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# EUTR Workshop: Substantiated Concerns and Producer Country Cooperation

28–29 October 2014

Food and Agriculture Organization of the UN, Rome

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Under the EU Timber Regulation (EUTR), member state Competent Authorities (CAs) must endeavour to carry out checks on Monitoring Organizations and Operators when ‘substantiated concerns’ are raised by third parties about their compliance with the EUTR. This workshop, which took place 28–29 October 2014, was part of a series that aims to improve implementation of the EUTR. The workshop considered the status of substantiated concerns under the EUTR, including standards for NGOs wishing to submit substantiated concerns, the experience of Competent Authorities in receiving them and best practice in acting on them in the future. It also looked at cooperation with producer countries. The PowerPoint files used in the presentations summarized below can be found on the [Illegal Logging Portal](#).

### **Session 1: Introductions and Aims**

Astrid Schomaker, representing the European Commission (EC), set out what the Commission is hoping to do to assist EUTR implementation. With regard to interstate communication, the Commission is supporting both formal and informal meetings, and has begun work on a concept paper for an EUTR communications platform. Such a platform would allow rapid exchange of information between Competent Authorities and enable the building of consensus on issues such as substantiated concerns, and could potentially be open to other countries with similar legislation such as the US and Australia. Schomaker emphasized the importance of looking at the practical issues of implementation as they occur, and incorporating lessons into the EUTR guidance document – which is a living document and continuously updated. The Commission hopes to be able to work more with member states that have the capacity to undertake case studies and consider scenarios, the results of which can then be made more broadly available. The Commission would also like to explore the idea of field visits between low- and high-capacity countries, and Schomaker invited requests from CAs as to what would be useful in this regard. Further work needs to be done on communication with non-EU countries. Communication with China is currently on the basis of a bilateral communication mechanism and needs to be stepped up. Communication with India needs to be brought up to the same level as that with China. Communication with Russia and Mexico is still just via a bilateral environmental dialogue where not much can be done.

### **Session 2: Substantiated Concerns and Lacey Evidence-gathering**

Elinor Colburn, of the US Department of Justice (DoJ), outlined some of her department’s experiences of working with NGOs on criminal investigations. She emphasized the importance of providing NGOs with an understanding of the task confronting investigators and the restrictions under which they work (e.g. relevant statutes, rules for communication and admission of evidence). First of all, the DoJ has no jurisdiction in other countries, and so cannot ‘direct’ the activities of an NGO. NGOs can bring information to the attention of the DoJ, but there can be no communication the other way, and no information can subsequently be added. It is therefore important that NGOs first collect all the information they can, and then bring it to the DoJ. More in-depth cooperation has to be the subject of an agreement. Furthermore, the modus operandi of the DoJ is not to publicize investigations, which is often contrary to the way in which NGOs wish to proceed, e.g. by raising awareness. Such tensions must be discussed at the outset of any cooperation. Most problems so far have been due to a breakdown in communications, e.g. misunderstandings based on informal or verbal agreements.

Several EUTR CA representatives voiced the opinion that in practice it is not possible to distinguish between criminal and civil investigations. For example, a CA may impose a civil penalty in a case that, if the penalty is appealed, is given over to a criminal court. The process for pursuing cases must therefore be the same.

Emily Unwin, of ClientEarth, gave a civil society perspective on substantiated concerns.<sup>1</sup> She highlighted a number of challenges that have been faced in dealing with substantiated concerns so far, particularly in terms of how to deal with conflicting indications of legality from ‘official’ and ‘unofficial’ sources, substantiated concerns based on inadmissible evidence, and lack of information from CAs as to how substantiated concerns are followed up on when they have been submitted. She then went on to set out a number of questions that must be considered by CAs:

- Whether information submitted that challenges the credibility of official documentation in itself establishes a breach of the prohibition;
- Whether more information is required;
- Whether there is any way of avoiding a risk of illegality;
- Whether the operator or monitoring organization was aware of the information, or ought to have known;
- Whether the operator or monitoring organization has taken appropriate reaction; and
- How competent authorities communicate their reasoning and decision to third parties.

Unwin emphasized the fact that information from third parties reduces the regulatory burden on CAs and improves the functioning of the EUTR, while the nature of the EUTR means that the timber industry is obliged to act on information that is made public.

Alex Pardal, of Global Witness, gave a presentation on the challenges and experiences of evidence-gathering with reference to the work of Global Witness in the Democratic Republic of the Congo (DRC). The overriding problem in the DRC is the very poor governance, which throws into question official documentation and decisions. For example, investigations have found examples of official permits for the logging of Sicobois being granted retrospectively. Ultimately, the governance situation means that DRC timber imported into the EU cannot be legal under the EUTR. Under the circumstances, the fact that timber from this area is accompanied by official documentation does not demonstrate legality, and operators cannot rely on it to demonstrate that they have complied with the EUTR.

Louise Truslove, of the Environmental Investigation Agency, spoke about the protection of sources in evidence-gathering.<sup>2</sup> Corruption or the absence of governance can mean that local information-providers are at genuine risk of violence or unjust prosecution, which means that NGOs and others have a duty to protect their sources. In the case of Forest Law Enforcement, Governance and Trade (FLEGT) in Indonesia, third-party monitoring is written into the Voluntary Partnership Agreement (VPA), and such organizations have a place on the joint implementation committee. Problems remain, however, as a result of low capacity, restriction on sharing of some information, handling of complaints once submitted, competing and shifting administrative priorities, and uncertainty over funding (which is currently supplied by donors). Truslove emphasized the importance of making CAs aware of the necessity of source protection and of securing an appropriate way of handling sensitive information. She recommended the development of a set of source protection principles that CAs can adopt for EUTR legal proceedings, and the codification in the 2015 EUTR review of a source protection standard.

Thorsten Hinrichs, of the Germany Federal Ministry of Food and Agriculture, gave a presentation on how substantiated concerns are handled by the authorities in Germany.<sup>3</sup> The CA for timber imports is the Federal Office for Agriculture (BLE). The BLE carries out checks based on a risk-based approach,

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<sup>1</sup> Emily Unwin, [‘Substantiated Concerns: Elements for a common understanding’](#).

<sup>2</sup> Louise Truslove, [‘Evidence Gathering & Source Protection’](#).

<sup>3</sup> Thorsten Hinrichs, [‘Substantiated concerns: how can competent authorities use them? First experiences in Germany’](#).

according to a plan drawn up every three months. For each operator, 10 cases are checked in detail. So far, substantiated concerns have related to:

- General concerns about specific countries. These have to be substantiated. Saying that wood comes from a problematic country is not enough. Countries are ranked for checks, so that if there is a problem with a given country, the CA prioritizes imports from that country for checks. Checks carried out (on imports from Brazil and Myanmar) have not yielded results, but operators have been given the message that official documentation is not sufficient.
- Concerns about shipment or supplier. Individual shipments can be checked if the concerns are sufficiently concrete. The one case so far (that of Wenge from the DRC) is still ongoing because the operator keeps submitting new documents, but the timber has been seized and the costs of the case fall on the operator.
- Concerns about specific operators. Extraordinary checks can be carried out in some cases. There have been two of these cases so far, in which insufficient due diligence was found and notice of remedial action taken, followed by a check four weeks later.

A substantiated concern should be as concrete as possible, with a summary of points. It should list the main offence, the proof, and ideally a specific shipment or operator. It should also be capable of verification in the CA's member state, and should be directed at the operator in addition to the CA, to allow the operator to consider it in their due diligence system. Hinrichs restated the importance to CAs of substantiated concerns, and the usefulness of third parties in this respect. He also emphasized the necessity of CAs communicating their approach clearly to such partners, to allow them to fulfil the role envisaged by the EUTR.

The workshop participants discussed the question of whether guidelines for third parties submitting substantiated concerns would be necessary or helpful. The general consensus was that some guidance – though perhaps not a formal document – would be helpful, although it would have to remain flexible to cover all types of cases and to avoid third parties being obliged to collect information that might not be used. During the following session, the workshop participants were to discuss what information should be contained in the submission of a substantiated concern. There was also general agreement that third parties should be able to expect some measure of feedback as to how the substantiated concern would be dealt with, in terms of both time-frame and procedure.

### **Session 3: Substantiated Concerns – Breakout Groups and Plenary Discussion**

During this session, the workshop participants divided into breakout groups to discuss the question of guidelines for the submission of, and response to, substantiated concerns. Following the discussion, the breakout groups reconvened to share their conclusions.

There was general consensus that guidelines for third parties submitting substantiated concerns would be useful, in order to ensure that sufficient information is provided for the cases to be taken forward by the CAs, allowing third parties to focus their efforts on relevant information, and to promote consistent standards across EU member states. Conversely, it was seen as important that CAs respond to substantiated concerns in a clear and transparent manner, providing information on how they will be assessed, and in what time-frame. Furthermore, it was recognized as important to provide feedback in cases where substantiated concerns were not accepted. Some level of guidance for CAs in dealing with substantiated concerns would therefore also be helpful to allow third parties to assist CAs in EUTR implementation.

It was suggested that while the EC can assist in drawing up the guidelines, the process should be led by the member state CAs themselves. The guidelines might in that connection be put on the agenda of the working group. There is no legal basis for issuing binding, EU-wide requirements as to how substantiated concerns are handled. Some CA representatives also voiced strong reservations about implementing EU-wide requirements for CAs in responding to substantiated concerns, citing national data-sharing restrictions and other requirements.

The information to be submitted as part of a substantiated concern was the subject of some discussion. Certain basic information should be included as a matter of course, including the EUTR offence in question, the documentation for this and the companies, species or shipments involved. Apart from this, it may be necessary to have different requirements depending on the issue in question – e.g. whether there is an issue with a specific shipment or with imports from high-risk countries.

### **Session 4: Enforcement Cooperation – Best Practice and Options**

This session focused on enforcement cooperation with producer countries. Elinor Colburn (US DoJ) gave the first presentation, on producer country enforcement cooperation in prosecutions under the Lacey Act. Specifically, she referred to a prosecution in 2003 of the McNab fishing company for illegal trade in lobster out of Honduras. Among the lessons identified was that informal communication is often more effective than proceeding through formal channels. This underscores the importance for CAs of maintaining direct contact with individual producer country counterparts, including calling them or travelling out to meet them. Developing a personal long-term working relationship is important, because the effectiveness of the partnership grows with the level of trust. The same is the case for evidence-collection, where efforts often fail in spite of formal agreements. Testimonies from individual officials or officers from producer countries are often crucial in securing convictions. It is also important to share the results of investigations and prosecutions, including money generated through fines. Doing so helps to build relationships and generates political will.

Jonathan Barzdo, of the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) Secretariat, gave a presentation on CITES. CITES works by a system of permits, under which an export permit issued by the producer country is required to be able to trade in wood of a species or population listed in Appendix I–III to the Convention. Permits can be issued only in cases where the trade is both legal and sustainable. For the most critically endangered species (Appendix I), trade in which is generally prohibited, an import licence is also required. The CITES website lists the national authorities empowered to issue permits, shows sample permits for verification purposes, and contains an open forum for stakeholder discussion. In the case of severe governance problems (such as the DRC), the CITES Secretariat formally recommends that permits be submitted for verification. CITES parties share responsibility for the working of the Convention, and there is a process for assisting partner countries in case of problems.

Henry Coleman, of Ghana's Timber Industry Development Department, gave a presentation on FLEGT licensing and institutional arrangements for enforcement cooperation.<sup>4</sup> Ghana and the EU ratified their VPA in 2009, making Ghana the first country to conclude such an agreement. Since then, Ghana has come a long way in implementing legislation and establishing the relevant institutions to fulfil its commitments (see the PowerPoint presentation for full details). The institutions responsible for enforcement are the Forestry Commission (managing forest and wildlife resources), and under that the Forest Services Division (in charge of forest production and protection), the Timber Industry

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<sup>4</sup> Henry Coleman, '[FLEGT licensing and institutional arrangements for enforcement cooperation](#)'.

Development Division (industry regulation and development) and the Wildlife Department (managing protected areas). These assist timber operatives by providing information on EUTR requirements, delivering training and helping to develop certification schemes. Coleman made the point that very significant progress had been made, but that work is still needed to secure industry buy-in and sensitize customs officials and other relevant staff, as well as to ensure that producers and buyers work together to ensure EUTR compliance. A data-system that will allow officials to check if a FLEGT licence has been issued is currently under development.

### **Session 5: Independent Monitoring – Cooperation Options and Data Sources**

This session focused on independent monitoring in producer countries. Stuart Wilson, of Resource Extraction Monitoring, gave a presentation on real-time monitoring and data-sharing frameworks.<sup>5</sup> He argued that, one way or another, NGO monitoring is going to have to be stepped up dramatically if it is to be effective, and that this will require the adoption of new technology. In particular, he pointed to the Vessel Monitoring System which allows the real-time tracking via satellite of registered vessels globally, through an internet platform.<sup>6</sup> REM has been working on a similar system for vehicles, which could be used nationally to track vehicles in the logging industry. This is currently being tested in the Congo. If carrying such trackers was made a legal requirement, it would generate permanent and constant data that would be hugely valuable to CAs and to operators seeking to comply with the due diligence requirement. A system will need to be established to manage and present the data, and funding would have to be secured, either from donors or from charges levied on industry operators.

Patrice Crochet, of the World Resources Institute, gave a presentation on the Forest Transparency Initiative (FTI).<sup>7</sup> The FTI is an online repository of information on the concessions and companies operating in a number of countries in Central Africa: Cameroon, the Central African Republic, the DRC, Gabon and the Republic of the Congo. It serves to help link government, industry and stakeholders. Functionalities under development include making information available in a way that is meaningful for due diligence, a tool for navigating national forest legality frameworks and facilitated interpretation of information supplied by third parties from the field, including the possibility of submitting information directly on the website. While registration in the database is not mandatory for companies, it is hoped that companies will want to use it for due diligence and marketing.

Rupert Oliver gave a presentation on the International Tropical Timber Organization's (ITTO) FLEGT Independent Market Monitoring (IMM) and its findings.<sup>8</sup> The IMM project, which is funded by the EC Directorate-General for International Cooperation and Development (DG DEVCO), monitors the global timber market based on a large number of indicators for quantitative assessment, including trade and investment flows and prices. The information it generates is required by FLEGT VPAs for impact assessment and annual reporting. So far, the findings of the project show that the countries engaged in the VPA process account for 75 per cent of the worldwide timber trade, making it an important factor in the global trade. There has been a general decline in trade with those countries since about 2008, probably the result of a combination of the global economic downturn, increased substitution, competition from emerging markets and other factors, although it is uncertain whether or not this will continue. The introduction of the EUTR does not, however, coincide with a major change in trade patterns, and there is no discernible shift within the EU to countries where EUTR implementation might

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<sup>5</sup> Stuart Wilson, '[Tools for the Implementation of Forest Governance \(TIFG\)](#)'.

<sup>6</sup> [Marine Traffic website](#).

<sup>7</sup> Patrice Crochet, '[Forest Transparency Initiative - Incentivizing legal and sustainable timber through better information](#)'; Forest Transparency Initiative website.

<sup>8</sup> Rupert Oliver, '[Role of ITTO FLEGT Independent Market Monitoring](#)'.

be thought to be weaker. Oliver emphasized that significant gaps remain in available data, including the limited availability and poor quality of production and trade data, and the lack of systematic assessments of illegality risks for specific countries, regions and products.

### **Session 6: Brazil – Pará State Case Study**

This session focused on the current situation in Brazil, particularly with regard to false claims of legality. Daniela Montalto of Greenpeace gave a presentation on Greenpeace's investigations into illegal logging in Brazil's Pará state.<sup>9</sup> Using electronic tracking devices, Greenpeace has tracked trucks carrying timber in areas where no logging licences exist, supplying sawmills with licences that relate to other areas. These sawmills in turn supply companies that routinely export wood to EU countries. Having been informed of these circumstances, EU operators cannot claim to have fulfilled their due diligence requirements or to have mitigated the risk involved in their trade. When challenged, the companies point to the official documentation as proof that the wood has been legally harvested and that they have done what they could to verify this. This is a clear and obvious failure of their obligations under the EUTR.

Roberto Waack, of the Brazilian wood trading company AMATA, gave a presentation on the challenges facing the legal trade in wood.<sup>10</sup> An estimated 80% of wood harvested in Brazil is illegal, and enforcement is hampered by Brazil's decentralized state system. Illegal timber becomes 'legal' in a variety of ways, and at various stages of the production process – e.g. through false management plans, overexploitation of approved management plans, falsely reported yields, and simple 'laundering' operations in which illegal timber is taken through sawmills that also produce legal timber. Despite obvious incongruities, such as impossible loads or logistics, there is virtually no enforcement. In order to change this, it will be necessary to harmonize federal and state systems, organize information on authorizations, improve the focus of saw mill activities – particularly yield controls – and leverage the full effect of public procurement and legislation such as the EUTR and Lacey. Waack also emphasized the importance of sustaining the legal trade in wood, and of not boycotting tropical timber, since areas not logged will be turned over to other uses, resulting in deforestation.

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<sup>9</sup> Daniela Montalto, ['The Amazon's silent crisis: Illegal timber for export – with official documentation'](#).

<sup>10</sup> Roberto Waack, ['The False Legality Challenge'](#).