

Ecocide and the Threat of Trade Embargos and Economic Sanctions

Richard Chalk and Pascale Siegel*

Environmentalism is drawing ever-increasing attention and support across the globe, with climate change, energy extraction and land use issues fuelling increasingly frequent and devastating natural disasters, from the fires in South America and Australia last year to the current Covid-19 pandemic. If a pandemic is first and foremost a health issue, ecological conditions such as urbanisation, food demand putting animals and humans in close proximity, temperatures and ease of travel facilitate the emergence and contagion of new viruses. Celebrity environmentalists and global movements have driven an increase in media coverage around these issues, which they view as the main existential threats. Meanwhile, the high costs of dealing with the consequences of these events – culminating in the unprecedented shutting down of entire economies in the case of Covid-19 – is prompting politicians around the globe to press for change. As climate-change-related disasters proliferate and increasingly disrupt lives and economic activity, attention to ecocide will accelerate. With it, the pressure for public action in the form of public shaming, trade embargos and sanctions will intensify.

Ecocide is defined as ‘the destruction of large areas of the natural environment as a consequence of human activity’.¹ Ecocide has yet to be criminalised in most domestic or international legal systems, but given the recent political energy around climate issues, that may soon change. Currently, the only international law addressing widespread environmental damage, the Rome Statute, is limited to war-time-related environmental damage, but climate activists are seeking to change that.² The search

* Pascale Siegel is Managing Director at Ankura Consulting Group. Richard Chalk is a former managing director of Ankura Consulting Group.

1 Ecocide definition: www.merriam-webster.com/dictionary/ecocide accessed 27 November 2020

2 Rome Statute: www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx accessed 27 November 2020.

term 'ecocide' shows an increasing trend on Google, with the top five most interested regions being France, the United Kingdom, Australia, the Netherlands and Ireland.³

To put ecocide in context, in terms of scale, environmental crime is the fourth-largest criminal category, surpassed only by drugs, counterfeiting and human trafficking. Experts have projected this type of crime to grow by five to seven per cent annually.⁴ The Financial Action Task Force (FATF) has defined environmental crime as a 'designated category of offence' in relation to money laundering, meaning that handling proceeds from environmental crime should constitute acts of money laundering in local law.⁵ Many global and regional bodies recognise specific acts as environmental crimes. In relation to deforestation and illegal logging, these primarily focus on the illegal trade component and are driven by 'compliance with the laws of the country where it is harvested'.⁶ The challenge is that national laws, their definition and application, are difficult to enforce, and often allow, and even promote, ecocide for profit or financial gain or to achieve some other policy objective.

Limiting the extent of climate change and avoiding irreparable damage continues to move up the international agenda. The United Nations Intergovernmental Panel on Climate Change (IPCC)'s August 2019 report specifically calls out the issues relating to land as a critical resource in the climate system. The contribution to greenhouse gases (GHGs), through agriculture and forestry, and the natural ability to absorb carbon dioxide outline the importance of land management.⁷ The goals of global food security, biodiversity and the need for rapid decarbonisation are not sufficiently interconnected and are currently somewhat left to market forces. For example, forested areas of land are increasingly being cleared to grow crops such as palm oil and soya, to satisfy global demand. Money still talks over the survival of the planet in 2020.

3 Google trends – ecocide <https://trends.google.com/trends/explore?q=ecocide> accessed 27 November 2020.

4 Christian Nellemann, Rune Henriksen, Arnold Kreilhuber, Davyth Stewart, Maria Kotsovou, Patricia Raxter, Elizabeth Mrema and Sam Barrat (eds), *The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development And Security. A UNEP INTERPOL Rapid Response Assessment* (United Nations Environment Programme and RHIPTO Rapid Response – Norwegian Center for Global Analyses, 2016) www.rhipto.org accessed 27 November 2020.

5 FATF Designated categories of offences: www.fatf-gafi.org/glossary/d-i accessed 27 November 2020.

6 European Union Timber Regulation: www.euflegt.efi.int/what-is-the-eu-timber-regulation- accessed 27 November 2020.

7 IPCC, *Climate Change and Land*, an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems (2019) www.ipcc.ch/2019/08/08/land-is-a-critical-resource_srcl accessed 27 November 2020.

Can trade embargos and economic sanctions halt ecocide?

In response to the Amazon rainforest fires, European leaders looked to leverage trade restrictions against the country responsible for the protection of rainforests. Green political parties elected in last year's European Parliamentary elections have vowed to use climate change as a key criteria for the signing of free trade agreements (FTAs), a political strategy that puts the signing of the FTA with Mercosur, the South American trade block including Argentina, Brazil, Paraguay and Uruguay, and Australia, at risk. The new European Commission has also vowed to impose a carbon border adjustment tax to ensure that European companies would not lose their competitiveness because of the European Union carbon regulations.⁸ In the EU, Covid-19 is accelerating the push for a greener economy.⁹

However, as countries or regional blocks move at different paces and incentives or trade restrictions fail to yield satisfactory results, then a more extreme measure for a dire situation could see the development of economic sanctions regimes.

Increasingly, nation states are threatening and, in many cases, applying sanctions as economic weapons to achieve a desired behavioural change. Sanctions can target governments, entities, groups/organisations, vessels/aircraft and individuals to drive these desired outcomes. The application of precisely targeted economic sanctions on designated recipients limits the unintentional impact on the wider population. Historical sanctions are often centred on promoting human rights, avoiding genocide, non-proliferation, counter-narcotics and counterterrorism, all of which have a detrimental humanitarian impact, and do widespread global damage similar to that of ecocide.

Sanctions apply pressure but are often ineffective at achieving their intended goals. Irrespective of their efficacy, sanction regimes have proliferated in the last 20 years. The United States averaged three sanction announcements per month in 2001. In 2019 (excluding December), it averaged over 13.¹⁰ The extraterritoriality of US sanctions has prompted other countries to expand their own sanction arsenals, raising the likelihood that we will see increasingly more sanctions in the years to come.

8 For a description of the EU carbon border tax, see <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism> accessed 27 November 2020.

9 See https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe_en accessed 27 November 2020.

10 Figures based on civil penalties and enforcement information released by OFAC www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx accessed 27 November 2020.

Where does the law stand on ecocide?

As outlined above, international courts will not prosecute acts of ecocide that occur outside conflict. The International Criminal Court (ICC) claims jurisdiction over four crimes defined within the Rome Statute: genocide, crimes against humanity, war crimes and crimes of aggression. The UN operates independently of the ICC but cooperates on matters of common interest, such as in the case of crimes against the environment. The inclusion of ecocide in international law has been discussed as a potential fifth international crime against peace since the 1970s.¹¹ Between 1984 and 1996, the International Law Commission (ILC) considered the inclusion of an article (Article 26) focusing on 'wilful and severe damage to the environment'. At the time, several countries challenged that the restriction of proving wilful intent would limit the effectiveness of the article. This condition is due to environmental damage often being a by-product of otherwise legal industrial or other activity and therefore unintentional. The subsequent reviews and discussions ultimately resulted in the narrow interpretation we currently have, where environmental damage is recognised only in the context of wartime situations and where it is intentional in nature. Some authors indicate that the nuclear arms races and concerns around liabilities relating to atmospheric testing may have played a significant role in the removal of Article 26 and its limitation to a war-time context.¹² It stands to reason that countries involved in testing would look to limit the liability of activities having the potential to cause cross-border damage. Nuclear testing may not have been the only concern. Environmental damage associated with fossil fuel exploration and production may have prompted industry lobbying to limit the exposure of the fossil fuel industry.

Rome Statute amendments are possible but require a State Party initially to propose the amendment, followed by adoption and ratification by other State Parties, in line with Articles 121 and 122 of the statute. Not all countries are State Parties, with significant countries abstaining, such as the US, China, India and Russia. Many environmental lawyers and barristers have been pushing ecocide to the front line for many years.¹³ Polly Higgins, a British criminal barrister, was a key figure on the topic of ecocide, submitting a draft model ecocide law to the UN Law Commission in 2010.

11 Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins, The Ecocide Project 'Ecocide is the missing 5th Crime Against Peace' https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf accessed 27 November 2020.

12 Christian Tomuschat, 'Crimes Against the Environment' (1996) 26(6) *Environmental Policy and Law* 243.

13 Key lawyers and barristers supporting ecocide <https://ecocidelaw.com/catalyst/allies> accessed 27 November 2020.

This model proposed the following amendment to the Rome Statute: ‘ecocide is the extensive damage to, destruction of, or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.’ Despite a decade of research and evidence, it has not been codified into law.

Are we about to witness a new era of environmentally driven economic sanctions?

Multilateral and unilateral sanction regimes exist based on common, enhanced and diverging objectives.¹⁴ Several challenges exist around implementing sanctions in respect of international ecocide and environmental crime. Soft or deficient legislation, economic dependency and the need for global consensus on the topic are a few key examples. Who could look to implement these types of sanctions and what is the likelihood?

UN

The UN Environment Programme (UNEP) is the voice for the environment within the UN system. UNEP acts as a catalyst, advocate, educator and facilitator to promote the wise use and sustainable development of the global environment. While this global authority highlights the resulting threats to natural resources, peace, development and security arising from environmental crime,¹⁵ it lacks enforcement powers and cannot coerce countries into action. The UN Security Council resolutions (UNSCR) would be challenging to implement, and require a strong legal basis. Council members would be likely to look to ensure any proposed sanctions didn’t ultimately result in significant domestic challenges. The dependency on countries associated with alleged environmental crimes and their related export industries can be illustrated by the relationship between China, Brazil and the US. China accounts for 63 per cent of global soybean imports, while Brazil and the US respectively account for 45 per cent and 38 per cent of global exports.¹⁶ If the UN were to explore UNSCRs against Brazil’s food

14 Devika Hovell, ‘Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions’ (2019) www.cambridge.org/core/journals/american-journal-of-international-law/article/unfinished-business-of-international-law-the-questionable-legality-of-autonomous-sanctions/85AFD5B0732D18F2B35D7FC25146CB07/core-reader accessed 27 November 2020.

15 See n 4 above.

16 OEC Soybeans Exports (October 2019) <https://oec.world/en/profile/hs92/1201/#Exporters> accessed 27 November 2020.

and agricultural sector, it would be likely to be vetoed by China, especially considering recent import tariffs applied by the US in its continued trade dispute leading to further dependence by China on Brazil's supply.

Brazil and many other countries of environmental significance have very slow economic growth, are reliant on commodities, have relatively closed economies and are at risk of a recession if global growth continues to slow. UN sanctions on these countries would further damage their economic prospects. Would the UN want to be responsible for a recession in these countries? Would their respective leaders be concerned? Would it drive further protectionist policies? And as noted above, China, or any one of the permanent UNSC countries, could block the implementation of sanctions. Attempting to implement other environmentally driven UNSCRs, if a legal basis can be established, would result in a similar challenge. Could sanctions be more targeted? It's unlikely that being more targeted towards specific individuals and entities in the supply chain will drive the necessary changes.

EU

The EU is a proponent of combating climate change, which it sees as a threat to human security.¹⁷ As a result, it has long pushed for international negotiations on the topic, helping develop the UN Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Climate Agreement.¹⁸ Article 191 of the Treaty on the Functioning of the EU outlines key objectives that are in line with the prevention of ecocide, 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'.¹⁹ Moreover, the EU has a sophisticated framework for sanctions. The EU can implement 'restrictive measures' or 'autonomous sanctions', which go beyond UNSCRs, to achieve its Common Foreign and Security Policy (CFSP) objectives,²⁰ examples of which can be seen on matters relating to Russia and Iran. The EU is the only regional organisation with a sanctions policy

17 Frederic Simon, 'European Parliament declares climate emergency', EURACTIV, 28 November 2019 www.euractiv.com/section/climate-environment/news/european-parliament-declares-climate-emergency accessed 27 November 2020.

18 European Council of the EU, *Tackling Climate Change in the EU* www.consilium.europa.eu/en/policies/climate-change/# accessed 27 November 2020.

19 EUR-Lex, *Article 191, Treaty of the Functioning of the European Union*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12016E191> accessed 27 November 2020.

20 European Commission, *Service for Foreign Policy Instruments*, https://ec.europa.eu/fpi/what-we-do/sanctions_en accessed 27 November 2020.

directed at non-Member States²¹ including third countries and non-state entities and individuals.

However, the overarching CFSP objectives do not currently focus on climate change. Written in the early 1990s, they focus on promoting international peace and security, preventing conflict, defending democratic principles and human rights, preventing the proliferation of weapons of mass destruction and fighting terrorism. Using sanctions to curb ecocide would require stretching the current rationales available for sanctions. In an organisation built around consensus like the EU, it would likely be a painstaking process to extend this to include ecocide. The EU states that sanctions must always be in accordance with international law, which may be problematic when it comes to using sanctions to target ecocide.

Nonetheless, as domestic pressure to adapt to climate change builds up and the EU progresses towards a low-carbon economy, restrictive measures against countries that are guilty of ecocide are increasingly likely. In the case of the Amazon fires, threatening the EU-Mercosur trade deal and boycotting Brazilian leather by several EU Member States appeared to apply short-term pressure, resulting in Brazil sending in its army to deal with the fires.²² Several EU countries are contemplating whether to ratify the trade agreement, unless Brazil does more to protect the region. This threat will apply direct pressure on Brazil from the other Mercosur members. This posture is not a long-term solution, as it is only effective while the deal is being negotiated and ratified. Financial sanctions targeting entities profiting and products derived from ecocide would further hit countries that continue to support this activity. EU companies would inevitably be caught in the crossfire.

The EU will be likely to proceed cautiously on this topic. At this stage, the EU wants to shape international behaviour in support of sustainability and a low-carbon economy through positive incentives. It wants to coax partners into adopting similar frameworks as the one it is developing domestically. Coercion would be a measure of last resort. As such, in the near term, it is likely to shy away from using extraterritorial sanctions. It does, however, have a developing sanction and counter-sanction arsenal that could be leveraged against ecocide if the situation continues to deteriorate.

21 See n 3 above.

22 Phoebe Weston, 'Amazon Fires: Brazil Sends in 44,000 Troops to Tackles Blazes as Bolsonaro Is Accused of Ignoring Illegal Deforestation' *Independent* (London, 25 August 2019) www.independent.co.uk/environment/amazon-rainforest-fires-brazil-bolsonaro-environmental-protection-army-a9078216.html accessed 27 November 2020.

US

Since 9/11, both the executive and legislative branches of the US have increasingly relied on sanctions to shape international behaviour in favour of the US. Sanctions have become a policy tool of choice because they are more coercive than negotiation, but less destructive than military action. Moreover, because the government does not conduct economic impact analysis, sanctions are largely perceived as ‘cost-free’ to the US economy. Thus, policy-makers have turned to sanctions with increasing frequency. In 2001, the Office of Foreign Assets Control (OFAC) averaged 3.2 sanction-related announcements per month. As of November 2019, that number jumped to 13.3. The rationale for sanctions has also grown from human rights (Myanmar, South Africa, Sudan and Venezuela), to terrorism (Hezbollah, al-Qaeda and like-minded groups) to drug cartels and kingpins, counter-proliferation (Iran, Libya and North Korea), hostile behaviour (Cuba), territorial aggression (Russia and Iran), democratic interference (China and Russia). At the same time, sanctions have become more targeted at specific individuals, sectors or companies to limit the unintended impact on the general population. At the time of writing, the US is reviewing possible sanctions against Turkey, Spain, Germany and Central American officials. As the use of sanctions has proliferated, so has enforcement. The centrality of the US dollar to the world’s economy means that foreign companies that do not operate in the US can be held liable for violating US statutes if they are ever connected to the US financial system. Moreover, enforcement by the US continues to increase with the OFAC civil penalty amounts reaching new highs in 2019.²³ Although the number of settlements has decreased over the years, from several hundred per year between 2003 and 2005 to less than 30 per year since 2008, the yearly total civil penalties continue to trend upwards. In 2019, 24 settlements netted over \$1.28bn for the US treasury, resulting in an average penalty of over \$53.5m. US sanctions present the greatest financial risk to global organisations who engage in activities involving elements designated by OFAC. The US has potentially the greatest legal arsenal to implement sanctions, as Congress decides what and whom to sanction.

The US is not a leader in relation to climate change and thus, is unlikely to lead the push for ecocide-related sanctions. Congressional Democrats are pushing climate change bills such as the Green New Deal. At the subnational level, many policy-makers on both sides of the aisle take climate change as a serious issue to be reckoned with.

23 OFAC 2019 Penalties www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx accessed 27 November 2020.

Sufficiently determining a threat to peace and security would significantly aid these bodies in being able to apply sanctions. For example, should any country affect indigenous populations as a by-product of ecocide, then this could offer an alternative legal justification.

What can companies do to mitigate the risk?

Sanctions, boycotts and other trade restrictions are becoming a more frequent tool of foreign policy and economic engagement. The US is introducing more sanction regimes and enforcing them more thoroughly. Other countries are following suit, while also building anti-sanction arsenals to protect themselves from US sanctions. Extraterritorial sanction schemes are proliferating. Meanwhile, the multilateral system of adjudicating cross-border disputes is fraying. It is increasingly difficult to find consensus at the UN. The EU and North Atlantic Treaty Organization (NATO) must reconcile diverging views of their members' core interests. Stubborn disagreements on the World Trade Organization (WTO) appellate court system are weakening the world's dispute resolution mechanism. This environment is likely to be leaving businesses exposed to retaliation. Monitoring who develops what sanctions or trade restrictions for what purpose and understanding how one's operations can be affected are key to mitigating exposure risks successfully.

Even if eco-related sanctions are not yet an imminent threat, social activism in support of environmentally friendly policies already generates reputational and financial risks for companies who must adapt to this new demand. Long-term investment in fossil fuels and other environmentally harmful assets and activities may soon become a financial liability as banks, insurers and policy-makers seek to reduce the risk of exposure to liabilities induced by climate change.

Meanwhile, as the younger generation pushes for speedier climate change adaptation, activism in the form of public shaming against businesses seen as not divesting quickly enough from environmentally harmful activities will rise. We anticipate that demands for transitioning out of fossil fuels will affect all economic sectors. If oil and gas, construction, transport and mining are likely to be obvious target sectors, all heavy power and resources users or transport users, such as retail, digital, agriculture and heavy industries, could be affected. Many large companies have started by reducing their global environmental footprint, potentially driven by social media attention against their own supply chain. Amazon (the company) has already announced that it will meet the Paris Climate Accord goals by 2040, a decade ahead of the 2050 timeline. As the financial and reputational risks of not acting rise, we expect more companies to follow suit, developing climate action strategies,

internal procedures and controls, and innovative financing mechanisms. Small and medium-sized businesses will not be immune to these trends and need to be prepared.

In that adaptation process, the vetting of partners and suppliers will have to be expanded to include environmental concerns. Association with companies that are party to environmental crimes or environmentally damaging practices could quickly become a reputational liability or a compliance issue. Strong internal controls will be essential to limit exposure through third parties. Due diligence policies and procedures can be extended to consider the impact third parties, and even potentially, customers, have on the environment and redirect supply chains where appropriate. Existing negative media procedures should explicitly seek to flag references around environmental crime or damage. Companies can develop internal lists for risk management, based on geographies, industries and entities at higher risk of being exposed to environmental crime or damage. Leveraging technology to assist in managing risk will be dependent on the size, nature and location of businesses. Proactive technology-enabled audits offer companies the ability to understand current and historical exposure. List-matching and due diligence solutions, leveraging advances in the application of machine learning technology, can improve compliance and risk management effectiveness and efficiency. Many businesses still struggle with managing and analysing due diligence information to respond to ever-increasing sanction designations. Enhancing data quality and analytical capabilities provide businesses with the ability to address potential issues in a timely fashion. Understanding and refreshing knowledge of party ownership structures ensures that designated entities aren't in a position of aggregate or circular ownership, influence or control. US and EU sanctions have different ownership thresholds and definitions, which would need considering.

Similarly, training (or retraining) employees in incorporating climate patterns, risks and opportunities in strategic planning will be key for successfully transitioning towards environmentally friendly business practices. This is likely to be a multifaceted transition requiring extensive planning, and adoption of new risk management tools to identify and quantify both liabilities and new opportunities. At the same time, there is still much debate over what constitutes a green investment or process. Controversial debates are likely to endure. To a large extent, businesses will have to build the bridge to the low-carbon economy as they walk on it. Much work remains to be done. According to the Association of Climate Change Officers, we do

not currently have ‘the right people with the right skills in the right places’ to move this change along.²⁴

Ethics and integrity must be incorporated within the fabric of organisations, with a focus to promote strong values demonstrated by the conduct of their employees. Education and training around products, services, customers and geographical locations associated with organisations and their environmental impact will increase transparency. Companies are beginning to explore new roles focused on environmental responsibility. Positions such as chief sustainability officer (CSO) could become as common as chief information security officer (CISO), and appear just as quickly.

Closing comments

Currently, the lack of both strong international law and multilateral cooperation that specifically addresses ecocide fosters a legal environment that does not discourage ecocide. If this trend continues, we may continue to see threats of trade embargos and sanctions at peaks of ecocide media coverage but stopping short of efforts to stop or reverse the tidal wave of ecological destruction. Driving a reduction in demand for products and services from countries associated with ecocide and environmental crimes will be likely to see the most significant change in supply-side countries. The most significant and immediate reduction is likely to be driven by coordinated government action, a possibility that the staggering costs of Covid-19 make more likely.

We are on the precipice of change, and businesses should take note and prepare for that eventuality by incorporating sustainability to mitigate the associated current and future risk.

24 Amanda Ruggieri, ‘How Climate Change will Transform Business and the Workforce’, BBC, 9 July 2017 www.bbc.com/future/article/20170705-how-climate-change-could-transform-the-work-force accessed 27 November 2020.

