

**Institute for Environmental Security
Programme on Environmental Security and Poverty Alleviation**

Workshop on Illegal Trade in Natural Resources
Friday, 6 October 2006, 14:00-17:30

Summary Record of Discussion

Objectives of the workshop

On Friday, 6 October 2006, the Institute for Environmental Security (IES) organized a workshop in The Hague on 'New Legal Mechanisms for Combating Illegal Trade in Natural Resources: Alternative Jurisdiction for the Protection of Natural Resources'. This new IES project promotes the creation of new legal barriers to the commercial trade in illicitly obtained natural resources by assisting importing and transit countries to adjust their domestic legal and administrative systems.

The project coordinators decided to organize an 'advisory meeting' right at the beginning of the project in order to make sure that the main objective – the creation of new legal barriers in importing and transit countries to the commercial trade in illicitly obtained natural resources – is judged by leading civil society organizations and experts in this fields as a valuable and innovative goal to pursue. The project coordinators also sought to ways to avoid implementation problems at a later stage of the project as a whole. The purpose of the meeting was to introduce the project to the participants, solicit their strategic advice and welcome practical recommendations regarding the initiative. The workshop was organized to collect the right questions, not necessarily to receive all the answers. Above all, the meeting provided an important opportunity for IES to invite other organizations to exchange information on related work of their own and to express their interest and willingness to join us as full participants in this new initiative.

The participants were selected on their expertise regarding the legal, social or economic aspects of illegal trade in natural resources as well as because of their knowledge and understanding of these problems in the project's focus areas in Central Africa and Indonesia.¹

The workshop: introduction

¹ For list of participants, see annex.

After a word of welcome from Ron Kingham, the project manager and meeting chair, there was a round of self introductions by the participants. Subsequently Wouter Veening, the Director of IES, spoke about the Institute and its programmes and Harris Gleckman, one of the coordinators of the project introduced the project to the participants, explained the project description and stated that this project sought to break new legal and political ground. One of the options might be to open up the court system in importing and transit countries to challenge the ownership of the imported natural resources. Legal action in importing countries would never stop all illegal trade in natural resources but any such action in key importing countries would make such trade increasingly difficult and less profitable.

Other new projects, such as the UNU/UNCTAD study on Private Sector Actors in Zones of Conflict,² are critically related to this IES project. Mr. Gleckman concluded his introduction of the project by asking the participants not to hesitate to come forward with critical remarks, comments and suggestions.

In the course of the meeting interesting comments were made and many challenging questions were raised. In the following minutes, since the questions are much more important than the answers given by the project coordinators, only specific important answers relevant for the understanding of the participants and future partners are recorded.

The issues that were raised and discussed at the meeting can be divided into five categories:

- A. Legal issues
- B. Political issues
- C. Practical problems
- D. Legitimacy
- E. Cooperation

Ad. A: Legal issues

1. *The focus on importing countries instead of exporting countries.*

Why is the project directed to adjusting the law in importing countries instead of focussing on the exporting countries? It was acknowledged that much is to be done in the exporting countries themselves. However effective enforcement of existing national legislation is often impossible in certain domestic districts, due to lack of governmental control in these areas. The fact that this project seeks solutions outside the exporting countries was considered a very valuable complement to any national exporting country efforts. Until now, the possibility to combat illegal trade in natural resources in importing and transit countries has not very well been examined. Defining 'illegal'

Several questions were raised regarding the definition of 'illegal trade' or 'illegal production or extraction'. How do you determine whether the trade in natural resources is illegal? Is it the national law of the exporting country that defines 'illegal extraction'? Or is it the law of the importing or transit country?

Implementation of 'illegal' definition in exporting country

If the exporting country issued arrest warrants for stolen natural assets, Interpol or other multilateral or bilateral crime response mechanisms could be used. However, most of the situations of illegitimate natural resource exports occur when the exporting country has a policy of tolerance regarding trade in natural resources not in conformity with the law or

² The IES project coordinators are both participants in the UNCTAD/UNU project

when the authorities are unaware of such trade or lack the capacity to enforce applicable laws. In some cases the national law conflicts with international agreed standards or treaties.

2. *Use of “Illegal” verses “illicit” to categorize illegitimate natural resource exports*

It was suggested to use the term ‘illegal’ instead of ‘illicit’ trade in natural resources. While illegal normally means ‘against the law’, illicit is something immoral or between legal and illegal. As noted above, if - for whatever reason - the exporting country does not institute criminal procedures against private exporters, then it is very difficult for importing countries to treat the imported commodities as “illegal”. It was concluded that the project coordinators have to explore the exact meaning of these two words and especially the consequences of using one or the other in importing and transit jurisdictions. .

3. *The question of ownership over natural resources.*

How can one determine the ownership of natural resources from areas of weak, corrupt, or non-existing state authority? How can one determine the legitimacy of the original export when the natural resource is processed or incorporated in different products? Apart from secure ownership documents, it may be very hard to prove: Ownership certificates may be false, conflict parties may issues self-serving ‘export licenses’ or national law of an exporting country may not recognize the natural resource rights of indigenous peoples or provincial authorities. This remark was considered to be a very interesting and essential point both from a legal point of view as well as with regard to the more practical issue of evidence. It was noted that normally the rules of evidence are those of the court in question: the Dutch court will apply Dutch rules of evidence and Dutch definitions of ownership. Normally, foreign documents are accepted without challenge as evidence for ownership.

4. *Problem of ‘standing’ before a court of importing or transit country. Who may be the plaintiff in a civil law suit?*

It was observed that the basic idea must be that everyone who claims ownership should have access to the courts in importing countries. It is one of the research topics mentioned in the project description. During the discussions it was acknowledged that ‘standing’ is a complicated issue which differs from country to country, especially with regard to standing of (foreign) groups. It was suggested that making an inventory of this issue in different legal systems/jurisdiction may be useful.

5. *Feasibility of the legal proposals*

The legal experts present at the meeting admitted that there are obstacles to overcome but that we should go ahead with promoting the legal changes as proposed. Furthermore, it was suggested to find a balance between the law of the country of import and the law of the exporting country. It may very well be that a Dutch court will find itself applying Dutch rules or international regulations instead of the national law of the exporting country. It is therefore suggested to involve a private international lawyer in the project.

Ad. B: Political issues

1. *Corruption: illegal export by official authorities*

An important comment was made regarding the project’s focus on private companies. The project refers to illegal trade without distinguishing between the different actors that may be involved. The project’s main focus is on private actors while governmental officials may cooperate with these private businesses in the illegal trade. Therefore, it was suggested that the project takes account of such a situation. Especially since new legal mechanisms in importing countries may be protested against by corrupt governments in exporting countries on the basis of sovereignty claims.

2. *Communication with governments in exporting countries.*

See D: legitimacy (under 2)

3. *Political problems with Indonesia*

In order to test the proposed new legal mechanisms, the project selected two exporting test areas: Central Africa and Indonesia. These areas were selected because of the presence of important natural resources, the expectation of possible illegal trade and the partnerships that IES had established in these areas. It was observed that the project treats these two areas equally, while considerable differences exist. First of all it was observed that, contrary to Indonesia, the other test area – Central Africa – comprises more than one country. Moreover, Central Africa is currently known for its conflict zones with many areas effectively outside governmental control or under the de facto control of armed combatants. Here, the government may support the legal assistance that the project tries to offer. On the other hand, Indonesia, a much more stable country which the government is officially in control of most of its territory, may consider the proposals an unsolicited interference with their sovereignty.

Ad. C: Practical problems

1. *Differentiation between different product markets.*

It was suggested that the project should review other natural resources, the import of which is already illegal, such as opium, uranium endangered species under the CITES convention, (blood-) diamonds and certain weapons. The project should also seek administrative lessons from the movement of currencies and banking payments. The international norms on the movement and trade in these forbidden goods may serve as an example for this project in the way countries and the private sector implement these rules may provide for answers on traceability, ownership, evidence etc.

2. *Questions of traceability.*

Important questions on traceability were: How can one prove where the resource originates from and the legitimacy or illegitimacy of claims to ownership? Another interesting issue that was raised in this respect was that sometimes – for instance with oil – illegal goods are being mixed with legal goods. When illegally extracted oil is mixed with legal oil, the illegal oil is very hard or even impossible to identify. It was also mentioned that products are being transformed en route to the importing country. This problem involves the project's reference to transit countries. It also involves questions related to laundering: illegal goods transformed into legal goods. Has this issue been examined before?

3. *Trust Fund*

One of the ideas might be to have available a model trust agreement that courts could use to protect the value of seized goods containing or consisting of natural resources, until the rightful owner is found or the government of the developing country in conflict has restored effective control over its territory. Such a fund may preserve the resources or its market value. Whatever the exact meaning of such a trust fund may be, no reference is made to such a trust fund in the project description. This idea is to be taken seriously and the project description should clarify it.

Ad. D: Legitimacy

1. *Ownership of the project*

Questions were raised regarding the implementation and promotion of the project objectives and solutions. Harris Gleckman pointed out that neither IES nor the coordinators intend to own this project and its ideas. The project involves many complex issues and therefore broad support will be needed for successful implementation of the project. Any institution, government, (non-)governmental organization that takes over the ideas of this project is very welcome to do so. It only improves the potential success of the project.

2. *North-South politics*

It was suggested that account has to be taken for the sensitivities in the exporting developing countries. Special attention and consideration is needed for dialogue and discussion with government officials as well as with local communities and civil society groups in exporting countries. It was stressed that the project will need their support in that exporting countries recognise that the proposed legal mechanisms in importing countries will be beneficial to them and complementary to their own national efforts to stop illegal trade in natural resources.

3. *OECD cases and the COPs of the Corruption Convention*

The project description refers to the OECD and especially to its guidelines for multinational enterprises. In this respect it was recommended to look for support in cases brought before the OECD National Contact Points. Although not binding, these cases and the NCP's reaction may prove this project is necessary. The COPs of the Corruption Convention could also provide useful guidance.

Ad. E: Cooperation

1. *Multi-actor approach, including business*

In implementing the project, cooperation is needed with governments (both of importing and exporting countries), parliamentarians, ministries of justice and civil society groups. It was observed that in the project description no reference is made to collaborating or otherwise involving business in the process. It was therefore proposed to inform, consult, or discuss the project with private actors in order to at least hear their position and possible objections. Recommended literature: 'Who's Minding the Store' (<http://www.bicc.de/publications/briefs/brief32/brief32.pdf>)

2. *Cooperation with civil society and more: setting up an internet blog*

Many institutes and civil society organizations are working in related fields. Participants made clear that this project is very interesting and complementary to their work and they offered their support and cooperation. It is stressed again that it is a participatory project which needs input from other stakeholders. Requests for information will be directed to the respective organization in a bilateral way. Moreover, the coordinators will inform and keep updated all the persons and organizations that expressed their support and interest. A *blog or a list server* will be set up which will accommodate discussions on illegal trade in natural resources in general and on the project and its approach in particular. These communication tools will be open for all interested persons and organizations.

3. *Translation of documents*

In order to cooperate with local communities, civil society groups, business representatives and governmental officials, some project documents need translation. Some participants already requested to have the project description translated into French so as to make the project available for their partner organizations in French speaking exporting countries.

4. *Specific research questions*

Some participants offered their help and asked for specific research questions. They then may be able to assist the project in providing answers or other information related to those specific questions.

Conclusion

First of all the coordinators were very thankful for the many questions, comments and suggestions made by the participants at the meeting. They are also very pleased with the positive feedback and expressions of interest received from several other organisations and experts who were not able to attend this first consultative meeting. It is clear that this project is not an easy undertaking and we are very happy and thankful for the support and help offered by the participating organizations.

The next steps will include the circulation of the report of this meeting, an updating of the project description in the light of these discussions and the setting up a contact group and communications channels for the continued scrutiny and development of the project proposal.

More specifically, future action includes initial selection of importing and transit countries for the purposes of the project; further elaboration of key issues identified in the meeting, possibly through a Internet based dialogue; fund raising for phases two and three; establishing joint understandings and division labor with key organizations; and briefing government officials on the development of the project.

It is very good to know that the project is considered valuable and that the approach is considered feasible and workable. However, it is also made clear that a lot needs to be done. The project coordinators need to do some hard thinking on the issues that have been raised and discussed. They will be included in a revised project description as soon as possible.

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List of Participants

Mr. Serge Bronkhorst	Founder and Director, Bronkhorst International Law Services / IES-ESPA Law Programme Coordinator / Instructor in public international law at the University of Amsterdam and Erasmus University.
Dr. Wybe Douma	Senior Researcher on EU law, T.M.C. Asser Institute
Dr. Harris Gleckman	Principal, Benchmark Environmental Consulting / Co-ordinator for the UNU-UNCTAD book on the rule of law and corporate social responsibility in zones of conflict; Advisor to governments in the preparatory process for the UN Peacebuilding Commission; Former Head, New York Office, UNCTAD.
Prof. Ellen Hey	Prof. Public International Law, Erasmus University Rotterdam

Ms. Jeanna Hyde-Hecker	Scientific Coordinator / Project Leader Colombia, Environmental Security for Poverty Alleviation, Institute for Environmental Security
Mr. Willem Jaspers	Bonn International Center for Conversion (BICC)
Mr. Leendert Jonker	Programme Manager, Environmental Security for Poverty Alleviation, Institute for Environmental Security
Ms. Seema Joshi	Global Witness
Mr. Ronald A. Kingham	Co-founder and Programme Director, Institute for Environmental Security
Dr. Gottfried J. Leibbrandt	Senior Advisor IES; Former Director-General for Higher Education and Research at the Dutch Ministry of Education and Research; and founding president of the Open University of the Netherlands
Drs. Jeannette E. Mullaart	Programme Assistant, Institute for Environmental Security / Programme Coordinator, Environment & Development Resource Centre
Mrs. Jolien Schure	Netherlands Institute for Southern Africa (NIZA)
Mr. Eric van de Giessen	Project Leader East Africa, Environmental Security for Poverty Alleviation, Institute for Environmental Security
Wijnand van IJssel	Knowledge Management, Innovation and Research Department for Environment and Water, Ministry of Foreign Affairs
Mr. Wouter Veening	Co-founder / Chairman / Director, Institute for Environmental Security, The Hague; Former Policy Director, Netherlands Committee for the IUCN
Ms. Evelien Weller	Researcher on business in conflict areas, Pax Christi
Mrs. Sheila Wertz	Institut du Développement Durable et des Relations Internationales (IDDRI), Paris (Programme on natural resources)

Apologies

(Persons who have expressed an interest in being kept informed about the project but who were unable to attend this workshop.)

Mr. Patrick Alley	Founding Director, Global Witness
Mr. Duncan Brack	Associate Fellow, Energy, Environment and Development Programme, Chatham House, Royal Institute of International Affairs

Ms. Willemine Brinkman	Coordinator, European Tropical Forest Research Network (ETFRN), Topenbos International
Mr. Ton Boon van Ochssée	Special Ambassador for Sustainable Development, Ministry of Foreign Affairs
Mr. Olio Brown	Project Manager, International Institute for Sustainable Development (IISD), Geneva
Mrs. Margaret Brusasco-MacKenzie	Senior advisor IES; Former Head, International Affairs, DG ENV, European Commission
Mr. Rob de Wijk	Head, Security and Conflict Programme (CSCP), Netherlands Institute of International Relations – Clingendael
Prof. Georg Frerks	Professor of Conflict Prevention and Conflict Management, Centre for Conflict Studies, Utrecht University
Mr. Maas Goote	Directorate for Legal / International Affairs, Ministry of Housing, Spatial Planning and the Environment (VROM)
Mr. Fons Gribling	Senior Policy Adviser Forests, DMW Environment and Water Dept., Ministry of Foreign Affairs
Mr. Nick Grono	International Crisis Group (ICG)
Ms. Sharon Harvey	Africa Division, UK Department for International Development (DFID); Former Policy Adviser, Sustainable Development Group, DFID
Ms. Kirsten Hund	Netherlands Institute for Southern Africa (NIZA)
Dr. Alejandro Iza	Head, IUCN Environmental Law Programme; Senior Legal Officer, IUCN Environmental Law Centre
Mr. Kees Kouwenaar	Director, Center for International Legal Cooperation (CILC)
Ms. Patricia J. Lerner	Counselor of Mission for International Development USAID Representative to the European Union US Mission to the EU
Mr. Leonardo Massai	Senior Researcher, T.M.C. Asser Institute
Prof. Frans Nelissen	General Director, T.M.C. Asser Institute
Prof. André Nollkaemper	Professor Public International Law, University of Amsterdam
Mr. William R. Pace	Convenor, Coalition for the International Criminal Court: and Executive Director, World Federalist Movement-Institute for Global Policy (WFM-IGP)
Mr. Wolf-Christian Paes	Bonn International Center for Conversion (BICC)

Dr. Marc Pallemarts	Senior Fellow & Head of the Governance Team, Institute for European Environmental Policy (IEEP); Lecturer in Environmental Law at the Free University of Brussels; Former Deputy Chief of Staff of the Belgian Secretary of State for Energy and Sustainable Development
Dr. David Raic	Deputy Director of The Hague Institute for the Internationalisation of Law
Mr. Dane Ratliff	Legal Counsel, Permanent Court of Arbitration
Mr. Herman J.F. Savenije	Senior Policymaker, Knowledge Department, Ministry of Agriculture, Nature and Food Quality h.j.f.savenije@minlnv.nl
Ms. Jade Saunders	Chatham House (Royal Institute of International Affairs)
Dr. Nico J. Schrijver	Chair of Public International Law, Faculty of Law, University of Leiden; Member, Advisory Council International Affairs of The Netherlands Government; Member, Advisory Committee on Issues of International Law of the Dutch Minister of Foreign Affairs; Member, Board of Trustees, UN Institute for Training and research (UNITAR); General Rapporteur, International Law Association Committee on Legal Aspects of Sustainable Development; Member, Permanent Court of Arbitration
Mr. Thomas N.B. Spencer	Vice-Chairman IES; Visiting Professor of Global Governance at the SEMS School of Management, University of Surrey, Guildford; Executive Director European Centre for Public Affairs; Former President GLOBE International; Former President of the EP Committee on Foreign Affairs, Security and Defence Policy
Mr. Mark Taylor	Fafo Institute for Applied International Studies (FAFO AIS)
Mr. Jaco Tavenier	Policy Advisor International Affairs, Ministry of Housing, Spatial Planning and the Environment (VROM)
Mr. Salil Tripathi	International Alert
Mr. Flip van Helden	Senior Policymaker, Department of Nature, Ministry of Agriculture, Nature and Food Quality
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