

Stemming Illegal Logging and Timber Trade



An Overview of the EUROPEAN UNION FLEGT ACTION PLAN FLEGT - FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE

Ana Lucia Jaramillo | Tristram Lock | Ahmet Kilinc

November 2008

STEMMING ILLEGAL LOGGING AND TIMBER TRADE

AN OVERVIEW OF THE EUROPEAN UNION FLEGT ACTION PLAN

November 2008

INSTITUTE FOR ENVIRONMENTAL SECURITY

Stemming Illegal Logging and Timber Trade

An Overview of the European Union FLEGT Action Plan

Brussels, November 2008

Authors:

Ana Lucia Jaramillo
Tristram Lock
Ahmet Kilinc

Supervisors:

Mw. Dr. A.A.M. Schrauwen
Mw. Dr. D. Obradovic

Coordinator:

Mw. H. E. Veenstra-Kjos, J.D.

Published in association with the Amsterdam International Law Clinic (AILC) and Bronkhorst International Law Services (BILS) by the Institute for Environmental Security (IES). This publication has been produced by IES within its Environmental Security for Poverty Alleviation (ESPA) Programme with the support of the Netherlands Ministry for Foreign Affairs.

(IES), Anna Paulownastraat 103, 2518 BC The Hague, The Netherlands

Copyright © Institute for Environmental Security

November 2008

ISBN/EAN: 978-90-808184-8-4

NUR: 947

Cover design: Traits Graphic Design: www.traits.be

Cover photo Copyright © Nigel Dickinson / Still Pictures

All rights reserved. Reproduction and dissemination of material in this publication for education and other non-commercial purposes are authorised without any prior written permission from the copyright holder provided the speaker and publisher are fully acknowledged. Reproduction for resale or other commercial purposes is prohibited without written permission of the publisher.

The



The original version of this report was produced in September 2007 by researchers from the Amsterdam International Law Clinic (AILC). The present version, published in November 2008, includes an afterword by IES with additional information on the latest negotiations on Voluntary Partnership Agreements (VPAs).

TABLE OF CONTENTS

INTRODUCTION	7
1. THE EU FLEGT ACTION PLAN	9
1.1. A Multilateral Network for Trade in Timber	10
1.2. Voluntary Licensing of Exports	10
1.3. Additional Legislative Options	12
1.4. Public Procurement	12
1.5. Private Sector Initiatives	12
1.6. Financing and Investment Safeguards	13
1.7. Money Laundering	13
2. THE LICENSING REGULATION	14
2.1. FLEGT Licences	14
2.2. Powers and Obligations of Competent Authorities and European Union Member States	16
2.2.1. Competent Authorities	16
2.2.1.1 <i>Verification of the Validity of FLEGT Licenses</i>	16
2.2.1.2 <i>Verification of Shipments</i>	17
2.2.1.3 <i>Measures to be Taken in Cases of Non-Compliance with the FLEGT Licensing Scheme</i>	17
2.2.2. European Union Member States	18
2.2.2.1 <i>Legislating</i>	18
2.2.2.2 <i>Monitoring</i>	20
2.3. Powers and Obligations of the European Commission	20
3. VOLUNTARY PARTNERSHIP AGREEMENTS	22
3.1. Content	22
3.2. Structure	23
3.2.1. The Components of the Legality Assurance System (LAS)	24
3.2.2. Timber Products.....	26
3.3. Partner Countries: Case Studies	26
3.3.1. Indonesia.....	26
3.3.2. Malaysia	27
3.3.3. African Countries.....	28
4. PRIVATE SECTOR INITIATIVES AND PARTICIPATION CONDITIONALITY	30
4.1. Private Sector Initiatives	30

4.1.1. Private Initiatives in the Netherlands	33
4.2. Private Sector Participation in Voluntary Partnership Agreements	34
4.2.1. Participation of Civil Society in the Cotonou Agreement.....	34
4.2.2. Participation Criteria	37
4.3. Consultation Processes in Potential Partner Countries.....	38
4.3.1. Ghana.....	39
4.3.2. Cameroon.....	40
4.3.3. Liberia	40
4.3.4. Indonesia.....	41
4.3.5. Malaysia	42
4.3.6. Ecuador.....	44
4.4. Interim Conclusions.....	44
5. EVALUATION OF AND RECOMMENDATIONS CONCERNING THE EU FLEGT LICENSING SCHEME.....	46
5.1. Including ‘Conflict Timber’ in the Definition of Illegal Timber	47
5.2. ‘Lame Duck’ Partnership Agreements	48
5.2.1. The Voluntary Nature of the Partnership Agreements.....	49
5.2.2. Circumvention of the Licensing Scheme	49
5.2.3. EC Environment and Development Cooperation Policies as a Legal Basis for the Licensing Regulation	50
5.3. Total Prohibition on all Illegal Timber Entering the EC	53
5.3.1. The Competence of the EC and EU Member States to Create a ‘Blanket ban’ Legislation.....	54
5.3.2. The EC’s Important Role in Promulgating ‘Blanket Ban’ Legislation.....	54
5.4. How Effective is the ‘Legal Cocktail’ in Preventing Illegal Timber from Entering the Common Market?	56
ANNEX I: MAJOR INTERNATIONAL FORUMS RELATING TO TIMBER AND THEIR OUTCOMES	57
ANNEX II: EU FLEGT ACTION PLAN.....	58
ANNEX III: COUNCIL REGULATION NO. 2173/2005	91
ANNEX IV: DOCUMENT FROM THE DUTCH MINISTRY OF AGRICULTURE, NATURE AND FOOD QUALITY	99
1. Law and Policy.....	105
2. Jurisprudence	108
3. Books	109
4. Articles	110

5. Reports and Civil Society Discussion Documents.....	111
6. Press Releases.....	113
7. Websites	119
AFTERWORD	121
ONGOING FLEGT NEGOTIATIONS.....	121
IN THE PIPELINE.....	123
CONCLUSION	123

INTRODUCTION

Over the last four decades, there has been a global recognition of the damage to world forests caused by illegal logging and the related trade in illegally produced timber products. The European Community (hereinafter “EC”), as a major timber-consuming market, understands that the EC’s demand for timber, and the subsequent money flow there from, perpetuates the negative effects of illegal logging. The EC recognises that illegal logging poses a threat to wild fauna and flora, to the indigenous people living in the forests of timber-producing countries, the depressing effect on the economies of timber-producing countries, and the fact that profits of illegal logging often flow back to corrupt regimes and conflict zones.

The purpose of this report, requested by Mr. Serge Bronkhorst, is to give an overview of the EC’s effort to tackle illegal logging and trade in illegally produced timber. The sum total of this effort is contained in the European Union Action Plan for Forest Law Enforcement, Governance and Trade (hereinafter “EU FLEGT Action Plan”).¹ The EU FLEGT Action Plan incorporates a wide range of legal tools, predominantly from within the EC and the Member States, to be used to combat illegal logging and trade in illegally logged timber. The EU FLEGT Action Plan is contained in Annex II of this report.

At the heart of the EU FLEGT Action Plan is the creation of a licensing scheme for the import of timber products into the EC. To meet this goal, Council Regulation (EC) No. 2173/2005 on the establishment of a FLEGT licensing scheme for imports into the European Community (hereinafter “Licensing Regulation”) was adopted, which entered into force on the 30th of December 2005.² The complete text of the Licensing Regulation is contained in Annex III of this report.

The purpose of the licensing scheme is to licence timber products that have been legally produced in accordance with the national legislation of the timber-producing countries, with the intention of releasing those timber products on the EC common market. Implementation of the licensing scheme requires the relevant timber products to be made subject to a system of checks and controls to guarantee the legality of those products. To this end, the EC will conclude Voluntary Partnership Agreements (hereinafter “VPAs”) with timber-producing

¹ Communication from the Commission to the Council and the European Parliament FLEGT, proposal for an EU action plan COM (2003) 251 final, 21 May 2003 as adopted by Council Conclusions FLEGT OJ C 268, 7 November 2003 (hereafter: *EU FLEGT Action Plan*). The EU FLEGT Action Plan is included in Annex II.

² Council Regulation (EC) No. 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ L 347 30 December 2005 (hereafter: *Licensing Regulation*). The Licensing Regulation is included in Annex III.

countries to place a legally binding obligation on those countries to implement the licensing scheme within the schedule stipulated in each VPA.

The report will focus on the main features of the EU FLEGT Action Plan, and the measures that it proposes to combat illegal logging. The EU FLEGT Action Plan itself is introduced in Chapter 1. Chapter 2 examines the Licensing Regulation and its application to timber products arriving at the border of an EC Member State; more specifically – and in line with the Client’s request – the Netherlands. Chapter 3 analyses the VPAs to be entered into with timber-producing countries, what they are likely to contain, how they are structured, and the stage of the negotiating process between the EC and Indonesia, Malaysia and relevant African countries. Chapter 4 reviews the involvement of the private sector in the EC and timber-producing countries (hereinafter “partner countries”) in the implementation of the EU FLEGT Action Plan, using the Cotonou Agreement as an example of the participatory framework for stakeholders. The last Chapter contains an evaluation of the licensing scheme, in light of stakeholder concerns about the effectiveness of the scheme to combat illegal logging and the trade in illegally produced timber products. As set out in the Table of Contents, the Report includes several annexes, including a bibliography.

1. THE EU FLEGT ACTION PLAN

The EU FLEGT Action Plan is part of a global strategy developed after 35 years of international discussion. The Declaration of the United Nations Conference on the Human Environment in 1972 (hereinafter “the Stockholm Declaration of 1972”)³ recommended that the United Nations should discover new scientific knowledge to environmental problems, including forest management.⁴ The Rio Declaration on Environment and Development in 1992 (hereinafter “the Rio Declaration”)⁵ stated the need to combat deforestation as a means to achieving environmental protection.⁶ The World Summit on Sustainable Development in 2002 (hereinafter “WSSD”) produced the Johannesburg Plan of Implementation,⁷ which called for an immediate action in forest law enforcement and illegal international trade in forest products.⁸ Table 1.1, as contained in Annex I of this report, summarises the major international fora discussing global deforestation and the outcomes from those discussions.

Forest Law Enforcement and Governance (hereinafter “FLEG”) is a sub-category of the wider international issue of sustainable forest management. Some examples are the African FLEG,⁹ the ENA FLEG between North Asia and Russia,¹⁰ and the South East Asia FLEG Task Force.¹¹

The EC adopted its policy as part of its involvement in the World Summit on Sustainable Development¹² in order to pursue its own objective of encouraging sustainable

³ Declaration of the United Nations Conference on the Human Environment (hereinafter: *Stockholm Declaration of 1972*), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (last visited, Aug. 15, 2007).

⁴ *Id.*, at art. 6; *id.*, principle 20.

⁵ Rio Declaration on Environment and Development (hereinafter: *Rio Declaration of 1992*), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last visited Aug. 15, 2007).

⁶ *Id.*, at principles 3 and 7.

⁷ Resolution adopting the Plan of Implementation of the World Summit on Sustainable development (hereinafter: *Johannesburg Plan of Implementation*), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/636/93/PDF/N0263693.pdf?OpenElement> (last visited Aug. 15, 2007). The Johannesburg Plan of Implementation is annexed to the resolution.

⁸ *Id.*, at pp. 20-39.

⁹ African FLEG Plan, available at

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTARD/EXTFORESTS/0,,contentMDK:20636564~pagePK:210058~piPK:210062~theSitePK:985785,00.html> (last visited Aug. 15, 2007).

¹⁰ More information about the ENA FLEG is available at

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/RUSSIANFEDERATIONEXTN/0,,contentMDK:20521942~isCURL:Y~pagePK:141137~piPK:141127~theSitePK:305600,00.html> (last visited Aug. 15, 2007).

¹¹ More information on the South East Asia Task Force is available at <http://web.worldbank.org> (last visited Aug. 13, 2007).

¹² EU FLEGT Action Plan, *supra* n. 1, at p. 3.

forest management, both within and outside the EC.¹³ In addition to dealing with the question of illegal logging (FLEG), the EC has taken it a step further, including the related trade in illegal timber (FLEGT). In fact, it may be said that the primary aim of the EU FLEGT Action Plan is to combat trade in illegally logged/produced timber.

The EU FLEGT Action Plan suggests several ways to combat trade in illegal timber. The scope of the report does not allow for a full treatment of all of the proposed measures set out below. Of these, the Licensing Regulation, the voluntary partnership agreements, and private sector initiatives, will be discussed in more detail in Chapters 2-5.

1.1. A MULTILATERAL NETWORK FOR TRADE IN TIMBER

One of the aims of the EU Action Plan is to establish a long-term dialogue between timber-producing and timber-consuming countries. Four key regions and countries fall within the scope of the EU FLEGT Action Plan, which together contain nearly 60% of the world's forests and supply a large proportion of internationally traded timber. These regions are Central Africa, Russia, Tropical South America and South East Asia.¹⁴

Volumes of timber that are imported into the EC from Africa are limited (less than 4% in value of world trade flows in wood products). Nonetheless, the EC constitutes an important market for certain African regions. In Central Africa, for example, the trade in timber accounts for over 20% of the total trade with the EC. Exports from Russia are important in both absolute and relative terms. Northwest Russia, in particular, is the EC's largest supplier of round wood.¹⁵

In light of these patterns, the preferred approach in tackling the trade in illegally produced timber is to build a multilateral network of main importers and exporters to control the legality of the timber traded on world markets.

1.2. VOLUNTARY LICENSING OF EXPORTS

While the development of a multilateral trade network is still some time away from being a reality, the first step in that direction has been taken by the adopting of a Licensing

¹³ Consolidated treaty establishing the economic community, OJ C 325, 24 December 2002 (hereinafter: *EC Treaty*) art. 174 (environmental policy).

¹⁴ *Id.*, p. 10.

¹⁵ *Id.*

Regulation.¹⁶ This piece of legislation, passed at the EC level, allows only legally produced timber products, from certain timber-producing countries, to enter the EC Common Market.

The Licensing Regulation enables the EC to conclude voluntary partnership agreements¹⁷ with partner countries to establish a licensing scheme, whereby timber products from those countries are licensed before they are allowed to be freely released onto the Common Market. Although voluntary, VPAs do bind FLEGT partner countries to implement the licensing scheme.¹⁸ Concluding a VPA implies:

a commitment to ensure that the applicable forest laws are consistent, understandable, enforceable and is supportive of sustainable forest management principles; developing technical and administrative systems to monitor logging operations and identify and track timber from the point of harvest to the market or point of export; build checks and balances into the tracking and licensing system, including the appointment of independent monitors; and develop procedures to license the export of legally harvested timber.¹⁹

The licensing scheme requires the establishment of reliable and credible systems to certify that timber has been legally harvested in conformity with national legislation of the partner country.²⁰ The Licensing Regulation describes the license required to verify that timber has been legally harvested, defines the products needing a license,²¹ specifies the nature and mandate of any advisory or management bodies set up to assist the European Commission (hereinafter “Commission”), and indicates the partner countries from which imports are to comply with those controls. It will also make provision for partner countries to nominate the authority responsible for issuing licenses and provide for administrative co-operation to the relevant competent authorities in the EC.²²

¹⁶ Licensing Regulation, *supra* n. 2 at p. 1. The Licensing Regulation is discussed in more detail in Chapter 2.

¹⁷ Voluntary partnership agreements are discussed more fully in Chapter 3.

¹⁸ EU FLEGT Action Plan, *supra* n. 1, at p. 13.

¹⁹ *Id.*

²⁰ A VPA template is contained in Annex 5 of this report. The template is provided by Mr. Thibaut Portevin. Mr. Portevin is the European Commission’s Project Officer for Natural Resources and Environment in Indonesia. (Address: Delegation of the European Commission. Wisma Dharmala Sakti, 16th floor, Jl Jend Sudirman 32, Jakarta 10220, Indonesia). According to the VPA template, at 6, the VPAs will contain provisions on the “system to verify legality and FLEGT licensing”, including, *inter alia*, criteria for the legality verification system, the possibility to use verification and traceability systems operated by private bodies, identification of authorities to issue FLEGT licences, procedures to issue FLEGT licences, description of FLEGT licences, and the “EU import regime”.

²¹ The FLEGT partnership agreements would initially cover a limited range of solid wood products (roundwood and rough sawnwood) due to the difficulties of ascertaining the origin of processed timber products, but provision could be made to extend the scheme to other product categories, where practicable: EU FLEGT Action Plan, *supra* n. 1, at p.12.

²² *Id.*

1.3. ADDITIONAL LEGISLATIVE OPTIONS

The EU FLEGT Action Plan acknowledges that there is currently no EC legislation expressly prohibiting the import and marketing of illegally produced timber (products) and that some important timber-producing countries may choose not to enter into VPAs with the EC. Therefore, the EU FLEGT Action Plan recognizes the need to review options for further measures at the EC level while EC Member States should also examine how the trafficking of illegally produced timber products is addressed under national laws.²³

1.4. PUBLIC PROCUREMENT

The EU FLEGT Action Plan envisages the need for public authorities to include the criterion of legality into their public procurement contracts, whenever they act as purchasers of timber products. EC directives on public procurement have undergone a revision. The relevant piece of EC legislation is Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts.²⁴ Practical information for ‘greening’ the public procurement of timber products is provided in the Handbook on Green Public Procurement.²⁵

1.5. PRIVATE SECTOR INITIATIVES

In order to ensure a substantial impact on the trade in illegally produced timber products, the Commission wants the private sector²⁶ to integrate sustainable forest management concerns into their business operations based on the principles of Corporate Social Responsibility. This principle implies that companies ought to integrate, on a voluntary basis, social and environmental concerns into their business operations and interactions with stakeholders.²⁷ The EC’s approach in this area is to encourage the private sector in the EC to

²³ Legislative instruments and international processes, including the US Lacey Act (applied to fish and wildlife products), the Kimberly Process, an international initiative to control the trade in conflict diamonds, and the UN Convention on Transnational Crime, could be used to help inform the Commission’s position in this regard: EU FLEGT Action Plan, *supra* n. 1, at p. 15.

²⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 April 2004.

²⁵ European Commission *Buying Green! A Handbook on Environmental Public Procurement* SEC (2004) 1050.

²⁶ The involvement of the private sector is discussed more fully in Chapter 5.

²⁷ Communication from the Commission concerning corporate social responsibility: A Business contribution to Sustainable Development COM (2002) 347 final, 2 July 2002.

work with the private sector in timber-producing countries based on voluntary codes of conduct.²⁸

1.6. FINANCING AND INVESTMENT SAFEGUARDS

To further combat illegal logging, the Commission seeks to encourage the banking and financial sector of the EC to take environmental considerations into account in their due diligence practices.²⁹ In its view, greater prudence is needed from institutions, or individuals, who finance activities in the forestry sector, to assess the risk attached to environmental factors that would have a bearing on the viability of their investments. To this end, banks and other financial institutions are encouraged to investigate the source and supply of timber before making credit or investment available to multi-national logging companies.

1.7. MONEY LAUNDERING

Action against money laundering is taken at both the EC and the EU level. Legislation within the EU is a joint action on money laundering,³⁰ while two directives, the prevention on the use of the financial system for the purpose of money laundering³¹ and the financing of terrorism,³² operate within the EC framework. The EU FLEGT Action Plan recognises that it is within the discretion of the Member States to alter their national criminal legislation to prohibit the trade in illegal timber. Categorising the trade in illegally produced timber as a ‘serious’ crime allows the money laundering directives to be applicable to the revenues and profits sourced from the trade in illegal timber.³³

²⁸ Tropical Forest Trust, an organisation established to assist purchasers of tropical timber to source from sustainably managed forests and build capacity for certification is developing a scheme towards this purpose. More information is available at <http://www.tropicalforesttrust.com/> (last visited Aug. 28, 2007).

²⁹ EU FLEGT Action Plan, *supra* n. 1, at p. 18.

³⁰ 98/699/JHA: Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, OJ L 333, 9 December 1998.

³¹ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28 June 1991.

³² Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25 November 2005.

³³ EU FLEGT Action Plan, *supra* n. 1, at p. 19.

2. THE LICENSING REGULATION

While a multilateral trade network is still some time away from being a reality, the first step has been taken in the form of legislation passed at the EC level. The EU FLEGT Action Plan requires the Commission to ask the Council of the European Union (hereinafter “Council”) to endorse a proposal to enter into negotiations for voluntary partnership agreements with wood producing countries and to present a regulation setting up the voluntary licensing scheme, in conjunction with wide stakeholder consultation.³⁴ The proposal was accepted as part of the EC trade policy. The resulting Licensing Regulation has been coined the ‘crown jewel’ of the EU FLEGT Action Plan, adding to the existing law on forestry and external trade.³⁵ The Regulation requires EC Member States to prohibit illegally produced timber products, imported from partner countries, from entering the EC common market.

The Licensing Regulation starts out with the objective of establishing a set of Community rules for the import of certain timber products (as listed in Annexes II and III of the Regulation³⁶) for the purpose of setting up a licensing scheme.³⁷ To this end, VPAs will be entered into with timber-producing countries³⁸ (as listed in Annex I of the Regulation³⁹). The Regulation proceeds to lay down the framework in which the Commission and the EC Member States are obliged to act in (a) the administration of the FLEGT licensing scheme, and (b) in penalising importers who transgress their obligations to licence their imports of timber products. The different obligations imposed by the Licensing Regulations on the competent authorities, EC Member States, and the Commission are set out below.

2.1. FLEGT LICENCES

The Licensing Regulation prohibits the import of timber products, as contained in Annexes II and III of the Regulation,⁴⁰ from partner countries unless they are covered by a FLEGT licence.⁴¹ All other products made from wood, such as furniture, paper or toothpicks, fall outside the scope of the Regulation.⁴²

³⁴ *Id.*, at p. 23.

³⁵ Licensing Regulation, *supra* n. 2, at recital 5.

³⁶ *Id.*, art. 1(3).

³⁷ *Id.*, art. 1(1).

³⁸ *Id.*, art. 1(2).

³⁹ *Id.*, art. 1(3).

⁴⁰ *Id.*, art. 2(9).

⁴¹ *Id.*, arts. 3(1) and 4(1).

⁴² *Id.*, art. 2(9).

The Licensing Regulation gives a positive definition of ‘legally produced timber’ for which a FLEGT licence is needed. The timber products must be either domestic timber that is legally harvested in accordance with the national laws of the timber-producing country or legally imported into a partner country.⁴³

A FLEGT licence is a shipment-based⁴⁴ or market participant-based⁴⁵ document of a standard format. It is to be forgery-resistant, tamper-proof, and verifiable. It is duly issued and validated by a partner country’s licensing authority, and it refers to a shipment of timber complying with the requirements of the FLEGT licensing scheme.⁴⁶ The licence is to be made available to the competent authority at the same time the customs declaration for that shipment is presented to be released for free circulation in the EC.⁴⁷ As long as the licence remains valid, this creates a presumption that the timber products are legally produced and the imports should be accepted for free circulation.⁴⁸

It is noted that by way of exception, Article 4(3) of the Licensing Regulation allows for the presentation of a CITES licence to be sufficient evidence of the shipment containing legally produced timber products. CITES is an international agreement,⁴⁹ between governments, aimed at the protection of certain types of plant and wild animals, so that the international trade in those species does not threaten their survival. The species covered by CITES are listed in three appendices. Appendix I contains species that are threatened with extinction, and trade in those species is permitted only in exceptional cases. Appendix II contains tree species that are not threatened with extinction, but the trade in those species is controlled for their survival. Appendix III contains tree species that are protected in at least one State, who is a signatory to CITES, and has asked the other signatories for assistance in controlling the trade of those species.

A permit is needed for the import into, or export from, a State that is party to the CITES. This permit is a document which expressly indicates the specimens that are being imported or exported.

⁴³ *Id.*, art. 2(10).

⁴⁴ ‘Shipment’ means a shipment of timber products: *Id.*, art. 2(12).

⁴⁵ ‘Market participant’ means an actor, private or public, involved in forestry or transformation or trade of timber products: *Id.*, art. 2(6).

⁴⁶ *Id.*, art. 2(5).

⁴⁷ *Id.*, art. 5(1).

⁴⁸ *Id.*

⁴⁹ CITES is implemented into EC law via Council Regulation (EC) No. 338/97 of 9 December 1996 on the Protection of Species of Wild Fauna and Flora, OJ L 61, 3 March 1997 and Commission Regulation (EC) No. 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora, OJ L 166, 19 June 2006.

2.2. POWERS AND OBLIGATIONS OF COMPETENT AUTHORITIES AND EUROPEAN UNION MEMBER STATES

The Licensing Regulation lays down, in Articles 5 to 10, the powers and obligations of the competent authorities, the Member States, and the Commission in the implementation of the Regulation. As a FLEGT license is to cover specified imports,⁵⁰ the Regulation is to be read in conjunction with the Council Regulation No. 2913/92 of 12 October 1992 establishing the Community Customs Code (hereinafter “Community Customs Code”).⁵¹ The Community Customs Code is a Council Regulation completely harmonising the customs rules of the European Customs Union.⁵² In light of the fact that the FLEGT licence is to be presented on all imports of timber products from partner countries, they are – in accordance with the Community Customs Code – still subject to customs procedures.⁵³

2.2.1. Competent Authorities

The competent authority, as referred to in Article 5(1) of the Licensing Regulation, is to be determined by each Member State.⁵⁴ The terms ‘competent authority’ and ‘customs authority’ have been used interchangeably in the Licensing Regulation. In the absence of a competent authority being appointed by an EC Member State, it is likely that the competent authority could be the customs authority provided for in the Community Customs Code. But this is dependent upon whether the procedure, under the Licensing Regulation, is of an administrative nature or whether a more specialised knowledge in timber, is required.

The role of the competent authority is to verify FLEGT licences. This power can be exercised in two ways: first, in verifying the validity of the FLEGT licence;⁵⁵ and second, in deciding on the need for further verification of shipments.⁵⁶

2.2.1.1 Verification of the Validity of FLEGT Licenses

A FLEGT licence is intended to be forgery-resistant, tamper-proof, and verifiable.⁵⁷ False documents are frequently used to disguise the legality of shipments. This has been said

⁵⁰ ‘Imports’ means the release for free circulation of timber products within the meaning of Article 79 of the Community Customs Code: Licensing Regulation, *supra* n. 2, art. 2(11).

⁵¹ Council Regulation No. 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L302, 19 October 1992 (hereafter: *Community Customs Code*), recital 3.

⁵² *Id.*, at recitals 1 and 2.

⁵³ *Id.*, arts 1, 38(3), 68 and 79 (second sentence).

⁵⁴ Licensing Regulation, *supra* n. 2, arts. 2(8) and 7(1).

⁵⁵ *Id.*, art. 5(5).

⁵⁶ *Id.*, art. 5(4).

to be true for certain species of wood, such as Merbau and Ramin, from Indonesia.⁵⁸ If doubt still exists as to the validity of the licence, the competent authority may approach the licensing authority to seek further clarification and additional verification.⁵⁹

The licensing authority is the authority, designated by the exporting partner country, to issue and validate FLEGT licences.⁶⁰ Information, such as names and details of the licensing authorities, authenticated specimens of stamps and signatures attesting that the licence has been legally issued, and any other relevant information, will be supplied to the competent authority by the Commission.⁶¹

2.2.1.2. Verification of Shipments

Article 72(1) of the Community Customs Code gives the competent authorities the power to take necessary measures to identify the goods, where identification is required, to ensure compliance with the conditions governing the customs procedure for which the said goods have been declared.

Where there is a risk that a shipment does not comply with the FLEGT licensing scheme,⁶² the competent authority is entitled to examine the timber products in the shipment to identify and confirm which timber products, if any, are covered by the FLEGT licence.⁶³ It is relevant to note again that only those timber products listed in Annexes II and III of the Licensing Regulation are covered by the FLEGT licence. So even though timber products falling outside the scope of the licensing regulation may be illegally produced; they are, nonetheless, free to enter the EC without a FLEGT licence.

2.2.1.3. Measures to be Taken in Cases of Non-Compliance with the FLEGT Licensing Scheme

Where the competent authorities have established that Article 4(1) of the licensing regulation has not been fulfilled,⁶⁴ they shall act in accordance with the national legislation in

⁵⁷ *Id.*, art. 2(5).

⁵⁸ EIA and Telapak have publicly identified Frankie Chua as a key player in the provision of false documentation to aid and abet the smuggling of illegal timber between Indonesia/Malaysia and China. EIA and Telapak report *The Last Frontier: Illegal Logging in Papua and China's Massive Timber Theft* (2005) p. 21, available at <http://www.eia-international.org/files/reports93-1.pdf> (last visited Aug. 28, 2007).

⁵⁹ Licensing Regulation, *supra* n. 2, art. 5(5).

⁶⁰ *Id.*, art. 2(7).

⁶¹ *Id.*, art. 7(2).

⁶² *Id.*, art. 5(4).

⁶³ Community Customs Code, *supra* n. 51, art. 68(b).

⁶⁴ Licensing Regulation, *supra* n. 2, art 4(1); *id.*, at recitals 3 and 9.

force.⁶⁵ As of July 2007, no Member State has identified, passed or amended legislation applicable to breaches of Article 4(1) of the Licensing Regulation. Member States are still awaiting further clarification from the Commission on the implementation of the Licensing Regulation before proceeding with legislating. Further action will likely be taken when the first VPA is signed.

Where there is reason to believe that the licence may not be valid, the customs authority may, as an interim measure, suspend the release of or detain the timber products.⁶⁶

2.2.2. European Union Member States

Member States have obligations to legislate, at the national level, and to assist the Community in monitoring the FLEGT licensing scheme. Member States are entitled to collect a fee to cover the necessary expenses arising from official acts by competent authorities required for control purposes under Article 5 of the Licensing Regulation.⁶⁷

2.2.2.1. Legislating

Competent authorities are to comply with the national legislation in force to deal with importers that breach Article 4(1) of the Licensing Regulation. A Council regulation is directly applicable in all Member States and does not need an implementing measure.⁶⁸ Nonetheless, the Licensing Regulation obliges EC Member States to determine the penalties to be imposed where provisions of the Regulation are infringed.⁶⁹ In the Netherlands, the fixing of the sanctions (and the designation of the competent authority) will take place by a national Order in Council (*AmvB*) pursuant to a new Dutch Customs Act. The promulgation of the Order in Council and the Dutch Customs Act is currently in progress.⁷⁰

While the Regulation requires the penalties to be effective, proportionate and dissuasive, the exact determination of penalties rests with the EC Member States.⁷¹ The requirement that the penalty should dissuade the trade in illegally-produced timber products is to prevent the

⁶⁵ *Id.*, art. 6(1).

⁶⁶ *Id.*, art. 5(7).

⁶⁷ *Id.*, art. 5(6).

⁶⁸ A Arnall and others (5th edn) *European Union Law* (Sweet & Maxwell; London, 2006) p. 57; PA Mathijsen (8th edn) *Guide to European Union Law* (2004) p. 159.

⁶⁹ Licensing Regulation, *supra* n. 2, art. 5(8).

⁷⁰ Information provided by Flip van Helden of the Dutch Ministry of Agriculture, Nature and Food Quality contained in Annex 4.

⁷¹ Licensing Regulation, *supra* n. 2, art. 5(8).

possibility that imports of timber products are directed through the Member State with more lenient punitive sanctions.

Whereas the Licensing Regulation requires Member States to pass, or amend, legislation for breaches of Article 4(1), it appears that Member States may also rely on general criminal laws in order to prosecute those involved in the trade in illegal timber or for theft of logs from the forest in which they were felled. In the context of trade in timber and for the Netherlands,⁷² the offence of handling stolen goods⁷³ may be a more suitable basis than the offence of theft.⁷⁴

Prosecution on the basis of national criminal codes may prove difficult. The burden of proving the charges is an onerous one for the prosecution and the gathering of evidence is not simple. For proving a charge of handling stolen goods, for example, three elements need to be shown. First, evidence of the initial theft is needed. In some timber-producing countries there may be conflict between regional and national legislation, and such conflict will make it more difficult to establish whether theft has occurred in the first place.⁷⁵ Second, it must be shown that the timber imported is the same timber that has been stolen. This involves demonstrating the chain of custody from origin to destination.⁷⁶ The problem of establishing such a chain is exacerbated by the fact that there is no effective co-operation between enforcement agencies in the Member States and their counterparts in the timber-producing countries.⁷⁷ Lastly, it needs to be shown that the accused knew the timber was stolen (*mens rea*).

Successful prosecution of the crime of handling in stolen goods may also be exigent. The definition of illegal timber, as contained in the Licensing Regulation, is wider than the definition of, *stricto sensu*, stolen goods in the *Wetboek van Strafrecht* (the Dutch Criminal Code). For example, timber logged with permits issued in contravention of a moratorium on the issuing logging permits, and subsequently exported to the Netherlands, could be illegal timber within the definition of the Licensing Regulation, but not necessarily stolen within the definition of stolen goods as contained in the *Wetboek van Strafrecht*. As the goods are not

⁷² Dutch Government *Analysis of National Legislation of Relevance to Exclude Illegal Timber from EU Markets – Netherlands Study* (31 January 2006) p. 4, available at http://www.illegal-logging.info/sub_approach.php?approach_id=26&subApproach_id=120 (last visited Aug. 28, 2007).

⁷³ *Wetboek van Strafrecht*, art. 416.

⁷⁴ *Id.*, art. 310.

⁷⁵ D Brack *Analysis of National Legislation of Relevance to Exclude Illegal Timber from EU Markets – UK study* (31 January 2006) p. 6, available at http://www.illegal-logging.info/sub_approach.php?approach_id=26&subApproach_id=120 (last visited Aug. 28, 2007).

⁷⁶ *Id.*, p. 8.

⁷⁷ B Pillon *Analysis of National Legislation of Relevance to Excluding Illegal Timber from EU Markets – Italy Study* (31 January 2006) p. 21, available at http://www.illegal-logging.info/sub_approach.php?approach_id=26&subApproach_id=120 (last visited Aug. 28, 2007); D Brack *EU FLEGT Initiative: Assessment of ‘Additional Measures’ to Exclude Illegal Trade from EU Markets* (2005) p. 16. Dutch Government *Analysis of National Legislation of Relevance to Exclude Illegal Timber from EU Markets – Netherlands Study* (31 January 2006) p. 5; Brack *supra* n. 75, at pp. 7-8.

stolen, as such, it appears likely that the importer would escape prosecution for the offence of handling stolen goods.⁷⁸ The result is that Member States are forced to rely on the Licensing Regulation and the use of dissuasive penalties to effectively curb the trade in illegally-produced timber products.

2.2.2.2. Monitoring

As part of the administration of the Licensing Regulation, EC Member States are required, at all times, to notify the Commission in cases where the Regulation is being, or has been, circumvented and penalties have been imposed in accordance with Article 4(1).⁷⁹

Such notification is but a small part in the greater system of monitoring the licensing scheme. Member States are obliged to submit to the Commission, by April 30th every year, an annual report.⁸⁰ This report is to be (i) in a standard format;⁸¹ (ii) must contain the quantities of timber products covered by the Licensing Regulation imported into the Member State from each partner country;⁸² (iii) must set out the number of FLEGT licences received from each country;⁸³ and (iv) must specify the number of cases and quantities of timber products involved where the Member State has applied their ‘sanction’ legislation to breaches of the Licensing Regulation.⁸⁴

2.3. POWERS AND OBLIGATIONS OF THE EUROPEAN COMMISSION

The European Commission, in cooperation with the FLEGT Committee, is responsible for taking the initiative to pass legislation at the European Community/Union level. Legislation that is to regulate the import of timber products from partner countries should be consistent, or at least partially consistent, throughout the European Community. According to information provided by the Dutch Ministry of Agriculture, Nature and Food Quality, the Commission is developing a Commission Implementing Regulation, which further specifies

⁷⁸ Brack, *supra* n. 75, at p. 6.

⁷⁹ Licensing Regulation, *supra* n. 2, art. 6(2). This may be left to the competent authority to do on behalf of the Member State as part of the competent authorities’ responsibilities in communicating with the Commission: *id.*, art. 7(1).

⁸⁰ *Id.*, art. 8(1).

⁸¹ *Id.*, art. 8(2).

⁸² *Id.*, art. 8(1)(a).

⁸³ *Id.*, art. 8(1)(b).

⁸⁴ *Id.*, art. 8(1)(c).

the framework of the Licensing Regulation and provides instructions for the efficacious operation and enforcement of, in particular, Article 5 of the Licensing Regulation.⁸⁵

The *modus operandi* of the competent authority, as prescribed in Article 5 of the Licensing Regulation, is dependent upon the Commission. Article 5 details the practical application of the Regulation to the importation of timber products covered by FLEGT licences. Article 5(9) states that the Commission shall adopt detailed requirements for the application of that Article in accordance with the procedure referred to in Article 11(3) of the Licensing Regulation.⁸⁶ Article 11(3) provides that the Commission shall be assisted by the FLEGT Committee.⁸⁷

The Commission Implementing Regulation will be considered and agreed upon by the FLEGT Committee.⁸⁸ The FLEGT Committee met for the first time in Brussels, on 16 July 2007, where it formally adopted its Rules of Procedure and exchanged views on the measures needed for the implementation of Article 5 of the Licensing Regulation.⁸⁹ As soon as the details of the Commission Implementing Regulation are formally agreed upon and brought into effect, EC Member States are obliged to implement the new customs procedures for timber products.⁹⁰

Furthermore, the Commission has an internal monitoring role. It shall publicly publish details, in synthesised reports, of the compliance by EC Member States with the Licensing Regulation.⁹¹ Additionally, the Commission must present to the Council a report of the implementation of the Licensing Regulation. This will occur two years after the first VPA comes into force.⁹²

Finally, the Commission is to critically assess the operation of the Licensing Regulation and suggest proposals for improvements to the system. This could include recommendations to exercise the Commission's power to amend the annexes to the Licensing Regulation that will either account for the addition of new partner countries or to increase the number of timber products that are to fall within the scope of the FLEGT licensing scheme and, thereby, the Licensing Regulation.⁹³

⁸⁵ See van Helden, *supra* n. 70.

⁸⁶ Licensing Regulation, *supra* n. 2, art. 5 (9).

⁸⁷ *Id.*, art. 11.

⁸⁸ See van Helden, *supra* n. 70.

⁸⁹ First Meeting of the FLEGT Committee, Draft Agenda, *available at* <http://ec.europa.eu/transparency/regcomitology/registre.cfm?CL=en> (last visited Aug. 28, 2007).

⁹⁰ See van Helden, *supra* n. 70.

⁹¹ Licensing Regulation, *supra* n. 2, art. 8(3).

⁹² *Id.*, art. 9.

⁹³ *Id.*, art. 10.

3. VOLUNTARY PARTNERSHIP AGREEMENTS

Together with the Licensing Regulation, voluntary partnership agreements make up an intricate licensing scheme, requiring the establishment of reliable and credible systems to certify that timber has been legally harvested in conformity with the national legislation of the respective partner countries. This scheme is classified as an external trade measure under Article 133 EC Treaty. Pursuant to this Article, the Commission has the competence to negotiate and the Council has the competence to conclude binding VPAs with partner countries.⁹⁴ VPAs are binding agreements between the EC and a partner country by which both parties agree to co-operate in the implementation of the FLEGT licensing scheme.⁹⁵

Annex I of the Licensing Regulation will contain a list of partner countries. As of July 2007, no VPAs have been concluded; and consequently, this Annex remains empty.

3.1. CONTENT

The purpose of a voluntary partnership agreement is two-fold. First, it identifies a licensing system in each partner country. By concluding a binding VPA,⁹⁶ the partner country commits to an agreement that gives the Member States the opportunity to take measures against the import of illegal timber. The licensing system in each partner country is designed to ensure that timber exported to the EC is legally produced.

Second, VPAs include a provision on ‘capacity-building’, which is to provide assistance to partner countries to set up the licensing scheme; improve forestry law enforcement; and, if necessary, reform the laws of the partner countries.⁹⁷ The governments of most timber-producing countries have to deal with many issues that surround the prevention of illegal logging. The issues are pointed out by the Commission in the EU FLEGT Action Plan:

[M]onitoring and gathering evidence of environmental crime; building legal cases against those who transgress; raising awareness of environmental law within the police, the legal profession, public prosecution services and the courts; training of customs officials; and awareness raising to help build the public and political support needed to tackle the entrenched corruption which often lies beneath illegal logging.⁹⁸

⁹⁴ A partner country is any state or regional organisation that enters into a partnership agreement, as listed in Annex I of the Licensing Regulation: Licensing Regulation, *supra* n. 2, art. 2(2).

⁹⁵ *Id.*, art. 2(3); recitals 4-5.

⁹⁶ *Id.*, at recital 5.

⁹⁷ D Brack *Excluding Illegal Timber from EU Markets, Options for the EU and Member States* (Chatham House, 2006) p. 3, available at <http://www.chathamhouse.org.uk/eedp> (last visited Aug. 20, 2007).

⁹⁸ EU FLEGT Action Plan, *supra* n. 1, at p. 7.

The Commission has acknowledged that direct help to partner governments to overcome these issues is needed as a part of the VPAs or as an additional measure to support the VPAs.

3.2. STRUCTURE

At this stage, the structure of voluntary partnership agreements remains indicative.⁹⁹ FLEGT licences are intended to be issued on the basis of a Legality Assurance System (hereinafter “LAS”) that helps ensure the legality of the timber. It consists of the following components (see fig. 1 below):

- (i) a definition of legal timber;
- (ii) a ‘Chain of Custody’ system to control the supply chain;
- (iii) a system to verify legality and to control the Chain of Custody system,
- (iv) a licensing authority, which checks the verification records and issues licences;
and
- (v) an independent monitoring system, needed to assure that the LAS is working as intended.

Agreement will be needed on the provisions and annexes relating to the country-specific timber products to be covered by the licensing scheme. Furthermore, the VPA is to appoint the licensing authority.

Finally, a Joint Implementation Committee consisting of representatives of the partner country, the European Commission, and the Member States is to be established to oversee implementation of each VPA.¹⁰⁰

⁹⁹ VPA Template, *supra* n. 20.

¹⁰⁰ *Id.*

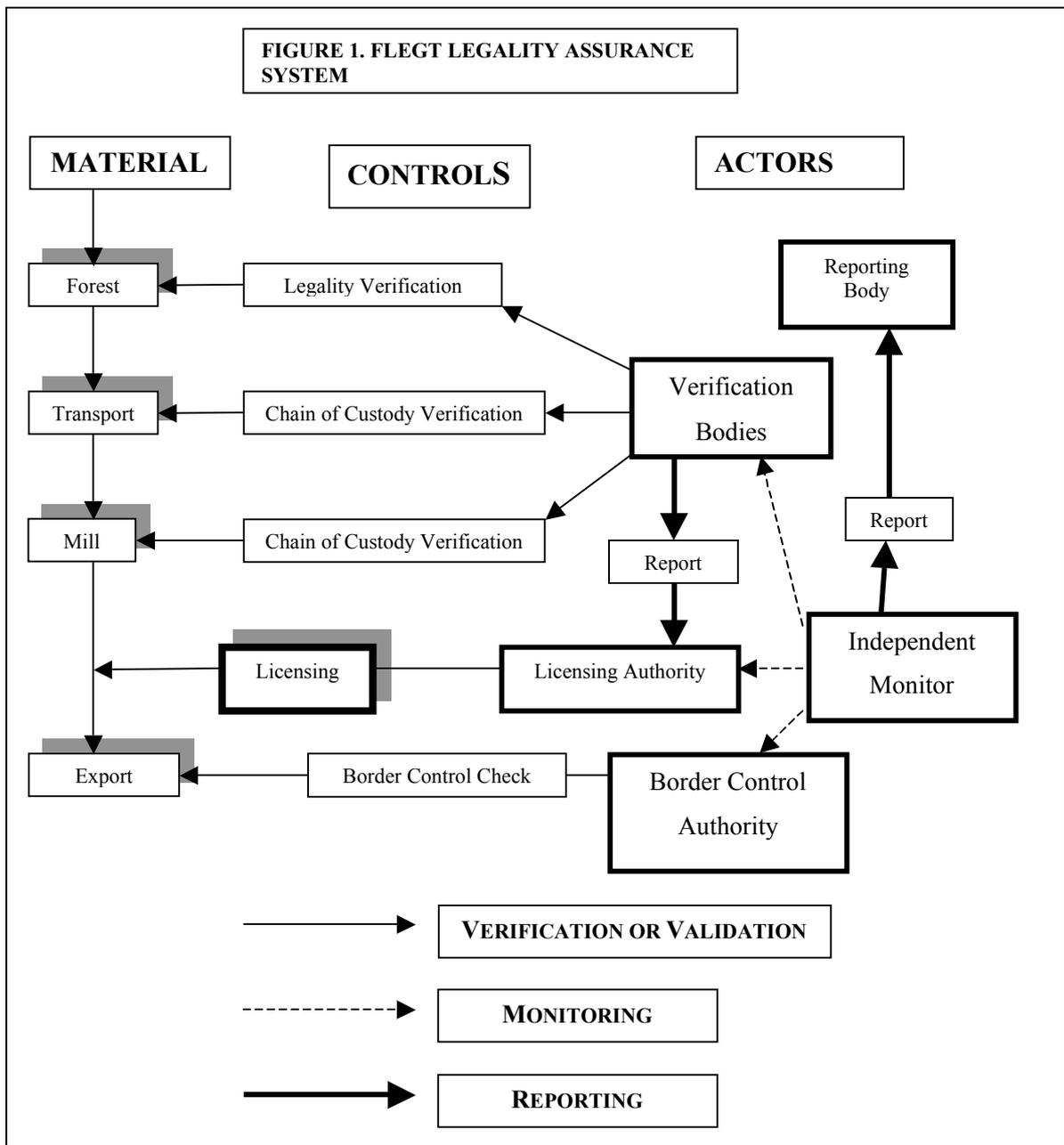


Figure 1: The operation of the FLEGT Legality Assurance System (LAS)¹⁰¹

3.2.1. The Components of the Legality Assurance System (LAS)

The LAS is made up of four components. The first is a definition of legally produced timber. For the licensing scheme to be efficacious, the definition of legally produced timber ought to be clear, enforceable, and objectively verifiable. This means that: (a) it must noticeably indicate which laws and regulations are applicable in the partner country, (b) it

¹⁰¹ Figure is based on a figure used in a report by A Contreras-Hermosilla and others *The Economics of Illegal Logging and Associated Trade Round Table on Sustainable Development* (2007) p.28, available at <http://www.oecd.org/dataoecd/36/18/37968440.pdf> (last visited Aug. 28, 2007).

must be easily understood, for instance, by law enforcement agents, who have to work with the definition, and (c) it should be possible, in a clear and practical manner, to verify compliance with the definition.¹⁰²

The second component is the Chain of Custody system. This consists of several mechanisms for tracing every intermediary who obtained ‘custody’ of the timber, from the point of harvest to the point of import. Each link in the supply chain has to be identified and the timber and timber products have to be controlled, in order to ensure traceability and legality of the timber and timber products. This is so long as the ‘chain of custody’ occurs within a FLEGT partner country.

The third component of the LAS is a system to verify legality and to control the Chain of Custody system. This will be carried out by a governmental organisation, a market participant, a third party organisation, or a combination of all three.¹⁰³

When these three components of the LAS are in place, the licensing authority is capable of issuing licences. Market participants may obtain their FLEGT licence only when the requirements of the LAS have been met.

An Independent Monitor is designated by the government of each partner country to make sure that all of the components of the VPA are operating as intended.¹⁰⁴ This is the fourth and last component of the LAS. This body will have a mandate to enable it to have access to the people, documents and sites necessary to carry out its function.¹⁰⁵ The Independent Monitor is to be free from interference by the partner country and by the EC. This is to ensure that the autonomy of the Independent Monitor is, and is seen to be, maintained. So far, no Independent Monitor has been designated.¹⁰⁶

¹⁰² Commission FLEGT briefing notes *What is Legal Timber* (2007) no. 2, p. 2.

¹⁰³ Commission FLEGT briefing notes *Legality Assurance System: Requirements for Verification* (2007) no. 5, p. 2.

¹⁰⁴ Licensing Regulation, *supra* n. 2, art. 2(14). The Licensing Regulation uses the term ‘third party monitor’. In other Commission publications on FLEGT the term has been used interchangeably with Independent Monitor: Compare Commission FLEGT briefing notes *Guidelines for Independent Monitoring* (2007) no. 7, p. 1.

¹⁰⁵ Commission FLEGT briefing notes *Guidelines for Independent Monitoring* (2007) no. 7, p. 1.

¹⁰⁶ As far as determining an Independent Monitor, the European Commission held a stakeholder discussion on the FLEGT Independent Monitoring System. The aim of the meeting was to explore a number of key questions concerning the principles and criteria of independent monitoring. Questions about independence, reporting, transparency and the costs of independent monitoring were raised during the meeting: DG Development and Relations with ACP States *FLEGT Independent Monitoring – Stakeholder Discussion Agenda* (21 May 2007). It is noteworthy to add that two of the participants in the discussion were from the independent monitoring company REM (Resource Extraction Monitoring: <http://www.rem.org.uk>, last visited Aug. 20, 2007). The expression of interest by REM shows an intention by this company to act as the independent monitor in some partner countries.

3.2.2. Timber Products

The types of timber products covered by the VPAs are limited due to the difficulties of ascertaining the origin of processed timber products.¹⁰⁷ In Annex II to the Licensing Regulation there is a short list containing five types of timber products to which the FLEGT licensing scheme will apply irrespective of the species of wood the timber product is made from. This list will apply to all partner countries. Annex III to the Licensing Regulation contains the timber products to which the FLEGT licensing scheme will apply only in relation to the corresponding partner countries.

3.3. PARTNER COUNTRIES: CASE STUDIES

Since 2005, discussions on the conclusion of voluntary partnership agreements have been taking place between the EC and certain potential partner countries: Indonesia, Malaysia, the Democratic Republic of Congo (hereinafter “DRC”), Ghana, Liberia and Cameroon. These consultations have been, or are being, supported by EC bilateral aid agencies in Malaysia by the Netherlands, in the DRC by France, in Ghana by the United Kingdom, and in Cameroon by Germany. The European Commission supports the consultation process in Indonesia.¹⁰⁸

3.3.1. Indonesia

Consultations between Indonesia and the EC concerning the objectives of the EU FLEGT Action Plan started in 2005. In January 2007, the parties announced their intentions to start VPA negotiations. The first formal negotiations on a VPA took place in Jakarta on the 29th and 30th March 2007.¹⁰⁹

During the first negotiation, the Indonesian Ministry of Forestry identified most of the key issues concerning the entering into of a VPA. In the opinion of the Government of Indonesia, a VPA should increase the access of Indonesian timber products to the EC market. Further, a VPA should not to be used as an approach to prohibit timber production, but to

¹⁰⁷ EU FLEGT Action Plan, *supra* n. 1, at p. 12.

¹⁰⁸ Global Agriculture Information Network (GAIN) report *FLEGT Regulation Adopted – State of the Voluntary Partnerships Agreement* (10 January 2006), available at <http://www.fas.usda.gov/gainfiles/200601/146176538.pdf> (last visited Aug. 20, 2007).

¹⁰⁹ Joint press release *The 1st Negotiation on FLEGT-VPA between Indonesia – European Commission*, available at <http://www.delidn.ec.europa.eu/en/newsroom/2007-FLEGTVPA1-EN.pdf> (last visited Sept. 13, 2007). More information on the negotiation process can be found at <http://www.eu-flegt.org> (last visited Aug. 20, 2007).

promote legal timber trade. Additionally, a VPA should not increase the cost and burden to Indonesian timber companies.

The delegations agreed to establish two working groups to identify and formulate recommendations on the necessary steps towards the conclusion of a VPA. These groups will work on the harmonization of the legality standard, as well as capacity building and incentive measures in enforcing national laws regarding the legal production of timber. At a further stage, a third working group will be set up to work on legislation and protocol matters. Other issues, such as timber laundering, will also be addressed in the negotiation. The second formal negotiation will be held in July 2007.¹¹⁰ The parties' objective is to have a VPA signed at the beginning of 2008.¹¹¹

3.3.2. Malaysia

The first 'Malaysia-European Commission Senior Officials Meeting on a Forest Law Enforcement Governance and Trade – Voluntary Partnership Agreement (FLEGT-VPA)' was held in Sarawak, Malaysia, on the 19th January 2006. The Second Senior Officials Meeting was held on the 17th and 18th April 2007, in Brussels.¹¹² The Malaysian and European Commission delegations agreed that further work is needed in developing a 'legality' definition, and that a consultation process with relevant stakeholders should be established. An interim meeting was scheduled for mid-June 2007 to further discuss issues related to the Malaysian regulation of its forestry industry to ensure the legality of timber and timber products. Furthermore, there should be further discussion on market access and capacity building. The date for the third Official Seniors Meeting, to be held in Malaysia, has been set for the 11th and 12th September 2007.

As part of the negotiation process, Malaysia and the European Commission have agreed to exchange proposals on certain areas of the licensing scheme.¹¹³ The ambition of both parties is to conclude negotiations by the end of 2007.¹¹⁴

Malaysia and the EC have already agreed to build the FLEGT licensing scheme upon an existing certification scheme. The certification for FLEGT licences has been entrusted to the

¹¹⁰ *Id.*

¹¹¹ Update on the EU FLEGT process in Indonesia, April 2007, *available at* http://www.loggingoff.info/media/articles/article_349.doc (last visited Sept. 13, 2007)

¹¹² Second Malaysia-European Commission Senior Officials Meeting, *available at* <http://www.illegal-logging.info/uploads/MalaysiaAgreedMinutespublic.doc> (last visited Sept. 13, 2007). More information is *available at* <http://ec.europa.eu/development/body/press-forum/c9-m1.html> (last visited Aug. 20, 2007).

¹¹³ *Id.*

¹¹⁴ *Id.*

Malaysian Timber Certification Council (hereinafter “MTCC”).¹¹⁵ The MTCC is the licensing authority issuing FLEGT licences for all timber products imported into the EC, so long as the timber products are covered by the Licensing Regulation.

3.3.3. African Countries

For the EU FLEGT Action Plan to have measurable effect, participation by African countries is needed as the problem of illegal logging, especially of tropical timber, is perhaps more rampant in this part of the world than in South East Asia. For that reason, FLEGT impact assessment reports urged for VPAs first to be concluded with African countries.¹¹⁶ The consultation process between the European Commission and several African countries is still ongoing. The DRC, Ghana, Cameroon, and Liberia have been positively identified as potential partner countries to sign VPAs. Cameroon and Liberia have expressed a desire to have a VPA,¹¹⁷ but little information is available about these countries’ involvement in the conclusion of VPAs.

In 2002, the DRC put a moratorium in place prohibiting the issuing, or re-issuing, of felling licenses. Despite this moratorium, Greenpeace has publicly identified French company, ITB, as obtaining renewed licenses for logging significant parts of forests in the DRC.¹¹⁸ The EC, together with France, has started consultations with the DRC for a VPA, but these efforts have yet to result in formal negotiations.

Ghana and the EC have released a joint statement concerning the conclusion of a VPA.¹¹⁹ Both parties have expressed their intentions to conclude a VPA, primarily because of the fact that the EC accounts for over 50 % of Ghana’s timber exports by volume and value.¹²⁰ Consultation between Ghana and the EC started on the 26th February 2007.¹²¹ The Ghanaian

¹¹⁵ More information about MTCC is available at <http://www.mtcc.com.my> (last visited Aug. 24, 2007).

¹¹⁶ Indufor *European Commission DG for Development: Impact Assessment of the EU Action Plan for FLEGT*, T/2004/002, 3 July 2004, 36. Commission Staff Working Document *Proposal for a Council Regulation concerning the establishment of a voluntary FLEGT licensing scheme for imports of timber into the European Community: Extended Impact Assessment* COM (2004) 515 final, 20 July 2004 p. 27.

¹¹⁷ Further up to date, country-based information is available at <http://www.loggingoff.info> (last visited Aug. 24, 2007)

¹¹⁸ Greenpeace report *Carving up the Congo* (2007) p. 3, available at <http://www.greenpeace.org.uk/media/reports/carving-up-the-congo> (last visited Aug. 28, 2007); Chatham House press release *Greenpeaces’ Report Shows Ongoing Illegal Logging in DRC*, 24 February 2007.

¹¹⁹ Joint statement on a voluntary partnership agreement on FLEGT between Ghana and the European Community (2006), available at http://ec.europa.eu/development/body/tmp_docs/2006/joint_vpa_statement_ghana_final.pdf (last visited Aug. 20, 2007).

¹²⁰ Ghanaian Ministry of Lands, Forestry and Mines *VPA Briefing Paper 1* February 2007. More information is available at <http://www.fcghana.com> (last visited Aug. 20, 2007).

¹²¹ *Id.*

Ministry of Lands, Forestry and Mines created a road map¹²² identifying the steps that have to be taken to agree upon a VPA with the Commission. According to this road map, the second round of formal negotiations was to be held in June 2007, a third round in September 2007, and the final step should be the conclusion and signing of a VPA in December 2007. This process has already been subject to some delay. According to the notes from the second Ghana-European Commission negotiation session,¹²³ which was held on the 15th of June 2007 in Brussels, the third negotiation meeting will be held in mid-January 2008, and the fourth and final meeting in the spring of 2008.

¹²² *Id.*

¹²³ Second Ghana-European Commission Negotiation Session on a Forest Law Enforcement *Governance and Trade Voluntary Partnership Agreement* June 15 2007. See <http://www.illegal-logging.info> (last visited Aug. 20, 2007).

4. PRIVATE SECTOR INITIATIVES AND PARTICIPATION CONDITIONALITY

The EU FLEGT Action Plan recommends initiatives to ensure the contribution of the private sector¹²⁴ to the efficient implementation of the measures aimed at combating illegal logging. Private parties can be involved in two different ways: (i) through the process of implementation of the EU FLEGT Action Plan at the national level,¹²⁵ or (ii) by participating in the negotiation of the licensing regime.¹²⁶ Private parties situated in the EC can be involved in the former; while the private sector of partner countries can be involved in the latter.

4.1. PRIVATE SECTOR INITIATIVES

The involvement of private parties in EC Member States should be conducted in accordance with the principle of Corporate Social Responsibility (hereinafter “CSR”).¹²⁷ This principle refers to the situation where companies voluntarily integrate social and environmental concerns into their business operations and in their interactions with stakeholders.¹²⁸ As far as achieving the goal of sustainable forestry management, private parties are encouraged to integrate the EU FLEGT Action Plan into their business operations.

In the context of the EC, CSR operates through the European Multi-Stakeholder Forum on Corporate Social Responsibility (hereinafter “the Forum”).¹²⁹ The Forum, chaired by the Commission, brings together European representative organisations of employers, business networks trade unions and non-governmental organisations (NGOs) to promote innovation, convergence, and transparency in existing CSR practices and tools. Forum thematic round

¹²⁴ EU FLEGT Action Plan, *supra* n. 1, at p. 16.

¹²⁵ *Id.*, p. 17.

¹⁷⁴ *Id.*, p. 18.

¹²⁷ Communication from the Commission *Corporate Social Responsibility: A Business Contribution to Sustainable Development* COM (2002) 347 final, 2 July 2002 (hereinafter: *CSR Communication*). CSR has also been developed by the Commission, in Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* COM (2006) 136 final, 22 March 2006, and, European Commission *Promoting a European Framework for Corporate Social Responsibility: Green Paper* COM (2001) 366, 18 July 2001. Concerning civil society dialogue: Commission of the European Communities *European Governance: White Paper* COM (2001) 428, 25 July 2001.

¹²⁸ *CSR Communication*, p. 3.

¹²⁹ European Commission *European Multi-stakeholder Forum on Corporate Social Responsibility: Final Results and Recommendations* (29 June 2004) (hereinafter: *2004 CSR Multi-stakeholder Forum Report*), available at http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20ems%20forum.htm (last visited Aug. 20, 2007). See also Eurofond, Multi-stakeholder forum issues CSR recommendations, *available at* <http://www.eiro.eurofound.eu.int/2004/07/feature/eu0407205f.html> (last visited Aug. 20, 2007).

tables exchange good practices, and assess the appropriateness of establishing common guiding principles for CSR practices and instruments.¹³⁰

The Forum reasserts the contribution private parties can make to sustainable development by adhering to the principles of CSR.¹³¹ To create certainty for private parties, the EC institutions and the governments of EC Member States should be consistent in their policies concerning CSR. In particular, consistency needs to be shown in the appropriate trade and development policies and international agreements.¹³² Forum participants agree on the need to foster good public and private governance in developing countries.¹³³ The Forum suggests carrying on the business practices and CSR initiatives in light of the effect they may have on the sustainable development of natural resources in developing countries.¹³⁴

The trend set by the Forum is followed up in the EU FLEGT Action Plan. The Plan specifies that CSR relies less on prescriptive measures and more on encouraging the EC private sector to work with the private sector in timber-producing countries. As a matter of principle, voluntary codes of practice for timber harvesting and procurement, supplemented by a rigorous independent and voluntary audit of the supply chain, ought to guide co-operation between the respective private sectors. This approach is likely to be particularly effective where the international timber market is characterised as being an oligopoly.¹³⁵

The voluntary licensing scheme aims to assist this type of initiative¹³⁶ by introducing a reliable mechanism for the private sector, in the partner countries, to differentiate their legal timber products from illegal timber products. The Forum considers that “positive differentiation”¹³⁷ for particular products or services can be achieved by carrying a label or

Some organizations currently grant voluntary forest management certificates that could be used as reference for FLEGT schemes:

- Forest Stewardship Council (FSC)
<http://www.fsc.org/en/>
- Programme for the Endorsement of Forest Certification (PEFC) Council
<http://www.pefc.org/internet/html/>
- Canadian Standards Association (CSA) Sustainable Forestry Initiative (SFI)
<http://www.sfiprogram.org/sfilabel.cfm>
- Indonesian Eco-labelling Institute (LEI)
<http://www.lei.or.id/indonesia/>
- Malaysian Timber Certification Council (MTCC) <http://www.mtcc.com.my/>
- The Australian Forestry Standard.
<http://www.forestrystandard.org.au/>

¹³⁰ The Forum’s mandate was approved at the launch on 16th October 2002. High level meetings took place in 2003 and 2004 to take stock of progress, and findings and conclusions were presented to the Commission on 29th June 2004. The Forum is the centrepiece of the Commission strategy for promoting CSR and sustainable development, as set out in the CSR Communication of July 2002.

¹³¹ 2004 CSR Multi-Stakeholder Forum Report, *supra* n. 129, at p. 20.

¹³² *Id.*, pp. 16, 109 and 118.

¹³³ *Id.*, p. 93.

¹³⁴ *Id.*, p. 91.

¹³⁵ EU FLEGT Action Plan, *supra* n. 1, at p. 17.

¹³⁶ *Id.*

¹³⁷ 2004 CSR multi-stakeholder forum report, *supra* n. 129, at p. 124. The report exemplified a case of a partnership between ‘B&Q’, a UK home improvement retailer, and the Forest Stewardship Council (FSC). B&Q was challenged about where its timber was from, and the way source forests were managed. B&Q found in the FSC international labelling scheme for forest products a useful tool to provide a credible guarantee that the product comes from a well-managed forest. All forest products carrying the logo are independently certified.

meeting a standard awarded by a third party.¹³⁸ This can boost the reputation of a company's brand and their product, attract the recognition from other certification bodies, and build market integrity. Other benefits could be in the form of product labels awarded by independent bodies, or, approval for certified management standards from analysis and rating agencies.¹³⁹

Practical action schemes have developed to push forward the boundaries of CSR. One example is the "Extractive Industries Transparency Initiative".¹⁴⁰ This practical action scheme aims to address the key issue of governance of natural resources and the revenues flowing from their extraction. Although the initiative focuses on oil, gas, and mining; the principles established for the co-operation between the private sector, and the producing and consuming countries, could be applied, *mutatis mutandis*, to the CSR of private parties, who are integrating the EU FLEGT Action Plan into their business operations.¹⁴¹

An alternative framework is promoted by the Tropical Forest Trust. It works by linking the wood supply chain from producers to suppliers and from suppliers to buyers who want to procure sustainable and legally-produced timber products.¹⁴² This scheme includes assistance with: (i) the development of codes of conduct and wood procurement; (ii) understanding the current situation on forest policy, the views of stakeholders, and issues faced by timber-producing countries; (iii) the identification of legal resources; (iv) on-going assessments of sustainable forest management; (v) technical assistance to improve sustainable forest management; and (vi) the audit of members' performance.¹⁴³

¹³⁸ *Id.*, p. 109.

¹³⁹ *Id.*

¹⁴⁰ It was launched at the World Summit on Sustainable Development and now is being further developed by the G8. *See* EU FLEGT Action Plan, *supra* n. 1, at p. 17.

¹⁴¹ *Id.*

¹⁴² TFT members invest a fixed percentage of their products gross margin to fund TFT activities, and therefore secure a more ethical wood supply

¹⁴³ *Id.* Other existing frameworks currently aid the private sector to choose from different certification systems, for example: Online Comparative Matrix of Forest Certification Scheme (2004) launched by the Confederation of European Paper Industries (CEPI); International Mutual Recognition Framework (2001), a proposal of the International Forest Industry Roundtable (IFIR); Forest Certification Assessment Guide (FCAG) developed by WWF and the World Bank - working together under the Alliance – Questionnaire for Assessing the Comprehensiveness of Certification Schemes (QACC); Footprints in the Forest (2004) by Forests and the European Union Resource Network (FERN) assesses the key strengths and weaknesses of eight certification schemes, based on eight case studies; UK's Assessment of Five Forest Certification Schemes (DEFRA) commissioned by the UK Government; The Forest Dialogue (TFD) reports on the reviews of forest certification schemes and compares four certification frameworks (CEPI, IFIR, QACC and FERN). *See* <http://research.yale.edu/gisf/assets/pdf/tfd/certreview.pdf> (last visited 31 August 2007).

4.1.1. Private Initiatives in the Netherlands

Private parties in the Netherlands are involved in the implementation of the EU FLEGT Action Plan into the formulation of codes of conduct to ensure that only legally produced timber products enter the EC.

One important private initiative taken for that purpose includes the Forest Stewardship Council (hereinafter “FSC”), an international non-profit organisation operating in 75 countries worldwide, and whose mission is to promote environmentally responsible, socially beneficial and economically viable management of the world’s forests.¹⁴⁴ The Dutch Chapter of the FSC was founded in September 1999, and at the moment 154 companies are participating in FSC the Netherlands.¹⁴⁵

Another private sector initiative is from the *Vereniging van Nederlandse Houtondernemingen* (hereinafter “VVNH”). The VVNH is an association of 300 wholesale companies in timber. Upon signing the VVNH code of conduct in December 2003, all members made a commitment to ensure that they only import legally produced timber onto the Dutch market. This includes timber being produced in compliance with international laws and regulations as well as the national laws of the various timber-producing countries.¹⁴⁶

A drawback of this initiative is the lack of enforcing compliance. To meet this deficiency, VVNH works together with *Keurhout*, a former Dutch foundation that since 2004 is facilitated by the VVNH. *Keurhout* has developed the *Keurhout* Protocol for the Validation of Claims of Legal Timber,¹⁴⁷ a system to verify the legal source of the timber.

A second initiative of the VVNH is a project called ‘pilot project Indonesia chain of custody and legality’. This project, which started in February 2004, is meant to develop and test a transparent and workable chain of custody system in Indonesia. The project is still running.¹⁴⁸

¹⁴⁴ More information about FSC is available at <http://www.fsc.org/en/about> (last visited Aug. 20, 2007).

¹⁴⁵ More about FSC The Netherlands is available at <http://www.fscnl.org> (last visited Aug. 20, 2007).

¹⁴⁶ VVNH Code of Conduct, Rule 1, available at <http://www.vvnh.nl/> (last visited Aug. 20, 2007).

¹⁴⁷ More information about the Keurhout Protocol is available at <http://www.keurhout.nl> (last visited Aug. 20, 2007).

¹⁴⁸ More information about the initiatives of the VVNH is available at <http://www.vvnh.nl> (last visited Aug. 20, 2007).

4.2. PRIVATE SECTOR PARTICIPATION IN VOLUNTARY PARTNERSHIP AGREEMENTS

The available VPA template¹⁴⁹ envisages the participation of civil society in partner countries, into the process of design and implementation of the licensing scheme. Specifically, Article 6 on capacity building measures and communication will include “a general text on support for improved traceability and legal verification, and for FLEGT licensing, and, where relevant, broader support on related matters such as stakeholder consultation processes, including private sector, training of staff, market studies, etc.” Article 7, on consultation, refers to “stakeholder involvement in partnership agreement design and implementation”.

The manner in which the private sector will participate is not prescribed in any detail. However, we can assume that the various forms of participation will be comparable to those existing participatory mechanisms in other EC agreements concluded with third parties. The Cotonou Agreement will be used as an example in order to demonstrate how a participation conditionality clause operates.

4.2.1. Participation of Civil Society in the Cotonou Agreement

On the 23 June 2000, 15 EC Member States and 77 Sub-Sahara African, Caribbean and Pacific countries (hereinafter “ACP Countries”) signed the Cotonou Agreement, replacing the former Lomé Convention. The Cotonou Agreement is a partnership agreement¹⁵⁰ with the objective of eradicating poverty in the ACP countries for the purpose of sustainably developing their economies so as to gradually integrate the ACP countries into the world economy.¹⁵¹

The importance of civil society participation is expressly stated in Article 1 of the Cotonou Agreement. This Article defines the objectives of the partnership as “building the capacity for the actors in development and improving the institutional framework necessary for social cohesion, for the functioning of a democratic society and market economy, and for the emergence of an active and organised civil society shall be integral to the approach”.¹⁵²

¹⁴⁹ VPA Template, *supra* n. 20, at 6-7.

¹⁵⁰ O Barbarinde and G Faber *From Lomé to Cotonou: ACP-EU Partnership in Transition* in O Barbarinde and G Faber (eds) *The European Union and the Developing Countries – The Cotonou Agreement* (Nijhoff; Leiden, 2005) pp. 1-3.

¹⁵¹ Cotonou Agreement of 2000, article 1.

¹⁵² M Carbone “*The Role of Civil Society in the Cotonou Agreement*” in O Babarinde and G Faber (eds) *The European Union and the Developing Countries - The Cotonou Agreement* (Nijhoff; Leiden, 2005) p. 186.

Article 6 uses the term ‘non-state actors’. This term includes the private sector, economic and social partners (including trade union organisations), and, civil society in all its forms, according to national characteristics.¹⁵³ In the context of the Cotonou Agreement ‘civil society’ is not restricted to NGOs. But to be represented, non-state actors ought to have clearly defined interests and should operate in a transparent and accountable manner.¹⁵⁴

Article 2 includes participation as one of the four ‘fundamental principles’ of cooperation: “apart from the central government as the main partner, the partnership shall be open to different kinds of the other actors in order to encourage the integration of all sections of society, including the private sector and civil society organisations, into the mainstream of political, economic, and social life”.¹⁵⁵

Concerning the forms of participation, Article 4 of the Cotonou Agreement establishes that, ‘where appropriate’ non-state actors must be: i) informed and involved in consultation on cooperation policies and strategies; ii) provided with financial resources, under the conditions laid down in the Agreement; iii) involved in the implementation of cooperation projects and programs in areas that concern them or where these actors have comparative advantage; and iv) provided with capacity building support in critical areas in order to reinforce the capabilities of these actors, particularly as regards organisation and representation. Further, it provides for the establishment of consultation mechanisms including channels of communication and dialogue; and it promotes strategic alliances.¹⁵⁶

Although the Cotonou Agreement does not contain specific dispositions to implement these new provisions, specific guidelines are incorporated in the ‘Compendium on Cooperation Strategies’ and the ‘Guidelines for Programming under the 9th European Development Fund’ (hereinafter “EDF”).¹⁵⁷ Programming is the process of consultation by which resources are allocated. The first step is the elaboration of a Country Support Strategy; the second step is, on the basis of the Country Support Strategy, to draw up a National Indicative Programme (hereinafter “NIP”) with concrete operations and focal areas. This

¹⁵³ *Id.* According to the learned author this means, first, European civil society organisations are not included in this definition, even though in other parts of the agreement there is a reference to a partnership between ACP and EC civil society actors. Second, the recognition of non-state actors is to be done by the ACP Group and the EC and depends ‘on the extent to which they address the needs of the population, on their specific competencies, and whether they are organised and managed democratically and transparently’. Third, the Cotonou Agreement does not restrict ‘civil society’ to NGOs. A broader concept is used to include categories such as human rights groups, grassroots organisations, women’s associations, environmental movements, farmers’ organisations, indigenous peoples’ representatives, religious organisations, research institutes, cultural associations, and media.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*, p. 187.

¹⁵⁷ The European Development Fund is the main instrument for development cooperation in the ACP countries. It is not part of the general EC budget, but it is funded by the Member States, covered by its own financial rules, and managed by a specific committee. The Member States set the EDF budget in the Council via agreements that are subsequently ratified by the national parliament of each State: *Id.*

programme will be valid for five years subject to annual reviews and a ‘performance test’. The performance test will take place every two-and-a-half years for the five year period.

With regard to implementation, non-state actors are provided with financial resources. The Cotonou Agreement has rationalised the grant instruments in a single long-term ‘development envelope’.

Resources can then be administered in an integrated and coherent manner. Non-state actors can access financial resources in three ways: i) direct access to EDF resources, via the EC delegations, that can be used, *inter alia*, for activities related to information, consultation, dialogue, and capacity building; ii) other EDF resources that may not be part of the NIP;¹⁵⁸ and iii) resources from the EC budget as part of the budget lines for external actions, managed by the Commission and monitored by the European Parliament. Aid is allocated according to an assessment of each country’s needs and performance, combined with regular adjustments through a ‘rolling programming’ system.¹⁵⁹ Non-state actors must be consulted when the national programs are reviewed, and the civil society organizations can criticize and contribute to the improvement of the development cooperation programs.

EU Forest Action Plan

Key action 16: Strengthen the EU profile in international forest-related processes

“Although the Commission will no longer have a specific financing instrument for forests after 2006, there will be opportunities for financial support from 2007 on country or regional programmes. This will allow support to continue Multilateral Environmental Agreements and forest policy processes to continue. The FLEGT Action Plan will be another priority objective for support from the Commission and Member States, in particular for capacity building in FLEGT partner countries.” Brussels, 15.6.2006
COM (2006) 302 final

Civil society should be involved in political dialogue. The Cotonou Agreement does not provide details on how this role should be played.¹⁶⁰

On capacity building support, the role of the EC delegations as critical observers and as facilitators is fundamental, and the challenge of northern NGOs is to “gradually move away from direct intervention at operational level and to develop closer partnerships with their southern partners”.¹⁶¹ The European Commission has stated that northern NGOs

¹⁵⁸ Three types of resources are foreseen: i) public-private partnerships, ii) decentralized cooperation, and, iii) micro-projects: *Id.*, p. 190.

¹⁵⁹ For further information: P Hoebink “*European Development Aid in Transition*” in O Babarinde and G Faber (eds) *The European Union and the Developing Countries - The Cotonou Agreement* (Nijhoff; Leiden, 2005) p. 127-153.

¹⁶⁰ Carbone, *supra* n. 152, at p. 191.

¹⁶¹ *Id.*, at p. 192.

can provide assistance for facilitating and promoting the initiation or consolidation of in-country dialogue processes, and helping key organizations to participate in the dialogue, in the programming exercise and in the drawing up of programs involving the allocation of resources to non-state actors. These activities should be furthered in terms of transferring know-how to rural and marginalized populations, advancing not only an 'inclusive participatory approach', but also ownership of the development process at large.¹⁶²

4.2.2. Participation Criteria

Existing documents or templates do not make it clear according to which criteria civil society should be involved in the process of designing VPAs and implementing the licensing scheme. There are still outstanding questions that need to be answered: who is going to decide the rules for participation in third countries? Would each VPA define the rules, or should the issue be decided independently by the relevant partner country? If the VPA defines the rules, and it ought to be expressly stipulated in the Agreement, then it is probable that those rules could then be used as a minimum standard¹⁶³ for the European Commission to conduct their consultation with civil society groups, concerning European legislative proposals.¹⁶⁴

However, the European Commission has emphasised that standards required under European law should not be applicable on the consultations required by international agreements.¹⁶⁵ Nevertheless, the European Commission recently applied those standards on consultation required under the Aarhus Convention.¹⁶⁶ The Commission set five minimum standards,¹⁶⁷ which give slightly more concrete requirements for the Commissions' conduct in the consultation process.¹⁶⁸ The application of those standards has been reaffirmed in the

¹⁶² Commission of the European Communities *Participation of Non-State Actors in EC Development Policy* COM (2002) 598, 07 November 2002, p. 16.

¹⁶³ Commission of European Communities *European Governance: White Paper* COM (2001) 428, 25 July 2001 p. 17.

¹⁶⁴ Communication from the Commission *Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission* COM (2002) 704, 11 December 2002. Those standards have been supplemented by European Commission *Draft Recommendations to Member States regarding a code of conduct for non-profit organisations to Promote Transparency and Accountability Best Practices: An EU Design for Implementation of FATF Special Recommendations VIII-Non Profit Organization* JLS/D2/DB/HSK D(2005) 8208.

¹⁶⁵ Communication from the Commission *Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission* COM (2002) 704, 11 December 2002 pp.15-16.

¹⁶⁶ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, OJ L 264, 25 September 2006. Convention on Access to Information, Public participation in Decision-making and Access to Justice in Environmental Matters signed at Aarhus, Denmark, 25 June 1998.

¹⁶⁷ The codification of standards for the conduct of the civil dialogue is accompanied with the establishment of the CONECCS database (Consultation, European Commission and Civil Society).

¹⁶⁸ D Obradovic and JMA Vizcaino *Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations* (2006) 43 CML Rev 1049 p. 1055.

‘Follow up to the Green Paper European Transparency Initiative’¹⁶⁹ and should be applied together with the principles of participation, openness, accountability, effectiveness and coherence.¹⁷⁰

- i) Transparency in the consultation process. All communications relating to consultations should be clear and concise, and should include all necessary information to facilitate responses;
- ii) Consultation target groups. When defining the target group(s) in a consultation process, the European Commission should ensure that the relevant parties have an opportunity to express their opinions;
- iii) Publications. The European Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Open public consultations should also be published on the Internet and announced at the single access point;
- iv) time limits for participation. The European Commission should provide sufficient time for planning and responses to invitations and written contributions,¹⁷¹ and
- v) Acknowledgement and feedback. Receipt of contributions should be acknowledged, and displayed on websites linked to the single access point on the Internet.

4.3. CONSULTATION PROCESSES IN POTENTIAL PARTNER COUNTRIES

Currently there are no uniform rules for conducting the consultation with civil society in countries potentially interested in signing voluntary partnership agreements with the EC. The consultation process is fragmented and involves many leading actors in different potential partner countries.

The following examples show how each country is developing mechanisms and channels of communication, and that some EC Member States are directly involved in the

¹⁶⁹ Communication from the Commission *Follow-up to the Green Paper ‘European Transparency Initiative’* COM (2007) 127 final, 21 March 2007, pp. 6-8.

¹⁷⁰ D Obradovic *Civil Society and the Social Dialogue in European Governance* (2005) vol. 24 Year Book of European Law p. 270.

¹⁷¹ At least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings. See Obradovic & Vizcaino, *supra* n. 168, at p. 1055.

dialogue with several countries. For instance, the United Kingdom is involved in Liberia and Ghana; Germany in Cameroon; the Netherlands in Malaysia; and Spain in Ecuador.

It is not clear to what extent the EC is applying its own minimum standards for consultation with EC civil society to the dialogue with potential partner countries. To avoid double standards, it would be desirable that the principles and standards adopted in the EC since 2003 also apply to the negotiation of a VPA between the EC and partner countries.

4.3.1. Ghana

The Ministry of Lands Forests and Mines (MLFM) appointed a Steering Committee in May 2006. The Committee was originally composed of representatives from State agencies and the timber industry, and the facilitator in Ghana of International Union for the Conservation of Nature and Natural Resources¹⁷² FLEG programme. Following recommendations by the Steering Committee, Forest Watch Ghana, a coalition of Ghanaian NGOs, was invited to participate in the Committee.¹⁷³

Following up the joint statement for the negotiations on the VPA between the Government of Ghana and the EC, in 2006, a delegation from the European Commission¹⁷⁴ visited Ghana and met with representatives from the forest industry, civil society and local communities. The Government of Ghana and the EC agreed on elements that need to be addressed during the negotiations.¹⁷⁵ The roadmap outlines a participatory process, development of mechanisms for policy reforms in the forest sector, and discussions on law enforcement and governance.

The negotiation elements will go through a process of consensus building among stakeholders. The VPA Steering Committee will oversee and collate views on the consultative process. Stakeholders are being consulted in separate sessions, on five elements: i) the legal standard/definition; ii) the licensing system and the associated institutional arrangement, iii) a chain of custody system;¹⁷⁶ iv) an independent monitoring system; and v) the impact assessment and mitigating measures.

¹⁷² See generally World Conservation Union, available at <http://www.iucn.org/> (last visited Aug. 14, 2007).

¹⁷³ More information is available at <http://www.loggingoff.info/country> (last visited Aug. 20, 2007).

¹⁷⁴ The delegation was led by Luis Riera Figueras, Director in Directorate Generale for Development and the Government of Ghana negotiation team was led by the Hon. Adjei-Yeboah: Joint Ghana – European Union press release *Forest Law Enforcement Governance and Trade* (2nd March 2007).

¹⁷⁵ Including standard of legality, verification system, domestic market, mitigating the impacts on livelihoods of the transitions to legality, market access and trade promotion, and, monitoring indicators of the VPA.

¹⁷⁶ The development of the chain of custody system and the verification system has enjoyed a number of stakeholder consultations since 2005: Ministry of Lands, Forestry & Mines – Ghana VPA Briefing Paper 2 April 2007.

4.3.2. Cameroon

Officials of the German Agency of Cooperation (GTZ) are leading the development of the VPA in Cameroon. In December 2004, 27 groups (who form part of the EC Forest Platform Cameroon (hereinafter “the Platform”), an open network supported by Forests and the European Union Resource Network) met to discuss their involvement in the FLEGT process. On April 2005, a meeting took place in Yaoundé between representatives of the German Government, the EC delegation, the Government of Cameroon and international NGOs (International Union for the Conservation of Nature and Natural Resources and World Wide Fund for Nature) to prepare the strategy leading to the signature of the VPA. Since then, the civil society and indigenous people’s organizations of Cameroon have met several times to outline joint plans of action for the involvement of civil society in the development of the VPA and to set up working groups.

The Platform called on the Government of Cameroon to guarantee the representation of civil society organizations in the preparation, negotiation and implementation of the VPA. The Platform established a mechanism to share information and reach decisions that allow interested groups to follow the process.¹⁷⁷ A group of NGOs is preparing a document proposing the necessary elements of indigenous peoples’ rights in the legality definition, as well as their participation in the implementation process.¹⁷⁸ However, a document prepared by the Platform points out the absence of an efficacious administrative institution; the absence of a clear calendar with respect to the stages of the process; and the absence of a formal channel of consultation and information.¹⁷⁹

4.3.3. Liberia

In November 2006, a delegate from the United Kingdom Department for International Development¹⁸⁰ visited Liberia with the purpose to hold series of meetings with stakeholders groups including government, industry and civil society representatives, aimed at increasing

¹⁷⁷ EC Forest Platform *Final Statement of the European Community Forest Action Platform Workshop on Cameroon European Union Voluntary Partnership Agreement* (21-22 September 2005), available at http://www.loggingoff.info/media/articles/article_221.pdf (last visited Aug. 28, 2007).

¹⁷⁸ For the working schedule see <http://www.loggingoff.info/country> (last visited Aug. 20, 2007).

¹⁷⁹ Plateforme forêts Communauté Européenne note d’information *L’Accord de Partenariat Volontaire au Cameroun : Evaluation du processus* March 2007, available at http://www.fern.org/media/documents/document_3925_3926.pdf (last visited Aug. 28, 2007).

¹⁸⁰ See generally <http://www.loggingoff.info/country> (last visited Aug. 20, 2007).

awareness amongst these stakeholders on the key elements of the EU FLEGT Action Plan and VPAs.¹⁸¹

Following a letter dated December 2006, several preliminary discussions on the EU FLEGT Action Plan and VPAs were held, from which the Liberian Government, through the Forestry Development Authority, informed the European Commission's delegation to Monrovia that Liberia is considering entering into a VPA.

4.3.4. Indonesia

The Steering Committee in Indonesia is chaired by the Secretary General of the Department of Forestry and there are five members representing the private sector, indigenous people and members of local communities, NGOs, and experts. Two national and two regional multi-stakeholder public consultations were conducted by the Ministry of Forestry in 2006. The three main concerns were i) how to stop third country laundering of illegal timber; ii) the need for a reciprocal obligations between partners, so that were Indonesia to only export legal timber, the EC should agree to only import legal timber; and iii) the EC must respect the legality standard Indonesia has already developed.¹⁸²

As a result of the consultation process, the Indonesia Civil Society (ICS) Groups presented a paper on 'Legality Verification'.¹⁸³ It states a definition of legal timber¹⁸⁴ and summarizes key points of interest, such as the need for a credible organisation that is independent, transparent and appointed by the Government of Indonesia, to implement the legality verification. To maintain independence, such organisation should be audited by an independent third party.

Furthermore, the Indonesian Civil Society has agreed on 'Principles from Indonesian Civil Society for a Voluntary Partnership Agreement'.¹⁸⁵ These include, *inter alia*,

¹⁸¹ Loggingoff.info press release *Major Developments in Forest Sector - Update on Forest Sector Reform Process* (27 February 2007), available at http://www.loggingoff.info/media/articles/article_284.pdf (last visited Aug. 28, 2007).

¹⁸² EU-Indonesia VPA FLEGT Official Update (10 April 2007), available at <http://www.loggingoff.info/country> (last visited Aug. 20, 2007).

¹⁸³ ICS *NGO Briefing Paper on Legality Verification in Indonesia* (2006), available at http://www.loggingoff.info/media/articles/article_268.pdf (last visited Aug. 28, 2007); ICS *Briefing Paper on Forest Law Enforcement* (available at http://www.loggingoff.info/media/articles/article_272.pdf, last visited Aug. 28, 2007) recommends a comprehensive strategy to curb forest crime and the use of the Anti-Money Laundering Act and the Anticorruption Act to prosecute the masterminds behind forest crime.

¹⁸⁴ Timber is legal when the validity of its origin, logging permit, logging system and procedures, administration and transport documentation, processing, and trade to transfer are verified as meeting all applicable legal requirements: ICS *NGO Briefing Paper on Legality Verification in Indonesia* (2006) p. 1.

¹⁸⁵ The agreement is the outcome of a consultation process amongst Indonesian Civil Society Groups through a series of workshops, meetings and seminars between 2004 and 23-24 February 2005. See generally <http://www.loggingoff.info/countries> (last visited Aug. 20, 2007).

- i) the involvement of stakeholders in every step of the process for a VPA, which should recognize the ‘Free and Prior Informed Consent’ principles through a consultation process;
- ii) transparency in the negotiation process between the Government of Indonesia and the EC, with clear information and adequate communication;
- iii) transparency and participation in any changes to legislation as a pre-requisite for good forest management;
- iv) the full participation of stakeholders in the definition of legality;
- v) participation of civil society ensured in the mandate of negotiation, and;
- vi) a civil society ‘Independent Spot Check Monitoring’ system to enhance the credibility for the official legality verification.

4.3.5. Malaysia

The key materials produced by the civil society in Malaysia for the VPA negotiations are contained in three documents: the Report on ‘Forest Governance in Malaysia’,¹⁸⁶ a document on the ‘Key Principles for the Malaysia-EU FLEGT Voluntary Partnership Agreement’,¹⁸⁷ and a Briefing Paper submitted by the Friends of Earth on the key issues of logging in Malaysia.¹⁸⁸

The Report on forest governance recommends that the process should start with an open and honest debate including communities, indigenous peoples and civil society groups to define what is legal and not legal. To facilitate this debate a proper analysis of all existing legislation is needed. This includes an analysis of the Federal Constitution, the state forest and land laws, the Orang Asal’s *adat* law, legal and human rights instruments and institutions, both within and outside Malaysia, as well as court decisions, including those of Native courts.¹⁸⁹ Moreover, the Reports point out the importance of full recognition of customary land rights as a basis of any legitimate claim to forest resources;¹⁹⁰ and recommends the

¹⁸⁶ JOANGO Hutan report *Forest Governance in Malaysia: An NGO perspective* (2006), available at http://www.fern.org/media/documents/document_3754_3755.pdf (last visited Aug. 28, 2007).

¹⁸⁷ Submitted by JOANGO Hutan and Jaringan Orang Asal SeMalaysia to the European Union Delegation for Forest Law Enforcement, Governance and Trade (15 January 2007).

¹⁸⁸ Sahabat Alam Malaysia – Friends of the Earth *Briefing Paper I, Logging in Malaysia, Some Key Issues* (15 January 2007).

¹⁸⁹ JOANGO Hutan report, *supra* n. 186, at p. 32.

¹⁹⁰ *Id.*, p. 33.

constitution of a national body, with civil society involvement, provided with the political and legal clout to ensure that its decisions are implemented.¹⁹¹

The ‘key principles’ listed in the Briefing Paper include:

- i) consultation and engagements based on openness, transparency, and the free flow of information;
- ii) reforms in forest governance and legislation that observe transparency in the decision-making process of the licensing of timber extraction activities, strengthening the recognition on native customary rights, and best practices in environmental conservation;
- iii) a definition of legality that should contain basic principles of responsible forest management and the recognition of indigenous peoples rights;
- iv) safeguard mechanisms against illegal mixing of timber and trans-boundary timber movement;
- v) guarantee of legality;
- vi) certification, verification, monitoring and independent third party assessments, taking into account that the Malaysian Timber Certification Council is not the appropriate body for this purpose;
- vii) repeatability, consistency, and corrective mechanisms;
- viii) strengthening of enforcement capacity, particularly through a system of monitoring by independent organisations with civil society involvement;
- ix) anti-corruption measures that incorporate the capacity of civil society and community groups to carry out monitoring and verification activities; and
- x) clear targets and schedules, in order that the Malaysian Government and/or civil society groups as well as European Governments and/or civil society groups can coordinate efforts.

The Briefing Paper covers different areas of concern, from environmental to social issues. It mentions statistics of forest cover¹⁹² in Malaysia, as well as issues to take into account in evaluating the sustainability of timber production. The Briefing Paper concludes

¹⁹¹ *Id.*, p. 34.

¹⁹² Forest cover means an area of land consisting of forest stands or cover types of a plant community made up of trees and other woody vegetation growing closely together. See <http://www.borealforest.org/nwgloss4.htm> (last visited Aug. 14, 2007). Forest cover is one of the best single indicators of the changes in land use. Shrinking forest cover shows the felling of more trees than are being planted. The shrinkage of forested area means not only that the forest's capacity to supply products is diminished, but also a reduction in the capacity to provide services, such as flood control, soil protection, and the purification of water. See <http://www.edcnews.se/Research/EcoEconomy-All.html> (last visited Aug. 14, 2007).

that the Malaysian Timber Certification Council Process is unable to provide for the protection of the rights and privileges of local communities.

4.3.6. Ecuador

Members of the biggest Ecuadorian NGO network CEDENMA (Ecuadorian Committee for Nature and Environment Defence) and the CIFOP (Society of Forest Engineers of Pichincha) petitioned the Ecuadorian Minister of Environment to approach the EC to start the process leading to the negotiation of a VPA. In 2006, and as a result of the petition of the NGO network, the Ecuadorian Minister of Environment asked the EC to consider Ecuador as a partner country. Following the positive answer of the European Commission, the Government of Spain took the lead in defining the strategic points of cooperation between the EC and Ecuador. An Ibero-American Ministerial Conference to establish dialogue between the EC and the region will be part of the process of negotiation.¹⁹³

CEDENMA points out that Ecuador has initiated a ‘Third Party Forest Control System’. This system depends on the creation of incentives for the small forest producers; the implementation of a communication strategy to promote the legal and sustainable use of forest resources; support for measures organized by civil society, such as the “Green Vigilance”; the creation of financial mechanisms that avoid the dependence on the tax on forest exploitation; mechanisms to support forest territorial reorganization; and the definition of the ownership regime.¹⁹⁴

4.4. INTERIM CONCLUSIONS

In order to foster the cooperation needed to combat illegal logging and related trade, the implementation of the measures in the EU FLEGT Action Plan requires the involvement of the private sector, both in the EC Member States and in the partner countries with whom the EC will sign VPAs. Private enterprise is expected to apply the principles of Corporate Social Responsibility while the participation of civil society is essential in the creation of VPAs.

Private enterprise, particularly those active in the timber trade, are encouraged to develop CSR practices through voluntary initiatives. In this context, the Forum has acknowledged the importance of carrying on CRS in their relation with developing countries,

¹⁹³ For more information see <http://www.loggingoff.info/country> (last visited Aug. 20, 2007).

¹⁹⁴ Letter from the Ecuadorian Committee for Nature and Environment Defence (CEDENMA) asking the Government of Ecuador to make the necessary arrangements to start negotiating a VPA, Oficio No. 0005-PE, November 2005.

as well as the advantages of ‘positive differentiation’ for particular products and services when they comply with a standard awarded by a third party. The private initiatives developed in the Netherlands illustrate voluntary participation in certification schemes and the adoption of codes of practice to contribute to a system that verifies timber legality.

The participation of civil society is an ongoing process within each potential partner country, i.e. the timber-exporting countries interested in concluding a VPA with the EC. VPAs contain a participation clause in order to guarantee the involvement of civil society in the design and implementation of the licensing scheme. Although the principles and rules for consultation are not clearly defined, minimum standards developed by the European Commission could be used as a guide for the negotiation and implementation of the VPAs.

Given the diversity of approaches and particularities with regard to participation, it is important to continue the follow-up of what different potential partner countries are doing to ensure effective stakeholder participation in relation to the VPAs. An expressed concern is that the minimum standards for consultation in the potential partner countries ought to be the same as the ones applied within the EC.¹⁹⁵ Moreover, it is interesting to see to what extent the mechanisms set for VPAs are similar to those applied to other comparable international agreements, like the Cotonou Agreement.

¹⁹⁵ Information is *available at* http://www.loggingoff.info/cross_cutting_issues.html (last visited Aug, 20, 2007).

5. EVALUATION OF AND RECOMMENDATIONS CONCERNING THE EU FLEGT LICENSING SCHEME

The licensing scheme is not uncontroversial, and has received the heaviest criticism for the ‘legal cocktail’ of the inseparable licensing regulation and the VPAs. The central question on the tips of critics’ tongues is how effective is the licensing regulation in preventing illegal timber from entering the EC common market. In particular, it has been stated, the scheme is deficient in three areas:

1. The definition of legal timber is not defined widely enough so as to exclude ‘conflict timber’ from entering the Community;
2. VPAs are too heavily-centred on trade, with the bulk of the criticisms being centred on:
 - i) The voluntary nature of the VPAs;
 - ii) The possibility to circumvent the licensing scheme; and
 - iii) An argument that the legal basis of the Licensing Regulation ought to include Article 175 and/or Article 179 EC Treaty relating to the EC’s environmental policy and development cooperation; and
3. There is a lack of legislation prohibiting all illegal timber products, regardless of their country of origin.

Such criticism has come from different corners. While accepting the environmental policy as a whole, the European Parliament asks to be included in the legislative process by changing the legal basis of the Licensing Regulation to include the environmental policies of the EC. Environmental civil groups and stakeholders have jumped on the European Parliaments’ ‘bandwagon,’ claiming that measures based on EC commercial policy alone lacks effectiveness, and calling for legislation to be passed under the EC’s environmental policy. Further, the European Parliament has criticised the slow implementation of the EU FLEGT Action Plan.

This Chapter evaluates the licensing scheme and makes recommendations on how the legal measures proposed in the EU FLEGT Action Plan ought to be amended.

5.1. INCLUDING ‘CONFLICT TIMBER’ IN THE DEFINITION OF ILLEGAL TIMBER

The definition given in the Licensing Regulation relates solely to the legal harvesting and importation of timber products. Arguably, this definition is too narrow to be used to sever the flow of conflict timber onto the EC common market. As observed by one NGO, “illegal logging takes place when timber is harvested, processed, transported, bought or sold in violation of national laws”.¹⁹⁶

The United Nations has called upon its Member States to assist regional and international NGOs in halting the flow of illegal timber from conflict zones and to develop an international definition of conflict timber.¹⁹⁷ In the EU FLEGT Action Plan, conflict timber is loosely defined as timber traded by armed groups, the proceeds of which are used to fund armed conflicts.¹⁹⁸

In the EU FLEGT Action Plan, the Council implicitly acknowledges that conflict timber is excluded from the definition; and the Commission will help develop an international definition of conflict timber.¹⁹⁹ To add a ‘sting-in-the-tail’, the European Parliament has expressed its disappointment that such a definition, along with the EU FLEGT Action Plan’s other measures, has been so slow in being developed.²⁰⁰

According to the EU Action Plan, conflict timber is usually illegal as it is often unauthorised by the relevant government agencies. When authorised by such agencies, the logging becomes ‘legal’, even though the profits are being used to fuel conflict in the area under the government’s control.²⁰¹ This situation is particularly evident in the DRC, where 33m hectares of forest has been carved up amongst the DRC and Zimbabwe’s political elite. The profits are used to fund Zimbabwe’s military presence in the DRC and the Zimbabwean military’s continued exploitation of the DRC’s natural resources.²⁰²

¹⁹⁶ Greenpeace report *A Lawless State: Europe’s Borders must Close to Trade in Illegal Timber* (2006) p. 1, available at <http://www.greenpeace.org/raw/content/finland/fi/dokumentit/a-lawless-state-europe-s-bord.pdf> (last visited Aug. 28, 2007)

¹⁹⁷ UN Security Council document, S/2002/1146, Oct. 16, 2002.

¹⁹⁸ EU FLEGT Action Plan, *supra* n. 1, at p. 21.

¹⁹⁹ *Id.*

²⁰⁰ Parliamentary Resolution B6-0412/2005, 04 July 2005.

²⁰¹ EU FLEGT Action Plan, *supra* n. 1, at p. 21.

²⁰² UN Security Council, *supra* n. 197; Global Witness report *The Logs of War: The Timber Trade and Armed Conflict* (2002) pp. 35-36, available at <http://www.faf.no/pub/rapp/379/379.pdf> (last visited Aug. 28, 2007).

Widening the scope of illegality to timber that has been ‘harvested-for-profit-by-armed-groups’, serves several purposes. In terms of exploitation of natural resources, conflict timber has a similar destructive effect on world forests as logging in breach of national laws. The fact that it may be committed by a government does not excuse the significant devastation. The inclusion of conflict timber in the definition aligns the different situations that cause significant destruction to world forests, under the one banner of illegal timber.

Another purpose is to reduce the source of funding used to perpetuate the cycle of conflict. In areas like the DRC, the harvesting of 33m hectares of land creates profits of up to USD\$300m in the first three years of operation. The profits then flows back to military groups and are used to maintain their control over the natural resources to continue harvesting timber, as their primary source of funding.

Société Congolaise d’Exploitation du Bois (SOCEBO)

During the civil war of the DRC in the 1990s, President Mugabe of Zimbabwe committed a third of his armed troops to defend certain resources in the DRC. Laurent Kabila, who was then President of the DRC, pledged to repay Zimbabwe using foreign currency. The DRC defaulted and Zimbabwe captured natural resources in the Katanga and Kasai-Oriental regions.

In 2001, 33 million hectares of natural forests in the DRC was divided between Zimbabwe and the DRC. Osleg (Pvt.) Ltd, who is considered to be the commercial arm of the Zimbabwean Military, and Comiex-Congo, majority-owned by ex-President Laurent Kabila, formed a joint venture called Cosleg (Pvt.) Ltd. This company incorporated a subsidiary Société Congolaise d’Exploitation du Bois to exploit the logging rights.

5.2. ‘LAME DUCK’ PARTNERSHIP AGREEMENTS

By far the heaviest criticism of the EU FLEGT Action Plan falls on the voluntary partnership agreements. The concern, in general, is that VPAs, by their voluntary nature and their content, is not the right ‘mix of ingredients’ to effectively reduce the trade in illegal timber. In particular, it is argued that the Agreements are too heavily weighted in favour of the trade-related aspects of illegal timber, such as the licensing scheme, and not enough on the capacity-building and governance that timber-producing countries require to combat illegal logging.²⁰³

Further, the voluntary nature of the VPA allows for the circumvention of the licence requirements. As a result, the incentive for powerful logging companies to comply with the FLEGT licensing scheme is reduced. Timber products are traded and exported to countries that have not signed a VPA with the EC, including – possibly – China.

²⁰³ Global Witness, Greenpeace, FERN *Briefing: FLEGT VPAs* (2006) p. 2 available at http://www.fern.org/media/documents/document_3760_3761.pdf (last visited Aug. 28, 2007).

5.2.1. The Voluntary Nature of the Partnership Agreements

The voluntary nature of the partnership agreements is not mentioned in the definition contained in the Licensing Regulation,²⁰⁴ yet, it goes right to the nature of their validity. The FLEGT licensing scheme cannot be enforced in all timber-producing countries. It is only enforceable against those timber-producing countries that have voluntarily agreed to bind themselves through VPAs. A timber-producing country refusing to enter into a VPA is still able to freely trade with the EC.

The EU FLEGT Action Plan lays down a roadmap for developing VPAs into regional agreements. The EU FLEGT Action Plan would try to harness the existing ‘political will’ to address illegal logging on a regional level.²⁰⁵ The Association of South East Asian Nations has been identified as a potential regional partner for a regional VPA.²⁰⁶

Until the time is ripe for a regional agreement to be signed, the challenge continues to be to convince more timber-producing countries to sign VPAs. The building of ‘political will’ is hampered where an insufficient number of countries sign up to the licensing scheme. As a result, the scheme will continue to lack any real impact in prohibiting illegally produced timber onto the European common market.

5.2.2. Circumvention of the Licensing Scheme

Circumvention of the licensing scheme is closely linked to the voluntary nature of the VPAs. Together they contribute towards ‘timber laundering’. The result for the EC is that logging companies in timber-producing countries would search for other markets to send their products and not directly to the EC.

The VPAs only cover direct importation from a partner country.²⁰⁷ Logging companies can circumvent the requirements of the FLEGT licensing authority by exporting to a non-partner country. The possibility exists that the timber is then transformed into various types of timber products, including the products listed in the Annex to the Licensing Regulation, which is then on sold to European buyers. Those non-partner countries do not need FLEGT licences for importation of their timber products. This is the case where illegally produced

²⁰⁴ Licensing Regulation, *supra* n. 2, art. 2(3).

²⁰⁵ EU FLEGT Action Plan, *supra* n. 1, at p. 14.

²⁰⁶ *Id.*

²⁰⁷ Global Witness, *supra* n. 203, at p. 2.

timber from a partner country such as Indonesia is sent to be transformed into other products in a non-partner country, for instance China.²⁰⁸

Another means of circumvention, albeit a mild symptom of ineffectiveness, is to illegally log and transform the wood into timber-products other than those covered by the Licensing Regulation, in the partner country itself. Timber products that are not listed in the Annex to the Licensing Regulation, do not need FLEGT licences. For example, illegally-logged wood could be turned into furniture, paper or toothpicks in Indonesia; and still be legally imported into the EC without a FLEGT license.²⁰⁹

Principles of Corporate Social Responsibility could help plug some of these gaps of circumvention. However, similarly with the voluntariness of the VPAs, CSR is also a voluntary initiative and the EU FLEGT Action Plan certainly does not require the private sector to prevent any purchases of illegally produced timber. CSR is a weak stay upon which to rest an expectation of effective prohibition.

5.2.3. EC Environment and Development Cooperation Policies as a Legal Basis for the Licensing Regulation

To ensure a more equal concentration of trade and governance, the legal basis of the Licensing Regulation ought arguably to be included under the Community's environmental policy and/or its policy relating to development cooperation. The current legal basis, Article 133 EC Treaty, allows the Commission to negotiate international agreements on behalf of the EC. The European Parliament together with international environmental NGOs, ask that the legal basis pursuant to which the VPAs ought to be negotiated, be changed to Article 175 (environment²¹⁰) and/or 179 (development cooperation²¹¹) EC Treaty.²¹²

²⁰⁸ *Id.*

²⁰⁹ D Brack *Excluding Illegal Timber from EU Markets: Options for the EU and its Member States* (Royal Institute for International Affairs, 2006) p. 4.

²¹⁰ EC Treaty, *supra* n. 13, art. 175 (1): "The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall declare what action is to be taken by the Community in order to achieve the objectives referred to in art 174." *Id.*, art. 174 (1) EC Treaty: "Community policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health, prudent and rational utilisation of natural resources and promoting measures at international level to deal with regional or worldwide environmental problems."

²¹¹ *Id.*, art. 179 (1): "Without prejudice to the other provisions of this Treaty, the Council, acting in accordance with the procedure referred to in art 251, shall adopt the measures necessary to further the objectives referred to in art 177. Such measures may take the form of multi-annual programmes." *Id.*, art. 177 (1): "Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster: the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged amongst them; the smooth and gradual integration of the developing countries into the world economy and the campaign against poverty in the developing countries."

²¹² Parliamentary Motion B5-0397/2003, 04/09/2003; Parliamentary Resolution B6-0412/2005, 04/07/2005; Global Witness, *supra* n. 203, at p. 3; Greenpeace and Friends of the Earth position paper *EU Public*

The Commission and the Council have always intended to use Article 133 EC Treaty as their legal basis for the Licensing Regulation,²¹³ to the exclusion of Article 175 and/or Article 179 EC Treaty. The only apparent reason could be seen as circular. The Council, in their adopted EU FLEGT Action Plan, assumes that licensing timber products falls exclusively within the trade policy of the EC and that is therefore falls within the competence of the Council to legislate and to determine the means to achieve their policy and legal objectives.²¹⁴ Arguably this reasoning amounts to no more than a self-proclaimed competence to decide upon an issue that touches upon the environment as much as it does upon trade.

The European Court of Justice has consistently held that the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow from the author's conviction alone, but must rest upon objective factors which are amendable to judicial review. Those factors include in particular the aim and the content of the measure.²¹⁵ If an examination of the Community measure reveals that the measure serves dual (or multi-) purposes, then the measure may be adopted on one legal basis if one purpose is the main or predominant purpose, while the other remains secondary. The measure may be adopted on more than one legal basis where the dual (or multi-) purposes are inseparably linked and without one purpose being secondary.²¹⁶

Having the Licensing Regulation on a dual, or even triple, legal basis is in keeping with the EC's range of other legal measures implementing global policies and agreements with regard to timber. The International Tropical Timber Agreement is proposed to be implemented into the EC under the double legal basis of Article 175 and Article 133 of the EC Treaty and is to be read in conjunction with the first paragraph Article 300(2) of the EC Treaty,²¹⁷ because the measure simultaneously pursue environmental and trade aims.²¹⁸ The ECJ has stated that the Declaration of Rio ought to be on a dual basis of Articles 133 and 175 of the EC Treaty.²¹⁹

Consultation on Additional Options to Combat Illegal Logging and Associated Trade (2007) p. 4, available at <http://www.greenpeace.org/raw/content/eu-unit/press-centre/policy-papers-briefings/position-paper-on-additional-o.pdf> (last visited Aug. 28, 2007).

²¹³ EU FLEGT Action Plan, *supra* n. 1, at p. 14.

²¹⁴ Arnulf, *supra* n. 68, at p. 57; Mathijsen, *supra* n. 68, at p. 440.

²¹⁵ *Opinion 2/00 Cartagena Protocol* [2001] ECR I-9713 para. 22, *Case C-176/03 Commission of the European Communities and European Parliament v Council of the European Union* [2005] ECR I-7879 para. 45, *Case C-281/01 Commission of the European Communities v Council of the European Union* [2002] ECR I-12049 para. 1.

²¹⁶ *Case C-281/01*, *supra* n. 215, at para. 1; *Opinion 2/00 of the Court of 6 December 2001* [2001] ECR I-9713 para 23.

²¹⁷ Proposal for a Council Decision on the signing and conclusion on behalf of the European Community of the 2006 International Tropical Timber Agreement presented by the Commission COM (2006) 807 final, 15 December 2006.

²¹⁸ *Id.*, at recital 4.

²¹⁹ *Opinion 2/00*, *supra* n. 215.

The purpose of the EU FLEGT Action Plan, in a wider sense, is to promote the sustainable development of the environment.²²⁰ This is considered to be an environmental aim²²¹ at the international level.²²² Thus, it can be argued that the appropriate legal basis to deal with international environmental objectives should include Articles 175 and 179 EC Treaty. The promotion of sustainable development is supported by the licensing scheme²²³ as a first step towards tackling the urgent issue of illegal logging and associated trade.²²⁴

The content of the Licensing Regulation lays out the technicalities of the licensing scheme²²⁵ as it applies to the Member States as well as providing the competence for the Commission to negotiate VPAs.²²⁶ The VPA, it should be remembered, also includes to some degree the requirement that timber-producing countries reform their national laws for a more effective means to reduce illegal logging. These two legal measures are inseparably linked (hence they may be classified as a ‘legal cocktail’). Together they constitute the licensing scheme, which is the trade measure to tackle illegal logging and associated trade.

From the nature and content of the Licensing Regulation, the EC is pursuing the dual objective of environmental protection while promoting the trade in legally produced timber products. The inseparability of these purposes is reflected in the licensing scheme and the VPA agreements. Therefore, the Licensing Regulation arguably ought to be based on Articles 175 and 179 EC Treaty as well as Article 133 EC Treaty.

The consequence of changing the legal basis is that European Parliament would be a co-decision maker in any secondary legislation prohibiting the import of illegally produced timber products. Through Parliament, a democratic voice is given to environmental stakeholders on the protection of the environment.²²⁷

The question of legal competence is more than a power play between the institutions of the Community. It has a more practical effect for the EU FLEGT Action Plan. It has been briefly mentioned, in Chapter 1 (EU FLEGT Action Plan) and again in Chapter 3 (VPAs),

²²⁰ Licensing Regulation, *supra* n. 2, recital 2; EU FLEGT Action Plan, *supra* n. 1, at p. 5.

²²¹ EC Treaty, *supra* n. 13, art. 174 (1); Communication from the Commission to the Council and the European Parliament on an EU Forest Action Plan, COM (2006) 302, 15 June 2006, Key Action 16. Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L242, 10 September 2002.

²²² EC Treaty, *supra* n. 13, art. 177.

²²³ Licensing Regulation, *supra* n. 2, at recital 3.

²²⁴ *Id.*, at recital 1.

²²⁵ *Id.*, at recital 4.

²²⁶ *Id.*, at recital 5.

²²⁷ *Case C-300/89 Commission v Council* [1991] ECR I-2867 paras. 18-20. A liberal interpretation of this case is that where faced with a choice of legal basis the Court ought to favour the legal basis which includes Parliament in the legislative procedure: Arnall, *supra* n. 68, at p. 79. This interpretation takes into account the decision made by the Court at paras. 22-24. In fact the ratio of the Court’s opinion is that where there are two legal bases with a different legal procedure then the legal procedure which involved Parliament should take precedence over the legislative procedure that excludes Parliament.

that there is to be capacity building and improvement of the forestry governance of the timber-producing countries. Direct help, states the EU FLEGT Action Plan, is to be provided, by the Community, the Member States and other donors, for financing the enforcement of the national legislation in the timber-producing countries.²²⁸ Any financial assistance to the timber-producing countries as part of a VPA would have to be approved by European Parliament.²²⁹

Leaving the current legal basis as Article 133 EC Treaty would mean that European Parliament would approve expenditure achieving environmental policy aims but would have no say on where the financial assistance would be spent or whether it has been spent effectively; the reason being that it would be accounted for under commercial policy expenditure. Changing the legal basis to bring the negotiation of VPAs under EC environmental/development cooperation policy means that Parliament would be part of the decision to determine whether the VPA is effective in achieving its aims concerning the environment and development cooperation before giving its commitment to any financial assistance to the timber-producing country. The result would be to restore the proper balance between continuing trade with timber-producing countries and protecting the environment.

5.3. TOTAL PROHIBITION ON ALL ILLEGAL TIMBER ENTERING THE EC

The voluntary nature, the possible circumvention of the licensing scheme, and the argument that the licensing scheme was created on the incorrect legal basis all support the conclusion that any FLEGT legislation ought to prohibit all illegally-produced timber products from entering the common market, regardless of its country of origin (hereinafter “Blanket Ban Legislation”).²³⁰

The argument of sharing the legal basis between Articles 175, 179 and 133 EC Treaty raises two questions: The first is who is competent to create ‘blanket ban’ legislation. And if the answer to the first question is that both the EC and Member States have competence, the second question is who should be responsible for creating the legislation. So far environmental NGOs state that it ought to be the EC’s responsibility.

²²⁸ EU FLEGT Action Plan, *supra* n. 1, at pp. 6-7; Commission FLEGT briefing notes *Voluntary Partnership Agreements* (2007) no. 6 pp. 1-2.

²²⁹ EC Treaty, *supra* n. 13, art. 272(4); Arnall, *supra* n. 68, at p. 47.

²³⁰ EIA and Telapak *Blocking Loopholes with Law: Why FLEGT VPAs Require New EU Legislation* (2007) p. 1, available at http://www.loggingoff.info/media/articles/article_392.pdf (last visited Aug. 28, 2007).

5.3.1. The Competence of the EC and EU Member States to Create a ‘Blanket ban’ Legislation

The European Court of Justice has held that the EC has the competence to create criminal sanctions for offences against the environment.²³¹ Indeed, to do so the legal basis of the legislation needs to be made, at least partly, on Article 175 EC Treaty.²³² When necessary²³³ the competence of the EC to create penal legislation on environmental matters is extended to defining the constituent elements of the offence and, where the appropriate, to the prescription of the nature and level of the criminal penalties applicable.²³⁴ This does not affect the Member States’ competence to lay down the specific penalties. The EC can do no more than oblige Member States to pass legislation requiring such penalties to be effective, dissuasive and proportionate.²³⁵ This is because responsibility lays with the competent authorities of the Member States, for enforcing Community law relating to the environment.

Under the Licensing Regulation, the competent authorities, who verify the FLEGT licences, are required to apply national legislation penalising breaches of the Article 4(1) prohibition. In principle, this situation would not be altered were ‘blanket ban’ legislation to be passed.

5.3.2. The EC’s Important Role in Promulgating ‘Blanket Ban’ Legislation

The above analysis presumes that as the EC is competent to pass legislation, then it ought to be the law-making body responsible for passing the blanket ban legislation. On that presumption, were the EC responsible for legislating, then the Member States have a residual discretion to legislate specific penalties for breaches of Community law. The situation, however, is still hotly debated.²³⁶

²³¹ *Case C-176/03 Commission of the European Communities and European Parliament v Council of the European Union* [2005] ECR I-7879 para. 48; *D Spinellis Judgment of 13 September 2005 (Case C-176/03, Commission v Council) Annuling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the Protection of the Environment through Criminal Law* [2001] 2 EuConst 293; *C Tobler Case C-176/03 Commission v Council, Judgment of the Grand Chamber of 13 September 2005* [2006] CML Rev 835 pp. 841, 846-850; Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (*Case C-176/03 Commission v Council*) COM (2005) 583 final 23 November 2005 para. 3.

²³² Spinellis, *supra* n. 231, at p. 301.

²³³ *Case C-176/03, supra* n. 231, at para. 48.

²³⁴ Commission Communication, *supra* n. 231, at para. 10; Spinellis, *supra* n. 231, at p. 300.

²³⁵ *Case C-176/03, supra* n. 231, at para. 48; Spinellis, *supra* n. 231, at p. 300; *C Tobler Case C-176/03, supra* n. 231, at 847.

²³⁶ Several proposals for a directive protecting the environment through criminal law have been proffered by the Commission, but has yet to be passed by the Council: Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM (2001) 139 final OJ E180 26

The exercise of the EC's competence to legislate for offences relating to the environment is subject to two conditions. The first is the necessity test and the second is the consistency test.²³⁷

According to the Commission, the necessity test means the Community legislature must justify the use of criminal measures prescribed in EC legislation on the basis that it makes the EC policy in question effective. EC legislation must also abide by the principles of subsidiarity²³⁸ and proportionality.²³⁹ Where these conditions are fulfilled, the Community may specify i) the type of behaviour which constitutes a criminal offence; and/or ii) the type of penalties to be applied; and/or iii) other appropriate criminal measures, to direct implementation by EC Member States of Community law.²⁴⁰

The consistency test is to ensure an overall coherence of the Union's system of criminal law, whether adopted under the EC Treaty or the Treaty establishing the European Union, so that criminal provisions do not become fragmented and ill-matched.²⁴¹ Where either of these two conditions is not fulfilled, the EC's competence to legislate for criminal offences relating to Community environmental law is limited.²⁴²

Both the EC Member States and the EC share a competence to legislate, or to pass other legal measures, on environmental issues. Were it to be solely left to Member States to pass 'blanket ban' legislation, this would create fragmentation in the effectiveness of the EU FLEGT Action Plan. This scenario should be looked at in the absence of the current Licensing Regulation. Member States are not obliged to pass 'blanket ban' legislation under the EU FLEGT Action Plan. As such it is not certain that any of the 27 Member States would pass such legislation. Some Member States could be more lenient with their trade partners, while others could tend to adopt a tougher stance. This could divert trade from those Member States

June 2001, Amended proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law COM (2002) 544 final OJ E020 28 January 2003, Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law COM (2007) 051 final 09 February 2007 and M Horspool and M Humphreys *European Union Law* (4th edn, 2006) p. 403.

²³⁷ Commission Communication, *supra* n. 231, at paras. 12 and 13.

²³⁸ EC Treaty, *supra* n. 13, art. 5 (second sentence): "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States of the proposed action, be better achieved by the Community."

²³⁹ EC Treaty, art. 5 (third sentence): "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

²⁴⁰ Commission Communication, *supra* n. 231, at para. 12.

²⁴¹ *Id.*, at para. 13.

²⁴² EC Treaty, *supra* n. 13, art. 5 (third sentence). Even were this to be so Member States could still be obliged under art. 10 EC Treaty to pass criminal legislation: D Spinellis *Judgment of 13 September 2005 (Case C-176/03, Commission v Council) Annuling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the Protection of the Environment through Criminal Law* [2001] 2 EuConst 293 p. 296. The discretion on what Member States can legislate is much wider under this Article than it would if the Community was competent under Article 175 (relating to environmental policy).

with such a blanket ban to those Member States who do not adopt such a ban. Accordingly, the EU FLEGT Action Plan would be less effective were it left to the Member States to pass ‘blanket ban’ legislation.

What makes the EC the appropriate level to legislate is that the EC has already taken responsibility for Community policy under the EU FLEGT Action Plan. Therefore, the ‘blanket ban’ legislation ought to also be passed by the EC to ensure that the EU FLEGT Action Plan is effective and consistent by eliminating the fragmentation caused were it to be left to the EU Member States alone. All that would be required to have a blanket ban in EC legislation is to amend Article 4(1) of the current Licensing Regulation to provide that the licensing scheme applies to all timber products regardless of the country of origin. Arguably, this would not create a disproportionate result, as far as EC law is concerned, because the Licensing Regulation would still require Member States to pass legislation for penalties, or other sanctions, to enforce the ‘blanket ban’ so long as they were effective, proportionate and dissuasive.

5.4. HOW EFFECTIVE IS THE ‘LEGAL COCKTAIL’ IN PREVENTING ILLEGAL TIMBER FROM ENTERING THE COMMON MARKET?

While the importance of the EU FLEGT Plan should not be underestimated, the evaluation of the licensing scheme shows that it is the voluntary partnership agreements that are the ‘Achilles Heel’ of the Plan as a whole. Its purpose is to combat the illegal harvest and the trade in illegal timber products. Yet one of the core measures, the VPAs, seemingly allows for the easy circumvention of the entire scheme. Arguably, it does not truly combat the problem but merely re-directs it to the shores of the EC via non-partner countries. The voluntary nature of the VPAs creates uncertainty as to whether this circumvention can be efficiently stopped merely by creating more VPAs with other timber-producing countries.

The recommendation by environmental NGOs is to cast the ECs’ ‘legal net’ as wide as possible by creating a broad definition of illegally produced timber to include conflict timber, and by implementing a ‘blanket ban’ on all illegal timber regardless of the country of origin. There is force in this argument. It provides a more effective means to combat illegal logging without the circumvention problems associated with VPAs.

ANNEX I: MAJOR INTERNATIONAL FORUMS RELATING TO TIMBER AND THEIR OUTCOMES

Table 1.1.

Date	Relevant Action	Result
1972	Stockholm Declaration	<u>Recommendation 24</u> UN Secretary-General to take steps to ensure that the United Nations bodies concerned cooperate to meet the needs for new knowledge on the environmental aspects of forests and forest management.
1992	Rio Declaration on Environment and Development	<u>Agenda 21</u> 'Combating deforestation' <u>Principle 11</u> Enact effective environmental (standards, management, objectives, priorities) <u>Principle 12</u> Cooperation to address environmental declaration, non-discriminatory trade policy measures for environmental purposes. <u>Principle 22</u> Indigenous people and communities participation in environmental management.
1999	World Bank Policy Review and Forest Strategy	FAO prepared several papers on sustainable forest management and global markets for forest products.
2001	Ministerial Conference Bali, Indonesia	<u>Ministerial Declaration</u> to intensify national efforts and strengthen bilateral, regional and multilateral collaboration to address violations of forest law and forest crime, and create a regional task force on forest law enforcement and governance.
2002	EU Workshop in Brussels	Proposal of a mechanism for verification of the legality of wood products.
2002	World Summit on Sustainable Development WSSD	Johannesburg Plan of Implementation IV. <u>Protecting and managing the natural resource base of economic and social development</u> . Para. 45(c) <ul style="list-style-type: none"> ▪ Immediate law enforcement against illegal trade in forest products ▪ Build stronger governance and provide more human resources in timber-producing countries
2003	Communication from the Commission to the Council and the European Parliament	Forest Law Enforcement, Governance and Trade (FLEGT) Proposal for an EU Action Plan
2005	Council Regulation (EC) No. 2173/2005	On the establishment of a FLEGT licensing scheme for imports of timber into the European Community

ANNEX II: EU FLEGT ACTION PLAN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.5.2003
COM (2003) 251 final

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE
(FLEGT)

PROPOSAL FOR AN EU ACTION PLAN

TABLE OF CONTENTS

1..... EXECUTIVE SUMMARY
.....60

2..... INTRODUCTION
.....61

3..... THE ORIGINS AND SCOPE OF THE ACTION PLAN
.....62

4..... THE EU ACTION PLAN FOR FOREST LAW ENFORCEMENT,
GOVERNANCE AND TRADE (FLEGT).....63

 4.1. Support to timber-producing countries63

 4.2. Trade in timber66

 4.3. Public procurement.....72

 4.4. Private sector initiatives.....73

 4.5. Financing and investment.....74

 4.6. Supporting the Action Plan with existing legislative instruments.....75

 4.7. Conflict timber77

5..... CO-ORDINATION AND PROGRAMMING
.....78

6..... THE NEXT STEPS
.....79

ANNEXES24

1. EXECUTIVE SUMMARY

This document, the EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT), sets out a process and a package of measures through which the European Commission proposes to address the growing problem of illegal logging and related trade. Addressing this issue is one of the European Commission's priorities in the follow-up to the 2002 World Summit on Sustainable Development (WSSD).

The Action Plan is the start of a process which places particular emphasis on governance reforms and capacity building, supported by actions aimed at developing multilateral co-operation and complementary demand-side measures designed to reduce the consumption of illegally harvested timber²⁴³ in the EU (and ultimately major consumer markets elsewhere in the world).

Development co-operation: Efforts will be focused on promoting equitable and just solutions to the illegal logging problem which do not have an adverse impact on poor people; helping partner countries to build systems to verify timber has been harvested legally; promoting transparency of information; capacity building for partner country governments and civil society; and promoting policy reform.

Trade in timber: The EU will initiate a longer-term process of dialogue with wood-producing and wood-consuming countries to extend international collaboration to tackle illegal logging and to develop a multilateral framework on which actions could be based. In the immediate term, a voluntary licensing scheme is proposed, whereby partner countries issue a permit attesting to the legality of timber exported to the EU. This will require a Council Regulation for implementation. The Commission will review options for, and the impact of, further measures, including, in the absence of multilateral progress, the feasibility of legislation to control the imports of illegally produced timber into the EU.

Public procurement: Practical information will be provided to guide contracting authorities on how to deal with legality when specifying timber in procurement procedures.

Private sector initiatives: Measures are proposed to encourage private sector initiatives for good practice in the forest sector, including the use of voluntary codes of conduct to source only legal timber.

Financing and investment safeguards: Banks and financial institutions which invest in the forest sector should be encouraged to develop due diligence procedures which take account of the environmental and social impact of forest sector lending; including conformity with relevant legislation. Export Credit Agencies should be encouraged to develop guidance on improved project screening procedures and codes of practice for forest sector projects.

Implementation: To support implementation of the above activities, a co-ordinated EU response is proposed, drawing on the different strengths and capacities of the Commission and EU Member states. A joint work programme will be prepared with Member States to facilitate this.

²⁴³ Throughout the document the term 'timber' is used to refer to roundwood and rough sawnwood. The term 'timber products' implies additional further processing.

2. INTRODUCTION

Illegal logging takes place when timber is harvested in violation of national laws. The clandestine nature of illegal logging makes its scale and value difficult to estimate in relation to the global trade in forest products (estimated by the OECD to be worth over €150bn per year²⁴⁴), but strong evidence suggests that it is a substantial and growing problem. The World Bank's 1999 review of its global forest policy observed: "In many countries, illegal logging is similar in size to legal production. In others, it exceeds legal logging by a substantial margin."²⁴⁵

The illegal exploitation of natural resources, including forests, is closely associated with corruption and organised crime. In some forest-rich countries, the corruption fuelled by profits from illegal logging has grown to such an extent that it is undermining the rule of law, principles of democratic governance and respect for human rights.

In some cases the illegal exploitation of forests is also associated with violent conflict. Profits from the illegal exploitation of forests (and of other natural resources) are often used to fund and prolong these conflicts.

Illegal logging and associated trade undermines the competitiveness of legitimate forest industry operations in both exporting and importing countries. In so doing, this limits the ability of these industries to conduct operations that foster sustainable forest management, and sustainable development generally.

Illegal logging costs governments vast sums of money. Estimates suggest that illegal logging costs timber-producing countries €10-15 billion per year in lost revenues,²⁴⁶ which could otherwise be spent on the provision of better healthcare, education and other public services, as well as the implementation of sustainable forest management.

Illegal logging also causes enormous environmental damage and loss of biodiversity, for instance through logging of national parks, and can facilitate the illegal exploitation of wildlife. It can be a contributory factor to the process of deforestation, and it can increase the vulnerability of forests to fires – both of which have climate change implications. It undermines sustainable forest management and has a long term negative impact on the livelihoods of forest-dependent people, many of whom are amongst the world's poorest and most marginalised people.

Illegal logging thus undermines many essential elements of the EC's development objectives: public sector financing for development targeted at the poor, peace, security, good governance, the fight against corruption, and sustainable environmental management. Although the supply-side of the problem lies in timber-producing countries, strong international demand for timber can be exploited by unscrupulous operators and traders, with the effect of encouraging illegal logging operations. As a major source of this demand, important measures can be taken by the EU and other major consumers of timber products to direct demand towards only legally harvested timber.

²⁴⁴ OECD Environmental Outlook (2001)

²⁴⁵ World Bank, Forest Sector Review (1999)

²⁴⁶ World Bank Revised Forest Strategy (2002)

3. THE ORIGINS AND SCOPE OF THE ACTION PLAN

This Communication proposes an Action Plan through which the European Union intends to support efforts to tackle the problem of illegal logging. The Commission began work on this following a Ministerial Conference in Indonesia in September 2001, and held an international workshop in Brussels in April 2002 to which experts from the main wood-producing and importing countries, forest-based industries, civil society and other stakeholders were invited as part of the process of developing this Action Plan. The Plan also builds on the commitments made in the Communication on a Global Partnership for Sustainable Development²⁴⁷ and in the 6th Community Environmental Action Plan.²⁴⁸ The Action Plan represents a contribution to the implementation of the WSSD Plan of Implementation, specifically paragraph 45c.²⁴⁹

A description of EU involvement in national and international efforts to improve forest law enforcement and governance around the world is presented in Annex 1. Notable amongst international efforts are a series of regional initiatives addressing forest law enforcement and governance. The first such regional initiative was the Asia Forest Law Enforcement and Governance process. This has made considerable progress in raising political commitment to address illegal logging, and in bringing together the governments of timber-producing and consuming countries, local and international civil society, the private sector, and donors, in a co-ordinated programme of work. A similar process is now being initiated in Africa, with possible replication in other regions. The European Commission and a number of EU Member States have provided strong support to the processes in Asia and Africa – both through political support and financial contributions.

These regional initiatives in Africa and Asia focus only on the question of legality, and do not address wider and more complex questions concerning the sustainability of forest exploitation. There is a distinct difference between the two: legal timber can be harvested in an unsustainable manner, for example through authorised land clearance; and illegal timber can come from sustainable sources, for example, timber harvested under indigenous management systems which are sustainable but don't comply with formal legal requirements. This Action Plan adopts the same approach taken in the Africa and Asia regional processes, and deals only with the question of legality, but it should be noted that the EU's wider objective is to encourage sustainable forest management. Since in many countries forest legislation is based on the premise of sustainable forest management, better law enforcement will in general lead to more sustainable forest management. Where this is not the case the EU should encourage a review of the legal framework. Better forest governance is therefore an important step on the path to sustainable development.

The Action Plan should thus be placed in the context of the overall efforts of the European Community to achieve sustainable forest management, both within and outside the EU. European Community efforts in this regard include substantial tropical forest development co-operation programmes in Brazil, Central Africa and Indonesia.

²⁴⁷ COM(2002) 82, 13.2.2002

²⁴⁸ Decision No 1600/2002/EC of the European Parliament and the Council, 22 July 2002

²⁴⁹ Paragraph 45c states: Take immediate action on domestic forest law enforcement and illegal international trade in forest products, including in forest biological resources, with the support of the international community, and provide human and institutional capacity-building related to the enforcement of national legislation in those areas.

4. THE EU ACTION PLAN FOR FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE (FLEGT)

The Action Plan consists of support for timber-producing countries, efforts to develop multilateral collaboration to combat the trade in illegally harvested timber, voluntary measures to support governments wanting to ensure that illegally harvested timber from their territory is not admitted to the EU market, public procurement policy, private sector initiatives, measures to avoid investment in activities which encourage illegal logging, and conflict timber. In addition reference is made to existing legislation at Community and Member State level which could be applied to address the issue.

1.1. Support to timber-producing countries

The highest levels of illegal logging are found in developing and emerging market countries, and development co-operation has an important role to play in building capacity to tackle the illegal logging problem.

1.1.1. Equitable and just solutions

Illegal logging can range in scale from large industrial operations working openly and illegally in national parks, through to impoverished smallholder farmers clearing land for agriculture or cutting timber for housing without possessing the necessary licences. The challenge is to ensure that actions to address illegal logging, particularly enhanced law enforcement, do not target weak groups, such as the rural poor, while leaving powerful players unscathed. This requires careful consideration in countries where corrupt elements within the police and judicial services operate in complicity with large scale illegal business activities.

Existing forest laws and policies frequently promote large scale forest operations and may exclude local people from access to forest resources. This inequity breeds resentment and conflict. It also forces local people who depend on forest resources to operate illegally, since they often have no choice in the way they meet their basic livelihood needs. However, given the correct incentives, forest-dependent communities can become key allies in the drive to reduce illegal logging. Many examples of this have evolved *in situ* – sometimes with and sometimes without donor help. For example, in West Kalimantan, Indonesia, a forest protection scheme launched by the village of Pendaun has been replicated by neighbouring settlements, effectively excluding illegal loggers from a large area of hitherto unprotected forest.²⁵⁰ In Brazil, the Mamiraua Sustainable Development Reserve is one of several examples of structures for participation of civil society in the management and protection of forests. Similar examples exist elsewhere in the world.

Donors, including the EU and Member States, can give greater weight to these initiatives by providing support to community-based forest management, by helping to propagate lessons from these schemes in national laws and policies, and by working with partner governments to ensure that key underlying factors, such as land tenure and access to forest resources, encourage local participation in the fight against illegal logging.

²⁵⁰ Case study presented at the Asia Ministerial Conference for Forest Law Enforcement and Governance. 11-13 September 2001, Bali, Indonesia.

1.1.2. Verification systems

In countries with weak forest law enforcement, reliable systems which can distinguish legal from illegal production will be essential in order to provide credible guarantees to the market that timber has been legally harvested. Such systems would form the basis for the identification of legally harvested timber for export to the EU market under proposed Partnership Agreements (Section 4.2). The setting up of such systems is likely to require technical development and additional capacity building and institutional strengthening in government institutions, civil society and the private sector.

Amongst the measures which can be applied, a range of technologies can help to monitor harvesting operations and track timber from point of harvest, through processing mills, ports and on to final markets. Development of such monitoring and tracking systems will be supported by future EC forest development co-operation.

1.1.3. Transparency

Donors can help to encourage greater transparency of information within the forest sector. Important aspects of transparency include the availability of accurate information on forest concession location and ownership, forest condition, and the provision of information on laws and regulations translated into languages understood by the general public.

Transparency is also helped by the involvement of independent monitoring and auditing of systems to verify the legality of timber in producing countries. Independent monitoring makes verification systems more credible and less prone to corruption. There are many examples of where independent monitoring has been used to good effect in the forest sector, at the instigation of the relevant national authorities. Accountants, auditors, consultants and non-governmental organisations have all played an important role in this ground-breaking work to promote transparency.

Technologies such as remote sensing and aerial photography also have an important role to play in ensuring transparency. The Joint Research Centre of the European Commission (JRC) has a long-standing expertise in the application of remote sensing technologies to forest mapping and monitoring and the management of information, and will be able to offer relevant expertise to support the evolving FLEGT programme.

1.1.4. Capacity building

Partner governments need donor support to implement broad governance reforms, for example in the judiciary, the police and the military. In many countries corruption and the lack of accountability in these institutions does much to encourage illegal and unsustainable exploitation of natural resources, including forests.

Direct help is also needed to build capacity to deal with the new and complex set of issues which government agencies in developing countries must deal with: monitoring and gathering evidence of environmental crime; building legal cases against those who transgress; raising awareness of environmental law within the police, the legal profession, public prosecution services and the courts; training of customs officials; and awareness raising to help build the public and political support needed to tackle the entrenched corruption which often lies beneath illegal logging. Capacity building can also be directed to support revenue collection

in the forest sector, since it is through enhanced revenues that partner countries stand to gain most from reducing illegal logging. Capacity building should not be limited to the public sector, but must also include civil society and the private sector.

1.1.5. Policy reform

Forest laws and policies prepared in past political eras (such as under colonial administrations or ousted dictatorships) may be outdated and over-emphasise a top-down approach which is neither equitable nor effective, especially in remote areas with little government presence. Laws may also be so complex that complying with all the requirements becomes a disproportionate burden, thus inadvertently creating incentives which encourage illegal activities. In other cases laws may be contradictory, especially where such legislation emanates from different sectors.

There is frequently a need for policy reform and simplification of procedures. National forest programme (nfp) processes provide a framework through which all stakeholders – governments, industry and civil society – can work towards this type of reform in the forest sector. The EC is supporting nfp processes in various countries.

Engagement in policy dialogue between donors and partner governments can also do much to promote the necessary reform. This is a very important area of work, since it is becoming clear that initiatives to promote good governance for the management of natural resources will fail in countries where the broader policy environment is not favourable to reform and change. Policy dialogue to promote forest sector reform has had some success in Cambodia, Indonesia and Cameroon (among others). In the latter, forest sector reform became a condition of future financial assistance from the IMF after a study highlighted the large revenue losses due to illegal logging.

Box 1: Indonesia as a pilot example of a forests and governance support programme

The case of Indonesia provides a pilot example of how development co-operation to support the Action Plan will work in practice.

The Indonesian government has identified stopping illegal logging as a high policy priority, and has taken some ground-breaking steps towards addressing the problem. Fighting illegal logging and corruption form an important focus in the political dialogue between the Indonesian government and the EU (and other) donors, who meet together in the forum of the Consultative Group on Indonesia (CGI). Indonesian ministers and European Commissioners have also on a number of occasions met to discuss closer collaboration to tackle illegal logging.

This policy priority is reflected strongly in EU development co-operation with Indonesia, including in the EC Country Strategy for the country, which prioritises the management of natural resources and good governance.

A process to identify a forests and governance support programme is now under way. The lessons learned both from the dialogue with the Indonesian government, and the experience with preparing the support programme will offer valuable lessons for other countries participating in the FLEGT programme.

To implement development co-operation actions for 4.1.1 to 4.1.5, the Commission will:

- work to integrate further support for FLEGT issues into future programming of EC Thematic, Country and Regional development co-operation, into EC Country and Regional Strategy Papers, and into national Poverty Reduction Strategies (PRSPs), in countries where this is a national priority, and in particular in FLEGT Partner countries.
- use the funds available under the Tropical Forest Budget Line (B7-6200). Combating illegal logging is identified as a priority issue in the 2002/2003 strategic guidelines for the Tropical Forest Budget Line;²⁵¹ and;
- use resources already earmarked for FLEGT-related activities under existing Regional and Country Programmes (box 1).

1.2. Trade in timber

Illegal logging is largely concentrated in developing and emerging market countries, but the international demand for timber provides a substantial market, within which there is scope for unscrupulous operators to procure and trade in illegally harvested timber. The OECD estimates that the global trade in timber is worth over €150bn a year.²⁵² There is strong evidence – as summarised in the 1999 World Bank Forest Sector Review and demonstrated in a growing number of country-based studies – to show that a significant share of this trade is likely to be based on illegally harvested timber.

In the light of wood product trade patterns presented below and in Annex 2, and because of the nature of the problem of illegal logging, a multilateral framework gathering main importers and exporters would be the most effective way of tackling the issue.

However, given the complexity of building such a multilateral framework and considering the urgency of helping exporting countries to better control the legal origin of their exports, the EU, in addition to pursuing multilateral co-operation, aims to immediately conclude bilateral or regional FLEGT partnership agreements, which are described further below. These complementary measures can play an important role in restricting the entry of illegally harvested timber into the EU.

1.2.1. EU import patterns in timber products

This section provides an outline of the size and nature of flows of forest products into the EU in order to provide the context for trade-related elements of the Action Plan. The greater part of the trade in timber and timber products occurs between developed countries and is not unduly affected by illegal logging activities. For example, the EU has an important trade in temperate hardwood logs, veneers and sawnwood from North America. This trade involves lower volumes of timber than, for example, the trade with Russia, but has a higher value due to the type of product.

²⁵¹ Throughout this document the term Tropical Forest Budget Line refers to funds made available under budget line B7-6200 (now 21 02 05) on the basis of Regulation (EC) No 2494/2000 of the European Parliament and of the Council of 7th November 2000 on measures to promote the conservation and sustainable management of tropical forest and other forests in developing countries.

²⁵² OECD Environmental Outlook (Paris, 2001, page 122).

Intra-EU trade is also very important, accounting for around 80% of the total EU trade in timber. Nevertheless, the EU is an important market for both legal and illegally harvested timber entering international trade. Other important markets for internationally traded timber are Japan, China and the United States.

There are four key regions and countries within the scope of this Action Plan, which together contain nearly 60% of the world's forest and supply a large proportion of internationally traded timber – Central Africa, Russia, Tropical South America and Southeast Asia. Each region is characterised by specific trade patterns. Volumes of timber that are imported from Africa by the EU remain limited (less than 4% in value of world trade flows in wood products) but constitute an important trade for the region. In certain countries, most notably in Central Africa, exports of timber to the EU account for over 20% of their total trade with the EU.²⁵³ The EU is an important market for timber from Russia – in particular from Northwest Russia – which is the largest supplier of roundwood to the EU. Exports to the EU from Russia are important in both absolute and relative terms.

EU imports from Asia and Latin America are less important. In the case of Asia which is the most important importer and exporter of tropical wood, the EU counts for only a minor part of exports. Summary trade data is presented in Annex 2. Unlike Russia and Africa, which export mainly roundwood or sawnwood, Asia and South America mainly trade in processed timber products with higher added value, such as mouldings, furniture and paper. The longer and more complex supply chain for these products raises some difficulties with respect to verifying legality of the raw materials. Firstly, such products are often made with wood from more than one source. Secondly, processing often takes place in an intermediary country before export to the final marketplace. This is particularly the case in Asia, where there are very strong indications that large volumes of wood are harvested illegally in Indonesia, Burma, and Cambodia and shipped to large manufacturing centres in other countries of the region. These products are then processed and sold onto major consumer markets, such as Europe, often at very competitive prices and frequently at prices which undermine legitimately produced goods.

Tracking products made of wood harvested in one country and processed in another is more complex than tracking primary and rough-processed products manufactured in the country where the raw material was harvested. According to the non-preferential rules of origin in the Community applying to timber, as set out in the EC Customs Code,²⁵⁴ goods are deemed to originate in the country where they underwent their last, substantial, economically justified processing.

Given the place of the EU in the world market of wood products, important but not dominant, any measure targeting trade flows will be more efficient if extended to include collaboration with other importers (i.e. in a multilateral framework). When designing trade measures, attention has also to be paid to the specificity of each region and of the potential to divert trade flows to regions where demand is on the rise, such as Asia.

1.2.2. Developing the multilateral framework and international collaboration

An important element of the trade-related measures set out in this part of the Action Plan is to engage other major timber consumers and explore ways of working together towards a more

²⁵³ DG Trade: <http://europa.eu.int/comm/trade/bilateral/acp/acp.htm>

²⁵⁴ Council Regulation (EEC) No 2913/92, OJ L 302, 19.10.1992, p.1-50 as last amended

comprehensive framework to restrict the volumes of illegally harvested timber entering their markets. This part of the Action Plan will build on a need for such collaboration highlighted by the G8.

Some initial exchanges of views amongst major consumer blocks have taken place. At the EU-Japan Summit in Tokyo on 8 July 2002, it was agreed to continue exchanging views and collaborating in order to combat illegal logging and the use of illegally harvested timber and related products as a priority under the EU-Japan Action Plan.²⁵⁵ At a high-level EU-US Task Force meeting held in Copenhagen, Denmark, on 15 July 2002, the US and EU delegates expressed great interest in working together on this issue.

The EU, the United States and Japan were all present at a side event on illegal logging hosted by the European Commission at the World Summit on Sustainable Development (WSSD) in Johannesburg, in August 2002. At the side event, which also included producer country governments, representatives of the private sector and non-government organisations, all parties expressed agreement on the need to work together to tackle illegal logging.

Co-operation between the EU, the US and Japan in this matter would account for a large part of the world market for timber and timber products. Efforts must also be made to engage other major wood-consuming nations, particularly China, in the expansion of the global FLEGT initiative.

Once a caucus of the main wood-producing and importing countries are working closely together to combat illegal logging and the associated trade, it may become appropriate to look at ways of transforming this step-by-step approach into a global process, whether by multilateral agreement or by a series of linked regional agreements.

To develop the multilateral framework and international collaboration, the Commission will:

- continue to build on contacts made with Japan and the US, widen this dialogue to include other major markets for timber and key timber-producing countries, and seek to build consensus amongst importing and exporting countries on the best way to tackle the problem;
- explore possibilities for collaboration on the issue with countries in the European Free Trade Area (EFTA);
- engage in dialogue, based on the ideas presented in the Action Plan, with other countries in appropriate international meetings, such as the UN Forum on Forests, International Tropical Timber Organisation, the regional FLEG processes, the Asia Forest Partnership and the Congo Basin Forest Partnership; and
- gather lessons from international efforts in other sectors, such as the Kimberley Process, an international initiative to restrict trade in conflict diamonds with a view to building effective conditions and a framework for multilateral actions.

These actions will be taken in close collaboration with other importing and exporting countries which share the EU's concerns about illegal logging.

²⁵⁵ See http://europa.eu.int/comm/external_relations/w28/1.htm, Annex 2, objective 3, final point

1.2.3. Voluntary licensing of exports

Countries attempting to tackle illegal logging can find their efforts frustrated by the fact that once illegally harvested timber is shipped abroad there is no simple means to prevent it entering the supply chain and providing profits for those involved. Similarly, importers purchasing timber from countries alleged to have problems of illegal logging often are not able to ensure that they only purchase legally harvested timber, unless they operate a chain of custody system going back to the forest or purchase certified timber. The Commission thus proposes to launch a voluntary licensing scheme to ensure that only legal timber is imported from countries participating in the scheme.

Under this scheme, exports of timber from participating countries (FLEGT Partner Countries) to the EU would be accompanied by an export permit, which would be granted if the timber has been harvested in conformity with relevant national legislation. Timber originating in a FLEGT Partner Country and arriving at an EU point of import would not be released for free circulation in the EU without such a permit.

In order for the scheme to function properly, FLEGT Partner Countries would need to establish reliable and credible systems and structures to identify and certify timber harvested in conformity with national legislation and monitor its flow to the EU and elsewhere. Initially, a phasing-in period may be required.

The FLEGT partnership agreements would initially cover a limited range of solid wood products (roundwood and rough sawnwood) due to the difficulties of ascertaining the origin of processed timber products, but provision could be made to extend the scheme to other product categories, where practicable. This could involve development of a means of verifying that timber imports from third countries, which were then subject to further processing and exported to the EU, were harvested in conformity with national legislation in the country where the wood was logged. Such an approach would be facilitated if regional rather than national FLEGT partnership agreements were developed.

The main advantages for participating countries would be:

- increased market confidence for timber from participating countries;
- increased revenues from taxes and duties – indications are that these will more than cover the expenses associated with running a system to verify legality of harvesting and tracking;
- additional enforcement tools to combat illegal activities in the market of origin of the wood;
- once established, the mechanisms could be upgraded to support the tracking and verification of certified timber from sustainably managed forests; and
- priority for EC development assistance for FLEGT-related support measures, to be decided in the context of programming of the relevant country strategies.

The Commission will propose a Regulation to implement the scheme. The Regulation will define the products covered; describe the permit / licence required to verify that timber has been legally harvested; specify the nature and mandate of any advisory or management bodies set up to assist the Commission; and indicate the countries to which these controls apply as per the voluntary partnership agreements. It will also make provision for participating countries to nominate the competent authorities for issuing and verifying the licence and provide for administrative co-operation between EU and FLEGT partner country authorities.

Conditions in the forest sector, and the overall governance environment, vary sharply from country to country. The details of the systems and structures required to verify that timber has been legally harvested in the country of origin will be tailored to meet these different conditions, in consultation with potential partner countries. Detailed proposals will also be contingent on the results of studies underway. Licensing and associated schemes must be usable by industry and commerce and controllable by governments and other relevant services; licensing must be effective, cost-effective, reliable, publicly verifiable and not penalise legitimate business.

There will be some elements common to each agreement – notably that partner countries should have or be committed to developing credible legal and administrative structures and technical systems for the purpose of verifying the legality of wood production according to national laws. This implies:

- a commitment to ensure that the applicable forest law is consistent, understandable and enforceable and is supportive of sustainable forest management principles;
- developing technical and administrative systems to monitor logging operations and identify and track timber from the point of harvest to the market or point of export;
- building checks and balances into the tracking and licensing system, including the appointment of independent monitors, where this is considered necessary for the effective functioning of the scheme; and
- developing procedures to licence the export of legally harvested timber.

Box 2 below illustrates some of the steps to be considered for a hypothetical Partnership Agreement in a country wishing to establish a system with a third party monitoring element.

Box 2: An example of procedures under a hypothetical Forest Partnership Agreement

Step 1: The FLEGT Partner Country designates an accreditation body, which is empowered to appoint bodies to certify the legality of wood products.

Step 2: The FLEGT Partner Country designates an independent monitor and sets out a transparent dispute settlement mechanism.

Step 3: The EC confirms that the proposed system constitutes a credible system to verify that timber has been legally harvested.

Step 4: Certificates are issued for legally harvested timber, allowing customs authorities to clear legal shipments for export. Information derived from the permits may also be made available to the general public for inspection, for example through an electronic platform.

Step 5: The export permit denoting legal harvesting is produced at the Community port where timber is declared for free circulation in the EU, and checked by Member State customs authorities against the description of the consignment provided under pre-shipment notification.

Step 6: Customs only accept declarations for release for free circulation into the EU when timber is accompanied by the necessary export permit.

The EU will also seek to develop regional approaches to FLEGT partnerships in order to implement coherent and efficient trade measures within interregional frameworks.

For the Association of South East Asian Nations (ASEAN), an important timber-producing region where illegal logging presents a challenge to several member countries, the forestry sector has been identified as a potential priority area for enhanced future co-operation with the EU. As part of the strategy for building relations with Southeast Asia, the Commission will develop a trade action plan with the region – the Trans-Regional EU-ASEAN Trade Initiative (TREATI) – comprising dialogue and joint activities with the goal of facilitating trade and investment flows. Building on bilateral agreements, it is hoped that these activities may eventually lead to the establishment of a regional FLEGT Partnership Agreement with ASEAN.

If appropriate, interregional-FLEGT partnership agreements will be promoted by the EU in current regional trade negotiations with other regions, such as Central Africa, the wider group of Africa, Caribbean and Pacific (ACP) countries, and Mercosur as a contribution to sustainable development, in line with the overarching goal to promote sustainable development agreed by the EU and its third country partners in the WSSD.

To implement the voluntary licensing of exports, the Commission will:

- enter into discussions with interested countries and regional organisations on the elements of proposed FLEGT partnership agreements, and ensure broad stakeholder participation. This includes establishing a dialogue in the current frame of regional trade negotiations with a view to promote interregional FLEGT partnerships;
- in parallel with the above, request the authorisation from the Council, on the basis of article 133 of the TEC, to enter into negotiations on FLEGT Partnership Agreements with timber producing countries; and present to the Council and European Parliament a Regulation setting up the voluntary licensing scheme;
- negotiate with interested parties and regional organisations on the elements of proposed FLEGT partnership agreements
- sign Memoranda of Understanding²⁵⁶ to work towards a FLEGT partnership agreement with interested countries; and
- conclude FLEGT Partnership Agreements with interested countries.

The European Commission will use existing structures for dialogue with potential partner countries and also take advantage of forest-related international meetings and processes to engage with potential partner countries, in particular the regional FLEG processes co-ordinated by the World Bank. Where there is interest in taking the discussion further, funding for support activities such as workshops and studies will be provided within existing co-operation instruments. Collaboration with relevant EU Member States development co-operation programmes will be sought to strengthen the process.

1.2.4. Additional legislative options

In the EU there is currently no Community legislation prohibiting the import and marketing of timber or timber products produced in breach of the laws of the country of origin. For a variety of reasons, some important wood-producing countries may choose not to enter into

²⁵⁶ Memoranda of Understanding will be brief statements of political intent to co-operate to address illegal logging, signed by the EC and potential partner countries. These MoU will help to harness existing political will to address illegal logging while the longer process of setting up voluntary agreements is ongoing.

FLEGT partnership agreements with the EU, despite the advantages outlined above in 4.2.3. The Commission will therefore review options for, and the impact of, further measures, including, in the absence of multilateral progress, the feasibility of legislation to control imports of illegally harvested timber into the EU, and report back to the Council on this work during 2004. Member States should also examine how the trafficking of illegally harvested timber is addressed under national laws.

There are legislative instruments and international processes which may help to inform the Commission's position in this regard, including the US Lacey Act, which applies to fish and wildlife products, and the Kimberly Process, an international initiative to control the trade in conflict diamonds. The UN Convention on Transnational Crime may also be a useful instrument for this aspect of the Action Plan.

On the legislative framework, the Commission will:

- undertake an analysis of the options for, and the impact of, further measures, including, in the absence of multilateral progress, the feasibility of legislation to control imports of illegally harvested timber into the EU, and report back to the Council on this work during 2004. Specific questions to be addressed will include the likely impact on customs services responsible for enforcing the rules and procedures for distinguishing legal from illegal timber arriving from countries which are not participating in the voluntary licensing scheme; and how to treat shipments of wood from non-partner countries which are suspected to be of illegal origin; and
- conduct consultations with forest sector stakeholders on the options for and the impact of further legislative controls to address the imports of illegally harvested timber.

1.3. Public procurement

European Community legislation on public procurement is governed by Directives 92/50/EEC (Services), 93/36/EEC (Supplies) and 93/37/EEC (Works) for the classical sectors and by Directive 93/38/EEC for the utilities sectors. The directives were last amended by Directive 97/52/EC for the classical directives and by Directive 98/4/EC for the utilities directive.

The above-mentioned directives are currently undergoing a complete revision. The Commission has put forward a proposal for a new joint directive for the classical sectors, combining the Services, Supplies and Works Directives, and has proposed a revised directive for the utilities sector. These proposals are currently going through a co-decision procedure with the Council and the European Parliament.

The current public procurement legislation, as well as the proposed future legislation, offers a number of possibilities for taking into account environmental considerations in public procurement procedures. The Commission has recently presented a Communication which sets out the possibilities under the current legislation.²⁵⁷

In line with this Communication on public procurement and the environment, a Handbook on Green Procurement is being developed. This will present clear guidance and best practice examples on the utilisation of environmental considerations in public procurement procedures as part of the drive towards sustainable development.

²⁵⁷ Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final, see <http://simap.eu.int/EN/pub/src/welcome.htm>, under 'rules and guidelines'.

On public procurement, the Commission will:

- use the Handbook on Green Procurement to show that under the public procurement directives it is possible to take into account legally harvested timber and products made from such timber. Environmental aspects of sustainable forest management can be taken into consideration in public procurement. Schemes that certify sustainable forest management cover environmental considerations and other issues including, usually, the legality of harvesting of the timber. Certification of sustainable forest management can therefore act as a means of proof of compliance with these environmental requirements and increase the likelihood that the public authority is being supplied with legally harvested timber. Such a request should be integrated into the definition of the subject matter of the contract and the technical specifications of the call for tender. This possibility will also apply in the proposed future procurement directives.
- draw the attention of Member State governments to the fact that illegal logging can be addressed through the adoption of procurement policies as described above.

Member States should make use of their competencies in this field. For example, both the present and the proposed future public procurement Directives mention the possibility of excluding a bidder from a contract for ‘grave professional misconduct’. The definition of grave professional misconduct is an issue of Member State competence. For application of this exclusion criterion, Member States will have to examine whether deliberately handling illegally harvested timber would constitute grave professional misconduct according to their national law.

1.4. Private sector initiatives

A fourth theme which the Commission proposes to address through the Action Plan is that of private sector initiatives based on principles of corporate social responsibility. The private sector has a key role to play in combating illegal logging, and can exert a direct and positive influence through a network of business relationships extending from the forest to the market place. A recent Communication²⁵⁸ on corporate social responsibility defines the concept as when “companies integrate social and environmental concerns in their business operations and in their interactions with stakeholders on a voluntary basis”.

This theme relies less on prescriptive policy measures and more on encouraging the private sector in the EU to work with the private sector in timber-producing countries according to voluntary codes of practice for timber harvesting and procurement, supplemented by rigorous voluntary independent audit of the supply chain. This approach is likely to be particularly effective in cases where the trade is dominated by relatively few suppliers and importers into the EU. The voluntary licensing scheme described in section 4.2 above will also greatly assist this type of initiative.

European businesses working in the forest sector are developing a number of initiatives to introduce more socially and environmentally responsive approaches into their business practices. One such scheme is being developed by the Tropical Forest Trust²⁵⁹ (Box 3). A number of interesting initiatives outside the forest sector are also currently pushing forward the boundaries of corporate social responsibility. Notable among these is the Extractive Industries Transparency Initiative, which was launched at the World Summit on Sustainable

²⁵⁸ COM(2002) 347 final, 2 July 2002

²⁵⁹ The Tropical Forest Trust is an organisation established to assist purchasers of tropical timber to source from sustainably managed forests and build capacity for certification.

Development and now being further developed by the G8. The initiative aims to address the key issue of governance of natural resources and the revenues flowing from their extraction. Although the initiative focuses on oil, gas, and mining and does not include timber, it nevertheless establishes interesting principles for co-operation between the private sector and producer and consumer countries which could be applicable in the context of the FLEGT programme.

Box 3: The Tropical Forest Trust approach

The TFT works by linking the wood supply chain from producers to suppliers and on to buyers who wish to procure sustainable and legal timber products.

Members participate in the scheme because they have neither time nor human resources within their own organisations to manage the very complex process of moving forests towards certification and ensuring a future supply of legal and sustainable timber. The TFT manages this process for them.

TFT members invest a fixed percentage of their product's gross margin to fund TFT activities. Members get a return on their investment by securing a more ethical wood supply. TFT members gain access to timber products generated by specific projects they are supporting – before the project achieves certification members have the security of knowing that their supply chain originates in a project that is demonstrably moving towards certification with TFT assistance and monitoring. Having established such a close relationship with these projects, TFT members have the opportunity to secure a long-term supply of certified timber products once the project is certified.

Activities initiated under the TFT scheme include:

1. Assistance with the development of codes of conduct / wood procurement policies;
2. Assistance with understanding the current situation on forest policy, stakeholder views, and producing country issues;
3. Assistance with the identification of legal sources that can progress towards sustainable and certified;
4. Baseline and on-going assessments of forest management;
5. Technical assistance to improve forest management; and
6. Audit of members performance.

On private sector initiatives, the Commission will:

- draw lessons from new initiatives for corporate social responsibility, and examine ways of applying these lessons in the forest sector;
- promote private sector initiatives, including support for the establishment of co-ordinating bodies, the adoption of high standards in codes of conduct, transparency in private sector activities, and independent monitoring;
- provide support for capacity building in developing countries to initiate private sector initiatives , for example in forest monitoring; and
- encourage active private sector participation, including with a view to: providing technical and financial assistance to ensure legality throughout the supply chain; developing and implementing codes of conduct and supply chain management systems; using of internal and external audit to verify compliance with the supplier code of conduct; assisting with the third party verification of the supply chain from source to end user; and reporting publicly in an agreed format on progress towards ensuring legality of products.

1.5. Financing and investment

The fifth element of the Action Plan addresses the question of financing institutions and the investment of funds in projects which potentially encourage illegal logging.

1.5.1. Improved due diligence

Large-scale capital investments in the forest sector, such as pulp and paper mills, can have a high risk attached to them if they do not have clearly defined, legal and sustainable supplies of timber over the long-term. These operations are liable to disruption due to the environmental and social damage which they cause, but current practice in banks and financial institutions for screening and risk assessment of forest sector investments does not sufficiently take this into account.

Banks and financial institutions investing in forest sector operations should be encouraged to assess the risk attached to the social and environmental factors which could have a bearing on the viability of their investments. Social factors which are of relevance to forest sector investments include conflict over land and access to forest resources (for example, disputed land ownership, or contradictions between official and traditional land ownership rights). Relevant environmental factors include the lack of a long-term supply of legal and sustainable timber (in which case the company could come to have an implicit reliance on illegally harvested timber).

On improved due diligence, the Commission will:

- encourage banks and financial institutions to take environmental and social factors into account when conducting due diligence and assessing the viability of investments in the forest sector. Particular attention must be devoted to investigating the supply and source of timber available over the longer term;
- foster the development of specific procedures for environmental and social due diligence for Export Credit Agencies (ECAs), the European Investment Bank and the Cotonou Investment Facility, since these operate with public money. Project screening procedures should ensure there is no evidence or undue future risk of illegal forest sector activity; and
- identify ways to assist Export Credit Agencies and other public lending bodies to obtain better information about forest sector investments and the associated risks; and

1.6. Supporting the Action Plan with existing legislative instruments

1.6.1. Money laundering

Under Council Framework Decision of 26 June 2001 (2001/500/JHA),²⁶⁰ EU Member States agreed to criminalise the laundering of the proceeds of "serious offences". Such offences shall in any event include offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those states which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or detention order for a minimum of more than six months. The criminalisation of the laundering of the proceeds from illegal logging or related offences would thus depend on whether such

²⁶⁰ OJ L 182, 5.7.2001, p.1.

activity constituted a serious offence in each Member State in accordance with the above-mentioned definition.

The EU anti-money laundering directive of 1991,²⁶¹ as amended in 2001,²⁶² obliges Member States to act against money laundering, notably by requiring financial institutions to report any suspicions of money laundering. It covers the laundering of the proceeds from a wide range of serious crimes but does not define serious offences in the same way as in the Framework Decision referred to above. Article 1(E) of the amended Directive does, however, require an alignment of the Framework Decision definition of serious crime before 15 December 2004 on the basis of a Commission proposal. Under the 2001 amendment some crimes are listed while others fall under a general reference to offences generating substantial proceeds or carrying a severe term of imprisonment. Thus Member States could, if they wished, treat crimes relating to illegal logging as serious offences for the purposes of the Directive. Currently only a small number of Member States designate crimes relating to illegal logging under money laundering legislation. It should be noted that the Directive states that money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country.

On money laundering, the Commission will:

- undertake work to establish the extent to which existing Member State legislation for money laundering is applicable to forest sector crimes, and disseminate this information widely to banks, financial institutions, financial crimes units and non-government organisations in the European Union;
- encourage Member States to designate illegal logging as a crime for the purposes of EC Directive 97/2001 on money laundering;
- provide development co-operation assistance, where appropriate, to strengthen developing country capacity to deal with forest-related money laundering issues; and
- encourage information sharing between the financial crimes units of the EU Member States on forest-related crimes.

1.6.2. The Convention on Trade in Endangered Species (CITES)

The 1973 Convention on Trade in Endangered Species (CITES) has an important role to play in controlling trade in endangered tree species. All EC Member States are Parties to CITES, as are all the candidate countries. CITES is currently implemented in Community law through Council Regulation (EC) No 338/97 of 9 December 1996 and Commission Regulation (EC) No 1808/2001 of 30 August 2001. CITES has developed mechanisms to ensure that trade in listed species is both legal and sustainable.

Currently 19 tree species are listed in Appendices I and II of CITES. Such a listing means that timber products from these species can only be imported into the EU when accompanied by an export permit from the country of origin and an EU import permit. An export permit is valid only if the timber was harvested legally within the country of origin. An EU import permit can only be granted when it is established that the granting of such a permit would not

²⁶¹ Directive 91/308/EEC, OJ L 166, 28.6.1991, p.77.

²⁶² Directive 2001/97/EC, OJ L 344, 28.12.2001, p. 76.

have a detrimental effect on the survival of the species or the extent of the territory occupied by it. Furthermore one genus and three tree species are listed in Appendix III – where countries have unilaterally restricted exports of such species. Once again, export permits granted for such species are only valid if the timber has been harvested legally.

At the 12th CITES Conference of the Parties in 2002 it was agreed to place restrictions on trade in big leaf mahogany (by listing in Appendix II) due to concerns about over-exploitation, as well as on species of the *Guaiacum* genus (lignum vitae, tree of life). On the basis of scientific evidence it may be decided to add further tree species in future – there would appear to be a number of potential candidate species.

On the Convention in International Trade in Endangered Species (CITES), the Commission will:

- promote research on endangered timber species to justify their inclusion in Appendices I and II to CITES, and encourage wood-producing countries to use voluntary listing of timber species under Appendix III;
- work to address weaknesses in the permit system which regulates trade in species listed in the Appendices to the Convention; and
- encourage third countries to manage CITES-listed species sustainably in order to avoid potential import restrictions under Article 4 of Council Regulation 338/97.
-

1.6.3. Other legislative instruments

Member State legislation for stolen goods and other legislation may in some cases be applicable to illegal logging. This legislation would allow illegally harvested timber to be dealt with in consumer countries, rather than being stopped at the port of entry. Such legislation is a Member State competence.

The OECD Convention on Bribery and Corruption is also relevant, since illegal logging operations are virtually synonymous with bribery and corruption.

On other legislative instruments, the Commission will:

- Raise awareness, and encourage Member States to apply existing criminal legislation and other legislative instruments, including, where applicable, legislation for stolen goods, and compile and exchange relevant information.
- Encourage Member States to apply measures set out in the OECD Action Statement on Combating Bribery, including the refusal to approve credit, cover or other support where evidence is shown that bribery was involved in the award of an export contract.

1.7. Conflict timber

Conflict timber is loosely defined as timber traded by armed groups, the proceeds of which are used to fund armed conflicts. It is usually unauthorised by the relevant government agencies and therefore illegal, but can sometimes be “legal” if authorised by the government and taking place in an area under its control. The final report of the expert panel on the illegal

exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo²⁶³ recommended that an international definition of conflict timber be developed.

On conflict timber, the Commission will:

- support work to define conflict timber – a necessary starting point for any further action to be taken at the international level.
- follow up in relevant international fora any recommendations in this regard which the UN Security Council may make.
- work to recognise and address in its development co-operation programmes the role forests play in the context of conflicts, and address relevant issues including local and indigenous peoples' rights to the forests they depend on for a living, and good governance in remote, sparsely populated forest areas; and
- initiate discussion with Member States, other donors and forested countries on the role of forests during conflicts and in pre- and post- conflict situations, and how this can best be taken into account in work related to forest law enforcement and governance.

2. CO-ORDINATION AND PROGRAMMING

As a cross-cutting issue, action on forest law enforcement, governance and trade requires a high level of co-ordination across different sectors and between different players. A co-ordination mechanism will be established within the Commission to:

- act as a central focal point for the FLEGT initiative, and facilitate the implementation of the FLEGT Action Plan, including through existing instruments;
- provide technical inputs for the development of partnership agreements with major wood-producing countries;
- develop a detailed and co-ordinated work plan for the FLEGT Action Plan with EU Member States;
- support a process of consultation with major forest sector stakeholders and other relevant parties on the FLEGT initiative in the EU and in potential partner countries;
- co-ordinate the Commission's support to ongoing international initiatives to build political commitment to address illegal logging, in particular the Africa, Asia and proposed Latin America initiatives for forest law enforcement and governance, and co-ordinate Commission positions in relation to dialogue with G8 countries and China;
- ensure that the technical inputs and expertise required to implement the FLEGT programme are made available. Immediate short term technical inputs which are needed include:
 - investigation of the importance of illegal logging in international trade, and the potential for indirect and spill over effects from measures taken by the EU;
 - economic analysis of the impact of illegal logging to affected countries – where this does not already exist – and the global economy; and
 - follow-on technical development and technical assistance to introduce systems for log tracking and legality verification both in the EU and in FLEGT Partner

²⁶³ UN Security Council, *supra* n. 197.

Countries. (A scoping exercise for this is currently being financed by the Commission.)

- assist development of a strategy to expand the focus of the initiative to include other major wood-consuming markets; and
- monitor the evolving impact of the programme on forest sector stakeholders, including forest-based industries in the EU and wood-producing countries, and governments and local communities in wood-producing countries.

As an initial step, the inter-service co-ordination group established for the development of the Action Plan will be maintained as a mechanism to co-ordinate activities. The Tropical Forest budget line, as well as other development co-operation financial instruments, will contribute to the implementation of the Action Plan.

The Commission will work to implement the Action Plan jointly with Member States and partner countries. The Commission will encourage a joint approach with Member States, including through co-ordination through the European Tropical Forest Advisers Group (ETFAG),²⁶⁴ and similar in-country co-ordination fora. In the short term, operational funds to initiate the FLEGT Action Plan will mainly be provided from the Tropical Forest Budget Line (B7-6200). The funds will be used to perform the tasks identified as a priority for the initiation of the FLEGT programme, where these are eligible for funding under the Regulation governing the budget line and in line with the biannual programming of the budget line. It should be noted that the Tropical Forest Budget Line can only be used to fund activities of benefit to developing countries. The Regulation governing the Tropical Forest Budget Line will expire at the end of 2006. The need to ensure the availability of resources to fund FLEGT-related activities will be an important factor to be taken into account by the Commission when considering whether to propose a new Regulation.

Funds available under the budget line may be insufficient to support the programmes of technical assistance and capacity building required in wood-producing FLEGT partner countries. Where appropriate, the Commission will thus work to integrate the FLEGT programme into the EC's main country-based and regional development co-operation programmes. Interested Member States will also be encouraged to contribute resources or activities to a common work plan.

3. THE NEXT STEPS

The Council and European Parliament are asked to endorse the Commission's proposals to:

- enter into negotiations for FLEGT Partnership Agreements with wood producing countries;
- present a Regulation setting up the voluntary licensing scheme, in conjunction with wide stakeholder consultation; and
- review options for, and consider the impact of, further measures to support the Action Plan, including, in the absence of multilateral progress, the feasibility of legislation to control imports of illegally harvested timber, and report back to the Council on this work during 2004.

²⁶⁴ The European Tropical Forest Advisers Group (ETFAG) is a forum which exists to promote co-ordination between the Commission and Member States active in the forest sector.

- Member States are also asked to identify relevant national legislation which could be applied to address the illegal logging issue, and to inform the Commission of their findings.

ANNEXES

ANNEX 1: ONGOING INITIATIVES FOR IMPROVED FOREST LAW ENFORCEMENT

A great deal of effort has been put into national, regional and international initiatives to raise commitment and initiate work programmes to tackle illegal logging. Many of these initiatives involve the European Commission and EU Member States, through delegations to multilateral processes, direct policy initiatives, and programmes of development co-operation. These initiatives are summarised below.

International initiatives

At an international level, the first major public pronouncement was made at the G8 summit in Birmingham in 1998. A working group set up after the Birmingham summit reported back to the G8 meeting in Canada in 2002. This report proposed measures for the identification and verification of legal production, timber tracking, labelling and certification, linked to measures denying market access to illegal products, public procurement policy, and assistance for capacity building and forest management. The G8 also stated a commitment to identifying actions in both producer and consumer countries.

Statements have also been made in other multilateral fora. In November 2001, the 31st session of the International Tropical Timber Council (ITTC) (ITTC-31) adopted a decision on forest law enforcement in the context of sustainable timber production and trade. In May 2002, the 32nd session of the ITTC (ITTC-32) adopted a decision on forest law enforcement in Africa to undertake data collection on forests in the Central African Republic, the Democratic Republic of Congo, and the Republic of Congo, aimed at improving forest concession management and ensuring conservation in protected areas.

In March 2002, the second session of the UN Forum on Forests (UNFF-2) developed a Ministerial Message to the World Summit on Sustainable Development (WSSD) that among other things calls for immediate action on domestic forest law enforcement and international trade in forest products. In addressing progress in combating deforestation and forest degradation, UNFF-2 also highlighted the vital role of initiatives to strengthen law enforcement, and urged governments to address law enforcement and illegal logging.

The Convention on Biological Diversity in 2002 adopted an Expanded Work Programme on Forest Biological Diversity, which includes proposed actions concerning the promotion of forest law enforcement and measures to address the related trade.

Regional initiatives

The World Bank is co-ordinating regional initiatives for forest law enforcement and governance in Asia and Africa.²⁶⁵ In Asia a series of regional planning meetings

²⁶⁵ Full details of these initiatives can be found at:

culminated in a ministerial conference in Bali, Indonesia in September 2001. The meeting issued a Ministerial Declaration: “Recognising that all countries, exporting and importing, have a role and responsibility in combating forest crime, in particular the elimination of illegal logging and associated illegal trade” (Annex 3). An Asian FLEG Task Force has been set up, with associated advisory bodies consisting of industry and non-government organisation representatives, and a substantial programme of work is now ongoing. Ministers are due to meet again to review progress later in 2003.

In Africa, a Ministerial Conference is due to take place in 2003. This meeting aims to galvanise commitment in Africa at a high political level to strengthen capacity for forest governance, in particular with regard to illegal logging. It is expected that participants will endorse a Ministerial Declaration and a follow-up programme of work will be launched.

The European Commission and a number of EU Member States have provided strong support to these processes in Asia and Africa – both through political support and financial contributions.

Illegal logging and governance also form a focus of two major type II partnerships launched at the World Summit on Sustainable Development (WSSD) – the Asia Forest Partnership, launched by Japan and Indonesia, and the Congo Basin Forest Partnership, launched by the United States and South Africa.

European Commission initiatives

The European Commission set out its intention to combat the illegal logging and the associated trade in its Communication to the Council and the European Parliament on a global partnership for sustainable development²⁶⁶ and in the 6th Community Environmental Action Plan.²⁶⁷

To assist with the preparation of this Action Plan, the Commission hosted an international workshop in Brussels from 22-24 April 2002. The workshop was attended by representatives of the EU Member States, the governments of several non-EU wood-producing and wood-importing countries, the forest industry, and non-government organisations.

The workshop examined methods of controlling the entry of illegally harvested timber into the EU, including through the use of legislation and a licence of legality; data exchange and collaboration between customs authorities; due diligence by financing institutions; and the role of public procurement policy. Further details of the workshop are available online at:

http://europa.eu.int:8082/comm/external_relations/flegt/intro/index.htm

The European Commission then hosted a side event on illegal logging at the World

<http://lnweb18.worldbank.org/ESSD/essdext.nsf/14ByDocName/ForestGovernanceProgramMinisterialProcesses>

²⁶⁶ COM(2002) 82, 13.2.02

²⁶⁷ Decision N° 1600/2002/EC of the European Parliament and the Council, 22 July 2002

Summit on Sustainable Development (WSSD) in Johannesburg, in August 2002. The EU, the United States and Japan were all present. At the side event, which also included producer country governments, and representatives of the private sector and non-government organisations, all parties expressed agreement of the need to work together to tackle illegal logging.

EU Member State initiatives

EU Member States are undertaking many different actions to combat illegal logging and the associated trade. Without prejudice to their conformity with EU laws, the following paragraphs provide some examples of the types of activities which are ongoing.

Denmark, in its capacity as serving EU president, jointly hosted a side event on illegal logging at the World Summit on Sustainable Development (WSSD) with the European Commission in August 2002. The government places considerable priority on combating illegal logging and related trade, and among other actions already taken, Denmark is at an advanced stage of producing guidelines for public procurement of tropical timber, aiming to ensure that only legal and sustainable timber will be purchased by public institutions.

Finland is in the process of defining a strategy for forest development co-operation, and this may include a focus on illegal logging. The Finnish Forest Industries Federation have also issued a statement of their support for efforts to eradicate illegal logging, which is available at <http://english.forestindustries.fi/press/2002/081102.html>.

France is providing support to the Africa Forest Law Enforcement and Governance (AFLEG) process, in partnership with the US, UK, Switzerland and the Commission. Issues concerning illegal logging and trade will also be addressed in co-operation projects at the regional and national level through activities focused on capacity building, data collection and support for the control of forest activities. France is also working to encourage the commitment of the private sector, and in particular is encouraging French corporations to implement the code of conduct targeted at Forest Management.

A dialogue has been initiated within the National Working Group for Tropical Humid Forests in order to address the issue of illegal logging at the national level through awareness raising and the use of specific policy instruments, such as public procurement. A study on the impact of public procurement measures has been launched and is being managed by the ministries responsible for the environment and forests. The French Development Agency (AFD) is also working on the possible options to strengthen controls in the implementation of the Forest Management Plans supported by French Development Co-operation.

Germany in 2002 approved a new strategy for development co-operation in the forest sector. Combating illegal logging is amongst a number of priorities identified for German development co-operation in the sector. The strategy proposes to fight illegal logging and timber trafficking, as well as trade in other illegally harvested forest products (e.g. game and bush-meat), by addressing the following areas for action: Developing transparent procedures as a basis for issuing concessions and utilisation

licences; establishing effective control and penalty mechanisms (law enforcement); ensuring civil society participation in these processes; creating incentives in import countries for public and private procurement of independently certified timber and wood products from sustainable forest management; and assisting partner countries with their efforts to implement and further develop the CITES endangered species convention (particularly protection of the endangered species listed and inclusion of further species in Annex 3). Action in these areas will be implemented through development co-operation programmes as and where appropriate.

The full strategy document is available in English online at:

http://www.gtz.de/forest-policy/download/Documents/German%20Government/BMZ_Forest_Sector_Concept_2002.pdf

The Netherlands does not have a specific policy on illegal logging, but some relevant actions are being taken within the Netherlands and overseas through development co-operation programmes. The subject is attracting increasing attention.

Within the Netherlands, listing in the appendices of the Convention on Trade in Endangered Species (CITES) is being used to control the illegal trade in endangered tree species. The Netherlands is also supporting a specific programme on the "Evaluation of tree species using the CITES listing criteria" to further the usefulness of the Convention in protecting endangered tree species. The Netherlands also actively promotes timber certification processes, which include a focus on the legality of sources in the country of origin.

Through development co-operation, by way of projects and the sectoral approach, the Netherlands is supporting initiatives to promote good governance in the forest sector in several developing countries, including Peru, Guatemala, Ecuador, and Surinam. The Netherlands is also financing a number of smaller relevant projects implemented by IUCN-Netherlands in a number of countries.

The United Kingdom is supporting both the Asia and Africa Ministerial Process for Forest Law Enforcement and Governance. The issue is addressed through both policy actions and country programmes in Indonesia, Cameroon and parts of Central America (among others). In April 2002 the United Kingdom signed a Memorandum of Understanding with the Government of Indonesia to combat illegal logging and the associated international trade in illegally logged timber and wood products. The MoU includes agreement to work together on legal and administrative reforms, legality verification systems, and financial and technical assistance. Both the process leading up to the signing of this MoU, and the issues which have subsequently arisen with respect to its implementation, offer valuable lessons for elements of the Action Plan which the European Commission is now preparing. The UK is also at an advanced stage of reforming public procurement policy to ensure that only legal and sustainable timber is purchased by public institutions.

ANNEX 2: A SUMMARY OF THE INTERNATIONAL TRADE IN TIMBER

The world market for the production, processing and trading of wood is largely dominated by the temperate zones and developed countries (US, EU, Canada, Japan). Tropical products account for a small proportion of total world exports of wood, namely 16% of industrial roundwood, 13% of sawnwood, pulp and paper and 39% of panels. Only plywood made of tropical hardwood accounts for a dominant proportion of the international market (71%).

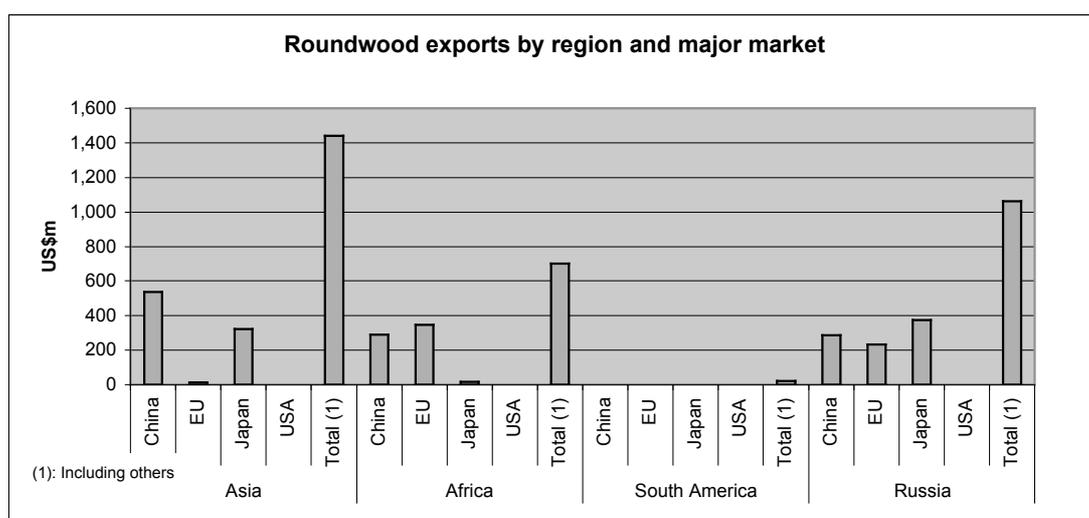
Another particularity of world trade in wood products is that much of the trade in forest products is within regions. According to the World Bank, 80% of Europe's trade is between European countries, 85% of exports from countries in Asia are to countries in the same region and 80% of North American imports come from within the region. The only major inter-regional trade flows (over US\$5 billion) are from North America to Europe and from North America and Europe to Asia and Oceania.²⁶⁸

Nevertheless, the figures below confirm the potential for EU trade-based measures to exert an influence on the global trade in timber, and also highlights the importance of working towards wider collaboration on this issue with the other major wood consuming countries in the longer term.

Roundwood

Key points to note:

- Demand for roundwood from Asian producer countries is dominated by China and Japan.
- The EU is the largest importer of African roundwood by value.
- Trade in roundwood from South America is negligible.
- Imports of roundwood by China, Japan and the EU from Russia are of roughly equal value (although the EU is the largest importer by volume).



Source: FAO FAOSTAT online database

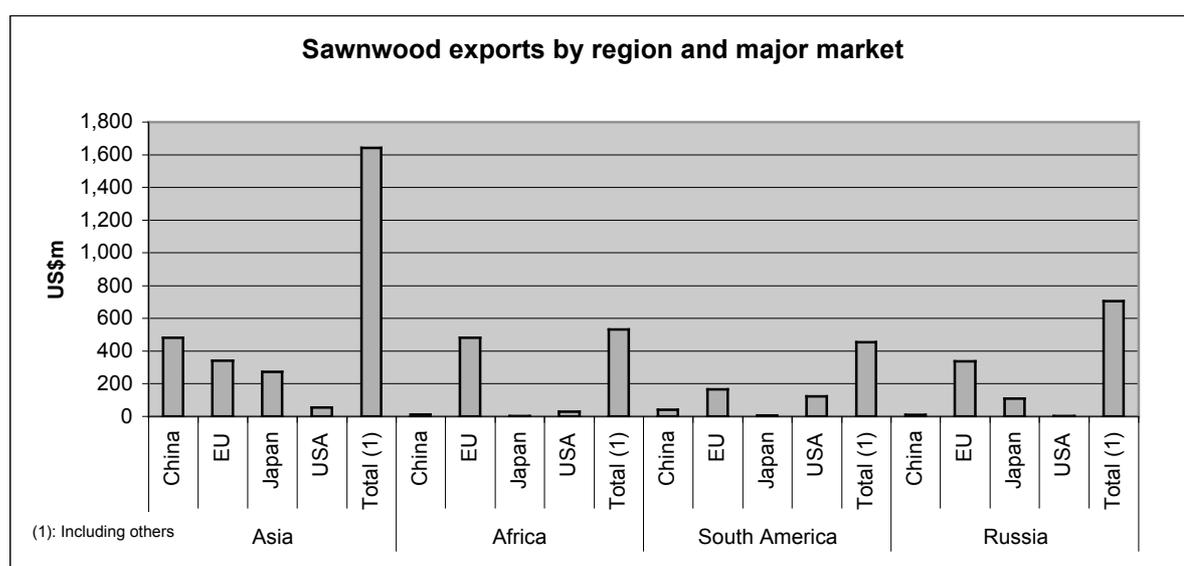
²⁶⁸

World Bank. Future Developments in Forest Products Markets (1999).

Sawnwood

Key points to note:

- The EU is the second largest market for sawnwood from Asia, accounting for 21% of the trade with Asia by value.
- The EU is the largest importer of sawnwood from Africa, accounting for 91% of Africa's trade by value with the four major markets.
- The EU accounts for 38% of the value of sawnwood exports from South America.
- EU imports account for nearly half of Russia's trade in sawnwood.

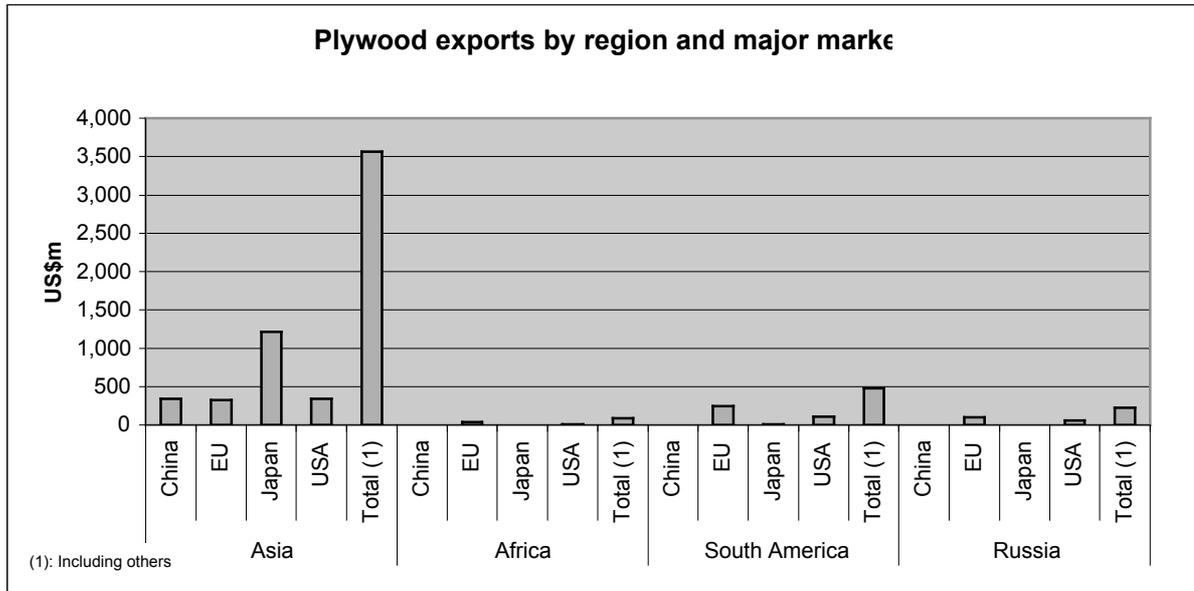


Source: FAO FAOSTAT online database

Plywood

Key points to note:

- The EU is the second largest market for Asian plywood, accounting for 9% of trade by value.
- The EU is the largest importer of plywood from Africa, accounting for 43% of Africa's (very modest) trade by value.
- The EU accounts for 51% of the value of plywood exports from South America.
- EU imports account for nearly half of Russia's plywood exports.



Source: FAO FAOSTAT online database

ANNEX 3: THE BALI DECLARATION

**FOREST LAW ENFORCEMENT AND GOVERNANCE
EAST ASIA MINISTERIAL CONFERENCE
Bali, Indonesia
11 – 13 September 2001
MINISTERIAL DECLARATION**

Countries from the East Asian and other regions participating in this Ministerial Conference:

Understanding that forest ecosystems support human, animal and plant life, and provide humanity with a rich endowment of natural, renewable resources;

Deeply concerned with the serious global threat posed to this endowment by negative effects on the rule of law by violations of forest law and forest crime, in particular illegal logging and associated illegal trade;

Recognising that illegal logging and associated illegal trade directly threaten ecosystems and biodiversity in forests throughout Asia and the rest of our world;

Also recognising the resulting serious economic and social damage upon our nations, particularly on local communities, the poor and the disadvantaged;

Further recognising that the problem has many complex social, economic, cultural and political causes;

Convinced of the urgent need for, and importance of good governance to, a lasting solution to the problem of forest crime;

Recognising that all countries, exporting and importing, have a role and responsibility in combating forest crime, in particular the elimination of illegal logging and associated illegal trade;

Emphasising the urgent need for effective co-operation to address these problems simultaneously at the national and sub-national, regional and international levels;

Declare that we will:

Take immediate action to intensify national efforts, and to strengthen bilateral, regional and multilateral collaboration to address violations of forest law and forest crime, in particular illegal logging, associated illegal trade and corruption, and their negative effects on the rule of law;

Develop mechanisms for effective exchange of experience and information;

Undertake actions, including co-operation among the law enforcement authorities within and among countries, to prevent the movement of illegal timber;

Explore ways in which the export and import of illegally harvested timber can be eliminated, including the possibility of a prior notification system for commercially traded timber;

Help raise awareness, through the media and other means, of forest crimes and the threats which forest destruction poses to our future environmental, economic and social well-being;

Improve forest-related governance in our countries in order to enforce forest law, inter alia to better enforce property rights and promote the independence of the judiciary;

Involve stakeholders, including local communities, in decision-making in the forestry sector, thereby promoting transparency, reducing the potential for corruption, ensuring greater equity, and minimising the undue influence of privileged groups;

Improve economic opportunities for those relying on forest resources to reduce the incentives for illegal logging and indiscriminate forest conversion, in order to contribute to sustainable forest management;

Review existing domestic forest policy frameworks and institute appropriate policy reforms, including those relating to granting and monitoring concessions, subsidies, and excess processing capacity, to prevent illegal practices;

Give priority to the most vulnerable transboundary areas, which require co-ordinated and responsible action;

Develop and expand at all appropriate levels work on monitoring and assessment of forest resources;

Undertake the demarcation, accurate and timely mapping, and precise allocation of forest areas, and make this information available to the public;

Strengthen the capacity within and among governments, private sector and civil society to prevent, detect and suppress forest crime.

Further, in order to give full effect to the intentions of this Declaration, and to proceed with urgency to explore timely implementation of significant indicative actions developed by technical experts at this meeting, we:

Undertake to create a regional task force on forest law enforcement and governance to advance the objectives of this Declaration;

Invite the representatives at this conference from NGOs, industry, civil society and other relevant stakeholders to consider forming an advisory group to the regional taskforce;

Decide to meet again at the Ministerial level in 2003 to review progress on first actions to implement these commitments, in co-operation with relevant international partners;

Request the ASEAN and APEC countries participating in this Conference to inform the next ASEAN and APEC Summits of the outcome of this Ministerial Conference and to invite their support;

Pledge to work to see that the issue of forest crime is given significant attention in future international fora, including by the World Summit on Sustainable Development (WSSD) and the United Nations Forum on Forests, and by the member organisations of the Collaborative Partnership on Forests;

Request the G-8 countries and other donors to consider further how they can join in the fight against forest crime, including through capacity building efforts;

Encourage other regions to consider creating similar regional initiatives to combat forest crime.

Bali, Indonesia

13 September 2001

ANNEX III: COUNCIL REGULATION NO. 2173/2005

Council Regulation (EC) No 2173/2005

of 20 December 2005

on the establishment of a FLEGT licensing scheme for imports of timber into the European Community

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) The Council and the European Parliament welcomed the Communication from the Commission to the Council and the European Parliament on an EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT) as a first step towards tackling the urgent issue of illegal logging and associated trade.

(2) The Action Plan puts emphasis on governance reforms and capacity building, supported by actions aimed at developing multilateral cooperation and complementary demand-side measures designed to reduce the consumption of illegally harvested timber and contributing to the wider objective of sustainable forest management in timber-producing countries.

(3) The Action Plan identifies the setting up of a licensing scheme as a measure to ensure that only timber products that have been legally produced in accordance with the national legislation of the producing country may enter the Community, and emphasises that that licensing scheme should not impede legitimate trade.

(4) Implementation of the licensing scheme requires that imports of relevant timber products into the Community be made subject to a system of checks and controls seeking to guarantee the legality of such products.

(5) To this end the Community should conclude voluntary Partnership Agreements with countries and regional organisations, which are to place a legally binding obligation on a partner country or regional organisation to implement the licensing scheme within the schedule stipulated in each Partnership Agreement.

(6) Under the licensing scheme, certain timber products exported from a partner country and entering the Community at any customs point designated for release for free circulation should be covered by a licence issued by the partner country, stating that the timber products have been produced from domestic timber that was legally harvested or from timber that was legally imported into a partner country in accordance with national laws as set out in the respective Partnership Agreement. Compliance with those rules should be subject to third-party monitoring.

- (7) The competent authorities of the Member States should verify that each shipment is covered by a valid licence prior to releasing the shipment covered by that licence for free circulation in the Community.
- (8) Each Member State should determine the penalties applicable in the event of infringements of this Regulation.
- (9) The licensing scheme should initially cover a limited range of timber products. When agreed, the range of products could be extended to other product categories.
- (10) It is important to revise the Annexes specifying the countries and products covered by the licensing scheme promptly. Those revisions should take into account the progress in implementation of Partnership Agreements. A partner country may be added to Annex I after it has notified the Commission and the Commission has confirmed that this partner country has put in place all the controls needed to be able to issue licences for all the products listed in Annex II. A partner country may be removed from Annex I either when it has given one year's notice of its intention to terminate its Partnership Agreement or with immediate effect, in the case of suspension of its Partnership Agreement.
- (11) Annex II may be amended after the Commission and all partner countries have agreed to such amendment. Annex III may be amended after the Commission and the partner country concerned have agreed to such amendment.
- (12) The amendments to Annexes I, II and III would be implementing measures of technical nature and in order to simplify and expedite the procedure, their adoption should be entrusted to the Commission. Such amendments should comprise commodity codes, at four-digit heading level or six-digit subheading level of the current version of Annex I to the Harmonised Commodity Description and Coding System.
- (13) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1] with a distinction being made between those measures which are subject to the regulatory committee procedure and those which are subject to the management committee procedure, the management committee procedure being in certain cases, with a view to increased efficiency, the more appropriate,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT MATTER AND DEFINITIONS

Article 1

1. This Regulation establishes a Community set of rules for the import of certain timber products for the purposes of implementing the FLEGT licensing scheme.
2. The licensing scheme shall be implemented through Partnership Agreements with timber producing countries.
3. This Regulation shall apply to imports of timber products set out in Annexes II and III from partner countries listed in Annex I.

Article 2

For the purposes of this Regulation the following definitions shall apply:

1. "Forest Law Enforcement, Governance and Trade licensing scheme" (hereinafter referred to as FLEGT licensing scheme) means the issuing of licences for timber products for export to the Community from partner countries and its implementation in the Community, in particular in Community provisions on border controls;
2. "partner country" means any State or regional organisation that enters into a Partnership Agreement, as listed in Annex I;
3. "Partnership Agreement" means an agreement between the Community and a partner country by which the Community and that partner country undertake to work together in support of the FLEGT Action Plan and to implement the FLEGT licensing scheme;
4. "regional organisation" means an organisation consisting of sovereign states that have transferred competence to that organisation, granting it the capacity to enter into a Partnership Agreement on their behalf, in respect of matters governed by the FLEGT licensing scheme, as listed in Annex I;
5. "FLEGT licence" means a shipment-based or market participant-based document of a standard format which is to be forgery-resistant, tamper-proof, and verifiable, and which refers to a shipment as being in compliance with the requirements of the FLEGT licensing scheme, duly issued and validated by a partner country's licensing authority. Systems for issuing, recording and communicating licences may be paper-based or based on electronic means, as appropriate;
6. "market participant" means an actor, private or public, involved in forestry or transformation or trade of timber products;
7. "licensing authority(ies)" means the authority(ies) designated by a partner country to issue and validate FLEGT licences;
8. "competent authority(ies)" means the authority(ies) designated by Member States to verify FLEGT licences;
9. "timber products" means the products set out in Annexes II and III, to which the FLEGT licensing scheme applies, and which, when imported into the Community, cannot be qualified as "goods of a non-commercial nature" as defined in point 6 of Article 1 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [2];

10. "legally produced timber" means timber products produced from domestic timber that was legally harvested or timber that was legally imported into a partner country in accordance with national laws determined by that partner country as set out in the Partnership Agreement;

11. "imports" means the release for free circulation of timber products within the meaning of Article 79 of Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code [3]

12. "shipment" means a shipment of timber products;

13. "export" means the physical leaving or taking out of timber products from any part of the geographical territory of a partner country to bring them into the Community;

14. "third-party monitoring" means a system through which an organisation that is independent of a partner country's government authorities and its forest and timber sector monitors and reports on the operation of the FLEGT licensing scheme.

CHAPTER II

FLEGT LICENSING SCHEME

Article 3

1. The FLEGT licensing scheme shall apply only to imports from partner countries.
2. Each Partnership Agreement shall specify an agreed schedule for implementing the commitments entered into by that Agreement.

Article 4

1. Imports into the Community of timber products exported from partner countries shall be prohibited unless the shipment is covered by a FLEGT licence.
2. Existing schemes that guarantee the legality and reliable tracking of timber products exported from partner countries may form the basis of a FLEGT licence on condition that those schemes have been assessed and approved in accordance with the procedure referred to in Article 11(2), in order to provide the necessary assurance as to the legality of the timber products concerned.
3. Timber products of species listed in Annexes A, B and C to Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [4] shall be exempt from the requirement laid down in paragraph 1 of this Article. The Commission shall review this exemption, in accordance with the procedure referred to in Article 11(3), by 30 December 2010.

Article 5

1. A FLEGT licence covering each shipment shall be available to the competent authority at the same time as the customs declaration for that shipment is presented for release for free circulation in the Community. The competent authorities shall keep a record — in electronic or paper format — of the original FLEGT licence together with the corresponding customs declaration.

Import of timber products under a FLEGT licence issued to a market participant shall be accepted as long as the market participant's licence remains valid.

2. The competent authorities shall provide the Commission, or persons or bodies designated by the Commission, with access to the relevant documents and data, should problems arise which impair the effective operation of the FLEGT licensing scheme.

3. The competent authorities shall grant to the persons or bodies designated by partner countries as being responsible for the third party monitoring of the FLEGT licensing scheme access to the relevant documents and data, but the competent authorities shall not be required to provide any information which they are not permitted to communicate pursuant to their national law.

4. The competent authorities shall decide on the need for further verification of shipments using a risk-based approach.

5. In case of doubt as to the validity of the licence, the competent authorities may ask the licensing authorities for additional verification and seek further clarification, as set out in the Partnership Agreement with the exporting partner country.

6. Member States may collect fees to cover the necessary expenses arising from official acts by competent authorities required for control purposes under this Article.

7. Customs authorities may suspend the release of or detain timber products where they have reason to believe that the licence may not be valid. Costs incurred while the verification is completed shall be at the expense of the importer, except where the Member State concerned determines otherwise.

8. Each Member State shall determine the penalties to be imposed where the provisions of this Regulation are infringed. Such penalties shall be effective, proportionate and dissuasive.

9. The Commission shall adopt detailed requirements for application of this Article in accordance with the procedure referred to in Article 11(3).

Article 6

1. If competent authorities establish that the requirement laid down in Article 4(1) is not fulfilled, they shall act in accordance with national legislation in force.

2. Member States shall notify the Commission of any information suggesting that the provisions of this Regulation are being, or have been, circumvented.

Article 7

1. Member States shall designate the competent authorities responsible for implementing this Regulation and for communicating with the Commission.

2. The Commission shall provide all competent authorities of the Member States with the names and other relevant details of the licensing authorities designated by partner countries, authenticated specimens of stamps and signatures attesting that a licence has been legally issued, and any other relevant information received in respect of licences.

Article 8

1. Member States shall be required to submit by 30 April an annual report covering the previous calendar year, which shall include the following:

- (a) quantities of timber products imported into the Member State under the FLEGT licensing scheme, as per HS Heading specified in Annexes II and III and per each partner country;
 - (b) the number of FLEGT licences received, as per HS Heading specified in Annexes II and III and per each partner country;
 - (c) the number of cases and quantities of timber products involved where Article 6(1) has been applied.
2. The Commission shall lay down a format for annual reports in order to facilitate monitoring of the FLEGT licensing scheme.
 3. The Commission shall prepare by 30 June an annual synthesis report based on the information submitted by the Member States in their annual reports covering the previous calendar year and shall make it accessible to the public in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [5].

CHAPTER III

GENERAL PROVISIONS

Article 9

Two years after the entry into force of the first Partnership Agreement the Commission shall present the Council with a report on the implementation of this Regulation, based in particular on the synthesis reports referred to in Article 8(3) and on the reviews of Partnership Agreements. This report shall be accompanied, where appropriate, by proposals for improvement of the FLEGT licensing scheme.

Article 10

1. The Commission may amend the list of partner countries and their designated licensing authorities as set out in Annex I in accordance with the procedure referred to in Article 11(3).
2. The Commission may amend the list of timber products as set out in Annex II to which the FLEGT licensing scheme applies in accordance with the procedure referred to in Article 11(3). Those amendments shall be adopted by the Commission taking into account the implementation of the FLEGT Partnership Agreements. Such amendments shall comprise commodity codes, at four-digit heading level or six-digit subheading level of the current version of Annex I to the Harmonised Commodity Description and Coding System.
3. The Commission may amend the list of timber products as set out in Annex III to which the FLEGT licensing scheme applies in accordance with the procedure referred to in Article 11(3). Those amendments shall be adopted by the Commission taking into account the implementation of the FLEGT Partnership Agreements. Such amendments shall comprise commodity codes, at four-digit heading level or six-digit subheading level of the current version of Annex I to the Harmonised Commodity Description and Coding System and shall only apply in relation to the corresponding partner countries as set out in Annex III.

Article 11

1. The Commission shall be assisted by the Forest Law Enforcement Governance and Trade (FLEGT) Committee (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at three months.

3. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

4. The Committee shall adopt its Rules of Procedure.

Article 12

This Regulation shall enter into force on the day of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 December 2005.

For the Council

The President

M. Beckett

[1] OJ L 184, 17.7.1999, p. 23.

[2] OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 883/2005 (OJ L 148, 11.6.2005, p. 5).

[3] OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council (OJ L 117, 4.5.2005, p. 13);

[4] OJ L 61, 3.3.1997, p. 1. Regulation as last amended by Commission Regulation (EC) No 1332/2005 (OJ L 215, 19.8.2005, p. 1).

[5] OJ L 145, 31.5.2001, p. 43.

ANNEX I

PARTNER COUNTRIES AND THEIR DESIGNATED LICENSING AUTHORITIES

ANNEX II

Timber products to which the FLEGT licensing scheme applies irrespective of the partner country

HS heading | Description |

4403 | Wood in the rough, whether or not stripped of bark or sapwood, or roughly squared |

4406 | Railway or tramway sleepers (cross-ties) of wood |

4407 | Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm |

4408 | Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for other similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm |

4412 | Plywood, veneered panels and similar laminated wood |

ANNEX III

Timber products to which the FLEGT licensing scheme applies only in relation to the corresponding partner countries

Partner country | HS heading | Description |

|||

ANNEX IV: DOCUMENT FROM THE DUTCH MINISTRY OF AGRICULTURE, NATURE AND FOOD QUALITY

Administrative procedures with regard to the development of a FLEGT partnership agreement and its licensing scheme

This paper was written in response to the tripartite meeting between the Malaysian Ministry of Plantation Industries and Commodities, the European Commission and a delegation from the Netherlands in December 2005.

It provides an overview of the formal administrative requirements and procedures that are necessary on the side of the European Commission and Member States and provides information on i) the formal approval procedures with regard to a Partnership Agreement; ii) the specification of customs procedures by the European Commission, and iii) the implementation of national legislation with regard to these customs procedures. For this latter point the example of The Netherlands is given. Procedures may vary between EU Member States.

i) The formal approval of a Partnership Agreement

Within the European Union, the procedures required for the approval of a bilateral agreement depend on the nature of the bilateral agreement. Once a Partnership Agreement has been negotiated the Commission puts forward a proposal for a decision by which the agreement is approved by the Member States of the European Union. The shape and timing of subsequent approval procedures is dependent on the legal basis of this decision.

ii) The specification of customs procedures by the European Commission

The specification of customs procedures with regard to the FLEGT licensing Scheme consists of 2 main steps:

a) The Establishment of a FLEGT Committee under article 11 of Council Regulation 2173/2005

b) The development of a Commission Implementing Regulation that further specifies the broad framework set out in Council Regulation 2173/2005 and that provides detailed instructions required to make the Regulation operational. This will take an estimated 6 months to one year to complete. The Commission Implementing Regulation will be considered and agreed by the FLEGT Committee.

iii) The implementation of national legislation with regard to these customs procedures

In the Netherlands this entails two parallel procedures:

a) National legislative procedures. Work on the necessary implementing measures concerning Regulation 2173/2005 (such as fixing the sanctions for the import of timber products in violation of FLEGT and designating the competent authorities) will take place by a national Order in Council (AmvB) pursuant to the new Netherlands Customs Act.

This new Customs Act is currently being developed. Both the Customs Act and the Order in Council with respect to FLEGT are expected to be approved by Parliament and enter into force on January 1st 2007.

However, it depends on the exact content of the Commission Implementing Regulation whether additional national legislative measures are necessary. If so, it will take two to six months extra to amend the new Customs Act in accordance with the Commission Implementing Regulation.

b) Implement national customs procedures. The development of new customs procedures for timber products following FLEGT starts as soon as the details of the Commission Implementing Regulation are clear and formally agreed. When implementing is rather simple, i.e. fits in the existing procedures, this will take an estimated 6 months. More complex procedures, different from the existing procedures, will take more time to implement.

The full process of making the licensing scheme operational as described in ii) and iii) is estimated to take about one and a half years at least and to be concluded by the beginning of 2008.

ANNEX V: VPA TEMPLATE

OUTLINE OF FLEGT VPA

Recitals

1. Objectives

Sustainable forest management
Good forest governance
Trade in legally produced timber

2. Definitions of Terms

Including reference to definitions in FLEGT Regulation

3. Scope

Timber and timber products covered (HS classification)

Cooperation to enhance capacity to develop and enforce legislation concerning forests and forest management

Scope of legislation to be taken into account for a working definition of legality for purposes of the agreement; principles for in-country process to guide development of the national working definition

4. System to verify legality and FLEGT licensing

General Objective

Legality verification system including chain of custody (including criteria for assessment of system)

Possibility to use verification and traceability systems operated by private bodies if deemed equivalent (according to agreed criteria)

Identification of Authority authorised to issue FLEGT Licenses

Procedure for issuing FLEGT License

Description of FLEGT Licence (reference to Annex)

Record-keeping, information, commercial confidentiality

Procedure for issuing FLEGT Licence

Independent monitoring

EU import regime (describes procedures that will apply to FLEGT licensed timber products at EU borders, based on FLEGT Regulation)

CITES clause (imports of products with CITES permits to be exempted from requirement to have FLEGT licence at point of entry to EU)

Reporting (min. annual, including reporting on possible circumvention)

Timing (phasing of the development and implementation steps of the traceability systems, verification and licensing system)

5. General Provisions

Develop enabling legislation (if appropriate)

Review process of relevant legislation (if appropriate)

Reporting on circumvention

Social safeguards including impacts on marginal groups and provisions for small/ community based forest enterprises

6. Capacity Building Measures and Communication

General text on support for improved traceability and legal verification and for FLEGT licensing and, where relevant, broader support on related matters such as stakeholder consultation processes, including private sector, training of staff, market studies etc.

Coordinated approach by EU donors

Details in separate Finance Agreement including, commitments by European Community and relevant Member States

7. Consultation

Stakeholder involvement in partnership agreement design and implementation

8. Market Access

Best efforts to ensure market access for FLEGT VPA licensed products, consistent with general WTO obligations

9. Administrative Matters

Joint Implementation Committee

(Describes the Committee to oversee implementation of the partnership agreement)

Composition, chairing, frequency of meetings, objectives and ToRs

Reviews

Joint Implementation Committee drafting and publication of annual report.

Elements to be included in annual report

Regular joint reviews of the effectiveness of the Agreement by the Joint Implementation Committee

Exceptional joint reviews by Joint Implementation Committee

10. Procedures

Communication

Official contact points

Suspension of the Agreement

Withdrawal

Settlement of disputes (procedure in Annex)

Amendments

Notification to Joint Implementation Committee

Notification to depositary

11. Final Provisions

Territorial applicationDuration

Authentic text

Entry into force

Notification of ratification and entry into force

Depositary

Annexes (non-exhaustive list)

1. Products Covered By The FLEGT Licensing Scheme

2. National and Sub-national Legislation to Be Specifically Taken Into Account in verifying the Legality of Timber and other forest products

3 Format of FLEGT Licence

4 Dispute Settlement

BIBLIOGRAPHY

1. LAW AND POLICY

98/699/JHA: Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, OJ L 333, 9 December 1998.

Amended Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law COM (2002) 544 final, OJ 020E, 28 January 2003.

An EC Design for Implementation of FATF Special Recommendations VIII-Non Profit Organisation JLS/D2/DB/HSK, D (2005) 8208.

Commission Interpretative Communication on the Community Law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement COM (2001) 274 final, 04 July 2001.

Commission of the European Communities *European Governance: A White Paper* COM (2001) 428, 25 July 2001.

Commission of the European Communities *Participation of Non-State Actors in EC Development Policy* COM (2002) 598, 07 November 2002.

Commission Recommendation of 10 July 2003 on guidance for the implementation of regulation (EC) no. 761/2001 of the European Parliament and of the Council allowing voluntary participation by organisations in a community eco-management and audit scheme (EMAS) concerning the selection and use of environmental performance indicators OJ C 184, 23 July 2003.

Commission Regulation (EC) No. 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora, OJ L 166, 19 June 2006.

Commission Staff Working Document *Proposal for a Council Regulation Concerning the Establishment of a Voluntary FLEGT Licensing Scheme for Imports into the European Community – Extended Impact Assessment* SEC (2004) 977, 20 July 2004.
Communication from the Commission *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development* COM (2001) 264 final, 15 May 2001.

Communication from the Commission concerning Corporate Social Responsibility: *A Business Contribution to Sustainable Development* COM (2002) 347 final, 02 July 2002.

Communication from the Commission *Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission* COM (2002) 704, 11 December 2002.

Communication from the Commission to the Council and the European Parliament *Forest Law Enforcement, Governance and Trade (FLEGT) Proposal for an EU Action Plan* COM (2003) 251 final, 21 May 2003.

Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee *Integration of Environmental Aspects into European Standardisation* COM (2004) 130 final, 25 February 2004.

Communication from the Commission to the Council and the European parliament *Reporting on the Implementation of the EU Forestry Strategy* COM (2005) 84 final, 10 March 2005.

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* COM (2006) 136 final, 22 March 2006.

Communication from the Commission *Follow-up to the Green Paper 'European Transparency Initiative'* COM (2007) 127 final, 21 March 2007.

Cotonou Agreement of 2000.

Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28 June 1991.
Council Regulation No. 2913/92 of 12 October 1992 establishing the community customs code, OJ L 302, 19 October 1992.

Council Conclusions Forest, *Law Enforcement, Governance and Trade (FLEGT)* OJ C 268, 07 November 2003.

Council Regulation (EC) No. 338/97 of 9 December 1996 on the Protection of Species of Wild Fauna and Flora, OJ L 61, 3 March 1997.

Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community OJ L 347, 30 December 2005.

Declaration of the United Nations Conference on the Human Environment of 1978.

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ C 134, 30 April 2004.

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25 November 2005.

European Commission *Promoting a European Framework for Corporate Social Responsibility: Green Paper* COM (2001) 366, 18 July 2001.

European Commission *Buying Green! A Handbook on Environmental Public Procurement* SEC (2004) 1050.

European Commission *European Multi-Stakeholder Forum on Corporate Social Responsibility: Final Results and Recommendations* (29 June 2004).

European Commission *FLEGT Briefing Notes – What is FLEGT?* March (2007), no. 1.

European Commission *FLEGT Briefing Notes – What is Illegal Timber?* March (2007), no. 2.

European Commission *FLEGT Briefing Notes – A Timber Legality Assurance System* March (2007), no. 3.

European Commission *FLEGT Briefing Notes – Control of the Supply Chain: Wood Tracing, Systems and Chain of Custody* March (2007), no. 4.

European Commission *FLEGT Briefing Notes – Legality Assurance Systems: Requirements for Verification* March (2007), no. 5.

European Commission *FLEGT Briefing Notes – Voluntary Partnership Agreements* March (2007), no. 6.

European Commission *FLEGT Briefing Notes – Guidelines for Independent Monitoring* March (2007), no. 7.

European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility; A new Partnership P6_TA_PROV (2007) 0062.

General Agree on Tariffs and Trade.

Ghana Ministry of Lands, Forestry and Mines *VPA Briefing Paper* February 2007, no. 1.

Ghana Ministry of Lands, Forestry and Mines *VPA Briefing Paper* February 2007, no. 2.

Ministerial Declaration *AFLEG* (Ministerial Conference Yaoundé Cameroon, 16 October 2003).

Parliamentary Resolution B6-04/2/2005, 04 July 2005.

Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law COM (2001) 0139 final, OJ 180E, 26 June 2001.

Proposal for a Council Regulation concerning the establishment of a voluntary FLEGT licensing scheme for imports of timber into the European Community COM (2004) 515 final, 20 July 2004.

Proposal for a Council Decision on the signing and conclusion on behalf of the European Community of the 2006 international tropical timber agreement COM (2006) 807 final, 15 December 2006.

Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law COM (2007) 0051 final, 9 February 2007.

Republique du Cameroun Ministre des Forets et de la Faune *Processus FLEGT Légalité des bois mis en Marché au Cameroun – Document de Travail* (4 December 2006).

Resolution on EU standards for european enterprises operating in developing countries towards a european code of conduct OJ C 104, 14 April 1999.

Resolution Adopting the Plan of the World Summit on Sustainable Development of 2002.

Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD) OJ C 176, 28 July 2006.

Rio Declaration on Environment and Development of 1992.

UN Security Council Document s/2002/1146, 16 October 2002.

Vienna Convention on the Law of Treaties.

Wetboek van Strafrecht (Dutch Criminal Code).

Written question E-1379/03 by Anne Jensen (ELDR) to the Commission *Multi-Stakeholder Forum* OJ 011E, 15 January 2004.

2. JURISPRUDENCE

Case C-300/89 Commission of the European Communities v Council of the European Union [1991] ECR I-2867.

Case C-281/01 Commission of the European Communities v Council of the European Union [2002] ECR I-12049.

Case C-176/03 Commission of the European Communities and European Parliament v Council of the European Union [2005] ECR I-7879.

Case C-122/04 Commission of the European Communities v European Parliament and Council of the European Union [2006] ECR I-2001.

EC – Measures Affecting Asbestos and Asbestos-Containing Products WT/DS135/AB/R, adopted on 12 March 2001.

EC – Trade Description of Sardines WT/DS231/AB/R adopted on 23 October 2002.
India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products WT/DS90/AB/R, adopted on 23 August 1999.

Japan – Trade in Semi-Conductors published in BISD 35S/116 adopted on 4 May 1988.

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef WT/DS161/AB/R, adopted on 11 December 2000.

Opinion 1/78 Opinion of the Court of 4 October 1979 [1979] ECR I-2871.

Opinion 2/92 Opinion of the Court of 24 March 1995 [1995] ECR I-521.

Opinion 1/00 Opinion of the Court of 18 April 2002 [2002] CR I-3493.

Opinion 2/00 Cartagena Protocol [2001] ECR I-9713.

US – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R, adopted on 12 October 1998.

US – Restrictions on Imports of Tuna (Tuna Dolphin I – Mexico) published in BISD 39S/155 adopted on 18 February 1992.

US – Restrictions on Tuna (Tuna Dolphin II – EEC) DS29/R adopted on 16 June 1994.

US – Section 337 of the Tariff Act of 1930 published in BISD 36S/345 adopted on 7 November 1989.

US – Standards for Reformulated and Conventional Gasoline WT/DS2/AB/R, adopted on 29 April 1996 .

3. BOOKS

A Arnall and others (5th edn) *European Union Law* (Sweet & Maxwell; London, 2006).

O Barbarinde and G Faber (eds) *The European Union and the Developing Countries – The Cotonou Agreement* (Martijunus Nijhoff Publishers; Leiden, 2005).

L Bartels and F Ortina (eds) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press; Oxford, 2006).

F Comte and L Krämer *Environmental Crime in Europe: Rules of Sanctions* (Europa Law Publishing; Groningen, 2004).

A Dashwood and C Hillion *The General Law of EC External Relations* (Sweet & Maxwell; London, 2000).

I Fletcher, L Mistelis and M Cremona (eds) *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell; London, 2001).

M Horspool and M Humphreys (4th edn) *European Union Law* (Oxford University Press; Oxford, 2006).

J Mathis *Legal Issues of European Integration* (1991).

PA Mathijsen (8th edn) *Guide to European Union Law* (Sweet & Maxwell: London, 2004).

M Matsushita and others (2nd edn) *The World Trade Organisation* (Oxford University Press; Oxford, 2006).

D Obradovic and N Lavranos *Interface Between EU Law and National Law* (Europa Law Publishing; Groningen, 2007).

L Tacconi *Illegal Logging: Law Enforcement, Livelihoods and the Timber Trade* (Earthscan; London, 2007).

P van den Bossche *The Law and Policy of the WTO: Text, Cases and Materials* (Cambridge, 2005).

4. ARTICLES

AE Appleton *Shrimp/Turtle: Untangling the Nets* (1999) vol. 2 no. 3 J Int Economic Law 477.

A Ekroos *Forests and the Environment – Legislation and Policy of the EU* (2005) Feb. European Environmental Law Review 44.

S Charnovitz *The Law of Environmental ‘PPMs’ in the WTO: Debunking the Myth of Illegality* (2002) vol. 27 no. 1 Yale Journal of International Law 717.

T Christa *Case C-176/03 Commission v Council, Judgment of the Grand Chamber of 13 September 2005, nyr* (2006) 43 CML Rev 835.

J Manoj *Are Eco-Labels Consistent with World Trade Organisation Agreements* (2004) vol. 38 no. 1 Journal of World Trade 69.

J Neumann and E Turk *Necessity Revisited: Proportionality in World Trade Organisation Law After Korea-Beef, EC Asbestos and EC Sardines* (2003) vol. 37 no. 1 Journal of World Trade 199.

D Obradovic *Civil Society and the Social Dialogue in European Governance* (2005) vol. 24 Year Book of European Law 261.

D Obradovic and JMA Vizcaino *Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations* (2006) 43 C.M.L. Rev. 1049.

D Spinellis *Judgment of 13 September 2005 (Case C-176/03 Commission v Council) Annuling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the Protection of the Environment through Criminal Law* [2001] 2 EuConst 293.

C Tobler *Case C-176/03 Commission v Council, Judgment of the Grand Chamber of 13 September 2005* [2006] CML Rev 835.

JP Trachtman *Decisions of the Appellate Body of the World Trade Organisation* (1999) vol. 10 no. 1 E.J.I.L. 192.

DW Young *Independent Forest Monitoring: Seven Years On* (2007) vol. 9 no. 1 International Forestry Review 563.

5. REPORTS AND CIVIL SOCIETY DISCUSSION DOCUMENTS

Australian Conservation Foundation and CELCOR *Bulldozing Progress : Human Rights Abuses and Corruption in Papua New Guinea's Large Scale Logging Industry* (July 2006).

SNE Abilogo and BS Azantsa *Plateforme Forêts Communauté Européenne Note d'Information – L'Accord de Partenariat Volontaire au Cameroun : Evaluation du Processus* (March 2007) no. 8.

R Augustini and others *EC Forest Platform Briefing Note: Finding Solutions to Illegal Logging: Civil Society and the FLEGT Support Project* (2005) no. 2.

D Brack *WTO Implications of an International Timber Licensing Scheme – Discussion Document* (Royal Institute of International Affairs, 12 March 2003).

D Brack and K Gray *Multilateral Environmental Agreements and the WTO* (Royal Institute of International Affairs, September 2003).

D Brack *EU FLEGT Initiative: Assessment of 'Additional Measures' to Exclude Illegal Timber from EU Markets* (Chatham House, July 2005).

D Brack *EU FLEGT Initiative: Analysis of National Legislation of Relevance to Excluding Illegal Timber from EU Markets – UK Study* (Chatham House, 31 January 2006).

D Brack *Excluding Illegal Timber from EU Markets: Options for the EU and its Member States* (Royal Institute of International Affairs, May 2006).

Dutch Government *EU FLEGT Initiative: Analysis of National Legislation of Relevance to Excluding Illegal Timber from EU Markets – the Netherlands Study* (31 January 2006).

A Contreras-Hermosilla and others *The Economics of Illegal Logging and Associated Trade Round Table on Sustainable Development* (2007).

A Cosbey *The WTO and PPMs: Time to Drop a Taboo in Bridges Between Trade and Development* International Centre for Trade and Sustainable Development Year 5 no. 1-3, Jan-April 2001.

A Cosby *A Sustainable Development Roadmap for the WTO?* (November 2006)
EIA and Telapak *Last Frontier: Illegal Logging in Papua and China's Massive Timber Theft* (February 2005).

EIA and Telapak *The Thousand-Headed Snake: Forest Crimes, Corruption and Injustice in Indonesia* (March 2007).

FERN, Greenpeace, WWF *Principles for FLEGT Partnerships Agreements* (January 2005).

Forest Watch Ghana *Forest Governance in Ghana: AN NGO Perspective* (March 2006).

FSC *Specifying FSC in Public Procurement in line with WTO Rules* (December 2006)
GAIN report *FLEGT Regulation Adopted – State of Voluntary Partnership Agreements* (10 January 2006).

German Federal Ministry of Food, Agriculture and Consumer Protection *Existing National Legislation of Relevance to Exclude Illegal A Timber from German Markets (Update)* (23 January 2006).

Global Witness, Greenpeace, FERN *Briefing: FLEGT, VPAs* (19 September 2006).
Greenpeace *Partners in Crime: The UK Timber trade, Chinese Sweatshops and Malaysian Robber Barons in Papua New Guinea's Rainforests* (October 2005).

Greenpeace *The Untouchables: Rimbunan Hijau's World of Forest Crime and Political Patronage* (January 2004).

Greenpeace *A Lawless State: Europe's Borders Must close to Trade in Illegal Timber* (October 2006).

Greenpeace *Carving Up the Congo* (2007).

Greenpeace *Rimbunan Hijau Group: Thirty Years of Forest Plunder* (May 2006).

Greenpeace and Friends of the Earth *Position Paper: EU Public Consultation on Additional Options to Combat Illegal Logging and Associated Trade* (February 2007).

Indonesia Civil Society Group (ICS) *EU Action Plan on FLEGT: Agreed Principles from Indonesian Civil Society for a Voluntary Partnership Agreement* (February 2005).

Indonesia Civil Society Group (ICS) *Briefing Paper on Legality Verification – Draft* (March 2006).

Indufor *European Commission DG for Development: Impact Assessment of the EU Action Plan for FLEGT*, T/2004/002, 3 July 2004.

Institute for Environmental Security *Project in New Legal Mechanisms for Combating Illegal Trade in Natural Resources: Alternative Jurisdiction for the Protection of Natural Resources* (September 2006).

Institute for Environmental Security *Workshop on Illegal Trade in Natural Resources* (November 2006).

ITS Global *Whatever it Takes: Greenpeace's Anti-forestry Campaign in Papua New Guinea* (July 2006).

IUCN and IISD *The WTO and the Sustainable Development Agenda: Prospects After Hong Kong Aiding, Trading or Abetting? The Future of Trade Aid and Security* (February 2006).

R Nussbaum and M Simula *Forest Certification: A Review of Imports and Assessment Frameworks – Research Paper* (2004) AFFD Publication no. 1.

B Pillion and D Pettenella *EU FLEGT Initiative: Analysis of National Legislation of Relevance to Excluding Illegal Timber from EU Markets – Italy Study* (31 January 2006).

J Saunders *Supply Chain Management and Illegal Timber* (Chatham House, September 2006).

UN Millenium Project 2005 *Investing in Development: A Practical Plan to Achieve the Millenium Development Goals* (New York).

Van den Biesen Advocaten *EU Civil Society Initiative for a EU Regulation Concerning Sustainable Forest Management and the Trade in Illegally Harvested Timber and Related Products* (14 December 2004).

World Business Council for Sustainable Development *Membership Principles and Responsibilities* (31 March 2007).

6. PRESS RELEASES

Chatham House Press Releases:

Communique from Civil Society Meeting on EU-Ghana VPA (03 August 2007)

Joint Ghana-European Union Press Release on FLEGT Ghana and the EU held the first Round of Negotiations on a FLEGT Voluntary Partnership Agreements (2 March 2007).

Illegal Loggers Mutilating Congolese Forests (28 February 2007).

Greenpeace Condemns Illegal Logging in Congo-Kinshasa (27 February 2007).

Greenpeace's Report Shows Ongoing Illegal Logging in DR Congo (24 February 2007).

Environmental Groups Attack Indonesian Govt, World Bank (23 February 2007).

Swiss Bank Involved in Malaysian Logging Giant's Stock Exchange Listing (15 February 2007).

EU Offers Subsidies for Certification of Legality (15 February 2007).

Over 55% of Imported Wood in the UK is Certified (15 February 2007).

Malaysian Police Clear Penan Blockade for "Certified" Logging (12 February 2007).

EU Tackles Illegal Logging (07 February 2007).

Britain Third in Illegal Wood Use (01 February 2007).

Malaysia and EU Agree on an Independent Body (31 January 2007).

UK Criticised over Illegal Timber (31 January 2007).

UK Buys £712m Worth of Illegal Timber (31 January 2007).

Indonesia: Export Prices Edge up Amid Storms and Police Control (30 January 2007).

UN Experts Seek Tougher Rules on Congo Resources (30 January 2007).

Signs of Growing Justice in Forest Business (23 January 2007).

UK and Australia agree Closer Ties to Combat Illegal Timber (22 January 2007).

Forest Stewardship Council Suspends Samling Certification (22 January 2007).

EU Delegation in Malaysia's Borneo to Check on Legality of Timber Exports (21 January 2007).

Indonesia, Malaysia Floods Drive Timber Prices (21 January 2007).

Timber Prices Shoot up (19 January 2007).

Get Legal or Lose Markets – Part Two (19 January 2007).

Malaysia-EU Pact can Influence Fight Against Illegal Logging (19 January 2007).

EU Delegation to Visit Penan Blockade Area Without Meeting the Penan (16 January 2007).

EU Delegation Visits Blockade Sites in Beram (15 January 2007).

Indonesia and EU Kick-off Formal VPA Talks (15 January 2007).

Get Legal or Lose Markets – Part One (15 January 2007).

EU, Indonesia Target Illegal Logging Pact (10 January 2007).

Indonesia, EU Ready to Discuss Timber Export Licensing System (10 January 2007).

Malaysia Aims to Boost Timber Product Exports to Europe (08 January 2007).

EU-funded Project Tracks Wood from Forest Floor to Showroom Floor (08 January 2007).

Indonesia and EU Agree to Tackle Illegal Logging Through a “FLEGT Partnership” (08 January 2007).

The Vanishing Man of the Forest (06 January 2007).

Shady Loggers Blamed for De-railed EU Workshop: British High Commission Malaysia Reports (31 December 2006).

Govt. Backsliding on Sustainable Timber (27 December 2006).

Timber Schemes pass Assessment (21 December 2006).

Forestry Men Aiding Illegal Loggers? (20 December 2006).

KL to Blame, says Papua NGOs (18 December 2006).

Timber Assurance Schemes Pass Govt. Test (18 December 2006).

UK Govt. Confirms PEFC as Source of Legal and Sustainable Timber (18 December 2006).

DENR: Illegal Logging “Under Control” in Darao Oriental (16 December 2006).

TTAP Seminar Urges Harmonised Procurement Policies (15 December 2006).

VVNH to Screen Legality in Timber Trade Chains (15 December 2006).

EU Delegation to Visit Penan Blockade Sits in Utu Baram (12 December 2006).

Indonesia's Forest Destruction Downgrades International Confidence: Minister (09 December 2006).

Shady Loggers Blamed for De-railed Workshop (05 December 2006).

On Trail of Culprit in Illegal Logging (02 December 2006).

Renovated EU Commission HQ in new row over Timber (01 December 2006).

Red Face for EU Officials over Private Timber Floor (01 December 2006).

European Commission Admits Illegal Timber Scandal (01 December 2006).

Beijing, Jakarta put Business Before History (30 November 2006).

INA told to halt Forestry Dialogue (30 November 2006).

Illegal Logging Evidence Lost (27 November 2006).

Cambodian Court Jail Eight for Illegal Logging (25 November 2006).

Cambodia Sentences Powerful Officials to jail for Illegal Logging (24 November 2006).

EU Accused as Discriminative Towards Indonesian Timber Products (22 November 2006).

EU-RI Agree to Regulate Illegal Log Import (22 November 2006).

Buying Illegal Timber for Europe (20 November 2006).

Top Mindano DENR Officials Face Illegal Logging Suit (18 November 2006).

Logging Nations set Tough Agenda for Action (13 November 2006).

Minister Slammed over Logging Probe (11 November 2006).

PEFC: New Guide for the Avoidance of Controversial Timber (10 November 2006).

DENR Orders Log Ban in North Quezon (05 November 2006).

World Bank Still Pursuing Questionable Forestry Agenda (02 November 2006).

Forest Authority Holds Regional Seminar on FLEG (31 October 2006).

Azmi Allays Fears over Furniture Exports to Europe (20 October 2006).

New WWF Monitoring Brief Details how Company Threatens Natural Forests and Wildlife in Sumatra (20 October 2006).

Loaded Logging Trucks Line the Highways near Bislig (17 October 2006).

Forest Policies need Review (16 October 2006).

Malaysia and EU to Hold more Formal Talks on VPA (15 October 2006).

Malaysia Chalks Gains in Certified Timber Products (15 October 2006).

UNECE/FAO Hold Policy Forum on Public Procurement (15 October 2006).

Two Ships with Cargoes of Sawn Timber Detained: 17 Foreigners and Four Malaysian Arrested (14 October 2006).

Forestry Industry big Money Earner: Sector earned K541m last year to rank Second after Mining, Petroleum (11 October 2006).

Govts Fight Illegal Logging and Promote Sustainability Through Their Purchasing (10 October 2006).

Two NGOs Blame EU for Importing Illegal Timber (05 October 2006).

Buying Legal Timber for Europe: Purchasing Policies and Legality Definitions (03 October 2006).

Illegal Rainforest Timber Used in Parliament Refurbishment (29 September 2006).

EU Malaysia plan for Legal Timber Trade Fails to Tackle Massive wood Smuggling (29 September 2006).

EU and Malaysia Agree to Start Negotiations on FLEGT (25 September 2006).

EU and Malaysia to Talk on Curbing Illegal Timber (25 September 2006).

Call for more EU Cooperation on Forest Policy (25 September 2006).

Minister to Lead Timber Mission to Europe (22 September 2006).

Illegal Logging Dialogue Launched in Singapore (20 September 2006).

Laos: FSC Certified Timber is Illegal (20 September 2006).

Illegal wood Supplies 67-70% of Indonesia Industries – NGOs (20 September 2006).

Illegal or Legal Logging? (19 September 2006).

International Logging Scheme Begins (19 September 2006).

Illegal Logging Costing Nations Billions – World Bank (16 September 2006).

Major Forest Governance Initiative Launched (16 September 2006).

Police Arrest 31 for Illegal Logging (14 September 2006).

Timber Prices Reach new Highs (13 September 2006).

Indonesian Police Hunt International Syndicate of Illegal Logging (12 September 2006).

Loggers Remain Law unto Themselves (09 September 2006).

European Community Forest Platform Workshop on Cameroon *European Union Voluntary partnership Agreement – Final Statement* (Yaoundé, September 2005).

Greenpeace Press Releases:

Congo Shows Europe how to Protect Forests with Laws (03 November 2005).

Activists Intimidated as Logging Company Reacts Violently to Peaceful Approach (31 May 2006).

Illegal Logging Debate Heats up in Papua New Guinea (11 August 2006).

Illegal Rainforest Timber Used in Parliament Refurbishment (29 September 2006).

Yet More Illegal Rainforest Timber Found in Westminster (28 September 2006).

European Commission Admits Illegal Timber Scandal (09 December 2006).

Stop the Horror: Ban Illegal Timber (07 February 2007).

FLEGT Press Releases:

DG Development with ACP States *FLEGT Independent Monitoring – Stakeholder Discussion Agenda* (21 May 2007).

European Union – Delegation of the European Commission in Indonesia *Update on the FLEGT Process in Indonesia* (April 2007).

Indonesia – European Commission Joint Press Release *The 1st Negotiation on FLEGT-VPA* (March 2007).

Joint Statement on a Voluntary Partnership Agreement on FLEGT between Ghana and the European Community (2006).

Joint Ghana-European Union Press Release on FLEGT *Ghana and the EU Held the first Round of Negotiations on a FLEGT Voluntary Partnership Agreement* (2 March 2007).

Ministerial Conference Yaoundé, Cameroon *Ministerial Declaration – AFLEG* (16 October 2003).

T Portevin *EU – Indonesia VPA-FLEGT Official Update* (10 April 2007).

Other Press Releases:

Green Building press release *Stolen Rainforest Timber in Cabinet Office* (20 April 2007).

Loggingoff.info press release *Major Developments in Forest Sector – Update on Forest Sector Reform Process* (February 27 2007).

This is Local London press release *Trafalgar Square Wood Illegal* (28 June 2006).

WWF press release *London Local Authorities Failing the Forests* (30 March 2006).

7. WEBSITES

<http://archive.greenpeace.org>

<http://ec.europa.eu>

<http://home.snafu.de>

<http://webdomino1.oecd.org>

<http://www.chathamhouse.org.uk>

<http://www.delidn.ec.europa.eu>

<http://www.dfid.gov.uk>

<http://www.eia-international.org>

<http://www.fao.org>

<http://www.fcghana.com>

<http://www.fern.org>

<http://www.fni.no>

<http://www.forestandtradeasia.org>

<http://www.fsc.org>

<http://www.greenpeace.org.uk>

<http://www.ictsd.org>

<http://www.iisd.org>

<http://www.illegal-logging.info>

<http://www.loggingoff.info>

<http://www.masalai-i-tokaut.com>

<http://www.mcpfe.org>

<http://www.milieudefensie.nl>

<http://www.minlnv.nl>

<http://www.mtcc.com.my>

<http://www.mtc.co.uk>

<http://www.newbuilder.co.uk>

<http://www.pefc.org>

<http://www.proforest.net>

<http://www.rem.org.uk>

<http://www.samling.com>

<http://www.telapak.org>

<http://www.theforestdialogue.org>

<http://www.thisislocallondon.co.uk>

<http://www.ttf.co.uk>

<http://www.unece.org>

<http://www.verifor.org>

<http://www.vrom.nl>

<http://www.vvnh.nl>

<http://www.wbcds.org>

<http://www.wwforg.uk>

AFTERWORD

By Géraud de Ville, Institute for Environmental Security

ONGOING FLEGT NEGOTIATIONS

Indonesia

The EU-Indonesia Voluntary Partnership Agreement (VPA) is among the most advanced processes within the overall FLEGT negotiations. The EC-Indonesia FLEGT Support Project, set up in the framework of the EU FLEGT Action Plan with Indonesia, has played a role in many public events, including a parallel event of the Ministry of Forestry at the occasion of the UNFCCC COP-13 in December 2007 in Bali²⁶⁹.

Concrete actions from the EC-Indonesia FLEGT Support Project include, among others, the organisation, in cooperation with the Forestry Information Center (PUSINFO) of the Ministry of Forestry, and Forestry Services, of two strategic workshops in Pontianak on 12 November 2007, and in Jambi on 20 November 2007. With the participation of representatives of government agencies, private sector, mass media, and local NGO's, these workshops aimed at facilitating good governance through the establishment of Forestry Information Centers in both provinces.

Subsequently, three meetings were organised on 20-21 November 2007, 19 December 2007 and 31 January - 1 February 2008 to define a Work programme for the Coordination, Monitoring and Evaluation Team (Kormonev). The Kormonev Team is an initiative to eradicate illegal logging in forest areas and prevent the distribution of illegal logs from the territory of Indonesia and it is carried out by the coordinating Ministry for Political, Legal and Security Affairs.²⁷⁰

Finally, the EC-Indonesia FLEGT Support Project has been involved in the trial implementation of an online system for timber administration (known as the Timber Traceability System²⁷¹), by providing field equipment and hardware. If properly implemented, this online system for timber administration²⁷² will enable verification of timber legality to be carried out on-line. The system will support the trade of legal timber on both national and international markets and could become part of a future Timber Legality Assurance System which is under development by the Government of Indonesia.

²⁶⁹ More information on this event available at: www.eu-flegt.org/newsroom_detail.php?pkid=906&lang=en (last visited 28 May 2008).

²⁷⁰ The Kormonev Team will gradually carry out other agendas, including official working visits to various related agencies within the framework of strengthening the effectiveness of implementation of Presidential Instruction N° 4/2005.

²⁷¹ The information collected by the Timber Traceability System is open to and accessible by the public through the following website : <http://puhh.dephut.go.id> (last visited 3 July 2008).

²⁷² The system applies for forest concessions in State Forests and primary forest product industries : The framework of the online system on timber administration is based on Ministerial Regulation Number P.55/Menhut-II/2006 jo P.63/Menhut-II/2006 regarding Timber Administration for State Forest Products.

Malaysia

Although the country has formally launched the negotiations with the EU by holding two ‘Malaysia-European Commission Senior Official Meetings on a FLEGT-VPA’, respectively on 19 January 2006 and 17 and 18 April 2007, further work is still needed before an agreement on the definition of ‘legality’ can be reached. To this end, a consultation process including various interested stakeholders has gone underway with a first meeting held in Kuala Lumpur on 15 January 2007.

A definition of ‘legality’ was proposed during the second consultation held on 22 June 2007 without reaching a consensus. The negotiation was organised around three issues : 1) Definition of Legality – Upstream; 2) Definition of Legality – Downstream; 3) Procedure of Stakeholder Consultation.

The third consultation (15 November 2007) was attended by a broader audience, including members of the Sarawak Iban Dayak Association (SADIA), witnessing greater concern for indigenous peoples’ input in the Malaysia-EU VPA negotiations. The issues discussed during this consultation included: 1) The definition of legality and 2) Details of Control Procedures for LAS (Legality Assurance System)²⁷³.

In March 2008, a statement by the Indigenous Communities was communicated laying down the conditions for lending their support to the VPA. A revised definition of legality respecting the Traditional Land Rights of the Indigenous Communities, the improvement of the transparency of the timber licensing system as well as a meaningful and transparent multi-stakeholder consultation are among the preconditions for their further participation to the negotiations²⁷⁴.

Ghana

Ghana is considered as a leading partner in the African VPA process. Although the Ghanaian Government expressed interest to enter in a VPA agreement as early as 2005, no serious civil society involvement was seen before 2007. The reason was the absence of precedents for such engagements in state-civil society relations and a certain lack of trust from both sides.

In February 2008, the technical working groups set up by the VPA Steering Committee submitted their reports, subsequently used on 10-11 March by the Policy sub-Committee to draw out policy and legislative reform recommendations for the Ghanaian Government. Well underway, the negotiations continued through April and May and an agreement is expected to be reached by the end of July 2008²⁷⁵. However, an open letter addressed to the European Commission by the Forests and the European Union Resource Network (FERN) and Global Witness expressed concern over three main areas, which are *specifically important to address as the VPA with*

²⁷³ For more up-to-date information on Malaysia and the VPA negotiations, visit http://www.loggingoff.info/country_detail.html?id=131 (last visited 2 July 2008).

²⁷⁴ *Statement of the Indigenous Communities on the Forest Law Enforcement Governance and Trade between the European Union and Malaysia*, March 2008, available at http://www.loggingoff.info/country_detail.html?id=131 (last visited 2 July 2008).

²⁷⁵ More information about the FLEGT-VPA process in Ghana available at http://www.loggingoff.info/country_detail.html?id=570 (last visited 3 July 2008).

*Ghana will be the first VPA and therefore set a precedent. In the letter, FERN and Global Witness ask the Commission to give due diligence to the commitment to a meaningful, participatory and timely forest law review process, the independence and credibility of the Independent Monitor and the governance of the legality assurance system*²⁷⁶.

Cameroon

Following an official ceremony launch on 28 September 2008, the Cameroonian Government created a Technical Commission in charge of participating in VPA negotiations on its behalf and nominated a person within the Ministry of Forestry for conducting these negotiations²⁷⁷. The first formal negotiation took place on 28-29 November 2007 in Yaoundé. The session was attended by 25 participants, including both EU officials and members of the Cameroonian Technical Commission. Specific issues on the agenda included : 1) Global cooperation framework for the VPA ; 2) Modalities of the negotiations ; 3) Definition of legality ; and 4) Roadmap²⁷⁸. The negotiations are ongoing and expected to be followed by several meetings throughout 2008.

Liberia

Liberia formally expressed its interest in a VPA via a letter to the European Commission Delegation in Liberia. In May 2007, a delegation of the European Commission visited Liberia for further negotiations on the FLEGT-VPA process with governmental agencies, civil society groups and the private sector. This visit was followed, in June, by a three day National Workshop on Forest Law Enforcement, Governance and Trade, Voluntary Partnership Agreements and Forest Certification convened in Monrovia. Subsequently, a multi-stakeholder National Steering Committee on FLEGT and VPA was established, comprising of nineteen members including four representatives of civil society²⁷⁹.

IN THE PIPELINE

Several other countries, such as **Congo-Brazzaville**, the **Democratic Republic of Congo**, **Gabon**, the **Central African Republic** and **Ecuador**, have also expressed interest in entering into VPA negotiations.

CONCLUSION

Environmental conservation, civil society empowerment, development but also privileged access to the European market are strong incentives for both civil society organisations and governments of timber-producing countries to trigger a VPA negotiation process with the EU. However, if the FLEGT process is to succeed in its objectives, a strong accent has to be put on questions of governance and legality. What is meant by 'illegal' trade or by trade in 'illegally' obtained natural resources? If

²⁷⁶ The original letter can be downloaded at <http://www.fern.org/> (last visited 3 July 2007).

²⁷⁷ Decision 0957 of 15 November 2007 and Decision 0999 of 27 November 2007.

²⁷⁸ For more up-to-date, country-based information, visit <http://www.loggingoff.info> (last visited 2 July 2008).

²⁷⁹ LOMAX, T., *Forest Governance in Liberia. An NGO Perspective*, FERN, January 2008, pp. 23-28.

‘illegal’ means ‘in violation of national laws of the timber-producing country’, then the question could be raised whether national legislation should be in conformity with an internationally recognised minimum standard. One other significant issue regarding the definition of ‘legality’ is whether this includes timber obtained in conflict zones.

Furthermore, many timber-producing countries are homeland of indigenous people who strive to have their rights recognised at the national level. Modern civil law is often in contradiction with customary law, especially when it comes to defining property rights. As a result, poor, marginalised people may be left out when concessions on land are granted or when resources are being exploited, contributing to maintain a cycle of poverty, a global sensation of injustice and, eventually, leading to social unrest. If nothing is done to include all stakeholders in VPA negotiations, there is little chance to see this attempt to promote legal trade in timber succeed. On the opposite, transparent negotiation processes not only represent a great opportunity for the emergence of a democratic dialogue between stakeholders, but also strongly increase the chances of success of VPA negotiations.

THE EUROPEAN UNION FLEGT ACTION PLAN

Illegal logging undermines many essential elements of the EC's development objectives: public sector financing for development targeted at the poor, peace, security, good governance, the fight against corruption, and sustainable environmental management.

Although the supply-side of the problem lies in timber-producing countries, strong international demand for timber can be exploited by unscrupulous operators and traders, with the effect of encouraging illegal logging operations. As a major source of this demand, important measures can be taken by the EU and other major consumers of timber products to direct demand towards only legally harvested timber.

Communication from the Commission to the Council and the European Parliament
Forest Law Enforcement, Governance and Trade - Proposal for an EU Action Plan

INSTITUTE FOR ENVIRONMENTAL SECURITY

Anna Paulownastraat 103
2518 BC The Hague
The Netherlands
Tel. +31 70 365 2299 - Fax +31 70 365 1948
info@envirosecurity.org
www.envirosecurity.org