

TACKLING DEFORESTATION AND THE TRADE IN FOREST RISK COMMODITIES: CONSUMER-COUNTRY MEASURES AND THE ‘LEGALITY APPROACH’

FOREST POLICY TRADE AND FINANCE INITIATIVE

BRIEF

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The world continues to lose forests at an unsustainable rate. Deforestation, primarily in the tropics, contributes to climate change, degrades local environments, destroys habitats and biodiversity, and impoverishes forest communities and indigenous peoples.

On the global scale, the main driver of deforestation is clearance for agriculture; a 2018 study estimated that 51 percent of global tree cover loss between 2000 and 2015 was due to agriculture, and another 26 percent to forestry.¹ The main agricultural products associated with deforestation include cattle products (beef and leather), soy and palm oil; others with lower global but important local impacts include cocoa, coffee, tea, sugar cane, rice, maize and rubber.



A significant proportion of this forest clearance has been illegal; a 2014 study concluded that 49 percent of total tropical deforestation between 2000 and 2012 was due to the illegal conversion of forests for commercial agriculture. Nearly one quarter (24 percent) was the direct result of illegal conversion to agriculture for export markets.² Illegality may be associated with farming as well as forest clearance, for example in the use of forced or child labor for crop cultivation and processing.

Countries that import timber and agricultural commodities whose production is associated with deforestation contribute to these problems if they do not ensure that their imports have been responsibly sourced. In this way they provide revenue to individuals and companies in the supply chain which trade and process the illegally (or unsustainably) produced products. Since such products are generally cheaper to produce than their legally, sustainably or responsibly produced equivalents, their presence on the market can drag down prices and undermine the competitiveness of suppliers of legal and sustainable commodities. A 2004 study, for example, estimated that world timber prices had been depressed by between 7 and 16 percent (depending on product) by the prevalence of illegal products in the market, losing US timber firms at least US\$460 million each year in forgone sales.³



¹ Philip G. Curtis et al, 'Classifying drivers of global forest loss', *Science* 361:6407 (2018).

² Sam Lawson et al, *Consumer Goods and Deforestation: An Analysis of the Extent and Nature of Illegality in Forest Conversion for Agriculture and Timber Plantations* (Forest Trends, September 2014), p. 2.

³ *Illegal Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry* (Seneca Creek Associates, LLC & Wood Resources International, LLC, 2004).

Consumer-country measures

It is for reasons like these that much attention has been focused on measures to encourage or require consumer-country imports of timber and agricultural commodities to have been produced legally, or sustainably, or responsibly, in their countries of origin. These are designed to reinforce producer countries' efforts to enforce their own laws and regulations.

These can be voluntary measures, adopted by companies aiming to exclude undesirable products from their operations and supply chains. In 2010, the Consumer Goods Forum, a global industry network of retailers, manufacturers and service providers, adopted a target of achieving zero net deforestation in its membership's supply chains by 2020, and many individual companies have adopted purchasing policies aiming at sourcing legally (and, often, sustainably or responsibly) produced timber and wood products. Consumer-country measures can also be adopted by governments aiming to condition access to their countries' markets, or parts of their markets, on the imported products meeting specified standards. Together, these voluntary and regulatory steps are generally what is meant by 'consumer-country measures' (or, sometimes, 'demand-side measures').



Consumer-country measures for timber and wood

To date, this approach has been implemented most extensively in measures designed to address illegal logging and the trade in illegal timber. Measures introduced in recent years in various countries to exclude illegally sourced timber products from supply chains and consumer markets include:

- **Public procurement policies** which require government buyers to source legal and, sometimes, sustainable, timber and wood products. Governments are often major purchasers of paper, furniture and construction projects, and the standards they set for public purchasing can have a correspondingly significant impact on the wider market. Over 30 countries, mostly in the EU, now possess public procurement policies for timber.
- **Import and sales prohibitions** which make it a legal offense to buy or sell timber products produced illegally either domestically or in foreign countries; this is an element of both the US Lacey Act and the EU Timber Regulation.
- **Supply chain due diligence requirements** whereby any company placing timber products on the consumer-country market is required to have in place systems designed to minimize the risk of them handling illegal products. Due diligence systems must include means of ensuring access to information on the products and a process of analyzing and mitigating against the risk of placing illegal products on the market. This requirement is included in the EU Timber Regulation and equivalent legislation in Australia.

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- **Bilateral agreements** between consumer and producer countries to ensure that all timber exports from the producer country are verified as legally produced; this requires putting in place legality assurance and export licensing schemes, and for the consumer country to require the presence of a legality license at the border. This is one element of the Voluntary Partnership Agreements (VPAs) between the EU and timber-exporting countries; nine have now been agreed, and a further six are in negotiation.

Some of these consumer-country measures, in particular company purchasing policies and public procurement policies, make use of the main international voluntary forest certification systems, those of the Forest Stewardship Council (FSC) and the Program for the Endorsement of Forest Certification (PEFC), as relatively straightforward ways of identifying sustainable or legal products, and in turn this has helped boost the market penetration of such certified products. A number of simpler legality verification systems have also emerged aiming to supply legally (rather than sustainably) verified products.

Consumer-country measures work best when they reinforce efforts made at the producer-country level to improve governance, step up law enforcement and stop illegal behavior. These elements are also included in the bilateral VPAs between the EU and timber-exporting countries. This combination of mutually supportive measures in producer and consumer countries, improving law enforcement and governance in producer countries and excluding illegal products from consumer markets, has proved effective in many cases related to timber and wood production. Because these impacts have largely occurred through improvements in forest governance, they are likely to be long lasting.

Could consumer-country measures based on legality work for agricultural commodities?

In principle, many of these kind of measures could be applied to agricultural commodities whose production is associated with deforestation. Indeed, some governments are beginning to use public procurement policy in this way, and many trading, processing and retail companies handling commodities such as palm oil, soy or cocoa already possess commitments to eliminate deforestation from their supply chains. A possible due diligence regulation for forest risk commodities was one of the options listed in the European Commission's feasibility study for an EU action plan on deforestation published in 2018.⁴

Most of the measures outlined above for timber have been based on a 'legality approach': an attempt to reduce the level of illegal behavior in the production of the products in question, and to exclude from consumer markets products that are produced illegally. The illegality is generally defined in reference to the laws

⁴ Available at <http://ec.europa.eu/environment/forests/pdf/KH0418199ENN2.pdf>.

of the producer country, but may also include adherence to international agreements to which the country is a signatory (see box).

In the absence of legally binding international agreements on timber, for example, the EU Timber Regulation and the VPAs define legal timber with reference to the applicable legislation in the country of harvest. The EU's Illegal, Unreported and Unregulated (IUU) Fishing Regulation defines legality in relation to compliance with international fisheries agreements as well as to the flag state's own conservation and management rules.

The main advantage of an approach focusing on the legality of production is that the definition of the problem rests in the hands of the producer country. It is the national legal framework, as drawn up in the country of origin that defines the illegality; it is not a question of standards drawn up outside the country being imposed on it – an accusation which is sometimes levelled at an approach based on broader sustainability standards. Attempts to negotiate a legally binding international treaty on forests in the early 1990s had failed mainly because of resistance by developing countries to what they saw as developed-country efforts to impose standards which would prevent them using their own natural resources for development. An approach stressing the need for international cooperation in halting illegal behavior, which cost producer-country governments tax revenue and undermined the rule of law while at the same time destroying the forests, did not suffer from this problem, and it was this local ownership of the problem that helped to generate commitment to solutions in the case of timber trade.

The main disadvantage of the legality approach is the inverse: that the national laws in question may not be adequate to deliver the underlying objective of reducing the impact on forests.

What is meant by 'illegal'?

Illegal behavior relates to the violation of national laws set in the country of production of the commodity in question. This may include, for example, logging in protected areas, logging in excess of permit or concession quotas, establishing or expanding plantations beyond legal limits, forest clearance for agriculture without permission or title to the land, misdeclaration of exports to customs, avoidance of taxes and other charges, and obtaining permits or licenses through bribes (this list is not exhaustive).

While most countries are signatories to various UN declarations, covenants and agreements on human and labor rights (such as the Universal Declaration of Human Rights or the International Labor Organization's core conventions on labor standards), this does not automatically mean that their provisions are incorporated into domestic law.

In principle many different laws and regulations could affect a particular activity, such as logging, but for measures aiming to promote legal sourcing, some laws – e.g. those covering protected areas – are clearly more significant than others – e.g. those governing the licensing requirements for the truckers transporting the logs. In some cases stakeholders in producer countries have agreed operational definitions of 'legal timber', which have been incorporated in the Voluntary Partnership Agreements discussed above. The EU Timber Regulation covers laws relating to the right to harvest, payment of fees and taxes, forest management and biodiversity conservation, land use and tenure rights, and trade and customs laws. If applied to agricultural forest-risk commodities, an operational definition of 'legal production' would be required, potentially using similar approaches to those applied for timber.

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While a legality approach should reduce illegal activities, it may not be sufficient to address legal deforestation. If the law permits deforestation (or even possibly requires it; for example, palm oil companies are sometimes obliged to develop their concessions to the full even where they would prefer to avoid areas of high conservation value forest), simply relying on establishing legal production may not do enough to protect the forests. This is one of the arguments for a sustainability approach, encompassing a broader range of social and environmental measures, in preference to a legality approach.

While this is a valid concern, a legality approach can often act as a stepping-stone to sustainability. Putting in place the mechanisms needed to track the movement of logs from the forest, or crops from the farms, through to consumption or export – necessary for a legality approach – is a big step towards establishing full chain-of-custody tracking, which is itself necessary for a sustainability approach. Often a legality approach may itself lead to improvements in laws and regulations, with long-term improvements in forest and land management. The VPAs in particular have helped to improve transparency, opening up the forest sector and forest policy to scrutiny in particular from civil society, with potentially long-term positive impacts on standards of governance. A legality standard applied more broadly to forest-risk agricultural commodities would likely lead to further improvements in transparency, expanding the reach of public scrutiny into land governance and the conversion of forests to farms more broadly, and to long-term improvements in governance and the rights of forest communities.

