

Draft Virgin Forests Act

Introduction

Purpose

The purpose of the Act is to prohibit the possession and marketing of timber and timber products that were illegally logged in virgin forests. Virgin forests have outstanding ecological importance for biodiversity. The Federal Government wishes to help ensure that this natural heritage is not squandered, and put an end to overexploitation and illegal logging. In this respect, it is also responding to a request by the German Bundestag to investigate the extent to which an autonomous prohibition on the possession of timber or timber products from illegal logging can be achieved.

Virgin forests are among the most species-rich, diverse habitats on earth. At the same time, they also face a particular threat of destruction. Tropical wetland forests are of particular importance to the earth's biological diversity. Estimates predict that around 50 – 90 % of the world's scientifically classified fauna and flora species occur in tropical wetland forests. Although boreal and temperate forests generally contain fewer numbers of species than tropical wetland forests, the coastal rain forests of Canada and Alaska, which contain an exceptionally large number of species, are exceptions to this rule.

Forests – particularly those with the greatest biological diversity – have long faced a threat from human activity, and many of them have been degraded or destroyed. Of

those that remain, only some are comparable with the last remaining virgin forests in terms of their biological diversity.

Although the threats to the forests and their biological diversity are widely known and enjoy a high public profile, nevertheless, the loss of woodlands is continuing almost unchecked. Coordinated international measures would appear to be the most effective means of protecting the forests; however, attempts to coordinate a joint international approach have repeatedly failed in the face of resistance from individual nations or interest groups.

For this reason, every individual country has a responsibility to contribute to the preservation of the last remaining virgin forests. In terms of donations to protect virgin forests, Germany continues to rank among the most generous countries. However, this alone is not enough. Germany must also take steps to ensure that it is not contributing financially to the destruction of virgin forests via the demand for certain types of timber or timber products. Hence, the protection of virgin forests from the demand end in Germany complements the Federal Government's intensive efforts to promote the protection of virgin forests and forests in general within the context of development cooperation, by means of corresponding projects in developing countries.

In the EU single market, there are limited opportunities for provisions at national level on the protection of virgin forest. This is particularly true of the regulation of imports and exports, which essentially falls under the sole competence of the European Community. For this reason, the Federal Government welcomes the fact that in July 2004, the EU Commission presented its long-awaited proposals on an EU-wide regulation to restrict imports of illegally logged timber (FLEGT Regulation). However, the EU Commission's proposals are not designed to regulate possession and marketing; in this respect, it is left to the Member States to take autonomous action. In view of the critical state of the virgin forests, measures to counteract illegal logging in these areas cannot afford to wait until the text of the Regulation has been adopted at EU level, a negotiating mandate for agreements with exporting nations has been adopted, negotiations with the exporting nations are complete, and

the Regulation itself has entered into force. These various stages are likely to take many years, and time is running out. However, for enforcement of the Virgin Forests Act, it would be helpful if partnership agreements could be reached with the countries of origin as a matter of priority. The Virgin Forests Act and the uniform EU-wide regulations and partnership agreements would then complement one another.

Principal content

The draft Act envisages incorporating targeted provisions on the possession and marketing of timber and timber products from illegal logging in virgin forests into the Federal Nature Conservation Act. These can be linked to the existing provisions in the Federal Nature Conservation Act on species conservation, since the facts regulated therein are structurally similar. In order to delimit the affected timber products, as in the EU Commission's proposal for a FLEGT Regulation, recourse is made to the classification contained in the EU's Common Customs Tariff. In particular, this includes timber and timber products in the narrower sense of the word, charcoal, articles made from wood pulp, paper and paper board, as well as wooden furniture and wooden toys. It does not include books, newspapers and other printed matter.

The Act prohibits the possession and marketing of timber that was illegally logged in virgin forests and of products made from such timber. By means of a statutory ordinance, other forests considered particularly important for the preservation of biodiversity may be afforded the same status as virgin forests. Additionally, by means of a statutory ordinance, the legal provisions governing the assessment of legality may be extended.

The possession and marketing of timber and timber products are not regulated by special directives within the EU single market, and consequently, Germany is able to regulate this autonomously under Article 28 of the EC Treaty. The justification required under Article 30 of the EC Treaty in conjunction with the European Court of Justice's Cassis-de-Dijon ruling is derived from the persistent severe threat to the last remaining virgin forests and their biological diversity, as outlined earlier. The Federal Government will notify the Commission of the draft Act in accordance with the provisions of Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services. Under certain circumstances, this may delay the Act's entry into force.

It is impossible to tell by looking at timber and timber products whether the timber has been logged illegally. Similarly, it is generally impossible to ascertain without further investigation whether the timber was logged in virgin forests. Nor is it expedient to confine application of the Act to certain species of tree. Species which grow in threatened virgin forests also grow outside of these areas. Measures against illegal logging cannot be confined to tropical forests and hence to tropical species, since it is to be assumed that a substantial proportion of illegal logging takes place in forests outside of the tropics. Furthermore, a differentiation between tropical and other virgin forests could prompt accusations of discrimination.

Any action to counteract illegal logging from the demand end must therefore ensure the traceability of timber, from the time when it is logged right through to its marketing in Germany, so that a differentiation may be made between legally and illegally logged timber. In this respect, there is no need to start from scratch; established verification systems are already in place, to which recourse may be made.

However, it would be unreasonable to expect every single owner and marketer of timber or timber products in Germany to participate in a tracking system. With this in mind, the draft Act essentially only requires large-scale marketers, handlers and processors of timber to furnish proof encompassing the entire supply chain that the timber was not illegally logged in virgin forests. Private consumers, commercial users with no intention of sale and companies with a turnover of less than € 100,000 per annum are exempt from this requirement. This would also be unnecessary, since the envisaged provision covers all major timber flows.

In many cases, however, consumers have a justified interest in ensuring that the timber they purchase or which was used in the manufacture of a purchased product was not illegally logged in virgin forests. Mindful of this fact, the Act entitles purchasers of products falling under the scope of the Act to demand a copy of the confirmation, where the seller himself is required to obtain such confirmation. This entitlement to information is a key element of the draft. It not only serves to protect the buyers' interests, but also at the same time mobilises their vested interest in

implementation of the Act, which in turn substantially reduces the effort involved in enforcement.

However, this effect can only come into play if the enforcing authorities are in a position to take action against infringements of the prohibitions on possession and marketing where necessary. This can only be the case if it is not the responsibility of the authorities to verify that timber or timber products originate from illegal logging; instead, this onus of proof must lie with the marketer, at least where larger-scale marketers are concerned. Consequently, another key element of the draft Act is a corresponding provision on the reversal of the burden of proof, as already found in valid species conservation legislation (Article 49 of the Federal Nature Conservation Act <BNatSchG>). This is justified, particularly since only the marketer is able to obtain the appropriate information via his suppliers, and he is the one who ultimately bears responsibility for the products he markets. As in Article 49 of the Federal Nature Conservation Act <BNatSchG>, this provision concerns a material burden of proof, rather than an administrative procedure.

The last essential element of the provisions on traceability is the provision stipulating that generally speaking, confirmation of legal logging by a certifying agency that has been recognised by the Federal Office for Nature Conservation shall constitute valid proof. This, firstly, ensures the quality and credibility of the confirmations, and secondly, simplifies matters considerably for all parties involved. For legal reasons, proof cannot be confined solely to such recognised certifying agencies. In practice, however, this will become established as the verification channel with the lowest risks for the furnishing party. However, even in such cases, in case of doubt there is nothing to stop the enforcing authorities from conducting by their own investigations to prove that a confirmation is false. However, this does not detract from the fact that the individual in question has fulfilled his obligation to furnish proof. If a recognised certifying agency issues a false confirmation, not only can this result in legal action and damage to its reputation; additionally, the agency's recognition may also be revoked. Finally, in respect of the EU single market, the draft Act includes a provision that certifying agencies which were recognised in other EU Member States

or the EEA on the basis of corresponding administrative agreements shall be considered equal to the agencies recognised by the Federal Office for Nature Conservation.

The precise format of the confirmation stating that timber was not illegally logged in virgin forests is only regulated in very general terms in the Act. These provisions have deliberately been formulated in an open-ended manner so that existing verification systems may be incorporated, and compatibility with any future EU provisions on all types of wood felling is also possible. This openness also leaves sufficient scope for efficient solutions to emerge as a result of competition, while at the same time, the quality of the proof is ensured by the recognition procedure and the transparency derived from the entitlement to information.

An adequate transitional period is envisaged for the system to develop. If timber was logged prior to expiry of the transitional period, the possession and marketing prohibitions shall not apply. Provisions pertaining to the burden of proof shall apply analogously to proof of the date of logging. Anyone falling under this provision who fails to obtain confirmation in accordance with the terms of this Act or who uses false, counterfeit or invalid confirmations may be fined. If this is done commercially or habitually, then in certain cases an offence pursuant to § 66 of the Federal Nature Conservation Act <BNatSchG> shall be deemed to have been committed. Within this context, and under general police and administrative law, the seizure or confiscation of the affected products is also possible.

Draft of an Initial Act to Amend the Federal Nature Conservation Act*

Dated ...

The *Bundestag* <Lower House of Parliament> has adopted the following Act:

Article 1

Amendment of the Federal Nature Conservation Act

The Act on Nature Conservation and Landscape Management (Federal Nature Conservation Act) of 25 March 2002 (Federal Law Gazette I, page 1193), most recently amended by ... in the version promulgated on ... (Federal Law Gazette I ...), is hereby amended as follows:

1. In the list of contents under Section 5, after the line "Obligation to Furnish Proof, Impounding ...49", the following new line shall be inserted:

"Protection of virgin forests from illegal logging 49a"

2. After Article 49, the following Article 49a shall be inserted:

"Article 49a Protection of virgin forests from illegal logging

- (1) The prohibitions on possession and marketing set out in Article 42, paragraph (2), sentence 1 shall also apply to timber or products manufactured from timber (timber products) where the timber was logged in virgin forests in violation of the statutory provisions applicable at the site of felling to regulate logging, particularly provisions on protected areas and other restrictions and prohibitions on logging, restrictions governing the volume of timber that may be felled, or other requirements relating to the performance of logging. Article 43 shall not apply, with the exception of Article 43, paragraph (7). The prohibitions on possession and marketing pursuant to sentence 1 shall not apply if a licence pursuant to Article [...] of Council Regulation No. [...] concerning the establishment of a voluntary FLEGT licensing scheme for imports of timber into the European Community [COM (2004) 515 final, status 20 July 2004] is available for the timber

* The obligations from Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services (OJ EC No. L 104, page 37), amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ EC No. L 217, page 18), have been observed.

or timber product in question. If the timber or timber product falls directly under Article 42, paragraph (2) or (3), then sentence 1 shall not apply.

(2) Timber and timber products within the meaning of paragraph (1) shall refer to articles listed in Annex I of Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ EC L 256, 7.9.1987, page 1), amended by Commission Regulation (EC) No 1810/2004 of 7 September 2004 (OJ EC No. L 327, 30.10.2004, page 1), specifically in

1. Section IX, chapter 44 (wood and articles of wood; charcoal),
2. Section X,
 - a) Chapter 47 excluding items 4706 and 4707 (pulp of wood),
 - b) Chapter 48 (paper and paperboard; articles of paper pulp, of paper or of paper board), or
3. Section XX (miscellaneous manufactured articles), chapters 94 and 95, where reference is made in the items or sub-items of these two chapters to the fact that these articles are of wood.

(3) For the purposes of this provision, the term "virgin forest" shall refer to cohesive forest covering an area of at least 10 ha exhibiting largely natural development of its species composition, structure and dynamics, which has been only marginally directly influenced by human activity.

(4) It is prohibited,

1. to sell, to offer for sale, to keep in stock for sale purposes or
2. for the purpose of subsequent sale
 - a) to gain possession of or control over, have possession of or control over, to handle or to process, or
 - b) to purchase, to acquire, to transport, to display to the public or to use in some other manner

timber or timber products, unless the party concerned is in possession of a written confirmation issued by a certifying agency that the timber was not logged in virgin forests in violation of the applicable statutory provisions at the site of felling to regulate logging. For the purposes of this provision, "certifying agency" shall refer to any agency whose activities include ascertaining whether timber has been logged in virgin forests in violation of the applicable statutory provisions at the site of felling to regulate logging. If the timber or timber product was not acquired directly from the party which felled it, then this confirmation must encompass the entire supply and processing chain. As a minimum requirement, the confirmation must contain details of the party responsible for logging, the location, date and scope of logging, the applicable statutory provisions, any intermediate purchasers and the name and address of the certifying agency. Sentence 1 shall not apply to companies whose turnover is less than 100,000 € per annum, or to

private consumers. In the cases referred to in sentence 1, no. 2, sentence 1 shall also apply to public bodies, even if there is no intention of subsequent selling.

- (4) Whoever purchases timber or timber products may demand a copy of the confirmation pursuant to paragraph (4) from the seller.
- (5) Parties who are not allowed to possess or market timber or timber products without being in possession of a confirmation pursuant to paragraph (4) may only appeal to the competent authorities under regional law that the wood was not logged in virgin forests in violation of the applicable statutory provisions at the site of felling to regulate logging if they are able to prove that this is so.
- (6) Notwithstanding further investigations, the confirmation pursuant to paragraph (4) shall be considered valid pursuant to paragraph (6) if it has been issued by a certifying agency recognised by the Federal Office for Nature Conservation. In addition to the information pursuant to paragraph (4), sentence 4, it must also include details of the official recognition of the certifying agency.
- (7) During the course of the recognition procedure, compliance with the following requirements pertaining to the certifying agency shall be ensured:
 1. Independence of the management and other individuals entrusted with the performance of specialist tasks from any persons involved in the logging, trading, handling and processing of timber and timber products or otherwise dependent upon the outcome of certification;
 2. Availability of the required organisational structures, staff, funding and equipment to ensure adequate, independent performance of its duties
 3. Adequate expertise, professional integrity, experience and professional independence of the appointed staff;
 4. The existence of an indemnity insurance policy;
 5. The preservation of any trade and company secrets revealed to the authorised agency in conjunction with the performance of its duties against unauthorised disclosure.Recognition may be granted subject to certain conditions, and shall be for a limited period. Recognition of a certifying agency shall be announced in the Federal Gazette. The Federal Office for Nature Conservation shall monitor compliance with the requirements pursuant to sentences 1 and 2. Article 50 shall apply *mutatis mutandis*. If the certifying agency is domiciled abroad, a contract shall be drawn up stipulating that the certifying agency is required to meet the same obligations as certifying agencies based in Germany pursuant to sentence 5. If a certifying agency that is domiciled abroad fails to meet these obligations, its recognition may be revoked.
- (8) A certifying agency based in a different Member State of the European Union or another Party to the European Economic Area Agreement may be

designated to the Federal Office for Nature Conservation by the competent authority. The pre-requisites are:

- a. The conclusion of an administrative agreement between the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety and the respective Member State of the European Union or Party to the European Economic Area Agreement, and
- b. An official recognition procedure verifying that the requirements of the administrative agreement have been met.

The administrative agreement must regulate:

1. The requirements incumbent upon the certifying agency in accordance with paragraph (8), sentence 1,
2. The involvement of the competent authority in the recognition procedure carried out in the Member State or Contracting State, and
3. Supervision of the certifying agency in accordance with paragraph (8), sentences 4 and 5.

If the requirements pursuant to sentence 2 are met, the certifying agency shall be considered to have been recognised by the Federal Office; recognition shall be announced in the Federal Gazette."

- (10) It is prohibited to issue a confirmation upon request to a purchaser pursuant to Article 49a, paragraph (5) or presents the same as proof pursuant to Article 49a, paragraph (6), if the confirmation has been obtained through threat, bribery or collusion or has been obtained by fraud through incorrect or incomplete statements."

3. In Article 52, the following paragraphs 7a and 7b shall be inserted after paragraph 7:

- "(7a) The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety is authorised, by way of statutory ordinance in consultation with the Federal Ministry for Consumer Protection, Food and Agriculture and with the consent of the *Bundesrat*,
1. to afford certain forests whose contribution to biological diversity is equivalent to that of virgin forests and which face the same level of threat of destruction as virgin forests, the same status as virgin forests as per the definition in Article 49a, paragraph (3),
 2. to determine that Article 49a, paragraph (1) shall apply to certain timber products not covered by Article 49a, paragraph (2), where the inclusion of such products is important for the protection of virgin forests because significant quantities thereof are manufactured from timber that was illegally logged in virgin forests, and that Article 49a, paragraph (1) shall not apply to certain timber products covered by Article 49a, paragraph (2) where their inclusion is not of material importance to the protection of virgin forests,

3. to afford the same status as statutory provisions to regulate logging, as defined in Article 49a, paragraph (1), sentence 1 to
 - a. other statutory provisions in the state where logging occurs, insofar as compliance with said provisions is important for the protection of virgin forests, in particular, statutory provisions to combat corruption, regulate land use and protect the environment,
 - b. other requirements for the protection of virgin forests, particularly those arising from international law or from the law of the European Community,
 4. to specify in greater detail the requirements governing the form and content of the confirmation pursuant to Article 49a, paragraph (4),
 5. to determine the conditions under which other types of confirmation may be considered equivalent with regard to Article 49a, paragraphs (4), (5) and (7), particularly in cases where it is obvious that timber was not logged in violation of Article 49a, paragraph (1).
- (7b) The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety is authorised, by way of statutory ordinance in consultation with the Federal Ministry for Consumer Protection, Food and Agriculture and without the consent of the *Bundesrat*, to specify in greater detail the requirements governing the recognition of certifying agencies pursuant to Article 49a, paragraphs (8) and (9) and the administrative procedure for recognition."

4. Article 65 shall be amended as follows:

- a) Paragraph (1) shall be amended as follows:
 - aa) In no.2 the word „or“ shall be replaced by a comma.
 - bb) In no.3 the period at the end shall be replaced by the word „or“.
 - cc) the following number 4 shall be inserted:

„4. in contravention of Article 49a, paragraph (4), sentence 1, no. 1 sells, offers for sale or keeps in stock for sale purposes timber or timber products.“
- b) In paragraph (2) the following numbers 6a and 6b shall be inserted after number 6:

„6a. in contravention of Article 49a, paragraph (4), sentence 1, no. 2 for the purposes of subsequent sale gains possession of or control over, has possession of or control over, handles or processes, purchases, acquires, transports, displays or otherwise uses timber or timber products,

- 6b. in contravention of Article 49a, paragraph (10) issues a copy of a confirmation or presents a confirmation as proof,“.
 - c) In paragraph (5) the words „No. 1 letter b) and No.4“ shall be replaced by the words „No. 1 letter b), No. 4, 6a and 6b“.
- 5.
5. In Article 69, the following paragraph (8) shall be inserted:
- “(8) Article 49a, paragraph (1), sentence 1 shall not apply to timber and timber products if the timber or timber from which the timber product was manufactured was logged prior to 1 January 2007. Article 49a, paragraph (6) shall apply *mutatis mutandis* to proof that timber or timber products were logged prior to this date.”

Article 2

Entry into force

The Act shall enter into force on the day following its promulgation.

The constitutional rights of the *Bundesrat* are preserved.