

Potential Legality Issues from Forest Conversion Timber

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Purpose

This paper investigates whether there is evidence that timber generated during the conversion of natural forest areas to non-forest or plantation use in tropical and sub-tropical timber-producing countries could be a significant source of illegal timber entering markets. It asks two related questions: How important a timber source is forest conversion? And what are the sources of potential illegality associated with timber from forest clearance?

Much attention in the past decade has focused on efforts to control deforestation through the elimination of illegal logging practices in the production of timber from designated forest areas; however, it is not certain that illegal logging itself is the most significant driver of the observed rate of deforestation. The conversion to other land uses, particularly commodity agriculture, appears to be more significant. Increasing regulatory control, and cost, on managed forest sources risks altering market dynamics and driving timber supply through alternate channels, such as conversion, by making agricultural clearance permits a more attractive option for accessing timber. Therefore it is important to understand the volumes of timber entering markets from conversion and the possible associated sources of illegality to ensure that these markets are as appropriately regulated as other channels.

This paper looks at the potential for timber from forest conversion to be classed as illegal. It then moves on to discuss the type of information needed to start to frame policies and initiatives that address incidences of illegality and irregularity in forest conversion worldwide and to ensure that control of illegal timber harvesting includes measures to prevent illegal conversion from undermining such initiatives.

1. Overview of Current Situation

Despite increased attention at international and national levels over the past few decades, deforestation remains one of the most urgent environmental and social pressures on the planet; resulting not only in loss of biodiversity but also loss of economic potential, and increased negative impacts on climate change through the release of stored carbon into the atmosphere. Over the past decade the apparent drivers of deforestation have changed quite dramatically, shifting away from subsistence activities towards large business interest and industry-driven causes. Recent studies demonstrate that agriculture alone accounts for around 73% of all deforestation across tropical and sub-tropical countries, with other causes making significantly smaller contributions – mining (7%), infrastructure (10%), urban expansion (10%) and remaining activities (10%).¹ In a study of eight countries which collectively account for 75% of global deforestation,² around half of the forest loss was found to be due to conversion to medium and large scale agricultural production, primarily oil palm, soy and beef³ and commodity agriculture is now found to be the most significant driver of deforestation in most of the world's tropical forest area.⁴ While this is particularly prevalent in Asia and Latin America, this driver is expected to be increasingly important in Africa in the near future.⁵

Box 1: What is Forest Conversion?

Forest conversion is defined as the clearance of natural forest resources from an area in order to convert the land for other uses. This process is usually irreversible. Increasingly forest is being cleared for growing crops like soya or palm oil, or extraction of mineral resources. The loss of natural forest incurs costs to people and the environment which can be severe. Habitats are lost, greenhouse-gas emissions increase, and the rights and interests of local communities are often ignored.

Source: WWF Website 2013.

¹ Hosonuma, N. et al, 2012.

² Brazil, Indonesia, Papua New Guinea, Cameroon, Democratic Republic of Congo, Ghana, Bolivia and Malaysia. *See ref below.*

³ Grieg-Gran, M, 2008.

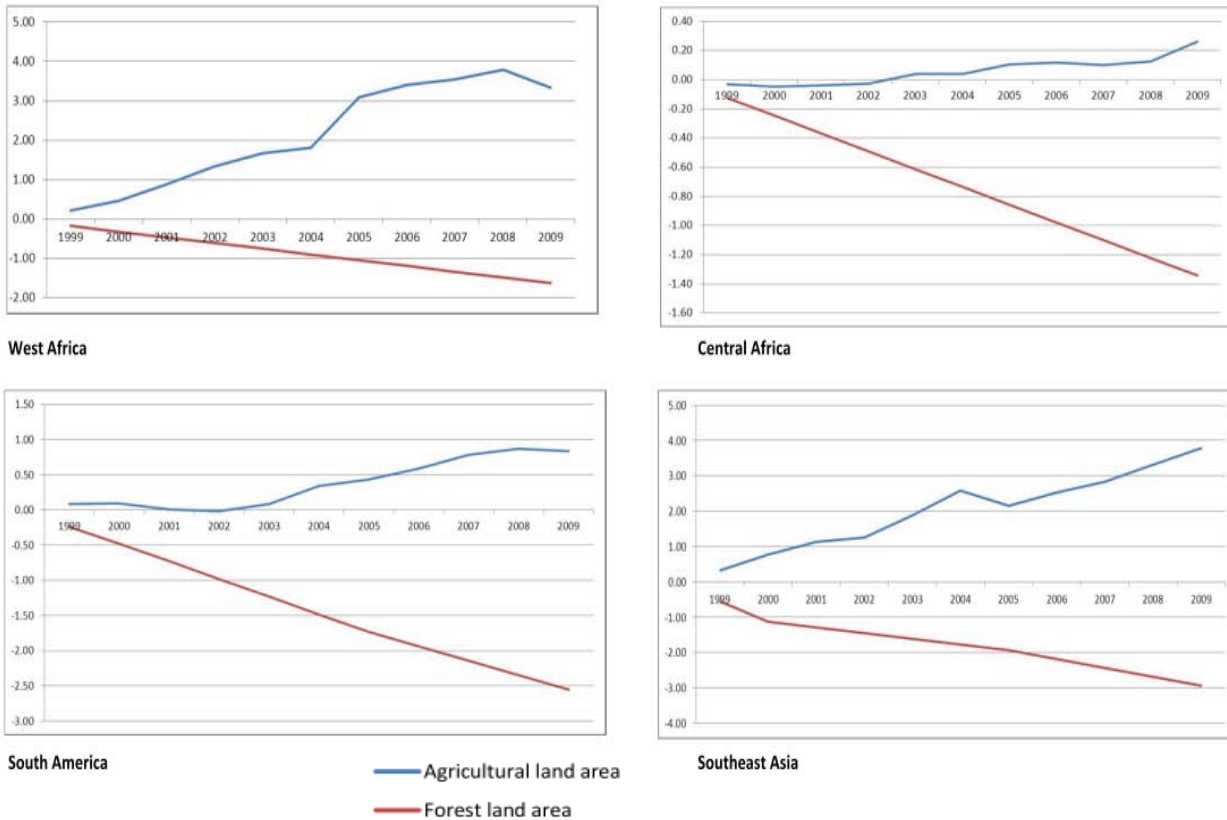
⁴ Kissinger, G., M. Herold, V. de. Sy, 2012.

⁵ Union of Concerned Scientists, 2011.

Data regarding the scale of conversions is inconsistent and frequently conflicting – land use data is often unreliable. Land has not been formally gazetted in many tropical timber producing countries and very little information is in the public domain. This makes it difficult to quantify the extent of forest area which has been lost to conversion at global or regional levels, or to estimate associated timber volumes resulting from land clearances. Available data on percentage of land use cover classified as agriculture and forest across the most significant tropical and sub-tropical timber producing regions clearly shows a distinct reduction in forest cover as agricultural area increases (Figure 1). While this data alone cannot be taken as an evidence of direct correlation, it is a useful demonstration of trends.

Figure 1: Land Cover Changes in Most Significant Tropical and Sub-Tropical Timber-Producing Regions, 1999-2009

(% total land area)



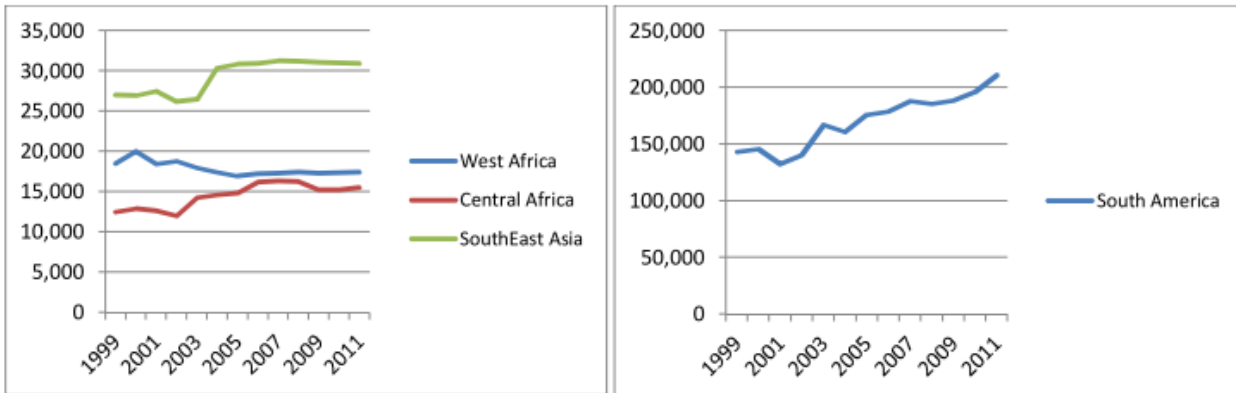
Source (Data): FAOSTAT 2013

An overview of industrial timber production figures for the same regions over the same time period and up to 2011 does not show any correlation between agricultural expansion and increased total industrial timber production at a regional level except for South America (Figure 2).

Total roundwood production figures, while frequently available from government statistics, are not sufficient to draw conclusions regarding the source of timber or potential impact of forest loss by conversion. Timber production levels are subject to a large number of variables including market demand, availability of quality standing timber, cost of access and production etc. Rather they are shown here to give an indication of the challenges of capturing meaningful data in the public domain regarding timber sources and forest conversion.

Figure 2: Roundwood Production
in Most Significant Tropical and Sub-Tropical Timber Producing Regions, 1999-2011

(1000m³)

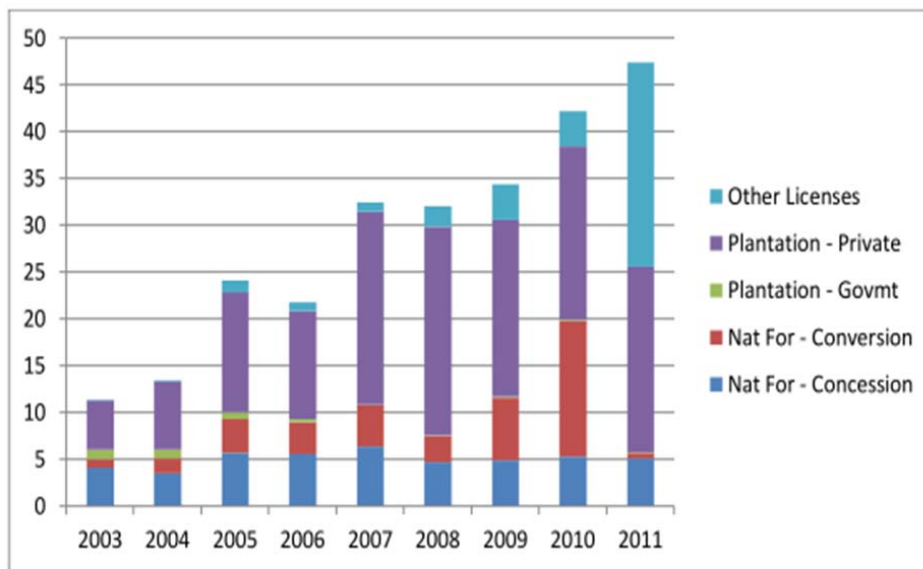


Source (Data): FAOSTAT 2013.

Data from some country-level statistics already demonstrate the significance of conversions as a source of timber, as shown below for total log production in Indonesia (Figure 3) and log exports from Papua New Guinea (Figure 4).

Figure 3: Licensed Log Production in Indonesia, 2003-2011

(million m³)

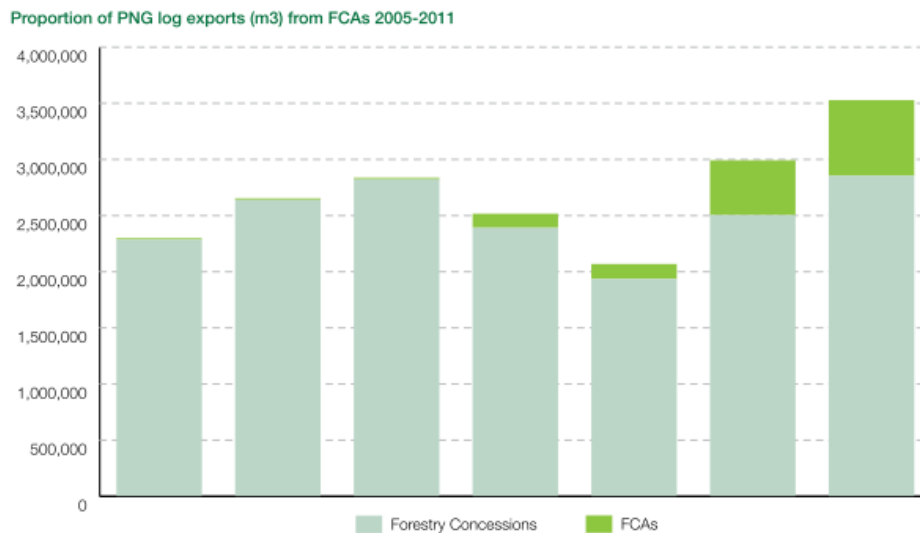


Source: Annual Forestry Statistic reports, Ministry of Forestry, Indonesia

In the case of Indonesia, the IPK license is used for forest conversions and shows a rapid increase in 2010, followed by a drop in 2011 whereas timber from “other licenses” increased six-fold over the same period. Field verification may be required to understand the sudden changes but the increased significance of conversion and other permits as sources of timber in Indonesia is a clear trend.

Figure 4 below shows the changes in volumes of logs produced from forest management concession areas and forest conversions under Forest Clearance Authority (FCA) permits over a recent 6-year period.

Figure 4: Log Production in Papua New Guinea
from Concession and Conversion Areas, 2005-2011
(m³)⁶



Source: SGS export log statistics 2005-2011

What Proportion of Forest Conversion Is Likely to Be Illegal?

In general it is extremely difficult to obtain reliable and detailed data regarding land use allocation, drivers of deforestation and rates of forest clearance at national or global levels.⁷ Government data is hard to access and is frequently unverified. Spatial data on land use and associated changes often does not exist and most tropical timber producing countries have not completed formal gazettement processes for land use allocation. In combination with disagreement around classification of forest types this creates a risk that some forest conversion can be “legalized” through practices such as defining an area as “degraded” without sufficient data.

The data that does exist at national and local levels is providing a growing body of evidence that a large proportion of forest clearances may be at least partially illegal. Recent studies in Brazil and Indonesia estimate the figure at 48 - 82%⁸ and a 2010 government study of Indonesia’s Central Kalimantan province revealed that 80 per cent of plantations and mining companies were operating illegally. During the past decade, 5.5 million hectares of forest on the Indonesian islands of Kalimantan and Sumatra have been cleared. Of this 350,000 hectares (3,500 sq km / 1,350 square miles) was within biodiversity conservation and watershed protection areas which should, by law, not be converted.⁹

Using Kalimantan province, Indonesia, as an example, a government taskforce investigation in February 2011 found that only 20% of operating plantation companies had received permission from the Ministry of Forestry to clear the forest in the area under its jurisdiction, and that around 92% of all plantation and mining companies had committed some form of permit violation. In addition, around two-thirds of plantation and mining companies were operating without legally required environmental and social impact assessments.¹⁰

These cases provide some indication of the potential scale of the problem of illegal forest conversions; however more work is needed to quantify levels of illegality by country and market, and to enable regional and global estimates to be made.

⁶ Op cit Greenpeace 2012.

⁷ Lutterll, C. et. al. 2011.

⁸ Swallow, B. et. al. 2007.

⁹ EIA 2012. Forest Conversion www.eia-international.org/our-work/ecosystems-and-biodiversity/forest-loss/forest-conversion.

¹⁰ EIA and Telepak, 2012.

What Makes a Forest Conversion “Illegal”?

Ultimately, Governments have sovereignty over their lands and while forest conversion may represent an environmental problem, operations may be conducted legally and in accordance with national policy. In land use and resource allocation, prevailing legislation can often be confusing or contradictory, and the framework for assessing applicability of regulations is frequently unclear; creating loop holes. In combination with lack of clarity over the boundaries of authority between decentralized levels of government this frequently results in a highly complex regulatory and enforcement environment which can be open to potential abuses of power and difficult to validate.¹¹

A number of recent case studies conducted in countries with high conversion pressure highlight practices of governments and private companies which contravene established legal processes. Some commonalities in practices which can lead to conversions being considered “illegal” are summarized in Box 2. Two individual case studies are presented in more detail in Box 3.

Box 2: What makes a forest conversion “illegal”?

Many conversions of forest land are legal and may be part of a government’s policy to increase areas of food production, for example. However there is increasing evidence that a high number of conversions in recent years may be considered illegal. Common issues of non-compliance by both government authorities and private companies may be summarised as follows:

- Clearing forest without required corresponding clearance permit and/or without permission from corresponding ministry with jurisdiction over the area;
- Clearing forest in designated protected area or forest identified as HCVF, i.e., deep peat or riparian forest;
- Permit for conducting clearance was issued / obtained illegally, not following due legal process, i.e., through bribery or coercion;
- Permit for conducting clearance was issued / obtained without meeting pre-requisite conditions, i.e., approved EIA, forest inventory or community consent;
- Failing to pay corresponding taxes for timber resources and/or for land acquisition;
- Failure to enforce / implement required environmental mitigation measures during forest clearance activities;
- Failing to comply with provisions stated in contract.

Source: Compiled from multiple cases brought to public attention.

This brief review indicates that one of the most common problematic areas is in the permit allocation process itself which is frequently opaque and where it may be difficult to prove illegality with certainty.

It is important to note that if the process of converting land from forest to non-forest use was illegal in any way according to the laws in force in that country, from land use allocation to clearance practices and extraction of the timber resources, then the resulting timber could also be considered to be illegal. Following the same argument, the resulting product grown on that land could be considered illegal.

¹¹ Lutterll, C. et. al., 2011.

Box 3: Examples of Forest Conversion Cases Noted for Likely Illegal Practices

Case 1: The actions of a company, Sithe Global Sustainable Oils Cameroon (SGSOC) a subsidiary of Herakles Farms which has a contract with the Government of Cameroon for oil palm plantation developments, have been scrutinized by national and international civil society organisations for failing to comply with national and international legislation. The contract with SGSOC is for 99 years and for a total area of 69,975 hectares. Complaints have been taken up to the Government of Cameroon and the secretariat of the Roundtable on Sustainable Palm Oil (RSPO) of which the parent company, Herakles Farms, was a member. In June 2012 RSPO requested the cessation of all company activities pending resolution of the complaints but in August 2012, Herakles Farms withdrew its membership of the RSPO. As of March 2013 there has been no investigation by the Government of Cameroon.

The key non-compliance issues which form the basis of the complaints are summarized as follows:

- Conditions of the contract violate Cameroonian national land law which requires land use concessions to be for a 5-year period to start with and only transform into a long-term lease following a positive evaluation;
- Violation of national and international human rights laws recognising local communities' customary rights to resources the obligation of companies to obtain Free and Prior Informed Consent (FPIC) prior to issuing permit;
- Non-compliance with legal procedures for forest clearing, including apparent lack of approval from competent authority and deforesting land in the permanent forest estate;
- Non-compliance with legal requirements that all operations over 100 h. need to complete an ESIA prior to commencing operations;
- Operating in HCV forest areas.

Source: Centre pour l'Environnement et le Développement (CED) and RELUFA, 2013. Above all Laws: How an American Company Operates Illegally in Cameroon. February 2013.

Case 2: Evidence has been documented demonstrating failures of legal compliance by an oil palm company, PT Suryamas Cipta Perkasa (PT SCP), operating in Central Kalimantan, Indonesia. The company has permits to develop 63,000 hectares of land including peatland and swamp forest, into oil palm plantations. Complaints and documented evidence have been taken to the government authorities responsible for law enforcement in Kalimantan province. As of January 2013 the case is still pending formal investigation by the Government of Indonesia.

The non-compliance issues which form the basis of the complaints are summarised as follows:

- Obtaining a plantation permit without an approved environmental and social impact assessment (AMDAL);
- Operating in deep peat areas, which are protected by law in Indonesia;
- Failure to obtain permission from the Ministry of Forestry to "release" the concession from the forest zone where it is located geographically, and subsequent failure to obtain required forest clearance permit (IPK);
- Operating outside concession boundaries;
- Failure to mitigate risk of fire during land clearance.

Source: EIA and Telepak 2012. Testing the Law. Carbon, Crime and Impunity in Indonesia's Plantation Sector. Associated dossier: Evidence of legal irregularities in plantation concession PT Suryamas Cipta Perkasa, March 2012.

2. Current Focus in Producer Countries

Findings suggesting that as much as 80% of traded timber was sourced illegally have led to a concerted focus over the past decade to eliminate illegal logging practices within timber producing countries, in an effort to reduce deforestation and promote sustainable forest management especially in tropical forest areas. In this context, the term “illegal logging” is most often used to refer to timber harvested, transported, bought or sold in violation of national laws. While there is no internationally agreed definition of illegal logging, common practices which are found to be illegal have been identified. Namely harvesting without authority in designated national parks or forest reserves; harvesting without authorization or in excess of concession permit limits; failing to report harvesting activity to avoid royalty payments or taxes; and violating international trading rules or agreements, such as export bans or CITES.¹²

One of the most far reaching and significant initiatives to address illegal logging within producer countries is the development of bilateral Forest Law Enforcement Governance and Trade (FLEGT) Voluntary Partnership Agreements (VPAs) as part of the EU’s FLEGT Action Plan.¹³ Timber-producing countries engaged in a VPA with the EU each develop a national system for identifying legal timber by thoroughly examining current legislation addressing timber production, processing and export through multi-stakeholder consultation mechanisms. This collaborative identification of key legal instruments governing the forest sector, known as the Legality Definition, is a core component of all VPAs and guides national efforts to strengthen enforcement.

Initiatives to date, both at the producer and consumer side, are found to be having an impact and reducing the incidences of illegal timber in trade.¹⁴ However, as noted above, the attention focused on illegal logging has generally followed the supply chain from allocation of timber rights through to entry into trade and there is a risk that illegal practices in conversion of forest land to non-forest use may have been overlooked, particularly where these occur in the allocation process itself.

Donors and other stakeholders concerned with reducing illegal logging and preventing further forest cover loss are increasingly recognizing the role that conversion of forests to other uses – primarily large-scale agriculture – has on their ultimate goals. Improved understanding of the nature and scale of illegalities and irregularities that relate to deforestation through the production of major agricultural crops, and the scale of associated trade, is needed. Likewise improved understanding of demand-side drivers of deforestation and forest degradation is needed.

Without a more inclusive and extended valuation of forest resources, current short-term capital market pressures may continue to drive conversion of forest to agriculture. For example, a hectare of forest which is theoretically worth US\$1,000-2,000 if sustainably managed for timber is likely to be cleared for immediate gains of US\$ 200-500 a hectare as pasture for beef cattle in the absence of strong governance to enable long-term market objectives to be prioritized over shorter-term returns.¹⁵

Strengthened enforcement of regulations governing timber harvesting and trade may create a motivation to seek conversion as a quick source of timber products. Anecdotal evidence reported in previous studies on illegal logging suggests that, faced with strengthened enforcement in the forest sector, companies are increasingly turning to clearance licenses as a means to gain access to valuable timber resources.¹⁶ A recent study in Papua New Guinea found that a streamlined process for issuing permits for agricultural use resulted in a 20% increase in log exports due almost entirely to forest clearance for conversion. A total of 5.1 million hectares of land in PNG (over 11% total land area and 72 titles) is now under this title of Special Agricultural and Business Leases (SABL), including designated intact natural forest landscapes and protected areas. Only nine of the 72 titles are held by listed agricultural companies (oil palm or biofuel), indicating that access to timber resources is the driving factor behind companies seeking these leases.¹⁷

¹² Seneca Creek, 2004.

¹³ See <http://www.euflegt.efi.int/files/attachments/euflegt/01flegtactionplanenfinalen.pdf>

¹⁴ Lawson. S. and L. MacFaul, 2010.

¹⁵ Chomitz, K.M. et al. The World Bank, 2007.

¹⁶ Lawson. S. and L. MacFaul, 2010.

¹⁷ Greenpeace, 2012.

To date, there are no international initiatives on the scale of timber trade regulations, FLEGT and national procurement policies which address illegal forest conversion for non-forest use. A number of voluntary certification standards and roundtables are increasing awareness of issues with land conversion, be it legal or otherwise, and standards generally establish cut-off dates for conversion from natural forest. In addition some governments are starting to declare purchasing policies for agricultural commodities which include “zero conversion” as a target for imports.¹⁸ In Brazil, two national initiatives – the Soy Moratorium and government action on illegal deforestation for cattle development – appear to have successfully reduced deforestation pressure by directly addressing illegal conversion.¹⁹

While recognizing the limitations of the available data, the current situation suggests:

- There is a high likelihood that forest conversion taking place at present includes significant elements of illegal practice, particularly around permit allocation processes;
- There is a risk that timber from forest clearance is entering both domestic and export markets;
- Some legal instruments governing forest conversions within the countries subject to conversion pressure are unclear, with potentially conflicting legislation and regulatory responsibilities;
- There are few mechanisms at present, beyond voluntary certification schemes, which are set up to address illegality in the production of agricultural commodities in producer countries;
- Initiatives to detect production of illegal timber and prevent entry into the market – most importantly VPA mechanisms– need to ensure they adequately address the issues underlying illegality in conversion as a source of timber.

3. Key Considerations and Conclusions

Forest clearance for conversion is a highly charged topic, with the focus on environmental impacts potentially clashing with national government strategies for food and fiber production and sovereignty over land use. Reliable data is rare but studies to date already identify some alarming trends, as noted above.

Increased regulation in the forest sector may have unintended consequences of making forest clearance for conversion an easier and more competitive route to access timber resources. This potential impact clearly needs more exploration but some evidence exists that this may be taking place particularly in countries which still have valuable timber resources in natural forest areas combined with a weak regulatory structure and lack of attention to date, i.e., not part of VPA process and have not taken up voluntary measures to any extent.

While the underlying motivations behind large-scale agricultural conversion need to be explored country by country there is already evidence that this is a rapidly increasing driver of forest loss. It is essential that the regulatory frameworks governing conversion are identified and enforced, in order to ensure that legality for timber is treated equally across all sectors and to prevent loop-holes for illegal conversion timber production from undermining the efforts made to date in the forestry sector. If not, this timber may be a driver for quick returns and easy access to forest resources as appears to be already happening in PNG.²⁰

Forest clearance permits may also be used as an easy entry point for access to land, whether or not the land is productive in the long term. Land acquisition by international investors is a serious threat to national ownership of resources and may be a stronger motivation than the value of the standing timber, particularly if the forest has already been logged and may be degraded to some extent. Data collected by a coalition of concerned organizations to track such acquisitions shows this to be a particular concern in Southeast Asia where forest clearance has accelerated rapidly in recent years, even though timber production figures have actually decreased (see Figure 5).

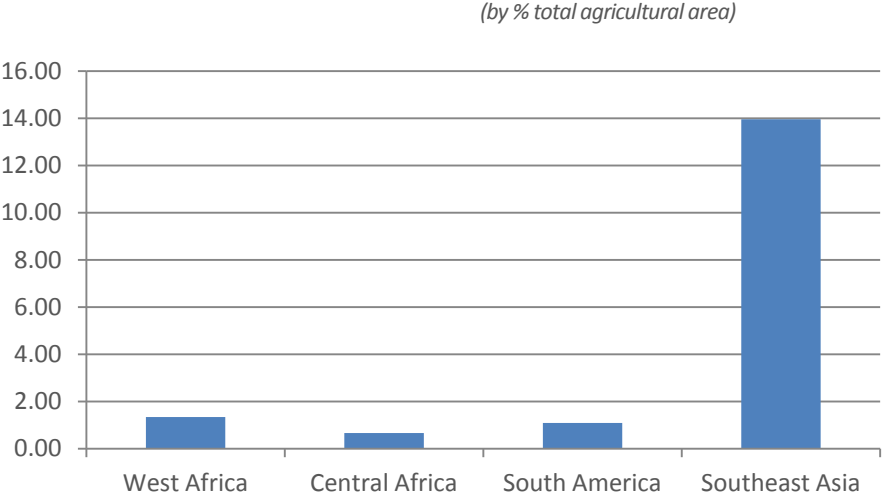
¹⁸ Proforest, 2011.

¹⁹ IEG, 2010.

²⁰ Greenpeace, 2012.

Figure 5: Agricultural Land Acquisition 2011 in Most Significant Tropical and Sub-Tropical Timber-Producing Regions Which Meet the Following Criteria

- Entails transfer of rights to use, control or own land through sale, lease or concession;
- Concluded since 2000;
- Covers area of 200 ha. or more;
- Entails conversion of land from local community use or important ecosystem service provision to commercial production



Source: LandMatrix 2013 (<http://landportal.info/landmatrix>)

Progress in the following areas will be essential to address these issues:

- Increase focus and support to processes of land classification, land use allocation and gazetting as a fundamental approach to strengthening resource governance across mining, agriculture and forest sectors;
- Ensure that mechanisms to detect and eliminate illegal timber from the market are robust and adequately address potential illegal forest clearances as a source of timber. Ensure that these mechanisms apply to domestic as well as export markets to avoid potential loop-holes for illegal conversion timber;
- Eliminate the potential for illegal forest conversion to become a quick and relatively easy source of timber from producer countries;
- Increase public awareness and demand-side drivers for legal agricultural commodities, and support mechanisms to frame legality for commodity production in producer countries while strengthening governance to implement regulations.

4. What Do We Need to Know Now?

Information Gathering and Research

In order to be able to respond to concerns over illegal practices in forest conversion and any subsequent flow of illegal timber from forest clearance, reliable quantitative data needs to be readily available in the public domain to enable and support rational decision-making by policy makers and stakeholders.

Verifiable data is urgently needed in the following areas:

- **Quantify drivers of deforestation at a country level** to identify most significant causes, i.e., mining, agriculture (commodity and small scale), or other development activities. Publically available data demonstrates trends and focuses on a sample of countries, but this country-specific information is needed to complement any national initiative addressing illegal logging, for example in all VPA countries;
- **Quantify and map current land use allocations in priority countries**, by land use type, i.e.,:
 - Hectares of land allocated to forest concession or other productive forest area
 - Hectares of land allocated to agricultural concession
 - Hectares of land allocated to mining concession
- **Quantify the contribution of conversion timber to overall timber production at country level** to better identify products and market destination of timber from forest clearances. Information gathering will require site-verification in order to generate the level of detail needed, as this is currently not possible from publically available data. Initial studies should focus on priority countries and can include forest-level data to assess likely volume and value per hectare removed during conversion process. Such data will allow estimates of financial gains being made and corresponding value to producer country with regards to taxes for example.
- **Identify current legal instruments governing forest clearance for conversion at country level** in order to estimate current levels of non-compliance, identify most significant breaches of legal practices in the forest conversion process, and assess effectiveness of enforcement. This is essential information to capture country by country where conversion pressures are highest, in order to start to quantify levels of illegality in conversion practices and thereby estimate corresponding volumes of timber which may be considered illegal as a result.

As with the discussions around illegal logging and associated data challenges, it will be necessary to generate measures to capture illegality in forest conversion which will withstand verification and replication at a global level. Particular considerations may include:

- Type of conversion to focus on based on importance of that conversion driver to selected country and the availability of data for the sector (i.e., agriculture versus mining). Likewise select to focus on particular scale – i.e., large-scale concessions and conversions only.
- Identify regulatory arrangements governing **issuance of licenses** to establish plantations/agricultural commodity/mining etc. including all specific permits, licenses and payments required, the order for proper issuance and identity and role of all government agencies involved;
- Identify regulatory arrangements governing the **forest clearance practices themselves** and establishment of plantation/crop/etc. once all the licenses and permits have been obtained including **social** (e.g., payments to local communities or set-aside of subsistence farms inside concessions) and **environmental obligations** (e.g., river buffer or HCWF requirements);
- **Identify current measures in producer and consumer countries to address challenges of conversion timber**, including voluntary schemes and tools developed through initiatives to address illegal timber initiatives. Work on consumer country measure has already been started.²¹ Reviewing current initiatives and tools in both exporting and importing countries will enable an assessment of their potential to address illegality in forest conversion, and identify ways in which current tools could be appropriately adapted or strengthened. Additionally this can determine whether these measures, developed for their own specific objectives, will be enough to cover illegal practices in conversion as well, and what else might be needed.

²¹ Brack, 2013.

Local Civil Society and Community Action

- **Request public information on forest conversion allocation** and share among national and international networks. This is important to keep governments accountable for land use decisions which are often confusing to clarify among different sectors and ministries. Actions by local civil society and community organizations play a key role in information sharing with wider stakeholder groups, including:
 - Identify information on land use and permit allocation which is required by law to be made available to the public;
 - Seek information and continue to push for access to information if not available; and
 - Insist on the right to structured, quality information which can be readily analyzed.
- **Push on voluntary schemes with high market recognition (FSC, RSPO, etc.)** to increase transparency around permit allocation processes as the starting point of any system certifying legality or sustainability. Highly visible voluntary schemes working with private sector companies are in a position of influence and have an important role to play in their respective sectors in making industry accountable. Standards for voluntary schemes need to focus the sector on the challenges which can be encountered around land use rights allocation and establish expectations for transparency and consistency.

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