THE UNIVERSITY OF SYDNEY

Sydney Centre for International Law

Committee Secretary
Senate Standing Committees on Rural and Regional Affairs and Transport
Online Submission

22 February 2012

Dear Committee,

Re: Inquiry into the Illegal Logging Prohibition Bill 2011 (the Bill).

This submission by the Sydney Centre for International Law (SCIL) addresses two issues connected with the Bill, namely its conformity with Australia's obligations under multilateral environmental instruments and with international trade law. In particular it assesses claims made by Indonesia and Canada to this inquiry that the Bill may not comply with Australia's World Trade Organization (WTO) commitments.

Multilateral environmental instruments

Illegal logging, particularly in tropical forest countries, results in adverse environmental impacts. These include the loss of biological diversity, and the removal of large stocks of forest carbon. As a party to a range of multilateral environmental agreements, and non-binding arrangements and partnerships with various states (most notably Indonesia), Australia has a strong interest in removing incentives for illegal logging.

We draw the Committee's attention to the following treaties and other instruments that are relevant in this regard:

> *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora* which requires measures to ensure that international trade in wild animals and plants (including timber) does not threaten their survival;
>
> *1992 Convention on Biological Diversity* which seeks to conserve biodiversity and to promote the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources;
>
> *2007 Non-Legally Binding Instrument on All Types of Forests* that encourages states, among other things, 'to combat and eradicate illegal practices according to national legislation, in the forest and related sectors';

Faculty of Law
Law Building F10
The University of Sydney
NSW 2006 Australia

T +61 2 9351 0354
F +61 2 9351 0200
E ben.saul@sydney.edu.au
www.law.usyd.edu.au

ABN 15 211 513 464
CRICOS 00026A

2008 Indonesia-Australia Forest Carbon Partnership under which Australia is cooperating with Indonesia in its implementation of laws and policies on Reduced Emissions from Deforestation and Degradation (REDD+); and

2008 Papua New Guinea-Australia Forest Carbon Partnership under which Australia is cooperating with Papua New Guinea in REDD+ policy development.

Australia also participates in the non-binding Montreal Process of 12 countries which encompass 60 per cent of the world's forests. That process aims to develop and implement internationally agreed criteria and indicators for the conservation and sustainable management of forests.

Australia's obligations to combat corruption are also relevant to this Bill.[1]

In principle, imposing restrictions on imports of illegally logged timber products into Australia is one among a number of legitimate measures that Australia can take to protect forests and advance the objectives of its international environmental commitments. The design of the Bill's scheme must also comply with world trade law.

International Trade Law

We note that the Bill imposes trade restrictions, raising issues as to its conformity with Australia's obligations under WTO agreements. We also note the objections made to the Bill in this regard by the governments of Indonesia and Canada in their submissions to this inquiry. (New Zealand's submission does not raise any issue of WTO compliance.)

Indonesia claims that the Bill would be impermissibly discriminatory because it would unilaterally and selectively impose trade restrictions on timber products from a limited number of target countries, including Indonesia.[2] Indonesia also calls for proper consultation between Australia and stakeholders, raising a further WTO issue.

Canada claims that the Bill may impose higher administrative costs and burdens on foreign timber products compared with Australian timber products, and thus amount to unjustified differential treatment, contrary to WTO obligations.[3]

In assessing these claims, the starting point is that the WTO regime prohibits unjustifiable discriminatory trade restrictions.

While the Bill's measures apply equally to timber imported from any country, they may in effect apply to some countries more onerously than others (i.e. to those with higher levels of illegal logging, such as Indonesia and Malaysia and Papua New Guinea).

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[1] Including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business; the UN Convention against Corruption; and the UN Convention against Transnational Organised Crime.
[2] Minister of Trade of the Republic of Indonesia, Submission to this Inquiry, 25 January 2012.
[3] High Commission of Canada, Submission to this Inquiry, 20 Dec ember 2011, p. 3.

The Bill accordingly raises the prospect that it may *prima facie* offend Article I of the *1994 General Agreement on Tariffs and Trade* (the GATT) that sets out the Most Favoured Nation Treatment requirement. The Bill may therefore operate as a discriminatory restriction on timber source countries which do not comply.

If this were the case, the question is then whether such restrictions are justified. Article I is subject to an important exemption set out in Article XX(g) of the GATT, under which it is permissible for Australia to impose trade restrictive measures that relate to the 'conservation of exhaustible natural resources'. Article XX(g) relevantly provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> … … … …
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

We note that the WTO Appellate Body interpreted Article XX of the GATT in *Shrimp–Turtle I* (1998). A number of key principles emerged from that decision which are relevant in assessing the Bill's compatibility with WTO law:

1. 'exhaustible natural resources' are not limited to finite resources such as minerals, but can including living species that are susceptible to depletion;

2. A measure may target resources outside the country seeking to regulate where there is a nexus between the resource and that country;

3. The restrictive measure adopted must be related to the objective of preserving the endangered species.

4. The measure must be enforced evenly between domestic and foreign products;

5. The country seeking to regulate should negotiate in good faith with other countries with a view to seeking multilateral agreement;

6. In a later case, the Appellate Body clarified that *unilateral* environmental measures which restrict trade may still be lawful even in the absence of binding bilateral or multilateral agreements.[4]

[4] Shrimp/Turtle II (2001), at para. 124. There is thus no need to invoke specific environmental treaties as *lex specialis* to satisfy the Article XX(g) exception.

On the facts in *Shrimp-Turtle I*, the Appellate Body confirmed that in principle a unilateral measure adopted by the United States to prevent the importation of tuna harvested using methods that involved high rates of mortality for species of sea turtle was covered by the Article XX exemption. It was also accepted that there was a nexus between sea turtles and the United States as sea turtles swim through the maritime zones of several states, including the United States, and that there is a strong global interest in protecting endangered species.[5]

However, the United States was found not to have taken the necessary steps to ensure that the measure was non-discriminatory by engaging in meaningful multilateral negotiations with other relevant shrimp producing nations, or in considering other available methods for achieving the same result.

Analysis of the Bill in light of international trade law

In our opinion, the Bill is largely compatible with Australia's obligations under WTO law, although there are a number of issues which may require further scrutiny.

First, the Bill falls squarely within Article XX(g) exception for conserving timber as an 'exhaustible natural resource'.

Second, there is a sufficient nexus between illegal logging abroad and importing such timber into Australia. While the timber prohibited from import is harvested wholly in the territory of other states, Australia has a legitimate interest in preventing illegal logging in other states so as to maintain reserves of biodiversity and carbon stocks.

Third, the measures clearly relate to the environmental object of conservation (as well as to pursuing legitimate anti-corruption objectives).

Fourth, strictly speaking, Australia is not a party to any multilateral agreement which requires it to legislate to prohibit imports of foreign illegally logged timber. Nonetheless, as note above, *unilateral* environmental measures which restrict trade may still be lawful even in the absence of binding bilateral or multilateral agreements, and Australia's measures are consistent with the objects and purposes of the various environmental law sources above.

Two remaining issues may leave Australia somewhat exposed. *Australia may need to demonstrate that it negotiated in good faith with affected countries to secure its conservation objectives before resorting to unilateral restrictive measures.* The objections of Canada and Indonesia indicate that those countries do not appear satisfied with negotiations thus far.

[5] Under the *1973 Convention on International Trade in Endangered Species*.

Careful consideration is therefore needed of the extent to which Australia has pursued genuine negotiations with affected countries with a view to reaching agreement on bilateral or multilateral measures to prevent trade in illegal logging. Such negotiations should relevantly include consideration of possible alternative non-restrictive measures (such as those suggested by Indonesia in its submission, among others).

It may be that such negotiations as have occurred were adequate but that a reasonable outcome could not be agreed, in which case the Bill may still satisfy Australia's WTO obligations. Our submission does not take a position on the facts on whether Australia's engagement of other countries has been adequate.

Finally, it was noted above that WTO law requires a restrictive measure to be enforced evenly as between domestic and foreign products. We draw attention again to Canada's objection that the Bill may favour domestic timber processing by imposing more onerous due diligence obligations in respect of foreign timber in certain circumstances (eg, composite products).

This submission does not take a view on the facts whether this is a correct characterisation of the Bill's impact. If, however, the Bill does in fact treat certain domestic and foreign timber differently without justification, it may be regarded by the WTO as unjustifiably discriminatory.

There are also practical considerations which suggest that a WTO challenge to this Bill if passed into law is unlikely. We note that the Bill seeks to determine the status of timber as legal or illegal by reference to the laws in place where the timber was harvested (section 7). It is difficult to envisage a state such as Indonesia making an argument in the WTO that Australia may not apply trade restrictions on timber harvested illegally under Indonesian law. The Bill's key effect is to require proof of compliance by timber source countries with *their own laws*, albeit by imposing additional procedures of verification.

Please be in touch if we can be of any further assistance.

Yours sincerely

Associate Professor Tim Stephens
Director, Sydney Centre for International Law

Professor Ben Saul
Professor of International Law
ARC Future Fellow