Illegal Timber Trade: Effectiveness of the European Union Timber Regulation and the United States Lacey Act

LLM Paper
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<tr>
<td>CITES</td>
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<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<td>EIA</td>
<td>Environmental Investigation Agency</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCPA</td>
<td>Foreign Corrupt Practices Act</td>
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<td>FCPSA</td>
<td>Food and Consumer Product Safety Authority</td>
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<td>FLEGT</td>
<td>Forest Law Enforcement, Governance and Trade</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>REDD+</td>
<td>Reducing Emissions from Deforestation and Forest Degradation</td>
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<td>TPP</td>
<td>Trans-Pacific Partnership</td>
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<td>UK</td>
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<td>UN</td>
<td>United Nations</td>
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<td>USA</td>
<td>United States of America</td>
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<td>VPA</td>
<td>Voluntary Partnership Agreement</td>
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**INTRODUCTION**

Forests are of immense importance for the future of the planet: they provide habitat for wildlife and livelihoods for over two billion people. Forests also mitigate climate change, prevent soil erosion, offer watershed protection and have the ability to contribute to sustainable development and economic growth\(^1\). These benefits are however threatened by illegal logging and the related timber trade, which can be defined as being “all practices related to the harvesting, processing and trading of timber inconsistent with national and sub-national law”\(^2\). This importance justifies the choice of the timber trade as a thesis topic.

Illegal logging and related timber trade (also referred to as illegal timber trade and illegally harvested timber in this paper) is a major driver of deforestation, a factor of government revenue loses in developing countries\(^3\), and a threat to good governance\(^4\). It is therefore crucial for states to adopt adequate and effective legislations to curb this problem by, on the one hand, prohibiting illegal logging, and, on the other hand, regulating the international timber trade. Cooperation between timber-producer countries and timber-consumer countries is a much-needed strategy to achieve acceptable results.

It was originally in the United States (US), and in the European Union (EU) two years later, that the first initiatives emerged to have comprehensive pieces of legislation on illegal logging, specifically the 2008 Amendment to the US Lacey Act\(^5\) and the 2010 EU Timber Regulation (EUTR)\(^6\). This paper will therefore focus on these two laws as they are the most detailed ones and those having the greatest potential to reduce illegal timber trade. Particular attention will also be given to Voluntary Partnership Agreements (VPAs), which are, with the EUTR, part of the 2003 EU Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT)\(^7\).

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\(^1\) WWF, *The importance of forests cannot be underestimated*, 2017, http://wwf.panda.org/about_our_earth/deforestation/importance_forests/ (last visited on April 23, 2018);
\(^4\) According to the World Bank, these loses exceed $15 billion annually in developing countries.
\(^7\) Regulation (EU) no 995/2010 of the European Parliament and the Council laying down the obligations of operators who place timber and timber products on the market, 12 November 2010.

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Australia has also taken measures to protect its market against illegal timber with its 2012 Illegal Logging Prohibition Act\(^8\) and Illegal Logging Prohibition Regulation\(^9\): it will however not be discussed further in this paper as its key requirement (due diligence, see infra) is modeled on the one of the EUTR so from a normative perspective does not shed new light\(^{10}\). Japan is the fourth state to have passed comprehensive legislation in the matter, called the Clean Wood Act\(^{11}\). However, as it was adopted less than a year ago, it will not be analyzed either.

The main question this paper will undertake to answer is whether the existing European and US legislations on countering illegal timber trade are effective. An effective law is a law which works “in the way that was intended”\(^{12}\), meaning that it must be clear and foreseeable, that the people it is addressed to respect it, and that if it is violated, sanctions will be meted out. In the end, we will determine whether the EUTR and the Lacey Act have reached their objectives. The method used to respond to this question will be to describe these laws and the context in which they were adopted, give case law developed on the basis of the EUTR and the Lacey Act, compare both pieces of legislation, and explore the ways in which they could reach their full potential.

The first chapter will start by tracing the evolution of the initiatives taken at the international, regional and national levels to fight illegal logging and trade, to then turn to the drivers and impacts of this practice. The second and third chapters deal, respectively, with the EU and the US frameworks. Finally, the fourth chapter goes through specific issues related to illegal logging in the EU and the US, namely their relations with China and with the General Agreement on Tariffs and Trade (GATT)\(^{13}\), the potential need of an international convention on illegal logging and the problem of corruption in the forest sector in some countries.

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\(^8\) Australian Illegal Logging Prohibition Act, No. 166, 28 November 2012.
\(^13\) General Agreement on Tariffs and Trade, 30 October 1947.
CHAPTER I. BACKGROUND AND SCOPE OF ILLEGAL LOGGING AND TRADE

This first chapter contextualizes legislation regarding illegal logging and trade. After having examined the existing international, regional and national legislations (section 1), we will turn to the reasons why illegal logging persists in certain parts of the world (section 2). Finally, we will analyze the impacts of illegal logging (section 3).

Section 1. Context of the framing of illegal logging and trade

The framing of illegal logging and trade, at international, regional and national levels, has been done gradually from the early 1990s. To this day, only one international convention deals with illegal timber trade, leading to the need for countries to develop their own comprehensive legislation.

A. International framing of illegal logging and trade

Because of the multi-faced nature of illegal logging, countries, companies, organizations and individuals have had a different understanding of this issue\textsuperscript{14}. Therefore, although illegal logging has been high on the international political agenda since the 1990s and tackling illegality as well as improving governance in the forest sector are essential for improving its sustainability, framing this matter from the legal perspective has proven complex\textsuperscript{15}. This pressing complexity has been increasingly recognized by governments, trade associations, international organizations, wood processing industries and non-governmental organizations\textsuperscript{16}.

Major timber exporters, for instance, refused to accept sole responsibility for the problem, leading illegal logging to be called “undocumented trade” in the International Tropical Timber Agreement of 1994\textsuperscript{17}. The objectives of this Agreement were, \textit{inter alia}, “to contribute to the process of sustainable development”\textsuperscript{18} and “to enhance the capacity of members to implement

\textsuperscript{14} D. KLEINSCHMIT, S. LEIPOLD and M. SOTIROV, \textit{op. cit.}, p. 16.
\textsuperscript{15} A. HOARE, \textit{op. cit.}, p. 4; \textit{ibidem}.
\textsuperscript{16} R. JONSSON \textit{et al.}, “Assessment of the EU Timber Regulation and FLEGT Action Plan”, \textit{European Forest Institute}, 2015, p. 5.
\textsuperscript{17} International Tropical Timber Agreement, 26 January 1994.
\textsuperscript{18} Article 15 (c) of the International Tropical Timber Agreement, 26 January 1994.
a strategy for achieving exports of tropical timber and timber products from sustainably managed sources by the year 2000”19.

It was only during the G8 Action Program on Forests in 1998 that producer countries agreed on the term “illegal logging”, given the fact that this Program also held consumers of timber accountable, not only exporting countries; this created therefore a shared responsibility between these two sets of actors20. Since 1998, G8 members undertook several initiatives regarding joint actions between timber consumer and timber producer countries. These include enhancing access to information, sharing technical knowledge, engaging the public and promoting timber procurement policies21. Nevertheless, this only involved limited binding commitments22.

During the 2002 World Summit on Sustainable Development held in Johannesburg and led by the UN, the Johannesburg Plan of Implementation was drafted23. This Plan obliged its 191 signatories to, inter alia, “take immediate action on domestic forest law enforcement and illegal international trade in forest products, including in forest biological resources, with the support of the international community, and provide human and institutional capacity-building related to the enforcement of national legislation in those area”24. As the G8 Action Program on Forests, this 2002 World Summit stressed the importance for consumer nations to also assume responsibility for illegal trade of timber, not only countries producing it25.

In addition, international governance initiatives designed for broader purposes also influence illegal logging and trade. These include the United Nations (UN) Program for Reducing Emissions from Deforestation and Forest Degradation of 2008 (REDD+) and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)26. The aim of REDD+ is to lower greenhouse gas emissions by reducing tropical deforestation and forest

19 Article 15 (d) of the International Tropical Timber Agreement, 26 January 1994.
25 S. WAITE, op. cit., p. 327.
degradation which is sometimes the result of illegal logging.\textsuperscript{27} CITES, on the other hand, is the only international multilateral instrument that addresses illegal logging. It is comprised of three appendices. The first one lists endangered species whose “(…) trade must be subject to particularly strict regulation (…) and must only be authorized in exceptional circumstances.”\textsuperscript{28} The second and third appendices include, in turn, protected species which can be traded after the grant of an export permit; and species which may be traded provided that no laws have been breached in harvesting them.\textsuperscript{29} Despite its 183 members and its focus on trade of specific wood species, CITES was not designed as an instrument to tackle illegal logging at the international level, as its primary aim is the conservation of wildlife species.\textsuperscript{30}

Finally, international bodies and initiatives such as the World Trade Organization (WTO) and the UN Sustainable Development Goals also refer to illegal logging without being directly concerned with it.\textsuperscript{31}

B. Regional and national framing of illegal logging and trade

According to Ragnar Jonsson, “the support of timber legality verification initially started with the Bali Action Plan in 2001 at the first regional Forest Law Enforcement and Governance (FLEG) conference, when some of the world’s leading economies committed to supporting legality in the forest sector.”\textsuperscript{32}

It is in this context, with the 2002 aforementioned World Summit, and with the objective of excluding illegal timber from the European and American markets, that regional and national policies emerged, such as the EU FLEGT Action Plan in 2003 and the 2008 Amendment to the US Lacey Act.\textsuperscript{33} These policies, which will be further analyzed in Chapters II and III of this


\textsuperscript{30} F. GAROT, \textit{op. cit.}, p. 36; European Commission, \textit{Evaluation of the EU FLEGT Action Plan...}, \textit{op. cit.}, p. 28.

\textsuperscript{31} D. KLEINSCHMIT, S. LEIPOLD and M. SOTIROV, \textit{op. cit.}, p. 17.

\textsuperscript{32} R. JONSSON \textit{et al.}, \textit{op. cit.}, p. 5.

paper, aim at prohibiting the import of wood harvested or traded in contravention to the laws of the country of origin.

Section 2. Drivers and impacts of illegal logging

This second section addresses the reasons why illegal logging persists, and what the impacts of these illegal activities are.

A. Drivers

Illegal logging tends to take over legal logging in four main situations: when there are differential costs between legal and illegal logging, when there is a governance deficit, when there are regulatory and enforcement challenges and when actors of the forest sector are uninformed of their rights and responsibilities.

1. Differential costs

When there is a significant difference in the costs of legal and illegal logging, either because costs are avoided or because profits are generated, illegal logging is likely to occur. For instance, loggers will engage in illegal activities when the costs of compliance are higher than the costs of avoiding the law, including the costs of being punished for it. Therefore, according to several experts, “the larger the margin between legal and illegal operations, the more powerful this incentive will be”. Economic aspects are consequently prioritized over environmental aspects: stakeholders are more interested in profit, affordable prices and income than in protecting the environment.

34 D. KLEINSCHMIT, S. LEIPOLD and M. SOTIROV, op. cit., p. 17.
37 Ibidem.
2. Governance deficit

Corruption and weak governance are also drivers of illegal logging. In the forest sector, corruption ranges from low-level activities, including paying enforcement officials to get illegal timber through checkpoints, to serious offences, such as paying bribes to governmental officials for logging rights. While a vast majority of countries have legislation and watchdog organizations aimed at limiting corruption, there is inadequate incentive to respect them given the lack of political will of governments to give effectiveness to these instruments (see further information on corruption in Section 4 of Chapter IV).

Governments, moreover, suffer from inadequate administrative and financial capacity. They are limited in their ability to detect and prosecute because of a lack of adequate resources and because their institutions are not functioning effectively. In several developing countries, it is often the case that only a few officers - who are poorly-trained and underpaid - are expected to monitor vast areas with insufficient means.

3. Regulatory failure or enforcement challenges

In developing countries, forest-related laws are often unclear, inconsistent or even contradictory, making it difficult, for those who want to, to comply with the rule of law. Some legal frameworks are also contested or illegitimate: they may not recognize rights of local or indigenous peoples, leading to the consequence that these peoples do not see the law as valid and consequently do not comply with it. Environmental laws may also contrast with regulations related to other sectors and only play a marginal role compared to macro-economic and financial policies. In Indonesia, for example, until recently, timber companies were required to submit 1,600 documents per year as well as

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40 A. HOARE, ibidem, p. 31.
42 A. CONTRERAS-HERMOSILLA, R. DOORNBOOSCH and M. LODGE, op. cit., p. 22.
43 Ibidem, p. 21.
44 A. HOARE, personal e-mail communication, April 17th, 2018.
an important amount of data to 16 agencies in Jakarta and eight in other regions. This administrative burden is a disincentive to legally trade timber, making compliance unrealistic for local forest managers. Moreover, if we take the example of the Democratic Republic of the Congo (DRC), regulations on taxes, land-use planning, forest zoning, export procedures and artisanal logging which are required to implement forest laws are scarce and often unrealistic.

However, even when the forest sector is clearly regulated, enforcing national laws may prove to be problematic. More than one-fifth of the wood in the world comes from states that have trouble enforcing their laws. Indeed, monitoring and surveillance of forests to counter illegal trade is labor-intensive and costly and developing countries tend to not prioritize environmental crimes. Therefore, the level of prosecution of people involved in illegal logging is low and criminal justice systems often fail to view illegal timber trade as organized crime. Moreover, because there is both legal and illegal logging, it is not always easy to make a distinction between them throughout the supply chain: it is easy to hide the origin and nature of the wood.

Greenpeace Brazil, for instance, launched investigations in the Brazilian Amazon and was able to highlight that official documents, which served as a guarantee of the legal origin of the timber, were inadequate and the result of various forms of fraud. Incorrect botanical identification, overestimation of tree volume, and listing non-existent trees are among the strategies used to illegally extract timber in the Brazilian Amazon.

4. Lack of information

Even if lack of information is not a driver of illegal logging per se it is still relevant to mention it here. Lack of information means that legislation enforcement is more difficult, but it does not in itself encourage people to engage in illegal logging.

Forest resources are often found in remote places, which cover large areas with different types of vegetation in complex ecosystems. However, developing countries rarely have an adequate

47 A. HOARE, op. cit., p. 29.
48 S. EBERHARDT, op. cit., p. 409.
50 OECD Trade Policy Studies, ibidem, p. 34.
51 S. EBERHARDT, op. cit., p. 412; ibidem, p. 35.
53 Ibidem.
ecological inventory of forest resources and sometimes do not know enough about their quality and importance\textsuperscript{54}. Therefore, according to A. Contreras-Hermosilla, R. Doornbosch and M. Lodge, “(...) it is usually difficult for forest agencies to have a baseline against which changes in the resource base can be monitored and illegal activities detected. Even with modern detection and monitoring technologies, illegal logging and other operations may take place for extended periods before government agencies become aware of them”\textsuperscript{55}. New technology is gradually solving this problem. Global Forest Watch is one example of how satellite monitoring and analysis is filling the information vacuum\textsuperscript{56}. Greenpeace Brazil is also launching an interactive platform called “Crime in the Forest” to “(...) engage people into identifying evidence of real frauds in forest management plans and send alerts to the Brazilian authorities”\textsuperscript{57}.

Transparency, which is poor in many producer countries, plays a crucial role in enabling the monitoring of the forest sector. Information that should be made available to the public includes “(...) the texts of relevant policies and laws, procedures for allocating logging rights, the results of environmental and social impact assessments, logging permits and the location of the land for which they have been issued, annual quotas, the holders of logging rights and their responsibilities, forest revenues and their use, and data on enforcement”\textsuperscript{58}.

**B. Impacts**

Illegal forest activities tend to have four main impacts: environmental, social, economic and fiscal, political. Legal logging can also have similar impacts in certain circumstances, but they may differ significantly in their magnitude\textsuperscript{59}.

\textsuperscript{54} A. CONTRERAS-HERMOSILLA, R. DOORNBOSCH and M. LODGE, op. cit., pp. 21-22.

\textsuperscript{55} Ibidem.


\textsuperscript{57} Greenpeace international, Illegal logging of Ipê tree is causing irreversible damage to the Amazon, 2018, https://www.greenpeace.org/international/press/15437/illegal-logging-of-ipe-tree-is-causing-irreversible-damage-to-the-amazon/ (last visited on March 21\textsuperscript{st}, 2018).

\textsuperscript{58} A. HOARE, op. cit., p. 35.

1. Environmental impacts

Eighty percent of the world’s fauna and flora lives in forests. Illegal logging depletes these forests, causing deforestation and degradation\(^60\). This in turn leads to the destruction of wildlife habitat, which affects the survival of animals\(^61\). Illegal logging also endangers particular tree species, which are susceptible to being harvested to extinction, provoking forests to suffer irreparable harm\(^62\). Furthermore, deforestation is responsible for one-fifth of greenhouse gas emissions and is the most significant contributor to climate change\(^63\). Finally, deforestation also triggers a rise in carbon emission, soil erosion, water runoffs, denuding of mountain slopes, fires and changes in local weather patterns\(^64\). Emphasizing the intricacies of global ecological impacts, researchers from Greentumble even suggest “(...) that deforestation in the Amazon Basin could reduce rainfall over the US Midwest and northeast China, while increasing rainfall in eastern Africa and northern Europe”\(^65\).

2. Social impacts

Illegal logging has direct and indirect impacts on the environment: it is also associated with human rights violations, violence, worsening of poverty and conflicts with indigenous and local communities\(^66\). In many developing countries, such as Cambodia, Laos and China, property rights of local communities are unrecognized: the land is the government’s property, meaning that it can sell, lease or grant it even if people live on it, causing human rights issues and conflict\(^67\).


\(^62\) S. EBERHARDT, ibidem, p. 324.

\(^63\) OECD Trade Policy Studies, op. cit., p. 42; S. WAITE, op. cit., p. 323.


\(^65\) “The Negative Effects of Illegal Logging”, ibidem.

\(^66\) T. LENNAERTS, op. cit., p. 2.

\(^67\) S. WAITE, op. cit., p. 325.
Illegal logging destroys the livelihoods and well-being of indigenous and local communities living in the forests because when the forests are degraded, so is their traditional way of living\textsuperscript{68}. They are therefore forced to rely – in most cases unrealistically - on the logging companies for income and food. They complain of being unable to live like they used to when they depend on the forest’s resources\textsuperscript{69}.

3. Economic and fiscal impacts

Because of illegal logging, the price of legal timber has gone down, given the fact that providing cheap wood to the market undervalues legally harvested timber\textsuperscript{70}. This impact was clearly demonstrated in Honduras where it was 75\% cheaper to produce illegal wood than legal wood; this made it necessary to reduce the price of legal timber\textsuperscript{71}. Indeed, illegal harvesting depresses global prices of wood by 7\% to 16\%\textsuperscript{72}. It also prompts an unequal distribution along the supply chain of the pecuniary benefits obtained from logging, leading to local people working in this sector to receive lower remuneration and benefits\textsuperscript{73}. Estimates suggest that national governments are losing up to 15 billion U.S. dollars on tax revenue and assets annually\textsuperscript{74}. Finally, there is an increasingly broad consensus that the loss of valuable natural resources today is likely to cause economic problems in the future\textsuperscript{75}.

4. Political impacts

In addition to being a driver of illegal logging, corruption is also one of its impacts. Corrupt individuals gain power thanks to illegal revenues and may then take advantage of poor governance practices to maintain revenues and acquire greater influence\textsuperscript{76}. In Honduras and Nicaragua, illegal logging has contributed to the decline of civil governance in numerous rural areas and, in countries such as Myanmar, Cambodia and Liberia, to the funding of armed conflict and rebel groups\textsuperscript{77}.

\textsuperscript{68} “The Negative Effects of Illegal Logging”, \textit{op. cit.}
\textsuperscript{69} European Commission, \textit{FLEGT Briefing Notes…}, \textit{op. cit.}, p. 1; “The Negative Effects of Illegal Logging”, \textit{ibidem}.
\textsuperscript{71} OECD Trade Policy Studies, \textit{op. cit.}, p. 39.
\textsuperscript{72} \textit{ibidem}.
\textsuperscript{73} P. PACHECO, \textit{op. cit.}, p. 102.
\textsuperscript{74} European Commission, \textit{FLEGT Briefing Notes…}, \textit{op. cit.}, p. 1; OECD Trade Policy Studies, \textit{op. cit.}, p. 38; S. WAITE, \textit{op. cit.}, p. 326.
\textsuperscript{75} “The Negative Effects of Illegal Logging”, \textit{op. cit.}
\textsuperscript{76} P. PACHECO, \textit{op. cit.}, p. 103.
\textsuperscript{77} T. LENNAERTS, \textit{op. cit.}, p. 2; OECD Trade Policy Studies, \textit{op. cit.}, p. 44.
CHAPTER II. THE EUROPEAN FRAMEWORK

This second chapter starts by describing the EU FLEGT Action Plan (Section 1) and then contextualizes it by looking at cases where EU companies were sanctioned for non-compliance (Section 2). Finally, an assessment of the Action Plan is presented (Section 3).

Section 1. European Union Forest Law Enforcement Governance and Trade Action Plan

The European Commission established the EU FLEGT Action Plan in 2003. It focuses on two key elements meant to reinforce each other: VPAs and the EUTR.

A. Objective of the European Union Forest Law Enforcement Governance and Trade Action Plan

The difference between the EU FLEGT Action Plan and previous processes, such as the aforementioned FLEG conference, is the added focus on trade.

The overall objective of the EU FLEGT Action Plan is “to support efforts to tackle the problem of illegal logging and related trade”. The aim of the Action Plan is also to emphasize “(…) on governance reforms and capacity building, supported by actions aimed at developing multilateral cooperation and complementary demand-side measures designed to reduce the consumption of illegally harvested timber and contributing to the wider objective of sustainable forest management in timber-producing countries”. This Action Plan was the first European initiative that focused on eliminating the demand for illegal timber on the EU market.

As the 1998 G8 Action Program on Forests and the 2002 World Summit on Sustainable Development, the FLEGT Action Plan recognizes that producer and consumer countries have shared responsibilities. It therefore introduced demand (EUTR) and supply (VPAs) side measures to combat illegally harvested timber. The Action Plan moreover “(…) consists of support for timber-producing countries, efforts to develop multilateral collaboration to combat the trade in illegally harvested timber, voluntary measures to support governments wanting to

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79 R. JONSSON et al., op. cit., p. 5.
80 European Commission, Communication from the Commission..., op. cit., p. 5.
82 R. JONSSON et al., op. cit., p. 5.
ensure that illegally harvested timber from their territory is not admitted to the EU market, public procurement policy, private sector initiatives, measures to avoid investment in activities which encourage illegal logging, and conflict timber.\textsuperscript{83}

\textbf{B. Voluntary Partnership Agreements}

VPAs are the cornerstone of the 2003 Action Plan and are enshrined in the FLEGT Regulation of 2005\textsuperscript{84}. They are bilateral trade agreements between the EU and timber product-exporting countries outside the EU\textsuperscript{85}. The Regulation applies to timber products set out in its Annexes\textsuperscript{86}. As the name implies, a VPA is not a legislative act, but a bilateral voluntary agreement negotiated between the European Commission and an exporting country\textsuperscript{87}. However, whenever a timber product-producing country ratifies a VPA, it becomes legally binding on both sides\textsuperscript{88}. The parties are not adversaries, but partners, working together to eliminate illegal logging.

The ways in which VPAs are designed and implemented vary from country to country as they are shaped by negotiations to pin down the most important elements of the agreement and determine their scope of application\textsuperscript{89}. However, the underlying objective of VPAs must always be respected: partner countries are granted improved access to EU timber markets if they can assure the legal production of wood\textsuperscript{90}. Each VPA agreement has its own definitions about what is legal and what is not\textsuperscript{91}. These legality standards are, according to C. Overdevest and J. Zeitlin, “(…) the product of a deliberative, multi-stakeholder review process, requiring reconciliation and consolidation of conflicting regulations from different sources, including international treaty commitments as well as domestic law. They cover not only fiscal, forestry, and

\textsuperscript{83} European Commission, \textit{Communication from the Commission…, op. cit.}, p. 8.
\textsuperscript{85} R. JONSSON \textit{et al., op. cit.}, p. 6.
\textsuperscript{86} Article 1 §3, Regulation (EU) no 2173/2005 of the European Council on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, 20 December 2005: “This Regulation shall apply to imports of timber products set out in Annexes II and III from partner countries listed in Annex I”.
\textsuperscript{88} R. JONSSON \textit{et al., op. cit.}, pp. 6-7.
\textsuperscript{90} R. JONSSON \textit{et al., op. cit.}, p. 7.
\textsuperscript{91} F. GAROT, \textit{op. cit.}, p. 38.
environmental regulation, but also labor law, worker health and safety, and the rights of indigenous communities.\footnote{C. OVERDEVEST and J. ZEITLIN, “Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector”, Osgoode Hall Law School, 2012, p. 26.}

Finally, the exporting country must also develop a system to ensure legal compliance and issue legal products with FLEGT licenses\footnote{What is a VPA? http://www.vpaunpacked.org/en/web/vpa-unpacked-multilang/vpau-what-is-a-vpa (last visited March 21\textsuperscript{st}, 2018).}. This system is called the Legality Assurance system, which is at the heart of each VPA\footnote{C. OVERDEVEST and J. ZEITLIN, op. cit., p. 25.}. In other words, this system, usually built on existing structures, verifies that the timber products of the exporting country are legal. Once a product has a FLEGT license, it can enter the EU market automatically, without the need for due diligence (as required by the EUTR, see \textit{infra})\footnote{Ibidem.}. Once the VPA is agreed upon and ratified, both signatory parties must respect their commitments and take action to meet the standards of the agreement\footnote{R. OLIVER, “Europe’s changing tropical timber trade”, \textit{International Tropical Timber Organization}, 2015, p. 13.}. The role of the EU is to assist partner states to develop a timber licensing and tracking system and strengthen national governance capacity, including by requiring civil society participation\footnote{F. GAROT, op. cit., p. 38.}. Up until now, six countries have signed a VPA: Cameroon, the Central African Republic, Ghana, Indonesia, Liberia and the Republic of Congo\footnote{“FLEGT and VPA countries”, \textit{FLEGT licenced timber}, http://www.flegtlicence.org/vpa-countries (last visited on March 20\textsuperscript{th}, 2018).}. They cover a forest area of 168 million hectares\footnote{A. BOLEN and S. OZINGA, “Improving forest governance. A Comparison of FLEGT VPAs and their Impact”, \textit{FERN}, 2013, p. 7.}. Indonesia now has a licensing system in place and operating since 2016 and Ghana hopes to have such a system in place in 2019\footnote{A. HOARE, personal e-mail communication, April 17\textsuperscript{th}, 2018; Union Européenne Action Extérieure, \textit{Indonesia begins issuing FLEGT licensing scheme for verified legal timber products}, 2016, https://eeas.europa.eu/headquarters/headquarters-homepage/14827/indonesia-begins-issuing-flegt-licensing-scheme-verified-legal-timber-products_fr (last visited on April 19\textsuperscript{th}, 2018).}. Nine other countries are currently negotiating VPAs with Europe: Côte d’Ivoire, the DRC, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam\footnote{“FLEGT and VPA countries”, \textit{op. cit.}}. However, out of these nine countries, four are reputed by international monitors as being very corrupt (namely the DRC, Gabon, Côte d’Ivoire and Guyana). This will make it challenging to reach effective VPAs between them and Europe.\footnote{Transparency International, \textit{Corruption Perceptions Index} 2017, 2018.}
C. European Union Timber Regulation

A second important step was taken in 2010 to increase the effectiveness of the EU FLEGT Action Plan: the adoption of the EUTR, which came into effect in March 2013. Contrary to VPAs which focus on exporting countries of timber products (supply side) and which are bilateral instruments, the EUTR is directed towards the European importing countries (demand side) and is a unilateral instrument. Moreover, the EUTR applies to both timber produced within the EU and timber imported into the EU. The objective, however, stays the same: addressing the problem of illegal logging by trying to ensure that no illegal timber enters or is sold in the EU market.

More specifically, Article 1 of the Regulation states that “This Regulation lays down the obligations of operators who place timber and timber products on the internal market for the first time, as well as the obligations of traders”. Understanding the three terms outlined in this first article is necessary to correctly implement the EUTR: placing on the market, operator and trader. Two additional concepts must also be defined: timber and illegally harvested. With these definitions, we will be able to further determine the obligations of operators, traders and member states as laid down in the EUTR.

1. Definitions

a) Placing on the market

“Placing on the market’ means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge. It also includes the supply by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. The supply on the internal market of timber products derived


104 F. GAROT, op. cit., p. 41; R. JONSSON et al., op. cit., p. 7.
105 J. BUCKRELL and A. HOARE, op. cit., p. 3.
106 F. MAUL and B. VAN HELVOIRT, op. cit., p. 4.
from timber or timber products already placed on the internal market shall not constitute ‘placing on the market’¹⁰⁷.

b) Operator

“Operator’ means any natural or legal person that places timber or timber products on the market”¹⁰⁸.

c) Trader

“‘Trader’ means any natural or legal person who, in the course of a commercial activity, sells or buys on the internal market timber or timber products already placed on the internal market”¹⁰⁹.

d) Timber and timber products

“‘Timber and timber products’ means the timber and timber products set out in the Annex, with the exception of timber products or components of such products manufactured from timber or timber products that have completed their lifecycle and would otherwise be disposed of as waste, as defined in Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste”¹¹⁰.

e) Illegally harvested

“‘Illegally harvested’ means harvested in contravention of the applicable legislation in the country of harvest”¹¹¹.

2. Obligations of operators and traders

European operators, on the one hand, have three obligations which are set out in Article 4 of the EUTR. First, operators must not place illegally harvested timber on the EU market, as they will be held accountable for the illegal products they bring into the EU¹¹². Second, operators are required to exercise due diligence before placing timber products on the market. If possible,

¹⁰⁷ Article 2 (b), EUTR.
¹⁰⁸ Article 2 (c), EUTR.
¹⁰⁹ Article 2 (d), EUTR.
¹¹⁰ Article 2 (a), EUTR.
¹¹¹ Article 2 (g), EUTR.
¹¹² R. JONSSON et al., op. cit., p. 7.
due diligence must be carried out before concluding the contract with the supplier\textsuperscript{113}. Third, operators must regularly evaluate the due diligence system it uses. Good practice suggests that this evaluation should be conducted annually\textsuperscript{114}. This does not apply to operators who make use of a due diligence system established by a monitoring organization, which is an organization recognized by the European Commission that establishes a due diligence system and verifies that operators using it do so in a proper way\textsuperscript{115}.

European traders, on the other hand, have two obligations, which are set out in Article 5 of the EUTR: they must be able to identify the operators and traders who have supplied the timber to them and keep this information for at least five years.

The most important element in these obligations is the due diligence requirement, which is at the heart of the EUTR traceability priority. Due diligence is a risk assessment exercise and its aim, in the context of the EUTR, is to minimize the risk of placing products containing illegally harvested timber on the EU market\textsuperscript{116}. This means that operators must have access to information about the type of product they are bringing to the EU market, the country of harvest, the quantity of the said product, the supplier, the trader and about the documents indicating compliance of the timber products with the applicable legislation\textsuperscript{117}. Based on this information and further criteria listed in the Regulation\textsuperscript{118}, operators can assess the risk of having illegal timber in their supply chain\textsuperscript{119}. The last step to follow for the operators is when the assessment shows that there is a greater than negligible risk\textsuperscript{120}. In that case, operators must mitigate that risk by requiring additional information from the supplier and requiring verification from third parties\textsuperscript{121}.

\textsuperscript{113} D. DE ROUVRE and E. UNWIN, “The EU Timber Regulation due diligence obligation: An appropriate tool”, \textit{Client Earth}, 2015, p. 2.
\textsuperscript{114} European Commission, \textit{Guidance Document for the EU Timber Regulation}, 2016, p. 18.
\textsuperscript{115} F. MAUL and B. VAN HELVOIRT, \textit{op. cit.}, p. 7; Article 8, §1 (b) and §3, EUTR.
\textsuperscript{116} J. BRUSSELAERS and J. BUIJSSE, \textit{The Due diligence system in the EU’s Timber Regulation: non-tariff trade barrier or leverage effect?}, Ghent University, 2016, p. 1; European Forest Institute, \textit{All you need to know about the US Lacey Act, the EU Timber Regulation and the Australian Illegal Logging Prohibition Act 2012, 2013, p. 10}.
\textsuperscript{117} Article 6, §1 (a) EUTR.
\textsuperscript{118} Article 6, §1 (b) EUTR; “(...) prevalence of illegal harvesting of specific tree species; prevalence of illegal harvesting or practices in the country of harvest and/or sub-national region where the timber was harvested, including consideration of the prevalence of armed conflict; sanctions imposed by the UN Security Council or the Council of the European Union on timber imports or exports; complexity of the supply chain of timber and timber products”.
\textsuperscript{119} J. BRUSSELAERS and J. BUIJSSE, \textit{op. cit.}, p. 3; Article 6, §1 (c) EUTR.
\textsuperscript{120} D. DE ROUVRE and E. UNWIN, \textit{op. cit.}, p. 2.
\textsuperscript{121} \textit{Ibidem}. 

Timber imported from countries which have concluded a VPA with the EU (and therefore have a FLEGT license), or timber species which comply with CITES, are considered as risk free and legally harvested, meaning that the due diligence requirement is not imposed upon the operators.\textsuperscript{122}

3. Obligations of member states

Member states have three obligations under the EUTR. The first obligation is that they must designate one or more competent authority(ies). Authorities “(...) shall cooperate with each other, with the administrative authorities of third countries and with the Commission in order to ensure compliance with this Regulation”\textsuperscript{123}. The competent authorities shall also verify if operators comply with their obligations and if monitoring organizations fulfil their obligations\textsuperscript{124}. The second obligation that rests upon member states is that they must submit, every two years, a report to the Commission on the application of the EUTR\textsuperscript{125}. Finally, the third obligation is that “the Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented”\textsuperscript{126}. These penalties, as for penalties provided in VPAs, must be “effective, proportionate and dissuasive”\textsuperscript{127}.

Section 2. Member State enforcement cases

Since the entry into force of the EUTR, national competent authorities (designated by each member state) have imposed sanctions upon operators who have breached their obligations. The 2016 Swedish Almtra Nordic case, which will be discussed below, set an important precedent and led to a wave of enforcement cases all over Europe. This was especially the case in the Netherlands and the United Kingdom (UK), which were the first countries after Sweden

\textsuperscript{122} D. BRACK, “Controlling Illegal Logging: Consumer-Country Measures”, \textit{Chatham House}, 2010, p. 7; European Commission, \textit{Guidance Document...}, \textit{op. cit.}, p. 21; R. JONSSON et al., \textit{op. cit.}, p. 11; Article 3, EUTR.
\textsuperscript{123} Article 12, §1 EUTR.
\textsuperscript{124} D. DE ROUVRE and E. UNWIN “L’utilisation des documents officiels dans le cadre de l’obligation de diligence raisonnée du Règlement bois de l’UE”, \textit{Client Earth}, 2015, p. 1 ; E. UNWIN, “The interpretation and assessment of Due Diligence in the EU Timber Regulation, drawing links from other sectors”, \textit{Client Earth}, 2015, p. 1 ; Article 10, §1 EUTR.
\textsuperscript{125} A. FISHMAN and K. OBITZINSKI, \textit{op. cit.}, p. 262; Article 20, §1 EUTR
\textsuperscript{126} Article 19, §1 EUTR.
\textsuperscript{127} J. BUCKRELL and A. HOARE, \textit{op. cit.}, p. 8; Client Earth, \textit{Penalties under the EU Timber Regulation and VPAs}, 2012, p. 1; Article 19, §2 EUTR.
to impose fines on their national companies for not complying with the EUTR. In this section, we will focus on Sweden and the Netherlands.

A. Sweden

Almtra Nordic is a company that imported timber from Myanmar and was accused by the Swedish Forest Agency (Skogsstyrelsen) of placing timber on the Swedish market in violation of the due diligence requirement of the EUTR. The Swedish Forest Agency, which is the competent Swedish authority in charge of enforcing the EUTR, concluded that the company was unable to demonstrate which logging company had harvested the timber, what was the origin of the wood and whether Myanmar’s forest legislation had been complied with.

This decision was confirmed by the Jönköping Administrative Court in October 2016. It ruled that “(…) a certificate issued by the Myanmar Forest Products Merchants’ Federation (MFPMF) did not provide adequate proof that a shipment of teak imported into Sweden had been legally harvested”. Almtra Nordic was therefore required to pay a 17,000 Swedish kronor fine and received an injunction preventing it from selling timber imported from Myanmar on the Swedish market until it could assess the risk of illegality. The Court also highlighted in its judgement acceptable risk mitigation strategies that companies could use to determine whether timber has been legally logged, such as: “(…) the use of field inspection by third parties, independent audits, and appropriate scientific techniques for tracing the origin of timber (…)”.

Peter Cooper, an Environmental Investigation Agency (EIA) forest campaigner, stated that this “(…) ruling means no Burmese teak can be legally placed on the EU market until the Myanmar

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131 Förvaltningsrätten Jönköping (Administrative court Jönköping), 5 October 2016, case nr. 2095-16, Almträ Nordic AB v Skogsstyrelsen.
132 J. SAUNDERS, op. cit.
133 Ibidem.
134 Ibidem.
Timber Enterprise addresses illegality and transparency within the supply chain. He further stressed that the EIA expects to see EUTR rulings equivalent to this one in the other cases it has submitted.

B. The Netherlands

In the Netherlands, two companies were fined by the Dutch competent authority, the Food and Consumer Product Safety Authority (FCPSA), for placing illegally harvested wood on the Dutch market. Moreover, the FCPSA itself was accused of failing to enforce the EUTR.

1. Fibois BV Purmerend

The first company to be fined in the Netherlands was Fibois BV Purmerend, a wholesale timber company. It was accused of introducing a shipment of timber from Cameroon on the Dutch market in a way that did not comply with the EUTR standards. The documentation of the company was not in order and could therefore not comply with the due diligence requirement set out in the EUTR. The outcome was that the Dutch competent authority delivered a non-compliance penalty to Fibois BV Purmerend, that had to pay €1,800 per cubic meter of timber from Cameroon placed on the European market until it met with the EUTR due diligence requirement. The authority based its reasoning on the fact that there was a high level of corruption in Cameroon and that the political situation in the Congo Basin was unstable, meaning that there was a higher chance that the timber was not legally harvested. Indeed, this country was ranked as the world’s 25th most corrupt country according to Transparency International.

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135 Environmental Investigation Agency, Sweden prosecutes..., op. cit.
136 Ibidem.
139 D. DOUMA, op. cit.
International\(^{141}\). In such circumstances, the FCPSA considers that importers must exercise greater caution\(^{142}\).

The importer appealed against the decision, but the appeal was rejected on the 24\(^{th}\) of May, 2017, by the District Court in Noord-Holland\(^{143}\). The court stressed that the information gathered by the importing companies must “(…) cover all the steps in the supply chain, from harvest to placing on the EU market”\(^{144}\). In this case, the Court concluded that the importer had not collected sufficient verifiable information about the timber it imported: the origin of the shipment of timber was not identified and the risk inventory did not meet the standards of the EUTR\(^{145}\). Therefore, because the information gathered was insufficient, it was impossible for Fibois BV Purmerend to assess the risk of illegal timber in the supply chain.

2. Boogaerdt Hout

Fibois BV Purmerend is not the only timber importer that has been accused of violating the EUTR in the Netherlands. Boogaerdt Hout, was fined by the FCPSA for placing illegally sourced timber from Myanmar on the European market\(^{146}\). Boogaerdt Hout was given two months to clear its supply chain of the illegal timber, or else it would be fined €23,000 per cubic meter of illegal wood\(^{147}\). Two other companies were also accused of importing illegal timber to the Dutch market but have not yet been prosecuted: Gold Teak Holdings and World Wood\(^{148}\).

Evidence of the violation was reported by the EIA, which led a two-month investigation and concluded that it was impossible to comply with the EUTR due diligence requirement at the current time when placing Myanmar wood on the EU market\(^{149}\). For the same reason, the EIA submitted complaints against six companies in four other EU countries: Crown Teak in

\(^{141}\) Transparency International, op. cit.

\(^{142}\) Ibidem.


\(^{145}\) D. DOUMA, op. cit.


\(^{147}\) Ibidem.


\(^{149}\) Ibidem.
Belgium; Teak Solutions in Germany; Antonini Legnami, Basso Legnami and Bellotti Spa in Italy; and Keflico in Denmark. The concerned illegal wood was a tropical hardwood used to build boats and make furniture. Pursuant to this complaint, Danish authorities placed injunctions on Keflico and on all Danish operators placing Burmese timber on the Danish market. In relation to this, Peter Cooper stated that “with Denmark setting a clear precedent on a case submitted by EIA, we now expect authorities in Italy, the Netherlands, Belgium, Spain and the UK to rapidly resolve the remaining 12 cases submitted by EIA.” However, one year after this statement, these cases are still unresolved.

The EIA based its arguments, inter alia, on the report of a EUTR monitoring organization (NEPcon), which warned states that “even timber with the legally required hammer marks and documents at the point of export will be subject to considerable risk that the original logs have been harvested or transported in ways that are not in compliance with the Myanmar Forest Law or the EUTR.” There is, moreover, a “(…) broad consensus across a wide range of government agencies, trade federations, EUTR Monitoring Organizations, NGOs and industry experts that timber from Myanmar poses a significant risk of illegality.”

3. Food and Consumer Product Safety Authority
Greenpeace Netherlands requested the FCPSA to investigate and, if needed, prosecute eleven companies importing timber coming from the Brazilian Amazon region, as the risk of importing illegal harvested timber from that region is high. In the end, the investigation showed that a number of these Dutch companies were infringing the EU due diligence system. The FCPSA decided, however, not to prosecute these companies, and only issued written warnings to them, giving them a chance to take the necessary measures to comply with the EUTR. The reason
for this decision was that the FCPSA considered that the EUTR was a new Regulation and that businesses needed time to take measures to comply with it\textsuperscript{158}.

Greenpeace appealed this decision and the case went before the Amsterdam District Court. The Court found that the measures taken by the FCPSA were in violation of articles 4(2)-(3) and 5 of the EUTR\textsuperscript{159}. Furthermore, the Court recalled that “the EUTR was adopted on 20 October 2010 and entered into force on 3 March 2013, allowing market participants a considerable amount of time to prepare for meeting the Regulation’s requirements”\textsuperscript{160}. Finally, the Court set out that authorities may only decide not to enforce the law against companies in special circumstances, which is not the case here\textsuperscript{161}. Consequently, by not prosecuting the companies which were violating the EUTR, the FCPSA took an unjustified decision. The Court therefore ordered the FCPSA to take this judgment into account and reach a new decision within six weeks\textsuperscript{162}.

Section 3. Assessment of the European Framework

This last section assesses the VPAs and the EUTR.

A. Assessment of Voluntary Partnership Agreements

VPAs have had a positive impact in partner producer countries. They have enabled a greater participation in the decision process of domestic civil society organizations and of a wide range


\textsuperscript{159} Stichting Greenpeace Nederland \textit{v. de staatssecretaris van Economische Zaken}, Rechtbank Amsterdam, July 4, 2017, AMS 15/5067, ECLI:NL:RBAMS:2017:4926, §10.8; Article 4 (2). EUTR: “Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures, hereinafter referred to as a ‘due diligence system’, as set out in Article 6”; Article 4 (3) EUTR: “Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation referred to in Article 8. Existing supervision systems under national legislation and any voluntary chain of custody mechanism which fulfil the requirements of this Regulation may be used as a basis for the due diligence system”; Article 5 EUTR: “Traders shall, throughout the supply chain, be able to identify:

(a) the operators or the traders who have supplied the timber and timber products; and

(b) where applicable, the traders to whom they have supplied timber and timber products. Traders shall keep the information referred to in the first paragraph for at least five years and shall provide that information to competent authorities if they so request”.

\textsuperscript{160} D. DOUMA, \textit{op. cit.; ibidem}, §10.9.

\textsuperscript{161} \textit{Ibidem}, §10.12.

\textsuperscript{162} \textit{Ibidem}, §11.
of stakeholders. This was the case in Cameroon, for instance, where prior to the signature of its VPA with Europe, the government did not recognize civil society having rights to express concern about the management of forest resources. Major steps towards improving legal reforms have also been taken in producer countries and mechanisms for reviewing and monitoring national timber legality have been further developed. VPAs also enhance a country’s international reputation as being willing to address illegality and environmental sustainability, which improves its access to the EU market.

However, VPAs have not been welcomed equally in all regions. Latin America, where little timber trade with Europe occurs, was hostile to the FLEGT Action Plan, and countered with its own regional plan: Aplicação da Legislação Florestal na Amazônia. Brazil, for instance, argued that “(...) the primary threat to the forest in the country is not necessarily illegal logging but rather land conversion, and that other measures are needed to address this form of deforestation.” As mentioned, VPAs are voluntary, and countries which do not wish to enter into them, such as many South American states, do not face sanctions. This might make it more difficult for countries which have negotiated VPAs to compete with those who did not, even if, in theory, VPA countries choose to enter negotiations because they see a trade benefit. This is where the EUTR and the Lacey Act, as we will see in the next chapter, come into play, as they should make it harder for those countries with high levels of illegal logging to sell illegal wood to the European and US markets.

Moreover, even if the negotiation process of VPAs involves a wider array of people, local communities are not yet properly involved or lack information. It is indeed a huge task to find effective ways to consult with the large number of stakeholders in remote parts of a country. Involving local communities also depends on the willingness of the partner country not only to include elements on timber legality in the agreement, but to also touch upon socioeconomic objectives. In Ghana, for instance, there used to be a lack of formal mechanisms for long-term civil society participation and forest communities were barely

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163 A. Perram, op. cit., p. 20.
164 European Court of Auditors, Special Report. EU support to timber-producing countries under the FLEGT action plan, 2015, p. 19.
165 R. Jonsson et al., op. cit., p. 23.
166 A. Fishman and K. Obidzinski, op. cit., p. 260; C. Overdevest and J. Zeitlin, op. cit., p. 27.
167 D. Brown et al., op. cit., p. 11.
168 A. Hoare, personal e-mail communication, April 17th, 2018.
169 R. Jonsson et al., op. cit., p. 23.
170 D. Brown et al., op. cit., p. 11.
represented, but after concerted efforts to engage with local communities, this is no longer the case.171 Furthermore, in Indonesia, there is an extensive civil society participation, but stakeholders (especially small-scale operators) have a limited understanding of what exactly are VPAs.172

VPAs tend to create market barriers for small-scale producers, leading them to stay outside the formal sector, because of the technical verification requirements and the costs it entails which apply uniformly to all producers, whether large or small173. For example, to comply with the Indonesian VPA, all companies must pay between $6,120 and $10,200 and respect a complex administrative process174. In response, Indonesia has developed a simplified procedure for disadvantaged producers175.

Despite these shortcomings, the problem of illegally harvested timber has evolved in a positive way since 2003: it is no longer one of the main causes of deforestation in a larger amount of countries (although this is also because of the increase in importance of other drivers of deforestation such as land conversion)176. This evolution is however paired with an important side effect: the decrease in the demand of tropical wood and the correlative rise in the demand of timber from temperate regions and alternative materials which could diminish demand for tropical hardwoods, thereby handicapping economies in tropical timber producing countries177.

### B. Assessment of the European Union Timber Regulation

The aim of the EUTR is to create a level playing field by setting equal requirements for legality on both domestically harvested timber and imported timber and timber products178. It also introduces an additional control layer applicable to all operators across the EU179. Without the EUTR, operators who apply due diligence requirements would be disadvantaged compared to

171 D. BROWN et al., op. cit., p. 12.
173 Ibidem; R. JONSSON et al., op. cit., p. 13.
175 Ibidem.
179 Ibidem.
those who do not, as the latter would tend to buy the cheapest wood entering the EU market, which is often the wood which has been illegally harvested.

However, at first, many member states, forest industries and private forest owners were against the adoption of this Regulation\(^{180}\). One of the reasons for this was that they considered that the FLEGT Action Plan was not yet correctly applied, and that there was therefore no need to impose extra administrative requirements upon them\(^{181}\). They also rejected the argument that illegal logging was taking place in Europe and, moreover, that the EUTR could be a solution to global illegal logging\(^{182}\). Some actors also argue that the EUTR is advantageous for products coming from low-risk countries (countries in the northern hemisphere), but disadvantageous for exporters in high-risk developing countries\(^{183}\). The EU institutions themselves were divided on the subject: the Parliament was supportive of the adoption of the EUTR and of the strict prohibition of illegal timber on the EU market; the Council, governed by the opposing member states, was against it because it perceived the adoption of the EUTR as a way for the Parliament and the Commission to expand their decision-making powers; and the Commission favored a less severe approach, supporting a soft-law approach, such as industry self-regulation, instead of strict prohibition\(^{184}\).

Once the EUTR was adopted, further issues arose, one of them being that the way in which the EUTR is implemented, understood and given political priority to varies from one member state to another given the limited guidance offered by the European Commission\(^{185}\). The UK, for instance, had already taken measures against illegal timber trade before the adoption of the EUTR, making it easier to implement it and adopt domestic legislations on the matter\(^{186}\). However, in other countries, the EUTR represented a new element in national legislation. In Italy, for instance, the Regulation was adopted with a two-year delay\(^{187}\).

The potential consequences of an uneven implementation are that companies relocate to states where penalties are lower and where enforcement is weaker, leading to a run to the bottom,


\(^{181}\) Ibidem, p. 74.


\(^{184}\) M. SOTIROT, M. STELTER, G. WINKEL, *op. cit.*, p. 75.

\(^{185}\) A. HOARE, *op. cit.*, p. 43.

\(^{186}\) R. JONSSON et al., *op. cit.*, pp. 23-24.

unfair competition between member states and to inconsistent market requirement for producer countries\textsuperscript{188}. To resolve this, the Commission has launched, \textit{inter alia}, infringement procedures in 2015 against Greece, Hungary, Romania and Spain for failure to implement domestic legislation\textsuperscript{189}. These countries are slow in implementing the EUTR because they have other policy priorities or because they have a lack of political influence and/or capacities\textsuperscript{190}.

The available resources and the role of the competent authority of each member state can also differ, as it can be strong and carry out regular controls on companies, or it can be weak and not have much presence\textsuperscript{191}. In some member states, no additional financial resources have been allocated for the enforcement of the EUTR\textsuperscript{192}. In the EUTR News, we can read that “in October 2017, the Commission launched legal action against Belgium for not enforcing the EUTR properly, arguing that it has not carried out enough EUTR checks on wood placed on the Belgian market. Between 2013 and March 2017, Belgium had carried out only 26 EUTR checks. If Belgium does not take action, the case could go to the European Court of Justice where Belgium could face financial penalties”\textsuperscript{193}.

In the private sector, businesses also have compliance costs, which depend on several factors, such as “(…) the existence of previous responsible sourcing policies, the type and complexity of traded products, the number and geographic location of suppliers and, finally, the complexity of the supply chains”\textsuperscript{194}. Moreover, as for the implementation of VPAs in producer countries, smaller companies in importing countries consider the implementation of the EUTR challenging. This is due to the difficulty to understand the technical requirements of the due diligence system, the lack of knowledge and experience of the staff to exercise due diligence, and the limited financial resources of small companies to update their control systems\textsuperscript{195}.

\textsuperscript{188} S. LEIPOLD, “How to move companies to source responsibly? German implementation of the European Timber Regulation between persuasion and coercion”, Forest Policy and Economics, 2017, p. 48; S. LEIPOLD et al., \textit{op. cit.}, p. 300.


\textsuperscript{190} C. MCDERMOTT and M. SOTIROF, “A political economy of the European Union’s timber regulation: Which member states would, should or could support and implement EU rules on the import of illegal wood?”, Forest Policy and Economics, 2018, p. 5.

\textsuperscript{191} European Commission, \textit{Report from the Commission…}, \textit{op. cit.}, p. 7; \textit{ibidem}.

\textsuperscript{192} C. MCDERMOTT and M. SOTIROF, \textit{ibidem}.


\textsuperscript{194} C. MCDERMOTT and M. SOTIROF, \textit{op. cit}, p. 5

\textsuperscript{195} European Commission, \textit{Report from the Commission…}, \textit{op. cit.}, pp. 7-8.
Countries such as Germany, the UK and the Netherlands have developed training programs aimed at staffs of small businesses to help them comply\textsuperscript{196}.

Moreover, the EUTR itself has shortcomings. First, as seen above, the EUTR imposes most of the obligations on operators, not traders who have only limited obligations. This means that timber placed on the European market contrary to the due diligence requirement cannot be taken off by the competent authorities once it is in the hands of traders\textsuperscript{197}. Second, the EUTR applies to the species of timber listed in its Annex, which is limited and does not include many other types of wood and wood products such as musical instruments, wooden coffins and wooden chairs\textsuperscript{198}. Printed books, newspapers, pictures and other products of the printing industry, manuscripts, typescripts and plans are not included in the EUTR either\textsuperscript{199}. However, there currently is a public consultation on the product scope of the EUTR being run by the European Commission until the 24\textsuperscript{th} of April 2018\textsuperscript{200}. The Commission stated that “operators, traders, affected industry and/or trade associations, EU Member States' EUTR Competent Authorities, Monitoring Organisations under the EUTR, civil society organisations, non-EU timber-producing countries and the general public are invited to provide their views and evidence on possible changes to the EUTR product scope”\textsuperscript{201}.

Despite its flaws, the EUTR has stimulated increased awareness among operators and consumers about illegal logging. The Regulation has been introduced in the Agreement on the European Economic Area and is therefore implemented by Norway, Iceland and Lichtenstein\textsuperscript{202}. It has also “(…) created an incentive for producer countries to develop systems to verify and demonstrate compliance with the legality requirements, and also encouraged some third-countries to conclude FLEGT VPAs with the EU. Furthermore, it has, together with the US Lacey Act, encouraged other consumer countries to expand their national legislation with similar legislative acts (Australia, Switzerland) or start considering measures with similar objectives (China, Japan, Korea)”\textsuperscript{203}.

\textsuperscript{196} European Commission, Evaluation of the EU FLEGT Action Plan..., op. cit., p. 56.
\textsuperscript{197} Environmental Investigation Agency, Forests. A Tale of Two Laws..., op. cit., p. 10.
\textsuperscript{198} European Commission, Report from the Commission..., op. cit., p. 10; S. LEIPOLD, op. cit., p. 46.
\textsuperscript{199} European Commission, Report from the Commission..., ibidem.
\textsuperscript{201} Ibidem.
\textsuperscript{202} European Commission, Report from the Commission..., op. cit., p. 10.
\textsuperscript{203} Ibidem.
All in all, the EUTR is contributing to a decrease of imports on the EU market of illegally harvested timber. However, it is not happening evenly in all member states, some of which are far in the process of implementation of the Regulation, whereas others still lag behind. Its impact also varies depending on the exporting country (low-risk/high-risk) and the exporting company (big/small). As mentioned, measures are already being taken either by the Commission or by member states themselves to lower these discrepancies and should continue to be taken to ensure a full and fair implementation of the EUTR.
CHAPTER III. THE UNITED STATES FRAMEWORK

This third chapter follows the same structure as the second one: it starts by describing the US Lacey Act (Section 1); contextualizes it by looking at cases where US companies were sanctioned for noncompliance (Section 2) and proceeds to an overall assessment of the Lacey Act (Section 3).

Section 1. Lacey Act

The Lacey Act has evolved over time and contains provisions which are relevant for our study about the acts it prohibits, the products it covers, the due care standard and the sanctions imposed in case of violation. We will also point out, throughout this first section, the differences between the Lacey Act and the EUTR.

A. Evolution and prohibited acts

The Lacey Act was adopted in 1900 and gradually broadened its scope over the years. At first, its aim was to preserve wild birds and endangered animals by making it a crime to hunt them in one state and selling them in another state\(^{204}\). Then, in 1935, the provisions of the Lacey Act were expanded to also apply to international trade\(^{205}\). Further amendments were made to the Act in 1947, 1969, 1981, 1988 and, finally, in 2008. This last amendment was brought by the Food, Conservation, and Energy Act which was passed by the US Congress on the 18\(^{th}\) of June 2008. It extended the scope of the Lacey Act to plants and trees\(^{206}\).

This led to the Lacey Act being the first piece of legislation banning trade of illegally sourced wood products, because since 2008, in the US, it is unlawful for “any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law, that protects plants or that regulates (I) the theft of plants; (II) the taking of plants from a park, forest reserve, or other officially protected area; (III) the taking of plants from an officially designated area; or (IV) the taking of plants without, or contrary to, required authorization”\(^{207}\).

\(^{205}\) W. SHELLY, ibidem, p. 551.
\(^{206}\) M. FRANK et al., op. cit., p. 4; S. WAITE, op. cit., p. 333.
\(^{207}\) §3372 (a) (1) of the Lacey Act.
Therefore, like the EUTR, the amended Lacey Act applies to products which are, according to the laws of the exporting country, illegally harvested and brought to the US. This means that if the wood is illegally harvested, it will be prohibited from being traded in the US. However, contrary to the EUTR, these requirements do not only apply to the person who places the timber on the EU market for the first time (the operator), but to “any person”, no matter their position in the supply chain, as everybody is equally liable.

**B. Product covered**

The Act defines the term “plant” as “any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands”\(^\text{208}\). Some species are expressly excluded from the term “plant”: “(A) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof); (B) a scientific specimen of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that is to be used only for laboratory or field research; and (C) any plant that is to remain planted or to be planted or replanted”\(^\text{209}\). However, these exclusions do not apply if the plant is listed “(A) in an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (…); (B) as an endangered or threatened species under the Endangered Species Act of 1973 (…); or (C) pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction”\(^\text{210}\).

Here, contrary to the EUTR, the scope of the Lacey Act is wider. Where the EUTR does not apply to wood and wood products not defined in its Annex, the Lacey Act covers every plant besides the three exceptions listed above.

**C. Due care standard**

The Lacey Act was designed to adapt to the needs of each individual business. It requires US timber importers not to buy illegally harvested timber, but it does not impose a precise strategy to reach that goal, it does not stipulate precise guidelines\(^\text{211}\).

\(^{208}\) §3371 (f) of the Lacey Act.
\(^{209}\) §3371 (f) of the Lacey Act.
\(^{210}\) §3371 (f) of the Lacey Act.
\(^{211}\) European Forest Institute, *All you need to know about the US Lacey Act…, op. cit.*, p. 5.
The only requirement to ensure compliance with the Lacey Act is that when a plant enters or exits the US, a declaration must be completed by the importer/exporter. It must contain “(A) the scientific name of any plant (...); (B) a description of (i) the value of the importation; and (ii) the quantity, including the unit of measure, of the plant; and (C) the name of the country from which the plant was taken”212.

To make sure the imported wood is legal, the buyer will have to exercise due care, which is about giving the importing process the amount of attention that a reasonable person would in the same circumstance213. This means that the buyer is responsible for knowing all the relevant information concerning the sourcing process of the wood when bringing it in the US by asking questions to the relevant persons214. Importers must also be aware and comply with the applicable law of the country of origin215.

In the US, a subjective standard has therefore been set to determine whether the Lacey Act is being respected. It will be assessed on a case by case basis, by taking into account the context of the transaction, the knowledge of the buyer and his experience216. Several elements will be considered when undertaking such an assessment: the price at which the timber was sold; the validity and credibility of the paperwork; the knowledge of the product’s origin...217. In the EU, as we have seen, a different approach has been adopted. Indeed, the due diligence system outlines precise measures operators must take to comply with the legality requirements. In the US, it is by providing detailed recommendations to companies that have been sanctioned under the Lacey Act (see Gibson and Lumber Liquidators cases infra) that the due care standard has become less subjective218. Therefore, these recommendations, as they are made publicly available, provide a reference for what best practice is likely to entail219.

212 §3372 (f) (1) of the Lacey Act.
213 M. FRANK et al., op. cit., p. 6.
215 M. FRANK et al., op. cit., p. 6.
216 S. WAITE, op. cit., p. 335.
218 A. HOARE, personal e-mail communication, April 17th, 2018.
219 Ibidem.
**D. Sanctions**

Violating the Lacey Act can result in civil or criminal charges, as well as in the forfeiture of the product (see Appendix I of this paper). The imposed penalties will depend on whether the timber purchaser knowingly or unknowingly violated the Lacey Act and the authorities responsible for investigating these cases are the Secretary of Agriculture and the Secretary of the Interior\(^{220}\).

A buyer will be subject to civil penalties, which can be up to $10,000, if, in the exercise of due care, they should have known that they were engaging in a conduct prohibited by the Lacey Act\(^ {221}\). The same penalties will be applied to a person who knowingly commits a false labeling offense or knowingly violates the declaration requirements\(^ {222}\).

Criminal penalties range from misdemeanor to felony charges. Misdemeanor charges, on the one hand, are imposed to “(…) any person who knowingly engages in conduct prohibited by the Lacey Act and should have known in the exercise of due care that the plant was illegal”\(^ {223}\). People subject to misdemeanor charges will be “(…) fined not more than $10,000, or imprisoned for not more than one year, or both”\(^ {224}\). Felony charges, on the other hand, occur when buyers knowingly import or export wood which does not comply with the Lacey Act, or when they knowingly engage “(…) in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, (…) plants with a market value in excess of $350”\(^ {225}\). Here, people subject to felony charges will be “(…) fined not more than $20,000, or imprisoned for not more than five years, or both”\(^ {226}\).

Finally, the illegally obtained wood “(…) shall be subject to forfeiture to the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution”\(^ {227}\).


\(^{221}\) §3373 (a) (1) of the Lacey Act.

\(^{222}\) S. EBERHARDT, *op. cit.*, p. 404.

\(^{223}\) *Ibidem*, p. 405; §3373 (d) (2) of the Lacey Act.

\(^{224}\) §3373 (d) (2) of the Lacey Act.

\(^{225}\) §3373 (d) (1) of the Lacey Act.

\(^{226}\) §3373 (d) (1) of the Lacey Act.

\(^{227}\) §3374 (a) (1) of the Lacey Act.
These provisions differ from the system put in place by the EUTR, where it is up to individual member states to set their own sanctions, provided that they are effective, proportionate and dissuasive\textsuperscript{228}.

Section 2. United States enforcement cases

As soon as the amended 2008 Lacey Act came into force, the US government showed its commitment to stop the trafficking of illegally harvested timber. The Gibson Guitar and Lumber Liquidator cases are examples of this commitment.

A. Gibson Guitar cases

Gibson Guitar Corporation, which was founded in 1890, is one of the main musical instrument manufactures in the world and has long been involved in environmental activism by allying itself with environmental groups such as Greenpeace\textsuperscript{229}. However, in 2009 and again in 2011, Gibson Guitar Corporation’s headquarters in Nashville and its manufacturing facility were raided\textsuperscript{230}.

The first raid occurred in connection to Madagascan ebony to be used by the company on guitar fingerboards. The wood, which had an estimated value of $70,000, was seized by federal officials\textsuperscript{231}. The US argued that the ebony was an unfinished wood product (so called sawn timber), whose export is prohibited by Madagascar law, whereas Gibson Guitar claimed that it was a finished wood, approved by Madagascar\textsuperscript{232}. The company requested the return of the ebony, which was temporary denied as the case was under a potential criminal investigation.

In the meantime, Gibson Guitar had stopped importing Madagascan ebony, but a second raid still occurred. Here, Indian ebony and rosewood were confiscated, along with computer hard drives, documents and guitars\textsuperscript{233}. The issue was the same as in 2009 and the US and Gibson

\textsuperscript{228} Article 19, §2 EUTR.
\textsuperscript{230} \textit{Ibidem}, pp. 556-557.
\textsuperscript{231} \textit{Ibidem}, p. 557.
\textsuperscript{232} J. CROOK, “Contemporary practice of the United States relating to international law”, \textit{The American Journal of International law}, 2012, p. 858; J. HAGERTY and K. MAHER, \textit{op. cit.}
\textsuperscript{233} W. SHELLEY, \textit{op. cit.}, p. 557.
Guitar used the same arguments, the only difference being that Indian law was concerned, not Madagascan law\textsuperscript{234}.

The outcome of these two raids led to a criminal enforcement agreement between the Justice Department and Gibson Guitar in which it was made clear that the latter had violated the Lacey Act\textsuperscript{235}. It was the first time that measures were taken against a company violating the amended 2008 Lacey Act. The agreement stated that the company did not exercise due care and was made aware of the illegality of the wood but continued importing the Madagascan and Indian ebony and rosewood\textsuperscript{236}. Gibson Guitar was therefore required to pay a penalty of $300,000, make a payment of $50,000 to the National Fish and Wildlife Foundation, implement a compliance program within its company, and, finally, withdraw its claims to get the seized Madagascan ebony back\textsuperscript{237}. Provided that the company fully carried out its obligations and committed no future violations of the Lacey Act, it would face no criminal charges\textsuperscript{238}.

**B. Lumber Liquidator case**

Lumber Liquidator, a hardwood floor retailer, was the first US corporation to face criminal charges due to a violation of the amended Lacey Act\textsuperscript{239}. It started with a multi-year investigation in Russia and China conducted by the EIA. This investigation showed that illegally harvested timber was being transported from Russian forests to China to then be distributed to companies all over the world\textsuperscript{240}. The illegal cutting of oak in these forests is of particular concern because they are the home of the last remaining Siberian tigers and Amur leopards in the world\textsuperscript{241}.

\textsuperscript{234} W. SHELLY, \textit{op. cit.}, p. 557.
\textsuperscript{237} J. CROOK, \textit{op. cit.}, p. 557; ibidem.
\textsuperscript{238} The United States Department of Justice, \textit{Gibson Guitar Corp.}, \textit{op. cit.}
\textsuperscript{240} J. ABRAHAMSON, “Tiger Liquidators”, \textit{Sierra Club}, 2015, p. 48.
Xingjia factory, one of the Chinese suppliers of the illegal wood, freely admitted that its practice was illegal, and that Lumber Liquidator was one of its biggest consumers.\textsuperscript{242} Xingjia officials moreover stated that they believed the company was aware of the illegal practices but continued importing the timber.\textsuperscript{243}

On the basis of this investigation, the US Immigration and Customs Enforcement and the Fish and Wildlife Service raided Lumber Liquidator stores in two cities in the state of Virginia (Toano and Richmond).\textsuperscript{244} This led to the case being brought before the US District Court of the Eastern District of Virginia in 2015, where Lumber Liquidator pleaded guilty and was charged with one felony count of importing goods through false statements and four misdemeanor violations of the Lacey Act.\textsuperscript{246} Indeed, by knowingly importing wood from high risk countries, of high risk species, and from suppliers who provided false information and were unable to deliver proper documentation, Lumber Liquidator did not exercise due care. The company also made false statements concerning the origin of the timber.\textsuperscript{247}

The outcome of the judgment was a plea agreement, were Lumber Liquidators agreed to pay “(…) $13.15 million, including $7.8 million in criminal fines, $969,175 in criminal forfeiture and more than $1.23 million in community service payments. Lumber Liquidators has also agreed to a five-year term of organizational probation and mandatory implementation of a government-approved environmental compliance plan and independent audits. In addition, the company will pay more than $3.15 million in cash through a related civil forfeiture.”\textsuperscript{248}

\textbf{Section 3. Assessment of the United States Framework}

The aforementioned cases demonstrate that despite the low frequency of cases concerning illegal timber imports, the few high-profile prosecutions that have already taken place have had a deterrent effect on other American wood importing businesses and created incentives for

\textsuperscript{242} J. ABRAHAMSON, \textit{op. cit.}, p. 48.
\textsuperscript{243} Environmental Investigation Agency, \textit{Facing the Consequences...}, \textit{op. cit.}, p. 4.
\textsuperscript{244} \textit{Ibidem.}
\textsuperscript{245} \textit{United States of America v. Lumber Liquidators, Inc.} (October 17, 2015). U.S. District Court Eastern District of Virginia.
\textsuperscript{246} The United States Department of Justice, \textit{Lumber Liquidators Inc...}, \textit{op. cit.}
\textsuperscript{247} Environmental Investigation Agency, \textit{Facing the Consequences...}, \textit{op. cit.}, p. 1.
companies to set up legality assurance systems to avoid importing illegal wood and to demonstrate due care.\footnote{Environmental Investigation Agency, \textit{Forests. A Tale of Two Laws...}, \textit{op. cit.}, p. 6; C. OVERDEVEST and J. \textit{ZEITLIN}, \textit{op. cit.}, p. 32.}

Moreover, it has been suggested by the EIA that since its adoption, “the Lacey Act has contributed to a global 22 percent decline in illegal logging and is considered one of the world’s most successful forest conservation laws.”\footnote{Environmental Investigation Agency, \textit{Gibson Guitar...}, \textit{op. cit.}} It has also benefited the American economy, by creating a worldwide demand for legal wood from American sustainably managed forests.\footnote{\textit{Ibidem.}}

Other strengths of the Lacey Act are that it applies to “any person” and “all wood and wood products”, meaning that its scope is larger than the scope of the EUTR. However, despite these positive aspects, the Lacey Act has been criticized. The first critique is directed towards the fact that, the Lacey Act does not include domestic civil societies’ participation in the decision-making process of defining what illegal logging is, as it has not benefited from a framework of actions that enables these broader issues to be addressed.\footnote{C. OVERDEVEST and J. \textit{ZEITLIN}, \textit{op. cit.}, p. 32.} Therefore, “it takes foreign laws as they stand, without seeking to reconcile ambiguous and contradictory legislation or fill gaps in existing regulations (…)”\footnote{\textit{Ibidem.}} leaving to judges, prosecutors and US officials the responsibility to assess foreign laws.\footnote{\textit{Ibidem.}} Moreover, these foreign laws are burdensome on the importers themselves, as they must comply with them even when they are unclear, contradictory and numerous.\footnote{W. \textit{SHELLY}, \textit{op. cit.}, p. 564.}

The second critique concerns the due care principle, which, if it is exercised, reduces the liability of the person who has violated the Lacey Act. The problem with this legal principle is that none of the US laws on the subject are sufficiently precise on how exactly due care should be conducted and what constitutes a failure to conduct due care.\footnote{Environmental Investigation Agency, \textit{Forests. A Tale of Two Laws...}, \textit{op. cit.}; S. GORDON, “The Foreign Corrupt Practices Act: Prosecute Corruption and End Transnational Illegal Logging”, \textit{Environmental Affairs}, 2016, p. 121.} The due care standard is also a subjective one and is applied differently by the enforcement agencies depending on people’s level of knowledge.\footnote{F. \textit{TANCZOS}, “A New Crime: Possession of Wood- Remedying the Due Care Double Standard of the Revised Lacey Act”, \textit{Rutgers Law Journal}, 2011, p. 568.} To nuance this critique, it has however been argued that by not providing detailed guidance, the Lacey Act encourages companies to think in more detail about what due
care involves – rather than encouraging a ‘tick box’ exercise – and so potentially, could be more effective\(^{258}\). Finally, violating this standard can lead to criminal charges, which is a harsh sanction, seen as over-criminalization by some importers\(^{259}\). This leads to the conclusion that, contrary to the due care principle, the EU due diligence system, is more detailed, more predictable and can be better applied by operators. Moreover, the burden of proof imposed upon US prosecutors is higher, as it is difficult to show that due care has not been conducted\(^{260}\). This is because under the EUTR, companies can also be penalized for not having a due diligence system in place – rather than just for trading in illegal timber, meaning that getting evidence of the former is relatively straightforward\(^{261}\).

The third critique is directed towards the declaration requirements, as US importers consider them as being ambiguous and burdensome\(^{262}\). Indeed, any amount of imported wood must be reported, even negligible amounts. For instance, the Lacey Act applies to wine importers who must provide information about the cork they use\(^{263}\). This means that a single importer could have to file up to 30,000 entries per day and that sometimes, the information needed to comply is impossible to know\(^{264}\). A solution was therefore given to importers who import wood regularly: blanket declaration forms, which act “(...) as a summary report of all imported products they anticipate receiving throughout a given month. At the end of each month, importers must file a reconciliation form (...) that includes the actual data from each shipment”\(^{265}\).

Importers also expressed their concern as to the extent to which the new provisions of the Lacey Act would be enforced, as immediate application would have negative effects on many industries\(^{266}\). In response to this concern, the US Government answered that a “phased in” approach would be adopted giving importers warning on the items protected under the Lacey Act and time to take the necessary measures to comply with it\(^{267}\). This “phased in” approach was adopted, but has now ended, meaning that the Lacey Act is now being fully implemented\(^{268}\).

\(^{258}\) A. HOARE, personal e-mail communication, April 17\(^{th}\), 2018.
\(^{259}\) F. TANZOS, \textit{op. cit.}, p. 568.
\(^{261}\) A. HOARE, personal e-mail communication, April 17\(^{th}\), 2018.
\(^{262}\) F. TANZOS, \textit{op. cit.}, p. 562.
\(^{263}\) \textit{Ibidem}, p. 564.
\(^{264}\) W. SHELLY, \textit{op. cit.}, p. 563; \textit{ibidem}.
\(^{265}\) M. FRANK et al., \textit{op. cit.}, p. 5.
\(^{266}\) F. TANZOS, \textit{op. cit.}, p. 552.
\(^{267}\) \textit{Ibidem}, p. 551.
\(^{268}\) A. HOARE, personal e-mail communication, April 17\(^{th}\), 2018.
The fourth critique concerns extra costs. The new requirements do not only impose costs on importers who will spend money on certification and on tracking the information needed to comply.\(^{269}\). This information can be hard to find, as the timber supply chain may be long compared to wildlife trafficking supply chains for instance\(^{270}\). It is also costly for the US, as resources are needed to conduct inspections and raids\(^{271}\).

Finally, a separate but relevant issue must be raised, relating to the Trans-Pacific Partnership (TPP) Agreement, which created free trade arrangements between the US, Brunei, Japan, Malaysia, New Zealand, Vietnam, Canada, Mexico, Australia, Chile, Peru and Singapore. The US however withdrew from the TPP Agreement in 2017, which weakened anti-logging measures\(^{272}\). Indeed, when TPP negotiations started in 2010, US trade negotiators argued for having this segment in the agreement, to oblige the eleven signatories to mirror the 2008 Lacey Act amendment: “In a further effort to address the illegal take of, and illegal trade in, wild fauna and flora, including parts and products thereof, each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party’s law or another applicable law (emphasis added), the primary purpose of which is to conserve, protect, or manage wild fauna or flora”\(^{273}\). However, the new negotiated agreement concluded between the remaining parties, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, removed the US approach, and these countries, according to Charles Barber and Bo Li, “(…) are now free from any obligation to consider whether the timber they import was stolen or not, as long as their own domestic import paperwork requirements are satisfied”\(^{274}\). This can be seen as a missed opportunity to fight illegal logging at a global level.

\(^{269}\) F. TANCZOS, *op. cit.*, p. 566.
\(^{270}\) S. GORDON, *op. cit.*, p. 117.
\(^{271}\) F. TANCZOS, *op. cit.*, p. 566.
\(^{273}\) Chapter 20.17, §5, Trans-Pacific Partnership Agreement, 4 February 2016.
\(^{274}\) C. BARBER and B. LI, *op. cit.*
CHAPTER IV. SPECIFIC ISSUES RELATED TO ILLEGAL LOGGING IN THE EUROPEAN UNION AND THE UNITED STATES

The EU and the US, with the FLEGT Action Plan and the Lacey Act, both took measures to fight illegal logging and to prevent illegally harvested timber from entering their domestic markets. They have however been faced with challenges because of China’s policies regarding timber trade (section 1). The EUTR and the Lacey Act have also been accused of breaching the GATT because, according to experts and timber-producer countries, the Lacey Act and the EUTR have trade-restrictive effects (section 2).

A question related to these legislations has also been raised in this context: should an international convention be adopted regarding illegal timber trade instead of having national and regional law on the matter (section 3)?

Finally, as illegal logging will go on as long as corruption in producer countries persists, international measures could be adopted to fight this phenomenon in the specific context of the forest industry (section 4).

Section 1. Relations with China

China is the largest importer of tropical timber in the world, as well as a key processing country. It is, for instance, the main manufacturer of furniture and flooring, which is mostly exported to Europe and the US. Consequently, a large proportion of timber-based products is traded via China, meaning that trade between producer countries and end-consumer countries is lower than before.

Since the implementation of the Lacey Act and the FLEGT Action Plan, imports of illegal wood have decreased in most countries, except for China, where there has been a rise of illegal

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imports of timber, as well as in two other processing countries: Vietnam and India. This contributes to allowing illegally harvested wood into the US and Europe. Indeed, because China has a high demand for timber, it imports it from many countries, including high-risk countries and areas such as Indonesia, Myanmar, Papua New Guinea, Russia and the Congo Basin. Moreover, since the application of the Lacey Act and the FLEGT Action Plan, wood producing countries prefer exporting their timber to China, Vietnam and India, where there is no or little control and where there is more demand.

The way China defines legal and illegal timber is therefore of great importance for the understanding of the worldwide timber trade. However, unlike Europe and the US, China does not possess legislation dedicated to suppressing illegal wood imports. It nevertheless has the ambition to develop a timber legality framework comprised of two dimensions: the policy framework for timber legality and China’s Timber Legality Verification System. It is still being developed and many aspects of it remain unclear, but it seems to be that this framework will be based on the due diligence system and that it will apply to forest management enterprises, trading enterprises and processing enterprises. According to the briefing given by EU FLEG Facility on this new Chinese framework, “the ambition is to develop a timber legality framework that meets international and Chinese market requirements, boosts global trade in legal and sustainably sourced forest products, assists Chinese enterprises operating in international markets, and promotes legality and supply chain transparency throughout the timber sector.”

Voluntary certification and membership initiatives have moreover been taken by industry stakeholders and the Chinese government, which were under pressure from international NGOs such as the EIA and Global Witness. These initiatives promote traceability and due

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281 Ibidem.
282 Ibidem.
283 Ibidem.
284 Ibidem.
diligence\textsuperscript{286}. Also, in response to its increase in illegally harvested timber imports, China has taken part in international initiatives, such as FLEG ministerial conferences, engaged with the EU, the United States and Russia on the subject and signed memorandums of understanding with timber exporting countries such as Indonesia and Myanmar\textsuperscript{287}. Finally, in 2009, the Guide on Sustainable Overseas Forest Management and Utilization by Chinese Enterprises was produced by the Chinese authorities\textsuperscript{288}. This guide outlines the companies’ obligations to comply with the laws and regulations of the country of harvest, it calls for industries to operate in a sustainable way and to promote social development amongst local communities\textsuperscript{289}. However, these initiatives have only resulted in limited progress, such as a decrease in timber trade with Myanmar and have otherwise failed to regulate China’s imports of illegal timber\textsuperscript{290}. For instance, since China has signed the memorandum of understanding with Indonesia, the former has imported a billion dollars’ worth of illegal wood from the latter\textsuperscript{291}.

China should be encouraged to follow the example of the EU and the US and peruse its efforts to adopt binding laws that prohibit trade of illegally harvested wood, instead of only having guidelines and bilateral agreements. As China is often the intermediary between timber producer countries and timber consumer countries, the wood it imports must be harvested legally. Indeed, this legal certainty is necessary to comply with the EUTR and the Lacey Act and to be certain that only legal timber reaches the EU and US markets.

\textbf{Section 2. Relations with the World Trade Organization}

The EUTR and the Lacey Act restrict trade of wood which is illegally harvested under the laws and regulations of the country in which the timber was collected. Therefore, this wood must comply with the standards of foreign countries, not with European or US rules. This \textit{modus operandi} has been criticized and claims have been made that the EUTR and the Lacey Act violate the GATT. The GATT seeks to liberalize international trade and is governed by the World Trade Organization (WTO) since 1994, which controls trade between nations and aims at reducing obstacles to international trade\textsuperscript{292}. Two main principles must be respected by WTO

\textsuperscript{286} G. ZHIJIE and G. PEICHEN, \textit{op. cit.}, p. 471.
\textsuperscript{287} OECD Trade Policy Studies, \textit{op. cit.}, pp. 56-57.
\textsuperscript{288} L. WELLESLEY, \textit{op. cit.}, p. 12.
\textsuperscript{289} \textit{Ibidem}.
\textsuperscript{290} Environmental Investigation Agency, \textit{Appetite for destruction...}, \textit{op cit.}, p. 3.
\textsuperscript{291} \textit{Ibidem}.
\textsuperscript{292} A. FISHMAN and K. OBIDZINSKI, \textit{op. cit.}, p. 264.
members to comply with the GATT: the principle of non-discrimination or most favored nation (article I, GATT)\textsuperscript{293} and the principle of national treatment (article III, GATT)\textsuperscript{294}.

Allegations were first made against the Lacey Act by scholars who argued “(…) that the import declaration may cause WTO issues as it affects imported goods only and increases costs for importers. Moreover, the Lacey Act confers different treatment to timber that violates national laws and timber that does not”\textsuperscript{295}. Argentina also stated that the aim of the Lacey Act was not to protect endangered wood, but to secure the US market from wood imports\textsuperscript{296}. An additional issue related to the Lacey Act is that it makes no difference between high-risk countries (such as Indonesia, Russia, Brazil and Malaysia) and low-risk countries (such as Canada and the US)\textsuperscript{297}. This creates a thickening of the Canada-US border, leading to counterproductive relations and delays, when, before the Lacey Act, timber trade between these countries was easy\textsuperscript{298}.

Similar concerns were then raised against the EUTR: timber-exporting countries alleged that the Regulation had potential trade-restrictive effects\textsuperscript{299}. Here, the question arose whether the EUTR breaches articles I and III of the GATT, consequently raising the following issues: whether the Regulation privileges products depending on their origin; and whether the EUTR accords illegally harvested timber less favorable treatment than it does domestic timber\textsuperscript{300}. This means that to have a violation of the GATT, operators should, on the one hand, favor European products by subjecting them to a less severe due diligence requirement and, on the other hand, stigmatize high-risk countries\textsuperscript{301}. However, according to Dylan Geraets and Bregt Natens, since the EUTR “(…) only makes a distinction between legally and illegally harvested timber, it does

\textsuperscript{293} Article I §1 GATT: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”.

\textsuperscript{294} Article III §4 GATT: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”.

\textsuperscript{295} D. GERAETS and B. NATENS, \textit{op. cit.}, p. 6.

\textsuperscript{296} \textit{Ibidem}, p. 9; F. TANCZOS, \textit{op. cit.}, p. 580.

\textsuperscript{297} F. TANCZOS, ibidem, pp. 584-585.

\textsuperscript{298} \textit{Ibidem}.

\textsuperscript{299} F. GAROT, \textit{op. cit.}, p. 54.

\textsuperscript{300} D. GERAETS and B. NATENS, \textit{op. cit.}, p. 11.

\textsuperscript{301} F. GAROT, \textit{op. cit.}, p. 54.
not discriminate between ‘like products’ as there is no competitive relationship between these two groups of products\textsuperscript{302}. The question underlying this issue is whether WTO rules apply to illegal trade in the same way they apply to legal trade\textsuperscript{303}.

There have not been actual challenges before the WTO against the EUTR and the Lacey act, and it is unlikely that they will arise, as states would not go before the WTO to accuse the EU or the US of restricting trade of illegally harvested timber\textsuperscript{304}. Moreover, even if a challenge should occur, Article XX of the GATT, which provides general exceptions to the application of the principles set out in the Agreement, could potentially apply to the EUTR and the Lacey Act. Indeed, this article provides, \textit{inter alia}, exceptions for measures “necessary to protect human, animal or plant life or health”\textsuperscript{305} and “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”\textsuperscript{306}.

\textbf{Section 3. Towards a global governance?}

There is an increasing global awareness of the negative consequences that illegal logging has on the environment, societies and the economy. However, important actors still do not have legislations in that matter or have incomplete and sometimes contradictory legislations, which leads to fragmented efforts to combat illegal logging. As studied above, the EU and the US have adopted comprehensive legislations about timber trade, but without the robust cooperation of countries such as China, these laws cannot reach their full effectiveness, so trade of illegally harvested timber will persist.

There is, moreover, little understanding of what exactly amounts to illegal logging, and countries and organizations still have different interpretations. Neither the EUTR nor the Lacey give one clear definition of illegal timber, as they both refer to the law of the country of harvest. A first step should therefore be to share an understanding at a global level of what constitutes illegal logging\textsuperscript{307}. According to Sean Waite, “the definition should be practical, enforceable, and should cover environmental, social, political, and economic issues. In addition, the

\textsuperscript{302} D. GERAETS and B. NATENS, \textit{op. cit.}, p. 25.
\textsuperscript{303} Ibidem, p. 9.
\textsuperscript{304} A. FISHMAN and K. OBIDZINSKI, \textit{op. cit.}, p. 264; OECD Trade Policy Studies, \textit{op. cit.}, p. 86.
\textsuperscript{305} Article XX (b) GATT.
\textsuperscript{306} Article XX (g) GATT.
definition should work to spell out the responsibilities of those involved”\textsuperscript{308}. Having a harmonized definition will prevent consumer states from importing wood from countries which have less restrictive laws than others, even if having an effective legal framework and the capacity to check compliance remains the key challenge for each individual state.

The EUTR due diligence requirement and the Lacey Act due care standard, which are both essential to ensure transparency, should also be interpreted as having the same meaning. It is indeed easier for the international timber industry to comply with a single universal standard than with two separate obligations\textsuperscript{309}. As mentioned, the EU due diligence system is more detailed and predictable than the due care principle and should therefore prevail over the latter, even if, in practice, they can be interpreted in the same way. This means that if a company has a due diligence system in place for the EUTR, then this is likely to also meet the requirements of Lacey Act.

Some authors have gone further than advocating the need for a harmonized definition and for a single standard to be applied. Stephanie Eberhardt, for instance, has insisted on the importance of having an international agreement to address illegal logging\textsuperscript{310}. According to her, such a treaty would prove to be more effective than a combination of national or regional laws\textsuperscript{311}. Rudy Salo, moreover, argues that being involved in illegal logging should amount to an international crime, “(…) because only the fear of being prosecuted and classified as an international criminal can stop the current trade in illegal and conflict timber”\textsuperscript{312}.

Nevertheless, such an agreement seems difficult to reach. In the EU, for example, we already mentioned that member states do not implement and understand the EUTR in the same way, which sometimes leads to companies relocating to member states where implementation of the Regulation is weaker. The same phenomenon could occur on the international scene, where discrepancies in applying the agreement could arise among developed and developing countries, as well as producer and consumer countries. It could moreover lead to a race to the bottom, because such an agreement would be agreed upon a minimal consensus, with the risk of undermining the achievements of the EUTR and the Lacey Act. Indeed, countries are at

\textsuperscript{308} S. Waite, \textit{op. cit.}, p. 338.
\textsuperscript{309} Ibidem, p. 339.
\textsuperscript{310} S. Eberhardt, \textit{op. cit.}, p. 424.
\textsuperscript{311} Ibidem.
\textsuperscript{312} R. Salo, \textit{op. cit.}, p. 146.
different levels of willingness to fight illegal timber trade as some states have more pressing matters and priorities.

Because there is no international convention on combatting illegal timber trade and that having one is unlikely to happen in the near future, it is essential to have fully effective national legislations. As studied in the second and third chapter, the EUTR and the Lacey Act are two of the most detailed pieces of legislation on the subject and both have their own strengths and weaknesses: the EUTR imposes most of the obligations on the operator and applies to a limited number of species of wood, but has a detailed due diligence system; and the Lacey Act’s due care standard is vague, but it applies to any person involved and applies to all species of timber, besides the exceptions listed. Both legislations could therefore be improved by learning one from the other. It is however very unlikely that either piece of legislation is going to be changed in the near future – with the exception of the product scope for the EUTR. It is therefore more important that lessons are drawn from these two pieces of legislation for other countries, such as China, that might be working towards introducing such legislation.

Section 4. Need for anti-corruption measures

The EU and the US both import timber and processed wood products from countries which have poor rankings by international corruption monitors. Some of the key sources and manifestations of corruption in the forestry sector are: “the lack of proper public procurement practices in the awarding of licenses and concessions; the lack of both accountability and transparency in contracts; political leverage and regulatory capture in timber-producing countries; non-compliance with procedures and legal requirements; inadequate consultations with landowners, civil society and forest-dependent communities; as well as inadequate corporate accountability of multinational companies due to opaque chains of subcontracting; and the lack of annual financial reports providing a country-by-country breakdown of operations.”

Peru, for instance, is affected by corruption and exports its timber to the US. The US is aware of the consequences this can have on the legality of the timber it imports but documenting the

313 A. HOARE, personal e-mail communication, April 17th, 2018.
full chain of evidence required to demonstrate it has long proved a challenge. The same goes for the EU that imports timber from countries such as the DRC, where corruption in the forest sector is widespread. Indeed, up until 2015, none of DRC’s timber production met the requirement set in international timber trade laws.

As demonstrated by Appendix II of this paper, Ghana, Cameroon, South-Africa, Gabon and the DRC are the five major African timber exporters but are also countries which are heavily involved in corruption. Out of 180 countries, they are, respectively, the 40, 25, 43, 32 and 21 most corrupted countries. The same goes for China, Indonesia, Malaysia, the Philippines and Vietnam, the largest Asian wood exporters, which are, respectively, the 41, 37, 47, 34 and 35 most corrupted states. Finally, if we turn to South-America, we see that Brazil, Chili, Uruguay, Ecuador and Peru are the biggest timber exporters. Here, some of these countries are sometimes less corrupted such as Chili (67/180) and Uruguay (70/180), but Brazil (37/180), Ecuador (32/180) and Peru (37/180) are still involved in such practices.

The EU and the US both import wood from these countries, and it is therefore important for them to take anti-corruption measures to avoid having their timber supply chains contaminated by corruption. In 1977, the US adopted the Foreign Corrupt Practices Act (FCPA), which was designed to combat global corruption and disincentivize US corporations and businesses from engaging in bribery or corruption abroad. With the same purpose, the UK also adopted an anti-bribery Act in 2010, as well as France with its recent law on Transparency, the Fight against Corruption and Modernization of the Economy. Finally, the EU Transparency Directive requires large companies in extractive sectors (including forestry) to deliver reports on payments they make to governments, which shall be made public.

316 Transparency International, op. cit.
319 S. GORDON, op. cit., p. 125.
320 United Kingdom Bribery Act, 8 April 2010, Chapter 23.
321 French Law on Transparency, the Fight against Corruption and Modernization of the Economy, n° 2016-1691, 9 December 2016.
323 Article 6, EU Transparency Directive.
According to Sarah Gordon, the FCPA should be used to break the cycle of corruption in illegal logging when US companies are part of the supply chain\textsuperscript{324}. The US, as well as the EU, could also adopt anti-corruption strategies to effectively tackle corruption in the forest industry. These strategies must promote transparency, integrity, participation and accountability\textsuperscript{325}. In Europe, VPAs already deal with these issues, but they only concern a limited number of countries and are still a work in progress\textsuperscript{326}.

\begin{footnotesize}
\begin{enumerate}
\item S. GORDON, \textit{op. cit.}, p. 141.
\item Global Witness, “Tackling corruption…”, \textit{op. cit.}, p. 11.
\item Ibidem, p. 13.
\end{enumerate}
\end{footnotesize}
CONCLUSION

This paper has demonstrated that the will to fight illegal logging is not new, as measures started to be gradually taken on the international scene from the 1990s. States have increasingly become aware of the pressing need to save the forests and protect them from illegal logging and related trade, which have devastating consequences not only on the environment, but also on the economy and on good governance.

A positive outcome has been the growing international cooperation between timber-producer countries and timber-consumer countries, where the latter has been supporting the former to reduce illegal timber trade. This has been done by developing partnerships, such as VPAs between the EU and six timber-producer countries. These tailor-made agreements have worked on establishing legality verification systems in each producer state, but they are voluntary and can therefore not be imposed on unwilling countries.

Binding legislations on illegal timber trade have also been adopted in countries which wished to take a step further. The ones we have looked at closely in this paper are the EUTR and the US Lacey Act which require, respectively, operators to exercise due diligence, and any person involved in timber trade to obey the due care standard. We have seen that the overall objective of these two laws is to address the problem of illegal logging by trying to ensure that no illegal timber is entering the EU and US markets. As these laws are still relatively recent and therefore immature, it could not have been expected that in 2018, the EU and US markets would be completely free from illegal timber.

By describing these laws and by analyzing their positive and negative aspects in practice, this paper has demonstrated that the EUTR and the Lacey Act have had a somewhat positive impact on the forest sector and on their respective markets. Moreover, enforcement cases against European and US companies have also served as incentives for businesses to comply with these two pieces of legislation. However, numerous challenges remain. The EUTR is not implemented evenly in member states, it only applies to a limited list of timber and wood products and national competent authorities often lack resources. As for the Lacey Act, it refers to the vague due care standard and its correct application entails heavy costs.

To reach their full effectiveness, these two laws must still be improved by completing each other, ensuring legal compliance by timber importers and by continuing to support timber

327 A. HOARE, op. cit., p. 48.
producer countries in their fight against illegal logging. This is of great importance, as it is unlikely that an international convention on illegal timber and timber trade will come into existence, as studied in Section 3 of Chapter IV. This means that the EUTR and the Lacey Act are the current legislative basis for the fight of illegal timber trade on the European and US markets, and should be used as models by Asian, South-American and African states which wish to adopt similar laws.
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APPENDICES

Appendix I. Penalties under the Lacey Act

Appendix II. Top wood exporters and their corruption rank (2017)

<table>
<thead>
<tr>
<th>Top African Wood Exporters</th>
<th>Level of corruption (out of 180)</th>
<th>Top Asian Wood Exporters</th>
<th>Level of corruption (out of 180)</th>
<th>Top South-American Wood Exporters</th>
<th>Level of corruption (out of 180)</th>
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</thead>
<tbody>
<tr>
<td>2. Cameroon</td>
<td>25</td>
<td>2. Indonesia</td>
<td>37</td>
<td>2. Chile</td>
<td>67</td>
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<tr>
<td>5. DRC</td>
<td>21</td>
<td>5. Vietnam</td>
<td>35</td>
<td>5. Peru</td>
<td>37</td>
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