

# ENHANCING CUSTOMS COLLABORATION TO COMBAT THE TRADE IN ILLEGAL TIMBER





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This report is made possible by the generous support of the American people through the United States Agency for International Development (USAID) and The Nature Conservancy, under the terms of Award No. 486-A-00-06-00016-00. The contents are the responsibility of the Institute for Global Environmental Strategies (IGES) and do not necessarily reflect the views of the U.S. Agency for International Development, the United States Government or The Nature Conservancy.

**Henry Scheyvens and Federico López-Casero**

January 2010

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Cover photos: Peer review workshop on Customs Collaboration to Combat the Trade in Illegal Timber, 28-29 October 2009, Bangkok, © Henry Scheyvens

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The authors alone are responsible for any errors in fact.

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14 January 2010



# EXECUTIVE SUMMARY

- ⊙ This report builds on the initiatives of the Asia Forest Partnership and East Asia and Pacific FLEG to promote cooperation among Customs, Forestry and other authorities to reduce the trade of illegal wood products. The goal of this review is to assist Customs and timber trade regulating agencies in their efforts to improve control over the international tropical timber trade, thereby preventing trade from being a driver of illegal logging and thus supporting the management, conservation and sustainable development of forests.
- ⊙ This study is based on a wide-ranging analytical review of (i) Customs and illegal logging literature, (ii) international legal instruments, (iii) bilateral arrangements that assign or imply a role for Customs in combating the trade of illegal timber, (iv) model and existing agreements for Customs mutual administrative assistance, and (v) existing Customs networks. The review was augmented through consultations including Customs, Forestry and other officials, experts and key stakeholders. Further input was provided through the peer review workshop for this paper, which was held on 28-29 October 2009 in Bangkok.
- ⊙ As the first and last line of defence against smuggling, fraud, and detection of various illegalities that could transpire during the processes of export, re-export, transit and import, Customs administrations can make an important contribution to combating illegal logging and the resultant trade. While most forest-related crimes are outside the purview of Customs, violations of Customs law in the forest products trade are not inconsiderable and take a variety of forms. These include:
  - Export and import of tree species banned under international law;
  - Export and import of timber in contravention of national bans;
  - Attempted bribery;
  - Export without a licence or other necessary documents or using fraudulent documents;
  - Undervaluing export prices and volumes and misclassification of wood products and species;
  - Illegalities on the high seas: Re-routing, trans-shipment fraud and tampering with cargo;
  - Import without the necessary documents or using faked documents.

- ⊙ Often, Customs administrations have to control goods that arrive in their territory with little or no external support or background information to assist them, except for Customs declarations and accompanying documents. Further, like many other parts of government, Customs are being asked to do more – trade facilitation and security – without necessarily more resources. Nevertheless, Customs officials at the peer review workshop were well aware of the illegal timber trade and concerned for their agencies to play a greater role in combating this.
- ⊙ Customs administrations are increasingly collaborating with their counterparts in other countries to more effectively implement trade controls. Customs collaboration is also needed to effectively counter the trade in illegal timber. Useful types of collaboration against this trade include:

  - Information-sharing on customs and forest laws, documentation accompanying shipments, and export restrictions;
  - Spontaneous intelligence sharing on specific shipments;
  - Prior notification of shipments;
  - Joint investigation of timber trade statistics discrepancies, with early analysis to monitor trade flows and to enable greater control of data;
  - Sharing of best practices and experiences to strengthen Customs integrity;
  - Cooperation to more effectively implement CITES;
  - Agreement for the use of Customs export declarations, or an additional attestation of legality, in the country of import as a check on legality.
- ⊙ Piloting is one way of taking some of these recommendations forward. For example, two countries could be encouraged to agree to the use of export declarations as a check on legality at the point of import. This would help in eliminating some forms of illegality and is a useful tool for monitoring the timber trade between two countries. If the export declaration form was sent in advance of the shipment, it could also be used as a form of prior notification to combat timber smuggling.
- ⊙ The greatest prospect for enhanced Customs collaboration against the illegal timber trade in the short-to-medium term lies in bilateral arrangements on illegal logging. The challenge is thus to make fullest use of existing bilateral arrangements and statements on illegal logging to promote enhanced Customs collaboration and to encourage provisions for Customs collaboration in future agreements. Bilateral agreements and statements on illegal logging in the Asia-Pacific region include:

  - UK-Indonesia Memorandum of Understanding on Cooperation to Improve Forest Law Enforcement and Governance and to Combat Illegal Logging and the International Trade in Illegally Logged Timber and Wood Products (April 2002)
  - China-Indonesia Memorandum of Understanding Concerning Cooperation in Combating Illegal Trade of Forest Products (December 2002)
  - US-Indonesia Memorandum of Understanding on Combating Illegal Logging and Associated Trade (November 2006)
  - China-US Memorandum of Understanding on Illegal Logging and Associated Trade (May 2008)
  - Japan and Indonesia Joint Announcement on the Cooperation in Combating Illegal Logging and the Trade in Illegally Logged Timber and Wood Products (June 2003)
  - Indonesia and Republic of Korea Joint Statement on “The Call for Combating International Trade in Illegally Harvested Forest Products” (July 2003)
  - Letter of Intent signed by Indonesia and Norway on illegal logging (August 2002).



- ⊙ Many agreements and arrangements for Customs-to-Customs mutual administrative assistance exist and are often based on WCO models. These models elaborate generic protocols for information exchange, investigations, surveillance and joint action. Therefore, the combination of (i) a bilateral agreement on illegal logging with provisions for Customs collaboration and (ii) a general Customs-to-Customs agreement (either a more formal Customs Cooperation and Mutual Administrative Assistance Agreement (CMAA) or a MoU) could be a particularly effective way of enhancing Customs collaboration to combat the trade in illegal timber. MoUs between Customs authorities in the Asia Pacific region already exist and there may be scope to mobilize these for combating the trade in illegal timber.
- ⊙ The higher the political support that can be secured, the more likely it is for Customs to collaborate against the trade in illegal timber. The US-Indonesia illegal logging MoU and US-Peru Trade Promotion Agreement provide illustrations of how provisions for Customs collaboration can be included in bilateral arrangements on illegal logging, while the Action Plan of the UK-Indonesia illegal logging MoU illustrates how such agreements can elaborate various concrete activities to engage and strengthen Customs.
- ⊙ This review highlighted the importance of interagency coordination. The skills, resources and powers to detect and prosecute illegal timber are beyond the scope of Customs acting alone. A coordinated response is required involving Customs, Forestry/Agriculture, Trade, Environment, Foreign Affairs, and other border control authorities. MoUs between the relevant agencies would facilitate the necessary co-operation.
- ⊙ Other than making fullest use of existing bilateral agreements, there is a need to target regional processes and platforms for regular meetings between Customs and Forestry officials. Linkages to existing regional processes and building on a shared agenda are the only ways that cooperation tends to emerge. The ASOF program and FLEG could provide a useful platform for co-operation involving Customs and other authorities. Another useful platform could be the ASEAN Customs Procedures and Trade Facilitation Working Group, which was designed to take up any issues relating to Customs integration. The specific actions suggested at the peer review workshop include:

  - Encourage ASEAN to establish a joint Customs-Forestry working group on illegal logging and trade;
  - Request ASEAN to organize a workshop on collaboration between Forestry, Police and Customs;
  - Request the International Tropical Timber Organization (ITTO) to support an Asian Customs-Forestry working group on illegal logging and trade.
- ⊙ A variety of instruments already exist in the Customs field that could be used to combat the trade in illegal timber, including ENVIRONET, RILO A/P, and the CEN, if the will to do so could be harnessed. Useful measures would be:

  - WCO member countries to officially request RILO A/P to incorporate the control of illegal trade in timber and other forest products as a priority element of its work program;
  - To include trade in illegal wood as a separate category of the CEN seizures database, and/or all countries to submit information on illegal timber trade (seizures and infractions) to RILO A/P, and/or all countries to use ENVIRONET to request and exchange information on suspect timber shipments and documentation.

- ⊙ ENVIRONET, a new initiative of the World Customs Organization, is an internet based service for information exchange and cooperation in the area of environmental border protection among Customs administrations and other authorities. Given that illegal timber is included in its scope, that Customs, Forestry, enforcement officials and others can use the service, and its multifarious aims, such as the exchange of information on seizures and possible on-going trafficking, ENVIRONET could provide a very useful platform to facilitate rapid decision making on the ground regarding suspect timber shipments and documentation.
- ⊙ The needs of Customs agencies are not the same in each country. Some are much better resourced than others, and initiatives for enhanced Customs collaboration must take this into account.
- ⊙ One way of moving forward with some of the recommendations presented in this report would be to develop a support program for the neighbouring countries of Viet Nam, Cambodia, Laos, and Thailand. Action is needed to reduce the trade in illegal timber between these countries and they share a number of commonalities that make them conducive to some form of sub-regional program. Customs-to-Customs MoUs already exist amongst the four countries and it is likely they share similar capacity building needs.
- ⊙ There is a need not only to combat illegal logging and the resultant trade, but also to promote the positive trade of legal and sustainable timber. Wood products may have advantages for climate change mitigation over their substitutes. Customs have a role to play, not only in restricting the trade in illegal timber, but also facilitating the trade of legal and sustainable timber.

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# ACRONYMS

<b>AFP</b>	Asia Forest Partnership
<b>AMAF</b>	ASEAN Ministers on Agriculture and Forestry
<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>AQSIQ</b>	Administration of Quality Supervision Inspection and Quarantine, China
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ASEM</b>	Asia-Europe Meeting
<b>ASOF</b>	ASEAN Senior Officials on Forestry
<b>CECWG</b>	Customs Enforcement and Compliance Working Group
<b>CEN</b>	Customs Enforcement Network
<b>CITES</b>	Convention on International Trade in Endangered Species of Wild Fauna and Flora
<b>CMAA(s)</b>	Customs Cooperation and Mutual Administrative Assistance Agreement(s)
<b>CoP</b>	Conference of the Parties
<b>CPTFWG (ASEAN)</b>	Customs Procedures and Trade Facilitation Working Group
<b>CSI</b>	Container Security Initiative
<b>C-TPAT</b>	Customs-Trade Partnership Against Terrorism
<b>DfID</b>	Department for International Development, UK
<b>EU</b>	European Union
<b>FLEG</b>	Forest Law Enforcement and Governance
<b>FLEGT</b>	Forest Law Enforcement, Governance and Trade
<b>FTA(s)</b>	Free trade agreement(s)
<b>GATT</b>	General Agreement on Tariffs and Trade

<b>HS</b>	Harmonized System of the World Customs Organisation
<b>IBM</b>	International Maritime Bureau
<b>ITTO</b>	International Tropical Timber Organisation
<b>MBA</b>	Model Bilateral Agreement
<b>MEAs</b>	Multilateral Environmental Agreements
<b>MoU</b>	Memorandum of Understanding
<b>MTIB</b>	Malaysian Timber Industry Board
<b>NGOs</b>	Nongovernmental organisations
<b>PEB</b>	Pemberitahuan Ekspor Barang (Export Declaration Form, Indonesia)
<b>PNG</b>	Papua New Guinea
<b>RAFT</b>	Responsible Asia Forestry and Trade
<b>RILO A/P</b>	Regional Intelligence Liaison Office for Asia and the Pacific
<b>ROK</b>	Republic of Korea
<b>RUB</b>	Rouble, Russian Federation
<b>SAPU</b>	Sarawak Forestry Corporation Security and Asset Protection Business Unit
<b>SCCP</b>	(APEC) Sub-Committee on Customs Procedures
<b>SED III</b>	Third Meeting of the Strategic Economic Dialogue
<b>SGS</b>	Société Générale de Surveillance
<b>SKSHH</b>	Surat Keterangan Sahnya Hasil Hutan (timber transport permit, Indonesia)
<b>STIDC</b>	Sarawak Timber Industry Development Corporation
<b>TIFA</b>	US-Indonesia Trade and Investment Framework Agreement
<b>TPA</b>	Trade Promotion Agreement
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>USAID</b>	United States Agency for International Development
<b>USD</b>	United States Dollar
<b>VPA(s)</b>	Voluntary Partnership Agreement(s)
<b>WCO</b>	World Customs Organisation
<b>WTO</b>	World Trade Organisation

# INTRODUCTION

# 1

The destruction of natural forests continues to be the greatest challenge to forestry in the Asia-Pacific region. The Food and Agriculture Organisation of the United Nations has estimated that the area of primary forest in Asia decreased at an average rate of 1.5 million hectares per annum from 1990-2005 (FAO 2006, 135).

Illegal logging<sup>1</sup> is broadly recognized as one of the most critical proximate causes of deforestation and forest degradation. One review concluded that a third of operations on logging concessions in Papua New Guinea were fundamentally illegal and that illegalities existed in all 32 logging concessions (Contreras-Hermosilla 2002). In Indonesia, Kishor and Rosenbaum (2003) calculated that the government was losing USD 600 million per year in public revenue because of “stolen timber”, more than double the public expenditure on subsidized food programs for the poor in 2001. In the Russian Federation, it has been estimated that 6.4 million trees were harvested illegally each year resulting in a loss of government revenue of RUB 72 billion (USD 2.7 billion) (Kommersant 21 Aug. 2006). Globally, as much as 23 per cent of plywood exports are thought to be “suspicious”

and up to 17 per cent of roundwood could have been harvested illegally (Seneca Creek Associates/Wood Resources International 2004).

The global response to illegal logging was spurred by the G8’s Action Program on Forests, which was launched in May 1998. Actions under the program included assessments of the nature and extent of the international trade in illegally harvested timber, measures to improve market transparency, and assessments of the effectiveness of international measures to control illegal forest activities. In September 2001, a Ministerial Conference in Bali launched the East Asia and Pacific Forest Law Enforcement and Governance (FLEG) process. In the Conference’s Ministerial Declaration, the participating countries committed themselves to, inter alia, strengthen collaboration to address violations of forest law and forest crime, associated illegal trade and corruption, and their negative effects on the rule of law (Ministerial Declaration 2001). In May of the following year, the governments of Japan and Indonesia launched the Asia Forest Partnership (AFP), which, in its most recent Announcement, reconfirmed combating illegal logging and associated trade as one of its key themes ([www.asiaforests.org](http://www.asiaforests.org)).

1. Brack and Hayman (2002) define illegal logging as “when timber is harvested, transported, bought or sold in violation of national laws. The harvesting procedure itself may be illegal, including corrupt means to gain access to forests, extraction without permission or from a protected area, cutting of protected species or extraction of timber in excess of agreed limits. Illegalities may also occur during transport including illegal processing and export, misdeclaration to Customs, and avoidance of taxes and other charges.”

Collaboration between Customs administrations is one of a range of actions that is needed to stop the trade in illegal timber (FAO 2005). Traditionally, the role of Customs administrations has been that of a “gatekeeper” to collect revenue through import duties and taxes. Their responsibilities have evolved to include the protection of society and the fighting of transnational crime and they play a vital role as the first or last line of defense against smuggling, fraud, and detection of various illegalities that could transpire during the processes of export, re-export, transit and import. However, Customs administrations operate on the basis of their national legislation which limits their powers to within their national territories and for their own purposes. Consequently, they often have to deal with goods arriving in their territory with little or no external support or background information to assist them with their controls.

As an example of how enhanced Customs collaboration could contribute to combating the trade in illegal timber, a study by the Environmental Investigation Agency and Telapak revealed that large volumes of merbau (*Intsia spp.*) logs were being illegally shipped from Indonesia to China using fraudulent Malaysian documents and without the white government tags required under Malaysian laws for log exports (EIA/Telapak 2005; EIA/Telapak undated). Chinese Customs could have detected this illegal trade and alerted the Indonesian authorities, if directed to include timber legality as an item for attention in their risk assessment strategies and if provided the necessary training.

Recognising that Customs collaboration on illegal timber is needed, the Asia Forest Partnership approved a workshop to develop recommendations that could assist in reducing illegal timber trade. The East Asia and Pacific FLEG later endorsed the idea and the “Asia Customs and Forestry Law Enforcement Workshop: Promoting Cooperation among Customs and Forestry Authorities and other Relevant Agencies in East Asia to reduce the

Trade of Illegal Wood Products” was held in November 2005 in Cebu, Philippines. The workshop gathered about 90 participants from 15 countries representing Customs and Forestry administrations, civil society, international organisations and donors.

This review draws on the recommendations arising from this workshop. It was formulated under the USAID-funded Responsible Asia Forestry and Trade (RAFT) Program, which recognized the need to better understand the policy context governing timber and associated timber products trade from non-legal sources. Targeted analytical studies were identified as critical to ensuring a policy focus which grounds the program and its multiple partners through implementation.

The goal of the review is to assist Customs and timber trade regulating agencies in their efforts to improve control over the international tropical timber trade, thereby preventing trade from being a driver of illegal logging and thus supporting the management, conservation and sustainable development of forests. The objectives set for the review were:

- © Developing options for immediate measures to promote technical and legal collaboration through the inclusion of forest products in Customs Cooperation and Mutual Administrative Assistance Agreements (CMAAs) or more appropriate instruments;
- © Developing a strategy and follow-up steps to promote the findings of the research.

In the course of conducting the review it became clear that CMAAs were never intended to be product specific. The World Customs Organisation’s Model Bilateral Agreement for Customs mutual assistance is generic as are all existing CMAAs that are modelled on it. This review could find no example of a CMAA that was product specific and Customs officials interviewed in Japan, the Netherlands and Indonesia as well as World Customs Organisation (WCO) officials all rejected the idea of a CMAA specific to the trade in illegal timber. Recognising that the study needed to look beyond



CMAAs, the following three sub-objectives were developed:

- ⊙ Explore types of arrangements under which Customs collaboration to tackle illegal logging and the resultant trade could take place;
- ⊙ Identify useful types of collaborative action between Customs against the illegal timber trade that could be included in such arrangements;
- ⊙ Identify concepts and text for reference in the drafting of collaborative arrangements.

The study is based on a wide-ranging analytical review of i) Customs and illegal logging literature, ii) international legal instruments, iii) bilateral arrangements that assign or imply a role for Customs in combating the trade of illegal timber, iv) model and existing agreements for Customs mutual administrative assistance, and v) existing Customs networks. The review was augmented through consultations including Customs, Forestry and other officials, experts and key stakeholders. Rounds of consultations were conducted in Japan, the Netherlands, Brussels and Indonesia.

A workshop on Customs Collaboration to Combat the Trade in Illegal Timber was held on 28-29 October 2009 in Bangkok to provide further peer review of the report. Participants included Forestry and Customs officials from Indonesia, Malaysia, Vietnam, China, Lao PDR, Cambodia, Thailand and Japan, as well as representatives of regional and international organizations, including the US Agency for International Development Regional Development Mission for Asia (USAID RDMA), the ASEAN Wildlife Enforcement Network (ASEAN-WEN), The Nature Conservancy (TNC), TRAFFIC, the World Customs Organization Regional Intelligence Liaison Office for Asia and the Pacific (RILO-A/P), and IGES.

The objectives of the workshop were to:

- ⊙ Provide expert feedback for the policy report “Enhancing Customs Collaboration to Combat the Trade in Illegal Timber” prepared by IGES;

- ⊙ Clarify effective options to enhance collaboration between Customs agencies to prevent trade from being a driver of illegal logging; and
- ⊙ Prioritize the options and identify ways forward including the most appropriate collaborative arrangements for implementing the options.

The participants from Customs and Forestry authorities prepared for the workshop by providing written answers to a set of guiding questions for each session. The workshop was facilitated by IGES, TNC and TRAFFIC, and IGES and TRAFFIC provided the kick-off presentations for each of the sessions. The sessions addressed the analysis and findings of successive sections of the IGES report, and in this way the workshop was very successful in gathering a rich set of information and views on the report. TRAFFIC presented its research findings on timber trade statistics discrepancies in one session. The points raised by the participants during the workshop have been incorporated into this final version of the report, and the participants list and agenda are presented in the appendix.

The report is structured as follows. Section 2 provides the necessary grounding for this review by exploring the rapidly transforming environment in which Customs operate and their need to balance trade facilitation and security. Section 3 takes this analysis further by clarifying Customs procedures for the export and import of wood products. Through an analysis of past Customs offences, Section 3 also identifies useful forms of collaboration between Customs against the illegal timber trade. Section 4 analyses the content of World Customs Organisation conventions and its Customs Enforcement Network to see whether they could be used to combat this trade. Moving beyond an examination of content, the analysis considers whether there is interest amongst the Parties in using the WCO legal instruments for this purpose. Section 5 reviews the activities and functions of regional Customs networks. In Section 6, agreements of significance to

illegal logging and the resultant trade are reviewed with respect to their implications and provisions for Customs collaboration. The review begins with the Convention on International Trade in Endangered Species of Wild Fauna and Flora, before examining relevant bilateral instruments. Attention is given to the Trade Promotion Agreement between the United States and Peru, the planned partnership agreements on licensed timber trade between the EU and selected producer countries, and the UK-Indonesia and US-Indonesia memoranda of understanding on illegal logging. Section 7 analyses Customs arrangements for mutual administrative assistance to

determine whether they could complement bilateral agreements on illegal logging. The World Customs Organisation's model agreements are analysed and the possible synergies between the US-Indonesia memoranda of understanding on illegal logging and on Customs mutual administrative assistance are examined. Section 8 summarizes findings by highlighting the types of agreements under which Customs collaboration against the illegal timber trade could be organized, useful actions that such agreements could specify and possible sources of concepts and text to aid the drafting of agreements. ©

# CHANGING ROLE OF CUSTOMS

## 2

The roles assigned to Customs authorities and the instruments and resources available to them affect what actions they can take against the trade in illegal timber. Their roles and their institutional set-ups differ widely reflecting different national priorities. Where revenue collection is a priority, Customs are likely to be under the ministry of finance, whereas in countries where security is a priority Customs are likely to be aligned with border protection agencies. Adding further to the challenge of understanding Customs is the fact that their roles are not static, nor are they

confined to the implementation of policies of the Ministry in which they are located. Their roles are undergoing a transition towards trade facilitation and security and the administrative duties of Customs are being further shaped by policies that other ministries and agencies are responsible for and by bilateral and international agreements. This section provides the necessary grounding for this review by exploring the rapidly transforming environment in which Customs operate and their need to balance trade facilitation and security.

### 2.1 From the “Traditional” to the “New” customs authority

Traditionally, the role of Customs has been that of a “gatekeeper” that scrutinizes traded products as they physically cross national borders. The purpose of this gate keeping has, for many centuries, been to *control trade* in the national interest and to *collect revenue* through the application of import duties and taxes (which explains why Customs is often placed under finance ministries).

The national and international spheres which Customs stand between are changing rapidly and this change is driving a transformation in the roles of Customs. Gordhan (2007) identifies

the following national, regional and international strategic drivers as responsible for this transformation:

- © Facilitated by the invention of wide-bodied aircraft, containerisation and e-commerce, international trade volumes are increasing dramatically, requiring Customs to process more transactions, often without additional resources;
- © There has been a significant reduction in tariff (from 26.1% in 1980 to 10.4% in 2002) and non-tariff barriers to liberalize trade, which has increased opportunities for both legitimate and illicit trade;

- ⊙ Fluid transnational organized crime networks have emerged that provide criminals with low visibility and the agility to avoid detection and prosecution;
- ⊙ With the establishment of the World Trade Organisation (WTO) and its ongoing work, international trade is now subject to a wider and more multifarious set of rules;
- ⊙ International trade is subject to various international instruments to control the international movement of endangered species as well as dangerous and harmful goods;
- ⊙ There has been a rapid increase in the number of regional free trade agreements - in 2005, there were 183 WTO-registered regional trade agreements in force (WTO 2005) - which bring with them complex and often unique preferential rules of origin;
- ⊙ The traditional patterns of trade are changing with developing countries now responsible for over 30% of world merchandise trade and with a rapid increase in South-South trade;
- ⊙ The structure of global trade has changed significantly with manufactured goods accounting for an increasing share of global merchandise trade and with exported manufactured goods now often containing imported inputs;
- ⊙ New logistics and supply chain models employing procedures designed to speed up and reduce the costs of transporting goods across borders, such as just-in-time distribution, are increasing pressure on supply chains;
- ⊙ Global health concerns (e.g. avian flu) and international terrorism pose new security threats that are not confined by national borders.

These observations general apply to the Asia-Pacific region, where the Regional Strategic Plan 2008-2010 developed by the WCO member administrations of the Asia Pacific region noted the following drivers:

- ⊙ Increased expectations and emphasis around the role that Customs plays to secure and facilitate global trade;

- ⊙ A rise in the extent and sophistication of transnational crime, including commercial fraud, smuggling, drugs, piracy and counterfeiting;
- ⊙ Technological advances and an increasing need for Customs administrations to introduce non-intrusive inspection (NII) equipments and Information and Communication Technology (ICT) systems including establishing a Single Window for cargo clearance;
- ⊙ The continued rise in the number of regional and bilateral trade agreements and the WTO multilateral negotiations;
- ⊙ Increasing Customs' community protection roles into areas such as health, the environment and disaster response and relief;
- ⊙ Greater interface between industry and Customs and between Customs and other government agencies;
- ⊙ Continued developments in the governance, structure and work of Customs administrations (World Customs Organisation Asia Pacific Region 2008).

These drivers are shifting the roles of Customs away from *control* and *revenue collection* towards *trade facilitation* and *security*. A new type of Customs agency with new responsibilities is emerging. The new Customs agency no longer controls trade, but rather facilitates legitimate trade to support the competitiveness of countries and companies. For the new Customs agency the concepts of trade facilitation and security mean a shift towards automation, risk management and intelligence designed to focus resources on perceived high-risk areas, without delaying the processing of legitimate trade. In the new Customs agency, revenue collection is less significant, but this does not mean a decrease in workload. To the contrary, trade facilitation and security have increased the volume, scope and complexity of Customs work.

The new Customs agency employs a variety of new concepts and modern information technologies to facilitate and secure global trade. These include:

- ⊙ Single window systems - the concept that

traders only have to deal with one government agency which then passes on information to other government agencies;

- ⊙ Preferential treatment of authorized firms (e.g. the Authorized Economic Operator concept);
- ⊙ Standardisation and simplification of procedures;
- ⊙ Electronic reporting systems;
- ⊙ Risk management techniques including risk indicators, high risk product profiles, high risk containers concept and World Customs Organisation alerts.

Specific examples of the modernisation of Customs include the European Union's Modernized Customs Code and vision for a paperless trade and Customs environment, as well as commitment by the Association of Southeast Asian Nations (ASEAN) to implement interoperable single window systems.

In reality, the responses of Customs to the above drivers are uneven and Customs agencies mostly lie somewhere between the "traditional" and the "new". Many have insufficient resources to meet the challenges of increasing volumes of trade, the expanded scope of their administrative functions and the increasing sophistication of international crime. In many developing and least developed countries (including tropical timber exporting countries), revenue collection by Customs contributes significantly to the national purse and remains one of their primary functions (Widdowson 2007). Nevertheless, trade facilitation and security are affecting Customs everywhere and have implications for the establishment of collaborative arrangements between Customs to combat the illegal timber trade.

## Trade facilitation

The international movement to liberalize trade has spurred nine rounds of trade negotiations since the formation of the General Agreement on Tariffs and Trade (GATT) in 1947-48. In a liberalized trade environment international

traders are subject to increased competition and are seeking practical solutions to speeding up and reducing the costs of processing internationally traded goods. They have pressured governments to reduce their intervention in the market place and, in turn, Customs have been asked to reinvent themselves as facilitators rather than controllers of trade.

The WTO defines trade facilitation as "simplification and harmonization of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data required for the movement of goods in international trade" (WTO 2001), which implies a critical role for Customs. Indeed, trade facilitation is a key concern behind the evolution of various international Customs instruments developed by the World Customs Organisation that are designed to develop a coordinated response to the new global demands on Customs. Foremost amongst these is the International Convention on the Simplification and Harmonisation of Customs Procedures (Revised Kyoto Convention), which came into force in 2006 as the blueprint for standard and facilitative Customs procedures. The Revised Kyoto Convention is intended to provide Customs administrations with a modern set of uniform principles for simple, effective and predictable Customs procedures that facilitate international trade while maintaining appropriate levels of regulatory control.

## Security

One result of the September 11, 2001 terrorist attacks on the US has been an increase in the attention of governments towards securing supply chains from the concealment of terrorist weapons. The US Customs Container Security Initiative (CSI) and Customs-Trade Partnership Against Terrorism (C-TPAT) were prompted by this concern and have been particularly influential in defining the security role of Customs globally. The C-TPAT differentiates between supply chains that it assesses

as “secure” from those it assesses as high risk and, in doing so, seeks to work with exporting countries to improve their supply chain security.

The WCO Framework of Standards to Secure and Facilitate Global Trade was developed in response to the heightened fear of international terrorism and was heavily influenced by the US initiative. The foreword of the WCO Framework argues that Customs administrations are in a unique position to provide increased security to the global supply chain at a time when they are vulnerable to terrorist exploitation and to contribute to socio-economic development through revenue collection and trade facilitation. The Framework is designed to secure global trade without impeding (rather, facilitating) the movement of that trade. This is to be achieved through focusing resources on assessing and responding to risk. The standards are designed to secure the global supply chain by strengthening co-operation between Customs administrations to improve their capability to detect high-risk consignments (Customs-to-Customs network arrangements) and to facilitate trade by providing a mechanism — Authorized Economic Operator — for speeding up processing and reducing reporting requirements for businesses identified as having secure supply chains (Customs-to-Business partnerships). This new security role has thus demanded two basic shifts in Customs administration. First, a focus on trade at the border is being replaced by a focus on the supply chain under what could be described as a “total control approach”. Second, a focus on import control, brought about by the attention of Customs to revenue collection isolated

from export and transit control, is being replaced by real-time co-operation between Customs administrations that allows for detection of high risk shipments prior to import (Gordhan 2007).

## Customs as the key border agency

Another important consideration is that traditionally Customs have been assigned administrative duties for implementing government policies that are the purview of other ministries and agencies (e.g. in areas such as health, agriculture, environment, trade statistics and in some instances immigration). The Customs law will usually have a general provision on the administrative duties of Customs in relation to other laws. Service level agreements are normally the means by which Customs are assigned regulatory responsibility at the point of import and export for these policies (Widdowson 2007). In a number of countries, Customs are now undertaking functions on an agency basis on behalf of other national administrations to the extent that they are viewed as “the key border agency responsible for all transactions related to issues arising from border crossings” (Gordhan 2007). Adding further complexity to the work of Customs, responsibilities for all cross-border transactions are not only defined by Customs and other national laws, but also by regional agreements and international instruments such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

## 2.2 Concluding discussion

This brief description of the evolving roles of Customs agencies suggests a number of key observations about the formulation of agreements for enhanced collaboration between Customs on the trade of illegal timber. First,

any arrangement to strengthen collaboration between Customs administrations will have to consider international norms on trade facilitation and security that are set out in international agreements and further elaborated in WCO

legal instruments. Second, regional and bilateral agreements to promote the liberalisation of trade have proliferated. Any agreement for enhanced collaboration between Customs administrations would have to be informed by the content of any existing higher level agreements. Third, the workload of Customs is increasing dramatically across all areas often without a matched increase in additional resources and in some cases a decrease (Bolhofer 2008). Participants at the peer review workshop for this report noted that like many other parts of government, Customs are being

asked to do more – trade facilitation and security – without necessarily more resources. Parties to an agreement between Customs administrations that results in a greater workload for Customs and other border control officers should thus spell out what additional resources are required and how these will be provided. Moreover, the needs of Customs agencies are not the same in each country. Some are much better resourced than others, and initiatives for enhanced Customs collaboration must take this into account. ©





# USEFUL TYPES OF CUSTOMS COLLABORATION TO COMBAT THE ILLEGAL TIMBER TRADE

## 3

In this section we identify the types of illegalities in the trade of timber that fall within the purview of Customs authorities and suggest a number of options for enhanced Customs collaboration to tackle these. This

analysis first requires an understanding of Customs procedures for the export and import of wood products, including the documentation that accompanies shipments and the roles of various actors.

### 3.1 Customs procedures for the export and import of wood products

The United Nations Conference on Trade and Development (UNCTAD) explains that the purpose of all Customs controls is to ensure that the movement of vessels, vehicles, aircraft, goods and persons across international borders occurs within the framework of laws, regulations and procedures that comprise the Customs clearance process<sup>2</sup>. The powers of Customs are thus regulated by legislation which sets out the responsibilities of Customs at the point of export and import for checking the conformity and the legality of the products presented.

In general, an exporter must submit to Customs an export declaration and official documents as described by the Customs Law (e.g. export permit), as well as shipping, insurance and commercial documents. Of these, Customs authorities mostly rely on the export declara-

tion when checking a cargo for conformity and legality. Export declarations include information about the contents and value of the shipment, the ports of loading, transit and unloading, the type of commercial contract, and details of the exporter and importer. For timber, the information subject to control by Customs may include origin, diameters, length, volume, species, and product classification.

Although Customs are responsible for checking the conformity and legality of timber insofar as the Customs Law requires, they may delegate some of this responsibility to other agencies. For the export of timber an export licence or permit may be required and this responsibility is usually delegated to agencies dealing with the timber industry. The application by the exporter for a timber export permit must be accompanied by supporting documentation.

2. UNCTAD Trust Fund for Trade Facilitation Negotiations. Technical Note No. 12.

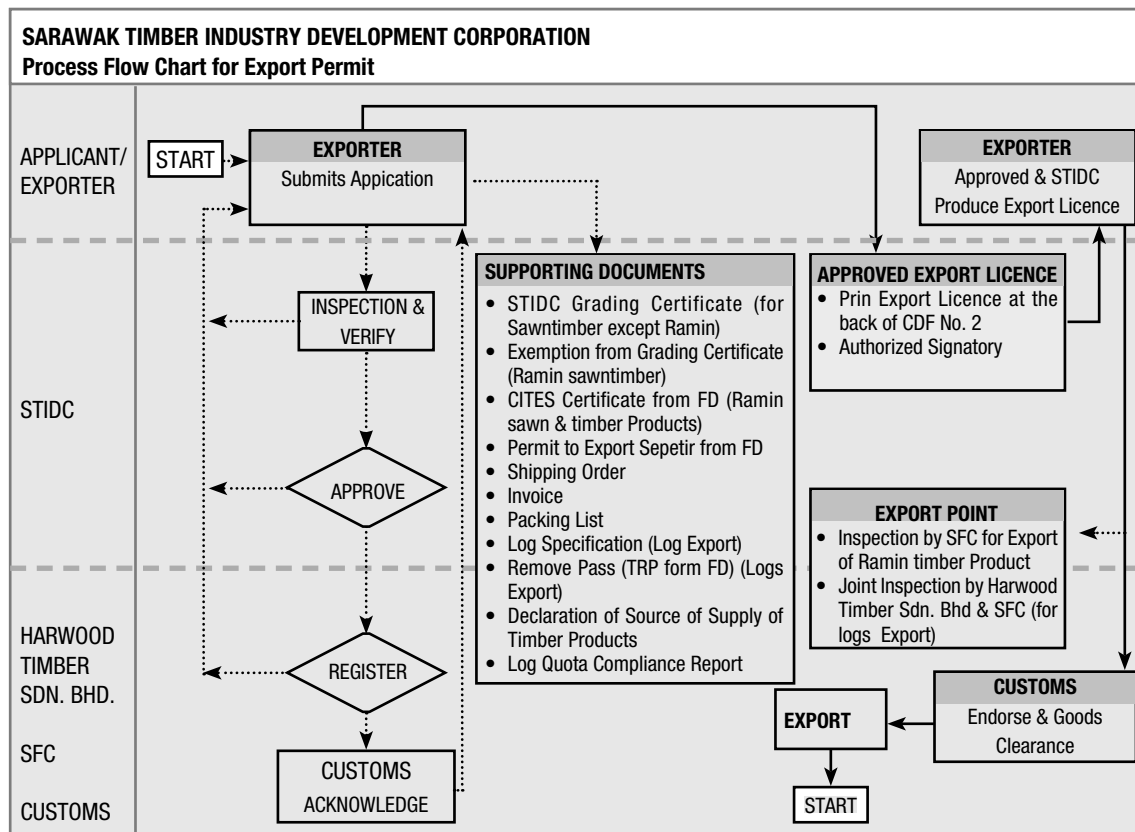
These supporting documents are treated as verification that the timber product is legally fit for export (e.g. that the timber was legally harvested and removed from the forest). Acceptance of an export declaration by Customs is dependent upon the exporter holding a valid export licence; hence, the approved export declaration form can be viewed as an umbrella document that provides some indication of the legality of the product.

issues an Export Clearance Certificate and SAPU issues a Transit Removal Pass. The exporter then submits an application for an export licence, which is issued by the Sawarak Timber Industry Development Corporation (STIDC) and is stamped on the back of the Export Declaration Form (Customs Form 2). STIDC asserts that buyers need not have any doubts that timber issued with an export permit is legal<sup>3</sup>.

Figure 3.1 illustrates the above by describing the process behind the issuing of an export licence in Sarawak, Malaysia. Harwood Timber Sdn. Bhd., a wholly state-owned subsidiary, and the Sarawak Forestry Corporation Security and Asset Protection Business Unit (SAPU) inspect a particular shipment at the approved export points. One objective of this inspection is to check that the shipment does not exceed the 40% export quota for logs (the other 60% are reserved for domestic processing). Harwood

Papua New Guinea (PNG) presents an interesting case where the export permit is issued by the PNG Forest Authority, but where Société Générale de Surveillance (SGS) has been contracted to implement a third party log export monitoring system. At the export port the SGS inspector undertakes a pre-shipment inspection which involves a scaling and species check and verification that the volumes and species match the details on the export permit. If there is any discrepancy between the goods destined

Figure 3.1 © Process for issuance of export permit, Sarawak



Source: Presentation by Mohd Hinri Abdullah at the International Seminar for Tackling Illegal Logging, 2007 II in Yokohama, 3 December 2007, Yokohama.

3. Presentation by Mohd Hinri Abdullah at International seminar for tackling illegal logging, 2007 II in Yokohama, 3 December 2007 Yokohama

for export and the documentation, the Forest Authority officer should not allow ship-loading to commence. After loading SGS issues an inspection report which is used by all government authorities to check the commercial and shipping documentation and clear the shipment for export (Telfer 2007).

The documents that are required for loading differ between countries but usually include i) specification of the timber, ii) Bill of Lading, iii) cargo invoices, iv) certificate of origin, and v) phytosanitary certificate. Additional documents can include kiln drying certificates and CITES export certificates. The documents are prepared by various actors in the trade chain, with intermediaries playing an important role. The exporter or the forwarding agent acting on their behalf is responsible for the Customs declaration and establishing the Bill of Lading; the authorities are responsible for the certificate of origin, phytosanitary certificate, and the document for paying export taxes; and the ship or ship's agent is responsible for the ship's Manifest.

The Manifest is declared to the export Customs as a detailed summary of a vessel's total cargo. The Hague-Visby Rules state that "no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received" (<http://www.admiraltylaw.com/>). As Landrot and Lo (2007) explain, "the shipping documentation itself can be a vulnerability in the tropical timber chain, since it removes the possibility of the carriers, ship's captain (and therefore crew) and future ship buyers' liability or accountability for ensuring the legality of the cargo shipped".

The documents associated with the export clearance process that would be most useful for combating the trade in illegal timber are the timber export permit and the export declaration, which provide an indication of the legality of the timber shipped. However, they do not accompany the shipment.

To clear Customs and tax procedures in the importing country, importers must submit an import declaration and accompanying documentation (e.g. a document that shows that the goods have passed quarantine inspection). In Japan, for example, the log scales and species are checked in a bonded area by a company approved by the government for "Japanese government authorized weights and scales". The results are submitted as a certificate to the Customs broker and the importer. Acting on behalf of the importer the Customs broker presents the necessary documents such as the invoice and log certificate to Customs, which then provides the importer with an import permit to release the goods to the domestic market.

An important function of Customs at the point of export and import is statistics gathering and reporting, for which they primarily rely on export and import declarations. Statistics gathered by Customs include volumes, species and classification of products into HS (Harmonized System of the World Customs Organisation) categories. Discrepancies in international timber trade statistics can be very large for both legitimate and illegitimate reasons. Legitimate reasons for discrepancies include inadequate trade data collection systems, data entry errors, different reporting systems and scaling methods, the time required for a shipment to reach its destination, differences in measurement and conversion factors (weight versus volume), and duty structures (Chen, forthcoming). For example, Tachibana (2005) found that differences in the trade statistics of Malaysia and Japan using the four digit code HS 4403 were quite low over a six year period, but when extended to six digit codes, were quite large because of different product classification: whereas Malaysia classifies much of its roundwood exports as HS 4403.99, in Japan roundwood is mainly divided between HS 4403.49 and 4403.41 (ibid.). In this study we are interested in illegitimate reasons for discrepancies in export and import statistics; however, reducing legitimate discrepancies is also desirable as it would direct attention to discrepancies associated with the cross-border trade of illegal timber.

## 3.2 Illegalities in the timber trade that could be detected by the customs clearance process

To determine what types of Customs collaboration might be useful to combat the trade in illegal timber, we must first understand what types of illegalities could be detected by the Customs clearance process. Many illegalities in the forest sector do not fall within the purview of Customs. There are usually various points of control in the timber production chain to check legality, starting with the harvesting site (usually the log pond, but sometimes the tree stump), but the purview of Customs is limited to export and import controls. Much of the documentation that verifies legality of forest operations, including the transportation, buying and selling of timber, is not inspected by Customs, but by Forestry, Transport or other authorities and, in some countries, by third parties. The explanation by Sheingauz et al. (2005) that the responsibility of Russian Customs officials is limited to the prosecution of any forest violations that can be identified through Customs control is applicable to all producer countries.

Likewise, Customs in consumer countries take their mandate from Customs legislation, which, with the exception of the US Lacey Act<sup>4</sup>, does not prohibit the import of goods produced in contravention of the producer country's laws. For example, under German Customs law Customs officials have no powers to seize wood imports of illegal origin, with the exception of CITES-listed timber species. However, they are not totally powerless. If there is strong evidence suggesting that money comes from trade in illegally felled timber and has been moved for the purpose of money laundering, Customs officials may seize the cash or equivalent means of payment and take this into safe-keeping to uncover the origin or the intended use (Federal Government of Germany 2004). Moreover, goods that are smuggled out of a country may

be misdescribed in the accompanying documentation, which is a Customs offence that allows Customs agencies to seize the goods (Brack 2005).

Although Customs law only empowers Customs authorities to act on a small subset of the wide range of illegal activities that can occur in the forest sector, the illegalities that affect or could be detected by the Customs clearance process are in no way insignificant. Many examples of breaches of Customs law in the trade of timber have been reported. These can be divided into i) illegalities in dealing with Customs procedures (e.g. misdeclaration or bribing Customs officials) and ii) total circumvention of Customs procedures. Smuggling is of immediate concern to Customs and may either be by stealth or by fraud. The following types of illegalities in the timber trade that fall within the jurisdiction of Customs have been reported or suggested.

### **Export and import of tree species banned under international law**

The international trade in species of wild animals and plants which are endangered or which may become endangered if their exploitation is not controlled is regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see Section 5). Illegal export and import of trade in CITES-listed tree species (i.e. trade without the requisite CITES export and import permits) has been widely reported.

4. See section 5.4.

### Example

Acting under authorisation as the Malaysian Management Authority for CITES, the Malaysian Timber Industry Board (MTIB) inspected sawn timber stored in warehouses located in the Free Trade Zone of Pasir Gudang, with the co-operation of the port and Customs authorities. The transshipment documents did not specify the species, of which MTIB found nearly half to be Ramin (*Gonystylus* spp.), believed to be of Indonesian origin. Ramin is listed in Appendix II of CITES, meaning that it must be accompanied with a CITES permit. The Port Authority was instructed to seize the Ramin sawn timber (<http://www.mtc.com>).

## Export and import of timber in contravention of national bans

A number of countries have banned the export of roundwood, yet their roundwood continues to register in the import statistics of their trading partners. While the export of such timber is illegal, its import is not, unless the consumer country has formally recognized the ban. Malaysia is the only country to recognize Indonesia's export ban on roundwood and squared logs (i.e. timber measuring more than 60 square inches in size), making any import illegal.

### Example

Despite the fact that Lao PDR has banned the export of logs and sawn timber, EIA/Telepak (2008) estimated that 500,000 m<sup>3</sup> of logs are transported across the border into Viet Nam every year.

## Bribing customs officials

Reports suggest that in some countries, unscrupulous traders may be able to bribe Customs officials to stop proper documentation checks.

### Example

Newell and Lebedev (2000) found that for a small bribe Customs officials allowed containers and train cars of timber to move from Russia into China without verification and that consequently a large volume of timber was crossing the border illegally.

## Export without a licence or other necessary documents or using fraudulent documents

Many accounts of timber smuggling by stealth (i.e. circumvention of the Customs clearance process) or by using fraudulent documentation have been reported in countries that have strong restrictive export policies.

### Example (without documents)

Four ships were loaded with over 25,000 m<sup>3</sup> of illegally sourced timber at Pangkalanbun, Indonesia in November 2001. Three of these were seized by the Indonesian Navy, which found that none of the vessels carried the required legality document for the transport of logs or sawn timber (SKSHH) and that the vessels were planning to depart Indonesian waters in clear contravention of the log export ban (EIA/Telapak 2002).

### Example (fraudulent documents)

In November and December 2006, the Indonesian Navy seized 314 containers of timber and pulp destined for Singapore in the Malacca Strait. Officials reported that the boats carried false documents that described their cargo as wood mouldings, when they were in fact carrying sawn timber, which Indonesia has banned from export (Washington Post 09/04/2006).

## Undervaluing export prices and volumes and misclassification of wood products and species

Exporters may undervalue export prices and volumes and misclassify wood products and species to reduce export taxes.

### Example (undervaluing export prices and volumes)

Sheingauz et al. (2005) reported that in Dalnerechensk, Primorskiy Krai, Russia exporters were misreporting the grade and quantity of consignments at the Customs inspection yard, and that Customs officers were complicit in this evasion of payments, receiving several dollars per cubic metre "for their pocket".

#### Example (misclassification of wood products and species)

Newell and Levedev (2000) and Lopina et al. (2003) found that some Russian timber exporters were declaring their consignments as pulpwood logs or fuelwood when they were actually exporting industrial hardwood to reduce their payment of export taxes. Lankin and Voropaev (2002) reported that to avoid taxes, exporters were also misclassifying consignments as regular pine rather than valuable Siberian and Korean pine.

### Illegals on the high seas: Re-routing, trans-shipment fraud and tampering with cargo

Trans-shipment occurs when cargo is transferred between ships after export and before reaching the consumer country and allows all the export documents to be replaced.

#### Example (suspect documentation)

In 2008, the International Maritime Bureau (IMB) found irregularities in shipments of timber originating from North Africa, the Middle East and Malaysia. The Bills of Lading accompanying the shipments all listed the same supplier and carrier for the timber. The IMB established that the listed carrier had not called into the port of loading at the declared time, nor had the port any record of the loading (<http://www.icc-ccs.org/main/news.php?newsid=115>).

#### Example (tampering with cargo)

In 2006, the IMB found that seals had been broken on containerized ships which facilitated the movement of illegal paper and board products into the UK (Landrot and Lo 2007).

### Import without the necessary documents or using faked documents

Illegals can also occur when imported timber is not accompanied by the necessary documents or when documents are fraudulent.

#### Example

Despite the Chinese ban on imports of timber from northern Myanmar (Burma) imposed since 2005, recent reports claim that truckloads of logs are crossing from Kachin State into China daily (Kachi News Group, 04/04/2008; Raw Story (USA), 15/07/2007). Chinese law requires that timber imports are accompanied by a valid certificate of origin and a valid quarantine certificate from the country of origin. After determining that the quarantine certificate is valid, the Chinese Administration of Quality Supervision Inspection and Quarantine (AQSIQ) issues its own quarantine documentation. Chinese Customs are able to release the timber after checking the certificate of origin and the AQSIQ quarantine document. Global Witness (2005) concludes that contrary to Chinese law “either the timber importers on the China-Burma border are failing to supply the required documentation to Customs and AQSIQ, providing false documentation, or avoiding inspection by these agencies entirely”.

### Other possible illegalities

The volume of a shipment can legally be reduced, if the timber does not fit any specific industrial use (e.g. if a log is split through rough handling) or if the process of waste removal prior to transportation is damaging to the balance of valuable timber (Landrot and Lo 2007). This opens the possible for over-commercial or illegal volume reductions.

## 3.3 Types of useful customs collaboration to combat the illegal timber trade

All of the illegal acts described above affect Customs law or could be detected by inspection at the point of export or import. They suggest the following useful types of collaboration

between the Customs administrations of exporting and importing countries to combat the illegal timber trade.

### ***Protocols for spontaneous intelligence sharing and to make and accept requests for assistance***

An agreement between Customs authorities to share intelligence on a spontaneous basis when illegalities are suspected or detected and to make and accept requests for assistance would be useful. Some specific examples are given below.

### ***Reciprocal recognition of trade restrictions***

Reciprocal recognition of timber trade restrictions is desirable, such as Malaysia's recognition of Indonesia's ban on the export of roundwood and squared logs. Customs in the country of import would be instructed not to grant import licences for these restricted products.

### ***Information sharing on export restrictions***

Even when importer countries do not formally recognize the trade restrictions of exporter countries (e.g. bans on the export of roundwood), an agreement and protocol for the importer country to voluntarily supply information on any such imports would be useful.

### ***Development and use of risk profiles***

The identification of high risk timber and development of their risk profiles would be helpful in enabling intelligence targeting by Customs. Exporter countries would share this information with importer countries. Customs at the point of import would include attention to high risk timber products in their risk assessment strategies and would inform Customs in the country of origin of suspect shipments. Interagency coordination would be desirable for developing timber risk profiles. The WCO Customs Enforcement Network seizures database could become an important reference for timber risk profiles, if expanded to cover the trade in illegal timber (see Section 4).

### ***Information-sharing on documentation accompanying shipments***

It would be useful to have provision of information by exporter countries to importer countries on documents that must accompany timber shipments as well as some means to

identify their authenticity. This would include sharing of information between exporter and importer countries on detected fraudulent documentation and its reflection in risk assessment strategies.

### ***Requirement for export declarations to accompany timber shipments***

In producer countries where a permit is required for the export of timber and where that permit will only be issued after a documentation check to ensure that the forest operation and the downstream activities are legal, the stamped export declaration form provides an indication of the legality of the timber. Export declarations also have greater enforcement consequence than the commercial and shipping documents as they are directly enforceable by the relevant government agency (Chen, forthcoming). Export declarations could thus be used by Customs in importing countries as a check on timber legality. This would require an agreement between exporting and importing countries for a check on export declarations and for information and intelligence exchange. Revision of the Customs Law would be necessary to make it mandatory that export declarations accompany timber shipments.

It should be stressed that export declarations can mostly only provide an indication and not complete assurance of timber legality. This would require an attestation of legal origin and compliance based on a robust enforcement of laws affecting forestry operations and the forestry industry and a robust and properly implemented documentation system, both of which are often lacking in producer countries.

There is one instructive unique example of reciprocal paper requirements. To stem the movement of illegal timber from Indonesia to the Malaysian state of Sarawak, the Sarawak authorities now require certain Indonesian legal documents to accompany the shipments. These are the Indonesian timber transport permit (SKSHH) and the equivalent export permit (PEB).

Certificates of origin could also be used to combat smuggling on the high seas (e.g. when a producer country has an export ban and timber is smuggled out and labelled as being sourced from another country); however, they are not always established with adequate control or investigation (Landrot and Lo 2007).

### ***Establishment of prior notification systems***

Prior notification of exported timber shipments by the exporter country to the importer country would be a useful strategy to combat smuggling by stealth. This could be supported by an agreement for Customs at the point of import to inform Customs of the exporter country of any unnotified shipments and protocols for requests for further inspection and voluntary exchange of information.

### ***Periodic communication between Customs authorities***

To update on new developments, identify challenges, propose solutions, and keep attention focused on the timber legality issue, periodic communication between Customs authorities, and involving Forestry and other affected departments, would be useful.

### ***Cooperation to investigate timber trade statistics discrepancies***

Cooperation to investigate timber trade statistics discrepancies would help distinguish between discrepancies due to normal factors (e.g. differences in conversion factors and interpretation of HS Codes) and abnormal factors (i.e. exports and imports of illegal timber). This would contribute to raising the awareness of Customs at the point of import of export controls in the country of origin and means used to circumvent these.

### ***Cooperation to strengthen Customs integrity***

To combat corruption within Customs administrations, sharing of experiences to strengthen Customs integrity may be useful. In countries where bribery of border control officers is associated with exports of illegal timber, development assistance could be directed at improving Customs governance, taking note of the Arusha Declaration (Declaration of the Customs Co-operation Council Concerning Good Governance and Integrity in Customs), which elaborates necessary elements of a national Customs integrity program<sup>5</sup>.

## **3.4** Concluding discussion

Countries have clear procedures for the permitting of wood product exports and some exporting countries now have wood product legality verification processes as part of their export permitting. However, the requirements of the exporting countries for the clearance of wood product consignments are not well known by Customs agencies in importing countries. Information sharing is thus critical for more effective co-operation.

At the peer review workshop for this report several Customs officials and experts agreed

that the use of the Customs export declaration form as a check on legality in the country of import could be feasible. This is the official document endorsed by Customs and other agencies before the shipment leaves a country. This official document could be checked at the point of import to verify and validate the other documents presented, such as business and shipping documents. This will help in eliminating some forms of illegality including misidentification, misevaluation, tax evasion, etc. and is a useful tool for monitoring the timber trade between two countries.

5. See <http://www.wcoomd.org> for a copy of the revised Declaration.



Requiring an additional document as a check on the legality of timber in the country of import could also be feasible. At one time the idea for an advanced passenger declaration had been floated: Before the airplane departs, Customs would send advanced information related to the passenger list to Customs in the destination country. In a similar vein, the Customs of the export country could send the export declaration forms for all wood product shipments to Customs in the country of import as a form of prior notification.

The potential for Customs administrations to combat the trade in illegal timber is limited by their powers, which are set out in the Customs law. Nevertheless, the literature contains many cases of illegal timber trade where enhanced collaboration between Customs administrations would be advantageous, as described above. The remainder of this report discusses how this collaboration could be organized. ©



# WCO LEGAL INSTRUMENTS AND TOOLS

## 4

In this section we consider whether WCO legal instruments and tools could contribute to enhanced collaboration between Customs agencies to combat the illegal timber trade. The WCO was established in 1952 as the Customs Co-operation Council, with the mission to enhance the efficiency and effectiveness of its member Customs administrations, thereby assisting them to contribute successfully to national development goals, particularly in the areas of trade facilitation, revenue collection, community protection and national security. The WCO has a particularly important role to play in facilitating collaboration between Customs administrations: It is the only independent intergovernmental organisation that focuses exclusively on Customs matters; it has a global membership of 174 Customs administrations which are responsible for administering 98% of global trade; and it has developed a number of conventions and other international instruments that can enhance collaboration. Its main areas of work include:

- ⊙ Developing, maintaining and promoting a series of internationally-agreed conventions, other instruments and best-practice

approaches to achieve harmonisation and simplification of Customs systems and procedures;

- ⊙ Promoting co-operation, communication and partnership with governments, other international and regional organisations, donor agencies and the private sector;
- ⊙ Promoting “Customs-to-Customs networks” and “Customs-to-Business partnerships” to secure and facilitate international supply chains;
- ⊙ Promoting communication and co-operation among its members and with other stakeholders;
- ⊙ Overseeing the Harmonized Commodity Description and Coding System;
- ⊙ Making recommendations on the interpretation and application of conventions and for the settlement of disputes concerning the conventions;
- ⊙ Providing capacity building, training and technical assistance and integrity program to increase the capacity of its member Customs administrations (<http://www.wcoomd.org>).

### 4.1 WCO legal instruments

The WCO’s promotion of Customs collaboration to combat Customs offences dates back to

1953 when it adopted the Recommendation on Mutual Administrative Assistance. The WCO

later learnt that recommendations were insufficient for some states to grant administrative assistance and began working on a model bilateral convention on mutual administrative assistance for the prevention, investigation and repression of Customs offences. Still later, it turned its attention to developing international conventions. In total, the WCO has developed 19 conventions, two agreements and a model bilateral agreement.

The WCO conventions do not mention illegal logging and the resultant trade when specifying types of collaboration between Customs administrations. However, the analysis in Section 3 suggests that some of the protocols could be useful in combating this trade. It might also be technically possible that one of these conventions could be extended to include a specific annex on illegal logging. The conventions contain international Customs norms that should not be ignored in the drafting of any bilateral agreements on illegal logging that specify a role for Customs and they contain text that could be used for drafting clear legal provisions on the exchange of information and requests for assistance between Customs administrations<sup>6</sup>. Table 4.1 lists the relevant WCO legal instruments.

Table 4.1 © **WCO legal instruments with protocols that could be useful for Customs collaboration against the illegal timber trade**

Date	Legal Instrument
1974	International Convention on the Simplification and Harmonisation of Customs procedures (Kyoto Convention) - enters into force
1999	Revised Kyoto Convention adopted by WCO Council - entered into force in Feb. 2006
1980	Convention on Mutual Administrative Assistance in the Prevention, Repression and Investigation of Customs Offences (Nairobi Convention) - enters into force
2003	Convention on Mutual Administrative Assistance in Customs Matters (Johannesburg Convention) - adopted by WCO Council, but not yet ratified by the necessary number of signatories for it to enter into force

## **International convention on the simplification and harmonisation of Customs Procedures (Kyoto Convention)**

The revised Kyoto Convention seeks to eliminate divergence between the Customs procedures and practices of Contracting Parties to facilitate international trade and other international exchanges without compromising control. As of 30 June 2008 there were 58 contracting parties to the Convention.

The revision of the 1973 Convention was deemed necessary to provide Customs administrations with a modern set of uniform principles that took advantage of information technology and risk management techniques to achieve an appropriate balance between trade facilitation and security. The revised Convention also carries greater legal implications than the original Convention as reservations by contracting parties against the Standards and Transitional Standards of the General Annex are not permitted. The Convention requires that contracting parties adopt national legislation that specifies the conditions to be fulfilled and Customs formalities to be accomplished for procedures and practices in the Convention. The significance of the Kyoto Convention for this review is that it establishes international Customs norms in its Chapter 6 on Customs Control such as risk management and analysis that any agreement for enhanced Customs collaboration against illegal timber would have to consider.

## **International convention on mutual administrative assistance for the prevention, investigation and repression of customs offences (Nairobi Convention)**

The Nairobi Convention was drawn up in 1977 and as of June 2008 has 50 Contracting Parties and two signatories subject to ratification.

6. The conventions can be downloaded from the WCO website (<http://www.wcoomd.org/>).

Under the Convention, Contracting Parties agree that their Customs administrations shall afford each other mutual assistance with a view to preventing, investigating and repressing Customs offences. The Convention covers only administrative and not judicial assistance. Both a weakness and strength of the Convention is its flexibility, designed to encourage maximum participation. Parties only need accept one annex and reservations are permitted.

The administrative assistance the Convention prescribes is generic but could be used against the trade in illegal timber. The Body and 11 annexes require Contracting Parties to volunteer information and define how Parties can request assistance, including on document authenticity. The following procedures, reworded for brevity, would appear most significant.

#### **Annex I © Assistance by a Customs administration on its own initiative**

A Customs administration shall, on its own initiative, communicate to another Customs administration any information, supported by documentation, of a substantial nature (including the movement of goods) which gives good reason to believe that a serious Customs offence will be committed in the territory of the other Contracting Party. A Customs administration, on its own initiative, shall inform another Customs administration of any information likely to be of material assistance to it in connection with Customs offences and, particularly, in connection with new means or methods of committing such offences.

#### **Annex II © Assistance, on request, in the assessment of import or export duties and taxes**

At the request of a Customs administration which has good reason to believe that a serious Customs offence has been committed in its country, the requested Customs administration shall communicate all available information which may help to ensure the proper assessment of import or export duties and taxes. The information communicated can include the tariff classification of goods and the declaration of origin.

#### **Annex III © Assistance, on request, relating to controls**

On request, a Customs administration shall communicate to another Customs administration information on: the authenticity of official documents; whether goods imported have been lawfully exported; whether goods exported have been lawfully imported.

#### **Annex IV © Assistance, on request, relating to surveillance**

On request of another Customs administration, a Customs administration shall maintain special surveillance for a specified period over the movements of particular goods which are reported by the requesting Customs administration as giving rise to important illicit traffic towards or from its territory.

#### **Annex V © Enquiries and notifications, on request, on behalf of another Contracting Party**

On request of another Customs administration, a Customs administration shall, subject to the laws of its territory, make enquiries to obtain evidence concerning a Customs offence under investigation in the territory of the requesting administration.

The annexes also provide for and describe the procedures for appearance by Customs officials before a court or tribunal abroad, presence of Customs officials of one Contracting Party in the territory of another Contracting Party and participation in investigations abroad. The Convention has annexes on the illegal trade of specific products, i.e. "Assistance in Action Against the Smuggling of Narcotic Drugs and Psychotropic Substances" and "Assistance in Action Against the Smuggling of Works, Antiques and other Cultural Property", suggesting that the inclusion of a specific annex on the illegal timber trade might be technically feasible.

## Convention on mutual administrative assistance in customs matters (Johannesburg Convention)

The Johannesburg Convention draws on the framework to facilitate mutual administrative assistance in Customs matters laid out in the Nairobi Convention, but has a wider scope and incorporates modern Customs clearance principles and methods. The Convention is 39 pages in length and has 54 articles. As of June 2008, the Convention has three Contracting Parties and seven signatories, which means that it has not yet entered in force.

Contracting Parties are, through their Customs administrations, to provide each other with administrative assistance for the proper application of Customs law, for the prevention, investigation and combating of Customs offences and to ensure the security of the international trade supply chain. The information to be exchanged under the Convention, either spontaneously or on request, may include: new effective enforcement techniques having proved their effectiveness; new trends, means or methods of committing Customs offences; goods known to be the subject of

Customs offences, as well as transport and storage methods used in respect of those goods; persons known to have committed a Customs offence or suspected of being about to commit a Customs offence; any other data that can assist Customs administrations with risk assessment for control and facilitation purposes.

A number of the Convention's articles specify forms of mutual administrative assistance that could be useful for combating the illegal timber trade. Article 3 specifies the protocols for requests for assistance and identifies how the requests should be communicated, who they should be communicated through and the content of the requests. Chapter 4, Articles 5-10, which specify information exchange, both spontaneous and through requests for assistance, are particularly relevant. Article 10 allows for prior notification in advance of the arrival of consignments, which was identified in Section 3 as potentially useful for combating timber smuggling by stealth. Chapter 5 on Special Types of Assistance sets out protocols for surveillance and investigations and Chapter 6 on Cross-Border Co-operation specifies protocols for hot pursuit, covert investigations and joint control and investigation teams.

## 4.2 Customs enforcement network

The WCO collects data and information for intelligence purposes through its global enforcement information and intelligence tool, the Customs Enforcement Network (CEN), which became operational in July 2000. The CEN manages a seizures and offences database which stores intelligence submitted voluntarily by member Customs administrations. The CEN provides "alerts" based on intelligence submitted to the database that contain intelligence, including photos and routes, on seizure, concealment, transport and indicators that led to detection. The CEN also manages a concealment picture database to illustrate concealment

methods. Other features of the CEN include a database search tool, alert messages and the option for users to exchange emails and engage in discussion forums. The CEN is accessible to any Customs administration and only authorized users can access the database.

Seizure information is reported under 13 categories: drugs; tobacco; alcoholic beverages and spirits; CITES; intellectual property rights; counterfeiting; precursors; tax and duty evasion; weapons and explosives; currency; nuclear materials; hazardous material; pornography / paedophilia. As of September 2009,

there were 12,254 cases of seizures reported under the CITES category (peer review workshop). The seizures reported on timber smuggling consisted of six cases of red sanders wood (*Pterocarpus santalinus*) destined for Singapore, Malaysia, Hong Kong and elsewhere, reported

from India. The concealment was detected either in freight or on premises and in one case there was no attempted concealment. This intelligence was the basis for a CEN alert message on the large scale smuggling of red sanders wood from India.

### 4.3 Environet

The WCO Secretariat has recently developed ENVIRONET for the purpose of informal consultation and assistance from experts and other Customs colleagues related, but not limited to, consignments controlled by the multilateral environmental agreements (MEAs). ENVIRONET is an internet based service maintained and made available free of charge by the WCO to all members subscribed to the users group.

ENVIRONET is described as a real-time communication tool for information exchange and cooperation in the area of environmental border protection among Customs administrations (with no limits to the number from each establishment), competent national agencies, international organizations and their regional networks, as well as other enforcement authorities bearing similar responsibilities. ENVIRONET aims to:

- ⊙ share best practices;
- ⊙ provide downloadable training materials, identification guides, manuals, and other

background information valuable for environmental enforcement;

- ⊙ exchange information on seizures, and possible on-going trafficking;
- ⊙ create discussion forums on specific topics;
- ⊙ facilitate assistance by experts from international organizations, competent national authorities, and experienced Customs officers;
- ⊙ facilitate cooperation between Customs administrations, competent agencies and international organizations.

The scope of ENVIRONET covers all information that is relevant to Customs environmental border protection, in particular implementation and enforcement of several trade related MEAs. In addition, information related to nuclear materials, *illegal trade in timber*, and unregulated, unreported fishing may also be exchanged via ENVIRONET<sup>7</sup>.

### 4.4 Concluding discussion

Clearly, the WCO holds an important position in organizing Customs collaboration. Its conventions contain protocols for information exchange, investigations, surveillance and joint

action that could be useful for Customs administrations to collaborate against the trade in illegal timber within the limits of their powers<sup>8</sup>. However, this review found no evidence of

7. As is generally the case in the field of mutual administrative assistance, in all the conventions the principle of reciprocity is applied to the extent that a Contracting Party has an obligation to render assistance to another Contracting Party only insofar as both have accepted the same annex. The conventions generally include the following type of escape clause: "If a Contracting Party considers that the assistance sought would infringe upon its sovereignty, security or other substantial national interests or prejudice the legitimate commercial interests of any enterprise, public or private, it may decline to provide that assistance or give it subject to certain conditions or requirements" (Nairobi Convention).
8. Interviews, Indonesian Customs, Sept. 2008.

such collaboration having taken place under the conventions. Concern for trade in illegal timber was not a driver behind the establishment of any of the conventions and the WCO itself has not taken up illegal logging as a priority issue. As noted, it would seem technically feasible to include an annex to the Nairobi Convention on illegally logged timber, but Indonesian Customs suggested this was not likely to receive much support<sup>9</sup>. Further, at the peer review workshop for this report, one participant described the Nairobi Convention as an “old story” and that Customs could organize collaboration to do their work through other avenues, such as RILO A/P. WCO work has focused on issues where its members have a shared interest, such as the security and facilitation of the international trade supply chain and the prevention of the illicit traffic in drugs and weapons. Some producer and consumer countries now recognize that they have a shared interest in combating illegal logging and the resultant trade, but this is of a more recent development. Nevertheless, the WCO legal instruments should not be ignored in the drafting of any agreement that specifies enhanced Customs collaboration as they set out international Customs norms.

There are also concepts in the WCO Framework of Standards to Secure and Facilitate Global Trade that could be useful for an agreement on the trade in illegal timber such as “high risk shipments”, “risk targeting methodology”, “standardized risk assessments” and “risk indicators”. While the concepts are applicable, the Framework itself is not as it is directed at the movement of items that could be used in terrorist acts.

Other than its legal instruments, the WCO has produced a Model Bilateral Agreement to provide a common reference for members that wish to conclude bilateral Customs mutual

assistance agreements. The Agreement contains similar protocols for information sharing to those in the WCO conventions (see Section 6).

While there appears to be little interest in using WCO conventions against the trade in illegal timber, the WCO could make an important contribution through its CEN. Indonesian Customs officials stated that they referred to the CEN regularly for informing their risk management strategies, especially related to the movement of illicit drugs. Information they value includes high risk carriers, routes and *modus operandi*<sup>10</sup>. A study of the CEN to determine its effectiveness in combating the illegal trade in CITES listed timber species and to explore the possibility of adding a new category on illegal wood to the seizures database should be considered. Participants at the peer review workshop for this report supported the idea that trade in illegal wood could be included as a separate category in the CEN seizures database.

Given that illegal timber is included in its scope, that Customs, Forestry, enforcement officials and others can use the service, and its multifarious aims, ENVIRONET could provide a very useful platform to facilitate rapid decision making on the ground regarding suspect timber shipments and documentation.

Outside of the WCO, there are other international legal instruments such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, whose use at a bilateral, regional and international level against the trade in illegal timber could be explored further. ©

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9. Ibid.

10. The authors were not able to view a detailed description of this project.



# REGIONAL CUSTOMS NETWORKS

# 5

Several Customs networks exist in the region that should be considered when exploring options for organizing Customs collaboration to combat the trade in illegal timber. These include networks under APEC (Asia-Pacific Economic Cooperation),

ASEM (Asia-Europe Meeting), ASEAN (Association of Southeast Asian Nations) and the RILO-A/P (World Customs Organisation Regional Intelligence Liaison Office for Asia and the Pacific).

## 5.1 APEC

Interest in using APEC to take up the illegal logging issue is evident in the hosting of a conference of illegal logging for APEC members by Indonesia in March 2004. Concern for climate change has also seen mention of illegal logging in the APEC Leaders Declaration on Climate Change, Energy Security and Clean Development (2007), which states "Ongoing action is required to encourage afforestation and reforestation and to reduce deforestation, forest degradation and forest fires, including by promoting sustainable forest management, combating illegal logging and addressing the underlying economic and social drivers." However, this expression of concern for illegal logging within APEC has not translated into

the engagement of Customs to combat the resultant trade. Customs work under APEC is co-ordinated by the Sub-Committee on Customs Procedures (SCCP) whose objective is to simplify and harmonize regional Customs procedures to ensure that goods and services move efficiently, effectively and safely through the region, and to reconcile and facilitate border control. Its 2008 work program prioritizes trade facilitation, secure trade, intellectual property rights enforcement, and transparency. Overall, SCCP activities are directed mostly at trade facilitation and its activities on trade security focus on intellectual property rights and the WCO Framework of Standards to Secure and Facilitate Global Trade.

## 5.2 ASEM

The Asia-Europe Meeting (ASEM) is a gathering of heads-of-government from ten Asian and the 15 European Union Member states as well as the President of the European Commission. Its objective is to strengthen the political, economic and cultural ties between the two continents. The 7<sup>th</sup> ASEM Customs DG Commissioner Meeting adopted the Yokohama Declaration on strengthened ASEM Customs

cooperation in November 2007. The Declaration focuses on initiatives to secure and facilitate trade, enforce intellectual property rights, protect societies and the environment, and to combat fraud. The declaration recommends coordinated approaches to the fight against fraud and smuggling, but does not single out trade-related illegalities in the forest sector for attention, beyond CITES-listed species.

## 5.3 ASEAN

Several observations suggest that ASEAN could be receptive to an initiative to organize Customs collaboration against the trade in illegal timber. Trade facilitation has been high on ASEAN's agenda but enforcement issues have also received attention. ASEAN has established the Guidelines for Mutual Assistance to Combat Customs Fraud and Smuggling, which are based on the Nairobi Convention, and the ASEAN Strategic Plan of Customs Development includes enforcement and mutual assistance as one of its activities. During the 16<sup>th</sup> ASEAN Directors-General Meeting in June 2007 in Bandung, Indonesia the Directors-General of Customs adopted the Terms of Reference of the Customs Enforcement and Compliance Working Group (CECWG) and its work program. The work program comprises three Strategic Plans of Customs Development, one of which is Customs Enforcement and Mutual Assistance (SPCD No.9).

The launching of the ASEAN Wildlife Law Enforcement Network (ASEAN-WEN) also provides some reason for optimism that Customs collaboration against the trade in illegal timber might be organized under ASEAN. ASEAN-WEN was established to encourage regional co-operation for the implementation of CITES, to which all ASEAN members are Parties. ASEAN-WEN maintains a website which includes a "help hotline"

through which any suspicious activity related to the trade of wild fauna and flora and/or fraud can be reported.

At the peer review workshop for this report it was noted that ASEAN-WEN offers an important lesson in the way it has taken existing commonalities in countries to build a framework for collaboration. Key features include a ministerial agreement, involvement of Police, Customs and Forestry, the establishment of national task forces, annual meetings, bilateral and multilateral meetings, need assessments in each member country, the development of special investigation groups, and border liaison offices in the Mekong countries to combat drug and human trafficking.

Specific mention of engaging Customs to act against the trade of illegal timber has come from the ASEAN Ministers on Agriculture and Forestry (AMAF). AMAF at their 29<sup>th</sup> meeting in Bangkok on 1 November 2007 agreed in their Statement on Strengthening Forest Law Enforcement and Governance (FLEG) to "enhance collaborative activities and programmes such as regional Customs and trade cooperation." At the 30<sup>th</sup> Meeting of AMAF held in Ha Noi, Viet Nam on 23 October 2008, the Ministers encouraged completion of the Work Plan for Strengthening Forest Law Enforcement and Governance (FLEG) in ASEAN (2008-2015).

Within the Customs network, concern for the illegal trade in timber has also been expressed. At the 2<sup>nd</sup> CECWG meeting in September 2007 in Sarawak, Malaysian Customs Director-General Auk Seri Abdul Rahman Abdul Hamid identified illegal trade in timber as one of the new challenges of Customs enforcement.

Officers responsible for Customs work in the ASEAN Secretariat who were interviewed

## 5.4 RILO A/P

RILO A/P serves as the WCO focal point of intelligence analysis and liaison of enforcement cooperation with member administrations in Asia and the Pacific region. It provides a platform for member administrations to identify critical areas that require attention in the region and works collaboratively to modernize Customs procedures. Its roles include:

- ⊙ Checking whether national seizure information has been entered into the CEN on a regular and timely basis, and validating the information;
- ⊙ Producing regional tactical analysis to support Customs law enforcement authorities;
- ⊙ Collecting, collating, evaluating and disseminating information on Customs offences;
- ⊙ Producing a periodic intelligence bulletin containing seizures of global and regional relevance, regional trend analysis, and regional analytical reports;
- ⊙ Producing and disseminating intelligence alerts and intelligence profiles;
- ⊙ Devising and producing topical intelligence analysis projects;
- ⊙ Devising and supporting regional intelligence-led operations;
- ⊙ Facilitating mutual administrative assistance;
- ⊙ Promoting and maintaining regional cooperation with other law enforcement agencies and organizations;
- ⊙ Assisting Member administrations with their analysis of specific cases.

suggested that, because Indonesia is most vocal in raising the illegal logging issue in ASEAN, the ASEAN Secretariat could propose a project to engage Indonesian Customs in combating the illegal trade of timber, which could then later be expanded to include other members. Involving Malaysia and Viet Nam, major timber processing ASEAN member countries, would be especially desirable.

If the illegal timber trade was specified as a priority item for RILO A/P work, these roles allow RILO to make an important contribution to combating this trade through, for example, promoting mutual administrative assistance, and improving the quality and availability of intelligence. This would require WCO member countries to officially request RILO A/P to incorporate the control of illegal trade in timber and other forest products as a priority element of its work program.

RILO made a presentation at the Timber Enforcement Meeting, held 18-19 October 2004 in Bangkok, which discussed timber cases in the CEN system and what RILO can do for timber enforcement. On the latter topic, the presentation discussed several ways in which RILO can make a contribution:

- ⊙ Assistance request and information exchange;
- ⊙ Joint projects, including coordinating information exchange on suspicious shipments and monitoring suspicious shipments through prior notification;
- ⊙ Collect, analyse and disseminate intelligence;
- ⊙ Technical assistance, including expert missions, regional seminars and on-the-job training.

At this juncture it is worth mentioning the Regional Strategic Plan 2008-2010 developed by the WCO member administrations of the

Asia Pacific region, facilitated by the WCO Regional Office for Asia-Pacific. This aims at supplementing the WCO Strategic Plan by identifying the relative focus areas for the Asia Pacific region. There is no mention of illegal timber in the Regional Strategic Plan, though this focuses on generic rather than product specific issues. The three-year Strategic Plan has identified four focus areas – capacity building; trade security and facilitation; compliance and enforcement; research and analysis – and an action plan has been developed for each.

Japan and the WCO Asia Pacific Office for Capacity Building are the coordinators for the action plan on capacity building. Some of the specific actions could be relevant to the illegal timber trade such as a regional capacity building program. If there is sufficient interest amongst members, this could be used to build capacity for identification of tree species and on checking the veracity of documentation accompanying timber consignments, for

example. It also specifies integrity workshops and promoting integrity in the region, which could consider whether there are cases of border control staff who are complicit in the illegal timber trade.

India and China are the coordinators for the action plan on compliance and enforcement. Again, this action plan could be made relevant to the illegal timber trade, depending on members' priorities. The action plan includes improving the quality of intelligence products, strengthening intelligence analysis and expanding the scope of analysis, and promoting the use of the CEN. Sharing experience of the pilot project on data exchange prior to arrival of cargo, a project that India is responsible for, is also mentioned and could provide input into developing a prior notification system for timber<sup>11</sup>. Overall, however, most of the concern regarding compliance and enforcement is with commercial fraud and intellectual property rights.

## 5.5 Concluding discussion

Customs networks could make an important contribution to combating the trade in illegal timber. The networks most open to this notion are likely to be ASEAN and RILO A/P. Interest in engaging Customs against the illegal timber trade has already been expressed within ASEAN, which could draw useful lessons from ASEAN-WEN. The mandate of RILO A/P provides it with the potential to also make an important contribution. For both ASEAN and RILO A/P, the initiative to give priority to the illegal timber trade issue will have to come from their member countries.

The peer review workshop noted that linkages to existing regional processes and building on a shared agenda are the only ways that cooperation tends to emerge. The ASEAN Senior Officials on Forestry (ASOF) program on Forest Law Enforcement and Governance (FLEG) and the ASEAN Customs Procedures and Trade Facilitation Working Group (CPTFWG), which was designed to take up any issues relating to Customs integration, were suggested as useful platforms for co-operation to combat the trade in illegal timber. ©

11. Interview, European Commission DG Environment official, July 2008.

# AGREEMENTS RELATED TO ILLEGAL LOGGING AND THE RESULTANT TRADE AND THEIR PROVISIONS/ IMPLICATIONS FOR CUSTOMS AND CUSTOMS COLLABORATION

## 6

**T**his section examines existing agreements – both multilateral and bilateral – on illegal logging and the resultant trade and analyses the extent to which they consider and specify the role that Customs authorities can play in contributing to tackling the trade in illegal timber. These agreements take various forms. The section begins with a review of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, a multilateral agreement that contains provisions relevant to the trade in a number of endangered tree species. The review next turns to bilateral instruments with implications for the trade in legal timber, namely:

the Trade Promotion Agreement between the United States and Peru, which includes an Annex on Forest Sector Governance that contains provisions for Customs; the planned partnership agreements on licensed timber trade between the EU and selected producer countries under the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan, which will require Customs to handle timber licences; memoranda of understanding on combating illegal logging and the resultant trade in illegal timber, particularly those of Indonesia with the UK and with the US, which specify or imply roles for Customs; and other types of bilateral instruments.

### 6.1 CITES

Global wildlife trade is estimated to be worth billions of dollars annually and to involve millions of individual plant and animal specimens. The trade is diverse, ranging from live animals and plants to a vast array of wildlife products derived from them. The legal international trade in wild plants and animals and the products derived from them was estimated as worth close to USD 300 billion in 2005, based on declared import values, and to be rising (TRAFFIC International 2008). Together with other factors, such as habitat loss, the trade in some animal and plant species could heavily

deplete their populations and even bring some species close to extinction.

Recognising that the international trade in wild animals and plants requires international cooperation to safeguard certain species from over-exploitation, the Convention on International Trade in Endangered Species of Wild Fauna and Flora was established and entered in force on 1 July 1975. CITES aims to regulate international trade in species of wild animals and plants which are endangered or which may become endangered if their exploitation

is not controlled. The Representatives of 80 countries agreed on the original text of the Convention in 1973, which has since been amended twice. With currently 173 parties to the convention, CITES has been one of the conservation agreements with the largest membership for many years (CITES Secretariat 2008). Although CITES is legally binding on the Parties, it does not take the place of national laws. Rather, it provides a framework for each member state to adopt its own domestic legislation ensuring that CITES is implemented at the national level.

CITES works by subjecting the international trade in specimens of selected species to certain controls. All import, export, re-export and introduction from the sea of species covered by the Convention has to be authorized through a licensing system. Each Party to the Convention must designate one or more Management Authorities to administer the licensing system and one or more Scientific Authorities to advise them on the effects of trade on the status of the species. The supreme decision-making body of the Convention is the Conference of the Parties (CoP) comprising all its member states.

The more than 30,000 species of animals and plants covered under CITES are listed in three appendices, depending on the level of protection deemed necessary by the parties. In general terms, a specimen of a CITES-listed species may be imported into or exported/re-exported from a Party only if the appropriate document has been obtained and presented for clearance at the port of entry or exit. There is some variation of the requirements from one country to another and it is always necessary to check on the national laws that may be stricter than the CITES stipulations. The basic conditions that apply for the appendices are as follows.

## Appendices I and II

The Conference of the Parties agreed in Resolution Conf. 9.24 (Rev. CoP14) on a set of bio-

logical and trade criteria to help determine whether a species should be included in Appendices I or II. At each regular meeting of the CoP, Parties submit proposals based on those criteria to amend these two Appendices. The proposals are discussed and then submitted to a vote. Appendix I includes species threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction, but the trade of which must be controlled to avoid utilisation that threatens their survival.

For Appendix I specimens an import permit issued by the Management Authority of the State of import is required. This may be issued only if the specimen is not to be used for primarily commercial purposes and if the import will be for purposes that are not detrimental to the survival of the species. An export permit/re-export certificate issued by the Management Authority of the State of export/re-export is also required. The export permit may be issued only if the specimen was legally obtained; the trade will not be detrimental to the survival of the species; and an import permit has already been issued. A re-export certificate may be issued only if the specimen was imported in accordance with the provisions of the Convention. For Appendix II specimens, the same exports controls are applied but no import permit is needed unless required by national law. In the case of specimens introduced from the sea, a certificate has to be issued by the Management Authority of the State into which the specimens are being brought for species listed in both Appendix I and Appendix II.

## Appendix III

Appendix III lists species that are protected in at least one country that has asked other CITES Parties for assistance in controlling the trade. Amendments to Appendix III follow a distinct procedure from those of Appendices I and II that allows each Party to make unilateral changes.

For Appendix III specimens, in the case of trade from a State that has included the species in Appendix III, an export permit issued by the Management Authority of that State is required. This permit may be issued only if the specimen was legally obtained. For export from any other State, a certificate of origin issued by its Management Authority is required. For re-export, a re-export certificate issued by the State of re-export is required.

In Article VII, the Convention allows or requires Parties to make certain exceptions to the general principles described above, particularly for specimens in transit or being transhipped. There are special rules in these cases and a permit or certificate will generally still be required. When a specimen of a CITES-listed species is transferred between a country that is a Party to CITES and a country that is not, the country that is a Party may accept documentation equivalent to the permits and certificates described above.

#### Action on ramin

Ramin (*Gonystylus* spp.) is a tropical hardwood genus native mainly to peat swamp forests of Indonesia (Kalimantan and Sumatra), Malaysia and Brunei Darussalam. In response to growing concerns about illegal logging and trade, in 2001 the Indonesian government banned all logging and export of ramin, except for a small quantity from a concession certified as sustainably managed. Indonesia also listed the genus in Appendix III of CITES in April 2001.

Initial monitoring by environmental NGOs indicated that the listing of ramin in Appendix III contributed to tackling the trade in illegally sourced wood, had a positive ecological impact (EIA/Telapak 2004, 4) and increased the transparency of the trade (TRAFFIC International 2004, 3). However, it became evident that more measures were needed to improve the effectiveness of trade controls and enhance co-operation and coordination both regionally and globally including involving major importer countries (ibid.). At CoP 13 in Bangkok in November 2003, Indonesia succeeded with its proposal to uplist the genus to Appendix II.

Enforcement of the listing in the key importer countries has improved considerably after problems related to a lack of timber identification skills received attention, as shown by a dramatic decrease in reported imports. Successful seizures of processed ramin wood and products have been made in a number of countries including the UK, Italy and the US.

## CITES and the international trade in timber

Tree species have been listed in CITES appendices ever since the Convention came into force in 1975. As of 18 June 2007, the appendices list one complete tree genus (*Gonystylus* or ramin wood), including six species of commercial importance, and 23 other specific tree species used for timber (and a few more species used mainly for medicinal purposes) (UNEP 2007). CITES has recently created the position of a timber officer to assist with the implementation of resolutions and decisions of the CoP in relation to timber/tree species and to establish close cooperation with key international bodies. CITES has recently also been liaising with FAO for enhanced collaboration and developed a collaborative ITTO-CITES program on tree species (CITES Secretariat 2008a).

The UK government claims that “tackling the illegal trade in CITES is a UK wildlife crime priority.” According to the UK National Report on Ramin, presented at the 57th meeting of the CITES Standing Committee in Geneva in July 2008, the UK plans to produce by September 2008 an assessment of the illegal trade in the context of the overall trade, and in the meantime to deal with any identified offences (Defra 2008). The report also discloses the number of seizures of ramin in the UK from 2002 – 2007. In 2002, 15 seizures involving 15 cases and a total quantity of 1,988,051 units originating mainly from Malaysia, Taiwan and Indonesia took place. The number of seizures decreased to none in 2005 and 2006, but there were two seizures in 2007 involving 22,135 units. The UK CITES Management Authority has funded a research project to develop a validated forensic genetic test for the identification of ramin and is considering further research in this area (Defra 2008).

With funding from the US Department of State and USAID, the US Forest Service convened a workshop held in Singapore in November 2007 where specialists from the US Department of Agriculture Forest Service – Forest Products Laboratory and the Malaysian Timber Industry Board taught nearly 30 Customs officials and representatives of CITES Management Authorities and forestry agencies from Singapore, Malaysia, Indonesia and China how to identify ramin from other confusable and look-a-like wood species.

The role and/or potential role of CITES in combating illegal logging stems from its requirements for monitoring trade, sustainable rates of harvesting, the adherence to national laws for the protection of fauna and flora, and the enactment and enforcement of national laws for its implementation (Chen 2006, 12). However, the capacity for CITES to combat illegal logging in particular, and to manage native species for conservation and economic benefit in general, is not used to its full potential (ibid.). The impact of CITES is limited to the species that are listed in its appendices, the licensing and extraction controls under CITES are not well integrated, and there is a lack of integration between CITES management authorities and forest management agencies in many member states (ibid., 32).

A key weakness of CITES is the possibility of fraud, theft and corruption in issuing export and import permits, given that they effectively acquire a value. Falsification of CITES permits appears to be a common problem, as simple inspection of the permits sometimes reveals fraud (Brack 2005a, 12-13). Another weakness is the difficulty of cross-checking documents against the large number of consignments. Correctly identifying species listed under CITES also remains a problem, due to a lack of capacity, manpower and knowledge. Even in developed countries CITES is subject to abuse. A study of mahogany imports into the United States from 1997-98 estimated that at least 25 per cent of sawnwood imports worth more than USD 17 million annually was illegal, and this figure did not include trade unreported to US Customs (Blundell 2000).

## 6.2 Free trade agreements

Free trade agreements (FTAs) are agreements under international law with the objective of removing trade restrictions between the signatory states. Countries choose this kind of economic integration form if their economic structures are mostly complementary rather than

A bilateral agreement between CITES Parties could address a number of the constraints CITES faces in its implementation, such as cooperation for better integrated controls and capacity building in the field of wildlife. It could also establish enhanced mutual assistance between Customs agencies of exporter and importer countries, which would be useful for sharing information on consignments and their accompanying documentation. CITES itself cannot be used as a comprehensive framework for collaboration between countries to tackle the trade in illegal timber because it is restricted to the species listed in its appendices, but it does suggest some important lessons for such frameworks. Through the enactment of national legislation, CITES assigns Customs a role in checking on timber legality, which has empowered Customs to seize shipments of timber (i.e. timber without the necessary CITES permits). Similarly, any agreement for enhanced Customs collaboration to control the trader in timber would be strengthened by specifying national legislation that empowers Customs to act on the issue of timber legality. The control of origin and licensing procedures established by CITES – particularly under Appendix 2 – shows that Customs can play an important role in controlling the trade in timber when licensing schemes and chain-of-custody management schemes for timber are in place. Another important lesson of CITES is that for Customs to play an effective role in checking on timber legality during the import clearance process will depend upon the security of the accompanying documentation. CITES permits have been vulnerable to fraud.

competitive. An FTA reduces Customs duties and non-fiscal trade barriers (such as export and import bans) aiming to enhance economic opportunities for both/all parties through trade growth as a result of specialisation, division of labor, and comparative advantage.



Unlike a Customs union, parties to a FTA maintain their different policies with respect to third parties, meaning different quotas and tariffs. To avoid evasion through re-exportation the countries use a system of certification of origin – most commonly called rules of origin – which requires adding value to the goods through a minimum of local material inputs and local transformations. Goods that do not cover these minimum requirements are not entitled for the special treatment envisioned in the FTA.

Although FTAs in principle aim to remove non-fiscal trade barriers, they can include provisions that establish exceptional rules in fields such as labor and natural environment and with respect to particular goods and services. The United States – Peru Trade Promotion Agreement (TPA), signed on 12 April, 2006, includes a host of enforceable labor and environmental provisions and may be the only free trade agreement that includes comprehensive provisions to combat the trade in illegal timber and wildlife.

## The United States – Peru Trade Promotion Agreement

After the ratification processes in the US and Peru, the TPA was finally signed on 14 December 2007 by the two countries' presidents and scheduled to enter into force on 1 January 2009. However, implementation has hinged on Peru passing legislation to bring its regulatory standards into compliance with the agreement. After a meeting between the two presidents in November 2008, U.S. trade officials said they still could not say for certain if the agreement would go into force by the target date (Reuters 23 November 2008).

This comprehensive free trade agreement is designed to eliminate barriers to goods and services, promote economic growth, and expand trade between the two countries. It includes enforceable labor and environmental provisions, resulting from a bipartisan approach in the US to pending free trade agreements, and includes the Annex on Forest Sector Governance (Annex 18.3.4).

### Annex on Forest Sector Governance

The Annex on Forest Sector Governance commits in principle both Parties to combat the trade associated with illegal logging and illegal trade in wildlife and to promote legal trade in timber products. The Annex includes a host of detailed provisions which commit Peru to action for strengthening forest sector governance, including to:

- ⊙ Increase the number and effectiveness of personnel devoted to enforcing Peru's laws, regulations etc., and developing and implementing an anti-corruption plan for officials;
- ⊙ Provide criminal and civil liability at adequate deterrent levels for actions that impede or undermine the sustainable management of Peru's forest resources (such actions can involve false information on any material document related to the enforcement of Peru's laws and regulations and other measures relating to harvest or trade, forest management plans, applications for permits/concessions, and transportation documents etc.); knowingly harvesting, purchasing or transporting timber or timber products from areas or persons not authorized under Peruvian law; or bribery);
- ⊙ Impose criminal and civil penalties to deter violations of laws, regulations and other measures relating to the harvest and trade in timber products;
- ⊙ Adopt and implement policies to monitor the extent and condition of tree species listed in any Appendix of CITES, which include conducting a comprehensive inventory and technical studies, and providing for their technical review and periodic updating;
- ⊙ Finalize and adopt a strategic plan of action to implement the CITES Appendix II listing of Bigleaf Mahogany;
- ⊙ Establish an annual export quota for Bigleaf Mahogany consistent with Article IV of CITES and the advice of Peru's CITES Scientific Authority;
- ⊙ Improve the administration and management of forest concessions, which includes, inter alia, physically inspecting areas designated for the extraction of any CITES-listed tree species prior to approving or verifying an operating plan;

- ⊙ Develop and promote the use of tools that complement and strengthen regulatory controls and verification mechanisms relating to the harvest of and trade in timber products (the Peruvian government commits to i) consider multi-stakeholder views; ii) develop systems to verify the legal origin and chain of custody of CITES-listed tree species as well as effective chain-of-custody systems; iii) fully implement existing laws and regulations for forest sector governance; iv) identify a focal point within the government with specified duties);
- ⊙ Strengthen, protect and increase the capacity of indigenous communities to manage their lands for commercial timber production.

To implement these actions both parties are committed to co-operate through capacity-building and other joint initiatives to promote the sustainable management of Peru's forest resources and to promote law enforcement and forest governance. Moreover, Peru is committed to conduct audits of producers and exporters of timber products exported to the US and to verify that exports of the timber products, comply with all applicable laws, regulations, and other measures of Peru governing the harvest of, and trade in, timber products, including in the case of tree species listed in CITES Appendix II, relevant chain of custody requirements. The audits comprise both periodic reviews and, on written request of the US, audits of a particular producer or exporter including written summaries of the findings.

On the written request of the US, Peru must verify the compliance of harvesting and trade procedures with Peru's laws, regulations and measures for particular shipments of timber products. The US is committed to assist Peru in conducting these verifications, which can involve visits to the premises of companies. If Peru denies participation of US officials in visiting the premises of suspicious producers and exporters upon prior request, "the United States may deny entry to the shipment that is the subject of verification" (para. 11).

Peru must within 45 days after receiving such a request provide the US with a written report on the results of any verification. The US shall "within a reasonable time" after receiving the report notify Peru of any action it will take – including denial of entry to the shipment that was subject to verification – taking into account, inter alia, the content of the report, information that US Customs authorities have obtained regarding the shipment or relevant enterprise, and information that US officials obtained during the verification visit (para. 13).

The Annex reaffirms both parties' commitment to work within the framework of CITES and establishes a Sub-Committee on Forest Sector Governance under both the Committee on Trade in Goods and the Environmental Affairs Council. Exchange of appropriate, non-confidential information on bilateral trade in timber products through the Sub-Committee can involve Customs data, information on efforts to combat illegal logging and associated trade, implementation of CITES requirements, etc. (para. 17). Unless otherwise agreed, this information should be made publicly available.

## Provisions for Customs

Apart from the specifications in paragraphs 13 and 17, there is no further mentioning of Customs in the Annex. However, the main text of the Agreement includes a series of provisions with relevance to the Customs authorities of both countries. Chapter Five is on Customs Administration and Trade Facilitation. It commits both countries to publish Customs laws, regulations, and administrative procedures, to establish enquiry points, to adopt or maintain simplified Customs procedures, to

use information technology and to adopt or maintain risk management systems.

Particularly relevant in the context of this study are the detailed provisions for enhanced cooperation between the parties in Article 5.5. Apart from providing each other party with advance notice of any significant modification of administrative policies and similar developments, the US and Peru "shall cooperate in achieving compliance with their respective laws and regulations pertaining to:

- ⊙ The implementation and operation of the

provisions of this Agreement governing importations or exportations, including claims of origin and origin procedures;

- ⊙ The implementation and operation of the Customs Valuation Agreement;
- ⊙ (Restrictions or prohibitions on imports or exports; and
- ⊙ (Other Customs matters as the Parties may agree" (Art. 5.5 para. 2).

Where a Party has a reasonable suspicion of unlawful activity related to its laws or regulations governing importations, the Party may request in writing that another Party provide specific confidential information normally collected in connection with the importation of goods. A reasonable suspicion of unlawful activity is defined as a suspicion based on relevant factual information obtained from public or private sources comprising one or more (a-c) types of historical evidence of non-compliance with laws or regulations governing importations (d) other information that both parties agree is sufficient (Art. 5.5. para. 6). It has to be noted that the focus of these regulations is (with the exception of Art. 5.5 par. 6 [d]) on laws and regulations governing importations. Therefore, they do not apply to unlawful activity during the supply chain of timber products prior to importation.

Neither the Agreement nor its Annex on Forest Sector Governance specifies which authorities in the US and Peru are competent for making or receiving the written requests. For the US, the United States – Peru Trade Promotion Agreement Implementation Act from 2007 specifies the competent US authority. Sections 501-502 implement obligations set out in the Annex on Forest Sector Governance. Section 501 (a) provides establishing an interagency committee responsible for overseeing the implementation of this Annex (US House Committee on Ways and Means 2007, 10).

The Implementation Act authorizes the Committee to request Peru to conduct audits of particular (suspicious) producers/exporters and verifications of particular (suspicious) ship-

ments, to determine if the producers and exporters have complied with the applicable Peruvian laws, regulations and measures governing the harvest and trade of timber products. While a particular verification is pending, the Committee may direct US Customs and Border Protection to detain the suspicious shipment, and under the provisions of paragraph 13 of the Annex, deny entry to the shipment.

## Discussion

In its Annex on Forest Sector Governance, the US-Peru Trade Promotion Agreement stipulates a range of rights and responsibilities of the Parties which make it an extremely powerful bilateral instrument for tackling the trade in illegal timber between the two countries. It goes well beyond stipulating information sharing on a voluntary basis to requiring the Peruvian authorities to respond to US requests for information on suspect timber. It gives the US authorities the right to have suspect shipments investigated and to participate in investigations by collecting data in Peru. Moreover, the US has the right to deny entry to suspect shipments if Peru denies any cooperation stipulated by the Annex.

In the broader context of the TPA, a series of provisions on Customs Administration promote enhanced cooperation between the Customs authorities of both parties. Apart from information sharing on significant modification of administrative policies and similar developments, the TPA stipulates cooperation between Customs administrations on the implementation and operation of the provisions of the Agreement governing importations or exportations, the implementation and operation of the Customs Valuation Agreement and restrictions or prohibitions on imports or exports. This legal basis for information sharing and cooperation between Customs authorities of the Parties can be expected to contribute to creating a cooperative environment that will facilitate the implementation of the Annex on Forest Sector Governance.

The US-Peru TPA illustrates that free trade agreements can provide an opportunity for countries to collaborate on illegal logging and the resultant trade, but this will depend on the commitment of the Parties and/or the willingness of one party to accept conditions. The role of Customs agencies in combating the trade in illegal timber can be stipulated under an FTA. To incorporate such provisions, Customs representatives should be involved in the negotiation processes according to the procedures for intra-agency coordination in place in each country.

The US-Peru TPA is one of a small number of bilateral trade agreements involving the US and Colombia, Panama and the Republic of Korea that go further in incorporating environmental obligations than any previous trade agreement involving the United States (USTR 2008). The US-Peru TPA is presently unique in incorporating provisions on forest sector governance, but it can be expected to pave the way for similar regulations in future trade agreements between the US and major (tropical) timber producing countries. For instance, the US Trade Representative to Indonesia stated in 2006 that the talks between the US and Indonesia to curb illegal logging could lead

to a free trade pact. This view was reiterated in a brief published by the US – Indonesia Society in 2007: “Labor and environmental standards will be significant issues in any US-Indonesia FTA negotiations. Areas of particular concern are restrictive Indonesian labor laws as well as illegal logging” (Hufbauer and Katz 2007).

The European Union (EU) and ASEAN are also presently considering a free trade agreement that likely would include provisions on trade in legal timber<sup>12</sup>. In April 2008, the European Parliament’s International Trade Committee voted in favour of concluding a free trade agreement between the EU and the ten ASEAN member countries subject to WTO rules and the outcome of the Doha development round. A report adopted by an overwhelming majority of the Trade Committee demands that the agreement must meet certain conditions regarding sustainable development, the fight against fraud and respect for human rights. The report states that in addition to labor regulations, measures to combat the destruction of tropical forests should also be included in the agreement and that ASEAN countries that try to stem the illegal exploitation of forests should be supported (European Parliament Press Service 2008).

### 6.3 Forest law enforcement, governance and trade (FLEGT)<sup>13</sup>

In October 2003, the EU adopted the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan to combat illegal logging and the resultant timber trade. EU member states, some of them major global importers of timber and timber products, and the European Commission had become aware that there was no practical mechanism for identifying and excluding illegal timber from the EU market.

The principal instruments to implement the FLEGT Action Plan are bilateral Voluntary

Partnership Agreements (VPAs) between timber-producing countries and the EU. The main objectives of the VPAs are to reinforce the ability of partner countries to control their forest sectors and to offer a mechanism to exclude illegal timber products from EU markets. Although the details of each partnership agreement will vary depending on the conditions of each prospective partner country and the nature of their timber trade with the EU, some elements will be common to all VPAs (European Commission 2004a).

12. Information for this section received from Hugh Speechly (Nov. 2008) and Flip van Helden (Dec. 2008).

13. Interview, Agus Setyarso, Sept. 2008.

All VPAs set out a range of measures to increase the capacity of producer countries to control illegal logging, while reducing the trade in illegal timber products between these countries and the EU. These are:

- ⊙ Support for improved governance and capacity building in the forest sector of producer countries;
- ⊙ Development of legality standards through a participatory stakeholder process within individual producer countries;
- ⊙ Establishment of a timber legality assurance and licensing scheme;
- ⊙ Efforts to discourage investments by EU institutions that may encourage illegal logging;
- ⊙ Support for private sector initiatives aimed at combating the trade in illegally harvested timber and timber products (European Commission 2004).

Under the VPAs each partner country will implement a timber legality assurance system that contains a definition of legal timber and that guarantees that timber exports to the EU have been legally produced by means of a licensing procedure (European Commission 2005). The issuance of FLEGT licences requires credible evidence that the products in question had been produced in compliance with the specified laws of the partner country.

The basic elements of the timber legality assurance scheme include:

- ⊙ A definition of legally-produced timber that sets out all the laws and regulations that must be complied with in the production process;
- ⊙ A secure chain of custody that tracks timber from the forest where it was harvested through different owners and stages in processing to the point of export;
- ⊙ A verification system to provide reasonable assurance that the requirements of the definition have been met for each export consignment;
- ⊙ The issuance of licences to validate the results of legality verification and chain of

custody and to allow for Customs clearance of the timber products in the EU;

- ⊙ Independent monitoring of the whole timber legality assurance system to provide transparency and guarantee its credibility (European Commission 2005).

Once the timber licensing scheme is established, the EU member states' Customs agencies will allow imports only of FLEGT licensed timber products from FLEGT partner countries.

After protracted preliminary discussions, negotiations for the first VPAs started at the end of 2006. Negotiations with Ghana were concluded in early September 2008, while negotiations with Cameroon and Congo Brazzaville are in an advanced stage. Liberia has indicated its intention to start negotiating a VPA by early 2009. In the Asia-Pacific region, negotiations are ongoing with Indonesia and Malaysia, while technical FLEGT talks have started with Viet Nam and China. With the Ghana VPA concluded, European Commission officials expect that the implementation of the FLEGT licensing scheme in that country will require about two years to become operational.

Under the umbrella of the FLEGT Action Plan, and following the adoption of the FLEGT regulation in 2005, the European Commission has established a FLEGT Committee to incorporate the provisions resulting from the FLEGT action plan into the existing Customs procedures. The Committee has recently developed an implementing regulation which provides EU Customs authorities in the Member States with detailed instructions on how to handle shipments of FLEGT timber, how to exchange information and how to assess the FLEGT licences and accompanying documentation. The competent authorities in the 27 member states of the European Union — commonly but not necessarily Customs — are now in the process of implementing these provisions as preparation for the first shipments of FLEGT licensed timber.

If the ongoing VPA negotiations lead to the conclusion of a large number of VPAs, the FLEGT Action Plan is likely to become an increasingly comprehensive framework for the exclusion of illegal timber products from the EU, while at the same time improving forest management in producer countries. Development assistance will focus on establishing credible technical and administrative structures with adequate systems to verify that exported timber is legal, which could entail considerable institutional strengthening and capacity building. The licensing system will reward the implementation of these systems through an improved market position on the EU market.

However, a particularly serious risk is “circumvention” whereby unlicensed products originating from a producer country that has signed a VPA enters the EU through a non-signatory country. The scheme would benefit from all producer countries in a particular region that are major suppliers, directly or indirectly, to the EU signing VPAs. A major concern in the Asia-Pacific region is the role of re-exporting countries — above all China and Viet Nam — where large volumes of timber are imported to be processed and exported as finished products to Western markets and Japan. These intermediary countries in the trade chain would have to formally recognize the VPAs by only accepting licensed products from VPA producer countries for further processing and onward export to the EU. To this end the EU has recently established a FLEGT Technical Working Group with Viet Nam and has also established a Bilateral Coordination Mechanism against illegal logging with China.

In addition to these bilateral measures the European Commission has adopted a legislative proposal against the trade in illegally

harvested timber and timber products. This proposal is currently under consideration in the European Parliament and the Council of Member States. The proposal is based on the due diligence principle and will oblige European traders to provide reasonable assurance that the timber products traded are produced in accordance with the relevant legislation of the producing country. FLEGT licences are regarded as proof of legality and will thus exempt European traders or their suppliers in FLEGT partner countries from further administrative requirements. The proposed due diligence regulation in combination with the negotiation of VPAs is expected to have three important effects:

- ⊙ Create a level playing field in the European Market for those companies that are trying to address illegality and those that are undercutting the market by selling cheaper illegally harvested timber products;
- ⊙ Provide an incentive to traders to buy and sell low-risk timber rather than high-risk timber, thereby reducing the use of illegally harvested timber by EU consumers;
- ⊙ Provide an incentive to producer countries to conclude VPAs, as well as to exporters in non-VPA countries to put in place timber tracking and legality verification schemes.

The FLEGT Action Plan consisting of the VPAs, the FLEGT implementing regulation and the due diligence regulation will together provide a strong framework with clear legal provisions for involving Customs in combating the trade in illegal timber. As identified in Section 3, requiring export declarations to accompany timber shipments and a check on these during the import clearance process would be useful, but a licence based on a robust system of legal verification would provide for a far stronger check on legality at the point of import.

## 6.4 Memoranda of understanding

A Memorandum of Understanding (MoU) is a written, non-contractual, non-legally binding international arrangement between two or more parties (Australian Customs Service 2008, 2). It expresses a convergence of will between the parties, indicating an intended common line of action, but without creating enforceable rights or obligations. It most often is used in cases where parties either do not imply a legal commitment or cannot create a legally binding agreement. It often, but not necessarily, sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters. It is typically in the form of a single instrument and does not require ratification. MoUs are entered into either by states or international organisations (United Nations 2008).

A number of bilateral Memoranda of Understanding and Joint Statements on cooperation to tackle the trade in illegal timber and/or other forest products have been signed between exporter and importer countries. Indonesia has been particularly proactive in organizing MoUs on illegal logging with its trading partners. A range of activities have been organized under some MoUs, including various forms of collaboration between Customs agencies, while others lie fairly dormant.

### UK – Indonesia MoU

In 2001, the UK was the world's sixth largest importer country of tropical plywood (originating mostly from Indonesia) with a share of three per cent of the global market (ITTO 2004, 19). By 2001, Indonesia had lost 72% of its original forest cover almost entirely due to the activities of the timber industry, which had either cleared forest or paved the way for forest conversion (Global Forest Watch 2001). A study in 1999 by the Indonesia-UK Tropical Forest Management Program estimated that 73% of Indonesia's logging was illegal (Scotland et al. 1999).

Perhaps prompted by criticism from environmental NGOs, the UK began to explore policy options to combat illegal logging and the trade in illegal wood products. One of a number of actions considered by the government was the idea of concluding a bilateral agreement with a major timber exporting country. Following bilateral negotiations, in April 2002 the UK and Indonesia signed a pioneering Memorandum of Understanding on Cooperation to Improve Forest Law Enforcement and Governance and to Combat Illegal Logging and the International Trade in Illegally Logged Timber and Wood Products. The MoU commits both parties to work together to reduce, and eventually eliminate, illegal logging and the international trade in illegally logged timber and wood products between the Parties by rapid development and implementation of the necessary regulatory and policy reforms, including:

- ⊙ Identification by both parties of any reform of legislation and action required to prevent harvesting, export, and trade in illegally logged timber and wood products;
- ⊙ Support by both sides for the development, testing and implementation of systems for the verification of legal compliance based on independently verified chain-of-custody tracking and identification systems, to be applied throughout Indonesia with technical and financial capacity-building assistance by the UK;
- ⊙ The joint development of systems for the timely collection and exchange of data on timber trade and wood product between the two Governments;
- ⊙ The joint development of effective collaboration between enforcement agencies and networks in the two countries, aiming to provide mutual assistance in the application of Indonesian and UK law.

An Action Plan under the MoU was agreed in August 2002 and re-drafted in March 2003. It included the following activities involving Customs authorities:

- ⊙ A refresher training course for law enforcement officers in Indonesia, including Customs, against illegal logging practices;
- ⊙ Identify and clarify the role and capacity of Customs in Indonesia and UK;
- ⊙ In the UK, the Department for International Development (DfID) to engage UK Customs in identifying the scope for mutual assistance;
- ⊙ In Indonesia, the Ministry of Forestry to engage Customs and the Ministry of Transportation in identifying the scope for mutual assistance, including determining the administrative requirements for co-operation between the Ministry of Forestry and Customs;
- ⊙ Capacity building of Indonesian enforcement agencies (Customs and transport) to implement a collaborative system (Operational Action Plan 2003).

In Indonesia, the Ministry of Forestry led the process of preparing the Action Plan, but invited resource persons to participate, including Customs officials and NGO representatives. The draft Action Plan was later discussed in London and the Indonesian delegation included one Customs official. The first objective of this trip was technical finalisation of the Action Plan; the second objective was basic orientation to familiarize Indonesian officials (including Customs) with UK systems. Actions specified under this MoU included establishing an information network between Customs, the Ministry of Forestry, the Ministry of Industry and Trade (later divided into two ministries) and the Institute for the Revitalisation of the Timber Industry - *Badan Revitalisasi Industri Kayu* (BRIK). This did not materialize, but coordination meetings were organized between the Ministry of Forestry and Ministry of Trade to discuss trade issues<sup>14</sup>.

On the UK side, UK Customs officials expressed interest in the Action Plan, but this did not lead

to any independent action from Customs on the illegal logging issue. Without a supporting regulation, it seems unlikely that UK Customs would direct its limited resources to investigate timber shipments and their accompanying documentation<sup>15</sup>. Trade is an EU area of competence and UK Customs (and those of other member states) can only take action if empowered by legislation to do so, explaining why the MoU alone could not enforce any trade provisions.

Despite these limitations, the MoU does appear to have had some positive impacts. The MoU facilitated contacts between the Indonesian and UK trade, the latter of which was facing increasing pressure to demonstrate legality of its timber supplies. Audits of the Indonesian timber industry carried out under the auspices of the MoU indicated that the legality of almost no Indonesian plywood could be guaranteed, leading UK buyers to search elsewhere for their supplies<sup>16</sup>. These audits evolved into the EC-supported Tropical Timber Action Plan (TTAP), which helps suppliers in timber producing countries implement systems to assure legality. Brack (2005a) concludes that the UK-Indonesia MoU proved its value in “providing assistance for the establishment of some of the conditions that Indonesia will need to fulfil [if] it is to agree to a Voluntary Partnership with the EU under FLEGT”.

Bilateral efforts under the MoU have now been superseded by the FLEGT VPA negotiation process<sup>17</sup>. It was always intended that the MoU would be a transitory measure and would be superseded by a VPA. The MoU is still in effect and current UK support to Indonesia under its Forest Governance and Trade Program (see <http://www.dfid.gov.uk/mdg/forest-govern-trade.asp>) focuses on preparing for and implementing the VPA. Customs cooperation under a VPA will be framed in the EU Regula-

14. Interview, Andy Roby, Sept. 2008.

15. The quantity of plywood imported into the UK from Indonesia declined steeply after 2002 (Global Timber 2006, 14).

16. Email inquiry to UK government official, July 2008.

17. Information in this and the preceding paragraph received from Hugh Speechly, Nov. 2008.



tion, its implementing regulation (now undergoing final editing) and the VPA itself.

Linked to the MoU and as preparation for the “Asia Customs and Forestry Law Enforcement Workshop” in Cebu, November 2005, the World Bank (under the FLEG program) brought together officials from the Forestry Ministry, Ministry of Trade, Customs and NGOs to prepare a detailed account of how inter-agency cooperation might work in Indonesia. As a result, Indonesia was the best prepared of any country at the workshop, but with the protracted discussion on how to continue with East Asia and Pacific FLEG process, impetus seems to have been lost<sup>18</sup>.

This pioneering agreement showed that a bilateral MoU could be used to develop and implement a comprehensive range of actions to combat illegal logging and the resultant trade. The subsequent Action Plan and its implementation showed that initiatives to bring Customs authorities together could be organized under a bilateral MoU on illegal logging. The experience of drafting and implementing the Action Plan highlighted the importance of interagency coordination and the need for regulation to direct Customs to inspect the legality of timber presented for import clearance.

## US – Indonesia MoU

Bilateral trade between the US and Indonesia totalled USD 15.1 billion in 2005, up 11.8% over the previous year (USTR 2006). With imports of Indonesian plywood totalling 760,000 m<sup>3</sup> the US was Indonesia’s third largest plywood importer in 2002 (Seneca Creek Associates/Wood Resources International 2004, A-3).

The US Trade Representative and Indonesia’s Ministers of Trade and of Forestry signed a Memorandum of Understanding on Combating Illegal Logging and Associated Trade on 16 November 2006 on the margins of the Asia

18. Interview, US Embassy Official, Jakarta, Nov. 2008.

Pacific Economic Cooperation (APEC) meeting in Hanoi. The US has referred to the MoU as a “bilateral agreement” (USTR 2006) suggesting that it sees it as more than a convergence of will for an intended common line of action, but as an instrument that implies obligations for the parties.

The MoU is an element of former President Bush’s global Initiative to Address Illegal Logging that was launched in 2003. The US explains that it has focused on Indonesia because of the importance of bilateral trade in forest products and because Indonesian forests and their biodiversity present a significant conservation opportunity. The US has already committed one million dollars to fund start up activities under this initiative (ibid.).

The MoU aims to enhance joint efforts between the two countries to combat illegal logging and associated trade while helping to ensure that Indonesia’s legally produced timber and wood products have continued access to the US and elsewhere. The MoU establishes a working group under the existing US-Indonesia Trade and Investment Framework Agreement (TIFA) to guide implementation and identify priority actions that both countries will undertake. The point of contact for the working group in Indonesia is the Directorate General of Forest Production Management of the Ministry of Forestry and for the US is the United States Trade Representative.

Indonesian Customs participated in the drafting of the MoU, which includes specific provisions on the role of Customs. Article 3 paragraph (2) states that:

*Pursuant to paragraph 1 of this Article, on request of the United States or on its own initiative, Indonesia’s Directorate General of Customs and Excise shall inform the United States Customs and Border Protection whether timber and wood products originating in Indonesia have been lawfully exported to the United States. On request of Indonesia, or on its own initiative, the United*

*States Customs and Border Protection shall inform Indonesia's Directorate General of Customs and Excise whether timber and wood products originating in Indonesia have been lawfully imported into the United States.*

Article 4 states that on request of the other Party, a Party's relevant trade, Customs and law enforcement authorities may assist in the investigation of persons or organisations either suspected of committing or known to have

committed an offence related to illegal logging or associated trade.

The US-Indonesia MoU is the only bilateral arrangement reviewed in this study that includes provisions for collaboration between Customs authorities to combat the trade of illegal timber. Customs officials in the US and Indonesia are already engaged in implementing the MoU and collaboration between them can be expected to increase further because of recent reform to the Lacey Act.

### US Lacey Act

The Lacey Act, first enacted in 1900, makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce fish and wildlife taken in violation of US laws or of any foreign laws. In 2008, the Farm Bill (the Food, Conservation, and Energy Act of 2008) extended the Lacey Act to a broader set of plants and plant products in an effort to combat the trade in illegal timber. The amendments extend the statute's reach to timber products derived from illegal harvesting in the country of origin, including products manufactured in countries other than the country where the illegal harvesting took place. Under the Act it is unlawful to submit a false record for, or false identification of, any plant. Any suspect plants or plant products may be seized and anyone who imports illegally harvested plants or products made from illegally harvested plants or who exports, transports, sells, receives, acquires or purchases such products in the US, may be prosecuted. A violation of the Lacey Act can also lead to charges of smuggling or money laundering. The US Department of Justice has recently warned that it intends to apply the Act to prosecute those who import timber taken or transported in violation of the laws of the country where the timber was harvested. Penalties under the Lacey Act comprise civil administrative penalties, forfeiture of the trafficked goods, criminal fines or imprisonment (Gregg and Porges 2008, 1). The US government can use the law to penalize individuals and companies regardless of whether they know or not of illegalities in the sourcing of their wood. However, the potential for significant penalties or imprisonment increases with the degree to which someone knew – or should have known – about the illegalities. With the revision of this law, the US has become the first country to prohibit the import, trade and sale of wood and wood products harvested in contravention of the laws of the country of origin.

The Lacey Act as amended also requires importers to submit a “plant import declaration” that accompanies every shipment of plants or plant products. The declaration must include:

- ⊙ Scientific name of any species used;
- ⊙ Country/countries of harvest;
- ⊙ Quantity and measure;
- ⊙ Percentage of recycled material; and
- ⊙ Value.

The purpose of the declaration requirement is to reinforce the need to know precise sourcing information. In many cases this information is readily available to importers. The declaration is also critical for the US government to be able to focus its enforcement resources and successfully prosecute violations of the Lacey Act. US Customs will deem timber shipments not accompanied by the required declaration at the time of entry into the United States inadmissible (Gregg and Porges 2008, 3).

While the Lacey Act ban on imports of illegally harvested wood is in effect and violators can already be prosecuted, the US government has used a phased approach for enforcing the import declaration requirements. The main reason for this is that an electronic system for information collection had to be established, and that importers could not be expected to readily provide all the required information for all kinds of plant products. The US Department of Agriculture has repeatedly published

notices on a phased enforcement plan (October 2008 and February 2009) seeking comments from industry and other stakeholders to explore the feasibility of the plan and make appropriate revisions. For the first two years, enforcement focuses on the plant import declaration requirement for timber and wood products, beginning with fuel wood, wood in the rough and least processed wood products in the first of three half-year periods. In each of the next periods declarations are required for further categories of more processed wood products (APHIS 2009). The law allows, at least initially, for exporters to list multiple countries of likely origin and/or possible species of the wood, if more precise information is unavailable.

To implement the revised Lacey Act, the Department of Justice will operate a hotline that anyone can use to tip off Customs of suspect shipments. The Department of Agriculture is responsible for plant materials and is receiving training to check suspect timber imports. To prepare Indonesia for the Act's implementation, the US Department of Justice sent a delegation and the US Embassy organized a three-day awareness raising workshop for district police, attorneys, judges and others. Customs officials in Jakarta interviewed for this study were aware of the Act and its implications.

Under the illegal logging MoU periodic digital video conferences are organized between the two countries. These are held at the US Embassy in Jakarta, which has the necessary facilities. On the Indonesian side the digital video conferences have brought together the 18 government bodies directed under Presidential Instruction 4/05 to cooperate and coordinate to eradicate illegal logging and the Ministry of Trade. On the US side the conferences have brought together the Office of the United States Trade Representative, USAID, the Department of Justice, the Department of Commerce, and Customs and Border Protection. Since the MoU was agreed there has been at least one request for information from the US to Indonesia. This request was for information on the legality of roundwood found in one container and was passed from the Ministry of Forestry on to Customs. The US also supplied Indonesia with a compilation of information on suspect timber imports from Indonesia that generated a lot of interest.

Under the MOU the Ministry of Forestry has decided to focus on the ports of Surabaya and Medan. Surabaya receives a lot of timber from Kalimantan and Papua and could be especially important for the onward movement of illegal timber.

US Customs has been funded to work with Indonesian Customs and training is planned

for both administrations on the identification of illegal timber. Indonesia Customs have also been involved in training that is organized between the US Department of Justice and the Indonesian National Police on the investigation of illegal logging. The National Police have boat units for near shore patrols that have made many small seizures of illegal timber and a database of these seizures is also planned as part of the cooperation under the MOU<sup>19</sup>.

In summary, at present Customs administrations are engaged more actively under the US-Indonesia illegal logging MoU than any of the other MoUs reviewed in this study. The periodic digital video conferences have provided a convenient medium for requests for information and voluntary information sharing between Customs to take place. The US-Indonesia illegal logging MoU also confirms that Customs action to combat the trade in illegal timber would benefit greatly from legislation in the importer country that makes the import of timber harvested in contravention of the laws of the country of origin unlawful.

## Other MoUs

Other MoUs on illegal logging have been concluded between the People's Republic of China and Indonesia, and China and the United States.

19. Comment received from Hui Fu, World Customs Organisation, Dec. 2008.

### ***China-Indonesia MoU***

On 18 December 2002, shortly after the signing of the UK-Indonesia MoU, the governments of China and Indonesia concluded a Memorandum of Understanding Concerning Cooperation in Combating Illegal Trade of Forest Products. Global markets had witnessed China's increasingly important role as an importer of tropical timber and re-exporter of manufactured wood products and China was under increased pressure to demonstrate its willingness to contribute to combating the trade in illegal timber. The MoU committed China and Indonesia to cooperation with some possible implications for Customs that included:

- ⊙ The joint development of systems for the timely collection and exchange of data on timber trade, related forest laws and regulations, endangered wild fauna and flora and wood products between the Parties;
- ⊙ Exchange of information on respective forest laws, regulations and its enforcement.
- ⊙ The joint development of effective collaboration between enforcement agencies and network in the two countries;
- ⊙ Joint cooperation on training of law enforcement officers and exchange of relevant information in a timely manner.

There is little evidence of collaborative action resulting from the MoU; however, the MoU may have played an important role in ice-breaking.

### ***China-US MoU***

In May 2008, China and the United States – the world's two largest importing nations of timber and wood products – concluded a Memorandum of Understanding on Illegal Logging and Associated Trade on the occasion of the Third Meeting of the Strategic Economic Dialogue (SED III). The MoU reflects the two countries' decision to establish a bilateral forum for cooperation in support of efforts to combat illegal logging. Through the forum, the two parties are committed to identify priority

activities for cooperation, promote trade in forest products from legally-harvested resources, encourage public-private partnerships, and establish mechanisms for sharing information, including efforts to promote trade in legal timber and on relevant domestic law. Representation in the bilateral forum should include multiple agencies on both sides to ensure a comprehensive approach to addressing challenges presented by international trade associated with illegal logging (USTR 2007). Chinese Customs officials participated in the first meeting in June 2008; the next meeting is scheduled for January 2009.

The MoU commits both parties through the forum to endeavour to complete negotiation of a detailed agreement on bilateral cooperation to combat illegal logging and associated trade by the Fourth US-China Strategic Economic Dialogue. The negotiation process of a more comprehensive agreement will most likely require representation of Customs agencies of both parties in the forum. In comparison with the US-Indonesia MoU, the commitments under the US-China MoU are more limited and formulated in a comparatively vague fashion. In addition, the latter does not specify concrete measures to implement the above commitments.

### ***China-Australia MoU***

A MoU on illegal logging between Australia and China can be expected. Both countries have agreed to develop a MoU by establishing a working group to identify key areas for potential cooperation, as was announced by the Australian Minister for Agriculture, Fisheries and Forestry on 9 April 2008 after a meeting with the Vice Minister of the Chinese State Forestry Administration in Beijing (MAFF of Australia 2008).

### ***EU-China Arrangement***

An important bilateral arrangement to note is the bilateral mechanism established to cooperate on timber legality verification, public procurement policies, and facilitating links

between the EU and Chinese businesses to improve information on timber product supply chains, agreed in April 2008 at a EC-China Ministerial-Level Dialogue on Sustainable Forest Management and Forest Law Enforce-

ment and Governance between EC Environment Commissioner Stavros Dimas and Chinese Minister of the State Forestry Administration, Jia Zhibang. Work on implementation details is proceeding.

## 6.5 Other bilateral instruments on promoting legal timber trade

In addition to trade agreements and MoUs on illegal logging, this review has identified three cases where parties have preferred other types of “softer” bilateral arrangements. These are a Joint Announcement by Japan and Indonesia, a Joint Statement by the Republic of Korea and Indonesia and a Letter of Intent between Norway and Indonesia.

The governments of Japan and Indonesia signed the Joint Announcement on the Cooperation in Combating Illegal Logging and the Trade in Illegally Logged Timber and Wood Products and an Action Plan on 24 June 2003. The Announcement has five objectives and specifies five areas for cooperation. Of these, the intention to establish collaboration between enforcement agencies in the two countries, aiming to mutually provide information on the application of relevant laws and regulations, could have implications for Customs. The Action Plan to implement the Announcement specifies an “export ban of illegal and unverified timber by Indonesian Government” as one of several “long term actions” for collaboration between enforcement agencies, which implies an important role for Customs if such a ban was ever to be implemented. Thus far, action under the Joint Announcement appears to have focused mainly on the technical development of a two-dimensional bar code for timber tracking.

The Governments of Indonesia and Republic of Korea (ROK) signed the Joint Statement on “The Call for Combating International Trade in Illegally Harvested Forest Products” in Daejeon in July 2003. In the Joint Statement

ROK announced that it would continue to support Indonesia’s efforts to combat illegal logging, but did not specify types of action (Ministry of Forestry, Republic of Korea 2003).

In a Letter of Intent signed in Johannesburg in August 2002, Norway and Indonesia reached an understanding on Norway’s support for Indonesia’s efforts to reduce and eventually eliminate illegal logging and trade on illegal timber and timber products. With relevance for Customs cooperation is the statement that Norwegian assistance may include support for the development and enforcement of policy reforms, laws and regulations, and for capacity building of judicial, legislative and administrative institutions to combat illegal logging. As a follow-up to the letter of intent, Norway announced a workshop in January 2004 with participants from a wide range of government institutions, civil society groups and donors. A key objective of the workshop was to help Indonesia establish better cooperation and co-ordination in this area amongst both government institutions and donors (Government of Norway 2003). In the letter both governments expressed their intention to enter into an agreement on illegal logging, but this review could not identify further steps in this direction.

## 6.6 Concluding discussion

There are many examples of collaboration between countries that already exist that could be extended to include the issue of illegal timber. The higher the political support that can be secured, the more likely it is for this to happen. The peer review workshop for this report noted that if agreements between countries for interagency collaboration to combat the illegal timber trade are concluded, they must be followed through by the revision of regulations. Consistent regulation between exporting and importing countries is required. Some of the workshop participants felt that further efforts should be made to incorporate clauses on collaboration to tackle the illegal timber trade in free trade agreements, and that there is a need for monitoring and evaluation of any mechanisms for collaboration.

The above review of existing bilateral agreements that take up the issue of illegal logging and the resultant trade allows for five broad observations:

***Observation 1: When contemplating immediate measures for enhanced Customs collaboration to combat the illegal timber trade, the initiative for this collaboration will have to come from outside Customs.***

None of the reviewed multilateral and bilateral agreements relevant to the trade in legal timber was the initiative of Customs. The departments leading the negotiations and responsible for concluding and implementing the agreements were/are related to either the competences of i) trade (mostly in the case of trade agreements), ii) forestry/agriculture (mostly for MoUs and, especially at the time of signing, CITES), and to a lesser extent iii) environment (e.g. VPA negotiations and CITES) and iv) foreign affairs (e.g. the US-China MoU).

The primary task of Customs is to implement laws, regulations and procedures pertaining to the control of and revenue from cross-border

trade. Customs tend not to engage in proposing new legislation, particularly if it is not directly related to their primary task. Similarly, when concluding agreements with counterparts in trade partner countries, Customs usually target improving the implementation of existing Customs laws and regulations through mutual assistance or Customs-to-Customs collaboration.

Agreements with partner countries on facilitating or restricting trade in general or for particular commodities generally fall within the competence of the national entity that is responsible for that particular trade. In cases where there is a cross-cutting competence for environmental issues, environmental agencies may be authorized to negotiate agreements that include provisions on trade. Customs experts of Japan, the European Commission and the Netherlands consulted under this study all emphasized that the initiative for controlling the trade in legal timber would have to originate from the competent agencies within their respective national administrations.

***Observation 2: The type of arrangement does not appear to be the determining factor regarding the type of activities it specifies, nor does it seem to be significant for the extent of implementation of these activities.***

Collaboration between Customs on illegal logging and the resultant trade can be organized under various bilateral arrangements. These can be free trade agreements, more specific trade agreements focused on the legality of timber and wood products, such as the FLEGT Voluntary Partnership Agreements, the less formal MoUs on illegal logging or other non-legally binding arrangements on illegal logging. The type of arrangement appears less important than the will of the Parties and the legal framework from which Customs take their mandate. The legal weight varies with the type of arrangement, but there is no indication

that this imposes limitations on the activities it specifies for Customs. Parties to a MoU may prefer its legally non-binding nature, but they could just as well sign a legally binding agreement to specify exactly the same activities for Customs.

***Observation 3: Customs collaboration can be located within an arrangement to combating illegal logging and the resultant trade on a broad scope, but it could also be organized under more limited arrangements.***

The scope of the reviewed agreements was mostly fairly comprehensive in terms of covering various types of action to tackle illegal logging and the resultant timber trade. Comprehensive arrangements specify action on law enforcement, capacity building, interagency coordination, possibly legal reform etc. The planned VPAs under FLEGT are comprehensive, with lengthy negotiation processes that are a result of efforts to both deliver a broad definition of timber legality and also develop effective systems of chain of custody management and licensing. The US-Peru Trade Promotion Agreement likewise provides a fairly comprehensive set of activities in its Forest Sector Governance annex, and the less formal bilateral MoUs and joint statements/announcements generally share a broad perspective in their approach to illegal logging and options for joint action.

However, bilateral agreements could also have a narrow focus on a specific issue related to illegal logging. For example, New Zealand has expressed particular concern for the import of kwila (*Intsia spp.*), also known as merbau and ipil. In the paper *Illegal Logging and Associated Trade: International and Domestic Action* delivered to Cabinet in 2008, the Ministers of Forestry and Trade stated that kwila is estimated to represent up to 80% of illegally-sourced wood products sold in New Zealand (New Zealand Government 2008). Three priority areas of policy approaches were identified in the paper: ministerial-level bilateral engagement; mandatory labelling at the point of sale in New

Zealand; a consumer awareness campaign. In October 2008, the Cabinet introduced a new requirement for all sellers of kwila/merbau to clearly display whether they have information about the legality of the timber and timber products from a legality certification or verification scheme which is recognized by the government (it is expected to take about two years for this policy to be implemented). In addition, the Minister of Forestry met with counterparts from Malaysia, Indonesia, Papua New Guinea and the Solomon Islands to discuss the possibility of bilateral mechanisms to prevent illegally sourced wood products entering New Zealand. It is thus possible to foresee bilateral arrangements between New Zealand and countries from which it imports kwila that would focus on this species.

***Observation 4: CITES has proved difficult to implement and would benefit from being included in any bilateral arrangement on illegal logging.***

Effective implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora is often hampered by the possibility of fraud, theft and corruption in issuing export and import permits, the difficulty of cross-checking documents against the large number of consignments and a lack of capacity, manpower and knowledge to correctly identify species listed under CITES. Implementation of CITES by Customs would benefit from the development of systems to verify the legal origin and chain of custody of CITES-listed tree species, as these would ensure the robustness of the CITES documents that Customs have to handle. The US-Peru Trade Promotion Agreement is the only reviewed arrangement that includes explicit objectives to cooperate on the implementation of CITES. It not only stipulates comprehensive inventories and periodically reviewed technical studies, annual export quota and a Strategic Plan for Bigleaf Mahogany, but also the development of a system to verify the legal origin and chain of custody of CITES-listed tree species.

***Observation 5: Interagency coordination involving Customs is critical in the drafting of bilateral arrangements on illegal logging and in implementing such arrangements.***

If the bilateral arrangement is to specify the role of Customs authorities in controlling the trade in legal timber, Customs representatives should be consulted and be involved in the negotiation. This appears to be well understood and examples of Customs involvement can be seen in i) the interagency committee established

by the Implementation Act of the US-Peru TPA, ii) the Customs Working Group under FLEGT, iii) the drafting of the US-Indonesia MoU, iv) the drafting of the UK-Indonesian Action Plan, and v) the bilateral forum under the US-China MoU in which multiple agencies are represented. The periodic digital video conferences organized under the US-Indonesia MoU illustrate how interagency collaboration can be encouraged. Effective interagency collaboration within countries might also benefit from its own MoU. ©



# BILATERAL ARRANGEMENTS BETWEEN CUSTOMS

## 7

**A**s noted in the previous section, collaboration on illegal logging and the resultant trade will be organized by Forestry, Trade and other government departments, but they can specify or imply a role for Customs. To carry out this role, some type of agreement between Customs that specifies protocols for information exchange and other forms of collaboration might be useful. This section discusses existing bilateral arrangements on mutual administrative assistance between Customs administrations to shed further light on this issue.

The WCO Johannesburg Convention provides protocols for mutual administrative assistance and information-sharing in cases of infractions. However, if countries prefer to establish a

routine exchange of Customs information, national legislation providing for the collection and transmission of data in line with existing laws on data protection and data privacy, and a bilateral arrangement specifying the condition and use of such information would be required (UNCTAD 2008, 3). There are two basic types of arrangements - legally binding agreements and non-legally binding arrangements which include memoranda of understanding. The need for Customs collaboration is first discussed, then both types of arrangements are analysed reflecting on models provided by the World Customs Organisation. The MoUs on Customs Mutual Assistance and on Illegal Logging between the US and Indonesia are analysed to explore further the potential for the combination of these two types of arrangements.

## 7.1 Customs collaboration

National legislation usually provides Customs with wide-ranging competencies but only within their national territories and for their own purposes. Often Customs administrations have to control goods that arrive in their territory with little or no external support or background information to assist them, except for Customs declarations and accompanying documents.

Customs administrations collaborate for at least two reasons. First, collaboration is a powerful investigative tool to detect, deter and prosecute Customs offences, especially at a time when the volume and complexity of international trade is increasing dramatically, requiring Customs to be more selective in their assessments. Second, Customs collaboration can facilitate the legitimate movement of goods by simplifying and harmonising procedures.

However, organizing collaboration will be challenging. The powers and options that Customs administrations have to combat organized cross-border crime vary widely from country to country. Some Customs have to seek agreement of the appropriate legal authority even for the decision to launch a criminal investigation, while others can prosecute their own cases in Court. Practices in inter-agency exchange of information can also complicate administrative and legal assistance in some countries.

One important instrument available to Customs administrations is mutual administrative assistance, which can be organized through

bilateral arrangements. These arrangements can take the form of legally binding Agreements on Mutual Administrative Assistance in Customs Matters or simply Customs Mutual (Administrative) Assistance Agreements (CMAAs). They can also be concluded as less formal or even non-legally binding cooperative arrangements known as Administrative Arrangements, Memoranda of Understanding and Letters of Understanding, etc. While CMAAs are agreements between states represented by high-level government officials, cooperative arrangements and MoUs can be concluded between Customs administrations (WCO 2004, 2).

## 7.2 Bilateral arrangements between customs

### Customs Mutual Assistance Agreements

Worldwide, an increasing number of countries have concluded bilateral agreements on mutual administrative assistance in Customs matters with their trade partners. CMAAs are bilateral legal frameworks that enable the Customs administrations of the contracting parties to provide each other with administrative assistance to more effectively implement Customs laws, including the effective border control of goods harmful to society, such as illicit drugs and guns, and goods infringing intellectual property rights, while ensuring the prompt clearance of legitimate goods (Japan Customs 2008). CMAAs also aim at i) creating a level playing field for economic operators, ii) exchanging information on Customs legislation and Customs rules as early as possible, iii) granting technical assistance to partner countries, and iv) striving for simplification and harmonisation of Customs procedures (European Commission 2008).

#### Existing CMAAs

Japan has signed CMAAs with the US (1997), the Republic of Korea (2004), the People's Republic of China (2006), and the European Union (2008), apart from a number of less formal Customs arrangements. It is presently negotiating another agreement with Russia. The European Union has concluded agreements with the US, Canada, Republic of Korea, Hong Kong, China, India and Japan. The US has concluded over 60 CMAAs and other countries are also actively seeking CMAAs with their trade partners.

Significant bilateral trade volumes are an important reason why countries sign a CMAA. The EU Taxation and Customs Union Commissioner explains that because of the significance of trade between the EU and Japan "We therefore need to strengthen our Customs cooperation with Japan in order to promote trade facilitation for reliable traders, to improve the fight against fraud and to provide protection of Intellectual Property Rights" (European Commission 2007).

### **Model bilateral agreement**

During its 85th/86th session in June 1995 the Council of the World Customs Organisation adopted a recommendation on a revised Model Bilateral Agreement. The revised Model Bilateral Agreement (MBA) is intended to promote and facilitate the conclusion of bilateral agreements for mutual administrative assistance in Customs matters between WCO members and to complement the Nairobi Convention (see Section 4) (WCO 2004, 25). Apart from providing protocols for administrative assistance in conventional areas of Customs competence, such as valuation, classification and origin, the MBA includes provisions on cross-border action to fight organized crime.

The WCO intends that the MBA should be seen as a flexible checklist to assist members in negotiating bilateral agreements (WCO 2004, 2). Despite this flexibility, the MBA contains a host of what the WCO considers core provisions that should form part of a bilateral agreement (*ibid.*). These core provisions are required for a comprehensive legal basis for the exchange of information and comprise:

- ⊙ Definitions (Art. 1)
- ⊙ Scope of the agreement (Art. 2)
- ⊙ Exchange of information for the application and enforcement of Customs law, the assessment of Customs duties, and related Customs offences (Art. 3-5)
- ⊙ Spontaneous assistance (Art. 8)
- ⊙ Notification (Art. 9)
- ⊙ Recovery of Customs claims (Art. 10)
- ⊙ Surveillance and information (Art. 11)
- ⊙ Communication on request (Art. 19)
- ⊙ Means of obtaining information in the execution of requests (Art. 20)
- ⊙ Use, confidentiality and protection of information (Art. 24-25)
- ⊙ Exemptions (Art. 26) and costs (Art. 27)
- ⊙ Implementation and application of the agreement (Art. 28), territorial application (Art. 29), settlement of disputes (Art. 30), and final provisions (Art. 31-33).

### **Definitions, scope and objectives**

Article 1 on definitions provides an explanation

for a number of key and recurring terms and suggests a definition of “Customs law” in the broadest sense possible. This means that the legal and administrative provisions could extend to the laws of other agencies for which Customs have control or enforcement responsibilities, as in the case of CITES. Hence, where a bilateral agreement on the trade in legal timber contains specifications on the role of Customs, these specifications, too, fall under Customs law.

The definition of “information” is also broad and covers data in paper documents and any other form including electronic, and intelligence, i.e. information that has been processed and analysed. However, as with any part of the negotiated CMAA, the parties are free to exclude, modify or include definitions as required (WCO 2004, 26).

The objectives of CMAAs laid down in the MBA are i) the proper application of Customs law, ii) the prevention, investigation (excluding criminal investigation unless approved by the supplying party) and combating of Customs offences, and iii) ensuring the security of the transnational trade supply chain. The MBA recognizes limitations to mutual assistance with all assistance by either Contracting Party provided in accordance with its legal provisions and within the limits of its Customs administration’s competence and available resources.

### **Information exchange**

CMAAs are formulated in a way that allows for a comprehensive exchange of information in the field of Customs competence, either on request or spontaneously, in order to ensure proper application of Customs law and to prevent, investigate and combat Customs offences. The MBA recommends that such exchange include information on i) new law enforcement techniques, ii) emerging trends, means or methods of committing Customs offences, iii) goods known to be the subject of Customs offences, including related transport and storage methods, iv) offenders or suspected offenders, and v) any other data that can assist Customs administrations with risk assessment.

These forms of information exchange could be useful for action on illegal or suspect timber shipments, provided that Customs have both a mandate and administrative guidelines for identifying such shipments and taking action. A CMAA could be helpful in providing protocols for information exchange on shipments of CITES listed species. For non-CITES listed species, the import of illegal timber is not a Customs offence, but if the goods were acquired dishonestly they may be falsely described in the accompanying documentation, which is a Customs offence (Brack 2005). Here, again, a CMAA or similar arrangement between Customs could be useful.

A provision in the MBA that could be particularly relevant for ensuring the trade in legal timber is that, upon request, information should be shared on whether goods imported into the territory of the requesting contracting party have been lawfully exported from the requested contracting party. The MBA recommends that Customs administrations inform their respective counterpart in case they believe that a Customs offence has been or will be committed in the other party's territory. The MBA also sets out the protocol for an "advance exchange of information" (Art. 7) designed to help identify high-risk consignments in advance of their arrival. As explained in section 4, the same type of protocol exists in the Nairobi Convention and could be the basis for the prior notification of timber shipments.

### **Special types of assistance**

The provisions on "Surveillance and Information" and "Controlled Delivery" could also have relevance to the timber trade. Based on its surveillance findings the requested administration should provide the requesting administration with information on goods, means of transport, premises or persons sus-

pected of being/having been used to commit a Customs offence in the territory of the requesting party. The concept of controlled delivery would allow suspect or illegal goods to proceed across borders to their destination under surveillance, without being detained or seized, in order to identify and apprehend suspects who are responsible for smuggling rather than limiting action to seizing the illegal goods and apprehending their couriers.

### **Other provisions**

The MBA specifies the procedures for requesting assistance through direct communication between Customs administrations, without the need to go through diplomatic channels.

The MBA stipulates that the costs incurred in providing mutual administrative assistance under a CMAA are, in principle, borne by the Customs administration providing the assistance. This principle could be problematic in the case of information exchange on suspicious timber imports if requests are made by Customs in the importer country. It may be difficult for producer countries to meet the costs of providing assistance and some provision for financial aid by the requesting party might be appropriate. The MBA itself mentions exceptions to the above rule for the costs of experts, witnesses, translators and interpreters who are not government employees, which should be paid by the requesting party.

The MBA recommends including an obligation to ensure that the enforcement officials establish and maintain direct relations with each other. Although not mentioned in the MBA, some CMAAs provide for the establishment of a special joint committee in order to institutionalize Customs cooperation.

### Joint Customs Cooperation Committees

The European Commission explains that Joint Customs Cooperation Committees consist of representatives of the Customs authorities of the contracting parties and that their function is to ensure that the agreement is correctly applied and to strive for the solution of problems arising in the application of the agreement rules (European Commission 2008). The Committee can adopt decisions and recommendations to strengthen co-operation, and also serves as a forum to discuss and prepare meetings related to international organisations like the WCO. Apart from formal meetings to enshrine joint positions and to formally agree a common approach, both sides cooperate closely through informal channels and at the margins of international meetings (European Commission 2008). Once Customs have a mandate to take action on suspicious timber shipments, some type of joint committee could provide a valuable forum for information sharing and discussion.

## Customs-to-Customs MoUs and other non-legally binding arrangements

Many WCO members prefer legally binding agreements, yet others favour non-legally binding agreements in order to avoid the formalities of the former (WCO 2004, 2). Non-legally binding agreements between Customs administrations can include Memoranda of Understanding, Service Level Agreements, administrative agreements, letters of understanding and other similar cooperative arrangements (Australian Customs Service 2008, 2). A Customs MoU is an arrangement between Customs and other party/s to cooperate in activities including services, training and information exchange (ibid).

The WCO has drafted a Model Memorandum of Understanding on Mutual Administrative Assistance in Customs Matters (WCO 2004, 43). In contrast to the Model Bilateral Agreement, the Model MoU stipulates reciprocal commitments in a form and with a wording that expresses the intention of the signatories, rather than their legal obligations. The structure of the Model MoU resembles that of the Model

CMAA and is thus almost as comprehensive, but the provisions are generally less detailed and compelling, with both “will” and “may” clauses. One difference is that the requesting side ought to bear the costs for any request under the MoU. While they carry less legal weight, MoUs on mutual administrative assistance between Customs drawing on the WCO model could contain the same protocols as CMAAs and thus be similarly useful for combating the trade in illegal timber.

### *US-Indonesia MoU on Customs mutual assistance*

The US-Indonesia MoU on Customs mutual assistance deserves particular attention in this review because it was signed at the same time as the MoU on Illegal Logging between the two countries and may prove to be useful in implementing this MoU. The US Ambassador and the Director for Customs and Excise of the Indonesian Ministry of Finance signed the MoU Regarding Mutual Assistance Between their Customs Administrations in Jakarta on 17 November 2006. This was a lower level of government representation than the conclusion of the MoU on Illegal Logging which was between ministers.

The Customs MoU establishes a framework for information sharing and law enforcement cooperation to facilitate increased trade, while preventing transshipments and other Customs crimes. The MoU is to assist in the gathering of evidence for criminal and civil cases involving trade fraud, money laundering, violations of export control laws, and drug smuggling. It will also permit Customs to exchange information and provide mutual assistance on a range of other issues, including combating terrorism and trafficking in persons (US Embassy Jakarta 2006).

The Customs MoU places greater emphasis on mutual assistance through seizure and freezing of illicit goods and the forfeiture of property than the WCO model. The scope of the MoU goes beyond that of the WCO model describing assistance on i) methods and techniques of

processing cargo, ii) successful application of enforcement aids and techniques, iii) enforcement actions that might be useful to suppress offences, and iv) special means of combating offences. All of these types of assistance could be relevant for improving enforcement action of Customs with respect to suspicious timber shipments.

Article IV defines the scope of “special assistance” between the Parties. This includes special surveillance upon request of goods either in transport or in storage identified by the requesting Party as giving rise to suspected illicit traffic toward its territory. This provision could be particularly useful for the implementation of information exchange on the legality of timber exports from Indonesia according to Article 3 paragraph (2) of the Illegal Logging MoU. It also has the potential to facilitate the enforcement of the US Lacey Act (see Section 6).

Another relevant provision in Article IV is that upon request the Customs Administrations shall furnish each other with information regarding the activities that may result in offences within the territory of the other Party. This would appear to strengthen the potential to use the Lacey Act against illegal timber imports as Indonesian Customs should respond to any request from the US for information concerning a timber shipment.

The MoU also stipulates mutual assistance through the use of provisional measures and forfeiture, and in proceedings involving property subject to provisional measures or forfeiture. This complements the MoU on Illegal Logging, which does not include any such provisions, by providing Customs administrations the option of assistance by means of seizure, freezing and forfeiture of suspected timber shipments.

With respect to the execution of requests, if the requested Customs Administration is not the

appropriate agency to execute a request, it should promptly transmit the request to the appropriate agency. One strong provision not found in the WCO model is that the requested administration shall conduct to the fullest extent possible, or permit the requesting administration to conduct, such inspections, verifications, fact-finding inquiries, or other investigative steps, including the questioning of experts, witnesses, and persons suspected of having committed an offence, as are necessary to execute a request. This again might be helpful for US Customs to gather necessary information in Indonesia to investigate violations of the Lacey Act. The Customs MoU also provides specific options that could be used for the “investigation of persons or organisations either suspected of committing or known to have committed an offence related to illegal logging or associated trade” as stipulated by the Illegal Logging MoU. A relevant provision not found in the model MoU is that upon request, the requested Party shall authorise, to the fullest extent possible, officials of the requesting Party to be present in the territory of the requested Party to assist in the execution of a request. Under the MoU, the Customs Administrations of the Parties agree to meet periodically, which could be an opportunity for exchange of information and requests on timber trade issues.

In summary, while basically following the structure and containing most of the essential provisions contained in the WCO model MoU, the US-Indonesia Customs MoU includes a number of additional commitments for the Parties. These could prove relevant to implementation of the US-Indonesia MoU on Illegal Logging and could facilitate requests by the US when investigating suspicious shipment in breach of the revised US Lacey Act.

## 7.3 Concluding discussion

Section 5 concluded that collaboration between Customs against the trade in illegal timber would normally be set out in an agreement between authorities other than Customs, such as Forestry. The review in Section 6 supports this conclusion by finding that the legal basis for Customs collaboration is CMAAs, which were never intended to be product specific. The WCO Model Bilateral Agreement is generic as are all the CMAAs that are modelled on it. This review could find no example of a CMAA that was product specific and Customs officials interviewed in Japan, the EU and Indonesia as well as WCO officials all rejected the idea of a CMAA on illegal timber. All important instruments and tools developed by the WCO Secretariat target Customs procedures and enforcement in general and are applicable to all commodities controlled by Customs<sup>21</sup>.

Nevertheless, participants at the peer review workshop for this report explained that CMAAs provide an important bilateral mechanism for the information exchange and other forms of mutual administrative assistance needed to combat the trade in illegal timber. They stressed that greater use of instruments such as MoUs and CMAAs for this purpose is needed, and they noted that the exchange of information on Customs and forestry laws between exporting and importing countries would be particularly useful. MoUs between Customs authorities in the Asia Pacific region already exist and there may be scope to mobilize these for combating the trade in illegal timber.

One suggestion from the workshop was that a model MoU between Customs authorities on the illegal timber trade should be drafted. Piloting to test approaches was also suggested, specifically:

- © Setting up a pilot to test specific collaboration mechanisms under current CMAAs and MoUs;

- © Two countries in the region to agree on a measure to reduce the volume of suspect timber trade between them. (Indonesia and China were proposed as possible candidates)

An example of how a MoU between Customs might be useful was given for the import of Indonesian timber into Sarawak. As noted above, the Sarawak authorities now require Indonesian timber transport permit (SKSHH) to accompany the shipments, but it is difficult for them to assess whether the permit is genuine. A MoU that enables Malaysian authorities to request further information from Indonesia on any suspect permits could be useful.

One of the key points raised at the workshop was that the drafting and implementation of any bilateral arrangement between Customs authorities on the illegal timber trade must engage Forestry and other agencies. Moreover, workshop participants stressed that greater internal coordination between Forestry and Customs (MoUs or other appropriate arrangements between Customs and Forestry would be helpful) is needed.

The review above suggests that a CMAA or softer instrument for Customs mutual administrative assistance could provide useful support for implementing the Customs provisions of a bilateral agreement on illegal logging. The US-Indonesia MoUs are particularly instructive. The MoU on Illegal Logging provides for requests for information and the voluntary provision of information between Customs administrations, but does not provide protocols that describe the medium for requests, the medium of the delivery of the response, advanced exchange of information, the sharing of costs, legitimate reasons for non-response, etc. Without such protocols, Customs have no

guidance for implementing the provisions. The MoU on Customs mutual assistance regulates and promotes a more intensive information exchange between both Customs administration and could certainly reinforce the information exchange on timber shipments stipulated by the Illegal Logging MoU. ©



# CONCLUSION AND WAYS FORWARD

# 8

**A**s the first and last line of defence against smuggling, fraud, and detection of various illegalities that could transpire during the processes of export, re-export, transit and import, Customs administrations can make an important contribution to combating illegal logging and the resultant trade. While most forest-related crimes are outside the purview of Customs, violations of Customs law in the forest products trade are not inconsiderable and take a variety of forms.

Like many other parts of government, Customs are being asked to do more – trade facilitation and security – without necessarily more resources. Nevertheless, Customs officials at the peer review workshop for this paper were well aware of the illegal timber trade and concerned for their agencies to play a greater role in combating this. Useful types of collaboration against this trade would include:

- ⊙ Information-sharing on customs and forest laws, documentation accompanying shipments, and export restrictions;
- ⊙ Spontaneous intelligence sharing on specific shipments;
- ⊙ Prior notification of shipments;
- ⊙ Joint investigation of timber trade statistics discrepancies, with early analysis to monitor trade flows and to enable greater control of data;
- ⊙ Sharing of best practices and experiences to strengthen Customs integrity;

- ⊙ Cooperation to more effectively implement CITES;
- ⊙ Agreement for the use of Customs export declarations, or an additional attestation of legality, in the country of import as a check on legality.

Piloting is one way of taking some of these recommendations forward. For example, two countries could be encouraged to agree to the use of export declarations as a check on legality at the point of import. This would help in eliminating some forms of illegality and is a useful tool for monitoring the timber trade between two countries. If the export declaration form was sent in advance of the shipment, it could also be used as a form of prior notification to combat timber smuggling.

This review finds that the greatest prospects for enhanced Customs collaboration against the illegal timber trade in the short-to-medium term lies in bilateral arrangements on illegal logging. The challenge is thus to make fullest use of existing bilateral arrangements and statements on illegal logging to promote enhanced Customs collaboration and to encourage provisions for Customs collaboration in future agreements. Under the existing bilateral arrangements Customs collaboration could begin with their involvement in a study of bilateral timber trade statistics discrepancies or CITES implementation, and progress to

sharing of information on documentation, suspect timber shipments and to requests for assistance. Customs in the country of import may not have the powers to prosecute imports of illegal timber, but through information sharing with their counterpart administrations in exporting countries, they could draw attention to the seriousness of the issue, thereby encouraging action from importers and end consumers. A prior notification system would be most effective with legislation to empower Customs at the point of import to seize suspect shipments, but, even without such legislation it would be useful for drawing attention to the existence and scale of timber smuggling.

Agreements and arrangements on Customs-to-Customs mutual assistance are often modelled on the WCO Model Bilateral Agreement or the less formal Model Memorandum of Understanding on Mutual Administrative Assistance in Customs Matters. They elaborate generic protocols for information exchange, investigations, surveillance and joint action. Therefore, the combination of (i) a bilateral agreement on illegal logging with provisions for Customs collaboration and (ii) a general Customs-to-Customs agreement (CMAA or MoU) could be a particularly effective way of enhancing Customs collaboration to combat the trade in illegal timber. MoUs between Customs authorities in the Asia Pacific region already exist and there may be scope to mobilize these for combating the trade in illegal timber. The higher the political support that can be secured, the more likely it is for this to happen.

This review highlighted the importance of interagency coordination. The skills, resources and powers to detect and prosecute illegal timber are beyond the scope of Customs acting alone. A coordinated response is required involving Customs, Forestry/Agriculture, Trade, Environment, Foreign Affairs, and other border control authorities. MoUs between the relevant agencies would facilitate the necessary co-operation.

Other than making fullest use of existing bilateral agreements, there is a need to target regional processes and platforms for regular meetings between Customs and Forestry officials. Linkages to existing regional processes and building on a shared agenda are the only ways that cooperation tends to emerge. The ASOF program and FLEG could provide a useful platform for co-operation involving Customs and other authorities. Another useful platform could be the ASEAN Customs Procedures and Trade Facilitation Working Group, which was designed to take up any issues relating to Customs integration. The specific actions suggested at the peer review workshop include:

- ⊙ Encourage ASEAN to establish a joint Customs-Forestry working group on illegal logging and trade;
- ⊙ Request ASEAN to organize a workshop on collaboration between Forestry, Police and Customs;
- ⊙ Request the International Tropical Timber Organization (ITTO) to support an Asian Customs-Forestry working group on illegal logging and trade.

The review noted that a variety of instruments already exist in the Customs field that could be used to combat the trade in illegal timber, including ENVIRONET, RILO A/P, and the CEN, if the will to do so could be harnessed. Useful measures would be:

- ⊙ WCO member countries to officially request RILO A/P to incorporate the control of illegal trade in timber and other forest products as a priority element of its work program;
- ⊙ To include trade in illegal wood as a separate category of the CEN seizures database, and/or all countries to submit information on illegal timber trade (seizures and infractions) to RILO A/P, and/or all countries to use ENVIRONET to request and exchange information on suspect timber shipments and documentation.

Another important observation is that the needs of Customs agencies are not the same in

each country. Some are much better resourced than others, and initiatives for enhanced Customs collaboration must take this into account. Overall, there is a need need for capacity building and training of Customs officials to be more effective in combating the illegal timber trade.

One way of moving forward with some of the recommendations presented in this report would be to develop a support program for the neighbouring countries of Viet Nam, Cambodia, Laos, and Thailand. Action is needed to reduce the trade in illegal timber between these countries and they share a number of commonalities that make them conducive to some

form of sub-regional program. Customs-to-Customs MoUs already exist between the four countries and it is likely that their capacity building needs are not too dissimilar.

Finally, it must be stressed that there is a need not only to combat illegal logging and the resultant trade, but also to promote the positive trade of legal and sustainable timber. Wood products may have advantages for climate change mitigation over their substitutes. Customs have a role to play, not only in restricting the trade in illegal timber, but also facilitating the trade of legal and sustainable timber. ©

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# APPENDIX

## WORKSHOP PROGRAM AND PARTICIPANTS LIST



### Program

Workshop Title: Peer Review Workshop of the Policy Report on *Enhancing Customs Collaboration to Combat the Trade In Illegal Timber*

Venue: Amari Atrium Hotel, Bangkok, Thailand

Dates: 28-29 October 2009]

### Workshop objectives

- ⊙ Provide expert feedback for the policy report “Enhancing Customs Collaboration to Combat the Trade in Illegal Timber” prepared by IGES;
- ⊙ Clarify effective options to enhance collaboration between Customs agencies to prevent trade from being a driver of illegal logging; and
- ⊙ Prioritize the options and identify ways forward including the most appropriate collaborative arrangements for implementing the options.

#### Day 1 (Wednesday, 28<sup>th</sup> October)

		P: Framing presentation F: Facilitator R: Rapporteur
8:30 – 10:00	<ul style="list-style-type: none"> <li>• Introduction               <ul style="list-style-type: none"> <li>⊙ Welcome address</li> <li>⊙ Introduction to the workshop</li> <li>⊙ Self-introduction by participants</li> <li>⊙ The problem of illegal logging and the resultant trade (Chapter 1)</li> <li>⊙ The changing role of Customs (Chapter 2)</li> </ul> </li> </ul>	Mr. Winston Bowman P: David Cassells, TNC & Henry Scheyvens, IGES F: Jack Hurd, TNC R: Federico Lopez-Casero, IGES
10:00 – 10:30	<b>Coffee break</b>	
10:30 – 12:00	Session 1. Customs procedures for the export and import of wood products and illegalities detected(Chapter 3.1, 3.2)	P: Henry Scheyvens, IGES and Chen Hin Keong, TRAFFIC F: Chen Xiaoqian, TNC R: Cole Genge, TNC
12:00 – 13:00	<b>Lunch</b>	

**Day 1 (Wednesday, 28<sup>th</sup> October)**

13:00 – 14:30	Session 2. Types of useful customs collaboration to combat the illegal timber trade (Chapter 3.3)	P: Federico Lopez-Casero and Henry Scheyvens, IGES F: Jack Hurd, TNC R: Chen Hin Keong, TRAFFIC
14:30 – 15:00	<b>Coffee break</b>	
15:00 – 16:30	Session 3. Protocols for collaboration (Presentation on TRAFFIC report)	P: Chen Hin Keong, TRAFFIC F: Henry Scheyvens, IGES R: Federico Lopez-Casero, IGES
16:30 – 17:00	Reflection and key points	F: David Cassells, TNC, Henry Scheyvens, IGES & Chen Hin Keong, TRAFFIC R: Cole Genge, TNC
18:30 – 21:30	Dinner with cultural show at Siam Niramit	All

**Day 2 (Thursday, 29<sup>th</sup> October)**

		P: Framing presentation F: Facilitator R: Rapporteur
8:30 – 10:00	Session 4. WCO legal instruments and tools; Regional Customs networks (Chapter 4 and Chapter 5)	P: Henry Scheyvens, IGES F: Chen Hin Keong, TRAFFIC R: Cole Genge, TNC
10:00 – 10:30	<b>Coffee break</b>	
10:30 – 12:00	Session 5. Agreements related to illegal logging and the resultant trade and their provisions/implications for Customs and Customs collaboration (Chapter 6)	P: Federico Lopez-Casero, IGES F: Henry Scheyvens, IGES R: Chen Hin Keong, TRAFFIC
12:00 – 13:00	<b>Lunch</b>	
13:00 – 14:30	Session 7. Bilateral arrangements between Customs (Chapter 7)	P: Henry Scheyvens, IGES F: Federico Lopez-Casero, IGES R: Cole Genge, TNC
14:30 – 15:00	<b>Coffee break</b>	
15:00 – 16:30	Reflection, key points, prioritization and next steps	F: David Cassells, TNC Henry Scheyvens, IGES Chen Hin Keong, TRAFFIC R: Federico Lopez-Casero, IGES
16:30 – 17:00	<b>Next steps</b>	

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