



Combating Illegal Logging

Interaction with WTO Rules

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Summary points

- Controlling international trade in illegal timber is an essential part of the international effort to reduce illegal logging, and consumer countries are taking a range of measures to exclude illegal timber from their markets. To date these include the EU's FLEGT licensing scheme and due diligence regulation, the US Lacey Act, and public procurement policies.
- Since these measures are designed to alter the existing patterns of international trade in timber and timber products, they may interact with the rules governing international trade overseen by the World Trade Organization.
- Concerns are often raised about whether measures like these are compatible with WTO rules. Since the outcome of any possible dispute case would rest on the interpretation of various clauses of the GATT and other WTO agreements, and since there is no experience to date of WTO dispute cases dealing with even vaguely similar issues, in fact it is impossible to be definite about the outcome of such a case.
- Nevertheless it is important to be aware of the broad constraints placed by WTO rules in designing measures such as these, which seem likely to be increasingly used in controlling trade in illegal timber. The more the measure diverges from the core WTO principle of non-discrimination in trade, and the more trade-disruptive it is, the more vulnerable it could be to challenge.
- Within these broad constraints, governments have plenty of flexibility to adopt measures designed to exclude illegal timber from international trade. None of the main measures being pursued at present should experience any conflict with WTO rules.

Introduction

Controlling international trade in illegal timber has long been recognized as an essential part of the international effort to reduce illegal logging. The EU, US, Japan, China and other importer countries provide a market for timber from forest-rich developing countries, many of which have significant problems with illegal logging.

There has accordingly been a long-running debate about the best means to exclude 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; it is also finalizing a regulation establishing a system of 'due diligence' for all timber-importing companies aimed at ensuring that they do not handle illegal products. 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 World Trade Organization (WTO). Indeed, critics of various proposed measures sometimes claim that WTO rules prevent any interference in trade at all; although this is 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. This paper therefore gives a brief summary of the WTO system and its potential interface with measures designed to control the trade in illegally logged timber.

How the WTO system works

The WTO, which came into existence in 1995, oversees a set of agreements designed to regulate international trade centred around the General Agreement on Tariffs and Trade (GATT). The WTO agreements essentially lay down general rules for governments to follow in liberalizing international trade. They cannot possibly deal with

every specific traded product or service, so they set out broad principles which must be interpreted and applied in particular dispute cases where one WTO member believes that another is failing to comply with them.

The system is based around opposition to discrimination in trade: WTO members are not permitted to discriminate between traded products produced by different WTO members, or between domestic and international products. These core principles are to be found in Articles I, III and XI of the GATT. Article I ('most favoured nation' treatment) and Article III ('national treatment') prohibit discrimination in trade, and 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.

There are, however, some exceptions permitting unilateral trade restrictions, set out in GATT Article XX, some of which have been cited in a series of dispute cases concerned with trade measures taken in pursuit of environmental protection. These include, for example, measures 'necessary to protect human, animal or plant life or health' (Article XX(b)) and those '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)) – though the headnote to Article XX makes it clear that even where these conditions apply, WTO members are not allowed to arbitrarily or unjustifiably discriminate between countries where the same conditions prevail. The key question at issue is whether the disruption to trade in each case can be justified under these wordings – e.g., in the case of Article XX(b), is the measure really *necessary* to the environmental objective, or are there alternative measures available that could achieve the same ends with less disruption to trade?

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 is the key role for interpretation that often leads to uncertainty and disagreement over what the WTO rules might mean in practice ’

It should be noted that interpretations can change, even if the wording that is being interpreted does not. In recent years, 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 extrapolate from other disputes.

Distinguishing between legal and illegal timber

Governments seeking to exclude imports of illegal timber products from their countries 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 (perhaps that provided by voluntary certification or legality verification systems) is necessary. It is in the attempts to set up such trade controls 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?

WTO implications

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.¹
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 Article I.
3. If imports are treated differently from domestic timber production, this is a violation of Article III. This is obviously not a problem where the measures apply to domestic products as well as imports, as in the EU due diligence regulation (see below).
4. The system is designed to discriminate between legal and illegal timber, and these could potentially be considered to be ‘like products’ (the term used in the GATT); if so, this is a violation of Article I.

If the legality requirement falls under the category of ‘import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade’,² this would bring it under the remit of the WTO Agreement on Technical Barriers to Trade, which is considered below.

1 It does not breach Article III, because the imported timber is not treated differently from domestic timber once it has crossed the border. If there were to be an additional requirement on imported timber to show proof of legality at the point of sale, then there would also be a violation of Article III, as there would be no such requirement for domestic timber.

2 GATT Article XI 2(b).

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 recent 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.

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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, however; 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). There is no experience at all of how a WTO dispute would consider this issue.

The 'savings clause'

Even if the legality requirement is found to be in violation of the GATT under any of the 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 more 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 (see below) – 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 nowhere explicitly stated in the GATT, however, and the decisions in the second tuna-dolphin dispute and in the shrimp-turtle dispute recognized that the GATT *does* permit countries to take measures designed to protect natural resources outside their borders. (This is a good example of the evolution of GATT/WTO jurisprudence, and underlines the interpretive function of the panels and Appellate Body.)

The panels and 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; and of course certified products, 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.

Technical Barriers to Trade Agreement

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

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

Like GATT Article XX, the TBT Agreement contains a 'saving clause' (Article 2.2), which recognizes the right to take necessary measures to fulfil a legitimate objective such as 'the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment'. All the questions discussed above in relation to the GATT are therefore

also relevant in the case of the TBT Agreement, and can be argued similarly. There has been almost no relevant experience with interpretation of the TBT Agreement, so it is not clear whether proof of legality could fall under the coverage of the Agreement, or how any conflicts would be resolved in practice.

Conclusions: do WTO rules constrain policy measures?

No one can predict exactly what would happen in a WTO dispute case dealing with measures taken against illegally produced timber – there is no experience at all to date with cases dealing with even vaguely similar issues. However, it is clear that the more policy measures diverge from the core WTO principle of non-discrimination (between imports and domestic production, and between products originating from different countries), the more vulnerable they could be to challenge. Similarly, more trade-disruptive measures would probably be more vulnerable than less trade-disruptive ones.

Within these broad constraints, however, there should be plenty of flexibility for governments to impose trade controls with the aim of excluding illegal products. Next we look at the various measures that are currently being adopted.

The EU FLEGT licensing system

The first solution reached by the EU to the problem of excluding illegal timber products involves the establishment of a licensing system for legal timber with cooperating partner countries. This lies at the heart of the EU's Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT), agreed in 2003. So far two voluntary partnership agreements have been signed, with Ghana and the Republic of Congo, and negotiations with several more countries are near to conclusion.

These agreements will put in place in each country a licensing system designed to identify legal products and license them for import to the EU; unlicensed – and therefore possibly illegal – products will be denied entry at the EU border. The agreements will include the provision of capacity-building assistance to partner countries to set up the licensing scheme, improve enforcement and, if necessary, reform their laws – and, where appro-

priate, provisions for independent scrutiny of the validity of the issue of the licences, verifying legal behaviour at every stage of the chain of custody of the timber.

WTO implications

The licensing system will be agreed on a voluntary and bilateral basis between the EU and partner countries; i.e., they are agreeing to additional trade controls between themselves, as a means of enforcing the producer country's laws. The WTO dispute settlement system does not produce rulings in the abstract; it acts only when a complaint is raised. It is inconceivable that a country would mount a WTO challenge, on the basis of impairment of trade, to a voluntary measure to which it had itself agreed.

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

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

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

It could be possible to argue that the system is discriminatory, in that FLEGT-licensed products are treated differently from imports, needing to be accompanied by a legality licence. It would be impossible, however, for a non-VPA country to argue this in relation to its own exports, which would not of course be subject to the requirement. In any case, the VPAs will include the provision of capacity-building assistance from the EU for the establishment of the licensing system by the producer country, so the additional costs to be imposed on imports from VPA countries should be minimized (indeed, the system ought to help the producer country with collecting taxes, export duties and charges).

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

The past few years have seen much debate about the extent to which MEA trade measures are compatible with WTO disciplines.³ Since there has never been a WTO dispute involving an MEA-mandated trade measure, the conclusion is not clear. However, it is frequently argued that WTO challenges would probably not arise in cases where the trade measures are taken between parties to the MEA, as the MEA itself provides a more appropriate dispute settlement forum. Even where MEA trade measures have been applied against

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

non-parties, no dispute has ever been pursued through the WTO.

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

The EU due diligence regulation

The second measure to be pursued by the EU in excluding illegal timber products is the so-called ‘due diligence’ regulation, published by the European Commission in October 2008 and currently making its way through the EU’s legislative processes.

The aim of the regulation ‘laying down the obligations of operators who place timber and timber products on the market’ is to deal with timber products entering the EU from non-VPA countries. As they are non-participants in the FLEGT licensing system, products from these sources are not subject to any controls at the point of entry into the EU (except for the small number of timber species listed under CITES). Since this provides an obvious route to circumvent the VPAs (exporters in VPA countries determined to avoid the controls could simply trans-ship their illegal products via non-VPA countries), it was recognized right from the beginning that the VPA licensing system would need some reinforcement in the form of a broader control on imports.

Many details of the regulation remain to be worked out, either in the negotiations between the European Parliament and Agriculture Council, or through secondary regulations published once it has been finally agreed. In essence, however, it aims to place a requirement on all companies placing timber and timber products on the market for the first time, either through imports or through domestic production, to try to ensure that illegal products are excluded. It will operate through a risk-based system, depending on the likelihood of products from any given origin being illegal, and

will require some degree of information about the products’ compliance with the laws of the country of origin. The Commission intends that existing product identification systems, such as timber certification and legality verification systems, will be used to make it easier for companies to identify legal timber, but it is not yet clear precisely how this will work.

WTO implications

The due diligence regulation was clearly designed with possible WTO implications in mind, in that it applies equally to timber produced domestically within the EU as well as to imports, despite the much lower risk of EU timber being produced illegally.⁴ Without this, the regulation could be vulnerable to a WTO challenge on the grounds of discrimination.

There have been various suggestions for the regulation to exclude products from small producers in the EU, on the grounds that they are less well placed to bear the cost burdens of certification or legality verification. Because of the WTO implications, this would only be acceptable if it applied equally to the products of small producers outside the EU as well – which raises some questions about how such products could be identified.

Care will need to be taken in developing the criteria for the risk assessment process, in determining the likelihood of products from any particular origin being illegal, and therefore the degree and type of proof of legality required; it is assumed that a stricter degree of proof will be necessary for higher-risk products. If the process resulted in entire countries being labelled as high-risk sources, for example, it could be vulnerable to a WTO challenge, as it would treat products from low-risk areas or companies within the country in the same way as those from high-risk ones.⁵

Could the regulation as a whole be regarded as unnecessarily disruptive to trade? Once again, it is designed not to be. As the Commission has made clear,

⁴ Though the risk is not zero; the Commission accepts that illegal logging still persists in a few EU member states.

⁵ A similar issue arose in the shrimp-turtle 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.

it does not constitute a requirement for documentary proof of legality for every product entering the EU:

Traders shall demonstrate the exercise of due diligence on the basis of a system of procedures and measures which will enable legality to be reasonably assured. This standard does not require that it is proven that each individual piece of timber is legal.⁶

The regulation aims, rather, to require companies to set up systems with a reasonable chance of ensuring legality, and is clearly attempting to make maximum use of existing systems such as certification. Exactly how the system will work, however, including precisely what information will be needed to assess legality, is not yet clear – and of course the text itself may well be changed in the process of debate.

In its current version, however, the due diligence regulation is clearly non-discriminatory, and reasonably non-disruptive. It should be therefore be safe against any hypothetical WTO challenge.

The US Lacey Act

The US has also attempted to exclude illegal timber, but its preferred measure has been to use criminal law. In May 2008, Congress voted to amend the Lacey Act, a piece of legislation originally dating from 1900, which makes it unlawful 'to import, export, transport, sell, receive, acquire, or purchase' fish or wildlife produced illegally in foreign countries. The amendment extended the coverage of the Act to plants and plant products, including timber, and added a number of details dealing specifically with illegal timber, including a definition of illegal logging, and a requirement for an import declaration. From December 2008, importers of timber products have to provide information on the scientific name of the species, the value and quantity of the timber and the name of the country in which the timber was harvested; implementation is being phased in gradually for different product types. Unlike the

EU's due diligence regulation, however, no information is required on compliance with the harvesting country's laws.

If companies are found to be handling illegal timber, however, they can be prosecuted under the Lacey Act; the penalties vary depending on the degree to which it can be shown that the company knew it was handling illegal products, or ought to have known – for example, if it was importing timber from a known source of illegal products, or without proper documentation. In all cases, even if the company did not know that it was handling illegal products, the illegal timber can be confiscated by the authorities. The Act therefore establishes a powerful incentive for companies to exercise 'due care' in sourcing timber products, and recent months have seen an increased uptake of legality verification systems among US importers.⁷ US enforcement authorities have plenty of experience of using the Lacey Act against illegal shipments of fish and wildlife, with a fair degree of success.

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The Lacey Act and the EU's due diligence regulation are almost mirror images of each other. The Lacey Act defines in law what companies must not handle, but leaves it up to them to work out how. By contrast, the due diligence regulation does not define any underlying offence of handling illegal products, but describes in some detail the systems operators must put in place to

6 European Commission, Questions and answers on the proposed regulation (October 2008), question 13; available at http://www.illegal-logging.info/item_single.php?item=document&item_id=691&approach_id=26.

7 Environmental Investigation Agency, 'Early impacts of the 2008 Lacey Act Plant Amendments' (EIA, March 2009); available at http://www.illegal-logging.info/item_single.php?item=document&item_id=741&approach_id=1.

try to ensure they avoid doing so. Suggestions have been made, however, for the inclusion of a Lacey Act-style offence in the due diligence regulation, with the aim of increasing its effectiveness.

WTO implications

The Lacey Act is not a trade measure, applied at the border. Imports of fish and wildlife entering the US are not, in general, required to provide proof of legality at the point of import, any more than goods put on sale in British shops have to prove that their supply has not violated the Theft Act. It is simply a provision to make fish and wildlife – and now timber – produced illegally overseas also illegal in the US.

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GATT Article III does require imported and domestic ‘like products’ to be treated identically with respect to internal taxes and regulations, which could potentially cover Lacey Act-style legislation. However, there is nothing in the Lacey Act to imply that imported and domestic products should be treated any differently from each other, and there should therefore be no likelihood of a WTO challenge.

The issue of WTO compatibility has also been discussed in the context of the ongoing debate about means of controlling trade in illegally caught fish. A

number of other countries possess Lacey Act-style legislation applying to fish, and in 2006 the High Seas Task Force, an international group of fisheries ministers and NGOs, recommended the adoption of domestic legislation similar to the Lacey Act.⁸ In a background paper produced for the Task Force, the US concluded that there was no likelihood of a WTO challenge:

The United States is confident that the application of Lacey Act prohibitions to imports taken unlawfully in foreign jurisdictions do not violate US trade obligations ... The Lacey Act does not provide protection to any domestic product at the expense of foreign product, and in fact, the law applies equally to illegally taken product imported by domestic or foreign entities.⁹

Some questions have been raised about whether the new requirements for an import declaration for timber products could violate WTO rules, but in fact information like this is typically required of all imports. The major departure in this case is the requirement for information on the country in which the timber was originally harvested. This differs from normal country-of-origin requirements, which accept that when a product undergoes a significant economic transformation (such as logs being processed into plywood), the country of origin becomes the processing country rather than the original country of harvest. However, these rules are set by individual countries, not by the WTO; the existing WTO Agreement on Rules of Origin is fairly limited in effect, simply requiring that such rules be transparent and be administered in a consistent, uniform, impartial and reasonable manner, and that they do not have restricting, distorting or disruptive effects on international trade. It has yet to be shown that the new US import declaration might do that.

8 High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, Summary proposals of the Ministerially-Led Task Force on IUU Fishing on the High Seas, March 2006, p. 16; available at www.illegal-fishing.info/item_single.php?item=document&item_id=52&approach_id=16.

9 Paul A. Ortiz (National Oceanic and Atmospheric Administration), *An Overview of the US Lacey Act Amendments of 1981 and a Proposal for a Model Port States Fisheries Enforcement Act* (paper prepared for the Ministerially Led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas), section 7; available at www.illegal-fishing.info/item_single.php?item=document&item_id=60&approach_id=13.

Public procurement policy

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

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

Governments have greater latitude in imposing requirements for their own purchases than in setting trade rules for their countries as a whole, and several have introduced procurement policies which specify that all timber products bought by government must be legally and, generally, sustainably produced; such policies currently exist in Belgium, Denmark, France, Germany, Japan, the Netherlands, New Zealand, Norway and the UK.¹⁰

WTO implications

Government procurement measures are explicitly excluded from the GATT; they are subject instead to the WTO Government Procurement Agreement (GPA). Unlike most WTO agreements, this is a plurilateral agreement, to which not all WTO members are parties – in fact, as at June 2009, only the EU (and all its member states) and twelve other countries are parties; eight further states are currently negotiating accession. While some important producers of timber (the EU, Canada and the US) are GPA signatories, most – including China, Russia and all the timber-exporting developing countries – are not.

The GPA is significantly different from the GATT and other WTO agreements in a number of respects. GPA rules do not apply automatically to all procurement contracts; GPA parties specify the government entities

and services they decide to have covered, and also minimum threshold values, and can also specify exclusions. Timber procurement, therefore, does not necessarily have to be covered, and could be subject to exemptions even if it is.

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

Following the discussions above, there seems no reason to think that most of the timber procurement policies so far adopted could be subject to a successful challenge under the GPA. In practice, procurement policies have acted to provide a boost to the market for certified timber products, since certification under the main international schemes (FSC and PEFC) has proved to be the easiest way to meet the procurement policies' criteria; in fact, Germany has decided simply to accept the criteria set out in those two schemes rather than develop separate criteria of its own. Article VI of the GPA forbids setting technical specifications in the form only of particular certificates, but all the procurement policies with detailed criteria, and Germany's, provide for equivalent forms of proof as well.

The Norwegian procurement policy, however, could be subject to challenge if any tropical timber-producing country was a GPA party. Norway's policy simply bans the use of all tropical timber in government buildings, regardless of its means of production, and is therefore clearly discriminatory – though not against any current

¹⁰ For more details see Duncan Brack, *Controlling Illegal Logging: Using Public Procurement Policy* (Chatham House briefing paper, June 2008), available at http://www.illegal-logging.info/item_single.php?item=document&item_id=633&approach_id=25.

GPA party (and Norway could always decide to exclude this policy from its GPA coverage). No other timber procurement policy, however, contains such crude criteria; they all apply to products regardless of their country of origin. Nor do any of them discriminate on the basis of the supplier's nationality.

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

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

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

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