



Combating the International Trade in Illegally Sourced Timber: Options Available to the EC

Briefing Document: Clarification Of The Legal
Technicalities and Constraints of Introducing Measures
to Combat the International Trade in Illegally Sourced
Timber and Timber Products

Introduction

The discourse on illegally sourced timber and timber products is evolving rapidly at the international level. International trade rules remain a stumbling block for activists and policy makers alike. Governments frequently refer to the WTO as a justification for inaction, while NGOs push for actions that are seen by policy makers as unrealistic given existing trade regimes.

There is a need for increased knowledge about the GATT/WTO to progress the debate, and to facilitate the finding of creative and effective solutions to tackle the problem of the international trade in illegally sourced timber and timber products. This draft briefing is intended to provide an initial analysis of the legal implications of EC measures¹ to restrict the import of illegally sourced timber. As this is a legal briefing, it does not consider the wider implications of such measures.

The following provides a brief analysis of relevant trade law as well as an outline of possible approaches and obstacles to introducing measures to restrict the import of illegally sourced timber and timber products.²

Context

Over recent years, the relationship between trade and environment has gained prominence, and the 4th WTO Ministerial Conference in Doha in November 2001, firmly put the environment on the agenda for the new trade round.³ The WTO will further explore the relationship between existing WTO rules and specific trade obligations as set out in multilateral environmental agreements (MEAs). This was reaffirmed at the Johannesburg summit, and the following paragraph was included in the Plan of Implementation that resulted from the summit;

‘Promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments’ (WSSD, Plan of Implementation paragraph 18).

¹ The definition of a ‘measure’ is open, and in the context of this briefing it could mean anything from a unilateral import ban, to increases in tariffs or taxes related to timber, changes in verification procedures, requirement of certificate of legal origin, sales bans, confiscation/forfeiture of illegal timber and timber products.

² The WTO website, www.wto.org, provided a useful source for this section.

³ Steve Charnovitz, ‘The environmental significance of the Doha Declaration’, *Bridges* (Year 5, no 9, 2001), p. 13.

1. The WTO and the Trade-Environment Dialogue

The WTO seeks to raise global standards of living by liberalising trade. Its basic tenets are as follows:

- *Elimination of Barriers to Trade*: The agreements prohibit quantitative restrictions, such as quotas, import/export licenses and bans. Tariffs are the only permissible form of trade barrier, and they shall be reduced and eventually eliminated;
- *MFN*: Members shall treat 'like products' of other Members according to how they treat the products of their most-favoured nation; and
- *National Treatment (NT)*: Members shall treat imported products no less favourably than the treatment accorded to 'like products' of national origin.

A measure that seeks to restrict the trade of illegally sourced timber and timber products within the EC would be open to challenge under at least two WTO Agreements, the General Agreement on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement). Among other things, these agreements:

- preclude the instituting and maintenance of quantitative restrictions on imports (GATT Article XI:1);
- prohibit discrimination in connection with imports as between the like products of third states (GATT Article I);
- require that imported products shall be accorded treatment no less favourable than that accorded to like products of national origin (GATT Article III:4);
- require in respect of technical regulations⁴ that imported products shall be accorded treatment no less favourable than that accorded to like products of national origin (TBT Agreement Article 2.1);
- require that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade (TBT Agreement Article 2.2); and
- impose publication, notification and consultation requirements on a WTO Member that proposes to introduce technical regulations in an area in which relevant international standards do not exist (TBT Agreement Article 2.9).

a) Committee on Trade and Environment (CTE)

The relationship between trade and environment has always been controversial, and discussions in the General Council and the Committee on Trade and Environment

⁴ See paragraph 4.

(CTE) demonstrate that the WTO is split on various issues. The CTE was established by the WTO general council in 1995 and it has broad responsibilities covering all aspects of the multilateral trading system.

There are approximately 200 multilateral environmental agreements, only 20 of these contain trade provisions, limiting the scope of the discussions within the CTE. The Doha Declaration calls on the CTE to, amongst other things, focus its work on the effect of environmental measures on market access and eco-labeling.⁵

Importantly, the CTE is made up of Member States and political differences have often brought debate to a virtual standstill. As has been noted, the CTE has failed to make any policy recommendations in the past seven years.⁶ Increased input from stakeholders and experts would benefit the work of the CTE, and help Members progress beyond the stalemate that often arises. Currently, several requests for observer status are pending. There are hopes that the new duties assigned to the CTE by the Doha Declaration may help focus the agenda of the Committee, and render it more effective. The nature of the make-up of the membership, however, does point to a risk for continued inaction.

b) Dispute Settlement System

In addition to the CTE, environment-trade issues have been dealt with within the WTO Dispute Settlement system. The Appellant Body has traditionally ruled against unilateral environmental measures, preferring multilateral action instead. It points to Rio Principle 12 to acknowledge the importance of multilateral solutions, and has introduced a duty to negotiate in good faith prior to the introduction of unilateral measures. Importantly, however, the latest Shrimp-Turtle, Recourse to Article 21.5 decision, demonstrates that the Appellant Body has not ruled out the use of unilateral measures.

c) The Agreement on Technical Barriers to Trade

With respect to the TBT Agreement, a measure may only constitute a violation if it amounts to a “technical regulation”. A technical regulation is a measure that lays down product characteristics or their related processes and production methods. If the EC were to enact consumer legislation to restrict trade in timber and timber products based on the way they are produced, such legislation could very well amount to a technical regulation, leaving it open to challenge under the provisions described below.

⁵ ‘Environment: A Potential ‘New Beginning for the World Trade system?’ *Bridges* (year 5, no 9, 2001), pp 5 and 19.

⁶ Charnovitz, p. 13

d) Article 2.1 of the TBT Agreement

Article 2.1 ensures that technical regulations are not applied in a manner that results in less favourable treatment being afforded to imported products as compared to like products of a national origin. The principle question is whether illegally sourced timber products are “like” legal timber products. The answer to this question will determine whether they have to be treated in a ‘no less favourable’ manner. Instinctively, one would think that there is a difference between legal and illegal products, however, WTO jurisprudence seems to suggest otherwise.

According to the WTO Appellate Body, the determination of “likeness” is based on four general criteria: (i) the properties, nature and quality of the products; (ii) the end-uses of the products, (iii) consumers’ tastes and habits in respect of the products and (iv) the products’ tariff classification. As the criteria relate primarily to the physical characteristics of the products, not to their origin or production method, the present state of the law suggests that it would be difficult to differentiate between a timber produced in accordance with, or in violation of, another Member’s laws.

The thought that illegally sourced timber should be treated in the same manner as legal timber is widely acknowledged to be unacceptable. Nevertheless, the law as it stands does not provide a clear and easy basis upon which to distinguish between illegal and legal logs. As the *Asbestos* decision⁷ has left open the criteria used to determine ‘likeness’, any efforts made by the EC to advance the debate and to contribute to the recognition that illegally sourced timber products are not like legal imports and not like timber products of EC origin would be significant and welcomed.

e) Article 2.2 of the TBT Agreement

Article 2.2 obliges Members to “ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” It also provides that trade regulations should be no more trade restrictive than necessary to fulfil their objective. WTO jurisprudence gives little insight as to how this provision would be interpreted. Nevertheless, the word “unnecessary” implies that a Member must attempt all reasonably available alternatives that are less trade restrictive before adopting a more serious obstacle to trade, such as a ban. As the EC has made few efforts to date to negotiate a less trade restrictive means of preventing illegal logging, Article 2.2 would likely provide another basis to challenge consumer legislation that imposes a ban.

f) Article 2.9 of the TBT Agreement

Article 2.9 imposes notification requirements on a WTO Member that proposes to adopt and apply a technical regulation. The idea behind notification is that it permits other WTO Members time for consultation. It also provides producers with the

⁷ EC – *Asbestos*, AB Report, adopted 5 April 2001, WT/DS135/AB/R, at para. 80.

opportunity to make any necessary adjustments to the methods of production of their products in order to meet the regulation.

A Member is required to comply with the notification requirements of Article 2.9 when no relevant international standard exists upon which to base a technical regulation. It is clear that there is currently no international standard that establishes what amounts to illegally sourced timber and timber products. Therefore, consumer legislation could be subject to a WTO complaint on the basis that the EC failed to fulfil its notification requirements.

g) Approaches to Avoid Non-compliance under the TBT Agreement

First, it is important to realise that the TBT Agreement does not contain exceptions like those of GATT Article XX, which justify a departure from the substantive obligations in the Agreement. Instead, it is the preamble of the TBT Agreement that recognises that “no country should be prevented from taking measures necessary ... for the protection of ... plant life [and] the environment”. This suggests that although a technical regulation may be adopted in order to protect the environment or guard against deceptive practices, the regulation must still comply with the other provisions of the TBT Agreement. This does not mean, however, that the TBT Agreement prevents Members from taking action to prevent the trade in illegally sourced timber. In fact, the provisions of the TBT Agreement must be interpreted with regard to the preamble, and therefore with regard to the Member’s right to take measures necessary to protect the environment, and to protect against the use of deceptive practices. Nevertheless, the provisions of the Agreement clearly stipulate that a technical regulation must not be more trade-restrictive than necessary, and that the Member adopting it must comply with its notification and consultation requirements in Article 2.9.

Due to the limitations stated above, the immediate adoption and application of consumer legislation banning imports of illegally sourced timber and timber products could result in it being easily challenged. Matters are further complicated by the intricacy of identifying what is illegal. Moreover, the TBT Agreement seeks to ensure that technical regulations are to be measured against international standards⁸ and against the technical regulations of another Member.⁹ If they are adopted on a unilateral basis, notification requirements must be complied with. A technical regulation may therefore not depend on the laws of the exporting country alone, since those laws create no obligations for the EC.

One available course of action is for the EC to commence immediately a process that would result in the creation of a legal obligation to prevent the trade in illegally sourced timber and timber products. One manner of doing this is to draft a technical regulation requiring the identification of lawful production and processing of timber and timber products, and to begin the process of notification required by the TBT Agreement. Even if the technical regulation ultimately went unadopted, consultations

⁸ TBT Agreement, Article 2.4.

⁹ TBT Agreement, Article 2.7.

that would ensue on a regional and bilateral basis could result in the necessary steps being taken to ebb the flow of illegally sourced timber and timber products into the European Union.

An additional course of action is for the EC to consider how best to proceed to create an international standard that recognises the ‘lawfulness’ of imported timber products. The continued importation of illegally sourced timber and timber products is not only contributing to the destruction of forests and to the encouragement of corruption, it is likely harming local European industry. While foreign timber may have been harvested illegally, European timber must conform to domestic laws and regulations.

2. The General Agreement on Tariffs and Trade

With respect to the GATT, a violation of one of its provisions may be justified by the exceptions in Article XX, provided that certain requirements are met. These are considered following a brief analysis of the TBT Agreement.

Consumer legislation banning the importation of illegally sourced timber would also give rise to issues under the GATT, and in particular, problems in relation to Articles III:4 and XI. Like Article 2.1 of the TBT Agreement, GATT Article III:4 prevents ‘like products’ from being treated less favourably.¹⁰ Article XI prohibits all measures, other than duties, taxes or other charges, that prohibit or restrict imports. Consumer legislation that restricts the importation of illegally sourced timber and timber products would likely be challenged under one or both of these principles. The question is whether the legislation could be justified as an exception, according to Article XX.

a) Article XX of the GATT

The purpose of Article XX is to allow Members to derogate from the GATT’s general tenets in certain circumstances. The three most relevant exceptions to the discussion of illegally sourced timber and timber products allow for measures to be taken relating to the conservation of exhaustible natural resources,¹¹ measures that are necessary to protect human, animal or plant life or health,¹² and measures necessary to secure compliance with existing laws or regulations.¹³

The text of the relevant parts of Article XX is as follows:

Subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,

¹⁰ The comments in respect of Article 2.1 of the TBT Agreement therefore apply equally to Article III:4 of the GATT. See paragraph 8.

¹¹ GATT Article XX(g)

¹² GATT Article XX(b)

¹³ GATT Article XX(d)

or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

Strong arguments could be made to justify consumer legislation restricting the trade of illegally sourced timber and timber products, especially with respect to Article XX(d). Once it has been shown that a measure falls within the scope of any of the above paragraphs, the requirements of Article XX's chapeau must be satisfied.

The chapeau stipulates that for a measure to be acceptable, it may “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.” The chapeau aims to prevent the abuse or misuse of the exceptions,¹⁴ and therefore embodies “a balance of rights and obligations.”¹⁵ The balancing exercise contains three standards: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade.¹⁶ The existence of any one of these standards will result in the measure not being entitled to justification under Article XX.¹⁷

With respect to the third standard, three criteria have been advanced to date to determine whether a measure has the intention to disguise or conceal the pursuit of trade-restrictive objectives. These are: a) the publicity test; b) the measure's design, architecture and revealing structure, and c) the arbitrary or unjustifiable discrimination test.¹⁸

For an illegal logging measure to succeed, it is clear that it must be publicly announced,¹⁹ and its design, architecture and revealing structure must demonstrate that the measure was not meant to have a concealed protective application.²⁰ Moreover, it must satisfy “the kinds of considerations pertinent in deciding whether

¹⁴ *US – Reformulated Gasoline*, AB Report, 20 May 1996, AB-1996-1, WT/DS2/AB/R, at p.21.

¹⁵ *US – Shrimp*, AB Report, adopted 6 November 1998, WT/DS58/AB/R, at paras. 158 and 156.

¹⁶ *Id.* at para. 150.

¹⁷ *US – Shrimp*, AB Report; *US – Shrimp (Article 21.5)*, 2 October 2001, WT/DS58/AB/RW.

¹⁸ *EC – Asbestos*, Panel Report, at paras. 8.233-8.238.

¹⁹ *Id.* at para. 8.234.

²⁰ *EC – Asbestos*, Panel Report, at para. 8.236 and *US – Shrimp (Article 21.5)*, Panel Report, at para. 5.142.

the application of a particular measure amounts to arbitrary or unjustifiable discrimination”,²¹ the first two standards.

When assessing whether a measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination, the Appellate Body has considered the flexibility of the measure as well as the efforts of the State invoking it to negotiate a co-operative solution to the problem. For a measure to be flexible, it should be “appropriate” or “suitable to the conditions prevailing in the exporting countries”.²² As for negotiations, the Appellate Body has stated that they must be initiated by the Member seeking to invoke the measure, involve all interested parties, constitute serious, good faith efforts, and take place before the enforcement of a unilateral trade measure.

The EC may decide that they want to work towards a complete ban on the import of illegal timber and timber products. As the latest Shrimp-Turtle decision and the analysis above demonstrate, unilateral action is not completely ruled out. Rather, the Appellate Body has set out a number of tests that such a measure must meet (see above). If the EC elects to work towards a ban, they should engage in extensive negotiations with producer countries, introduce less trade restrictive measures, and actively seek to combat the problem of illegal logging and trade in illegal timber through participation in existing international fora.

Conclusions

There are a number of possible ways in which the EC can help to restrict imports of illegally sourced timber and timber products. The analysis of the TBT Agreement and the GATT below suggest that regardless of the course of action chosen, negotiations with timber exporting countries must take place.

- First, the EC could immediately commence a process that would result in the creation of a legal obligation to prevent the trade in illegally sourced timber and timber products by introducing a technical regulation requiring the identification of lawful production and processing of timber and timber products, and to begin the process of notification required by the TBT Agreement.
- Second, the EC could encourage the development of an ‘international standard’ in respect of which a technical regulation can be adopted.
- Third, the EC may initiate negotiations with a view of adopting the least trade-restrictive means to address illegal logging, and should the negotiations fail, proceed to adopt consumer legislation or other unilateral measures
- Fourth, another alternative open to the EC is to consider how best to proceed to create an international standard that recognises the ‘lawfulness’ of imported timber products.

²¹ *EC - Asbestos*, Panel Report, at para. 8.237; see also *US - Reformulated Gasoline*, AB Report, at p.23.

²² *US - Shrimp (Article 21.5)*, AB Report, at para. 144; *US - Shrimp (Article 21.5)*, Panel Report, at paras. 5.122 and 5.46; *US - Shrimp*, AB Report, at paras. 161-164.

Recommendations

Regardless of the course of action taken, the EU should commence immediately bilateral and regional negotiations. These negotiations should not be discounted in favour of a multilateral process. Multilateral negotiations are not discouraged, but as they can be drawn out over a long period, bilateral efforts should take place in the meantime. The bilateral agreements must include commitments on the part of the producer countries to undertake judicial reviews of their forestry legislation, and solve any outstanding issues with regard to land tenure and customary land rights.

The Forest Law Enforcement and Governance (FLEG) initiative has demonstrated that some exporting states are open to finding co-operative solutions to combat the trade in illegally sourced timber. The EU should actively engage with exporter states participating in the FLEG process to reach bilateral treaties that:

- Have the purpose of eradicating the trade in illegally sourced timber and timber products
- Oblige parties to increase transparency of the forestry sector and make concession maps, names of concession holders and associated information publicly available.
- Oblige parties to engage stakeholders at all levels
- Oblige parties to adopt legislation defining illegal timber and timber products
- Prohibit the trade of timber products that have been produced in contravention to the laws of the exporting state
- Solve any outstanding issues regarding land tenure and customary lands