

**Technical Workshop on Guidance for Independent monitoring and the
FLEGT legality licensing scheme with civil society and private sector
Brussels, DG DEV, 21 May 2007**

Independent monitoring will be a required element of FLEGT Voluntary Partnership Agreements (VPAs). The exact form that implementation will take in each partner country is likely to vary and will be established during negotiations, but to assure credibility, certain principles will need to apply in all agreements. The Commission's FLEGT Briefing Note 7, published in April 2007, provides guidance on these principles and describes criteria against which they could be assessed, it is recommended that this document be read in tandem with the Briefing Note, which is available here:
http://ec.europa.eu/development/ICenter/Pdf/Environment/forests/briefing%20notes%202007/B2_Flegt_BR7_2007.pdf

The meeting agenda focused on three main sets of issues: those relating to the aim and scope of action of the monitor, those related to the institution and independence of the monitor and civil society input, and finally, those relating to the reporting structure and likely relationship with Joint Implementation Committees (JICs).

Aim and scope agenda questions:

- **What information sources should be taken into consideration by the IM, through what channels?**
- **How should the IM work with market participant ('operator-based') systems?**

The meeting opened with a presentation setting out the function of the IM as detailed in briefing note seven. Once operational, the issuance of FLEGT export licenses will be based on a functioning Legality Assurance System (LAS). This system can be 'market participant' based or consignment based. Legality assurance systems proposed by partner countries will be evaluated to ensure they meet EU expectations and the system(s) will be agreed in VPA negotiations. Independent monitoring aims to ensure that the agreed systems are being followed and that they are preventing potentially illegal timber from being licensed. So the function of independent monitoring is not so much to highlight individual infractions but to take an overview and ensure that whichever system is chosen, it is robust and can be relied upon to assure credible legal timber for export.

The Commission Briefing Note specifies that monitoring reports will be evidence-based and therefore report on incidences where licensed companies can be shown to have broken the law; however, the remit for their recommendations will relate to improvements in the design or implementation of the LAS rather than recommendations for specific sanctions relating to individual problems. Given this, it is possible that the monitor will have to report on systemic problems outside the LAS, such as failures to effectively prosecute forest crime where identified by the LAS.

'Market participant' monitoring

The definitions of consignment-based and market participant-based systems are set out in Commission Briefing Note X. Participants were keen to understand better the way that market participants will be monitored. The Commission informed the group that this type of system can only be agreed as part of a nationally-negotiated VPA, so monitoring should be no different from monitoring consignment-based systems. Civil

society representatives stated that monitors should be given the same level of access to operations in order to ensure system credibility, even where these systems are certified by a third party.

The group was informed that if the IM finds evidence of repeated infractions by a licensed company, the JIC should have the power to recommend withdrawal of the company's FLEGT license, but this would also pose questions about the overall effectiveness of how the verification system dealt with operator-based licences. Whether infractions explored by the monitor can only be ones that are related to company production that is destined for European export, or include other forest crimes will depend on the legality definition on which the system is based and the coverage of the LAS. This should be clear in each partner country before a VPA is signed.

Information sources

Monitoring practitioners were keen to emphasise the importance of formally accepting a wide range of information from different local sources. The Commission accepted this point and felt that acceptable information sources should be set out transparently in monitor's ToRs. In addition, participants suggested that effective ToRs may need to include a definition of what is considered 'admissible' evidence of the failure of an LAS, and practical standards of due diligence for private and public reporting on specific pieces of information.

A number of participants were supportive of IMs establishing a clear risk-based sampling procedure rather than a random approach, but some thought that this decision should best be taken by the organisation given responsibility for the monitoring.

Institutions and independence agenda questions:

- **How should people/institutions best be selected, given sensitivities around independence, transparency and Partner country sovereignty?**
- **What key attributes should a monitor be expected to demonstrate?**
- **Should contracts be non-renewable or term-limited? If not, how best should longer-term conflicts of interest be avoided?**
- **Are the guidelines relating to ISO standards, set out in Briefing Note 7, appropriate for non-certifying bodies? If not, on what basis should qualifications for monitoring agencies be assessed?**

Appointment and conditions

Criteria for the appointment of monitors are set out in detail in Briefing Note Seven. A number of participants felt that the criteria are likely to favour commercial auditing organisations rather than a purely civil society or advocacy organisations, and went on to stress the importance of developing capacity in local civil society to take part in monitoring where appropriate.

A number of civil society participants expressed concern about how best to guard against conflicts of interest when using commercial auditors.

In addition, the briefing notes currently include a prerequisite that monitoring organisations should have five years experience in the sector. Commission representatives asked participants if this was a useful condition. Some felt that it was

necessary to ensure that monitors understood the complexities of the sector. One participant was concerned that organisations with this amount of time in the sector would be identified too strongly with previous projects to be considered truly independent.

Terms of Reference

The Commission informed the group that Monitoring ToRs would be established during VPA negotiations, prior to a VPA being signed or implemented. Detailed guidance on what these terms should include is in Briefing Note Seven.

Minimum IM requirements will be established in line with the guidance to ensure that standards are broadly uniform among partner countries; however, it is likely that differences that reflect different situations in partner countries will arise in the course of individual VPA negotiations.

Contracts and payment

In the interests of independence, a number of participants suggested that the monitor should be paid on the basis of 'work done' rather than outcomes, and, ideally (but not definitely) contracted by an authority that is separate from those that it is monitoring. Monitoring practitioners at the meeting were keen to stress the importance of isolating the source of payment from the institutions with a stake in the monitors' findings, in order to support independent judgements and reporting.

Civil society agenda questions:

- **What role should local civil society play in the execution of the IM function?**
- **Should building domestic capacity be a requirement for IM contracts?**

Many in the group felt that some degree of civil society participation in monitoring will be key to FLEGT credibility in partner countries. The Commission stated that joint ventures will be encouraged where possible. Particularly where local institutions are keen to be involved but do not have the capacity to take on monitoring alone, or where this is not politically feasible or considered safe. Monitors from outside the partner country but from the region may provide a good compromise in some circumstances. However it was noted that monitoring can be particularly dangerous for local practitioners. In addition, some noted that civil society groups might wish to maintain their distance from the system in order hold it to account if problems were to arise.

Reporting and transparency agenda questions:

- **What does experience of peer review/ reading committees to date suggest is best practice?**
- **How will the Joint Implementation Committee's (JIC) reading committee' relationship work in practice?**
- **Who should be on the committee? What mechanisms should be established to deal with conflicts over IM conclusions if they arise?**
- **Who should have the ultimate right to publish and what approvals should be obtained before publication?**
- **What is the best formal relationship between monitoring of forest crime and monitoring of FLEGT systems, where both exist?**

Reporting

The reporting system was discussed in some detail. The primary role of the monitor is to collect information to be judged and acted upon where relevant by the JIC, which will include representatives of the partner country government and the EU. The JIC may wish to delegate its day to day oversight for the IM of the FLEGT LAS to another body (called a reporting body) if it does not meet regularly enough to perform it effectively.

As set out in Briefing Note Seven, the group was informed that the Monitor will produce two reports, if necessary, one for the JIC and one for publication. The public report will be a summary of the more detailed reporting to the JIC. It should include information on systems problems and recommended actions, but would not be expected to report on cases of individual infractions. Details on reporting should be worked out in the TORs.

This dual reporting mechanism is to allow information that is sensitive or difficult to verify to be considered by the JIC. What information should be included in the published report will be set out in detail in monitors' ToRs. The monitor will have the ultimate right to publish all information in line with the ToR, with or without the JIC's consent.

The Commission was keen to elicit views on whether the monitor should have a formal communications role, particularly relating to local media. Practitioners suggested that this would be inappropriate.

In the early stages of the system it is expected that the monitor will report frequently. Once a robust system is in place, monitors may be expected to report less frequently. In addition, the Commission expected that as national LAS are more effectively implemented over time, the monitoring function will change, not only quantitatively (as in less frequent reports) but also potentially qualitatively.

Legal protections

Following discussions on the process for report publication, practitioners suggested to the group that if the monitoring organisation has final sign off on published reports it would be important to ensure that it is not legally responsible for commercial liabilities, for example, if companies have export licenses rescinded, or otherwise suffered loss of business as a result of a published report. It may be possible to cover this with insurance or within contractual wording, or it may be necessary to institutionalise the monitoring function in a way that protects the monitor. This area was highlighted as one for further exploration.

Sanctions

The group was informed that the Monitor will only recommend improvements in the design or implementation of the LAS. It reports problems, but does not have responsibility or authority to insist on corrective actions (as would be the case for auditors in Certification schemes.) It will not have power to recommend specific actors be sanctioned under partner country law or that a VPA be ended. However, evidence presented by the monitor may indicate non-compliance by an actor that justifies sanctions.

Where there is any concern that domestic judicial systems may not function efficiently in support of the LAS, it was proposed by participants that an option for judicial capacity building could be included in VPAs.

JIC responsibilities

The group discussed the role and responsibilities of the JIC in some detail. Interacting with the IM is only one part of the JIC's much broader remit of ensuring the effectiveness of the whole VPA. The JIC or its delegated authority will examine the information gathered by the monitor, check that the proposed LAS corrective actions are undertaken in an appropriate timeframe and respond to any complaints about the monitor.

If the JIC delegates authority over the monitoring function to a separate group (a reporting body), it will be necessary to ensure that this group has both the political and technical capacity required to understand the monitors' reports and ensure that recommendations are considered in appropriate detail and acted upon.

A number of participants were concerned that the Commission may not have the technical capacity to put representatives with both a detailed understanding of forest issues and a reasonable degree of political overview on each JIC and/or its delegated authority.

There was also a range of views on the inclusion of industry and civil society representatives on JICs. Some felt that without civil society the Committees would not be truly accountable. Others were concerned about conflicts of interest. There was no consensus on this question.

Dispute resolution

Participants were interested in the detail of dispute resolution mechanisms. The Commission stated that in the case of disputes, the JIC would have ultimate responsibility for their resolution and should have a formal mechanism set out in the VPA. In addition practitioners at the meeting proposed that VPA negotiators consider not just disputes but the potential for conflict avoidance and delay when negotiating the powers and responsibilities of the IM and JIC.

Conclusions

As detailed above, many outstanding questions will be answered in detail at the country level during VPA negotiations. However three main areas for future consideration were identified by the group:

- The likely costs of monitoring and who should bear them
- How best the monitor should be protected against legal liabilities relating to its control over publication
- How the FLEGT monitoring function will relate to other formal or informal forest crime monitoring