

The EU as Force to “Do Good”: The EU’s Wider Influence on Environmental Matters

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Abstract

This research paper examines the capacity of the EU to exercise its influence in relation to environmental matters beyond its Member States. More specifically, this paper identifies that EU law and policy has the potential to influence environmental laws and business practices in New Zealand. Two hypotheses are put forward: first, that the EU can use its market force in such a way as to influence laws in third countries such as New Zealand - that is, relatively small countries seeking economies of scale and for whom the EU represents a valuable market. It is suggested that such influence can be observed in New Zealand through a spill-over effect in product standards for those goods exported to the EU and sold within New Zealand. Secondly, it is argued that the EU overcomes legal jurisdictional limits by relentlessly pursuing the adoption of its environmental policies and practices outside the EU through international consensus.

Keywords: business, environmental, EU, influence, international law

Brief insight into the development of EU environmental law

Unlike many other territories, the EU has been ‘markedly proactive in the development of environmental standards and policy, and in driving forward the level of environmental protection in each of the Member States.’¹ This environmental legislative framework did not, however, exist upon the formation of the EU.

Originally construed as an economic force, the first of the Treaties that formed what is now known as the European Union (EU)² did not make any reference to

¹ M. Horspool and M. Humphreys, *European Union Law*, Oxford; New York: Oxford University Press (5th ed.) 2008, p. 511. At the time of writing, the ‘Member States’ comprise the original six countries of France, Germany, Italy, Belgium, the Netherlands and Luxembourg, together with the United Kingdom, Denmark, Ireland, Greece, Spain, Portugal, Austria, Finland, Sweden, Cyprus, Malta, Estonia, Latvia, Lithuania, the Czech Republic, Hungary, Poland, Slovakia, Slovenia, Bulgaria and Romania.

² The term ‘European Union’ replaces that of ‘European Communities’ and ‘Union’ replaces the words ‘Community’ and ‘European Community’ throughout the EC Treaty by virtue of Treaty of Lisbon, which came into force on 1 December 2009 following a protracted period of negotiations to have all 27

environmental matters. At the risk of restating common knowledge, the EU was originally conceived as three 'European Communities' created in the post-World War II period through a series of founding treaties.³ This foundation was built on by subsequent amending treaties, the first of these being the Single European Act 1986 which clearly made environmental policy 'a legitimate area of activity' of the EU. However, it is the second of these amending treaties which is of most significance in terms of the EU's development generally. The Treaty on the European Union 1992 concluded at Maastricht in the Netherlands created an organisational framework for the EU comprising three pillars. The first of these pillars consists of the founding treaties (as amended by the Single European Act 1986), which includes what is now referred to as the Treaty on the Functioning of the European Union (FEU Treaty.) It is this treaty which relates to economic, social and environmental matters and is therefore of relevance for the purpose of this paper. The scope of the FEU Treaty is important in that the EU may act only if the FEU Treaty has given it power to do so.⁴

Article 191 FEU Treaty (ex Article 174 EC Treaty) is of particular significance in relation to EU environmental objectives⁵ and principles,⁶ the latter being the subject

Member States ratify it. (The Treaty of Lisbon amends the EU's two core treaties, the Treaty on European Union and the Treaty establishing the European Community, the latter being renamed the Treaty on the Functioning of the European Union.) Therefore, with the exception of titles, quotations and direct reference to terminology used within those, the term 'European Union' or 'EU' will be used predominantly throughout this paper.

³ Namely, The Treaty of Paris establishing the European Coal and Steel Community 1951 (commonly referred to as the 'ECSC Treaty', but since expired July 2002), the treaties of Rome entered into in 1957, one of which establishing the European Atomic Energy Community 1957 (commonly referred to as the 'EURATOM Treaty') and the other of which establishing the EEC 1957 (until recently, referred to as the 'EC Treaty', but now by virtue of the Treaty of Lisbon, which came into force on 1 December 2009, to be referred to as the 'Treaty on the Functioning of Europe.' This Treaty, as "evolved" will be referred to throughout this paper as the FEU Treaty.

⁴ Article 5 FEU Treaty (ex Article 5 EC Treaty.) See also E Berry and S Hargreaves, *European Union Law*, Oxford; New York: Oxford University Press (2nd ed), 2007, p. 42. To impart a brief insight into the various sources of EU law and its correlation with the national law of the Member States, the principal sources of EU law are contained in the Treaties, Regulations, Directives and judgments of the European Court of Justices (the latter having been instrumental in the development of EU environmental law both prior and subsequent to the Single European Act 1986.) Generally, Regulations that are sufficiently clear and unconditional are directly applicable in the Member States (see Article 288 FEU Treaty (ex Article 249 EC Treaty.) That is, a Regulation will override the law of any Member State once it comes into force. Regulations have been used in areas where a uniform approach is necessary, for example, to regulate trade with third countries and to implement international agreements. However, due to the need for flexibility in the implementation of environmental objectives of the FEU Treaty within the Member States, the use of Regulations as a legislative tool is relatively uncommon. Instead, most EU environmental legislation exists in the form of Directives. All secondary legislation such as Directives must be based on relevant Articles of the FEU Treaty.

⁵ The four environmental objectives to be pursued by the EU in formulating environmental policy are set out in Article 191(1) (ex Article 174(1) EC Treaty.) They are: 'preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems.'

⁶ Article 191(2) FEU Treaty (ex Article 174(2) EC Treaty) sets out the fundamental principles on which environmental policy is to be based. These principles are: the principle of high level of protection, which is softened to some extent by the qualification 'taking into account the diversity of situations in the various regions of the Community'; the prevention principle, which allows action to be taken to protect the environment at an early stage, rather than repairing the damage once it has occurred (for example, Directive 94/62 on packaging and packaging waste in respect of the reduction of overall

of discussion later in this paper. Article 11 of the FEU Treaty (ex Article 6 EC Treaty) is also of significance in that it provides for environmental protection requirements to be integrated into the definition and implementation of EU policies and activities 'in particular with a view to promoting *sustainable development*' (emphasis added.)

'Sustainable development' has been described as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'⁷ Although this meaning has been the subject of scrutiny and contested at an international level,⁸ there does not appear to be any international legal consensus on what it might mean substantively.⁹ The application of 'sustainable development' as a legal principle, at least presently, therefore appears to be largely aspirational.¹⁰

'Community law does not have much by way of case law expressions of such a sustainability principle and it seems that the Article 6 EC [now Article 11 FEU Treaty] requirement, such as it is, rests more properly on the political level and is not yet a general principle that can be used to review the validity of Community law or policies.'¹¹

Nevertheless, Article 11 does at least show a clear intention that environmental policy considerations be implemented into all policy areas and activities of the EU.

EU Environmental Protection Product Standards

The EU has exclusive competence to act in matters to achieve the common market, however, it shares competence with the Member States in relation to matters concerning the protection of the environment. This represents some challenges in the area of product standard harmonisation where measures are introduced in pursuit of environmental protection.¹² Harmonisation of product standards is of particular

volume of packaging); the source principle, which, requires that environmental damage be rectified at source; the polluter pays principle; and the precautionary principle.

⁷ Report of the 1987 World Commission on Environment and Development, *Our Common Future*, known as the Brundtland Report. Note that this definition was adopted in the New Zealand context in a report entitled 'Implications of the Sustainable Development Programme of Action' prepared for the New Zealand Department of Prime Minister and Cabinet (October 2006.) <http://www.landcareresearch.co.nz/publications/researchpubs/LCR_SDPOA_review_2006.pdf>, accessed 18 September 2010.

⁸ *Gabcikovo- Nagymaros Project* (Hungary/Slovakia) 37 ILM (1998) 162 where the ICJ stated that 'The principle of sustainable development is... a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.'

⁹ S. Bell and D. McGillivray, *Environmental Law*, Oxford; New York, Oxford University Press (7th ed), 2008, p. 58.

¹⁰ *Ibid.*, p. 74.

¹¹ Horspool and Humphreys, *op. cit.*, p. 157.

¹² The principle of subsidiarity requires that, in areas that do not fall within the EU's exclusive competence, it may take action (for example, legislate) only and in so far as the objectives of the proposed action 'cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.' Directive 2001/101 in relation to greenhouse gas emission trading may be a good example of this. This must be measured with the principle of proportionality which requires that any action by the Community not go beyond what is necessary in order to achieve the FEU Treaty objectives. An example of the principle of proportionality may be reflected in certain voluntary environmental agreements. For example, the

importance in relation to the free movement of goods, which is fundamental in achieving the common market. The EU may enact Directives¹³ under Article 114 FEU Treaty (ex Article 95 EC Treaty)¹⁴ to achieve this purpose. Paragraph three of Article 114 specifically provides that, when considering proposals for such Directives concerning environmental protection, the Commission is to 'take as a base a high level of protection, taking account in particular of any new development based on scientific facts.' It seems, therefore, that the EU may set minimum product standards which are aimed at implementing a high level of environmental protection. This, however, must be read in conjunction with Article 114(4).

Article 114(4) allows a Member State to maintain or introduce stricter national environmental protection requirements derogating from EU harmonisation measures where that Member State 'deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment... on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.' Should the protective measure be based on FEU Treaty Articles specific to the environment, then a similar, but wider, provision appears in Article 193 FEU Treaty (ex Article 176 EC Treaty.) This Article provides that protective measures adopted by the EU in order to implement environmental objectives 'shall not prevent any Member State from maintaining or introducing more stringent protective measures.' (Arguably, Article 193 provides Member States with a wider ability to introduce more stringent protective measures as there is no requirement for the Member States to show grounds of a problem specific to it.) The legal basis for an EU measure is significant¹⁵ as it may be successfully challenged in the ECJ¹⁶ if the measure is not adopted in accordance with the appropriate procedure and involving the appropriate institution(s).

However, for a third country such as New Zealand the significance of the foregoing is that even where EU action is deemed necessary in relation to environmental matters, Member States may introduce or maintain stricter national provisions that derogate from EU common market harmonisation measures. In both cases (that is, whether

agreement between the Commission and the European car industry on the reduction of CO2 emissions from passenger cars; [1999] O.J. L40/49.

¹³ Given the fact that the Treaty Articles concerning the environment have more of a policy flavour, rather than containing law capable of having direct effect in the Member States, legislation is required to implement them. Most EU environmental legislation exists in the form of Directives. (See P S R F Mathijsen, *A Guide to European Union Law*, London : Sweet & Maxwell (9th ed, 2007), 475 where the writer comments that almost all of the 300 or more Community legislative acts aiming at environmental protection are in the form of Directives.)

¹⁴ Note that the recently concluded FEU Treaty reversed the order of the previous Articles 94 and 95 EC Treaty. That is, Article 114 FEU Treaty embodies Article 95 EC Treaty, while Article 115 FEU Treaty embodies Article 94 EC Treaty.

¹⁵ Identifying the correct legal base for environmental measures has also been the subject of dispute between institutions of the EU concerning external trade policy. In *Cartagena Protocol on Biosafety* [2001] ECR I-9713 the Commission sought a dual legal base in Articles 191(4) (ex Article 174(4) EC Treaty) and 207 (ex Article 133 EC Treaty) in relation to a Protocol adopted pursuant to the 1992 UN Convention on Biological Diversity. It argued that, as such the EU had exclusive competence to negotiate on behalf of Member States. However, the ECJ upheld the Council's view that the Protocol was primarily an environmental protection measure and, as such, had a single legal basis under the environmental provisions of the treaty. As a consequence, there was shared competence between the EU and the Member States.

¹⁶ Under the doctrine of 'attribution,' all EU law must have a treaty basis. Bell and McGillivray, op cit., p. 187: 'If there is no legal basis for an EC environmental Regulation or Directive, or if the incorrect basis has been given, then the ECJ can annul the law.'

the exception under Article 114(4) or Article 193 is adopted), the requirement for notification to the Commission avoids the potential for abuse by Member States as the Commission will only approve the more stringent protective measure if it is based on grounds of major need or on new scientific evidence. The Member State must also satisfy the Commission that the measures do not amount to arbitrary discrimination or disguised restrictions on trade within the common market.¹⁷ While grounds such as new scientific evidence required by the Commission to support a more stringent measure may be relatively straightforward, it remains to be seen what would be likely to amount to 'grounds of major need.' Developments in this area may be interesting, as increasing consumer market demand for environmentally sound products is experienced.

In relation to trade between the EU and New Zealand and in light of the increasing focus on environmental matters, exporters of product to the EU would therefore need to be mindful of the potential for a Member State to impose more stringent protective measures in order to promote an even higher standard of environmental protection than that set by the EU. This would be of particular concern if the Member State imposing the more stringent protective measure were to represent a significant market for New Zealand. For example, as will be discussed in the following section, the United Kingdom is a key market for New Zealand wine.¹⁸ If the United Kingdom were to impose more stringent environmental protection measures on product standards for wine, this could have a significant interim effect on New Zealand's wine industry. In light of this, closer examination of the value of the EU to New Zealand as an export market merits attention.

EU and New Zealand Trade Related Matters

It is common knowledge that the European Union currently comprises 27 countries, including one of New Zealand's traditionally significant export markets, the United Kingdom. The EU is New Zealand's second largest trading partner after Australia.¹⁹ For the financial year to June 2009, New Zealand exports to the EU totalled approximately NZ\$5.6 billion.²⁰ This figure is consistent with incremental increases recorded over at least the past few years – even in the face of recent world economic recession conditions.

¹⁷ Mathijsen, op cit, p.473. An example of a Member State imposing stricter environmental standards was seen in *Commission v Denmark* (Case 302/86) (known as the 'Danish Bottles' case.) This case pre-dated Articles 191 – 193 FEU Treaty, but nevertheless demonstrates the ECJ's sympathetic approach to genuine environmental protection claims (or in this case, defences) raised by Member States.

¹⁸ Over one third of New Zealand wine exports to the EU went to the United Kingdom during the year ending June 2009.

¹⁹ The European Union and New Zealand Joint Declaration on Relations and Cooperation, para 22. This joint declaration was adopted at the Foreign Ministers' meeting on 21 September 2007 in Lisbon and is intended to 'shape the relationship for the coming 5 years and beyond':

<http://ec.europa.eu/external_relations/new_zealand/index_en.htm>, accessed 28 September 2009. See also

<http://www.delous.ec.europa.eu/newzealand/EU_NZ_relations/tradeandconomy.htm>, accessed 28 September 2009.

²⁰ Total exports (and re-exports) to the EU to June 2009 were \$5,577,918,695. This compares with \$5,390,017,838 to June 2008 and \$5,087,058,235 to June 2007. All figures retrieved from the Statistics New Zealand website which was recorded as having last been updated on 25 September 2009. <<http://www.stats.govt.nz/infoshare>>, accessed 28 September 2009.

Conversely, New Zealand ranks from the EU's perspective only as its 50th trading partner.²¹ While 'trade is a dominant feature of the bilateral relationship'²² between the EU and New Zealand, such discrepancies in ranking creates the potential for dominance – and therefore influence – in the relationship.²³

'The European Union is now the largest trading group in the world, accounting for just over 20 per cent of total global trade in goods. This gives the EU the capacity to play a leadership role in global negotiations to liberalise world trade...'²⁴

Arguably, it also gives the EU capacity to play a leadership role in other matters it sets its mind to, such as in establishing high environmental sustainability standards²⁵ for goods in which it trades. Certainly, for countries such as New Zealand, whose economies are reliant on exports to the EU, its law and policy on environmental standards are not to be ignored. As the effects of EU environmental law and policy are only beginning to be felt in New Zealand, it may be of interest to examine other areas of EU regulation that have already impacted on New Zealand law and industry practices in order to make analogies. The EU wine industry has recently undergone significant law reform which has had ramifications for the wine industry in New Zealand. It will therefore be examined by way of example.

New Zealand Winegrowers²⁶ is an organisation established as the joint initiative of the New Zealand Grape Growers Council and the Wine Institute of New Zealand to represent the interests of New Zealand's independent grapegrowers and wineries. It is export driven, having recently achieved a milestone of exporting \$1.01 billion of wine in the year to 31 July 2009.²⁷ Of these exports, over one third went to the EU,²⁸ with the United Kingdom being identified as a 'key market.'²⁹

²¹ Ibid.

²² The European Union and New Zealand - Political and economic Relationship with New Zealand <http://ec.europa.eu/external_relations/new_zealand/index_en.htm>, accessed 28 September 2009.

²³ M. Gibbons, *New Zealand and the European Union*, North Shore, New Zealand, Pearson, 2008, pp.137 - 138: 'New Zealand remains less obviously important to the EU than the EU is to New Zealand... There should be a greater recognition in New Zealand of the importance of the EU market.'

²⁴ Mathijsen, op cit.,p. 502.

²⁵ As discussed earlier, Article 11 FEU Treaty (ex Article 6 EC Treaty) provides that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities.' Article 191(2) FEU Treaty requires Union policy on the environment to aim at a high level of protection.

²⁶ Established in March 2002, it is governed by a Board of Directors of 12, comprising 7 representatives from the Institute and 5 representatives from the Council. Its function is to research, represent and promote the national and international interests of the New Zealand wine industry.

²⁷ Press statement of Philip Gegan, chief executive of the New Zealand Winegrowers <<http://www.silobreaker.com/new-zealand-wine-exports-reach-nz1-bln-mark-5-2262601939902529542>> accessed 8 October 2009.

²⁸ \$310,925 million of wine was exported to the United Kingdom, Netherlands, Ireland and Germany in the year to June 2009 (representing 6% of the total exports to the EU during that period.) See New Zealand Winegrowers Annual Report 2009<<http://www.nzwine.com/report>>, accessed 8 October 2009.

²⁹ Ibid, p. 6. Where the United Kingdom is identified first in the list of top three markets and working its way into new markets in Europe is stipulated to be part of its marketing strategy. Also at p.5: 'New Zealand wine continued to out-perform in key markets. Shipments to the UK were up 22%. In that

The key legislation regulating the wine industry in New Zealand is the Wine Act 2003. Its specified purpose includes to:

Facilitate the entry of wine into overseas markets by providing the controls and mechanisms needed to give and safeguard official assurances issued for the purpose of enabling entry into those markets; [and] enable the setting of export eligibility requirements to safeguard the reputation of New Zealand wine in overseas markets.³⁰

Part 2 of the Wine Act 2003 regulates wine standards and specifications that must be met by any wine intended for export. Legal regulatory requirements for wine destined for export are often referred to as overseas market access requirements or OMARs. Notification of such requirements is made by the Director-General pursuant to section 41 Wine Act 2003.³¹ EU Regulations with which New Zealand exporters of wine are required to comply are enlisted in such notifications.³²

The New Zealand wine industry needs to remain current with developments in industry-related EU law in order for wine destined for that market to be export compliant. By way of example, the New Zealand Winegrowers Report of 2008 stated: 'The EU wine reform will change the labelling, winemaking and certification rules for NZ wines exported to Europe for better and for worse.'³³ This statement was made in light of wine reforms which have recently taken place in the EU. The EU has undertaken drastic measures through this reform to address its ailing wine industry.³⁴ Such measures were intended, among other things, to increase the competitiveness of the EU's wine producers and create a wine regime that operates through clear, simple rules and respects the environment.³⁵ EC Regulation 479/2008 of 29 April 2008 (in paragraph 5 of the preamble) includes the following:

'In the light of the experience gained it is therefore appropriate fundamentally to change the Community regime applying to the wine sector with a view to achieving the following objectives: ... creating a wine regime that preserves the

market New Zealand wine is now the second largest category in the 8 – 9 [pound] price bracket, with a market share of more than 20%.'

³⁰ Section 3 Wine Act 2003.

³¹ Previously section 26A of the Wine Makers Act 1981, this Act having been repealed by section 122 Wine Act 2003.

³² By way of example, Wine (Export to European Union) Notice 2003 lists EC Regulation 1493/1999 (with further reference to EC Regulations 1622/2000, 883/2001 and 753/2002 laying down rules implementing this Regulation.) As will be discussed, EC Regulation 1493/1999 was repealed by EC Regulation 479/2008 of 29 April 2008 as a result of the EU wine reform. The EU amendments were, however, not immediately effective. For example EC Regulation 109/2009 relating to, among other things, labelling requirements, came into force on 1 August 2009. The New Zealand overseas market access requirements for the EU are currently being reviewed.

³³ See <<http://www.nzwine.com/reports>>, accessed 8 October 2009.

³⁴ Referred to commonly as the 'CAP Wine Reform' (CAP, signifying Common Agricultural Policy), see various speeches of Mariann Fischer Boel (Member of European Commission responsible for agriculture and rural development), including that of 17 July 2007 to the Italian Senate <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/493&format=HTML&aged=0&language=EN&guiLanguage=en>>, accessed 12 August 2009.

³⁵ Paragraph 5 of the preamble of EC Regulation 479/2008 of 29 April 2008 specifically includes among its objectives: 'creating a wine regime that operates through clear, simple and effective rules that balance supply and demand.'

best traditions of Community wine production... and ensuring that all production respects the environment.’

The New Zealand overseas market access requirements for the EU were reviewed with the previous Wine (Export to EU) Notice 2003 being revoked and a new OMAR issued in view of the EU implementing “a new regulatory regime as part of its wine reform.”³⁶

In practice, wine makers engaged in export do not separate the wine production process according to the requirements of individual markets. Instead, wine will be produced in accordance with the strictest of requirements – commonly being those of the EU.³⁷ As mentioned above, the EU accounts for over one third of New Zealand’s wine export market. It follows therefore, that a good proportion of wine produced in New Zealand (where exporting is also an objective) and sold in New Zealand will often meet additional legal requirements of the EU. It is suggested that spillover effects such as this may not be uncommon in New Zealand where industries that are relatively small from a global perspective are seeking efficiencies and economies of scale.

This is directly relevant to the wine industry in New Zealand,³⁸ which would need to adhere to environmental protection measures in the production of wine imposed by the EU.³⁹ Fortunately, the wine industry in New Zealand appears to have anticipated such a shift in demand:

“The time is coming when lack of environmental sustainability will be a barrier to trade. It has happened in other primary production sectors and it would be naïve to assume that the wine industry is immune to this global trend.”⁴⁰

As mentioned previously, ‘sustainable development’ is a term of significance in EU environmental law.⁴¹ While the EU appears to be pursuing this within the ambit of

³⁶ Notification of the new export requirements was made pursuant to section 41(1) Wine Act 2003 and was subsequently published by the New Zealand Food Safety Authority. See <<http://www.nzfsa.govt.nz/wine/all-documents/omars/eun/amendments/amendment-0/eun-wine-omar-coversheet-admt-0.htm>>, accessed 18 September 2010. See also <<http://www.nzfsa.govt.nz/wine/all-documents/omars/eun/>>, accessed 18 September 2010 for details of the new OMAR which took effect on 14 December 2009.

³⁷ J. P. H. Barker, *Different Worlds: Law and the Changing Geographies of Wine in France and New Zealand* (2004) Published PhD Thesis, University of Auckland, p. 304. <<http://researchspace.auckland.ac.nz/handle/2292/1226>>, accessed 8 August 2009: ‘New Zealand producers tend to make wines to the most demanding foreign standards (in most cases, those of the EU), because they do not usually have the capacity to make particular batches of wine to exploit the rules of each market.’

³⁸ As will be discussed, such requirements would also need to be permissible under GATT (including the TBT Agreement) or any other relevant international agreement.

³⁹ See T. Renton, D Manktelow and C Kingston, ‘Sustainable Winegrowing: New Zealand’s Place in the World,’ *Wine Institute of New Zealand*, 2002, p. 6 where the comment is made that: “the day may not be too far away when not only might your label have to comply with regulations, but what’s in the bottle will be affected too.”

⁴⁰ *Ibid.*, 3. Note also that this trend to require environmental sustainability does not only come from Institutes of the EU, but also from private sector bodies such as EurepGAP (a private sector body that sets voluntary standards for the certification of agricultural products around the globe.) Large supermarket chains are also seen as ‘gatekeepers’ as they try to place themselves one step ahead of consumer demand.

‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs,’⁴² the implementation of ‘sustainable development’ is inevitably open to different interpretations by various industries.

Sustainable Winegrowing New Zealand (SWNZ)⁴³ was developed to ‘provide a best practice model of environmental practices in the vineyard and winery, guarantee better quality assurance from the vineyard through to the bottle and address consumer concerns in matters pertaining to the environment and winegrape production.’⁴⁴ It would be hoped that such best practices also accord with the EU’s concept of sustainable development.

In any event, New Zealand Winegrowers appears to be aware of the EU’s wider influence through international agreements. The EU’s practice of exerting influence over environmental policies and practices through international consensus will be discussed below. It is proactive in protecting trade interests through ‘mediating international, national and local regulatory influences.’⁴⁵ Its pending activities include making submissions through the World Trade Organisation (WTO) on the EU’s proposed winemaking and labelling rules, and entering into discussions to create an internationally recognised methodology for measuring greenhouse gas emissions with the International Wine and Vine Organisation and the International Wine and Spirits Federation.⁴⁶ In view of the fact that both environmental law and international trade law are largely policy driven, engaging in such activities appears to be a sensible and pragmatic approach to best anticipate changes in EU requirements and, if at all possible, to influence such requirements in a way that best secures New Zealand’s trade interests.

EU Environmental Protection Product Standards vs International Trade Law

Negotiation and agreement is fundamental to international law. As part of this, international consensus on environmental protection product standards must take into account other international agreements as different forms of agreement have the potential to conflict. For example, the General Agreement on Tariffs and Trade 1994 (GATT),⁴⁷ which endeavours to remove trade restrictions on goods between nations may conflict with restrictions imposed for environmental reasons on goods being

⁴¹ See Report of the 1987 World Commission on Environment and Development, also known as the Brundtland Report, *op. cit.*, and accompanying discussion.

⁴² *Ibid.* This commonly referred to description may be at variance with that alluded to in respect of the New Zealand wine industry example. See T Renton, D Manktelow and C Kingston, *Sustainable Winegrowing: New Zealand’s Place in the World* (2002) *Wine Institute of New Zealand*, p. 6 where ‘sustainable’ was used in the context of environmentally sound, economically viable and socially responsible.

⁴³ SWNZ was established 14 years ago as an industry initiative. Although membership is voluntary, as at the time of writing, 85% of New Zealand’s producing vineyard area are processed by SWNZ member wineries. According to the New Zealand Winegrowers Annual Report 2009, ‘the SWNZ programme is well on-track to helping achieve the 100% sustainable production target over the next three years.’ See page 17 of the report at < <http://www.nzwine.com/report>>, accessed 8 October 2009.

⁴⁴ Refer to the website of New Zealand Winegrowers <<http://www.nzwine.com/swnz>> , accessed 8 October 2009.

⁴⁵ Barker, *op. cit.*, p. 274.

⁴⁶ New Zealand Winegrowers Annual Report 2009, *op. cit.*, p. 9.

⁴⁷ Ratified by individual Member States and the EU.

imported from one country to another. In practice, the EU cannot impose restrictions for environmental reasons on goods being imported from third countries into the EU, without having regard to its obligations under GATT.⁴⁸

In order to justify an environmental protection measure under GATT, the EU would need to satisfy a two-tier test: first, that the measure falls under at least one of the ten exceptions to free trade set out in Article XX of GATT; and secondly 'the application of that measure must meet the requirements of the chapeau (or preamble) of Article XX.'⁴⁹ In relation to the first requirement, there are two environmentally orientated exceptions under Article XX: Article XX(b) refers to where such measure is 'necessary to protect human, animal or plant life or health'⁵⁰ This Article bears some resemblance to Article 36 of the FEU Treaty (ex Article 30 EC Treaty) which allows 'derogation' from the principle of free movement of goods within the EU under certain circumstances, including for the protection of health and life of humans, animals or plants.⁵¹ The other exception on environmental grounds lies under Article XX(g) which relates 'to the conservation of exhaustible natural resources...' The WTO Appellate Body determined in *US-Shrimp/Turtle*⁵² that this Article was not limited to 'mineral' or 'non living' natural resources, but rather, also extended to living resources given that they are also susceptible to depletion, exhaustion and extinction. It made this determination in view of the fact that the words of this Article 'were actually crafted more than 50 years ago' and should therefore be read 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.' Article XX(g) continues with an important qualification by allowing such exceptions only '...if such measures are made effective in conjunction with restrictions on domestic product or consumption.' For:

'... if no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.'⁵³

⁴⁸ Article 27 of the Vienna Convention on the Law of Treaties reflects the general rule of international law that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

⁴⁹ P. Van den Bossche, *The Law and Policy of the World Trade Organisation: Text, Cases and Materials*, Cambridge, UK; New York: Cambridge University Press (2nd ed, 2008), 641. See also the decision of the WTO Panel in *Brazil – Re-Treaded Tyres* WT/DS58/AB/R para. 7.37. In that case, whilst Brazil used the term 'environment', the Panel required that it identify risks to animal or plant life or health specifically in terms of Article XX(b) of GATT.

⁵⁰ Article XX(b) of GATT. Note that, whilst Brazil used the term 'environment' in *Brazil – Re-Treaded Tyres* WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, the WTO Panel required that it identify risks to animal or plant life or health specifically in terms of Article XX(b) of GATT.

⁵¹ Article 36 FEU Treaty (ex Article 30 EC Treaty.) See also the provisions of Article 114(6) FEU Treaty (ex Article 95(6) EC Treaty) where it provides that the Commission may approve or reject national provisions (relating to the protection of the environment) 'after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States....'

⁵² *US-Shrimp/Turtle* WT/DS58/AB/R, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R.

⁵³ *US – Gasoline* WT/DS2/AB/R, 20 – 21.

At the same time, however, the WTO Appellate Body in *US – Gasoline*⁵⁴ determined that this element of Article XX(g) did not require that imported and domestic products be treated equally, but rather, it required that ‘even-handedness’ be present in the imposition of restrictions on imported and domestic products.

The second requirement of the two-tier test relates to *application* of the permitted exceptions listed in Article XX of GATT;⁵⁵ that is, under the chapeau of Article XX, the measure designed to protect the environment must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between states where the same conditions prevail or amount to a disguised restriction on international trade. This chapeau appears to be an expression of the principle of good faith, the purpose and object of which is to avoid ‘abuse or illegitimate use of the exceptions to substantive rules available in Article XX.’⁵⁶

Nevertheless, during the Uruguay Round of negotiations the EU (and the USA) instigated clarification of the right to maintain domestic environmental protection rules on the basis that these did not constitute disguised trade barriers.⁵⁷ Two agreements were introduced in 1995 as a result, being the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)⁵⁸ and the Agreement on Technical Barriers to Trade (TBT Agreement).⁵⁹ These agreements provide guidelines and rules to regulate technical standards and regulations sought to be imposed by states to facilitate protection of the environment.⁶⁰

Given that environmental protection requirements are to be integrated into the implementation of its activities,⁶¹ together with its ambition of being a leader in the environmental arena, obligations under GATT and its incidental agreements should not ordinarily present concern for the EU. To clarify, it seems unlikely that the EU would impose higher product standards for environmental grounds on a third country exporting goods to the EU than it imposes within its own territories. However, these agreements serve as a further important control to prevent environmental protection measures being imposed by the EU and individual Member States under Articles 114(4) and 193 FEU Treaty on third countries such as

⁵⁴ *Ibid.*, 19.

⁵⁵ Article XX Chapeau of GATT 1994.

⁵⁶ *US- Gasoline*, op. cit., p. 23.

⁵⁷ R D Keleman, ‘Globalizing EU Environmental Regulation,’ paper prepared for conference on Europe and the Management of Globalization, Princeton University, 23 February 2007, p. 5. <<http://www.princeton.edu/~smeunier/Kelemen.doc>> accessed 5 October 2009.

⁵⁸ See Bell and McGillivray, op. cit., p.161 where it states that the SPS Agreement ‘relates to additives, toxins, etc in food, drinks and animal feed and is... relevant to disputes about trade in products containing genetically modified organisms and was central to the EC- Biotech dispute.’ *EC- Biotech* was concerned with trade issues arising when the EU had put in place measures which effectively banned the importation of genetically modified organisms into the EU. Also of relevance is the *EC- Hormones*, where the EU put in place measures preventing the importation of beef containing artificial hormones into the EU from the United States and Canada.

⁵⁹ In light of *EC – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, it would appear that general GATT rules still need to be considered when the TBT Agreement is involved.

⁶⁰ For example, the no-less-favourable-treatment principle in Article 2.1 of the TBT Agreement and the requirement in Article 2.2 of that Agreement that technical regulations are to be no ‘more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.’

⁶¹ Article 11 FEU Treaty (ex Article 6 EC Treaty) .

New Zealand in a way that is arbitrary or that amounts to an unjustifiable discrimination.

The EU's Influence and its Pursuit of International Environmental Consensus

The EU's support for the 'greening' of international trade by the instigation of rules concerning the protection of the environment in agreements such as the TBT Agreement and SPS Agreement has been described as part of its 'offensive management' in globalising environmental regulation.⁶² Clearly law is territory specific.⁶³ It is therefore of interest to observe how the EU uses international consensus to promote wider environmental protection in the face of jurisdictional limits.

It would appear that Multilateral Environmental Agreements are becoming more prolific. The EU has shared competence with Member States to conclude Multilateral Environmental Agreements by virtue of Article 191(4) FEU Treaty, which provides:

“Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with competent international organisations...

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.”

The scope of the EU's competence to enter into environmental treaties with third countries most likely correlates to the objectives set out in Article 191(1) and, as reflected in the Cartagena Protocol on Biosafety 2000, principles in Article 191(2.) In addition, however, this competence must also be recognised by other parties in order to make accession possible. To clarify the position where the EU is party, a clause may be included in the environmental treaty to the effect that accession is open not only to states, but also to 'regional economic integration organisations.'⁶⁴ Having said that, it is also commonplace for environmental treaties entered into by the EU to be 'mixed agreements' in that they must also be ratified by Member States. This 'shared competence' is consistent with the wording under the FEU Treaty.⁶⁵

With the increase in Multilateral Environmental Agreements, so too does the potential for conflict in approaches to environmental protection measures contained within Multilateral Environmental Agreements and WTO agreements such as GATT. While a detailed discussion of principles of international law lies outside the scope of this paper, it is of interest to have an overview of the general principles and recent challenges Multilateral Environmental Agreements might provide for such principles. Generally, in the event of conflict between treaty obligations where states are party to both instruments, international law requires that the later in time

⁶² Keleman, *op cit.*, p. 5.

⁶³ *Ibid.*, 33: 'Art 191 EC leaves room to seek to attain extraterritorial protective objectives, though this power should be interpreted in accordance with principles of public international law.'

⁶⁴ Jans and Vedder, *op cit.*, p. 60.

⁶⁵ See S. Marsden, *Strategic Environmental Assessment in International & European Law*, London; Sterling, VA: Earthscan (2008), p. 165.

prevails. Applying this principle in relation to GATT raises inherent problems in establishing its relevant date, given that GATT has been subject to various subsequently agreed amendments. However, even should the date assigned to GATT be taken as 1994 (being the date of the last agreed amendments) then, applying the general international law principle that the later in time prevails, the trade related climate change provisions of the Kyoto Protocol (and any agreement subsequently reached), should prevail over those of GATT – at least in relation to environmental protection measures affecting trade between countries that have ratified both agreements. Even so, the WTO appears to have sought to limit the application of this principle in practice. It would appear that, arguably there might also be room for application of the principle of *generalia specialibus non derogant* (the more specific treaty should take priority over the general treaty) under international law. It is interesting to observe how such international legal principles are received by the WTO, especially in light of newly agreed Multinational Environmental Agreements such as the Cartagena Protocol on Biosafety 2000.

Among other things, the Cartagena Protocol on Biosafety 2000 expressly adopts the precautionary principle in its Articles 1 and 10(6.) By way of background, the precautionary principle is one of the environmental principles adopted by the EU in Article 191(2) FEU Treaty. Stated simply, the precautionary principle provides that, where there is risk of harmful consequences for the environment associated with an activity, then it is better to act before it is too late, than to delay until scientific evidence confirming the harmful effects is available.⁶⁶ The EU endeavoured to rely on the precautionary principle as a rule of general or customary international law, or at least as a general principle of law applicable to the provisions of the SPS Agreement, in *EC – Hormones*.⁶⁷ In that case, the WTO Appellate Body noted that, while Article 5.7 of the SPS Agreement provides for the possibility of states to take provisional measures where scientific evidence of risk is insufficient, it also requires that the measure be adopted on the basis of pertinent information, that it be reviewed within a reasonable period of time and that it not be maintained unless the state seeks to obtain additional information necessary for a more objective assessment of risk. This last requirement indicates that the WTO does not consider that the need to establish the presence or absence of risk by way of scientific assessment is dispensed with entirely. In its report, the WTO Appellate Body acknowledged that ‘the status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges.’ While it declined to take a position on the status of the precautionary principle (on the basis that it didn’t consider it necessary in respect of the matter then before it), it held that the precautionary principle could not override certain provisions of the SPS Agreement.⁶⁸

⁶⁶ See J. H. Jans and H. H. B. Vedder, *European Environmental Law*, Groningen: Europa Law Pub. (3rd edition), 2008, p. 38 where it is commented: ‘According to the Commission guidelines the precautionary principle is all about ‘risk management’, which does not mean that all risks must be reduced to zero. Judging what is an acceptable level of risk for society is a political responsibility.’

⁶⁷ *EC – Hormones* WT/DS826/R/USA, adopted 13 February 1998, as modified by the Appellate Body Report WT/DS26/AB//R.

⁶⁸ Namely the requirements of Articles 5.1 and 5.2 of the SPS Agreement. See Van den Bossche, *op cit*, p. 868 where he comments that ‘[t]he effect of this ruling is to limit the applicability of the precautionary principle under the SPS Agreement to the situation covered by Article 5.7.’

Later when the EU argued before the WTO Panel in *EC – Approval and Marketing of Biotech Products*⁶⁹ that the precautionary principle had become a principle of international law, the Panel simply noted that this legal debate was ‘still ongoing.’ Thus the precautionary principle has not been accepted by the WTO as an established principle of general or customary international law.

It is noteworthy that the EU was the ‘leading proponent’ of the Cartagena Protocol on Biosafety 2000, which as mentioned, expressly adopts the precautionary principle in its Articles 1 and 10(6.) This Protocol has been taken to indicate a ‘drive [by the EU] to internationalize its approach’⁷⁰ by having its own standard adopted at an international level and thereby increasing the possibility that this EU principle ‘might withstand scrutiny before the WTO.’ Certainly, should the general principles of international law discussed above be applied (that is, the later treaty in time prevailing and the more specific treaty taking priority over the general), then the Cartagena Protocol could have served as an ingenious way of having an EU environmental principle accepted at an international level. It should be noted, however, that, the WTO panel severely limited the application of the Cartagena Protocol in the case *EC – Measures Affecting the Approval and Marketing of Biotech Products*, where it imposed a very high threshold in deciding that the Protocol would only be relevant if it had been ratified by all 153 WTO parties.⁷¹

The EU appears to continue to openly express an intention to extend environmental protection beyond the Member State territories to the ‘global commons’⁷² and also to the environments of other states.⁷³ This is reflected in the fourth of the environmental policy objectives to be pursued by the EU set out in Article 191(1) FEU Treaty which relates to ‘promoting measures *at international level* to deal with regional *or worldwide environmental problems*’ (emphasis added.)⁷⁴ In addition, the EU’s current Action Programme⁷⁵ refers to the integration of the environment into its external policies:

‘Internationally, it will be essential that environmental concerns are fully and properly integrated into all aspects of the Community’s external relations.’

⁶⁹ *EC – Approval and Marketing of Biotech Products* WT/DS291/R, adopted 21 November 2006. Notably, this decision was made after the Cartagena Protocol on Biosafety 2000 arose. While acknowledging the existence of such agreements expressly or impliedly incorporating the precautionary principle, the Panel did not change its view. See below for further discussion on this point.

⁷⁰ Kelemen, op cit., p. 3.

⁷¹ *Measures Affecting the Approval and Marketing of Biotech Products* (2006) WT/DS291/R.

⁷² The term ‘global commons’ refers to natural resources beyond the territory of any individual state such as the oceans and deep seabed beyond the 200-nautical –mile limit of states’ exclusive economic zones, the atmosphere and the ozone layer.

⁷³ Jans and Vedder state ‘An important part of the European environment policy is not concerned primarily with protecting the EU’s own environment, but the environment outside the EU.’ op cit., p. 32.

⁷⁴ *Ibid*, pp.28-29: ‘In the pre-Maastricht period, the territorial limitation of the environmental objectives was a matter for discussion. In other words, can the European legislature act not so much to protect its own environment, but to preserve the environment outside the EU, to address global and regional environmental problems, or even the environment of other states? Since ‘Maastricht’ this problem of interpretation has largely been resolved now the fourth objective of Article 191 FEU Treaty (ex 174 EC Treaty) explicitly includes ‘promoting measures at international level to deal with regional or worldwide environmental problems.’

⁷⁵ *Ibid*.

and later:

‘Environmental considerations should be mainstreamed as a principle in the EU’s external relations, and in particular: ... trade policy, at the multilateral level and also in all regional and bilateral agreements, should be supportive of environmental protection. Trade, and international investment flows and export credits have to become more positive factors in the pursuit of environmental protection and sustainable development.’

Such statements show a clear intention on the part of the EU to have its environmental protection policies reflected as widely as possible in its relations with third countries. In light of the territorial limits on its legal jurisdiction, gaining the consensus of as many third countries as possible is of course the most effective way of promoting its environmental objectives. The European Economic Area (that is, European Free Trade Association states that were opting to remain outside the EU) is an example of EU environmental law operating beyond the EU by way of consensus.⁷⁶ The more recent European Union and New Zealand Joint Declaration on Relations and Cooperation⁷⁷ may also have culminated as a result of the EU’s endeavours to have its environmental protection policies recognised beyond its Member States. Although its legally binding force is arguable given that it is in the nature of ‘soft law’, this Declaration, includes among its objectives the promotion of ‘sustainable development and the protection of the global environment including, in particular, the need to address the issue of climate change.’ Admittedly, its non-specific wording and soft law nature, together with the unsuccessful culmination of the meeting of nations at Copenhagen in December 2009, has allowed New Zealand to avoid the EU’s wider influence, at least initially, in respect of issues such as emissions trading.⁷⁸ While a detailed analysis of the carbon emission schemes lies beyond the scope of this paper, in light of the EU’s strong support for a reduction in carbon emissions, a brief comparison will be made.

The European ETS implements its obligations under the Kyoto Protocol by imposing a quantity cap⁷⁹ based on the EU’s overall Kyoto emissions target. The European scheme has been described as imposing:⁸⁰

⁷⁶ Horspool and Humphreys, *op cit.*, p. 515.

⁷⁷ The European Union and New Zealand Joint Declaration on Relations and Cooperation, *op cit.*, p. 6.

⁷⁸ Emissions trading was first addressed at an international level through the Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, which was strongly supported by the EU. The EU also strongly encouraged further agreement surrounding carbon emission reduction at the meeting of nations held at Copenhagen in December 2009. José Manuel Barroso, President of the European Commission in his address at a meeting of the Council of Foreign Relations on 21 September 2009 went so far as to say ‘If we don’t sort this out, it [i.e. the proposed 200 page agreement on emission reduction] risks becoming the longest global suicide note in history.’ See ‘Achieving a deal on climate change: an EU view on Copenhagen Council of Foreign Relations New York’ <<http://europa.eu.rapid/pressReleasesAction.do?reference=SPEECH/09/416&format=H>>, accessed 6 October 2009. See also European Commission, *Combating Climate Change: The EU Leads the Way* (2008), p. 12 where it states that the EU emission trading scheme was launched in January 2005 as the ‘first international trading system for CO₂ emissions and has become the main driver behind the rapid expansion in carbon trading around the world.’

⁷⁹ *Ibid.* European Commission, *Combating Climate Change: The EU Leads the Way* (2008), pp. 37 - 38 where it confirms that: ‘[t]his cap is made up by aggregation of country-specific caps which are implemented by limited allocations of emissions permits under “National Allocation Plans” (NAPs), each of which is related to the relevant member state’s Kyoto target and subject to scrutiny and

‘an aggregate emissions cap for a set of key sectors, supplemented at the margin by a quantity-restricted loophole.... While the existence of the loophole alters the size of the cap, it does not eliminate the cap itself; it simply sets it at a higher level. The great bulk of emission reductions will still have to be carried out within the home country.’

While also being described as a ‘cap-and-trade’ system,⁸¹ the New Zealand ETS⁸² does not in fact appear to directly cap the emissions that occur within New Zealand.⁸³ Indeed, in response to questioning concerning the then Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009⁸⁴, the Minister for Climate Change Issues stated that ‘[i]n the period from 2008 to 2012 the recessionary measures taken to halve the price effect of the scheme on power and petrol increases will reduce the incentive to reduce emissions, so that results in slightly higher projected emissions for New Zealand in 2012.’⁸⁵

The Climate Change Response (Moderated Emissions Trading) Amendment Act 2009 was enacted in order to amend the Climate Change Response Act 2002.⁸⁶ Primary motivations for the revised emissions trading scheme brought about by the amendment appear to be first, to align New Zealand’s scheme more closely with that of Australia⁸⁷ and secondly, to ‘provide incentives for industry to reduce emissions

approval by the European Commission. See

<<http://www.sustainabilitynz.org/docs/TheCarbonChallenge.pdf>>, accessed 6 October 2009.

⁸⁰ G. Bertram and S. Terry, ‘The Carbon Challenge: Response, Responsibility, and the Emissions Trading Scheme’ *Sustainability Council of New Zealand* (2008), p.37.

⁸¹ The New Zealand government describes its scheme as a ‘mandatory cap and trade scheme that will cover all sectors and all greenhouse gases by 2015.’ See

<<http://www.climatechange.govt.nz/emissions-trading-scheme/about/international-examples.html>>, accessed 18 September 2010.

⁸² Introduced by virtue of the Climate Change Response Act 2002.

⁸³ New Zealand Ministry for the Environment, *Factsheet 15 – How the New Zealand Emissions Trading Scheme Works* <<http://www.mfe.govt.nz/publications/climate/emissions-factsheets/factsheet-15.html>>, accessed 1 December 2009. See also *ibid*, pp. 33-39. See also Bertram and Terry, *op cit.*, p. 37 where the New Zealand scheme is described as ‘the European loophole without the quantity limit’ and later at 38: ‘The New Zealand scheme, in stark contrast, imposes no caps at either national or sectoral level, and places no restriction on what proportion of any firm’s emissions may be covered by externally-purchased credits (Kyoto currencies).’

⁸⁴ This legislation came into force on 8 December 2009, being the day after receiving Royal Assent. See also <<http://www.climatechange.govt.nz/emissions-trading-scheme/about/questions-and-answers.html#carbon>>, accessed 18 September 2010.

⁸⁵ (24 November 2009) 659 NZPD 8198 per Honorable Dr Nick Smith, Minister for Climate Change Issues. The Minister did continue by stating that it was expected that the legislative changes would do more to reduce emissions in the period 2012 to 2018 due to lesser allocation to industry and a stronger price signal to reduce emissions.

⁸⁶ See Cabinet Paper Climate Change Response (Moderated Emissions Trading) Amendment Bill: Approval for Introduction of Hon. Dr Nick Smith <<http://www.mfe.govt.nz/cabinet-papers/cabinet-paper-climate-change-response-moderated-emissions-trading-amendments-bill.html>>, accessed 8 December 2009 where the Minister describes the amendment as assisting in the effective functioning of the Act to achieve a reduction in domestic carbon emissions by 50% of the 1990 levels by 2050. The amendment does also provides an earlier entry date of 1 July 2010 for industries such as transport, energy and industrial sectors and also brings the agricultural sector entry date forward to 1 January 2015.

⁸⁷ An underlying objective undoubtedly being to act consistently with facilitating a single economic market (SEM) with Australia, however, preventing ‘carbon leakage’ to Australia was also noted among the concerns during the Parliamentary debates of 24 November 2009 when the Climate Change

without encouraging an exodus overseas of industry and its skilled staff.’⁸⁸ Balancing New Zealand’s economic interests with its environmental responsibilities has undoubtedly proven difficult for law makers during recessionary economic conditions. The New Zealand emissions trading scheme will most likely continue to be the subject of much political and public debate as it is intermittently reviewed.⁸⁹ However, it would appear that, on this occasion at least, Australian influences outweighed those of the EU in relation to New Zealand’s current carbon emissions trading legislation.

The failure to achieve international agreement on carbon emissions at Copenhagen in December 2009 has undoubtedly delayed advancement in obtaining more immediate carbon reduction commitments from countries such as New Zealand. However, this appears to be an issue that the EU has chosen to pursue – at least within its Member States - in the meantime. It remains to be seen whether and how the EU might use its influence to obtain a reduction of carbon emissions beyond its Member States.

Conclusion

This paper has explored the potential of the EU, not only to *lead* the world in setting down environmental laws, but also to *steer* other nations in their environmental laws. Perhaps this has arisen due to the unique nature of the EU and its experience in managing the seemingly conflicting demands of economic prosperity within a common market while establishing and maintaining environmentally responsible practices:

‘... the unique nature of the EC has made it a testing ground for international environmental cooperation. For example, the balancing of trade and environmental concerns in the EC is often held up as a model for integration; the insertion of environmental policy principles in the EC Treaty (now contained in Art. [191(2) FEU Treaty] also means that their legal status can now be explored within the EC, but contributes to the development of similar principles in international environmental law. In this way, there is a clear synergy between EC and international law and policy.’⁹⁰

The EU has the potential to influence law and business practices in New Zealand in the environmental area through two main factors: first, backed by a strong legislative framework, the EU holds the potential to use its market force through market-based mechanisms to facilitate environmentally sound practices in third countries exporting to it; secondly, the EU has significant drive and availability of resources to achieve international consensus on environmental matters.

Response (Moderated Emissions Trading) Amendment Bill 2009 was at committee stage. See (24 November 2009) 659 NZPD 8039.

⁸⁸ Ibid. per Honorable Dr Nick Smith, Minister for Climate Change Issues concerning the Climate Change Response (Moderated Emissions Trading) Amendment Bill 2009.

⁸⁹ This Bill was criticised by members of Parliament during its second and third readings for the speed at which it went through Parliamentary process without, in some members view, the opportunity for close analytical consideration.

⁹⁰ Bell and McGillivray, *op cit.*, p. 137.

EU influence on law and business practices in New Zealand exists through market-based mechanisms, as has been observed from an examination of the New Zealand wine industry. Essentially, where the EU sets product requirements which must be observed by third countries exporting product to it and seeking economies of scale, then a spillover effect may result. By analogy, should the EU seek to impose product standards in order to achieve environmental protection, then New Zealand could well find itself observing them - not only in respect of product it exports to the EU, but also in respect of any proportion of that product destined for the New Zealand market, notwithstanding that New Zealand law does not specifically require such measures. While it may be reassuring for third countries such as New Zealand to note that such measures cannot be arbitrarily imposed due to controls that exist through international trade agreements such as GATT, this does demonstrate how the EU can use its market force to indirectly influence business practices and norms, notwithstanding less stringent laws existing within another country.

In relation to the second hypothesis, it has been shown that the EU has been almost relentless in its pursuit of environmental protection through international agreements:

‘Since the late 1980s, the EU has “erected the most comprehensive and strict body of environmental legislation of any jurisdiction in the world” and been “a key supporter, if not the chief demandeur, of every major international environmental treaty.”⁹¹

The potential for the EU to influence law and business practices in third countries has been made possible through the ‘sheer consistency’⁹² with which the EU has supported, and in many cases instigated, international environmental agreements. The Cartagena Protocol on Biosafety 2000, which embraces the precautionary principle appearing in Article 191 of the FEU Treaty, is an example of such a multilateral environmental agreement.

While the EU might not always be successful in achieving international consensus on environmental matters it considers important (the meeting of nations at Copenhagen in December 2009 concerning the reduction of global carbon emissions being an example), it would be naïve to deny the power of market forces as an alternative measure in facilitating environmental protection. Environmental concerns have attracted significant public sympathy in recent times. It would be hoped that opinion within the EU and New Zealand concerning sound business practices to protect the environment might be held in common. In the meantime, continued joint scientific research initiatives⁹³ would appear to be a prudent measure in facilitating understanding between the territories.

⁹¹ J. R. Schmidt, ‘Why Europe Leads on Climate Change’ (2008) *Survival*, Vol. 50, No. 4, 2008, p. 83 <http://pdfserve.informaworld.com/880259_731196519_901427020.pdf>, accessed 5 October 2009 citing from R D Keleman, ‘Globalizing EU Environmental Regulation’ paper prepared for conference on Europe and the Management of Globalization, 23 February 2007, Princeton University, pp.2-5, <<http://www.princeton.edu/~smeunier/Kelemen.doc>>, accessed 5 October 2009.

⁹² Keleman, op. cit., p.3.

⁹³ Such as the Joint EC-New Zealand Committee on Scientific and Technological Cooperation Agreement signed in 2008. See Europa Press Release dated 16 July 2007 <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1159&format=HTML&aged=0&language=EN&guiLanguage=en>>, accessed 30 May 2010.