

# The Path Not Yet Taken: Bilateral Trade Agreements to Promote Sustainable Biofuels Under the EU Renewable Energy Directive

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## Summary

In order for biofuels to count as renewable energy for transport under the European Union Renewable Energy Directive, most applicants have relied on certification by the European Commission. But bilateral agreements can also be used to meet the sustainability criteria. This Article examines the bilateral agreement option, particularly whether such agreements might provide more flexibility in developing countries that export to the EU, while also addressing more general land use policies and cross-sector linkages in natural resource management.

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The European Union Renewable Energy Directive (EU-RED) established sustainability criteria for biofuels counted under the target of 10% renewable energy for transport. The main approach thus far to certify compliance with the sustainability criteria has been voluntary schemes that are submitted for approval to the European Commission. Scant attention has been paid to the potential role of bilateral agreements in fulfilling the sustainability criteria, which could offer a more strategic approach. This Article examines the role and potential applicability and effectiveness of the bilateral option based on Article 18(4) of the EU-RED. Of special interest is the question of how bilateral agreements might provide a more flexible governance mechanism for meeting sustainability criteria in developing countries that export to the EU while also addressing more general land use policies and cross-sector linkages in natural resource management.

## I. Introduction

The Renewable Energy Directive of the European Union (EU-RED) established a target for 2020 of 10% renewable energy in the transport sector, with only liquid biofuels qualifying toward the sustainability criteria given in the EU-RED for fulfillment of the targets of the EU Member States.<sup>1</sup> The criteria are aimed especially at addressing

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1. Directive 2009/28/EC, of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy From Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. (L 140) 16, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=Oj:L:2009:140:0016:0062:en:PDF>.

land use, biodiversity, and greenhouse gas (GHG) emissions. Of particular concern is the possibility that forested land might be cleared to produce biofuels, which not only would lead to additional GHG emissions, but more generally would defeat the sustainability objectives that underlie renewable energy market development.

A number of mechanisms are permissible for proving compliance with the sustainability criteria, including national systems in Member States, voluntary schemes, and bilateral or multilateral agreements. Among these mechanisms, the emphasis thus far has been on voluntary schemes, a wide variety of which have emerged in recent years in response to the global expansion of biofuels and bioenergy markets, with some designed specifically in response to the EU-RED requirements. The proliferation and variety of the schemes has complicated the work of policymakers, investors, and other market actors and has illustrated the need for harmonization and coordination.<sup>2</sup> The European Commission approved seven voluntary schemes in July 2011 and has added several additional schemes since that time.<sup>3</sup> However, several concerns have arisen with voluntary schemes with respect to international trade and in terms of their relation to broader land use and development policy issues. The complexity, proliferation, and costs associated with such schemes can also be problematic for small-scale producers, particularly those located in the least developed countries (LDCs).<sup>4</sup>

Exploring other mechanisms for implementation of the sustainability criteria is thus important, but so far, they have received much less attention. Of particular interest in this Article is the option of concluding bilateral agreements, as provided in Article 18(4) of the EU-RED, to facilitate a more flexible fulfillment of the biofuels sustainability criteria that are attached to the current EU renewable energy transportation target. The bilateral approach could offer greater flexibility to interact constructively with countries' specific circumstances, particularly in the context of a "meta-standard" such as the biofuels sustainability criteria of the EU-RED. At the same time, since bilateral agreements are typically less problematic within the international trade regime, this approach might help avoid erecting non-tariff trade barriers toward third countries.

The bilateral option in Article 18(4) is in legal terms a verification mechanism, but the article is sparsely worded, leaving ample maneuvering room for the strategic use of this option, especially when seeking to support the participation of developing countries and smaller scale producers

in the EU biofuels market. This Article is thus particularly concerned with how the bilateral option might help improve access to the EU biofuels market for developing countries while at the same time pushing developing country producers toward more economically viable and environmentally sustainable pathways. As there are currently no Article 18(4) bilateral agreements in place, we also examine political and practical obstacles to this option. Our purpose is to outline one approach that seems to offer a constructive path forward for EU biofuels market governance during a rather precarious period characterized by significant uncertainties about the future trajectory of EU biofuels policy.

## II. Policy Context

The use of bilateral agreements to fulfill the EU biofuels sustainability criteria is a largely unexplored governance option. Though it features prominently in the legislation, and formally holds equal status to other forms of verification, it has been sidelined by the almost exclusive reliance on voluntary schemes for sustainability certification. This section provides some context on the policy and legal rationale for the inclusion of this option in the EU-RED.<sup>5</sup> There is a dearth of published information on this topic, so much of the material in this section is based on interviews with relevant actors and policymakers.

In order to understand the potential role for bilateral agreements, it is necessary to first consider the evolution of this option in the EU-RED by examining the lawmakers' original intentions and then comparing these with the overall policy objectives associated with sustainable biofuels in the EU-RED and, to some extent, with the broader EU policy agendas for energy, climate, development, and trade. This latter aspect—the strategic EU policy context—is covered primarily in Part V of this paper.

### A. The Trouble With Voluntary Schemes

The difficulties with relying mainly on voluntary schemes have been discussed at length in the literature. For example, Simonetta Zarilli writes: "Certification initiatives . . . raise a number of concerns. Proliferation of individual sustainability schemes may damage the efficiency and credibility of certification and create market segmentation and opacity. The principles and criteria on which the different certification schemes are based are diversified and often far reaching."<sup>6</sup>

Costs of certification schemes for developing countries have also been criticized. Zarilli notes that they will be "highly dependent on the number, strictness, and inclu-

2. Nicolae Scarlat & Jean-Francois Dallemand, *Recent Developments of Biofuels/Bioenergy Sustainability Certification: A Global Overview*, 39 ENERGY POL'Y 1630-46 (2011).

3. European Commission, Directorate-General for Energy [hereinafter DG-Energy], *Biofuels: Sustainability Schemes*, available at [http://ec.europa.eu/energy/renewables/biofuels/sustainability\\_schemes\\_en.htm](http://ec.europa.eu/energy/renewables/biofuels/sustainability_schemes_en.htm) (last visited Aug. 20, 2012).

4. FRANCIS X. JOHNSON ET AL., CTR. FOR INT'L FORESTRY RES. (CIFOR), TRANSFORMATIONS IN EU BIOFUELS MARKETS UNDER THE RENEWABLE ENERGY DIRECTIVE AND THE IMPLICATIONS FOR LAND USE, TRADE, AND FORESTS 78 (2012), available at <http://www.cifor.org/online-library/browse/view-publication/publication/3775.html>.

5. For a history of the EU-RED sustainability criteria themselves, which this Article does not explore, see Jody M. Endres, *Clearing the Air: The Meta-Standard Approach to Ensuring Biofuels Environmental and Social Sustainability*, 28 VA. ENVTL. L.J. 73 (2010).

6. Simonetta Zarilli, *Development of the Emerging Biofuels Market*, in GLOBAL ENERGY GOVERNANCE: THE NEW RULES OF THE GAME 93 (Andreas Goldthau & Jan Martin Witte eds., 2010).

siveness of the requirements established by the certification system,” and likely to be greater for developing countries than for large-scale producers. She adds: “Furthermore, concerns remain regarding developing countries ability to effectively participate in the process of standards development and regarding the risk of domestic producers playing a disproportionately influential role in the establishment of sustainability requirements.”<sup>7</sup>

This Article argues that a key strength of the bilateral option is that it can incorporate developing-country stakeholders and policymakers in the process of fulfilling sustainability criteria. A heavy reliance on voluntary schemes, on the other hand, is far from ideal for smaller scale producers in developing countries. The sustainability criteria are of course closely connected to their verification mechanisms, yet it seems that the current reliance on voluntary schemes is sometimes treated as if it were ironclad, rather than simply the current state of affairs, with opportunities to do better. For example, Jolene Lin has written: “[I]t is not clear that the sustainability criteria can be effectively implemented. The difficulties do not stem so much from the use of a meta-standard per se as from the reliance on voluntary certification schemes to monitor land-use change and complex industrial processes.”<sup>8</sup>

Adding to this, Robert Ackrill and Adrian Kay note that the sustainability criteria were put in place before key concepts were defined, such as “highly biodiverse grassland.”<sup>9</sup> Second, although the default values for GHG emissions savings from different feedstocks published in the EU-RED can be replaced with actual values, it may be both difficult and costly for developing countries, in particular, to do so.<sup>10</sup> It is not a far step to say that perhaps this is better, and more holistically, taken care of through government involvement and negotiation. That is where bilateral agreements can be important not just as a verification mechanism, but as a potent tool for the widened use and acceptance of the sustainability criteria themselves. Another quote by Lin intuits this possibility, yet focuses on the multilateral sphere rather than the bilateral: “[E]fforts to conclude an international agreement containing mandatory sustainability standards should be intensified. Whatever the inadequacies of international law enforcement, entrusting environmental protection to voluntary certification schemes seems to be the riskier proposition.”<sup>11</sup>

The potential for bilateral agreements to address such inadequacies has not been unexamined. Instead, the “first best” political approach mainly suggested in the literature seems to be a “true” multilateral agreement that ensures fairness and broad participation. Lin even posits that the European Commission “envisions” such a possibility by

citing the Commission Guidelines at note 21, paragraph 2, which say that economic operators can demonstrate compliance with the sustainability criteria “[i]n accordance with the terms of a bilateral or multilateral agreement concluded by the Union with third countries and which the Commission has recognised for the purpose.”<sup>12</sup>

The problem with a multilateral approach is that Europe is deeply divided about biofuels, especially in the context of concerns about indirect land use change (ILUC) and threats to food security. These issues may be addressed in the long term by focusing on more sustainable “second-generation” biofuels, but such fuels are not expected to have a large market share until about 2030.<sup>13</sup> This, combined with the stalemate in World Trade Organization (WTO) negotiations, puts biofuels at serious risk of being cast aside as a renewable energy policy option beyond 2020.

The low likelihood of multilateral progress is recognized, and it has led to a certain malaise with regard to the treatment of biofuels in the EU. Indeed, the very *raison d’être* of EU biofuels policy has come under attack. As Lin wrote in 2011:

Documents obtained from the Commission through freedom of information laws confirm that opinion within the Commission is divided amidst serious concerns that the current push to expand the use of biofuels is creating tensions, and that these tensions will disrupt agricultural commodity markets and food prices without generating significant environmental benefits.<sup>14</sup>

It is of course too ambitious to say that a greater focus on bilateral agreements would be a panacea to all these uncertainties, but it can be a step in the right direction and is certainly superior to the despair that now seems to prevail. Accepting the major stumbling blocks to “ideal” approaches such as multilateral agreements and working instead with the instruments on hand, such as bilaterals, is thus part of a more pragmatic approach to biofuels policy.

## B. EU-RED Article 18(4)

For reference, we provide here the complete text of EU-RED Article 18(4):

The Community shall endeavour to conclude bilateral or multilateral agreements with third countries containing provisions on sustainability criteria that correspond to those of this Directive. Where the Community has concluded agreements containing provisions relating to matters covered by the sustainability criteria set out in Article 17(2) to (5), the Commission may decide that those agreements demonstrate that biofuels and bioliquids produced from raw materials cultivated in those countries comply with the sustainability criteria in question. When those agreements are concluded, due consideration shall be given to measures taken for the conservation of areas

7. *Id.*

8. Jolene Lin, *The Environmental Regulation of Biofuels: Limits of the Meta-Standard Approach*, 1 CARBON & CLIMATE L. REV. 43 (2011).

9. Robert Ackrill & Adrian Kay, *EU Biofuels Sustainability Standards and Certification Systems: How to Seek WTO-Compatibility*, 62 J. AGRIC. ECON. (2011).

10. *Id.*

11. See Lin, *supra* note 8.

12. *Id.*

13. Zarilli, *supra* note 6, at 94.

14. Lin, *supra* note 8.



that provide, in critical situations, basic ecosystem services (such as watershed protection and erosion control), for soil, water and air protection, indirect land-use changes, the restoration of degraded land, the avoidance of excessive water consumption in areas where water is scarce and to the issues referred to in the second subparagraph of Article 17(7).<sup>15</sup>

In addition, the European Commission released a Communication in 2010 that provided further guidance on the application of Article 18(4). Article 2.6 of that document, entitled *Recognition of Bilateral or Multilateral Agreements*, states:

The Union can conclude bilateral or multilateral agreements with third countries containing provisions on sustainability criteria that correspond to those of the Directive. Such an agreement would, after conclusion, still need to be recognised for the purposes of the Directive in a similar way as for voluntary schemes. This process could include taking into account relevant parts of Section 2.2.2.<sup>16</sup>

Section 2.2.2 that is mentioned here refers to independent auditing. A footnote adds that the mechanism to conclude such agreements would be Article 218 within Part V of the Treaty on the Functioning of the European Union, which lays down procedural requirements associated with agreements between the EU and third countries or international organizations.<sup>17</sup>

The key point in considering the legal scope of Article 18(4) is that very little detail is provided in terms of legal guidelines for the use of bilateral agreements to verify sustainability criteria. Instead, much legal flexibility is left open to the interpretation and decision of the parties, if they choose to go the bilateral route. The time to prepare the EU-RED was limited, and this can be seen in the lack of detail attached to the various sustainability verification options, including the bilateral option. Based on interviews and background research, there seems to have been an overwhelming focus on defining the criteria themselves, leaving verification issues—that is, how the criteria would work in practice—to be developed at a later stage.

An interesting legal point to note is that the text of the article acknowledges rather explicitly that sustainability criteria can be *part of* other types of agreements and/or larger agreements and that the Commission can decide that these agreements demonstrate compliance with the sustainability criteria. That is to say, a bilateral agreement as envisioned in Article 18(4) does not have to deal *specifically and exclusively* with the verification of the biofuels sustainability criteria, while at the same time, the Commission *has the authority* to approve those agreements in

relation to the biofuels sustainability criteria. This is why we noted above that the bilateral option gives countries more flexibility.

The legal flexibility opens, and perhaps even suggests, the potential to take a broader, more holistic approach to fulfilling sustainability criteria, which is particularly relevant for developing countries. In terms of the underlying economics and also the political/economic transaction costs associated with launching and conducting negotiations between nation-states, it would also make eminent sense to develop broader agreements. Part IV of this Article examines some strategic aspects of such an approach in more detail. Here, we will emphasize that the brevity and lack of details of EU-RED Article 18(4) opens up many pathways, with relatively few constraints.

### C. *The Legislative Journey of the EU-RED's Bilateral Provision*

When the European Commission was charged with drafting the EU-RED, the proposal developed by the Directorate-General for Energy (DG Energy) that went to the European Parliament referred to the bilateral option thus: “The Commission *may decide* that bilateral and multilateral agreements between the Community and third countries demonstrate that biofuels and other bioliquids produced from raw materials cultivated in those countries comply with the environmental sustainability criteria in paragraphs 3 or 4 of Article 15.”<sup>18</sup> Over the course of revisions, the text was changed to: “The Community shall endeavour to conclude bilateral or multilateral agreements with third countries containing provisions on sustainability criteria. . . .”

The second wording is a stronger imperative to conclude bilateral agreements. One might speculate that the revision demonstrates that, at the time, political will existed for enhancing the use of bilateral agreements. We have found no documentation of the discussion behind the wording changes, but interviews in Brussels conducted as part of our research suggest that the bilateral option must be understood in a wider context, and as supporting a wider policy of harmonizing the sustainability criteria across the EU within the EU-RED.

Harmonization could have been accomplished through regulation instead of a Directive, but that would have probably required creating a new EU agency, which was not considered politically attractive. Thus, incorporating biofuels sustainability criteria within the EU Directive was deemed the better instrument. Bilateral agreements seem to have figured in the thinking from the start. Interviewees speculated that, from the earliest stages, the Commission was well aware that the EU would have to import biofuels to meet the targets, and that the application of sustain-

15. See *supra* note 1.

16. *Commission Communication on Voluntary Schemes and Default Values in the EU Biofuels and Bioliquids Sustainability Scheme*, 2010/C 160/01, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:160:0001:0007:EN:PDF>.

17. *Id.* at C 160/6, note 2.

18. *Commission Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy From Renewable Sources*, COM (2008) 30 final (emphasis added), available at [http://ec.europa.eu/energy/climate\\_actions/doc/2008\\_res\\_directive\\_en.pdf](http://ec.europa.eu/energy/climate_actions/doc/2008_res_directive_en.pdf).

ability criteria could be a very sensitive issue for trading partners. Led by this insight, they saw a need early on for flexible and clear options for third countries to comply with the sustainability criteria. Bilateral agreements, it seems, were viewed as a natural option to help accomplish this.

Despite the early inclusion of the bilateral option, it does not seem to have gotten much attention in the Commission's early work on the EU-RED. EU policymakers did specifically work to keep third countries informed about the sustainability criteria, and sought some countries' input—aware, among other things, of the WTO advantages of such an approach. Yet, feedback from other countries on the sustainability criteria was rather poor. In the first round of consultations, Malaysia and Norway were the only non-EU countries that provided feedback. To get more information, the Commission asked five countries for their views. Brazil, Indonesia, Malaysia, and Mozambique responded, but South Africa remained silent.<sup>19</sup> Significantly, the clause on bilaterals was not directly discussed in any of these consultations.

Once the EU-RED was actually adopted, there was more serious interest in the bilateral option. However, interviewees noted that despite varying degrees of engagement from a number of countries, primarily in South America, the interest soon faded. The short-lived interest was explained by the recognition that such an approach would evolve almost exclusively through negotiations that would undoubtedly require significant amounts of time, whereas the more immediate concern was to simply make sure that industry could comply with the criteria. Thus, even countries that initially showed interest in the bilateral option, such as Argentina and Malaysia, chose instead to emphasize industry compliance through voluntary schemes.<sup>20</sup>

We should note here that the WTO implications of the sustainability criteria in the drafting were handled by the lead DG Energy, primarily through consultations with DG Trade. DG Trade contributed in two main ways, though not on bilaterals in particular: (1) determining the potential WTO litigation implications of the sustainability criteria, something that was found to depend on a number of factors and can probably still be said to be unclear and dependent on interpretation; and (2) advising strongly for holding consultations and meetings with Partner Countries that would be sensitive to the criteria, and give them clear opportunities to voice their opinions.

According to our interviews, all three options for verification of the sustainability criteria (EU member state verification, voluntary schemes, and bilateral agreements) were considered equals at the time of drafting.<sup>21</sup> Nevertheless,

there were clear political signals from the European Parliament to encourage the bilateral option, which ultimately led to the stronger wording explained above.

Leaving the rationale of the European Parliament aside for a moment, the Commission's own approach to the bilateral option seems to have been—and continues to be, according to interviews—“wait and see.” In other words, the Commission will consider inquiries or requests from potential Partner Countries, and then launch a discussion on those issues, leading eventually to negotiations if mutually desirable. Thus, the Commission does not seem to have envisioned the bilateral option as any form of “crusading” instrument, with which to take an initiative in directly approaching third countries.

With regard to the ability to go beyond just the technical requirements of the sustainability criteria, and include adjacent or additional areas into bilateral negotiations, our interview with DG Energy confirmed that Article 18(4) clearly gives room for such inclusion.<sup>22</sup> However, the caveat is that political priorities and political will are paramount for determining just what such a broadened scope would mean in any individual case. DG Energy is clearly *not* actively pursuing such a broadened approach, although it does appear to be leaving the door open for it, subject to the appropriate political signals. A paradox thus seems to arise in the potential use of the bilateral option: The Commission, via DG Energy, views the option as appropriate if it is approached by a third party or if it receives positive signals from EU political leadership. Meanwhile, political figures or Parliamentarians tend to look at the Commission as being the appropriate party to initiate such agreements. The result is an impasse, with each side seemingly looking to the other for a mandate to move forward.

On a technical note, formally speaking, it is the Commission that first has to propose a mandate, followed by an adoption of that mandate by the Council. Only after actual negotiations would the finished bilateral agreement be subject to approval, also by the Parliament. This is not to say that the Commission would necessarily be immune to political pressure for launching such a mandate, as political signals can always operate behind the scenes in such decisions. Interviews also revealed that the lead DG in a given thematic area or sector (Energy, in this case) is crucial in such undertakings and thus has a great impact on the use of the particular instrument (bilateral agreements, in this case). Indeed, due to its mandate with the energy sector and its industries, DG Energy seems unlikely to be as forceful in pursuing environmentally beneficial measures in bilateral agreements as, for example, DG Environment has been in pursuing its Forest Law Enforcement, Governance, and Trade (FLEGT) scheme.<sup>23</sup> The FLEGT example with DG Environment is explored in greater detail in Part III of this Article.

19. Interview with Ewout Deurwaarder, DG Energy Policy Officer, Renewable Energy (Apr. 26, 2012).

20. Both the Roundtable on Responsible Soy (RTRS, Argentina) and the Roundtable on Sustainable Palm Oil (RSPO, Malaysia) were created before the EU-RED, but their work was significantly affected by the requirements of the EU-RED, and they have made some modifications or additions to facilitate compliance with it. In addition, Argentina has a de facto national scheme, CARBIO, which has applied for recognition.

21. Deurwaarder Interview, *supra* note 19.

22. *Id.*

23. Interview with Imke Luebbecke, EU Bioenergy Policy Officer, WWF, Brussels (Apr. 27, 2012).

## D. Developing-Country Cooperation

It is hard to fully separate the history and background of the bilateral option from the strategic considerations that underlined its inclusion: the relation to developing-country cooperation and market access is particularly relevant for this Article. Though later sections will address such issues in more depth, a crucial point to make here is that though this Article focuses primarily on the use of the bilateral option in the context of the EU-RED as a way to improve flexibility and market access for mainly the use of developing countries, such considerations predate this directive. For example, in the Commission Green Paper of March 8, 2006, which set out the EU biofuels strategy, two of the three aims of the text explicitly mentioned developing-country implications. The first reads: “[T]o further promote biofuels in the EU *and developing countries*, ensure that their production and use is globally positive for the environment and that they contribute to the objectives of the Lisbon Strategy taking into account competitiveness considerations;” while the second reads: “[T]o explore the opportunities *for developing countries*—including those affected by the reform of the EU sugar regime—for the production of biofuel feedstocks and biofuels, and to set out the role the EU could play in supporting the development of sustainable biofuel production.”<sup>24</sup>

In other words, the subject of this analysis in more general terms—the trade and development context that goes beyond the focus on bilateral agreements—has been discussed in the EU from early on with regard to biofuels. For the sake of manageability, in this Article we carve out the sustainability criteria in order to focus on the verification option of concluding bilaterals, but there are often strong links between the two. For example, the use of bilateral agreements in a way that seeks a broader and more holistic engagement with a third country in fulfilling the sustainability criteria may come to include certain adjacent areas, such as environment, labor, and social issues. If such aspects indeed come to the forefront in negotiations, one ought to bear in mind that such concerns may have already arisen in the overall context of the sustainability criteria themselves (as opposed to only in the context of bilateral negotiations). For example, during debates about the EU sustainability criteria for biofuels in 2008, the European Biomass Association noted in its newsletter:

Countries willing to export biofuels to the EU should ratify a number of environmental treaties and several conventions of the International Labour Organization. This is still a critical issue because these aspects should be *ideally treated via bilateral discussions and it is questionable how far we can impose the sustainability criteria outside Europe*.<sup>25</sup>

24. *Commission Green Paper: A European Strategy for Sustainable, Competitive, and Secure Energy*, SEC (2006) 317, COM (2006) 105 final (Mar. 8, 2006) (emphasis added), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0105:FIN:EN:HTML>.

25. EURO. BIOMASS ASS'N, COUNCIL FOCUSES ON FLEXIBILITY MECHANISM AND SUSTAINABILITY CRITERIA (July 2008) (emphasis added), available at [http://www.aebiom.org/wp-content/uploads/file/Newsletters/AEBIOMnewsletter\\_June2008.pdf](http://www.aebiom.org/wp-content/uploads/file/Newsletters/AEBIOMnewsletter_June2008.pdf), at p.6.

Needless to say, the issues raised during the Slovenian presidency can be relevant to a discussion on how to move forward with bilateral agreements.

## E. Strengthening and Diluting the Bilateral Option

We have previously noted that the bilateral option was strengthened as it made its way from a Commission draft to a final EU Directive, and indeed the strength of the emphasis seems to have fluctuated as the text moved through the legislative process. Some evidence can be found in the Final Report coauthored by MEP Claude Turmes, who was Rapporteur for the EU-RED (as well as head of the Parliament's Committee on Industry, Research, and Energy), and Anders Wijkman, Rapporteur for Opinion, who was also head of the Committee on the Environment, Public Health, and Safety.<sup>26</sup> The report shows a change in the wording on bilaterals, from the Commission's original “may conclude” to the following, stronger wording:

The Commission shall conclude bilateral and multilateral agreements between the Community and third countries to guarantee that energy from biomass produced from raw materials cultivated in those countries comply with the environmental sustainability criteria in paragraphs 3, 4, 7a and 8 of Article 15. The agreements shall include measures to guarantee the participation of SMEs.<sup>27</sup>

Thus, it seems the European Parliament actually sought an even stronger commitment toward concluding bilaterals than what ended up in the final text. After further revisions, the wording ended up as “The *Community* shall *endeavour* to conclude. . . .” and the mention of SMEs (small and medium enterprises) was dropped. Thus, although the initial wording in the Commission proposal was strengthened, in the end, there was also a weakening of the more aggressive wording that was first suggested by the Parliament.

One suspects that this apparent tit-for-tat between the Commission and the Parliament is quite simply due to an issue of the burden of work, since concluding bilateral agreements would fall on the Commission and there was no discussion of adding staff for such purposes. It could also have been more convenient for the Commission to favor, despite assurances that no favoring was made, the “arm's-length” approach of the “meta-standard” of sustainability criteria, which subsequently led to a dominance of voluntary schemes. However, to put this in perspective, it is also important to mention that the vast majority of the work done revising of the Commission proposal had to do

[www.aebiom.org/wp-content/uploads/file/Newsletters/AEBIOMnewsletter\\_June2008.pdf](http://www.aebiom.org/wp-content/uploads/file/Newsletters/AEBIOMnewsletter_June2008.pdf), at p.6.

26. Rapporteur for Opinion means that Wijkman was chief of the committees that also put in their opinions to the deciding committee. This indicates that both committees worked very closely indeed on the EU-RED.

27. CLAUDE TURMES & ANDERS WIJGMAN, REPORT ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROMOTION OF THE USE OF ENERGY FROM RENEWABLE SOURCES AMENDMENT 84 (European Parliament 2008), available at <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0369/2008>.



with the quantitative calculations and levels of the sustainability criteria, not on institutional issues such as bilateral agreements. Compared with the difficulties encountered therein, the bilateral option was certainly a minor issue in the discussions.

If the Commission did, indeed, resist strengthening the bilateral option, it would be curious indeed with respect to the legislation itself. Article 18 of the EU-RED requires that the Commission establish regulations for reporting systems that avoid overly excessive administrative burdens on operators and farmers, particularly small ones.<sup>28</sup> Such concerns about small producers are highly relevant for the use of bilaterals, since it can be questioned whether the concerns of small enterprises are being addressed, or can ever be, with the voluntary schemes and the significant thresholds to market access that they pose for developing country producers and SMEs in particular. Indeed, Lin writes: “The existence of a plethora of certification schemes has caused producers and operators concern about the prohibitive costs associated with multiple certifications (which will have a disproportionate effect on small-scale producers in developing countries) and how voluntary standards fit into regulatory regimes.”<sup>29</sup> Lin also critiques the system of independent auditors and their links to the industry, and points out several loopholes and difficulties with such an approach.<sup>30</sup>

Although naturally this would not have been fully predictable at the time of drafting and revising the EU-RED, research and analysis of the Directive before it was adopted suggest that there were already clear indications that a primary reliance on voluntary schemes was expected.<sup>31</sup> Jody Endres, for example, notes that when concluding bilateral agreements under Article 18(4), the labor concerns raised in Article 17(7) must be directly addressed, as this provision is referred to in 18(4).<sup>32</sup> Article 17(7) refers to certain reporting duties with regard to labor standards and international agreements. This reference to labor standards in the context of bilaterals may signify a more direct responsibility for the Commission to engage with such issues in negotiations and thus, arguably, become more exposed to a controversial area. Whether or not such a point actually affects the way the Commission views the bilateral option can of course be debated, but it illustrates another example where an arm’s-length approach of focusing on voluntary schemes may prove convenient in practical terms, as opposed to the political complexities of a directly negotiated bilateral agreement.

Thus, to understand the bilateral option, it is important to properly take into account the concerns, incentives, and

constraints that decisionmakers had when the legislation was drafted. Notably, interviewees mentioned that in discussions while drafting the EU-RED, it was assumed that the bilateral option would be used.<sup>33</sup> Indeed, one may even speculate as to how the sustainability criteria themselves might be customized through bilateral agreements. It is also important to note again that the Commission’s relative indifference toward bilaterals was accompanied by—although unrelated to—dwindling enthusiasm from third countries; both factors contributed to the lack of use of Article 18(4). Companies and operators, meanwhile, were much more actively involved than their respective governments in pushing forward their (voluntary third-party) sustainability schemes.

Furthermore, in some cases, “country” and “industry” are not easily separated. For example, Argentina initially showed interest in the bilateral option, but ultimately abandoned the route of state negotiation to focus on a certification scheme led by a government-backed trade group, Cámara Argentina de Biocombustibles (translated as Argentinian Biofuels Chamber) (CARBIO), which today encompasses roughly 95% of the Argentinian market.<sup>34</sup> For some countries and industries, even a detailed consideration of the bilateral option can lead to the conclusion that voluntary schemes are flexible and workable enough, especially when there is a strong organizational base and high market coverage, as in Argentina. The Argentinian case brings up another pertinent question: Is there sufficient demand for bilateral agreements on biofuels to verify sustainability criteria? The Argentinian case seems to suggest otherwise, but it is not necessarily representative, and certainly not for the poorest and most vulnerable states, which may have great physical potential but lack scale, infrastructure, and institutions. In this Article, we argue that there is a very important role for bilaterals not primarily with more-developed countries, but with poorer, less-developed countries in particular. This will be explored in greater depth in a later section.

## F. The Parliamentary Process in Context

Going back to the importance of what was expected and assumed at the time of drafting Article 18(4), a brief clarification on the EU parliamentary process is useful. In the European Parliament, every proposition within a Directive has to go through the parliamentary process and have some form of commentary and/or decision attached to it. The Parliament has committees that deal with particular issues, based on the competency and mandate of the specific com-

28. Endres, *supra* note 5, at 100.

29. Lin, *supra* note 8, at 40.

30. One may insert here an argument that bilaterals may form a better approach in severing the common principal/agent difficulties that auditors can find themselves in, particularly as they relate to voluntary schemes set up by industry.

31. Florent Pelsy, *The European Commission 2008 Directive Proposal on Biofuels: A Critique*, 4 LAW, ENV’T & DEV. J. 134, available at <http://www.lead-journal.org/content/08119.pdf>.

32. Endres, *supra* note 5.

33. Interview with Anders Wijkman, former member of the European Parliament and senior adviser, Stockholm Environment Institute (May 31, 2012). This opinion was confirmed in an interview with Fredrik Hannerz, former political assistant to Wijkman in the European Parliament, on July 1, 2012.

34. CARBIO stands for Cámara Argentina de Biocombustibles, or Argentinian Biofuels Chamber. It has close ties with the Argentina Ministry for Agriculture and other government bodies. See <http://www.carbio.com.ar>. The 95% figure comes from a presentation by Gustavo Idígoras and S. Papiendeck, Business Issue Management Consulting Co., titled *Argentina Biodiesel Industry*, held in Buenos Aires on Dec. 14, 2011.

mittee. For each committee, there is a Rapporteur, who guides the question through the committee. Though several committees can be involved, there is always one that has the lead, and consequently, it is not strictly speaking a parliamentary system at all, since the committee system does not consist of a majority and an opposition. The Commission cannot assume that it will get a majority for its proposals, but instead has to reach such approval on a case-by-case basis. Because of this, the Lead Rapporteur, who is chosen from the lead Parliamentary Committee for a given topic, is in charge of shepherding the question or issue through the Parliamentary Committee, and holds a very strong position, especially when having technical knowledge on the specific issues. However, there are also Shadow Rapporteurs (plural), reflecting the different party groups in the Parliament and different relevant Committees. For example, if a social democrat is Rapporteur, then so-called Shadow Rapporteurs are appointed from the other parties.

In the case of the EU-RED, MEP Claude Turmes served as Rapporteur, and Wijkman was Shadow Rapporteur. Wijkman's role is of special interest, as he served on the Environment Committee and had a particular focus on the 10% target itself and the sustainability criteria that would be needed to qualify that target. It must be reiterated, however, that the vast majority of drafting time was spent on the sustainability criteria themselves. Interestingly, the EU-RED is often described as having been a "speedy" process, typically implying that if only more time had been spent on it, all its ills would have been solved. With regard to the bilateral option, however, interviews suggest this was not the case. Bilaterals were not "abandoned" during the process due to lack of time—they were simply not a focus of attention. Instead, a few key perspectives on the sustainability criteria took centre stage. In an interview, Wijkman suggested that there were two primary overall concerns with respect to EU policies toward external or third countries: (1) How to design a regime that did not just apply to Europe, but would influence the world at large, avoiding the "isolated island" phenomenon; and (2) How to best alleviate potentially sensitive sovereignty issues that may arise if third countries felt that ambitious sustainability criteria encroached on what might be considered a national prerogative.<sup>35</sup>

The thinking behind the bilateral agreements option, as it relates to these strategic concerns, was to be able to negotiate well on the *forms* of compliance. This meant specifically, just as with the biofuels sustainability meta-standard, to try to avoid dealing with individual production facilities and instead find broader solutions that would be more administratively feasible. The thinking seems to simply have been that agreements made at nation-state level would facilitate broad solutions, and have the added advantage of direct engagement with the Partner Country in question.<sup>36</sup> Interestingly for later sections of this Article, capacity-building was envisioned as a potential aspect of

such bilateral agreements, and so was a focus on developing countries that might have difficulties with the administrative complexities of fulfilling sustainability criteria. In addition, Parliamentary Committees discussed their interest in both establishing a domestic EU market, and promoting domestic markets in third countries.<sup>37</sup> The case for the latter is clear to see, as an "artificial" market such as this runs the risk of being provided by so-called islands of good practice in third countries, while failing to actually bring about functioning domestic markets in the third country itself.

There are potential conflicts in these lines of reasoning. From interviews, it seems clear that, in drafting the EU-RED, policymakers were interested both in favouring domestic EU producers, and in promoting well-functioning biofuels markets abroad, to ensure a sufficient supply of imports and to make the global market more sustainable. However, domestic EU interests feared competition from abroad, leading to a somewhat ambiguous approach, where Member State interests did not necessarily overlap with those of the proposed EU external policy promoting third-country production and market access. France and Germany, especially, seem to have been eager to protect their own production, which was based primarily on rapeseed.<sup>38</sup>

### G. Trade and Development Linkages in the Sustainability Criteria

While this Article focuses on bilateral agreements to promote market access and resource utilization in developing countries, it is important to underline that neither the EU-RED nor even Article 18(4) itself were intended as measures for supporting developing countries. Though it holds great potential to be used to support trade and economic development, the basic short-term market interests of EU Member States conflict to a significant degree with such trade/development cooperation goals. The drafters knew that the ambitious 10% transport target would require substantial imports, but the full extent of potential conflicts over imports, clashing with EU domestic priorities, appear not to have been foreseen, contributing to ambiguity in the final legislation. This ambiguity remained despite the fact that during the political process, the bilateral alternative gained steadily in importance as the European Parliament came to see it as a valuable part of the sustainability toolbox. Interviews suggest that the greater importance attributed to bilaterals was due to key people in the Parliament doubting that one-size-fits-all homogenous criteria would be effective in ensuring sustainable production to meet the 10% target.<sup>39</sup> Coupled with the uncertainties at that time regarding the environmental and social impacts of increased production of biofuels, several Parliamentarians felt that an institutional ability to "customize" for local effects and circumstances would be helpful.

35. Wijkman Interview; *supra* note 33.

36. *Id.*

37. Wijkman & Hannerz Interviews, *supra* note 33.

38. Wijkman Interview, *supra* note 33.

39. *Id.*



The strengthening of the wording on bilaterals thus seems to be linked to the uncertainty that was felt in the Parliament when the Commission presented its calculations of the sustainability criteria. There was wide recognition in the Parliament that in order to meet the sustainability criteria, a quite substantial organizational capacity would be required to gather, measure, and monitor data at a reasonable cost. Because of the substantial administrative requirements, it was felt that adopting meta-standard sustainability criteria inherently favored large-scale production over smaller production facilities, unless additional checks and balances were put into place. Bilateral agreements offered one type of counterbalance, as affirmed by the Parliament's strengthening in the wording of Article 18(4). Of course, it was always assumed that while overall the sustainability criteria must be met, a certain amount of flexibility with the environmental and social criteria must be afforded based on local conditions. The more holistic approach based on bilateral agreements with developing countries is discussed further in Part V.

### III. Lessons From the FLEGT Scheme on Illegal Logging

Bilateral agreements are by no means a new measure for the EU to engage with third countries on issues of environmental and social significance. In this part, we examine the FLEGT initiative of the EU and draw lessons from it on the potential for bilateral agreements on biofuels. In particular, we consider the more holistic and customized approach to problem solving that can be facilitated through bilateral agreements; such an approach has been a hallmark of the FLEGT bilateral agreements.

#### A. A Brief History of the FLEGT

Insofar as there are no Article 18(4) bilateral agreements with the EU related to biofuels (and none currently under formal negotiation, to our knowledge), it is instructive to consider the development and ongoing implementation of the FLEGT, the EU's most prominent bilateral environmental program. The FLEGT initiative began in 2003 with the aim of combating illegal logging, which was recognized as a widespread problem in developing countries. Many large timber producers and exporters are in developing countries, where weak institutions, poverty, and lack of enforcement resources all contribute to illegal logging practices. Furthermore, civil society organizations that aim to address environmental degradation often have a weaker voice compared to that of logging companies.

The resulting natural resource depletion, destruction of valuable ecosystems, and removal of important carbon sinks often outweighs any short-term economic gains from logging, and thus there is a strong public interest in addressing the problem. Illegal logging also poses significant direct economic costs in addition to the environmental costs: the EU estimates it is costing governments

\$10 billion every year in lost revenues.<sup>40</sup> Furthermore, lax enforcement and corruption can exacerbate disregard for laws and entrench the illegal practices as the normal cost of doing business. Although there are voluntary schemes for sourcing sustainable forest products, there is no global agreement yet related to illegal logging.

In 1998, the foreign ministers of the G8 launched the Action Programme on Forests (APF), which dealt with illegal logging as one of its five action areas. The destructive effects of illegal logging for both timber markets and local communities were stressed, and a range of actions were promised, including research on the trade impacts and flows of illegal timber, market measures to improve transparency, gaps and obstacles to controlling illegal logging and timber trade, and pledges for cross-border cooperation to combat illegal logging.

Spurred by this initial show of strength and commitment, a number of developed countries began to pledge major donations. These donations, among others, were channeled into a World Bank-coordinated instrument called Forest Law Enforcement and Governance (FLEG). This instrument resulted in several major regional conferences that brought together governments, nongovernmental organizations (NGOs), and researchers from many countries in order to establish common frameworks for timber-producing and -consuming countries to collaborate to more effectively combat illegal logging.

Meanwhile, the United Kingdom began bilateral negotiations with Indonesia. In April 2002, a Memorandum of Understanding (MOU) was completed between the two countries on cooperation to improve forest law enforcement and governance and to combat illegal logging and international trade in illegally logged timber and wood products; an action plan followed soon after.

This MOU served as somewhat of a prototype for the FLEGT initiative. In April 2002, the European Commission held a workshop in Brussels to identify ways to limit the importation of illegal timber into the EU, based on recognition of both the significant size of the EU market and the extent of illegal timber logging and trade. After much discussion, the FLEGT Action Plan was launched in 2003 and approved in February 2004 by a motion of the European Parliament.

Duncan Brack summarizes the key points of the FLEGT Action Plan thus:

- The negotiation of FLEGT voluntary partnership agreements with producer countries.
- A licensing system to identify legal products in Partner Countries and license them for import into the EU; unlicensed products will be denied entry.
- Examination of Member States' existing legislation (for example on money laundering) that might be of value in preventing imports of illegal products.

40. *Id.*

- Consideration of additional legislative options that might be necessary to prohibit the import of illegal timber, particularly products originating from countries not participating in partnership agreements and therefore not covered by the licensing scheme.
- Capacity-building assistance to Partner Countries to assist them in setting up the licensing scheme, reform their laws and regulations (if necessary) and improve enforcement.
- Pressure on financial institutions to scrutinize flows of finance to the forestry industry.
- Encouragement for voluntary industry initiatives, and government procurement policy, to buy only from legal sources.<sup>41</sup>

The European Commission's own synthesis of the FLEGT plan identifies seven broad areas of action:

- Support to timber-producing countries.
- Activities to promote trade in legal timber.
- Promoting public procurement policies.
- Support for private-sector initiatives.
- Safeguards for financing and investment.
- Use of existing legislative instruments or adoption of new legislation to support the Plan.
- Addressing the problem of conflict timber (that is, timber produced in areas of conflict or war, the proceeds of which might be used to support one or both sides).<sup>42</sup>

Regarding what is meant by "support" to timber-producing countries (highly relevant to any exploration of a bilateral option for biofuels), this work is defined by the EU as:

- Improved governance structures and development of reliable verification systems where forest law enforcement has been weak.
- Policy reform that focuses on laws and regulations that are appropriate to the country in question, and through which all stakeholders can engage in policy dialogue.
- Improved transparency and information exchange between producing and consuming countries, including support for independent forest monitoring.
- Capacity-building and training in producing countries, including support for governance institutions in the implementation of new governance procedures.

- Support for the development of community-based forest management and the empowerment of local people to help prevent illegal logging.<sup>43</sup>

A number of voluntary certification systems existed before FLEGT, the largest of which are the Pan-European Forest Certification (PEFC) system and the system of the Forest Stewardship Council (FSC). The situation thus differs somewhat from that of the EU-RED, since the voluntary schemes associated with it were incentivized to a great extent by the EU-RED and/or modified because of the EU-RED and the sustainable biofuels market that it created. There are nevertheless some interesting lessons to be drawn from the simultaneous existence of voluntary schemes and a bilateral approach.

Florent Pelsy, drawing on this similarity in a 2008 critique of the proposed (or expected) EU-RED, offered some words of warning about the use of voluntary schemes, comparing reliance on voluntary schemes for biofuels with those used to combat illegal logging:

These certification systems, however, might not be the most effective tool to enforce sustainable production of biofuels in developing countries with poor governance. For example, forest certification schemes illustrate the different loopholes of such private mechanisms. They represent a small part of the market of timber. Moreover, their success is largely limited to temperate and boreal forest in industrialised countries with a high level of environmental law enforcement and where deforestation is not a major issue. In developing countries certification schemes account for a small part of the market because unsustainable production of timber is much more lucrative due to weak forest laws and their weak enforcement.<sup>44</sup>

Highlighting such problems, Pelsy goes on to write (prior to the EU-RED coming into force): "All the critics [sic] addressed toward the voluntary sustainable forest certification schemes could probably apply to the certification of biofuels. Certification schemes of biofuels could well suffer more loopholes than forest certification schemes since the production of biofuels is much more complex to assess."<sup>45</sup>

These comments suggest that although FLEGT has been largely successful in combating illegal logging, the bilateral approach taken by FLEGT was implicitly accompanied by concerns about the inadequacy of voluntary schemes to address the issue. In particular, two obvious problems with voluntary schemes were apparent. The first was the realization that these schemes have been adopted mainly in temperate regions and/or in Organisation for Economic Co-operation and Development (OECD) countries and included relatively few developing countries. The second was the recognition that creating incentives for trading in sustainable timber is quite different from building institutions that can simultaneously *de-incentivize* unsustainable

41. Duncan Brack, *Controlling Illegal Logging and the Trade in Illegally Harvested Timber: The EU's Forest Law Enforcement, Governance and Trade Initiative*, 14 REV. EUR. CMTY. & INT'L ENVTL. L. 32 (2005).

42. *Commission FLEGT Briefing Note 01, What Is FLEGT? Forest Law Enforcement, Governance, and Trade* at 2 (2007), available at [http://www.euflegt.efi.int/portal/home/flegt\\_intro/flegt\\_action\\_plan/](http://www.euflegt.efi.int/portal/home/flegt_intro/flegt_action_plan/).

43. *Id.*

44. Pelsy, *supra* note 31, at 131.

45. *Id.* at 132.

timber trade. A more holistic approach was needed to build such stronger institutions in developing countries, leading to adoption of the main instrument used by FLEGT: Voluntary Partnership Agreements (VPAs).

## B. VPAs: A FLEGT Bilateral Trade Agreement

A VPA is essentially a bilateral trade agreement between the EU and third countries that has as its core purpose the reduction and elimination of illegal logging. With a binding VPA, the EU and a Partner Country both undertake to work together to support the aims of the FLEGT Action Plan and to implement a timber-licensing scheme. The possibility of reaching such agreements was set out in a 2005 EU regulation,<sup>46</sup> which was followed by an implementing regulation in 2008.<sup>47</sup>

In the FLEGT Action Plan of 2003, voluntary, bilateral agreements between producing countries (FLEGT Partner Countries) and the EU were proposed. According to the Commission, the intended outcomes of VPAs are:

- Improved forest governance.
- Improved access to markets within the EU for timber from Partner Countries.
- Increased revenues collected by Partner Country governments.
- Increased access to support and development for Partner Country governments.
- Implementation of more effective enforcement tools in Partner Countries.
- Improved foundations for sustainable forest management.<sup>48</sup>

VPAs offer an approach to identify legally exported timber using licenses issued by the Partner Country. These licenses must be underpinned by certain timber legality assurance systems as developed under the auspices of each VPA.<sup>49</sup> In other words, the VPA customizes the licensing system in accordance with the results of the bilateral negotiations between the EU and the Partner Country. Needless to say, such direct engagement means that the EU can, in a VPA, go beyond a voluntary certification scheme in terms of seeking assurances of—and guaranteeing for the parties involved—the legality of the timber produced and traded.

VPAs are expressly condoned by the EU due to their ability to take into account differing conditions in Partner Countries. In each country, a VPA “will need to take account of factors such as national forest governance issues, forest-related legislation, the nature of forest and land rights, the nature of timber trade, current forest-sector initiatives, and the capacity to implement agreements.”<sup>50</sup>

Though customization and specific tailoring to the Partner Country is a key aspect in concluding VPA bilateral agreements, some recurring elements when designing and implementing VPAs are likely to include social safeguards and stakeholder involvement. Social safeguards can mean, for example, protecting against adverse impacts on the livelihoods of indigenous and local communities. An important and related point is that Partner Countries will also be encouraged to connect any poverty alleviation strategies they may have to the VPA and establish monitoring of the VPAs as they relate to poverty reduction. With regard to stakeholder involvement, regular consultations will typically be held already during the design and implementation of the VPA. Crucially, stakeholder involvement procedures are among the best ways to ensure that undue burdens are not imposed on small-scale producers.

In some Partner Countries, meeting these commitments will require considerable institutional strengthening and capacity-building. VPAs generally identify areas in which there is a need for technical and financial assistance. Any assistance will be directed toward promoting legality in the forest sector, as a fundamental step toward achieving sustainable forest management. Likely areas of focus, per the Commission, will include:

- Assistance with undertaking legislative and regulatory reforms, where needed.
- Assistance to develop systems to verify that timber has been harvested legally.
- Capacity-building for Partner Country governments and civil society.
- Seeking just and equitable solutions to illegal logging that minimize adverse impacts on forest-dependent communities.
- Strengthening existing institutions and institution-building.
- Support for policy, legislative, and regulatory reform in the forest sector.<sup>51</sup>

The start of a VPA process is often rather informal. The first and most important objective is to ensure a comprehensive understanding of the process and what it means for the two parties, particularly as it relates to the aims of the VPA and to the practical implications of its implementation mechanisms. Communication at this early stage

46. Council Regulation 2173/2005 on the Establishment of a FLEGT Licensing Scheme for Imports of Timber Into the European Community, 2005, O.J. (L 347) 1, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF>.

47. Commission Regulation 1024/2008, Laying Down Detailed Measures for the Implementation of Council Regulation 2173/2005 on the Establishment of a FLEGT Licensing Scheme for Imports of Timber Into the European Community, 2008, available at [http://ec.europa.eu/development/icenter/repository/Com\\_Reg\\_1024-08\\_en.pdf](http://ec.europa.eu/development/icenter/repository/Com_Reg_1024-08_en.pdf).

48. See *supra* note 47.

49. The assurance systems address controls on timber production, processing, internal verification, licensing, and independent monitoring.

50. Commission FLEGT Briefing Note 06, *Voluntary Partnership Agreements, Forest Law Enforcement, Governance and Trade*, available at [http://www.euflegt.efi.int/portal/home/flegt\\_intro/flegt\\_action\\_plan/](http://www.euflegt.efi.int/portal/home/flegt_intro/flegt_action_plan/).

51. *Id.*



is typically between the Partner Country and the European Commission. From the side of the Partner Country, early and informal communication typically means informing the Commission of specific forest-sector issues that the country is experiencing and that could potentially be addressed through a VPA. When the informal contact phase has concluded, the prospective Partner Country can notify the Commission of its willingness to commence formal negotiations.

In order to promote continuous communication and oversight by representatives of both the EU and the Partner Country, a FLEGT VPA also utilizes what is called a Joint Implementation Committee (JIC). The role of this body is to “facilitate, monitor and supervise the implementation of the Partnership Agreement and mediate and resolve any conflicts and disputes that arise.”<sup>52</sup>

A VPA always includes a detailed plan with clearly defined and time-bound actions for implementing the specific licensing scheme that has been worked out and the forest-sector governance as needed. Typically, only a limited amount of solid wood products is initially covered, but provisions are made to allow for extension into other product categories, subject to approval by the Partner Country. This inherent flexibility also gives the opportunity to have other products follow in lockstep later on if there are differences between the parties, without having to cut them completely out of the picture. The agreements are indefinite unless otherwise stated, with the possibility to withdraw with one year’s notice.

### C. *Capacity-Building and “Adjacent Areas” in FLEGT Bilateral Agreements*

There are currently six countries developing the systems agreed under a VPA, and six countries that are negotiating with the EU. Furthermore, around 15 countries from Africa, Asia, and Central and South America have expressed interest in VPAs. The FLEGT instrument has clearly attracted significant interest from the prospective Partner Countries. Work under the FLEGT Action Plan is carried out jointly by the Directorates-General for Environment and Development and Cooperation (DG Environment and DG Devco; note that DG Energy is the lead DG for the EU-RED). Other relevant DGs (such as DG Trade) are often invited to comment, but the lead DG takes the key ownership role for a program such as FLEGT or a Directive such as the EU-RED.

Capacity-building is part of all VPAs, and investment is needed to start running the licensing scheme that will be tailored to the Partner Countries’ circumstances. Though help with capacity-building can be provided, much will of course depend on vigorous engagement by the Partner Country. It must be understood that although development benefits may be an enticement for engaging in a FLEGT VPA, it is typically not direct financial assistance

that is the main motivator for VPA Partner Countries. Rather, it is the establishment of functioning revenue measures and an enforcement system that is less prone to leakage and damage from illegal logging. Thus, the political and financial reforms aimed at improving forest governance that are undertaken by a Partner Country typically also result not only in improved access to EU markets, but also in increased collection of taxes and duties, which will often exceed the additional costs associated with running a proper licensing system. This increase of “open” revenue can then, in a more transparent manner, be directed toward poverty reduction and community development programs and jobs that engage with the licensing scheme. Of course, development assistance does still matter, and FLEGT partners get some priority in EU programs as a result of engagement with a VPA.

We must stress that importation of timber from countries that are not parties to a VPA is, of course, still fully legal in the EU, and here a parallel can be drawn to the fact that it is legal to import biofuels that do not meet sustainability criteria. However, the advantages and help included in seeking to conclude a VPA, as well as consumer preference, has clearly been attractive enough for a large number of countries to engage with this approach.

### D. *Lessons From FLEGT for Applying the Bilateral Option Under the EU-RED*

As mentioned previously, several voluntary forest certification schemes preceded the FLEGT approach, and thus it is important to distinguish this case from voluntary schemes under the EU-RED. Voluntary sustainability schemes are one of three methods of verification included in the EU-RED, along with national schemes and bilateral or multilateral agreements. Voluntary certification schemes for forests, on the other hand, existed outside of any formal EU legal framework, and the FLEGT initiative was certainly not an attempt by the EU to supplant them. This distinction is crucial for drawing conclusions with respect to the concurrent existence under the EU-RED of voluntary certification schemes and bilateral agreements.

Interviews suggested that, in the case of FLEGT, the initiative for the use of bilateral agreements came from the Commission itself in response to pressure from stakeholders who demanded that the EU, as a major market for tropical timber, must stop importing illegally harvested timber products.<sup>53</sup> The free movement of goods within the EU made actions by individual Member States largely pointless: Action at the EU level was thus quickly and widely seen as the rational approach. There also seem to have been few, if any, political signals pointing specifically toward this path. Rather, the simplicity and directness of the proposition that the EU should not serve as a market for illegal timber probably helped overcome any reservations at the time about the bilateral approach. Furthermore, the clear

52. *Id.*

53. Interview with John Bazill, FLEGT Team Representative, DG Environment (Apr. 26, 2012).

appeal of the bilateral approach can be seen against the backdrop of global initiatives that did not materialize, such as a forest convention that was first proposed at the 1992 Earth Summit in Rio.

The voluntary schemes such as FSC's and the PEFC were originally intended mainly for tropical countries, to help them improve their standards of management and market access. But as it turned out, more than 80% of the certified area covered by these voluntary approaches has actually been in developed countries.<sup>54</sup> Despite a lot of money being poured into certification projects in Africa, interviews suggest the projects created only isolated areas of good practice.<sup>55</sup> Worse still, these isolated areas would typically be completely dependent on international markets, and amounted to a form of "export hub" rather than having any impact on the domestic market in question.

The FLEGT approach became attractive when policy-makers took a step back and realized the need for a broader approach in order to deal with fundamental institutional issues in the exporting countries. This of course did not mean reducing ambitions in terms of sustainability, but making sure that real and meaningful sustainability was achieved by building administrative and technical capacity and forming new institutions for managing forests and trade in forest products. Such an approach could thereby escape the trap of creating "islands" of sustainability in exporting countries that depend on foreign investment.

### E. FLEGT Negotiations and On-the-Ground Issues

VPAs require substantial negotiations before being implemented. As in any negotiation, there will be trade offs between maximizing outcomes and maintaining momentum. The process can be energized or it can get tired. The negotiations alone will often take two years, and often an additional two years are needed for implementing and operationalizing the systems.

From a practical perspective, operating on a country basis has some disadvantages, especially in larger countries and/or where there is regional autonomy. Negotiations can be stalled or blocked by the "lowest common denominator" effect—that is, the worst-performing provinces or companies can hold back progress toward a national system. This can slow negotiations considerably when compared with an operator-based system, where one does not need to wait for an entire country to be in line, but can instead proceed with one company or operator at a time. Of course, herein also lies the advantage of the bilateral approach, in that there is no one "left behind," and thus the risk of creating only islands of good practice is avoided.<sup>56</sup>

A somewhat counterintuitive issue and an on-the-ground concern with a FLEGT VPA is that it can also be risky for SMEs. SMEs operate to some extent in more informal markets, and despite the advantage of making sure everyone is on board with a national system, there can also be a temptation for the sake of efficiency in negotiations to focus mainly on the needs of the bigger operators, which have a stronger voice. Yet, it is typically the smallest operators that struggle most to comply with the law and that need the most assistance and assurances. Thus, though a bilateral approach could allow for a better engagement with smaller operators, there is no guarantee that such engagement will be realized. After all, a bilateral agreement still means countrywide requirements, and compliance with those requirements can be tougher for SMEs unless an explicit mechanism addresses their needs.

### F. Commonalities Between FLEGT and Biofuels Regarding the Bilateral Approach

Some of our interviewees were amenable to the idea that the FLEGT approach of bilateral agreements may be beneficial also for biofuels. Primarily, this would have to do with engaging directly with some of the "leakage" problems that are arising with biofuels, particularly ILUC. Since ILUC is by definition an indirect effect that cannot be traced specifically to the actions of any operator, only by improving overall land use policies can ILUC be mitigated in a cost-effective manner.<sup>57</sup>

A key point that was made in interviews and that may be very relevant to the potential for bilateral agreements for biofuels is that FLEGT has been successful largely thanks to significant buy-in from stakeholders and to close coordination with development cooperation resources. Thus, FLEGT has been able to sell itself as providing not only benefits on compliance with laws on illegal logging, but also as being able to provide better governance and development benefits, as well as clarification of rights and transparency initiatives.

Connecting to biofuels, one may raise questions as to whether biofuels bilaterals will be able to muster the same amount of stakeholder involvement or development cooperation resources. DG Devco is heavily involved in the FLEGT approach, and it can only be speculated at this point what its role, if any, would be for bilateral biofuels agreements. DG Energy would likely be the lead DG on any biofuel bilateral agreement, and as such would have the overall responsibility and run much of the critical process and decisionmaking. Furthermore, the public goods nature of forests is not easily compared to the semi-private nature of lands normally used for biofuels production. Arguably,

54. U.N. FOOD & AGRIC. ORG. FORESTRY PAPER 162: WHAT WOODFUELS CAN DO TO MITIGATE CLIMATE CHANGE (2010), available at <http://www.fao.org/docrep/013/i1756e/i1756e00.htm>.

55. Bazill Interview, *supra* note 53.

56. It is instructive to note that Indonesia is the only country that operates a type of hybrid approach under FLEGT, where there are audits of specific operators in the supply chain, as in an operator-based system, but without the need to actually audit the entire country. The geographical complexity of

Indonesia as an island state and the regional autonomy in its political system calls for such a hybrid approach.

57. The ILUC factor approaches that have generally been proposed would provide only a negative incentive—that is, to reduce the use of biofuels that have significant ILUC effects. See Johnson et al., *supra* note 4, at 20. The institutional improvements that accompany a FLEGT-like mechanism offer positive incentives for developing countries.

the former has a stronger and less controversial position in the current discourse than biofuels, making the underlying basis for cooperation easier and less fraught with uncertainty. However, there are elements within DG Devco that are favorable toward biofuels as a new market for developing countries. This aspect, according to interviews, seems to pertain particularly to sugar-producing countries that “lost out” when EU special tariffs for African, Caribbean, and Pacific countries were taken away.<sup>58</sup>

One of the most important, and potentially damaging, arguments against seeing FLEGT VPAs as a model for biofuels bilaterals is the fundamental approach used in the former. In essence, FLEGT offers to help developing countries to *better enforce their own legislation*. After all, illegal timber logging is, by definition, already outlawed in timber-exporting countries. Rather, it is the enforcement that is lacking and which the VPAs seek to improve. Though laws may change as a result of engaging with the FLEGT process, the key point is that the FLEGT approach engages with something that is already there. Illegal timber is illegal in these countries even before they receive assistance from the EU. Now, with regard to biofuels sustainability criteria, this is not the case, as other countries generally do not have any sustainability criteria already in place that the EU can approach as something it wants to help improve.

This fundamental difference from the FLEGT context raises some difficult sovereignty issues related to the imposition of external standards. Since the sustainability criteria are a so-called meta-standard that is applied generally, this also means some of the flexibility of the FLEGT approach may be lost due to the rigidity of the biofuels criteria. Working with a country’s own logging laws, it may be argued, is less intimidating than approaching a country with a series of external standards that it must fulfill. In this way, biofuels sustainability criteria, and the bilateral agreements that would seek to facilitate them, may perhaps be said to be more locked down than is the FLEGT initiative. Though there can be, and frequently is, an element of encouraging legal changes within the FLEGT context, this is never hardwired into the VPAs, because the sovereignty issues that would be sparked would change the entire nature of the discussions. The goal in FLEGT is to help third countries with their problems and to access the EU market, not to impose external laws. The goal is crucial as it is the basis of the trust that allows bilateral negotiations in the VPA context to be successful.

As mentioned, the FLEGT VPAs take a broad and holistic approach when seeking to stop international trade in illegal timber. With regards to some of these adjacent areas that frequently find their way into VPAs, an important point is that not all of the areas negotiated and dealt with in the process necessarily show up in the final text. From interviews, it was suggested that, in a negotiation

setting, one is always looking for spinoffs that might take effect outside the FLEGT context.<sup>59</sup> Clearly, there is no need for everything to be formally included in the VPA. For example, although the EU cannot tell a Partner Country to change its laws, a discussion under FLEGT might lead to reforms, based on information shared during the discussion. Thus, the negotiation process provides a platform where many issues can be brought up, some of which are incorporated in the VPA, some of which are dropped, and still others end up as spinoffs outside the VPA.

The direct engagement that leads to constructive dialogue is one of the strengths of the bilateral approach and serves to concentrate minds and converge on solutions, especially if sufficient funds are invested to allow for NGOs and the private sector to be part of the process. It was noted, for example, that NGOs and governments can sometimes be at loggerheads for years, until an external instrument such as a VPA helps or forces them to close ranks and figure out national priorities together.<sup>60</sup> More generally, facilitation and clarification of national policies is advantageous wherever such policies are either muddled or previously did not exist.

### G. Engaging With Indirect Areas in FLEGT Bilateral Agreements

Pursuing bilateral agreements contains exciting opportunities for engaging with areas that may be highly relevant and go beyond the core purpose of the agreement. Social and environmental factors in third countries with the potential to impact sustainability criteria are quite varied and elusive. Because of this, the danger of involving indirect areas in bilateral agreements is that they can balloon out of control, to the point where the engagement becomes unmanageable and cumbersome. Has this been an issue for FLEGT, and are there lessons from its trade agreements for biofuels? According to interviews, ballooning is already starting to become an issue in the FLEGT context.<sup>61</sup> There is a tendency to pile issues on top of one another, a tendency furthered by the fact that Partner Countries generally keep a close eye on what the preceding FLEGT agreements have involved. Put simply, these negotiations are not immune from precedent or to trends in negotiation priorities.<sup>62</sup>

Another line frequently tested is the one between international and domestic markets. If so much effort is expended on combating illegal timber trade on the international market (for example, exported to the EU), then a Partner Country may wish to receive direct support and capacity-building aid for its domestic market as well, which it typically will consider even more important. This is by no means an unworthy cause, but the point to make here is that somewhere along the line of expanding mandates,

58. Interview with Flavia Bernardini, policy officer, Trade Policy in Agriculture, and Peter Thompson, director for Sustainable Development, Economic Partnership Agreements—Africa, Caribbean, and Pacific; Agri-Food and Fisheries, both at DG Trade (Apr. 26, 2012).

59. Bazill Interview, *supra* note 53.

60. *Id.*

61. *Id.*

62. For example, a current trend in the FLEGT context, according to our interview with Bazill, *supra* note 53, is to focus more on poverty alleviation.



measures may start to straddle the line between the core objective (fighting illegal logging or making biofuels sustainable) and normal development assistance. Depending on how this is approached, with either a firm core purpose or something looser, it completely changes the dynamic of negotiations. This point will be expanded and deepened below in the discussion of EU Economic Partnership Agreements (EPAs).

In terms of geopolitics, one must also be careful not to overestimate the role of the EU. Although the EU is an important player in international markets for both timber and biofuels, it is likely to see this role lessening with the rise of advanced developing countries and emerging economies. In such a world, suggestions that European markets can “lead the world” are perhaps a bit grandiose, given that the European market is likely to have diminishing leverage in the future.<sup>63</sup>

#### IV. Lessons From EPAs

Another EU instrument that engages with state-negotiated agreements in a more holistic approach is the EPA spearheaded by DG Trade. EPAs are trade and development deals negotiated by the EU with the African, Caribbean, and Pacific (ACP) region. The rationale is to use trade agreements to explicitly promote economic development in third countries (that is, the purpose is not tit-for-tat, as in routine trade deals). The initiative, according to EU sources and confirmed by interviews, came out of frustrations in the EU with tariff preferences (Generalized System of Preferences), leading to the search for a more ambitious approach.<sup>64</sup> For well over 30 years, exports from the ACP countries were given generous access to the European market. Yet, preferential access failed to boost local economies and stimulate growth in ACP countries. EPAs were therefore launched as an attempt to remedy this situation after the signing of the 20-year Cotonou Agreement between the EU and 79 ACP countries in 2000, subsequently revised in 2010.<sup>65</sup>

EPAs are ambitious indeed. They expressly aim for regional integration in ACP countries and package offers toward several countries in a region, not engaging directly with only one country as in the case of FLEGT (or, as discussed here, the potential for bilateral agreements on biofuels). Despite such ambition, or perhaps because of it, few of these agreements have been ratified, particularly in Africa. The first EPA in Africa has recently “gone live” with implementation by Madagascar, Mauritius, the Seychelles, and Zimbabwe. However, this is just the first one that has gone to an implementation stage, with four out of six countries in the region reaching an interim agreement,

so it is not yet a full EPA.<sup>66</sup> The only fully functioning EPA currently in existence is CARIFORUM, established in 2008 for the Caribbean region. The Caribbean agreement includes provisions for environmental standards and workers’ rights, although much flexibility is still afforded to Caribbean countries to establish their own social and environmental regulations.

#### A. Understanding EPAs

We begin by providing a brief overview of EPAs, based on EU sources.<sup>67</sup> EPAs are tailor-made to suit specific regional circumstances. They go beyond conventional free trade agreements, focusing on ACP economic development, taking account of these countries’ socioeconomic circumstances. They also include cooperation and assistance to help ACPs implement the agreements.

EPAs opened up EU markets unilaterally beginning January 1, 2008, but allow 15 to 25 years for ACP countries to open up their markets to EU imports, while also maintaining protection for the most sensitive 20% of such import markets. EPAs provide scope for wide-ranging trade cooperation on areas such as services and standards. They are also designed to be drivers of change that will kick-start reform and help strengthen the rule of law in economic and financial matters, thereby helping to attract foreign direct investment (FDI), and helping to create a “virtuous cycle” of growth.

The benefits of EPAs for LDCs, according to the European Commission, are:<sup>68</sup>

- *Enhance trade.* Beyond free-market access, EPAs provide less strict rules of origin, making it easier for LDCs to export products that include inputs from other countries (third-country inputs), especially in the key export sectors of agriculture, fisheries, and textiles.
- *Tackle cooperation on trade-related issues.* Provide an opportunity to address complex issues affecting trade, such as copyright laws and the environmental regulations.
- *Boost regional markets and rules.* By tagging on to ACP regional integration initiatives, EPAs seek to promote regional solutions, which are seen as good for development.
- *Provide for a broader approach to trade barriers.* The EPA approach recognizes that tariffs and quotas are not the only barriers to trade, and provides a way of addressing wider issues; for example, poor infrastruc-

63. Bazill Interview, *supra* note 53.

64. Bernardini & Thompson Interview, *supra* note 58.

65. The Cotonou Agreement, signed in Cotonou on June 23, 2000, and subsequently revised in Luxembourg on June 25, 2005, and in Ouagadougou on June 22, 2010, is available at <http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement>. Articles 34-38 focus especially on EPAs and related trade issues.

66. The two remaining countries are Comoros and Zambia. See EURO. COMM’N DG TRADE, EU’S FIRST ECONOMIC PARTNERSHIP AGREEMENT WITH AN AFRICAN REGION GOES LIVE (May 14, 2012), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=800>.

67. EURO. COMM’N DG TRADE, ECONOMIC PARTNERSHIPS, available at <http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/> (last visited June 3, 2014).

68. *Id.*

ture, inefficient customs and border controls, or inadequate technical standards.

- *Bring tailor-made approaches to regional needs.* EPAs are worked out in regional negotiations to make sure they take account of regional needs and each country's sensitivities and conditions.
- *Safeguard local economies.* Although ACP countries that sign EPAs must gradually open up as much as 80% of their markets to EU imports, safeguards ensure that EU products do not compete against locally produced products. The disruption of local economies is thereby avoided while allowing local industries and consumers to benefit from cheaper inputs and consumer goods.
- *Respect national sovereignty.* Instead of imposing development strategies, EPAs ask countries to determine their own development strategies that can then incorporate the appropriate pace and sequence of reform decisions.
- *Create stable partnerships between EU and ACP countries.* EPAs establish viable contracts between equal partners, which cannot be altered without mutual agreement, thus favoring long-term planning and investment for development. The partnership element of EPAs makes it quite different from the Everything But Arms (EBA) initiative, which is a favorable trade status granted by the EU based on meeting certain conditions, as opposed to the negotiation between trading partners that characterizes EPAs.

## B. Lessons From EPAs for Potential Bilateral Agreements on Biofuels

The above description of EPAs reveals some important overlaps with the potential structure of a holistic bilateral agreement on biofuels, such as the idea of partnerships and the protection of certain sensitive segments of biofuels markets (for example, those that might affect developing countries' food security). Consequently, there may be some useful lessons from the EPAs for designing a bilateral policy instrument for biofuels. But first, we should note some special characteristics of EPAs that might not apply to biofuels agreements:

- EPAs strive for regional integration.
- EPAs are inherently development-oriented; that is, the core rationale is to use trade as an instrument for economic development.
- EPAs can avoid agricultural politics and focus on other goods.
- EPAs are handled or negotiated by DG Trade.<sup>69</sup>

Although EPAs and FLEGT cannot be directly compared due to their differing purposes, in the more general context of EU external relations and agreements, EPAs are not considered as successful as FLEGT, since so few EPAs have been ratified. The ambitious nature of the EPA instrument might even serve as a cautionary tale. Interviews have confirmed that the regional approach has been especially problematic, particularly in Africa. Scale issues and difficulties on the ground present recurring barriers; agreements that are more focused and specific would be more manageable than reaching for both the thematic breadth and the deep regional integration that characterize EPAs.<sup>70</sup> Bilateral agreements targeting individual countries and focusing on the most relevant issues can be much less daunting than the regional complexities that frequently bog down the EPA approach. In fact, the slow progress with EPAs has gradually reduced the focus on deep regional integration, and shifted the focus to trade in particular goods and different types of "low-hanging fruit," especially in Africa.<sup>71</sup>

With regard to the practicalities of negotiating EPAs, we return to the issue of potential dichotomy between the executive and political leadership of the EU, which may be relevant for potential bilaterals concluded on biofuels under the EU-RED. After the Lisbon Treaty, the European Parliament plays a bigger role in EU affairs, while also being generally known as more aggressive than the Commission on issues such as sustainability and labor. This can lead to an element of uncertainty on the side of the Commission, which will be negotiating any bilateral or regional agreements, since it will need approval from the European Parliament. If the Partner Country firmly says no to sustainability or labor issues, will the European Parliament still accept the deal?

The strategic sense of dealing not only with the Partner Country but also navigating around the thresholds of acceptability within the European Parliament makes the Commission likely to want to see clear political signals before engaging with these initiatives. In practice, naturally, much of it will work on a case-by-case basis. This practical point is important, because everything in a formal negotiation becomes part of a package of sorts. Within such packages, it is necessary to limit somewhat the scope when entering the negotiations to avoid the unnecessary swelling of issues based on using them as strategic bargaining chips.

Based on the above discussion and deeper background discussions undertaken in interviews, we identified the following lessons from EPAs for potential bilateral agreements on biofuels:

- *Manage ambitions and avoid regional divisions.* When multiple parties are engaged in negotiating a single deal, difficulties are likelier to arise. Complex, or even hostile, relations with other regional Partner Countries can complicate a regional approach, compared

69. Bernardini & Thompson Interview, *supra* note 58.

70. *Id.*

71. *Id.*

with more straightforward one-on-one negotiations between countries.

- *Have clarity of purpose.* What exactly is the core of the deal? Having a core purpose and very clear incentives to accompany the core purpose helps to focus discussions. In this respect, EPAs are more general in purpose compared to a more targeted goal such as fulfilling/verifying biofuels sustainability criteria in the EU-RED, or combating illegal logging in the case of FLEGT.
- *Hold good domestic focus.* It is important not to focus too much on EU institutions. Supporting more effective domestic and regional institutions in developing countries is the key to expanding sustainable energy markets. If the EU pursues bilateral agreements on biofuels, interviewees stressed, legislation in the Partner Country is crucial. The closer that domestic legislation and enforcement in the Partner Countries tracks the basic sustainability goals, the likelier the agreements are to succeed. Even basic information sources and definitions of key terms may not be well-established in the Partner Countries: Basic environmental or ecological definitions such as wetlands or peat lands may differ, and data on such areas may not be kept. Whenever scientific language is required, as is the case with biofuels and with land use in general, there are significant risks of misinterpretation.
- *Respect capacity limits.* What is already there, and what is needed in the particular country of engagement? Knowing the laws and institutions is very important. Also, one should not underestimate the administrative burdens on developing and vulnerable Partner Countries. Things should be kept as simple as possible.
- *Avoid green protectionism.* It may be hidden or unintended, and developing countries in particular tend to be wary of protectionism, sometimes to the point of assuming that it is a part of any green trade agenda.
- *Avoid a race to the bottom.* Precedents matter, as potential Partner Countries closely follow the preceding negotiations. There are always specific circumstances: a country is landlocked, prone to tsunamis, and so forth. Thus, it is easy to find many different reasons to notch down each time, without ever intending to set a precedent. This potential weakness of the bilateral approach must be handled with great care.

## V. Bilateral Agreements for EU-RED Sustainability: Strategic Issues

Every discussion of a potential bilateral agreement in which the EU engages would create a precedent. Therefore, there are strategic considerations, some of which have already surfaced with respect to bilaterals. The bilateral agreement option is currently being explored in

more detail in talks between the United States and the EU. It is too early to tell where this will lead and what clarifications in the use of bilaterals might arise from these discussions. The United States, of course, is not a developing country, unlike the partners envisioned by the drafters of the bilateral option in Article 18(4). Time will tell whether it will be considered that there is a sufficient basis to go forward, or whether the United States will go the way of Argentina, showing initial interest, but ultimately not pursuing the bilateral option.

Negotiating a bilateral agreement is a political issue that differs from the technical and economic focus that has dominated the implementation thus far of the EU-RED. As discussed in Part II, strengthening the wording of the bilateral option showed a certain level of comfort with the use of bilateral agreements, and perhaps even an outright realization that they can play an important balancing function by engaging with developing countries and particularly by providing a closer linkage to small-scale producers in developing countries.

Furthermore, although the Commission's initial proposal for the EU-RED focused on the mandatory sustainability criteria, in the final legislation, the EU political leadership brought in a host of other sustainability issues to be considered. This political will at the very outset suggests an apparent interest in *broader* sustainability issues beyond the technical criteria, some of which could be more effectively addressed through bilateral or multilateral agreements. Consequently, the confluence of policymakers' concerns with broader sustainability issues and the opening of political channels for bilateral agreements might offer a new way forward for the EU in engaging directly with the increasingly sensitive sustainability impacts in third countries. Despite the fact that it has been a few years since the EU-RED came into force, and there still is yet to be a single bilateral agreement concluded, this indicator of political comfort at the outset suggests that the option remains viable.

Interviews suggest that the EU political leaders at the time of EU-RED passage were aware of the difficulties in verifying the social effects of growing biofuels crops outside the EU. The bilateral option thereby emerged as a necessary counterweight due to the difficulty in getting at local circumstances with the meta-standard criteria. In concrete terms, sub-Saharan Africa served as the mental model in terms of the political geography for applying the bilateral option. Finally, SMEs also figured frequently in the discussions on bilaterals, as related to difficulties in fulfilling the criteria. With regard to the holistic approach of engaging with another country in bilateral negotiations and, in that context, directly involving further social and environmental areas into the realm of negotiation, this seems not to have been analyzed directly as such, but did enter the discussion on how to properly accommodate local circumstances. Thus, the inclusion of bilaterals did reflect a realization of the need to see the bigger picture beyond the technical sustainability criteria. Such strategic



considerations are explored in more detail in this section of the Article.

### A. *Deepening Trade Agreements and Inherent Political Conflicts*

A general development in the world of trade agreements is the move away from the old model of “market access for market access” toward a new model of “market access for domestic reform.”<sup>72</sup> In this world, tariffs and their reduction are no longer the main point of concern. Rather it is non-tariff barriers (NTBs) that often stand as the greatest threat to improved market access, particularly for developing countries. The importance of NTBs in the case of biofuels markets is increasing. In a survey of market actors, sustainability criteria and logistics, both of which can be classified as NTBs, were cited as major obstacles to biofuels trade.<sup>73</sup>

One definition of a bioenergy trade barrier is “any issue that either directly or indirectly hinders the growth of international trade of biomass commodities for energy end-use.”<sup>74</sup> Tariffs are thus no longer necessarily the main problem for developing countries, as has been pointed out by researchers.<sup>75</sup> Indeed, LDCs often already have duty-free market access to the EU through arrangements such as the EBA Initiative, which has benefitted LDCs in some commodity markets that are going through restructuring, such as sugar.<sup>76</sup> Instead, it is the cost-efficient fulfillment of technical standards or sustainability conditionalities that creates major stumbling blocks for developing countries. As Peter Oosterveer and Arthur Mol noted, “technical standards and the implementation of currently debated sustainability criteria may constitute non-tariff barriers for import into the EU for all developing countries.”<sup>77</sup> The researchers further noted the challenges for developing countries navigating sustainability criteria:

Biofuel production costs are relatively low in developing countries where tropical conditions prevail, although this is conditioned by the presence of adequate (material, institutional and knowledge) infrastructures and a supportive policy environment. Up till now, however, their contribution to global biofuels trade has remained fairly small. This is partly due to the technological and institutional challenges in producing these goods, but import

requirements in OECD countries also limit access of developing countries.<sup>78</sup>

Thus, there is a risk of developing countries being sidelined without direct help and customization efforts by important market actors such as the EU. A survey of market actors has confirmed such risks, and noted that the main drivers for bioenergy trade are fossil fuel prices and policy support.<sup>79</sup>

Writing about the changing nature of trade agreements, Nancy Birdsall and Robert Lawrence note: “Special treatment was straightforward when trade agreements related to barriers at the border; developed countries could simply adopt lower tariffs than developing countries.”<sup>80</sup> Now, however, there is a growing interest in influencing domestic legislation and promoting reforms in Partner Countries, and engagement has become more direct. Thus, Birdsall and Lawrence add:

As the barriers to trade have been dismantled, the impact of different domestic policies has become apparent, especially as it affects international competition. Increasingly, the major political actors in society (business, labour and civil society groups concerned with the environment) have called for a level playing field. For coalitions representing business, the problem is product dumping, for labour it is “social dumping,” and for environmentalists it is “eco-dumping.” Trade agreements offer these groups a vehicle to lobby for changes at home, either by directly changing the trading rules or by using trade as a weapon to enforce agreements achieved elsewhere.<sup>81</sup>

The above remark is also a reminder of a key flashpoint in the biofuels debate: the inextricability of the EU-RED from European agriculture and the associated deeply entrenched agricultural policies. Competition is rarely welcome, and a curious balance seems to exist between the will to keep as much market share as possible for European biofuels producers, and the recognition that imports are needed to reach the stated goals of the EU-RED. EU policymakers are thus forced into a balancing act, in which imports of biofuels are condoned just enough to avoid threatening European production. This has significant implications for biofuels bilaterals and the use of Article 18(4) in the EU-RED, particularly as it relates to developing countries.

Most importantly, it affects the power dynamic that is always present in a bilateral negotiation, which is skewed in favor of the stronger partner and puts developing countries at a disadvantage.<sup>82</sup> The effect is exacerbated if there are strong domestic interests in the more powerful party that are none too keen on seeing an influx of greater competi-

72. See, e.g., RICHARD BALDWIN, CTR. FOR ECON. POL’Y RES., 21ST CENTURY REGIONALISM: FILLING THE GAPS BETWEEN 21ST CENTURY TRADE AND 20TH CENTURY TRADE RULES, available at [http://www.cepr.org/pubs/PolicyInsights/CEPR\\_Policy\\_Insight\\_056.asp](http://www.cepr.org/pubs/PolicyInsights/CEPR_Policy_Insight_056.asp).

73. Martin Junginger et al., *Opportunities and Barriers for International Bioenergy Trade*, 39 ENERGY POL’Y 2028-42 (2011).

74. *Id.* at 2029.

75. Peter Oosterveer & Arthur P.J. Mol, *Biofuels, Trade, and Sustainability: A Review of Perspectives for Developing Countries*, 4 BIOFUELS, BIOPRODS. & BIOREFINING 75 (2010).

76. Lindsay Jolly, *Sugar Reforms, Ethanol Demand, and Market Restructuring*, in BIOENERGY FOR SUSTAINABLE DEVELOPMENT AND INTERNATIONAL COMPETITIVENESS: THE ROLE OF SUGAR CANE IN AFRICA 183-211 (Francis X. Johnson & Vikram Seebaluck eds., 2012).

77. See Oosterveer & Mol, *supra* note 75, at 72.

78. *Id.* at 71.

79. See Junginger et al., *supra* note 73, at 37.

80. Nancy Birdsall & Robert Z. Lawrence, *Deep Integration and Trade Agreements: Good for Developing Countries?*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 128-51 (Inge Kaul et al. eds., Oxford Univ. Press 1999).

81. *Id.* at 132.

82. *Id.* at 139.

tion. The incentive for protectionism is recognized by developing countries, which explains the suspicion we noted in Part IV. As Birdsall and Lawrence put it: “Thus developing countries justifiably fear that trade agreements that cover product standards will be used as a vehicle by politically powerful protectionist interests in developed countries to deny access to developing country producers.”<sup>83</sup>

This perspective illustrates a legitimate suspicion, namely that the EU would be under pressure to alternately step on the gas and on the brake with regard to biofuels imports. Even a hint of such tensions may potentially sour the mood in bilateral negotiations between the EU and a developing country. Perhaps even more significantly, the considerable investments required to build technical and institutional capacity in small developing countries require long-term continuity and consistency, which would be directly hindered by the tug-of-war that has thus far characterized EU biofuels policies with respect to the market-access implications of the sustainability standards.

Jean-Christophe Bureau writes that, for France and Germany especially, the motivation to support biofuels in the first place was clearly to increase agricultural income.<sup>84</sup> This has not come about frivolously, and there is political history behind it. Jennifer Franco writes in a paper on underlying assumptions in European biofuels policy: “Biomass originally was meant to come from European ‘indigenous’ sources, especially to reduce dependence on imports and so enhance security for Europe.”<sup>85</sup> Though prospective sources were later widened to developing countries, it is easy to see how a seed of pro-European sources was thus planted at the earliest stages of biofuels policy, and how it now has come to collide with a greater focus on external sources.

Put simply, there might be a conflict between the EU’s own market concerns and the political will to provide support for a broader approach in which developing countries might start to produce biofuels for both domestic use and export and thereby contribute to energy, climate, and development goals.<sup>86</sup> In fact, from a technical standpoint, the EU-RED went further than the Kyoto Protocol in terms of climate accountability, in that biofuel producers became responsible for land use impacts outside the EU (and in particular, outside of any Annex I countries), whereas Kyoto did not include such impacts—only those at the point of use.<sup>87</sup> At the same time, on the legal/economic side (and in more general terms) there seems to be a

trend of the EU increasingly using its market power to put in place “better” climate policy in third countries.<sup>88</sup>

Thus, one of the core concerns when drafting the EU-RED was to ensure that it would not only inspire good practices within the EU in isolation, but that it would also inspire change elsewhere in the world. It has even been suggested that this is part of an overall change in EU strategy, with biofuels as an early manifestation of that change.<sup>89</sup> Joanne Scott sees the strategy of EU unilateralism as affecting climate governance in other countries in a number of areas. In this context, bilateral agreements on biofuels would encourage developing countries to embrace sustainability standards that are as strong as the EU’s, through domestic laws or regulations, so that the EU standards become redundant. She writes:

In the event that adequate domestic regulation is adopted, or where a bilateral or global deal is struck, the EU backstop measures [such as the biofuels sustainability criteria] may cease to apply. Consequently, the EU’s ultimate goal is not to enforce compliance with EU rules on the part of operators situated abroad, but to galvanize or incentivize regulatory or normative engagement elsewhere.<sup>90</sup>

This is certainly not to judge whether such an approach would be good or bad. Scott does note one strong potential benefit of such active engagement toward third countries: “[B]y incentivizing normative engagement elsewhere (for example domestic legislation on aviation and voluntary certification systems for biofuels), and by entering into dialogue with individual states, the EU will also *enjoy opportunities to learn more about how best to address pressing problems, the solutions to which remain far from clear.*”<sup>91</sup>

There seems to be obvious value in such an approach when it comes to dealing with ILUC and other domains where continuing uncertainties can otherwise prevent progress without deeper institutional cooperation. Yet, the situation leads one to wonder about the core purpose of the EU-RED, and especially the transport-sector target. If cost-effective climate change actions are the core rationale, then capacity-building in developing countries is quite important. Indeed, the European Commission, in its communication on EU strategy on biofuels, expressly mentions that the cost of production is lower and the biomass productivity is often higher in developing countries.<sup>92</sup> However, if improving European agriculture and technological platforms (including second-generation biofuels) is a core objective, one would expect caution toward bilateral engagement. The most likely answer is that both these forces coexist and are still in a largely unsettled state. The ambiguous push-pull approach hinders initiatives that would increase developing-country resource utilization

83. *Id.* at 140.

84. Jean-Christophe Bureau et al., *European Biofuel Policy: How Far Will Public Support Go?*, in 33 HANDBOOK OF BIOENERGY ECONOMICS & POLICY 401-23 (M. Khanna et al. eds., 2010).

85. Jennifer Franco et al., *Assumptions in the European Union Biofuels Policy: Frictions With Experiences in Germany, Brazil, and Mozambique*, 37 J. PEASANT STUD. 661-98 (2010).

86. Francis X. Johnson, *Regional-Global Linkages in the Energy-Climate-Development Policy Nexus: The Case of Biofuels in the EU Renewable Energy Directive*, 2011 RENEWABLE ENERGY L. & POL’Y REV. 91-106 (2011).

87. NAOMI PENA ET AL., CIFOR, CONQUERING SPACE AND TIME: THE CHALLENGE OF EMISSIONS FROM LAND USE CHANGE (2010), available at <http://www.cifor.org/online-library/browse/view-publication/publication/3269.html>.

88. Joanne Scott, *The Multi-Level Governance of Climate Change*, 2011 CARBON & CLIMATE L. REV. 25 (2011).

89. *Id.*

90. *Id.* at 30.

91. *Id.* at 33 (emphasis added).

92. See Pelsy, *supra* note 31.

through bilateral agreements, especially those that would aggressively seek to remedy NTB issues.

As an example of how the conflict plays out, one may also look at the five years of the EU-Brazil strategic partnership, with its slow progress in the area of biofuels, despite obvious potential for cooperation and increased efficiencies. In order for such cooperation to make progress, EU policymakers will have to prioritize more clearly among the various goals: nurturing the domestic market, or advancing global sustainable development and climate mitigation. Complicating matters further is the fact that the two Member States that seem to be the most committed to their respective domestic industries are France and Germany, which are not only two anchor members of the EU, but are also its major biofuels producers. European agriculture is a politically intractable topic, and it is clear that biofuels cannot easily be decoupled from such sensitivities. The majority of Member States seem to favor keeping the currently uncompromising status quo on agriculture. This is not to suggest that partnerships such as that with Brazil have been insignificant. Research collaboration has been done in a number of joint projects, and a three-way biofuels collaboration has been carried out with Mozambique (another, with Kenya, is under consideration). But the main issues related to global market development have not advanced on a scale commensurate with the potential associated with a biofuel powerhouse such as Brazil.

The Brazilian example illustrates a more general conflict created by the ambiguity between external policy and Member State priorities, which greatly complicates policy goals and EU strategy and thereby reduce overall cost-effectiveness. Stavros Afionis and Lindsay C. Stringer write:

[I]n the case of biofuels, values and economic interests intermingle in the EU. Here, the normative power perspective is largely unable to explain why an actor so keen on promoting the environmental sustainability of international biofuels trade, actually impedes imports of biofuels that are far more energy efficient compared to their heavily subsidized domestic counterparts.<sup>93</sup>

The potential trade frictions and even hostilities that might arise from this double-mindedness are rather obvious. Martin Junginger writes:

[Rather than increased trade conflicts] we would recommend that policy makers from the major producing and consuming regions in developing and developed countries explore the possibilities for joint international trade agreements to enable developing countries to produce biofuels for export, and to allow developed countries to meet their bioenergy (and renewable energy) targets.<sup>94</sup>

Bilateral agreements, as set out in Article 18(4) of the EU-RED, clearly offer precisely such an instrument for facilitating a joint approach between the EU and partners in developing countries.

Birdsall and Lawrence, writing on multilateral agreements, note: “Trade itself and trade-related investments are already accelerating a healthy process of improved standards for labour and environment in developing countries; the challenge is to find more effective and, for the developing countries, less risky vehicles for accelerating that process.”<sup>95</sup>

Can bilateral agreements be such vehicles, or at least one such vehicle? There is a good case to be made for such a role, especially in a changing geopolitical landscape that holds the potential to give more power to developing countries for aligning the domestic reforms being pressed from abroad with existing policy objectives in the areas of agricultural and rural development, resource access, and energy security. More than ever with the new type of trade agreements that lead to domestic reforms in third countries, institutional capacity and technical and financial assistance are needed to ensure that developing countries find their place at the table. Such investment will make the agreements:

- More likely to actually reach their intended goal, and to provide the requisite platform to conduct meaningful discussion at all.
- More robust over time, since wise investment will lead to better-functioning and more efficient governance systems.
- More transparent, since greater capacity will facilitate better stakeholder participation.

## B. Strategic Implications in Using a “Meta-Standard” of Sustainability

Though this Article does not examine the overall history and function of the sustainability criteria, their use has strategic implications that are crucial in seeking to use bilaterals to better verify such criteria. Having a one-size-fits-all meta-standard of sustainability criteria is administratively efficient for the EU, yet potentially troublesome for bilateral (external) relationships, because third countries could see it as the EU imposing an external standard that does not match their own law. Of course, meta-standards are not new. As Daniel Bodansky notes, the European Commission initiated such a system in the 1980s in order to expand regional trade.<sup>96</sup> In other words, the use of meta-standards was largely born out of the EU’s history of harmonizing its own internal markets.

The attractiveness of a meta-standard is that it avoids reinventing the wheel for every new partner and thus can

93. STAVROS AFIONIS & LINDSAY C. STRINGER, SUSTAINABILITY RES. INST., THE ENVIRONMENT AS A STRATEGIC PRIORITY IN THE EUROPEAN UNION-BRAZIL PARTNERSHIP: IS THE EU BEHAVING AS A NORMATIVE POWER OR SOFT IMPERIALIST? 17 (2012), available at <http://www.see.leeds.ac.uk/fileadmin/Documents/research/sri/workingpapers/SRIPs-29.pdf>.

94. See Junginger et al., *supra* note 73.

95. See Birdsall & Lawrence, *supra* note 80.

96. THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 619 (Daniel Bodansky et al. eds., Oxford Univ. Press 2007).



save time and administrative costs. Lin writes: “Developing a sustainability standard through a multi-stakeholder process can take several years and is costly. Resorting to a meta-standard avoids wasting resources on duplicative efforts.”<sup>97</sup> The disincentive, on the other hand, to using a meta-standard is the lack of flexibility and customization, both of which must yield somewhat to a more harmonized overall approach. The potential role of bilateral agreements when facing such a choice is to work as a *balancing mechanism* that offsets the rigidity of a meta-standard with the flexibility and customization opportunities of a directly negotiated agreement, particularly with those who are most affected by the rigidity of the standard. Thus, a chief advantage of the bilateral approach is that it does not necessarily need to supplant or undermine a meta-standard, but can serve to balance it and to provide a more sensitive type of direction on a country-by-country basis.

### C. Potential Constraints for Biofuels Production From Food Crops

A key concern about biofuels that was envisioned in the formulation of the EU-RED is the effect of ILUC, which is in turn strongly linked to the use of food crops or land that could be used for food production. If, to compensate for land taken over by biofuels crops, farmers convert other land types, such as forests, to agricultural use, this could negate some of the GHG emissions savings.<sup>98</sup> Given that the EU-RED includes GHG emissions standards, ILUC could undermine the intent of the legislation. The Commission published a brief report in 2010 noting the various uncertainties to be addressed in further analysis, since the EU-RED specifically called for an approach to address ILUC.<sup>99</sup> In the heated debates that ensued, a variety of approaches have been evaluated and discussed in policy circles and in academic publications.<sup>100</sup>

Finally, in October 2012, the Commission released a proposal to address ILUC concerns. It consists of a package of measures that will cap the amount of biofuels from food-based crops at 5% of the total consumption of energy in transport (i.e., one-half of the 10% target) for 2020, which is roughly the EU average share as of 2011.<sup>101</sup> Advanced (second- or third-generation) biofuels will be counted at

four times their value in fulfilling the target, which doubles the existing double-counting in the EU-RED.

The proposal is remarkable in a number of respects. First, according to the Commission’s own impact assessment, “it has not been possible to assess the effectiveness of this package of measures under the current methodology.”<sup>102</sup> The impact assessment analyzed in considerable detail, using rather complex models, the four main options and some variations, but the option that was ultimately chosen was not among them! While one might expect some arbitrariness in the complex world of EU legislation, it is ironic that the detailed modelling done for other options could not be applied to this one. Second, the proposal is not really a “package of measures,” but centers on the restriction on first-generation biofuels. A package of measures might have included some type of remedial or institutional instruments, including expanded scope of applying the bilateral approach as discussed in this Article. Third, average ILUC factors (given in grams of carbon dioxide per megajoule of energy delivered by the biofuel) were calculated, but will not be used. These factors are more than four times as high for oil crops as they are for sugar and starch crops, so applying them would have put oil crops at a relative disadvantage.<sup>103</sup> However, the overwhelming majority of the world’s biofuels production from oil-based crops is within the EU, whereas biofuels from starch and sugar crops are almost all produced outside the EU. Thus, non-EU producers could argue that the proposal discriminates against them.

The proposal from the Commission seems to be another lost opportunity to use the bilateral option. In fact, bilateral agreements are precisely the kind of instruments that could address certain aspects of ILUC. In particular, bilateral agreements can address land use management for all uses, not just to grow energy crops, offering the opportunity for positive incentives aimed at overall productivity rather than constraining one sector. True, such agreements are complex and take time, as shown in the case of FLEGT, and their outcome is much less predictable, which makes them unpopular with risk-averse bureaucrats working for the European Commission. But such agreements offer an approach that is dynamic and addresses national institutions in third countries, which at the very least is complementary to the operator-level application of specific sustainability criteria that has been favored thus far. They are also more WTO-friendly and can neutralize the “regulatory chill” that can result from the broader sustainability measures in legislation such as the EU-RED.<sup>104</sup> Furthermore, because they address developing-country institutional reform, they can shift domestic markets toward sustainability, bringing benefits beyond the EU market itself.

97. Lin, *supra* note 8, at 40.

98. See ROBERT EDWARDS ET AL., EUR. COMM’N INST. FOR ENERGY, INDIRECT LAND USE CHANGE FROM INCREASED BIOFUELS DEMAND: COMPARISON OF MODELS AND RESULTS FOR MARGINAL BIOFUELS PRODUCTION FROM DIFFERENT FEEDSTOCKS (2010), available at <http://publications.jrc.ec.europa.eu/repository/handle/111111111/15324>.

99. European Commission Report on Indirect Land-Use Change Related to Biofuels and Bioliqids, COM (2010) 811 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0811:FIN:EN:HTML>.

100. See, e.g., Seungdo Kim & Bruce E. Dale, *Indirect Land Use Change for Biofuels: Testing Predictions and Improving Analytical Methodologies*, 35 BIOMASS & BIOENERGY 3235-40 (2011). For a perspective from industry/policy, see HART ENERGY CONSULTING & CABI, LAND USE CHANGE: SCIENCE & POLICY REVIEW (2010).

101. Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive 98/70/EC Relating to the Quality of Petrol and Diesel Fuels and Amending Directive 2009/28/EC on the Promotion of the Use of Energy From Renewable Sources, COM (2012) 595

final, available at [http://ec.europa.eu/clima/policies/transport/fuel/docs/com\\_2012\\_595\\_en.pdf](http://ec.europa.eu/clima/policies/transport/fuel/docs/com_2012_595_en.pdf).

102. Commission Staff Working Document Executive Summary of the Impact Assessment on Indirect Land-Use Change Related to Biofuels and Bioliqids. SWD (2012) 344 final, available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/SWD20120344.do>.

103. *Id.* at 19.

104. Emile Barrett Lydgate, *Biofuels, Sustainability, and Trade-Related Regulatory Chill*, 15 J. INT’L ECON. L. 1-24 (2012).

## VI. Conclusions and Recommendations

Perhaps, one of the most helpful insights to underline on the use of the bilateral option of Article 18(4) in the EU-RED is that there is no hidden landmine to this option. It is unexplored rather than unviable. As has been analyzed in this Article, a core reason for why this exploration has not occurred is the push-pull going on between the EU's external priorities/leadership style and the domestic strategic priorities of EU Member States. Biofuels are a flashpoint for this tension, and their governance suffers for it, with bilateral agreements apparently being one of the casualties.

A lack of awareness and a somewhat distorted perception of the role of bilateral agreements have hampered their serious consideration by policymakers in Brussels. Bilateral agreements are seen as a trade issue, whereas energy is seen as a technical-economic issue; consequently, the lead DG in this case—Energy—does not necessarily see their value, nor does it have the political mandate and the administrative resources to pursue them. The success of bilateral agreements under FLEGT suggests that targeted bilateral engagements can be effective. Furthermore, bilaterals can provide the institution-building aspects that are completely absent in voluntary approaches.

Adding the institution-building aspect imbues the whole biofuels policy sphere with a more holistic approach and offers flexibility and customization that will be highly valued by developing-country partners. The greater flexibility in fulfilling sustainability criteria makes it more worthwhile for both sides to launch negotiations. Such commitments, via direct engagement and customization, would also be likelier to provide the discussion platform that negotiators and political leaders need in order to have enough maneuvering space to arrive at an agreement.

Compared with what some have labeled, rightly or wrongly, the “first best” option of having an all-encompassing global agreement for biofuels trade, moving forward with bilaterals is a much less daunting and realistic option for the EU that better takes into account the global move toward regionalism. The future of transport biofuels in the EU is uncertain at the moment, particularly beyond 2020. The bilateral option can be an effective policy pathway for coming to terms head on with sticky issues such as ILUC and definitional problems that are easier to solve through direct and tailored dialogue with individual partners rather than the meta-standard created through the sustainability criteria.

The bilateral option can also have direct and powerful implications for ensuring the viability of biofuels beyond 2020. There is insufficient investment at the moment in second-generation biofuels compared with the ambitions to address climate impacts in the transport sector as well as energy security concerns.<sup>105</sup> Bilateral agreements can help the EU wisely manage the link over time between first- and second-generation fuels, by extending the acceptability and robustness of sustainable first-generation biofuels. By

doing so, a sufficient time period can be afforded to allow the second generation to come online without halting progress and engagement on biofuels in the EU in the precarious transition period between 2020, when the current targets are set, and 2030, when second-generation biofuels are forecast to reach a meaningful scale.

For all their potential, however, bilateral agreements are not a panacea, and good policy will be required to harness their potential, especially when engaging with developing countries, arguably where the greatest overall benefits can be realized. This Article discussed the potential of the option primarily from the side of the EU, the originator of the instrument. Yet, the engagement goes both ways, and awareness and even proactive engagement from developing countries in exploring this option is likely to be needed. A first step is to understand the pros and cons, from their perspective, of pursuing bilateral agreements on biofuels. The work of Birdsall and Lawrence, while focused on trade agreements rather than biofuels in particular, offers a useful starting point.<sup>106</sup> Below is a selection of the potential “pros” they identify:

- *Avoiding races to the bottom through clearer rules:* As they write: “Establishing rules of the game can be particularly important to developing countries, which otherwise can be subject to constant pressure from potential investors for lower standards in order to attract new investment.”<sup>107</sup>
- *Restraining protectionism:* Agreed rules from bilateral negotiation can preempt domestic protectionists in industrialized countries from using environmental or other standards to hinder imports.
- *Low-cost institutional learning:* Participation in international agreements provides a valuable discussion forum through which developing countries can gain knowledge for improving their own institutions and regulatory systems.
- *Enhancing beneficial domestic reform:* Beyond the direct trade benefits of agreeing to a certain social policy, such reform can often be in the interest of a developing country by focusing and reinforcing the internal reform process. Participation in an international agreement can make feasible internal reforms that are beneficial for the country as a whole, but might otherwise be successfully resisted by interest groups.
- *A chance for direct dialogue between developing and developed countries on a nation-to-nation level:* Becoming actors in negotiations gives developing countries a better chance to assert their interests, especially with regard to modern trade agreements involving domestic reform and demands on social policy. Such issues are best discussed between states and engaged

105. See Johnson et al., *supra* note 4.

106. See Birdsall & Lawrence, *supra* note 80, at 134-45.

107. *Id.* at 134.

with head on. The great potential for adjacent issues to be handled in a bilateral context (or as spinoffs) makes this aspect particularly relevant.

An additional argument on the “pro” side for concluding bilateral agreements for developing countries is that they could be catalysts for more open and democratic decisionmaking and better stakeholder involvement, since the more public distrust reigns about an international agreement, the more bottom-up decisionmaking can potentially be inspired in a stakeholder process, especially in countries that are used to very top-down policymaking. NGOs in interviews have described a certain wariness of bilateral negotiations turning into a “black box” without chances for proper involvement. This concern must be acknowledged.

Meanwhile, to balance this picture, the risks of the bilateral approach for developing countries, as identified by Birdsall and Lawrence, include:<sup>108</sup>

- *Potentially weak hand in negotiations:* Sufficient financial and human resources for fair negotiation are needed.
- *Protectionist politics in developed-country markets:* This is not just about disallowing developing country access; it is also about potentially putting mechanisms into place that over time veer away from how they were originally intended to function.
- *Preference for stronger and/or larger economies:* International or bilateral agreements have their own economies of scale in the process of negotiation and in the technical and political competence of those involved. Thus, they will not necessarily be feasible for smaller, poorer and/or more weakly governed countries. In other words, there are some countries for which bilateral agreements may be neither efficient nor effective.
- *Inappropriate standards on labor and environment:* Given a country's level of development or need, it is not self-evident that high standards in so-called adjacent areas to the core purpose of the agreement are appropriate for developing countries. Apart from simply having less capacity to pay such “costs,” indirect

aspects such as monitoring costs and enforcement are generally less efficient and more costly in developing countries. Where to set the standards when concluding a bilateral agreement is a fundamental issue that must be addressed on a country-by-country basis.

Strong synergies and mutual benefits for both the EU and developing countries could be realized by exploring the bilateral option. Our Article therefore recommends that the use of the bilateral option in EU-RED Article 18(4) be more vigorously explored by both EU and potential Partner Countries. Bilateral agreements offer a tractable approach to biofuels governance and, more specifically, provide a means for fulfilling the sustainability criteria in the EU-RED that is proactive with respect to the needs of developing countries.

In fact, the recent proposal from the European Commission to amend the EU-RED underscores the tendency to be reactive rather than proactive by viewing sustainability implementation from a highly constrained and discriminatory policy lens. The proposal restricts the use of food-based crops to 5% of renewable fuels in transport, which corresponds not only to the levels as of 2011, but also to the levels beyond which economic modelling suggests that ILUC impacts begin to gain in significance. Ironically, however, the proposal affects *all* food-based crops, even though the GHG emissions associated with ILUC differ tremendously across different biofuels and locations according to the Commission's own estimates.

Furthermore, such an approach offers only restrictions and does not create any incentives for positive linkages that improve productivity for food *and* fuel. The proposal is consistent with the view that application of sustainability criteria is primarily a technical matter that can be dealt with at the level of operators and specified in legislation. The bilateral approach for which we have argued here recognizes that sustainability must be built into *institutions* and thus requires different instruments, to improve the capacity of developing countries and thereby liberate valuable international trading opportunities rather than constraining them.

108. *Id.* at 139-44.