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# TRADE IN FOREST PRODUCTS AND THE WORLD TRADE ORGANIZATION: WHETHER FORESTS ARE AT RISK?

*Bipin Kumar*

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## TRADE IN FOREST PRODUCTS AND THE WORLD TRADE ORGANIZATION: WHETHER FORESTS ARE AT RISK?

*Bipin Kumar\**

### THE TRADE AND ENVIRONMENT LINKAGE

Trade and environment are two spheres which are *linked not by choice, but by fact*.<sup>1</sup> Trade in most goods or services ends up affecting the environment in one way or the other, creating clashes between trade officials and environmentalists.<sup>2</sup> For free traders, the word “*protection*” represents the consummate evil. For environmentalists, it is the ultimate good. Of course, for the trade community, “*protection*” conjures up dark images of Smoot and Hawley, while the environmental camp sees clear mountain streams, lush green forests, and piercing blue skies.<sup>3</sup>

Trade policy and particularly trade liberalization, inescapably affect the natural environment. And where environmental resources are mispriced, trade may magnify the harms. The WTO itself acknowledges this.<sup>4</sup> Simultaneously, environmental policy affects trade. The presence of regulatory requirements- health standards, emission limits, disposal requirements, labelling rules, and so on- channels (and may confine)

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1 Daniel C. Esty, *Bridging the Trade-Environment Divide*, 15(3) JOURNAL OF ECONOMIC PERSPECTIVES 113 (2001).

2 Patti Goldman & Joe Scott, OUR FORESTS AT RISK: THE WORLD TRADE ORGANIZATION’S THREAT TO FOREST PROTECTION, *Earthjustice Legal Defense Fund Northwest Ecosystem Alliance* (September 1999).

3 *Id.*

4 THE WTO AFTER SEATTLE, INSTITUTE FOR INTERNATIONAL ECONOMICS 56 (ed. Jeffrey J. Schott, 2000).

trade flows, creating a potential for trade-environment clashes. As economic independence grows, the number of points of intersection expands and concomitantly so does the potential for conflict.<sup>5</sup>

While protection of the environment has become exceedingly important, and promises to be more important for the benefit of future generations, trade liberalization is important for enhancing world economic welfare and for providing a greater opportunity for billions of individuals to lead satisfying lives.<sup>6</sup> Thus, there is a policy discord which is not so unique. Indeed, there is some evidence that environmental policy and trade policy are complementary, at least in the sense that increasing world welfare can lead to citizen demands and governmental actions to improve protection for the environment. The poorest nations in the world cannot afford such protection, but as welfare increases protection becomes more affordable.<sup>7</sup>

### *The Seattle Fiasco*

The most memorable assault on the WTO's environmental record came at its 1999 meeting in Seattle,<sup>8</sup> where *anti-globalization demonstrators dressed as sea turtles to highlight the alleged damage wrought by the organization's policies*. The Seattle Meeting was a fiasco; the talks failed because WTO was not willing to consider environmental and poverty issues adequately.<sup>9</sup> Similar protests have dogged multilateral trade meetings ever since. It would be foolhardy for future WTO trade talks to ignore the messages championed by grassroots activists in Seattle that future global trade negotiations must include consideration of sustainable forestry, labour, social, cultural, and environmental concerns. Of course, no one knows whether future WTO negotiations will better reflect the concerns raised in Seattle. Official post-Seattle statements from the WTO Director-General have been vague, promising only "open and balanced trade negotiations."<sup>10</sup>

5 THE WTO AFTER SEATTLE, INSTITUTE FOR INTERNATIONAL ECONOMICS 62 (ed. Jeffrey J. Schott, 2000).

6 John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992).

7 Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENV'TH. L. REV. 265 (1997):

8 3rd Ministerial Conference of the World Trade Organization, held in Seattle, (November 30 to December 3, 1999).

9 THE WTO AFTER SEATTLE, INSTITUTE FOR INTERNATIONAL ECONOMICS 62 (ed. Jeffrey J. Schott, 2000).

10 See Michael Moore, *Seattle Conference Doomed to Succeed* (Nov. 30, 1999) [http://www.wto.org/wto/seattle/english/presse/press\\_156.htm](http://www.wto.org/wto/seattle/english/presse/press_156.htm).

## WORLD TRADE IN FORESTRY: CURRENT POSITION AND IMPACT

Forests provide humans around the world with a wealth of commodities and vital ecological services, and are of great social and cultural value.<sup>11</sup> Despite the diverse values of forests, widespread deforestation and forest degradation has occurred in this century and continues today.<sup>12</sup> The United Nations Food and Agriculture Organization (FAO) reports that, *between 1980 and 1995, an area larger in size than Mexico (approximately 200 million hectares) was deforested, mostly in the tropics.*<sup>13</sup> The main cause of this forest loss has been clearing and conversion of forested land to other uses, such as agriculture, urban development, industry, human settlements, and infrastructure.<sup>14</sup> Additionally, the clearing of forests in the process of logging timber also causes considerable loss of forested land.<sup>15</sup> What role, if any, has trade liberalization played in this deforestation and forest degradation?

### *Trade Liberalization under the WTO and its implications for the World's Forests*

The main rationale for the ongoing liberalization of international trade is to raise global standards of living by increasing economic efficiency, based on *the theory of comparative advantage*, propounded by *David Ricardo*.<sup>16</sup> The heart of the WTO regime lies in its obligation to reduce and eventually eliminate barriers to trade.<sup>17</sup> The GATT tackled trade barriers by first requiring parties to quantify non-tariff barriers into tariffs, and second, prohibiting the creation of further non-tariff restrictions.<sup>18</sup> The idea was to quantify all barriers into the same unit - tariffs - and then negotiate tariff concessions.

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- 11 See Janet N. Abramovitz, *Taking A Stand: Cultivating A New Relationship With The World's Forests* 9-10 WORLDWATCH INSTITUTE, PAPER NO. 140 (1998).
  - 12 NIGEL DUDLEY ET. AL., *BAD HARVEST? THE TIMBER TRADE AND THE DEGRADATION OF THE WORLD'S FORESTS* 16 (1995).
  - 13 NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 215-35 (Gretchen C. Daily ed., 1997).
  - 14 FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *STATE OF THE WORLD'S FORESTS 1999*, at 1(1999).
  - 15 BURTON V. BARNES ET AL., *FOREST ECOLOGY* 436 (4th ed. 1998); David Pearce, *Global Environmental Values and the Tropical Forests: Demonstration and Capture*, in *FORESTRY, ECONOMICS AND THE ENVIRONMENT* 11,14 (Wicktor L. Adamowicz et al. eds., 1996).
  - 16 Nathalie Chalifour, *Global Trade Rules and the World's Forests: Taking Stock of the World Trade Organization's Implications for Forests* 12 *Geo. INT'L ENVTL. L. REV.* 575 (1999-2000).
  - 17 Organization for Economic Co-Operation and Development, *Methodologies for Environmental and Trade Reviews*, OCDE/GD(94)103, at 7 (1994).
  - 18 JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE*, 139(1998).

## a) Reduction and Elimination of Tariffs

Tariffs were once widely used by countries to protect their domestic industries from competition.<sup>19</sup> The GATT has significantly reduced tariff rates, from rates as high as 60 or 70% down to single digit rates or elimination in most cases. When tariffs are reduced or lifted, economic and trade theories demonstrate that the price of the imported product will be lowered and the quantity demanded of the good will concomitantly increase.<sup>20</sup> When a tariff is reduced or eliminated, the price of the affected imported product is lowered. The lower price generally leads to an increase in consumption of that good, depending on the price elasticity of demand for that item. The more price elastic demand is for an item, the more demand will rise in response to a price decrease.

Tariff reductions, therefore, have implications for forests because they can cause increases in the consumption of forest products and other commodities whose consumption affects forests. Edward Barbier considered the impact of tariff reduction under the Uruguay Round on trade in forest products.<sup>21</sup> He concluded that tariff reduction would create a small increase in demand, which in turn would lead to some trade creation and trade diversion.<sup>22</sup>

One of the proposals before the Seattle Ministerial Meeting was the *Accelerated Tariff Liberalization initiative*, which among other things proposed to eliminate remaining tariffs on forest products by 2004.<sup>23</sup> Because tariffs on forest products are generally already quite low, eliminating remaining tariffs on forest products will not raise global demand for forest products by a large percentage. There are some notable exceptions, however, where tariffs on forest products are not already low. For example, China, who is not yet a member of the WTO, and Malaysia still have high tariffs on raw forest products. Tariff reductions in these countries will have a greater impact on demand. Also, processed forest products (such as wood furniture) continue to be subject to higher tariffs than raw goods.<sup>24</sup>

19 *Id.* at 154.

20 *Supra* note 16 at 140-41.

21 EDWARD B. BARBIER, *IMPACT OF THE URUGUAY ROUND ON INTERNATIONAL TRADE IN FOREST PRODUCTS* (1996).

22 *Id.* at 1.

23 OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE AND COUNCIL ON ENVIRONMENTAL QUALITY, *ACCELERATED TARIFF LIBERALIZATION IN THE FOREST PRODUCTS SECTOR: A STUDY OF THE ECONOMIC AND ENVIRONMENTAL EFFECTS* (1999), available at <http://www.usia.gov/wto/tf1102b.htm>.

24 I.J. BOURKE & JEANETRE LEITCH, *FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, TRADE RESTRICTIONS AND THEIR IMPACT ON INTERNATIONAL TRADE IN FOREST PRODUCTS* (1998), available at <http://www.fao.org/forestry/fop/fophfbkleich/b98-1.stm>.

b) Reduction of Non-tariff Trade Measures

There are many different measures that countries may take to conserve forests, from setting aside protected forest areas to enacting laws regulating forest management practices. To the extent that measures impede international trade, however, they may be limited by trade agreements. For instance, the WTO prohibits the use of quantitative trade restrictions, such as quotas and export bans, with some exceptions.<sup>25</sup> Also, many agreements designed to clarify trade rules and further limit non-tariff trade measures have emerged under the WTO. Examples of such agreements include *the Technical Barriers to Trade Agreement*, and *the Agreement on the Application of Sanitary and Phytosanitary Measures*. These, too, have implications for forests. Finally, decisions made in future trade negotiations will further reduce many non-tariff measures. This section explores a number of current and proposed non-tariff measures that have implications for forests.

*i. Quantitative Restrictions and Multilateral Environmental Agreements*

The WTO's rules relating to trade restrictions may conflict with existing provisions in *multilateral environmental agreements (MEAs)* that are beneficial for forests. Such conflicts have implications for forests by potentially interfering with both existing MEAs and with the freedom of countries to negotiate provisions in new MEAs that might benefit forests.

Many MEAs contain trade-restricting measures that violate the WTO's rules on their face. Examples of such trade-restricting measures include explicit trade bans for endangered species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>26</sup> and trade sanctions against non-signatories to the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>27</sup> If a challenge were made, an argument could be made that *the MEA is saved by Article XX of the GATT*, which allows parties to derogate from the general prohibition against quantitative restrictions by applying trade restrictions when necessary to protect animal, human or plant life, or to conserve exhaustible natural resources.<sup>28</sup> Alternatively, an

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25 See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-1, T.I.A.S. 1700, 55 U.N.T.S. 194, art. XI.

26 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

27 Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.

28 See GATT, Art. XX.

argument could be made under the Vienna Convention on the Law of Treaties<sup>29</sup> that *the environmental treaty supersedes WTO rules if it is more recent* than the trade rule, or that the rules of the environmental treaty apply because they are more specific. These arguments may fail, however, given the narrow interpretation of Article XX by the WTO thus far,<sup>30</sup> and the possibility that the WTO, established in 1995, would qualify all WTO-administered trade rules as 1995 rules (and therefore “later in time” than most MEAs).<sup>31</sup>

ii. *Eco-Labeling and the Agreement on Technical Barriers to Trade*

*Eco-labeling* is a policy instrument designed to give consumers *information about the impacts of a product on the environment and on prospects for sustainable development, so that consumers may make informed purchases.*<sup>32</sup> Most eco-labeling programs provide information about the processing and production methods relevant to the product. The extent to which WTO rules apply to eco-labeling programs is a subject of much current debate. The rules are fairly clear if a country imposes differential tariffs based on an eco-label. WTO rules generally prohibit countries from distinguishing between otherwise “like” products based on how they were produced. Therefore, if a country imposed a lower tariff on products carrying an eco-label, that country would risk violating WTO rules. Eco-labeling will be discussed in detail in the next chapter.

The European Union (EU) in 1994, for instance, developed an eco-labeling program for paper products that would, among other things, assign penalty points to producers for using virgin wood pulp in their products.<sup>33</sup> Upon reaching a certain number of penalty points, producers would no longer be entitled to an eco-label. While the program was to be entirely voluntary, governments were permitted to use the eco-label as a basis for purchasing preferences.<sup>34</sup> The U.S. forest products industry criticized this initiative on many grounds, including charging that the program relied on

29 Vienna Convention on the Law of Treaties, May 23, 1969, Art.30(3), 1155 U.N.T.S.331.

30 See GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna (Sept. 3, 1991), 30 I.L.M. 1594 (1991).

31 Nathalie Chalifour, *Global Trade Rules and the World's Forests: Taking Stock of the World Trade Organization's Implications for Forests* 12 GEO. INT'L ENVTL. L. REV. 575, 593 (1999-2000).

32 Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labelling and its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 209 (1996).

33 Christine Elwell, *"Sustainably Priced": Trade in Forest Products and Ecological Services: Some Legal Standards and Economic Instruments*, in GLOBAL FORESTS AND INTERNATIONAL ENVIRONMENTAL LAW 212 (1996).

34 *Id.*

distinguishing between products based on production methods and provided misleading characterization of the environmental attributes of non-labelled products. The EU eventually abolished the program.<sup>35</sup>

The restriction against parties' differentiation of imported products sporting an eco-label, and the potential application of the TBT Agreement's rules to eco-labelling programs has implications for forests. Whether the TBT Agreement's disciplines apply to eco-labelling initiatives depend on whether the TBT Agreement's definition of product standards is interpreted to include standards of eco-labelling initiatives. Forest certification, as administered by the *Forest Stewardship Council (FSC)*, allows consumers to purchase forest products that came from sustainably managed forests.

The inability of governments to favour FSC products upon import, however, and recent WTO rules on government procurement which generally preclude governments from preferring FSC certified products in their procurement policies,<sup>36</sup> will limit the FSC's potential to increase the amount of forested land that is managed sustainably. Because the FSC process is voluntary and independent, the program should be safe from WTO challenge.<sup>37</sup> However, some WTO members have argued that even voluntary and independent eco-labelling programs should be subject to WTO discipline.<sup>38</sup>

Implications of WTO rules relating to eco-labels for forests extend beyond the FSC. Initiatives like that of the EU, which favoured recycled content in paper products, would have lowered demand for products derived from virgin forests. Eco-labelling programs favouring products produced with less pollution could reduce the impact of pollution on forests. Thus, WTO rules impeding such programs also have implications for forests.

The implications for forests of WTO rules that impact eco-labels merit closer attention and negotiation within the WTO. The WTO's rules reach further than they should when they interfere with the right of consumers to make informed choices in their purchases.

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35 *Id.*

36 Robalino J. and Herrera, L. D. *Trade and deforestation: A literature review*, Geneva: WTO, BACKGROUND REPORT FOR THE WORLD TRADE REPORT 2010 (2009).

37 Voluntary and independent actions are not captured by the WTO rules, which are applicable to government actions.

38 Canada, for instance, recently suggested to the WTO Committee on Trade and the Environment that the FSC process should be subject to WTO rules.



### iii. *Invasive Species and Sanitary and Phytosanitary Measures*

WTO rules pertaining to sanitary and phytosanitary measures may limit the ability of countries to restrict the importation of invasive species that might damage forests. The Agreement on the Application of Sanitary and Phytosanitary Measures<sup>39</sup> is the WTO agreement that governs countries' regulations pertaining to the protection of human, animal, and plant health from diseases, pests, additives, toxins, and other health-risking factors. It requires countries to satisfy a number of tests to justify trade-restrictive measures related to health protection. The WTO's rules on sanitary and phytosanitary measures have major implications for forests. *Invasive species*, such as *Chestnut Blight*, *Dutch Elm Disease*, and *Asian Longhorned Beetles*, have caused severe ecological damage to forests.<sup>40</sup> Because countries are not permitted to restrict imports in the absence of definitive scientific evidence of harm - which is often not available - more invasive species may make their way into forests around the world, contributing to forest degradation and, in some cases, forest loss. These rules effectively discourage precautionary measures relating to invasive species.

### iv. *Export Bans*

The WTO's rules restricting the use of export bans will have an impact on the dynamics of forest products trade. These rules are likely to increase trade and potentially increase timber harvesting in jurisdictions where export bans are lifted.

Export bans are sometimes used by countries in an attempt to encourage domestic processing of raw materials. Several countries currently ban the export of raw logs in order to benefit domestic processing industries or to ensure that domestic industries have an adequate supply of raw logs in the face of declining supplies.<sup>41</sup> The United States, for example, has instituted an export ban on raw logs from public land in a number of western states.<sup>41</sup> British Columbia also has an export ban on raw logs.<sup>42</sup> These export bans may serve to slow rates of forest harvesting, depending on the capacity of processing plants in the jurisdiction subject to the export ban.

39 The Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994.

40 Nathalie Chalifour, *Global Trade Rules and the World's Forests: Taking Stock of the World Trade Organization's Implications for Forests* 12 GEO. INT'L ENVTL. L. REV. 575 (1999-2000).

41 STEVEN LEWIS YAFFEE, *THE WISDOM OF THE SPOTVIED OWL: POLICY LESSONS FOR A NEW CENTURY* 161 (1994).

42 *Id.*

Export bans are prohibited by the WTO,<sup>43</sup> though some countries still employ them. With its high demand for wood products, Japan opposes raw log export bans and may challenge these export bans under the WTO. If the bans are successfully challenged, this could affect forests by increasing rates of raw log exports. The impact of higher levels of raw log exports on forests depends, of course, on how the forests supplying the demand are managed. If they are truly managed sustainably, increased export demand should not have a negative impact.

*v. Restrictions on Subsidies*

The WTO's rules relating to subsidies may have both positive and negative implications for forests. By helping to internalize the environmental and social costs of timber harvesting, the elimination of some subsidies may benefit the forests. These rules may also, however, have negative implications for forests by limiting the use of subsidies that could be used to encourage sustainable forest management.

Broadly defined as *financial contributions by government bodies that confer a benefit on a particular enterprise or industry group*,<sup>44</sup> subsidies are subject to discipline under the WTO.<sup>45</sup> Export subsidies are prohibited.<sup>46</sup> Most other subsidies are made actionable, meaning that when countries can demonstrate injury to their domestic industries due to subsidized imported products, they can impose countervailing duties in the amount of the injury.<sup>47</sup>

Rules relating to subsidies have *important implications for forests*:

*First*, restrictions on subsidies can help *reduce price distortions on forest or agricultural products*, which can have an artificially low price when subsidized. Many governments sell timber to forest products companies from publicly owned land at below-market prices.<sup>48</sup> There are claims, for example, that British Columbia is subsidizing its timber industry by over one billion U.S. dollars annually based largely on below-market stumpage fees for timber harvested off of public land.<sup>49</sup> The impact of such

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43 See GATT, Art. XI.

44 The financial benefit can vary from a direct transfer of money, forgiven loan, or service conferred. See JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 139, 291 (1998).

45 See, e.g., GATT, art. XVI; Agreement on Subsidies and Countervailing Measures.

46 See *id.*, arts. VI, XVI.

47 See Agreement on Subsidies and Countervailing Measures, art. 10.

48 LESTER R. BROWN ET AL., *WORLDWATCH INSTITUTE, STATE OF THE WORLD 1999*, at 76-77 (1999).

49 *Id.*

subsidization, to the extent it may exist, is to create price distortions that favour the use of a forest to provide timber, rather than for other uses.<sup>50</sup>

Eliminating government subsidies on timber can help eliminate price distortions, thus achieving a more efficient allocation of resources and allowing the market to more accurately indicate scarcity. If adhered to, the restrictions on subsidies found within the WTO could help remove price distortions that occur within the forest products industry, which would allow the market to better react to forest loss and degradation (i.e., with higher prices for forest products) and likely cause some shifts in forest use (i.e., from timber harvesting to recreation). However, agricultural subsidies, notably export subsidies, were on the agenda at the failed Seattle Ministerial Meeting and are expected to feature in future WTO negotiations.<sup>51</sup> Disciplines to agricultural subsidies would help reduce price distortions on agricultural goods. Bringing truer prices to agricultural goods might lessen the rate of conversion of forested land for agricultural purposes.

*Second*, restrictions on subsidies, however, also *limit the ability of countries to subsidize industries that are incurring additional costs to implement sustainable forestry practices*. While subsidies create price distortions, their price-distorting impact may be outweighed by their potential social or environmental utility. In some cases, for instance, governments provide subsidies to an industry for costs incurred in reducing environmental impact. These subsidies are often referred to as “green subsidies” or “eco-subsidies.”<sup>52</sup> An example relevant to forests would be the case of a government encouraging forest companies to employ sustainable harvesting practices by providing them some relief on stumpage fees or by giving the land managers a tax break for certifying forests under the FSC. Such subsidies, however, are inconsistent with the WTO rules.

One exception allowing “green” subsidies was included in the recent Agreement on Subsidies and Countervailing Measures.<sup>53</sup> This provision allows governments to fund

50 Claims that Canada subsidizes its timber industry have been the subject of a series of complex disputes between Canada and the United States over the last two decades. See ELIZABETH MAY, AT THE CUTTING EDGE: THE CRISIS IN CANADA'S FORESTS 52-55 (2004).

51 World Trade Organization, *Agriculture (1)-The Issue*, available at [http://www.wto.org/wto/seattle/english/about\\_e/07ag-e.htm](http://www.wto.org/wto/seattle/english/about_e/07ag-e.htm).

52 Sykes, A. O., *The economics of WTO rules on subsidies and countervailing measures*, in MCCRORY, P. F. J., APPLETON, A.E., AND PLUMMER, M.G. (EDS), THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, Vol. 2 (New York: Springer, 2005).

53 See Agreement on Subsidies and Countervailing Measures, art. 8.2(c).

or subsidize up to 20% of a one-time capital investment required to satisfy new environmental rules without another country being able to impose a countervailing duty.<sup>54</sup> This rule was clearly designed with the case of pollution regulations in mind (where companies may have to acquire pollution education technologies to meet new environmental regulations), and would not

## ARTICLE XX EXCEPTION

The key trading principles in the General Agreement on Trade and Tariff are:

- (1) most-favoured-nation (MFN) treatment,<sup>55</sup>
- (2) national treatment,<sup>56</sup> and
- (3) non-discrimination in the administration of quantitative restrictions.<sup>57</sup>

The *MFN rule* requires member nations of the GATT/WTO to ensure that products imported from the territory of one member receive treatment no less favourable than like products imported from any other member. The *national treatment rule* requires members to treat imported goods like nationally produced goods. The *rule on non-discrimination with regard to import quotas* requires members to apply such restrictions to all like goods and not just to goods from a specific member country.

There are exceptions to these general principles, however, that permit members to justify national measures that violate one or more of these principles. Article XX, for example, provides exceptions for national measures that are; *inter alia*, necessary to protect human, animal, or plant life and health.<sup>58</sup> Article XX also provides an exception for national measures that conserve exhaustible natural resources.<sup>59</sup> This is the exception that permits members to have laws and regulations that preserve forests, fossil fuels, and other resources.<sup>60</sup>

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54 *Id.*

55 See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-1, T.I.A.S. 1700, 55 U.N.T.S. 194 art.I (regarding most-favored-nation treatment).

56 GATT, art.III (regarding national treatment of internal taxation and regulation).

57 GATT, art.XIII (regarding non-discriminatory administration of quantitative restrictions).

58 GATT, Art.XX(b).

59 GATT, art.XX(g).

60 Mike Meier, *GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?* 8 COLO. J. INT'L ENVTL. L. & POL'Y 241, 242 (1997).

As John H. Jackson observed forty five years ago, Article 20 may be the exception to the general principles of the GATT that is *most troublesome and most subject to abuse*.<sup>61</sup> The meaning of terms in Article XX such as “arbitrary and unjustified, discrimination,” and “disguised restriction on international trade” are far from clear, and for guidance one must turn to the interpretations adopted by GATT/WTO Panels in solving specific disputes.

Several GATT/WTO cases have elaborated on the basic language of Article XX (b) and (g). In the *Tuna-Dolphin* cases<sup>62</sup> and in the Panel and Appellate Body decisions in the *Gasoline Case*,<sup>63</sup> the GATT/WTO Panels and Appellate Body considered the applicability of both Article XX (b) and Article XX (g). In the *Automobiles Case*,<sup>64</sup> the GATT/WTO Panel considered the applicability of Article XX (g). Unfortunately, the tests that can be extracted from these cases provide limited guidance for a member that plans to address specific environmental or health concerns in a way that might adversely affect trade. To complicate matters further, only the decision in *Tuna-Dolphin II*, the decision in the *Automobiles Case*, and the Appellate Body decision in the *Gasoline II Case* have full precedential value, because the other decisions have been partially revised and superseded by subsequent decisions.

The test that can be extracted from the *Tuna-Dolphin II* decision for Article XX (g) is as follows:

When reviewing a challenged national measure, the Panel will analyse<sup>65</sup>:

- (1) whether the policy purportedly embodied in the national measure is a policy to conserve exhaustible natural resources;
- (2) whether the national measure is “related to” the conservation of exhaustible natural resources, and whether it is made effective “in

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61 JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 741 (1969).

62 GATT Dispute Settlement Panel Report on US Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991).

63 WTO Report of the Panel in United States-Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 274 (1996).

64 GATT Dispute Settlement Panel Report on U.S. Taxes on Automobiles, 33 I.L.M. 1397 (1994).

65 Mike Meier, *GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?* in 8 COLO. J. INT'L ENVTL. L. & POL'Y 241, 261 (1997).

- conjunction” with restrictions on domestic production or consumption;
- (3) whether the measure conforms with the requirements set out in the introductory clause to Article 20, that the measure not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner that would constitute a disguised restriction on international trade; and
  - (4) whether the national measure forces other members to change their policies within their jurisdiction. This final element, although central to the Panel’s conclusions, was not articulated in the Panel’s initial statement of the test under Article 20(g).

According to the Panel in the *Automobiles Case*, the text of Article XX (g) suggested a three-step analysis:

- (1) *First*, it had to be determined whether the policy in respect of which these provisions were invoked fell within the range of policies to conserve exhaustible natural resources.
- (2) *Second*, it had to be determined whether the measure for which the exception was being invoked—that is the particular trade measure inconsistent with the obligations under [the GATT]—was “related to” the conservation of exhaustible natural resources, and whether it was made effective “in conjunction” with restrictions on domestic production or consumption.
- (3) *Third*, it had to be determined whether the measure was applied in conformity with the requirements set out in the introductory clause to Article XX, that the measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade.<sup>66</sup>

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66 GATT Dispute Settlement Panel Report on U.S. Taxes on Automobiles, 33 I.L.M. 1397, 1455 (1994).

In reviewing the Panel's decision, the Appellate Body in *US Gasoline*, first restated the Panel's relevant findings. The Panel had concluded that a policy against the depletion of clean air was a policy to conserve an exhaustible natural resource within the meaning of Article XX (g). The Panel, however, had also concluded that "the less favourable baseline establishment methods" were not primarily aimed at conserving exhaustible natural resources and thus were not justified by Article XX (g).<sup>67</sup>

According to the Appellate Body, the Panel failed to interpret the GATT properly in accordance with the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>68</sup> Under Article 31 of the Vienna Convention, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>69</sup> Because Article XX(g) must be "read in context and in such a manner as to give effect to the purposes and objects of the GATT,"<sup>69</sup> the phrase "relating to the conservation of exhaustible natural resources" should not have been read so expansively that it subverted the purpose and object of Article 3:4, nor should Article 4:4 have been interpreted so that it "effectively emasculated"<sup>70</sup> Article XX (g) and its underlying policies. In other words, the articles should have been interpreted co-ordinately.

## **LABELLING PROGRAMS AND OTHER TRADE MEASURES IN FORESTRY**

Concern over the effects of non-sustainable forest management has spurred activities by importers, retailers, private certifiers, and governments to curb trade in products from non-sustainably managed forests. Section A explores why these actors resort to trade measures to address degradation of forests; section B explains what types of trade measures have been used for that purpose; and section C summarizes the objections of producer states.

### **A. REASONS FOR THE USE OF TRADE MEASURES**

Trade measures are not the first policy options that come to mind for curbing forest degradation. The efficacy of trade measures in changing policy in producer countries is insignificant when compared with strategies targeted at the root causes of

67 Gasoline Appellate Body Report, 35 I.L.M. 603.

68 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, S. EXEC. DOC. L, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (entered into force Jan. 27, 1980).

69 Gasoline Appellate Body Report, 35 I.L.M. at 622.

70 *Id.*

deforestation such as poverty, overpopulation, land tenure systems, and the drive of large corporations (and governments that depend on such corporations) for profits.<sup>71</sup>

Moreover, many observers expect few benefits from trade measures for the protection of forests because the volume of trade in forest products is relatively limited and the possibilities for diversion are large.<sup>72</sup> Only a small percentage of the timber logged in operations causing degradation to forest eco-systems is harvested for export purposes.<sup>73</sup> Most timber harvested for commercial purposes is consumed domestically, often as fuelwood. About twenty-five percent of harvested tropical and temperate timber enters international trade.<sup>74</sup> These figures may reduce the impact trade measures have on forest management, and thus trade measures' positive impact may be limited to relatively few exporting areas.<sup>75</sup>

Why, then, do consumer states and private organizations resort to trade measures in attempts to limit forest degradation? Several factors appear relevant in explanation<sup>76</sup>:

1. **First**, although only twenty-five percent of forest products enter international trade; this portion still has a value of \$98 billion.<sup>77</sup> It thus represents an economic interest that may influence policies of target states.
2. **Second**, states with relatively limited imports may exert leverage. The amount of timber imports to the Netherlands, for instance, is limited when compared to those of Japan. However, Dutch imports still affect 5.6 million hectares of temperate and boreal forests and

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71 Mara Kimmel Hoyt, *Breaking the Trade Barriers: Common Property Solutions to Tropical Deforestation*, 5 MINN. J. GLOBAL TRADE 195, 203-04 (1995).

72 Andre Nollkaemper, *Protecting Forests through Trade Measures: The Search for Substantive Benchmarks* in 8 GEO. INT'L ENVTL. L. REV. 389, 393 (1995-1996).

73 About 18% of tropical forest depletion is due to logging, with 64% due to agriculture, 10% due to fuelwood gatherers, and 8% due to cattle ranching. See Panayotis N. Varangis et al., *Tropical Timber Trade Policies: What Impact Will Eco-Labeling Have?* 4 GEO. INT'L ENVTL. L. REV. (March 22-23, 1993).

74 FOOD AND AGRIC. ORG., STATE OF THE WORLD'S FORESTS 25 (1995).

75 DOUGLAS C. PATTIE, *TIMBER CERTIFICATION AS A POLICY INSTRUMENT FOR SUSTAINABLE FOREST DEVELOPMENT* 9 (June 1994).

76 Andre Nollkaemper, *Protecting Forests through Trade Measures: The Search for Substantive Benchmarks* in 8 GEO. INT'L ENVTL. L. REV. 389, 393 (1995-1996).

77 FOOD AND AGRIC. ORG., STATE OF THE WORLD'S FORESTS 25 (1995).



51,000 hectares of tropical forests annually - an area twice the size of the Netherlands.<sup>78</sup>

3. **Third**, trade measures may be an important policy consideration for countries or regions with high timber exports. For instance, the relative size of timber exports is much higher for British Columbia than for Canada overall, and trade measures targeted at British Columbia could therefore significantly influence local forest management practices.<sup>79</sup>
4. **Fourth**, trade measures may influence policy in forests other than those that export targeted products. Recent practice suggests that export states and industries, in both developed and developing countries, increasingly adopt nationwide labelling schemes and forest management standards to satisfy requirements of importing states, without confining such schemes to particular forests that are used for export purposes.<sup>80</sup>
5. **Fifth**, unilateral trade measures may function as leverage for producer states to enter into negotiations with consumer states for possible agreements on forest management. As will be discussed in Part III, present treaties relevant to forestry are inadequate. Trade measures may induce states to negotiate proper criteria and disciplines governing forest management and trade in forest products.<sup>81</sup>
6. **Finally**, the possibility that producer states may simply divert their exports is not a valid reason to abandon trade measures. Importing states have their own responsibility for forest degradation. Refusing to import timber from clearcuts that erase the last habitats of the endangered tiger in the Siberian forests, the rhino in the jungle of Sumatra, the spectacled bear in the cloud forests of South America,

78 CASBESSELINK, NETHERLANDS COMM. FOR THE IUCN, THE NETHERLANDS AND THE WORLD ECOLOGY 67 (1994).

79 Barbier, E. B. and Rauscher, M., *Trade, Tropical Deforestation and Policy Interventions*, 4(1) ENVIRONMENTAL & RESOURCE ECONOMICS 76 (1994).

80 Andre Nollkaemper, *Protecting Forests through Trade Measures: The Search for Substantive Benchmarks* in 8 GEO. INT'L ENVTL.-L. REV. 389, 390 (1995-1996).

81 See generally Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. TRANSNAT'L L. 51, 79-83 (1981); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 493-498 (1994).

the white-backed woodpecker in forests in Finland and Sweden, or the woodland caribou in northern forests<sup>82</sup> is not merely a lofty objective, but also a matter of law.

## **B. RECENT TRADE MEASURES: TYPOLOGY**

Concern about the degradation of forests and hope in the efficacy of trade measures have spurred importers and retailers,<sup>83</sup> private certifiers,<sup>84</sup> and governments<sup>85</sup> to establish trade measures attempting to curb trade in products from unsustainably managed forests. Because the variety of trade measures is large, a brief typology will help to define trade measures and the legal issues they raise.

Trade measures for forest products can be classified by making four distinctions<sup>86</sup>:

- (1) between certification programs and other trade measures,
- (2) between mandatory and voluntary certification programs,
- (3) between government-sponsored and privately-sponsored programs, and
- (4) between eco-labels and single-issue labels.

**First**, trade measures must be divided between certification programs and other trade measures, which include import bans, countervailing duties and tariff preferences. These measures raise legal questions that to a certain extent are comparable to those raised by certification schemes. Certification programs are used to certify imported forest products and mark or label them when certain criteria are met, such as when a product originates from a sustainably managed forest.<sup>87</sup> The policy assumption underlying certification programs is that an unlabelled forest product sends consumers

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82 ENVTL INVESTIGATION AGENCY, *HOW TO SAVE THE WORLD'S FORESTS*, 10-11 (1995).

83 See Charles W. Thurston, *Timber Producers Seek U.S. 'Green Light'*, J. COM., July 11, 1995.

84 Examples include Scientific Certification Systems and the Rainforest Alliance. The Forest Stewardship Council (FSC) represents environmental and industry groups and accredits certifiers to guarantee that certified wood actually meets certain ecological criteria.

85 See Leslie Webb, *Eco-labels Stuck on Search for Common Standards*, 36 PULP & PAPER INT'L 39 (1994).

86 Andre Nollkaemper, *Protecting Forests through Trade Measures: The Search for Substantive Benchmarks* in 8 GEO. INT'L ENVTL. L. REV. 389, 395 (1995-1996).

87 Jennifer Schultz, *The GATT/WTO Committee on Trade and Environment - Toward Environmental Reform*, 89 AM. J. INT'L. L. 423, 435 n.60 (1995).

a message that production of the product causes unacceptable harm to forests. For example, the U.S. dolphin-safe label was highly effective and nearly wiped out retail sales of Mexican tuna caught using the dolphin-killing pursuingsnets). When certification is mandatory, timber from these areas must be segregated and products made thereof must be confined to the domestic market or to those export markets not requiring certification. When certification is voluntary, forest products from such areas can still end up on the shelves, but consumers have the additional option of purchasing products certified as “environmentally friendly.”<sup>88</sup>

**Second**, certification programs are either mandatory or voluntary. Mandatory programs require that all imported products of a selected category be labelled. Voluntary programs allow the exporter to decide. States seem to prefer voluntary labelling programs over mandatory labelling- not so much for reasons of effectiveness (as trade impacts of voluntary labelling schemes remain uncertain) but rather to avoid conflict with producer states. The distinction has legal relevance because mandatory and voluntary labelling schemes are presumably examined under different rules,<sup>89</sup> but the core principles applying to mandatory and voluntary labelling are identical. Voluntary labelling schemes appear to be covered by Annex 3 of the TBT Agreement - the Code of Good Practice for the Preparation, Adoption and Application of Standards. This application of the TBT Agreement to voluntary schemes is contested, however.<sup>90</sup>

**Third**, a distinction can be drawn between government-sponsored labelling programs and private labelling programs. The number of government programs for forest products is limited. In contrast, activities by private, national, and international non-governmental organizations (NGOs) proliferate. This distinction formerly had some legal relevance under GATT, although the 1994 Agreement on Technical Barriers to Trade (TBT Agreement) has brought private certification programs under requirements

88 Staffin, E. B., *Trade barrier of trade boon? A critical evaluation of environmental labelling and its role in the 'greening' of world trade*, 12 (205) COLUMBIA JOURNAL OF ENVIRONMENTAL LAW (1996).

89 Mandatory labeling schemes are covered by the 1994 Agreement on Technical Barriers to Trade (TBT) as “regulations.” See Agreement on Technical Barriers to Trade, LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION, Booklet 1, 135 [hereinafter TBT Agreement], at 155 (Joseph F. Dennin ed., 1995).

90 See WTO Trade and Environment Committee Agrees on Work Programme in Preparation for the Singapore Ministerial Meeting, WTO Doc. Press/TE.006 (Dec. 8, 1995) ((summarizing differing opinions regarding the legal basis of voluntary schemes).

that are substantively equivalent to government program requirements.<sup>91</sup> Therefore, whenever this article makes reference to certification programs, these observations also apply to private labelling schemes covered by the TBT Agreement.

**Fourth**, labelling programs can be distinguished between eco-labels and single-issue labels. Eco-labels are labels that attempt to present an overall assessment of a product's environmental quality. Of the labels discussed in this article, only the labels based on EC Regulation 880/92 are defined as eco-labels. Single-issue labels, on the other hand, provide information on one aspect of a product, such as "dolphin-friendly" tuna, "biodegradable" detergents, or, in the present context, "sustainably harvested" timber.

Though trade measures aimed at timber products vary widely, they all share one important feature: they employ substantive norms against which forest management practices of different countries are examined. Such norms hold, for instance, that timber originating in primary forests,<sup>92</sup> or in conversion lands,<sup>93</sup> is *per se* unsustainable and cannot be certificated. These norms determine the information transmitted to consumers<sup>94</sup> and thereby establish the guidelines by which producer states must establish their policies.

### C. THE DISPUTE OVER THE CHOICE OF NORMS FOR FOREST MANAGEMENT

It is exactly the choice of these norms that has become the core of the dispute between producer and consumer states. The choice of norms has encountered legal objections from producer states<sup>95</sup> and from the international trade community. Unilateral consumer-state determination of what is sustainable forest management would be arbitrary and discriminatory, and would fail to address differences in the

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91 Article 4.1 of the TBT Agreement provides that Members shall take "such reasonable measures as may be available to them" to ensure that non-governmental standardizing bodies accept and comply with the Code of Good Practice. What constitutes a "non-governmental standardizing body" is, however, not fully clear. Article 3.1 of the TBT Agreement contains a comparable obligation for mandatory labels. While the formulation of these obligations is more flexible than the obligation applying to labeling programs adopted by states, private labeling schemes are not exempt from legal disciplines.

92 FOREST STEWARDSHIP COUNCIL, FSC PRINCIPLES AND CRITERIA FOR NATURAL FOREST MANAGEMENT, Principle 9, Document No. 1.2 (1995).

93 *Report of the Working Group of Experts on Sustainable Forest Management*, in 17 EVALUATING SUSTAINABLE FOREST MANAGEMENT (Jan. 1994).

94 *Report on Trade and Environment to the OECD Council at Ministerial Level* OECD Doc. GD(95) 63, para. 69 (1995).

95 EUROPEAN REPORT, *Paper Industry Criticizes Eco-Label*, Apr. 29, 1995.

circumstances of different countries. In three cases, producer states have disputed consumer states' choices of substantive norms.

In 1992, the Austrian Parliament adopted a law requiring mandatory labelling of tropical timber and tropical timber products marketed in Austria and a voluntary quality mark for timber and timber products from sustainably-managed forests.<sup>96</sup> Several Asian countries considered this law to be discriminatory, an unnecessary obstacle to trade, and an unjustified, unilateral attempt to dictate what constitutes sustainable forest management.<sup>97</sup> In response, Austria amended the legislation by removing the mandatory labelling requirement.<sup>98</sup> The new law provides for a voluntary quality mark for all timber products originating from sustainably managed forests. It is designed to influence trade as little as possible<sup>99</sup>- a far cry from the initial aim of influencing production to use more sustainable methods.

The Netherlands pursues a policy that seeks to ensure that only timber from countries or regions with a “*forestry policy and forest management system geared to protection -and sustainable production*” will be used.<sup>100</sup> The ideal expressed by the Netherlands policy is that labelling systems promote the development and use of sustainable management systems for timber production and eventually eliminate trade in non-sustainably produced timber.<sup>101</sup> In addition to the Netherlands official policy, the Netherlands Parliament proposed a bill that would ban all imports of timber from non-sustainably managed forests after January 1, 1999. Like the Austrian legislation, the Netherlands' policy on tropical forest products also invited criticism as an unjustified deviation from agreed-upon international standards, an intrusion into the sovereignty of producer states, and in conflict with trade law. Eventually, the Netherlands deferred the deadline for elimination of non-sustainably produced timber on the Dutch market until the year 2000.<sup>102</sup>

96 Lilly Sucharipa-Behrmann, *Austrian Legislative Efforts to Regulate Trade in Tropical Timber and Tropical Timber Products*, 46 AUSTRIAN J. PUB. & INT'L L. 283, 284 (1994).

97 *Austria - Mandatory Labeling of Tropical Timber and Timber Products and Creation of a Quality Mark for Timber and Timber Products From Sustainable-Forest Management*, GATT Doc. L/7110 2-3 (Oct. 23, 1992).

98 BGB 1 228/1993 (Austrian federal law for the creation of a quality mark for timber and timber products from sustainable exploitation).

99 Lilly Sucharipa-Behrmann, *Austrian Legislative Efforts to Regulate Trade in Tropical Timber and Tropical Timber Products*, 46 AUSTRIAN J. PUB. & INT'L L. 283, 289 (1994).

100 *The Dutch Government's Policy Paper on Tropical Rainforests* (1992).

101 *Id.* at 47.

102 *See Ban on Unsustainably Produced Hardwood Unlikely By End of 1995, Dutch Commission Says*, 17 INT'L ENV'T REP. (BNA) 478 (June 1, 1994).

The EC has implemented the most comprehensive scheme for forest products to date.<sup>103</sup> Under *Council Regulation 880/92*,<sup>104</sup> the Ecan award eco-labels for products marketed in the Community. Two 1994 decisions implement the regulation by establishing criteria upon which the environmental performance of toilet paper and kitchen paper towels is to be assessed.<sup>105</sup> Several of the criteria included in these decisions are relevant to forest management.<sup>106</sup> For example, no eco-label will be awarded to forest products manufactured by methods likely to cause significant harm to the environment, which, of course, includes forests.<sup>107</sup>

The criteria also indicate a strong preference for recycled paper rather than paper from virgin fiber—regardless of whether forests are sustainably managed.<sup>108</sup> Furthermore, all virgin wood used as raw material for pulp must originate from regions where “environmentally appropriate forest management” is applied.<sup>109</sup> Forest management practices must comply with the definition of sustainable forest management adopted by the 1993 Helsinki Conference on the Protection of Forests in Europe. Forest management practices in states that have not adopted this definition must comply with the Forest Stewardship Council’s Forest Principles.

The EC eco-labelling scheme has come under fire. The U.S. forest and paper industry and the U.S. government consider European standards biased towards a European context, making it virtually impossible for U.S. forest products to enter the European market.<sup>110</sup> The American Forest and Paper Association (AF&PA), for example, has criticized the EC norm, and has proposed that U.S. producers be entitled to certify with respect to the AF&PA’s own sustainable forestry norms.<sup>111</sup>

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103 Amended Commission Proposal for a Council Regulation on Operations to Promote Tropical Forests, art. 4(l)(c), 1994 O.J. (C201) 15, 16.

104 Council Regulation 880/92, 1992 O.J. (L 99) 1 [hereinafter EC Eco-Labeling Regulation].

105 Commission Decision 94/924, 1994 O.J. (L 36) 24; Commission Decision 94/925, 1994 O.J. (L 364) 32.

106 Regulation 880/92 applies the concept of life-cycle analysis. The criteria for paper products also apply to emissions in water and air. Although these criteria have proved even more controversial for U.S. forest and paper industry, they will not be discussed here.

107 EC Eco-Labeling Regulation, art. 4(2)(b).

108 It follows from the Annex to the Eco-labeling scheme that the decisions award credit points for use of recycled fibers. The relative weight of these credit points means that paper products from recycled paper are treated more favorably, and are more likely to obtain an eco-label than products from forests, even when they are sustainably managed.

109 EC Decision 94/924, at appendix para. 1.1.

110 Rob Tucker, *Industry Chief Decries Eco-label*, NEWS TRIBUNE, June 20, 1995, at E1.

111 American Forest & Paper Association, *Comments on Proposed EU Ecolabel Criteria for Photocopying and Non-Impact Paper (Formerly ‘Fine-Paper’ Products)*, at 4 (May 1995); see AF&PA *Guidelines*, *supra* note 21.

These examples call for two observations. First, government certification programs are still quite primitive. They use very general norms, and it is difficult to identify what exactly the authors of these laws had in mind when they attempted to discourage imports of products from 'non-sustainably' managed forests. The second observation is that there are strong arguments against implementation of unilateral policies of this type by European states. Historically, European forest management has been unsustainable in the extreme. It is far easier to satisfy requirements of sustainability in the plantation forests that now cover Europe than in the old-growth forests in the Pacific Northwest or in tropical rain forests. While this historical record does not necessarily affect the legality of trade measures for forest products, it does call for some modesty in scrutinizing other countries' forest management against a grand but undefined norm of sustainable management.

### ACHIEVING A BALANCE: SUSTAINABLE FORESTRY

As the WTO struggles to handle environmental concerns, one issue looms above all others: the organization needs to figure out how to manage the clash between its open trade agenda and unilateral attempts by some member governments to protect the environment through trade restrictions. *The WTO must strike a balance between two extremes.* Cracking down too hard on the use of environmental trade restrictions invites environmental damage. But excessive leniency in imposing sanctions invites two other abuses: pressure on poorer countries to adopt standards that are ill suited to their strained economies, and suppression of trade that will lead to higher prices and stunted growth.<sup>112</sup>

Forests throughout the world are seriously threatened by exploitation and development.<sup>113</sup> Although a multitude of national laws proclaim that forests should be protected,<sup>114</sup> states have done little to mitigate this threat. Deforestation rates in

<sup>112</sup> Michael M. Weinstein and Steve Cbarnovitz, *The Greening of the WTO* 80(6) FOREIGN AFF.147, 148 2001.

<sup>113</sup> *Report of the United Nations Conference on Environment and Development*, Annex II, Agenda 219111.10, U.N. Doc.A/CONF. 151/26 (1992).

<sup>114</sup> See, e.g., Karen M. Schwab, *Added Hope for the Amazon Rainforest*, 15 Hous. J. INTL. L. 163, 190-195 (1992) (discussing forestry laws in Brazil, Venezuela, Columbia, and Peru); Duane R. Gibson, *Sustainable Development and the Forestry Law of the Tongass National Forest and Indonesian Forests*, 31 WILLAMERRE L. REV. 403, 407 (Spring 1995) (discussing Indonesian and U.S. laws on forestry); Wong Kum Choon, *Management of Tropical Forest: The Policy of a Major Timber Exporting Country*, in NATURE MANAGEMENT AND SUSTAINABLE DEVELOPMENT 115, 117 (Wil Verwey, ed., 1989) (discussing legislation of Malaysia). For a summary of legislation of European states, see MINISTRY OF AGRIC. AND FORESTRY OF FINLAND, INTERIM REPORT ON THE FOLLOW-UP OF THE SECOND MINISTERIAL CONFERENCE (Helsinki 1993).

tropical countries remain high, driven by hunger for land and a booming demand for wood.<sup>115</sup> Forest cover in the temperate zone is increasing, but this cannot mitigate the degradation of many forests by air pollution, an over-emphasis on timber production, and a lack of conservation measures.<sup>116</sup>

Several states, including Austria, the Netherlands, and the European Community (EC), have responded to inadequate forest management practices by enacting trade measures for forest products. They aim thereby to induce producer states and forest product exporters to adopt more sustainable forestry policies. Under EC law, for instance, paper products from non-sustainably managed forests cannot obtain an “eco-label.” The EC hopes that forest products without labels will not reach the consumer and that this will induce producer states and timber companies to abandon forest management practices deemed unsustainable by the Community.<sup>117</sup>

However, the status of the norm of sustainable forest management in the ITTA is weak. The commitment by consumer states is not legally binding, and the commitment of producer states is not as solid as the text suggests. Consumer states do not appear to wish to hold producer states legally accountable for a failure to comply with the norm. The broad acceptance of the norm “sustainable forest management” is important. It shows that states and regional entities, such as the EC, do not base their trade measures on a unilaterally postulated norm, but on a norm accepted by all producer and consumer states.

## CONCLUSION

Many decisions to further liberalize world trade and clarify current trade rules will be made in future WTO negotiations, as well as within other existing or emerging regional or bilateral liberalized trade blocks. These decisions will have profound implications not only on the economy of this century, but also on social and cultural policies and on the environment. The public made it clear at the Seattle Ministerial Meeting that trade negotiations must take these broader implications into account.

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115 See FOOD AND AGRIC. ORG., *State Of The World's Forests* 29-30 (1995) (discussing tropical forest loss).

116 See *WWF Cites 'Political Neglect' as Biggest Threat to Forests in Europe*, 18 INT'L ENVTL. REP. (BNA) No. 12, at 797 (Oct. 18, 1995).

117 Andre Nollkaemper, *Protecting Forests through Trade Measures: The Search for Substantive Benchmarks* in 8 GEO. INT'L ENVTL. L. REV. 389, 390 (1995-1996).



This paper demonstrates that the WTO has many serious implications for forests, some direct and others indirect, some positive and others negative. While the rules relating to tariff measures on forest products are not likely to have a serious global impact, there are likely to be important regional impacts. Further, rules reducing tariffs on products other than forest products will also have implications for forests, and these should be further explored before more tariff reductions are made. The WTO's disciplines relating to non-tariff measures have a multitude of implications for forests. Important multilateral environmental agreements could come under attack from WTO rules. Restrictions and uncertainty on the ability of countries to treat products differently based on their processing and production methods have major implications for forests, reducing the capacity of countries to ensure that forests are sustainably managed, as well as limiting the potential success of market mechanisms, such as forest certification. Similarly, rules limiting the use of trade restrictions on invasive species could have a serious impact on forests, which are highly vulnerable to exotic pests and diseases. Disciplines on subsidies have positive implications for forests, potentially reducing price distortions on forest products, though they also limit the extent to which governments can subsidize forest product companies employing sustainable forest practices.

In conclusion, the WTO has many implications for forests, positive and negative, most of which are not well understood. Before further decisions are made within the WTO, member countries should take stock of the implications of the WTO's current and proposed rules for forests and ensure that its rules are reformed to lessen negative impacts on forests and bolster positive impacts. Similarly, negotiations relating to existing trade regimes, or intended to develop new trade agreements, should take these implications into account. Countries have an obligation to current and future generations to be informed about the implications of their decisions on trade for forests.

Only once the implications for forests of trade liberalization are fully appreciated can informed policy choices truly be made and evaluated. With a full understanding of the links between trade liberalization policy and the future of forests, policy-makers will be in a position to capture synergies between the two policy goals. Policy-makers will also need to make compromises between values. However, those compromises should not be made in the absence of information. At the Seattle Ministerial Meeting, some countries proposed a conference of the WTO parties to discuss reform of the WTO. Such a conference would be an opportune time for

WTO countries to demonstrate responsibility and stewardship by undertaking to ensure the world trade system promotes sustainable trade for a sustainable economy. An important element of doing this will be to assess the WTO's implications for forests.

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