



5.2 Can the FLEGT Action Plan and voluntary forest certification reinforce each other?

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Introduction

Following the failure of the 1992 Rio Earth Summit to agree on a global forest convention, the 1990s saw the establishment of voluntary certification schemes for sustainable forest management. These were developed by an alliance of non-governmental actors in what has been called a process of “non-state market-driven global governance” (Cashore and Stone 2010).

In subsequent years these voluntary approaches were complemented by a number of regulatory approaches to legality. The FLEGT Action Plan and voluntary certification schemes have significant potential to support good forest governance and sustainable forest management if voluntary and regulatory efforts can be made mutually reinforcing.

Voluntary approaches for sustainability

The development of certification schemes has been characterized by three factors:

1) a direct interaction between civil society groups and the private sector; 2) independent third-party auditing of company operations and supply chains; and 3) a reliance on discerning end-users to create the necessary market for certified timber. Initially, this led to the establishment of a variety of schemes, these have now largely consolidated into two competing approaches: the Programme for the Endorsement of Forest Certification (PEFC) and the Forest Stewardship Council (FSC).

Voluntary certification schemes have received considerable public sector support in the form of direct and indirect subsidies and through public procurement policies. In some instances governments have actively promoted the development of national certification schemes. This has blurred the distinction between private-sector and government-led approaches.



MOST RECENT FOREST POLICY INITIATIVES TEND TO INCORPORATE ELEMENTS OF BOTH REGULATORY AND VOLUNTARY APPROACHES.

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Even though concern about tropical forest management triggered the development of voluntary certification, in practice its uptake in the tropics has been slow. This has led many tropical timber-producing countries, as well as regional bodies such as the Association of Southeast Asian Nations, to emphasize the specific constraints of tropical forest management and the need for a step-wise approach to sustainability certification, with legality as its entry point. Today, a variety of voluntary legality verification initiatives have been developed in response to market demand, and certification schemes have established rules to allow for the mixing of timber from non-certified but verified “controlled” or “non-controversial” sources.¹

The relationship between voluntary approaches and forest-sector governance is complex. Governance failure — particularly in relation to property rights, market conditions, stakeholder involvement and law enforcement — has often hindered the effective implementation of certification schemes. A favourable policy climate is in many ways a precondition for certification to fully meet its aims.

Although certification stands to benefit from better governance, and can strengthen compliance at the level of the individual management unit, it cannot be expected to directly address broader institutional and governance failure. Better law enforcement, for example, is difficult to achieve through voluntary certification. Certification bodies check procedures at the level of the certified enterprise but are “unlikely to have much impact on those companies whose business models are based on evading the law” (Bass 2003: 37).

Regulatory approaches for timber legality

In recent years, growing public concern about deforestation and forest degradation has led to a call for regulatory approaches. This is based on the assumption that the legally binding nature of regulatory instruments and their universal scope gives them a greater impact than voluntary initiatives. Many countries already find it difficult to enforce existing laws and regulations, however, and the impact of regulatory approaches depends on the ability and willingness of governments to implement and enforce them.

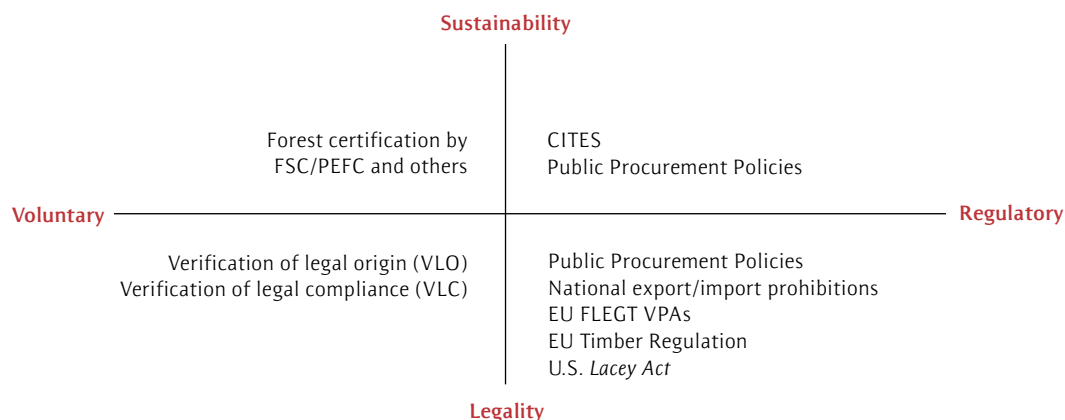
These are the most common regulatory approaches taken in the forest sector to date:

- specifications used in mandatory public procurement policies for timber and timber products;
- attempts to regulate international trade in endangered timber species in the framework of the Convention on the International Trade in Endangered Species (CITES);
- prohibitions on the export and in some cases the import of certain timber species or timber sizes, usually logs;
- legally binding trade agreements in which a certain standard for timber legality is agreed upon by exporting and importing countries;
- general prohibitions on the trade in illegally harvested timber; and
- mandatory due diligence measures.

The EU and U.S. have been instrumental in promoting such regulatory approaches. The Voluntary Partnership Agreements (VPAs)² of the 2003 EU FLEGT Action Plan, for

example, take the fourth mechanism as their focus, with the aim “to create the governance structures that reinforce capacity for law enforcement and oblige companies to respect the law” (European Commission 2010). The EU Timber Regulation of 2010 and the U.S. *Lacey Act* amendment of 2008 combine the last two mechanisms by prohibiting the trade in illegally harvested timber and by obliging or stimulating traders to minimize the risk of trading in such timber (Figure 1).

Figure 1. Voluntary and regulatory approaches to legal and sustainable timber



Note: Specifications in public procurement policies for timber and timber products recognize both legality and sustainability.

These approaches take legality as their focus for two reasons. First: country-wide sustainability is not achievable without addressing underlying governance issues. Second: a unilateral imposition of a sustainability standard would face difficulty in the absence of an internationally agreed definition of sustainable forest management. No country, however, can object to taking its own legal framework as a standard for trade. Unlike sustainability standards — which are often perceived as an imposition from abroad — legality standards reinforce national sovereignty over forest resources.

Similarities and differences between voluntary and regulatory approaches

Most voluntary and regulatory approaches rely on the power of the discerning market to foster better forest management and use clearly defined standards to assess compliance. FLEGT VPAs and voluntary approaches also dedicate an important role to multi-stakeholder dialogues and rely on independent third-party monitoring to assure their functioning and maintain credibility.³

The two approaches have a number of differences:

- Regulatory measures cover the entire forest sector in a country, while voluntary initiatives focus on the certified enterprise or forest management unit. At the industry level, certification can even be limited to a single product line. This difference in scope has major implications for implementation and enforcement,

since controlling sector wide-performance is much more difficult than assuring localized compliance.

- Companies use voluntary standards to improve their market position compared to their competitors, while governments may use regulations to create fair conditions and improve practices within the sector as a whole. As a result, only regulatory measures have the potential to enhance the reputation of an entire country.
- Voluntary initiatives depend on the good will of actors and are binding only on those participating in the scheme. Companies can always opt out. Regulatory measures are compulsory and bring the force of law to bear on all actors within the jurisdiction in question.

Do voluntary sustainability and regulatory legality approaches compete?

Some authors are concerned that legality verification competes with efforts to move towards sustainability (Brown and Bird 2007). They are concerned by the duplication of efforts related to the development of standards, the costs associated with obtaining both legality verification and sustainability certification, and the assumption that legality implies a lowering of the threshold.

The degree to which legality and sustainability notions overlap depends on the extent to which the legal framework of a country incorporates sustainability requirements. The difference between legality and sustainability would largely fall away if governments made it mandatory for forest operations to meet a specific sustainability standard.⁴ In practice, the legal frameworks of many timber-producing countries already incorporate substantial sustainability requirements, such as preparation of management plans and monitoring procedures. Enforcing these requirements would be a major step forward.



Within the EU there is little evidence that the market will permanently accept legality as sufficient proof of sound forest management. On the contrary, large retailers do not stop at meeting mandatory legality requirements, but tend to aim for certification for corporate responsibility and marketing efforts aimed at end users. These company policies are reinforced by increasingly mandatory public procurement policies that require proof of sustainability.

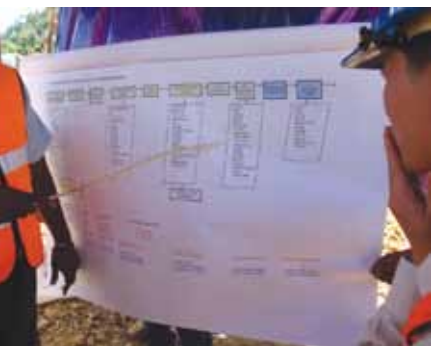
How sustainability certification and FLEGT VPAs are mutually reinforcing

While FLEGT VPAs and voluntary certification processes differ in standard, scope, and approach, there are a number of ways in which these instruments support each other.

VPAs can benefit from voluntary certification schemes, which provide working examples of traceability mechanisms and auditing processes at the level of the forest management unit. Voluntary schemes can function as a testing ground for case-based and practical solutions at the local level. This is especially important where voluntary approaches improve local understanding of national laws and regulations; develop local stakeholder

processes that feed into national VPA processes; and have developed tracking and tracing procedures that benefit the traceability systems agreed to under the VPA.

Voluntary approaches can also help pioneer best practice in countries that are not yet ready for nation-wide regulatory approaches and therefore allow countries and companies to prepare themselves for improved forest management. At the same time, countries can prepare for new export market challenges and opportunities, including those stemming from the EU Timber Regulation and U.S. *Lacey Act*.



Voluntary certification in turn may benefit from VPAs, since they tend to provide greater clarity on the legal requirements applicable to forest operations. They also enhance transparency by ensuring that information on forest operations is made public. Although the legality principles of certification schemes state the obligation to meet all applicable legislation, these principles often lack

the detailed sets of indicators and verifiers that characterize the FLEGT legality definitions and verification procedures, and the support these receive by national stakeholders.⁵

The overall improvement of governance and law enforcement decreases the risk of conflicts among stakeholders, lessens the level of effort required to move to sustainability certification and reduces the cost advantage of non-certified producers over certified producers. In these ways, improved governance can be seen as a prerequisite for certification.

In summary, it appears that the two approaches are mutually reinforcing. Voluntary certification schemes deepen management requirements to the level of social, economic and environmental sustainability at the company level, while VPAs help to spread legality requirements and good governance to the forest sector as a whole.

Creating practical synergies between FLEGT and voluntary schemes

Although sustainability certification and FLEGT VPAs appear mutually reinforcing there is still the risk that duplication of efforts will impose unnecessary costs on companies or lead them to opt for lower legality verification rather than higher sustainability certification.

The FLEGT Action Plan allows for ways to address this issue. Both within the VPAs and in the EU Timber Regulation there are possibilities to make use of the control systems and risk-reduction mechanisms provided by voluntary schemes and to create practical synergies between certification and FLEGT.

Voluntary schemes in the context of FLEGT VPAs

In FLEGT negotiations partner countries and the EU have foreseen the possibility that voluntary schemes could be linked to the Legality Assurance System (LAS) developed under the VPA. The main condition for such market-based elements to be accepted for use in the LAS of a FLEGT partner country is that the scheme in question provides at least the same degree of legality verification as that agreed to under the VPA.

The procedure outlined by the EU is that partner country governments conduct a rigorous evaluation of the standard and supply chain controls of the voluntary scheme in question so as to ensure equivalence with FLEGT legality controls. After discussion of these findings with the EU, the parties could agree to accept the voluntary scheme as meeting all or part of the requirements for issuing a FLEGT licence. Ultimately, if a voluntary scheme could demonstrate the same quality of legality controls as those associated with the FLEGT VPA, the partner country could treat the certificate of a voluntary scheme as equivalent to FLEGT.

If such a combination of legality and sustainability controls were to develop, the FLEGT VPA would not only help to improve transparency and strengthen forest governance in the forest sector of FLEGT partner countries, but could also become a driver for the acceptance of voluntary schemes in those countries.⁶

The FSC has foreseen this possibility. With the ongoing revision of its Global Principles and Criteria, FSC plans to present its legality principle as a stand-alone section that can be used as a first step in a modular approach to full FSC certification. PEFC also studied the matter with a workshop in Gabon in 2011 that focused on the question, “how far FLEGT may facilitate efforts ... to provide not only legal, but also certified sustainable timber to international markets.”

In addition to FLEGT VPAs recognizing the advantages of voluntary schemes, it is also possible that certification schemes can make use of the advantages of FLEGT-licensed timber. Both PEFC and FSC allow a certain degree of mixing between certified and non-certified produce on the condition that the non-certified component is fulfilling the Controlled Wood standard of FSC or comes from what PEFC calls a “non-controversial source.” It is still an open question if these schemes would endorse FLEGT timber as such. The FSC Controlled Wood standard, for example, includes specifications on genetically modified trees and conversion timber that likely are not covered by FLEGT.

Voluntary schemes in the context of the EU Timber Regulation

The EU Timber Regulation prohibits the placing of illegal timber and timber products on the EU market. In addition, it requires due diligence on the part of companies placing timber on the EU market for the first time, in order to minimize the risk of trade in illegally harvested material. The regulation regards FLEGT licensed timber and timber with a CITES certificate as meeting its requirements and therefore exempt from the due diligence requirement. Voluntary forest certification and legality verification are not considered equivalent proof of legality.

Voluntary schemes can, however, be used to reduce risk, and their use by timber trading companies may go some way to demonstrating due diligence. Private-sector initiatives such as the Timber Retail Coalition have asked the EU to explicitly recognize the value of existing forest certification systems. Voluntary schemes are also well positioned to provide their own due diligence services to companies wanting to meet the EU Timber Regulation. In late 2011, for example, FSC announced its intention to develop a FSC Due Diligence System to ensure that operators in the EU would be able to provide the relevant information to the authorities; and to offer legal verification under the EU Timber Regulation as a temporary measure on the way to full certification.



The main change that can be expected from the EU Timber Regulation is that it will influence day-to-day purchasing decisions by EU companies that trade in timber products. Next to issues of supply, quality, delivery time and price, risk will become part of the decision to buy or not buy a certain allotment of timber. In this decision-making process timber from low-risk sources will have an advantage over timber

from high-risk sources. If certified timber from recognized schemes is regarded as low risk under the EU Timber Regulation this will likely provide an additional impetus to global certification efforts.

Conclusion

Approaches to meeting the demand for timber from legally and sustainably managed forests can be placed on a continuum ranging from private-sector voluntary initiatives to government-led regulatory approaches. In reality, there are few initiatives at the extremes of the continuum. Most policy initiatives tend to incorporate elements of both voluntary and regulatory approaches.

One of the key principles of voluntary certification schemes, for example, is compliance with the legal framework of the country where they operate. Regulatory approaches are often initiated at the request of “responsible” market parties, who feel they are being undercut by less scrupulous competitors.

Voluntary and regulatory approaches have the potential to be mutually beneficial. Voluntary schemes can provide a framework of principles and criteria that can be adapted to local circumstances through national stakeholder processes. Voluntary schemes also provide technical procedures and lessons learned from implementation that are of value to regulatory approaches. Their limitation lies in the fact that they are usually only taken up by the responsible operators in the timber sector; they also have a limited ability to strengthen law enforcement and good governance at the national scale.

Regulatory approaches can help to improve forest governance in a much more broad way. Implementing FLEGT VPAs across the forest sector of timber producing or processing countries, however, can be quite a challenge. Countries may benefit from certification-

based methods before moving towards sector-wide legality. It is important to note that the impact of regulatory approaches depends on the ability and willingness of governments to enforce them, and the full impact of regulatory instruments — in particular, those contained in the FLEGT Action Plan and the U.S. *Lacey Act* — is still not known.

While the two types of instruments are generally mutually reinforcing there is a risk that the proliferation of standards, as well as the practical interaction between voluntary and regulatory approaches, will lead to a duplication of efforts and costs. Discussions on strengthening the practical linkages between voluntary and regulatory approaches have started only recently. These discussions should provide the basis for a more systematic analysis of regulatory and voluntary approaches and result in increased collaboration, a harmonization of terminology, benchmarks and standards as well as a systematic discussion of their practical interactions and joint impacts.

Acknowledgement

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Endnotes

1. FSC requires that the non-certified portion in an FSC mix product has to comply with the FSC Controlled Wood standard describing five origins, including illegally harvested wood, that must be avoided. PEFC rules that the non-certified portion of a PEFC recognised certificate has to comply with the PEFC Due Diligence System, which includes a self-declaration of the supplier and a risk assessment procedure. Controversial sources are defined under PEFC ST 2002: 2010 3.7 and require compliance with local, national or international legislation on various aspects.
2. The FLEGT Voluntary Partnership Agreements are "voluntary" in the sense that partner countries can decide whether to enter into such an agreement. Once signed and ratified, however, these agreements are legally binding. They thus fall under the regulatory approaches.
3. The exceptions are the EU Timber Regulation and U.S. *Lacey Act* amendment, whose development and enforcement rely on government and the judiciary.
4. One of the most important differences between sustainability and legality standards lies in the treatment of conversion timber. Timber from converted forests obviously cannot be certified for sustainability. Legality standards, however, allow for the conversion of forestland to other uses as long as due legal process is followed. Timber thus produced can receive a legality certificate.
5. Certification schemes in some FLEGT countries, such as those in the Congo Basin, are already looking to the VPAs to strengthen verification of their legality principle.
6. The reverse is also possible, in that voluntary certification can assist FLEGT partner countries in developing their Legality Assurance Systems. The Indonesian Legality Assurance System, for example, is based on a certification approach.

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