



Briefing Paper

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4. INDEPENDENT MONITORING OF THE FLEGT TIMBER LEGALITY ASSURANCE SYSTEM: THINKING OUTSIDE THE BOX

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Summary

The European Union (EU) is seeking to control the provenance of timber and products entering the EU market, through its Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. Under FLEGT, Voluntary Partnership Agreements (VPAs) will be signed with interested producer states, and these will involve the latter establishing 'timber legality assurance systems' to guarantee the legality of their production and associated trade. This paper offers a contribution to the process of developing FLEGT, drawing on case studies from outside the forest sector. Using a 'discursive institutional analysis approach' it distinguishes four dimensions that characterise partnerships: actors, rules, power and discourses. Using these building blocks, it abstracts some of the key principles for verification system design.

POLICY CONCLUSIONS

- Effective verification systems are more likely to emerge from the concerted efforts of all the major stakeholders to jointly resolve a shared problem, rather than from a technical solution designed by only a few.
- In the FLEGT case, NGOs and the private sector need to be actively involved in the design and implementation of the verification system. This will enhance credibility and 'ownership'.
- Consensus emerges as a key principle of decision-making, notwithstanding its tendency to lengthen time-frames for decision making.
- Firm rules on non-compliance and the threat of negative sanctions (such as exclusion from the process) increase credibility.
- Issues of power are likely to exert a critical influence on monitoring systems; dispersal of power within the verification body (for example, through a layered system of decision making) is conducive to success.
- A peer review system of monitoring is strongly indicated where credibility and trust are low.
- Above all, it is helpful for all major stakeholders to share a common understanding of the problem to be solved; in this respect, FLEGT's multiple aims present a particular challenge for verification system design.

Introduction

The issue of illegal forest operations and associated trade has recently come to the fore in the international dialogue on sustainable forest management. EU policy now puts the emphasis on demand-side measures as a way of encouraging legal production as well as promoting wider governance reforms. The FLEGT Action Plan was proposed in 2003 and led, in 2006, to the adoption of EU FLEGT Regulation. This establishes a licensing scheme for the imports of timber into the Community. The way is now open for EU delegations to negotiate VPAs with the Community's main timber

supplying countries. A key component of a VPA is the Timber Legality Assurance System (TLAS). This provides a guarantee from the partner country that only legal timber will be exported to the EU from its territory. Under the EU proposals, a TLAS will consist of five components: a legality definition, chain of custody control, verification system and issuing of licences, and independent monitoring (see Box One).

The requirement for independent monitoring is a potential source of controversy. The preferred European option appears to be the appointment of an independent



monitor, who will provide oversight of the whole system (including the performance of the industry and the supervisory role of the state), and attest to its credibility and transparency. This is a demanding role, as each monitor will have to:

- distinguish clearly between legal and illegal timber;
- secure the credibility of the TLAS;
- exercise a degree of control over an intergovernmental agreement.

The third element is particularly contentious as, due to the voluntary and bilateral nature of each VPA, monitoring under a TLAS will be unidirectional. This means that the monitor will effectively be asked to review and comment upon the activities of a sovereign state. This differs from most international agreements, where the underlying relationship is a reciprocal one and monitors operate on behalf of the collectivity.

How can independent monitoring under the TLAS be shaped in such a way that it is credible, feasible and cost-effective, while also being politically acceptable to the various parties involved? In order to provide some tentative answers to this question, the Netherlands Ministry of Agriculture, Nature and Food Quality commissioned a review of independent monitoring in other sectors to look for guidance from extra-sectoral experience. An inventory was made of eleven forms of partnership, of which three are presented here¹:

- The African Peer Review Mechanism (APRM) operated under the New Partnership for Africa's Development (NEPAD);
- The Kimberley Process to combat trade in conflict diamonds;
- The Dutch integral chain management certificate system for pigs, 'IKB'.

Box 1: The EU Timber Legality Assurance System (TLAS)

EU FLEGT Briefing Notes No. 9 lays out the EU's view of the TLAS. Five basic elements are proposed:

1. A definition of legally produced timber that identifies the laws and regulations that must be complied with.
2. A secure chain of custody to track the timber and products through from harvest to the point of export.
3. A verification system that provides a reasonable assurance that all the requirements have been met for each consignment.
4. The issuance of licences to validate the results of legality verification and chain of custody.
5. Independent monitoring of the whole system to assure its credibility and to provide transparency.

Source: 'A Timber Legality Assurance System', Brussels, September 2005
<http://ec.europa.eu/comm/development/body/theme/forest/initiative/docs/FLEGT%20briefs%20EN9.pdf>

Methodology

The objective of this desk review was to formulate recommendations for monitoring of TLAS within the framework of EU VPAs. In relation to each of the three extra-sectoral cases, three questions were posed:

- How was the sovereignty dimension handled?
- How effective was the independent monitoring arrangement in raising the credibility of the system?
- How were the intangible elements (for example, 'illegality' and 'welfare') measured and assessed?

The analytical framework adopted for the review was the 'policy arrangement' approach (*see* Van Tatenhove *et al*, 2000). This distinguishes complex partnerships (also referred to as 'arrangements') in terms of four dimensions:

- a) The *actors and coalitions*, including the organisations created by the arrangement.
- b) The *rules*, which determine the way in which actors can participate in the arrangement (formal laws and regulations and also informal procedures for policy making)
- c) The *power and resources*: power balance, differences in power, information and knowledge.
- d) The *discourses* of the actors and coalitions: the verbal interchange of ideas; these ideas give meaning to physical and social realities.

Methods used included study of available documents, interviews with informants and (in the IKB case) review of practical experience. This triangulation of sources and methods allows the researcher to abstract key elements from diverse processes as a basis for their subsequent comparison, and can be anticipated to result in a generally high reliability of findings.

1- Actors

In terms of actors, an important variable is the role of government.

TLAS arrangements are still at an early preparatory stage, but the European Commission has indicated that the TLAS, as part of the VPA, should be an inter-governmental agreement, and the initial negotiations will be confidential. It has to convince its governmental partners in timber producing countries that the TLAS are worth the investment, and also that the stages proposed are necessary ones. Some of the producing countries consider the emphasis on independent monitoring as indicative of lack of trust.

The confidentiality of the process risks marginalising two other players with a critical interest in, and capacity to influence, the TLAS. A lot of the companies active in the timber sector worldwide are trying to make sure that their product chain is a legal one, through chain of custody and other verification methods. But, to date, the private sector has hardly been visible in the negotiations on the TLAS. Likewise, NGOs are potentially powerful actors in the timber sector but not part of the negotiations. While their role in the TLAS and their monitoring cannot yet be predicted, it is clear that they will demand a place at the table.

1. For more detail on each of these, and the findings from the other case studies, see: Van Midwoud, 2006

The other cases have been organised rather differently:

- *The Kimberley Process*: Most of the diamond trading countries came together to find a solution to the problem of conflict diamonds, and agreed that only joint action could put a stop to the illegal trade. The process was encouraged by pressure from the G8 and UN, who were also important players. The private sector and NGOs were heavily involved right from the start, with NGOs being particularly influential, having brought the issue to global attention. During the negotiations, they formed a powerful coalition that kept the process under constant pressure. Like the private sector, they were given the floor during the meetings and were active in the working groups and review teams.
- *APRM*: This started with all participating governments coming together within the framework of NEPAD, and the peer review mechanism grew out of this. Civil society and the private sector were not really involved in the creation of the APRM. However, civil society has been very active in the implementation of the reviews. By contrast, the private sector has had little involvement in the APRM projects or reviews, although it was invited to participate.
- *IKB*: This was a private sector initiative and the government had no formal role, though European legislation was critical in setting the scene. The private sector wanted to set up a new product standard and all operators in the chain were approached to participate. Under the impact of a series of food crises and growing pressure from globalising markets, there was a shift of power in the chain from equal promotion by all operators to domination by supermarkets. In this instance, it was because the meat consumers had lost their trust in the industry after various crises (greatly decreasing demand for meat) that the supermarkets intervened. Eager to regain consumer confidence, they wanted to guarantee the safest meat possible and specifically demanded IKB certification. NGOs were involved in the round table discussions that led to the creation of the IKB certificate, but their contribution was not appreciated by other stakeholders who felt they were setting the standards too high. The NGOs left the process, but the system is still there, and has survived the rejection.

Through these processes, new *institutions* were created.

- The APRM has a four layered structure: the heads of state, the panel of eminent persons, a secretariat and a team that takes care of the reviews.
- Similarly, the IKB has a group of stakeholders accredited by the Council for Accreditation. An independent company issues the certificates and another independent company takes care of the control, both of them being formally accredited.
- The Kimberley structure is flatter, with only a participation committee to check on the compliance of (new) members. This has kept the bureaucracy light and limited the demands on resources.

The institutional structure of the TLAS is still under negotiation.

Credibility is a crucial issue. In the APRM (which, in principle, uses the same kind of review as the Kimberley process), monitoring has not yet established the credibility of the system. The peer reviews in the APRM are a tool of the governments to control each other and to prove to each other – but not necessarily other stakeholders – that they are making efforts to reform. A similar situation arises with the IKB. Here the main negotiating group are the entrepreneurs in the pig meat chain. They have agreed that an independent party should monitor their partnerships, to increase external credibility. Finally, in the Kimberley process, all of the groups have a considerable stake, although governments are in formal terms the ones that take the decisions. This process has credibility with governments, the private sector and NGOs. This does not mean that there is no criticism (some NGOs publish very critical reports), but the process has sustained its overall credibility.

2- Rules

The functioning of the TLAS will be broadly laid down in a set of guiding principles to be identified by the EU, and used by its negotiating delegations. As in the other cases, the TLAS is an agreement in which actors work on a basis of equity. However, the EU is proactively proposing independent monitoring, though this does not necessarily meet with the approval of the partner governments and stakeholders. It thus differs from the other cases in that equity could already be considered as compromised to a certain extent.

The three external cases

All three extra-sectoral partnerships involve agreements on intangible elements, such as animal welfare, legal diamonds and good governance. The intangibles they have to implement are not necessarily measured further down the chain, but the manufacturer has to state that they comply with them. Should non-compliance be proven, the manufacturer loses its membership and credibility.

- *APRM*: Joining is voluntary but the tasks are quite precise and include the submission of an action plan and implementation of different kinds of reviews. The ultimate rule concerning content is that in the APRM, the ‘traditional governments’ have to work towards good governance. The vehicle is peer pressure.
- *IKB*: The legislative framework is full of formal laws and regulations, set by Europe and the Netherlands. The chain of production is regularly checked for compliance by governmental agencies. Non-compliance leads to heavy fines. To increase the efficiency of their controls, the controlling agencies make use of the Hazard Analysis and Critical Control Point (HACCP) system, which identifies points of high risk and seeks to control them. The IKB certificate requires extra measures to be taken by entrepreneurs, such as rules on transport and farm visits of outsiders. The checking of the certificate is also more frequent than with the government, about three times a year. Non-compliance with the IKB doesn’t lead to financial penalties (unlike the government controls), but can lead to cancellation of the certificate, which is a strong

threat since all downstream marketing depends on it.

- *The Kimberley Process*: Within the process, governments involved in the diamond trade agree to trade only with co-signatories. This has turned out to be a relatively effective measure to make countries implement the regulations. The peer reviews check the compliance of the members, and reports are made to the Participation Committee. A strong regulatory framework was not anticipated at the inception of the Kimberley Process Certification Scheme. Over the years, however, the efforts of the working groups and informal consultations have led to more ambitious demands and more detailed operations, with clear rules on compliance. The principle that kept the process alive in the early days was that all decisions would be taken by consensus. At first, parties feared that no agreements would be reached, but in the event, it has helped keep the agreement on track through some difficult times.

3- Power

Power relations in the early stages of the TLAS are clear: the TLAS is to be negotiated between governments. The character of the negotiations is inter-governmental and civil society and private sector are not (or not yet) formally part of the negotiations. This approach is not encountered in any of the other cases. The research did not find any evidence that the private sector wanted to be more involved in the TLAS, though there is certainly demand from the NGOs. NGOs cannot be excluded from the wider arena anyway, as they are active on illegal logging and exert an influence over public perceptions. Their main fear is that the TLAS will not be able to guarantee legal timber and that illegal timber will be imported in the EU via third, non-partner countries, over which (given the rules of diplomacy) the EU has no control.

- *The Kimberley process*: From the outset, the NGOs and industry were important stakeholders and the NGOs were able to exploit the fear of a boycott of the industry to exert real influence. The outcomes are the result of consensus between governments, but very much influenced by the private sector (World Diamond Council) and the NGOs.
- *APRM*: The inputs are mainly determined by governments, while the outcome has to involve cooperation between society, the private sector and government. The power of the APRM is in the hands of heads of state, but the multi-layered nature of the organisation gives the APRM some credibility and prevents it being seen merely as a tool of government.
- *IKB*: The system to guarantee food safety is exacting. The power of the government is considerable since the public tends to err on the side of caution when it comes to what they eat, and interventions to block unsafe foodstuffs are almost always seen as legitimate. The IKB was created to improve the image of the sector and to squeeze out operators who were giving the industry a bad name. The increasing influence of animal welfare organisations in the IKB led to some farmers establishing a new and less constraining label, the IKB 2004. From this moment on, the IKB functioned as a roundtable in which all actors of the

chain had an equal stake. Over the years, however, the power of the supermarkets has grown progressively, due partly to factors extraneous to the industry.

The key actor in these various sequences is often the NGOs, even though the partnerships were government or private sector initiated. NGOs exert influence nevertheless, through their public information roles, forcing arrangements to be more amenable to them. In the APRM and Kimberley, the power of the governments was countered by setting up various bodies within the partnership. The APRM did this by creating the various layers (the panel of eminent Africans is particularly influential). The Kimberley process set up a Participation Committee and four working groups in which all stakeholders could be active. Interestingly, in the case of the IKB, the supermarkets would seem to have taken over the role that the NGOs would otherwise play, of representing the consumer interest. They also, of course, have interests of their own.

4 - Discourses

The discourse of the EU can be summarized simply by the statement that 'TLAS are needed to guarantee that only legal timber is traded'. However, it has been made clear that this is only one step in the process of forest governance reform, leading to sustainable management and pro-poor development. The NGOs agree that illegal timber is one of the biggest problems facing the forest and they argue that immediate action is needed. They therefore value the initiative though they also view the VPA as only a step towards sustainable forest management, and not an end in itself. Partner countries are interested in entering into VPAs to protect their market share and the revenues, but some of them fear the extra costs of a monitoring system on top of the existing regulations. They argue that a green premium is needed, to distinguish legal from unverified timber, although this is not necessarily a strong negotiating position (in that it implies a legitimate, but discounted, category of timber that is 'not verified as legal'). So the discourses of the various key TLAS actors are not necessarily the same.

- *The Kimberley Process*: By contrast, the trade in diamonds is seen as a common problem that needs a joint solution. Despite major differences in perspective, stakeholders share a sense of urgency. The human suffering associated with the trade in conflict diamonds has no natural champions, at least not in public arena. NGOs brought the issue to the table, but the involvement of the UN heightened its profile. Major industries also wanted to work on the problem, to head off a consumer boycott. The 'premium' in the Kimberley Process lies in its exclusivity (i.e. similar products are no longer traded). The problem of the costs for the additional measures to guarantee legality has been successfully countered by the NGOs (the price mark-up is trivial relative to the typical retail sale price).
- *APRM*: In this discourse, everybody is theoretically in favour of 'good governance'. The key problem is the implementation. The subject matter of the peer review monitoring is not a product or product line but a process, and one that should lead to good governance.

Box 2: The three extra-sectoral case studies

3.1 The African Peer Review Mechanism (APRM)

- A mutually agreed instrument for self-monitoring by the participating member governments of the African Union.
- Designed to help reinforce good governance in Africa and assess member states' level of socio-economic development.
- Introduced in 2003, within the framework of NEPAD, as a process to stop Africa's underdevelopment.
- All countries that sign the Memorandum of Understanding (MOU) of the APRM have to create a framework in which all national players are involved, meaning government, private sector and civil society.
- Reviews must, in all cases, be followed by an action plan that engages the country in a dynamic to resolve the problems that have been identified.
- By April 2006, 23 countries had signed the MOU about APRM (Source: <http://www.nepad.org/2005/files/aprmcountries.php>)
- Country review reports available for Ghana and Kenya. Reports of supporting missions within the APRM framework also available for Tanzania, Benin, South Africa, Nigeria, Rwanda and Mauritius.

3.2 Kimberley Process

- Diamonds first linked to conflict in 1998 by Global Witness, and then raised at the UN Security Council.
- In 2000, an NGO-led campaign denouncing the bloody associations of this luxury good heavily impacted De Beers, which controls 80% of the world's rough diamonds. This revealed the vulnerability of the industry;
- South Africa initiated a meeting in the town of Kimberley with industry leaders, governments and NGOs in an effort to end the phenomenon of 'conflict' or 'blood diamonds', leading to The Kimberley Process Certification System (KPCS) for rough diamonds.
- System was agreed whereby governments had to certify the origins of diamonds before they could be exported and only trade with Kimberley member countries should take place.
- Teams made up of government, business and NGO representatives review countries efforts, on a case by case basis.

See: *VERIFOR Extrasectoral Case Study No. 1*

3.3 Dutch integral chain management certificate system for pigs or 'IKB'

- The most important of the 15 private sector, market-driven labels for meat production in the Netherlands, in terms of size and impact.
- Imposes extra controls on pigs, in addition to the government controls, with three levels:
 1. All details of a pig are recorded in a logbook by the individual producer.
 2. Regular controls on certified producers by the IKB.
 3. Accreditation process, which also has three dimensions: the IKB certificate, the control body and the IKB organisation. All are separately accredited by the Dutch Council for Accreditation (RVA).

See: *VERIFOR Extrasectoral Case Study No. 4*

However, the private sector has been sceptical that the APRM will make a difference and, to date, has been cool in its support. On the other hand, civil society, the role of which is also critical, has been quite active.

- *IKB*: In this case, the discourse steers action towards its goal: to guarantee safe food, and avoid loss of consumer confidence. Although farmers agree that food must be safe, they experience the effects of this in a negative way: intensive controls, too many rules and a controlling body which is altogether too suspicious of them. Remarkably, the system they created themselves has even more rules and more stringent controls. However, they trust this system because they created it; this has helped to generate ownership.

What lessons can be learnt for FLEGT, VPAs and TLAS?

From the review of these case studies, a number of conclusions can be drawn which may be of value to the design of the TLAS:

Actors

An important conclusion is that in order to be successful, the EU and the potential partner countries need to

increase their efforts to bring NGOs and private sector on board the FLEGT process, as active partners. This might, for example, involve linking existing private sector efforts to control the trade in illegal timber to the FLEGT/VPA process. (Indeed, there is evidence that this is already occurring; for example, the Government of Cameroon has indicated that it may accept forest certification as a surrogate for legality.)

Credibility of the monitoring system is a crucial issue. In all the other cases, new institutions were created to monitor implementation of the agreement. However, in the case of FLEGT, the EU is promoting one specific solution: independent monitoring. This has particular connotations in the producer states and consideration might be given to alternative instruments to raise credibility, particularly peer review. This option deserves more attention because it might help to deal with the difficult issue of sovereignty. Whatever arrangement is reached, this is likely to be the result of either a process of negotiation and discussion between NGOs, governments and the private sector, or a system in which NGOs and the private sector are both allowed a role.

Rules

The comparative cases also show that there are several other options to raise the credibility of a partnership, aside from its monitoring. It is important to have all important stakeholders at the table at the moment of design of the system, as only this will create a sense of ownership.

Consensus seems a strong basis for negotiations. Initially, it slows progress, but in the long run it may turn out to be an effective principle. In the cases studied, the quality of monitoring varied, both by sector and also over time, but the result was sometimes a very strict system. Length and frequency of control are aspects that should be determined by the stakeholders.

Clear rules on non-compliance add to the credibility of a system. In two of the cases (Kimberley and IKB), the ultimate sanction is complete exclusion from the process, and from the markets it supports. In the case of the APRM, non-compliance may rebound on a country in terms of decreased ODA, which is a form of 'market penalty'. So exclusion from the process is a sanction which might seriously be considered in the FLEGT case.

Power

In the FLEGT process, many stakeholders are involved, but only stakeholders in producing countries are likely to be evaluated. This creates an unequal power balance and measures may need to be considered to counterbalance this. Providing information to stakeholders and giving them access to the official or unofficial negotiating tables are both ways to share power and to increase credibility. When it comes to a monitoring system, spreading the power over more bodies could increase acceptability and decrease the risk of one body getting too much power. Again, this points to the value of participatory approaches such as peer review.

The power of consumers (or donors as a proxy for consumers) may well be a decisive factor, as shown in the case studies. For FLEGT, the consumers are still the 'sleeping giant' and nobody knows if and when they will wake up.

Discourses

Serious efforts arguably need to be made to harmonize the varying discourses on FLEGT, which are hardly conducive to joint action. The partners are urgently in need of a common problem on which to work together. By contrast, what the other cases have in common is a single dominant discourse which is morally undeniable. Who does not want to fight blood diamonds? Who does not want good governance? Who does not want safe food? An important question to be asked in the FLEGT/VPA case is: has 'illegal timber' the same potential to mobilise the general public as 'blood diamonds' or 'unsafe meat' - or even 'corruption' and 'bad governance'? A strong and emotional motif is clearly an asset in circumstances such as these.

In the FLEGT case, the power of the imagery is diminished by lack of clarity of purpose. There are major differences in opinion: is the problem about illegal logging or sustainable management of forests? Good governance? Poverty alleviation? Conservation of biodiversity? Is the struggle against illegal logging a first step or a goal in itself? Further debate is needed to clarify these issues and to identify some common ground.

Conclusion

Monitoring of the activities of an independent country is a demanding task and a matter for great sensitivity. The very complicated issue of illegal logging will only be successfully addressed if governments, NGOs and the private sector work together and generate sufficient common ground. There is a case for much greater involvement of NGOs and the private sector in the FLEGT process and in the design and implementation of its verification systems.

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