Catching it all

MAKING EU ILLEGAL LOGGING POLICIES WORK BETTER FOR PEOPLE AND FORESTS

March 2015
Acknowledgements

Catching it all: making EU illegal logging policies work better for people and forests

Author: Saskia Ozinga and Janet Meissner Pritchard

Editor: Ed Fenton
Cartoon: Patrick Blower
Design: Daan van Beek

ISBN: 978-1-906607-49-4

March 2015

Fern would like to thank the European Union, the Ford Foundation and the UK Department for International Development for their financial support. The views expressed do not necessarily reflect the funders' official positions.

FERN office UK, 1C Fosseway Business Centre, Stratford Road, Moreton in Marsh, GL56 9NQ, UK
FERN office Brussels, Rue d'Edimbourg, 26, 1050 Bruxelles, Belgium
www.fern.org
The EU has set itself the goal of ending deforestation by 2030. More than 70 per cent of deforestation in the tropics is the result of land being cleared for commercial agriculture. 36 per cent of the crops and livestock products that were grown on deforested land and traded internationally, was consumed by the EU: twice as much as China and Japan combined. Even in 2015, with China’s consumption increasing at a rapid rate, the EU still has a far larger footprint per person than China.

Much of this deforestation is illegal. In 2012 alone the EU imported EUR six billion of soy, beef, leather and oil palm that came from land illegally cleared of forests. Not only is our consumption destroying forests: it is undermining global governance and the rule of law.

Market pressure from consumers who do not want to be party to this trail of destruction is increasing. Far-reaching corporate commitments on zero deforestation have shown that businesses are also ready to act. But consumers and companies cannot act alone.

The EU, as one of the largest importers of forest risk commodities needs to act and serve as a model for others. It must base its policies on the fact that many of the world’s forests belong to communities who depend on them. Forest protection will not work, therefore, unless it goes hand in hand with respecting and strengthening communities’ tenure rights.

This report is one of a series presenting recommendations to the EU for an Action Plan to halt deforestation and respect rights, looking at EU aid, climate, consumption, financial, illegal logging, renewable energy and trade policies. Together, the series forms a comprehensive action plan for the EU, available at www.fern.org/EUdrivers.

“I do not want a Europe stuck on the sidelines of history … I want a Europe at the heart of the action, a Europe which moves forward, a Europe which exists, protects, wins and serves as a model for others.”

Jean-Claude Juncker, President of the European Commission, Opening Statement in European Parliament, 15 July 2014
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Acronyms

CFS Committee on World Food Security
CITES Convention on International Trade in Endangered Species of Wild Fauna and Flora
EU European Union
EUTR EU Timber Regulation
FAO Food and Agricultural Organisation
FLEGT Forest Law Enforcement, Governance and Trade
HCVF High Conservation Value Forest
LAS Legality Assurance System
NGO non-governmental organisation
SFN Sustainable Forest Management
UNDP United Nations Development Programme
VPA Voluntary Partnership Agreement
WTO World Trade Organisation
Summary

Existing European Union (EU) policies to tackle illegal logging and improve governance in the forestry sector have led to the development of a framework for action to tackle the underlying causes of illegal and unsustainable logging. These include lack of transparency, corruption and lack of clarity over land tenure rights.

The two key elements of the framework are the Voluntary Partnership Agreements (VPAs) – trade agreements which the EU negotiates with tropical forest countries – and the European Union Timber Regulation (EUTR), which aims to ban illegally sourced timber from the EU market. This paper argues that the VPA and the EUTR are innovative and effective tools, and could be effective if implemented well. Implementation is, however, weak and must be strengthened.

Although illegal logging remains a problem in the forestry sector, conversion of forests to land, often illegally cleared for agriculture commodities, has now become a much larger problem. Most tropical timber entering the EU today does not come from logging concessions but from land converted to other uses, often illegally. This paper suggests that both VPAs and the EUTR must be used to address this new reality effectively and tackle illegal conversion timber as well as illegal timber from forestry concessions.

Furthermore, although the VPA and the EUTR focus on timber, they could be seen as a model for how the EU should address the import of illegally or unsustainably sourced agricultural commodities like palm oil, soya and beef. This paper argues that any new EU initiative to address imports of illegally and unsustainably harvested agricultural commodities must be created together with producer country governments with the aim of helping them improve and enforce their own laws. For this to happen effectively local civil society and communities will need to be trained to be able to point to problems with the existing laws, and be involved in discussions around legal reform. They must also be able to hold their governments to account.
In 2003, the European Union (EU) adopted the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan to reduce illegal logging (see Box 1). Central to this plan is a belief that illegal logging can be reduced by increasing the voice of civil society and community stakeholders in the development and implementation of forestry policies and laws that affect them, thereby strengthening communities’ rights to the land they live on. Studies by Chatham House and Fern indicate that the FLEGT Action Plan has had some success both in reducing illegal logging and in strengthening community rights.

When the FLEGT Action Plan was developed, most illegal logging consisted of selective harvesting, and the most important products driving this were timber and wood products. Since then, however, this situation has changed. Now most illegal timber comes from illegal conversion of forests for commercial agriculture, and the trade in the products grown or reared is the principal driver. See Fern’s report Stolen Goods: EU’s complicity in Illegal Deforestation in illegal tropical deforestation. The illegal conversion of forests for commercial agriculture – and the associated trade in both wood and agricultural commodities – is therefore now the largest forest governance challenge the world faces. The EU’s approach to addressing illegal logging and improving forest governance needs to adapt to reflect this.

This paper assesses what lessons can be learned from the FLEGT Action Plan’s efforts to tackle illegal logging, and how the Action Plan could be extended or adapted to prevent more widespread conversion of forests to agricultural land. To do this, the paper examines four issues:

1. What distinguishes the FLEGT Action Plan from other policy efforts to address deforestation.
2. Whether and how VPAs can address the problem of conversion of forest to agricultural lands.
3. The possibilities and limits of the EU TR to address the conversion of forested land.
4. The next steps the EU could take to address the import of illegally produced agricultural commodities and improve land governance in producer countries.
Box 1: The FLEGT Action Plan

The EU FLEGT Action Plan is the EU’s response to illegal logging and the trade in illegally sourced timber products. It sets out a range of measures that aim to combat the problem of illegal logging, including government procurement policies, financial due diligence and a regulation to control the sale of illegal timber (the EUTR). Its central feature is the adoption of VPAs between the EU and timber-producing countries.

VPAs are legally binding bilateral trade agreements setting out the commitments and actions that the EU and timber-exporting countries need to take to tackle illegal logging, including measures to increase participation of civil society actors, strengthen communities’ tenure rights and address corruption. Although each VPA is negotiated by two parties – the EU on behalf of its Member States, and the government of the timber-exporting country – it is understood by both parties that VPAs must have the buy-in of national stakeholders, including NGOs, forest-dependent communities and the timber industry. The six VPAs signed to date – between the EU and Cameroon, Central African Republic, Ghana, Indonesia, Liberia and the Republic of Congo – have all been negotiated with the full participation of local and national NGOs, the timber trade and the governments concerned, and have been adopted with the consent of all stakeholders involved. Nine more VPAs are currently being negotiated. It is estimated that 90 per cent of the US dollar value of all cross-border trade in timber and timber products from countries in the tropical zone is derived from countries engaged at various stages of the VPA process. VPAs include three key elements:

a) defining legality, or deciding which laws that impact on forest use and trade will be enforced for the purpose of the agreement

b) developing a Legality Assurance System (LAS) (including timber tracking, government legality controls, licensing and systems to verify the legality of the timber)

c) independent audits of the whole system, to ensure credibility of the export licences.

For an up-to-date picture, go to www.loggingoff.info
What distinguishes the FLEGT Action Plan from other policy efforts?

Four critical factors distinguish the FLEGT Action Plan, and notably its VPAs, from other past efforts to address deforestation, such as the Tropical Forest Action Plan⁹ and the EU’s previous Communication on Tropical Forests.¹⁰

(1) Multi-stakeholder processes. A VPA is based on a genuine multi-stakeholder process that should allow local NGOs and community representatives to be directly involved in the negotiation and implementation of a legally binding trade agreement. This emphasis on process ensures a voice for key stakeholders – including civil society, local communities and industry – to define key issues and problems, and develop responsive, workable solutions that have the endorsement of all key stakeholders. All signed VPAs have been based on a multi-stakeholder process, although some were notably better (e.g. Liberia) than others (e.g. Cameroon).

(2) Coordination of supply- and demand-side measures. The EUTR makes it illegal to put illegally sourced timber on the EU market, but it accepts timber with a FLEGT licence. VPAs support timber-producing countries to define what ‘illegal’ means and enable them to set up a process to monitor compliance with the legality definition. Hence demand-side measures favouring, or restricting certain types of products from the EU market, are complemented by supply-side measures enabling developing countries to meet these market demands. Stakeholders in producer countries engaged in multi-stakeholder processes in line with these supply-side measures are, in turn, motivated by the prospect that EU demand-side measures will reward their efforts.

(3) Focus on legality. FLEGT focuses primarily on legality, rather than on broader definitions of sustainability. This fosters the engagement of producer countries by deferring to the sovereignty of the producer country, and also avoids potential World Trade Organisation (WTO) issues in relation to demand-side measures. See Fern’s report ➤ WTO compatibility with EU action on deforestation.¹¹ By taking a broad approach to what constitutes ‘legal’, and interpreting ‘legal’ as including international and customary law, FLEGT mechanisms create the foundation to catalyse more far-reaching governance changes. See Box 2.

(4) International coherence. The FLEGT VPA and EUTR cultivate collaboration and coherence not only between demand- and supply-side initiatives as they pertain to the EU and producer countries, but also across consumer and processing countries. The United States and Australia have also adopted legislation addressing illegal logging, Japan is considering similar legislation and the EU has been in talks with China and India to find common ground as well. Similar efforts towards international collaboration and coherence will be equally – if not more – crucial with regard to agricultural commodities.

In summary, the VPA approach uses trade incentives by activating and supporting multi-stakeholder processes to motivate ground-up law reforms, increased governance and law enforcement in producer countries. This approach is based on the assumption that such ground-up reforms are more appropriate and feasible given the national sovereignty and jurisdictional limitations of producer and consumer countries respectively. Moreover, in addition to delivering sustainability results from an environmental point of view, a VPA can deliver social and economic sustainability for producer countries, particularly forest-dependent communities, but only if they are given a role in shaping the text and the implementation of the VPAs. So far this has been the case in Ghana, Liberia and Honduras.

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⁹ For a critique see: http://www.edwardgoldsmith.org/939/tropical-forests-a-plan-for-action/
¹¹ Duncan Brack; WTO compatibility with EU action on deforestation; Fern March 2015. Available at: www.fern.org/WTOcompatibility
What is the motivation for producer countries to conclude VPAs? In addition to the economic benefits that can be expected from trade with the EU, in most cases a reduction in the level of illegal behaviour should increase the capture of tax revenues by partner-country governments. The introduction of the EUTR in March 2013 has provided an additional incentive for countries to negotiate and implement VPAs. The EUTR prohibits the placing of illegal timber on the EU market, and requires companies in the supply chain to put in place systems of due diligence to minimise the chance of their handling illegal products. VPA-licensed timber is automatically granted entry to the EU market without further conditions.

**Box 2: How legality can also increase sustainability**

FLEGT VPAs and the EUTR are both expressly framed in terms of legality. They do not attempt to define or enforce broader concepts of sustainability. However, experience of FLEGT so far indicates that results include reformed practices that go beyond mere legality towards broader sustainability. For example, the EUTR stipulates that timber products placed on the EU market must have been legally harvested in accordance with the laws of the country of harvest. The regulation requires operators placing timber on the EU market to assess the risk that the timber has been illegally harvested. This compels operators to obtain timber from suppliers that they know and trust. In general, operators will be more likely to seek supplies from countries where relevant laws are clear.

In many former colonial countries, the reality of legal pluralism – in which customary land tenure systems (see Box 5) continue to operate alongside (and sometimes conflict with) statutory laws governing land use – results in a lack of clarity over the basic issue of who has the right to control and use land and resources. Timber operators’ need for legal clarity can motivate land tenure reforms to integrate customary and statutory laws to secure community land rights, provided that local NGOs and communities are well organised and that governments are willing to recognise communities’ customary tenure rights.

Moreover, operators will seek supplies from countries where forest governance and law enforcement are known to be sound and reliable. This, in turn, compels producer countries to reduce systematic risks such as weak governance, transparency, and law enforcement systems and to continually increase their standards. Particularly where law reforms are being ushered in through FLEGT VPA multi-stakeholder processes, these reforms can focus on greater sustainability – as well as legality – benefits on a nationwide scale, since the law reforms envisaged include improved transparency and accountability of the forest sector, securing community rights to land and resources and compliance with environmental and social impact assessments, among other issues.

12 What constitutes legal is of key importance. The EUTR is clear that to determine whether timber has been harvested legally, a number of categories of law and rights must be considered. Doing so, combined with the risk approach, is important to ensuring that the focus on ‘legality’ does not become narrowly interpreted and should include customary law.
14 Ibid. Specifically in Liberia and Ghana
15 Ibid. Specifically in Republic of Congo, Liberia and Central African Republic
VPAs and conversion timber

Now, a decade after FLEGT VPAs were first authorised, recent developments clearly indicate that ‘conversion timber’ (i.e. timber coming from forests that are being cut down to allow the land to be used for other purposes, such as agricultural or infrastructure development or mining) is a key issue in the African countries that have signed VPAs, as well as in Indonesia. Research by Forest Trends indicates that most timber from most VPA countries is now conversion timber.16

Growth in conversion timber from key VPA countries17

<table>
<thead>
<tr>
<th>Country</th>
<th>Impact on deforestation rate</th>
<th>The proportion is set to grow further</th>
<th>Most tropical wood now comes from conversion</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2011</td>
<td>NOW</td>
<td>THEN</td>
</tr>
<tr>
<td>Republic of Congo</td>
<td></td>
<td>48%</td>
<td>Malaysia</td>
</tr>
<tr>
<td>Cameroon</td>
<td></td>
<td>12%</td>
<td>Indonesia</td>
</tr>
</tbody>
</table>

Whether conversion timber is eligible for a FLEGT licence, and hence eligible for export to the EU or elsewhere, will depend on the configuration of existing laws and their incorporation in the VPA, and whether these laws have been fully complied with in accordance with the Legality Assurance System (LAS) (See Box 1). Early assessments of VPA legality definitions indicate that VPA countries provide permits that could apply to conversion practices.18 It should be emphasised, however, that as for any legal logging permit in a VPA country, all the steps necessary to obtain the conversion permit – as well as the manner in which the logging is carried out – must comply with the permit requirements and other relevant legal provisions, and compliance will be monitored. Where the LAS discloses a failure to comply with any aspect of the permitting and logging requirements, a FLEGT licence must be denied. This means the timber cannot be exported.

Specific kinds of infringements that could be deemed to contravene LAS requirements are noted in Box 3. Of particular interest are such requirements as the need to undertake a social and environmental impact assessment, obtain community consent, and put anti-corruption measures in place. It can be presumed that where such requirements are rigorously enforced, many land conversions that might otherwise have taken place will be obstructed, or at least significantly delayed, because of the VPA.

Where conversion is deemed to be consistent with national priorities and undertaken in compliance with all relevant laws, VPAs cannot stand in the way. Insofar as the VPA has identified areas for further review, however – whether in relation to land tenure and use rights, environmental and social impact assessment, law enforcement, transparency and monitoring measures, benefit sharing, or any other area of law slated for reform – the risks posed by agricultural conversion should be taken into account in law reforms. Likewise, participants in multi-stakeholder processes currently negotiating VPAs should be aware of the implications of the VPA – the kinds of permits included, as well as their prerequisites and other requirements – for conversion of forest land to large-scale agriculture.

As noted above, one key attribute of the FLEGT approach is the coordination between demand- and supply-side measures. Although there is nothing inherent in FLEGT VPAs that would automatically bar conversion timber from being legally permitted, where coupled with consumer-country demands for commodities that do not drive deforestation,19 FLEGT VPAs provide a platform for producer countries to adopt comprehensive, reliable, and transparent measures to meet these market demands.

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17 Ibid.
19 This could be through voluntary commitments by companies to source ‘deforestation-free’ supplies or through the operation of an EUTR-type regulation of commodities.
Box 3: What makes a forest conversion ‘illegal’?

Forest clearance illegalities can result from failure to comply with legal provisions relating to permit allocation or clearance implementation practices. Common issues include the following:


- Pre-conditions for a permit to be granted are not in place, e.g. land is not classified as land that can be converted from forests.
- Land and was cleared without free prior and informed consent of local communities.
- Land was cleared without the forest area being properly gazetted.
- Land was cleared without the required corresponding clearance permit and/or without permission from the ministry with jurisdiction over the area.
- Land was cleared in a designated protected area or forest identified as High Conservation Value Forest (HCVF), e.g. deep peat or riparian forest.
- A permit for conducting clearance was issued/obtained illegally, not following legal due process, e.g. through bribery or coercion.
- A permit for conducting clearance was issued/obtained without meeting prerequisite conditions including an environmental and social impact assessment, a forest inventory, community consent.
- The relevant taxes for timber resources and/or for land acquisition were not paid.
- There was a failure to enforce/implement required environmental mitigation measures during forest clearance activities.
- There was a failure to comply with provisions stated in the contract.

Recommendations

- VPAs should ensure that the necessary steps that proceed the granting of particular permits to log should be explicitly incorporated into legality grids.
- Where permits incorporated into existing VPAs could plausibly be used for forest land conversion, the EU and other stakeholders should identify and closely monitor permit and logging requirements that could result in the denial of a FLEGT licence to conversion timber where infractions are disclosed by the LAS.
- Stakeholders engaged in law reforms taking place as part of a VPA implementation process should ensure that existing loopholes for commercial export of ‘shadow permits’21 will be closed. Of particular relevance are provisions for strong social and environmental impact assessments, forest inventories, and community consent.
- VPAs currently being negotiated should include international law and customary law provisions into the legality grid to ensure that communities’ customary rights to land and resources are being formally recognised.

21 Global Witness; Logging in the shadows; April 2013
Box 4: What illegality means for zero deforestation commitments

Over the last two years, many of the largest companies involved in producing, trading and consuming forest-risk agricultural commodities have made public pledges to ensure that the commodities they handle do not contribute to deforestation. The majority of palm oil in international trade is now covered by such a policy. The flurry of zero deforestation promises made by companies and governments worldwide begs the question: why focus on illegal deforestation if many commitments, at least in theory, go much further? There are five main reasons why we believe that a focus on illegality is complementary to the effort to halt all industrial deforestation:

1. The scale of illegality relating to the conversion of forests for commercial agriculture is so large – tainting over 50 per cent of all deforestation – that it cannot be ignored in the solutions designed to tackle deforestation.

2. While the promises made by companies to end deforestation in their concessions are to be applauded, companies will struggle to fulfill their zero-deforestation promises in an environment of rampant illegality and governance failure. Governments must support them to fulfill their promises. Poor governance – including corruption, a lack of transparency, and unclear and conflicting regulations – is already making it hard for companies to implement their promises.

3. None of the company standards fully address issues of legality: they do not address many of the most common forms of illegality, such as illegal licence issuance. Most also ignore other illegalities, where these occurred before the policy was implemented.

4. Due to limited transparency, it is difficult to monitor implementation of the standards that companies are setting themselves.

5. Existing company standards are voluntary and will never capture the whole market. Even if standards were improved, such voluntary measures will always be undermined by those companies which do not sign up, and are able to undercut their competitors.

Ultimately, illegalities relating to commercial agriculture can only be fully addressed by governments (in both producer and consumer countries), and voluntary efforts are unlikely to be effective in reducing overall deforestation until those governments – and the EU – take action. Companies, particularly retailer companies, have an interest in reducing illegalities and can play a valuable role in pressing governments to tackle these illegalities.

Focusing on the legality of commodities is also potentially an easier starting point for discussions on how to regulate the problem (rather than relying on voluntary commitments alone). Starting a discussion in producer countries on the legality of land allocation and designation of forest concessions could potentially trigger wider reforms of the relevant laws.

During this process, it is important that civil society organisations in these countries are adequately represented and are in a position to make their voices heard. Ultimately, the goal should be for sustainability aspirations to be the basis for legality, and for the definitions of legality to be just.

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Palm oil plantation development in Malaysia. Conversion to agricultural land is the largest threat to tropical forests. © Roba/TiknCC

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The EUTR and conversion timber

The EUTR prohibits the placing of illegally harvested timber and timber products on the EU market and requires operators to implement a system of ‘due diligence’ in order to minimise the risk of doing so. The EUTR applies to all timber products (with a few exceptions) from all sources, whether imported or produced within the EU. Legality is defined in relation to national legislation in the country of harvest, and covers rights to harvest timber, payments for harvest rights and timber, laws relating to timber harvesting (including environmental and forest legislation), third parties’ legal rights concerning use and tenure that are affected by harvesting, and trade and customs regulations (Article 2(h)).

Products accompanied by a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) permit or a FLEGT licence are considered to have been legally harvested.

Notably, the EUTR does not demand proof of legality. Instead, it requires operators to minimise the risk of placing illegal timber products on the market by implementing a due diligence system, and it specifies elements of the due diligence systems that operators must implement. These include means of ensuring access to information on the timber products, including their country of harvest, their volume or weight, details of their suppliers, and information on compliance with legislation in the country of harvest. Operators must analyse and evaluate the risk of illegally harvested timber or timber products being placed on the market, taking into account relevant risk assessment criteria including assurance of legal compliance, prevalence of illegal harvesting of particular tree species and in particular countries, UN Security Council sanctions, and supply-chain complexity. Except where the risk is determined to be negligible, operators are obliged to undertake mitigating measures, such as requesting additional documentation from suppliers, getting third-party verification, or refraining from placing the timber on the EU market.

The due diligence component of the EUTR has the potential to have much more impact than a prohibition measure alone. A prohibition against trading illegal timber can be difficult to enforce through legal prosecution of alleged infractions, because it requires prosecutors to prove the illegality of the timber in question. In contrast, because the due diligence obligation does not turn on proof of legality or illegality, but rather compels operators to assess and mitigate the risk of trading timber that was harvested illegally, this provision can be enforced by checking that operators have in place and are consistently implementing an appropriate due diligence system, without having to prove that any particular timber being traded is illegal. Widespread and consistent exercise of due diligence by operators would substantially shift the EU market away from high-risk timber supplies and, in turn, motivate suppliers to provide reliable assurance against the risk of illegality. Of course, the effectiveness of the due diligence provision of the EUTR still depends upon its effective implementation by operators which is, in turn, dependent upon effective enforcement of the law by Member State competent authorities.

Applying due diligence to conversion timber

There is no reason why exercising due diligence to assess the risk of illegality in relation to conversion timber should be any different from exercising due diligence in relation to any other timber products. Timber harvested in the course of converting land from forest to non-forest use, where such conversion was illegal according to the laws in force in that country, should be considered illegal under the terms of the EUTR.

Of course, governments may react by simply ‘legalising’ illegal conversions. However, to the extent that the country’s
legal framework includes elements such as mandatory environmental and social impact assessments, clarification of land rights and obtaining consent of affected communities, or environmental damage mitigation measures as a part of the legal permitting and clearance practices, requiring legal conversion is still likely to have the effect of limiting unsustainable conversion of forest to agricultural production. Indeed, this is one way that a focus on legality can serve broader sustainability objectives, although it is still dependent upon the quality of the legal regime in relation to social and environmental concerns.

Box 5: Lack of implementation and enforcement of the EUTR

Although the EUTR has the potential to be effective to ban illegally sourced timber from both forest concessions and conversions, its implementation and its enforcement are currently lacking.

Although all Member States should have regulations in place to implement the EUTR, as of March 2015, only 20 of the 28 EU Member States had. The European Commission must now act to ensure Member States that are lagging behind develop legislation immediately. Not having done so is an infringement of EU law.

Even Member States that have implemented the EUTR are not yet effectively enforcing the law. Only a handful of cases have been made public where Member States’ competent authorities have acted to investigate and act against illegally sourced timber.

The UK checked a number of companies importing Chinese plywood, and out of the 16 companies checked, 14 had an insufficient due diligence system. In Germany and Belgium shipments of potentially illegally sourced timber from the Democratic Republic of Congo were seized. These examples show that illegally sourced timber is still entering the EU in large numbers and more needs to be done to ensure the flow of illegal timber.

Recommendations to the EU

- The EUTR should be enforced in a manner that ensures that illegal conversion timber is recognised as illegal for the purposes of the EUTR. Accordingly, operators should consider the risk that timber products resulted from illegal forest conversion in the course of exercising EUTR due diligence.

- The EU needs to look into possibilities of EUTR-type regulation for forest-risk agricultural commodities (see page 17).

For more information about what FLEGT has achieved so far, watch the film Stories from the Ground www.fern.org/storiesfromtheground

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25 Ibid
New EUTR-type regulation for forest-risk commodities

To date, initiatives to address forest-risk commodities such as soya, palm oil and beef, have mostly been limited to a sustainability certification approach. A risk assessment approach, however – such as that exemplified by the EUTR – can have a broader reach and greater impact than a certification approach alone, for reasons elaborated below: including the potential to drive the continuous improvement of relevant certification schemes. Could the EUTR model be adapted to address forest-risk commodities? We believe that this possibility deserves serious consideration.

Focus on legality

Like the EUTR, a forest-risk commodities regulation could focus on legality, particularly in relation to land rights, land use and conversion, rather than trying to impose definitions of what comprises a ‘sustainably produced’ commodity in terms of the methods of production. Applicable laws would include customary, international and statutory laws governing tenure and use rights to the land on which commodities are produced.

A forest-risk commodities regulation could also mirror the EUTR by requiring operators placing the commodity on the EU market to assess the risk that the commodity was cultivated on land for which the tenure and use rights are uncertain or have been violated. Land tenure and use rights in many producer countries can be hard to ascertain, particularly for foreign actors and in light of the reality of legal pluralism. See Box 6.

If during a risk assessment there is lack of clarity as to land tenure and use rights, this would suggest a greater than negligible risk that tenure rights or land use laws will have been violated. Where operators discern a risk, they will seek lower-risk sources of supply. Accordingly, regulation that takes a risk assessment approach to legality could provide a strong incentive for producer countries to undertake law reform processes integrating relevant customary, statutory, and international laws to clarify land tenure and use rights.

26 Consideration should be given to when the conversion happened? ie. How far back does one consider land allocation and rights?


including how communities can engage with external investors in relation to the exploitation of community land and resources. Other applicable legislation would include requirements for social and environmental impact assessments prior to the conversion or development of land as well as, more generally, the governance of forest, land and resources, including transparency, accountability, due process, and other law enforcement concerns.

Scope of coverage and traceability concerns

Forest-risk commodities regulations should cover commodities derived from crops cultivated on land that has been illegally deforested. Often these commodities enter the EU market in an already highly processed state, however, and often as a composite product in which the suspect commodity is just one – maybe small – component. To effectively address agricultural deforestation, therefore, regulations would need to cover any products placed on the EU market which contain materials derived from commodities cultivated on land that has been deforested in violation of land use laws in the producer country.

Some commentators have observed that this may present problems regarding traceability. For any law, it is important to clarify and maintain legal responsibility – and liability for non-compliance – on regulated parties within the EU’s jurisdiction. As with the EUTR, liability should remain with operators placing relevant products on the EU market; and as in the case of timber, this liability will, in turn, compel regulated operators to require their suppliers to provide information about the products they are trading, in order to enable operators to assess and mitigate their risk.

The fact that the commodities in question tend to be highly processed and are often already incorporated into composite products even before they enter the EU market should not present an insurmountable obstacle to the feasibility of the legislation. Instead, information demands made by regulated operators will likely compel global traders located at critical ‘choke points’ in the commodity supply chains to monitor the commodities’ compliance with regulatory requirement

28 See ibid., at part 5.3.
Box 6: The reality of legal pluralism

In most countries there are three legal systems simultaneously in operation: customary law, statutory law and international law. Most countries will legitimately have all three systems of law operating at the same time, and covering the same places. The legal systems in force often have quite different rules on who owns land and resources and how they are governed and used. This creates legal uncertainty.

In the light of such uncertainty, some individuals or institutions adopt a ‘selective approach’ by promoting the system of law that would benefit them most. A party seeking to defend or assert rights to land may therefore engage in ‘legal forum shopping’ – shopping for the set of rules and laws that best suits their own interests. For example, if an investor – or a community leader – finds that national laws are useful for securing their own individual rights and power over land and resources, they may choose to base their claims on only national laws and disregard customary laws that contradict their claims, even though these customary laws are recognised by the people who have lived on the land for generations. Lack of clarity about which law decides who actually has rights to the land therefore creates an obvious danger of conflict and potential dispossession.

Cameroon is a clear example. Under Cameroon’s national land tenure laws, land whose ownership is not registered will automatically be considered ‘national land’ under government control. ‘National land’ that is undeveloped (not occupied with houses, farms, or grazing) is considered free of any effective occupation and can be allocated to other uses e.g. to companies for logging, agricultural or mining concessions, as national parks and reserves, or as areas for infrastructure development. National law provides communities with rights to hunt and gather from land that is considered free of occupation, but only if it has not yet been allocated for another purpose.

Under customary law, many communities in Cameroon claim collective customary rights over lands and natural resources they have used for as long as they can remember, regardless of whether the land is registered or considered developed or unoccupied by national law. The customary lands of rural communities with houses and farms will often also include areas of forests used as sacred areas or for hunting and medicinal use. Most if not all the traditional lands and territories of Baka and Bagyelí hunter-gatherer peoples will not be developed with houses, farms or grazing and will therefore be considered undeveloped and suitable for allocation to other uses.

Only customary land owners who have developed their land can obtain registered property rights – and only if they have been able to access the national law’s technical and costly registration procedure. This is beyond the reach of most rural communities and indigenous peoples. Cameroon is legally bound by international and regional human rights laws that support the right of communities to own land, territory and resources that they have traditionally owned, used or occupied, including land owned under customary law. Furthermore, the constitution of Cameroon recognises the legal priority of international law over national law.

What does this mean? Legally, this means that Cameroon’s national law is currently in conflict with the constitution, as well as with customary and international and regional law. For communities, this means that Cameroon has huge areas of land considered as community-owned land by customary, international and regional law, but that is considered unoccupied national land by the State and available for allocation to other parties. This is a recipe for conflict and confusion. In practice, it leads to large-scale dispossession and impoverishment of communities through the destruction of their resources, sacred sites, livelihoods and food security, and undermines the cultural and physical survival of communities and whole peoples.

VPAs must be therefore be based on an ‘inclusive’ approach which recognises that, in reality, multiple legal systems and sources of law exist in the same place, over the same community, at the same time. This ‘inclusive’ or ‘legal pluralism’ approach seeks to integrate different systems of law – that is, find a way for them to work together – to achieve legal clarity.
as the goods come into their processing facilities. In order to provide reliable information to EU-regulated operators that the commodities are compliant with the new regulation, key global traders will then segregate these goods into monitored supply chains. What classifies as ‘reliable information’ and ‘how to keep legal liability for compliance with the operator’ are points that need to be agreed by all stakeholders.

In other words, it can be expected that the proposed EU regulation would compel key global traders to make the necessary supply chain modifications to satisfy the new regulatory demands. Even if the volume of EU demand for forest-risk commodities is reduced, it will remain substantial enough that key global commodity traders will be reluctant to give up the EU market entirely. Once EU regulatory demands are put in place, the supply chains in question might in fact be transformed more smoothly and comprehensively than they have been for timber, given the relatively small set of global agricultural commodity traders as compared to the widely diverse set of operators involved in global timber markets.30

**Linking demand- and supply-side measures**

As with the EUTR and FLEGT VPAs, forest-risk commodities regulations should be coupled with complementary supply-side measures to enable producer countries to undertake multi-stakeholder reform of the relevant legal frameworks and then comply with the new regulation.

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30 Global supply chains for forest-risk commodities are largely controlled by a handful of large and powerful agricultural trading companies.

**Recommendations**

- The European Commission should propose legislation modelled on the EUTR to address agricultural commodities cultivated on forest land that was illegally converted to large-scale agriculture.

- The proposed legislation should focus on the status of the land on which the commodity crop is cultivated, looking specifically at the legality of the land’s conversion to large-scale agriculture. In particular, the regulation should require operators to assess the risk of non-compliance with land rights, land conversion, and land use laws (rather than trying to clarify or impose more complex definitions of what comprises sustainable production methods for the ongoing cultivation of a commodity crop).

- The new regulation should cover commodities derived from crops cultivated on land that has been illegally deforested in the producer country, and place liability for compliance on economic operators who first place these products on the EU market.
Partnership agreements for agricultural commodities

Could agreements similar to VPAs be developed for agricultural commodities associated with deforestation, such as palm oil, soy, beef and cocoa? Some of the issues are the same as they were for illegal logging in the early 2000s: consumer-country concern over the environmental and social impacts of the products; problems with governance in some of the countries of origin; at least some of the production being illegal; and significant export markets in the EU.

There have been calls for VPA-type agreements in the past. For example, a UK government submission to the European Commission in 2004–05, during the consultations over the EU strategy on the sustainable use of natural resources, suggested EU action plans for sustainable palm oil and sustainable soy, including exploring ‘options for applying the FLEGT model, with its VPAs and import regulation’ to both commodities.31 There are, however, also large differences. Before adopting a VPA-type approach to other commodities, the pros and cons and feasibility should be studied carefully and discussed with producer country governments, the industry, local civil society organisations and communities.

Our preliminary conclusions are that if the EU were to develop such agreements they should focus on the legality (or otherwise) of land conversion for the production of forest-risk commodities, including customary, national and international law. There will also need to be a complementary EUTR-type measure put in place at the EU level. As with FLEGT VPAs, the details of legal provisions to be incorporated into these agreements should not be imposed by the EU but rather negotiated and agreed (and, if necessary, supplemented or reformed) through multi-stakeholder processes including government, civil society, local communities and the private sector.

Only commodities produced on lands properly designated and approved for production, and legally converted to agricultural cultivation, would receive these ‘VPA+ licences’ and therefore be eligible for import into the EU.

Key priorities for these ‘VPAs+’ would include legal clarity of land tenure and use rights, and clarification of how communities can engage with external investors, including requirements for community consent in relation to conversion of community lands. In order to deal with these issues, the reality of legal pluralism (see Box 6) would need to be squarely addressed.

To provide legal clarity as to land ownership, tenure, and use rights, it will be necessary to undertake law reform processes to integrate customary and statutory law systems – taking into consideration relevant provisions of the country’s constitution and its international law commitments.32 These law reforms should build on internationally agreed principles for land tenure and governance, including the Food and Agriculture Organisation’s (FAO) Committee of World Food Security (CFS) Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests; the proposed United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas currently being discussed, modelled on the UN Declaration of the Rights of Indigenous Peoples; and the EU’s own Tenure Guidelines. Together these would be a good way forward for the EU and other consumer countries to work with producer-country governments, to build VPA-style processes of consultation over agricultural policy and land tenure, allocation and management. As the VPAs have shown, the act of opening up discussions and debate on these issues is itself positive.

Other relevant areas of governance and law include requirements for social and environmental impact assessments prior to the conversion or development of land as well as transparency, accountability, due process, and other law enforcement concerns.

If proposed by the producer-country, a VPA+ could be expanded to include compliance with producer-country laws regulating sustainable production or international certification standards for the commodities in question. The UN Development Programme’s experiment with establishing national commodity platforms is relevant in this respect.33

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32 For a fuller discussion of legal pluralism and law reform, see Pritchard J et al., op. cit. For a broader discussion of the multiple sources of law relevant to land and natural resource rights and use, see also Lesniewska E, Pritchard JM, Navigating through Complex Legal Landscapes: A Legal Compass for VPAs, ClientEarth, 2011, available at http://www.clientearth.org/climate-and-forests/climate-forests-publications/legal-compass-1312

33 For further information, see http://www.greencommodities.org/index.php?option=com_content&view=article&id=85&Itemid=62
This appears to be an attempt to develop a multi-stakeholder dialogue process within individual national commodity supply chains. All relevant actors, including producers, traders, buyers, financial organisations, national and local governments and rural communities are brought together in facilitated dialogues to encourage the production and trade of sustainable commodities. The objective is to reduce the conversion of natural habitat into farmland, increase biodiversity, improve water management, reduce the ecological and carbon footprint of production, protect food security and ensure sustainable livelihoods for rural communities. The United Nations Development Programme (UNDP) states that it hopes to provide initial financial and capacity support, and longer-term funding for new schemes, incentives and services. Examples of current initiatives include national platforms for the production of pineapple in Costa Rica and for cocoa in Ghana and the Dominican Republic. Fern has not yet looked into the effectiveness or lack thereof, of these schemes.

To be more effective, efforts to negotiate and implement VPA+ agreements should be coupled with consumer country measures demanding that commodities entering their markets have not been cultivated on illegally converted forest land. As an additional incentive to pursue VPA+ agreements, VPA+ licensed commodities might also be made eligible for trade advantages such as favourable tariffs. See Fern report Duty free? Making EU tariffs work for people and forests and public procurement preferences (see Fern report The power of public purchasing: Making EU public procurement policy work for people and forests.

Conclusions and recommendations

Given the growth in demand for agricultural products, some producer countries may be open to working jointly with the EU, and possibly other consumer countries, to develop VPA+ style processes of multi-stakeholder consultation. Incentives would likely be substantially increased if the EU were to adopt an EUTR-type measure for agricultural commodities.

The EU should attempt to build on the VPA experience to open discussions on the potential for partnership agreements on agriculture commodities, governance and trade. In doing this, it should:

- Assess the feasibility and possible impacts of the establishment of VPA+ arrangements to improve land governance in the producer country. Many of the problematic issues in these sectors revolve around decisions over land use, and it would make sense for these to be discussed in a single forum, building on the FAO Land Tenure Guidelines.

- Focus efforts on laws pertaining to land rights, land use and land conversion. At the discretion of the partner country stakeholders, however, VPA+s could also include laws governing sustainable production methods for the commodities.
“The EU should attempt to build on the VPA experience to open discussions on the potential for partnership agreements dealing with agricultural commodities and land rights.”