MMSD

Mining, Minerals and Sustainable Development

November 2001 | No. 40

Mining, Minerals and Sustainable Development: The Links to Trade and Investment Rules

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Mining, Minerals and Sustainable Development is a project of the International Institute for Environment and Development (IIED). The project was made possible by the support of the World Business Council for Sustainable Development (WBCSD). IIED is a company limited by guarantee and incorporated in England. Reg. No. 2188452. VAT Reg. No. GB 440 4948 50. Registered Charity No. 800066

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1. Introduction

The mining and minerals sector is at once a major participant in, and a major force for, the globalization of the world's economies. Its products are intensively traded, and many of its mining operations are highly dependent on foreign direct investment. In searching for the ways in which the sector can contribute to the transition to sustainable development, it is therefore important to consider how the rules and policies of trade and investment might help or hinder progress toward that goal.

This paper first analyzes the ways in which trade rules, trade policies and trade measures in environmental agreements might impact on the contribution trade in metals and minerals can make to sustainable development. It reviews recent important developments in WTO case law, analyzes data on the extent of tariff escalation in the sector, and goes in depth into the Basel Convention as a case study in trade-related environmental treaty law. It then turns to investment rules, bilateral, regional and multilateral, and asks how they might impact on the sector's contribution to the transition, with a focus mostly on mining activities. The discussion relies primarily on analyses of the defunct Multilateral Agreement on Investment and the investment provisions in the NAFTA, as cases with wider applicability. In each case, the paper makes some suggestions for actions that the MMSD Project may want to recommend or initiate.

2. Executive Summary

It is important, when considering the relationship between metals, minerals and mining on the one hand and trade and sustainable development on the other, that we realize the trade agenda is really many agendas. For the purposes of this paper, we should at least segregate it into investment and trade in goods. The latter will be of greater relevance for the minerals and metals sectors, while the former will be of greater relevance for mining endeavours.

Looking first at trade, metals and minerals, we can break the analysis into three themes: trade rules, trade policies, and trade measures in environmental agreements.

The key trade rules relevant to this paper are those dealing with processing and production methods (PPMs). While traditionally it has been held that trade measures at the border based on PPMs are WTO-illegal, recent jurisprudence has shown that under certain circumstances such measures – including environmental measures – might be allowed. To pass muster, though, any such measures would have to meet a fairly high standard of fairness and due process. The industry might be better off propounding its own sectoral PPM standards in a forum like the ISO, than waiting for governments to do so individually.

Such industry-led standards might also forestall the development of standards of a voluntary non-governmental sort. There is a raging debate in the WTO over whether the WTO rules of fair process apply to such standards, but odds are that the naysayers will win, leaving the development of such voluntary standards unguided by the WTO procedural safeguards.

One particular trade rule that might have helped the industry contribute to sustainable development lapsed into oblivion at the failed WTO Seattle Ministerial in 1999, and it might

be useful to push for its reinstatement, perhaps even in a stronger form, in the current negotiations. This was the provision that allowed for non-actionable (legal) subsidies to cover a percentage of firms' costs of meeting new environmental regulations.

On trade policy, the key issue for minerals and metals is tariff escalation. Original research for this paper confirms that there is a marked increase in tariff rates with the degree of processing of the products of mining, minerals and metals. This frustrates the ability of local processors to create employment, often in less developed regions. The industry should come out strongly against this unfair and damaging form of protectionism.

On trade measures in MEAs, easily the most interesting for mining, minerals and metals is the Basel Convention on the Transboundary Movement of Hazardous Wastes. This agreement uses a prior informed consent procedure that forces exporters of hazardous wastes to obtain consent from importers before shipping. Both importers and exporters have a responsibility to ensure that the importer has the capacity to properly dispose of the waste.

Key to the industry's interest is the fact that, in order to prevent major loopholes in coverage from "sham recycling" operations, the convention covers hazardous wastes both for disposal *and* for recycling. Waste for recycling is an important feedstock for a number of operations, and restricting its flow might even lead to environmentally worse outcomes.

The Convention has an amendment, not yet in force and not likely to be any time soon, that bans the export of waste from developed to developing countries. This reverses the burden of responsibility – instead of making importers declare whether they will or will not ban imports of waste, it makes developed countries proactively ban exports outright.

It is recommended that the industry push hard for a solution that can separate the treatment of wastes for disposal from wastes for recycling, as legally complex as such a fix might be given the language in the ban amendment. It is also recommended that the industry not come out against the idea of national-level bans under the Convention; the effort would be futile, and would blacken the industry's image.

Investment rules, as noted above, tend to be of greater interest to the mining sector. The typical Bilateral Investment Treaty, of which there are some 2,000 in existence, offers several standard provisions binding on governments: protection from expropriation, obligations for non-discriminatory treatment, obligations to refrain from imposing performance requirements as a condition of entry, and responsibility to accord the investor a minimum international standard of treatment.

On the positive side, such rules can help foster increased investment in countries where investment is needed. They say nothing, though, about the quality of the investment. The industry might consider pushing for a strong set of multilateral rules that includes meaningful investor responsibilities as well as rights. It would be a head-turning stance that would serve the industry well.

On the negative side, investment rules offer the possibility for rogue actors within the industry to directly sue host governments over breaches of their obligations. Not a bad

thing in itself, this possibility can turn bad when the rules are used in ways the drafters never contemplated, as we have seen in NAFTA, where investors are claiming that new environmental regulations amount to expropriation of their business interest, and suing for multi-million dollar settlements. The negative public relations impact of even one such case can mar the image of an entire sector. The industry might consider supporting a reform of the existing rules to tighten up interpretations of the provisions, preventing this kind of incident.

3. Background: Trade, Investment and Mining

What is often called the trade and environment – or trade and sustainable development – agenda is in fact about more than trade. In the WTO context, for example, it is about trade, services, investment, intellectual property rights, competition policy and other non-trade commercial issues all lumped together as the "trade" regime. The current paper deals primarily with trade and investment, and is careful to make the distinction between the two sets of issues. While the two are often closely linked, in practice they respond to different rules and incentives, and liberalizing them at the international level is subject to distinctive institutional requirements. Indeed, the arguments in favour of liberalizing trade in goods – essentially the concept of comparative advantage – do not apply to liberalizing investment: if one party has capital and the other has none, the relationship will necessarily be different than when both parties have something to trade.

As well, the rules governing FDI are quite different than those governing trade in minerals so that the opportunities to introduce considerations of sustainability will also differ. Above all, investors in productive mining activities have a more long-term outlook than participants in international minerals markets and have a commitment to a specific source of supply that is missing in the trade.

4. MMSD and Trade

4.1. Introduction

This section of the paper analyzes the ways in which trade rules, trade policies and trade measures in environmental agreements can impact on the achievement of sustainable development through mining and trade in minerals, with the discussion accordingly grouped into these three themes. Because we are dealing in this section with trade, rather than investment (treated in the next section), the discussions here will focus more on trade in minerals than on mining.

4.2. Trade Rules and MMSD

In considering the ways in which trade rules might impact on the achievement of sustainable development in the MMSD context, it is useful to first briefly recap what the trade rules system can and cannot do.

The multilateral trading system, embodied in the World Trade Organization's system of law, does not set standards, either environmental or other types. Each country is allowed to

set its own standards on issues such as environmental protection, and human, plant and animal health and safety, as appropriate. The WTO simply mandates the *way* in which those standards must be set. The key rules of conduct – such as the principle of non-discrimination – demand that the laws not be used to protect domestic industry against foreign competitors. They should not, for example, impose stricter environmental conditions on foreign imports than on comparable domestic products. There are several areas in which the WTO defers to internationally set standards, such as food safety standards, but these are not relevant to the MMSD context, for which no such international standards exist.

It is also useful to set out the definitions for two terms that will be extensively used in this section. In WTO parlance, a mandatory standard set by a government is a *technical regulation*. These types of standards must meet a number of requirements, including non-discrimination and various other rules of procedural fairness. A *standard* by comparison, is a voluntary requirement, and can be set by a government, a buyer, or a standard-setting body such as ISO. There is some controversy in the WTO over the rules applicable to such measures, and this will be discussed in greater detail below. This paper will use the WTO meanings when referring to standards and technical regulations.

4.2.1. Technical regulations: The PPMs Debate

The most important types of technical regulations in the context of MMSD are those that relate to the processing and production methods (PPMs) used for traded metals. There has, since 1991, been intense debate over the GATT/WTO consistency of PPM-based technical regulations covering imports. The prevailing view in the trade community has, for most of that time, been that such trade measures were, as a matter of basic principle, in violation of the GATT's clauses on non-discrimination (Articles I and III), and that they could not be justified under the general environmental exception provisions found in Article XX. This view held that the only types of rules that could apply to imported goods at the border were based on the characteristics of the product itself, rather than on the way in which that product was made.

This view was the subject of intense protest and debate by the environmental community, who argued that this interpretation of GATT law was wrong, and that in any case it would impinge on the ability of domestic environmental regulators to do their jobs. The trade community responded that to give such licence to national governments would be to give them the scope to unfairly protect their domestic industries. They might, for example, demand that the products of foreign mining have been produced in accordance with tough domestic environmental standards that would be inappropriate in foreign settings.

At the level of basic principle, this debate has now been ended by recent decisions from the WTO's dispute settlement bodies. In two rulings on a US measure banning the import of shrimp caught in ways that killed sea turtles, the WTO's Appellate Body has made it clear that under certain conditions, PPM-based technical regulations applicable to imported products can be consistent with the rights and obligations of trade law.

For the purposes of mining and trade in minerals, the key question is: what are those certain conditions? When will countries be allowed to enact domestic technical regulations based on the PPMs used in foreign exporters' sites, even if those PPMs have no effect on the final products? There is no definitive answer to this question. Even a full legal analysis of the rulings – which is beyond the scope of this paper – would not yield certainty in this regard. In part this is because the measures in question would need to be examined on a case-by-case basis. We can, however, identify some elements that would likely be considered by a dispute panel in ruling on any such measure in the context of minerals and mining:

- The panel would look for a *bona fide* effort by the importing country to seek multilateral solutions to its environmental concerns before resorting to unilateral measures. Note that this does not imply that the country will have had to be successful in its efforts to negotiate some sort of MEA.
- The panel would look for flexibility in the requirements: does the technical regulation require specific technology, or does it just outline the results it expects, and leave the attainment of those results to the exporters?
- Regulatory treatment would have to be equivalent from country to country; there could be no preference for certain importing nations.
- The measure itself would have to be procedurally "fair," involving appeal mechanisms, transparency of procedure, reasonably easy access to verification procedures, and so on.
- The panel would take into account whether the measure was based on an existing international standard, and would favour those that are.

In the end, a number of such considerations would have to be taken into account as the panel balanced the rights of countries to protect the environment, human health and safety, with the rights of other countries granted under other WTO provisions. The process does not by any means give *carte blanche* to regulators. But there seems little doubt that the final result could be a WTO-consistent technical regulation based on PPMs used in mining and mineral production.

This might foster sustainable development in forcing higher environmental standards of processing and production as a condition of market access for traded minerals. The downside is the risk that such standards might be inappropriate, or ill conceived, from industry's perspective. This risk is mitigated by the requirement for pursuit of multilateral solutions, where industry's voice would presumably be heard.

Actions: One of the MMSD recommendations might be the development of a set of sectoral environmental standards, either within or outside the ISO framework. These would guide individual firms in establishing their own standards by setting out a code of conduct to be locally adapted as appropriate. While the precedent for this work is not encouraging (similar efforts in the forestry sector have not progressed well), there may be better prospect for such work in the context of mining and minerals. For one thing, the forest industry lacked the cohesion and consensus that presumably will be expressed in MMSD's final report. For another, it faced several competing initiatives and processes, and could not successfully argue that its standard would work to bring them all together. Finally, ISO itself has evolved to the position where it, at least informally, now supports the

idea of sectoral standards. For all these reasons a proactive effort by the mining and minerals sector might be better received. If credibly fashioned, and followed by a critical mass of industry players, such a standard would remove the impetus for a patchwork of different trade-based requirements.

4.2.2. Voluntary Standards and Labels

Domestic standards are set by governmental and non-governmental bodies. Those set by governments are bound to follow the procedures laid down in an Annex to the WTO's Agreement on Technical Barriers to Trade: The Code of Good Practice.[1] The Code sets out procedural requirements much like those set out for technical regulations: advance notice of standards and other transparency requirements; a preference for performance-based, rather than design-based, standards; 60-day comment periods; a basis in existing international standards; and so on.

The TBT Agreement also encourages governments to ensure that their non-governmental standard-setting bodies formally commit to following the Code. However, few, if any, of the non-governmental standards bodies developing environmental standards have adopted the Standards Code. Given the proliferation of non-governmental standards and labels, it is worthwhile asking to what extent the Code or the TBT have any force in this area, specifically on PPM-related standards and labels. This question has not been definitively answered in the WTO, either by a dispute panel or by negotiation in the TBT or Trade and Environment Committees. Some countries, primarily resource exporters, insist that the TBT and the Code cover such labels, in hopes that they might bring some discipline to bear on them. Many developing countries counter this argument, in a bid to refuse any formal recognition that any aspect of WTO law covers PPM-related measures. And others, mostly from countries with high environmental standards, argue that non-governmental standards and labels are not covered by the strictures of the TBT or the Code – that only governments are covered.

It is, thus, hard to conclude one way or the other on the question of the WTO obligations faced by non-governmental PPM-based standards and labels. But a plain reading of the language of the TBT Agreement seems to indicate that only governmental measures are covered. By such a reading, while governments are obliged to try to bring non-governmental standard-setters in line with the Code, the standard setters themselves are not bound by the TBT. By this interpretation, governments would lack jurisdiction in an important area; such schemes are often set up in less than ideal ways, using closed processes and developing standards that favour the few actors that have been involved with their development.

Action: The recommendation floated above, to develop a set of sectoral PPM-based standards inside or outside of ISO, would address this problem as well. Timeliness, credibility and legitimacy through proper process would be key to forestalling competing efforts by others to develop such standards.

[1] "The Code of Good Practice for the Preparation, Adoption and Application of Standards." Annex 3 of the WTO Agreement on Technical Barriers to Trade, 1994.

4.2.3. Subsidies

One way in which trade law might help mining and trade in minerals to achieve sustainable development is through preferential treatment of subsidies designed to cushion the costs of adjusting to new environmental regulations. At the completion of the Uruguay Round there was just such a provision in the Subsidies and Countervailing Measures Agreement (SCM) – Article 8.2(c), which allowed the following type of subsidy:

> "Assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:
>
> i. is a one-time non-recurring measure; and
>
> ii. is limited to 20 per cent of the cost of adaptation; and
>
> iii. does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
>
> iv. is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
>
> v. is available to all firms which can adopt the new equipment and/or production processes."

With the failure of the WTO Members to launch a new round of negotiations in Seattle in 1999 came also the expiry of a number of temporary clauses in the Uruguay Round Agreements, the above being one of them. Subsidies such as those described above, then, are now considered "actionable," or challengeable under WTO law.

Action: The MMSD member firms could voice their desire to see a renewal of the SCM exception for environmental expenditures. They might, moreover, push for an even more ambitious formulation than what was agreed to in 1995, increasing the allowable percentage for example, or expanding the focus from "environment" to the broader concept of "sustainable development."

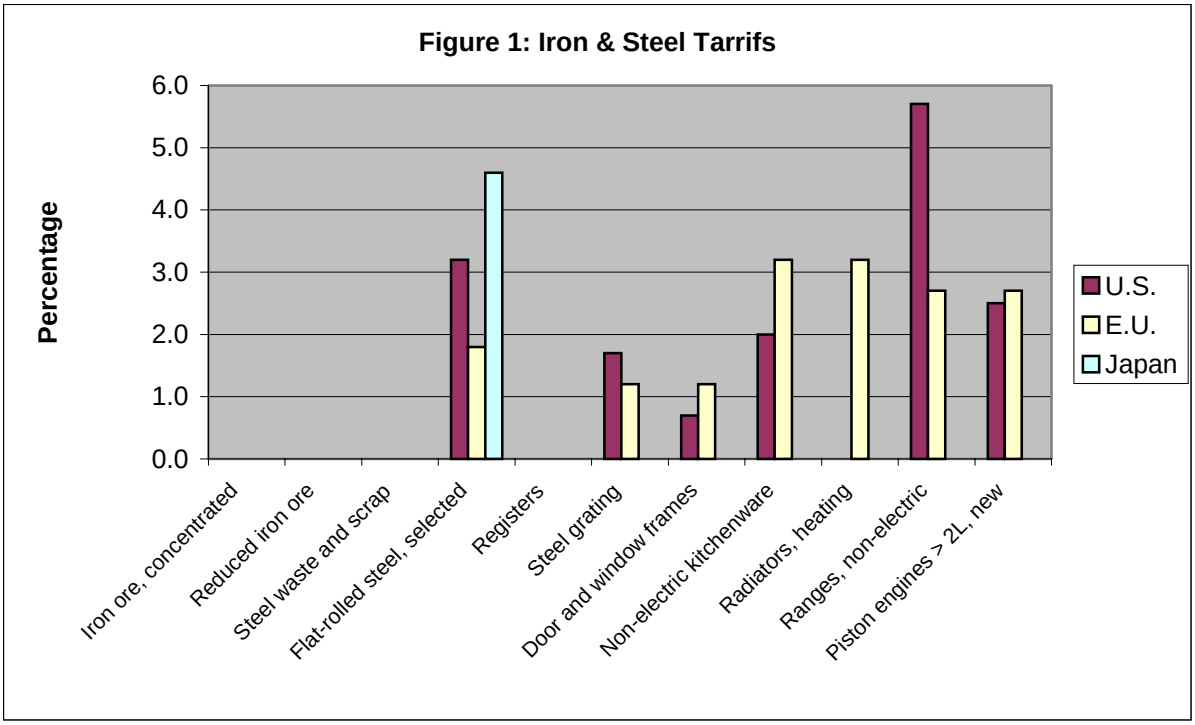
4.3. Trade Policy and MMSD: Tariff Escalation

One of the key potential contributors from the mining and mineral sector to sustainable development is the economic growth and activity associated with extraction and processing. As such, one of the key obstacles to sustainable development in the sector is the escalation of tariff rates with the degree of processing. That is, most countries levy low or zero tariffs on unprocessed minerals, but raise the rates as the degree of processing increases, in an effort to keep the value added within their own borders.

Figures 1 to 3 show the tariff rates charged by the U.S., the E.U. and Japan on a range of upstream and downstream products of iron & steel, aluminum and copper.[2] The traded goods are roughly arranged from left to right in order of degree of processing. The pattern is clear: while most basic inputs are allowed into the countries tariff-free, processed goods face a very different regime.

The result is less value added in the country of source. This means less diversification away from primary production – a goal of many commodity-dependent countries seeking lower economic volatility and higher growth and employment rates.[3] In this way tariff escalation frustrates sustainable development, particularly in developing countries dependent on only a few key mining and minerals sector exports.

Action: The MMSD project should come out strongly against tariff escalation. A new round of multilateral trade negotiations would be an excellent forum for addressing the problem. National governments may also have to take the lead, particularly those most guilty of the practice.



[2] These figures are illustrative only. A full analysis would incorporate trade volume weighting of the goods selected, and would employ more rigour in the designation of degree of processing, among other things. It would also analyze the structures of domestic production using and competing with the selected imports in the three jurisdictions.

[3] See Oxfam America. "Extractive Sectors and the Poor." Boston: Oxfam America, 2001.

Figure 2: Aluminum Tariffs

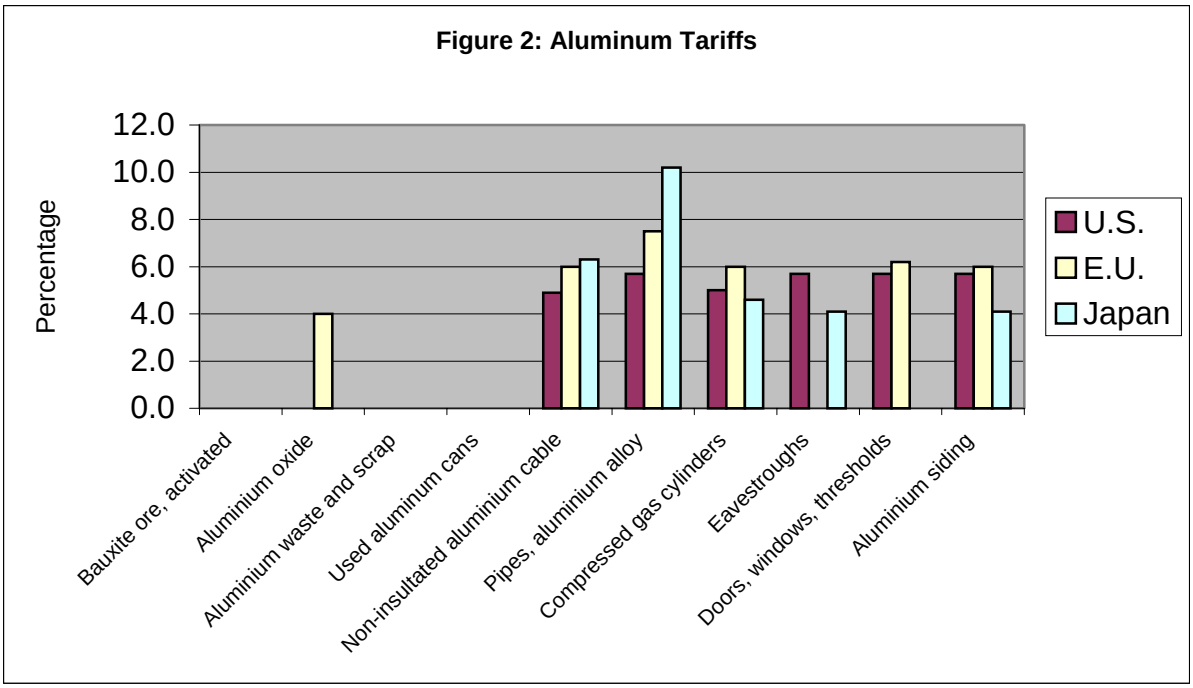
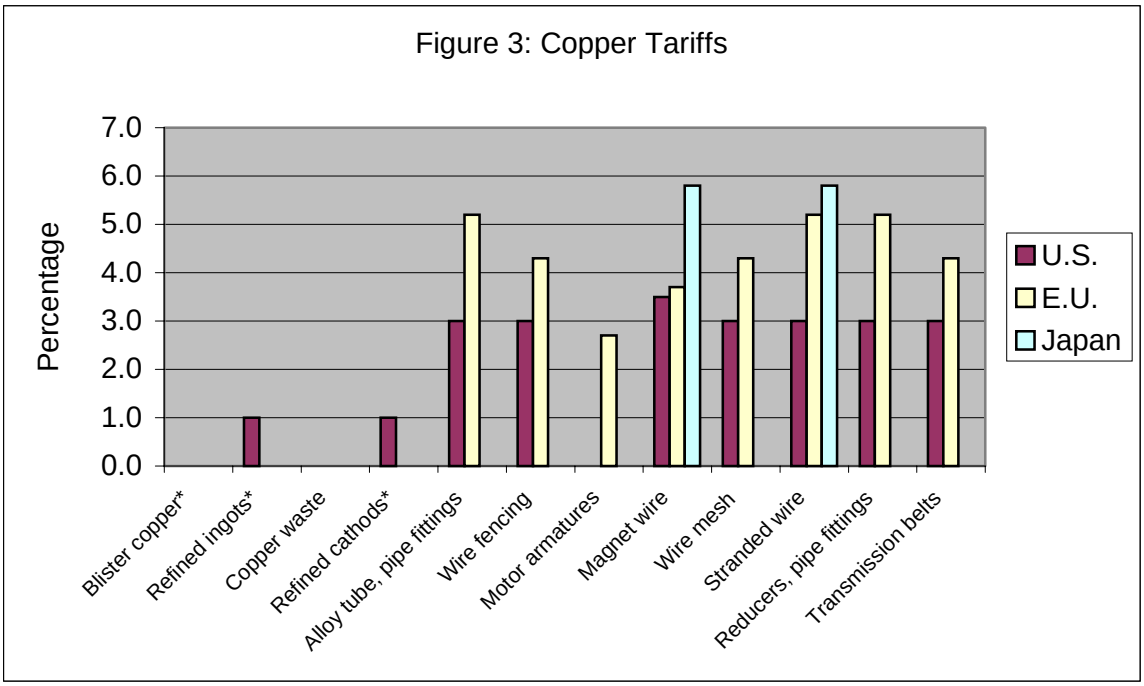


Figure 3: Copper Tariffs



* Japanese Figures not available: tariff charged at 15 yen/kg.

Sources: U.S. tariffs: Harmonized Tariff Schedule of the United States (Revision 1 to Supplement 1, August 24, 2001); E.U. tariffs: U.S. Trade Information Centre, International Trade Administration, Commerce Dept. (http://www.trade.gov/td/tic/); Japanese tariffs: APEC Database (http://www.apectariff.org). Rates as of October 2001.

4.4. MMSD and Trade Measures in Environmental Agreements

Of the 200-odd existing multilateral environmental agreements (MEAs), 20 incorporate trade measures – bans, trade restrictions, information requirements – to achieve their objectives. This section of the paper will examine first whether such measures are necessary in the first place, and second, what impacts they may have in the achievement of sustainable development through minerals and mining. Special attention is devoted to the Basel Convention on the Transboundary Movement of Hazardous Waste, given its significance for the industry.

4.4.1. Why use Trade Measures?

There are three basic reasons for using trade measures in MEAs. First, trade measures may be needed to help ensure the effectiveness of the MEA. The Montreal Protocol on Ozone Depleting Substances, for example, banned the import of such substances from non-parties. This ban prevented "leakage," whereby the cuts in production by parties would simply be replaced by increased imports from non-parties. Permitting trade with non-parties would have created a massive loophole, sufficient to negate the entire agreement.

Second, trade measures may be used as an incentive to join the agreement. Given the Montreal Protocol's ban on trade between parties and non-parties, the incentive to join was access to some fairly significant markets.

Third, they may be used because the MEA is in fact an agreement that addresses the specific trade-related aspects of an environmental problem. CITES is an agreement that addresses the pressures put on conservation of endangered species by the international trade in those species. The Basel Convention is an agreement that seeks to reduce and manage the risks associated with the transboundary movements of hazardous materials, in this case wastes and recyclables. In both cases, their trade provisions are fundamental to their objectives.

It is widely conceded, then, that these types of trade measures are necessary in MEAs, and that no reasonable alternatives exist to their use.[4]

4.4.2. MEAs and WTO Law

The relationship between trade law and the international law set out in MEAs is complex. Trade law does not have inherent hierarchical ranking above MEAs, and recent case law clarifies the need for WTO dispute settlement bodies to consider relevant international agreements in assessing the balance between the different rights and obligations under trade law, including the rights to protect the environment found in Article XX of the GATT.

As a result, it is no longer sufficient to say that because a provision of an MEA may lead to a violation of, for example, Article XI of the GATT on trade quotas, that the agreement is in

[4] See Joy Hyvarinen and Duncan Brack. "Global Environmental Institutions: Analysis and Options for Change." Report commissioned by the UK DETR. London: Royal Institute of International Affairs, 2000.

breach of trade law. The rationale for the measures, their scope, and other factors such as the extent of global participation all would be relevant in such an assessment.

This is an important consideration, since many of the trade measures used in MEAs seem to violate specific disciplines within WTO law. For example the Montreal Protocol's ban on imports of ozone-depleting substances from non-parties is discriminatory. It accords different treatment to two like products – ozone depleting substances from parties, and those from non-parties –based on what country they've come from.[5] And it may amount to a quantitative restriction – also prohibited. These types of potential conflicts are the rule, rather than the exception, in MEAs containing trade measures. But, to repeat, such violations may well be within the rights of WTO members, depending on the circumstances of the case in question. In the case of the Montreal Protocol, for example, the Protocol's widespread adoption, open process, legitimacy of objectives, and the necessity of the trade measures to achieving those objectives, would make it extremely unlikely that the measures would be found to be violations of WTO law.

No WTO member has yet brought a complaint related to its treatment as a non-party of an MEA (though they have brought complaints that should rightly have been settled within the mechanisms of an MEA, since both members were parties[6]). But the million-dollar question is: what happens when one does? There are two bodies of law; which should prevail?

In the absence of any preset rules for dealing with such conflicts, the Appellate Body has indicated the need for WTO law interpreters to consider the measures and processes set out in MEA's that are specifically relevant to a trade law dispute. In recent cases panels and the Appellate Body have indeed used non-trade law to help interpret WTO provisions. This has often been done in the context of seeking to establish whether there are underlying complementarities between the two regimes that can lead to mutually supportive rather than conflicting interpretations. The result is a process will increasingly demand case-specific solutions, in the absence of a broader statement on the relationship between these two types of agreements. Discussions are ongoing on possible alternatives to this approach, but they have been ongoing for years without much result and may continue for years more yet.

4.4.3. The Basel Convention

The Basel Convention has been of special concern to the mining and minerals sector since its inception. It is therefore treated here in some detail. This section will first briefly sketch out the Convention's origins and substantive provisions. It will then turn to the question of

[5] Technically, non-parties can export to parties, provided they have adopted the types of phase out and control measures demanded by the Protocol. These types of non-parties are arguably not the victims of discrimination.

[6] The WTO EU-Chile Swordfish dispute (WT/DS193/1), brought April 19, 2000, was one such case. Both countries were signatories to the UN Convention on the Law of the Sea, and Chile maintained that the dispute should have been settled under UNCLOS. But the EU took the matter to the WTO dispute settlement mechanism, which was faster, had more teeth and was arguably more trade-friendly. The matter was settled without proceeding to a WTO dispute panel.

how those provisions, particularly the ban amendment, might impact on the achievement of sustainable development through mining and minerals trade.

Origins of the Convention

Concerns about the growing number of shipments of hazardous wastes from developed countries to developing countries increased steadily in the early and mid 1980's. By 1985, the United Nations Environment Programme, in response to this trend, adopted the Cairo Guidelines and Principles for Environmentally Sound Management of Hazardous Wastes. Although not specific in title to transboundary movements from the North to the South, the preamble made it clear this was a primary concern.

The Guidelines did not, however, significantly impact the trend to more waste exports. Although there is little evidence of a complete shift from treatment at home to exports to developing countries, several factors supported the negotiation on a binding international agreement in relation to hazardous wastes. First, there were a small but significant number of incidents of ships roaming the seas until a destination for its hazardous waste cargo could be found. Many considered these known instances to be the tip of the iceberg of unregulated, clandestine hazardous waste movements. Second, the increased concerns in OECD countries to ensure the sound management of hazardous wastes led to increased standards and concomitant increased costs to generators. Exporting wastes was becoming an increasingly attractive economic option. Third, while percentages of known exports to developing countries may not have appeared extreme, some estimates suggesting less than 0.5% of total wastes generated in developed countries,[7] they were still widely seen as exports destined for countries that lacked the infrastructure to deal with them. Thus, there was a significant increase in environmental and human health risk associated with each such transboundary movement when compared to treatment at home. The transfer of such increased risks from developed to developing countries raised legitimate concerns of state liability, civil liability of private actors, of equity and of propriety, in particular in the emerging context of the "environmental justice" movement in the US and elsewhere. As waste brokers and traders began searching for cheaper ways to "manage" hazardous wastes, making developing countries and Eastern Europe destinations of choice led to international outrage and, ultimately, the drafting and adoption of the Basel Convention.

The Basel Convention was completed in 1989, and entered into force in 1992. As of August 2001, there were 148 parties to the Convention from all parts of the world.

The Basel Convention in a nutshell

The Convention provides an international regulatory framework that has three principal objectives:

- To reduce the generation of hazardous wastes globally.
  - This has now emerged as a central goal for the second decade of the Basel Convention;[8]

[7] Mark Montgomery, "Reassessing the Waste Trade Crisis: What do we really Know?", *Journal of Environment and Development*, Vol. 4, 1995, pages 1-28, at p. 4-5.

[8] Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.5/29, 10 December 1999. Decision V/33, para 1(a).

- To reduce to a minimum the transboundary shipments of the hazardous wastes that are generated, consistent with ensuring their environmentally sound management; and
- To ensure through a prior informed consent mechanism that all transboundary movements that do take place do so in an environmentally sound manner.

In order to ensure consistent management and avoid major loopholes through "sham recycling" operations, the transboundary movement of both hazardous wastes for disposal and hazardous materials for recycling was included in its scope of coverage.

Of particular concern to the minerals and mining sector is this coverage of the recycling industry.

What are the control mechanisms, and what do they cover?
The Basel Convention employs, as its primary regulatory tool, a prior informed consent (PIC) mechanism. This requires all exports and imports of covered materials to be consented to by the countries of import and export. Fundamental to the granting of this consent is the assurance for each party that the wastes will be handled in an environmentally sound manner. Ensuring this is a legal responsibility for both countries involved. This confirmation of an international legal responsibility on the exporting countries, supported by an obligation to make the illegal trade in hazardous wastes (including recyclable materials) a criminal act in their own countries, is a fundamental element of the Basel Convention.

Accompanying the PIC process are additional requirements relating to the labelling, placarding, manifesting, and similar matters concerning the transport of hazardous wastes and materials. These provide additional safety features within the regime.

Some additional elements are also set out. One is the sovereign right of any state to prohibit the import of any covered materials, whether for recycling or final disposal.[9] Once this right is exercised, and notice is provided under the Convention, all other states must prohibit, *mutatis mutandis*, the export of such wastes and recyclable materials.

A second additional element of importance is the recognition that in some cases the export of wastes may be warranted, if not preferable, to their domestic disposal. Local disposal that is not environmentally sound is not to be preferred over an export that would ensure a lower level of risk through a higher standard of care. Ensuring the environmentally sound management of the wastes is a primary touchstone in this regard. In relation to recycling, the Convention also recognizes that exports may occur when "the wastes in question are required as a raw material for recycling or recovery industries in the State of import."[10] This recognition is, however, subject to an obligation to ensure that any such trade meets the environmentally sound management requirement and other requirements of the Convention.

[9] Basel Convention, preamble para. 6, and Art. 4(1).
[10] Basel Convention, Art. 4(9).

Finally, where an importing or exporting country is not a Basel party, trade in hazardous wastes is prohibited unless governed by a bilateral agreement that meets the same objectives for the environmentally sound management of the wastes or recyclable materials.

The Basel Ban Amendment

The Basel Convention has the regulation of transboundary movement of hazardous wastes and recyclable materials as its principal focus. As such, it inherently has an impact on trade in these areas. The original Convention text applies a combination of regulation to international trade in wastes and recyclable materials, with the recognition of the sovereign right of any Party to prohibit any imports.

Beginning at the first meeting of the Conference of the Parties, however, developing countries, spurred by several NGO's, began to push for a comprehensive prohibition on exports of wastes or recyclable materials from OECD to developing countries. A decision to prohibit the export of wastes for final disposal from developed to developing countries was taken at that first meeting.[11] At the second meeting, a Decision to prohibit the export of hazardous recyclable material, effective 31 December 1997, was taken.[12] Owing to some uncertainty as to the legal status of these two decisions, the Third Meeting of the Conference of the Parties adopted a further Decision to amend the Convention text itself to establish a prohibition on the export of hazardous wastes and recyclable materials from developed to developing countries.[13]

This amendment has not yet come into force. If it does, it would have two major legal impacts. First, it would reduce the applicability of the transboundary movement control regime between developed and developing countries, and replace it with a comprehensive prohibition. Second, it would reverse the legal burden currently in the Convention that allows a country to ban imports, creating instead an obligation on developed countries to ban exports.

The consistency of this amendment with international trade law is a matter of some debate, which time and space does not permit entering into.[14] In any event, perhaps more important at this point is the environmental policy issues that are raised by this amendment. The primary justification for the ban amendment was the express recognition that

> Transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention.[15]

The response to this environmental concern was a blanket prohibition of exports from developed to developing countries. In trade law terms, this can be stated as the choice of a zero risk level of tolerance. However, in a sustainable development sense the blanket

[11] Decision I/22, First Meeting of the Conference of the Parties, December 1992.

[12] Decision II/12, Second Meeting of the Conference of the Parties.

[13] Decision III/1, Third Meeting of the Conference of the Parties.

[14] Any attempt to assess this issue must take into account recent WTO Appellate Body decisions in the so-called Shrimp-Turtle case (decision of Oct. 22, 2001, and 12 October, 1998) and in the Asbestos case (Canada-EU), February 2001). The same cases relate directly to any assessment of the consistency of the Basel Convention per se with trade law.

[15] Decision III/1, para. 3.

prohibition has significant potential impacts for developing countries as well. Most notable is the loss of potential feedstocks to supply recycling facilities. State of the art facilities require significant quantities of feedstocks to operate effectively.

Supporters of the ban amendment argue that the ban should lead to a leapfrogging of recycling as a primary waste management tool to the promotion of waste minimization and elimination. To some extent, this may be so, and from a waste management hierarchy perspective, this would be the preferred route. However, a realistic assessment suggests that the capacity to bypass recycling as a preferred approach to disposal in favour of full elimination of hazardous wastes is not readily supported by available technologies.

Hence, from a sustainable development standpoint, allowing for environmentally sound recycling in developing countries where there is a legitimate, environmentally sound demand and capacity for this purpose, appears to meet both the objectives of the Convention, and the objectives seen in the ban amendment itself to address the high risk of North-South transfers not being environmentally sound. It also fosters economic development in the South, where recycling facilities often constitute an important industry.

The mechanics of introducing such a capacity raises certain international law difficulties, but these should not be insurmountable. Appropriate standards for defining environmentally sound recycling are not beyond grasp. What is more difficult will be the relationship between the existing Convention text, the ban amendment, and the process for establishing when a recycling operation in a developing (or for that matter developed) country is environmentally sound.

Conclusions

The existing text of the Basel Convention responds to what is now an almost universally recognized responsibility of developed countries to ensure they do not export materials that create a higher level of risk for developing countries than they are prepared to accept for themselves. While this imposes constraints on those involved in legitimate and environmentally sound – and often preferred – practices, the meeting of this responsibility has widespread support.

The extension of the existing text to a blanket prohibition raises additional concerns, however. Whether the ban amendment can be married to a control regime that permits only environmentally sound facilities to be excluded from its terms is an open question. Whether the ban amendment should be wholly reversed is closely tied to this question. In either case, recognition of the broadly accepted international law responsibility to prevent the export of higher levels of environmental and human health risks should lie at the heart of the debate. This is not inconsistent with, or a barrier to, the sound contribution that the metals recycling industry can play in the achievement of a sustainable sector and a sustainable recycling industry.

In terms of current impacts, it bears repeating that the ban amendment is not yet in force, and that entry into force looks unlikely in the foreseeable future. Current impacts, then, are

entirely related to the invocation of import bans by individual governments – an option that has now been exercised by 47 of the Convention's 148 Parties.[16]

Action: The MMSD project should consider supporting a push to promote the marriage of the ban amendment with a control regime that would allow for the export of recyclables in those cases where it can be demonstrated that the importer has the capacity for the environmentally sound management (ESM) of the wastes in question. This, however, presupposes an international standard for such management – a standard that does not currently exist. Such a standard might be a part of the set of standards recommended above, to be pursued in the context of an ISO sectoral standard on MMSD. Alternatively, the Parties might be urged to more clearly spell out the existing general statement on ESM in the Basel text.

It is not recommended that MMSD adopt a critical stance toward the national-level exercise of the Basel import ban provisions. Not only would this be ineffective (the probability of changing these provisions is near zero), and run counter to established principles of international law, but the public relations implications for the industry would be terrible.

Given the central nature of the Basel Convention in the trade and environment debates for the mining and minerals sector, the MMSD Project might do well to commission a piece specifically devoted to an objective analysis of the legal and policy issues involved, bearing in mind the different perspectives and interests at stake.

5. MMSD and Investment

This section of the paper will look at the international rules for investment, both existing and prospective, and analyze their possible impacts on the achievement of sustainable development through mining and trade in minerals. While the previous section on trade was mostly relevant to traded minerals, this section will have most relevance for mining operations that rely on foreign direct investment (FDI).

There will first be a brief background discussion on investment rules at the international level, looking at their origins and history, and a survey of the existing state of play in multilateral, bilateral and regional fora. Then the analysis will turn to scenarios under which investment law in the context of mining and minerals might hinder or help the transition to sustainable development.

5.1. Background

Rules on investment are found primarily in bilateral treaties signed between states. There are over 600 of these bilateral investment treaties (BITs) in force. They are also found within the provisions of treaties on international trade, as they are in the North American Free Trade Area. Such an agreement is being negotiated in the Free Trade Area of the

[16] As per reporting information received by the Secretariat in 1998. See Basel Convention Series/SBC No. 00/05 Geneva, December 2000. The definition of "import ban" is difficult – for the purposes of this calculation, any decision taken "not to consent partially" to the import of hazardous wastes constitutes a ban, as does anything between that level of stringency and a total ban.

Americas as well, though its final shape is not yet clear. They are also found, in weaker form, as one of the Agreements contained in the World Trade Organization body of law, as the Agreement on Trade-Related Investment Measures (TRIMs). It is possible that the WTO will launch new multilateral negotiations on investment as part of a broad new round of negotiations; the decision whether to do so will be taken in Qatar in November 2001. Finally, there was an attempt in the 1990s to draft a stand-alone multilateral agreement on investment, or MAI within the OECD. (The intent was always to take it farther than the OECD to have developing countries sign on.) Secrecy of process and unaddressed environmental implications led to unprecedented NGO opposition efforts which, combined with differences among the negotiating countries, led to the abandonment of negotiations in 1998.[17]

All of these agreements except the TRIMs share the same basic elements. The typical investment treaty sets out the rights of foreign investors, as they shall be granted by host governments. These usually include:

- Freedom from expropriation, or measures tantamount to expropriation, without fair compensation;
- Freedom from performance requirements such as demands to buy local inputs, export a certain percentage of production or transfer technologies;
- The right to treatment not less favourable than that granted to domestic firms or firms from third countries.
- The right to treatment in accordance with minimum international standards.

As well, it spells out the manner in which alleged breaches of these rights may be pursued with the host government. Such mechanisms may be state-to-state, wherein the headquarter state of the firm deals with the host state. Or they may be investor-state, wherein the firm directly deals with the host government. The typical forum for such disputes is either the World Bank's International Centre for Settlement of Investment Disputes (ICSID), or the United Nations Commission on International Trade law (UNCITRAL).

The need for such agreements is based on the reluctance of most investors to deal with governments against whom they have no internationally enforceable legal rights. To the extent that such agreements facilitate the flows of investment to developing countries in need of such funds (and assuming that the investments in question are not environmentally, socially or economically damaging), they can be tools for the advancement of sustainable development, supporting the creation of new infrastructure, and bringing new more efficient technologies.

[17] For an excellent overview of the history of efforts to date to draft international investment agreements, see Konrad von Moltke, An International Investment Regime? Issues of Sustainability. Winnipeg: IISD, 2000. (http://www.iisd.org/pdf/investment.pdf)

5.2. Positive Scenarios

How might the existence of investment agreements foster the achievement of sustainable development through mining and trade in minerals? The most direct effect is the obvious one, described above: if such agreements increase the levels of beneficial FDI going to developing countries, then they can be contributors to sustainable development.

A potential *indirect* effect relates to one of the objectives pursued by the OECD in negotiating the MAI. That agreement included the OECD's non-binding Guidelines for Multinational Enterprises. The ostensible purpose was to hold investors to high standards of conduct, on the understanding that if all firms were to hold to such a code all would be better off. The types of high-profile disasters that result from poor practice are detrimental to the entire sector, and obviously do not contribute to sustainable development.

However, as with a cartel, the more firms stick with such an agreement, the more incentive there is for any individual firm to "free ride" on the efforts of the others, lowering the benefits for all. For that reason to the extent that such guidelines, if they exist, are voluntary, their ability to foster sustainable development, and to deliver the potential public profile benefits to the industry, are weakened.

In any case, such benefits are a hypothetical case, since investor responsibilities are not a part of the standard BITs or trade/investment agreement. The MAI was unique in this regard, even to the limited extent it did attempt such text.

Action: MMSD should voice its support for the positive potential role of investment agreements in fostering sustainable development, perhaps even extending to the advocacy of another attempt at multilateral negotiations. But in doing so it should also push strongly for a "balanced" agreement whose primary objective is in fact sustainable development. An agreement with such a starting point would look very different from the draft MAI, and would contain stronger provisions on investor and government responsibilities concomitant with investor rights. In so doing, the mining and minerals sector would send a powerful and unmistakeable message to its potential critics that it is committed to working toward sustainable development.

5.3. Negative Scenarios

Recent years have seen a new development in the NAFTA context – one that now seems to be beginning to spread to the BITs as well. Firms are using the provisions for investor protection (NAFTA's Chapter 11) as a strategic tool for policy intervention, rather than as a defensive shield of last resort.[18] For example, the provisions on expropriation are now being used to claim compensation for any government regulation that impacts on the profitability of an investment, whether or not undertaken for a valid public purpose such as protection of the environment or public health. As well, expropriation and other provisions in NAFTA are being used to threaten governments considering new tough environmental regulations.

[18] See IISD. Private Rights, Public Problems, Winnipeg: IISD, 2001. Also see Howard Mann., and Konrad von Moltke. "*NAFTA's Chapter 11 and the Environment - Addressing the Impacts of the Investor-State Process on the Environment* IISD working paper, June 1999.

This is far from the intended use of such protections. To use expropriation as an example again, the traditional approach has been to exempt from claim actions by governments exercising their responsibilities to protect the public at large (the "police powers" exemption).

The negative impact on sustainable development comes through the challenge of appropriate existing and pending environmental and public safety laws. For the mining and minerals sector, there is also the danger that "rogue" firms will become involved in publicized attempts to unravel tough environmental standards, creating a public relations problem for the sector as a whole.

Action: As an effort based in a sector with a heavy dependence on foreign direct investment, the MMSD project should support restricted interpretations of the provisions of investor protection, allowing for the use of the "police powers" exception, and other improvements. This effort should be directed at existing and future agreements. Abuse of the current provisions by mining and minerals firms could result in lower-than-appropriate standards for environment and human health, and the glare of negative publicity that surrounds such challenges (those brought under the NAFTA, in any case) could be damaging for the sector's reputation as a whole.

6. Conclusions

There are a number of important ways in which trade and investment can impact on the achievement of sustainable development through mining and trade in metals and minerals. Most of them call for proactive work by the industry – work that will pay off in terms of environmental protection as well as in terms of economic health for the sector.

But the challenges are not insignificant. Primary among them is the difficulty of acting as a coherent sector on issues about which there will necessarily be a broad array of opinions. As well, it will be difficult to sell the intangible gains from such action as more than balancing out what may in many cases be hard costs up front.

The good news is that in many cases there is no trade off to speak of. Working for decreased tariff escalation, for example, is financially good for the industry and at the same time good for the sustainable development. These types of opportunities should be pursued without hesitation.