

**Comments on the Joint draft report prepared by the Office of Management and Budget and the Secretariat General of the European Commission:  
“Review of the Application of EU and US Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment”**

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**General comments**

- The review presents a valuable overview of impact assessment cultures on both sides of the Atlantic, and suggests implications for international Trade and Investment. The approach is challenging, though, because of the complexity and heterogeneity of both impact assessment practices and impacts on Trade and Investment.
- The review presents separately what work the Office of Management and Budget (OMB) and the European Commission (EC) are doing in terms of Impact Assessments (IAs) on trade and investment. The European and American contributions are somewhat disconnected and do not present a transatlantic integrated approach for the future.
- The two parts are not balanced because the EC describes how IA guidelines address the trade and investment issue, whereas the OMB presents cases where this issue was dealt with in individual IAs.
- The EU section provides a rather generous self-evaluation of the consultation process. Page 3 for instance states that the EC “has adopted strict minimum standards” on stakeholder consultation. Minimum standard are by definition not strict, compared for instance with consultation codes. The EU consultation regime is less stringent than in Member States and has been criticized for not allowing enough time -8 weeks compared to 12 weeks in the UK- and for its lack of transparency (Lofstedt, 2007; Torriti, 2007).
- The nature of the document – a short review- overlooks key limitations of the United States cost-benefit model that may be relevant for the Trade and Investment debate: the fact that OIRA is very ‘EPA centred’ (i); the need to better internalize externalities (environmental and social impacts) (ii); the lack of

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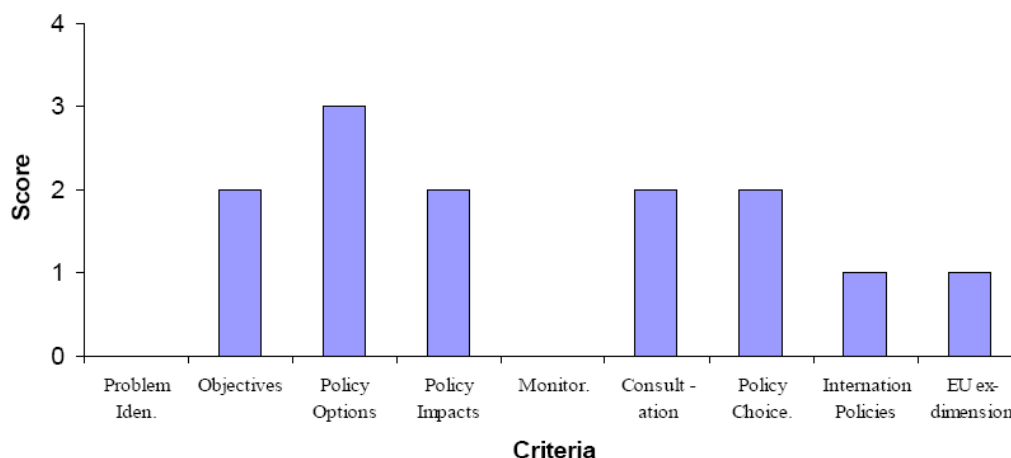
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integration between the OMB and agencies (iii); the need to ‘depoliticize’ OIRA through improving the robustness and scientific basis of its analytical models .

- On page 6, it is not clear how the EU Impact Assessment Board actually increases the focus of IAs on trade and investment. No examples are made to strengthen the concept that the Board improves the analysis of international impacts within specific IAs. Yet, the comments of the Board are normally made available and published.
- The confidence showed in the review by the EC as to the suitability of the IA system for addressing international trade and investment issues is not shared by academic studies. A study by Opoku and Jordan (2005) finds that the IA procedure does not function as an effective instrument for the implementation of the Union’s commitment to promoting sustainability in non-European countries. For instance, they believe that IA on the Reform of the Tobacco Regime, also mentioned in the review, entirely ignores the external impacts on the economies of non-EU tobacco growing countries through market distortions. While this IA touches on external dimensions, it would be done in a vague and somewhat abstract manner, as it results in the evaluation score illustrated in the graph below.

**Figure 1-Impact Assessment on the Reform of the Tobacco Regime: Evaluation of the consideration of effects on non-EU countries (4 = Good, 3 =satisfactory, 2 = unsatisfactory, 1 = little attention, 0 = no mention) from Opoku and Jordan (2005)**



### Comments on specific topics posed by the review

The joint review explicitly seeks for comments on the following topics:

- 1) Both sides value the timely announcement of planned legislative and regulatory initiatives, and of transparency concerning upcoming corresponding impact assessments. In this context it is desirable to establish ways to indicate whether a

planned regulatory or legislative initiative, might have an impact on international trade or investment, or might otherwise be of interest to U.S., EU third countries.

- 2) Both sides underline the importance of having their impact assessment methodologies and procedures incorporated into a transparent set of rules or guidelines that are accessible to the public, accompanied by a rigorous system of quality control. In this context it is crucial to have public consultation and notice and comment mechanisms in place that give the authorities, businesses, and citizens of the, EU, U.S. and third countries the opportunity to voice solicited or unsolicited comments on planned initiatives, and to reflect their input in impact assessment and impact analysis reports.
- 3) Both sides are committed to make their proposed policies and accompanying impact assessments public, which will allow the other side to respond if it expects international trade and investment issues to be significant. The results of relevant underlying technical analysis and data should generally be published or otherwise made available.
- 4) As regards methodologies concerning the impact on trade and investment *per se*, both sides have identified possible elements for consideration in their respective rules and guidelines for impact assessment. In particular, if preliminary analysis suggests that a proposal might significantly affect international trade and investment, guidance should be provided on the type of analysis that would be useful to make decision makers aware of the international impacts. This could include: an analysis demonstrating the need for any proposed regulation that might directly impede international trade or investment, an analysis of the degree in which different groups (foreign and domestic businesses and consumers) are affected by such a proposal or a recommendation that existing international standards or regulatory approaches, if applicable, should be analysed as an explicit regulatory alternative.

These questions are addressed as follows:

- 1) In order to establish whether a planned regulatory or legislative initiative might have an impact on international trade or investment an *ex ante* thorough screening and scoping of IAs on proposals related to trade is advisable. The idea of screening is that the IAs of those proposals that fall in the trade domain are examined to see whether any are sufficiently minor as to not need detailed assessment. Those remaining are scoped, involving analysis which relates each proposed trade measure to its eventual significant impacts both positive and negative (ITSP, 2005). When detailed assessments are carried out, needs, methods and data have to be reconciled with time, budget and other real-world constraints. A range of methods including economic modeling, statistical estimation, case studies and the use of expert opinion can be used to carry out the detailed assessment (George et al 2003).
- 2) In theory, one can only agree that “having public consultation and notice and comment mechanisms in place that give the authorities, businesses, and citizens of the, EU, U.S. and third countries the opportunity to voice solicited or unsolicited comments on planned initiatives” is the ideal way forward. However,

it will be very difficult to identify a suitable platform for cross-country stakeholder consultation. If it is already arduous to consult at EU and national level, the obstacles increase at international level. Moreover, the legal framework of such international consultations needs to be defined in agreement with e.g. WTO rules.

- 3) Making policies and accompanying impact assessments public is substantially easier to achieve than the previous point, given that both US and EU publish their IAs. More importantly, it is a more demanding task for both sides to build the capacity to monitor each other's regulatory activity and search for proposals that may affect trade and investment issues.
- 4) This point seems to partially answer the question posed in the first question, i.e. (question) how to identify those proposals which may have impacts on trade and investment: (answer) preliminary analysis can suggest that a proposal might significantly affect international trade. Preliminary and scoping phases for sustainability IAs in the EU have traditionally focused on causal chain analysis. This consists of: (i) specifying each trade measure; (ii) setting up the concrete scenarios; (iii) significance criteria to assess measures of each scenario; (iv) country groups; (v) time horizon; (vi) cumulative impacts; (vii) methods, data sources, sustainability indicators, consultations (EC, 2003). Causal chain analysis has advantages, but also several drawbacks. The approach follows a logical progression beginning with economic effect. It identifies the cause and effect linkages between the trade measure and its consequent economic effects and then the social and environmental impact of this economic change. Another alternative approach would be to start with the desired end result first and work backwards towards the appropriate trade measure. This would involve establishing sustainability objectives in their different dimensions and identifying which scenarios or groups of trade measures would be most likely to reach those objectives.

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