

# *The Australian Government's Illegal Logging Prohibition Bill: WTO implications*

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## Executive Summary

The Australian government is currently legislating to exclude illegally logged timber from imports and from domestic processing. The proposals in the draft bill include: a prohibition on the import of all timber products containing illegally logged timber, and on the processing of domestically grown raw logs that have been illegally harvested; a requirement on importers and processors to undertake due diligence to mitigate the risk of products containing illegally logged timber; and a comprehensive monitoring, investigation and enforcement regime to ensure compliance.

The proposed legislation has been criticized on the basis, among other things, that it conflicts with the disciplines of the World Trade Organization (WTO). Similar criticisms have, on occasion, been levelled at other consumer-country measures to exclude illegal timber from their markets, such as the European Union's Forest Law Enforcement, Governance and Trade licensing scheme and Timber Regulation, or the United States' Lacey Act.

This paper explores whether the measures proposed in the Australian legislation are likely to be WTO-compatible, and concludes that they should be. The Australian government will need to be careful to ensure the legislation is designed and implemented in ways that do not afford protection to Australian products, and is as non-trade-restrictive as possible. Within those constraints, however, they should not be inhibited from pressing ahead and introducing measures, similar to those being implemented in other consumer countries, to exclude illegal products from the market—and by so doing, improve sustainable development, protect the interests of companies playing by the rules and uphold the rule of law.

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## The Illegal Logging Prohibition Bill

The Australian Labor Party included a commitment to prohibit the import of illegally logged timber in its manifestos for both the 2007 and 2010 general elections. A policy document was published in October 2007,<sup>1</sup> and, after consultation with stakeholders, an “exposure draft” bill was introduced to Parliament in March 2011. The bill aimed to restrict imports of illegally logged timber into Australia, to implement a code of conduct to ensure suppliers first placing timber products on the market carried out appropriate tests to ensure the products were legal and to draw up a trade description for legally verified timber products.

The bill was referred to the Senate Rural Affairs and Transport Legislation Committee for consideration.<sup>2</sup> The committee reported in June 2011, recommending, among other things: a simplification of the requirements on industry, a requirement for importers to make a declaration of legality of product at the border, and a requirement for importers and processors to demonstrate that they had followed due diligence procedures to ensure legal compliance using forest certification schemes, national timber legality schemes or management systems.

A revised bill was published in November 2011, incorporating several of the Senate committee's recommendations and introducing some new elements.<sup>3</sup> It contained three main proposals:

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<sup>1</sup> See the document, *Bringing down the axe on illegal logging* (Commonwealth of Australia, 2007), at [www.illegal-logging.info/item\\_single.php?it\\_id=815&it=document](http://www.illegal-logging.info/item_single.php?it_id=815&it=document)

<sup>2</sup> See the bill at: [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=rat\\_ctte/logging\\_bill\\_2011/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rat_ctte/logging_bill_2011/report/index.htm)

<sup>3</sup> The text of the bill is available at: [www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r4740](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r4740)

1. A prohibition on the import of all timber products containing illegally logged timber, and on the processing of domestically grown raw logs that had been illegally harvested.
2. A requirement on importers of “regulated timber products” and processors of domestic 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 were to be defined later in secondary legislation.
3. A comprehensive monitoring, investigation and enforcement regime to ensure compliance with all elements of the bill.

In many ways, the bill is similar in approach to the European Union’s (EU) Timber Regulation, which enters into force in March 2013. This bill will prohibit the placing of illegally harvested timber and timber products, whether from domestic production or imports, on the EU market, and require operators to implement due diligence systems in order to minimize the risk of doing so.

The bill was again referred to the Senate Rural Affairs and Transport Legislation Committee, which reported in February 2012.<sup>4</sup> The committee was broadly supportive, repeating one of its earlier recommendations that the legislation should be aligned as much as possible to similar provisions in other countries, in particular the EU’s Timber Regulation and the United States’ (U.S.) Lacey Act. A minority report from the Liberal-National opposition members on the committee, however, noted concerns over a possible lack of consultation with timber-exporting countries and called for more outreach to affected countries and the conclusion, where possible, of bilateral arrangements with them.

A number of submissions to the committee during its inquiry raised concerns about the interrelationship of the proposals with World Trade Organization (WTO) rules, and a number of timber-exporting countries expressed their worries about the potential impact on their exports to Australia.<sup>5</sup> In light of this, and in the face of increasing opposition from Liberal-National parliamentarians, in March 2012 the bill was referred to a further inquiry, to be conducted by the Parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade.<sup>6</sup> At the time of writing, this inquiry is still under way.

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## *Restricting Trade in Illegal Timber*

Australia is not alone in seeking to restrict imports of illegal timber and wood products. As far back as the East Asia Forest Law Enforcement and Governance ministerial conference in Bali in September 2001, producer and consumer countries have recognized that the control of international trade is an essential part of the global effort to reduce illegal logging. Importer nations such as Australia, the EU, the U.S., Japan and China provide a market for timber from forest-rich developing countries, many of which have significant problems with illegal logging. At the same time, as many of these countries lack the capacity to regulate exports adequately, taking action in importer countries to shut off the illegal loggers’ ability to access foreign markets has long been seen as an essential reinforcement to domestic law enforcement.

<sup>4</sup> The report is available at: [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=rrat\\_ctte/logging\\_2011/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/logging_2011/report/index.htm)

<sup>5</sup> All submissions are available at: [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=rrat\\_ctte/logging\\_2011/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/logging_2011/submissions.htm)

<sup>6</sup> See [www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jfadl/loggingbill2011/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadl/loggingbill2011/index.htm)

There has accordingly been a long-running debate about the best means of excluding illegal timber from international markets. The EU is currently 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 four countries are negotiating them; several more are expressing interest in opening negotiations. In addition to the VPAs, from March 2013 the EU will also implement the Timber Regulation, which will prohibit the placing of illegally harvested timber and timber products (whether from domestic production or imports) on the EU market, and require operators to implement due diligence systems in order to minimize the risk of doing so. The U.S. has amended its Lacey Act to make it unlawful to import, or transport within the U.S., timber produced illegally in foreign countries. 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 WTO. Indeed, critics of various proposed measures sometimes claim that WTO rules prevent any interference in trade at all; although this is certainly not the case, governments do need to be aware of the constraints on their efforts to control trade in illegal timber posed by WTO rules.

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## 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).<sup>7</sup> The WTO agreements essentially lay down general rules for governments to follow in liberalizing international trade. They cannot possibly 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 on opposition to discrimination in trade. Its core principles are to be found in the following articles of the GATT:

- 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.
- GATT 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.

WTO members, in other words, are not permitted to discriminate between other WTO members’ traded products, or between domestic and international production. 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 unilateral trade restrictions to be taken. These exceptions are set out in GATT Article XX, and include:

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<sup>7</sup> The complete text of the GATT is available at: [www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

- 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—for example, 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?

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 the loser to the estimated value of the trade lost because of the loser’s action.

It should be noted that interpretations can change, even if the wording that is being interpreted does not. Over the period since the founding of the WTO in 1995, decisions by the Appellate Body in particular have clearly helped to shift the way in which the WTO 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. All we can do is extrapolate from other disputes.

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## WTO Implications of Measures Against Illegal Timber

### Distinguishing Between Legal and Illegal Timber

Governments seeking to exclude imports of illegal timber products are faced with an immediate problem: how can legal goods be distinguished 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 not difficult to falsify. So some kind of additional evidence of legality is necessary, such as, for example, the licenses 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 that are imported or placed on the market that the possibilities of interaction with WTO trade rules really 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:

1. 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. In fact, 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 illegal. The following three cases therefore raise more realistic questions.
2. 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—also a violation of GATT Article I (“most-favoured nation” treatment).
3. If imports are treated differently from domestic timber products, this is a violation of GATT Article III (“national treatment”).
4. The requirement is a trade restriction imposed at the border other than a duty, tax or other charge—a violation of GATT Article XI (“elimination of quantitative restrictions”).

Clearly, the exact design of the trade-restrictive measures are 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 points 2 and 3 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 subparagraphs 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”—that is to say, are there no 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, would 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 easier. In addition, products certified under the main voluntary certification schemes (Forest Stewardship Council and Programme for the Endorsement of Forest Certification), 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 EU’s Forest Law Enforcement, Governance and Trade (FLEGT) initiative—rather than an unaccompanied unilateral trade measure, 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, that is to say, 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, of course, 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 U.S. 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.<sup>8</sup>
2. 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 a sink for carbon, are a global resource of concern to all.
3. 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.
4. 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).
5. The country seeking to regulate should negotiate in good faith with other countries with a view to seeking bilateral or multilateral agreements.
6. 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 U.S. had tried, but failed, to negotiate an agreement with the complainants.

## Conclusions

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; products should be treated similarly wherever they originated, and domestic products should be treated 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.
- It should also be remembered that the WTO system does not produce rulings in the abstract, but only when a WTO member country lodges a complaint. Where trade measures are agreed between importing and exporting states (as in the VPAs’ licensing systems, for example), there is no reason to think that any challenge would be mounted.

<sup>8</sup> Adapted from Sydney Centre for International Law (2012, February 22). *Inquiry into the Illegal Logging Prohibition Bill 2011*. Submission to the Senate Rural Affairs and Transport Legislation Committee. Retrieved from: <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=0ea71f2c-d962-4616-a9cd-12f0932c546c>.

## WTO Implications of the Illegal Logging Prohibition Bill

Against that general background, how do the proposals in the Australian legislation relate to these WTO rules? It is impossible to be entirely precise at this stage, as the details of the proposals are not yet finalized. In particular, we do not know exactly which products will fall into the category of “regulated timber products” for the purpose of the due diligence requirements, or many of the details of those requirements themselves—including, importantly, which legality verification, forest certification or other existing or evolving systems for identifying legality are likely to be regarded as placing their products into low-risk categories for the purpose of the due diligence requirements.

Nevertheless, the general provisions of the bill are clear: to prohibit the import of all timber products that contain illegally logged timber and the processing of domestically grown raw logs that have been illegally harvested, and to establish a system of due diligence for importers and processors of domestic timber to minimize the chances of handling illegal products.

A number of submissions to the Senate inquiry argued that these proposals were likely to conflict with WTO rules. There were three main arguments:

1. Legal and illegal timber would be considered “like products” under the GATT.
2. Discrimination against illegal timber could not be “saved” under GATT Article XX.
3. The bill proposed to treat imported timber differently from domestic timber, affording protection to domestic timber.

In addition, a number of submissions complained that there had been a lack of consultation with timber-exporting countries, and no attempt to reach bilateral solutions.

### Are Legal and Illegal Timber “Like Products”?

If legal and illegal timber are considered to be “like products” under the terms of the GATT, and if they are treated differently by the bill, then it could be argued that this is a violation of GATT Article I. One of the Senate committee submissions, from Andrew Mitchell and Glyn Ayres, argued just this, on the basis of the products’ physical properties, end uses and processes and production methods.<sup>9</sup>

In fact, the paper implies that national laws themselves are an inappropriate basis on which to regulate the trade in timber:

The sole criterion in the Bill for determining whether timber is ‘illegally logged’ is the law of the place where the timber was harvested. This raises a strong possibility of discrimination because logging laws inevitably differ between countries ...<sup>10</sup>

For these reasons, the Bill would discriminate between products that could be identical in their physical properties, their end uses and their processes and production methods. Such products would be *like* within the meaning of Article I:<sup>11</sup>

<sup>9</sup> A.D. Mitchell & G. Ayres (2012), *The consistency of Australia’s Illegal Logging Prohibition Bill with international trade rules*. Attachment to Alan Oxley’s submission to the Senate Committee, paras 25–30. Retrieved from: <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=227acf15-8841-484a-a38b-395dfab39ebf>

<sup>10</sup> *Ibid.*, para 24.

<sup>11</sup> *Ibid.*, para 29.

Taking this argument—that discrimination on the basis of legality is inconsistent with WTO rules—to its logical conclusion, it would appear that national laws cannot be used at all as a basis to restrict trade in illegal timber—or indeed, in anything else. For any legislation affecting anything that could be traded, every country should have the same laws. Even if the country of export whose laws are being flouted requests assistance from the country of import in excluding illegal timber, the paper appears to argue that WTO rules forbid the importing country from restricting this trade.

It seems unlikely that the drafters of the GATT and the other WTO agreements had this conclusion in mind when they negotiated their final texts. It is not the *content* of the laws that should be the issue for a WTO dispute, but *compliance or non-compliance* with whatever national laws exist. Following this argument, legal and illegal timber are not like products and treating illegal products differently from legal products does not breach Article I because legal timber is different from illegal timber.

## Can Discrimination Against Illegal Timber Be “Saved” by Article XX?

Even if legal and illegal timber are considered to be like products, there is the possibility of “saving” the trade measure under one of the subparagraphs of GATT Article XX, as explored above. The Mitchell/Ayres submission mentioned above considers three subparagraphs, (b), (d) and (g), and considers that the measures of the Illegal Logging Prohibition Bill could potentially qualify under (g).

Some of the arguments against the other exceptions can be contested. For example, one of the reasons the paper gives for not considering that the bill’s measures are “necessary” under XX(b) is that the bill itself “might make only a limited contribution to preventing illegal logging because a significant proportion of the illegally logged timber that it stopped from entering Australia would simply be diverted to other markets, rather than not being logged or exported at all.”<sup>12</sup> This ignores the fact that many other countries are taking steps, or have already implemented measures, to exclude illegal timber; the bill should not be treated in isolation.

Nevertheless, as argued above, Article XX(g), which provides that measures are allowable if they are “relating to the conservation of exhaustible natural resources,” seems to be the most applicable exception. The Mitchell/Ayres paper concludes that although the bill’s measures could qualify under the wording of subparagraph (g), they nevertheless fail under the headnote to Article XX, which requires the measure not to constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”<sup>13</sup> This is because, as above, they consider legal and illegal timber to be “like products,” and the bill aims to treat them differently:

As demonstrated above, the Bill discriminates between countries because it applies differently depending on the laws of the country where the relevant timber was logged. This discrimination is not rationally connected to the objective of protecting ‘human, animal or plant life or health’ ... nor is it rationally connected to the conservation of ‘exhaustible natural resources’ ...<sup>14</sup>

The arguments are exactly the same as those considered above; the Mitchell/Ayres paper assumes any products that enter trade cannot be treated differently, whatever national laws may say. If one disagrees with this argument, and believes that countries are allowed to have different laws from each other, and that therefore legal and illegal products are not “like,” then the headnote to Article XX should apply, thereby “saving” the measure—in this case, by determining that the bill is consistent with WTO obligations.

<sup>12</sup>Ibid., para 53.

<sup>13</sup>Ibid., paras 59–63.

<sup>14</sup>Ibid., para 62. The quotes are references to GATT Article XX (b) and (g) respectively.

This conclusion is only valid, however, if controls are applied to domestic products as well as to imports, so that no protection of domestic products results. Legal domestic products should be treated in the same way as legal imports, and illegal domestic products should be treated in the same way as illegal imports. This conclusion is broadly consistent with the arguments put forward by the University of Sydney Centre for International Law in its submission to the Senate inquiry, and with a paper produced by ClientEarth in regard to the EU Timber Regulation, which, as noted, contains a similar system of due diligence.<sup>15</sup> Both had caveats, however, which are considered below.

## Does the Bill Afford Protection to Domestic Timber?

This is the key argument that the government needs to address in regard to the bill, and one that will probably be impossible to deal with fully until the details of the secondary legislation are known, that is to say, the details of the due diligence procedure, the risk assessment process, and so on. This is the main focus of the concerns raised by Canada and Indonesia in their submissions to the Senate committee. It also lies behind the caveats noted in the ClientEarth paper on the EU Timber Regulation, and one of the caveats of the Sydney Centre for International Law submission to the Senate committee.

The real challenge, in WTO terms, for any measure designed to exclude illegal timber is to ensure that imports are treated, as far as possible, in the same way as domestic products. Article III of the GATT provides that imported products should be accorded “treatment no less favourable” than that accorded to like products of national origin, and the various exceptions listed in Article XX similarly require even-handed treatment.

Legal timber imported into the country should not, therefore, suffer any disadvantage in reaching the market compared with legal domestic timber (and illegal domestic timber should not be treated any more leniently than illegal imported timber). This has a number of implications.

First, the measures cannot apply only to imports; they must apply to domestic products too. The bill clearly does apply both to imports and to domestic raw logs—both are subject to the prohibition and to the due diligence procedure at the point at which they enter the market (the border, for imports, and processing, for domestic raw logs). Furthermore, the procedures to be followed in each case appear to be mostly the same.

There is one possible slight discrepancy. Clause 13 of the bill requires importers to make a declaration on their compliance with the due diligence requirements at the point of import. No such equivalent clause appears for domestic processors, though the section on the due diligence requirements for processing domestic raw logs states that the regulations (which are still to be drawn up) may include a requirement for statements of compliance (clause 18 (3) (d))—the same requirement is present in the clause on due diligence requirements for imports (clause 14 (3) (e)). In introducing the bill to Parliament, however, the minister made clear in his speech that “Processors are required to complete a statement of compliance with the due diligence requirements of the bill.”<sup>16</sup>

It is not yet clear, however, how onerous this requirement is—the explanatory memorandum to the bill implies that it may simply involve answering one question on the customs form.<sup>17</sup> Indeed, Greenpeace’s submission to the Senate committee explicitly criticized this provision as unclear and likely to be too weak, and called for a requirement for an import declaration modelled on that in the U.S. Lacey Act, which requires importers to provide information on

<sup>15</sup>ClientEarth, (2009), *Legal analysis: WTO implications of the Illegal Timber Regulation*. Retrieved from: [www.clientearth.org/climate-and-forests/climate-forests-publications/briefing-clientearth-briefing-wto-284](http://www.clientearth.org/climate-and-forests/climate-forests-publications/briefing-clientearth-briefing-wto-284)

<sup>16</sup>Commonwealth of Australia (2011, November 23), *Parliamentary debates*, p. 13570. Retrieved from: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F14965034-cdb8-4a26-98aa-26c862a1cd0e%2F0083;query=Id%3A%22chamber%2Fhansardr%2F14965034-cdb8-4a26-98aa-26c862a1cd0e%2F0050%22>

<sup>17</sup>Illegal Logging Prohibition Bill 2011, Explanatory Memorandum, p. 15.

the scientific name of the species, the value and quantity of the timber and the name of the country in which it was harvested.<sup>18</sup> On the other hand, Canada's submission to the Senate inquiry explicitly pointed to this requirement as a potential barrier to imports into Australia.<sup>19</sup> Clearly, clarification of the requirement would be helpful.

Second, the details of the due diligence process need to be as similar as possible between imported and domestic timber. Again this is a question that must be clarified in the secondary legislation, but covers issues such as risk assessment. For example, risks should relate as closely as possible to the specific forest areas from which the products originated; simply classifying an entire country and its timber exports as "high risk" would almost certainly provide justification for a WTO challenge. This issue arose in the shrimp-turtle WTO dispute case, when the U.S. 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 basis.

Indonesia's submission to the Senate committee considered this to be a major potential flaw in the bill, and the main reason why it might be inconsistent with WTO obligations: "this Bill is discriminatory in that it is set to selectively impose restrictions on timber products from a limited number of targeted countries ... a unilateral ban on Indonesian imports would ... be illegal ...."<sup>20</sup> It is not clear why the Indonesian government thought that this might happen, and it seems highly unlikely that the risk assessment procedure in the due diligence system would operate in this way; the bill makes it clear that both imports and the processing of domestic raw logs are subject to due diligence procedures. Clearly, however, the sooner the systems can be clarified the better. (The EU Timber Regulation applies its due diligence requirements to all operators first placing timber products on the market, whether they are imported or domestically produced.)

Third, the more that the due diligence systems are able to rely on existing systems for verifying legality, the easier they will be to operate and the lower the burden they will place on foreign exporters to Australia. National and international legality verification and forest certification schemes are increasingly common in the international trade in timber and timber products—though as noted above, their relevance will depend on the precise details of the due diligence system.

The EU's VPAs with timber-producing countries under its FLEGT initiative provide one particularly helpful route to assist Australia's ability to control its imports of illegal timber. Under each agreement, the timber-exporting country will establish (with assistance from the EU), a timber legality verification scheme for its own products; exports to the EU will only be permitted if the products are licensed as being legally produced under the scheme, which will be subject to independent monitoring. The FLEGT license will be required for the entry of timber products from VPA countries to the EU, and licensed products will also automatically satisfy the requirements of the EU Timber Regulation.

Although the agreements are reached between the EU and the exporting country, every VPA partner country to date has stated its intention to license all its exports regardless of destination. If the licenses can be recognized under the Australian bill's due diligence procedures as guaranteeing legality, that provides a potential solution for exports

<sup>18</sup>Greenpeace Australia Pacific (2011), *Submission to the Senate Rural Affairs and Transport Legislation: Follow-up inquiry into the Illegal Logging Prohibition Bill 2011*, pp. 7–8. Retrieved from: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=171601eb-91ae-4db7-97b1-4667c02cae5d>

<sup>19</sup>Government of Canada (2011, December 20), *Canada's concerns and suggestions for Australia's Illegal Logging Prohibition Bill and the development of the subordinate legislation*, pp. 3–4. Retrieved from: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=f0c4e13d-a256-4153-8117-2801c04d6b78>

<sup>20</sup> Republic of Indonesia (2012, January 30), *Comments from the Government of Indonesia on Australia's Draft Illegal Logging Prohibition Bill 2011*. Retrieved from: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=589549e5-ffb0-4698-a961-c28c0a14fc70>

from a number of countries that have experienced significant problems with illegal logging, such as Indonesia, which agreed to a VPA in May 2011. Malaysia and Vietnam are currently negotiating VPAs. Indonesia's Senate committee submission itself drew attention to its timber legality assurance system, SVLK, which has been developed to meet the VPA's requirements. (Australia would need to put in place verification requirements to guarantee that the legality licenses were valid.)

The details of the application of the due diligence systems in the bill is the area where most care needs to be taken to ensure compliance with WTO rules. With careful design, however, it should be possible to achieve this objective.

### Lack of Consultation and Capacity Building?

The final objection raised to the Illegal Logging Prohibition Bill is the argument that it is being put forward after inadequate consultation with Australia's trading partners. The Indonesian submission, for example, requested "proper consultation." Clearly it is good practice to consult foreign countries that may be affected by domestic legislation—and this paper cannot judge whether the complaints are justified—but there are potential WTO implications too, as the University of Sydney submission pointed out.

In general, the WTO agreements encourage countries to reach multilateral solutions to problems, and to avoid the application of unilateral trade measures. One of the reasons why the U.S. embargo on shrimp imports was found inconsistent with WTO rules in the first shrimp-turtle dispute was that it had failed to engage in multilateral negotiations over the issue with some of the countries affected (though the problem was more that the U.S. had negotiated an agreement with some shrimp exporters but not others).

However, the WTO does not absolutely forbid unilateral measures, and in the second shrimp-turtle dispute—which followed the opening (though not the conclusion) of multilateral negotiations, and also the application of the embargo to individual shipments rather than entire countries—the U.S. measure was found to be consistent with WTO rules. The EU's approach, in attempting to negotiate VPAs with timber-exporting countries, places this particular trade measure (the FLEGT licenses) in a strong position with respect to WTO rules. As noted above, it would be possible, in effect, for Australia to join in VPAs with particular countries by agreeing to accept their FLEGT licenses as evidence of legality for the purposes of the bill's due diligence system.

However, it should also be noted that not every timber-exporting country will join a VPA, and even for those which do, negotiations can be lengthy. This is the justification behind the EU Timber Regulation, which applies due diligence requirements to all imports, and domestic products, in a similar way to the Australian bill.

The provision of financial and technical assistance with meeting the provisions of the due diligence system—to timber operators both in Australia and abroad—also strengthens the cooperative element of the measures and lowers the chance of a successful WTO challenge. As has been seen, Article XX(g) may allow trade-restrictive measures on the basis that they are designed to ensure the "conservation of exhaustible natural resources." If the measures taken against illegal timber are part of a broader package of steps to improve forest governance, law enforcement and corporate governance, it is easier to argue that they are a necessary component of a broad forest conservation strategy. There are many examples of assistance provided to exporter countries by importer countries in helping them meet stricter environmental standards; the EU FLEGT scheme is one way of doing this with respect to timber production and legality identification, and has also included, for example, assistance to civil society organizations to help improve the quality of policy-making.

## Conclusion

The interrelationship of measures designed to restrict trade in illegal timber and timber products with WTO trade rules has been a constant issue throughout the international debate over the last ten years or more. On occasion, the spectre of a WTO challenge has been deployed by those seeking to inhibit any effective action against illegal logging—for example, by those defending the practices of companies benefiting from illegal behaviour, or by deregulatory enthusiasts who appear to believe that illegal trade is a small price to pay for trade liberalization and globalization.

There are, nevertheless, genuine concerns about the extent to which well-intentioned measures may inhibit trade in legal products as well as illegal, or favour some countries' products over others, and it is right to be careful in designing measures to ensure that they do not conflict with WTO rules. The principles of rules-based equal treatment and non-discrimination that lie at the heart of the WTO agreements are worth defending.

There has never been a dispute case dealing with illegal products, or one even vaguely similar, so no one can draw hard and fast conclusions about what the outcome of any such dispute might be; all we can do is extrapolate from the WTO agreements themselves and possibly relevant dispute cases. As this paper has tried to show, there are good reasons for thinking that trade measures taken against illegal timber can be compatible with WTO rules. As long as care is taken in their design, it should be entirely possible to respect WTO constraints, while at the same time implementing measures effective enough to exclude illegal products from international trade—and by so doing, improve sustainable development, protect the interests of companies playing by the rules and uphold the rule of law.

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Duncan's work has focused on the interaction between environmental regulation and international trade rules, international environmental regimes and institutions and international environmental crime. He has published widely on the debates about forest governance, illegal logging and the trade in illegal timber, focusing mainly on mechanisms to exclude illegal products from consumer markets.

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