

## The VPA in Honduras:

### An Opportunity to Take Forward the Forestry Reform Started with the 2007 Forestry Law

**This Information Brief revises and updates a previous version of the same article that was published in February 2013. With the aim of supporting civil society engagement in the VPA process in Honduras, the brief describes some of the key forest governance challenges that the country faces as well as some emerging priorities of local stakeholder groups.**

#### Introduction

In January 2013 Honduras and the European Union (EU) started formal negotiations on a Voluntary Partnership Agreement (VPA). A VPA is a bilateral trade agreement between the EU and a country that exports timber products to the EU. But a VPA is not only about timber and trade – it is a partnership agreement that seeks to support the partner country in its efforts to improve forest governance.

This partnership element appears particularly important in the case of Honduras. Given the limited wood product trade with the EU,<sup>1</sup> legality assurance of timber exports is widely seen as a secondary concern by most stakeholders in the country, and there is a growing consensus that the VPA should focus on the underlying drivers of poor forest governance. This requires broadening the discussion to take in a greater range of issues or commodities that impact on forests and forest communities, including, for example, corruption, forest land tenure, and extra-sectoral deforestation drivers. In principle anything that is considered relevant to forest governance can be put on the agenda for discussion as part of the VPA process (Bollen and Ozinga 2013).

While VPAs allow for great flexibility, they have common elements. A key one is the Legality Assurance System (LAS), which is the main tool for guaranteeing the legality of timber products covered by the VPA. Several structural elements of the LAS can be seen as building blocks for improving forest governance, such as (i) the legality definition, (ii) control of the supply chain, (iii) verification procedures, and (iv) auditing and monitoring mechanisms (Bollen and Ozinga 2013). This Forest Trends Information Brief focuses on these governance building blocks. For each one, the article points out relevant experiences in other VPA countries, discusses the main challenges faced by Honduras, and describes some emerging priorities of local stakeholder groups involved the VPA process.

#### Definition of Legality

For Honduran stakeholders one of the first steps in the VPA process will be to jointly agree on a definition of 'legal timber', based on the country's own laws and regulations. In this section three sets of issues with important implications for this task are introduced. The first concerns the Forestry, Protected Areas and Wildlife Law (hereafter Forestry Law) approved in 2007; the second relates to the unclear and overlapping property rights situation found in many rural areas of the country; and the third briefly touches on the issue of Free, Prior and Informed Consent (FPIC).

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<sup>1</sup> In recent years, the annual trade value of VPA core products exported to the EU has often been less than US\$1 million (ICF 2013).

### The 2007 Forestry Law

The development of a definition of legality under a FLEGT<sup>2</sup> VPA agreement is the responsibility of each partner country. It is widely recognized that this definition should not be limited to forestry laws and their regulatory frameworks, but should also include all other applicable (national and international) legislation relevant to forests and local communities, including for instance land tenure laws, environmental regulations, labor norms, justice codes, fiscal arrangements, and trade restrictions and tariffs.

In all VPAs countries,<sup>3</sup> the legality definition exercise has allowed for the identification of necessary legal reforms, whether at the level of the law itself or at the level of implementing decrees of specific aspects (Bollen and Ozinga 2013). In Ghana, for example, local stakeholders recognized early on that existing legal provisions needed to undergo substantial reforms in order to arrive at an acceptable definition of legally produced timber (Bekoe Ansah and Ozinga 2010). In Liberia several forest relevant reforms had already been put in place when the VPA negotiations started, as a result the process was able to build on these foundations (Bollen and Ozinga 2013).

Somewhat similarly, in Honduras an important reform of the forest sector occurred in 2007 with the approval of the Forestry Law. This law consolidated the previous dispersed legislation, some of which was overlapping or conflicting, into a single legal instrument. The drafting of the law involved a lengthy process of multi-stakeholder public discussions that spanned three presidential terms. Its approval in September 2007 was greeted as a success of civil society engagement. As a result, important local and national constituencies today share a high sense of ownership of the Forestry Law, and consider that the legality definition in Honduras will not require substantial reforms of existing legislation as has been necessary in most VPA processes in Africa or Asia.

There is however a growing recognition that the policy reform process started with the 2007 Forestry Law is widely incomplete. Important regulatory instruments – especially those related to forest management and administration – remain over-centralized and based on unrealistic assumptions of the forest authority's capacity (Pellegrini 2009). As described below, little has been done so far to tackle the country's problematic forest land tenure situation or to promote a genuine shift in forest tenure rights. For a large number of stakeholders, the VPA process therefore represents a key *opportunity* to continue the reform process started in 2007, especially on the issues of rights for forest communities and promotion of a more enabling regulatory framework.

Some observers have also noted that the Forestry Law is over-regulatory, in the sense that it includes many aspects that could have been left to subsidiary legal provisions (Barrance and Vallejo 2007). The attention to normative detail in the Forestry Law was intentional in order to limit discretion in its interpretation (Sandoval Corea, pers. com., December 2012); however, a consequence of its legal specificity could be to increase the number of 'supporting reform measures' to be included in an annex of the VPA, because even minor changes – which could be necessary to arrive at a workable definition of legality – will need to go through the complex process of reforming the law itself.

### Forest Land Tenure

As in many other countries, the issue of 'who owns the forest' is perhaps the single most important challenge for identifying timber legality in Honduras. Land ownership is often not a simple, straight-forward concept in the country. In rural areas, understanding and documentation of land rights has been varied and contradictory. Although in recent years there has been an effort to make land titling more coherent and reduce the types of titles issued, Honduran landholders hold a range of documents issued at different times and reflecting different stages of the country's tenure evolution (Bonnard 1995). The tradition of private land ownership, in fact, finds its roots in the colonial era, when the Spanish crown gave land to influential citizens, and continued in the 19<sup>th</sup> and 20<sup>th</sup> centuries with land titles issued at first directly by Presidents and later by different government institutions, including local municipalities. The result is a complex and overlapping land tenure situation.

Since the early 1980s there has been a renewed emphasis on this tenure policy tradition. After two decades of heavy government intervention in support of agrarian reform, in 1982 the government of Honduras launched the Land Titling Project (*Proyecto de Titulación de Tierras*) with the aim of enhancing private tenure security and improving agricultural productivity (Jansen and Roquas 1998). The 1992 Law for Modernization and Development of the Agricultural Sector expanded these titling

<sup>2</sup> FLEGT stands for Forest Law Enforcement, Governance and Trade. The EU FLEGT Action Plan sets out a range of measures available to the European Union and its Member States to help improve the governance of the world's forests. VPAs are one of these measures.

<sup>3</sup> By June 2013 six countries had signed VPAs: Cameroon, Central African Republic, Ghana, Indonesia, Liberia and Republic of Congo.

efforts nationwide. As a result, more than 150,000 private land titles were granted in the 1980s and 1990s (Boucher et al. 2005), and this trend has continued to the present time.

In theory these titling activities should not have affected national lands covered by forest or classified as ‘forest vocation’ areas. Legal procedures were established that required the prior consent of the forest authority in such cases. In practice however such procedures have seldom been followed, and thousands of hectares with forest cover have been titled to private owners in the past decades.

A significant proportion of these forest land titles were secured by large landowners. Obtaining a title requires time, money, information and knowledge that most landless or near landless rural residents do not have (Bonnard 1995). Conversely, many large landowners were able to increase the size of their holdings through economic, political and even coercive pressure (Nelson 2003). Indeed, in spite of being one of the original objectives, there is evidence that titling efforts did not significantly change the inequitable distribution of agricultural land – the Gini coefficient for land concentration remained above 0.70 (Nelson 2003; Boucher et al. 2005).

During much of the last century forest land occupation was a common means, sanctioned by legislation, for rural households to access land. As a result, many forest areas were inhabited and used by smallholders and communities long before private ownership titles were issued. In many parts of the country, title-less residents – and often even owners with earlier titles – gradually discovered that the forest and agriculture lands they depended upon were recognized by the state as private property of large landowners. This has resulted in overlapping tenure claims, and in some cases violent eviction by the newly empowered landowners.

Beyond the benefits of individual land ownership, the rush for privatization of national forest lands can partly be explained by a perverse incentive – avoidance by loggers of forest fees. As described in Box 1 below, the Honduran forest authority has ended timber auctions to sell logging rights on national forests, but they were common practice in pine forests for two decades. The auction system was designed to generate maximum revenue from the forest resources and to help fund the forest authority. In spite of some evidence of collusion among auction bidders (EIA 2005), the mechanism was effective in gradually increasing the stumpage fees obtained for the sale of public timber. Since logging activities on private land do not require stumpage payments (only a small administrative fee), it became economically attractive for loggers and timber companies to try to by-pass auctions by obtaining private titles to national forest lands, often by forging documents and bribing public officials (Álvarez 2009).

Although the subsequent logging may be carried out in accordance with a forest management plan, the fraudulent privatization of public forest lands is often considered to be one of the most alarming types of illegal forest practices in Honduras, because it is at the heart of political patronage and corruption in public governance. Even though this problem is widely recognized, it may be difficult to develop and refine a timber legality criterion for its assessment when there are concerns about tenure legitimacy – a key challenge given that most timber extraction is presently carried out on private land.

### Free, Prior, and Informed Consent (FPIC)

As mentioned above, the legality definition should not be limited to national laws, but should also take into account relevant international legislation, as for example the ILO Convention No. 169 on Indigenous and Tribal Peoples, which has been ratified by Honduras. Several articles of this convention refer to the FPIC principles. In countries like Ghana and Indonesia the inclusion of such principles has been an important topic during the VPA negotiations. For instance, in Ghana the final text did not include an explicit reference to FPIC, but the latter can be seen as a requirement since the legality matrix of the VPA makes reference to “land owner, individual or group written consent” before a logging permit is issued to a timber company (Bekoe Ansaah and Ozinga 2010). Box 1 discusses the potential relevance of FPIC for the VPA process in Honduras.

### Control of the Supply Chain

As part of the VPA legality assurance mechanisms, the control of the supply chain through a timber tracking system seeks to ensure that no wood from illegal or unknown sources enters the supply chain of legal timber products. This seemingly technical issue has important governance implications.

In all VPAs signed to date, it has been agreed by partner countries that the timber tracking system will cover all exported timber, including exports to non-EU markets. Given the small amount of wood trade with the EU, this appears an essential

### Box 1. FPIC Principles in the Context of Honduras' Forest Sector

In Honduras, FPIC is likely to be an important demand of indigenous people organizations during the VPA negotiations. The 2007 Forestry Law reaffirmed the principle that forest management in private areas must be carried out in accordance with the objectives of the owner. It also reaffirmed that commercial harvesting in private lands requires a forest management plan prepared by the owners of the property. Therefore, the country's forest authority – the Instituto Nacional de Conservación y Desarrollo Forestal, Áreas Protegidas y Vida Silvestre (ICF) – cannot authorize logging activities on indigenous territories with communal land titles without their explicit request. The issue is more complex in the case of lands that are officially state-owned but claimed by indigenous people, as is the case, for example, in various areas of northeast Honduras. The implementation of public auctions of standing timber on these lands could be an issue of concern. Indigenous organizations could challenge the legality of such timber if auctions and subsequent harvesting operations were to be carried out without an FPIC process. However, while auctioning timber from national lands is a possibility under the Forestry Law, in practice the ICF has ruled this out and such auctions have not been carried out for several years. Logging activities in national forests are being authorized only when requested by local community-based organizations recognized by the Social Forestry System, the national program to promote community forestry. Therefore local observers expect that the debate around FPIC will be less contentious than in other VPA countries.

approach in the case of Honduras. Any narrower approach, focused on only some export destinations, would limit the capacity of the VPA to impact positively on the overall quality of forest governance – an underlying aim of the FLEGT initiative.<sup>4</sup>

Furthermore, all concluded VPAs plan to apply the timber tracking system to the domestic market as well.<sup>5</sup> This implies tracking all timber in circulation in the country, whether destined for domestic or international markets. This approach is much more comprehensive, but regulating the domestic market poses several challenges, especially since in Honduras the domestic market is larger than the export market, and includes a large range of small- and large-scale operators.

An associated challenge is how to treat imported timber and timber that is 'only' in transit, for instance Nicaraguan timber that passes through Honduras in order to be exported from the transnational shipping port of Puerto Cortés in the northwest of the country. All VPAs have had to deal with this issue of imported timber. Box 2 describes how it has been addressed in the VPA of Cameroon.

### Box 2. How Cameroon's VPA Deals with Imported Timber

As the VPA in Cameroon covers both the domestic and international markets; all timber imported into the country, as well as timber in transit, will be captured by the wood tracking system. Timber imported into the Cameroonian production chain (that is, timber that will enter the country's supply chain and therefore will be sold as being of Cameroonian origin) will have its legality checked and will only be allowed to enter if it possesses a legality licence or a private certificate that the Cameroonian government recognizes as equivalent to its VPA legality matrix. Timber in transit will need to be accompanied by proof of its country of origin throughout transit and will not be allowed to enter the Cameroonian supply chain. Timber in transit will therefore not receive a Cameroon legality licence. But it will be checked by the traceability system in order to ensure that it does not enter the country's verified supply chain.

Source: Azantsa y Riesco 2010.

## Verification System

The purpose of the verification system is to provide evidence of compliance with the procedures established in the legality definition and proof that no wood from illegal or unknown sources has entered the supply chain of legal products. Here too, Honduras will have to make important decisions during the VPA negotiation. Broadly speaking, two types of verification system have been envisaged for VPAs: *consignment-* and *operator-based* systems.

<sup>4</sup> The FLEGT Action Plan, in fact, recognizes that the issue of timber legality should be an entry point into wider governance concerns (EC 2007).

<sup>5</sup> The only partial exception is the Central African Republic, which plans to do so but only in a second phase, once the licensing for exports has commenced (Bollen and Ozinga 2013).

Of the six VPAs agreed so far, only the Indonesian one has a verification system based on operator accreditation. Under such system, local assessment bodies will examine if the companies audited operate in compliance with the Indonesian legality definition and have credible supply chain controls. Companies that meet the requirements will be certified for legality and then be subject to regular audits (at least once a year) of their approved systems in order to maintain their certified status (EC et al. 2011). The arrangement will function in a way that resembles certification schemes as they presently operate, and will give considerable scope for recognizing a variety of tracking and chain-of-custody systems being used by operators. In the presence of underfunded and weak government institutions, operator accreditation appears more feasible than systematic consignment checks. But it has been argued that an operator-based verification system could be more vulnerable to political influence, a particular concern in poor governance situations (Brown et al. 2008).

This concern helps to explain why in the other VPAs the timber verification systems focus on direct consignment assessment. Under this approach, each consignment of timber products is individually verified (and eventually licensed). However, the monitoring of individual timber consignments is difficult and costly without a capable authority and a well-functioning computer-based system (Brown et al. 2008).

Another important issue for the verification of legality in Honduras is the role of certification. Given that all major forest certification schemes demand proof of legality as a precondition for certification, some stakeholders would like to see certification as a proxy for legality assurance. They suggest that forest management and chain-of-custody certificates issued by certification schemes recognized and endorsed by the government of Honduras should be accepted as evidence of legal compliance with the country's legality definition. The procedure would have the advantage of avoiding verifying legality twice, preventing duplication of requirements and associated costs, which in turn adheres to an implicit guiding principle of VPA development – minimizing bureaucracy and red tape.

It would however be necessary to ensure that the legality criteria used by the certification body match the legality definition, and that its monitoring systems are sufficiently robust. This is not necessarily the case considering the short time available for most forest certification assessment missions, which means that legal compliance often has to be assessed quickly and based on readily available evidence. Another important concern is certification's focus on the forest management unit, since it is widely recognized that the legality definition should be based on a much wider vision of legal compliance. Some observers are also concerned that commercial interests driving certification bodies could lead to compromises in judging legal performance. An additional worry is that the use of certification as a proxy for legal compliance would disadvantage small-scale and community-based operators, which have less capacity to become certified than more capital intensive industrial operators.

### Independent Monitoring and Independent Auditing

Since 2005, the Honduran National Commission for Human Rights (CONADEH) has implemented an Independent Forest Monitoring (IFM) project. The almost 100 reports published (as at June 2013) have greatly improved understanding and exposure of illegal forest activities in the country.

As in Honduras, there were ongoing independent monitoring initiatives in Cameroon and the Republic of Congo when the VPA negotiations started. In both countries their work has been incorporated in the respective VPAs, alongside the independent audits which in all VPAs are a requirement of the LAS. The role of these monitors is to contribute to transparency and accountability in the VPA by providing field-level evidence on law compliance and governance. The VPA in the Republic of Congo also explicitly specifies improving the capabilities of civil society as one of its key objectives (Brack and Leger 2013; Bollen and Ozinga 2013).

In all VPAs, what are generally called 'independent audits' play a different role. For instance, while CONADEH carries out its monitoring activities on a continuous basis, in the VPAs it is usually foreseen that independent audits imply a periodic assessment of performance. The audits are also usually understood to have a system orientation. In other words, the audits aim to verify that the appropriate systems are in place and functioning effectively, rather than to investigate specific activities or violations as CONADEH typically does. Independent audits would thus consist of periodic (after an initial period, generally once a year) surveys to ascertain whether the VPA is working as planned and improving forest governance. The VPA audits would also be expected to identify weaknesses and recommend systemic reforms in the LAS. The on-going monitoring function of CONADEH can therefore be viewed as different, but complementary, to the future work of the independent auditor.

Besides these complementary assessments, it is important that civil society organizations carry out regular and routine checks on the performance of the whole VPA process at the local and national levels. These would help identify general governance



weaknesses and bring them to the attention of the competent authorities. They would also ensure that the independent auditors base their reports not just on information provided by the government, CONADEH and their own research, but also on wider evidence gathered by third parties like NGOs, local communities and indigenous organizations.

## Potential Benefits and Opportunities

While a VPA demands attention to various complex issues such as those discussed above, it is above all about how to generate environmental, governance and social benefits and opportunities. Their aim is not simply to ensure legal timber exports to the EU; key potential benefits include rural development, poverty reduction, reduced conflicts in forest areas, and the promotion of a better climate for investment in sustainable forest management (EFI 2009). The FLEGT VPA initiative also seeks to support the development of community-based forest management and empower local people who depend on forests for their livelihoods (EC 2007).

It is explicitly described in the FLEGT Action Plan that VPAs should at least ‘do no harm’ and preferably be pro-poor. In fact all VPAs contain a ‘social safeguards’ clause which commits the signatories to understand, monitor, and mitigate any adverse impacts on local communities or other stakeholders. For example, various studies show that poor forest-dependent people are vulnerable to forest legalization policies and stricter law enforcement since their livelihoods often depend – due to the lack of alternative options – on “illegal” use of the forest resource (Kaimowitz 2007).

The experience of several countries in Africa and Asia has been that VPA processes have opened up considerable political space for forest reform to benefit vulnerable or forest dependent peoples, including those involved in community forestry efforts. Key instances are discussions on changing the legal regime encompassing tree tenure in Ghana, legalization of pit sawing in Liberia, and a new law giving new rights to indigenous peoples in the Republic of Congo (Bollen and Ozinga 2013).

Honduras is one of the few Latin American countries which, since the 1970s, has had an official social forestry policy. It has extensively promoted collective forms of peasant organization for forest use and management. Today there are hundreds of community forestry enterprises (CFEs) that manage vast tracks of public forest. In spite of these achievements, the political commitment of government institutions to social forestry has often been low (Nygren 2005). As previously noted, in the eyes of many stakeholders the VPA is a key *opportunity* to reinvigorate the social forestry policy, to recognize greater and more secure rights for forest communities, and to eliminate some of the regulatory and institutional barriers that have constrained the growth of CFEs in Honduras (Richards et al. 2003). The links between a VPA process and community forest management in Honduras are explored in Forest Trends Information Brief no. 8.

## Conclusion: Challenges of the VPA Negotiations

The issues discussed in this paper are far from exhaustive, but provide an indication of some of the choices that will need to be made in the negotiations of the VPA of Honduras. While the VPA initiative in Honduras is just starting to get off the ground, the process has already seen the active engagement of key actors from civil society and the private sector. However, there is a legitimate preoccupation about the limited buy-in from some government institutions and the scarce participation of forest communities themselves, and particularly of indigenous peoples. Beyond the practicalities of the agreement, multi-stakeholder commitment is a critical condition for successful negotiation. Therefore, as demanded in a joint political communication on the FLEGT VPA by two civil society platforms in the country (Plataformas de Sociedad Civil 2013), it will be important for the government to grant space for dialogue to civil society, so that NGOs, local communities and indigenous organizations can play an active role in the negotiations and work in concert with government institutions and the private sector in the design of the VPA.

Finally, there could be a temptation to concentrate on the technical aspects of the VPA (such as the LAS) and give less attention to the governance agenda and associated equity issues, which in the long term hold the key to the sustainable management of forest resources and the struggle against the illegal timber trade. To avoid this pitfall it is essential to integrate the governance and equity agendas in the LAS.

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