

European Union Timber Regulation: Is It Legal?

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The recent entry into force of the European Union (EU) Timber Regulation completes the EU's anti-illegal logging policy framework – the most comprehensive legislative effort to combat illegal logging in the world. The Regulation prohibits the import of timber to the European market that violates applicable laws of the harvest country, and requires that importers conduct due diligence to mitigate the risk that their inventories contain illegal timber. Despite this strong stance, the Regulation's ability to reduce the incidence of timber illegality depends on its ability to withstand challenges under international trade law. No case yet decided by the World Trade Organization's dispute bodies has considered the implications of trade restrictions built on foreign definitions of legality. An analysis of the General Agreement on Tariffs and Trade and of relevant trade and environment cases reveals a possibility that the EU Timber Regulation may constitute an illegal trade barrier.

INTRODUCTION

Deforestation has variously been proclaimed a 'modern-day plague'¹ and a 'tragedy' of grand proportions.² Its adverse consequences are significant and widely felt, including the disruption of hydrological cycles,³ a reduction in biodiversity⁴ and a contribution to rising atmospheric levels of greenhouse gases.⁵ Forests are often perceived as private goods, but the global benefits they provide (e.g., weather-regulating services, habitat for biota, sinks for carbon) indicate that they are properly regarded as public goods as well.⁶

This public good character has spurred a 'high level of global interest' in the sustainability of forest management practices employed in forested countries.⁷ The international community has pursued several strategies to address deforestation, but to date these have generally proven unsuccessful. In the lead-up to the 1992 United Nations (UN) Conference on Environment and Development, some countries pressed for a robust international forest convention, but strong opposition from actors including the Group of 77 and China to the inclusion of any binding commitments forced negotiators to settle for a set of non-legally binding Forest Principles.⁸ Following this conference, a series of institutions were established to keep deforestation on the international agenda, but these have failed to make significant headway toward a binding treaty.⁹ Simultaneously, international development groups tried conditioning development aid on domestic efforts to tackle deforestation, and private schemes, such as the Forest Stewardship Council, emerged to certify sustainably managed forests, but these efforts have also largely failed to slow deforestation.¹⁰ A related trend has seen increased attention paid to the economic 'services' that ecosystems provide, with numerous initiatives being launched to pay ecosystem users to conserve these services.¹¹ However, the conservation impacts to date of such payment for ecosystem services programmes have been 'modest' and their methods have been heatedly criticized.¹² All the while, 'soft' forest law has continued to evolve through instruments such as Chapter 11 of Agenda 21 on 'Combating Deforestation', policy proposals developed by the Intergovernmental Panel on Forests and the Intergovernmental Forum on Forests, the Non-Legally Binding Instrument on All Types of

¹ National Geographic, 'Deforestation', found at: <<http://environment.nationalgeographic.com/environment/global-warming/deforestation-overview/>>.

² B. Bowonder, 'Deforestation in Developing Countries', 15:2 *Journal of Environmental Systems* (1985/1986), 171, at 171.

³ D. Werth and R. Avissar, 'The Local and Global Effects of Amazon Deforestation', 107:D20 *Journal of Geophysical Research* (2002), 8087, at 8087; P.M. Fearnside, 'Deforestation in Brazilian Amazonia: History, Rates and Consequences', 19:3 *Conservation Biology* (2005), 680, at 683.

⁴ M.K. Pandit *et al.*, 'Unreported Yet Massive Deforestation Driving Loss of Endemic Biodiversity in Indian Himalaya', 16:1 *Biodiversity Conservation* (2007), 153, at 153.

⁵ R.F. Hughes, J.B. Kauffman and V.J. Jaramillo, 'Ecosystem-Scale Impacts of Deforestation and Land Use in a Humid Tropical Region of Mexico', 10:2 *Ecological Applications* (2000), 515, at 515.

⁶ D. Brown *et al.*, *Legal Timber: Verification and Governance in the Forest Sector* (Overseas Development Institute, 2008), at 3.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, at 4.

¹⁰ *Ibid.* Aid conditionality has failed in part because withholding loans runs counter to the purposes of the World Bank and the International Monetary Fund, and because the forest industry is often more influential than international donors within forested countries. Certification of sustainably managed forests has been too expensive and prone to benefitting forest managers who already employ sustainable practices. *Ibid.*, at 4–5.

¹¹ E. Gómez-Baggethun *et al.*, 'The History of Ecosystem Services in Economic Theory and Practice: From Early Notions to Markets and Payment Schemes', 69:6 *Ecological Economics* (2010), 1209, at 1209.

¹² S. Wunder, 'Are Direct Payments for Environmental Services Spelling Doom for Sustainable Forest Management in the Tropics?', 11:2 *Ecology and Society* (2006).

Forests¹³ and a mechanism to tackle emissions from deforestation and forest degradation adopted under the UN Framework Convention on Climate Change.

Whatever the merits of these various strategies, the fact is that throughout the period of their application in the 1990s and 2000s, rapid deforestation persisted.¹⁴ At the current rate of loss, tropical rainforests could disappear within 100 years.¹⁵ In response to continued forest loss, interest grew around the turn of the millennium in the possibility of indirectly addressing deforestation by focusing on trade in illegal timber.¹⁶ Restricting imports to allow only timber that complies with the relevant laws of the country in which it was harvested should, in principle, eliminate illegal harvests driven by foreign demand and reduce the contribution of illegal logging to deforestation. Of course, deforestation could continue even if all logging were done legally, but eradicating illegality from the sector would at least enhance the ability of governments to require sustainable practices.

The European Union (EU) has taken a leading role in the effort to create a market for legal timber, enacting the Forest Law Enforcement, Governance and Trade (FLEGT) licensing scheme¹⁷ and the EU Timber Regulation (EUTR),¹⁸ which respectively create voluntary and compulsory regimes for assuring the legality of imported timber. Fundamentally, the EUTR bans the import of illegal timber and requires importers to conduct due diligence to ensure that the timber products in which they trade have legal origins.¹⁹ FLEGT licensing provides timber-exporting countries a means of sidestepping these burdensome due diligence requirements,²⁰ which could harm the competitiveness of their timber.

The EUTR is a 'potentially powerful tool to help the EU exclude illegal timber from its markets, and so contribute to its broader objectives of environmental

protection and sustainable development'.²¹ As the EU accounts for about 40% of global forest product imports,²² it has substantial potential to influence the global timber trade through domestic legislation. However, the Regulation's value to the struggle against illegal logging depends on its ability to withstand challenge in the World Trade Organization (WTO). The ban on illegal timber potentially violates two treaties which the WTO administers: the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade (GATT). WTO tribunals have never confronted a regulation quite like the EUTR. Unlike previously litigated regulations, the EUTR seeks to limit trade on the basis of foreign definitions of legality rather than imposing its own substantive requirements. There is a plausible argument that such an approach constitutes an impermissible restriction on trade, which, if borne out, could put the EU's illegal logging efforts at risk.

This article analyzes the consistency of the EUTR with WTO law, arguing that there is a case to be made that the Regulation violates the GATT. First, it briefly outlines the development of policy and regulatory responses to the problem of illegal logging, culminating in the promulgation of the EUTR. Next, it analyzes the EUTR with a view to highlighting provisions that potentially conflict with international trade law. The following section analyzes relevant elements of this body of law, arguing that the EUTR is not subject to the TBT, but that although it probably does not violate the GATT, it raises novel legal questions that could plausibly result in a finding to the opposite effect. The concluding section summarizes the article's main findings.

DEVELOPMENT OF THE EU'S ILLEGAL LOGGING REGULATORY INFRASTRUCTURE

International attention first turned to the problem of illegal logging in the late 1990s,²³ but early initiatives involved limited binding commitments. The Group of 8 (G8) released an Action Programme on Forests in 1998, which did little more than oblige G8 members to

¹³ Non-legally Binding Instrument on All Types of Forests (UNGA Resolution A/RES/62/98, 17 December 2007).

¹⁴ Global net deforestation between 1990 and 2000 is estimated at 8.3 million ha per year, or an annual loss of 0.2% of the remaining forest area. The rate of loss between 2000 and 2010 declined to 5.2 million ha per year, but this still represented an annual net loss of 'an area slightly bigger than the size of Costa Rica'. Food and Agriculture Organization (FAO) of the United Nations, *Global Forest Resources Assessment 2010* (FAO, 2010), at 15–17.

¹⁵ See National Geographic, n. 1 above.

¹⁶ See D. Brown *et al.*, n. 6 above, at 5–6.

¹⁷ Regulation 2173/2005/EC of 20 December 2005 on the Establishment of a FLEGT Licensing Scheme for Imports of Timber into the European Community, [2005] OJ L347/1, Article 4.1.

¹⁸ Regulation 995/2010/EU of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, [2010] OJ L295/23.

¹⁹ *Ibid.*, Articles 4.1 and 6.1.

²⁰ *Ibid.*, Article 3.

²¹ J. Buckrell and A. Hoare, *Controlling Illegal Logging: Implementation of the EU Timber Regulation* (Chatham House, 2011), found at: <http://www.chathamhouse.org/sites/default/files/0611buckrell_hoare.pdf>.

²² In 2008, 2009 and 2010, respectively, the EU accounted for 45%, 43% and 41% of global forest product imports. FAO, 'Forestry Trade Flows', FAOSTAT database, found at: <<http://faostat.fao.org/site/628/default.aspx>>. However, only 20% of timber imports come from tropical countries, and this proportion is declining rapidly because of the economic downturn in Europe and increasing barriers to trade in tropical timber products. See UN Economic Commission for Europe and FAO, *Forest Products Annual Market Review, 2012–2013* (UN, 2013).

²³ See D. Brown *et al.*, n. 6 above, at 6.

reflect on their internal measures for combating illegal logging, make efforts to improve transparency in the international timber trade and work to realize international pledges to combat timber-related corruption.²⁴ In 2002, the United States announced a President's Initiative against Illegal Logging, the goal of which was to assist developing countries to address illegal logging within their borders, but which did not include any firm commitments.²⁵ One of the more significant early efforts was the World Bank's Forest Law Enforcement and Governance (FLEG) programme. Launched in 2001, FLEG was comprised of regional processes in which governments joined together in making policy commitments to strengthen forest governance.²⁶ Although FLEG conferences resulted in action plans for curbing illegal logging, these were mere 'political statement[s] of intent', which did not include implementing mechanisms.²⁷

These efforts did, however, reflect the growing international focus on illegal logging. Building on this trend, the EU adopted the Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT) in 2003. The Action Plan promised support for governance reform, much like the earlier FLEG programme, but it also sought to create a market incentive to curb illegal logging using a licensing mechanism to promote trade in legal timber.²⁸ The 2005 FLEGT Regulation put this plan into effect, establishing a licensing scheme which enables countries to negotiate Voluntary Partnership Agreements (VPAs) with the EU, under which timber products can only be exported to the EU with a valid license.²⁹ The concept was that by granting FLEGT licenses solely for timber whose legality could be verified, illegal timber from partner countries could be excluded from the European market.

In one respect the VPA system is similar to another trade scheme in which the EU is heavily involved. The Kimberley Process Certification Scheme (KPCS) seeks to eliminate trade in 'conflict diamonds'. In a similar

way that VPAs use FLEGT licenses to certify timber as legal and restrict trade between VPA countries and the EU to certified timber, the KPCS certifies rough diamonds as 'conflict-free' and restricts participants to trading only in such diamonds.³⁰ There are, however, at least two major differences. Whereas the former regulates the timber trade only between the EU and countries with which it has negotiated agreements, the KPCS prohibits participants from trading rough diamonds with any country that does not meet the scheme's minimum requirements.³¹ Additionally, these minimum requirements are set forth by the KPCS instrument. The FLEGT Regulation, on the other hand, provides a basic outline for VPAs, requiring, for example, establishment of a timber legality standard and certain institutional structures, but most details are negotiated on an individual basis with partner countries. The standardized nature of the KPCS' minimum requirements may help explain the short time lag between the start of negotiations and the scheme's entry into force (less than three years), whereas eight years after the FLEGT Regulation's adoption only two VPAs are operational (with Ghana and Liberia).

Countries have a number of incentives to negotiate a VPA. The FLEGT Action plan lists several, including strengthening of enforcement tools to combat illegal logging, increased tax revenues from the reduction in illegal logging and a priority position for development aid concerning FLEGT-related projects.³² A VPA may also help a country reinforce domestic governance reforms, and enhance its international reputation as being serious about addressing illegality and environmental sustainability. But as the name denotes, VPAs are voluntary and the FLEGT regulation imposes no additional regulatory burdens on countries that decline to enter into them. As a result, the benefits associated with VPAs are counterbalanced by the disadvantage that they subject companies in VPA countries to compliance costs that make it harder to compete with companies in other countries. To obtain legality certification and comply with the Indonesian VPA, for example, Indonesian companies must pay between Rp 60 million (~US\$6,120) and Rp 100 million (~US\$10,200)³³ and complete a complex administrative process that exceeds the management capacity of most small timber enterprises.³⁴ Exporters have complained that their competitiveness has suffered in the time since legality certification became mandatory.³⁵

²⁴ G8, 'Report on the Implementation of the G8 Action Programme on Forests: Annex B – G8 Action Programme on Forests' (G8, 1998), found at: <http://www.mofa.go.jp/policy/economy/summit/2000/documents/forest/fore_ab.html>.

²⁵ White House, 'President's Initiative against Illegal Logging', found at: <<http://georgewbush-whitehouse.archives.gov/infocus/illegal-logging/piaail.html>>.

²⁶ See D. Brown *et al.*, n. 6 above, at 8.

²⁷ *Ibid.*

²⁸ Commission of the European Communities Communication of 21 May 2003 on Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan, COM(2003) 251.

²⁹ Regulation 2173/2005/EC, n. 17 above, Article 4.1. The FLEGT Implementing Regulation, promulgated three years later, elaborates on the rules governing the import of timber products under the FLEGT Regulation. See Regulation 1024/2008/EC of 17 October 2008 Laying Down Detailed Measures for the Implementation of Council Regulation (EC) No 2173/2005 on the Establishment of a FLEGT Licensing Scheme for Imports of Timber into the European Community, [2008] OJ L277/23.

³⁰ See <<http://www.kimberleyprocess.com/en/about>>.

³¹ *Ibid.*

³² COM(2003) 251, n. 28 above.

³³ A.M. Lubis, 'Timber Certification Moves on Despite EU Agreement Delay', *Jakarta Post* (28 May 2013).

³⁴ International Tropical Timber Organization (ITTO), 17:11 *Tropical Timber Market Report* (1–15 June 2013), at 5.

³⁵ ITTO, 17:9 *Tropical Timber Market Report* (1–15 May 2013), at 5.

The EUTR, adopted in 2010,³⁶ levels the playing field by creating legality requirements that apply to timber imports from all countries. Pursuant to the Regulation, imports of illegal timber are banned from all countries,³⁷ and importers must carry out due diligence to ensure that they comply with this ban.³⁸ The European Parliament and the European Council justify their involvement in the struggle against illegal logging taking place abroad on the grounds that it presents challenges not only to the countries where it happens, but to the international community as well. Beyond damaging the local environment, illegal logging contributes to the approximately 20% of global carbon dioxide emissions for which deforestation and forest degradation are responsible, threatens biodiversity and undercuts international development efforts.³⁹

The other major arena in which EU regulations seek to leverage the substantial European market to stem deforestation is palm oil – the expansion of which is a growing driver of forest loss and greenhouse gas emissions.⁴⁰ An EU law which will come into effect in December 2014 requires manufacturers to state the types of vegetable oil they use in food products, precluding their ability to ‘hide’ palm oil in ingredients lists and empowering consumers to choose not to purchase foods containing palm oil.⁴¹ Recently, there have been proposals for additional rules to lower tariffs on imports of sustainable palm oil products to increase growers’ incentive to certify.⁴² As is the case with the definition of ‘legal’ timber under the EUTR and the FLEGT Regulation, the EU does not provide a definition of ‘sustainable’ palm oil, relying instead on standards such as those developed by the not-for-profit Roundtable on Sustainable Palm Oil. But whereas the illegal logging mechanisms create an exclusive market for legal timber, regulatory efforts to promote sustainable palm oil incentivize trade in such oil while allowing continued trade in the ‘unsustainable’ variety. This difference may yield varying implications under international trade law.

The EUTR and the VPA mechanism work together to promote trade in legal timber within the European market. The EUTR sets out baseline legality require-

ments that apply to timber products irrespective of their point of origin, but timber products that possess a FLEGT license authorized under a VPA are exempt from these requirements.⁴³ The European Commission explains that:

[L]egality verification controls – and hence due diligence – will have been carried out in the exporting country in accordance with the Voluntary Partnership Agreements between those countries and the European Union, and the resulting timber can be considered risk-free by operators.⁴⁴

This relationship should, in principle, incentivize the negotiation of VPAs.⁴⁵ The EUTR exposes timber importers to the risk of a penalty if they are found to be in violation of the ban on illegal timber or their due diligence obligations. This is likely to make them less willing to deal in timber coming from countries that carry a risk of illegality, harming the timber trade from these countries. VPAs provide these countries a means to free economic actors from doubt and to secure access for their timber products to the European market. Meanwhile, the EU’s interest in negotiating VPAs stems from their ability to free the EU from the EUTR’s default rules, granting the EU greater control over the terms of trade with VPA countries. Indeed, the EUTR conceptualizes itself as complementing the VPA mechanism and as a means to incentivize completion of additional VPAs.⁴⁶

The link between the EUTR and the VPA mechanism resembles that between import tariffs and free trade agreements; the EUTR sets default rules concerning timber that enters Europe, and exporting countries may negotiate alternative rules through VPAs that displace the EUTR.⁴⁷ And in the same way that free trade agreements would be meaningless without the underlying threat of tariffs subjecting imports to entrance fees, countries would lose much of the incentive to negotiate VPAs if the threat of the EUTR’s due diligence requirements were to disappear. It is thus critically important to the EU’s anti-illegal logging efforts that the EUTR

³⁶ Regulation 995/2010/EU, n. 18 above.

³⁷ *Ibid.*, Article 4.1.

³⁸ *Ibid.*, Article 6.1.

³⁹ *Ibid.*, at recital 3.

⁴⁰ E. Saxon and S. Roquemore, ‘Palm Oil’, in: D. Boucher *et al.* (eds.), *The Root of the Problem: Drivers of Deforestation* (Union of Concerned Scientists, 2011), 51.

⁴¹ Regulation 1169/2011/EU of 25 October 2011 on the Provision of Food Information to Consumers, [2011] OJ L304/18.

⁴² Malaysia External Trade Development Corporation, ‘Netherlands to Push for the Lifting of EU Import Tariff on Sustainable Palm Oil’ (1 January 2012), found at: <<http://www.matrade.gov.my/en/about-matrade/media/market-alerts/market-alerts-2012/1969-netherlands-to-push-for-the-lifting-of-eu-import-tariff-on-sustainable-palm-oil-january-2012>>.

⁴³ Regulation 1169/2011/EU, n. 41 above, Article 3. Timber and timber products that bear a license related to the Convention on International Trade of Endangered Species are also deemed compliant with the EUTR. *Ibid.*

⁴⁴ Commission of the European Communities, *Guidance Document for the EU Timber Regulation* (September 2013), found at: <<http://ec.europa.eu/environment/forests/pdf/Final%20Guidance%20document.pdf>>, at 21.

⁴⁵ FERN, *Forest Watch Special – VPA Update May 2013*, found at: <<http://www.fern.org/sites/fern.org/files/VPA%20Update%20May%202013.pdf>>, at 1.

⁴⁶ The recitals of Regulation 995/2010/EU, n. 18 above, which provide context to the operative text and set forth principles to inform its interpretation, assert that ‘it is necessary . . . to complement and strengthen the FLEGT VPA initiative’ (recital 8) and instruct that ‘further encouragement for countries to conclude FLEGT VPAs should be given’ (recital 9).

⁴⁷ One difference is that while free trade agreements always have the effect of lowering tariffs, VPAs can modify EUTR requirements in any way.

continue to supplement the VPA mechanism. A ruling by a WTO dispute-resolution body that the Regulation violates international trade law could jeopardize this.

THE EU TIMBER REGULATION

An analysis of how the EUTR fares under the GATT requires a thorough understanding of the EUTR. This section discusses the elements of the Regulation that bear on the GATT inquiry conducted in the following section. The EUTR's central provision is a ban on the introduction to the European market of timber or products made from timber harvested in violation of the laws of the country of harvest.⁴⁸ Specifically, the ban applies to timber and timber products enumerated on a fairly long list in the Regulation's sole annex. To realize this ban, the Regulation creates sets of obligations that apply to EU Member States and to certain non-State actors that carry out timber-related economic activity in Europe.

Member States have three primary roles to play under the EUTR. First, they must designate at least one 'competent authority' to implement the EUTR.⁴⁹ Competent authorities are in turn required to cooperate – through information sharing and other means – with each other, with governmental authorities in non-EU countries and with the European Commission to ensure compliance with the Regulation.⁵⁰ Second, Member States must report to the Commission every two years on the application of the EUTR to enable review of its effectiveness with a view to making legislative adjustments if deemed necessary.⁵¹ The third role is optional: Member States may choose to facilitate non-State actor compliance with the EUTR by sharing information regarding illegal logging and by offering technical and other assistance.⁵²

The obligations that apply to non-State economic actors are fashioned for two distinct groups: operators and traders. 'Operators' are natural or legal persons who place timber or products thereof on the European market, while 'traders' are those natural or legal persons who sell or buy timber or timber products that have previously been placed on the European market by operators.⁵³ The Regulation describes a procedure by which competent authorities must audit operators,⁵⁴ but no specific procedure is provided for auditing

traders. The requirements that pertain specifically to traders are fairly straightforward, and are intended merely to ensure that the timber and timber products that traders deal in can be traced along the supply chain. Traders must retain records, going back at least five years, of the operators or other traders that have supplied their inventories, and of any traders to whom they have supplied timber or timber products.⁵⁵ Any competent authority may request this information, and traders must be prepared to provide it.⁵⁶

Operators face somewhat more demanding requirements. To ensure that they do not place illegally harvested timber or timber products on the European market, they must exercise 'due diligence'.⁵⁷ The fact that due diligence is only demanded of operators represents a concession by the drafters of the EUTR, who recognized that the due diligence provisions might prove quite burdensome for traders, and wished to avoid imposing unnecessary administrative costs.⁵⁸ Perhaps representing another effort to lower compliance costs, the EUTR gives operators the choice to either maintain and apply their own due diligence system, or to use a due diligence system maintained by a recognized monitoring organization.⁵⁹ The EUTR provides criteria for granting recognition to monitoring organizations, sets out requirements that they must follow and establishes a protocol by which competent authorities must audit monitoring organizations and withdraw recognition where necessary.⁶⁰

Regardless of whether the operator itself or a monitoring organization develops the due diligence system,

⁵⁵ *Ibid.*, Article 5.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, Article 4.2.

⁵⁸ *Ibid.*, at recital 15.

⁵⁹ *Ibid.*, Article 4.3. This flexibility mechanism is especially important because the EUTR does not specify which laws an operator must be familiar with to ensure that its timber and timber products were harvested legally; it simply lists the legislative areas that contain the particular laws that must be adhered to. Commission of the European Communities, n. 44 above, at 10. Monitoring organizations may be better positioned than operators to follow legal developments in multiple timber-exporting countries.

⁶⁰ Regulation 995/2010/EU, n. 18 above, Article 8. A clarifying Regulation provides further details on the process of recognizing and withdrawing recognition from monitoring organizations: Regulation 363/2012/EU of 23 February 2012 on the Procedural Rules for the Recognition and Withdrawal of Recognition from Monitoring Organizations as Provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, [2012] OJ L115/12. A second clarifying Regulation provides further direction as to the frequency and nature of the audits that must be conducted of monitoring organizations: Regulation 607/2012/EU of 6 July 2012 on the Detailed Rules Concerning the Due Diligence System and the Frequency and Nature of the Checks on Monitoring Organisations as Provided for in Regulation (EU) No 995/2010 or the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, [2012] OJ L177/16, Article 6.

⁴⁸ Regulation 995/2010/EU, n. 18 above, Article 4.1. Rather than impose a blanket ban on all timber or timber products, the EUTR takes a selective approach, specifying in an annex the types of timber and timber products subject to the regulation.

⁴⁹ *Ibid.*, Article 7.

⁵⁰ *Ibid.*, Article 12.

⁵¹ *Ibid.*, Article 20.

⁵² *Ibid.*, Article 13.

⁵³ *Ibid.*, Article 2(c–d).

⁵⁴ *Ibid.*, Article 10.

such a system must comprise three components: information gathering, risk assessment and risk mitigation. The first component is designed to ensure that operators possess adequate information concerning the timber or timber products in their inventory to perform a useful risk assessment. Similar to traders, operators must keep relevant information for five years and must make it available to competent authorities upon request.⁶¹ Relevant information includes the supply chain tracking data that traders must retain, but extends to the location of harvest, the quantity and description of each product, the names of the tree species represented and documents or other information which demonstrate that all timber in the operator's inventory has complied with the relevant laws of the country in which it was harvested.⁶²

The second component of the due diligence system – the risk assessment procedure – is intended to provide a helpful analysis to inform risk mitigation activities. Operators must evaluate the likelihood that the timber which they introduce to the market was harvested illegally. The Regulation provides a list of specific risk assessment criteria to consider, but the list is non-exhaustive; additional criteria may be considered if they help determine the likelihood of illegal harvest. The first category of criteria that must be considered is the information collected at the information-gathering stage, which is specific to the timber or timber product at issue.⁶³ The second category of criteria concerns the context in which harvesting took place. The first criterion in this group is assurance of compliance with applicable legislation,⁶⁴ defined essentially as any legislation in force in the country of harvest which concerns rights and obligations associated with timber harvesting.⁶⁵ Assurance of compliance with these laws may be provided by certification or another third-party verification scheme.⁶⁶ The other listed criteria in this group are: prevalence of illegality in the harvesting of the timber species at issue or in the harvesting of timber generally in the country or sub-national region where the timber was harvested; presence of sanctions on timber trade; and complexity of the supply chain of the particular timber or timber products at issue.⁶⁷

The final piece of the due diligence system is the risk mitigation procedure. Any risk identified at the risk assessment stage that is not 'negligible' must be mitigated using measures that are 'adequate and propor-

tionate'.⁶⁸ Such measures could include requiring additional information, requiring third-party verification, or other actions.⁶⁹ 'Negligible' is not defined in the Regulation, but a guidance document which the European Commission released defines it as a finding that 'no cause for concern can be discerned' following a full risk assessment.⁷⁰ While the guidance document characterizes itself as lacking binding legal effect,⁷¹ courts might very well find this definition persuasive when interpreting the EUTR in the course of future litigation.

Operators and traders that violate their obligations under the EUTR are subject to penalties which may include fines, seizure of inventory and suspension of authorization to trade.⁷² Critically, the Regulation devolves authority to the Member States to devise their own penalties. Although it specifies that penalties shall be 'effective, proportionate and dissuasive',⁷³ Member States have wide discretion to choose the form and severity of the penalties they will apply within their borders. Equally as importantly, Member States must each decide whether violations require a particular level of intent to warrant penalty. Penalty design may strongly affect the level of risk that operators are likely to embrace in choosing to deal in timber with a spectre of illegality. Severe penalties combined with the possibility that operators could be found liable for mere negligent violations, or even on the basis of strict liability could significantly chill imports from sources with even a hint of illegality. Such a penalty would provide a strong incentive for timber-exporting countries to negotiate VPAs, to eliminate the uncertainty that operators face in deciding whether to deal in their timber.

The trade regime that the EUTR creates is designed to increase the proportion of legally harvested timber on the international market by incentivizing the governments of timber-exporting countries to crack down on illegality so as to facilitate access to the lucrative European market. The central mechanism that the EUTR employs to reach this goal – the ban on the introduction of illegal timber to the EU – is a bright-line rule which lends itself to easy application. But were it to stand alone, the ban would be of limited utility. Unless a court in a timber-exporting country were to declare timber in a particular shipment or timber originating from a particular concession to be illegal, it would be difficult for European courts deciding disputes arising under the EUTR to determine the legal status of such timber. They are unfamiliar with foreign laws, probably unable

⁶¹ Regulation 607/2012/EU, n. 60 above, Article 5.1.

⁶² Regulation 995/2010/EU, n. 18 above, Article 6.1(a).

⁶³ *Ibid.*, Article 6.1(b).

⁶⁴ *Ibid.* Whether this criterion is in fact mandatory to consider during risk assessment is unclear in light of the clarifying Regulation on due diligence. See Regulation 607/2012, n. 60 above, Article 4, and the discussion further below.

⁶⁵ Regulation 995/2010/EU, n. 18 above, Article 2(h).

⁶⁶ *Ibid.*, Article 6.1(b).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, Article 6.1(c).

⁶⁹ *Ibid.*

⁷⁰ Commission of the European Communities, n. 44 above, at 6.

⁷¹ *Ibid.*, at 1.

⁷² Regulation 995/2010/EU, n. 18 above, Article 19.

⁷³ *Ibid.*, Article 19.2.

to read many such laws in their original language and geographically removed from relevant evidence. As courts in developing countries from which the bulk of internationally traded timber is harvested rarely weigh in on the legality of harvested timber,⁷⁴ European courts will not be able to simply apply foreign legal rulings. The due diligence provision, which specifies how illegality is to be determined, is thus critical to actualizing the import ban. Instead of having to rely on unlikely rulings by courts in timber-exporting countries, European courts can make use of other evidence in deciding whether timber entering the EU has been harvested legally.

POTENTIAL CONFLICT WITH INTERNATIONAL TRADE LAW

There is no legal precedent directly on point with which to accurately predict the outcome of a theoretical challenge to the EUTR before an international court. A close analysis reveals that while it is unlikely that the Regulation conflicts with the TBT, there is at least a colourable argument that it violates the GATT, which seeks to liberalize international trade by forbidding the use of certain trade restrictions in certain contexts. The WTO assumed oversight of the GATT upon its creation in 1995, employing a system for resolving trade disputes arising under the GATT and associated trade agreements, which directs complainants to dispute panels and, if necessary, to the WTO Appellate Body. Compliance with the decisions handed down by these bodies is fairly high because WTO tribunals – unlike traditional international tribunals – enjoy compulsory jurisdiction and are authorized to issue binding decisions on WTO members.⁷⁵ Moreover, the WTO permits the winning party to impose normally forbidden trade sanctions on a losing party that fails to comply with the decision.⁷⁶

One report has argued that a WTO challenge to a regulation such as the EUTR is unlikely because '[i]t is

difficult to envisage a state . . . making an argument in the WTO that [a country] may not apply trade restrictions on timber harvested illegally under [its own] law'.⁷⁷ But the fact is that the timber trade is lucrative, valued at over US\$150 billion per year.⁷⁸ Some countries' gross domestic products (GDPs) are particularly tied to timber: in 2006, the forestry sector's contribution to the GDPs of the Central African Republic, Liberia and the Solomon Islands were, respectively, 11.1%, 16.7% and 17.7%.⁷⁹ Such countries face a strong incentive to use any means available to protect their timber industries, even if it means making the awkward argument that their illegal products cannot be discriminated against. Indeed, Indonesia has asserted (although it has not brought a formal claim) that Australia's new law prohibiting illegal timber, which is highly similar to the EUTR,⁸⁰ violates WTO agreements.⁸¹

The history of tension between timber-importing and timber-exporting countries over the use of trade barriers to combat tropical deforestation also suggests that a challenge could be forthcoming. For example, when a proposal surfaced in 1989 to develop a forest certification scheme within the International Tropical Timber Organization, exporting countries were quick to attack it as a discriminatory trade barrier that would violate the GATT, and the proposal died.⁸² Three years later, timber-exporting countries threatened to file a claim with the WTO when Austria sought to mandate that imported timber be accompanied by proof of sustainable harvest. Rather than risk international repercussions, Austria revised the law.⁸³ Although several countries in addition to the EU have now enacted illegal logging laws without challenge, including Australia,⁸⁴ Japan⁸⁵ and the United

⁷⁷ Sydney Centre for International Law, *Re: Inquiry into the Illegal Logging Prohibition Bill 2011* (22 February 2012), found at: <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=0ea71f2c-d962-4616-a9cd-12f0932c546c>>, at 5.

⁷⁸ T. Whelan, 'Visit Them, Conserve Them', *Our Planet* (June 2011), found at: <http://www.unep.org/pdf/op_june/EN/OP-2011-06-EN-FULLVERSION.pdf>, at 31.

⁷⁹ FAO, *State of the World's Forests 2011* (FAO, 2011), at 147–155.

⁸⁰ Like the EUTR, the Australian law makes it an offense to import illegal timber and imposes due diligence obligations on importers. *Illegal Logging Prohibition Act 2012*, No 166, 2012, Articles 8 and 14.

⁸¹ See Republic of Indonesia, 'Comments from the Government of Indonesia on Australia's Draft Illegal Logging Prohibition Bill 2011' (30 January 2012), found at: <<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=589549e5-ffb0-4698-a961-c28c0a14fc70>>.

⁸² T. Bartley, 'Certifying Forests and Factories: States, Social Movements and the Rise of Private Regulation in the Apparel and Forest Products Fields', 31:3 *Politics and Society* (2003), 433, at 451–452.

⁸³ *Ibid.*, at 447.

⁸⁴ *Illegal Logging Prohibition Act 2012*, n. 80 above.

⁸⁵ In 2006, Japan amended its Green Procurement Law to restrict State purchases of forest products to those that have been harvested legally from sustainable sources. Chatham House, 'Green Procurement Law Revised to Help Prevent Illegal Logging' (15 June 2006), found at: <<http://www.illegal-logging.info/content/green-procurement-law-revised-help-prevent-illegal-logging>>.

⁷⁴ A notable exception is the decision by the Liberian Supreme Court to uphold a presidential moratorium on the issuance of licenses to harvest timber on private forested land, which effectively declared all timber harvested from concessions licensed in contravention of the moratorium to be illegal. Letter Dated 3 December 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1521 (2003) Concerning Liberia Addressed to the President of the Security Council (UN Doc. S/2012/901, 4 December 2012), at paragraph 114.

⁷⁵ G. Born, 'A New Generation of International Adjudication', 61:4 *Duke Law Journal* (2012), 775, at 852–853. Formally, panel decisions must be adopted by the Dispute Settlement Body (DSB) to become binding. The DSB is required to adopt panel decisions unless timely appeal is filed. Understanding on Rules and Procedures Governing the Settlement of Disputes (Marrakesh, 15 April 1994; in force 1 January 1995, Article 16.4). It must adopt Appellate Body decisions unless it decides by consensus not to. *Ibid.*, Article 17.14.

⁷⁶ See G. Born, n. 75 above, at 853.

States,⁸⁶ this does not necessarily signal that a challenge is unlikely. These laws have only been in effect for a short period of time, and timber-exporting countries may simply be waiting to see what impact they have in practice before taking action. Members of the Asia-Pacific Economic Cooperation have indicated their displeasure by agreeing to a 'non-binding' accord to isolate the United States and Australia in retaliation for their illegal logging laws.⁸⁷

The EUTR is not the first legislative attempt to achieve environmental ends via trade restrictions. Previously enacted regulations in a number of countries have, for instance, limited trade in an effort to conserve dolphins, salmon and turtles, protect air quality and reduce the accumulation of waste tyres.⁸⁸ However, the approach of the EUTR differs from these efforts in an important way. The 1998 adjudication of *United States: Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)* is representative of cases involving environmental regulations to date. In it, the United States sought to ban the import of shrimp caught using methods that it had determined to be illegal within its territory.⁸⁹ The EUTR, by contrast, restricts trade not in goods that are illegal in the EU, but which are illegal under the laws of the countries in which they were produced. Thus, imported timber and timber products are obliged to meet the substantive standards for legality imposed by other countries rather than standards developed by the EU. The WTO Appellate Body has never heard a claim involving such a restriction, nor 'one even vaguely similar'.⁹⁰ As a result, 'no one can draw hard and fast conclusions' concerning the outcome of a dispute, were a country to claim that the EUTR violates WTO treaty law.⁹¹ However, previous cases have developed a body of jurisprudence that would inform the resolution of such a dispute.

The EUTR itself explains that its reason for relying on foreign domestic legality standards is that there is no

internationally agreed definition of 'illegal logging'.⁹² Indeed, one expert on timber legality could not offer a more specific definition than 'logging in violation of relevant national and international laws'.⁹³ However, this probably does not fully explain the EU's rationale. It is not unheard of for countries to enact national legislation to create a standard, in the absence of an internationally agreed standard, to guide its interactions with other countries. For example, the United States Foreign Corrupt Practices Act requires American companies to avoid engaging in activity that violates the corruption standard contained in the Act itself, rather than comply with the corruption laws of the countries in which they do business.⁹⁴ Another explanation for the EUTR's approach is that it may enable the Regulation to survive the challenges that were levelled against earlier trade and environmental regulations like the one in *Shrimp-Turtle*, which attempted to impose legality standards on other countries.

The next section first examines the likelihood that the EUTR could be successfully challenged under the GATT. The following section looks at such a claim if brought under the TBT Agreement.

GENERAL AGREEMENT ON TARIFFS AND TRADE

Determining whether a national regulation violates the GATT involves three steps. The first question is whether the regulation violates one of the GATT's primary provisions. For purposes of analyzing the EUTR's compliance with the GATT, the relevant provisions are the three core prohibitions around which the treaty is structured: the bans on (i) imposition of most types of trade restrictions,⁹⁵ (ii) discriminating between domestic and foreign like products (i.e., the 'national treatment' principle),⁹⁶ and (iii) discriminating between imports from different countries (i.e., the 'most-favoured-nation' principle).⁹⁷ If one or more of these prohibitions is violated, the second step is to review Article XX to determine whether any of the exceptions that it lists is applicable – in which case the violation is justified. If an exception applies, the third step is to ensure that the country seeking to regulate has complied with the requirements of the *chapeau* of Article XX.⁹⁸

⁸⁶ The United States Lacey Act was originally enacted in 1900 to prohibit trade in fish, wildlife or plants taken, transported or sold in violation of any United States or Indian tribal law. It was amended in 2008 to extend its prohibition to plants (especially trees) taken, transported or sold in violation of the laws of the country of harvest. Food, Conservation and Energy Act 2008, Pub. L. No. 110-234, § 8204, 122 Stat. 923 (codified at 16 USC §§ 3371–3378).

⁸⁷ A.M. Lubis, 'APEC Agrees to Isolate the US, Australia Over Forestry Trade Bans', *Jakarta Post* (19 August, 2013).

⁸⁸ World Trade Organization, 'WTO Rules and Environmental Policies: GATT Exceptions', found at: <http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm>.

⁸⁹ WTO AB 6 November 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RM ('US-Shrimp'), at paragraphs 2–3.

⁹⁰ D. Brack, A.C. Chandra and H. Kinasih, *The Australian Government's Illegal Logging Prohibition Bill: WTO Implications* (International Institute for Sustainable Development, 2012), found at: <http://www.iisd.org/pdf/2012/australian_illegal_logging.pdf>, at 13.

⁹¹ *Ibid.*

⁹² Regulation 995/2010/EU, n. 18 above, at recital 14.

⁹³ See D. Brown *et al.*, n. 6 above, at 6.

⁹⁴ Foreign Corrupt Practices Act 1977, 15 USC §§ 78dd-1(a).

⁹⁵ General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994; in force 1 January 1995) ('GATT'), Article XI.

⁹⁶ *Ibid.*, Article III.

⁹⁷ *Ibid.*, Article I.

⁹⁸ The Appellate Body has held that the *chapeau* provides substantive requirements that are distinct from the requirements of Article XX's individual exceptions. 'US-Shrimp', n. 89 above, at paragraphs 118–119.

DOES THE EUTR VIOLATE ANY OF THE GATT'S CORE PROHIBITIONS?

At the first step of the analysis, the EUTR appears to be vulnerable to attack under any one of the core prohibitions. The ban on selected forms of trade restrictions, which applies expansively to any type of trade restriction 'other than duties, taxes or other charges',⁹⁹ would seem to cover the EUTR's ban on illegal timber for three reasons. First, neither a categorical ban on the import of particular products nor documentary requirements of the type that would be needed to prove legality under the EUTR are among the three listed exclusions.¹⁰⁰ Second, a dispute panel held that regulations which penalize the import of particular products fall under the prohibition,¹⁰¹ and the EUTR makes clear that penalties apply to breaches of the import ban.¹⁰² Third, the *de facto* effect of restricting trade, which would result from importers choosing to avoid timber from high-risk areas, may constitute a distinct form of prohibited trade restriction.¹⁰³ The provision goes on to exclude from the ban 'restrictions on any agricultural . . . product', where the restrictions are 'necessary to the enforcement of governmental measures which operate to restrict the quantities of the like domestic product permitted to be marketed or produced'.¹⁰⁴ The EUTR indeed serves to restrict the quantity of domestically produced illegal timber, and it arguably could not do so without the parallel restriction on foreign illegal timber (because foreign and domestic timber may become hard to separate upon entering the market). However, timber appears not to constitute an agricultural product under WTO rules.¹⁰⁵

The Regulation is likely safe, from a design standpoint, with respect to the prohibition against discriminating between domestic and foreign like products. On paper, the ban on illegal timber and the due diligence requirements should satisfy this 'national treatment' principle because they apply equally to imported and domestic timber.¹⁰⁶ But in application the Regulation may present a real challenge. Despite identical requirements, it is not difficult to imagine that timber harvested in Europe might in practice receive less scrutiny than imported timber, particularly if the latter originates in areas with high levels of illegal logging.¹⁰⁷ Regulators may be biased in favour of domestic goods, and it may be easier to introduce implementing regulations at ports of entry where timber is imported than to control the entry to the market of domestic timber at dispersed locations. However, if regulators apply due diligence requirements evenly, the EUTR may prove compatible with this prohibition.

The most problematic GATT prohibition, as applied to the EUTR, is the 'most-favoured-nation' provision, which forbids discrimination between imports from different countries.¹⁰⁸ The EUTR specifically instructs operators to assess the risk that their timber is illegal, in part based on whether it originates from areas where illegality is prevalent.¹⁰⁹ On the one hand, this risk assessment criterion applies to all timber, and no additional due diligence requirements adhere to timber found to come from areas identified as being at high risk of illegality. On the other hand, timber from high-risk areas may nonetheless experience *de facto* discrimination given that operators may hesitate to deal in such timber, which could reduce the timber's marketability even if it is in fact legal.

The EUTR's very approach of banning illegal timber will pose another design problem if illegal and legal timber are deemed to be the same product, because the 'national treatment' principle prohibits discrimination between foreign and domestic 'like' products.¹¹⁰ A submission to the Senate committee considering the WTO implications of Australia's illegal logging prohibition bill argued that illegal and legal timber are 'like' in that they are identical in many respects, including physical properties and end uses.¹¹¹ An opposing view counters

⁹⁹ GATT, n. 95 above, Article XI.1.

¹⁰⁰ Whether a categorical import ban falls under the prohibition against selected forms of trade restrictions seems obvious from the language of Article XI of the GATT, but a Panel entertained the question in connection with a proceeding which the United States instituted against the EU after the latter placed a moratorium on the approval of biotech product imports. Specifically, the United States and Canada argued that a Greek ban on 'the importing into the territory of Greece of seeds of the genetically modified rape-plant' violated Article XI. However, as the Panel had previously determined that this measure was inconsistent with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (Marrakesh, 15 April 1994; in force 1 January 1995), the Panel exercised judicial economy in refraining from further deciding whether this measure was consistent with the GATT. WTO DS 29 September 2006, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, at paragraphs 7.3426–7.3430.

¹⁰¹ WTO DS 12 June 2007, *Brazil: Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, at paragraph 7.372.

¹⁰² Regulation 995/2010/EU, n. 18 above, Article 19.

¹⁰³ A.D. Mitchell and G. Ayres, *The Consistency of Australia's Illegal Logging Prohibition Bill with International Trade Rules* (2012), found at: <http://www.illegal-logging.info/sites/default/files/uploads/1_MitchellAyresIllegalLogging.pdf>.

¹⁰⁴ GATT, n. 95 above, Article XI.2(c)(i).

¹⁰⁵ The Agreement on Agriculture (Marrakesh, 15 April 1994; in force 1 January 1995), for example, does not apply to timber.

¹⁰⁶ GATT, n. 95 above, Article III.

¹⁰⁷ This concern was raised regarding an Australian bill (since enacted) that would ban illegal timber and impose due diligence obligations on importers in much the same way as the EUTR. See Sydney Centre for International Law, n. 77 above.

¹⁰⁸ GATT, n. 95 above, Article I.

¹⁰⁹ Regulation 995/2010/EU, n. 18 above, Article 6(b).

¹¹⁰ GATT, n. 95 above, Article III.

¹¹¹ See A.D. Mitchell and G. Ayres, n. 103 above, at paragraph 29. The 'likeness' analysis is done on a case-by-case basis, as there is 'no precise and absolute definition of like'. WTO DS 18 September 2000, *European Communities: Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/R ('EC-Asbestos Panel'), at paragraph 8.114. However, in the *EC-Asbestos*, case the Appellate

that this argument, taken to its logical conclusion, would prohibit national legislation concerning anything that could be traded unless every country were to have the same laws – an outcome which ‘seems unlikely’ to have been the drafters’ intent.¹¹²

As mentioned above, no case has ever come before the Appellate Body concerning illegal goods, so there is no way to know how it would hold, but the *Shrimp-Turtle* decision provides some insight into how the Appellate Body might approach the issue. In the concise words of one analyst, the complainants in this case asserted that ‘goods must be permitted to flow across borders without regard to the processes used to produce them’.¹¹³ The Appellate Body disagreed, upholding the design of a trade measure that banned the import into the United States of shrimp caught without the use of a mechanism for excluding sea turtle by-catch.¹¹⁴ In other words, such shrimp could correctly be characterized as being *unlike* shrimp caught in manner that protects turtles. This decision created a precedent for the notion that the process used to produce a product can serve as a basis for restricting its trade, and it is conceivable that the Appellate Body might extend this logic to the case of two otherwise identical timber products, only one of which was produced legally. Although the compliance of a particular timber product with production laws does not provide any information regarding the actual methods used to produce it (because laws governing timber production differ from country to country), the product might still be said to have been produced differently, by complying with those laws, than an illegal but otherwise identical version of the product.

DO ANY OF THE SAVINGS CLAUSES IN ARTICLE XX APPLY?

If the EUTR violates one of the GATT’s core prohibitions, the next analytical step is to determine whether the EU can invoke one of the savings clauses enumerated in Article XX to justify the EUTR notwithstanding the violation. Two of the listed grounds for permitting an otherwise prohibited regulation are particularly relevant to illegal timber: measures which are ‘necessary to protect human, animal or plant life or health’, and measures that ‘relat[e] to the conservation of exhaustible natural resources’.¹¹⁵

Body supported the Panel’s choice to consider four particular factors at minimum: the products’ properties, nature and quality; end-use; consumers’ tastes and habits; and tariff classification. WTO AB 5 April 2001, *European Communities: Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R (‘EC-Asbestos AB’), at paragraphs 105–106.

¹¹² See D. Brack, A.C. Chandra and H. Kinasih, n. 90 above, at 9.

¹¹³ J. Atik, ‘Two Hopeful Readings of Shrimp-Turtle’, 9 *Yearbook of International Environmental Law* (1998), 7.

¹¹⁴ *US-Shrimp*, n. 89 above, at paragraph 187.

¹¹⁵ GATT, n. 95 above, Article XX(b) and (g). An analysis of the WTO implications of the Australian illegal logging bill discusses a third

It is not particularly controversial to maintain that the EUTR’s efforts to reduce illegal logging contribute to protection of plant life, or even that it helps protect the health of animals and humans that depend on forests.¹¹⁶ It is less clear, however, whether the ban on illegal logging is ‘necessary’ to this goal. As used in the GATT, this term has been interpreted as imposing a stringent standard, denoting a degree of requirement a step below indispensable.¹¹⁷ The WTO’s dispute resolution institutions apply a three-part test to assess whether a trade measure is necessary: How important is the measure’s objective? Given this level of importance, how significant is the measure’s contribution to the objective relative to the severity of the measure’s interference with international trade? And is there a reasonably available alternative measure that would achieve the desired level of trade protection while causing less interference?¹¹⁸

It becomes quickly evident in applying this test to the EUTR that the Regulation is probably not ‘necessary’ for protecting human, animal or plant life or health. Even taking the Regulation’s self-described importance at face value (its ‘objective [is to] fight against illegal logging’¹¹⁹ – a problem that ‘poses a significant threat to forests’¹²⁰),¹²¹ illegal logging’s contribution to deforesta-

relevant justification from the savings clause: measures which are ‘necessary to secure compliance with laws or regulations . . . relating to . . . the prevention of deceptive practices’. *Ibid.*, Article XX(d). See A.D. Mitchell and G. Ayres, n. 103 above, at paragraphs 56–58. This provision does not appear relevant to the EUTR because whereas the Australian bill was intended in part to ensure fair competition in Australia’s timber market, the EUTR is focused on reducing the incidence of illegal logging. See Regulation 995/2010/EU, n. 18 above, at recital 31 (‘[T]he objective of this Regulation [is], namely the fight against illegal logging and related trade’). It is thus not an objective of the EUTR to help prevent deceptive practices.

¹¹⁶ The necessity test applies only to the measures imposed to achieve a particular policy objective; the necessity of the policy objective in the first place is not relevant here. WTO DS 29 January 1996, *United States: Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, at paragraph 6.22; *EC-Asbestos Panel*, n. 111 above, at paragraph 8.171. Thus the EU’s policy of reducing illegal logging would merely have to ‘fall within the range of policies designed to protect human[, animal or plant] life or health’, which it almost certainly does. *Ibid.*, at paragraph 8.169.

¹¹⁷ WTO AB 11 December 2000, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, at paragraph 161.

¹¹⁸ *Ibid.*, at paragraphs 162–164; WTO AB 7 April 2005, *United States: Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R, at paragraphs 305–308; WTO AB 3 December 2007, *Brazil: Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (‘Brazil-Retreaded Tyres AB’), at paragraph 156; WTO AB 21 December 2009, *China: Measures Affecting the Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, at paragraph 242.

¹¹⁹ Regulation 995/2010/EU, n. 18 above, at recital 31.

¹²⁰ *Ibid.*, at recital 3.

¹²¹ The preamble to the WTO Agreement may support the claim that containing threats to forests is ‘important’ because it recognizes the objectives of sustainable development and environmental preservation. Marrakesh Agreement Establishing the World Trade Organiza-

tion distantly trails that of forest conversion to plantations,¹²² and its levels are declining.¹²³ Similarly, although the contribution of forest loss to desertification and climate change can adversely affect humans, the proportion of these effects attributable to illegal logging is both difficult to prove and probably not large when all other contributing factors are taken into account.¹²⁴ The EUTR's 'importance' would be further eroded if it were to succeed only in diverting illegal timber to other markets instead of reducing its incidence.¹²⁵ It is thus uncertain, at best, that a panel would find the Regulation's benefits to compare favourably with the substantial trade impacts that could flow from a ban on illegal timber.

The Appellate Body has previously held, however, that a trade measure of unclear effectiveness can still be

deemed necessary if 'quantitative projections . . . or qualitative reasoning' suggests that it is 'apt to produce a material contribution to the achievement of its objective'.¹²⁶ If, as a result, the EUTR's contribution were deemed material and the second element of the necessity test were met, it remains the case that less trade-disruptive alternatives to a ban are probably available. The EU could, for example, allow its domestic timber industry to establish legality verification standards and then enforce those standards,¹²⁷ or work with timber-exporting countries to improve their forest sector enforcement.¹²⁸

The second savings clause, which protects trade measures that relate to the conservation of exhaustible natural resources, is likelier to be relevant, but may not apply to the EUTR either. Forests probably qualify as an 'exhaustible' resource in light of the Appellate Body's determination that this term extends beyond non-regenerating resource like oil, gas and minerals to living resources such as sea turtles.¹²⁹ If this is the case, the ban on illegal timber need not be 'necessary' for conserving forests, as with the first savings clause; it need only 'relate to' forest conservation. The Appellate Body has repudiated and broadened earlier interpretations of this phrase,¹³⁰ deciding that it indicates simply that the means which the measure employs must be 'reasonably related' to its objective.¹³¹ The EUTR almost certainly meets this laxer standard, as its objective of reducing illegal logging 'is expected to contribute to the Union's climate change mitigation efforts' by reducing emissions from deforestation.¹³²

What is not clear is whether a country is permitted to invoke the natural resource conservation exception to protect resources located wholly beyond its borders. In *Shrimp-Turtle*, the United States defended its restriction on shrimp imports caught without turtle-excluding devices as a means of conserving the turtle population. In response, the complainants argued that the exception does not grant countries jurisdiction to impose restrictions on resources found beyond their borders. The Appellate Body avoided making a determination about the extent of this jurisdiction by finding that the turtles of concern migrate into American territorial waters, creating a sufficient 'nexus' between the United States and the turtle population it sought to conserve.¹³³

Commentators have argued that countries likewise share a nexus with the timber whose import they

tion (Marrakesh, 15 April 1994; in force 1 January 1995), at preamble. However, the Appellate Body has indicated that the function of this preambular reference to sustainable development is merely to 'add colour, texture and shading' to interpretations of the WTO agreements. *US-Shrimp*, n. 89 above, at paragraph 153. The preamble, moreover, does not direct States to conduct trade in an environmentally protective manner; it merely states that trade should seek to protect the environment. Compared with the directive that 'relations . . . should be conducted' (emphasis added), this language seems to present environmental protection as a secondary objective, which perhaps does not rise to the level of 'important'.

¹²² Rainforest Conservation Fund, 'Conversion for Agriculture', found at: <<http://www.rainforestconservation.org/rainforest-primer/3-rainforests-in-peril-deforestation/d-causes-of-tropical-rainforest-destruction/3-conversion-for-agriculture>>; NASA Earth Observatory, 'Causes of Deforestation: Direct Causes', found at: <http://earthobservatory.nasa.gov/Features/Deforestation/deforestation_update3.php>; World Wildlife Fund, 'Threats: Deforestation', found at: <<http://worldwildlife.org/threats/deforestation>>.

¹²³ Illegal timber production is thought to have fallen by 22% since 2002. S. Lawson and L. MacFaul, *Illegal Logging and Related Trade: Indicators of the Global Response* (Chatham House, 2010), at xvii. A UN Environment Programme (UNEP) report argues, however, that this reported trend is misleading. First, the decline may only be temporary, having been due to short-term law enforcement efforts that are unlikely to continue. Second, the 'decline' is merely a perception caused by more advanced laundering operations that have made illegality less apparent. C. Nellemann and INTERPOL Environmental Crime Programme (eds.), *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests* (UNEP, 2012), at 7.

¹²⁴ Direct drivers of deforestation, besides illegal logging, include: commercial and subsistence agriculture; mining, infrastructure and urban expansion; legal timber extraction; and livestock grazing. G. Kissinger, M. Herold and V. de Sy, *Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers* (UK Government, 2012), found at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65505/6316-drivers-deforestation-report.pdf>.

¹²⁵ A report commissioned by the Australian government to inform its proposed illegal timber law estimated that the law 'would only stop production of about a tenth of the products incorporating illegally logged timber currently coming to Australia. The rest would be diverted to other markets and other products (export and domestic)'. Centre for International Economics (CIE), *A Final Report to Inform a Regulation Impact Statement for the Proposed New Policy on Illegally Logged Timber* (CIE, 2010), found at: <http://www.thecie.com.au/content/publications/Illegal_logging.pdf>, at 13.

¹²⁶ *Brazil-Retreaded Tyres AB*, n. 118 above, at paragraph 151.

¹²⁷ See CIE, n. 125 above, at 39.

¹²⁸ See D. Brack, A.C. Chandra and H. Kinasih, n. 90 above, at 5.

¹²⁹ *US-Shrimp*, n. 89 above, at paragraph 131.

¹³⁰ T.J. Schoenbaum, 'The Decision in the *Shrimp-Turtle Case*', 9 *Yearbook of International Environmental Law* (1999), 36, at 37.

¹³¹ *US-Shrimp*, n. 89 above, at paragraph 141.

¹³² Regulation 995/2010/EU, n. 18 above, at recital 3.

¹³³ *US-Shrimp*, n. 89 above, at paragraph 133.

restrict: their citizens consume it, they have an interest in stable rule of law which illegal logging undermines and they are affected by the biodiversity loss and emissions associated with deforestation.¹³⁴ But this argument depends on a broad reading of the *Shrimp-Turtle* decision; whereas the migrations of sea turtles place them geographically under American jurisdiction when they are accidentally caught, trees grow and are harvested wholly beyond the jurisdiction of the importing country. The Appellate Body may have been using the term 'nexus' to signify physical proximity rather than a relationship based on impacts. This interpretation would conform to the 'traditional' territoriality basis of jurisdiction in public international law,¹³⁵ which limits countries to regulating persons and goods within their territory.¹³⁶

The 'effects doctrine' is a somewhat more controversial jurisdictional basis,¹³⁷ which provides that a country may regulate conduct outside its territory that causes impacts within its own territory.¹³⁸ Were the Appellate Body to find a nexus between the timber and importing countries, it would have to rely on something akin to the effects doctrine. As a WTO institution, the Appellate Body is not bound, or even authorized, to apply public international law,¹³⁹ so it would be limited to drawing inspiration from public international law principles. But if it were to construct a jurisdictional rule similar to the effects doctrine, it would presumably construct similar limiting principles as well. It would certainly have to set *some* lower bound for establishing jurisdiction because if it did not, countries could theoretically restrict trade in any good whose production generates greenhouse gas emissions (i.e., effectively all goods) or contributes to other global environmental problems. Under the effects doctrine, the type or degree of impact necessary to establish jurisdiction is somewhat ambiguous, but it probably has to be significant at the very least.¹⁴⁰ Under this standard, it might be difficult to

argue that the contribution of illegal logging to undermining rule of law, loss of biodiversity and exacerbating climate change is sufficiently significant, given all the other causes of these harms, to provide an adequate jurisdictional basis for countries to regulate it.

DOES THE EUTR COMPLY WITH THE CHAPEAU OF ARTICLE XX?

If either of the Article XX exceptions applies and 'saves' the EUTR, the final step in the GATT analysis is to determine whether the EU complied with the requirements of the *chapeau* of Article XX when enacting the Regulation. The *chapeau* provides that the grounds that would justify violation of the core prohibitions do not excuse trade measures which, when applied, result in 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail,' or constitute 'a disguised restriction on international trade'.¹⁴¹ The idea is to ensure that exceptions are invoked only in good faith and that the 'delicate balancing of the interests of the Member invoking an exception . . . and the rights of other Members' is maintained.¹⁴² Compared with the burden of demonstrating that one of the savings clauses provisionally applies, satisfying the *chapeau* is deemed a 'heavier task'.¹⁴³

To decipher the *chapeau's* requirements, we must examine prior decisions that analyze its text. Several cases have considered particular trade measures in light of the *chapeau*, and their analyses have elicited a number of criteria that measures must satisfy to comply with it. The Panel made clear in *EC-Asbestos* that a trade measure must be published in order to avoid being deemed a 'disguised restriction'. In that case, the Panel determined that publication in the *Official Journal of the French Republic* of a French decree banning the import of asbestos and products containing asbestos was sufficient to meet this requirement.¹⁴⁴ Presumably, publication of the EUTR in the *Official Journal of the European Union* qualifies as adequate publicity. The *EC-Asbestos* Panel went on to hold that the term 'disguised restriction' implies a protectionist intent which, although difficult perhaps to ascertain, may be 'discerned from its design, architecture and revealing structure'.¹⁴⁵ The Panel decided that the French ban was not likely to have been motivated by 'a premeditated intention to protect French industry'

¹³⁴ See Sydney Centre for International Law, n. 77 above; D. Brack, A.C. Chandra and H. Kinasih, n. 90 above, at 7.

¹³⁵ K. Hixson, 'Extraterritorial Jurisdiction under the Third Restatement of Foreign Relations Law of the United States', 12:1 *Fordham International Law Journal* (1988), 127, at 132.

¹³⁶ See, e.g., 'European Communities: Comments on the US Regulations Concerning Trade with the USSR', 21 *International Legal Materials* (1982), 891, at 893.

¹³⁷ For example, civil law countries reject jurisdiction founded on the effects doctrine except where a State has broadly construed the relevant offence. International Bar Association (IBA), *Report of the Task Force on Extraterritorial Jurisdiction* (IBA, 2009), found at: <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=Ecf39839-A217-4B3D-8106-DAB716B34F1E>>, at 27.

¹³⁸ See K. Hixson, n. 135 above, at 132.

¹³⁹ See J.P. Trachtman, 'The Domain of WTO Dispute Resolution', 40:2 *Harvard International Law Journal* (1999), 338.

¹⁴⁰ The Third Restatement of US Foreign Relations Law states that for a country to regulate conduct taking place beyond its jurisdiction, the conduct must have or be intended to have 'substantial effect within its territory'. Restatement (Third) of the Foreign Relations Law of the United States 1988, § 402(1)(c). In cartel cases, the EU requires the

conduct's economic effects within the EU to be 'direct, immediate, reasonably foreseeable and substantial'. IBA, n. 137 above, at 12.

¹⁴¹ GATT, n. 95 above, Article XX.

¹⁴² *Brazil-Retreaded Tyres AB*, n. 121 above, at paragraph 29.

¹⁴³ WTO AB 20 May 1996, *United States: Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R ('US-Reformulated Gasoline AB'), at 23.

¹⁴⁴ *EC-Asbestos Panel*, n. 111 above, at paragraph 8.234.

¹⁴⁵ *Ibid.*, at paragraph 8.236.

because it was hastily imposed in response to ‘panicked public opinion and other health scares implicating officials and members of the government’.¹⁴⁶ Unlike the hurried French asbestos ban, Europe had contemplated some form of restriction on illegal timber at least as far back as 2003, when the European Commission proposed measures to address illegal logging including ‘in the absence of multilateral progress, . . . legislation to control the imports of illegally produced timber into the EU’.¹⁴⁷ This degree of premeditation does not necessarily suggest protectionist intent, but it invites a closer analysis to determine whether any such intent may have been present.

The *Shrimp-Turtle* decision raised a number of additional bases on which a trade measure might be found to have been implemented arbitrarily. In that case, the Appellate Body held that the American shrimp ban fell under the natural resource conservation exception in GATT Article XX, but it nonetheless held that the United States applied this exception in a discriminatory fashion, in violation of the *chapeau*. It found that the United States had perpetrated three forms of discrimination: the shrimp ban effectively required shrimp-exporting countries to adopt the same shrimping regulations as the United States; the United States had failed to seriously negotiate bilateral or multilateral agreements with exporting countries before imposing the ban; and the United States had accorded different treatment to countries desiring to trade with it. All three manifestations of discrimination are potentially relevant to the EUTR and are treated in turn.

Compelling the Adoption of the Same Regulatory Requirements

The Appellate Body held that the American shrimp ban, although appearing flexible on its face, actually created a ‘rigid and unbending standard’ that amounted to a requirement that exporting countries adopt ‘essentially the same’ regulatory programme for protecting turtles as the United States.¹⁴⁸ It further declared that:

[I]t is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory.¹⁴⁹

Effectively, the United States acted in a discriminatory fashion by imposing its own substantive requirements on other countries without ‘allow[ing] for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries’.¹⁵⁰ Following this decision, the United States

revised its import regulations to require instead that exporting countries apply programmes ‘comparable in effectiveness’ to the avoided by-catch system that it imposed on its own fishermen, and the Appellate Body upheld the revised version.¹⁵¹

A report analyzing the WTO implications of the EUTR argues that the EUTR is not discriminatory in this way because it does not compel timber-exporting countries to adopt the EU’s own legal regime; on the contrary, it allows them to choose their own legality standards in much the same way that the revised shrimp ban permits shrimp exporting countries to craft their own turtle protection regulations.¹⁵² But while it is true that the EUTR does not foist *substantive* legality standards on other countries, it arguably does require other countries to apply its own *procedural* standard for verifying legality. Under the EUTR, regulators who doubt the efficacy of third-party verification schemes are likely able to demand proof of legality beyond that which these schemes afford.¹⁵³ In effect, regulators are free to assign however much weight they please to the methods by which legality verifiers conduct their verification – even to the point of rejecting their validity entirely. This amounts to authorization for regulators to impose their own procedural criteria for establishing legality. Even worse, from the perspective of timber-exporting countries hoping to rely on these verification schemes, is the fact that the EUTR does not specify these criteria so there is no way to know in advance whether a particular verification methodology will meet regulatory approval.

Labelling the imposition of procedural requirements ‘discrimination’ for purposes of the *chapeau* is an issue that has yet to be litigated. It would require a somewhat broad reading of the decision in *Shrimp-Turtle*, but one that is certainly possible. That decision concerned the substantive requirement that shrimp-exporting countries adopt the same shrimping regulations as the United States, making no explicit mention of procedural requirements. Whether the Appellate Body will in fact extend its holding concerning substantive requirements to procedural ones must await future adjudication.

¹⁵¹ WTO AB 21 November 2001, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (*US-Shrimp – Article 21.5*), at paragraph 144.

¹⁵² ClientEarth, *Legal Analysis: WTO Implications of the Illegal-Timber Regulation* (ClientEarth, 2009), found at: <<http://www.clientearth.org/reports/climate-and-forests-clientearth-briefing-wto-21-sept-09.pdf>>, at 8.

¹⁵³ The EUTR’s due diligence provisions list ‘assurance of compliance with applicable legislation’ as but one of a number of risk assessment criteria. Regulation 995/2010/EU, n. 18 above, Article 6.1(b). Regulation 607/2012/EU, n. 60 above, Article 4, revised the list of risk assessment criteria such that assurances of compliance are no longer even obligatory to consider.

¹⁴⁶ *Ibid.*

¹⁴⁷ COM(2003) 251, n. 28 above.

¹⁴⁸ *US-Shrimp*, n. 89 above, at paragraph 163 (emphasis omitted).

¹⁴⁹ *Ibid.*, at paragraph 164 (emphasis omitted).

¹⁵⁰ *Ibid.*, at paragraph 165.

Failing to Seriously Negotiate Agreements with Exporting Countries

The second reason that the Appellate Body found the American shrimp ban to have been applied discriminatorily is that the United States did not make good-faith efforts to reach agreement with all of its trade partners before imposing the unilateral trade measure. Import prohibitions, even where permitted by a savings clause, are measures of last resort.¹⁵⁴ In order to meet the criteria of the *chapeau*, countries must 'engage ... in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements ... before enforcing [an] import prohibition'.¹⁵⁵ In *Shrimp-Turtle*, the WTO initially ruled against the American ban on imports of non-complying shrimp in part because the United States 'negotiated seriously with some, but not with other [WTO] Members'.¹⁵⁶ Subsequently, the United States undertook good faith efforts to negotiate an international agreement on the protection of sea turtles. Although it nevertheless imposed a unilateral trade ban, the Appellate Body held in a second adjudication that this could no longer be characterized as unjustifiably or arbitrarily discriminatory, clarifying that the *chapeau* does not necessarily require a multilateral agreement to be concluded.¹⁵⁷

In *US-Reformulated Gasoline*, the Appellate Body considered whether the United States had acted arbitrarily in promulgating a regulation to control pollution from the combustion of gasoline. This regulation mandated that imported gasoline use the baseline provided by statute to demonstrate compliance with required standards, but permitted domestic gasoline refiners to develop their own baselines – an attempt to provide a cheaper compliance option.¹⁵⁸ The United States justified this approach by citing the difficulty of verifying and enforcing individual baselines on foreign soil, but the Appellate Body held that the United States could have entered into 'cooperative arrangements' with foreign refiners and governments that would have permitted use of individualized baselines while addressing the verification and enforcement issue.¹⁵⁹ Not doing so was arbitrary both because negotiated agreement was not attempted and because the cost to foreign refiners that would result from requiring them to use the statutory baseline was not considered the way it was for domestic refiners.¹⁶⁰

Along with the two *Shrimp-Turtle* decisions, this decision helps define the duty to negotiate and signals

the Appellate Body's willingness to rule against trade measures imposed without sufficient consultation. There remains, however, a lack of clarity concerning the requisite degree of negotiation before unilateral measures become permissible. Fearing that insufficient consultation with timber-exporting countries could expose Australia's illegal timber prohibition bill to attack under the GATT, a minority of Australia's parliament succeeded in delaying its passage to allow for further consultation.¹⁶¹

The EU's policy of negotiating VPAs with interested parties¹⁶² and the availability of the VPA mechanism as a means to escape default EUTR requirements reflect the EU's good faith efforts to avoid the use of unilateral trade restrictions if possible. Moreover, the EU consulted a number of timber-exporting countries when developing the EUTR and has participated in multilateral discussions concerning the problem of illegal logging in forums, including the UN Forum on Forests and the International Tropical Timber Organization.¹⁶³ Together, these actions should satisfy the WTO's preference for negotiated agreements.¹⁶⁴

According Differential Treatment to Countries Seeking to Trade

One of the issues under appeal in the *Retreaded Tyres* case was whether Brazil had acted discriminatorily in deviating from its blanket import ban on retreaded tyres by permitting imports of remoulded tyres solely from the other members of its regional trade agreement, Mercosur.¹⁶⁵ The Appellate Body held that even though Brazil altered the ban in response to a ruling by the Mercosur arbitral tribunal requiring such, this represented arbitrary discrimination against other tyre-exporting States.¹⁶⁶ Superficially, the EU might seem guilty of similar favouritism in that it permits selective departure from the EUTR to those countries with which it concludes a VPA. However, this bears little resemblance to the situation in *Retreaded Tyres* because any country is free to enter into a VPA whereas Brazil selected the countries from which it would permit imports.

The regulation at issue in *Shrimp-Turtle* banned shrimp from all countries except those certified by the

¹⁶¹ See D. Brack, A.C. Chandra and H. Kinasih, n. 90 above, at 2.

¹⁶² COM(2003) 251, n. 28 above, at 14.

¹⁶³ *Ibid.*, at 2.

¹⁶⁴ The availability of 'technical and other assistance and guidance to operators' (Regulation 995/2010/EU, n. 18 above, Article 13.1), may also 'strengthen the cooperative element of the [Regulation] and lower the chance of the successful WTO challenge'. See D. Brack, A.C. Chandra and H. Kinasih, n. 90 above, at 12 (suggesting that Australia's illegal logging bill could improve its odds of surviving a WTO challenge if it were to provide assistance in complying with its due diligence provisions).

¹⁶⁵ *Brazil-Retreaded Tyres* AB, n. 118 above, at paragraph 233.

¹⁶⁶ *Ibid.*, at paragraph 232.

¹⁵⁴ *US-Shrimp*, n. 89 above, at paragraph 171.

¹⁵⁵ *Ibid.*, at paragraph 166.

¹⁵⁶ *Ibid.*, at paragraph 172.

¹⁵⁷ *US-Shrimp – Article 21.5*, n. 151 above, at paragraph 124.

¹⁵⁸ *US-Reformulated Gasoline* AB, n. 143 above, at 6.

¹⁵⁹ *Ibid.*, at 25–26.

¹⁶⁰ *Ibid.*, at 28–29.

United States as being protective of sea turtles. Countries could obtain certification either by demonstrating that their fishing environment does not pose a threat to sea turtles or by adopting a regulatory programme that would achieve the requisite level of protection for sea turtles.¹⁶⁷ The Appellate Body found no fault with this certification approach, but it highlighted several flaws in its implementation. First, the United States granted certain countries (i.e., those in the Caribbean/western Atlantic region) a three-year phase-in period before the ban would become effective, while all other countries received only four months' notice, resulting in heavier compliance burdens.¹⁶⁸ Second, the United States exerted significantly greater effort to transfer turtle protection technology to some countries than to others, effectively denying the latter countries the ability to become certified '[b]ecause compliance with the requirements of certification realistically assumes successful [turtle protection] technology transfer'.¹⁶⁹ Third, the certification process did not conform to principles of due process. It was neither transparent nor predictable, lacked a formal opportunity for applicant countries to be heard or to respond to arguments made against certification, did not require the decision to grant or deny certification to be formally written or reasoned, did not require notification of applicant countries as to the decision and lacked a procedure for review of or appeal from denial.¹⁷⁰

The VPA mechanism functions as a certification scheme much like that of the American regulation. The EUTR imposes default requirements on timber importers (analogous to the ban on shrimp imports), which may be avoided if countries negotiate VPAs, whose built-in legality assurance mechanisms certify timber as being legal (analogous to obtaining certification as being protective of sea turtles). Although the certification offered by VPAs does not suffer from all of the same flaws that rendered application of the shrimp ban discriminatory, it may still be problematic. The EUTR provides no phase-in period in the first place, so import restrictions became binding on all countries simultaneously in March 2013, in equitable fashion. However, the EU does provide the functional equivalent of a technology transfer – VPAs enable countries to export timber to the EU similarly to how turtle protection technology enables countries to export shrimp to the United States. Thus, the VPA negotiation process is potentially open to attack if countries can show that the EU put in less effort to negotiate with them than with others.¹⁷¹

Malaysia, for example, began negotiations with the EU two months before Indonesia, and two years before Liberia, but it still has nothing to show for it two years after Indonesia's and Liberia's VPAs were signed.¹⁷² VPA negotiations may also be vulnerable to attack on due process grounds. No defined process governs negotiations, and the FLEGT Regulation provides only a minimal outline as to the shape that VPAs must assume and the content they must incorporate. Furthermore, there is no mechanism for appeal if the EU decides to suspend negotiations.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The TBT Agreement concerns itself with 'technical regulations', defining these as '[d]ocument[s] which lay down product characteristics or their related processes and production methods . . . with which compliance is mandatory'.¹⁷³ The Appellate Body has clarified that for documents to be considered 'technical regulations' they must: apply to an identifiable product or group of products; provide one or more characteristics of the product; and mandate compliance with the product characteristics.¹⁷⁴ Such a definition implies that the Agreement has a fairly broad scope, applying where a regulation concerns either specific product characteristics or the means by which a product is produced. Moreover, the term 'product characteristics' has been broadly interpreted to include 'not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product'.¹⁷⁵

In its *Tuna II* decision, the Appellate Body determined that a set of American regulations defining the criteria under which tuna could be marketed in the United States as 'dolphin-safe' constituted a technical regulation. The regulations established

a single and legally mandated definition of a 'dolphin-safe' tuna product and disallow[ed] the use of other labels on tuna products that do not satisfy this definition. . . . As

devoted to securing an international agreement'. *US-Shrimp – Article 21.5*, n. 151 above, at paragraph 122.

¹⁷² See European Forest Institute, 'Malaysia', found at: <http://www.euflegt.efi.int/portal/home/vpa_countries/in_asia/malaysia/>; European Forest Institute, 'Indonesia', found at: <http://www.euflegt.efi.int/portal/home/vpa_countries/in_asia/indonesia/>; European Forest Institute, 'Liberia', found at: <http://www.euflegt.efi.int/portal/home/vpa_countries/in_africa/liberia/>.

¹⁷³ Agreement on Technical Barriers to Trade (Marrakesh, 15 April 1994; in force 1 January 1995).

¹⁷⁴ WTO AB 26 September 2002, *European Communities: Trade Description of Sardines*, WT/DS231/AB/R, at paragraph 176; *EC-Asbestos* AB, n. 111 above, at paragraphs 66–70.

¹⁷⁵ *EC-Asbestos* AB, n. 111 above, at paragraph 67.

¹⁶⁷ *US-Shrimp*, n. 89 above, at paragraphs 139–140.

¹⁶⁸ *Ibid.*, at paragraphs 173–174.

¹⁶⁹ *Ibid.*, at paragraph 175.

¹⁷⁰ *Ibid.*, at paragraph 180.

¹⁷¹ However, 'negotiations need not be identical. . . . [N]egotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are

a consequence, the US measure cover[ed] the entire field of what 'dolphin-safe' means in relation to tuna products.¹⁷⁶

In this case the above three criteria were met: tuna is an identifiable product; the regulations provided characteristics of 'dolphin-safe' tuna – namely certification by the fishing boat captain and an observer that no dolphins were killed or seriously injured in the course of tuna harvesting and that specified types of nets were not intentionally used to encircle dolphins;¹⁷⁷ and the 'dolphin-safe' label could only be used upon satisfying these regulatory requirements.

Despite its broad scope, the TBT Agreement most likely does not apply to the EUTR. The major difference between the regulations at issue in *Tuna II* and the EUTR is that the latter does not specify any relevant characteristics that timber must meet to be imported to Europe. It provides no specifications as to the physical requirements of timber products that may be placed on the European market, nor does it mandate anything in connection with means of identification, presentation or appearance. The only relevant 'characteristic' that it references is legality – a characteristic that is not 'related' to a 'feature or qualit[y] intrinsic to' the timber. Whereas the regulations in *Tuna II* concerning 'dolphin-safe' tuna may be said to 'cover the entire field' because they specify the exclusive criteria for earning the dolphin-safe label, the EUTR makes a point of leaving the definition of timber legality up to producer countries. Further, the EUTR does not concern itself with 'processes and production methods'; it requires that timber have complied with the relevant laws of the country in which it was harvested but is indifferent to content of those laws, imposing no requirements that timber be processed in any particular manner.

While the EUTR itself probably does not fall under the scope of the TBT Agreement, it is possible that EU Member States could issue rules that qualify as 'technical regulations' when implementing the EUTR. A rule might require, for example, that timber entering the country be barcoded to facilitate chain of custody verification, or be marked in some other way to indicate legal origin. Such rules could be interpreted as establishing requirements concerning product characteristics or production methods.

CONCLUSION

Together, the EUTR and the VPA mechanism provide significant incentives to timber-exporting countries to

get tough on illegality in their forestry sectors. The former bans the import of illegal timber to Europe and establishes a presumption that due diligence requirements will adhere to all incoming timber shipments. The latter affords exporting countries the opportunity to negotiate tailored agreements with the EU to get around these burdensome requirements and secure favourable market access to the world's largest economy.¹⁷⁸

The ability of this regulatory framework to significantly reduce the incidence of illegal timber on the European market may depend, however, on whether one or more countries challenge the EUTR under the WTO as an illegal restriction on trade, and whether it is able to withstand the challenge. A successful challenge would not require the EU to recall the EUTR; it could maintain the EUTR and become subject to sanctioned trade retaliation.¹⁷⁹ However, this is a result that the EU seems to have sought to avoid by refraining from imposing its own substantive legality standard on imported timber to begin with.

How a challenge to the EUTR would be resolved is difficult to predict because no claim has ever been advanced concerning a regulation that restricts trade on the basis of foreign legality definitions. It is likely that the Regulation is not subject to the TBT Agreement because its exclusive concern is legality, making no demands that timber possess any particular physical or related qualities. As regards the GATT, precedent clearly indicates that environmentally motivated trade restrictions are permissible in principle, even if they violate one or more of the treaty's core prohibitions. But there is a plausible argument that the EUTR does not qualify for either of the two relevant savings clauses. The exception for trade measures that protect human, animal or plant life or health is subject to a strict necessity test that the EUTR may not satisfy. The exception for trade measures that conserve exhaustible natural resources may only apply to resources found within the regulating country's jurisdiction. Further, even if the EUTR were to fall under one of these two exceptions, the EU may have acted discriminatorily in the way that it imposed the ban on illegal timber and the due diligence requirements. The fact that the EUTR was long planned allows for the possibility that it was partially motivated by protectionist ambitions, which a dispute body would have to investigate. Moreover, the EUTR effectively imposes on other countries its own procedural requirements for verifying legality, and the EU may have a difficult time establishing that it treats similarly all countries that it certifies to export legal timber (by concluding VPAs with them) because it lacks

¹⁷⁶ WTO AB 16 May 2012, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, at paragraph 199.

¹⁷⁷ *Ibid.*, at paragraph 176.

¹⁷⁸ CIA World Factbook, 'GDP (Official Exchange Rate)', found at <<https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html>>.

¹⁷⁹ See G. Born, n. 75 above, at 853.

explicit procedures for conducting VPA negotiations and for reviewing decisions to suspend negotiations. The EU could improve the chances that the EUTR would survive WTO scrutiny by addressing these issues.

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