Inquiry into Illegal Logging Prohibition Bill 2011

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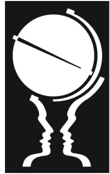

WTO implications of the Australian government's Illegal Logging Prohibition Bill

Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade of the Parliament of Australia

by

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with

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This is a submission to the inquiry into the Illegal Logging Prohibition Bill 2011 conducted by the Australian Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade.[1] It deals specifically with the interaction of the proposals contained in the Bill with the disciplines and rules of the World Trade Organisation (WTO).

The paper draws on material previously published by this author for Chatham House[2] to introduce the general debate around WTO rules and efforts to control the international trade in illegally logged timber. It then attempts to deal with the issues raised in particular by the earlier submissions to the Senate Committee on Rural and Regional Affairs and Transport of the governments of Indonesia and Canada and of Mr Alan Oxley[3] – which all mention, among other issues, the WTO implications of the Bill. Mr Oxley's submission includes a paper prepared by Andrew Mitchell and Glyn Ayres dealing explicitly with WTO (and other international trade) issues. (In fact this paper refers to the earlier version of the bill, the Exposure Draft, prepared in March 2011; some portions are therefore irrelevant, as they relate to earlier proposals which do not feature in the November 2011 Bill.)

1. Introduction: restricting trade in illegal timber

Controlling international trade in illegal timber has long been recognised as an essential part of the international effort to reduce illegal logging. The EU, US, Japan, China, Australia and other importer countries provide a market for timber from forest-rich developing countries, many of which have significant problems with illegal logging, and many of which lack the ability to regulate exports adequately. Denying criminals the proceeds of their crimes by shutting off their ability to access foreign markets has long been seen as an essential reinforcement to domestic law enforcement efforts.

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 products are exported to the EU. Six VPAs have so far been agreed, and a further four countries are negotiating them; several more are expressing interest in opening negotiations. From March 2013 the EU will also implement the Timber Regulation, which will prohibit the placing of illegally harvested timber and timber (whether from domestic production or imports) products on the EU market, and require operators to implement due diligence systems in order to minimise the risk of doing so. The US has amended its Lacey Act to make it unlawful to import 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 WTO. Indeed, critics of various proposed measures sometimes claim that WTO rules prevent any

[1] The text of the bill is available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4740. The committee's inquiry is explained at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/loggingbill2011/tor.htm.

[2] Duncan Brack, *Combating Illegal Logging: Interaction with WTO Rules* (Chatham House, June 2009), available at http://www.chathamhouse.org/publications/papers/view/109079.

[3] All available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/logging_2011/submissions.htm

interference in trade at all; although this is certainly not the case, it is true that governments must be aware of how WTO rules can constrain their efforts to control trade in timber.

2. 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.

In fact recent years have seen the rapid expansion of a range of voluntary legality verification schemes, which are increasingly used particularly in high-risk areas; several countries (such as Indonesia – see further below) are also developing mandatory national legality verification schemes. In addition, a growing volume of timber products are certified under forest stewardship schemes which aim to provide evidence of sustainable forest management and timber production, including legality but also a much wider range of criteria; the main global certification schemes are those of the Forest Stewardship Council (FSC) and the Programme for Endorsement of Forest Certification (PEFC).

It is in the attempts to establish requirements of evidence of legal origin and processing of timber products which 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 possibly contravene WTO rules:

1. 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').

2. If the requirement 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).

3. If imports are treated differently from domestic timber products, this is a violation of GATT Article III ('national treatment'). This is obviously not a problem where the measures apply to domestic products as well as imports.

4. 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 Article I.

3. Are legal and illegal timber 'like products?'

In the fourth case, it is not clear whether legal and illegal timber should be considered to be 'like products'. The GATT does not define what it means by a 'like product', and its meaning has become one of the most difficult issues in the trade–environment arena. Often interpreted as forbidding discrimination based on processes – the ways in which products are manufactured, caught or harvested

– in fact this is nowhere explicitly stated in the GATT, and several dispute cases have suggested ways in which process-based discrimination can be allowed, as long as the core principle of non-discrimination between WTO members is maintained. In deciding whether products should be considered to be 'like', aspects such as consumers' tastes and habits have been considered, as well as just the physical properties of the products.

In any case, it is not at all clear that the question of legality is a process. Legally produced timber and illegally produced timber are grown and logged in essentially the same ways; the differences relate mainly to questions of whether the harvesting should be permitted in the first place, and whether appropriate fees and taxes are paid. Not all of these factors are actually processes; payment or non-payment of export duties, for example, is clearly a post-production issue. It could be argued that the question of legality is a product, rather than a process, 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).

4. GATT Article XX

Even if the legality requirement is found to be in violation of the GATT under any of the four cases considered above, it could still be 'saved' under the provisions of Article XX, under which exceptions can be made to the other provisions of the agreement. The sub-paragraphs of Article XX list a series of measures which may be allowable. None of them relate explicitly to illegal production, but two may provide possible justifications in the case of a requirement for proof of legality.

Article XX(g) provides that measures are allowable if they are designed to ensure the 'conservation of exhaustible natural resources'. This is attractive partly because one well-known environmental trade restriction which 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. In practice, of course, illegal logging almost always contributes to the unsustainable exploitation of forest resources, in some cases dramatically so. However, action against illegal logging is not necessarily mainly concerned with conserving natural resources; enforcing existing laws, and ensuring taxes and charges are paid, may be significant objectives. On the other hand, if the measures taken against illegal timber are part of a broader package of steps to improve forest governance – as in the EU's FLEGT initiative – it could be argued that they are a necessary component of a conservation strategy.

A case could also be made under 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 which 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.

This is an unusual situation, but not one that is completely unprecedented. Early interpretations of other sub-paragraphs of Article XX (as in the tuna-dolphin dispute in the early 1990s, where the US imposed controls on the imports of tuna caught by methods that killed dolphins) assumed that the text referred to conditions in the state taking the trade measure – 'extrajurisdictional' measures were not permitted. This is not explicitly stated in the GATT, however, and the decisions in the second tuna-dolphin dispute and in the WTO shrimp-turtle dispute (over a US embargo on imports of shrimp fished with methods that killed endangered sea turtles) recognised that the GATT *does* permit countries to take measures designed to protect natural resources outside their borders.

The dispute panels and the WTO Appellate Body argued that there had to be some sort of link – the word 'nexus' was used in the shrimp-turtle dispute – between the resource and the country applying the trade measure. The fact that the sea turtles endangered by the fishing practices swim in the high seas and coastal waters of many nations – including those of the US – was a sufficient link in that case. Could the same argument succeed in the case of natural resources – timber – entirely located in the exporting country? It could be argued that consumers in the importing country share a 'nexus' through their use of the 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. Once again this argument is probably strengthened if the measure is part of a broader strategy designed to improve forest governance and sustainable forest management.

If the measure is found to be justified under Article XX(d), it would still need to be shown that it was 'necessary' to the aim of reducing the volume of illegal timber in trade – which, in WTO jurisprudence, has tended to mean whether less trade-distorting options are 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, however, an uncertain 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, FSC and PEFC, which already bear the costs of proof of legality, would not increase in price at all. 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.

If the measure is found to be justified under Article XX(g), this does not contain the requirement that the measure be 'necessary', just that it relates to the objective of the measure. It does, however, contain the requirement that the measures be 'made effective in conjunction with restrictions on domestic production or consumption', implying that no protection of domestic production must result from the measure – thus reinforcing the argument that controls must be applied to domestic products as well as to imports.

Finally, whatever sub-paragraph of Article XX is used to defend the measure, to succeed it must also satisfy the requirements of the headnote to Article XX, which requires that the measures 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’. Once again this argues strongly for domestic products and imports to be treated in the same way.

5. 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 finalised. 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 minimise the chances of handling illegal products. It is similar in several ways to the EU Timber Regulation.

6. Arguments against: are legal and illegal timber ‘like products’?

As explored above in section 3, it is not clear whether legal and illegal timber should be considered to be ‘like products’. The Mitchell/Ayres paper referred to earlier assumes that they are, on the basis of their physical properties, end uses and processes and production methods.[4] In fact, the paper implies that national laws are irrelevant to the question of 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 …[5]
>
> 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 meeting of Article I:1.[6]

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 as a basis to restrict trade in illegal timber (unless the laws in question are identical between countries). The only thing that matters is whether the timber products being imported – whether illegal or legal – are treated differently from domestic products. Even if the country of export whose laws are being flouted requests assistance from the country of import, the paper would appear to argue that WTO rules forbid the importing country from restricting this trade.

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[4] Andrew Mitchell and Glyn Ayres, ‘The consistency of Australia’s Illegal Logging Prohibition Bill with international trade rules’ (available as attachment to Alan Oxley’s submission to the Senate Committee, see n3), paras 25–30.

[5] Ibid., para 24.

[6] Ibid., para 29.

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. Rather, as argued above in section 3, legality can be thought of as a universal requirement that any product must possess to be put on sale in a (legal) market, whether at home or abroad. In reality, as a wide range of studies have shown, many forest-rich countries lack the capacity adequately to enforce their laws domestically and to prevent the export of illegal timber – which is why increasingly they are collaborating with importer countries in developing means of excluding these illegal products from trade.

7. Arguments against: savings clauses

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 sub-paragraphs of GATT Article XX, as explored in section 4 above. The Mitchell/Ayres paper considers three sub-paragraphs, (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 that not being logged or exported at all'.[7] This entirely 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 in section 4, Article XX(g), which provides that measures are allowable if they are designed to ensure the 'conservation of exhaustible natural resources', seems to be the most applicable exception, so here we deal only with that question. The Mitchell/Ayres paper concludes that although the Bill's measures could qualify under the wording of sub-paragraph (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'.[8] 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 whether 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' …[9]

If one discards this argument, and believes that importing countries are allowed to discriminate between legal and illegal timber, even if the laws in question are those of foreign countries, then it is possible that the headnote to Article XX could apply, thereby 'saving' the measure – i.e. in this case, determining that the Bill is consistent with WTO obligations. However, this conclusion is only valid if controls are applied to domestic products as well as to imports, so that no protection of domestic products results.

[7] Ibid., para 53.
[8] Ibid., paras 59–63.
[9] Ibid., para 62. The quotes are references to GATT Article XX (b) and (g) respectively.

(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.[10] Both had caveats, however, which are considered below.)

8. Arguments against: different treatment of imported and domestic timber

This is the key argument which the government needs to address in regard to the Bill, and one which will probably be impossible to deal with fully until the details of the secondary legislation are known – i.e. 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, even though the chance of imports being illegal is probably much higher. *Legal* timber imported into the country should not suffer any disadvantage in reaching the market compared with legal domestic 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 processers, 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’.[11]

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.[12] Indeed, Greenpeace’s submission to the Senate committee explicitly criticised this provision as unclear and likely to be too weak, and called for a requirement for an import declaration modelled on that in the US Lacey Act, which requires importers 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 it was harvested.[13] This does

[10] ClientEarth, ‘Legal analysis: WTO implications of the Illegal Timber Regulation’, September 2009, available at http://www.clientearth.org/climate-and-forests/climate-forests-publications/briefing-clientearth-briefing-wto-284
[11] Commonwealth of Australia, *Parliamentary Debates*, 23 November 2011, p. 13570.
[12] Illegal Logging Prohibition Bill 2011, Explanatory Memorandum, p. 15.
[13] Greenpeace Australia Pacific, Submission to the Senate Rural Affairs and Transport Legislation Committee Inquiry into the Illegal Logging Prohibition Bill 2011, pp. 7–8 (for URL, see n3).

not appear to have caused major problems for US importers. On the other hand, Canada's submission to the Senate inquiry explicitly pointed to this requirement as a potential barrier to imports into Australia.[14] Clearly, clarification of this 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 US 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 …'.[15] In fact it seems highly unlikely that the risk assessment procedure in the due diligence system would operate in this way – and the Bill makes clear that both imports and the processing of domestic raw logs are subject to due diligence procedures – but 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. As noted above, national and international legality verification and forest certification schemes are increasingly common in the international trade in timber and timber products.

The EU's voluntary partnership agreements (VPAs) with timber-producing countries under its Forest Law Enforcement, Governance and Trade (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 recognised under the Bill's due diligence procedures as guaranteeing legality, that provides an instant solution to exports from a number of countries which have experienced significant problems with illegal logging – such as Indonesia, which agreed a VPA in May 2011; Malaysia and Viet Nam are currently negotiating VPAs. The Senate committee submission from Indonesia itself drew

[14] 'Canada's concerns and suggestions for Australia's Illegal Logging Prohibition Bill and the development of the subordinate legislation', pp. 3–4 (for URL, see n3).
[15] 'Comments from the Government of Indonesia on Australia's Draft Illegal Logging Prohibition Bill 2011' (for URL, see n3).

attention to its timber legality assurance system, SVLK, which has been developed to meet the VPA's requirements.

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 entirely possible to achieve this objective.

9. Arguments against: 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 who 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 US 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 US 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 US 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 production, 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 organisations to help improve the quality of policy-making.

10. Conclusion

The inter-relationship 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 are 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 fanatics who appear to believe that illegal trade is a small price to pay for trade liberalisation and globalisation.

There are, nevertheless, genuine concerns about the extent to which well-intentioned measures may inhibit trade in legal products as well as illegal, 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 which 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 implement 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.

About the author

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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 around 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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