

## **CHAPTER 4**

### **LOCATING TIMBER TRADE IN INTERNATIONAL TRADE: A CONSPECTUS OF WTO REGIME**

#### **The Frame**

The frame of this chapter is the legal regime of international Trade. Timber trade is not confined to domestic market only; it has a strong international market. However the location of timber trade within the framework of the international trade regime is not very clear. There is need for a control and regulation of timber trade at the international level

#### **The focus**

The focus of this chapter is to provide a concise background to the main issues at stake in the interaction between the WTO system in international timber trade and sustainable development and to bring to the fore the disputed relationship between sustainable development and liberalization of international trade. It has been argued that trade

liberalization is crucial to economic and social development and environmental protection; and, conversely, that is harmful to one or all of these three pillars of sustainable development or at least , that it gives a much greater focus to economic growth at the expense of the social and environmental dimensions.

## Objective

The objectives of this chapter is to explore a number of issues which affect the international context in which action against illegal logging and the associated trade in illegally logged timber can be undertaken. Specifically, it looks at activities designed to exclude illegal products from final consumer markets, and other similar potential initiatives and their interaction with the following:

- The World Trade Organization (WTO) agreements and the WTO's current Doha Round of trade negotiations.
- Bilateral agreements on trade or agreements which influence trade: US Free Trade Agreements, and EU Economic Partnership Agreements.
- The International Tropical Timber Agreement.

The questions to be explored are to what extent does these agreements affect the potential for measures to exclude illegal products and to what extent do they provide an opportunity for existing or new measures to exclude illegal products

Finally, the chapter examines the questions which arise from provisions of WTO itself including, ultimately, to a multilateral arrangement and barriers of trade.

The general agreement on tariff and trade (GATT) was concluded as early as in 1947. In 1994 it was re negotiated and World Trade Organization (WTO) was created. There was no explicit provision in GATT in 1947 that directly addressed environmental protection or timber trade. Article 20 of GATT may be interpreted as dealing with environment directly<sup>387</sup>. GATT'S competence limited to trade policies and those trade related aspects of environmental policies that may result in significant trade effects for contracting parties. It

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<sup>387</sup> Article 20, GATT reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where same condition prevail, or a disguised restriction on International Trade, nothing in the agreement shall be construed to prevent the adoption or enforcement by any party of measures.....(b) necessary to protect , human, animal or plant life or health.....(g) Relating to conservation of exhaustible natural resources, if such measures are made effective in connection with restrictions on domestic production or consumption.

does not concern itself with reviving national environmental policies or policies relating to trade in environmental (forest) produce. It also does not set any environmental standards or priorities at global level. Therefore it is difficult to consider GATT at domestic context or in relation to trade in a particular product. Therefore in case of timber depletion of forest, endangered species etc are of no concern to GATT. Concern for environment has become acute almost from the decade of the eighties and is at present both a global and national priority. So there is a rationale in applying the “Technical Barrier to Trade”. Signatories of the Tokyo Round Agreements on “Technical Barrier to Trade” are required to notify the other party through GATT Secretariat of products to be covered by their proposed technical regulations, To the best of the knowledge of the present researcher no such notification regarding timber trade has been made.

The Uruguay Round<sup>388</sup> was launched before environmental concerns became so prominent but there is an expectation among the stake holders that GATT will make some contribution towards trade in Environmental (Forest) Produce.

The Preamble of WTO<sup>389</sup> stipulates that resources are to be used according to the objective of sustainable development seeking both to protect and preserve the environment.

Relation between trade and environment are covered under different branches of international law viz. International Environmental Law and International Trade Law. There are a series of multilateral agreements under International Environmental Law which is already discussed in Chapter 2 of this thesis. WTO and GATT both come within the purview of International Trade and Law.

The final Act of GATT 1994 includes the following provision of health safety and environment:

- **Technical Barrier to Trade:** Standard technical regulation and conformity assessment procedures such as testing, inspection and certification may not be used by the government to discriminate or otherwise create obstacle for trade. It advances procedure where testing by one country may be accepted by another country.

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<sup>388</sup> September 1986 to December 1993.

<sup>389</sup> Preamble.WTO: “Recognizing that relation in the field of trade and economic endeavor should be conducted with a view of raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand and expanding the production of trade in goods and services while allowing for the optional use of the worlds resources in accordance with the objective of sustainable development seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”

- **Sanitary and Phytosanitary Measures:** Regulation measures aimed to protect human, animal or plant life or health from risk of plant and animal borne pests and data must be based on scientific principles and should not be maintained without sufficient scientific evidence.

Despite the above it allows members to provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information where there is insufficient scientific evidence. Under the trade provisions there are effects of new forms of packing, labeling requirements and transparency of trade related environmental measures.

Member Governments have notified GATT of some 300 environmental regulations and standards which include domestic scale, restrictions on trade in hazardous products, environmental packing, marketing, labeling requirements and waste disposal regulation and requirement.

The final Act of GATT 1994 contained a decision on trade in service and the environment in Article XIV, Paragraph (b)<sup>390</sup>.

**COMMITTEE ON TRADE AND ENVIRONMENT (CTE):** This was set up in 1995 after the Uruguay Round. It has two fold mandates.

- a. Identity relationship between trade measures and environment measures.
- b. Make recommendation whether any modification to WTO provision is required with respect to goods, services and intellectual property rules.

**MINISTERIAL CONFERENCE OF WTO, SINGAPORE 1996:** It observed that the CTE has made an important contribution towards fulfilling its work programme and it will continue to examine, inter alia, the scope of the complementarities between liberalization, economic development and environmental protection.

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<sup>390</sup> "Nothing that since measures necessary to protect the environment typically have as their objective the protection of human, animal or plant life or health, it is not clear that there is need to provide for more than is contained in paragraph (b) of Article XIV decides as follows:

In order to determine whether any modification of Article XIV of the Agreement is required to take account of such measures, to request the committee on Trade and Environment to examine and report with recommendations, if any, on the relationship between services, trade and the environment including the issue of sustainable development, the committee shall also examine the relevance of inter-Governmental agreements on the environment and their relationship to the Agreement. The committee shall report the results of its work to the first biennial meeting of the Ministerial Conference after the entry into force of the Agreement establishing the WTO".

Full implementation of WTO will help to achieve sustainable development. The CTE will continue to coordinate at the national level as well.

**MINISTERIAL CONFERENCE OF WTO, GENEVA, 1998:** It included indirectly the issue of link between trade and environment in its declaration in the form of other issue.

**MINISTERIAL CONFERENCE OF WTO, SEATTLE, 1999:** It is differed from the issue of trade and environment.

**MINISTERIAL CONFERENCE OF WTO, DOHA, 2001:** The conference declared that “with a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudicing their outcome of:

- (i) The relationship between existing WTO Rules and specific Trade obligations set in Multilateral Environmental Agreements (MEAs).
- (ii) Procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, the criteria for granting of observer status.
- (iii) The reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We instruct the committee on Trade and Environment to give particular attention to:

- (i) The effect of environmental measures on market access;
- (ii) The relevant provisions of the Agreement on TRIPs; and
- (iii) The labeling requirements for environmental purposes.

The committee shall report to the 5<sup>th</sup> session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations” (paragraph 31)

The 5<sup>th</sup> Ministerial Conference was held at Cancun of Mexico in 2003. The declaration states about ‘environment negotiations’ thus:

“They take note of the progress made by special session of the Committee on Trade and Environment in developing a common understanding of the concepts contained in its mandate in paragraph 31 of the Doha Ministerial Declaration”

The 6<sup>th</sup> Ministerial Conference of WTO was held at Hong Kong in 2005. The declaration states on ‘environment negotiation’ thus:

“They reaffirm the mandate in paragraph 31 of the Doha Ministerial Declaration aimed at enhancing the mutual supportiveness of the trade and environment and welcome the significant work undertaken by the Committee on Trade and Environment (CTE) in special session. They instruct members to intensify the negotiations without prejudging their outcome, on all parts of paragraph 31 to fulfill the mandate”

The developing countries fear that their concern for the environment and working conditions in the developing countries are really a subterfuge for protectionism. So, the developing countries opposed the proposal of the link between trade and environment in WTO.

International trade in forest products and services is an important contributor to deforestation and forest degradation, especially in developing countries<sup>391</sup>. The World Trade Organization (WTO, 1997)<sup>392</sup> has concluded that international trade has little to do with unsustainable forestry and deforestation, and WTO’s Committee on Trade and Environment expressed the view that trade and sustainable forest management are mutually supportive when cross-sectoral collaboration and coherent policies are in place<sup>393</sup>. Nonetheless, with international trade in all categories of forest products measured in round-wood equivalents having increased by more than 400% over the past 10 years, concerns over continued forest degradation and loss of forest cover are increasing the pressure on governments, the private sector and international institutions to address the impact of trade on sustainable forest management<sup>394</sup>.

With issues of sustainable forest management driving the current policy agenda, the economic value of world trade of wood products is at stake. This value in the main categories of round-wood, sawn-wood, pulp and paper, was estimated at approximately 150 billion US dollar in 2003 with paper continuing for nearly half. Trade in secondary processed wood products added approximately 40 billion US dollar to the total. The trade in all products

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<sup>391</sup> . Dudley, N & Nectoux, F. 1995. The Timber Trade: a study for the expert panel on trade and sustainable development. Bristol UK, Equilibrium.

<sup>392</sup> . World Trade Organization (WTO), Committee on Trade and Environment. 1997. Environmental benefits of removing trade restrictions and distortions. Note by the Secretariat. WT/CTE/W/67. Geneva, Switzerland.

<sup>393</sup> .WTO Committee on Trade and Environment. 2003. Report to the fifth session of the WTO Ministerial Conference in Cancun. Paragraphs 32 and 33 of the Doha Ministerial Declaration. WT/CTE/8. Geneva, Switzerland. Available at: [docsonline.wto.org/ddfdocuments/t/wt/cte/8.doc](http://docsonline.wto.org/ddfdocuments/t/wt/cte/8.doc).

<sup>394</sup> . Rytönen, A. 2003. Market access of forest goods and services. Background paper of global project: Impact Assessment of Forest Products Trade in Promotion of Sustainable Forest Management, GCP/INT/775/JPN. Rome, FAO. Available at: [www.fao.org/forestry/foris/data/trade/pdf/rytkonen.pdf](http://www.fao.org/forestry/foris/data/trade/pdf/rytkonen.pdf).

categories of tropical timber accounted for only 16 billion US dollar in 2002. While most of the international trade in forest products takes place between developed countries and rapidly emerging markets such as China and India, exports from developing countries offer much needed opportunities for income. However, forest production for international markets is limited to a relatively small number of developing countries, either those with an important resource base or those with rapidly expanding plantations<sup>395</sup>.

## CONSPECTUS OF WTO REGIME

The General Agreement on Tariffs and Trade (GATT) came into existence, alongside the World Bank and International Monetary Fund, as a result of the discussions on the post-war international economic architecture held at Bretton Woods in 1944. Its aim was to remove barriers to trade between participating countries, and to end discrimination in trade, both between domestic and foreign products and between products originating in different countries. Its scope and effect were steadily enlarged through a series of rounds of negotiations, of which the Uruguay Round, completed in 1994, was the eighth<sup>396</sup>.

More ambitious and long-drawn-out than its predecessors, it led to the creation of a permanent rule based body, the World Trade Organisation (WTO), which came into being in 1995. The WTO oversees the implementation of the GATT and the range of additional agreements which came into place alongside it, together with a quasi-judicial system of dispute resolution which requires consensus among WTO members to overturn any decision – taken together, a much more powerful and far-reaching system of trade rules than had previously existed. To date the WTO has been less successful, however, than the GATT in extending its reach further. This is not particularly surprising. Because of the achievements of successive trade rounds in reducing tariffs, particularly on manufactured products, the attention of trade negotiators increasingly turned to other factors affecting trade in goods – for example, product standards imposed for reasons of health and safety, or environmental quality – which are much more difficult to harmonize, or approximate, between countries. In

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<sup>395</sup> . C. Mersmann Links between Trade and Sustainable Forest Management: An overview, <http://www.fao.org/docrep/008/y5918e/y5918e02.htm>.

<sup>396</sup> . Duncan Brack, Action against illegal logging: interaction with international trade agreements, [www.chathamhouse.org.uk/eedp](http://www.chathamhouse.org.uk/eedp).

addition, the growth in WTO membership (which now stands at 150, compared to twenty-three original signatories of the GATT) vastly complicates the negotiations<sup>397</sup>.

The first WTO round finally got off the ground in 2001, after an abortive attempt at Seattle in 1999. Dubbed the 'Doha Development Round' (with the Doha Development Agenda, (DDA)) the negotiations were supposed to focus in particular on the needs of developing countries. Four new issues which are investment, competition, government procurement and trade facilitation were included, mainly at the request of developed countries, but for developing countries more important was the implementation of Uruguay Round commitments, mainly on market access. However, it became clear at the fifth WTO ministerial, in Cancun in 2003, that developing countries were still not convinced that an acceptable balance was being struck, and the conference ended in failure. Many of the more ambitious components of the DDA, including investment, competition and government procurement, were dropped or sidelined; the main remaining issue, and the most difficult, was agriculture, the 'last major frontier for trade liberalization', as one observer put it. In contrast to manufactured products, trade distortions in agriculture, including export subsidies, domestic support and limitations on market access, remain extensive. Although agricultural and related activities are not of great economic significance to most developed countries (their priorities lie in further liberalisation of services and non-agricultural goods), farmers' organisations and pressure groups still retain considerable political power.

The difficulties over agriculture contributed to the limited outcome of the Hong Kong ministerial, in December 2005. Members were able to agree on the phasing out of agricultural export subsidies by 2013, but only if subsequent agreement was reached on numbers and formulas for cutting tariffs and subsidies for both agricultural and non-agricultural products. Successive deadlines for this agreement, in April and June 2006, were missed, and in late July the Doha Round talks were suspended indefinitely, as the key trading nations failed to reach any agreement on the crucial issues: US agreement to deeper cuts in domestic farm support, EU willingness to accept increased agricultural market access, and commitment by developing countries to lower industrial tariffs<sup>398</sup>.

Although past trade rounds have often looked deadlocked until the very final stages, and although the Uruguay Round itself at several points looked close to failure, few observers are optimistic about the future of the Doha Round. According to Indian trade minister Kamal

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<sup>397</sup> Ibid.

<sup>398</sup> Ibid

Nath, the round, although not dead, was ‘between intensive care and the crematorium’<sup>399</sup>. Maintaining the medical analogy, in December 2006, the chair of the Agriculture Committee, Crawford Falconer, claimed that the negotiations – being carried out through informal talks – seemed to be showing ‘signs of life’, although it was possible that these amounted to little more than a minor ‘twitch’<sup>400</sup>. His reasons for suggesting this, though, seemed to amount to little more than the observation that participants had engaged less in ‘empty posturing’; no one argued that anyone had actually changed their position<sup>401</sup>.

In summer 2007 the US administration’s trade promotion (or ‘fast-track’) authority, which enables it to put any WTO agreement through Congress as a single item, expires, and the prospects for renewal now seem very slim. This represents yet another obstacle to the completion of the Doha Round. One area of discussion that has made some progress is over the need for ‘aid for trade’, based on the recognition that financial assistance is needed for most developing countries to enable them to take advantage of the potential benefits from liberalised trade. A WTO Task Force report in July 2006 was endorsed by the WTO Council in October; it set out policies for the WTO, donors, and recipients to follow in terms of identifying and fulfilling trade-related needs, and monitoring the progress of aid for trade activities. Since the WTO itself does not possess the resources to deliver this aid, it is of course reliant on donors to incorporate the proposals in their development cooperation programmes<sup>402</sup>.

### **International Timber Trade**

The liberalization of trade in forest products is not a separate item on the WTO’s Doha agenda, but is included under the negotiations on non-agricultural market access – which, along with all the other elements of the Doha Round, are currently suspended. Nevertheless, since the Round may ultimately be revived, and since trade in forest products may be liberalized in any case under bilateral agreements, it is worth examining the likely impact of reductions in trade barriers.

## **CHANGING ORIGIN OF FOREST PRODUCTION**

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<sup>399</sup> . ‘Doha Round suspended indefinitely after G-6 talks collapse’ BRIDGES Weekly Trade News Digest Vol. 10, Number 27, 26, July 2006 as cited in Duncan Brack, Action against illegal logging: interaction with international trade agreements, [www.chathamhouse.org.uk/eedp](http://www.chathamhouse.org.uk/eedp).

<sup>400</sup> . ‘Doha Round “patent” shows “signs of life,” Ag chair says’, BRIDGES Weekly Trade News Digest Vol. 10, Number 42, 14, December 2006 as cited in Duncan Brack, Action against illegal logging: interaction with international trade agreements, [www.chathamhouse.org.uk/eedp](http://www.chathamhouse.org.uk/eedp).

<sup>401</sup> .Duncan Brack, Action against illegal logging: interaction with international trade agreements, [www.chathamhouse.org.uk/eedp](http://www.chathamhouse.org.uk/eedp)

<sup>402</sup> Ibid

Forest plantations of high –yielding varieties are providing an increasing share of the supply of industrial round wood. In 2000, planted forests were estimated to supply about 35% of the global industrial round wood, with a further increase to 44% expected by 2002<sup>403</sup>. Much of the wood which is not sourced from the plantations is from semi-natural forests, with the share from round wood from natural forests in international trade becoming increasingly small. Even though in global production the share of tropical round wood has grown from 9 to 8% since 1961. The annual increase of tropical hardwood in the world market has been only slight over the past 10 years<sup>404</sup> and the increase to a certain extent due to maturation of plantations.

## **NON-TARIFFS BARRIERS OF TIMBER TRADE**

Imports tariffs are generally low for logs and do not limit their trade. Tariffs escalations, where higher tariffs are applied to the import of value added products, are higher in developing countries, particularly in Asia, and are used to support domestic industrialisation rather than sustainable forest management. Exports tariff on logs including direct charges such as, export taxes or export levies have been widely used by timber exporting countries to raise revenue and support domestic wood processing industries particularly in Asia where they generally range from 10 to 20% and can be even higher<sup>405</sup>. However policies generally shifting away from export tariffs towards investment incentives supported by export restrictions.

Government export restrictions are among the more frequently applied non-tariff measures in most developing and some developed producer countries. These restrictions include total export bans, export quotas and selective bans based on species; limits on harvest levels which limit the amount available for export and administrative controls such as, permits and licences<sup>406</sup>. While most of the international trade in forest products take place between develop countries and rapidly emerging markets such as China and India, export from developing countries offer much needed opportunities for income. However, forest

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<sup>403</sup>. J. Carle, Vuorinen, P. & del Lunge, A. 2002. Status and trends in global forest plantation development. *Forest Products Journal*, 52(7/8): 12-23.

<sup>404</sup>. FAO, 2004. FAOSTAT forestry data. Available at: [faostat.external.fao.org/faostat/collections?subset=forestry](http://faostat.external.fao.org/faostat/collections?subset=forestry)

<sup>405</sup> Trade and Sustainable Forest Management-Impacts and Interaction, Analytical study of the global project, GCP/INT/775/JPN: Impact Assessment of Forest Products Trade in the Promotion of Sustainable Forest Management, Rome, [www.fao.org/forestry/site/trade](http://www.fao.org/forestry/site/trade).

<sup>406</sup>. A. Rytkonen, Market Access of Forest Goods and Services, Background Paper for Global Project: Impact Assessment of Forest Products Trade in Promotion of Sustainable Forest Management, GCP/INT/775/JPN: Rome, FAO, [www.fao.org/forestry/foris/data/trade/pdf/rytkonen.pdf](http://www.fao.org/forestry/foris/data/trade/pdf/rytkonen.pdf).

production for international market is limited to a relatively small number of developing countries, either those with a important resource base like Indonesia or those with rapidly expanding timber plantations<sup>407</sup>.

Although often criticized, such non-tariff restrictions can contribute to industrial development and prevent the destruction of forest albeit at a substantial cost. They may also contribute to forest destructions by keeping domestic prices artificially low and encouraging wasteful use of timber. As long as they are adapted to local situations and used in combination with other policy instruments aimed at rural or industrial development<sup>408</sup>.

It is difficult to be precise about the impact of trade liberalization. Since the average tariff for forest products is already quite low about 5 per cent in aggregate, and lower in the major trading nations further reductions are only likely to have a marginal effect. Non-tariff measures are common, and vary substantially between countries, complicating the analysis significantly. Nevertheless, the analysis of the forest products sector carried out for the European Commission as part of its series of sustainability impact assessments of the WTO negotiations<sup>409</sup> included the following conclusions:

- Global round wood production would increase a little, by about 0.5 per cent compared to baseline, though trade would increase by more (about 2 per cent).
- Trade in value-added products would increase in importance, and trade in industrial round wood would decline; in countries where log export bans are currently in place, however, their removal would counter this effect, and trade in logs could increase.
- South–South trade would increase proportionally more, as developing countries tend to apply larger tariffs than do developed countries; since many developing-country exports to the EU already enjoy tariff reductions, the impact on their exports to the EU would be limited.
- Those developing countries with the highest concentrations of good-quality forest resources, good transport infrastructure, adequate technological and human resource capacity, ready access to capital and political stability will see their exports expand the most.

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<sup>407</sup> . C. Mersmann Links between Trade and Sustainable Forest Management: An overview, <http://www.fao.org/docrep/008/y5918e/y5918e02.htm>.

<sup>408</sup> .B. M. Hoekman and M.M. Kostecki, The political Economy of the World Trading System: The WTO and Beyond, Oxford University Press (2001).

<sup>409</sup> . Savcor Indufor Oy in association with institution for Development Policy and management, University of Manchester. Sustainability, Impact Assessment of Proposed WTO Negotiations: Final Report for the Forest Sector Study, 19 June 2005; available at [http://trade-info.cec.eu.int/doclib/docs/2005/october/tradoc\\_125566.pdf](http://trade-info.cec.eu.int/doclib/docs/2005/october/tradoc_125566.pdf)

- The removal of log export restrictions would gradually improve the production efficiency of processing industries, particularly sawmills and ply mills, following increased competition for raw material.
- The environmental impact would almost certainly be negative, at least in developing countries, adding to pressures on the remaining natural forests. This would particularly be the case where forest governance is weak, and especially in countries containing unique biodiversity resources (as is generally true of trade, however, trade liberalisation would be a magnifier rather than a cause of these negative impacts).
- The likely rise in some forest product prices, particularly of finished products, would improve incentives for sustainable forest management, though it could also accelerate the current trend towards conversion of natural forest into higher-yield plantations.
- Increased pressure on forests would also cause negative social impacts in many developing countries, including continued erosion of indigenous people's rights, and an inequitable distribution of the economic benefits, with large companies benefiting much more than small and medium-sized enterprises or local communities.

Liberalization in trade in agricultural products, under the agriculture component of the Doha Agenda, could also increase pressure on forests by encouraging increased conversion of forest areas to agricultural land. The main beneficiaries of agricultural liberalization seem likely to be the middle income developing countries with large, but not particularly intensive agricultural sectors, such as Brazil; in these countries in particular, forest conversion would accelerate.

Restrictions of imports of illegally harvested and traded timber is currently under discussion as a new approach for supporting sustainable management through trade<sup>410</sup>. Although consumer countries have so far refrained from developing specific laws in this regard, few countries like China, Japan, Norway, United States and the European Union have begun to negotiate and finalize bilateral agreements with individual timber producer countries. These activities carried out under Forest Law Enforcement and Governance (FLEG) initiatives in Asia and Africa are often coupled with increased bilateral cooperation supported by Overseas Development Assistance (ODA), the private sector and the non-governmental Organisations (NGOs). This approach to increase compliance with national and international laws has an interface of trade, social standards, and environmental standards in forest production<sup>411</sup>.

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<sup>410</sup> . C. Mersmann Links between Trade and Sustainable Forest Management: An overview, <http://www.fao.org/docrep/008/y5918e/y5918e02.htm>

<sup>411</sup> Ibid.

Governments seeking to exclude imports of illegal timber goods have to face two problems:

- Goods produced illegally in one country are not necessarily illegal in another country just because the trees are cut illegally in protected area. In Indonesia placing the illegally cut timber on the market in a foreign country is not illegal. The act of felling is illegal in Indonesia but transaction in a foreign market is legal. Countries like United States<sup>412</sup>, the European Union<sup>413</sup> and Australia<sup>414</sup> have passed legislation to prohibit the placing of illegal timber on their markets notwithstanding where it originates.
- The government seeking to exclude illegal timber find it difficult to distinguish legal timber from illegal timber. The prohibition is not a trade measure applied at the border and companies handling the timber products are not required for providing proof of legality at the point of import or sale. The exporting and importing companies may not be aware that they are handling illegal products. Even when they are aware that the product is illegal, it is not difficult to falsify the documentation<sup>415</sup>.

GATT Article III requires imported and domestic “like products” to be treated identically with respect to internal taxes and regulations which could protect the goods produced from illegally felled timber.

It is in the attempts to establish requirements of evidence of legal origin and processing of timber products imported or placed in the market the possibility of interaction with the WTO trade rules lie. There are four cases under which a requirement for proof of legality for imports could, at least in theory, raise potential issues.

First, the system is designed to discriminate between legal and illegal timber and these could potentially be considered to be “like products”. If this is done, it is a violation of Article I of GATT. The GATT does not define “like product” and in recent years there are much debate on this topic, in particular over whether the ways in such products are manufactured or harvested can be used as a basis for discrimination in trade ( between sustainable and unsustainable timber). Legality is a universal requirement. Any product that is put on sale in a market must be a legal product. There is however no clarity as to how a WTO dispute would handle the issue of legality of product. More important is the issue of trade restriction primarily derived from the requirements placed on all timber imports to show a proof of

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<sup>412</sup> The Lacey Act.

<sup>413</sup> Timber Regulation

<sup>414</sup> Illegal Logging Prohibition Act.

<sup>415</sup> Duncan Brack, Combating Illegal Logging: Interaction with WTO Rules, [www.Chathamhouse.org](http://www.Chathamhouse.org).

legality which is very difficult especially at the border where the product passes on to the final market destination. The difficulties are as follows:

1. If the requirement for proof of legality is imposed on countries with high level of illegal logging and not on others, some WTO members would be treated differently from the others. This is violation of GATT Article I (most favoured nation treatment)<sup>416</sup>.
2. If imports are treated differently from domestic timber products, this would be violation of GATT Article no. III (national treatment)<sup>417</sup>.
3. Since the requirement of trade restriction imposed on the border other than a duty, tax, or other charge, it would be violation of GATT Article XI (elimination of quantitative restrictions)<sup>418</sup>.

If the legality requirement is found to conflict with any of the GATT Articles described above it could be “saved” under GATT Article-XX under which exceptions can be made to other provisions of the agreement and thus be in compliance with WTO rules. Article XX of GATT does not relate to illegal logging directly but Article XX (b) provides that measures are allowable if “necessary to protect human, animal, or plant life or health”. Illegal logging is clearly detrimental to the life and health of the plant. In order to protect the life and health of the plant it is necessary that less trade distorting options are made available. However imposing such increased restriction on the other hand could result in unnecessary disruption of trade raising timber prices, reducing demand for timber and encouraging consumption of timber substitutes and alternative non-trade disrupting option such as improving the enforcement of law in the country of origin of the timber and timber product could be much more preferable<sup>419</sup>. The cost of proving legality varies from country to country and may not very significant. Other measures are adoption of national and international verification schemes particularly in high risk areas makes the question of legality verification much easier. Moreover, the products can now be certified under the Voluntary Certification Scheme (VCS) of the Forest Stewardship Council (FSC) and Programme for the Endorsement of Forest Certification (PEFC) bare the cost of proving legality which does not increase the cost of the timber. Many of the timber producing countries insist that they have improved the enforcement of law within their country and deny that revenue from foreign market is earned

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<sup>416</sup>. Ibid.

<sup>417</sup>. Ibid.

<sup>418</sup>. Ibid.

<sup>419</sup>. Ibid.

from selling of illegal logs. Nevertheless, the necessity test is a crucial but difficult one to satisfy<sup>420</sup>.

GATT Article XX (d) covers “measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this agreement, including those relating to custom enforcement and the prevention of deceptive practices”. This Article is specifically pointed toward prevention of imports of counterfeit goods. Under this Article one could require that the harvesting process and its source be compatible with the requirements under GATT and illegal timber should not be passed off as legal timber. Under this provision the laws of the exporting country is to be stringently enforced and not that of the importing country<sup>421</sup>.

GATT Article XX (g) provides that measures are allowable if they are “relating to conservation of exhaustible natural resources and is specifically applicable to the issue of illegal logging. This Article probably offers the strongest defense against illegal logging<sup>422</sup>”.

## **TECHNICAL BARRIER TO TRADE**

The WTO Technical Barrier to Trade Agreement (TBT) is designed to ensure that technical regulation and standards which apply to trade may not be distorted. Requirement for proof of legality of timber is a technical requirement. This provision aims at transparency, predictability and encourages the use of international standards. The Forest Certification System (FCS) and Programme for the Endorsement of Forest Certification (PEFC) are international in scope but are not in the same category of the bodies accepted by the WTO system as international standard setters such as ISO for technical standards or Codex Alimentarius for food standards. Similarly standards may be set by various international processes for sustainable forest management. Voluntary Certification Systems (VCS) for timber is relatively wide spread and there is no strong reason for governments to develop their own national or international standards for their own products. Like GATT Article XX the TBT agreement also contains a saving clause in Article 2.2 which recognizes the right to take necessary measures to fulfill a legitimate objective such as prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment. The difficulties that are discussed above in relation to GATT are also relevant

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<sup>420</sup> .Ibid

<sup>421</sup> .Ibid

<sup>422</sup> Ibid.

to TBT agreement and can have the same arguments. Experience of timber trade restriction due to technical barriers of trade has not yet been encountered. Therefore development in this segment is much awaited<sup>423</sup>.

It is still too early to access the practical outcome of the application of the above provisions more documentary evidence and disputes studies are required to ascertain how the WTO rules can control and monitor international trade in timber<sup>424</sup>.

## **TRADE MEASURES IN MULTILATERAL ENVIRONMENTAL AGREEMENTS AND WTO**

The WTO approach recognizes the importance and the strength of a multilateral trading system. However there is a conflict between WTO, Multilateral Environment Agreements (MEA) and Trade Related Environmental Measure (TREM) on jurisdictional issues relating to dispute settlement regarding illegal international trade in environmental products including timber. There is also a need to reconcile the provisions of these instruments with GATT Article XX. The first option provides for GATT Article XX in order to enable measures taken in accordance with Multilateral Environment Agreements to be compatible with WTO<sup>425</sup>. A second option requires WTO Ministerial Conference to give an official interpretation of GATT Article XX<sup>426</sup>. A third option provides for waivers of specific Multilateral Environment Agreements<sup>427</sup> renewable every year. A fourth option is the reversal of burden of proof in GATT Article XX. Currently the party that applies the Trade Related Environmental Measure (TREM) must prove its legitimacy and necessity and the burden would fall on the party affected by the measure. Therefore any conflict between TREMs and the MEAs and the WTO has to be resolved amicably. One of the way to resolve conflict between the three is to explore solution outside their preview. Another way to solve the conflict is the non-compliance procedures and dispute settlement systems of the MEAs must be made stronger and decided in exclusive environmental fora. A last way to solve the conflict is to constitute a Global Environmental Organization (GEO) on the lines of WTO. Since the conflict between TREMs, MEAs and the WTO is that of Jurisdiction, a cooperative

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<sup>423</sup> . Ibid.

<sup>424</sup> .Ibid.

<sup>425</sup> T. J. Schoenbaum, "International Trade and Protection of the Environment: The continuing search for reconciliation", 91.2AJIL (1997) P. 283-312.

<sup>426</sup> . Article IX.2, Marrakech Agreement Establishing the WTO.

<sup>427</sup> Ibid.

approach would be the best approach. It is also submitted that Article 30 of Vienna Convention on the Law of Treaties which rules how to deal with competing treaties can also be made use of for settling the disputes between these organizations.

## **THE DOHA ROUND**

Only two years after the completion of the Uruguay Round in 1994, pressure began to build for a further round of trade talks. Four new issues investment, competition, government procurement and trade facilitation were proposed for negotiations, mainly by developed countries, at the first WTO ministerial conference at Singapore in 1996. From one perspective this reflected a logical process of establishing multilateral rules to govern policies which affected cross-border economic activity. For developing countries, however, more important was the implementation of Uruguay Round commitments, mainly on market access. It was these developing country concerns, much more than the well-publicized NGO and trade union demonstrations that torpedoed the third WTO ministerial, at Seattle in 1999, and prevented the launching of a 'Millennium Round' of negotiations<sup>428</sup>.

The new round finally got off the ground at Doha in 2001. The four 'Singapore issues' were included in the agenda, along with further liberalization of agriculture and services (envisaged in the Uruguay Round agreement), implementation issues from the Uruguay Round, and a new trade and environment agenda. Dubbed the 'Doha Development Round' (with the Doha Development Agenda, DDA) the negotiations were supposed to focus in particular on the needs of developing countries<sup>429</sup>.

However, it became clear at the fifth WTO ministerial, at Cancun in 2003, that developing countries were still not convinced, and this conference too ended in failure. Cancun was notable for the emergence of more organized developing-country negotiating blocs, in particular the G20, a group of middle-income developing countries with significant agricultural exports. Other groups which came into being at Cancun or subsequently include the G33, led by Indonesia and focusing on proposals for special and differential treatment and special products, and the G90, the least developed countries together with other developing countries from Africa, the Caribbean and the Pacific. The creation of these groups helped to highlight how diverse the 'developing world' is in terms of trade interests<sup>430</sup>.

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<sup>428</sup> . Duncan Brack, *The World Trade Organization and sustainable development: A guide to the debate*, Chatham House, December 2005.

<sup>429</sup> Ibid.

<sup>430</sup> . Duncan Brack, *The World Trade Organization and sustainable development: A guide to the debate*, Chatham House, December 2005.

In the wake of the failure at Cancun, many of the more ambitious components of the DDA, including investment, competition and government procurement, were dropped or sidelined. The overriding issue going into the Hong Kong ministerial, in December 2005, is agriculture, the 'last major frontier for trade liberalization', as one observer put it. In contrast to manufactured products, trade distortions in agriculture, including export subsidies, domestic support and limitations on market access, remain extensive. Although agricultural and related activities are not of great economic significance to most developed countries (their priorities lie in further liberalization of services and non-agricultural goods), farmers' organizations and pressure groups still retain considerable political power. The EU, one of the two major negotiators alongside the US, is itself internally split over reform of the Common Agricultural Policy. If significant progress is not made at Hong Kong, then WTO members will be under severe pressure to reach final agreement in 2006, before the expiry in summer 2007 of the US administration's fast-track authority, which enables it to put the agreement through Congress as a single item. The final shape of the deal, which is bound to focus on agriculture and non-agricultural market access (the main priority for developed countries) but may include a disparate range of other issues, is still far from clear<sup>431</sup>.

## **INTERNATIONAL TIMBER AGREEMENT**

The new International Tropical Timber Agreement (ITTA 2006) was agreed in January 2006 to replace the ITTA 1994; it is expected to enter into force in 2008. The new agreement is not significantly different from the old one. Its aim is 'to promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests and to promote the sustainable management of tropical timber producing forests'<sup>432</sup>. A few other references to illegal (or legal) logging and forest governance appear throughout the text, but their inclusion proved controversial during the negotiations.<sup>433</sup> The ITTO's activities on illegal logging are limited to two areas: project funding for national initiatives on analyzing illegal activities and improving forest law enforcement; and the collection, and attempts to improve the reliability of, data on trade in timber and timber products.

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<sup>431</sup> Ibid.

<sup>432</sup> . 'New tropical timber trade agreement created', Bridges Trade BioRes, Vol. 6, No. 2, 3 February 2006 as cited in. Duncan Brack, Action against illegal logging: interaction with international trade agreements, [www.chathamhouse.org.uk/eedp](http://www.chathamhouse.org.uk/eedp)

<sup>433</sup> . Lauren Flezjor, How the ITTO addresses Illegal Logging (Chatham House, July 2005)

In summations free trade in timber must not be a goal in itself and the issue of sustainable development and sustainable forest management lost sight of. Sustainable development has a link with social, economic and environmental policies and obligations to preserve the environment for future generation. WTO and its allied instruments do not address the issue of timber trade exclusively anywhere. However given the state of the world forest we seem to have reached the brink of a precipice and an urgent need to avoid the issue of international trade in timber cannot be put off any longer.

## **CHAPTER 5**

### **ILLEGAL LOGGING IN SOUTH, SOUTH EAST ASIA, AND CHINA: A SKETCH**

#### **THE FRAME**

This article focuses upon the status of timber trading in the countries in the south and South-East Asia and China. The forest cover map of Asia shows that these areas have dense forest and it is understood that timber



**Map No: 1-Map showing the concentration of Forest in ASIA**

trading activities would be concentrated in this region. Moreover there is a trading route for illegal timber that originates in Indonesia and reaches china through Myanmar or borders of Mizoram in some cases. Until 2013, Malaysia was one of the largest exporters of teak logs to India. For this reason in South Asia SAARC countries status of timber trade along with Indonesia, Malaysia and Myanmar is looked into.