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REDD: Addressing the Drivers – A case for the WTO?

Throughout the REDD+ negotiations, Parties have dedicated much time and attention to both the local and national drivers of deforestation, while international and transboundary drivers, though equally significant, have received far less attention. Some Parties continue to argue that the UNFCCC cannot tackle drivers because that would interfere with trade regulations under the World Trade Organization (WTO). However, addressing the international and transboundary drivers of deforestation is not only critical to the objectives of REDD+ policymaking, the UNFCCC provides the most appropriate venue to do so.

UNFCCC Guidance and Principles Related to International Trade

The UNFCCC does not prevent Parties from taking measures that would affect international trade. Rather, Article 3.5 of the Convention sets forth the principle that measures taken to combat climate change "should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."¹ This does not mean that Parties are prohibited from taking any action that would impact trade. Indeed, taking joint action within the UNFCCC to address international drivers of deforestation is neither an arbitrary nor an unjustifiable means of reducing emissions caused by deforestation and forest degradation, given that measures to reduce these emissions are unlikely to be effective while strong market incentives for deforestation remain unaddressed. Nor would a measure taken jointly by the UNFCCC Parties to achieve this goal constitute a disguised restriction on international trade: the measure is clearly related to and motivated by a conservation objective, not by an effort to distort the markets to the advantage of a specific Party.

Article 3.5 indicates a general intention on the part of the Parties that measures to address climate change should not be arbitrary, unjustifiable, or disguised restrictions on international trade, but it lies with the UNFCCC Parties, in the first instance, to determine precisely what this provision means. A decision by the COP or other authorized UNFCCC body to address international drivers of deforestation would effectively constitute a shared understanding by the Parties that the adopted measures are not arbitrary, unjustifiable, or disguised restrictions on trade.

Relationship of the WTO to the UNFCCC

Nor would the WTO limit the power of the Parties acting within the UNFCCC to take such measures. The UNFCCC and the WTO are coeval international agreements: one does not supersede the other. Additionally, the WTO explicitly recognizes that its "members have the right to adopt trade-related measures to protect the environment."² Article XX(b) of the General Agreement on Tariffs and Trade (GATT) defines a set of exceptions recognizing the right of countries to implement measures "necessary to protect human, animal or plant life or health."³ Even more relevant for addressing the drivers of deforestation is Article XX(g) which acknowledges the right of WTO members to adopt measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."⁴

The circumstances under which this matter might be brought before a WTO panel would be limited, and would most likely involve actions taken by a Party to implement the UNFCCC decision in a way a member of the WTO considered inconsistent with WTO obligations. In that case, there would be a strong argument that the UNFCCC represented both *lex posterior* and *lex specialis* on the matter--that is to say, the UNFCCC decision would be an agreement among the Parties that is both later in time and more specific to the issue and, therefore, should

¹ United Nations Framework Convention on Climate Change, Art. 3.5.

² World Trade Organization. "WTO rules and environmental policies: an introduction." Accessed May 28, 2013: http://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm.

³ World Trade Organization. "Article XX: General Exceptions." Accessed May 28, 2013: http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX.

⁴ Ibid.

prevail.

More importantly, one of the key factors considered in WTO arbitration panels related to the Article XX exemption is whether the Party implementing a measure affecting trade engaged in good faith negotiations with other Parties prior to implementing the measure. In a case where the Parties to another agreement (i.e. the UNFCCC) actually adopted the trade restrictive measure together, the evidence of those good faith negotiations would be clear.

Precedent from Other Multilateral Environmental Agreements (MEAs)

Many of the world's most pressing environmental problems are transboundary in nature. As per Principle 12 of the Rio Declaration, international agreement is clearly preferable to unilateral action in tackling transboundary or global environmental problems. The international community has recognized this principle by establishing collective goals and shared understanding for action through Multilateral Environmental Agreements (MEAs). At least fifteen MEAs currently in force incorporate related trade measures of some kind; indeed, some are primarily intended to control trade.⁵ Dozens more such agreements exist at the regional level.⁶ There are a wide variety of policies and measures included in MEAs that may impact international trade, including labelling requirements, export or import bans, as well as various taxes and fees. These trade measures are intended to: (a) provide a means of monitoring and controlling trade where uncontrolled trade would lead to environmental damage; (b) provide a means of complying with the MEA's requirements; and (c) provide a means of enforcing the MEA, by forbidding trade with non-Parties or non-complying Parties.⁷

The REDD Negotiations

The UNFCCC has set out a clear goal of stabilizing greenhouse gas emissions in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Deforestation and forest degradation, caused by a variety of factors at the local, national and international levels, contribute significantly to global greenhouse gas emissions. Parties have already recognized the need to "collectively aim to slow, halt and reverse forest cover and carbon loss."⁸ Furthermore, the Cancun decisions encouraged "all Parties to find effective ways to reduce the human pressure on forests that results in greenhouse gas emissions, including actions to address drivers of deforestation," thereby providing an explicit mandate for Parties to consider how the UNFCCC can effectively address the drivers of deforestation.⁹ Alongside sustainable, predictable, adequate finance and the full and effective implementation of agreed safeguards, addressing the drivers of deforestation is a critical pillar in effective global efforts to halt forest cover loss, and ultimately in achieving the objective of the Convention.

Conclusion

Without global action to address the international and transboundary drivers of deforestation, there is a very real danger that "free-riders" - or in the parlance of REDD+ policymaking, "leakage," - may threaten to undermine the shared goal of halting forest loss. There are a range of policy options available to Parties to the UNFCCC to fairly and effectively address international drivers. Precluding discussion of these policy options on the grounds that it "interferes with WTO policy" is specious and moreover may lead to an ultimately weak and ineffective REDD+ framework. In the coming year, it will be necessary for Parties to devote sufficient attention to this critical issue and to develop fair and effective policy options.

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⁵ WT/CTE/W/160/Rev.5 (15 June 2011). Accessed May 28, 2013. http://www.wtocommerce.org/tw/SmartKMS/do/www/readDoc?document_id=115156.

⁶ Brack, Duncan & Gray, Kevin. "Multilateral Environmental Agreements and the WTO" Royal Institute of International Affairs and International Institute for Sustainable Development. September 2003. p. 5.

⁷ Ibid., p. 7.

⁸ United Nations Framework Convention on Climate Change. Decision 1/CP.16, Section III.C.

⁹ United Nations Framework Convention on Climate Change. Decision 1/CP.16, paragraph 68.