

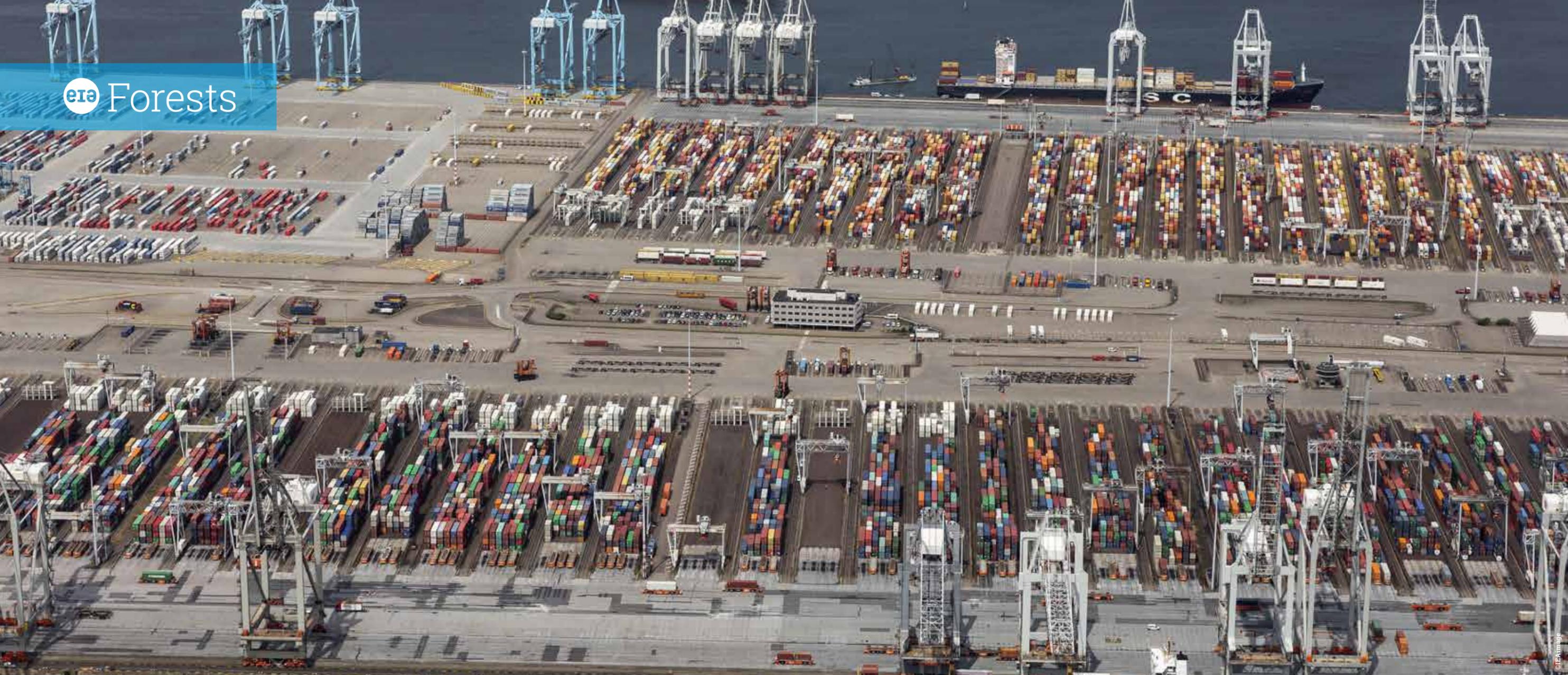


ENVIRONMENTAL
INVESTIGATION
AGENCY

Forests

A Tale of Two Laws

Using existing EU and US laws
to strengthen action on illegal
timber trade



February 2018

ABOUT US

We investigate and campaign against environmental crime and abuse.

Our undercover investigations expose transnational wildlife crime, with a focus on elephants and tigers, and forest crimes such as illegal logging and deforestation for cash crops like palm oil. We work to safeguard global marine ecosystems by addressing the threats posed by plastic pollution, bycatch and commercial exploitation of whales, dolphins and porpoises.

Finally, we reduce the impact of climate change by campaigning to eliminate powerful refrigerant greenhouse gases, exposing related illicit trade and improving energy efficiency in the cooling sector.

We would like to thank

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“any product containing wood that was placed on the EU market in violation of the EUTR is contraband under Lacey”

Introduction

It is rare that two pieces of landmark environmental legislation on two continents are simultaneously strengthened, broadened in scope and significantly harmonised without any changes to the underlying legal texts.

This report explores new legal analysis by the Environmental Investigation Agency (EIA) that outlines existing but previously unrecognised risks and liabilities under the USA's Lacey Act in relation to the EU Timber Regulation (EUTR).

Over the past year, EIA has both identified and explored the previously unrealised fact that **the US Lacey Act prohibits timber which has been sold in violation of any foreign law protecting plants and that the EUTR is such a 'foreign law'**.

In turn, EIA analysis concludes that **placing wood on the EU market in violation of the EUTR is a predicate offense under Lacey** and that **wood sold in violation of the EUTR is, by definition, contraband under US law**.

Further, because the Lacey Act regulates all products containing wood, **any product containing wood that was placed on the EU market in violation of the EUTR is contraband under Lacey**.

The insight has significant implications, extending legal and/or commercial risks and liabilities to virtually all actors in the entire supply chain of any type of product incorporating timber traded from the EU to the US. As this briefing describes, these liabilities now extend to companies not even regulated by either the EUTR or Lacey, resulting in the intent of these laws – embedding Due Diligence and Due Care into company procurement decisions – being more likely to be applied by a far larger source of timber demand in both markets.

The newly recognised reciprocity between Lacey and EUTR presents historic

opportunities and incentives to remove or reduce the impact of weaknesses in both, making them more powerful incentives for timber traders and manufacturers using wood to screen out high-risk and illegal timber.

The need to reinforce the EUTR certainly exists. In 2016, EIA exposed widespread violations of the EUTR by companies supplying high-grade teak to Europe's superyacht and megayacht industries¹. While this promoted widespread albeit belated enforcement, the process also revealed persistent failures to implement the law in key member states, weaknesses in the law itself and the limited will or ability of the private sector in the EU to avoid wood placed in violation of EUTR.

These failings in turn resulted in considerable volumes of wood recognised to have been placed in violation of the EUTR not being prevented from entering into and passing through the EU supply chain unhindered. As a result, in 2017 EIA submitted detailed information to US Lacey Act enforcement officials regarding superyachts imported into the US from two UK companies.

While presenting opportunities for enhanced enforcement and the maintenance of the rule of law, the legitimate interests of EU and US companies that use wood but are not regulated by the EUTR need to be suitably protected through the provision of timely information on EUTR enforcement. This briefing makes recommendations regarding how to do this without undermining the legal opportunities this new interpretation of existing laws creates.

EIA is hopeful that, through this briefing, civil society organisations, businesses and governments alike can bring dramatically increased accountability to illegal and high risk timber supply chains in the EU and US in powerful and innovative ways – all without changing a single word of the law.

EUTR Violations and the Lacey Act

It is EIA's legal analysis that the act of placing timber on the EU market in violation of either the Prohibition or Due Diligence provisions of the EUTR is a predicate offence under the US Lacey Act.

In turn, products containing such EUTR non-compliant timber that are imported into the US from Europe are contraband and subject to seizure under the Lacey Act, with importers and distributors exposed to significant fines and prison sentences.

While this may appear obvious, EIA understands that regulators, enforcement agencies and industry actors in both Europe and the US, including some consumers, do not currently perceive or understand that EUTR non-compliant timber found in violation of EUTR Due Diligence provisions is contraband under the Lacey act.

This has potentially huge impacts for significant sections of EU-US products trade.

The ramifications fundamentally change the legal and/or commercial obligations for virtually all actors in the entire supply chain of any type of product that contains wood traded from the EU to the US and, in turn, for the entire global supply chain upstream of the EU.

EIA believes that the reciprocity of EUTR non-compliance implicitly built into the Lacey Act functions to significantly expand the scope and reach of both the EUTR and the Lacey Act – without any legal change having occurred. This constitutes an historic opportunity to optimise efforts and means to eliminate illegal timber from major markets, and the illegal logging and deforestation that its traffic generates worldwide.

EIA believes the newly identified liabilities hold significant potential for engendering

enhanced enforcement action against high-risk and illegal timber in both the US and EU, and correspondingly stronger and more meaningful implementation of Due Diligence and Due Care in trade in both markets

Legal reciprocity between the EUTR and the Lacey Act will act to patch limitations and weaknesses in both laws in remarkably innovative ways.

Where enforcement has been found to have failed in Europe, it is possible to apply enforcement against EUTR non-compliant timber at any point in the supply or value chain in the US, providing significant opportunity to close down weak links in Europe's enforcement of a law that only regulates the act of first placement. This opens a series of new opportunities to hold to account Operators in both jurisdictions which are violating timber legality laws and has the potential to become a significant tool in the global fight against illegal logging.

Competent Authorities in Europe will find they have a new and urgent need for transparency in their enforcement, with a potential need for legislative change in some member states, in order to protect European industry's market share in the US. Opacity in enforcement has left unregulated actors in supply chains unable to identify and avoid illegitimately traded timber while remaining exposed to significant commercial and legal risks.

Lacey Act liabilities related to EUTR offences also shift the demand for EUTR compliance to parties not regulated by the EUTR and which, in some cases, are currently making use of timber traded in breach of the legislation. This harmonisation and reciprocity between the two pieces of legislation greatly expands the capacity of each to achieve the goals of changing both Operator and Producer behaviours through reduced demand for illegally harvested and traded timber.

“Legal reciprocity between the EUTR and the Lacey Act will act to patch limitations and weaknesses in both laws”

¹ <https://eia-international.org/report/overdue-diligence>



The Lacey Act

Under the 2008 amendments to the US Lacey Act, it is an offence 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 that protects plants².

The US Lacey Act's definition of "plants"³ is specifically designed to regulate timber and wood products, and the 2008 amendment's inclusion of them was an intentional act to prohibit trade within the US of timber and wood products taken, possessed, transported or sold in violation of any US State or foreign law designed to protect plants that produce timber. The Lacey Act is therefore the US Government's landmark policy to counter the scourge of illegal logging, timber smuggling and laundering, as well as the US's role in driving demand for illegal timber.

Lacey's Strengths

The Lacey Act applies to any "person"⁴ subject to the jurisdiction of the US, commercial or otherwise, who commits any regulated act ("importing, exporting, transporting selling, receiving, acquiring or purchasing, in interstate or foreign commerce") where foreign laws designed to protect plants or the timber produced from them have been violated. The Act applies to anyone in the value chain who commits those actions and is not limited to the principle importer of offending wood.

The Lacey Act also applies to all wood and wood products, regardless of the physical form they take and regardless of any change in product type since predicate violations of relevant foreign laws occurred.

In addition to the overarching prohibition on trade in illegally sourced or traded plants and plant products, the Lacey Act also has a declaration obligation, which is being phased in over time by product (HS) code. The

US government publishes updated lists of the products requiring a declaration prior to import (as it is phased in), but the core provisions of the Act are not limited to these products.

Combined, these strengths mean that all wood products (with an extremely limited group of exclusions) and all involved in the trade are covered by the Lacey Act.

Lacey's Weaknesses

While the Lacey Act, like any US law, provides the opportunity for regulated actors to show how their conduct of "Due Care" reduces their liability for proven violations of the law itself, US provisions on Due Care as a legal principle are not perhaps sufficiently proscriptive of what this should constitute in practise; a failure to conduct Due Care or in the manner it is carried out are not stand-alone offences in themselves. Instead, a lack of Due Care is taken into account only when allocating penalties and corrective measures for proven core Lacey Act violations (e.g. trade in contraband timber, mislabelling, mis-declaration/ violation of the declaration requirement, etc.).

While high-profile cases in recent years have resulted in the development and imposition of Lacey Compliance Plans on convicted offenders⁵ and while these are highly proscriptive and act to solidify legal conceptions of expected "Due Care and Due Diligence" measures under the Lacey Act, it is generally considered that US Due Care provisions, as interpreted in relation to the Lacey Act itself, are significantly less specific than the equivalent and explicit provision under the EUTR's "Due Diligence".

These limits to Due Care liabilities have resulted in the burden of proof for Lacey Act prosecutions being relatively high and, in instances of this burden not being met, high-risk timber entering the US market unhindered.



The European Timber Regulation (EUTR)

Similar to the US Lacey Act, the 2010 EUTR, which came into force in March 2013, is intended to eliminate illegal timber from the EU market in ways that define illegality in relation to producer country laws⁶. It is, however, considerably different to the US Lacey Act.

The EUTR prohibits the placing on the EU market, for the first time, of illegally harvested timber and products derived from such timber, creating a Prohibition offence. It requires EU traders who place timber products on the EU market for the first time to conduct Due Diligence on their supply chain to identify and mitigate any risks of illegality. Where risks cannot be mitigated to a negligible level, the timber cannot legally be placed on the market and, where it is placed, a Due Diligence violation occurs.⁷

EUTR strengths

The EUTR's Due Diligence provisions are, to the extent possible, relatively proscriptive, including specific obligations of "Operators" (actors who place the timber on the EU market for the first time). Additionally, and contrary to the US Lacey Act Due Care provisions, failure to conduct EUTR Due Diligence is an offence in its own right, irrespective of whether the wood placed can be proven to have been illegally logged or traded in the producer country or trade countries it may have passed through.

This makes it easier for the EUTR to extend its legal reach to timber regarded as "high risk" but for which the burden of proof of illegality has not or cannot be met.

EUTR weaknesses

The core provisions of the EUTR apply only to "Operators" – companies that place the wood concerned

"for the first time on the EU market". The only legal obligations EUTR imposes on actors downstream of the Operator (known as "Traders" in EUTR parlance) is for them to maintain records of purchases and sales for a five-year period⁸ and make these available to enforcement officials on request.

This limitation means that timber placed in violation of EUTR by a regulated Operator cannot be taken off the market once in the hands of unregulated Traders and inherently limits the intensity of demand for Due Diligence by most of the timber industry in Europe.

The EUTR also applies to only a select range of timber and timber products listed under a range of HS codes in an Annex⁹ affixed to the Regulation. Many products containing significant volumes of wood and wood material are not included, resulting in EUTR's product scope being far smaller than that of the Lacey Act.

A final key weakness of the EUTR is that – while its Due Diligence provisions are strong and proscriptive, and legal requirements in their own right – EU Member State implementing regulations that transpose the EUTR into domestic law do not generally provide a mandate for seizure of goods where Due Diligence violations have been proven, but in the absence of a Prohibition conviction.

EU authorities' lack of seizure powers when detecting timber products in Europe that do not comply with the Due Diligence requirements of the EUTR allows offending companies to leave significant volumes of non-compliant high-risk timber on the market unhindered.

Combined with the fact Traders are not regulated, this weakness prevents removal of non-compliant timber at any stage of the EU value chain.

² <https://www.law.cornell.edu/uscode/text/16/3372>

³ https://www.aphis.usda.gov/plant_health/lacey_act/downloads/lacey-act-glossary.pdf

⁴ "The term "person" includes any individual, partnership, association, corporation, trust, or any officer, employee, agent, department, or instrumentality of the Federal Government or of any State or political subdivision thereof, or any other entity subject to the jurisdiction of the United States." Source: <https://www.law.cornell.edu/uscode/text/16/3372>

⁵ As in the case of Lumber Liquidators – See: http://c.y.mcdn.com/sites/www.iwpawood.org/resource/resmgr/Files/LL_Inc_ECP_9_25_2015.pdf

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R0995>

⁷ http://ec.europa.eu/environment/forests/timber_regulation.htm

⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995>

⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995>

Expanded Liabilities

The revelation that EUTR Due Diligence violations are predicate offences under the Lacey Act presents new and powerful liabilities for most actors in the supply and distribution of wood and wood products (and products incorporating them) shipped from the EU to the US.

While not considered to be exhaustive, the table below seeks to summarise the likely new liabilities faced by different actors in relation to their role in trade and the jurisdictional regulations under which they must govern themselves.

It is an offence under the Lacey Act to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce any product containing wood that has been placed on the EU market in violation of the Due Diligence requirements of the EUTR.

It is US "persons", including US importers, distributors, business partners and consumers of EU exported goods containing EUTR non-compliant wood, that are liable under the Lacey Act. Any US "person" taking possession of such products faces the very real risk that the products can be seized and forfeited while they become liable to significant fines and prison sentences.

Further where US "persons" wilfully take custody of such products in the knowledge that Due Diligence practices in Europe were not compliant with EUTR, the Lacey Act upgrades the violation from a misdemeanour to a felony offence, substantially increasing penalties for Lacey Act violations.¹⁰

While any US company importing affected products also runs the very real risk of losing customers, commercial risks are perhaps more apparent to EU exporters and manufacturers. EU Traders, as defined by the EUTR, will continue to have no legal obligation to avoid EUTR non-compliant timber; however, if they are unable to demonstrate that the timber they are using has complied with the EUTR, they can expect to rapidly lose the confidence of US customers and business partners



who are liable under the Lacey Act.

To mitigate both the legal and commercial risks associated with a lack of EUTR Due Diligence in their supply chain, US actors and EU Traders need to conduct their own Due Diligence, to ensure no risks of illegality exist within their supply chains. This need not be an arduous process since the EUTR already requires traders to keep detailed records of sellers of timber and timber products, forming a readily accessible paper trail back to the Operator placing the timber.

An assessment of the Due Diligence Systems each has in place (and how this was applied to specific shipments) to ensure that all risks of illegality have been successfully identified and mitigated to a negligible level is then required. EIA suggests the European Commission's Guidance Document for the EUTR is a good starting point for anyone conducting an assessment of the Due Diligence Systems used in their supply chains.¹¹

US importers and distributors face the very real risk that the products can be seized and forfeited while they become liable to significant fines and prison sentences.

Navigating New Liabilities: How Lacey's Reciprocity for EUTR Affects Different Actors				
Timber Product Actor / Legal Person Type	EUTR / Lacey Status	Traditional EUTR / Lacey Status & Obligations	Newly Identified Legal and/or Commercial Risks	Required and recommended actions
EU Operators (first to place timber on EU market, whether EU foresters (domestic EU timber) or importers (non-EU timber))	Regulated under EUTR Not Regulated under Lacey (unless through international corporate structures)	Prohibited from placing illegally harvested timber on the market Required to conduct Due Diligence to remove any risks of illegality within their supply chains	Commercial Risk: Loss of market share if trading EUTR non-compliant timber Legal risk: Operators with US operations may be liable under Lacey where wood placed by them is imported into US	Required: Ensure EUTR compliance Recommended: Provide details of EUTR compliance, including access to Due Diligence Systems, to customers
EU Traders (anyone else trading products containing EUTR regulated wood) exporting to the US/supplying to supply chains for products destined for the US	Not regulated under EUTR Not Regulated under Lacey (unless through international corporate structures)	No obligation to avoid EUTR non-compliant timber Obligated to keep records of sales & purchases for 5 years and share with enforcement officials on request	Commercial Risk: Loss of market share if trading EUTR non-compliant timber Legal risk: to EU subsidiaries, affiliates, business partners, and even end users in the US	Recommended: Identify all EUTR regulated Operators within supply chain Recommended: Conduct Due Diligence to ensure no EUTR non-compliant timber present in supply chain Recommended: Only make use of legally traded timber Recommended: Provide access to proof of EUTR compliance to customers
US Importers, distributors, traders, end users, etc	Regulated by the Lacey Act Not Regulated by EUTR	Prohibited from importing, selling, and possessing timber harvested or traded in violation of US State or foreign laws designed to protect plants Required to show Due Care considerations where a violation of US or foreign law is evidenced Importers required to declare the country of harvest and species name of all plants contained in their products	Legal risk: Product seizure and forfeiture on EUTR non-compliant products under the Lacey Act, significant fines and prison sentences	Recommended: Conduct Due Care on EUTR Due Diligence on EU supplies, to ensure no EUTR non-compliant timber present in supply chain Required: Only take custody of legally traded timber Recommended: Provide access to proof of EUTR compliance to customers



¹⁰ https://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf

¹¹ The European Commission's Guidance Document for the EUTR is available from http://ec.europa.eu/environment/forests/timber_regulation.htm



La Ley Border, Laos PDR, 2015

The EUTR's need for Lacey Reciprocity

A combination of weaknesses in the legislation, a lack of resources for EU Competent Authorities, little to no transparency on enforcement and low levels of enforcement by some member states has seen large volumes of non-compliant timber enter, remain on or be traded through the European market during the first five years of the EUTR's existence.

While the past year has seen some definite examples of effective enforcement from and collaboration between EUTR Competent Authorities, including with regards to Myanmar (see below), the EUTR cannot be said to be a reliable measure overall at this stage.

Weaknesses in legislation

As outlined above, the EUTR's limited product scope and limitation of Due Diligence and prohibition measures to Operators alone conspire to limit sources of demand for credible Due Diligence. When and where this goes wrong, EUTR competent authorities are not mandated to remove from the market timber they have found to be in violation of Article 6 of the EUTR on Due Diligence.

There is also the potential for unscrupulous Operators to circumvent

the EUTR, even if already found to be non-compliant, through the use of proxy companies to conduct the act of first placement.

Weaknesses in enforcement

While all Member states have now implemented the EUTR through national legislation, infringement procedures were launched by the European Commission against Greece, Hungary, Romania and Spain in 2015 for failure to implement national legislation.¹² Today, the EUTR is still not applied in a consistent manner across the different member states and many Competent Authorities remain under-resourced. Alongside allowing non-compliant timber to enter the EU market, a disparity in enforcement has the potential to give an advantage Operators in member states where the EUTR is enforced, as US actors start to favour those EU markets with lower levels of toxicity.

Burmese teak provides a good example of the uneven playing field faced by Operators in different member states. The EUTR/FLEGT Group of Experts has recently had a strong focus towards this timber and has agreed that, to date and under current conditions, no Operator placing Burmese teak on the market has achieved EUTR compliance¹³ (see case study below). However, the enforcement response from different national Competent Authorities has been

unacceptably varied. Some member states, such as Denmark and the UK, assessed the Due Diligence being used by every Operator in their country to provide a consistent and level playing field. Others, such as Italy and Spain, completely failed to enforce the legislation, even when receiving Substantiated Concerns from EIA comparable to those already enforced by their EU peers.

This lack of enforcement is not unique to cases related to Burmese teak – Belgium was the subject of legal action by the European Commission in October 2017 for failing to carry out enough checks on wood being placed on the Belgian market in general¹⁴.

These failures in enforcement have led to a situation where the European market remains flush with EUTR non-compliant timber.

Illegal timber still in the EU market

A lack of seizure provisions under the EUTR for Due Diligence offences means the EU market is still toxic even after "enforcement has occurred", with non-compliant timber openly offered for sale. For example, EIA submissions to EUTR Competent Authorities have led to numerous Operators being found in breach of the EUTR for their placement of Burmese teak (see cases studies below). Yet these same Operators have since been identified offering the same timber for sale at Metstrade, one of the largest business-to-business selling events for the marine industry in Europe¹⁵.

This has led to an unjustified sense of confidence in legal wood from Traders, who have perhaps assumed that only legally sourced timber would be available from a large and seemingly reputable event. That their status as Traders insulates them from legal action under the EUTR has led to a situation where

numerous Traders appear to have no Due Diligence in their procurement policies to avoid non-compliant timber.

Opacity in enforcement

Competent Authorities from different member states display varied levels of enforcement reporting, either through a lack of policies related to publication or privacy obligations under national legislation. This has resulted in a lack of transparency in enforcement (itself a risk indicator under the EUTR). Even for cases submitted by EIA, Freedom of Information requests have been required to compel some Competent Authorities to provide details on the outcomes; some Competent Authorities have refused to provide details of enforcement on cases not initiated by EIA.

Combined with an absence of seizure powers leaving non-compliant timber on the market, this opacity ensures non-compliant timber is not readily identifiable to traders in the EU market, presenting barriers to anyone attempting to conduct Due Diligence on European supply chains. This raises the risk profile for EU produced goods destined for the US market.

'Trusting the trade' is not always an option for any non-EUTR regulated actors conducting Due Diligence on EUTR compliance, as Operators found to be in breach of the EUTR are not always entirely forthcoming in disclosing this enforcement.

For example, companies reported by EIA and found in violation of EUTR when placing Burmese teak have subsequently made public statements claiming they are compliant^{16,17}, have such assertions on their websites¹⁸ and have categorically denied any breach of the EUTR to their customers – leaving those customers¹⁹ exposed to risks of Lacey Act enforcement.



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Top and bottom: Myanmar Timber Enterprise depot at Dagon, Yangon, Myanmar, 2013

large volumes of non-compliant timber enter, remain on or have been traded through the European market

¹⁴ <https://www.clientearth.org/belgium-facing-legal-action-breaking-illegal-logging-law/>

¹⁵ <https://www.metstrade.com/>

¹⁶ Vandecasteele Hout Import was found in breach of the EUTR in May 2017, yet released this statement in January 2018 https://www.ihb.de/wood/news/EIA_teak_Myanmar_Vandecasteele_56042.html

¹⁷ Media coverage about Moody Decking Services Ltd. stated that the company was found to be "EUTR compliant", but failed to mention that Moody Decking are a Trader, and not regulated under the EUTR. All firms known to be supplying Moody Decking with Burmese teak have been found in breach of the EUTR. <http://www.boatingbusiness.com/news101/industry-news/moody-decking-cleared-in-illegal-myanmar-teak-case>

¹⁸ Vandecasteele Hout Import were found to be in breach of the EUTR by the Belgian Competent Authority in May 2017, yet their website claims "Thanks to our focus on the legality of the timber (conform the EUTR regulation), thorough [sic] quality control in Burma, our high quality standards and consistency in quality, we can guarantee our customers continuity on the long term". <https://louis-vandecasteele-ktnf.squarespace.com/new-page/>

¹⁹ Letter to EIA from an end user of Vandecasteele Hout Import, dated 11 January 2018, which stated that "NHG and Vandecasteele have categorically denied any breach of the EUTR in its supply of products". Both companies have been found in breach of the EUTR for the same products referenced.

¹² http://ec.europa.eu/environment/forests/eutr_report.htm

¹³ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=35032&no=13>

Case study: The Superyacht Sector

Burmese teak use within the EU-US superyacht trade

The trade in teak from Myanmar is one that spans the world and in which both the EU and US play a significant role. The sectors and supply chains involved are subject to many of the weaknesses in EUTR design and implementation, and the proactive application of timber laws in the US is now required to clean up the US yacht sector, prevent market distortions occurring in Europe and the US and in assisting EU enforcement officials.

Burmese teak is the timber of choice for the decks of Europe's luxury yachts, many of which are exported to the US. However, there are extremely high, unmitigable risks of illegality associated with this timber, which has meant that no Burmese teak placed on the EU market since the EUTR came into force has complied.

Despite the well-publicised nature of these risks, and of enforcement of the EUTR for related breaches, weaknesses in EUTR design and an obsession from the sector to use Burmese teak at any cost have produced a high-risk value chain ripe for Lacey enforcement.

While Myanmar is working toward reform within the timber sector and is looking at ways to provide EUTR compliant teak, the sector-wide nature of the EUTR offences related to this timber, and (with a few notable exceptions, such as Italy) the coordinated and consistent enforcement of the EUTR by Competent Authorities, has led to de facto breaches of the Lacey Act occurring as EU-produced yachts containing Burmese teak are exported to the US.

No legal Burmese teak in Europe

After the EUTR entered into force in March 2013, EIA published an alert of the high risks of illegality for Burmese teak in December 2013²⁰. Other organisations, including NEPCON (a recognised EUTR Monitoring Organisation), WWF and the UN Office on Drugs & Crime all also published information related to the high levels of illegality within Myanmar's forestry sector that same year^{21 22 23}.

In light of massive illegal logging in Myanmar (see *Risky Business*, on next page) and continued placement of high-risk teak on the EU market, EIA investigators approached numerous EU teak traders in 2016 and were

able to assess the Due Diligence Systems used by a number of companies. None of those investigated could verify information about their supply chains beyond the point of sale by the Myanmar Timber Enterprise, resulting in fundamental failures in their Due Diligence Systems²⁴. However, each still made the decision to place the timber on the EU market in clear breach of the EUTR.

Without access to any meaningful evidence of compliance with Myanmar's laws, it is impossible for EU Operators to successfully apply Due Diligence systems to Burmese teak originating from Myanmar, yet the timber was still placed on the market.

As a result, EIA submitted 15 EUTR Substantiated Concerns (evidenced complaints) in 2016 and 2017 related to the placement of Burmese teak across Europe. The past 18 months have seen Operators found in breach of the EUTR in at least Sweden, Denmark, Germany, Belgium, the UK and the Netherlands. EIA cases remain under investigation in the Netherlands (2), Spain (1) and Italy (4).

A lack of published information means EIA is not sure of the total number of Operators found in breach of the EUTR for the placement of Burmese teak. However, EIA is aware of at least 19 Operators found to be in breach by EUTR Competent Authorities. This includes every single Operator placing this timber in both Denmark and the UK. All cases submitted by EIA that have been concluded have found those Operators identified to be in violation of EUTR Due Diligence requirements.

The EUTR/FLEGT Group of Experts, a body comprising every EUTR Competent Authority and the European Commission, has repeatedly concluded in its meetings that no Due Diligence System assessed for the placement of Burmese teak has to date met the requirements of the EUTR and a clear consensus exists within the EUTR enforcement community around the lack of compliance currently possible for this timber.

The Commission Expert Group on EU Timber Regulation and the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation (E03282) exists to "ensure cooperation between member states Competent Authorities and with the Commission in order to ensure compliance with EUTR (in the spirit of article 12 of the EUTR), and to assist the Commission in ensuring uniform implementation of the EUTR and FLEGT Regulation across the European Union²⁵".

The group has repeatedly stated that no information it has assessed relating to Due Diligence for Burmese teak has been able to satisfy EUTR requirements.

"While the CAs reiterated that efforts in Myanmar to move in the right direction are appreciated, it was concluded that, at the moment, none of the assurances that the CAs have received can be relied upon as sufficient for demonstration of compliance with the EUTR Due Diligence obligations²⁶".

Risky Business

Overharvesting in Myanmar, in excess of the legally proscribed Annual Allowable Cut, has been the norm in recent years. Upon assessing risk related to forest management, NEPCON concluded that "There is a significant risk that forest management practices do not meet the intention of the forest policy and comply with the forest law²⁷".

ALARM has compared the aggregate Annual Allowable Cut for the whole of Myanmar with actual extraction, evidencing a continued pattern of excess harvesting. In both 2012-13 and 2013-14, the national AAC for teak was exceeded in Sagaing Division alone²⁸.

The chart below refers only to state-sanctioned logging – huge volumes of timber are also illegally logged and smuggled out of Myanmar across the border with China, as documented in EIA's 2015 report *Organised Chaos*²⁹.

Acknowledging the problem, and in an effort to address the massive overharvest, Myanmar enacted a log export ban in March of 2014. In the lead up to the ban, there was a massive timber grab where, in the words of a Spanish teak trader, "Thousands and thousands of logs were cut, sold and exported. Many which should not have been cut³⁰" (despite knowing this, this same trader claimed to have gone "each month to Myanmar during those last months and purchased the best teak logs possible"). Today, thousands of these logs remain in stockpiles in countries such as Malaysia, Singapore, China and India, and are still entering the EU market.

In further reaction to the systematic overharvest in Myanmar, a one year logging ban was placed across the country in 2016, and a 10 year ban across the Bago-Yoma mountain range³¹, the 'home of teak'.



Figure 6: Teak – National aggregate AAC and Trees Marked for felling by FD for 2009-2015
Data source: MOECAP 2015 – note no wastage or illegal extraction estimates are shown.

26 <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=35032&no=13>

27 Myanmar Forest Sector Legality Analysis, NEPCON, for the European Timber Trade Federation, September 2013, <http://docplayer.net/66045944-Myanmar-forest-sector-legality-analysis.html>

28 Legally and Illegally Logged out: Extent and Drivers of Deforestation & Forest Degradation in Myanmar Thorsten Treue, Oliver Springate-Baginski, Kyaw Htun for ALARM, March 2016

29 <https://eia-international.org/wp-content/uploads/EIA-Organised-Chaos-FINAL-lr1.pdf>

30 Teak Solutions, by email to EIA 20 June 2016.

31 <https://www.nepcon.org/sourcinghub/timber/timber-myanmar>

20 <https://eia-international.org/eia-alert-timber-shipments-from-burma-to-the-eu>

21 Myanmar Forest Sector Legality Analysis, NEPCON, for the European Timber Trade Federation, September 2013, <http://docplayer.net/66045944-Myanmar-forest-sector-legality-analysis.html>

22 Guidance note on sourcing forest products from Myanmar (Burma), WWF, November 2013.

23 Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment. United Nations Office on Drugs and Crime (UNODC), 2013.

24 <https://eia-international.org/report/overdue-diligence>

25 <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3282>





Decking Demand

Despite the clear risks of illegality and the well-publicised breaches of the EUTR by Operators placing Burmese teak on the EU market, demand for this timber in Europe continues to be driven, principally, by the marine sector. Myanmar teak is favoured for applications such as marine grade decking, used for marinas and jetties but particularly in boat construction and refurbishment. Demand in Europe appears to be driven by luxury yacht and superyacht production.

On the understanding that EUTR Competent Authorities have found that no Due Diligence System assessed for Myanmar teak placed on the EU market since March 2013 has complied with the EUTR and that boat builders don't hold huge stocks, it is likely that most decks on European manufactured yachts exported to the US since that time have been made with Myanmar teak placed in violation of the EUTR. Whether or not they are regulated by the EUTR, EU yacht manufacturers using Burmese teak are using EUTR non-compliant timber – rendering the vessels themselves contraband under the Lacey Act.

Burmese teak certainly possesses extraordinary properties but the demand for this timber cannot justify ignoring

the rule of law. Readily available, legally traded alternatives to Burmese teak decks exist but the mythology of this timber as an indispensable attribute of luxury yachts has been well spun over decades by the industry. Consequently, yacht customers and manufacturers alike usually reject legal and sustainable alternatives to Burmese teak, particularly at the high-end of the market.

Indeed, due to economic sanctions imposed on Myanmar during the tenure of the country's previous military regime, EU and US timber traders supplying the marine and superyacht sectors went out of their ways to maintain ongoing supply of Burmese teak, often through creative and legally questionable circumvention of trade sanctions. To a large degree, that culture of "only the best regardless of the law" remains in place today and, with the lifting of economic sanctions, EU importers of Burmese teak have in turn failed to respect the EUTR and wilfully violated EU law to fulfil the demand of superyacht owners and manufacturers.

Lacey Act enforcement on Burmese teak will support much-needed reform in Myanmar, where steps are already being taken, and would send a strong message to major consuming countries where no legislation exists.



the mythology of this timber as an indispensable attribute of luxury yachts has been well spun over decades by the industry



Princess and Sunseeker Yachts – Contraband under Lacey

During research into the Myanmar teak industry in the EU, EIA investigated the supply chains of two of the UK's largest yacht manufacturers, Princess Yachts and Sunseeker Yachts, both of which make use of Burmese teak as decking and export to the US. These companies are symptomatic of the core demand for Burmese teak in Europe and America.

The two companies make use of two British deck producers, Moody Decking Services Ltd, and DH Watts & Sons, which in turn source Burmese teak from NHG Timber (UK) and Vandercastele Hout Import (Belgium)³². Following the submission of Substantiated Concerns by EIA, both suppliers have been found to be in breach of the EUTR by their respective Competent Authorities. EIA has confirmed this with Competent Authorities and provided their responses to email enquiries and FoI requests from EIA to Sunseeker. This followed NHG Timber and Vandercastele Hout Import's denials of enforcement actions against them.

While EIA considers all Burmese teak placed on the EU market since March 2013 to be contraband under the Lacey Act, EIA believes Sunseeker and Princess are the first cases where enforcement officials in Europe are known to have already investigated and found companies in the supply chains to have placed the teak used in violation of the EUTR.

On the understanding that no Myanmar teak placed on the EU market since 2013 has complied with the EUTR, should any unidentified Operators be supplying

these companies, an offence under the Lacey Act will still have occurred if these yachts enter the US. As all Burmese teak entering the Princess and Sunseeker supply chains since the EUTR came into force has been placed on the EU market in contravention of the EUTR – a law that protects plants – it is therefore legally contraband under the US Lacey Act.

As Princess and Sunseeker build this teak into their yachts and export them to the US, the American entities that may variably "import, export, transport, sell, receive, acquire or purchase", in interstate or international commerce, Sunseeker or Princess yachts containing wood "sold" [explicitly equated with "placement" under EUTR] in violation of a foreign law protecting plants (the EUTR) immediately violate the Lacey Act.

Information detailing the Princess and Sunseeker supply chains, the breaches of the EUTR that have occurred within these, the hundreds of yachts shipped to the US and the key American distributors for each brand has been forwarded to the relevant authorities in the US. Princess's key distributors include Viking Sports Cruisers and Princess America, while Rick Obey and Associates is Sunseeker Yachts's principle US distributor.

EIA has similarly alerted both Princess and Sunseeker to these liabilities under the Lacey Act, informing them that under the Act's Due Care provisions, knowledge of these liabilities elevates any future repeat Lacey Act offences to felonies under Due Care provisions, which are punishable by five years in prison and a \$250,000 fine (\$500,000 for corporations)³³.

³² <https://news.mongabay.com/2018/01/luxury-british-yacht-makers-vow-to-examine-supply-chains/>

³³ https://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf

Seizing the Opportunity

Weaknesses in EUTR design and implementation mean it has failed to keep the EU market free of illegal and high-risk timber and failed to prevent the toxicity being exported to the US market.

That the Lacey Act recognises a violation of EUTR Due Diligence requirements as a predicate violation of Lacey provides unprecedented and much-needed opportunities to bring accountability to illegal and high-risk timber that has navigated its way through EUTR enforcement, while simultaneously addressing some of the respective weaknesses in both the EUTR and the Lacey Act.

US and EU enforcement officials and policy-makers should seize these opportunities as a means to strengthen both laws without the need for regulatory change.

A Lacey Act expert from the US Department of Justice has publicly acknowledged the need for risk provisions in the Lacey Act, with “an ideal law including Due Diligence at the front end and Prohibition in support³⁴. With limited enforcement action on high-risk timber (timber not proven to be illegally logged but likely to have been) under Lacey to date, the recognition of EUTR Due Diligence failings as predicate offenses under Lacey provides the US Government with an opportunity to strengthen the exercise of Due Care, at least in relation to imports from Europe.

The very real commercial and legal risks that the relationship between the two laws poses reinforces the need for better Due Diligence by EU Operators; the adoption of Due Diligence by Traders and exporters not currently regulated by the legislation; and introduces the need for EUTR-style Due Diligence in the exercise of Due Care in the US.

US officials can also simultaneously bring accountability to both EU and US traders in EUTR non-compliant timber, while providing real reasons to reform EUTR provisions on product scope, the actors regulated and transparency surrounding enforcement.

For the EU, Lacey enforcement of EUTR non-compliant Due Diligence in US supply chains would dramatically increase the exercise of Due Diligence by all actors in EU supply chains (both regulated Operators and unregulated traders) and help address very real market distortions that unequal enforcement of EUTR is having in key timber subsectors.

Combined, the application of Lacey to EUTR non-compliant timber imported from the EU would dramatically increase the efficacy and impact of

the core forest conservation policies of both the EU and US at a time when forests' role in climate change mitigation, as well as species biodiversity and Sustainable Development Goals has been widely recognised.

The need for this increased Due Diligence immediately extends the product scope of the EUTR to include the entire value chain for huge swathes of EU-US trade in goods. However, there is a need for cooperation, both to realise the full potential of both pieces of legislation in the fight against illegal logging and to reduce risks to actors in this trade.

Publication of enforcement actions by EUTR Competent Authorities, and the sharing of this information with enforcement officials in the US, is an important step in realising these opportunities, but this also needs to be supported through enforcement action in the US. Only giving the relationship between the EUTR and the Lacey Act ‘teeth’, through the successful prosecution of offenders, will drive the sector-wide reforms that this relationship has the potential to realise.

Changes to the EUTR

That EUTR non-compliant timber remains on the market, and that a lack of transparency in enforcement has led to a situation where this timber can be difficult to identify, poses significant risks, both legal and commercial, to all actors downstream of the point of enforcement in the supply chain of products containing wood destined for the US market. While enforcement of the Lacey Act for breaches of the EUTR has the potential to address some of these issues through market demand, changes to the EUTR are required to protect European industry (and its US customer base) from unwittingly purchasing illegal wood that violates Lacey.

Specifically, the EUTR should be amended to compel all member states to publish, in real time, the outcomes of enforcement actions and, where need be, introduce or amend national legislation where existing laws prevent this disclosure. Apart from being contrary to the actual goals of the EUTR, the availability of this timber on the market generates significant risks for EU and US companies operating within a Lacey Act context.

The EUTR should be further amended to require the seizure of timber placed on the EU market in violation of its Due Diligence provisions. EIA believes that that the European Commission should coordinate this process in concert with the current process to expand the product scope regulated under EUTR.

Conclusions

In this report, EIA has detailed the already extant but previously unidentified relationship between the EUTR and the Lacey Act, whereby EUTR offences (Due Diligence or Prohibition) constitute predicate offences under the Lacey Act and products containing non-EUTR-compliant timber exported to the US are contraband under US law.

This reality presents previously unidentified and significant risks and liabilities to a wide range of actors across the EU and US economies; risks compounded by a market containing non-compliant yet hard to identify timber. Risks to US actors are both commercial and legal, with importers, distributors and their customers exposed to product forfeiture and seizures, along with significant fines and prison sentences.

Within the EU, all actors within supply chains for products containing wood destined for the US market are exposed to the risk of losing market share, regardless of whether or not they are regulated by the EUTR, dramatically expanding the de facto reach of the legislation.

Timber producers, both those in Europe and abroad, will face an increased demand for risk-free timber and sufficient proof of this to allow EU Operators to successfully conduct Due Diligence.

The response from industry to these risks will dictate their effect. Ultimately, all any actor needs do to protect itself and its customers from the dangers EIA has revealed is avoid risks of illegality in its supply chain. Due Diligence within this context need not represent an arduous process – but failure to conduct Due Diligence, or to seek alternative supply where EUTR non-compliance is detected, has very real ramifications.

A combination of weak and unequal enforcement plus flaws in the design of the EUTR has led to Europe remaining flush with timber with high risks of illegality. Recognising Europe's role as a timber producing and processing region in the context of the Lacey Act as a demand side measure has the potential to address some of these failings.

A well-functioning EUTR would reduce the risk to all actors and reduce, if not remove, the need for any enforcement of the Lacey Act for EUTR-related

offences. However, changes to both the EUTR legislation and enforcement culture are required to achieve this. A lack of seizure provisions for Due Diligence offences, and a lack of transparency in enforcement leaves non-compliant timber on the market and makes it hard to identify, even after enforcement has occurred.

The Lacey Act's relationship with the EUTR will also address some of the weaknesses inherent in the Lacey Act itself. The most apparent of these is the introduction of risk mitigation as a legal requirement under the Lacey Act. While the Lacey Act recognises the concept of Due Care, failure to conduct Due Care is not in itself an offence – however, making use of timber or products containing wood where EUTR Due Diligence has not occurred is an offence under the Lacey Act.

The burden of proof under the currently understood application of the Lacey Act is extremely hard to achieve, making enforcement difficult and, as a result, rendering the Act comparatively weak as a disincentive to operators to use high-risk timber. Solidifying the concepts of risk, Due Diligence and risk mitigation to the Lacey Act greatly strengthens its power as a demand side measure designed to eliminate illegal timber trade (at least for supply chains involving Europe).

EIA has already appealed to the relationship between the two laws during the submission of information about breaches of the EUTR in UK-US supply chains to US enforcement officials. It is EIA's expectation that civil society more broadly will begin to look into this relationship to further its own goals, through being able to initiate legal proceedings and market-based approaches to previously untouchable actors.

It is also EIA's hope that the sharing of information between enforcement agencies in the US and the EU will become the norm, with the US checking for imports of products from supply chains subject to EUTR enforcement actions in the EU.

The combination of these outcomes, if seized by governments, dramatically increases the effectiveness of both the EUTR and the Lacey Act as demand side measures in the fight against illegal logging, enhancing both pieces of legislation – and all without the need for any laws to be changed.

³⁴ <https://www.chathamhouse.org/sites/files/chathamhouse/events/2016-july-ch-illegal-logging-meeting-summary.pdf> See summary of statements from Patrick Duggan made at Chatham House's 26th Illegal Logging Update and Stakeholder Consultation Meeting



Recommendations

EUTR-regulated Operators should

- Conduct full Due Diligence on any timber being placed on the market and, where risks of illegality cannot be mitigated, do not place this timber on the market
- Communicate their concerns to suppliers in producer countries
- Establish procedures to transparently and routinely disclose to their customers evidence of the application of Due Diligence, so as to reassure them their products are not liable under the Lacey Act
- Become willing to share their Due Diligence practices with companies further down the supply chain who may also need to mitigate their liabilities under the Lacey Act

EU Traders/exporters to the US market and American entities:

- Insist upon viewing and accessing the Due Diligence Systems used by any Operators in their supply chain to help protect yourselves, their distributors and their customers from legal action under the Lacey Act. In the case of EU exporters, this is to help them protect market share and market access, and for US actors who are regulated by the Lacey Act, this is to help prevent legal prosecution for Lacey Act offences

The European Commission should:

- Coordinate and provide a central space for publication of EUTR enforcement actions by member states
- Coordinate a process leading to the amendment of EUTR to require seizure of timber placed on the EU market in violation of the Due Diligence provisions, and disclosure of enforcement actions by Member states. Do this in concert with the current process to expand the product scope regulated under EUTR
- Work with US Lacey Act officials to bring EUTR accountability to supply chains stemming from Operators in member states that are not currently enforcing the EUTR, such as Italy and Spain
- Ensure failings in or the absence of EUTR enforcement by some member states does not favour exporters of manufactured goods to the US market from those jurisdictions over and above exporters from member states enforcing the EUTR
- Inform its international trade partners, particularly those involved in FLEGT processes, of the expanded liabilities under the Lacey Act that exist

EUTR Competent Authorities should:

- Publish all enforcement actions taken under the EUTR in real time, in partnership with the EC
- Seek amendments to national EUTR implementing laws where disclosure of enforcement actions is not currently mandated

EU Member States should:

- Where applicable, amend national legislation to allow for the publication of EUTR enforcement actions
- Support moves to strengthen mandates for seizure of timber in violation of EUTR Due Diligence provisions
- Work with US officials in processing Lacey Act cases, where required
- Increase budgets and resources for EUTR enforcement, and mandate better inter-EU coordination of enforcement actions

The EU boat building industry:

- Make use of readily available, legally sourced alternatives to Burmese teak until such time as EUTR compliant Burmese teak is available, and communicate reasons why to suppliers
- Ensure all boatyards are aware of their liabilities under the Lacey Act or the liabilities of their US customers
- Push trade federations to serve industry's interests by understanding the new liabilities that Lacey Act presents to EU exporters of yachts

The US Government should:

- Update its communications to include information and advice on EUTR-linked predicate offences under the Lacey Act
- Alert key US trade and consumer federations of the legal risks associated with EUTR non-compliant timber entering the USA
- Work with EU Member states, the EC, NGOs and other relevant actors working to bring legal accountability to illegal timber in EU and US markets

Governments of Timber Producing Countries Supplying the EU should:

- Understand the new Lacey Act / EUTR liabilities and ensure timber producers and exporters are aware of them
- Ensure systems are developed and maintained that enable EU Operators to comply with EUTR Due Diligence requirements
- Consider taking advantage of FLEGT Voluntary Partnership processes to assist in the maintenance of EU and US market access in lieu of EUTR
- Undertake governance reforms that effectively reduce illegal logging, increase domestic enforcement, and decrease risks for EU and US operators

Civil Society Organisations should:

- Take advantage of the newly realised scope for increased law enforcement against illegal timber through the submission of complaints, lobbying of EU and US officials to enforce the provisions available to them and strengthening the EUTR's seizure and disclosure provisions.





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