EU FLEGT Initiative:
Assessment of ‘Additional Measures’ to Exclude Illegal Timber from EU Markets

by

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## Contents

1 INTRODUCTION ........................................................................................................................................... 3  
  1.1 THE EU’S FLEGT ACTION PLAN .............................................................................................................. 3  
  1.2 THE STUDY ............................................................................................................................................. 4  

2 ASSESSMENT OF NATIONAL LEGISLATION ......................................................................................... 6  
  2.1 LEGISLATION ON STOLEN GOODS ...................................................................................................... 6  
  2.2 CUSTOMS MISDECLARATION ................................................................................................................. 8  
  2.3 MONEY LAUNDERING ........................................................................................................................... 8  

3 ASSESSMENT OF ADDITIONAL MEASURES ......................................................................................... 12  
  3.1 BANNING IMPORTS .............................................................................................................................. 12  
  3.2 MAKING FOREIGN ILLEGAL PRODUCTS ILLEGAL ............................................................................. 13  
  3.3 USING EXISTING INTERNATIONAL FRAMEWORKS .............................................................................. 15
Assessment of additional measures to exclude illegal timber from EU markets

1 Introduction

1. The purpose of this paper is to provide the background and context to the study of the ‘additional legislative options’ that could be employed to exclude illegal timber and timber products from EU markets being conducted by Chatham House (the Royal Institute of International Affairs) – additional, that is, to the timber licensing scheme and other measures specified in the EU’s Forest Law Enforcement, Governance and Trade (FLEGT) initiative. The study also includes an examination of existing national legislation in a range of EU member states that may be of relevance in halting the import of illegally logged timber and wood products.

1.1 The EU’s FLEGT Action Plan

2. The issue of illegal logging has been attracting increasing attention since the late 1990s. It featured as one component of the 1998–2002 G8 Action Programme on Forests, and the G8 returned to the issue in 2005. G8 discussions helped stimulate a series of Forest Law Enforcement and Governance (FLEG) conferences coordinated by the World Bank, including those in East Asia (Bali, September 2001) and Africa (Yaoundé, October 2003); others are planned for Europe and North Asia (in November 2005) and possibly Latin America.

3. Each of these initiatives has included a focus on the role of consumers in world markets in fuelling the demand for timber and thereby potentially contributing to illegal logging. Ministers at the Bali conference agreed to ‘undertake actions, including cooperation among the law enforcement authorities within and among countries, to prevent the movement of illegal timber’, and to ‘explore ways in which the export and import of illegally harvested timber can be eliminated, including the possibility of a prior notification system for commercially traded timber’.¹

4. This emphasis on excluding illegal products from consumer markets also features in the European Commission’s Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT), which was published in May 2003 and approved by the Council in October 2003.² It includes proposals for:

- The negotiation of voluntary partnership agreements (VPAs) with producer countries.
- A licensing system to identify legal products in partner countries and license them for import to the EU; unlicensed products will be denied entry.
- Capacity-building assistance to partner countries to assist them in setting up the licensing scheme, reform their laws and regulations (if necessary) and improve enforcement.
- Encouragement for voluntary industry initiatives, and government procurement policy, to buy only from legal sources.
- Pressure on financial institutions to scrutinise flows of finance to the forestry industry.
- Examination of member states’ existing legislation (for example on money laundering) that might be of value in preventing imports of illegal products.

¹ Forest Law Enforcement and Governance East Asia Ministerial Conference, Ministerial Declaration, page 2; available at www.illegal-logging.info/papers/Bali_ministerial_declaration.pdf
² See www.illegal-logging.info/papers/flegt.pdf
• Consideration of additional legislative options that might be necessary to prohibit the import of illegal timber, particularly products originating from countries not participating in partnership agreements and therefore not covered by the licensing scheme.

5. Although the licensing system is only one of the components of the FLEGT Action Plan, it really lies at its heart. As a new requirement for imports into the EU, it requires new EU legislation, in the form of a regulation (which, unlike a directive, applies uniformly throughout the EU without any need for member-state implementing legislation). The Commission published its proposal for a regulation in July 2004, and it is currently being discussed within the EU; exploratory talks are also being held with potential partner countries and, once the negotiating mandate is agreed within the EU, formal VPAs will begin to be negotiated.

1.2 The study

6. As the FLEGT Action Plan (section 4.2.4) points out, ‘in the EU there is currently no Community legislation prohibiting the import and marketing of timber and timber products produced in breach of the laws of the country of origin’. Clearly, for whatever reasons, some countries which produce and export timber to the EU will not join the proposed voluntary partnership agreements (VPAs), at least straight away, so the question of what measures can be taken to exclude illegal products exported from these countries to the EU therefore arises.

7. As the Action Plan concludes, the Commission will therefore: ‘review options for, and the impact of, further measures, including, in the absence of multilateral progress, the feasibility of legislation to control imports of illegally harvested timber into the EU …’. Similarly, the Council Conclusions of October 2003 (para. 13) invite the Commission to ‘review options for, and the feasibility of, further legislation to control imports of illegally harvested timber … taking account of relevant initiatives in other areas, as well as existing multilateral mechanisms …’.

8. Starting in spring 2005, Chatham House aims to produce a study which can contribute to the discussion within the Commission and member states on this subject, by analysing the available options and their feasibility. It is anticipated that the study will be concluded by the end of 2005 or early 2006.

9. An important part of this study is an examination of whether existing national legislation may already be adequate to control imports of illegal timber. Clearly, if it is, there is no need for any additional legislation either at EU or member state level.

10. Accordingly, the Action Plan states that the Commission will: ‘raise awareness, and encourage Member States to apply existing criminal legislation and other legislative instruments …’ (section 4.6.3) and ‘undertake work to establish the extent to which existing Member State legislation for money laundering is applicable to forest sector crimes …’ (section 4.6.1). The Council Conclusions (para. 14) ‘urges Member States to provide the Commission with relevant information regarding national legislation which could be applied to address the illegal logging issue …’

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11. The Chatham House study therefore envisages case studies, in a range of member states, of national legislation which could be applied to seize timber and timber products produced illegally overseas but imported into the EU and to prosecute those responsible for carrying out the crimes and handling the products and the profits deriving from them. The types of legislation include, but are not limited to, laws dealing with theft, receiving stolen goods, fraud, forgery, misdeclaration to customs, bribery and money laundering. These issues are explored further in Section 2.

12. We hope that a wide range of EU member states will undertake the studies of national legislation they agreed to do in the Council Conclusions, and feed in the results to this study. At the time of writing (July 2005), the UK, Netherlands and Spain are undertaking studies, and the UK will fund a study in one of the new EU member states which acceded in May 2004. Some other member states appear to be considering similar studies. There is also, however, some information available on national legislation in France and Germany, where research was carried out as part of a FERN/Chatham House study in late 2002.  

13. The other part of the study is an examination of options for new legislation which could be adopted, either at EU and/or member state level, should existing national legislation prove to be inadequate. This includes the possibility of an outright ban on imports of unlicensed (and therefore potentially illegal) timber; legislation making the import, possession and sale of timber products produced illegally overseas illegal in the EU; reciprocal import bans where producer countries have imposed export bans; and the use of existing international forums and organisations, such as the UN Convention on Transnational Organised Crime, Interpol or the World Customs Organisation. These issues are explored further in Section 3.

14. The study will culminate in an experts’ workshop – provisionally scheduled for mid-November 2005 – where the results of the country studies will be presented and discussed, together with a full analysis of options for new legislation. A draft report will be produced for this workshop and rewritten into a final version afterwards.

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2 Assessment of national legislation

15. The assessment of national legislation to be carried out through the country studies in EU member states needs to cover three aspects:

- An analysis of the applicability in theory of the legislation’s application to timber and timber products produced illegally abroad but imported into the EU member state (this may benefit from advice from qualified lawyers).
- An analysis of the applicability in practice of its application (this should involve discussions with enforcement agencies, such as police or customs).
- A description of the practical challenges facing enforcement agencies in seeking to apply this legislation (e.g., structures of collaboration with similar agencies in the country of origin of the timber, how evidence can be obtained, etc., etc.).

16. We consider these issues briefly in the remainder of this section in respect to three categories of legislation: on stolen goods, on fraud and customs misdeclaration and on money laundering. The organisations carrying out the country studies should, however, feel free to analyse any other laws they consider might be relevant.

2.1 Legislation on stolen goods

17. All EU member states possess legislation on stolen goods (including theft, and receiving or handling stolen goods) and in all the countries researched in the 2002 FERN/Chatham House study – France, Germany, the Netherlands and the UK – it was found that this legislation also applies to goods that have been stolen abroad. These laws vary across member states, as detailed below. In most EU countries, criminal proceedings can be taken against a person who handles stolen goods in the country of import. Whether these laws are applicable to illegally produced timber depends on whether the timber has been defined as ‘stolen’, which in turn depends on the relevant legislation in the country of origin.

18. Probably only a proportion of the illegally logged timber entering EU markets could be defined as ‘stolen’ for these purposes. For example, timber would be considered stolen if it was taken from protected areas, such as national parks, from concessions in which the loggers had no right to operate, or from land owned by local communities which had not consented to the logging. However the position is less clear with the products of logging beyond quota or in breach of conditions (such as a ban on logging on slopes), or with timber exported without payment of taxes.

19. As far as the study could ascertain, there is no systematic analysis of the extent of the different types of illegal logging in producer countries – and in some countries, where legislation is poorly written or confusing, these studies may be simply impossible. It is therefore difficult to know to what extent the laws on stolen property could be used in importing countries.

20. As the FERN/Chatham House study showed, in France it is possible to prosecute a French national for being an accomplice to a crime committed by a foreigner abroad. However, the offence committed abroad needs to have been tried and had sentence passed in the country of the original crime. The public prosecutor alone has the right to decide whether legal proceedings can be instituted. Wider room for manoeuvre seems to be given by the law on receiving stolen goods, under which the person receiving the stolen goods in France can be prosecuted even if the person who has stolen,
cheated or abused confidence has not been prosecuted in the country where the crime was committed. The public prosecutor has no discretion over whether to take the case, but the plaintiff does need to prove that a crime, punishable under both French law and that of the country where the crime was committed, has taken place.

21. In Germany, the laws that could potentially be used to address illegal logging and associated trade include legislation on theft, damage to property, fraud, receiving stolen goods, forgery and legislation on threats to protected areas. Of particular interest could be the legislation on receiving stolen goods, under which the import of goods that have been obtained or produced using unlawful activities could be a criminal offence. If a timber importer has been informed that timber from a particular region or country might have been stolen, he might become complicit and therefore liable if he buys the timber.

22. In the Netherlands, stolen goods laws were seen as a possibility to address illegal logging. If goods are stolen then they can be confiscated; the problem is finding the proof of the fact that they have been stolen.

23. In the UK, the relevant legislation is the Theft Act 1968, which also applies to the handling of goods that have been stolen abroad. If the illegal activity has occurred abroad there must first be a request for the suspected stolen goods to be seized by a court or prosecuting authority in the country of origin, and criminal proceedings must have been instituted, or a person arrested, for the offence. This makes the application of these laws entirely dependent on the activities of the enforcement authorities in the producer countries. Possession of stolen goods in the UK is not an offence if the person possessing them can prove that they did not know they were stolen. However, once they are made aware of the fact, it is then an offence for them to sell the goods on to anyone else.

24. In most EU countries, an alternative route to the criminal proceedings touched on above could be civil proceedings, which could be taken by the person or organisation lawfully entitled to possession of the products in the country of origin. The action could be brought against the ship-owner or the person who arranged the shipment of stolen goods, or both. A successful action would result in the court ordering the return of the goods to the lawful possessor or, if appropriate, an award of damages. This has the advantage of not requiring proof of theft (though some evidence that the goods are stolen is clearly required), and therefore avoids police involvement in the country of origin, but its effectiveness still depends on the ability to provide evidence of legal ownership of the timber in the country of origin. In addition, courts may decline to exercise jurisdiction where they consider that the relevant activities occurred in a foreign jurisdiction and most of the relevant evidence, including witnesses, are located there.

**Key questions**

25. In analysing the possibility of using legislation on stolen goods against the import of illegal timber and timber products, the following questions – among others – should therefore be addressed:

- Does application of the legislation require criminal proceedings in the country of origin of the products to have been started or concluded successfully, and does action require a request from the authorities in the country of origin?
- Does the legislation require that the original offence is a crime under the laws of both the country of origin and the country of destination?
- What degree of knowledge of the crime or illegal origin of the goods would have to be shown before an individual or company could be prosecuted?
• Would courts in practice exercise jurisdiction, or would they refer the matter to the country of origin?

26. In addition to these questions relating to the application of the legislation, it is necessary to examine whether in practice it could be used. Even if it applicable in theory, enforcement agencies may prefer not to make use of it, given the obvious difficulties in obtaining evidence of criminal activities in the country of origin. The country studies therefore need to examine to what extent the police and prosecuting authorities would be willing to take action, and under what circumstances an action would be most likely to be successful. This includes an examination of the structures of international collaboration between police forces in the EU member states being studied and in the countries where illegal logging is widespread.

2.2 Customs misdeclaration

27. The import of stolen goods is not in itself a customs offence. It is possible, however, that if the goods were acquired dishonestly they would then be falsely described in the accompanying documentation. This is a customs offence and would allow customs agencies to seize the goods – as long, of course, as they can prove that they are misdescribed.

28. The country studies therefore need to examine the extent to which illegal timber entering the EU country might be misdescribed, the degree of checking that customs agencies engage in, and the likelihood that products that are misdescribed would be detected.

29. In general customs agencies examine closely only a small proportion of products crossing borders – they do not have the resources to carry out extensive checks, and in any case this would delay international trade for entirely legal products. Instead, checks are targeted on products which have a high risk profile, either because of the type of product, its country of origin, the companies involved in exporting, shipping or importing it, or specific intelligence received or unearthed about possible criminality. The country studies should therefore investigate the applicability of all these factors to illegal timber in practice, including the extent to which the national customs agency might cooperate with customs agencies in the countries where illegal logging is common.

2.3 Money laundering

30. Money laundering is the processing of the proceeds of crime in order to disguise their illegal origin. National legislation allowing authorities to tackle money laundering and seize the proceeds (financial or physical, i.e. property or goods purchased with the money proceeds) of criminal activity has grown in importance with the expansion of the illegal trade in narcotics. With the increasing focus on international organised crime and, particularly in recent years, on international terrorism, the scope of money laundering legislation has broadened accordingly.

31. At the EU level, Directive 2001/97/EC, which entered into force in June 2003, obliges EU member states to combat the laundering of the proceeds of all criminal activities. In this instance, criminal activities are defined as narcotics-related, those linked to organised crime, or ‘any other criminal activity designated as such for the purposes of this Directive by each Member State’. The Directive extended previous requirements for client identification, record-keeping and reporting of suspicious transactions, which were previously limited to the financial sector, to a series of non-financial activities and professions that are vulnerable to misuse by money launderers, including
external accountants and auditors, estate agents, notaries and lawyers. A further directive on money laundering is under discussion within the EU.

32. Could money laundering legislation be used to seize the proceeds of illegal logging? This topic has attracted considerable interest in recent months, including an EU-wide workshop organised by the German and Dutch governments in Berlin in September/October 2004.5

33. In general, if the activity in question is illegal under EU or member state law, then the proceeds of the activity could be subject to recovery, provided they are deposited or disposed of within the EU. The fact that the activity itself may take place overseas and be carried out by non-EU nationals is not relevant. This is made explicit in the Directive, in which Article 1 specifies that ‘money laundering shall be regarded as such even where the activities which generated the property to be laundered were generated in the territory of another Member State or in that of a third country’.

34. An analysis of member state legislation carried out for the 2004 Berlin workshop6 (based on a questionnaire to which twelve EU member states7 responded) revealed a general belief that money laundering laws could be used to target the proceeds of illegal logging, whether in the case of the illegal products themselves entering the EU or in the case of the financial proceeds of the criminal activity being deposited in the EU. However, there are a number of important factors influencing the possibility of prosecuting such cases, which do differ from country to country.

35. First is the question of whether the underlying crime – the ‘predicate offence’ – would be illegal under the EU country’s laws if it was committed in the EU country – which in most countries is a requirement for the application of money laundering regulations (see further below). Most respondents do have laws covering various forms of illegal logging domestically – logging without a license, or in breach of the conditions of the license, theft of wildlife for commercial gain, and so on – and therefore in most cases there is little doubt that ‘illegal logging’ carried out overseas would constitute an offence for the purposes of the money laundering legislation.

36. There are, however, some caveats in some countries. Denmark has no particular provisions covering illegal logging, but the crime could be categorised as theft, fraud or forgery, which are covered. In Luxembourg, in order to be considered a money laundering offence, the underlying offence has to be carried out by a criminal organisation – which probably is the case for most illegal logging operations.

37. In Cyprus, the penalties for illegal logging carried out domestically fall below the threshold necessary for money laundering offences in that country (criminal offences punishable with more than one year’s imprisonment) and so could not be considered to be a qualifying predicate offence. Other offences which are likely to be committed, however, such as theft, fraud or forgery, carry more serious penalties and therefore would qualify.

38. Similarly, Austria requires the predicate offence to be punishable by at least three years’ imprisonment, but Austrian law also includes a range of misdemeanours with lesser penalties, including corruption, forgery, and criminal association. Other countries, including Netherlands and the UK, have no such threshold; any criminal offence could qualify as the predicate offence.

5 For the papers and a report of the meeting, see www.illegal-logging.info/events/Berlin_Meeting__Illegal_logging_and_money_laundering.zip
6 Available at www.illegal-logging.info/papers/Money_laundering_quest_analysis.pdf
7 Austria, Belgium, Cyprus, Denmark, France, Germany, Latvia, Lithuania, Luxembourg, Netherlands, Slovakia, and the UK
39. Connected to this discussion is the need for a criminal offence to have been committed in the
country of origin of the timber – the ‘parallel offence’ or ‘dual criminality’. In some countries,
including Denmark, France, Germany and some elements of UK legislation, this is an explicit
requirement; in others, including Netherlands, it is not clear. In general it is not necessary for the
crime actually to have been prosecuted in the country of origin, but clearly it helps, in terms of the
provision of evidence, if it has been.

40. In some countries, however, money laundering is an autonomous offence, and the underlying
predicate offence is of no particular importance. As the Belgian response to the questionnaire put it, ‘it
does not matter from which kind of offence the profits are coming from, from the moment it is a
criminal activity and the advantages are being laundered, the money laundering offence can be
applied’. So in these countries, which includes Belgium and the UK (for other elements of its
legislation), the link between the illegal activity and the money laundering offence does not have to
be proved absolutely, and neither does the link between the predicate offence and the money
launderer. Clearly there needs to be some evidence that the funds being laundered are of illegal origin,
but this can take a wide variety of forms, and does not have to be as concrete as, for example, a court
judgement in the country of origin. Similarly, in Austria, if the money laundering is ‘in the interest of
a criminal organisation or of a terrorist group’, it is not necessary to have a predicate offence.

41. The question of the evidence of the original crime, or the proof of the illegal origin of the funds,
is an important one. In some countries, including Austria, Belgium and the UK, courts have
considerable latitude to consider, and reach judgements on the basis of, a wide variety of evidence,
including generally suspicious behaviour, the lack of evidence or explanations of genuine sources of
funds, the use of false names or documents, and so on. UK legislation includes the concept of a
‘criminal lifestyle’, where the suspect appears to have no legitimate source of income and therefore it
can be assumed that everything he acquires and spends is the proceeds of illegal activity. The burden
of proof in these cases, including the UK’s ‘criminal lifestyle’, in general rests with the defendant,
though this will vary from case to case.

42. A related issue is the extent to which the individuals handling the laundered money have any
knowledge of the illegal origin of the funds. In general they can be prosecuted if they either know or
suspect, or should have suspected, illegal origin; factors such as the manner in which the money is
transferred, whether taxes are paid, and so on, are relevant. In Luxembourg, however, it has to be
shown that the individual did know that the money was of illegal origin before they can be
successfully prosecuted.

43. This is a matter of particular importance to the financial institutions that may process the
laundered money. UK legislation creates the offence of ‘failure to disclose’ for the ‘regulated sector’
(banks, estate agents, accountants, lawyers, etc.), which puts people working in the sector who know
or suspect, or have reasonable grounds for knowing or suspecting, that people are engaged in money
laundering under an obligation to pass on this information to the authorities.

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8 The ‘civil recovery’ procedure under the Proceeds of Crime Act.
9 The ‘money laundering’ procedure under the Proceeds of Crime Act.
Key questions

44. Country studies being carried out in member states which did not respond to the 2004 questionnaire need to consider the range of issues covered above to decide whether or not their money laundering legislation could be used, in theory, against the proceeds of illegal logging.

45. An equally important matter, however, is whether the legislation is likely to be used in practice. For cases where there is no investigation or prosecution in the country of origin of the products, it may be very difficult for the relevant authorities in the EU member state to detect the fact that products, or money, entering their country is the proceeds of illegal logging – particularly where it forms part of a normal pattern of financial flows between the institutions financing and carrying out the logging or processing operations. In these cases, the difficulties of detection, coupled with the lack of knowledge of the issue amongst the authorities – particularly the financial intelligence units whose remit is to look out for possible cases of money laundering – may render this approach pointless.

46. However, where there is an ongoing investigation or successful prosecution in the country of origin, the use of money laundering laws in the EU against the profits of the operations may provide a valuable reinforcement to the activities of the overseas enforcement agencies, helping to punish not just those carrying out the illegal activities, but also those individuals and companies financing them and disposing of the proceeds.

47. The country studies therefore need to discuss with the relevant enforcement agencies in their own country the circumstances for the successful use of money laundering legislation. This kind of discussion was held in the UK in early 2004\textsuperscript{10} and was not particularly encouraging, revealing a lack of awareness of the problem, coupled with a shortage of resources and a reluctance to deploy them in what was seen to be an area not likely to result in successful actions.

\textsuperscript{10} See www.illegal-logging.info/papers/POCA_Illegal-logging_Discussion2.doc
3 **Assessment of additional measures**

48. Following from the discussion in Section 2, it seems likely that national legislation in EU countries will be most effectively deployed against illegal timber – where it can be at all – where there is effective cooperation with enforcement agencies in the countries of origin, and probably where there is a successful prosecution, or at least investigation, in the country of origin. Yet the point of this study is to examine options to deal with illegal timber originating from countries which have declined to agree VPAs with the EU – and it seems quite likely that cooperation with enforcement authorities in those countries will be poor or non-existent, and active pursuit of illegal loggers and processors by those authorities similarly weak.

49. We therefore need to examine the options for new legislation which could be adopted, either at EU and/or member state level, should existing national legislation prove to be inadequate. The rest of this section briefly explores a number of options for action; these – and others – will be examined further in the process of the study.

3.1 **Banning imports**

50. The most intuitively straightforward option would be to ban the import of timber and wood products not positively identified as legal – presumably covering all products not covered by the FLEGT licensing system, or by certification schemes held to guarantee legality of production, and not providing documentary proof of legality. In some ways this would be similar to the government procurement rules now operating in the UK (and developing in other EU countries), which impose a requirement for proof of legality for all central government purchases of timber and all wood products, including paper. Five certification schemes – FSC, CSA, SFI, PEFC and MTCC – have been judged as providing adequate proof of UK government requirements for legality, and a system is also being established to allow sellers to provide alternative forms of documentation to prove their products are legal.11

51. The main problem with this approach is that it would apply to substantial volumes of timber entering EU markets from countries with no significant problems with illegal activities (e.g. the US or Canada), imposing additional administrative burdens without any particular benefit. It is also likely to raise WTO issues (and countries affected by the action would almost certainly pursue a WTO dispute case), particularly if imports are required to show documentary proof of legality and domestically produced products are not – which would be a clear case of discrimination. (The full study will explore the WTO implications in more detail.12)

52. Possible answers to these problems could include imposing a requirement for proof of legality on domestic timber and wood products as well as imports – though, again, this means an additional administrative burden without very clear benefits. Alternatively, countries could be identified according to the degree of illegality believed to be associated with their products, and import bans applied against only the most risky. Again this raises potential WTO problems, as a case of discrimination between similar imports from different countries.

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12 It should be noted that WTO rules governing procurement allow for stricter restrictions than do those governing imports, so there is not thought to be any WTO problem with the UK and other member states’ timber procurement policies.
53. A more limited form of import ban could be applied, however, in cases where producer countries are themselves banning exports of some categories of timber products. Indonesia, for example, banned the export of logs and sawn timber in 2004, in an attempt to reduce the illegal trade, and the ban has been more effectively enforced after Malaysia banned the import of the same products from Indonesia. This kind of reciprocal action could prove useful in particular cases, but is hardly likely to be a long-term or comprehensive solution to the problem, as widespread export bans are not realistic.

### 3.2 Making foreign illegal products illegal

54. As pointed out in the Introduction, section 4.2.4 of the FLEGT Action Plan refers to the fact that there is ‘currently no Community legislation prohibiting the import and marketing of timber or timber products produced in breach of the laws of the country of origin’. An obvious solution, then, is to introduce legislation to prohibit the import and marketing of these illegal products.

55. This is similar in principle to the US Lacey Act, which makes it ‘unlawful for any person … to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce … any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.’ An examination of the way in which the Lacey Act operates in practice, and the challenges its implementation presents to enforcement agencies and the judiciary, should therefore offer valuable lessons for the EU.

56. The Lacey Act was first adopted in 1900, being named after its sponsor, Iowa Congressman John Fletcher Lacey, a well-known naturalist. Its original purpose was to outlaw intra-US traffic in birds and other animals illegally killed in their state of origin. It was amended on a number of occasions, most notably in 1981 when its scope was expanded and its enforcement provisions and penalties strengthened. In fact timber is not covered under the Act (apart from species listed under CITES or identified as endangered in a US state), though there are ongoing discussions in the US about expanding it.

57. A two-tiered penalty scheme exists, creating both ‘misdemeanour’ and ‘felony’ offences, partially dependent on the level of knowledge of the laws violated on the part of the accused. The penalties can involve imprisonment and/or fines, and forfeiture of equipment involved in the offence. In each case, the defendant need not be the one who violated the foreign law – the fact that the fish or wildlife were obtained illegally is the important point.

58. The Lacey Act also requires that shipments of fish and wildlife be accurately marked and labelled on the shipping containers. Failure to do so (a ‘marking offence’) is a civil offence punishable by a fine. In all cases, federal agents are authorised to seize any wildlife which they have reasonable grounds to believe was taken, possessed, transported, or imported in violation of any provisions of the underlying laws. This is true even if the defendant can show that they were not aware that the wildlife was illegally obtained.

59. The Lacey Act is often used by US prosecutors. In 1999, for example, the US Fish and Wildlife Service was involved in almost 1500 cases. It has also been used, in co-operation with a number of South Pacific countries which are members of the Forum Fisheries Agency, to tackle illegal fishing.

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13 16 USC; SS 3372(2a). ‘State’ means a state of the US.
14 Animal Welfare Institute Quarterly 49:4 (Fall 2000); it is difficult to acquire precise figures, as cases may often be coded as import violations or CITES violations.
and US action has been taken against foreign-flagged vessels carrying fish illegally caught in the exclusive economic zones of Agency states. A number of Agency member states, including Papua New Guinea, Nauru and Solomon Islands, have incorporated Lacey Act-type provisions in their fisheries legislation, and the extension of this type of legislation is an ongoing item for discussion within the debates over the control of illegal fishing world-wide.

60. Proving the illegality is not always straightforward, not least because of a lack of knowledge, or a lack of clarity, about the foreign laws in question. US courts have interpreted the term ‘any foreign law’ broadly, including regulations as well as statutes, and not restricting the laws in question to those aimed directly at wildlife conservation. In a Lacey Act proceeding, the determination of a violation of foreign law is made by the judge presiding over the case; it is not a question of fact presented to the jury for determination. Courts are given broad discretion in these proceedings because of the general lack of availability of foreign law materials and expert opinion. Sources used by courts have included affidavits and expert testimony from foreign judges, government ministers and lawyers; foreign case law; law review articles and translations of foreign decrees; information obtained from foreign officials; and the court’s own research and analysis.

61. It is worth stressing – because it appears to have caused some confusion – that the Lacey Act is not a trade measure, applied at the border. Imports of fish and wildlife entering the US are not required to provide proof of legality any more than goods put on sale in British shops have to prove that their production has not violated the Theft Act. It is simply a provision to make fish and wildlife produced illegally overseas also illegal in the US. As such, its application has no WTO implications.

62. It would not be possible to transpose directly the broad range of activities covered by the Lacey Act – ‘import, export, transport, sell, receive, acquire, or purchase’ – into a single piece of EU legislation. The regulation of trade – imports and exports – is a EU-level responsibility, because of the single market that exists within the Union, whereas most of the other activities – sale, purchase, and so on – are areas that fall within the competence of member states. If it were desired to regulate all these activities, member state legislation would therefore be required, though it could be given a European framework through an EU directive.

63. In this context the publication by Germany, in April 2005, of draft legislation – the Draft Virgin Forests Act – designed to prohibit the sale and marketing of timber and timber products harvested illegally from virgin forests (anywhere in the world) is of considerable interest. The draft legislation, which is currently undergoing consultation, is designed as an amendment to an existing act on nature conservation, and can be seen as an attempt to introduce Lacey Act-type provisions for timber at a national level.

64. The adaptation of the Lacey Act model to the EU and its member states – including the distribution of responsibilities between the EU and member states – will be further explored in the full study. It is not clear how well the Lacey Act’s approach is suited to European judicial and enforcement systems, and it may be that European courts would be less willing to interpret and apply other countries’ legislation than are US courts – though the fact that its application does not require cooperation from the foreign countries in question helps to meet the objections that can be applied to existing EU member state legislation (see section 2). Nevertheless, it clearly provides valuable lessons for the EU – which is presumably why the FLEGT Action Plan itself (section 4.2.4) mentions the Lacey Act as a ‘legislative instrument … which may help to inform the Commission’s position in this regard’.
3.3 Using existing international frameworks

65. A third possibility for taking action against imports of illegal timber from non-VPA countries lies in utilising existing international frameworks. If these can be made to work in such a way that shipments of illegal timber and wood products are detected and seized before they ever enter the EU, then there may be no need for any new legislation within the EU. A number of possibilities are listed below; they are not exhaustive, and the study will attempt to examine all relevant international frameworks.

Customs cooperation

66. Established in 1952 as the Customs Co-operation Council, the World Customs Organisation (WCO) is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of customs administrations; it currently has 162 members. One of its main tasks is to oversee the Harmonised Commodity Description and Coding System, which is used world-wide as the basis for classifying goods and for the collection of customs revenue and international trade statistics by almost all countries. Currently 179 countries and customs or economic unions, representing about 98 per cent of world trade, use the Harmonised System (HS). HS codes are of limited relevance, however, to the control of illegal trade; they tend to aggregate products to a greater level than is usually needed to act as a warning signal to customs officers trying to detect smuggled goods – and of course they are designed to facilitate trade, not slow it down.

67. The WCO Customs Enforcement Network provides a route for exchange of information between customs agencies, and a mechanism for cooperation with other international agencies such as Interpol. WCO itself is collaborating increasingly with the UN Environment Programme (UNEP) and secretariats of multilateral environmental agreements in combating international environmental crime, and memorandums of understanding currently exist between the WCO, UNEP and the CITES and Basel Convention secretariats covering information exchange, joint technical meetings, cooperation between environment and customs officials at national level and training and awareness-raising exercises. In June 2003 UNEP announced a ‘Green Customs’ initiative to improve training and coordination. Control of trade in illegal timber has not, however, so far been a topic in which the WCO has expressed much interest (apart from trade in CITES-listed species).

68. The WCO has supported the establishment of a total of eleven Regional Intelligence Liaison Offices (RILOs), the first of which was set up in the Asia–Pacific region in 1987; it proved to be successful in terms of the quality and quantity of its intelligence output, and its model was emulated elsewhere in the world. Member countries take turns to host and provide administrative support for the RILO, and non-host members have seconded officers to help build up a network of personal contacts between customs officials across the region, and also with other RILOs elsewhere in the world. Exchange of information between the RILOs and WCO centrally is encouraged through the Customs Enforcement Network.

69. There may well be scope for improving customs collaboration on the issue of illegal logging by working through the WCO – particularly if the main problem identified by the country studies (see section 2) is a lack of international cooperation and information.

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15 See www.wcoomd.org
Police cooperation

70. Interpol (the International Criminal Police Organisation) facilitates information exchange between national police authorities; it does not investigate or prosecute cases itself.\(^{16}\) As with the WCO, Interpol possesses memorandums of understanding with the CITES and Basel Convention secretariats. The Interpol Working Party on Environmental Crime was set up in 1993, with subgroups on wildlife crime and hazardous wastes, with the aim of improving information exchange and analysis, though this work has been given a rather lower priority since 11 September 2001. Interpol has supported regional working groups of law enforcement officers in these areas and instigated ‘training for trainers’ courses on environmental criminal investigations.

71. In the mid 1990s, Interpol introduced an ‘ecomessage’ system for the collection and analysis of information in cases concerning international environmental crime. It was developed to tackle common problems in areas such as wildlife crime or illegal dumping of hazardous wastes, including the need to collect information from widely scattered sources; the problem of member countries lacking uniform reporting methods; a lack of organised collection, storage, analysis and circulation of information about suspects; and a lack of knowledge about which law enforcement and other agencies need to be contacted. The ecomessage aimed to provide a uniform format to be used by National Criminal Bureaux (the Interpol contact points in each country); the General Secretariat in Lyons acts as a central collection and dissemination point. However, wide variations in what is legal and what is illegal in Interpol member countries, a lack of commonly agreed definitions of some terms (such as ‘waste’), the involvement of a huge range of law enforcement agencies, not just the police, and a general lack of knowledge of environmental crimes amongst many of them, have all combined to render the system less useful than had been hoped.

72. Since the mid 1990s Interpol has laid increasing stress on regional activities, with more regionally-focused meetings, more training in the regions and increased support for National Central Bureaux. This is coordinated from the Regional and National Police Services Directorate at Interpol headquarters.

73. As with customs, there may be scope for improving international police collaboration on the issue of illegal logging by working through Interpol – particularly if the main problem identified by the country studies (see section 2) is a lack of international cooperation and information.

UN Convention Against Transnational Organised Crime

74. The UN Convention Against Transnational Organised Crime\(^{17}\) was agreed in 2000 and entered into force in September 2003. It is a legally binding instrument committing states that ratify it to taking a series of measures against transnational organised crime, including the creation of domestic criminal offences to combat the problem, and the adoption of new, sweeping frameworks for mutual legal assistance, extradition, law-enforcement cooperation and technical assistance and training.

75. Parties to the Convention will be able to rely on one another in investigating, prosecuting and punishing crimes committed by organised criminal groups where either the crimes or the groups who commit them have some element of transnational involvement. The aim of the Convention is to make it much more difficult for offenders and organised criminal groups to take advantage of gaps in

\(^{16}\)See www.interpol.int
\(^{17}\)See www.unodc.org/unodc/en/crime_cicp_convention.html
national law, jurisdictional problems or a lack of accurate information about the full scope of their activities.

76. The Convention deals with the fight against organised crime in general and some of the major activities in which transnational organised crime is commonly involved, such as money laundering, corruption and the obstruction of investigations or prosecutions. Three protocols supplement the Convention by tackling specific areas: on trafficking in persons (entered into force December 2003), the smuggling of migrants (January 2004) and the manufacturing and trafficking in firearms (not yet in force). The protocols commit countries which ratify them to making the basic subject of the protocol a criminal offence and to adopting other specific measures, such as controls on travel documents, to combat the problem.

77. Whether the framework established by the Convention could be used effectively to assist cooperative action against cases where the exporting and/or importing countries have reasonable doubts over the legality of a consignment of timber or wood products will be examined in the full study. Whether the Convention itself could be extended, through a further protocol, explicitly to cover illegal logging and the trade in illegal timber (or perhaps illegally obtained natural resources more widely), will also be a subject for the full study.