

# Designing Fiscal Instruments for Sustainable Forests



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# 9

## Fiscal Incentives for Decreasing Deforestation: Does International Trade Law Restrict Export Taxes?

DYLAN GERAETS

### Introduction

**This chapter examines whether international trade law, as composed of the World Trade Organization Agreement and other free trade agreements, restricts timber-exporting countries' freedom to implement export taxes.** First, the basic concepts and core principles of international trade law are explained. Second, the chapter focuses on the constraints that these rules pose on states' ability to impose export taxes in general. Third, it assesses whether they restrict states' ability to adopt export taxes on timber products, and whether it would be possible legally to develop an export tax system fostering adherence to sustainability standards in the timber sector. Finally, the chapter assesses in detail the extent to which member countries of the CIF's Forest Investment Program would be constrained by rules of international trade law, should they wish to adopt such taxes.

### International Trade Law and Regulatory Autonomy

**International trade law is the body of public international law containing rules and disciplines concluded between states that govern the way in which they regulate trade relations between economic entities.** International trade law consists of multilateral, as well as bi- and plurilateral, agreements in which the contracting parties lay down rules that govern trade relations between them. At the multilateral level, the WTO Agreement and its predecessor, the General Agreement on Tariffs and Trade 1947 (GATT 1947), form the foundation of "international trade law." At the bi- and plurilateral level, there are diverse regional economic integration agreements concluded between states—such as customs unions (for example, the European Union) and free trade agreements (FTAs), for example, the North American Free Trade Agreement (NAFTA) and its planned successor, the United States–Mexico–Canada Agreement (USMCA).

**The WTO Agreement defines member countries' mutual rights and obligations regarding both imports and exports.** The WTO Agreement is the successor to the GATT 1947, which is incorporated into the agreement by reference through the General Agreement on Tariffs



and Trade 1994 (GATT 1994, hereafter just called GATT). Its essence lies in the principles of nondiscrimination and market access. The principle of nondiscrimination can be divided into the most-favored nation treatment obligation and the national treatment obligation. Whereas the former provides that WTO members must not treat products from a particular foreign origin more favorably than foreign products originating in any other country, the latter requires WTO members not to treat imported products less favorably than domestic products in terms of internal taxation or domestic regulation. While the WTO Agreement predominantly provides rules that restrain importing members' ability to discriminate against imported products from one country in favor of domestic products or products from another country, it also includes provisions limiting their ability to restrict the export of domestic products.

**The WTO allows its members to conclude regional economic integration agreements with each other, in the form of FTAs or customs unions, which may contain additional rules and obligations that go beyond those contained in the WTO Agreement.** For instance, the EU, like many other WTO members, has concluded such agreements with several of its trading partners, including many timber-exporting countries.

**The WTO Agreement, including the GATT, and FTAs contain rules that limit member states' ability to restrict the export of goods, such as timber products.** These rules can be broadly divided into (i) quantitative export restrictions and (ii) export taxes or duties (collectively referred to throughout this chapter as "export taxes"), that is, charges levied upon the exportation of a product outside of the customs territory of the state imposing that measure.

## Export Restrictions on Timber Products and the WTO Agreement

**The GATT prohibits the imposition of quantitative restrictions on the export of goods but does not prohibit the imposition of export taxes if they are applied in a nondiscriminatory manner.**

### Quantitative restrictions on exports

**Quantitative restrictions on the export of goods, such as timber products, are prohibited under GATT Article XI:1** (box 9.1). Measures that would restrict the volume of timber products exported from a WTO member would therefore result in a violation of the WTO commitments of the member adopting the measure.

#### BOX 9.1 GATT ARTICLE XI:1 – GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

1. "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any

contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

## Export taxes

**Export taxes are taxes levied on the exportation of goods outside of the exporting country's customs territory.** Upon presenting the goods to the customs authorities prior to exportation, the exporter must pay a certain amount over the value of the exported products (ad valorem tax), or in relation to the number of items exported (unit-based tax). Crucially, an export tax is not due if the products are not exported; that is, if they remain within the customs territory of the country of origin.

**The application of export taxes, like many other fiscal instruments, can be tied to (non) compliance with certain sustainability criteria.** In other words, a country imposing an export tax may make the payment of such a tax conditional upon fulfilling certain sustainability standards. Where products comply with these criteria, an exporting country may refrain from imposing the export tax, whereas the tax would be due in the case of noncompliance.

**The GATT does not prevent WTO members from adopting export taxes if they are implemented in a nondiscriminatory manner.** Contrary to quantitative restrictions, the GATT does not explicitly prevent WTO members from adopting export taxes. GATT Article XI:1 states, “No prohibitions or restrictions other than duties, taxes or other charges...shall be instituted or maintained by any contracting party on the...exportation or sale for export of any product destined for the territory of any other contracting party.” Thus, in principle, export taxes or other charges are not prohibited. WTO members are, therefore, in principle entirely free to adopt export taxes on exports of certain products without risking violation of their WTO commitments.

**This freedom to impose export taxes is however constrained by the most-favored-nation treatment obligation as contained in GATT Article I:1 (box 9.2).**

### BOX 9.2 GATT ARTICLE I:1 – GENERAL MOST-FAVORED-NATION TREATMENT

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|---|--|
| <p>1. <i>“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect</i></p> | <p><i>to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”</i></p> |
|---|--|

**Consequently, WTO members cannot impose an export tax dependent on the destination of the product in question.** GATT Article I:1 requires WTO members, when they adopt export taxes (“customs duties...imposed on...exportation”), to ensure that they grant “any advantage, favor, privilege or immunity...to any product...destined for any other country...immediately and unconditionally to the like product...destined for the territories of all other contracting parties.”

## Commitments in WTO protocols of accession of timber-exporting countries

**WTO members that joined the organization after its founding in 1995 have on some occasions had to accept additional obligations, such as prohibitions on the imposition of export taxes,**

**as a condition for their accession** (Geraets 2018).<sup>1</sup> Generally speaking, WTO members have often sought commitments from acceding states that would preclude them from adopting export taxes.

**Commitments on the elimination of export taxes contained in protocols of accession have been used successfully to challenge such taxes in WTO dispute settlement proceedings.** In *China – Raw Materials* and *China – Rare Earths*, panels and the Appellate Body found that China had acted inconsistently with its WTO commitments by imposing export taxes on certain raw materials and rare earth metals.<sup>2</sup> Complaints against these taxes had been filed by, among others, the EU and the United States. In 2016, the EU and the United States filed new complaints against China’s use of export taxes on raw materials.<sup>3</sup>

**Importantly, none of the four FIP member countries that acceded to the WTO after its establishment (Cambodia, Ecuador, the Lao People’s Democratic Republic, and Nepal) have accepted such an obligation in their respective protocol of accession.** Consequently, like founding WTO members, they would not violate any WTO law provision by adopting export taxes, provided they did so in a nondiscriminatory manner.

### Rules on export restrictions in FTAs concluded with FIP member countries

**In addition to WTO rules, states may be bound by other international economic law agreements, such as FTAs.** A country-by-country and agreement-specific analysis is required to determine whether FTAs prevent timber-exporting countries from imposing export taxes. Canada, the EU, and the United States are the most significant export markets with which FIP member countries have concluded FTAs. Whether these FTAs prohibit FIP member countries from adopting export taxes on timber products can only be determined based on an analysis of the exact commitments contained in these agreements.

**FTAs signed with the EU include provisions restricting export taxes.** The EU has concluded FTAs, sometimes named economic partnership agreements or association agreements, with 17 of the 23 FIP member countries (and is negotiating one with four others). Each FTA contains a prohibition on both the EU and the partner country to impose “new customs duties on exports.” The language used to define these commitments varies from agreement to agreement and may include references to the following:

- “duties or taxes on exports or charges with equivalent effect”
- “customs duties on exports”
- “duties or taxes imposed on or in connection with the exportation of goods”
- “any tax or charge on the exportation of a good to the other Party that is in excess of the tax imposed on that good when destined for domestic consumption” (EU-Mexico FTA 2018)

**The EU-Mexico and EU-Vietnam FTAs contain the most recent articulations of commitments not to adopt or maintain export taxes** (WTO 2018a) (box 9.3 and box 9.4).

1 The list of WTO members that have accepted such commitments include Afghanistan, Bulgaria, China, Croatia, Estonia, Georgia, Kazakhstan, Latvia, Mongolia, Montenegro, Russia, Saudi Arabia, Tajikistan, Ukraine, and Vietnam.

2 WTO, *China – Raw Materials*, DS394/DS395/DS398; and *China – Rare Earths*, DS431/432/433.

3 WTO, *China – Raw Materials (II)* (EU) and *China – Raw Materials (II)* (US), DS509/DS508.

**BOX 9.3** EU-MEXICO FTA: ARTICLE X.4 – EXPORT DUTIES, TAXES, OR OTHER CHARGES

1. *“No Party shall adopt or maintain any tax or charge on the exportation of a good to the other Party that is in excess of the tax imposed on that good when destined for domestic consumption.*
2. *No Party shall adopt or maintain any duty or charge of any kind imposed on, or in connection with, the exportation of a good to the territory of the other Party, that is in excess of those adopted or maintained on that good when destined for domestic consumption....*

**BOX 9.4** EU-VIETNAM FTA: ARTICLE 2.11 – EXPORT DUTIES, TAXES, OR OTHER CHARGES

1. *“A Party shall not maintain or adopt any duties, taxes, or other charges of any kind imposed on, or in connection with, the exportation of a good to the territory of the other Party that are in excess of those imposed on like goods destined for domestic consumption, other than in accordance with the schedule included in Appendix 2-A-3 (Export Duties Schedule of Viet Nam) of Annex 2-A (Reduction or Elimination of Customs Duties).*
2. *If a Party applies a lower rate of duty, tax or charge on, or in connection with, the exportation of a good and for as long as it is lower than the rate calculated in accordance with the schedule included*  
*in Appendix 2-A-3 (Export Duties Schedule of Viet Nam) of Annex 2-A (Reduction or Elimination of Customs Duties), that lower rate shall apply. This paragraph shall not apply to more favorable treatment granted to any other third party pursuant to a preferential trade agreement.*
3. *At the request of either Party, the Trade Committee shall review any duties, taxes, or other charges of any kind imposed on, or in connection with, the exportation of goods to the territory of the other Party, when a Party has granted more favorable treatment to any other third party pursuant to a preferential trade agreement.”*

**The EU-Vietnam FTA is a special case because Vietnam is not a FIP member country. However, the export tax elimination commitment is particularly detailed, as it refers to the “Export Duties Schedule of Viet Nam,”** that is, Appendix 2-A-3 to the agreement (WTO 2018b). This appendix contains export tax reduction commitments for a large group of products falling within chapter 44 of the Harmonized System nomenclature, that is, timber and forestry products. For each product, an export tax reduction commitment with a base rate and a final rate (of 0 percent) has been included.

**The United States and Canada have also concluded FTAs with FIP member countries that include commitments not to adopt or maintain export taxes.** Like the EU FTAs, a detailed textual analysis of these commitments is required to establish the scope of the commitments in each case. Table 9.1 lists the agreements concluded by the EU, the United States, and Canada with FIP member countries and indicates whether a commitment exists that would prevent or restrict the ability of FIP member countries to adopt export taxes.



**TABLE 9.1**  
**AGREEMENTS CONCLUDED BETWEEN THE EU, THE UNITED STATES, AND CANADA AND FIP**  
**MEMBER COUNTRIES**

FIP COUNTRY	COMMITMENT OR OBLIGATION TO ELIMINATE OR NOT (RE)-INTRODUCE EXPORT DUTIES?		
	EU FTA	US FTA	CANADA FTA
Bangladesh	No	No	No
Brazil	No	No	No
Burkina Faso	Yes, Article 13 EU – ECOWAS EPA, but exception for environmental protection	No	No
Cambodia	No	No	No
Cameroon	Yes, Article 15 EU – Central Africa EPA, but exception for environmental protection	No	No
Congo, Dem. Rep.	Yes, Article 15 EU – Central Africa EPA, but exception for environmental protection	No	No
Congo, Rep.	Yes, Article 15 EU – Central Africa EPA, but exception for environmental protection	No	No
Côte d’Ivoire	Yes, Article 13 EU – ECOWAS EPA, but exception for environmental protection	No	No
Ecuador	Yes, Article 25 EU – Andean (with Colombia and Peru)	No	No
Ghana	Yes, Article 13 EU – ECOWAS EPA, but exception for environmental protection	No	No
Guatemala	Yes, Article 88 EU – Central America AA	Yes, Article 3.11 CAFTA-DR (Dominican Republic–Central America FTA)	No
Guyana	Yes, Article 14 EU – CARIFORUM EPA	No	No
Honduras	Yes, Article 88 EU – Central America AA	Yes, Article 3.11 CAFTA-DR (Dominican Republic–Central America FTA)	Yes, Article 3.11 Canada-Honduras Free Trade Agreement
Indonesia	No	No	No

Lao PDR	No	No	No
Mexico	Yes, Article X.4 EU – Mexico FTA (Agreement in Principle, 2018)	Yes, Article 2.13 United States–Mexico–Canada Agreement	Yes, Article 2.15 Trans-Pacific Partnership
Mozambique	Yes, Article 26 EU – South African Development Community EPA, but exception for environmental protection	No	No
Nepal	No	No	No
Peru	Yes, Article 25 EU – Andean (with Colombia and Peru)	Yes, Article 2.11 Peru Trade Promotion Agreement	Yes, Article 2.15 Trans-Pacific Partnership
Rwanda	Yes, Article 14 EU – East African Community EPA, but exception for environmental protection	No	No
Tunisia	Yes, Article 26 EU – Tunisia AA	No	No
Uganda	Yes, Article 14 EU – East African Community EPA, but exception for environmental protection	No	No
Zambia	Yes, Article 15 EU – Eastern and Southern Africa EPA GSP EBA	No	No

Note: AA = association agreement; CARIFORUM = Caribbean Forum; ECOWAS = Economic Community of West African States; EPA = economic partnership agreement; EU = European Union; FTA = free trade agreement; US = United States.

**General FTA commitments on export taxes do not in every instance preclude FIP member countries from adopting such taxes.** Depending on the FTA, a commitment may be phrased differently and may provide for more flexibility. The economic partnership agreement concluded between the EU and the Economic Community of West African States (ECOWAS) provides a case in point (WTO 2014). The FIP member countries Burkina Faso, Côte d'Ivoire, and Ghana are party to this agreement, which has its own commitments on export taxes (box 9.5).

**BOX 9.5** EU-ECOWAS EPA: ARTICLE 13 – EXPORT DUTIES AND TAXES

1. *“No new duties or taxes on exports or charges with equivalent effect shall be introduced, nor shall those currently applied in trade between the Parties be increased from the date of entry into force of this Agreement.*
  2. *The duties, taxes on exports or charges with equivalent effect shall be no greater than the same duties and taxes applied to similar goods exported to any other countries that are not party to this Agreement.*
  3. *In exceptional circumstances, if the West Africa Party can justify specific needs for income,*
- promotion for fledgling industry or **environmental protection**, it may, on a **temporary basis** and **after consulting the European Union Party, introduce duties, taxes on exports or charges with equivalent effect on a limited number of additional goods or increase the impact of those that already exist.***<sup>a</sup>
4. *The Parties agree to review the provisions of this Article in the framework of the Joint Council of the EPA in accordance with the revision clause of this Agreement, taking full account of their impact on the development and diversification of the economy of the West Africa Party.”*

a. Emphasis added.

**The wording of Article 13:3 of the EU-ECOWAS economic partnership agreement therefore leaves open the possibility to introduce an export duty for environmental protection considerations.** However, where a FIP member country would contemplate the adoption of such an export tax, it would—in any event—have to “consult” the EU and the measure would have to be temporary.

## Conclusion

**The WTO Agreement does not prohibit the imposition of export taxes, but the EU and the United States, as WTO members with significant market power, have concluded FTAs with the majority of FIP member countries that in some cases include restrictions on export taxes.**

These agreements may include commitments by both parties to eliminate any existing export taxes and/or to refrain from adopting new export taxes. Consequently, timber-exporting countries that have concluded FTAs with relevant export markets would be well advised to verify that they are not prevented from adopting export taxes under these agreements. Whereas the adoption of export taxes on timber for environmental reasons may not in every case be prohibited, prior consultations with partner countries may be required under existing FTAs.

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