

BRIDGES NETWORK

# BIORES

Analysis and news on trade and environment

VOLUME 6, ISSUE 1 - MAY 2012



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Is charging airlines for their emissions WTO compatible?

### CLIMATE CHANGE

The long shadow over green growth hopes

### NATURAL RESOURCES

Can China invoke environmental exceptions at the WTO?



International Centre for Trade  
and Sustainable Development

# BIORES

VOLUME 6, ISSUE 1 - MAY 2012

## BRIDGES TRADE BIORES

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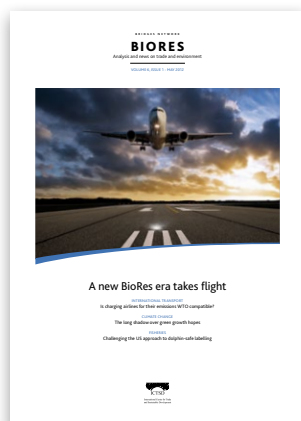
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## Change is good.



*As recent events have demonstrated, the trade and environment worlds are increasingly influencing each other. As seen last December in Durban, tensions over the role of response measures in UNFCCC climate change negotiations underscored the notion that trade strongly influences some of the most contentious issues facing global climate change negotiators. Similarly, and perhaps more pressing, threats of a trade war have emerged as a response by some countries to the EU's controversial decision to include aviation in its Emissions Trading Scheme, rather than waiting for a global solution.*

*These and countless other issues highlight the need for attention and deeper dialogue to ensure policymakers are equipped with the knowledge they need to make well-informed decisions. This reality lies at the heart of what Bridges Trade BioRes stands for. Natural resources, sustainable energy, biodiversity, fisheries, forestry and other crucial environmental issues will continue to affect and be affected by trade and, as always, BioRes will endeavour to bring a balanced view to its wide range of regular readers.*

*In the 12 years that BioRes has been providing news, analysis and information to the trade and environment community, we've always endeavoured to be current, engaging, and useful. The release of the first issue of this year's review takes these three tenets to heart.*

*The frequency of the review has been increased this year in response to readers' expressed request for more commentary and analysis. Subscribers can, thus, expect a full magazine-style publication on a much more frequent basis. Our biweekly news periodical has also been overhauled to allow for more frequent news updates as stories unfold. Visit our "news stream" on our newly revamped [homepage](#) or visit us on [twitter](#) for regular updates. For a roundup of the salient trade and environment news items in the world today, explore the newsroom in every issue of BioRes (see page 23).*

*The redesign of our periodical is the result of countless hours of research and consultation aimed at simply making the most pleasant reading experience possible. The new design is visually lighter, less ink-intensive when printing, and optimised for reading on computer screens, tablets, and mobile devices.*

*We hope you enjoy the changes and the articles presented in this issue. As always, we welcome your comments and feedback on what you read and may publish your remarks. Please write to us at [biores@ictsd.ch](mailto:biores@ictsd.ch)*

*The BioRes Team*

INTERNATIONAL TRANSPORT

# The inclusion of aviation in the EU's ETS: WTO law considerations

Lorand Bartels

*In this article, Lorand Bartels offers an analysis of the trade law implications of the inclusion of aviation under EU's emissions trading scheme. The author finds that, with one exception, all aspects of the EU's scheme can be justified on environmental grounds.*

On 1 January 2012 the EU emissions trading system (ETS) was extended to cover aviation. All airlines must now acquire and "surrender" allowances for the carbon emissions produced by their flights. If not, the airline will be fined €100 per allowance and must make up the shortfall the following year. The scheme applies to passenger and cargo flights operated by EU and non-EU airlines. It also applies not only to flights between EU airports, but also – controversially – to the "last leg" of international flights between EU (including non-EU members Iceland and Norway) and non-EU airports.

The scheme has been controversial at the UN International Civil Aviation Organization (ICAO). China and India have ordered their airlines not to comply with the EU's scheme, and the US Senate is due to consider proposed legislation to the same effect. On 22 February, twenty-three countries mooted other diplomatic responses in a "Moscow Declaration" on the EU's scheme. This followed an unsuccessful challenge by US airlines before the European Court of Justice, which in December 2011 held that the scheme did not violate the EU's obligations under the Chicago Convention or other agreements concerning air transport, nor under general international law.

This article is based on a more comprehensive study on the legal aspects of the EU's scheme under WTO law. This undertaking is not necessarily meant to imply that the scheme will have any significant effects on trade. Indeed, with emissions allowances trading at record lows, the regulatory cost of the EU's scheme and its impact on trade in goods or services are negligible. But this may change, and, in any case, the actual trade effects of a measure are irrelevant to its legality under WTO law, which is rather concerned with more abstract conditions of competition. It is against this background that the study investigated the legal aspects of the EU's scheme under both the GATT – insofar as it relates to trade in goods – and the GATS – insofar as it relates to trade in services, particularly services supplied outside of the EU, such as tourism.

## Character of the EU scheme under GATT

One of the basic distinctions made by the GATT is between fiscal measures – duties, taxes, and other charges – and other regulatory measures affecting trade in goods. The EU's scheme is not a tax or other type of fiscal measure. This is principally because the scheme requires airlines to purchase carbon permits on the open market, and as a result airlines gain a tradable property right. This conclusion is not affected by the fact that some of the revenue earned as a result of such a measure flows back to the state, nor that the purchase of allowances is compulsory. It is notable that the European Court of Justice came to the same conclusion in December 2011, in the context of the EU's aviation transport service obligations. The Court said that the scheme was not a tax or charge because it was "not intended to generate revenue for the public authorities, does not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable per tonne of fuel consumed for all the flights carried out in a calendar year." These reasons may also be plausible, but they are not fundamental to the conclusions of the study.

## €2-€12

According to Connie Hedegaard, the EU's Commissioner for Climate Action, ticket prices will see an increase in the range of €2-€12 each way on transatlantic or other long-haul flights at current carbon prices.

### The EU's scheme as a quantitative restriction

If the EU's aviation scheme therefore is a non-fiscal measure, the first question is whether it might constitute a prohibited quantitative restriction within the meaning of Article XI:1 GATT. This provision applies to non-fiscal measures affecting products before or on importation and prohibits measures with the effect of restricting imports (and exports) of products. In principle, the EU's scheme could have such effects on foreign imports. For airlines complying with the scheme, the result is increased and unpredictable transportation costs. For airlines that do not comply, the costs are greater, with an additional €100 per allowance fine. In all of these cases there is a possibility that the EU's aviation scheme has restrictive effects – no matter how small – on the importation of products into the EU. The scheme can therefore amount to a prohibited quantitative restriction within the meaning of Article XI:1 GATT.

### Discrimination

The two main non-discrimination obligations contained in the GATT must also be considered. The most favoured nation obligation – (Article I:1), which prohibits measures discriminating in favour of imported products from any given origins – applies to measures affecting international transportation. It prevents WTO members from discriminating on the basis of geographical factors connected with the origin of the affected products. This presents a difficulty for the EU's scheme, under which regulatory compliance costs differ according to the distance travelled by products on their way to the EU. Further problems arise if the EU grants selective exemptions to airlines from countries that have adopted "equivalent measures," as foreseen. Under Article I:1 GATT, the EU would have to grant any such exemptions "immediately and unconditionally" to products from all WTO members. This is not foreseen in the EU's scheme.

By contrast, when looking at national treatment obligations – (Article III:4), which prohibits measures discriminating in favour of domestic products – it is apparent that the scheme does not discriminate against already-imported products in favour of domestic products. Both sets of products are affected by the same regulatory costs on intra-EU flights.

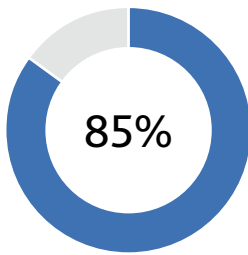
### Freedom of transit

The legality of the transit aspects of the EU's measure should be considered unproblematic insofar as the EU constitutes a transit territory. However, it might violate Article V:6, which requires that WTO members may not give a preference to one journey over another in relation to products from the same origin, and in respect of products transiting via another WTO member. This presents a problem for the "last leg" aspect of the EU's scheme, which has the effect of discriminating between direct and indirect flights from the same origin. A direct flight from Hong Kong to Frankfurt would need to be covered by permits for the full 9,130 km, while an indirect flight via Dubai would need permits for just over half that distance. This may prove legally problematic.

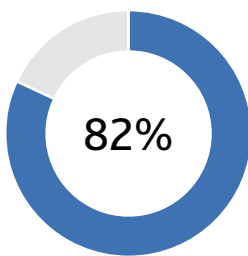
### Environmental justifications

Whether any violations of the GATT can be justified on the basis that the EU's scheme is adopted for environmental reasons rests primarily on two GATT provisions: Article XX(g), which permits measures related to the conservation of exhaustible natural resources, and Article XX(b), which permits measures necessary to the protection of human, animal or plant life or health. In both cases, the measure must additionally not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

The measure is provisionally justified under Article XX(g), but its justification under Article XX(b) is more complicated. The latter provision requires the EU's scheme to be at least "apt" to make a "material contribution" to the protection of "human, animal or plant life or health." Given its present ineffectiveness, this could be difficult to demonstrate. However, the Appellate Body has also cautioned that one must take the long-term view, and in this respect it is possible to say that the EU's aviation scheme is at least "apt" to make a material contribution to its objectives.



Percentage of aviation allowances allocated for free in 2012.



Percentage of aviation allowances allocated for free from 2013-2020.

Source: European Commission

A more difficult question is whether the measure would also meet the additional requirement that the EU's scheme may not be applied in a manner constituting unjustifiable discrimination or arbitrary discrimination between countries where the same conditions prevail. Relevantly, this requires two comparisons: between countries with regulatory measures (including the EU), and between countries without regulatory measures – at present all other countries.

The first comparison requires the EU not to discriminate unjustifiably or arbitrarily against any other country that adopts equivalent measures. This means that the EU would not only be permitted to exempt such countries from its scheme, but that it would be required to do so. This aspect of the scheme, while violating Article I:1 GATT, is therefore perfectly justified.

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*The measure is provisionally justified under Article XX(g), but its justification under Article XX(b) is more complicated.*

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As for the second comparison, the EU's scheme does, in fact, discriminate between countries with no regulatory measures. First, it treats countries differently according to their distance from the EU; this, however, is justified on environmental grounds. More problematic is the discrimination arising from the scheme's "last leg" application. This has the effect of potentially discriminating between products from equidistant origins if it is relatively easier for the products of one of these countries to fly to the EU on an indirect flight. Such a flight would thereby incur lower compliance costs.

It is not clear whether this is a real scenario, but on the assumption that it could be, the next question is whether such discrimination can be justified. There are no environmental reasons for such treatment: indeed, the incentive for airlines to use indirect routes has the perverse effect of increasing overall carbon emissions. One possible reason is that the EU considers itself unable, under international law, to regulate the more distant legs of an indirect flight. The problem is that the Appellate Body held in *Brazil – Retreaded Tyres* that it is not permitted to adopt a measure simply to comply with international obligations, if these have no connection with the purpose of the measure. A second explanation is that the EU cannot obtain data relevant to flights without a terminal point in the EU. If the facts support such an argument, the EU might be on safer ground, although even in this case it would find it difficult to justify the perverse environmental incentives produced by this aspect of the measure. Nonetheless, as mentioned, whether this aspect of the EU's measure is a genuine issue is speculative.

#### **The annex on air transport services**

The GATS applies, in principle, to all measures affecting trade in services. Exceptionally, however, measures affecting air transport services are, to varying degrees, exempted from the scope of the GATS by virtue of the GATS Annex on Air Transport Services. This is largely to preserve the regulatory primacy of the ICAO. The question, however, is whether this Annex also has the effect of exempting from the GATS measures affecting services dependent on air transport services, such as tourism.

It is important to note that the Annex actually contains two carve-outs. Paragraph 2 exempts certain measures from GATS obligations. These do not include all measures affecting air transport services – as is often erroneously assumed – but only a sub-set of these. The only one of these relevant to the EU's scheme is measures affecting "traffic rights." This term is further defined in paragraph 6 of the Annex, relevantly, to include "tariffs to be charged and their conditions." These are of very limited importance in the current system of air transport regulation, and the EU's scheme does not affect traffic rights. The EU's scheme is therefore not exempt from the substantive scope of the GATS.



However, the Annex also contains a second carve-out. Paragraph 4 covers all measures affecting air transport services, and prohibits WTO dispute settlement for such measures prior to the exhaustion of remedies under relevant air transport agreements. It is likely, though not certain, that the EU's scheme does fall under the scope of the ICAO's Chicago Convention. However, interestingly, in domestic proceedings both the UK and the Netherlands governments have taken the view that the Chicago Convention is irrelevant to ticket taxes, which are in relevant respects similar to the ETS. It may be that the EU also denies the relevance of the Chicago Convention in this context. In such a case, paragraph 4 might not apply. And, even if it does, this provision only establishes a conditional exemption. If dispute settlement under those other agreements proves ineffective or futile, the carve-out will not apply.

### **GATS obligations and exceptions**

When looking at the application of relevant GATS obligations and exceptions – in the event that the GATS is applicable – the first to observe is the most favoured nation obligation in Article II:1 GATS, which applies to the EU's scheme insofar as it affects services such as tourism. For reasons similar to those in the context of Article I:1 GATT, there would most likely be a violation. The next issue to consider is the application of obligations applicable to committed service sectors, based on EU commitments in tourism and related services supplied abroad (so-called Mode 2). The scheme does not violate Article XVI GATS concerning market access, but it is likely to violate Article XVII GATS concerning national treatment. The reason is simply that the measure has the effect of burdening tourism in other countries more than tourism in the EU. Furthermore, this conclusion is not affected by a footnote stating that WTO members need not "compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers." The footnote protects the EU from having to subsidise the costs of international transportation of consumers, but it does not permit the EU to add to these costs.

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*It is likely, though not certain, that the EU's scheme does fall under the scope of the ICAO's Chicago Convention.*

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Finally, when looking at the application of the GATS exceptions, Article XIV(b) GATS replicates the wording of Article XX(b), including its Chapeau, and for the reasons mentioned above the EU's scheme would be justified on these grounds. It is worth noting that the GATS does not have an exception for measures relating to exhaustible natural resources.

### **Conclusions**

The EU's aviation scheme is, thus, subject both to the GATT and, subject to a possible procedural carve-out, the GATS. It makes no difference that the measure has no discernible trade effects. Furthermore, the measure is likely to violate a number of the obligations set out in these agreements, including the most favoured nation obligations, and obligations relating to quantitative restrictions on goods, transit for goods, and national treatment in the context of services. Significantly, however, with one exception all aspects of the EU's scheme can be justified on environmental grounds. The exception relates to the discriminatory effects of the EU's scheme on products from two different origins equidistant from the EU, where those of one origin are more easily transported on indirect flights incurring lower regulatory costs. Whether this is in practice a significant scenario is, on the other hand, a speculative question.

*This article is based on a more comprehensive study, which can be accessed at <http://bit.ly/ILuxY8>*



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CLIMATE CHANGE

# Green growth sounds nice, but can it deliver climate change mitigation?

Ulrich Hoffmann

*In this article, Ulrich Hoffmann calls into question the notion of "green growth," asserting that economic growth cannot be decoupled from a related rise in greenhouse gas emissions.*

Many economists and policymakers advocate a fundamental shift towards "green growth" as the new, qualitatively-different growth paradigm, based on enhanced material/resource/energy (MRE) efficiency and drastic changes in the energy mix, with corresponding structural changes. Advocates argue that such a paradigm change would unleash new wealth creation and employment opportunities, provided that there was sufficient investment and that companies had access to better information and supportive incentives. In other words, the concept is flawless – only the enabling conditions are lacking. "Green growth", which should rather be seen as a process of structural change, may indeed create new growth impulses with reduced environmental load, in particular at the micro-economic level. But can it also mitigate climate change at the required scale and pace (i.e., significant, absolute and permanent decline of greenhouse gas (GHG) emissions) at the macro-economic and global levels?

My new paper casts a long shadow on the "green growth" hopes, and also reviews related developmental implications for the South. "Green growth" may provide false hope and excuses to do nothing really fundamental to bring about a U-turn in global GHG emissions. The arithmetic of economic and population growth, efficiency limits related to the rebound effect, as well as systemic issues call into question the hopes of decoupling economic growth from GHG growth. One should not deceive oneself into believing that such an evolutionary (and often reductionist) approach would be sufficient to cope with the complexities of climate change. "Green growth" proponents need to scrutinise the historical macro- (not micro-) economic evidence, in particular the arithmetic of economic and population growth, as well as the significant influence of the rebound effect. Furthermore, they need to realise that the required transformation goes beyond innovation and structural changes to include democratisation of the economy and cultural change. Climate change calls into question global equality with regard to opportunity for prosperity (i.e., ecological justice and development space). It poses a huge developmental challenge for the South and a question of life and death for some developing countries.

## Limits set by the arithmetic of economic and population growth

It is highly questionable whether the required drastic GHG-emissions reductions are really achievable under the prevailing growth paradigm. By way of illustration, global carbon intensity of production fell from around 1kg/\$ of economic activity to just 770g/\$ (i.e., by 23 percent) in the 28 years between 1980 and 2008 (a drop of about 0.7 percent per annum). Even if recent trends of global population (at 0.7 percent per annum) and income growth (at 1.4 percent per year) were just extrapolated to 2050, carbon intensity would have to be reduced to 36gCO<sub>2</sub>/\$ – a 21-fold improvement on the current global average – to limit global warming to two degrees Celsius. Allowing developing countries to catch up with the present level of GDP per-capita in developed nations would require a much higher drop in carbon intensity of 99.2 percent (almost 130 times) by 2050 (See Figure 1).

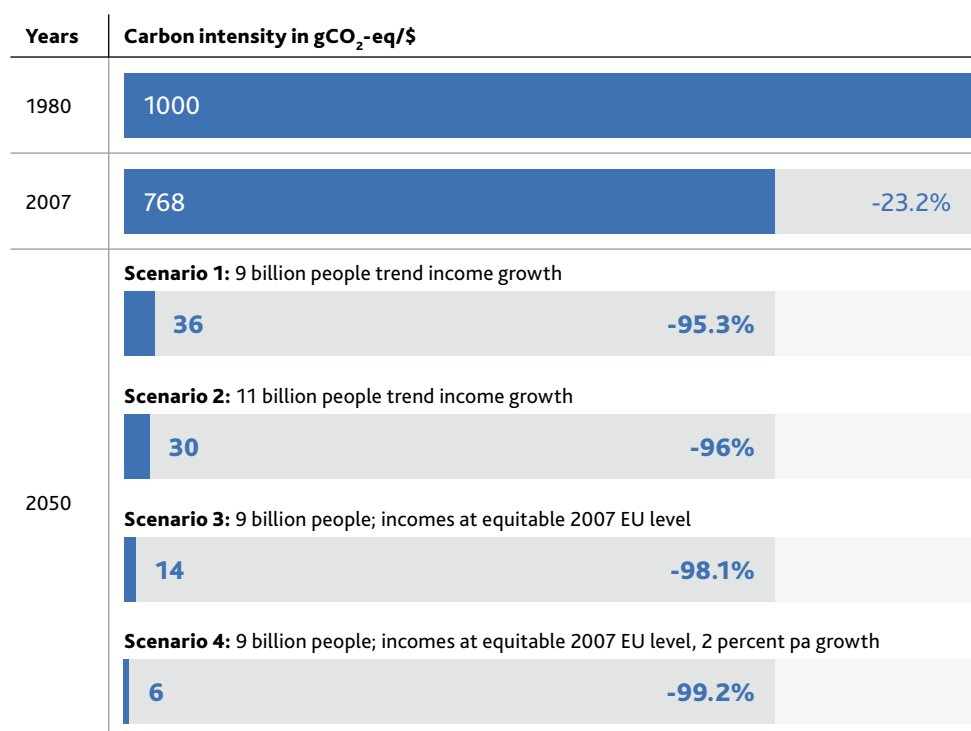
In retrospect, apart from Germany for a short period after reunification in the 1990s, the Russian Federation is the only large economy that has reduced emissions substantially since 1990, mostly due to a breakdown of its heavy industry. The country's carbon emissions fell by almost three percent annually from 1990–2005. The world – not only a handful of technologically very advanced countries – would have to repeat the Russian



experience although two to three times more drastically. And even that would only result in limiting global warming to about three degrees. Does this sound feasible?

The rise of global population by about 35 percent, from 6.9 billion in 2010 to about 9.3 billion by 2050, will drive the scale effect of production and consumption. This growth, combined with a four-fold increase in output per capita (and even assuming that the rich world grows no more) would boost the size of the world economy by six times. While it is a fact that the countries with the highest population growth have contributed least to GHG emissions thus far, this is only because their populations continue to live in extreme poverty. In other words, population growth does not matter for resource consumption and GHG emissions as long as one accepts that people remain poor, with minimal levels of consumption. But it begins to matter a great deal if the international community has the ambition to reduce poverty amidst rapidly growing populations. If the 1.5 billion people currently without access to basic energy supply obtained that access and had the current average per capita CO<sub>2</sub> emissions, this would increase global carbon emissions by 20 percent and double those of the developing world.

**Figure 1**  
Recent carbon intensity of GDP and the level required to limit global warming to 2 degrees



Source: Jackson, T (2009: 81) and additions by the author.

### Efficiency limits

Enhanced MRE efficiency and ample availability of cheap renewable energy would encourage a "rebound effect" – physical consumption is likely to increase as a result of productivity increases – which leads to lower costs and prices and the shifting of thus saved consumer money or investment funds. This is called the financial rebound effect. In addition, there are two other clusters of rebound effects: material rebound and cross-factor rebound effects. Material rebound effects are caused by higher MRE consumption resulting from the need to change fixed capital and infra-structure for increasing MRE efficiency. The cross-factor rebound effect, in turn, is triggered by enhanced labour productivity, which replaces labour by mechanisation and motorisation, driving material and resource consumption, but in particular energy use.

The rebound effects have been poorly analysed so far, with estimates limited to the financial rebound effects. These alone are estimated to neutralise about half of the total MRE efficiency gains. Empirical information on material and cross-factor rebound effects

## Beyond GDP

Alternative approaches to representing people's wellbeing

### GPI

Genuine Progress Indicator

### HPI

Happy Planet Index

### ISEW

Index of Sustainable Economic Welfare

is not yet available. Against this background, it would be simplistic to assume that MRE efficiency gains could play the main role in reducing GHG intensity. The key dilemma is that efficiency and productivity gains tend to boost economic growth, thus ushering in more physical consumption. This is one of the key reasons to call into question the feasibility of the "decoupling strategy" at the macro-economic level.

#### Linear thinking and horizontal shifting

There is also a tendency of too much linear thinking and approaches to enhancing MRE efficiency, often resulting in an outcome that only shifts the problem. Some of the technical advances leading to MRE efficiency gains, for instance, rely on materials that are either scarce, very energy intensive to produce, or difficult to re-use, recycle or safely dispose of. According to Bleischwitz et al., "the upswing for eco-industries in the North may have a dark side in the South: resource-rich countries being moved into rapid extraction paths exceeding the eco-systems and socio-economic institutions of those regions and fuelling civil wars with resource rents".

A considerable part of GHG intensity drops in developed countries has been achieved not by real physical savings, but by "outsourcing" MRE-intensive production to developing countries. In fact, almost a quarter of GHG emissions related to goods consumed in developed countries has been outsourced. A team of scientists at Oxford University, for instance, estimated that under a correct account, allowing for imports and exports, Britain's carbon footprint is nearly twice as high as the official figure (i.e., 21 t CO<sub>2</sub>eq/person/year instead of 11). The share of CO<sub>2</sub> net imports to total carbon emissions of individual developed countries has recently ranged from about 15 percent for Greece to almost 60 percent for Switzerland.

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*Some of the technical advances leading to MRE efficiency gains, for instance, rely on materials that are either scarce, very energy intensive to produce, or difficult to re-use, recycle or safely dispose of.*

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#### A very hard nut to crack – changing consumption patterns

The colossal required decarbonisation of the economy and human life will only be achievable if current consumption patterns, methods and lifestyles are also subject to profound change. Yet, far-reaching and lasting changes will be very difficult to bring about. The globalisation of unsustainable Western lifestyles and consumption trends, the tendency towards higher animal protein diets, and the high mobility obtained through modern, but carbon-intensive transport systems, are but three examples of the very hard nuts to crack on the consumption front. What is often underestimated by the advocates of "green growth" is the fact that changing consumption and concomitant lifestyles need to be understood as a social issue, factoring in equity. Consumption patterns are unlikely to significantly change unless income distribution changes as well.

#### Governance and market constraints

No doubt, the drastic and quick changes required for achieving the unprecedented absolute, permanent and global GHG emission reductions necessitate a clear political vision, a sound strategy and consistent implementation. Yet, in practice, we remain far from that. The international climate regime, though without alternative, is not providing a coherent and sufficiently effective approach yet. The gap between the claims and the reality of international climate policy is widening. According to Fatih Birol, the chief economist of IEA, "potentially, we are already with our feet in water, reaching the level of our knees. Yet we make decisions and keep promising that our toes will remain dry."

Moreover, the current public debt and financial crisis in numerous Western countries is likely to complicate the much required structural and technological change that underpins

"green growth." Governments in the crisis-stricken developed countries find themselves in a budgetary straightjacket. They are obliged to drastically cut back public expenses and investment in the next few years, increasing deflationary and recessionary tendencies in the concerned economies. Most of these countries will be unable to launch big economic stimulus or re-structuring packages as in the wake of the 2008–2009 crisis.

Existing market structures are also complicating the "green" transformation of economies. For instance, from a systemic point of view, a considerable part of renewable energy can (and should) be deployed in a local, decentralised way, avoiding much of the required investment in new grids, avoiding transmission losses and matching supply with demand. Yet, the market domination of few energy companies leads to a preference for central, grid-based approaches that retain their market power. Off-shore wind parks and project proposals for huge solar power generation facilities, for instance in the Sahara, are cases in point.

The externalisation of environmental costs and massive subsidisation of fossil-fuel dependent industries and industrialisation approaches have become a fundamental part of the capitalist market economy. More generally, there is a systemic problem of free riding of "conventional producers" that take advantage of all kinds of "perverse" subsidies and misguided incentives. Conversely, sustainable producers, who want to distinguish themselves, have to provide and pay for the evidence that they are indeed meeting specific sustainability criteria (usually partly reflected in voluntary sustainability standards).

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*The externalisation of environmental costs and massive subsidisation of fossil-fuel dependent industries and industrialisation approaches have become a fundamental part of the capitalist market economy.*

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The much-vaunted market-based instruments for internalising GHG emission costs, in particular emissions trading, have so far also fallen far short of expectations. A recent review of the EU Emissions Trading System (ETS) by Carbon Trade Watch and Corporate Europe Observatory draws very sobering conclusions: "It is failing badly. In theory, it provides a cheap and efficient means to reduce greenhouse gases within an ever-tightening cap, but in practice it has rewarded major polluters with windfall profits, while undermining efforts to reduce pollution and achieve a more equitable and sustainable economy." What is more, even the smartest-designed carbon offset trading scheme cannot overcome the constraints set by the above-mentioned limits of the maths of decarbonisation - as stressed by Pielke, carbon "markets cannot make the impossible possible."

### **Systemic limits**

As if the growth, technological, governance and market constraints were not already enough, some systemic issues are also calling into question the "green growth" hopes. Their essence is that the capitalist economic system cannot operate without growth, with the exception of short cyclical crises. "Expand or perish" is an inexorable force and the constant accumulation of capital has inherent expansionist features – all economic agents are under competitive pressure to either undercut the costs of their competitors or create new products and markets. Increases in labour productivity and the permanent creation of new consumer needs generally lead to more, not less, physical production and consumption (i.e., the principal of capitalist accumulation). This increase in growth can bring, but does not necessarily mean, additional benefits to society. Capitalist actors are not interested per se in growth of societal benefits, but in sales' increases so that profits rise. As put by Lockwood, "growth is inherent in capitalism, which means you can't have capitalism without growth, and you can't have a capitalist steady state economy," as advocated by Herman Daly and others. Rather, as nicely described by Green, "growth is like a bicycle – if it stops, you fall off".

### Key challenges for developing countries

Often arguments are made that developed countries should drastically cut their GHG emissions to make sufficient atmospheric carbon space for development in the South. As analysed above, however, significant absolute declines of Northern GHG emissions will remain illusory. What is more, it is simplistic to assume that a drastic reduction of growth (or even a decline) in developed countries could make sufficient "development and carbon space" for developing countries in the future. One cannot deny the reality that much of developing country growth will continue to be dependent on unsustainable Northern consumption.

The above analysis on the math of required drastic decarbonisation of the world economy under various scenarios of the South catching up with Northern levels of GDP per capita illustrate that, to avoid an apocalyptic future, developing countries will no longer be able to follow, but will have to "tunnel" the so-called Environmental Kuznets Curve. In other words, there is insufficient atmospheric carbon space. Developing countries will no longer be able to rely on unabated economic growth until GDP per capita reaches a level at which environmental pollution and GHG emission intensity of growth start falling. As a result, "developmental space and justice" and "historical climate debt" are set to become very contentious issues in North-South relations and international climate change negotiations.

Because of multiple vulnerabilities associated with lower levels of development and inadequate resources, developing countries tend to suffer more from climate calamities. Disaster risk management and adaptation to climate change have not been mainstreamed and responses are mostly event-driven. It is therefore imperative that investment and technology decisions related to disaster risk reduction and adaptation to climate change are incorporated in national development strategies.

Against this background, while climate-change mitigation efforts remain important, developing countries need to prioritise effective climate-change adaptation in forms that optimise poverty-eradication. The most pressing and promising areas in this regard are a fundamental transformation of agriculture; harnessing the use of renewable energy, in particular for sustainable rural development; and energy-efficient and climate-resilient construction and renovation of buildings – including urbanisation in low-carbon cities and climate-proofing of infrastructure in coastal zones.

Given the level of urgency and the time constraint, freeing sufficient national funding and obtaining adequate external funding for the above-mentioned adaptation measures is of pivotal importance. Appropriate international adaptation funding should reflect (i) the full costs of avoiding harm; (ii) actual harm and damage; and (iii) lost opportunities for development in developing countries.

Taken together, the adaptation and mitigation measures outlined above for developing countries are unlikely to sufficiently check global warming, yet they have the potential to make economic development more climate change resilient. They also offer ample development space for prosperity gain. It should however be remembered that, as the Fukushima incident, the recent floods in Thailand, or the catastrophic floods in Pakistan harshly illustrated, major climate change-caused disasters may roll back development gains, in particular when certain environmental tipping points are reached.

*The full paper, including all references for the summary of its key findings above, is available at <http://bit.ly/I5dYKZ>*



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The views expressed in this  
article are those of the author  
and do not represent the position  
of the UNCTAD secretariat or  
UNCTAD member countries.

CLIMATE CHANGE

# Green growth: Is it really an illusion?

Ernst Ulrich von Weizsäcker

*In this article, UNEP's Ernst Ulrich von Weizsäcker responds to Ulrich Hoffmann's take on green growth. The author acknowledges Hoffmann's analysis, but insists there is hope.*

Ulrich Hoffmann has done a great job exploding illusions around green growth. The idea of reconciling growth aspirations with environmental – particularly climate – necessities remains a phantom as long as growth does not truly change its meaning. Growth has so far been closely coupled with carbon dioxide emissions and with material turnover. This is one of the key messages of the UNEP International Resource Panel's first Decoupling report. As is well known, local pollution receded in the rich countries while they kept growing. The trouble with the pollution experience, often described by the Environmental Kuznets Curve, is that everybody is using it as a paradigm, or recipe, for dealing with all environmental challenges. What is suppressed is the fact that while overcoming local pollution, the rich countries became ever more resource and carbon intensive.

Hoffmann shows that all existing efforts of decarbonisation have hardly had any tangible result. The most important instrument meant to curb greenhouse gas emissions, the EU Emissions Trading System (ETS), has not actually reduced those emissions; that's one of the grim facts reported by Hoffmann. That Russia and Germany managed to reduce net carbon emissions is proven to be mainly the effect of closing dirty operations stemming from the communist past.

Hoffmann considers more recent efforts of decarbonisation of economic value creation but concludes that they fall far short of what would be needed to keep temperatures below the magic threshold of two degrees centigrade above pre-industrial levels. A 36-fold decarbonisation would be needed by 2050, assuming that world population was stabilising at 9 billion by that time. Even more ambitious decoupling goals would be necessary if those 9 billion people were reaching European wealth levels. All this sounds truly depressing. But it is difficult to argue against.

Is there no hope then? Well, I suggest there is, but it would come from policies so far not considered: the systematic elevation of prices of carbon emissions and indeed energy – acknowledging that huge quantities of renewable energies can also become ecological nightmares. The long term price elasticity is very high – only the short term price elasticity is low – and that has scared politicians out of any attempt of artificially raising energy prices.

A long term price trajectory is actually proposed in the book "Factor Five: Transforming the Global Economy through 80% Improvements of Resource Productivity," suggesting that price increases in parallel with efficiency gains, so that the average monthly cost for energy use would remain stable. Some special measures could take care of social and industrial concerns. Predictably raising energy or carbon prices would boost efficiency technologies and make daily habits that dramatically reduce energy demand reasonable. Then, some of the mathematical assumptions behind Hoffmann's arguments would implode. European wealth standards could be reached at much lower levels of energy use. But Hoffmann is not to be blamed for not considering policies that have not yet reached the pragmatic political arena. In fact, his study could trigger new thinking in the political arena, focused on shifting subsidies from the big polluters to stimulate their rapid exit from climate-destroying operations.



**Ernst Ulrich von Weizsäcker**  
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FISHERIES

# The fairy tale of US “dolphin safe” labelling: False claims, unintended consequences

Mark J. Robertson

*Tuna-Dolphin is one of the best-known and most controversial environment-related cases in the history of the multilateral trade regime. In this article, Mark J. Robertson takes aim at what he calls Washington's “unsustainable” and “indefensible” dolphin-safe labelling policy.*

Once upon a time in the 1960s, '70s, and '80s, the US fleet dominated in the Eastern Tropical Pacific (ETP) tuna “purse seine” fishery and millions of dolphins were estimated to have been killed as a side effect to standard fishing practices. The mile-long nets used by purse seine fishing fleets encircled pods of dolphins as a strategy for capturing the tuna swimming beneath them. They did so without a comprehensive set of effective procedures, knowledge, training, or gear to safely release the dolphins before hauling in the tuna.

In the mid-1980s, the US fleet began its wholesale migration from the ETP to new fishing grounds in the Central and Western Pacific, and as a concerted multilateral cooperative effort to reduce incidental dolphin mortality began to take shape, mortalities in the ETP began to decline dramatically. Nevertheless, by the end of the 1980s, dolphin mortalities remained unacceptably high from a public and political perspective, leading to the passage in 1990 of the US Dolphin Protection Consumer Information Act – the “dolphin safe” labelling law. Under this law and other amendments to the Marine Mammal Protection Act, any tuna caught in the ETP on a vessel trip in which any sets were made on tuna in association with dolphins was deemed non-dolphin safe and embargoed from import into the United States. As is described in detail below, the U.S. consumer is being deceived today as to the true dolphin safe status of the tuna bearing the dolphin safe label.

Mexico challenged this embargo in dispute settlement proceedings under the General Agreement on Tariffs and Trade (GATT). Mexico prevailed when a GATT panel ruled in September 1991 that the US measure imposing the import ban was inconsistent with its GATT obligations. Mexico chose, however, not to seek implementation of that GATT ruling. In any event, under the rules of the multilateral trading system as they were at that time, the United States would have been able to block the implementation of the ruling by refusing to join in a consensus to adopt it.

Meanwhile, multilateral cooperation towards improving the International Dolphin Conservation Program (IDCP) in the ETP continued to evolve. In 1992, under the auspices of the Inter-American Tropical Tuna Commission – the treaty organisation established in 1949 to manage the ETP tuna fishery – the US, Mexico, and eight other countries participating in the fishery adopted the La Jolla Agreement (33 I.L.M. 936, 1994). The La Jolla Agreement formalised the IDCP into a comprehensive but voluntary program that included advanced dolphin safety gear, techniques for release of dolphins from the nets, prohibitions on fishing after sunset, training for captains and crews, and, for the first time in any international fishery, 100 percent on-board coverage by independent scientific observers.

Importantly, the Agreement also locked-in targets for further reductions in dolphin mortality – from the 1992 level of 15,539 to less than 5,000 within five years. In 1993, the first year of full implementation of the La Jolla Agreement, dolphin mortalities had already been reduced to below 3,600, and they have remained well below that level ever since. To put that number into context, the total estimated population of the three main dolphin stocks in the ETP that are associated with the fishery is greater than 6.5 million.



## Abbreviations

### ETP

Eastern Tropical Pacific

### IDCP

International Dolphin Conservation Program

### IDCPA

International Dolphin Conservation Program Act

### AIDCP

Agreement on the International Dolphin Conservation Program

### FADs

Fish Aggregating Devices

### ICCAT

International Commission for the Conservation of Atlantic Tunas

### WCPFC

Western and Central Pacific Fisheries Commission

### MMPA

Marine Mammal Protection Act

### DSP

Dispute Settlement Panel

In 1995, since the problem of exceedingly high levels of fishery-related dolphin mortality in the ETP had successfully been addressed by and sustained through the voluntary La Jolla Agreement, Mexico began working with responsible conservation organisations such as WWF, Environmental Defense, Greenpeace, National Wildlife Federation and Ocean Conservancy. The purpose was to transition the focus in the ETP from single-species (dolphin) management to one that manages all living marine resources in the ecosystem, with an emphasis on dolphins. A key concern leading to the change was recognition of the high level of destructive bycatch – non-target species caught unintentionally – and discards of living marine resources associated with so-called “dolphin safe” fishing, as defined by the United States policy, on fish aggregating devices (FADs).

The use of FADs has proven to be quite controversial. Studies by the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Western and Central Pacific Fisheries Commission (WCPFC) in 2009, the University of Hawaii (2008) and many others have all raised significant concerns that the strong tendency of juvenile yellowfin and bigeye tunas to associate with the devices is having a particularly significant negative impact on their abundance status.

### Comparative Annual Bycatch and Discards of Main Fishing Methods in the ETP

| Species of Bycatch                 | Dolphin Associated Sets | FAD Sets           |
|------------------------------------|-------------------------|--------------------|
| Dorado                             | 727                     | 327,179            |
| Rainbow Runner                     | 120                     | 42,900             |
| Yellowtail                         | 0                       | 48,192             |
| Wahoo                              | 178                     | 126,929            |
| Trigger Fish                       | 841                     | 144,021            |
| Other Small Fish                   | 321                     | 139,839            |
| Sharks and Rays                    | 1,952                   | 42,141             |
| Sea Turtles                        | 0                       | 5                  |
| Tuna Bycatch (including juveniles) | 534 metric tons         | 20,567 metric tons |

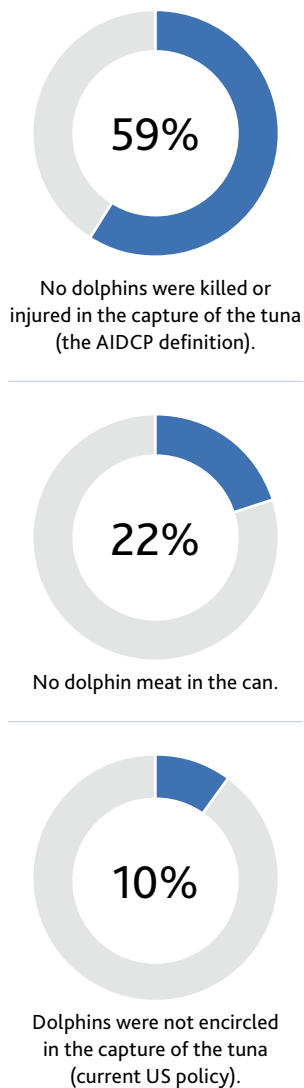
Source: 2008 Annual Report of the Inter-American Tropical Tuna Commission

The other important objective of the collaborative 1995 effort was to lock in and improve upon the dramatic success of the La Jolla Agreement by making compliance mandatory for the fleets of nations participating in the ETP. The US joined this effort, and the 15 nations participating in the fishery, including the European Union, Spain, Ecuador, Venezuela, Costa Rica, Colombia, and Panama, agreed to the Declaration of Panama in October of 1995. By this time virtually the entire US fleet had migrated to the Central and Western Pacific under regulatory pressures of the MMPA. This was facilitated by the multilateral treaty on fisheries between the US and the Pacific Island States, which provided permits for the US fleet to fish in the exclusive economic zones of 16 Pacific Island States in exchange for annual foreign assistance payments from the US. Annual US payments to the Pacific Island States under the Treaty have averaged some US\$18 million since 1987.

The preamble of the Declaration of Panama called for the negotiation and adoption into law and regulation by all Parties of a new legally binding multilateral agreement not only for the protection of dolphins, but also to “reduce and minimize the bycatch of juvenile yellowfin tuna and bycatch of non-target species, in order to maintain the long-term sustainability of all these species, taking into consideration the interrelationships among species in the ecosystem.” In that same preamble, the Declaration, to which the US was a signatory, stated that the adoption of the legally binding instrument was “contingent upon the adoption of changes in United States law as envisioned in Annex I to this Declaration.” Annex I detailed the commitment of the US to lift the embargoes and change the definition of dolphin safe from a “method of capture” standard to a “non-mortality or serious injury” standard.

## Dolphin safe labels

How do US consumers interpret them?



Source: Public Opinion Strategies

In July of 1997, after a long debate, the United States enacted the International Dolphin Conservation Program Act (IDCPA), which amended the MMPA law. This legislation "gave effect to" the Declaration of Panama, including providing for the requisite change in the definition of dolphin safe in accordance with Annex I of the Declaration. In April of 1998, the nations participating in the ETP tuna fishery signed the Agreement on the International Dolphin Conservation Program (AIDCP), a treaty which became effective in February of 1999. The US definition of dolphin safe was changed for three weeks in 2003 before being stayed and then permanently reversed by a US court. This is where the situation remains today.

The other parties have either fully implemented or conditionally applied the legally binding mandates for dolphin protection under the AIDCP, while the United States has failed to fulfil its commitments to rationalise the definition of dolphin safe. The US market remains effectively closed to tuna from Mexico and others not willing or able to change their method of fishing to one recognised as "dolphin safe" under the unilateral US label, principally FAD fishing. Mexico challenged this before the WTO (DS381), and a Dispute Settlement Panel handed down its decision in November 2011. The decision is currently on appeal before the Appellate Body (for more on the legal aspects of the case, see Bridges Trade BioRes Review, [Volume 5, Number 3](#)).

In the course of the WTO case, the Dispute Settlement Panel (DSP) considered all of the evidence and determined that US consumers were being misled as to the true "dolphin safe" status of tuna bearing the dolphin safe label in the market today. The DSP determined that consumers would benefit from additional information and choices that would result from allowing AIDCP Dolphin Safe tuna into the US market. The US has conceded the fact that tuna sourced from outside the ETP and eligible to carry the "dolphin safe" label in the US market today does not necessarily mean that the tuna was caught without mortality or serious injury to dolphins – or even with independently verified proof that the tuna was caught without encirclement of dolphins. In fact, Mexico provided extensive scientific evidence, cited by the DSP in its decision, that not only were non-ETP fleets intentionally setting on dolphins, but that there is quite regular and very significant mortality and serious injury to dolphins in global tuna fisheries, including in the Central and Western Pacific, home to the US fleet and the source of the vast majority of tuna sold in the US market.

*The current US label is not only misleading to consumers, but it is outright deceptive given that there is regular and very significant mortality and serious injury to dolphins associated with the tuna covered by the US label.*

Indeed, a report issued by the Western and Central Pacific Fisheries Commission estimates that as many as 1195 dolphins were killed in tuna fishing operations in that ocean region in 2009, with a very limited level of independent observer coverage. Disregarding what might have happened in the large proportion of unobserved operations, this is approximately the same as the number killed in the ETP that same year. Yet tuna from the Western Pacific is eligible to be labelled dolphin-safe in the US market.

According to two nationwide polls conducted by Public Opinion Strategies over the past decade, 59 percent of US canned tuna consumers said they thought the definition of "dolphin safe" meant that no dolphins were killed or injured in the capture of the tuna (the AIDCP definition). The polls also found that 22 percent tuna consumers thought the label indicated that there was no dolphin meat in the can; and only 10 percent thought it meant that dolphins were not encircled in the capture of the tuna (the currently applied US policy). The current US label is not only misleading to consumers, but it is outright deceptive given that there is regular and very significant mortality and serious injury to dolphins associated with the tuna covered by the US label.

From the Declaration of Panama's adoption in 1995, up until the US court reversed the change in the dolphin safe definition in 2003, the US government had vigorously defended the international program now in place under the AIDCP. In fact, then-Vice President Al Gore led the Clinton Administration effort in 1997 to allow Mexican tuna to enter the US market labelled as dolphin safe. This effort was sustained throughout the political and legal battles to implement the AIDCP commitments. This US posture changed 180 degrees in defence of the current labelling requirements before the WTO.

AIDCP-certified dolphin safe tuna is backed up by a transparent, legally binding multilateral program, verified by an on-board independent scientific observer for 100 percent of vessel trips and sets of nets. It is further supported by a comprehensive tracking and verification program that tracks tuna from the moment it is captured all the way through processing and to the grocery store shelves. It truly ensures consumers that no dolphins were killed or injured in the capture of the tuna contained within that particular can. For non-ETP tuna products, representing more than 90 percent of the tuna in the US market today, the US rules provide no such assurance; in fact, there is no requirement for even self-certification that no dolphins were killed or injured in the harvesting of non-ETP tuna.

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*By maintaining a single misleading and deceptive dolphin safe standard, the US precludes the fully verifiable, multilateral AIDCP Dolphin Safe label from entering the market to more fully educate consumers.*

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In maintaining their measure in its current form, the US continues to maintain an effective barrier to market access against the 96 percent of Mexican tuna products that are "AIDCP Dolphin Safe." In addition, by maintaining a single misleading and deceptive dolphin safe standard, the US precludes the fully verifiable, multilateral AIDCP Dolphin Safe label from entering the market to more fully educate consumers and give them a competitive choice as to what level of marine mammal protection and fishery stock sustainability they wish to support through their purchase.

Importantly, leading international environmental NGOs are seeking strict controls on FAD fishing given its well-demonstrated adverse impact on ocean ecosystems, including dolphin mortalities from tuna fishing in other oceans. The US itself is focusing on sustainability of fisheries through reductions in bycatch and discards. Meanwhile, the US is maintaining and defending its current dolphin safe policy, effectively mandating that anyone wanting to effectively access the US market with a dolphin safe label must fish on FADs.

If the US is successful in maintaining this unsustainable and indefensible policy, there will be no "happily ever after" under the AIDCP or any other international fisheries agreement that must rely on its parties to fulfil their obligations and commitments. It will also serve to undermine the balance between trade and the environment and multilateral cooperation in the protection of international resources. Finally, dolphins in ocean regions other than the ETP will be left unprotected by the US "dolphin safe" policy, as they are currently.



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NATURAL RESOURCES

# An impossible relationship? Article XX GATT and China's accession protocol in the *China – Raw Materials* case

Elisa Baroncini

*In this article, Elisa Baroncini delves into the recent WTO AB ruling on the China – Raw Materials case with specific reference to the applicability of Article XX GATT to Paragraph 11.3 of China's Accession Protocol. The article proposes a different construction of the relation between the two pieces of WTO legislation, deeming such an interpretative outcome more in harmony with the object and purpose of the WTO system, in particular with the principle of sustainable development.*

On 30 January, the WTO Appellate Body (AB) handed down a long awaited ruling in the dispute brought by the US, the EU and Mexico against several export restrictions imposed by China on raw materials. The AB concluded that there is no basis in the China Accession Protocol (the Protocol) to allow the application of Article XX GATT to Paragraph 11.3, the WTO-plus provision of the Protocol requiring Beijing to eliminate export duties. The AB's interpretative result runs the risk of strengthening what is increasingly perceived as an irrational aspect of the multilateral trade system that is also difficult to reconcile with the principle of permanent sovereignty over natural resources. This article proposes a different coordinated reading between Paragraph 11.3 of the Protocol and the GATT general exceptions' clause – one that is more likely to produce an interpretative outcome in harmony with the principle of sustainable development enshrined in the Preamble of the WTO Agreement.

## China WTO-plus obligation to eliminate export duties

The 2001 China Accession Protocol contains the largest number of "WTO-plus" obligations – the more stringent disciplines imposed on WTO acceding members going beyond the commitments generally undertaken by the WTO membership. Among such special obligations there is the severe regime on the elimination of export duties. Pursuant to Paragraph 11.3 of the Protocol, "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994." While the latter concerns fees and charges imposed as payment for a service rendered, Annex 6 of the Protocol lists 84 products – mainly raw materials – indicating for each of those goods the maximum export duty rate that Beijing may impose as export tariff. A Note to Annex 6 reaffirms that "the tariff levels included in this Annex are maximum levels which will not be exceeded," pointing out that "China ... would not increase the presently applied rates, except under exceptional circumstances."

China infringed Paragraph 11.3 by imposing export duties on products not listed in Annex 6 of the Protocol – including coke, various types of metal scraps, and some forms of fluorspar. It therefore requested to justify those export duties on the basis of Article XX(b) and (g) GATT, considering that those tariff measures were "necessary to protect human, animal or plant life or health," and "relating to the conservation of exhaustible natural resources."

Beijing claimed that the attacked measures were part of a unitary environmental strategy also addressing the objective of reducing the pollution emitted when the raw materials are extracted or produced, in order to decrease the risks to human, animal, and plant life and health in accordance with Article XX(b) GATT. With regard to export duties adopted as conservation measures, China argued that they are an expression of its sovereign right to elaborate and implement a wide-ranging mineral conservation policy, bearing in mind China's special social and economic development needs. Beijing stressed that Article XX(g) GATT, devoted to the preservation of exhaustible natural resources, protects the principle of sovereignty on the latter, observing that the sovereign right on natural

## WTO Agreement Preamble

*"[WTO members'] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."*

resources, sheltered by Article XX(g), has to be exercised in the light of the principle of sustainable development enshrined in the WTO Preamble.

Since the Panel Report concluded that "the wording and the context of Paragraph 11.3 precludes the possibility for China to invoke the defence of Article XX of the GATT 1994 for violations of the obligations contained in Paragraph 11.3 of China's Accession Protocol" (para. 7.158), Beijing asked the AB to reverse the finding, being convinced of the erroneous nature of the Panel's assumption "that the absence of language expressly granting the right to regulate trade in a manner consistent with Article XX means that China and other members intended to deprive China of that right" (AB Report, para. 28).

### Text and context in the AB interpretation

After having reported that the Protocol has to be considered "an integral part" of the WTO Agreement, and thus interpreted in accordance with the customary rules of interpretation of public international law, as requested by Article 3.2. of the DSU, the AB expressly recalled Article 31 § 1 of the 1969 Vienna Convention on the Law of Treaties, pursuant to which "a treaty [has to] 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," beginning its analysis with the text of Paragraph 11.3 of the Protocol.

In few lines, the AB concluded that the absence of indications, in the wording of the WTO-plus obligation, on the applicability of Article XX GATT, together with the lack of any introductory clause similar to that of Paragraph 5.1 of the Protocol –pointing out that the right to import and export goods has to be guaranteed to all enterprises established in China "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement"- "suggest ... that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3 of China's Accession Protocol" (para. 291), finding it "difficult to see how [the WTO-plus obligation] language could be read as indicating that China can have recourse to the provisions of Article XX of the GATT in order to justify imposition of export duties on products that are not listed in Annex 6 or the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6" (para. 284).

Turning to the immediate context – Paragraph 11.1 and Paragraph 11.2 of the Protocol – the AB highlighted that Beijing guaranteed to WTO Members the application and administration of customs fees or charges and internal taxes and charges "in conformity with the GATT 1994," a phrase which is absent in Paragraph 11.3, specifically referred to the elimination of "taxes and charges applied to exports." Such silence, the AB argued, "further supports our interpretation that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3;" in fact, went on their reasoning, as China's WTO-plus obligation "arises exclusively from China's Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China's Accession Protocol" (para. 293).

Finally, taking into consideration the WTO Preamble, the AB recalled that it contemplates various objectives, including "raising standards of living ... seeking both to protect and preserve the environment ... expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development," and ending with the resolution "to develop an integrated, more viable and durable multilateral trading system." Surprisingly, and without any further consideration or legal reasoning, the AB instantly affirmed that "none of the [considered] objectives, nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT is applicable to Paragraph 11.3 of China's Accession Protocol"; and it is because of such asserted absence of "specific guidance," in light of Beijing "explicit commitment" to eliminate export duties and "the lack of any textual reference to Article XX" in the China WTO-plus obligation, that the AB

## Raw materials in question

### bauxite

source of aluminium

### coke

used in production of iron

### fluorspar

multiple ornamental and industrial uses

### magnesium

commonly used in alloys

### manganese

commonly used in alloys, especially stainless steel

### silicon carbide

often used in abrasives and electronics

### silicon metal

used in aluminium casting

### yellow phosphorus

used in fertilisers

### zinc

used in galvanising and production of brass and bronze

concluded to "see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3" (para. 306).

### Effects of the AB conclusions

The austere AB interpretative approach unfortunately produces a series of negative consequences. First of all, it renders the WTO-plus obligation to eliminate export duties "immune"<sup>1</sup> from any GATT policy exception, while even the pillars of trade liberalisation – the MFN clause, the principle of national treatment – may be derogated by domestic measures necessary or related to the protection of one or more of the non-trade values enshrined in the WTO general exceptions clauses. It therefore aggravates the asymmetry already characterising the WTO-plus commitments, an asymmetry which is difficult to correct by amending the multilateral trade texts, as it is by no means clear which procedure should be followed to revise Accession Protocols, nor is it simple to satisfy the very demanding decisional mechanism – provided for by Article X of the WTO Agreement – should it be concluded that the WTO amending procedure has to be applied to modify WTO-plus obligations accepted by the WTO acceding countries.

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*The austere AB interpretative approach unfortunately produces a series of negative consequences.*

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Additionally, the AB interpretation generates another "illogical result."<sup>2</sup> Being barred from using export duties – even though customs duties are considered the less distorting and the most transparent obstacle to trade, and thus the preferred tool to have recourse to by a WTO Member in need to apply a trade remedy – China is forced to resort to (severely trade distorting) bans and quotas in order to pursue its national environmental, conservation and health policies.

More generally, the impossibility to apply Article XX GATT to Paragraph 11.3 of the Protocol appears to be in contrast with the principle of sustainable development codified in the WTO Preamble and the model of sustainable economic development pursued by the Geneva-based multilateral trade system, where no trade liberalisation commitment is absolute, but may be derogated, obviously respecting the requirements of the general exceptions clauses, while pursuing the non-trade values therein contemplated.

### Suggestions for a different interpretative perspective: the text of Paragraph 11.3 of the Protocol

Having highlighted the serious undesirable and controversial consequences that the recent Geneva case-law provokes, it may be easily stated that the inability of the WTO judiciary to mitigate the inequity among WTO Members generated by the stand-alone export concessions, more than being "perceived as imbalanced" (Panel Report, para. 7.160), leads to what Article 32, lett. b) of the Vienna Convention defines as "a result which is manifestly absurd [and] unreasonable."

Such an unsatisfying scenario imposes an in-depth review of the problematic interpretative path that the AB has decided to embark upon. It is, in fact, possible to define a connection between Paragraph 11.3 of the Protocol and Article XX capable of allowing China to invoke the GATT public policy exceptions for justifying derogations to the obligation to eliminate export duties beyond the goods listed and the limits contemplated in Annex 6 of the Protocol.

Starting with the text of Paragraph 11.3, it is true that there is no reference to the GATT, but it is also accurate to say that there is no express exclusion of the possibility to invoke the GATT public policy exceptions. The certainly improvident silence of the negotiators cannot be automatically transformed into the most stringent and unequivocal prohibition of having recourse to the GATT general exceptions clause. This is all the more so if – as required by Article 31 § 3 lett. c) of the Vienna Convention, according to which a treaty interpreter has to take into account "any relevant rules of international law applicable in



the relations between the parties"- due consideration is given to the principle of permanent sovereignty over natural resources. Pursuant to this most relevant principle of customary law, all peoples are now recognised to have the right "for their own ends [to] freely dispose of their natural wealth and resources" (Articles 1.2 of the 1966 UN Covenants) and the State has to responsibly exercise sovereignty in order to manage natural resources in the best interest of its population. While, in light of this principle, it is acceptable that a WTO Member reduces its policy space in the management of its natural resources by agreeing to the WTO-plus obligation to reduce and/or eliminate export duties on them, the silence accompanying such special commitment cannot be interpreted as an eternal abdication by a state to dispose of the national resources of its own population by using export duties under the GATT general exceptions clause.

Accordingly, the scope of the two ad hoc exceptions to the obligation to eliminate export duties expressly contemplated in Paragraph 11.3 of the Accession Protocol should be reconstructed just in light of the wording of that Paragraph: negotiators clarified that the severe WTO-plus discipline does not concern charges imposed as payment for a service rendered (Article VIII GATT), nor does it affect the 84 products listed in Annex 6 of the Protocol, as export duties may still be levied on those goods, within the limits of the export duty rates provided for in that Annex. These clarifications cannot be read as expressing China renouncing to the right to have recourse to Article XX GATT with reference to the right to impose export duties on products not contemplated in the list of Annex 6, or to overcome the export duty rates contemplated for the 84 products quoted in Annex 6. Of course, this assumes that all the requirements imposed by the GATT general exceptions clause are respected, in primis the condition that the extra export duties pursue one of the non-trade values contemplated in Article XX.

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*The wording of the relevant parts of the Protocol does not allow one to conclude that China abandoned the relevant right to avail itself of the GATT public policy exceptions.*

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Undeniably there is also the Note to Annex 6 to take into consideration, pursuant to which "China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded," and "that it would not increase the presently applied rates, except under exceptional circumstances." But, again, such text just indicates that China undertook an additional obligation with reference to the 84 products listed in Annex 6: Beijing accepted not to raise the export duty rates applied on those products at the moment of acceding to the WTO, if those rates were lower than the rates fixed in the Annex; and it was agreed that China could derogate to such further commitment only "under exceptional circumstances." Once more, the wording of the relevant parts of the Protocol does not allow one to conclude that China abandoned the relevant right to avail itself of the GATT public policy exceptions. Certainly, it is still to be ascertained the precise scope of the "exceptional circumstances" outlined in Annex 6, an activity which will require a further very delicate and sensitive interpretation. It is therefore to be underlined that, in the *China – Raw Materials* case, all the Beijing export duties considered to have violated Paragraph 11.3 of the Protocol –and thus "looking for" being justified under Article XX of the GATT- were raised on products not listed in Annex 6 of the Accession Protocol, so that, also for space reasons, no further considerations will be reserved here on the "exceptional circumstances" expression introduced into the Note to Annex 6.

#### **The WTO Preamble and the object and purpose of the WTO system**

Turning now to examine the immediate context, this should be read always keeping in mind that Paragraph 11.3 disciplines a WTO-plus obligation. It is thus only normal that the prescriptions expressed there – being sui generis and not reflecting the GATT fees, charges or internal taxes contemplated in Paragraph 11.1 and Paragraph 11.2 in order

to reaffirm those traditional multilateral trade obligations with reference to the new WTO Member – are not accompanied by the expression “in conformity with GATT.” The General Agreement does not refer to any general obligation to eliminate export duties. Consequently, the silence of Paragraph 11.3 should be considered due to the fact that the GATT does not contain special principles or disciplines to be respected by China when implementing the WTO-plus obligation to eliminate export duties; it has hence to be concluded once again that that silence does not express China's renunciation to resort to Article XX for justifying derogations to the Paragraph 11.3 commitment.<sup>③</sup>

Enlarging the analysis of the context to the WTO Preamble, it is finally possible to impart a positive meaning to the silence of Paragraph 11.3 of the Protocol, a positive meaning that may also be tested in light of the “object and purpose” characterising the whole WTO system, and synthesised in the already recalled WTO Preamble. Far from being the final target of the Marrakesh Agreements, trade liberalisation is conceived and regulated within the WTO system as a tool “to rais[e] standards of living,” constantly to be pursued “allowing for the optimal use of the world's resources,” and “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.” Trade liberalisation commitments are consequently disciplined in the Geneva-based multilateral system not as absolute duties and prohibitions, impossible to derogate, but as obligations which may be overcome to pursue the non-trade values contemplated in many WTO rules, in particular in the general exceptions clauses, respecting all the requirements and the equilibrium among conflicting needs and concerns expressed by those multilateral provisions. The attention devoted by the WTO Preamble to environmental protection and the optimal use of natural resources, together with the explicit acknowledgement of the principle of sustainable development, evidently reveal that the signatories of the multilateral trade agreements chose a model of economic development capable of being sustainable – constantly conjugated with the respect of the environment and social progress. Since the WTO Preamble informs all the covered agreements – hence also Accession Protocols as integral parts of the WTO system – the meaning of Paragraph 11.3 has to be construed in order to be a coherent expression and articulation of the principles therein enshrined, and a proper implementation of the model of sustainable economic development therein shaped.

It follows that the text of Paragraph 11.3, read in the light of the context of the WTO Preamble, and the object and purpose of the WTO system, unequivocally indicates that China, while accepting the WTO-plus obligation to eliminate export duties, did not relinquish its right to regulate trade in a manner that promotes conservation and public health also through the adoption of export tariffs, should these measures prove to be the most appropriate tools to realise its legitimate public policy purposes.

It may therefore be concluded that Article XX GATT is applicable to the WTO-plus obligation accepted by China to eliminate export duties. In fact, attributing this meaning to the silence of Paragraph 11.3 of the Protocol is the only interpretative outcome capable of being in harmony with the principles and the model of sustainable economic development promoted by the WTO system, which provide “specific guidance” to the treaty interpreter applying all the hermeneutic criteria expressed by the international customary rules on the interpretation of treaties.



**Elisa Baroncini**

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① Julia Ya Qin, *Reforming Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection*, March 2012, <http://bit.ly/lrCZ0g>, at p. 10.

② See, with reference to the applicability of Article XX of the GATT 1994 to the SCM Agreement, Robert Howse, *Climate Mitigation Subsidies and the WTO Legak Framework - A Policy Analysis*, IISD Paper, May 2010, at p. 17.

③ For this aspect see also Hannes Schloemann, *China – Raw Materials – Some Observations*, Power Point Presentation, ICTSD/WTO Advisors, Talking Disputes Vol. 2 - The *China – Raw Materials* Case, Geneva, 20 July 2011.

## *The newsroom*

### Aviation emissions scheme under fire

The storm of opposition against the EU's controversial decision to charge all incoming and outgoing commercial airlines for their in-flight carbon emissions continues to intensify. On 22 March India fell in line with fellow BRIC China by announcing its refusal to allow national airlines to comply with the Emissions Trading Scheme (ETS).

The Asian manufacturing giants say the aviation scheme overreaches Brussels' jurisdiction and represents a unilateral trade levy disguised as an attempt to fight climate change.

"Though the European Union (EU) has directed Indian carriers to submit emission details of their aircraft by March 31, 2012, no Indian carrier is submitting them in view of the position of the government," Ajit Singh, India's civil aviation minister, told reporters.

India has also suggested that the aviation policy is a "deal breaker" for global climate talks, where common ground between developed and developing countries has proven to be tenuous.

The inclusion of aviation under the scheme is also attracting controversy at home, with the CEO's of several European airlines issuing a letter in March to political leaders outlining their concerns. Comments in a recently-released letter from French Prime Minister François Fillon caused a stir when some pundits interpreted them as support for those critical of the scheme.

"It seems absolutely vital that the EU...deploy every effort necessary to find mutually acceptable solutions with the third-party countries," reads the letter addressed to European Commission President José Manuel Barroso. Other observers have since dismissed suggestions that the letter is proof France is wavering in its support for the inclusion of aviation.

China has recently announced a new national plan to cut aviation emissions, which it says would make Chinese airlines exempted. The EU ETS does not require countries with "equivalent measures" to participate in the scheme.

EU Climate Commissioner Connie Hedegaard says the bloc's delegation in Beijing is looking into the plan.

### Trade deal expected despite "dirty" oil row

The EU's recent announcement that it will delay making a decision on its controversial Fuel Quality Directive until early 2013 appears to ensure the issue will not stand in the way of wrapping up its Comprehensive Economic and Trade Agreement (CETA) with Canada.

The Directive is intended to help EU member countries meet emissions targets by assigning values to more or less polluting fuels. Fuel sourced from Canada's controversial oil sands, for example, would be assigned a higher value than traditional crude oil.

While Canada has denied any connection between the fuel scheme and the trade pact, a communiqué from Canada's ambassador to the EU, leaked earlier this year, says Canada will "defend its interests" at the WTO if necessary.

Brussels and Ottawa say they expect to finalise the details of the trade deal by year's end.

### Common ground scarce as Rio+20 draws nearer

The Rio+20 preparatory process has moved forward in recent months, with delegates holding several meetings to help consolidate a draft outcome document for the June meeting. The process, however, continues to be the subject of controversy, with many observers noting a conspicuous lack of convergence on negotiating positions.

Others have noted that the abundance of issues on the agenda – 26 official meeting priorities – could be setting the meeting up for failure. Denmark's development minister, Christian Friis Bach, called the meeting "a Christmas tree overloaded with candles and decorations."

UN Secretary-General Ban Ki-moon has been working diligently to ensure as many heads of state as possible attend the Rio conference, to avoid "meeting fatigue," and to keep the event on track.

US President Barack Obama, however, has not confirmed his attendance at the sustainable development meet, despite Ban calling his presence "crucial."

## "Reasonable" price for rare earths?

Beijing has established a rare earths industry association to regulate the sector and help respond to trade complaints, government officials announced in April. The move came a month after the US, Japan, and EU launched a WTO challenge against China's controversial export restrictions.

According to China's Ministry of Industry and Information Technology (MIIT) the new association will coordinate mining, smelting, and processing and work to form a "reasonable price mechanism" for the precious materials.

In recent years, China has imposed strict environmental standards and export quotas on the scarce elements, which are crucial to the manufacturing process of many high-tech and green energy products.

While Beijing argues that the measures are necessary to mitigate the environmental damage caused by the elaborate extraction process, critics say the restrictions offer Chinese competitors an advantage by providing them with cheaper and easier access to the elements compared with foreign manufacturers.

The new 155-member association is also expected to help coordinate China's responses to trade complaints regarding rare earths.

## EU misses deadline for climate fund seats

EU member states will have to negotiate directly with other developed countries to determine the makeup of the UNFCCC's Green Climate Fund (GCF), as ambassadors have failed to reach an agreement on a joint European proposal before the 31 March deadline.

The governing board of the GCF will be composed of 24 permanent seats split evenly between developed and developing countries. An additional twenty-four seats that will rotate amongst members.

The fund's first board meeting is tentatively set for 25-27 April, but some analysts say the uncertainty surrounding the composition of the board may cause a delay. With the fund scheduled to launch in 2013, European leaders have expressed concern that further delay will damage the EU's legitimacy in the global fight against climate change.

Current EU president Denmark has said that the nominations will be held off until member states have had an opportunity to negotiate with other developed countries.

## WTO delves into Canada renewables case

The legality of government support for renewable energy initiatives took centre stage in Geneva on 27 March, with a WTO dispute panel hearing opening arguments in cases launched by Japan and the EU over the Canadian province of Ontario's local content requirements tied to its scheme to boost the renewable energy sector.

Ontario's feed-in tariff (FIT) scheme aims to increase the share of renewable energy in the province's electricity mix by insulating green energy producers from risks, and facilitating investments that would otherwise be costly. While Ottawa maintains that the programme is necessary to incentivise clean energy generation, Brussels and Tokyo are concerned over the programme's subsidising effect.

Japan and the EU argue that the FIT's domestic content requirements violate the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). They also assert that the measures violate the national treatment requirements of the General Agreement on Tariffs and Trade (GATT) and are inconsistent with the Agreement on Trade-Related Investment Measures (TRIMs Agreement).

Canada, however, counters that the FIT programme is compliant because it is a form of government procurement designed to ensure the affordable generation of clean energy in Ontario.

While a confidential interim report may be submitted to the parties as early as next month, a public ruling is not expected before late October.

## US proposes duties on Chinese solar panels

The US Commerce Department has recommended that duties be applied to solar panel imports from China, after finding that Chinese manufacturers receive unfair government support. While the suggested duties were far below the complainants' requests, the decision is expected to increase tensions between Beijing and Washington.

The 20 March announcement came in response to an October complaint from the Coalition for American Solar Manufacturing (CASM), a group of seven solar panel manufacturers that had together petitioned Washington to investigate Chinese solar imports.

The duties must be confirmed both by the US Department of Commerce and International Trade Commission (ITC). If the final determinations are affirmative, the US may enforce the duties as of 26 July.

## Fishing nations butt heads over South China Sea

Tensions are running high in Asia as the Philippines and China argue over fishing rights in the South China Sea. Disagreement over the Scarborough Shoal – which both countries claim as their own – has led to a protracted standoff, with Chinese vessels ordering a Filipino coast guard ship to leave the area.

The latest row erupted on 10 April when a Filipino war ship attempted to arrest Chinese fishermen, accusing them of poaching endangered species including giant clams.

Authorities in Manila say the standoff is a small indication of the territorial implications of the South China Sea, which Beijing claims virtually in its entirety.

The Sea, which has been the source of a number of territorial rifts between China and other countries, accounts for about 10 percent of the annual global fisheries catch. It is also believed to have significant oil and gas deposits.

Manila has asked Beijing to bring its disputes to the UN for arbitration, but Chinese officials say they prefer to negotiate with other claimants individually.

## UNFCCC shortlists Technology Centre proposals

The UNFCCC Secretariat has released the report on the evaluation of proposals for hosting the Climate Technology Centre (CTC). The Centre and the Technology Executive Committee (TEC) are part of the Technology Mechanism, which was established at COP 16 in Cancun.

The report presents an assessment by the evaluation panel of the proposals and provides a ranked shortlist of three that met the minimum thresholds: a consortium led by the UN Environment Programme (UNEP), Washington-based Global Environment Facility (GEF), and Norway's Det Norske Veritas.

Six other proposals from organisations based in China, Costa Rica, Germany, India, Indonesia, and Iran did not make the short list. The report identifies the criteria for the evaluation and highlights the strengths and weaknesses of the proposals, in particular those shortlisted.

With the facilitation and coordination of technology transfer at the core of its function, the CTC has an array of trade-related dimensions. The shortlist will be proposed to the Subsidiary Body for Implementation (SBI) for consideration at the UNFCCC's 14-25 May mid-year meeting in Bonn, Germany.

## Environment concerns as Burma trade sanctions lifted

Environmental groups are welcoming moves by Western governments to lift long-standing trade sanctions against Burma, but are urging them to ensure exports are sourced sustainably. The Southeast Asian country is widely known as a hot-spot for illegal logging and environmentalists caution that the appropriate infrastructure for a sustainable forestry sector is not yet in place.

Experts say the recent move toward normalised trade relations by major economies – including Canada and the EU – is likely to lead to an influx of interested companies in search of the country's bounty of natural resources, such as oil, gas, timber, and gemstones.

London-based green group Environmental Investigation Agency (EIA) says decades of military rule has gutted the checks and balances needed to verify environmentally-sound timber harvesting, mining and oil extraction.

"After half a century of corruption and rule by the military and their business associates, Burma simply has no credible infrastructure through which we can verify the legality and sustainability of its timber exports," said Faith Doherty, the EIA's head of forests.

## Indirect cost of conventional biofuels highlighted in new study

The indirect effects of using conventional biofuels as a fossil fuel substitute outweigh their purported carbon dioxide emissions benefits and as such should not be considered a long-term alternative fuel, according to a new report commissioned by the EU.

The draft EU report, focussing on the cost effectiveness of policies and options for decarbonising transport, is the latest in a series of reports that have called the environmental benefits of biofuels into question. The latest study will provide further ammunition to those who challenge the purported environmental benefits of first-generation or "conventional" biofuels – those made from sugar, starch, and vegetable oils.

The study finds that when the indirect costs of reducing Europe's carbon emissions with conventional biofuels are considered – such as deforestation for crop space – they are not cost effective as they lead to greenhouse gas emissions exceeding those of fossil fuels.

Some experts say the study and others like it are forcing lawmakers to re-examine the desirability of using biofuels as a means to reduce emissions.

## Publications and resources

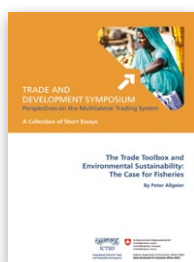


### **Technology Transfer and Innovation:**

#### **Key Country Priorities For Rio +20 – ICTSD – March 2012**

This information note – published by ICTSD's Programme on Innovation, Technology, and Intellectual Property – highlights the most salient technology transfer and innovation-related proposals in country submissions to the Rio +20 process. It is a compilation of major priority areas for action put forward in these proposals. The priority areas identified are: mechanisms, innovation, enabling environments, capacity building and know-how, intellectual property, and financial resources.

The full information note can be found at <http://bit.ly/JWePrS>



### **The Trade Toolbox and Environmental Sustainability:**

#### **The Case for Fisheries – ICTSD – February 2012**

This short paper, written by former Deputy US Trade Representative Peter Allgeier, argues that the increasing severity of global environmental challenges has prompted increased attention to the relationship between international trade and resource issues – especially how trade agreements and rules affect the global commons. To date, efforts to incorporate environmental and sustainability considerations into trade agreements have largely been confined to fostering environmental cooperation among the parties, facilitating civil society views into government policy making, and promoting compliance with existing domestic laws and regulations. The impact of such agreements, Allgeier asserts, has been minimal. However, the author suggests that the existing tool box of trade negotiators from other sectors could be applied effectively to environmental and sustainability issues.

The full think-piece can be found at <http://bit.ly/HRsTnG>

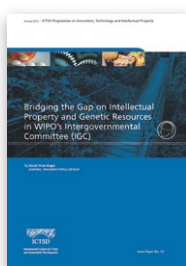


### **The Inclusion of Aviation in the EU ETS:**

#### **WTO Law Considerations – ICTSD – April 2012**

This paper is an assessment of the application of the European Union Emissions Trading System (EU ETS) to aviation in light of WTO law. The following questions are addressed in this paper: is it possible to design a carbon trading scheme that is both administratively feasible and justifiable under WTO law? Does the inclusion of aviation in the EU ETS violate the unconditional most-favoured nation obligation in Article I:1 of GATT? Is the scheme exempt from regulation because of the GATS Annex on Air Transport Services? Does the scheme violate the most favoured nation and national treatment obligations under Articles II and XVII GATS? And, finally, can the scheme be justified under the environmental exceptions of Article XX GATT and Article XIV GATS, respectively?

The full study can be found at <http://bit.ly/ILuxY8>

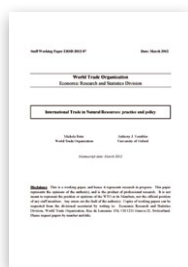


### **Bridging the Gap on Intellectual Property and Genetic Resources in WIPO's Intergovernmental Committee (IGC) – ICTSD – January 2012**

This study examines at length issues raised in the IGC's deliberations on intellectual property and genetic resources – in particular biodiversity disclosure requirements and databases. It considers the binding or non-binding nature of the instrument(s) to emerge from the IGC and their different implications. The paper also makes recommendations on processes, substantive content, and identifies existing research gaps.

The full report can be found at <http://bit.ly/IuAlpI>

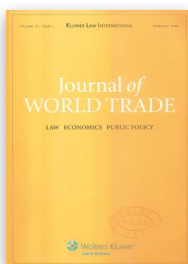




### **International Trade in Natural Resources: Practice and Policy – WTO – March 2012**

This WTO working paper reviews a range of literature on international trade policy in the natural resources sector, which accounts for 20 percent of world trade and dominates the exports of many countries. The various policy instruments reviewed include export taxes, price controls, production quotas, and domestic producer and consumer taxes. The paper argues that the policy equilibrium in the natural resources sector is inefficient. This inefficiency, it says, is exacerbated by market failure in long-run contracts for exploration and development of natural resources. Furthermore, it suggests that properly coordinated policy reforms will offer an avenue to resource exporting and importing countries to overcome these inefficiencies and obtain mutual gains.

The full working paper can be found at <http://bit.ly/HZG0Er>



### **How Vulnerable is India's Trade to Possible Border Carbon Adjustments in the EU? – Journal of World Trade – April 2012**

This paper presents an empirical exercise with the aim of assessing the vulnerability of India's trade to any future border carbon adjustments in the EU and identifying which sectors/items would most likely be affected. The study is based on the EU List released in December 2009 in which the bloc has identified 164 (sub)sectors as deemed to be exposed to a significant risk of carbon leakage. The paper argues there is a very high probability that border measures would have a considerable impact on India's exports to the bloc. The study further reveals that even if the EU decides to leave the 117 highly trade-intensive but low carbon-intensive sectors (included in the EU List) outside the ambit of any future border carbon adjustments, the overall vulnerability of India could still be quite high. Among the four BASIC countries, the author argues that India is the second-most vulnerable, after South Africa.

This paper can be accessed at <http://bit.ly/ljk87F>



### **Greening Development: Enhancing Capacity for Environmental Management and Governance – OECD – February 2012**

This Organisation for Economic Co-operation and Development policy paper outlines a number of steps to be considered when building capacity for greening national development planning, national budgetary processes, and key economic sector strategies. It identifies the key actors to be engaged in the decision making processes, outlines possible capacity needs and suggests how these can be addressed. The publication is intended to support developing countries in their efforts to move to a greener development path. It is also intended to assist development co-operation and environment agencies in their efforts to support that process.

The full report is available for purchase at <http://bit.ly/HZWOPi>



### **Why New Zealand's Consultation Process is Important for REDD+ Countries – Environmental Defense Fund – April 2012**

This EDF case study addresses the steps taken by the New Zealand Government to incorporate the interests of its indigenous Māori population when designing its 2008 emissions trading system (NZ ETS). The paper explores the NZ ETS consultation design with respect to Māori inclusion and participation, determines which, if any, strategies should be replicated elsewhere, and provides recommendations to improve future consultation processes. In order to ensure a good supply of REDD+ credits from a national level jurisdiction, the paper says, it is essential that thorough consultation processes are properly implemented. The authors contend that the case study is an important example that can provide valuable lessons for countries around the world that are also beginning to construct national climate policies, particularly countries pursuing national REDD+ strategies.

The full study can be found at <http://bit.ly/HRky3g>

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