,141, supra note 1, §7.
ments formed part of the deal. Granting such trading relations has little direct impact on the environment, but it gives up an influential carrot (or, depending on one’s perspective, stick) for influencing environmental policies in the yearly bargaining to renew most-favored-nation status.

The third, “proactive engagement” model not only promotes liberalization measures but also, from the outset, identifies trade practices that cause environmental harms and explicitly considers alternative rules to reduce them. Traditionally, environmentalists have viewed trade as a stick to change trading partners’ behavior (described above) or a harm that must be contained (finding increased trade, itself, to be the cause of environmental problems). One could view trade agreements, however, as a direct policy tool to promote environmental interests by shaping liberalized trade flows in an environmentally supportive manner. The current WTO discussions on an agreement to reduce fishery subsidies typify this strategy, which is both opportunistic and expansive—it uses reviews to understand how trade agreements can improve the state of the environment while advancing economic interests. As the Friends of the Earth concisely observed in a public comment on EO 13,141:

We believe that it is important to take a step back and ask the question: “given the economic and environmental implications of our commercial relations with another country or countries, or in a certain sector, how can we adjust international trade rules in that sector or with that country to better meet our environmental goals and make the commercial relations more sustainable?”

The key difference between these three models of review, then, turns on the proper starting point for framing the analysis. Should one fix the boundaries of the review at the specific agreement, or around the larger sectoral practices underpinning the agreement? Does one start with pre-set trade objectives and then consider the environmental impacts of alternative means to achieve them, or with the commercial and environmental realities and ask what the trade policy can achieve? In the first instance, trade policies drive an environmental response. In the second, environmental considerations help shape the trade policies.

Similarly, although everyone agrees that reviews should inform negotiators and the trade policy process, this information could take two very different forms—as results or as recommendations. Following the NEPA model, the review could simply present the likely environmental impacts of the various negotiating proposals. Primarily an analytic exercise, this option would provide useful data that the decision makers could consider as they deem appropriate. Alternatively, the review could contain a concluding section explicitly recommending environmentally preferable alternatives. This type of review more closely resembles an advocacy tool and would arguably be more useful to the trade policy community. The proposals under review, of course, might differ so markedly in impact that identifying the environmentally preferable option would be superfluous. But if not, an additional layer of policy analysis and recommendations would create a very different type of process, perhaps more political than technical.

25 See, e.g., Friends of the Earth: Congress Passes Anti-Environmental China Trade Deal, U.S. Newswire, May 24, 2000 (criticizing approval of permanent normal trade relations because “the trade deal fails to promote the export of clean, renewable energy technology to China”), at LEXIS, News Group File, Most Recent Two Years.
26 With the support of many developing countries, Iceland, Australia, New Zealand, the Philippines, and the United States have called for a WTO agreement to reduce fishery subsidies. Reducing overcapacity would arguably lead to higher seafood prices and less pressure on already stressed fisheries. This proposal received strong support at the Seattle ministerial meeting and might well have been adopted had talks not broken down over agriculture. Thorir Ibsen (Iceland Ministry for Foreign Affairs), Sustainable Fisheries: The Linkages with Trade and Environment, 4 Linkages J. (May 28, 1999), at <http://www.isid.ca/linkages/journal/Ibsen.html>>.
Public Participation in Trade Policy

The creation of trade policy is an evolving process. As negotiations develop, objectives subtly change. Potential areas of agreement recede while others open up. The challenge for most trade ministries lies in moving the trade agenda forward with negotiating partners even as they remain responsive to political constituencies in the executive and legislative branches and, by extension, powerful private economic interests. In recent years, this responsibility has expanded in many OECD countries to engaging the public and other stakeholders.

The U.S. government, for example, relies on a closed interagency process, known as the Trade Policy Staff Committee, to determine negotiating positions.\(^{28}\) Chaired by a USTR official, the TPSC is composed of representatives from seventeen agencies and offices that oversee the more than sixty subcommittees examining specific issues. If members of the TPSC cannot reach agreement or significant policy decisions need to be made, these issues are then considered by the Trade Policy Review Group, chaired by the deputy USTR and staffed by agency undersecretaries. If issues still remain unresolved, the final decision lies with the National Economic Council, chaired by the president to coordinate the federal government’s economic policymaking, including trade. The council, for example, delegated responsibility for drafting Executive Order 13,141.\(^{29}\) While often less extensive, such interagency trade policy processes are followed in many countries.

Not surprisingly, this process is closed to the public. Indeed, as one commentator has observed, "[I]nternational trade agreements, with the notable exception of the North American Free Trade Agreement . . ., have historically been negotiated and implemented in relative obscurity, away from public scrutiny."\(^{30}\) In the United States, a notice is published in the Federal Register at the commencement of trade negotiations stating the objectives of the negotiation and allowing interested parties to submit comments but, traditionally, there has been little room for further public participation in this process.\(^{31}\)

Environmental reviews have the potential to change this dynamic by formally moving public participation upstream in the trade negotiating process. Injecting public input into the shaping of trade agreements may provide a real voice not only to established NGOs that have long enjoyed access to decision makers, but also to smaller groups and individuals whose experience and ideas can enrich the development of trade policy. But this is easier said than done.

Public participation in decision making has three components—transparent decisions by the government, dissemination of information justifying decisions, and meaningful opportunities for the public to influence decisions. From the outset, environmental reviews have been held out as a means to promote transparency and public participation—to legitimate the trade policy process—but what does that mean in practice? Ensuring that the review is transparent by releasing drafts and accepting public comment does not ensure that the input will be meaningful. Is it enough for the public simply to be informed of the

\(^{28}\) The TPSC was established by section 242 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. §1872 (1994).

\(^{29}\) The Environmental Trade Commission can also become involved when requested to report on the projected impacts of a specific trade issue. The commission held hearings, for example, on the economic impacts of NAFTA.


\(^{31}\) The trade advisory committee system was created by the Trade Act of 1974. The three tiers of committees, composed of civil-society representatives, are routinely consulted, but their influence, particularly on environmental issues through the Trade and Environment Policy Advisory Committee, has been limited. Informal consultation, of course, has long taken place with traditional business constituencies and is now regularly engaged in with NGOs as well. See 19 U.S.C. §2155 (1994).
government's analysis? How can the review process demonstrate that the public's contributions have actually been considered? And how can it do so in the often very short time allowed by negotiating deadlines? To date, environmental reviews have been conducted by the same trade agencies and directorates that have negotiated the agreement. Similarly, under NEPA the agencies have overseen the EISs of their proposed projects. But this practice creates the possibility that the exercise will become a post hoc rationalization of a decision already taken.

EO 13,141 results in a much more transparent and accessible process than in the past, but it lacks a mechanism to ensure that public comments are taken into account. Unlike NEPA, it does not require a response to public comments (a signal that comments have been considered). Moreover, beyond releasing the draft reviews and scope of the intended negotiation, it does not stipulate the release of further information. Access to draft negotiating texts, however, is critical to ensuring meaningful external assessment of regulatory and environmental impacts. How can outsiders effectively examine the review if they are unaware of the negotiating positions? But the countervailing need for secrecy seems obvious as well. One can imagine a range of compromises beyond release of the chairman's draft—for example, limited disclosure to public advisory committees (whose members all have security clearance), identification of the key substantive provisions—but the broader conflict seems unavoidable. Trade negotiations and full transparency cannot easily coexist.

Timing

While impact statements under NEPA and its progeny constitute a useful model for environmental reviews of trade agreements, there are some fundamental differences between them. Most important, an EIS generally focuses on a specific, fixed project, whether a dam, mine, or timber sale. When the recipient of a loan from a federal agency or the World Bank prepares an EIS, it knows the details of the proposed project and its alternatives up front. With trade proposals this will rarely be the case. Negotiation, by definition, is fluid, resulting in modified and sometimes drastically different proposals as talks progress. The final positions are often not reached until the eleventh hour, or later. These conditions make it hard not only to reopen issues, but also to decide early on, when the range of options is still broad, which alternatives merit detailed study. An additional problem is secrecy. For obvious reasons negotiators often hold their positions close to the chest, which makes early public review of alternatives problematic.

52 As a result, Public Citizen bluntly predicted at the time of the EO's issuance that the end product would simply become "a meaningless insider review." Ceci Connolly, U.S. to Give Trade Pacts Eco-Review, Wash. Post, Nov. 17, 1999, at E1. Presumably, other NGOs do not share this severe assessment, though, or they would not be so active.


54 Executive Order 12,114's treatment of classified information provides a model worth considering. When shipping radioactive waste, to avoid disclosing the shipping route (which could be of significant interest to terrorists or environmental activists) agencies have held it as a classified document until after the shipment. But they have still written a supplemental EIS prior to shipment. In such cases, the agency has considered the impact of alternative actions but held the document internally until after the shipment and offered no opportunity for public comment. This compromise satisfies the government's consideration of environmental impacts while respecting the need for secrecy. See, e.g., Greenpeace USA v. Stone, 748 F. Supp. 749, 754 (D. Haw. 1990) (describing the process of classifying the assessment document); Environmental Effects Abroad of Major Federal Actions, Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979).

55 An additional challenge to examining alternatives is that the "no action" option does not equal the status quo, since breaking off trade negotiations may strain diplomatic relations and make environmental cooperation worse than before. See CEC REPORT, supra note 10, at 25.

56 It is worth noting that the economic modeling of trade agreements described above is generally not published so as to avoid tipping off negotiating positions.
If a key goal of reviews is to inform negotiators by identifying potential opportunities and vulnerabilities prior to final agreement, then presumably the assessment should take place as early as possible. But when, to allow for meaningful analysis, is the time ripe for review? If NEPA is a guide, it should be early enough for meaningful consideration of alternatives to the negotiating objectives, including a no-action decision. But should that be once the parameters of the negotiations have been framed? At the time negotiations have formally commenced? When the likely positions have become clear? At what point will releasing the review to the public for comments be most useful?

Perhaps the timing should depend on the type of agreement—that is, requiring early reviews for WTO rounds, when the negotiators could benefit from information on general problem areas and opportunities, and later review for sectoral-liberalization agreements, when they could focus on specific provisions that have emerged. The review could take the form of a dynamic, evolving process initiated early in the policy cycle but revisited during the negotiations, or it might be more useful as a thorough, one-time analysis. The resource and timing constraints of the two approaches differ considerably. Compounding the challenge of timing is the overwhelming importance of negotiating deadlines. Should the review be a prerequisite for action? If a deadline arrives and the review is incomplete, must parties break off negotiations? As a seasoned USTR negotiator explained to the author, the halfway point of the negotiating process may be a good time to conduct a review, but that generally occurs forty-eight hours before the final deadline.

**Geographic Scope**

The guidelines to EO 13,141 do ensure that global and transboundary effects will at least be considered during the scoping phase, when the determination is made whether further study is "appropriate and prudent." But upon closer examination the guidelines stack the deck against considering impacts beyond U.S. borders. In determining what is "appropriate and prudent," for example, the guidelines require consideration of the scope and magnitude of global and transboundary impacts, but also the implications for U.S. international commitments and programs, data availability, and "diplomatic considerations." Most of the factors determining the appropriateness of review (1) are not environmental, and (2) discourage review. Moreover, the definition of "transboundary and global impacts" specifically includes places "not subject to national jurisdiction." Combined with the presumption in favor of considering domestic impacts, this provision likely excludes impacts in foreign jurisdictions from consideration unless they cause transboundary impacts in the United States. See Guidelines, supra note 21, ¶ (B) (5)(2). Interestingly, Canada's draft review procedures are even narrower, focusing on impacts only within Canada.

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57 The regulations of the Council on Environmental Quality call for an EIS to be prepared at the time of a proposal—"that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. 1508.25 (1999).

58 See, e.g., Rio Declaration on Environment and Development, June 14, 1992, Principle 12, 31 ILM 874 (1992) (stating that "[i]nternational actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided").
While these paternalistic concerns merit attention, excluding consideration of environmental impacts in other nations blunt most of the potential of the review by shielding the most significant consequences of increased trade from scrutiny. As an example, consider the first review conducted under EO 13,141—the Jordanian bilateral trade agreement. The Clinton administration pledged to review this agreement, but to what purpose? Increased trade with Jordan will have negligible impacts in the United States. USTR, to its credit, took the bold decision to push for environmental measures in the agreement in the hope of strengthening Jordan's environmental protection efforts. But, according to the guidelines, these efforts could not be considered in the review because the agreement will cause impacts solely in Jordan and its neighbors, not in the United States or the global commons. As the previous part explained, the review could have taken a "proactive engagement" approach, focusing on the nature of the environmental problems facing Jordan, looking into whether any of them are trade related and, if so, how the bilateral agreement could assist in mitigating them through cooperative capacity building or other measures. But this approach will not be considered if there are narrow provisions for geographic scope.

**Impact Analysis**

The usefulness of the review depends most, of course, upon what it examines. The scholarship on reviews of trade agreements describes four discrete categories of impacts. *Scale impacts* result from increased trade on the overall level of economic activity and growth. These macroeconomic effects can increase consumption and production or, equally, provide new and additional resources to address environmental harms. *Structural impacts* take a more focused form and show how increased trade influences the patterns of economic growth and investment within specific sectors (as in the analysis of agricultural subsidies excerpted below). Will lowered tariffs result in different patterns of resource use and investment, in more pollution but less land degradation? Will they induce a flight to foreign "pollution havens"? *Product impacts* result from changes in trade flows themselves. These may be positive—increasing imports of environmentally cleaner technologies and know-how—or negative—increasing trade in hazardous wastes or the potential for the introduction of invasive species. Finally, *regulatory impacts* represent the consequences of trade agreements on domestic environmental laws, as well as multilateral environmental agreements. The creation of disciplines and dispute mechanisms in trade agreements may directly threaten domestic protections and implementation of international commitments or chill the extension of new protections. At the same time, provisions such as those in the NAFTA environmental side agreement may furnish a mechanism to strengthen the enforcement of existing protections.

Those conducting the review must also determine the assessment technique for each of these impacts. Assessing scale and structural impacts requires economic modeling, projecting rates of economic growth and shifts in trade flows, and then relating these to environmental impacts. Regulatory impacts lend themselves more to qualitative analysis through the assessment of hypothetical cases of inconsistencies between the proposed trade disciplines and existing laws. The specific indicators chosen for each of these impacts, while

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41 See text at note 43 infra.

42 While not seriously discussed during the drafting of EO 13,141, a fifth category of impacts has been focused on in European environmental reviews—social impacts. NGOs commenting on the EU sustainability impact assessment have called for further analysis of trade impacts on children, indigenous peoples, and women in both developing and developed countries. As discussed below, developing countries have echoed these calls, see text at note 93 infra.
often overlooked, are critically important as well. Depending on how impacts are measured, trade reviews can tell very different stories.

Moreover, reviewing these impacts is hard. Amidst the heated debate between free traders and environmentalists rests the uncomfortable fact that, after more than a decade, we still do not adequately understand the relationship between trade liberalization and environmental protection. As an example, consider a negotiation that will surely take place in the next WTO round—liberalization of the European agricultural sector. As the World Wildlife Fund has suggested, this situation might play out along the following lines:

- removal of subsidies in cereal production in Europe following a free trade agreement – fall in cereal prices on European markets – use of fertiliser declines and land area under cultivation is also likely to decline – soil erosion decreases and quality of soil improves – relocation of agricultural production outside Europe – farmers switch to other activities – economic and social effects: boom in recreational services with different kinds of environmental impacts or/and increased urban migration – increased pollution and waste discharge problems in urban areas and rising unemployment;

- removal of production subsidies in the cereal sector in Europe – fall in market prices and decrease in price support schemes – loss of extensive cereal systems in Portugal because of lack of competitiveness – decline in the habitat and population of the Great Bustard, an already threatened bird specie – loss of cultural interest and hence a decline in tourist attraction in the area – increased unemployment.48

If Europe’s agricultural sector shrinks, what will the consequences be for other sectors and the economy-wide implications for resource reallocation? What types of changes could this development mean for specific environmental indicators or species? Can one even qualitatively predict the chain of causation from specific trade measures to discrete environmental consequences?44 And if the nature of the impact can be perceived, can the degree of impact? The economic growth due to NAFTA, for example, has been small compared to the overall growth in gross domestic product. In as complex a system as a national economy, linking cause and effect—disentangling the relationships between increased trade, economic activity, and ensuing environmental impacts—poses a dramatic challenge. As one USTR official noted, “We have virtually no experience with environmental modeling or how to limit the scope of analysis. A matrix of the economic and environmental impacts could fill an entire wall.”

Our limited ability to model the environmental impacts of trade systems comes as no surprise, as little money has been spent on the effort, but it makes a daunting methodological task even more challenging. Before throwing up one’s hands in despair, though, one should recognize that governments believe this type of modeling can be done for economic impacts and, in fact, routinely engage in such an examination prior to major negotiations. Hence the oft-heard arguments in national capitals that “the proposed trade liberalization will increase gross national product by %.” If we have confidence in this type of economic modeling of trade agreements, it seems reasonable to assume we could develop similar

44 The NAFTA review, for example, is firmly agnostic in predicting specific environmental impacts, noting that as NAFTA obligations alter relative prices in the agricultural sector, changing the use of agricultural inputs such as pesticides, labor and land, as well as the ratio of input mixes[,] . . . such changes “can improve or worsen” water quality, soil erosion, soil productivity, biodiversity, wildlife habitat, food safety and worker health.

CEC REPORT, supra note 10, at 28 (quoting THE NAFTA: REPORT ON ENVIRONMENTAL ISSUES 83 (Office of the President PREX 1:2:N 82/2, 1993)).
expertise and reliability in environmental modeling. By starting now, though, we lack the fifty or more years of experience reflected in economic forecasters' general-equilibrium models and other sophisticated methodologies.

III. IMPLICATIONS FOR THE TRADE AND ENVIRONMENT DEBATE

The implementation of EO 13,141 and the European Union's sustainability impact assessment, the development of methodologies at the OECD, and the further sponsorship of pilot studies by UNEP and UNCTAD indicate that reviews of trade agreements are likely to become a mainstream practice at least among OECD countries in the next few years. However, whether the practice will spread beyond the OECD to developing countries remains less clear. This issue takes on particular importance when one recalls that developing-country practice will largely determine, in turn, whether the WTO or UNCTAD adopts review procedures. If one looks beyond the specifics of review methodologies under EO 13,141, what are the broader institutional implications of environmental reviews for the conduct of nonstate actors, states, and IOs in international trade negotiations? How does formally involving the public upstream in the trade policy process shift the trade and environment debate?

Nonstate Actors

As was evident in the streets of Seattle, NGOs harbor a whole range of concerns and frustrations over the environmental impacts of trade. Reviews, however, simply cannot address many of these. Reviews of trade agreements, for example, will never satisfy anti-globalization groups who view trade liberalization itself as the problem. Nevertheless, by creating a formal mechanism for the environmental community to raise issues at the outset of the negotiating process, the review can help identify the environmental consequences of liberalization agreements. While it may not provide greater access to industry associations and established NGOs that already routinely interact with policymakers, the review should open the door to many in the public who have not enjoyed close relations with trade ministries. Whether such access will be obtained in developing countries where civil society has traditionally enjoyed little involvement in decision making remains to be seen. The experience of reviews carried out for development bank loans gives cause for concern.46

OECD Countries

For states that routinely prepare environmental reviews of government action, the main consequence of trade reviews may well be similar to that of NEPA for U.S. federal agencies—the institutionalization of environmental concerns. The number of NEPA lawsuits has fallen considerably since the 1970s, largely because agencies have internalized the EIS as an accepted way of doing business.47 Indeed, some USTR staff members have predicted that simply knowing they have to carry out an environmental review will influence actions at early stages of policy development.

In considering state conduct in international negotiations, the advent of reviews raises a further, subtler possibility. The reviews may not only shape a country's negotiating

46 In a study of thirty-five environmental impact assessments carried out by African nations for the World Bank, for example, researchers found that "the public participation requirements were not followed in any case and more than one half of the projects failed to allow for public participation." Gray, supra note 5, at 110 n.141.

position, but also become a strategic part of the negotiation itself. As Robert Putnam has pointed out, diplomacy is a two-level game. Positions taken at international negotiations reflect both the dynamic at the bargaining table and the preceding (and often concurrent) domestic negotiations within the national government. While the environmental review in a particular state will probably influence its negotiators’ positions, one could easily imagine situations where the review, as such, is strategically used in the negotiations.

At first glance, one might expect trade ministries carrying out environmental reviews to prefer the resulting conclusions to be as broad and uncertain as possible, leaving the negotiators a free hand to bargain and strike deals. Recognizing the two levels in play, however, the ministry might be equally likely to want the review to be precise and prescriptive. That is, negotiators may prefer that their hands be visibly tied by the public review so as to justify intransigency on certain issues. In this manner, the review speaks to multiple audiences—the interagency process, the domestic public, and the negotiating partners. Indeed, it may be naïve to think that reviews would inform only domestic negotiating positions. Taken to extremes (as will be described in the WTO discussion below), the review can become a justification of negotiating positions intended more for trading partners than for domestic audiences.

**Developing Countries**

As a result of domestic legislation or compliance with the lending requirements of the World Bank and regional development banks, most developing countries do have experience conducting environmental reviews of proposed projects. One might expect this experience and their concerns over the negative impacts of trade agreements to lead them to welcome assistance in reviewing trade agreements. Thus, Jordan offered to carry out its own environmental review (with technical and financial assistance from USAID) as part of the negotiations on its bilateral agreement with the United States.

Almost without exception, however, developing countries have expressed suspicion and, in many cases, direct opposition to environmental reviews of trade agreements. Much of this opposition is long-standing. In negotiations on the 1972 Stockholm Declaration, for example, the commitment to environmental impact assessments in draft Principle 20 faced significant opposition “because it was perceived that any obligation could lead to abuse by developed countries to impede projects in developing countries.” As anyone familiar with recent WTO conflicts surely knows, many developing countries have opposed labor and environmental provisions in trade agreements out of concern that these threaten their few relative strengths (low-wage labor and abundant natural resources) in the world marketplace.

Recently, at meetings of the Commission on Sustainable Development and the WTO Committee on Trade and Environment, the European Union proposed that IOs carry out sustainability impact assessments. It met with a wall of resistance. At an international conference several weeks later hosted by the government of Ecuador and organized by the World Wildlife Fund, developing countries’ suspicions were given clear voice in the conference report. The bluntness of the criticism is striking, given the understated nature of such documents. The report notes that “[s]ome participants emphasised the issue of trust, saying that there seemed to be a certain perception by developing countries that there is

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48 Gray, supra note 5, at 105 (citation omitted) (adding that, “[a]s a result, a watered-down version was agreed to calling for rational planning to be an essential tool to reconcile development and environment needs”; id. at 105–06).
a hidden agenda behind SA [sustainability assessment] methodology." This point is elaborated on as follows:

One group suggested that there exists a large credibility gap and that the debate might still be premature. Others noted that it is necessary to build trust around the development of SA to address, among other things, the concern that SAs may be used as barriers to trade. It was observed that classifying countries' trading behavior using SA criteria could influence market access and possibly access to credit by developing countries.

After almost three decades, many developing countries continue to suspect that environmental reviews will develop into a precondition for trade liberalization that links environmental protection requirements with trade access. If anything, these concerns have only grown stronger. One can reply that the review is only that, a review, and will do no more than inform trade negotiators. But, as the above quote makes clear, many developing countries fear that environmental reviews will prove to be the camel's nose under the tent, enabling entry for more explicit conditionality later on.

The WTO

Neither the WTO nor its predecessor, the General Agreement on Tariffs and Trade, has ever undertaken an environmental review of a trade round. Not surprisingly, recent suggestions that the WTO itself conduct environmental reviews have garnered little support. As discussed above, developing countries suspect that reviews will work against their interests. How will a uniform methodology be developed? Who will develop it? And who will carry out the reviews to ensure their trustworthiness and objectivity? Some developing countries have expressed concern that the process, if done within the WTO, will be dominated by powerful OECD countries.

In this regard, it is interesting to note that the World Wildlife Fund, the leading NGO advocate of reviews, has not called for reviews at the WTO. It has focused, instead, on developing domestic capacity, hoping that higher visibility and more widespread state practice will soften opposition and gain credibility for eventual reviews at the multilateral level. Communiqués from the Commission for Sustainable Development have similarly focused on domestic capacity building and information sharing. Mindful of these developments, the United States has formally proposed to the Committee on Trade and Environment that national governments review trade agreements.

50 Id., Annex 1, para. 3.1.
51 In many ways, this conflict parallels the debate over implementation of sustainable development, in which developing countries express wariness of environmental protection at the expense of development. Hence the proposals at numerous international meetings to rename the goal as "sustainable economic development." See Joel B. Eben, 1999, from Stockholm to Kyoto and back to the United States: International Environmental Law's Effect on Domestic Law, 32 U. Rich. L. Rev. 1435, 1462 (1999).
52 With the exception of Japan, for example, the governments of the three other leading economies (Canada, the European Union, and the United States) already conduct reviews.
53 Committee on Trade and Environment, Environmental Review of Trade Agreements at the National Level, Communication from the United States, WTO Doc. WT/CTE/W/37 (July 25, 1996), at http://docsline.wto.org/gen_home.asp. It states:

11. In view of the recommendations by international bodies and the experience which has been gained on environmental assessment in general and for trade agreements in particular, . . . CTE Ministers should recommend that national governments carry out environmental reviews of trade agreements likely to have significant environmental effects, as part of the process of developing such agreements.
But even if the WTO followed this suggestion and required reviews at the national level, it remains an open question whether they would prove to be useful policy exercises or would simply serve as environmental justifications for national trade positions. For example, the agriculture liberalization talks scheduled as part of the next round might evoke radically different assessments, even among OECD countries. Thus, the U.S. review can easily be imagined as showing that agricultural subsidies are environmentally harmful, increasing pesticide and nutrient loads. On the other hand, the EU and Japanese reviews can be expected to show the opposite, emphasizing the benefits of farms to habitat conservation. As the above section on trade ministries explained, reviews can serve strategic purposes at both the domestic and the international levels, and this dynamic interplay surely influences the agreements’ substance.

While developing countries have largely opposed reviews of prospective trade agreements at either the national or the multilateral level, they have taken the lead in supporting retrospective reviews that consider environmental and social impacts.\(^{54}\) If the Uruguay Round agreements have harmed developing countries’ interests, what better platform to demonstrate this outcome than an international review of the agreements’ environmental and social effects? Moreover, because these reviews are retrospective, they leave no possibility of imposing conditionalities. For example, at an international workshop sponsored by the World Wildlife Fund in 1999, delegates from India and Egypt requested that the “WTO secretariat . . . prepare an analytical paper on the impacts of the Uruguay Round Agreements on developing countries, which should refer to the effects on developed countries as well.”\(^{55}\)

IV. CONCLUSION

It has become increasingly fashionable for political leaders to talk about “putting a human face on trade” and “promoting sustainable development.” The problem lies in going beyond such well-intentioned rhetoric and making these phrases meaningful. Environmental reviews are important, in the final analysis, precisely because they provide the practical means to craft a trade policy that seriously engages both environmental and commercial concerns. To be sure, while environmental reviews are increasing, institutionalizing them into state practice will not be easy. It requires challenging both the accepted process of setting trade policy and those parties that have benefited from this practice. It seeks to complement a known and tested process with a largely unproven and evolving review mechanism. The end result, though, holds the potential to begin realigning the trade and environment debate from conflict to cooperation.

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\(^{54}\) This stance is consistent with developing countries’ long-standing concern that developed countries focus too much on the environmental, and not enough on the economic, aspects of sustainable development. See supra note 51.

\(^{55}\) The conference also called on an array of UN agencies—UNEP, UNCTAD, UNDP, the World Health Organization, the International Labour Organization, and the Commission on Sustainable Development—to provide analyses of the environmental, developmental, social, and regulatory effects of the Uruguay Round agreements. World Wildlife Fund, Initiating an Environmental Assessment of Trade Liberalisation in the WTO, para. 6.5 (1999) (on file with author). NGOs have supported these demands as well, calling for an expanded scope of research far beyond environmental impacts, including the effects of trade liberalization on “income level and distribution, cultural and gender issues (such as impacts on the sexual division of labour, women’s role in and access to trade).” Id., para. 5.6.

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