



Treatment of Conversion Timber in Consumer-Country Measures

Duncan Brack

With Support from:



On behalf of
BMZ



Federal Ministry
for Economic Cooperation
and Development

giz Deutsche Gesellschaft
für Internationale
Zusammenarbeit (GIZ) GmbH

Treatment of Conversion Timber in Consumer-Country Measures

Duncan Brack

December 2013

With Support from



On behalf of

BMZ



Federal Ministry
for Economic Cooperation
and Development

giz Deutsche Gesellschaft
für Internationale
Zusammenarbeit (GIZ) GmbH

Table of Contents

Executive Summary	1
1. Introduction: Conversion Timber and Supply-Chain Controls	4
1.1 Consumer-Country Measures to Exclude Illegal Timber.....	4
1.2 Land Tenure, Resource Rights, Illegal Clearance, and Conversion Timber	5
1.3 Conversion Timber and Timber Supply-Chain Controls.....	5
2. Treatment of Conversion Timber in Certification Schemes	6
2.1 Forest Stewardship Council.....	7
2.2 Programme for the Endorsement of Forest Certification.....	12
2.3 Conclusions	15
3. Treatment of Conversion Timber in Public Procurement Policies	15
3.1 Denmark.....	16
3.2 Netherlands	18
3.3 United Kingdom	20
3.4 Conclusions.....	22
4. Treatment of Conversion Timber in FLEGT VPAs	23
4.1 Cameroon.....	23
4.2 Central African Republic.....	25
4.3 Ghana.....	26
4.4 Indonesia	27
4.5 Liberia.....	28
4.6 Republic of Congo	30
4.7 Conclusions.....	31
5. Treatment of Conversion Timber in the US Lacey Act, EU Timber Regulation and Australian Illegal Logging Prohibition Act	32
5.1 The US Lacey Act.....	32
5.2 The EU Timber Regulation	35
5.3 The Australian Illegal Logging Prohibition Act	37
5.4 Conclusions.....	38

Executive Summary

Over the last decade, governments in timber-producing and timber-consuming countries have implemented a range of policies and measures aimed at improving forest governance and reducing illegal logging. Although these have had some impact, illegal logging clearly remains a significant problem.

“Conversion timber” deriving from natural forests converted to commercial concessions is the predominant source of timber in many countries; these concessions are often closely associated with land use conflicts with local communities, stemming from unclear rights, access or land tenure arrangements. The legal issues surrounding land tenure and resource rights and the management of the allocation of concessions may often be the most important areas of concern for forest law enforcement and governance.

The quasi-legal nature of land allocation processes and the implementation of land reforms often make it difficult to prove illegality. This therefore potentially adds a level of uncertainty to the various supply chain controls being implemented by consumer countries. Those which focus on illegality rather than sustainability tend not to deal directly with conversion timber, though they do sometimes cover questions of land tenure and ownership. Those that aim to source sustainable (as opposed to legal) products generally do cover conversion timber, though the design of these policies has often caused some controversy.

It is possible, then, that timber products identified as legal may nevertheless originate from timber produced from natural forests converted to commercial concessions with questionable legal ownership or tenure rights. This paper examines the treatment of such conversion timber under the various certification, licensing, procurement and supply chain control measures currently being implemented.

Chapter 2 deals with the treatment of conversion timber in the two international forest certification schemes, FSC and PEFC. Both contain criteria relating to legal use rights, and the rights of local communities. Both also deal explicitly with conversion timber.

FSC excludes forest conversion to plantations or non-forest lands, except in limited circumstances (only a very limited portion of the forest management unit; no conversion of high conservation value forest; the process leads to conservation benefits) or where conversion occurred before November 1994 (when FSC published its first principles and criteria). The interpretation of these criteria has proved controversial, and FSC has been criticized for being too permissive of conversion, particularly in its controlled wood standard. After a review and long debate (including consideration of the concepts of allowable “upwards” conversion and prohibited “downwards” conversion), slightly modified criteria have been included in the revised principles and criteria about to be introduced; “very limited” is defined as no more 0.5 per cent of the area, and conversion of plantations to more native ecosystems is permitted.

PEFC similarly excludes forest conversion, again with exceptions (where: conversion is legal and in accordance with land-use planning policies; it involves only a small proportion of forest type; it does not have negative impacts on threatened ecosystems; and it makes a contribution to long-term conservation, economic and social benefits). The current principles and criteria have been in force since May 2011; the previous criteria had been extensively criticized for not explicitly excluding conversion. The revised criteria should deal with the criticisms, though they do have to be incorporated into each of the PEFC-recognized national schemes.

Chapter 3 deals with the treatment of conversion timber in public procurement policies for timber and timber products. Some countries, most notably Germany and Denmark, base their policies explicitly on the FSC and PEFC schemes described above (or equivalent). Others, most notably the Netherlands and the UK (and Denmark in its original policy), have drawn up detailed criteria against which the certification schemes have been assessed. The Dutch, British and original Danish procurement policy criteria all cover forest conversion.

The original Danish criteria for conversion were somewhat vague, and were criticized for this by NGOs. The decision to accept FSC or PEFC timber as acceptable, temporarily, until new criteria could be drawn up led the three Danish NGO

members of the steering group on timber procurement policy to withdraw; they were particularly critical of the decision to accept PEFC timber (under its old criteria – see above). In the end the policy was revised radically to follow the German approach of simply accepting FSC or PEFC timber, or equivalent, though this approach remains under review.

The Dutch criteria exclude conversion timber, except under exceptional circumstances (e.g., where the area is insignificant, if it leads to clear conservation benefits, or if it is based on government decisions), or where degraded land is converted to plantations. The assessments of certification schemes against the criteria have found FSC and some national PEFC schemes to be fully compliant and some PEFC schemes partially compliant (though still above the threshold necessary to comply overall). The assessment of the Malaysian MTCS scheme proved controversial, and, after an appeal against their original decision, the assessment committee finally decided that the scheme provided inadequate protection against conversion and so did not qualify.

The main British criteria do not cover conversion explicitly, but since 2010 the issue has been included in the criteria for evaluating certification schemes. FSC was judged as having fully met the requirements; PEFC only partially met them but still exceeded the threshold necessary for compliance with the British criteria overall.

Chapter 4 deals with the treatment of conversion timber in the six voluntary partnership agreements (VPAs) so far agreed under the EU's Forest Law Enforcement, Governance and Trade (FLEGT) initiative. None of the agreements, and the legality matrices they set out, contains any mention of conversion timber.

Four of the six VPAs contain some reference to land ownership or land tenure, though those in the Central African Republic VPA are fairly cursory; the Cameroon and Republic of Congo VPAs contain no references at all. The Ghana, Indonesia and Liberia VPAs do contain requirements, to varying degrees of detail, that the legal land-owner must consent to the logging, and that legal tenure and use rights must be respected; these are all set out in the legality matrices and reflected in the legality assurance schemes. In most of these countries, NGOs have raised concerns over the laws dealing with land ownership and tenure and in some of them the relevant laws are scheduled to be reformed.

Only Indonesia possesses a specific "conversion permit" for forest clearance (though the allocation process for it is not included in the VPA's legality definition); Cameroon, Ghana and Liberia have permit types which could address conversion practices, but in Central African Republic and Republic of Congo the issue is still to be clarified. It is likely, therefore, that the legality definitions alone may not be enough to address the legality of wood coming from all forest types cleared for agricultural use, though the issue may be addressed in the law reform processes triggered by the VPAs.

More positively, all six legality definitions contain provisions relevant to the implementation of clearance practices, including payment of applicable fees and taxes, requirements for environmental impact assessments and environmental mitigation measures throughout, and social obligations during operations (except in Indonesia). The legality definitions should therefore be as effective in identifying illegality in forest clearance as in forest management.

However, even where systems exist for the allocation of permits, in many cases there are current problems with their implementation, resulting in over-allocation or allocation in defiance of the law. When the VPA is fully implemented, however, these problems should be picked up by the independent auditors to be appointed under each VPA, and by the independent monitors that are also being established in most VPA countries.

Chapter 5 deals with the treatment of conversion timber in the broader legislative measures that the US, EU and Australia have introduced to reduce the likelihood of imports of illegal timber.

The US Lacey Act makes timber produced illegally elsewhere also illegal in the US. As has been seen, conversion timber is more clearly dealt with in definitions of sustainable forest management than it is definitions of legal practices, and therefore the Lacey Act would probably have no effect. Where the conversion timber clearly is the

product of illegal activities, however, the Lacey Act should act as a deterrent to its import to the US – though whether the authorities chose to act against an importer would depend on a variety of factors, including the strength of the evidence of illegality, which in the case of conversion timber may be difficult to obtain. If the Lacey Act also encourages US importers to use certification schemes more widely – which it may do, particularly if the “Lacey Act Due Care Standard” is widely adopted – there may also be an indirect impact on imports of conversion timber.

The EU Timber Regulation 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 minimize the risk of doing so. As with the Lacey Act, conversion timber which has been legally produced will not be affected, though where the conversion timber clearly is the product of illegal activities, the regulation should act as a deterrent to its import to the EU. In this respect, the regulation is more specific than the Lacey Act, including legal rights relating to tenure in its definition of applicable legislation. Also, the regulation explicitly encourages the use of the certification schemes, and should therefore have an indirect impact on imports of conversion timber. FLEGT-licensed timber is automatically assumed to be in compliance with the Regulation, so for VPA countries the provisions in their VPAs relevant to conversion timber are the key issue; as seen above, these are not always satisfactory.

The Australian Illegal Logging Prohibition Act prohibits the import of all timber products containing illegally logged timber, and the processing of domestically grown raw logs that have been illegally harvested, and places a requirement on importers of “regulated timber products” and processors of domestic raw logs to undertake due diligence to mitigate the risk of products containing illegally logged timber. As with the US Lacey Act and the EU Timber Regulation, conversion timber which has been legally produced will not be affected; where it clearly is the product of illegal activities, the Act should act as a deterrent to its import. The detailed regulations clearly encourage the sourcing of FLEGT-licensed timber (note the problems identified above), and of timber certified under the FSC or PEFC schemes. As with the US and EU legislation, this should therefore encourage the uptake of the certification schemes and reduce imports of conversion timber.

1. Introduction: Conversion Timber and Supply-Chain Controls

1.1 Consumer-Country Measures to Exclude Illegal Timber

Over the last decade, governments in timber-producing and timber-consuming countries have implemented a range of policies and measures aimed at improving forest governance and reducing illegal logging. An important means of achieving these objectives has been attempts to exclude illegal (and sometimes unsustainable) timber products from international trade. Consumer-country controls on market access for exports of timber and timber products, usually operating alongside the provision of financial and technical assistance, have proved a valuable addition to producer countries' enforcement efforts and, sometimes, an incentive for them to take action.

The main regulatory policy options aimed at excluding illegal products from international trade flows have included:

- The use of public procurement policies to require legal (and often sustainable) products for government purchasing; thirteen consumer countries now possess such policies. The experience of the UK and Netherlands in particular shows how this can affect in turn the whole timber sector, rather than merely public-sector purchases.
- Bilateral agreements between consumer and producer countries to establish licensing agreements designed to ensure that only legal products enter trade between the two, and improve forest governance in the producer country – such as the voluntary partnership agreements (VPAs) currently being negotiated and implemented under the EU Forest Law Enforcement, Governance and Trade (FLEGT) initiative.
- The introduction of broader legislative controls to make imported illegal products illegal in the country of import – such as the US Lacey Act, EU Timber Regulation and Australian Illegal Logging Prohibition Act.
- “Due diligence” requirements on industry, requiring companies to put in place procedures to minimize the chance of them handling illegal products – as in the EU and Australian legislation mentioned above.

Many private sector actors have taken similar steps to exclude illegal or unsustainable timber from their own supply chains. Many supply chain controls, both private and public, make use of the main voluntary certification systems, those of the Forest Stewardship Council (FSC) and Programme for the Endorsement of Forest Certification (PEFC), as a relatively straightforward way of identifying sustainable products. Similar but less complex systems also exist for identifying legal though not sustainable products. Sometimes these are divided into systems for verifying the legal origin of the products and systems for verifying that timber harvesting and other relevant management activities in the forest where it was harvested comply with all applicable and relevant laws and regulations.

In addition, many forest-rich countries have taken considerable steps to reform their laws and improve law enforcement. Studies by, among others, Chatham House, suggest that the combined effects of all the measures taken over the last decade or so has been positive, with a significant reduction (about 25 per cent) in illegal logging between 2000 and 2008, and a similar (30 per cent) fall in major-country imports of illegal timber from 2004 to 2008.¹ It is not yet known, however, whether this represents only a temporary improvement, and it clear that illegal logging remains a significant problem in many countries. A recent study for Interpol estimated that illegal logging accounts for 50–90 per cent of the volume of forestry activities in key producer tropical countries and 15–30 per cent of all wood traded globally.²

¹ Sam Lawson and Larry MacFaul, *Illegal Logging and Related Trade: Indicators of the Global Response* (Chatham House, July 2010).

² Christian Nellemann (ed.), *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests* (Interpol Environmental Crime Programme, 2012).

1.2 Land Tenure, Resource Rights, Illegal Clearance, and Conversion Timber

Land concessions, whether they are forest concessions or large-scale agri-business projects, play a major role in producing wood from natural forests in producer countries. “Conversion timber” deriving from natural forests converted to commercial concessions is the predominant source of timber in many timber-producing countries, with large-scale agri-business projects for cash crops or plantations, mining, hydropower and road infrastructure development projects playing a major role in the availability of timber.

In many countries these land concessions are often closely associated with land use conflicts with local communities, stemming from unclear rights, access or land tenure arrangements, together with widespread smallholder displacement and “land-grabbing” by elites at the expense of local communities. The legal issues surrounding land tenure and resource rights issues and the management of the allocation of concessions may be the most important areas of concern for forest law enforcement and governance in many countries. Even in countries like China, which have adopted dramatic land tenure reforms for smallholders, the lack of implementing regulations have sometimes led to unethical abuse of those with newly acquired rights to sell their land.

Research on the extent of illegal behavior in forest conversion has been less extensive than on illegal logging, but there are many reports of illegal clearance of forest for oil palm or soy, or pasture for cattle, in most countries which produce them. Research currently under way for Forest Trends, based on case studies in Brazil, Peru, Colombia, Cameroon, Cambodia, Indonesia, Malaysia and Papua New Guinea, has estimated that most conversion of forest to agriculture (including timber plantations) in tropical countries is currently illegal; this is particularly true of clearance for oil palm plantations and cattle pasture.³

It is often impossible to disentangle illegal logging and illegal agricultural production: forest may be cleared illegally for its timber, and then planted with soy, or oil palm; or forests may be cleared illegally for agriculture and the timber produced illegally sold on to the market. Illegal behavior related to forest conversion includes:

- 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 high-conservation value, e.g., deep peat or riparian forest.
- Permit for conducting clearance was issued or obtained illegally, not following due legal process, e.g., through bribery or coercion.
- Permit for conducting clearance was issued or obtained without meeting conditions, e.g., approved environmental impact assessment, forest inventory or community consent.
- Failing to pay corresponding taxes for timber resources and/or for land acquisition.
- Failure to enforce or implement required environmental mitigation measures during forest clearance activities.
- Failing to comply with provisions stated in contract.⁴

In addition there may be illegalities associated with the production of crops, for example in failures to abide by environmental standards (e.g., excessive pesticide or fertilizer use) or labor standards (e.g., the use of forced labor, which has often been reported in cocoa production).

1.3 Conversion Timber and Timber Supply-Chain Controls

³ Sam Lawson, presentation at Chatham House, 9 July 2013: ‘Illegal forest conversion for industrial agriculture, and associated trade in timber and agro-commodities: The scale of the problem and potential solutions’, available at <http://www.illegal-logging.info/sites/default/files/Sam%20Lawson%20%282%29.pdf>

⁴ Daphne Hewitt, *Potential Legality Issues from Forest Conversion Timber* (Forest Trends and IDL Group, 2013).

While human rights groups have been watching this situation, none have made the specific link to the various initiatives outlined above in section 1.1 for excluding legal or sustainable timber from international supply chains.

The quasi-legal nature of land allocation processes and the implementation of land reforms often make it difficult to prove illegality, and therefore potentially add a level of uncertainty to these supply chain controls. Those which aim to exclude unsustainable (rather than simply illegal) timber from consumer markets – such as the voluntary certification systems, and some public procurement policies – generally have policies in place to exclude timber produced from forest conversion. In most cases, the design of these policies has proved a matter of controversy in recent years, often leading to their modification.

Those which aim to exclude illegal (rather than unsustainable) timber – such as the FLEGT VPAs, the US Lacey Act and the EU Timber Regulation – do not directly cover conversion timber. Although they all deal, in various ways, with questions of land tenure and ownership, as noted above, these can sometimes be unclear, and it is possible that timber stemming from conversion projects of dubious legality could qualify as legal under these mechanisms. It is not clear whether consumers in discerning markets (such as the EU) would want to buy these forest products if they were aware of their origin, especially if they originate from high-conservation-value forests.

This question is also relevant to the development of REDD+ programmes, given the need to address the same land tenure and rights issues before performance-based carbon payments with adequate social safeguards can be made.

This paper is therefore designed to examine the treatment of “Conversion Timber” – defined as timber produced from natural forests converted to commercial concessions – under the various certification, licensing, procurement and supply chain control measures listed above. In each case two issues are analyzed: the way in which questions of land tenure and ownership are dealt with; and the explicit treatment (if any) of conversion timber.

2. Treatment of Conversion Timber in Certification Schemes

Private forest certification schemes have developed since the mid 1990s in response to the growing demand for environmentally friendly timber. There are two main international certification schemes: the Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification Schemes (PEFC), essentially a mutual recognition arrangement for national certification schemes. These two now dominate the global market. At the end of May 2012 the global area of forest certified amounted to 394 million hectares, 9.6 per cent of the total. This included 243 million hectares under PEFC (62 per cent of the total) and 147 million hectares under FSC (37 per cent) (some is certified under both). Certified industrial roundwood produced amounted to 469 million m³, around 27 per cent of global industrial roundwood production.⁵

The regional distribution of certified forest area is highly uneven. The proportion of commercial forest that is certified reaches 57 per cent in Western Europe, and 32 per cent in North America (including almost 75 per cent in Canada). The most rapid growth in recent years has been in the CIS region (from 3.6 per cent in 2010 to 5.7 per cent in 2012). Although Brazil, Malaysia, China and Republic of Congo all possess significant areas of certified forest, the penetration of certification in the developing world is very low; in 2010 only 2 per cent of tropical forest was certified, a proportion that had not changed for twenty years. Several developing countries have, however, seen very rapid recent growth, albeit from a very low base, under the impact of the various supply chain initiatives described in Section 1. In tropical Africa, for example, the area of FSC-certified forest increased by 80 per cent during 2008 alone,⁶ while in Indonesia, the area of FSC-certified forest increased by 60 per cent during 2012.⁷

⁵ All figures in this section (except where otherwise noted): FAO/UNECE, *Forest Products Annual Market Review 2011–2012*, Chapter 10 ('Certified forest products markets, 2011–2012').

⁶ Rupert Oliver, *The EU Market for 'Verified Legal' and 'Verified Legal and Sustainable' Timber Products* (Forest Industries Intelligence Ltd., 2009).

⁷ FSC Facts and Figures; <http://ic.fsc.org/facts-figures.19.htm>.

Global statistics are not easily available, but the figures suggest that the penetration of certified products into consumer markets has, similarly, grown rapidly in the last few years. During 2007 25 per cent of solid timber products imported into the EU derived from independently certified or legally verified forests, the majority of it either from Russia or other European countries. The UK and Netherlands are the countries with the highest penetration of certified timber. In the UK in 2008, certified timber and panel products accounted for over 80 per cent of the market, having grown from 55 per cent in 2005.⁸ In the Netherlands, the share of certified timber and panel products grew from 13 per cent in 2005 to 34 per cent in 2008 to 68 per cent in 2011; the share of certified paper and paperboard was 33 per cent in 2011.⁹

The rest of this section considers how conversion timber is treated under the FSC and PEFC schemes.

2.1 Forest Stewardship Council

FSC, established in 1993, is the only globally operating forest certification system. It provides its own international *Principles and Criteria for Forest Stewardship* for national certification standards, and a set of standards for chain-of-custody certification. By August 2013, national and regional (i.e., sub-national) FSC standards had been endorsed in thirty countries.¹⁰ Detailed rules for the standard-setting process, including balanced participation of stakeholders, exist for these endorsed standards. National standard-setting, however, can be a lengthy process, and is particularly difficult in some countries with weakly developed civil society groups – e.g., many developing countries. Where national standards cannot, or have not yet been, established, interim standards are used, based on the FSC generic principles and criteria and adapted to account for local conditions.

The FSC *Principles and Criteria* are currently being updated; a new version was agreed in early 2012 but will not come into operation until the completion of the FSC International Generic Indicators and the transfer process of the National Standards, a process expected to take until at least 2014. The following text cites both the existing (version 4¹¹) and revised (version 5¹²) documents.

Ownership and Tenure

The current *Principles and Criteria* deals with issues of ownership and tenure in criteria 2.1 and 2.2:

- 2.1 Clear evidence of long-term forest use rights to the land (e.g., land title, customary rights, or lease agreements) shall be demonstrated.
- 2.2 Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.

The revised *Principles and Criteria* cover essentially the same issues in 1.2, 4.1, and 4.2:

- 1.2 The Organization shall demonstrate that the legal status of the Management Unit, including tenure and use rights, and its boundaries, are clearly defined.
- 4.1 The Organization shall identify the local communities that exist within the Management Unit and those that are affected by management activities. The organization shall then, through engagement with these local communities, identify their rights of tenure, their rights of access to and use of forest resources and ecosystem services, their customary rights and legal rights and obligations, that apply within the Management Unit.

⁸ Nick Moore, *UK Timber Industry Certification* (UK Timber Trade Federation, 2009).

⁹ Probos, 'Market share of sustainably produced timber doubled in three years: government target exceeded' (2013).

¹⁰ See <https://ic.fsc.org/national-standards.247.htm>.

¹¹ <http://ic.fsc.org/download.fsc-std-01-001-v4-0-en-fsc-principles-and-criteria-for-forest-stewardship.181.pdf>

¹² <http://ic.fsc.org/the-revised-pc.191.htm>. Also see 'Explanatory Notes'; <http://ic.fsc.org/download.explanatory-notes.413.pdf>

4.2 The Organization shall recognize and uphold the legal and customary rights of local communities to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources, lands and territories. Delegation by local communities of control over management activities to third parties requires Free, Prior and Informed Consent.

Conversion: Current Criteria

Conversion is dealt with explicitly in the current criteria 6.10 and 10.9:

6.10 Forest conversion to plantations or non-forest land uses shall not occur, except in circumstances where conversion:

- a) Entails a very limited portion of the forest management unit; and
- b) Does not occur on high conservation value forest areas; and
- c) Will enable clear, substantial, additional, secure, long term conservation benefits across the forest management unit.

10.9 Plantations established in areas converted from natural forests after November 1994 normally shall not qualify for certification. Certification may be allowed in circumstances where sufficient evidence is submitted to the certification body that the manager/owner is not responsible directly or indirectly for such conversion.

November 1994 is the date on which the first version of the FSC *Principles and Criteria* were agreed.

Further guidance is included in FSC policy document FSC-POL-20-003, “The Excision of Areas from the Scope of Certification,”¹³ which defines the circumstances in which it is acceptable to take out, or “excise,” transformed areas from the scope of an evaluation while allowing certification for the remaining area. The justifications included factors beyond the control of the forest managers; as long as the remaining “non-excised” forest is still managed in accordance with FSC criteria, certification of the remaining area could be maintained. If the excised area still remained under the control of the owners or managers, the document made clear (in 2.2.(c)) that management would be verified as “non-controversial” as long as a number of conditions were met; conversion of natural forest to plantations or non-forest uses was not permitted, with the exception of community forest areas where they were part of a community-endorsed land use plan.

“Non-controversial” timber qualifies for the FSC “controlled wood” standard, which is defined as “wood that has been controlled to avoid wood that is illegally harvested, harvested in violation of traditional and civil rights, harvested in forest management units in which high conservation values are threatened by management activities, harvested in areas in which forests are being converted to plantations or non-forest use or harvested from forests in which genetically modified trees are planted.”¹⁴

¹³ <http://ic.fsc.org/download.fsc-pol-20-003-2004-the-excision-of-areas-from-the-scope-of-certification.160.pdf>

¹⁴ <https://ic.fsc.org/controlled-wood-standards.174.htm>.

Criticisms of FSC Conversion Criteria

The interpretation of these criteria and of other relevant FSC guidelines has proved controversial over many years. A policy working group on the review of the FSC's approach to plantations concluded that: "Conversion is one of the most sensitive issues within the FSC, and [the Group] acknowledges the concerns and frustrations expressed by stakeholders on this topic during the Group's consultations. If FSC gets its policy on this issue right, it will be recognized as being part of the solution to deforestation. If we get it wrong, the organization will be seen as part of the problem and criticized accordingly."¹⁵

Criticisms have often been made of the FSC's approach to conversion. For example, respondents to the UK CPET's 2010 review of the FSC against the UK government's criteria for legal and sustainable timber (see Section 3.3) objected to FSC's excision policy (see above), which they argued was too loose (and also not considered as part of the previous (2008) CPET evaluation of FSC); and the fact that FSC criterion 10.9 allowed for certification in cases of conversion where the manager or owner was not responsible. Furthermore, it did not define the terms "normally" or "sufficient evidence."¹⁶ The CPET Technical Panel responded merely that it had taken these comments into account during its evaluation. The FSC-Watch website lists a number of specific instances where companies producing wood from forest conversion nevertheless qualified for FSC certification.¹⁷ It also attacks the FSC controlled wood standard for permitting timber from forest conversion – though the FSC's definition of "controlled wood" in fact excludes conversion timber (see above).

Review of FSC Conversion Criteria

In 2008–09 an FSC technical working group conducted a review of the conversion criteria. Some stakeholders believed FSC's approach was too restrictive; others thought it was too relaxed. The working group identified a wide range of arguments relating to conversion which the organization had tried to deal with:¹⁸

- *Conversion prohibition discriminates against southern and tropical regions* – developed countries had mostly converted their natural forest before the FSC cut-off date of 1994.
- *Conversion prohibition prevents certification of progressive forest managers* – i.e., those trying to manage plantations responsibly, who, it was argued, FSC would thus be unable to influence.
- *Conversion resulting from management objectives that do not meet the requirements for certification* – in some cases national or local laws on, e.g., land use planning, could override FSC requirements, though this was partly dealt with through FSC guidelines on excision, which, as seen above, define the circumstances in which it is acceptable to excise transformed areas from the scope of an evaluation while allowing certification for the remaining area.
- *Conversion resulting from reasons beyond control of the forest manager* – a similar issue, arising, for example, where different government agencies reached conflicting decisions over the same area of forest.
- *Apparent contradiction between criterion 6.10 and 10.9* – 6.10 allowed for some exemptions, whereas 10.9 did not, though there was some lack of clarity over the word "normally."
- *Ownership loophole in criterion 10.9* – for example in cases where an organization might not have owned the land when conversion took place but where it encouraged, or by contract required, the previous owner to

¹⁵ FSC, *Principles and Criteria Review: Briefing Paper on Conversion* (November 2010); <http://ic.fsc.org/download.pc-review-briefing-paper-on-conversion.582.pdf>

¹⁶ CPET Category A 2010 Review of FSC Stakeholders' comments and responses; <http://www.cpet.org.uk/uk-government-timber-procurement-policy/files/Stakeholders2019%20comments%20and%20responses%20related%20to%20FSC%202010-1.pdf>. The organisations and individuals making the comments were not identified.

¹⁷ See, e.g., 'FSC certified company, Hancock, caught on film converting forest to plantations in the Strzelecki Ranges, Australia', 4 January 2011; http://www.fsc-watch.org/archives/2011/01/04/FSC_certified_compan

¹⁸ FSC Plantations Review – Technical Phase: Review of FSC Conversion Policy – Final Report of Expert Team D (August 2009); <http://ic.fsc.org/download.final-report-of-expert-team-d.321.pdf>

convert; in these cases the organization was directly responsible for the conversion but still complied with 10.9.

- *Mimicking of natural disturbances patterns* – for example, would replanting after a fire or a hurricane qualify as conversion or not?
- *Conflicting definitions and expectations of what constitutes ecosystem change and conversion* – forests are always dynamic, changing ecosystems, and in practice different stakeholder groups in different regions tended to have widely differing perspectives of acceptable levels of disturbance, change and conversion.
- *The presumption against plantations as an acceptable form of conversion* – held by a number of stakeholders, who argued that FSC should have nothing to do with plantations.
- *Conversion of non-forest ecosystems* – i.e., areas such as grassland or peatland.
- *Natural forests are automatically preferred as the ideal vegetation type* – similarly, non-forest ecosystems possibly contained in a forest management unit – e.g., swamps or wetlands – can have value.
- FSC should follow social justice considerations when evaluating large-scale, industrial intensity plantations on land previously owned by smallholders – e.g., how should FSC deal with the conversion of e.g., smallholder farms, even if the farmers have been compensated according to national and local laws, where the smallholders do not have alternative lands or livelihoods of equivalent or better quality?
- *Conversion to plantations must demonstrably reduce pressure on natural forests* – is this the only case in which plantations should be allowed? (The working group noted that this was difficult to prove one way or the other).
- *FSC must retain the 1994 cut-off date to prevent creation of new plantations from natural forests* – although many stakeholders held this position, it was also argued that the conversion of degraded natural forest could be of net ecological benefit.

The working group summed up some of the key issues at stake:

Conversion is simply the changing from one state to another – although the effect of the change implied is long-term and may even be permanent.

At the same time there is an assumption that is frequently made but often unvoiced, that conversion is intrinsically a bad thing. This is not necessarily the case. Conversion is not always a bad thing. The change of secondary (degraded) forest to primary is conversion, but is commonly perceived as a “good thing” and therefore acceptable. But it should be realized even this simple rule is more complex than it appears. Conversion will no doubt benefit some members of the population affected by the change and may even benefit the majority. But equally it will have a seriously negative effect on other members of the same population.

Moreover, this change does not occur in one step and there is little thought as to what the incremental changes may be and whether each (if taken independently) would automatically be considered acceptable – even if the ultimate forest structure ends up being an acceptable conversion.

If any change is permanent then this is considered conversion. In the example above the whole process would be considered an acceptable conversion – because secondary forest has been converted to primary. But no forest ecosystem is static and again there is little thought given to what changes could be considered acceptable once the primary forest has been re-established. Are managers allowed to modify forest so far – but no further?

It is important to revisit these basic concepts because all forest management is about change. Enrichment changes the very fabric of the forest – but is perceived as a beneficial change which hopefully will bring about a permanent change (conversion) of the forest structure.

FSC is predicated on active and responsible forest management. The definitions in the glossary show that constant and repeated change in the forest environment is expected and so implicitly is “beneficial” conversion, though this is not defined in the glossary. Indeed there is no definition of conversion at all – and this is clearly an oversight that this working group intends to rectify.

The working group developed definitions of acceptable conversion and unacceptable conversion, including the concepts of potentially certifiable “upwards” conversion, and non-certifiable “downwards” conversion. Upwards conversion maintained or enhanced six attributes of the target area: species biodiversity, habitat diversity, structural complexity, ecosystem functionality, economic productivity, and social significance. Downwards conversion degraded any of the six. The group also developed a concept of compensatory restoration which could be applied to areas which had previously been subjected to downwards conversion.

Conversion: Revised Criteria

In the end the criteria were revised slightly as part of the comprehensive revision of the FSC *Principles and Criteria* currently under way, though the modifications do not go as far as the working group proposed. The new conversion criteria are set out in 6.9 and 6.10 of the version 5 document:

- 6.9 The Organization shall not convert natural forest to plantations, nor natural forests or plantations to any other land use, except when the conversion:
- a) Affects a very limited portion of the area of the Management Unit, and
 - b) Will produce clear, substantial, additional, secure long-term conservation benefits in the Management Unit, and
 - c) Does not damage or threaten High Conservation Values, nor any sites or resources necessary to maintain or enhance those High Conservation Values.
- 6.10 Management Units containing plantations that were established on areas converted from natural forest after November 1994 shall not qualify for certification, except where:
- a) Clear and sufficient evidence is provided that The Organization was not directly or indirectly responsible for the conversion, or
 - b) The conversion affected a very limited portion of the area of the Management Unit and is producing clear, substantial, additional, secure long term conservation benefits in the Management Unit.

“A very limited portion” is defined as no more than 0.5 per cent of the area of the Management Unit in any one year, and no more than 5 per cent in total. “Conversion” from plantations to more native ecosystems is permitted, and the construction of forest roads and other essential infrastructure for forest management is not considered as a conversion process. Conversion of plantations to other land uses such as urban areas is, however, covered.

Criterion 1.8 is also relevant:

- 1.8 *The Organization* shall demonstrate a long-term commitment to adhere to the FSC *Principles and Criteria* in the *Management Unit*, and to related FSC Policies and Standards. A statement of this commitment shall be contained in a *publicly available* document made freely available.

The Explanatory Notes make it clear that this criterion is designed to prevent “green-washing.” It lists “significant conversion of forests to plantations or non-forest use” as one of the activities that would be unacceptable.

2.2 Programme for the Endorsement of Forest Certification

The Programme for the Endorsement of Forest Certification (PEFC) is different from FSC; it is essentially an arrangement for mutual recognition of national forest certification schemes. As at July 2013, PEFC's membership comprised thirty-seven national members and fourteen international stakeholder members.¹⁹ Thirty-five national certification systems had been through an assessment process and were recognized as meeting the PEFC's sustainability benchmarks (the other national schemes were at various stages of development). Although PEFC was established, in 1999, as the Pan-European Forest Certification scheme, more than one-third of its endorsed national systems are now outside Europe, and they account for over two-thirds of the PEFC-certified forest area.

The PEFC requirements for endorsed certification schemes have recently been revised, with the current version in force since May 2011.²⁰ Its criteria are developed from the various international and regional principles, criteria and indicators processes for sustainable forest management, the key set being the Pan-European Operational Level Guidelines for Sustainable Forest Management (PEOLG), derived from the Pan-European Criteria for Sustainable Forest Management and agreed in 1998 by the Ministerial Conference for the Protection of Forests in Europe. Similar principles derived from the equivalent processes of the African Timber Organisation and International Tropical Timber Organisation are also relevant.

All schemes endorsed by PEFC must themselves have been developed through participative processes involving balanced representation of relevant stakeholder groups; formal approval is based on evidence that consensus has been reached. This requirement for consensus represents a revision of the earlier system after the UK CPET's first assessment's of the scheme, in 2004, found that it was not adequate to meet the UK requirements for sustainability.²¹ The revision addressed a common criticism of the PEFC national schemes, which was that it is possible for some types of stakeholder, e.g., environmental NGOs, to be sidelined, and for PEFC's main supporters – forest-owners and the forest industry – to dominate the standard-setting process; this view is still sometimes held despite the change in procedures. (In some cases, NGOs have refused to participate, preferring the FSC scheme.)

Ownership and Tenure

Issues of land ownership and tenure are covered in criterion 5.6.3:

- 5.6.3 Property rights and land tenure arrangements shall be clearly defined, documented and established for the relevant forest area. Likewise, legal, customary and traditional rights related to the forest land shall be clarified, recognized and respected.

Conversion

Conversion is covered in criteria 5.1.11 and 5.1.12:

- 5.1.11 Conversion of forests to other types of land use, including conversion of primary forests to forest plantations, shall not occur unless in justified circumstances where the conversion:
 - a) Is in compliance with national and regional policy and legislation relevant for land use and forest management and is a result of national or regional land-use planning governed by a governmental or other official authority including consultation with materially and directly interested persons and organisations; and

¹⁹ See <http://www.pefc.org/about-pefc/who-we-are/facts-a-figures>.

²⁰ *PEFC International Standard: Requirements for certification schemes – Sustainable Forest Management – Requirements* (November 2010); <http://www.pefc.org/standards/technical-documentation/pefc-international-standards-2010/item/download/292>

²¹ The assessment found PEFC lacking over the requirements for balanced influence over decision-making in the standard-setting process, and consultation and transparency in the certification process. See CPET, *UK Government Timber Procurement Policy: Assessment of five forest certification schemes* (November 2004), p. 12; available at http://www.illegal-logging.info/item_single.php?item=document&item_id=153&approach_id=1

- b) Entails a small proportion of forest type; and
- c) Does not have negative impacts on threatened (including vulnerable, rare or endangered) forest ecosystems, culturally and socially significant areas, important habitats of threatened species or other protected areas; and
- d) Makes a contribution to long-term conservation, economic, and social benefits.

5.1.12 Conversion of abandoned agricultural and treeless land into forest land shall be taken into consideration, whenever it can add economic, ecological, social and/or cultural value.

The application of these criteria to plantations is given this interpretation in Appendix 1:

The requirement for the 'conversion of forests to other types of land use, including conversion of primary forests to forest plantations' means that forest plantations established by a forest conversion after 31 December 2010 in other than 'justified circumstances' do not meet the requirement and are not eligible for certification.

Criticisms of Previous PEFC Conversion Criteria

As noted below in Section 3.2, in the Netherlands the TPAC evaluation of PEFC International and several national PEFC schemes against the Dutch procurement criteria found that in some case the conversion criteria were only partially or inadequately addressed. In fact the evaluations were carried out on the previous version of the PEFC standards, which largely borrowed from the PEOLG and the ATO and ITTO sustainable forest management processes.

The Dutch assessments of PEFC International, and of the Swedish and Finnish national PEFC schemes, found that the main conversion criterion was only partially addressed, as the old PEFC standards did not explicitly state that conversion should not occur. TPAC considered, however, that the PEOLG requirement that forest management planning should aim to maintain or increase forest and other wooded area justified its decision that the main criterion was "partially addressed." The assessment of the Finnish scheme also observed that the lack of an explicit reference to conversion was of little relevance, as forest cover in Finland had remained stable for many decades. PEFC International was assessed as inadequately addressing criterion 4.5, requiring that plantations should not be established through the conversion of natural forests after 1997. Despite these ratings, however, the overall scores the schemes achieved were enough to satisfy the Dutch criteria.

Stakeholder comments supported these points.²² WWF pointed to exactly the weaknesses that TPAC identified. Friends of the Earth drew attention to a ProForest review of PEFC schemes in Canada, Finland, Sweden, Australia and the US. While conversion was not an issue in the first three countries, it could be in the US and Australia. The national US scheme recognized by PEFC, SFI, did not forbid conversion. Although the national Australian scheme, AFS, did not allow conversion of natural forests, there was evidence that conversion was nevertheless taking place in Tasmania and Northern Territory; detailed supporting evidence was provided. In response, TPAC observed that it would be assessing SFI and AFS separately and would take these issues into account. However, since very little timber certified under either of these schemes was imported into the Netherlands, TPAC believed it could still conclude that PEFC International did meet the Dutch procurement criteria.

(TPAC looked at SFI and AFS further during 2013, in an attempt to verify the NGOs' complaints (it did not attempt full assessments of the schemes).²³ It did find some issues where each scheme only partially addressed the Dutch

²² TPAC, *Stakeholder Forum Report: PEFC International* (June 2010); http://www.tpac.smk.nl/webadmin/files/pdf/stakeholder%20forum%20reports/TPAC_Stakeholder%20Forum%20PEFC%20International_Final%20Report.pdf

²³ TPAC, *Case Report on the Sustainable Forestry Initiative* (March 2013), <http://www.tpac.smk.nl/Public/TPAC%20documents/SFICASEREPORTMAR2013.pdf>; and *Case Report on the Australian Forestry Standard* (April 2013), <http://www.tpac.smk.nl/Public/TPAC%20documents/TPACreportAFScaseAPRIL2013.pdf>.

procurement criteria. It also concluded that, in line with some of the NGO assertions, in 2007–08 an Australian company, Gunns Ltd, had converted 2,720 ha of its natural private forest land into plantations, in contravention of the AFS standard, and had therefore been wrongly certified by the certification body DNV; it was unable, however, to find any other instances of non-compliance. Both these investigations would be taken into account in TPAC's next assessment of PEFC International, due in 2014.)

In the UK, the CPET evaluation of the PEFC scheme in 2010 was also carried out on the old PEFC standards and also found that these only partially addressed the UK conversion criterion (see Section 3.3). As with TPAC, CPET believed that the PEOLG requirement to maintain or increase forest and other wooded area justified its rating of "partially addressed." Also as in the Netherlands, the overall score the scheme achieved was enough to satisfy the UK criteria.

Stakeholder comments were very similar to those made in the Netherlands.²⁴ Specific criticisms were directed at the US SFI and ATFS schemes, the Australian AFS scheme and the Malaysian MTCS scheme. In response, the CPET Technical Panel argued that the comments on MTCS related to a draft scheme document, not the one in use at the time. SFI claimed in response to the criticisms that it did prohibit conversion except in justified circumstances, and also observed that the overall decline in US forest cover (of which conversion to plantations was only one contributory factor) was only 0.1 per cent a year, considerably less than the 0.5 per cent conversion rate allowed under FSC. AFS argued that it did not certify any forests in the areas in which it was claimed conversion was going ahead. Commenting on those responses, the CPET Technical Panel concluded that it was "unable to address comments relating specifically to national scheme requirements within the available time period, and have proposed that the next review includes specific provision for comparing PEFC's checklist for the endorsement of national certification schemes and relevant evaluation reports of specific national schemes."²⁵

In May 2012 a comparison of PEFC requirements with the FSC controlled wood standard in eighteen national PEFC schemes, conducted by NEPCo, found that:

- Four (Brazil plantations, Brazil natural forests, US SFI and US ATFS) did not cover conversion timber to the same standard as FSC controlled wood, and the risk of sourcing controversial material was unspecified.
- One (Australia) mostly, though not entirely, covered conversion, and the risk was unspecified.
- Six (Belarus, Finland, Germany, Poland, Russia and Sweden) did not cover conversion, but the risk was low.
- Two (Canada Z809 and Z804 (smallholders)) partly covered conversion, but the scale was not limited; the risk was low.
- One (UK) mostly covered conversion, but the scale was not clearly limited; the risk was low.
- One (Gabon) covered conversion, and the risk was low.
- Three (Chile plantations, Chile natural forest, Malaysia) covered conversion, and the risk was unspecified.

The authors gave the Brazilian and US schemes a red rating, the Australian scheme an amber rating and the rest a green rating – while noting that only four of them (Gabon, Chile, Malaysia) fully met the FSC controlled wood requirements for excluding conversion timber.²⁶ The new PEFC standard, however, was assessed as meeting the FSC controlled wood requirements, but the study also raised concerns about the extent to which PEFC chain-of-custody requirements were adequate to exclude conversion timber, pointing to the fact that the procedures for risk evaluation had not been updated in line with the new standards.²⁷ FSC, which commissioned the study, commented

²⁴ CPET Category A 2010 Review of PEFC Stakeholders' comments and responses; <http://www.cpet.org.uk/uk-government-timber-procurement-policy/files/Stakeholders2019%20comments%20and%20responses%20related%20to%20PEFC%202010-1.pdf>. The organisations and individuals making the comments were not identified.

²⁵ Ibid., p. 41.

²⁶ NEPCo, *Comparative Analysis of the PEFC System with FSC Controlled Wood Requirements* (May 2012)

²⁷ Ibid., p. 30.

that “while the new PEFC global forest management standards, which will come into effect in May 2013, may in theory address forest conversion, it remains to be seen if accreditation of the national PEFC standard will be rigorous enough to meet FSC CW [controlled wood] requirements on this crucial issue.”²⁸

As the NEPCon study concluded, the new PEFC criteria reproduced above should deal with the weaknesses identified by both TPAC and CPET, though they will of course also have to be incorporated in or adapted to each of the PEFC-recognised national schemes.

2.3 Conclusions

Both of the timber certification schemes possess criteria which exclude timber produced from forest conversion, except under closely defined circumstances. Although the definitions can be contested, and it is not always clear that policing of the schemes is entirely robust, any products certified under the FSC or PEFC schemes should be free of conversion timber.

3. Treatment of Conversion Timber in Public Procurement Policies

In all developed countries, the public sector is a major purchaser and specifier of timber for a variety of uses, including paper and paper products, furniture and timber for construction. Purchasing of goods and services by public authorities – central, regional and local – is estimated to account for an average of about 10 per cent of GDP. Several EU member states, and a number of other countries, now possess government procurement policies aimed at ensuring that public purchasers source only legal and/or sustainable timber and wood products. As at August 2013, these include Austria, Belgium, Denmark, Finland, France, Germany, Japan, Mexico, the Netherlands, New Zealand, Norway, Switzerland and the UK; a number of other countries, mostly EU member states, are considering adopting similar policies and many local and regional governments in these and other countries also possess some kind of timber procurement policy.²⁹

Governments have adopted one of two different approaches to deciding the criteria for legality and sustainability they wish the products they procure to satisfy.

Some countries, notably the Netherlands and the UK, have drawn up their own criteria, derived from a variety of sources and inputs and generally subject to a consultation process. Under this approach, governments need to give guidance to their buyers to ensure that they purchase products that meet their criteria for sustainability, and do so quickly and efficiently. In practice the simplest way to achieve this has been to purchase products covered by the main certification schemes, FSC and PEFC (see Section 2). Both countries have also established systems, relying on independent advisory bodies, for assessing whether the certification schemes meet their criteria for legality and sustainability. Since EU procurement rules require that procurement policies must rest on criteria, not on membership of a particular scheme, both countries have also developed systems for assessing claims by suppliers that their products meet the sustainability or legality criteria even if they are not certified by any recognized scheme.

Other countries have adopted a less elaborate system, deciding simply that particular certification schemes are adequate to meet their criteria. Germany’s policy, for example, is as follows:

Wood products procured by the federal administration must demonstrably come from legal and sustainable forest management. The bidder must furnish proof of this by presenting a certificate of FSC or PEFC, a

²⁸ ‘New study finds PEFC system insufficient to meet FSC Controlled Wood requirements’, 15 May 2012; http://pre.fsc.org/news.html?&no_cache=1&tx_ttnews%5Btt_news%5D=2159&cHash=5d6225f9973c9dc4a92ff3f335168cd1

²⁹ For summaries, see Duncan Brack, *Controlling Illegal Logging: Using Public Procurement Policy* (Chatham House, June 2008); http://www.illegal-logging.info/item_single.php?item=document&item_id=633&approach_id=1; and Markku Simula et al., *The Pros and Cons of Procurement: Developments and Progress in Timber Procurement Policies as Tools to Promote Sustainable Management of Tropical Forests* (ITTO Technical Series 34, April 2010), http://www.illegal-logging.info/item_single.php?it_id=908&it=document. For more information in general, see <http://www.illegal-logging.info/procurement> and <http://www.proforest.net/cpet/international-policies-1>

comparable certificate or by producing individual specifications. Comparable certificates or individual specifications are accepted if the bidder can prove that the criteria of FSC or PEFC that apply to the respective country of origin have been met.³⁰

Although this is a far less complex system than the British or Dutch policies outlined above, in practice the outcome is much the same, as almost all timber purchased under British or Dutch guidelines is FSC- or PEFC-certified. Denmark initially drew up its own criteria, similar to the British and Dutch ones, but eventually concluded that in practice simply opting for FSC- or PEFC-certified timber (or equivalent) was a much simpler process for both buyers and policy-makers, and had much the same impact.

Other countries, for instance France and Japan, accept an even wider range of evidence of legality and/or sustainability. Some countries' procurement policies cover only particular end uses or products, such as timber for construction, or paper. Within the EU, a European Commission working group was established in 2009 to encourage member states to exchange experiences on their approaches to timber procurement; it reported in November 2010 with a series of recommendations encouraging member states to adopt consistent approaches towards issues such as the definitions of legality and sustainability.³¹

For most countries, therefore, the ways in which FSC and PEFC deal with conversion timber – explored above in Section 2 – effectively determine how their procurement policy works in this respect. The question has been dealt with explicitly, however, in the evolution of timber procurement policy in Denmark, Netherlands, and the UK; these are looked at in more detail below.

3.1 Denmark

In June 2001 the Danish Parliament's Board on Environment and Planning decided to request the government to ensure that public purchases of tropical timber would be based only on legal and sustainable sources. The government decided to proceed through setting voluntary guidelines for public purchasers, and these were published in June 2003. In 2006 the government agreed to extend the policy to products from all sources (not just tropical), and published temporary guidelines on legal timber. Draft revised criteria for legal and sustainable timber were published for consultation in April 2007.³²

Criterion 1.2.7c) in the draft dealt directly with the issue of forest conversion:

1.2.7 The standard must seek to ensure that the extent of the forest resource is maintained. In order to do this the standard should include requirements for:

- a) Forest management planning should aim to maintain or increase forest and other wooded area, and enhance the quality of the economic, ecological, cultural and social values of forest resources, including soil and water.
- b) Forest management practices should safeguard the quantity and quality of the forest resources in the medium and long term by balancing harvest and growth rates, and by preferring techniques that minimise direct or indirect damage to forest, soil or water resources.
- c) More detailed requirements regarding operations that affect the extent and composition of forest resources in the short term should be laid down, either in nationally or locally developed

³⁰ http://www.bmelv.de/cIn_181/SharedDocs/Rechtsgrundlagen/EN/H/HolzbeschaffungErlass.html

³¹ *Public Procurement of Wood and Wood-Based Products: Report to the Standing Forestry Committee by the Standing Forestry Committee Ad Hoc Working Group IV on Public Procurement of Wood and Wood-Based Products* (November 2010); http://ec.europa.eu/agriculture/fore/publi/wg4-112010_en.pdf

³² http://www.naturstyrelsen.dk/NR/rdonlyres/5A67AF1A-018B-4AC4-836E-60922C5A63F0/39935/draft_19_30_6.pdf

standards, or in broader framework standards addressing the issue, e.g., standards regulating opportunities for the conversion of forest areas.

In responding to the consultation, a coalition of Danish and international NGOs³³ criticized this criterion as unfocused, particularly with regard to conversion timber.³⁴ They suggested an alternative wording for part c):

Principles for the conversion of forests to other land uses and for the conversion of natural forests to plantations must be laid down in forest management standards aiming to ensure that such conversions occur only where such activities – within each forest management unit – are compensated for by other measures ensuring the short, medium and long-term provision of equally valuable forest goods and services – socially, environmentally and economically.

The aim of the proposed replacement was to create a default presumption that conversion should generally not occur, but if it did, it should at least be compensated for.

In contrast, responses from PEFC International, PEFC Denmark and the Danish Forest Association suggested the deletion of part c). They argued that the question of forest conversion to other land use was a subject of national policies of sovereign governments, and should not be required as part of certification schemes; and in any case it was implicitly dealt with through the processes of national stakeholder consultation which were themselves required under the main certification schemes. (In addition, as the draft text included forest conversion as an example, it was not entirely clear whether it was actually part of the mandatory criteria.)

The NGOs also commented on draft criterion 4.3, which dealt with the mixing of timber from certified and uncertified areas, and required that the uncertified material must be legal. The NGOs recommended going beyond this and requiring that the uncertified timber did not originate from “controversial” sources, such as areas with known problems with indigenous peoples’ rights, legality or forest conversion.

The new revised guidelines were supposed to be published by 1 April 2009, but in the end were delayed until after the EU working group on timber procurement had concluded its work. In February 2008, further temporary guidance was issued by the government advising public buyers to accept either FSC or PEFC as proof of sustainable timber.³⁵ In turn that decision led the three Danish NGO members of the steering group on timber procurement policy to withdraw; disagreeing with the temporary guidance, they argued that PEFC could not be considered to be a guarantee of sustainable forestry.³⁶ The treatment of conversion timber by PEFC was of particular importance to this decision.

The new guidelines were finally published in May 2010.³⁷ They represented an entirely new approach (though they remain under review), abandoning the detailed criteria and adopting a much simpler approach resting primarily on certification and legality verification schemes – similar in effect to the German approach described above. Timber from FSC- and/or PEFC-certified forests – as well as other forests managed according to corresponding standards – is considered as both legal and sustainable. Timber verified by specified legality verification schemes (TLTV (SGS), VLC (Smartwood) and OLB), and any accompanied by FLEGT licenses, is considered legal. In all cases alternative means of appropriate and equally convincing evidence are allowed for.

The guidelines recommend two options for buyers when inviting tenders: either set minimum requirements for legal timber and a minimum volume of sustainable and/or recycled timber (typically at least 70 per cent, although 50 per

³³ A group of three Danish NGOs – WWF Denmark, Nepenthes and IWGIA – supported by several international NGOs and NGOs based in forest countries.

³⁴ For responses, see <http://www.naturstyrelsen.dk/International/English/Topics/Forestry/Comments.htm>. A summary is available at <http://www.naturstyrelsen.dk/NR/rdonlyres/0E4CEA06-49E5-4C2C-9915-77BC4352FCB7/0/SynteserapportUK.pdf>

³⁵ http://www.skovognatur.dk/International/English/Forestry/Procurement_Sustainable_Timber.htm

³⁶ See press release at http://www.illegal-logging.info/item_single.php?it_id=2627&it=news

³⁷ <http://www.cpet.org.uk/uk-government-timber-procurement-policy/international-context/international-policies-1/denmark>

cent in some cases); or set minimum requirements for legal timber only and optional award criteria for a share of sustainable and/or recycled timber.

3.2 Netherlands

From June 2004, all national government institutions in the Netherlands were required to purchase timber from legal and, where possible, sustainable sources, aiming to reach 100 per cent sustainable by 2010. A National Assessment Guideline (BRL) was established to assess forest certification schemes for evidence of sustainability, and the Equivalence Assessment Board was set up to carry out the assessments. The criteria turned out to be too strict, however: a test run on six certification systems showed that none met the BRL test.

Revised criteria were published in October 2008, and were used to assess the main certification schemes.³⁸ The Equivalence Assessment Board was superseded by the Timber Procurement Assessment Committee (TPAC). Where sustainable timber is not available, legal products can be purchased, and in this respect the Dutch policy explicitly followed the British policy (see Section 3.3), by accepting as evidence of legality a certification or legality verification scheme positively assessed by UK CPET, or FLEGT-licensed timber and wood products.

The criteria for sustainability contain requirements relating to legal use rights and respect for other parties' tenure and use rights:

C 1.1. The forest manager holds legal use rights to the forest.

C 2.1. The legal status of the management of the forest management unit and claims of the local population, including indigenous peoples, in the property/tenure or use rights regarding the forest management unit or a portion thereof have been inventoried and are respected.

Conversion is covered explicitly in criterion 4.3:

C 4.3. Conversion of forests in the FMU to other types of land use, including timber plantations, shall not occur unless in justified exceptional circumstances.

Guidance: Exceptional circumstances are for example natural disasters. In addition conversion can take place if the area to be converted is insignificant, if it enables clear long-term conservation benefits, or if it is based on undisputed governmental decisions.

Guidance: The forest manager of a plantation should aspire to make clear how the plantation helps in relieving pressure from natural forests; for instance when the plantation is established on degraded land instead of by conversion of natural forest.

Conversion is also mentioned in criterion 4.5, dealing with plantations:

C 4.5. Plantations shall not be established through the conversion of natural forests after 1997.

Guidance: Degraded land and degraded forest may be converted into plantations if this is ecologically and economically beneficial and if the owner or user has no relation to the actors behind the degradation.

³⁸ TPAC, *Dutch Procurement Criteria for Timber* (October 2008);

[http://www.tpac.smk.nl/webadmin/files/pdf/system%20documents/Procurement%20Criteria%20+%20PEM%20oct%202008%20\(2\).pdf](http://www.tpac.smk.nl/webadmin/files/pdf/system%20documents/Procurement%20Criteria%20+%20PEM%20oct%202008%20(2).pdf); and TPAC, *Dutch Timber Procurement Policy: Framework for Evaluating Evidence of Compliance with Timber Procurement Requirements* (February 2010);

[http://www.tpac.smk.nl/webadmin/files/pdf/system%20documents/Dutch%20Framework%20for%20Evaluating%20Evidence%20of%20Compliance%20with%20Timber%20Procurement%20Requirements_Feb%202010%20\(3\).pdf](http://www.tpac.smk.nl/webadmin/files/pdf/system%20documents/Dutch%20Framework%20for%20Evaluating%20Evidence%20of%20Compliance%20with%20Timber%20Procurement%20Requirements_Feb%202010%20(3).pdf)

To date TPAC has conducted assessments of the FSC International (generic) scheme and several FSC national schemes (Finland, Sweden and the locally adapted generic FSC standard for Cameroon), the PEFC International scheme and a range of national PEFC schemes (Austria, Belgium, Finland, Germany, and Sweden), and the Malaysian Timber Certification Scheme (MTCS). All the FSC schemes were found to be fully compliant with the legal use rights and conversion criteria.

All the PEFC schemes apart from PEFC Sweden were found to be fully compliant with the criteria on legal use rights (C1.1) and respect for the rights of local people (C2.1). The PEFC Sweden scheme was found to be partially compliant with both, because of concerns over the rights of Sami populations in northern Sweden, but its overall rating still exceeded the threshold necessary to satisfy the assessment.³⁹

The Austrian, Belgian and German PEFC schemes were judged to have fully met the main conversion criterion (C4.3) but, as noted above in Section 2.2 (where stakeholders' comments are also summarized), the Finnish, Swedish and International PEFC schemes were judged only to have partially addressed it. PEFC International was judged to have inadequately addressed the plantation conversion criterion (C4.5; this was not relevant for the national schemes). Again all three schemes exceeded the threshold necessary to secure compliance, so all were found adequate to meet the requirements of the Dutch procurement policy. (Also see Section 2.2 for TPAC's investigations of alleged non-compliance by the Australian AFS and American SFI schemes.)

The Malaysian scheme MTCS is one of the national forest certification schemes endorsed by PEFC, but it was assessed separately by TPAC. The Netherlands is the largest market for Malaysian timber in the EU, accounting for about half the exports of MTCS-certified timber products. The issue of forest conversion was a specific concern during the assessment. It was raised in particular by Greenpeace Netherlands, who supplied information to the Committee on six case studies in support of its argument that MTCS should not be judged compatible with the Dutch procurement criteria; four of the six dealt with cases of forest conversion.⁴⁰

In March 2010 the Committee announced that its assessment of MTCS had concluded that it did conform:

Until recently, TPAC was sincerely concerned that certified timber could be mixed with timber from forest conversion or plantations. Late 2009 this concern was addressed by MTCS for Peninsular Malaysia with the requirement to give such timber a special code in the chain of custody. As from this week, this procedure is also required in Sabah and Sarawak, the Malaysian states in Borneo. This means that MTCS meets all conditions set by TPAC and that it receives the final judgment 'conform'.⁴¹

However, having looked into the situation in some depth – partly thanks to the information supplied by Greenpeace – the Committee concluded that Malaysian state governments could decide to effectively override the MTCS and order the conversion of certified forest. Since the Dutch policy explicitly reserves the right of the Minister of Environment to make a final decision on the acceptability of certification schemes, TPAC referred the decision to him:

An important point however, is that the certified forest area in Malaysia is not secured against politically-initiated forest conversion for (timber) plantations or infrastructure. 'Nevertheless, the certification system cannot be held accountable for this kind of conversion because politicians and not forest managers take the decision', clarifies TPAC chairman Udo de Haes. 'It is therefore not up to TPAC, as a technical Committee, to judge this politically initiated and approved conversion. The judgment, including possible consequences for

³⁹ See TPAC, *Stakeholder Forum Report: PEFC Sweden* (July 2009), p. 4;
<http://www.tpac.smk.nl/webadmin/files/pdf/stakeholder%20forum%20reports/Stakeholder%20forum%20report%20PEFC%20Sweden%2020090717.pdf>

⁴⁰ TPAC, *Stakeholder Forum Report: MTCS* (March 2010),
http://www.tpac.smk.nl/webadmin/files/pdf/stakeholder%20forum%20reports/TPAC_Forum%20report%20MTCS_DEF.pdf

⁴¹ Press release, 3 March 2010, 'TPAC concludes: MTCS conform, but decision by Minister necessary on risk of forest conversion';
http://www.tpac.smk.nl/webadmin/files/pdf/persberichten/MTCS%20persbericht%20EN%20FINAL_3March2010.pdf

the Dutch procurement policy, is up to the Minister of Environment', says the chairman. Whatever the outcome, the Committee has advised the Minister to prioritize the issue of conversion in the international dialogue on forest issues.⁴²

Before the decision was taken, however, in April 2010 five Dutch NGOs lodged an objection to TPAC's decision that in principle MTCS did conform with the Dutch procurement criteria. On further investigation, in October 2010 TPAC changed its mind and decided that MTCS did not qualify. Three problems were identified: a failure to respect the rights of indigenous people, a lack of protection of objects of high ecological value, and insufficient protection against conversion. In particular:

... the MTCS criterion 6.10 which deals with conversion is very weak in its current form. A strengthening of MTCS criterion 6.10 and its indicators is therefore required. MTCC [Malaysian Timber Certification Council] shares this view with TPAC, as became clear during the hearing that was organised by TPAC at 14 September last.

MTCC indicated that for the current revision of the MTCS standard a cap for conversion is envisaged for the certified forests. Subsequently, if in a Forest Management Unit (FMU) conversion exceeds the established cap, the certificate for the FMU is to be suspended or withdrawn. TPAC welcomes the envisaged cap as well as the consequence if the cap is exceeded, as this will truly provide the certainty to procurement officers and consumers that sustainable timber is coming from sustainable forests. However, TPAC also argues that for a cap to be both practical and meaningful, a – one time – redefinition of the boundaries of the forest is necessary leaving out all areas that are planned to be converted, and further that a cap is sufficiently low.⁴³

TPAC revised its assessment, giving MTCS a score of "inadequately addressed" for criteria C2.1 and C4.3. Alongside other revisions, this was enough to tip the assessment over to non-conformity. In December 2010 the MTCC appealed against this decision, but in October 2011 the appeal was dismissed. Regretting the decision, MTCC chief executive Chew Lye Teng observed that: "As a voluntary timber certification scheme that has been developed through a Malaysian multi-stakeholder process, the MTCS is unfortunately held responsible by SMK [TPAC's managing organization] for issues that are inherent to the Malaysian constitutional, legal and political system."⁴⁴

3.3 United Kingdom

In the UK, voluntary guidance advising government departments to purchase timber and timber products from sustainable and legal sources was issued in 1997, and became a binding commitment in 2000. Legal or recycled timber was the minimum requirement; sustainable and "progressing towards sustainable" were optional variants. Criteria for "legality" and "sustainability" were set out, and in 2004 the Central Point of Expertise on Timber (CPET) was established to provide guidance to government purchasers on how to meet the criteria, and also to conduct training and awareness-raising exercises.

The policy subsequently changed on a number of occasions. From April 2010, government buyers have been required to source sustainable or recycled products only, or (until 2015) FLEGT-licensed products from VPA countries (see further in Section 4).⁴⁵ If no sustainable, recycled or FLEGT-licensed products are available for the specific use required, legal-only products are acceptable. The legality and sustainability criteria have been amended on a number

⁴² Ibid.

⁴³ TPAC, 'Summary of the revised judgement of the Timber Procurement Assessment Committee (TPAC) on the Malaysian Timber Certification System (MTCS)', 22 October 2010; [http://www.tpac.smk.nl/webadmin/files/Press%20release%20TPAC%20\(EN\)%20okt%202010%20FINAL.pdf](http://www.tpac.smk.nl/webadmin/files/Press%20release%20TPAC%20(EN)%20okt%202010%20FINAL.pdf)

⁴⁴ 'Dutch panel rejects Malaysian timber certification appeal', *Converting Today* 24 October 2011.

⁴⁵ *UK Government Timber Procurement Advice Note* (April 2010); <http://www.cpet.org.uk/files/TPAN%20April%202010.pdf>; and *UK Government Timber Procurement Policy: Definition of Legal and Sustainable for timber procurement* (fourth edition, April 2010); <http://www.cpet.org.uk/files/Definition%20of%20legal%20and%20sustainable%20fourth%20edition%20April%202010.pdf>

of occasions; the latest revision added a number of social elements of sustainability to the contract conditions of the procurement contract (unlike other EU member states, the UK had previously held the view that most social issues could not be included in the sustainability criteria, though it eventually changed its mind).

CPET conducts regular assessments of the major certification schemes to judge whether they provide sufficient evidence of the legality and sustainability criteria; the next is due by the end of 2014. FSC and PEFC-certified timber do meet the criteria, and in practice this is the easiest way for suppliers to demonstrate compliance with the procurement policy; this is the so-called Category A evidence. Acceptable schemes must ensure that at least 70 per cent (by volume or weight) is from a legal and sustainable source, with the balance from a legal source. Category B evidence is other forms of proof of evidence of legality and sustainability (with the same 70 per cent sustainable minimum requirement); in practice, this is relatively infrequently used. In March 2010, CPET estimated that in 60–70 per cent of cases buyers were able to source products supported by Category A evidence. The vast majority of the remaining 30–40 per cent were instances of “broken” chains of custody, where the supplier was not itself certified, but could nevertheless show that the products did derive from certified sources. Only in about 2–5 per cent of cases did products originate from non-certified sources; generally these were tropical timber products.⁴⁶

The UK criteria for legality include requirements relating to legal use rights and respect for other parties’ tenure and use rights:

- 1.1 The forest owner/manager holds legal use rights to the forest.
- 1.2 There is compliance by both the forest management organization and any contractors with local and national legal requirements including those relevant to:
Forest management;
Other parties’ tenure and use rights.

Tenure and use rights are also included in the social criteria which should be reflected in contract conditions:

Management of the forest must have full regard for:

Identification, documentation and respect of legal, customary and traditional tenure and use rights related to the forest;

(The inclusion of these criteria in contract conditions rather than technical specifications or the subject matter of the contract (three different stages of the procurement process) is an oddity of the UK approach to timber procurement, and one where it differs from other EU member states. In any case, however, as noted, the main route for satisfying the UK criteria is by providing FSC or PEFC-certified products, and since both schemes contain all the social criteria set out in the UK policy (and more), the inclusion of additional criteria in contract conditions, rather than in technical specifications or the subject matter of the contract is largely irrelevant.)⁴⁷

Unlike the Dutch and old Danish criteria, the issue of conversion is not mentioned explicitly, but is arguably implicit in criterion 2.5:

- 2.5 Management of the forest must ensure that forest ecosystem health and vitality is maintained. In order to achieve this, the definition of sustainable must include requirements for:

Adequate protection of the forest from unauthorised activities such as illegal logging, mining and encroachment.

⁴⁶ UK CPET, pers. comm., March 2010.

⁴⁷ For a longer discussion, see Duncan Brack, *Social Issues in Timber Procurement* (Chatham House, October 2010), p. 64.

However, conversion is dealt with explicitly in the separate document which sets out the criteria for evaluating certification schemes (Category A evidence). This document incorporates all the basic legality and sustainability criteria, but adds considerably more detail in terms of requirements for standard-setting, certification, accreditation, chain of custody and national application processes.

The first two editions of the evaluation criteria contained no mention of forest conversion. As part of the process of revising the various CPET guidance documents after the decision to add new social criteria, however, in early 2010 CPET undertook a consultation exercise on amendments to the evaluation criteria. This included, as well as a general update and the inclusion of the new social criteria, proposals to include two new criteria, one of them to address the issue of certification following conversion from natural or semi-natural forest. This, it was argued, would address stakeholder concerns and also further align UK government policy with Denmark's and the Netherlands' timber procurement policies.⁴⁸

The consultation, on text proposed by CPET's Technical Panel, closed in March 2010, and new evaluation criteria were published the following month.⁴⁹ They include:

2.7 The certification scheme must include measures which limit and clearly describe and justify the circumstances in which certification may be awarded to a forest, the character of which has been subject to planned and systematic transformation in a concentrated period of time with the consequence of significantly reducing the forest's biodiversity and/or health and vitality of the forest ecosystem; for example, the conversion of natural forest or forest with many of the characteristics of natural forest to industrial forest plantation.

Guidance on Interpretation:

Certification schemes may limit the circumstances in which affected forests may be certified in whatever ways they consider appropriate.

A score of 2, 1 or 0 shall be awarded based on the degree of assurance provided that timber from forests that have been the subject of transformation, as described in the criterion, will enter the supply chain as timber from certified forests only in clearly defined and justifiable circumstances.

Following the publication of this updated evaluation criteria, the two main certification schemes were assessed against them; the results were published in December 2010.

The FSC scheme was judged to have fully addressed criterion 2.7 in the evaluation criteria. As noted in Section 2.1, some stakeholders were critical, but the CPET Technical Panel found the FSC criteria convincing.

As described in Section 2.2, the PEFC scheme was judged to have only partially addressed criterion 2.7. Under the CPET evaluation criteria, to achieve recognition as delivering the requirements for sustainability the scheme must achieve a score of at least 1 for each criterion applicable to sustainability, as well as an overall score equal to 75 per cent of the total possible. PEFC achieved both of these, so qualified as meeting the UK requirements.

3.4 Conclusions

Those timber procurement policies which in practice rely on FSC and PEFC-certified timber to fulfil their criteria (whether or not detailed criteria are published) – including the British, Danish Dutch and German schemes – should effectively exclude conversion timber, as long as they are properly implemented and policed. Procurement policies with weaker criteria – such as the French or Japanese systems – may not.

⁴⁸ <http://www.cpet.org.uk/uk-government-timber-procurement-policy/evidence-of-compliance/cpet-s-assessment-of-evidence/review-comments-1/2010-consultation-on-new-guidance-criteria>

⁴⁹ CPET, UK Government Timber Procurement Policy: Criteria for Evaluating Certification Schemes (Category A Evidence) (third edition, April 2010); <http://www.cpet.org.uk/uk-government-timber-procurement-policy/files/Category%20A%20Criteria%20April%202010.pdf>

4. Treatment of Conversion Timber in FLEGT VPAs

The EU published its Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT) in 2003; it remains the most ambitious set of measures aimed at illegal logging and forest governance adopted by any consumer country or bloc to date.

The negotiation of FLEGT voluntary partnership agreements (VPAs) with timber-producing countries lies at the heart of the FLEGT approach. When fully implemented the VPAs will put in place in each partner country a legality assurance system designed to identify legal products and license them for export to the EU (unlicensed products will be denied entry at the EU border), combined with capacity-building assistance to set up the legality assurance and licensing scheme, improve enforcement and, where necessary, reform relevant laws.

By August 2013, VPAs had been concluded with Cameroon, Central African Republic, Ghana, Indonesia, Liberia and Republic of Congo (though some have yet to be ratified). VPA negotiations were under way in Côte d'Ivoire, Democratic Republic of Congo, Gabon, Guyana, Honduras, Malaysia, Thailand, and Vietnam; a number of other countries were expressing an interest in entering negotiations.

The licensing systems established under the terms of the VPAs aim to prevent the export of timber products which have not been licensed as legally produced from the partner country to the EU. What is “legal” is defined in relation to the laws of the country of harvest of the timber. This is not always straightforward; in some countries, forest law is not always clear, and laws agreed by national governments sometimes conflict with those adopted by regional or local governments. Even where the laws are clear, there may be uncertainty over which are relevant to the consideration of “illegal logging” – those relating to timber harvesting or the payment of royalties or export duties are obviously important, but laws regulating the working conditions of truckers transporting the timber, for instance, may be more tangential. In several cases the VPA negotiation processes have seen the adoption of multi-stakeholder processes to agree operational definitions of “legal timber,” and several VPAs contain commitments to legal reform to make the laws clearer and more comprehensive.

Against this background, how is conversion timber dealt with by the six VPAs agreed so far? All of them have essentially the same structure and contain many common elements. However, since they rest on country-specific legality definitions, inevitably they will vary in detail. None deal explicitly with the question of conversion, but their legality definitions do contain relevant elements. The following analysis looks at three elements:

- Definitions of legality – what the VPA defines as “legal timber.”
- The extent to which the legality definition covers requirements for conducting forest clearance, including the need for permits and other conditions such as payment of taxes.⁵⁰
- The treatment of questions of land tenure and ownership in the VPA.

4.1 Cameroon

The EU-Cameroon VPA was agreed in May 2009, formally signed in October 2010 and ratified in August 2011.⁵¹ Article 1(k) of the agreement sets out its definition of legality:

(k) ‘Timber produced or acquired legally’: timber originating or coming from one or more production or acquisition processes, including imported timber, which conforms entirely to all the criteria laid down in the laws and regulations in force in Cameroon and applicable to the forestry sector, and verified/controlled in accordance with the terms and conditions set out in Annex II.

⁵⁰ The analysis of this element is taken from Hewitt, *A Review of Legality Definitions*, which contains considerable detail.

⁵¹ http://www.euflegt.efi.int/files/attachments/euflegt/cameroon_eu_vpa.pdf

Annex II (“Legality Matrices”) explains this in more detail. The legality definition, which was drawn up through a multi-stakeholder process, is framed around five criteria covering essential aspects of forest production and processing: (1) administrative/fiscal obligations, (2) harvesting, forest management, and processing operations; (3) transport; (4) social; and (5) environmental obligations. For each criterion, indicators and verifiers have been identified to demonstrate compliance. Once compliance is assured, a “certificate of legality” is issued, valid for either one year or six months. The certificate forms one part of the requirements for the FLEGT license.

The matrices are complex and contain cross-references to a range of national laws and decrees governing forestry operations. References to land ownership or tenure are absent, however. Indeed, the only section of the VPA where this issue is mentioned is Annex VIII, “Criteria for Evaluation of the Legality Assurance System” (a common element to all VPAs) which, in its criteria for the definition of legality, includes: “laws which cover ... other users: respect for other parties’ legal tenure or rights of use of land and resources that may be affected by timber harvesting rights, where such other rights exist.” The description of the Legality Assurance System itself, however, which is contained in Annex III, contains no such reference.

A number of permit types could be issued for forest clearance, including salvage licenses (ARB), cut timber (VC) and potentially community forest licenses (FC). The allocation process for each permit type is described in detail in the legality definition; all types of permit require that the entity demonstrates the right to forest resources, holds the required permit, adheres to a public tender process (where applicable), can demonstrate competency to perform the activity, has not been suspended and has paid applicable taxes and fees.⁵² When the VPA is fully implemented, the verifiers listed in the legality definition should provide the ability to identify illegality in the allocation process and compliance with permit requirements in clearance activities.

NGOs are increasingly raising concerns about the award of mining and palm oil concessions in a manner which lacks transparency and, it is claimed, fails to respect the land and resource rights of local communities. In practice, companies are able to operate in forests, even in the permanent forest domain, without demonstrating clear, authorized permits from competent authorities responsible for forest resources. In addition, these cases indicate that multiple resource rights may be granted from different sectors (mining, agriculture and forestry) covering the same land area. This illustrates confusion and a lack of coordination in land-use allocation in Cameroon at present. In addition, corruption is rife. In 2011 the independent monitor estimated that the government was involved in 80 per cent of all forest infractions.⁵³

Annex IX to the VPA, which contains the schedule for implementation of the agreement, includes a process of reform of the legal framework (section 5). There is no specific reference to land tenure or ownership, though the commitments are fairly general (“reform of forestry law;” “improvement of legal framework”). NGOs have called for the reform process to include strengthening land tenure and access rights, and for Cameroon stakeholders to be better informed of their rights.⁵⁴

The legal reform process is supposed to take place during years 1–3 (year 1 starting with the signing of the agreement, in October 2010). The process is ongoing and, alongside reform of the 1994 Forest Code and associated decrees, the President of Cameroon has hinted that a reform of the land law will also take place, though the details are not yet clear.⁵⁵

⁵² Hewitt, *Potential Legality Issues from Forest Conversion Timber*.

⁵³ Forest Watch Special – VPA Update (FERN, November 2011), p. 2.

⁵⁴ See A Civil Society Counter-brief on the Cameroon–EU VPA (LoggingOff, May 2010).

⁵⁵ Forest Watch Special – VPA Update (FERN, November 2011), p. 1.

4.2 Central African Republic

The EU-Central African Republic VPA was agreed in December 2010, formally signed in November 2011 and ratified in July 2012. It is intended that FLEGT-licensed exports will be available from 2014, though implementation problems are likely to be significant; with an estimated per capita income of \$800 (2011), the Republic is one of the least developed countries in the world. In addition, the overthrow of the President by rebels in March 2013 has largely frozen progress with implementation.

Article 2(i) of the agreement contains the following definition:

- (i) ‘Timber that is legally produced or acquired’: harvested or imported timber and derived products, produced in accordance with the legislation specified in Annex II.

Annex II (“Definition of Legally Produced Wood”) sets out a legality matrix, drawn up through a multi-stakeholder process, comprising indicators grouped around ten main themes: 1. The company has a legal existence; 2. Legal access rights to forest resources in its area of operation; 3. Compliance with environmental legislation; 4. Rights of workers, local and indigenous communities; 5. Legislation on forest logging; 6. Processing of forest products; 7. General and forest taxation; 8. The transport and traceability of timber forest products is in accordance with the regulations; 9. Compliance with contractual obligations; 10. Relations with sub-contractors in activities other than timber production.

Unlike other VPA countries, the agreement excludes the domestic market (timber produced and consumed within CAR, and also community and artisanal logging (community forests of no more 5,000 ha, and artisanal logging or no more than 10 ha, respectively), on the basis that timber exports derive primarily from exploitation and land-use permits (PEAs) issued to industrial logging companies, together with some timber from old teak plantations. Although the 2008 Forest Code provides for the legalization of traditional activities, implementing measures have yet to be drawn up, so at present all traditional activities are defined as “informal.” The legality matrix thus applies only to timber from PEAs and plantations, though in due course it is intended that its application will be widened.

Criterion 2.1 (“The company holds the necessary concessions authorizing it to log the forest resources”) contains two relevant indicators:

Indicator 2.1.1: All stages (informing the population, tender, application for concession, award committee, including the independent monitor) leading to the allocation of a logging concession have been properly followed by the company, observing the deadlines set by the laws and regulations of the CAR, before and after enactment of Law No 08.022 on the Forest Code.

Indicator 2.1.3: In the case of plantations belonging to a private individual or community, the individual or community has a property title.

These are the only references to land ownership or tenure in the VPA, apart from Annex VII, the standard “Criteria for Evaluation of the Legality Assurance System” annex (see above in Section 4.2).

It is not clear what permits could be issued for forest clearance for agriculture (or any other use) – neither PEAs nor plantation permits allow this. It also seems unlikely that the new permit types to be developed, for artisanal and community forest use, would cover clearance either.

NGOs have identified a series of problems with the state of forest governance in CAR, including tensions over community rights of access and usage: “communities are confronted by long lists of prohibitions, which explain the significant tensions in all zones: communities do not fully enjoy the rights that have been recognized. One could sum this up by the fact that the law provides more of a “principle of prohibition” than a “right to.”⁵⁶ The “legality grid” for community forests does not exist (because of the lack of implementing measures under the Forest Code), but should

⁵⁶ A Civil Society Counter-brief on the CAR–EU VPA (LoggingOff, July 2012), p. 9.

be drawn up under the VPA legal reform process; problems over land law may make this a difficult process. Civil society appears to have good opportunities for participation and input, but in general lacks capacity and experience. However, illegal forest conversion does not appear to be a significant threat at present.

4.3 Ghana

The EU-Ghana VPA was agreed in September 2008, formally signed in November 2009 and ratified in March 2010.⁵⁷ Article 2 (i) of the agreement defines “legally produced timber” as “timber products harvested or imported and produced in accordance with the legislation as set out in Annex II.” Article 7 contains a similar definition:

For the purposes of this Agreement, a definition of ‘legally produced timber’ is set out in Annex II. The definition sets out Ghana's national and sub-national legislation that must be complied with in order for timber products to be covered by FLEGT licenses. It also sets out the documentation including criteria and indicators that shall serve as proof of compliance with such legislation.

As with Cameroon, the legality definition was drawn up through a multi-stakeholder process; it is described in a legality matrix listing all the relevant laws and regulations which apply, and has also triggered a process of reform and consolidation. It is rather more explicit, however, in dealing with questions of land ownership. The annotated legal definition contained in Annex II of the VPA specifies that:

A product containing wood sourced from Ghana can be licensed for sale within Ghana or for export from Ghana:

(a) in cases where the source and ownership is a felling permit:

(i) timber originated from prescribed sources and the individual, group and owners concerned gave their consent to the logging of the resource;

Criterion 1.2 of the legality matrix (“Land owner, individual or group written consent”) identifies a number of relevant laws and regulations dealing with procedures for granting timber rights by the owners of land.

Annex VII, “Criteria to Assess the Operational Legality Assurance System,” contains the same language as the equivalent annex in other VPAs in its criteria for the definition of legality, which includes “laws which cover ... other users: respect for other parties’ legal tenure or rights of use of land and resources that may be affected by timber harvesting rights, where such other rights exist.” Unlike many of the others, however, this is picked up in the description of the Legality Assurance System itself, which is contained in Annex V; the responsibility for checking whether owners have given consent to their land being subjected to the grant of timber rights rests with “FC-FSD checks on public notification through districts’ quarterly reports” (Criterion 1.2). The procedure is described as follows:

On-reserve

Consent embodied in the reserve management plan (FC-FSD) [Forestry Commission – Forest Services Division].

Off-reserve

Land owner and affected farmer(s) identified through District Assembly, Traditional Council, Unit area, District Forest Office as part of the consultation process; constitute field inspection team as stated by law (FC-FSD);

Any tenure disputes resolved through arbitration (FC-FSD);

Local stakeholders (e.g., land owners, affected farmers) consented in writing to harvesting of the resource.

⁵⁷ <http://www.euflegt.efi.int/files/attachments/euflegt/ecghanavpaen1doc.pdf>

The VPA legality assurance system has still not been established, however, and no FLEGT licenses are expected to be issued until 2014.⁵⁸ This delay has, however, allowed time for the process of legal reform identified in the VPA to proceed. Set out in Annex III of the VPA, this includes:

Affirmation of local forest tenure and of different stakeholder rights, particularly farmers in different types of forests and clarification of the respective scope of local (including customary) and national institutions in forest management to:

- (a) Sustain forests;
- (b) Develop and exploit forests (both timber and non-timber).

NGOs have criticized aspects of Ghana's land tenure arrangements, pointing to a lack of community involvement in decision-making over the use of forest resources, a lack of access of communities to forest resources and the fact that community tenure rights are not enshrined in the country's constitution.⁵⁹ The legal reform process initiated under the VPA, however, has featured inclusive participatory processes, and a clear focus on tenure reform, particularly of tree tenure (where communities own the land but not the naturally regenerated trees).

The only permit that would allow clear-felling of an area to accommodate large-scale agriculture is a Salvage Permit (SP) issued by the Forestry Commission. Legislation does not require SPs to be issued through competitive bidding but it does stipulate that they are intended for specific purposes only, which includes land undergoing development. The VPA legality definition contains verifiers intended to assess whether the SPs have been validly issued.⁶⁰

4.4 Indonesia

The EU-Indonesia VPA was agreed in May 2011; it has yet to be formally signed or ratified, though this is expected in 2013. As with other VPAs, it contains a comprehensive definition of legality, reached through a multi-stakeholder process, referred to in Article 2 (i):

(i) 'legally-produced timber' means timber products harvested or imported and produced in accordance with the legislation as set out in Annex II.

Annex II sets out five legality standards: 1, 2 and 3 cover state-owned forests (1 is company-managed, 2 community-managed, 3 non-forest zones); 4 covers private land; 5 covers processing facilities. For legality standard 4, the following principles, criteria and indicators apply:

- Principle 1: "timber ownership can be verified."
- Criterion K.1.1: "legal ownership relates to area, logs and trading of the logs."
- Indicator 1.1.1: "private land / forest owner can prove legal status."
- Verifier (a): "land ownership certificate (other deed / approved document) is valid."

There are the usual cross-references to relevant forestry regulations.

Annex VIII, "Criteria for Assessing the Operationality of the Indonesian Timber Legality Assurance System," contains the usual language in its criteria for the definition of legality, which includes "laws which cover ... other users: respect for other parties' legal tenure or rights of use of land and resources that may be affected by timber harvesting rights, where such other rights exist."

This is reflected in the description of the legality assurance system in Annex V, which includes references to recognition of property rights by the National Land Authority. Section 5.1 opens with the statement that "Indonesian

⁵⁸ Forest Watch Special – VPA Update (FERN, November 2012), p. 3.

⁵⁹ A Civil Society Counter-brief on the Republic of Ghana–EU VPA (LoggingOff, June 2010).

⁶⁰ Hewitt, *Potential Legality Issues from Forest Conversion Timber*.

timber is deemed legal when its origin and production process as well as subsequent processing, transport and trade activities are verified as meeting all applicable Indonesian laws and regulations set out in Annex II and when it is derived from a secure supply chain.” Proof of ownership of the forest is not listed, however, amongst the documents that need to be checked by the legality verification body.

Similarly, the legality definition and its corresponding verifiers start with the presence of the appropriate permit; they do not detail the allocation process itself which would enable compliance with the process to be verified. So although the IPK permit is cited specifically for application to forest conversion practices, the legality definition does not provide any provision for assessing the process of allocating this permit. Corresponding legislation does provide some further detail on the allocation process and eligibility of applicants – including requirements, for example, for demonstration of ability to comply with legislation, size limits for conversion areas, time limits, logging plans, etc. – but these are not reflected in the verifiers in the legality definition.⁶¹

Indonesia’s Timber Legality Assurance System (Sistem Verifikasi Legalitas Kayu, or SVLK) was introduced as a mandatory requirement in 2010; a multi-stakeholder process has been under way to revise and improve it. In September 2010 Indonesian NGOs established an independent forest monitoring network to monitor its implementation. By March 2012 half of Indonesia’s major timber firms had achieved SVLK certification;⁶² the government is now providing financial assistance to small-scale producers to help them become certified.⁶³ While all timber utilisation permits in Indonesia are required to be audited under the SVLK system, NGOs have raised doubts over the application of audits to IPK clearance permits.⁶⁴

From January 2013 all timber exports have been required to be accompanied by a “V-Legal Document,” assuring the legality of the products from the point of harvesting to transporting, trading and processing. In late 2012, Indonesia and several EU member states conducted a shipment test as a pilot exercise for the export of timber products with V-Legal Documents, with largely positive outcomes.⁶⁵ It is still not yet clear when the first FLEGT-licensed timber will be available, but the country does appear to be making good progress.

As in other VPA countries, the legal reform process which accompanies the implementation of the VPA has improved transparency and created opportunities for civil society to input.

4.5 Liberia

The EU-Liberia VPA was agreed in May 2011 and formally signed in July 2011; in May 2012 it was ratified by the EU, but has yet to be ratified by the Liberian parliament. As with other VPAs, it contains a comprehensive definition of legality, reached through a multi-stakeholder process, referred to in Article 2 (j):

(j) ‘legally produced timber’ means timber products acquired, produced and marketed by processes that comply with all the statutory and regulatory provisions in force in Liberia, as set out in Annex II;

Article 7 refers to the details set out in full in Appendix A (“Legality Definition, Matrix and Verification Procedures”) to Annex II (“Legality Assurance System of Liberia”).

As in other VPAs, the appendix contains a comprehensive legality matrix of principles, indicators and verifiers. Principle 2 (Forest Allocation) is “the Forest Use Rights covered by the contract was awarded pursuant to the National Forestry Reform Law and the Community Rights Law;” and under this heading, Indicator 2.5 states that “In case of a

⁶¹ Ibid.

⁶² ‘Half of RI’s major timber companies legally certified’, *Jakarta Post*, 24 March 2012.

⁶³ ‘Govt helps small timber product firms get SVLK certification’, 3 August 2012.

⁶⁴ Environmental Investigation Agency, ‘Road to reform & Indonesian Legality Assurance System’, 5 February 2013; <http://www.eia-international.org/the-road-to-reform-the-indonesian-legality-assurance-system>

⁶⁵ See Gunther Hentschel and Emily Fripp, ‘V-Legal/FLEGT shipment test – Lessons learned from the EU visits’ (January 2013), http://www.euflegt.efi.int/files/attachments/euflegt/publications_2013/vlegal_flegt_shipment_test___lessons_learned_from_the_eu_visits.pdf

private use permit (PUP), the contract was awarded upon the written permission of the verified land owner.” Two verifiers are identified: “2.5.1 The valid deed of the private land owner;” and “2.5.2 The written permission of the private land owner.”

The verification guidance is as follows:

Objective:

The aim of this procedure is to ensure that the PUP is only granted where private land ownership is clearly established and upon the written approval of the land owner.

Regulatory Control:

The LVD [Liberia Verification Department] is required to verify the owner of a private land intended to be the subject of a PUP. This will entail checking the submitted deed against public records at the Center for National Records and Documentation (CNDRA).

The verification method is:

Description:

The LVD must verify that the above requirements were met by first reviewing the titled deed to the land, and then confirming that the written permission is in fact from the land owner.

Verification means:

1. Consultation with CNDRA
2. Document review

And the verification frequency is once during the contract period.

As in other VPAs, Annex VI, dealing with “Criteria for Evaluation of the Legality Assurance System,” contains the usual language in its criteria for the definition of legality, which includes “laws which cover ... other users: respect for other parties’ legal tenure or rights of use of land and resources that may be affected by timber harvesting rights, where such other rights exist.” In this case, as can be seen above, this is reflected in the legality assurance system.

Two types of forest permits could potentially be used for forest conversion in Liberia: – Private Use Permits (PUPs) and Timber Sales Contracts (TSCs). Processes governing authorization for and management of TSCs are described in detail in the legislation and the legality definition. Conversion to non-forest use is technically possible after the initial three-year timber harvest period.

The issuance of PUPs, however, has become a major source of controversy. Since 2010 there has been a huge increase in the number of PUPs issued; estimates suggest that by September 2012 sixty-six PUPs had been issued covering 26,000 km² – almost a quarter of Liberia’s territory and over 40 per cent of Liberia’s forests, including 46 per cent of the country’s intact rainforest. Unlike other forest use licenses, which generally aim at sustainable timber operations, PUPs are very lightly regulated, with no size limit and very few restrictions on how logging operations are carried out; when the forest regulations were developed, this permit type was not envisaged to be used extensively, and it is not addressed in detail in the VPA’s legality definition either. In addition, evidence has been uncovered of PUPs awarded in violation of Liberia’s Community Rights Law, suspected forged documents and award of PUPs in the absence of the informed consent of communities living in concession areas.⁶⁶

In February 2012 the Forestry Development Authority ordered a moratorium on the operations of most PUPs and on the issuance of further permits, but this was widely ignored. In August President Johnson Sirleaf renewed the moratorium, though later that month, in response to a complaint from the Liberian Timber Association, the Liberian

⁶⁶ Global Witness, Save My Future Foundation and Sustainable Development Institute, *Spoiled: Liberia’s Private Use Permits* (August 2012) and *Signing their Lives away: Liberia’s Private Use Permits and the Destruction of Community-Owned Rainforest* (September 2012).

Senate declared that the moratorium should be lifted, although the legal force of their statement is unclear. The Timber Association has also filed a complaint with the Supreme Court. On 31 August the President appointed an independent commission to investigate the issue and suspended the Managing Director of the Forestry Development Authority.⁶⁷

Once the VPA is ratified, of course, assuming the legality assurance system is implemented fully, timber from PUPs issued without the agreement of the land owner would not qualify as legal. In 2011, in response to letters from the Liberian Sustainable Development Institute querying the issuance of the PUPs, the government replied: “How can the issuance of a PUP ... run contrary to the tenets of the VPA, which was just initialed as early as May 2011, but not yet consummated to take effect on activities of the forestry sector?”⁶⁸ As FERN observed, “This statement is concerning as it does not show active Government commitment towards implementation.”⁶⁹ NGOs remain supportive of the VPA, however, seeing it as a possible means of achieving lasting reform of the forestry sector.

Draft regulations detailing PUP use have recently been developed and will be undergoing stakeholder consultation and review during the second quarter of 2013. When the new regulations are in place, the processes for applying PUPs to forest conversion should be clearer.

Agricultural concession contracts are mentioned in the legality definition but only in reference to the production of rubberwood, which is listed in the products covered by the FLEGT license. This contract type also requires the development of regulations to define and govern approval and implementation; at present it is only described at the policy level, and further clarification is required to determine whether this could be a source of timber from forest conversion.

Recent cases of companies clearing land for commodity agricultural development in Liberia have been subject to scrutiny and criticism, particularly regarding community rights issues and lack of consultation.⁷⁰ To date, these developments have taken place on farmland, but companies are now targeting forest areas for future expansion, at which point they will need to seek the appropriate permit from the FDA. Therefore it is important that authorization requirements for the appropriate permits be clarified and coordination between the Ministry of Agriculture and Forest Development Authority (FDA) for all approvals is effective and transparent.⁷¹

4.6 Republic of Congo

The EU-Republic of Congo VPA was agreed in May 2009, formally signed in May 2010 and ratified in July 2012. As in other VPAs, “legal timber” is defined in Article 2:

- (i) ‘Legally produced timber’ is deemed to be any timber from acquisition, production and marketing processes that meets all of the statutory and regulatory provisions in force in Congo applicable to forest management and logging according to Annex II.

Article 7 refers to the legality matrices set out in Annex II. There is no specific reference to land tenure or ownership. The list of “laws, principal sets of regulations and regional and international agreements taken into account in determining the legality of forestry products” which comes at the end of Annex II contains a single reference to “Law No 17-2000 of 31 December 2000 relating to land ownership.”

⁶⁷ ‘Illegal logging report gets Liberia’s attention – forestry chief suspended’, NBC News, 4 September 2012.

⁶⁸ Forest Watch Special – VPA Update (FERN, November 2011), p. 3.

⁶⁹ Ibid.

⁷⁰ Forest Peoples Programme, Human rights-based analysis of the agricultural concession agreements between Sime Darby and Golden Veroleum and the Government of Liberia (December 2012).

⁷¹ Hewitt, *Potential Legality Issues from Forest Conversion Timber*.

As with all the other VPAs, Annex VII, dealing with “Criteria for Assessing the Operational Legality Assurance System in Congo,” contains the usual language in its criteria for the definition of legality, which includes “laws which cover ... other users: respect for other parties’ legal tenure or rights of use of land and resources that may be affected by timber harvesting rights, where such other rights exist.” This is not reflected in the legality assurance system itself, as described in detail in Annex III.

Two types of permit could be used for clearing forests – the industrial processing agreement (CTI), which is detailed in the legality definition, including provisions for allocation, and an agricultural permit which is issued directly by the Ministry of Agriculture and is not included in the legality definition. Oil palm companies operating in Congo to date are using this second type of permit, and their operations include some forest clearance activity. It is not clear whether the Ministry of Agriculture is collaborating with the Ministry of Forest Economy and the Environment for the issuance of these permits.

The presence of a permit authorized by the Ministry of Agriculture which enables trees to be cut and sold during clearance is of concern, and the situation merits further investigation to clarify requirements. If this is to be a recognized legal source of timber, provisions for this permit type need to be included in the legality definition in order for legality to be verified.⁷²

Annex IX to the VPA identifies a wide range of laws and regulations needing to be reformed or supplemented. These include the need for decrees laying down the terms of involvement of local communities, indigenous populations and civil society in various decisions, and the need for regulations specifying the concept of community forests, which does not exist in the current Forest Code.

Implementation of the VPA has been slow, and the original deadline for issuing the first FLEGT licenses, of December 2012, was missed. Legal reforms are under way, although the process has not proved particularly transparent or participatory – unlike the development of the legality definition, which was achieved through a multi-stakeholder process. NGOs regard the clarification and recognition of the rights of communities to be an essential part of the process.⁷³ Large-scale agriculture is not a significant driver of potentially illegal forest clearance at the present, but it may become more of a concern in the future.

4.7 Conclusions

The VPAs represent an ambitious attempt to deal with the problem of illegal logging, and even though none of them have yet developed a functioning licensing scheme for timber exports (though Indonesia is close), their negotiation and implementation have contributed to a process of legal reform and improvements in governance in each country – albeit a much slower one than originally anticipated.

It is not clear, however, how well they deal with forest conversion, for agriculture or any other use. Only Indonesia, for example, possesses a specific “conversion permit” (though the allocation process for it is not included in the VPA’s legality definition); Cameroon, Ghana and Liberia have permit types which could address conversion practices, but in Central African Republic and Republic of Congo the issue is still to be clarified. It is likely, therefore, that the legality definitions alone may not be enough to address the legality of wood coming from all forest types cleared for agricultural use, though the issue may be addressed in the law reform processes triggered by the VPAs.

It is also possible that permits exist which result in timber production, perhaps from other sectors (i.e., agriculture clearance permits), which were not included as legal timber sources in the legality definition at the time of its development. These sources will not, therefore, be subject to the requirements of the legality assurance system, and will not receive a FLEGT license for export. However until the VPA is fully implemented in each country, including in the domestic market, this timber could conceivably enter the domestic and possibly the regional market supply.

⁷² Ibid.

⁷³ See A Civil Society Counter-brief on the Republic of Congo–EU VPA (LoggingOff, March 2010).

More positively, all six legality definitions contain provisions relevant to the implementation of clearance practices, including payment of applicable fees and taxes, requirements for environmental impact assessments and environmental mitigation measures throughout, and social obligations during operations (except in Indonesia). The legality definitions should therefore be as effective in identifying illegality in forest clearance as in forest management.

Finally, as noted, even where systems exist for the allocation of permits, in many cases there are currently problems with their implementation, resulting in over-allocation or allocation in defiance of the law. It is also not clear to what extent the transparency provisions in the VPAs are yet working to provide full information to the public. Of course, when the VPA is fully implemented these problems should be picked up by the independent auditors, which must be appointed under each VPA to monitor the application of the legality assurance system, and by the independent monitors that are also being established in most VPA countries.

5. Treatment of Conversion Timber in the US Lacey Act, EU Timber Regulation and Australian Illegal Logging Prohibition Act

The major benefit of a licensing system such as that established by the FLEGT VPAs is that it creates a means of distinguishing between legal and illegal timber. Any product possessing a license is allowed to enter the country of import (the EU, in this case); any other product is barred from entry. As can be seen from Section 4, however, the vast bulk of timber in trade is not covered by any licensing system; only six countries have signed VPAs and none yet have functioning systems. Timber species listed under the Convention on International Trade in Endangered Species (CITES) do require export and in some cases import permits, but until recently the majority of those species have not been traded commercially; the addition of a large number of species in March 2013 has extended the agreement's coverage, but this still represents a small proportion of timber in trade. And although an increasing volume of timber is identified under the private certification schemes considered in Section 2, this still accounts for only about 27 per cent of global industrial roundwood production.

Accordingly, the US, EU and Australia have all taken broader measures to exclude illegal timber products from their markets. Although their aim is the same, the mechanisms they have chosen differ. This section considers how conversion timber might be treated under the US Lacey Act, the EU Timber Regulation and the Australian Illegal Logging Prohibition Act.

5.1 The US Lacey Act

In May 2008 the US Congress voted to extend its 100-year old Lacey Act to plants, including timber. This legislation already made it illegal to import or handle fish and wildlife produced illegally in foreign countries; the amendment extended this to plants, with the main aim of targeting illegal timber. This move therefore addressed the problem originally common to consumer-country efforts to tackle illegal logging: that in general timber produced illegally in foreign countries was not illegal elsewhere.

The Lacey Act regulates both intra-US and external trade, including both imports and exports. It makes it unlawful to "import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce ... any plant taken, possessed, transported or sold ... in violation of any foreign law."⁷⁴ In response to industry concerns about what exactly should be prohibited, the amendment included a definition of "illegal timber" (this had not been necessary for wildlife or fish, where the scope of legality had been established though case law). The range of relevant laws includes theft, logging in protected areas or without authorization, payment of taxes and fees, and transport regulations; issues of tenure or ownership are not explicitly mentioned.

⁷⁴ The Lacey Act (Chapter 53 of Title 16, United States Code), section 3372 (a)(B)(2)(i); http://www.illegal-logging.info/item_single.php?it_id=668&it=document.

The penalties involved depend on a number of factors, but mainly on the level of intent that can be shown on the part of the violator:

- Where specific intent can be shown – i.e., the individual knows that the products have been illegally produced – the violator can be convicted of a “felony,” with a maximum penalty of five years’ imprisonment and a fine of \$250,000 (\$500,000 for an organization).
- Where no intent can be shown, but the individual “in the exercise of due care should know” that the products are illegal, the violator can be convicted of a “misdemeanor,” with a maximum penalty of one year’s imprisonment and a fine of \$100,000 (\$200,000 for an organization), or can be subject to a civil penalty fine of up to \$10,000.

In all cases the illegal products can also be forfeit. These forfeitures are authorized on a strict liability basis – i.e., liability that does not depend on actual negligence or intent to harm; there is no “innocent owner” defense. So even where no intent can be shown, and the individual can show that due care has been exercised, the products can still be forfeit. Vessels, vehicles and equipment involved can also be forfeit, but only after a felony conviction, where specific intent can be shown.

The Lacey Act therefore provides a powerful combination of penalties. Anyone found to be handling illegal timber can at the very least expect to have the products confiscated, and where it can be shown that “due care” in acquiring the products has not been exercised, the violator could be subject to fines and possibly imprisonment. The prosecution does not have to prove that the defendant knew which underlying law in the country of origin was violated, just that in some fashion the products were procured illegally. And the term “imports” is defined as including products being trans-shipped through the US, which would not, under customs regulations, normally qualify as imports.

What “due care” means in practice is a key question, and largely remains to be determined through case law, of which there is now beginning to be some, thanks to enforcement actions against Gibson Guitar, which was found to have been importing illegally produced rosewood from Madagascar for several years, and also against a single small import of decorative hardwoods from Peru. As part of its settlement with the authorities (which included paying \$350,000 in fines and forfeiting all the illegal material), Gibson agreed to implement a compliance program to minimize the risk of purchasing illegal timber in the future. This included:

- (1) Work with suppliers to ensure they can implement Gibson’s policies, which include procuring wood from either recycled sources or forests where legal harvest and chain of custody can be verified, and obtaining copies of all relevant import and export documentation and business or export licenses;
- (2) Ask questions to gather information about suppliers and the source of the wood and wood products to determine whether the products meet Gibson’s requirements for known/legal wood products;
- (3) “Conduct independent research and exercise care before making a purchase,” which may include everything from internet research to consulting with US or foreign experts or authorities and making site visits;
- (4) Request sample documentation from suppliers to evaluate Lacey Act compliance and document validity;
- (5) Make a determination prior to making a purchase based on all of the information collected;
- (6) Maintain records of these efforts; and
- (7) Decline to pursue the purchase if there is any uncertainty of legality.⁷⁵

⁷⁵ Cited in ‘Interpreting The Lacey Act’s “Due Care” Standard after the Settlement of the Gibson Guitar Environmental Enforcement Case’ (Arnold & Porter LLP, Advisory, August 2012).

This therefore helps to define what could be considered to be “due care” in future enforcement actions.

It is notable that no specific documentation is mentioned in the compliance program. US officials have repeatedly stressed that in principle no documentation should be assumed to guarantee that the product is legal, though the presence of documents such as FLEGT licenses, or independently verified certification schemes, should go some way towards showing that the importer tried to exercise due care. However, a paper for the US Congressional Research Service highlighted some of the problems of that approach:

One component of a due care process might be employing third parties to verify timber operations in foreign countries (i.e., certification scheme). Third parties can invest resources in particular countries to monitor logging and processing operations for several importers, and provide a certificate to operations that comply with the law. For example, the Forest Stewardship Council (FSC) certifies timber operations to ensure legal, sustainable management of forested land and monitors the chain of custody to trace the life cycle of wood products originating in a certified forest. The effectiveness of third parties to monitor all aspects of plant harvesting and production, however, has been questioned by some. They claim that corruption and fraud can take place, thus undercutting the ability to certify legal wood.⁷⁶ This would lower the credibility of the standard and lower its effect in curbing illegal logging. Further, some certification schemes might not cover all aspects of a due care process and the timber and timber products in question. FSC, for example, does not apply rigorous oversight to “FSC-Controlled Wood,” which is non-FSC-certified wood that is allowed to be mixed with FSC-certified wood. Further, certification schemes may not cover all steps in the succession from harvesting to importation. For example, FSC standards would not cover some laws dealing with the export or processing of wood after harvest that would be subject to the Lacey Act.⁷⁷

Nevertheless, in May 2012 the Lacey Act Defence National Consensus Committee, a group mainly of companies and industry associations, together with some NGOs and FSC, published a “Lacey Act Due Care Standard.”⁷⁸ This was explicitly based on either FSC or PEFC certification or the American Hardwood Export Council / Seneca Creek US hardwood forest assessment (which aimed to demonstrate the very low levels of illegality in US hardwood production). As the Committee commented:

The Standard is expected to reduce market confusion for Lacey Act compliance since it clearly and transparently defines the steps identifying legal forest products throughout the global forest product supply chain through risk, compliance and legal audits and forest certification, providing companies with needed certainty of doing business globally particularly in tropical forest markets of Africa, Asia and South and Central America ...

Based on repeated statements by the United States Justice and Agriculture Departments that an industry standard provides an important measure of due care, the Standard constitutes a legal opinion and provides Lacey Act defenses to strict criminal liability including Due Care, Innocent Owner, seizure, forfeiture, and retroactivity by identifying the law and best global practices.⁷⁹

Conversion Timber and the Lacey Act

How would conversion timber be treated under the Lacey Act? Like the VPAs, but unlike certification schemes and most procurement policies, the Lacey Act is aimed at penalizing those who handle illegal, not unsustainable, timber.

⁷⁶ Frederic Achard et al., *Vital Forest Graphics* (United Nations Environment Programme/GRID-Arendal, 2009), pp. 54–56; http://www.grida.no/files/publications/vital_forest_graphics.pdf

⁷⁷ Pervaze A. Sheikh, *The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products* (Congressional Research Service, July 2012), pp. 19–20.

⁷⁸ See <http://www.laceyduecare.com> for a summary; the full standard is available for \$199.

⁷⁹ ‘National Consensus Lacey Due Care Standard Unanimously Approved’; http://www.laceyduecare.com/Press_Release_on_Unanimous_Approval_2.pdf

As has been seen, conversion timber is more clearly dealt with in definitions of sustainable forest management than it is definitions of legal practices, and therefore the Lacey Act would probably have no effect.

Where the conversion timber clearly is the product of illegal activities, the Lacey Act should act as a deterrent to its import to the US – the more so since the high-profile successful enforcement action against Gibson Guitar. Having said that, whether the authorities did choose to act against an importer of illegal conversion timber would depend on a variety of factors, including the size and value of the shipment, the quality of the evidence and the chances of the action being successful.

If the Lacey Act also encourages US importers to use certification schemes more widely – which it may do, particularly if the “Lacey Act Due Care Standard” is widely adopted – there may also be an indirect impact on conversion timber. As has been seen, both FSC and PEFC now contain reasonably clear prohibitions on certifying conversion timber; the more certified products are imported into the US, the less conversion timber should be present.

5.2 The EU Timber Regulation

The EU, of course, faced the same problems as the US in trying to exclude illegal timber. Even though the gradual appearance of FLEGT licenses under the VPAs should help to tackle this, the way in which the licensing system is being built up, through agreements with individual countries, renders it vulnerable to evasion; illegal products could simply be trans-shipped via non-partner countries to the EU to escape the need for a license.

In October 2008 the European Commission published a proposal for a regulation requiring timber operators who first place timber or timber products on the EU market to establish “due diligence” systems to minimize the risk of illegal products entering the EU. After protracted negotiations between the European Council and Parliament, a new regulation (the EU Timber Regulation) was adopted on 20 October 2010 and became effective on 3 December 2010.⁸⁰ It has applied in full from 3 March 2013.

The regulation 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 minimize the risk of doing so. Placing on the market in this context means the supply of timber or timber products for the first time on the EU internal market; it excludes the sale of products resulting from subsequent processing within the EU. However, traders in the supply chain (anyone who buys and sells within the EU) must be able to identify the operators or traders who have supplied them and, where applicable, the traders to whom they have supplied timber or timber products, and this information must be retained for at least five years.

The regulation applies to all timber products (with some exceptions such as post-consumer recycled material, printed matter and a range of minor products such as handicrafts) from all sources, whether imported or produced within the EU. As with the VPAs, legality is defined in relation to existing national legislation in the country of harvest, and covers rights to harvest timber, payments for harvest rights and timber, laws related 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 CITES permit or a FLEGT license are considered to have been legally harvested for the purposes of the regulation (so for VPA countries, the Regulation will in practice be irrelevant).

The regulation does not demand proof of legality of timber products but 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. Further details of the due diligence system were published as an

⁸⁰ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010; <http://www.illegal-logging.info/uploads/129520101112en00230034.pdf>.

implementing regulation in July 2012, and a guidance document is also available.⁸¹ Operators must analyze 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 or third-party verification.

The regulation allows operators either to establish their own due diligence systems or use systems provided by “monitoring organizations.” These organizations will need to apply to the European Commission for recognition and will be obliged to check that operators are implementing their systems properly. Their performance will be checked by competent authorities in the member states, and failure to ensure proper implementation may result in withdrawal of a monitoring organization’s recognition.

Conversion Timber and the EU Timber Regulation

Just as with the US Lacey Act, the EU Timber Regulation is designed to prevent the import of illegal, not unsustainable, timber. Conversion timber which has been legally produced will therefore not be affected by the regulation.

Where the conversion timber clearly is the product of illegal activities, the regulation should act as a deterrent to its import to the EU. In this respect, the regulation is rather more specific than the Lacey Act, including legal rights relating to tenure in its definition of applicable legislation.

Also, the regulation explicitly encourages the use of certification. Para 19 of the preamble states that “In order to recognize good practice in the forestry sector, certification or other third party verified schemes that include verification of compliance with applicable legislation may be used in the risk assessment procedure.” Article 6, on due diligence systems, lists in the description of the risk assessment procedures to be followed by operators: “Such procedures shall take into account ... relevant risk assessment criteria, including: – assurance of compliance with applicable legislation, which may include certification or other third-party-verified schemes which cover compliance with applicable legislation” (Article 6(1)(b)).

The July 2012 implementing regulation (Article 4) lists criteria which certification or other schemes would be expected to satisfy if they are to be used in the risk assessment and risk mitigation processes:

- (a) they have established and made available for third-party use a publicly available system of requirements, which system shall at the least include all relevant requirements of the applicable legislation;
- (b) they specify that appropriate checks, including field-visits, are made by a third party at regular intervals no longer than 12 months to verify that the applicable legislation is complied with;
- (c) they include means, verified by a third party, to trace timber harvested in accordance with applicable legislation, and timber products derived from such timber, at any point in the supply chain before such timber or timber products are placed on the market;
- (d) they include controls, verified by a third party, to ensure that timber or timber products of unknown origin, or timber or timber products which have not been harvested in accordance with applicable legislation, do not enter the supply chain.

The guidance document adds slightly more detail on how certification of similar schemes should be used in practice, including indicating what information operators need to check and have access to.

⁸¹ See European Commission Environment Directorate-General, ‘Timber Regulation’, http://ec.europa.eu/environment/forests/timber_regulation.htm

Fairly clearly, then, the EU Timber Regulation should have the impact of encouraging EU importers to use certification schemes more widely, in turn reinforcing the growth of such schemes world-wide and reducing the imports of conversion timber into the EU.

FLEGT-licensed timber is automatically assumed to be in compliance with the Regulation, so for VPA countries the provisions in their VPAs relevant to conversion timber are the key issue. As seen above in Chapter 4, these provisions are not always satisfactory.

5.3 The Australian Illegal Logging Prohibition Act

Australia's Illegal Logging Prohibition Act was passed by its parliament in November 2012. Similar in principle to the EU Timber Regulation, it prohibits the import of all timber products containing illegally logged timber, and the processing of domestically grown raw logs that have been illegally harvested. Illegally logged timber is defined simply as timber "harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested."⁸²

The Act places a requirement on importers of "regulated timber products" and processors of domestic raw logs to undertake due diligence to mitigate the risk of products containing illegally logged timber. Importers are to be required to complete a statement of compliance with the due diligence requirements alongside the customs import declaration. The definition of "regulated timber products" and the exact processes for carrying out due diligence was to be defined later in secondary legislation. Finally, the act puts in place a comprehensive monitoring, investigation and enforcement regime to ensure compliance.

The Illegal Logging Prohibition Regulation Amendment 2013 was registered on 31 May 2013, and will come into effect on 30 November 2014, two years after the Act was passed. The regulation defines "regulated timber products," which are most types of timber and wooden products, including pulp and paper, but excluding fuelwood, wood packing materials, handicrafts and printed matter. Products made from recycled timber, and products imported in very small shipments (with a value less than A\$1,000) are exempt.

The regulation also provides details of the due diligence procedures, which are described separately for importers and for processors. Importers must have access to a similar list of information as required by operators under the EU Timber Regulation, including the type of product (including trade name and scientific name), the product's country, region and forest harvesting unit of harvest, the country in which the product was manufactured, their volume or weight and details of their suppliers.

For information on compliance with legislation in the country of harvest, the regulation provides for two specific cases: where a "timber legality framework" exists or where a "country-specific guideline" applies. Timber legality frameworks are defined as the FLEGT licensing scheme, and the FSC and PEFC certification schemes; country-specific guidelines remain undefined for the present. In each case, the importer must have access to a copy of the relevant license or certificate providing evidence of compliance with the framework or guidelines and, under the due diligence procedure, assess whether the information contained is likely to be accurate and reliable. If no such framework or guidelines exist, the importer must assess the likelihood of the product being illegal based on information about the prevalence of illegal logging in the area of harvest, the presence of armed conflict, the complexity of the product and any other information that may reasonably suggest that product is made from or includes illegal timber. Clearly, the use of the timber legality framework is likely to be easier – which is likely also to be the impact of the EU Timber Regulation, though in the Australian case it is stated explicitly.

The procedures for Australian processors of raw logs are largely the same, except that the provision for country-specific guidelines are replaced by (Australian) state-specific guidelines, which are yet to be defined.

⁸² Illegal Logging Prohibition Act, Section 7.

Conversion Timber and the Illegal Logging Prohibition Act

Just as with the US Lacey Act and the EU Timber Regulation, the Illegal Logging Prohibition Act is designed to prevent the import (and processing) of illegal, not unsustainable, timber. Conversion timber which has been legally produced will therefore not be affected by the legislation; where the conversion timber clearly is the product of illegal activities, the Act should act as a deterrent to its import.

The detailed regulations clearly encourage the sourcing of FLEGT-licensed timber, and of timber certified under the FSC or PEFC schemes. Similarly to the EU Timber Regulation, this should encourage the uptake of the certification schemes (as there is as yet no FLEGT-licensed timber available) and reduce the imports of conversion timber into Australia.

FLEGT-licensed timber is automatically assumed to be in compliance with the Act, so for VPA countries the provisions in their VPAs relevant to conversion timber are the key issue. As seen above in Chapter 4, these provisions are not always satisfactory.

5.4 Conclusions

These three measures all aim to exclude illegal, not unsustainable, timber products. As has been seen, conversion timber is more clearly dealt with in definitions of sustainable forest management than it is in definitions of legal practices, and therefore these measures may not have much of an impact, though this depends on the extent to which the timber is itself the product of illegal conversion, and how easily the illegality can be identified. However, all the three measures, and particularly the EU and Australian legislation, with their requirements on operators to put in place due diligence systems, are likely to encourage the uptake of certification schemes, which should, as discussed in Chapter 2, exclude conversion timber. Question marks may remain over uncertified timber imports.



The Family of Forest Trends Initiatives

Ecosystem Marketplace

A global platform for transparent information on ecosystem service payments and markets

Water Initiative

Protecting watershed services through markets and incentives that complement conventional management

Forest Trade & Finance

Bringing sustainability to trade and financial investments in the global market for forest products

BBOP

Business and Biodiversity Offsets Program, developing, testing and supporting best practice in biodiversity offsets

the katoomba group

Building capacity for local communities and governments to engage in emerging environmental markets

Communities and Markets

Supporting local communities to make informed decisions regarding their participation in environmental markets, strengthening their territorial rights



Using innovative financing to promote the conservation of coastal and marine ecosystem services

Public-Private Co-Finance Initiative

Creating innovative, integrated, and efficient financing to support the transition to low emissions and zero deforestation land use

Learn more about our programs at www.forest-trends.org