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Combating Illegal Logging: Interaction with WTO Rules

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Summary points

- Controlling international trade in illegal timber is an essential part of the effort to reduce illegal logging. Consumer countries are taking a range of measures including the EU's FLEGT licensing scheme and Timber Regulation, the Australian Illegal Logging Prohibition Act, the US Lacey Act, and public procurement policies in several countries.
- Since these measures are designed to alter the existing patterns of international trade in timber and timber products, concerns are often raised about their compatibility with World Trade Organization rules.
- The outcome of any potential dispute case would rest on the interpretation of various clauses of the GATT and other WTO agreements, but there is no experience to date of WTO dispute cases dealing with even vaguely similar issues.
- It is important to be aware of the broad constraints placed by WTO rules in designing such measures for controlling trade in illegal timber, which seem likely to be increasingly used. The more the measure diverges from the core WTO principle of non-discrimination in trade, and the more trade-disruptive it is, the more vulnerable it could be to challenge.
- Within these constraints, governments have plenty of flexibility to adopt measures designed to exclude illegal timber from international trade. None of the main measures being pursued at present should experience any conflict with WTO rules.

Introduction

Controlling the international trade in illegal timber has long been recognized as an essential part of the international effort to combat illegal logging. Importers such as the EU, the United States, Japan and China provide a market for timber from forest-rich developing countries, many of which have significant problems with forest governance and illegal logging. As many of these countries lack the capacity to regulate their exports adequately, taking action in importer countries to shut off the illegal loggers' ability to access foreign markets has been recognized, by exporting and importing countries alike, as an essential reinforcement to domestic law enforcement.

There has accordingly been a long-running debate about the best means of excluding illegal timber from international markets. The EU is negotiating a series of bilateral voluntary partnership agreements (VPAs) with timber-producing countries, incorporating a licensing scheme designed to ensure that only legal timber products are exported to the EU from those countries. Six VPAs have so far been agreed, and a further six countries are negotiating them; several more are expressing interest in opening negotiations. As well as the VPAs, the EU has adopted the EU Timber Regulation which, from March 2013, prohibits the placing of illegally harvested timber and timber products (whether from domestic production or imports) on the EU market, and requires operators to implement 'due diligence' systems in order to minimize the risk of doing so. In November 2012 the Australian parliament passed the Illegal Logging Prohibition Act, similar in many ways to the EU Timber Regulation. In 2008 the United States amended its Lacey Act to make it unlawful to import, or transport within the United States, timber produced illegally in foreign countries. And several governments have established public procurement policies requiring government buyers to source only legal and sustainable timber.

All these measures are designed to alter the existing patterns of international trade in timber and timber products. They may therefore interact with the rules governing international trade overseen by the World Trade Organization (WTO). Indeed, critics of various proposed measures sometimes claim that WTO rules prevent any interference in trade at all. Although this is not the case, governments need to be aware of the constraints on their efforts to control trade in illegal timber posed by WTO rules. This paper therefore gives a brief summary of the WTO system and its potential interface with measures designed to control the trade in illegally logged timber.

How the WTO system works

The WTO, which came into existence in 1995, oversees a set of agreements designed to regulate international trade, centred around the General Agreement on Tariffs and Trade (GATT). The WTO agreements essentially lay down general rules for governments to follow in liberalizing international trade. They cannot deal with every specific traded product or service, so they set out broad principles that must be interpreted and applied in particular dispute cases where one WTO member believes that another is failing to comply with them.

The system is based around opposition to discrimination in trade. Its core principles are to be found in the following articles of the GATT:

- Articles I ('most favoured nation' treatment) and III ('national treatment') outlaw discrimination: WTO members are not permitted to discriminate between traded 'like products' produced by other WTO members, or between domestic and international like products.
- Article XI ('elimination of quantitative restrictions') forbids any restrictions other than duties, taxes or other charges on imports from and exports to other WTO members.

Essentially the same principles are built into all the other WTO agreements that have developed alongside the GATT. It was always recognized, however, that some circumstances justified exceptions to this general approach, permitting trade restrictions to be imposed. These exceptions are set out in GATT Article XX, and include:

- Measures 'necessary to protect human, animal or plant life or health' (Article XX(b));
- Measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement […] and the prevention of deceptive practices' (Article XX(d));
- Measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption' (Article XX(g)).

Some of these exceptions – particularly those in XX(b) and XX(g) – have been cited in a series of dispute cases concerned with trade measures taken in pursuit of environmental protection. In all of these cases, however, the headnote to Article XX makes it clear that even where these conditions apply, WTO members are not allowed to arbitrarily or unjustifiably discriminate between countries where the same conditions prevail. The key question at issue is whether the disruption to trade in each case can be justified under these wordings – e.g. in the case of Article XX(b), is the measure really necessary to the environmental objective, or are there alternative measures available that could achieve the same ends with less disruption to trade?

> 'Since the founding of the WTO, decisions by the Appellate Body have clearly helped to shift the way in which the system is applied, especially in environment-related disputes'

So dispute cases revolve around the interpretation of WTO rules. The bodies that carry out these interpretations are the dispute panels (generally composed of trade experts), which issue an initial set of findings, and the WTO Appellate Body (mostly international lawyers), to which dissatisfied parties can appeal. Since their decisions can only be overturned if all WTO members (other than those involved in the dispute) agree – which has never happened – this system is a powerful means of resolving conflicts and ensuring that trade rules are interpreted and applied consistently around the world. If the loser in any given case does not modify its policy accordingly, the winner is entitled to take trade-restrictive measures (e.g. apply tariffs) against it to the estimated value of the trade lost because of its action.

It should be noted that interpretations can change, even if the wording that is being interpreted does not. Since the founding of the WTO, decisions by the Appellate Body in particular have clearly helped to shift the way in which the system is applied, especially in environment-related disputes. It is this key role for interpretation that often leads to uncertainty and disagreement over what the WTO rules might mean in practice. Since there has never been a dispute case involving trade measures taken to reduce illegal logging, or to keep illegal timber products out of international markets, it is not known exactly how a dispute panel, or the Appellate Body, would rule. It is only possible to extrapolate from other disputes.

WTO implications of measures against illegal timber

Prohibiting illegal products

Governments seeking to exclude imports of illegal timber products have faced two problems. First, goods produced illegally in one country are not necessarily illegal in any other country; just because trees are cut illegally in a protected area in Indonesia, say, does not mean that their placing on the market in a foreign country is illegal. Thus in recent years the United States (Lacey Act), the EU (Timber Regulation) and Australia (Illegal Logging Prohibition Act) have passed legislation to prohibit the placing of illegal timber on their markets, wherever it originates (the EU and Australian measures also contain other provisions, considered below).

This should not raise any WTO issues. The prohibition is not a trade measure, applied at the border, and companies handling the timber products are not required to provide proof of legality at the point of import or sale, any more than those putting goods on sale in British shops have to prove that their supply has not violated the UK Theft Act. It is simply a provision to make timber produced illegally (overseas or at home) also illegal in the home country.

GATT Article III requires imported and domestic 'like products' to be treated identically with respect to internal taxes and regulations, which could potentially cover this type of legislation. However, there is nothing in any of the measures listed above to imply that imported and domestic products should be treated any differently from each other, and there should therefore be no likelihood of a WTO challenge.

Distinguishing between legal and illegal timber

The second problem faced by governments seeking to exclude illegal timber is how to distinguish legal goods from illegal ones. The exporting and importing companies may not be aware that they are handling illegal products – and, even if they are, standard shipping documentation is often easy to falsify. So some kind of additional evidence of legality is necessary – such as, for example, the licences of legality that will be issued under the EU's VPAs with timber-exporting countries.

It is in the attempts to establish requirements of evidence of legal origin and processing of timber products imported or placed on the market that the possibilities of interaction with WTO trade rules lie: do they lead to unfair treatment of imported products or unnecessary restrictions on trade? There are four cases under which a requirement for proof of legality for imports could – at least in theory – raise potential issues.

First, the system is designed to discriminate between legal and illegal timber, and these could potentially be considered to be 'like products'. If so, this is a violation of GATT Article I. The GATT does not define what it means by 'like product', and recent years have seen much debate on the topic, in particular over whether the ways in which products are manufactured or harvested can be used as a basis for discrimination in trade (e.g. between sustainable and unsustainable timber). However, it is not clear whether the question of legality is a process or a product characteristic (has the timber been stolen? has it avoided taxation?). Arguably, legality is a universal requirement that any product must possess to be put on sale in a market (at least, a legal market). There is no experience at all of how a WTO dispute would consider this issue.

> "Exporting and importing companies may not be aware that they are handling illegal products – standard shipping documentation is often easy to falsify"

In any case, although this has sometimes been raised as an objection, it is generally not the main issue, as the trade restriction derives primarily from the requirements placed on all timber imports to show proof of legality. As pointed out, it is difficult to know at the border which products are legal and which are illegal. The following three cases therefore raise more realistic questions.

- If the requirement for proof of legality is imposed for some countries (e.g. countries with a high level of illegal logging) and not others, some WTO members would be treated differently from others – a violation of GATT Article I ('most favoured nation' treatment).
- If imports are treated differently from domestic timber products, this would be a violation of GATT Article III ('national treatment').
- Since the requirement is a trade restriction imposed at the border other than a duty, tax or other charge, it would be a violation of GATT Article XI ('elimination of quantitative restrictions').

Clearly, the exact design of the trade-restrictive measures is important. The EU Timber Regulation, for example, is carefully constructed to apply both to domestic production and to all imports, regardless of origin – thus avoiding the problems identified in the first and second points above. However, even if the measures are notionally the same, if in practice they operate to afford an advantage to domestic products, or to the products of some countries and not others, there could still be a WTO violation. And, regardless of that, a requirement for documentary proof of legality by itself has the potential to conflict with Article XI.

The 'savings clause': GATT Article XX

If the legality requirement is found to conflict with any of the GATT articles described above, however, it could still be 'saved' under the provisions of GATT Article XX – under which exceptions can be made to the other provisions of the agreement – and therefore be in compliance with WTO rules. None of the sub-paragraphs of Article XX relate explicitly to illegal production, but (b), (d) and (g) may provide possible justifications in the case of a requirement for proof of legality.

Article XX(b)

Article XX(b) provides that measures are allowable if 'necessary to protect human, animal or plant life or health'. Action taken against illegal logging is clearly important to 'plant life or health', but the main question is whether the measure is 'necessary' – i.e. are there less trade-distorting options available that meet the same objective? It could be argued that imposing an additional documentary requirement for proof of legality on the entire timber and timber products sector, despite the fact that the majority of its products are legal, could result in an unnecessary degree of disruption to trade, raising timber prices, reducing demand for timber and encouraging consumption of timber substitutes. Alternative non-trade-disrupting options, such as improving law enforcement in the country of origin, could be preferable.

This is not, however, a strong argument. The costs incurred in proving legality vary from country to country and are not always very significant; the increasing use of national and international legality verification schemes, particularly in high-risk areas, is making this process easier. In addition, products certified under the main voluntary certification schemes – those of the Forest Stewardship Council (FSC) and Programme for the Endorsement of Forest Certification (PEFC) – which already bear the costs of proof of legality, may not increase in price at all (depending on the extent to which the legality requirement recognizes the schemes as adequate proof of legality). Many producer countries have argued that trade controls on their exports are a necessary component of their own strategies to improve enforcement, denying illegal loggers revenue from foreign markets. And if the trade measures are part of a broader package of steps to improve forest governance – as in the VPAs, which cover a wide range of measures – rather than an unaccompanied unilateral trade measure, it should be easier to argue that they are a 'necessary' component of a broader strategy.

> 'If the trade measures are part of a broader package of steps to improve forest governance … it should be easier to argue that they are a "necessary" component of a broader strategy'

Nevertheless, the 'necessity' test can be a difficult one to satisfy, requiring an examination of all potential hypothetical alternatives. Arguments resting on Article XX(g), which does not contain the necessity test, are generally preferred.

Article XX(d)

The arguments are similar in the case of Article XX(d), which covers measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those

relating to customs enforcement […] and the prevention of deceptive practices'. This was designed to cover measures that could only be taken at the border, such as a ban on imports of counterfeit goods. If the counterfeiting was carried out domestically, the country in question could take action against the enterprises involved, but where they were foreign companies no such action would be possible, and trade measures would be necessary to defend intellectual property rights in the importing country.

It could certainly be argued that imposing a legality requirement for timber products at the border would help to secure compliance with laws on timber harvesting, processing and export that are not themselves incompatible with the GATT, and also to prevent deceptive practices, i.e. illegally sourced timber being passed off as legal. Unlike every example of a dispute case under Article XX(d) so far brought before the GATT or WTO, however, it is not the laws of the *importing* country that are to be enforced, but those of the *exporting* country. And the same 'necessity' test applies as in Article XX(b).

Article XX(g)

Article XX(g) provides that measures are allowable if they are 'relating to the conservation of exhaustible natural resources'. In practice, illegal logging almost always contributes to the unsustainable exploitation of forest resources, in some cases dramatically so. Article XX(g) probably offers the strongest defence, not least because it does not contain a 'necessity' test.

Article XX(g) is also attractive because one well-known environmental trade restriction that was the subject of a WTO dispute case – a US embargo on imports of shrimp fished with methods that killed endangered sea turtles – was found to be justified under its provisions. This particular dispute case established a number of key principles that would be of relevance to a potential dispute over trade restrictions on timber products:[1]

- 'Exhaustible natural resources' are not limited to finite resources such as minerals, but can including living species that are susceptible to depletion. Clearly, this could include forests and their products.
- A measure may target resources outside the country that applies the trade restrictions, where there is a 'nexus' between the resource and that country. It can be argued that consumers in the importing country share a 'nexus' through their use of the timber products, or through their interest in the global rule of law; or that forests, as sources and reserves of biodiversity and as carbon sinks, are a global resource of concern to all.
- The restrictive measure adopted must be related to the objective of preserving the resources. In other dispute cases, 'relating to' has been clarified as meaning 'primarily aimed at' or 'having a substantial relationship to'. As argued above, trade measures aimed at excluding illegal products are designed to reinforce domestic enforcement efforts, compensating for exporting countries' lack of capacity in controlling exports.
- The measure must be enforced evenly between domestic and foreign products; it must be 'made effective in conjunction with restrictions on domestic production or consumption' (Article XX(g)) and must not be applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' (headnote to Article XX).
- The country seeking to regulate should negotiate in good faith with other countries with a view to seeking multilateral agreement.
- In a later case, the Appellate Body clarified that unilateral environmental measures that restrict trade may still be lawful even in the absence of bilateral or multilateral agreements. In the shrimp-turtle case, the United States had tried, but failed, to negotiate an agreement with the complainants.

1 Adapted from Sydney Centre for International Law submission to the Australian Senate Rural Affairs and Transport Legislation Committee Inquiry into the Illegal Logging Prohibition Bill, February 2012, http://sydney.edu.au/law/scil/documents/2012/Submission_Illegal_Logging_Bill_Feb_2012.pdf.

Technical Barriers to Trade Agreement

The WTO Technical Barriers to Trade (TBT) Agreement is designed to ensure that technical regulations and standards which may affect trade are applied in the least trade-distorting manner possible. It is relevant to this argument because a requirement for proof of legality could qualify as a 'technical regulation', if defined as a 'document which lays down product characteristics or their related processes and production methods'.

In common with other WTO agreements, with the aims of transparency and predictability, the TBT Agreement encourages the use of international standards where these exist. The main forest certification systems, FSC and PEFC, are effectively international in scope, though these are not really in the same category as the bodies already accepted by the WTO system as international standard-setters (such as ISO, for technical standards, or Codex Alimentarius, for food standards). However, the fact that both draw on the criteria and indicators set by the various international processes for sustainable forest management might help. In fact timber is an unusual case: because the voluntary certification systems are relatively widespread, there is no strong argument for governments to develop their own national or international standards, and some have simply used the certification standards for their own procurement criteria, for example (see further below).

Like GATT Article XX, the TBT Agreement contains a 'savings clause' (Article 2.2), which recognizes the right to take necessary measures to fulfil a legitimate objective such as 'the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment'. All the questions discussed above in relation to the GATT are therefore also relevant in the case of the TBT Agreement, and can be argued similarly. There has been almost no relevant experience with interpretation of the TBT Agreement, so it is not clear whether proof of legality could fall under the coverage of the Agreement, or how any conflicts would be resolved in practice.

Do WTO rules constrain policy measures?

No one can say for sure what would be the outcome of any WTO dispute case involving measures taken to exclude illegal timber from international trade. Since the case would rest on the interpretation of various clauses of the GATT and other WTO agreements, and as there is no experience to date of WTO dispute cases dealing with even vaguely similar issues, it is only possible to speculate.

> 'It is clear that the more policy measures diverge from the core WTO principle of non-discrimination, the more vulnerable they could be to challenge'

However, it is clear that the more policy measures diverge from the core WTO principle of non-discrimination (between imports and domestic production, and between products originating from different countries), the more vulnerable they could be to challenge. The same would apply to measures that were more rather than less trade-disruptive.

Nevertheless, within these broad constraints there should be plenty of flexibility for governments to impose trade controls with the aim of excluding illegal products. Various measures are currently being adopted in pursuit of that aim, as examined below.

The EU FLEGT licensing system

The first solution reached by the EU to the problem of excluding illegal timber products involves the establishment of a licensing system for legal timber with cooperating partner countries. This lies at the heart of the EU's Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT), agreed in 2003. As at April 2013, six VPAs have been signed (with Cameroon, the Central African Republic, the Republic of Congo,

Ghana, Indonesia and Liberia); negotiations are under way with a further seven countries, and exploratory discussions are being held with others.[2]

These agreements will put in place in each country a legality assurance system designed to identify legal products and license them for import to the EU; unlicensed – and therefore possibly illegal – products will be denied entry at the EU border. The agreements will include the provision of capacity-building assistance to partner countries to set up the licensing scheme, improve enforcement and, where necessary, reform their laws, together with provisions for independent scrutiny of the validity of the issue of the licences, verifying legal behaviour at every stage of the chain of custody of the timber.

To date no country has fully implemented its legality assurance system and issued FLEGT licences. In general this has proved more difficult and time-consuming than originally anticipated. However, some VPA countries are quite close to implementation. From January 2013 Indonesia has required all timber imports to be accompanied by a 'V-Legal Document', assuring the legality of the products from the point of harvesting to transporting, trading and processing. In late 2012, Indonesia and several EU member states conducted a shipment test as a pilot exercise for the export of timber products with V-Legal Documents, with largely positive outcomes.

WTO implications

The licensing system is agreed on a voluntary and bilateral basis between the EU and partner countries; i.e. they are agreeing to additional trade controls between themselves, as a means of enforcing the producer country's laws. It is inconceivable that a country would mount a WTO challenge, on the basis of impairment of trade, to a voluntary measure to which it had itself agreed.

In theory, however, WTO disputes can be initiated by countries not affected by the trade restriction in question. It is possible, for example, that a country not participating in a VPA could decide to mount a challenge if it felt that its own timber exports were losing market share to products from VPA countries.

This, however, seems quite unlikely. The complainant country would risk the accusation that it was trying to dismantle a system of protection against illegal products because it knew its own exports were at least partly illegal. Similarly, it is unlikely that the members of the WTO dispute panels and Appellate Body would wish to see the organization portrayed as a body that forced illegal products into markets against the wishes of the governments directly involved. Rather, it is probably safe to assume that the dispute bodies would look favourably on the general principle of excluding illegal products from the market, as long as the means of exclusion were as non-disruptive and non-discriminatory as possible.

> 'It seems highly unlikely either that a challenge to the FLEGT licensing system would ever be pursued or that it would have any realistic chance of succeeding if it were'

The FLEGT licensing system scores well under both these criteria. The only trade that is disrupted is in the products of countries that have voluntarily entered into the agreement, so the argument that the licensing system is 'necessary' under the terms of the sub-paragraphs of Article XX is fairly compelling.

It could be possible to argue that the system is discriminatory, in that FLEGT-licensed products are treated differently from imports, needing to be accompanied by a legality licence. It would be impossible, however, for

2 See European Forest Institute webpage on FLEGT Voluntary Partnership Agreements for the latest list: http://www.euflegt.efi.int/portal/home/vpa_countries/.

a non-VPA country to argue this in relation to its own exports, which would not, of course, be subject to the requirement. In any case, the VPAs include the provision of capacity-building assistance from the EU for the establishment of the licensing system by the producer country, so the additional costs to be imposed on imports from VPA countries should be minimized. (Indeed, the system ought to help the producer country with revenue collection from taxes, export duties and charges.)

Finally, licensing systems designed to exclude undesirable products are already familiar mechanisms in international trade. The FLEGT timber licensing system is similar in effect to systems already in place in several multilateral environmental agreements (MEAs), including the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), the Montreal Protocol on ozone-depleting substances and the Kimberley Process on conflict diamonds. None of these systems has been the subject of a WTO challenge. Unlike these other systems, however, there is no equivalent global agreement under which to develop a timber licensing scheme, and the FLEGT system is therefore being built up through a series of bilateral agreements.

The past few years have seen much debate about the extent to which MEA trade measures are compatible with WTO disciplines.[3] Since there has never been a WTO dispute involving an MEA-mandated trade measure, the conclusion is not clear. However, it is frequently argued that WTO challenges would probably not arise in cases where the trade measures are taken between parties to the MEA, as the latter itself provides a more appropriate dispute settlement forum. Even where MEA trade measures have been applied against non-parties, no dispute has ever been pursued through the WTO.

For all these reasons, therefore, it seems highly unlikely either that a challenge to the FLEGT licensing system would ever be pursued or that it would have any realistic chance of succeeding if it were.

The EU Timber Regulation

The second measure introduced by the EU with the aim of excluding illegal timber products is the Timber Regulation, agreed in 2010 and applying from 3 March 2013.[4] It was always recognized that a broader measure was likely to be needed alongside the FLEGT licences. Since they were being developed through a series of agreements with individual countries, the system was vulnerable to evasion; illegal products could simply be transshipped via non-partner countries to the EU to escape the need for a licence.

The Timber Regulation prohibits the placing of illegally harvested timber and timber products on the EU market, wherever their origin, and also requires operators to implement a system of 'due diligence' in order to minimize the risk of doing so. 'Placing on the market' means the supply of timber or timber products for the first time on the EU internal market. Once the products have been first placed on the market, 'traders' in the supply chain (anyone who buys and sells within the EU) must be able to identify the operators or traders who have supplied them and, where applicable, the traders to whom they have supplied timber or timber products.

The regulation applies to most timber products, whether imported or produced within the EU. As with the VPAs, legality is defined in relation to existing national legislation in the country of harvest. Products accompanied by a FLEGT licence or a CITES permit are considered to have been legally harvested – which should create a significant incentive for countries to agree VPAs with the EU.

The regulation does not demand proof of legality of all timber products entering the EU market, but specifies elements of the due diligence systems that operators must implement in order to minimize their risk of handling illegal timber. These include means of ensuring access to information on the products, including their country of harvest, volume or weight, details of their suppliers, and information on compliance with legislation in the country of harvest. Operators must evaluate the risk of

3 See Duncan Brack and Kevin Gray, *Multilateral Environmental Agreements and the WTO* (Chatham House and International Institute for Sustainable Development, June 2003) for an overview of the debate.

4 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

illegally harvested timber or timber products being placed on the market. Except where the risk is negligible, they are required to undertake mitigating measures, such as requesting additional documentation from suppliers or third-party verification. The regulation allows operators either to establish their own due diligence systems or to use systems provided by 'monitoring organizations'. (Further details of the due diligence system were published as implementing regulations, and a guidance document is also available.[5])

WTO implications[6]

The Timber Regulation was clearly designed with possible WTO implications in mind, in that it applies equally to timber produced domestically within the EU as well as to imports, despite the much lower risk of EU timber being produced illegally.[7] Without this, the regulation could have been vulnerable to a WTO challenge on the grounds of discrimination.

As noted above, the prohibition on the placing of illegal timber on the market should not raise any WTO issues. It is not a trade measure, applied at the border, and operators or traders are not required to provide proof of legality at the point of import or sale. It is simply a provision to make timber produced illegally (overseas or in the EU) also illegal in the EU.

It is still too early to assess the practical outcomes of operators' implementation of their due diligence systems, but care will need to be taken to ensure that the risk assessment process they must carry out does not in practice lead to entire countries being treated as high-risk sources. If more extensive (and therefore potentially more expensive) documentary evidence were routinely demanded of all products originating in some countries and not others, regardless of the company or area of production, the regulation could be found to be operating in effect to give protection to some countries' products at the expense of others'.[8] The Timber Regulation itself, and the implementing regulation setting out details of the due diligence procedure, are careful to specify that operators should seek information not just about the country of origin and its degree of illegal logging, but also about the sub-national region and concession of origin, including the prevalence of illegal activity in the sub-national region, where there are variations in levels of illegality within the country.

Could the Timber Regulation as a whole be regarded as unnecessarily disruptive to trade? Once again, it is designed not to be. It deliberately does not include a requirement for documentary proof of legality for every product entering the EU, but places an obligation on all those placing timber on the EU market to exercise due diligence to ensure that they do not handle illegal products. It also encourages operators to make use of existing schemes that demonstrate legality – such as the forest certification or legality verification schemes that are increasingly being used – as part of the risk assessment procedure, thereby minimizing the burden on timber operators.

Exactly how the Timber Regulation will work in practice remains to be seen; but it is clearly non-discriminatory, and reasonably non-disruptive. It should therefore be safe against any hypothetical WTO challenge.

The Australian Illegal Logging Prohibition Act

Australia's Illegal Logging Prohibition Act was passed by its parliament in November 2012. Similar in principle to the EU regulation, it prohibits the import of all timber products containing illegally logged timber, and the processing of domestically grown raw logs that have been illegally harvested. It places a requirement on importers of 'regulated timber products' and processors of domestic

5 See European Commission Environment Directorate-General, 'Timber Regulation', http://ec.europa.eu/environment/forests/timber_regulation.htm.

6 See *Legal Analysis: WTO Implications of the EU Illegal-Timber Regulation* (Client Earth, September 2009), for a longer discussion on an earlier version of the regulation.

7 Though the risk is not zero; the European Commission accepts that illegal logging still persists in a few member states.

8 A similar issue arose in the WTO shrimp-turtle dispute, when the United States originally embargoed shrimp imports from entire countries on the basis of their turtle protection policies, irrespective of how particular shipments had been caught; as a result of the findings of the first dispute case on the topic it modified this to a shipment-by-shipment treatment.

raw logs to undertake due diligence to mitigate the risk of products containing illegally logged timber. Importers are to be required to complete a statement of compliance with the due diligence requirements alongside the customs import declaration. The definition of 'regulated timber products' and the exact processes for carrying out due diligence are to be defined later in secondary legislation. Finally, the act puts in place a comprehensive monitoring, investigation and enforcement regime to ensure compliance.

WTO implications[9]

The WTO implications of the Australian legislation are virtually the same as those of the EU Timber Regulation. In principle it should be WTO-compatible, but, as with its EU equivalent, care will need to be taken to ensure that implementation does not in practice result in protection for Australian timber products. The details of the due diligence procedure and risk assessment process, and the definition of 'regulated timber products' will be specified in secondary legislation that is still in preparation. A better picture of how the legislation will work in detail will be possible when this is finalized.

The WTO implications of the proposal were raised during the passage of the bill through parliament, and the subject featured in particular in the advisory report published by the Joint Standing Committee on Foreign Affairs, Defence and Trade in June 2012.[10] In its submission to the committee, the government argued that:

> The Bill complies with principles and disciplines contained in Australia's international trade obligations, including those aimed at ensuring non-discriminatory treatment of products and those governing approaches to trade policies which have clear environmental objectives. The Bill meets these obligations by providing even-handed treatment of suppliers of timber irrespective of their nationality; incorporating clear environmental objectives; minimising the administrative burden that importers will face; and, importantly, having a clear and direct relationship between the environmental objective of the Bill and the detailed operational provisions.[11]

In response to concerns raised by a number of timber-exporting nations, including Canada and New Zealand, the government stressed that the legislation was designed to provide even-handed treatment between imports and domestic production, but some of the timber-exporting countries argued that the supply chain for imports was more complex, and therefore more difficult to track, than it was for domestic timber. Kimberly-Clark Australia observed that compliance with the bill 'should be no more difficult or onerous than that existing now for US imports', though the Canadian government argued that in fact the application of the Lacey Act (see below) was adversely affecting its own exports to the United States.[12]

The committee concluded by recommending support for the bill, but also called on the government to consult closely with timber-exporting countries and other relevant stakeholders on its implementation and the development of secondary legislation.

The US Lacey Act

The United States has also attempted to exclude illegal timber, but its preferred measure has been to use criminal law. In May 2008, Congress voted to amend the Lacey Act, legislation originally dating from 1900 making it unlawful 'to import, export, transport, sell, receive, acquire, or purchase' fish or wildlife produced illegally in foreign countries. The amendment extended the coverage of the act to plants and plant products, including timber,

9 For a longer discussion, see Duncan Brack, with Alexander C. Chandra and Herjuno Kinasih, *The Australian Government's Illegal Logging Prohibition Bill: WTO Implications* (International Institute for Sustainable Development, July 2012).

10 Parliament of the Commonwealth of Australia, *Advisory Report on the Illegal Logging Prohibition Bill 2011* (Joint Standing Committee on Foreign Affairs, Defence and Trade, June 2012), http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/loggingbill2011/report.htm.

11 Ibid., p. 7.

12 Ibid., p. 12.

and added a number of details dealing specifically with illegal timber, including a definition of illegal logging, and a requirement for an import declaration. Importers of timber products have to provide information on the scientific name of the species, the value and quantity of the timber and the name of the country in which the timber was harvested; implementation was phased in gradually for different product types and only applies to imports for commercial purposes. Unlike the EU Timber Regulation, however, no information is required on compliance with the harvesting country's laws.

If companies are found to be handling illegal timber, however, they can be prosecuted under the Lacey Act. The penalties vary depending on the degree to which it can be shown that a company knew it was handling illegal products, or ought to have known – for example, if it was importing timber from a known source of illegal products, or without proper documentation. In all cases, even if the company did not know that it was handling illegal products, the illegal timber can be confiscated by the authorities.

The act therefore establishes a powerful incentive for companies to exercise 'due care' in sourcing timber products. What this means in practice is therefore a key question, and largely remains to be determined through case law, which is beginning to build up – thanks to enforcement actions against Gibson Guitar, which was found to have been importing illegally produced rosewood from Madagascar for several years, and also against a single small import of decorative hardwoods from Peru. As part of its settlement with the authorities (which included paying $350,000 in fines and forfeiting all the illegal material), Gibson agreed to implement a compliance programme to minimize the risk of purchasing illegal timber in the future. This included working with suppliers, collecting information on the sources of the products, looking carefully at documentation and declining to purchase products if there was any doubt over their legality.[13]

WTO implications

As with the EU Timber Regulation's prohibition on the placing of illegal timber on the market, the Lacey Act is not a trade measure, applied at the border. It is simply a provision to make fish and wildlife – and now timber – produced illegally overseas also illegal in the United States.

In fact the same issue has been discussed in the context of the ongoing debate about means of controlling trade in illegally caught fish. A number of other countries possess Lacey Act-style legislation applying to fish, and in 2006 the High Seas Task Force, an international group of fisheries ministers and NGOs, recommended the adoption of domestic legislation similar to the Lacey Act.[14] In a background paper produced for the task force, the United States concluded that there was no likelihood of a WTO challenge:

> The United States is confident that the application of Lacey Act prohibitions to imports taken unlawfully in foreign jurisdictions [does] not violate US trade obligations […] The Lacey Act does not provide protection to any domestic product at the expense of foreign product, and in fact, the law applies equally to illegally taken product imported by domestic or foreign entities.[15]

Some questions have been raised about whether the requirements for an import declaration for timber products could violate WTO rules, but in fact information like this is typically required of all imports. The major departure in this case is the requirement for information on the country in which the timber was originally harvested. This differs from normal country-of-origin requirements, which accept that when a product undergoes a

13 See 'Interpreting the Lacey Act's "Due Care" Standard after the Settlement of the Gibson Guitar Environmental Enforcement Case' (Arnold & Porter LLP, Advisory, August 2012).

14 High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, Final report of the Ministerially-led Task Force on IUU Fishing on the High Seas, March 2006, pp. 79–80.

15 Paul A. Ortiz (National Oceanic and Atmospheric Administration), *An Overview of the US Lacey Act Amendments of 1981 and a Proposal for a Model Port States Fisheries Enforcement Act*, paper prepared for the Ministerially-led Task Force on IUU Fishing on the High Seas, section 7.

significant economic transformation (such as logs being processed into plywood), the country of origin becomes the processing country rather than the original country of harvest. However, these rules are set by individual countries, not by the WTO. The WTO Agreement on Rules of Origin is fairly limited in effect, simply requiring that such rules be transparent and be administered in a consistent, uniform, impartial and reasonable manner, and that they do not have restricting, distorting or disruptive effects on international trade. It has yet to be shown that the US import declaration might do that.

Public procurement policy

Alongside seeking to exclude illegal products from national markets, governments can also take stricter action to exclude them from their own purchases, creating protected markets for products that are demonstrably legal.

In all developed countries, government (central, regional and local) is a major consumer of timber and timber products in its own right – for example, of timber for construction, paper or office furniture. Though precise figures are difficult to come by, in most developed countries government purchasing accounts for about 10 per cent of GDP, and can therefore have a significant impact on the market.

Governments have greater latitude in imposing requirements for their own purchases than in setting trade rules for their countries as a whole, and several have introduced procurement policies specifying that all timber products bought by government must be legally and, generally, sustainably produced. As of April 2013, such policies exist in Austria, Belgium, Denmark, Finland, France, Germany, Japan, Mexico, the Netherlands, New Zealand, Norway, Switzerland and the United Kingdom.

WTO implications

Government procurement measures are explicitly excluded from the GATT; they are subject instead to the WTO Government Procurement Agreement (GPA). Unlike most WTO agreements, this is a plurilateral agreement, to which not all WTO members are parties – as at April 2013, only the EU (and all its member states) and 14 other countries are parties; 10 further states are negotiating accession. While some important producers of timber (the EU, Canada and the United States) are GPA signatories, most – including China, Russia and all the timber-exporting developing countries – are not (though China is negotiating accession).

The GPA is significantly different from the GATT and other WTO agreements in a number of respects. GPA rules do not apply automatically to all procurement contracts. Its parties specify the government entities and services they decide to have covered, and also minimum threshold values, and can also specify exclusions. Timber procurement, therefore, does not necessarily have to be covered, and could be subject to exemptions even if it is.

> ‘In practice, procurement policies have acted to provide a boost to the market for certified timber products’

The GPA rests on the core WTO principles of non-discrimination (between like products from foreign and domestic suppliers) and transparency (of the requirements included in contracts and in the awarding of contracts). It sets out rules to govern the inclusion in contracts for requirements for technical specifications, selection criteria, the award process and contract performance. For sourcing legal and sustainable timber, the technical specifications in the contract are key, and the GPA allows them to be related to the product’s performance and production methods. In addition, Article XXIII of the GPA includes exceptions to its obligations for reasons of public morals or protection of human, animal and plant life.

There seems no reason to think that most of the timber procurement policies so far adopted could be subject to a successful challenge under the GPA. In practice,

procurement policies have acted to provide a boost to the market for certified timber products, since certification under the main international schemes (FSC and PEFC) has proved to be the easiest way to meet the procurement policies' criteria. Some countries, including Germany and Denmark, have decided simply to accept the criteria set out in those two schemes rather than develop separate criteria of their own. Article VI of the GPA forbids the setting of technical specifications in the form only of particular certificates, but all the procurement policies with their own criteria, and those that rest on the certification schemes, provide for equivalent forms of proof as well.

The Norwegian procurement policy, however, could be subject to challenge if any tropical-timber-producing country was a GPA party. Norway's policy simply bans the use of all tropical timber in government buildings, regardless of its means of production, and is therefore clearly discriminatory – though not against any current GPA party (and Norway could always decide to exclude this policy from its GPA coverage). No other timber procurement policy, however, contains such crude criteria; they all apply to products regardless of their country of origin. Nor do any of them discriminate on the basis of the supplier's nationality.

Conclusion

No one can say for sure what would be the outcome of any WTO dispute case involving measures taken to exclude illegal timber from international trade. Since the case would rest on the interpretation of various clauses of the GATT and other WTO agreements, and as there is no experience to date of WTO dispute cases dealing with even vaguely similar issues, it is only possible to speculate.

Three broad conclusions can be drawn, however.

- The more the trade measure diverges from the core WTO principle of non-discrimination in trade, the more vulnerable it could be to challenge; so where trade measures are imposed without agreement, care must be taken to treat domestic products similarly to imports.
- The more trade-disruptive the measure is, the more vulnerable it could be to a challenge under the WTO; so the more frequently measures such as providing capacity-building assistance are also taken, for example, the less disruptive the trade controls become.
- Where the measures are agreed between importing and exporting states (as in the FLEGT licensing system), there is no real prospect of any successful challenge through the WTO.

‘Within these broad constraints, governments have plenty of flexibility to adopt measures designed to exclude illegal timber from international trade’

Within these broad constraints, governments have plenty of flexibility to adopt measures designed to exclude illegal timber from international trade. None of the main measures being pursued at the present – the EU's FLEGT licensing scheme and Timber Regulation, the Australian Illegal Logging Prohibition Act, the US Lacey Act, and public procurement policies in various countries – should experience any conflict with WTO rules.

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For more details and further information on all the topics covered in this paper, see www.illegal-logging.info.

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