



5.1 Developing timber legality regimes

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Introduction

Since the 1980s much attention has been given to developing decentralized forest management systems in the form of social and community forestry. This development was based on the notion, that a dual forestry economy should be created, and that the development of the commercial forestry sector should be matched by efforts to develop forestry for rural development and provision of basic needs (Wiersum 1999; Arnold 2001). This notion was quickly accepted and resulted in the gradual development of a variety of decentralized forest management systems.

Small-scale, artisanal timber harvesting and manufacturing systems also got attention within this context (Forestry Department 1987; De la Cruz 1989).

Chainsaw milling (CSM) is a typical example of artisanal timber production. Many people are involved in this system for providing timber to local markets; they mostly operate under informal and location-specific arrangements. This is in strong contrast to the legal context of the formal timber sector. As a result of the recent international emphasis on timber legality, the legal duality between the formal timber sector and the artisanal timber sector is becoming more pronounced. Whereas the formal timber sector has to comply with legal requirements, the artisanal timber sector mostly continues to operate under informal, and sometimes even illegal, arrangements. As a result, existing programmes to stimulate legality in the formal forestry sector may have negative consequences on artisanal timber production.



THERE IS A LEGAL DUALITY BETWEEN THE FORMAL TIMBER SECTOR AND THE ARTISANAL TIMBER SECTOR, BUT THIS DUALITY IS NOT USUALLY RECOGNIZED IN TIMBER LEGALITY PROGRAMMES.

Changing forestry regimes

Forestry regimes comprise the convergent principles, norms, rules, procedures and programmes that govern the interaction between people and forest resources (Kant and Berry 2001). Traditionally, a basic tenet of tropical forestry was that governments formulated the norms and rules and implemented the procedures for exploiting forests; the timber industry was responsible for timber exploitation and trade. Consequently, the

forestry sector was characterized by a closed corporate structure, consisting of a tightly defined group of professionals from the government and the timber industry. Within this structure, the legal procedures for timber exploitation focused mainly on technical norms for contractually agreed timber production, and on financial norms regarding payments of duties to the government for exploitation of national forest resources.



The past decades saw changes in forestry regimes in many tropical countries as decentralized forms of forest management developed. The basic principle underlying this development was that civil and grassroots organizations — not just government and the timber industry — should be involved in forestry policies. This new approach is often referred to by the term “forest governance.” It involves a multi-stakeholder process of decision-making on and

implementation of forest use and management, with specific attention to the purposes for which forests are managed and to the equitable access of different stakeholders to decision-making and implementation processes (Lemos and Agrawal 2006).

This decentralized forest governance regime is based on several considerations:

- sustainable forest use and management involve the reconciliation of different ecological, economic and social forest values held by different stakeholder groups;
- forest values are expressed at different levels of society, represented by global environmental concerns (such as biodiversity conservation and climate change mitigation), national economic and environmental concerns, and local livelihood needs;
- profiting from forest resources and services must be just and fair, reflected in norms such as participation, empowerment and equity;
- efficient management is assured if people who are directly dependent on forest resources are involved in the management; and
- the combination of a participatory approach and effective management allows for transparency and accountability in implementing governance rules and regulations.

At first, a dual forestry regime — consisting of the traditional forestry sector and a social forestry sector — seemed to be the best approach. But with the gradual development of a variety of decentralized forest management systems, this notion has been replaced by the notion of forestry regimes that are characterized by a variety of multi-actor partnerships (Lemos and Agrawal 2006). Although the need to recognize different forestry regimes is now well accepted in respect to forest management, the notion has received much less attention in respect to timber trade and manufacturing. Programmes on stimulating timber legality are still based mostly on concepts related to the traditional forestry regime, and give little attention to the presence of small-scale, artisanal timber harvesting and manufacturing systems.

Linking timber legality and governance

The FLEGT/VPA programme

The need to change from government control over the forestry sector to decentralized forest governance is reflected in several programmes to stimulate timber legality. One example is the EU Forest Law Enforcement, Governance, and Trade (FLEGT) Action Programme. In order to eliminate the import of illegal timber into Europe, the programme stimulates the formulation of a Voluntary Partnership Agreement (VPA) between the EU and selected tropical countries that provide timber to the European market. The VPA identifies the national legal framework and compliance monitoring system that ensure that all timber exports from the country to the EU have been legally acquired, harvested, transported and exported.

The FLEGT programme explicitly aims to combine legal and governance principles (van Bodegom et al. 2008). In order to stimulate good forest governance, the programme supports the formation of multi-stakeholder platforms to define national criteria for timber legality and for monitoring the implementation of legality schemes (European Commission 2007). This is expected to result in greater transparency and accountability in forest exploitation and trade.

Different categories of legal principles for forest exploitation

Although the FLEGT programme supports both timber legality and good forest governance, it is not clearly defined whether it is intended to stimulate good governance of the traditional corporate forestry regime or of the newly emerging decentralized forestry regime. This becomes clear when considering the different types of legal norms for forest exploitation, which fall into four main categories:

- timber exploitation as an ecologically sustainable practice. Important issues include the cutting of officially assigned timber species and quotas in assigned exploitation blocks and meeting requirements for damage-controlled logging. Requirements regarding timber tracking throughout the marketing chain are also important in order to prove that the marketed timber has been legally exploited;
- payments of different types of timber duties, including fees for exploitation rights, stumpage fees, transport fees and export fees;
- fulfillment of social obligations by timber exploitation companies, which traditionally mainly focus on safe and socially responsible labour conditions. Increasingly, they also concern the social responsibilities of timber exploitation groups with respect to local communities — examples are benefit-sharing schemes or reimbursement of damages to community forest resources; and
- forest access rights and benefit sharing by local communities. During the past decades, new policies have been developed for assuring equitable access to forest resources and schemes for forest benefit sharing. These schemes aim not only to encourage better forest management, but to support more equitable use of forests and improve the livelihoods of forest-dependent people.

These norms play different roles in the traditional corporate forestry regime and the decentralized forest governance regime. The traditional regime mainly focuses on the first two categories of legal principles, and, in some cases, the labour rights of timber industry workers. But this regime does not include regulations on benefit sharing with local communities or on recognizing forest access rights of local people. These issues are the focus of decentralized forest governance regimes. They also provide a basis for explicitly incorporating artisanal timber production systems in legality schemes.

The FLEGT programme mainly considers norms that relate to formal exploitation rights for cutting specified quantities of formally recognized timber species in designated forest locations, and to payment of forest exploitation and timber trade duties. This interpretation of timber legality is rather narrow and basically refers to norms considered under the traditional corporate forestry regime. FLEGT pays scant attention to the emergence of new norms as reflected in the development of the decentralized forest governance regimes. Hence, no explicit attention is paid to the legality of artisanal timber production.

Different approaches to law enforcement

The different interpretations of the norms to be considered in linking timber legality and governance are reflected not only in the types of norms to be considered, but also in how they should be enforced. Colchester et al. (2006) distinguish two types of law enforcement:

- hard enforcement in the form of legal enforcement of existing forestry laws, including criminalization of violators through arrests, the filing of charges, court judgments and the imposition of punishments; and
- soft enforcement in the form of providing incentives for law adherence or administering symbolic penalties.

The first approach is based on strict legal considerations; the second on social considerations. For instance, the second approach addresses the need to develop appropriate and accountable systems in respect to juridical services for dealing with legal infringements. Such systems concern arrangements for access to legal courts and arbitration services, and attention to social safeguards that prevent legal requirements from having undesired social effects. They also include effective governance arrangements that enable inadequate legal regulations to be improved.

Soft approaches to law enforcement are particularly relevant in decentralized forest governance regimes, since explicit attention is given to improving the livelihoods of forest dependent people. To accomplish this, law enforcement should focus not only on adherence to official regulations on benefit-sharing, but on social safeguards in the form of measures to minimize possible adverse impacts on forest fringe communities and labourers in timber industry (Kaimowitz 2003; Owusu et al. 2010).

Linking timber legality and social norms on legality

Although the different norms on timber legality and law enforcement are recognized in international agreements and national laws, they are not systematically considered in the emerging programmes on timber legality. This is demonstrated in the first legally ratified FLEGT/VPA agreement between the EU and Ghana. The preamble states that “the Parties shall seek to minimize any adverse impacts on indigenous and local communities and poor people which may arise as a direct consequence of implementing this Agreement.” Article 17 indicates that the parties “agree to develop a better understanding of the livelihoods of potentially affected indigenous and local communities as well as the timber industry, including those engaged in illegal logging” and that they will monitor these impacts and take reasonable steps to mitigate any adverse impacts. These principles are not further elaborated, however, nor is there reference to the fact that CSM is illegal in Ghana. This limited attention to social issues stands in contrast to the extensive elaboration of the articles defining the various technical issues regarding timber legality (Owusu et al. 2010).

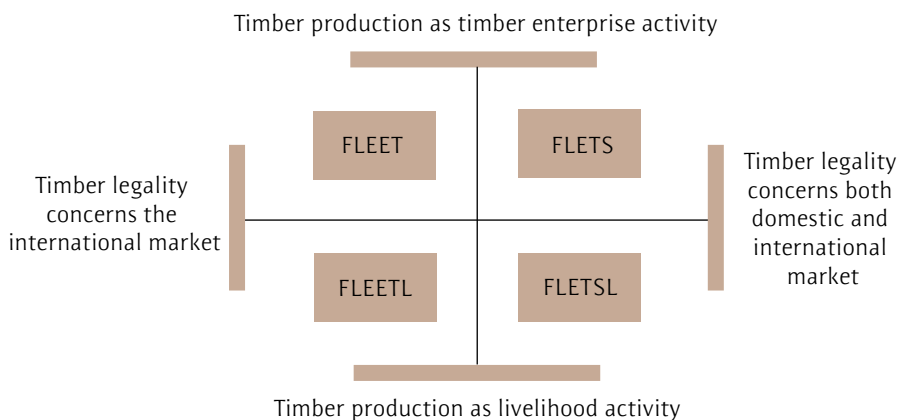
Scenarios for stimulating timber legality and governance

In view of the different governance regimes for timber production, an important question is whether timber legality programmes are focused on governing the traditional forestry sector (characterized by timber exploitation by forest business enterprises), or whether they also include artisanal forestry activities (characterized by timber production forming a livelihood activity of mostly rural people). Two sets of competing principles underlie the basic foundation of timber legality programmes:

- Should the programme have a legality focus or a livelihood improvement focus?
- Should the programme focus on legal timber production for the export market or on legal timber for both the international and domestic market?

On the basis of these competing principles, four policy scenarios on how to link timber legality and governance can be distinguished (Figure 1).

Figure 1. Policy scenarios for timber legality and forest governance



The main characteristics of each of these four scenarios are elaborated in Table 1.

Table 1. Policy scenarios for timber legality and forest governance

scenario		characteristics
FLEET	Forest Law Enforcement for Export Timber	<ul style="list-style-type: none"> ▪ mainly international trade agreement with focus on improved governance and control on timber production laws and regulations for formal forest sector ▪ policy implementation based mostly on hard law enforcement in respect to fulfilling criteria for sustained yield and other contractual agreements for timber harvesting, timber tracking and payments of export duties
FLETS	Forest Law Enforcement in integrated Timber Sector	<ul style="list-style-type: none"> ▪ mainly sustainable timber production agreement with a focus on the need to include legal recognition of diversity in small, medium and large forest enterprises ▪ policy implementation based mostly on hard law enforcement in respect to legal criteria for sustained yield, payments of duties and organization of business enterprises ▪ attention to development of artisanal forest enterprises
FLEETL	Forest Law Enforcement for Export Timber and forest-related Livelihoods	<ul style="list-style-type: none"> ▪ combined international trade and forest governance agreement with focus on improved control of regulations on timber production and trade and on benefit sharing by local communities ▪ policy implementation focused mainly on hard law enforcement in respect to fulfilling criteria on sustainable export timber production and commercial timber tracking, and on contractual agreements for benefit sharing at local and national level ▪ attention to social safeguards for forest fringe communities
FLETSL	Forest Law Enforcement in integrated Timber Sector and for forest-related Livelihoods	<ul style="list-style-type: none"> ▪ combined timber sector development and forest governance agreement with livelihood considerations integrated in timber legality norms ▪ focus on improved control over existing timber production regulations, and on further adaptation of forest laws, giving explicit attention to artisanal timber enterprises and benefit sharing by local communities ▪ policy implementation based on combination of hard and soft law enforcement with attention to criteria for sustainable timber production and timber tracking, and for benefit sharing at the local and national level ▪ attention to social safeguards for groups that are unduly disadvantaged by legal norms

The EU-FLEGT programme is intended to be the first step in achieving sustainable forest management (European Commission 2007). This could be interpreted as signifying a gradual change from the FLEET scenario to the FLETSL scenario. Trajectories for such a change may either include the FLETS or the FLEETL scenario. The gradual change from a FLEET to a FLETSL scenario will involve the adaptation from the present, mostly hard law enforcement approach towards a more soft law enforcement approach. This requires changes in the legal assurance systems of the timber producing countries, with more attention to social safeguards. At present, the discussions on FLEGT legal assurance systems are dominated by the need for stakeholder access to legal courts and juridical arbitration services for dealing with legal infringements. But under the FLETSL scenario, legal assurance systems should also include governance conditions that enable the necessary improvements of inadequate legal regulations.

Conclusion

Chainsaw milling is a major example of artisanal timber production. There is a legal duality between the formal timber sector and the artisanal timber sector, but this duality is not usually recognized in timber legality programmes. In order to regularize chainsaw milling, international programmes stimulating timber legality need to adapt their interpretation of what is involved in good forest governance. The currently dominating focus on stimulating better governance of the formal timber sector should be further developed into a focus on better governance of all timber resources.

Such a change requires the recognition of a wider range of principles and norms for timber legality. Social norms in respect to benefit-sharing and social safeguards need particular attention. These norms have been formalized in programmes for stimulating decentralized forms of forest management, but still receive scant attention in timber legality initiatives. A change in focus from legality as involving technical and economic issues to an approach that also involves social issues requires major changes in the hard law enforcement processes that currently dominate the discussion.

There is a need to mitigate potential adverse social impacts when enforcing the existing laws that ban chainsaw milling. This requires structural innovations in the forest sector, with specific attention to equitable rights on timber resources and legalization of artisanal timber production. Moreover, the strict law enforcement approach should be complemented by a soft law enforcement approach that provides incentives for developing alternative labour and income earning opportunities for local people involved in illegal harvesting and manufacturing, and for rural communities that are involved in illegal timber harvesting.

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