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Counter-brief

**LOGGINGOFF**

## **A civil society counter-brief on the Republic of Congo-EU VPA**

March 2010

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

[www.loggingoff.info](http://www.loggingoff.info)

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## SUMMARY

**On 9 May 2009 the government of the Republic of Congo**<sup>1</sup> (hereafter referred to as the Congo) and the European Union (EU) concluded a Voluntary Partnership Agreement (VPA) that aims to solve the country's problem of illegal logging and associated poor forest governance. The agreement aims to develop measures to ensure the timber sector in the Congo is both legal and sustainable.

This briefing provides the views of Congolese and European civil society on the concluded agreement and its implementation. It concludes that finalising the VPA is just the first step and that success can only be achieved through implementation that keeps the FLEGT objectives in mind. Initial efforts must focus on ensuring that the legal texts that need to be developed deal with social issues and strengthen the rights of forest dependent peoples. There must also be broad stakeholder involvement in policy-making and the monitoring of logging activities.

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## ILLEGAL LOGGING IN CONGO – ADDING UP TO THE RESOURCE CURSE

Congo covers an area of 342,000 km<sup>22</sup> and has a population of around 3.7 million inhabitants, over half of whom live in cities.<sup>3</sup> The wars of 1993, 1997, 1998 and 1999 plunged the country into a multi-sector crisis, with problems including: lack of diversity in production; inadequate infrastructure; social insecurity; opaque management of public funds; and diminished purchasing power of people. It is estimated that 50.1 per cent of the population live below the national Congolese poverty line.<sup>4</sup> Such extreme poverty should be unthinkable in a country that has such natural oil and wood resources. Unfortunately as is so often the case, such resources often end up being a curse on communities that live on the land as they receive none of the financial benefits but all of the negative effects on their lives and livelihoods. In a world driven by justified fears over climate change the situation becomes even more complicated as the need to leave the oil in the ground and keep the trees standing is overpowering.

The oil sector is the Congo's main economic activity, accounting in 2008 for 67.3 per cent of Congo's gross domestic product (GDP).<sup>5</sup> Forests contributed 5.6 per cent to the GDP in 2006,<sup>6</sup> a reduction from around 10 per cent of GDP in the 1070s.<sup>7</sup> This reduced percentage does not reflect, however, the significance of forests for the economy in rural areas. Estimates suggest that in 2007, the informal forest sector generated about 7,400 direct jobs and 14,800 indirect jobs, making the forest sector the largest provider of employment outside the cities.<sup>8</sup> Congolese forests are also of high social and cultural importance to the around 100,000 Baka Pygmies and other local Bantu communities who depend on this ecosystem for subsistence although this is not accounted for in the GDP as it does not make it into the formal economy.

Of the 18.5 million hectares of forests (50 per cent of the territory), over half of them (12 million) had been allocated in 2008 for production, an area that is expected to increase to 15.2 million hectares (82 per cent of the forests).<sup>9</sup> There is also 70,000 hectares of commercial plantations, mostly eucalyptus, with a planned expansion of 20,000 hectares.<sup>10</sup> The EU and China import half of the timber originating from Congo each, with a total volume of approximately one million m<sup>3</sup> round wood equivalent (RWE).<sup>11</sup> This is worth USD\$330 million annually.<sup>12</sup> In 2008, two thirds of the timber produced in northern forest region of Congo was exported to the EU via Cameroon. Exports to China are in the form of logs and tend to originate from the south.<sup>13</sup>

The Congo, in line with other countries in the Congo Basin region, faces the problem of illegal logging. Roughly 20 per cent of Congolese timber reaching the EU is thought to be illegal, with Italy, France, Spain and Portugal being the main importers.<sup>14</sup> Since January 2007, the NGO Resource Extraction Monitoring (REM) has been employed by the government of Congo as independent forest observer to improve forest governance in the country. This makes Congo the second country in central Africa to use such a monitor.

REM investigations have pointed out that due to a combination of low enforcement and low penalties, the current control system fails to detect or deter illegalities activities. This failure puts companies that comply with the law in a disadvantage position,<sup>15</sup> and denies local populations of their legally defined benefits.<sup>16</sup> But this is only one of the current system's problems that prevents communities from benefiting from their forests. Texts regulating private sector use and benefits from forests have been developed, but those defining communities involvement in forest management and the importance of respecting their user rights are still missing.<sup>17</sup>

The Congo-EU VPA is expected to address the underlying causes of illegal logging and eliminate the financial incentives to conduct illegal activities. Commitments in the VPA foresee the passing of legal texts to ensure the rights and obligations of local communities are clarified before the agreement is made operational in May 2011. The agreement will only succeed if the needs of local communities are taken on board, and for that, both parties must continue to ensure a strong commitment to work with all stakeholders affected by the new legality assurance system to regulate and verify and control forest use.

### Box 1. Key facts about the Congo-EU VPA

- The objective of the Congo-EU VPA is to provide a legislative framework; systems to tag and track timber and government and independent verification procedures to ensure that all timber exports from the Congo into the European market have been legally acquired, harvested, transported and exported.
- Congo and the EU have stated that they want the VPA to improve forest governance and to promote environmentally sound and socially just forest management. Achieving this goal will require good quality legal texts and effective civil society participation during the implementation of the agreement. Assuring that the VPA not only focuses on trade facilitation but also addresses the wider social and environmental issues of concern to forestry will also be essential.
- **The VPA should lead to the passing of legal texts** which promote and clarify local populations and indigenous peoples' rights to the forests before the agreement is operational.
- The **Legality Assurance System (LAS)** will apply to all timber and timber products produced, processed, imported and in transit in the Congo.
- The VPA does not only address timber exported to the EU: The legal framework, systems, controls and verification procedures outlined in **the VPA will cover all timber and timber products in circulation in the Congo**, whether it is destined to be sold in domestic or international markets.
- **Wood of non-Congolese origin in transit** through Congo will not receive a FLEGT license and systems will be set up to ensure that it does not enter the Congolese supply chain.
- The VPA will have to ensure that a vast array of **information** is brought into the public domain.
- **Independent monitoring of law enforcement** will continue and is expected to be carried out in the medium term through local civil society.
- **Independent audits** of the system are foreseen as a way to promote interactive monitoring and guarantee the credibility of the new control system.
- **Civil society** will have a formal role in implementing and monitoring the implementation of the agreement.
- Full implementation of the agreement will only occur when systems are functional, at which point, only licensed legal wood will be exported from the Congo to the European market. The first **FLEGT licenses**, which will only be given to timber exported towards the EU, are expected to be issued in 2011.

## THE NEGOTIATION PROCESS AND THE INVOLVEMENT OF CIVIL SOCIETY

Negotiations to conclude the Congo-EU VPA lasted less than one year (June 2008- May 2009), making it the fastest to date. Little was done in the form of informal pre-negotiations, although a workshop took place on December 2007 to establish the national plan for negotiations, and working groups to define the different sections of the agreement were already up and running three months later. The formal political and technical negotiation sessions were launched in June 2008 and progressed in a hasty pace until both parties concluded the agreement on 9 May 2009.

Two bodies were established by the forest administration to facilitate the work of the Congolese side: A **technical secretariat** in charge of preparing the Congolese negotiating position (and negotiating with the EU), and a **national advisory group** that was to review and validate all documents in discussion. Both bodies included civil society, government and industry representatives.

When the process began, concerns were raised about whether the country's nascent civil society would be able to counterbalance the power of the forestry industry and ensure that the VPA led to meaningful governance reform processes. Although participation was not smooth and civil society struggled to raise their concerns, the EU position to demand and commit to ensuring the participation of local groups throughout the process was instrumental in making sure that their concerns were picked up in the process. The establishment of Congolese structures promoting direct dialogue between civil society, the Congolese government and the private sector, as well as the organisation of sessions in Brussels to allow interested European stakeholders to get updates on the process, also supported local civil society involvement by providing spaces where issues could be debated.

While NGOs and indigenous peoples' representative were involved in negotiations, direct participation of local and indigenous communities was not achieved. It was agreed that for the agreement to become operational, numerous activities would have to occur that will have a direct effect on communities, it is therefore hoped that they will play a central role during the implementation phase.

### Box 2. How does the VPA deal with the rights of local communities

The involvement of local communities is particularly important in the Congo. They have been deprived from the economic benefits of commercial exploitation and, perhaps more importantly, seen their rights overturned in the battle to gain access to the resources. Perhaps as a result of the wealth of resources available, many communities rights of ownership have not being recognised. There is a lack of equity at both the social and the legal level which leads to a reduced ability to be involved at political forums. It is a positive step that the VPA includes provisions for both strengthening and protecting the rights of communities.

The rights of indigenous and local communities are taken into account in the legality grids. The agreement foresees the development of new legal texts to ensure, among others but not exhaustively, the promotion and respect of community rights, and the participation of civil society in forest management. A specific allusion to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is made in the preamble of the agreement. Texts that the Congolese government has committed to develop include a law ensuring the promotion and respect of the rights of indigenous peoples.<sup>18</sup>

In a context where ownership rights of communities are not recognised and where communities living in poverty feel the most negative climatic and environmental impacts of the over extraction of natural resources, it is important to consider the effects of agreements aiming to regulate trade in natural resources. Article 17 of the VPA focuses on social protection and highlights the importance of taking measures to minimise any negative effects that the VPA may have on communities: "the parties agree to develop a better understanding of the lifestyles of indigenous and local communities potentially affected... (and to) monitor the effects of this agreement on these communities, while taking reasonable steps to mitigate the negative effects."<sup>19</sup>



*Logging concession in Congo. Where roads lead into forests, deforestation and illegal logging often follow.*

*Photo: Marianne Jensen*

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## THE VPA IN DETAIL

The Congo-EU VPA commits both parties to only trade legal timber. The first step is therefore to agree a definition of **legal timber**. For Congolese timber to be legal, it must comply with all legislation applicable to the Congolese's forest and/or plantation sectors (including forestry, land ownership, environment, human rights, labour and trade) and international agreements, such as the Convention on Biological Diversity (CBD) ratified by the Congo. Two separate 'legality grids', one for timber coming from forests and one for commercial plantations, were developed. These grids are templates that allow the assessor to know what needs to be checked when assessing the legality of timber and of forestry operations.

The definition of legality was consensually agreed through a multi-stakeholder process including civil society, the Congolese government and the private sector, but the development of the legality grids highlighted many shortcomings and the unsuitability of the forest-related laws and regulations in force, such as clarification of the rights of indigenous and local communities and the involvement of civil society in forest management. The agreement includes commitments to: pass legal texts which ensure the involvement of civil society and local and indigenous communities in forest management; strengthen civil society capacity; and clarify any deficiency in the law that may be discovered during the implementation of the agreement. New legal texts will have to be developed in cooperation with civil society and then agreed and enacted before the first FLEGT license is granted. Close civil society involvement and oversight will be crucial to ensure that this process concludes with a strong text that addresses the weaknesses identified.

The VPA foresees that the Congolese government ensures there is an update of some existing legal texts and that regulations about implementation of the VPA as well as legal texts to cover other areas are drafted. These reforms will be included in a revision of the legality grids to ensure that the VPA complies with all national, regional and international laws.

Once there is an agreement on which laws should be checked, a **Legality Assurance System (LAS)** will be set up to trace legal timber and ensure it is not mixed with illegal timber before export. Once there is an agreement on which laws should be checked, a Legality Assurance System (LAS) is set up to trace legal timber and ensure it is not mixed with illegal timber before export. As the Congo-EU agreement stipulates the legal texts that will be the basis of the LAS (this is the legality grids) need to be amended and that new laws must be developed, the grids (and therefore the LAS) will have to also be amended. The LAS covers the entire timber production and control process, including the two legality grids, verification of legality of forest companies, a wood traceability system throughout the supply chain, the issuing of FLEGT licenses and independent audits. The system will apply to all commercial timber and timber products produced, sold in, and exported from the Congo, regardless of whether timber is destined for the domestic or international market. Only timber exported to the EU will receive a FLEGT license, which will be issued by the Forest Product Control Service for Export (SCPFE) under instruction of the Forest Economy General Inspection Unit (IGEF), which is the government agency responsible for overall control of the system.

### Box 3. How private certification schemes fit under the FLEGT system

A major challenge for implementation of the VPA is how to ensure that FLEGT licenses and private and voluntary certification schemes complement and support rather than undermine each other. In the hope of lowering the burden on logging companies using private schemes to certify that their timber is legal and/or sustainable, the agreement foresees integrating them into the system after ensuring that they meet the criteria, indicators and verifiers of Congo's legality definition. The IGEF will assess the criteria used by the body issuing certificates (the 'certification body') in order to determine whether it adequately matches the Congolese legality grid and whether its monitoring and audit systems are robust enough. If results are positive, the IGEF will approve the certification scheme and operators whose timber has been certified under the scheme will be granted an annual certificate of legality - provided that their audit reports do not indicate any major non compliance. This assessment will be carried out by the Ministry of Forest Economy before FLEGT licenses become operational, and assessment reports will be made public.

Although this procedure has the advantage of avoiding the requirement to verify legality twice, if the certification scheme does not have to ensure compliance as robustly as the FLEGT system, it may mean that producers aim to avoid the LAS system by going through private certification. An assessment report on private schemes will go some way to ensuring substandard schemes are not accepted. Participation of local civil society in the monitoring of the VPA will also help ensure coherence between FLEGT licensed timber and that which has been certified by private schemes.

The timber from these operations will still be subject to checks along the supply chain through the traceability system which will apply to all operators. Its checks will include looking at where and how the tree is harvested, transported and processed.

The Ministry of Forest Economy is the government agency responsible for the implementation of the LAS and for the overall coordination among government services with roles in the system.

The first step in the **verification of legality** is to check that operators' are compliant with their requirements to: ensure they have complied with the process through which rights were allocated; have followed the processes required to enter into agreements with communities; pay fees and taxes; and, instigate good labour practices etc. Verification of such compliance involves the responsible government agencies checking documentation and doing field checks, with supervision by IGEF. Frequency of controls depends on the criteria and indicator. Once legality has been proven, the IGEF issues a 'legality certificate' that is valid for one year. The legality certificate is therefore issued before transportation and excludes legal compliance along the supply chain.

The second step in the verification is to **control and verify the supply chain**. The VPA foresees the establishment of a chain of custody system for timber and timber products that confirms legal compliance. The system will include, among others, geo-referencing trees during inventories, bar codes to trace products, and linking different databases to facilitate monitoring. Information will be reconciled in the SIGEF database, which will be hosted by the General Direction of Forest Economy (DGEF) and will integrate all private traceability systems used in Congo. The SIGEF will signal irregularities automatically to the IGEF. If no irregularities are detected, a FLEGT licence will be issued.

Although the Congo currently has no imported wood and only a small amount in transit and leaving the Country through Pointe-Noire, the traceability system is designed so that it will be able to capture all **timber imported into Congo as well as timber in transit**. The legality of all timber and timber products will be checked at the Congolese border. Verification and control procedures for timber imported or in transit will be developed during the design of the system. Timber of non-Congolese origin in transit will not be allowed to enter the Congolese supply chain and will not receive a Congolese FLEGT license.

The **independent monitor of forest operations** that is presently part of the Congolese governance system will continue to provide field level investigations and gather evidence of illegality for a minimum period of 3 years (until 2012). This monitor's work has previously been done by an international NGO but will continue under a structure of national civil society (which could be supported by international NGOs). It is outlined as a supporting measure to the agreement rather than an integral part of the LAS. An **independent auditor** will however be an integral part of the LAS system and will add to the work of the monitor by assessing the performance and efficiency of the FLEGT licensing system. It will base its reports on information provided by third parties (i.e. NGOs, local communities, SIGEF data, civil society independent observer structures, Congolese and EU authorities etc.) and its own research. It will provide information to the parties and support monitoring of the VPA's implementation. Auditor reports will be made available to the public.

Implementation of the agreement will be overseen by a joint Congo-EU structure known as the **Joint Implementation Committee**. The Committee will oversee and decide measures for the correct implementation of the agreement. It will also be in charge of publishing an annual report with information on activities, progress made and statistics on the agreement.

The Congolese side has established a multi-stakeholder **Technical Secretariat**, including representatives of the government, civil society and the private sector, to support the implementation of the agreement. The Secretariat will, among others, prepare documents for Joint Implementation Committee meetings; monitor and suggest measures to facilitate the implementation of the agreement; and examine and adopt projects to implement the complementary texts and legislative reforms as foreseen in the agreement.

Involvement of civil society is crucial to ensure the success of the governance reform processes. With this aim, measures should be taken to broaden the participation of civil society and local communities beyond the official structures created as part of the agreement. A good way forward would be to allow for citizens to feed information into the system (this is foreseen as part of the independent audits, which must gather information from all actors including citizens), and to facilitate access to information about progress and measures taken. To address the latter and “ensure a good understanding of the FLEGT licensing scheme by all stakeholders”, specific provisions for **access to information** are included in both the text of the agreement and its annexes. Among others, the public will have information available about concession contracts and allocation; harvesting, processing and management documents; national and local taxes paid; verification and control reports; cases of non-compliance with the FLEGT licensing scheme and actions taken; Congo’s forest production statistics; and independent audits.

The agreement also covers the supporting measures required for successful implementation. These include building the capacity of civil society and the government, and completing the legislative framework.

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## The challenges ahead: implementation of the agreement

The conclusion of the Congo-EU VPA is a step in the right direction, but the question of whether it will contribute towards improved forest governance in the Congo can only be answered during implementation. The VPA will be considered successful if the FLEGT objectives and agreement commitments (strengthening community land tenure and access rights, ensuring the effective participation of civil society -with specific attention to indigenous peoples - in policy making on forest-governance related issues; increasing transparency and reducing corruption) are met. To this end, the following actions must be prioritised:

- **The development of legislative and regulatory texts foreseen in the agreement.** All legislative changes the government must seek close cooperation and agreement with civil society in country. Local communities, whenever texts affect them, must be duly involved in the process.
- **The inclusion of a mechanism to allow local civil society to participate in policy-making.** As local communities’ participation in this process has not yet been assured, it is key that this mechanism functions well and this is one area where attention will be focused.
- **Ensuring a good rather than a fast process.** The pace of negotiations concerned civil society groups in both Congo and Europe who argued that hurried engagement undermined the quality of proposals to improve governance. If the agreement is to be successful, this trend must be reversed during the implementation of the agreed systems. Giving time to the different actors to engage is particularly important if meaningful participation is expected from local and indigenous communities in decisions that will affect them directly.
- **Ensuring meaningful involvement of local NGOs and communities in the implementation and monitoring of the VPA.** This will require the continuation of independent forest monitoring activities and provisions to strengthen stakeholder capacity. Particular emphasis should be put on building the capacity of local communities and indigenous peoples so that they can be directly involved during the implementation phase.
- **Addressing the underlying causes of illegal logging, including corruption.** Although improved law enforcement systems, improved transparency and public participation in policy-making and implementation, and third party controls are preconditions to respond to forest corruption associated with illegal logging, adequate sanctions are needed as ‘incentives’ to deter illegal activities.

In order to ensure that these key objectives are met and the VPA implementation a success, civil society will concentrate on the following areas:

- Supporting the government in developing comprehensive and coherent legal texts, in line with national, regional and international commitments, to strengthen the environmental and social weaknesses identified during negotiations
- Actively participating in the Technical Secretariat supporting the implementation of the agreement
- Monitoring the implementation of the VPA
- Developing strong systems to independently monitor forest operations
- Assessing the impact of the VPA on the livelihoods of local and indigenous communities and proposing measures to minimise negative impacts.

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## END NOTES

1. Republic of Congo is often referred to as Congo Brazzaville to avoid confusion with its neighbouring Democratic Republic of Congo, also known as Congo Kinshasa.
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4. ECOM, 2005, *Enquête Congolaise auprès des ménages*. Brazzaville: Centre National de la Statistique et des Études Économiques.
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7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. European Forest Institute, 2009, *Press release 'As Logging Pressures Increase in Congo Basin, EU Concludes Deal with Republic of Congo to Trade Only in Legal Timber'*. 9 May 2009.
13. Globaltimber, 2010, <http://www.globaltimber.org.uk> Site accessed on 14 January 2010
14. WWF-Germany, 2008, *Illegal wood for the European market - An analysis of the EU import and export of illegal wood and related products*. Frankfurt am Main: July 2008.
15. Resource Extraction Monitoring (REM), 2008, *Capacity building in the Congo Basin and implementation of Independent Monitoring of Forest Law Enforcement and Governance (IM-FLEG) in the Republic of Congo January 07 – June 08*. Cambridge: REM, IM-FLEG Republic of Congo Briefing Note, July 2008.
16. Resource Extraction Monitoring (REM), 2009, *Évolution du contrôle et des sanctions de l'exploitation forestière illégale en République du Congo*. Cambridge : Rapport annuel janvier 2008 – mars 2009 OI-FLEG République du Congo, 2009.
17. ODDHC, FGDH & OCDH, 2009, *Rapport d'étude : Participation de la société civile et des populations locales à la gestion forestière en République du Congo dans le cas de concessions forestières aménagées*. Brazzaville, unpublished.
18. The government of the Republic of Congo finalised the draft legislation on the promotion and protection of the rights of indigenous peoples on 23 December 2009. Progress on this bill had been blocked since its initiation in 2004. Making the passage of this law a precondition for the implementation of the Congo-EU VPA seems to have played a role in speeding up this process. At the time of drafting this briefing the bill had been sent to the Parliament and Senate and its final adoption was foreseen for mid 2010.
19. At the time of drafting this briefing no English official translation of the agreement was available. Quotes from text are therefore unofficial translations.

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