

# **Illegal Timber Trade: Analysing the Effectiveness of European Union Timber Regulation (EUTR) in the UK**

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**PhD**

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## **Thesis Submission Statement**

I, Nainesh Patel, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Signed

## **Abstract**

Despite the decades of concern and efforts, the forest cover of the world is more endangered than ever. Failure of international dialogues since the Rio Summit in 1992 is an indication that inclusive coordinated approach with strict laws and policies needed to protect global forest cover and to fight against the transnational issue of illegal logging. The emerging transnational timber legality assurance regime and the experimentalist form of governance in the form of the European Union Timber Regulation (EUTR) aimed at controlling trade in illegally logged wood and wood products into the EU. This research critically examines the mechanisms of EUTR and performance of its legal instruments in eradicating the illegal timber from the EU market. This research helps in identifying the operational difficulties of implementing this regulation in the UK as the UK is one of the major importers of wood products from countries where illegal logging of timber is a massive issue.

To achieve the research objectives, the black letter approach and empirical research method have been considered to analyse the potential of EUTR. The experimentalist governance theory to develop analytical framework and the empirical study with stakeholders including the timber industry in the UK, EUTR enforcement agency and research organisations including the environmental Non-government organisations are a significant part of this thesis. The experience and opinions of different stakeholders on EUTR components, collected through questionnaire and semi-structured interviews, have been analysed qualitatively by using the computer software NVIVO 11 to conclude.

This research shows that views of the stakeholders are very diverse and there are noticeable differences in opinions from the same category of stakeholders. The study finds that although EUTR is considered as a welcome initiative by most of the stakeholders, they are also of the opinion that EUTR has weaknesses which make it difficult to completely control illegal timber and timber products being placed in the UK market. From the data analysis, it is quite evident that implementation and enforcement of timber regulation, narrow product scope, ambiguous concept of monitoring organisation, lack of transparency from competent authority and coherent

approach across EU, technical issues within due diligence system are some of the significant challenges that affect the potential of EUTR in combating illegal timber trade.

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## List of Acronyms

APHIS	Animal Plant Health Inspection Service
CA	Competent Authority
CBD	Convention on Biodiversity
CEPI	Confederation of European Paper Industries
CEPI	Confederation of European Paper Industries
CFCS	China Forest Certification Scheme
CIFOR	Center for International Forestry Research
CIS	Commonwealth of Independent States
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CN	Combined Nomenclature
CSD	Commission on Sustainable Development
DDS	Due Diligence System
DEFRA	Department for Environment Food & Rural Affairs
DIT	Department for International Trade
DRC	Democratic Republic of the Congo
EC	European Commission
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
EIA	Environmental Investigation Agency
EMCEF	European Mine, Chemical and Energy Workers' Federation
ETTF	European Timber Trade Federation
EU	European Union
EUTR	European Union Timber Regulation
FAO	Food and Agriculture Organisation
FLEG	Forest Law Enforcement and Governance

FLEGT	Forest Law Enforcement Governance and Trade
FREC	Faculty Research Ethics Committee
FSC	Forest Stewardship Council
GFC	Global Forest Convention
GFG	Global Forest Governance
GFTN	Global Forest and Trade Network
HMRC	Her Majesty's Revenue & Customs
IFF	Intergovernmental Forum on Forests
IIED	International Institute of Environment and Development
IPF	Intergovernmental Panel on Forests
ITTO	International Tropical Timber Organisation
IUCN	International Union for Conservation of Nature
IUFRO	International Union of Forest Research Organisations
MEP	Members in the European Parliament
MO	Monitoring Organisation
NETTA	North-East Timber Trade Association
NGOs	Non-Government Organisations
NMO	National Measurement Office
OECD	Organisation for Economic Co-operation and Development
PEFC	Programme for the Endorsement of Forest Certification
REDD	Reducing Emission from Deforestation and Forest Degradation
Regions	Regulatory Fitness and Performance Programme
RWE	Round Wood Equivalent
SFI	Sustainable Forestry Initiative
SSI	Semi-Structured Interviews
STTA	Scottish Timber Trade Association
TFEU	Treaty of the Functioning of the European Union
TLAS	Timber Legality Assurance System
TREE	Timber Regulation Enforcement Exchange
TTAP	Timber Trade Action Plan
TTF	Timber Trade Federation
UKTR	United Kingdom Timber Regulation
UKWAS	United Kingdom Woodland Assurance Standard
UN	United Nations

UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNFF	United Nations Forum on Forests
UNGA	United Nations General Assembly
USDA	United States Department of Agriculture
VPA	Voluntary Partnership Agreements
WRI	World Resources Institute
WTO	World Trade Organisation
WWF	Worldwide Fund for Nature

## Chapter 1: Introduction

### 1.1 Background of the research

Despite international recognition of how significant the role of forests in mitigating climate change is<sup>1</sup>, forests continue to disappear at an alarming rate.<sup>2</sup> The causes of deforestation, both immediate and underlying, are diverse and often arises due to multiple factors. The immediate causes are agriculture expansion, wood harvesting, and infrastructure development such as road building.<sup>3</sup> The most widely recognised fundamental causes are poverty, financial development, and other economic components; government strategies, innovative advances, statistic change and social variables.<sup>4</sup> Agriculture is one of the proximate drivers for around 80% of deforestation globally.<sup>5</sup> According to the new Food and Agriculture Organisation (FAO) report of 2016, In Latin America, commercial agriculture is the foremost driver of deforestation, causing around 70% of the total deforested area.<sup>6</sup> The commercial agriculture also accounts for 1/3 of deforestation in Africa and subtropical Asia.<sup>7</sup>

The degradation of forests threatens the survival of many species and it reduces the capacity of forests to provide vital services.<sup>8</sup> The increasing overseas demand for the commodities such as soy, beef/leather, palm oil, tropical timber, pulp and paper, and plantation-grown timber has played an essential role in the growing importance of

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<sup>1</sup>Sam Adelman, 'Tropical Forests and Climate Change: A Critique of Green Governmentality' (2015) 11 *International Journal of Legal Context* 195; Giacomo Grassi and others, 'The Key Role of Forests in Meeting Climate Targets Requires Science for Credible Mitigation' (2017) 7 *Nature Climate Change* 220

<sup>2</sup>Sam Lawson and others, 'Consumer Goods and Deforestation: An Analysis of The Extent and Nature of Illegality in Forest Conversion for Agriculture and Timber Plantations' (Forest Trends Report Series, Forest Trade and Finance 2014)

<sup>3</sup>Richard Houghton, 'Deforestation' (eds) *Biological and Environmental Hazards, Risks and Disasters* (Academic Press 2016)

<sup>4</sup>David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press 2015)

<sup>5</sup>Gabrielle Kissinger, Martin Herold and Veronique De Sy, 'Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers' (Lexeme Consulting 2012) <[https://www.forestcarbonpartnership.org/sites/fcp/files/DriversOfDeforestation.pdf\\_N\\_S.pdf](https://www.forestcarbonpartnership.org/sites/fcp/files/DriversOfDeforestation.pdf_N_S.pdf)>

<sup>6</sup>Food and Agriculture Organisation (FAO), 'State of the World's Forests: Forests and Agriculture: Land-use Challenges and Opportunities (FAO 2016) <<http://www.fao.org/3/a-i5588e.pdf>>

<sup>7</sup>John Francis Kessy and others, 'Analysis of Drivers and Agents of Deforestation and Forest Degradation in Masito Forests, Kigoma, Tanzania' (2016) 6 *International Journal of Asian Social Science*

<sup>8</sup>International Union for Conservation of Nature, *Issues Brief*, November 2017 <[https://www.iucn.org/sites/dev/files/deforestation-forest\\_degradation\\_issues\\_brief\\_final.pdf](https://www.iucn.org/sites/dev/files/deforestation-forest_degradation_issues_brief_final.pdf)>

commercial agriculture and closely linked to the degradation of tropical forests.<sup>9</sup> Developing tropical countries face the challenge of meeting their development objectives by preserving natural capital without clearing forests. For example, The palm oil industry has grown substantially across the globe and has made tangible contributions to poverty alleviation in Indonesia, Malaysia and Liberia. However, palm oil production is also associated with a range of environmental issues, including widespread deforestation.<sup>10</sup> In Indonesia, Laos, Malaysia and Papua New Guinea forests are cleared for mining and infrastructure development and to expand the source of timber.<sup>11</sup> Hence, the focus of international forests agreements for over the last two decades was on protecting tropical forests.<sup>12</sup>

The forest issues have become more complex and need innovative solutions or strategies.<sup>13</sup> Even where forest protection policies and laws exist, many countries cannot enforce them due to the complexity of the issue, leading to deforestation on a vast scale.<sup>14</sup> Failure of international dialogues since the Rio Summit in 1992<sup>15</sup> is an indication that an inclusive coordinated approach with stringent laws and policies was needed to protect global forest cover. A combination of demand and supply policies, public and private initiatives, and cooperation between the developed and developing

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<sup>9</sup>Dieter Cuypers and others, The Impact of EU Consumption on Deforestation: Comprehensive Analysis of the Impact of EU Consumption on Deforestation (European Union 2013) <<http://ec.europa.eu/environment/forests/pdf/1.%20Report%20analysis%20of%20impact.pdf>>

<sup>10</sup>Sophie Bertazzo, 'In Palm Oil, Liberia Sees Economic Boom But Forests May Lose' (Conservation International 2016) <[https://www.conservation.org/blog/in-palm-oil-liberia-sees-economic-boom-but-forests-may-lose/?\\_ga=2.33724515.339188500.1573812794-1589950684.1573812794](https://www.conservation.org/blog/in-palm-oil-liberia-sees-economic-boom-but-forests-may-lose/?_ga=2.33724515.339188500.1573812794-1589950684.1573812794)>

<sup>11</sup>Alison Hoare, 'Tackling Illegal Logging and the Related Trade: What Progress and Where Next?' (Chatham House 2015) <[https://indicators.chathamhouse.org/sites/files/reports/Tackling%20Illegal%20Logging%20and%20Related%20Trade\\_0.pdf](https://indicators.chathamhouse.org/sites/files/reports/Tackling%20Illegal%20Logging%20and%20Related%20Trade_0.pdf)>

<sup>12</sup>Hunter (n 4)

<sup>13</sup>Max Krott and Nicholas D Hasanagas, 'Measuring Bridges Between Sectors: Causative Evaluation of Cross-sectorality' (2006) 8(5) Forest Policy and Economics

<sup>14</sup>Luca Tacconi, Rafael J Rodrigues and Ahmad Maryudi, 'Law Enforcement and Deforestation: Lessons for Indonesia From Brazil' (2019) 108 Forest Policy and Economics; Food and Agriculture Organisation, 'Best Practices for Improving Law Compliance in The Forestry Sector' (2005) <<http://ftp://ftp.fao.org/docrep/fao/008/a0146e/a0146e00.pdf>>

<sup>15</sup>Jeremy Rayner, Alexander Buck and Pia Katila, 'Embracing complexity: Meeting the Challenges of International Forest Governance' A Global Assessment Report Prepared by the Global Forest Expert Panel on the International Forest Regime (IUFRO World Series 2010)

countries set the stage for the development of a transnational forest governance regime with many innovative features.<sup>16</sup>

The European Union (EU) has built an innovative structure for transnational forest governance by bringing forward a combination of policy measures to encourage sustainable forestry and to prevent trade in illegal wood and timber products.<sup>17</sup> The vision laid out initially in the 2003 Forest Law Enforcement Governance and Trade (FLEGT) Action Plan.<sup>18</sup> The FLEGT action plan overall comprises:

- 1) negotiating bilateral Voluntary Partnership Agreements (VPAs)<sup>19</sup> with the producer countries to achieve broad stakeholder participation in building institutions to promote sustainable forestry and assure the export of 'legal' timber
- 2) Promoting initiatives by the private sector and civil society to promote sustainable forestry and timber legality in developing countries
- 3) introduce legislation (EU Timber Regulation)<sup>20</sup> that criminalises place illegal timber on the EU market and allowing trading firms to demonstrate 'due diligence' that they have not done so.

Through its interactions with private certification schemes and public legal timber requirements in third countries such as the United States (US) and Australia, this EU-based experimentalist architecture is likewise contributing to the stepwise construction of a broader transnational forest governance regime. The experimentalist governance<sup>21</sup> which is based on extensive participation by civil society stakeholders

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<sup>16</sup>Christine Overdeest and Jonathan Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector' (2014) 8 Regulation and Governance 22

<sup>17</sup>Christine Overdeest and Jonathan Zeitlin, 'Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana' (2018) 12 Regulation and Governance 64

<sup>18</sup>Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament of 21 May 2003, Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan (EC 2003) <<http://www.fao.org/forestry/33093-04ee4b3cc7232ef705169b9cc20c30850.pdf>>

<sup>19</sup>Voluntary Partnership Agreements (VPAs) are a central element of the EU's strategy in the fight against illegal logging. A VPA is a bilateral trade agreement between the EU and a timber-exporting country outside the EU.

<sup>20</sup>Regulation (EU) No 995/2010 on laying down the obligations of operators who place timber and timber products on the market (2010) OJ 295/23

<sup>21</sup>Overdeest (n 16) defined experimentalist governance as a recursive process of provisional goal setting and revision based on learning from comparison of alternative approaches to their advancement in different contexts

and revision of framework goals through continuous monitoring and regular review of implementation by countries and firms, underpinned by a penalty default mechanism.

## 1.2 Problem Statement: Illegal logging and its global range

Over the past years, there is an increasing interest among consumers, retailers, investors, communities and governments to be aware that their purchases and consumption of wood-based products have been making positive social and environmental contributions to the local environment and people.<sup>22</sup> The products supply chain that brings products to final consumers start at producer country, processed in a different country and exported to many diverse consumer countries.<sup>23</sup> It is through trade and the demand for wood products in timber consuming developed countries that the issue of forest loss becomes a question of inter-regional and international policy, and the problem of illegal logging is at the centre of this trend.<sup>24</sup>

Illegal logging can be broadly defined as logging in violation of relevant national and international laws.<sup>25</sup> The East Asia Ministerial Conference on The Forest Law Enforcement and Governance (FLEG), held in Bali on 11-13 September 2001<sup>26</sup> states that forest ecosystems have been threatened “by negative effects on the rule of law by violations of forest law and forest crime, in particular, illegal logging and related trade”: This clearly defines illegal logging and related trade as subsets forest law violations. In another way, illegal logging is the harvest, transport, sale or purchase of timber in infringement to the laws of timber exporting and importing countries. Illegality is anything that takes place in violation of the legal framework of a country (Box 1).<sup>27</sup> It

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<sup>22</sup>Ruth Nogueron and Loretta Cheung, 'Sourcing Legally Produced Wood: A Guide For Businesses' (World Resource Institute 2014) <[https://www.wri.org/sites/default/files/wri\\_report\\_4c\\_report\\_legalityguide\\_final320.pdf](https://www.wri.org/sites/default/files/wri_report_4c_report_legalityguide_final320.pdf)>;

United Nations Environment Programme (UNEP), 'Sustainable Consumption and Production: A Handbook for Policy makers' (UNEP 2015) <<https://sustainabledevelopment.un.org/content/documents/1951Sustainable%20Consumption.pdf>>

<sup>23</sup>Peter Hazell and Stanley Wood, 'Drivers of Change in Global Agriculture' (2007) 363 Philosophical Transactions of the Royal Society Biological Sciences <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2610166/pdf/rstb20072166.pdf>>

<sup>24</sup>Alexandru Giurca and others, 'Ambiguity in Timber Trade Regarding Efforts to Combat Illegal Logging: Potential Impacts on Trade Between South-East Asia and Europe' (2013) 4 Forests

<sup>25</sup>Luca Tacconi, *Illegal Logging: Law Enforcement, Livelihoods and The Timber Trade* (Earthscan 2007)

<sup>26</sup>The Forest Law Enforcement and Governance (FLEG) East Asia Ministerial Conference, Ministerial Declaration See [http://siteresources.worldbank.org/INTFORESTS/Resources/Bali\\_ministerial\\_declaration.pdf](http://siteresources.worldbank.org/INTFORESTS/Resources/Bali_ministerial_declaration.pdf)

<sup>27</sup>Nogueron (n 22)

includes timber taken without a license, timber taken from protected areas, timber stolen from the private property, timber taken without paying the correct taxes.<sup>28</sup> Illegal logging and its associated trade is a significant problem for environmental, economic and social reasons, raising severe concerns about overexploitation and poor forest management.<sup>29</sup> Chapter 2 discusses various existing illegal logging definitions and the impact of illegal logging in detail.

**Table 1: Examples of Illegal Logging**

<b>Illegal origin (ownership, title, or source)</b>	<b>Lack of compliance throughout the supply chain (harvesting, manufacturing, and trade)</b>
Logging trees in protected areas without proper permission (e.g. in national parks).	Violations of workers' rights (e.g. illegal labour, underpaying workers, etc.), labour laws and international standards, and violation of traditional rights of local populations and indigenous groups
Logging protected species	Violation of international human rights treaties
Logging in prohibited areas such as steep slopes, riverbanks and water catchments.	Wood transported or processed in defiance of local and national laws.
Logging in non-compliance with specifications of the concession permit or harvesting license (e.g. harvesting volumes below or above the specifications, or before or after the period authorised for logging).	Violations of international trade agreements (e.g., CITES species)
Harvesting wood of size or species not covered by the concession permit.	Failure to pay legally prescribed taxes, fees and royalties
Trespass or theft, logging in forests without the legal right to do so	Logging and trading logs and forest products despite logging and trade bans
Violations, bribes and deception in the bidding process to acquire rights to a forest concession.	Illegal transfer pricing (e.g. when it is to avoid duties and taxes), timber theft, and smuggling. Money laundering
Illegal documentation (including trade documents).	Failure to fully report volumes harvested or reporting different species for tax evasion purposes.

Source: Global Forest and Trade Network (GFTN)<sup>30</sup>

The different understandings of illegal logging give rise to many partly conflicting estimates about its consequences.<sup>31</sup> A study described illegal logging as a hidden crime in an “abysmally regulated” forest sector<sup>32</sup> and argued that illegal logging and

<sup>28</sup>ibid

<sup>29</sup>Giurca (n 24)

<sup>30</sup>Global Forest and Trade Network (GFTN), 'Building a Better Business Through Responsible Purchasing: Developing and Implementing a Wood and Paper Purchasing Policy' (WWF, 2005)

<sup>31</sup>Lieselot Bisschop, 'Out of The Woods: The Illegal Trade in Tropical Timber and A European Trade Hub' (2012) 13 Global Crime

<sup>32</sup>Sina Leipold and others, 'Protecting First World Markets and Third World Nature: The Politics of Illegal Logging in Australia, The European Union and The United States' (2016) 39 Global Environmental Change



associated timber trade are supported by both large enterprises and the corrupt governments in the global South as well as some opportunist importers in the global North.<sup>33</sup> The pattern of timber trade is generally, although not exclusively, characterised by a flow of wood and wood products from less-developed and transitional producer countries, to industrialised consumer countries.<sup>34</sup> Initially, illegal logging was considered one of the severe issues in developing tropical countries, but the dynamics of timber market and growing demand for tropical timber in developed nations made this issue more complicated.<sup>35</sup>

Internationally, the issue of Illegal logging and deforestation was discussed many times over the past 25 years towards developing a legally binding agreement, but all the efforts resulted in adopting the soft law on forest issues due to the divide within developing and developed countries.<sup>36</sup> The scale of the illegal logging has prompted a range of political responses over the last five years. Meetings of the G8 group of major economies,<sup>37</sup> the UN Convention on Biological Diversity (CBD)<sup>38</sup> and the International Tropical Timber Organisation (ITTO) have all seen announcements by nations of their intention to work to halt illegal logging and associated trade. At the 2002 World Summit on Sustainable Development, the United Nations pledged to “take immediate action on the violation of domestic forest law enforcement and illegal international trade in forest products”.<sup>39</sup> Several bilateral agreements have since been signed.<sup>40</sup> The mechanism forest certification, the multilateral efforts of the International

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<sup>33</sup>Interpol and The World Bank, 'Chainsaw Project: An INTERPOL perspective on law enforcement in illegal logging' Lyon and Washington DC: (Interpol and World Bank 2009) <<https://www.illegallogging.info/sites/files/chlogging/uploads/WorldBankChainsawIllegalLoggingReport.pdf>>

<sup>34</sup>Laura Wellesley, 'Trade in Illegal Timber: The Response in China, A Chatham House Assessment' (Chatham House 2014) <[https://indicators.chathamhouse.org/sites/files/reports/CHHJ2361\\_China\\_Logging\\_Research\\_Paper\\_FINAL.pdf](https://indicators.chathamhouse.org/sites/files/reports/CHHJ2361_China_Logging_Research_Paper_FINAL.pdf)>

<sup>35</sup>Xiaobiao Zhang, 'Eliminating Illegal Timber Consumption or Production: Which Is the More Economical Means to Reduce Illegal Logging?' (2016) 7(9) Forests < <https://www.mdpi.com/1999-4907/7/9/191/htm>>

<sup>36</sup>United Nations (UN), 'Review of Implementation of Agenda 21 and the Rio Principles, Study Prepared by the Stakeholder Forum for a Sustainable Future (UN 2012) <[https://sustainabledevelopment.un.org/content/documents/641Synthesis\\_report\\_Web.pdf](https://sustainabledevelopment.un.org/content/documents/641Synthesis_report_Web.pdf)>

<sup>37</sup>Memorandum from the G8 Summit, Birmingham 1998

<sup>38</sup>United Nations Environment Programme (UNEP), 'Report of the 6th Meeting of the Conference of the Parties to the Convention on Biological Diversity' (UNEP 2002) <<https://www.cbd.int/doc/meetings/cop/cop-06/official/cop-06-20-en.pdf>>

<sup>39</sup>Plan of Implementation of the World Summit on Sustainable Development (Revised) 23rd Sept 2002 <<https://sustainabledevelopment.un.org/milestones/wssd>>

<sup>40</sup>Memoranda of Understanding (MoUs) were signed on the subject between the UK and Indonesia in April 2002, between Indonesia and China in December 2002, and between Indonesia and Japan in June 2003

Tropical Timber Organisation (ITTO) and responsible procurement policies of the government such as the UK timber procurement policy are some of the mechanisms applied to stop illegal timber trade.

Unfortunately, these global and domestic efforts did not produce meaningful actions, and illegal timber trade continues. There is an apparent lack of international regulation controlling the trade in timber, although a few timber species do fall under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>41</sup> A significant reason for the failure to act was that consuming countries did not have laws banning the import of illegally sourced wood. Consequently, as soon as vessels carrying stolen timber and wood products reach international waters, the cargo is effectively legalised and importing states cannot deny entry.

Timber consuming developed countries are under constant pressure to regulate the flow of timber coming from countries that are at high risk of illegal logging.<sup>42</sup> Different non-governmental organisations (NGOs), conservation groups, international organisations, industries and governments have focused on promoting policies and incentives to address this issue.<sup>43</sup> There have been several briefing notes and guidance published by NGOs frequently asking state Governments to take decisive action against illegal logging.<sup>44</sup> The investigations carried out by some international NGOs on illegal logging have proved to be groundbreaking both for the governments

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<sup>41</sup>CITES is an international agreement between governments. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival

<sup>42</sup>Giurca (n 24)

<sup>43</sup>Ruhong Li and others, 'Long-Term Effects of Eliminating Illegal Logging on the World Forest Industries, Trade, and Inventory' (2008) 10 Forest Policy and Economics

<sup>44</sup>NGO Statement, Tackling Deforestation and Forest Degradation: A Case for EU Action in 2017 See <https://www.forestpeoples.org/sites/default/files/documents/deforestation-4.pdf>; Briefing Notes, Healthy Forests = Equitable Livelihoods, Inclusive Development and A Resilient Climate, September 2019 See <https://www.fern.org/news-resources/healthy-forests-equitable-livelihoods-inclusive-development-and-a-resilient-climate-2009/>

and for the public.<sup>45</sup> The supply change initiative<sup>46</sup> and CDP's<sup>47</sup> disclosure programme are some of the examples which shows major companies have stepped forward with voluntary pledges to eliminate deforestation in their commodity supply chains.<sup>48</sup>

However, these international discussions certainly helped in raising awareness about the problems of illegal logging. There have been some noted improvements observed in government responses to illegal logging and related trade in both producer (and processing) and consumer countries. National policies are deeply interconnected with and are supported by international political processes.<sup>49</sup> The consumer countries have taken several unilateral measures designed to exclude the illegal timber products from their respective markets to strengthen the fight against illegal logging in the absence of legally binding international agreement. In 2008, the USA was first to address the issue of illegal logging and made amendments in the Lacey Act<sup>50</sup> of 1900. Australia also introduced the illegal logging prohibition act<sup>51</sup> in 2012 to curb down the illegal logging and associated trade.<sup>52</sup> The EUTR entered into application on 3<sup>rd</sup> March 2013, making it illegal to place illegally logged timber and timber products on the EU market, which is legally binding on all 28 EU member states.

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<sup>45</sup>Environmental Investigation Agency, 'State of Corruption the Top-level Conspiracy Behind the Global Trade in Myanmar's Stolen Teak' (EIA 2019) < <https://eia-international.org/wp-content/uploads/EIA-report-State-of-Corruption.pdf>>; Denis Smirnov, 'Assessment of Scope of Illegal Logging in Laos and Associated Trans-Boundary Timber Trade' (WWF 2015); Greenpeace Brazil, 'Imaginary Trees, Real Destruction: How Licensing Fraud and Illegal Logging of Ipe Trees are Causing Irreversible Damage to The Amazon Rainforest' (Greenpeace 2017) <<https://storage.googleapis.com/planet4-international-stateless/2018/03/b91d03c3-greenpeace-report-imaginary-trees-real-destruction-march-2018.pdf>>

<sup>46</sup>Forest Trends introduces the Supply Change Initiative as a transformational resource for businesses, investors, governments, and the civil society organisations that support and hold them accountable; providing information on the extent and value of commitment-driven commodity production and demand. See <http://supply-change.org/#remove>

<sup>47</sup>CDP is a not-for-profit charity that runs the global disclosure system for investors, companies, cities, states and regions to manage their environmental impacts. See <https://www.cdp.net/en>

<sup>48</sup>Genevieve Bennett, 'Companies Acting On Deforestation Have A Legality Issue' Ecosystem Marketplace 2018) <<https://www.ecosystemmarketplace.com/articles/companies-acting-on-deforestation-have-a-legality-issue/>>

<sup>49</sup>Hoare (n 11)

<sup>50</sup>Amendments to the Lacey Act from H.R.2419, Sec. 8204 <[https://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/background--redlinedLaceyamndmnt--forests--may08.pdf](https://www.aphis.usda.gov/plant_health/lacey_act/downloads/background--redlinedLaceyamndmnt--forests--may08.pdf)>

<sup>51</sup>Australian Illegal prohibition Act No 166 of 2012

<sup>52</sup>Duncan Brack, 'Controlling Illegal Logging: Consumer-Country Measures' (Chatham House 2010) <<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/bp0110brack.pdf>>

### 1.3 Research topic and theories of transnational timber legality verification and experimentalist governance

This research is the attempt to analyse the effectiveness of the European Union Timber Regulation (EUTR)<sup>53</sup> in eliminating the illegal timber and timber products entering from timber producer developing countries to timber consuming developed countries. The EUTR prohibits the sale of timber logged illegally as per the law of the country of origin.<sup>54</sup> Furthermore, the legislation requires operators placing timber and timber products on the EU market to exercise due diligence, ensuring that the timber they sell in the EU is not harvested illegally.<sup>55</sup> The thesis aims to identify technical and operational inadequacies of EUTR instruments in the UK.

The fundamental research questions this dissertation explores is “Does EUTR has the potential to prohibit the import of illegal timber and timber products entering the UK market?” The empirical study with stakeholders, including the qualitative analysis using NVIVO 11 software is a methodological approach selected to achieve the objectives of the research. This study helps in assessing the impact of the regulation by collecting information from various stakeholders on their experiences with different aspects of EUTR such as enforcement efforts, implementation challenges for timber industry, due diligence system of EUTR, enforcement agency approach, timber products covered by the regulation, monitoring organisation set up under EUTR, role of forest certification bodies. This research also attempts to draw recommendations to overcome the identified flaws. This research contributes to the current debate of timber legality verification by exploring the effectiveness of EUTR in the UK. In the UK, the Timber and Timber Products (Placing on the Market) Regulations 2013<sup>56</sup> enforces the European Commission Regulation 995/2010.<sup>57</sup>

As noted in the section above, since 1992, international negotiations have failed to produce a binding global forest convention due to divergent interests and values and

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<sup>53</sup>Regulation (EU) No 995/2010

<sup>54</sup>Regulation (EU) No 995/2010 Article 1

<sup>55</sup>Regulation (EU) No 995/2010 Article 4

<sup>56</sup>Timber and Timber Products (Placing on the Market) Regulations 2013

<sup>57</sup>Council Regulation (EC) 995/2010

have created a weak international public regime.<sup>58</sup> In response to this, the EU moved unilaterally to a different approach of transnational forest governance in the form of timber legality verification initiative. The timber legality verification, one of the most recent global instruments for forest governance, focuses on keeping track of the products along the supply chains, providing more significant reflection on the technical challenges.<sup>59</sup> The transnational timber legality initiative comprises a set of interrelated policy instruments, both public and private, aimed at promoting sustainable forestry and controlling trade in illegally logged wood products. The potentially productive interactions between these instruments in developing forestry regime create prospects for learning through positive and negative demonstration effects, stimulating cross-fertilisation, and enhancing accountability.<sup>60</sup>

The emergence of timber legality verification regulations has spurred various debates among scholars and practitioners. The contributions from scholars to understand the timber legality regime have been noteworthy and has encouraged diverse views in the context of transnational governance initiative. The contributions by Overdevest and Zeitlin<sup>61</sup> and Cashore and Stone<sup>62</sup> is ground-breaking in understanding the timber legality regime and work by Bartley<sup>63</sup> and Sotirov<sup>64</sup> provides additional guidance for theorising private standards and public authority. These theories have been discussed in chapter 3.

This thesis takes an approach that an effective timber legality regime may certainly be construed from distinct components, but the complexity may create a potential barrier to effectiveness. The scholars have predominantly analysed the interactions of timber legality regime only with private forest certification schemes that gave rise to several

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<sup>58</sup>Richard G Tarasofsky, 'Assessing the International Forest Regime', IUCN Environmental Policy and Law Paper No. 37

<sup>59</sup>Ragnar Jonsson and others, 'Assessment of the EU Timber Regulation and FLEGT Action Plan' (European Forest Institute 2015) <[https://www.efi.int/sites/default/files/files/publication-bank/2018/efi\\_fstp\\_1\\_2015.pdf](https://www.efi.int/sites/default/files/files/publication-bank/2018/efi_fstp_1_2015.pdf)>

<sup>60</sup>Overdevest (n 16)

<sup>61</sup>ibid

<sup>62</sup>Benjamin Cashore and Michael W Stone, 'Can Legality Verification Rescue Global Forest Governance? Analyzing the Potential of Public and Private Policy Intersection to Ameliorate Forest Challenges in Southeast Asia.' (2012) 18 *Forest Policy and Economics* 13

<sup>63</sup>Tim Bartley, 'Transnational Governance and the Re-centered State: Sustainability or Legality?' (2014) 8 *Regulation and Governance* 93

<sup>64</sup>Metodi Sotirov, Maïke Stelter and George Winkel, 'The Emergence of the European Union Timber Regulation: How Baptists, Bootleggers, Devil Shifting and Moral Legitimacy Drive Change in The Environmental Governance of Global Timber Trade' (2017) 81 *Forest Policy Economics* 69

possible theories between public and private standards within the forest governance. Many scholars have addressed the subject of transnational timber legality verification but the evidence regarding important questions is still limited. The studies have more hypotheses than empirically established causal links. It is to be noted that the quoted scholars conducted these studies when the timber legality verification initiatives started to transform in the form of legislation and therefore provide the foundation for this research to understand the implementation challenges and compliance issues of initiatives such as EUTR at a state level. This thesis helps in developing the forward-looking theory by adding an implementation component at domestic level and theorises that approach of the state actors (private companies, enforcement authority, NGOs and other firms) play a significant role to eliminate the regime complexity that can be a barrier to achieve the objectives of the legislation, especially when adopting risk-based approach to enforcement.

### 1.3.1 The transnational timber legality initiative and the EUTR

The EU timber regulation prohibits the import of timber to the European market that infringes upon existing laws of the harvest country and provides that importers conduct due diligence to reduce the risk that their inventories contain illegal timber. Operators in Europe will be required to exercise “due diligence”, which means that they must minimise the risk of illegal timber in the supply chain and obtain information on the origin of their imports.<sup>65</sup> The main objective of FLEGT is to ensure that only timber that comes from legal sources enters the EU market, whereas EUTR further strengthens these actions by requiring importers to demonstrate due diligence and prohibits timber imports if not covered by FLEGT or CITES permits.<sup>66</sup>

The new emphasis on the legality of internationally traded timber as a demand-side measure recognises both the potential of consumer markets to influence industrial behaviour and the inability of earlier supply-side attempts in order to reform forest

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<sup>65</sup>EU-FLEGT Facility, 'Guidance On The EU Timber Regulation' (European Forest Institute undated) <[http://eeas.europa.eu/archives/delegations/cameroon/documents/eu\\_cameroon/eutr\\_vpa\\_en.pdf](http://eeas.europa.eu/archives/delegations/cameroon/documents/eu_cameroon/eutr_vpa_en.pdf)>

<sup>66</sup>Christopher Carden, Robbert Wijers and Paul Zambon, 'FLEGT, VPA, EUTR And Their Possible Impact On The Bolivian Timber Sector' (CBI: Ministry of Foreign Affairs of The Netherlands 2012) <<http://www.illegal-logging.info/sites/default/files/uploads/20120615finalreportcibolengwithphotos.pdf>>

governance.<sup>67</sup> Legality verification has been endorsed in the United States and the EU for two main reasons. First, It is increasingly recognised that a legally binding international agreement, even if effective, will have little ground effect in those countries with insufficient capability, training and compliance. Second, efforts to certify the best forest practices in the forest prompted to simply separating markets rather than improving on the ground results. Consequently, legality verification originated by using similar ideas as a certification but stressing adherence to national laws and regulations. As rightly stated by Cashore and Stone<sup>68</sup>, the timber legality regime is an outcome of interaction, competition, and learning in the world of forestry standards, and it has the potential to transform future forms of transnational governance.

The rise of binding timber legality rules, occurring amid private efforts to certify sustainability, leaves with an essential set of questions: How should we understand the co-existence of legality verification and sustainability certification with state legislation? Does complying with the legislation (meeting legality verification standards) decrease the acceptance of forest certification amongst the companies? Another variable which has been associated with shaping the impact of the legality regulation is the strength of civil society pressure in a country.<sup>69</sup> The stronger the voice of civil society, the more effective it will be in compelling domestic governments to act. The question to be answered here is what influence do NGOs have on the government and on private companies to comply with UK legislation? As pointed out earlier, the timber legality verification can be complex to understand and can undermine effectiveness. It raises a very crucial question of how private companies comply with state regulation and what supports do they have to achieve the objectives of the EUTR? It can be a daunting task for the national enforcement authority to develop effective enforcement strategies for such regulation and visit the operators for checks which raise another critical question: Does the governmental enforcement authority

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<sup>67</sup>David Brown and others, 'Legal Timber: Verification and Governance in the Forest Sector' (Centre for International forestry Research 2008) <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3472.pdf>>

<sup>68</sup>Cashore (n 62)

<sup>69</sup>Clare Barnes, Frank Van Laerhoven and Peter Driessen, 'Advocating for Change? How a Civil Society-led Coalition Influences the Implementation of the Forest Rights Act in India' (2016) 84 World Development 162 <[https://www.research.ed.ac.uk/portal/files/58462675/WD\\_3661.pdf](https://www.research.ed.ac.uk/portal/files/58462675/WD_3661.pdf)>; Nafees Ahmad, 'The Role of Civil Society Institutions in Environmental Governance in India: Post-Colonial Context and Human Rights Challenges in the Environmental Justice' (2018) International Journal of Legal Studies and Research 16

possess required competence and resources, both financial and human, for effective enforcement?

The EU's import volume of tropical timber products over the past few years has decreased because of the economic downturn in Europe. Nevertheless, the value of these imports has risen over the same period. A report<sup>70</sup> from the centre for the promotion of imports from developing countries claims that import volumes declined from 3.2 million m<sup>3</sup> in 2010 to 2.1 million m<sup>3</sup> in 2014. Nonetheless, the value of imports increased from € 4303 million in 2013 to € 4681 million in 2014. The FLEGT Independent Marketing Monitor (IMM) reports<sup>71</sup> indicates that in 2017, imports of tropical wood products into the EU dropped by 3% to US\$ 4.06 billion. The report also highlights that EU's share of global imports of wood products from tropical countries dropped from 12.4% in 2016 to 11.8% in 2017. There is not any conclusive evidence available that shows a FLEGT action plan or EUTR have affected the import of illegal timber or timber products in the EU. The import figures indicate that illegal timber and timber products are still being placed on the EU market even though the measures are in place to prohibit them. The figures clearly show that the rules in place are not sufficient enough to address the complexity attached to the illegal timber trade.

EUTR is considered as secondary legislation to strengthen the FLEGT action plan, and it took ten years for EUTR to come into force after the introduction of FLGT action plan in 2003. The EU's illegal import figures above indicate that even after adopting the ambitious FLEGT action plan in 2003, it was very challenging to control the flow of illegal timber through voluntary measures for EU. The EUTR is believed to have a significant impact on international trade in wood products.<sup>72</sup> This study evaluates if EUTR, as a timber consumer country measure, has the potential to halt the illegal timber import by assessing its likely effects in the UK.

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<sup>70</sup>CBI, Market Intelligence, 'Trade Statistics: Timber in Europe' (Ministry of Foreign Affairs 2016) <[https://www.cbi.eu/sites/default/files/market\\_information/researches/trade-statistics-timber-2016.pdf](https://www.cbi.eu/sites/default/files/market_information/researches/trade-statistics-timber-2016.pdf) >

<sup>71</sup>Sarah Strock and Rupert Oliver, 'FLEGT VPA Partners in the EU Timber Trade 2017' (International Tropical Timber Organisation / FLEGT Independent Market Monitor (IMM), 2018) <[http://www.flegtimm.eu/images/annual\\_reports/VPA-Partners-in-EU-Timber-Trade-2017-1.pdf](http://www.flegtimm.eu/images/annual_reports/VPA-Partners-in-EU-Timber-Trade-2017-1.pdf)>

<sup>72</sup>Jonsson (n 59)



The hypothesis to be tested here is that legality verification initiative in the form of EUTR does not achieve the intended objectives of prohibiting illegal logging and timber trade. The transnational timber legality verification initiative has added more complexity<sup>73</sup> to the existing regime complexes of illegal logging and timber trade. The analytical approach taken to test the hypothesis is experimentalist in nature. According to Overdevest and Zeitlin<sup>74</sup>, the experimentalist approach provides an analytical framework for evaluating transnational governance interactions and its effectiveness in regime complexes. The experimentalist approach helps in determining whether progress is made towards achieving the desired performance goals and whether failures and the inevitable unintended consequences of specific institutional designs are recursively recognised and redressed. This developing transnational system has been described by policy experiments that lead to performance evaluation, learning from success and failure and broader stakeholder participation which is also the analytical framework for the thesis.

#### 1.4 Why the UK is vital to assess the effectiveness of EUTR?

The UK is sparsely forested and the forest cover of the country is gradually increasing since 1990. The vast majority (over 80%) of these forests are plantations, and around 70% are privately owned.<sup>75</sup> The woodland covers the area of 3.16 million hectares in the UK at 31<sup>st</sup> March 2016 which is 13% of the total land area in the UK with 10% in England, 15% in Wales, 18% in Scotland and 8% in Northern Ireland.<sup>76</sup> Hence, UK is one of the major importers of wood-based products and relies heavily on other countries to meet the demand of wood-based products especially hardwood timber; its import accounted for 76% of solid timber supply in 2011.<sup>77</sup>

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<sup>73</sup>Sigrid Quack, 'Regime Complexity and Expertise in Transnational Governance: Strategizing in the Face of Regulatory Uncertainty', 3(4) (2013) *Oñati Socio-legal Series* 647

<sup>74</sup>Overdevest (n 16)

<sup>75</sup>FAO (n 6)

<sup>76</sup>Forestry Commission, 'Forestry Statistics and Forestry Facts and Figures' (Forestry Commission 2017) <<https://www.forestry.gov.uk/forestry/infd-7aqdgc>>

<sup>77</sup>Rupert Oliver, '2011 Statistics - UK Timber Trade Monitoring in Support of Effective, Efficient and Equitable Operation of the EU Timber Regulation (EUTR)' Department for International Development and Forest Industries Intelligence Limited, (European Timber Trade Federation undated)

Chatham House estimated that in 2008 UK imports of illegal wood and timber products totalled 1.5 million m<sup>3</sup> round wood equivalent. The per capita import of illegally sourced wood products of the UK was more than the US, France, China or Vietnam. The UK import of illegally sourced wood material increased in from 8% in 2000 to around 59% in 2010. This increase was primarily contributed to the wood arrived from the processing countries which are considered as the third party. The timber comes from processing countries are difficult to track due to the length of the supply chain which makes timber traceability very challenging.<sup>78</sup>

The UK timber import volume from within and outside the EU has been significant. The UK timber import volume from within the EU was 15 million m<sup>3</sup> Roundwood equivalent in 2013 and 7 million m<sup>3</sup> from outside the EU for the same year. The import from EU was in the form of sawn woods, especially from Sweden, Finland and Latvia, with smaller volumes of furniture, panels and plywood. The timber imports from outside the EU were mostly in the form of plywood, particularly from China, Russia and Malaysia, and by furniture, mainly from China.<sup>79</sup>

The import of timber and timber products from China has dominated the total timber import of the UK. In 2013, the timber import accounted for approximately half the RWE volume of total timber products imported into the UK from outside the EU, which was about 30% in 2007 and only 5% in 2000. Besides the UK, the other EU countries who imported timber from China in the large quantities were Germany (15%), France (14%), Netherlands (8%) and Belgium (7%). The UK is the largest importer from high-risk countries in the region, accounting for 25% by value. WWF report shows that China is by far the most significant import partner country, providing 42% of all relevant UK furniture imports (€1.6 billion; 450,000 tonnes).<sup>80</sup>

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<sup>78</sup>Sam Lawson and Larry MacFaul, 'Illegal Logging and Related Trade Indicators of the Global Response' (Chatham House, The Royal Institute of International Affairs 2010) <<http://www.illegallogging.info/sites/default/files/uploads/CHillegalloggingpaperwebready1.pdf>>

<sup>79</sup>Brack (n 52)

<sup>80</sup>Charles Drewe and Tim Barker, 'Are You Sitting Comfortably? Sustainable Timber Sourcing and the UK Furniture Industry' New Leaf Sustainability Practice Limited (WWF 2016) <[https://www.wwf.org.uk/sites/default/files/201702/WWF\\_Are%20You%20Sitting%20Comfortably\\_Web.pdf](https://www.wwf.org.uk/sites/default/files/201702/WWF_Are%20You%20Sitting%20Comfortably_Web.pdf)>

The Chatham House report<sup>81</sup> indicated that share of illegal import in the processing and consumer countries, including the UK declined from 2000 to 2013. However, estimations for the scale of illegal logging are still highly uncertain<sup>82</sup>, and illegal trade is not registered in the trade databases.<sup>83</sup> It is challenging to estimate illegal timber trade partly because of the estimation difficulty linked with illegality nature and partly because of the differences in the scope of estimation (e.g. products and time covered), the definition of illegality, data sources and estimation methods used.<sup>84</sup> Thus, the observed trend of decreasing tropical timber imports, to the EU in general and the UK in particular, can be associated to some extent with the decline of illegally sourced wood being placed on the market. One plausible cause of this decrease could be that the present regulation has created uncertainty in the timber trade market and due to this national and international timber trade companies are merely reluctant to trade. However, to what extent initiatives such as FLEGT or EUTR play a part in this decline of illegal exports is still unclear.<sup>85</sup>

The UK has been actively engaged in addressing the trade in illegal timber. It became the first country to implement a timber public procurement policy and played an active role in the development of the EU's FLEGT Action Plan.<sup>86</sup> The UK has the range of stakeholders that can affect by EUTR including a massive number of timber importers, timber merchants, traders, timber trade associations, domestic woodland owners, civil society organisations, campaigning organisations, government bodies, independent researchers. The EUTR can also affect the international timber trade and volume of imports entering the UK. Being one of the major importers of the wood-based products both from within the EU and outside, UK provides a comprehensive setting to analyse the efficiency of EUTR and its components. The UK is and will continue to be a key consumer country in terms of timber imports and this research helps in evaluating how

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<sup>81</sup>Hoare (n 11)

<sup>82</sup>Cecilia Luttrell and others, 'Lessons For REDD+ From Measures to Control Illegal Logging in Indonesia' (United Nations Office on Drugs and Crime and Centre for International Forestry Research 2011)

<sup>83</sup>Patrick Meyfroidt, Thomas Rudel and Eric Lambin, 'Forest Transitions, Trade, and the Global Displacement of Land Use' (2010) 107 Proceedings of the National Academy of Sciences <<http://www.pnas.org/content/107/49/20917.full.pdf>>

<sup>84</sup>Jianbang Gan and others, 'Quantifying Illegal Logging and Related Timber Trade' (eds) Illegal Logging and Related Timber Trade – Dimensions, Drivers, Impacts and Responses: A Global Scientific Rapid Response Assessment (International Union of Forest Research Organisations 2016)

<sup>85</sup>Giurca (n 24)

<sup>86</sup>Brack (n 52)

EUTR is understood and implemented by different stakeholders and their experience and responses to the EUTR.<sup>87</sup>

Although stakeholders appeared to have reached consensus on the issue of illegal logging and related trade, there remain concerns as to whether the EUTR is the appropriate instrument to deal with this issue. Some stakeholders view the EUTR as beneficial for the businesses; others see it as an impediment and raise questions such as law enforcement, lack of guidance and bureaucracy. Bureaucracy is a structural, or inevitable problem, as any legislation that seeks to curb the illegal timber trade will incur some cost and restrict free trade.<sup>88</sup> However, concerns about whether the EUTR is the best mechanism to combat illegal logging and its associated trade is at the core of the discussion, which leads to different frames among actors.<sup>89</sup> EUTR's penalty system has also been criticised<sup>90</sup> since each member states decide the level of fines that will be applied and that there is no consensus on the compatibility of fines within the EU. The uniformity in the penalty systems at a national level is necessary to increase the potential of the EUTR, as pointed out by Levashova.<sup>91</sup>

A study<sup>92</sup> pointed out that the EUTR as a mechanism has received criticism from non-government organisations to private and small-medium enterprises. The same study also pointed out that EUTR is all about timber legality and it does not take into consideration timber sustainability. There is a reasonable argument that this approach represents an impermissible trade restrictions, which are likely to put the EU's illegal logging efforts on risk.<sup>93</sup> This research will help in identifying the regulation's ability to reduce the incidence of timber illegality in the UK and to withstand challenges under

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<sup>87</sup>Rupert Oliver, 'Imports of Composite Wood Products Into the EU and Implications For the EU Timber Regulation – Furniture Sector Focus' (Chatham House 2013) <[http://www.illegallogging.info/sites/default/files/Oliver\\_EU\\_Imports\\_of\\_Composite\\_Wood\\_Products.pdf](http://www.illegallogging.info/sites/default/files/Oliver_EU_Imports_of_Composite_Wood_Products.pdf)>

<sup>88</sup>Dylan Geraets and Bregt Natens, 'The WTO Consistency of the European Union Timber Regulation' (Leuven Centre for Global Governance Studies 2013)

<sup>89</sup>Alexandru Giurca and Ragnar Jonsson, 'The Opinions of Some Stakeholders on the European Union Timber Regulation (EUTR): An Analysis of Secondary Sources' 8 (2015) *IForest: Biogeosciences and Forestry* 681

<sup>90</sup>ibid

<sup>91</sup>Yulia Levashova, 'How Effective Is the New EU Timber Regulation in the Fight Against Illegal Logging?' (2011) 20 *Review of European Community & International Environmental Law* 290

<sup>92</sup>Giurca (n 89)

<sup>93</sup>Akiva Fishman and Krystof Obidzinski, 'European Union Timber Regulation: Is It Legal?' (2014) 23 *Review of European, Comparative & International Environmental Law* <[http://www.cifor.org/publications/pdf\\_files/articles/AObidzinski1402.pdf](http://www.cifor.org/publications/pdf_files/articles/AObidzinski1402.pdf)>

international trade law. As mentioned earlier, this research aims to assess the effectiveness of the EUTR as a piece of legislation and to analyse its potential in prohibiting illegal timber entering the UK. This thesis identifies the technical and operational difficulties of implementing this regulation in the UK. This research critically analyses the approach of UK enforcement agency, the EU recognised monitoring organisations under EUTR, the due diligence system, the product scope of the EUTR, role of forest certification, penalty system, the implementation by timber industry by the empirical survey.

## 1.5 Research Methodology

The methodology adopted to achieve the research objectives are the combination of two different research methods, namely the black letter law and empirical research method.<sup>94</sup> The black letter law is necessary to understand the different mechanisms described under EUTR. The primary sources of data for doctrinal research are the legal instruments of EUTR itself, in this case, various reports and articles that are available when the regulation was drafted and after it came into force. (See Chapter 4)

The black letter approach allows to critically analyse the implications of EUTR and the principles which support the legislation. The provisions of the EUTR have been examined to answer the research questions. However, the research questions of this thesis require more than a law in books kind of approach and therefore, empirical research method has been identified as a suitable method to attain the research objectives. An examination of various components of EUTR and the nature of illegal timber trade inevitably leads the research to look beyond the black letter law. However, that is not to say that the thesis is interdisciplinary, it does not seek to answer the research questions from a socio-legal perspective; instead, the dissertation is assessing the functionality of EUTR using an empirical research method. Legal empirical research can enable us to find out the deficiencies in EUTR enactments and the problems of its implementation.

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<sup>94</sup>Frans L Leeuw, 'American Legal Realism: Research Programme and Policy Impact' (2017) 13(3) Utrecht Law Review 28

For empirical research, the methods such as observation, interview, questionnaire, survey and case study are applied for the collection of data in empirical legal studies.<sup>95</sup> Empirical research helps in evaluating the application of the law. It helps in understanding the actual effects law produces when translated into reality and keeping this in mind this research has also opted for empirical research to understand how EUTR has been applied and impacted the associated stakeholders and the timber trade overall.<sup>96</sup> It is utmost important to know how a law or legal decision-making or enforcement works outside the statute or textbook.<sup>97</sup> Therefore, a purely doctrinal analysis may prove insufficient in confronting some of the contemporary issues with illegal timber trade such as the approach of enforcement authority and implementation challenges.

This research characteristically falls under the branch of environmental law as the EUTR deals with one of the major drivers of deforestation and is expected to have a significant impact on the global forest. Even though environmental lawyers are probably the lawyers most interested in research on the effectiveness of law and policy, empirical legal work in this domain remains relatively limited.<sup>98</sup> For example, Professor Michael Faure<sup>99</sup> had raised the issue of limited usage of empirical research in environmental law. He opined regarding the empirical evidence for studying the impact of environmental laws, an important dimension of environmental governance, and explained that to a large extent, this evidence is not provided by lawyers. Furthermore, he questioned that when making environmental law and choosing environmental instruments, how well do the environmental lawyers know the effects of the chosen instruments are? In other words, what do we know empirically? This study contributes to the limited literature of empirical legal research on environmental law and attempts to assess the practical side of the EUTR emphasising on

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<sup>95</sup>Alexander J Wulf, 'The Contribution of Empirical Research to Law' (2016) 29 *Journal of Jurisprudence* 29

<sup>96</sup>Robert L Fischman and Lydia Barbarsh-Riley, 'Empirical Environmental Scholarship' (2018) 44 *Ecology Law Quarterly* 767

<sup>97</sup>Hazel G Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works* (Nuffield Foundation 2006)

<sup>98</sup>T S Krishnan, 'Does Better Environmental Governance Reduce Anthropogenic Carbon Dioxide Emission? A Cross-Country Analysis' (2016) 12 *Law, Environment and Development Journal*

<sup>99</sup>Michael G Faure, 'Instruments for Environmental Governance: What Works', Paper presented at the Annual Colloquium of the Academy for Environmental Law of the IUCN Wuhan, 1-5 November 2009 (Metro and Rile 2009)

implementation and enforcement which has received little attention in the field of environmental law even though patterns of environmental monitoring and enforcement are of crucial importance to assess changes in actual environmental quality.

The empirical approach can help identify gaps between theory and practise and similarly, it can help in finding a new area within the timber regulation where issues are not yet understood or adequately identified.<sup>100</sup> The empirical data has been collected by survey questionnaires and semi-structured interviews to understand the enforcement of a law, difficulties of timber industry or issues of implementation and to comply with the regulation. The data collected from the concern stakeholders within the UK is analysed qualitatively by using a computer software programme NVIVO 11 by the coding method to identify the patterns in responses. Chapter 4 explains the empirical research methodology, survey participants and qualitative analysis in detail.

#### 1.5.1 Stakeholders analysis to assess the potential of EUTR

The involvement of stakeholders is very vital in planning or decision-making process.<sup>101</sup> For instance, a stakeholder study recommended for a process of governance that enable control and coordination across a multiple stakeholder arena of decision-making for the disposal of the toxic waste.<sup>102</sup> The stakeholders can be anyone from an individual to the government organisations, for example locally affected communities, national or local government authorities, politicians, civil society organisations and businesses. The participants for empirical research include the UK timber industry, regulatory organisations, EUTR enforcement agency and research organisations, including non-government organisations. Their participation in the research can enhance the credibility of information, which involves the scientific adequacy of the technical evidence and arguments.<sup>103</sup> One of the research objectives

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<sup>100</sup>Sofie Molin and Annie Sjöberg, 'Addressing the Gap Between Theory and Practice: A Marketing-as-Practice Approach' (2017) Lund University, School of Economics and Management <<https://pdfs.semanticscholar.org/8650/bb46f303d6160302ed1e1f0e423cfdd1181f.pdf>>

<sup>101</sup>Neema Mori, 'Roles of Stakeholders in Strategic Decision-Making of Microfinance Organisations', (2010) 9(7) International Business & Economics Research Journal

<sup>102</sup>Suzanne Benn, Dexter Dunphy and Andrew Martin, 'Governance of Environmental Risk: New Approaches to Managing Stakeholder Involvement' (2009) 90 Journal of Environmental Management 1567

<sup>103</sup>Jennifer Hauck and others, 'Stakeholder Involvement in Ecosystem Service Decision-Making and Research' (eds) Ecosystem Services Reference Book (2016) Openness

of the study is to understand how different stakeholders contribute to the development and implementation of EU timber regulation, legislation which has a global impact on the forests and timber trade.

In the global environmental governance, it is difficult to define stakeholders and it is not a straightforward legal concept<sup>104</sup>, so for this research, the scope of the stakeholders has been considered and essentially divided two classes. First, are those stakeholders who are involved in the course of action such as for this research, the enforcement agency and timber industry. Second are those stakeholders who are affected by a course of action such as UK government bodies, monitoring organisations and UK timber trade federations. Each category of stakeholder is equally important to evaluate the EUTR as each category has vastly different concerns and objectives. While focussing on stakeholders' views will not resolve some of the intricate legal issues for example, building legal compliance along the supply chains, forest governance of timber-producing countries, impact of import policies of timber processing countries such as China on global supply chain – a stakeholder analysis helps in assessing the practical issues that illegal timber trade may present in achieving the objectives of EUTR.

The stakeholder perspective is considered sufficiently broad enough to provide a lens for investigating issues that are dominant in the mainstream literature.<sup>105</sup> Hence, in this research, stakeholder analysis presents an opportunity to examine problem areas within EUTR from differing stakeholder viewpoints. It helps to understand what regulatory enhancements would enable better outcomes when assessing EUTR instruments. Thus, the stakeholder analysis helps in determining the strongest and feeblest mechanisms within EUTR and depict necessary adjustments required to regulatory processes that may result in improved outcomes.<sup>106</sup>

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<sup>104</sup>Marc Pallemarts and Marlène Moreau, 'The role of stakeholders in international environmental governance' (Institute for sustainable development and international relations 2004)

<sup>105</sup>Caitlin Andersen, 'Who Cares? A Stakeholder Analysis of Nitrous Oxide Emissions from Agricultural Soils' (2016) 21 Drake Journal of Agricultural Law

<sup>106</sup>Nigel Martin and others, 'Using Offsets to Mitigate Environmental Impacts of Major Projects: A Stakeholder Analysis' (2016) 179 Journal of Environmental Management



Findings from this study can help regulatory authorities to understand the weaknesses of the EUTR and possible suggestions to rectify the system loopholes to make the timber regulation effective and better implemented. This piece of research contributes to the literature on using empirical data to evaluate the effects of policies and procedures. One of the research objectives of the study is to understand how different stakeholders contribute to the development and implementation of EU timber regulation, legislation which has a global impact on the forests and timber trade. The overall aim of this research is to determine if EUTR has the mechanism to fight against the complex issue of the illegal timber trade.

## 1.6 The current scenario on Brexit and Implications of Brexit on timber trade

The public in the UK voted to leave the European Union in a referendum on 23 June 2016. On 29 March 2017, the Prime Minister officially triggered Article 50 in writing to European Council President Donald Tusk and launched the two-year countdown to the UK formally leaving the EU, generally referred to as 'Brexit'. The UK had to leave the European Union on March 29, 2019. Nevertheless, after a vote on 14 March 2019 by the House of Commons, the government sought permission from the EU to prolong Article 50 and commit to a later Brexit date.<sup>107</sup>

The Prime Minister wrote to President Donald Tusk of the European Council on 20 March 2019, asking that Article 50 be extended until 30 June 2019. After a European Council meeting the next day, EU27 leaders agreed to give an extension comprising two possible dates: 22 May 2019, should the Withdrawal Agreement gain approval from MPs; or 12 April 2019, should the Withdrawal Agreement not be approved by the House of Commons. At a meeting of the European Council on 10 April 2019, the UK and EU27 agreed to extend Article 50 until 31 October 2019.

On 19 October 2019, the Prime Minister's new Brexit deal has been lost on the amendment in the Commons. Under the European Union (Withdrawal) (No. 2) Act<sup>108</sup>

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<sup>107</sup>Nigel Walker, 'Brexit timeline: events leading to the UK's exit from the European Union' Briefing Paper Number 7960 (House of Commons Library 2019)

<sup>108</sup>European Union (Withdrawal) (No 2) Act 2019

2019 – commonly known as the ‘Benn Act’ – the Prime Minister wrote to the President Donald Trump of European Council requesting an extension to the Brexit process. On 28 October 2019, EU Ambassadors agreed on further Brexit expansion up to 31 January 2020 and the Prime Minister confirmed the UK’s agreement to this.

The UK’s decision to leave the EU has created a cloud of uncertainty over the global economy.<sup>109</sup> This uncertainty will have an impact on imports of wood products from tropical countries and related stakeholders as the UK is the largest importer of tropical timber in the EU with around 25% of the total value imported into the EU from tropical countries.<sup>110</sup> Environmental law and policy in the UK are well founded, for the most part, on EU legislation and UK environmental law involves the implementation of EU directives.<sup>111</sup> It will be a considerable task for Defra and other ministries, along with their counterparts in Scotland, Wales and Northern Ireland, given the volume of legislation. The research by the House of Commons library has identified over 1100 pieces of EU environmental legislation that are DEFRA owned.<sup>112</sup>

Trade deals are one of the most effective ways of enforcing common environmental standards. The UK Government has formed a new Department for International Trade (DIT) to seek new trade opportunities for Britain and planning to establish a separate working group on forestry to discuss the implications of Brexit for the sector.<sup>113</sup> The UK Government’s trade and customs white paper<sup>114</sup> published in October 2017 has

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<sup>109</sup>Therese Raphael, ‘Brexit Knocks the Wind Out of the U.K. Economy’ Bloomberg Opinion <https://www.bloomberg.com/opinion/articles/2019-01-14/the-economic-damage-of-brexit-in-charts>; Thomas Sampson, ‘Brexit: The Economics of International Disintegration’ (2017) 31(4) Journal of Economic Perspectives 163 <<http://personal.lse.ac.uk/sampson/BrexitDisintegration.pdf>>; Gemma Tetlow and Alex Stojanovic, ‘Understanding the Economic Impact of Brexit’ (Institute for Government 2018) <<https://www.instituteforgovernment.org.uk/sites/default/files/publications/2018%20IfG%20Brexit%20Impact%205Bfinal%20for%20web%5D.pdf>>

<sup>110</sup>EU-FLEGT Facility, ‘ITTO analysis of Brexit implications for timber trade and FLEGT’ (EUFLEGT 2016) <http://www.flegt.org/news/content/viewItem/itto-analysis-of-brexit-implications-for-timber-trade-and-flegt/13-07-2016/15>

<sup>111</sup>Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text Cases and Materials* (2<sup>nd</sup> edn, Oxford University Press 2019)

<sup>112</sup>Caroline Lucas, MP, Brighton Pavilion & Green Party Co-leader, ‘Exiting the EU, Not the Environment’ (2017) <<https://www.carolinelucas.com/sites/carolinelucas.com/files/Safe%20Guarding%20Environment%20after%20Brexit.pdf>>

<sup>113</sup>Confor Welcomes New Forestry Working Group on Brexit (Confor 2017) <<http://www.confor.org.uk/news/latest-news/confor-welcomes-new-forestry-working-group-on-brexit/>>

<sup>114</sup>Department for International Trade, ‘Preparing for our future UK trade policy’ (Crown Copyright 2017) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/651192/CCS207\\_CCS09170\\_00298-1\\_Preparing\\_for\\_our\\_future\\_UK\\_trade\\_policy\\_Report\\_H....pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/651192/CCS207_CCS09170_00298-1_Preparing_for_our_future_UK_trade_policy_Report_H....pdf)>

indicated that the UK is preparing to attract new trade partners and has already started trade deal talks with USA, Australia and many others. As the European Commission's own 'Trade for All Strategy'<sup>115</sup> suggests, 90% of global economic growth in the next two decades will come from outside the EU, so a more significant proportion of UK trade will likely be with non-EU countries.

The white paper also mentioned that the UK will develop a trading framework that supports the foreign and domestic policy, sustainability, security, environmental and development goals in line with World Trade Organisation (WTO) commitments. The UK will also set up a trade remedies framework to protect domestic industry against unfair trading practices or unforeseen surges in imports by allowing for measures to be placed on imports of specific products. The new UK framework will be implemented, consistent with WTO obligations, that protects domestic producers, to investigate cases and propose measures. The UK is willing to put in place a trade preferences scheme which will provide the same level of access as the current EU trade preference scheme to ensure that the world's poorest countries and other developing countries across the globe can continue to export to the UK accordingly.

It seems like the UK is trying to ensure the highest amount of certainty, continuity and stability in trade and investment relationships with domestic, EU and other new trade partners but it creates a massive sense of insecurity amongst the businesses when the UK's imports from and exports to the EU is totalled £553bn, with over 200,000 UK businesses trading in goods with the EU in 2016 alone.<sup>116</sup> To boost export capacity, investment and trade policy overseas, the UK will create a new network of Trade Commissioners to head nine regions overseas. Such regional commissioners will add renewed focus and efficiency to trade and investment efforts. It remains to be seen that how the criteria to ensure high standards for environment and sustainability perform but the UK has indicated that the new trade partners and sources will be developed in case of hard Brexit is negotiated. To meet the demand and to find alternatives for the UK's domestic businesses, the country like China can import and

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<sup>115</sup>European Commission, 'Trade for All: Towards A More Responsible Trade and Investment Policy' (European Union 2015) <[http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)>

<sup>116</sup> HM Government, 'Future customs arrangements: A Future Partnership Paper' <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/637748/Future\\_customs\\_arrangements\\_-\\_a\\_future\\_partnership\\_paper.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf)>

process more illegal timber from high-risk countries. Being aware of China's role in the illegal timber trade, the UK must negotiate the bilateral trade agreements with countries like the USA, Australia and Canada.

There will be new customs agreements with the EU and other trade partners after the UK leaves the customs union. It means that after the completion of the Brexit process, the UK can introduce some form of the regulatory framework for trade with EU trade partner countries and countries outside the EU which will also apply to the trade from EU to the UK. These trade procedures can be in the form of customs declarations, trade licenses, and border inspections on goods which can affect the trade. These changes may impact on the ability to access or benefit from markets.

There are apparent differences in opinions of England, Scotland, Wales and Northern Ireland with regards to the Environmental Law and especially the European Single Market. Both Scotland<sup>117</sup> and Wales<sup>118</sup> want to retain the single market and looking to develop specific policies that build upon EU environmental policies and legislation concerning the environment, health, farming and fisheries. On the other hand, Northern Ireland wants to focus on the opportunities that Brexit presents and will actively participate in the UK's domestic agricultural, environmental and fisheries policy and trade agendas that will come with Brexit.<sup>119</sup>

The security and meeting the demands for UK businesses appear to be the Government's priority during the trade negotiations and the Government is keeping all the options open with trade partners from developed, developing and underdeveloped countries. While keeping the interest of businesses, the Government also needs to make sure that it applies all the checks before agreeing to any agreement. The loopholes in a trade agreement can benefit the companies involved in modern practices of illegal timber trade such as by fabricating documents as the illegal timber trade in itself very complex to detect.

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<sup>117</sup> Scotland's Place in Europe (Scottish Government News, 2016) < <https://news.gov.scot/news/scotlands-place-in-europe-4> >

<sup>118</sup> Welsh Government: First Minister Sets Out His Vision for Post-Brexit Wales (Government of Wales, 2016) < <http://gov.wales/newsroom/firstminister/2016/160909walespostbrexit/?lang=en> >

<sup>119</sup> McIlveen Discusses EU Exit With Cabinet Ministers (Department of Agriculture, Environment and Rural Affairs, 2017) < <https://www.daerani.gov.uk/news/mcilveen-discusses-eu-exit-cabinet-ministers> >

It is difficult to predict the full effect of the Brexit on timber trade scenario, but now that it is confirmed that the UK is leaving the European single market, the UK can develop comprehensive trade framework that prioritises the strongest possible environmental criteria in any trade deal. The Brexit could be an opportunity for the UK to draw global businesses towards timber legality and clean the system to eliminate illegal timber flow. The other possible effects of Brexit with robust timber legality criteria can be that the UK hardwood import can be shifted from tropical species to temperate species. The temperate region includes large areas of North America which have excellent forestry standards compared to tropical region. This type of shift can reduce the import from China as China imports timber from tropical countries with high-level of illegal logging, process them and export it to the Europe. The UK government delegation negotiating trade deals with weaker forest governance countries must be experienced, prepared and aware to include the robust criteria of timber legality and forest protection.

The UK leaving the European Union might have a negative influence on the environment and forests.<sup>120</sup> Even if it is difficult to predict all the problems that would appear from this situation, the actions to protect and restore the forests will slow down across the EU. The thesis deals with the European legislation, i.e. EUTR, so it provides a significant opportunity to discuss the scenario concerning the future of EUTR in the UK under Brexit. This research, in the last chapter, tries to explore the implications of EU withdrawal especially with timber trade import and discusses the alternatives to the EU regulatory controls to fill the regulatory gaps. For this research, the empirical data from stakeholders collected before the results of EU referendum declared, so the question on effects of Brexit on EUTR has not been included in the stakeholders' survey, but Brexit can have some severe implications on the arguments presented in the research. The stakeholders' views presented in this research on due diligence system, product scope of EUTR, enforcement agency, recommendations of improvement are some aspects which can immensely be affected if the UK introduces

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<sup>120</sup>Paul Stookes, 'Brexit and Implications for Environmental Law' (2018) 6 Environmental Law and Practice Review 103

new legislation for the illegal timber trade. The effects of Brexit on UK import of timber and timber products has been discussed in chapter 7.

## 1.7 Outline of the research

This chapter illustrates the global drivers of deforestation, measures are taken to stop deforestation and briefly explains the illegal logging of timber and related issues. It further describes the stands of European Union on tackling the issue of the illegal timber trade and besides justifies selecting the UK to study the effectiveness of the EU timber regulation. It also explains the theoretical background of the dissertation and this chapter also touches upon the methodology selected to achieve the research objectives. A more detailed presentation of the literature on international developments within forest law and policies and illegal logging follows in Chapter 2. Chapter 2 also emphasises the impact of illegal logging, including global approaches and legal responses. It examines the historical developments within the international forest policy and attempts to learn the challenges for legally binding international agreement on forests.

Chapter 3 elaborates the broad theoretical context of the thesis and analyses the emergence of transnational timber legality initiative and how it has been introduced into the legislation. The chapter also discusses the various theories on transnational timber legality verification. Chapter 4 discusses the European Union Timber Regulation and its policy instruments by applying the black letter approach. In this chapter, various instruments of EUTR and their functions have been discussed. The black letter approach method provides an understanding that it is difficult to assess the effectiveness of EUTR in controlling illegal timber trade due to its complex nature (e.g. implementation challenges of EUTR faced by timber industry) with doctrinal research. Thus, it requires to study the legislation with actors involved in it to understand the application of EUTR and how successful it is in achieving the objectives.

Chapter 5 elaborates on the empirical methodology employed in the study and illustrates the significance of choosing the methodology for this thesis. It explains the

various stakeholders involved in the thesis and different components of EUTR taken into consideration to meet the objective of the dissertation. Chapter 6 is built upon results and discussion based on the empirical data collected from stakeholders through questionnaire and semi-structured interviews. The data have been analysed qualitatively using the NVIVO 11 software to conclude. Chapter 7 concludes the thesis with recommendations to improve the EUTR as a piece of legislation to control the illegal timber trade. The chapter also identifies the areas of research for future developments and also discusses the effects of Brexit on UK timber import.

## Chapter 2: Illegal logging, its impacts and various international and national efforts to combat illegal timber trade

The challenge of sustainable development and the management of natural resources are having a significant influence on the direction that international forest law is developing.<sup>121</sup> During the last two decades, significant forest issues emerged that were the subject of intense debate among specialists, government officials and environmental activists.<sup>122</sup> The issues of forest fires, natural forest conversion, illegal logging and trading of timber, land tenure conflict, and national park management are still being debated at the international forums.<sup>123</sup>

Illegal logging is an environmental issue which is debated internationally and it causes enormous damage to forests, forest communities and the economies of timber producer countries.<sup>124</sup> About half of the tropical-timber imports into the EU are illegally sourced.<sup>125</sup> Despite growing concern, there remains an apparent lack of immediate and well-coordinated action at the national and international level to address the problem of illegal logging. In both the United States and the European Union,<sup>126</sup> two of the biggest timber importers, a legislation tailored to tackle illegal logging is in place, but these measures are yet to prove their worth.<sup>127</sup> This chapter focuses on the impacts of illegal logging, efforts to combat illegal timber trade and helps in understanding the complex nature of illegal timber trade with different cases. It helps in assessing the complexity attached to illegal timber trade and why the illegal logging

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<sup>121</sup>Food and Agriculture Organisation, 'Developing Effective Forest Policy: A Guide', (FAO Forestry Paper 2010) <<http://www.fao.org/3/i1679e/i1679e00.pdf>>

<sup>122</sup>Tamara Tschentscher, 'Promoting Sustainable Development Through More Effective Civil Society Participation in Environmental Governance: A Selection of Country Case Studies from the EU-NGOs Project' (United Nations Development Programme 2016) <[https://ec.europa.eu/environment/international\\_issues/pdf/EU\\_NGOs\\_publication\\_20161219.pdf](https://ec.europa.eu/environment/international_issues/pdf/EU_NGOs_publication_20161219.pdf)>

<sup>123</sup>United Nations, 'Review of the Effectiveness of the International Arrangement on Forests', Department of Economic and Social Affairs, Secretariat of the United Nations Forum on Forests (UN 2015) <[https://www.un.org/esa/forests/wp-content/uploads/2015/06/Review\\_Effectiveness\\_IAF.pdf](https://www.un.org/esa/forests/wp-content/uploads/2015/06/Review_Effectiveness_IAF.pdf)>

<sup>124</sup>See sections of impacts of illegal logging and efforts on this chapter

<sup>125</sup>Ozinga S and Mowatt H, 'Strategies to Prevent Illegal Logging' (eds) A Handbook of Globalisation and Environmental Policy, National Government Interventions in a Global Arena 2nd edn, National Government Interventions in a Global Arena (Edward Elgar Publishing Limited 2012)

<sup>126</sup>See section 2.3.2

<sup>127</sup>Marigold Norman and Jade Saunders, 'Regulating the Trade in Illegal Timber: Asian Approaches Compared - State of Play June 2017' (Forest Trends 2017) <[https://www.forest-trends.org/wp-content/uploads/2017/08/doc\\_5634.pdf](https://www.forest-trends.org/wp-content/uploads/2017/08/doc_5634.pdf)>



is still a massive issue even after continues efforts from international and national communities.

## 2.1 Defining illegal logging

The existing definitions of illegal logging range from a narrow understanding (that refers to taking timber from outside authorised forest concessions or exceeding assigned timber quotas) to broad definitions comprising the entire supply chains, including the processing and trading of timber and timber products.<sup>128</sup> However, it is widely accepted that illegal logging takes place when timber is harvested, transported, bought or sold in violation of national laws. The concept of illegal logging also involves the avoidance of taxes and duties and the over or understatement of sales and profits by misusing transfer pricing.<sup>129</sup>

Hoare<sup>130</sup> uses the term illegal logging to refer to timber harvesting activities that are “inconsistent with national or sub-national laws.” The Confederation of European Paper Industries (CEPI)<sup>131</sup> considers illegal logging to be when timber is harvested in violation of national laws.<sup>132</sup> According to Brack, Gray and Hayman,<sup>133</sup> the timber harvesting process itself can be illegal, which includes the corrupt means of the ability to access the forests, extracting without the permission or from a protected area, cutting of protected species or extracting of timber in addition to the agreed limits.

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<sup>128</sup>Daniela Kleinschmit, Sina Leopold and Metodi Sotirov, ‘Understanding the Complexities of Illegal Logging and Associated Timber Trade’ (eds) *Illegal Logging and Related Timber Trade – Dimensions, Drivers, Impacts and Responses: A Global Scientific Rapid Response Assessment* (International Union of Forest Research Organisations 2016)

<sup>129</sup>Food and Agriculture Organisation, ‘The FAO Advisory Committee on Paper and Wood Products, Report of the 44th Session of the Advisory Committee on Paper and Wood Products, Oaxaca, Mexico (FAO 2003) <<http://www.fao.org/3/Y4829E/y4829e00.htm#TopOfPage>>

<sup>130</sup>Hoare (n 11)

<sup>131</sup>Confederation of European Paper Industry (CEPI)’s Position on Illegal Logging and Forest Law Enforcement, Governance and Trade, (CEPI 2002) <[https://www.illegal-logging.info/sites/files/chlogging/uploads/CEPI\\_FLEGT\\_Position\\_Paper.pdf](https://www.illegal-logging.info/sites/files/chlogging/uploads/CEPI_FLEGT_Position_Paper.pdf)>

<sup>132</sup>Victor K Agyeman, Kwame A Oduro and Kwame Gyan, ‘Review of Existing Policy and Legislative Documents on Definition of Timber Legality in Ghana: Validation of Legal Timber Program’ (Forestry Commission, Ghana 2007)

<sup>133</sup>Duncan Brack, Kevin Gray and Gavin Hayman, ‘Controlling the International Trade in Illegally Logged Timber and Wood Products: A Study Prepared for the UK Department for International Development, Sustainable Development Programme’ (Royal Institute of International Affairs 2002) <[http://www.unece.lsu.edu/responsible\\_trade/documents/2003-2006/rt03\\_022.pdf](http://www.unece.lsu.edu/responsible_trade/documents/2003-2006/rt03_022.pdf)>

Some scholars and experts depict illegal logging ambiguous phenomenon with different expressions across the variety of affected countries arguing that it often results from unclear legal situations (e.g. regarding informal or traditional tenure rights) and the illegalization of subsistence logging.<sup>134</sup> Some experts specifically highlight international competition in the wood products markets as a significant dimension of illegal logging and associated trade.<sup>135</sup> World Wide Fund for Nature (WWF) defines “illegal logging and related trade, and corruption as occurring when timber is harvested or traded in violation of relevant national or sub-national laws or where access to forest resources or trade in forest products is authorised through corrupt practices.”<sup>136</sup>

The above definitions have three common elements that include illegal harvesting, illegal trading and corruption. Illegal harvesting includes timber removed without required licence or in breach of harvesting licence or law. Illegal timber trading involves timber or timber products bought, sold, exported, imported and processed in breach of the laws, including the laws implemented under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).<sup>137</sup> The corruption in terms of illegal timber trade arises when authorisation to harvest or trade logs or timber products is secured through the corrupt application of laws or administrative procedures.

## 2.2 Impact of illegal logging

In the last few years, illegal logging has become a severe concern of the forestry sector worldwide, especially in the tropical developing countries due to the weak forest

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<sup>134</sup>Paolo Cerutti and others, ‘Cameroon’s Hidden Harvest: Commercial Chainsaw Logging, Corruption, and Livelihoods’ (2013) 26(5) Society & Natural Resources 539; Constance L. McDermott, Lloyd C. Irland and Pablo Pacheco, ‘Forest certification and legality initiatives in the Brazilian Amazon: Lessons for effective and equitable forest governance’ (2015) 50 Forest Policy and Economics 134

<sup>135</sup>Seneca Creek Associates LLC and Wood Resources International LLC, ‘Illegal Logging and Global Wood Markets: The Competitive Impacts on the US Wood Products Industry’, (American Forest & Paper Association 2004); Jaakko Pöyry Consulting, ‘Overview of Illegal Logging’, (Australian Government - Department of Agriculture, Fisheries and Forestry 2005)

<sup>136</sup>The GFTN Guide to Legal and Responsible Sourcing <<http://sourcing.gftn.panda.org/index.php?id=77>>

<sup>137</sup>CITES is an international agreement between governments. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. See <https://www.cites.org/eng/disc/what.php>

governance, law enforcement and high corruption rates.<sup>138</sup> Illegal logging has been linked with highly sensitive economic and development issues such as the distortion of the market and free trade, loss of government revenue and tax evasion and income disparities.<sup>139</sup> Furthermore, illegal logging is deemed undermining the principles of statehood, such as national sovereignty over natural resources or good forest governance.<sup>140</sup>

Illegally logged timber and its associated international trade are a significant problem for social, economic and environmental reasons.<sup>141</sup> In social terms, illegal logging can be associated with contributing to poverty, national and regional armed conflicts by threatening the livelihood of local forest-dependent communities.<sup>142</sup> Economically, illegal logging and the related trade hinder economic development. The market value of products derived from illegal logging exceeds US\$ 15 billion annually.<sup>143</sup> Illegal logging leads to adverse environmental impacts including forest degradation, loss of species and emission of greenhouse gases. It is also contributing to desertification and soil erosion and can amplify extreme weather conditions and flooding.<sup>144</sup>

## **(A) Social impacts**

The destruction of forests and the lack of tenure rights to forest communities will put enormous pressure on indigenous populations forcing them to migrate to more densely populated areas.<sup>145</sup> Highly uncertain land tenure relations intensify conflicts

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<sup>138</sup>Global Witness and Transparency International EU, 'Tackling Corruption to Protect the World's Forests: How the EU Can Rise to the Challenge' (Global Witness and Transparency International EU 2017) <<https://transparency.eu/wp-content/uploads/2017/01/TI-GW-Anti-corruption-briefing-January-2017.pdf>>

<sup>139</sup>Metodi Sotirov and others, 'Forest Policy Integration in Europe: Lessons Learnt, Challenges Ahead, and Strategies to Support Sustainable Forest Management and Multifunctional Forestry in the Future' (Integral 2015) <[http://www.integral-project.eu/images/Documents/EuPolicyPaper/Policy%20Paper\\_WEB.pdf](http://www.integral-project.eu/images/Documents/EuPolicyPaper/Policy%20Paper_WEB.pdf)>

<sup>140</sup>David Humphreys, *LogJam: Deforestation and the Crisis of Global Governance* (Earthscan 2008)

<sup>141</sup>Lawson (n 78)

<sup>142</sup>David Kaimowitz, 'Forest Law Enforcement and Rural Livelihoods' (2003) 5(3) *International Forestry Review* 199

<sup>143</sup>Christian Nellemann, 'Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests. A Rapid Response Assessment', INTERPOL Environmental Crime Programme (United Nations Environment Programme 2012)

<sup>144</sup>Arnoldo Contreras-Hermosilla, 'Law Compliance in the Forestry Sector: An overview' (The International Bank for Reconstruction and Development/The World Bank 2002)

<sup>145</sup>Global Forest Coalition, 'Getting to the Roots: Underlying Causes of Deforestation and Forest Degradation, and Drivers of Forest Restoration' (GFC 2010) <<https://www.illegallogging.info/sites/files/chlogging/uploads/ReportGettingtotheroots.pdf>>

between wood industry and local communities. The indigenous people of Siberia and the Far East are no longer guaranteed the free use of lands and forests where the illegal harvest is a significant threat.<sup>146</sup>

Illegal logging creates well-paid jobs compared with conventional labour and opportunities<sup>147</sup>, although in some cases very little of the profit from illegal logging remains in the local community. In Siberia and the Russian Far East, the use of illegal paid labour, the breaching of forest legislation, and illegal accounting practices are the main problems of unreported wood in Russia.<sup>148</sup> According to the U.S. Department of Labour,<sup>149</sup> timber is produced with forced labour in Peru and Brazil, particularly valuable hardwoods such as mahogany, and in Myanmar (Burma) bamboo and the hardwood teak. According to INTERPOL, between 50 and 90 % of logging in critical tropical countries of the Amazon basin, Central Africa, and Southeast Asia is being carried out by organised crime.<sup>150</sup>

## **(B) Economic losses**

The scale of illegal logging represents a significant loss of revenue to many countries. A Senate Committee in the Philippines calculated that the country lost as much as US\$1.8 billion per year from illegal logging during the 1980s.<sup>151</sup> The World Bank<sup>152</sup> estimated that illegal logging causes losses to the governments of approximately US\$15 billion every year. In a report of UNEP/INTERPOL,<sup>153</sup> this value has been doubled, that is, the economic value of global illegal logging, including processing, is now estimated to be worth between US\$30 and 100 billion of the global wood trade.

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<sup>146</sup>Joyotee Smith and others, 'Illegal Logging, Collusive Corruption and Fragmented Governments in Kalimantan, Indonesia' (2003) 5(3) *International Forest Review* 293

<sup>147</sup>Anne Casson and Krystof Obidzinski, 'From New Order to Regional Autonomy: Shifting Dynamics of "Illegal" Logging in Kalimantan, Indonesia' (2002) 30(12) *World Development* 2133

<sup>148</sup>Yuri Gerasimov and Timo Karjalainen, 'Development of Wood Procurement in Northwest Russia: Round Wood Balance and Unreported Flows' (2006) 125 *European Journal of Forest Resources* 189

<sup>149</sup>Fernando Reboledo, 'Socio-Economic, Environmental and Governance Impacts of Illegal Logging' (2013) 33 *Environment Systems and Decisions* 295, 296

<sup>150</sup>Nellemann (n 143)

<sup>151</sup>Deborah Callister, *Illegal Tropical Timber Trade: Asia-Pacific (TRAFFIC International, 1992)*

<sup>152</sup>The World Bank, 'Strengthening Forest Law Enforcement and Governance: Addressing a Systematic Constraint to Sustainable Development', Washington, Report no. 36638–GLB (World Bank 2006) <[http://siteresources.worldbank.org/INTFORESTS/Resources/ForestLawFINAL\\_HI\\_RES\\_9\\_27\\_06\\_FINAL\\_web.pdf](http://siteresources.worldbank.org/INTFORESTS/Resources/ForestLawFINAL_HI_RES_9_27_06_FINAL_web.pdf)>

<sup>153</sup>Nellemann (n 143)

Illegal logging increases timber supply into the markets, lowering the price of timber, thus increasing the competitiveness of national industries.<sup>154</sup> The Indonesian Government estimated losses of approximately \$3.2 billion a year as a consequence of illegal logging activities, while the NGO Telepak Indonesia claims losses of about \$5.3 billion per year due to the overall deforestation from logging, slash-and-burn farming techniques, and other factors responsible for the environmental degradation.<sup>155</sup> According to data from the Russian Natural Resources Ministry, the yearly losses resulting from illegal logging are around US\$183.3 million. Besides, the Forest Integrity Network described that the study funded by the World Bank calculated that direct yearly economic losses from illegal logging and forest corruption at US\$12-18 million for Honduras and US\$8-12 million for Nicaragua.<sup>156</sup>

### **(C) Environmental impacts**

Environmental impacts such as forest degradation, biodiversity and habitat loss are commonly associated with illegal logging, which consequently affects the sustainable forest management.<sup>157</sup> In some region, illegal logging is responsible for extinct some of the world's exotic species such as primates<sup>158</sup> including orang-utans in Indonesia<sup>159</sup> and the Siberian tiger. The impact of massive deforestation caused by logging encompasses everything from landslides and property destruction to destroying biodiversity in deforested areas and increasing global carbon emissions.<sup>160</sup> The

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<sup>154</sup>Luca Tacconi, Marco Boscolo and Duncan Brack, 'National and International Policies to Control Illegal Forest Activities' A Report Prepared for the Ministry of Foreign Affairs of the Government of Japan (Centre for International Forestry Research 2003) <[https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/national\\_and\\_international\\_policies-japan.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/national_and_international_policies-japan.pdf)>

<sup>155</sup>Reboredo (n 149) 297

<sup>156</sup>ibid

<sup>157</sup>European Commission (EC), 'Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions: A New EU Forest Strategy for Forests and the Forest-based Sector (EC 2013) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0342&from=EN>>

<sup>158</sup>Christoph Schwitzer and others, 'Primates in Peril the World's 25 Most Endangered Primates 2012–2014' (IUCN/SSC Primate Specialist Group, International Primatological Society, Conservation International and Bristol Zoological Society 2014) <[http://static1.1.sqspcdn.com/static/f/1200343/25117808/1403888374823/Primates\\_in\\_Peril\\_2012-2014\\_Full\\_Report.pdf?token=T2M+ZAKsMD5TXNMsZfOvhlYxJHY=>](http://static1.1.sqspcdn.com/static/f/1200343/25117808/1403888374823/Primates_in_Peril_2012-2014_Full_Report.pdf?token=T2M+ZAKsMD5TXNMsZfOvhlYxJHY=>)

<sup>159</sup>Serge Witch and others, *Orangutans and The Economics of Sustainable Forest Management in Sumatra* (United Nations Environment Programme 2011)

<sup>160</sup>John A Parrotta, Christoph Wildburger and Stephanie Mansourian, 'Understanding Relationships Between Biodiversity, Carbon, Forests and People: The Key to Achieving REDD+ Objectives: A Global Assessment Report

extensive floods in the Philippines in December 2004, which left over 1000 people dead or missing, were blamed by the country's government on illegal logging, which had stripped the hillsides of the forests that could have absorbed the flooding water.<sup>161</sup>

The high levels of deforestation due to illegal logging have been prevalent in the region of Central America—Honduras and Nicaragua<sup>162</sup>, South America—Brazil<sup>163</sup>, Southeast Asia<sup>164</sup>, Africa—Congo Basin<sup>165</sup>, Central and Eastern Europe and former communist countries such as Belarus, Ukraine, Moldova, and Russia.<sup>166</sup> The large scale illegal logging can lead to the conversion of forests to grassland and the depletion of plant and animal species. If illegal logging occurs in protected areas, rare plants and animals may become threatened.<sup>167</sup> Deforestation and forest loss also have consequences for climate change, as forests play a pivotal role in both climate change mitigation and adaptation.<sup>168</sup> In 2013, illegal logging is estimated to have released 190 million tonnes of carbon dioxide into the atmosphere in nine forest producing countries.<sup>169</sup>

The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) has a vast list of species that are believed to be vulnerable to overexploitation. Among the tree species under the CITES, concerns are the big leaf mahogany (*Swietenia macrophylla*) in America, afrormosia (*Pericopsis elata*) in Africa,

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Prepared by the Global Forest Expert Panel on Biodiversity, Forest Management and REDD+’ (International Union of Forest Research Organisations 2012)

<sup>161</sup>Duncan Brack, ‘Controlling Illegal Logging and the Trade in Illegally Harvested Timber: The EU’s Forest Law Enforcement, Governance and Trade Initiative’ (2005) 14(1) *Review of European, Comparative and International Environmental Law*

<sup>162</sup>Michael Richards and others, ‘Impacts of Illegality and Barriers to Legality: A Diagnostic Analysis of Illegal Logging in Honduras and Nicaragua’ (2003) 5(3) *International Forestry Review* 282

<sup>163</sup>Lawson (n 78)

<sup>164</sup>Mikaela N Rosander, ‘Illegal Logging: Current Issues and Opportunities for SIDA/SENSA Engagement in Southeast Asia’ (Swedish International Development Cooperation Agency 2008) <[http://www.recoftc.org/sites/default/files/old/uploads/content/pdf/Illegal\\_Logging\\_03\\_-\\_web-no-bleed\\_52.pdf](http://www.recoftc.org/sites/default/files/old/uploads/content/pdf/Illegal_Logging_03_-_web-no-bleed_52.pdf)>

<sup>165</sup>Jamie Thomson and Ramzy Kanaan, ‘Conflict Timber: Dimensions of the Problem in Asia and Africa’ (2003) (The United States Agency for International Development 2003) <[http://pdf.usaid.gov/pdf\\_docs/PNACT462.pdf](http://pdf.usaid.gov/pdf_docs/PNACT462.pdf)>

<sup>166</sup>Regional Environmental Centre, ‘Illegal Logging Activities in Bosnia and Herzegovina: A Fact-Finding Study’ (2010) <[http://illegallogging.rec.org/publications/BiH\\_IL%20Fact%20Finding\\_Final.pdf](http://illegallogging.rec.org/publications/BiH_IL%20Fact%20Finding_Final.pdf)>

<sup>167</sup>Pervaze A Sheikh, ‘Illegal Logging: Background and Issues: Congressional Report Service Report for Congress’ (Congressional Research Service 2007)

<sup>168</sup>IUCN (n 8)

<sup>169</sup>Hoare (n 11)

and ramin (*Gonystylus spp.*) in Southeast Asia. In Honduras, illegal logging is highly selective and the valuable species of mahogany and tropical cedar are at risk. According to Del Gatto<sup>170</sup>, the annual extraction of mahogany ranges between 30,000 and 50,000 m<sup>3</sup> and it is believed that this species is near extinction outside of protected areas.

Tanjung Puting National Park (located in the province of Central Kalimantan—Indonesia) is recognised as the World Biosphere Reserve by the United Nations and constitutes the largest protected area of swamp forest in Southeast Asia.<sup>171</sup> This region is unique due to the existence of commercial tree species which include meranti (*Shorea spp.*) and ramin (*Gonystylus spp.*) and the orangutan (*Pongo pygmaeus*).<sup>172</sup> Environment Investigation Agency (EIA)/Telepak investigators discovered several illegalities in Tanjung Park, which was confirmed by the authorities who seized ramin loads and detected ramin factories without a license to operate in Central Kalimantan.<sup>173</sup> Its use in luxury products and increasing scarcity make ramin a valuable timber on the international market with prices varying from \$600 per m<sup>3</sup> for sawn ramin to \$1,200 per m<sup>3</sup> for moulded ramin.<sup>174</sup>

#### **(D) Governance impacts**

Illegal logging and timber smuggling are well recognised as a transnational environmental crime as it is generally committed in more than one state.<sup>175</sup> The Indonesian Ministry of Forestry criticised Malaysia and China, for accepting stolen timber, thus taking unfair advantages to wood industries in these countries.<sup>176</sup> The

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<sup>170</sup>Richards (n 162) 288

<sup>171</sup>UNESCO, 'Ecological Sciences for Sustainable Development' <<http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/asia-and-the-pacific/indonesia/tanjung-puting/>>

<sup>172</sup> Reboredo (n 149) 298

<sup>173</sup> Julian Newman, Dave Currey and Ambrosius Ruwindrijarto, 'The Final Cut: Illegal Logging in Indonesia's Orang-Utan Parks' (Environmental Investigation Agency and Telepak 1999) <[http://telapak.gekkovoices.com/publikasi/download/The\\_Final\\_Cut.pdf](http://telapak.gekkovoices.com/publikasi/download/The_Final_Cut.pdf)>

<sup>174</sup>Reboredo (n 149)

<sup>175</sup>Loraine Elliot, 'Transnational Environmental Crime in the Asia Pacific: An un(der)securitized Security Problem?' (2007) 20 The Pacific Review 499

<sup>176</sup>Krystof Obidzinski, Agus Andrianto and Chandra Wijaya, 'Cross-Border Timber Trade in Indonesia: Critical or Overstated Problem? Forest Governance Lessons from Kalimantan' (2007) 9(1) International Forestry Review 526,527 <[http://www.cifor.org/publications/pdf\\_files/articles/AObidzinski0701.pdf](http://www.cifor.org/publications/pdf_files/articles/AObidzinski0701.pdf)>

links between armed groups and logging companies became evident during the Khmer Rouge regime—forest cover in Cambodia decreased from 75 % in the early 1970s to less than 35 % in the mid-1990s due to the illegal, but officially sanctioned logging, by the Royal Cambodian Army Forces and Khmer Rouge.<sup>177</sup>

An Environmental Investigation Agency (EIA) in Honduras<sup>178</sup> revealed a web of corruption and illegalities involving politicians, the State Forestry Administration, timber companies, sawmills, loggers, transporters, mayors, and police. Similar conclusions were derived from the work of Pye-Smith<sup>179</sup> when analysing forestry crimes and court convictions and forest-related abuses in Indonesia, Ghana and Cameroon. The considerable complexity of obscure interests between the State, government officials and multiple stakeholders is the main obstacle to stop illegal activities. In 2008, hackers working for illegal logging cartels in the state of Pará (Brazil) had access to transport and logging permits, allowing the theft of an estimated volume of 1.7 m<sup>3</sup>.<sup>180</sup> Also, in Brazil in 2009, a federal prosecutor investigated a scam allegedly involving some 3,000 companies that eco-certified and exported illegal timber.<sup>181</sup>

Illegal logging is not a straightforward case of criminality but rather a complex economic and political system that includes several stakeholders.<sup>182</sup> The multitude of consequences ascribed to illegal logging activities is strongly related to many underlying causes that vary between places and show high complexity covering structural, economic and political reasons. There are several reasons for illegal tree

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<sup>177</sup>Thomson (n 165) 11

<sup>178</sup>Environmental Investigation Agency and Centre for International Policy, 'The Illegal Logging Crisis in Honduras. How US and EU Imports of Illegal Honduran Wood Increase Poverty, Fuel Corruption and Devastate Forest and Communities' (EIA 2005) <<https://eia-international.org/wp-content/uploads/Honduras-Report-English-low-res.pdf>>

<sup>179</sup>Charlie Pye-Smith, 'Crime and Persuasion: Tackling Illegal Logging, Improving Forest Governance' (Department for International Development 2007) <<http://charliepyesmith.com/wpcontent/uploads/2014/01/Crime-and-Persuasion.pdf>>

<sup>180</sup>Reboredo (n 149)

<sup>181</sup>United Nations Environment Programme, 'Organised Crime Trade Worth Over US\$30 Billion Responsible for Up To 90% of Tropical Deforestation' (2012) <<http://www.unep.org/newscentre/organised-crime-trade-worth-over-us30-billion-responsible-90-tropical-deforestation>>

<sup>182</sup>Wahjudi Wardoyo, Suhariyanto and Boen M Purnama, 'Law Enforcement and Forest Protection in Indonesia: A Retrospect and Prospect', Paper presented on the East Asia Ministerial Conference on Forest Law Enforcement and Governance, Bali, Indonesia, September 11-13 (2001) <[http://siteresources.worldbank.org/INTINDONESIA/FLEG/20171554/Law\\_Enforcement.pdf](http://siteresources.worldbank.org/INTINDONESIA/FLEG/20171554/Law_Enforcement.pdf)>



felling, ranging from economic necessities to the shortages of forestry personnel. Illegal logging is spread throughout the tropics, where sustainable forest management and forest certified area is less compared to the temperate region and in European countries. For example, the certified forest as a percentage of total forest area is 1.4% and 1.1%, in Asia and Africa, respectively, while Western European countries have 50.8% and North America 32.7%.<sup>183</sup>

Despite many fora discussing illegal logging and other topics of interest to the international forest policy community over the past 25 years, little agreement has been reached over actions to deal with illegal logging.<sup>184</sup> Some progress is evident in the form of bilateral initiatives<sup>185</sup> which have emerged, primarily because of the EU Action Plan for Forest Law Enforcement, Governance and Trade (EU-FLEGT). Government procurement policies have emerged in consumer countries as a potential means of curbing the demand for illegally sourced wood. The scope of compliance, however, is uncertain. Certification has long been intended as a tool among the potential market-based mechanisms that would reward companies in the tropics managing their forests sustainably but uptake of this procedure has been disappointingly slow. The evidence indicates that illegal logging is still occurring even in certified forests which highlights significant problems with the auditing process.<sup>186</sup>

The next section reflects on various measures taken to counter illegal timber trade. Although illegal logging was considered one of the significant causes of deforestation since the 1990s, real efforts to counter illegal logging started in the early 21<sup>st</sup> century. The following section identifies several initiatives taken at the global level and legislative measures from timber consumer developed countries such as the USA, Australia and the European Union.

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<sup>183</sup>United Nations Economic Commission for Europe and Food and Agriculture Organisation of the United Nations, 'Forest products, Annual market review 2010–2011' Geneva Timber and Forest study paper 30 (UN 2012) <[http://www.unece.org/fileadmin/DAM/timber/publications/FPAMR\\_2012.pdf](http://www.unece.org/fileadmin/DAM/timber/publications/FPAMR_2012.pdf)>

<sup>184</sup>See chapter 3

<sup>185</sup>John L Innes, 'Madagascar Rosewood, illegal logging and the Tropical Timber Trade' (2010) 5(1) Madagascar Conservation and Development 6,7

<sup>186</sup>ibid

## 2.3 Global efforts on combating illegal logging

In past few decades, illegally sourced timber has contributed to the growing roster of problems affecting both timber producing and consuming countries.<sup>187</sup> There have been a wide range of initiatives designed to highlight and combat illegal logging in recent years. These efforts are varied and encompass different activities conducted at local, national, regional and international levels.

### 2.3.1 International Efforts

First general and official declaration on the matter was laid out during G8 summit in Birmingham in 1998 and then at the 2000 G8 summit in Okinawa.<sup>188</sup> In 1998-2002, the G8 adopted an action plan (G8 Action Program on Forests) that recognised the need for further information on the scope of the issue before recommending the measures to counter.<sup>189</sup> The action plan included formal commitments from the world's most extensive global financial powers to encourage the rule of law in the forest sector.<sup>190</sup> For example, illegally-sourced timber was estimated to cost, on average, 16% less than legal wood, and therefore it was distorting international timber markets and undermining the overall competitiveness of legally-operating forest industries.<sup>191</sup>

The Asian ministerial-level conference referred to as Forest Law Enforcement Governance was also organised by the World Bank in Bali, in September 2001.<sup>192</sup> This new kind of cooperation has led to similar regional FLEG conferences being organised

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<sup>187</sup>William M Rhodes, Elizabeth P Allen and Myfanwy Callahan, 'Illegal Logging: A Market-Based Analysis of Trafficking in Illegal Timber' Abbot Associates Inclusive (2006) <[http://www.abtassociates.com/reports/ES\\_Illegal\\_Logging\\_053106.pdf](http://www.abtassociates.com/reports/ES_Illegal_Logging_053106.pdf)>

<sup>188</sup>European Commission, 'Forest Law Enforcement, Governance and Trade (FLEGT): International Workshop In Brussels, 22-24 April 2002 <[http://europa.eu/rapid/press-release\\_MEMO-02-82\\_en.htm](http://europa.eu/rapid/press-release_MEMO-02-82_en.htm)>

<sup>189</sup>'G8 Action Programme on Forests, G8 Action Programme on Forests' (Backgrounders 2002) <<http://www.illegal-logging.info/sites/default/files/uploads/G8-final-backgrounders.pdf>>

<sup>190</sup>David Humphreys, 'Forest Negotiations at the United Nations: Explaining Cooperation and Discord' (2001) 3 Forest Policy and Economics 125,127

<sup>191</sup>Forest Trends, 'Consumer Goods and Deforestation: An Analysis of the Extent and Nature of Illegality in Forest Conversion for Agriculture and Timber Plantations', Forest Trends Report Series: Forest Trade and Finance (Forest Trends 2014) < [https://www.forest-trends.org/wp-content/uploads/imported/for168-consumer-goods-and-deforestation-letter-14-0916-hr-no-crops\\_web-pdf.pdf](https://www.forest-trends.org/wp-content/uploads/imported/for168-consumer-goods-and-deforestation-letter-14-0916-hr-no-crops_web-pdf.pdf) >

<sup>192</sup>Forest Law Enforcement and Governance East Asia Ministerial Conference, Bali, Indonesia 11 – 13 September 2001 Ministerial Declaration See [http://siteresources.worldbank.org/INTFORESTS/Resources/Bali\\_ministerial\\_declaration.pdf](http://siteresources.worldbank.org/INTFORESTS/Resources/Bali_ministerial_declaration.pdf)

in Africa and Europe during 2003 and 2005 respectively and contribute to raising awareness of the issue at the international level.<sup>193</sup> These multi-stakeholder meetings which included government agencies, NGOs, civil society groups and timber companies discussed and prepared a comprehensive set of plans and commitments in order to eliminate illegal timber from global supply chains.<sup>194</sup>

Food and Agriculture Organisation (FAO) has addressed illegal logging as part of its forestry program. The annual editions of The State of the World's Forests reports from FAO have highlighted illegal logging as a concern. In January 2002, FAO convened an experts panel on the topic that placed illegal logging onto the agenda of the Latin American and Caribbean Forestry Commission meeting in October 2002.<sup>195</sup> From 14-15 May 2019, FAO organised a technical working group meeting of experts from international organisations, research institutions, academia, civil society and private sector who gathered to exchange and provide feedback on a preliminary set on guiding legal elements. The guiding statutory elements will be the backbone of Timber-Lex, an online FAO database that catalogues forest-related legislation for timber trading countries and ensures neutral access to information for all stakeholders.<sup>196</sup>

CITES provides a mechanism to regulate international trade in timber species and products. CITES is a treaty aimed at restricting the international trade in certain critically endangered species and regulating and monitor trade in other species that deemed vulnerable to overexploitation. The CITES appendices list species that could be at risk and whose import, export and re-export is controlled through a permit system (Appendix II) and species that are already threatened with extinction and cannot be commercially traded (Appendix I).<sup>197</sup> It is thought to be the only international mechanism that might regulate international trade in wild species, including timber, between all 183 of its Parties.

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<sup>193</sup>United Nations Forum on Forests, 'Recent Developments in Existing Forest-Related Instruments, Agreements, And Processes' Ad hoc expert group on Consideration with a View to Recommending the Parameters of a Mandate for Developing a Legal Framework on All Types of Forests (UNFF 2004) <<http://www.un.org/esa/forests/wp-content/uploads/2014/12/background-2.pdf> >

<sup>194</sup>World Bank (n 152)

<sup>195</sup>Food and Agriculture Organisation of the United Nations, 'FAO Advisory Committee on Paper and Wood Products: Forty-Fourth Session', Oaxaca, Mexico 8 - 9 May 2003 (FAO 2003) <<http://www.fao.org/3/Y4829E/y4829e00.htm#TopOfPage> >

<sup>196</sup>EU FLEGT Programme, 'Strengthening Legal Frameworks to Fight Illegal Logging' (FAO-EUFLEGT 2019) <http://www.fao.org/in-action/eu-fao-flegt-programme/news-events/news-eventsnews archive/fr/c/1193375/>

<sup>197</sup>The CITES Appendices, see <https://www.cites.org/eng/app/index.php>

The multilateral efforts of the International Tropical Timber Organisation (ITTO)<sup>198</sup> also have a strong potential to help reduce illegal logging. The ITTO supports projects to address illegal logging in tropical-timber-producing countries, primarily through the promotion of sustainable forest management. For instance, an ITTO project in Fiji helped control illegal logging using barcodes and chain-of-custody<sup>199</sup> information. A statistical development project in Peru has resulted in improved controls on illegal operations through the establishment of strategic checkpoints and the creation of detailed databases of concession allotments with which log output can be compared in real time. The ITTO has also undertaken case studies on illegal logging in Honduras, Malaysia and Peru.<sup>200</sup>

Some governments have also adopted different initiatives to restrict the import of wood from other countries. Indonesian government resorted to bilateral or regional agreements with their trading partners in order to obtain urgent support and focus on issues concerning illegal logging that occurs within their countries. For example, the Malaysian government banned the import of logs from Indonesia from ensuring that Malaysian wood products considered as produced from legal sources.<sup>201</sup>

The initiatives taken by the government include memoranda of understanding (MoU) between countries such as MoU between the United Kingdom and the Republic of Indonesia, signed in the April 2002.<sup>202</sup> As per the MoU, the Indonesian and UK governments to work together to reduce, and eventually eliminate, illegal logging and

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<sup>198</sup>The International Tropical Timber Organisation (ITTO) is an intergovernmental organisation promoting the sustainable management and conservation of tropical forests and the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests.

<sup>199</sup> According to Programme for the Endorsement of Forest Certification (PEFC), chain of custody outlines requirements for tracking certified material from the forest to the final product to ensure that the wood contained in the product or product line originates from certified forests.

<sup>200</sup> Lauren Flejzor, 'How the ITTO Addresses Illegal Logging: Current Political issues and Programme Activities' (Chatham House 2005)

<sup>201</sup> Carl-Éric Guertin, 'Illegal Logging and Illegal Activities in the Forestry Sector: Overview and Possible Issues for the UNECE Timber Committee and FAO European Forestry Commission', A Paper Presented as Basis of an Expert Presentation at the UNECE Timber Committee Market Discussions (2003) <[http://www.unece.lsu.edu/responsible\\_trade/documents/2003-2006/rt03\\_065.pdf](http://www.unece.lsu.edu/responsible_trade/documents/2003-2006/rt03_065.pdf)>

<sup>202</sup>Memorandum of Understanding Between The State Ministry Of Environment of The Republic Of Indonesia And The Department Of Energy and Climate Change and The Department of Environment, Food and Rural Affairs of The United Kingdom of Great Britain and Northern Ireland on Environmental Cooperation and The Response To Climate Change See <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/48107/uk-indonesia-mou-081212.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/48107/uk-indonesia-mou-081212.pdf)>

the related trade by rapid development and implementation of the necessary regulatory and policy reforms. The action plan is designed to cover six commitments ranging from legislative changes to a framework for checking compliance with independent verification of the traceability chain, to data exchange and cooperation between government agencies.<sup>203</sup>

The Asia Forest Partnership, headed by Japanese and the Indonesian governments, describes the areas in which different countries must work together to fight illegal logging and the associated trade in timber. The U.S. led the Congo Basin forest partnership in particular against illegal logging and enhance local governance.<sup>204</sup> In May 2003, the European Commission released its draft EU action plan tackling the problem of illegal timber trade beneath which some areas or countries were selected, i.e. Central Africa, Russia, Tropical South and Southeast Asia.<sup>205</sup>

Governments have actively considered responsible procurement policies that not only advocate certified wood products but require that products are derived from legal sources.<sup>206</sup> The United Kingdom government appears to have taken the initiative, by implementing the United Kingdom Forest Partnership for Action, that forbids the illegally logged timber to the UK markets.<sup>207</sup> This agreement allows partnership members to buy the wood and wood products from legitimate sources and forests that are sustainably managed.

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<sup>203</sup> Duncan Brack, Chantal Marijnissen, and Saskia Ozinga, 'Controlling Imports of Illegal Timber: Options for Europe' (The Royal Institute of International Affairs and FERN 2002) <[http://www.cifor.org/publications/pdf\\_files/reports/OptionsforEurope.pdf](http://www.cifor.org/publications/pdf_files/reports/OptionsforEurope.pdf) >

<sup>204</sup>Guertin (n 201)

<sup>205</sup>Ana Lucia Jaramillo, Tristram Lock and Ahmet Kilinc, 'Stemming Illegal Logging and Timber Trade: An Overview of The European Union FLEGT Action Plan' (Institute for Environmental Security 2008) <[http://www.envirosecurity.org/activities/law/trade/FLEGT\\_web.pdf](http://www.envirosecurity.org/activities/law/trade/FLEGT_web.pdf) >

<sup>206</sup>Duncan Brack, 'Promoting Legal and Sustainable Timber: Using Public Procurement Policy' (Chatham House 2014) <[https://www.chathamhouse.org/sites/default/files/field/field\\_document/20140908PromotingLegalSustainableTimberBrackFinal.pdf](https://www.chathamhouse.org/sites/default/files/field/field_document/20140908PromotingLegalSustainableTimberBrackFinal.pdf) >

<sup>207</sup>Department for Environment, Food and Rural Affairs (DEFRA), 'Government Forestry and Woodlands Policy Statement: Incorporating the Government's Response to the Independent Panel on Forestry's Final Report', (Forestry Commission 2013) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/221023/pb13871-forestry-policy-statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/221023/pb13871-forestry-policy-statement.pdf) >

China is the world's largest importer and exporter of wood and has agreed to the principle of combating illegal logging. China has signed bilateral cooperation agreements and memoranda of understanding on the subject with many countries, including the US, the EU, and Australia.<sup>208</sup> Order to improve its image and comply with international requirements, China has created its national forest certification scheme known as China Forest Certification Scheme (CFCS), which is now recognised by the PEFC and is also developing its legality verification system.<sup>209</sup> The EU has also been trying to reduce the trade in illegally logged wood through cooperation with private industry federations. Introduced in 2005, the Timber Trade Action Plan (TTAP), teaches companies to check the legality of their tropical timber supplies and allows them to develop timber tracking systems.<sup>210</sup>

Several other countries have negotiated bilateral agreements to address the problem of illegal logging and the associated trade in illegal timber. Australia, for example negotiated agreements in 2008–09 and memorandums of understanding with Indonesia, Papua New Guinea and China, all of which included commitments to work together to identify mechanisms to verify the legal origin of wood products.<sup>211</sup> In The Same way, both the US and the EU have reached agreements (in 2007 and 2009, respectively) with China to tackle illegal logging though, neither contains concrete commitments to regulate trade. The US agreed on a similar framework with Indonesia in 2006.<sup>212</sup>

The US has gone significantly further in its Trade Promotion Agreement with Peru in 2007 which includes an annexe on governance of the forest sector in the chapter on the environment.<sup>213</sup> This cover several mandatory requirements to address illegal logging, including commitments by Peru to improve forest law enforcement, develop

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<sup>208</sup>Christine Overdeest and Jonathan Zeitlin, 'Constructing a Transnational Timber Legality Assurance Regime: Architecture, Accomplishments, Challenges' (2014) 48 *Forest Policy and Economics* 6

<sup>209</sup>Cashore (n 62)

<sup>210</sup>Overdeest (n 208) 14

<sup>211</sup>Australian Government, 'Australia's Bilateral Relationships on Forestry' (Department of Agriculture and Water resources 2016) See <<http://www.agriculture.gov.au/forestry/international/regional>>

<sup>212</sup>Duncan Brack, 'Controlling Illegal Logging: Consumer-Country Measures' (Chatham House 2010) <<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/bp0110brack.pdf>>

<sup>213</sup> The United States - Peru Trade Promotion Agreement (*Office of the United States Trade Representative*) <<https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>>

systems to track tree species protected under CITES through the supply chain, improve protection specifically of big-leaf mahogany, improve the management of forest concessions, and conduct periodic audits of producers and exporters of timber products exported to the US.<sup>214</sup> On the request of the USA, Peru also undertook to identify a focal point, with adequate and sufficient staff to investigate violations of law and forest sector governance regulation. Peru also verified whether a particular shipment was legally produced. The US can detain questionable shipments pending verification that the timber was legally harvested.<sup>215</sup>

The initiatives outside the government sphere have sought to improve the traceability and sustainability of the world's timber resources. Notable among these has been the emergence of independent third-party forest certification schemes, such as the Forest Stewardship Council and the Programme for the Endorsement of Forest Certification schemes which are discussed in chapter 3.

An essential part of the debate has been the role of consumer countries in driving the demand for timber and timber products, and hence increasing the incentives for illegal logging. It has always been recognised that consumer countries contribute to the problems of illegal logging by importing timber and wood products without ensuring that they are legally sourced.<sup>216</sup> Until recently, there had been no legal mechanisms for importing countries to exclude illicit timber even if they could detect it. With a few exceptions (including the small number of tree species listed under CITES), it was not unlawful to import timber products produced illegally in a foreign country.<sup>217</sup> However, because legally and illegally harvested timber is mostly indistinguishable in international market due to the high number of independent operators and production stages in most timber supply chains, few consumer countries attempted to prohibit the import of timber through legislative measures that were illegally harvested.<sup>218</sup>

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<sup>214</sup>Brack (n 206)

<sup>215</sup>ibid

<sup>216</sup>Arnoldo Contreras-Hermosilla, Richard Doornbosch and Michael Lodge, 'The Economics of Illegal Logging and Associated Trade', Round Table on Sustainable Development (Organisation for Economic Co-operation and Development 2007) < <https://www.oecd.org/sd-roundtable/papersandpublications/39348796.pdf> >

<sup>217</sup> ibid

<sup>218</sup>Ed Matthew, 'European League Tables of Imports of Illegal Tropical Timber' (Friends of the Earth 2001) <[http://www.foe.co.uk/sites/default/files/downloads/league\\_table\\_tropical\\_timber.pdf](http://www.foe.co.uk/sites/default/files/downloads/league_table_tropical_timber.pdf)>

### 2.3.2 Legislative measures adopted by the USA, Australia and the EU

#### (A) Lacey Act of USA

The Lacey Act was first introduced by Iowa Congressman John Lacey to the House of Representatives in the spring of 1900. The Lacey Act was primarily designed to protect and restore game birds and other wild birds. The legislation also included provisions for a ban on the international movement of live wildlife species.<sup>219</sup> Lacey's law authorised the Department of Agriculture to help with the reinstatement of game birds and other wild birds where they had become locally scarce or extinct.<sup>220</sup> Between 1900 to 2008, the Lacey Act has been amended six times. The Act was first amended in 1935, expanding illegal wildlife shipment liability so that it includes individuals and companies. The U.S. Department of Agriculture (USDA) had also been given the responsibility for enforcing the Act, which also included making arrests and executing warrants.<sup>221</sup>

In 2008, the Lacey Act was amended again through the Food, Conservation and Energy Act. The United States, as the largest importer and consumer of forest products, plays a correspondingly significant role in the trade of illegally harvested wood.<sup>222</sup> There was substantial evidence that wood exported from certain countries with large volumes to the United States had a significant percentage of illegally harvested wood.<sup>223</sup> Vast amounts of illegally harvested wood from all corners of the globe – primarily as manufactured wood products and rarely as raw timber enters the United States either directly from the country of the timber's origin or through intermediary countries.<sup>224</sup> The Lacey Act provides a new means of addressing this issue.

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<sup>219</sup>Niki Lovegren and others, 'Understanding the Lacey Act' (Dovetail Partners 2013) <[http://www.dovetailinc.org/report\\_pdfs/2013/dovetaillaceyact1113\\_0.pdf](http://www.dovetailinc.org/report_pdfs/2013/dovetaillaceyact1113_0.pdf)>

<sup>220</sup>Robert S Anderson, 'The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking' (1995) 16 Public Land and Resources Law Review 27,37

<sup>221</sup>Lovegren (n 219)

<sup>222</sup>Hoare (n 11)

<sup>223</sup>Environmental Investigation Agency, 'Toxic Trade: Forest Crime in Gabon and the Republic of Congo and Contamination of the US Market' (EIA 2019) <[https://www.illegallogging.info/sites/files/chlogging/Toxic\\_Trade\\_Executive\\_Summary-web.pdf](https://www.illegallogging.info/sites/files/chlogging/Toxic_Trade_Executive_Summary-web.pdf)>

<sup>224</sup>Environmental Investigation Agency, 'The Laundering Machine: How Fraud and Corruption in Peru's Concession System Are Destroying the Future of Its Forests' (EIA 2012) <<https://eia-international.org/wp-content/uploads/The-Laundering-Machine.pdf>>



The Lacey Act was expanded to include plants and trees covered by the definition of wildlife. Previously, U.S. law only protected indigenous plants listed as endangered species. The 2008 amendment stipulates that all plant products imported into the U.S. have to be legal in compliance with the laws of each country.<sup>225</sup> The 2008 amendment made the U.S. the first nation to prohibit the import and sale of illegal timber and plant products.<sup>226</sup> Further, the amendments strengthened the penalties and punishments for violations of the provisions of the act and included strict regulations and requirements on how to prevent illegally sourced wood from being imported or entering the market. Such reforms took place in the context of growing concerns about the negative impact of illegal logging on natural resources and market opportunities for legitimate products and materials.<sup>227</sup>

Several U.S. government agencies are involved in the implementation of the Act's new provisions and the enforcement of the penalties if a company or individual violates the Lacey Act.<sup>228</sup> The United States Department of Agriculture's Animal Plant Health Inspection Service (APHIS) oversees the declarations required with any shipment or trade activity of wood products. Besides the federal agencies, several private and non-governmental organisations have also come together to create programs to enforce the Lacey Act and to help push awareness of illegal logging.<sup>229</sup>

The law sets forth several steps that anyone involved in the trade, sale, or transport of lumber or wood products should follow to abide by the provisions of the Lacey Act. The Lacey Act lays out clearly what is defined as a "plant" and what is required for companies or persons to make a declaration properly. The Lacey Act amendments also layout the penalties as a result of any violations.<sup>230</sup> Civil or criminal penalties apply differently depending on how deliberately a person or company chose to commit the

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<sup>225</sup>Kristina Alexander, 'The Lacey Act: Protecting the Environment by Restricting Trade' (Congressional Research Service 2014) <<http://www.fas.org/sgp/crs/misc/R42067.pdf>>

<sup>226</sup>Francis G Tanczos, 'A New Crime: Possession of Wood – Remedying the Due Care Double Standard of the Revised Lacey Act' (2009) 42 Rutgers Law Journal 549

<sup>227</sup>Lovegren (n 219) 4

<sup>228</sup>Yijin J Lee, 'The Lacey Act amendments of 2008: The world's First Ban on Illegal Logging Combats Deforestation but Get Stumped by Foreign Laws' (2014) 5 San Diego Journal of Climate and Energy Law 187

<sup>229</sup>ibid 194

<sup>230</sup>ibid 192

violation, and whether the person or company engaged in due care.<sup>231</sup> The Lacey Act defines due care as that degree of care which a relatively prudent individual would exercise under identical or similar circumstances.<sup>232</sup> However, the exercise of due care can be largely subjective and it is up to the individual company or person's discretion in exercising due care such that they can ensure they are not in violation of the Lacey Act.<sup>233</sup>

Since it passed on May 22, 2008, the Lacey Act amendments have already seen companies commit violations.<sup>234</sup> First time the legal case that resulted from the 2008 amendment was against Gibson Guitar Corporation, one of the high-profile companies to violate the Lacey Act.<sup>235</sup> The federal agents raided its factories and storage sites in 2009 and 2011 and found various types of wood products that were illegally purchased and imported. In 2012, Gibson signed a criminal enforcement agreement with the U.S. government. This agreement postponed criminal prosecution, and Gibson agreed to

- a) establish a compliance program in order to strengthen controls and procedures
- b) to pay a fine amount of \$300,000 and
- c) pay a community service payment of \$50,000 to the National Fish and Wildlife Foundation.<sup>236</sup>

Despite their positive and productive demonstration of the United States' efforts of combating the negative impact of global deforestation, the amendments are nonetheless weakened by dependency on the strengths and effectiveness of foreign laws that combat illegal logging.<sup>237</sup> The weaknesses of the amendments to the Lacey Act become apparent when it is recognised that one part of triggering a Lacey Act

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<sup>231</sup>Tara L Tchir, Edward Johnson and Lawrence Nkemdirim, 'Deforestation in North America: Past, Present and Future' (2004) 1 Regional Sustainable Development Review

<sup>232</sup>Rachel Saltzman, 'Establishing a "Due Care" Standard Under the Lacey Act Amendments of 2008' (2010) 109 Michigan Law Review First Impressions <<https://pdfs.semanticscholar.org/464b/f51edebf6c079ce10d2e9ecbc95065f18491.pdf>>

<sup>233</sup>Lee (n 228)

<sup>234</sup>Anne Middleton and Adam Grant, 'Fact Sheet: Are You Ready for the Lacey Act?' (World Resources Institute 2009) <<http://www.wri.org/blog/2009/12/fact-sheet-are-you-ready-lacey-act>>

<sup>235</sup>The United States Department of Justice (2012), <https://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations>

<sup>236</sup> Lovegren (n 219)

<sup>237</sup>Lee (n 228) 188

violation is dependent upon the forestry management laws that are in countries like Indonesia and the Democratic Republic of Congo.<sup>238</sup>

## **(B) Australia's illegal logging prohibition Act**

It is estimated that each year around AUD\$400 million of Australia's forest products imports come from the sources with some risk of being illegally logged.<sup>239</sup> In November 2011, the illegal logging prohibition bill was introduced in the Commonwealth Parliament. The Bill gave effect to the 2010 election commitment of the Gillard government to restrict the importation of illegally logged timber products into Australia.<sup>240</sup> The legislation restricts the import of illegally logged timber and endorses the trade in legally harvested timber by restricting the importation of illegally logged timber and forms part of international efforts to do so.<sup>241</sup>

The Illegal Logging Prohibition Act<sup>242</sup> came into force on 28 November 2012. The Act requires a structured risk assessment and mitigation process before a business or individual imports a regulated timber product (as defined by their customs tariff codes) into Australia or processes domestically grown raw logs.<sup>243</sup> Under the Act, Australian importers and processors of raw logs are required to perform due diligence to reduce the risk of illegally logged timber that are present in their supply chains.<sup>244</sup> The timber products to which the law applies and the due diligence requirements for importers and processors came into effect on 30<sup>th</sup> November 2014. To strengthen the enforcement of this Act, it sets out the robust penalty system, including the comprehensive monitoring system with investigation powers so that the enforcement of this act can be strengthened.<sup>245</sup>

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<sup>238</sup>ibid 201

<sup>239</sup>Jaakko Pöyry Consulting (n 135)

<sup>240</sup> Ben Saul and Tim Stephens, 'Not Yet Out of the Woods: Australia's Attempt to Regulate Illegal Timber Imports and World Trade Organisation Obligations' (2012) 19 Australian International Law Journal 143

<sup>241</sup>ibid

<sup>242</sup>Australian Government, Illegal Logging Prohibition Act 2012 No. 166, 2012

<sup>243</sup>Department of Agriculture and Water Resources, 'Reforming Australia's Illegal Logging Regulations: Consultation Regulation Impact Statement' (Commonwealth of Australia 2016) <<http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/illegal-logging-consult-ris.pdf>>

<sup>244</sup>Australian Illegal Logging Prohibition Act 2012, Section 12, Division 2 Importers' due diligence

<sup>245</sup> Australian Illegal Logging Prohibition Act 2012, Section 23, Division 4 Civil Penalties

According to this Act, timber is illegal if harvested in contravention of laws in force in the place where the timber was harvested.<sup>246</sup> The due diligence requirements stipulate that an importer must have information relating to the timber product and its area of harvest, including any legality frameworks which apply. A copy of the harvesting license as a piece of evidence that necessary payments or taxes have been paid at the point of the harvest would be essential to satisfy due diligence requirement. The requirements of this legislation apply to both imported timber and the timber or timber products produced or processed in Australia and are consistent with Australia's obligations under the World Trade Organisation (WTO).<sup>247</sup> The requirements apply to all the companies involved in trading in Australia, which establishes equal treatment for suppliers of timber regardless of nationality.

The Department of Agriculture and Water Resources is responsible for implementing the Act. To help companies adjust to the new requirements, the department has, since May 2015, been conducting compliance assessments across the industry. The Australian government decided not to impose any criminal or civil penalties on any businesses during the early stages of the Act. The government took a lenient approach and gave the Australian businesses enough time to understand the requirements of this Act and allow them to make changes to their business to incorporate the due diligence system. Companies and individuals who import timber products into Australia or process domestically grown raw logs can face penalties from 1 January 2018 for failing to comply with the illegal logging laws' due diligence requirements.<sup>248</sup> To prosecute someone under this Act, it needs to be proven that an Australian importer or processor knowingly, intentionally or recklessly imported or processed illegally logged timber.<sup>249</sup> The individual or a company can face significant penalties, including

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<sup>246</sup>Australian Illegal Logging Prohibition Act 2012, Section 7 Definitions

<sup>247</sup>KPMG, 'Independent Review of the Impact of the Illegal Logging Regulations on Small Business' (Department of Agriculture 2015) <<http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/independent-review-impact-illegal-logging-regulations.pdf>>

<sup>248</sup>Department of Agriculture and Water Resources, 'Illegal Logging Compliance Plan: Our plan for Managing Compliance (Commonwealth of Australia 2018) <<http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/illegal-logging-compliance-plan.pdf>>

<sup>249</sup>Department of Agriculture and Water Resources, 'Reforming Australian illegal logging regulations: Regulation Impact Statement: Regulation Impact Assessment' (Commonwealth of Australia 2017) <[https://ris.pmc.gov.au/sites/default/files/posts/2017/12/reforming\\_australias\\_illegal\\_logging\\_regulations\\_-\\_regulation\\_impact\\_statement.pdf](https://ris.pmc.gov.au/sites/default/files/posts/2017/12/reforming_australias_illegal_logging_regulations_-_regulation_impact_statement.pdf)>

imprisonment and hefty fines up to AUD\$85000 for an individual or AUD\$425000 for a corporation.

### **(C) European Union Forest Law Enforcement, Governance and Trade (FLEGT)**

As mentioned in the previous section, since 1998, numerous regional efforts were undertaken to tackle national forest law enforcement and governance (FLEG). Following the FLEG conference in Bali, in April 2002, the European Commission held a workshop in Brussels to identify options for the EU to help control illegal logging and the import into the EU.<sup>250</sup> After lengthy discussions following the workshop, the commission finally released its action plan on Forest Law Enforcement, Governance and Trade (FLEGT) in May 2003.<sup>251</sup> The European Council adopted the proposal for an EU FLEGT action plan in October 2003. It sets out measures through which the European Commission proposes to address the growing problem of illegal logging and related trade. The European Parliament adopted a motion on the topic in February 2004 and further elaborated in October 2008.<sup>252</sup>

A vital driving force to the whole FLEGT process, without which it is hard to envisage that any significant intergovernmental action would have taken place, was the persistent and often courageous activism of a relatively small number of environmental and development NGOs, working in both timber producing and consuming countries.<sup>253</sup> Environmental NGOs undertook a series of detailed investigations into the growing problem of illegal logging and related trade, notably in Cambodia, Indonesia, Brazil, and West Africa.<sup>254</sup> These highlighted the devastating local impact

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<sup>250</sup>Duncan Brack and Jade Saunders, 'Public Procurement of Timber: EU Member State Initiatives for Sourcing Legal and Sustainable Timber' (Chatham House, Royal Institute of International Affairs 2004)

<sup>251</sup> FLEGT Action Plan (n 18)

<sup>252</sup>Commission of the European Communities, 'Proposal for a Regulation of the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market' (EC 2008) < <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0644:FIN:EN:PDF> >

<sup>253</sup>An Bollen and Saskia Ozinga, 'Improving Forest Governance: A Comparison of FLEGT VPAs and their Impact' (Fern 2013) < [https://www.fern.org/fileadmin/uploads/fern/Documents/VPAComparison\\_internet\\_0.pdf](https://www.fern.org/fileadmin/uploads/fern/Documents/VPAComparison_internet_0.pdf) >

<sup>254</sup>Global Witness, Corruption, War and Foreign Policy: The Unsustainable Exploitation of Cambodia's Forests (Global Witness 1996)

of illegal logging on the environment, on forest communities and governance and showed how demand from the significant importing countries was fuelling the process.

The EU FLEGT Action Plan consists of four key elements: government procurement policies, financial due diligence, Voluntary Partnership Agreements (VPAs) between the EU and timber-producing countries, and illegal logging legislation to control timber imports from non VPA countries.<sup>255</sup> The VPAs are the central part of the FLEGT action plan. The FLEGT Action Plan invites developing countries (timber producer) to negotiate bilateral agreements with the EU in order to gain access to a green lane for legal timber imports into the European market.<sup>256</sup> Six countries have signed a VPA with the EU and currently developing the systems necessary to control, verify and license legal timber. In November 2016, Indonesia became the first country to be able to issue FLEGT licences through a Voluntary Partnership Agreement with the EU. Since then, it has issued more than 50,000 FLEGT licences to EU-bound shipments with a combined value of nearly USD 2 billion.<sup>257</sup> These countries are known as VPA partner countries. It is expected that in the next few years more countries will become the VPA partner countries and some countries are interested in the process of VPA.

The licensing systems established under the terms of VPAs are intended to prevent the export of non-licensed timber products from the partner country to the EU.<sup>258</sup> For every legal requirement, a VPA will list criteria, indicators and specific verifiers such as the documents that need to be produced in order to prove compliance that will form the basis for enforcement.<sup>259</sup> The action plan sets out a few basic requirements for partner countries to conclude VPA. Producer countries are free to decide if to enter into partnership agreements but once they have done so only timber verified as legal will be accepted from that country.

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<sup>255</sup>FLEGT Action Plan (n 18)

<sup>256</sup>Overdevest (n 208)

<sup>257</sup>EU FLEGT Facility, 'Indonesia Improving FLEGT Licensing Procedures (EU FLEGT 2018) <[http://www.euflegt.efi.int/indonesia-news/\\_/asset\\_publisher/FWJBfN3Zu1f6/content/indonesia-improving-flegt-licensing-procedures](http://www.euflegt.efi.int/indonesia-news/_/asset_publisher/FWJBfN3Zu1f6/content/indonesia-improving-flegt-licensing-procedures)>

<sup>258</sup>Brack (n 206) 3

<sup>259</sup>ibid

In all VPA countries, a designated licensing authority will be authorised to issue the FLEGT licences based on the approved verification process and the timber traceability system which ensures that non-verified timber does not enter the supply chain. In this way, VPAs will oblige partner countries not to grant licences for products containing timber that has been illegally produced in any other country, and FLEGT licences will indicate a country of harvest.<sup>260</sup>

The licensing system applies only to timber traded between VPA countries and the EU, but in practice, all VPA countries to date have made clear their intention to license all exports regardless of destination.<sup>261</sup> This could help to address an obvious problem with the FLEGT licensing system because it is built on agreements between the EU and individual countries, it is vulnerable to evasion if illegal products are shipped via non-VPA countries to the EU. Also, the EU Timber Regulation, which came into force in March 2013, extends controls to all timber imports to the EU, including from non-VPA countries. It requires timber producers and importers who place timber products on the EU market to have due diligence systems in place to minimise the chances of handling illegal timber. FLEGT licensed timber will automatically qualify as meeting due diligence requirements, thus providing additional incentives for countries to enter into VPAs.<sup>262</sup>

#### **(D) European Union Timber Regulation (EUTR)**

The FLEGT regulation entered into force in 2005, enabling bilateral FLEGT VPAs to be established between the EU and timber-exporting countries.<sup>263</sup> Policies resulting from the FLEGT action plan, however, are mostly voluntary and therefore lack adequate compliance. The aim of the European Union Timber Regulation is to change the current situation by imposing a ban on the use and sale of illegal timber on the European market. The Timber Regulation entered into force in March 2013.<sup>264</sup> High

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<sup>260</sup>Duncan Brack, 'Controlling Trade in Agricultural Commodities: Bilateral Agreements' (Chatham House and Forest Trends 2013) <[https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public\\_html/sites/default/files/Nov13Brack.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/Nov13Brack.pdf)>

<sup>261</sup>Brack (n 206)

<sup>262</sup>Jonsson (n 59)

<sup>263</sup>Levashova (n 91)

<sup>264</sup>ibid 291

demand for illegal timber in conjunction with inadequate national legislation to prevent the importation of illegal timber has forced the EU to take serious action and introduce this piece of legislation at EU level. The EUTR was one of several measures specified in the EC FLEGT Action Plan.<sup>265</sup> The EUTR has helped in increasing the market access of legally verified products in the EU and eventually has reduced the market and demand of products coming from the high-risk region which are challenging to verify.<sup>266</sup>

The regulation encompasses a variety of timber products ranging from pulp and paper, furniture, flooring, building products and other hardwood products. Nevertheless, the recycled products and printed materials such as magazines, books and newspapers are exempted from the scope of the regulation. Printed products are, at least for the first five years, excluded from the scope of the regulation.<sup>267</sup> Exemptions also exist, such as musical instruments, certain kinds of seats and smaller product groups. The regulation covers the timber and timber products imported from outside the EU and products produced or manufactured in the EU member states. The timber and timber products with valid FLEGT or CITES licenses are exempted from the due diligence regulation and considered as legal as per the regulation.<sup>268</sup>

In deciding whether the timber is legally or illegally harvested, the timber regulation acknowledges that the law of the harvesting country must be the rule of reference.<sup>269</sup> Instead of trying to list every such laws for each timber harvesting country, it identifies the category of legislation that would be considered, thus leaving operators, monitoring organisations and competent authorities to decide on what it means in the practice.<sup>270</sup>

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<sup>265</sup>European Commission, 'Evaluation of the EU FLEGT Action Plan: Final Report 2004-2014' (Forest Law Enforcement Governance and Trade 2016) Final <<https://ec.europa.eu/europeaid/sites/devco/files/report-flegt-evaluation.pdf>>

<sup>266</sup>Hoare (n 11)

<sup>267</sup>Levashova (n 91) 295

<sup>268</sup>Jade Saunders and Rosalind Reeve, 'The EU Timber Regulation and CITES' (Chatham House and CIFOR 2014) <<https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20140424EUTimberRegulationCITESsaundersreeve.pdf>>

<sup>269</sup>Client Earth, 'Risk Assessment Under the EU Timber Regulation and VPAs' (ClientEarth 2012)

<sup>270</sup>Article 2(h), Timber Regulation: 'Applicable legislation' means the legislation in force in the country of harvest covering the following matters: Rights to harvest timber within legally gazetted boundaries; Payments for harvest rights and timber including duties related to timber harvesting; Timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly



The EU member states are responsible for developing the penalty system under EUTR, which should be effective, proportionate and dissuasive for enforcing the regulation.<sup>271</sup> Under the effective, proportionate and dissuasive penalty system, the member states national rules may provide that penalties applied for infringements, the illegally harvested timber or timber products should not necessarily be destroyed but may instead be used for public interest purposes.<sup>272</sup> Regulation stipulates monitoring organisations to be recognised by the European Commission.<sup>273</sup> The monitoring organisations are responsible for developing the due diligence system which EU operators can use or help the operators to design the due diligence system. Member states must ensure that the infringements of this regulation, including operators, traders and monitoring organisations, are sanctioned by effective, proportionate and dissuasive penalties. The EUTR focuses on lowering the risk of illegal products entering into the supply chain rather than licensing legal ones.<sup>274</sup>

## 2.4 Complex nature of illegal timber trade

Illegal logging has moved from direct illegal logging to more advanced methods of concealment and timber laundering. Primary methods involve fabrication of logging permits, bribes to acquire logging permits and logging beyond concessions. The multitude of consequences attributed to illegal logging activities is strongly related to many underlying causes that vary between places and show high complexity covering structural, economic and political reasons. Contreras-Hermosilla<sup>275</sup> acknowledges that these complexities are influenced by factors such as policies, traditions and level of democracy. Governance responses, depending on the current definition of illegal logging, may address specific activities while disregarding others.

One of the fundamental challenges is the diverse understandings of what illegal logging means and to whom. This ambiguity has implications not only for estimating

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related to timber harvesting; Third parties legal rights concerning use and tenure that are affected by timber harvesting; and Trade and customs

<sup>271</sup>Regulation (EU) No 995/2010 Recital 27

<sup>272</sup>Regulation (EU) No 995/2010 Article 19

<sup>273</sup>Regulation (EU) No 995/2010 Recital 27 Article 8

<sup>274</sup>Saunders (n 268)

<sup>275</sup>Contreras-Hermosilla (n 144)

the scale of illegal logging and related trade but also because identifying its drivers and impacts. Many studies and programmes have acknowledged that various types of illegal logging may be differentiated, e.g. the “ten ways to conduct illegal logging”.<sup>276</sup> However it is recognised that many of these activities are interrelated and therefore, a clear differentiation becomes difficult.

Despite the broad acknowledgement and efforts to address illegal logging internationally over the last two decades, further actions are still required. The illegal timber is still being traded referred in chapter 1.<sup>277</sup> For instance, Indonesia has published data on law enforcement against illegal logging and other crimes in its State of Indonesia’s Forests 2018 report.<sup>278</sup> The report shows that numbers of operations against illegal logging has increased from 25 in 2015 to 88 in 2017 where authorities seized nearly 4,000 cubic metres of wood. In the same period, there were also 175 court cases for illegal logging. Need for greater international cooperation against illegal logging and the related trade in timber has therefore been firmly recognised at the highest level of intergovernmental cooperation. The existing differences between developing and developed countries (see chapter 3) can hinder the measures taken by countries. At present, the government agencies of both developing and developed nations, NGOs, businesses relying on forest resources are trying to identify the ways to set up interventions which are capable of enhancing compliance with national, subnational and local governmental policies and laws.

A key challenge in combating the global illegal wood trade is the fact that illegal wood crosses borders as a laundered “legal” product. Transnational crime, or the transnational trade in laundered products, provides a particular law enforcement challenge as national law enforcement has no international jurisdiction unless through specific operations or exclusive agreements. The UN General Assembly (UNGA) emphasised that coordinated action is critical to eliminate corruption and disrupt the criminal networks that drive and enable trafficking in wildlife, timber and timber

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<sup>276</sup>Nellemann (n 143)

<sup>277</sup>Hoare (n 11)

<sup>278</sup>United Nations Food and Agriculture Organisation, ‘The State of Indonesia’s Forests 2018’, Ministry of Environment and Forestry Republic of Indonesia (UNFAO 2018) <[http://perpustakaan.bappenas.go.id/lontar/file?file=digital/191959-%5B\\_Konten\\_%5DKonten%20E2337.pdf](http://perpustakaan.bappenas.go.id/lontar/file?file=digital/191959-%5B_Konten_%5DKonten%20E2337.pdf)>

products, harvested in violation of national laws.<sup>279</sup> In addition, the 2030 Agenda for Sustainable Development and the related Sustainable Development Goals adopted by the UNGA in September 2015, link environmental security and sustainable development emphasising that combatting illegal logging and related timber trade is vital for the future and requires considerable attention.<sup>280</sup>

Actions to illegal logging require stringent legislative measures and better implementation of existing laws, clampdowns on fraud, and generating opportunities for indigenous communities. Attention must be paid to monitor and assess the impacts of the various initiatives individually and on a range of stakeholders. Information sharing, informed decision-making and improved capacity building at all levels of governance are essential to achieve the objectives of legislation and initiatives in place. The continuous failure of global forest governance on the legally binding agreement and pressure from environmental NGOs forced developed countries to introduce measures to tackle the issue of the illegal timber trade.<sup>281</sup> The countries like USA, Australia and Europe have developed legislative measures to control the illegal timber import. However, the effectiveness of these measures on a global and national scale is still to be assessed and this research attempts to evaluate the effectiveness of European Union Timber Regulation in the UK.

#### 2.4.1 The complexity of Illegal logging from producer countries' case studies

The chapter highlights that illegal logging is one of most devastating wildlife crimes since it threatens not only one species but the entire habitat. The illegal logging usually involves cutting common species for charcoal or pulp and paper.<sup>282</sup> The rare species of tropical hardwood are targeted for the furniture industry and provides a prime example of the way that the wild animals harvested or being exported as opposed to the national laws in source country can still be introduced into the authentic trade

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<sup>279</sup>United Nations Environment Programme, 'Scenario Note for the First Session of the United Nations Environment Assembly of the United Nations Environment Programme' (UN 2014)

<sup>280</sup>United Nations General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (UN 2015) < [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)>

<sup>281</sup>Sam Lawson, 'Illegal Logging and Related Trade: Measuring the Global Response' (Chatham House 2007) <<https://www.illegal-logging.info/sites/files/chlogging/uploads/Measuringtheresponse.pdf>>

<sup>282</sup>United Nations Office on Drugs and Crime (UNODC), 'World Wildlife Crime Report: Trafficking in Protected Species' (UNODC 2016)

market in other countries. A small amount of the tropical hardwoods that are used on stylish furniture are CITES listed, which includes the mahogany (*Swietenia* species and *Cedrela* species), afrormosia (*Pericopsis elata*), and ramin (*Gonystylus* species). Several species commonly marketed as “rosewood” are also contained.<sup>283</sup>

Over the past few years, focus on high value, CITES listed Siamese rosewood (*Dalbergia cochinchinensis*), which can be found in the Cambodia, Lao People’s Democratic Republic, Thailand and Viet Nam. Harvesting of this species is prohibited under national legislation during much of its range.<sup>284</sup> The harvesting of Burmese rosewood (*Dalbergia oliveri*) and Burmese padauk (*Pterocarpus macrocarpus*), that are not included in the CITES-list, appears to have filled the void. As previously noted, these species are recognised as endangered, and therefore they are protected under national law across all countries, but not under CITES.

Some of the poorer source countries have struggled to stop increasing trade in tropical hardwoods and rosewood species, as they do not have the ability to monitor the forest loss and to prevent excessive logging.<sup>285</sup> Some source countries have imposed log export bans or even the overall logging bans. Nevertheless, with limited ability to track and enforce these checks, exports can be vulnerable to the introduction of wood that is illegally sourced.<sup>286</sup> The logging bans can give officials a base for action at logging sites, but do not provide a basis for challenging exports. This occurs because even if the new wild harvesting is not permitted, it is still possible that the timber to be exported is derived from the stocks of timber felled prior to the ban, or that it was imported from any other country without the logging ban.

All of this creates a scenario of considerable ambiguity as to the legality of any given export. To aggravate the confusion, all those domestic controls seem to have little power as soon as the wood has been exported. Outside CITES, most destination

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<sup>283</sup>CITES Appendix (n 197)

<sup>284</sup>Rachel Nuwer, ‘Tracing Thailand’s Illegal Rosewood Trade’ (Scientific American 2018) <<https://www.scientificamerican.com/article/tracing-thailands-illegal-rosewood-trade/>>

<sup>285</sup>UNODC (n 282)

<sup>286</sup>Phuc Xuan To and others, ‘Impacts of the Laos Log and Sawm wood Export Bans’ Forest Trends Report Series: Forest Policy, Trade, and Finance (Forest Trends 2017) <<https://www.forest-trends.org/wp-content/uploads/imported/Laos%20Export%20Ban%20Final.pdf>>

countries do not have a legal basis for refusing wood that has been harvested or exported contrary to source country regulations. The US Lacey Act, the EU Timber Regulations, and the Australian Illegal Logging Prohibition Act prohibit the import of any illegal timber, wherever the law was broken. For other destination markets, however, the local regulations of source countries are insignificant and the trade could not be refused. Thus, illegally logged or exported timber can be a part of legal tropical hardwood furniture in another national market.

In another case of illegal logging, during 2013 and 2014, Environmental Investigation Agency (EIA) carried out in-depth research in Kalteng area of Indonesia to identify timber harvested illegally from palm oil concessions.<sup>287</sup> The EIA also found that land clearing occurred far beyond the boundaries of the concession, as far as 2 km into areas designated as Production Forest. By 2014, Kotawaringin Timur's state attorney brought criminal charges against four individuals connected to the organisation. The case was brought on the relatively small charge of cultivating palm oil on 181ha of land in 2012 before obtaining a permit, in the breach of the Forestry Law and Plantation Law. The allegations were dismissed before the case made it to trial because the contents of the indictment were "vague" and it should be heard in a civil court. In October 2014, a judicial official confirmed to EIA that the case remains in the system. The case illustrates how concessions must undergo more in-depth inspection, even when there is a seemingly legitimate permit. The scale of the offences that occurred before the permit that is issued, and for the illegitimacy during the process of establishing tenure over the concession, means the timber from it should be considered illegal.

In 2015, an undercover investigation by Greenpeace Brazil exposed how logging company laundered and sold over \$7 million of illegal timber. The company filed fraudulent paperwork to claim high quantities of the valuable timber in areas than it could legally log. Then it used that documentation to launder illegal wood from other areas of the Amazon. After one-year, Brazilian authorities confirmed that the company engaged in large scale fraud and imposed sanction on the company. Nevertheless,

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<sup>287</sup>Environmental Investigation Agency (EIA), 'Permitting Crime: How Palm Oil Expansion Drives Illegal Logging in Indonesia' (EIA 2014) < <https://eia-international.org/wp-content/uploads/Permitting-Crime.pdf>>

the damage is already done because the laundered wood entered the global market.<sup>288</sup>

The World Bank study<sup>289</sup> reported that criminal justice system has been used to combat illegal logging but only in very sporadic instances and in a restricted and inefficient manner. The study also reported that most cases targeted the low-level criminals whose involvement in illegal logging activity was due to poverty and therefore did not create any effective results and encouraged sceptics to overlook the relevance of criminal justice methods. There are few examples available that indicates the failure of criminal justice system in the field of illegal logging. In 2005, an initiative to fight illegal logging identified 186 suspects in Papua, Indonesia and secured nearly 400,000 cubic meters of illegally harvested timber. However, only 13 suspects were convicted and the prison sentence of two years was the only most significant punishment.<sup>290</sup>

Likewise, in April 2010, Indonesia's President Yudhoyono ordered the country's Anti-Mafia Task Force to review cases of illegal logging in which suspects were convicted or acquitted to lenient sentences. It was discovered that from 92 accused of illegal logging, 49 were acquitted, 24 received one-year prison terms and 19 others received between one and two years of punishment.<sup>291</sup>

From the above cases, it is apparent that illegal logging has many multifaceted causes ingrained deeply in the social, economic, cultural and political structures of the societies. The impact of illegal logging varies, depending on local, regional and historical circumstances, making it challenging to employ a simplified solution globally. The international community, national and local governments, multilateral, regional and bilateral processes as well as civil society organisations have heavily invested their resources in tropical forest governance. While some measures yielded

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<sup>288</sup>How Loggers Are Destroying the Amazon — and Getting away with it' (Greenpeace 2015) <<https://www.greenpeace.org.au/blog/loggers-amazon/>>

<sup>289</sup>Marilyne Pereira Goncalves and others, 'Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging' (World Bank 2012) <[https://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal\\_Logging.pdf](https://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal_Logging.pdf)>

<sup>290</sup>Fidelis E Satriastanti, 'Forest of Problems Hinders Illegal Logging Fight' (Jakarta Globe 2010) <<http://www.archive.asia-pacific-solidarity.net/southeastasia/indonesia/netnews/2010/ind16v14.htm>>

<sup>291</sup>Goncalves (n 289)

encouraging results,<sup>292</sup> the problem of corruption, deficiencies in the design and performance of regulations and enforcement institutions are some of the weaknesses that still need to be addressed.

The discussion about the various definition of illegal logging, its impact and measures undertaken highlights that it is significant to clarify the concept of illegal timber trade to check the effectiveness of a regulation that tackles illegal logging and related trade. The varied impacts of illegal logging helps in identifying the activities that are considered illegal in the context of harvesting and timber trade which could also have significant impact on forest and people. The different legislative measures adopted by the timber consuming countries and other international efforts help in understanding how the international provisions interact with legal system which subsequently be useful to achieve the aim of the study. The insight of complexity within illegal timber trade including the dynamics of timber producer developing countries helps in determining the tools or regulatory governance used in the conceptualization or designing the legislation to tackle the multifaceted issue of illegal logging.<sup>293</sup>

Chapter three helps in setting the theoretical background for this research. It attempts to study the developments within the international forest policies and analyses the failure of the international community in attaining legally binding international agreements on forest issues during various global forest conventions. The chapter also describes the theories of transnational timber legality initiative and explains how the experimentalist governance provides the analytical framework for the thesis.

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<sup>292</sup>Robertus Pudayanto, 'VPA Supports Increased Law Enforcement Against Illegal Logging in Indonesia' (EUFLEGT Facility 2018) <[http://www.euflegt.efi.int/web/guest/news/-/asset\\_publisher/VoA92AEdZlro/content/vpa-supports-increased-law-enforcement-against-illegal-logging-in-indonesia](http://www.euflegt.efi.int/web/guest/news/-/asset_publisher/VoA92AEdZlro/content/vpa-supports-increased-law-enforcement-against-illegal-logging-in-indonesia)>

<sup>293</sup>Maria Mousmouti, 'The "Effectiveness Test" As a Tool for Law Reform' (2014) 2(1) Law Reform and Child Protection < <https://sas-space.sas.ac.uk/5752/1/2116-3099-1-SM.pdf>>

## Chapter 3: The global forest conventions, development of transnational timber legality verification initiative and experimentalist governance

### 3.1 Development of global forest negotiations

The historical developments strongly influence the forest policies implemented today in the forest sector.<sup>294</sup> The series of international forest conventions took place in the last three decades but participating nations or agencies have not been able to frame legally binding agreements on forests.<sup>295</sup> In the absence of a legally binding global forest policy, many global forest conventions, regional, multilateral and bilateral policy initiatives, processes and arrangements have emerged.<sup>296</sup> Therefore, it is necessary to analyse and understand the historical developments of the sector to form the theoretical background for the thesis.

The regulation of forest access and resources are in focus of local governments, especially in developing and underdeveloped countries.<sup>297</sup> Forests were being viewed as not just a global resource but also an object of knowledge that could be managed, made productive, and economised.<sup>298</sup> For many years, sustainable management of timber supplies was debated internationally.<sup>299</sup> However, the concern to protect global forests emerged in the 1980s, which in many ways was a starting point for attention to global environmental issues. In the mid-1980s, tropical deforestation climbed the international agenda as importance of forests and the biological diversity sustained by tropical forests realised.<sup>300</sup>

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<sup>294</sup>Donald L Grebner, Pete Bettinger and Jacek P Siry, *Forest Policies and External Pressures* (eds) Introduction to Forestry and Natural Resources (Academic Press 2013)

<sup>295</sup>Deborah S Davenport, 'An Alternative Explanation for the Failure of the UNCED Forest Negotiations' (2005) 5(1) *Global Environmental Politics* 105

<sup>296</sup>Stefan Werland, 'Global forest governance: Bringing Forestry Science (back) in' (2009)11 *Forest Policy and Economics* 446

<sup>297</sup>William D Sunderlin, Arild Angelsen and Sven Wunder, 'Forests and Poverty Alleviation' (Center for International Forestry Research 2004)

<sup>298</sup>Per Anglestam and others, 'Knowledge Production and Learning for Sustainable Forest Management on the Ground: Pan-European Landscapes as a Time Machine (2011) 84(5) *Forestry* 581

<sup>299</sup>William Boyd, 'Ways of Seeing in Environmental Law: How Deforestation Became an Object of Climate Governance' (2010) 37 *Ecology Law Quarterly* 843, 881  
<<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1931&context=elq>>

<sup>300</sup>ibid



The concept of biodiversity was first introduced in 1986 at the conference of the National Forum on Biodiversity, which was held in Washington, DC, USA.<sup>301</sup> This conference not only dealt with the richness of life on earth and the threats to the extinction of species but also addressed the economics, functions, values and conservation of biodiversity. Another source for the term biodiversity has been the International Union for Conservation of Nature (IUCN).<sup>302</sup> This international nature conservation organisation recognised the need for a global biodiversity convention in 1984 and wrote a draft treaty.<sup>303</sup> Inspired by this, the United Nations Environment Program (UNEP) established an intergovernmental negotiation committee to design a legally binding global biodiversity treaty. This led, after complex and challenging negotiations, to the adoption of the Framework Convention on Biological Diversity in 1992, which was signed by most countries at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in the same year.<sup>304</sup>

Many conventions addressed the forest concerns but three of them are of particular importance to the forest sector: The Convention on Biological Diversity (CBD), the United Nations Convention to Combat Desertification (UNCCD) and the United Nations Framework Convention on Climate Change (UNFCCC). All three of the Rio conventions recognise the significant contribution of forests in achieving their respective goals and objectives.<sup>305</sup>

The Convention on Biological Diversity (CBD) and its accompanying protocols support an international effort to protect and sustain future generations of Earth's biological resources.<sup>306</sup> The CBD has provided an important forum for discussing biodiversity-related issues of access and benefit-sharing, such as conventional rights to land and

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<sup>301</sup>José Luiz de Andrade Franco, 'The concept of Biodiversity and the History of Conservation Biology: From Wilderness Preservation to Biodiversity Conservation' (2013) 32 *Historia* 21, 22 <[http://www.scielo.br/pdf/his/v32n2/en\\_a03v32n2.pdf](http://www.scielo.br/pdf/his/v32n2/en_a03v32n2.pdf) >

<sup>302</sup>The International Union for Conservation of Nature is the global authority on the status of the natural world and the measures needed to safeguard it.

<sup>303</sup>Secretariat of the Convention on Biological Diversity, 'Global Biodiversity Outlook' (CBD 2001)

<sup>304</sup>Bas Arts and Marleen Buizer, 'Forests, Discourses, Institutions: A Discursive-Institutional Analysis of Global Forest Governance' (2009) 11 *Forest Policy and Economics* 340,344

<sup>305</sup>The Rio Conventions on Forests: Action on Forests (2012) [https://unfccc.int/resource/docs/publications/rio\\_20\\_forests\\_brochure.pdf](https://unfccc.int/resource/docs/publications/rio_20_forests_brochure.pdf)

<sup>306</sup>History of the Convention, Convention on Biological Diversity <https://www.cbd.int/history/>

intellectual property rights.<sup>307</sup> Since the advent of the CBD, many countries have considerably moved ahead with its implementation. For instance, since 2002, Brazil has significantly reduced deforestation in the Brazilian Amazon and designated half of Acre's Amazonian state as protected areas.<sup>308</sup> The UNCCD supports sustainable land management strategies such as agricultural conservation, agro-forestry and soil preservation in drylands, where tree removal, cropping and overgrazing leads to soil erosion and degradation of watersheds. The UNFCCC acknowledges the important role forests play in mitigating climate change, as they represent a major global carbon reserve.<sup>309</sup>

The next section analyses the success and failure of forest conventions and other developments that took place in governing forest resources worldwide. It highlights that why the international forest community shifted from global forest convention to the transnational timber legality verification approach to combat the multidimensional issue of illegal logging and timber trade. It further explains how the timber legality verification initiative incorporated in the form of legislation.

### 3.1.1 Journey from forest Principles to United Nations Forum on Forests

The G7<sup>310</sup> countries, the group of seven major industrialised states, initiated the international negotiations aimed at a global forest convention in 1990. Forests had been firmly placed on the international agenda during the UN Conference on Environment and Development (UNCED) process, which acted as the facilitator for building an official discourse on the topic.<sup>311</sup> The conference highlighted a period of numerous international environmental agreements. The legacy of UNCED was three conventions covering biodiversity (Convention on Biodiversity, CBD), climate change

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<sup>307</sup>Catherine Klein, 'New Leadership Needed: The Convention on Biological Diversity' (2016) 31 *Emory International Law Review* 135

<sup>308</sup>Ministry of the Environment of Brazil, Office of the National Program for Biodiversity Conservation, Fourth National Report to the Convention on Biological Diversity (2010) Ministry of the Environment <<https://www.cbd.int/doc/world/br/br-nr-04-en.pdf>>

<sup>309</sup> The Rio Convention on Forests (n 305)

<sup>310</sup>The Group of Seven (G7) is an informal forum of countries representing around half of global economic output. The group has met regularly since 1976 to discuss key issues related to global economic stability

<sup>311</sup>Melanie Steiner, 'The Journey from Rio to Johannesburg: Ten Years of Forest Negotiations, Ten Years of Successes and Failures (Rio's Decade: Reassessing the 1992 Earth Summit)' (2002) 32 *Golden Gate University Law Review* 629, 630

(UN Framework Convention on Climate Change, UNFCCC) and desertification (UN Convention to Combat Desertification, UNCCD).<sup>312</sup> The Rio Summit generated a variety of forest commitments relating to, both legally and non-legally binding (Forest Principles), and prompted many other forest-related initiatives and commitments. While the adoption of a legally binding instrument focusing on forests failed at the UNCED in 1992, forests formed the central part on the international level.<sup>313</sup>

Three years, after the Rio Earth Summit, was known as a time of building confidence between the negotiating partners. Subsequent to this phase, representatives in the third session of the Commission on Sustainable Development (CSD-3) reached agreement on the formation of an ad hoc Intergovernmental Panel on Forests (IPF), with a time limit of two years to review forest issues and to report the CSD in 1997. The IPF was not created to implement the forest principles that have emerged because of Rio, but instead to take forward the work that was begun during the 1992 Earth Summit and to produce concrete goals, capable of implementing the action.<sup>314</sup>

Between 1995 and 1997, four IPF sessions took place and finally agreed to over one hundred action proposals related to sustainable forest management. In some instances, however, matters remained pending because further examination and discussion were required.<sup>315</sup> One of the recommendations to appear out of the final IPF session (IPF-4) was intended to proceed with Intergovernmental dialogue post-IPF in the hopes of achieving consensus on critical issues.<sup>316</sup> The IPF also underscored the need for enhanced international efforts in sectors such as governance, international institutions, and organisations and instruments.<sup>317</sup> Accordingly, the final IPF report recommended that a successor body be formed to keep working towards achieving consensus on issues that might not be resolved by the IPF process.<sup>318</sup>

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<sup>312</sup>Gunilla Reischl, 'Designing Institutions for Governing Planetary Boundaries: Lessons from Global Forest Governance' (2012) 81 *ecological economics* 33, 36

<sup>313</sup>Werland (n 296) 446

<sup>314</sup>Steiner (n 315) 638

<sup>315</sup>Catherine P Mackenzie, 'Future Prospects for International Law' (2012) 14(2) *The International Forestry Review* 249

<sup>316</sup>Steiner (n 311)

<sup>317</sup>Report of the Ad Hoc Intergovernmental Panel on Forests on its fourth session (New York), U.N. ESCOR Doc. E/CN.17/1997/12, at 140 (1997)

<sup>318</sup>Steiner (n 311) 640

In July 1997, the United Nations Economic and Social Council (ECOSOC)<sup>319</sup> decided to create a special Intergovernmental Forum on Forests (IFF) to continue the work of the panel for the next three years.<sup>320</sup> The IFF held four meetings, with fourth and last session being organized from January 31 - February 11, 2000 in New York. The programme components discussed at IFF-4 included: promoting, facilitating and monitoring implementation of the IPF proposals for action, the need for financial resources, problems requiring further explanation and protection of all forest types and sustainable development. Despite the difficulty with a few of these elements, the IFF was able to succeed in establishing consensus and reached agreement on proposals for action on all programme.<sup>321</sup> In the end, a decision was reached after hours of negotiations to establish a United Nations Forum on Forests (UNFF).<sup>322</sup>

The UNFF is an intergovernmental policy forum to promote the management, conservation and sustainable development of all types of forests. Its primary function was to strengthen long-term political commitment.<sup>323</sup> The UNFF met ten times from 2001 to 2013 to discuss the issues related to forests with a different set of objectives and the eleventh session concluded on 14<sup>th</sup> May in 2015 at New York. In 2007, at its seventh session, the UNFF adopted a non-legally binding instrument on all types of forests, following nearly three years of intense negotiations, starting from UNFF-5 and culminating at UNFF-7. The main objective of this instrument was to increase the strength in political commitment to implement sustainable management practices for all types of forests at all levels. In September 2014, the New York Declaration on Forests pledged to halve the rate of deforestation by 2020 and end the loss of natural forests by 2030 at the Climate Summit held at UN Headquarters in New York.<sup>324</sup>

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<sup>319</sup>The Economic and Social Council (ECOSOC) is the United Nations' Central Platform for Reflection, Debate, and Innovative Thinking on Sustainable Development

<sup>320</sup>UNGA Resolution A/Res/S-19/2 (1997), See also, Proposed Programme of Work of the Intergovernmental Forum on Forests, U.N. ESCOR Doc. E/CN.17/IFF/1997/2

<sup>321</sup>David Humphreys, 'The Elusive Quest for a Global Forests Convention' (2005) 14(1) Review of European, Comparative and International Environmental Law < <https://www.cbd.int/doc/articles/2005/A-00470.pdf>>

<sup>322</sup>Steiner (n 311) 642

<sup>323</sup>United Nations Forum on Forests, Report on the Organisational and First Sessions, ECOSOC E/2001/42/Rev.1, 12 and 16 February and 11–22 June 2001

<sup>324</sup>United Nations Climate Change, 'New York Declaration on Forests - Halving the Loss of Natural Forest By 2020, Striving to End it By 2030' (UN 2015) < <https://unfccc.int/news/new-york-declaration-on-forests>>

It is evident that forests have been in the central agenda in many UN conferences, starting from Kyoto Protocol in 1997 to New York declaration on forests in 2014, but the success of these conferences to save the forest is obscure and it seems like never ending process. In 2007, UNFF 7 approved a “Non-Legally Binding Instrument on all Types of Forests” (NLBI) but the Core Forest Process remains mostly ineffective because the instrument is not legally binding, i.e. participation and compliance are voluntary and the instrument adopted has yet to affect changes in the behaviour of actors or the policies of institutions.<sup>325</sup> It is necessary to understand why the efforts of forming a strong agreement have been failed. Virtually there is no progress made even after more than two decades, then why governments continue to engage in international deliberations. The next section focuses on the developments that took place during the conventions and analyses why the international convention on forests does not seem to be an achievable target.

### 3.1.2 The failures of forest negotiations: North-South divide

Global debates on sustainable forest management have been primarily characterised as a collective debate between the rich and developing countries<sup>326</sup>, in the forest context—countries that have tropical forests with high levels of deforestation and those with boreal and temperate forests with low deforestation rates. When the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, it appeared that it would be possible to come up with a legally binding agreement on forests.<sup>327</sup> Instead, the parties adopted the non-legally binding statement of principles on the management, conservation and sustainable development for all types of forests (forest principles)<sup>328</sup>. The forest principles lack both specifics and implementation action, leaving it very difficult to achieve the objectives.

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<sup>325</sup>Werland (n 296)

<sup>326</sup>Adil Najam, Ioli Christopoulou and William Moomaw, “The Emergent System of Global Environmental Governance (2004) 4(4) Global Environmental Politics 23

<sup>327</sup>Jane A Leggett and Nicole T Carter, ‘Rio+20: The United Nations Conference on Sustainable Development’ (Congressional Research Service 2012) < <https://fas.org/sgp/crs/row/R42573.pdf>>

<sup>328</sup>Forest Principles is a non-legally binding framework for international action to deal with the causes and impacts of deforestation, particularly within the tropics, that was agreed at the United Nations Conference on Environment and Development in 1992

In the post-UNCED conferences and meetings, the international will to arrive at a legally binding agreement was missing<sup>329</sup> and the international community was divided in reaching agreement on the forest convention. Despite widespread awareness of the crisis in tropical forests, the international community has moved from one policy to another. Explanations of the failure of global forest governance have focused on a variety of factors, including conflicts over sovereignty and control of forest resources, northern consumption patterns, appropriate financial mechanisms and limited institutional and forest governance capacities at national and sub-national levels.<sup>330</sup>

Before the Rio conference in 1992, many organisations had already started preparing the issues of global forest governance. With forests strongly in the agenda at Rio, the discussion of a Global Forest Convention (GFC) had been looking like a step away. Though, negotiations toward the GFC became rapidly distracted, owing to a widening gap between North-South negotiating partners.<sup>331</sup> Forests were the one environmental commodity on which developing countries were unwilling to reach a compromise.<sup>332</sup> Issues such as the underlying causes of deforestation, northern consumption patterns, appropriate financial mechanisms and technology transfer hindered the attainment of consensus in governing the world's forests.<sup>333</sup>

Forest negotiations were divided between developed countries of North and developing countries of the South. In the North, the Organisation for Economic Co-operation and Development (OECD)<sup>334</sup> countries have been unanimous in their appeals for forest convention. In south, the group of seventy-seven (G77)<sup>335</sup>

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<sup>329</sup>Katharina Kunzmann, 'The Non-Legally Binding Instrument on Sustainable Management of all Types of Forests: Towards a Legal Regime for Sustainable Forest Management?' (2008) 9 German Law Journal 981, 982

<sup>330</sup>Boyd (n 299) 866

<sup>331</sup>Steiner (n 311) 632

<sup>332</sup>Nicola Durrant and Rowena Maguire, 'An Integrated Legal Approach to Global Environmental Governance: Combating Climate Change, Drought and Deforestation' (2006) 9 Canberra Law Review 65,76

<sup>333</sup>Steiner (n 311) 632

<sup>334</sup>The Organisation for Economic Co-operation and Development (OECD) is an International Economic Organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. The OECD provides a forum in which governments can work together to share experiences and seek solutions to common problems.

<sup>335</sup>The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries. The Group of 77 is the largest intergovernmental organisation of developing countries in the United Nations, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.

developing countries, supported by China, strongly opposed to a convention because it would interfere with the sovereign rights of states to control their natural resource use policies.<sup>336</sup> Developing countries were also of the view that financial incentives should be offered by developed countries to finance the protection of the world's remaining forest stocks. The Malaysian Prime Minister commented, "If it is in the interests of the North that we do not cut down our trees then they must compensate us for our loss of income".<sup>337</sup>

The North attempted to specify jurisdictional duties for forested countries of the southern hemisphere by emphasising the fundamental principle of stewardship, under which all countries need to preserve their forest cover. The Southern developing countries declined the concept of stewardship as an infringement on sovereignty. US negotiator Curtis Bohlen stated that some countries are not willing to take specific measures to protect their forests and they are trying to obtain money prior to agreeing to do anything.<sup>338</sup>

Similar to the unstable UNCED forest talks, the international debate on forest policy became more constructive at the turn of the millennium. The origins of this transformation can be traced to an informal intergovernmental working group on forests co-sponsored by Canada (the most persistent pro-convention advocate over the last decade) and Malaysia (which led for the G77 during the UNCED negotiations). This group agreed on a programme adopted by the Commission on Sustainable Development in a revised form as the programme of work for the Intergovernmental Panel on Forests. Nevertheless, nominal progress has been made on the issues of trade, finance and technology transfers.<sup>339</sup>

Canada's stance was that it would talk about the funding only if the other states agreed on a forest convention that also prevailed during the last phase of the IFF negotiations. The G77 stayed firm in their argument for higher financial flows and technological

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<sup>336</sup>Humphreys (n 190)

<sup>337</sup>Speech by the Prime Minister of Malaysia, Data Seri Dr Mahathir Mohamad at the official opening of the Second Ministerial Conference of Developing Countries on Environment and Development, Kuala Lumpur on Monday 27 April 1992, para.11

<sup>338</sup>Humphreys (n 190) 127

<sup>339</sup> Humphreys (n 190) 128

transfer and again, the developed countries managed to avoid making any concessions. At the IFF, many countries demanded the establishment of a global forests fund. In response, the EU and the United States did not agree to support the global forest fund.

Canada headed the negotiations for the pro-convention lobby at IFF 4 and the moment when the IFF discussed the convention issue, the representatives had apparently agreed to create UNFF. However, two days from the end of IFF 4, Canada withdrew its support for UNFF as there was no consensus for a convention.<sup>340</sup> The United States, who objected with the commitments both to a convention and the supplementary financial flows, supported the creation of UNFF. Canada agreed somehow, despite the absence of the firm commitment to a forest convention. The G77 spokesman noted that the G77 had made the concessions in the spirit of compromise and that their key concerns on finance, trade and technology continued to be outstanding and should be dealt with by UNFF after it is created.

Forest convention proved to be impossible to achieve as the negotiations revealed deep divisions among developed and developing countries. Critically, negotiations about forest convention and attempts to embed its principles in a legally binding agreement plunged because of three key points. First, there was no agreement on how developing countries would be compensated for not being able to use their forests to develop their economies. Second, some countries felt that a legally binding agreement would limit their sovereignty. Third, there were concerns by non-governmental organisations that a legally binding agreement would favour timber production to the detriment of other interests.

The current international forest regime consists of soft law (non-legally binding) instruments. The term 'soft law' does not have a precise legal meaning, but it usually refers to any international instrument other than a treaty containing principles<sup>341</sup>, norms, standards, such as the IPF/IFF proposals for action. It reflects political rather

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<sup>340</sup>ibid

<sup>341</sup>Feja Lesniewska, 'Laws for Forests: An Introductory Guide to International Forest and Forest Related Legal Materials That Shape Forest Ethics and Practice' (International Institute for Environment and Development 2005) <<http://eprints.soas.ac.uk/21045/1/13505IIED.pdf>>



than legal commitments. Those states that reject any resolution do not generally distance themselves from the negotiating process and do not subsequently ignore its existence. The states who reject the resolution has no obligation to comply with any commitments and respect other states to react as they think appropriate. Thus, soft law is characterised by a lack of state consent, respectively the lack of consent to be bound by an agreement.<sup>342</sup> State consensus is perceived as a fundamental parameter for the legitimacy of an agreement. Considering these aspects, soft law on forests is essential for the formation and evolution of international law on forests and a valuable part of an ideal international forest regulation. This in turn, advocates for international legally binding norms on the forest to ensure the enforcement of forest regulation.

### 3.2 The complexities of international forest governance

International forest dialogues, by its very nature, includes a range of actors that vary widely in their type, specific interests, and goals. They constitute a wide variety of entities from global institutions, civic groups to national governments. Although global forest governance has been described as a ‘non-regime’ by Dimitrov<sup>343</sup>, the current framework is more accurately described as a “regime complex” – a set of specialised sectoral and issue-based regimes and other governance arrangements more or less loosely linked together, sometimes mutually reinforcing and sometimes overlapping and conflicting.<sup>344</sup>

The myriad of national and international organisations involved Global Forest Governance (GFG) make the system complex. Complexity is interpreted as a source of failure and should be minimised or fixed.<sup>345</sup> These complexities create a lack of coherence in state approaches in the international arena which added to the failure of the GFG. As such, it has resulted in divisions between developed nations and underdeveloped nations which is difficult to bridge and a general inability to look at

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<sup>342</sup>Anja Eikermann, *Forests in International Law: Is There Really Need for an International Forest Convention* (Springer International Publishing 2015) 138

<sup>343</sup>Radoslav S Dimitrov, *Science and international environmental policy: Regimes and non-regimes in global governance* (Rowman & Littlefield 2006)

<sup>344</sup>Robert O Keohane and David G Victor, ‘The Regime Complex for Climate Change: Discussion Paper 2010-33 Cambridge, Mass’ (The Harvard Project on International Climate Agreements 2010)

<sup>345</sup>Geert Teisman, Arwin van Buuren and Lasse M. Gerrits, *Managing Complex Governance Systems: Dynamics, Self-organisation and Co-evolution in Public Investments* (Routledge 2009) p.2

forest issues. The proliferation of international instruments, in particular the treaties or conventions concerning GFG, and the lack enforcing means have complicated the problem, making effective governance at all levels more difficult.

It is important to note that forest issues are multidimensional and have numerous linkages such as biodiversity conservation, climate change, economic development, sustainable forest management, poverty reduction and livelihoods, trade and economic development. To handle this complexity, the international forest dialogues kept on shifting the agenda to address emerging urgencies better. During the past 40 years, these transformations have altered forest policy from a commodity issue into a biodiversity issue, a sustainable development issue and a human rights issue among others.<sup>346</sup> As the world's population increases, demand for agricultural commodities and timber will continue to increase. So, the improvements in agriculture productivity and the sustainable management of forests need to play a vital role in Global Forest Governance.

The multi-dimensional issues related to forests, such as illegal logging and trading of timber, requires a great deal of co-operation between both timber producer and consumer countries. For an international instrument to be effective, countries must engage fully with it. For example, the restricted implementation of the 1992 Convention on Biological Diversity (CBD) shows that it is almost impossible to implement aspirational legislation effectively.<sup>347</sup> The responsibilities of Article 14 (Access to Genetic Resources) and 15 (Access to and Transfer of Technology) of the CBD were not fully implemented. During the negotiations, the internal differences among the member states have proved to be hard to overcome. The issues of sovereignty and finance shifted the main agenda of addressing forest issues. The issue of deforestation has been discussed on the international agenda for the last three decades and if countries were united during the forest conventions, much of the forest loss could have been restricted.

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<sup>346</sup>Hans Hoogeveen and Patrick Verkooijen, *Transforming Sustainable Development Diplomacy: Lessons Learned from Global Forest Governance* (Wageningen University 2010) p.21

<sup>347</sup>Catherine P Mackenzie, 'Lessons from Forestry for International Environmental Law' (2012) 21(2) *Review of European Community and International Environmental Law* 114

The global forest conferences have been useful in raising awareness on forest issues but to protect forests, strong law at national and international level and enforcement of laws are essential. The events since 1992 confirm that the biggest challenges in the forest sector are the development of the rule of law and the identification of means by which a law can be implemented effectively on a global scale. The result of the negotiations could be interpreted as an instance of failed governance since it did not lead to a hard law agreement. Dimitrov<sup>348</sup> describes the international forest negotiations as a case of the unsuccessful regime, meaning that the discussions have not led to a formal treaty and consequently no regime has come into existence.<sup>349</sup> Moreover, during conventions, the international legal standards of forest sustainability were ambiguous, weak and incomplete.<sup>350</sup>

Although the international forest negotiations will be remembered as a case of weak consensus, it has certainly put the forest and related issues in the global agenda. The instruments such as forest certification, The United Nations collaborative programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) programme, proactive role of environmental NGOs in forest governance are some of the positive developments of last three decades.

### 3.3 New developments along with global forest negotiations

The international institutional framework for forests has many overlaps in terms of forest management policy which ultimately has increased difficulties to address the underlying issues. However, it has certainly helped in developing the understanding and awareness about the importance of forests globally with increased participation from civil society organisations to businesses, actively supporting sustainable forest management. This new partnerships and stakeholders participation has enhanced decision-making and implementation.<sup>351</sup> Although states once played the dominant

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<sup>348</sup>Lucas Giessen, 'Reviewing the Main Characteristics of the International Forest Regime Complex and Partial Explanations for its Fragmentation' (2013) 15(1) International Forestry Review 60,62

<sup>349</sup>Davenport (n 295)

<sup>350</sup>Assembe M Samuel, 'A Review of States Practice of Sustainable Forests Management with Regard to Some International Conventions' (2008) 5(2) Miskolc Journal of International Law 109,110

<sup>351</sup>Susan Braatz, 'International Forest Governance: International Forest Policy, Legal and Institutional Framework' A Paper Submitted to the XII World Forestry Congress (FAO 2003) <<http://www.fao.org/docrep/ARTICLE/WFC/XII/1053-C5.HTM>>

role in global governance, as issues have increased and the interconnections between them became more complex, other actors, including international organisations, private sector, civil society organisations, and consumers, also become major players in designing and implementation of the GFG process.<sup>352</sup> Ironically, the governance discourse produced new tools to give organisational shape to this integration process.<sup>353</sup>

A comprehensive discussion of the new developments in the form of collaborative partnerships is beyond the scope of this research, but developments of forest certification and Forest Law Enforcement and Governance (FLEG) conference which are essential for this research due to their importance on developing timber legality regime and combating illegal logging. The reason for choosing these two initiatives is that both these partnerships have distinctive features. Forest certification is a non-governmental programme and system for the inspection, monitoring and labelling of timber, wood and pulp and non-timber forest products in which forest management quality is measured against many agreed standards. While FLEG conference was a high-profile international meeting on illegal logging, organised by the World Bank, the UK and US aid agencies which were held in Bali in 2001. The forest certification has been discussed below and the FLEG conference initiative has been discussed in chapter 2.

### 3.3.1 Forest Certification

The tropical deforestation and environmental issues were growing concern in the 1990s and to discuss these issues, a group of timber companies and representatives of environmental and human rights organisations met in California in 1990.<sup>354</sup> This group comprises of officials from different backgrounds emphasised that the wood products traded globally should come from the sustainably managed forests and a system that could credibly identify well-managed forests has to be developed. This innovative concept was developed over parallel NGO meetings in Rio and a non-profit

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<sup>352</sup>Najam (n 326)

<sup>353</sup>Arts (n 304) 345

<sup>354</sup>Forest Stewardship Council, 'Our History: An Innovative Idea Takes Root' See <https://www.fsc-uk.org/en-uk/about-fsc/who-is-fsc/our-history>

organisation referred to as the Forest Stewardship Council (FSC) was launched in 1993 with the alliance of Worldwide Fund for Nature (WWF) and with other leading environmental organisations.<sup>355</sup> In 1994, the founding members approved a set of principles and criteria for well-managed forests, and a global secretariat was established in Oaxaca, Mexico, reflecting the FSC's intent to address the regulation of forests globally.<sup>356</sup>

Forest certification is a system that results in an independent third party issuing written certification that certifies the location and management status of a timber producing forest. This involves assessing quality of forest management with a range of predetermined principals and criteria. A product with forest certification assures its customer that product comes from responsibly managed forest and environmental, social and economic criteria have been taken care of.<sup>357</sup> The idea behind certification was to develop a set of wide-ranging rules governing sustainable forest management and mobilise customers of forest products to encourage adherence to the standards.

Many certification programmes started to emerge as the concept of certification began to take traction. Since the beginning of the FSC, a range of alternative forest certification schemes have been developed and some are dominated by industry in terms of decision making and are more flexible in terms of criteria and policies, including the Sustainable Forestry Initiative and the Canadian Sustainable Forestry Certification Coalition, created by timber industry associations in the United States and Canada, respectively. Some certification programs cover the forests worldwide while some countries have developed their own national and regional programs or schemes to manage the forests. Out of many certification schemes, FSC and Programme for the Endorsement of Forest Certification (PEFC) are the most popular and credible, which manages the global forests.<sup>358</sup>

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<sup>355</sup>Forest Stewardship Council, 'Our History' (FSC United Kingdom) <<http://www.fsc-uk.org/en-uk/about-fsc/who-is-fsc/our-history>>

<sup>356</sup>Christine Overdeest 'Codes of Conduct and Standard Setting in the Forest Sector: Constructing Markets for Democracy?' (2004) 59 Industrial Relations/Relations Industrielles 172

<sup>357</sup>Priyan Perera and Richard P Vlosky, 'A History of Forest Certification, Working Paper #71' (Louisiana Forest Products Development Centre 2006)

<sup>358</sup>Ibid

The FSC is a certification program that lays a series of standards to guide logging companies. FSC claims that by applying these standards, the companies can get good value for their products and be responsible for the environment. This certification system provides a logo which allows customers to recognise the forest products produced from sustainably managed forests or recycled materials. The FSC has certified around 50 million hectares of forest between 2012 and 2017. The FSC is managing nearly 196 million hectares of forests according to FSC standards across 84 countries.<sup>359</sup> The majority of these FSC certified forests are within Europe and North America. The tropics — Asia, Africa, and South America — account for 16% of FSC certified areas.

With the emergence of the FSC, landowner groups in several European countries, the USA and Canada, initiated alternative industrial schemes that gradually moved under the umbrella of an international organisation called PEFC.<sup>360</sup> The PEFC is an international non-profit, non-governmental organisation promoting sustainable forest management. The PEFC is a mutual recognition scheme of national standards, e.g. UK Woodland Assurance Standard (UKWAS) in the UK or USA's Sustainable Forestry Initiative (SFI). As of September 2017, more than 300 million hectares of forest area is administered in accordance with the PEFC's internationally recognized sustainability benchmarks.<sup>361</sup>

Over the years, efforts to promote sustainable forest management through forest certification have been mixed. There is now considerable support for third party certification among most commercial forestry operations in North America and Europe.<sup>362</sup> The amount of certified forest area has increased almost exponentially during the last decade; about 90% of the globally certified area is located in the northern hemisphere.<sup>363</sup> This indicates the success of forest management certification in Europe and North America but also shows that certification schemes have still not

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<sup>359</sup>Forest Stewardship Council International, 'Facts and Figures' (*FSC International*, 2017) <<https://ic.fsc.org/en/facts-and-figures>>

<sup>360</sup>Overdevest (n 356)

<sup>361</sup>Programme for the Endorsement of Forest Certification, 'PEFC Global Statistics: SFM and CoC Certification' (PEFC 2017) <<https://www.pefc.org/about-pefc/who-we-are/facts-a-figures>>

<sup>362</sup>Cashore (n 62)

<sup>363</sup>Florian Kraxner and others, 'Forest Management Certification: A New Tool for Certification Monitoring, Planning and Mapping' (2015) XIV World Forestry Congress, Durban, South Africa, 7-11 September 2015

become widely established in the southern hemisphere.<sup>364</sup> While support for forest certification is growing, it is weakest in tropical developing countries where there was so much scrutiny was first placed. The share of southern developing countries in certified land has been significantly lower, as most developing country producers could not afford the associated costs, needed external support to adopt high forest sustainability standards, and faced little domestic demand for certified forest products.<sup>365</sup>

The concern over the legitimacy of forest certification has also affected its uptake. The founding members of FSC comprised stakeholders not only from environmental realm but also comprised stakeholders from forestry, the timber industry, non-governmental organisations, and local communities. Lars Gulbrandsen<sup>366</sup> emphasises that environmental NGOs have been portrayed as “self-appointed judges in an area in which they have insufficient understanding, limited experience and no legitimate right to regulate in the first place”. It is worth noting that the claim for representing a broad array of different actors is used as a source of legitimacy from one side, while this very argument is used to delegitimise the FSC from the other side. While the FSC claims to derive its legitimacy from which represents a wide range of stakeholders from the social, the economic and the environmental realms, PEFC membership is limited to actors from the forestry sector that ultimately set up their norms.<sup>367</sup>

Forest certification plays a significant role in ensuring the legality of timber products as most certification schemes require compliance with national legislation. However, since certification is not based on surprise audits, it could not be the most ultimate solution to the illegal timber trade and can only ensure responsible forest management.<sup>368</sup> Nevertheless, the question is how effective the certification system is

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<sup>364</sup>Florian Kraxner and others, ‘Mapping Certified Forests for Sustainable Management - A Global Tool for Information Improvement Through Participatory and Collaborative Mapping’ (2017) 83 *Forest Policy and Economics* 10

<sup>365</sup>Maharaj Muthoo, ‘Certification, Timber Trade and Market’ (2009) Paper Presented to the 13th World Forestry Congress, 18–23 Oct 2009, Buenos Aires, Argentina

<sup>366</sup>Lars H Gulbrandsen, ‘Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?’ (2004) 4(2) *Global Environmental Politics* 75

<sup>367</sup>Werland (n 296)

<sup>368</sup>SGS Global Trade Solutions, ‘Establishing the Foundation for Sustainable Forest Management in Africa: Legal Origin of Timber as a Step Towards Sustainable Forest Management (World Bank / WWF Alliance 2003)

in controlling illegal logging and has the certification scheme delivered the promises it set out to realise? According to a study<sup>369</sup> in Mexico, the comparison between FSC certified forests and non-certified forests revealed that there is no difference in deforestation rates which means that the FSC system has not made any difference to the deforestation. Another study<sup>370</sup> in Indonesia's Borneo region, conducted between 2000 and 2008, concluded that FSC certified forests have forests that were FSC-certified had lower deforestation rates compared to non-certified timber forests. One study published in 2016 indicated that the forest certification system improved the forest management practices in Gabon, Cameroon, and the Republic of the Congo in Africa.<sup>371</sup>

Since last two decades, private forest certification has provided a more creative but incomplete response to the failed multilateral forest regime.<sup>372</sup> Karmann and Smith<sup>373</sup> and Romero<sup>374</sup> found that most literature they reviewed was based on geographically limited case studies, anecdotal evidence, or studies that were not conducted by independent observers. More importantly, they concluded that there is insufficient empirical evidence regarding the impact of certification at a global scale and hence, more studies of the impact of certification are needed. More recently, Heilmayr and Lambin<sup>375</sup> showed that FSC certification schemes were more effective in slowing down the conversion of forests in other forms of land use compared to other market-driven governance approaches in Chile, although the results are only for one country. A

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<http://documents.worldbank.org/curated/en/231031468002100033/pdf/330910ENGLISH0Legal1Origin1of1Timber.pdf> >

<sup>369</sup>Allen Blackman, Leonard Goff and Marisol Rivera Planter, 'Does Eco-Certification Stem Tropical Deforestation? Forest Stewardship Council Certification in Mexico' (Resources for the Future 2015) <http://www.rff.org/files/document/file/RFF-DP-15-36.pdf>>

<sup>370</sup>Daniela A Miteva, Colby J Loucks and Subhrendu K Pattanayak, 'Social and Environmental Impacts of Forest Management Certification in Indonesia' (2015) 10(7) PLoS ONE <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0129675&type=printable>>

<sup>371</sup>Paolo Omar Cerutti and others, 'Social Impacts of the Forest Stewardship Council certification in the Congo Basin' (2016) 20(10) International Forestry Review [http://www.cifor.org/publications/pdf\\_files/articles/ACerutti1601.pdf](http://www.cifor.org/publications/pdf_files/articles/ACerutti1601.pdf)>

<sup>372</sup>Overdevest (n 16)

<sup>373</sup>Marion Karmann and Alan Smith, 'FSC Reflected in Scientific and Professional Literature: Literature Study on the Outcomes and Impacts of FSC Certification' (FSC International Centre 2009)

<sup>374</sup>Claudia Romero and others, *An Overview of Current Knowledge About the Impacts of Forest Management Certification: A Proposed Framework for Its Evaluation* (Centre for International Forestry Research 2013)

<sup>375</sup>Robert Heilmayr and Eric F Lambin, 'Impacts of Nonstate, Market-Driven Governance on Chilean Forests' (2016) 113 (11) Proceedings of the National Academy of Sciences of the United States of America 2910



study<sup>376</sup> conducted in Cameroon, Indonesia and Peru, FSC certification has improved environmental management and social performance of the certified companies but it has limited effectiveness in reducing deforestation and forest degradation, the primary concerns to which certification was a response. Thus, the focus of several countries has shifted to other instruments and legality verification has emerged as the new leading policy instrument to combat illegal logging and forest degradation.

### 3.4 The emergence of timber legality verification initiative to combat illegal timber trade

In the mid-1990s, environmental NGOs successfully pushed the issue of illegal logging on the agenda of the UN Intergovernmental Panel on Forests, calling on participating countries to take national action and encourage international cooperation to minimise illegal trade in forest products.<sup>377</sup> The G8 then included illegal logging in its 1998 Action Programme on Forests<sup>378</sup> and introduced a set of measures to improve enforcement of the domestic forest laws and reduce illegal international trade in forest products, which were echoed in turn by the 2002 Johannesburg World Summit on Sustainable Development.

The private certification schemes, by the early 2000s, had achieved high rates of coverage among industrial forest companies in developed economies but due to certification's limited uptake in the tropics, international agencies, led by the World Bank, began to focus increasingly on promoting capacity building and learning within tropical countries.<sup>379</sup> The idea, supported by studies showing that many developing countries had strong but unenforced forest practice regulations<sup>380</sup>, was to help

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<sup>376</sup>Sini Savilaakso and others, 'Timber Certification as a Catalyst for Change in Forest Governance in Cameroon, Indonesia, and Peru' (2017) 13(1) International Journal of Biodiversity Science, Ecosystem Services and Management 116

<sup>377</sup>Overdevest (n 16)

<sup>378</sup>The G8 Action Programme on Forests was launched in 1998 to address five issues of particular importance in addressing the continuing pressure on the world's forests and in achieving sustainable forest management (SFM): monitoring and assessment; national forest programmes; protected areas; private sector; and illegal logging

<sup>379</sup>Cashore (n 62)

<sup>380</sup>Constance L McDermott, Benjamin Cashore and Peter Kanowski, 'Setting the Bar: An International Comparison of Public and Private Forest Policy Specifications and Implications for Explaining Policy Trends' (2009) 6(3) Journal of Integrative Environmental Sciences 217

countries develop and implement their policy priorities and goals for sustainable forest management. Consequently, the UK, German and EU development agencies committed themselves to “Forest Law Enforcement and Governance (FLEG)”<sup>381</sup> initiatives to strengthen capacity development, and also promote the policy learning networks with the hope of improving, instead of challenging the sovereignty and national policymaking.<sup>382</sup>

Similar to the private certification itself, FLEG initiative has emerged from discontent with the lack of progress in tackling the problem of forest degradation through multilateral institutions.<sup>383</sup> The FLEG initiatives brought together governments, businesses, and NGOs from timber producing and consuming countries to discuss domestic and international steps to combat illegal logging and trade.<sup>384</sup> The main FLEG outputs included an East Asian FLEG ministerial statement in Bali in 2001, followed by ministerial statements in Africa in Yaoundé in 2003, in Europe and in St. Petersburg in North Asia in 2005, as well as initial talks in Latin America.<sup>385</sup>

The FLEG processes opened the door for new initiatives and experiments within and across countries,<sup>386</sup> with various participation of civil society and forest sector stakeholders.<sup>387</sup> Many of these FLEG mechanisms focused on building greater capacity to enforce existing laws,<sup>388</sup> decreasing various legal systems, and enlisting NGOs to oversee the on-the-ground activities, including a reduction in elevated levels of illegal logging.<sup>389</sup> However, none of these processes generated binding commitments among the participating countries, nor the creation of systematic mechanisms for monitoring progress toward their agreed aims.<sup>390</sup> In these

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<sup>381</sup>Food and Agriculture Organisation of the United Nations, and International Tropical Timber Organisation, ‘Best Practices for Improving Law Compliance in the Forest Sector (FAO 2005)

<sup>382</sup>Hooi Chiew Thang, ‘Forest Law Enforcement, Governance and Trade in Asia—An Update. Legality of Traded Timber: The Development Challenges’ (2008) FAO, Rome

<sup>383</sup>Tim Bartley, ‘Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards’ (2011) 12 *Theoretical Inquiries in Law* 517

<sup>384</sup>Overdevest (n 16)

<sup>385</sup>Lars H Gulbrandsen and David Humphrey, ‘International Initiatives to Address Tropical Timber Logging and Trade: A Report for the Norwegian Ministry of the Environment’ (The Fridtjof Nansen Institute 2006)

<sup>386</sup>Brack (n 161)

<sup>387</sup>Thang (n 382)

<sup>388</sup>Tacconi (n 25)

<sup>389</sup>FAO (n 381)

<sup>390</sup>Humphreys (n 140)

circumstances, the EU decided to go ahead by connecting the improvement of forest law enforcement and governance (FLEG) to the regulation of trade (T) to obtain the consent of developing countries themselves.<sup>391</sup> The focus of the FLEGT Action Plan was the negotiation of bilateral Voluntary Partnership Agreements (VPAs)<sup>392</sup> with the developing countries in establishing licensing systems for the export of legally harvested wood to the European market, where legality includes the reference to the social and environmental conditions of production.

Partly as a result of concern about the effectiveness of global certification systems and FLEGT initiatives, “legality verification” is now becoming a principal policy tool for the fight against forest degradation and deforestation that are linked to illegal logging.<sup>393</sup> The rise of a timber legality regime holds a unique significance in the governance of forests and has its historical basis in the 2001 G-8 Bali Ministerial Declaration that committed the parties “to address violations of forest law and forest crime, in particular illegal logging, associated illegal trade and corruption, and their negative effects on the rule of law”.<sup>394</sup> The legality verification involves audits against a set of standards by an independent body to identify a method to eliminate illegal supply from global forest products<sup>395</sup> and focuses on tracking products along the supply chains, providing more considerable attention on the technical challenges.<sup>396</sup> The legality verification is a combination of international certification and FLEG efforts; similar to FLEG efforts legality verification acknowledges and supports national sovereignty; however like certification, it depends on third party verification.<sup>397</sup>

By 2010, activist campaigns, market pressures, and inter-governmental negotiations transcended into a transnational timber legality regime in legislative interventions, such as the United States Lacey Act and the European Union Timber Regulation. This legality regime requires importers in the US and EU to exercise due diligence (or due

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<sup>391</sup>Overdevest (n 208)

<sup>392</sup> A Voluntary Partnership Agreements (VPA) is a bilateral trade agreement between the EU and a timber-exporting country outside the EU. For more information, visit <http://www.euflegt.efi.int/what-is-a-vpa>

<sup>393</sup>Tacconi (n 25)

<sup>394</sup>Cashore (n 62) 15

<sup>395</sup>Ahmad Maryudi, ‘Choosing Timber Legality Verification as A Policy Instrument to Combat Illegal Logging in Indonesia’ (2016) 68 Forest Policy and Economics 99

<sup>396</sup>Jonsson (n 59)

<sup>397</sup>Cashore (n 62)

care) of their timber supplies and subjects them to penalties (consignment seizure, fines, or even imprisonment) for illegal timber in their supply chains. More recently, Australia and Japan have introduced their timber regulations, and China is in the process of doing so.<sup>398</sup>

The EUTR introduced in 2010, levels the playing field by establishing legality requirements that extend to timber import from all countries. The European Commission explains that “legality verification controls - and hence due diligence will have been carried out in the exporting country in accordance with the Voluntary Partnership Agreements between those countries and the European Union, and the resulting timber can be considered risk-free by operators.”<sup>399</sup> The EUTR and the VPA system work together in the European market to facilitate trade in legal timber.<sup>400</sup> The idea was that illicit timber from partner countries could be removed from the European market by issuing FLEGT licences exclusively for timber whose legality could be checked. The EUTR aims to limit trade on the basis of international legality definitions rather than enforce its own concrete requirements. The EUTR sets out specific legality criteria for timber products regardless of their origin, but timber products with a FLEGT licence are excluded from these requirements.<sup>401</sup>

### 3.5 Transnational business governance and theoretical contributions towards transnational timber legality verification initiative

Conventionally, the policy making have focused on the competence of states to collaborate in the development of an international economic activity legal framework.<sup>402</sup> In recent decades, various environmental and sustainability issues remain inadequately addressed and many countries have become susceptible to the

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<sup>398</sup>Benjamin Cashore and Michael Stone, ‘Does California Need Delaware? Explaining Indonesian, Chinese, and United States Support for Legality Compliance of Internationally Traded Products’ (2014) 8 Regulation and Governance 49

<sup>399</sup>Commission of the European Communities, Guidance Document for the EU Timber Regulation (September 2013)

<sup>400</sup>Akiva n (93)

<sup>401</sup>Regulation (EU) No 995/2010 Article 3

<sup>402</sup>Virginia Haufler, ‘Transnational Business Governance and the Management of Natural Resources’ (2012) 8(5) Comparative Research in Law and Political Economy

economic, social and environmental crisis spreading rapidly across globally.<sup>403</sup> Nevertheless, attention has been concentrated in recent years on new forms of global governance that supplement or compete with conventional forms of authority known as transnational business governance.<sup>404</sup> An understanding of the nature and function of transnational governance form a vital part of the search for new approaches to environmental governance.<sup>405</sup> The transnational governance promotes governance in accordance with objective legal prescriptions. It holds at least some governance actors accountable in terms of the rule of law through the work of international and national courts and other judicial, adjudicative, and enforcement mechanisms.<sup>406</sup>

Transnational business governance (TBG) refers to systematic efforts to regulate business conduct that involve a significant degree of non-state authority in the performance of regulatory functions across national borders.<sup>407</sup> TBG is long-standing in domains including accounting<sup>408</sup>, electricity<sup>409</sup> and kosher food.<sup>410</sup> As their scope has broadened, transnational codes of conduct, certification and labelling schemes, and other TBG initiatives have proliferated. TBG schemes involve diverse actors – from individuals to organisations, technical experts to political entrepreneurs, NGOs to government agencies to business firms.<sup>411</sup> Pursuing diverse interests, values, and

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<sup>403</sup>United Nations, 'World Economic and Social Survey 2013: Sustainable Development Challenges' (Department of Economic and Social Affairs 2013) <<https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf>>

<sup>404</sup>Deborah Avant, Finnemore Martha, and Susan Sell. 2010. *Who Governs the Globe?* (Cambridge University Press 2010)

<sup>405</sup>Anel du Plessis, 'A Role for Local Government in Global Environment Governance and Transnational Environmental Law from a Subsidiarity Perspective' (2015) 48 *Comparative and International Law Journal of Southern Africa* 281

<sup>406</sup>Cameron Holley, 'Facilitating Monitoring, Subverting Self-interest and Limiting Discretion: Learning from "New" Forms of Accountability in Practice' (2010) 35(1) *Columbia Journal of Environmental Law* 128

<sup>407</sup>Burkard Eberlein and others, 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis' (2013) 8(1) *Regulation and Governance*

<sup>408</sup>Kees Camfferman and Stephen A Zeff, *Financial Reporting and Global Capital Markets: A History of the International Accounting Standards Committee, 1973–2000* (Oxford University Press 2007)

<sup>409</sup>Tim Buthe, 'Engineering Uncontestedness? The Origins and Institutional Development of the International Electrotechnical Commission (IEC)' (2010) 12(3) *Business and Politics*

<sup>410</sup>Shana Starobin and Erika Weinthal, 'The Search for Credible Information in Social and Environmental Global Governance: The Kosher Label' (2010) 12(3) *Business and Politics*

<sup>411</sup>Karin Buhmann, 'Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions' (2015) 6(2) *Transnational Legal Theory* 399

beliefs, these actors establish institutions that take highly varied forms and take on virtually all of the tasks that constitute regulatory governance.<sup>412</sup>

Transnational standards for sustainable forestry or agriculture exist in various laws governing land use, pesticides, and water pollution. However, the growing literature on social and environmental standards, codes of conduct, and certification systems routinely overlooks this layering of rules. Instead it portrays private standards as filling a "regulatory void" or "governance gap" created by the inability or unwillingness of states and international bodies to regulate a world of mobile capital and global supply chains.<sup>413</sup>

As noted in chapter 2, there have been many efforts taken internationally and at the state level by many institutions to curb illegal logging and trade associated with it. Consequently, the growing institutional density has spurred the development of new concepts in international relations. This has eventually led to the concept of regime complexity<sup>414</sup> which is a set of overlapping and perhaps even different regimes which share a common focus. The regime complexity can be characterised as a situation where there is no single, coherent set of hierarchically enforced rules governing a transnational issue or policy area, but instead a set of parallel or overlapping regulatory institutions.<sup>415</sup> Transnational governance initiatives are constantly facing the issue of the complexity of the regime wherein the proliferation of regulatory schemes function in the same policy field, supported by variety of public and private actors.<sup>416</sup>

Overdeest and Zeitlin theorise forestry standards with experimentalist governance and argue that experimentalist governance constitutes a promising "regime complex" in the forestry sector with the emergence of legality regulations. Cashore and Stone<sup>417</sup>

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<sup>412</sup>Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 Vanderbilt Journal Transnational Law 501, 578

<sup>413</sup>Bartley (n 63)

<sup>414</sup>Alter and Raustiala described regime complexity as a set of overlapping and perhaps even contradictory regimes which share a common focus—was developed by a new generation of scholars examining the intersection of international law and international relations. The concept was first introduced by Raustiala and Victor and significantly extended by Alter and Meunier

<sup>415</sup>Overdeest (n 16)

<sup>416</sup>ibid

<sup>417</sup>Cashore (n 62)

use the theory of coalition to understand the “nascent” legality regime. In the US, a “Baptist-bootlegger”<sup>418</sup> coalition of environmentalists and domestic lumber manufacturers supported the expansion of the Lacey Act. By using the coalition theory Cashore and Stone argue that legality verification can help to build a global coalition of firms, governments, and NGOs that can benefit from higher prices and stronger standards. Bartley,<sup>419</sup> on the one hand, argues that legality verification approaches such as the EUTR are likely to undermine private forest certification schemes because the former is likely to spur customers and suppliers to meet the compulsory legality requirements rather than the more costly and demanding sustainability requirements under the latter. As per Sotirov and others,<sup>420</sup> the timber legality has a narrower focus than sustainability certification and they set narrower political boundaries at national or regional rather than global levels, thus making it easier to reach a common agreement.

Alter and Meunier<sup>421</sup> focus primarily on the adverse effects of regime complexity but they suggest it may build more positive interactions between parallel or overlapping institutions. Thus, competition between regimes can promote productive experimentation by actors pursuing different approaches, reduce the risk of failure of any single institution and enhance accountability by creating new opportunities for dissatisfied parties to challenge existing rules. From the above theories, it is very evident that complex transnational regulatory governance will produce novel, problematic, or impactful interactions. As pointed out by Overdevest and Zeitlin, Cashore and Stone also argue that standard-setting can in the form of timber legality regulation strengthen one another and evolve, such that an apparent weakening of standards can lead to stronger standards in the future. Nevertheless, they also indicate that legality standards are weaker than their own sustainability standards.

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<sup>418</sup>According to Bruce Yandle, Durable social regulation evolves when it is demanded by both of two distinctly different groups. “Baptists” point to the moral high ground and give vital and vocal endorsement of laudable public benefits promised by a desired regulation. Baptists flourish when their moral message forms a visible foundation for political action. “Bootleggers” are much less visible but no less vital. Bootleggers, who expect to profit from the very regulatory restrictions desired by Baptists, grease the political machinery with some of their expected proceeds. They are simply in it for the money.

<<https://object.cato.org/sites/cato.org/files/serials/files/regulation/1999/10/bootleggers.pdf>>

<sup>419</sup>Bartley (n 63)

<sup>420</sup>Sotirov (n 64)

<sup>421</sup>Karen Alter and Sophie Meunier, ‘The Politics of International Regime Complexity’ (2009) 7 Perspectives on Politics 13

After highlighting several problematic issues related to risk management, the infrastructure for certification, and market segmentation, Bartley argues that surpassing certification by the legality regime would not necessarily be a negative development. As per Sotirov and others<sup>422</sup>, the timber legality has a narrower focus than sustainability certification and they set narrower political boundaries at national or regional rather than global levels, thus making it easier to reach a common agreement. They use the same coalition theory of “Baptist -Bootlegger” of Cashore and Stone to conclude that transnational governance of timber legality regime revealed common interests between industry and environmentalists. For instance, the timber companies that could easily verify their legality held a competitive interest in squeezing out illegal timber; while environmentalists saw new leverage to protest against damaging forest practices.<sup>423</sup> Although Alter and Meunier<sup>424</sup> mainly focus on the harmful effects of regime complexity, they also suggest that it can generate more positive interactions between parallel or overlapping institutions.

These theories provide contrasting views on relationship between public-private interactions. Meanwhile, some scholars are predicting that legality regime will promote the voluntary initiatives that certify sustainable forests. Along the same lines, Cashore and Stone<sup>425</sup> suggest that public legislation initiatives have strengthened private third-party certification schemes. On the other hand, Bartley<sup>426</sup> opposes such predictions and argues that the rise of the timber legality regime could restrict the expansion of private forest certification. Keohane and Victor<sup>427</sup> elaborate that regime complexity has the potential to generate positive interactions in transnational governance. In their view, “loosely coupled” regime complexes can emerge as a creative response to the failure of attempts to create a more comprehensive and integrated international system. Jonsson and others<sup>428</sup> highlight that there is a need to reconsider the importance of the legality verification regime because legality does not guarantee

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<sup>422</sup>Sotirov (n 64)

<sup>423</sup>Constance McDermott, ‘REDDuced: From sustainability to Legality to Units of Carbon: The Search for Common Interests in International Forest Governance’ (2014) 35 *Environmental Science and Policy* 12

<sup>424</sup>Alter (n 421)

<sup>425</sup>Cashore (n 62)

<sup>426</sup>Bartley (n 63)

<sup>427</sup>Robert Kohane and David Victor, ‘The Regime Complex for Climate Change’ (2011) 9(1) *Perspectives on Politics* 7

<sup>428</sup>Jonsson (n 59)



sustainability in the broader context of the global governance system targeting sustainable forest management. The striking common feature of all these theories is that scholars are hopeful that the rise of timber legality may remove illegal timber from the supply chains irrespective of regime complexity.

The EUTR has facilitated substantial institutional development by private actors in the establishment of legality verification and certification schemes. The implementing regulation promotes the adoption of private certification and legality verification as an instrument for achieving due diligence.<sup>429</sup> The EUTR puts private certification and legality verification schemes under public oversight and thus incorporates them into the wider transnational legality assurance scheme. The emergence of transnational approaches to tackle illegal logging and associated trade by verification of legality has triggered discussion on the consequences for the global timber trade regime.<sup>430</sup> This thesis helps assessing to what role legality verification plays in effectiveness of EUTR, to what extent various actors or stakeholders support transnational legality verification mechanism in the form of EUTR and whether legality verification affects uptake of private forest certification schemes. The research also helps in evaluating the different challenges emerged due to the legality verification instrument for operators or importers such as interpreting the rules, documenting the verifying timber legality and appropriate actions to mitigate the risk. The research helps in identifying if the transnational timber legality initiative like EUTR may construct an effective legality regime from distinct components with diverse interests or constitute a constraint for the businesses to achieve the legality regime and create a barrier to transparency and hence effectiveness.

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<sup>429</sup>European Commission, Implementing Regulation No. 607/2012 of 6 July 2012 on the Detailed Rules Concerning the Due Diligence System and the Frequency and Nature of the Checks on Monitoring Organisations as Provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market.

<sup>430</sup>Iben Nathan and others, 'Facing the Complexities of the Global Timber Trade Regime: How Do Chinese wood Enterprises Respond to International Legality Verification Requirements and What are the Implications for Regime Effectiveness' (2018) 92 Forest Policy and Economics 169

### 3.6 Transnational business governance (TBG) and experimentalist framework for analysis

To evaluate the regulatory effectiveness of transnational interactions poses significant analytical challenges. Diversified body of transnational business governance is emerging but the understandings of the interactions or relationships between different actors or how regulatory forms co-evolve, reshape or perform with each other are still minimal.<sup>431</sup> The interactions take place at multiple levels of analysis. At the micro level, the individuals and organisations that create and act within TBG schemes, the meso level of schemes themselves and the macro level of regulatory complexes.<sup>432</sup> Similarly, units of analysis and the regulatory components can vary with more comprehensive interactions<sup>433</sup> within public-private regime complexes.<sup>434</sup> According to Eberlein and others<sup>435</sup>, a single approach or theory cannot encompass the full complexity of the TGB initiative.

The experimentalist Governance represents a form of adaptive, open-ended, participatory, and information-rich cooperation in which the local actors interact through the localised and transnationally agreed to norms, subject to the periodic revision in light of knowledge locally generated.<sup>436</sup> The experimentalist approach has several fundamental advantages.<sup>437</sup> Though adapting common goals, it accommodates diversity to different local contexts and provides a system to coordinate learning from local experimentation. Since both the objectives and means of achieving them are explicitly conceived as provisional and are subject to revision in view of experience, the problems identified in one implementation phase can be corrected in the next iteration. Transnational experimentalist regimes seem to emerge

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<sup>431</sup>Marc Schneiberg and Tim Bartley, 'Organisations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century' (2008) 4 Annual Review of Law and Social Science 51,52

<sup>432</sup>Fabrizio Cafaggi, 'The Architecture of Transnational Private Regulation' (2011) EUI Law Working Paper

<sup>433</sup>Thomas Gehring and Sebastian Oberthür, 'The Causal Mechanisms of Interaction Between International Institutions (2009) European Journal of International Relations

<sup>434</sup>Kenneth Abbott, 'The Transnational Regime Complex for Climate Change' (2012) 30(4) Environment and Planning Government and Policy

<sup>435</sup>Eberlein (n 407)

<sup>436</sup>Gráinne de Búrca, Robert O Keohane and Charles Sabel, 'New Modes of Pluralist governance (2013) New York University Journal of International Law and Politics

<sup>437</sup>Jonathan Zeitlin, 'EU Experimentalist Governance in Times of Crisis' (2016) 39(5) West European Politics 1073

in many key issue-areas, such as finance, energy, telecommunications, food safety, disability rights, data privacy and environmental sustainability.<sup>438</sup>

The experimentalism has received considerable attention as a new model of governance for emerging challenges within the transnational governance system.<sup>439</sup> The experimentalism has been presented mainly as a response to strategic uncertainty where the parties are facing problems but aware that their preferred problem-solving strategies cannot succeed and therefore are willing to engage in a joint investigation of possible solutions.<sup>440</sup> FLEGT is an example of how experimentalist regulation along global supply chains may stimulate the construction of a jointly governed transnational regime involving public and private actors from developed and developing countries. However, other pathways are also possible, and comparison among them is likely to prove fruitful. As mentioned in the chapter earlier about the failure of international forest dialogues and regime complexity, the experimentalism within EUTR proves to be the correct measure to address the issue of illegal logging and develop forest governance structure in tropical countries.

The experimentalist governance offers more significant policy space to the nations and regions in pursuing broadly shared goals, arguably makes it compelling and legitimate. However, the same diversity that makes experimentalist governance attractive can also make it difficult to get a transnational regime to diverge from the framework goals.<sup>441</sup> Thus, too many participants with different perspectives may make it hard to reach an initial agreement on common framework goals. Conversely, a single dominant player may be able to reject other proposed solutions even if he cannot impose his own. In the case of application of Experimentalist Governance to law-

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<sup>438</sup>Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14(3) European Law Journal 271; Charles F Sabel and Jonathan Zeitlin, 'Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms' (2011) Paper presented at the panel on "Global Governance in Transition", annual conference of the International Studies Association, Montreal, March 16-19, 2011 <[https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/green/papers/experimentalisminternationalgovernanceisapaper\\_2.pdf](https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/green/papers/experimentalisminternationalgovernanceisapaper_2.pdf)>

<sup>439</sup>Chiara Armeni, 'Global Experimentalist Governance, International Law and Climate Change Technologies' (2015) 64 International and Comparative Law Quarterly 875

<sup>440</sup>Charles F Sabel and Jonathan Zeitlin, 'Experimentalist Governance' (eds) The Oxford Handbook of Governance (Oxford University Press 2011)

<sup>441</sup>Sabel (n 438)

making in European private law, especially consumer law, While there is agreement in the EU that markets should be regulated to ensure the economic and social inclusion of consumers,<sup>442</sup> the diversification of law making across public and private actors creates a complex picture within which it is uncertain that by whom the responsibility will be taken for ensuring consumer protection.<sup>443</sup>

The EUTR definition of due diligence allows operators to be diligent in assessing risk and mitigating risk. The EU plays a much stronger role in overseeing due diligence than in the Lacey Act and by comparison to the EUTR, the Lacey Act does not specifically allow outside actors to provide due diligence.<sup>444</sup> The EUTR is much better in terms of the institutional development that it needs along the supply chain than the Lacey Act and as it is likely to produce more performance-based and risk information, the EUTR contributes to a more sustained experimentalist architecture.

Overdevest and Zeitlin<sup>445</sup> have substantially contributed to the theory of experimentalist governance in the European Union and defined “experimentalist governance as a recursive process of provisional goalsetting and revision based on learning from the alternative approaches to progress these goals in different contexts”. They further explained that in the most developed form experimentalist governance framework involves a multilevel architecture. This multilevel design consists of four elements, explained below, which are linked in a repetitive cycle. Furthermore, experimentalist governance regimes are strengthened by ‘penalty default’ mechanisms that encourage reluctant parties to cooperate by threatening to impose adequately unattractive alternatives.<sup>446</sup>

1. **Broad framework goals**, such as prohibiting the import of illegal timber, and metrics for assessing their accomplishments are provisionally established by

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<sup>442</sup>See Strategy 2020 and the consumer protection policy laid down in Art 38 of the EU Charter on Fundamental Rights, and in Artt 114 and 169 TFEU < [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_2.2.1.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_2.2.1.pdf) >

<sup>443</sup>Vanessa Mark, ‘Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspective’, Tilburg Law School Legal Studies Research Paper Series No. 08/2017 (Tilburg Institute of Private Law 2017)

<sup>444</sup>Overdevest (n 208)

<sup>445</sup>ibid

<sup>446</sup>Burca (n 436)

some combination of 'central' and 'local' units, in consultation with relevant stakeholders.

2. These established **central or local units** can be public, private or hybrid partnerships (such as monitoring organisations, enforcement authorities, forest certification bodies, timber trade associations, civil society organisations) and they are given adequate preferences to follow the framework goals in their way.
3. As a condition of autonomy, these units must **regularly report** about their performance and engage in a peer review whereby their results are compared to those of others employing different means to the same ends. If the progress is not satisfactory against the agreed indicators, the local units are expected to show that they are taking appropriate remedial measures, informed by the experience of their peers.
4. Stakeholders **regularly review the goals**, metrics, and decision-making procedures themselves in response to the challenges and possibilities discovered by the review process, and the cycle repeats.

Based on the above four broad elements of the experimentalist governance, this thesis develops a similar analytical approach to evaluate the effectiveness of the regulation with a transnational form of governance aimed at discouraging illegal timber trade. This analytical framework helps in examine interactions within a single scheme including among actors that set standards, implement them and review them. The research framework helps in determining if the above mentioned four broad elements of experimentalist governance help in overcome challenges within illegal timber trade and develop a coherent approach between diverse stakeholders working towards the same objectives. This framework also helps in assessing interactions with transnational timber legality verification initiative that address different issues within a single sector such as timber legality and sustainability.<sup>447</sup> The analytical framework including the stakeholders also helps in assessing the potential of experimentalist

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<sup>447</sup>Bartley (n 63)

governance in simplifying the transnational governance for the businesses to comply with timber regulation obligations.

The analytical approach with experimentalist governance and stakeholder's analysis identifies if the experimentalist governance mechanism displays a robust capacity to improve existing timber regulation with regime complexity. Inspired from the four experimentalist elements, the analytical framework has been developed that includes different components or instruments of the EUTR and the experiences or perspectives of various stakeholders with their components. To evaluate the effectiveness of the EUTR. The implementation of the EUTR, the compliance mechanism, penalty regime, timber industry awareness, due diligence requirement is some of the components which have been assessed during the empirical research with different stakeholders. Chapters four and five have more in-depth detail on components of the EUTR and empirical research.

The international forest governance has failed to develop legally binding agreements to address the issues such as illegal logging while experimentalist governance appears promising but it often untested.<sup>448</sup>The empirical evidence to the experimentalist governance would make a precious contribution to the governance of transnational timber legality verification initiative in reshaping the international decision-making process to effectively respond to uncertainty and ultimately strengthen the problem-solving function of international law.<sup>449</sup>

The research methodology chosen for the thesis is a combination of the black letter or doctrinal and empirical approach. It must be noted that doctrinal and empirical legal research is the ultimate way to find the answers that have been raised in the context of attempts to understand the emerging issues in the framework of the law. Both methodologies are of equal importance for development and understanding of the law and often the combination of methodologies can work together to achieve a better

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<sup>448</sup>Gabrielle Goldstein and Christopher Ansell, 'Experimentalist Governance in Global Public Health: The Case of UNAIDS' (2018) 35 *Arizona Journal of International and Comparative Law* 219

<sup>449</sup>Armeni (n 439)

understanding of the law depending on the research questions.<sup>450</sup> The use of multiple methods results in higher reliability than a single methodological approach to a problem.<sup>451</sup> The next chapter helps in evaluating the legal instruments of European Union Timber Regulation by black letter approach. The doctrinal approach is the necessary prerequisite for undertaking empirical analysis of law.<sup>452</sup>

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<sup>450</sup>Salim Ibrahim Ali, Zuryati Mohamed Yusoff and Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4(1) International Journal of Trend in Research and Development 2394 <<http://www.ijtrd.com/papers/IJTRD6653.pdf>>

<sup>451</sup>Khadijah Mohamed, 'Combining Methods in Legal Research' (2016) 11(21) The Social Sciences 5191 <<http://docsdrive.com/pdfs/medwelljournals/sscience/2016/5191-5198.pdf>>

<sup>452</sup>Jan M Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (eds.), Rethinking Legal Scholarship: A Transatlantic Dialogue, New York (Cambridge University Press) 2017, pp. 207-228

## Chapter 4: Evaluating the legal instruments of European Union Timber Regulation by black letter approach

As mentioned in the chapter 1, world's forest are at risk from deforestation and degrading very rapidly<sup>453</sup> with forest area of 1.3 million square kilometres lost between 1990 and 2016; it is the equivalent of 800 soccer fields of forest lost every hour.<sup>454</sup> Fighting deforestation and achieving sustainable forest management are very complex issues. It is very evident that despite all efforts, conservation and sustainable use of forests cannot be ensured by current policies. Therefore, stringent actions are needed to manage forests sustainably and create new forest coverage to play a crucial role in our sustainability policies. Solutions need to be country specific and region specific, with an overall dual objective of safeguarding existing forests, particularly primary forests, and substantially increasing sustainable, biodiverse forest coverage worldwide. The EU by itself cannot reverse the trend of deforestation and it must be part of a global coalition.<sup>455</sup>

The EU has adopted a significant number of environmental legislation in the form of regulations, directives and international conventions. The environment action programmes regulated by article 192(3) TEFU, are adopted in the form of legally binding decision.<sup>456</sup> The article 3(3) of the Treaty on European Union (TEU) stipulates that the Union should aim for the "high level of protection and improvement of the quality of the environment".<sup>457</sup> The objectives of article 3(3) TEU are completed by the environmental objectives in article 191 and 192 of the Treaty on the Functioning of the European Union (TEFU) which states protection of human health, protecting and improving the environmental quality, prudent use of natural resource and environmental protection at international level. The EU Timber Regulation (EUTR) has

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<sup>453</sup>Lalisa A Duguma and others 'Deforestation and Forest Degradation as an Environmental Behavior: Unpacking Realities Shaping Community Actions (2019) 8(26) Land

<sup>454</sup>European Commission, 'Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: Stepping up EU Action to Protect and Restore the World's Forests' (EC 2019) <[https://ec.europa.eu/info/sites/info/files/communication-eu-action-protect-restore-forests\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-eu-action-protect-restore-forests_en.pdf)>

<sup>455</sup>ibid

<sup>456</sup> Decision No 1600/2002/EC laying down the Sixth Community Environment Action Programme [2002] OJ L242/1

<sup>457</sup> [2012] OJ C 326/13



been enacted by the Treaty on the Functioning of the European Union Article 192(1) which refers to the environment protection at international level. Thus, EUTR directly becomes a part of the environment action programme which is regulated by the article 191 – 193 TFEU. The EUTR is complemented by the regulation 363/2012<sup>458</sup> laying down the rules for the recognition of monitoring organizations by the Commission, and by the regulation 607/2012<sup>459</sup> providing detailed rules for due diligence systems and for the checks of monitoring organizations by Competent Authorities.

The European Commission published a proposal<sup>460</sup> in 2008 for a regulation which states that companies first placing the timber on the EU market must develop and apply due diligence system to invalidate the risk of illegal products imported into the EU. A strong demand for illegal timber combined with poor national legislation to prevent the import of illegal timber has resulted in the EU taking serious measures and implementing this regulation at EU level.<sup>461</sup> The introduction of the timber regulation signifies the transition within the EU by announcing a statutory requirement which requires that if timber is to gain access to the EU market, it must be harvested legally.<sup>462</sup> The EUTR has become applied directly across the EU on 3rd March 2013. The EUTR was implemented in the UK through The Timber and Timber Products (Placing on the Market) Regulations 2013.<sup>463</sup>

To achieve the research objectives, it is essential to study the components of EUTR by applying the black letter approach which then helps in evaluating the mechanism of EUTR that controls the illegal timber. A doctrinal (or black letter) research scrutinises law as a written body of principles and involves a critical conceptual analysis of legislation.<sup>464</sup> Thus, the aim of using the doctrinal research is to assess the

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<sup>458</sup> Regulation (EU) No 363/2012

<sup>459</sup> Regulation (EU) No 607/2012

<sup>460</sup> European Commission (n 254)

<sup>461</sup> Regulation (EU) No 995/2010

<sup>462</sup> Emily Unwin, 'Considering How the EU Timber Regulation May Inform Systems of Governance for the Sustainable Production of Commodities Impacting Forest Ecosystems' (ClientEarth 2012)

<<https://www.documents.clientearth.org/wp-content/uploads/library/2013-02-01-considering-how-the-eu-timber-regulation-may-inform-systems-of-governance-for-the-sustainable-production-of-commodities-impacting-forest-ecosystems-ce-en.pdf>>

<sup>463</sup> Timber and Timber Products (Placing on the Market) Regulations 2013

<sup>464</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 Erasmus Law Review 130

principles of EUTR which lays down the obligations on operators who place timber and timber products on the internal market for the first time. This chapter examines the responsibilities on the private companies and enforcement authorities to achieve the objectives stipulated under this regulation. It also discusses the role of forest certification bodies, monitoring organisation, due diligence system and timber products included in the regulation. The chapter also analyses the implementation status of the regulation in the EU and the UK based on the information available from the two evaluation reports published by the European union and post information review report published by UK Department for Environment Food and Rural Affairs (DEFRA).

Before evaluating the EUTR components, it is essential to understand the reasons for the European Union to adopt a new regulation as a choice of legal measure and what were the deficiencies in the current position that EUTR addresses or provide remedies with this measure. This chapter also focuses on the current state of implementation in all EU member states, reporting requirements exist to the EU and how is the potential member state non-compliance is managed.

#### 4.1 The adoption of EUTR timber legality mechanism despite the existences of the EU Wildlife Trade Regulations (EUWTR)/CITES

The EU has introduced a variety of regulatory and non-regulatory actions to deal with the challenges of deforestation and forest degradation.<sup>465</sup> Deforestation and forest degradation have a negative impact on many of the EU's global objectives in various policy areas such as conservation of biodiversity, climate change, human rights, peace and security, good governance and the rule of law.<sup>466</sup> Although forest cover in the EU has increased<sup>467</sup> in recent decades, the deforestation rate in other regions, especially in tropical areas, continues at alarming levels.<sup>468</sup> Therefore, significant measures to

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<sup>465</sup>EC (n 454)

<sup>466</sup>European Commission, 'Deforestation and Forest Degradation: Introduction (EC 2019) <<https://ec.europa.eu/environment/forests/deforestation.htm>>

<sup>467</sup>Forest Europe, 'State of Europe's Forests' (Forest Europe 2015) <<https://www.foresteurope.org/docs/fullsoef2015.pdf>>

<sup>468</sup>United Nations, 'The Sustainable Development Goals Report' (UN 2017) <<https://unstats.un.org/sdgs/files/report/2017/TheSustainableDevelopmentGoalsReport2017.pdf>>

combat deforestation and forest degradation are necessary to enable EU to comply with its related international commitments.

Three fundamental legislative mechanisms that the EU uses to address the issue of illegal timber trade: the EU Timber Regulation (EUTR)<sup>469</sup>, the FLEGT Regulation<sup>470</sup> and the EU Wildlife Trade Regulations (EUWTR)<sup>471</sup> which is the EU's mechanism for implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The 2003 Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan outlines the EU response to the fight against illegal logging and associated trade, by improving forest governance, strengthening law enforcement and promoting trade in legally and sustainably harvested timber and timber products. Based on the FLEGT Action Plan, the EU adopted two regulations: Regulation (EC) No 2173/2005 (the FLEGT Regulation) and Regulation (EU) No 995/2010 (the EU Timber Regulation or EUTR).

Although there is no specific global forest agreement/treaty to tackle illegal logging and related trade, CITES focuses on the protection of international trade in the plants and animals listed in its Appendices.<sup>472</sup> CITES is an international agreement which came into force in 1975 and currently has 183 Parties having committed to protecting >35 000 species from unsustainable or illegal international trade, including several of commercially valuable timber species.<sup>473</sup> The capacity-building support for governance of listed timber species is delivered through the program together by the ITTO and the CITES Secretariat and funded primarily by the EU, the United States and private sector.<sup>474</sup> CITES is implemented in the EU through the EU Wildlife Trade

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<sup>469</sup>Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance *OJ L 295, 12.11.2010, p. 23–34*

<sup>470</sup>Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community *OJ L 347, 30.12.2005, p. 1–6*

<sup>471</sup>Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein *OJ L 61, 3.3.1997, p. 1–69*

<sup>472</sup>CITES Appendix (n 197)

<sup>473</sup>CITES Press Release, See [https://www.cites.org/eng/news/pr/Largest-ever-World-Wildlife-Conference-opens-Johannesburg-with-calls-for-changes-protection-levels-500-species-wild-animals-plants\\_23092016](https://www.cites.org/eng/news/pr/Largest-ever-World-Wildlife-Conference-opens-Johannesburg-with-calls-for-changes-protection-levels-500-species-wild-animals-plants_23092016)

<sup>474</sup>Rosalind Reeve, 'The Role of CITES in the Governance of Transnational Timber Trade' (Centre for International Forestry Research 2015)

Regulations (EUWTR). In the chapter 2, the significance of FLEGT and EUTR as EU policy measure to fight against illegal logging has already been discussed in detail.

Within the framework of the EU Wildlife Trade Regulations (EUWTR), commercial trade is prohibited for tree species listed in Annex A<sup>475</sup> (with some exceptions, such as plantation timber). For commercial trade in timber and timber products that are included under Annex B, imports into the European Union require a legality finding by both the Management Authority (MA) of the exporting country and the MA of the importing country, before the issuance of export and import permits. Likewise, legality findings are required for Annex C species, for those countries whose populations are listed in this Annex.<sup>476</sup>

Under the EU Timber Regulation and FLEGT Regulation, timber and timber products covered by CITES provisions (timber and timber products listed in Annexes A, B or C of the EUWTR) are deemed to be legally harvested and to comply with the EUTR requirements and are exempt from the FLEGT licencing requirements.<sup>477</sup> As such, timber covered under CITES licence may enter the EU without operators having to exercise due diligence obligations under EUTR and without the requirement for a FLEGT licence. Considering the interaction between these three EU regulations, a clear view of the various approaches to ensure the legality is important, to improve the effectiveness of the EU's commitments for addressing illegal logging and related international trade.

There are some important differences between the legality required under CITES/EUWTR (verification of legal acquisition) and the due diligence obligations for operators placing timber on the EU market for the first time under EUTR.<sup>478</sup> Under CITES/EUWTR legality defined for each shipment whereas according to EUTR, legality is specified by the operators for each supply chain. Similarly, with

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<sup>475</sup>Council Regulation (EC) No 338/97 Article 8

<sup>476</sup>Liz Womack and others, 'The Interplay Between CITES and EUTR/FLEGT: A Discussion Document for the Joint EUTR/CITES Expert Group Meeting, UNEP-WCMC Technical Report' (EC 2019) <[https://ec.europa.eu/environment/forests/pdf/UNEP-WCMC%202019%20The%20interplay%20between%20CITES%20and%20EUTR%20FLEGT\\_FINAL.pdf](https://ec.europa.eu/environment/forests/pdf/UNEP-WCMC%202019%20The%20interplay%20between%20CITES%20and%20EUTR%20FLEGT_FINAL.pdf)>

<sup>477</sup>Regulation (EU) No 995/2010 Article 3

<sup>478</sup>Saunders (n 268)

CITES/EUWTR, government officials issue permits for each shipment confirming legality whereas with EUTR, it is EU operators who are obliged to ensure legality of their supply chains. Under EUTR, the scope of legality is much broader (i.e. covering 'all applicable legislation' in the country of harvest, including rights to harvest, payments for harvest rights, third parties' legal rights and trade and customs), compared with laws 'for the protection of fauna and flora' considered under CITES/EUWTR.

The EUTR requires systematic approach, with the due diligence process being used by operators placing timber on the EU market for the first time consisting three steps: information gathering, risk assessment and risk mitigation.<sup>479</sup> Thus, EUTR explicitly requires due diligence in verifying legality, detailing precisely what a due diligence system should entail. Furthermore, the traders in the EU have to ensure traceability back to the operator by maintaining a record of their suppliers and clients. Under CITES, the approach used by MAs for determining legal acquisition is left to the discretion of the Parties (i.e. MAs in the country of export), hence practices may vary widely.

The EUWTR only requires a 'documentary evidence' from an applicant.<sup>480</sup> EUTR requires 'documents or other information'<sup>481</sup> and exceeds the requirement for documents in which the legality risk is high (e.g. draft guidelines suggest that the risk mitigation may include field visits, audits and third-party verification). Central to the EUTR, legality is traced throughout the supply chain, back to the sub-national region and harvest concession where appropriate. This aspect is less emphasised in the context of CITES/EUWTR, but the 2018 EUWTR guidance document<sup>482</sup> points out that timber legality ought to be from harvest to export, traced across the supply chain, bringing the EUWTR into closer alignment with the EUTR.

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<sup>479</sup>Womack (n 476)

<sup>480</sup>Council Regulation (EC) No 338/97 Article 5(2b)

<sup>481</sup>Regulation (EU) No 995/2010 Article 6 (1a)

<sup>482</sup>Commission notice — Guidance Document on Steps to be Taken by EU Member States in the Case of Doubts as to the Legality of timber from CITES-listed Species Imported into the EU C/2018/6681 OJ C 376

Under EUTR, Competent Authorities (CAs) carry out checks on operators and traders. They can be penalised in accordance with national legislation of the Member States.<sup>483</sup> CITES non-compliance is designed to focus on broad governance changes rather than resolving particular offences. Under EUWTR, suspension and negative opinions can be formed for imports in EU of species/country combinations of concern. EUTR stipulates that individual operators can also be sanctioned, including fines and prosecutions, following CA checks.<sup>484</sup>

As described above, there are differences in achieving the timber legality verification in accordance with the CITES/EUWTR and the due diligence requirements for operators placing timber on the EU market for the first time under the EUTR. Notably, the EUTR due diligence obligations consider a much broader scope of laws in the country of harvest and have a more comprehensive methodology, with the due diligence process including data collection, risk assessment and risk mitigation. Nevertheless, the success of the EUTR depends on operators being aware of their due diligence obligations and implementing effective due diligence programmes, while the responsibility for granting import permits and checking legality under the EUWTR rests with the EU management authorities. The challenge within the EU, despite the exemption for CITES-listed timber under EUTR and FLEGT, is how best to achieve greater consistency and compatibility ensuring that timber protected by Annex I to the EUTR entering the EU market is legally sourced, whether it enters on a CITES permit, FLEGT licence or EUTR due diligence obligations apply to it directly.

## 4.2 Elements of the EUTR

The timber regulation broadly contains three main elements. First, it prohibits the placement of illegal timber and related products on the EU market.<sup>485</sup> Second, it implements a system of 'due diligence' that obliges operators to ensure that timber and timber products placed on the internal market are derived from legally harvested

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<sup>483</sup>Regulation (EU) No 995/2010 recital 12

<sup>484</sup>Womack (n 476)

<sup>485</sup>Regulation (EU) No 995/2010 Article 4

timber.<sup>486</sup> The third component is regulatory or enforcement mechanism to ensure that operators comply with the due diligence requirements.<sup>487</sup>

The timber regulation stipulates several requirements for different actors operating in the timber industry. This section highlights the role of different legal instruments of the EUTR including the sets of obligations that apply to certain non-state actors that carry out timber-related economic activity in Europe. The EUTR obligations that apply to non-state economic actors are two distinct groups: operators and traders. The UK enforcement agency, monitoring organisation, UK penalty system developed and the role of forest certification have also been discussed in this section. The study of various components of EUTR helps in critically analysing the existing statutory provisions and also helps in evaluating the potential of the regulation in controlling illegal timber trade which has been discussed in detail in section 3.3.

#### 4.2.1 Obligations to operators and traders and due diligence requirements

##### **(A) Responsibilities of operators**

The timber regulation provisions applies to timber harvested in the EU or outside and specify that the timber legality assessment should be made referring to the laws established in the country of harvest. The timber regulation makes it illegal to place illegally harvested timber on the EU market and requires due diligence from operators or companies that first place timber on the EU market and take sensible steps to determine that the timber or timber products being placed on the market by them have not been harvested illegally.<sup>488</sup> The 2016 guidance document published by European Commission defined placing on the market when an operator first makes timber or timber products available on the EU market for distribution or for use in the course of its commercial activity.

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<sup>486</sup>Regulation (EU) No 995/2010 Article 6

<sup>487</sup>Regulation (EU) No 995/2010 Article 7

<sup>488</sup>Regulation (EU) No 995/2010 Article 4

The regulation states that operators shall apply the due diligence system to each specific type of timber or timber product supplied by a supplier. A "due diligence system" can be described as a documented, tested, step-by-step method, including controls, aimed at producing a desired outcome in a business process. The process of due diligence requires operators to access specific information on the records of timber including country of harvest, species, and quantity to assess the risk of timber illegality concerning relevant risk criteria.<sup>489</sup>

Operators while importing or placing the timber or timber products must identify, analyse and mitigate the risk of illegally harvested timber or timber products being placed on the market, considering the appropriate risk assessment criteria. The risk assessment criteria must assure legal compliance and prevalence of legal harvesting of tree species in a country of harvest.<sup>490</sup> An operator needs to know relevant risk factors to incorporate them into their due diligence process.<sup>491</sup> During the risk assessment, if the risk identified is negligible, operators are still required to request all the details from the suppliers and need to keep the necessary documentary evidences.<sup>492</sup>

There are three possible pathways to validate due diligence established EUTR. The first is possession of a valid FLEGT VPA license. As mentioned in the above section, the timber and timber products with FLEGT-license are proof that the timber is legal and complies with the requirements of the EUTR. In this scenario, the operator can place FLEGT licensed products on the market without any obligation of exercising due diligence. As per article 3 of the EUTR, the timber products imported under the EU Wildlife Trade Regulation (EC) No 338/97<sup>493</sup>, which implements CITES in the EU, have also been exempted from the due diligence requirement. "The timber species listed in Annexes A, B or C to Regulation (EC) No 338/97 shall be considered to have been legally harvested for the purposes of EUTR." Second, operators can develop their own

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<sup>489</sup>Regulation (EU) No 995/2010 Article 6

<sup>490</sup>Jon Buckrell and Alison Hoare, 'Controlling Illegal Logging: Implementation of the EU Timber Regulation' (Chatham House 2011) <[http://www.chathamhouse.org/sites/files/chathamhouse/0611buckrell\\_hoare.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/0611buckrell_hoare.pdf) >

<sup>491</sup>Centre for Environment and Development and ClientEarth, 'The EU Timber Regulation: Using Information to Support Enforcement' (Undated) <<https://www.documents.clientearth.org/wp-content/uploads/library/2013-11-01-the-eu-timber-regulation-using-information-to-support-enforcement-coll-en.pdf> >

<sup>492</sup>Brack (n 161)

<sup>493</sup>Council Regulation (EC) No 338/97



due diligence system, with full risk assessment, risk mitigation, and regular evaluation procedures. Third, they can use a system developed by a monitoring organisation (MO) recognised by the European Commission (EC) which has been described in the latter section of this chapter.

For the operators maintaining their own due diligence system, it is their responsibility to regularly evaluate the due diligence system they have developed and ensure that all the responsible actors of a supply chain are aware about the requirements and implementing the correct procedure to comply with EUTR.<sup>494</sup> The evaluation should for example check whether there are documented procedures for collecting and recording vital information about supplies of timber product, assessing the risk if product contained illegally harvested timber, and describing actions to mitigate different levels of risk. The proof of timber legality is decided based on the documentary evidences and on the elements of due diligence process that operator implements.

## **(B) Role of traders**

Traders are all those organisations or buyers who sell or buy timber or timber products that have already been placed on the European market by the operators. It means responsibilities rest upon the individual or unit that first places timber on the EU market (the operator) but there is also record-keeping requirements applicable to entities further down the supply chain (traders). Obligations specifically related to the traders are simple and are designed to provide timber and timber products that traders are dealing in can be tracked throughout the supply chain. The traders in the supply chain must be able to identify the operators or traders who have supplied them and, where applicable and whom they have supplied timber or timber products. The information must be retained for at least five years.<sup>495</sup>

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<sup>494</sup>European Commission, 'Guidance Document: The EU Timber Regulation' (European Union 2013)

<sup>495</sup>Regulation (EU) No 995/2010 Article 11

## 4.2.2 Role of Competent Authority (CA) and Monitoring Organisation (MO)

### **(A) Duties of a competent authority**

The successful implementation and compliance of the timber regulation depends on simple, consistent processes and requirements being implemented, as well as on the availability and use of relevant information.<sup>496</sup> The EU member states are required to designate their competent authorities<sup>497</sup> and need to establish ‘effective, proportionate and dissuasive’ rules on penalties for infringements of the provisions of the regulation.<sup>498</sup> In the UK this responsibility has been placed on Department for Environment Food & Rural Affairs (DEFRA) who have nominated the Regulatory Delivery, previously known as National Measurement Office as the competent authority. Now the Office for Product Safety and Standards (Safety & Standards), part of the department for Business, Energy and Industrial Strategy (BEIS), is the Competent Authority (CA) for to enforce the Regulations on behalf of DEFRA. Competent authorities are the public authorities who implement and enforce the timber regulation. The competent authorities must carry out checks on operators,<sup>499</sup> monitoring organisations,<sup>500</sup> traders and maintain and communicate records of their actions.<sup>501</sup>

Competent authorities must regularly carry out checks and may also carry out inspections when in possession of relevant information suggesting risk factors or a breach of the law, from third parties which can include NGOs. Civil society organisations are expected to play a supervisory role, as the EUTR requires competent authorities to investigate substantiated complaints by third parties.<sup>502</sup> The competent authority must have appropriate authority and resources to carry out its

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<sup>496</sup>Unwin (n 462)

<sup>497</sup>Centre for Environment and Development (n 491)

<sup>498</sup>Regulation (EU) No 995/2010 Article 19

<sup>499</sup>Regulation (EU) No 995/2010 Article 10(1)

<sup>500</sup>Regulation (EU) No 995/2010 Article 8(4)

<sup>501</sup>Regulation (EU) No 995/2010 Articles 10(5), 11(1)

<sup>502</sup>European Commission (n 494)

role.<sup>503</sup> In Accordance With That, obligations of the competent authority are to identify implementation actions necessary at national level.

Competent authorities must conduct checks on operators to verify that they are compliant in line with a periodically revised plan in response to a risk based approach.<sup>504</sup> If the competent authority identifies flaws in the activities of an operator, it can serve the notice of remedial actions to that operator.<sup>505</sup> Additionally, according to the nature of the inadequacies detected, the member state can take provisional measures which may include the seizure of timber and a prohibition on the marketing of timber and timber products. These steps apply to corrective actions and should not substitute any prosecution steps for infringement.

The EUTR does not indicate that competent authority must carry out checks on traders. To apply the sanctions to traders for violations of the traceability obligation, checks should first be carried out. Further, the timber regulation stipulates that “Member States should ensure that infringements, including by operators, traders and monitoring organisations are punished by effective, proportionate and dissuasive penalties.”<sup>506</sup>

Competent authorities must conduct checks on monitoring organisations regularly and where a competent authority has relevant information, which could include substantiated third parties’ complaints.<sup>507</sup> If the competent authority establishes that monitoring agency no longer meets the relevant criteria based on tests carried out, it must notify the Commission. The Commission is entitled to withdraw recognition. Competent authorities do not have the authority to grant or revoke recognition, rather they are being consulted throughout the process of recognising monitoring organisations.

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<sup>503</sup>ClientEarth, Competent Authorities: Roles and Responsibilities under the EU Timber Regulation and VPAs (ClientEarth 2012) <<https://www.documents.clientearth.org/wp-content/uploads/library/2012-04-01-competent-authorities-roles-and-responsibilities-under-the-eu-timber-regulation-and-vpas-ce-en.pdf> >

<sup>504</sup>Regulation (EU) No 995/2010 Article 10(2)

<sup>505</sup>Regulation (EU) No 995/2010 Article 10(5)

<sup>506</sup>Regulation (EU) No 995/2010 Recital 27

<sup>507</sup>Regulation (EU) No 995/2010 Article 8(4)

The competent authorities must maintain records that must be provided to the public and circulated to other government agencies. If a competent authority detects a violation of the terms of the timber regulation, any subsequent disciplinary action will be focused on the documents it maintains. Consequently, such inspections must be conducted to a standard that will support such enforcement steps. Furthermore, records of such checks must be kept in a manner that would be admissible in enforcement proceedings. Although notices of remedial actions may be issued by a competent authority, it may not be necessary to initiate more formal disciplinary proceedings, such as court proceedings.

Besides, competent authorities must work with “each other, with the administrative authorities of third countries and with the Commission” to ensure compliance with the timber regulation and exchange information on serious deficiencies found by checks carried out on operators and monitoring organisations.<sup>508</sup> Such cooperation is vital for achieving the goals of the timber regulation. Importantly, it acknowledges that the Member States’ competent authorities have active responsibilities to cooperate with other relevant government agencies.

### **(B) The concept of Monitoring Organisation (MO)**

Monitoring Organisations are a new type of organisation that the European Commission will officially recognise. The MOs has to develop and maintain due diligence systems that an operator may use. The duties of the MOs are to develop, review and enhance information collection, risk assessment and risk mitigation systems; to verify their proper use by participating operators; and to take corrective action in the event of misuse.<sup>509</sup> An operator that is using the monitoring organisation’s due diligence system is still prohibited from placing illegal timber on the market. Currently there are thirteen monitoring organisations recognised by the European Commission across all the EU member states and out of these thirteen organisations, six organisations operate within the UK.

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<sup>508</sup>Regulation (EU) No 995/2010 Article 12

<sup>509</sup>Overdevest (n 208)

Since an effective due diligence system is a key tool to ensure that this prohibition is not infringed, an operator has a clear interest in ensuring that the due diligence system it uses is fit for purpose. A monitoring organization, based on its reputation, has legitimacy and prestige, which will suggest to an operator that its due diligence process is effective. A monitoring organization can reduce the supervisory burden of a competent authority by serving as a provider of a reliable due diligence programme. Thus, a monitoring organisation is in the position of significant accountability and clear usefulness to an operator and competent authority. This combination underlines the value of ensuring the effective establishment and implementation of regulations relating to the acknowledgement and removal of the recognition of monitoring organisations.

The EUTR recognition provisions for MOs state that they will be subject to scrutiny by both the European Commission and the Member States' national competent authorities responsible for administering the EUTR. The MOs will be subject to EC audit at least every two years and will be subject to further scrutiny if the 'operational due diligence systems' provided to operators fail to exclude illegal material.

#### 4.2.3 Penalties

Member states must establish penalties for infringements of the timber regulation.<sup>510</sup> Article 19 mentions that the “penalties must be ‘effective, proportionate and dissuasive and may include fines, seizure of the timber and timber products, and immediate suspension of the authorisation to trade.” This means that they should be fixed at a level which is sufficiently dissuasive to make sure that in general, companies are not willing to break the law. This may take into consideration of the financial benefit of the law-breaking companies and the financial loss to communities and governments in harvesting country.

Penalties will apply if an operator refuses to practise due diligence and an operator fails to maintain their due diligence process. Penalties must also apply equally to cases where the concerned timber is derived from the EU Member State or as been imported.

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<sup>510</sup>Eoin Brady and Emily Unwin, 'ClientEarth, Member State Implementation of the Timber Regulation: The Basics' (ClientEarth 2014) <<https://www.documents.clientearth.org/wp-content/uploads/library/2014-02-28-may-2014-member-state-implementation-of-the-eu-timber-regulation-the-basics-ce-en.pdf> >

If the member states want to depend on existing laws to sanctions for infringements of the timber regulation, they must ensure that these legislation already imposes penalties on all enforceable duties.<sup>511</sup>

In the case of non-compliance, the law allows for two forms of measures: immediate interim measures; and general sanctions. If, after an operator check, a Member State's competent authority detects any deficiencies, it has the authority to issue interim measures, depending on the level of seriousness, including: the seizure of timber and timber products; or the prohibition of the marketing of timber and timber products.<sup>512</sup> The timber regulation suggests possible penalties that Member States might establish, which include fines appropriate to environmental damage, the value of timber products in question and economic losses in the form of tax loss. The member state authority can also seizure the consignment of timber and immediately suspend the trade licence of the company.

The penalties set in the UK Regulations<sup>513</sup> for an operator who places illegally harvested timber on the EU market and does not maintain and apply the due diligence system, obstruct the visiting inspector or fails to act on a remedial notice. The operator is liable for up to two years imprisonment or an unlimited fine if convicted in a Crown Court. If convicted in a Magistrates Court, the operator may face up to three months of imprisonment and/or a fine up to £5,000 for each offence. If any operator or trader fails to maintain adequate traceability records can be fined up to £5,000 for each offence. The fine of up to £5000 has been sanctioned for any person disclosing the information received from the competent authority without permission.

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<sup>511</sup>ibid

<sup>512</sup>Proforest, 'Briefing Note: EU Timber Regulation Preparing for the Regulation' (Proforest 2011)  
< <http://www.proforest.net/objects/publications/eu-timber-regulation-briefing-note> >

<sup>513</sup>Department for Environment Food and Rural Affairs (DEFRA), 'Consultation on the Timber and Timber Products (Placing on the Market) Regulations 2013, A Summary of Responses to the Consultation and the Government Reply (DEFRA 2013)  
<[https://www.legislation.gov.uk/ukxi/2013/233/pdfs/ukxi0d\\_20130233\\_en.pdf](https://www.legislation.gov.uk/ukxi/2013/233/pdfs/ukxi0d_20130233_en.pdf)>

#### 4.2.4 Forest certification schemes and the EUTR

The EUTR has recognised the forest certification or third-party verification schemes as a part of the risk assessment procedure that include verification of compliance with applicable legislation. If an operator wishes to use the certification or other third-party verification schemes, then those schemes must meet the criteria explained in the Article 6(1) (b) and Article 6(1) (c). The criteria include that the scheme must include relevant legislation, must conduct field visit at least once in a year to verify that the operator complies with applicable legislation, should be able to trace the product supply chain before placing on the market and the schemes must include controls to confirm that timber or timber products of unidentified origin or have not been harvested in accordance with applicable legislation, must not enter the supply chain.

The operators can use credible certification schemes which provides information on the origin of the timber and timber products which is an indicator that timber has been logged legally<sup>514</sup> but it is not an evidence of legality under the timber regulation. Certification is one possible tool to assist compliance with the timber regulation and provides an important starting point for the risk assessment. So, if the product is independently certified and is from a low risk area the risk assessment will be simple. As mentioned in chapter 2, the Forest Stewardship Council and the Programme for the Endorsement of Forest Certification are the internationally recognised schemes available for the operators and traders to choose from. Both FSC and PEFC have made are in the process of changing their systems to more closely align with the requirements of EUTR.

#### 4.3 Product scope of the EUTR

The EUTR does not cover all the timber and timber products placed on the EU market. The timber regulation covers most timber products, including paper. However, an exception is made for recycled goods and printed materials like books, magazines and newspapers. Printed products are exempted from the scope of the regulation at least for the first five years. The EUTR uses the Combined Nomenclature (CN) codes as a

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<sup>514</sup>Emily Unwin and Elisa Grabbe, 'The Use of Certification in the Context of the EU Timber Regulation' (ClientEarth 2015) < <http://loggingoff.info/wp-content/uploads/2015/09/545.pdf> >

way of identifying products that are affected by the regulation. The list below indicates the products which are covered by the EUTR with their CN codes.

- 4401 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms
- 4403 Wood in the rough, whether or not stripped of bark or sapwood, or roughly squared
- 4406 Railway or tramway sleepers of wood
- 4407 Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm
- 4408 Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for other similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm
- 4409 Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, moulded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed
- 4410 Particle board, oriented strand board and similar board (for example, waferboard) of wood or other ligneous materials, whether or not agglomerated with resins or other organic binding substances
- 4411 Fibreboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances
- 4412 Plywood, veneered panels and similar laminated wood
- 4413 00 00 Densified wood, in blocks, plates, strips or profile shapes
- 4414 00 Wooden frames for paintings, photographs, mirrors or similar objects
- 4415 Packing cases, boxes, crates, drums and similar packings, of wood; cable-drums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood
- 4416 00 00 Casks, barrels, vats, tubs and other cooperers' products and parts thereof, of wood, including staves
- 4418 Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes
- Pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, with the exception of bamboo-based and recovered (waste and scrap) products
- 9403 30, 9403 40, 9403 50 00, 9403 60 and 9403 90 30 Wooden furniture
- 9406 00 20 Prefabricated buildings

The EU can change the list of timber products mentioned in the annexure to include the exempted products that contain wood. These changes in the timber products can be seen in few years' time once some experience of implementing EUTR has been



acquired. The amendments might be needed to expand the product scope of the EUTR considering the future developments.

#### 4.4 Analysing EUTR instruments

The regulations on fighting illegal logging was implemented after extensive discussions and with a strong push from the European Parliament. The last rapporteur<sup>515</sup> of this regulation and Member of the European Parliament (MEP) Satu Hassi stated that: “EU legislation to ban the sale of illegally-sourced timber represents a major international breakthrough, from the forests around the world that are ravaged by illegal logging to the EU market where timber and wood products are sold.”<sup>516</sup> She also added that “the tough rules agreed would not have been possible without the strong backing of the European Parliament.” The regulation is a vital tool to ensuring progress in the fight against illegal logging. The law on timber was intended to change the timber industry by banning illicit timber from the EU market.<sup>517</sup> However, it is uncertain whether the protection afforded in the regulation is adequate.

##### **(A) Due diligence requirements for timber industry**

The regulation's prohibition requirement is limited to only first importers, excluding other timber producers and retailers in the rest of the supply chain. According to the European Economic and Social Committee, because of this limitation “the expected impact of controlling the risk of placing illegal products on the market is progressively reduced as operators in the supply chain can get nearer to the final consumer.”<sup>518</sup> This

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<sup>515</sup>The rapporteur in the European Parliament is elected by fellow MEPs when one of the Parliament's committees is assigned to prepare a report on a certain legislative proposal or some other document of the European Commission. The main responsibility of the rapporteur is to consult with experts in the particular field, to analyse the project, to engage in discussions with other members of the committee and to recommend the political 'line' that should be followed.

<sup>516</sup>European Parliament, 'Cutting Illegal Timber Out of the EU Market' (2010) <<http://www.europarl.europa.eu/news/en/agenda/briefing/2010-07-05/8/cutting-illegal-timber-out-of-the-eu-market>>

<sup>517</sup>Levashova (n 91)

<sup>518</sup>European Economic and Social Committee, Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, COM(2008) 644 final – 2008/0198 COD <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0456:FIN:EN:PDF>>

can be argued that with the aid of the traceability provision extended to all timber traders, this loophole in the law can be filled. Nonetheless, the traceability duty is restricted only to basic information and failure to disclose such details will most likely result in no penalties.<sup>519</sup>

The regulation defines the procedure whereby competent authorities have to audit operators, but there is no specific system is made available for auditing traders. The due diligence is only demanded of operators accounts for a concession made by drafters of the EUTR, who understood that the due diligence provisions could turn out to be quite costly for traders and wanted to avoid imposing undue administrative costs.

The stage at which the timber regulation's key responsibilities are applied is when timber or timber products are first made available for sale or commercial introduced on the EU market. Broadly, it means that if timber or timber product are first offered for sale or commercial exploitation within the EU, having custom clearance if arriving from outside the EU, the organisation which does this is referred to as an operator. The purpose of exploring how this strategy works in practise is to point out that any regulatory regime that attempts to control or otherwise affect commodity trading must be vigilant to the point where the key responsibilities have an effect. There must be clarity to the party that is regulated, the exact point at which the obligations attached must be known, and public authorities must be able to accurately identify those parties and have adequate means to take enforcement action where there are infringements.

The timber legislation defines the types of law applicable to whether timber has been legally harvested but does not describe the specific laws falling within those categories. The downside is that those affected by the timber regulation need to identify the specific laws to be adhered to at national level, thus increasing the pressure on individual actors to consider different laws. This indicates the need for clear and effective guidelines at Member State and EU level from public authorities.<sup>520</sup>

The timber regulation does not determine that the operator needs to be based in the EU, it does not clearly specify that an operator can be an entity outside the EU. It is

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<sup>519</sup>Levashova (n 91)

<sup>520</sup>Unwin (n 462)

an essential consideration whether an operator can be based outside the EU, which has substantial consequences for the way in which the law is enforced. This is something that should be clarified from the beginning and, if the controlled group can be located outside the EU, care must be taken to ensure that the law itself can be applied.<sup>521</sup>

The timber regulation forces operators to examine whether the timber has been harvested illegally. If present risk of illegality is identified, the financial flows that are related to that trade are flows that are related to illegal practices. Consequently, in EU Member States these could be regulated with a focus on money laundering or the movement of assets that are linked to illegal practices. The operators had not previously had to question that timber was of legitimate origin but since they need to do it now, the associated financial services companies should also pay attention to the information produced by timber regulation activity and respond to it.

### **(B) Assessing the responsibilities of competent authority/enforcement agency**

Competent authorities must carry out operator checks and establish a schedule of checks or system to determine a schedule involving the identification of operators within their jurisdiction and the identification of relevant risk factors and how they will be used to decide the frequency of checks. The timber regulation framework somewhat answer the first point, by identifying obligations to which the operators are prone to. Bearing in mind the absence of further guidance on other points over the EU level, accountability is falling with each Member State competent authority to define the way to fulfil these steps. The risk is that member states can interpret the relevant provisions in a different manner, which will lead to unfair standards of implementation throughout the EU. This highlights the importance of creating clear enough stipulation from the beginning. The law must be implemented in the same way in each Member State and provisions must be clear enough to ensure consistency of approach. Essential point here is that more information on how procedures are to run and

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<sup>521</sup>ibid

decisions are to be taken in action will help all stakeholders play their role in regulatory framework activity.

There must be specific requirements and standards to be met in order to be accountable, transparent and efficient, and accurate information about the application of the law itself and the regulated goods must be available and used. For the timber regulation to be complied with, the information on how it operates in practice, must be made publicly available. Keeping in mind the reality of timber supply chains, a substantial amount of information concerning the harvest of timber originate beyond the EU, should be provided. Possible barriers to this information include a lack of certainty as to which information is essential, how it is to be presented and how it is taken into account. The competent authority must provide relevant guidance to the operators to simplify the information gathering process. This clarity is necessary for public authorities applying the law and for interested third parties to scrutinise the operation of the law. Failure to provide relevant information in a timely and open manner may substantially restrict the ability of various stakeholders to communicate effectively with the legislation, including the right of third parties to request relevant information.

With regards to the checks on monitoring organisations, the 2016 guidance document<sup>522</sup> describes that if an MO provides services to operators within a CA's jurisdiction, the CA should carry out checks on this MO at least once every two years. If an MO does not currently provide services to operators within a CA's jurisdiction, the CA does not need to carry out checks on the MO. Though, the CA of the member state where an MO has its principal office, has to carry out checks on the MO at least every two years. The CAs are being encouraged to share their results amongst themselves. Effective liaison between MOs and CAs can help improve the work of both. If the CA is aware which operators are using the MOs, it could take account in its risk-based planning, for instance by making less visits to those particular operators. This is beneficial for the CA, operators and MOs. In the same way, if the CA knows that operators are unable to properly use the due diligence systems provided by an MO, it

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<sup>522</sup>European Commission, 'Guidance Document for The EU Timber Regulation' (EC 2016) <<https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/C-2016-755-F1-EN-MAIN-PART-1.PDF>>

can take this into account, for example through increasing the number of visits to these operators. Keep in mind that the MOs are required to share this information with CAs referred to in paragraph 8(1)(c) of Regulation 995/2010. If a particular MO discovers particular evidence of illegality, it may be of instant use to CAs in all Member States.

As per the first evaluation report<sup>523</sup>, checks in 19 Member States resulted in remedial actions or penalties for violation of EUTR obligations. Many inquiries were conducted on the basis of substantiated third-party complaints. A risk-based approach is used by all CAs to prepare and review their plans. Risk elements contain the specific features of suppliers and their products, the type of operators and third-party evidence (i.e. "substantiated concerns"). Not all Member States reported having carried out checks in the first evaluation report. The checks started late and were irregular at the beginning in several countries due to delays in the implementation of applicable national legislation.

With regard to the checks on monitoring organisations, the CAs are obliged<sup>524</sup> to carry out checks on a MO at least once every two years. In the second half of 2015, i.e. after the evaluation period covered by the first report, the checks on the first recognised MO were carried out. During the second evaluation reporting period (March 2015 – February 2017), all monitoring organisations, except for ICILA S.R.L. in Italy, were inspected by competent authorities and none of the inspections resulted in the Commission being notified of issues that might lead to the withdrawal of recognition as a monitoring organisation.

The Commission has set up an Expert Group on the EU Timber Regulation and the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation to ensure cooperation between Member States, Competent Authorities and the European Commission to ensure compliance with the EU Timber Regulation according to Article 12 of the EUTR. The Expert Group meets four to five times per year. Concerning the

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<sup>523</sup>European Commission, 'Report from the Commission to the European Parliament and the Council' (EC 2016) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0074&from=EN>>

<sup>524</sup>Council Regulation (EU) 607/2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 OJ L177, 06.07.2012 p. 16-18

EUTR, it is the duty of the competent authorities and the Commission to exchange information on deficiencies found by checks indicated in articles 8(4) and 10(1) of the EUTR and on the types of sanctions implemented under Article 19 of the EUTR.

The post implementation review published in April 2018 by UK DEFRA<sup>525</sup> suggests that during the first two years of implementation of the Regulations, Safety & Standards focused primarily on raising awareness as opposed to compliance activities, to allow for a period of adjustments for business to adapt to new requirements. Since 2015 a much more enforcement-led approach has been adopted and the UK CA started to focus on continued non-compliance by operators, resulting in two prosecution under the Regulations.

Angora 2011 Limited, trading as Lombok, was convicted on 25 October 2017 at Westminster Magistrates Court and was fined £ 5,000 plus expenses after pleading guilty at the first hearing.<sup>526</sup> The company failed to take due care when placing an artisan sideboard on the market, imported on 1 June 2016 from India. Considering their mitigation and credit for an early guilty plea, The British timber retailer, Hardwood Dimensions (Holdings) Ltd, was fined £4,000 in March 2018, for its failure to ensure that timber it placed on the market from Cameroon was legally harvested. The prosecution was based on deficiencies in the company's due diligence systems.<sup>527</sup>

The UK enforcement authority for the EUTR, recently published a report on the plywood imported from China to the UK.<sup>528</sup> The report indicates insufficient due diligence process, a failure in terms of knowledge of their product when tested, or both. Out of 16 companies surveyed, only two companies have supplied satisfactory due

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<sup>525</sup>Department for Environment, Food and Rural Affairs (DEFRA), 'Timber and Timber Products (Placing on the Market) Regulations 2013 Post Implementation Review' (DEFRA 2018)

<[http://www.legislation.gov.uk/ukxi/2013/233/pdfs/ukxi0d\\_20130233\\_en\\_001.pdf](http://www.legislation.gov.uk/ukxi/2013/233/pdfs/ukxi0d_20130233_en_001.pdf)>

<sup>526</sup>Press Release from Department for Business, Energy and Industrial Strategy <https://www.gov.uk/government/news/company-fined-for-failure-to-check-product-was-made-from-illegally-harvested-timber>

<sup>527</sup>See Press Release from Department for Business, Energy and Industrial Strategy <<https://www.gov.uk/government/news/national-product-safety-office-carries-out-first-enforcement-action>>

<sup>528</sup>Nicolas Pillet and Michael Sawyer, 'EUTR: Plywood Imported from China', Project Prepared for DEFRA, (National Measurement Office 2015)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/402325/Chinese\\_Plywood\\_Research\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402325/Chinese_Plywood_Research_Report.pdf)>

diligence system. The report also highlighted the less proactive approach of the companies in complying with the EUTR. The overreliance on the certified timber was also a significant factor identified under the report. As per the EUTR, certified timber does not prove that the timber has originated from a legal source. As per the Article 6 of the EUTR, there needs to be evidence of the steps taken to achieve negligible risk, which was missing as per the report.

### **(C) Penalty system of EUTR**

A consistent system of sanctions is required for effective implementation of the regulation. The penalty system is not harmonised in the Regulation since Member States are entitled to determine the nature of the penalties as they deem necessary.<sup>529</sup> The only clarification available in Article 19 of the regulation is that penalties should be 'effective, proportionate and dissuasive' and may include fines, the seizure of timber and timber products, and an immediate suspension of the permit to trade. The expectation is that the competent authorities would act against operators who did not implement adequate due diligence systems, or who place illegal products on the market.<sup>530</sup> As per the first evaluation report, small number of penalties have been applied so it could not determine if they are "effective, proportionate and dissuasive. All member states have range of penalties for potential infringements of the EUTR. Penalties can be administrative and criminal in 13 countries, only administrative in 10 countries, only criminal in two countries and four countries did not specify the type of the penalties (administrative and/or criminal).<sup>531</sup>

The absence of a harmonised system of sanctions is criticised by non-governmental organisations.<sup>532</sup> If the penalty systems of different Member States varied substantially, resulting in a discrepancy between the various measures aimed at the

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<sup>529</sup>Levashova (n 91) 296

<sup>530</sup>Brack (n 206)

<sup>531</sup>European Commission, 'Report from the Commission to the European Parliament and the Council on Regulation (EU) No 995/2010: Biennial report for the period March 2015 - February 2017' (EC 2018) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0668&from=EN>>

<sup>532</sup>World Wide Fund for Nature (WWF) and The Alliance for Beverage Cartons and the Environment (ACE), 'WWF - ACE Stakeholder Workshop on the Draft Timber Regulation', April 13, 2010, Brussels (WWF European Policy Office 2010) <<http://www.ace.be/uploads/Modules/Publications/wwf-ace-joint-views-on-illegal-logging.pdf>>

eliminating illegal timber, this could undermine the effective implementation of the regulation on a national level.<sup>533</sup> Furthermore, considering the international nature of timber trade, decisions on the appropriate level of penalties must also take into account the penalties imposed or envisaged by other appropriate international legal frameworks.

The position held by MEP Satu Hassi on this issue was more optimistic. First, the formulation that the penalties should be 'effective, proportionate and dissuasive' is strong enough to avoid major inconsistencies with respect to penalties on a national level. Second, it is the European Commission that has to control the adoption of sanctions among Member States. Third, complete harmonisation of penalties is almost impossible to attain because of the resilient commitment of individual Member States to keep their law enforcement systems intact.<sup>534</sup>

The issue on which there was no consensus between the European Parliament and the Council was whether the sale of illegal timber could be considered a criminal offence. The European Parliament called for serious timber-related offences to be criminalised.<sup>535</sup> The European Commission and Council's stance prevailed in the final text of the regulation and the criminalization of the selling of illegal timber was not implemented. The failure to introduce a criminalisation paragraph for serious timber-related offences weakens the timber regulation because the Member States are unlikely to incorporate criminal penalties for grave timber offences into their legal systems on their own initiative.

One example is the United Kingdom. Caroline Lucas, former MEP, has proposed a Bill that addresses the holes in the EU regulation and introduces more strict penalties

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<sup>533</sup> *ibid*

<sup>534</sup> Levashova (n 91)

<sup>535</sup> In the Regulation Amendments, the European Parliament proposed that 'penalties must be both criminal and administrative'. See European Parliament, Committee on the Environment, Public Health and Food Safety, 'Draft Recommendation on Second Reading on the Council position at first reading for adopting a regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market' (05885/4/2010 – C7-0053/2010 – 2008/0198(COD), 15 March 2010) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-439.878+01+DOC+PDF+V0//EN&language=EN> >



for illegal logging in the UK. The proposed Bill includes measures that make the possession and importation of illegal timber a criminal offence. By authorising and implementing these measures, the British government backed down, even after previous assurances to the House of Commons to go ahead with the timber bill criminalising significant timber crimes.

The British government's position is that the best way to address the global issue of illegal logging is through coordinated action at European level. In failing to support the regulation's criminalization mandate, Member States were unwilling to fill this gap at national level, fearing the extra administrative burden and the necessary changes in their criminal processes. Moreover, the UK competent authority indicated a preference to work by persuasion, with prosecution only as a last resort for those flagrantly ignoring the rules. The proposed UK rules provide a defence if it can be proven that proper use has been made of a due diligence system which complies with the requirements of the EUTR.

#### **(D) Narrow product scope**

The EUTR was designed to provide consumers with assurances that wood products purchased in EU member states such as the UK are not contributing to forest destruction due to illegal logging. The introduction of the regulation itself marked a significant step forward – but it does not go far enough. The Timber regulation covers most timber products, including paper. However, an exception is made for recycled products and printed materials such as books, magazines and newspapers. As a result, illegal timber can still enter European markets in the form of books, magazines and other imported products from abroad.<sup>536</sup> Printed products are excluded from the scope of the regulation at least during the first five years.

The Confederation of European Paper Industries (CEPI) and the European Mine, Chemical and Energy Workers' Federation (EMCEF) demanded the incorporation of printed products in the Timber Regulation in order to prevent the evasion and ensuring

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<sup>536</sup> Levashova (n 91)

a level playing field.<sup>537</sup> The concern expressed by CEPI was that by virtue of being converted into printed products, thousands of tonnes of paper could slip into Europe's markets under the EU's regulatory radar – circumventing rules with which papermakers inside the EU must comply. Because paper itself is not exempt from the regulation, a due diligence process will have to be developed by the European paper industry, whereas international suppliers are able to ignore these regulations. Possible implications would have been that illegal timber continues to enter the EU market and that print buyers will choose non-European suppliers, therefore excluding European papermakers and their suppliers. These developments will inevitably eliminate a level playing field and contribute to timber regime inequality.

WWF tested the goods coming to the UK that are not protected by the EUTR and found many of the samples contain non-declared high-risk species. The analysis of all 934 wood-based CN codes highlighted that 481 CN codes, or 51%, currently sit outside the scope of the EUTR.<sup>538</sup> Drawback of the approach is that some industries can still trade or import timber products harvested illegally which is an unfair advantage to the companies who import timber products which are not included in the regulation. For example, some musical instruments are made from high value tropical timber and are currently completely unregulated and it might continue to remain out of scope because the trading volume is minimal compared to other sectors. The scale of the out of scope codes was highly significant with a value of €31.7bn.<sup>539</sup> The exclusion of some timber products can undermine the impact of EUTR as illegally logged products can make their way to the EU market.

EUTR's current scope is not sufficiently extensive to halt the putting of illicit timber on the EU market. Widening the CN code list or making it all-inclusive would bring several non-timber industries into scope and give it a more level playing field – not only within the EU but for all businesses wishing to trade with the EU.

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<sup>537</sup> ibid

<sup>538</sup> Charles Drewe and Tim Barker, 'Analysis of Potential European Union Timber Regulation Product Scope Changes' (WWF and Newleaf Sustainability Practice Ltd 2016) <[http://assets.wwf.org.uk/downloads/eutr\\_product\\_scope\\_report.pdf](http://assets.wwf.org.uk/downloads/eutr_product_scope_report.pdf)>

<sup>539</sup> Charles Drewe, 'In or Out? Can the European Union's Timber Regulation Keep Out Illegal Timber?' (WWF and Newleaf Sustainability Practice Ltd Undated)

## **(E) Using forest certification schemes for compliance**

A first point to take note from the timber regulation is that in certain circumstances, voluntary methods alone are not adequate means of influencing the production of a particular product. Voluntary certification programs have existed in the wood industry for many years. Yet convincing and ensuring sector-wide compliance with a high standard of harvest legality were not adequate on their own. According to the 2016 guidance document, when operators are dependent on the certification as assurance and purchase from suppliers with chain-of-custody certification, they must make sure that the chain of custody certification covers the particular product they purchase.

The timber legislation sets out situations when schemes for certification may be of use. In particular, certificate schemes are recognised as potential instruments in the exercise of due diligence, evaluating and reducing the risk of illegal harvesting. The regulation makes it clear that to be of possible use here, a certification scheme must meet the same category of legislation that the timber regulation imposes compliance with and would have to meet four criteria stated in previous section. The responsibility for considering such a case lies with the operator<sup>540</sup> and it has been clarified that the certification is a potential but not essential tool. The operator must be convinced that the third-party organisation which issued a certificate was adequately qualified and is in order with the certification scheme and the appropriate accreditation body. There is no requirement to use voluntary certification schemes; instead, each operator can decide whether or not to do so; the operator will remain liable in any case.<sup>541</sup>

Despite all these provisions, questions remain to be asked regarding how the certification schemes can be used in the practice. In order to make possible use of voluntary certification schemes in the operation of law, detailed clarity must be given as to the extent to which this may be the case. This is about ensuring that the Timber

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<sup>540</sup>Overdevest (n 17)

<sup>541</sup>Unwin (n 462)

Regulation works properly. The research by Proforest<sup>542</sup> has shown that none of the existing private schemes is fully compatible with EUTR and FLEGT VPAs.

## **(F) The impact of FLEGT VPA or CITES licenses on EUTR**

The timber regulation creates special recognition for VPA or CITES licences by providing for the automatic recognition of timber and timber products with these licences as legally harvested.<sup>543</sup> This creates an incentive for countries to engage with the EU in a VPA, which is arguably aimed at facilitating more comprehensive reforms of national forest governance systems. Generating, storing and, where appropriate, sharing information about illegality risks in timber supply chains and imports is central to efficient enforcement of both CITES and EUTR requirements.<sup>544</sup> The decision to link the EUTR explicitly with the legal framework for the enactment of CITES in the EU could appear at first view to create a loophole in the EUTR, since the legal validation element of CITES export permitting is significantly weaker in some timber range states than would be expected under a VPA or the EUTR.

The FLEGT action plan initiated in 2003 but only one country has yet been permitted to deliver FLEGT export licenses. Indonesia has become the first and only country to issue FLEGT licenses in November 2016. Indonesia, which has been establishing its own national Timber Legality Assurance System (TLAs)<sup>545</sup> for over ten years, has been piloting checked timber shipments in collaboration with EU Member State authorities. Apart from Indonesia, five other countries are in implementing stage of their VPAs (including Ghana, Liberia and the Republic of Congo) and nine others are in negotiations with the EU. Ghana, began the process of VPA with the EU in 2008

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<sup>542</sup>Sofie Tind Nielsen, 'Main Report: Assessment of Certification and Legality Verification Schemes for European Timber Trade Federation (ETTF) (Proforest 2012) < <https://www.proforest.net/proforest/en/files/assessment-of-certification-and-legality-verification-schemes-2013-full-report.pdf> >

<sup>543</sup>Regulation (EU) No 995/2010 Article 3

<sup>544</sup>Jade Saunders and Jens Hein, 'EUTR, CITES and Money Laundering: Challenges to Coordinated Enforcement in the Global Forest Products Sector Work Package 4 "Case Studies' (European Union Action to Fight Environmental Crime 2015) <[https://www.ecologic.eu/sites/files/publication/2015/efface\\_eutr\\_cites\\_and\\_money\\_laundering.pdf](https://www.ecologic.eu/sites/files/publication/2015/efface_eutr_cites_and_money_laundering.pdf)>

<sup>545</sup>The Indonesian Timber Legality Assurance System (INDO-TLAS)/Sistem Verifikasi Legalitas Kayu (SVLK) is an Indonesian scheme to assure the international timber market of the legality of its timber products

and signed its first VPA in the same year, was expected to deliver FLEGT license timber by the end of 2013, has not yet reach this target.<sup>546</sup>

There is a serious risk that the continued failure to deliver FLEGT licences in conjunction with the onset of EUTR legality verification requirements will lead to the unravelling of the coalition in many countries supporting VPAs. With the distribution of FLEGT licences in many VPA countries still off for some years, the opportunities may flow in the reverse direction, leading local producers and European buyers to seek private solutions such as certification to meet EUTR's due diligence requirements. These innovations are likely to penalise domestic forestry firms that have actively participated in multi-stakeholder VPA processes to define agreed legality concepts and matrices for verification.<sup>547</sup> This may drive smaller local producers who cannot afford the costs of private certification to direct their sales towards less remunerative Asian markets.

### **(G) Supporting role of Monitoring Organisations (MOs)**

Any organisation may, in principle, qualify as a monitoring organisation provided that it operates as a legal entity, possesses the requisite expertise and does not have any conflicting interests in conducting these functions. Even though there is no mention of remuneration in the timber regulation, it is most likely that a monitoring organisation will charge operators for the services provided or have some form of pre-existing relationship with the operator by offering the service as an advantage to an ongoing association.

The regulation does not provide any specific information on the European Commission's criteria for recognising monitoring organisations. However, paragraph 28 of the preamble of the regulation clearly states that “the Commission should be empowered to adopt delegated acts per Article 290 of the Treaty of the Functioning of the European Union (TFEU) concerning the procedures for the recognition and

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<sup>546</sup>Overdevest (n 208)

<sup>547</sup> ibid

withdrawal of recognition of monitoring organisations”.<sup>548</sup> The 2016 guidance document<sup>549</sup> clarifies that MOs must be aware that, even if they do not have an office in a specific member state, if the CA of that Member state intends to carry out a check on them, they need to provide staff and to make the information available to the CA at the CA’s convenience.

#### 4.5 Current state of implementation of the regulation in the EU

Article 20(3) of the EUTR allows the Commission to review the application of the Regulation, on the basis of Member States' reports and the experience, "the functioning and effectiveness of the Regulation, including in preventing illegally harvested timber or timber products derived from such timber being placed on the market." In 2016, The Commission's review takes the form of an evaluation under the EU's Better Regulation Guidelines. This includes answers to five questions of evaluation: relevance, effectiveness, efficiency, coherence and EU-added value. The assessment involves EUTR’s first two years of operation. Besides, Article 20 stipulates that, based on reporting and experience with the application of the EU Timber Regulation, the Commission shall review the functioning and effectiveness of this Regulation by 3 December 2015 and every six years after that.

The evaluation revealed that there were discrepancies across the EU over the period from March 2013 to March 2015. In the reporting period, a Few Member States began to implement the EUTR only late. The commission has conducted bilateral dialogue with eight Member States, which has been successful in fast-tracking enforcement with the majority of them. In 2015, however, the Commission initiated legal action against four non-compliant Member States. All Member States, except in the case of Spain, reported having named a Competent Authority (CA) to control operators ' compliance with EUTR requirements. These institutions ' institutional structures, legal powers and status vary from one Member State to another, reflecting different legal and institutional frameworks.

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<sup>548</sup>Regulation (EU) No 995/2010 Paragraph 28

<sup>549</sup>EC (n 523)

A broad variance has been identified in the human and financial resources available for EUTR implementation and compliance. Existing human resources vary from around 1 to 200 person/month.<sup>550</sup> The assessment report suggested that EUTR implementation and compliance during the first two years were sluggish and inconsistent and is still incomplete. During the first two years of operation, inconsistent implementation and patchy compliance did not encourage the creation of a level playing field to protect operators from unfair competition from products made from illegally harvested timber.

This second report<sup>551</sup> on the implementation of the EUTR indicates steady progress after four years of its implementation. Nearly all countries meet EUTR's formal requirements. During the reporting period, there has been a substantial increase in the number of reviews and penalties imposed for EUTR violations. Despite clear progress, ongoing efforts are needed to ensure that EUTR is applied consistently and effectively across countries. Uneven implementation can have potential implications for market operators in term of both legislative effectiveness and a level playing field. More than 17,700 controls on operators placing domestic timber on the market and approximately 2,800 controls on operators placing imported timber on the market were carried out over the reporting period. Report indicates, however, that the number of checks on operators deal with domestic timber varied significantly between Member States, from thousands to no checks.

Some EU countries have stepped up their law enforcement over the past couple of years. A Swedish court ruled in 2016 that Almtra Nordic breached the EUTR for importing tropical wood from Myanmar without adequately evaluating the risk of illegal logging of the timber. The case set a significant precedent under the EU Timber Regulation for companies to fully trace their supply chains back to where the timber was harvested. This sparked a flood of compliance actions across Europe, with countries such as the Netherlands, Sweden, and the UK fining companies who did not comply with the law.

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<sup>550</sup>EC (n 531)

<sup>551</sup>ibid

The number of checks remained relatively low in several countries compared to the number of operators and should make further effort to ensure that scope and quality of the checks carried out reflect a more consistent EU wide approach. In 2017, the commission published a letter of formal notice to Belgium on the quantity and quality of checks carried out by its competent authorities and, respectively, a reasoned opinion to Slovakia on the penalty rules applicable to violations of EUTR provisions on imported timber. The Commission is also has bilateral dialogues on the introduction of EUTR with a variety of member states. Although progress has been made in some countries, the current level of technical capability and resources available to the competent authorities (both human and financial) does not always meet the needs and must be strengthened in most of the Member States to increase the number and performance of enforcement controls.

The biennial report indicates a positive response from the participants towards to overall implementation of EUTR but some major challenges still exist. Only a few EU countries have shown some commitment to enforcing the EUTR. Some lagging behind, especially in critical tropical timber import countries such as Belgium, or those in the south of Europe. Very little information is made available to the public on EUTR compliance by member states. Further data is necessary to demonstrate the success of the EUTR or lack of progress and to preserve the integrity of the system, both within the EU and in countries exporting timber.

There needs to be a robust enforcement of the regulation and penalties from all EU member states for the infringement of the regulations to eradicate the import of illegal timber and timber products. This matters because countries that are trying to enforce the EUTR are being undermined by those that are not and when high-risk products are put on the market without proper controls, they can travel across Europe easily. This creates a competitive disadvantage on firms that work under stricter rules.

#### 4.6 Can the legal framework be strengthened by black letter research?

The critical question is whether the EUTR has stopped illegally harvested timber entering the EU supply chain. It has undoubtedly strengthened operators' ability to obtain more information from the supplier but this needs to be more than just a paper



exercise in high-risk areas where third party verification is still the best solution. Greenpeace, the environmental NGO operating worldwide, monitoring of the situation since May 2014 indicated that some operators do not collect or keep records of the products supply chain and in the process completely ignore the risk factors. They only collect official documentation and do not make any attempt go beyond that for verifying the information provided by the supplier unless they receive a request from the authorities. The EUTR can undoubtedly be a significant positive change for the timber industry and for the forests worldwide but its efficiency and applicability in addressing the complex issue of illegal logging is a topic which needs to be evaluated at application level.

Complicated supply chains, with logs sourced from different areas, are intricate for operators to assess and competent authorities to audit. This has been highlighted in a report on Chinese plywood compiled by the UK competent authority. Moreover, various factors have an impact on wood import from tropical countries where illegal logging is a massive issue. Weak internal accounting, weak timber logging control and faking of timber records make the work more difficult for responsible timber firms.

According to a study<sup>552</sup> on company's due diligence system from North-western Russia concluded that most logging companies in Russia lack systems to track the origin of wood, except for certified wood. This study highlights major obstacles persist in the implementation of legislation by EU member states on the technical effectiveness of DDS in relation to the EUTR. Furthermore, the prosecution remains unclear, the fine system is not unified and the role of third-party evidence is still unclear.

The EUTR confines the trade does not exist in commodities that are illegal in the EU, but that are illegal in accordance with the laws of the countries where they have been manufactured. In this Way, imported timber and timber products are required to comply with the standards for legality that are enforced by other countries instead of

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<sup>552</sup>Maxim Trishkin, Eugene Lopatin and Timo Karjalainen, 'Exploratory Assessment of a Company's Due Diligence System against the EU Timber Regulation: A Case Study from North-western Russia' (2015) 6 Forests 1381 <<http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=F6FB8F016B0520024C34B8CFBFABB1A1?doi=10.1.1.699.1258&rep=rep1&type=pdf>>

criteria developed by the EU. Except if the court in a timber-exporting nation were expected to proclaim the timber to be illegal, it would be challenging for European courts determining differences that arise under the EUTR to define legal status of such timber. They might not be familiar with overseas laws and are probably impossible to read many such laws in their original language. The due diligence requirement, which indicates how illegality is to be determined, is therefore important to achieve the import ban. Despite reliance on improbable rulings by courts in timber-exporting countries, European courts can also take advantage of other evidence in determining whether the timber imported into the EU has been harvested legally.

The success of the EUTR is highly dependent on the EU – FLEGT programme initiated in 2003 and delay in issuing the trade licences can undermine the success of the regulation. The forest certification schemes have not been exempted from the regulation but it seems to be the most straightforward options to carry out due diligence. The over reliance on certification to comply with the EUTR also raised concern in the report published by the UK competent authority and there needs to be proper guidelines to deal with this raising concern effectively.

The regulation does not mention anything on controlling the timber shipments on a border which means the custom officials do not have the authority to check the shipment. The regulation has been enforced by the member state appointed enforcement agency that carry out the checks on the businesses whose timber-trading activities are subject to the regulation. The EUTR is focusing on reducing the risk of illegal products entering the supply chain rather than licensing legal ones.<sup>553</sup> The enforcement procedures and criteria to be used by competent authority must be made clear to all stakeholders. Therefore, it must be allowed to actively engaged stakeholders who can provide relevant information. These elements are essential for ensuring a transparent, accountable system of governance.

The black letter methodology alone is not a suitable methodology to understand the practical application of a law or the on-field impact of a legislation. Nevertheless, doctrinal analysis needs to support the most legal research, as a strong doctrinal

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<sup>553</sup>Saunders (n 268)

analysis to establish what the law is often a necessary precursor to researching other legal questions – particularly in areas in which the law is uncertain or evolving.<sup>554</sup> Doctrinal research is one of the most fundamental methodologies of legal research but to identify the effectiveness of EUTR, research methodology which looks beyond pure doctrinal analysis needs to be adopted.

To evaluate the efficiency of EUTR, it is necessary to have information on enforcement efforts, timber industry awareness, implementation challenges, approach of the competent authority and scope of the EUTR in controlling the illegal timber. These aspects require a multilevel enquiry with relevant stakeholders which can be gathered by empirical research. The timber industry, enforcement agency, forest certification bodies, monitoring organisations, and different research and non-Government organisations would be amongst the targeted participants.

The empirical research with stakeholder analysis helps in revealing how the regulation has been perceived amongst stakeholders and in finding various positive and negative aspects of EUTR's legal instruments. The number of checks and prosecution by competent authority, the application of due diligence system, number of companies using the services of monitoring organisation, the system changes made by forest certification bodies to comply with EUTR are few examples which have been considered during the empirical research method. The questionnaire and semi-structured interviews have been selected as the modes of data collection for empirical surveys. The next chapter focuses on the empirical research method and illustrates the step by step procedure to collect responses including the different categories of stakeholders involved.

#### **4.7 Empirical/stakeholder studies conducted within the European Union on EUTR implementation**

The EUTR was welcomed by many stakeholders as a long-awaited effort to curb illegal logging.<sup>555</sup> However, particularly in the early stages of its implementation, the

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<sup>554</sup>Terry Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106(4) Law Library Journal 579, 584

<sup>555</sup>Giurca (n 89)

regulation caused ambiguity in international timber markets as the effects and/or the requirements were not fully understood or known by stakeholders.<sup>556</sup> An effort had been made to disseminate information and adapt viable risk assessment and risk mitigation procedures through adequate Due Diligence Systems by European companies, industry federations, non-governmental organizations and Member States.<sup>557</sup> Following consultations with stakeholders and experts, the EC acknowledged that certain aspects of the EUTR and its non-legislative aspects need clarification, hence producing guidance documents and supporting various information campaigns.<sup>558</sup> Since the EUTR is fairly new regulation, assessments of the effects on timber markets of this regulation and its implementation studies are very scarce. Papers assessing stakeholders' interpretations of the regulation are also scant. However, how the EUTR is understood and regarded by different stakeholders is of paramount importance for the implementation of the regulation.

The results of a 2011 study<sup>559</sup> conducted on the implementation of due diligence system (DDS) in Romania indicate that the business sector is more likely to be proactive in fighting the problem of illegal logging compared to the forest administration sector. However, the results highlight that the provision of the EUTR regulation are not known by the private sector which is supposed to be held responsible for the implementation of the DDS. This stakeholder study, conducted before the EUTR came into force, indicated that the stakeholders' opinion can be beneficial in the negotiation process to design an efficient policy instrument if the opinion of relevant stakeholders is considered. In another study<sup>560</sup> for Romania published in 2016, the relationship between the EUTR implementation process and the FSC certification is explored. The study used the analytical framework of Transnational Business Governance and found that FSC certification helped companies to prepare for and align with the EUTR's

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<sup>556</sup> Giurca (n 24)

<sup>557</sup>European Forest Institute, 'Support Study for Development of the Non-Legislative Acts Provided for the Regulation of the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market' (EFI 2011)

<sup>558</sup>European Commission, 'Issues Relating to the EU Timber Regulation Legal Framework for Which Guidance Should Be Developed' (Commission of the European Communities 2013)

<sup>559</sup>Raluca Nichiforel and Liviu Nichiforel, 'Perception of Relevant Stakeholders on the Potential of the Implementation of the "Due Diligence" System in Combating Illegal Logging in Romania' (2011) 15(3) Journal of Horticulture, Forestry and Biotechnology 126

<sup>560</sup>Ines Gavrilut and others, 'The Interaction Between FSC Certification and the Implementation of the EU Timber Regulation in Romania' (2016) 7 Forests

requirements, in particular concerning risk assessment and risk mitigation procedures needed for a due diligence system (DDS). However, the study also concluded that development of viable DDS remains problematic as many companies were unprepared to undertake this task.

A qualitative study<sup>561</sup> on the Impact of EUTR on forest certification strategies in the Finnish wood industry suggest that the EUTR is not likely to impact domestic timber producers and large importers with existing certification in Finland, while the impact will be on SMEs importing timber from outside the EU without any existing traceability systems and on downstream wholesale/retail companies providing a variety of wood products. The study confirmed that business-to-business customer demand continues to be the major driver for the forest certification uptake. Moreover, the demand for certified products is not inherently from the consumer markets, but the pressure comes from global corporation, governments, NGOs, and investors. In a study<sup>562</sup> conducted in Germany, the researcher scrutinised implementation of EUTR by gathering the stakeholder data between May and August 2014. The study argued that EUTR performance in Germany is not generally perceived as ineffective, instead, stakeholder perceptions vary.

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<sup>561</sup>Jani Holopainen, Anne Toppinen and Sini Perttula, 'Impact of European Union Timber Regulation on Forest Certification Strategies in the Finnish Wood Industry Value Chain' (2015) 6 Forests 2879

<sup>562</sup>Sina Leipold, 'How to Move Companies to Source Responsibly? German Implementation of the European Timber Regulation Between Persuasion and Coercion' (2017) 82 Forest Policy and Economics 41

## Chapter 5: Research setting and empirical methodology

One of the main objectives of the EUTR is to establish sustainable and legal market for timber trade in the EU. The research hypothesis to be tested is that “The EUTR has technical and operational limitations in controlling illegal timber entering the UK.” The assessment of EUTR and its principles by Black letter approach in chapter 3 gave an understanding that to study the enforcement efforts of EUTR, the views of the timber industry on EUTR, due diligence system to identify the risk and mitigation, timber products coverage require more than just black letter approach. To test the hypothesis, the empirical research methodology has been considered to study the various components of the legislation by obtaining information from the stakeholders’ experience and their views on EUTR in the form of questionnaire and semi-structured interviews.

The following sections explain the step by step process for empirical research method adopted for this thesis. The procedure followed to obtain ethical approval from the university for the empirical study, the selection of participants to collect primary data, questionnaire design and semi-structured interview method for data collection and qualitative examination conducted using NVIVO 11 have been explained in detail. The resulting research establishes the propositions that empirical method has contributed a great deal towards legal scholarship. Moreover, this method can contribute to the scholarly understanding of the law, and that the techniques necessary to become adept at this method are not so difficult to apply.

### 5.1 The process of receiving ethical approval from the university before conducting empirical study

Any research involving human participants should be subject to an appropriate level of ethical scrutiny to protect participants, researchers and the University.<sup>563</sup> The researcher must consider the ethical implications before finalising the research plan

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<sup>563</sup>Kingston University, ‘Ethics Guidance and Procedures for Undertaking Research Involving Human Subjects (Kingston University 2014) <<http://cdn.kingston.ac.uk/documents/research/research-policies-and-guides/documents/ethics-2014.pdf>>

and prior to begin the research.<sup>564</sup> All the researchers must ensure that their projects are conducted following the Kingston University's Guide to Good Research Practice and the ethical principles appropriate to their discipline/professional body.

The procedure has been followed under the University's ethics guidance to get the ethical clearance from the Faculty Research Ethics Committee (FREC). Before starting the application process, the attempt has been made to design the study to mitigate or minimise ethical problems from the outset followed by drafting the consent form for participants. Consent form had been kept short and straightforward as possible while retaining the relevant information. The draft schedule of questions (questionnaire) had been designed which contained a few personal questions but no sensitive topics. For example, the name and the nature of the participating organisation were included in the questionnaire but name and the sex of the participant were excluded. The application along with application form, consent form and questionnaire submitted to FREC to get the ethical clearance of the study.

The questionnaire received few suggestions from the research ethics committee. The FREC advised to collect data anonymously at source and recommended that online questionnaire could be designed to keep the participant's identity completely anonymous. The committee suggested that due to the sensitive nature of the research topic (effectiveness of legal boundaries for timber trade) data collection will be highly scrutinised. The information for participants' and brief detail about the research study has been added before the commencement of questionnaire. It gives the flexibility to respondents whether to be a part of the study or not.

In the ethical approval application, it has also been mentioned that due care will be taken for storage and safety of the data on computer systems. It has also been assured that the data gathered from questionnaires and interviews will remain confidential and will not be disclosed to any third party for any purposes. As per the University's research ethics guidelines, this research project falls under the low risk category and has been considered for fast track clearance. In June 2015, after considering the final

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<sup>564</sup> ibid

draft version of questionnaire with all the recommended changes, the committee approved the application for empirical study.

## 5.2 The selection of survey participants to collect primary data and sampling method for representative sample size

In any legal system, stakeholders are an integral part of that system as they form the basis for the objectives of that legislation. The process of identifying the stakeholders or survey participants began during the doctrine analysis of EU timber regulation and although the list of survey participants was finalised during the ethical approval application, some participants were also contacted during the survey. The stakeholders have been identified as per their involvement (e.g. civil society organisation) and functioning and governing role of the organisation (e.g. timber industry, enforcement authority) within the EUTR regime. For this research, non-governmental organisations, timber import companies, timber industry associations, certification bodies, monitoring organisations, other independent organisations working within the field of timber trade are the source of primary data.

Primary data is the raw information collected by the researcher for a specific purpose. The aim of collecting primary data is to acquire vital insight on EUTR mechanism which enables to examine the timber regulation in more appropriate and effective ways. It has also helped in obtaining significant views that are not available in the context of purely doctrinal approach. The next section of survey participants describes the nature of the participants and the purpose of their selection to obtain the primary data. The survey participants are divided into four major categories. The table below shows the number of stakeholders contacted, responses received and mode of data collection.



**Table 2: Number of stakeholders contacted and data collection mode**

<b>Stakeholders' category</b>	<b>Number of organisations contacted</b>	<b>Number of responses received</b>	<b>Data collection Mode</b>
Timber companies	Over 250 companies	25	Online questionnaire
Timber trade associations	4	2	Semi-structured interview
Monitoring organisations	5	2	Online questionnaire
Enforcement agency	1	1	Questionnaire
UK government departments responsible for protecting environment and woodlands	2	2	Semi-structured interview and emailing questions
Forest certification bodies	3	2	Online questionnaire
Civil society organisations	4	3	Semi-structured interview and EU led consultation questionnaire
Other independent organisations	4	3	Semi-structured interview

(1) The **UK timber industry** includes the timber importing companies (large businesses and small-medium enterprises) and timber trade associations operating in the UK

(2) The **Regulating and enforcement authorities** includes the UK enforcement agency, UK government body managing the enforcement agency and EU recognised monitoring organisation operating in the UK

(3) **Forest Certification bodies** includes the two of the most globally known forest certification bodies and independent national certification standard

(4) **Civil Society Organisations and other independent organisation** includes the UK based environmental non-government organisations (NGOs) and other independent research organisations actively working for EUTR

## 1. UK Timber Industry

The UK timber industry significantly imports hardwood timber/timber products from the tropical countries of South East Asia, South America and from Russia where illegal logging is a common issue. The timber industry is a vital source to understand the changes in the dynamics of timber import after the EUTR came into effect. The response of timber industry in importing timber from outside EU and exercising due diligence is significant in understanding the impact of the EUTR on timber industry. The changes in timber import volume, awareness towards the EUTR requirements and impact on supplier outside EU can be helpful in identifying the future impacts on the timber industry within and outside the UK.

To select the participants from UK timber industry, timber importers details have been collected from the UK Government website HM Revenue & Customs (HMRC) Trade Statistics unit. All products imported into or sent out from the EU need to be classified for customs' identification purposes. Each different item is categorised in different classification code which is known as Combined Nomenclature (CN) codes. The CN codes have been collected for the timber products falling under the scope of the EUTR. The names of the timber importers have been gathered by entering the CN codes for a specific timber product from the UK Trade Info website. The name of the importing companies collected for the import from April 2013 to October 2015. Apart from importers, the other players of timber industry such as traders, retailers, saw- millers have also been contacted to take part in the research survey to understand the impact of the EUTR on their businesses.

There are four major timber trade associations exist in the UK namely Timber Trade Federation (TTF), Southern Region Timber Trade Association, Scottish Timber Trade Association (STTA) and North-East Timber Trade Association (NETTA). These associations have been contacted to take part in the survey and they have been provided with a questionnaire link created for timber industry to distribute amongst their member companies. The member companies of these associations have also been contacted separately to take part in the study.

The data from the timber importing companies have been collected through carefully designed online questionnaire. During the questionnaire designing process, utmost care has been taken to keep the respondent's identity anonymous. The questionnaire designed to detect the awareness of the timber industry and their views and experiences after the introduction of the timber regulation. The semi-structured interview has been the mode of data collection for timber trade associations which has the questions on EUTR impacts on timber companies, the import volume, the implementation challenges for companies, the enforcement efforts and overall approach of enforcement agency, the effects of monitoring organisations on the companies, the timber products covered and illegal timber entering the UK.

## **2. Regulating and enforcement Authorities**

As per article 7 Regulation (EU) No 995/2010 “each Member State shall designate one or more competent authorities responsible for the application of this Regulation.” The EUTR is implemented in each Member State via national legislation and enforced by national authorities. In the UK, Regulatory Delivery Enforcement, Department for Business, Energy and Industrial Strategy acts as the competent authority, contracted by the Department of Environment, Food and Rural Affairs. The competent authority has powers to keep a check on operators (Article 10) and need to keep the record of checks (Article 11). The data on implementation status, financial and human resources, penalty regime, checks carried out by competent authority, key implementation/enforcement strengths, weaknesses and challenges have been included as the schedule questions in the interview to analyse the efforts.

The enforcement agency as a participant helps to analyse the approach of the enforcement agency, prosecution and fines imposed on companies in the case of illegalities identified, total number of checks on operators carried out and number of cases dealt with. It also helps in understanding operating procedures for different circumstances such as carrying checks on operators, due diligence evaluation, procedure followed for identification of timber species and products testing during the checks, exchange of technical assistance or guidance with other member states or European Commission and process undertaken to evaluate the due diligence system

developed by monitoring organisations.

The EUTR allows third parties to present ‘substantiated concerns’. To have information from CA on the procedure/protocol to deal with these concerns would help in rating the organisational aspects of the UK’s CA. In the same way, the CA’s system to deal with companies operating without appropriate due diligence could also help in the achievements of the CA. As an enforcement authority, the information on transparency in the functioning of the CA is a crucial point of investigation for this research. The enforcement agency had been contacted several times for the semi-structured interview but the agency kept on denying the request. After the intervention from then supervisor, the agency agreed to answer the questions over the email.

Article 8 of the regulation describes the functions of monitoring organisations. The role of EU-recognised Monitoring Organisations is to develop and maintain due diligence system that an operator may use to comply with the EUTR. The competent authority is responsible carryout checks at regular intervals to verify that the monitoring organisations operating within the competent authorities’ jurisdiction. MOs are formally obliged to report repeated failures to observe due diligence to the relevant competent authority.

**Table 3: Monitoring Organisations operating in the UK**

<b>Monitoring Organisations</b>	<b>Functions in</b>	<b>Recognition Date</b>
BM Trada	All the EU Member States	01.06.2015
SGS United Kingdom Limited	All the EU Member States except IT	30.01.2015
Soil Association Woodmark	All the EU Member States	30.01.2015
Control Union Certifications	All the EU Member States	27.03.2014
NEPCon	All the EU Member States	19.08.2013

The MOs are the integral part of the EUTR and its success or failure would help correlate and analyse the impact of the EUTR. The number of clients using the due diligence of MOs, the operational challenges and the awareness in the industry regarding the EUTR would help in evaluating the performance of the MOs. The data from monitoring organisations have been collected through online questionnaire. The questions on their overall experience with EUTR, the industry awareness on MO, the

due diligence regulation they have developed, challenges and issues of MOs have been included in the questionnaire.

### **3. Forest certification bodies**

Article 6 (b) of the timber regulation mentions that “operators must apply risk assessment procedures to assess risk of illegally harvested timber or timber products obtained from such timber being placed on the market.” These procedures shall consider “the relevant risk assessment criteria, including assurance of compliance with any applicable legislation, which could include certification or other third-party- verified schemes.” It is clearly mentioned in the timber regulation that although certification could be an aspect in timber legality but only certified timber will not prove that operator has implemented due diligence.

It has been observed from the initial analysis that the over reliance on certified timber for legality prevails in the timber industry so the legality and sustainability criteria of the certification bodies would help in assessing the part played by the certification bodies for the timber regulation. The data on changes within the framework of forest certification bodies, both FSC and PEFC, to comply with the EUTR due diligence system can be helpful in determining the role of the forest certification bodies. The information such as the role of forest certification in due diligence regulation and maintaining documentation proof required in support of the due diligence can be helpful. The assistance from the enforcement agency to forest certification bodies for development of due diligence procedure can also be helpful. The online questionnaire has been developed to collect data from forest certification bodies.

### **4. Non-Government Organisations (NGOs) and other organisations**

NGOs are the one of the most important stakeholders for this research as their campaigning and investigating work impact profoundly on timber industry and enforcement agency. As mentioned in chapter 1, NGOs played very crucial role in the formation of EUTR and they play a key role in recognising the shipments of suspicious timber. For example, a shipment from Myanmar carrying the Burmese teak to European market was identified by the Environmental Investigation Agency (EIA). The

EIA investigation revealed that the shipment violated the timber regulation and submitted the legal complaint to authorities in five countries regarding violations of the European Timber Regulation by nine companies.<sup>565</sup> The charges in the EIA's complaint included the failure of due diligence obligations mentioned under the EUTR, inability of companies to identify or trace the harvest place and harvesting procedure and accepting the documents that were fake according to the two months investigation of EIA.

NGOs are very active, particularly in influencing environmental law and policy. NGOs and other civil society groups regularly challenge the decisions of public authorities (by judicial review) and to divert the proposition of large organisations that they consider to be destructive to nature. For example, in 2015 ClientEarth obtained a mandatory order from the Supreme Court requiring the government to produce new air quality plans for urban nitrogen dioxide limits to comply with the 2008 Air Quality Directive.<sup>566</sup> NGOs also have powers to bring a derivative action against a company's directors to ensure that the environment is fully considered. They also have powers to request action under the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (ED Regulations).<sup>567</sup>

Data from environmental NGOs and independent organisations actively working for EUTR has been collected through semi structured interviews. They play an essential role not only at the UK level but at the EU level which influences the timber regulation. Data from this category will help in understanding the scope of the EUTR and provide a broad understanding of stakeholder's perspective. The schedule of interview questions includes their views or experiences with the EUTR, challenges for enforcement agency and timber industry, the performance of monitoring organisation, timber product scope of EUTR and the amendments or changes they would like to see in the EUTR to minimise the existing operational and technical flaws in the EUTR

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<sup>565</sup>Environmental Investigation Agency (EIA), 'Overdue Diligence: Teak Exports from Myanmar in Breach of European Union Rules (EIA 2016) < <https://eia-international.org/wp-content/uploads/EIA-Overdue-Diligence-FINAL.pdf>>

<sup>566</sup>ClientEarth vs DEFRA [2012] EWCA Civ 897

<sup>567</sup>Coxall Michael and Hardacre Elizabeth, Environmental Law and Practice in The UK (England and Wales): overview (Thomson Reuters 2015) <[https://uk.practicallaw.thomsonreuters.com/6-503-1654?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-503-1654?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)>

system. The semi structured interview over skype call and phone has been conducted to get their views on above mentioned aspects.

### 5.2.1 Choosing a sample size (sampling) for empirical research

Commonly, sampling can be explained as selecting members of the population to be included in the study. The target population assists in choosing the sampling frame which can be explained as a list of people with the target population who can contribute to the research and subsequently helps in choosing the sample size. In this research, the target population represent specific sections of the society associated with EUTR that are better positioned to serve as a primary data source.

The sampling methods are divided mainly into two categories: probability and non-probability. In probability sampling, each participant of the populace has a known possibility of contributing to the study and it incorporates basic, stratified systematic, multistage, and cluster sampling methods. In non-probability sampling, group members are selected on non-random basis, so not every member of the population has an opportunity to participate in the study. Methods of non-probability sampling include methods of purposeful sampling, allocation, convenience and snowball sampling methods.<sup>568</sup> The stratified sampling is a probability sampling method and it is suitable for this empirical study as it helps in dividing the population into different groups (strata) according to one or more common attributes. The process of stratifying reduces sampling error and ensures a higher level of representation of all groups.

A right sample size meets performance, representativeness and reliability criteria. However, the size of the sample is no necessary insurance of its representativeness.<sup>569</sup> Similarly, for this research, primary data has been collected from relatively small samples but properly selected which can be much more reliable than large samples selected. The sample size has been cautiously chosen to get the diverse and ample information as per the research objectives. The number of participants surely indicates the sample representativeness but in this research the

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<sup>568</sup>Antje Kirchner, Kristen Olson and Jolene D Smyth, 'Do Interviewer Post Survey Evaluations of Respondents' Engagement Measure Who Respondents Are or What They Do?' (2017) *Public Opinion Quarterly*

<sup>569</sup>Srinivas Rao Myneni, *Legal Research Methodology* 4<sup>th</sup> Ed. (Allahabd Law Agency 2009) 11

sampling size would not affect the research quality in great deal, except in the case of timber companies as the number of timber importing companies in the UK are high in number. The number of monitoring organisations operating in the UK, the forest certification bodies, the enforcement agency and UK government departments responsible for protecting environment and woodland all are limited in numbers.

### 5.2.2 Incorporating EU's consultation on evaluation of the EUTR for analysis

Although the size of the sample does not correspond to the representativeness for this research, to minimise the effects of lower sample size on the results, the EU's consultation on evaluation of EUTR has been considered for the data analysis. Article 20(3) of the EUTR requires "the European Commission to review, based on Member States' reports and the experience with the application of the regulation, the functioning and effectiveness of the regulation, including in preventing illegally harvested timber or timber products derived from such timber being placed on the market."

The European Commission conducted a review by considering the EU 'Better Regulation'<sup>570</sup> guidelines which provides answers to five evaluation questions i.e. relevance, effectiveness, efficiency, coherence and EU-added value. Assessment of the EUTR launched in April 2015 and covered the period March 2013 - March 2015 and covers the first two years of application of the EUTR. The purpose of this counsel was to increase stakeholder and public participation for EUTR appraisal.

The survey questions were devised using a combination of closed questions as well as open-ended comment boxes available at the end of each group of questions. On occasion, the open-ended comment boxes led to a wide range of comments that did not always match the questions being asked. The questionnaires with detailed comments from the stakeholders in the open-ended comment box were selected for analysis here for qualitative analysis purpose. The questionnaires with only closed

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<sup>570</sup>European Commission, 'Communication from The Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: Regulatory Fitness and Performance Programme: State of Play and Outlook' (EC 2014) < <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0368&from=EN>>



questions responses have not been included for analysis. The inclusion of the consultation has significantly contributed to enhance the research quality with diverse views of the stakeholders especially on enforcement issues and implementation challenges for the timber industry.

**Table 4: Number of contributions per sector of activity**

<b>Participants</b>	<b>Total Responses received</b>	<b>Responses used for analysis</b>
Competent authority for EUTR	11	0
Other government body	9	0
Monitoring organisation as per EUTR	7	0
Certification body or institution	7	3
Professions organisation or federation	56	0
International organisation	22	0
Operators	80	6
SME trader	6	0
Consultancy	16	4
Civil society organisation	28	19
<b>TOTAL</b>	<b>242</b>	<b>32</b>

The table above shows the number of contributions per sector of activity for the review and the number of survey have been used for analysis. All the relevant stakeholders were invited for this review from inside and outside of the European Union. The total number of respondents were 242 which is very low since respondents were invited from all parts of the world to take part in this review.

### 5.3 Data collection by questionnaire and semi-structured interviews method

A questionnaire is an instrument to collect information from the group of representatives of a target population which in other words known as a sample. It

comprises a set list of questions designed to gather responses from respondents on a given topic.<sup>571</sup> The primary purpose of choosing the questionnaire method is to gather maximum responses from the stakeholders, especially from the timber companies, with minimum efforts. Also, in this method, the researcher does not go to any respondent for the collection of information and multiple respondents can be reached easily by merely e-mailing the questionnaire or by providing the link of an online questionnaire as in this case. It gives the flexibility to respondents to decide whether to take part in the study and provides the convenience to reply at their own time. For this study, the questionnaire method is appropriate because the data can be systematically retrieved and reinterpreted in a variety of ways and can be more easily coded and prepared for computer analysis.

### 5.3.1 Questionnaire design

Presser and Zhao show how a shorter question helps the researcher do a better job by decreasing the tendency to misread it. Furthermore, the complexity of a long question is magnified by the intricacy of the subject matter covered. To satisfy research objectives, the importance has been given to identify and clarify the questions that need to be asked to avoid any misleading or unnecessary questions while designing the questionnaire.

The questionnaire presentation, level of difficulty and sensitivity influences the willingness of a prospective respondent to participate. Enhancing question design has been one of the easiest, most cost-effective steps that can be taken to improve the quality of data. To achieve relevance, familiarity with questions, objectives of the questions and the type of information needed have been planned during the questionnaire design. To enhance accuracy, the wording style, type and sequence of questions have been carefully selected to motivate the respondents to take part in the study.

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<sup>571</sup>Maria Teresa Siniscalco and Nadia Auriat, 'Questionnaire Design' in Quantitative Research Methods in Educational Planning, Series editor: Kenneth N.Ross (UNESCO International Institute for Educational Planning 2005)

During questionnaire development, considerable attention has been given to refining wording and content. The research questions have been revisited frequently to ensure validity and relevance and associated subject literature has been reviewed wherever necessary. The words and expressions that are simple, direct and familiar to all respondents have been sensibly selected for question formation. In the questionnaire, both close-ended (yes, No and Do Not Know) and the open-ended questions have been included.

This survey carries a variety of respondents from four broad categories mentioned in the previous section. To maintain the accuracy of responses, different questionnaires have been designed as per the respondents' role in this survey. The design of questions asked to different stakeholders are different but the theme of the questions have been kept similar as per the research objectives. It serves no purpose to ask the respondent about something he or she does not understand clearly.

### 5.3.2 Pilot testing

Reliability and efficiency are essential measures on the consistency of information gathered by using the questionnaire. They help in realising if the respondents genuinely understand the meaning of the questions as they are stated. The most commonly used reliability and efficiency test for questionnaire is the test and re-test method that serves as the pilot testing. A pilot study is considered as a tool which helps in testing and identifying the initial response of the participants and on the quality of the questionnaire. It also helps in allowing researchers to conduct a preliminary analysis before conducting a full-scale study or experiment.<sup>572</sup>

Pilot testing is a technique used for testing the questionnaire that uses a smaller sample compared with the planned sample size. The pilot testing of questionnaire had been conducted for timber companies. During the pilot testing, the emails sent to the prospective respondents for their consent to participate in the study without including the link of questionnaire. It was observed that the response rate was considerably low and the strategy has been changed to contact the respondents for consent including

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<sup>572</sup> Sarah Mae Sincero, 'Surveys and Questionnaires -Guide' (Explorable 2012)

the questionnaire link in the email. This reformulated approach worked to some extent but the rate of response was still meagre.

Due to this, the questionnaire has been redesigned several times to improve the response rate. Although open form questionnaire can prove useful where primary information to be developed is qualitative in nature, the questionnaire has been transformed from open ended questions to the mixture of more close ended questions and less descriptive questions. Consideration has been given to the sequence in which the items are presented. To engage participants and prevent boredom, descriptive questions have been presented at the end. The numbers of questions have also been reduced to encourage participation. It has also been observed that response rate fluctuates based on the days to send the questionnaire. The strategy applied has worked successfully and it was also observed that the response rate was higher for weekdays compared to weekends. Pilot studies have helped immensely in identifying and rectifying mistakes in the questionnaire that could have a negative impact on the information received.

#### 5.4 Semi – Structured Interviews (SSI)

The interview method is a verbal technique for obtaining data and best suited for understanding people's perceptions and experiences.<sup>573</sup> The interview provides a flexibility in a way that it can be appropriately designed or planned with strict determined order to each interviewee in a similar way. On the other hand, the interviews can be completely unstructured, like a free-flowing conversation and does not include any strict order. In the Semi-structured interview, the interviewer may have to ask number of specific major questions, but he may be free to probe beyond the answers to these questions. This interview method is appropriate for this study as it starts with the assumption that flexibility is needed so that participants are not restricted by standardised questions and closed-ended structured answering formats.<sup>574</sup> A broad range of predominantly open-ended questions that are derived from doctrinal analysis and questionnaires have been asked.

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<sup>573</sup>Ann Blandford, 'Semi-structured Qualitative Studies' (eds) The Encyclopaedia of Human-Computer Interaction, 2nd Ed (Interaction Design Foundation 2015)

<sup>574</sup>Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (3rd edn, Teachers College Press 2006)

The purpose of SSIs for this research is to ascertain participants' perspectives regarding an experience pertaining to the aspects of EUTR.<sup>575</sup> For this research, semi-structured interviews are suitable which involve several open-ended questions such as EUTR's impact on timber industry, enforcement approach, monitoring organisations, role of forest certification bodies in timber legality, due diligence system and product scope. In the open-ended type of questions, the interview revolves around the research topic and provides opportunities for both interviewer and interviewee to discuss the topics in more detail.<sup>576</sup> Moreover, since the interviewer and the person interviewed are both present, there is an opportunity for greater flexibility in eliciting information. Also, the interviewer can observe both the subject and the entire situation to which he is responding.

Even though the nature of questioning with SSIs is flexible, the questions related to the research objectives have been covered. To do that, the interview pro-forma has been designed which comprised of predetermined or scheduled primary questions followed by sub questions or probes. Arthur and Nazroo<sup>577</sup> emphasise the importance of careful preparation for interviews, particularly a topic guide known as an interview schedule or interview guide. Following the pocket guide advice from Arthur and Nazroo, the interview pro-forma has been framed which includes introduction, opening questions, in-depth focussing on the core research questions and closure. This scheduling corresponds to the stages of an interview process.

It is important to note that questions are formulated to generate discussion and interviewers can diverge slightly from the script. Due to this, the questions have not strictly been asked in the same order to each interviewee, however, the systematic order has been followed whenever possible during the interviews. Each interview followed its own trajectory based on the responses from the participant. During the

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<sup>575</sup>Michele J McIntosh and Janice M Morse, 'Situating and Constructing Diversity in Semi-Structured Interviews' (2015) 25 *Global Qualitative Nursing Research*

<sup>576</sup>Beverley Hancock, Elizabeth Ockleford and Kate Windridge, 'An Introduction to Qualitative Research' (National Institute of Health Research 2007) <[http://www.rds-yh.nihr.ac.uk/wp-content/uploads/2013/05/5\\_Introduction-to-qualitative-research-2009.pdf](http://www.rds-yh.nihr.ac.uk/wp-content/uploads/2013/05/5_Introduction-to-qualitative-research-2009.pdf)>

<sup>577</sup>Sue Arthur and James Nazroo, 'Designing Fieldwork Strategies and Materials', *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publications Ltd 2003)

interview, emphasise has been given to the importance of listening, to encourage participants to talk, asking open-ended questions, and not being judgemental. Even though the participant should do most of the talking, during some interviews, the discussion has been steered towards the subject areas of research interest by interviewer to avoid taking a direction that are out of scope.<sup>578</sup>

In total, eight interviews have been conducted with stakeholders. Out of these eight interviews one interview has not been recorded as it was conducted over skype. To conduct interview, participants have been given the priority to decide the location and time. For this research, the most commonly used interview methods are face to face and telephonic. Participants have also been given the option of skype calling in case they have any time constraints. On an average basis, these interviews took approximately 45 minutes to complete. A smart phone application has been used to audio-record the interviews with prior consent of participants and each interview was transcribed. The saved audio file has been saved safely to the computer under the locked folder.

#### 5.4.1 Transcribing the interview

Transcribing is a process of generating a written transcript of an interview or conversation which helps in analysing the recorded interview or a discussion.<sup>579</sup> Transcription involves close observation of data through repeated careful listening and it is an essential first step in data analysis. Transcribing is a very tedious process requiring several hours for each taped interview.<sup>580</sup> The time consumption depends on the quality of the audio, the experience of a person transcribing the interview and the typing speed. To transcribe the interviews, first the recorded interview files have been transferred from smart phone to computer and then the interview files have been imported to the software called Listen N Write to transcribe. This software allows to play/pause/rewind easily/fast-forward the recording and typing at the same time.

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<sup>578</sup>Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (SAGE Publications 2006)

<sup>579</sup>Hancock (n 580)

<sup>580</sup>Julia Bailey, 'First Steps in Qualitative Data Analysis: Transcribing' (2008) 25(2) Family Practice 127

During discussion, it is apparent that the actual message conveyed is relatively small compared to the duration of discussion. A large extent of the discussion is conveyed in the way individuals talk. Tone and inflection are generally good indicators to identify the range of different emotions and meanings. During transcribing, consideration has been given to whether and how these feelings and meanings communicated on paper by using punctuation marks (full stops and commas will be essential for meaning, for instance).<sup>581</sup> The process of revising the recordings for transcription has helped in recollecting visual observations of the interviewee and certainly added more meaning to the content and improved the quality of the transcript.

When transcribing the interviewees' statements verbatim, the fillers in speech pattern such as um, ah, like and so forth has been left out as it did not affect the context of what was stated. The audio has been transcribed accurately from the tape and not paraphrased. Identifying information that may compromise the privacy of the participants and/or those to whom they refer during the interview have been removed to maintain confidentiality. The attention has been paid to ensure that a transcript remains as faithful as possible to the speech it transcribes.

## 5.5 Qualitative data analysis using NVIVO 11 software and data coding process in NVIVO

Qualitative analysis is a way to discover “patterns, coherent themes, meaningful categories, and new ideas in data and in general uncovers better understanding of a phenomenon or process.”<sup>582</sup> To analyse the data gathered from questionnaire and semis structured interviews, qualitative content analysis has been the most suitable method. The advantage of qualitative research is that it helps in discovering broader picture using different techniques to find it. For the most part of this research, focus is to use the data to identify stakeholders' view on various components of EUTR and its impact on stakeholders.

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<sup>581</sup> *ibid*

<sup>582</sup> Newton Suter, 'Qualitative Data, Analysis, and Design' (eds) Introduction to Educational Research: A Critical Thinking Approach (2<sup>nd</sup> edn Sage Publication 2012)

For qualitative analysis, software NVIVO 11 has been used because it is freely available from the University and several video tutorials are available on how to use various functions of this software. This software helps in identifying and managing ideas, exploring relationships in the data and finding emergent concepts. Two days training workshop funded by the Kingston University has been attended by the researcher to familiarise with the software analysis.

NVIVO supports various file types such as PDFs, word documents, Audio files, visuals and many more. The file types used for this study are PDFs and word documents and these are termed as sources in NVIVO. In NVivo, source is the common term which shows all research materials including the primary data collected and the existing secondary data to be analysed. All the questionnaire and transcriptions to be analysed have been imported in the NVIVO workspace. After importing all the data to NVIVO workspace, the responses in the text form has been analysed to identify themes and relationships by coding sources to a node.

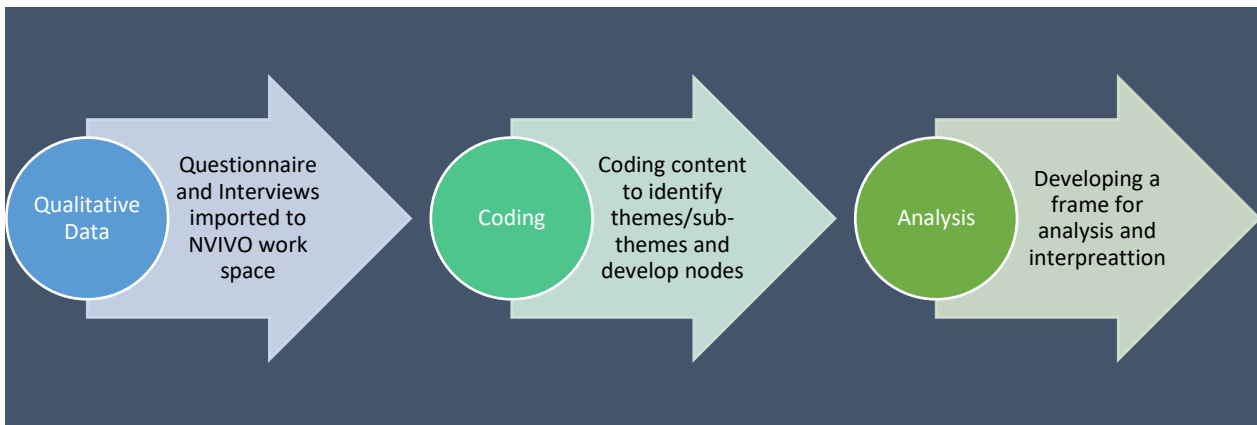
The sources have been coded to gather all the references to a specific topic and to organise the data to identify underlying patterns. Node is an NVIVO term which is more commonly referred to in research as codes signifying data themes and subthemes and designed based on the research objectives being dealt for the study. Node is a vital component of NVIVO which helps in gathering, categorising and separating the material with different ideas and content in one place so that emerging patterns and ideas can be recognised. To analyse the content qualitatively, responses have been read thoroughly to the same question to derive codes. The standard coding procedure, highlighting important words or phrases that emphasize important features in each response have been noticed. Once the commonalities detected in each response, the sorting process begins by keeping the categories broad. Once these categories become “cluttered” and lengthy, they are subdivided into smaller categories.<sup>583</sup>

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<sup>583</sup>John L Campbell and others, ‘Coding In-depth Semi-structured Interviews: Problems of Unitization and Intercoder Reliability and Agreement’ (2013) 42(3) Sociological Methods and Research 294 <[http://sociology.dartmouth.edu/sites/sociology.dartmouth.edu/files/coding\\_in\\_depth\\_semi.pdf](http://sociology.dartmouth.edu/sites/sociology.dartmouth.edu/files/coding_in_depth_semi.pdf)>



## Steps in data processing



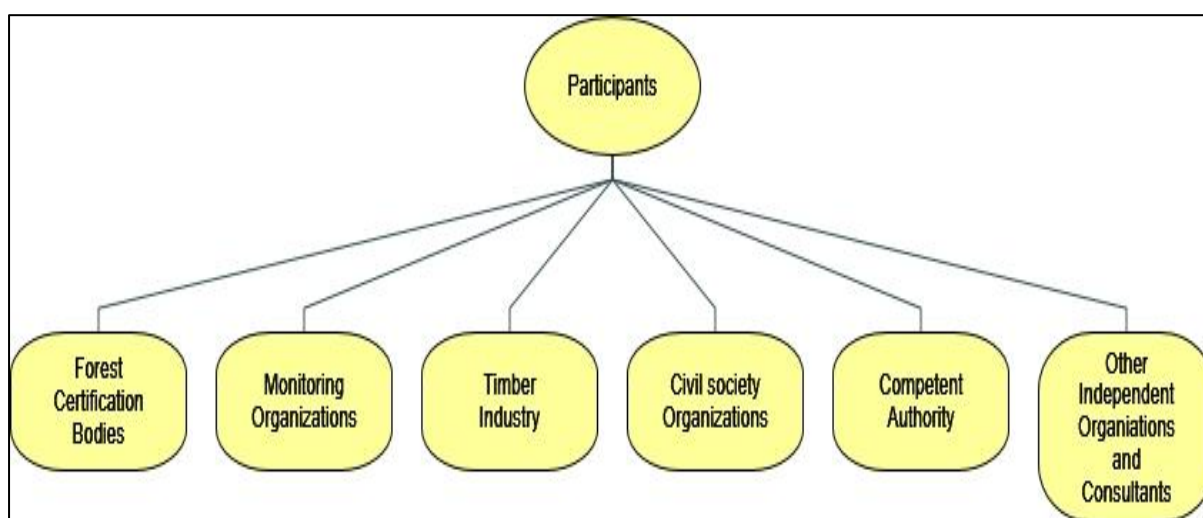
Once coding is complete, codes have been organized and analysed to provide additional information about the prevalence of themes within and across the responses. For data interpretation, attention has been paid to relationships among the ways themes co-occur within participants' accounts and to look for patterns in the types of concerns raised to gather insights that could contribute most efficiently to the research focus. NVIVO 11 provides many tools for finding and filtering your data to get results. Models and charts have been created to present your data and display results visually.

In the initial stages of the analyses, coding and memos of ideas that emerged while exploring the data have been mainly used along with coding the group of participants. The themes were distilled from the coded text to reflect the themes critical to the central question. The data analysis using matrix queries, cluster analysis, hierarchy charts and several other functions of NVIVO help in identifying patterns, signalling the themes most explored by participants.

## Chapter 6: Data analysis, Results and Discussion

### 6.1 Separating data to different nodes and sub-nodes in NVIVO for analysis

To analyse the data, survey participants are divided in 6 major categories depicted in Figure 1. The number of participants for each category varies and discusses various aspects of EUTR.



**Figure 1: Survey Participants**

Data analysis using the coding facilities within NVivo has been the first stage of analysis because it has facilitated preliminary thoughts to emerge across cases and develop linkages between categories and first themes. By coding the sources into different nodes, the information on various components of EUTR provided by stakeholders have been separated. These coding of the components have been further divided in different themes to extract and interpret the stakeholders view and experience for specific component. To keep the survey participants anonymous, various abbreviations are used which are mentioned in the table below. During analysis, the number after each stakeholder abbreviation indicates the serial number as mentioned in Table 5. The total number of responses in the table consist of both primary data and responses from EU consultation carried out in 2015-16.

**Table 5: Survey participants with number of responses and abbreviations**

<b>Survey Participants</b>	<b>No. of Responses</b>	<b>Abbreviations used for analysis</b>
Forest Certification Bodies	5	FC
Civil Society Organisations	20	CSO
Monitoring Organisations	2	MO
Timber Industry	29	TI
Consultants	4	Const.
Competent Authority and Govt. Body	2	CA
Independent Organisations	6	IO

## 6.2 Limitations of the data

The process of collecting stakeholders' views were initiated in July 2015 and continued till February 2016. Some interviews were conducted during the later months of 2016 due to the availability issues of some participants during early months of 2016. The analysis presented here reflects the views of the stakeholders during the data collection period and does not address the change in views, if there is any, afterwards. For example, the participant who criticised the approach of enforcement agency during data collection, might have a view that the enforcement efforts have improved now. There can be more guidance documents available from European Commission to improve the application flaws of EUTR identified in this research which were unavailable during data collection or analysis.

The sample size for timber importers and monitoring organisations have been small and the sample representativeness especially of the timber importers was an issue given the number of companies in the UK. The timber companies were one of the most important stakeholders for this research as they have the central role in complying with EUTR. Even after continuous efforts of reaching out to companies, only 25 companies

responded to questionnaire from 250 companies. To mitigate this, the timber trade associations have been considered for this study as these associations work collaboratively with the industry. The companies who took part in the research have all been aware about the EUTR requirements but that does not correspond to the awareness level in the UK because the number of operators are much higher than the sample size considered in this study.

The monitoring organisations who operates in the UK approached several times over the email and phone but only 2 monitoring organisations responded to a questionnaire from total of 6 monitoring organisations operating in the UK. One monitoring organisation replied that they have not carried out any work under and therefore they are not confident and declined my request.

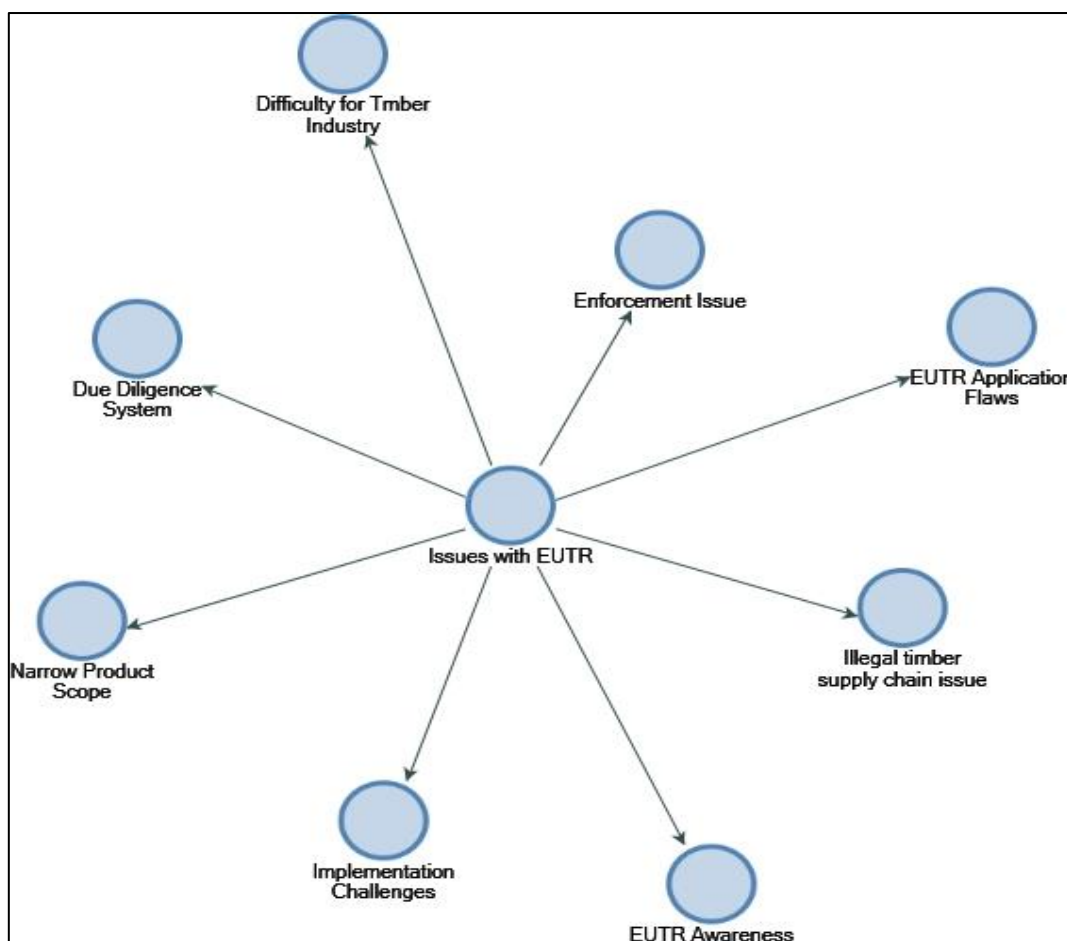
The questions on Brexit have not been included in the empirical survey (also mentioned in chapter 1) to keep the uniformity in data collection as results of EU referendum came in 2016 and the data collection process started even before the EU referendum was announced. However, the implications of Brexit on this research have been discussed in chapter 6 and the views expressed are solely researcher's own view and have no connection to any stakeholders who took part in this study.

### 6.3 Analysing the responses of the participants

To achieve the research objectives and to test the hypotheses, the responses of survey participants are coded in NVIVO based on the issues with EUTR first and divided in several sub-nodes such as enforcement issues, implementation challenges, due diligence system, product scope, issues with application and supply chain (Figure 2). The responses have also been analysed to identify the positive reforms that EUTR has brought in fight against illegal timber trade. During the analysis of the EUTR issues it was noted that lack of uniform enforcement, transparency and implementation are the most common issues discussed by most stakeholders. These issues are very much connected with each other and in the analysis, it has been challenging to separate them while mentioning other issues.

## Issues with EUTR

In this section, the analysis classifies the issues with EUTR enforcement, implementation challenges, concept of monitoring organisation, difficulties for timber industry and awareness. Under the enforcement issues, the penalty system, the efforts and approach of the enforcement agency and technical barriers to enforcement have been discussed. The application difficulties, narrow products scope and EUTR due diligence system have been debated in the implementation challenges.



**Figure 2: Sub-nodes for issues of EUTR**

### 6.3.1 Enforcement issues, penalty system and approach of the competent authority

The EUTR is being implemented in each member state through the national laws and enforced by the national authorities. This means that differences exist in enforcement practices and penalty regimes. The stakeholders consider enforcement related issues

are the most significant one that needs improvement. The difference in penalties across the EU and the complications to prosecute the offender under the EUTR with clear evidence (due to the complexity attached with illegal timber trade and lack of knowledge of legislation in the country of harvest) can be obstacles for both competent authority to enforce and operators to comply with the regulation. With the existing connections of global and internal EU timber trade, such irregular implementation across EU member states would not help to create a level playing field.

### **(A) Lack of uniformity in enforcement efforts**

There should be consistency of enforcement across the EU because member states with weak enforcement could affect the countries who are actively enforcing the regulation. Participant **IO1** indicated that priority needs to be that its more effectively enforced across Europe on all member states. When timber is imported into the EU, the entry points keep on shifting from one member states to another, so there are high chances that member states that have demonstrated vigorous enforcement end up receiving illegal timber through the member states with weak enforcement. The effective and visible enforcement efforts distributed equally across all member states are necessary to influence the behaviour of operators.

### **(B) Penalty system**

Penalties for infringements of timber regulation must be effective, proportionate and dissuasive.<sup>584</sup> In the UK, when the operators place illegal timber or timber products on the market or breaches due diligence requirements, they are liable to a fine not exceeding £5,000 and/or a term of imprisonment not exceeding 3 months; or on conviction on indictment to a fine and/or a term of imprisonment not exceeding 2 years. The participants also note that penalty regime is not adequate, insufficient and not dissuasive enough. Participant **Const.1** states that penalties are insufficient and enforcement is patchy. The ability to fine £5000 per product is perhaps dissuasive but

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<sup>584</sup>Regulation EU 995/2010 Article 19(2)

without access to any data concerning penalties it is difficult to determine the extent to which UK sanctions have deterred infringements.

Many stakeholders believe that penalty difference across the EU hinder the development of a level playing field for operators and prevent effective enforcement of the EUTR. There has not been any information available on prosecution to date which raises question on the approach adopted by the enforcement agency. **Const. 4** stated that *“the knowledge of the competent authority is too limited to be able to perform an effective check at operator level.”* It is unclear to what extent this is due to the unwillingness or inability of the competent authority to escalate cases and initiate legal proceedings or difficulties around collecting evidence. The ability to seize illegal timber in the UK further demonstrates a rational sanctions regime.

### **(C) Lack of sufficient resources**

The stakeholders' analysis also revealed that competent authority lacks sufficient resources both personnel and financial, the approach of the competent authority is lenient and absence of precise procedure to raise substantiated concern. **MO2** stated that UK competent authority lacks resources to cover all the operators in the UK and that is the reason there has not been any results. The concern on lack of resources has been raised not only for UK competent authority but for all EU member states in general.

During data collection, the UK competent authority mentioned that it employs 17 full time employees that can deliver enforcement actions under the European Union Timber Regulation. The authority further said that it receives £500,000 for activities designed to increase awareness and levels of compliance, to detect non-compliance and bring those matters to an appropriate outcome and to deliver effective management processes. An additional budget of up to £250,000 is available to deliver a productive and risk-based programme of product testing. From this information, it is quite evident that UK competent authority has a dedicated team and financial resources for enforcing the EUTR but the results are hardly visible. There has not been any information available of any cases in which the UK competent authority has taken operators to court following non-compliance of the EUTR.

The competent authority has the power to carry out checks on operators and on monitoring organisations but as per stakeholders there is an evident absence of information on number of checks and their outcomes in public domain apart from one report on furniture imported from Chinese companies which is officially published by the UK competent authority. During data collection, the competent authority mentioned that in 2014 – 15 it has issued 23 warning letters and 19 notices of remedial action and in 2015 – 16 issued 21 warning letters and 21 notices of remedial action. The reasons of issuing these warning letters and remedial action are missing which fails to show the precise picture of enforcement efforts undertaken. The information on number of checks carried out on monitoring organisations operating in the UK, the evaluation of due diligence system developed by monitoring organisations, number of companies using the services of monitoring organisation can be a useful tool to check the efficiency of enforcement team and the absence of these information can certainly raise concerns on the enforcement efforts. Possibility exists that the absence of sufficient resources can be a reason that competent authority has not been able to carry out proper checks on companies. It is difficult to assess the adequacy and effectiveness of due diligence systems, in the absence of full transparency on the system and information from competent authorities on the results of checks.

#### **(D) Lenient approach of competent authority**

Some stakeholders revealed that the UK competent authority's general approach to enforcement so far has appeared to be lenient towards industry and competent authority considering itself and operators to be in a learning phase. The UK enforcement agency has prioritised working with and supporting industry sectors, trade associations, and businesses that are likely to be affected. It means that the focus has been on raising awareness of the legislation and to collaboratively identify and overcome the challenges that UK businesses face in complying with complex technical regulations. The approach adopted by the competent authority is very supportive to all the sectors of timber industry but this approach needs to be transformed into strong enforcement efforts and the competent authority should start investigating and prosecuting the offenders under EUTR. The soft approach can cause complacency amongst operators not already on their radar and there are many small operators not even aware about the activities of competent authority.



## **(E) Lack of guidance to raise substantiated concern**

The issue of raising substantiated concern has also been very evident especially with civil society organisations. Some stakeholders reported that the communication is lacking regarding the content and detail of substantiated concerns raised. There is no definite guidelines available on how a substantiated concern has been managed by the competent authority. One of the civil society organisations has documented many cases of illegal shipments from high risk countries but most them have not been acted on by competent authorities of member states despite raising substantiated concerns through the proper channels. The substantiated concerns present a useful tool for better enforcement of the EUTR but have so far not been fulfilling their potential. The development of proper guidelines and creating a central online platform for submitting the substantiated concerns (only accessed by the competent authorities) can be helpful in dealing with complaints. Substantiated concerns can be very vital for competent authorities to initiate actions on companies but before taking actions they must be cautious regarding the authenticity of the submitted concerns.

From the enforcement perspective, the impact of the EUTR has so far been disappointing not because the instrument itself is flawed but because at the member state level enforcement has been weak. The lack of uniform enforcement of the EUTR across the member states could lead to a disadvantage for companies which strictly comply with the law and correctly apply due diligence compared to other operators. The different interpretations of the requirements by competent authorities generate uncertainty for multinationals trying to centralize a uniform approach across several member states and fuel misinformation for SMEs in supply chains trying to adhere to the law.

The competent authority has failed to take the appropriate measures against the operators involved in the trade of timber at high-risk of illegality, even though the substantiated concerns provided detailed indications on the potential violations of the EUTR. The proficiency in timber issues and understanding of basic concepts such as the role of chain of custody within supply chain due diligence might be lacking within the audit teams of the competent authorities. These issues can be associated with lack of personnel and financial resources or in other case it could relate to the

competency of staff members, working for enforcement agency.

The **UK government agency** managing the activities of UK competent authority describes that competent authority is never going to check every single timber importer and it is very ambitious to think that EUTR has stopped illegal timber placed in the market due to poor implementation. The competent authority will be unable to effectively enforce the EU timber regulation without sufficient resources and proficient staff members. The capacity building process approach of competent authority must move towards penalising non-compliance.

### 6.3.2 EUTR implementation challenges

Implementation of EUTR is a significant concern that relates to how EUTR is applied which can seriously affects the efficiency of the EUTR. Due to the connections between the enforcement and implementation issues several stakeholders mentioned that lack of resources and difference in penalties and uniform enforcement across EU member states are some of the common application challenges within EUTR regime. The common implementation challenges identified by the stakeholders are supply chain issue coupled with fraudulent documentation, the role of forest certification in due diligence system and weak implementation of due diligence system.

#### **(A) Slow implementation of EUTR across EU**

As the implementation, enforcement and penalties of EUTR varies in the EU, importers in member states where the EUTR is implemented can be seen as difficult customers when asking for all necessary documentation. The participant **IO2** said that “*buyers here in the UK are even more careful about their procurement and more demanding of their suppliers in terms of evidence to prove legality.*” There is considerable burden on businesses here in the UK and they have been passing some of that burden back to their suppliers because they request more detailed information in the form of documents. Discrepancies in the systems of penalties and the application of sanctions create distortions within the internal market, giving an undue advantage to operators in EU countries where sanctions have been weaker or not effectively applied. It can severely impact the objectives of EUTR as illegal timber and timber products can be

redirected to member states with weaker implementation.

## **(B) Setting up a due diligence system**

For timber legality, EUTR due diligence alone must be easier to apply but its implementation has been extremely complicated for individual parties due to the high level of required expert knowledge. The participant **TI30** claimed that *“I can still play around with switching the country of import or false declarations of the products.”* The participant **CSO13** mentioned that *“It is difficult for competent authorities and public prosecutors to be able to provide the decisive evidence required to fulfil the burden of proof”* because official documentation does not, on their own, adequately comply with the EUTR. It can be challenging to establish good cases because they have to deal with complex supply chains and unclear legal framework from where the timber is coming from. The real challenge here for competent authority is to acquire knowledge on the country-specific documentation demonstrating compliance during checks for better implementation.

Forest certification could have been directly linked with timber legality but as per EUTR forest certification cannot legitimate that the logging is done legally and can only be used to prove to a better sourcing system. The technical compliance standards established by certification schemes are a vital component of the effective functioning and credibility of the EUTR. The **FC4** initiated an updating process of its standards in 2012 to ensure harmonization with EUTR. FC4 regards EUTR legality as an essential but not necessarily sufficient step towards sustainable forest management worldwide which indicates that EUTR addresses the legality issues sufficiently however, sustainable forest management is beyond its aim.

The **FC5** has added a new section on due diligence to fully aligned with EUTR requirements and mentioned that demand for the certified timber has increased. There may have been an increase in certified timber entering the EU market but Operators must recognise that rigorous EUTR compliance requires a thorough primary risk evaluation for all products regardless of the availability of certification. Whether operators have adequately identified or mitigated risks that certified supply chains may incorporate unwanted material is very uncertain. Although the forest certification

bodies regularly produce guidance documents for the certificate holders to clarify the process of obtaining reliable certified products, some substantial circumstantial evidence<sup>585</sup> from the EUTR-competent authorities and from independent auditors suggest presence of significant confusion about the nature and scope of different claims and the necessary steps to avoid purchasing fraudulent certified products.

As per **CSO 18** the EUTR has not yet succeeded in preventing vast quantities of illegal timber from entering the EU market due to inadequate implementation of due diligence system and enforcement. It is difficult to estimate the full effect on the business environment as evidence is lacking, especially regarding whether due diligence systems are preventing illegal timber from entering the EU market. These weaknesses are indication that no real incentive has yet been created for producer countries to improve forest governance especially to those who engaged with FLEGT VPA process.

There is currently also no accessible trade data seeking to show differences in import that could point to specific areas of discrepancy that could suggest illegality of trade. The deficiencies in the implementation of the regulation at national level, as well as the lack of systematic enforcement by competent authorities, have hindered Member States and the Commission from gaining the experience that is necessary to evaluate the functioning of the law in accordance with Article 20 EUTR. The application of the EUTR still has a number of flaws which do not help to fulfil the objectives of the legislation.

### 6.3.3 Concept of Monitoring Organisations (MOs)

Monitoring organisations are EC recognised private organisations which can provide EU operators with due diligence systems. The competent authorities are responsible for the verification of the functionality of MOs. Most stakeholders during survey appeared unaware of how monitoring organisation are working in practice because there is a lack of information regarding the actions of monitoring organisations. In this situation, it has been difficult to analyse the overall impact and role of monitoring

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<sup>585</sup>Jade Saunders, 'Certified Products and EUTR Compliance in the Furniture Sector' (Chatham House 2014) <[https://www.illegal-logging.info/sites/default/files/Saunders\\_Certification\\_PP\\_FINAL.pdf](https://www.illegal-logging.info/sites/default/files/Saunders_Certification_PP_FINAL.pdf)>

organisation in achieving its objective. The information from competent authority on checks carried out would have helped in evaluating the actions of monitoring organisation but there is no data available from competent authority. However, some stakeholders mentioned that the uptake of monitoring organisation has been low by the operators. The operators have different options of developing and implementing their due diligence system so the use of a monitoring organisation is just one option and this could be one reason of low interest of using MOs from operators.

The other reason of not using services of monitoring organisations could be that operators could expose to further and additional checks as it is obligation of monitoring organisation to report competent authority about any illegalities detected in supply chains of their clients. **MO2** said that the operator has a perception that *“using monitoring organisation does not protect from competent authority and would be ‘paying the police to stop us’.”* In the case of the audit, it is the operator who is finally responsible, even if the operator uses the monitoring organisation services, so paying a monitoring organisation would not make sense. In this situation, the operators would avoid using monitoring organisation, instead would prefer local/national timber trade associations who provides the same services and they are not under any obligations of reporting illegalities to competent authority.

The role of competent authority can play a vital role in reviving monitoring organisations. Competent authority needs to thoroughly evaluate MO's due diligence system and publish the results of checks. **MO1** fears that *the “status of MO has no appeal to the industry and will likely to continue until regulator is visiting a much larger section of the market and penalties start being issued.”* It would help the operators in deciding whether to use monitoring organisation services or not. This statement questions the ability of competent authority in penalising the companies and states that unless the companies penalised for not applying and maintaining the proper due diligence system, the importance of monitoring organisations would not increase amongst the operators.

The stakeholders have also been concerned for conflict of interest for monitoring organisations. There is a potential conflict of interest situation when timber trade associations or supplier to the timber industry, is acknowledged as a monitoring

organisation under the EUTR. The businesses employing service providers who are registered as MOs could use this not in a MO capacity, which is a risk to credibility of the entire function of MOs under the regulation. The EU and member state must make sure while recognising the monitoring organisations that no conflict of interest occurs which would risk the effectiveness of the EUTR particularly when they are linked to (or controlled by) timber operators and traders.

The credibility of monitoring organisations relies on the quality of their due diligence system but one of the stakeholder **IO3** revealed during the interview that he was “*disgusted and shocked*” to see a due diligence report prepared by a monitoring organisation for the products imported from China. The stakeholder IO3 further mentioned that the monitoring organisation reached to the conclusion that there was a negligible risk without any evidence and the report prepared was full of errors. This observation raises questions on the inability of monitoring organisations on access to adequate country specific information and approach and competency of competent authority in checking the due diligence system developed by the monitoring organisations. Without accurate information on the amount of checks on operators and MOs, it is difficult to ascertain whether the quantity or quality of checks can be considered sufficient.

The monitoring organisations can be increasingly helpful in terms of affordability for small and medium enterprises (SMEs). Larger businesses can invest in developing their own due diligence system while for smaller businesses it can be more profitable to rely on a MO. One possible option would be for Member States to enable access to the services of monitoring organisations for SMEs via either technical or financial assistance or support. MOs don't seem to provide any added value for companies. So, to make them more noticeable to operators, it requires enhanced transparency, for instance, on the standards and procedures that monitoring organisations must follow to ensure the effectiveness of due diligence; the frequency and scope of their monitoring activities and the outcome should also be made public.

#### 6.3.4 Difficulties for timber industry and awareness within the industry

EUTR has created obligations for those first placing timber and timber products on the EU market (operators). **CSO15** stated that “*by limiting the EUTR’s prohibition and due diligence requirements to first placers, the EUTR exempts large-scale traders that buy supplies from numerous small operators, including domestic EU foresters.*” Traders are effectively exempt from the core EUTR measures i.e. the prohibition and due diligence and are only explicitly required to keep record of supplies and sales. While the regulation stipulated that traders must also face proportionate penalties for non-compliance with the regulation, this has not been adequately transposed into member state law, including the UK.

##### **(A) Unfair market condition**

As mentioned in the chapters earlier, EUTR is not coherently implemented across EU Member States, leads to disadvantages for companies which are following the law and investing in proper due diligence and transparency compared to other operators. Absence of consistency in the implementation of the EUTR across Member States places the regulation at risk of distorting trade routes and generating unfair market competition. Furthermore, the EUTR currently does not cover products such as seating furniture, printed materials and musical instruments so the companies that are dealing in timber products that fall out of scope of the EUTR will have an advantage as they don’t have to set up a due diligence system and are able to source illegal material that can often be cheaper without being subject to the same level of scrutiny. Most of the stakeholders of this research have shown concern with the narrow product scope of the EUTR and have been in favour of expanding the product scope to include all the timber products.

##### **(B) Dilemma of due diligence procedure**

To comply with EUTR, the EU operators must have access to information indicating that timber was logged legitimately and be adequately sure that their suppliers complied with relevant national laws. According to **CSO15** operator, trader, and

competent authority interpretation of the due diligence requirements also often fall short of what is actually required by the EUTR. Lack of knowledge of legislation in the country of harvest has been an obstacle for both competent authorities and operators. As per **IO2** many buyers here in the UK need to be more careful and need to ask more question perhaps they did previously. Companies required incredible amount of information which needs expert knowledge to implement an effective and accurate due diligence system to be more transparent so more cost is involved. There are companies routinely visit their overseas suppliers to see for themselves but of course if someone is going overseas, they have only seen things on that day and you can only rely on what you've seen and what you are shown. So, you must make judgement in terms of what you have seen and what documentary evidence is being presented to you.

### **(C) Administrative and financial burden**

The due diligence system has increased the administrative and financial burden on operators and this has affected mainly the small and medium enterprises. The **IO2** mentioned that *“every company that I have spoken to reported some degree of additional work that's required and all timber importers report a significant increase in administration surrounding their procurement of wood and wood products from overseas.”* Most of the participants from timber industry in this study have reported that EUTR has incurred cost to businesses. This makes the current rule of due diligence costly and can be frustrating for companies who take their obligations seriously compared to other operators that did not take their obligation seriously.

**TI28** has been very critical to the administrative work required and mentioned that *“the fallacy of the whole EUTR is based on the assumption that volumes of illegal timber were entering the EU prior to the EUTR which was never the case. Our clients across the EU were purchasing legal timber before March 1, 2013 and by and large have continued with their same supply chains since March 1, 2013.”* He further mentioned that the only difference is the amount of paperwork they are required to compile and the time and energy it takes to attempt compliance which has proven difficult in case of investigation since the burden of proof varies so much from one country to the next. As per **TI4** *“it is a big task to obtain and monitor due diligence and to keep up to date*



*with ever evolving market but this has not affected the business.”* **TI17** and **TI18** also have a similar view and felt that EUTR has been just another requirement. It seems that EUTR has definitely increased the administrative work required to demonstrate compliance but the companies which are least affected are those who had better record keeping system prior to EUTR. Most importers have probably not removed many suppliers and just have adapted their procedures to the new legislation. The small and medium companies could more likely consider purchasing within the EU than from high risk countries due to resources required for compliance work.

The cost of applying and maintaining due diligence is exceptionally high for small businesses relied on certified products and began their journey towards the sustainability prior to EUTR. **TI12** revealed that since EUTR is a legal compliance which does not have sustainability, it has weakened our position and also said that he is a bit depressed and is also hopeful that EUTR sustainability criteria will be added in the future. The same has been felt by participant **TI14**. In a contrasting view, **TI20** would like to see EUTR as a benchmark for all risk assessment and take away the need for forest certification to avoid confusion. Before EUTR, the companies relied heavily on forest certification as a tool for timber legality but EUTR has diversified this process and companies may have been taking time to adjust with the process of due diligence. To adjust to the cost, operators need to be sufficiently aware of alternative sources of information to carry out the due diligence and should access information from the competent authority but they can be hesitant to do so for fear of exposing themselves of rigorous checks. The same applies for operators using a monitoring organisation for due diligence system.

#### **(D) Timber industry awareness**

The awareness within the timber industry on EUTR can be a very vital criterion to check the efficiency of EUTR. It can be a good indication of what has been the timber industry's approach to the regulation. It also helps in identifying how successful the enforcement agency has been campaigning in raising awareness amongst the timber industry and if they have made any attempts to carry out checks on timber industry. The questionnaire has been designed to check awareness between the operators and traders in the UK which comprised questions on EUTR implications on their business,

their role in the industry as per EUTR, basic understanding on documents required for due diligence, about monitoring organisation and competent authority and products covered under EUTR. As mentioned in this chapter previously, the sample size has been small compared to the number of operators and traders in the UK but the questionnaire survey has given quite varied results.

Total 25 responses have been received from timber industry and out of these 25 responses, there are 10 operators, 8 traders and 3 saw millers. The remaining 4 respondents have not mentioned the category they fall under. Apart from one saw miller, all the respondents are aware about the EUTR and its implication on their businesses and all of them regularly apply due diligence to their timber import and also aware about the documentary evidence required for compliance.

With regards to the size of the operators, there are 2 micro firms (<10 employees), 4 small companies (<50 employees) and 4 large companies (>250 employees). All the 10 operators are aware about the competent authority in the UK and one of the large operators has invited the competent authority for surveillance visit. So the awareness level in terms of enforcement and implementation is noteworthy and out of 10 operators 6 companies have an environment manager/sustainability professional to guide companies on matters related to EUTR. Three operators are not aware about the services of monitoring organisations but for due diligence they have been using the system developed by timber trade associations. The most important point that came up from the questionnaire survey is that 5 operators regularly import timber and timber products from high risk regions such as Russia, Africa, Asia, China, Indonesia, Brazil and Malaysia. Although, they have shown that they apply due diligence, the effectiveness of identifying the risk in the supply chain and mitigating it must be evaluated by the competent authority.

As per the EUTR, traders have been exempted from the due diligence requirement and only needs to keep the record of sales which they have to show as a proof during checks. From the survey it seems that all the traders are aware about their responsibility and follow the due diligence procedure whenever necessary. There are four traders who has developed their own due diligence system with the help of their local timber trade associations. Four traders are specifically using the due diligence

system developed by the timber trade association. One of the large traders who had been visited by the competent authority has stopped importing Malaysian plywood after they identified illegalities in supply chain which shows that companies are willing to change their suppliers in case of illegalities, however, this is just one example and cannot be taken as a case with every importer. There are two traders who are not aware of the monitoring organisations. It seems like even though companies are aware about monitoring organisations, they prefer to take help from the local trade associations for due diligence. The reason could be the cost involved to use monitoring organisation and also during checks it is the company's responsibility to provide sufficient timber legality evidence irrespective of using services of monitoring organisation.

The saw millers have not responded most of the questions and it is difficult to evaluate the awareness level in saw millers. Their awareness on the competent authority, monitoring organisation and due diligence cannot be evaluated as they have responded with not applicable. The sawmills in most cases receive wood from domestic producers and woodland owners. The UK's domestic structure of wood procurement has been very controlled so it has been considered as very low risk. The four respondents without did not disclose their business category and company size seem not much aware about the monitoring organisation and competent authority however, all four of them are aware about the due diligence process as all of them are using the due diligence system developed by the trade associations which highlights that role of the local timber trade associations are much more significant than EU recognised monitoring organisations.

#### 6.3.5 The positive changes brought by the EUTR

The stakeholders have clearly identified the challenges complying with the EUTR obligations and how they are trying to mitigate the existing issues within the EUTR. Although EUTR has a complex set of rules, it has helped to contribute EU's international obligations to fight against illegal logging and has led to a greater awareness of the problem of illegal logging and its underlying causes. The EUTR has created pressure on both governments and companies, in and out of the EU, to clean up their acts, ensuring more transparency and better protection and management of

their timber resources. As per **CSO10**, *“for the first-time legislation exists that regulates the trade for all companies placing timber on the EU market.”* It is difficult to assess the changes that EUTR has made due to lack of information and comprehensive datasets, but it has enhanced the debate about transparency and traceability of supply chains and the need for assessment of supply sources with credibility of information and documentation. From the timber industry survey it is evident that a number of well-versed companies, have put in place due diligence systems and made efforts to prevent illegal timber entering their supply chains, when acting as operators, or kept records effectively, when acting as traders.

The EUTR has raised attention to the problem of law enforcement and highlighted the challenges of implementation in the different EU Member States but internationally, the EUTR has had a positive effect on other demand-side markets. The **CSO19** stated that *“the EUTR is expected to bring benefits to exporting countries affected by illegal logging in the form of improved governance, security, and justice, by promoting the rule of law including the rights of indigenous peoples and local communities.”* The **IO1** mentioned during the interview that *“there's some anecdotal evidence that there has been a shift away from tropical timber and increase on more temperate sources.”* EUTR has raised awareness amongst industry about their sourcing policies and started a discussion about transparency along supply chains. EUTR has forced the companies that violate the laws to change practices and come clean off their hidden economy. The potential need for operators to change suppliers or geographic sources when risks of illegality are identified as non-negligible should be viewed as a success of the EUTR. There are possibilities that companies may actively engage in educating their suppliers about the need for credible proof of legality and the EU trade partners such as China might develop mechanisms for complying with the EUTR.

During the analysis of enforcement issues, the approach of competent authority has been criticised by stakeholders but some stakeholders have praised the work of UK competent authority. The **FC3** said that UK competent authority has published some interesting reports using scientific testing as a means to verify documentation claims which demonstrates that current due diligence systems have many gaps. The participant **CSO15** stated that UK competent authority has been suffering from limited staffing and financial services but also considered the UK competent authority has

outperformed many other competent authorities across EU. The same stakeholder further mentioned that UK competent authority has reportedly conducted more stringent, higher quality checks than, for example, the German competent authority.

The **UK government department** managing the activities of competent authority has been really pleased with the competent authority and further stated that the feedback they are getting from the stakeholders especially from the industry and NGO side has been really positive. **MO1** mentioned that the work of UK competent authority has been very effective in raising awareness and highlighting inadequate due diligence which consequently has encouraged operators to implement due diligence. The stakeholder **IO2** found the competent authority very approachable and pleased with their approach. The **IO1** stated that they have been doing a good job given the resources they have but also questioned in a sarcastic way by saying that there is still illegal timber entering the UK because it's very difficult to clamp down. The **FC5** has the similar view for competent authority and said that they are doing a good job so far and have worked with industry very closely.

#### 6.4 Concluding remarks on data analysis

The stakeholders' analysis has shown the variety of views and experiences among the participants on the EUTR and it is evident that profound effects of the EUTR can only be felt when operators bring their activity in compliance with the EUTR and competent authorities are effectively and uniformly enforcing it across the EU. In the UK, businesses who had robust due diligence and environmental purchasing policies in place before EUTR are in a better position to benefit from the law than those who had not set up a due diligence system. The competent authority in the UK has supported the businesses to comply with complex technicalities for few years now which has been an efficient approach to give the confidence to the timber industry but the time has come to penalise the companies who have not complied with the regulation. Nevertheless, to do that they need to reach a much larger section of the industry which required more funding from the government.

Apart from slow implementation and uniform enforcement, the set-up of monitoring organisation, narrow product scope and transparency are the weaknesses identified

during the analysis. As mentioned in the timber industry analysis, UK operators have been using the due diligence system of timber trade associations and can satisfy the EUTR requirements without taking help from monitoring organisation. The absence of information from the UK competent authority on the checks they have conducted, it is difficult to assess the role monitoring organisations under EUTR.

During data collection, the monitoring organisations (operating in the UK) listed on the European Commission website have been contacted to participate in the study. The person from one of the contacted monitoring organisations, who operates in all the EU member states with the office in London, have replied that they have never been a monitoring organisation. This organisation is still listed as the monitoring organisation on the official website of European Commission. The competent authority must check these monitoring organisation and robustly assess the due diligence system developed by them because it is the duty of competent authority to carry out checks on monitoring organisation and report to the Commission if they are not satisfying their role correctly.

The narrow product scope is a key challenge being faced by the EUTR and ideally should include all timber-based products. The EUTR applies to some operators dealing in timber products and not others, creating an unfair and uneven market in the EU. It is a definite disadvantage for the companies who are applying and investing in robust due diligence system while others can just escape because the products they are importing do not fall under the product scope of the EUTR. During data collection, all the categories of stakeholders have recommended that the products scope must be expanded. The exclusion of some timber products means that illegal timber can still be traded in the EU and certain companies can escape the regulation.

The EUTR can contribute to a healthier economy and benefit the forestry sector both inside and outside of the EU. However, the effectiveness of the regulation is still to be seen due the slow implementation of the regulation. There are additional obligations for timber companies (especially the operators who import timber from high risk countries to EU) but sound due diligence system and stronger procurement frameworks can lead to higher profitability for individual businesses regardless of the size of the company. The priority needs to be set to deal with the existing loopholes

and create better level playing field that ensures fair competition and fair prices, and higher incentives for investment in sustainable forest management.

## Chapter 7: Conclusion and Recommendations

Illegal logging and associated timber trade constitute complex and serious challenges for the international community. Various international resolutions and decisions on this topic have been passed and several UN bodies have been directed to assist in illegal timber trade but the problem still exists. The European Union has taken a foremost role in enacting a legal timber market, the Forest Law Enforcement, Governance and Trade (FLEGT) licensing scheme and the EU Timber Regulation which define voluntary and mandatory regulations to ensure the legality of imported timber.

The primary purpose of this research is to assess the efficiency of instruments of EU Timber Regulation which is designed to prohibit the illegal timber and timber products in the EU market. The entire process of systematically gathering and analysing qualitative information from stakeholders on their concerns, issues, and experiences for EUTR have been utilised as a basis to achieve the research objectives.

This study is an attempt to identify the impact of EUTR in a unique way by applying black letter approach and empirical survey including the experimentalist governance approach to develop analytical framework. Both theoretical and empirical work is included to satisfy the research objectives. This research specifies that an empirical evidence can be a very powerful lens to critically analyse a legislation that deals with a transnational issue such as illegal logging. The emphasis of the thesis is on empirical research to investigate the effects of the law, the enforcement of a law, compliance with law and experience of law.

The assessment has concerned, particularly, the UK market. The theoretical framework on transnational timber legality verification initiative in chapter three and black letter approach presented in chapter four indicated the weaknesses of the regulation that subsequently facilitated in constructing the basis of the empirical survey. Consequently, questions considered for EUTR assessment for the empirical survey are enforcement challenges, implementation difficulties of the timber industry, the approach of the enforcement authority, product scope, due diligence system, role of monitoring organisations and certification bodies in EUTR. The possible effect of



Brexit have also been discussed separately in this chapter although the empirical survey was conducted before the result of EU referendum declared.

This research shows that views of the stakeholders are very diverse and there are noticeable differences in opinions from the same category of stakeholders. For example, one of the civil society organisations (name of the organisation has been kept anonymous, see chapter 4) believes that EUTR is bringing benefits for all kind of businesses (small, medium and large) under the condition that it is applied adequately while the other one claims that the effectiveness of the regulation is still to be seen due to the slow implementation of the regulation.

The study finds that although EUTR is considered as a welcome initiative by most of the stakeholders, they are also of opinion that EUTR has weaknesses which make it difficult to completely control illegal timber and timber products being placed in the UK market. From the data analysis, it is quite evident that implementation and enforcement of timber regulation, narrow product scope, ambiguous concept of monitoring organisation, lack of transparency from competent authority and coherent approach across EU, technical issues within due diligence system are some of the significant challenges that affect the potential of EUTR in combating illegal timber trade. The study concludes that the existing enforcement activities under EUTR needs more improvement and the level of transparency on enforcement activities are still a major concern among the stakeholders.

However, the analysis also reveals that EUTR has helped to contribute EU's international obligations on deforestation. The stakeholders believe that it has initiated broader discussions amongst industry about their sourcing policies. The risk assessment elements of due diligence have raised attention to the lack of enforcement and corrupt practices in high-risk countries. The Industry is much more aware of the need for transparency of their supply chains and the challenges linked to establishing traceability systems and the credibility of documentation. At the same time, more specific guidelines must be developed by the competent authority on due diligence procedure and forest certification as an evidence of timber legality so that the offence related to due diligence deficiencies can be prevented. The case of UK timber operator Hardwood Dimensions Holdings Limited highlighted the similar issue that all the

importers must conduct due diligence process on all their products even from the FSC certification. The concluding remarks on different aspects of EUTR have been discussed in the following sections. The concluding remarks are mainly based on the black letter approach and the empirical studies conducted.

The experimentalist governance approach adopted for analytical framework justified based on inclusiveness of different stakeholder engagement and exchanging the information and sharing experience over time. Although the effectiveness or the goals of the focus activity cannot be assured just by the inclusivity as inclusion of all relevant stakeholder cannot be assured. The actors under experimentalist governance broadly know what outcomes they want to achieve, for example in this case, to prohibit the import of illegal timber and timber products, however, they seem uncertain how the objectives can be fully achieved.

This study highlights that the experimentalist governance reflects the awareness of the participants, in this case the awareness amongst the UK timber industry, more than the concern about the due diligence procedure within the timber industry. The periodic revision process described under the experimentalist governance does not always achieve the desired outcomes even on the basis of experience. However, the most appealing feature of experimentalist governance lies in its ability to increase participation which increases the democratic legitimacy of institutions. The agenda setting and problem solving with wide variety of networks, especially the civil society organisations, is one of the major and dynamic difference between the new approach and traditional principle regime to achieve accountability.

## 7.1 The predicament of enforcing the regulation and the approach of enforcement agency

From the survey, it is evident that initial focus of the UK competent authority has been on raising awareness of the legislation and supporting businesses to comply. The approach to enforcement is based on the assessment of risk and intelligence with activities designed to remove non-compliant products from the market to achieve proportionate outcomes and facilitate fair markets.

In 2014 – 15 regulatory delivery issued 23 warning letters and 19 notices of remedial action. In 2015 – 16 issued 21 warning letters and 21 notices of remedial action. However, further information on the details of these warning letters and remedial actions, standard operating procedure for checks, the total number of checks and penalties imposed are some of the queries which need to be addressed. This demonstrates a lack of transparency which gives rise to miss-communication and sense of insecurity to stakeholders which have also been raised during the stakeholders' survey (see chapter 5). However, one of the civil society organisations have praised the efforts of UK competent authority and considers that it has outperformed many other competent authorities across the EU.

Due to the multifaceted nature of illegal timber trade in the UK, it is fair to say that competent authority of the UK has taken a lenient approach towards the industry. Even after four years, the competent authority is trying to simplify compliance with this technical regulation for UK business to gain clear understandings of the dynamics of illegal timber imported to the UK. It is challenging for the enforcement agency to prove or to form a case against the operator in a court of law for the illegality in the timber or timber products without being on the ground. The only way they can prove illegality, say for example an Indonesian plywood, they must go to Indonesia and they need to prove that the logs supplied to plywood mill were illegal and scrutinised each element within the supply chain. This whole process of auditing and case building could take years as it happened in the case against Gibson guitar<sup>586</sup> in the USA. The only thing the competent authority can do is highlight the weak due diligence system of a company. It is difficult for competent authorities and public prosecutors to be able to provide the decisive evidence required to fulfil the burden of proof. The efforts must be made to understand the intricacy of illegal logging and related timber trade and develop the mitigating responses to eliminate the complexities attached with illegal timber trade.

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<sup>586</sup>The American guitar manufacturer Gibson Guitar has entered into a criminal enforcement agreement with the US Department of Justice. The company allegedly violated the Lacey Act by illegally purchasing and importing ebony wood from Madagascar and rosewood and ebony from India. See United States Department of Justice Press Release <<https://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations>>

From the survey, some stakeholders are of opinion that the staff members of enforcement agency are not the timber experts and their responsibilities are within the process that they have to follow. It has also been noted that the competent authority has been supportive in capacity building amongst the UK stakeholders but the efforts of the competent authority are not satisfactory because there is hardly any published outcome or list of prosecutions available. In February 2015, the UK Competent Authority investigated Chinese plywood imports which was commended by UK Timber Trade Federation (TTF) is the only noticeable work carried out by UK competent authority.

Even though restrictions on the marketing of illegally harvested timber on the EU internal market has already been banned for more than four years, only now the first court cases are appearing. Judge in the Sweden and The Netherlands have been recently ruled that the due diligence requirements of the EU Timber Regulation were not met by two importing companies.<sup>587</sup> In Germany, similar court decisions were adopted.<sup>588</sup> A judge in France is investigating companies importing timber from the Democratic Republic of Congo (DRC) after a criminal complaint.<sup>589</sup> The UK competent authority issued the notice of a remedial action to two UK operators importing timber from Myanmar.<sup>590</sup> It is time for the UK competent authority to move from the phase of capacity building to actively enforcing the EUTR and start inspecting companies systematically.

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<sup>587</sup>The companies should have ensured that the timber from Myanmar and Cameroon was logged in compliance with the local legislation, should have provided extensive evidence of this, especially where the countries in question are prone to corruption and governance challenges, and should have adopted risk mitigation measures. See Förvaltningsrätten Jönköping (Administrative court Jönköping) 5 October 2016, case nr. 2095-16, Almträ Nordic AB v Skogsstyrelsen

<sup>588</sup>In Germany, an administrative court dismissed an action against the confiscation of shipments of wenge wood imported into Germany from the Democratic Republic of Congo. The court agreed with the findings of the German competent authority (the German Federal Agency for Agriculture and Food, BLE) that the falsified supporting documents justified the confiscation.

<sup>589</sup>A French judge is investigating a number of companies importing timber from the Democratic Republic of Congo (DRC) after Greenpeace France filed a criminal complaint. Greenpeace claimed that companies were violating EUTR obligations, such as the prohibition to import illegal timber, and the obligation to conduct due diligence. This follows a previous case against illegal timber imports from DRC, also brought by Greenpeace France, which was closed by the public prosecutor.

<sup>590</sup>UN Environment Programme - World Conservation Monitoring Centre (UNEP – WCMC), ‘Briefing Note for the Competent Authorities Implementing EU Timber Regulation (April 2017 – May 2017), Developed by UNEP-WCMC

In the UK, operators can face fines of up to £5,000, possibly per product, for breaching the EUTR. If convicted by a magistrate's court operators can face three months in jail. If the case goes to a crown court these sanctions become more acute; higher fines and a jail term for up to two years can be imposed. The ability to fine £5000 per product is arguably dissuasive but without access to any data concerning penalties, it is difficult to determine the extent to which UK sanctions have deterred infringements. The competence of staff should be translated into more publicly available information because that would show their ability to track down and eliminate illegal timber coming. Their achievements need to be highlighted which will give more confidence that they can execute their job or if not, what do they need to do to be able to do it.

The analysis also points out the inefficiency of competent authority to respond to substantiated concerns raised by the third party and lack of proper guidance to submit concerns. Some stakeholders have shown concern over the financial resources the competent authority receives for enforcement. The regulatory delivery employs 17 full-time employees that deliver enforcement actions under the European Union Timber Regulation. It receives £500,000 for activities designed to increase awareness and levels of compliance. An additional budget of up to £250,000 is available to deliver a productive and risk-based program of product testing. The money received for enforcing this regulation is sufficient or not that is debatable but these resources should be better utilised to achieve the objectives of EUTR and the information should be available publicly.

## 7.2 The challenges of due diligence system for timber industry

The EUTR has been portrayed as a newly emerging legality verification regime which has the capacity to contribute to global economic development and environmental goals related to forest management and the entire forest product supply chain.<sup>591</sup> However, from the data analysis, it is apparent that it lacks the mechanism to address the ambiguous aspects of illegal logging such as traceability of processed/finished timber products with complex supply chain and financial difficulties faced by small-scale businesses.

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<sup>591</sup>Kleinschmit (n 128)

There is a due diligence system in place to tackle the supply chain issue and timber legality verification but the difficulty for the businesses is that they must rely on the information provided by the suppliers of a timber producer country and they do not have any other necessary tools to verify the claims of the supplier. EUTR due diligence entails a risk assessment of government documentation asserting that timber products are legal. Most official documentation is not considered to be absolute proof of legality.<sup>592</sup> Widespread illegalities – including violations of community tenure rights – are associated with forest conversion in most of the major source countries for forest-risk commodities.<sup>593</sup> These types of illegalities are hard to identify and rectify in the timber supply chain even with the appropriate due diligence system. The large companies have the capabilities to develop their own due diligence and regularly visit their suppliers but for the small and medium enterprises, this is not cost-effective.

The findings of the research indicate that EUTR has augmented the awareness of illegal logging issue and purchasing behaviour amongst the UK timber industry. Since EUTR came into effect, the operators are seeking detailed information on the supply chains documents for products originating from outside EU. The operators are even changing the supplier or carry out supplier audits or use other verification programme if the supplier fails to provide the information. Nevertheless, the sluggish rate of implementation and lack of coherent approach of the EUTR across the member states can lead to a disadvantage for companies which strictly comply with the law and adequately apply due diligence compared to others. Companies are not sufficiently guided due to the incredible amount of information, which needs expert knowledge to implement an effective and accurate due diligence.

There is a threat that emerging legality verification regime under EUTR creates advantages for large, export-oriented enterprises compared to smaller firms in both exporting and importing countries. There are some stakeholders that point out that there is still lack of information and weak implementation of the due diligence systems among the small enterprises importing occasional consignments. In some instances,

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<sup>592</sup>Janet Pritchard, 'Developing EU Measures to Address Forest-Risk Commodities What Can Be Learned from EU Regulation of Other Sectors?' (Fern 2016) <[https://www.fern.org/fileadmin/uploads/fern/Documents/Developing%20EU%20measures\\_0.pdf](https://www.fern.org/fileadmin/uploads/fern/Documents/Developing%20EU%20measures_0.pdf) >

<sup>593</sup>Lawson (n 2)

the complex nature of compliance and legality verification procedures impacts negatively on small-scale companies.<sup>594</sup> This is due to the perceived costs of legality verification, added administration cost and lack of adequate capacity and knowledge.

As per EUTR, operators have the option to develop and implement own due diligence system to ensure that illegally harvested material is removed from the supply chain, by exclusion or by working with the supplier more closely. Traders are effectively exempt from the core EUTR measures, namely the prohibition and due diligence, and are only explicitly required to keep the record of supplies and sales. While the regulation stipulates that traders must also face proportionate penalties for non-compliance with the regulation, this has not been adequately transposed in the UK. There appears to be limited options to seize illegal timber that has passed to traders after inadequate due diligence and enforcement of the EUTR's obligations on operators.

During the empirical survey, it was noted that there is a large number of timber operators and traders operate in the UK that is part of domestic, regional and global markets for legal and illegal wood products. This market is interlinked which makes it difficult to monitor and resolve illegal logging and related timber trade. By limiting EUTR's prohibition and due diligence requirements to "first placers" (operators) the EUTR exempts large-scale traders that buy supplies from numerous small operators, including domestic EU foresters. Thus, timber commodity chains lack transparency and traceability for ensuring timber legality. Technological tools, such as timber forensics, can contribute to timber verification and the detection of illegal timber.

### 7.3 Role of forest certification under EUTR – misconception or symbiotic relationship between public and private law

The findings of the research, especially from the timber industry survey, indicate that the UK businesses rely heavily on forest certification from FSC and PEFC as a tool for

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<sup>594</sup>Daniela Kleinschmit and others, 'Conclusion', *Illegal Logging and Related Timber Trade – Dimensions, Drivers, Impacts and Responses: A Global Scientific Rapid Response Assessment* (International Union of Forest Research Organisations 2016)

timber legality verification. FSC and PEFC certified timber does not automatically comply with EUTR. However, it should be noted that article 6 of the EUTR implicitly gives a particular role to private forest certification. As per Article 6 on the EUTR due diligence system (DDS), it becomes clear that certification or other third-party verified schemes may be considered in the risk assessment and risk mitigation procedures.<sup>595</sup> Risk assessment and risk mitigation are part of the DDS, and in both the private certification schemes can play an important supportive role.

This scenario can be interpreted in two different ways. First, it may increase the financial and administrative burden on small and medium operators for timber legality verification which generally depends on forest certification which is a scheme designed around the sustainability concept while EUTR fundamentally revolves around timber legality and there is a lack of sustainability criteria. The operators importing forest certified timber still have to apply due diligence on the same timber to show the compliance with EUTR. This applies to the timber traded within the EU or UK and not only to the timber imported from outside EU. Businesses are spending a lot of money to have forest certification and now they have added the cost of documentation and carry out risk mitigation. The companies started their journey towards the sustainability before EUTR have now had to divert towards legality after EUTR.

Secondly, article 6 establishes an interrelation between EUTR and privately held forest certification which is an opportunity to link public with private forest law. Here it becomes clear that there is apparently regulatory co-existence between private regulation by self-regulatory organisations and public regulation by governments like the UK. Concurring regulation might be considered as complementary regulation if it is not colliding regulation. Law collision should be avoided but such a collision is not very likely here, as focus and aims of EUTR, FSC and PEFC are, as stated above, not contradictory. Moreover, privately held self-regulation schemes could become even more successful in the shadow of the public law. Both EUTR and private certification are interrelated by article 6 and could be mutually supportive. Both regulatory

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<sup>595</sup>Article 6/1(b) in the first indent of the second paragraph verbatim states that risk assessment may include certification and according to article 6/1(c) risk mitigation may include requiring additional information or documents and/or third-party verification.



frameworks do not appear as counterproductive instruments and could be welcomed as tools of designing a symbiotic policy mix combatting illegal logging.

#### 7.4 The weak concept of monitoring organisation

The regulation gives operators different options in developing and implementing their due diligence system so the use of a monitoring organisation is just one option that businesses can take. The research shows that many operators and suppliers can satisfy the EUTR without monitoring organisation so the use of monitoring organisations by operators seems to be very low. Without detailed information from the UK competent authority on a number of checks they are conducting on monitoring organisations; it is difficult to ascertain whether the quantity or quality of checks can be considered sufficient. There is hardly any information that is available regarding the actions of monitoring organisations, making an assessment difficult.

The monitoring organisations are liable to inform the state competent authority of any type of illegalities they found in the supply chain of their client. Thus, the operators are reluctant to take services of monitoring organisation because using a monitoring organisation can expose them to further and additional checks by the competent authority. Using the due diligence system developed by the monitoring organisation does not guarantee any protection or security to the companies for not being penalised by the competent authority. In an event of an audit, if the competent authority finds any illegality, the company is still being penalised even though the company is using the services of monitoring organisation. It is the operator who is solely responsible to make sure that it has applied proper due diligence and eliminate any risk of illegality through risk assessment.

The monitoring organisations operating in the UK are some of the big companies which have the bureaucracy and volume behind the timber industry business. The EU should consider smaller and more independent organisations with sufficient knowledge of the sector which can function without any industry influence and provide transparency within the system.

The EU recognised monitoring organisations also act as timber legality consultants which may have a vested interest in avoiding any disruption to their clients' business models. Those businesses employing service providers who are registered as MOs could use this not in a MO capacity, which is a risk to the credibility of the entire function of MOs under the regulation. Consequently, monitoring organisations are exposed to the risk of conflict of interest, mainly when they are linked to timber operators, traders or their organisations.

Large businesses are usually more willing to invest in DDS on their own, while for smaller businesses it becomes more profitable to rely on a monitoring organisation. At present, MOs don't seem to provide any added value for companies which reflects on low level of their uptake. The entrustment of such public function requires enhanced transparency on the standards and procedures that monitoring organisations have to follow to ensure the effectiveness of due diligence; the frequency and scope of their monitoring activities and the outcome thereof should be made public.

### 7.5 Limited product scope of EUTR undermines the fight against illegal logging

Article 2(a) of the EUTR focuses on timber and timber products with the exception of timber products which have completed their lifecycle and they would be disposed of as a waste. The product coverage includes wood and articles of wood, pulp of wood and paper and paperboard and articles made thereof (chapter 48). Additionally, some commodity codes for furniture and one code for prefabricated buildings are listed. As already mentioned in chapter 3, the EUTR does not cover all commodities which have been defined as wood-based products. With regard to the Combined Nomenclature (CN), the statistical classification of traded goods, products such as wood charcoal, wood marquetry, printed matter or regenerated cellulose are not listed in the annexe of the EUTR.

Both the black letter approach in chapter 3 and data analysis show that EUTR is still far from comprehensive as they do not include all products.<sup>596</sup> The data analysis

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<sup>596</sup>Sepul Kranti Barua, Juho Penttila and Mika Malmstorm, 'China as a timber consumer and processing country: an analysis of China's import and export statistics with an in-depth focus on trade with the EU' (WWF – UK and Indufor 2016)

shows that product scope is a crucial challenge as EUTR applies to some operators dealing in timber products and not others, creating an unfair and uneven market. Companies that are dealing in timber products that fall out of the scope of the EUTR will have an advantage as they can source illegal material that can often be cheaper without undergoing the same high level of scrutiny or being subject to the due diligence requirements of the EUTR. It is a definite disadvantage for companies which are following the law and investing in proper due diligence and transparency compared to other operators who can easily escape and circumvent the regulation.

In the UK, plywood import from China is considered as high-risk products.<sup>597</sup> From 2011-2015, UK imported 2.90 million RWE of EUTR products from China with the most share of wooden furniture, plywood and paper. Amongst the non-EUTR products, UK imported 0.70 million RWE with the most share of printed media and wood charcoal.<sup>598</sup> The 2016 report<sup>599</sup> published by WWF with newleaf sustainability practice Ltd suggests that the value of out-of-scope imports rose from €43.1 billion (2013) to over €46 billion (2014). The value of the products included under EUTR increased a little from €21.7 billion to €23.1 billion. By the value of timber products covered by EUTR, only 33% of products that may contain wood were included in the EUTR product scope, that means 67% of products were still not included under EUTR. With regards to the volume of timber products, 86% of wood-related products are covered by the regulation. Therefore, EUTR currently covers a significant majority of wood-related imports by quantity, but only one-third of imports in terms of value. This suggests that products not currently included in the scope of the EUTR typically have a high value, perhaps because they are more highly processed. The value and wide range of out of scope product groups undermine the coverage and effectiveness of the existing EUTR and makes a strong case for widening its scope. The expansion of products list will help to ensure that European consumers are not at risk of buying illegally logged timber or timber products.

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<sup>597</sup>Pillet (n 528)

<sup>598</sup>Barua (n 596)

<sup>599</sup>Drewe (n 539)

## 7.6 The impact of EUTR on timber import and trade diversion

The 2015-16 biannual review and assessment report<sup>600</sup> of ITTO suggests that the UK imported about \$6.1 billion of secondary processed wood products and UK's tropical plywood imports almost doubled in 2016 to get to 197000 m<sup>3</sup>, with a significant increase in imports from China. As reported in the thesis earlier, China is considered as the most significant processing and exporting centre for illegal timber and timber products. There has been an increase in the share of potentially illegal timber imports into China during 2014-2015. In 2015, UK was China's second largest market for total export value after the USA for wooden furniture. The figures showed that China is by far the most significant import partner country, providing 42% of all relevant UK furniture imports (€1.6 billion; 450,000 tonnes). Potentially, illegal timber continued to enter the UK from China through the imports of both EUTR and non-EUTR products. Along with China, Vietnam, Malaysia, Brazil and Indonesia are also considered as significant high-risk import partners of UK.<sup>601</sup>

The case of China suggests that FLEGT action plan and particularly the EUTR are useful only in reducing the share of potentially illegal timber imports into the EU, not in eliminating the total imports of such products. In other words, EU policies are only partially effective in cutting illegal timber flows into the EU. However, this research points out that UK buyers have been making increasing efforts to source legally verified timber and timber products from abroad. The FLEGT action plan and EUTR have been effective in terms of raising awareness of the problem of illegal logging and contributing to improved forest governance globally.

It has been reported<sup>602</sup> that measures from consumer countries such as US, EU and Australia to eliminate illegal timber imports have the positive impact. The findings of the research indicate that EU importers are shifting to lower-risk sources, favouring timber from verified legal and sustainable sources.<sup>603</sup> Nevertheless, there is a lack of

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<sup>600</sup>International Tropical Timber Organisation (ITTO), 'Biennial Review and Assessment of the World Timber Situation 2015-2016' (ITTO 2017)

<sup>601</sup>Drewe (n 496)

<sup>602</sup>Hoare (n 11)

<sup>603</sup>CBI (n 70)

credible evidence that the shift is due to the EUTR because of the time gap between the enforcement of EUTR and the shift from high to low-risk timber sources.

EU imports of timber both temperate and tropical have been declining overall, however, it is uncertain that decline is due to the EUTR.<sup>604</sup> After the EUTR took effect, the bulk of illegal trade can now shift to other countries. The diversions could include increased domestic consumption in the producer countries (even though this is less evident) and the increased imports by countries that have no or less stringent regulations on the illegal trade of wood products. These diversions can undermine the effectiveness of initiatives such as EUTR from the consumer countries and require more extensive global collaboration in combatting illegal logging and related timber trade.

### 7.7 EUTR and Brexit – What could be the possible effects of new United Kingdom Timber Regulation (UKTR)?

The empirical survey with stakeholders conducted before BREXIT so it is difficult to present the stakeholders' view but BREXIT can have a significant impact on this research if the UK opts to have a completely new regulation for the illegal timber trade. At the same time, this research could possibly be the only piece of comprehensive academic research which studies the impact of EUTR in the UK once the new UK legislation introduced. During the time when the empirical survey conducted, there was hardly any thought that then Prime Minister David Cameron will order for EU referendum so the survey questions and data analysis in the thesis has been presented considering that the UK will remain an integral part of the European Union.

Post-Brexit concerns focussed primarily on global political and economic consequences but environmental concerns cannot be ignored especially when the illegal timber trade has many damaging effects and the UK is one of the largest importers of timber and timber products from outside EU. There are some articles, blogs and viewpoints available which describe the diverse impacts Brexit can have on environmental laws and forest-related policies both in the UK and EU. To highlight few

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<sup>604</sup>Giurca (n 89)

of them, Winkel and Derks' study<sup>605</sup> shows that without the UK, the EU would lose influence and diplomatic standing substantially in global forest governance. According to ClientEarth, non-profit environmental law organisation, considers that Brexit would have the negative impact on the environment because The EU is insisting the UK and other EU countries to raise their protection to a higher level than they would actually want on their own.<sup>606</sup> ClientEarth's Supreme Court victory over the UK government on air pollution was based upon the EU law.<sup>607</sup>

At present, EU laws including EUTR remains in force in the UK and UK should still be a member of the European Economic Area (EEA) after Brexit.<sup>608</sup> The European Economic Area was formed in 1994 to expand the EU's internal market rules to the countries of the European Free Trade Area (EFTA). The EU countries as well as Iceland, Liechtenstein and Norway are included in the EEA which allows them to be part of the EU Single Market. The EEA membership gives full access to the single market depending upon members sanctioning the national versions of all EU legislation and make a substantial contribution to the European budget. Notably, the EUTR was transposed into the EEA Agreement in May 2015, so membership would require that the UK maintain the EUTR. Interestingly, the FLEGT regulation which depicts the liabilities of European Member States on attainment FLEGT licences, is not currently replicated in the EEA Agreement. This means that when UK leaves the single market, the new arrangements, for the UK, will be required to receive the FLEGT licenses.

In theory, once the UK has left EU, it has the opportunity to enforce its national timber regulations against buyers of wood products illegally harvested within the EU for example Romania. As pointed out the weaknesses of EUTR in this research, there will be some genuine opportunities to include full product scope including all the wood

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<sup>605</sup>Georg Winkel and Jakob Derks, 'The Nature of Brexit: How the UK Exiting the European Union Could Affect European Forest and (Forest Related) Environmental Policy' (2016) 70 Forest Policy and Economics 124

<sup>606</sup>Brexit Debate: Staying In EU Is Best For UK Nature And Climate (ClientEarth, 2016) <<https://www.clientearth.org/james-thornton-on-brexit-staying-in-the-eu-is-best-for-uk-nature-and-climate/>>

<sup>607</sup>ClientEarth vs DEFRA [2016] EWHC2740 [2016]

<sup>608</sup>Yuliya Kaspiarovich and Nicolas Levrat, 'After a No-Deal Brexit, Would the UK Remain in the EEA by Default?' (Brexit Institute 2018) <<http://dcubrexitinstitute.eu/2018/10/after-a-no-deal-brexit-would-the-uk-remain-in-the-eea-by-default/>>

products under the new regulation. Problems such as lack of financial resources in order to enforce the regulation can be diverted specifically to deal with UK issues. Any such dynamic would take at least a couple of years to come into effect. The option to avoid this risk is to buy certified or otherwise third-party audited wood from within the EU.

The explanatory memorandum<sup>609</sup> prepared by DEFRA to The Timber and Timber Products and FLEGT (EU Exit) Regulations 2018<sup>610</sup>, ensures that EU and UK legislation establishing the regime prohibiting restrictions on the marketing of illegally logged timber on the market will remain operable once the UK leaves the EU. The tool makes small and functional modifications to the existing legislation mentioned above in order to ensure that the law becomes operable after Exit. The amendments include amending references to the EU, institutions of the EU and EU administrative processes to UK equivalents; upgrading legal references applicable to the UK legislation and maintaining policy reporting requirements. The aim is to have a United Kingdom Timber Regulation (UKTR) and UK Forest Law Enforcement Governance and Trade regulation which tackles illegal logging and ensure the demand and supply of, legally harvested timber for the UK market.

The instrument's purpose is solely to allow the current legislative and policy framework to remain unchanged by the United Kingdom's withdrawal from the European Union. Under UKTR, the monitoring organisations operating in the UK recognised under EUTR will be continued and the requirements and obligations will remain intact. It seems like there will be some changes to the EU FLEGT partnership agreements as UK intends to conclude its own partnership agreements. Until the UK concludes new partnership agreements, Indonesia will be removed from the annexe of the FLEGT regulations as Indonesia is currently named as a Partner Country in the annexe of the FLEGT regulation 2173/2005.

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<sup>609</sup>Explanatory Memorandum to The Timber and Timber Products and FLEGT (EU Exit) Regulations 2018, See <[https://assets.publishing.service.gov.uk/media/5b573aaa40f0b6338b116dba/The\\_Timber\\_and\\_Products\\_and\\_FLEGT\\_EU\\_Exit\\_Regulations\\_2018\\_EM.pdf](https://assets.publishing.service.gov.uk/media/5b573aaa40f0b6338b116dba/The_Timber_and_Products_and_FLEGT_EU_Exit_Regulations_2018_EM.pdf)>

<sup>610</sup>Timber and Timber Products and FLEGT (EU Exit) Regulations 2018 <[https://assets.publishing.service.gov.uk/media/5b573a5040f0b633a4313da9/The\\_Timber\\_and\\_Products\\_and\\_FLEGT\\_EU\\_Exit\\_Regulations\\_2018\\_SI.pdf](https://assets.publishing.service.gov.uk/media/5b573a5040f0b633a4313da9/The_Timber_and_Products_and_FLEGT_EU_Exit_Regulations_2018_SI.pdf)>

The introduction of the UKTR may increase the amount of paperwork that authorities have to deal with which consequently affect the businesses adversely. It can complicate and unnecessarily increase the trading cost between the UK, affect the transparency and the businesses may end up paying more amount on the same volume of product than what they are paying now. Therefore, as soon as the UK leaves the EU, it will create many disadvantages for the businesses for both UK and EU countries.<sup>611</sup> The challenge for the upcoming negotiations between the EU and the UK will be to minimise these costs.

Clearly with an industry as global as the timber trade, the adoption of new standards can have a significant impact on timber industry in developing countries especially the small and medium size companies. Adoption of new requirements in place of EUTR can damage the traceability system companies have set up to comply with EUTR. Forest certification bodies have developed many guidance notes to simplify EUTR obligations for operators since EUTR came into force. With new UK legislation on illegal timber, the forest certification bodies may have to develop new standards so this may create many perplexing regulatory frameworks. This whole scenario could have a damaging global impact on the fight against illegal logging.

The complex supply chain issue for the timber products harvested in high risk countries, processed in countries like China and entering via EU in the UK can create more complications to the timber traceability for operators. During the survey, it has been noted that UK timber importers are trying their best to comply with EUTR requirements with the knowledge they have and with new legislation, it is highly likely that it will add extra administrative cost and could possibly weaken the timber market. Therefore, even if in theory the UK did not need to meet some of the EU's requirements, it is possible that the trade would continue to do so in order to minimise cost and reduce barriers to trade.

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<sup>611</sup>The National Board of Trade Sweden, 'Brexit – Options For a Future Regulatory Framework for Trade in Services and Customs and Trade Procedures Between the EU and the UK' (NBTS 2017) <<http://www.regeringen.se/494cc9/contentassets/6fda5c79a5d94ad692e4c65f082b4aa6/english-summary-brexit-analysis.pdf>>



Amidst this, is the government going to take a step back in the fight against illegal logging the main point for the UK to focus on? There is a prime example of the 2012 coalition government's controversial plans to sell-off England's public forest estate to raise £250 million. The plans faced a massive criticism and were finally abandoned after the government hastily set up an expert panel which called for the 637,000 acres of woodlands owned by the Forestry Commission to remain in public ownership. The damages or consequences of new legislation in place of EUTR are considerably high even if UK tries to address the existing weaknesses in the EUTR. The UK has been very instrumental in providing support both financial and human resource to FLEGT action plan. The UK, especially its NGO community, was influential in bringing the FLEGT and the EUTR and remains among the most proactively driving its implementation.<sup>612</sup> The UK's Competent Authority 'Regulatory Delivery' is viewed as one of the most active member states.

Although this research has highlighted that there is a room for improvement under EUTR, it seems that neither the EUTR nor FLEGT VPA initiative should be downgraded as part of Brexit. Once the UK leaves the EU, it would cause unnecessary administrative burden and put a potential barrier in the way of trade with or via other European businesses. Perhaps most importantly, at a time when their potential for positive impact looks set to grow, it would send out the wrong signal on the UK's commitment to combatting the illegal timber trade. The Brexit would not affect the commitment of either the UK or the EU to fight against the transnational issues of illegal timber trade and will co-operate with each other and will be on the same page to address this issue. The UK has been and probably continue to coordinate enforcement approaches with EU Member States, like Norway and Switzerland, along with the US, Canada, and Australia, in an informal government process known as the Timber Regulation Enforcement Exchange (TREE). It is in the global interest that UK keeps EUTR's instruments intact to fight against illegal logging and not to take a step back due to Brexit.

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<sup>612</sup>EU-FLEGT Facility, 'EUTR perspectives - The non-governmental organisation (NGO) view' (EUFLEGT 2012) <[http://www.euflegt.efi.int/81/-/asset\\_publisher/2WbEg9FaGcCQ/content/eutr-perspectives-the-non-governmental-organisation-ngo-view?inheritRedirect=false](http://www.euflegt.efi.int/81/-/asset_publisher/2WbEg9FaGcCQ/content/eutr-perspectives-the-non-governmental-organisation-ngo-view?inheritRedirect=false)>

The Brexit negotiations must take potential future burdens into consideration to ensure that trade can continue without restrictions after UK have left the EU. Assessing the current scenario on timber trade, it is very uncertain but it is fair to say that it is going to be a very complicated matter when UKTR comes into force. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulations will be kept in UK law after Brexit. The change will be that companies have to provide CITES documents for CITES listed species between the UK and the EU with designated trade routes.<sup>613</sup> The encouraging news for the UK companies using monitoring organization for due diligence requirement is that the monitoring organizations established in the UK would continue to be recognised by the UK. However, the EU has indicated it will no longer recognise monitoring organisations based in the UK if there's no deal. The Office for Product Safety and Quality will continue to check that companies maintain appropriate records and there would be no need for further action to be taken by businesses at the border as a result of the EUTR reforms.

## 7.8 Recommendations

The recommendations provided here are based on the information gathered during the empirical survey and analysis performed. It considers how the EUTR system can be improved overall and in the UK including its instruments. Therefore, effects of Brexit have been excluded from the suggestions below.

There are differences in how the EUTR is applied in the EU, especially in terms of enforcing the penalties and product coverage, which hinders the development of a level playing field in the EU and the effective implementation of the law. This must be improved to support responsible businesses who take their obligations seriously. A uniform and binding EU framework can be one instrument that can deliver a level playing field between operators and enforcement agency in the EU timber sector.

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<sup>613</sup>Brexit Guidance for Businesses, Trading CITES-listed Specimens through UK Ports and Airports if there's a No-Deal Brexit <<https://www.gov.uk/guidance/trading-cites-listed-species-through-uk-ports-and-airports-after-brexit>>

EUTR has the potential to create a level playing field that ensures fair competition and fair prices, and higher incentives for investment in sustainable forest management. The EUTR can contribute to a healthier economy, benefit the forestry sector and strengthen the rights of indigenous community both inside and outside of the EU. Profound effects of the EUTR such as systemic reform and governance improvement can and will only be felt when operators bring their timber trading activities in compliance with the EUTR and competent authorities are effectively and uniformly enforcing it across the EU. It remains to be seen when the European Union addresses the weaknesses identified in 2016 consultation to ensure effective implementation of the EUTR to stop the flow of illegal timber into the EU market.

### **(A) Competent Authority**

There can be more transparency on enforcement checks made by the competent authority and that checks are performed regularly and cover a representative percentage of operators (importers, national operators as well as traders). Where shortcomings are identified by the Competent Authority, they should follow this up with penalties. From the survey, it has been noticed that UK competent authority (CA) reports to the UK government's Department for Environment, Food & Rural Affairs (DEFRA) every 6 months. DEFRA should at least annually publicize the activities undertaken by the competent authority and their enforcement achievements.

The UK competent authority should be more transparent about the process for substantiated concerns raised by third parties and ensure that this process is simple and readily available. One of the survey respondent mentioned that UK competent authority does not provide an open channel to submit substantiated concerns or communicate the scale, scope and outcomes of enforcement. A centralised online system can be developed to raise the concerns which can alert all the competent authorities in EU member states. The substantiated concern raised by the NGOs should be communicated to the relevant authorities such as customs department, border agencies and intelligence agencies.

Concerns raised should be treated in a timely manner with a response made detailing whether and why further action is taken. Competent authorities can engage in a

transparent dialogue with complainants on the basis of reliable procedural standards. Regular reporting on substantiated concerns including total number received, allocated remedial actions, and number followed up on where no remedial action was determined is necessary.

For effective law enforcement, it would seem more logical for customs to be directly involved in the EUTR enforcement. Controls are more precise and productive when they happen when the shipment and bill of lading are together and when (forensic) verification techniques can be employed to see whether they correspond, rather than afterwards, via documents or during an inspection at a timber company, as is still common EUTR practice.

The timber trade associations and their members across the UK can play a significant role with both awareness and implementation of EUTR. The competent authority should encourage these associations to report annually to competent authority with the status of EUTR compliance and issues encountered amongst their member companies. Engagement by the competent authority with operators helps to clarify the requirements of the regulation. More feedback from the competent authority would help persuade resistant operators to engage more fully with their due diligence obligations.

## **(B) Timber Industry**

In section 6.7 of this chapter, it is mentioned that Timber Regulation Enforcement Exchange has been established to assemble enforcement officers from EU Member States, Australia and the US to provide support to a coordinated effort to address the trade in illegal timber. A similar platform for operators would facilitate greater access to national legal requirements that would help ensure better compliance. Even though some operators may have set up a reasonable control on their supply chain, much remains to be done to ensure that only legal or sustainable timber is entering the EU market.

During the survey, it has been noted that some members of timber industry think that EUTR brings extra administrative costs to their businesses but EUTR should not be

seen as a burden. It is the first step that must be further developed towards more sustainable supply chains that can bring more confidence into the timber market. The temporary or permanent change of suppliers or geographic supply sources is a small price to pay compared to the long-term benefits that it will generate for the forestry sector and society as a whole. The EUTR obliges the operator to apply due diligence as a first placer of wood products on the EU market which can create complacency regarding the awareness on illegal timber trade amongst other actors further down the supply chain. It is always of good support if all market actors are informed better about the objectives, the content and the procedures of the EUTR. That would raise awareness and acceptance of the EUTR and lead to a better implementation.

Operators should pay attention to various sources of information that can inform risk assessments including independent monitor and NGO reports. They should also publish through their website a purchasing policy that prohibits illegal timber entering into their supply chains and demands sustainable timber and timber product purchasing. If an operator changes its supplier relating to timber illegalities, the operator should inform the respective competent authority about the concern so that the competent authority can keep an eye for other operators importing or buying wood from the same supplier.

### **(C) Expansion of product scope**

The current scope of the EUTR is not comprehensive enough to stop illegal timber from being placed on the UK market. Currently, the EUTR advantages some operators dealing in timber products over others, creating an uneven and unfair market in the EU. An approach covering all products related to timber would not only improve this situation but furthermore simplify the due diligence process for those companies trading in products that are out of scope. Broadening of product scope would ensure all suppliers in all countries are captured by the EUTR.

The traders buying large volumes of un-verified out of scope timber products from multiple operators that are not being checked by national competent authorities need to be covered by the EUTR. The European Commission should review the product scope of the regulation by inviting the proposal for studies or consider existing studies

(mentioned in section 6.3 of this chapter) to identify the feasible options of expanding the product scope so that all wood-based products are covered.

#### **(D) Monitoring Organisations (MOs)**

The biggest challenges for monitoring organisations and the competent authorities who are monitoring their systems are the providing an effective due diligence system and the avoidance of conflicts of interest. Clear criteria and standards need to be applied when addressing these problems, as well as competent authorities should check monitoring organisations regularly and thoroughly that no conflict of interest occurs which would risk the effectiveness of the EUTR. It remains unclear what are the criteria or standards applied by the commission in the process to recognise monitoring organisation. Greater transparency is requested and required to ensure EUTR is seen to be enforced and therefore effective.

The role of monitoring organisations is to help operator develop an EUTR-compliant due diligence system and conduct regular due diligence performance evaluations. In the UK, there are options available for operators to develop due diligence system without taking help from MOs. The UK Timber Trade Federation (TTF) is not a monitoring organisation but has its own due diligence system which is being used by its members. Monitoring organisations do not provide a service that the importers cannot provide themselves and they don't seem to provide any added value for companies which reflects on the low level of their uptake.

Even after four years of EUTR, there is no sufficient information available on actions of UK monitoring organisations which certainly affects the acceptance of the concept amongst the operators. The competent authorities should annually report to the commission on checks carried out and activities of monitoring organisation and If, from the report, the concept doesn't seem to be working, then the commission should take a call to remove this concept.

## 7.9 Future developments of research

The EUTR is a measure adopted by timber consumer countries so its impact on timber producer developing countries considering forest governance, the timber industry and on livelihoods of a country needs to be studied to get a holistic approach of EUTR. The comparison between before and after EUTR scenarios in the developing countries can reflect the actual effects of EUTR. The assessment of how transnational policy efforts of combatting illegal logging have helped to control agricultural conversion, whether formally legal or illegal. Similarly, the impact of EUTR and risk assessment studies for different industry sectors (such as building and furniture) both in timber producer developing countries and timber consumer developed countries can generate a good amount of data. These type of studies can help a particular industry to understand their carbon footprint, risk identification, mitigation and complying with regulatory mechanisms. The element of Brexit in this type of studies can enhance the knowledge and help, both the private industries and government agencies, in identifying the areas that need further clarification.

The more in-depth research is needed to develop the mechanisms that deal with regime complexity issue especially in the field of transnational business governance. The measures need to be developed to understand the connections and interactions across international regimes. So that the mechanisms to streamline the cooperation with different institutions developed and further disintegration through overlapping can be prevented.

More accurate data about illegal forest activities is needed. Research/Methods are needed to develop on how to engage forest communities in detecting and reporting situational forest crime. Research is needed to effectively apply forensics to extract high-quality DNA from timber which can help the enforcement agencies during investigating the timber species. The mapping tools of GIS and remote sensing should be developed and provided to the developing countries to monitor the forest activities and record data.

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