



The New Face of European Environmental Protectionism: Forestry and Climate Change

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I. The rise of environmental trade restrictions

The European Union (EU) is seeking to impose environmental trade restrictions on food and forestry products which serve to protect European producers and harm viable sources of growth in developing countries.

This action is not new. It is reflective of a longer term trend in the rise environmental trade protectionism. The last few years have seen the growth of regulation in the EU to address environmental concerns affecting trade in food and agriculture as governments have sought to manage the impacts of climate change and ensure environmental sustainability.¹ There is now a vast array of regulations in the EU which include obligations for producer responsibility; address tolerance levels for hazardous substances exceeding international standards; require product traceability requirements; mandate compliance with whole of life cycle regulation, and; apply the precautionary principle in decision making.

The trend has been to depart from market based approaches (in particular that regulation should be restricted to protect health and safety and be supported by sound science), and to permit discretion by regulators to determine the compliance of products with environmental policies. Requirements are increasingly being used as a policy tool to shield products from international competition.

This approach is being extended to international trade agreements and negotiations. In the agricultural sphere, the EU has made clear (including in the World Trade Organization (WTO) Doha Round negotiations) that it intends to seek new trade restrictions which ostensibly ensure environmental considerations are recognized in any new agreements to liberalize trade in agriculture.

II. New barriers to trade: forestry and climate change

New trade restrictive policy measures on forestry and climate change are now being instituted by the EU. Two new measures - one to encourage consumption of renewable fuels instead of those derived from fossil fuels, and another to ensure that trade in timber products has been legally harvested - have recently been put in place.

While seemingly legitimate policy goals, both measures restrict trade. They operate to indirectly influence forestry and land use policy in third, mainly developing, countries. This is despite World Trade Organisation (WTO) rules to support open trade and the recent commitment by G20 Leaders not to raise trade barriers in the wake of the Global Financial Crisis.

It is overarching EU policy that environmental issues be addressed in every directive. Instead of absorbing the cost of these environmental measures, it is increasingly common for them to include measures which impose trade restrictions on imports. The REACH (Chemical) and ROHS (Recycling) Directives were opposed by some of the EUs' major trading partners for this reason.

In the recently approved Renewable Energy Directive,² the EU has developed trade controls which restrict entry of biofuels. While it justifies the Directive as promoting renewable energy and leveraging trading partners to reduce emissions of greenhouse gases, the measure serves to protect EU producers and harm development of renewable energy industries in developing countries. It is probably illegal under WTO rules. The Directive has yet to be implemented by EU member states.

The EU is also implementing other trade measures which would also restrict imports of agro and forest products. It is negotiating "Voluntary Partnership Agreements" (VPAs) with developing countries which permit forest product imports to the EU to be banned if EU customs officials decide measures in exporting countries to verify they are legal (which already exist) are not adequate. The VPAs require developing country timber exporters to satisfy EU requirements which demonstrate that imports have been "legally" acquired. Such requirements are problematic under WTO rules. Countries which enter into VPAs with the EU could be altering their WTO rights. To date VPAs have been concluded with Ghana and the Republic of Congo. They are currently being negotiated with Cameroon, Liberia, Malaysia, Indonesia and Vietnam.³

As well, the European Parliament is considering a "Due Diligence" Regulation⁴ which would require all EU purchasers of timber products to demonstrate they had established the legality of such products prior to their purchase. The incidence of illegal domestically produced timber in the EU is low, meaning it would essentially apply as a form of control over imports from outside the EU.

Restrictions on imports of renewable energy

The EU Renewable Energy Directive sets mandatory national targets for the use of renewable energy sources in EU Member states by 2020. Each EU Member must ensure that, in their country in 2020, the share of gross final consumption of energy from renewable sources is at least the national overall target for that year as fixed by the Directive. To be included in the contribution to the target, biofuels must meet mandated sustainability criteria⁵ related to emissions and land use for the cultivation of biofuels. This includes ensuring that biofuels have not been made from raw materials obtained from land with high biodiversity value, high carbon stock or peatland.

The Directive's purpose is to encourage consumption of renewable fuels instead of those derived from fossil fuels - coal, oil and gas. It welcomes biofuels, which replace fossil fuels that generate high carbon emissions. Developing countries such as Indonesia, Malaysia, Brazil and Argentina are major biofuel producers and exporters to the EU market.

Its effects are twofold. The first is to afford protection to EU biofuels by restricting trade in cheaper and more competitive carbon friendly products which compete with EU biofuels in the EU market. Imports of biofuels produced by countries using materials from a tropical climate and landscape with high biodiversity (mostly developing countries) are not likely to meet the land-related sustainability criteria. Incidentally, these are the countries that have a comparative advantage in the production of these products.

The second is environmental. The broad goal is to pressure exporters not to reduce the size of their natural forests. The Directive threatens to block imports of biofuel from exporting countries unless they manage their forests in the way Europe approves. Its effect is to condition market access on compliance with EU policy.

Trade bans on timber products

The European Commission has developed the "Forest Law, Enforcement, Governance and Trade (FLEGT) program". It encourages developing countries to work with the EU to stop illegal logging. Through VPAs between the EU and developing countries, accreditation bodies and independent monitoring systems are identified to certify the legality of wood products. The certificates issued for legally harvested timber must be presented to customs authorities in order to clear legal shipments for export to the EU and for importation into the EU." ⁶

The procedures envisage adoption in the exporting country of a voluntary form of certification to verify legality of the export. For its part, the Commission regulates to authorize its customs officials to hold up imports unless evidence of legality is provided in import documentation. FLEGT procedures then envisage these arrangements being formally agreed between the two Governments.

Although termed "voluntary" because the decision to enter into an agreement is taken by the government (of the country exporting to the EU) involved, VPAs operate pursuant to an EU regulation.⁷ Once they are concluded they become legally binding, compliance with which is mandatory for importation. Furthermore, the decision to do so is made under trade coercion. The EU has threatened to cut off trade access if developing countries don't participate. The Report from the Commission to the European Council and the European Parliament in 2003 on EU strategies to a deal with illegal logging sets out an operational proposition that if

developing countries don't cooperate "voluntarily" the EU would reduce import access.⁸

The effect of VPAs is to institute EU policy in exporting countries. This is regardless of whether it is the most suitable option for reducing illegal timber harvesting to encourage sustainable forestry. Illegal activity mostly represents the failure to enforce law, not the failure of law itself. Governments of the country where the illegal activity occurs have the sovereign right to determine how best to do that, not third countries.

Restrictions on illegal imports

The Due Diligence Directive also operates to restrict imports of timber products on the basis of their legality. It is similar to a law passed by the UK Parliament which was clear about its intent to use trade as a form of control over imports.

EU action has been mirrored in the United States (US) with passage of amendments to the Lacey Act.⁹ This Act prevents sale in the US of wildlife, possession of which is illegal in the US or in other countries. The Act has been extended to cover protected plant species and was clearly intended to extend to species of trees. It obliges any US purchaser to demonstrate it has established that any or wood product or product containing fibre has been checked to ensure no illegal species is included.

This measure will inhibit the import of timber, pulp and paper products into the US. It has been introduced in the US at the same timber anti-dumping action has been taken against imports of pulp and paper from China and Indonesia.

Carbon Tariffs

While details of how and if tougher targets to reduce greenhouse gas emissions are currently up in the air, there are proposals on the table in Brussels to levy carbon tariffs on imports if other countries do not match European cuts in emissions. There is similar thinking in the US Congress in respect of any US Emissions Trading Scheme.

This issue will not come to a head until these matters are resolved in international climate change negotiations, but the inclination in the EU to continue to use environmental trade barriers seems clear.

III. A threat to the multilateral trading system

Both measures are problematic under WTO rules. They threaten to legitimize environmental barriers in international trade. They could erode core WTO rights of members.

Most controls on trade which are mandated by governments fall under the purview of WTO rules.

Those rules give individual countries the right to resist trade coercion.¹⁰ They prevent governments from discriminating in trade on the basis that a product has been produced in a particular way in another country, or from specifying compliance with domestic policy as a condition for entry of import.¹¹ This stops governments from playing politics with trade. That undermines the goal of securing mutual advantage from opening markets to trade and the sovereign right of governments to determine their own national policies.

The Renewable Energy Directive is likely to be inconsistent with WTO rules because it treats certain biofuels differently on the basis of whether they meet the set sustainability criteria.¹² VPAs are also problematic. There is nothing in WTO rules which gives importing countries general rights to ban products unless the legality of the product is specifically verified.¹³ WTO Agreements also prohibit the use of voluntary export restraints, which include discretionary import licensing schemes that afford protection.¹⁴ In signing VPAs, countries could be altering or giving away these rights.

More broadly, these measures could also undermine broader efforts to reduce trade restrictions as part of the Doha Round. They risk trade wars - Brazil has already indicated that it may dispute the WTO legality of the Directive - and further politicising the already sensitive debate on trade, forestry and climate change.

IV. Impeding growth in developing countries

Biofuels and timber are a viable source of exports in an area of comparative advantage in developing countries. They are important sources of economic growth. For example, *palm oil production is one of Malaysia's major industries and sources of exports*. Over 90 percent of Malaysia palm oil production is exported. Palm oil is Malaysia's second largest export by value, worth over US\$13 billion in 2008.¹⁵ The timber sector in Ghana contributes 6-8 percent of the country's GDP and directly employs over 80,000 workers.¹⁶

Restricting trade in these products threatens to disrupt viable, sustainable and wealth creating commercial agriculture and forestry. The EU is Malaysia's 2nd largest export market, taking 13 percent by volume.¹⁷ It accounts for about 60 percent of Ghana's timber exports.¹⁸

Measures which induce policy change under the threat of trade restrictions undermine the right of exporting countries to exploit their natural resources in line with their own policy objectives and economic circumstances. They reflect a fundamental disregard for the development circumstances in poor countries where protection of the environment can often not be afforded priority over economic growth.

Protection of the environment and promotion of growth should go hand in hand. As part of the UNCED Agenda

21 program, members of the EU committed to apply environmental measures in a way that does not restrict economic development interests. That included specific commitments to preserve and respect the multilateral trading system.

V. Poor environmental outcomes

The use of trade measures by one country to indirectly influence environmental policy in another leads to poor environmental outcomes. Indirect measures generate adverse costs and effects and are rarely effective in achieving their objectives - restricting trade to enforce compliance with environmental in another country will not necessarily lead to reductions in carbon emissions or reduce the incidence of illegal logging practices. Achieving these goals depends on broader policy action by the countries in question.

It is widely recognized that a more effective approach to manage environmental impacts is to target the cause of the environmental problem directly. If the aim is to get governments to agree to address a common environmental problem, the most effective way is to agree common measures, then for each government to take national responsibility for enacting them in national law.

VI. The way forward: trade cooperation, not coercion

Trade measures which contravene WTO rules, erode WTO rights of members and impact adversely on trade should be avoided. Where international action is to be taken, a policy approach based on consensus, rather than confrontation, and in the appropriate forum, is to be preferred.

Flexible policy measures are needed to take account of the differing conditions in developing countries and the impacts of environmental policies on biofuel and agricultural exports, farmers and small holders.

They should be consistent with WTO rules and principles and other accepted principles of international law that respect national sovereignty and reject trade coercion.

There is an opportunity for Europe to take the lead on this. Instead of becoming an advocate of trade coercion, using unilateral trade barriers to improve the environment, Europe can demonstrate the higher value of collaborative action. This calls for a more enlightened approach on trade and environment issues which includes preserving the multilateral trading system; eschewing trade coercion; and working towards international environmental agreements which governments freely join to advance agreed common goals.

Environmental protection has a cost. Exporting it to developing countries should not be a practicable option.

Endnotes

¹ See “*European Unilateralism; Environmental Trade Barriers and the Rising Threat to Prosperity through Trade*,” Australian APEC Study Centre, Monash University, May 2003, Melbourne and “*Looking Behind the Curtain: The Growth of Trade Barriers that Ignore Sound Science*,” National Foreign Trade Council, May 2003, Washington.

² *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC* (the ‘EU Renewable Energy Directive’)

³ “*EU to conclude deal to stop illegal timber extraction from Republic of Congo*”, European Forest Institute, 9 May 2009
http://www.eurekaalert.org/pub_releases/2009-05/bc-etc050609.php#

⁴ Commission of the European Communities, *Proposal for a Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market*, {Sec(2008) 2615} {Sec(2008) 2616} Brussels, COM(2008) 644/3; 2008/xxxx (cod)

⁵ As set out in Article 17 of the Directive.

⁶ See Duncan Brack, Yale Forestry Dialogue
<http://research.yale.edu/gisf/tfd/logging/IL%20presentations.html>

⁷ See Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, *Official Journal L 347, 30/12/2005, p1-6*.

⁸ See EU, COM (2003) 251 Final – Communication from the Commission to the Council and the European Parliament – Forest Law, Enforcement, Governance and Trade – Proposal for an EU Action Plan, p 15 where the Commission indicates it will consider proposing legislation to ban imports of illegal timber products if no multilateral arrangements for this can be negotiated (i.e. under the FLEGT system).

⁹ See **16 U.S.C. SS 3371-3378 and amendments**.

¹⁰ The General Agreement on Tariffs and Trade and the WTO Agreement on Technical Barriers to Trade are relevant in this respect.

¹¹ In two unadopted GATT Panel reports, it was held that two products are not ‘unlike’ under GATT Article III:4 by virtue of different production methods, where that sole difference had no impact on the physical characteristics of the final product. Although unadopted GATT Panel reports have no legal status, they can provide ‘useful guidance’. The principle stated in these Panel reports has not been explicitly overturned, and other cases have found that products are ‘like’ despite

differences in the characteristics of the producer. See *US – Tuna (Mexico)*, and *US – Tuna (EEC)* GATT Panel Reports as well as WTO Appellate Body Report *Japan – Alcoholic Beverages*, and WTO Panel Reports *US – Malt Beverages*, *US – Taxes on Automobiles* and *US – Gasoline*, discussed in Andrew Mitchell & Christopher Tran, “*The Consistency of the EU Renewable Energy Directive with the WTO Agreements*” at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485549.

¹² See Andrew Mitchell & Christopher Tran above. Notably, whether the Directive is ultimately consistent WTO rules requires consideration of the applicability of all WTO rules, which is beyond the scope of this paper.

¹³ Some legal analysts have argued that precedents exist in WTO jurisprudence to justify trade controls imposed to protect environmental policy goals. The cases concerned, particularly the so-called “Shrimp Turtle” rulings, are controversial and not considered as establishing clear precedents. See Huffbauer, Charnovitz and Kim, “*Global Warming and the World Trading System*” Peterson Institute for International Economics, Washington 2009. In a study in 2003 for DFID, Duncan Brack and others concluded that existing circumstances did not allow direct application of the Shrimp Turtle precedents to justify restrictions on imports of timber because they were not legally procured.

http://www.chathamhouse.org.uk/pdf/briefing_papers/tradeinillegaltimber.pdf

¹⁴ See Article 11.1(b) of the WTO Agreement on Safeguards.

¹⁵ Based on value of RMB 49.7 billion, January – December 2008. See “*Exports by major products, 2008*” at <http://www.miti.gov.my>.

¹⁶ See Trade Invest Africa, Ghana: Partner with Wood Processors to Expand Sector 17 November 2008, at <http://allafrica.com/stories/200905250149.html>.

¹⁷ Volume calculation based on export volume in the first half of 2008. See *Global Oils and Fats Business Magazine* (Jan-Mar 2009) and *Malaysian Palm Oil: Industry Performance 2008*, accessed at <http://www.malaysiapalmoil.org>.

¹⁸ Total Ghanaian exports of wood and articles of wood account for over US\$302 million in 2008. Source: Comtrade.



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