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## Controlling Illegal Logging: Lessons from the US Lacey Act

*Duncan Brack, Chatham House*



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### Summary

- The US Lacey Act, which makes it illegal to import, sell or possess fish or wildlife produced illegally in foreign countries, is generally regarded by US enforcement agencies as an effective piece of legislation in helping to control illegal trade. It effectively creates a requirement for due diligence on the part of importers to ensure that the products they handle are legally sourced.
- Lessons from the Lacey Act's operation are of direct relevance to the current debate in the EU around controlling imports of illegal timber.
- Since existing legislation in the EU is, by and large, inadequate for the task, new legislation modelled on the Lacey Act is a potential option in tackling imports of illegal timber, and a valuable reinforcement to the Forest Law Enforcement, Governance and Trade (FLEGT) licensing scheme.

### Excluding illegal timber from consumer markets

Excluding illegal timber and timber products from consumer markets is an important weapon in the struggle to control illegal logging. The European Union's Forest Law Enforcement, Governance and Trade (FLEGT) initiative centres on a new licensing system, agreed with timber-producing countries, to shut out illegal timber from those countries from EU markets. Yet because this system is being built up through a series of bilateral agreements, the problem remains of how to exclude illegal timber from non-participating producer countries – and also how to exclude illegal timber from partner countries that manages to evade the licensing controls, for example by transshipment through non-partner countries.

Existing legislation in consumer countries is not particularly useful. Although some laws, for example those concerned with handling stolen property, may be applicable in theory, they tend to suffer from severe drawbacks in practice, including their scope ('stolen property', for example, would not include timber exported without paying export duties, a common type of illegal logging), the difficulty of showing intent on the part of the importers (often importing companies do not know whether timber is stolen or not), and the problems of cooperating with enforcement agencies in foreign countries. The only instances of successful detection of imports of illegal timber to date have been where the timber species are listed under the Convention on International Trade in Endangered Species (CITES).

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There is growing interest, therefore, in the possibilities of new legislation in the EU and its member states, to plug the loopholes in the FLEGT licensing system. This is the so-called 'additional options' debate, flagged up in the FLEGT Action Plan itself and subject to a European Commission consultation exercise over the winter of 2006–07. Two possibilities have emerged as the main options for new measures. The first is the imposition of a requirement for documentary proof of legality for all timber products entering the EU, imposed at the border or at the point of sale; WTO rules would probably mean imposition of the same requirement on domestic products too.

The second option is the introduction of a new law to prohibit the import and marketing of timber or timber products produced illegally in foreign countries. This differs from the first option in that it would be up to government enforcement agencies to prove that the timber was illegal, through an investigation and court case; in the first option, it would be the importer or retailer who would have to prove that the goods were legal before they were allowed on to the market.

This is similar in principle to the US Lacey Act. Although the Lacey Act does not currently apply to timber, or other plants, unless they are species native to the US, attempts are now being made to extend its coverage. An examination of its operation in practice, and the challenges of implementation, should offer valuable lessons for the EU in its attempts to control illegal logging and its associated trade.<sup>1</sup>

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### The Lacey Act

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Iowa Congressman John Fletcher Lacey, a well-known naturalist, first introduced the Lacey Act to the US Congress in the spring of 1900. Its original purpose was to outlaw intra-US traffic in birds and other animals illegally killed in their state of origin, given the inability of US state laws to regulate inter-state commerce. It was subsequently amended on several occasions, most notably in 1981 when its scope was expanded and its enforcement provisions and penalties were strengthened. The Act, in the view of one US commentator, 'is arguably our nation's most effective tool in the fight against an illegal wildlife trade whose size, profitability, and threat to global biodiversity Lacey could probably not have imagined'.<sup>2</sup>

The Lacey Act regulates both intra-US and external trade – imports and exports. It contains two main types of prohibitions with respect to foreign products. The first is the *false labelling offence*, under which any 'false record, account or label' is unlawful. Violation of this section carries either the 'misdemeanour' or the more serious 'felony' penalty. If someone knowingly violates the section and the products are imported or exported, the offender can face either a fine of up to \$10,000 or up to five years' imprisonment, or both.

The second, and more general, offence, is the *trafficking offence*, which makes it 'unlawful for any person ... to import, export, transport, sell, receive, acquire, or purchase in ... foreign commerce ... any fish or wildlife taken, possessed, transported, or sold ... in violation of any foreign law'. The penalties depend on a number of factors, but mainly on the level of intent that can be shown on the part of the violator:

- Where specific intent can be shown – i.e. the individual knows that the products have been illegally produced – the violator can be convicted of a 'felony', with a maximum penalty of five years' imprisonment and a fine of \$250,000 (\$500,000 for an organization).

- An individual who 'in the exercise of due care should know' that the products are illegal can be convicted of a 'misdemeanour', with a maximum penalty of one year's imprisonment and a fine of \$100,000 (\$200,000 for an organization).

- Where no specific intent can be shown – a negligent violation – a fine of up to \$10,000 may be imposed.

The Lacey Act also authorizes the forfeiture of the illegal products which are being handled. These forfeitures are authorized on a strict liability basis – i.e. liability that does not depend on actual negligence or intent to harm; there is no 'innocent owner' defence and the products can be confiscated because they are of illegal origin. Vessels, vehicles, aircraft and equipment involved can also be forfeited, but only after a felony conviction involving actual or intended sale, where specific intent can be shown.

Compared with other types of legislation, like that covering the handling of stolen goods in many EU states, the Lacey Act is far broader in its application. For a felony, the prosecution must prove intent, but for misdemeanour offences, the prosecution only needs to show that in the exercise of due care, the defendant *should have known* of the illegality. Similarly, the prosecution does not have to prove that the defendant knew which underlying law was violated, just that in some fashion the fish or wildlife was procured illegally. And the term 'imports' is defined as including products being transhipped through the US, which would not, under customs regulations, normally qualify as imports.

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### The Lacey Act in practice

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The Lacey Act is often used by US prosecutors, in the Department of Justice, the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA). An investigation can be triggered in many ways, through information provided by US agents, foreign governments, NGOs, companies, the news media or private individuals. The Lacey Act Reward Account, which receives some of the proceeds of fines under the Act, is used to provide financial incentives for information leading to convictions.

In practice, prosecutors have to show both the underlying violation – of a foreign or other law – and the 'overlying violation' of an action prohibited by the Act ('import, export, transport, sell, receive, acquire, or purchase ...'). The actions need not be carried out by the same person, however; culpability attaches to anyone committing the overlying violation.

US courts have interpreted the term 'any foreign law' broadly, including regulations as well as statutes. They have generally held that the law should be 'resource-related', i.e. the protection of wildlife needs to be *one* of the purposes of the law, but not necessarily the only or even the main one.

The determination of a violation of foreign law is made by the judge presiding over the case. Courts are given broad discretion in these proceedings because of the general lack of availability of foreign law materials and expert opinion. Sources used by courts have included affidavits and expert testimony from foreign judges, government ministers and lawyers; foreign case law; law review articles and translations of foreign decrees; information obtained from foreign officials; and the court's own research and analysis.

Effective cooperation with the foreign government in question obviously makes obtaining information about its laws much easier, as well as obtaining proof of the original illegality. The first step in a possible case is usually to contact the foreign government to ascertain its degree of willingness to cooperate; a formal statement of support is sometimes requested. Sometimes cooperation is very good; evidence may be willingly shared and prosecutions may be conducted simultaneously. Even when it is much poorer, is usually possible to find some agency within the country with which to cooperate. It should be noted, though, that cooperation with the foreign government is not an absolute requirement, and cases can be prosecuted without any degree of cooperation, provided that US agents can unearth sufficient evidence of the original crime themselves.

US prosecutors regard the Lacey Act as a valuable tool, particularly where the violators can be imprisoned and their equipment confiscated. As one NOAA lawyer put it, 'the Act covers activities which ... foreign countries may not be able to reach once the individuals or wildlife leave their borders ... [It] covers a wide range of behaviours and is unique in its approach. As an effective conservation tool, it can only be hoped that [it] will fulfil its intended purpose for a long time.'<sup>3</sup>

## Extending the Lacey Act to timber

The Lacey Act covers fish and wildlife. Plants (including timber) are only covered if they are native to the US and are also species listed under CITES or identified as endangered in a US state. Most timber in international trade is therefore not covered. In response to the general rise in concern about illegal logging and associated trade, however, attempts are now being made to extend the Lacey Act. In March 2007 three members of the House of Representatives (two Democrats and one Republican) introduced the Legal Timber Protection Act, a measure aimed at extending the protection of the Lacey Act to foreign plants, including timber (common food crops and cultivars are excluded).<sup>4</sup> The measure was welcomed by many NGOs and, more cautiously, by timber industry associations. A hearing is expected in the summer of 2007, and it is also possible that a similar Act may be introduced in the Senate.

The proposed new Act differs from the old one in two important respects. First, in response to concerns from importers about what exactly would be prohibited, the current text includes a definition of illegal timber. This covers illegalities occurring during harvesting (including removal from a protected area), transport, sale and export, non-payment of taxes and royalties, or violation of the provisions of international agreements. Whether such a definition is really necessary is an open question; it has not been required for fish and wildlife. The second difference allows (though does not require) the US government to issue regulations related to requirements for official documentation for the products.

Just three weeks before the Legal Timber Protection Act was introduced, the Illegally Logged Wood Act was introduced into the state legislature in Illinois.<sup>5</sup> It aims to prohibit the import into or sale in Illinois of whole logs, timber or raw wood products 'harvested, transported, bought or sold in violation of national laws'. Anyone knowingly violating the law is subject to a fine of \$1,000 per day of the violation.

## Lacey-type legislation outside the US: illegal fishing

The Lacey Act has been used by US enforcement agents to control the import of illegal fish into the US. The underlying violation has often been a breach of an international fisheries treaty, and US prosecutors have usually found that evidence of illegal record-keeping, or other trafficking measures, has been easier to show than evidence of the original illegal fishing; this has nevertheless allowed the forfeiture of shipping containers and their contents.

Several southern Pacific states, including Papua New Guinea, Nauru, Federated States of Micronesia, Marshall Islands, Solomon Islands and Tonga, have incorporated Lacey-type provisions in their own fisheries laws. The extension of this type of legislation was recommended for all port states by the High Seas Task Force, a group of fisheries ministers and international NGOs, in its final report in March 2006.<sup>6</sup> The Task Force published a background paper explaining how the Lacey Act works in the US and including a model fisheries enforcement act based on Lacey Act provisions.

## Using Lacey Act principles in the EU

The Lacey Act clearly possesses advantages when compared to existing criminal legislation, such as that dealing with handling stolen property. Since it can rest on violations of foreign laws, it has a wide range of triggers, for example licensing requirements or non-payment of charges or taxes. It does not require proof beyond reasonable doubt that the importer knew, at the point of purchase or import of the timber, that it was illegal, and even if the importer did not know, the products can still be confiscated. Effectively the Act imposes a requirement for due diligence on importers – an obligation to ensure they are dealing in legitimate products.

Could legislation modelled on the Lacey Act and applied to timber be introduced at EU level? A legal opinion commissioned by Chatham House on this and related issues<sup>7</sup> suggested that Community competence to adopt such a measure does indeed exist, under the environmental provisions of the EC Treaty. A European Court of Justice (ECJ) ruling in 2005 found that although as general rule criminal law does not fall within the Community's competence, this does not prevent it from taking measures considered necessary 'in order to ensure that the rules which [the Community] lays down on environmental protection are fully effective'.<sup>8</sup> (This led, among other things, to the publication by the European Commission in February 2007 of a draft directive aimed at criminalizing the most serious offences against the environment across the EU.) It could certainly be argued that a Lacey-type measure is necessary to safeguard the integrity of the FLEGT licensing scheme.

If the EU as a whole decided not to act, it would still be possible for EU member states to legislate individually to introduce such measures. Imports and exports can only be controlled at the border by the EU, as international trade is an area of Community competence, but the Lacey Act is not a trade measure, applied through border controls; rather, it is a prohibition, breach of which is subject to penalties. Article 30 of the EC Treaty explicitly permits member states to impose prohibitions or restrictions on imports, exports or goods in

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transit for a variety of reasons, including environmental objectives, and a number of cases heard by the ECJ have demonstrated what types of restrictions have been permitted without distorting the single market excessively. There is no experience of how the ECJ would rule on a case involving illegal products, but it seems quite likely that it would find in favour of such a measure, which should not lead to any protectionist advantage for the member state imposing it. In any case, member states can certainly regulate activities such as the sale, purchase or marketing of products on their territories.

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### Implications

Any EU or member state legislation would not, of course, have to replicate the Lacey Act exactly; it is its principles and lessons, rather than its exact wording, that are important. Issues such as the relationship with existing legislation, which enforcement agencies are responsible for applying it, what sanctions are applicable, and so on, would have to be decided, generally at member-state level even if the legislation were promulgated through an EU directive.

Concerns have sometimes been raised about whether there are any WTO implications of Lacey-type legislation. The Lacey Act is not a trade measure, applied at the border; imports of fish and wildlife entering the US are not, in general, required to provide proof of legality at the point of import. It simply allows action to be taken against importers or purchasers of products produced illegally overseas once it has been shown that the products are indeed illegal. Imported and domestic products are treated identically in this respect, and there is no protectionist discrimination.

How can we expect timber-importing companies in the EU to respond to Lacey-style legislation? Although there would be no absolute requirement for them to provide documentary proof of legality, under the new legislation it would be more likely than hitherto that they would have to show that the products they were handling were legal – particularly if they were importing from high-risk countries, with a high incidence

of illegal logging. A logical response would be for importers to negotiate contracts which shifted the risk onto their suppliers in the countries of production. Suppliers would be required to provide proof of legality and perhaps to provide compensation if their products prove illegal. Payment by the importers could be delayed until they were satisfied that the products really were legal. In all circumstances, there should be a powerful incentive for importers to source timber with accompanying documentation guaranteeing legality – e.g. certification schemes (where these are regarded as effective enough to guarantee legality) or a FLEGT licence. Similarly, it is likely that implicit or explicit blacklisting of suppliers and producer countries which could not guarantee legality would spread. In practice, of course, thanks to the anticipated introduction of the FLEGT licensing scheme, the use of public procurement policies and private-sector voluntary initiatives to control supply chains, all this is already beginning to happen.

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### Conclusions

The introduction of Lacey-style legislation is not a panacea. Its successful operation would still rest on the ability to show the underlying illegality in the country of origin – not a straightforward task, particularly in the absence of effective cooperation with foreign enforcement agencies. The illegal products must still be detected and identified in the EU; and unlike much fish and wildlife, timber products sometimes have complicated supply chains stretching through several countries, making it harder to track their movement.

The FLEGT licensing scheme, which provides a means of distinguishing between legal and illegal products, is an answer to these problems. Nevertheless, as we have seen, it has inherent loopholes, particularly when only a few producer countries are participating, and without some means of plugging them the system will not work effectively. Legislation modelled on the Lacey Act should be a powerful reinforcement to the licensing scheme, and an added disincentive to those trying to bring illegal timber into the EU.

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<sup>1</sup> For more detail on the additional options debate, see Duncan Brack, *EU FLEGT Initiative: Assessment of 'Additional Measures' to Exclude Illegal Timber from EU Markets* (Chatham House, April 2006), available at [http://www.illegal-logging.info/papers/Add\\_options\\_030406.doc](http://www.illegal-logging.info/papers/Add_options_030406.doc).

<sup>2</sup> Robert S. Anderson, 'The Lacey Act: America's Premier Weapon in the Fight against Unlawful Wildlife Trafficking', *Public Land Law Review*, vol. 16, no. 27 (1995).

<sup>3</sup> Michele Kuruc, NOAA, 'The Lacey Act: Stemming the Flow of Illegally Commercialized Fish, Wildlife and Plants', paper prepared for an OECD workshop on enforcement measures, 1993.

<sup>4</sup> See <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.01497>.

<sup>5</sup> See <http://12.43.67.2/legislation/BillStatus.asp?DocTypeID=HB&DocNum=1635&GAID=9&SessionID=51&LegID=30447>.

<sup>6</sup> High Seas Task Force, *Closing the Net: Stopping illegal fishing on the high seas*, March 2006; available at [http://www.illegal-fishing.info/item\\_single.php?item=document&item\\_id=58&approach\\_id=16](http://www.illegal-fishing.info/item_single.php?item=document&item_id=58&approach_id=16).

<sup>7</sup> Kate Cook, *Illegal Logging: Use of the Civil and Criminal Law to Address Imports of Illegally Logged Timber* (March 2006), Matrix Chambers, available at [http://www.illegal-logging.info/item\\_single.php?item=document&item\\_id=330&approach\\_id=26](http://www.illegal-logging.info/item_single.php?item=document&item_id=330&approach_id=26).

<sup>8</sup> Case 176/03 Commission v Council, para 48.

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**Duncan Brack** is an Associate Fellow of Chatham House, where he manages its work on illegal logging and associated trade.

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