

NEW EU TRADE REGULATIONS TO COMBAT ILLEGAL LOGGING: A CRITIQUE

by

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1. THE EU BATTLE AGAINST ILLEGAL LOGGING

The EU has for several years been engaged in what it describes as an “international fight against illegal logging” across the world. The policy is driven by a belief that there is too much logging. The Commission says that: “Illegal logging is a major contributor to global deforestation which causes enormous environmental damage. Deforestation is responsible for approximately 20% of global emissions of greenhouse gasses (more than the total emissions from the transport sector) and is a major cause for global losses of biodiversity” (European Commission, 2008, p.1).

These claims are widely published and almost universally accepted and need no rehearsal here. Instead, this paper focuses on the tactics the EU uses in its fight.

One core tactic, already in operation, is threat. The EU has said that it may refuse shipments of timber to the EU unless the exporting country accepts a system under which each piece of timber and each timber product sent to the EU is accompanied by a license showing, *inter alia*, that it was legally harvested. This was the central plank of the 2003 EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT). The license proposed by the EU is usually referred to as a FLEGT license.

To refuse entry to the EU of exports not accompanied by a FLEGT licence may conflict with the WTO commitments of the EU; an issue discussed in the second half of this paper. Nevertheless, faced with the threat, a number of countries have agreed to

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negotiate with the EU in an effort to arrive at what the EU calls – ironically, in the light of the threat that preceded them – FLEGT Voluntary Partnership Agreements (VPAs).²

An issue now under discussion is how the EU should build upon the VPA foundation. The Commission proposed new legislation to the European Parliament and the European Council in 2008. In April 2009, the Parliament passed as a first reading a heavily amended version of the Commission’s proposal (European Parliament, 2009).

2. PROPOSALS OF THE PARLIAMENT AND THE COMMISSION

The document approved on a first reading by the parliament differs from that proposed by the Commission in many respects – too many for all to be considered in this short paper. The following section, however, highlights central elements of the two proposals and differences between them.

2.1 Definition of illegality

The Commission proposal says (p.2) that: “illegal logging takes place when timber is harvested, processed or traded in violation of national laws applicable in the country of harvest”. It defines ‘applicable legislation’ (Art 2(c)) as “the legislation of the country of harvest regulating forest conservation and management and the harvesting of timber as well as legislation on trade in timber or timber products related to forest conservation and management and the harvesting of timber”.

The parliamentary version casts a wider net. It says (Article 21) that, “In the absence of an internationally agreed definition, the legislation of the country where the timber was harvested should be the *primary* basis to define what constitutes illegal logging”. It goes on to call for “further consideration” of a list of sources of international standards, though who should consider and what might be the outcome of consideration is not clear. The parliament also calls on “[t]he timber-harvesting country [to] provide an inventory of total local logging including details of tree species and maximum timber production”. It does not say on what authority it demands this information and offers no indication of the action, if any, that such an inventory – or a failure to provide one -- might trigger.

To complement this wide-ranging approach, the parliament offers a broader definition

² Malaysia, Indonesia, Cameroon, Congo (Brazzaville) and Ghana have opened negotiations with the EU. The Commission claims (p.8) that Russia and Brazil have “shown interest in discussing VPAs with the EU”.

of 'applicable legislation' (Article 2(h)). "Applicable legislation", it says, "means legislation, whether national, regional or international, in particular that concerning the conservation of biological diversity, forest management, resource use rights and the minimisation of adverse environmental impacts; it should also take into account property tenure, rights of indigenous people, labour and community welfare legislation, taxes, import and export duties or fees relating to harvesting, transportation and marketing".³

The tone adopted by the parliament is oddly suggestive of an imperial power issuing instructions to client states. It may not be the most productive approach.

In terms of practicality, also, the Commission's focus on the national legislation of the country of harvest – which, of course, may be influenced by regional or international treaties and conventions -- is simpler to apply than that of the Parliament. Indeed, the meaning of the parliamentary version is far from clear. What, for example, does it mean to "take into account property tenure, rights of indigenous people, labour and community welfare legislation, taxes, import and export duties or fees relating to harvesting, transportation and marketing"? Were these words to become EU law, could anyone tell from them what timber might be deemed by the EU to be illegally harvested?

Yet the proposal of the Commission also raises problems. If the EU respects national legislation, why not respect national enforcement of that legislation?

Moreover, in both proposals, EU action is ostensibly focused on stopping exports to the EU of illegally harvested timber. But while it is easy to see that there may be illegal harvesting, it is harder to see how this leads to the *export* of illegally harvested timber. Governments of timber-producing nations typically tax logging. They have a clear incentive to police timber that leaves their frontiers in order to ensure that tax has been paid.

Timber exports may be easier to police than illegal logging, moreover -- a shipment of timber, after all, can't be hidden in the bottom of a suitcase. Moreover, since its carriage requires roads, waterways or ports, a shipment of timber will typically have only a small number of feasible exit points. If the object of the proposed EC legislation is to keep out

³ Similar but not identical words are to be found in paragraph 18 of the introduction to the parliamentary version of the proposed legislation, which describes the principles that "must" be set out in VPAs.

of the EU timber that has been harvested without the permission of the national government of the country of harvest, it is not evident that anything more than technical assistance is needed.

2.2 Due diligence

A requirement that operators in forest products should display due diligence is at the heart of both legislative proposals. That condition, the Commission says (p.7), “requires operators to exercise due diligence to ascertain to the best of their ability that the timber and timber products they place on the Community market were legally harvested”. “A major advantage of requiring due diligence”, the Commission continues, “is that it will tend to favour sourcing from countries ... that have concluded FLEGT VPAs with the EU ...”.⁴ And although due diligence has the sound of voluntarism, the Commission notes (p.9) that: “... due diligence is not just a moral duty to care but a legal requirement for a proactive behavior”.

The Commission (Article 4) says that a due diligence system “shall provide access to information on timber and timber products placed on market by the operator”. It calls for a description of the product; country of harvest; volume and/or weight; the identity of the supplier, “where applicable”; and certification of compliance with the applicable legislation. It requires a procedure to minimise risk of error and provides for audits of the system – presumably by the monitoring organisations referred to in Article 5 and discussed below.

Article 4 of the parliamentary version elaborates on the Commission proposal, laying greater and more explicit emphasis on “employing a traceability system and third party verification by the monitoring organisation”. It says, moreover, that: “[t]hese measures shall be supported by appropriate documentation maintained in a database by the operator or by the monitoring organisation”. (Emphasis added)

The traceability system requires that documentation accompanying a piece of timber or a timber product should permit a buyer or bureaucrat to trace back through the chain of transactions to the point at which the timber was harvested. That requires a great deal

⁴ This is a foolish comment, presumably by an official who knows nothing of the WTO, despite the fact that WTO rules are necessarily a major factor in the appropriate design of VPAs and of FLEGT licenses. Favours of the kind the comment refers to is unlikely to be consistent with the WTO obligations of the EU, and therefore unlikely to survive examination in the WTO legal system. The issue is discussed below.

of documentation, and is a heavy burden to place upon forest operators, especially in, but not only in, poor countries, in which the information infrastructure might be less developed.⁵ It seems likely that much of that burden will be shifted to the monitoring organisations (MOs) that both proposals seek to establish.

It should be noted, furthermore, that whatever paperwork burdens the EU puts on foreign sellers of timber or timber products, it must put the same burden on domestic sellers of timber or timber products. Under the national treatment provisions of the WTO, the EU can favour domestic sellers over foreign sellers only by means of import duties: it cannot, consistently with its WTO obligations, favour them by exempting them from administrative burdens that it places on foreign sellers.

2.2.1 Monitoring Organisations

The working in practice of the proposals of the Community institutions depends crucially on the nature of the monitoring organisations (MOs) and how deeply they are involved in the due-diligence system. On the basis of the information in the two proposals, the function of MOs could range anywhere from making spot checks on information held by loggers to designating what is legal; giving loggers permission to work; and keeping records of their activities.

Article 10(1) of the Commission proposal requires that “each Member State shall designate one or more competent authorities responsible for the operation of this Regulation”. Article 5(1) calls for competent authorities to “recognise monitoring organisations which apply for such recognition if the monitoring organisation has legal personality; has established a due diligence system consistent with the legislation, which it obliges operators to use; has in place a monitoring system to ensure the use of its system; and takes “appropriate disciplinary action’ against any certified operator who fails to comply with it.

The parliament’s amendment goes further. It offers separate requirements for MOs that are public entities and those that are private. It adds an essentially new and lengthy

⁵ This burden is recognised in Article 2 of the parliamentary draft, which calls upon the Commission to “... take particular account of the special position and capacity of SMEs [small and medium sized enterprises] and, as far as possible, offer those enterprises adapted and simplified alternatives to reporting and control systems so that those systems do not become too burdensome.” This is an odd instruction. If simplified alternatives are available, should they not be available to everyone?

section on “monitoring and control measures” (Article 8), which requires “competent authorities” to “carry out controls to verify if operators comply with the requirements” of the legislation. Presumably MOs, whose function it is to ensure operator compliance, will also be checked. There is a great deal of scope for confusion here about the responsibilities of the “competent authorities”, the MOs, and the forest operators.

Neither document discusses how MOs will be staffed or funded. In principle, they might be paid by the EC, by the government of the exporting country, or by loggers; and they might be paid a fixed amount par annum or a fee per log certified. Despite their central position in both proposals, absence of these details impedes assessment of their likely behaviour.

3. ANALYSIS

A central question for analysis of any legislative proposal is whether the legislation is likely to achieve the objectives at which it is said to be aimed and whether the proposal is the best way of achieving them. A complication for such analysis in the case of the new proposals for timber trade, however, is uncertainty about the true target of the legislation. Is the legislation intended to reduce the possibility of illegally harvested timber entering the EU market, or is it intended to establish a model and a modality for international control of logging?

Much of the high-flown rhetoric in both proposals suggests the latter: it does not make much sense to talk of global deforestation and greenhouse gasses if the actions proposed simply shuffle illegally harvested timber between the EU and the rest of the world, as is clearly possible. If the EU insists on certified timber, that is what it will probably get – and dubious shipments will be shifted to other, less environmentally correct destinations. In that likely event, there will be little or no change in the incentives for illegal logging, nor, therefore, any reason to expect changes in the volume of illegal logging; nor, since these would follow from changes in that volume, any environmental effects.

The Commission’s response to this probable outcome certainly suggests that its ultimate aim is international control of logging. It says (p.11):

“It has been argued that measures affecting imports of timber and timber products would only shift trade to non-discriminatory markets. However, the EU is a major

player in the international arena and with such an initiative it would set the example and send a clear signal on its commitment in the combat against illegal logging, loss of biodiversity and climate change, encouraging similar initiatives from other major consuming nations”.

This may be true, but it is not obviously true; and may, indeed, be a serious overestimate of the power of the EU to influence the rest of the world. Certainly, other outcomes are worth analysis.

3.1 FLEGT licenses and the global market

Several remarks about the proposals are appropriate. One -- that they might have no effect other than shuffling illegally harvested timber between markets -- has already been noted.

Second, if the EU can insist on its own certification system, other importers can also do so.⁶ But if other major timber importers adopt certification systems, the possibility of conflict arises: the US rejects EU certification and the EU rejects US certification. That could lead to messy outcomes as well as to acrimony.

Yet if importers accept one another’s certification systems *without* harmonizing the conditions under which they are granted, competition between them becomes a third issue. If the EU allows loggers to use alternatives to FLEGT licenses as a means of accessing the EU market, loggers will use whichever alternative is the least expensive. They will reject FLEGT licenses if there is a cheaper alternative. If the EU wants to promote FLEGT licenses as a global standard, therefore, it should give thought to ensuring that the FLEGT license is cheaper than the alternatives. That probably implies direct funding of the licenses from the EU – but the same applies to any other certification system that aims for global dominance.

Fourth, however licenses are funded, EU residents will ultimately pay the cost of the EU certification system, either through taxation or through higher prices of timber. Different schemes may shift the payments of the costs between taxes and the cost of wood, but, through one route or the other, EU residents will pay.

⁶ Legislative action in the US has entailed amending the Lacey Act – which is aimed at wildlife trafficking – to include timber. Proposals to this effect passed the House and the Senate in 2008, and the US started phasing in a certification system on 15 December 2008.

This is clear when all of the costs of licenses are funded by EU taxes, but may be less clear when they are not. Suppose, therefore, that:

- (a) the EU only permits imports that are accompanied by a FLEGT license; and
- (b) all of the costs of obtaining a FLEGT license are borne by operators.

Supposition (b) opens the possibility that licenses are expensive for operators; which in turn means that exports to the EU cost exporters more than sales to markets that do not carefully discriminate between legally and illegally harvested timber. The cost of timber exported to the EU will reflect this difference in the costs of servicing different markets. If it is more expensive to export to the EU than to other areas, operators will raise the prices they charge for timber exported to the EU until the difference in prices reflects the difference in costs, and the profitability of serving the two markets is the same.⁷

Under these conditions, the cost of the FLEGT license to operators will be reflected in a higher price of timber exported to the EU, and EU purchasers of timber will ultimately pay for the licenses.

3.2 Unanswered Questions

To press further detailed analysis of proposals that themselves lack detail is not, however, useful. In the present case, some missing detail relates to institutions: the exact role and character of the monitoring organisations, for example, or the way in which the proposed innovations will be financed. Answers to these questions are crucial for a proper analysis of the effects of the parliamentary proposals. They do not, however – or do not obviously – raise issues about the legality of the proposals.

⁷ More precisely, operators will adjust prices until the expected profits of serving the markets are the same at the margin.

The consequent difference in prices will depend on whether the cost of the license is fixed (a logger pays £x p.a. to have timber certified, regardless of quantity) or marginal (a logger pays £z per tonne for certification). Elaboration of this point does not seem useful here, however.

When licenses are costly for loggers, it is conceivable that the rise in the price of timber in the EU following introduction of a certification system will cause imports into the EU to fall by enough to reduce the price of timber in the world as a whole. In that event, the proposition that licenses will be paid for by EU residents requires modification. Again, elaboration does not seem useful in the present context.

Other unresolved issues, however, do raise legal problems. Among them, three questions are especially prominent. They are:

- (a) Will EU customs authorities be instructed to refuse entry to timber without a FLEGT license?
- (b) In countries whose government does not negotiate a VPA with the EU, will individual operators be able to obtain a FLEGT license?
- (c) If the EU accepts some alternative licensing systems, will it accept all of them? If not, how will it differentiate between those it accepts and those it rejects?

These questions are basic – so basic that the failure to answer them opens the Commission and the parliament to the charge that they are merely posturing -- of saying what they want without regard to what they can have. The issues posed by the questions cannot be left unresolved as the legislation moves forward.

The relevant body of law governing answers is that of the World Trade Organisation (WTO). In the following sections, therefore, possible answers are tested against the WTO rules.

4. TRADE LAW

Trade-related law or policy in any WTO member can be the subject of a complaint by any other member. The basis for a complaint is that the law or policy is inconsistent with the WTO obligations of the member making the law or employing the policy. If the charge of inconsistency is upheld, the WTO legal process will condemn the law or policy, and call for its withdrawal. This is at least embarrassing for governments, especially those, like the EU, that profess a special regard for international law; and it follows that trade-related EU legislation should be rigorously assessed for consistency with the WTO.

The Commission's proposals on illegal logging have been the subject of such assessment, though what has been made public is far from satisfying. No official analysis of the amendments of the European Parliament has been published, however.

A report by the environmental organisation Client Earth suggests that the parliament's amendments are consistent with the WTO obligations of the EU, subject to a few small revisions. The company writes:

“Some have argued that an overriding prohibition, such as that in the Parliament

amendments, violates WTO rules. This is not the case. Here, the regulation under consideration is part of a comprehensive program to strengthen efforts to address illegal logging and trade. The record is replete with legitimate environmental justifications for banning illegally harvested timber and timber products. The European Union has exercised good faith to comply with its duty to negotiate, which is heightened by the unilateral nature of its proposal. It has engaged in bilateral negotiations to resolve these issues through its Voluntary Partnership Agreements (VPA), consulted with several timber-exporting countries -- including, but not limited to, China, Japan, USA, Malaysia, Indonesia, Ghana, Cameroon, Russia, Brazil -- and participated in multilateral illegal logging negotiations. Moreover, the prohibition does not purport to compel foreign governments to adopt essentially the same legal regime and, in fact, grants to foreign countries the ability to control the legality of harvested timber by amending their laws. Under these conditions, general prohibitions are proper under the Article XX exceptions and *chapeau* requirements.”⁸

Views such as this probably represent those of many persons, both in the European Parliament and out of it, and they are worth citing for that reason. They rest, however, on a selective interpretation of WTO agreements and rulings. They derive from a way of reading WTO agreements that pays little attention to how the law has in fact been interpreted in actual judicial proceedings and much more to how the law *might be interpreted* were the panels and/or the appellate body to take an ‘activist’ position. Furthermore, views such as this cause confusion: they do not give a clear account of what aspects of the proposed regulation will be subject to legal examination.

Section 6 examines the WTO agreements that are relevant to timber and their implications for answers to the as-yet-unanswered questions in the proposals of the Commission and the parliament. Before that, however, we elaborate on the linkages between the questions themselves.

5. FILLING THE GAPS IN THE PARLIAMENTARY PROPOSAL

The first two unanswered questions are quite closely linked, and so are discussed

⁸ Client Earth, 2009, p. 8. Footnotes in the original text have not been reproduced here: they are not essential to the substance of the views expressed.

together. To recall, they are:

- (a) Will timber without a FLEGT license be refused entry into the EU? and
- (b) In countries whose government does not negotiate a VPA with the EU, will individual operators be able to obtain a FLEGT license?

Different combinations of answers to these questions are possible. In this section, however, only affirmative answers to (a) will be considered. The third question deals with the issue of alternatives to a FLEGT license, and questions arising when the answer to (a) is negative are discussed under that heading, below. Thus two circumstances call for discussion here, in both of which the EU requires a FLEGT license but:

- (i) makes it easy for operators anywhere to obtain one – as easy as for operators in countries that have accepted a VPA; or
- (ii) makes it difficult or impossible for operators in countries without a VPA to obtain one – more difficult than for operators in VPA countries.

Option (i) carries the problem that the easier it is to obtain a FLEGT license, the less effective the license is likely to be in identifying legally cut timber. This course also militates against the spread of VPAs. Why should a government go to the trouble of negotiating a VPA with the EU if there is little or no advantage to be obtained from doing so?

Option (ii) would increase the attractions of VPAs, and is at least consistent with rigorous exclusion of illegally harvested timber from the EU market (though perhaps at the cost of excluding legally harvested timber also – perhaps a great deal of legally harvested timber). Under it, however, the EU would treat differently similar imports from different sources – behaviour the WTO normally prohibits. In that circumstance, there is a question as to whether the EU could successfully defend this policy in the WTO.

6. APPLICABLE TRADE LAW

No agreement in the WTO sets out regulations that are specific to trade in illegally harvested timber – or to trade in timber overall. The general agreements in the WTO therefore apply.

Furthermore, no agreements in other inter-governmental organisations require a specific course of action by member countries towards trade in illegally harvested

timber. There are agreements or summit declarations associated with forestry and deforestation, but these have no relevance to WTO procedure. Thus, obligations in the WTO do not conflict with obligations in any other inter-governmental organisation in ways that call for consideration in a WTO dispute.

Two agreements within the WTO are principally relevant to a restriction on trade. They are the GATT and the Agreement on Technical Barriers to Trade (the TBT agreement). A body of case law has been built up since the Uruguay Round which is relevant to their interpretation. Moreover, unadopted rulings that have a bearing on the EU timber proposals have not been reversed in subsequent cases, and are therefore relevant.⁹

6.1 Identical treatment of like products

A starting point for analysis is GATT Article I(1). It sets out the general WTO principles for the regulation of trade and restrictions on trade. It says:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, *any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*” [emphasis added]

This is a core article of the WTO. It sets out the basic rights of WTO members and it restricts the power of member governments in designing their laws and policies with respect to trade. Three issues in this article are of central concern: (a) *any advantage* must be extended to, (b) the *like products* originating in any GATT member, (c) *immediately and unconditionally*.

These conditions are relevant to the hypothetical case in which the EU makes it difficult or impossible for companies in some countries to obtain licenses that are necessary for

⁹ These rulings were not adopted because negotiated solutions to them emerged from the Uruguay Round: they therefore did not need to be adopted.

them to sell in the EU. There can be no question that this is a disadvantage for companies located in those countries. It is therefore necessary to examine whether the product of VPA countries is “like” that of non-VPA countries.¹⁰

“Likeness” is not defined in the GATT. Case law, however, offers interpretations. Two unadopted Panel reports have ruled that products are not unlike just because there are differences in *production methods* – arguably, in the form of legal and illegal logging, a central concern in the proposals of both the Commission and the parliament – when these differences do not affect the physical characteristics of the final product: as the legality or illegality of the cutting presumably does not.¹¹ Even though these reports were unadopted, they can, as later cases have shown, be a “useful guidance”¹², especially as they have not been opposed in subsequent cases.

In rulings from the Appellate Body (AB), four criteria have consistently been used to define likeness. They are:

- (a) the physical characteristics of the products;
- (b) the extent to which they share end uses;
- (c) the extent to which consumers treat the products as alternative means of satisfying the same demand; and
- (d) the tariff classification of the products.

None of these criteria, however, provide legal cover for EU discrimination in the timber market.

Some supporters of the EU proposals emphasise a case in which there was discussion of whether products that are basically like, but whose production processes have different environmental impacts, could be treated differently.¹³ The AB ruled in this case that consumer perception could be used to determine likeness.¹⁴ Hence, if consumers perceive timber from VPA states to be fundamentally different than timber from non-

¹⁰ To be clear, it is evident that timber from one country may differ from that in another: mahogany and pine are different woods (though, depending on context, they could be “like” in WTO terms). The issue discussed here is whether the VPA status of the country of origin affects the issue of “likeness” in one direction or the other.

¹¹ GPR, *US-Tuna (Mexico)*; GPR, *US-Tuna (EEC)*

¹² ABR, *Japan-Alcoholic Beverages*

¹³ ABR, *EC-Asbestos*

¹⁴ It concerned article III:4.

VPA states, legal precedent suggests that the concept of likeness should take account of the environmental impact.

The basis for this AB decision, however, was *physical* differences between the goods. The case concerned the use in the production method of a particular ingredient, carcinogenicity, which is a “physical characteristic”.¹⁵ Differentiating access to the EU market on the basis of a VPA is something different. The AB discussion stressed this link between the end product and the use of a product in the production method by pointing to “those physical properties of products that are likely to influence the competitive relationship between products”.¹⁶ In the light of the emphasis of current case law on physical characteristics, it is unlikely that acceptance of a VPA, which has no connection to physical properties, will affect the GATT conditions for defining likeness.

A possible objection to this discussion of likeness is that a regulatory requirement – a license – or a trade prohibition imposed by the EU could be considered by consumers to be, for example, for the purpose of slowing deforestation. If previous case law is a useful guide, however, this cannot be achieved without significant changes in the parliamentary proposal.

First, a link to physical characteristics is still required. *Second*, it must be demonstrated that consumer perceptions are strong enough to be considered. *Third*, it must be demonstrated that either the absence of proper regulation of illegally harvested timber, or the placing of timber or wood products with illegally harvested content, are concurrently linked to environmental concerns and consumer perceptions. This is, to say the least, a difficult task.

The “like products” provisions of GATT Article I are reflected in GATT Article III(4). It says that “(t)he products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.” This Article also sets out the principle of national treatment. If the EU restricts

¹⁵ For further interpretation, see Mitchell & Tran (2009).

¹⁶ The AB also said that physical differences between products create a “higher burden” for establishing likeness.

imports for operators in countries without a VPA, that is to treat products from another WTO member less favourably than like products of national origin. Hence, such a regulation will be inconsistent with GATT Article III(4). For countries with a VPA, there is a greater degree of national treatment. Yet it might not be a sufficient degree of national treatment as access to the EU market might hinge upon the signing of an agreement. This agreement might add another layer of administrative burden that European operators do not have to concern themselves with.

However, it is not clear that GATT Article III(4) will be applicable. It is the identity of the technical regulation that presents difficulties: it is a process and production method (PPM) regulation and not a regulation of physical characteristics. There are two (unadopted) panel decisions of interest.¹⁷ In both cases the panel reports held that GATT Article III is not applicable on PPMs. However, if GATT Article III is not applicable, GATT Article XI(1), which is sometimes is seen as a substitute for GATT Article III, will be. Yet Article XI is also of relevance in its own right. It says that “(n)o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” Panels have taken a broad view on restrictions and have clearly defined *de facto* restrictions so that they are covered by the Article XI. If the EU adopts a regulation that restricts import from countries that have not signed a VPA, it is likely to be inconsistent with GATT Article XI.

6.2 The General Exception: Article XX

The GATT agreement, however, includes an exception for measures that are inconsistent with other GATT articles. This article, called the General Exception, is of central importance for the EU proposals. The full article is therefore quoted:

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

¹⁷ GPR, *US-Tuna (Mexico)*; GPR, *US-Tuna (EEC)*.

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved;
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The contracting parties shall review the need for this sub-paragraph not later than 30 June 1960."

Article XX has been the subject of much discussion among legal scholars. The reason for their interest is clear: Article XX allows countries to be in breach of other GATT articles if they are consistent with a motivation acknowledged by the article. A too generally formulated exemption would provide an open-ended excuse for direct or indirect protectionism. To avoid excessive use of Article XX, and to minimise the risk of protectionist policies being concealed as measures covered by this general exception, panels and the AB have taken a rather restrictive view of what could be considered lawful trade restrictions under this heading. In fact, only one environmental measure defended under Article XX has survived examination by the WTO judiciary.¹⁸

Paragraphs XX(b) and XX(g) are relevant to the hypothetical policy of the EU now under discussion – that the EU refuses to admit timber exported to it that is not accompanied by a FLEGT licence, and that it makes it difficult to obtain FLEGT licenses in non-VPA countries. It is reasonably clear that this EU policy would not survive under the general GATT rules. Nevertheless, some protagonists of the parliamentary proposals believe that Article XX can be used to avoid the application of other GATT articles to the proposed timber regulations.¹⁹ Article XX, though, is not the open door that environmentalists sometimes perceive. Examination of some of the principle rulings regarding paragraphs (b) and (g) explains why this is so.

6.2.1 Article XX(b)

The central word of paragraph (b) is “necessary”. Rulings hold that a measure that aims to attain an environmental goal should be subject to scrutiny of the goal in the light of the trade-restrictiveness of the measure. The importance of the goal itself is subject to examination. Panels will also examine less trade-restrictive means of attaining the goal.²⁰

Were the EU to require imports of timber to be accompanied by FLEGT licenses, but at the same time made it difficult for loggers in some countries to obtain such a license, two problems would arise in terms of Article XX jurisprudence. First, the measures are very discriminatory and very trade-restrictive. The more restrictive a measure is, the more difficult it is to justify it. Second, the measures are aimed at regulation of trade in timber

¹⁸ ABR, *US-Shrimps*

¹⁹ The earlier quotation from *Client Earth* is an instance.

²⁰ ABR, *Brazil-Retreaded Tyres*

and regulation of trade in illegally harvested timber. Yet no compelling scientific evidence suggests that a trade regulation is an effective way of reducing trade in illegally harvested timber, or an effective way of reducing illegal logging. No one knows how much timber is illegally harvested: estimates exist, but no one knows how accurate they are. Even less is known about exports of illegally cut timber: the export share of timber that is illegally cut might be large or it might be insignificant. In the absence of verifiable information, action that makes it difficult for loggers in some countries to obtain a FLEGT license is very unlikely to stand the tests required for an Article XX:(b) exception.

6.2.2 Article XX(g)

The key words in Article XX(g) are “relating to”. Interpretation of them has been less stringent than that applied to “necessary” in paragraph (b). The rulings on “relating to” say, however, that a measure should be “primarily aimed at” the environmental target it professes and should have a “substantial relationship” to that goal.²¹ Keeping illegally harvested timber out of the EU is unlikely to be regarded as a worthwhile goal if it cannot be shown to affect the volume of illegal logging in the world as a whole. Conservation of forests must be the goal.

Yet there is no *prima facie* link between hindering the exports of timber to the EU of some countries and forest conservation: no reason to suppose, for example, that such a policy will have any greater effect on forest conservation than a non-discriminatory policy that reduced EU imports of timber to the same extent. Attempts to establish a link do not rest on verifiable information about the scope of the problem, or the location of the problem, or the extent to which a restriction on exports to the EU relates to harvesting of illegal timber.

6.2.3 The Chapeau

Finally, to be a legitimate Article XX exception, the measure must also stand the test of the *chapeau*. Even if paragraphs (b) or (g) fit the proposal, the proposal could still be deemed unlawful if it violates the *chapeau*. If it cannot be shown to be consistent with the paragraphs, on the other hand, consistency with the *chapeau* will not be enough.

First, the hypothesised situation, in which the EU creates difficulties in obtaining FLEGT licenses for operators based in non-VPA countries, is clearly discriminatory. The

²¹ ABR, *US-Gasoline*; ABR, *US-Shrimp*

discrimination requires justification in terms of the policy objectives of the EU measure, but justification in these terms would in fact be hard to provide. How will making a FLEGT license expensive for some operators help to combat illegal logging?

Aside from this hypothetical discrimination, there are in the parliamentary proposals at least two instances of discrimination. One is the proposal that SMEs should be treated differently than larger enterprises. That proposal might be driven by worthy motives, but it is still inconsistent with the chapeau. In the eyes of the *chapeau*: a regulation either applies to everyone or to no one.

Second, a key element of the action plan is capacity building in countries that sign a VPA with the EU. The Commission website states that: “Funding for FLEGT-related projects has been provided through development cooperation instruments managed by the Commission.”²² Conflict with the chapeau arises from the fact that the EU gives financial advantages to some but not to all countries that have to abide by the new proposal. That is discrimination, which is explicitly prohibited by the *chapeau*.²³

A possible solution to this problem would be for the EU to stop financing FLEGT-related capacity building. Capacity building may be a better way of changing matters on the ground in countries from which illegally harvested timber is exported than anything else in the parliament proposal. Stopping capacity building to preserve the parliamentary proposal might therefore be ecologically foolish (and economically inefficient), but it would solve the legal problem. Alternatively, the Commission could extend technical assistance to all timber-producing countries.

A final aspect of the chapeau was established in a recent case and states that there should be a “rational connection” between discrimination and the goal set out in paragraph (b) and (g).²⁴ An evident rational connection, however, is lacking.

6.3 Conclusion with respect to FLEGT licenses in countries without a VPA

This section has focussed on the possible case in which the EU accepts only timber imports that are accompanied by a FLEGT license. The analysis supports the conclusion that any difficulties that the EU might put in the way of companies in non-VPA states

²² <http://ec.europa.eu/environment/forests/flegt.htm>

²³ ABR, *US-Shrimp*

²⁴ ABR, *Brazil-Retreaded Tyres*

obtaining FLEGT licenses cannot be justified under the general GATT rules and do not qualify for an Article XX exception from those rules.

Hence, if it insists on FLEGT licenses, the EU, if it wishes to avoid embarrassment in the WTO, must create a situation in which FLEGT licenses are as easy to obtain in countries without a VPA as in countries with a VPA. That threatens the viability of the VPA system towards which the EU is working: it appears, however, to be the only WTO-consistent route open to it.

7. ALTERNATIVES TO FLEGT LICENSES

We now turn to the situation in which the EU does not insist that imports into the EU are accompanied by a FLEGT license, but will, at least in principle, accept other forms of certification as proof of legal harvesting. In that circumstance, a central question is the conditions the EU can impose upon other licensing systems for them to be acceptable to the EU in place of a FLEGT license.

A WTO agreement that applies to this question is the Agreement on Technical Barriers to Trade (the TBT agreement). Technical barrier to trade are typically found in regulations that are more expensive for foreign sellers to comply with than domestic sellers (a requirement, for example, that each individual imported motor car is inspected for consistency with national regulations whereas domestic cars need only submit to one inspection of a type).

The Annex to the TBT agreement defines a technical regulation as a:

“... document which lays down product characteristics or their related processes and production methods, *including the applicable administrative provisions*, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or *labelling requirements* as they apply to a product, process or production method”. [emphasis added]

EU specification of the characteristics of the documentation that should accompany exports of timber to the EU clearly would be a technical regulation. A FLEGT license is precisely an administrative provision to ensure proper production methods (i.e. use of legally harvested timber). Moreover, the parliamentary proposal includes a requirement that timber or timber products should be labelled in such a way as to give

all of the information included in a FLEGT license. Compliance with these conditions would be mandatory. The conditions of the TBT agreement therefore apply.

Under the TBT agreement EU actions will be subject to treatment that is somewhat different from that under the GATT articles. The TBT agreement is based on a narrower interpretation of “like products”; and there are no general exceptions in the TBT agreement comparable to Article XX in the GATT.

A technical regulation is not lawful if it discriminates between like products. Thus, any licensing system accepted by the EU as alternative to the FLEGT license could not be required by the EU to be more rigorous than a FLEGT license.

The TBT agreement, however, also raises a question as to how rigorous the FLEGT license could be. Article 2.2. of the agreement says:

“Members shall 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. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective”²⁵

It is therefore open to the government of a country exporting timber to the EU to argue that the technical regulations imposed by the EU – the FLEGT license -- are more trade restrictive than is necessary to achieve the objectives of the EU. Were the EU to fail to demonstrate the necessity of all of the conditions of a FLEGT license, or of the conditions imposed by the EU on alternative licenses, it would be called upon to withdraw those conditions.

To move away from the hypothetical, moreover, the parliamentary proposal as it stands clearly breaches the TBT agreement. First, the parliamentary proposal does not uniformly apply to all countries. Operators in countries that are deemed to be “high risk” are called upon to perform a different kind of due diligence than those in other countries. This stands in contrast to general protection against discrimination in the TBT agreement, but also in contrast to Article XII of the same agreement, which states that developing countries (illegal logging seems to be related to poverty, so high-risk countries are likely to be developing countries) should be *favourably* treated.

²⁵ Among the legitimate objectives cited in Article 2.2 are “... the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment”.

Article XII also states that special attention should be given to the developmental and trade needs of developing countries, “with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.”²⁶ The parliamentary proposals appear to be inconsistent with that instruction.

If carried into legislation, the tenor of the current proposals by the EU institutions will create problems for the EU in the WTO. Ultimately, the EU will not be able to reject alternative licensing systems that fulfill the legitimate aims of its legislation. Nor will it be able to maintain the rigour currently proposed for FLEGT licenses if it cannot show – as it probably cannot show – that all of that rigour is necessary to fulfill those aims of its legislation that can be demonstrated in the WTO to be legitimate.

8. CONCLUSIONS

The EU cannot, consistently with its WTO obligations, make it more difficult for operators in non-VPA countries to obtain FLEGT licenses than operators in VPA countries. It must accept licenses from alternative sources that perform the same function as FLEGT licenses. It will be able to maintain the structure of FLEGT licenses in its proposals only if it can show that all of that structure is necessary to combat illegal logging.

There is no sign in the documents that anyone involved in the design of the proposals by these institutions has paid any attention or given any thought to these restrictions. The EU institutions – Commission and Parliament both – talk of “struggle” and “combat” and “the international fight against illegal logging”, but avoid the awkward questions raised by the tactics they propose to use in that fight. This is not sensible policy making: it is posturing.

That the EU, in its purported assault on illegal logging, wishes to come into conflict with the WTO is quite unlikely. It therefore behoves the EU institutions – mostly the parliament, but not only the parliament – to bring their proposals into at least plausible consistency with the WTO obligations accepted by the EU. That requires a fundamentally different approach to that adopted by the parliament in its first reading. In particular, all elements of *de jure* or *de facto* discrimination must be eliminated.

²⁶ TBT agreement, Article XXII: 3.

Without this, the EU is condemned to watch its proposals for the timber market whittled down in the WTO. Would it not be better for the EU institutions to think through their proposals for themselves?

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