WORLD GROWTH
Palm Oil Green Development Campaign

Abuse of Sustainability Standards

An Attack on Free Trade, Competition and Economic Growth

A Report by World Growth

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WORLD GROWTH

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Palm Oil Green Development Campaign

Alleviating Poverty through Wealth Creation

Palm oil provides developing nations and the poor a path out of poverty. Expanding efficient and sustainable agriculture such as palm oil plantations provides small and large plantation owners and their workers with a means to improve their standard of living.

Sustainable Development

Sustainable development of palm oil plantations and growth of the palm oil industry in developing nations can and will be achieved through consultation and collaboration with industry, growers, lobby groups and the wider community.

Climate and the Environment

Palm oil is a highly efficient, high yielding source of food and fuel. Palm oil plantations are an efficient way of producing fossil fuel alternatives and capturing carbon from the atmosphere.

Opportunity and Prosperity

Developing nations must be allowed the chance to grow and develop without political intervention by environmental groups or developed nations. It is crucial that developing nations be given the same opportunities which developed nations have benefited from.

Property Rights

Efficient palm oil plantations and the growing demand for palm oil give smaller land holders greater opportunities to make a living off their land, maintain their ownership and support their rights to property and prosperity.

Table of Contents

Glossary of Terms 4

Executive Summary 5

I Introduction 7

II. Voluntary Sustainability Schemes: The ENGO Strategy to "Transform Markets" 8

III. The Private Sector – Turning CSR into a Market Control Tool 13

IV. Regulating Sustainability of Traded Goods – The New Green Protectionism 15

V. The Impact of the New Sustainability Standards 17

On Consumer Choice 17

On Market Management 18

On Economic Development in Developing Nations 18

VI. On Free Trade 20

VII. Conclusion 22

Annex I – How Inappropriate Sustainability Standards Can Disadvantage Developing Economies 23

Annex II – The WTO and Environmental Trade Barriers 25

Bibliography 27

CITES	Convention on International Trade in Endangered Species
ENGO	Environmental Non-Government Organization
EU	European Union
FLEGT	Forest Law Enforcement, Governance and Trade
FSC	Forest Stewardship Council
GATT	General Agreement on Tariffs and Trade
GSCP	Global Social Compliance Program
GFTN	Global Forest & Trade Network
IFC	International Finance Corporation
ISO	International Organization for Standardization
ITTO	International Tropical Timber Organization
MEA	Multilateral Environmental Agreement
NGO	Non-Government Organization
OECD	Organization for Economic Cooperation and Development
PEFC	Programme for the Endorsement of Forest Certification
POP	Persistent Organic Pollutants
RED	Renewable Energy Directive
RSPO	Roundtable for Sustainable Palm Oil
SAI	Sustainable Agriculture Initiative
TED	Turtle Excluder Device
TBT	Technical Barriers to Trade
UNCTAD	United Nations Conference on Trade and Development
VASEP	Vietnam Association of Seafood Exporters and Producers
VPA	Voluntary Partnership Agreement
WBG	World Bank Group
WTO	World Trade Organization
WWF	World Wide Fund for Nature

Executive Summary

Misuse of Sustainability Standards

The case to enhance sustainability is now being used to justify trade barriers, constraints on competition, denial of consumer choice and slower economic growth. In different spheres, governments, large corporations and NGOs are taking action which will produce these perverse results across a common set of industries and products. These are industries which have been selected by the World Wide Fund for Nature (WWF) to advance its environmental ambitions. They include timber and paper, vegetable oils, seafood, beef and sugar. The European Commission and some of its leading members are actively advancing these ambitions in public policy. The World Bank has also become an active partner.

Restricting Competition and Consumer Choice

Large retailers and consumer food companies in Europe and the US already demand compliance with WWF sustainability standards when sourcing timber products and palm oil, even in instances where there is not adequate supply. Leading companies have announced they will demand in the future that other products they source and stock will also have to meet predetermined sustainability standards. Business groups have been formed in Europe to advance these goals, most notably the Consumer Goods Forum and the Sustainable Agriculture Initiative. The leaders are two of the world's biggest food and consumer goods manufacturers — Unilever and Nestlé.

These companies are engaging in activities which, by virtue of their influential roles in the supply chain, have the effect of restricting access to markets and reducing consumer choice.

In parallel, WWF has announced its intention to use voluntary certification systems to "transform" markets and has demonstrated how by recent developments in its certification systems for timber and paper and palm oil. WWF has made no secret of its strategy to pressure companies occupying strategic positions in the supply chain, such as dominant consumer goods manufacturers and retailers, to adopt its certification standards. Other NGOs such as Greenpeace and the Rainforest Action Network are aggressively attacking brand names and leading products of major companies to incentivize them to join the strategy.

The World Bank has given exclusive endorsement to WWF certification schemes for forest products and palm oil, effectively making compliance a pre-requisite for companies seeking finance for investments from the International Finance Corporation or for financial institutions which have elected to require borrowers to adopt the IFC's "Equator Principles" to demonstrate corporate social responsibility.

Sustainability Standards – The New Tool for Green Protectionism

The European Commission recently enacted a Directive on Renewable Energy which restricts biofuel imports unless they are produced in accordance with sustainability policies which stipulate standards governing land use set by the European Parliament. The Commission is also pressuring developing countries, under threat of blocking imports, to enter legal agreements to adopt standards to demonstrate exported timber products are legally sourced. The European Parliament has adopted a closely-related measure requiring suppliers of timber products to demonstrate the timber was legally obtained. Similar measures have been adopted in the US and are under preparation in Australia. These measures are justified as necessary to protect forests.

WWF has made no secret of its strategy to pressure companies occupying strategic positions in the supply chain, such as dominant consumer goods manufacturers and retailers, to adopt its certification standards.

These measures serve to restrict entry to the European market of products that are cheaper than goods produced in the EU. This is Green Protectionism. Legal experts consider most of these measures to breach WTO rules. Similar measures have been adopted in the US and are under consideration in Australia.

Underlining the protectionist interest behind these measures, in parallel, uncompetitive European, U.S. and Australian paper manufacturers have sued for anti-dumping duties and duties to countervail the impact of alleged subsidies to restrict the entry of paper products. Several of these suits have failed.

The Need to Act to Protect Free Trade and Open Markets

These measures restrict trade and will distort markets. Access to the markets by producers is limited and consumers are denied access to products. The result will be lower growth.

The contention these measures are necessary to improve sustainability are either technically uninformed or a contrived justification to prevent products entering the market.

It is also clear that governments need to act to ensure the capacity of markets to deliver the optimal returns to the economy is protected and groups which take action which undermines that and businesses which collaborate in such actions are penalized.

At a time of great uncertainty and slowing growth in the global economy, actions like this to restrict markets and trade, and thereby economic growth, are matters for grave concern. They reflect disinterest among their proponents about the economic welfare of people.

These measures are likely to be overturned in the WTO if challenged. Recent legal rulings show measures like these which unnecessarily restrict trade and have only an indirect impact on environmental problems are not acceptable.

It is also clear that governments need to act to ensure the capacity of markets to deliver the optimal returns to the economy is protected and groups which take action which undermines that and businesses which collaborate in such actions are penalized.

There is also a case for a global code to ensure competition policy allows for the most effective operation of domestic markets and is not distorted to serve other policy objectives, such as enhancing sustainability.

Efforts to enhance sustainability should either be secured through effective domestic measures and, if there is a consensus for this, through international agreements which lay down common approaches to be adopted in national legislation. Seeking to build adherence to sustainability standards inside trade rules or as condition for trading serves only to reduce economic activity and restrict opportunities to raise living standards in developing countries.

I. Introduction

There has been concern for many years that sustainability standards could be misused to constrain commerce and competition. In 2002, the OECD hosted a Roundtable on Sustainable Development. At that time, the principal means for demonstrating adoption of sustainability standards by producers above and beyond what environmental regulations required was by the use of an "Eco-label."

Eco-labels denote that a particular system has been used to demonstrate that the product concerned has been sustainably produced. These systems are voluntary (i.e. not required by government regulation). They broadly follow the systems for setting voluntary standards which have been developed over the years for industrial standards. International coordination development and implementation of industrial standards is effected through the ISO (International Organization for Standardization).

They have also been controversial. The issues they raise were laid out in a paper commissioned by the OECD in 2002 - "Private Voluntary Eco-labels: Trade Distorting, Discriminatory and Environmentally Disappointing."[1] The report warned that:

> *"Private voluntary Eco-labels can be expensive for developing countries and price premiums for eco-labeled goods are not as significant as proponents have argued. Further, the evidence that such labels are even affecting positive environmental outcomes is mixed."*

Use of Eco-labels expanded, but their popularity with consumers remained limited. As a consequence, environmental groups have since then concentrated instead on encouraging producers and processors of products to adopt private sustainability standards. Unlike ISO 14000 which enables organizations to demonstrate that their quality management systems also include environmental impacts, a new group of sustainability standards have been developed which lay down specific outputs to be achieved to demonstrate sustainability.

The first system of this type was the Forest Stewardship Council (FSC). It was developed by environmental groups, headed by the then World Wide Fund for Nature (WWF). An alternative system was the Pan European Forest Certification system (PEFC), later re-titled the Program for the Evaluation of Forest Certification. It was fostered by governments and forest industries. Both systems were established in the early 90's. The forest schemes are the largest and most advanced and provide a model for others.[2]

Since then WWF has promoted the Marine Stewardship Council (established in 1999); the Roundtable on Sustainable Palm Oil (RSPO), established in 2002; the Roundtable on Responsible Soy (RTRS) (2005); and the Aquaculture Stewardship Council (2009). WWF tried without success to establish voluntary certifications system for minerals and has announced its intention to develop similar voluntary certification systems for beef, sugar and dairy products.

All these systems propose voluntary standards for sustainability which typically go further than what is legally required under government regulation. Some large companies have been active partners in establishing these systems with WWF. Unilever helped establish the Marine and Palm Oil systems and is active in the management of the latter.

In recent times, we have seen sustainability standards specified as a condition for allowing imports as a means of pressuring producers in exporting nations to adopt them. As well we have seen companies like Unilever encouraged or pressured by WWF or other environmental NGOs to demand that suppliers comply with similar standards; and action by companies to supply to retail markets only products which comply with those standards, thereby limiting consumer choice.

These developments raise some serious questions. This report aims to review these developments and assess their consistency with the principles of open global markets and competitive domestic markets to which most governments subscribe.

1 Vitalis, V., "Round Table on Sustainable Development: Private Voluntary Eco-labels: Trade Distorting, Discriminatory and Environmentally Disappointing", OECD, Paris, 2002;

2 While both standards are similar, the PEFC standard is based on ISO principles for design and governance. FSC's governance model is different and is widely regarded in the forest industry as controlled by WWF.

II. Voluntary Sustainability Schemes – The ENGO Strategy to "Transform Markets"

Environmental Non-Government Organizations (ENGOs) have devoted considerable resources to expanding the scope and number of systems providing voluntary sustainability standards.

These are systems which in theory respond to market demand. The idea is the consumer values the higher level of sustainability with compliance which the system provides and will pay a higher price for the product. So certification systems should pay for themselves. This is the case for the well-known ISO standard 9000 to demonstrate quality management and ISO 14000 to demonstrate the use of systems to manage environmental impacts.

Most of the popular sustainability certification systems, such as for forest products and palm oil do not pay for themselves. WWF's strategy for developing its certification systems is instead to secure grants and donations and establish a system of active public policy advocacy to promote the system.[3] Whereas the private sector adopts voluntary sustainability standards as a marketing or corporate social responsibility tool, ENGOs advocate these standards as a mechanism to advance environmental policies, and now, as admitted recently by WWF, to try to control the supply chain to transform markets.

WWF's Market Transformation Initiative

Review of the history and modus operandi of the Forest Stewardship Council and the Roundtable on

WWF's Anti-Free Market Philosophy

At its core WWF believes that environmental policy interests should take precedence over trade interests. At the 1999 WTO Ministerial meeting, WWF lobbied for the creation of a set of environmental rules which would take preference over trade rules.[1]

In 2006, WWF stated that "governments must ….. make it clear that the WTO does not have a mandate to set rules or criteria that might in any way define or restrict the use or national implementation of any trade measures agreed to in Multilateral Environment Agreements (MEAs)". Several MEAs allowed parties to impose trade bans on other parties to the agreement.

During a very notable dispute in the WTO over use by the U.S. of trade bans against other WTO members who did not comply with U.S. legislation demanding adoption of certain netting practices in the high seas (The Shrimp-Turtle case), WWF criticized the WTO disputes panel for only focusing on trade liberalization and enforcing the belief that 'if trade is good, more trade is better'.

WWF has also stated that trade liberalization in agriculture has led to a 'price squeeze' which has precluded the tightening of environment standards on a cost basis alone; clearly indicating that WWF does not consider free trade and the environment to be complimentary.

The architect of the RSPO noted recently that it was created after WWF found WTO trade rules prevented the use of government rules to restrict trade in commodities. It was stated that a driving interest in forming RSPO was to find an alternative to control deforestation because it was recognized that the rules of the World Trade Organization would not permit use of "improper trade barriers" for that purpose.[2]

1 WWF, Greenpeace and ANEP, "Joint Stakeholder Discussion Paper: UN REFORM Integrating Environment and Development by 2015, accessed at: http://www.stakeholderforum.org/policy/ieg/SubmissionsToThePanel/WWFANPEDandGreenpeace.pdf
2 WWF, "WWF briefing - native vegetation regulation: financial impact and policy issues", 2005, accessed at: www.wwf.org.au/publications/NativeVegetationRegulation.pdf

3 To establish FSC WWF received over time very large grants from Conservation International, European Governments and the Ford Foundation.

Sustainable Palm Oil demonstrated clearly that the strategy of WWF was to use these sustainability systems to control supply chains and to dictate environmental terms to producers and consumers.

The language suggested that WWF was 'market friendly'. In 2011 WWF announced as policy what previously was imputed. It has created a "Market Transformation" Initiative. WWF's position on international trade issues did not demonstrate a philosophical attachment to the importance of the market. As the Box on the previous page shows, quite the contrary.

The following was drawn from the WWF website in January 2011.[4]

Changing Markets So that Conservation Makes Business Sense

WWF´s Market Transformation Initiative contributes substantially to reducing our global human Footprint.

By showing that commodities can be produced at affordable costs with measurably reduced environmental impacts, and by creating a significant demand for such products, entire commodity markets can be moved towards greater sustainability, and deliver large-scale environmental outcomes. Working in close collaboration with other WWF Initiatives, WWF´s Market Transformation Initiative centers its activities on companies in sectors, such as commodity traders, manufacturers, retailers and banks that relate to the following suite of commodities:

Timber	Bio-energy
Pulp and paper	Cotton
Palm oil	Beef and dairy (livestock)
Sugarcane	Wild-caught tuna and whitefish
Soy	Farmed salmon and shrimp

Engaging with the private sector is nothing new for WWF. We have a long history of working on certain commodities and markets, particularly in the areas of forestry and fisheries.

The key challenge is how to change more markets faster!

The ENGO Strategy – 1. Control the Sustainability Standard

WWF's strategy to 'transform markets' is first to create sustainability standards, such as FSC and RSPO (the Round Table on Sustainable Palm Oil), in concert with a select number of companies. These standards place tight restrictions on environmental practices for anyone who adopts the standard and is formally certified as meeting the standard. Generally, certified businesses will be entitled to apply an eco-label on products which were manufactured or developed under the standard.

In addition, these standards and rules for being certified are governed by bodies in which environmental groups have preponderant influence and standards are decided politically, rather than according to objective and technically-sound bases or by consensus.

This is not 'best practice' in standards and conformance (The "Gold Standard" is reflected in the procedures of the ISO. Once standards are set, they cannot be changed without all stakeholders having an equal say). The result is that once companies achieve certification they often find themselves in a situation where the certifying organization initiates action to tighten environmental standards further.

It is not uncommon for companies once they join FSC to find themselves subject to criticism from other NGO members, like Greenpeace, for not doing enough.

4 See: http://wwf.panda.org/what_we_do/how_we_work/businesses/transforming_markets/solutions/

ISO - The Gold Standard in Standards and Certification

The ISO is an international standard-setting body composed of representatives from various national standards organizations. It sets rules of technical standards setting bodies. Most national standards bodies are members. The ISO seeks a consensus position on standard setting and will not introduce a new standard if there is sustained protest to it.

Once an ISO standard is developed, it cannot be changed unless the whole standard is reviewed under the formal consultative procedures laid down in ISO rules.

Most national standard setting bodies in each country follow ISO rules for standard setting.

Because NGOs like WWF prefer to control the sustainability certification bodies, they cannot get accreditation under the International Accreditation Forum (IAF) which is the body which accredits standard setting bodies using ISO rules. NGOs have set up their own accreditor, ISEAL.

The PEFC forestry certification standard which globally certifies double the forest of FSC is based on ISO standards.

WWF has also fostered buyers groups such as the Global Forest and Trade Network. The Network aims to turn demand for wood products into "a positive force to save the world's most valuable and threatened forests".[5] The Network works to regulate trade to favor certified and 'legally produced' timber. One aim is to connect producers of sustainable product with consumers. They seem to have little commercial influence on trade.

The ENGO Strategy – 2. Greenmail the Companies

To 'transform markets', WWF and other supporters of the voluntary standards must first engage the leading players in the supply chain. The argument is often put to producers and processors that they face a 'business risk' if they remain uncertified. The 'business risk' is that ENGOs will launch publicity campaigns to criticize company brands to pressure them to seek certification. The ultimate aim of this tactic is to capture retailers, distributors and processors which occupy a dominant position in the supply chain to sign on to certification. By gaining influence over a large and prominent market share, the ENGOs are able to leverage off that market position to impose certification as a 'norm' up and down the supply chain.

ENGOs will also engage a method often referred to as 'greenmail' to force companies into certification. 'Greenmail' involves action to devalue the public perception of a brand name or company reputation of producers and retailers through advocacy campaigns aimed at consumers and processors. Running negative campaigns against brand labels with significant market position is common. The aim is to pressure these businesses to align with or adopt certification systems developed by NGOs. Once the company adopts that system, it has become an agent for delivering the sustainability values of the NGO. By these means, ENGOs are able to influence and even control the supply chain.

High profile examples include a campaign by Greenpeace against Nestlé, targeting their use of palm oil which was not certified as 'sustainable' under the RSPO. Following an intense online and publicity campaign Nestlé agreed to stop purchasing palm oil that was not certified by the RSPO.

ENGOs have hassled Mattel and Disney to cease using paper sourced from Indonesia on the grounds this is tantamount to support for destruction of rainforest.

Similar campaigns have been run by the Rainforest Action Network, which was funded to pressure Japanese companies not to purchase timber products

5 WWF, "Why We Need the GFTN and How it Works", accessed at: http://gftn.panda.org/about_gftn/

MarketsforChange.org

In 2011, Greenpeace established an NGO in Australia "MarketsforChange.org". With two board members from Greenpeace International, this is clearly a trial run for comparable operations in other countries.

It declared its first goal was to close down natural forestry in Australia. It indicated it would intimidate retailers and producers who did not go along. A first target was a large retail outlet. It announced that if companies used the FSC system to certify their timber and refused to import product from developing countries unless it was certified FSC*, they would not be attacked. Greenpeace is a member of FSC. Details can be found on www.marketsfor change.org

* *Through this principle FSC obliges companies not to clear forest land for commercial or other purposes, implementing WWF and Greenpeace opposition to any conversion of forest land or extension of native forestry, regardless of existing land set aside for conservation*

from Australian forestry company Gunns, because it was not FSC certified. The campaign resulted in the Japanese ceasing to buy Gunns products until such time as they were certified. Similarly, Kellogg, who admits it is a small user of palm oil and has formally committed only to purchase RSPO-certified palm oil (and was officially congratulated for this by WWF)[6], has been criticized by the Rainforest Action Network and the Union of Concerned Scientists for not going far enough.

The ENGO Strategy – 3. Pressure Financiers

WWF has been successful in moving many financial institutions to a position where they will only finance projects which use its sustainability standards. A key strategy has been to secure exclusive endorsement by the World Bank of its sustainability standards for forestry and palm oil standards.

The Bank's standards are set out in "The Equator Principles" to which many financial institutions subscribe. Their risk assessors rate the acceptability of forest or palm oil projects for loans according to their conformity with principles for sustainability set out in the Equator Principles. Most risk assessors in financial institutions, such as ABN Amro and Credit Suisse, are technically inexpert in these fields and are unaware of the deficiencies and political orientation of key features of the sustainability standards or the governance procedures to measure compliance. In the process, they become de-facto regulators of compliance by their customers through the imposition of WWF sustainability standards.

By gaining influence over a large and prominent market share, the ENGOs are able to leverage off that market position to impose certification as a 'norm' up and down the supply chain.

6 See: http://kelloggcorporateresponsibility.com/enviroinment/11.html

WWF's Seafood Guide – A Lesson in Risk for Vietnamese Fisheries

The way in which WWF recently managed its consumer seafood guide demonstrates the risk its approach to voluntary sustainability schemes presents to producers.

WWF recently removed catfish from the yellow list and placed it in the red list for its 2010-2011 Consumer Seafood Guide. The guide advises consumers in six European countries - Germany, Austria, Switzerland, Belgium, Norway, and Demark - to purchase fish only from its green and yellow lists.

WWF was forced to admit, following an industry uproar, that it acted without scientific evidence. The Vietnam Association of Seafood Exporters and Producers (VASEP) deputy chairman Nguyen Huu Dung warned "the decision by the WWF could cost both producers and consumers heavily and impact WWF's prestige and transparency."

A fisheries official said WWF had incurred significant losses on the Vietnamese fishing industry. European markets reportedly make up almost 37 percent of catfish exports from Vietnamese fishing companies. The EU reportedly accounted for $423 million worth of catfish exports in the first 10 months of 2010.

This illustrates the risk of giving de facto-regulatory authority to non-governmental organizations.

III. The Private Sector – Turning CSR into a Market Control Tool

Demonstrating Corporate Social Responsibility

The basic interest of the private sector in responding to calls and blandishments from ENGOs to use and develop sustainability standards and labeling schemes is to demonstrate a high standard of corporate social responsibility (CSR) and to protect valuable brands and company names from public criticism by ENGOs. Producers of food products are particularly sensitive to such public criticism.

CSR typically demonstrates concern for a range of issues which include respect for appropriate labor standards, regard for human rights, and protection of the environment. Ensuring "sustainability" has become the principle means of demonstrating environmental awareness. It accordingly figures largely in CSR strategies of retailers, and traders and producers of consumer goods, particularly food products.

Initially, it is a demonstration of sustainability focused on particular products. Many private corporations have taken unilateral action to create sustainability standards for marketing or corporate social responsibility purposes. Examples include cosmetics company Lush, which has launched a 'palm oil free' brand. Other companies have banned the use of other products because controversy has been attached to them, usually by NGOs like Greenpeace, such as soy and beef from Brazil.

As noted earlier, WWF has identified around a dozen food and agricultural products to which it is directing its attention. Common features of these industries are that they are major global business players — producers, traders, processors or retailers — which occupy strategic influence in global supply chains.

In recent years, they have found common interest in applying common principles to shape global CSR programs. One result is the creation of the Global Social Compliance Program (GSCP). The aim of the program is to develop standards of environmental management to be required from producers, particularly in developing nations.

The Program was developed by members of the Consumer Goods Forum which comprises a significant number of the world's biggest consumer goods producers and retailers. The formal purpose of the forum is networking and knowledge exchange. It has a particular focus which it describes as "non-competitive process improvement".[7] A leading body is the GSCP Task Force. It comprises companies domiciled in developing nations, except for the retailer, Pick 'N Pay, from South Africa.

The purpose of the GSCP is to develop sustainability standards as references. It has established research and collaborative services to establish consensus on best practice sustainability standards at the retailer and brand manufacturer level, almost exclusively to apply to products sourced from developing nations.

The basic interest of the private sector in responding to calls and blandishments from ENGOs to use and develop sustainability standards and labeling schemes is to demonstrate a high standard of corporate social responsibility (CSR) and to protect valuable brands and company names from public criticism by ENGOs.

A separate but related program is "The Sustainable Agriculture Initiative" (SAI). It was developed by international processors Unilever, Danone and Nestlé. Members of SAI are a mixture of processors and producers primarily from developed nations, but includes some also from developing nations. SAI develops and tests sustainability standards, benchmarking these standards and then developing a tool for internal or external assessment of adherence to standards. SAI has developed sustainability standards for arable and vegetable crops, coffee, fruit and dairy. The SAI seeks to promote the standards and benchmarks created by the body to a range of

7 Global Social Compliance website, accessed at: http://www.gscpnet.com/about-the-gscp/the-consumer-goods-forum.html on 31 March 2011.

corporations and business professionals. The Sustainable Agriculture Initiative formally states its purpose is to train and inform producers in the supply chain on how to practice sustainable agriculture.

Tools to Control Markets

Recently, some large and leading members of the Consumer Goods Forum and the Sustainable Agriculture Initiative have indicated they intend to use sustainability standards to determine the features of products they will purchase and what products they will make available to consumers.

To date several of them have announced already they will only source products if they meet the standards set in the WWF-originated sustainability systems. (To date this affects forest products, palm oil, soy and marine products).

After a meeting of members of the Consumer Goods Forum in the margins of the Climate Change conference held in Cancun, Mexico in December 2010, the CEOs of Tesco and Unilever announced they planned by 2020 to procure only products which meet prescribed sustainability standards. From the framework of the SAI grouping, Nestlé and Unilever have announced that by a due date in the future they will also only source agricultural products which meet their prescribed sustainability standards.

The risk in current developments is that stipulation of sustainability standards as part of CSR programs is laying the basis for practices which will give major players control of markets.

In itself, these practices would seem unexceptionable. However, in the context of the nature of the global supply chains in which there producers and retailers occupy influential, if not commanding positions, they raise the prospect that these companies are putting themselves in positions to dictate production standards and what product will be made available to consumers.

This is even more disturbing given that leading companies have established active partnerships with WWF to implement common sustainability standards and the latter has recently made clear its intention to control global trade and production in several important food and agricultural industries (see page 9).

In all major industrialized economies, competition and consumer laws are implemented in recognition of the risk to the proper operation of markets of the exercise of significant control over the market of businesses exercising dominant positions. The concern is that if competition is constrained, prices will be higher than they should be, more competitive suppliers will be closed out from markets and product choice for consumers will be limited.

The risk in current developments is that stipulation of sustainability standards as part of CSR programs is laying the basis for practices which will give major players control of markets.

IV. Regulating Sustainability of Traded Goods - The New Green Protectionism

In parallel with the more aggressive assertion of sustainability standards by ENGOs and the private sector, there has been a marked increase in the use by governments of trade controls to impose related sustainability standards on importers, again this is manifest in two of the areas in which ENGOs have pioneered development of tougher sustainability standards – forest products and palm oil.

The EU recently imposed new trade controls which restrict imports unless they conform to prescribed sustainability standards. These include the Renewable Energy Directive which regulates imports of biofuels according to prescribed standards. As well, the EU Due Diligence Directive and EU FLEGT policy require designated developing countries to enter into bilateral trade agreements to ensure sustainability standards are imposed on products derived from the forestry sector. Both seek to enhance sustainability by limiting illegal logging. Similar measures to restrict imports of illegal forest products have been introduced by the U.S. Congress, through amendments to the Lacey Act, as well as by the Australian Government.

These measures have a protectionist impact and motive, and weak environmental justifications. Target products are palm oil from Southeast Asia and timber (including paper) products from Southeast Asia and indirectly from China. In all cases the imported products are cheaper than those competing EU products. Further demonstration of the protectionist sentiment in the case of paper products, was the launching of anti-dumping and countervailing cases at around the same time in the US, the EU, and Australia, against similar products from similar sources. The anti-dumping cases failed in Australia and some failed in the US.

These measures denote a resurgence of Green protectionism. The first wave was in the late eighties and nineties when discriminatory trade controls were included in multilateral environmental agreements (CITES, the Montreal Protocol, The Biosafety Protocol and the POPs convention). There were also sporadic efforts to use environmental standards to restrict imports, notably — U.S. restrictions on imports of tuna and shrimp.

[EU RED sustainability] criteria include not accepting biofuels from feedstock grown on land which was forest land, peat land or land with a high conservation value before January 2008. This obviously favors feedstock grown in European countries.

There is strong commonality in content and purpose of the sustainability standards which these new trade measures stipulate with those being developed and pursued in private certification schemes.

The EU Renewable Energy Directive

In 2009, the European Parliament adopted the Renewable Energy Directive (RED). It set targets for the use of biofuels to replace fossil fuel to reduce carbon emissions, standards for emissions from fuels and subsidies to encourage their consumption. Promotion of biofuels to reduce emissions has been hotly contested by environmental groups. The leading objection is that they ease pressure on fossil fuel industries to reduce emissions.[8] A second objection is that expansion of production of biofuel increases broad-scale cropping or plantation on forest land.[9]

In response to these concerns the EU included 'sustainability criteria' in the Directive which limit imports of biofuels. These criteria include not accepting biofuels from feedstock grown on land which was forest land, peat land or land with a high conservation value before January 2008. This obviously favors feedstock grown in European countries. European nations have

8 This is a long established position of Greenpeace and Friends of the Earth.
9 These contentions take no account of the balance of forest land set aside or available for conservation or the national agricultural development strategies of developing countries.

cleared all the land they require for agriculture, whereas developing nations are still in the process of clearing agricultural land.

The primary measure which restricts imports is the requirement that biofuel meets a threshold reduction in carbon emissions in comparison to fossil fuels to qualify for subsidy. Biofuels must release 35 per cent less carbon than the equivalent in fossil fuels. To demonstrate compliance with the threshold, the Directive (Article 22(2)) as interpreted by the European Commission[10] allows European member countries to report the *typical value* of emissions in their biennial reporting to the Commission (designated by the Directive), while economic operators must rely on a *default value* which assumes higher emissions from any imported biofuel.

One analysis (Pehnelt[11]) concluded that "the EU Renewable Energy Directive was discriminatory from the outset and that the GHG saving values and their interpretation are based on wrong assumptions and faulty calculations. Under the Directive biofuel producers in the European Union are permitted to claim higher GHG savings than biofuel producers outside the EU."

Legal analysis also shows the Directive clearly violates WTO provisions.[12]

The Forest Law Enforcement, Governance and Trade (FLEGT) Program

FLEGT seeks the establishment of regulatory regimes in exporting countries which require producers to adopt verification systems which demonstrate timber exported has been legally produced. The justification for FLEGT is that it will protect tropical forests and biodiversity in developing countries. As part of the arrangement the EU establishes a regulatory right to impede such imports unless EC authorities verify the exporting nation has adopted the required procedures. These arrangements are then enshrined in a bilateral legal agreement.[13]

The ultimate product of an arrangement under FLEGT is a Voluntary Partnership Agreement (VPA). It is hardly voluntary. The European Commission has stated that unless countries enter into FLEGT EPAs the EU will consider restricting imports.[14]

Previous jurisprudence on discrimination in trade suggests the EU measures clearly breach WTO rules. It is presumed that the function of capping the measures in a formal bilateral agreement between the EU and the importing country is to create a legal device whereby the EU's trading partners legally surrender their rights to challenge these EU controls on their exports.

In the United States, the Lacey Act, that prevents sales in the U.S. of wildlife, possession of which is illegal in the U.S. or in other countries, has been extended to cover protected plant species, particularly species of trees. It obliges any U.S. purchaser to demonstrate it has established that any wood product or product containing fiber has been checked to ensure no illegal species are included. In Australia, the Government has introduced a Bill to prohibition sale of illegal timber. The aim is to prevent imports of illegal timber, but recognizing a straightforward ban like that would breach WTO rules, Australian authorities propose to make the sale of any illegal timber illegal.

Recent jurisprudence in the WTO shows that if technical standards excessively and unwarrantedly restrict trade (and that includes by trying to effect an environmental change indirectly instead of directly) then the measure would breach rules on Technical Standards in WTO agreements. All the foregoing measures are likely to be contestable under WTO rules.

10 European Commission, "Communication from the Commission on the practical implementation of the EU biofuels and bioliquids sustainability scheme and on counting rules for biofuels," 19 June 2010

11 Pehnelt, G., Vietze, C. "European Policies towards Palm Oil – Sorting Out some Facts: Why the Renewable Energy Directive is discriminatory against non-EU Producers of Biofuels", GlobEcon Research Paper, 2010

12 Mitchell & Tran, "The Consistency of the European Union Renewable Energy Directive with the World Trade Organization Agreements", Renewable Energy Law and Policy Review, Vol. 1, 2010

13 See: Brack, D., Yale Forestry Dialogue, accessed at: http://environment.yale.edu/tfd/uploads/TFD_illegal_logging_Brack_presentation.ppt

14 Oxley, A., "Illegal logging – a green attack on the WTO and developing countries?", European Centre for International Political Economy, 2007

V. The Impact of the New Sustainability Standards

On Consumer Choice

The proper market role of 'voluntary sustainability standards' is to enable consumers to exercise choice. Voluntary standards should provide clear guidance to consumers on how products were produced. In market theory, certification and eco-labeling are used as a "tool to overcome market failure due to information asymmetries for environmental products".[15] Voluntary sustainability standards provide an opportunity for producers and processors to differentiate their product from other similar products on environmental grounds and gain a price premium or increased market share as a result.

The theory behind such standards is straight forward. However, in practice voluntary sustainability standards are not used for product differentiation or even premium seeking. They are increasingly being used by both ENGOs and companies as means to create a 'norm' for production standards and therefore control supply chains and markets. When used in such a manner, sustainability standards actually reduce consumer choice, rather than increase it.

At this point, it is important to differentiate between the concepts of 'consumer choice' and 'consumer education'. Consumer choice is a "model of consumer decision based on the assumption that the consumer, given the limited budget, is trying to achieve the maximum level of utility".[16] That is, given a set of pre-determined preferences, a consumer will try and maximize the benefit derived from any given transaction. This means that if a consumer values sustainability higher than cost, they will pay extra for a product which was produced in a sustainable manner. This is markedly different from the ENGO practice of using sustainability standards as a means of 'push marketing' or consumer education. In this case, sustainability standards are used as a means to influence consumer behavior through marketing campaigns aimed at putting a one-sided case to the consumer to influence their choices. In other words, instead of taking a consumer's set of preferences as a given, the 'consumer education' model will seek to completely change those preferences based on the provision of asymmetrical information. In this case, sustainability standards become a marketing tool, rather than a tool to provide consumer choice.

The clearest indication that sustainability standards are being used to change consumers preferences, rather than provide an alternative, are the numerous studies which indicate that there is no premium paid on certified products. A report by Forest Industries Intelligence found that there was little or no premium paid for FSC labeled wood products in the European Union.[17] This indicates that there is very little or no demand for FSC certification for which customers are willing to pay an additional price. For that reason, FSC and other similar certification schemes are unable to survive off a market premium only, they must generate demand for their brand in other ways — usually through aggressive marketing or advocacy campaigns.

In practice voluntary sustainability standards are neither voluntary nor aimed at increasing consumer choice. As professed by WWF on numerous occasions, their intent is to control the supply chain and thereby, control production methods in importer nations. By seeking to control the supply chain, ENGOs and certification schemes are by nature, seeking to restrict the choice of consumers. In short, they are seeking to

The clearest indication that sustainability standards are being used to change consumers preferences, rather than provide an alternative, are the numerous studies which indicate that there is no premium paid on certified products.

15 Sammer, K. Wüstenhagen, R., "the influence of eco-labelling on consumer behaviour", Business Strategy and the Environment, Volume 15, Issue 3, 2006.

16 Definition of 'rational consumer choice, accessed at: http://eng.biznesowe.edu.pl/293-the_rational_consumer_choice/

17 Forest Industries Intelligence (2009), "EU market conditions for "verified legal" and "verified legal and sustainable" wood products", Report prepared for the Tropical Timber Foundation and the United Kingdom Department for International Development.

'Voluntary sustainability standards' specifically aim to impose environmental standards and regulations on nations with under-developed regulatory and environmental frameworks.

fulfill a regulatory role that should only be undertaken by government. Their ultimate goal of certifying all produce will necessarily involve consumers being denied the option to buy cheaper or 'less sustainably' produced goods.

Despite the claims by proponents of certification and labeling for 'product and process methods' that "[i]n many situations, some organization or agent *must* make a choice that will affect the choices of some other people"[18], it is also clear from the actions of the ENGOs that there is validity in the long-held position that the "process/product distinction [is] a useful device for determining when consumer product regulations are likely to have drifted beyond the satisfaction of significant consumer interest into areas of unjustified alarm, disguised protectionism, or excessive encroachment onto competing interest."[19]

The activist campaigns being run by numerous ENGOs to force producers, processors and retailers into certification is a clear example of when 'product/process' measures can be used to reduce competition and restrict consumer choice. In such circumstances, the scope for unwarranted market distortion and manipulation is so great that such certification actions must be left to non-partisan bodies such as the ISO or in some cases, governments.

On Market Management

Some major consumer goods manufacturers and retailers who hold considerable market power either through the share of the market they hold or the share of the consumer goods market in which they operate will, if they follow through with their intention to source only products which meet their sustainability standards, start to distort markets.

It is commonly understood that products which have to satisfy complex sustainability standards are more expensive to produce. The CEO of Unilever is reported as estimating this might increase the cost of inputs by 2 to 3 percent.[20] This will either force producers to carry the costs or deny access to the market by lower priced producers who cannot afford the production costs.

Similarly, consumers will face a reduction in choice — the opportunity to buy alternative lower priced goods will be reduced or will have to pay higher prices. It is impossible to anticipate how a business with a dominant position in the market will respond to that situation. However, the reasons advanced economies have stringent laws to ensure competition is maximized in markets is to reduce the capacity of dominant entities to manipulate that situation to their commercial advantage.

On Economic Development in Developing Nations

Another primary impact of the misuse of 'voluntary sustainability schemes' is the direct impact on economic growth and development in developing nations. 'Voluntary sustainability standards' specifically aim to impose environmental standards and regulations on nations with under-developed regulatory and environmental frameworks. In other words, 'voluntary sustainability standards' seek to constrain the amount of agriculture and economic development in developing nations based on their pre-determined notions of good environmental practice.

Examples of the impact of imposing a 'one-size-fits-all' standard on all economies in developing countries are reviewed in Annex I.

18 Brief for Respondent, *Nike Inc v Kasky* (No. 02-575), available in 2003 WL 1844849, at *33

19 As cited by: Kysar (2004) Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice, Harvard Law Review.

20 Paul Polman, The Hindu Businessline March 16, 2011, accessed at: http://www.thehindubusinessline.com/features/brandline/article1543724.ece

Case Study - The Roundtable on Sustainable Palm Oil

The Roundtable for Sustainable Palm Oil (RSPO) originated with WWF in 2001. To turn this idea into a reality WWF gleaned support from its Dutch interests.

With the help of ongoing and significant funding from the Dutch National Postcode Lottery, WWF worked with a major Dutch palm oil purchaser Unilever, with whom it had previously collaborated to form the Marine Stewardship certification system, to establish the arrangement. These Dutch-funded and based organizations, together with Novib (Oxfam's affiliate in the Netherlands), three other European based companies and one Malaysian company to found RSPO. Dutch financial institutions — Rabobank and ABN AMRO — are also leading members.

This set of Dutch-based companies and groups now form the spine of the RSPO. The Netherlands also represents a major hub for imports of palm oil through Rotterdam, with estimates as high as 80 percent of imports being transported out of the Netherlands for consumption, meaning that Dutch companies control a significant amount of the European supply of palm oil.

The end result is that through Dutch funded and based companies, WWF has created a system which seems to offer control of the European end of the palm oil supply chain. Producers are forced to adopt 'voluntary certification standards'. There has been speculation over whether RSPO gives 'first-mover' advantage for the Dutch-based companies and establish a sustainable palm oil supply where the retailers and processors were not forced to pay a premium for the product but the cost is pushed back onto the producer.

Under the RSPO's current model of supply chain control, 'sustainability' becomes a condition of sale - despite the lack of global supply to meet the 'demand'- rather than an alternative product for retailers and consumers at a higher price.

Similarly 'Fair Trade' has come in for considerable criticism. The Adam Smith Institute has criticized 'fair trade' for distorting prices in the same way that subsidies do. That is, by setting a price floor above the market value, more producers enter the market and force the price lower in the non-'fair trade' market.[21] The Cato Institute has argued that while benefiting a number of Fair Trade producers over the short run, fair trade critics worry about the impact on long run development and economic growth. Economic theory suggests that when prices are low due to surplus production, adding a subsidy or otherwise artificially raising prices will only exacerbate the problem by encouraging more supply and also encouraging workers into unproductive activities.[22]

21 Sidwell, M., "Unfair Trade", The Adam Smith Institute, London, 2008, accessed at http://www.adamsmith.org/blog/international/unfair-trade/;
22 Lindsey, B., Grounds for Complaint: Understanding the "Coffee Crisis", 2003, accessed at: http://www.cato.org/pub_display.php?pub_id=6807;

VI. On Free Trade

Environmental Trade Barriers and the WTO

Work commissioned by the OECD has questioned the relationship between private sector sustainability standards and eco-labels and free trade, pointing out they undermine the principles of comparative advantage.

It is notable however that because such standards have not been adopted by governments, they will not offend national obligations under the WTO.

> *"Some of the main concerns about private voluntary eco-labels rest on three inter-related points. First, some of these programs may have the potential to become a de facto market standard against which consumers assess all products. Second, many of these schemes apply a 'one-size-fits-all' approach. This fails to reflect the possibility of differing circumstances, whereby one process or production method may be appropriate in one part of the world, but quite inappropriate in another. Third, many private voluntary eco-labels are developed with significant input from domestic producers and, in theory at least, they may have vested (i.e. protectionist) interests in establishing particular standards."*[23]

Work commissioned by the OECD has questioned the relationship between private sector sustainability standards and eco-labels and free trade, pointing out they undermine the principles of comparative advantage.

Yet when governments apply sustainability standards which are very similar as a condition for trade, there is little doubt they do. WTO rules generally do not permit restrictions on imports which discriminate between products (for example between one produced according to sustainability standards and one which was not) or which unnecessarily restrict trade. A general review of the relevant issues is set out in Annex II.

The EU renewable energy directive, its FLEGT strategy and the Lacey Act all demonstrate how unilateral action by importing nations can restrict the sale of imports based on environmental grounds. These measures have not yet been tested in the WTO Disputes processes but it is widely held that they would fail if tested.

WTO rules do not allow trade controls to discriminate among trading partners and require that regulations may not be used as disguised barriers to trade or to unnecessarily impede trade. It is also established in WTO processes that the WTO rules are blind to how a product is processed and produced for the purposes of regulating its movement across national jurisdictions; and that environmental regulations to restrict imports must demonstrate how that impediment directly ameliorates the environmental problem.

The general "blindness" of the WTO system to environmental issues which environmental groups criticize is essential to the preservation of its core mission — to ensure the exchange of goods is free to enable producers to exploit the natural advantage of their economies. This system fosters efficiency in the use of resources which creates a more favorable setting to take action to improve the environment.

The most effective way to reduce environmental damage is to apply constraints and controls at the point of production of the pollution. This mostly requires national measures. By their very nature, trade measures are indirect.

On an empirical level, the governmental regulations referred to above are all designed to restrict trade, in almost all cases from developing countries. The rationale for these measures is that this is to preserve the environment. In all cases, they also serve a protectionist purpose. The timber, paper and palm oil products, which are the targets of these measures, all

23 Vitalis (2002).

A Case Study - Trade Law and Environmental Regulation – Proposed Australian Labeling Laws on Palm Oil

The trade law implications of a proposed piece of legislation to raise trade barriers based on environmental grounds has been examined recently by Associate Professor, Andrew Mitchell, University of Melbourne Law School and Elizabeth Sheargold, Researcher, University of Melbourne Law School.

The opinion addresses a Bill being considered by the Australian Senate for the mandatory labeling of palm oil on the grounds that it is claimed to cause environmental damage in tropical nations.

In this opinion, the authors found that the proposed legislation is most likely inconsistent with Article 2.2 of the Technical Barriers to Trade ('TBT') Agreement, and may also be inconsistent with Article 2.1 of the TBT Agreement and Article III: 4 of the General Agreement on Tariffs and Trade.

The authors concluded that the measure constituted an 'unnecessary obstacle to trade' and was 'more restrictive than necessary'. While Article 2.2 of the TBT Agreement allows the imposition of trade barriers based on 'legitimate objectives', including the protection of animal or plant health or life, the authors considered that the use of labeling legislation in Australia would not make a 'material contribution' to the reduction of deforestation in tropical nations.

The authors also concluded that if palm oil and other vegetable oils were considered to be 'like' products, then the Bill would also breach Article III: 4 of the GATT on the grounds that goods produced in other nations would be treated less favorably than domestically produced goods. It was also considered that even if the Bill was saved from offending Article III: 4 by the exceptions contained in Article XX (b) of the GATT, it is stated in the 'chapeau' to Article XX that such a measure may not be used as a disguised restriction on trade.

are cheaper than competing products in the industrialized markets where these trade barriers are being imposed. There industries are also large and important to key developing countries.

These trade measures directly restrict economic growth in developing countries.

VII. CONCLUSION

VII. Conclusion

Sustainability schemes, certification and eco-labels all have an important role to play in the expansion of consumer choice and information in the market place on issues relating to the environment. When undertaken correctly, they have the ability to provide impartial information to consumers with particular preferences.

When misused for the interests of environmental NGOs, lobby groups, the commercial interests of large companies or the protectionist interests of governments, sustainability schemes can be highly detrimental.

WWF has stated their intent to 'transform markets' through the use of environmental standards and the capture of supply chains. Governments across the developing world have started adopting sustainability standards as part of their regulation armory. Important elements of the private sector, particularly in the food and consumer good sectors, are embracing sustainability standards as a marketing technique in ways which will also facilitate influence over the entire supply chain.

The economic cost of the misuse of sustainability schemes will be felt the most in developing nations. The upfront cost of complying with certification can be significant. The lost revenue from declining sales due to environmental trade barriers will be even greater.

Yet it is not just developing nations that will be harmed by manipulated sustainability schemes. The imposition of new trade barriers will clearly increase the cost of produce in developed nations as well as reduce consumer choice and access to a wide range of goods.

When misused for the interests of environmental NGOs, lobby groups, the commercial interests of large companies or the protectionist interests of governments, sustainability schemes can be highly detrimental.

While sustainability schemes have a purpose to serve, their use must be closely monitored to ensure that consumers, the poor and the global system of free trade is not unnecessarily sacrificed.

What should be done?

The WWF and Greenpeace strategy to 'transform' markets must be recognized for what it is — an effort to conscript business to control supply chains to deliver sustainability standards which simply advance the environmental goals of these organizations.

These measures not only have little material impact on improving core environmental issues, they carry a collateral cost of reducing competition in markets. The results — higher prices and less choice — impede economic growth.

Major corporations in leading industrialized nations need to adjust their CSR policies to recognize the requirements of developing countries, not serve as vehicles of the environmental values of NGOs in wealthy economies.

Corporations should assess national environmental policies in the economies from which they buy and those into which they sell for their efficacy in requiring adequate environmental stewardship. In most countries, it is government regulation which delivers sustainability, and quite adequately so, not voluntary systems.

They should also assess the business risk of being beholden to one sustainability system which is controlled by other private parties. It is in their interests to foster multiple sustainability systems to reduce their vulnerability to Greenmail strategies.

Governments need to act to preserve the integrity of the global trading system to ensure it continues to provide opportunities for all economies, particularly developing economies, to trade into global markets and raise living standards.

Governments also now need to ensure their national policies to ensure markets remain competitive and are effective. International economic agencies should consider enshrining in global multilateral codes the importance of preserving competitiveness in free market economies.

Annex I – How Inappropriate Sustainability Standards Can Disadvantage Developing Economies

A report for the OECD provides a real-life example:

> *The design of many private voluntary eco-labels frequently fails to take into account the different circumstances prevailing in other producer countries. One of the main reasons, for instance, some developing countries were unable or refused to comply with the 'turtle friendly' Eco-label promoting the use of Turtle Excluder Devices (the requirement of which under U.S. law generated the complaint in the WTO against the measures (in the "Turtle-Shrimp case)) ....was that the U.S. technology simply did not suit local circumstances. Many developing countries fish for shrimp in shallow waters, whereas the U.S. TEDs were designed for deep-water fishing."*[24]

A paper by the University of Cape Town highlighted a number of different ways in which voluntary sustainability standards may be discriminatory or detrimental to developing nations. Firstly, sustainability standards are usually based on the domestic environmental priorities and technologies of the importing country and may overlook the relevant and acceptable methods of production in the exporting country.

Secondly, sustainability criteria may be developed around technology which developing countries may not have introduced as yet and therefore developing country producers may have to bear the majority of the cost burden to adjust to gain certification. A systematic lack of environmental infrastructure and expertise may necessarily place a higher cost burden on developing nations than on developed nations. Finally, suppliers of certified materials may be more difficult to source from within developing countries where the environment is often considered a lower priority than economic development and growth.[25]

The International Tropical Timber Organization (ITTO) undertook a study in Borneo which showed a similar impact. It estimated that adopting 'zero-impact' logging would increase costs to producers by up to 100%.[26] Another study estimated that the adoption of sustainable forest management in the Philippines would add between US$36 and US$38 per cubic meter of log.[27] Other studies suggest that the economic cost of sustainable forest management lies somewhere in the 10-20% range of the average international price for traded timber.[28] The OECD estimates that the impact of adopting and adhering to an eco-labeling program for timber on the Indonesian economy would be approximately $300 million per year.[29]

The additional cost of certification and meeting sustainability standards also serves to distort the allocation of resources in developing nations. In particular, sustainability standards are inherently biased against smallholders. The cost of certification per unit is dramatically reduced by having large areas of plantation which thereby gives larger corporations a distinct cost advantage against smallholders. A study by Segerstedt et al. found that the costs of certifying Jatropha crops in Tanzania in line with ISCC sustainability standards on 'moderately suitable land' would make it "unlikely that smallholders will be able to participate without assistance from outside."[30]

The Draft Conclusions of Sub-regional Workshop of UNCTAD on Environmental and Health-related Requirements, Market Access/Entry and Export Competitiveness in the Horticultural Sector found that the European Certification scheme for farm management practices EUREPGAP was "biased against smallholders" because "importers tend to exclude exporters relying on small out growers; exporters do not source from smallholders where

24 Vitalis (2002);
25 University of Cape Town, 2001, Eco-labeling: Overview and Implications for Developing Nations,
26 Cited in Crossley, R, (1997) Is there a Commercial Case for Tropical Timber Certification? S Zarrilli, V Jha and R Vossenaar (1997) Eco-labeling and International Trade, Macmillan, Basingstoke, p. 244 from pp. 228-250
27 Paris, R., and Ruzicka, I., 1991, Barking up the Wrong Tree: The Role of Rent Appropriation in Sustainable Forest Management, Environmental Office, Occasional Paper, Number 1, Asian Development Bank, Manila
28 Cited by the International Institute for Environment and Development, 2004, Sustainable Products and the PPMs Dilemma: How the international community can help in resolving developing countries' concerns
29 Above, n 1
30 Segerstedt, A., et al., Impact of Sustainability Standards on Jatropha Production, Tropentag 2010

alternative sources exist; production costs of smallholders therefore tend to drastically increase, because of more expensive technical advice, agro-chemicals and controls".[31]

Voluntary sustainability standards will also skew the use of productive agricultural land away from products which may require certification, such as palm oil, towards less productive crops including coconut and rice.

Voluntary sustainability standards have often been questioned on the grounds that they operate to protect 'western' industries against imports from developing countries. Conflicts over the use of environmental regulations as trade barriers have been well documented, but unresolved, under WTO law. The two most commonly cited WTO cases regarding environmental trade barriers imposed by developed nations on developing nations have been the Tuna-Dolphin and Shrimp-Turtle cases. In both cases, the United States has been accused of imposing trade barriers on imported goods on the grounds of the environmental impact of the goods production processes. In both cases, the WTO appellate body found against the United States. However the decisions in both cases failed to create a precedent against trade barriers on the grounds of the environmental impact of the product.

Regardless of the intent behind the use of voluntary sustainability standards and eco-labels, they do operate to reduce the demand for goods produced in developing nations. This in turn constrains the capacity of developing nations to build their economies on the back of agriculture and agricultural exports.

The impact of sustainability criteria on developing nations' economic growth is exacerbated by the adoption of such standards by financial institutions ranging from commercial banking institutions to the World Bank Group (WBG) financial arm the International Finance Corporation (IFC). Recently the WBG has adopted new standards for IFC funding of palm oil projects whereby they adopt sustainability certification as a prerequisite for any new investment in palm oil projects.[32] The IFC strategy for engagement in the palm oil sector states that before projects are certified, they must commit to obtain independent certification to appropriate standards for sustainable practices and will invest only in companies that 'commit to adopting industry best practice for environmental and social performance'. In essence, the WBG has adopted a framework which ensures that before any new project can be funded, it must be certified or commit to being certified under the RSPO.

The Framework states that:

> *"[A]n appropriate certification system as one that would be independent, cost-effective, based on objective and measurable performance standards and developed through consultation with relevant stakeholders, such as local people and communities, indigenous peoples, and civil society organizations representing consumer, producer and conservation interests. Such a system has fair, transparent and independent decision-making procedures that avoid conflicts of interest."*[33]

The clear implication of these criteria is that the World Bank Group will not accept or endorse any Government run certification scheme because it will not be considered to be 'independent'. The World Bank also states that other certification schemes may play a 'supplementary'[34] role in helping define certification standards.

The ramifications of this Framework are that the World Bank has now excluded funding for any palm oil development project certified under a certification scheme other than RSPO. The anti-growth and economic development implications of this strategy are clear, as they effectively remove any financial support for the expansion of agricultural land or forest conversion in developing nations. The WBG's new framework is just one example of international bodies and corporations adopting 'voluntary' sustainability standards as de facto-regulation, constraining economic development in developing nations.

31 Draft Conclusions, Sub-regional Workshop of UNCTAD on Environmental and Health-related Requirements, Market Access/Entry and Export Competitiveness in the Horticultural Sector Institute for Trade and Development, Bangkok, 29 September – 1 October 2004

32 The World Bank Group Framework and IFC Strategy for Engagement in the Palm Oil Sector, Annex XIII, p. 84

33 Ibid

34 Ibid, section 4.1.4, p. 32.

Annex II – The WTO and Environmental Trade Barriers

A common argument among some economists is that the cost of impacts 'external' to transactions, such as pollution or environmental degradation, are overlooked. This is a general justification to use 'sustainability standards' to regulate imports.

As noted in the body of the report, there is no inherent principle underpinning that proposition. States can set national laws to specify environmental standards and they can negotiate international agreements where each government will commit to introduce commonly agreed proposition in national law.

There are not many international environmental agreements which do this. The reason, as also noted in the report, is that it is in the nature of the differences among conditions in economies that there will be few areas where standards are common.

The primary question about requiring that traded products demonstrate compliance with specified technical standards centers on the approach in WTO rules to the production and process methods by which a product has been created. In essence the general proposition is that how the product was produced is of very little relevance to whether or not it can be controlled at the border, subject to some defined exceptions.

Article III: 4 of the GATT states that:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment *no less favorable* than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[35] (emphasis added)

The primary point of contention over trade-restrictive environmental regulation is what is constituted by a 'like product'. This is defined as meaning 'a directly competitive or substitutable product'.[36] The Appellate Body in *EC — Asbestos* interpreted 'like products' to mean products that are in a "competitive relationship" — that is, whether consumers readily choose between two goods to perform the same function. The Appellate Body considered four different characteristics in determining whether products were 'like products' under Article III: 4:

> "(i) the physical properties of the products;
>
> (ii) the extent to which the products are capable of serving the same or similar end-uses;
>
> (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and
>
> (iv) the international classification of the products for tariff purposes."[37]

Under this ruling, it is generally accepted that the way in which a product is produced and the environmental impact of its production is not a characteristic which allows nations to differentiate between products. The result is that a trade barrier applied purely because of the differing environmental impact of an import's production breaches Article III: 4.

In addition, it has been argued that *mandatory* government regulations would breach Article 2.2 of the Technical Barriers to Trade Agreement which requires that WTO Members:

> "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."

In particular, it is argued that many environmental trade barriers are 'more trade restrictive than necessary' to achieve the claimed environmental outcomes.

35 Article III:4, General Agreement on Tariffs and Trade, 1994

36 Article III:2, WTO, *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge: Cambridge University Press, 1999

37 Appellate Body Ruling, EC – Asbestos, [118].

One of the reasons for the large 'north-south' divide on the veracity of process and production methods is the position of developing nations that trade barriers on environmental grounds will be highly detrimental to their interests. This is because the use of regulatory measures by government to impose trade barriers against import goods provides a range of new trade restrictive measures which are detrimental specifically to developing nations.

According to the OECD "[f]ree trade occurs when goods and services can be bought and sold between countries or sub-national regions without tariffs, quotas or other restrictions being applied."[38] The theory of comparative advantage underpins the rules of the World Trade Organization. The most efficient use of resources occurs when economic actors produce principally what they are most efficient at producing and trade that produce to meet all their other requirements or comparative advantage.

A growing awareness of the environmental impact of many production processes has led many environmentalists to argue that 'free trade' is unable to provide for the efficient allocation of non-renewable resources because it cannot provide a marketplace for the externalities associated with their use. As stated in the WTO World Trade Report, 2010, "the general conclusion is that the classical gains from trade opening may no longer hold, once the negative impact related to declining biodiversity is taken into account."[39]

Therefore, in the absence of an agreement under the WTO which allows countries to raise trade barriers to ensure the efficient allocation of non-renewable resources, it has been argued that governments should adopt 'sustainability schemes' into regulation as a tool to ensure proper environmental practices. However, when such certification schemes or sustainability standards are adopted as a piece of government regulation they will possibly conflict with the Technical Barriers to Trade Agreement (TBT) under the WTO.[40]

The World Trade report 2010 observes that the rationale for such government action is not as clear cut. The current system of free trade offers potential gains for the environment to be achieved through the environment. In relation to biodiversity and habitat protection, by allowing nations to focus on producing what they are most efficient at producing, they will minimize the amount of land needed and therefore the amount of disruption to species habitat.[38, 39] The WTO has argued that in such circumstances, "since each country specializes in a different product, the overlap of species will be reduced (species that existed in multiple countries exist now in only one country), but worldwide biodiversity will increase."[43]

In this respect, government action to endorse or adopt sustainability standards which are used to control trade flows and transform markets by defining 'acceptable' environmental standards such as 'no forest land conversion' are more likely to cause a decrease in the amount of land available to meet global demand for food. Reducing land available for agriculture will also place significant upward pressure on global food prices by restricting total global supply.[44]

The imposition of trade barriers by countries to force other nations into compliance with particular environmental standards is not a new phenomenon. The precedent for such action was set by three conventions — the CITES convention, the Montreal Convention and the Basel Convention. Under these three conventions, parties to the conventions agreed to place trade restrictions on nations which were not parties to the conventions.

The precedent for imposing sustainability standards in bilateral trade was established by the U.S. with imposition of controls on imports of Tuna and Shrimp. The practice is now resurgent with imposition of sustainability standards as trade barriers by several countries.

38 OECD Glossary of Statistical Terms, accessed at: http://stats.oecd.org/glossary/detail.asp?ID=6265
39 World Trade Organisation, "World Trade Report: Trade in Natural Resources", Geneva 2010
40 See box below on Trade Law and Environmental Regulation
41 Above, n 40
42 The WTO does not claim that this is always the case merely that the dynamics of a particular market may see this result occur.
43 Above, n 40
44 See World Growth, Palm Oil and Food Security: The Impediment of Land Supply; How Environmentalists and "No Conversion" are Inflating Food Prices, December 2010

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