

Submission regarding Exposure Draft and Explanatory Memorandum of the Illegal Logging Prohibition Bill 2011

Environmental Investigation Agency

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Introduction

Thank you for the opportunity to submit comments regarding the Illegal Logging Prohibition Bill Exposure Draft now being considered by the Senate Standing Committee on Rural Affairs and Transport. The Environmental Investigation Agency (EIA) is a non-governmental organization founded in 1984 with bases in Washington, DC and London. For 27 years, EIA has worked to investigate and expose environmental crimes and advocate for creative and effective solutions.

EIA's analyses of the trade in illegal timber, wildlife, and ozone-depleting substances have been globally recognized. Over the past fifteen years, we have documented (in partnership with local organizations) the mechanisms of illegal logging and associated trade, its relation to corruption and criminal activity, as well as the environmental and social impacts in countries throughout Southeast Asia, China, Russia, Central and South America. Our experiences have demonstrated unequivocally that the illegal logging practices responsible for the greatest amount of environmental and social damage are inextricably linked to international trade, and that any solution will therefore require action from both producer and consumer nations. EIA's expertise has informed the legislation that both markets now have to prohibit commerce in illegally-sourced timber: the U.S. Lacey Act Amendments of 2008 and the E.U. Illegal Timber Regulation approved in 2010. EIA has closely followed these political processes and is currently leading efforts to track and assure strong implementation and enforcement of the laws.

We commend the Australian government for its commitment to passing legislation to reduce its consumers' and businesses' role in unwittingly supporting forest destruction. It is clear that a broad range of actors in Australia desire such regulations, as evidenced by the two statements ("Joint Statement" and "Common Platform") issued by a joint forest industry, wood product sector and environmental NGO coalition.¹ Through the passage of a strong, well enforced law prohibiting import, export or other commerce in illegally sourced wood products, Australia has the opportunity to be a leader on this issue in a geographical region where illegal logging has been and continues to be a systemic and pressing problem. No less significant is the "tipping point" effect that an Australian law will have, as the cumulative effect of consumer country policies increases the incentives for legal production and meaningful oversight in order to maintain market access. As the RIS in the Explanatory Memo states; "Complementary regulatory and non-regulatory measures have now reached a point of development where a new international policy environment has been established." Without legislation,

¹ Joint Statement: <http://www.goodwoodguide.org.au/assets/docs/JointStatement.pdf> , Common Platform: <http://www.goodwoodguide.org.au/assets/docs/CommonPlatform.pdf>



Australia's market currently offers a loophole within this environment where illegal timber trade may continue to flourish.

Moreover, legislation will bring Australia's policies and markets into greater consistency with national climate objectives, rather than undermining the millions of dollars currently being invested in efforts to protect forests or reduce emissions from forest degradation. The value of illegal timber imports into Australia has been estimated to be \$840m by the European Commission in 2007², compared to Australia's \$200 million International Forest Carbon Initiative.

In this submission, EIA offers observations and recommendations regarding the draft Bill based on our years of experience researching illegal logging and working on legislation in consumer countries, as well as three years of experience with the Lacey Act amendments' model, implementation and enforcement. EIA encourages a regulatory approach that harmonizes – to the extent possible – with existing laws in the US and EU, in order to minimize confusion and allow for cost-efficient, meaningful compliance by industry actors exporting legal products to different national markets, including transnational companies, small and medium enterprises, and community forest operations.

1. Definition of “illegally logged” must be sufficiently comprehensive to address problem that the Illegal Logging Bill is intended to address

The definition proposed by the Exposure Draft for “Illegally logged” is currently “harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested.” However, definitions of illegal logging used by governments and institutions the world over are not limited to harvesting (the implication of which is cutting in the forest). The Australian Government's own definition, as cited within the Explanatory Memo, includes instances when:

- Timber is stolen
- Timber is harvested without the required approvals or in breach of a harvesting license or law
- Timber is bought, sold, exported or imported and processed in breach of law, and/or
- Timber is harvested or trade is authorized through corrupt practices.

The Lacey Act, for its part, includes relevant payments, export and transshipment laws in addition to harvesting laws as underlying violations:

“[3372(a)(2)(B)](i) any law or regulation of any State, or any foreign law, that protects plants or that regulates—

(I) the theft of plants;

(II) the taking of plants from a park, forest reserve, or other officially protected area;

(III) the taking of plants from an officially designated area; or

(IV) the taking of plants without, or contrary to, required authorization;

² European Commission submission to the CIE Report to Inform the Regulatory Impact Statement, Nov, 2009, <http://www.thecie.com.au/RIS%20illegal%20logging/17%20-%20EU%20submission.pdf>

(ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law; or
(iii) taken, possessed, transported, or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants;

Lacey also makes it “unlawful for any person to make or submit any false record, account, or label for, or any false identification” of timber or wood products.

The EU Regulation defines illegal timber in the following way. Although ‘illegally harvested’ is used this definition is then expanded and explicitly includes trade and customs laws and the rights of third parties such as indigenous people:

Article 2

Definitions

(g) ‘illegally harvested’ means harvested in contravention of the applicable legislation in the country of harvest

(h) ‘applicable legislation’ means the legislation in force in the country of harvest covering the following matters:

- rights to harvest timber within legally gazetted boundaries,*
- payments for harvest rights and timber including duties related to timber harvesting,*
- timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,*
- third parties’ legal rights concerning use and tenure that are affected by timber harvesting, and*
- trade and customs, in so far as the forest sector is concerned.*

Definitions matter. By limiting illegal logging to the forests, the Exposure Draft ignores the fact that some of the criminal activity most harmful from a societal and economic point of view occurs at different points in the wood production chain. For example, the systematic underreporting and underpayment of timber royalties or concession taxes, or the laundering of timber across a national border, are activities that deprive national governments of revenue, undermine the rule of law and contribute to undervaluing forests. The widespread smuggling of Indonesian ramin (*Gonostylus spp.*) into Malaysia documented by EIA and Telapak which resulted in the conviction of trading company Style Craft Furniture Inc. for CITES violations³, hinged on forged documents used for export and import. Such crimes would not clearly be covered in the government’s current definition.

Moreover, enforcement of this statute necessitates an understanding of the length of a supply chain. Illegal harvest in the forest is often followed by additional processing or export violations that are more

³ “Chinese Baby Furniture Company Pleads Guilty to Smuggling Internationally Protected Wood”, 1 May 2009. <http://www.justice.gov/opa/pr/2009/May/09-enrd-424.html>

visible or demonstrable to national authorities. Restrictions such as log or unprocessed timber export bans provide an example. In Madagascar, where there has been no clearly legal authorized rosewood or ebony extraction since at least 2006 and logging is primarily conducted within national parks, restrictions on export of unfinished timber products are also commonly violated.⁴ These restrictions now form the basis for a Lacey Act case under investigation by US authorities. The mass export of logs from Laos to Vietnam, in violation of Laos's log ban, is another example of illegal logging that would not clearly be covered by the current Exposure Draft.⁵

2. Requirements for reporting basic information about wood products (species and country of harvest origin) are an important driver of change.

The Lacey Act includes a requirement for importers to declare species and country of harvest origin. EIA's ongoing experience and interactions with actors in the forest products industry both within the United States and abroad suggests ever more strongly that the declaration requirement is a critical element for achieving the intent of the broader prohibition on trade in illegally sourced wood. On-the-ground evidence confirms that sectors such as flooring and sawn timber that are subject to the declaration are far more aware of the requirements and consequences of all aspects of the statute.

The principle of the declaration requirement – the value of identifying what a wood product is made of, and what forest it comes from – has also been widely acknowledged by other consumer nations. The principle is enshrined not only in the Lacey Act but also in the due diligence requirements of the European Union's Regulation Against Illegal Logging. Switzerland, not part of the European Union or the European Economic Zone, has recently passed its own law that requires on-product labeling of scientific species and country of harvest origin for many wood products. In Australia, the broad coalition of industry and environmental groups represented by the Common Platform has come out in support of the principle of increased transparency as well.

While the implementation of the Lacey Act declaration is imperfect, as with all new regulations, and is in a state of ongoing phase-in and improvement, the principle behind it remains vital. We recommend this principle be adapted to meet Australia's systems. A declaration requirement serves at least three purposes:

- Augmenting trade data to support policy making. Declaration data is useful in furthering understanding of where U.S. imports are actually originating and therefore what forest regions are impacted by U.S. consumption. This can support more targeted interventions in support of bilateral aid priorities, bilateral and multilateral trade relationships, and climate priority setting or strategies, including REDD negotiations.

⁴ EIA and Global Witness. "Investigation into the Global Trade in Malagasy Precious Woods: Rosewood, Ebony and Palisander" (October 2010), and "Report of an Investigation into the Illegal Felling, Transport and Export of Precious Wood in Sava Region Madagascar" (November 2009), which concluded: "all timber awaiting export or already having been exported since 2006 was cut or collected, transported and stored in violation of the regulations in force in the Malagasy forest sector"

⁵ EIA/Telapak. "Borderlines: Vietnam's Booming Furniture Industry and Timber Smuggling in the Mekong Region" (March 2008).

- Increasing transparency in supply chains. The requirement to ask basic questions about species and country of harvest encourages the collection of several facts fundamental for a company try to reduce risk of illegality and thereby exercise ‘due care.’ The increased level of questioning in a previously unregulated global market establishes a new level of transparency in business practices, and furthers the underlying purpose of the statute.
- Strengthening and supporting enforcement: The declarations assist with risk analysis for inspections and investigations by enabling agencies to examine patterns, compare declarations to other trade data like manifests or CITES permits, understand which ports might be priorities, and better understand which species and or countries to pay attention to, thereby aiding in enforcement activities. The declarations also may contain information that can support emerging investigations, and allow investigators to pinpoint individual shipments of interest.

For example, in June 2009, agents of the U.S. Fish & Wildlife Service seized three pallets of tropical hardwood as they entered the Port of Tampa, Florida from Iquitos, Peru. Originating deep in the Amazon, the pallets contained numerous species of decorative woods, including tigrillo (*Swartzia arborescens*), palisangre (*Brosimum rubescens*), and tigre caspi (*Zygia cataractae*). Agents confiscated the wood on grounds that the shipment violated the declaration requirement of the Lacey Act. The seizure was supported by substantial evidence that the exporter was using stolen and forged documents.⁶

3. Establishment of sufficiently strong penalties to create a deterrent effect is important.

EIA’s experience documenting the mechanisms of illegal logging and associated trade has shown it to be best understood in the context of corruption, criminal activity and “no questions asked” international trade. It follows that in order to effectively address the problem, the equation of risk and return must be altered to create incentives for robust due diligence. Effective legislation should lower the incentives for illegal logging and trade – through reducing demand and lowering profit margins – while raising the risks – through establishing sufficiently deterrent penalties. In this regard, EIA commends the clarity of the prohibition and penalty in the Exposure Draft.

4. Parity in the prohibition between domestic and foreign producers is vital.

EIA notes with concern an apparent distinction in the Exposure Draft between the treatment of Australian domestic forestry practices and foreign forestry practices. To be effective, consumer country legislation must retain the principle of parity in its prohibition across all countries alike.

5. Mechanisms to permit civil society input or oversight are fundamental.

⁶ INV No. 2009403072, “Decision in Response to Petition for Remission” regarding U.S. Department of the Interior v. Three Pallets of Tropical Hardwood. (Office of the Solicitor, Knoxville TN, June 2010). Also see “Declarations and Due Care: Insights from Another Lacey case” (World Resources Institute , 2010).

EIA encourages the government of Australia to incorporate mechanisms into the Bill or its Regulations that enable civil society to bring credible information about possible trade in illegally-sourced wood products to the attention of enforcement and implementing agencies.

Businesses and the Lacey Act

The Lacey Act Amendments of 2008 have been received positively by the American forest products and importing industry due, in large part, to the political process that surrounded their passage. This process included negotiations among industry, environmental and labor stakeholders and extensive consultation with experts and government agencies. The resulting coalition was precedent-setting in its breadth, reflecting the reality of illegal logging's multifold impacts on not only forests but legal businesses and efforts to manage forests in a sustainable manner.

In the three years subsequent to the amendments, ongoing dialogue and negotiation among an even broader set of stakeholders have allowed Lacey Act regulations to develop in a way that is pragmatic and responsive to business reality. Two "Consensus Statements" with recommendations on technical implementation issues have been issued by a coalition of trade associations and environmental groups: July 2009 (37 signatories) and July 2010 (57 signatories). (EIA would be happy to provide these statements to the Committee as a supplement to the current Submission, as input particularly regarding the technical details necessary to regulate and implement the Bill in question.) These documents are one indication of US industry's commitment to supporting the law, as suggested by the opening text:

"We believe that the Lacey Act declaration requirement, if properly implemented, facilitates achieving the intent of the Lacey Act to curb trade in illegally harvested plants. The processes that companies put in place to determine the origin of their plant material for declaration purposes, as well as the data generated by the requirement, are tools that support compliance with and enforcement of the Lacey Act. The declaration requirement has the potential to ensure that businesses all along the supply chain – harvesting operations, manufacturers, brokers, importers, retailers – become a part of the solution to the problem through joint action. We support swift implementation of the clarifications in this consensus statement, as well as the clarifications included in the Congressional letter dated October 10, 2008. We pledge to work cooperatively to facilitate smooth implementation of the Lacey Act." (July 2009)

Early experience with implementation of the Lacey Act

EIA's research and information gathering from colleagues around the world shows that the passage of Lacey – and the cumulative impact of the impending legislation in Europe – has spurred positive changes in policies and practices in both the US wood product sector and producer countries. Among these changes are:

- Industry associations and government agencies dramatically increasing their outreach regarding the importance of legal trade, raising the profile of the issue among members and sectors;
- More companies are asking basic questions about legality: the first survey done in mid-2010 by the Forest Legality Alliance (a partnership between EIA, World Resources Institute supported by

the US Agency for International Development) found that 83.5% of respondents had conversations with suppliers or members about Lacey compliance

- New standards for minimum practices or best practices have been formalized by associations and individual companies within the US and producer countries;
- Sectors exposed to early enforcement action, such as music instruments, are turning away from high-risk wood streams and in some instances seeking third-party assistance to assure legal supply.
- Government to government processes, such as the EU's Forest Law Enforcement Governance and Trade initiative and various MoUs, have been initiated or invigorated since 2008.

Conclusion

Debates about illegal logging often center on monetary figures. But action by policy makers or consumers should not depend on knowing exactly how many dollars worth or board feet of wood enter our country's borders each year. For critically endangered species like Sumatran rhinos or African lowland gorillas, a few hundred trees cut in the wrong place can mean the difference between survival and extinction. For the voluntarily isolated Mashco-Piro people of Southeastern Peru, loggers' invasion to steal a few dozen mahogany trees from one riverbank can mean contact with disease that wipes out their entire tribe. Even if the total board feet are small, the damage can be great.

Legislative action on illegal logging in consumer countries is not a replacement for, but a reinforcement of, domestic enforcement in producer countries. On the demand end, the purpose of an effective law must be judged by how well it can perform the following broad functions: (1) close market access for illegal timber and wood products to the most lucrative destinations for these products, (2) create incentives for high standards of due diligence, and (3) level the playing field for businesses that want to do the right thing, without unduly burdening them. An effective law must also be feasible to implement.

A successful response to this sort of illegal activity must come from both ends. The international community must support, and demand, on-the-ground efforts by governments in producing countries to curb illegal logging and investigate and prosecute the timber mafias within their borders. But producing countries cannot do it alone if markets like Australia's continue to nourish trade in illegal timber with hundreds of millions of dollars and a no-questions-asked import policy. Harmonizing domestic policies with the impacts of global consumption is a serious environmental challenge in the 21st century. This Bill, with the above modifications and appropriate regulations, can be a model that gets it right.

Thank you for your attention to our input, and best of luck in your own process.