

Licensing of Legal Timber Logic and Design of an EU Scheme

A report for FERN

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1 **Summary**

1. This report reviews the voluntary licensing scheme proposed by the European Commission to prevent importation illegally produced and traded timber into the EU. The report considers the role of the scheme in relation to the implicit objectives of the EU's FLEGT Action Plan and in wider context of sustainable forest management and forest governance reforms.
2. Action against the trade in illegal timber is needed for a variety of reasons. But action could have the unwanted consequences of reinforcing poverty and bad governance and legitimising or diverting attention from bad practice. Action therefore has to be designed in an inclusive, participatory, transparent and cross-sectoral way to ensure that it does not reinforce exclusionary forms of forestry.
3. The licensing scheme will add to the impacts that can be achieved by acting on other levers of change including: the behaviour of EU government, corporate and individual purchasers; the scope and quality of laws in producer countries; the level of law enforcement in producer countries; and civil society awareness and mobilization in producer countries. But the voluntary nature of the scheme will limit its impact to partner countries and the size of the impact there will depend on a number of variables including the volume of exports to the EU relative to volumes exported to other countries and consumed domestically and the volume of products that are subject to licensing relative to the volume of products that are excluded. The ultimate impacts of prohibiting the import of illegal timber – on misappropriation of funds, on distribution of income from forest use, on poverty and livelihoods - will depend crucially on the scope and quality of the law in producer countries.

1.1 ***The logic for the scheme is flawed***

4. The unprecedented level of political interest in illegal logging has created a new industry of defining legality. It is the law that makes an action legal or illegal, but including all laws that regulate the management of forests and the production and sale of timber products would be burdensome. At the same time, attempts to define legal or illegal in terms of a selection of laws are fraught with problems; determining "legality" is not always straightforward because laws may contain ambiguous or conflicting provisions, and neither is deciding which limited set of laws should be brought within the scope of the term.
5. The result of the Indonesian process of deciding the set of laws on which to base determination of legality is a standard for responsible forest management that contains many of the criteria that are included in internationally recognised certification standards. This is a good result, enabled by the fact that Indonesia already has a comprehensive set of laws governing forest management and business practice. But there is no guarantee, nor is it the EU's intention, that other partner countries will seek to emulate it. Indeed, it is likely that the licensing scheme will admit different standards.
6. The licensing scheme is based on the false assumption that legality equals responsible forest management. The scheme's logic is thus seriously flawed. The focus on legality risks compromising the ultimate goals of sustainable forest management, improved livelihoods and social justice of which the targets of the scheme are a subset with many and complex linkages to other determinants. Furthermore, if producer countries can access EU markets by complying with a minimum set of "legality" criteria, there will be no incentive for them to go the next step of ensuring that forests are managed in compliance with sustainable forest management criteria.

1.2 ***But it could still serve a useful purpose, if refocused***

7. The licensing scheme could still be a useful tool for the EU to achieve its ultimate goals. The scheme should be framed within a broader policy of ensuring that all forest products produced, imported into or consumed in the EU comply with sustainable forest management principles. Since it will be many years before all producers will be able to conform to these principles and before governments in all producer countries will be able to enforce compliance, a phased approach is necessary. The licensing scheme should be developed as a means of enabling producer countries to provide their exporters with evidence of compliance with a base level of responsible forest

management and business practice but as a step towards achieving the same level of responsibility in all forests.

8. The scheme must not be allowed to undermine responsible procurement initiatives taken by governments and private business by admitting timber products produced in accordance with a different set of standards that might be lower than those required by existing or emerging schemes. The EU must define basic requirements that it will insist upon on behalf of its consumers before a licence is accepted as evidence of conformity. These requirements should be developed in a participatory process that allows stakeholders in the EU and producer countries to influence the outcome. The outcomes implicit in the Action Plan provide a starting point for developing the requirements but the criteria adopted or being developed by government, civil society and business to business initiatives with a similar purpose should also be taken into account. Producer countries would be required to meet those minimum criteria but would be free to adopt additional criteria.

9. To ensure that partner countries' efforts to achieve a basic level of responsibility are not undermined by other countries' continuing irresponsibility, the EU should enact legislation that will prohibit the importation into and circulation in the EU of timber and timber products that do not comply with the criteria that define the basic level of responsible forest management and business practice.

1.3 Product scope

10. The European Commission intends that the licensing scheme would cover a limited range of solid wood products. The Action Plan offers no insights into which products are the largest drivers of illegal logging or which illegally logged products have the greatest negative impact on forests and people. Selecting roundwood and rough sawn wood simply because they are easier to track completely misses the laundering of illegal timber through furniture and other manufacturers in second countries and what may be much larger volumes of lower value timber that is processed before it is exported. The licensing scheme should therefore include all products unless it can be demonstrated beyond reasonable doubt that a particular product, as a consequence of its production, does not lead to any of the outcomes that the FLEGT Action Plan is designed to combat.

1.4 Tracking, verification and monitoring

11. Effective operation of the scheme will require robust tracking and verification systems. Systems will need to be adapted to countries' supply chains as well as to product but the EU should insist on certain basic requirements that will be common to all agreements with FLEGT partner countries. To prevent leakage of irresponsibly and illegally produced timber through non-partner countries, all production for export must be subject to tracking and verification. Verification should be carried out by a body independent of the government and the industry. Licenses should be issued by a separate body: it might be a government body but should be a separate entity, removed from the influence of government forestry authority and forest management bodies; or it might be a private body, though independent of industry interests, authorized by the government to issue licences on its behalf.

12. Finally, the scheme must provide for monitoring by independent organisations to ensure that procedures for verifying legality are being implemented properly and to check for illegal timber that goes undetected by the licensing system.

2 Introduction

13. In May 2003 the European Commission proposed an Action Plan to implement the EU's commitments to the Forest Law Enforcement, Governance and Trade initiative. The Action Plan consists of a package of measures designed to combat the trade in illegal timber (Box 2-1). It includes proposals for a voluntary licensing scheme to ensure that only legal timber is imported from countries participating in the scheme.

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

15. The scheme will be implemented by a Regulation, a draft of which is currently in inter-service consultation within the Commission. The Regulation will define the products covered; describe the permit/licence required to verify that timber has been legally harvested; and specify the nature and mandate of any advisory or management bodies set up to assist the European Commission. The Regulation will also make provision for participating countries to nominate the competent authorities for issuing and verifying the licence and provide for administrative co-operation between EU and FLEGT partner country authorities.

Box 2-1 EU FLEGT Action Plan Measures

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

Trade in timber. Dialogue with wood-producing and wood-consuming countries to extend international collaboration to tackle illegal logging and to develop a multilateral framework on which actions could be based. In addition to the voluntary licensing scheme the Commission will review options for, and the impact of, further measures, including, in the absence of multilateral progress, the feasibility of legislation to control the imports of illegally produced timber into the EU.

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

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

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

2.1 Why action is needed against the trade in illegal timber

16. Action is needed because, as the Action Plan observes:

- ❑ corruption fuelled by profits from illegal logging has grown to such an extent that it is undermining the rule of law, principles of democratic governance and respect for human rights.
- ❑ profits from the illegal exploitation of forests (and of other natural resources) are often used to fund and prolong conflicts.
- ❑ illegal logging and associated trade undermines the competitiveness of legitimate forest operations in both exporting and importing countries, limiting industry's ability to foster sustainable forest management and sustainable development generally.

- ❑ illegal logging costs governments vast sums of money in lost revenues, which could otherwise be spent on the provision of better healthcare, education and other public services, as well as the implementation of sustainable forest management.
- ❑ illegal logging causes enormous environmental damage and loss of biodiversity and has a long term negative impact on the livelihoods of forest-dependent people, many of whom are amongst the world's poorest and most marginalised people.

17. There are powerful drivers behind the trade in illegal timber: global demand for timber and burgeoning domestic timber markets; food, energy and cash poverty; and sheer human greed.

18. And there are powerful enablers:

- ❑ The elaborate and deeply entrenched patronage systems which facilitate illegal forest use are often closely linked to political networks that control and protect these lucrative activities. Profits from illegal forest use are woven into the fabric of society and keep existing political parties and processes in operation (Colchester 2004).
- ❑ Weak enforcement by forestry, tax and customs authorities that do not have the resources or incentives to act against the perpetrators creates an environment in which disregard for the law becomes the norm.

2.2 But action could have unwanted consequences

Action could reinforce poverty

19. Many people have no alternative to illegal harvesting or accepting employment by companies that trade in illegal timber. Law enforcement initiatives that do not address the need for alternative livelihood strategies risk further marginalising such people.

20. Existing enforcement processes often unevenly target small-scale users and may ignore the political economy surrounding illegal forest use. In some cases forest management laws that restrict forest access and use by local communities and give preferential access to large-scale forestry enterprises are applied more vigorously than complementary measures that recognise community rights (Colchester 2004).

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

Action could reinforce bad governance

22. There may be gaps in a country's laws governing forests. Laws may contain inappropriate provisions, which might be intentional to assign rights to a favoured few, or simply a result of lack of knowledge or poor application of knowledge.

23. In many countries current laws related to forests limit the rights and livelihoods of forest-dependent communities. Rights of ownership, use and access to forests by local communities are often not recognised in forest-related laws, which tend to treat forests as public lands or even 'state-owned' domains. Law enforcement may unintentionally harm poor and marginalized social groups by reinforcing current laws and policies that contribute to social exclusion (Colchester 2004).

24. As the Action Plan notes: *“Existing forest laws and policies frequently promote large scale forest operations and may exclude local people from access to forest resources. This inequity breeds resentment and conflict. It also forces local people who depend on forest resources to operate illegally, since they often have no choice in the way they meet their basic livelihood needs.”*

Action could legitimise or divert attention from bad practice

25. Legal harvesting may cause more damage than illegal logging. Legal harvesting may take place in forests that have been designated as conversion by poorly constructed and poorly or corruptly implemented land use planning systems and corrupt application of procedures for granting use rights. There may be no guidelines addressing potentially damaging operations, or guidelines may have no legal force, allowing large scale operators to cause social and environmental damage without sanction.

26. As the Action Plan notes, there is a distinct difference between legality and sustainability. Legal timber can be harvested in an unsustainable manner, for example through authorised land clearance; and illegal timber can come from sustainable sources, for example timber harvested under indigenous management systems which are sustainable but do not comply with formal legal requirements.

27. Efforts to curb illegal logging may encourage national governments to water-down their existing environmental laws rather than strengthen them in order to satisfy the EU and other international markets. The challenge, therefore, is to ensure that the illegal logging debate is not focused on legality at the risk of encouraging destructive logging practices (Marijnissen et al 2004).

2.3 *What this report is about*

28. Recent reports have raised questions about the linkages between action against trade in illegal timber and forest governance reforms (Colchester 2004, Marijnissen et al 2004). Illegal logging has positive as well as negative effects. While it often causes environmental and social damage it also supports the livelihoods of the rural poor. The trade in some species and some products is more damaging than the trade in others. Illegal commercial logging in protected areas and high conservation value forests is more significant than low intensity logging for fuel wood in secondary forests. Although illegal logging certainly contributes to forest destruction, forest law enforcement may not be the most appropriate response in every case.

29. The Action Plan is silent on the total volume of illegally traded wood imported into the EU, on the contribution of these imports to the overall impact of illegal logging, and on the impact of the proposed licensing scheme on illegal logging. Does the scheme have a role to play? What should it be designed to do and how should it be designed? The first part of this report reviews the logic of a licensing scheme within the broader context of EU legislation against illegal trade and the other actions that might be taken under FLEGT partnership agreements. The second part draws from the experience of other schemes and proposes principles for the design of the scheme to ensure that it is does what it is intended to do and is credible.

30. The report is based on a desk study of different licensing schemes in existence (including schemes developed by private sector, NGOs, governments and international bodies) and discussions with key people in the NGO movement and governments.

3 The logic of a licensing scheme

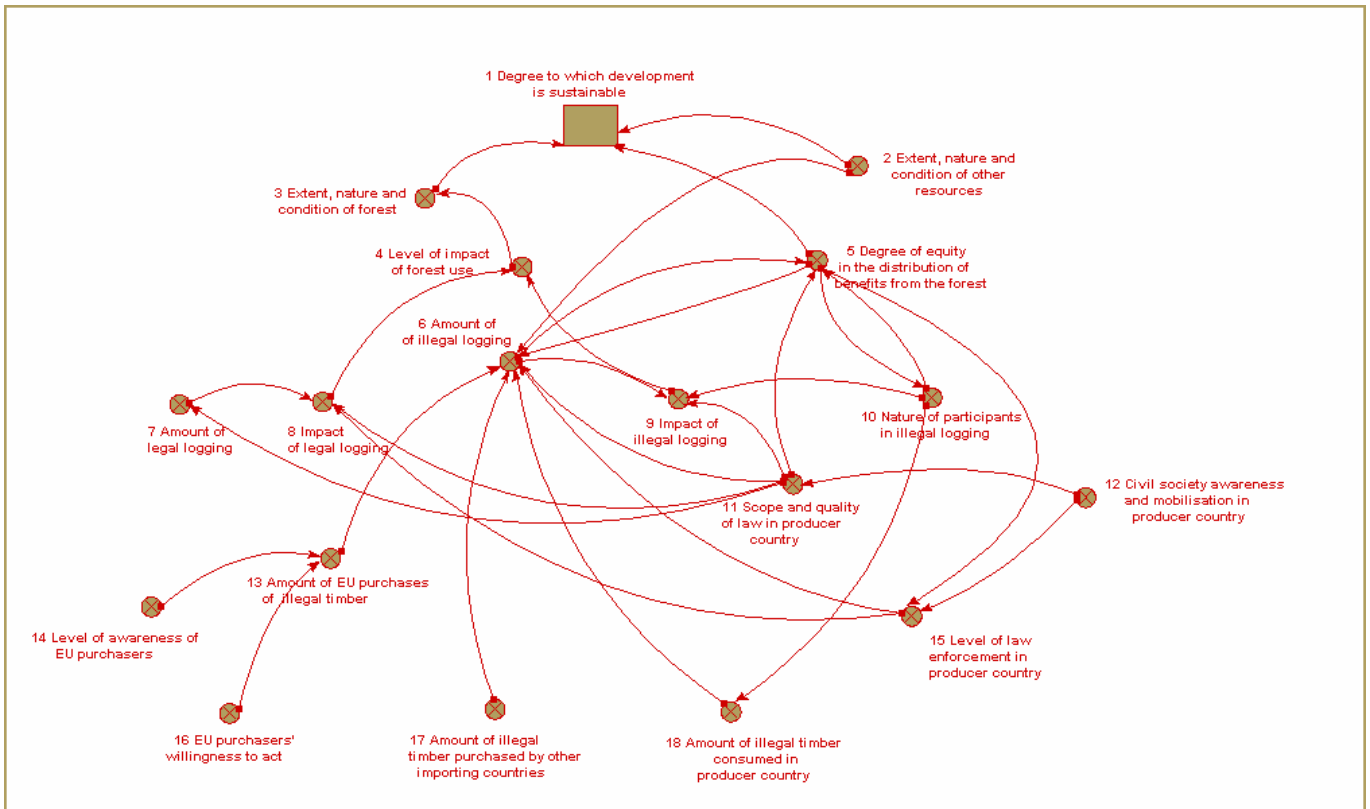
31. The stated purpose of the licensing scheme is to ensure that only legal timber is imported from countries participating in the scheme. The action plan defines legal timber as timber that “has been harvested in conformity with relevant national legislation”. Conversely, illegal timber is timber “harvested in violation of national laws” (EC Commission 2003).

32. The Action Plan is not designed to support the EU's wider objective of sustainable forest management; it deals only with the question of legality. The Action Plan assumes, however, that since in many countries forest legislation is designed to promote and support sustainable forest management, better law enforcement will in general lead to more sustainable forest management. Where this is not the case the Action Plan proposes that the EU should encourage a review of the legal framework (European Commission 2003).

3.1 The licensing scheme in the context of sustainable development

33. Figure 3.1 is a simplified representation of the system in which illegal logging acts on sustainable development (represented by 1. Degree to which development is sustainable). The definition of sustainable development depends of course on people's values and is negotiable. It is also changes with time as people's values change. Sustainable forest management is represented by variables 3. Extent, nature and condition of forest and 5. Degree of equity in the distribution of benefits from the forest, and is influenced by 9. Impact of illegal logging acting through 4. Level of impact of forest use, which is also influenced by 8. Impact of legal logging (and of course the impact of other uses, illegal and legal).

Figure 3.1 Illegal logging, sustainable forest management and sustainable development system



34. The EU Action Plan is designed to act directly on several variables in the system:

- 13. *Amount of EU purchases of illegal timber;*
- 4. *Amount of illegal logging*
- 11. *Scope and quality of law in the producer country;*
- 15. *Level of law enforcement in producer countries;*
- 12. *Civil society awareness and mobilisation in the producer countries;*

and to act indirectly on:

- 5. *Degree of equity in the distribution of benefits from the forest; and*
- 9. *Impact of illegal logging.*

35. It will also act through those and other variables on:

- 4. *Level of impact of forest use;*
- 3. *Extent, nature and condition of forest; and*
- 1. *Extent to which development is sustainable;*

although the stated aim of the Action Plan does not extend this far.

36. There are two powerful positive feedback loops in the system: between 5. *Degree of equity in the distribution of benefits from the forest* and 6. *Amount of illegal logging*; and between 5. *Degree of equity in the distribution of benefits from the forest* and 10. *Nature of participants in illegal logging*. If distribution is biased against poor families, one can expect the proportion of illegal logging carried out by poor families for their own use to increase.

37. Variables 11. *Scope and quality of law in producer countries* and 15. *Level of law enforcement in producer countries* are particularly important because they influence the amount and impact of legal logging as well as the amount (and thereby the impact) of illegal logging. Both variables are influenced by 12. *Civil society awareness and mobilisation in the producer countries*.

38. The prohibition element of the proposed licensing scheme adds to the impacts that can be achieved by acting on other variables such as EU purchasers' behaviour (government, corporate and individual purchasers), the scope and quality of laws in producer countries, the level of law enforcement in producer countries, and civil society awareness and mobilisation in producer countries.

39. Whether the added impact in a partner country will be significant or not in terms of combating illegal logging will depend on the volume of exports to the EU relative to volumes exported to other countries and consumed domestically. If exports to the EU are low in relative terms, or if there is a high probability that illegal timber will be exported to the EU by non-partner third countries, the added impact is likely to be insignificant. The impact on the trade in illegal timber will also depend on the volume of products that are subject to licensing relative to the volume of products that are excluded. But the ultimate impacts of prohibiting the import of illegal timber – on misappropriation of funds, on distribution of income from forest use, on poverty and livelihoods - will depend crucially on variable 11. *Scope and quality of law in producer countries*.

3.1.1 "LEGAL" TIMBER IS THE WRONG STARTING POINT

40. There are many laws to which reference could potentially be made in the EU scheme, extending far beyond a legal right to harvest the timber; for example:

- ❑ Procedures for designating forest as production forest or conversion forest, including environmental impact assessment and decision making procedures, consultation and appeal mechanisms;
- ❑ Obligations on the forest owner/forest manager to prepare a forest management plan that takes account of environmental and social impact assessments;

- ❑ Obligations on the forest owner/forest manager/harvesting company, in law or in contracts, not to cause damage to the environment and to ensure the safety of people working in or using the forest;
- ❑ Obligations on the forest owner/forest manager/harvesting company and sellers and purchasers in the supply chain to pay all royalties and taxes for which they are liable;

41. Including all laws that regulate the management of forests and the production and sale of timber products would be burdensome. But attempts to define legal in terms of a selection of laws are fraught with problems:

- ❑ *Determining legality is not straightforward.* Laws may contain ambiguous or conflicting provisions, making determination of what constitutes legal timber highly contentious (de La Rochefordiere, SGS, 2003, Colchester 2004). Timber may appear to be legal in the sense that all necessary procedures have been signed off and permissions granted but behind the paperwork there may be corrupt companies and officials. Greenpeace's allegations of the extent of timber market, i.e., the market of "partially legal" or "grey" timber in Russia, which though backed up with the permit document, is alleged to have been cut with violations of the Russian forest law, demonstrates the need for agreed legal definitions and levels of performance (Greenpeace March 2003 – cited in ERM 2003).
- ❑ *And neither is deciding which laws the scheme should apply to.* What is legal in one country may be illegal in another (de La Rochefordiere, SGS, 2003, Colchester 2004). Which laws should be brought within the definition of legal? Only that the rights of the producer have been awarded in accordance with the; or should the definition include all provisions that apply to forest planning and practice? Who should decide which laws apply and how should they decide? The definition of legal timber (and by corollary illegal timber) needs to satisfy the demands of EU consumers but must also be appropriate for and acceptable to producer countries.

42. How should the laws that are to be brought within the scope of the licensing scheme be decided? The Action Plan does not help us here because it does not set out explicitly the sought-after outcomes from the licensing scheme, though it alludes to the negative impacts of illegal logging. If the scheme's purpose is to combat theft of timber and attendant payments, it will be sufficient to include that narrow set of laws governing tenure, harvesting rights and royalties and other taxes and charges. If its purpose is to prevent environmental and social harm, a far wider set of laws would need to be included, assuming that they were to exist.

43. ERM's option study for the European Commission (ERM 2003) proposes four options for legality. In ERM's own assessment of the options the most robust is a process that begins with a series of stakeholder workshops to identify the key issues that a best practice forestry operation needs to comply with. The key issues are refined through working groups, and in the light of experience from other countries and international best practice standards and finally agreed following a thorough consultation process. But this process is not so much about defining legality as defining responsible forestry.

44. In Indonesia the process of defining legality that is being supported by the UK government has reviewed existing law and produced a set of criteria for "legal" timber. The result is a standard for responsible forest management that contains many of the criteria that are included in internationally recognised certification standards¹. This is a good result, enabled by the fact that Indonesia already has a comprehensive set of laws governing forest management and business practice. But there is no guarantee, nor is it the EU's intention, that other partner countries will seek to emulate it. Indeed, it is likely that the licensing scheme will admit different standards.

45. The logic behind the proposed scheme is seriously flawed. The focus on legality risks compromising the ultimate goal of responsible forest management. If producer countries can access

¹ <http://www.illegal-logging.info/papers/Z%20Introduction%20and%20Principles.htm#Principles>

EU markets by complying with a minimum set of “legality” criteria, where will be the incentive for them to go the next step of ensuring that forests are managed in compliance with sustainable forest management criteria? The licensing scheme could also undermine responsible purchasing policies being developed by EU member states – if the licensing scheme admits timber products produced according to one set of standards, it will be more difficult for member states to set higher standards.

3.1.2 WHAT COULD BE THE ROLE OF THE SCHEME?

46. EU action on forests and forests products trade should be designed in the context of the ultimate goals of ensuring that all forests are managed and forest products are produced in conformity to internationally accepted principles of responsible practice (sustainable forest management, corporate social responsibility, social justice). The EU can achieve this goal in part by ensuring that all forest products produced, imported into or consumed in the EU comply with these principles. However, it will be many years before all producers will be able to conform to these principles and before governments in all producer countries will be able to enforce compliance. A phased approach is therefore necessary. This is already recognised by those private businesses and governments who are implementing responsible timber procurement policies. The EU should follow the same approach and the licensing scheme should be developed as a means of enabling producer countries to provide their exporters with evidence of compliance with a base level of responsible forest management and business practice.

47. There already exist a number of forest management and forest product certification schemes. The first were developed as voluntary business to business mechanisms for demonstrating compliance with certain principles of responsible forest management. Some schemes now differentiate between levels of responsible forest management. More recently, governments have begun to develop certification schemes in partnership with private verification organisations that are compulsory for exporters.

48. An EU scheme to differentiate between products that conform to certain criteria of responsible management and business practice and products should avoid introducing confusion into the market place. The EU must define basic requirements that it will insist upon on behalf of its consumers before a license is accepted as evidence of conformity; the basic requirements should be informed by the requirements of schemes with a similar focus; for example, the SGS Verification of Legal Timber scheme (see section 4.7) and the criteria that the UK government is developing to evaluate forest certification schemes in relation to claims of legality (see section 4.6.1). Chapter 5 discusses what these basic requirements might be. Additional requirements could be developed by partner countries with support under the Action Plan and made a condition of the licence if the exporting country wishes. If a potential partner country is already operating a licensing scheme whose criteria are consistent with the EU’s basic requirements, the scheme could be brought into a partnership agreement.

3.1.2.1 DIFFERENT ROLES FOR PARTNERSHIP AGREEMENTS AND THE LICENSING SCHEME

49. As noted earlier, in the context of forest management and the timber trade the EU’s development co-operation with producer countries should be aimed at the ultimate goal of sustainable forest management, corporate social responsibility and social justice. FLEGT partnership agreements therefore should not focus only on tackling illegal logging problem. They should be constructed to act more broadly and with an express commitment from both partners to work together towards the ultimate goal. The licensing scheme would be one instrument for progressing towards the goal, helping the partner producer country to mount the first step and achieve a basic level of responsible practice before proceeding to the next step.

3.1.2.2 CATCH-ALL LEGISLATION TO PROHIBIT IMPORTS OF ILLEGAL TIMBER

50. The licensing scheme will not prevent illegal timber from being imported into the EU. The EC Commission has said that it will review options for legislation to control imports of illegally harvested timber into the EU and report during 2004.

51. Legislation could be simple to construct – the Lacey Act summarised Box 3-1 provides a possible model – but would be difficult to enforce. Some of the problems of constructing a licensing

scheme for legal timber apply equally to legislation that prohibits illegal timber: which legislation is relevant, and who should decide? If a prohibition were to apply to the breach of any law in a producer country, a substantial proportion of trade would be stopped assuming that the breaches were detected and prosecuted.

Box 3-1 *The USA's Lacey Act*

The USA's Lacey Act is aimed at prohibiting inter-state and international trafficking in protected wildlife. Originally adopted in 1900 it has been amended many times. The act prohibits two general types of activity. First, it prohibits the failure to mark, as well as the falsification of documents for, most wildlife shipments, providing a civil and criminal penalty, respectively for these violations. Second, it prohibits trade in wildlife fish or plants that have been illegally taken, possessed, transported or sold. (Anderson 1995).

The act defines "fish and wildlife" in language that encompasses virtually any wild animal, fish or invertebrate, dead or alive, from any part of the world, and part thereof, or product made from such a specimen. Given the breadth of the definition, courts have not been frequently called upon to interpret it. The Act's coverage of plants, on the other hand, is far narrower. Not only must the plant in question be a wild species native to the United States, it must also be specifically protected by a state law or by a CITES listing. (Anderson 1995).

Lessons for combating the trade in illegal timber are (ERM 2003, RIIA 2003b):

- ❑ The Lacey Act is a powerful tool for controlling illegal trade in wildlife products; convictions have been secured in cases involving caviar smuggling, international coral trafficking, and illegal trade of exotic reptiles;
- ❑ There have been cases where foreign courts created backdated law to invalidate Lacey cases in the USA;
- ❑ The Lacey Act and other wildlife laws depend on vital political support for their effectiveness. As with CITES, where governments do not wish to implement legislation in a robust manner they simply don't provide the resources or encouragement to their officers to do so;
- ❑ Fines imposed by judges have not always reflected the severity of the crime.

52. A possible solution is to specify the practices that the EU and producer countries wish to enforce and then to specify in legislation that products produced by methods that do not conform to those practices are prohibited. Existing parallels in forestry are the Forest Reproductive Materials Directive, which lays down genetic and other quality requirements for forest tree seeds, seedlings and cuttings marketed for forestry purposes in the EU, and the Plant Health Directive which lays down phytosanitary requirements for forest plants and timber products imported into and circulating in the EU.

3.2 *Conclusions on the role of the licensing scheme*

53. The licensing scheme in its present design will add to the impacts achieved by other EU actions. The added impact in terms of raising the standard of forest management and business practice could be significant for that part of partner countries' production that is exported to the EU. The added impact in terms of achieving responsible forest management and business practice in relation to all forests and forest products is unlikely to be significant unless the licensing scheme is designed as a component of partnership agreements that expressly aim at that goal.

54. The focus on legality creates problems of definition and will lead to the EU supporting differing standards of practice and to confusion in the market place. The focus of the scheme should be on ensuring a basic level of responsible forest management and business practice which may or may not be provided for in the legislation of a producer country. What that basic level should be is considered in Chapter 5.

55. To ensure that partner countries' efforts to achieve a basic level of responsibility are not undermined by other countries' continuing irresponsibility, the EU should enact legislation that will prohibit the importation into and circulation in the EU of timber and timber products that do not comply with the criteria that define the basic level of responsible forest management and business practice.

4 Designing the scheme - lessons from elsewhere

4.1 Endangered species - CITES

56. CITES aims at the survival of endangered species by regulating their trade. At EU level CITES is implemented by a Council Regulation (EC Council 1997) with detailed rules laid down in a Commission Regulation (EC Commission 2001). In general EU implementation follows the requirements of CITES. However, more species are listed (though these are not timber species), many more require import permits, and in some cases additional requirements are made relating to conditions of housing and transport. The Council Regulation lists in three appendices equivalent to the CITES appendices; different requirements apply to each appendix:

- ❑ Species listed in Appendix A of the Council Regulation (equivalent to CITES Appendix I) are those threatened by extinction. Trade may not be primarily for commercial purposes and requires permits issued by both exporting and importing authorities. Permits are issued where it can be proved that the trade will not result in any likely detrimental effects to the species and that national law has been complied with.
- ❑ Appendix B of the Council Regulation (equivalent to CITES Appendix II) lists species considered to be facing a less serious threat and trade. Listed species require an import permit issued by the EU importing country and an export permit issued by the exporting country.
- ❑ Appendix C of the Council Regulation (equivalent to CITES Appendix III) lists species that producer countries have nominated unilaterally in order to gain international cooperation in controlling their trade. Listed species require an import notification issued by the EU importing country and export permit or certificate of origin.

57. CITES has had demonstrable success in reducing the risk of extinction of particular endangered species. The system of checking at import and export points by CITES authorities as well as by customs authorities is a powerful tool. Discrepancies in reports submitted by Parties, have frequently helped identify the source of illegal trade. But CITES has weaknesses (TRAFFIC 2002, ERM 2003, RIIA 2003b):

- ❑ Insufficient independence and authority of scientific and management authorities;
- ❑ Insufficient resources and capacity for enforcement and monitoring, thus there are gaps in checking export permits;
- ❑ Checking of documents against what is actually in the shipment sometimes fails – it is physically impossible to check the huge volume of goods in international trade;
- ❑ Problems in correct species identification will be greatly exacerbated if the number of species is increased. This requires technical expertise that carries cost and resource implications. Reliance on ability of authorities in country of import as well as export to accurately identify products in trade; and
- ❑ Identification problems for composite products.

58. The Environmental Investigation Agency and Telepak's recent report on the smuggling of timber from Indonesian forests for processing in Malaysia and export in the form of finished goods is a stark lesson in the determination and power of corrupt business and government networks to profit from the trade in illegal timber (EIA and Telepak 2004). Combating this particular trade is made all the more difficult by inadequate legislation, including insufficient powers for the Indonesian Customs authorities, lack of resources, and widespread lack of respect for the law which manifests itself in hostility towards the police and Customs and endemic smuggling of all many commodities (RIIA 2003b).

4.2 Conflict diamonds – the Kimberley Process

59. The Kimberley Process comprises a politically binding set of minimum standards to which 40 companies are signatories, covering 98% of the trade in rough diamonds. The Process requires all

exports, imports and re-exports of rough diamonds to be accompanied by official certification that the goods have been formally identified as conflict free². Without Kimberley certificates it is illegal to import, sell, buy or export rough diamonds in signatory countries.

60. Implementation of Kimberley in EU countries is based on EU regulation EC 2368/2002 (EC Council 2002). The system is based on physical certificates accompanying each shipment of diamonds that enters or leaves a country. Shipments must be sealed and inspection is based on risk analysis. The system was designed to carry as little administrative burden as possible and work within the current customs system. Direct email communication between exporting and importing authorities is used extensively to monitor the system without incurring significant costs. Detailed and verifiable paper audit trails are currently being developed by the industry.

61. Lessons learned so far that are relevant to combating the illegal timber trade are (RIIA 2003b):

- ❑ Action may simply cause the target to move. A significant new diamond processing industry has established itself in former Soviet eastern Europe in order to circumnavigate the system. The movement of diamonds between producer countries may also be a significant loophole in the system. South Africa has been identified as a possible central 'clearing-house' for the international export of many smuggled diamonds from conflict zones across Africa.
- ❑ Clear aims are vital - Kimberley suffers from the dual aim of managing trade and attempting to bring peace to the diamond exporting regions of Africa.
- ❑ The importance of including on-the-ground expertise of civil society in all negotiations must be recognised;
- ❑ Independent and robust monitoring is key to ensuring a credible and workable system.

4.3 Fish – Measures taken to protect the Patagonian Toothfish

62. In the 1990s the fishery for Patagonian Toothfish, concentrated in the Southern Ocean, came under pressure from illegal, unreported and unregulated (IUU) fishing. The high market value of Patagonian Toothfish for food and the decline in fish stocks worldwide, together with the remoteness of the main fishing grounds and the resultant difficulties and high cost associated with effective surveillance and the relatively low risk of being detected, provided the ideal circumstances for IUU fishing.

63. Conservation of fisheries in the Southern Ocean is one of the responsibilities of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). The Commission was established in 1982 under the Convention on the Conservation of Antarctic Marine Living Resources. Of the actions taken by the CCAMLR in response to IUU fishing for Patagonian toothfish, the most significant have been the mandatory use of an automated satellite-linked vessel monitoring system (VMS) on Patagonian toothfish vessels, the introduction of a Catch Documentation Scheme (CDS) and a resolution urging Members to blacklist known IUU vessels.

64. The CDS is designed to track the landings and trade flows of toothfish caught in the CCAMLR Area by requiring landings of toothfish at participants' ports, or trans-shipments to participants' vessels, to be accompanied by a valid CCAMLR Catch Document. This enables the Commission to identify the origin of toothfish entering the markets of all participants in the Scheme, helps to determine whether toothfish taken in the CCAMLR Area were caught in a manner consistent with CCAMLR's Conservation Measures, and provides additional data for stock assessment purposes. The catch document collects information including:

² "Conflict diamonds" in the Kimberley agreement means "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future."

- ❑ the name, home port, national registry, call sign (a vessel-specific telecommunications identifier) of the vessel, and if issued, its International Maritime Organisation/Lloyd's registration number;
- ❑ the reference number of the licence or permit, issued to the vessel;
- ❑ the weight of fish landed or trans-shipped by product type, by CCAMLR statistical sub-area or division (if caught in the CCAMLR Area) or by FAO statistical area, sub-area or division caught outside the CCAMLR Area.
- ❑ the date the catch was taken; and
- ❑ the date and port at which the catch was landed, or the date and the vessel, its flag and national registry number, to which the catch was trans-shipped.

65. There have been, and continue to be, some deficiencies in the CDS (TRAFFIC 2001, RIIA 2003b):

- ❑ Implementation of the CDS does not in itself preclude the possibility of IUU catch being landed. A serious deficiency in the CDS remains the discretion afforded implementing States to test whether the catch was taken in accordance with CCAMLR's measures; at present the Scheme does not prescribe how catch documents should be verified.
- ❑ There remains doubt as to whether all clearance authorities have access to sufficient information at the time of clearance to verify the information on the CDS documentation.
- ❑ Comprehensive coverage of trade by the CDS is critical to its success. Some 56 countries were involved in the trade of Patagonian Toothfish in 2000. Of those, 23 are either CCAMLR Members or overseas territories of a CCAMLR Member. A further four have acceded to CCAMLR and another eight have been approached by CCAMLR regarding co-operation with the CDS. The countries outside the CCAMLR could be significant, particularly China with its large and increasing processing capacity.
- ❑ The capacity of participating States for effective implementation is likely to have an impact on the success of the CDS. Fisheries inspectors in South Africa, for instance, have a limited capacity with regard to species identification and a demonstrated lack of consistency and vigilance in the monitoring of toothfish landings in Cape Town prior to the introduction of the CDS.
- ❑ It is not possible for civil society organisations to check compliance of CCAMLR Members with conservation measures because this information not made publicly available.

4.4 Hazardous materials

66. The 1989 **Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal** establishes a regime for controlling the international trade in hazardous and other types of wastes. The Convention uses a system of "prior notification and consent", where the exporting state must notify the importing state and any states of transit of the proposed trans-boundary movements. The 2000 **Cartagena Protocol on Biosafety** requires an exporter to seek consent from an importing country prior to the first shipment of a living modified organism (LMO) intended for intentional introduction into the environment. The AIA requires that before the first intentional trans-boundary movement of a specific LMO into its jurisdiction the Party of import is notified of the proposed trans-boundary movement, is provided with information about the LMO and its proposed use, and is given the opportunity to decide whether to accept the shipment or not and upon what conditions (if any).

4.5 Conflict timber – UN sanctions on Liberia

67. United Nations Security Council Resolutions 1343 (2001) of 7 March 2001 and 1408 (2002) of 6 May 2002 imposed restrictive measures on the government of Liberia for its support to armed rebel groups in the region. By Resolution 1478 (2003) of 6 May 2003 the Security Council decided to extend

the application of those restrictive measures for a period of 12 months from 7 May 2003. It also decided to prohibit all imports of round logs and timber products originating in Liberia for a period of 10 months from 7 July 2003.

68. The UN sanctions are implemented in the EU by Council Regulation 1030/2003 (EC Council, 2003a). The Regulation prohibits the direct or indirect import into the Community of all round logs and timber products originating in Liberia. The Regulation's definition of timber products include sawn wood, articles made of solid wood including furniture, picture frames and prefabricated buildings, engineered wood products such as chipboard and medium density fibre board, wood pulp. The sanctions to be imposed when infringements occur are determined by individual member states but they "*shall be effective, proportionate and dissuasive*".

69. Some anecdotal evidence indicates that the sanctions have been successful in reducing flows of timber and attendant revenues, though there may have been other factors at work (RIIA 2003b).

4.6 Responsible timber procurement initiatives

4.6.1 GOVERNMENT

70. Few governments have attempted to take action against illegal timber in their procurement procedures. The UK is the most advanced of EU countries. In January 2004 the Government announced a new condition in procurement contracts that will require contractors to ensure that the timber³ they supply to Government has been legally logged and traded (UK Department for the Environment, Food and Rural Affairs 2004). The condition places the onus on the supplier to ensure that the organisation or body that felled the trees and provided the timber from which the products are supplied has legal use rights to the forest, holds a register of all local and national laws and codes of practice relevant to forest operations, has complied with all relevant local and national laws and codes of practice including environmental, labour and health and safety laws and paid all relevant royalties and taxes. The supplier is also required to obtain documentary evidence that the timber is both "legal timber" and "legally traded timber". On the written request of the purchaser, the supplier must submit the documentary evidence to the purchaser. The evidence that is submitted must include a chain of custody from the source of the timber through to delivery of the final product. The conditions of the contract gives the purchaser the right to decide whether the evidence is adequate. If the purchaser is not satisfied they may require the supplier to commission and meet the costs of an independent report to (a) verify the source of the timber and (b) assess whether the trees used were legally felled.

71. Verification of source and legality has to be independent, that is: carried out by an individual or body whose organisation, systems and procedures conform to ISO Guide 65:1996 (EN 45011:1998) General requirements for bodies operating product certification systems, and that is accredited to audit against forest management standards by a national or international body whose organisation, systems and procedures conform to ISO Guide 61 General Requirements for Assessment and Accreditation of Certification Bodies.

72. The purchaser reserves the right to reject any timber that does not comply with the provisions of these conditions. Where the purchaser exercises their right to reject any timber, the supplier is required to supply alternative timber that complies with the conditions at no additional cost to the purchaser and without causing delay to the Contract completion period.

73. It is too early to draw any lessons from the implementation of the new contract condition but it serves to demonstrate that one EU member state is satisfied that it has found a way of defining legal that is clear and verifiable.

³ Timber is deemed to include any product that at some stage in its creation requires the felling of trees and use of the timber so obtained. Such products range from lumber or timber in its raw state to those where the manufacturing processes obscure the wood element. Paper is an example of a wood product where the wood element has been obscured.

4.6.2 PRIVATE SECTOR

74. Responsible timber purchasing programmes implemented by the private sector include the group programmes offered by the Tropical Forest Trust (TFT) and the WWF Global Forest and Trade Network (GFTN) and individual company programmes. All the programmes include tracking from forest to company, verification of the chain of custody back to the source forest verification of legality (in some cases by company auditors and in others by a third party verifier) and, to varying degrees compliance of forest management to certain standards (the standards vary from one scheme to another). There are some differences between the programmes with regard to the scope and content of the forest management standard, the tracking system and verification procedures. The differences reflect the differences in the objectives of the companies implementing the programmes.

75. There is an important difference between the original design of the two group programmes. Purchasing members of the TFT programme support specific producers to help them move along the path towards certification of responsible forest management. The GFTN on the other hand has focused on generating demand for certified timber and has concentrated on helping purchasers develop timber procurement policies. The GFTN approach is now being extended with the development of producer groups to provide a framework for producers to move towards full certification.

4.6.2.1 GFTN GUIDANCE

76. The GFTN has recently issued guidance on the design and implementation of private sector responsible timber purchasing programmes (White and Sarshar 2004). The guidance is designed to support the implementation of programmes aimed at improving the environmental and social performance of the supply base by ending the purchase of forest products from illegal or controversial sources and by continuously increasing the proportion of those products purchased from credibly certified forests. The guidance advocates a step-wise approach that seeks to move forward through a series of management advances:

- Known source that complies with purchaser's policy
- Legal source
- Source in progress to certification
- Credibly certified source

77. The final step – *a credibly certified source* – is a source that has third party verification of compliance with an acceptable forest certification standard. The guidance cites the World Bank – WWF Alliance principles for the development and content of a standard for it to be credible (World Bank – WWF Alliance 2000). A source that is *in progress to certification* is legal and engaged in a time bound process towards being a credibly certified source.

78. The guidance lists evidence of a legal source. The list implies a scope of the definition of a legal source:

- Permission to harvest; i.e. the company that fells the trees has the been granted the right to do so by the relevant authorities;
- Approved management plan; i.e. where there law prescribes that harvesting must be in accordance with a management plan approved by the relevant authorities, an approved plan exists and harvesting is compliant with it; and
- CITES.

79. The guidance notes the difficulties of verifying legality because of, for example, fraud, bribery, corruption and tax evasion and therefore provides a checklist that can be used for considering whether illegality has occurred (Box 2). The scope of the definition of legal source implied by this list contains several points that are not implied by the list of evidence of legal source:

- Property and customary rights are respected;
- There is no dispute of over property/customary rights;

- Operations meet the requirements and stipulations of the permits;
- There has been no corruption in the awarding of harvesting rights;
- All required payments have been made;
- Transfer pricing has not occurred.

80. As the guidance notes, “*Verification (of legal compliance and traceability) may be restricted to compliance with harvesting regulations ... or may be much broader including other legal requirements such as those pertaining to health and safety law. Best practice is to insist on third-party verification of compliance with all laws in the source forest ...*”.

Box 4-1 GFTN checklist for considering legality (White and Sarshar 2004)

Legal source

- Tenure:
 - ⇒ the logging contractor/operator is authorised to be there by the proprietor (lease, concession agreements are in place)
 - ⇒ property and/or customary rights are respected
 - ⇒ there is no dispute over property/customary rights
- All government-required approvals are in place, including harvesting permits, cutting licences and annual allowable-cut permits.
- Operations meet the requirements and stipulations of the permits.
- There are no credible allegations of corruption in the tendering / concession / lease process.

Revenue payments

- Stumpage fees and other required revenue payments are paid.
- The timber extracted corresponds to the volumes authorized in the licence or contract. (There should be no duplicate felling licences.)
- There is accurate measurement, reporting and declaration of the values and volumes extracted or transported.

Forest operations

- There is no commercial logging in protected areas.
- There is no logging
 - ⇒ in prohibited zones, such as steep slopes, riverbanks and water catchment areas;
 - ⇒ of protected species;
 - ⇒ outside concession boundaries; or
 - ⇒ of undersized trees.
- There is no girdling or ring-barking to kill trees so that they can be legally logged.

Related forest crime

- There is no credible suspicion of transfer pricing irregularities such as:
 - ⇒ inaccurate declaration of purchase prices for inputs such as equipment or services from related companies; or
 - ⇒ manipulation of debt cash flows in order to transfer money to a subsidiary or parent company, for example, by inflating debt repayment to avoid taxes on profits.

Log transportation

- All timber transported has official documentation

81. The GFTN guidance notes the importance of being able to trace products within the supply chain and of putting in place a tracking system that identifies the source forest, the species of timber and the volume or value of the timber. Without traceability “*there is no mechanism through which to apply market pressure on or to generate a market pull towards producers*”. But traceability can be complicated because some products go through many stages of transport and processing before reaching the purchaser. For the GFTN first step - known source - the degree of verification of source may lower or higher. “*For low risk countries a simple self-declaration from the supplier might suffice. In*

high-risk situations the degree of scrutiny and verification required will be much greater, and third party verification may be required. For the second and third steps – legal source and source in progress to certification – third party verification is recommended. For the final step – credibly certified source – third party verification is essential.

4.6.2.2 INDIVIDUAL COMPANY PROGRAMMES

82. There are many companies that are implementing responsible timber purchasing programmes. There are several examples in ERM 2003 and Dykstra et al 2002. They include tracking systems whose sole purpose is to confirm the source forest (and in some cases the harvesting area within the forest), tracking to a forest that has been verified by the company or a third party verifier as being in compliance with certain standards, and programmes that support suppliers in their efforts to achieve credible certification.

4.7 National verification programmes

83. The inspection and verification company SGS has recently developed a Verification of Legal Origin (VLO) programme for national governments. The programme is designed to provide assurance that timber derives from a legal, valid and locally approved source, with all changes of ownership documented and validated, product specifications compliant with regulations and all royalties and other fees paid. VLO also provides assurance that the producer is not over-harvesting. (SGS Global Trade Solutions 2003).

84. SGS describes VLO as being distinct from Chain of Custody (CoC) systems because it has been developed to deal specifically with the problem of illegal logging. It is implemented on a national scale and is compulsory. It uses technology-based log tracking systems integrated with a centralised forest industry database at a national level. SGS considers VLO to be a more effective CoC verification system than a traditional CoC system that is paper based and voluntary, reliant on good will and only audited once a year with prior notification. Under VLO, all producers would typically be required to label produce; any produce not labelled is considered illegal and confiscated. Logs and timber products are bar-coded and uniquely numbered to minimise reliance on documentation which can be easily falsified.

85. Declarations (of volume and species) are cross-checked at various stages throughout the supply chain to reduce the risk of uncertified produce entering the system. Due to its application at a national level, VLO systems will enable Governments to maintain accurate statistics on forest sector production and allow rapid and accurate invoicing for payment of royalties.

86. Verification of Legal Origin can be further enhanced through Verification of Legal Compliance (VLC). This requires the producer to respect all regulations relating to forest management and logging. If the producer is a concessionaire, they must not be in contravention of any of the terms of the concession agreement. If a producer has both the VLO and VLC, the products can qualify as 'Validated Legal Timber'. The purchaser and his customers are then assured that the timber has been obtained entirely legally.

87. The design of the programme includes the principle that monitoring and verification activities must cover raw logs, processed products and export/domestic trade flows. Imports must also be monitored where there is a risk that illegally cut domestic timber is presented as imported material or timber in transit.

88. The definitions of legality that the programme proposes (the definitions can be adapted to individual countries' preferences) are as follows:

Legal Origin criteria

- All companies involved in the chain of custody of these logs, up to the point of issuance of the certificate, are fully registered and licensed to operate.
- The logging company is covered by valid official access and use rights to the land and forest resources.

- ❑ The log production area is free from any serious disputes with indigenous peoples or other social stakeholders over traditional, customary or civil rights.
- ❑ Logs can be reliably traced back to the legal source and owners can prove ownership throughout the supply chain (including a legal destination).
- ❑ Area-based royalties, taxes and fees have been duly settled in full by the logging company for the log production area.
- ❑ Product-based royalties, taxes and fees have been duly settled and to the correct amount for the batch of logs undergoing verification.
- ❑ Logs conform to product-related regulations (i.e. protected species, minimum diameters).

Similar principles would apply to processed wood products including: production licence, traceability of the products back to legal logs, payment of product-based taxes and fees, compliance with processing quotas.

Two further criteria could be included in Legal Origin:

- ❑ Areas outside the legitimate production area are not being logged; areas inside or outside the production area are not being illegally converted to other land uses by the concessionaire.
- ❑ Log volumes comply with authorised volumes of cut or with set quotas for each production area.

Legal Compliance criteria.

- ❑ The 'legal compliance' criteria for the producing company would include guarantees that forest management and exploitation is compliant with specified regulations, including the terms and conditions of any concession agreement or permit (for example preparation and implementation of management and harvesting plans, including base maps, forest inventories, assessment of social, economic and environmental impacts, zoning, planning, monitoring of management and keeping production records).

89. VLO and VLC modules can be introduced as the programme is gradually implemented in a country. An essential element of the programme is the export permit system, defining which modules and criteria must have been adhered to, at any stage of the implementation of the programme, in order to authorise the export of a consignment of timber. Eventually, the programme can be applied to the domestic market as well.

4.8 Generic forest certification schemes

90. There are a large number of schemes that offer assurance of the standard of management of the forest in which products originate. They have the same basic components: a forest management standard; a chain of custody; and third party verification of compliance with both standards (Nussbaum et al 2001). Two schemes operate internationally: the Forest Stewardship Council (FSC) scheme and the Programme for the Endorsement of Forest Certification (PEFC). There are differences between them in the content of the forest management and chain of custody standards and in the procedures for third party verification.

91. The SGS Certification Support Programme offers producers a phased approach to achieving and demonstrating that their forest management complies with the FSC standard. The CSP was developed in recognition of the fact that most of the forest industry in developing countries centres on logging and not forest management and that there is therefore a significant gap for legal concession holders to attain a level of forest management that would meet international certification standard of FSC.

92. It has been suggested that, since certification processes are not designed to address legal compliance in any detail, certification is not a robust legal compliance verification system (Bourke, 2002, cited in SGS Global Trade Solutions 2003). Certification is a quality assurance approach and demands trust and goodwill. Initial assessments and surveillance visits are limited in time, frequency

and area. Current chain-of-custody requirements and audit systems are therefore vulnerable to abuse (SGS Global Trade Solutions 2003).

93. These criticisms apply to the present design of forest certification and chain of custody systems. They could be redesigned so that they do address legality effectively. FSC is currently reviewing its own procedures to address the requirement that companies that hold an FSC chain of custody certificate must not purchase forest products from controversial sources. The draft standard is summarised in section 5.1.

4.9 What can we learn from these actions?

94. From the experience of the schemes summarised in this section there are some useful lessons that can inform the design of the EU's legal timber licensing scheme.

Verification of source and compliance of the source with scheme requirements

- The criteria with which production systems are required to conform must be clear and verifiable.
- The degree of compliance depends on the quality and capacity of verifiers and on the frequency of audits
- No verification system will identify all instances of non-conformance to the criteria that production processes are required to meet. In other words, no system provides a cast iron guarantee; all systems are open to fraud.
- Verification is far more credible if it is carried out by an authority that is independent of the producer, purchaser and government.

Tracking from source forest to the EU border

- Means exist to track any product from source through production process and change of ownership, even highly processed products such as paper.
- The means by which products are identified as originating from a known location and conforming to the scheme's criteria need to be effective against fraud and efficient (ie the cost of the identification mechanism needs to be proportional to the value of the product).

Pre-export and pre-import checks

- Consignments of all products that are controlled under the scheme need to be checked before departure from the exporting country and at the border of the importing country to ensure that there is a valid license.
- Pre-export and pre-import checks can be facilitated and the possibility of fraud reduced by a computer data-base of all licenses that can be accessed on-line by officials in the exporting and importing country.
- It is not possible to ensure that large volume shipments conform to the accompanying documentation.
- Identifying species needs training or access to specialist services and even after training is impractical in the case of composite or processed wood products.

Monitoring

- Independent monitoring can play a useful role in detecting abuses of the scheme but monitors can operate effectively only if they are given unrestricted access to the documentation held by the verification and licensing bodies and powers to inspect the operations of companies that act as links in the chain of custody from forest to point of export.

Penalties and sanctions

- Must reflect the severity of the crime

Unwanted side effects

- There will be some in the international timber trade who will find ways of “laundering” illegal timber through third countries who are not operating a licensing scheme with the EU.

5 Implementing an EU licensing scheme for legal timber

95. The purpose proposed by the EC Commission for the licensing scheme is to prohibit the importation from partner countries of certain timber products that are not accompanied by a valid license testifying to the legality of the goods. Chapter 3 of this report concluded that the purpose should be changed and that the scheme should prohibit the importation from partner countries of goods that have been produced in breach of certain responsible practice criteria. The scheme would thus be similar in concept to CITES, the CCAMLR Catch Documentation Scheme and the Kimberley certification scheme for diamonds. This change of purpose does not affect the technical design of the scheme; the only difference is that license conditions would specify certain practices with which the production of timber exported to the EU should comply rather than certain laws or certain provisions of certain laws (though in many cases the practices will be required or prohibited by law). This chapter begins by considering the practices that the scheme should specify. It goes on to consider the products that should be brought within the scope of the scheme and then discusses the systems and procedures that will need to be put in place to ensure that only products that conform to the criteria are accepted into the EU.

5.1 A basic level of responsible forest management and business practice

96. The criteria of two responsible production or purchasing scheme have already been described in chapter 4 - UK government criteria in model public procurement contracts and those in the SGS VLO scheme. There are many other potential reference points. Box 5-1 and Box 5-2 summarise, respectively, criteria that have been developed by the FSC regarding wood from controversial sources and by the Indonesian stakeholder group working under the auspices of the Indonesia-UK bilateral agreement mentioned earlier. The relevance of the FSC criteria to the EU licensing scheme is that: (i) they are designed to exclude from environmentally and socially responsible markets forest products that originate from controversial sources; and (ii) they have been prepared by an organisation that represents a wide range of stakeholders in a participatory process. The relevance of the Indonesian principles and criteria is that: (i) they have been developed to support the implementation of a licensing scheme, albeit a bilateral one; and (ii) they have been developed in a participatory process involving key stakeholders, albeit only from the producer country.

97. The FSC, Indonesian and other sets of criteria address many of the same points but there are also many differences which result from the schemes for which they are designed varying in purpose and from differences in process. The differences serve to highlight the importance of being clear about the objectives of a scheme and then developing the criteria in the most appropriate way.

98. By implementing the licensing scheme the EU seeks to act against the socially and environmentally harmful impacts of illegal logging. Drawing from the text of the Action Plan we can infer that at the very least timber imported into the EU should not have been produced in a way that: (i) undermines the rule of law, principles of democratic governance and respect for human rights; (ii) provides funding to sustain conflicts; (iii) leads to theft of revenue; or (iv) causes loss of biodiversity or a reduction in forests' protective utility. We can then begin to identify criteria that help to prevent these unwanted outcomes, for example:

- ❑ *Undermining the rule of law and principles of democratic governance* could be addressed by criteria that require the provisions of certain key laws to be observed, in particular (where they exist) provisions governing the allocation of tenure and use rights, amounts and due payment of resource use and other taxes;
- ❑ *Undermining respect for human rights* could be addressed by criteria that require consultation with and free and informed consent of forest-dependent communities before granting harvesting rights;
- ❑ *Loss of biodiversity and reduction in forests' protective utility* could be addressed by criteria that require an adequate forest management plan to be prepared and an environmental impact assessment to be carried out;

- ❑ *Funding to sustain conflicts and theft of revenue* would be addressed by some of the criteria that address the unwanted outcomes in the first three bullets.

99. Depending on the scope of a country's laws, criteria might be cross-referenced to existing legal provisions. Where there are gaps, the criteria would need to be written in such a way that compliance could be assessed without any such cross-reference. As existing forest certification schemes have demonstrated, this is not difficult to do.

Box 5-1 *Forest Stewardship Council proposals regarding wood from controversial sources (FSC 2004)*

Forest management enterprises that are not FSC certified and that are supplying products to FSC certified businesses have to ensure that wood is not harvested:

- ❑ *From areas where there are conflicts relating to tenure or used rights or over forest resources by traditional or indigenous peoples groups and/or civil society groups which involve a significant number of interests and for which a resolution process has not been agreed by the main parties to the dispute.* Documented evidence of compliance includes but is not restricted to: documentation showing identification of all local communities, traditional and indigenous peoples in the forest management unit and adjacent area; documentation showing the ownership or legal right to harvest; documentation showing traditional rights as identified by the communities and peoples groups so identified; documented evidence of consultation with identified local communities, traditional and indigenous peoples groups; documented evidence of the process by which any disputes are being resolved and which has the broad support of the parties to the dispute.
- ❑ *From non-certified forests having high conservation values.* Documented evidence of compliance includes but is not restricted to: a documented assessment that confirms the absence of the biological, environmental, social and cultural high conservation values in the forest area; documented evidence of consultation with stakeholders, including NGOs and parties that are involved with or have an interest in the forest area with respect of social or environmental aspects to confirm the findings of the assessment; documented evidence of consultation with representatives and members of communities and indigenous peoples living in or adjacent to the forest management unit, to confirm the findings of the assessment.
- ❑ *From genetically modified trees in plantation forests.* Documented evidence of compliance includes but is not restricted to documentation from national regulatory bodies confirming the locations and species of GM tree trials within the district.
- ❑ *In violation of national regulations,* including the acquisition of the harvesting rights from the rightful owner, the harvesting methods used, and payment of all relevant royalties and fees. The enterprise is required to ensure that the correct procedures were used to obtain permits and licences and that species harvested are classified accordingly. Documented evidence of compliance includes but is not restricted to: concession license and/or harvesting permit approved by the appropriate government authority; maps or documents showing the location of harvesting within the harvesting license or permit areas; are forest management plan and associated documents for the forest management unit; an up-to-date register of all statutes, guidelines and regulations; harvesting plans and sales contracts showing volumes sold; documents showing tax declarations and royalty payments; documentation related to CITES-listed species.

Box 5-2 Indonesia's proposals for a standard of legality (Anon. 2004)

Indonesia's draft 'Legality Standard' aims at promoting trading in legal timber originating from Indonesia, and at discouraging the trade in illegal timber. The standard does this by specifying legal requirements relating to timber origin, production, transportation, processing and trade - a subset of the approximately 900 Indonesian laws, regulations and decrees that cover these areas. The standard comprises seven broad principles of legality supported by 18 criteria and 47 sub-criteria. There are separate guidance notes to assist auditors in verifying compliance with the criteria.

Principle 1. Land Tenure and Use Rights

The legal status of, and tenure rights to the Forest Management Unit^{i[2]} are clearly defined and its boundaries have been properly gazetted. The Company^{ii[3]} has documented, legally established rights to harvest timber within those boundaries, and harvests timber only within those boundaries.

Principle 2. Physical and Social Environmental Impact

The Company has an Environmental Impact Assessment (AMDAL) covering the Forest Management Unit that was prepared in the prescribed manner, and can demonstrate that it complies with all legal, physical, social and environmental requirements stated in the AMDAL, as well as all legal requirements for monitoring and reporting on implementation of the AMDAL.

Principle 3. Community Relations and Workers Rights

The Company complies with all its legal responsibilities in ensuring the well-being of communities affected by its activities in the Forest Management Unit, its provision of services to local communities, and the well-being and safety of its workers and contractors employed in the Forest Management Unit.

Principle 4. Timber Harvesting Laws and Regulations

The Company conducts all forest planning, harvesting and other activities within the Forest Management Unit in compliance with relevant government regulations.

Principle 5. Forest Taxes

The Company pays all relevant legally prescribed fees, royalties, taxes and other legal charges related to its use of the Forest Management Unit and the timber extracted from it.

Principle 6. Log Identification, Transfer and Delivery

The Company ensures that all logs transported from the Forest Management Unit are properly identified, have correct associated documentation and are transported in accordance with government regulations.

Principle 7. Timber Processing and Shipping

Timber processing facilities and shipping companies have valid licenses and operate in accordance with applicable government regulations.

5.2 Who should develop the criteria and how?

100. Chapter 3 of this report proposes that EU action on forests and forests products trade should be designed in the context of the ultimate goals of ensuring that all forests are managed and forest products are produced in conformity to internationally accepted principles of responsible practice. The licensing scheme should support those goals by enabling exporters to provide evidence of a basic level of responsible practice and should be set in a partnership agreement in which the producer country commits to progressing towards and achieving responsible practice in all forests and production of forest products. Both sides to the partnership agreement have an interest in and responsibility for the criteria that are incorporated into the scheme: the EU is committed to supporting the achievement of responsible practice in all forests and acts on behalf of its citizens to ensure that their consumption of forest products does not cause environmental or social harm; the producer country is committed to achieving responsible practice in all of its forests and for protecting the rights and values of its citizens against potentially negative impacts of EU rules.

101. For its part, then, the EU should develop a minimum set of criteria that would be applied in any licensing scheme implemented under a FLEGT partnership agreement. The criteria should be developed in a transparent, participatory process that allows EU member state governments, NGOs and private business and potential partner countries to influence the outcome. Producer countries that want to implement a licensing scheme in partnership with the EU should develop national criteria in a similar process, although the participation of the EU should be limited to ensuring that its basic criteria are met. Producer countries should be free to set as rigorous criteria as they want.

5.3 Product range

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

103. The Action Plan offers no insights into which products are the largest drivers of illegal logging or which illegally logged products have the greatest negative impact on forests and people. Selecting roundwood and rough sawn wood simply because they are easier to track completely misses the laundering of illegal timber through furniture and other manufacturers in second countries and what may be much larger volumes of lower value timber that is processed before it is exported. The licensing scheme should therefore include all products unless it can be demonstrated beyond reasonable doubt that a particular product, as a consequence of its production, does not lead to any of the outcomes that the FLEGT Action Plan is designed to combat.

5.4 Tracking, verification and monitoring

104. The Action Plan notes that in order for the scheme to function properly FLEGT Partner Countries will need to establish reliable and credible systems and structures to identify and certify timber harvested in conformity with national legislation and monitor its flow to the EU and elsewhere. The procedures hypothesised in the Action Plan appear straightforward, but there will be problems in putting in place credible tracking systems, and of operating a credible verification system.

5.4.1 TRACKING

105. Tracking (or chain of custody) systems for timber and timber products have been in use for many years. The essential elements of product identification, product segregation and documentation are well known (Box 5-3). Segregation in the sense that it has been used in certification may not be

relevant in the context of the EU licensing scheme; all risk of contamination must be eliminated and therefore segregation needs to be implemented in a way that all unknown sources of timber are excluded, not merely kept separate (personal communication, Hugh Speechly, UK DFID May 2004). The strengths and weaknesses of available technologies for maintaining the identity of material as it moves through the supply chain are also well known (Dykstra et al 2002).

Box 5-3 Essential elements of tracking systems (Dykstra et al 2002)

To be effective, chain of custody systems for logs and processed wood products must be based on the principles of *identification*, *segregation*, and *documentation*:

- Logs or other products must be *identified* using some type of labelling technology.
- At each point along the supply chain where material from a known source could potentially become mixed with material from unknown sources, it should be *segregated* and handled or processed separately.
- Finally, the labels affixed to the logs or other products must be keyed to *documentation* so that information on wood volume, species, quality, and other attributes is available to managers of the supply chain.

106. ERM (2003) note that the structure and components of national wood supply chains are unique, and each needs to be considered in their own right. The tracking system for a FLEGT partner country must therefore be tailored to the country's supply chain. ERM (2003) contains a helpful table of options for each critical control point. No system provides 100% security against illegal timber. The choice of option will depend on the level of robustness that is required, which will be influenced by the volume and value of material moving through a supply chain and the intensity of third party verification and monitoring.

107. SGS suggest that for a legal origin verification scheme to provide the maximum efficiency, centralised systems should be implemented by the timber licensing authority countrywide on a mandatory basis for continuous product tracking and comprehensive monitoring throughout the production chain (SGS 2004):

- A robust computer-based tracking system is recommended, run by a single organisation across an entire province/ country/ region. This would provide technical coherence, cost-efficiency (economies of scale), consistency of methods and accountability. If producing companies use their own systems, they must be verifiable and be able to interface/ communicate with the central data system.
- A database system, integrated with the log tracking system, is needed to centralise, cross check and consolidate the data. Depending on local conditions i) the new information system will replace the existing forest database system and data network, or ii) it will be developed separately and will share data with it or iii) it will be developed as an enhancement of the existing system and will add new functionalities to it.

108. Although tracking need to be adapted to a country's supply chain, and therefore needs to be developed in partnership with the country, the EU must insist on certain basic requirements that will be common to all agreements with FLEGT partner countries. Furthermore, licensing must apply to all exports of all timber products and FLEGT partner countries must make verification of legality and the tracking systems that provide the evidence for verifying legality mandatory for all exporters.

5.4.2 VERIFICATION

109. In the context of the licensing scheme the purpose of verification will be to confirm to the licensing authority that a product has been produced in accordance with the requirements of the scheme. The verifier will need to be satisfied (to the extent that they will be able to counter any challenge of negligence) that harvesting of the timber from which the product derives complies with

whatever criteria are specified within the scheme and that any other requirements that apply along the supply chain are also met; for example payment of taxes by transport and processing companies.

110. ERM (2003) describes the scope of an audit to verify legality (Box 5-4). The reliability of verification in terms of the probability of non-conforming products being excluded from licensing depends crucially on the frequency and scope of inspections. An auditing scheme limited to “regular spot checks”, such as take place in existing forest and forest product certification scheme, would be far from reliable due to limited access to information and lack of authority. The licensing scheme should look to the monitoring and verification system of SGS’s IVLT scheme because it is designed to be comprehensive and continuous over time.

Box 5-4 Scope of Audit to Verify Legality (from ERM 2003)

Verification of legality comprises:

- An audit of legal compliance at source (at forest management level) ; and
- An audit of chain of custody (the tracking system across the value chain).

An audit of legal compliance at source determines whether appropriate laws and regulations as specified in the definition of legality are being met. Audits check that a forest organisation has adequate knowledge of the laws, systems to assure compliance and evaluate objective evidence to verify compliance.

A chain of custody audit ensures that the ‘legal’ timber identified during the audit of legal compliance reaches the end user without being mixed with un-inspected and therefore potentially ‘illegal’ timber. Inspections are needed where products change ownership, are transformed or pass through CCP’s.

These audits check that each custodian has the skills, systems, and documentation to demonstrate that the timber comes from a legal source and evaluate records relating to material throughput to ensure that non-qualifying material has not been introduced.

5.4.3 ISSUING THE LICENCE

111. The issuing of a license should not be simply a matter of checking that a chain of custody certificate for the consignment exists (or that the owner of the consignment at the time of export clearance has a verified chain of custody system in place if verification is of the system rather than of individual consignments) and adding a signature. The licensing authority should check for evidence of illegality that might justify detention of the consignment until further checks have been made. The licensing authority’s functions might include (de La Rochefordiere, SGS, 2004):

- data management system (data collection, processing and reporting);
- timber and wood product tracking system;
- data verification and validation (documentary verification and physical inspections); as well as
- preparation and issuance of the certificates.

112. What status should the licensing authority have? It needs to be as free as possible from pressure from state forestry authorities and state forest management enterprises which may themselves be involved in the illegal timber trade. And it needs to have the power to issue licences that will be issued under the authority of the government. These principles point to a separate government body established for the purpose or to a private body, independent of the industry that it would be scrutinising, authorised by the government to issue licenses on its behalf.

113. The function of issuing the licence could be combined in one organisation with the carrying out, or co-ordination, supervision or audit, of verification activities of documents/ systems and in the field (de La Rochefordiere, SGS, 2004). However, keeping the two functions separate would provide a better check within the system. If the functions are kept separate, the verification body should be

involved (but not have control) from the beginning in the overall data monitoring, verification and validation processes, i.e:

- ❑ firstly in the design and development of the wood tracking and data management systems (so as to bring their experience and incorporate audit and security devices into the systems) and
- ❑ secondly in the operation and running of these systems - for efficient management and continuous improvement purposes and, importantly, in order to have the required level of independent control over the whole system. (de La Rochefordiere, SGS, 2004)

5.4.4 CUSTOMS CLEARANCE BEFORE EXPORT

114. The final check in the exporting country's system is Customs clearance. Customs authorities need to have powers to carry out physical inspections of goods and to search vessels and detain them if there is suspicion of illegality. Some Customs authorities do not have these powers and only check that the documentation is in compliance with export requirements (ERM 2003). Exercise of additional powers could have significant resource implications.

5.4.5 CONTROLS AT THE EU BORDER

115. Consignments introduced into the EU, either for trans-shipment or release for free circulation, undergo a number of general procedure upon entry (ERM 2003):

- ❑ *Customs Supervision* - Shipment of timber enters into customs territory of EC and comes under customs supervision. It will only leave customs supervision once cleared for release or the ship has departed for its end destination.
- ❑ *Identity Check* - Customs check the shipment's 'Summary Declaration', this is a description of the consignment and enables customs to match what is on the boat and what has left the boat.
- ❑ *Documentation Check* - Customs check any specific authorization documents eg CITES, phytosanitary certificate, waste documentation. Other designated authorities in the member states may also have responsibilities for checking documentation and consignments.
- ❑ *Customs Declaration is made* - This consists of issuing a 'Single Administrative Document' (SAD) (standardised form). The SAD must be accompanied by a commercial invoice, transport document (eg bill of lading), customs duty (based on customs value which is cost of goods + transport + insurance).
- ❑ *Customs Clearance* – When customs formalities have been made and the goods are released into free circulation.

116. Resources and systems will be needed to allow Customs officers to undertake four key tasks inherent in implementing a timber licensing system effectively (RIIA 2003b):

- ❑ Verification
- ❑ Identification
- ❑ Storage and disposal
- ❑ Intelligence

117. Enough time needs to be allowed for proper checks to be made. Documentation needs to be standardised and tamper proof. And there need to be legal channels of communication between different countries, particularly with officials in producer countries (RIIA 2003b).

5.4.6 MONITORING

118. External monitoring provides an additional check. Two types of monitoring are needed.

119. **Monitoring to check that the licensing system is operating as it is designed to do** is important for added reliability and credibility of the system. Independent observers or a surveillance

committee, comprising representatives from civil society groups such as local communities and NGOs, would monitor the licensing scheme and guarantee that the whole process is running efficiently. To do this they will need access to the verification system that supports the licensing scheme. Observers can also be involved in field surveillance operations. In this way the observers would act as a fourth-party to monitor the verifier and guarantee that the whole process is satisfactory (de La Rochefordiere, SGS, 2004). Independent monitoring of this type helps to ensure the integrity of the system and to whistle-blow if inconsistencies are detected.

120. **Monitoring to check for movement of illegal timber.** Licensing will not provide a cast iron guarantee of legality of timber exported to the EU by FLEGT partner countries, nor will it prevent illegal timber being exported from non-partner countries even if the EU were to introduce legislation prohibiting illegal timber from all countries. Monitoring by organisations such as Global Witness, the Environmental Investigation Agency, Greenpeace and Telepak demonstrate that independent monitors are an essential part of action against illegal logging. Independent monitoring projects also encourage transparency and provide an aperture for civil society engagement in forest policy making (Colchester 2004).

121. A recent paper by the Overseas Development Institute based on a study of several independent monitoring initiatives provides useful lessons for their design and operation (ODI 2004).

5.5 **Conclusions**

122. Designing a scheme whose purpose is to prevent timber products that fail to meet certain criteria from being imported into Europe is not difficult. There is already a lot of experience from which the designers of the licensing scheme can draw. The criteria themselves and the range of products brought within the scope of the scheme are more problematical.

123. The criterion of illegality would be simple to apply if the purpose of the scheme was to prevent products being imported into the EU whose production, sale and transport had breached any of a country's laws. But this is not the schemes' purpose, nor should it be. EU action should focus on the outcomes from forest management that it wants to encourage or discourage. In countries that have well developed systems of forest governance, those outcomes will be the objects of laws that are clear and with which compliance is therefore verifiable, but this is not the situation in many of the countries that are exporting forest products to the EU. The scheme should incorporate criteria that describe the outcomes that the EU and partner countries want to achieve; in some cases criteria may be cross-referenced to a legal provision, in other cases not.

124. The criteria need to take account of the concerns of EU and producer countries' stakeholders and therefore should be developed in a participatory way. For its part the EU should develop a set of minimum criteria and partner countries should be required to adopt them as a condition of a partnership agreement though they would be free to include other criteria.

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