

Submission to the Senate Rural Affairs & Transport Legislation Committee
Illegal Logging Prohibition Bill 2011.
10 January 2012

I make this submission to the Committee because of deep concern the risk the *Illegal Logging Prohibition Bill* presents to Australia's international trade policy and the Government's capacity to advance Australia's foreign policy and trade interests.

Standing

I make this in my capacity as an Australian trade and foreign policy expert. I am a former member of the Department of Foreign Affairs, the Department of Trade and then the Department of Foreign Affairs and Trade. I served Australia's Ambassador to the GATT and during that time served as Chairman of the GATT Council then Chairman of the GATT Contracting Parties. I am Chairman of the Australian APEC Centre at RMIT University. I also head ITS Global consulting, one of Australia's leading international trade consultancies.

I have expertise in GATT and WTO dispute processes and in particular the cross over between trade policy and environmental policy. I was a panellist in the second of three cases contesting US trade restrictions against the import of tuna from Mexico, the well known "tuna dolphin" trade disputes.

I also have expertise in international environmental agreements, having written extensively over the years on international environmental agreements.

For the record ITS Global includes among its clients the PNG Forest Industries Association. The firm has also consulted to forestry and timber businesses in Australia and Southeast Asia.

Submission

This submission is being presented to highlight how the current *Illegal Logging Prohibition Bill* which is currently before the Federal Parliament would damage Australia's international trade interests and its capacity to pursue vital Australian foreign policy and international trade interests.

The Bill contravenes Australia's obligations as a member of the WTO and as a member of the ASEAN Australia and New Zealand Free Trade Agreement.

I attach to this submission an opinion provided by Associate Professor Andrew Mitchell one of Australia's leading legal expert on WTO law and Mr Glyn Ayres of the Melbourne University Law school, which explains why the Draft Exposure Bill is likely to contravene Australia's obligations. This opinion applies equally to the Bill in its current form.

In summary, the Bill

- fails to meet Australia's obligation under Article I.1 of the General Agreement on Tariffs and Trade 1994 not to create advantage for like products from some parties to the Agreement and not others and is not covered by other provisions in the Agreement; and
- breaches Australia's obligations under Article XI.1 of the General Agreement on Tariffs and Trade 1994 not to use restrictions of any kind other than duties, taxes or other charges on the importation of any product and cannot be justified under other provisions of the

Agreement; and

- fails to meet Australia's obligations under Article 7(1) of the ASEAN Australia New Zealand Free Trade Agreement which mirrors the terms of GATT 1994 Article XI.1

The Department of Agriculture, Forest and Fisheries has advised that in their view the Bill does not conflict with Australia's WTO obligations because the Bill purportedly imposes similar restrictions on timber and timber products placed on the Australian market by Australian producers.

This would appear to be an inexpert interpretation of a general proposition commonly expressed that WTO agreements allow controls to be imposed on imported products if the same measures are imposed on Australian producers.

I would note in passing that this misreading of the provisions of WTO agreements appears to be responsible for the inclusion in the Bill of particularly onerous and costly obligations on Australian producers to demonstrate product in Australia is legally produced. It has never been asserted by anyone that product in Australia is illegally procured.

There is no public evidence that the Department of Agriculture, Forestry and Fisheries consulted the Department of Foreign Affairs and Trade about the consistency of the Bill with Australia's international trade obligations

Impact on Australia's Trade and Foreign Policy interests

Undermining the fundamentals of Australian Trade Policy

Timber products are imported from Canada, members of the EU, Indonesia, Malaysia, New Zealand, Papua New Guinea, the Solomon Islands and Vietnam.

Each of those countries have rights under the WTO to challenge the measure, and given Associate Professor Mitchell's opinion, if they did so they would be likely to draw a ruling which required the law to be overturned.

It may be that some in Government would not mind that eventuality; then the Government could indicate to the interests supporting the Bill that the Government had no alternative but to overturn the Bill after it was enacted.

This has happened before. In the late eighties, the Australian Government introduced measures to support the Australian automobile industry in full knowledge they were likely to contravene GATT rules. The United States challenged the measures in the GATT and threatened trade retaliation. The offending measure was rescinded.

If there were such consideration, it would have to be regarded as irresponsible policy and legislating because of the losses incurred by the introduction of this costly system of regulation as well as costs wasted in preparing then amending legislation and regulations.

Nor would this strategy undo the damage enactment of this Bill would do to Australia's reputation as a reliable trading partner and an advocate of free and open markets, or as a good neighbour.

An odious principle informs the case for Australia to ban imports of illegal timber. It is that coercion through the threat of restricting trade should be used to pressure trading partners to change environmental policy.

Until now, Australia has never accepted the principle that trade controls should be used as leverage to force trading partners to alter policies in other areas. There are three key reasons.

The first is self interest. Obstructions such as this to the free flow of trade in and out of Australia diminish the capacity to generate optimal economic growth from trade.

The second is that Australia has international legal obligations arising from membership of the World Trade Organization (WTO) and other trade agreements, not to use trade to politicize issues or coerce neighbours.

The third is that it is a general obligation of membership of the United Nations not to coerce other nations.

In summary it is unenlightened and brutish international behaviour. Not only does it damage economic interests, it sours foreign relations.

One of the justifications advanced by DAFF for this Bill is that it is similar to legislation in the US and the EU. While they too are parties to the WTO Agreements, the US Congress and increasingly the European Parliament are willing to use their trade weight to pressure trading partners to adopt non-trade policies. Where Australia had faced such threats, it has vigorously defended its interests with recourse, where applicable, to international trade law.

Even if Australia wanted to contemplate such strategies, it does not have the market power in international trade to exercise leverage over trading partners.

Australia's credibility as a trading partner has rested until now on its respect for international trade rules and its advocacy that others apply them as well. This a fundamental plank of Australia's advocacy of free trade and open markets in the Asian Pacific region.

Potential Damage to Bilateral Relationships

Australia has important and sensitive relationships with most of the countries mentioned above.

Australia also has embarked on series of trade agreements to build stronger and more open trading relationships with neighbours.

It has negotiated and signed the ASEAN, Australia and New Zealand Free Trade Agreement (AANZFTA). Implementation of that has begun. It offers the prospect ASEAN economies will reduce trade and investment barriers to Australian companies.

Australia is encouraging PNG and the Pacific Island states to further open their markets in the Pacific Area Closer Economic Relations (PACER) regional free trade agreement.

Australia has commenced negotiation of bilateral trade agreements with Indonesia and Malaysia.

Securing effective results from these agreements depends upon goodwill, trust and respect. In trade that is measured by abiding by international obligations in multilateral, regional and bilateral

agreements. When those obligations are disregarded, goodwill trust and respect are eroded. The result is trade is impeded.

The fallout from the bans on live cattle exports to Indonesia demonstrates the consequences. Australia instituted a trade ban it could not justify under trade law and international quarantine standards.

Australia eventually lifted the ban, but the damage was done. One consequence is that Indonesia has now announced it will pursue a policy of self sufficiency in beef production. This will weaken the market for Australian beef in Indonesia, either because it will restrict imports to protect the domestic industry or controls will be imposed on imports. This will generate uncertainty about how much beef Indonesia will import each year from Australia and undermine confidence in Australia's beef export industry.

The unilateral restrictions envisaged in the *Illegal Logging Bill* would further hinder efforts to recover the damage from the mishandling of beef exports.

Australia has initiated discussions with Indonesia about a bilateral trade agreement. It is most likely Australia's capacity to negotiate a bilateral trade agreement which will reduce barriers to Australian exports has already been impaired, certainly for the life of the current Government.

Passage of the Bill also risks further suspicion in Indonesia about Australia's trade policy bona fides. The *Illegal Logging Prohibition Bill* also serves to advance protectionist inclinations of the Australian paper industry to restrict paper imports from Indonesia. Paper industry interests in particular have argued that one virtue of the Bill will be to restrict imports of cheaper paper. These are the same uncompetitive producers who sought and failed to secure anti-dumping duties on imports of paper products from Indonesia. The Australian customs department found the paper in question did not warrant imposition of dumping duties.

Australia is also seeking to negotiate a bilateral Free Trade Agreement with Malaysia. The Malaysian Government was pleased the Gillard Government opposed the palm oil labelling proposal. However suspicions linger about attitudes towards Malaysia among the parties which backed that proposal. The *Illegal Logging Prohibition Bill* presents similar risks. Malaysian industry officials have indicated to the Committee that consultation with them over the Bill has been perfunctory.

Australia also has other significant bilateral interests with both the Malaysian and Indonesian Governments over management of arrivals of illegal refugees. Australian interests will only be secured if governments in both countries consider Australia respects their trade and foreign policy interests

The civil alternative

Ample evidence has been put before the Committee that the incidence of entry of illegal timber and timber product is very small.

Until the Government decided to proceed with an *Illegal Logging Prohibition Bill*, the established policy convention was that the most effective way to deal with illegal logging was to work with national authorities in other countries, usually by providing development assistance to improve forest policy and governance.

In international relations, that remains the civil alternative. The fact that the US Congress and the European Union are prepared to engage in trade coercion to change logging policy in other countries creates no principle precedent for Australia to follow. Quite the contrary: the weight of international law proscribes intrusion into the sovereign authority of other countries. Yet that is what this Bill does.

Alan Oxley
Principal
ITS Global

Attachment: The Consistency of Australia's Illegal Logging Prohibition Bill with International Trade Rules, Andrew Mitchell and Glyn Ayres