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## **CONTROLLING THE INTERNATIONAL TRADE IN ILLEGALLY LOGGED TIMBER AND WOOD PRODUCTS**

A study prepared for the UK Department for International Development

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## **Executive summary**

This report examines the means by which the international trade in illegally logged timber and wood products can be controlled – in other words, how importing/consuming governments might establish and operate a system for denying market access to timber and wood products produced and exported illegally. This can be seen as a way of adding value to producer country enforcement actions, by establishing a system aiming to deny markets to the illegal products that are exported.

Although the report does not deal with other options for controlling illegal logging, it should be borne in mind that in many producer countries, reform of domestic laws and regulations dealing with forest crimes and related activities will be an essential prerequisite for the successful implementation of the options listed below. In some circumstances it may be helpful to make disbursement of development assistance conditional on improvements in forest law and governance.

### **Identifying legal production**

The first step in controlling the international trade is the establishment of a system to identify legally produced logs and wood products. It should be clear that given sufficient resources and political will, such a system can be made to work: there are no insuperable technical obstacles to overcome. The following points are worth stressing:

- Simple paper-based certificates or movement documents such as those employed under CITES are prone to theft and fraud; more technologically sophisticated solutions – of which there are many available – should be employed in any system established to identify legal production.
- Comprehensive chain-of-custody monitoring of every stage of the chain of production, processing, export and import is necessary to guarantee legality. Independent third-party auditing of the process is necessary to guarantee the validity of the system. Experience of operating such a system within the wider framework provided by certification systems such as the FSC is valuable.
- Although the costs involved in setting up such a system are not likely to be large, they are not negligible; capacity-building support should be provided.
- Similarly, capacity-building, and possible legal and administrative reform, will be needed to improve enforcement where breaches of the system are detected.
- Data on export and import of timber and wood products should be collected and exchanged more systematically in order to help tackle the problem of illegal trade. There is likely to be a role for a central monitoring function such as that provided by WCMC for CITES.

### **Closing markets to legal products**

There are a range of options open to consumer countries for reducing or ending market share for illegal timber and wood products. The clearest approach is to make the sale or import of such products illegal in the consumer country. This would require new legislation which would have either to adopt a definition of illegality based on the producer country's laws (as in the US Lacey Act) or establish some form of external (and if possible, preferably internationally agreed) standards which products would have to meet (such as evidence of independently verified chain-of-custody monitoring, etc.). While the new legislation is being adopted, non-coercive means of promoting the markets for products positively identified as legal could be introduced, including industry sourcing, tariff preferences and government procurement policies.

None of these are mutually exclusive, and the most effective combination of measures is likely to be a step-wise implementation of all of them:

- Encouragement for voluntary action on the part of industry, agreeing to source only legal products; accompanied by –
- Establishing further favourable tariff preferences (helpful but of limited application); accompanied by –
- An effective government procurement policy, implemented at central and local level, to source only from legal products; followed by –
- Lacey Act-type legislation outlawing the import and sale of illegal timber and wood products; followed by –
- Legislation outlawing the import and sale of products not positively identified as legal (including a definition, if possible agreed internationally, of what requirements the production process – essentially, independently verified chain-of-custody monitoring – has to meet to be treated favourably).

The time needed to draw up and introduce the new legislation could be used to publicise its impact in producer countries, to deliver capacity-building assistance, to establish robust systems for identification of legal production, and to negotiate bilateral and regional agreements with producer governments. Government procurement policy, which should be faster to implement, can be used as a clear signal to exporters of what to expect. For any measure involving extended enforcement powers (the sanctioning of illegal timber, or of timber not identified as legal), additional resources would need to be made available for customs and other enforcement authorities in the importing countries.

### **International cooperation**

While unilateral measures such as government procurement policies, or sanctioning of illegal timber, implemented by individual consumer country governments, or groups of them, would undoubtedly have an impact on the trade in illegal forest products, the impact will be enhanced if an international framework can be established to oversee the development and operation of a legality identification system and some means of trade controls. Bilateral agreements are of limited value in that they are relatively easy to evade, but they are likely to prove of value in demonstrating the viability of such a system and in providing the catalyst to wider regional agreements – for which the Forest Law Enforcement and Governance Conference in September 2001 could possibly provide a preliminary framework for East Asia.

The ultimate aim should of course be a multilateral agreement open to any country. While CITES may well prove of use in protecting particular endangered species, it cannot reasonably be extended to cover the whole of the timber trade, and a new agreement aimed at controlling trade in illegally logged timber is therefore called for; the ITTO and, in particular the FAO, provide potential forums in which such an agreement could be discussed. A valuable initial step would be international agreement, perhaps in the form of voluntary guidelines, on the definition of ‘illegality’, and the minimum requirements for a robust system of identification and verification.

Alongside this, greater efforts need to be made in improving international collaboration on data exchange and enforcement, including systems of ‘prior notification’ – though this seems likely to require the development of common accepted definitions of what constitutes illegal behaviour. The quality of the data collected also needs to be improved. The regional frameworks that can be established under regional forest law enforcement and governance conferences and declarations can help to further such enforcement collaboration.

## **WTO implications**

Any restrictions on trade, including labelling requirements, tariffs and taxes, trade embargoes, or any form of discrimination, are potentially subject to the disciplines of the trade agreements administered by the World Trade Organisation. There are considerable areas of uncertainty over how the WTO dispute settlement system would treat issues of illegality, should trade-restrictive measures ever become the subject of a dispute case, but it is possible to reach some tentative conclusions about the design of policy instruments which affect trade:

- The less trade-disruptive the measure involved, the lower the chance of a successful challenge under the WTO – a requirement simply for labelling, or government procurement policy, would be less likely to fail than an import ban.
- The more it can be shown that less trade-disruptive measures – such as preferential tariffs – have been attempted and have not proved effective, the greater the chance more trade-disruptive measures have of being found acceptable. This possibly even extends to non-trade related efforts, such as capacity-building assistance to the exporting countries concerned, forestry-related negotiations, and so on.
- Similarly, the more precisely targeted the measure, the less the chance of a successful challenge. An embargo applied against an country's entire timber exports because some of them were believed to be illegal would be more vulnerable to WTO challenge than an embargo applied only against products which could be proved to be illegal, or not shown to be legal. In the latter case, adherence to an internationally accepted means of determining legality in this context – e.g. a requirement for chain-of-custody documentation audited by an independent third party – would also help to justify the measure.
- The less discriminatory the measure is, the lower the chance of a successful challenge. A very strong case could be made under the WTO if a country was applying more restrictive measures (e.g. a requirement for legality identification) to imports than it was to its own production.
- The greater the effort to ensure that a measure is multilaterally acceptable, the less it is likely to be challenged. And the latest shrimp-turtle decision implies that even unilateral measures applied while a multilateral agreement is in the process of being negotiated may be acceptable.

There is sufficient ambiguity about the impact of the relevant WTO agreements that it should be possible for many different types of trade-restrictive measures to be designed and implemented so as to survive a WTO challenge.

## **Anti-corruption and money laundering initiatives**

In general the debate around controlling illegal logging has tended to focus directly on the participants involved in the timber industry and timber trade. Yet there is a wider context to consider, encompassing the disposal of the profits gained from the illegal activities, and the sources of finance for the sector. International collaboration against corruption and money laundering, and growing use of the leverage governments can exert on the industry and its sources of investment, may also reap dividends in the area of illegal logging and trade. Contacts should be pursued between the two areas, and the issue of controlling illegal logging taken up in the relevant international forums.

## 1 Introduction

1.1 The control of illegal activities in timber production and trade world-wide has received increasing attention over recent years. Awareness of the extent of these violations of forest law, and their impacts on the global and local environment, on nations deprived of natural resources and revenue, on local communities and on the rule of law and good governance, has steadily grown. In 1998, the foreign ministers of the G8 countries agreed an ‘Action Programme on Forests’, which included a section specifically covering illegal logging. After a report-back on progress in 2000, the G8 heads of government, meeting in Okinawa, reaffirmed their intention to ‘examine how best we can combat illegal logging, including export and procurement practices’.<sup>1</sup>

1.2 In September 2001, countries from East Asia and other regions (including the UK and US) participated in the Forest Law Enforcement and Governance ministerial conference in Bali, an important initiative designed to establish a framework through which producer country governments could work together with each other and with governments of consumer countries to tackle illegal activities. Further such conferences are planned for other regions with significant forest resources. In Bali, ministers resolved to ‘take immediate action to intensify national efforts, and to strengthen bilateral, regional and multilateral collaboration to address violations of forest law and forest crime, in particular illegal logging, associated illegal trade and corruption, and their negative effects on the rule of law’.<sup>2</sup>

1.3 In early 2001 the UK Department for International Development (DFID) commissioned the Royal Institute of International Affairs to carry out a scoping study on options for intergovernmental agreements to combat illegal logging and trade in illegal timber and forest products. The report of this study, *Intergovernmental Actions on Illegal Logging*, was published in March 2001. Its summary is attached to this report as Appendix 1, and the full report is available on the RIIA website.<sup>3</sup> The immediate purpose of the report was to feed ideas for policy development into the discussions on the G8 Forestry Action Plan, due for completion in 2002; the UK is the focal point for actions on illegal logging within the G8 process. The report was discussed at a G8 forestry experts’ meeting in Rome in March 2001, and at a meeting of all relevant UK government departments in April. It was also circulated widely within the international policy community.

1.4 Based on these discussions, DFID then commissioned RIIA to carry out a further study, concentrating on the means by which importing/consuming governments (such as the UK) might establish and operate a system for denying market access to timber and wood products produced or exported illegally. This is a more precisely focused study than our first report, which covered a wide range of options to combat illegal logging, both in producer and in consumer countries. This report focuses only on the international trade between these countries, and the different options that may exist to control it.

1.5 This topic was also considered by the Forest Law Enforcement and Governance conference. Ministers agreed to ‘undertake actions, including cooperation among the law enforcement authorities within and among countries, to prevent the movement of illegal timber’, and to ‘explore ways in which the export and import of illegally harvested timber can be eliminated, including the possibility

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<sup>1</sup> G8 communiqué, 23 July 2000, para 67.

<sup>2</sup> Forest Law Enforcement and Governance East Asia Ministerial Conference, Bali, Indonesia, 11–13 September 2001; Ministerial Declaration, page 1. See [www.worldbank.org/wbi/wbien/nrrp/governance](http://www.worldbank.org/wbi/wbien/nrrp/governance).

<sup>3</sup> See [www.riia.org/Research/eep/eeparticle.html](http://www.riia.org/Research/eep/eeparticle.html).

of a prior notification system for commercially traded timber'.<sup>4</sup> These and related options can be seen as adding value to producer country enforcement actions by establishing a system aiming to deny markets to the illegal products that are exported.

1.6 For reasons of space, this report does not repeat much of the background information on the scale and impact of illegal logging, which can be found in our earlier report. *Section 2* of the report provides a brief background to the international timber trade and illegal activities associated with it. *Sections 3, 4* and *5* then examine the steps necessary to control the international trade: the means of identifying and distinguishing legally produced material, including an analysis of experience from other international agreements (*Section 3*); the range of options which importer countries can take to promote legal, and sanction illegal, products, including voluntary industry-based measures, government procurement policy, tariff reductions, prior notification systems, and legal actions, and their consequences and requirements for domestic law and enforcement (*Section 4*); and the means through which such measures can be implemented at the international level, including an examination of whether existing multilateral agreements provide a suitable framework (*Section 5*). *Section 6* considers the potential WTO implications of any trade-restrictive measures, and *Section 7* examines the relevance of international anti-corruption and money laundering agreements. *Section 8* contains some brief concluding remarks.

### **Why control international trade?**

1.7 It should be emphasised that this report deals only with one possible set of means of helping to tackle illegal logging. The focus on this issue herein does not, of course, mean that other options should be ignored; the successful control of illegal logging will require the simultaneous implementation of many policies and measures across many producer and consumer countries.

1.8 It can be argued that efforts to control the international trade are counterproductive; that much illegal logging stems from land clearance, or low-level subsistence-oriented activities where the products do not enter the international market, and that therefore mitigation activities should focus on altering the domestic environment which stimulates this illegal behaviour. Up to a point, this is true; shutting out illegal timber and wood products from international markets cannot *wholly* end illegal forestry practices, corruption in the allocation of concessions, illegal land clearance and so on.

1.9 But only up to a point. It is clear that many enterprises, in developed and developing countries alike, enjoy substantial profits arising from illegal activities, that producer country governments are being robbed of equally substantial revenues that could be used for the benefit of their populations, and that the rate of destruction of forest resources is being significantly accelerated by illegal behaviour. Shutting out the products of such criminal activity from international markets should be seen as a means of mobilising the resources of consumer country law enforcement agencies against illegal logging, and bringing external pressure to bear on the perpetrators of forest crimes.

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<sup>4</sup> Forest Law Enforcement and Governance East Asia Ministerial Conference, Ministerial Declaration, page 2.



## 2 Background

2.1 In considering possible means of controlling the international trade in illegal timber, it is important to bear in mind the composition and patterns of the trade itself. It also needs to be decided how the matter of ‘illegality’ can be defined.

### The timber industry and international trade

2.2 Forests provide a wide range of services to humans, including wood products, recreational opportunities and ecosystems services. Approximately half of the wood products harvested for human use world-wide are used for fuelwood and the other half for industrial purposes such as building materials, furniture, or paper products. Consumption of the main forest products has grown by more than 50% since 1970, global production of total roundwood reaching 3,335 million m<sup>3</sup> in 1999. Just over half of this was woodfuel, about 90% of which was produced and consumed in developing countries. The remaining portion was industrial roundwood,<sup>5</sup> where production, totalling 1,550 million m<sup>3</sup> in 1999, was dominated by developed countries, which together accounted for 79% of total global production. Global industrial roundwood production is forecast to grow by 70% between 1998 and 2020.<sup>6</sup>

2.3 The forestry industry is a major global sector; gross production accounted for \$160 billion world-wide in 1998 (of which \$105 billion was in OECD countries), representing 0.4% of value-added in the world economy; this is projected to grow to \$299 billion by 2020. The sector has become increasingly globalised, with ownership of forests and processing plants, concession rights, and management contracts (e.g. for harvesting) increasingly held by foreign companies. Southern transnational corporations, mainly based in south-east and east Asia, are increasingly important participants in the market.

**Table 2.1: Share of total production of processed wood exported**

CATEGORY	% EXPORTED IN 1999	% EXPORTED IN 1990
Sawnwood	27	18
Wood-based panels and paper and paperboard	34	25
Wood pulp	20	16
Industrial roundwood	5	5

2.4 Forest products are important components of international trade. The value of industrial roundwood exports reached a high of \$148 billion in 1995, declining slightly thereafter as a result of the Asian financial crisis, but climbing again after 1998. The share of total production which is exported has increased for all processed wood products, as Table 2.1 shows. As can be seen, processed products have grown in importance as a proportion of total wood product exports, and many countries have also seen increasing production and export of secondary processed wood

<sup>5</sup> Industrial roundwood either enters international trade directly or is used in domestic processing for conversion into products such as sawnwood, wood-based panels, paper and paperboard, and pulp for paper. (Total roundwood consists of industrial roundwood plus woodfuel.)

<sup>6</sup> Figures in this section taken from *OECD Environmental Outlook*, chapter 10 (Paris: OECD, 2001); *State of the World's Forests 2001* (Rome: FAO, 2001) and I.J. Bourke and Jeanette Leitch, *Trade Restrictions and their Impact on International Trade in Forest Products* (Rome: FAO, 2000).

products, including wooden furniture, builders' woodwork (doors, window frames, flooring, beadings and mouldings, etc.) and a variety of small products (tools, brooms, bowls, boxes, statuettes, etc.).

2.5 Most trade in industrial wood occurs in the northern hemisphere between industrial countries; OECD members account for roughly 80% of total exports and 90% of total imports. The three dominant industrial wood importing markets – Western Europe, Japan and North America – are all expected to more than double their net imports of wood products by 2020. As in other sectors, however, China is of increasing significance; it is already the world's second largest consumer of forest products by value, and by volume it ranks second in consumption of wood-based panels, second for paper and paperboard products and third for sawnwood.

**Table 2.2: Major global importers and exporters of forest products, 1997<sup>7</sup>**

<b>IMPORTERS</b>	<b>(1000 US\$)</b>	<b>EXPORTERS</b>	<b>(1000 US\$)</b>
USA	24,134.454	Canada	25,647.813
Japan	16,684.401	USA	19,835.072
Germany	10,916.458	Finland	10,414.170
United Kingdom	9,992.619	Sweden	10,295.373
Italy	6,823.034	Germany	9,828.224
France	5,866.290	Indonesia	5,142.289
China Main	5,661.407	France	4,663.716
Korea, Republic of	3,739.716	Malaysia	3,951.831
Netherlands	4,657.664	Austria	3,834.619
Canada	3,976.011	Russian Federation	3,007.700
China Hong Kong	3,835.956	Netherlands	2,667.467
Korea Republic	3,739.716	Italy	2,650.942
Spain	3,719.661	Brazil	2,647.469
Taiwan Province of China	3,144.211	Bel-Lux	2,446.365
Switzerland	2,211.772	China, Hong Kong	2,267.271
Austria	2,016.214	United Kingdom	2,124.055
Denmark	1,950.245	Switzerland	1,893.527
Thailand	1,528.178	Spain	1,698.686
Australia	1,498.010	Norway	1,655.114
Mexico	1,470.208	Japan	1,640.459
<b>World</b>	<b>144,980.524</b>	<b>World</b>	<b>138,280.840</b>

2.6 A relatively small number of countries account for the bulk of both exports and imports, as can be seen in Table 2.2. Five countries accounted for 55 percent of world exports of forest products in 1997 and ten accounted for 70 percent. Canada and the United States alone accounted for one-third. On the import side, five countries accounted for 47 percent and ten countries for 64 percent, with the United States and Japan being responsible for over one quarter (28 percent). As can be seen, the UK and the EU are both major importers of wood products.

<sup>7</sup> Source: Bourke and Leitch, *Trade Restrictions and their Impact on International Trade in Forest Products*.

2.7 Tropical products only represent a small share of exports of most forest products. For 1997 tropical industrial roundwood production was estimated to represent about 18 percent of world industrial roundwood production. It accounts for varying, but generally small, shares of the total exports of different products: 17 percent of industrial roundwood exported; 8 percent of sawnwood; less than 10 percent of pulp and paper and paperboard products; and 36 percent of wood-based panels. It does, however, account for about 70 percent of plywood exports (Indonesia alone accounts for 41 percent, and Malaysia for a further 20 percent). The share of world production accounted for by tropical products has risen overall, but, while its share in trade has increased for wood-based panels it has declined for industrial roundwood and sawnwood. Table 2.3 shows the major tropical source countries for European and British imports.

**Table 2.3: Value of tropical timber imports to EU and UK, 1999<sup>8</sup>**

<b>SOURCE:</b>	<b>IMPORTS TO EU (million €)</b>	<b>IMPORTS TO UK (million €)</b>
Indonesia	670	158
Malaysia	449	121
Cameroon	402	20
Ivory Coast	271	8
Brazil	268	62
Gabon	193	1
Ghana	135	16
DRC	67	1
Nigeria	42	2
Liberia	31	–
Equatorial Guinea	29	–
Congo Brazzaville	22	1
Central African Republic	21	–
<b>Total tropical timber imports</b>	<b>2600</b>	<b>391</b>

### Tracking the timber trade

2.8 One factor to be borne in mind when considering possible controls on trade is the extent to which trade patterns do *not* follow simple export–import routes. A recent study of the trade in ramin (a particularly valuable tropical hardwood) in south-east Asia<sup>9</sup> demonstrated a complicated network of trade routes. Ramin felled in Kalimantan and Sumatra (Indonesia) is shipped or transported by road to sawmills in Peninsular Malaysia and Sarawak (Malaysia). Sawn and processed ramin may then be exported directly to European, Japanese, Chinese and American markets, or, frequently, shipped via Singapore, Hong Kong, Taiwan and China. Much of this trade is not reported or picked up officially; in 1998, for example, Taiwan reported more than ten times as much sawn ramin imported from Indonesia as Indonesia reported sawn ramin exported to Taiwan.

2.9 Tracking mechanisms are further complicated by the composition of individual shipments of timber and wood products, which generally contain a wide variety of logs and processed products,

<sup>8</sup> Source: Friends of the Earth briefing, ‘European League Table of Imports of Illegal Tropical Timber’.

<sup>9</sup> Environmental Investigation Agency and Telapak Indonesia, *Timber Trafficking: Illegal Logging in Indonesia, South East Asia and International Consumption of Illegally Sourced Timber* (September 2001).

species and sizes – particularly where they are transported from tropical producer countries to importing countries such as the UK. A further complication is that secondary processed products, such as furniture, may often be constructed from different types of timber sourced from different countries. Shipments into the main ports – Tilbury, Bristol and Liverpool in the UK – will contain many consignments destined for various merchants throughout the country. No figures are kept on the precise make-up of individual shipments, though the current UK government study on procurement policy (see para. 4.8) may help to shed some light. Where illegal products are present, they may often be effectively laundered by combining them in single shipments with legal materials.

## **Illegal activities in the forest sector**

2.10 Illegal logging takes place when timber is harvested, transported, bought or sold in violation of national laws. The harvesting procedure itself may be illegal, including corrupt means to gain access to forests, extraction without permission or from a protected area, cutting of protected species or extraction of timber in excess of agreed limits. Illegalities may also occur during transport, including illegal processing and export, misdeclaration to customs, and avoidance of taxes and other charges. Appendix 2 provides a list of the potential illegalities associated with the timber trade.

2.11 As in all areas of international environmental crime, the clandestine nature of the illegal trade makes its scale and value difficult to estimate, but it is true to say that extensive unlawful operations have been uncovered whenever and wherever authorities have tried to find them. As the World Bank's 1999 review of its global forest policy observed, 'countries with tropical moist forest have continued to log on a massive scale, often illegally and unsustainably. In many countries, illegal logging is similar in size to legal production. In others, it exceeds legal logging by a substantial margin ... poor governance, corruption, and political alliances between parts of the private sector and ruling elites combined with minimal enforcement capacity at local and regional levels, all played a part.'<sup>10</sup> Illegal activities generally drive down the price of timber, exaggerate demand, both domestic and international, and make it difficult, or impossible, for legal operations to compete.

2.12 Problems of forest law enforcement and governance tend, not surprisingly, to be exacerbated in developing countries where resources are limited, international companies which offer investment are relatively more powerful, and civil society is weaker. In particular, the allocation of timber concessions has often been used as a means of rewarding allies and extending patronage. Protected by powerful patrons, timber companies may evade national regulations with relative impunity. State forestry institutions may become in effect the clients of concession-holders in the ruling elite, exercising their powers as a form of private property rather than as a public service. Revenue (for example from taxes) that would otherwise accrue to central and local government is appropriated by a small number of private individuals and enterprises. Table 2.4 provides a summary of estimates (where they exist) of the extent of illegal logging in some of the major exporters to the UK and EU listed above in Table 2.3.

2.13 It is important to remember, however, that illegal logging is not confined to developing countries. Russia is a major timber producer and exporter, and estimates of the extent of illegal logging range from 20–30% for the country as a whole to 40–50% in particular areas of Siberia.<sup>11</sup> In

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<sup>10</sup> World Bank, *Forest Sector Review* (New York: World Bank, 1999), p. xii; *Financial Times*, 11 February 2000, 'World Bank sees flaws in forest policy'.

<sup>11</sup> Primorsky Regional Administration, cited in Bureau for Regional Oriental Campaigns, Friends of the Earth and Pacific Environment & Resources Centre, *Plundering Russia's Far Eastern Taiga: Illegal Logging, Corruption and Trade* (2000), p. 16.

Canada, research on compliance in Ontario found violations in logging operations in 55% of areas designated for protection as Areas of Concern and Riparian Reserves. A recent analysis estimated that since 1998 forest countries logging on the west coast had avoided paying \$149 m to the British Columbia government by ‘grade setting’, including an inaccurately high proportion of low-value wood in the samples used by government to set the stumpage fee.<sup>12</sup>

**Table 2.4: Estimates of country percentages of illegal logging for topical timber exporters<sup>13</sup>**

<b>SOURCE:</b>	<b>ESTIMATED PERCENTAGE OF ILLEGAL LOGGING</b>
Indonesia	73
Malaysia	35
Cameroon	50
Brazil	80
Gabon	70

### **Defining illegality; reforming the law**

2.14 An immediate problem facing any attempt to control the trade in illegal timber and wood products lies in defining what constitutes illegality. As expressed above in para. 2.10, the illegal practices in question relate to infringements of national laws – but in many countries forestry legislation is often clearly inadequate. For example, a 1998 review of Cambodian forest legislation by the legal firm White & Case found it was ‘difficult to obtain, difficult to analyse, provides few objective standards for forest protection and provides no integrated guidelines or standards for forest management’.<sup>14</sup> An overview of Indonesian forest governance in 2001 revealed inconsistencies and contradictions between laws and between government department decrees.<sup>15</sup> In countries such as Brazil, different levels of government – federal, state, and local – possess overlapping legal and regulatory systems that may not always be consistent with each other.

2.15 In some countries there may simply be no clear definition of what is and is not illegal. The definition of what is legal and what is not may depend on administrative fiat, or may be easily changed by local or national governments seeking to maximise revenue. Many undesirable (and environmentally unsustainable) practices in the forestry sector – such as excessive allocation of quotas or processing capacity – may in fact be legal, under existing laws. And even where the law is adequate, in terms of setting out clear definitions, the compliance costs – such as applying for permits – may be so high in terms of time or money that legal operations become uneconomic.

2.16 This should not be blown out of proportion: in some important producing countries, legislation is clear and adequate, and it is its enforcement that is lacking. In these cases the application of external pressure through the control of exports – coupled with capacity-building to assist enforcement – may be the key measure needed to control illegal behaviour. In many other countries,

<sup>12</sup> Both cited in Arnoldo Contreras-Hermosilla, *Forest Law Enforcement* (paper for Forest Law Enforcement and Governance East Asia Ministerial Conference, September 2001).

<sup>13</sup> Source: *EU Illegal Timber Imports*, EU Forest Watch July/August 2001 special report (compiled by Forests Monitor on behalf of Fern).

<sup>14</sup> White & Case, ‘Report to Senior Officials of Royal Government of Cambodia and International Donors’ (1999); Summary of Recommendations, p. 1.

<sup>15</sup> Nana Suparna, *Forest Governance and Forest Law Enforcement in Indonesia* (paper for Forest Law Enforcement and Governance East Asia Ministerial Conference, September 2001).

however, reform of legal and regulatory systems is a prerequisite for the effective control of the trade in illegal timber. Donor country governments can assist this process of improving governance by providing financial and technical assistance, and, in some cases, by making disbursement of development assistance conditional on such improvements.

2.17 Possible law reforms include creating clear definitions of illegal activities, including corrupt or improper allocation of concessions; reducing or removing discretionary powers; establishing significant deterrent sanctions, including powers to confiscate equipment; and specifying enforcement responsibilities at every stage in the timber commodity chain. Simplification is often called for, ensuring that legal activities are not so over-regulated that they become impossible or uneconomic for enterprises – particularly small-scale and community-based organisations – to carry out. Reform of laws outside the forestry sector is also frequently necessary, including laws dealing with land ownership, bankruptcy and corruption. Transparency of all private and public activities to the outside world (including both domestic and foreign observers) should be an important principle underlying all such reforms.

2.18 In implementing these reforms, it will be important to avoid creating marked imbalances between countries. If a country has very strong, well-defined forest legislation, then a relatively high quality of forest management might be ‘illegal’, whereas in a geographically comparable country with very weak legislation, the same quality of forest management might comply with the law. Purely national-level definitions of ‘legality’ therefore have the potential to create disparities between countries when controls are applied at the international level. This suggests that it might be helpful to try to develop an accepted definition of the types of illegal activities considered desirable to control, at least at a basic level – particularly if any eventual international agreement is negotiated (see further in Section 5). This would also help to focus attention on the major irregularities, and avoid trying to apply stringent controls to relatively minor infringements.

2.19 One category of logging deserves a special mention, that of so-called ‘conflict timber’, where revenues derived from its production and sale are used to finance armed conflict. The term ‘conflict timber’, suggested by the UN panel of experts investigating the illegal exploitation of natural resources in the Democratic Republic of the Congo, has been defined (by the NGO Global Witness) as ‘timber that has been traded at some point in the chain of custody by armed groups, be they rebel factions, regular soldiers, or the civilian administration, either to perpetuate conflict or take advantage of conflict situations for personal gain’.<sup>16</sup> Conflict timber is not necessarily illegal, as the administration in question may simply define it as legal. That puts it outside the scope of this paper, which presupposes a degree of willingness on the part of the producer country government to tackle the problem. It is probably best handled through UN action such as internationally agreed sanctions – though it should be noted that many of the procedures discussed in this report, such as monitoring and data exchange, and possible trade controls, may have a role to play in its control.

## Conclusions

2.20 This section has demonstrated the scale and complexity of the international timber trade, and the difficulties in defining what is meant by ‘illegal’ timber. These factors – the multiple entry and transit points for products in trade, and the discrepancies between countries in defining illegality – point towards the importance of coordinated international action, including some common definitions of illegality, if the trade in timber is to be effectively controlled. It should also be clear that in many

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<sup>16</sup> See Global Witness, *Economies of Conflict: Private Sector Activity in Civil Conflict and War* (2002).

producer countries, reform of domestic laws and regulations dealing with forest crimes and related activities is an essential condition of successful action against illegal logging and the trade in illegal timber, and in some circumstances it may be helpful to make disbursement of development assistance conditional on improvements in forest law and governance.

### 3 Identifying legal production

3.1 Having defined what is meant by products produced illegally, the next step is to establish the means to identify them. This section looks at four sets of issues:

- Lessons that can be learned from identification systems already established in other international agreements and in the normal processes of trade.
- Models provided in existing timber certification schemes.
- Lessons that can be learned from recent attempts at identifying legality.
- The practicalities of establishing a robust and verifiable system of identification.

#### **Movement documents: permits, licences and customs codes**

3.2 Several multilateral environmental agreements (MEAs) already employ means of identifying the materials which they seek to control in international trade. The Convention in International Trade in Endangered Species (CITES) and the Montreal Protocol on ozone-depleting substances use licensing systems to monitor and control exports and imports, while the Basel Convention on transboundary movements of hazardous wastes uses a system of ‘prior notification and consent’. Other MEAs not yet in force, including the Rotterdam and Stockholm Conventions, dealing with various categories of chemicals, and the Cartagena Protocol, controlling trade in genetically modified products, will in due course employ similar systems, variously known as ‘prior informed consent’ or ‘advanced informed agreement’. Another international agreement, the Kimberley Process to identify and eliminate the trade in conflict diamonds (also not yet in force) will similarly use a certificate-based system. The tracking mechanisms used in these agreements are set out in more detail in Appendix 3.

3.3 The two agreements in force with which there is most experience, CITES and the Basel Convention, both require paper certificates or movement documents to accompany the traded goods in question. A key weakness of both systems is that the documents themselves thus effectively acquire a value, opening up possibilities for fraud, theft and corruption in issuing them. Falsification of CITES permits is a common problem, particularly for high-value products such as caviar. Theft and sale of blank documents similarly undermines the system. The vast majority of the illegal trade in hazardous waste is believed to involve falsified documentation.

3.4 A second key weakness lies in the cross-checking of the documents against each other. The World Conservation Monitoring Centre, once an NGO and now part of UNEP, monitors the legal trade taking place under CITES (and a number of other MEAs, such as the Bonn Convention on Migratory Species), receiving copies of all import and export permits issued. Although strictly speaking it is not part of WCMC’s remit to investigate illegal trade, simple inspection of the permits sometimes reveals fraud. However, in common with all other MEAs, CITES lacks a comprehensive and independent system of monitoring and verifying the issuance and use of permits and the central reporting of data. The Kimberley Process on conflict diamonds does envisage a cross-checking procedure which may prove more effective.

3.5 The third key weakness lies in the cross-checking of the documents against what is actually in the shipment. The question of customs powers and resources is dealt with below (see Section 4) but only a tiny fraction of the huge volume of goods in international trade can ever be physically inspected. In the case of CITES, there are obvious problems in correctly identifying species, out of the almost 25,000 or so listed in its appendices. For the Basel Convention, hazardous waste can often be difficult to distinguish from non-hazardous waste; and, indeed, the two are sometimes deliberately



mixed together (there is also an understandable reluctance on the part of customs officers to inspect it).

3.6 Even in highly developed countries it is clear that the CITES permit system is subject to abuse. An analysis of mahogany imports into the US in 1997–98<sup>17</sup> (mahogany is the most commonly traded timber species listed by CITES) estimated that at least 25% of sawnwood imports (worth more than \$17 m a year) were illegal; the figure did not include trade unreported to US Customs and the true magnitude is therefore likely to be much higher.

3.7 There are, of course, many other forms of movement documentation. The World Customs Organisation oversees the Harmonised System (HS) of commodity classification and coding, which uses a six-digit number to identify traded goods. Chapter 44 of the HS lists the types of ‘wood and articles of wood’ covered by the system, although some products, e.g. furniture, are covered by other chapters. A few tree species are listed separately, but in general the products are identified by type, not by species. In some cases ‘tropical wood’ is given its own code; the heading covers about 100 species.

3.8 In principle it would be possible to extend the HS codes, and, indeed, the entire system is revised every seven years. The primary purpose of the HS, however, is to calculate customs tariffs and trade statistics; although it can be used as a means of monitoring illegal trade, this is not its primary purpose. It might help in identifying discrepancies in import and export data (though these are generally highly aggregated, and becoming more so), perhaps for key species – but given how easy it is to falsify codes, and bearing in mind the problems of cross-checking and identification outlined above with MEA documents, it seems unlikely that HS codes can play a major role in preventing trade in illegal timber.

3.9 The lack of a common system for identifying timber exports and imports is a hindrance to attempts to control the international trade. Often the same species goes by different names depending on its country of origin. Similarly, the aggregation of data, and the lack of a common system for collecting it, makes the trade more difficult to track.

3.10 None of the problems identified above, however, are insurmountable. Similar problems have been experienced and overcome by CITES in controlling trade in, for example, fur. In theory it should be possible to develop a global standardised nomenclature for identifying tree species in trade, and the spread of electronic data gathering and recording should make the system more robust and tamper-proof and easier to exchange. The efficient collection and exchange of data between exporting and importing countries’ customs agencies is likely to prove important to many of the means of denying market access to illegal products discussed below in Section 4. We consider possible improvements in data collection and exchange in Section 5.

### **Experience from timber certification schemes**

3.11 It is clear that detailed tracking of the production and movement of timber and wood products is necessary if legality of the product is to be guaranteed. A series of voluntary schemes, including product labelling and certification, already exist to provide additional information to consumers to encourage them to purchase sustainably managed forest products. These schemes are intended either to designate products that have been produced in accordance with a set of criteria and indicators of

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<sup>17</sup> Arthur G. Blundell, *Mahogany: Unregulated Trade* (US EPA, 2000).

sustainable timber production – perhaps the most well-known is that run by the Forest Stewardship Council, FSC – or to classify an organisation or company in terms of its ability to manage all aspects of its business in an environmentally sound manner – such as the European Eco-Management and Audit Scheme, or the ISO 14000 series. The number of forest certification initiatives has more than doubled since 1996, and there are now over forty schemes under development in more than thirty different countries.<sup>18</sup> In Western Europe, where market penetration is highest, certified wood products now account for 5% of the market.<sup>19</sup>

3.12 ‘Sustainably produced’ is of course not the same as ‘legally produced’ timber; sustainability, or stewardship, certification, involves a much wider range of factors. The award of an FSC certificate, for example, requires ten principles and fifty-six specific criteria of good forest management to be met. Nevertheless, many schemes denoting the ‘sustainability’ of their products also possess the requirement that production takes place within the law of the country concerned. For example, the award of an FSC certificate is predicated on adherence to all applicable laws of the country, including international agreements to which the country is a party, as well as specific forest management plans, and requires all prescribed fees, royalties, taxes and other charges to be paid. Moreover, according to FSC Criterion 1.5, forests under approved management must be protected from illegal harvesting, settlement or other unauthorised activities.

3.13 In the context of assuring the legality of supplies, operations must not only have ‘forest management certification’, implying that harvesting activities are legal. They must also have ‘wood product certification’ to demonstrate independent, third-party chain-of-custody inspection to trace wood harvested in certified forests through all stages of transport, processing and marketing to the finished product.<sup>20</sup> Of the three international timber certification schemes (FSC, PEFC and SFI), only the FSC requires chain of custody as an explicit component. National schemes in a number of countries – including Austria, Bolivia, Brazil, Denmark, Finland, France, Germany, Ghana, Indonesia and New Zealand – also include chain-of-custody monitoring. Many other certification schemes do not provide either chain-of-custody monitoring or independent third-party inspection and are not, therefore, of much value in controlling illegal logging.

3.14 Even independently audited chain-of-custody schemes such as the FSC can suffer from evasion of rules; no system is ever completely infallible, and its integrity will always depend on the extent to which the chain of custody is monitored in practice. The point about the FSC’s type of system is that does offer the *possibility* of monitoring at every stage, and a transparent means of auditing this. Along with any kind of certification where a market niche is established, it also benefits from a built-in incentive on the part of the operators to ensure that the system is fully put into practice and to guarantee the integrity of the certificate.

3.15 In practice FSC-certified forests represent a tiny (though growing) proportion of the world’s forests; some important regions, such as Africa, possess almost no FSC-certified areas. The process of FSC certification has stalled in some countries because of problems with the legality of operations – usually at the forest management stage, rather than during processing by industry, where activities are easier to monitor. In some cases certification has led to a focus on improving management systems and reducing waste that has actually led to cost savings.

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<sup>18</sup> Ita Rugge, *Progress in Timber Certification Schemes Worldwide* (London: Forests Forever, December 2000).

<sup>19</sup> ForestWorld.com: Summary Business Plan, 1 August 2001.

<sup>20</sup> Terminology from Rugge, *Progress in Timber Certification Schemes Worldwide*.

3.16 In general, however, certification systems such as the FSC add to the cost of production, though the costs need not be very large; in some countries an average of £1000 per factory has been cited, and the average falls as the number of participating enterprises rises. An EU project in Central Kalimantan in Indonesia provided \$150,000 for the first stage of FSC certification. The evidence suggests that at the final point of sale the impact on the retail price is likely to be small or negligible. Sustainability labels sometimes trade at a premium price in the final market, but not always; retailers have often proved reluctant to raise prices, and survey evidence suggests that many consumers would in fact be prepared to pay more than they currently do.<sup>21</sup> Certification schemes may also have helped prevent the erosion of market share which has been prevalent in the tropical timber sector, though supplies are still on such a small and irregular scale that it is difficult to reach any firm conclusion. It is worth remembering, however, that certificates such as the FSC, which identify *sustainably* produced timber, cover a much wider range of factors than a simple legality identification system would, and the costs of the latter would be lower.

### Experience from legality identification

3.17 There is relatively little experience with establishing systems to monitor the *legality* of timber and wood products – but there is some. In 1995 the National Hardwood Association of the British industry association, the Timber Trade Federation, and the Brazilian exporters' association Assonciacao das Industrias Exportadora de Madeira do Para (AIMEX) concluded an agreement committing signatories to trading only in legally derived mahogany. It required suppliers to provide IBAMA (the Brazilian environment agency) with forest management plans and transport documents. The technical requirements of the agreement are included in Box 3.1.

#### Box 3.1. Extract from NHA/AIMEX Agreement on Trade in Mahogany from the Para State of Brazil<sup>22</sup>

4. In technical support of the AIMEX and NHA Declarations, AIMEX has agreed with the NHA the following actions:

- a) Shippers will supply with each shipment, and attached to the relevant Bill of Lading, a numbered declaration stating that the good referred to have been produced in accordance with the AIMEX Declaration and a reference to the IBAMA Export Permit. Such certificates will only be released to buyers in the UK who have formally accepted the NHA Declaration and who have contributed to the Fund set up to cover the costs of administering and monitoring the workings of the NHS Declaration.
- b) The supplier will make available those pages of his individual IBAMA Forest Management Plans which show the IBAMA Licence number / land area / permitted harvestable volumes and also depict a detailed map of the area covered. The supplier will also provide a list of ATPF transport documents numbers allocated to the plan. This information will only be provided once for each plan.
- c) Suppliers will provide maps showing that logging is confined to areas outside Indian reserves (as designated before 1988 and after 1988).
- d) The supplier will provide copies of documentation (for example deforestation permits) giving legal authorities to clear forests for other use for mahogany derived from such areas.
- f) The supplier will keep available the serial number of ATPF (Autorisacao de Transporte de Produtos Florestal) transport notes for goods delivered and the reference numbers of other relevant transport documentation which may assist in tracking logs from source to sawmill and sawn timber from sawmill to port.
- g) Each supplying company will ask FUNAI formally that areas authorised for logging are outside indigenous reserves and copy the letter to their overseas agents.
- h) Supplier companies will inform AIMEX and their overseas agents if they receive 'autos de infracao' from IBAMA and their response.

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<sup>21</sup> See ForestWorld.com, certified wood market information.

3.18 Concerns were expressed, however, that government documents could be easily forged, and that illegally cut mahogany could be purchased by AIMEX members from third parties. The logs also tend to be transported for some distance by different modes (truck and log raft), which is difficult to monitor. In response to these problems, a pilot log-tracking project for tracing mahogany from forest to port was suggested by NGOs, and taken up by the TTF, which proposed a chain-of-custody project to identify problems and weaknesses in the supply chains and put forward possible solutions. This was to be executed by the Soil Association, an FSC-accredited certifier. IBAMA, however, felt that it had already implemented sufficient measures to guarantee legal extraction, and suggested that log tracking could only take place on a strict voluntary basis by private firms. AIMEX members proved reluctant to allow any independent survey of their operations, and the project was eventually shelved. In fact the Brazilian government later suspended the entire trade in mahogany, and introduced a log export ban for all types of timber.

3.19 Should governments begin to introduce the types of measures discussed below in Section 4 to deny market share to illegal timber, it seems likely that industry groups and associations will move to establish their own agreements along the lines of the NHA–AIMEX one. Buyers' groups are already becoming more active in trying to develop the market for certified products. Sometimes the impetus can come from the exporter side, and a number of countries such as Russia are seeing the growth of producer groups aiming to improve forest management in order to secure future access to markets which they perceive as increasingly likely to demand certified products.

3.20 Producer governments have on occasion used the services of surveillance firms to improve revenue collection. Firms such as Société Générale de Surveillance SA (SGS) have built up some experience in designing and operating log tracking systems, in SGS' case particularly in Papua New Guinea, the Central African Republic and Cameroon. The costs of implementing such a system are estimated at approximately \$1/m<sup>3</sup> for tropical logs (a small percentage of the final price), though this will vary substantially with the type of system employed. In Suriname, such a system was operated by an independent foundation, which charged \$3/m<sup>3</sup>, with initial investment costs of \$4–5 m.<sup>23</sup>

3.21 SGS is currently promoting the establishment of a system of 'Independent Validation of Legal Timber', based on the concept of independent monitoring and verification of land use changes, timber flows and resource management at both the national and producer level. It could lead on to sustainability certification, but does not have to. Box 3.2 explains the main components of the system; steps 1 and 2, which would be compulsory, provide the 'independent validation of legal timber', whereas step 3, which is voluntary, would then provide a certificate of sustainable forest management.

### **Practicalities of legality licensing: monitoring and verification**

3.22 Any system to control trade in illegal timber requires harvested logs to be identified, inspected and documented, and then followed through processing and packaging to export, with subsequent cross-checking with cooperating importers. A chain-of-custody assessment is essential to following this process and revealing whether illegal timber is entering legal commerce during harvesting, processing or at the point of export. Knowing the conversion efficiency of controlled mills and the amount of legal material entering them means it is relatively easy to calculate if a company is slipping illegal timber into the system. Spreadsheet accounts can be maintained in a central database, which should correlate records from concessionaires, licensed mills and processing plants (clearly, there

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<sup>22</sup> Information supplied by Timber Trade Federation, personal communication.

<sup>23</sup> SGS, personal communication.

should be no more processing capacity than legal harvest), payments and revenues accruing to the state and exports.

3.23 There are many alternatives to paper-based systems for identification and chain-of-custody monitoring, including barcodes, microchips and tracer paints; they are described and assessed in Appendix 4. The important point is that many technological options exist and can be easily built in to comprehensive control systems. Other useful measures of control and monitoring include maintaining registers of logging equipment (chainsaws etc.) and mandatory registration of processing and harvesting facilities with central government authorities.

**Box 3.2: ‘Independent Validation of Legal Timber’ (extract from SGS proposal)<sup>24</sup>**

A stepwise, pragmatic approach is therefore proposed to address the problems of illegal logging through the compulsory *Independent Validation of Legal Timber (IVLT)* - while providing a link or possibly integration with voluntary *sustainable forest management (SFM) certification*.

To illustrate this approach, a ‘Sustainable Timber Trade’ labelling system is suggested in three steps: 1) ‘Timber from a Legal Origin’, 2) ‘Validated Legal Timber’ and 3) ‘Sustainably Produced Timber’. Each step is conditional on a certificate issued independently by an accredited third party verifier / certifier at different stages of the process:

1. The ‘**Certificate of Legal Origin (CLO)**’ is the result of the successful verification – essentially through implementation of a log tracking system - that the logs or timber products: a) were legally purchased from the rightful owner and have legally been sold and transferred down the chain of custody to the point of reference of the certificate and b) conform to national or international product-specific regulations such as protected species and/or minimum diameters. The system would also periodically verify that duties have been paid and that allowed volumes of cut or quotas have been respected. Past, unsettled non-compliances may block the whole process. In the suggested labelling system, compliant logs and timber products could be labelled as ‘Timber from a Legal Origin’.
2. The ‘**Certificate of Legal Compliance (CLC)**’ is awarded where forest management was found compliant with specified national legislation and regulations including the terms of the concession agreement or permit. This essentially refers to the preparation and implementation of the management and harvesting plans, including the forest inventories. Logs or timber products already certified as from a ‘Legal Origin’ (CLO) could at this stage be labelled as ‘Validated Legal Timber’ if the CLO for the timber can be linked with a CLC for the forest the timber comes from.
3. The ‘**Certificate of Sustainable Forest Management (CSFM)**’ refers to the certificate awarded or maintained as a result of successful forest management auditing against the principles, criteria and indicators of an international forest certification scheme such as the Forest Stewardship Council (FSC). It is suggested that logs or timber products already certified as ‘from a legal origin’ (CLO) and originating from a forest certified both as ‘legally compliant’ (CLC) and, in addition, ‘sustainably managed’ (CSFM) could at this stage be labelled as ‘Sustainably Produced Timber’. Note: a certificate of ‘chain of custody’ issued under the forest certification scheme would not be enough to replace a Certificate of Legal Origin (CLO), whose scope is wider and which is based on advanced log tracking systems.

***Independent Validation of Legal Timber (IVLT)*** covers the first and second steps i.e. verification of the legal origin of the timber (CLO) and verification of the legal compliance of the timber source (CLC). From producer to consumer, the IVLT system has the potential to provide:

- an effective tool to aid law enforcement by the Government
- a powerful market-based instrument, both for producers (market access, fair competition) and buyers (sound, transparent timber trade)
- reliable information for all stakeholders, locally and internationally.

<sup>24</sup> See [www.sgs.com](http://www.sgs.com).

3.24 The reliability and integrity of such systems depend on the transparent and independent auditing of procedures. Again identification technology can be useful: for example where those monitoring, for instance, barcodes on logs are not themselves aware of what the code is or what it represents (and therefore cannot easily cheat the system). Centralised and transparent monitoring is clearly essential; oversight should not be dispersed amongst various units, as separate audits of each link in the marketing chain create problems of varying methodology and investigative gaps. Similarly, it would be very difficult for consumer countries to cooperate with producers to check custody arrangement if information was not centralised.

3.25 This may often require the reform of legal and administrative arrangements in the producer country, possibly encouraged by donor pressure. Often matters relating to the export of timber are the responsibility of ministries of finance or trade, whereas the monitoring of forest management will fall under the ministry of forestry or natural resources. NGOs and donor agencies often work with the latter and ignore the former, although when looked at in terms of revenue loss, the issue is clearly of concern across government. Corruption, poor levels of pay and lack of political will are common problems, however, across all government departments in many countries.

3.26 In all cases it is important that a separate check on system integrity should be established, or otherwise there is the danger that any system marking timber as legal simply creates a better and more effective method of laundering illegal timber. The notorious Management Quota System (MQS) for African elephant ivory in the 1980s serves as an example of how a system without an independent check on its integrity directly facilitated illegal traffic. The combined effect of no controls over the volume of MQS certificates issued and the presence of large stockpiles of illegal material that could acquire considerable additional value if they were certified led to a hopeless inflation of the system, with the end result that legal ivory trade amounted to under 20% of the total 'legitimised' trade under the system.<sup>25</sup>

3.27 A third-party independent tracking unit, private company or NGO is therefore required to audit the procedures used to establish the legality of timber and wood products. The FSC already provides international oversight over an increasing number of independent certification bodies, each using its own auditing system but with certain elements in common. FSC audits all accredited certifying bodies annually to ensure that systems are being implemented consistently. The presence of an external tracking organisation can raise problems of national sovereignty and interference, and co-management of the process with the host country may sometimes prove necessary. In Cameroon, a cooperative system operates where government enforcement and independent certifiers work in tandem. Another option is to develop a 'super-agency' charged with the specific responsibility for monitoring and certification, with a strong self-interest in ensuring that the system functions properly. However the auditing is carried out, however, an important point is that the entire procedure should be transparent, increasing external confidence in the system.

3.28 If the third-party tracking organisation discovers irregularities, it can then report them to government enforcement authorities for subsequent investigation. Separation of the law enforcement functions of the forest service from the routine administration of forestry management is generally required for effective enforcement. In the US, for example, the US Forest Service Law Enforcement and Investigations Programme operates on a 'stovepipe' arrangement – enforcement operatives are directly attached to senior forest service management and bypass district and regional bureaucracies so as to more effectively address allegations of corruption and collusion of forestry service

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<sup>25</sup> E.B. Barbier, J. C. Burgess, T. M. Swanson and D. W. Pearce, *Elephants, Economics and Ivory* (London: Earthscan, 1990).

personnel.<sup>26</sup> Malaysia has also used this autonomous enforcement operations approach, setting up, at various times, a specific enforcement task force involving police, the Anti-Corruption Agency, the Forestry Department and the Army.<sup>27</sup>

3.29 Allied to these enforcement and monitoring reforms, processes can be set up to allow field observation and intelligence from local communities and NGOs – assuming that the system is transparent enough for them to know what they are supposed to be monitoring. Networks of local and international NGOs already exist in many important producing countries, and donor countries have sometimes provided financial and technical assistance to help them develop; the UK government, for example, funded the UK-based NGO the Environmental Investigation Agency to run training workshops in monitoring forest activities for local NGOs and communities in Indonesia. The reform of property rights to devolve forest management to local communities with a vested interest in the long-term security of the resource can also prove helpful.

3.30 The World Bank-funded Forestry Reform Project in Cambodia may provide a useful model, with its establishment of a Forest Crime Monitoring Unit (funded by a UNDP trust fund through DFID and Aus Aid) involving an independent monitor – an NGO, Global Witness (funded by Danida) – to increase the monitoring system’s transparency and credibility. Private companies such as SGS provide independent monitoring services, issuing documents allowing for the movement, sale, distribution and export of forest products. This third-party service removes the certifiers of legal products from any corrupting influences and precludes any interference with the process that might result from inter-ministerial disputes or rivalries.

3.31 If an effective legal tracking system can be developed and made mandatory across an entire country, illegal timber becomes, by definition, any timber that exists outside that system, which would simplify intelligence gathering and enforcement operations by national authorities. It is more likely, however, that such a system would develop, at least initially, on a voluntary and non-universal basis, with timber not covered by the system simply being of ‘unknown legality’, not positively identified as legal, but not necessarily illegal. This has implications for the measures that can be taken in importing countries, considered below in Section 4.

3.32 Clearly there are costs in establishing any robust system of monitoring the timber trade and identifying legal products – para. 3.20 provides some estimates. Ideally, industry should internalise the costs, but unless the system is applied very widely across producing countries, or unless consumer country governments and industries act to source only legally identified material, this could simply render legal products uncompetitive. Assistance from international donors is likely to be necessary in establishing and operating the system, at least to begin with, until improved revenue collection for the domestic government and declining market share for illegal products allow the phasing out of aid.

## Conclusions

3.33 This section has examined the practicalities of establishing a system to identify legally produced logs and wood products. It should be clear that given sufficient resources and political will, such a system can be made to work: there are no insuperable technical obstacles to overcome. The following points are worth stressing:

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<sup>26</sup> See Ann Melle, ‘The US Forest Service approach to forest law enforcement’ (paper for Forest Law Enforcement and Governance East Asia Ministerial Conference, September 2001).

<sup>27</sup> ‘Army to be called in to combat illegal loggers’, *Borneo Bulletin*, 10 March 2000.

- Simple paper-based certificates or movement documents such as those employed under CITES are prone to theft and fraud; more technologically sophisticated solutions – of which there are many available – should be employed in any system established to identify legal production.
- Comprehensive chain-of-custody monitoring of every stage of the chain of production, processing, export and import is necessary to guarantee legality. Independent third-party auditing of the process is necessary to guarantee the validity of the system. Experience of operating such a system within the wider framework provided by certification systems such as the FSC is valuable.
- Although the costs involved in setting up such a system are not likely to be large, they are not negligible; capacity-building support should be provided.
- Similarly, capacity-building, and possible legal and administrative reform, will be needed to improve enforcement where breaches of the system are detected.
- Data on export and import of timber and wood products should be collected and exchanged more systematically in order to help tackle the problem of illegal trade. There is likely to be a role for a central monitoring function such as that provided by WCMC for CITES.



## 4 Closing markets to illegal products

4.1 Once an effective system of identification of legal material is established, how can it be used? The question of which products are being identified is crucial. In an ideal world, all measures should be directed against illegally produced timber and wood products. Until systems such as those discussed in Section 3 can be established for all sources of exports in all producing countries, however, most timber imports will simply be of ‘unknown legality’ (as touched on in para. 3.31). Importing countries can therefore take measures to:

- 1 Promote goods that can be identified as legal.
- 2 Sanction goods that can be identified as illegal.
- 3 Sanction goods that cannot be identified as legal, closing markets to all imports lacking evidence of legal production (including those of ‘unknown legality’).

4.2 The problem with enforcement action against illegal products – options 2 and 3 – lies with the definition of illegality. In the vast majority of consumer countries, enforcement authorities – police and customs – cannot seize imported illegal timber at the point of import or sale, because no domestic law has been broken; it is laws of other nations that have been broken. Changes to legislation would therefore be required in each of these cases, incorporating a definition of ‘illegality’ into the importing country’s laws. This could either rest upon what is defined as illegal in the producing country (option 2), or upon an external standard, such as might be established by the type of legality identification system discussed in Section 3 (option 3).

4.3 None of these sets of options are mutually exclusive, and it may well prove appropriate to implement them in a step-wise fashion, building up through the options as identification systems become more accepted and widespread in producing countries. This would create positive incentives for producers to establish and implement legality identification systems while the new legislation required in importing countries is developed and brought into force and intergovernmental agreements are negotiated and agreed. Many of the measures discussed in this section may be affected by international trade rules, which are explored below in Section 6.

### **Voluntary measures: labelling and industry sourcing**

4.4 The various stewardship certification schemes mentioned above in Section 3 are voluntary market-based instruments, relying on purchaser interest – whether individual consumers or wholesalers and retailers – to steer the market towards their products. This can be done either by labelling products which are sustainably produced, allowing them to compete with unlabelled products in the marketplace, or through retailers undertaking a commitment only to buy from certified sources (as the British retailer B&Q, for example, has done).

4.5 Applying a label identifying legally produced material is obviously feasible, and could be carried out on a similar voluntary basis, e.g. by industry and/or NGO action to set up identification systems. This carries some obvious advantages: as a voluntary scheme it would be less likely than a mandatory requirement to be subject to a challenge under WTO rules, and it does not require any implied or actual interference with national sovereignty in the producing country. It would also, however, suffer from obvious weaknesses. The volume of products identified as legal would not necessarily grow any faster than the volume certified under FSC or other schemes. There would also be a substantial likelihood of confusion between systems identifying ‘sustainably-produced’ and ‘legally-produced’ timber. And applying a label identifying ‘legally produced timber’ to some products and not to others is quite likely to have the effect of driving consumers away from tropical timber, or timber generally, with accompanying loss of export earnings for producer countries, even

where their exports are mostly legal but they have not yet managed to establish a legality identification scheme.

4.6 Retailers undertaking a commitment only to source products certified as legally produced would avoid some of the problems described above with labelling, and if such a system were in place it could help to develop the market for legal products. As before, the volume of products identified as legal would not necessarily grow any faster than the volume certified under FSC or other schemes – but this would depend on the speed of implementation of the scheme, its acceptability and its costs. If the system could be demonstrated satisfactorily through initial government action (see Section 5), then there should be little resistance to industry adopting such an approach.

4.7 In either case, some form of policing of the system would be required, to ensure that products identified as legally produced were actually so. This would involve advertising and trading standards authorities applying general fair trade laws to prevent misleading advertising or claims. These authorities have complete discretion as to which cases to pursue, and tend not to feel competent to make judgements about the *sustainability* of timber – but making judgements about the *legality* of the source may be easier.

### **Government procurement policy**

4.8 As major buyers of timber and wood products, government procurement policies can be used to affect the market in a significant way. Government procurement policy could be used to give preference to legally produced timber, guaranteeing a substantial share of the market. Indeed, in July 2000 the UK Government announced that ‘current voluntary guidance on environmental issues in timber procurement will become a binding commitment on all central government departments and agencies actively to seek to buy timber and timber products from sustainable and legal sources ...’.<sup>28</sup> Implementation of this commitment to date has been slow, and has revealed how little information departmental buyers actually possess on where they source their timber. Steps are now being taken to improve the availability of information and the implementation of the commitment across all departments.

4.9 A number of other initiatives are already in progress among governments, municipalities and large retailers to improve purchasing practices for timber and timber products, aiming to source primarily from sustainable and legal sources – for example those certified under the FSC or other certification schemes. To avoid purchasing illegal products, procurement policies would have to adhere to a standard that offers chain-of-custody certification. Under the OECD Anti-Bribery Convention (see Section 7) one of the sanctions available to be applied against companies which have been engaged in bribery of a foreign public official is exclusion from participation in public procurement.

4.10 Current EU legislation in the field of public procurement dates back to the early 1970s and is covered by four different directives (services, supplies, works and utilities). Several aspects of those old directives are either outdated or have been in need for clarification for some time, and in mid 2000 the European Commission put forward a proposal for a revision, while also preparing an interpretive paper on the old directives.

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<sup>28</sup> Michael Meacher, DETR News Release 516, 28 July 2000.

4.11 The application of the current and proposed new directives on ‘green procurement’ is disputed. It is clear that some environmental criteria can be included in the technical specifications of a tender when it is drawn up, but the Commission has argued that such criteria cannot be considered at the award stage. Legal action has been taken against a number of public authorities which have tried to do this; but in the most recent case, dealing with the purchase of low-emission buses by the City of Helsinki, the EU Advocate-General concluded (in December 2001) that the Commission’s position was mistaken, and that extra points could be awarded to low-emission vehicles at the award stage. If this is confirmed by the European Court of Justice, it would imply that the proposed revision of the directives, which make explicit the Commission’s previous position, could represent a more restrictive approach to green procurement. The impact of the new directives, and their application to cases such as legally or sustainably produced timber, should be clarified.

4.12 As with certification, national government procurement policies raise potential WTO issues (see Section 6), including limits on the extent to which they can specify exact forms of identification, though it is worth noting that under WTO disciplines local government and the private sector have more latitude. In one recent case, representatives of the Malaysian Chamber of Commerce lobbied against procurement measures by the New York and Los Angeles authorities requiring tropical timber to be certified because the move did not require certification for all timber products from all sources.<sup>29</sup> In another case, the state of Massachusetts adopted a procurement policy which banned products produced in Myanmar because of the abuse of labour standards and human rights prevalent in the country – a possible precedent for action against activities regarded as unacceptable.<sup>30</sup>

## **Tariff preferences**

4.13 Another means of improving market access to timber identified as legal would be to grant it favourable import status and tariff reductions. This already applies to a limited extent for timber produced in ways that can demonstrate compliance with environmental and/or labour standards. The EU, for example, added labour and environmental clauses to its generalised scheme of tariff preferences (GSP) in June 1998. Countries proving compliance with specific International Labour Organisation or ITTO sustainability standards became eligible to receive special tariff reductions of about 25%, and tropical wood exports respecting both the labour and environment clauses could attract a tariff reduction of 50%. This approach possesses the advantage of being likely to be favourably treated under WTO disciplines.

4.14 To date, however, no country has applied for the environmental special incentives under the GSP, probably largely due to the low rate of duties already applied to timber and wood products in most importing countries. In the EU many lines of timber, particularly tropical timber, only attract 0–5% tariffs. The bureaucracy involved, the implicit acknowledgement of trade and environment linkages (undesirable to some developing countries) and a simple lack of awareness of the system may also contribute to the poor uptake. Despite the current revision of the EU GSP, which aims to simplify the process and increase the tariff reductions, it seems highly unlikely that this approach can prove of much value in tackling illegal logging.

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<sup>29</sup> *Far Eastern Economic Review*, 4 February 1999, Letters to the Editor: ‘Timber certification’.

<sup>30</sup> See [www.usaengage.org/background/lawsuit/NFTCruling](http://www.usaengage.org/background/lawsuit/NFTCruling).

## **Enforcement powers and capacities**

4.15 Options 2 and 3 listed in para. 4.1 require new legislation to define ‘illegal timber’. The key responsibility in enforcing the new laws would fall on a number of government agencies: in the UK, Customs & Excise, DEFRA and the Forestry Commission are all involved in implementing CITES controls on listed tree species, and it seems likely that the same agencies would need to cooperate in action against illegal logging, combining the specialist expertise of the environment and forestry agencies with the inspection and enforcement powers of customs. As in some other instances of trade in specialised products (such as chemicals), assistance from industry is likely to be needed. If illegal products managed to enter the country, the police, and possibly local authority trading standards departments (see para. 4.7), would also have important roles to play.

4.16 In the UK the authority for Customs and Excise officers derives mainly from the Customs and Excise Management Act (CEMA) 1979. All goods imported into the UK that are subject to an excise duty cannot be removed until the duty is paid. Persons with the intent to defraud the government of a duty or evade any existing prohibition or restriction imposed on imports are guilty of an offence and can be arrested and subjected to summary conviction or indictment. Certain goods cannot be imported into the United Kingdom (e.g. firearms, narcotics, pornography) or require certification (e.g. CITES-listed species or cultural property); otherwise, there are no restrictions on importing a good regardless of the history of its production or cultivation.

4.17 There is nothing in CEMA that requires an importer to make any declaration avowing the legality of the good or product they are importing. It might be possible for a customs commissioner to require this but notice of the goods’ arrival is a simple form that requires only general information. The origin of the goods may be inquired into and customs can require an importer to furnish proof of any statement made to them to determine questions as to the goods’ origin. In addition, a customs officer has general authority to require persons concerned with the shipment or the carriage, unloading, landing or loading of goods to furnish any information relating to the goods, and to allow them to inspect any invoice, bill of lading or other book or document relating to the goods.

4.18 Customs has a general duty to discharge its duties in relation to any ‘assigned matter’ under CEMA, but this is done pursuant to specific requirements, e.g. under CITES. Illegally produced timber would therefore have to be defined as an assigned matter, through either UK legislation or, more realistically, an EU regulation or directive (since it is virtually pointless to establish new UK border controls alone; they would be easily evaded by trans-shipment through another EU country, from which exports could not be checked). The regulation would have to be comprehensive, specifying types of products (raw logs, sawnwood, processed products, etc.), the activities which would be controlled (import for sale? for trans-shipment? for processing and re-export? etc.) and the proof of legality that would be required.

4.19 In addition to the legal powers, there are practical questions of detection and inspection to consider. It is impossible for customs authorities to carry out routine checks of every shipment, and it would waste an enormous amount of resources even if it were possible. UK customs currently inspect less than 2% of imported freight shipments, and those are generally on a targeted risk management basis, where information or suspicions suggest that there may be fraud or theft involved.<sup>31</sup> There is no reason in principle why similar risk analyses cannot be carried out for the timber trade, highlighting points of export and types of shipments that warrant further investigation. This highlights the need for an international system of data and intelligence exchange; see further in Section 5. There is also the

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<sup>31</sup> HM Customs & Excise, personal communication. Other countries, such as the US, cite similar percentages.

problem of a simple lack of customs resources; when set against high-profile contraband such as tobacco, narcotics or arms, and with the current focus on anti-terrorist activities, action against illegal timber is likely to receive a low priority unless extra resources are specifically made available.

4.20 It has been suggested that the system of phytosanitary inspection of timber imports could be extended to checking legality. In the UK the Plant Health Act aims to control pests and diseases injurious to agricultural or horticultural produce, as well as trees and bushes. The import of particular species of timber is subject to inspection by an officer of the Forestry Commission where they may carry pests likely to be dangerous to UK plant health. This excludes virtually all tropical timber, however, since tropical pests do not survive in temperate climates such as the UK, and therefore phytosanitary inspections are unlikely to prove of much use in this area.

4.21 In recent years the police force has built up considerable expertise in taking action against wildlife illegally imported and put on sale, cooperating with NGOs through PAW, the UK Partnership for Action against Wildlife Crime. Possession of stolen or illegal goods is prohibited in the UK through the Theft Act 1968, which establishes offences for taking property by deception; it has been applied to convict people selling peregrine falcons taken from the wild by falsely claiming the birds were bred in captivity.<sup>32</sup> Whether the Act could be applied to a situation where a consumer of illegally obtained timber purchased it under the assumption that it was felled or processed legally is not clear, and it seems almost certain that new legislation would be needed to establish the requirement not to place on sale products produced illegally. Again, European single market requirements mean that this would have to be applied at a EU-wide level, and could not be imposed within a single member state.

### **Sanctioning illegal timber**

4.22 Bearing in mind the practical difficulties explored above, in many ways the simplest and most logical approach to take to denying market access to illegal products would be for government to establish a legal requirement that all timber, forest products and derivatives that are sold must be produced legally. As para. 4.2 set out, new legislation would then be required in the importing country to define ‘illegality’.

4.23 The first possibility (option 2 above) would offer a definition resting upon what is illegal in the producing country. It is unusual for legislation to depend on a definition established through a different jurisdiction. There is, however, an important precedent from the US, in the form of the Lacey Act, enacted over a century ago, which makes it ‘unlawful for any person ... to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce ... any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law’. Animals and plants are treated differently: whereas animal species can be subject to the Act where they are taken in violation of another country’s law, the import or possession of plant species can only be prohibited where there is a violation of a law or regulation of another state within the US. Furthermore, under the Act plants are restricted to species listed on CITES appendices or identified as endangered under a US state law; animals are subject to no such restriction. Both plants and animals that are taken in violation of a treaty would be subject to the Lacey Act. Appendix 5 discusses the Act in more detail.

4.24 The Lacey Act is often used by US prosecutors and in general is regarded as fairly effective, although the relatively low level of penalties awarded is one weakness. It has been used, in

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<sup>32</sup> Royal Society for the Protection of Birds, *By Hook or by Crook* (1998).

cooperation with a number of South Pacific countries which are members of the Forum Fisheries Agency, to tackle illegal fishing, and US action has been taken against foreign flagged vessels carrying fish illegally caught in the exclusive economic zones of Agency states. A number of Agency member states, including Papua New Guinea, Nauru and Solomon Islands, have incorporated Lacey Act-type provisions in their fisheries legislation.

4.25 The model provided by the Lacey Act is of obvious relevance to illegal logging, with the possibility of legislation outlawing the import, transshipment, purchase, sale and receipt of timber obtained or sourced in violation of the laws of a foreign state or of an international treaty. Proving the illegality would not, of course, always be straightforward; it would clearly work better in countries which had established the kind of legality identification system described in Section 3. It also argues for the establishment of cooperative international frameworks between producer and consumer countries (similar to that operated under the Forum Fisheries Agency) – which is the topic of Section 5.

4.26 Nevertheless, there is clear value in determining what is illegal through legislation even if enforcement of the law is not perfect; it provides a clear signal to participants in the market, and shifts the balance of what is perceived to be acceptable behaviour. It is possible that cooperative enforcement legislation like the Lacey Act may become more widespread as nations increasingly come to collaborate against the growing problem of transnational criminal activities.

### **Sanctioning products not identified as legal**

4.27 The option of sanctioning illegal products (option 2, discussed above) has some drawbacks. The concept of legislation incorporating definitions established under different jurisdictions seems likely to meet with some resistance, and in any case it is vulnerable to a producer country lowering the threshold of illegality to get round the law (indeed, it might increase the incentive for countries to behave in this way). An alternative (option 3 in para. 4.2) is to rest the definition of illegality on some more objective standard – or, at least, to require suppliers, including importers, to show evidence that the production process for their products meets specified criteria. (It is important that domestic producers and importers are subject to the same requirements, at least if a WTO challenge is to be avoided – see Section 6.)

4.28 These criteria in question are the elements discussed in Section 3; requirements for chain-of-custody certification, independent verification, and so on. The Kimberley Process on diamonds (see Appendix 3) contains this kind of system and may provide a useful model. Ideally, the system would proceed with the full cooperation of the exporting country's government, but this is not absolutely essential; schemes similar to stewardship certification could be established, relying on market incentives to grow in size. There is, however, a possible danger of destroying the market for tropical timber, shifting sourcing to industrial countries where legality is probably easier to guarantee.

4.29 This argues for a careful approach to implementation of such a requirement, with a widely advertised lead-in period accompanied by capacity-building assistance to improve forest management and enforcement in the producing countries. If a system to identify legal production could be established internationally, with a significant number of countries participating (see below, Section 5), this kind of legislation would clearly become much easier as a means of implementing the agreement's provisions – and, indeed, it is unlikely to be practical or acceptable until a sizeable number of countries are participating in such a system.

## Conclusions

4.30 There are, clearly, a range of options which can be deployed in shutting out illegal products – or products not positively identified as legal – from markets in consumer countries. None of these are mutually exclusive, and the most effective combination of measures is likely to be a step-wise implementation of all of them:

- Encouragement for voluntary action on the part of industry, agreeing to source only legal products (this may involve the establishment of industry agreements such as discussed in para 3.19); accompanied by –
- Establishing further favourable tariff preferences (helpful but of limited application); accompanied by –
- An effective government procurement policy, implemented at central and local level, to source only from legal products; followed by –
- Lacey Act-type legislation outlawing the import and sale of illegal timber and wood products; followed by –
- Legislation outlawing the import and sale of products not positively identified as legal (including a definition, preferably, if possible, agreed internationally, of what requirements the production process – essentially, independently verified chain-of-custody monitoring – has to meet to be treated favourably).

4.31 The time needed to draw up and introduce the new legislation – perhaps five years for an EU directive or regulation – could be used to publicise its impact in producer countries, to deliver capacity-building assistance, to establish robust systems for identification of legal production, and to negotiate bilateral and regional agreements with producer governments. Government procurement policy, which should be faster to implement, can be used as a clear signal to exporters of what to expect. For any measure involving extended enforcement powers (the sanctioning of illegal timber, or of timber not identified as legal), additional resources would need to be made available for customs and other enforcement authorities in the importing countries.

## 5 International cooperation

5.1 It should be clear from the previous two sections that implementing systems of identification of legally produced timber and means of denying market access to products not so identified, are both rendered easier the greater the degree of cooperation between producer and consumer countries. This section considers four broad approaches:

- Unilateral imposition of measures by one or more consumer countries.
- Bilateral agreements between individual producer and consumer countries.
- Regional agreements between groups of producer and consumer countries.
- Multilateral agreement, in principle open to any country.

The question of international collaboration over enforcement and data exchange, including the establishment of prior notification systems, is also addressed.

### Unilateral measures

5.2 A consumer/importer country (or group of countries, or the EU) could decide to apply any or all of the measures set out in Section 4 – government procurement policies, encouragement for industry to source legal supplies, new legislation to exclude illegal timber or products not identified as legal – to deny market share to illegal products. The obvious benefit is ease of implementation; no international agreement need be negotiated, though it is possible that unilateral measures could nevertheless fall foul of other international disciplines such as the WTO agreements (that would depend in turn partly on whether the country's own timber industry was subject to the same requirements).

5.3 There are two main drawbacks. First, a single importing country may not affect the market enough to influence behaviour amongst producers/exporters. This depends entirely on the size of the market, and as seen in Section 2, the UK probably, and the EU certainly, offer large enough markets to create significant incentives and affect behaviour. The second drawback is that it might prove difficult to establish the kind of system needed to guarantee legality of production without the cooperation of producer country governments, or at least the majority of producer country enterprises. In some cases active cooperation may not be necessary – industry may be able to establish and operate the identification systems by itself – but cooperation would help, not least in receiving and directing capacity-building assistance. Active opposition of the producer country – by, for example, legislating to lower the threshold of legality – would, however, seriously compromise any unilateral initiative. Unilateral action is perhaps best seen as a fall-back option if negotiations on international agreements fail to proceed fast enough (and this may help to remove the threat of a WTO challenge – see further in Section 6).

### Bilateral agreements

5.4 The possibility of a bilateral agreement between individual consumer and producer countries was floated at the Forest Law Enforcement and Governance conference in September 2001. As the British minister Hilary Benn MP (Parliamentary Under Secretary of State for International Development) put it, 'there is one specific course of action we can take, and that is to reach voluntary bilateral agreements between producer and consumer countries ... two governments could agree to take action to prevent the illegal timber trade that affects them.' The possibility of such voluntary agreements was included in the 'Indicative list of actions for the implementation of the declaration' annexed to the ministerial declaration.



5.5 As with a unilateral agreement, such a bilateral agreement could cover any or all of the measures identified above in Section 4. Furthermore, it could establish cooperation over data exchange and enforcement – such as systems of ‘prior notification’ between the partners (see further in para. 5.25). A bilateral agreement between, say, the UK and Indonesia would possess obvious benefits. It would be relatively easy to negotiate, and would probably not be agreed in the absence of governmental willingness to make it work – in other words, the establishment of a country-wide system of legality identification should be possible. It would clearly need to include extensive capacity-building commitments, both for the reform of the relevant producer country legislation and for the administrative and technical means to establish and operate the identification system. Non-governmental bilateral agreements between exporting and importing industries are also possible, perhaps along the lines of the agreement established between the UK National Hardwood Association and the Brazilian exporters’ association, AIMEX, to control the trade in mahogany (see paras 3.17–18) – though without, of course, replicating the weaknesses of that scheme.

5.6 A bilateral agreement would, however, be relatively easy to evade, through simply transshipping of products through third countries, either near the country of origin (e.g. through Malaysia or Singapore in the case of Indonesia) or near the country of destination (e.g. France or the Netherlands for the UK). Section 2 indicated the complex nature of trade patterns in timber and wood products – multiplied for processed and finished products using wood from several sources – and they would hardly need to be made more complex to render the bilateral agreement much less effective. Nevertheless, even if it was relatively easy to evade, such an agreement would have value; it would change the accepted levels of illegal behaviour, it would offer opportunities to NGOs to expose evasions of the agreement and embarrass the governments involved, and it would provide a signal to the industry of likely future developments such as a wider, regional, agreement.

## **Regional agreements**

5.7 The greatest value of a bilateral agreement is likely to be the leverage it could offer in its rapid extension to the surrounding region. It makes almost no sense, as noted above, for the UK to impose any kind of trade controls in isolation of the EU, but the Union as a whole could apply them. As can be seen from the list of major exporters in Section 2, tropical timber producers tend to fall into regional groups – south-east Asia, central Africa, west Africa – and a regional agreement amongst producers would be less vulnerable to evasion through third-country diversion..

5.8 Regional agreements of various kinds are increasingly common; more than 100 have been created since 1947, though with one major exception (the European Union), many of them have only become particularly effective in the last ten years. They vary widely in their mix of trade, economic and political and security objectives. Major regional agreements include the EU itself, the North American Free Trade Agreement, NAFTA (scheduled to be extended into the Free Trade Area of the Americas), Mercosur, the Association of South East Asian Nations (ASEAN) and the Asia-Pacific Economic Cooperation (APEC). Trading arrangements made between these regional groupings are of increasing importance in world trade. Other agreements, such as the Lusaka Agreement in southern Africa, or the Amazon Treaty, already provide frameworks for enforcement collaboration and associated dialogue and capacity-building.

5.9 Within the EU, trade is a matter of exclusive European competence – i.e. the EU institutions handle all issues of trade policy. Within the Commission DG Trade negotiates trade agreements on behalf of the Union with other regional groups and individual countries. Other DGs – DG Development for African–Caribbean–Pacific countries (the ACP grouping, largely former colonies of EU member states), DG Relex for others – are also involved in the wider umbrella agreements

including political, economic and development cooperation elements. An article in such agreements covering agreed action against illegal logging could improve political dialogue on the issue (e.g. through the ACP–EU joint assembly) and could also extend to capacity-building assistance and customs cooperation.

5.10 In September 2002 negotiations are due to begin with developing countries included in the ACP group under the Cotonou ACP–EU Partnership Agreement (the replacement for the Lomé Conventions). Some country strategy papers, e.g. that on Cameroon, already specifically mention action against illegal logging as an area where financial support is needed. Cotonou provides a ready-made framework within which the EU could negotiate agreements on denying market access to illegally produced timber.

5.11 As mentioned earlier, governments participating in the East Asia Forest Law Enforcement and Governance conference in September 2001 included in the final ministerial declaration a commitment to ‘explore ways in which the export and import of illegally harvested timber can be eliminated, including the possibility of a prior notification system for commercially traded timber’.<sup>33</sup> The section on trade and customs in the ‘Indicative list of actions for the implementation of the declaration’ annexed to it included:

- ‘Harmonised customs commodity codes;
- Protocols for sharing of export/import data;
- Complete chain of custody audit and negotiation systems;
- Initiatives for improved and timely trade statistics;
- Prior notification between importing and exporting countries.’<sup>34</sup>

(Some of these measures are considered further below.)

5.12 These commitments, if followed through, already provide a preliminary framework for the negotiation of a regional agreement in the East Asia region. Further Forest Law Enforcement and Governance conferences – the next is scheduled for Africa in late 2002 or early 2003 – offer similar opportunities.

## Multilateral agreements

5.13 If a multilateral, potentially world-wide, agreement can be negotiated, the problem of third-country diversion of course disappears. Similarly, legislation directed against all products not identified as legal (see paras 4.27 – 4.29) becomes a much more realistic option in importing countries. A multilateral agreement should be the final aim of any move towards an international system for controlling the trade in illegal timber. Clearly, however, it will neither be an easy nor a quick road to follow. Two years of negotiations on a global forests convention before the Rio ‘Earth Summit’ in 1992 ended in failure. Although an agreement simply on *illegal* logging might be easier to negotiate, and there seems to be increasing international willingness to act on the subject, concerns about national sovereignty and fears of disguised protectionism against exports are likely to lead many exporting countries, both industrialised and developing, to proceed with such negotiations only reluctantly. Successful bilateral and regional agreements demonstrating how the system could work in practice, how capacity-building could be delivered, and the impacts of the system on trade flows and government revenues, could, however, provide a much-needed stimulus for a wider agreement.

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<sup>33</sup> Forest Law Enforcement and Governance East Asia Ministerial Conference, Bali, Indonesia, 11–13 September 2001; Ministerial Declaration, page 2. (*Ref website*)

<sup>34</sup> Indicative List, page 3.

5.14 There are two existing multilateral environmental agreements which could possibly provide a suitable framework for negotiations: CITES and the Convention on Biological Diversity.

## CITES

5.15 The tracking mechanisms of CITES are explained in Appendix 3. Only about twenty tree species are currently listed on its appendices, including Brazilian rosewood and the South American araucana on Appendix I and the monkey-puzzle tree and small-leafed mahogany on Appendix II. However, an evaluation of 255 tree species carried out in 1998 against the CITES listing criteria decided by the ninth conference of the parties in 1994 found that about fifteen new species could be added to Appendix I and almost 100 to Appendix II.<sup>35</sup> Such additions to the appendices would need to be agreed at conferences of the parties, and any proposal to add substantial numbers of new species, particularly those important in international trade, would rouse strong opposition. If it succeeded, it could change the nature of the agreement almost out of recognition. Total international trade in animals, plants and their products currently covered by CITES is estimated to generate an annual turnover of about \$20 billion, but this is dwarfed by the value of timber and wood products in international trade, of almost \$150 billion. Such a massive expansion of the coverage of the agreement would place very severe strains on its operation.

5.16 Appendix III of CITES includes species subject to regulation only within the jurisdiction of a party and for which international cooperation is needed to control trade. Permits differ depending on whether exports originate in the listing country or in another range state. In the former case, an export permit must be granted subject to a finding that the specimen was legally obtained. In the latter, export is subject to the grant of a certificate of origin. Indonesia, for example, listed its own population of ramin on Appendix III in April 2001, with a zero quota, and the measure became effective from 6 August. An immediate side-effect was to increase smuggling of ramin into Malaysia, which has entered a reservation with regard to the listing.<sup>36</sup>

5.17 Appendix III has been used by a number of Central American range states to control the trade in mahogany, and there have been recent calls, at the Mahogany Working Group, to expand the use of such listings. The unilateral nature of Appendix III listings does offer an attractive way of controlling trade in particular species without waiting for a conference of the parties to agree a listing, and it may certainly prove of value in controlling the trade in particularly endangered tree species. Nevertheless, it suffers, along with the rest of the CITES system, from the drawbacks identified above in Section 3 – the lack of reliability of documentation and the onerous requirement on customs officers to be able to identify particular species.

5.18 The big advantages of CITES is that it is already in existence and is widely, if imperfectly, implemented. The treaty has had some success in preventing the extinction of particular endangered species, but as a general rule it has worked best where commercial trade has been ended completely (i.e. Appendix I listing). To stretch it to control a substantial volume of international trade in new tree

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<sup>35</sup> World Conservation Monitoring Centre, *Contribution to an evaluation of tree species using the new CITES listing criteria* (WCMC, December 1998). The species evaluated were chosen to provide 'a reasonable representation of tree species from various regions, climates and grades of commercialisation and conservation' (p. 2). The availability of information on individual tree species varied considerably.

<sup>36</sup> This means that Malaysia should be regarded, for the purposes of trade in the species concerned, as a non-party to CITES. Trade with non-parties is not permitted except where documentation equivalent to CITES permits (or, in this case, a certificate of origin) is provided. Whether this is likely to be required in practice remains to be seen. However, the reservation does mean that Malaysia is under no obligation under CITES to regulate trade in ramin into and out of its own territories.

species seems likely not only not to work, but to place the rest of the agreement in jeopardy. CITES is, therefore, likely to prove of value as a safety-net mechanism in protecting individual tree species which are endangered, but it cannot credibly be extended into an agreement to control illegal trade in all timber.

### **Convention on Biological Diversity**

5.19 The Convention on Biological Diversity (CBD) was agreed at the Earth Summit in 1992 and entered into force in December 1993. It currently has 182 parties, the major exception being the US (which has signed but not ratified). Although the CBD establishes only a general framework for the conservation of biodiversity, it possesses the benefit of linkage to a funding mechanism, the Global Environment Facility, and has also enabled the negotiation of one more specific environmental agreement (the Cartagena Protocol on biosafety). The 2002 conference of the parties is to consider a programme of work on forest biodiversity. The preparatory meeting of the CBD's Subsidiary Body on Scientific, Technical and Technological Advice in November 2001 agreed a draft work programme including activities to 'encourage and assist importing countries to prevent illegal imports not covered by CITES'.<sup>37</sup>

5.20 In principle, the CBD could provide a home for a set of multilateral negotiations aimed at creating a specific protocol on illegal logging. The negotiations on the Cartagena Protocol on the control of trade in GM products took three and a half years, concluding in January 2000, though the treaty has yet to enter into force (it is hoped that this will happen by the time of the World Summit on Sustainable Development in August 2002). However, it is fair to say that most of the forestry industry remains suspicious of the CBD, which is generally seen as a tool of environmentalists. Furthermore, the absence of the US, a key consumer and producer of timber and wood products, is a major deterrent to following this route.

### **Other Forums**

5.21 It seems preferable, therefore, to conduct negotiations in another forum. There are a number of international forums within which a new multilateral agreement could potentially be negotiated, including the UN Forum on Forests, the Food and Agriculture Organisation and the International Tropical Timber Organisation. Appendix 6 provides a brief description of each.

5.22 In the last few months both the ITTO and FAO have both shown an increasing level of interest in contributing to actions against illegal logging. The ITTO has agreed to conduct a global study of import and export data, potentially helping to reveal the extent of illegal trade; the study should be complete by the autumn of 2002. The organisation also provides training and assistance with timber tracking mechanisms and internal auditing, and several producer countries have expressed interest in following these up.

5.23 The FAO is currently considering what contributions it can make to tackling the problem of illegal logging.<sup>38</sup> The organisation's experience of negotiating the (voluntary) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (see Appendix 6 for a full description) may also provide a useful model to follow (though there is a substantial

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<sup>37</sup> *Earth Negotiations Bulletin*, Summary of the Seventh Session of the SBSTTA to the CBD, 12–16 November 2001 ([www.iisd.ca/biodiv/sbstta7/](http://www.iisd.ca/biodiv/sbstta7/)).

<sup>38</sup> See the FAO website for a report (forthcoming) of an experts meeting on 'Policy options for improving forest law compliance', January 2002.

difference between fisheries, where much illegal activity takes place in international waters and demands international cooperation, and forestry, where illegal activities take place on the sovereign territory of nations).

### **International collaboration on data exchange and enforcement**

5.24 Whatever kind of international agreement is pursued, it will be necessary to establish collaborative means of data exchange and customs cooperation. Timely exchange of information between customs agencies, for example, pre-arrival notification of shipments of legally identified timber and wood products, make the international tracking of movements much easier. FAO and ITTO already collect some relevant data, and there is also a possible role for the World Conservation Monitoring Centre (see para. 3.4) in administering an extended data reporting system. The quality of the data itself needs to be improved – as noted above in para. 3.9, names of species vary widely from country to country, some shipments are reported by weight and some by volume, and much is increasingly aggregated. The ITTO's forthcoming study of import and export data (see para. 5.22) could help to demonstrate some of the improvements likely to be needed.

5.25 The World Customs Organisation is collaborating increasingly with UNEP and environmental convention secretariats in tackling international environmental crime. Memoranda of understanding currently exist between the WCO and the CITES and the Basel Convention secretariats covering information exchange, joint technical meetings, cooperation between environment and customs officials at national level, and training and awareness-raising exercises. The WCO also oversees the Harmonised System of commodity classification and coding (see para. 3.7), and is currently engaged in discussions with the Montreal Protocol secretariat to modify the codes to facilitate detection of illegally traded ozone-depleting substances. These are all models which could be followed in the case of illegal logging, though the lack of a global agreement like CITES or the Montreal Protocol poses some problems of coordination, underlining the need for a clearer international legal framework.

5.26 Interpol (the International Criminal Police Organisation) facilitates information exchange between national police authorities; it does not investigate or prosecute cases itself. As with the WCO, Interpol possesses memoranda of understanding with the CITES and the Basel Convention secretariats. The Interpol Working Party on Environmental Crime was set up in 1993, with subgroups on wildlife crime and hazardous wastes, with the aim of improving information exchange and analysis. Interpol has supported regional working groups of law enforcement officers in these areas and instigated 'training for trainers' courses on environmental criminal investigations. As with the WCO, these are models which could be followed in the case of illegal logging.

5.27 In the mid 1990s, Interpol introduced an 'ecomessage' system for the collection and analysis of information in cases concerning international environmental crime. It was developed to tackle common problems in areas such as wildlife crime or illegal dumping of hazardous wastes, including: the need to collect information from widely scattered sources; the problem of member countries lacking uniform reporting methods; a lack of organised collection, storage, analysis and circulation of information about suspects; and a lack of knowledge about which law enforcement and other agencies need to be contacted. The ecomessage aimed to provide a uniform format to be used by National Criminal Bureaux (the Interpol contact points in each country); the General Secretariat in Lyons acts as a central collection and dissemination point. However, wide variations in what is legal and what is illegal in Interpol member countries, a lack of commonly agreed definitions of some terms (such as 'waste'), the involvement of a huge range of law enforcement agencies, not just the police, and a general lack of knowledge of environmental crimes amongst many of them, have all combined to render the system less useful than had been hoped. Many of these problems would be replicated in

adapting the system to illegal timber, pointing once more to the need for greater international coherence in terms and definitions.

5.28 A number of international environmental enforcement networks have developed over the last decade. Beginning with bilateral cooperation between the US and Dutch governments, the International Network for Environmental Compliance and Enforcement (INECE) came into being in the mid 1990s as an international (primarily intergovernmental) partnership to promote effective environmental compliance and enforcement of requirements of domestic environmental laws and international environmental agreements. INECE engages in networking, capacity-building and enforcement cooperation. Similarly, within the EU the European Network on the Implementation and Enforcement of Environmental Law (IMPEL) was established in 1992. Neither of these networks have touched much on illegal forestry issues (except in as much as they relate to CITES), but there is no reason in principle why they should not. It is likely that international collaborative arrangements such as these will grow in prominence in the next few years.

5.29 The lack of a central secretariat or unit responsible for promoting data collection and exchange and enforcement collaboration is a hindrance to establishing the kind of collaborative framework with WCO and Interpol described in the previous paragraphs. The Forest Law Enforcement and Governance conference in September 2001 produced commitments from participating countries to develop mechanisms for effective exchange of experience and information and to cooperate amongst law enforcement agencies. Furthermore, ministers undertook to create a regional task force on forest law enforcement and governance and to meet again at a ministerial level in 2003 to review progress on first actions to implement their commitments. This could represent the first steps towards an effective regional framework for cooperation against illegal logging; subsequent conferences in other regions could be used to establish similar bodies.

5.30 Ministers also committed themselves to explore ‘prior notification’ systems for the timber trade, and a number of NGOs have since called for ‘the establishment of a new mechanism to initiate a system of prior notification (of large volume shipments of timber) ...’<sup>39</sup> Such a system would require exporting countries to notify importing countries that ‘large value’ shipments were *en route*; if another ‘large value’ shipment came in without notice, it would be treated as of doubtful provenance – though in the absence of the new legislation in importing countries discussed in Section 4, the options open to the authorities would be limited. Nevertheless, this would help in building the kind of cooperative framework for data exchange necessary to any action against trade in illegal timber.

## Conclusions

5.31 While unilateral measures such as government procurement policies, or sanctioning of illegal timber, implemented by individual consumer country governments, or groups of them, would undoubtedly have an impact on the trade in illegal forest products, the impact will be enhanced if an international framework can be established to oversee the development and operation of a legality identification system and some means of trade controls. Bilateral agreements are of limited value in that they are relatively easy to evade, but they are likely to prove of value in demonstrating the viability of such a system and in providing the catalyst to wider regional agreements – for which the Forest Law Enforcement and Governance Conference in September 2001 could possibly provide a preliminary framework for East Asia.

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<sup>39</sup> Environmental Investigation Agency and Telapak Indonesia, ‘Brief on Prior Notification Mechanisms’ (November 2001).

5.32 The ultimate aim should of course be a multilateral agreement open to any country. While CITES may well prove of use in protecting particular endangered species, it cannot reasonably be extended to cover the whole of the timber trade, and a new agreement aimed at controlling trade in illegally logged timber is therefore called for; the ITTO and, in particular the FAO, provide potential forums in which such an agreement could be discussed. A valuable initial step would be international agreement, perhaps in the form of voluntary guidelines, on the definition of ‘illegality’, and the minimum requirements for a robust system of identification and verification.

5.33 Alongside this, greater efforts need to be made in improving international collaboration on data exchange and enforcement, including systems of ‘prior notification’ – though this seems likely to require the development of common accepted definitions of what constitutes illegal behaviour. The quality of the data collected also needs to be improved. The regional frameworks that can be established under regional forest law enforcement and governance conferences and declarations can help to further such enforcement collaboration.

## 6 WTO implications

6.1 Any restrictions on trade, including labelling requirements, tariffs and taxes, trade embargoes, or any form of discrimination, are potentially subject to the disciplines of the trade agreements administered by the World Trade Organisation (WTO) and centred around the General Agreement on Tariffs and Trade (GATT). This section looks at the elements of the WTO agreements which would be relevant to the types of measures discussed above in Section 4. It should be emphasised throughout that considerable uncertainty exists over almost every issue discussed in this section, and it is not possible to reach a firm conclusion over whether a WTO challenge to any given trade-restrictive measure would or would not succeed. It is possible, however, to reach some general conclusions about the design of trade measures, and these are listed at the end of the section.

### Process-based trade discrimination

6.2 Generally speaking, WTO agreements follow the GATT principles of non-discrimination between ‘like products’ originating from any WTO member and between domestic and foreign production. The GATT does not define precisely what it means by a ‘like product’, and its meaning has become one of the most difficult issues in the trade–environment arena. Originally incorporated into the GATT in order to prevent discrimination on the grounds of national origin, GATT and WTO dispute panels have in general interpreted the term more broadly to prevent discrimination in cases where *process* methods (‘non-product related processes or production methods’, or PPMs), rather than *product* characteristics, have been the distinguishing characteristic of the product and the justification for trade-restrictive measures.

6.3 This has aroused much concern among the environmental policy community, where policies designed to regulate PPMs (such as controlling emissions from manufacturing processes, or promoting sustainable production) are seen as increasingly important. It should be noted, however, that almost all of the relevant dispute cases to date have involved fairly crude PPM-based trade measures involving discrimination against exports from particular countries or producers on the basis of the PPMs used, not against specific products. In general it was not the panels’ final decisions themselves that tended to arouse concern, but the implications of their supporting arguments.

6.4 The GATT also, however, contains a ‘savings clause’, Article XX, under which exceptions can be made to the other provisions of the agreement, as long as they 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’. The sub-paragraphs of Article XX list a series of measures which may be allowable, including those:

- (a) necessary to protect public morals;
- (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 relating to customs enforcement ...
- (e) relating to the products of prison labour; ...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...

Other WTO agreements also contain ‘savings clauses’, similar in principle to GATT Article XX.



6.5 Paragraphs (b) and (g) of Article XX provide possible environmental justifications for trade measures that would otherwise be in breach of the GATT, and WTO dispute panels and, in particular, its Appellate Body (to which dispute panel findings may be referred) have shown an increasing tendency in recent years to accept them. In the well-known shrimp-turtle case, for example, a US embargo on imports of shrimp fished with methods that killed endangered sea turtles clearly embodied discrimination on the basis of the way in which the shrimp were caught (a PPM). The Appellate Body, however, considered that it could be justified under Article XX(g). In the end, the measure failed because the US had applied the embargo against all shrimp exports from a country unless it could demonstrate that it took sea turtle protection measures comparable to those of the US; if the exporting country in question could not do so, all its shrimp imports into the US were banned even if individual consignments were caught in turtle-friendly ways. In other words, this was another example of crude country-based PPM discrimination (see para. 6.3).

6.6 The Appellate Body also failed the measure because the US had applied it differently against different groups of countries. For both these reasons, the Appellate Body found that the embargo constituted ‘arbitrary and unjustifiable discrimination’ under the headnote to Article XX. The US subsequently reformed its regulations, including applying the embargo only to particular shipments, and began attempts to negotiate an international agreement with the complainant countries in south-eastern Asia, and on this basis, the embargo is still in place (see further below, para 6.12).

6.7 Can illegality of production be considered a PPM? Although superficially it relates to the way in which the products in question are produced, it is of course quite different in principle to the common understanding of the term, which relates primarily to physical impacts stemming directly from the process employed to produce the product (e.g. sea turtle deaths from shrimp fishing, greenhouse gas emissions from energy use, etc.). After all, 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 logging should be permitted or whether appropriate fees and taxes are paid. No paragraph of Article XX relates explicitly to illegal production, though possibly a case might be made under Article XX(d) (though there is very little GATT/WTO jurisprudence covering XX(d)).

6.8 In contrast, *sustainability* of production would seem to fit the definition much more clearly; sustainably produced timber is grown and harvested in different ways from unsustainably produced timber. If this argument is accepted, then it may prove possible to justify trade discrimination against illegally logged timber if it can be shown that this is an effective way to protect the environment – i.e., in this case, if it can be justified under Article XX(g). Among other things, the WTO member applying the ban would have to show – assuming a dispute case was brought – that the trade measure in question was effective in protecting the forests and that less trade-restrictive options were or would be less effective. 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, and Article XX(g) may not provide sufficient cover.

## **Extrajurisdictionality**

6.9 Another area of argument is the extraterritorial, or ‘extrajurisdictional’, application of the measures listed in Article XX. Clauses such as paragraphs (a) and (d) are generally viewed as referring to conditions in the state taking the trade measure (though this is not explicitly stated). As discussed in Section 4, laws in a consumer country seeking to bar access to illegally logged timber in effect rest on definitions of laws in another state. What is and what is not legal inevitably varies between states, and it is difficult to see how the WTO agreements could deal with this. This suggests, as concluded at various points elsewhere in this report, that it might be useful to try to develop some

kind of internationally agreed definition of illegal (or of legal) practices. In effect this is how paragraph (e) of Article XX operates, where the permitted discrimination against products produced with prison labour relates to such labour wherever the product is produced.

6.10 Pursuing the environmental argument (as in para 6.8), the decisions in the tuna-dolphin and shrimp-turtle disputes recognised that countries can take measures to protect natural resources outside their borders. However, 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<sup>40</sup> – 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 this case. It is not clear whether the same argument could succeed in the case of natural resources entirely located in the exporting country, though it could be argued that consumers in the importing country share a ‘nexus’ through their use of the products; or, alternatively, that forests, as sources and reserves of biodiversity, are a global resource of concern to all – another ‘nexus’. This could prove relevant in the interpretation of Article XX(d).

## MEAs and the WTO

6.11 Several multilateral environmental agreements (MEAs), including CITES, the Montreal Protocol and the Basel Convention, require parties to control or restrict trade in various ways, including imposing requirements for import and export licences or for different forms of prior informed consent, and applying total or partial bans in trade (in the products controlled by the agreement) with non-parties or with non-complying parties. The past few years have seen much debate about the extent to which these trade measures are compatible with WTO disciplines. Since there has never been a WTO dispute involving an MEA-mandated trade measure, the answer to this questions is not clear. However, it seems most likely that WTO problems would probably not arise in cases where the trade measures were taken between parties to the MEA, but are more likely to arise where they were directed against non-parties. This discussion is relevant, of course, to the development of any multilateral agreement on illegal timber – though, as above, a relationship would still have to be demonstrated to a paragraph of Article XX; for Article XX(g), for example, the agreement would need to have the objective and effect of protecting the environment.

6.12 The latest development in the long-running shrimp-turtle dispute contains a potentially important development of WTO jurisprudence. In October 2001 the WTO Appellate Body found that the US was entitled to maintain its embargo, even though it was a unilaterally applied measure, as long as it was engaged in serious good-faith efforts to reach a multilateral agreement. It did not accept Malaysia’s contention that the agreement had to be concluded *before* a trade restriction could be

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<sup>40</sup> United States – Import Prohibition of Certain Shrimp and Shrimp Products’, Report of the Appellate Body, 6 November 1998 (WT/DS58/AB/R), para. 133: ‘The sea turtle species here at stake ... are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat – the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX(g).’

enforced.<sup>41</sup> This has clear implications for the application of trade measures while an MEA is in the process of being negotiated.

## **Technical Barriers to Trade Agreement**

6.13 The Technical Barriers to Trade (TBT) Agreement is one of the specific agreements developed after the GATT was written and agreed, developing and codifying specific sets of trade rules. It is designed to ensure that technical regulations and standards which may affect trade are applied in at least trade-distorting means as possible. It is relevant to the timber trade because labelling or certification seem likely to qualify as technical regulations (if mandatory) or standards (if voluntary), and any dispute concerning them would probably relate to the TBT Agreement rather than the GATT (though that in itself would be a matter for the dispute system to resolve).

6.14 Annex 1 to the TBT Agreement defines a technical regulation as a ‘document which lays down product characteristics or their related processes and production methods’. There has been much dispute over whether this means that non-product related PPMs (i.e. PPMs that are not detectable in the final product) are covered by this definition or not (are they ‘related’ to the product characteristics?). Article 2.2 is the Agreement’s ‘saving clause’, recognising 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’ – though the article’s relationship to the rest of the Agreement nevertheless does not appear to allow countries to derogate from the core principles. All the questions discussed above in relation to the GATT – the application of requirements on the basis of PPMs, whether measures aimed at controlling illegal logging can be seen as protecting the environment, issues of extrajurisdictionality – are therefore also relevant in the case of the TBT Agreement.

6.15 There has been no relevant experience with interpretation of the TBT Agreement, so it is not known how these conflicts would be resolved in practice. In 1993 (before the WTO and the TBT Agreement came into being), Austria adopted a federal law that introduced a mandatory labelling scheme (regarding logging methods) for all imported timber. The law also placed a 70% tariff on tropical timber and wood products. Malaysia and other South East Asian nations lodged a protest against the Austrian law, identifying it as protectionist and discriminatory. They argued that while tropical timber was subject to such sustainability standards, timber from other types of forests were not subject to the same regime. Forests and timber products were argued to be like products regardless of their geographical place of origin. Fearing pressure that a challenge under the GATT could occur, Austria withdrew its law.

## **Agreement on Government Procurement**

6.16 Government procurement measures are subject to another WTO Agreement, the GPA, although this is a plurilateral agreement, to which not all WTO members have become parties (though all EU member states have ratified it). Its basis rests on the familiar WTO principles of non-discrimination between like products from foreign and domestic suppliers. The discussions above of whether legality is an appropriate measure to include as product characteristic, and whether environmental protection is a stronger justification, are again relevant. Article XXIII of the GPA includes exceptions to its obligations for reasons of public morals or protection of human, animal and plant life.

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<sup>41</sup> ‘United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 of the DSU by Malaysia’, Report of the Appellate Body, 22 October 2001 (WT/DS58/AB/RW).

## Illegal practices and international trade

6.17 The question of issuing labels or certificates or applying other trade restrictions on the basis of illegal origin has not, so far as we are aware, been discussed within the WTO; neither are corruption and bribery issues addressed specifically in the WTO agreements. However, as the OECD Trade Directorate commented in August 2000, ‘... a number of WTO provisions can have a bearing on bribery and corruption inasmuch as the latter distort international trade’<sup>42</sup> and because they contravene the WTO principles of non-discrimination, transparency, stability and predictability, and limitations to arbitrary action. Transparency remains one of the main topics of the WTO’s work on trade facilitation, and bribery and corruption were among the most important topics at a Trade Facilitation Symposium held in Singapore in 1997. Specific proposals were also forwarded by Venezuela in January 1999,<sup>43</sup> though little further discussion has been held.

## Conclusions

6.18 It is possible to draw some tentative conclusions from the discussion above, though it should be emphasised that there are considerable areas of uncertainty. The WTO-compatibility of trade measures taken to control illegal timber would not be settled definitively until an appropriate case came before the WTO dispute settlement system – though it should be pointed out that many potential disputes between WTO members are resolved by consultation and negotiation without the need for a dispute panel to be constituted. The dispute settlement system itself builds in provision for consultation periods between the parties involved, and the institutions of the WTO itself – committees (such as the Committee on Trade and Environment) and the General Council – do also discuss and reach decisions and understandings which clarify provisions and guide future behaviour. The negotiations on further modification of the WTO agreements launched at the WTO ministerial conference at Doha in November 2001 will also focus attention on a number of specific environmental issues.

6.19 Nevertheless, it is possible to reach some tentative conclusions about the design of policy instruments which affect trade:

- The less trade-disruptive the measure involved, the lower the chance of a successful challenge under the WTO – a requirement simply for labelling, or government procurement policy, would be less likely to fail than an import ban.
- The more it can be shown that less trade-disruptive measures – such as preferential tariffs – have been attempted and have not proved effective, the greater the chance more trade-disruptive measures have of being found acceptable. This possibly even extends to non-trade related efforts, such as capacity-building assistance to the exporting countries concerned, forestry-related negotiations, and so on.
- Similarly, the more precisely targeted the measure, the less the chance of a successful challenge. An embargo applied against an country’s entire timber exports because some of them were believed to be illegal would be more vulnerable to WTO challenge than an embargo applied only

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<sup>42</sup> OECD Trade Directorate, Trade Committee, *Potential Anti-Corruption Effects of WTO Disciplines*, TD/TC/(2000)3/Final, (Paris: OECD Paris, August 2000), p. 4, para. 4. ([www.oecd.org/ech](http://www.oecd.org/ech)).

<sup>43</sup> In a non-paper on ‘Transparency in Government Procurement and the fight against Corruption’, Working Group on Transparency in Government Procurement, JOB(99)481 of 28 January 1999.

against products which could be proved to be illegal, or not shown to be legal. In the latter case, adherence to an internationally accepted means of determining legality in this context – e.g. a requirement for chain-of-custody documentation audited by an independent third party (see para. 4.28) – would also help to justify the measure.

- The less discriminatory the measure is, the lower the chance of a successful challenge. A very strong case could be made under the WTO if a country was applying more restrictive measures (e.g. a requirement for legality identification) to imports than it was to its own production.
- The greater the effort to ensure that a measure is multilaterally acceptable, the less it is likely to be challenged. And the latest shrimp-turtle decision implies that even unilateral measures applied while a multilateral agreement is in the process of being negotiated may be acceptable.

6.20 One final point should be borne in mind. The WTO dispute settlement system does not produce rulings in the abstract, it acts only when a complaint is raised. The sort of bilateral, regional or multilateral agreements contemplated in Section 5 are all essentially voluntary; producer countries would agree to restrictions on their exports as a means of enforcing their own laws. It is virtually inconceivable that one of the same countries would then mount a WTO challenge on the basis of impairment of trade. However, dispute cases can be raised by countries not directly affected by the trade restriction in question.<sup>44</sup> It is possible that a country not participating in such an agreement could decide to mount a challenge for fear of the agreement eventually being forced on it. Or, and perhaps more likely, if an agreement was extensive enough to affect the market for non-participating countries indirectly (e.g. if retailers became so used to the idea of sourcing timber identified as legal that they stopped buying timber not so identified even when there was no obligation on the particular country to do so), then again a challenge could be mounted.

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<sup>44</sup> For example, Thailand, in the latest stage of the shrimp-turtle dispute, challenged the US regulations as a matter of principle, even though its fishing practices had been certified as acceptable by the US and its shrimp exports were therefore not embargoed.

## **7 Anti-corruption and money laundering initiatives**

7.1 All the measures described above in the rest of this report will fail to work effectively if corruption remains rife throughout the forestry sector. Corruption in the allocation of concessions, in the award of licences to log, to process and to export, and in the evasion of taxes and charges is currently widespread in many countries. If this were to spread to, for instance, the award of certificates of legality, it would seriously undermine the initiatives described in this report.

7.2 That is why measures such as reform of laws, transparency of operations, and independent third-party verification of chain-of-custody monitoring are stressed so heavily. There are other means, however, of tackling corruption, including a series of international agreements and initiatives launched over the past few years. In the wake of the terrorist attacks of 11 September 2001, increased international attention is being paid to related activities such as money laundering. To date little connection has been made between agreements on anti-corruption and money laundering and the timber trade, but there are clear opportunities to do so. This section briefly discusses the main options; full descriptions of the key agreements and initiatives are set out in Appendix 7.

### **Anti-corruption initiatives**

7.3 The main international agreement on corruption is the OECD Convention on Combating Bribery of Public Officials in International Business Transactions, which entered into force in 1999. The Convention criminalises ‘active corruption’ or ‘active bribery’ of foreign public officials; the act of bribery is defined as the ‘intentional promising, offering or giving of any undue pecuniary or other advantage to a foreign public official to secure action or forbearance from action by the official in order to obtain or retain business or other improper advantage in the conduct of international business.’ Improper advantage could include waivers from environmental laws and regulations, as well as value promised, offered or given in order simply to secure some favour associated with the overall functioning of a business operation.

7.4 Article 3.3 establishes the ‘proceeds’ of bribery to be the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery. It appears, therefore, that forestry products from an improperly-obtained concession could be subject to sanction, establishing a potential mandate for a member state’s authorities to act against timber shipments if bribery can be shown to be involved.

7.5 The Convention is not limited to OECD members; it can be signed by non-members that have become full participants in the OECD Working Group on Bribery in International Business Transactions. Brazil, for example, is a member of the working group, and has signed but not ratified the Convention. Thus, countries with significant forest governance problems could be invited to join and participate, providing a route for producer country-based logging interests to be covered by such rules, should their host countries wish to sign it. There is scope for collaboration with other international anti-corruption initiatives, such as the Inter-American Convention against Corruption, of particular interest as its current signatories contain both significant producers and consumers of tropical timber.

7.6 There are also a number of initiatives in the private sector that could be applied to combat the interface of bribery and illegal logging. For instance, in 1996 the International Chamber of Commerce (ICC) developed Rules of Conduct to Combat Extortion and Bribery in International Business Transactions. The Rules prohibit extortion and bribery for any purpose, which is wider than the OECD Convention’s focus on public officials. The Rules also call upon governments to make their

procurement procedures more transparent and to condition procurement contracts on abstention from bribery, including the requirement for anti-bribery certification from bidders. The ICC's Standing Committee on Extortion and Bribery is discharged with promoting the Corporate Rules of Conduct; it could perhaps consider calling upon major companies in the forest products industry to participate in its proceedings and develop a corporate code of conduct when bidding for concessions, etc.

7.7 In 1998 the World Bank instituted an Oversight Committee on Fraud and Corruption to review allegations of corruption received by World Bank group members. The Bank can declare a procurement null and void where a contract was awarded on the basis of corrupt practices, where procedures on bidding were not followed, where the Bank received incomplete, fraudulent or misleading information, or if corruption influenced the award. Contracts can be rejected, loans can be cancelled or firms can be blacklisted from further involvement in World Bank projects.<sup>45</sup> The World Bank also has the authority to inspect and audit books and records of the corrupt supplier or contractor, and all proposals are required to disclose commissions paid to agents or other third party intermediaries in the bidding process. These procedures could be used to delineate and manage proper award of forestry concessions.

## **Money laundering**

7.8 As mentioned above, the topic of money laundering is receiving increased attention as part of governments' focus on international terrorism. In general cooperation against money laundering proceeds through bilateral treaties of mutual legal assistance, but there is also a developing international framework. Appendix 7 describes relevant initiatives of the OECD, Interpol and the Council of Europe: these are of interest to the illegal logging issue both because of the precedents they may set for cooperation over enforcement investigations and for the prospect of sanctioning the proceeds of forest crime, especially capital flight that may accompany grand corruption.

7.9 In October 2000, 11 leading international banks – ABN-Amro, Barclays, Banco Santander Central Hispano SA, Chase Manhattan, Citibank, Credit Suisse Group, Deutsche Bank AG, HSBC, JP Morgan Inc, Société Générale, and UBS AG – together with the anti-corruption NGO Transparency International announced they had agreed to a voluntary set of global anti-money laundering principles. The Wolfsberg Principles seek to deny the use of the banking services for 'criminal purposes' as each bank will 'endeavour to accept only those clients whose source of wealth and funds can be reasonably established to be legitimate'.<sup>46</sup> These banks also include some of those that have recently made a declaration on appropriate forest investments, and there may be a way to link concern about these two topics to explore potential synergies.

## **Corporate and investor behaviour**

7.10 Governments may also find it possible to act against illegal logging through bringing pressure to bear directly on the companies involved and on institutions that invest in, or provide investment

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<sup>45</sup> By 1999, the World Bank had declared misprocurement on roughly forty contracts with a total value of \$40 million. See C. F. Corr & J. Lawler, 'Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures' (1999) 32 *Vanderbilt Journal of Transnational Law* 1249 at 1303. Latest figures show that there are now 72 firms that have been debarred from World Bank projects, with 66 of them being permanently banned. In addition, two other firms have been reprimanded although not debarred.

<sup>46</sup> Transparency International Press Release: 'Leading international banks establish anti-money laundering principles'; 30 October 2001: [www.transparency.de](http://www.transparency.de)

capital for, the timber industry. It should be noted that changing the practices of a few very large companies in the forest sector could have a major impact on the timber supply chain. The top five largest wood processing companies – International Paper, Georgia Pacific, Weyerhaeuser, Stora-Enso and Smurfit Stone Container – process around 20 per cent of the world's industrial wood.<sup>47</sup> Similarly, many investment funds may hold large shares in timber companies – emerging market funds, for example, often have a portfolio containing Malaysian timber multinationals – and could play a more proactive role in achieving appropriate standards of responsible corporate behaviour.

7.11 For example, procedures for proving financial due diligence for investments in the timber sector could highlight excessive returns that may indicate illegal activities. The recent moves by three major Dutch Banks – ABN AMRO Bank, Rabobank and Fortis Bank – to stop or substantially restrict the financing of the development of oil palm plantations, for which primary forest is destroyed, and to impose the criteria that their charges obey Indonesian laws is a good example of how the mainstream investment sector can engage this issue.<sup>48</sup> Central to encouraging greater transparency over company operations and greater due diligence in investments is a strong disclosure regime.

7.12 The provision of government-underwritten export credits is also of importance, and provides another lever for governments concerned about applying pressure to investors. In May 2001 the Dutch Government announced that future export credit guarantees would be tied to observance of the OECD's Guidelines for Multinational Enterprises.<sup>49</sup> The Guidelines are a set of minimum agreed standards of 'responsible' behaviour to which OECD companies are encouraged to adhere; they are essentially a voluntary code, but the Dutch move helps to give them an effective underpinning. Another similar development has been the requirement, by the German export credit agency, for anti-bribery statements, in line with recommendations submitted to the OECD and EU by Transparency International in September 1999, on how agencies should avoid continued complicity in corruption.

## Conclusions

7.13 In general the debate around controlling illegal logging has tended to focus directly on the participants involved in the timber industry and timber trade. Yet there is a wider context to consider, encompassing the disposal of the profits gained from the illegal activities, and the sources of finance for the sector. International collaboration against corruption and money laundering, and growing use of the leverage governments can exert on the industry and its sources of investment, may also reap dividends in the area of illegal logging and trade. Contacts should be pursued between the two areas, and the issue of controlling illegal logging taken up in the relevant international forums.

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<sup>47</sup> World Wild Fund for Nature, 'Ten Companies Control Fate of World's Forests', London, 15 March 2001.

<sup>48</sup> *Focus on Finance News*, 'Dutch Banks Commit to Forest Conservation', November 2001.

<sup>49</sup> *Focus on Finance Newsletter*, May 2001: 'Policy Case Study: Dutch government reforms ECA policy'.



## 8 Conclusions

8.1 The Executive Summary at the beginning of this report reproduces its conclusions and options for consideration, and it is not necessary to repeat them here. It is worth stressing, however, the thrust of the main argument:

1. It is possible to establish effective systems of identification of legally produced timber and wood products. Independently verified chain-of-custody monitoring is an absolute requirement of any such system. Constraints of cost, technical capacity and regulatory structure can be overcome given enough resources and political will; the provision of appropriate capacity-building assistance for underlying regulatory and administrative reform and for establishing the identification and monitoring systems will be required.
2. There are a number of options open to consumer countries for reducing or ending market share for illegal timber and wood products. The clearest approach is to make the sale or import of such products illegal in the consumer country. This would require new legislation which would either have to adopt a definition of illegality based on the producer country's laws (as in the US Lacey Act) or establish some form of external (and preferably internationally agreed) standards which products would have to meet (such as evidence of independently verified chain-of-custody monitoring, etc.). Additional resources for customs and other enforcement authorities will be required. While the new legislation is being adopted, non-coercive means of promoting the markets for products positively identified as legal could be introduced, including industry sourcing, tariff preferences and government procurement policies.
3. A variety of routes exist through which to introduce and implement such controls on trade at the international level. Bilateral agreements have value in demonstrating the technical possibilities and in sending a signal to producers and consumers, but may prove relatively to evade; they should be seen as stepping-stones to wider regional and, ultimately, multilateral, agreements. No suitable multilateral agreement currently exists under which an agreement on illegal logging could be negotiated; a new one is therefore needed, and a number of forums, such as the FAO, exist in which one could start. A potential initial step could be international agreement, perhaps in form of voluntary guidelines, on the definition of 'illegality', and the minimum requirements for a robust system of identification and verification. Greater efforts should be made to improve international collaboration over data exchange and enforcement, and the regional framework envisaged under the East Asia Forest Law Enforcement and Governance conference provides a valuable starting point.
4. There may be WTO implications for any measure that affects trade; all else being equal, the less trade-disruptive, the more precisely targeted, the more multilateral and the less discriminatory the measure in question, the more likely it is to survive a WTO challenge. There is sufficient ambiguity about the impact of the relevant WTO agreements that it should be possible for many different types of trade-restrictive measures to be designed and implemented so as to survive a WTO challenge.

8.2 What now needs to be done? At least one producer and one consumer country need to show that they are serious about establishing and implementing such a system. This would involve capacity-building assistance to implement effective chain-of-custody tracking and identification systems and possible legal and administrative reforms. An effective data exchange system, including 'prior notification' of significant shipments, needs to be put in place, and enforcement collaboration networks established between the countries. The consumer country needs to move to establish the

non-coercive promotional measures referred to above and to start the process of reforming its law to be able to sanction illegal products. This bilateral agreement should be extended to neighbouring producer and consumer countries as soon as feasible. Finally, the issue of illegal logging and the control of trade in illegal timber needs to be pushed further up the political agenda. Opportunities in the next year or so include the UN Forum on Forests, meetings of the Biodiversity Convention, FAO and ITTO, the G8 summit, where the G8 Forestry Action Plan concludes, the World Summit on Sustainable Development in Johannesburg and the next Forest Law Enforcement and Governance conference.

8.3 As in other areas of international environmental crime, solutions to the problem of illegal logging and the trade in illegally logged timber will not be easy to implement. They will require action across a wide variety of fields, legal, financial, diplomatic and technical. Yet they are not *impossible*; solutions do exist, and can be implemented by those who display the political will to do so.

## Appendix 1: Summary of RIIA study on Intergovernmental Actions on Illegal Logging (March 2001)

This report presents a brief overview of the range of options for intergovernmental action to help combat illegal logging and trade in illegal timber and forest products. Actions by individual producer and consumer governments could be complemented by international collaboration. Many of the options listed could be phased; and are also not mutually exclusive.

### Producer country measures

This section presents a range of options for dealing with illegal behaviour at source in producing and exporting countries. These include:

- Reform of legislation to include clear **definition of illegal activities** and to establish effective **deterrents**; streamlined taxation and better economic intelligence to improve tax revenues.
- Improved industry **regulation**, including open, transparent bidding for concessions; restricted allocation of processing licences to reduce over-capacity; clearly designated liability and performance incentives such as performance bonds; the development of professional ethics; the reform of inward investment laws; and restrictions on export points.
- Enhanced **enforcement**, including the establishment of specialised enforcement units, strengthening of resources, improved information and tracking, the use of novel enforcement methodologies such as markers and satellite imaging, and a more systematic approach to intelligence gathering, including the use of NGOs.
- Investment in **alternative employment** opportunities and small-scale and community-based initiatives; improved planning for domestic requirements for timber; and the use of positive incentives for compliance.

### Consumer country measures

Consumer/importer countries, either by themselves or in groups (such as the G8), can introduce a range of measures. These depend, however, on some system for identification of illegal products, which needs to be developed with producer countries within a bilateral, regional or global framework. Options include:

- The devotion of resources and political will to enhanced **border controls** for illegal products, and legislation to allow the **prohibition of import and sale** of illegally-sourced timber and timber products.
- **Tariff reductions** linked to timber production demonstrating compliance with particular standards.
- **Government procurement** policies to improve purchasing practices for timber and timber products, including requirements for chain-of-custody documentation.
- Encouragement for **market-based instruments** such as labelling and certification, particularly where they include requirements for chain-of-custody documentation; investigation of measures to avoid misleading 'green claims'; and encouragement for investors to require enhanced information from forestry companies about their activities.

## International frameworks

This section identifies options for intergovernmental initiatives, amongst consumer countries and between consumers and producers, and the scope offered by existing international agreements and institutions. Options include:

- Improved **enforcement collaboration**, including greater exchange of data between consumer and producer countries and enhanced customs collaboration.
- **Linking of financial assistance**, whether bilateral or multilateral, to reforms of forestry practices, the engagement of domestic constituencies for reform, and encouragement for the role of independent monitors.
- The development of a suitable **legal framework** for establishing international regulations identifying legality of production, ranging from a voluntary framework encouraging data exchange and cooperation to a legally binding multilateral agreement requiring signatory governments to take steps to identify and seize illegal products, together with capacity-building and financial assistance clauses.
- The pursuit of initiatives on illegal logging through appropriate **international forums**, including the UN Forum on Forests, the ITTO, CITES (where Appendix III listings provide opportunities for monitoring international trade) and the Biodiversity Convention.
- Building on the cooperation already established between the World Customs Organisation and Interpol, and UNEP and convention secretariats, in the area of **international environmental crime**, to improve information exchange and analysis and to provide training and technical support (including through the G8 Environment Crime working group).
- Investigation of the potential role of the **OECD Anti-Bribery Convention** in permitting customs to act against timber shipments if bribery can be shown to be involved at any point along the supply chain.
- Discussion of the **WTO implications** of trade measures directed against illegally produced timber and timber products and the treatment of labelling, certification and government procurement policies.

*For a copy of the full report, see [www.riia.org/Research/eep/eeparticle.html](http://www.riia.org/Research/eep/eeparticle.html).*

## **Appendix 2: Illegal activities associated with the timber trade<sup>50</sup>**

### **Illegal logging**

- Logging in breach of contractual obligations (e.g. without an environmental impact assessment)
- Illegally obtaining concessions through, for example, corrupt means
- Logging nationally-protected species without explicit permission
- Logging outside concession boundaries
- Logging in prohibited or protected areas such as steep slopes or river catchments
- Removing under-sized or over-sized trees
- Laundering illegal timber through a concession
- Use of old log permits or licences to collect illegally felled timber to ‘sanitise’ illegal timber

### **Timber smuggling**

- Log import/export in defiance of trade restrictions and/or national control measures
- Unauthorised or unreported movements across state boundaries
- Avoidance of CITES restrictions

### **Misclassification**

- Under-grading and misreporting harvest
- Under-valuing exports
- Misclassification of species to avoid trade restrictions (e.g. mahogany) or higher taxes

### **Transfer pricing**

- Nil profit accounting and manipulating revenue flows for services to avoid revenue

### **Illegal processing**

- i.e. at unlicensed facilities

### **Grand corruption**

Characterised by long-term, strategic alliances with high level of mutual trust. For example, companies providing support to senior politicians, political parties or major components of the state’s apparatus to:

- obtain or extend a concession or processing licences;
- avoid prosecution or administrative intervention for non-compliance with national legislation;
- negotiate favourable terms of investment, i.e. tax holidays or non-collection of statutory duties etc.

### **Petty corruption**

Shorter-term, more tactical, employer-employee relationship, facilitated by and may develop into grand corruption. Most obvious as graft given to or solicited by junior officials to:

- falsify harvest declarations;
- avoid reporting restrictions;
- overlook petty infringements;
- ignore logging or laundering of logs from outside proscribed boundaries.

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<sup>50</sup> For a more extensive discussion, see D. J. Callister, *Corrupt and Illegal Activities in the Forest Sector: Current Understandings and Implications for World Bank Forest Policy: Draft for Discussion* (World Bank Forest Policy Implementation and Strategy Development Group, May 1999).

## **Appendix 3: Tracking mechanisms in international agreements**

### **CITES**

The 1973 Convention on International Trade in Endangered Species (CITES) aims to protect certain endangered species from over-exploitation by controlling the international trade. Trade in such species and/or their products and derivatives are regulated under a system of import and export permits. Species are placed on different lists indicating the level of requirements to be fulfilled and the corresponding scope of documentation. Appendix I includes all species that are threatened with extinction. They are not to be traded unless authorised under exceptional circumstances. Appendix II includes species that are not necessarily threatened with extinction now but may become so unless trade in specimens of such species is subject to strict regulation. Appendix III includes species that a party identifies as being subject to regulation for the purposes of preventing or restricting exploitation, and where it needs the cooperation of other parties in control of trade. Amendments to Appendices I and II are implemented by the Conference of the Parties, while state parties themselves place species on Appendix III.

Trade in any species under any list is not permitted except in accordance with CITES. Exports require prior grant of and the presentation of an export permit, which is given upon meeting specific conditions. For Appendix I, II and III species, the Management Authority of the exporting state must be satisfied that the specimen was not obtained in contravention of the state's laws for the protection of fauna and flora. The importing state is not required to make a similar statement, indicating deference to the exporting state on matters of legality relating to the taking of the species. Additional requirements exist depending on the appendix where the species is listed. Exceptions from these requirements are made for transit or trans-shipment of species; specimens that are personal or household effects; specimens that was acquired prior to CITES applying to the specimen; non-commercial trade between scientists or scientific institutions in certain specimens; or certain specimens that are part of a travelling zoo, circus or other travelling exhibition. Parties can also make reservations from CITES for a listed species, upon becoming a party to CITES or upon an amendment to the appendix by the Conference of the Parties.

For Appendix I species, trade is strictly limited. Trade cannot be detrimental to the survival of the species, must not be for primarily commercial purposes and cannot be in relation to a species obtained in violation of the exporting state's laws. Any trade in listed specimens must obtain permits from both the importing and the exporting state. Certificates are also required for re-export of specimens.

Commercial trade in Appendix II specimens is allowed if it not detrimental to the survival of the species and the specimen was not obtained in contravention of the exporting state's laws. An export permit is required, and must to be provided to the importing state's customs authorities.

Trade in Appendix III specimens requires the management authority of the exporting state to issue an export permit. Importers must verify that the shipment is accompanied by an export permit, if the shipment is from a state which has listed that species on Appendix III, or a certificate of origin, if from another state.

### **Montreal Protocol**

The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer establishes a series of phase-out schedules for the production and consumption of ozone-depleting substances (ODS) such as

chlorofluorocarbons (CFCs), widely used as refrigerants, aerosol propellants, foam-blowing agents and solvents. The Protocol does not require specific controls on individual shipments of ODS, but parties have to possess some form of controlling trade in the substances, as 'consumption' is calculated as production – imports + exports. In practice, many parties have established import (and often export) licensing or 'petition' systems to ensure that they can meet their consumption phase-out targets.

Concern with illegal trade in CFCs and other ODS grew from the mid 1990s, as developed country parties approached total phase-out of CFCs. Although the alternatives to CFCs were not in general markedly more expensive, there were significant costs involved in retrofitting or replacing the equipment that used them. The incentive to keep old equipment in operation by relying on illegal supplies was reinforced, in the US, by the escalating excise tax that was applied to accelerate phase-out, which meant that legal supplies grew steadily more expensive than CFCs available (untaxed) on the black market. The smugglers used a wide variety of methods to move the illegal ODS, including falsification of documents, mislabelling of containers, and simple concealment. Although it is believed that the illegal trade peaked, in developed countries, in about 1996–97, developing countries, which are now meeting their first phase-out targets, are experiencing a rapid growth of illegal imports.

Largely in response to these actual and anticipated developments, in 1997 the Protocol itself was amended (through the Montreal Amendment) to introduce a requirement for export and import licenses for most categories of ODS. Entering into force in November 1999, this permit system was introduced primarily as a means of controlling the illegal trade, and would probably have been written into the treaty from the beginning if such illegal activities had been anticipated. Only those parties which ratify the amendment, however, are required to introduce the licenses; by January 2002 seventy-five parties had done so. Developed countries by and large possessed such systems in any case, so it is really in developing countries that the main impact can be expected. Technical and financial assistance is provided through UNEP for the revision of regulations, the introduction of export and import licensing systems, and training of customs and other officials in their operation. It is too soon to tell, however, to what extent these systems are proving effective in combating illegal trade in ODS.

## **Basel Convention**

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal establishes a regime for controlling the international trade in hazardous and other types of wastes. The general objective of the treaty is to ensure that transboundary movements of wastes are reduced to a level consistent with environmentally sound and efficient management. The movement must be conducted in a manner which will protect human health and the environment. Parties have the right to prohibit the import of hazardous waste, and an export ban applies to states that have not given written consent to a specific import.

The Convention establishes a system of 'prior notification and consent' for transboundary movements of waste. The exporting state, generator or exporter must notify the importing state and any states of transit of any proposed transboundary movements. A movement document must accompany any shipment of waste from its origin to its disposal. Such a document must specify: the exporter of the waste; the generator and site of the waste generation; disposer of waste and site of disposal; carrier of waste; date the transboundary movement of waste started and date and signature on receipt by each person who takes charge of the waste; means of transport; general description of waste; declaration that the competent authorities of all concerned states do not object to the shipment; and certification

by disposer of receipt at designated disposal facility and indication of method of disposal and of the approximate date of disposal.

Any traffic in waste that does not meet the notice and consent requirements, or fails to conform with the accompanying documents, or results in deliberate disposal in violation of the Basel Convention and general principles of international law, is held to be illegal and considered a criminal act.

Transport and disposal of hazardous and other wastes can only be carried out by authorised persons, with the movements meeting generally accepted and recognised international rules and standards of packaging, labelling and transport, taking into account relevant internationally recognised practices.

Importing states respond to the notice in three ways: giving consent (with or without conditions); denying permission; or requiring additional information. Written consent of the importing state and confirmation from the exporting state of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes is needed. Where the terms of the contract cannot be fulfilled, the exporting state has a duty to re-import the waste. Written consent is also needed from the transit state(s). Written consent can include conditions on the supply of certain information, such as the exact quantities or periodic lists of hazardous wastes or other wastes to be shipped.

Notice and consent covers a twelve-month period as long as the waste has the same characteristics and is shipped regularly to the same disposer through the same exit office of the exporting state, entry office of the importing state, and customs office of the transit state. In addition, importing states and transit states can require the wastes to be covered by insurance or other guarantee.

Traffic in waste is considered to be illegal where it is carried out: without notice to all the parties concerned; without the consent of all parties concerned; where consent of the state was obtained through falsification, misrepresentation or fraud; with lack of conformity in a material way with the accompanying documents; or there was a deliberate disposal in violation of the Basel Convention or international law. If the waste is deemed to be illegal, the exporting state, or the exporter or generator, has a responsibility to take back the waste, or if this is impracticable, to dispose of it in accordance with the Basel Convention, within thirty days of receiving notice of the illegal traffic. Parties are required to introduce national or domestic legislation to prevent or punish illegal traffic.

## **Rotterdam Convention**

The 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, not yet in force, aims to promote cooperation and shared responsibility for the international trade in chemicals. The Convention applies to banned or severely restricted chemicals and severely hazardous pesticide formulations. Similar in principle to the Basel Convention's system of prior notification and consent, importing countries are given the power to determine whether they wish to import the chemical or ban it due to concerns that it cannot be managed safely. Exports of a chemical can only take place with the prior informed consent of the importing party.

Annex III to the Convention lists the several pesticides and industrial chemicals that are to be controlled for health or environmental reasons. Parties are to provide to the Convention Secretariat decisions on the future import of these chemicals, indicating whether the party will consent or not consent to the import; give consent under certain conditions; provide an interim response consenting or not consenting to the import; provide a statement that the decision is under active consideration; submit a written request to the Secretariat for more information; or request to the Secretariat



assistance in evaluating the chemical. The parties are to transmit to the Secretariat responses with respect to each chemical listed in Annex III.

If a party notifies the Secretariat that it will not consent, or consent with conditions to the export, it must also simultaneously prohibit or subject the import of the chemical from any source and domestic production of the chemical for domestic use to the same conditions.

Where a chemical that is banned or severely restricted by a party is exported from its territory, that party is to provide an export notification to the importing party, including the name of the chemical; a statement relating to the foreseen use of the chemical; and information on precautionary measures to reduce exposure to, and emission of, the chemical. This notification is to be provided prior to export following the adoption of final regulatory action. However the requirement to provide export certification can be waived by the designated national authority of the importing party. The export notification is no longer required once the chemical is listed in Annex III; the importing party has provided a response to the Secretariat for the particular chemical; and the Secretariat has distributed the response to the parties.

Once the Convention enters into force, the Conference of the Parties is to encourage the World Customs Organisation to assign a specified Harmonised System customs code for each Annex III chemical. When the code is assigned to each chemical, the shipping document will bear the code when exported. The parties are to require that Annex III chemicals, and chemicals banned or severely restricted, are subject when exported to labelling requirements that ensure adequate availability of information regarding risks and/or hazards to human health or the environment, taking into account international standards.

## **Stockholm Convention**

The Stockholm Convention on Persistent Organic Pollutants (POPs Convention) was signed in 2001 and is not yet in force. The objective of the Convention is to protect human health and the environment from persistent organic pollutants. Parties are required to prohibit or take measures necessary to eliminate the production and use of the chemicals listed in Annex A to the Convention, and the import and export of Annex A chemicals. Production and use of Annex B chemicals are to be restricted. Parties are also required to ensure that chemicals listed in Annex A and B are imported only for the purpose of environmental sound disposal or for a use permitted for each party as prescribed in either Annex A or B. Chemicals that are listed in Annex A, for which any production or specific use exemption may be in effect, can be exported only under specific conditions. This applies *mutatis mutandis* for Annex B for which any production or specific use exemption or acceptable purpose is in effect. Both Annex A and B chemicals can only be exported for the purpose of environmentally sound disposal to a party that is permitted to use that chemical under Annex A or B, or to a non-party that has provided an annual certification to the exporting party.

Certification must specify the intended use of the chemical and include a statement that the importing state is committed to protect human health and the environment by taking the necessary measures to minimise or prevent releases; take certain measures to reduce or eliminate releases from stockpiles and wastes; and, in the case of DDT, to use it only for disease vector control in accordance with World Health Organisation recommendations. Certification is also to include applicable legislation, regulatory instruments, or administrative or policy guidelines.

## **Cartagena Protocol**

The Cartagena Protocol on Biosafety (Biosafety Protocol) was agreed in 2000, and is not yet in force. The objective of the Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity. There is a specific emphasis on transboundary movements of LMOs. The development, handling, transport, use, transfer and release of any LMO is to be undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.

The 'advance informed agreement' procedure governs the import of LMOs for intentional introduction into the environment but not LMOs intended for direct use as food or feed, or for processing. For the former, the exporter is required to notify, in writing, the competent national authority of the party of import. The party of import is to acknowledge receipt of the notification, although failure to do so does not imply any consent to the import. The party of import is then required to inform the notifier (and the Protocol's Biosafety Clearing House) in writing whether the transboundary movement can proceed. The decision will either approve the import, with or without conditions, including how the decision will affect future imports; prohibit the import; or request additional information in accordance with the state's domestic regulatory framework or Annex I to the Protocol. Decisions must be made following a risk assessment carried out by the importer, although the importer can allocate the costs of the assessment to the notifier.

For LMOs intended for direct use as food or feed, or for processing, the procedure is somewhat different. A party that makes a decision on these types of LMOs regarding domestic use, which might be subject to a transboundary movement, must inform all parties through the Biosafety Clearing House. The notice must include all information required under Annex II to the Protocol. Copies of any national laws, regulations and guidelines related to the import of LMOs must also be provided. Lack of scientific certainty and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity cannot preclude a party from taking a decision not to allow the importation of LMOs.

The Protocol also allows parties to act in accordance with a more simplified procedure. Provided that adequate measures are applied to ensure the safe intentional transboundary movement of LMOs, a party can communicate to the Biosafety Clearing House cases where movement of LMOs can take place simultaneously with notification, or imports that are exempted from the advance informed agreement procedure.

Parties are required to take necessary measures to ensure that LMOs are handled, packaged and transported under conditions of safety, taking into consideration relevant international rules and standards. Documentation accompanying shipments of LMOs intended for direct use as food or feed, or for processing, must clearly indicate that they 'may contain' living modified organisms and are not intended for intentional introduction into the environment, as well as a contact point for further information. Two years after the entry into force of the Protocol, the parties are to agree on detailed requirements including specification of their identity and any unique identification.

Information must also be provided for LMOs that are for contained use, clearly identifying them as living modified organisms, and specifying any requirements for the safe handling, storage, transport and use, the contact point for further information, including the name and address of the individual and institution to whom the living modified organisms are consigned. LMOs intended for intentional introduction into the environment must be clearly identified as LMOs and with their identity and

relevant traits and/or characteristics specified as well as any requirements for safe handling, storage, transport and use, the contact point for further information and, as appropriate, the name and address of the importer and exporter; and must be accompanied by a declaration that the movement is in conformity with the requirements of the Protocol applicable to the exporter.

Where domestic rules implementing the Cartagena Protocol in the import of LMOs have been violated, this is deemed to be illegal, and parties are required to penalise the violating transboundary movements. Where an illegal transboundary movement has occurred, the importing party can request the party of origin to dispose of the LMOs by repatriation or destruction. Rules regarding liability and damages are to be formulated by the parties once the Protocol enters into force.

### **Kimberley Process on conflict diamonds**

The Kimberley Process to identify and eliminate the trade in conflict diamonds was initiated by the Government of South Africa in May 2000. UN General Assembly Resolution 55/56, in December 2000, expanded this work into devising a system to ensure a ‘simple and workable international certification for rough diamonds based primarily on national certification schemes and on agreed minimum standards’.<sup>51</sup>

The process is not finalised as of late 2001, but several main elements of the control system are emerging from discussions. Basically, national authorities are to issue certificates, and these will be cross-checked at point of import; internal controls involve industry participants allowing third-party auditing and verification of their actions.

Under Section IV, national authorities where diamonds are mined are to establish an Import and Export Authority empowered to issue a certificate of origin (a Kimberley Process certificate) providing certain minimum standards of information attesting to the legal, verifiable and validated origin of an export of diamonds. These minimum standards are specified in Annex I and, if the process works, they should enable considerable additional tax revenues to be collected by exporters. Under Section III, all Kimberley participants must require a duly validated certificate to allow an import and on receipt, data is to expeditiously referred back to the exporting authority.

Section IV introduces independent monitoring of trade controls: ‘Participants understand that any system of [industry] self-regulation will only be effective if it provides for independent auditing, full traceability of transactions including rough diamonds, and internal penalties by the industry’. Section V on ‘Cooperation and Transparency’ specifies the provision of clear lines of communication between parties and mutual assistance in enforcement.

One clear point where the Kimberley process is likely to differ from timber trade controls is in the use of tamper-resistant containers, lessening the monitoring burden on transshipments.

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<sup>51</sup> Kimberley Process Working Document nr 8/2001. 9 November 2001. Preamble.

## Appendix 4: Technical means of identification

The technologies listed in the table below are relatively self-explanatory and are complementary. Remote sensing and automatic cameras are clearly large-scale technologies that are not designed to measure individual logs but areas of operation and aggregate volumes of traffic, etc. In December 1999, for instance, NASA launched two environmental satellites (LANDSAT 7 and EOS TERRA) that should allow routine production of accurate forest maps and monitoring of many aspects of concession management and ensure the integrity of protected areas.

Microtaggants are microscopic particles composed of layers of different coloured plastics – millions of permutations are possible by combining several colours in different sequences. The coding sequences are then read with a x100 pocket microscope. Radio frequency identity tags can be read-only or read-write, and can be programmed in the field or in advance. They are passive in that they only transmit data when ‘excited’ by a signal from an appropriate reader.

The French CIRAD-Foret system is a simple, low-cost method of timber tracking in which the average diameters of the two ends and length of the log are recorded and a sketch is made of the growth rings at two ends and other characteristic features (e.g. knots, bolls, bends etc.). Counterfeit proof documentation and cross-comparison of records between felling and processing should then make it difficult to substitute logs into the system. Forest management consultancy Development Alternatives’ recent Log Monitoring and Log Control project in Cambodia noted that the CIRAD system has ‘a proven track record under very difficult conditions and is known to international timber concessionaires’;<sup>52</sup> it is also used in Thailand and Laos.

Other technologies listed in the table are relatively new. Reflectors are read by laser devices and may be of value to aerial surveillance teams trying to identify concession boundaries, log trucks carrying illegal loads and the like, whilst satellite-based sensors can be read over enormous distances but are currently relatively cumbersome. So far, technological developments in forest management have tended to precede policy rather than being driven by it. Despite the enormous role for new information gathering technologies, such systems will only be invented if policy needs for their use are clearly identified.

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<sup>52</sup> ‘Proposal for a Log Tracking and Revenue Collection System for the Timber Concessions in Cambodia. Log Monitoring and Log Control Project. Technical Assistance Project (IDA Credit 2664-KH).’ Development Alternatives Inc., Bethesda, MD, USA, June 1998, p.5.

<b>Technology</b>	<b>Security/Reliability</b>	<b>Practicality</b>	<b>Cost</b>	<b>Level on information</b>
Microtaggant tracer paint and microscopes	Very high Virtually impossible to counterfeit Durable Identifies log origin from annual coupe Recommended by US Forest Service for covert enforcement	Practical Easy to apply with spray gun Fastest marking technique One application for trees and cut logs No use of sensitive electronic equipment Can be difficult to read in field and wet/muddy logs may not take marker well Training required to read codes	Development and installation costs high but operating costs low US\$145 for 8 oz. bottle of microtaggants in clear lacquer (1,000 applications) \$30 for spray applicator \$20 for microscope	Very high Can be coded with name of concession, location of coupe, time of cutting, name of authorised paint users, issuing authority etc.
Chemical tracer paint	Medium Only provides custodial information, not origin Limited accountability controls Can give false readings if paint degrades or reacts	Practical As for microtaggant but less training needed	Low	Low Custodial information limited and limited to who is allowed to use paint (assuming none is stolen etc)
Bar-coded tags and scanners	Good Easily read Can be combined with microtaggant or chemical tracer paint for greater security	Practical Very easy to read, even from several metres' distance Can link to automatic scaling system Can be difficult to apply Sensitive scanners may break down Tags can fall off or be cut out Metal staples can be fouled by milling equipment and visa versa Training required for system use and data entry	Medium US\$150 for standard application tool (\$300 for pneumatic) \$1000 for automatic feed and paint application \$0.10/standard tag \$0.60/tag with paint application	Very high As per microtaggant and may be linked to automatic scaling information
Radio Frequency Identification (RF/ID) tags	Very good Virtually undetectable Accurate and reliable	Very practical Transponders very durable (>8 years) Codes can be re-programmed Can be read remotely (and under water)	Very high but falling US\$3000 for applicator and reader \$800 for additional reader	Very high As per microtaggant with directly computer link

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		Direct interface with computers for data gathering Training in installation and reading required as well as equipment maintenance	\$3–8/transponder in 100,000-unit volumes	
Brand hammers	Poor (Fair if combined with documentation) Easy to copy brands Hammers can be easily copied and distributed to unauthorised personnel	Fair Quick and easy to apply but can be difficult in large log piles Cannot apply until tree is cut so requires a system for standing inventory Difficult to read Minimal training	Very low	Poor Not site-specific Concessionaire can use one hammer and forester/scaler can use another
CIRAD-Foret	Good Impossible to substitute logs in a shipment Can counterfeit forms and hammer marks to get through checkpoints but will be detected by audit.	Practical Easy to learn and use as builds on existing skills	Low Scaling and grading already done so added cost is only that of the forms and time taken to fill them out	High Form contains all the necessary information but cross-checking and auditing required Log has serial number matching form
Unique Reflector Identifiers	Very good	Poor but improving Technology in infancy Reading is fast and accurate and can be achieved remotely (from air etc) Laser devices not yet robust enough for field use	High \$500 for laser measuring device \$0.75/reflector in 100,000-unit volumes	Low (but improving) Can be modified to incorporate memory cards and unique identifiers to store more than just location information
Ground video surveillance cameras and automatic activation devices	Good Signal can be transmitted to remote site to enforcement personnel	Not practical for monitoring movements individual logs but good for monitoring major transportation routes Can be activated by light-, sound-, or motion- detectors Repeaters necessary if line-of-site to monitoring station not available Difficult to hide cameras for covert surveillance	High \$5000/unit c. \$2500 for repeater units	High

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Satellite-borne sensors	Very good	Not practical for monitoring movements individual logs but provides valuable information across concessions and nationally May be linkable to individual transponders in future	High but large scale application	High over large scale
Genetic fingerprinting	Very good Chloroplast DNA cannot be faked etc.	Not practical for monitoring movements individual logs May be very useful if customs intercept unidentified timber Still experimental Required genetic databases very patchy Specialist support required	High (but falling) Individual test requires specialist support Cost of developing databases high	Low-Medium Can trace origin of logs shipments to specific regions

## Appendix 5: The Lacey Act

The US Lacey Act (USC Title 16, Chapter 53) was passed in 1900 and was named after its sponsor, Iowa Congressman Lacey, a well-known naturalist. Its original purpose was to outlaw inter-state traffic in birds and other animals illegally killed in their state of origin. Plants were only included under the Act at a later date.

SS 3372(2a) of ‘Prohibited Acts’ under the Lacey Act makes it ‘unlawful for any person ... to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce ... any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law’. These are referred to as underlying laws. It is also an offence to make or submit any false record, account, or identification of any fish, wildlife, or plant which has been, or is intended to be imported, exported, sold, purchased, or received from any foreign country; or transported in interstate or foreign commerce. Federal agents are authorised to seize any wildlife which they have reasonable grounds to believe was taken, possessed, transported, or imported in violation of any provisions of the underlying laws.

There have been several amendments to the original Act. These include combining the Lacey Act and the Black Bass Act into a single comprehensive statute to provide more effective enforcement of State, Federal, Indian tribal, and foreign conservation laws protecting fish, wildlife, and rare plants and strengthen Federal laws and improve Federal assistance to States and foreign governments in enforcement of fish and wildlife laws. The amendments also strengthen the Lacey Act by, *inter alia*:

- Expanding underlying violations so that they are not, under certain provisions of the Lacey Act, restricted to acts or attempted acts of taking or possession but also transportation or sale of wildlife contrary to State or foreign law;
- Explicitly defining the sale of wildlife to include the provision or purchase of guiding or outfitting services for the illegal acquisition of wildlife;
- Expanding the underlying violations to include the intended violation rather than just the actual violation;
- Requiring a felony violation to be committed only with the prerequisite knowledge of the import or export of fish, wildlife or plants or the sale of fish, wildlife or plants with a market value greater than US\$350.

Plants are regulated somewhat differently. SS3372(2b) makes it unlawful for any person to ‘import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant taken, possessed, transported, or sold in violation of any law or regulation of any State’, i.e. a territory of the USA.<sup>53</sup> So, controls on animals and fish under the Act are effectively applied to all international fauna, whilst controls on plants are only interpreted to mean flora under protected under laws of separate US states or under CITES.

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<sup>53</sup> This difference is reinforced in definitions of animals and plants under the Lacey Act. For the purposes of the Act, fish and wildlife ‘means any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusc, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and includes any part, product, egg, or offspring thereof’ (16 USC 3371(a)) whilst ‘plants’ is interpreted only to mean ‘any wild member of the plant kingdom, including roots, seeds, and other parts thereof (but excluding common food crops and cultivars) which is indigenous to any State and which is either (A) listed on an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or (B) listed pursuant to any State law that provides for the conservation of species threatened with extinction’ (16 USC 3371(f)).



## Reciprocal enforcement and IUU fishing

The ‘Lacey Clause’ has also become recognised in the fight against illegal, unregulated and unreported (IUU) fishing. The provision basically makes it unlawful to import fish that has been taken contrary to the laws of another country, in order to buttress cooperation in enforcement to stem illegal fishing operations. A common example of violation of the laws of another state is the taking of fish without a licence where such licence is required by that state’s fisheries legislation.

The suggestion for use of the Lacey Act provision first arose in an Forum Fisheries Agency<sup>54</sup> regional legal consultation in October 1993, where it was agreed that the FFA Secretariat should examine the potential for use of a Lacey clause in enforcement by FFA members. Under the Agreed Minute on Cooperation on Surveillance and Enforcement between FFA members and the US, parties agreed to exchange fisheries information including information on violations, exchange personnel and develop ‘vessel monitoring systems’ to enhance surveillance and enforcement.

Cooperation under the auspices of the Agreed Minute has enabled the US to use the Lacey Act frequently to prosecute vessels importing fish taken contrary to the laws of the FFA member states and to provide assistance to FFA members to develop their own Lacey Act provisions.<sup>55</sup> Papua New Guinea subsequently incorporated a Lacey Act provision in its own Fisheries Act of 1994, followed by Nauru in 1997 and Solomon Islands in 1998.<sup>56</sup> In fisheries, there is the potential for reciprocity in the application of the Lacey Act provision where such provision exists in the law of neighbouring states or through bilateral agreements as envisaged by the provision relating to remittance of penalties.

## Prosecuting a Lacey Act contravention

With the exception of so-called ‘marking’ offences<sup>57</sup>, none of the offences under a ‘Lacey clause’ stand on their own. As there must be a violation of an underlying law, so a successful prosecution requires the need to prove foreign law and in this respect, the need for an expert witness on, or the availability of certified copies of, the foreign law in question. However, it should also be recognised that the offence committed under the Lacey Act provision is not an enforcement of the other State’s laws but the enforcement of the law of the country that has the Lacey Act provision.<sup>58</sup>

For the Lacey Act itself, both criminal and civil penalties can be assessed, depending upon the nature and type of the violation. A civil penalty can be as much as \$10,000 if there is evidence that the violator should have known that the fish, wildlife, or plants were taken, possessed, transported, or sold in violation of any underlying law. Vehicles, aircraft, vessels, or other equipment used during the

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<sup>54</sup> The Forum Fisheries Agency (FFA) is established by South Pacific Forum Fisheries Agency Convention, 10 July 1978. The 16 members of FFA are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. See [www.ffa.int](http://www.ffa.int).

<sup>55</sup> B. Kuemlangan, ‘National legislative options to combat IUU fishing’. Document AUS:IUU/2000/9 to the FAO’s Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15–19 May 2000.

<sup>56</sup> So far, only one prosecution of an offence committed against a Lacey Act provision has been conducted in Papua New Guinea, where the master of a fishing vessel with a Papua New Guinea fishing licence was convicted and penalised for catching fish in Solomon Islands waters without a Solomon Islands fishing licence and then bringing the catch into Papua New Guinea waters.

<sup>57</sup> These make it ‘unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labelled, or tagged in accordance with the regulations issued’ under 16 USC S§ 3376(a)(2).

<sup>58</sup> Kuemlangan, ‘National Legislative options to combat IUU fishing’.

commission of the crime may be forfeited to the government in cases involving felony convictions. Any fish, wildlife, or plants involved in violations of the Act are also subject to forfeiture.

## **Appendix 6: International forums**

### **UN Forum on Forests**

The United Nations Forum on Forests (UNFF) was established in 2000 as a replacement for the Intergovernmental Forum on Forests (IFF) created at the United Nations General Assembly Special Session ('Rio plus Five') in 1997. The IFF's predecessor was the Intergovernmental Panel on Forests (IPF), which submitted a report containing policy recommendations to the fifth session of the UN Commission on Sustainable Development (CSD). The IPF was mandated by the CSD to review the implementation of the 1992 Earth Summit's forest-related decisions; international cooperation in financial assistance and technology transfer; research, assessment and development of criteria and indicators for sustainable forest management; trade and environment; and international organisations and multilateral institutions and instruments. The report called for an intergovernmental dialogue on forest policy, despite the existence of issues where a consensus could not be reached, including financial assistance, trade-related issues and whether to begin negotiating a binding convention. It also called for national action and international cooperation to reduce and eventually eliminate the illegal forestry trade. The final report of the IFF in 2000 called for the creation of an intergovernmental arrangement on forests and the establishment of the UNFF, acting as a subsidiary body of the UN Economic and Social Council. The UNFF is to meet on an annual basis.

At the first meeting of the UNFF in 2001, it adopted a multi-year programme of work. During the meeting, illegal logging was discussed, with Malaysia and Brazil promoting the UNFF as the appropriate forum to discuss this issue. The programme noted that an intergovernmental arrangement for global forest policy, over which member countries still differ, should promote the management, conservation and sustainable development of all types of forests. There is no mention of illegal logging in the programme, although this might be encapsulated in the provision noting the emphasised importance of good governance and an enabling environment for sustainable forest management. Although the first meeting did see the establishment of the programme and a Plan of Action, deep divisions still exist on various issues including trade and environment, technology transfer, governance and illegal trade.

### **Food and Agriculture Organisation**

The Food and Agriculture Organisation is an agency of the United Nations, based in Rome. There are currently 180 members plus the EU. Established in 1945, it has an overall mandate to raise levels of nutrition and standards of living, to improve agricultural productivity, and to better the condition of rural populations. It is the lead UN agency on agriculture, fisheries and forests. Its governing body is the Conference, which meets every two years to review and plan the FAO work programme. The executive body of the FAO is the Council, which consists of forty-nine members.

The linkage between human development and sustainable management forms a cornerstone of the FAO's forestry mission; its Forestry Programme includes the aim of finding out 'how to maximise the potential of trees, forests, and related sources to improve people's economic, social and environmental conditions while ensuring that the resource is conserved to meet the needs of future generations'. The FAO Programme on Forestry and Planning provides for the collection, analysis and dissemination of information on numerous matters including trade, production, and consumption. The FAO also works with other international bodies on forest policy. It serves as a chair of the Inter-Agency Task Force on Forests (ITFF), coordinating the work of other international organisations.

FAO is the lead organisation, in the UNFF, on such matters as rehabilitation of forest cover, technology transfer, and supply and demand of wood in forest and non-wood forest products.

The FAO's Forest Products Division provides technical, environmental, and economic advice and assistance in harvesting, transport, processing, trade and marketing of wood and non-wood forest products, including wood-based energy and the management and development of forest industries appropriate to the conditions of individual countries. The Forest Harvest, Trade and Marketing Branch undertakes a wide range of activities including monitoring and analysing forestry and forest products trade. It also prepares studies on tariff and non-tariff barriers, reviews trade policies of relevance to marketing of forest products, and promotes the development of appropriate policies of relevance to forest products trade. In addition, it works on schemes for timber certification from sustainably managed forests. There is no specific programme at the FAO looking at either illegal logging or corruption in the forestry sector, though this may change in the future.

### **FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing**

FAO's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA on IUU fishing), which had 110 signatories in March 2001, recognised that a coordinated series of measures was necessary to establish effective control of the world fishing industry (and especially fishing on the high seas). This non-binding series of measures contains a number of important elements that a series of cooperative controls on the timber trade could follow.

Paragraphs 68 and 69 suggest that 'states should cooperate, including through relevant global and regional fisheries management organisations, to adopt appropriate multilaterally agreed trade-related measures, consistent with the WTO, that may be necessary to prevent, deter and eliminate IUU fishing for specific fish stocks or species. Multilateral trade-related measures envisaged in regional fisheries management organisations may be used to support cooperative efforts to ensure that trade in specific fish and fish products does not in any way encourage IUU fishing or otherwise undermine the effectiveness of conservation and management measures which are consistent with the 1982 UN Convention. Trade-related measures to reduce or eliminate trade in fish and fish products derived from IUU fishing could include the adoption of multilateral catch documentation and certification requirements, as well as other appropriate multilaterally agreed measures such as import and export controls or prohibitions. Such measures should be adopted in a fair, transparent and non-discriminatory manner. When such measures are adopted, States should support their consistent and effective implementation.'

Paragraph 24 declares that 'states should undertake comprehensive and effective monitoring, control and surveillance (MCS) of fishing from its commencement, through the point of landing, to final destination', which, allied with vessel monitoring system satellite receivers and catch documentation schemes, amounts to chain-of-custody monitoring (in fact, chain-of-custody arrangements from the dockside are normally advanced for health reasons, but this does not extend to point of capture).

Paragraphs 71–73 set out the basis for reciprocal enforcement by requesting that 'states should take steps to improve the transparency of their markets to allow the traceability of fish or fish products [71] [and] ... when requested by an interested State, should assist any State in deterring trade in fish and fish products illegally harvested in its jurisdiction [72] ... States should take measures to ensure that their importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers, other services suppliers and the public are aware of the detrimental effects of doing business with vessels identified as engaged in IUU fishing, whether by the State under whose jurisdiction the vessel is operating or by the relevant regional fisheries management organisations in accordance with its

agreed procedures, and should consider measures to deter such business. Such measures could include, to the extent possible under national law, legislation that makes it a violation to conduct such business or to trade in fish or fish products derived from IUU fishing [73].’

Paragraphs 18 and 19 calls on signatories to sanction nationals engaged in IUU fishing such that ‘without prejudice to the primary responsibility of the flag State on the high seas, each State should, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing ... States should discourage their nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities.’

Paragraph 74 further requests that ‘states should take measures to ensure that their fishers are aware of the detrimental effects of doing business with importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers and other services suppliers identified as doing business with vessels identified as engaged in IUU fishing, whether by the State under whose jurisdiction the vessel is operating or by the relevant regional fisheries management organisation in accordance with its agreed procedures, and should consider measures to deter such business. Such measures could include, to the extent possible under national law, legislation that makes it a violation to conduct such business or to trade in fish or fish products derived from IUU fishing.’ Paragraph 75 states that such cooperation will be partly based on ‘using the Harmonized Commodity Description and Coding System for fish and fisheries products in order to help promote the implementation of the IPOA’.

The IPOA also makes provision for comprehensive exchange of enforcement information. Paragraph 55 requires that vessels ‘provide reasonable advance notice of their entry into port’ as well as certain standards of documentation. Several of these principles – enforcement cooperation, agreed documentation, reciprocal or ‘long-arm’ enforcement measures could apply to any putative scheme to prevent, deter and eliminate the trade in illegally-sourced timber.

## **International Tropical Timber Organisation**

The ITTO was created under the 1983 International Tropical Timber Agreement (ITTA). It acts primarily as a forum for discussion and policy-making between producer and consumer countries relating to tropical timber. It facilitates discussion, consultation and international cooperation on issues relating to the international trade and utilisation of tropical timber and the sustainable management of its resource base. Its members comprise fifty-seven members representing 95 percent of world trade in tropical timber and 75 percent of the world’s tropical forests.

The ITTO operates through the International Tropical Timber Council (ITTC). The Council is supported by four Committees: Economic Information and Market Intelligence; Reforestation and Forest Management; Forest Industry; and Finance and Administration. The Council has established operational guidelines for achieving sustainable forest management in addition to developing a set of criteria and indicators against which the standard of management and progress towards sustainability can be assessed.

The ITTA itself addresses many aspects of the world tropical timber economy, including provisions dealing with information exchange, trade issues and socioeconomic matters. There is also a provision stating that the ITTA should not form a basis for trade discrimination against tropical timber. No acknowledgement or provision in the ITTA is made concerning illegal logging practices. The ITTO’s ‘Year 2000 Objective’ aims to ensure that all tropical timber and timber products traded internationally by its member countries should originate from sustainably managed sources by 2000.

In light of this, the ITTO established the Bali Partnership Fund to assist producing countries to make the necessary investments to enhance their capacity to implement a strategy for meeting the 2000 target.

The ITTO is beginning to look at the illegal logging issue. At the ITTC meeting on 29 October 2001, the Executive Director called on members to cooperate in protecting forests from illegal logging. He pledged ITTO to assist national efforts at prosecution and enforcement by providing data and analysis and assisting in putting in place measures to prevent illegalities. He proposed that the Council should consider authorising and financing case studies on illegal logging and the illegal timber trade, followed up with an international seminar where the findings could be disclosed. If sufficient common elements in the problems and recommended solutions were found, guidelines on preventing illegal logging and illegal trade could be developed.

## Appendix 7: Anti-corruption agreements and initiatives

### OECD Anti-Bribery Convention

The OECD Convention on Combating Bribery of Public Officials in International Business Transactions came into force in 1999. The Convention criminalises ‘active corruption’ or ‘active bribery’ of foreign public officials; thus it addresses the supply-side, rather than the demand-side, of international bribery: an offence is committed by the person who promises or gives the bribe ‘irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage’ (Article 1).

The act of bribery itself is defined as the ‘intentional promising, offering or giving of any undue pecuniary or other advantage to a foreign public official to secure action or forbearance from action by the official in order to obtain or retain business or other improper advantage in the conduct of international business.’ A ‘foreign public official’ is defined as ‘persons exercising a public function for a public enterprise’, so does not include, for example, officials of political parties. Improper advantage could include waivers from environmental law and regulations, as well as value promised, offered or given in order simply to secure some favour associated with the overall functioning of a business operation.

The Convention also covers undue indirect influence, making it an offence if ‘an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company’.

Article 3.3 establishes the ‘proceeds’ of bribery to be the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery;<sup>59</sup> hence, it appears that forestry products from an improperly-obtained concession could be subject to sanction, establishing a potential mandate for a signatory’s customs to act against timber shipments if bribery can be shown to be involved.

Companies in signatory states are required to issue financial statements disclosing their contingent liabilities under the Convention – in other words, losses which might flow from conviction of the company or its agents for bribery, exclusion from government contracts, or any other penalty. Provisions are also made in the Convention for anti-money laundering legislation to be used against the proceeds of the act of bribery, providing for more robust corporate investigations against corrupting companies.

The Convention is not limited to OECD members; it can be signed by non-members that have become full participants in the OECD Working Group on Bribery in International Business Transactions – for example Brazil is a member and has signed but not ratified the OECD Convention. Thus, countries with significant forest sector governance problems could be invited to join and participate, providing a route for producer country-based logging interests to be covered by such rules, should their host countries wish to sign it. The costs of inclusion for such participants could be met under the OECD’s financial mechanism. There is scope for collaboration with other international anti-corruption

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<sup>59</sup> Such that ‘the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable’.

initiatives, such the Inter-American Convention against Corruption which is of particular interest as its current signatories contain both significant producers and consumers of tropical timber.

Jurisdiction under the Convention is based on the principles of ‘nationality’ or ‘territoriality’ – i.e. a state can act against its own nationals as long as the act constitutes a violation of its own national law, or bribery can be prosecuted where the offence is actually committed (irrespective of the nationality of the offender). Nationality as a basis for jurisdiction is commonly exercised in countries with civil law traditions but common law countries like the UK traditionally rely on territorial jurisdiction. However, parties to the Anti-Bribery Convention must make bribery of a foreign public official an extraditable offence under their laws.

Sanctions should at a minimum be ‘effective, proportionate and dissuasive’ and comparable to those imposed for bribery of a country’s own public officials. These include criminal penalties, asset forfeiture (value of proceeds of bribery subject to search and seizure and confiscation) as well as non-criminal penalties and administrative sanctions such as exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement, placement under judicial supervision, or the issuance of a judicial winding-up order. In view of the difficulty of confiscating both bribes and benefits, monetary sanctions can be imposed that are of comparable effect.

### **International agreements on money laundering and organised crime**

There are several instruments that are designed to combat money laundering and organised crime: these are of interest to the illegal logging issue both because of the precedents they may set for enforcement cooperation on enforcement investigations and for the prospect of sanctioning the proceeds of forest crime, especially capital flight that may accompany grand corruption.

The OECD hosts the Financial Action Task Force on Money Laundering (FATF), which acts as an intergovernmental body that develops and promotes policies to combat organised criminal activity and money laundering. Some twenty-nine countries and two international organisations form part of the FATF and the group issued *Forty Recommendations* in 1990, revised in 1996, to set out a framework for cooperative efforts to tackle the proceeds of crime.

The Recommendations are general principles of action covering the criminal justice system and law enforcement, the financial system and its regulation, and international cooperation; they are intended to be relatively general to allow countries to implement them in light of their particular circumstances and constitutional systems. However, all cooperating countries agree to undergo an annual self-assessment exercise and a more detailed intermittent peer-review process.

The crime of money laundering is linked to commission of serious offences but states would have discretion to determine which ‘predicate offences’ would apply. Those with forest sectors as a major export earner could, therefore, include forest crime and embezzlement of revenues as a predicate offence. States are also urged to implement legislation enabling confiscation of laundered property, proceeds or instrumentalities.

The Recommendations are aimed to apply to more than simply banks but also to non-bank financial institutions, as well as to the conduct of financial activities as a commercial undertaking by businesses or professions that are not financial institutions. Financial institutions are to promptly report to competent authorities any suspicious funds stemming from criminal activity.



Parties are also urged to make efforts to improve international exchange of information upon requests relating to suspicious transactions. However, this exchange of information must be consistent with national and international provisions on privacy and data collection. Co-operative investigations between countries' appropriate competent authorities are encouraged and money laundering should be considered an extraditable offence in all countries.

Mutual assistance in legal matters laid out by the Recommendations includes production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money laundering investigations and prosecutions. There should also be arrangements for coordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets.

The FOPAC Branch of Interpol (an acronym deriving from the French title of the branch, 'Fonds Provenant d'Activités Criminelles') gathers information about the movements of funds derived from such criminal activities as drug trafficking, terrorism and commercial fraud. Through these efforts, it makes it possible to identify the 'bosses' of organised gangs of criminals and traffickers by tracing the sources of funds derived from criminal activities. FOPAC has also developed model legislation to facilitate obtaining evidence needed in criminal investigations and proceedings for confiscating the proceeds of crime. Interpol has also passed resolutions to concentrate their investigative resources in identifying, tracing and seizing the assets of criminal enterprises. The resolutions call on the parties to improve information exchange and enact legislation or regulations allowing access, by police, to financial records of criminal organisations and the confiscation of proceeds gained by criminal activity.

The Council of Europe's 1990 Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime widens the scope of linking money laundering to other criminal offences. The Strasbourg Convention provides for parties to give effect to other parties' confiscation orders, and to assist in identifying and tracing property and freezing or seizing property to prevent its disposal and calls for international cooperation for investigation, search, seizure and confiscation of the proceeds. There seems no reason why illegal timber could not be a topic for consideration. Parties also to adopt special investigative powers and techniques to allow courts to use special legislative techniques to facilitate the identification and tracing of the proceeds of crime and to gather evidence.