Executive summary

The object of this study is to promote an understanding of the provisions of French penal and administrative law regarding the illicit importation of wood, and to propose ways of improving the efficacity of these provisions with a view towards the implementation of the European Union's action plan on Forest Law Enforcement, Governance and Trade (FLEGT).

The international juridical instruments under examination, while not pertaining directly to forests, constitute a body of legal texts from which forests should not be excluded. Such instruments may serve as a binding legal foundation for preventive and/or coercive action undertaken at the national level against importers of illegal wood. In the absence of binding international or European norms in this domain, the provisions of French law aimed at sanctioning illicit importation of *unprotected wood* species are based on foundations other than those pertaining to the sustainable management of tropical forests — they are based, namely, on the protection of nature and *plant products* (Agriculture ministry) and on the *repression of fraud* (ministry of Industry), each of these ministries disposing of indirect and subsidiary means of combating illicit importation of such wood.

Consequently, in positive law, the notion of "illicit" importation of wood covers three main types of situations:

- The first situation concerns the illicit importation of "endangered plant species", protected by existing *international* norms.
- The second concerns the illicit importation of "live plant species" that are potentially harmful for the environment or for the health of humans or animals, as defined by essentially *national* phytosanitary norms.
- The third definition of "illicit" concerns the importation of wood "merchandise" in violation of the pertinent *European* customs regulations.

On the basis of these three possible qualifications of wood — as endangered and/or pathogenic species or as merchandise — a number of juridical frameworks may be applied, alternatively or cumulatively, to combat illicit wood imports.

In the absence of binding international or European norms defining the criteria for the "good management" of forests and the "traceability" of wood, these juridical foundations can nonetheless be moblized against unlawful wood imports and to address, albeit imperfectly, these lacunae. International norms against money laundering or corruption of civil servants may for example under certain conditions contribute to improving the means of fighting illicit wood imports.

This study thus examines the various foundations susceptible of preventing the importation of protected and unprotected wood species — by means of provisions contained in the Customs code, the Rural code, the Environment code and the Consumption code — as well as those foundations aimed at sanctioning directly or indirectly such offenses, by means of provisions contained in the Penal code.

With refernce to the failures and shortcomings analysed in this report, a number of recommendations of ways to reinforce the means of preventing and sanctioning illicit wood imports are formulated.

An understanding of existing provisions and lacunae is important as it will aid victims of illegal wood imports seeking to take legal action.

Such a case highlights in a concrete manner the interest of clarifying French legal norms liable to justify legal action.

■ The Convention on International Trade in Endangered Species (CITES), in force since 1975, constitutes one of the few texts of international law relating to the importation of protected wood species that is binding for 163 signatory countries, although it does not relate specifically to forest protection and is insufficient.

The aim of this Convention is to regulate the international trade in animal and plant species threatened with extinction, to guarantee their protection. It provides for three degrees of protection, related to the threat faced by the animal and vegetable populations covered by the text, but it does not provide for any sanction mechanism in case of violation of its provisions by member states. It is up to each signatory state to implement an appropriate system of penal measures.

Executive summary

The European Union has adopted binding norms aimed at regulating commerce in endangered species. CITES has been transposed by the Règlement du Conseil of 9 December 1996, modified several times, and covers a greater number of species than does CITES. If the restrictions on the importation of species benefiting from maximum CITES protection are more strict than those required under CITES, and if supplementary requirements are included concerning conditions of transport and storage, the provisions of the European regulation is nevertheless vulnerable to abuse by unscrupulous importers who may easily bring illicit wood into Europe with false documents. In cases of simple notification of import and/or export authorization, European Community institutions do not dispose of means capable of verifying the authenticity of a document produced in a non-EU country.

Furthermore, no authorization to circulate is required within the EU for logs or timber of appendix A species, that is, species in imminent threat of extinction.

CITES was approved by France on 11 May 1978 and came into force on 9 August 1978. The transcription into French law of the Règlement communautaire of 9 December 1996 came into effect by an arrêté of 30 June 1998.

Implementation of this text is today the responsibility of several different bureacracies, which makes enforcing it complex. Three ministries share forest management: the Environment ministry, the Agriculture ministry, and the ministry of Industry. Protection of flora and fauna, previously included in the Rural code, have been incorporated into the Environment code.

Unfortunately, the law fails to address the varying degrees of seriousness of offenses in trade in endangered species, for example by stipulating a graduated scale of sanctions. Moreover, the criteria of what constitutes an offense are insufficiently described and elaborated; particularly unfortunate is the absence of a definition of the term “protected species.”

Finally, in 2003, despite much criticism from NGOs, French lawmaker failed to adopt a range of more dissuasive sanctions, even though according to official estimates the traffic in protected species is the world’s third largest, after traffic in drugs and arms. The report presents recommendations to improve French law’s sanctions against illicit wood imports.

The rapport also calls for the adoption of a more coordinated approach among EU member states in verifying the authenticity of export permits at points of entry, and calls for all transport of protected species inside of the EU to require customs authorization by the member state in which they entered EU territory.

■ Unprotected wood species are considered as merchandise. As such their importation is subject to the customs regulations in force. However, guaranteeing the traceability of goods containing wood harvested in one country but processed in another is considerably more complex than in cases where wood-based goods are produced in the same country as the one where the wood was harvested. In the absence of norms regulating the traceability of wood-based products, it is in practice impossible to trace the origin of wood.

It is the responsibility of importers to declare the origin of merchandise they introduce into member countries regardless of the origin declared by foreign suppliers, which may differ from the EU definition. It would be beneficial to develop a single international definition of the term “country of origin.”

No binding method of preventing illicit wood import exists at the EU level. Import fraud is thus greatly facilitated by existing lacunae, all the more so that merchandise entering EU territory is able to circulate freely inside the EU. The EU Customs code and the definition of country of origin constitute a real obstacle, for even if it is possible to demonstrate that a wood product originates in illegal logging, once on EU territory it is impossible to prevent it from being integrated into the supply chain of legal commerce. It is thus essential that wood imports into Europe require documentation indicating the country in which the wood was extracted.

■ Under French law, Customs regulations allow for sanctions against importers of “wood merchandise” in the event of violations of notification requirements stipulated by French and EU

law. These offenses do not pertain to wood as such, but may nonetheless serve as means of repression in the domain.

The French customs code provides for the suspension of the presumption of innocence (it is the responsbility of the transporter of merchandise to prove that it is of legal origin). However, the regulation is ineffective when it comes to wood originating in countries suffering from generalized corruption — corruption sometimes encouraged by logging companies themselves, in certain cases to facilitate the issuing of false administrative documents.

As organic matter, wood may also in certain cases be considered as merchandise posing a hazard for the environment or for public health, and as such be subject to relevant phytosanitary regulation. The French Consumption code confers on certain services the authority to inspect and seize wood posing a risk to health or the environment. These powers remain insufficient.

Similarly, the Environment code confers inspection authority on these same agents, as well as others, inevitably resulting in conflicting authority and competence among different services, and adversely affecting the quality of the inspections undertaken.

It thus appears imperative to centralize provisions pertaining to environmental protection. Reinforcement of technical and financial capacities must accompany centralization. In the meantime it would be useful to estabish a special interministerial commission to minimize conflict and friction arising from institutional incoherence.

■ Finally, certain misdemeanors (theft, receiving, money laundering, corruption) or crimes from the new French penal code and sanctioned by numerous European and international texts, ought also to allow indirectly for the sanctioning of certain cases of illicit wood imports into France.

The criteria apt to justify a French jurisdiction are territorial when:

- the offense is committed in France, regardless of the nationality of the perpetrators and victims,
- the offenses are committed abroad by a French national (personal “active” competence)
- the offense is committed by a foreign national against a French victim (personal “passive” competence) under certain conditions.

However, application of the French penal code only makes sense where the victims of illegal logging (essentially local authorities as owner) qualify the actions of certain companies as illegal, which is practically impossible given that illegal acts are often perpetrated with the approval of local authorities.

Furthermore, the conditions required by the penal code for establishing the competence of French jurisdictions for international offenses varies depending on whether misdemeanors or crimes are involved. In the case of misdemeanors committed by a French national abroad, when the victim is not French, legal action is possible in France only if the acts are also punishable in the country where the misdemeanor was committed, and only at the request of the Public prosecutor on the filing of a complaint by the victim or foreign government. These conditions do not obtain in cases of crime.

Legal action against French accomplices of acts committed abroad is possible only when the principal non-French actor has been the object of a definitive legal decision in the foreign jurisdiction, which is nearly impossible given the absence of impartial judges in countries dominated by corruption. Together, these conditions constitute obstacles for collateral victims of illegal logging (eg farmers whose crops have been destroyed by illegal logging) to obtain reparation.

Concerning the acts of corruption that often accompany illegal logging, it is recommended that French authorities allow for the opening of legal action by victims of offenses involving corruption of foreign public authorities on the same basis that applies in cases of corruption of authorities of European member states. If the transposing into French law of the 1997 EU Convention and the additional protocol of the same year concerning corruption of civil servants of EU member states represents important progress, the transposing of the OCDE Convention concerning the corruption of foreign authorites in international transactions unfortunately involved greater restrictions.

■ It is also possible to use instruments designed to increase market share of goods produced in proven conformity with environmental standards; these include policies concerning award of public contracts.

In French law, the new public contracts code allows for the possibility of taking into account social or environmental considerations, including ecocertification, in public contracting, mainly at the beginning phases of the procedure, that is, during selection of candidates (execution conditions).

The integration of such considerations into the later stages of contract procedure as criteria for contract award (permitting greater flexibility, as the contracting authority can weigh each criterion against the others, including cost, before choosing a winner) can only be carried out with the greatest prudence.

It is in any case essential that at the European level, remaining ambiguities in public contract guidelines be dissipated.

■ In conclusion, it appears that a reform of preventive means of controlling illicit wood imports is necessary, particularly in clearly defining the notion of "country of origin" of merchandise.
Reforms are also required in terms of sanctioning such imports.

French law is utterly insufficient and ill-adapted in this domain. It is fragmentary (wood characterized cumulatively or alternatively as endangered species, prohibited merchandise, hazardous material) and the number of services responsible for its implementation constitutes an obstacle to effective enforcement.

It is also indispensable to create an offense specific to importing wood of illegal origin or wood exploited illegally, with appropriately dissuasive penalties.

Rules of relevant penal procedure must also be modified to reinforce capacity and to facilitate redress for victims of activities of French companies and their subsidiaries, when these victims have attempted in vain to obtain justice from courts in the territorially competent jurisdictions, such that the Public prosecutor no longer monopolizes the right to open proceedings.
Finally, effectively combating illicit wood imports requires explicitly empowering environmental NGOs to bring legal action in France when serious environmental degradation is committed abroad, providing that all or part of the wood illegally exploited is imported into France and/or that all or some of the parties responsible, de jure or de facto, for its exploitation, are of French nationality. ■