

Allocation of land – the need for clarity

Legal toolkit on forest conversion - Factsheet 1



This Factsheet is intended to inform law-makers about key legal issues that may arise when forested land is allocated for agriculture, mining or infrastructure, and the risks that may stem from those issues. It also provides questions to guide law-makers through processes of law reform to improve the laws regulating land allocation with a view to limiting forest loss.

This factsheet is part of a larger toolkit on law reform to address forest conversion:

<https://www.clientearth.org/forest-conversion/>

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The rules regarding land allocation are extremely important because they can encourage or restrict forest conversion. To develop a comprehensive legal framework, it is essential that:

1. Laws across different sectors regarding the use of forested land are clear and consistent.
2. Laws clearly set out the process that must be followed to allocate land, including how relevant stakeholders can participate.
3. Existing customary land tenure and forest resource rights of local communities and indigenous peoples are recognised in law.
4. Laws are detailed enough to be correctly applied and enforced.

This Factsheet explores four crucial areas for law-makers to consider. Within each area, we look at common legal problems and the risks that may stem from those problems. A set of key questions at the end of this Factsheet is offered as a checklist to reference during the process of law review and reform.

Background: the land title

Before implementing a project¹ that includes forest conversion, any developer must have a right to use the land, known as a land title. However, due to the number of overlapping and potentially conflicting interests in a single piece of land, it can be complicated to obtain a legal land title that will not trigger land-tenure disputes or cause unlawful forest conversion.

When the government grants a land title (or a permit) for an agricultural, mining or infrastructure project, the land may include forests. Before allocating a land title, it is therefore essential that the relevant authority has a clear understanding of both:

- whether the land under consideration contains forest, and if so,
- which areas of forested land are prohibited from land-use change and which can be converted, and under what conditions.

It is also essential to ensure that the land granted is not occupied or used by a third party. In this regard, it is especially important, but also challenging, to recognise and respect land tenure and resource rights of local communities and indigenous peoples.

1. Permitted use of forested land

Key legal problem: an absence of clarity and consistency between laws

Key risks: uncontrolled deforestation; inability to carry out intended project

The rules governing access to land are often complex and regulated by laws from different sectors.

Forest laws may not even mention the possibility of forests being converted. This makes it very difficult to achieve clarity on whether particular forests can or cannot be converted. For example, Gabon's forest law is silent on whether conversion is permitted.

Ideally, forest laws clearly specify which, if any, forest may be converted to another use, and which areas should remain permanently forested (e.g. protected areas, forests allocated for selective logging, national parks and community forests). However, even where forest laws are clear and provide protections, they may be contradicted by laws from other sectors that impact forests (Case Study 1).

Case Study 1: Contradictory laws leading to deforestation in Ghana

In Ghana, forest-related policies and guidelines give contradictory information on whether mining is permitted in forest reserves. While the National Land Policy bans mining outright in forest reserves,² the Environmental Guidelines for Mining in Production Forest Reserves³ and the Forest and Wildlife Policy⁴ imply that mining is permitted in forest reserves, within limits. Moreover, while the Minerals and Mining Act limits the land available for mineral rights, these limits do not include a restriction on mining in forest reserves.⁵ Therefore, there is legal confusion about whether land conversion to mining is permitted in forest reserves. Some mining exploration has already begun.

Even where forest laws specify which forest may be converted and which should be protected, exceptions can considerably dilute the protections granted. For example, the law may protect conservation forests from conversion activities, except those in the 'public interest' or for 'public utility' (Case Study 2).

Case Study 2: Protected forest classification is overruled by 'public utility' in Brazil

Brazilian law establishes Conservation Units and Permanent Preservation Areas on lands where there are important natural features, including forests. As a general rule, the vegetation in such areas cannot be converted or cleared for any purpose. However, the Forest Code 2012 defines exceptions to this rule: deforestation for public utility, social interest or low-impact activity is permitted. 'Public utility' is defined broadly, to include national security, infrastructure, public services, energy production, sanitation, communication and mining.⁶ This exception may open important natural areas, such as forests, to conversion.

Lack of clarity and consistency within and between laws on the use of forested land, particularly in areas which could be subject to land-use change, leads to the following risks.

- **Uncontrolled deforestation:** When the law does not specify which forest, if any, can be converted or where laws impacting forests are contradictory, any forested land may be allocated for a purpose other than forestry. This could include primary forests or forests with biologically important ecosystems. Equally, where land classification is done to identify which lands are appropriate for certain uses, this process should take forest cover into account. If this does not occur, forested land may be classified as land that can be used for agriculture and then may be cleared (Case Study 3).

Case Study 3: Land classification in Peru ignores forest cover

In Peru, land is classified according to its optimal land-use aptitude (*capacidad de uso mayor del suelo*), which is determined based on soil quality and climate variables.⁷ Whether or not the land is forested does not affect the decision on land classification. Any lands classified as ‘agrarian’ – even those with forest cover – can be allocated for agricultural land uses and a forest clearance permit requested, to make space for the new land use.⁸ Once classified, there is a presumption that the land will be used for agricultural activities and that the forest can be cleared.

- **Inability to carry out planned activities:** Companies may be given very large concession areas without the government knowing expressly the characteristics of the land (e.g. forested areas - protected areas - primary forests) they are granting. This is generally due to a lack of land use planning and lack of consultation with relevant stakeholders. However, when companies undertake initial assessments of the land (e.g. by conducting environmental impact assessments and/or using High Conservation Value or High Carbon Stock approaches), they might realise that they cannot undertake some of their planned activities because the land is covered with high-density forest or endangered species, which are protected by some of these assessments. For example, the Malaysian company, Sime Darby, has been granted a 220,000-hectare concession to develop palm oil and rubber plantations in Liberia but may not be able to develop part of its plantation because the land contains high-density forests (for more information, see Factsheet 4, Case Study 4).⁹

2. Steps to follow when granting a land title

Key legal problems: no requirement to consult with key stakeholders, lack of transparency

Key risks: overlapping rights on the same piece of land, land-tenure conflicts, discouragement of private investment

In some tropical countries, it is the government that mainly owns land. Ideally, before granting land title, the government should:

- consult all relevant ministries (to avoid forested land being allocated for another purpose without consultation of the relevant ministries)
- apply land-use planning principles (done correctly, land-use planning helps to determine the most appropriate practices for different areas of land, e.g. those best for forestry or for agriculture)
- consult affected local communities and indigenous peoples
- check the existing land register
- make the allocation process transparent
- allow public access to a list of granted land titles.

These steps can be missed if the legal framework does not include them as obligations. They may also be missed where the practical systems to deliver these obligations do not exist. Some countries do not always carry out land-use planning, and some do not have registers of land, for example.

Without strong and complete legal frameworks for allocating land, and good coordination between ministries, the following risks may emerge.

- **Overlapping rights on the same piece of land:** Different government agencies may grant permits for the same area of land. For example, in Gabon, permits have been granted for land uses and activities incompatible with protected areas and national parks but which overlap with these areas.¹⁰
- **Land-tenure conflicts:** Competing rights to the same area of land can lead to tenure disputes and allegations that the rights of one party to use land have been infringed by another party. Judicial or administrative decisions will usually be necessary to resolve these tenure disputes.
- **Discouragement of private investment:** The complexity of land tenure rights can also discourage private-sector investments, because investors are keen to avoid operational problems or delays caused by land-tenure conflicts.

Case Study 4: Collaboration to recognise traditional forest uses in Liberia

Customary land tenure is not recognised in statutory law in Liberia. Agricultural and mining concessions have been granted on land, including forested land, occupied and used by communities. In 2007, the government of Liberia granted ArcelorMittal a 51,000-hectare mining concession that included part of the East Nimba Nature Reserve (a protected forest area), and two community forests. Without appropriate planning, these land uses could be in conflict. Recognising this problem, ArcelorMittal, together with international and national NGOs, local communities and the government, developed the Nimba Biodiversity Conservation Programme, which aims to define different areas of land in northern Nimba County for mining, forest conservation and community land uses.¹¹

3. Recognition of land rights of local communities and indigenous peoples

Key legal problem: no statutory recognition of communities' land tenure rights

Key risks: unfair eviction, land-tenure conflicts, both leading to loss of livelihoods

When forested land is mainly publicly owned, this is often because customary land tenure rights are not formally recognised. This can lead to government authorities giving titles to forested lands that are occupied or used by customary owners. Communities' rights are, therefore, inadequately protected in processes governed by statutory law that do not recognise these rights (Case Study 4).

When customary land tenure rights are not formally recognised, there is a risk of eviction of local communities and indigenous peoples from their land, which can lead to loss of livelihood and risks of conflicts. There is more information on this in Factsheet 5 of this Toolkit.



4. A legal framework with adequate detail and implementation

Key legal problems: lack of detail, limited implementation and enforcement

Key risks: increased deforestation

Forests are at risk when the details of how to implement laws on land allocation are missing. For example, in certain countries, the legal framework states that only 'declassified' forest can be allocated for conversion to another use.¹² This means that a classified forest must be declassified before it can be allocated for conversion. It also means that forests can be protected from conversion by classifying them. However, where the declassification or classification processes are not clear, or are not followed, this undermines the distinction, leaving the potential for conversion without due process.

Another problem occurs even where a country has adequate laws in place. Despite the laws, a lack of implementing texts or enforcement may mean that the rules are not or cannot be used in practice (Case Study 5).

Case Study 5: Dispute resolution mechanism in theory not practice in the Republic of Congo

In 2009, the Republic of Congo created an inter-ministerial consultation committee for cases of land-use conflicts in natural ecosystems.¹³ However, the law does not specify the committee's function and remit. To our knowledge, this mechanism has not yet been used, and so its effectiveness remains unproven.

Key questions for law-makers on land allocation

A review or reform of national laws may be needed to ensure that they adequately address competing demands for land in tropical countries. Before starting any legal-reform process, all relevant laws across different sectors should be assessed for consistency and harmonised as necessary.

The following questions are for decision-makers to consider before starting legal reform of land-allocation processes.

Permitted use of forested land

1. Do forest laws expressly mention which forests can and cannot be converted to another use?
2. Is there a prohibition against changing the land use of a forest? For example, this may be the case for forests classified for protection, forests allocated for selective logging or forests reserved for use by local communities and indigenous peoples.
3. Is there consistency between sectoral laws regarding the conversion of forests? For example, are the forests banned from conversion under forest law also recognised in other sectoral laws?

Steps to follow when granting a land title

4. Is there a requirement to make the procedures for land allocation public? This includes a notice of calls for tender when there is a competitive bidding process and contracting between the government and a company. Ideally, it also includes the resulting land titles being public.
5. During the allocation process, are there rules requiring the participation of key stakeholders, including representatives of local communities and indigenous peoples, and the ministry of forests?

6. Is the process of land allocation synchronised with other processes that assess the suitability of the forestland for conversion? For example, the environmental impact assessment process.

Recognition of land rights of local communities and indigenous peoples

7. Is there formal recognition of the customary rights of local communities and indigenous peoples in the law?
8. Does the law require consultation with and/or the free, prior and informed consent of local communities and indigenous peoples during land allocation?

A legal framework with adequate detail and implementation

9. Do laws include implementing provisions that are sufficiently detailed to make the law function?
10. When declassification of forest is needed before it can be allocated for another purpose than forestry, are the rules well described? Are the grounds on which to justify forest declassification sufficiently defined?
11. How will the government enforce the law? Is independent monitoring of land allocations possible?
12. Is there a mechanism for resolving potential land-tenure disputes before going to court?
13. Is the procedure to bring a land-tenure dispute before courts accessible to anybody (e.g. regardless of language or ability to pay), and is there any right to appeal?

1. We use 'project' here to mean any activity or development (including agriculture, mining, infrastructure development and urban expansion) that can lead to forest land-use change.
2. Ghana, Ministry of Lands and Forestry (1999) National Land Policy, Section 4.4 (b and d) and 4.5(a).
3. Environmental Protection Agency (2001) Environmental Guidelines for Mining in Production Forest Reserves in Ghana.
4. Ministry of Lands and Natural Resources (2012) Ghana Forest and Wildlife Policy, Section 5.1.1, article 1.1.2.
5. Ghana, Minerals and Mining Act 2006 (Act 702), Section 3-5.
6. Brazil Forest Code 2012, article 3º, VIII.
7. Republic of Peru, Supreme Decree on the Regulation for Best Land Use Classification, No. 017-2009-AG.
8. Republic of Peru, Wildlife and Forestry Law No. 29763 2011, article 36.
9. Chain Reaction Research (November 2016) 'Sime Darby: Liberian Crossroads' (<http://bit.ly/2gytpRZ>).
10. Republic of Gabon (July 2012) 'Plan stratégique Gabon émergent – Vision 2025 et orientations stratégiques 2011-2016'.
11. ArcelorMittal and Conservation International, 'The Nimba Biodiversity Conservation Programme, Liberia: Response to Action Statement 2' (<http://bit.ly/2euSZ6B>).
12. See for example: ClientEarth (2015) 'The risks associated with conversion timber in the Republic of Congo' (<http://bit.ly/2yRZJpo>).
13. Republic of Congo (2009) 'Décret n°2009-304 du 31 août 2009 instituant un comité interministériel de concertation en cas d'usages superposés dans les écosystèmes naturels'.

Our vision is of a planet where all life is diverse, abundant and thriving. We want a home where people and nature flourish together.

We use law as a tool to mend the relationship between human societies and the earth.

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