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Plentiful forests, happy people? The EU's FLEGT approach and its impact on human rights and private forestry sustainability schemes¹

Karin Buhmann* and Iben Nathan**

Key words: Sustainable forestry, EU's Forest Law Enforcement, Governance and Trade (FLEGT) scheme, human rights, Forest Stewardship Council (FSC), Vietnam

Abstract

Focusing on potential impact on social sustainability in timber exporting or processing states outside the EU, this article discusses the EU's Forest Law Enforcement, Governance and Trade (FLEGT) scheme and its regulatory implementation modalities. Drawing on Vietnam as a case study and the private Forest Stewardship Council (FSC) criteria as an example of a broader sustainability scheme, in the analysis we identify concerns of a human rights or labour rights character that risk becoming institutionalised in an adverse fashion as a result of the FLEGT's scheme's legality orientation with regard to exporting states as well as importers who place timber on the EU market, and the assumption that civil society involvement in exporting states will sufficiently ensure consideration of such concerns. Next we consider potential adverse impact on the usage of broader sustainability schemes, such as FSC, which address social sustainability as well as the environment but do not (yet) deliver legality verification required by the EU Timber Regulation from March 2013. We also discuss possible contributions that could follow from adding a Corporate Social Responsibility (CSR) perspective to the FLEGT approach, given increasing recognition that CSR may be promoted by pub-

lic regulation. We conclude that although the FLEGT scheme seeks to achieve commendable objectives, it could do more to address human rights related to forestry usage, harvest and timber processing through the combined force of law and the market on which the scheme builds.

¹ The reference to 'plentiful forests, happy people' is inspired by a presentation by the European Forest Institute, 'FLEGT AP Progress Report: Brief overview of survey results: Interpretation and Implications' by John Hudson and Catherine Paul, 13 January 2011. Field work and other research for this article has been made possible through a grant from the Danish Research Council for the Social Science for the collaborative research project 'New forms of governance and law in Multi-Level Governance: The role of the state between international, transnational, national and sub-national governance of sustainable forestry' (2010-2013). The authors wish to thank the following persons for particularly useful information, comments and help: Ms Aimi Lee Abdullah (European Forest Institute), Mr John Bazill (EU Commission), Ms Guiliana Torta (EU Commission), Dr. Nguyen Thi Minh Hien (Hanoi University of Agriculture), Dr. Nguyen Viet Dang (Hanoi University of Agriculture), an anonymous reviewer and the editor of this journal, Professor Gabriel Michanek. The authors also wish to thank numerous individuals who spared their time to meet with the authors during field work in Vietnam in November 2010 and November 2012. Useful comments were also made to previous versions of this paper by participants at the 'Stock-taking conference', held 19-21 May 2011, under the GLOTHRO (Beyond Territoriality: Globalisation and Transnational Human Rights Obligations) research project, Antwerp, and by participants at a workshop on *Multi-Level Governance schemes across organisations and regions – Impact on forestry governance, sustainability and the role of the state*, held on 21 November 2012 at Hanoi University of Agriculture. The usual disclaimers apply.

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Introduction

The EU's Forest Law Enforcement, Governance and Trade (FLEGT) scheme seeks to promote sustainable forest management through supporting legality in tropical forestry. The scheme is implemented through a range of modalities, which include treaties with some tropical timber export states as well as intra-EU measures regulated through two Regulations. The later of those, the 2010 EU Timber Regulation, with effect from March 2013 prohibits the placing on the EU market of illegally harvested timber and products from such timber, and establishes requirements on the supply chain to exercise due diligence in that respect. The earlier 2005 FLEGT Regulation establishes a 'green lane' to the EU market for timber from states that have signed a 'Voluntary Partnership Agreement', a treaty with the EU under which both the exporting country and the EU commit to trade only in legal timber. Timber exporting or processing states are able to set their own definitions of legality within some overall policy requirements on economic, environmental and social aspects of forestry management. This provides these states with broad discretion to define what is to be acknowledged as legal timber traded as such in the EU, based on their own political, economic and social priorities, as well as to set the level of requirements according to what is locally convenient in the context of regional or global competition.

Emphasising legality and environmental sustainability, the FLEGT scheme both complements and competes with non-governmental forestry sustainability schemes, including the Forest Stewardship Council (FSC), which considers social sustainability issues of a human rights

character as well as environmental sustainability. FSC is a private scheme, which in the current context serves to exemplify a number of social sustainability concerns that can be addressed in a broader context of environmental sustainability and forest management. Because FSC mainly serves to illustrate the integration of social with environmental concerns, we do not analyse FSC specifically, nor discuss or critique the effectiveness of the FSC scheme.

In terms of the measures by which the FLEGT scheme is implemented, the scheme possesses a degree of extraterritorial, transnational or multi-level regulation elements: Policy objectives related to sustainable development are sought to be implemented outside of the EU's territory through the power of the market (trade with the EU) intended to drive change in timber exporting states, but in practice based on intra-EU and border measures introduced through conventional EU law as well as treaties with exporting states. As such, the objectives particularly address law enforcement and governance issues in developing states, which are typically those in which the problems and policy objectives targeted by the FLEGT scheme are the most acute. While recognising the close connection between forestry and environment, this article investigates some potential effects in exporting states in relation to impact on social aspects of sustainable development, in particular human and labour rights. We also discuss potential impact on the future role in the timber sector of broader sustainability schemes, which consider human and labour rights. Drawing on examples from Vietnam, we discuss the impact of the FLEGT approach on social aspects in sustainable forestry. The analysis concludes that while the FLEGT scheme addresses commendable objectives in relation to forestry management and environment, it fails to consider and address some significant human rights issues in relation to people who live in or

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off the forest in relation to land usage and working conditions, and that as a result, the legality requirement may lead to a deterioration of such social sustainability concerns.

Methodologically, this article is based on study of EU documents relating to or implementing the FLEGT Action Plan, study of documents relating to the forest and timber processing sectors in Vietnam, and semi-structured interviews with EU officials and Vietnamese officials, timber sector representatives and civil society in November 2010 and October-November 2012. The article proceeds as follows: Section 1 provides the background and frames the research problem. Section 2 provides an overview of the institutional framework of the FLEGT scheme, including the legality definition requirement and the 2005 and 2010 Regulations (2.1) and of FSC (2.2). Section 3 sets the framework for the discussion of human rights in relation to sustainable development through the perspective of later years' increased recognition of human rights as an element in the duties of both states and business enterprises with regard to Corporate Social Responsibility (CSR), and through the increased recognition of an interrelationship between CSR and the law. Section 4 introduces Vietnam's forestry sector as a basis for the inclusion of Vietnam as a case study in the subsequent discussion. Section 5 discusses sustainable development and human rights as FLEGT elements (5.1) and implications of FLEGT for FSC and human rights in sustainable forestry (5.2) with the situation in Vietnam serving to provide insight into practical implications. Section 6 concludes by summing up and critically questioning the potential for a happy marriage between environmental and social sustainability under the FLEGT scheme to achieve not only plentiful forests, but also happy people.

1. Background and problem

The European Union's (EU) Forest Law Enforcement, Governance and Trade (FLEGT) scheme aims to reduce illegal logging and its adverse impact on society. In addition to forest governance capacity building support in developing countries which export timber or processed timber products (such as furniture) and intra-EU procurement policies, the scheme is implemented through two Regulations (the 2005 FLEGT Regulation (No. 2173/2005, hereinafter 'EU 2005')² and the 2010 Timber Regulation (No. 995/2010, hereinafter 'EU 2010') and bilateral treaties with timber exporting countries. Connecting activities in timber producing countries and the EU market, the FLEGT scheme seeks to support governments in timber producing countries in fighting illegal timber by promoting access to the EU market for legal timber through the establishment of so-called Voluntary Partnership Agreements (VPAs), which are in effect treaties between the EU and a timber exporting country based on a definition of legal timber developed by the exporting state but approved by the EU for the purpose of the VPA in accordance with the Regulations. Under a VPA, exporting countries commit to licensing timber exports as legal, and the EU agrees to accept only licensed timber. A bilateral treaty between the European Union and a timber exporting country, a VPA combined with a Timber Legality Assurance System set up in the exporting country and a 'FLEGT licence' issued by the exporting country provide easy access to the EU market because timber exported under a FLEGT licence is treated as legal. Once the licensing system has been established and is working, exporters from a country with a VPA can export FLEGT-licensed timber into the EU

² See further details for this and other references in the reference section at the end of the article

without their customers being required to make further legality checks.

With effect from March 2013, the Timber Regulation requires timber to be placed on the EU market to be verified to be legal, and for this purpose requires action to be undertaken by the supply chain in order for tropical (and other) timber and timber products to be traded on the EU market. While importers ('operators') may meet the requirement through the exercise of due diligence (EU 2010, art. 4(2)), from the perspective of timber exporting states the prohibition of the placing on the EU market of illegally harvested timber or timber products derived from such timber (EU 2010, art. 4(1)) will strengthen the significance of the 'green lane' provided by a VPA (see also EU 2010, preambular para. 9) and, therefore, the importance of timber producing states' defining what constitutes legal timber for the purpose of a VPA. For goods not covered by a VPA, the general requirements under the Timber Regulation apply.

On a global scale the EU is a large market for imported timber, including tropical timber and timber products. Around 80 million m³ of imported timber and timber products are placed on the EU market annually (Europa 2008, WWF 2008). With the long term goal of contributing to sustainable forestry, the EU in 2003 launched its FLEGT Action Plan (EU 2003). The FLEGT Action Plan was established to reduce the consumption of illegally harvested timber and contributing to the wider objective of sustainable forest management in timber-producing countries. Combined with some capacity building to promote forest law enforcement and governance in (mainly tropical) timber producing countries, the Action Plan was to promote the trade in legal timber. For this purpose, it envisaged the setting up of a licensing scheme as a measure to ensure that only timber products that have been legally sourced in accordance with the national legislation of the

producing country may enter the EU market. To be effective, the licensing scheme was recognised to require that imports of timber and timber products be made subject to a system of legality checks and controls. The practical details were to be organised through VPAs to be concluded between the EU and timber exporting countries. A VPA is a border measure, targeting events before customs release of goods. If goods are accompanied by a license, they will be released to the EU market. Primarily relating to activities of importers and the intra-EU supply chain as well as monitoring and enforcement within the EU, the Timber Regulation is not a border measure. Nevertheless, as will be described below, the combination of the Timber Regulation, the FLEGT Regulation and a VPA has effects outside of the EU, specifically in relation to forest law within timber exporting states (both states that grow timber and those that process timber) and what is to be understood a legal timber in those states.

Working as a form of multilevel regulation, the FLEGT scheme does much to address environmental problems and promote law reforms and implementation in the environmental field in processing and exporting countries. The Preamble of the 2010 Timber Regulation specifically notes that forests provide a broad variety of environmental, economic and social benefits including timber and non-timber forest products and environmental services essential for humankind, such as maintaining biodiversity and ecosystem functions and protecting the climate system. Among social issues, it notes that illegal logging threatens the livelihood of local forest-dependent communities (EU 2010, preambular paras. 1 and 3). However, the FLEGT scheme and in particular the 2010 Regulation are also an example that marrying environmental and social sustainability is not easy, especially if the perspective is limited to one of those areas

(which in the case of the FLEGT scheme is the environmental one).

Illegal logging is the harvesting of timber in contravention of the laws and regulations of the country of harvest. The practice is recognised to have significant adverse economic, environmental and social impact. It leads to deforestation as corollary to a loss of biodiversity, lost revenue and other missed economic benefits. Illegal logging is believed to cost timber-producing countries 10-15 billion Euros per year in lost revenues (Europa 2008, WWF 2008). This undermines the competitiveness of legal forestry and discourages or harms efforts to develop long-term sustainable forestry practices. A global problem, illegal logging is particularly prone to occur in states with weak legal and governance systems. Illegal logging is often a result of the prevalence of corruption, not least among forestry officials (World Bank 2010, Miller 2011 esp. at 51-52 with references). Tropical timber is a valuable source of export income to many poor countries, and a valued product with costumers in Europe, Japan, Australia and the US. Among intergovernmental initiatives to address the problem, the EU's FLEGT scheme stands apart from development organisations' forest legality and governance initiatives (such as the World Bank's Forest Law Enforcement and Governance (FLEG) programme) by adding a trade element (hence the 'T' in FLEGT) intended to promote the scheme through the force of the market. The 2010 Timber Regulation introduces legality and due diligence requirements for the EU market that somewhat resemble measures introduced in later years in the United States and a few other jurisdictions.³

³ Amending a 100 year old statute (16 U.S.C. § 3371-3378) in May 2008 the U.S. Congress passed a law banning commerce in illegally sourced plants and their products, including timber and wood products, and requiring 'due care' and documentation. In Switzerland an Ordinance requires suppliers selling timber or wood products to

Primarily seen as an environmental issue, illegal logging and timber processing directly and indirectly causes adverse social impact affecting several types of human rights as defined in international declarations and conventions, in particular the Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Social and Economic Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), International Labour Organisation (ILO) Convention No. 169 on Indigenous Peoples and ILO conventions relating to working conditions, including occupational health and safety. In particular, local communities that live in or off the forest are affected in terms of access to land and continuation of traditional forestry practices. Illegal logging affects cultural practices related to forest or land usage and spurs conflicts over land and resources. The logging and timber industry in states that suffer from weak legal frameworks and monitoring may apply industrial standards or practices that are insufficient to protect workers against occupational health and safety injuries in an industry fraught with such risks.

When adopting the FLEGT Action Plan in 2003, at the level of policy the Council of the European Union urged the Community and Member States

- to enter into political dialogue with key target countries to instigate forest sector governance reforms, more specifically to:
- strengthen land tenure and access rights especially for marginalised, rural communities and indigenous peoples;
 - strengthen effective participation of all stakeholders, notably of non-state actors and

Swiss consumers to provide information on the species of wood and place of harvest. (EFI EU FLEGT News, October/November 2010). Japan and Australia have introduced similar measures.

indigenous peoples, in policy-making and implementation;

- increase transparency in association with forest exploitation operations, including through the introduction of independent monitoring;
- reduce corruption in association with the award of forest exploitations concessions, and the harvesting and trade in timber;
- engage the private sector of the timber producing countries in the efforts to combat illegal logging;
- address other issues related to illegal logging as identified, such as the financing of violent conflict (Council Conclusions 2003 – references in original omitted).

Thus, at the level of policy (including bilateral dialogue) social issues related to sustainable forestry are clearly objectives of the FLEGT Action Plan. Yet in terms of the legality definition of exporting states, which is a corner stone in the implementation of the FLEGT scheme, social issues are addressed only to a limited extent and where mentioned skirt problems such as indigenous rights and occupational health and safety.

The FLEGT scheme is both innovative and comprehensive in terms of seeking to regulate practices in states outside the regulator's jurisdiction (in casu the EU) through regulatory measures within the regulator's legislative powers (the VPAs and Regulations). The combination of extra- and intra-EU measures provides the scheme and its usage of intra-EU legislative acts (the Regulations) with a form of extraterritorial effect. Yet the relatively narrow focus of the scheme on environmental sustainability and anti-corruption measures calls for attention to be paid to its impact on social sustainability. This goes for instance for impact on the rights of people who live in or off the forest whose customary rights to forest usage may be adversely affected

in a rush to set legality definitions that comply with the 2010 Regulation's requirements on formal land rights, occupational health and safety in the sector which is not addressed by the legality definition requirements. For example, indications made to the authors during research for the Vietnam case study suggest that the economic interest of a government in fast developing a legality definition in order to enter into a VPA and preserving access to the EU market for the country's large small and medium sized timber processing sector may overrule time-consuming clarifications of contested boundaries or formalisation of informal usage rights, with the possible result that such contested or informal rights are simply declared illegal rather than formalised. Along with this comes the risk of reduced emphasis on social sustainability in forest management and timber processing, which may result from reduced application of other sustainability schemes that include social along with environmental issues, such as for the purposes of the current article, the case of FSC.

Sustainable forestry does not only require environmental sustainability and management, but also social sustainability, not least in terms of the human rights of communities and workers. That is a particularly acute need in countries in which rights of ethnic or other minorities who live in forest areas are known to pose problems in terms of international human rights. Social concerns are also relevant in states where respect and implementation of labour standards, including occupational health and safety standards, are problematic from a human rights perspective. Without detailed requirements in relation to human rights including labour rights and with detailed requirements on legality verification, FLEGT both complements and competes with private schemes like the Forest Stewardship Council (FSC) and the Programme for Endorsement of Forestry Certification (PEFC). FLEGT

complements the soft, non-enforceable schemes in setting enforceable legality requirements, but competes with the latter by being less comprehensive and therefore less demanding in terms of social sustainability requirements. The FLEGT scheme's emphasis on environmental sustainability differs from the broader sustainability emphasis proffered by private or public-private forestry sustainability schemes, such as FSC and PEFC, both of which include human rights and particularly labour rights beyond the limited focus of FLEGT.

Vietnam, a VPA-candidate aiming to conclude negotiations in 2013, offers insight into both issues and therefore serves as a case study in this article. FSC has obtained some hold in Vietnam's forestry and timber processing sectors exporting to sustainability conscious customers in the EU and elsewhere. FSC is purely voluntary and private, but serves as a case for placing FLEGT into perspective because of FSC's emphasis on social issues that are not addressed directly by the FLEGT scheme.

This is not to say that FSC does not have its own weaknesses (such as limited application outside temperate regions and questionable effectiveness with regard to conservation of biodiversity) or that voluntary sustainability modalities are preferable to those that work through mandatory action. Still, from the human rights and social sustainability perspective, FSC does offer a requirement (soft but with possibility to be included in contractual obligations in the supply chain) to consider social issues. Beyond the FSC issues, Vietnam serves as a case to illustrate some human rights issues that fail to be considered by the FLEGT scheme and may suffer as a result of the rush to set up VPAs and the scheme's limited focus on what may constitute legality in forestry.

Certification of compliance with privately developed criteria (such as FSC or similar schemes that do not have a legality verification

element) is not sufficient legality proof for the purposes of the Timber Regulation. Certification by FSC, PEFC and other third party verified schemes can be used by importers in their risk assessment and for risk mitigation purposes. However, certification is not an evidence of legality in accordance with the requirements under the Timber Regulation, and such certification therefore does not absolve importers from the Regulation's requirement that they collect information and assess risks (see also EFI (2012)). From the European retailers' and consumers' perspective, FSC or PEFC labelling may still be of interest as these labels are visible signals to consumers that timber or timber products are produced or sourced in accordance with certain sustainability criteria. However, from the producer's or processor's perspective in a non-EU, typical tropical, country competing in a global market as well as for governments seeking to preserve or gain access to the EU market for their timber industry, such labelling may not be very important compared to a VPA. As will be elaborated below based on the example of FSC, in terms of social issues related to sustainable timber FSC goes considerably further than the limited requirements for a VPA. While large-scale producers or processors who have already introduced labelling may prefer to continue applying these for the signal value to consumers, small and medium sized enterprises may prefer to simply comply with the legality requirements established by the national regulator for the purpose of the VPA.⁴ Because the global market for timber includes public authorities as well as emerging markets that do not (yet) have strong policies or law in relation to sustainably sourced timber, counting on a limited number of private or public consum-

⁴ Information to authors from interviews with timber industry and forestry sector specialists, Ho Chi Minh City and Hanoi, Vietnam, 2, 20 and 23 November 2012.

ers to demand broad sustainability may not be sufficient to drive suppliers to apply the more demanding schemes. Therefore, the fact that a FLEGT licence facilitates entry to the EU market may affect the application of forestry sustainability schemes, such as FSC or PEFC, that have so far been applied by the industry in order to gain access to markets of CSR concerned buyers, or a number of suppliers may simply turn to less demanding markets. In turn, this may affect the consideration of social issues considered by such schemes as part of sustainable forestry or timber supply chain practices.

Based on this complex web of issues, we proceed in the subsequent sections to identifying and discussing challenges to social sustainability that may result from the FLEGT scheme's emphasis on legality and its limited requirements in this regard.

2. The institutional framework

This sub-chapter sets out the key elements and provisions under the FLEGT scheme and its implementing modalities as well as of FSC for the purposes of the subsequent discussion. Hence, the sections do not provide complete overviews of the legal or political context but deal mainly with the parts of the FLEGT scheme that relate to social issues in tropical timber producing or processing states, and to those FSC principles that relate to social issues.

2.1 The FLEGT scheme: regulatory instruments to promote the trade in legal timber

2.1.1 2003 Action Plan and 2005 Regulation

When the FLEGT Action Plan was launched in 2003 it was described as the European Union's response to the global problem of illegal logging and the international trade in illegally harvested timber. To prevent imports of illegal timber to the EU, the Action Plan sets out measures intended to influence both the demand and the

supply of legal and sustainably produced timber. Within the EU, the Action Plan seeks, *i.a.*, to increase public and private consumer demand for verified legally produced timber through encouraging public procurement of such timber and encouraging the private sector in the EU to adopt purchasing policies ensuring that they use only legal timber in their supply chains (EU 2003). As noted above, with regard to activities outside the EU the Action Plan seeks to promote the harvest and trading of legal timber through capacity building, law and governance reforms, and the force of the market.

Adopted in 2005 the FLEGT Regulation establishes a set of rules for the import of certain timber products for the purposes of implementing the FLEGT licensing scheme. The Regulation provides border control requirements for EU member states and sets out details of VPAs with a view to establishing a licensing scheme with partner countries. The intention was to make entering into a VPA attractive to timber exporting countries as this would allow for easy access to the EU market. However, by 2008–2009 the impact of the VPA option was considered to be limited as only one state was in the process of negotiating a VPA (Ghana, which signed a VPA in 2009). As a result, to strengthen the EU's efforts to promote sustainable forestry, in the process of reviewing the results of the 2005 Regulation the European Parliament proposed stronger measures. These were operationalised with the Timber Regulation to which the subsequent subsection turn.

2.1.2 The 2010 Timber Regulation

While the FLEGT Action Plan and 2005 Regulation sought to induce forestry governance and law reform in timber producing countries by providing easy access to the EU market for timber from VPA states, the 2010 Regulation more radically aims to exclude illegal timber from the

EU market. With effect from 3 March 2013 the Timber Regulation prohibits the placing of illegally harvested timber and products derived from such timber on the EU market.⁵

The Regulation requires importers (“operators that place timber and timber products on the internal market for the first time” (EU 2010 preamble para. 15, art. 4(2)) to exercise due diligence to ensure legality of timber and timber products which they place on the EU market; and it sets out detailed requirements for the due diligence process (art. 6). Importers must apply information on the timber and on compliance with national legislation in the harvest state to conduct an assessment of risk that the timber is illegal. If the assessment shows that there is a risk of illegal timber in the supply chain, the importer must seek to mitigate the risk of illegal timber by requiring additional information and verification from the supplier. Importers may apply due diligence systems offered by so-called ‘monitoring organisations’. To ensure traceability of timber and timber products that have entered the EU market, the Regulation also requires that intra-EU traders keep records of their suppliers and customers (art. 5).

At the time of writing (December 2012), VPAs have been entered into with five African and one Asian state. Six states, including Vietnam, are negotiating VPAs. This is a considerable rise from the single VPA (with Ghana) that had been concluded prior to the adoption of the Timber Regulation. This indicates that seen in isolation, the Timber Regulation has the potential to promote sustainable forestry partly driven by the

easy access to the EU market established through the VPA and licensing scheme under the FLEGT Regulation.

2.1.3 Voluntary Partnership Agreements (VPAs)

As noted, a VPA is a bilateral trade agreement between the EU and a country that produces or processes timber. VPAs are voluntary only in the sense that partner countries are under no legal obligation to enter into such an agreement with the EU. Once a VPA has been concluded, it is binding as any other international treaty.

Under a VPA, partner states and the EU commit to trading only in wood products that can be verified as legal. A state entering into a VPA with the EU undertakes to establish a ‘Legality Assurance System’ to ensure that timber being exported to the EU is legally produced. The legal source and production of wood are verified by the partner country and subject to independent monitoring. A ‘FLEGT license’ issued by the exporting state is awarded to timber verified as legal. Once the Legality Assurance System is in place, the EU will only accept FLEGT licensed timber from that country. The EU still accepts non-licensed timber and timber products from countries that do not have a FLEGT licensing scheme. Such timber and timber products must be documented to be legality verified through other schemes.

By itself, the VPA does not ensure easy access to the EU market. But since establishing a VPA needs to be in place before the legality assurance system can be established, the legality definition which is key for the VPA as well as the assurance system becomes a *sine qua non* for a state’s achieving the ‘green lane’.

The process to draft a VPA is initiated at the request of the exporting country. Obviously, the EU is not able to regulate matters outside its jurisdiction. Still, the EU may set conditions for entering into a VPA. A VPA partner country is supposed by the EU to develop its legality defini-

⁵ The Regulation covers a range of timber products, including solid wood products, flooring and unprinted paper. Recycled products and rattan, bamboo and printed paper products (books, magazines and newspapers) are not covered. The product scope covered by the Regulation can be amended as necessary.

tion through a transparent and inclusive process with full stakeholder involvement. According to the EU Commission's FLEGT website, the development of the legality definition should involve stakeholders "so that there is a wide consensus supporting the defined requirements" (FLEGT website, "The Elements"). The 'consensus building' process within the partner country should include information dissemination, opportunities for stakeholders to organise and create a structure for discussion; and a debate to take place within the partner country on the specification of legality, the tracking system, and other elements required under a VPA (FLEGT website, "The Process"). In other words, the legality definition process is assumed to build on participatory processes which by themselves presuppose a vibrant civil society and culture of debate. This is associated with the sort of rule formation that the EU from a political perspective would like to see flourish but which also encounters obstacles in states which do not enjoy such a culture of debate, let alone legal guarantees or broad usage by citizens of the freedom of association or expression in order to state and seek to protect interests of particular groups, such as forest dependent communities.

Bilateral negotiations between the EU and the partner country to conclude a VPA are not initiated until the "consensus building process" has been finalised with a legality definition. Thus, to a potential partner state interested (or even eager) to have a VPA to be able to develop a FLEGT licensing system to make use of the 'green lane' to the EU market, the legality definition process may be seen as a cumbersome requirement and a process to be completed as soon as possible.

When the VPA is signed and ratified by the partner country and the EU, a tracking system must be developed or existing systems revised in order to live up to the requirements of the VPA. The partner state must establish a

licensing system and select independent auditors. VPAs are implemented through the of FLEGT licences, independent monitoring, and timber controls at EU borders, thus working through steps both in exporting states and the EU.

2.1.4 Legality, VPAs and due diligence

Before entering into a VPA the EU Commission will consider whether the legality definition accords with the overall policy requirement on economic, environmental and social aspects of forestry management. The EU may suggest changes, but in terms of the law the substantive elements of the legality definition is fully within the sovereign decision making power of the partner state. This leaves it up to each state to consider whether and to what extent to include (or if necessary, develop) national law that relates to social, economic or cultural rights of people living in or off the forest, occupational health and safety procedures and other working conditions related to the forest industry, or other social or human rights issues of particular relevance to forest communities and the forest industry. Likewise, this provides timber exporting states with considerable discretion to define what is to be acknowledged as legal timber in the EU, based on their own political, economic and social priorities, as well as according to what is locally convenient (for example to ensure competitive production prices) in the context of regional or global competition.

For the purpose of due diligence to be exercised in the absence of a FLEGT licence, legality is to be assessed on the basis of national law, including implementation within the 'partner' state's national legal system of "relevant international conventions" which that state has ratified or acceded to (EU 2010 preambular para. 14). Not all substantive areas of law are to be considered for this purpose, however: only legislation

relating to harvest rights, payment and duties, environmental, management and biodiversity conservation issues related to harvesting, third parties' legal usage and tenure rights, and trade and customs (EU 2010, art. 2(h)). The Commission Implementing Regulation (No. 607/2012, EU 2012) specifies technical requirements for the due diligence but does not elaborate the substantive issues to be considered.

For trade of timber and timber products within the EU, legality is based on the definition set by each timber exporting state (EU 2005, art. 2(10); EU 2010 preamble para. 14, art. 2). According to the Timber Regulation, which requires due diligence of importers, "legally harvested" means harvested in accordance with the applicable legislation in the country of harvest (art. 2 (f)). It further provides that

'applicable legislation' means the legislation in force in the country of harvest covering the following matters:

- rights to harvest timber within legally gazetted boundaries,
- payments for harvest rights and timber including duties related to timber harvesting,
- timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,
- third parties' legal rights concerning use and tenure that are affected by timber harvesting, and
- trade and customs, in so far as the forest sector is concerned. (art. 2 (h)).

The Timber Regulation provisions on what issues must be considered by the legality due diligence by importers functions as a sort of catch clause for timber or timber products imported from a state that does not (yet) offer a FLEGT licence based on a VPA and functioning Timber Legality Assurance System.

In relation to the legality definition, VPAs are negotiated in a grey zone between politics and law, with EU politics potentially having an impact on the law in terms of the coverage of the partner state legality definition but with no certainty that this will occur. On the policy side, the EU has indicated a very general set of overall requirements that the legal framework should relate to economic, environmental and social aspects of forest management and timber processing (FLEGT website, "The Elements"). On the law side, timber producing or processing states are free to set their own definitions of what is to be considered 'legal timber', thus what national legislation should be complied with. The Timber Regulation notes that "In the absence of an internationally agreed definition, the legislation of the country where the timber was harvested, including regulations as well as the implementation in that country of relevant international conventions to which that country is party, should be the basis for defining what constitutes illegal logging" (preamble, para. 14).

No explicit provision is made in the operative part of the Timber Regulation on the significance of "relevant international conventions", nor does the Regulation indicate what is "relevant" for the purposes of identifying treaties to be considered. Arguably, this may leave issues covered by international treaties on social, environmental or economic issues which are related to forest management but not effectively implemented within the partner state outside the legality definition. From a human rights perspective, particularly points related to the rights of people living in and off the forest, and working conditions related to harvest and processing are of interest in this context. Tenure rights address only some rights related to the former, as according to the Timber Regulation recognised tenure and use rights must be based on formal recognition. Therefore, usage rights based on informal

or customary law may risk being disregarded, as may disputed or overlapping usage claims. Those, however, are often of particular significance to minorities or other vulnerable groups who depend on the forest for their living.

As discussed below based on the Vietnam case study, the drive by governments to set up a VPA and therefore to live up to the requirements of legally recognised land or usage rights may result in customary usage rights being rejected in favour of allocation of land to other groups. Protection of working conditions including occupational health and safety may be limited. These types of labour rights (salaries, overtime payment, investing in occupational health and safety equipment) are costly from a purely economic perspective. As a result of competition among timber exporting and processing states, the bar may be set low in this context rather than high. And while the FLEGT scheme as such seeks to promote sustainable forest management, neither the general policy requirement for the national legality definition, nor the Timber Regulation's legality definition for the purposes of due diligence requires forest management practices that prevent flooding and/or drought. As a result, a legality definition developed for the purpose of a VPA in order to obtain the 'green lane' into the EU market may in effect promote forest usage that depletes forests, institutionalise forestry or processing practices that are the most harmful to those individuals or groups most in need of protection by legalising them, or not ensure the planting and harvest of trees in a sustained manner that will protect the social livelihood conditions of people living around the forest. And timber imported into the EU according to the Timber Regulation's due diligence requirement may be legal according to the law of the exporting state but without assurance that the production or processing method ensures environmental sustainability that may in the longer

term seriously affect living conditions and human rights to food, shelter, land or customary non-formalised usage or tenure rights.

2.1.5 FLEGT licences and partner state timber legality assurance systems

A FLEGT licence is defined as a shipment-based or market participant-based document of a standard format which is to be forgery-resistant, tamper-proof, and verifiable, and which refers to a shipment as being in compliance with the requirements of the FLEGT licensing scheme, duly issued and validated by a partner country's licensing authority (EU 2005, art. 2 (5)).

Issuance of FLEGT licences is connected to the Legality Assurance System in the VPA partner country. The objective is that timber is licensed as verified to have been legally produced, that is, having been produced from domestic timber that was legally harvested or timber that was legally imported into a partner country in accordance with national laws determined by that partner country as set out in the VPA (EU 2005, art. 2 (10)). The system is required in order to verify that laws included in the legality definition have been complied with, and that supply chain controls are implemented. Verification may be exercised by the government, the private sector or NGOs. It must contain a specific legality verification element. Once the system is in place, imports into the EU of timber products exported from partner countries are only allowed if the shipment is covered by a FLEGT licence (EU 2005, art. 4 (1)).

A FLEGT licence does not come with a label or other device that consumers may identify as a token of legality in accordance with the FLEGT Regulation. Thus, in contrast to schemes like FSC and PEFC which apply a label to indicate to buyers and consumers that a product has been certified, FLEGT licensed timber will not be visibly legal to the consumer. The difference may be put

down to different working modalities and receivers of visible signals (FLEGT working through the market at the level of buyers (importers, supply chain sellers) rather than consumers).

2.2 FSC

FSC is a private certification and labelling scheme developed by NGOs and the forest industry to ensure that forest products used originate from responsibly harvested and verified sources. A voluntary scheme, FSC offers companies a set of environmental and social sustainability criteria to follow in order to act in a socially responsible way. FSC certified forest products may carry the FSC label.

FSC was established in 1993 by NGOs and forestry sector actors in response to disillusionment with what they saw as incapacity of inter-governmental processes (the UN and its member states) to deliver comprehensive regulation of sustainable forestry at the 1992 Rio Summit on Sustainable Development. In terms of organisation, FSC is a multi-stakeholder organisation which provides certification on the basis of 10 Principles and 57 criteria developed by FSC and promotes the application of the principles. FSC offers three types of certification: Forest management, chain of custody, and FSC controlled wood (FSC homepage, "FSC certification"), based on assessment of respect for the principles and criteria. FSC certificates are issued by external consultants for a fee.

Setting out detailed requirements, the ten FSC principles provide detailed guidance for sustainable forestry that considers both environmental and social issues. Principles 1–4 focus on legality and social issues. They require compliance with all applicable laws and international treaties; demonstrated and uncontested, clearly defined, long-term land tenure and use rights; recognition and respect of indigenous peoples' rights; maintenance or enhancement of long-

term social and economic well-being of forest workers and local communities and respect of worker's rights in compliance with ILO conventions. Principles 5–9 focus on environmental sustainable forest usage. These require equitable use and sharing of benefits derived from the forest; reduction of environmental impact of logging activities and maintenance of the ecological functions and integrity of the forest; appropriate and continuously updated management plan appropriate monitoring and assessment activities to assess the condition of the forest, management activities and their social and environmental impacts; maintenance of High Conservation Value Forests defined as environmental and social values that are considered to be of outstanding significance or critical importance. Finally, principle 10 requires plantations to contribute to reduce the pressures on and promote the restoration and conservation of natural forests (FSC homepage, *FSC Principles and Criteria*).

For the purposes of the current article, principles 1–4 are the most relevant due to their emphasis on social issues with human rights relevance. Criteria under Principle 1 specify, *inter alia*, that forest management shall respect all national and local laws and administrative requirements; and that in signatory states the provisions of all binding international agreements shall be respected. Besides CITES (also noted in the FLEGT context) and conventions relating to environment and biodiversity, this criterion specifically notes ILO Conventions, thus connecting to labour conditions as well as concerns related to indigenous peoples under Convention 169 in states to which these conventions apply. Criteria under Principle 2 note, amongst others, that local communities with legal or customary tenure or use rights shall maintain control to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies. Criteria

under Principle 3 state that indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies, that forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples, and that sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers. It further notes that indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence. Criteria under Principle 4 note, amongst others, that forest management should meet or exceed all applicable laws and/or regulations covering health and safety of employees and their families, and that the rights of workers to organize and voluntarily negotiate with their employers shall be guaranteed as outlined in ILO's Conventions 87 and 98 on these matters.

Thus, the application of FSC principles and criteria by timber producing or processing companies aims to ensure that not only environmental sustainability is considered, but also that a range of social issues which are both core to the problems often facing the sector (such as customary use rights and occupational health and safety) and supported by international law standards on human rights or human rights related international labour rights (ILO conventions) are taken into account.

3. Sustainable development, Corporate Social Responsibility, and the law

The commonly accepted definition of sustainable development refers to meeting the needs of present generations while enabling future generations to meet their own needs (UN 1987). The human rights aspect of sustainable development and the conduct of the private sector, including through the notion of Corporate Social Responsibility (CSR) has become strengthened with globalisation and the spread of transnational business (Welford 2002, Whelan, Moon and Orlitzky 2009).

While successful efforts at the international and intergovernmental level to regulate the conduct of the private sector with regard to adverse impact on society have been rather limited until recently, for a longer period of time private initiatives have emerged and flourished based on social expectations on CSR. The FSC is an example of this. In the absence of public regulation across national or regional boundaries, private initiatives like the FSC were developed to offer options for the forest and timber industry and consumers to work along a set of normative guidelines that connect to international law standards (such as ILO standards), which due to the state-centred structure of international law only bind states directly. CSR, by contrast, has been seen to be voluntary and as a result has tended to be seen also as an area outside of governmental and intergovernmental regulation. This idea of CSR as only voluntary, however, is giving way to a more integrated approach that combines public and private regulatory modalities (Buhmann 2008, Buhmann 2011a). While the 1990s and early 2000s were marked by an emergence of private CSR codes, process standards and reporting initiatives, later years have witnessed an emergence of regulation of CSR by intergovernmental organisations as well as nation states, as

well as the promotion of CSR by combinations of enforceable public law and incentives as well as social expectations and private schemes. Several of these have emerged in efforts to remedy governance gaps that otherwise enable transnational business activities to harm sustainable environmental or human development (Lister 2011, Cashore and Stone 2011, Buhmann 2011a). The idea of CSR as 'voluntary' in the sense of action above what is required by law is giving way to recognition that CSR is increasingly subjected to governmental regulation, and that this impacts organisations' internalisation of social expectations (Mares 2012, Horrigan 2010, Matten & Moon 2008, McBarnet 2007, Zerk 2006). Thus, CSR is no longer simply a matter of vague social expectations related to sustainability and voluntary private sector action, but offers potential for combining public and enforceable law with softer public regulatory measures and social expectations of the market to address global sustainability concerns beyond the limits of national jurisdictions. This has come out clearly with recent years' clarification of CSR in relation to business and human rights.

With developments under the United Nations (UN) since 2005, human rights responsibilities of business enterprises have become substantively unfolded, particularly with a basis in international law. Under a mandate established by the UN Secretary General, as Special Representative on Business and Human Rights (SRSG) Professor John Ruggie noted that companies may affect all human rights (civil, cultural, economic, political and social), and that attention should be paid by companies as well as (inter-) governmental organisations to company respect of ILO core conventions (SRSG 2008, SRSG 2011). Under the *Protect, Respect, Remedy* framework accepted by the UN Human Rights Council in 2008, SRSG John Ruggie reminded the global society that states' duty to protect under international

human rights law includes an obligation to protect individuals against human rights violations caused by other non-state actors, such as companies, as well as by state-owned companies (SRSG 2008).

Labour rights as elaborated in ILO core conventions as well as other working condition related labour rights such as occupational health and safety are of particular relevance to many companies and communities. Rights considered 'core labour rights' under international labour law (freedom of association and negotiation, non-discrimination, elimination of child labour and forced labour) and other labour rights related to basic working conditions (such as occupational health and safety, working hours and payment) are regulated not only by ILO conventions but also under international human rights law (in particular article 7 of the International Covenant on Economic, Social and Cultural Rights).

The EU in a 2002 Communication's definition of CSR emphasised the 'voluntary' aspect (EU 2002). The 2002 Communication defined CSR as "behaviour by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest" (EU2002: 5). However, under the influence of the SRSG's recommendations, a new definition presented in a 2011 EU Communication omits reference to whether CSR is 'voluntary' or 'mandatory'. Stating simply that CSR is "the responsibility of enterprises for their impacts on society", it is qualified by noting that respect for applicable legislation is a prerequisite for "meeting that responsibility", and that to "fully meet their corporate social responsibility" enterprises should have processes in place to integrate social, environmental, ethical, human rights and consumer concerns into their business operations to identify, prevent and mitigate possible adverse impact (EU 2011, section 3.1). Referring to recommendations by SRSG John Ruggie, it

even announces a “smart mix” strategy of voluntary ‘policy measures’ and complementary (hard public) regulation to promote CSR (EU 2011, section 3.4). The EU’s approach to CSR, which remains (even with the 2011 Communication, cf EU 2011 section 3.4.) at least at the level of formality defined as a “Business-Driven, Voluntary and Process-Oriented Policy”, has been questioned for being too little integrated with EU legislative initiatives or development policies (Wouters & Hachez 2009).

Although at the level of policy both the European Parliament and the Commission have referred extensively to human rights and international human rights standards as what could constitute a normative part of a European CSR concept, the approach adopted by the Commission has not been very effective in bringing out the human rights potential in resulting normative guidance, nor so far in connecting the potential between authorities’ obligations, business compliance with law and private sector action, nor specifically with business compliance with requirements related to non-EU host states’ international obligations, such as international labour or human rights conventions that may not be sufficiently implemented or enforced in host states (Buhmann 2011b).

Preceding the EU’s 2011 definition of CSR, the FLEGT scheme and Regulations simply do not make reference to CSR. Developed under the EU Commission’s Directorate General (DG) for Environment, it is not surprising that the FLEGT scheme and Regulations should emphasise environmental issues. Yet in view of general EU policies related to sustainable development as well as specific policy and legal measures such as the GSP+ scheme, it is noteworthy that social sustainability issues are mainly considered indirectly and in a limited fashion. Also in view of the prevalence of social sustainability concerns in relation to forestry, such as those that gave rise

to the inclusion of these schemes in the formulation of the FSC principles or other private or public-private CSR schemes, it is surprising that the FLEGT scheme makes only limited direct reference to social issues.

The disconnect with compliance that has marked the EU’s approach to CSR until the 2011 Communication may be a reason why the EU’s FLEGT Action Plan and the Regulations do not refer to CSR, although much of what the Action Plan and Regulations aim to induce in terms of conduct in the forestry sector in timber exporting countries has many parallels to CSR expectations. The disconnect, however, may also be an explanation for the Commission’s limited focus on social sustainability issues and therefore its failure to consider sustainable forestry in the comprehensive fashion that schemes like FSC do. In view of the EU’s engagement with the SRSG process it is, however, striking that the 2010 Regulation does not take account of the normative guidance on business responsibilities for human rights that was developed by SRSG John Ruggie, including the 2008 *Protect, Respect, Remedy* ‘UN Framework’ that clarifies both the state duty to protect individuals (and groups) against human rights violations caused by business enterprises (whether private or state enterprises) and the corporate responsibility to respect, which encompasses not only the duty to comply with national law but also sets out international human rights and labour law as a normative source of social expectations of business enterprises (SRSG 2008).

Admittedly, achieving social sustainability in forestry in terms of, for example, raising working conditions or social conditions, which are closely related to the life of individuals living in or off the forest, is complex, often politically sensitive, and at least in the short term may be seen as costly without generating production savings or income. Raising working conditions often lead to more expensive production processes. Human

rights are politically sensitive in some timber exporting states. For this reason, states may be less willing to introduce or amend legislation to protect the relevant rights. 'Legality' is not by default the same as sustainability – environmental or social. Yet, recent years' recognition of law as a lever for CSR and emphasis on the role that international law plays as source of CSR normativity, particularly in the field of human rights, underscore that linking CSR with law may be fruitful, and that sustainable development requires broad based sustainability that connects environmental and social aspects (Buhmann 2008, SRSG 2008, SRSG 2011).

An example of an "experimentalist regime" that interacts with public law in timber producing states and to some extent with private certification schemes, the EU's FLEGT scheme may potentially offer a flexible and adaptive transnational governance scheme (Overdevest and Zeitlin 2012). However, as it also both complements and competes with private forest sustainability schemes, the omission of reference to several social sustainability concerns that are also forestry-relevant human rights becomes significant. As discussed in section 5, the disconnect from a comprehensive approach to sustainability leads to potentially undermining broader sustainability schemes that also address such concerns, and risks contributing to institutionalisation of forestry sector practices that contravene human rights.

4. Vietnam's forestry and timber processing sectors

Vietnam is the world's fourth largest exporter of wood products. The EU is a large market for Vietnam's considerable export of processed timber products, especially furniture. Officially, only around 10 per cent of the wood employed for exported products is harvested in Vietnam (ProForest 2009, McElwee 2004). Large quantities of timber for Vietnam's timber processing

industry come from Laos, Cambodia, Burma, Malaysia, Indonesia and Congo, where reportedly some of the timber supply originates from unknown or possibly illegal sources (ProForest 2009). According to a World Bank report, weak forest governance in neighbouring countries coupled with a strong market demand from Vietnam's wood-processing industry for cheap products motivates illegal trade, and corruption of customs and other government officials permit illegal timber trade to persist (World Bank 2010).

A socialist country, Vietnam does not have private ownership of forest land. The land belongs to the state which manages it on behalf of the people (Land Law 2004 art. 1). Land management and forest usage is governed through certificates which are issued to land users, of which the two main groups are comprised of local communities or households, and so-called state forest enterprises. A third group comprises individuals or groups who live in or around the forest and use it based on customary usage rights. The majority of the latter are so-called ethnic minorities, many of whom live in the mountainous forest areas of Vietnam. Some of these claim to be indigenous groups, having settled in Vietnam before the dominant Kinh people (Nguyen Khac Vien 2009; Government of Vietnam 2009; Wikipedia entry 'Demographics of Vietnam').

Vietnam's forestry sector is characterised by a combination of actors, including the national government, state forest enterprises, para-statal logging companies, provincial forest policy managers, and resident villagers around protected forests, many of which are 'ethnic minorities' (McElwee 2004). These are complemented by a number of private companies, and at the production level by community forestry and small scale forest users under the management of local government (People's Committees and People's Councils) at village, town and provincial level.

Sustainable forest management is decisive

to the livelihood of many local people, including indigenous people (ethnic minorities). The Government of Vietnam has introduced policies and legislation aiming at community forestry as a strategy to promote pro-poor and sustainable forest governance (FAO 2007, Nguyen 2006, Sikor & Nguyen 2007). The government officially recognises 54 ethnic minority groups each with their own language, lifestyle, and cultural heritage. Most, if not all of these groups are poor and forest dependent and live in the mountainous areas of the country (Government of Vietnam 2009). Sustainable access to forest and forest products is decisive to these groups of people (Sunderlin & Ba 2005). In a comprehensive poverty reduction strategy adopted in 2002, the Government linked reforestation and community based forest protection with rural development (Government of Vietnam 2002). More recently, the link between forest and poverty reduction has also been recognised by the Government in its strategies with regard to land and forest allocation (Government of Vietnam 2009).

In the mid-1950s, North Vietnam nationalised all natural forests. The process was extended to the South in 1975 after the reunification of Vietnam. National forests were turned over to state forest enterprises to log. Any locally used forest was considered to be national property. Still, local communities often continued to manage forests according to their traditions and customs. Access and tenure decreased for the communities in particular in the northwest forests of the country, where many non-Vietnamese minorities groups live. The borders of land rights and exploitation areas between villagers and state forest enterprises remain contested in many rural areas (McElwee 2004). Much of the timber that goes into the country's timber processing industry is grown in areas traditionally inhabited by 'ethnic groups'. Some of these have long-standing customs related to living off the

forest, living in houses built from forest timber, using timber for cooking and heating fuel, etc. Central level induced forest management plans introduced in later years have limited the legal possibilities of small-scale farmers and ethnic groups living in forest areas to gain access to wood for such subsistence fundamentals as maintenance of houses and firewood for heating and cooking.

Vietnam's official forestry policy aims to increase overall forest cover and protect natural forest, improve forest-based livelihoods and employment opportunities, and promote tenure reform and land reform of forest lands. The Constitution and several statutes, including the Land Law, the Forest Protection Law, the Law on Environmental Protection and the Penal Law already set out certain rights and duties related to forestry management, access, usage, ownership, protection and enforcement. There are, however, both gaps and overlaps between some of this legislation. For example, according to information provided to the authors during research in Vietnam, some case studies undertaken by civil society organisations involved in Vietnam's legality definition process suggest that inconsistencies between land and forestry law may mean that land that which is not actively used for a limited period of years may be reallocated by the government, for example to state forest enterprises or other users. This, however, may conflict both with practices of 'ethnic minorities' who customarily leave forest land to re-grow for a longer period, and with the Forest Law that allows for allocation of forest land for protected forest, with the land entrusted to local people for protection (and therefore, non-use).

Having decided in 2010 to enter the VPA process, Vietnam quickly moved towards the process of formal negotiations, originally aiming to finalise these in 2012 (Nguyen 2011) but at the time of writing more likely to not finalise negoti-

ations until some time into 2013. Studies to identify challenges and opportunities for Vietnam's conclusion of a VPA with the EU have indicated that within the Government of Vietnam and among forestry actors, there is concern about the potential negative impact on trade which may result from the application of the Timber Regulation, especially for small-scale producers (ProForest 2009). There is concern that small companies will encounter problems in setting up procedures to ensure the legality of timber supply and that they may incur increased costs from this or simply be pushed out of business. It is feared that timber product exports may decrease, and that there will be negative impact on trade and consequently on the national economy if companies are unable to provide documentation to prove legality (ProForest 2009). This may impact the economy of individual forest farmers, especially at community level. Limited reference to working conditions in recent draft legality definitions (Socialist Republic of Vietnam 2012a, Socialist Republic of Vietnam 2012b) also suggests that the legality definition process is not currently taken as an option to significantly strengthen the conditions of employees in the timber processing industry, such as in relation to occupational health and safety and other working conditions that are important from the perspective of social sustainability.

5. Discussion

5.1 Sustainable development and human rights as FLEGT elements

The Timber Regulation was drafted and is officially promoted as a measure to promote sustainable forest management. Yet the Timber Regulation focuses on legality, not whether timber or timber products are sustainably produced. The assumption appears to be that legality equates sustainability. Law and legality can certainly promote forestry that is environmentally and so-

cially sustainable. However, if the bar is set low of what is required for forestry related practices to be legal, legality by itself is no guarantee of sustainability.

The EU reserves its right to ratify the VPA if the legality definition or the stakeholder process towards development of the definition is not considered to be acceptable. Yet apart from the general points on social issues, noted in section 1, which are defined as points of policy, little is formally required of VPAs with regard to social sustainability. Obviously, much of this is related to the fact that the EU neither cannot nor should directly regulate what is legal or not within other states. Yet, the issue that emerges based on the discussion above is whether in addition to the definition of some requirements for environmentally sound practices and anti-corruption measures, the legality definition process may cause less fortunate results through institutionalising practices as legal even if these do not conform with sustainability concerns of a social rather than environmental nature.

The 2010 Timber Regulation sets out requirements for the due diligence process for timber that does not have a FLEGT licence, and referring mainly to harvest rights and processes in terms of payment and environmental concerns is also limited with regard to social issues. Having another objective, the 2005 FLEGT Regulation does not specify substantive legality requirements. The Regulations or the Commission's FLEGT guidance do not specify particular substantive elements to be encompassed by the legality definition. Guidance provided by the EU Commission notes that the "set of legal requirements should include laws responding to economic, environmental and social aspects of forest management and timber processing" (FLEGT website, "The Elements") and that definitions of legality may include granting of or compliance with rights to harvest of timber within legally gazetted bound-

aries, compliance with requirements concerning taxes, import or export duties, and with requirements for trade and export procedures (EU, no year). The guidance does refer to “compliance with requirements regarding forest management, including compliance with relevant environmental, labour and community welfare legislation”. Yet it does not specify what legislation is “relevant”, nor stipulate that particular type of legislation must be in place. Like the Regulation the guidance does refer to respect for tenure or use rights to land and resources that may be affected by timber harvest, with the addition, however, that this is “where such rights exist”.

In relation to harvest rights, the Timber Regulation presumes that these are already “legal” or within “legally gazetted boundaries”. Land or harvest rights are often based on tradition and in many developing countries remain non-gazetted. Indigenous peoples’ access to land and forest is often based on customary rights. Cadastral registration may be non-existent or faulty. Due to the value related to the forest as a natural resource, governments may be hesitant to introduce or register legal rights for forest dependent people as this would limit access by others to industrial exploitation of the forest (Un & So 2009). Even when land tenure rules do exist it is not uncommon that overlapping administrative borders between local government areas complicate these rights (Nathan & Boon, forthcoming). As examples noted in section 4 indicate, in developing countries such as Vietnam tenure and use rights may be claimed but indeed not formally recognised, or they may be disputed. As the Vietnam case also demonstrates, legal formalisation may cause less privileged groups, including but not limited to minorities, to loose customary land use rights or even rights associated with usage of protected forest.

In terms of sustainability concerns under the Timber Regulation, human rights issues are

mainly addressed through the general references to timber harvest rights, payments, forest management and third parties legal rights in the legality understanding. These provisions do address some of the human rights concerns of groups living off the forest and some other groups who depend on the forest for housing, fuel or other sustenance needs. In addition, human rights may be indirectly addressed as aspects of good governance, through emphasis on “stakeholder participation” in the development of VPAs. Recommendations have been made by some scholars to include administrative and judicial means to ensure rights of access and benefit to the forest for forest-dependent communities (Wiersum & van Oijin 2010). Yet more specific human rights issues, such as working conditions are not noted despite the fact that these are closely related to many forestry related activities that also lead to environmental sustainability concerns.⁶

It appears that from the perspective of the EU, the main human rights element which the FLEGT scheme is seen to contribute towards is related to public participation in public governance (*in casu* in the process of developing the legality definition). Indeed, the right to access to participation in the conduct of public affairs (such as public policy making and law-making) is a human right recognised by art. 25 of the International Covenant on Civil and Political Rights as well as by the Declaration adopted at the 1993 World Summit on Human Rights in Vienna. In the FLEGT context, however, the main outcome of public participation in development of the legality definition is considered from the good governance perspective rather than from the human rights perspective. The VPA negotiation process is assumed by the EU Commission

⁶ For example, the World Bank’s operational guidelines consider the rights of indigenous people after the World Bank were criticised in the 1990s for neglecting the human dimension of development and sustainability.

to have a positive impact on forest law enforcement and governance in the partner country. Assumed positive impacts include the promotion and institutionalisation of improved governance within the forest sector; better enforcement of existing forest, environmental and trade related laws; reduction in corruption and measures to that effect; adequate recognition of the rights of forest dependent communities and indigenous peoples; development and application of effective monitoring systems; and greater transparency and accountability, including a national level mechanism for consultation on forest governance (ProForest 2011). In principle, the process provides an option for bringing forth and formalising contested rights (such as boundaries or usage rights). However, formalisation is often to the advantage of those who are already more privileged in terms of knowledge, funds and/or access to decision-makers (Lund 2008). This may especially be the case where the process is hastened, civil society is weak and/or unused to voicing sensitive rights, the rights and practices of the most vulnerable groups (such as indigenous or other minorities which are already marginalised for political reasons) are sensitive issues, and where considerable economic interests (such as access to major markets in competition with other countries) are at stake. All of those issues apply to the situation in Vietnam.

The 'consensus building' process is considered by the EU Commission to be an important step in involving civil society and other stakeholders in the process. Part of the intended objective is to allow civil society to voice their concerns with the aim of the government considering those in the legality scheme. From that perspective, the consensus building process may indeed have an empowering effect for civil society and non-governmental forestry actors and in a wider sense lead to a sense of political empowerment and use of formal political rights. The Commis-

sion recognises that consensus building may be easier accomplished in some countries than in others and that Vietnam falls into the more difficult category. As a result, leading up to Vietnam's national VPA development process that took off from late 2010, the EU sponsored a field visit to Indonesia for Vietnamese organisations to enable them to observe what was considered by the Commission to be a fairly inclusive VPA consensus building process. In the Vietnamese context of limited independent civil society, as elaborated below tension between the government and forest dwelling minorities poses a risk that the particular concerns of such groups are muted.

The EU's main concern in terms of the VPA process in Vietnam appears to be stakeholder engagement and transparency of the process. The assumption appears to be that civil society stakeholders will bring up issues to be addressed (Vietnam Forestry 2010, authors' interview w/EU Commission, Hanoi, November 2010 and November 2012). This may be correct and feasible in many states. However, because of the political and organisational structure in Vietnam, which is based on the socialist Constitution and ideology, local communities are not organised in civil society organisations as in many other developing states, such as several African timber-producing states. Most formal organisations are state sponsored mass organizations or tenuously linked to the state. Determining how independent or not they are of the state – whether they are "government" or "non-government" – is difficult. A large proportion of groups calling themselves NGOs are linked to the state (Kerkvliet & Heng 2003).

In fact, the civil society network formed by the Government in 2011 for the purpose of the development of the legality definition is comprised of mainly governmental organisations, research institutions (which are also part of the

government) and other governmental civil society groups.⁷ Although some members of the civil society network are providing information on the situation of local communities and groups living in the mountainous regions, the overall governmental make-up of the organisations and the network limits the input of local insight as well as the building up of local participatory capacity to engage with governments. Arguably, this demonstrates that building up such capacity and ensuring local insight into governmental planning processes entails more than formal institution of such institutional networks. In other words, the civil society structure found within the boundaries of the EU cannot be expected to function in a similar way and with similar speed elsewhere, nor for that very reason to sufficiently ensure the consideration of social sustainability concerns at risk.

The EU's assumption that a nationally 'owned' process will provide for better results for the partner country and its population than detailed requirements issued by the EU is a valid one. Vietnam has a history of deciding its own development path based on information and experience from other states (Buhmann 2001). Yet even though it is based in an intention to promote public participation in public decision-making in forest governance, the FLEGT approach to stakeholder participation in the development of the legality definition in the particular Vietnamese context may mean that the interests and participation of local groups is decreased rather than increased.

The risk of insufficient insight being provided for the legality definition is exacerbated by a re-centralisation of forest governance based on economic considerations of securing access to

the EU market through a VPA. Also the potential to reduce occupational hazards in an industry prone to significant injuries is limited.

5.2 Implications of FLEGT for FSC and human rights in sustainable forestry

As noted the legality definition in the Timber Regulation in relation to due diligence and the Commission guidance for the legality definition development do not list working conditions such as working hours, payment, and occupational health and safety. All of these are regulated by ILO conventions and are therefore encompassed under FSC principle No. 4 ("respect of worker's rights in compliance with International Labour Organisation (ILO) conventions"). Nor is it required that indigenous peoples' rights, such as rights regulated under ILO Convention 169, are met under national law. This issue too is encompassed under FSC Principle No. 4. "Forest workers" and "local communities" may be indigenous groups enjoying rights according to Convention No. 169. This convention has been ratified by only a limited number of states.⁸ As indigenous people, however, exist in many more states, including in particular several tropical timber producing states and as, moreover, indigenous people in these states often live in and off the forest and/or work in forestry industries, ILO convention No. 169 has high relevance for these people. As noted, the government of Vietnam considers minority groups living in the forested mountain areas to be 'ethnic' but not indigenous. Vietnam has not ratified (or signed) Convention No. 169.

As indicated in section 2, human rights relevant aspects feature more prominently in FSC than in FLEGT. This applies both with regard to the communities living in or off the forest, and

⁷ List of members of Vietnam's civil society network for FLEGT, obtained through author's correspondence with the Centre for Sustainable Rural Development in Hanoi, which is the lead organisation of the network.

⁸ 22 states as of 8 October 2012 (List of ratifications of International Labour Conventions, <http://webfusion.ilo.org/public/applis/appl-byconv.cfm?conv=C169&hdroff=1&lang=EN>)

those individuals that gain their living from the forest industry. FSC's website introduction to the Principles states that "[m]any of the points (...) appear almost basic – but in many places even these basic requirements are not fulfilled. This is where FSC can have the biggest positive impact" (FSC homepage). From the human rights perspective, this is also where the FLEGT scheme and approach arguably may not only present a missed opportunity to promote human rights but may present a risk of driving out human rights relevant aspects of the forestry legality and governance process, as indicated in the preceding sub-section.

Through the recognition of due diligence systems offered by 'monitoring organisations' the Timber Regulation allows importers to apply third party schemes that include verification of compliance with applicable legislation. However, a certification system does not by itself guarantee that compliance with the Timber Regulation is ensured. FSC claims to intend to adapt its system to deliver legality verification in accordance with the Timber Regulation's requirements (FSC 2011, NepCon 2011). At the time of writing, FSC certification does not conform to the Regulation's legality verification requirements (NepCon 2012).

This fundamental difference between FSC's structure and practice and the requirements of the Timber Regulation presents both an opportunity for FSC to grow and a risk that FSC may be pushed out of the market for forestry sustainability schemes in states that enter into VPAs with the EU. The Commission recognises that FSC may adopt its procedures to conform to the Regulation's requirements. FSC's introduction of legality verification may improve the attraction of FSC as a forest sustainability scheme to be applied to timber to be sold to the EU. In that case, the FLEGT scheme may lead to increased application of FSC and by implication of inclu-

sion of social sustainability considerations. However, the opposite may also be true, with FSC perceived to be too demanding compared to the Timber Regulation's requirements.

If a VPA does materialise, the practical consequences may be that it will be simpler and less expensive for the forest industry to comply with the legality requirement related to the FLEGT licence rather than to apply the more complex and demanding FSC criteria. Consumers' choice through labelling may preserve a certain market for FSC certified wood, but timber buyers who consider price rather than sustainability (such as many consumers as well as institutional buyers, large-scale building projects, and even public authorities) will create a market for the less expensive timber. In a situation when customers are certain that the timber will be legal, less attention may be directed to the difference between legality and sustainability, especially among customers without in-depth knowledge of the issue.

Again, Vietnam offers a case at point. FSC has been employed since the mid-to-late 1990s by companies exporting from Vietnam to markets in Europe, the US, Australia and elsewhere. FSC is employed as a certification scheme by a number of Vietnamese companies in the timber processing industry as well as by foreign or joint Vietnamese-foreign companies. Over 100 Vietnam-based companies hold FSC Chain of Custody certificates, allowing them to import, process, and sell FSC-certified timber produced elsewhere. In 2010 the World Wildlife Foundation found great potential for FSC certification, as Vietnam's forest strategy aims to certify 30 per cent of the country's 4.48 million hectares of production forests in the next decade (WWF 2010). In recognition of the legality and sustainability problems that the forestry sector encounters, some local governments in timber producing provinces had begun to look at obtaining FSC certification for FSEs. For example, in 2010 con-

comitantly with the central government's initial VPA steps, without knowledge of that process a state forest enterprise in Lao Cai province was in the process of adapting its procedures towards obtaining FSC certification. Field interviews conducted by the authors in November 2010 at the provincial level forestry department and at the office of a local state forest enterprise headquarters showed that the local government and the company's management had not received information on the Government of Vietnam's negotiations towards a FLEGT VPA, nor were they aware of the impact that Vietnam's entering a FLEGT VPA might have on the application of FSC for products intended for the EU market. FSC had been seen by the local government and the state forest enterprise to be a demanding and complex system but still an option to cater for a sustainability concerned market. At the time of writing, the legality requirements that may be established for the VPA look to be less demanding and complex and the cause for applying FSC for the purpose of market access may be reduced. To the extent that application of FLEGT licensing is favoured by tropical timber producing countries, many of which sell timber for processing in Vietnam, the attraction for private or state owned forest or plantation managers to apply FSC may also come to be reduced.

The FLEGT scheme's legality focus may strengthen human rights, including forestry relevant labour rights and indigenous people's rights, in states that choose to include those in their legality definition. However, there is a risk that in some states, the legality definition will be limited to strictly environmental and economic governance aspects without regard for human rights. That risk may be particularly acute in states with limited legal protection of human rights of particular relevance to forestry communities, including those states that are not parties to international conventions protecting the hu-

man rights of such groups. Although improvements have been reported in later years the human rights situation of minorities in Vietnam, including the large proportion of 'ethnic groups' living in mountainous forest areas, is recognised by various sources to be problematic. Reportedly, a number of recent conflicts between authorities and ethnic minorities involve land, including compensation for land allocated to establish plantations in mountainous areas (State Department 2012, Human Rights Watch 2009).

Although African VPAs so far have tended to include labour rights and some other social issues, there is no certainty that other states will do the same. This may be particularly the case in states where occupational health and safety is weakly protected or enforced, sometimes because investing in protective equipment and safe practices is downplayed in favour of low production costs that may serve as a competition parameter. It may also be the case in states where indigenous peoples and their sustenance are politically sensitive issues, such as is the case in Vietnam (Human Rights Watch 2009, 2011). Indications are at the time of writing that the government of Vietnam is intent on reaching agreement to enter into a VPA as soon as possible, with the original aim for finalising negotiations in early 2013 now postponed to September 2013. A large number of jobs in the timber processing industry depend on Vietnamese timber products' access to the EU market after the legality requirement of the Timber Regulation takes effect in March 2013. According to some sources with whom the authors talked in late 2012, negotiators prefer a legality definition that covers the minimum for a VPA. Some research members of the civil society network have been drawing attention to other issues that require attention for longer term environmental and social sustainability, including overlaps or inconsistencies between land and forestry legislation and a requirement that for-

est be managed so as to prevent flooding and drought.

While Vietnam's national labour legislation contains relatively detailed regulation of working conditions, implementation and enforcement is reported to be inadequate. Occupational injuries are a problem, with many incidents caused by machinery. Working conditions are particularly harsh and hazardous in small and medium-sized enterprises, with many not conforming to governmental regulations on occupational health and safety (State Department 2012). In the forestry and timber industries as in other sectors, the right to form and join independent trade unions is limited as every union must be affiliated with the country's only trade union, the Vietnam General Confederation of Labour. Thus, in this respect too, FSC goes further than FLEGT.

It appears a missed opportunity for strengthening forestry related human rights through the intermediate impact of the due diligence requirement on sourcing countries that the Timber Regulation refers to "regulations as well as the implementation (...) of relevant international conventions to which that country is a party" (EU 2010, preambular para. 14) without specifying that international conventions targeting other issues than environment etc. should also be considered for the purpose of legality. The preamble refers to CITES and the protection of flora and fauna. Because of that and general emphasis of the Regulation on environment and climate change prevention, human rights relevant conventions and national law may be overlooked as relevant for sustainability purposes.

6. Conclusion

The FLEGT scheme seeks to achieve commendable objectives. Environmental sustainability and climate change mitigation are closely linked to well-managed forestry. Well-managed forestry is also a precondition for the survival and sus-

tainable social development of many communities living in forests or off forest products. EU's FLEGT scheme, however, is weak in relation to social sustainability. As this article has shown, legality cannot be assumed to equal nor necessarily lead to sustainable forestry exploitation or sustainable social or environmental development linked to forestry. Unfortunately, law may not only be employed to promote sustainable practices but also to suppress them. Increased international competition among timber growing or processing states to supply to markets that require legality based on national law may lead to lowering the bar rather than raising it. Leaving the definition of legality to exporting VPA states respects the sovereignty of those states but holds no guarantee that forestry related rights or customs of indigenous peoples or local communities are considered, nor that working conditions as set out in international human rights and labour law are protected. The lack of protection of these rights and interests may compromise social development and lead to or even institutionalise unsustainable practices. The omission of reference to forestry related working conditions is unfortunate because as production price is a common export parameter, timber producing states may be tempted to set the bar low in terms of elements of the production process that are costly in order for their exported products to be competitive. With a variety of buyers of tropical timber, many of which are institutional and/or consider price as a key parameter, sustainability concerned consumers willing to pay a premium price for FSC certified timber may not be sufficient to ensure broad application of FSC (or other broad sustainability schemes) to make up for the limited social sustainability coverage of the FLEGT scheme.

The non-linkage between the FLEGT scheme (including the Regulations) and CSR may be due to the fact that until the EU's September 2011

Communication on CSR the EU had somewhat locked itself into an application of CSR terminology only to action not resulting from legal requirements. The disconnect between CSR and a law-based regulatory approach may have caused a gap between proclaimed sustainability aims and the degree to which these are addressed through the Regulations. Arguably, considering the broad sustainability concern that characterises much CSR literature and policies, including in fact in the EU's own definition even prior to the 2011 definition, could have lent the FLEGT scheme more emphasis on social issues. CSR is also informed by civil society organisations. Relating the FLEGT scheme with CSR could not only have meant more emphasis on social sustainability and human rights responsibilities of governments as well as businesses in that respect. It might also have meant an opportunity for a much broader basis for such organisations both in EU and timber exporting states to contribute insight and expectations on sustainable development in the forestry sector, relating both to established legal rights and informal rights (such as customary usage rights and indigenous practices whose preservation comes under international human rights law) that may nevertheless be part of social expectations of companies. Applying law to strengthen sustainable forestry on such an informed background could have been a more forceful strategy towards both environmental and social sustainability to set the bar high.

Fighting corruption is a main objective of FLEGT both in terms of legality and forestry governance. Dealing with corruption, however, is not the only factor essential to promoting better forest governance. Good forest governance also depends on involvement of affected stakeholders, in particular local people whose lives are contingent on forests, the preservation and respect for local forestry practices, and the rel-

evance and appropriateness of national and sub-national regulatory schemes, their enforcement and implementation. The Vietnam case study indicates that when public hard law (legality) and private soft law (voluntary adherence to criteria beyond what is required by national applicable law or contractual obligations) meet, the result may be fragmentation, leading to insulation of certain objectives to the detriment of others. It also demonstrates that the process for integration of stakeholder interests, such as human rights and working condition concerns in the legality definition for VPAs, is vulnerable to political, legal and organisational contexts that differ from that of a vibrant and free civil society. In the case of the meeting between FLEGT and FSC, FSC and therefore the social sustainability concerns of FSC currently may stand to lose out, simply because FLEGT and the Timber Regulation require verification that many private sustainability schemes do not (yet) deliver. As a result, the human rights elements that FSC integrates in its conception of sustainable forestry may stand to become disregarded in favour of the more limited and less detailed requirements under the Timber Regulation, which address mainly established harvest and tenure rights and environmental issues directly related to forest harvesting.

Public participation clearly has potential to contribute to the improvement of governance and recognition of and the effective access to human rights related to forestry, tenure, use and working conditions. Even so, the potential human rights impact in a sustainability context may be limited because the FLEGT scheme focuses on the process as a consensus building process rather than the substantive human rights which are often at risk in the context of forestry. African VPAs already developed indicate that there may be options to integrate considerations of human rights aspects more directly into legality

definitions for the purpose of a FLEGT VPA and license. Nevertheless, although FLEGT has as its overall objective to promote sustainability, the FLEGT scheme's general legality understanding is limited as regards sustainable social development. As the same goes for the legality definition established by the Timber Regulation for the purpose of due diligence, the likelihood that the actions and information required by importers' due diligence may lead the timber sector to address social sustainability in exporting states is also limited. The problem is particularly acute and appears a missed opportunity for addressing conditions in states where human rights protection, respect and fulfillment is not fully guaranteed in existing national law. It is further exacerbated when such rights, as is the case in Vietnam and some other states that produce tropical timber, are politically sensitive and sometimes openly contested between the government and stakeholders.

As long as private schemes like FSC do not offer legality verification which conforms to the Timber Regulation requirements, application of such private schemes may stand to decrease in states that export to the EU market. In that case, forest sustainability will be limited to the somewhat narrow focus of the FLEGT scheme. Imbued with the strengths of formal law to control entry into the EU market, FLEGT enjoys an enforcement potential that private sustainability schemes like FSC lack. Combined with the force of trade – working precisely through the 'T' that makes FLEGT stand apart from many other inter-governmental forest sustainability schemes – the EU scheme gains its appeal to timber exporting countries through the gateway to the EU market that the VPA and FLEGT license provide. As indicated by the Vietnam case, if FSC or related schemes, such as PEFC which is also aiming to adapt to the legality verification requirement, are successful in adapting to the legality verification

requirement without losing focus on social sustainability, the longer term outcome could be a happy marriage of legality and the environmental focus of the FLEGT scheme with the broader sustainability focus of private schemes to the combined benefit of sustainable environmental management and human rights in tropical timber producing countries.

Given that Vietnam's VPA negotiation process is still on-going at the time of writing, the outcome in terms of the legality definition is not known. A VPA will be significant for Vietnam's access to the EU timber market from 2013. When in force, it may also lead to reduced application of FSC and therefore reduced emphasis on social sustainability in forestry. From the current perspective based on the Vietnam case study, the FLEGT scheme appears a missed opportunity to address human rights related to forestry usage, harvest and timber processing through the combined force of law and the market on which the scheme builds.

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