

The VPA in Honduras: An Opportunity to Take Forward the Forestry Reform Started with the 2007 Forestry Law

In January 2013 Honduras and the European Union (EU) started formal negotiations of a Voluntary Partnership Agreement (VPA). A VPA is a bilateral trade agreement between the EU and a timber-exporting country that seeks to ensure that the wood traded between the two is from legal sources and to support partner countries in improving their own regulation and governance of the forest sector. This brief discusses some background information on Honduras' forest sector that could have important bearing during the VPA negotiations. The analysis is structured around the five main elements of a timber legality assurance system.

Introduction

A key feature of a VPA is the establishment of a timber legality assurance system (TLAS) in an exporting country, which will identify legally-produced timber and ensure that only such legal timber is exported to the EU (and other international markets if the exporting country decides to expand the TLAS to cover other timber exports).¹ Five basic elements are envisaged to form a credible TLAS:

- A definition of **legal timber** that describes the laws of the partner country that must be complied with and the means (i.e., legality verifiers) to determine compliance;
- A **system to track timber** from forest operations to export that excludes timber from unknown or illegal sources from entering the international supply chain (and, for countries making the necessary commitment, entering also the domestic supply chain);
- A **system to verify compliance** with all elements of the timber legality definition throughout the supply chain;
- A **licensing scheme** of 'verified legal' timber products; and
- **Independent audits** to provide assurance to all interested parties that the system is working as planned, thereby maintaining its credibility.

Honduras has important experience in each one of these five components, but it also faces significant challenges in developing them adequately in the context of a VPA. For each of these five elements, this Forest Trends Information Brief describes relevant experiences in Honduras and discusses some of the difficult or unresolved issues that could have important bearing on the VPA process. The document also highlights some of the choices that the stakeholders involved in the VPA negotiations may need to make. In the case of Honduras, given its small volume of timber exports to the EU, it is unclear what precisely the VPA will look like, so this article assumes (at this point in time) that it will look rather similar to the VPAs of African and Asian countries that have much stronger trade links with the EU.



¹ For detailed information on the EU FLEGT Action Plan and FLEGT VPAs, please refer to <http://www.euflegt.efi.int/portal/home/vpas/>

Issues around the definition of timber legality

One of the first steps in the Honduras VPA will be to arrive at a definition of 'legal timber' based on Honduras' own laws and regulations. This section introduces three sets of issues that have important implications for this task. The first has to do with 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 salvage permits.

The 2007 Forestry Law

The development of a definition of timber legality under a FLEGT VPA agreement is a responsibility of each partner country. In some VPA countries, this has proven a challenging exercise. In Ghana, for example, local stakeholders recognized 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 Indonesia the process started with about 800 forestry-relevant laws, regulations and decrees that needed to be taken into account (Brown et al. 2008). In such situations deciding which legal instruments are central to the timber legality definition is no easy task.

Honduras faced a somewhat similar legislation situation before the approval of the Forestry Law in 2007, when there were multiple different laws regulating the forest sector. The 2007 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. The impetus for its final approval was promoted by an unprecedented coalition of representatives from the government, rural communities, religious groups and environmentalists that helped shape the final version of the law. 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. This could mean that the timber legality definition in Honduras will not require substantial reforms of existing legislation as has been necessary in some VPA processes in Africa or Asia – a view shared by many of these constituencies.

Audit requirements were not however a key point of debate when the Forestry Law and its implementing regulations were designed. They were not developed bearing in mind possible indicators of legal compliance. It could therefore be challenging to translate their content into parameters and verifiers of legal adherence that are both practical and good enough in the eyes of most stakeholders.

Some observers have also noted that the Forestry Law is too regulatory in nature, 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 in order to arrive to a workable definition of timber legality – will need to go through the complex process of reforming the law itself.

Another potential issue is the legal basis underpinning the definition of timber legality. It is widely recognized that such definition should not be limited to forestry laws and their regulatory frameworks, but should also include other legislation applicable to the forest sector and relevant for achieving sustainable forest management, as for instance land tenure laws, labor codes, trade restrictions and tariffs, environmental regulations, and fiscal arrangements, including forest fees. In addition, in other VPA countries much attention has also been given to the inclusion of key international agreements, as for example the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the ILO Convention No. 169 on Indigenous and Tribal Peoples (Box 1), both of which have been ratified by Honduras.

Besides identifying these multiple legal instruments, a related challenge is deciding which elements of them should be incorporated in the concept of 'timber legality'. Since weak legal compliance as well as stronger enforcement can affect different stakeholders in different ways, it is widely acknowledged that the process to decide which legal elements to include in the definition should involve extensive consultations with all interested parties (EFI 2009).

Box 1. Free, Prior and Informed Consent

Several articles of ILO Convention No. 169 on Indigenous and Tribal Peoples refer to the principles of Free, Prior and Informed Consent (FPIC). In countries like Ghana and Indonesia the inclusion of FPIC principles has been an important topic during VPA negotiations. For instance, in Ghana the final text did not include an explicit reference to FPIC, but it 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 Ansah and Ozinga 2010).

In Honduras FPIC is likely to be an important demand of indigenous people organizations. 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 the Mosquitia region 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 under the Social Forestry System, the state-run programme to promote community forestry. Therefore, local observers expect that the debate around FPIC will be less contentious than in other VPA countries.

Forest Tenure

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 leading citizens, and continued in the 19th and 20th 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 tenure security and improving agricultural productivity (Jansen and Roquas 1998). The 1992 Law for Modernization and Development of the Agricultural Sector expanded these titling 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, as for example in the fertile Bajo Aguan Valley of northeast Honduras.

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 briefly noted in Box 1, 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 public 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 one of the most alarming types of illegal forest practices in Honduras, because it goes at the heart of political patronage and corruption in public governance. Even though this problem is widely recognized, it may nevertheless be difficult to develop and refine a timber legality criterion of its assessment when there are concerns about tenure legitimacy – a particular challenge given that most timber extraction is presently carried out on private land.

Salvage permits

Salvage permits could prove to be another sensitive issue for the definition of timber legality. During the past decade they have been frequently used in Honduras, both for pine forests affected by the southern pine beetle (*Dendroctonus frontalis*) and for tropical humid forests damaged by hurricanes or converted to other land uses. Evidence suggests that salvage permits have been widely abused (Richards et al. 2003; Sanchez et al. 2008; Global Witness 2009), which could elicit some reservations about whether to allow for the inclusion of salvage timber under the timber legality definition. While its inclusion could undermine TLAS credibility, exclusion would increase the likelihood that salvage permits will continue to be abused.

Issues around the Timber Tracking System

Honduras exports very little timber to the EU. In recent years, the annual trade value of VPA core products exported to the EU has often been less than US\$1 million. This raises important questions regarding the focus of the VPA timber tracking system, which will trace wood products from harvest to export and will report based on adherence to the legal standards defined in the timber legality definition. This seemingly technical issue has important policy implications. Honduras will have to decide between different options:

- One option would be to include only timber and timber products exported to the EU. However, given the small volumes involved, the VPA probably would not have much effect on the overall quality of forest governance, which is one of the underlying aims of the FLEGT initiative. The FLEGT Action Plan, in fact, recognizes that the issue of timber legality should be an entry point into wider governance concerns (EC 2007).
- Another choice could be to track all exported timber, regardless of destination. This would allow a broader impact on forest governance, but runs the risk of creating a two-tier system of timber supply: verified legal timber based on quality enforcement for export markets; and timber of uncertain legality, and dubious environmental and social standards, for domestic consumption. This could be particularly problematic considering that the poorly regulated domestic trade is much bigger than export trade in Honduras, and its forest governance problems are arguably more acute.

- A third option, followed by countries like Ghana and Cameroon, could be to apply the system more widely and cover all timber in circulation in Honduras, whether destined for domestic or international markets. In this case the tracking system would monitor all timber and timber products produced and processed in the country. This approach is much more comprehensive but poses several challenges. An important one is how to treat imported timber and timber that is simply in transit (for instance Nicaraguan timber that passes through Honduras in order to be exported from the transnational shipping port of Puerto Cortés in northwest Honduras). Box 2 describes how the issue of imported timber 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 license 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 license. 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 and Riesco 2010.

Issues around the Verification System

Legality licenses will be issued on the basis of evidence of compliance with the procedures established in the timber legality definition. Proof must also be presented that no wood from illegal or unknown sources has entered the supply chain of products to be licensed. The purpose of the verification system is to provide these sets of evidence. Here too, Honduras will have to make important decisions during the VPA negotiation. Broadly speaking, two types of verification systems have been envisaged for VPAs: *consignment-* and *operator-based* systems.

In general, timber verification systems that have been put in place to date have been largely focused 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 well-functioning authority and a centralized computer-based system. One known problem of consignment-based systems, for example, is ensuring that transport permits are cancelled once consignments arrive at their stated destination.

Thus, for a country like Honduras, with a relatively small number of timber exporters, a verification system based on operator accreditation could be more viable. Under such a system, operators would be licensed to export timber and then be subject to regular audits of their approved control systems in order to maintain their licensed status. The arrangement would function in a way that resembles certification schemes as they presently operate, and would give considerable scope for recognizing a variety of tracking and chain-of-custody systems being used by operators. In the presence of weak government institutions, underfunded and with limited operational capacity, operator accreditation appears more feasible than systematic consignment checks. On the other hand, it can also be argued that an operator-based verification system could be more vulnerable to political influence, a particular concern in weak governance situations (Brown et al. 2008).

Issues around the Licensing Scheme

Similarly, the licensing scheme can be organized on the basis of approved market participants or for individual shipments. Another important decision concerns the coverage of the licensing scheme. For example, Ghana and Cameroon, as mentioned above, have decided that the legal framework and verification procedures outlined in their respective VPA will cover all timber in circulation in each country. However, both countries have also decided that only timber exported to

the EU market will receive a legality license. This means that timber for the domestic market, as well as timber in transit, despite being traced by the tracking system, will not be issued FLEGT licenses.

Honduras has a long experience in forest certification and a well-established Forest Stewardship Council (FSC) national initiative. As a result, an important issue for the VPA will be the role of certification in the verification and licensing of legality. Given that all major forest certification schemes demand proof of legality as a precondition for certification, one option could be to treat certification as a surrogate for legality assurance. Forest operations with forest management and chain-of-custody certificates issued by certification schemes recognized and approved by the government of Honduras could be entitled to receive an operator-based license of legality under the VPA system. For example, operators whose timber has been certified under an approved scheme could be granted an annual or six-monthly legality license. This procedure would have the advantage of avoiding verifying legality twice, preventing duplication of requirements and associated costs. This 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. Some observers are also concerned that commercial interests driving certification bodies could lead to compromises in judging legal performance. Another concern 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.

Issues around Independent Monitoring and Independent Audits

Since 2005 the Honduran National Commission for Human Rights (CONADEH) has implemented an Independent Forest Monitoring (IFM) project. The more than 100 reports published (as at January 2013) have greatly improved understanding and exposure of illegal forest activities in the country, including the illegal titling of national forest areas in favor of large landowners.

In Cameroon there was also an ongoing IFM initiative in the country when the VPA was negotiated and eventually signed. The VPA text in Cameroon envisages that this initiative will continue as part of the TLAS, providing field-level investigations and gathering evidence of illegality. However, the agreement also establishes that independent audits will complement the work of the independent monitor by assessing the performance and efficiency of the VPA TLAS system.

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, rather than operational, orientation. In other words the audits aim to verify that the appropriate systems are in place and functioning as they should, rather than to investigate specific activities or violations as CONADEH typically does. Independent audits would thus consist of periodic (usually every six or 12 months) surveys to ascertain whether the VPA is delivering its objectives of providing legal timber and improving forest governance. The VPA audits would also be expected to identify weaknesses and recommend systemic reforms in the TLAS. Independent audits are therefore different, but complementary, to the on-going monitoring work of CONADEH.

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. The primary aims are to reduce illegal logging and ensure legal timber exports to the EU, but other potential benefits include rural development, poverty reduction, reduced conflicts in forest areas, and the promotion of a better climate for long term 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 implicitly understood that a VPA 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 the VPA process has opened up considerable political space for civil society actors, led to increased transparency and accountability by government, and, in the case of the Republic of Congo, been accompanied by legislation giving new rights to indigenous peoples (Pearce 2012). It is also providing an opportunity in some countries, such as Indonesia, to promote community forestry.

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 governmental institutions to social forestry has often been low (Nygren 2005). The VPA is an opportunity to reinvigorate the social forestry policy and 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 will be explored in a forthcoming Forest Trends Information Brief.

Conclusión: Challenges of the VPA Negotiations

The issues discussed above 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-party commitment is a critical condition for successful negotiation. Therefore, as recently 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 it can play an active role in the negotiations and facilitate the capacity of marginalized rural communities and indigenous groups to work in tandem with ICF and other governmental institutions in the elaboration and design of the VPA.

There could be a temptation to concentrate on the technical aspects of the VPA (such as the TLAS) 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, strong mechanisms need to be put in place to ensure a continued and genuine participation of all the stakeholders, especially local forest-reliant people, during the negotiations. It is also important that donors and other entities interested in improving forest governance in Honduras continue to provide capacity and financial means for stakeholders to engage and contribute meaningfully to the negotiation.

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Forest Trends
1203 19th Street, NW
Washington DC 20036 USA
www.forest-trends.org

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