

Blood Forests: Post Lacey Act, Why Cohesive Global Governance is Essential to Extinguish the Market for Illegally Harvested Timber

Sean H. Waite[†]

TABLE OF CONTENTS

I. Introduction	318
II. Illegal Logging	321
A. Disagreement Regarding Defining Illegal Logging	321
B. Environmental Consequences.....	323
C. Socioeconomic/Human Rights Consequences.....	325
D. Economic Consequences	326
III. International Responses	326
A. Bilateral Agreements	328
B. E.U. Forest Law Enforcement, Governance, and Trade Action Plan.....	329
C. Public Procurement Policies	330
D. Certification	331
IV. The Lacey Act	332
A. Impacts of the 2008 Amendments	334
B. “Due Care”	335
C. The Lacey Act as a Powerful Tool	336
V. A Pressing Need for Unified Global Governance.....	338
A. Defining Illegal Logging	338
B. The Need for Collaborative Processes	340
C. Procurement Schemes.....	340
D. Combat Root Causes	341
VI. Conclusion.....	342

[†] J.D. candidate, Seattle University School of Law, 2012. B.S. in History, University of Idaho, 2008. I would like to thank my family, friends, and the SJEL staff. Particularly, I would like to thank Kevin Monahan for his guidance in this article’s earliest stages.

I. INTRODUCTION

In 2004, the United Nations uncovered over 300 bullet-riddled bodies in Youghbor, a small village in Liberia.¹ As described by eyewitnesses, the massacre was carried out by the militia forces of former Liberian warlord, Charles Taylor.² When the United Nations investigated Taylor, they made a significant discovery as to how he financed his military prowess: timber. The timber that fueled Taylor's crimes was harvested from what has appropriately been coined as Africa's "blood forests."³

The term of "blood" or "conflict" diamonds is widely known, most notably from the film starring Leonardo DiCaprio, *Blood Diamond*.⁴ "Conflict diamonds" refers to the exploitation of diamonds mined in territories of conflict to fund the furtherance of the conflict.⁵ Recent notoriety of the exploitation has resulted in a resounding response world over, as diamond manufacturers now proactively ensure that their products are conflict free.⁶

What remains widely unknown to the general population is that diamonds are not the only resource exploited in such a devastating manner. Timber is exploited by the same criminals in furtherance of the same corrupt objectives.⁷ Analogous to conflict diamonds, conflict timber is defined as follows:

timber that has been traded at some point in the chain of custody by armed groups, be they rebel factions or regular soldiers, or by a civilian administration involved in armed conflict or its representatives, either to perpetuate conflict or take advantage of conflict situations for personal gain.⁸

1. Arthur G. Blundell, *Conflict Timber and Liberia's War*, 43-44 EUROPEAN TROPICAL FOREST RES. NETWORK NEWS 32, 33 (2005), available at http://www.etfrn.org/etfrn/newsletter/news4344/articles/2_2_Blundell.pdf.

2. *Id.*; e.g., *Charles Taylor Lawyer Storms Out of War Crimes Trial*, BBC NEWS, Feb. 8, 2011, <http://www.bbc.co.uk/news/world-africa-12389550>.

3. Richard Black, *New Dawn for Liberia's 'Blood Forests'*, BBC NEWS, Oct. 12, 2006, <http://news.bbc.co.uk/2/hi/science/nature/6035617.stm>.

4. Stephen Miles, *Why Film Matters: No, It Really Does*, MOVIE CULTISTS (May 23, 2010), <http://moviecultists.com/2010/05/23/why-film-matters-no-really-it-does/>.

5. *Conflict Diamonds: Sanctions and War*, U.N. DEP'T OF PUB. INFO., <http://www.un.org/peace/africa/Diamond.html> (last visited Apr. 22, 2012).

6. *See, e.g.*, THE WORLD JEWELLERY CONFEDERATION (CIBJO), THE RETAILERS GUIDE TO MARKETING DIAMOND JEWELRY 26 (2007), available at http://www.cibjo.org/dtc/cibjo_Main.pdf.

7. *See generally* Black, *supra* note 3.

8. *See* GLOBAL WITNESS, THE LOGS OF WAR: TIMBER TRADE AND ARMED CONFLICT 17-40, (Mar. 2002), available at http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Logs_of_War.pdf.

While diamonds may compete with oil as the most valuable natural resource on Africa's expansive continent, timber is one of the most abundant.⁹ Like diamonds, timber serves as a means for some of the world's most horrific atrocities and the primary source of funding to sustain violent civil unrest.¹⁰ Conflict in Africa exemplifies some of the most devastating examples, yet blood forests persist on a global level and have taken particular root in Africa, South East Asia, and South America.¹¹

Liberia is the poster child of forest exploitation. The African nation has long been subject to an unstable government. In 1989, a brutal civil war began, and Charles Taylor, introduced at the outset of this article, capitalized.¹² Taylor exploited a heightened level of ethnic animosity that had accrued from the nation's unique origin.¹³ His forces quickly gained control of most of the nation and, with it, its natural resources. The unrest precipitated the collapse of the already feeble economy.¹⁴ However, despite the commercial disarray, Liberia is home to nearly half of West Africa's tropical forests, and thus an abundant supply of timber.¹⁵ The timber industry continued to attract investment during the insurgency and subsequent unrest.¹⁶ With control of this resource, Taylor and his forces had means of funding and support.¹⁷

By 2002, the Liberian timber industry accounted for 80 million U.S. dollars and 19 million in tax revenue.¹⁸ Yet these tax transactions were not processed in typical fashion. Rather, corruption disrupted the funds from being paid or being properly used. For example, in lieu of taxes, one company paid at least 1.5 million U.S. dollars of owed taxes to known arms dealers.¹⁹ In more direct instances, Taylor directly exchanged logging concessions or tax forgiveness for weapons.²⁰ For instance, Taylor issued substantial logging concessions to notorious

9. FOOD & AGRIC. ORG., STATE OF THE WORLD'S FORESTS 4 (2009), available at <http://www.pefc.org/images/stories/documents/external/i0350e.pdf> (Africa is home to sixteen percent of global forest cover).

10. See GLOBAL WITNESS, *supra* note 8, at 17–40.

11. *Id.*

12. *Id.* at 16; see also Blundell, *supra* note 1.

13. *Id.* The nation of Liberia was founded by freed American slaves who were shipped to Africa. At the outbreak of the civil war, the descendants comprised only three percent of the total population but had maintained rule.

14. Blundell, *supra* note 1, at 33.

15. *Background Note: Liberia*, U.S. DEP'T OF STATE (Nov. 22, 2011), available at <http://www.state.gov/r/pa/ei/bgn/6618.htm> (last visited Feb. 26, 2011).

16. Blundell, *supra* note 1, at 1.

17. See GLOBAL WITNESS, *supra* note 8, at 17–40; Blundell, *supra* note 1.

18. Blundell, *supra* note 1, at 33.

19. *Id.*

20. *Id.*

Ukrainian Mafia boss Leonid Minin, a known leader in the illicit arms trade.²¹

While the timber companies exploited Liberia's forests and funded Taylor's militias, they also armed security forces of their own to intimidate locals into providing access to untouched forests.²² These militias were largely enterprises associated with Taylor, and directly under the control of General Sumo, head of the Forestry Development Authority.²³ Sumo is accused of entering neighbor nation Cote d'Ivoire to loot, recruit new fighters, and attack civilians who resisted his militia.²⁴ Eyewitnesses report that Sumo directed his forces to murder the civilians of the village Youghbor in May 2003.²⁵ The United Nations' subsequent discovery of the bodies corroborates the reports of enslavement, mutilation, and cannibalism at the command of Charles Taylor, crimes bankrolled by timber sales.²⁶

The Liberian story serves as but one example of "conflict timber," one of the most striking consequences of illegal logging. In fact, the international timber market harbors one of the world's most expansive, yet lesser known, markets controlled by organized crime syndicates. While this consequence is the most appalling, some less immediate and obvious impacts abound, as illegal logging has devastating consequences on numerous levels.

Over the past forty years, the international community has become increasingly aware of these consequences and has begun to respond. The parties involved and the measures taken are various. Nation states, world governing bodies, and non-governmental organizations (NGOs) have worked to stifle the practice through education, legislation, treaties, and joint agreements. In 2008, the United States issued one of the most dramatic responses, expansively amending the nation's oldest wildlife protection statute, the Lacey Act.²⁷ First enacted in 1900, the century old

21. *Id.*

22. *Id.*

23. *Id.*

24. U.N. S.C. Rep. of the Panel of Experts concerning Liberia, transmitted by letter dated June 1, 2004 from the Chairman of the Security Council Comm. established pursuant to resolution 1521 (2003) concerning Liberia addressed to the President of the Security Council, 35, U.N. DOC. S/2004/396 (June 1, 2004), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Liberia%20S2004%20396.pdf>.

25. *Id.*

26. During Taylor's trial at The Hague, one of his war lords testified that the two ate a human heart together. Leo Cendrowicz, *Lies and Rumors: Liberia's Charles Taylor on the Stand*, TIME, July 14, 2009, <http://www.time.com/time/world/article/0,8599,1910365,00.html>. Currently, Mr. Taylor is awaiting sentencing for his crimes against humanity, having been found guilty by the Special Court for Sierra Leone sitting at The Hague.

27. Marcus A. Asner & Grace Pickering, *The Lacey Act and the World of Illegal Plant Products*, ENVTL. L. N.Y., June 2010, at 101, 102.

statute was amended to criminalize the importation of illegally harvested timber and products made from such materials.

The purpose of this paper is to provide a critical analysis of the directive to curb illegal logging and the market for illegally harvested forest products, with a particular emphasis on the United States' 2008 Amendments to the Lacey Act. Part II will provide an overview of the illegal timber trade and its impact globally. Part III will analyze the measures being taken among the international community to date, focusing on numerous case studies. Part IV will detail the amended Lacey Act and appraise its potential role amongst this backdrop. Finally, in Part V, the article will argue that to effectively extinguish the practice of illegal logging by diminishing the market for illegally harvested timber, the provisions of the United States' Lacey Act, and what may become its counterpoints in other nations, must be interpreted to align with a unified, cohesive system of global governance.

II. ILLEGAL LOGGING

A. *Disagreement Regarding Defining Illegal Logging*

There is substantial disagreement on how to define illegal logging.²⁸ Environmental NGOs tend to favor a broader definition covering all the relevant acts of the practice, while industry and government representatives tend to prefer a narrower set of criteria.²⁹ The United Nations' Food and Agriculture Organization (FAO) generally defines logging and timber trade operations as illegal when "wood is harvested, transported, processed, bought or sold in violation of national laws."³⁰ This definition is analogous to many other accepted definitions. However, because these definitions incorporate "national laws," they leave to question what national laws should or should not be considered and how to respond when a developing nation does not have appropriate forest legislation in place.³¹ The World Wildlife Fund (WWF) has responded by providing a lengthy definition of the inverse, legally

28. MINISTERIAL CONFERENCE ON THE PROT. OF FORESTS IN EUR., COMBATING ILLEGAL HARVESTING AND RELATED TRADE OF FOREST PRODUCTS IN EUROPE: REPORT FOR THE MCPFE WORKSHOP HELD IN MADRID, SPAIN 11 (Nov. 3-4, 2005), available at http://www.forestseurope.org/filestore/forestseurope/Publications/pdf/illegal_2007.pdf.

29. *Id.*

30. FOOD & AGRIC. ORG., FAO FORESTRY PAPER 145, BEST PRACTICES FOR IMPROVING LAW COMPLIANCE IN THE FORESTRY SECTOR 5 (2005), available at <ftp://ftp.fao.org/docrep/fao/008/a0146/a0146e00.pdf>.

31. See Duncan Brack & Katharina Umpfenbach, *Not For Felling*, THE WORLD TODAY, Oct. 2009, at 9, available at <http://www.illegal-logging.info/uploads/Brackwt100907.pdf> ("Forest laws are often contradictory or unclear, and poorly enforced because of a lack of resources.").

harvested timber, attempting to establish positive obligations that must be met for logging practices to be legal.³²

With discrepancy as to what exactly qualifies as illegal logging, there is no universal agreement as to the extent it occurs. Quantifying the practice is further hampered by the complexity of collecting data on international trade with wood and wood products. For example, there is no scientific method to determine when logging permits exceed quotas or are obtained through corrupt measures.³³ Thus, global figures vary because they are difficult to estimate. However, scholars agree that illegal logging is, at the least, a vastly practiced crime.³⁴ Under broader definitions, estimates suggest that illegal activities may account for over one tenth of the global timber trade. Scholars further believe that more than half of all logging and timber trade activities conducted in the developing world are illegal.³⁵

These activities are most visible in China.³⁶ Coined as the “motor of the global timber trade,”³⁷ China is among the most notorious players in

32. WORLD WILDLIFE FUND, WWF GUIDELINES FOR INVESTMENT IN OPERATIONS THAT IMPACT FORESTS 15 (2003), *available at* assets.panda.org/downloads/wwfinvestmentpol7oct03final.pdf. The World Wildlife Fund defines legally harvested timber as “Legal Source” by assessing the following criteria:

Tenure:

- the logging contractor/operator is authorized to be there by the proprietor (lease, concession agreements etc. are in place)
- property and/or customary rights are respected
- there is no dispute on property/customary rights

All Government required approvals are in place

- harvesting permits/cutting licenses
- annual allowable cut permits

Operations meet the requirements and stipulations of the permits

All national and local legislative and administrative processes for tendering, concession and lease processing have been followed.

There are no credible allegations of corruption in the tendering/concession/lease process

Revenue Payments

Stumpage fees and other required revenue payments are paid

Timber extracted corresponds to volumes authorized in the license/contract (e.g. no duplicate felling licenses).

There is accurate measurement, reporting and declaration of values and volumes extracted/transported

Id.

33. See generally Mathias Dieter, *Analysis of Trade in Illegally Harvested Timber: Accounting for Trade via Third Party Countries*, 11 FOREST POL’Y & ECON., 600–07 (2009).

34. See MINISTERIAL CONFERENCE ON THE PROT. OF FORESTS IN EUR., *supra* note 28, at 9.

35. DUNCAN BRACK, CHATHAM HOUSE, EEDP/LOG BP 06/01, ILLEGAL LOGGING (Aug. 2006), *available at* <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/bp0806illegallogging.pdf>.

36. See generally YONG-SHIK LEE, ECONOMIC DEVELOPMENT THROUGH WORLD TRADE: A DEVELOPING WORLD PERSPECTIVE 191 (2008) (Professor Lee includes China as a case study of

the supply chain. Over the past decade the country has become the leading importer of raw timber products, having trebled its imports since 1997.³⁸ In fact, researcher scientist William Laurance estimates that half of the world's timber is imported to China for production, an astonishing figure.³⁹ What makes this figure problematic is that much of what China imports is illegal.⁴⁰ Wood product manufacturers are largely ignorant of where the raw timber originates.⁴¹ Moreover, China does not govern the legality of the imported wood, and experts believe that a significant portion of the wood products imported into China come from unsustainable or illegal logging practices.⁴² For example, China is a major net importer of forest products from Indonesia, where activists estimate that up to seventy percent of exported wood derives from illegal activity of some form.⁴³ Collectively, despite a dramatic decrease over the past decade, academics assert that at least twenty percent of China's total wood imports derive from illegal sources.⁴⁴

The consequences of this illegal trade are numerous and widespread, extending to environmental, social, political, and economic sectors.

B. Environmental Consequences

From the environmental perspective, advocates stress that illegal logging depletes forests, thereby destroying wildlife habitat and impairing the ability of the forests to function as carbon sinks.⁴⁵ Developing regions of the world such as Central Africa and South

trade and development in developing countries, implicitly recognizing China to be a developing country).

37. Carmen Gonzalez, *China in Latin America: Law, Economics, and Sustainable Development*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10171, 10176 (2010).

38. Steve Kemper, *Forest Destruction's Prime Suspect*, ENVIRONMENT YALE, Spring 2008, at 4, available at [http://www.bio.uu.nl/pbc/course2008/EnvYale-PrimeSuspect\[1\].pdf](http://www.bio.uu.nl/pbc/course2008/EnvYale-PrimeSuspect[1].pdf).

39. *Id.*

40. See CHATHAM HOUSE, ILLEGAL LOGGING REPORT CARDS: CHINA (2010), available at <http://www.illegal-logging.info/uploads/CHillegalloggingreportcardchina.pdf>; *China: Illegal Imports and Exports*, GLOBALTIMBER.ORG.UK (2006), <http://www.globaltimber.org.uk/ChinaIllegalImpExp.htm> (last visited Mar. 2, 2011).

41. *The Lacey Act: Closing Down the Illegal Wood Trade*, ENVTL. INVESTIGATION AGENCY, http://www.eia-global.org/forests_for_the_world/lacey.html [hereinafter EIA Video] (view segment at 3:35).

42. *Id.*; CHATHAM HOUSE, *supra* note 40 (noting that while China's government has become involved in making changes, there lacks relevant legislation on the issue).

43. *Indonesia*, ILLEGAL-LOGGING INFO., http://www.illegal-logging.info/approach.php?a_id=85 (last visited Feb. 2, 2011).

44. CHATHAM HOUSE, *supra* note 40.

45. Juan Robalino & Luis Diego Herrera, *Trade and Deforestation: A Literature Review 3* (World Trade Org., Working Paper No. ERS-2010-04, 2009), available at <http://www.efinitiative.org/research/publications/publications-repository/trade-and-deforestation-a-literature-review>.

America are home to some of the most diversified and sensitive ecosystems in the world. Illegal logging's contribution to deforestation has a profound effect on the survival of threatened animal and fauna species in these regions.⁴⁶

Endangered tree species serve as the most obvious example. Malagasy Rosewood, a species unique to Madagascar, is one of the world's most valuable timber sources and is highly demanded by furniture and musical instrument craftsmen.⁴⁷ Citizens of Madagascar who practice illegal logging as their means of survival testify that it has become harder and harder to find a Rosewood tree, sometimes taking an experienced local man two to three days to find one.⁴⁸ As illegal logging continues to undermine sustainable forest management, it is a fair prediction that species like the Malagasy Rosewood will be harvested to extinction, and the forests will suffer irreparable harm.

Not only does illegal logging jeopardize particular tree species, but it increases deforestation and the likelihood of forest fires, both of which impact greenhouse emissions and climate change.⁴⁹ Deforestation is responsible for one-fifth of greenhouse gas emissions and is the most significant contributor to climate change.⁵⁰ In fact, it has become widely recognized that the impact on carbon emissions caused by deforestation exceeds that of all other sources, including transportation.⁵¹ Moreover, forests themselves serve to sequester carbon, and the abundance of trees serves as a cost-effective way of offsetting carbon that is released into the atmosphere.⁵² Thus, deforestation both robs the global community of a cost-effective way to mitigate climate change and also exacerbates the crisis by emitting additional carbon.⁵³ Illegal logging practices undermine the attempts to ensure that forests are managed sustainably to

46. *Id.*

47. Barry Bearack, *Shaky Rule in Madagascar Threatens Trees*, N.Y. TIMES, May 24, 2010, http://www.nytimes.com/2010/05/25/world/africa/25madagascar.html?_r=1&th&emc=th.

48. *Id.*

49. DIRECTORATE-GENERAL FOR THE ENV'T, COMMISSION STAFF WORKING DOCUMENT TO THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL: IMPACT ASSESSMENT, REPORT ON ADDITIONAL OPTIONS TO COMBAT ILLEGAL LOGGING 24 (2007), *available at* ec.europa.eu/environment/forests/pdf/impact_assessment.pdf.

50. NICHOLAS STERN, THE STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE 30 (2006), *available at* http://www.hm-treasury.gov.uk/stern_review_report.htm.

51. Virginia Cram Martos & Frederic Romig, *Trade in Energy and Forestry, a Perspective from the United Nations Economic Commission for Europe*, WORLD TRADE ORG. (2010), http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_11may10_e.htm.

52. ALDA CHAN, ILLEGAL LOGGING IN INDONESIA, THE ENVIRONMENTAL, SOCIAL, AND ECONOMIC COSTS 5 (2010), *available at* <http://e360.yale.edu/images/digest/BGA-Indonesia-report.pdf>.

53. *Id.*

maintain their function not only for the benefit of the forest ecosystem, but also for the sustainability of human health on a global scale.

C. Socioeconomic/Human Rights Consequences

Illegal logging not only undermines sustainable environmental policy, but as detailed in the article's introduction, cuts against the rule of law and is frequently associated with corruption and human rights violations.⁵⁴ Corrupt practices in the forest sector involve, among other things, payment of bribes to government officials in exchange for preferential treatment, extortion by officials to artificially legalize illegal operations, and unethical trading of political favors such as the allocation of timber concessions.⁵⁵ In more extreme cases, illegal logging is tied to activities such as money laundering and armed conflict.⁵⁶ Liberia provides only one recent example of this. In the 1990s, rogue militias in Cambodia and the Democratic Republic of Congo likewise received funding primarily through illegal logging revenue.⁵⁷ Burma and Indonesia share similar stories.⁵⁸ Even where violence is missing, criminal syndicates are using the logging industry as a means of wealth and power to further undermine sound governance.⁵⁹ A culture of corruption in developing nations and the practice of illegal logging are largely considered to feed off one another.⁶⁰

Aside from governance issues, illegal logging is understood to cause human rights violations, which are often overlooked.⁶¹ In many poor countries, the property rights of local communities are tenuous or unrecognized, a flaw exploited by logging companies and governments. "In Cambodia, Laos and also China," says Kerstin Canby, director of the Forest Trade and Finance Program at Forest Trends, "there's something harsh going on called economic land concessions. The land is technically the government's, but people are living on it, so when the government sells or gives away this land for a plantation or an agribusiness, it causes human rights issues."⁶² Additionally, the combination of weak government and poverty, contemporaneous in many of the illegal

54. *See id.*

55. FOOD & AGRIC. ORG., *supra* note 30, at 11.

56. *See, e.g.*, GLOBAL WITNESS, *supra* note 8.

57. DUNCAN BRACK, CHATHAM HOUSE, SDP BP 05/02, ILLEGAL LOGGING 2 (June 2005), available at <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/bpdb0305.pdf>.

58. GLOBAL WITNESS, *supra* note 8, at 13.

59. PERVAZE A. SHEIK, CONG. RESEARCH SERV., RL3392, ILLEGAL LOGGING: BACKGROUND AND ISSUES 5 (2008).

60. *See* FOOD & AGRIC. ORG., *supra* note 30, at xiii, 14.

61. DIRECTORATE-GENERAL FOR THE ENV'T, *supra* note 49, at 11.

62. Kemper, *supra* note 38, at 7.

logging hot spots, gives rise to vulnerable populations being taken advantage of economically. In one instance, timber valued at over 100,000 U.S. dollars was taken from a community for less than 100 U.S. dollars' worth of salt, sugar, and beer in compensation.⁶³ Though these consequences are not as visible as violence or environmental devastation, they still pose a serious threat to the welfare of vulnerable populations.

D. Economic Consequences

Finally, the trade and economic implications of illegal logging arguably have the widest reach and are at the forefront of the discussion. The illegal timber trade has a dramatic advantage in the market relative to timber harvested and traded legally.⁶⁴ A 2004 study published by the American Forests and Paper Association concluded that timber prices were depressed between seven and sixteen percent globally as a result of illegally logged timber.⁶⁵ Further, national governments are losing massive sums of tax revenue. The World Bank estimates that developing nations lose more than 15 billion U.S. dollars in revenue and assets annually.⁶⁶ Additionally, illegal logging correlates to a loss of jobs in the forest sector and retards investment in sustainable forest management practices.⁶⁷

It has become evident that illegal forest practices are economically and environmentally unsustainable, and diminish the cultural and social values of forests and timber producing nations. With the rise of globalization, these consequences have an increasingly widespread reach, and an international response is now gaining momentum.⁶⁸

III. INTERNATIONAL RESPONSES

Over the past forty years, the international community has become increasingly aware of the consequences of illegal logging.⁶⁹ Recognizing

63. *Id.*

64. CHAN, *supra* note 52, at 10.

65. SENECA CREEK ASSOCS., LLC, & WOOD RES. INT'L, LLC, "ILLEGAL" LOGGING AND GLOBAL WOOD MARKETS: THE COMPETITIVE IMPACTS ON THE U.S. WOOD PRODUCTS INDUSTRY (Nov. 2004) (prepared for American Forest & Paper Association).

66. WORLD BANK, A REVISED FOREST STRATEGY FOR THE WORLD BANK GROUP (2002), available at http://siteresources.worldbank.org/INTFORESTS/214573-1113990657527/20632625/Forest_Strategy_Booklet.pdf.

67. See CHAN, *supra* note 52, at 8.

68. See generally EIA Video, *supra* note 41.

69. See Declaration of the United Nations Conference on the Human Environment (Jun. 16, 1972), available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

the issue as an important global concern, the G8⁷⁰ included illegal logging as an element of its 1998–2002 Action Plan.⁷¹ Following this decision, the World Bank organized the first major international workshop specifically on Forest Law Enforcement in 1999.⁷² Subsequently, led by the World Bank's 2001 Ministerial Conference in Indonesia, international organizations began organizing Forest Law Enforcement Governance and Trade (FLEGT) conferences and drafting related Memorandums of Understanding (MOUs).⁷³ Among the most important of these conferences was the 2002 World Summit on Sustainable Development, held in Johannesburg, South Africa.

At this United Nations led summit, participating members drafted the *Johannesburg Plan of Implementation*, which recognizes the commitment of individual members to enact domestic legislation to diminish illegal logging worldwide. The plan obligates its signatories to

take immediate action on domestic forest law enforcement and illegal international trade in forest products, including in forest biological resources, with the support of the international community, and provide human and institutional capacity building related to the enforcement of national legislation.⁷⁴

One of the major achievements of the summit was the ability to gain consensus regarding the relationship between nations that produce timber and nations that consume timber. Specifically, members agreed that the market for exotic timber perpetuated by consumer nations undermines efforts of timber-producing nations to eradicate the practice.⁷⁵ Thus, rather than placing the burden squarely on the shoulders of the developing countries producing the timber, it is important for consumer nations to take the responsibility of curbing the market for the

70. The G8 is an international organization comprised of the heads of state of eight major world economic nation states. The organization hosts meetings referred to as "Summits," at which a central purpose is to deal with macroeconomic management, international trade, and relations with developing countries. See G8 Information Centre, *What is the G8?*, UNIV. OF TORONTO (July 15, 2005), http://www.g8.utoronto.ca/what_is_g8.html.

71. See DUNCAN BRACK, CHATHAM HOUSE, EERG IL BP 2010/01, CONTROLLING ILLEGAL LOGGING: CONSUMER COUNTRY MEASURES (Jan. 2010), available at <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/bp0110brack.pdf>; MINISTERIAL CONFERENCE ON THE PROT. OF FORESTS IN EUR., *supra* note 28.

72. See DEBRA J. CALLISTER, CORRUPT AND ILLEGAL ACTIVITIES IN THE FOREST SECTOR: CURRENT UNDERSTANDINGS AND IMPLICATIONS FOR THE WORLD BANK (1999), available at <http://siteresources.worldbank.org/EXTFORESTS/Resources/985784-1217874560960/Callister.pdf>.

73. *Africa Forest Law Enforcement and Governance Ministerial Conference*, INT'L INST. FOR SUSTAINABLE DEV. (2003), <http://www.iisd.ca/sd/sdyao/sdvol60num7e.html>.

74. See Johannesburg Plan of Implementation, available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter4.htm.

75. *Id.*

product. From this understanding came a wide range of formal and informal partnerships for implementation, bringing together governments, intergovernmental organizations, and non-governmental players such as businesses, NGOs, and community groups.⁷⁶ Today, consumer nations and international organizations are beginning to implement new measures to exclude illegal timber products from their markets.

A. Bilateral Agreements

Bilateral agreements are one measure that has been put into practice throughout the world to combat illegal logging practices. Related bilateral agreements can be described as formal agreements or MOUs between nations to ensure that timber harvesting and trade take place in accordance with agreed principles and procedures.⁷⁷ Several countries have negotiated bilateral agreements to address the problem of illegal logging, and the United States and its trade partners have led the way in this regard.

The 2007 Trade Promotion Agreement between the United States and Peru serves as an example of an agreement that sets forth a strong and detailed annex on forest sector governance.⁷⁸ The agreement contains a number of commitments by Peru to improve forest law enforcement, develop systems to track protected tree species, and to conduct periodic audits of producers and exporters of timber products exported to the United States.⁷⁹ This agreement is among the most detailed to date and complements agreements signed between the United States and additional timber producing nations. Many other nations, including the members of the European Union (E.U.), China, Australia, and Indonesia, have engaged in similar agreements.⁸⁰ However, while bilateral agreements serve as an important premise, their effectiveness is limited in a market where wood products have a lengthy and complicated chain of custody. Additionally, as evidenced by the U.S.-Peru agreement, these agreements place the responsibility largely with the timber-

76. MINISTERIAL CONFERENCE ON THE PROT. OF FORESTS IN EUR., *supra* note 28, at 29.

77. *See generally* WILLIAM POWERS & ANDREA WONG, WORLD POLICY PAPERS, FAIRLY TRADING THE WORLD'S TIMBER: LESSONS ON GLOBAL FOREST GOVERNANCE AND TRADE FROM EUROPE AND LIBERIA 7 (July 2011), *available at* http://www.worldpolicy.org/sites/default/files/policy_papers/Fairly%20Trading%20the%20World's%20Timber.pdf (generally describing bilateral agreements in the context of the global timber trade).

78. H.R. 3688, 110th Cong. (2010), *available at* <http://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

79. *Id.*

80. *See* Vivian H.W. Wang, Comment, *Investor Protection or Environmental Protection? "Green" Development Under CAFTA*, 32 COLUM. J. ENVTL. L. 251 (2007).

producing country, in contrast to the trend of placing the burden on the consumer nation to eliminate importation. Thus, standing alone, bilateral agreements fail to extinguish the consuming countries' demand for illegally harvested timber.

B. E.U. Forest Law Enforcement, Governance, and Trade Action Plan

Expanding on the concept of bilateral agreements, the European Union took its commitment from Johannesburg the furthest by creating the E.U. Forest Law Enforcement, Governance, and Trade (EU FLEGT) Action Plan in 2005.⁸¹ Academics have described the EU FLEGT Action Plan as the most ambitious set of measures adopted by any consumer country or bloc to date.⁸² The main elements of the Action Plan are articulated as:

- (1) voluntary partnerships with wood-producing countries badly affected by illegal logging to support and promote governance reform in their timber sectors and;
- (2) a regulation that sets up a legally binding licensing scheme with partner countries to ensure that only legal timber from these countries is allowed into the EU.⁸³

The cornerstone of the plan is its system of Voluntary Partnership Agreements (VPAs). VPAs are bilateral agreements between the European Union and tropical wood exporting countries that aim to improve forest governance and guarantee wood imports come from legal sources.⁸⁴ As the name suggests, entering into these agreements is voluntary for exporting countries. However, once a nation formally commits to a VPA, it becomes a legally binding instrument for both parties (each E.U. nation state and the individual nation that entered into the agreement), limiting trade to legal timber products. To ensure that the timber products are harvested legally, the Action Plan calls for the VPA's to establish a licensing scheme, whereby timber products from the exporting countries are licensed before they are allowed to enter the market. The Action Plan articulates this process by explaining that engaging in a VPA implies a broad array of positive commitments. For example, one VPA included the following language:

A commitment to ensure that the applicable forest laws are consistent, understandable, enforceable and is supportive of

81. Council Regulation 2173/2005, 2005 O.J. (L 347/1) I (EC), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF>.

82. BRACK, *supra* note 71, at 2.

83. CHAN, *supra* note 52, at 19.

84. JADE SAUNDERS, EFI POLICY BRIEF 3, WHAT IS A VOLUNTARY PARTNERSHIP AGREEMENT: THE EUROPEAN UNION APPROACH 4-10 (EU FLEGT Facility ed., 2009), available at http://www.efi.int/files/attachments/publications/efi_policy_brief_3_eng_net.pdf.

sustainable forest management principles; developing technical and administrative systems to monitor logging operations and identify and track timber from the point of harvest to the market or point of export; build checks and balances into the tracking and licensing system, including the appointment of independent monitors; and develop procedures to license the export of legally harvested timber.⁸⁵

It is unclear how operators within the European Union will be held to comply with these standards, other than the Action Plan articulating that they must act in accordance with a “due diligence” system.⁸⁶ Under this system E.U. timber importers must show that they have taken considerable steps to minimize the risk of handling timber that has been fraudulently certified. The effectiveness of the due diligence system may soon be visible in practice, as the first official FLEGT VPA was signed on November 20, 2009, between Ghana and the European Union, and became enforceable as of April 2010.⁸⁷ In 2010, the Democratic Republic of Congo and Cameroon followed suit, signing VPAs with the European Union on May 17, 2010, and June 10, 2010, respectively.⁸⁸ Several other nations are in the process of negotiating their own agreements with the European Union, and Indonesia appears to be on the cusp of joining the nations that have already done so.⁸⁹

C. Public Procurement Policies

Another measure being practiced at an increasing level is government public procurement policies. Procurement policies ensure that public purchasers make efforts to purchase only legal timber products. These policies can be developed and implemented more rapidly than most other options, and generally do not require the process of drafting and passing legislation. As of January 2010, nine nations—including several E.U. member states, along with Japan and New Zealand—have adopted timber specific procurement policies.⁹⁰

85. Communication from the Commission to the Council and the European Parliament FLEGT, proposal for an EU Action plan, COM 251 final, 21 OJ C 268, 7 (2003).

86. *Id.* at 76.

87. Voluntary Partnership Agreement Between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community, CE/GH/en 1 (2009), available at <http://www.euflegt.efi.int/files/attachments/euflegt/ecghanavpaen1.doc.pdf>.

88. *FLEGT Voluntary Partnership Agreements*, EUROPEAN COMM'N, <http://ec.europa.eu/environment/forests/flegt.htm> (last visited Jan. 20, 2012).

89. CHAN, *supra* note 52, at 14.

90. *Id.* at 10.

The influence that public procurement policies will have on the timber market will likely depend upon the market share that public purchasers account for: the greater the demand is for legally harvested sources, the more likely it is the industry will adapt. Thus, its success relies heavily on widespread adoption throughout the world. To date only limited research has been conducted evaluating the impacts of the procurement policies on the nation states that have them in place, yet the evidence shows an increase in certified timber imports.⁹¹ Furthermore, public procurement accounts for a substantial amount of the timber market in many nations.⁹² For example, the United Kingdom estimates that about ten percent of its timber imports are purchased through the public sector, and Japan estimates approximately three percent.⁹³ Many timber companies are now switching to certified products for all their customers for the sake of supply chain simplicity, indicating that public procurement policies may indeed be influencing industry practice.⁹⁴

D. Certification

A final measure to counteract illegal logging practice is systems of certification. Certification is incorporated into each of the measures discussed above by incentivizing timber producers and exporting nations to develop systems to assure that timber products are legal. Certified timber products carry labels demonstrating, in a manner verifiable by independent bodies, that they come from forests that meet standards for sustainable forest management and have been produced and traded legally.⁹⁵ Consumers down the chain may find labels on furniture and wood products, while manufacturers importing wood can verify certification through established chain of custody procedures.⁹⁶ Two independent NGOs have become the dominant and recognizable entities for certifying timber, the Forest Stewardship Council (FSC) and the Programme for Endorsement of Forest Certification (PEFC).⁹⁷ The objective of these organizations can be summarized by the PEFC mission statement, which reads that “[t]hrough the endorsement of national certification systems, PEFC motivates and enables people to sustainably

91. *Id.* at 8.

92. 16 U.S.C. § 3372(a)(B)(2)(i) (1981).

93. DUNCAN BRACK, CHATHAM HOUSE, EEDP LOG BP 08/02, CONTROLLING ILLEGAL LOGGING: USING PUBLIC PROCUREMENT POLICY 3 (June 2008), available at <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/bp0608logging.pdf>.

94. *Id.*

95. Martos & Romig, *supra* note 51.

96. *Id.*

97. *Id.*

manage their forests and works to provide a market for the products of those forests.”⁹⁸ More generally, authors Juan Tobalino and Luis Diego Herrera identified a laundry list of goals for certification schemes:

[I]ncrease general consumer awareness of the relationship of the forest industry to the environment; increase consumer acceptance and confidence; modify consumer behavior; modify manufacturer behavior; improve the earth’s environmental quality; increase market share; provide product differentiation; provide an objective audit of the management of the forest assesses; promote sustainable forest management; and demonstrate that forest management provides sustainable economic, ecological, and social benefits.⁹⁹

From a global perspective, the use of certification is being endorsed and used with greater frequency. Over the past fifteen years, certification has increased exponentially.¹⁰⁰ However, like the public procurement policies, this increased use is concentrated in a limited number of countries. In fact, in 2008, seventy percent of the FSC and PEFC certificates were issued in only five countries: the United States, the United Kingdom, Germany, Japan, and Canada.¹⁰¹ While this shows that the current prevalence of certification is concentrated, other regions of the world are beginning to embrace certification schemes. For example, in 2009, FSC certification increased by eighty-eight percent in Africa, led by Ghana, Gabon, Cameroon, Democratic Republic of Congo, and South Africa.¹⁰² Further, the consumer nations in which certification has taken root are likely those nations whose practices will have the greatest global impact, as the practice may very likely have a trickle-down effect to the rest of the supply chain.

IV. THE LACEY ACT

Against this backdrop, the United States recently responded to the global problem of illegal logging by enacting legislation intended to prohibit the import of illegal timber into its own market.¹⁰³ With the enactment of the 2008 Farm Bill (the Food, Conservation, and Energy

98. GLOBAL FOREST COAL., LIFE AS COMMERCE: SOUTH AFRICA CERTIFICATION 6 (2008), available at <http://www.illegal-logging.info/uploads/LIFEASCOMMERCECERTIFICATION.pdf>.

99. Robalino & Herrera, *supra* note 45, at 27.

100. U.N. ECON. COMM’N FOR EUR. & FOOD & AGRIC. ORG., FOREST PRODUCTS ANNUAL MARKET REVIEW 12 (2009), available at http://www.unece.org/fileadmin/DAM/timber/publications/Final_FPAMR2009.pdf (Chain of Custody Certificates issued worldwide increased by 41% in 2009).

101. *Id.* at 7.

102. See U.N. ECON. COMM’N FOR EUR. & FOOD & AGRIC. ORG., *supra* note 100, at 7.

103. BRACK, *supra* note 71, at 2.

Act of 2008), the Lacey Act—the United States’ oldest conservation law—was amended to combat illegal logging.

For over a century the Lacey Act served as an important tool for the U.S. government in the fight against wildlife crime.¹⁰⁴ The law makes it unlawful to “to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.”¹⁰⁵ A second enforcement provision prohibits the making or submitting of any “false record, account, label for, or identification of any wildlife transported or intended to be . . . imported, exported, transported, sold, purchased, or received from any foreign country; or . . . transported in interstate or foreign commerce.”¹⁰⁶

Prior to the 2008 amendment, however, the Act did not apply to all international plant species and excluded foreign timber and its associated processed wood products. Rather, it was limited to plants native to the United States and listed in one of the three appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or protected by a conservation law of an individual U.S. state.¹⁰⁷ Thus, despite the Act’s intention, the Act failed to address the import of illegally harvested timber.

With the consequences of illegal logging as its primer, the 110th Congress hoped to expand the reach of the Lacey Act with the 2008 amendment.¹⁰⁸ In August of 2007, Senator Ron Wyden introduced a bill entitled the “Combat Illegal Logging Act.”¹⁰⁹ The legislation was the product of a broad coalition of legislators, the timber industry, and environmental advocates.¹¹⁰ The bill sought to expand the Lacey Act by prohibiting the importation, sale, or trade, of illegally harvested wood and wood products.¹¹¹ The bill complemented similar legislation that the House introduced. The “Legal Timber Protection Act,” H.R. 1497, served to promote more or less the same goals as the bill.¹¹² These bills

104. EIA Video, *supra* note 41.

105. 16 U.S.C. § 3372(a)(1) (2008).

106. *Id.* § 3372(d).

107. See U.S. DEP’T OF AGRIC., LACEY ACT AMENDMENT: COMPLETE LIST OF QUESTIONS AND ANSWERS 1 (Feb. 16, 2012), available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf.

108. David R. Downes et al., *International Environmental Law*, 43 INT’L L. 837, 852–53 (2009).

109. Press Release, Senator Ron Wyden, Combat Illegal Logging Act Levels the Playing Field for American Business, Protects American Jobs and the Environment (Aug. 1, 2007), available at <http://wyden.senate.gov/newsroom/press/release/?id=efd967f0-91d7-45b4-b4ed-1114d118df56>.

110. *Id.*

111. *Id.*

112. *Id.*

were incorporated into the 2008 Farm Bill, which, when passed, dramatically amended and strengthened the Lacey Act.¹¹³

A. Impacts of the 2008 Amendments

The amendments to the Lacey Act extend the statute's reach to encompass products, such as timber, that are illegally harvested in the country of origin and brought into the United States.¹¹⁴ This includes both raw timber as well as value-added manufactured products, such as furniture and musical instruments. The amendments further include products that are manufactured and imported from countries other than the country where the illegal harvesting occurred.¹¹⁵ To effectuate its purpose, the amendment is written to (1) prohibit trade in illegally sourced plants or corresponding products; (2) require importers in the United States to submit a declaration to customs to prove they took due care when importing plants; and (3) establish criminal sanctions for violations of the preceding requirements.¹¹⁶ The amended Act requires importers to submit a declaration detailing the scientific name of the plant, the value of the importation, the quantity of the plant, and the name of the country from which the plant was taken.¹¹⁷ In the United States, anyone who knowingly imports, exports, transports, sells, or purchases illegally harvested plants or plant products, including timber, may be prosecuted.¹¹⁸

The 2008 amendment empowers the Lacey Act with a broader, more flexible definition of plant and wildlife species that are banned from importation.¹¹⁹ In relation to timber, the Act prohibits the import of any wood or wood product harvested or involved in an underlying violation during any part of its travel through the supply chain.¹²⁰ This includes not only obvious violations, such as timber harvested from within a protected national park, but less obvious violations as well.¹²¹ The Act also broadly incorporates violations of laws that generally protect plants, regulate the theft of plants, the taking of plants from

113. 16 U.S.C. § 3372(a)(1) (2008); *see also* *Legislation Enacted to Curb Illegal Logging*, WORLD WILDLIFE FUND, http://www.worldwildlife.org/site/PageServer?pagename=can_results_illegal_logging_imports (last visited Feb. 26, 2011).

114. 16 U.S.C. § 3372 (2008).

115. *Id.*

116. *Id.*; 16 U.S.C. § 3373 (2008). *See generally* EIA Video, *supra* note 41.

117. 16 U.S.C. § 3372 (2008).

118. *Id.* § 3373.

119. *Id.* § 3372.

120. *Id.*; *see also* R. JUGE GREGG, AMENDMENT TO THE U.S. LACEY ACT: IMPLICATIONS FOR EXPORTERS OF THAILAND'S FOREST PRODUCTS 6 (2009), *available at* http://www.forest-trends.org/documents/files/doc_2386.pdf.

121. *See generally* EIA Video, *supra* note 41.

officially protected areas, and the taking of plants without or contrary to required authorization.¹²² Less obvious examples include the transportation of timber at night in violation of a curfew statute, failure to pay appropriate royalties, taxes, or stumpage fees, or violations of laws that govern the trans-national shipment of plants.¹²³

To insure that importers are purchasing wood that has been harvested and shipped to the United States in compliance with this statute the Act requires the importer to file a declaration with customs.¹²⁴ The declaration must include the scientific species name of the tree from which the wood originated, the volume being imported, the value of the product, and the country in which it was harvested.¹²⁵ The declaration provides the U.S. government with the information necessary to enforce the law. Most importantly, the declaration requires a showing of “due care.”¹²⁶

B. “Due Care”

The definition of due care as it relates to the timber industry is unclear.¹²⁷ The due care standard was first incorporated into the Lacey Act language when it was amended in 1981.¹²⁸ However, courts have rarely articulated the standard. The few courts that have addressed the standard have created an interpretation that is arguably inapplicable to the timber industry.¹²⁹ The Department of Justice (DOJ) maintains that the definition of due care will be assessed on a case by case basis, taking into account the knowledge and experience of the purchaser, as well as the context of the transaction.¹³⁰ Thus, timber companies that operate on a large-scale level will be held more accountable than a smaller scale general contractor purchasing a door for a luxury home.

The DOJ has discussed a number of common sense red flags that it will take into consideration when making such an appraisal: (1) offers to sell timber products at prices considerably below the going market rate;

122. GREGG, *supra* note 120, at 5.

123. *Id.*

124. 16 U.S.C. § 3372(f)(1) (2008).

125. *Id.*

126. *Id.*

127. See Rachel Saltzman, *Establishing a “Due Care” Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1 (2010).

128. Pub. L. No. 97-79, 95 Stat. 1074 (1981).

129. See Saltzman, *supra* note 127 (arguing that because of unique industry custom, complexity of foreign laws and breadth of illegal logging hotspots, and a complex supply chain, existing precedent of due care as it related to other industries will not serve applicable to Lacey Act disputes regarding the timber industry).

130. Ellinor Colbourn, U.S. Dep’t of Justice, Lacey Act Amendments of 2008 (May 2009), http://www.forest-trends.org/~forestrtr/documents/files/doc_696.pdf.

(2) offers to sell timber products for cash or offers of a discount for products lacking required paperwork; (3) facially invalid paperwork; and (4) evasive answers to questions regarding a product's origins.¹³¹ Furthermore, in other non-timber related contexts, the Ninth Circuit, which has handled vastly more Lacey Act cases than any other jurisdiction, has issued a generalized definition of due care as the "degree of care which a reasonably prudent person would exercise under the same or similar circumstances."¹³² Thus, the question courts will face is to what extent a "reasonably prudent" corporation should investigate the source of the wood products it imports.

C. The Lacey Act as a Powerful Tool

The Lacey Act sets itself apart from other international efforts by its ability to prosecute and enforce timber trade regulations by way of powerful penalties.¹³³ Anyone found simply handling illegal timber can expect to have their products confiscated.¹³⁴ If prosecutors are able to prove specific intent, or that by "due care" the violator should have known the product was harvested illegally, the violator can face felony charges that carry fines up to \$250,000 and imprisonment of up to five years.¹³⁵ In between these two extremes, the Act equips the government with the authority to pursue a sliding scale of penalties based primarily on the importers' knowledge of the crime being committed.¹³⁶ These sanctions provide new deterrents for corporations involved in the international timber trade.

While the amended law provides the United States with a greater arsenal to combat illegal logging, it remains to be seen how effective the amendments can be. To date, commentators representing various interests have largely praised the amendment.¹³⁷ The World Wildlife Fund announced that the amendment was a "huge victory for conservation."¹³⁸ The Environmental Investigation Agency believes the amendments could promote a "sea change for how forests are governed around the world."¹³⁹ And timber industry executives have praised the

131. *Id.*

132. *Id.*

133. See generally EIA Video, *supra* note 41 (commenting that by way of the Lacey Act, the United States is the first country in the world to ban the import, export, and sale of illegal wood products).

134. Colbourn, *supra* note 130, at 12.

135. *Id.* See generally Downes, *supra* note 108, at 853.

136. Colbourn, *supra* note 130, at 12; see also GREGG, *supra* note 120, at 6.

137. Michael L. Brown, *Limiting Corrupt Incentives in a Global REDD Regime*, 37 *ECOLOGY L.Q.* 237, 258 (2010).

138. EIA Video, *supra* note 41.

139. *Id.*

amendment for sending a message about the United States' stance on environmental protection and promotion of sustainable forest management.¹⁴⁰ Yet, the same executives beg the question of whether or not the “teeth” the bill provides are actually capable of biting anything out of the problem.¹⁴¹

At present, the answer to that question can only be speculated on, as the DOJ is just completing a multi-phased implementation of the law's requirements.¹⁴² However, the DOJ is in the midst of its first investigation.¹⁴³ In late 2009, the Fish and Wildlife Service raided the offices of the Gibson Guitar Company, and in August of 2011, U.S. Marshalls raided Gibson's facilities twice more.¹⁴⁴ The DOJ directed the first raid because it believed that the company has been importing illegally harvested Malagasy Rosewood from Madagascar, via Germany, for use in its instrument production.¹⁴⁵ The DOJ's more recent raids were directed because of a tip that the company imported illegal timber from India.¹⁴⁶ To date, little information has been revealed as to the current status of either investigation. Those concerned remained acutely attentive to what could be the first interpretation of “due care” in the timber context and whether or not the Lacey Act's provisions have the teeth that many hope it does. Assuming that the import of illegally logged timber is pervasive in the United States, while the Gibson Guitar raid has put the industry on alert,¹⁴⁷ the current dormant status of the new authority suggests that the Act is not serving as a realistic enforcement mechanism.

140. *Id.*

141. *Id.*

142. Brown, *supra* note 137.

143. DERALD J. HAY, FOX ROTHSCHILD, LLP, FEDERAL AGENTS RAID GIBSON GUITAR CORPORATION IN AN ENFORCEMENT ACTION UNDER THE LACEY ACT: WHERE DOES THAT LEAVE “DUE CARE?” (Mar. 2010), available at http://www.foxrothschild.com/uploadedFiles/newspublications/hay_enviroFederalAgentsRaidGibsonGuitar_030110.pdf.

144. Craig Havighurst, *Why Gibson Guitar Was Raided by the Justice Department*, NPR THE RECORD (Aug. 31, 2011, 4:00 PM), <http://www.npr.org/blogs/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department>; see also Henry Juszkiewicz, *Repeal the Lacey Act? Hell No, Make It Stronger*, HUFF POST GREEN (Nov. 21, 2011, 1:57 PM), http://www.huffingtopost.com/henry-juszkiewicz/gibson-guitars-lacey-act_b_1071770.html.

145. See Sean Michaels, *Gibson Guitars Raided for Alleged Use of Smuggled Wood*, GUARDIAN, Nov. 20, 2009, <http://www.guardian.co.uk/music/2009/nov/20/gibson-guitars-raided>.

146. Havighurst, *supra* note 144.

147. See Myles Gilmer, *Lacey Act's Ramifications Are Being Felt*, WOODSHOP NEWS (Oct. 18, 2010), <http://www.woodshopnews.com/columns-blogs/pro-shop/499341-lacey-acts-ramifications-are-being-felt>.

V. A PRESSING NEED FOR UNIFIED GLOBAL GOVERNANCE

As this article has discussed, over the past forty years the global community has become acutely aware of illegal logging and its destructive environmental, social, political, and economic consequences. These consequences showcase the intrinsic link between the environment and economic development, and how illegal logging and its associated timber trade is an issue of global importance. International organizations, from the United Nations to the World Trade Organization, along with the European Union, the United States, and numerous other independent nations have responded by employing various measures, all with the common goal of eliminating illegal logging from the global marketplace. While these individual efforts are making headway, the progress is slow and fragmented.¹⁴⁸ As the market becomes increasingly globalized, there is a pressing need for the international community to unify governance measures focused on extinguishing the market for illegally harvested timber products.

Initially, efforts should focus on creating a universal understanding as to what *precisely* constitutes illegal logging. Once agreement is reached, the roles and responsibilities of different actors can be assigned. Collectively, the international community must increasingly collaborate on research and development efforts to better assess the issue, and work to proactively attack the underlying root causes that incentivize its market.

A. Defining Illegal Logging

First, disagreement on what exactly accounts for illegal logging is a problem. Put simply, illegal logging is the harvesting of timber that is not allowed to be cut. However, world players have different interpretations on what timber should not be harvested and the proper procedures that should be conducted through the chain of custody. While the World Trade Organization may not have the ability to enforce environmental or trade laws on a global scale, a unified governing system should be put in place to provide a common understanding of what constitutes illegal logging. The definition should be practical, enforceable, and should cover environmental, social, political, and economic issues. In addition, the definition should work to spell out the responsibilities of those involved.

148. See U.N. ECON. COMM'N FOR EUR., UNECE WORKS FOR YOUR FORESTS 2 (Apr. 2007), available at http://www.unece.org/fileadmin/DAM/highlights/what_ECE_does/English/0720278_UNECE_FORESTS.pdf.

An initial step towards this end is for consumer nations to unify and cooperate in taking measures that share the burden of tackling the problem of illegal logging. While producing countries should not be relieved of all accountability, it must be understood that the market created by the consumer nations undermines the efforts taken by local governments in the world's largest problem spots.¹⁴⁹

A good place to start is to encourage China to join the efforts of the consumption centric European and North American nations. As previously mentioned, China has been labeled the “motor of the global timber trade,” as it serves as a world leader in importing timber and exporting value added wood products.¹⁵⁰ Although China has not been entirely absent from the global discussion, having begun preliminary discussions to sign a VPA with the European Union under the European Union's FLEGT Action Plan, China has all the while become a leading contributor to the illegal timber trade.¹⁵¹ Furthermore, China's laws currently make no distinction between legal and illegal logging for import purposes.¹⁵² While the Lacey Act theoretically forces China to either come up with such laws or lose twenty-two percent of their wood product market, enforcing measures of due care and due diligence cannot realistically impose a duty on importers to completely stop importing from China.¹⁵³ The immediate economic consequences would be devastating. Thus, so long as China provides a market for illegal logging and timber trade, the international community's efforts to eliminate its practice will be stifled.

Consumer nations that have implemented systems to prevent the import of illegal timber should collaborate to create unified measures of licensing and certification schemes that provide the industry with a system that is relatively straightforward and easy to comply with. “Due diligence,” under the EU FLEGT Action Plan, and “due care,” under the Lacey Act, should be interpreted to have the same definition so as to allow the international timber industry an opportunity to comply with one universal standard.

149. See generally EIA Video, *supra* note 41.

150. Martos & Romig, *supra* note 51.

151. ANA LUCIA JARAMILLIO ET AL., STEMMING ILLEGAL LOGGING AND TIMBER TRADE: AN OVERVIEW OF THE EUROPEAN UNION FLEGT ACTION PLAN 48 (July 11, 2010), available at http://www.envirosecurity.org/pathfinder/FLEGT_web.pdf; Gonzalez, *supra* note 37.

152. Kemper, *supra* note 38, at 7.

153. GREGG, *supra* note 120, at 1.

B. The Need for Collaborative Processes

Second, the various involved parties need to coordinate and engage in collaborative processes of research and monitoring to further understand the market of illegally logged timber. Currently, there are many gaps in the available research. These gaps are both quantitative and qualitative, and hinder the understanding of the size of illegal logging as well as the effectiveness of the measures currently in place.¹⁵⁴ Adding to this problem, differing actors have often relied on each other's figures without citing the original studies or methodology of research, leaving researchers in the dark as to their current accuracy or credibility.¹⁵⁵ Further, as exemplified by China, the wood products trade, particularly at the value-added level in items such as furniture and musical instruments, often goes through third or fourth party countries before arriving in the hands of the consumer. This tracking problem could be solved through by employing comprehensive methods that fully trace the trade of illegally harvested timber. Whatever efforts are employed, it is important that the parties collect data to monitor and evaluate the effectiveness of the measures in place, and share their results shared throughout the global community.

C. Procurement Schemes

Third, encouraging the continued development of public procurement schemes and universally recognized labels of certification will further aid unified awareness of, and proactive action against, illegal logging. While implementation issues such as non-discriminatory trade regulations will need to be addressed, governments can implement public procurement policies with relative ease, and their impact seemingly reaches the broader consumer market. As many timber consuming nations are democratic in nature with representative, elected officials, the government is spending its citizen's money, and it thus should exemplify the responsible standard of purchasing certified, legally harvested timber products. These policies need to be actively encouraged; as the demand for certified products increases, so will the incentive for timber companies to switch their entire product lines over to certified goods.

Certification and licensing schemes are an invaluable component to any of the measures being given serious attention, and the global community should make a conscious effort to ensure their viability and improve recognition of these schemes. International organizations need to continue to educate both consumer and producer nations of the FSC

154. See MINISTERIAL CONFERENCE ON THE PROT. OF FORESTS IN EUR., *supra* note 28, at 56.

155. Dieter, *supra* note 33, at 601.

and PEFC, which are now operating in over seventy-five countries worldwide.¹⁵⁶ The more widespread these systems become, the less likely they are to create trade discrimination disputes and the more likely they will serve to enhance the market for legally harvested and traded timber products. The DOJ and the U.S. court system should consider requiring certification under the due care standard in order to eliminate the intrinsic ambiguity and inequity that results from the current case by case appraisal.

D. Combat Root Causes

Finally, the global community needs to take proactive measures to discover and, when possible, combat the root causes of illegal logging and its timber trade. While criminalizing the trade of unlawfully harvested timber through measures such as the European Union's FLEGT Action Plan and the United States' Lacey Act provide important legal tools, prohibition will only go so far to discourage an activity, and will likely move it further underground.

International organizations should exert efforts to understand the root causes that incentivize the practice of illegal logging and seek to curb the activity from the bottom up. Poverty is likely the most important motivating cause for the illegal actions of citizens in timber producing countries.¹⁵⁷ Short-term livelihood will always trump future sustainability when individuals are forced to make a decision between the two. Weak government and law enforcement capacities may further incentivize corporations and individual actors to engage in illegal logging. While efforts to address the problem at the point of sale between export and import nations should continue, the international community must begin to discuss means of proactively addressing the deeper issues that serve as the root causes of illegal activities in the forest sector.

As illustrated, the consequences of the illegal timber trade are widespread, exacerbating our global environment, and stifling economic, social, and political progress. Internationally, organizations such as the G8, World Trade Organization, United Nations, along with countless NGOs and private organizations, are taking measures to combat this trade and its degrading impacts. The United States has taken a stand as the first nation state to criminalize the import of illegal timber and processed products by way of the Lacey Act. Whether or not this law

156. LUCIA JARAMILLIO ET AL., *supra* note 151, at 33.

157. See DIRECTORATE-GENERAL FOR THE ENV'T, *supra* note 49, at 28; see also *News Release: Illegal Logging in Peru Blamed on Bureaucracy, Poverty*, INT'L TROPICAL TIMBER ORG. (July 7, 2003), http://www.itto.int/news_releases/id=2180000.

will serve its function is unclear, as we await an interpretation of what due care means, and whether or not the Act can coexist with the immensely complex global market.

VI. CONCLUSION

“For every complex problem there is an answer that is clear, simple, and wrong.”¹⁵⁸ Illegal logging is a complex problem, involving a complex web of actors and causing complex consequences. The Lacey Act will not suffice on its own. Its reach does not extend further than the harbors and warehouses of the United States. However, with approximately forty percent of China’s wood products being exported to the United States,¹⁵⁹ the Act is a great place to start. The world needs to come together to eradicate the market for illegal timber, and the Lacey Act needs to be part of a cohesive framework that provides the industry with a workable set of standards. Further discourse is imperative to bring the international community to a common understanding of the problem, create a shared pool of data and monitoring evaluations, engage in unified licensing and certification schemes, and combat the practice at its roots. To accomplish these goals, it is critical for the nation states of the world to engage in more unified governance that will extinguish the market for illegally harvested timber at a global level.

158. The quote has largely been credited to H.L. Mencken, though the source is unknown. See, e.g., Terry Harris, *A Complex Solution for the Sliver Valley*, KOOTENAI ENTL. ALLIANCE BLOG (Aug. 9, 2010, 7:45 AM), <http://kealliance.org/2010/08/09/a-complex-solution-for-the-silver-valley/>.

159. Kemper, *supra* note 38, at 5.