



Controlling Illegal Logging: Consumer-Country Measures

Duncan Brack

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Summary points

- Consumer countries contribute to the problems of illegal logging by importing timber and wood products without ensuring that they are legally sourced. Over the last few years, however, consumer countries have taken a series of measures to try to ensure that they exclude illegal timber products from their markets.
- The bilateral voluntary partnership agreements negotiated between the EU and timber-producing countries, which will establish a licensing scheme for legal timber, offer one of the best ways of controlling the trade but will be slow to establish.
- Broader measures to exclude illegal timber lack some of the benefits of this approach but can be implemented more quickly and with greater coverage. The extension of the Lacey Act to timber in 2008 was a significant development, providing the US with an effective means of encouraging the timber industry to exercise 'due care' and preventing imports of illegal timber. Whether the EU's 'due diligence' regulation will prove as effective remains to be seen.
- Public procurement policies aimed at purchasing legal (and, usually, sustainable) timber can prove very effective in excluding illegal timber from segments of a consumer-country market.
- All these developments will encourage the spread of the voluntary certification and legality verification schemes, but at the same time are likely to expose them to increasing pressures, for example from fraud.

Introduction

Illegal logging and the international trade in illegally logged timber are major problems for many timber-producing countries, particularly in the developing world. They cause environmental damage, cost governments billions of dollars in lost revenue, promote corruption, and undermine the rule of law and good governance; in some cases they have funded armed conflict. They retard sustainable development in some of the poorest countries of the world.

In recent years, however, governments have paid increasing attention to illegal logging and the associated trade in illegal timber. Concerns spread during the late 1990s, and in particular the inclusion of illegal logging as one element of the 1998–2002 G8 Action Programme on Forests helped to trigger widespread international discussions.

It has always been recognized that consumer countries contribute to the problems of illegal logging by importing timber and wood products without ensuring that they are legally sourced. In fact, until recently importing countries have had no legal mechanisms to exclude illegal timber even if they could detect it. With a few exceptions (including the small number of tree species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, CITES), it was not unlawful to import timber products produced illegally in a foreign country.

Over the last few years, however, consumer countries have taken a series of measures to try to ensure that they exclude illegal timber products from their markets. Their main initiatives have included:

- Bilateral agreements between timber-consuming and timber-producing countries to exclude illegal products from trade – most notably the voluntary partnership agreements negotiated under the EU’s Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT).
- Broader measures in consumer countries to exclude illegal timber products even in the absence of international agreement. These include the extension of the US Lacey Act to timber, and the EU’s ‘due diligence’ regulation, still under discussion.
- The use of government procurement policy to ensure that only legal (and usually sustainable) timber products are bought by government purchasers.

This paper examines these measures in more detail and highlights the implications for exporters of timber products to the consumer countries in question. All the measures aim, in different ways, to exclude illegal timber (originating from a particular country or from anywhere) from a given market (either the whole of a country’s market, or its public sector). In order to achieve this, they must establish means of distinguishing between legal and illegal products, either by setting up new systems or by making use of existing ones.

Bilateral agreements: FLEGT voluntary partnership agreements

The EU published its Action Plan for Forest Law Enforcement, Governance and Trade in 2003; it remains the most ambitious set of measures adopted by any consumer country or bloc to date.¹ The Action Plan includes:

- The negotiation of FLEGT voluntary partnership agreements (VPAs) with timber-producing countries. These include a licensing system designed to identify legal products and license them for import to the EU (unlicensed products will be denied entry), combined with capacity-building assistance to partner countries to set up the licensing scheme, improve enforcement and, where necessary, reform their laws.

¹ *Communication from the Commission to the Council and the European Parliament: Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan (May 2003).*

- Consideration of additional legislative options to prohibit the import of illegal timber to the EU more broadly, particularly products originating from countries not participating in VPAs and therefore not covered by the licensing scheme – this led eventually to the ‘due diligence’ regulation explained below.
- Encouragement for voluntary industry initiatives, and government procurement policy, to limit purchases to legal sources.
- Encouragement for financial institutions to scrutinize flows of finance to the forestry industry.

At the core of the FLEGT approach are the bilateral VPAs with timber-exporting nations. The first two were agreed with Ghana in September 2008 and the Republic of Congo in March 2009.² Negotiations are virtually concluded with Cameroon, and are still under way with the Central African Republic, Indonesia, Liberia and Malaysia; many other countries, particularly in Africa and Southeast Asia, have expressed an interest in entering negotiations. Within the EU, the regulation to introduce the requirement for licensed products from VPA countries was adopted in December 2005.³ The development of each country’s licensing system is anticipated to take about two years, so the first FLEGT-licensed timber could be entering trade in late 2010.

The FLEGT licensing system

The licensing system which the VPAs will establish should, if it works fully, prevent the export of timber products which have not been licensed as legally produced from the partner country to the EU.

What is ‘legal’ is defined in relation to the laws of the country of harvest of the timber. This is not always as straightforward as it might seem; in some developing countries, forest law is not always clear, and laws agreed by national governments sometimes conflict with those

adopted by regional or local governments. Even where the laws are clear, there may be uncertainty over which are relevant to the consideration of ‘illegal logging’ – those relating to timber harvesting, for example, or the payment of royalties or export duties are obviously important, but laws regulating the working conditions of truckers transporting the timber, for instance, may be more tangential. Under the VPA process, in Cameroon and Indonesia, multi-stakeholder processes have agreed operational definitions of ‘illegal logging’, and in Ghana and the Republic of Congo the VPAs both contain commitments to legal reforms to make the laws clearer and more comprehensive.

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The scope of the applicable legislation will be defined in each VPA. This is expected to include regulations relating to:

- Rights allocation processes and access rights;
- Company registration requirements;
- Social obligations, including labour requirements;
- Rights of local communities and indigenous populations;
- Environmental safeguards, forest management, timber harvesting, processing operations and associated financial and fiscal obligations;
- Transport and commercialization of timber.⁴

² The text of only one VPA (that with Ghana) is currently publicly available; see http://www.illegal-logging.info/item_single.php?it_id=802&it=document.

³ *European Council Regulation No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community.*

⁴ Julia Falconer (European Commission). ‘FLEGT VPA Update’: presentation at the Illegal Logging Update Meeting, Chatham House, June 2009; available at http://www.illegal-logging.info/item_single.php?it_id=369&it=presentation.

For each requirement, the VPA will list criteria, indicators and concrete verifiers – such as the documents operators need to produce in order to prove compliance – that will form the basis for enforcement. In many ways this approach resembles the voluntary forest certification schemes (such as those of the Forest Stewardship Council, FSC, or the Programme for the Endorsement of Forest Certification, PEFC) – with the important difference that the FLEGT systems will apply to all of a country's timber production.⁵

The FLEGT licences will be issued by a designated licensing authority in the partner country on the basis of proof of legality provided by the timber operator. The VPAs will contain provisions for traceability systems to track the timber through the supply chain. While in general this will not apply to timber imported into the partner country and subsequently exported to the EU, the VPAs will oblige partner countries not to issue licences to products that include timber which has been illegally produced in any other country, and the FLEGT licence will indicate the country of harvest. How will this be implemented in practice remains to be seen, but the draft Cameroon VPA restricts imports to products already possessing a FLEGT or 'other authorized' licence, and in both Cameroon and Congo mills will be required to source only legal timber, whether domestic or imported.

To ensure the system's integrity, the VPAs will contain provisions for independent third-party monitoring of the functioning of the system. The VPAs will set out the terms of reference for the monitoring organizations, and the extent to which their findings will be made public. Should major compliance problems arise, they will be discussed in the joint oversight committee comprising representatives of both the partner country and the EU. The ultimate sanction, should the system fail, would be suspension of the agreement, which either party can initiate.

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The licensing system will only apply to timber products traded between the VPA partner countries and the EU; there is no requirement for FLEGT licences for products from other countries, even if these originated in partner countries (for example, timber produced in Ghana, processed in China and re-exported to the EU would not need to show a licence at the EU border). All the partner countries which have agreed VPAs so far, however, intend to license all their timber exports regardless of destination, so the system may begin to spread beyond the direct trade between the partner countries and the EU.

Improving governance

Illegal logging can be seen as, at base, a failure of governance and law enforcement. The legal and regulatory regime which should protect forests and regulate their exploitation may be inadequately designed, poorly enforced or undermined by corruption – or sometimes all three. Although the licensing system which the FLEGT VPAs will establish is aimed mainly at excluding illegal timber from the EU market, the agreements' impacts on governance in the partner countries may have more long-lasting effects.

⁵ It is not yet clear how certified timber produced in a VPA country will be treated, but as long as the government is satisfied that the certification process meets the requirements of its legality assurance system, it should probably qualify as legal without needing any further auditing.

Both the Ghana and Congo VPAs will include:

- An analysis of existing legislation, as part of the process of drawing up the legality definition, together with a gap analysis and commitment to reforms where necessary;
- Agreement on independent monitoring of the functioning of the legality assurance and licensing systems, with outcomes available to the public;
- A commitment to national stakeholder involvement in the joint committees to be set up to oversee the process;
- Improvements in transparency, including annual reporting on the functioning of the system and in some cases agreement to make more information on forest sector management (such as information on production, rights allocation, finances and audits) available.

The process of negotiating the VPAs itself has also helped to improve governance, primarily through the inclusion of partner-country civil society in the negotiations.

Many problems of governance are due to a lack of capacity, and it was always recognized that the VPAs would need to be accompanied by provisions for capacity-building support for the establishment of the licensing system and for improving governance and enforcement. Although the costs of the operation of the licensing systems will be met by the partner countries – though of course a reduction in the level of illegal behaviour should increase tax and royalty revenues – in most cases some EU assistance will be needed. Although such support is not part of VPAs, where needed it is being agreed in parallel with the negotiations.

Implications for exporters

Exporters of timber or timber products to the EU from a VPA partner country must have their products

covered by a legality licence, or they will be refused entry at the EU border. (Indeed, as noted above, under the terms of the VPAs agreed so far all timber exports from partner countries will have to be licensed regardless of destination.) Exporters based in countries which have not agreed VPAs will not be affected directly, though of course the general improvement in governance that should result from the VPAs will help level the playing field for legal producers everywhere, making it less likely that their products will be undercut by cheaper illegal timber.

Other bilateral agreements

Several other countries have negotiated bilateral agreements to address the problem of illegal logging and the associated trade in illegal timber, though none have been as extensive as the FLEGT VPAs. For example, in 2008–09 Australia negotiated agreements or memorandums of understanding with Indonesia, Papua New Guinea and China, all of which include commitments to work together to identify mechanisms to verify the legal origin of wood products.⁶ Similarly, both the US and the EU have reached agreements (in 2007 and 2009, respectively) with China, the world's largest trader in timber products, to tackle illegal logging – though, again, neither contains concrete commitments to regulate trade.⁷ The US agreed a similar framework with Indonesia in 2006.⁸

The US has gone significantly further in its 2007 Trade Promotion Agreement with Peru, in which the chapter on environment includes an annex on forest sector governance.⁹ This contains a number of mandatory provisions to address illegal logging, including commitments by Peru to improve forest law enforcement, develop systems to track tree species protected under CITES through the supply chain, improve protection specifically of bigleaf mahogany, improve the management of forest concessions, and conduct periodic audits of producers and

6 See <http://www.daff.gov.au/forestry/international/regional> and http://www.maff.gov.au/media/media_releases/2009/october/australia_and_china_working_together_to_combat_illegal_logging.

7 See <http://www.state.gov/g/oes/rls/fs/2009/120036.htm> and http://www.illegal-logging.info/item_single.php?it_id=756&it=document.

8 Available at http://ustr.gov/assets/World_Regions/Southeast_Asia_Pacific/asset_upload_file619_9974.pdf.

9 Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

exporters of timber products exported to the US. Peru also undertook to identify a focal point, with appropriate and sufficient authority and staff to investigate violations of law and regulations for forest sector governance, and, on the request of the US, to verify whether a particular shipment was legally produced. The US is allowed to detain questionable shipments pending verification that the timber was legally harvested. The agreement establishes a sub-committee on forest sector governance to improve the exchange of information.

Implementation of the agreement ran into trouble in June 2009, however. After widespread protests (many violent) against a new law governing the use of forest resources in the Peruvian Amazon, which many NGOs and indigenous people's groups claimed had been imposed without consultation, the government suspended its operation.

The US–Singapore Free Trade Agreement, which entered into force in 2004, contains a chapter on environment, which has the broad aim of ensuring that environmental laws are not undermined by trade or investment activities.¹⁰ The Plan of Action agreed under the accompanying Memorandum of Intent on Environmental Cooperation establishes a framework for joint cooperation; trade in illegal forest products is mentioned in passing, but there are no specific provisions. Indeed, the agreement has been criticized by NGOs as leading to an increase in the trade in timber, including logs and sawn timber sourced from Indonesia which should have been subject to an export ban.¹¹

Implications for exporters

None of these bilateral agreements or memorandums of understanding have yet affected timber exporters' behaviour to any significant extent. For those which are free trade agreements, this is not particularly surprising; they are essentially designed to remove barriers to international trade, not to create new ones. Where the movement of products in question features trade in illegally produced timber, free trade agreements may even exacerbate the situation. In such situations there is a strong case

for side agreements dealing with environmental issues in general, or timber products in particular, although existing experience is not particularly encouraging.

Other bilateral agreements dealing specifically with illegal logging may prove more fruitful in developing mechanisms to regulate the trade in timber and exclude illegal products; but none of the agreements reached to date have proceeded very far in this direction.

Broader consumer-country measures

The major benefit of a licensing system such as that established by the FLEGT VPAs is that it creates a means of distinguishing between legal and illegal timber. Any product possessing a licence is allowed to enter the country of import (the EU, in this case); any other product is barred from entry.

Currently, however, the vast bulk of timber in trade is not covered by any licensing system; the handful of VPA countries do not yet have functioning systems, and although the twenty or so timber species listed under CITES do require export and in some cases import permits, the majority are not traded commercially. Although an increasing volume is identified under the private certification or legality verification schemes (see further below), this still accounts for only about 8 per cent of global forests, or 24 per cent of global industrial roundwood production.¹²

Accordingly, both the US and the EU have taken broader measures to exclude illegal timber products from their markets. Although their aim is the same, the mechanisms they have chosen are quite different.

The US Lacey Act

In May 2008 the US Congress voted to extend the Lacey Act to plants, including timber. This legislation already made it illegal to import or handle fish and wildlife produced illegally in foreign countries; the amendment extended this to plants, with the main aim of targeting illegal timber. This move therefore addressed the problem identified above, that in general timber produced illegally in foreign countries is not illegal elsewhere.

¹⁰ For the full text, see www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html.

¹¹ Environmental Investigation Agency and Telapak, *America's Free Trade for Illegal Timber: How US Trade Pacts Speed the Destruction of the World's Forests* (June 2006).

¹² Food & Agriculture Organization, *State of the World's Forests 2009*, p. 74 (figures are for 2008 and 2006, respectively).

Until 2008, plants (including timber) were only covered by the Lacey Act if they were native to the US and were also species listed under CITES or identified as endangered in a US state. The fact that most timber in international trade was not covered lay behind the argument for the Act's extension. It now covers all plants and plant products, excluding food crops, common cultivars and scientific specimens, and therefore applies to virtually all timber and timber products in trade.

‘The Lacey Act makes it unlawful 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 foreign law’

In response to industry concerns about what exactly should be prohibited, the amendment included a definition of ‘illegal timber’ (this had not been necessary for wildlife or fish, where the scope of legality had been established though case law). The range of relevant laws includes theft, logging in protected areas or without authorization, payment of taxes and fees, and transport regulations.

Another additional feature included in the amendment was a requirement for an import declaration. From December 2008, importers of timber products have been required to provide information on the scientific name of the species, the value and quantity of the timber and the name of the country in which it was harvested. Implementation of this element of the Act is being phased in gradually for different product types; the next phase, set for 1 April 2010, will add some musical instruments and furniture types. There are ongoing discussions about some of the details, including declarations for composite

products, recycled wood, blanket declarations for repeated identical shipments, and so on, and the entire provision is scheduled for review in 2010.

The core of the provisions for timber, however, is the same as those for fish and wildlife. The Lacey Act regulates both intra-US and external trade, including both imports and exports. It makes it unlawful 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 foreign law ...’¹³ The penalties involved depend on a number of factors, but mainly on the level of intent that can be shown on the part of the violator:

- Where specific intent can be shown – i.e. the individual knows that the products have been illegally produced – the violator can be convicted of a ‘felony’, with a maximum penalty of five years’ imprisonment and a fine of \$250,000 (\$500,000 for an organization).
- Where no intent can be shown, but the individual ‘in the exercise of due care should know’ that the products are illegal, the violator can be convicted of a ‘misdemeanour’, with a maximum penalty of one year’s imprisonment and a fine of \$100,000 (\$200,000 for an organization), or can be subject to a civil penalty fine of up to \$10,000.

In all cases the illegal products can also be forfeit. These forfeitures are authorized on a strict liability basis – i.e. liability that does not depend on actual negligence or intent to harm; there is no ‘innocent owner’ defence. So even where no intent can be shown, and the individual can show that due care has been exercised, the products can still be forfeit. Vessels, vehicles and equipment involved can also be forfeit, but only after a felony conviction, where specific intent can be shown. In addition, false import declarations can be subject to forfeiture of goods, civil penalty fines of \$250 where due care has not been exercised, or – where specific intent can be shown – criminal felony penalties, as above.

13 The Lacey Act (Chapter 53 of Title 16, United States Code), section 3372 (a) (B) (2) (i); available at http://www.illegal-logging.info/item_single.php?it_id=668&it=document

The Lacey Act in practice

The Lacey Act provides a powerful combination of penalties. Anyone found to be handling illegal timber can at the very least expect to have the products confiscated, and where it can be shown that ‘due care’ in acquiring the products has not been exercised, the violator could be subject to fines and possibly imprisonment. The prosecution does not have to prove that the defendant knew which underlying law in the country of origin was violated, just that in some fashion the products were procured illegally. And the term ‘imports’ is defined as including products being transhipped through the US, which would not, under customs regulations, normally qualify as imports.

What ‘due care’ means in practice remains to be determined through case law. In principle no documentation should be assumed to absolutely guarantee that the product is legal, though the presence of documents such as FLEGT licences, or independently verified certificates or legality licences, should go a long way in showing that the importer tried to exercise due care. Unsurprisingly, the US has seen a significant increase in enquiries to the various legality verification schemes since the amended Act came into force.¹⁴

There has been plenty of experience with enforcement of the Lacey Act with regard to fish and wildlife, and US prosecutors regard the Act as a valuable tool, particularly where violators can be imprisoned and their equipment confiscated. In practice, prosecutors have to show, first, the underlying violation – of a foreign or other law; and, second, the ‘overlying violation’ of an action prohibited by the Act. Culpability attaches to anyone who commits the overlying violation, which means that any individual or corporation along the supply chain – from logging company to retailer – can be found liable.

The determination of a violation of foreign law is made by the judge presiding over the case. Courts are given broad discretion in these proceedings because of the general lack of availability of foreign law materials and expert opinion. Sources used by courts have included affidavits and expert testimony from foreign

judges, government ministers and lawyers; foreign case law; law review articles and translations of foreign decrees; information obtained from foreign officials; and the court’s own research and analysis.

Effective cooperation with the foreign government in question obviously makes obtaining information about its laws much easier, as well as obtaining proof of the original illegality. It should be noted, however, that cooperation with the foreign government is not an absolute requirement, and cases can be prosecuted without any degree of cooperation, provided that US agents can unearth sufficient evidence of the original crime themselves.

The extent to which the application of the Lacey Act to timber will be different from enforcement on fish or wildlife remains to be seen. One complicating factor is that timber products often have longer supply chains, which may make tracking the illegal products more difficult; timber harvested in one country may often be processed in another (often China) before final shipment to the US.

The first enforcement action under the amended Act took place in November 2009, when the offices of the US company Gibson Guitar, in Nashville, Tennessee, were raided by Fish & Wildlife Service inspectors for the suspected import of rosewood and ebony illegally harvested in Madagascar. The company subsequently announced that it would cooperate fully with the authorities.¹⁵

Implications for exporters

Any company exporting timber products to the US is likely to find importers asking questions about its products, in the process of exercising ‘due care’ in trying to avoid importing illegal timber. Products from high-risk countries, where illegal logging is widespread, will be subjected to a particularly high degree of scrutiny. Evidence of robust means of supply chain control, and independent verification, are likely to be required; or such products may be avoided altogether. The implementation of the amended Lacey Act is likely to encourage the spread of private certification and

¹⁴ See Environmental Investigation Agency, ‘Early impacts of the 2008 Lacey Act Plant Amendments’ (March 2009).

¹⁵ ‘Gibson Guitar under federal investigation for use of illegal rainforest timber from Madagascar’, 19 November 2009; available at http://www.illegal-logging.info/item_single.php?it_id=3900&it=news.

legality verification systems, and promote the uptake of FLEGT-licensed products when these become available.

The FLEGT 'due diligence' regulation

The EU, of course, faces the same problems as the US in trying to exclude illegal timber. Even though the gradual appearance of FLEGT licences under the VPAs will help to tackle this, the way in which the licensing system is being built up, through agreements with individual countries, renders it vulnerable to evasion; illegal products could simply be trans-shipped via non-partner countries to the EU to escape the need for a licence.

After a protracted process of analysis and consultation (including consideration of an EU version of the US Lacey Act), in October 2008 the European Commission published its proposal for a regulation to require timber operators who first place timber or timber products on the EU market to establish 'due diligence' systems to minimize the risk of illegal products entering the EU.¹⁶ At the time of writing, the regulation is still making its way through the EU's legislative processes. Both the European Parliament and Agriculture Council have discussed the draft and proposed amendments to it, but their modifications differ significantly, and they must now enter a conciliation process.

The regulation applies to all timber products (with a few exceptions; see below) from all sources, whether imported or produced within the EU. As with the VPAs, illegality is defined in relation to existing national legislation in the country of harvest, but with a slightly narrower scope, focusing on the laws around harvesting of the timber. The European Parliament is attempting to broaden this definition, and the final draft may adopt a definition of scope more like that used in the VPAs (including, for example, laws relating to access rights, labour requirements, or the rights of local communities). Products accompanied by a FLEGT licence or a CITES permit are assumed automatically to be legal.

The regulation does not demand proof of legality of the timber products; it simply requires 'first placers' to

possess a system of 'due diligence' designed to minimize the risk of handling illegal products. These systems must include means of ensuring access to information on the timber products, including their country of harvest, their volume or weight, details of their suppliers, and information on compliance with legislation in the country of harvest – though precisely what information will be needed and how it should be provided is not yet clear. The due diligence system will also incorporate a risk management procedure. This will presumably be used to determine the level of proof of legality required, with stricter requirements for products originating from high-risk countries, regions or suppliers.

The draft regulation allows operators to use 'recognised monitoring organisations' to run the due diligence system for them if they prefer not to set up their own. Again, it is not yet clear how this will work, but it seems likely that all operators will make extensive use of the voluntary certification and legality verification schemes currently in existence or under development.

Unlike the Lacey Act, the draft regulation does not create any general offence of handling illegal timber. In the Q&A document accompanying the draft regulation, the European Commission stated that the risk of illegality must be minimized rather than fully excluded: 'it is not required that [operators] ensure legality beyond reasonable doubt. Operators have to show due diligence. In other words, they need to ensure legality to their best ability.'¹⁷ What happens if an operator possesses a due diligence system but still ends up importing illegal timber is not clear. Member states' competent authorities will take action against timber operators who do not possess such systems, and are also responsible for overseeing the effectiveness of the due diligence systems in general, so in theory they should act against operators whose systems fail to exclude illegal timber.

The due diligence system has been criticized for lacking a Lacey-Act-style 'underlying offence', and the

¹⁶ European Commission Proposal for a Regulation laying down the obligation of operators who place timber and timber products on the market, COM(2008) 644 final of 17 October 2008.

¹⁷ European Commission (2008), *Questions and Answers on the Proposed Regulation laying down the obligations of operators who place timber and timber products on the EU market* (October 2008), question 18.

European Parliament's amendments in fact do introduce such an element. A number of EU member states also argued for this approach, at least for first placers, in the discussions in the Agriculture Council, but in the end failed to gain a majority.¹⁸ Whether the Parliament will insist on this approach during the conciliation process remains to be seen.

The other main criticism levelled at the draft regulation is its limitation to first placers. There is some doubt whether some EU member states will be able effectively to control imports, and in the absence of any underlying offence of handling illegal timber, there is no possibility of taking action against any operators further down the supply chain even if it can be shown that they knew they were sourcing illegal products from a first placer who had escaped sanction.¹⁹ Again this could be tackled by introducing an underlying offence of handling illegal timber affecting all timber operators.

The proposed due diligence system and the Lacey Act can be seen as mirror images of each other: the Lacey Act establishes an underlying offence of handling illegal timber, and leaves it up to operators to work out what steps to take to avoid doing so; the 'due diligence' regulation establishes no such underlying offence, and as a consequence needs to go into some detail on what timber operators need to do to avoid handling illegal products.

Implications for exporters

The 'due diligence' regulation is not yet agreed, let alone implemented, but it is hoped that agreement will be reached by mid-2010. The draft contains a two-year interval until full implementation (though the Council amendments extend this to 30 months). This will give the European Commission time to work out details such as the information requirements, the risk management procedure or how monitoring organizations will work.

Following (or probably even before) full implementation of the regulation, exporters to the EU should start to see

importers asking for the same kind of details of products' origin and legality as US importers are starting to request. Again, this will be particularly true of products from high-risk countries, and it can be expected that similar encouragement will be generated for the uptake of certification and legality verification schemes. The regulation will also give a clear boost to the FLEGT licensing system, since such licences will automatically legitimize their products.

Public procurement policies

In all developed countries, the public sector is a major purchaser (or specifier) of timber for a variety of uses: construction (including contractors' disposable material), office or park furniture, and paper. Purchasing of goods and services by public authorities – central, regional and local – is estimated to account for an average of about 10 per cent of GDP.²⁰ Several EU member states, and a number of other countries, now possess government procurement policies aimed at ensuring that public purchasers source only legal and/or sustainable timber and wood products. As of January 2010, these include Belgium, Denmark, France, Germany, Japan, the Netherlands, New Zealand, Norway and the UK; a number of other countries, mostly EU member states, are considering adopting similar policies. The European Commission's policy on green procurement states that legality should be a minimum requirement for wood-based products.²¹

As with most of the measures outlined above, the aim of these procurement policies is to exclude illegal (and, usually, unsustainable) timber products from a particular market – in this case public-sector purchasing. These policies are already starting to have an impact. Although to date only two countries – the Netherlands and the UK – have undertaken market research studies on the impacts of public procurement policies on overall supply, both showed that the volume of certified timber products imported had grown steadily since their introduction. In the UK, growth has been particularly rapid; in 2008 certified

18 'EU shies away from stricter timber import rules', 15 December 2009; available at http://www.illegal-logging.info/item_single.php?it_id=4008&it=news.

19 For a full analysis, see Duncan Brack, 'Due Diligence in the EU Timber Market: Analysis of the European Commission's proposal for a regulation laying down the obligations of operators who place timber and timber products on the market' (Chatham House, November 2008).

20 For more details, see Duncan Brack, *Controlling Illegal Logging: Using Public Procurement Policy* (Chatham House, June 2008).

21 See European Commission, *Public Procurement for a Better Environment* (COM(2008) 400/2, 2008).

products accounted for over 80 per cent of the market (both domestic production and imports).²² Although the effect of other government policies, NGO and public pressure and a growing industry commitment to environmental and social responsibility should not be discounted, it seems likely that procurement policy has had the greatest single impact.

Procurement policies are effective because they can be developed and implemented more rapidly than most other policy options – generally they do not need new legislation, unlike the options examined above. The evidence also suggests that they can have a much broader impact on consumer markets than simply through the direct effect of government purchases. Suppliers' preferences for relatively simple supply chains magnifies the effect; if they need to supply sustainable timber for public purchasers, for example, the evidence suggests that they are tending to prefer to supply the same products to their other customers too. One estimate suggested that government procurement can achieve market leverage of up to 25 per cent of the market (compared with about 10 per cent for direct purchases) when knock-on impacts such as these are included.²³

The impact of the policy will obviously depend on the scale of government spending. So far, all the countries referred to above have adopted these policies only for central government, which accounts on average for about 30–35 per cent of total public-sector expenditure (in the UK, which is unusually centralized, this figure is about 70 per cent). There has been some take-up among regional and local governments, in the countries listed above and in others, but this has been slow and piecemeal.

The impact will also depend on the criteria adopted, in terms both of the definitions of legality and sustainability, and of the means of acceptable proof of meeting the criteria. To be effective the policies must rely on some robust means of excluding illegal and/or unsustainable timber – which most, but not all, of them do.

Although the criteria underlying timber procurement policies vary from country to country, with different definitions of 'sustainable', after a point this does not matter.

With the exception of the weakest policies, the main route through which timber products can be assessed in terms of sustainability is the private certification schemes, which now essentially means FSC and PEFC. In theory it would be desirable for consumer countries to harmonize their procurement policies, so that suppliers are not faced with information barriers when exporting to these markets. But in practice this matters only rarely, as whatever the details of the policies, the same certification schemes will be used to meet their criteria.

‘ Procurement policies are effective because they can be developed and implemented more rapidly than most other policy options – generally they do not need new legislation, unlike the options examined above ’

Implications for exporters

Anyone exporting timber products for potential use in central government contracts in those countries which possess timber procurement policies will have to supply proof that the products meet the policies' criteria for legality and sustainability. Legal (but not sustainable) timber is accepted in Denmark, Japan and New Zealand (though sustainable is preferred); the various legality verification schemes, FLEGT licences and certification schemes can all help to provide proof. FLEGT-licensed timber will be acceptable in the UK until 2015. Otherwise, in general, sustainable timber is required. As noted, importers and suppliers in countries with procurement policies seem already to be shifting to sourcing only legal and/or sustainable products across the board, not just for government contracts, so the impact will be widespread.

²² UK Timber Trade Federation, *UK Timber Industry Certification* (January 2010). Both certified imports and domestic production are almost entirely FSC- or PEFC-certified.

²³ Marku Simula, 'Public procurement policies for forest products – impacts' (presentation, October 2006); available at: http://www.unece.org/trade/timber/docs/tc-sessions/tc-64/01_Simula.pdf.

Impacts on certification and legality verification systems

All the consumer-country measures outlined above – the US Lacey Act, the EU ‘due diligence’ regulation, and public procurement policies – are creating incentives for the uptake of certification and legality verification schemes. Accordingly, it can be expected that there will be growing incentives to defraud the schemes. The certification schemes were developed originally as voluntary instruments for relatively niche markets, not as the mandatory requirements for market access that they are steadily becoming. Their growing use is of course a desirable development, but raises the question of whether the schemes themselves are capable of sufficiently close monitoring to detect fraudulent versions of their labels. There are already anecdotal stories of suspiciously high volumes of FSC-certified timber being exported from China, and the problem should be expected to get worse. This issue will need to be tackled at some point in the future.

Similarly, the voluntary legality verification schemes, which are now developing as a means of guaranteeing legality can be expected to come under the same sort of pressures. There will also probably be incentives to harmonize or approximate the ways in which they assess ‘legality’.

Conclusion

As well as the government policy options outlined here, consumer countries can also encourage their importing industries to set up supply chain controls to ensure that they do not handle illegal timber – and of course the policies described here will encourage companies to do that in any case. There is obviously a limit to what consumer-country measures can achieve – they cannot, for example, affect illegal logging aimed at the domestic market inside producer countries – but they can nevertheless have an important impact in reducing the profits to be made from illegal behaviour, in preventing legal and sustainable industries from being undercut by their illegal competitors, and in encouraging governance reforms in forest-rich countries.

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Duncan Brack is a Senior Research Fellow with the Energy, Environment and Development Programme at Chatham House, where he manages its work on illegal logging and associated trade. Funding support from the Department for International Development is gratefully acknowledged.

For more details and further information on all the topics covered in this paper, see www.illegal-logging.info.

Chatham House
10 St James's Square
London SW1Y 4LE
www.chathamhouse.org.uk

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