

Tackling Timber Regulations: A Guide for Myanmar

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Acronyms

FLEGT VPA	Forest Law Enforcement, Governance, and Trade Voluntary Partnership Agreements
ILPA	Illegal Logging Prohibition Act
MTE	Myanmar Timber Enterprise
MTMA	Myanmar Timber Merchants Association
NEPCon	Nature, Ecology, and People Consult
ETTF	European Timber Trade Federation
EUTR	European Union Timber Regulation
AAC	Annual Allowable Cut
FD	Forest Department
CPI	Consumer Price Index
TLAS	Timber Legality Assurance System

1. Introduction

Over the past decade, several major timber product consumer countries have put into place new regulations aimed at curtailing the import of illegally sourced wood products. The United States pioneered this development by passing an amendment to the Lacey act in 2008. This move was followed by the EU, which approved the EU Timber Regulation 2010. Subsequently, the Australian Illegal Logging Prohibition Act (ILPA) was made official in November 2012. Illegal logging, as defined in these three regulations, is the harvesting of timber in contravention of the laws and regulations of the country of harvest.

The main requirements of these regulations can be summarized as follows:

- There is a ban on placing illegal timber on the market
- There is a requirement for due diligence, including calls for importers to:
 - Provide access to information about the origin and legality of the material
 - Conduct risk assessment of the risk that material is originating from illegal sources
 - Mitigate any significant risks

These three new timber trade laws in Australia and the US have been changing the timber markets, providing challenges to timber exporting countries such as Myanmar. The new laws restrict the trade in illegally harvested timber and place obligations on the importers to these regulated markets.

To remain effective in the international timber markets and ensure market access for the export industry, it is important to understand these new regulations and be able to provide timber with the necessary legality assurance.

This guide provides an overview of the key aspects of these regulations and offers suggestions for how the Myanmar government and timber industry can improve market access by increasing the level of legal timber assurance.

2. Implications for Importers in Regulated Markets

The EUTR, amended US Lacey Act, and the Australia ILPA regulations all contain comparable requirements related to the legality of timber and timber products and pose requirements to exercise due diligence. However, it should be noted that the Lacey Act does not include specific requirements for implementation of due diligence systems, but only refers to an expectation that importers will exercise due care in order to avoid illegally harvested material.

2.1 Access to Information

The regulations all include requirements for information needs:

- **Species** (scientific and trade name): Scientific name is required where the trade name may cover several different species.
- **Quantity** (volume, pieces or similar)
- **Country of origin** (and where applicable region or concession):
- **Documents indicating the legal origin legality of the product:** access to documents may be used as part of the due diligence process, but should not be regarded as an end in itself.

Exporters from Myanmar can support EU, US and Australian buyers by providing the above access to information

2.2 Risk Assessment for Myanmar

One of the key elements of the due diligence systems of the EU and Australia regulations is the obligation of importers to carry out assessments of any risks that the timber products may have been illegally harvested.

Currently little information is globally available guidance to timber importers about such risks. Listing countries as high risk for illegal timber can become politically sensitive. The difficulties of assessing risk are compounded by the fact that laws surrounding land tenure, forest management, harvesting and transparency often vary even within a country, making it difficult to categorize an entire country as high or low risk. Considering species alongside information on the source country and trade routes is consequently important in making a risk assessment.

Many organizations are using Transparency International's Corruption Perception Index (CPI) as their main indicator of risk. This approach has the virtue of transparency and builds on the conclusions of other studies that there is a reasonable correlation between the CPI and incidence of illegality in the timber industry. Countries that score low on the CPI are considered to be higher risk than those that score high¹. Myanmar will be considered high risk since the CPI score is only 15.

In order to address this problem, the European Timber Trade Federation (ETTF)² contracted the non-profit organization NEPCon³ to carry out a study on the Myanmar timber sector in order to evaluate timber legality and tracking issues as support for the EU timber industry. The result of this was a full forest legality assessment, including an evaluation of potential risks of legal non-compliances in the Myanmar forest sector. The full study is available from the European Timber Trade Federation and the Myanmar Timber Trade Association.

3. Challenges to the Myanmar Timber Sector

The ETTF risk assessment has identified issues that outside observers would perceive as the most important risks when buying timber from Myanmar. Below are summaries of the identified key challenges for the Myanmar forest sector.

3.1 Corruption

Though recent changes and political reforms have improved the governance in Myanmar, corruption is still a serious problem in Myanmar society. Myanmar continues to rank at the bottom of Transparency International's Corruption Perception Index (CPI)⁴. However, the recently elected government has demonstrated willingness to improve the country's institutional and legal framework as well as the space for political participation.

3.2 Transparency

There are no legal requirements that Myanmar Timber Enterprise (MTE) allocates sub-contracting of timber extraction by an open process. This means that the process of sub-contracting lacks transparency, opening up the possibility for corruption.

3.3 Legal Framework

The policy and legal framework governing forest resources in Myanmar appears inadequate to fully ensure legal and sustainable forest management. One obvious gap in the legal framework is the fact that the National Code of Practice for Forest Harvesting (2000) has not been promulgated. Practical regulations for forest management are therefore not clearly defined in law.

¹ <http://cpi.transparency.org/cpi2012/>

² <http://www.ettf.info/>

³ www.nepcon.net

⁴ <http://www.transparency.org/>

3.4 Governance

The division of responsibilities between the Forest Department and MTE creates a difficult environment for good forest management. The separation between management responsibility and extraction rights has created a negative incentive structure that is not conducive to good forest management.

3.5 Timber Trade and Traceability

The complexity and lack of transparency pertaining to the transfer of logs from harvest site to export is considered to be a challenge for the Myanmar forest sector. Though the system is implemented, the actual log transport and ownership transfer are complex and involve multiple transactions and controls where the potential for human error and corrupt practices exists. Also, timber from a variety of sources, such as confiscated timber or timber originating from illegal conversion of forest land, may be mixed into the flow of logs during transportation.

3.6 Illegal Timber Markets

In addition to the unrecorded cross border trade with countries such as China, India, Bangladesh and Thailand, large amounts of timber are reported to enter onto the domestic market for unofficially logged timber, in parallel with the official MTE supply. The size of this unofficial and illegal trade has been estimated to be as large as the legal trade (Global Witness, 2003 and 2009).

3.7 Forest Management

Though the Myanmar Forest Department (FD) has acted to improve staff capacity and management practices recently, challenges still persist. Based on reports on forest management practices as well as observations, the capacity of the Forest Department (FD) to ensure consistent adherence to forest management rules and regulations in the forest is not always complete. Though the theoretical framework for sustained yield forest management exists, the policies, laws and rules do not appear to be followed in practice.

3.8 Inventory Data

It is clear that the current forest inventory data does not accurately reflect the actual situation in the forest. Better inventory data, on both national and sub-national levels, would be of great value to the future management of the remaining forest resources. The main challenge related to the legality of timber extraction to establish and implement annual allowable cut (AAC) limits when inventory data is inaccurate or misleading.

3.9 Land Re-Classification

Areas of Reserved Forest land in the country have been converted to agricultural production by smallholder farmers or village settlement without a change in the classification of the land. In some areas, classification of land as Forest Reserve land on existing maps does not match current use. Rural populations that have traditionally used areas of Reserved Forest land for generations are technically in violation of the Forest Law, though local authorities have often granted permission to use these lands in the past.

"...buyers from regulated markets such as the US, the EU and Australia are likely to regard timber from Myanmar as high risk for illegal logging"

3.10 Customary Rights

There are no laws or regulations that recognize indigenous people's rights to own or manage forest resources according to indigenous law or rules.

Definition and enforcement of laws regulating customary rights are considered important parts of an effective legal framework for forests. Without such a framework local people's rights to forest resources may be violated and can open up the potential for illegal timber extraction. Land conflicts have become one of the central issues currently confronting the Myanmar reform government.

3. 11 Armed Conflict

There are still internal conflicts between ethnic and political groups and the Union Government in Myanmar. Many areas marked by past or current armed conflict are subject to illegal logging. Obviously, armed conflict and limited control of border areas play significant roles in the ability of the Myanmar Government to control forest resources and to ensure legal management and timber extraction from such areas.

4. Recommendations for Securing Myanmar Timber Export

When considering the requirements for due diligence implementation and expectations of due care placed on EU, Australian and US importers the question is how Myanmar will provide assurance of legality to satisfy these requirements?

It is considered necessary that the Myanmar Government engages in a long-term reform process of the forest sector.

4.1 Recommended Actions for Governance and Institutional Reform

The on-going government-led reform in Myanmar is a keystone in the process towards effective management of forest resources. It is therefore recommended that the government continues and strengthens the current reform process, and in doing so integrates measures that contribute specifically to solving the key challenges for the forest sector.

“The question is therefore how the Myanmar timber sector can provide timber and timber products with a sufficient level of legality assurance to international markets?”

As part of this process the government may focus on different strategic areas:

1. Governance reform,
2. Legal reforms,
3. Land rights,
4. Anti-corruption measures,
5. Improvement of forest management capacity and competence,
6. Updated forest inventory data, and
7. Timber tracking and segregation systems revision.

The above issues would all be part of issues that could be included under a Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreement (VPA) process between the European Commission and Government of Myanmar.

4.2 Potential Short-Term Measure

Based on the challenges of the Myanmar timber sector summarized above, clearly buyers from regulated markets such as the US, EU and Australia are likely to regard timber from Myanmar as high risk for illegal logging. Buyers will demand that they are provided with proof of legality. These buyers need to provide assurance that they have managed these risks before they place Myanmar timber on the market.

One short-term measure available is to implement a transparent and independently verified forest legality verification project aiming at well-defined forest areas and supply chains, by:

1. Applying legality verification to selected supply chains from selected forest areas which are more easily verified and can be kept separate from other higher risk supply;
2. Using a well-established legality definition that is well-aligned with definitions used in key timber market regulations, as a basis for the verification;
3. Using a verification system that offers transparent quality assurance.

4.2.1 Verifying Legality

Legality verification involves evaluating the legality of the forest area and forest management practices at the place of origin, as well as evaluating the ability of supply chain entities to track and trace the material and keep it separated from material with unknown origin.

The process of implementing such a verification program may be outlined as follows:

1. Define source forest area and ensure that management of the area is or can be controlled and implemented according to the National Code. This should be done in collaboration with relevant national authorities (Forest department and MTE). The following types of areas should avoid areas:
 - i. where risk exist of armed conflict,
 - ii. that are close to international borders and the risk of illegal logging may be increased, and;
 - iii. where classification of land is unclear or where there may exist significant conflict over resources either with local communities, ethnic groups or other interests.
2. Define the transport and processing chain, from the forest to point of export. In this case it should be assured that logs can be traced to the forest and that all legal requirements are met, assuring that the trade and transport is legal and that a chain of custody system (CoC) is functioning.
3. Verify conformance against timber legality standard requirements⁵ relevant to forest, supply chain legality and traceability (CoC):
4. Forest level evaluation should include evaluation of all relevant criteria for forest management. The actual field verification activities may include observations from harvest sites and extraction activities, document reviews, forest staff interviews (including FD, MTE and contractor staff), and stakeholder consultation (including government officials, local communities, national and international experts).
5. Trade and transport evaluation should assess the legal functioning of trade and transport activities, including (where relevant) processing. Evaluation may include field observations, document reviews, interviews with staff of supply chain companies, as well as government bodies related to transport and trade (FD, MTE and customs authorities). Appendix A lists requirements that can be used as verifiers.
6. Chain of Custody (CoC) evaluation should verify the ability of all links in the chain, including the forest, to control the movement of logs and products from the logging site to the point of export. This should be done to assure that no material with unknown or potential illegal origin enters the specified supply chain. Appendix A includes a simple generic CoC standard that could be used for this.

"...legality verification projects should involve stakeholders from relevant industries, government departments and civil society to ensure that lessons learned can be applied to a wider reform process."

⁵ It is suggested to apply an internationally recognised standard for verification of legality at both forest level and in the supply chain, such as the LegalSource standard. http://www.nepcon.net/files/resource_1/news/2013/2%20FEB/NEPCon%20LegalSource%20Standard%2008FEB13.pdf



A number of tools can be used during the verification process, including:

- Stakeholder consultation
- Interviewing stakeholders or experts
- Document verification
- Interviews with relevant staff and contractors
- Expert evaluation
- Field verification/audits
- Direct observation on the ground.

Verifying the legal conformance of an isolated forest area, and tracing timber from this area through a controlled supply chain, can provide a channel for continued export of Myanmar timber to key markets. However, it should be underlined that this does not address the wider issues of national level forest governance, resource rights and legal reform

It is therefore strongly recommended that any legality verification work is developed and implemented in conjunction with the on-going, long-term efforts to improve the institutional frameworks and governance of Myanmar. In addition activities and systems should be developed in a way that enables them to be replicated and scaled up to a national level.

Annex 1: Timber Regulations of USA, Australia, and EU

Over the past decade, several major timber product consumer regions have implemented legal regulation of their wood products markets.

The US pioneered this development by passing an amendment to the Lacey act in 2008. This move was followed by the EU, which approved the EU Timber Regulation 2010. Subsequently, the Australian illegal logging prohibition act was made official in November 2012.

The US Lacey Act

Effective 22 May 2008, the law makes it illegal to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken or traded in violation of the laws of the US, a US State, or relevant foreign law

The US government can use this law to impose significant penalties on individuals and companies who are found guilty of such acts. The Lacey Act and the import declaration it requires affect manufacturers and exporters who ship a variety of products made from wood to the U.S., including paper, furniture, lumber, flooring, plywood, and other products made out of wood.

The ban on illegal timber as defined in the Lacey Act amendments has not been supported by a clear framework that sets guidelines for importers, exporters and traders. However, it is suggested that operators exhibit due care and implement due diligence systems in order to minimize the risk of illegal wood entering supply chains.

The Lacey Act defines illegal timber and timber products as:

1. Theft of timber, including from parks and protected areas
2. Harvesting without permission
3. Failure to comply with harvesting regulations
4. Failure to pay royalties, taxes or fees
5. The Lacey Act also makes it unlawful to make or submit any false record, account or label for, or any false identification of, any plant.
6. It is unlawful as of December 15, 2008 to import any covered plant or plant product to the US without a declaration form collected by Customs and Border Protection, Department of Homeland Security.

For more information: http://www.aphis.usda.gov/plant_health/lacey_act/

The Australian Illegal Logging Prohibition Act

In November 2012, the Australian Illegal Logging Prohibition Act received Royal Assent. The Act is designed to support the trade of legal timber into Australia and to close the Australian market to illegal wood products, by making it a criminal offense in Australia to:

1. Import timber and timber products containing illegally sourced timber; and
2. Process Australian raw logs that have been illegally logged.

Potential criminal sanctions range up to five years' imprisonment and fines in the order of AUS\$55,000 for an individual, and AUS\$275,000 for a corporation.

The details of the required due diligence process, the detailed list of products covered by the Act, and the operational framework for importers and processors are laid out in the Illegal Logging Prohibition Amendment 2013 (01) and enter into force on 30 November 2014.

The requirements for due diligence posed by Act and the amendment are very similar to those of the EU Timber Regulation. The Act provides for due diligence to involve a three step process:

1. Identifying and gathering information to determine whether the timber being sourced is at risk of being illegally logged;
2. Identifying and assessing the risk of timber being illegally logged based on this information; and
3. If necessary, taking steps to mitigate identified risk.

The Australian Illegal Logging Prohibition Act defines illegal timber and timber products as:

“...as timber harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested.”

For more information: <http://www.daff.gov.au/forestry/policies/illegal-logging>

The EU FLEGT Programme

Similar to the US and Australia, the EU has been engaged in trying to halt the trade in illegally harvested timber products. In order to tackle the issues of illegal logging, the EU developed the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan which sets out a range of measures tackle illegal logging in the world’s forest.

There are two main instruments used under the FLEGT action plan:

1. Voluntary Partnership Agreements (VPAs)
2. The EU Timber Regulation (EUTR).

Voluntary Partnership Agreements

VPAs are bilateral agreements between the European Union and timber exporting countries such as Myanmar, which aim to guarantee that the wood exported to the EU is from legal sources and to support partner countries in improving their own regulation and governance of the sector.

A key element of a VPA is the development of a Timber Legality Assurance System (TLAS), which includes:

1. A clear definition of legal timber;
2. Mechanism to control the timber supply chains;
3. Verification of compliance to the Legality Definition (point 1) and controlled timber supply chains (point 2);
4. Licensing of legally produced timber and timber products for exports;
5. Independent audit of the LAS to ensure the system is fully implemented.

A successful VPA with a functioning TLAS will enable Myanmar to ship timber as FLEGT licensed to the EU and the licensed timber would be exempt from risk assessment under the EUTR. However, experience has shown that VPA processes take a relatively long time to conclude. Therefore intermediate measures may be useful.

A successful VPA with a functioning TLAS will ultimately enable Myanmar to ship timber with a FLEGT license exempting the timber from risk assessment under the EUTR. However, experience has shown that VPA processes take a relatively long time to conclude. Therefore intermediate measures could be useful.

For more information: <http://www.euflegt.efi.int/portal/>

The EU Timber Regulation

The EU Timber Regulation is binding legislation that came into force on 3 March 2013. All EU Member States are legally bound to comply with its requirements.

The regulation lays down the following key obligations applying to Operators placing wood products on the EU market:

1. **Ban on illegal timber:** Under the regulation, the EU prohibits operators in Europe from placing illegally harvested timber and products derived from illegal timber on the EU market. 'Illegal timber' is defined as timber that has been harvested or traded in contravention of applicable laws of the country where it is harvested.
2. **Requirement for due diligence:** Operators in Europe are required to exercise "due diligence." "Due diligence" means that the EU operator must minimize the risk of illegal timber in the supply chain based on an elaborate Due Diligence System (DDS). Three key elements of the DDS are:
 - a. *Information:* The operator must have access to information describing the timber and timber products, country of harvest, species, quantity, details of the supplier and information on compliance with national legislation.
 - b. *Risk assessment:* The operator should assess the risk of illegal timber in his supply chain, based on the information identified above and taking into account criteria set out in the regulation.
 - c. *Risk mitigation:* When the assessment shows that there is a risk of illegal timber in the supply chain, that risk needs to be mitigated, for instance by requiring additional information and verification from the supplier.

The EU TR defines illegal timber and timber products as:

"harvested in contravention of the applicable legislation in the country of harvest", where "applicable legislation" means the legislation in force in the country of harvest covering the following matters:

1. Rights to harvest timber within legally gazetted boundaries,
2. Payments for harvest rights and timber including duties related to timber harvesting,
3. Timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,
4. Third parties' legal rights concerning use and tenure that are affected by timber harvesting, and
5. Trade and customs, in so far as the forest sector is concerned."

For more information: http://ec.europa.eu/environment/forests/timber_regulation.htm

About Forest Trends

Forest Trends' mission is to maintain, restore, and enhance forests and connected natural ecosystems, which provide life-sustaining processes, by promoting incentives stemming from a broad range of ecosystem services and products. Specifically, Forest Trends seeks to catalyze the development of integrated carbon, water, and biodiversity incentives that deliver real conservation outcomes and benefits to local communities and other stewards of our natural resources.

Forest Trends analyzes strategic market and policy issues, catalyzes connections between producers, communities and investors, and develops new financial tools to help markets work for conservation and people.

About the European Timber Trade Federation

The ETTF promotes the interests of the timber trade across Europe, representing key national federations for importers, merchants and distributors. The ETTF liaises with and lobbies government and governmental bodies at national and international level, engages with environmental and other NGOs and provides a discussion and networking forum for the EU timber trade on key issues, from legislation and the environment, to sustainable timber promotion and best practice.

About NEPCon

NEPCon is an international, non-profit organization that works to ensure responsible use of natural resources and secure sustainable livelihoods worldwide. We aim to transform land-use, business practice and consumer behavior through the delivery of credible certification services as well as our involvement in innovation projects.

By engaging with companies, organizations and governments, we empower people to be part of the solution in tackling some of the greatest environmental threats facing mankind - including climate change and biodiversity loss. All of our services enable our customers to communicate their commitments to their clients and the public.

FSC®, SmartLogging, carbon forest verification and timber legality verification services are provided in collaboration with the Rainforest Alliance. NEPCon is accredited for PEFC Chain of Custody certification (DANAK reg.no.7029).