



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

**Assessing the Effects on Forests of
Proposed Trade Liberalization
in the Forest Product Sector**

**Comments Submitted to the
Office of the United States Trade Representative
and the Council on Environmental Quality**

These comments are submitted in response to the request for public comments from the Office of the United States Trade Representative (USTR) and the Council on Environmental Quality (CEQ) published in the June 25, 1999 Federal Register (64 Fed. Reg. 34304-306). The Center for International Environmental Law (CIEL) is a non-profit organization based in Washington, D.C. that promotes sustainable and equitable development and environmental protection through the development and implementation of international law.

Summary

Trade in forest products can have significant impacts on forests in several ways (Part 1). The liberalization of trade in forest products can increase trade and intensify its impacts, stimulating or facilitating new trade flows, expansion of existing flows, intensification of production techniques and expansion of productive capacity. (Part 2). Trade liberalization policies and rules can affect implementation of forest protection measures: the application of trade rules, as they have been interpreted to date, can interfere with conservation laws and policies, while subsidies disciplines could encourage helpful reforms (Part 3).

Where proposed policies are likely to have environmental impacts such as these, there must be an environmental assessment (Part 4). While the USTR/CEQ effort to produce an environmental analysis on the forest product liberalization initiative is a significant step forward in United States trade policy-making, as currently designed, the review process is entirely inadequate (Part 5). The administration should halt negotiations for accelerated liberalization until completion of an adequate assessment that considers the categories of impacts outlined in Parts 1-3 related to the forest product trade liberalization initiative, including both the World Trade Organization tariff reduction proposal and the review of non-tariff measures in the context of Asia Pacific Economic Cooperation (APEC) (Part 6).

To ensure an adequate assessment in this and future trade negotiations, the administration must develop and apply procedures for environmental assessment of trade policy-making, looking for guidance to the National Environmental Policy Act (NEPA) (Part 7).

Part of the assessment process must involve the formulation of policy alternatives and mitigating measures.

Trade can be sustainable only if adequate frameworks of forest protection measures are in place. Unfortunately, the current international and national forest frameworks for forest protection are inadequate to ensure that trade is sustainable (Part 8). Thus the United States must promote forest protection in tandem with forest product liberalization (Part 9). Developing the frameworks of laws, institutions and policies needed to ensure sustainable forest product trade will require a comprehensive set of reforms, including correction of market failures, reform of faulty government policies, and strengthening of protective institutions and laws and their enforcement. Developed countries need to provide technical and financial assistance to developing ones. Moving forward on this ambitious program could involve a series of tiered “readiness criteria” that indicate when countries have the capacity to maintain forest conservation and sustainable management while enhancing the flow of trade and taking on additional obligations for trade liberalization.

1. Trade in Forest Products Can Have Significant Impacts on Forests¹

A significant fraction of world forest products move in international trade. Recent estimates suggest that international trade accounts for about 25% of world production of wood based panels and paper products, about 20% of sawnwood and wood pulp, and 6-7% of industrial roundwood.² For some countries, the proportion of forest products being exported is far higher. For instance, exports account for a majority of national commercial production in Indonesia, Malaysia, and Papua New Guinea.³

There are a range of foreseeable effects of trade that the USTR/CEQ analysis must consider. Trade in forest products has significant, if indirect, effects on forests by stimulating changes in the rate and manner of production, and development of infrastructure such as roads. Trade has a direct effect on forests by facilitating the introduction of alien species. Foreign direct investment supports expansion of harvesting or processing facilities as well as changes in technology, which in turn affect forests. More indirect effects may result from increased income available for conservation services as well as the influence of consumer preferences in importing countries on exporter practices.

Production. Trade in timber and other forest products has significant effects on the rate and manner of production of those products, which in turn has impacts on the rate of forest degradation and loss in exporting countries. Increases in the export of timber products can lead to intensified exploitation of harvested species as well as degradation and loss of forests, with attendant ecological and economic consequences such as loss of watershed quality, erosion, and damage to freshwater biological diversity and fisheries. At the same time, of course, export of forest products can provide income needed for prosperity and development, as well as poverty alleviation, assuming that a significant proportion of the profits return to needy groups.

¹ Portions of this Part are adapted from David R. Downes, *Global Forest Policy and Selected International Instruments: A preliminary review*, 65, 74-76 in *ASSESSING THE INTERNATIONAL FOREST REGIME* (Richard G. Tarasofsky, ed., Gland, Switzerland: IUCN, 1999).

² See United Nations Department of Economic and Social Affairs (UNDESA), *Matters left pending on trade and environment*, at para. 7 (advance unedited text). Available at IFF web site <<http://www.un.org/esa/sustdev/iff.htm>>.

³ See Panayotis N. Varangis, Rachel Crossley and Carlos A. Primo Braga, *Is there a Commercial Case for Tropical Timber Certification*, at 18, POLICY RESEARCH WORKING PAPER 1479 (Washington: World Bank, 1995).

Infrastructure. The transportation and infrastructure involved in trade can also have significant effects, particularly the construction of roads through forestlands. On the one hand, this infrastructure can benefit forest communities by enhancing access to outside markets, improving communication, and increasing access to educational, health care and other resources. On the other hand, it can have severe impacts on forest ecosystems and resources important for local communities. For example, one of the biggest impacts of logging on primary tropical forests stems from construction of roads for logging operations which are then used by immigrant settlers who convert forestlands for agriculture.⁴

Alien Species. The import of forest products can result in the introduction of alien species, particularly through the inadvertent inclusion of forest pests in shipments of wood and other forest products. Introductions of alien species are directly related to trade, and they are one of the biggest threats to native biological diversity. They displace native species and destabilize ecosystems, and can cause major economic losses in the forest product sector. Introductions of pests into North America in the early 20th century killed “as many as a billion” specimens of the American chestnut tree, which had been “the most economically important hardwood species in eastern [American] forests.”⁵ The European gypsy moth caused an estimated \$764 million in damage in 1981, the white pine is currently at risk from an introduced rust, and worst-case estimates by the federal government projected as much as \$35 to \$58 billion in losses over a 50-year span from the Asian gypsy moth and the nun moth.⁶

More Indirect Effects. While the additional demand from foreign markets can stimulate expanded production with resulting forest loss and degradation, it has been argued that the additional income from exports could increase the resources available for domestic environmental protection (empirical evidence for this assertion remains scanty, however). Where enhanced demand drives forest product prices up, domestic timber processors may have more incentives to increase efficiency of timber use. In principle, imports that displace less efficient domestic producers — or imports from plantations that displace domestic products harvested from old-growth forests — could result in a net gain for forests.

Positive impacts from trade might also result if demand from environmentally sensitive consumers in foreign countries stimulated more environmentally responsible production among exporters, if the consumers select products according to the nature of the production or processing method (PPM). The result could be beneficial for the long-term health of forests in exporting countries. Indeed, this is precisely what motivates efforts to define criteria and principles for well-managed forests such as the work of the Forest Stewardship Council (FSC). While the theory is persuasive, the percentage of world timber production that is certified by FSC-accredited certifiers, and labeled as such, remains small.⁷

2. Liberalization of Trade in Forest Products Can Increase Trade and Its Impacts⁸

Trade liberalization policies and rules — such as the proposed WTO agreement on tariff reduction and the APEC initiative to remove non-tariff measures — can intensify all the effects discussed in Part 1 above. They can stimulate or facilitate new trade flows, expansion of existing flows, intensification of production techniques and expansion of productive capacity.

⁴ See Dirk Bryant, Daniel Nielsen & Laura Tanglely, *THE LAST FRONTIER FORESTS: ECOSYSTEMS & ECONOMIES ON THE EDGE* 15 (Washington, D.C.: World Resources Institute, 1997).

⁵ U.S. Congress Office of Technology Assessment, *HARMFUL NON-INDIGENOUS SPECIES IN THE UNITED STATES* 66 (Washington, D.C.: U.S. G.P.O., 1993).

⁶ See *id.* at 66-67, 118.

⁷ Portions of this Part are adapted from David R. Downes, *Global Forest Policy*, *supra* n. 1 at 82.

⁸ Portions of this section are adapted from David R. Downes, *Global Forest Policy*, *supra* n. 1 at 75-76.

Opening markets of countries with higher levels of protection to imports from countries with weak frameworks for forest protection could put downward pressure on the higher standards. The USTR/CEQ review must take these possible impacts into account.

Indeed, the stimulation of consumption through lower prices and otherwise more competitive goods, and the increase in production to respond to greater demand, are exactly what free trade advocates argue will result from trade liberalization. In fact, some negative trade-related impacts can be deduced from the basic principles of the world trade system, combined with features of national law and policy frameworks. According to the economic theory underlying the world trading system, countries should specialize in production of products for which they have a comparative advantage in that their costs of production are lower. International trade rules reduce barriers to trade so that each country exports products for which it has a comparative advantage, and imports products for which domestic production is more expensive. Global production is more efficient overall and every society benefits.

While this theory underlies a process of trade liberalization that has helped to spur increased production of many goods, its application may also have negative effects on a country's economy, environment, and natural resources including forests. Production of a primary commodity like timber inflicts significant environmental and social costs. Loss of forest cover often increases soil erosion, increases flooding, reduces water clarity which in turn harms fisheries, and reduces the supply of non-timber forest products important for local communities, as well as regional, national and international markets. If, however, the legal system does not regulate harvesting to control such "external" costs of production — for instance through the protection of property rights over the forest — then the private cost to the producer of harvesting the timber may be much lower than the total social cost of production.⁹ That is, the logging company harvesting the timber does not have to pay for soil erosion, flooding, and other costs.

As a result, private gain from exports may produce net social loss in terms of overall forest values and productivity.¹⁰ Liberalized trade may consequently intensify the social cost to the exporting country of its weak system of regulation. The result is "an apparent comparative advantage . . . even where there is none," and "apparent gains from trade, which in reality could be losses."¹¹ Thus, "the world economy as a whole consumes an inefficient quantity of resources, because it takes no account of the costs to the world economy of the resource overuse."¹²

Implications for This Review. It is in this context that CEQ and USTR must analyze the impacts of the proposed accelerated trade liberalization initiative. The immediate concrete step proposed by the government is to achieve agreement among WTO members to reduce tariffs from their present levels to zero. The United States and nine of its trading partners — including Canada, the European Union and Japan — have already committed to reduction of tariffs to zero on pulp, paper and paper products by 2004.¹³ Average tariffs for these products together with logs and wood products range from zero for Hong Kong, 1.14% for Japan and 1.4% for the

⁹ See Graciela Chichilinsky, *North-South Trade and the Dynamics of Renewable Resources*, 4 STRUCTURAL CHANGE AND ECONOMIC DYNAMICS 219, 221 (1993).

¹⁰ See *id.* at 222.

¹¹ See Graciela Chichilinsky, *Sustainable Development and North-South Trade* at 9 (paper prepared for University of Arizona conference, "Biological Diversity: Exploring the Complexities," Tucson, Arizona, 25-27 March 1994); see also Graciela Chichilinsky, *Global Environment and North-South Trade*, 84 AM. ECON. REV. 851 (1994).

¹² See Chichilinsky, *Sustainable Development*, *supra* note 11.

¹³ See WT/GC/W/138/Add.1 at Part IX, ¶ 1; June 25 Federal Register Notice, 64 Fed. Reg. at 34306.

United States, to 11% for Chile and 20.86% for China.¹⁴ Tariff escalation remains significant, however, in the forest product sector: tariffs for products such as furniture range from 10% to 15% among OECD countries and 10% to 60% among other countries.¹⁵

What impacts would result from the proposed accelerated reduction of tariffs? The logic of trade liberalization suggests that it will lower market prices. This should encourage demand, which in turn will increase production, leading to increased impacts on forests. Indeed, representatives of the U.S. timber industry, which supports the proposal, argue that further liberalization of forest products trade will result in a 3-4% annual increase in world wide consumption above currently projected trends.¹⁶ The increase in production that would probably result could cause a significant worsening of forest degradation and loss.

On the other hand, in countries with previously high tariffs, domestic production might actually decrease, which in turn might benefit those particular nations' forests. Yet if the substituting imports come from countries with weak forest policy frameworks — e.g. countries that subsidize their timber producers — the net outcome for forests might be negative. In fact, many exporting countries have deeply flawed forest policy frameworks, including subsidies to producers and below-market price concessions on public lands, as described in Part 8 below. Perversely, the removal of trade-distorting tariffs could expand the impact of these other trade-distorting policies, by increasing the economic gains to private firms that come from taking advantage of them.

Similarly, the liberalization of trade between countries that have different legal standards for forest production may negatively affect forest protection laws as well as on forests themselves. As already discussed, foreign demand intensifies the economic pressure that drives overexploitation where forest protection policies are weak and fail to account for the full values of forests and the full costs of harvesting. At the same time, when a country with a certain level of protection for forests opens the doors to imports from a country with lower standards, the ability of the producers in the second country to externalize environmental costs may put pressure on the first country to lower its standards to level the playing field for its producers.

3. Trade Policy and Rules Can Affect Implementation of Forest Protection Measures

The application of trade rules, as they have been interpreted to date, can interfere with national and possibly international conservation laws and policies — especially those which seek to control threats posed by trade or consumption of traded goods — thus magnifying the impacts of trade on forests.¹⁷ Already there have been a series of successful challenges to conservation laws under the General Agreement on Tariffs and Trade (GATT) and the WTO. On the other hand, some trade rules, in particular disciplines on government subsidies to industry, could be applied so as to reduce impacts of production on forests.

The USTR/CEQ analysis should consider the possible impacts of the forest product liberalization initiative as a whole, including the work on non-tariff measures as well as the tariff reduction initiative at the WTO (see Part 5). The formulation of policy alternatives in this review should involve a clarification of the United States position on the possible impacts

¹⁴ June 25 Federal Register Notice, 64 Fed. Reg. at 34305.

¹⁵ *See id.*

¹⁶ American Forest and Paper Association, Press Release, April 28, 1999.

¹⁷ This paragraph is based in part on David R. Downes, *Global Forest Policy*, *supra* note 1, at 75.

discussed below, as well as a plan for promoting wider recognition of rule definitions that will mitigate possible negative impacts.

Certification and Labeling. Trade rules may also affect the ability of producers to resort to market incentives, such as certification and labeling, that reward environmentally responsible forest product harvesting by transmitting information between producers and consumers about environmental impacts and values. In fact, some governments and segments of industry have argued that the GATT and/or the WTO Agreement on Technical Barriers to Trade (TBT) forbid reliance upon production or processing methods (PPMs) as a basis for distinguishing between products. The fraction of global forest product production that moves in world trade competes against domestic production in many if not most producing countries. If adopted, such interpretations would apply to a large proportion of the world's markets for forest products, nearly extinguishing the potential of market mechanisms like ecolabels to promote sustainable forest management.

Sanitary and Phytosanitary Measures. There are also concerns that the WTO Agreement on Sanitary and Phytosanitary Measures (SPS) could be applied in ways that hinder the development and implementation of effective measures to protect against the impacts of introduced alien species upon native forest species and ecosystems.

Subsidies. The WTO Agreement on Subsidies and Countervailing Measures provides a basis for WTO Members to challenge other Members' subsidies to their domestic industries which distort trade. In the forest sector, such subsidies are widespread and operate as "perverse incentives" to increase activities that degrade and destroy forests. This is one area where trade rules could support better protection of forests. To date, however, there have been no challenges based on the subsidies agreement brought under the WTO dispute settlement procedures.

4. When Proposed Policies Are Likely to Affect the Environment, There Must Be an Environmental Assessment

As discussed in Parts 1-3 above, the proposed tariff reduction at the WTO, along with the exploration of non-tariff measures in APEC, poses potential for significant impacts on forests and forest protection laws and policies. Where a proposed action has the potential for significant environmental impact, society benefits from an assessment of those impacts before a decision is taken about the proposal. The USTR/CEQ review must take into account the categories of foreseeable impacts identified in Parts 1-3.

The reference point for environmental assessment in this country is the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, 4331-4347. Under NEPA, all federal agencies are obligated to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." *Id.* at § 4332(2)(A). In particular, every agency must develop methods and procedures to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." *Id.* at § 4332(2)(B).

The principal mechanism for achieving these objectives is the process of preparing an environmental impact statement (EIS). NEPA (42 USC § 4332(C)) requires an agency to include a "detailed statement" with any proposal for legislation or other major federal action "significantly affecting" the environment. The statement must discuss the environmental

impact of the proposed action, unavoidable adverse effects, alternatives, relationships between short term uses and maintaining long term productivity, and irreversible commitments of resources if the action were implemented.

5. The Present Environmental Review Process is Inadequate

The USTR/CEQ effort to produce an environmental analysis on the forest product liberalization initiative is a significant step forward in United States trade policy-making. To date, the government has done a poor job of incorporating environmental considerations into trade negotiations. In the Uruguay Round of trade negotiations, for example, the government sought public input for a report on the environmental impacts of the resulting WTO Agreements — *after* the governments that were parties to the General Agreement on Tariffs and Trade (GATT) had already concluded negotiations.¹⁸ In negotiations on the North American Free Trade Agreement (NAFTA), the government included environmental impacts among the issues on which it sought public input during negotiations, but did not commit to building a record of decision that incorporated environmental matters.¹⁹ In both these cases, the USTR had exclusive authority to carry out the review.

In contrast, the present review commits the Administration to producing a written report that will constitute a public record of its consideration of environmental issues and reasons for choosing its approach. Equally important, this review is being carried out jointly by USTR with CEQ, and the Environmental Protection Agency as well as the Forest Service have major roles. The involvement of organs of the government with environmental missions and expertise is essential to the integration of economic and environmental concerns into policy that ensures sustainable development. We commend the Administration for this precedent-setting step.

We are also pleased to see that the Federal Register notice incorporates some key elements of effective environmental assessment as the concept has been developed under the NEPA. In particular, the references to “reasonably foreseeable” effects, “policy alternatives” and global impacts are important and are consistent with NEPA.²⁰

Nevertheless, we must emphasize that this review, as currently designed, is entirely inadequate. In duration, it is far too short to allow a thorough analysis of relevant economic and environmental issues. Opportunity for public participation has also been inadequate, with very short deadlines for submission of comments and a lack of clarity about future opportunities. An overall lack of clarity about how the environmental analysis will contribute to decision-making raises doubts about whether the Administration can take the study’s findings into account in defining relevant trade policies. As outlined in the Federal Register notice, the review does not explicitly acknowledge a number of important features of

¹⁸ See 59 Fed. Reg. 9802 (Mar. 1, 1994).

¹⁹ See 56 Fed. Reg. 32454 (Jul. 16, 1991).

²⁰ NEPA directs all federal agencies to “*recognize the worldwide and long-range character of environmental problems*, and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives ... designed to maximize international cooperation” on environmental protection. 42 U.S.C. § 4332(2)(F) (emphasis added). The leading case on the extraterritorial application of NEPA, *EDF v. Massey*, 986 F.2d 528 (D.C. Cir. 1993), confirmed that NEPA requires consideration of environmental impacts outside the US, where the major federal action consists of a governmental decision-making process taking place primarily within the US. The judicial presumption against extraterritorial application does not apply to a statute like NEPA, which “control[s] the decisionmaking process of U.S. federal agencies” themselves, without dictating the “substance of agency decisions,” “prescribing action in foreign jurisdictions,” or requiring “enforcement in a foreign forum.” 986 F. 2d at 532, 533. The court also noted that the environmental impacts took place in Antarctica, which is considered a “global commons.” *Id.* at 534.

environmental impact assessment as defined under NEPA (see box, *Elements of an EIS*). Finally, the analysis focuses too narrowly on one part of the Administration's overall initiative, the tariff reduction proposal, ignoring cumulative effects from past and related efforts.

Duration. The schedule announced in the Federal Register does not allow time for a serious assessment of environmental impacts. The Administration did not publicly commit to conducting the review until early June. Yet USTR announced its intent to shift the tariff talks to the WTO in November 1998, and the APEC early voluntary sectoral liberalization (EVSL) process began in mid-1997. The current schedule allows one month for public input, followed by approximately three months during which the Administration must consider public input, publish a report, deliberate on policy alternatives, and define a position.

Opportunity for Public Input. The thirty-day comment period is a completely inadequate opportunity for the public to research and analyze the complex issues involved. The public notice is also rather unclear about the scope of the analysis — the description of relevant factors is only one paragraph long, making it difficult to know exactly what kind of information to submit. Furthermore, it is unclear what opportunities there will be for the public to comment upon the government's report when it is issued. Nor is it clear how the government can take into account any such comments in its decision-making during the short period before the Seattle meeting at which the Administration plans to achieve agreement.

Lack of Clarity on Structure and Procedure. Similarly, the lack of clarity as to the structure of the analysis suggests a lack of clarity about how to analyze the relevant issues which does not bode well for the quality of the results. The one-paragraph list of relevant issues does not indicate any sense of what is a "reasonably foreseeable environmental impact." The reference to "policy alternatives" leaves it unclear the extent to which the government will seriously consider mitigating measures or modifications to the negotiating position as currently proposed (compare box in Part 9, *Building the Forest Protection Framework*). Nor is it clear what the next steps in the procedure will be.

Inadequate Scope. While the Federal Register notice isolates the WTO effort for review, the forest product initiative actually includes two parts, one in APEC and the other involving the WTO. At the WTO, the Administration is proposing that Members commit in Seattle at the WTO Ministerial Conference later this year on a program of accelerated tariff reductions in the forest product sector. This proposal originated, however, in the context of Asia-Pacific Economic Cooperation (APEC). In APEC, Pacific Rim countries are analyzing non-tariff measures (NTMs) that distort trade in the forest product sector. Each government is submitting information on its own NTMs, and at least one consultant has been hired to analyze this information. The ultimate objective is to agree on early voluntary liberalization in forest products and a number of other sectors.

Policy changes aimed at liberalizing trade have cumulative impacts on use of natural resources and forests. The government must consider the impact of the forest product trade liberalization enterprise as a whole, rather than focusing its attention exclusively on a single step in a long staircase. The need is particularly acute in light of the longstanding failure of the federal government to incorporate environmental issues, as evidenced by the NAFTA and GATT examples cited above.

6. The Administration Should Halt Negotiations for Accelerated Liberalization Until an Adequate Assessment is Completed

The potential for serious impacts on forests from the proposed policy change is clear. Yet the Administration's procedure is inadequate to assess these impacts and develop policy responses to them. Continuing on this path risks irreversible loss and degradation of forests, damage to forest ecosystems, and loss of forest biological diversity. Thus, the Administration should halt its efforts to push ahead on this initiative until it has conducted a proper assessment that gives it a basis for defining a balanced policy that ensures sustainable development. As a first step, the Administration will need to define procedures for how such assessments should go forward as discussed in Part 7 below.

7. The Administration Should Adopt Procedures for Environmental Assessment of Trade Policy-Making

To remedy the defects in the current review, and avoid them in the future, the Administration must develop a considered approach to the assessment of environmental issues relating to trade policy-making. In developing a procedure and an analytical framework, the government should be guided by the wealth of experience and institutional authority embodied in NEPA.

Enacted in 1970, NEPA has been the model for similar legislation in dozens of other countries as well as many American States. It has been called "our basic national charter for protection of the environment." 40 CFR § 1500.1. Over the decades, the federal government has developed extensive practical experience in the assessment of environmental impacts through the repeated, indeed routine application of NEPA to proposed actions. Much of this accumulated wisdom is embodied in the regulations issued by CEQ for federal agency implementation of NEPA.²¹ These regulations offer guidance on how to decide whether to produce an environmental impact statement (EIS), how to develop the EIS so as to maximize its value for decision-making, and how to ensure adequate public input.

Based upon CEQ's guidance, each federal agency is required to revise its own regulations and procedures to bring them in accordance with CEQ's regulations, in consultation with CEQ and in light of public comments.²² To date, no such procedures have been developed for trade policy-making, in spite of the increasing recognition of its impacts on the environment and on environmental law and policy.

It is past time for the government to develop and apply such procedures.²³ Building on their current collaboration, CEQ and USTR need to work with the public to develop a procedure for all trade negotiations. The Administration has already committed to conducting an environmental review of the next round of trade talks. Planning how that process will go forward should begin immediately.

²¹ See 40 C.F.R. Parts 1500-1508.

²² See *id.* at § 1500.6, 1507.3.

²³ The one federal court that considered whether NEPA applied to trade negotiations ruled that "the plain language of the NEPA makes it a foregone conclusion that [the government] must prepare an EIS on [trade agreements]." *Public Citizen v. Office of the USTR*, 822 F.Supp. 21, 29 (D.D.C. 1993). That decision was reversed on appeal, on the ground that citizens have no right for judicial review under the Administrative Procedure Act (APA) of the government's failure to apply NEPA to trade agreements submitted for Congressional approval. See *Public Citizen v. Office of the USTR*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 685 (1994). The appeals court did not, however, question the trial court's ruling that NEPA applied. Indeed, a concurring opinion pointed out that "there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation." 5 F.3d at 554 (Randolph, J., concurring).

There are distinctive challenges involved in applying the environmental assessment process to policy formulation, as opposed to project design,²⁴ and trade policy-making poses its own specific set of problems within the policy realm. The CEQ regulations must be the starting point, but the government's procedures must be tailored to fit the context of trade negotiations.

For instance, it is important to frame the question properly when considering a specific policy proposal such as the forest product liberalization initiative. The analysis must take into account the full relevant context. Here, the question is not simply whether this specific set of tariff reductions cause harm to forests. Rather, the question is whether the forest product sector is ready for accelerated trade liberalization in the context of economic pressures for harvesting, market failures involving inadequate recognition of forest values, continuing

Elements of an Environmental Impact Statement

- *Purpose*: Statement of the purpose of (or need for) the proposed action
- *Alternatives*: Objective comparison of the proposal's impacts to the impacts of alternatives (this is the "heart" of the EIS)
 - include no-action alternative
 - identify the agency's preferred alternative
 - discuss "appropriate mitigation measures"
- *Affected Environment*: description of the affected environment
- *Environmental Consequences*: Description of consequences, including
 - reasonably foreseeable direct and indirect effects
 - possible conflicts with other federal state & local policies governing the affected areas
 - impacts of alternatives
 - and the impacts on natural or depletable resources and on conservation potential
- *Scientific Integrity and Methodology*: The government must ensure the professional and scientific integrity of the EIS and shall disclose methodologies used and the sources upon which the conclusions are based
- *Duty to Collect Information*: The government must include information relevant to reasonably foreseeable significant adverse impacts that is essential to a reasoned choice among alternatives, if the overall costs of obtaining it are not exorbitant.

Source: 40 C.F.R. Parts 1502, 1508.

²⁴ While NEPA's language applies to the full range of "major federal actions" — including the formulation of policies and legislation with broad coverage — over the years it has characteristically been applied to more specific activities, such as permitting for development or exploitation of federal lands.

One difficult question is to define the stages at which a trade policy is formulated in enough detail and with enough certainty that it is time to (1) do an environmental assessment, (2) make the “significant environmental impact” finding or (3) decide to prepare a draft EIS. Early in negotiations, positions may still be inchoate, making it difficult to assess impacts, mitigating measures or alternatives with any precision. Yet once multilateral agreement is achieved, it is far too late to incorporate environmental concerns, particularly since the executive branch conducts many trade negotiations under “fast track” authority by which Congress must approve or reject the resulting agreement in its entirety, without amendment.

8. The Current International and National Forest Frameworks are Inadequate to Ensure that Trade is Sustainable

Without appropriate mechanisms in place to protect forests, liberalization in the forest product is likely to lead to significant negative impacts on forests and forest protection measures, as discussed in Parts 1-3 above. Yet a 1999 IUCN study concludes that “[i]t is beyond dispute that [the] current international forest regime, as a whole, is not . . . creating the conditions for . . . conservation, sustainable management and sustainable development of all types of forests.”²⁵ Clear rules, measurable standards, financing, positive incentives, and institutional coordination are among the elements lacking.²⁶

Similarly, a 1999 FAO study identifies widespread market failures, faulty governmental policies and institutional weaknesses that prevent a transition to sustainable forest management.²⁷ Market failures include the failure to account for non-market values of forests such as carbon sequestration and watershed protection. Faulty government policies include subsidies to the forest sector and the conditioning of land titling on clearing of forests. Institutional weaknesses include the failure to protect ownership rights of the public or local communities, and the failure to enforce legal prohibitions on illegal trade and corruption.

²⁵ See Richard G. Tarasofsky, *Assessing the International Forest Regime: Gaps, Overlaps, Uncertainties and Opportunities 3* in *ASSESSING THE INTERNATIONAL FOREST REGIME* (Richard G. Tarasofsky, ed., Gland, Switzerland: IUCN, 1999).

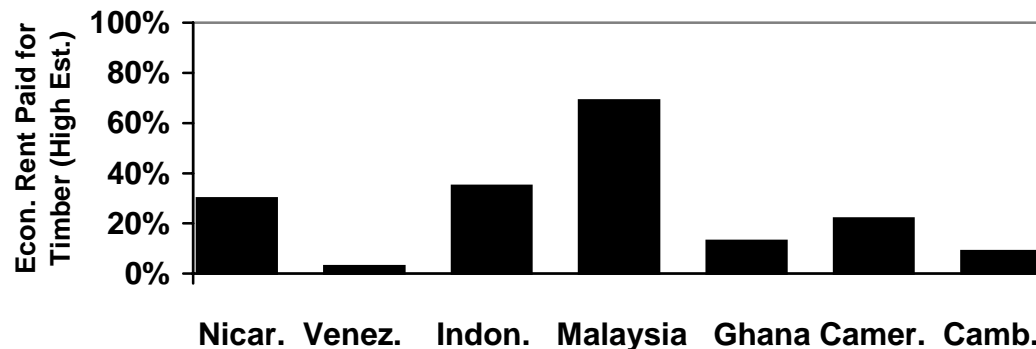
²⁶ See *id.*

²⁷ Food and Agriculture Organization of the United Nations], *SUSTAINABLE FOREST MANAGEMENT: ISSUES PAPER* (Washington, D.C.: World Bank, 1999) (“This paper was commissioned by the World Bank [and] [p]repared by FAO”), URL address = <<http://wbln0018.worldbank.org/essd/forestpol-e.nsf/>>.

For instance, one of the subsidies that can hinder SFM and lead to distortions in trade

Sample Timber Concession Policies

(Source: FAO, SFM Issues Paper, 1999)



are “implicit” subsidies in the form of below-market pricing of timber concessions on public lands. Concessions play a major role in many forests in the tropics. A review of studies on concession policy in seven tropical countries, mainly during the 1990s, found that the proportion of the economic rent captured by governments ranged from a high of 69% under some concessions in Sarawak, Malaysia, to a low of 2-3% in Venezuela and 2-4% in Cameroon.²⁸ Such underpricing of public resources encourages uneconomic exploitation and distorts trade.

In another example, 1995 comparative report on Washington State and British Columbia forest laws concluded that “the U.S. rules are more prescriptive and offer stronger legal protection for environmental values than British Columbia on 8 out of 10 topics.”²⁹ According to trade theory, free trade in timber between these two jurisdictions could be expected to intensify harvesting disproportionately in British Columbia, and to create an incentive for U.S. timber producers to seek regulatory relief in Washington State. A more recent study suggests that British Columbia regulations remain inadequate to protect the province’s old growth forests, being deficient on a number of counts. As of 1997, streamside protection is inadequate, with 83% of 1996 cut areas reported logged all the way to stream banks.³⁰ On the rate of cut, the provincial chief forester was cited for the claim that “the current allowable annual cut is well above the long-term sustainable harvesting level.”³¹ The province still lacked a law protecting endangered species.

9. The United States Must Promote Forest Protection in Tandem With Forest Product Liberalization

Sustainable development means integrating economic policy with environmental and natural resources policy. The United States must not rush ahead with liberalization without adequate policies in place, because irreversible harm could result.

²⁸ See *id.* at 29, Box 11.

²⁹ Sierra Legal Defense Fund and Natural Resources Defense Council, *FORESTS ON THE LINE: COMPARING THE RULES FOR LOGGING IN BRITISH COLUMBIA AND WASHINGTON STATE* at 4 (New York and Vancouver: NRDC and SLDF, 1995) (“written by Mark Haddock”).

³⁰ *BROKEN PROMISES: THE TRUTH ABOUT WHAT’S HAPPENING TO BRITISH COLUMBIA’S FORESTS*, Part 1 ([n.p.]: [Greenpeace], [1997]), URL address <<http://www.greenpeace.org/~comms/97/forest/biglie.html#summary>>.

³¹ *Id.* at Part 1 (“No Stopping the Chop”).

Liberalizing trade between countries at unequal stages of industrialization and with vastly disparate environmental protection policies, without furnishing adequate environmental safeguards is just not responsible policy. . . . On the other hand, with basic legal and institutional structures in place, and the intent to place safeguards in the agreement to ensure continued progress on environmental protection, the environmental harms of trade liberalization could be minimized.³²

One option for making simultaneous progress would be to define a series of tiered criteria to determine when countries are ready to enhance the flow of trade and take on additional obligations for trade liberalization. The ultimate goal is to ensure that countries participating in forest products trade within the trading system are able to handle the impacts on forests by implementing measures such as those outlined in the box, *Building the Forest Protection Framework*. At the outset of trade negotiations, there should be a review of each country's framework to ensure that basic measures are in place.

Each country should carry out an environmental assessment according to procedures reflecting the discussion in Part 7 above. Various requirements should be phased in at later stages in the process of negotiating, signing, and committing to a trade agreement.

³² This quote and subsequent discussion of readiness criteria are drawn from: Robert F. Housman, *The Center for International Environmental Law on Chilean Accession to the North American Free Trade Agreement*, Testimony before the Trade Subcommittee of the House Committee on Ways and Means, Jun. 21, 1995.

Building the Framework for Forest Protection — Examples of Needed Measures

<p>Correct Market Failures (using incentives or regulations)</p>	<p>Account for non-timber values of forests currently excluded from markets in some or all countries, including:</p> <ul style="list-style-type: none"> ▪ Carbon sequestration ▪ Watershed and soil maintenance ▪ Biodiversity as resource for pharmaceutical and other product development ▪ Recreation and tourism ▪ Non-timber forest products
<p>Reform Faulty Government Laws and Policies</p>	<p>End direct economic subsidies to forest sector, e.g. government construction of roads</p> <p>Charge full price for timber concessions</p> <p>Examine log export limitations</p> <p>End land titling and expropriation preferences against maintaining forest cover</p>
<p>Strengthen Laws, Regulations and Incentives*</p> <p>* Most but not all of these measures have particular relevance to management of public forest lands.</p>	<p>Environmental assessment procedures</p> <p>Measures to ensure sustainable rate of cut</p> <p>Laws to protect endangered species and biological diversity</p> <p>Measures to protect streamsides, water quality and flow</p> <p>Limits on destructive techniques (e.g. clearcutting)</p> <p>Requirements of reforestation</p> <p>Controls on road construction</p> <p>Accountability of users and officials through administrative and judicial review and criminal and civil penalties</p> <p>Transparency and public participation in decision-making</p> <p>Ratification and/or compliance with relevant international agreements such as those on biological diversity, climate change, trade in endangered species, and forests</p>
<p>Strengthen Institutions</p>	<p>Improve training and staffing of forest management/conservation agencies</p> <p>Improve agencies responsible for law enforcement</p> <p>Strengthen judicial system (impartiality, etc.)</p>
<p>Strengthen Incentives to Consumers</p>	<p>Allow or support better communication to consumers about impacts on forests of production of forest products, e.g. ecolabeling</p>
<p>Provide Appropriate Assistance</p>	<p>Financial and technical assistance to developing countries</p>

Adapted from discussion in: FAO, cited in note 27; NRDC/SLDF, cited in note 29.

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