

Reflections on the Social Dimensions of Verification in FLEGT processes: Issues, Risks and Challenges¹

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Key points:

- FLEGT verification faces quite different political challenges to timber certification: its aim is to catch out the crooks, not ensure compliance by the good guys;
- Current forest related laws make much community use of forests illegal;
- There is clear evidence that crude enforcement is unfairly targeting the poor while the big players are protected;
- Avoiding FLEG becoming another engine of social exclusion requires active attention to social considerations at all levels of the FLEGT process;
- Legality definition requires attention to laws that protect community interests and needs to be done through socially inclusive processes, but outcomes are difficult for vested interests to accept;
- Disagreement in interpretations of the EU Procurement Directive is delaying due attention being paid to social considerations;
- VPAs are meant to avoid negative consequences for local communities but procedures to achieve this are still under discussion;
- Effective VPAs and verification will require genuine participation to ensure adequate definitions of legality are adopted, action plans address social concerns, and transparent processes are adopted to ensure independent third-party verification and parallel monitoring;
- The time and financial implications of adopting adequate procedures should not be under-estimated.

Introduction:

Although 'Forest law enforcement, governance and trade' is being presented as a voluntary process and is thus compared with previous voluntary timber certification and third party verification processes that have been adopted by the private sector, in fact the FLEGT approach constitutes a significant shift back towards forestry reform through state regulation and control.

Timber certification has been adopted voluntarily by 'market leaders', who choose to go beyond what the law requires because they have adopted corporate policies of social and environmental responsibility, to gain a market premium or in order to access niche markets.

FLEG and FLEGT policies, by contrast, are being endorsed through regional intergovernmental statements and promoted through bilateral government to government agreements. Where certification aims to raise the ceiling on good forestry practice, FLEGT aims to raise the floor under bad practice, curbing illegality and ensuring good governance. Unlike **auditing of timber certification**, where companies can be expected to be keen to show off their commitments to participation and accountability, FLEGT **verification** may face much tougher challenges, as it is designed to deal with public and private actors that may often be unlawful, criminal, corrupt, unaccountable and untransparent.

Although economic and environmental concerns can be seen as the main drivers of both initiatives, social considerations have, sooner or later, come to be seen as central to both.

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Indeed 'Forest Law Enforcement and Governance' (FLEG) approaches have been justified as a way of benefiting the poor and meeting the Millennium Development Goals by improving State revenues from forests, but to date the social implications of such enforcement has not been given great attention.

Experiences with Forest Law Enforcement

A recent review carried out for CIFOR constitutes an attempt to fill this gap.³ It looked at community experiences with forest related laws and enforcement in Bolivia, Cameroon, Canada, Honduras, Nicaragua and Indonesia. Our study concluded that:

- the extent of forest-based livelihoods is often under-appreciated;
- laws that affect the way people use forests are often contradictory and restrictive;
- laws tend to be selectively developed, and applied, in favour of large-scale forestry;
- laws to secure community rights in forests, are often absent, ignored or too onerous to be widely used;
- this lack of legal protection of community rights makes much small-scale forest use technically 'illegal'; such illegality hinders good forest management;
- illegal forest use, including by communities, tends to be enmeshed in wider political economies, so major players tend to be politically protected while local communities are politically vulnerable;
- enforcement has sometimes focused narrowly on forestry laws to the neglect of other laws that secure rural livelihoods;
- crude enforcement measures have reinforced social exclusion and tended to target poor people, while avoiding those who are well connected;
- rather than helping alleviate poverty, crude enforcement can thus exacerbate it.

FLEG criteria:

Social considerations have not been absent from the recent regional agreements on 'Forest Law Enforcement and Governance'. Those adopted in Asia, Africa, Europe and North Asia, and by the European Union have committed governments to, *inter alia*:

- engage indigenous peoples and local communities in the formulation and implementation of forest laws and policies;
- ensure coherence between forestry and land tenure laws;
- reform laws and strengthen land tenure and access rights especially for rural communities and indigenous peoples;
- take into account customary law and traditional knowledge;
- strengthen effective participation of all stakeholders, notably non-state actors and indigenous peoples, in policy making and implementation.⁴

Confessions of a forest ranger:

'We have always pushed the little guy around because they have no political clout. It has always been our way of convincing ourselves and the public that we are doing our jobs. Yet the real crimes... the real damage is committed by the big corporations. They are ones who need to be hammered! It will never happen in a meaningful way... they are too powerful.'

³ Marcus Colchester et al, 2006, *Justice in the forest: rural livelihoods and forest law enforcement*. CIFOR, Bogor.

⁴ Ministerial Declaration on Forest Law Enforcement in Asia, Bali, 10-12 September 2002; Déclaration Ministérielle, 2003, Conférence Ministérielle sur l'Application des législations forestières et la gouvernance en Afrique (AFLEG), 13-16 octobre 2003. Yaoundé, Cameroon; EU Council Conclusion on Forest Law Enforcement, Governance and Trade, 13 October 2003; ENA-FLEG, 2005, St Petersburg Declaration. http://www.illegal-logging.info/papers/MDILA_final_25_Nov_05_eng.pdf

However, in practice, undue targeting of the 'little guy' remains all too common. It has been noted to be a problem in Peru, India, Honduras, Nicaragua, Indonesia, Cameroon, Cambodia, Russia and the Philippines. Even in Bolivia, which in many respects has been considered a 'best practice' example of FLEG - in terms of legal reform and politically independent enforcement - there have been complaints about the unfair targeting of the poor.

Early FLEG experiences: defining legality

Social considerations were not prominent in the early Independent Forest Monitoring Projects funded by the World Bank first in Cambodia and later Cameroon. Nor were they initially apparent in the MoU signed between the UK and Indonesian governments in 2003. At that time forest economists had already decided that based on comparisons of the country's 'annual allowable cut' with the amount of timber actually entering mills, it was evident that some 60-80% of Indonesia's timber was 'illegal'. But that is just in terms of one legal requirement - acquiring a permit to cut the timber. However, civil society organisations in Indonesia quickly realised that unless issues of human rights, land tenure, indigenous peoples and community forestry were adequately addressed, FLEG might only serve to marginalise the poor and enforce an unfair forestry regime that many NGOs in Indonesia see as a root cause of the corruption and illegality in the whole sector.

After considerable resistance, the Indonesian MoU parties did accede to a multi-stakeholder process to develop a definition of legality, which started with regional workshops to ensure that any differences in views about legality, between the central government and newly autonomous regional authorities, were also taken into account. The process, which has taken three years and is still not complete, had to look at some 900 laws and regulations related to forests, governance, tenure, occupancy and use in order to come up with a definition that satisfied the wide range of stakeholders, though it has yet to be endorsed by the Ministry of Forests. The trouble is that by this definition almost no forestry operations in Indonesia are legal.

Take, for example, two basic legal requirements, those related to forest gazettement and concession delineation - essential processes by which forest resources are surveyed and rights then allocated. Research by the World Agroforestry Centre (ICRAF) shows that only 12% of the 122 million hectare forest zone has yet been gazetted - the process by which forest areas are classified, their boundaries surveyed and agreed by interdepartmental teams and then officially registered as 'State Forest Areas'. ICRAF research also shows that, even where gazettement has occurred, the legal status of the 'forests' may be disputed - many of the required procedures for setting the boundaries have been rushed through without due consultation with local village leaders, to check that the designated forests do not overlap areas where people have rights.

Notwithstanding the failure to complete the process of ascertaining which areas actually fall under the Forestry Department's jurisdiction, the Department has granted concessions to the great majority of the country's forests (over 600 large concessions in all of which an estimated 270 are still active). In order to compensate for the lack of gazettement, concessionaires are required by law to 'delineate' their concession boundaries, with the participation of local governments and community leaders, a procedure aimed to clarify that concessions do not overlap the lands of other users. ICRAF data show that only 8% of forest concessions have been properly delineated by the companies that have been given logging licences, meaning most concessions should be forfeit.

An alternative approach ?

One response from the Indonesian Government has been to set up the *Badan Revitalisasi Industri Kayu* (BRIK - Indonesian Institute for the Revitalisation of the Timber Industry), which was established in 2002 as a para-statal agency charged with monitoring and verifying the legality of timber. To qualify for a legality certificate (ETPIK) issued by BRIK, companies must show: that all timbers coming into their mills are accompanied by transportation permits (SKSHH); how much timber the mill used; and how much processed timber it produced. Using these figures BRIK claims it is able to show that a mill is using only authorised timber and can issue a certificate accordingly. BRIK has claimed that Indonesian mills produce 50-60 million cubic metres of legal roundwood equivalent, even though the current Annual Allowable Cut from active concessions is only 5.5 million m³. BRIK explains the difference by stating that the other 45-55 million m³ come from legal sources such as forest conversion, clearance of old oil palm plantations, rubber wood and from home gardens. No one else believes this.

The government claims that ETPIK certificates provide a guarantee of the legality of processed timbers. Development agencies and timber traders have different views. They characterise BRIK as: 'untransparent', 'questionable' and 'not credible'. It is notorious that the crucial SKSHH certificates, on which the whole BRIK system relies, are readily available on the black market. Although the BRIK system has some merits – it is highly computerised and so, in the right hands, could offer a useful tool for tracking timbers – it is unlikely to reassure discerning buyers.

Buyers' Definitions of Legality:

Indeed, what definitions of legality will buyers accept? Is there a danger that the EU may adopt definitions of legality that leave out social considerations? There may be:

- there has been considerable disagreement in the interpretation of the EU Procurement Directive, with some countries, notably the Dutch, giving prominence to social considerations while others, like the UK government, initially ruled them out;
- This matter is now under review after constant public bombardment of governments by socially concerned NGOs and more covert pressure from the bilateral development agencies;
- Meanwhile the lately issued Japanese government's Green Procurement policy seems also to lack social criteria.

Procurement rules are clearly in a process of evolution. Although social criteria have not been given prominence in the initial development of these rules, it can be predicted that social criteria will be included sooner or later as the current logic, which denies that social issues have a bearing on 'sustainability' while environmental issues do, is, well, unsustainable.

Influence of VPAs:

The EC recognises that the development of legality definitions is a key early step in the implementation of VPAs and social issues are already taken into account to some extent. Internal instructions to teams developing such VPAs include requirements to:

- 'limit to a minimum the impact on the poor';
- 'limit to a minimum negative consequences to local communities and the poor';
- 'develop just and reasonable solutions';
- include 3rd party monitoring;
- involve stakeholders in consultations.

There are already intense discussions among NGOs and implementing agencies about: what will be the content of legality definitions; how these and other aspects of VPAs will be developed and; how compliance will be monitored. Learning from past experiences in the development of national certification standards and in FLEG activities, socially concerned actors are emphasising the importance of:

- definitions of legality which take into account existing legal protections of human rights, land tenure, customary rights and indigenous peoples, including in national constitutions and ratified international treaties;
- transparent and fully participatory national processes which engage civil society and indigenous peoples' organisations, as well as other stakeholders, in national committees to develop legality definitions and associated action plans;
- transparent processes for monitoring compliance, which involve local communities and civil society groups directly;
- fully participatory verification by accredited third party auditors.

Verification experiences: some lessons from certification

Are NGOs justified in their concerns that VPA and verification processes could be 'captured' or weakened by vested interests? Consider for example:

- Recent FSC certificates issued in Indonesia where auditors have decided to overlook the fact that forest concessions have not been gazetted and delineated - and are thus technically illegal according to the 'legality definition' developed by TNC and DfID. This places a question mark over whether FSC certificates should be accepted as verifications of legality, as CPET has done;
- Early examples of step-wise certification, also in Indonesia, where legality criteria were minimal and included no consideration of legal protections of community rights;
- The consultation process of the Malaysian Timber Certification Council, which early on included social NGOs and indigenous peoples' organisations who then resigned from the process when they found that their concerns were not even being minuted, much less taken into account and acted on. The MTCC has since then carried on its work for several years even with the effective absence of a social chamber. The example is especially relevant as Malaysia is one of the countries at the head of the queue for a VPA.

Implications for Verification: final thoughts

FLEG processes in general and verification procedures in particular face some very big challenges. They are being introduced in circumstances of poor forest governance, where illegality and corruption are endemic, where laws and procedures are often skewed heavily in favour of large operators and against local communities and indigenous peoples, and in situations where well developed political networks have strong economic interests in diluting reforms and masking criminal activities. With some notable exceptions (Ghana? Bolivia?), there is not much evidence of governments showing strong political commitment to the implementation of FLEG action plans. If FLEGT is to be different then the EU will need to:

- strengthen the social considerations in its legality definitions and procurement rules;
- clarify the rules for transparency, participation and accountability in VPA processes;
- insist on independent, third party verification, subject to greater transparency and better participation than has been achieved in certification schemes – big resource implications;
- require performance based verification of actual FMUs;
- require the inclusion of team members with strong social skills in verification teams;
- build in independent and participatory monitoring of compliance and verification.