CSR opportunities to prevent imports of unlawfully produced products

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Introduction

1.1 __ Background

Several products are produced and services rendered under conditions where local or national law and/or international guidelines are violated. This applies to a wide range of products and services, to a large extent originating from developing countries. On the one hand, the production (and trade) of these 'unlawful products' can lead to significant ecological impacts (e.g. on biodiversity), violation of human rights, bad labour conditions, loss of tax revenues for national authorities and unfair competition with companies that do operate in compliance with legislation. On the other hand, the production of such unlawful products is often related to the survival strategies of poor people in developing countries.

Chapter 2 is devoted to the 'definition' of 'unlawful products and services' that is applied in the context of this project.

There are a number of reasons why it is desirable to pay more attention to this topic:

- According to NGOs in particular, in developing countries many sustainability problems would be avoided if 'only' local/national laws were obeyed.
- Compliance with legislation can be considered the *minimum level* of sustainability companies should strive for.
- The sustainability impact of Dutch economic activities 'abroad' is gaining importance in Dutch policy making. So far, mainly 'illegally produced timber' has been in the spotlight. It is however clear that unlawful production is an issue in many other supply chains.

A pertinent question is to what extent Dutch companies are, through the supply chain, involved in the production and trade of unlawfully produced products or services, and whether they can be held legally responsible for this involvement. In addition, it is desirable to get a better picture of how this topic relates to initiatives in the area of Corporate Social Responsibility (CSR). Is it a threat to CSR, for example because companies' compliance with their own codes of conduct may become a legal issue? Or should it be considered a new opportunity, as an incentive for companies to push their suppliers to -at least- comply with the law?

It is against this background that the Dutch Ministry of Housing, Spatial Planning and the Environment commissioned MVO Nederland (CSR Netherlands) to have a closer look at such issues related to 'unlawfully produced products'. Furthermore, MVO Nederland assigned consultancy firm CREM BV in Amsterdam to conduct the research and compile

this report. Feedback on the interim results of the project was given by a group of representatives of the Dutch government, NGOs and the private sector.

1.2 __ Objectives

The following objectives were identified for this project:

- Exploration of the problem: in which international supply chains, somehow connected with the Netherlands are ‘unlawfully produced products / rendered services’ an issue?
- Exploration of the legal consequences and CSR opportunities for Dutch companies
- Raising more awareness on the issue in two specific economic sectors: tour operators and food industry.
- First exploration of possible mitigating measures.

1.3 __ Methodology

According to the original project proposal that was approved for funding by the Ministry of Housing, Spatial Planning and the Environment, execution of three case studies were planned. The objective of this was to have a closer look at violations of legislation in certain specific economic sectors in specific countries. The feedback group (see paragraph 1.1) however decided that, at this point, such case studies were not yet desirable. One of the reasons for this was that execution of such case studies could potentially lead to a lot of (negative) media attention, which could be counterproductive for promotion of CSR in the Netherlands. As an alternative, it was decided that this topic would be discussed in the context of two specific sectors, namely tour operators and the food industry. The objective of these discussions was to introduce the topic into these sectors and exchange ideas about possible measures. In order to create an environment in which participants would feel free to express their opinions, these discussions were held behind ‘closed doors’; with the results considered confidential.

Besides these confidential sector meetings, the following activities have been carried out:

- Literature and internet search to identify possible occurrence of unlawfully produced products/services abroad and to analyse possible legal consequences for Dutch companies involved with such products/services.
- Expert interviews with companies, NGOs, universities and government bodies (including the Public Prosecution Service) to analyse possible legal consequences for Dutch companies and ‘best practices’ and identify potential mitigating measures.

1.4 __ Reader’s guide

The next chapter will give more background information on this topic. Attention will be paid to ‘the definition’ of unlawfulness in the context of this project and to the possible relevance for Dutch companies. In addition, several examples are given.

Chapter 3 highlights the possible legal dimension of the topic and the theoretical and actual legal risks for Dutch companies. The different options offered by law to summon a Dutch company to court for supply chain involvement with unlawfully made products or

unlawfully rendered services will be explored. In that context a distinction will be made between ‘soft law’, Dutch civil law and Dutch criminal law.

The CSR dimension of involvement with such products/services will be described in chapter 4. The question of whether this topic should be of interest for Dutch companies will be dealt with. In addition, attention will be paid to best practices applied by Dutch timber importers. The chapter concludes with possible practical bottlenecks for Dutch companies wishing to include this topic in their CSR policies.

Chapter 5 lists some conclusions and recommendations derived from this study.

Chapter

2

A closer look at the problem

2.1 __ Non-compliance and unlawfulness: elements for a definition

The term ‘non-compliance’ in this project refers to products or services which are produced or rendered in a country outside the Netherlands in violation of the national laws and regulations of that country or of international law. If the act or situation of non-compliance can not be repaired or undone, we define the *making* of the product or the *rendering* of the service as ‘unlawful’.

We limit our focus to examples of unlawfulness that occur in the producing countries and to related products in which Dutch companies have a stake (see paragraph 2.2). This means that we do not look into forms of trade which are officially banned by Dutch or EU legislation. An example of this is the trade of (products made from) endangered species which is banned under the CITES treaty. This treaty provides for several enforcement procedures in the EU (for instance customs control). Another example is the trade in ‘conflict diamonds’, which is banned internationally by the Kimberley Process and also includes enforcement procedures in the EU.

In the project no distinction will be made between products that can be considered ‘unlawful’ as such, for example because they are produced without a required permit, or where products are produced under circumstances where ‘other laws’ are violated (e.g. illegal discharge of untreated waste water). It can however not be excluded that this distinction will be relevant in the view of legal risks.

2.2 __ Relevant type of companies

The study looks into the import of products into the Netherlands that have been made abroad and into the “consumption” of services that are rendered by Dutch companies abroad (e.g. a tour operator based in the Netherlands that makes hotel bookings abroad). Since the project focuses on stimulating CSR within and from the Netherlands it is necessary to study companies that are subject to Dutch law. The study is therefore limited to companies that are founded on the Dutch civil code (*boek 2 Burgerlijk Wetboek, BW*). This includes (branches or ‘daughters’ of) companies that are founded on Dutch law but operate abroad. In this study these companies are referred to as ‘Dutch companies’.

Roughly speaking, the position of Dutch companies within an international supply chain of unlawful products or services can be twofold:

- The company is part of the supply-chain of products but is not the producer (e.g. the trader and/or importer). **In this report, such companies are considered to be *indirectly* involved in violations.**
- The company is a direct investor in the production operations where laws are violated (e.g. the producer or main financier).). **In this report, such companies are considered to be *directly* involved in violations.**

The first, more indirect form of involvement is the most difficult one in terms of assessing a degree of "chain responsibility". A trader or importer has less direct means than a producer or main financier to gather information on and influence the policy and decisions of a foreign producer. It can however pose CSR-related demands on the product or service and the way it is was made or rendered. This influence may decrease with a higher number of intermediary companies positioned in the supply chain between the producer and the importer, but this need not necessarily be the case. The importer can of course also pose CSR-related demands on those intermediaries.

2.3 __ Examples

This paragraph provides some examples of violations of law that have been identified from different sources. This overview is certainly not exhaustive but provides a first inventory of situations where national or international legislation is violated, based on cases reported by NGOs. *General* examples of violations will be described below. In annex 1 some *specific* examples are given.

The following examples of violations of **national/local legislation** have been identified:

- Violation of environmental protection laws, for example no Environmental Impact Assessment carried out, production or activities in protected natural parks, industrial production without compulsory water treatment;
- Violation of national Mining Acts, for example mining without required permits or on illegally cleared land or in natural areas; illegal disposal of mining waste;
- Violation of national Forestry Acts, for example illegal clearing of land or starting of production on illegally cleared land; non-compliance with legislation to protect national biodiversity;
- Violation of national Water Acts, for example illegal withdrawal of water;
- Violation of national Fisheries Acts, for example application of illegal fishing methods (use of chemicals, dynamite, illegal mesh net sizes), fishing in protected areas etc;
- Violation of (national) Labour and Human Rights Acts, for example:
    - Rights of indigenous people (e.g. starting of mining operations without prior consent of national people);
    - National labour laws (e.g. use of child labour, underpayment).

Non-compliance with national legislation is often related to the concession of land rights and issuing of licenses needed for certain activities. On top of the rather 'clear-cut' cases of illegality described above, there is also a 'grey area' where a breach of law is less easy to pinpoint, for example in situations where a 'legal' license has been obtained through bribery, fraud or corruption.

Violation of national legislation is often due to a lack of enforcement (capacity) in national authorities and a lack of awareness or knowledge about the legal requirements among producers. In addition, in many cases enforcement is complicated because the violation of laws or illegal origin of the product is difficult to prove.

The following examples of violations of **international standards** have been identified:

- Violation of internationally accepted human rights, in particular the Universal Declaration of Human Rights and the ILO labour conventions;
- Violation of official guidelines. For example, there are many international conventions for fishing or the protection of certain types of fish, e.g. established under auspices of the FAO (e.g. ICCAT for tuna) or marine institutions (e.g. a set of guidelines on fishing methods developed by ASEAN);
- Violation of international voluntary agreements ('soft law'), e.g. UN Global Compact, OECD Guidelines for Multinational Enterprises, values and principles of the Earth Charter.

However, in general, such standards have little or no direct legal consequences for companies, unless these standards are translated into national laws.

Non-compliance with such international standards is often due to a complete absence of an international enforcement mechanism, because the standards are based on a voluntary agreement. Alternatively, if an enforcement mechanism has been put in place, it operates very weakly and has no power to impose sanctioning measures. In some cases of 'soft law', institutions have been established charged with supervision on compliance, for instance the OECD National Contact Points, (see paragraph 3.3) before which cases can be brought.

Chapter

3

Unlawfully produced products and legal risks for Dutch companies: theory and practice

3.1 __ Introduction

In this chapter theoretical and actual legal risks for Dutch companies somehow involved with unlawfully produced products / rendered services will be explored. In that respect a distinction will be made between risks related to violation of ‘soft law’ (paragraph 3.3), ‘civil law’ (paragraph 3.4) and ‘criminal law’ (paragraph 3.5).

First however some general points of departure with regard to legal risks will be described in paragraph 3.2.

To avoid misunderstandings among Dutch readers, in this chapter the Dutch translation of legal terms on legal issues is given as well.

3.2 __ Points of departure

3.2.1 __ Inquiry duty

In order to asses whether a company is susceptible to a legal measure of a certain kind (*nagaan of een bedrijf voor een rechter aangesproken kan worden op basis van bijvoorbeeld. civiel recht of strafrecht*), a judge will consider whether the legal person (*rechtspersoon*) or its (board of) director(s) knew or should have known that it was dealing in a way that is unlawful. A relevant aspect is the fact that legal persons that perform business activities are expected to inquire into the laws that apply to them. This duty rests on legal persons in order to secure a certain degree of professionalism that is necessary to establish confidence for consumers and for companies among each other when they engage in market transactions. This is referred to as the “inquiry duty” (*onderzoeksplicht*) of a legal person.

In general, an inquiry *duty* is not relevant with regard to the conduct of *suppliers* (are they operating lawfully?). However, an exception could be made in case the company has strong reasons to doubt about the lawfulness of the operations of its suppliers.

3.2.2 __ The relationship between self-imposed norms and legal obligations

Company statements on conduct have specific relevance in the context of chain responsibility and the inquiry duty. Many companies explicitly proclaim that they will adhere to international non-legally binding norms on CSR and/or that they will act in compliance with laws and regulations. International non-legally binding norms on CSR include the OECD Guidelines for multinational enterprises, UN Norms on business and human rights, UN Global Compact and ILO Conventions. When it comes to compliance with laws and regulations these companies for instance claim that the company and its employees will act in compliance with the laws and regulations of the countries in which they operate. Sometimes they also state that their suppliers must comply with national laws and regulations and with international conventions concerning social and working conditions, child labour and protection of the environment (e.g. IKEA Group).
These explicit statements can be part of the company's policy on corporate social responsibility (CSR), for example in a code of conduct, CSR strategy documents, corporate sustainability reports etc. The statements are often made publicly available by the company on the corporate website.

By making a statement on CSR or on compliance with existing laws and regulations a company creates the expectation that it will fulfil the inquiry duty and inquire into the laws that apply to the company itself and into the conduct of the companies they deal with. Otherwise it would be hard to live up to the statement.

In general it is assumed that company statements such as codes of conduct can not be legally binding in themselves. On the other hand the idea that these statements can be considered by a judge when he needs to assess whether a legally binding norm has been violated, is increasingly gaining ground among jurists. A statement on acting in compliance with international non-legally binding norms on CSR can therefore have indirect legal consequences. This topic will be further explored in paragraph 3.4.

It is necessary to make an extra remark on statements on acting in compliance with existing laws and regulations. Particularly with regard to companies who themselves are responsible for complying with these laws and regulations, the assumption is that such statements do not have any surplus value in terms of resting more legal obligations on a company. The legal obligation to comply with existing laws and regulations already follows from those laws and regulations. Such a statement can however cause more national jurisdictions (*nationale rechtssystemen*) to be applicable to the conduct of the company that makes the statement. This will be explained in paragraph 3.4.

3.3 __ Risks for Dutch companies in relation to compliance with 'soft law'

There are two important international agreements (that can be considered as part of international 'soft law') on corporate social responsibility:

- The United Nations' "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises"
- The OECD "Guidelines for Multinational Enterprises"

Both agreements address the issue of corporate responsibility within the supply chain.

The United Nations' "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises" establish a set of general obligations for transnationally operational enterprises, with among others respect to human rights, labour rights and environmental protection. The term 'chain responsibility' is not used exactly as such in the Norms, but in the 'General provisions of implementation' transnational corporations are urged to implement the Norms in the supply chain in the following way[1]:

"Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms."

The OECD "Guidelines for Multinational Enterprises" are a set of recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas including for example human rights, environment and bribery.

The Guidelines do not mention the term 'chain responsibility' as such, but principle no. 10 states that multinationals should "*encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines*"[2].

This obligation is softened with the notion that there are 'practical limitations' to the ability of enterprises to influence the conduct of their business partners, depending for example on the structure and complexity of the supply chain:

"*The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners*"[3].

Countries adhering to the OECD Guidelines are obliged to establish 'National Contact Points' (NCP) for promotional and facilitating activities, but also "*contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances*"[4]. The National Contact Point can examine cases of violation and ask the multinational involved to explain their conduct. The results of these investigations can be made publicly available, but the NCP is not authorized to impose sanctions or restricting measures on the company.

In other words, damage to reputation is the main risk companies can face if violating such 'soft laws' (there are no actual 'legal' risks).

[1] Source: http://www1.umn.edu/humanrts/links/norms-Aug2003.html
[2] Source: http://www.oecd.org/dataoecd/56/36/1922428.pdf
[3] Source: http://www.oecd.org/dataoecd/56/36/1922428.pdf
[4] Source: http://www.oecd.org/dataoecd/56/36/1922428.pdf

3.4 __ Risks for Dutch companies arising from susceptibility to legal measures based on Dutch civil law

3.4.1 __ Introduction

Dutch civil law regarding legal persons regulates among other things the founding of legal persons, the relationships between them and the ways that disputes between legal persons and also between legal persons and stakeholders should be handled.

Several Dutch jurists have studied the legal relevance of company codes of conduct in which corporations express their commitment to international (non-legally binding) CSR-norms. To their studies the example of companies stating that they and their employees will act in compliance with the laws and regulations of the countries in which they operate can be added. Additionally the example of companies stating that *their suppliers* must comply with national laws and regulations and with international to (non-legally binding) CSR-norms can also be added. The supposed leads that Dutch civil law offers to enforce corporate social responsibility will be explored. The goal is to assess whether a board of directors of a company which – knowingly or unknowingly – acts within a supply chain of unlawfully made products or unlawfully rendered services should be prepared for legal actions against it.

3.4.2 __ Possibilities of litigations based on the Dutch Civil Code

Prof. Steins Bisschop, Mr. Hamers and Prof. Schwarz have studied several legal aspects of CSR for the legal research group of the CSR Research Program of the Ministry of Economic Affairs[5]. They conclude that a violation by a company of its own code of conduct may lead to litigations based on the Dutch Civil Code (*Burgerlijk Wetboek, BW*) to dispute a specific decision of the board of directors of that company. This conclusion is shared by Mr. M. Koelemeijer[6].

The reasoning of these jurists consists of the following steps:

- Legal persons and those which are legally and statutorily related to their organization must act upon one another according to norms of reasonableness and equity and bona fides.

In this context it is relevant to point out the principles of justice (*rechtsbeginselen*) for corporate behaviour that are laid down in article 2:8 paragraph 1 BW in combination with the legal sanction provided by article 2:15 BW. These articles are part of Dutch civil law on legal persons. Article 2:8 paragraph 1 BW dictates that legal persons and those which are legally and statutorily related to their organization, must act upon one another according to the principles of “bona fides” (*goede trouw*) and “reasonableness and equity” (*redelijkheid en billijkheid*). In Western jurisdictions these principles provide a legally binding norm which dictates what a reasonable person should do under non-regulated circumstances. “Non-regulated” refers to the fact that no specific laws exist to regulate a situation. In that case a jurisdiction falls back on principles of justice which do provide legally binding norms. Of importance is the principle of bona fides from which – applied to this study – it can be derived that when a company makes a statement on conduct, a stakeholder may expect that the company will fulfil the statement. In other words: a company should live up to the expectations it raises.

[5] For more information on the Research Program, see the report ‘Ondernemen met MeerWaarde’, ministerie van Economische Zaken, 2004. Mr. B.T.M. Steins Bisschop has explored this issue more in-depth within the context of his oration which resulted in the study: ‘Maatschappelijk verantwoord ondernemen en het ondernemingsrecht’, BJu, Den Haag, 2004.
[6] Mr. M. Koelemeijer, ‘Gedragscode: effectief instrument voor maatschappelijk verantwoord ondernemen?, Tijdschrift voor Ondernemingsbestuur, 2004-1, p. 11-23.

Furthermore, article 2:15 BW offers a legal sanction in case of non compliance with article 2:8 BW. In that case paragraph 1 subsection b of article 2:15 BW in combination with paragraph 3 of the same article offers the legal ground for a court to nullify a decision (*een besluit vernietigen*) of an "organ" (*orgaan*) of the company. This means for example that a decision of the board of directors of a company (one of the "organs" of the company under Dutch law) to purchase or to invest in a product that turns out to have been unlawfully produced does not comply with the code of conduct of that company when that code states that it will only deal with suppliers that abide (*naleven*) the law. Therefore the decision can be contested before a judge who can decide to nullify the decision.

- Some companies have translated CSR into a code of conduct containing self-imposed norms for corporate behaviour

Having concluded that there is a lack of legal regulation of CSR, practice shows that companies are more and more committed to CSR and are developing strategies and policies on socially and environmentally responsible behaviour. This practice has developed from within society itself, without being forced by law or necessarily by commercial needs. They express this commitment to CSR via their website, annual CSR reports and codes of conduct. The self-imposed norms include commitment to international norms on CSR.
Some companies also explicitly state that the company and its employees shall not violate the laws and regulations of the (foreign) countries in which they are active. Sometimes they also state that their suppliers must comply with national laws and regulations and with international conventions.

- At some point a dispute can arise as to whether a certain decision of the board of directors of a company is in compliance with its own code of conduct.

Relevant for this project are disputes between the company and parties that are related to the company (e.g. shareholders and employees) and disputes between the company and external interested parties (e.g. consumers, suppliers and non-governmental organizations).

- Companies are considered to take into account interests of not only their shareholders and employees, but also of external interested parties.

The starting point for this view on CSR is the approach of the stakeholder model that is leading in continental Europe. This model acknowledges that corporations represent the interests of several interested parties, without one of these interests being decisive beforehand. This model is distinct from the Anglo-American approach in which the interests of shareholders are decisive for corporate policy and performance. The stakeholder model gives an indication of the position of corporations in society with respect to their corporate social policy, without translating this position into specific legal rights, obligations and responsibilities in the field of CSR[7]. This means that boards of directors of (European) companies will need to justify their decisions to two parties: the shareholders (represented by the annual shareholder meeting) and other stakeholders.
This view is shared by Ms. Koelemeijer who concludes that the norms laid down in article 2:8 BW extend their reach to external interested parties simply because acts that are performed outside the internal sphere of the organization of a legal entity can lead to a violation of internal norms.

- A dispute over compliance with a code of conduct can be brought before a judge.

From the previous step it follows that certain internal and external parties may be considered as a stakeholder that has a reasonable interest in (*redelijk belang hebben bij*) compliance with a (self-imposed) norm. Therefore both kinds of parties can claim nullification of a decision before a judge based on article 2:15 paragraph 3 subsection a.
Mr. Steins Bisschop c.s. identified three categories of interested parties which may contest a company's decisions before a judge:

[7] See also the report 'De winst van waarden', SER-advies of December 15th 2000.

- Direct stakeholders: entities which are directly associated with the company, i.e. shareholders, board of directors, board of commissioners and employees
- Direct-indirect stakeholders: entities which are not a part of the organization of the company but are associated since they can directly influence the business strategy, e.g. suppliers, clients, financers and NGOs. In contrast with the other direct indirect stakeholders NGOs do not have a formal legal or contractual relationship with the company. However, according to the authors of the study companies do have an obligation to justify their decisions to NGOs. They derive this conclusion from the "social contract" (maatschappelijk contract) that is supposed to exist between a company and society and the fact that NGOs represent parts of society. This conclusion is not only based on the aforementioned stakeholder model and international guidelines on CSR. NGOs are already acknowledged by Dutch civil law as being legal persons that can file a legal action against another party, namely in article 3:305a BW on class actions (*collectieve actie*).
- Indirect-indirect stakeholders: entities which can influence the business (strategy), but - different from the other two categories – cannot be influenced by the company, e.g. government and (semi) governmental institutions.

The court can consider a code of conduct in its decision since such a code can be seen as generally accepted legal principles (*algemeen erkende rechtsbeginselen*) that express prevailing opinions within the Netherlands (*binnen Nederland levende overtuigingen*). According to article 3:12 BW both these sources have to be considered by a judge when he assesses what is demanded of a legal person by the principle of reasonableness and equity.
An important element of the legal procedure will be the investigation into the fact of whether the board of directors knew that the product was produced in an unlawful way or that there were strong reasons to doubt about the lawfulness of suppliers. The bona fides norm implicates a certain inquiry duty in line with what may be reasonably expected under the given circumstances. In the case of a decision to purchase or invest, a judge will probably also consider aspects such as price, country of origin, contract conditions, influence of buying company, type of supplier, etc.

3.4.3 __ Conclusions

This reasoning leads to the conclusion that CSR and the non-legally binding regulation of this phenomenon can be introduced into the field of legal obligations. It also means that, apart from the legal measures that can be taken based on the jurisdiction of the foreign country where the laws were violated, Dutch jurisdiction can be applicable as well.

As of now however, this 'risk' remains a theoretical one. No cases have been brought before a Dutch judge in which a decision to (for instance) purchase or invest in an unlawfully made product was contested for being in violation with the company code of conduct. Prof. Steins Bisschop c.s. states however that their analysis indicates that boards of directors can not allow themselves to set aside these kinds of legal measures as imaginary. Put in other words, the fact that this risk has not yet struck a company does not mean it can be taken for granted as an imaginary risk.

3.5 __ Risks arising from susceptibility to legal measures based on Dutch criminal law

3.5.1 __ Introduction

The Dutch criminal code (*Wetboek van Strafrecht, WvSr*) contains public law (*publiek recht*) and defines criminal offences (*strafbare feiten*). The Public Prosecution Service (*Openbaar Ministerie*) is part of the government and is the only institution that can

prosecute (*vervolgen*) a suspect (*verdachte*). The use of criminal law is considered to be "ultimum remedium", which means that it should only be applied when other mechanisms for correction (e.g. civil law or administrative law) cannot be applied (successfully).

The following factors are relevant for assessing whether criminal law is applicable to supply chain involvement of a Dutch legal person with unlawfully made products and / or unlawfully rendered services:

- Article 5 paragraph 1 subsection 2 WvSr determines that the Dutch Criminal Code is applicable to a Dutch natural person (*natuurlijk persoon*) who commits a criminal offence outside the Netherlands which is considered as an indictable offence (*misdrijf: een zwaarder soort strafbaar feit*) under the Dutch Criminal Code *and* which is also a criminal offence under the laws of the country where the criminal offence was committed (*het beginsel van dubbele strafbaarheid*).
- Article 51 WvSr states that a criminal offence can also be committed by a legal person. This article offers the legal ground to prosecute the legal person and / or the natural person that ordered (opdracht gaf tot) the criminal offence to be committed and/or the natural person that was the executive who managed (*feitelijk leiding gaf aan*) the forbidden act.
- A suspicion (*verdenking*) of a criminal offence can arise from the reporting (aangifte) of a crime or from inspections or criminal investigations performed by government bodies.
- The Public Prosecution Service applies the principle of prosecutorial discretion (*opportuniteitsbeginsel*) to decide whether it will prosecute.

This means that the public prosecutor (*officier van justitie*) first decides whether the use of criminal law is the right choice (ultimum remedium). He also considers whether there will be enough opportunities for gathering evidence. This is especially relevant in cases in which the offence was committed abroad. The prosecutor also assesses whether the investigation services and the Public Prosecution Service have enough expertise and capacity to investigate and prosecute the offence. And finally the prosecutor assesses beforehand if a judge could be convinced of the guilt of the natural or legal person based on the available evidence.

3.5.2 Possibilities of litigations based on the Dutch Criminal Code

As part of the 'Forest Law Enforcement, Government and Trade (FLEGT) initiative' the European Commission has reviewed possible legal measures to control access to the European market of unlawfully produced timber originating from countries that do not participate in FLEGT. This has lead to the 'Assessment of 'Additional Measures' to Exclude Illegal Timber from EU Markets'[8]. This study describes some possibilities offered by the national legislation of EU member states on for instance theft (diefstal), fencing (heling), laundering (witwassen) and customs misdeclaration (belastingfraude). Other literature on using criminal law to fight unlawfully produced timber has been studied as well[9].

Fencing (*heling*)

The Dutch Criminal Code contains several articles on fencing. It is primarily article 417bis that is important for this. This article permits a criminal punishment for a natural (or legal) person who (for instance) buys, has available to them (*voorhanden hebben*), transfers or

[8] "EU FLEGT initiative: Assessment of 'Additional Measures' to Exclude Illegal Timber from EU Markets", D. Brack, Chatham House, July 2005.

[9] T. Boekhout van Solinge, 'De handel in illegaal tropisch hardhout', article from 'Discretie in het strafrecht', Boom Juridische uitgevers, Den Haag 2004 & J. van Meurs and B. van Houtert, 'De mogelijkheden van het Nederlandse strafrecht om handelaren in illegaal hout te vervolgen', paper Rijksuniversiteit Utrecht, 2003.

sells goods (een goed/goederen) while they - at the moment that they bought, stored, transferred or sold those goods - should reasonably have known that the goods were acquired through an indictable offence. This offence is punishable in the Netherlands even if the offence through which the goods were acquired took place outside the Netherlands. The offence through which the goods were acquired might be theft (e.g. quarrying outside the area indicated in a permit, or without a permit at all) or the punishable violation of another element of a permit. The fact that the offender "could reasonably have known" (*redelijkerwijs had kunnen weten*) that the goods were acquired through an indictable offence implies a certain inquiry duty or awareness on his part. It is easier for a public prosecutor to gather evidence on this element that to gather evidence on the fact that someone *knew* that the goods were acquired through an indictable offence.

Laundering (*witwassen*)
The Dutch Criminal Code also contains several articles on laundering. These articles protect the integrity of financial and economic transactions, which is a more limited scope than is covered by the articles on fencing. In this case it is primarily covered by article 420quater. This article states that a natural (or legal) person commits the offence of laundering when he - among other things - disguises or hides the true nature, origin or theft of a good or has it available to him, while he should reasonably know that the good was - directly or indirectly - acquired through an indictable offence. The fact that the offender "could reasonably know" that the goods were acquired through an indictable offence implies a certain inquiry duty or awareness on his part. In certain cases this article is applicable when the indictable offence was committed abroad.

Customs misdeclaration (*belastingfraude*)
Dutch national law may offer opportunities to prosecute misdescribed goods that enter the EU. Goods acquired in an unlawful manner will be falsely described in the accompanying documentation in order to smuggle them into another country. If so, this offence (*belastingfraude*) would allow customs to seize the goods.

3.5.3 Conditions for prosecution and conviction

In the box in paragraph 3.5.1 certain conditions are described that need to be met in order for a public prosecutor to make the decision to prosecute. Several of these factors also determine whether a judge will decide whether a company is guilty as charged. Some of these factors are described in more detail in this paragraph, since they give an indication of the risk a company runs of being charged (*gedagvaard worden*) and convicted (*veroordeeld worden)* for having committed a criminal offence. This paragraph is partly based on the 'Analysis of national legislation of relevance to excluding illegal timber form EU markets; Netherlands study'[10], which has been written with help from the Dutch Public Prosecution Service.

First of all it is important to indicate that the instruments available under criminal law can only be used effectively when administrative enforcement arrangements are in place and function properly. This means that when certain business activities abroad are regulated by the administrative law (*bestuursrecht)* of that country, the relevant administrative bodies (*bestuursorganen)* should actively see to it that the right rules are applied and that they frequently inspect activities and enforce the law when it is broken. It is for instance ineffective to start a criminal investigation when activities are performed in violation of a permit while the administrative body that issued the permit does not have or use any

[10] Ministry of Agriculture, Nature and Food Quality of The Netherlands; made for the discussion at a Brussels workshop on January 31st 2006.

enforcement instruments. The use of criminal law cannot take over the responsibilities and tasks of such administrative bodies. This would be incorrect for reasons of principle and also practically impossible to realize, since most countries will have far less public prosecutors than civil servants that work for administrative bodies.

Secondly, in order to prove that a certain product that has been imported into the Netherlands is linked to a crime committed in another country, an investigation in that foreign country and cooperation from its officials are absolutely necessary. Such an investigation will be much easier if both countries have made a bilateral agreement on international legal cooperation in criminal cases. For various reasons, the Netherlands does not have such agreements with every country. For instance, the Netherlands does not have a bilateral agreement on international legal cooperation in criminal cases with Indonesia, Malaysia, South Africa or Brazil. It does have a bilateral agreement with India on extradition (*uitlevering*)[11]. This treaty contains articles that can be the basis for judicial cooperation in criminal cases.
When an agreement on international legal cooperation in criminal cases does not exist, information is not easily obtained. And, in such cases, it is hardly ever obtained within the deadlines which are generally laid down in treaties on the (human) rights of suspects.

Another important element is proving the origin of the possibly unlawfully made product. It can be very difficult to gather the kind of information that will meet the demands for acceptable proof that are laid down in a Code of Criminal Procedure (*voldoen aan de eisen van een bewijsregime uit een Wetboek van Strafvordering)* especially when it concerns raw materials*.* These demands are high due to the far reaching consequences of the use of criminal law. This use can for instance limit a person's privacy and lead to the severe punishment of (legal) persons.

One might hope that DNA research can help to establish whether a certain amount of raw material comes from a specific area where the crime is supposed to have been committed. But in order to reach that stage it seems that it would first be necessary to make a complete database of the DNA characteristics of those raw materials from all the places where such materials can be found. Only then a judge can rule out the possibility that the material could come from another area.

3.5.4 Conclusions

When criminal law is applied many legal demands and safeguards need to be met due to the possible far-reaching consequences. The power of a government to punish a guilty party demands very careful conduct by its public prosecutors. The deployment of criminal law is therefore an instrument that can only be used in a very selective manner. With regard to unlawfully made products or unlawfully rendered services the effort of gaining conclusive evidence is relatively larger than usual since most of that evidence needs to be gathered from abroad.
In the current situation the chance of criminal investigation, prosecution and conviction of a Dutch natural or legal person due to supply chain involvement with unlawfully made products and unlawfully rendered services is quite small. The attention within the Public Prosecution Service for this issue is growing, but the deployment of criminal law in this area will probably always remain marginal compared to other measures that can be taken to enhance CSR. In short, criminal law is not apt for changing broad social phenomena. It is to be expected though that a conviction related to unlawfully made

11 Notawisseling tussen Nederland en India inzake toepassing van het Verdrag tussen Nederland en Groot-Brittanie tot uitlevering van misdadigers van 10 november 1967, Trb. 1968, 1. Article XVII creates the possibility to hear witnesses.

products or unlawfully rendered services will have some - temporary - preventive effect on other companies performing similar activities.

3.6 __ A framework for possible legal risks

On the basis of the previous paragraphs, eight different theoretical situations with regard to legal risks that Dutch companies may face can be distinguished (see table).

Table: Framework for possible legal measures to prevent imports of illegal products

		Situation in country of origin of illegal product	
		Violation of national / local law	**Violation of international law and guidelines**
Situation in The Netherlands	Company is part of the supply-chain and made *no explicit reference* to legal compliance		
	Company is part of the supply-chain and made **explicit** reference to legal compliance		
	Company is a **direct investor** and made *no explicit reference* to legal compliance		
	Company is a **direct investor** and made **explicit** reference to legal compliance		

Low risk
Moderaterisk
High risk
Very high risk

From this table the following conclusions can be drawn:

- Legal risks related to violations of national/local laws are bigger than risks related to violations of soft law.
- Legal risks for companies who are directly involved in violations of laws abroad (e.g. because they are a direct investor) are bigger than risks for companies who buy unlawful products / services generated by third parties.
- Legal risks for companies who actively claim that they and/or their suppliers comply with the law (but fail to do so) are bigger than legal risks for companies who don't make such external communications.

Chapter

4

Unlawfully produced products and Corporate Social Responsibility

4.1 __ Is or should it be an issue?

With the exception of illegal timber (see the next sub-heading), the topic of unlawfully produced products and services is not yet a (major) issue in other economic sectors. This is particularly true as far as violation of laws in supply chains is concerned. For this project several companies who are known for their progressive CSR policies have been approached and questioned about their policies on this topic and associated best practices, but most of them are not aware this may be an issue (e.g. they never checked with their suppliers) or they find it too difficult to actually control compliance with the law by their (indirect) suppliers (see paragraph 4.3).

With regard to Dutch companies being part of an international supply chain only, an important reason why they pay comparatively little attention to violations of laws in countries of production is simply because they don't consider this as 'their business'. Here law enforcement is considered an internal affair of the country where the supplier is based. One might ask however whether this is a desirable approach from a CSR point of view, particularly if it concerns a developing country. It should be stressed that enforcement mechanisms and capacities in these countries are often weak. It can at least be argued that it is not 'ethical' if companies in these countries, and indirectly the Dutch buyer (in such cases where the company is aware of such violations), take advantage of this.

The previous chapter was devoted to the possible legal risks Dutch companies may face in cases where they are involved in producing or trading unlawfully produced products or services, either as a party *directly* violating legislation (e.g. a direct investor in the offensive production process) or as a buyer of unlawful products/services generated by others. In principle this is a negative approach to the topic and the question arises as to whether the threat of legal risks should be applied in the policies of, for example, government bodies and NGOs. It can be argued that emphasis on legal risks for Dutch companies could be counterproductive to achieve benefits for the environment or people in developing countries. For example, this situation may occur if companies shy away from being transparent in their CSR policies. As described in the previous chapter, companies, particularly those that publicly state that they and their suppliers will comply with the law (for example in codes of conduct), but violate these laws after all, run legal risks. On the other hand it can be said that the potential threat that such a company will be held legally accountable will prevent the use of CSR statements as window dressing

only. It will make CSR a more serious component of doing international business (making CSR more professional).

Besides the possible legal risks of being involved in the production or trade of unlawfully produced products, there are also several other arguments why more attention to this topic is desirable:

- Compliance with the law can be considered the absolute minimum level of doing business in a sustainable way. In general, laws are made to prevent extreme cases of natural destruction and exploitation of human beings. It concerns topics such as the prevention of child prostitution and child, forced and bonded labour as well as large-scale environmental degradation. It also relates to the integrity of states. From this point of view legal compliance should be the starting point of any CSR policy. In this context it is however important to make a distinction between profit-oriented export companies who deliberately violate laws and the poor who have to violate laws out of survival strategies. In some cases products of such marginalized people may indirectly be exported to the Netherlands as well (e.g. fish, agricultural products, precious metals and stones).

- Violation of laws is also a high reputational risk for companies, not only because it generally concerns ‘big’ sustainability issues, but also because of the possible association with criminal acts in the perception of the public. This particularly concerns situations where consumers are directly confronted with the violation of the law (e.g. as in the case of tourism). In addition it is potentially an ‘attractive’ topic for both NGOs and the media to address.

- On the other hand, particularly because this is a comparatively new topic, companies who pro-actively take measures to prevent involvement with unlawfully produced products and services, can positively distinguish themselves in the marketplace and towards their employees and financiers.

The topic is also highly relevant for banks and government bodies. Banks don’t want to be associated with companies who directly or indirectly violate the law, both because of the financial risks involved and to protect their own corporate image as a responsible party.

Governments may play several roles in this context. In the first place, they are potential buyers of unlawfully produced products and can be held legally accountable as well. In the second place, government bodies are expected to give a ‘good example’ in society and it will be hard to explain if they buy such products and obtain financial benefits from them (via import tax and VAT). In the third place, the government should not support Dutch companies or activities if these companies / activities can be associated with unlawful activities (e.g. in the case of the PSOM subsidy programme).

4.2 __ Best practices: the timber case

As part of this research several companies have been approached in search of best practices. Other than the timber case, no best practices have been found. Although many companies do have progressive CSR policies and in some cases state/demand that they and their suppliers comply with national and local laws, none of them could actually prove their legal compliance. They admitted that they were mostly not aware of local laws if at all, and that if these laws were known to them that they could simply not check all their

suppliers for legal compliance. As mentioned already, timber is an exception in which a lot of time and energy have been invested in combating illegal practices, and in which the government and the timber sector itself play an important role.

4.2.1 Activities by the EU and Dutch authorities

The problem of illegal logging and illegal trade of associated timber products is deeply felt and shared among various stakeholders including politicians. Its impact on society is clear and visible both in the producing and importing country. For example, governments miss income taxes, forests are logged in a destructive manner and indigenous communities are adversely affected. Furthermore, dumping of cheap illegal timber disturbs market mechanisms and therefore prevents the setting of a fair price for timber. In the Netherlands has been estimated that 50% of imported timber products are illegal (LNV). NGOs, citizens, politicians and others in The Netherlands and abroad heavily protested against these illegal practices, which eventually resulted in the EU Forest Law Enforcement Governance and Trade (FLEGT) Action Plan.

The aim of the FLEGT Action Plan is to combat illegal logging and the associated trade in timber products. Its approach is based on bilateral partnerships between the EU and major producers in Brazil, Russia, Malaysia, Ghana, Cameroon, Gabon and DR Congo. These partnerships, which should lead to the establishment of Voluntary Partnership Agreements (VPAs), form the legal basis for a system of permits (a voluntary licensing scheme) that should prevent the import of illegal timber into the EU. Furthermore, these partnerships comprise financial and technical assistance for partner countries in promoting good forestry management throughout the sector and the transparency of the harvest, with a view to boosting trade and testing the legality of the product.
Another important aspect of the FLEGT Action Plan concerns the definition of legality, which the EU and producing country have to agree upon. This definition prescribes among other things the check procedures and regulations throughout the entire chain.

4.2.2 Private sector initiative: the Netherlands Timber and Trade Association

Apart from the government, the timber sector itself plays an important role in the combat of illegal logging and trade of associated timber products. In 2004, the members of the Netherlands Timber Trade Association (NTTA) agreed on a policy that includes a code of conduct obliging the NTTA members to exclusively bring legal timber into the Dutch market, preferably from sustainable sources.

The NTTA is against illegal logging, against the import of illegally logged timber, advocates an international and global approach in their fight against illegal practices in timber and advocates a ban on illegal timber at a European level.

NTTA's activities to combat illegal timber include:

- NTTA members have signed NTTA's code of conduct with the primary goal of bringing only legal timber into the Dutch market;
- NTTA members have asked their foreign suppliers to endorse and sign the NTTA legality statement whereby the suppliers safeguard the legal origin of their timber and associated products. Suppliers who do not sign this statement will no longer be entitled to furnish NTTA members;
- NTTA has developed a transparent tracking and tracing system whereby timber can be traced back to the forest it came from. This traceability is achieved by identifying the various stakeholders in the entire supply chain and verifying data by checking relevant documentation such as transport invoices and concession rights.

Furthermore, a Toolbox for legal verification and timber tracking has been developed, in which several tools are presented to safeguard the legal origin of timber;
- The NTTA has launched a legality protocol developed by its own certification body called Keurhout, which allows timber with approved certification to carry the official Keurhout-legality claim. Since January 2004 Keurhout is fully adopted and financed by the NTTA. The protocol enables the assessment of legality claims and the provision of 'demonstrably' legal timber.

In short, not only has NTTA developed a Code of Conduct signed by its members, they also have a tracking and tracing system in place and a protocol for the verification of 'demonstrably' legal timber.

It is worth mentioning that the NTTA works both internationally and with the Dutch government. In November 2004, NTTA together with their British, Belgian and French counterparts and with the assistance of the European Hardwood Federation (UCBD) and the European Timber Trade Association (FEBO) submitted a European project called 'Timber Trade Action Plan for Good Governance in Tropical Forestry' (TTAP). The EU granted a sum of 3.5 million euros to the project, providing 80% of the funding for all NTTA activities against illegal logging in Indonesia, Malaysia, Cameroon and Gabon. On top of this, the Dutch Ministry of Agriculture, Nature Management & Fisheries (LNV) agreed to fund half of the remaining 20%. A second TTAP project focused on four Latin American countries and China is taken into consideration.

4.3 __ Practical problems?

As described in paragraph 1.3 discussions were held with representatives from the outbound tourist industry and the food processing industry. From these discussions the following practical bottlenecks to addressing unlawfully produced products / rendered services have been identified:

- Many Dutch companies have no information about legislation in other countries. This particularly concerns Dutch companies who trade in an international supply chain only. In general it becomes more difficult to monitor such legislation if the Dutch company is doing business with many and fluctuating countries and regions (e.g. tour operators).

In cases that the Dutch company does have information about local legislation, compliance with such laws by suppliers is difficult to monitor. This is particularly true for commodities because the Dutch company can not trace back to the primary production area (where the risks of unlawful production are the biggest). It is however also a problem for, among others tour operators because most of the time they don't maintain a direct business relationship with the offending company (e.g. an accommodation provider violates the local law, but the Dutch tour operator is dealing with an incoming agent only).

Even if it is clear to the Dutch party that foreign laws are violated, it is sometimes difficult to translate this into action. This is particularly true for SMEs who have little influence / power in supply chains and who can not easily change suppliers. What can they do without harming themselves? In this context it is also important to bear in mind that a sudden pressure on suppliers to comply with the law may sometimes have adverse social consequences (e.g. children put out on the streets).

Chapter

5

Conclusions and recommendations

5.1 __ Conclusions

Based on this study the following conclusions can be identified:

- Several products are produced and services rendered under conditions in which local or national law and/or international guidelines are violated. This applies to a wide range of products and services, which to a large extent originate from developing countries. On the one hand, the production (and trade) of these ‘unlawful products’ can lead to a significant ecological impact (e.g. on biodiversity), violation of human rights, bad labour conditions, loss of tax revenues for national authorities and unfair competition with companies that operate in compliance with legislation. On the other hand, the production of illegal products is often related to the survival strategies of poor people in developing countries.

- Under the framework of this project several specific companies and industry associations have been interviewed to learn about their views and possible measures that can be taken regarding unlawfully produced products and services. Based on these interviews the conclusion seems that, with the exception of illegal timber, this topic is not yet a (major) issue in most economic sectors, particularly as far as violation of laws by suppliers is concerned.

- Non-compliance with *national* legislation is sometimes related to the concession of land rights and issuing of licenses needed for certain activities. On top of the rather ‘clear-cut’ cases of illegality, there is also a ‘grey area’ where the breach of law is less easy to pinpoint, for example situations where a ‘legal’ license has been obtained through bribery, fraud or corruption. Violation of national legislation is often due to lack of enforcement (capacity) by national authorities and lack of awareness or knowledge about the legal requirements by producers.

- In certain countries non-compliance with *international* standards is due to a complete absence of an international enforcement mechanism. Alternatively, if an enforcement mechanism has been put in place, it sometimes operates very weakly and has no power to impose sanctioning measures. In some cases of ‘soft law’, institutions have been established charged with supervision of compliance. Reputational damage is the main risk companies can face if they violate such ‘soft laws’ (there are no actual ‘legal’ risks)

- Legal persons have an “inquiry duty” in order to secure a certain degree of professionalism that is necessary to establish confidence for consumers and for companies among each other when they engage in market transactions. This means that companies are expected to inquire into the laws that apply to them.. In general, an inquiry *duty* is not relevant with regard to the conduct of *suppliers* (are they operating lawfully?). However, an exception could be made in case the company has strong reasons to doubt about the lawfulness of the operations of its suppliers.

- A company, particularly if it acts in a way that is not in compliance with expectations raised among stakeholders, runs a certain legal risk (e.g. the company has issued a CSR code of conduct stating that the company itself and its suppliers will obey the law, but proves to fail to do so in practice). Based on the Dutch Civil Code (*Burgerlijk Wetboek*) violation by a company of its own code of conduct may lead to litigations by third parties (e.g. NGOs) to dispute a specific decision by the board of directors of that company. As of now however, this ‘risk’ remains a theoretical one. No cases have yet been brought before a Dutch judge in which a decision to for instance purchase or invest in an unlawfully made product was contested for being in violation of the company code of conduct.

- When criminal law is applied (e.g. in relation to fencing, laundering and customs misdeclaration), many legal demands and safeguards need to be met due to the possible far-reaching consequences. The deployment of criminal law is therefore an instrument that can only be used in a very selective manner. With regard to unlawfully made products or unlawfully rendered services the efforts required for gaining conclusive evidence are relatively larger than usual since most of that evidence needs to be gathered from abroad. In the current situation the chance of a criminal investigation, prosecution and conviction of a Dutch natural or legal person due to supply chain involvement with unlawfully made products and unlawfully rendered services is therefore quite small. The attention within the Public Prosecution Service for this issue is however growing.

- The legal risks for Dutch companies are comparatively big in cases where they have direct investments in the production process to which the violation is related and if they have made public statements that they (and their suppliers) will obey the law.

- Some Dutch companies being traders in an international supply chain only, will argue that law enforcement is an internal affair of the country where the supplier is based. They don’t consider this as ‘their business’. It should however be stressed that enforcement mechanisms and capacities, in particular in developing countries are often weak. It can be argued that at least from a CSR point of view, it is not ‘ethical’ if companies in these countries, and indirectly the Dutch buyer (in cases where this company is aware of such violations), take advantage of this.

- It can be said that the potential threat of a Dutch company being held legally accountable will be counterproductive because of the increased risk to transparency concerning CSR policies. Others will argue that this will help to prevent the use of CSR statements for window dressing only, that it will make CSR a more serious component of doing international business (making CSR more professional).

- In general, from a CSR point of view, more attention to unlawfully produced products / rendered services is desirable:
    - Compliance with the law can be considered the absolute minimum level of doing business in a sustainable way. This particularly applies to companies who are directly involved in unlawful operations abroad. The extent to which companies are or should be held responsible for violations of laws by their direct or indirect suppliers is less obvious. In this context it is also important to make a distinction between profit-oriented export companies who deliberately violate laws and the poor who have to violate laws as a result of their survival strategies.
    - Violation of laws also constitutes a high reputational risk for companies, not only because it generally concerns 'big' sustainability issues, but also because of the possible association with criminal acts in the perception of the public. There is also the risk that NGOs or the media will embrace this topic. On the other hand, particularly because this is a comparatively new topic, companies who pro-actively take measures to prevent involvement with unlawfully produced products and services, can positively distinguish themselves in the marketplace and towards their employees and financiers.

- In general, companies may face the following practical bottlenecks when addressing unlawfully produced products / rendered services:
    - Many Dutch companies have no information about legislation in other countries.
    - In cases where the Dutch company does have information about local legislation, compliance with such laws by suppliers is difficult to monitor. This is particularly true for commodities.
    - Even if it is clear to the Dutch party that foreign laws are violated, it is sometimes difficult to translate this into action. This is particularly true for SMEs

- The topic is also highly relevant for banks because they do not want to be associated with companies who directly or indirectly violate the law, both because of the financial risks involved and to protect their own corporate image as a responsible party.

- The topic is also highly relevant for government bodies:
    - They are potential buyers of unlawfully produced products and can be held legally accountable as well.
    - They are expected to act as a 'good example' to society and it will be hard to explain if they buy such products and obtain financial benefits from them (e.g. via import levies and VAT).
    - They should not support Dutch companies or activities in cases where these companies / activities can be associated with unlawful activities (e.g. in the context of subsidy programmes). This applies in particular to companies who are directly involved in unlawful operations.

5.2 __ Recommendations

The following recommendations can be given:

General

- In general, more awareness among Dutch companies that involvement in unlawfully produced products is a potential legal risk and certainly an important CSR issue is desirable. MVO Nederland can play a major role in that area, for example in the context of partnerships with individual companies and associations. An important point for attention in such communications is that 'unlawful' production is sometimes a survival strategy of the poor in developing countries. Development of guidelines (e.g. by MVO Nederland) for how to deal with that is desirable.

- More specific information about violation of laws in specific countries and with regard to specific products is desirable to raise the sense of urgency on the relevance of this topic. Initially, this information should be used to get more company attention for this topic, not as a threat of legal or other measures. It should be stressed that many companies are sincerely not aware that this topic may play a role, for example in their supply chain. They should be given time and concrete guidelines to take mitigating measures.

- Government representatives in particular argue that according to WTO rules, nations importing products from other countries may not impose sustainability requirements related to production *processes* in the export country (this statement is however debated by certain NGOs). It is uncertain to what extent this also applies to production processes violating local legislation. Additional research should be carried out to take a closer look at this matter as this will determine the possible scope of policy making in the Netherlands.

- In particular, the CSR responsibility of companies who are only *indirectly* involved in trading unlawfully produced products or services (such products/services are generated by other parties), is unclear and debatable. It could be investigated as to what extent the 'Boundaries Protocol', developed by the Global Reporting Initiative (GRI), can be used to delineate such responsibility.

Government

- Initially, the government should analyse its own role with regard to unlawfully produced products. Particular roles that should be taken into consideration are:
    - the government as buyer of such products;
    - the government as tax collector related to trade in such products (import levies and VAT);
    - the government as provider of subsidies to companies involved with such products.

  Based on these analyses the government should implement measures, for example to incorporate additional criteria in current sustainable procurement policies and subsidy evaluation procedures.

- The Dutch Public Prosecution Service is increasingly interested in this topic but considers obtaining evidence in international supply chains a major problem. This organization may wish to consider seeking (structural) cooperation with comparable bodies in certain developing countries that are associated with this problem, to collect

legal evidence and/or to assist such bodies in the area of institutional development. In addition, the Public Prosecution Service may play an important role in raising awareness among Dutch companies.

- The Dutch government is currently developing the next phase of its international policy on biodiversity (BBI). This momentum should be used to also develop a policy on unlawfully produced products leading to a major impact on biodiversity.

Private sector

- Business associations should discuss this matter with their members. In cases where this topic is considered to be a major issue in a specific line of business, associations may wish to consider developing databases with regard to the laws in different countries with which companies and their suppliers should comply. Such databases are too difficult and time-consuming to be developed by individual companies (particularly SMEs). As an alternative, development and maintenance of such databases can be set up as an international initiative (e.g. at EU level).

- In cases where 'unlawfulness' is a major issue in certain supply chains, Dutch business associations may want to consider cooperation with sister organisations in other countries (as is the case with regard to timber importers in Europe). Such cooperation could focus on monitoring systems and implementation of mitigating measures.

- Many companies are doing business with a large number of countries. They are therefore dealing with a large number of laws that may differ to a large extent. If such companies wish to apply sustainability criteria in, for example their procurement policies, they would have to collect data on these laws and monitor compliance. As an alternative, companies may want to apply criteria at a 'higher sustainability level' assuming that these will cover legal standards in all countries that they are doing business with. It should however be realised that criteria 'stricter than local legislation' can place certain producers in a difficult position, particularly if they have to comply with them in the short term.

- The private sector may also consider entering into partnerships with NGOs on this topic. Many NGOs may be in a better position to monitor compliance with legislation by foreign suppliers 'at grassroots level' and advise on mitigating measures (to ensure that such measures will not have adverse consequences for local people or the environment).

- As the topic is also a potential reputational and financial risk for financial organisations they may also wish to consider paying greater attention to it. Banks may wish to apply related criteria in their evaluation procedures to (not) finance certain companies or projects. The same can be recommended for investment companies, particularly if they practice sustainable investment policies (e.g. in the context of shareholder dialogue on sustainability issues).

NGOs

Dutch NGOs can contribute to raising awareness. They may wish to identify cases of violations of laws abroad and the possible involvement of Dutch companies. If such cases can be found, the first step should be to inform the company in question and give assistance to implement measures to correct this, not to threaten them with legal action or to notify the media.

Annex 1. Examples of unlawfully produced products

Natural stone from India

India is the world's largest exporter of natural stone (e.g. granite, sand stone, marble). On average over ten percent of natural stone traded on the world market comes from India. Another large exporter is China. Smaller exporters are South Africa and Brazil.

The exploitation of land for stone quarrying in India can be carried out under several (sometimes complicated) arrangements. The exploitation may be managed by national authorities and Indian companies, and the workers in the mines may be (poor) families of Indian nationals (including lower castes) and migrants. There is also an informal sector with families operating small quarries, either (illegally) created by themselves or granted by a national chief or a large company.

Quarrying operations are often relatively small in scale, involving low levels of mechanisation and high labour intensity. Quarrying operations are sometimes unorganised and of an informal nature. However, the trend over the past decade has been one of mechanisation and modernisation though in almost every quarry, labour conditions remain harsh. Types of violation in the natural stone sector include:

Violation of national land concession laws:

- quarrying without a concession given out by the government, or concessions obtained under fraudulent circumstances (suspicion of corruption)

Violation of national environmental legislation[12]:

- quarrying in eco-sensitive areas (violation of the Environmental Protection Act) or no Environmental Impact Assessment carried out prior to the creation of a quarry
- Illegal quarrying methods (use of dynamite)
- Inadequate land reclamation after closure of the quarry

Violation of international labour laws and laws on human rights:

- Use of 'bonded labour' (underpayment) and child labour[13]
- Violation of health and safety law (e.g. no protection for workers from inhalation of stone dust)

It is certain that these laws are sometimes violated, but it is very difficult to indicate the exact scale of violation. It can be concluded that a part of natural stone imported from India is (within the definition used for this project) 'unlawful'[14].

After mining in India, natural stone is processed (sawing, cutting, polishing) into semi-finished products by the processing industry in India or other countries (increasingly

[12] MMP India, 2005 email; "Crack whip on illegal mining: SC to Haryana", Times of India 30/3/05; www.ilo.org.
[13] "Bonded Labour in India: Its Incidence and Pattern", Ravi S. Srivastava, Special Action Programme to Combat Forced Labour, ILO Geneva Working Paper 43, April 2005.
[14] Concept rapport "Duurzaamheids- en marktanalyse natuursteenketens naar Nederland", CREM, in opdracht van de Landelijke India Werkgroep, november 2005.

China). It is then bought by foreign importers (often at international business fairs) from all over the world. Processing into the final product takes place at the destination. The Netherlands is a large importer of natural stone, which is used for public and private buildings, works of art and grave stones etc.

Soy from Brazil

Brazil is the largest producer of soy. The commodity is mainly produced by national farmers (in combination with other crops) and further processed by large multinational firms (in particular Cargill, ADM and Monsanto). The following types of illegality have been signalled in the soy sector in Brazil:

- Cultivation and processing of soy on illegally cleared land[15]
- Non-compliance with legislative requirements established in the Forestry Code[16]

NGOs have reported cases of soy cultivation on land that was illegally cleared. They have accused multinationals (the purchasers of soy), of establishing a soy processing plant in the middle of a forest, thus providing an incentive for farmers to clear the forest. The illegal destruction of tropical and non-tropical forests means not only the disruption of national biosphere reserves and fish stocks, but also the creation of land tenure conflicts[17].

Brazil's Forestry Code is intended to mitigate threats of habitat loss, erosion, and water degradation that may result from agricultural expansion. The Forestry Code requires farmers to maintain buffer areas of natural vegetation along waterways and on steep slopes, in addition to protecting minimum amounts of natural habitat within the working landscape. This Forestry Code is violated on a large scale. For example, it is estimated that only 20% of the farmers in the Emas National Park region have implemented the required reserves. Failure to adhere to the Forestry Code is explained by a limited understanding of the importance of reserves and how they can protect the region's natural resources, reluctance to retire productive land, uncertainty regarding legal requirements of implementation, and poor enforcement[18].

Citrus from South Africa

In South Africa, producers of citrus fruit are reported to be in offence of the National Water Act. The National Water Act appoints water quotas to producers, in order to maintain local water levels.

The production of citrus is very water-intensive. Many citrus production sites are located near river banks and the water used to irrigate the fields may be withdrawn either from ground water or surface water sources. The South African government issues a water quota to citrus producers to limit the amount of water withdrawn for the irrigation of citrus plants[19].

[15] Cases reported by Greenpeace and Friends of the Earth International.
[16] Sources: "The forgotten ecosystem", R. Oliviera, News Feature Nature, Vol 437, 13 October 2005; "Bunge Partnership, working with Agribusiness in Brazil", Conservation International / Centre for Environmental Leadership in Business; personal communication with The Center for Environmental Leadership in Business Conservation International.
[17] Cases reported by Greenpeace and Friends of the Earth International.
[18] Sources: "The forgotten ecosystem", R. Oliviera, News Feature Nature, Vol 437, 13 October 2005; "Bunge Partnership, working with Agribusiness in Brazil", Conservation International / Centre for Environmental Leadership in Business; personal communication with The Center for Environmental Leadership in Business Conservation International.
[19] "Sustainability in the orange chain, A sustainability analysis of South African oranges", CREM report number 04.744, Amsterdam, July 2005.

Despite the establishment of the National Water Act, scientists have reported decreasing ground water levels and surface water levels in South Africa. The withdrawal of water for the purpose of irrigation undoubtedly contributes to this general decrease. It is suspected that many citrus producers violate the National Water Act and take more water than allowed by their quota. Because the National Water Act is difficult to enforce (it is very hard to check how much water has been withdrawn by a particular producer), these 'suspicions' cannot be supported with official numbers on non-compliance rates.
The withdrawal of water potentially affects the surrounding biodiversity and contributes to the general water shortage in South Africa. The Kruger National Park is suffering from water shortages because many producers are situated just outside the border of the park[20].

Shrimps from Indonesia and other countries

Most **shrimp farming** activities are carried out in tropical countries around the equator, e.g. Indonesia, Malaysia, Thailand, Bangladesh, India, Brazil, Honduras and Ghana. Shrimp farms are accused of a number of illegal practices, for example the following:

- Illegal clearance of mangrove forests for the creation of shrimp farms. For example in Indonesia, the development of shrimp ponds larger than 50 ha requires an Environmental Impact Analysis. For smaller projects an Environmental Management Plan and an Environmental Monitoring Plan must be available. Shrimp ponds in mangroves should leave 40% of the mangroves intact and a green belt must be maintained. The compliance to these regulations is a major problem due to lack of enforcement and/or information[21].
- Illegal permit or an expired legal permit.
- Violation of land tenure and water tenure rights of local communities. Shrimp farms are sometimes created through land seizures involving use of force and forced replacement of local coastal people[22].
- Use of illegal chemicals: pesticides (such as Endrin and Thiodan to kill microbes) and antibiotics (for treatment of diseases)[23].
- Violation of human rights on (and around) shrimp farms. In some countries cases of child labour have been reported on shrimp farms, where children were forced to collect shrimp fry, spending long hours in water[24].

Shrimp trawling is legally prohibited in certain areas in a number of countries. Only artisanal fishing activities are allowed in these areas, which are often close to the coast where there tends to be a lot of valuable shrimp. Cases have been reported in Venezuela, where shrimp trawling fleets illegally fish in shallow coastal areas reserved for artisanal fisheries[25]. There are also suspicions of illegal trawling in areas where this is prohibited in Indonesia, based on trawler catch figures that are impossible considering the legal ban[26]. Another type of illegal operation is shrimp trawling with a foreign vessel within the Exclusive Economic Zone of another country. Cases of such illegal trawling by 'fish-pirates' have been reported in several African nations.

[20] "Sustainability in the orange chain, A sustainability analysis of South African oranges", CREM report number 04.744, Amsterdam, July 2005.
[21] "Shrimp production in Indonesia: characteristics and sustainability performance", CREM report, November 2003.
[22] Environmental Justice Foundation, http://www.ejfoundation.org/index.php?name=PagEd&page_id=16
[23] "Shrimp production in Indonesia: characteristics and sustainability performance", CREM report, November 2003.
[24] Environmental Justice Foundation, http://www.ejfoundation.org/index.php?name=PagEd&page_id=16
[25] "Squandering the Seas, How shrimp trawling is threatening ecological integrity and food security around the world", Environmental Justice Foundation, page 22/23.
[26] "Shrimp production in Indonesia: characteristics and sustainability performance", CREM report, November 2003.

Shrimp trawling is a very unsustainable activity, primarily because of the large by-catch that occurs. Ratios of by-catch to shrimp have been recorded at 20:1. Shrimp trawling has therefore caused a considerable decline in local fish stocks, reducing food security and the incomes of people living in coastal areas[27]. However illegal practices in shrimp trawling are difficult to prove.

Tourism activities in Brazil

Brazil is becoming increasingly popular as a tourist destination. Dutch tour operators are offering cheap all-in holiday packages especially in the coastal areas of the north (e.g. Fortaleza, Recife, Salvador). Research has indicated that, among the Dutch tourists who book these holidays, there are also a large number of sex tourists.

There is national legislation on child prostitution in Brazil which prohibits adults from having sex with children aged younger than 14 years[28]. Under this law, owners of hotels and bars have a legal responsibility to make sure that child prostitution is not taking place in their accommodation. However, the law is violated by tourists in various ways, sometimes in cooperation with hotel staff[29].

Accommodation facilitating child prostitution may include hotels that have been booked by Dutch tour operators. Most Dutch tour operators have however signed the international ECPAT Code of Conduct for the Protection of Children from Commercial Sexual Exploitation in Travel and Tourism.

[27] Environmental Justice Foundation, http://www.ejfoundation.org/page17.html

[28] Sex with children between the age of 14 and 18 is allowed, but only within a relationship, and may be reported to the police by the parents of the child.

[29] Source: TV documentary ‘Zembla’, 2 september 2004, “Sekstoerisme in Brazilië”, NPS/VARA, http://redir.vara.nl/tv/zembla/.

Annex 2. References

Interviews

- Novib
- Greenpeace the Netherlands
- WWF the Netherlands
- WWF International
- IUCN the Netherlands
- IUCN Commission on Environmental Law
- Conservation International
- VNO-NCW
- Environmental Justice Foundation
- FNV Mondiaal
- CNV Internationaal
- Milieudefensie
- Consumentenbond
- IRENE
- Unilever
- Nutreco
- Several stakeholders related to outbound tour operators
- Rijksuniversiteit Utrecht
- Rijksuniversiteit Leiden
- Openbaar Ministerie

Documents

- “Bonded Labour in India: Its Incidence and Pattern”, Ravi S. Srivastava, Special Action Programme to Combat Forced Labour, ILO Geneva Working Paper 43, April 2005.
- “Bunge Partnership, working with Agribusiness in Brazil”, Conservation International / Centre for Environmental Leadership in Business; personal communication with The Center for Environmental Leadership in Business Conservation International.
- “Duurzaamheids- en marktanalyse natuursteenketens naar Nederland” (concept), CREM, in opdracht van de Landelijke India Werkgroep, november 2005.
- ”Crack whip on illegal mining: SC to Haryana”, Times of India 30/3/05; www.ilo.org.
- “Five Years On, A Review of the OECD Guidelines and National Contact Points”, OECD Watch, www.oecdwatch.org, 2005.
- “Shrimp production in Indonesia: characteristics and sustainability performance”, CREM report, November 2003.
- “Squandering the Seas, How shrimp trawling is threatening ecological integrity and food security around the world”, Environmental Justice Foundation, page 22/23.
- “Sustainability in the orange chain, A sustainability analysis of South African oranges”, CREM report number 04.744, Amsterdam, July 2005.
- “The forgotten ecosystem”, R. Oliviera, News Feature Nature, Vol 437, 13 October 2005.

- TV documentary ‘Zembla’, 2 september 2004, “Sekstoerisme in Brazilië”, NPS/VARA, http://redir.vara.nl/tv/zembla/.

Websites:

- Conservation International
- Environmental Justice Foundation
- www.fnv.nl
- www.foodnavigator.com
- Friends of the Earth International
- Greenpeace International
- Greenpeace Nederland
- www.ilo.org
- www.iucn.nl
- Keuringsdienst van Waarde
- Milieudefensie
- www.nosweat.org.uk
- www.oecdwatch.org
- WNF Nederland
- www.wri.org
- WWF International