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LOGGING OFF

This briefing note is developed by a group of NGOs from European and timber-producing countries involved in or monitoring the implementation of the EU FLEGT Action Plan, and specifically the implementation of the Voluntary Partnership Agreements between the EU and timber producing countries. They intend to provide joint North-South civil society positions. For information on each VPA see www.loggingoff.info

Consultation requirements under FLEGT

Introduction

“The Commission has underlined that, in particular, its intention is to reduce the risk of the policy makers just listening to one side of the argument or of particular groups getting privileged access.”¹

In 2002, the EU adopted clear principles and minimum standards for consultation processes in Europe. (See Annex 1). To avoid double standards it is necessary to ensure that these principles and standards also apply to Voluntary Partnership Agreement (VPA) negotiations between the EU and a Partner Country. Unfortunately, up to now, the Commission has been unable to set clear minimum standards for an effective good faith consultation process.

This is despite the fact that it has been agreed that it should not be possible to adopt a VPA unless there has been a proper consultation process. Furthermore, most countries, and EU Member States, have signed agreements which clearly spell out the need for involving different interest groups and specifically indigenous communities in policy decisions on forests. (See Annex 2)

We believe that the legitimacy of the whole FLEGT process depends on whether civil society actors in Europe and rights holders and interested parties in VPA countries, continue to support the process. This briefing therefore details what we believe to be the minimum requirements for an effective consultative process.

Different perspectives

“Trust is a prominent issue and key to poor people gaining a voice in policy making.”²

There have been countless occasions where environmental or social NGOs or indigenous peoples' organisations have participated in official and public consultation processes and subsequently found that their participation was used to legitimise the process with few or none of their concerns being addressed.³

“We had agreed to participate and during the process we have seen how the NTCC is not able to resolve critical issues. More importantly, the NSC meeting and other processes give very little room for real dialogue and our presence may only be used to legitimise indigenous and local communities' participation in the process.”⁴

Before participating in any VPA consultation process, there are a number of questions that civil society actors and rights holders ask such as: Does this VPA process create a useful space for engagement, and if so how do we work towards developing some dialogue with governments without compromising our values and our autonomy? Is this VPA process just window-dressing? Will our participation just legitimise a flawed process, the outcome of which is decided already?

- 1 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 final. Page 5.
- 2 From 'A review of lessons learned in enabling people's participation in policy making processes'. Paul Bulcock, Graham Haylor and William Savage. Published by STREAM in association with Gramin Vikas Trust, April 2003.
- 3 These include: the development of a national forest certification standard in Finland, the development of the MTCC certification standard in Malaysia, the development of the World Bank's Forest Policy in 2003.
- 4 Trading in Credibility Case study 8 Malaysia; Carol Yong; Rainforest Foundation UK. 2002.

At the same time, governments often think that civil society actors are not able to compromise and will never be satisfied no matter how good the consultation process is. Also, governments or intergovernmental bodies often don't understand why civil society actors and rights holders are upset after what was, in their view, a "good" consultation process.

"I don't understand what the problem is. We met with 1200 stakeholders from 35 countries. We dedicated three years, hundred of thousands of dollars and some of our best staff time. What is everybody complaining about?"⁵

Based on a careful analysis of several public consultation processes,⁶ we believe that the main risks for a genuine and effective consultation process are:

- limited trust and conflicts of interest and/or uneven bargaining power between different interest groups;
- differing perceptions of the participation process by stakeholders and the corresponding potential for misunderstanding and exaggerated expectations;
- insufficient sharing of knowledge;
- poorly planned processes;
- token efforts or lip service given to participation;
- lack of political will among government and policy planners as they fear loss of power or personal influence;
- limited resources for a genuine consultation process;
- being taken over by powerful interests.

These risks become visible as:

- poor facilitation and biased chairing of discussions;
- inaccurate and distorted records of inputs to the process by different rights holders and interest groups;
- bad quality or absent translation of background documents into languages and formats that are understandable to participants, including marginalised groups;
- prefixed agendas for dialogue set by the consulting body that fail to address the main issues and priorities of participants;
- poor or absent verbal translation into local languages during the dialogue;
- lack of clarity on how inputs, issues and recommendations presented by civil society organisations, rights holders and interested parties will affect the final policy, agreement or decision that is the subject of the consultation.

Ways forward

"A poor process leads to poor outcomes"

The main questions for a government involved in a VPA consultation process should be: What are the objectives of the process and how can it be best set up and managed? Sub-questions include:

- Which groups should the government invite to participate in order to ensure representation, and how can the interests of disadvantaged groups/communities be elicited?
- How can consultative processes be efficient, while fostering trust and remaining open and transparent, recognising the limited resources of governments and other participants?
- Which skills and capacities would need to be put in place by government to ensure that consultative processes are professionally managed and implemented, thus enhancing the trust of the partners?
- Which consultation techniques are most appropriate to obtain relevant input, e.g. notice and comment, face-to-face discussions, etc?
- How can the government ensure that stakeholders are satisfied with procedural aspects of the decision-making process, while recognising that disagreement may exist concerning the substance of the final decision?

5 Quality not quantity, lessons learned from consultation on the World Bank's Draft Indigenous Peoples Policy; a briefing note by Bank Information Centre; March 2004.

6 See Bibliography.

How to set up a consultation process under FLEGT

“Listen to and consider views of all key forest related constituencies and ensure that they have reasonable opportunity for involvement in the policy review and strategy development process”⁷

What does this mean for a VPA consultation process? Consultation as part of a VPA process should not just be to seek information, or advice and opinion. It should be an exchange of ideas and the possibility to talk things over in order to ensure that the adopted VPA, is acceptable to affected and interested parties, including environmental and social NGOs and all right holder groups, such as local communities and indigenous peoples.

The first and most essential step for a VPA consultation process is therefore for the government to ensure that all participants have faith in the consultation process. The main condition for this is to develop clear terms of reference for engagement or requirements to be agreed by all participants, which outline the planning, programming and feed-back stages of the consultation process, and make clear how inputs may affect final outcomes.

What are requirements for a consultation process under FLEGT?

It is important to see FLEGT as a development of a process as well as a product

I Planning Stage

- Accept the need for sufficient time and resources. Quality participation demands space for trial and error and good translation of all relevant documents;
- Recognise ‘governance’ issues: take into account representation and accountability questions on the part of all actors;
- Adopt a learning approach to the process on the part of all actors;
- Define the objectives of the consultation process and terms of engagement at the outset;
- Are funds available to allow for an equitable consultation process which allows financially weak participants to attend and prepare for meetings?
- How are cultural and local considerations taken into account in organising the meeting and its preparations?

II Management stage

- Ensure a proper and equally balanced cross selection of participants from environmental, social and economic sectors are invited to participate in the process;
- Ensure all participants will have at least a 2 months notice period for meetings to allow them to prepare and organise their constituencies;
- Provide sufficient information to all participants: background material should be made available at least two weeks prior to consultation, including an explanation of the process and proposed substantive issues to be discussed etc. Ensure any necessary translation are made available;
- Ensure independent or shared facilitation by different stakeholder groups, approved by all participants;
- Ensure meetings have rapporteurs and minutes are approved by all participants;
- Consider the formation of a multi-stakeholder drafting committee to draft the final agreement with self-selected members from each constituency.

III Final stage

- Provide feedback to participants including how their input influenced decisions;
- Present the draft VPA text and ask for feedback, ensure participants have ample time and opportunity to review any final draft before it goes for approval;
- Present final VPA text;
- Evaluate the consultation process.

Practical conditions that need to be met:

- Facilitators should clearly state the purpose of the meeting, the role of the participants and ensure everyone agrees to common ground rules which should be circulated for feedback prior to any face-to-face meeting. Facilitator must not interject personal views and opinions, but be an active listener, accepting ideas and suggestions without evaluating them and encouraging all members to participate and respect differences in views and opinions. The facilitator will focus the group's energy on the task at hand.
- Rapporteurs will accurately record the proceedings and ensure that the group's findings are presented for approval.
- NGOs, CBOs and other stakeholders will be asked to represent their constituencies or their partners and therefore need to have sufficient time before and between meetings to consult, prepare positions and organise travel.
- Financial means need to be made available to those participants who are financially disadvantaged but whose views would not otherwise be heard.

Annex 1:

EU Principles and Minimum Standards for Consultation Processes⁸

Consultation means those processes through which the Commission wishes to trigger input from outside interested parties for the shaping of a policy prior to a decision by the Commission. Wide consultation is one of the Commission's duties according to the Treaties.

The Commission has underlined that, in particular, its intention to reduce the risk of the policy makers just listening to one side of the argument or of particular groups getting privileged access. This means that the target groups of relevance for a particular consultation need to be identified on the basis of clear criteria.

By fulfilling its duty to consult, the Commission ensures that its proposals are technically viable, practically workable and based on a bottom-up approach. In other words, good consultation serves a dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large.

Consultation does not replace the procedures and decisions of legislative bodies, which possess democratic legitimacy. Only the council and parliament, as co-legislators, can take responsible decisions on the context of legislative procedure. The guiding principle for the Commission is therefore to give interested parties a voice but not a vote.

The Commission has adopted the following General Principles and Minimum Standards for Consultation Processes linked to the development of EU policies, processes and legislation.

General Principles

Participation: The quality of EU policy depends on ensuring wide participation throughout the policy chain- from conception to implementation.

Openness and accountability: The Commission believes that the processes of administration and policy-making must be visible to the outside world if they are to be understood and have credibility. This is particularly true of the consultations processes, run by the Commission which must be transparent, both to those who are directly involved and to the general public. It must be clear: what issues are being developed; what mechanisms are being used to consult; who is being consulted and why; what has influenced decisions in the formulation of policy. It follows that interested parties must themselves operate in an environment that is transparent. It must be apparent: which interests they represent and how inclusive that representation is.

Effectiveness: Policies must be effective and timely, delivering what is needed. Consultation must start as early as possible. A prerequisite for effectiveness is respect of the principle of proportionality. A better understanding of such factors and how the Commission works will help outside interested parties to have realistic expectations about what can be achieved.

Coherence: Policies and actions must be coherent. The Commission encourages interest groups to establish their own mechanisms for monitoring the process, so that they can see what they can learn from it and check that they are making an effective contribution to a transparent open and accountable system.

EU Minimum Standards for Consultation

Clear content of the consultation process. All communication relating to consultations should be clear and concise and should include all necessary information to facilitate response;

Consultation Target Group:

For consultation to be equitable, the Commission should ensure adequate coverage of the following parties in a consultation process:

- Those affected by policy
- Those who will be involved in implementation of it
- Bodies that have stated objectives giving them a direct interest in the policy

In determining relevant parties for consultation, the Commission should take into account the

⁸ Abstract from: Communication 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission COM(2002) 704 final.

following elements as well:

- The wider impact of the policy on other policy areas, e.g. environmental interests
- The need for specific experience, expertise or technical knowledge, where applicable
- The need to involve non-organised interests, where appropriate
- The track record of participants in previous consultations
- The need for a proper balance

Publication

The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultation should be published on the internet and announced at the 'single access point'.

Time limit for participation

The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings.

Acknowledgement and feedback

Receipt of contributions should be acknowledged. Results of open public consultations should be displayed on websites.

Annex 2

Government requirements for consultation in forest policy, as defined in different governmental processes

A. Requirements as spelled out by the EU in EU FLEGT Briefing Notes and Council Conclusions.

European Commission FLEGT Briefing Note 2 (2007)

"The process for deciding which laws are included in a definition of legality is the responsibility of the country in which the laws apply and, if a definition is to be a component of a legality assurance system to underpin a trade agreement, it must be endorsed by the country's government. However the nature of the process has a major influence on the definition's acceptability to different stakeholders."

"The potential harm caused by failure to comply with laws can affect different stakeholders in the timber-producing country – government, private sector, the general public, and local and indigenous communities – in different ways. Therefore the process to decide which laws should be included in a definition should generally involve wide consultation with all interested parties. In some countries with clearly-defined laws, developing a legality definition may be a relatively simple exercise. In others, inadequate, conflicting or inequitable laws might make a clear definition of legality more difficult to achieve.

In these cases several rounds of stakeholder consultation may be needed as well as field-testing application of the definition. There may be instances where the consultation process identifies laws which do not support sustainable forest management, or where an important right is not protected by existing law. In such cases, it may be necessary to adopt interim working definitions that give the best possible outcomes while a programme of regulatory reform is pursued."

European Commission FLEGT Briefing Note 6 (2007)

"Key elements to consider in designing and implementing VPAs are likely to include:

- **Social safeguards:** VPAs should seek to minimise adverse impacts on local communities and poor people by taking account of indigenous and local communities' livelihoods associated with forests. Partner Countries will also be encouraged to link FLEGT issues to their poverty reduction strategies and to monitor the impacts of VPAs on poverty;

- **Stakeholder involvement:** Provision should be made for regular consultation with stakeholders during the design and implementation of VPAs. This should include ways to involve the private sector in efforts to combat illegal logging but should also ensure that any requirements imposed are not an undue burden on small-scale producers. In some Partner Countries, meeting these commitments will require considerable institutional strengthening and capacity building.”

Council Conclusions on the EU FLEGT Action Plan, October 2003.

“Urges the Community and Member States to enter into political dialogue with key target countries to instigate forest sector governance reforms, more specifically to:

- **Strengthen land tenure and access rights especially for marginalised, rural communities and indigenous peoples;**⁹
- **Strengthen effective participation of all stakeholders, notably of non-state actors and indigenous peoples, in policy-making and implementation;**
- **Increase transparency in association with forest exploitation operations, including through the introduction of independent monitoring;**
- **Reduce corruption in association with the award of forest exploitations concessions, and the harvesting and trade in timber;**
- **Engage the private sector of the timber producing countries in the efforts to combat illegal logging;**
- **Address other issues related to illegal logging as identified, such as the financing of violent conflict.”**

B. IPF Proposals for Action, adopted by Report of the Ad Hoc Intergovernmental Panel on Forests on its fourth session, New York, 11-21 February 1997

17 (a) The Panel encouraged countries, in accordance with their national sovereignty, specific country conditions and national legislation, to develop, implement, monitor and evaluate national forest programmes, which include a wide range of approaches for sustainable forest management, taking into consideration the following: consistency with national, subnational or local policies and strategies, and - as appropriate - international agreements; partnership and participatory mechanisms to involve interested parties; recognition and respect for customary and traditional rights of, inter alia, indigenous people and local communities; secure land tenure arrangements; holistic, intersectoral and iterative approaches; ecosystem approaches that integrate the conservation of biological diversity and the sustainable use of biological resources; and adequate provision and valuation of forest goods and services;

29 (c) The Panel also encouraged countries to undertake, as needed, to formulate policies aiming at securing land tenure for local communities and indigenous people, including policies, as appropriate, aimed at the fair and equitable sharing of the benefits of forests;

77f (f) Invited Governments, within their respective legal frameworks, and international organizations, in consultation with countries, to consider supporting indigenous people, local communities, other inhabitants of forests, small-scale forest owners and forest-dependent communities by funding sustainable forest management projects, capacity-building and information dissemination, and by supporting direct participation of all interested parties in forest policy discussions and planning;

58bVI In particular developing countries and countries with economies in transition, to embark on capacity-building programmes at national, subnational and local levels, including especially existing national institutions, to promote effective participation in decision-making with respect to forests throughout the planning, implementation, monitoring and evaluation processes, and taking full advantage of the wealth of traditional knowledge available in the country.

⁹ There is no common EU position on the use of the term indigenous peoples. Some Member States are of the view that indigenous peoples are not to be regarded as having the right of self-determination for the purpose of Article 1 of the ICCPR and the ICESCR, and that use of the term does not imply that indigenous people or peoples are entitled to exercise collective rights.

Bibliography

Relevant EU Documents

Communication on Interactive Policy Making (C(2001) 1014)

CONECCS Consultation, the European Commission and Civil Society Database available at http://europa.eu.int/comm/civil_society/coneccs

Communication from the Commission: Towards a reinforced culture of consultation and dialogue- General principles and minimum standards for consultation of interested parties of the Commission; COM(2002) 704 final

European Governance, a white paper; COM(2001) 428 final

Report from the Commission in European Governance. ISBN 92-894-4555-6

The Commission and non-governmental organisations; Building a stronger partnership, COM(2000) 11 final

Commission Discussion Document on Partnership with non-governmental organisations

Case studies and background reports used in development of this briefing note.

Anon (March 2004). Quality not quantity; BIC Briefing Paper

Anon. Guyana Poverty Reduction Strategy Paper; Participation Action Plan

Anon (August 2005). Public Participation in Environmental Decision Making in the New South Africa; UCT/UNITAR

Bourgon, J (October 1998). A voice for all; engaging Canadians for Change

Bulcock, P (April 2003). A review of lessons learnt in enabling people's participation in policy making processes; STREAM in association with Gramin Vikas Trust

Hildyard, N. Same platform different train, pluralism, participation and power; The Corner House, UK

Hughes, A (July 2002). Lessons learnt on civil society engagement in PRSP processes in Bolivia, Kenya and Uganda

Pimbert, M (July 2003). The promise of participation; democratising the management of biodiversity; published in 'Seedling'

World Bank; World Bank Forestry Strategy Consultation Process and Feedback, Appendix 7