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WTO IMPLICATIONS OF AN INTERNATIONAL TIMBER LICENSING SCHEME

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by

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This is a draft paper for discussion. Comments on any section of it are very welcome – please send to the author at the address above.

Contents

1 The purpose of this paper is to explore one aspect of the current debate around the control of illegal logging, and, more specifically, the control of imports of illegally logged timber and wood products into consumer countries such as the EU, US or Japan. Since any restrictions on trade are potentially subject to the disciplines of the trade agreements administered by the World Trade Organisation (WTO), the WTO-compatibility of measures proposed to prevent imports of illegal timber is an important issue to consider.

Timber licensing

2 This paper looks at the WTO implications of one possible means of controlling imports, an international licensing scheme designed to exclude imports from a particular market unless they are accompanied by a certificate or license of legality.[1] For these purposes we assume that such a scheme possesses the following characteristics:

- Agreements to establish the licensing schemes are reached, at least initially, between individual producer and consumer countries[2] on a bilateral basis; the scheme is not imposed unilaterally, without the consent of the producer countries.

- Countries not participating in the agreement(s) have no restrictions placed on their exports.[3]

- 'Legality' is defined in reference to the national laws and regulations of the producer state.

- A license of legality is issued by the producer state only to products that can demonstrate legal compliance at every stage of the chain of custody. The exact means of implementing this system remain to be determined – there is a wide variety of possible models. Mostly the details are not relevant to this paper, but the assumption is made that whatever system is adopted, it operates at a consignment or shipment level, not at a country or company level (see further below).

- The presence of the license of legality accompanying the products is a requirement for entry into the market of the consumer state. Entry for transit, or for inward processing and re-export, does not require a license.

- The license is not required for sale *within* the consumer state's market – i.e. once the products are cleared through customs, there are no further restrictions on their sale. The license is purely a measure applied at the border.

- No additional restrictions are placed on *domestic* production within the consumer state – because the assumption is made that laws are implemented and enforced reasonably rigorously, and widespread illegality does not exist.

[1] This measure is explained in detail in Duncan Brack, Chantal Marijnissen and Saskia Ozinga, *Controlling Imports of Illegal Timber: Options for Europe* (FERN and RIIA, December 2002), section 6.3.

[2] Treating, for these purposes, the EU as a 'country'.

[3] Clearly, this limits the effectiveness of such agreements if they remain confined to a handful of countries. As explained in Brack, Marijnissen and Ozinga, *Controlling Imports of Illegal Timber,* it is desirable to see a network of agreements develop between major producer and consumer states as quickly as possible – probably evolving, in due course, into a multilateral agreement.

- The licensing system is part of a broad approach to controlling illegal logging, which includes capacity-building assistance to the producer countries participating in the agreement (including, in particular, assistance with establishing the licensing system) and efforts to boost market share for legal products – for example through government procurement policy – within the consumer country.

- Ultimately these individual bilateral agreements may evolve into a multilateral agreement open to any country. Such a multilateral agreement could include the possibility of discriminating against timber imports from non-participating states (see further below).

3 The purpose of the licensing scheme is to ensure that legally sourced timber can be identified and distinguished from illegally sourced timber, a procedure that is otherwise fraught with difficulty. If international cooperation between enforcement agencies was always rapid and effective, if it was easy to prove that particular shipments of timber had been produced or sourced illegally, and if it was clearly illegal to import products produced illegally in foreign countries, then there would probably be no need for such a scheme. But in reality none of these conditions prevail, and a licensing scheme has therefore been proposed as one possible way in which to exclude illegal products (in a similar way to which the Kimberley Process has been adopted to exclude conflict diamonds from the world diamond trade). Since a licensing scheme would be a requirement for *all* timber imports from countries participating in the bilateral agreement, it does represent a trade measure which could legitimately fall under the purview of the WTO agreements.

How likely is a WTO challenge?

4 As noted, this kind of licensing system will be agreed on a voluntary and bilateral basis between countries. Essentially, this represents governments agreeing to additional trade controls between themselves, as a means of enforcing the producer country's laws. The WTO dispute settlement system does not produce rulings in the abstract; it acts only when a complaint is raised. It is inconceivable that one of the same countries would mount a WTO challenge, on the basis of impairment of trade, to a voluntary measure to which it had itself agreed.

5 However, disputes can be initiated by countries not affected by the trade restriction in question.[4] It is possible that a country not participating in such an agreement could decide to mount a challenge for fear of it eventually becoming multilateral in scope. Or, and perhaps more likely, if such agreements became widespread enough to affect the market for non-participating countries indirectly (e.g. if purchasers 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.

6 Both these eventualities seem quite unlikely. The complainant country would risk the accusation that it was trying to dismantle a system of protection against illegal products because it knew its own exports were at least partly illegal; if it was worried about market perceptions of its exports, this would hardly be a good way to go about providing reassurance. The complainant country might have a stronger case if it argued that consumer countries were treating imports less favourably than their own domestic production, a point considered further below.

[4] For example, Thailand, in the latest stage of the long-running 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 Similarly, it should be borne in mind that the two final stages of a WTO dispute (after the preliminary conciliation and consultation stages) – the panel and the Appellate Body – involve *interpretations* of the WTO agreements. None of the WTO agreements explicitly deal with trade in illegal products, or corruption and bribery in trade, and 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, ever been discussed within the WTO. It is not at all clear how a dispute involving a licensing system would be resolved; it would depend in the end on how the dispute settlement bodies chose to interpret the texts of the WTO agreements.

8 The World Bank has drawn attention to the way in which illegal trade distorts the entire global marketplace for a number of key timber products, thereby hampering sustainable and legal forest management, which has to endure additional costs from good husbandry and proper tax declaration: 'widespread illegal extraction makes it pointless to invest in improved logging practices. This is a classic case of concurrent government and market failure.'[5] Widespread trade in illegal products also contravenes the general WTO principles of transparency, stability and predictability.

9 One can assume, therefore, that in making their interpretations, the putative panel and Appellate Body might be favourably disposed towards the general principle of excluding illegal products from the market (as long as the means of exclusion are as non-arbitrary and non-discriminatory as possible). Equally, it seems unlikely that either body (particularly the Appellate Body, composed as it is of international lawyers rather than the trade experts of the panels) would wish to see the WTO portrayed as a body that forces illegal products into markets against the wishes of the governments directly involved. These factors are bound to affect the way in which they interpret the texts of the relevant WTO agreements.

10 Against this background, it is still worth considering how a licensing system might be treated under WTO rules should a dispute ever arise. It should be emphasised again that considerable uncertainty exists over almost every issue discussed in this paper, and it is not possible to reach a firm conclusion over whether a WTO challenge to a licensing system would or would not succeed. It is possible, however, to reach some general conclusions about the design of licensing systems, and these are listed at the end of the paper.

11 Similar questions arise in the context of a possible eventual multilateral timber licensing agreement, which could include the option of discriminating against timber imports from non-participating states. A multilateral agreement provides a different context to trade restrictions than does unilateral or bilateral initiatives; again, this is considered below.

What would be the basis for a challenge under the WTO?

12 The core principles of the multilateral trading system overseen by the WTO are to be found in Articles I, III and XI of the General Agreement on Tariffs and Trade (GATT), the central agreement of the WTO system. GATT Article I ('most favoured nation' treatment) and Article III ('national treatment') prohibit discrimination in trade: WTO members are not permitted to discriminate between traded 'like products' produced by other WTO members, or between domestic and international like products. GATT Article XI ('elimination of quantitative restrictions') forbids any restrictions other than duties, taxes or other charges on imports from and exports to other WTO members.

[5] World Bank, *Forest Sector Review* (New York: World Bank, 1999), p. 40.

13 There are two conditions under which a licensing system may contravene these articles. First, because licenses are required only for imports from some countries; 'like' legal timber is treated differently depending on its origin. Second, because the system is designed to discriminate between legal and illegal timber, and these could potentially be considered to be 'like products'. These two situations are dealt with in turn below. In either case, however, the licensing system could be 'saved' by the GATT's 'general exceptions' clause, Article XX, which is also considered below.

Discrimination between timber from different countries

14 A system under which licenses are required only for imports from some countries appears to breach two GATT articles: Article I, because the license is required of some WTO members (those participating in the licensing agreements) but not of others, and Article XI, because the license is a trade restriction imposed at the border other than a duty, tax or other charge.[6] Effectively, the system treats legal timber differently depending on where it originates – i.e. it discriminates between 'like' legal timber.

15 Unlike other dispute cases, however, the licensing scheme involves no discrimination against the imports of countries not participating in the system; the only country whose exports are disadvantaged is the one that *has* accepted the scheme. It seems unlikely that an Article I violation could therefore be argued convincingly by a country not participating in the licensing scheme.

16 A stronger case may be made for an Article XI violation, as a license clearly is a restriction other than a duty, tax or other charge. However, it can be argued that the license of legality is a product standard, like the vast range of technical standards required of many products in international trade (for example, health and safety, or environmental, standards). This brings the licensing system under the remit of the WTO Agreement on Technical Barriers to Trade, which we consider below.

Discrimination between legal and illegal timber: are they 'like products'?

17 The second case in which a WTO challenge could be argued is because the licensing system is designed to discriminate between legal and illegal products. If legal and illegal timber can be considered to be 'like products', then again a WTO violation occurs, of GATT Article I, differential treatment of like products.

18 The GATT does not define what it means by a 'like product', and its meaning has become one of the most difficult issues in the trade–environment arena. 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 ('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.

19 This has led many observers to conclude that the GATT automatically rules out any discrimination in trade based on the way in which products are manufactured, caught or harvested. In turn this has aroused much concern among the environmental policy community, where policies

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

designed to regulate PPMs (such as controlling emissions from manufacturing processes, or promoting sustainable production) are seen as increasingly important. This has resulted in a long-lasting – but somewhat sterile – debate.

20 Before discussing process-based trade discrimination and its treatment under the WTO, should we assume that a WTO dispute would treat legal and illegal timber as like products? 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 and/or processing should be permitted in the first place, and whether appropriate fees and taxes are paid. Not all of these factors are actually processes, however; payment or non-payment of export duties, for example, is clearly a post-production issue. It could be argued that the question of legality is a *product,* rather than a *process,* characteristic (has the timber been stolen? has it avoided taxation?). Arguably, legality is a universal requirement that any product must possess to be put on sale in a market (at least, a legal market). We have no experience of how a WTO dispute would consider this issue.

21 Assuming for the sake of argument that legal and illegal timber *would* be considered to be like products, it should be noted that, contrary to widespread belief, nowhere does the GATT explicitly rule out process-based trade discrimination; indeed, in some areas it is clearly permitted.[7] Both the WTO Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) regulate some aspects of *how* goods are produced, allowing importing countries to discriminate against products if they are produced using excessive subsidy or misappropriated intellectual property. The TRIPS Agreement is of particular interest to a timber licensing scheme, being designed, among other things, to prevent the theft of intellectual property or counterfeiting. GATT Article XX(e) allows countries to discriminate against products produced using prison labour – and, indeed, the basis on which it can be argued that discrimination between like products can be permitted under the GATT in most cases rests upon the interpretation of this key article, GATT Article XX.

The 'savings clause': GATT Article XX

22 If the licensing system is found to be in violation of the GATT, under either of the cases considered above, it could still be found to be in compliance with the GATT under the provisions of Article XX, under which exceptions can be made to the other provisions of the agreement, as long as they are not applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. 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, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

[7] This point is powerfully argued in Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality', *Yale Journal of International Law* 27:1, Winter 2002.

(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.

23 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, the Appellate Body, have shown an increasing tendency in recent years to accept them. In the well-known shrimp-turtle case, for example, in 1998 a US embargo on imports of shrimp from south-east Asian nations which did not require the fitting of turtle-excluder devices to their trawlers (designed to avoid incidental catches of endangered sea turtles), a measure which US fishing fleets were required to undertake, clearly embodied discrimination on the basis of the way in which the shrimp were caught (a PPM). The Appellate Body, however, considered that this discrimination between like products could be justified under Article XX(g).

24 In the end, the measure failed, among other reasons 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 exports to the US were banned even if individual consignments were caught in turtle-friendly ways, for example by trawlers which *were* fitted with turtle-excluder devices. The US process of country-by-country 'certification' thus failed to satisfy the conditions set out in the headnote to Article XX, and did constitute, the Appellate Body decided, 'arbitrary or unjustifiable discrimination'.

25 In the light of this finding, the US amended its regulations in various ways, including permitting the import of shrimp harvested by particular commercial vessels using devices comparable in effectiveness to those required by the US. In the second WTO dispute on the case, in 2001, the dispute panel and Appellate Body ruled that the new measures *were* compatible with the GATT (though with an important caveat; see further below under 'multilateral agreements'), having satisfied the requirements of the headnote, and the measure remains in force today.

26 This dispute case helps to illustrate the fact that there are different ways in which PPM-based trade measures may be applied.[8] Almost all of the relevant dispute cases to date have involved fairly crude trade measures involving discrimination against all exports from particular countries, or particular producers, on the basis of the processes permitted, or not permitted, in that country or by that producer. The shrimp-turtle case demonstrates that a carefully targeted measure, designed to exclude particular products on the basis of the way in which the *individual products* are produced (not on which country or which company they come from) could be found to be GATT-compatible.

27 This underlines the importance of one of the assumptions made above in para. 2 – that the licensing system should be designed on a product or shipment basis, not on a country or company basis. In many ways it would be easier to do the latter – to refuse all imports from a particular country, say, because there was widespread illegality in the forestry sector in that country – but that would mean that even if particular products were sourced legally, and could be shown to be legal, they would

[8] For a further exploration of this issue, see Charnovitz, *ibid.,* and Marie Wynter, *International Trade and Environmental Protection: Domestic PPM Regulations and WTO Jurisprudence,* unpublished PhD thesis, Australian National University, October 2001. Charnovitz divides PPMs into three types: ones based on a government policy standard, on a producer characteristic or on a 'how produced' standard.

still be embargoed if they came from the country in question. This is highly unlikely to be WTO-compatible.

Could licenses of legality be 'saved 'by Article XX?

28 Unlike the shrimp-turtle case, where sea turtles were endangered species, and were considered to fall under the category of 'exhaustible natural resources' in Article XX(g), no paragraph of Article XX relates explicitly to illegal production.

Article XX(a)

29 A case might be made under Article XX(a), which covers measures 'necessary to protect public morals'. There is no experience with the way in which this phrase might be interpreted, so it is not clear whether attempts to prevent the import of illegal timber would be regarded as supportive of the protection of public morals or not. Measures designed to support the rule of law and to combat corruption and the evasion of regulations could be so regarded, but since these would affect only producers who exported to the consumer states applying the licensing scheme it could be argued that their impact on public morals in the exporting state would be rather limited. It seems highly likely that the drafters of this clause in the GATT had the protection of public morals in the *importing* country in mind, not in the *exporting* country – a general feature of this debate to which we return below.

Article XX(d)

30 A stronger case might be made under Article XX(d), which was designed to cover measures that could only be taken at the border, such as a ban on imports of counterfeit goods. If the counterfeiting was carried out domestically, the country in question could take action against the enterprises involved, but where they were foreign companies, no such action would be possible, and trade measures would be permitted to defend intellectual property rights in the importing country. (The clause requires the measure that is being defended – in this example, the protection of intellectual property rights – to be itself consistent with the GATT.)

31 It could certainly be argued that the intention of the licensing system is to secure compliance with laws on timber harvesting, processing and export which are not themselves incompatible with the GATT, and also to prevent deceptive practices, i.e. illegally sourced timber being passed off as legal. It might be somewhat more difficult to show that a licensing system would be 'necessary' to achieve these ends. The WTO dispute system has tended to interpret the term 'necessary' (which also appears in Article XX(b)) fairly narrowly, finding that trade measures were not necessary when it believed that other less trade-restrictive or less GATT-inconsistent measures could have been employed.

32 Clearly, there are alternative measures that could be employed to reduce illegal logging, including better domestic enforcement of the laws in question, but in the absence of almost total compliance, some form of *identification* of legality – the immediate aim of the licensing system – would still be needed to exclude illegal products at the border. It is difficult to think of any alternative and less trade-restrictive identification system for legal products. Furthermore, if the producer country government itself argues that a licensing system is necessary to enforce its own laws, it is not clear that a WTO dispute panel would disagree.

33 This highlights the main difference in this hypothetical case – that, unlike every example of a dispute case under Article XX(d) brought before the GATT or WTO, it is not the laws of the importing country that are to be enforced, but those of the exporting country. This is an unusual

situation, but not one that is completely unprecedented. Early interpretations of other sub-paragraphs of Article XX (as in the well-known tuna-dolphin dispute in the early 1990s) assumed that the text referred to conditions in the state taking the trade measure – 'extrajurisdictional' measures were not permitted. This is nowhere explicitly stated in the GATT, however, and the decisions in the second tuna-dolphin dispute and in the shrimp-turtle disputes recognised that the GATT does permit countries to take measures designed to protect natural resources outside their borders. (This is a good example of the evolution of GATT/WTO jurisprudence, and underlines the interpretive function of the panels and Appellate Body.) Similarly, Article XX(e) allows discrimination against products produced with prison labour, wherever the product is produced.

34 The panels and Appellate Body have argued that there has to be some sort of link – the word 'nexus' was used in the shrimp-turtle dispute – between the resource and the country applying the trade measure. The fact that the sea turtles endangered by the fishing practices swim in the high seas and coastal waters of many nations – including those of the US – was a sufficient link in this case. Could the same argument succeed in the case of natural resources – timber – entirely located in the exporting country? It could be argued that consumers in the importing country share a 'nexus' through their use of the products, or, through their interest in the global rule of law; or, that forests, as sources and reserves of biodiversity and as a sink for carbon, are a global resource of concern to all.[9] However, as in Article XX(e), the nexus argument may not be considered to be particularly relevant in this case.

Article XX(g)

35 Article XX(g) provides another possible defence of a licensing system, if it can be shown that it is designed to ensure the 'conservation of exhaustible natural resources'. In practice, illegal logging – at least, when carried out on a commercial scale – almost always contributes to the unsustainable exploitation of forest resources, in some cases, such as Cambodia, dramatically so. In some ways, Article XX(g) – the paragraph under which the US shrimp embargo was eventually found to be compatible with the GATT – is easier to satisfy than Articles XX(b) or (d), as it does not contain the requirement that the measure be 'necessary', just that it relates to the objective of the measure. It does, however, contain the requirement that the measures be 'made effective in conjunction with restrictions on domestic production or consumption', implying that no protection of domestic production results from the licensing system, i.e. it is designed to 'level the playing field' between domestic and foreign legal products (see further below).

36 There may be some doubts behind the use of Article XX(g). 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. Furthermore, in many countries what is legal is not necessarily sustainable, and it may be difficult to argue that a licensing system which permits the import of legal but unsustainable products really relates to 'the conservation of exhaustible natural resources'. On the other hand, if the legality licensing system naturally leads on to a sustainability licensing system – a controversial but not impracticable eventuality – the argument may become easier.

[9] The preamble to the Convention on Biological Diversity recognises 'that States have sovereign rights over their own biological resources' (though it also affirms that 'States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner'). The treatment of forests as carbon sinks under the Kyoto Protocol, however, suggests that they can be seen under international law as a global resource.

Headnote to Article XX

37 Whatever sub-paragraph of Article XX is used to defend the licensing system, to succeed it must also satisfy the requirements of the headnote (or 'chapeau') to Article XX – i.e. the measures must not be applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. Since domestic products entering the consumer country's market are not required to show proof of legality through a license, it could be argued that the effect of the licensing system is to afford protection to domestic products at the expense of imported timber.

38 However, it should be remembered that the license is needed because the producing country cannot guarantee in any other way that timber exported from its own jurisdiction has been legally sourced (and, importantly, the producing state accepts the need for such a system). This is not the case, we assume, for the importing state, whose own timber industry (assuming there is one) does not display evidence of widespread illegality, and possesses an effective set of laws and regulations which are efficiently enforced and complied with. Among other things, this implies that the importer state's businesses bear higher production costs than timber produced illegally in the exporter state – so requiring foreign products to show evidence of legality is *not* designed to give a competitive advantage to domestic products vis-à-vis foreign *legal* products. It *is* designed to prevent illegal products undercutting legal products of whatever origin; in other words, there *is* discrimination against foreign illegal products but not against foreign *legal* products.

39 This is an important point: the WTO system rests primarily on the principle of non-discrimination, and if it can be shown that the effect of a licensing system is to give protection to domestic products at the expense of foreign (including legal) products, it is not likely to survive a WTO challenge. In turn, this makes the provision of capacity-building assistance for the establishment of the licensing system by the consumer country important, demonstrating that legal production in the producer country does not have to bear costs above and beyond those of normal compliance with the law, simply to prove legality and thereby gain access to the consumer country's market.

40 Whether this line of argument would be accepted by the WTO dispute settlement system is not clear. There has been a long-running debate about whether the system should look primarily at the *effects* of particular trade measures or at their *aims,* and in general past panel and Appellate Body decisions have tended to come down in favour of the former, implying that because licenses are required for imports and not for domestic production, they would be found to be discriminatory, even if no protection of domestic products was intended or resulted.

41 However, in a recent decision on an GATT Article III violation, on a Canadian complaint against an EU ban on imports of asbestos because of their health impacts, the Appellate Body decided that even when two products were deemed to be 'like', there was no violation of the GATT unless the imported product was accorded 'less favourable treatment' than the like domestic products.[10] Since legal timber possessing the license is not treated any differently from domestic timber, it could be the case that no violation is found. Indeed, it could be argued that without the requirement for a license, imports are actually treated *more* favourably than domestic products, since they will include cheap illegal timber which is able to undercut legally produced domestic timber which bears the costs of legal compliance.

[10] WTO Appellate Body report on European Communities – Measures affecting asbestos and asbestos-containing products, WT/DS135/AB/R, 12 March 2001, para. 100.

42 Similarly, in the reformulated gasoline case in 1996, the Appellate Body, in interpreting GATT Article XX(g), required simply 'even-handedness' of treatment, not identical treatment, between imports and domestic production. In this case, domestic timber is guaranteed to be legal because domestic laws are enforced effectively; for imports the license is required only because laws are not enforced effectively in the producer state – but for each category mechanisms are in place to ensure legality.

Technical Barriers to Trade Agreement

43 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 as least trade-distorting a manner as possible. It is relevant to this argument because, as noted above, a requirement for a license could qualify as a 'technical regulation',[11] If so, any dispute concerning the system 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).

44 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 2.12 refers to the need for importing countries to allow a reasonable interval between publishing their regulations and their entry into force to allow exporters in producing countries time to adapt their products 'or methods of production' (i.e. PPMs). Article 2.9 contains a notification requirement, requiring WTO members to provide adequate notice of the introduction of new technical regulations which will affect trade.

45 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, and can be argued similarly.

46 There has been almost 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 a GATT challenge, Austria withdrew its law.

[11] A technical regulation is mandatory; a standard is voluntary.

MEAs and the WTO

47 Several multilateral environmental agreements (MEAs), including the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on the protection of the ozone layer, and the Basel Convention on transboundary movements of hazardous waste, require parties to control or restrict trade in various ways, including imposing requirements for import and export licenses 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.

48 Such trade measures and agreements seem to be becoming more important as means of excluding illegal products from the global market. The Montreal Amendment to the Montreal Protocol, agreed in 1997, introduced a system of import and export licenses mainly because of the growing illegal trade in ozone-depleting substances. The Food and Agriculture Organisation's 'International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing', adopted in June 2001, recommends trade measures (taken in the context of multilateral – regional – fisheries management agreements) against the products of IUU fishing. And the Kimberley Process, agreed in November 2002, is designed to exclude conflict diamonds from world markets.[12]

49 The past few years have seen much debate about the extent to which MEA 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 question is not clear. However, it is frequently argued that WTO problems would probably not arise in cases where the trade measures were taken between parties to the MEA, as the MEA itself provides a more appropriate dispute settlement forum, but are more likely to arise where they were directed against non-parties.

50 The latest stage of the shrimp-turtle dispute contains a potentially important development of WTO jurisprudence in this area. In the second shrimp-turtle case, in June 2001 the dispute panel found that the US was entitled to maintain its embargo (having adjusted its original regulations in various ways; see para 25), even though it was a unilaterally applied measure, as long as it was engaged in 'serious good-faith efforts to negotiate an international agreement, taking into account the situations of the other negotiating countries'.[13] It did not accept Malaysia's contention that the agreement had to be concluded *before* a trade restriction could be enforced. In addition, the panel believed that the US trade measures would 'be accepted under Article XX if they were allowed under an international agreement', but in the absence of such agreement, such measures are 'more to be seen, for the purposes of Article XX, as the possibility to adopt a *provisional* measure allowed for emergency reasons than as a definitive "right" to take a permanent measure'. The Appellate Body agreed.

51 This line of argument underlines the importance the WTO places on multilateral solutions to transboundary or global problems, and its hostility to unilateralism. It provides another reason for thinking that a bilateral agreement to establish a licensing system would survive a WTO challenge;

[12] A number of Kimberley Process signatories successfully sought a waiver from WTO obligations for its diamond certification scheme; the waiver, which was agreed by the WTO Council for Trade in Goods on 26 February 2003, exists until 31 December 2006, though it can be renewed. This is another option open to proponents of a timber licensing system. Most Kimberley Process signatories (including the EU and its member states), however, did not support the move, implying as it does that the Process is somehow subordinate to WTO rule-making. It was also argued that a waiver was unnecessary because of the text of GATT Article XXI(c), which exempts from GATT requirements a WTO member taking 'any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security'.

[13] 'United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia', Report of the Panel, 15 June 2001 (WT/DS58/RW), para 5.73.

such an agreement represents not just a 'good-faith effort to negotiate' an agreement, but the mutual settlement of one.

52 Further, it suggests that a wider, multilateral, agreement could also survive a WTO challenge, even if it included trade measures taken against non-parties – for example, a requirement for a license of legality for *all* imports of timber and wood products, from whatever country of origin. As long as the agreement was open to any country, and its obligations were not manifestly unfair to particular categories of countries (which suggests that a capacity-building mechanism should be built into the agreement), it would be possible to argue that the requirement for a license could, like the US shrimp embargo, be imposed on imports while the agreement was in the process of negotiation.

53 A multilateral agreement, however, has to impose obligations on all parties, which brings us back to the argument explored in paras 38–39, relating to the domestic forestry industry in the consumer countries. It would have to be shown in some way that these products too were legally produced and sourced. Yet a requirement for a licensing system in countries where laws are widely enforced and complied with is almost certainly unnecessary, given all the existing requirements for licensing of timber production, filing tax returns, maintaining audited accounts, and so on. Introducing a further requirement for proving legality would generate considerable resistance from industry and governments concerned about adding to the cost of production for no good reason.

54 An alternative mechanism for independent verification of legal behaviour could, however, be developed, perhaps through an inspection process by independent observers, and with a clear process by which countries could move from the category in which rigorous validation of legality (e.g. licensing) was required, to the category in which enough faith could be displayed in the legal and enforcement infrastructure that this was deemed unnecessary – perhaps through a series of intermediate stages. Non-parties could be treated as though legality was not proven (and therefore licenses would be required) or on a case-by-case basis, with a variety of findings.

Summary and conclusions

55 The conclusions of this paper are:

- A WTO dispute emanating from a bilateral agreement, or series of agreements, establishing a timber licensing system is highly unlikely.

- Nevertheless, it is not completely impossible, and it is therefore worth speculating on the outcome of such a dispute. It should be stressed that this *is* speculation; there is no experience at all in how the WTO dispute settlement system might deal with topics such as illegality of production and measures taken to exclude illegal products from the market.

- It is possible that a licensing system may be found to be in violation of Article I or XI of the GATT either because it discriminates between 'like' legal timber from different countries, or between domestic and foreign legal timber, or because legal and illegal timber could be argued to be 'like products'. Counter-arguments are, however, available.

- Even if an initial GATT violation is found, the licensing scheme could be found to be GATT-compatible under Article XX – probably under Article XX(d), and more questionably under Article XX(g).

- It is important, however, to consider the design of the licensing system. The more precisely targeted the measure, the less the chance of a successful WTO challenge. The licensing scheme should therefore operate on a product or consignment level, not at a country or company level.

- Similarly, the licensing scheme should be designed so as to avoid affording protection to domestic timber; the provision of capacity-building assistance to producer states to help them establish the licensing scheme would be an important component of this.

- A requirement for a license could possibly qualify as a 'technical regulation'; if so, a dispute could take place in relation to the terms of the TBT Agreement. Similar considerations as those outlined above, however, prevail. The TBT Agreement contains a notification requirement, which it would probably make good sense to follow whether or not the licensing system qualifies.

- The greater the effort to ensure that a licensing system is multilaterally acceptable, the less it is likely to be challenged, or challenged successfully.

- It may be possible to impose a requirement for licenses (or other proof of legality) on all timber imports, regardless of country of origin, in the context of a multilateral agreement open to any country. It would be important, however, for such an agreement to include a mechanism for determining the general standards of legality in all parties (and, possibly, non-parties) and applying the level of trade control appropriate to each individual case; a requirement for licenses would not necessarily be required from every country.