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Experimentalist interactions: Joining up the transnational timber legality regime

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Abstract

This paper analyzes the interactions between the separate components of the emerging transnational timber legality regime, both public and private. It examines how far, and through what institutional mechanisms, these interactions are producing a joined-up transnational regime, based on a shared normative commitment to combat illegal logging and cooperative efforts to implement and enforce it. The paper argues that the experimentalist architecture of the EU FLEGT initiative has fostered productive, mutually reinforcing interactions both with public timber legality regulation in other consumer countries and with private certification schemes. But this emerging regime remains highly polyarchic, with broad scope for autonomous initiatives by NGOs and private service providers, along with national governments, international organizations, and multi-donor partnerships. Hence horizontal integration and coordination within it depend on a series of institutional mechanisms, some of which are distinctively experimentalist, while others can also be found in more conventional regimes. These mechanisms include cross-referencing and reciprocal endorsement of rules and standards; recursive learning through information pooling and peer review of implementation experience; public oversight and joint assessment of private certification and legality verification schemes; and the "penalty default" effect of public legality regulation in consumer countries, which have pushed both exporting countries and transnational firms to comply with the norms and procedures of the emerging transnational regime. The paper's findings thus provide robust new evidence for the claim advanced in previous work that a joined-up transnational regime can be assembled piece by piece under polyarchic conditions through coordinated learning from decentralized experimentation, without a hegemonic power to impose common global rules.

Keywords: experimentalist governance, forest governance, regulation, timber legality, transnational governance.

1. Introduction

Over the past 15 years, something approaching a "joined-up" transnational timber legality regime has progressively emerged from the intersection of multiple public and private initiatives across different geographical regions and levels of governance. At the heart of this joined-up regime is the European Union's Forest Law Enforcement, Governance, and Trade (FLEGT) initiative, which includes Voluntary Partnership Agreements (VPAs) with producer countries to assure the legality of exported timber and legislation prohibiting operators from placing illegally harvested timber on the EU market and obliging them to demonstrate "due diligence" that they have not done so. During the same period, other major consuming countries such as the United States, Australia, and South Korea have likewise adopted legislation banning the import of wood harvested illegally in its country of origin. In response, the major transnational private forest certification schemes – the Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification (PEFC) – have revised their standards to meet the ensuing timber legality verification requirements in these jurisdictions. These developments, together with ongoing campaigns by transnational NGOs, have put growing pressure on both consumer and producer countries around the world to adopt measures of various kinds to combat trade in illegal wood.

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This paper analyzes the interactions between the EU FLEGT initiative and the other major components of the emerging timber legality regime. It examines how far, and through what institutional mechanisms, these interactions are producing a joined-up transnational regime, based on a shared normative commitment to combat illegal logging and cooperative efforts to implement and enforce it. The paper argues that the experimentalist governance architecture of the FLEGT initiative has fostered productive, mutually reinforcing interactions both with public timber legality regulation in other consuming countries and with private certification schemes. But since this emerging regime remains highly polyarchic, with broad scope for autonomous initiatives by both public and private actors, horizontal integration and coordination within it depend on a series of institutional mechanisms, some of which are distinctively experimentalist, while others can also be found in more conventional transnational regimes.

The paper's findings provide robust new evidence for the claim advanced in earlier work that a joined-up transnational regime can be assembled piece by piece under polyarchic conditions through coordinated learning from decentralized experimentation, without a hegemonic power to impose common rules (Overdevest & Zeitlin 2014). In a previous paper, we have analyzed the implementation of FLEGT VPAs in the two most advanced national cases (Indonesia and Ghana), together with the role of their experimentalist architecture in this process (Overdevest & Zeitlin 2018). In this paper, we focus instead on the horizontal interactions between FLEGT and other public and private initiatives aimed at ensuring the legality of internationally traded timber, together with their contribution to the emergence of a joined-up transnational regime. Its central contribution is to demonstrate, through a detailed study of a specific issue-area, how and through what institutional mechanisms a joined-up transnational regime can be stitched together from the separate components of a loosely coupled regime complex.

The paper proceeds as follows. Section 2 sets out what is meant by a "joined-up transnational regime" for timber legality and explores how experimentalist governance may contribute to the emergence of such a regime from a loosely coupled regime complex. Section 3 analyzes the EU FLEGT initiative as the experimentalist core of the emerging transnational regime, while sections 4 and 5 examine its interactions with public legality regulations in other consumer countries and private certification schemes respectively. Section 6 considers the prospects for integrating China, the world's biggest importer and exporter of wood products, into the transnational legality regime. Section 7 concludes by reviewing the key institutional mechanisms fostering horizontal coordination within this regime, identifying outstanding gaps, and considering the prospects for further integration.

This paper is based on exhaustive documentary research on materials produced by the principal institutions constituting the transnational timber legality regime, including the EU, national governments, international organizations, transgovernmental networks, NGOs, business associations, and think tanks, together with participation in a variety of expert and stakeholder meetings. A guide to these documentary sources, beyond those cited in the text and the references, can be found in Appendix S1. The paper is also informed by more than 100 interviews with public officials, civil society activists, business leaders, consultants, and independent experts conducted since 2011.[1] In this paper, we limit our references to individual interviews to support for specific factual and interpretive claims, which are cited in the text.

2. From a loosely coupled regime complex to a joined-up transnational regime

More than 25 years after the failure of proposals for a binding global forest convention at the 1992 Rio Earth Summit, there is still nothing like an overarching multilateral forest governance regime. The nonbinding "global objectives" and "common goals" adopted by the United Nations Forum on Forests, which include preventing deforestation and promoting sustainable forest management, remain at a very high level of generality, with voluntary national reporting and no specific indicators to measure progress toward them. At a regional level, similarly, intergovernmental negotiations for a "Legally Binding Agreement on Forests in Europe" collapsed acrimoniously in 2013 and have not been formally resumed (Pokorny *et al.* 2019, pp. 19–20, 22–24; Bezera *et al.* 2018, p. 647). Other regional organizations, such as the Asia-Pacific Economic Cooperation (APEC) and the Association of South East Asian Nations (ASEAN) are no closer to achieving a binding multilateral agreement among their members.[2]

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Yet, as this paper argues, something like a "joined-up" transnational regime has emerged over the past 15 years from interactions between multiple public and private initiatives, operating across jurisdictions at different levels within what following Abbott (2012, 2014) may be called the "transnational regime complex for forest governance".[3] This emerging regime is focused on ensuring timber legality and improving domestic forest governance, but with significant implications for related issues such as sustainable forest management.

In what sense can the various components of the transnational timber legality regime be considered "joined-up"? In this paper, we focus on four major interrelated developments to support this claim:

1. Growing convergence among actors and initiatives around a shared problem definition and accompanying norms, principles, and framework goals for combating illegal logging.
2. The diffusion of mutually reinforcing and often explicitly cross-referencing rules and standards across jurisdictions and schemes, both public and private.
3. Progressive institutionalization of practical cooperation among formally autonomous actors to advance these common goals, including information sharing, alignment of regulatory approaches, and collaborative training and enforcement activities.
4. An increasing focus on monitoring, review, and revision of practices and procedures at multiple levels, informed by comparison of implementation experiences across jurisdictions and schemes.

How can this emerging regime best be understood? As we have already observed, it is not a classic integrated multilateral regime, with a monopolistic international institution empowered by participating states to oversee a comprehensive set of hierarchical rules for a specific issue-area or policy domain. Nor can it be considered a "nested regime complex," as there is no single interstate institution which is "hierarchically superior to transnational schemes, with authority to resolve any rule inconsistencies" (Keohane & Victor 2011, p. 7; Abbott 2012, p. 583).

But the emerging timber legality regime is also far from a mere case of "polycentric governance," as conceived by Ostrom (2010) and others, in which a multiplicity of autonomous, self-organizing groups of actors tackle common-pool resource problems at various scales, but may learn from observation of each other's experiences and gradually come to form an overarching system through voluntary specialization on complementary functional niches (Abbott 2012, pp. 584–587; Hoffmann 2011; Jordan *et al.* 2018). As the preceding discussion of "joined-up governance" indicates, there is too much formal coordination and explicit cooperation among the various components of the timber legality regime, both within and beyond the EU FLEGT initiative, to fit the polycentric model, including collaborative enforcement of sanctions for noncompliance with its norms and rules.

Neither can the emerging timber legality regime be properly understood in terms of "orchestration," where a focal international organization, lacking hierarchical authority, implementation capacity, and enforcement powers, enlists the cooperation of intermediary actors with complementary capabilities and steers their activities through material incentives, ideational support, and other "soft" forms of influence (Abbott & Snidal 2009; Abbott 2012, 2014; Abbott *et al.* 2015). First, there is no single focal institution which orchestrates this transnational regime, even if, as we shall see, the European Commission does make some use of such indirect governance techniques within the FLEGT initiative. Second, orchestration as Abbott and colleagues define it focuses primarily on enhancing the scope and effectiveness of "regulatory standard setting," understood as voluntary norms of conduct "created largely by nonstate actors and address[ing] nonstate actors rather than states" (Abbott 2012, p. 572). By contrast, the timber legality regime, as its name suggests, centers around the implementation and enforcement of mandatory rules, some of which are based on binding agreements between states, even if these rules, as we shall see, function in a very different way than those of conventional hierarchical regimes. Finally, the roles performed by different types of actors in the timber legality regime, as we shall also see, are more polyvalent than in the orchestration model, as key steps in its development have frequently been initiated by nonstate actors rather than by international organizations or states.

On first inspection, the emerging timber legality regime might appear to resemble what Keohane and Victor (2011) call a "loosely coupled regime complex": a nonhierarchically interlinked set of institutions operating in the same transnational issue-area without an overarching governance architecture. In contrast to standard regime theory, Keohane and Victor argue that such loosely coupled regime complexes may offer advantages over comprehensive, integrated multilateral regimes – even where the latter are practically feasible – in terms of flexibility

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across issues and adaptability over time. They also propose a number of criteria for evaluating such regime complexes, including coherence, fairness, epistemic quality and sustainability. But they do not identify a specific set of institutional mechanisms for creating regime complexes with these beneficial features, nor do they explain how interactions among their components might be governed (Overdevest & Zeitlin 2014, p. 24).

To bridge that gap, this paper explores how experimentalist governance, in combination with other institutional mechanisms, may contribute to joining up the separate pieces of a loosely coupled regime complex. Although there is no hierarchical relationship between the main components of the timber legality regime complex, we argue that that it does have an identifiable core, in the form of the EU FLEGT initiative, whose experimentalist governance architecture plays a crucial role in fostering the development of a joined-up transnational regime.

Experimentalist governance can be defined as a recursive process of provisional goal setting and revision, based on learning from review of implementation experience in different settings. In its most developed form, experimentalism involves a multi-level governance architecture, whose four functional elements are linked in an iterative cycle. First, open-ended framework goals and metrics for gauging their advancement are established in consultation with relevant stakeholders by some combination of "central" and "local" units (public, private, or hybrid). Local units are then given substantial discretion to pursue these goals in ways adapted to their own specific contexts. But in exchange, they must report regularly on their performance, and participate in mutual monitoring, joint evaluation, and peer review. When they do not make good progress according to the agreed indicators, the local units are expected to take appropriate corrective measures, informed by the experience of their peers. Finally, the goals, metrics, and procedures themselves are periodically revised in response to the problems and possibilities revealed by the review process, and the cycle repeats. Often, such architectures are underpinned by "penalty defaults": measures aimed at inducing reluctant parties to cooperate in joint exploration and problem solving by threatening to impose sufficiently unattractive alternatives (Sabel & Zeitlin 2012; de Búrca *et al.* 2014).

Experimentalist governance is particularly well-suited to transnational domains, where there is no overarching sovereign to set common goals, while the diversity of local conditions makes enforcement of uniform fixed rules even less feasible than in domestic settings. Because experimentalist regimes depend on neither a central hierarchical authority nor a prior convergence of interests and values, but only on a common problem definition and broad open-ended goals, they likewise represent a promising framework for tackling contentious cross-border issues such as forest governance where there is no hegemonic power able to impose global rules (de Búrca *et al.* 2013, 2014). Because experimentalist governance architectures are defined in functional rather than structural terms, they can be built in multiple settings at different territorial scales, which can then be nested within one another vertically and joined up horizontally. Hence transnational experimentalist regimes can be gradually assembled piece by piece through a variety of pathways and mechanisms, rather than being constructed as a unified whole through conventional multilateral procedures (Overdevest & Zeitlin 2014).

As we have argued in previous work, the FLEGT initiative is built around an experimentalist governance architecture, involving extensive participation by public and private stakeholders from the EU and partner countries in establishing and revising open-ended framework goals (combating illegal logging and promoting sustainable forest governance) and metrics for assessing progress toward them (such as legality standards and indicators within VPAs) through continuous monitoring and regular review of implementation, resulting in periodic revision of plans, procedures, and goals at both local and central levels (Overdevest & Zeitlin 2014, 2015, 2018). In contrast to orchestration, this architecture is underpinned not only by positive incentives, but also by negative sanctions, including financial penalties and the exclusion of nonconforming products from the EU market. Unlike in conventional hierarchical regimes, however, the purpose of these sanctions is not to compel recalcitrant firms and states to comply with fixed rules, but rather to serve as a penalty default to induce such actors to respect the regime's procedures (by developing due diligence systems to avoid sourcing of illegal timber in the case of firms) and to cooperate in advancing its goals (by negotiating and implementing VPAs to combat illegal logging and improve domestic forest governance in the case of states).

As subsequent sections will show, FLEGT's openness to participation by producer country governments and civil society organizations through the VPAs and other mechanisms such as investigation of "substantiated concerns" of illegal logging brought forward by third parties makes it a powerful pole of attraction for engaging

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stakeholders beyond the EU in the emerging transnational timber legality regime. FLEGT's experimentalist architecture, particularly its capacity for recursive learning and revision of institutional arrangements in response to implementation experience, in turn contributes to the development of horizontal mechanisms such as information pooling, joint evaluation, and peer review for joining up the separate pieces of the transnational timber legality regime. This governance architecture likewise helps to impart an experimentalist dynamic to regime components that are not themselves experimentalist, such as timber legality regulations and enforcement arrangements in other consumer countries. In this way, the FLEGT initiative may be said to serve as the core of the emerging transnational regime, without the EU becoming a hegemonic actor or operating as a central orchestrator.

3. EU FLEGT as an open experimentalist architecture[4]

This section reviews the key elements of the EU FLEGT initiative, demonstrating how its experimentalist architecture has been progressively reinforced over time through successive cycles of recursive revision, leading to the development of new institutional arrangements for learning from implementation experience. It highlights FLEGT's open, polyarchic structure, which deliberately encourages a multiplicity of public and private stakeholders from within and beyond the EU to join in collaborative efforts to combat illegal logging, thereby positioning it to play a pivotal role in the emergence of a broader transnational regime.

The EU FLEGT initiative was launched in 2003 by an Action Plan drafted in consultation with civil society activists, which outlined a panoply of measures to tackle illegal logging and improve domestic forest governance in producer countries, including voluntary agreements to verify and licence the export of legally harvested wood to the EU market. The Action Plan built on the growing international consensus on the problem of illegal logging, which had emerged from multilateral discussions, notably regional Forest Law Enforcement and Governance (FLEG) dialogues, while adding trade regulation (T) as a lever to advance these shared goals. The FLEGT Action Plan committed the EU to continuing efforts to build an effective framework for controlling illegal trade in wood products in collaboration with other major importers. But it also envisaged that "in the absence of multilateral progress" the EU would consider further unilateral measures, including "legislation to control imports of illegally harvested timber," resulting in the passage of the EU Timber Regulation (EUTR) in 2010 (European Commission 2003, p. 15; Overdevest & Zeitlin 2015).

3.1. The VPAs

The FLEGT Action Plan invites producer countries to negotiate bilateral agreements with the EU to secure access for verified legal timber imports into the European market. To date, nine countries have agreed VPAs with the EU (Cameroon, Central African Republic, Ghana, Guyana, Honduras, Indonesia, Liberia, Republic of Congo, Vietnam), while negotiations are underway with a further seven (Côte d'Ivoire, Democratic Republic of Congo, Gabon, Laos, Malaysia, Thailand). Together, these 15 countries account for 79% of global trade in tropical wood products (IMM 2019, p. 5).

FLEGT VPAs are legally binding trade agreements, for which the EU sets a number of requirements. First, partner countries agree to develop shared definitions of legal timber, based on a multi-stakeholder review of existing national law, with broad participation by civil society as well as private business. Where this review reveals major gaps or inconsistencies in existing regulation, governments commit to rectify them through legal and administrative reforms. The legality definitions and compliance indicators are then subject to periodic review and revision in light of implementation experience (http://www.vpaunpacked.org/legality-definition). Second, partner countries commit to develop a timber legality assurance system (TLAS) to ensure that domestic wood is legally harvested, transported, and exported. In most VPA countries, the TLAS includes independent civil society monitors in addition to a third-party auditor. To support such monitoring, VPAs include broad transparency requirements for access to information on forest administration and TLAS operations (http://www.vpaunpacked.org/en/web/vpa-unpacked-multilang/vpa-elements). Third, the VPAs establish a joint committee of EU and partner country representatives, from civil society and business as well as government, which is responsible for monitoring and reviewing implementation of the agreement, resolving disputes, and recommending necessary changes.

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In Indonesia and Ghana, the countries furthest advanced with FLEGT licensing, these joint implementation committees have served as effective platforms for domestic NGOs and other stakeholders to raise problems about the working of the VPA, and to initiate collaborative processes for developing mutually acceptable solutions, subject to ongoing monitoring and review (Overdevest & Zeitlin 2018).[5]

In exchange, the EU commits not only to facilitating access for FLEGT licensed timber to the European market, but also to providing capacity-building support to domestic public and private actors. FLEGT has funneled substantial aid from the EU, member states, and international donors to assist partner countries with TLAS development and governance reforms. Much of this support has been channeled through autonomous multi-donor institutions, such as the FAO-EU FLEGT Programme and the European Forest Institute EU FLEGT Facility, as well as through transnational NGOs (European Commission 2016a, pp. 9–10). Since 2015, an Independent Market Monitoring (IMM) project has been tasked with analyzing FLEGT's impact on timber production in VPA countries and trade flows to the EU and other regions (http://www.flegtimm.eu/). Although there are no formal mechanisms for cross-national peer review, regular meetings of a range of transnational stakeholder forums have served as institutionalized platforms for information pooling, critical debate, and recursive learning from comparative experience with VPA negotiation and implementation (Overdevest & Zeitlin 2018, p. 68).

FLEGT VPAs are extremely challenging for partner country governments, both politically and administratively, in terms of their demands for multi-stakeholder participation and far-reaching reforms of forest governance. They have also proved technically complex and arduous to implement. Some of the key implementation challenges concern the practical difficulties of designing effective timber-tracking and legality assurance systems under developing country conditions. Others stem from widespread but often hard to detect forms of corruption, as well as from pervasive weaknesses in domestic administrative coordination and governance capacity. In every partner country, assuring timber legality has turned out to be tightly bound up with thorny, deep-rooted political issues concerning the exploitation of natural resources, property rights, and land use, which the VPA implementation process has progressively exposed to public scrutiny and pressure for remediation. As a result of these challenges, fulfilment of VPA commitments and issuance of FLEGT export licenses have taken much longer than originally expected. In Indonesia, the first country to complete the process, export of FLEGT-licensed timber began in 2016, nine years after the onset of negotiations with the EU and five years after VPA ratification. In Ghana, where the issuance of FLEGT licenses is expected to start in 2021, the VPA implementation process has taken even longer (Overdevest & Zeitlin 2018).

These delays in turn have given rise to critical assessments of the original FLEGT Action Plan, including by the European Court of Auditors (2015) and an independent evaluation team (TEREA/S-FOR-S/TOPPERSPECTIVE 2016).[6] In response, the EU has introduced a series of measures to strengthen its central capacities for monitoring, review, and coordination of both the individual VPAs and the initiative as a whole. The European Commission, in consultation with member states and external stakeholders, has developed a new multi-annual work plan for FLEGT implementation. Key elements of this work plan include the construction of an indicator-based framework for monitoring the global impact of the FLEGT initiative and "enhanced mechanisms… to review progress on negotiating or implementing VPA[s]… on a regular basis and develop suitable strategies if progress is considered insufficient." The latter involve joint stocktaking exercises with the partner countries to identify outstanding challenges and assess the feasibility of achieving the VPA's objectives, followed by the creation of a multi-year roadmap for supporting and monitoring implementation (FLEGT Ad Hoc Expert Group 2018, pp. 2–3, 5–7, 15–16).

At an operational level, the EU FLEGT Facility has developed a new set of planning, framing, and monitoring tools to overcome roadblocks within VPAs and drive implementation forward. Both the Facility and the FAO-EU Programme have likewise stepped up their efforts to capture practical lessons from comparative analysis of FLEGT processes and use them to guide other countries involved in VPA negotiation and implementation, across issues ranging from shipment testing, traceability, and integration of imported timber into TLASs to independent monitoring, land tenure, and support to SMEs. These enhanced mechanisms for monitoring, review, and recursive learning, which reinforce FLEGT's experimentalist architecture, appear to be delivering positive results within VPA processes in a number of countries, including Congo, Liberia, Vietnam, and Honduras (EU FLEGT Facility 2017a, pp. 14–16; EU-FAO 2017).

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3.2. The EU Timber Regulation

The other key element of the FLEGT architecture is the EUTR, which prohibits operators from placing illegally logged timber on the EU market, and obliges them to demonstrate "due diligence" that such products were legally harvested in their place of origin. Traders must keep records of their suppliers and customers so that wood circulating within the EU market can be traced back to its source. The EUTR establishes three pathways for meeting its requirements. The first is possession of a valid FLEGT export license, which serves as a "green lane" into the EU market. Second, operators can develop their own due diligence system (DDS), which should include detailed information on timber sources and species, as well as on suppliers' compliance with national legislation, coupled with regularly evaluated risk assessment and mitigation procedures. Third, they can use a turnkey system developed by an EU-recognized third-party monitoring organization (MO) (http://ec.europa.eu/environment/forests/timber_regulation.htm; Overdevest & Zeitlin 2015).

Member states are responsible for setting penalties for violations of the EUTR, which must be "effective, proportionate and dissuasive," and for establishing competent authorities (CAs) to enforce its provisions, in collaboration with the European Commission. The EUTR requires CAs to investigate "substantiated concerns" about trade in illegal timber brought forward by third parties (European Commission 2016b; E/FEG 2017). Transnational NGOs regularly use this provision to raise formal complaints about illegal wood imports from a variety of countries, including Brazil, Cameroon, and Myanmar (E/FEG Minutes 18 February 2015, 2 December 2016, 21 February 2017, 19 April 2017, 20 September 2017, 23 November 2017, 19 April 2018, 19 June 2018).

The EUTR enhances the attractiveness of signing a partnership agreement with the EU by exposing firms importing timber from non-VPA countries to additional risks and costs. In this way, it can be understood as a penalty default. The "underlying offense" of trafficking in illegally harvested timber, which can lead to severe consequences, including seizure of shipments, suspensions of authorization to trade, fines, and imprisonment, may likewise be seen as a penalty default inducing operators to minimize their sourcing risks.

Many member states were initially slow to establish competent authorities for EUTR implementation, to develop procedures for checking and evaluating operators' due diligence systems, and to introduce legal penalties for violations (Saunders 2013; Hoare 2015, pp. 42–43; European Commission 2016c). This uneven implementation left significant gaps through which illegal timber could enter the EU market, thereby weakening the Regulation's effectiveness (European Court of Auditors 2015, pp. 15, 23; TEREA/S-FOR-S/TOPPERSPECTIVE 2016, vol. I: pp. 50, 52–58).

But following infringement proceedings initiated by European Commission, all member states have now met the EUTR's basic requirements (European Commission 2018, p. 12; E/FEG 30 April 2019). To support uniform implementation, pool information, compare experiences, identify best practices, and develop common methodologies and procedures, national authorities and the Commission have created an EUTR/FLEGT Expert Group (E/FEG), which meets regularly. CAs have likewise established an informal enforcement network, with a confidential website for sharing documents, inspection reports, and event notifications, including third-party substantiated concerns. Alongside reviews of EUTR enforcement and updates on new developments, E/FEG meetings include presentations by recognized MOs, private certification bodies, NGOs raising substantiated concerns, and producer-country governments contesting such claims. Based on these reviews, the E/FEG produces authoritative conclusions on the validity of such concerns in specific cases (e.g. teak from Myanmar and timber from the Brazilian Amazon), and has developed a series of guidance documents covering key issues such as due diligence systems, risk mitigation measures, third-party verification schemes, and conflict timber. The E/FEG has recently agreed to open up some of its meetings to external stakeholders, including representatives of business, civil society, certification bodies, and international organizations, in order to exchange experiences and good practices and to reflect regularly on measures to enhance EUTR implementation (E/FEG Minutes 21 June 2019, 12 September 2019).[7]

National competent authorities have also begun to work together in smaller groups to map supply chains in high-risk countries, assess the adequacy of companies' due diligence procedures, provide common training, carry out joint inspections, and share experiences of successful prosecutions. Such cooperation has become increasingly formalized through regular meetings of geographical sub-groups, aimed at developing common approaches, learning from each other's experience, and harmonizing EUTR implementation across their regions (UNEP-WCMC *Briefing Notes* April-May 2017, August-October 2017, April-May 2018; E/FEG Minutes 20 September

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2017, 23 November 2017, 19 June 2018, 21 September 2019; Masuda 2017). In this way, the E/FEG and its geographical sub-groups have become a crucial node in the FLEGT initiative's experimentalist architecture, feeding back the results of joint monitoring and review to support collaborative improvements in EUTR implementation.

As a result of these developments, the level of EUTR enforcement activity has increased sharply in recent years, including site visits, due diligence assessments, corrective action requests, injunctions, and sanctions. According to official surveys, the number of checks conducted by CAs more than doubled (from 388 to 805) between the second half of 2017 and a similar period in 2018, while the number of countries reporting such checks increased from 21 to 26 (IMM 2019, p. 70). By the end of 2018, the German CA, among the leaders in this field, had inspected the 200 largest companies accounting for more than 70% by value of national imports of EUTR-regulated products (UNEP-WCMC *Briefing Notes* January-February 2019). The number of enforcement actions also nearly doubled between the second half of 2017 and 2018 (from 128 to 242 cases); a majority of these involved notices of remedial action in both periods, but the number of penalties imposed jumped from 5 to 65 (IMM 2019, p. 71). Most national checks and enforcement actions concerned operators' failure to conduct adequate due diligence, which is much easier to detect, prove, and pursue than violations of the prohibition on trafficking in illegal timber (European Commission 2018; UNEP-WCMC *Overviews of Competent Authority Checks* 2017–2018; Hinrichs 2018). Hence the E/FEG now explicitly recommends that "EUTR enforcement should focus on ensuring that the operators' DDS and their actual exercise of due diligence" meet the Regulation's requirements (E/FEG Minutes 21 June 2019). Following this approach, a 2018 survey conducted on behalf of the German CA found that operators accounting for 70–79% of the national import value of EUTR products had installed a DDS (Köthke 2020, p. 9).

Although there is still wide variation in enforcement activities across CAs, as well as in the penalties imposed for violations by national courts, intensified monitoring and comparison of EUTR implementation has put pressure on laggard member states and firms to improve their performance. Taken together, this combination of information pooling, comparative implementation monitoring, and collaborative enforcement has enhanced the effectiveness of the EUTR and reinforced its role as a penalty default for the FLEGT initiative and the emergent transnational timber legality regime more generally.[8]

The FLEGT Action Plan's linkages to broadly supported multilateral goals provided a crucial source of international legitimacy for the EU's unilateral initiatives to combat illegal logging. Both the FLEGT VPAs and the EUTR were carefully designed to comply with WTO rules, as well as to win the consent of developing countries, whose objections had blocked earlier efforts to negotiate a global forest convention (Overdevest & Zeitlin 2015). Rather than imposing "Northern" environmental standards on the Global South, the EU's approach to forest legality and governance respects territorial rights and sidesteps politically sensitive sovereignty issues. It offers developing countries an opportunity to participate in a jointly governed system of legality assurance, while imposing parallel obligations on European firms to exercise due diligence in respecting local legal standards. In this way, the FLEGT initiative creates a path to building a transnational consensus around what constitutes illegal timber and how best to control it, encompassing both producer and consumer countries. At the same time, the experimentalist governance architecture of the FLEGT initiative provides a robust institutional framework for monitoring, review, and recursive learning from decentralized implementation, in which promising experiences can be generalized across borders and operational problems detected and addressed at both central and local levels. This open, polyarchic governance architecture has likewise stimulated a variety of stakeholders, including NGOs, business associations, and international organizations as well as national governments, to collaborate in advancing shared goals. For each of these reasons, as we shall see in subsequent sections, the EU FLEGT initiative has contributed to the stepwise construction of a joined-up transnational regime through mutually reinforcing interactions both with public timber legality regulation in other consumer countries and with private certification schemes.

4. Experimentalist interactions: Public timber legality regulation in consumer countries

This section deals with interactions between public measures to combat illegal logging in timber-importing countries. It traces the reciprocal influences between the development of public timber regulation in the EU and the USA, and shows how their combined impact has worked to extend the reach of the emerging transnational

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legality regime to other major importing nations, notably Australia, Canada, Japan, and South Korea. It likewise shows how mutual learning, peer review, and collaborative training and enforcement activities conducted within transnational networks of public officials and NGOs have helped to stitch together the separate pieces of the timber legality regime and reinforce its experimentalist features.

The EU was not the first jurisdiction to enact public regulation aimed at combating trade in illegally logged timber. In 2008, the USA extended the coverage of the Lacey Act from fish and wildlife to plants. This legislation makes it a criminal offense to import, trade, or handle any timber taken, transported, or sold in violation of foreign laws. Penalties, which include imprisonment, fines, and confiscation of goods, depend on the level of intent of the violator, and the extent to which "due care" was exercised to avoid foreseeable risks of trafficking in illegal wood. To facilitate detection of illegal timber, importers are obliged to submit customs declarations with information on the species and country of origin, whose falsification is also a criminal offense (Birchell 2013; Leipold & Winkel 2016).

While the FLEGT Action Plan encouraged US environmental NGOs to push for the Lacey Amendment Act, the latter's passage fueled political support for the EUTR, and inspired the European Parliament to insist on a prohibition clause creating an "underlying offense" of placing illegal timber on the European market, which was absent from the Commission's original proposal (Hoare 2015, p. 49; Leipold *et al.* 2016; Sotirov *et al.* 2017). The adoption of legislation prohibiting trade in illegal timber by two of the world's largest importers, who together accounted for more than 50% of the global market, marked a crucial step toward the construction of a joined-up transnational regime, both by force of example and by reducing the risk of trade diversion. Alongside transnational NGOs and VPA partners such as Indonesia,[9] the EU and the USA have sought to reinforce this emerging regime, both separately and together, by "gospeling" the virtues of timber legality verification in international meetings, and pressing other countries to introduce similar measures, including through commitments to combat illegal logging in trade agreements.[10]

This transnational campaign in turn triggered a "norm cascade" (Finnemore & Sikkink 1998) of legislation by other major timber importers, which drew on and adapted key provisions of both the EUTR and the Lacey Act. In 2012, Australia passed the Illegal Logging Prohibition Act (ILPA), which makes it a criminal offense to place illegally harvested wood on the national market. Like the EUTR, the ILPA obliges firms to develop due diligence systems for minimizing risks that timber has been illegally logged and to demonstrate compliance in customs declarations, subject to substantial financial penalties (Leipold *et al.* 2016; McMaugh 2016; ADAWR 2018b). In 2016, Japan introduced a Clean Wood Act, which requires "best efforts" by all wood businesses to use only legally harvested timber. Firms that commit to do so can register with government-accredited bodies and must carry out due diligence under their oversight. In case of noncompliance, operators lose the reputational benefits of registration, which can be important in the Japanese market, but no financial penalties apply (Momii 2016; EU FLEGT Facility 2018a).[11] In 2017, South Korea revised its Sustainable Use of Timbers Act to prohibit the import and sale of illegally harvested wood, subject to both criminal and civil penalties. Operators must submit a declaration documenting that timber products have been legally harvested in their country of origin, which is verified by public authorities before an import permit can be granted (Lee 2018; EU FLEGT Facility 2018b). Among large "Northern" wood consumers, only Canada did not enact new regulation to combat trade in illegal timber, but instead extended enforcement of pre-existing legislation, which like the Lacey Act prohibits importation of any plant product "possessed, distributed or transported in contravention of any law of any foreign state" (Williamson 2016; Government of Canada 2017).

Over the past decade, the major timber-importing jurisdictions of the Global North (with the partial exception of Japan) have thus converged not only on a shared normative commitment to combat illegal logging beyond their own borders, but also on a broad common strategy for pursuing this goal through a combination of trade regulation and public enforcement. At the same time, however, their governance architectures for timber legality regulation differ significantly, as a result of variations in domestic coalitions among NGOs and industry groups, as well as pre-existing legal and administrative arrangements (Leipold *et al.* 2016). Public timber legality regulations elsewhere lack most of the experimentalist features of the EU FLEGT initiative. They take foreign laws as they stand, without seeking to reconcile ambiguous and contradictory legislation or fill regulatory gaps, unlike the agreed legality standards produced by the FLEGT VPAs. Public authorities, customs officials, prosecutors, and

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judges are thus placed in the difficult position of assessing the current state of foreign laws and regulations in order to determine whether a given timber shipment has been harvested illegally.

In the USA, importers are now required to file Lacey Act declarations through a single online system. The Animal Plant Health Inspection Service (APHIS) currently receives more than 3,400 such declarations per week, and is developing a reference database aimed at automatically flagging high-risk imports (Gardner 2018; Timber Regulation Enforcement Exchange [TREE] meeting summary, 23–24 October 2017, p. 9; Johnson & Gehl 2019; Hoare 2015, pp. 41–42). Enforcement relies primarily on spot inspections, usually based on tip-offs from competitors, whistle-blowers, and/or NGOs, leading to prosecutions and criminal penalties for major violations. Such prosecutions are highly resource-intensive, hence necessarily infrequent. The resulting penalties, which include multi-year compliance programs under court supervision as well substantial fines and forfeitures, are intended by prosecutors not merely to exert a "chilling effect," but also "to move the entire industry toward better implementation of due care standards, by increasing industry awareness of illegal logging schemes, and enhancing understanding about what level of knowledge companies should possess" (Colbourn 2018; TREE meeting summary 5–8 April 2016, p. 9; Duggan 2016; Leipold & Winkel 2016, p. 42; Hoare 2015, p. 41).

Australia has focused enforcement efforts on ensuring compliance with the ILPA's due diligence obligations through assessments of the largest trading firms, along with importers of specific high-risk products. The Australian Department of Agriculture and Water Resources (ADAWR) has developed country-specific guidelines to assist firms with their risk assessments, but importers remain responsible for considering any other information that they "ought reasonably to know" (ADAWR 2018b; Commonwealth of Australia 2018, §12; McMaugh 2016). Japan leaves responsibility for checking registered operators' due diligence systems to publicly accredited Registering Organizations, but empowers government ministries to require individual wood-related businesses to report on how they are "ensuring the use of legally harvested wood and wood products" and to carry out site inspections for this purpose (EU FLEGT Facility 2018a, p. 6; Norman & Saunders 2017, p. 7). South Korea does not formally require firms to develop due diligence systems, but obliges them to document the legality of imported timber, which is verified and physically checked before the shipment is allowed to clear customs. Like Australia, South Korea has also developed country guidelines to assist importers with their risk assessments (Client Earth 2017; Lee 2018; Saunders & Norman 2019).

Given the variation in legal and administrative frameworks, the complexity of wood supply chains, and the difficulties of obtaining reliable information about the situation in producer countries, ongoing collaboration among public authorities and other stakeholders is essential to ensure joined-up and effective enforcement of demand-side timber regulations. Such collaboration, which was initiated by transnational NGOs and think tanks with support from national governments and private foundations, began with the EU and the USA, but has progressively expanded to include enforcement officials from a wider range of consumer countries, including Australia, Canada, Japan, and South Korea. To assist national Competent Authorities with preparations for EUTR implementation, Chatham House and Forest Trends organized a series of meetings in 2013–2014 with industry experts, NGOs, trade associations, and certification bodies, including training sessions with Lacey Act enforcement agencies and a European study tour for US and Australian officials. In 2015, Forest Trends established the TREE network as "a forum for officials to gain detailed insight into high- and low-risk timber flows entering their countries, discuss practical enforcement issues with each other and relevant experts from the forest sector… establish emergent norms for Due Diligence/care… and build relationships with producer country governments, industry representatives, and other stakeholders involved in combating illegal logging and promoting global markets for legal timber." This network operates as a transnational counterpart to the EUTR/FLEGT Expert Group, and covers many of the same issues, such as national legality requirements and due diligence standards, sourcing risks in different countries and regions, substantiated concerns of illegal logging, cross-border cooperation, and innovative enforcement practices, including the use of traceability systems and timber forensics. After the public segment of each meeting, which is open to NGOs, businesses, and other stakeholders, officials from the participating countries meet in closed session for hands-on training in case handling, document review, and other enforcement techniques. The results of these meetings feed into regular updates of country risk guidelines for importing firms as well as public enforcement practices.[12]

These peer review and mutual learning activities, which build directly on the experimentalist capacities of the EU FLEGT initiative, have not only helped to ensure a better flow of information about illegal sourcing risks

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among public regulatory authorities, but also to bring their enforcement approaches closer to one another and bridge gaps in the transnational timber legality regime. Thus, for example, discussions within the TREE network directly shaped the provisions of the Environmental Compliance Plan (ECP) developed by the US Department of Justice (DOJ) in the pathbreaking 2016 Lumber Liquidators (LL) plea agreement, which was explicitly modeled on the EUTR's due diligence requirements and designed to set a standard for other comparable operators to follow. According to one of the prosecutors involved:

> *[W]e wanted to focus on front-end due diligence to ensure that LL was never in a position where they had to question the legality of a shipment* after *the purchase was made. We required them to follow a more European model of front-loading the due diligence instead of DOJ having to investigate afterwards. Hence, I spoke with a number of TREE members about how they deal with risk categorization. Those conversations resulted in section 5 of the ECP… which divides products into risk categories based on the supplier company risk as well as the product risk. The level of due diligence required then varies depending on the overall risk category…. The UK, Netherlands, and Denmark were especially helpful in providing input on the specific factors they consider (Duggan 2018).*[13]

Conversely, because the Lacey Act prohibits trafficking in wood sold in violation of any foreign law protecting plants, it can also be used to prosecute noncompliance with the provisions of the EUTR, which is considered a "predicate offense" under US law. The EUTR's prohibition and due diligence requirements apply only to the operator first placing wood on the European market, but not to subsequent traders or processors, while Lacey Act prosecutions face a high burden of proof. Reciprocity between the two laws extends liability to illegal timber products exported from the EU to the USA (such as superyachts with Myanmar teak decking), thereby reinforcing both and helping to close a significant loophole in the transnational legality regime (EIA Forests 2018; Colbourn 2018). US enforcement officials likewise state that FLEGT licenses "go a long way in proving that Due Care is being practiced," while South Korea explicitly recognizes them as evidence of legality for imported timber (IMM 2019, pp. 100, 103).[14] In this way, the emerging transnational regime draws on the normative and enforcement externalities resulting from cross-referencing of rules and standards across separate governance initiatives (Eberlein *et al.* 2014, p. 11), which Oren Perez (2011) has termed "ensemble regulation".

Ongoing interactions between the EU, the USA, and other major wood-consuming jurisdictions have not only stimulated the diffusion of public legality regulations for imported timber, but have also brought their enforcement approaches closer to one another and reinforced their effectiveness. Crucial to this process are experimentalist mechanisms of recursive learning from joint review of implementation experience developed within the VPAs and E/FEG and extended to other jurisdictions through the TREE network at the initiative of transnational NGOs. The governance architecture of the FLEGT initiative and its openness to participation by multiple stakeholders within and beyond the EU have thus helped not only to join up the separate pieces of the emerging transnational timber regime, but also to impart an experimentalist dynamic to public legality regulations elsewhere whose designs are not themselves experimentalist. Conversely, pursuit of EUTR violations and recognition of FLEGT licenses (de jure or de facto) by other jurisdictions enhances the effectiveness of the EU's own timber legality regulations and compensates for flaws in their design. In this way, as we will elaborate in the conclusion, the open, polyarchic architecture and recursive capacities of the EU FLEGT regime have given a distinctively experimentalist cast to causal mechanisms typically adduced to explain cross-jurisdictional policy diffusion, such as coercion, competition, emulation, and learning (Gilardi 2012; Biedenkopf 2015).

5. Experimentalist interactions: Private certification

This section analyzes interactions between public timber legality regulations and private certification schemes, and examines their contribution to the emergence of a joined-up transnational regime. It focuses on the extent to which public legality regulations have encouraged the growth of private certification schemes, while pushing the latter to revise their standards and procedures to meet the former's requirements. The section explains why despite the substantial adjustments made by these schemes to support demand-side legality regulations, public authorities in wood-importing jurisdictions (with the partial exception of South Korea) remain unwilling to recognize private certification as proof of compliance. It shows how a combination of public and private bodies are

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helping to bridge the resulting gap by providing reliable information on risks of illegal logging in different countries, and considers the prospects for coordinated evaluation of private certification schemes by transnational networks of public officials and other stakeholders.

Public timber legality regulations in consumer countries vary in their treatment of private certification schemes. The EUTR encourages their use as tools for demonstrating due diligence, so long as the systems are publicly available, incorporate the requirements of the nationally applicable legislation, and include "appropriate checks, including field-visits… by a third party at regular intervals no longer than 12 months" to verify compliance, together with full traceability and controls to ensure that illegal timber does not enter the supply chain. Operators are expected to assess how the legality verification standards set by these schemes are "applied and enforced… on the ground," and to check whether there are any "substantiated reports about possible shortcomings or problems". But liability for effectively excluding illegal timber from the market remains with the operator, not the scheme (European Commission 2012: Art. 4; E/FEG 2018). In contrast, the US Lacey Act does not explicitly encourage third parties to provide due diligence systems, although participation in private certification schemes may be adduced as evidence of due care (http://www.laceyduecare.com/). The Australian ILPA allows importers to use recognized Timber Legality Frameworks – including FSC and PEFC certification – for risk assessment, though firms remain responsible for assessing their accuracy and reliability in each case, as well as any other information that would cast doubt on the product's legality (ADAWR 2018b, pp. 17, 44; 2017, p. 30). To demonstrate due diligence in ensuring the use of legally harvested timber, the Japan Clean Wood Act likewise allows operators to utilize forest certification and chain-of-custody schemes (EU FLEGT Facility 2017b, p. 7). But only the detailed standards for imported timber issued by the Korea Forest Service officially recognize FSC and PEFC certification as evidence of legality (EU FLEGT Facility 2018b, pp. 9–10).

In both the EU and the USA, trade associations, NGOs, and private service providers have sought to assist timber-importing and processing firms to comply with public legality requirements through a variety of channels, including certification. The European Timber Trade Federation (ETTF) has developed a due diligence system in collaboration with the Danish environmental NGO NEPCon, which its national affiliates are encouraged to offer their members.[15] Several ETTF national affiliates have become recognized Monitoring Organizations, as has NEPCon, alongside a range of other standardization, certification, and auditing bodies.[16] Contrary to expectations, however, few EU timber operators have signed up to use these third-party DDSs. Beyond the additional costs involved, the main explanation seems to be that "MOs have an obligation to report to the CA on major failures in the use of a DDS by operators". As a NEPCon official confirmed, "there is minimal interest in MO services because companies feel like they are inviting 'law enforcement' in, and problems will be reported to CAs". But third-party MOs "have reported providing technical assistance to thousands of operators to develop their own DDS" (European Commission 2016c, p. 25; Cupit 2018; cf. Moser & Leipold 2019, pp. 7–9).

Soon after the EUTR's passage, the ETTF hired a consultancy to benchmark existing private forest certification and legality verification schemes, which found that none of them fully complied with the baseline requirements of the legislation, and identified key areas for improvement. NEPCon now produces regularly updated guides to how far the FSC and PEFC meet the EUTR's requirements, based on a common evaluation framework, along with a toolbox for ensuring legal timber sourcing (Butler 2013; Proforest 2012; Cupit 2018; www.nepcon.org). In the USA, similarly, the Forest Legality Alliance, a coalition of environmental NGOs and industry associations, has created online declaration and risk assessment tools, while a closely related multi-stakeholder partnership has developed "Lacey Act Due Care Consensus Standards," which encourage wood businesses to join approved certification schemes (Leipold & Winkel 2016, pp. 37–42; http://forestlegality.org/risk-tool; http://www.laceyduecare.com/).

In response to this process of "benchmarking for equivalence" (Overdevest & Zeitlin 2014), both the FSC and the PEFC have substantially revised their standards and procedures to meet the requirements of public legality regulations in timber-consuming countries. So too have PEFC-affiliated schemes in countries such as the USA, Malaysia, and Brazil. In this way, such private certification bodies have contributed to what Green and Auld (2017, pp. 272–273) call the "diffusion of public authority" within the transnational timber legality regime. The most significant modifications to these schemes have concerned the redefinition of the applicable national laws to include trade and customs regulations; the provision of detailed information to customers on the species and origin of certified products in high-risk countries; and the incorporation of mandatory due diligence

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procedures into the FSC Controlled Wood and FSC and PEFC chain-of-custody standards. To prevent abuse of the latter, the FSC now prohibits organizations that have not handled certified products since their last audit from using the scheme's trademark. It has also launched an Online Claims Platform to assist customers in validating transaction volumes to ensure that mixing of noncertified material has not occurred, together with a wood identification testing program to investigate species and origin claims in high-risk supply chains (Saunders 2014; PEFC 2015; FSC 2018; Guillery 2018; TREE 2019).

Scholars initially disagreed about whether the EU FLEGT initiative and public legality regulations in other timber-consuming countries would stimulate demand for private sustainable forest management certification schemes such as the FSC and PEFC (Cashore & Stone 2014; Overdevest & Zeitlin 2014), or only for less costly legality verification systems (Bartley 2014). Between 2005 and 2017, as Figure 1 shows, the global forest area certified by both the FSC and the PEFC increased substantially, with sharp accelerations following the passage of the Lacey Act, EUTR, and ILPA. Some of this growth, moreover, occurred outside Europe and North America, which still account for the vast bulk of certified forests (IMM 2019, pp. 88–90). In Indonesia, the number of FSC certified forest management units rose from 5 in 2007, before the onset of VPA negotiations with the EU, to 34 in March 2019, while the certified area more than tripled, from 739,368 to 2,539,000 hectares (FSC 2019; Karmann 2018). PEFC certification, which began in 2014, likewise reached 3,903,695 hectares in December 2018 (PEFC 2018; IMM 2019, p. 33). In the FSC case, increased certification was driven not only by growing demand from foreign customers (including Japanese firms), but also by financial and capacity-building support from international donors and NGOs (Ruslandi *et al.* 2014; PT Gunung Gajah Abadi & PT Karya Lestari 2018).[17]

In the wake of this growth, which currently appears to have peaked, the major schemes and their customers have pushed for public recognition of private certification as proof of due diligence and a "safe harbor" against liability for illegal timber trafficking. Both the FSC and the PEFC have urged the European Commission and the national CAs to harmonize their approach to the use of private certification in EUTR compliance, whether by providing regularly updated evaluations of their risk assessment and legality verification procedures (Hontelez & Salvador 2015), or by recognizing approved "EUTR-compatible" certification as proof of "negligible risk" and a "green lane" into the European market (PEFC 2015). Large wood operators like IKEA have likewise pressed the EU to recognize forest certification schemes like the FSC "as one important part of the necessary due diligence system" in order to foster a common approach to EUTR compliance (IKEA 2018; E/FEG Minutes 7 December 2018). In the USA, too, some industry representatives advocate recognition of FSC certification "as a possibility to demonstrate due care… while 'franchising out risks'" (Leipold & Winkel 2016, p. 42). Following an independent review of Australia's illegal logging regulations, the government proposed in 2017 that PEFC and FSC

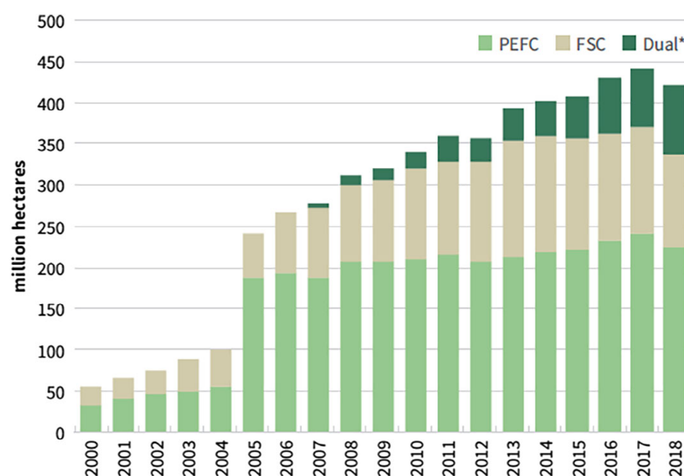

Figure 1 Global forest area certified by major schemes 2000–2018.Source: IMM 2019, p. 89, figure 11.4.2. *FSC and PEFC started to provide accurate joint estimates of dual certified areas from 2016. Data prior to 2016 is a rough estimate by IMM based on earlier analysis by PEFC in 2012 and by the United Nations Economic Commission on Europe (UNECE).

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certified timber should automatically be "deemed to comply" with the Act's due diligence requirements in order to reduce the cost burden on businesses (ADAWR 2017, 2018a).

So far, however, none of these proposals for public recognition of private forest certification have been accepted, with the partial exception of South Korea.[18] In this sense, what Green and Auld (2017, pp. 273, 283) call "incorporation by reference" of private authority into public timber regulation remains extremely circumscribed. US authorities have always been clear that private certification, although useful in demonstrating due care, does not absolve operators of liability for Lacey Act violations, while the "main suppliers" in all of the recent prosecutions were "FSC-certified in some capacity" (Conniff 2018; Johnson & Gehl 2019). The E/FEG recognizes the need to improve its guidance to CAs and operators on the use of third-party certification in EUTR due diligence, but continues to insist that the latter cannot substitute for independent risk assessments in high-risk areas (Hinrichs 2018; E/FEG Minutes 19 April 2018, 20–21 June 2019). In Australia, the government's proposed "deemed to comply" arrangement for certified wood imports were rejected by the Senate in the face of criticisms from transnational NGOs such as Forest Trends, who emphasized the "well-documented problem" of "fraud within even the most robust certification schemes" and their "challenges in controlling chain of custody, particularly through any sort of processing or multi-country trade hubs" (Forest Trends 2016; https://issuu.com/timberandforestryenews/docs/issue_498).

In the longer term, the EUTR/FLEGT Expert Group and/or the TREE network could take responsibility for producing authoritative, regularly updated evaluations of private certification schemes' risk assessment and legality verification procedures, while leaving ultimate liability for trafficking in illegal timber with the operators themselves. Such coordinated evaluations would provide greater interpretive consistency and security for well-intentioned operators seeking to use private certification in complying with public legality regulations in different jurisdictions (Hoekman & Sabel 2019a, p. 6). But they would not undermine the creation of "an environment where companies will invest resources in maintaining their records and reporting to ensure no fraud in the system… or improving the credibility of [certification] schemes," which both public authorities and NGOs like Forest Trends (2016) rightly consider indispensible.

In the meantime, however, a panoply of organizations, both private and public, have stepped in to bridge this gap in the transnational timber regime by bringing together reliable, up-to-date information on illegal sourcing risks in different countries and sectors. These include the World Resource Institute's Open Timber Portal (http://www.opentimberportal.org/), the European Forest Institute's Global Timber Tracking Network (www.globaltimbertrackingnetwork.org), and BVRio's Responsible Timber Exchange (www.bvrio.org/timber). NEPCon and BVRio publish country-specific due diligence guides, as do UNEP-WCMC, the Australian Department of Agriculture, and the Korea Forest Service (Parker 2018; NEPCon 2018; https://www.unep-wcmc.org/featured-projects/eu-timber-regulations-and-flegt). UNEP-WCMC, the EU FLEGT Facility, and Client Earth all collect and disseminate current information on public enforcement actions and substantiated concerns of illegal logging around the world, including those involving private certification schemes. Hence even in the absence of a single authoritative clearing house for the transnational timber legality regime, credible sources of information for operators seeking to mitigate the risks of illegal sourcing are increasingly widely available.

The experimentalist architecture of the EU FLEGT initiative has helped to join up the separate components of the transnational timber legality regime through productive interactions not only with public regulation in other consumer countries, but also with private certification schemes. The EUTR encourages operators to make use in their risk assessments of private certification schemes that meet specified standards, while subjecting both operators and schemes to public oversight, including reviews of substantiated concerns by the E/FEG. Public legality regulations in other consumer countries likewise promote to varying degrees the use of private certification to demonstrate due diligence/due care in avoiding sourcing of illegal timber. In response to multi-stakeholder benchmarking exercises, both the FSC and the PEFC have substantially revised their standards and procedures to meet the requirements of public legality regulations in wood-importing countries. The latter in turn appear to have contributed to a sharp rise in private certification since the mid-2000s, including in tropical wood-exporting countries such as Indonesia. But most public legality regulations understandably leave final liability for trafficking in illegal timber with the operators themselves, rather than recognizing private certification as proof of compliance. While a variety of organizations have stepped in to fill the resulting gap by providing reliable information on illegal logging risks around the world, the coherence of the transnational timber legality

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regime could be improved if public authorities within and beyond the EU, such as the E/FEG and the TREE network, would jointly produce and update evaluations of private certification schemes, without absolving operators of responsibility for ensuring the integrity of their own due diligence systems.

6. China: Integrating the world's largest timber trader

This section examines the prospects for extending the scope of the emerging transnational legality regime by integrating China, the world's largest timber trader. It shows how a combination of normative and material pressures from importing governments and transnational NGOs have induced both the Chinese state and domestic wood businesses to take increasingly visible steps to demonstrate their commitment to combating trade in illegal timber. The section analyzes the policy measures adopted for this purpose, as well as those currently under development, and reviews their contribution to changes in the sourcing behavior of Chinese forest enterprises. Alongside the internal challenges of constructing a national timber legality verification system for a large and heterogeneous domestic industry, it highlights the external challenges resulting from the complexity of the transnational legality regime.

Although domestic consumption currently accounts for 80% of total demand, China remains not only the world's largest importer of wood products, but also the largest exporter. More than 70% of Chinese wood exports (by value) in 2017 went to markets that have adopted public timber legality regulations, including more than 50% to the USA and the EU alone (EU FLEGT Facility & Forest Trends 2019, pp. 4–5, 9). Hence both the Chinese state and Chinese wood exporters have come under growing pressure from foreign governments and transnational NGOs to demonstrate their willingness and capacity to avoid trafficking in illegally harvested timber.

Over the past decade, the Chinese government has become increasingly explicit in endorsing the fight against illegal logging as a transnational norm with which domestic enterprises should comply. Thus China participates actively in the APEC Experts Group on Illegal Logging and Associated Trade (EGILAT), which has developed a "common understanding" of the problem and a multi-year strategic plan to combat it (Speechly 2016, pp. 36–37; https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Illegal-Logging-and-Associated-Trade). China has also signed a series of bilateral agreements on illegal logging with the USA, EU, Australia, Japan, Indonesia, Myanmar, and Mozambique (Speechly 2016, pp. 34–36; Wellesley 2014, p. 10). The China-EU FLEG Bilateral Cooperation Mechanism (BCM), which held its eighth annual meeting in 2018, currently focuses on supporting new legislation to promote legally sourced timber, providing input to guidelines for Chinese overseas enterprises, cooperating with Indonesia around FLEGT licensing, and strengthening synergies with African VPA countries (http://www.euflegt.efi.int/es/activities-china; Speechly 2016, pp. 32–33).

Since 2007, the Chinese Ministry of Commerce and State Forestry Administration (SFA) have produced three sets of guidelines on sustainable forest management, trade, and investment by Chinese overseas enterprises, which demand strict compliance with host country laws and regulations. But these guidelines remain voluntary, without any monitoring, reporting, or due diligence requirements. Potentially more powerful are green credit guidelines adopted in 2012, which require banks to "strengthen environmental and social risk management for overseas projects" and ensure that their sponsors "abide by applicable laws and regulations" of the host jurisdiction, though here too formal monitoring and compliance arrangements remain limited (Speechly 2016, pp. 25–28; Barua *et al.* 2016, pp. 47–48; Brack 2014).

In collaboration with the EU, the UK, and domestic industry associations, the Chinese government is seeking to construct a national timber legality verification system. A central component of this emergent system is a Timber Legality Verification Standard developed by the China National Forest Products Industry Association, which together with the China Timber and Wood Products Distribution Association covers more than 80% of Chinese importers and exporters. This standard sets out requirements for verification of compliance with applicable domestic laws both at the forest management level and throughout the chain of custody, including due diligence procedures. To build Chinese companies' capacities to implement the standard, the China-UK Collaboration on International Forest Investment & Trade (InFIT) and the Chinese Academy of Forestry (CAF) have created a China Responsible Forest Product Trade and Investment Alliance (China-RFA), which provides information, tools, and training on how to institute DDSs to comply with foreign timber legality regulations. While the standard remains voluntary, its adoption

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by companies, subject to third-party certification and auditing, is expected to be underpinned by the incorporation of legality requirements for imported timber into national regulation, plans for which are being developed by the SFA in collaboration with the EU FLEGT Facility, building on experience with the VPAs (Chen 2016; Norman & Saunders 2017; EU FLEGT Facility 2017b, 2018b; InFIT 2018).

Since the passage of the US Lacey Act, the EUTR, and the Australian ILPA, Chinese wood-processing firms have increasingly shifted their imports away from high-risk countries and sources, despite being obliged to pay a higher price per unit for legally verified timber. Not only did the share of tropical hardwoods in Chinese sawnwood imports decline (from 61% in 2000–2005 to 22% in 2011–2015), but so too did that of all timber imports from high-risk natural forests relative to lower-risk sources such as plantations. High-risk softwood imports from Russia were likewise replaced by more expensive certified timber from the USA, Canada, New Zealand, Australia, and Europe (Barua *et al.* 2016, pp. 14–15, 45–46, 64–67; Cheng *et al.* 2015, pp. 372–374). While these shifts were driven by broader market trends, notably the growing scarcity of tropical natural timber, public legality requirements in consumer countries also appear to have played a significant part, as much of this legally verified wood was re-exported in processed form to Northern markets. Thus, for example, an international survey of timber legality enforcement authorities found that China was the country most frequently affected by buyer decisions to stop purchasing from risky suppliers (*TREE Newsletter* Autumn 2016, https://www.forest-trends.org/who-we-are/initiatives/#ssection-5). At the same time, however, NGOs like Global Witness have exposed continuing evidence of illegal logging by Chinese companies in countries like Papua New Guinea and the Solomon Islands, and the volume of Chinese illegal wood exports to northern markets remains high, even if their relative share has declined (Wellesley 2014; Barua *et al.* 2016; Global Witness 2019).

Chinese forest enterprises themselves vary widely in size, management structure, and capacity to monitor and control their supply chains. A recent survey conducted by the CAF and western researchers found a high level of awareness of foreign legality requirements not only among export-oriented companies, but also among their domestic suppliers. The most common responses among the export-oriented firms were to apply third-party certification, provide information in accordance with customers' requirements, establish internal supply-chain management and due diligence systems, and switch to low-risk suppliers. The study also shows that Chinese wood enterprises perceive the complexity of the transnational legality regime, with its varying verification standards, due diligence requirements, and penalties for noncompliance, as a major source of additional costs and constraints on their engagement (Nathan *et al.* 2018).

Chinese wood exporters' growing dependence on markets with public legality regulations, coupled with the government's increasingly explicit embrace of the campaign against illegal logging and associated trade, has generated a series of policy measures aimed at avoiding sourcing of illegally harvested timber. Existing trade, credit, and investment guidelines lack formal monitoring and compliance provisions, while plans for a national timber legality verification system, backed up public legality regulation for imports and informed by European experience, remain under development. Yet there is evidence from both the trade statistics and surveys discussed above that many Chinese wood firms are seeking to meet the public legality requirements of foreign export markets through a variety of methods, including private certification, internal due diligence systems, and shifting to lower-risk suppliers. An important barrier to such efforts is the proliferation of rules, standards, and penalties across jurisdictions, which raises the costs and difficulties of compliance. In the longer term, therefore, the effective integration of countries like China into the emergent transnational regime will depend on the capacity of timber-importing jurisdictions to align their legality requirements with one another, in order to present a common interpretive face to suppliers. As in the case of private certification discussed earlier, such alignment could be generated through a process of benchmarking for equivalence, for example within a more formalized version of the TREE network, in which officials from different jurisdictions might compare their respective legality requirements and jointly develop key compliance indicators, which could then be used to communicate common expectations to third-country suppliers.[19]

7. Conclusions

Although there is still no overarching global forest governance regime, an increasingly joined-up transnational timber legality regime has nonetheless developed over the past 15 years. This emergent joined-up regime, as this

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paper has shown, is characterized by four main elements: growing convergence among autonomous actors and initiatives around a shared problem definition and accompanying norms, principles, and goals for combating illegal logging; the diffusion of mutually reinforcing and often cross-referencing rules and standards; progressive institutionalization of practical cooperation to advance these goals, including collaborative training and enforcement of sanctions for noncompliance; and comparative monitoring, review, and revision of implementation approaches at multiple levels across jurisdictions and schemes.

The emerging transnational timber legality regime is centered around the EU FLEGT initiative, whose experimentalist architecture has fostered productive, mutually reinforcing interactions both with public regulation in other countries and with private certification schemes. But this joined-up transnational regime remains highly polyarchic, with broad scope for independent initiatives by transnational NGOs and private service providers, along with national governments, international organizations, and multi-donor partnerships.

Horizontal integration and coordination within this emerging regime thus depend on a series of institutional mechanisms, whose operation this paper has analyzed. Some of these mechanisms are distinctively experimentalist, while others can also be found in other transnational regimes. One key mechanism is "ensemble regulation": the normative and enforcement externalities resulting from cross-referencing and diffusion of rules and standards across public authorities and private certification schemes (Perez 2011; Eberlein *et al.* 2014). Examples include enforcement reciprocity between the EUTR and the US Lacey Act, which helps to close loopholes in both legal frameworks, and the revision by the FSC and the PEFC of their standards and procedures to align them with public legality regulations in timber-importing countries. A second distinctively experimentalist mechanism is recursive learning through peer review of implementation experience, based on information pooling, comparison of enforcement approaches, collaborative training, and joint assessment of substantiated concerns of illegal logging by front-line enforcement officials from different jurisdictions within the E/FEG and the TREE network. A third closely related mechanism is public oversight and review of private certification and national legality verification schemes within these networks, which as suggested above could eventually develop into a full-blown experimentalist system of benchmarking for equivalence. A final experimentalist mechanism is the "penalty default" effect of the EUTR and other public regulations in timber-importing countries, which have pushed major exporters like China to cooperate with the emerging transnational legality regime, while also inducing transnational firms to develop due diligence systems aimed at minimizing the risks of illegal sourcing within their supply chains.

At a more abstract level, the emergence of the transnational timber legality regime has been driven by a combination of all four of the causal mechanisms typically adduced to explain cross-jurisdictional policy diffusion: coercion, competition, emulation, and learning (Gilardi 2012; Biedenkopf 2015). In these terms, exclusion of illegally harvested timber from consumer country markets may be understood as a form of coercion (though it involves the enforcement of producer countries' own laws), which in turn induces competitive adaption of rules and practices by countries and firms seeking access to those markets. At the same time, however, emulation through moral suasion and shaming by NGOs, governments, and international organizations has played a key role in diffusing support for combating illegal logging and associated trade, while cross-jurisdictional learning has been crucial to the development, mutual adaptation, and joining up of enforcement approaches and practices within the emergent timber legality regime. The EU FLEGT initiative, through its capacities for recursive review of implementation experience, has given this transnational learning a distinctively experimentalist character. Its open, polyarchic architecture, which offers exporting countries an opportunity to participate in the construction of a jointly governed timber legality assurance system, has likewise helped to enhance the normative legitimacy of the emerging transnational regime, while transforming market access restrictions that might otherwise appear like standard coercion into experimentalist penalty defaults.

The transnational timber legality regime has expanded steadily in scope and extent in recent years, as new countries have agreed FLEGT VPAs with the EU and/or introduced public legality regulations, while coverage of private forest certification and legality verification schemes has also expanded. The emerging regime has proved remarkably resilient to domestic and international political upheavals, including the advent of right-wing deregulatory governments in both Australia and the USA (Leipold *et al.* 2016), as well as Brexit, where the UK has enacted regulations to ensure continued enforcement of EUTR/FLEGT rules for imported timber after leaving the EU (https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-timber-and-products-and-flegt-eu-exit-regulations-2018).

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In addition, there are promising signs that elements of the transnational timber legality regime may be extended to tackle the distinct but interrelated problem of deforestation, which is widely recognized as a major driver of climate change. Thus the EU is currently considering the enactment of mandatory due diligence regulations for importers of forest-risk commodities, together with the negotiation of VPAs with producer-country governments for commodities such as cocoa, which would address social as well as environmental sustainability concerns (Council of the EU 2019; European Commission 2019). In the case of cocoa, these proposals have attracted support not only from CSOs and forestry officials in Ghana and Côte d'Ivoire, but also from major chocolate-producing multinationals (Barry Callebaut *et al.* 2019; Fern-Civic Response 2018). In Indonesia, similarly, independent civil society monitoring organizations established to address illegal logging have reoriented themselves to combat deforestation and reform the governance of the Indonesian Sustainable Palm Oil (ISPO) certification scheme (Indonesian Civil Society Groups 2018; Pacheco *et al.* 2018, pp. 10–11).

The findings of this paper thus provide robust new empirical support for the claim advanced in previous work that a joined-up transnational regime can be assembled piece-by-piece under polyarchic conditions through coordinated learning from decentralized experimentation, without a hegemonic power to impose common global rules. At the same time, as the paper also shows, significant gaps nonetheless remain within the emerging timber legality regime, which if left unfilled are likely to constrain its future expansion and effectiveness. Most salient among these is the proliferation across jurisdictions of overlapping legality standards, verification procedures, due diligence requirements, and penalties, which as we have seen in the case of China, raise the barriers and costs for firms seeking to comply with the underlying norm against trafficking in illegally logged wood. Here too, however, as suggested above, experimentalist mechanisms of benchmarking for equivalence through transnational institutions such as the TREE network offer a promising route to aligning the legality requirements and standards of participating jurisdictions, without imposing a single set of uniform rules and procedures across the emerging transnational regime.

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Endnotes

[1] For a full but anonymized list of interviews conducted between 2011 and 2016, see Appendix S1 to Overdevest and Zeitlin (2018: Appendix S1).

[2] https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Illegal-Logging-and-Associated-Trade; http://asean.org/storage/2016/10/Strategic-Plan-of-Action-for-ASEAN-Cooperation-on-Forestry-2016-2025.pdf.

[3] Abbott defines a "transnational regime complex" as a "loosely connected but… still fragmented… group of institutions" operating in a global policy field that includes nonstate and subnational actors as well as states and interstate organizations (Abbott 2014, p. 60).

[4] This section updates earlier work by Overdevest and Zeitlin (2015, 2018), focusing on recent developments contributing to the evolution of the transnational timber legality regime.

[5] Even critical assessments which argue that the VPAs have not resolved fundamental dilemmas of forest governance in countries like Ghana acknowledge that the resulting level of consultation, discussion, and information provision is "unprecedented" in the local context (Hansen *et al.* 2018, p. 80).

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[6] For a vigorous but highly partisan presentation of the critical debate on FLEGT, based on selective quotations from interviews with EU officials and other stakeholders, see Rutt *et al.* (2018). This article also provides an overview of the findings of the ProdJus project (https://www.dala.institute/Projects/-ProdJus-%28Supranational-Forest-Governance-in-an-Era-of-Globalising-Wood-Production-and-Justice-Politics), which highlight the risks posed by transnational timber legality regulation for local communities and small producers engaged in the informal economy. Responding to this body of work, which focuses on issues of local VPA implementation, is beyond the scope of the current paper. But for a rigorous comparative study of VPA impacts in Ghana, Indonesia, and Cameroon, based on surveys and focus group discussions with representative samples of 100+ stakeholders in each country conducted according to a standardized methodology, see Cerutti *et al.* (2020).

[7] For the E/FEG's mission, minutes, and materials, see http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3282.

[8] Caution should therefore be exercised in assessing claims about the weakness of EUTR enforcement relying on outdated information, such as Moser and Leipold (2019), which is based on German interviews conducted in 2014–15.

[9] For Indonesia's advocacy role in the adoption of public legality regulations in timber-importing countries, see Leipold *et al.* (2016, p. 299); EU FLEGT Facility (2018a, p. 1).

[10] Examples include the US and EU agreements with South Korea, US-Peru, EU-Canada, EU-Japan, and EU-Mercosur, as well as the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP) (prior to US withdrawal).

[11] This Act builds on an earlier system for the verification of legal wood, developed to promote compliance with Japan's 2006 Green Purchasing Law, whose use in the construction of public buildings was mandated in 2010 (Momii 2014).

[12] https://www.forest-trends.org/who-we-are/initiatives/#ssection-5; TREE (2013-2017, 2018, 2019); Saunders (2018); Hinrichs (2018).

[13] For the text of the ECP, see https://www.sec.gov/Archives/edgar/data/1396033/000114420415058462/v421764_ex10-1.htm; cf. TREE meeting summary 5–8/4/16; Duggan (2016).

[14] Although Australia does not yet recognize FLEGT licenses, it does recognize legality verification certificates issued by Indonesia under the VPA.

[15] http://www.ettf.info/eu-timber-regulation; https://www.NEPCon.org/certification/legalsource/legalsource-due-diligence-system.

[16] For a current list, see http://ec.europa.eu/environment/forests/timber_regulation.htm.

[17] In African VPA countries, by contrast, there has been no comparable uptick in private certification, but neither is there evidence that the implementation of these agreements has undermined progress toward certification, which was previously very slow (IMM 2019, pp. 89, 94).

[18] Even there, the Korea Forestry Service states that "products from high risk countries will be investigated after customs clearance, even if certified," while working with the international community to monitor evidence of fraud and efforts to combat it within certification schemes (Saunders & Norman 2019, p. 11).

[19] For benchmarking for equivalence against baseline requirements within private food safety certification, see Havinga and Verbruggen (2017); and for similar processes of regulatory equivalence assessment by public authorities in food and aviation safety, see Hoekman and Sabel (2019b).

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Supporting information

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Appendix S1. Supporting Information

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