ClientEarth

Legal toolkit on forest conversion

This Toolkit is intended to inform law-makers about key legal issues that may arise when forests are cleared for conversion to another use, including agriculture, mining, infrastructure or urbanisation, and the risks that may stem from those issues. It also provides questions to guide law-makers through processes of law reform to address legal frameworks governing forest conversion with a view to limiting forest loss. In addition to this Overview, the Toolkit consists of five Factsheets:

1) Allocation of land, 2) Clearing forested land, 3) Timber from forest conversion, 4) Environmental protection and 5) Communities' rights: https://www.clientearth.org/forest-conversion/

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Overview

Why is forest conversion an important challenge?

The growing demand in both domestic and international markets for commodities like soy, cocoa, palm oil, gold and iron ore is driving global tropical deforestation. In response to this demand for 'forest-risk commodities',[a] forests are destroyed and the land is converted. Forest conversion[b] contributes to increased emissions of carbon dioxide, loss of biodiversity, soil erosion, conflicts over land rights, and eviction and loss of livelihood for local communities and indigenous peoples. These issues are amplified by the illegal nature of much forest conversion.[c] As well as social and environmental issues, illegal forest conversion could lead to loss of revenue for operating companies, financial investors and governments, as project activities can be delayed once the illegalities come to light.

Activities that lead to forest loss and degradation must be avoided to reduce the current rate of tropical deforestation.[d] In many countries that contain tropical forests, national development policies promote sectors such as agriculture, mining and infrastructure for their potential to improve the national economy. In order to develop those sectors, these countries may not be able to avoid forest loss entirely. Nevertheless, countries must balance economic growth, food security and protection of the environment. Improving the legal frameworks governing forest conversion could help to achieve this balance.

Why do forest-conversion laws matter?

Legal frameworks governing forest conversion are crucial but complex. They involve the laws of several different sectors, such as land, forest, environment and tax. They are also often unclear, incomplete or contradictory, which means that conversion is not effectively regulated.

Complete and comprehensive legal frameworks create a set of rules that must be followed by those involved in forest conversion. They determine (i) what will be authorised, (ii) what is forbidden and (iii) what conditions need to be followed for rights to access forested land and clear it for another use to be granted. The design of legal frameworks should also take into account how to prevent and mitigate environmental and social damage.

Legal reform is one route to achieving a complete and comprehensive legal framework. However, it is important that legal reform involves a participatory approach, including civil society and local communities and indigenous peoples in decision-making processes.

How was the toolkit developed?

From 2014 to 2017, ClientEarth analysed legal frameworks governing forest conversion in nine tropical countries: Brazil, Cameroon, Cote d'Ivoire, Gabon, Ghana, Liberia, Peru, Republic of Congo and Viet Nam. ClientEarth and local consultants led the research into how forest conversion is addressed in national laws and identified areas of weakness, including ambiguities, overlaps and gaps, that create risks for national forests and local communities' rights. In five focus countries in West and Central Africa – Cote d'Ivoire, Gabon, Ghana, Liberia and Republic of Congo – we held workshops with national NGOs to share our findings.

Each of the nine countries analysed faces significant and increased forest conversion. However, each country is different in terms of forest cover, economic and environmental priorities and governance – and particularly concerning forest governance and communities' rights. While recognising the differences between each country, and the complexity of creating a unique set of rules to govern forest conversion, we have identified five key areas which require specific attention in all countries.

1. Allocation of land – the need for clarity
2. Clearing forested land – the need for a permit
3. Timber from forest conversion – the need for rules
4. Environmental protection – the need for consideration
5. Communities' rights – the need for better recognition

This Toolkit includes a Factsheet on each of these five topics. The Toolkit focuses on the necessary steps to regulate forest conversion but does not cover the rules that should apply to the production of commodities after forest land-use change.

What is the scope of the Toolkit?

This Toolkit approaches forest conversion broadly and covers the clearance of forests for multiple end uses. All studies agree that a significant current driver of deforestation is the clearance of natural forest for agricultural activities. However, regional or global trends driving deforestation could change. Therefore, legal frameworks should establish rules for any type of activity that could lead to forest conversion (e.g. agriculture, mining or urban expansion).

It is important to differentiate between large-scale and small-scale activities resulting in forest conversion. While a comprehensive legal framework should address the same issues for all actors, it is unrealistic and sometimes unfair to apply the same rules to a project converting a few hectares of forest as to one affecting thousands of hectares. Smallholders and small companies might not have the capacity and resources to comply with the same rules as a large company, creating significant increased risk that they will operate illegally. Acknowledging that regulating smallholders' activities depends considerably on national contexts, this Toolkit will focus mainly on rules governing large-scale projects.

a. Forest-risk commodities are 'globally traded goods and raw materials that originate from tropical forest ecosystems, either directly from within forest areas, or from areas previously under forest cover, whose extraction or production contributes significantly to global tropical deforestation and degradation' (Rautner et al. (2013), p.15, cited in COWI (2017) 'Draft feasibility study on options to step up EU Action against Deforestation' Part 1 (http://illegallogging-deforestation-conference.eu/wp-content/uploads/2017/06/Draft_Feasibility_Study-PART_I-.pdf).

b. Forest conversion is the clearing of natural forests (deforestation) to use the land for another purpose. This purpose is often agriculture (e.g. growing crops such as palm oil, or creating pasture for cattle) but can also be mining, construction of infrastructure, or urbanisation.

c. Lawson, Sam et al. (2014) 'Consumer goods and deforestation: an analysis of the extent and nature of illegality in forest conversion for agriculture and timber plantations', Forest Trends (http://www.forest-trends.org/documents/files/doc_4718.pdf).

d. Global loss of tree cover reached a record 29.7 million hectares (73.4 million acres) in 2016 (Global Forest Watch, http://bitly/2GbwRMK).

1. Allocation of land – the need for clarity

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 project[1] 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 Reserves[3] and the Forest and Wildlife Policy[4] 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: Iack 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?

2. Clearing forested land – the need for a permit

The clearance permit represents a crucial stage of the forest-conversion process because it requires consideration of whether or not it is appropriate to clear an area of forest for another use. To help develop a legal framework that comprehensively regulates forest clearance, this Factsheet identifies five essential requirements for law-makers to consider:

1. The permit required for forest clearance is unambiguous and details the clearance process.
2. All forested lands are subject to an environmental and social evaluation of whether clearance is appropriate (see Factsheet 4).
3. When to apply for a clearance permit for is explicit and consistent across all relevant laws.
4. The rights of local communities and indigenous peoples to participate in decisions affecting their land and resources are upheld.
5. Laws are accompanied by strong enforcement and dissuasive penalties.

Although the required permits and procedures differ between countries, these five essentials will be similar for all countries. For each topic, 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 clearance permit

A deforestation or clearance permit provides the right to deforest to use the land for another purpose. Generally, it is distinct from a logging permit because it allows clear-cutting of an entire forest area rather than selective logging of valuable trees. Therefore, clearance permits cause forest loss and should be carefully considered.

Before granting a clearance permit, it is good practice for the government to require specific information or documents, including:

- proof of land title
- confirmation of agricultural or mining plans
- schedule of work, including information on the scope and method of the clearance
- environmental permit, following a process of environmental impact assessment (EIA)
- proof of free, prior and informed consent from affected communities
- forest inventory and/or map, with details of the trees to be cleared (this is important if the timber is to be sold – see Factsheet 3).

When establishing the rules governing forest clearance, the law should at least include: how the clearance takes place; who undertakes the clearance; the areas where clearance can or cannot occur (such as slopes or the banks of waterways); and the destination of timber stemming from the conversion (‘conversion timber’). Clearance permits allow the government to monitor conversion activities, better identify illegal deforestation and track forest cover, to ensure forest loss is limited.

1. Legal clarity on clearance permits and standards

Key legal problem: uncertainty and an absence of strict rules

Key risks: forest conversion permits are exploited as a loophole, environmentally and socially destructive clearance practices, illegal timber

In some tropical countries, forest law does not include a clearance permit, or there may be a lack of clarity around which permit should be used for forest clearance (Case Study 1). If no clearance permit exists, the law may not establish where, how and by whom clearance can take place.

- To identify **where** conversion can take place, the law should establish limits on which forests are appropriate for clearance and determine whether small areas require a permit, or whether they are exempt to allow local communities to practise subsistence agriculture.
- To identify **how** clearance should be done, the law should detail permitted methods of deforestation.
- To identify **who** is able to clear the forest, the law should determine whether only registered timber operators are allowed, or whether the company doing the agricultural, mining or other project may itself carry out the clearance.

Case Study 1: Legal confusion on permits in Liberia

In Liberia, there is a lack of clarity in the law about which permit should be used for forest clearance. There are four forest resource permits that companies or individuals must obtain to harvest trees legally.[14] However, none of these four permits is specifically for forest clearance. The Timber Sale Contract (TSC) is often noted to be the most relevant, as it envisages clearing land for agriculture or plantations.[15] However, it mentions only agriculture and no other uses of the land (such as mining).[16] In practice, companies that have cleared land for palm oil plantations have not been required to obtain a TSC in Liberia.

Without precise rules, the forest clearance permit may be used as a loophole that companies exploit to clear forests for the sole purpose of easier access to the timber, without developing the new land use (Case Study 2). When this happens, the potential benefits of the agricultural, mining or infrastructure projects to national development, employment or social security are then lost – in addition to the loss of the forest.

Case Study 2: False use of clearance permits to access timber in the Republic of Congo

In the Republic of Congo, companies are exploiting clearance permits to harvest valuable timber. From 2014-2016, five companies were found to have obtained a forest clearance permit and to have used this permit simply to commercialise the high-value timber in the area, seemingly without the intention to undertake the agricultural activities.[17]

The rules developed for traditional logging are generally strict, and clearance rules should match this stringency to ensure all forestry activities adhere to the same standard. Where rules for the forest clearance are not stringent, clearing forests can be environmentally harmful. If there are no restrictions on who may clear the forest (registered timber operators, or the company running the conversion project), there is a risk of unknowledgeable companies adopting bad practices. Likewise, if clearance methods are not specified, greater destruction of the forest and surrounding areas could result from 'slash and burn'[18] and other environmentally or socially destructive clearance practices.

Finally, without clarity on the legal clearance permit and the rules regulating forest clearance, it may not be possible to sell the timber legally. The EU, USA and Australia require all timber entering their markets to be legal, based on the laws of the country of production. Companies prove legality by collecting information about the timber, including documents indicating compliance with applicable laws. If the clearance permit does not establish clear rules, the timber could be (seen as) illegal and excluded from trade.

2. Coordination and chronology of conversion authorisations (from land title to clearance permit)

Key legal problem: lack of clarity around when a permit must be obtained

Key risks: confusion over legality of permits, prioritisation of other land uses over forests

In many countries, it may not be clear at what point in the forest-conversion process the clearance permit must be obtained. For example, should the company have already received the licence for the new land use (e.g. a mining or agricultural licence) before the clearance permit is provided? Should the EIA have already been approved? If there is no set chronology or prerequisites, this may cause uncertainty and confusion about the legality of each individual permit.

Where sectoral laws are incoherent or where the chronology of permits is unclear, there is a risk that other uses of land – such as agriculture or mining – will be prioritised over forests. This risk manifests itself in exclusion of forest concerns from conversion decisions, where agricultural or mining laws do not require consultation with the forestry administration (Case Study 3).

A similar risk exists where it is unclear whether a clearance permit must be received before or after a land-use permit. There can be significant pressure on a forest administration to grant the clearance permit, if other agencies have already approved the project.

3. Consultation with affected communities and indigenous peoples

Key legal problem: lack of consultation with communities

Key risks: land-use conflicts and lack of compensation for loss of livelihood

Communities living in or near forests often depend on the forests for their livelihoods, including through collecting timber or non-timber forest products. If these communities are not consulted during the application process for clearance permits, they cannot participate in the decision or receive appropriate compensation for loss of livelihood. This may lead to land-use conflicts, invalidate the clearance permit or delay the conversion project while local communities' rights are considered and alternatives or compensation determined (for more information, see Factsheet 5).

Case Study 3: Different state authorities with differing rules in Liberia

In Liberia, the Minerals and Mining Law allows miners to clear forested land for mining activities[19] and gives authority to the Minister for Mines to authorise clearing the trees and shrubs "necessary for the mineral rights holder's activities outside the boundaries of his license or licenses".[20] This is incoherent with the forest law, which designates the forestry administration as the "representative of Government in any matter concerning the use of forest", meaning that no one should clear trees and shrubs, or cut wood, without its permission.[21]

Case Study 4: Amnesty for illegal forest clearance in Brazil

In Brazil, controversy has surrounded the amnesty granted in the 2012 Forest Code to illegal forest clearance carried out before 2008. The 2012 law states that rural land on which native vegetation was cleared before 22 July 2008, regardless of whether the clearance was legal according to reserve requirements, is now 'legalised', where there are currently buildings or agricultural activities.[22] There is a risk that this wide-ranging amnesty could encourage future illegality. On the other hand, some commentators argue that – if accompanied by rules and incentives for forestland owners – the amnesty grants space for increasing compliance with legal requirements for reserved forest areas on rural land.[23]

Case Study 5: Illegal use of the clearance permit in Viet Nam

In Viet Nam, the forest clearance permit (the permit for 'full utilisation of the wood') states that before the new land use begins, it is necessary to fully exploit the forest products.[24] Companies granted a permit for full utilisation of the wood for infrastructure projects, including hydropower dams, have been associated with illegal logging and clearing vast areas of forestland, outside the permit area.

For example, in 2005, the company behind the Khe Dien hydroelectric project was granted a permit for full utilisation of the wood in the area that would be flooded by the dam. However, the company cleared hundreds of hectares of protected forest outside the concession area, mixed this illegal timber with legally harvested timber from within the concession area[25] and falsely sold it using the authorisation provided by the permit. Eleven people were charged with illegal logging in this case in 2008.[26]

4. Strong implementation and enforcement

Key legal problems: limited enforcement, no dissuasive penalties

Key risk: little incentive to apply for a clearance permit and follow clearance rules

Without strong enforcement and dissuasive penalties, there may be little incentive to apply for a clearance permit or to follow the clearance rules (Case Study 4).

Monitoring all clearance permits to identify and apprehend illegal deforestation may be challenging for forest administrations, many of which have limited human and financial capacity. However, without monitoring, companies and individuals may act illegally (Case Study 5).

Key questions for law-makers on forest clearance

A review or reform of national laws may be needed to ensure forest clearance follows a stringent and detailed assessment. For this assessment to be done properly, decision-makers need sufficient information to decide on the merits of the case, without interference. The following questions are for law-makers to consider before starting legal reform of forest-clearance processes.

Legal clarity on clearance permits and standards

1. Is there a clear procedure in place that details how to file a clearance-permit application and which documents must be submit with the application (e.g. proof of land title, proof of free, prior and informed consent from affected communities, forest inventory and/or map, with details of the trees to be cleared) ?

2. Who grants a clearance permit? Is it the forestry administration? Should there be an advisory committee of representatives from across government?

3. Do all conversion projects need a clearance permit? Should the law distinguish between commercial activities, which require a permit, and subsistence activities, which do not?

4. Are there clear grounds for refusing to grant a clearance permit, such as maintaining slopes or the banks of waterways to protect against erosion or natural hazards?

5. Are there restrictions on which types of forest can be cleared for conversion purposes?

6. Do clearance rules restrict the most harmful clearance methods, such as slash and burn?

7. Are the harvesting rules for forest clearance as stringent as for logging permits?

8. Once the forestland has been cleared, is there a requirement for the land to be developed into the planned agricultural plantation, mine or infrastructure project within a certain timeframe? What is the penalty for a company that does not develop the productive activity?

Coordination and chronology of conversion authorisations

9. Is it clear when a clearance permit must be applied for – before, after or simultaneously with other permits, such as the agricultural, mining or other land-use licence, or the EIA?

10. Is the period of validity of the clearance permit defined? If it is valid for a short period, this may help officials to monitor the permit and to rescind it, if the rules are not followed. If the land is not cleared within the permitted timeframe (see Question 8), does the company have to re-apply?

Consultation with affected communities and indigenous peoples

11. Must affected communities be notified and participate in approving the clearance permit?

12. Should proof of free, prior and informed consent of local communities and indigenous peoples be a prerequisite to all clearance-permit applications?

Strong implementation and enforcement

13. Is there a strong, proportionate and dissuasive penalty regime in place, for permit-holders who do not follow the rules for clearance?

14. How will the government enforce the law? Is independent monitoring of clearance permits allowed, and may complaints be made where infractions are identified?

3. Timber from forest conversion – the need for rules

When a forest-conversion project is planned, the focus is usually on the loss of forest and the potential negative impacts of the project on livelihoods of affected communities. Until recently, less importance has been placed on the timber coming from the clearance of forests ('conversion timber'). However, conversion timber is a key component of some forest-conversion projects.

The commercial value of conversion timber can be significant and may be crucial in the financial viability of a forest-conversion project. When producing agricultural crops, the return on investment may take time (i.e. there will be a period prior to the first harvest) and the commercialisation of the timber coming from the land cleared can help fund the necessary project investments.

Furthermore, some companies use the fact that clearing forests is sometimes subject to less regulation than selective logging, to undertake conversion processes for the sole purpose of accessing the timber.

For those reasons, it is essential that clear rules govern the harvesting and traceability of conversion timber. Traceability is the ability to verify the location and journey of the timber, from harvest to consumer (Figure 1).

To help develop a legal framework that comprehensively regulates conversion timber, this Factsheet identifies three essential requirements for law-makers to consider.

1. Rules governing the harvest, processing, transport, commercialisation and export of conversion timber should be clear and detailed.

2. The definition of legality of conversion timber includes rules from all relevant laws.

3. All information regarding conversion timber should be publically available.

For each of these topics, 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.

Figure 1: Timber traceability steps[27]

Background: conversion timber

For decades, selective logging has been the main source of timber in global trade. However, recent studies predict that conversion timber is becoming increasingly dominant.[28] The growing presence of conversion timber on the market is due to the clearing of forests for agriculture, mining or infrastructure projects. The rules for clearance are often less strict than those governing selective logging; therefore, some companies seek to follow this easier path to access valuable timber.

Selective logging previously tended to be the main (and sometimes only) source of harvested timber, and was the only timber harvesting regulated by forest legislation. Because forest conversion is a relatively new source of timber, some tropical countries do not yet have specific laws and rules governing its production. Without a strong legal framework governing conversion timber, there are high risks of illegality associated with this timber.

Attention to the legality of conversion timber has increased during the past decade, particularly because of several new laws and regulations to tackle illegal logging. Examples include the US Lacey Act, the EU Timber Regulation and the Australian Illegal Logging Prohibition Act, in addition to Voluntary Partnership trade agreements between a number of tropical countries and the EU. Because conversion timber is becoming such a significant source of timber, the current absence of rules regulating conversion timber leaves a significant gap in the ability of producer countries' national laws to address illegal logging comprehensively.

1. Clear and detailed rules governing conversion timber

Key legal problem: absent or incomplete rules governing conversion timber

Key risks: illegal timber, land-grabbing solely to gain access to timber

As mentioned in Factsheet 2, some countries' forest laws do not include clearance permits. In this situation, there is generally a lack of clarity regarding the legality of forest clearance and use of conversion timber. Without clear rules, there is a risk that any trees that are clear-cut may be at risk of being felled illegally.

Even when national laws do require a clearance permit, the rules about how conversion timber can be used and what conditions must be met, are not always clear. This can mean that there is no clear definition of what constitutes legal conversion timber and no process to trace this timber (Case Study 1). If conversion timber cannot be traced from the point of harvest to the domestic market or port of export, the timber could be at risk of being considered illegal.

Case Study 1: Lack of rules to trace conversion timber in Congo

In the Republic of Congo, the legal requirements for the traceability of timber are outlined for selective timber logging permits but not for clearance permits. Even though some provisions – like those on transport – are considered to apply to all forest products, there are in fact no express standards that apply to the marking, storing, processing, transporting and exporting of conversion timber.[29] The lack of clear rules applicable to trace conversion timber creates a legal loophole.

Developing a process to trace conversion timber from harvest to consumer is not an easy task. The ability to verify the origin of the timber is particularly complicated by the fact that the stumps of trees cut down on land allocated to a conversion project are usually removed in the process of clear-cutting that land and preparing it for the new land use. During selective logging, by comparison, the stumps remain as a permanent marker of origin and the number identifying the timber can be traced directly back to the number of the stump. When the stump is removed, tropical countries will have to consider other means to confirm the origin of conversion timber.

The lack of precise rules regarding conversion timber may also be used as a loophole that companies exploit to clear forests for the sole purpose of easier access to the timber, without developing any new land use (see Factsheet 2, Case Study 2).

To avoid the risks associated with conversion timber, some countries have decided not to allow commercialisation of conversion timber. In Liberia, the forest administration confirmed in September 2016 that conversion timber cannot be commercialised, restricting any trees cleared to be "used locally" only.[30]

2. Definition of legality of conversion timber

Key legal problem: non-compliance with legal requirements regarding clearance permits and land title

Key risk: illegal timber

The legality of conversion timber depends on respecting rules regarding the harvest, processing, transport, commercialisation and export of the timber. It also requires compliance with other areas of the law, such as:

- land allocation (Factsheet 1)
- rights to clear the forest (Factsheet 2)
- adherence to environmental protections (Factsheet 4)
- communities' legal rights on land use and tenure (Factsheet 5).

When assessing the legality of conversion timber, some of these legal requirements are more obvious than others. For example, it is an obvious requirement to make sure that a permit to clear the forest has been obtained, and that this was done legally.

But, making sure that pre-existing third parties' rights (such as the customary land tenure rights of communities) have been respected before felling the trees is just as important. Thus, harvesting forested land without the guarantee that the land is free of either use or occupation rights could lead to illegal use of the land and be a source of conflict.

To compensate local communities and indigenous peoples for a loss of access to forest resources, a mechanism for sharing benefits from the revenue of harvested timber has emerged in several legal frameworks governing selective logging. Where clearance occurs, the same mechanism could be put in place, otherwise, local communities and indigenous people may miss out on their share of any profits from sale of conversation timber from their land. Ghana has decided to address this issue (Case Study 2).

If the right to use the land has been obtained without complying with all legal requirements, or if a dispute arises from several parties claiming rights over the same area of forested land, it is essential that these issues are resolved before the timber can be sold. If the forested land from which the conversion timber is harvested could be considered to be illegally acquired, there is a risk that the timber coming from this land is illegal. Therefore, particular attention needs to be paid to the land title and the clearance permit, in order to assess the risk of illegality of conversion timber.

Case Study 2: Consider communities' rights when clearing land in Ghana

In 2017, the Government of Ghana passed a new regulation to stop illegal deforestation.[31] Among other things, this new regulation clarifies the requirements for the holder of a clearance permit, called a 'salvage permit' in Ghana, concerning community land rights. Under the new regulation, the holder of a salvage permit must negotiate an agreement with affected local communities to make sure they also share in the profits of trees harvested from their forests.[32] This requirement is important to improve respect of communities' rights over their forests, as well as to ensure the legality of conversion timber. This second point is particularly important for Ghana, as the Voluntary Partnership trade agreement it has concluded with the EU identifies salvage permits as a legal source of timber. The new regulation should help assure that all conversion timber adheres to all relevant laws and can be legally traded with the EU.

3. Access to information about conversion timber

Key legal problem: lack of access to information on clearance permits and conversion timber

Key risk: inability to trace timber

At the global level, there are few official statistics on the sale of conversion timber. International bodies, such as the International Tropical Timber Organization (ITTO), do not yet make the distinction in their trade data between timber coming from selective logging and from conversion timber.

At the national level, data on conversion timber may also be lacking. Without official records, civil society and even government officials have reduced opportunity and ability to monitor for illegal practices.

More publicly accessible data on conversion timber should help to assess if the timber is at risk of being illegal.

Such information should, at a minimum, include :

- procedures for allocating forestland
- a list of granted land titles
- a list of granted clearance permits
- forest inventories, with details of the trees to be cleared
- annual authorised logging volumes, by species, title and company
- total production of timber (both conversion timber and selective harvesting)
- annual volumes processed, by type of product, species and company
- export licences
- the annual volumes of logs exported, by species.

Key questions for law-makers on conversion timber

A review or reform of national laws may be needed to ensure a strong legal framework governs conversion timber. Defining the legality of conversion timber is difficult because it involves considering the full legal process involved in a forest-conversion project. The following questions are for law-makers to consider before starting legal reform concerning timber from forest conversion.

Clear and detailed rules governing conversion timber

1. Does the law provide that any forest clearance activity is conditional upon obtaining a forest-clearance permit?

2. Does the definition of legality include that the forest-clearance permit has been issued in accordance with the law?

3. Does the clearance permit state the use that can be made of the timber, notably either commercialisation or only local use?

4. If commercialisation of conversion timber is permitted, does the law specify:

- Who will undertake the forest inventory to identify the marketable timber?
- Who will be permitted to harvest the forest for the marketable timber (e.g. through a call for tenders to find logging companies)?
- Which rules will apply to trace the timber, including marking, storing, processing and exporting the timber?
- Who owns the timber (e.g. the holder of the forest-clearance permit, the company in charge of harvesting the conversion timber, or the state)?

Definition of legality of conversion timber

5. Is it clear what processes need to be followed for conversion timber to be legal?

6. Does the definition of legality include requirements that:

- the land allocation has been issued in accordance with the law
- local communities and indigenous peoples' rights on the forested area concerned have been respected
- environmental obligations have been met?

Access to information about conversion timber

7. Is there a legal requirement to publish data on the volume of conversion timber (separately from the volume of timber from selective logging)?

8. Is there a legal requirement to publish:

- the list of land titles issued
- the list of clearance permits issued
- the annual authorised logging volumes, by species, title and company
- the annual volumes processed, by type of product, species and company
- the annual volumes of logs exported, by species?

9. Is independent monitoring allowed of forest-clearance activities and export activities, and may complaints be made where infractions are identified?

4. Environmental protection – the need for consideration

Forest conversion will inevitably have an impact on the environment. By converting a forest to another land use, the forest ecosystem will be damaged. Clearing large areas of forest contributes to global climate change, as the felled trees will no longer absorb and store carbon; local impacts include changes in rainfall patterns, biodiversity loss and erosion.

Environmental protections in law are necessary to reduce forest loss, and to anticipate and mitigate the environmental impacts of agricultural, mining or infrastructure projects. To develop a comprehensive legal framework on forest conversion that protects the environment, it is essential that:

1. Laws contain detailed and binding environmental protections, and these are not weakened by broad exceptions.
2. Environmental legal tools follow an appropriate process and consider the country context.
3. The law requires an environmental assessment to be undertaken early enough in the process to influence the conversion decision.
4. Environmental decisions and documentation are transparent and accessible.
5. Forests are classified and well-documented, to facilitate their protection.

This Factsheet identifies common legal problems and the risks that may stem from those problems. A set of key questions at the end is offered as a checklist to reference during the process of law review and reform.

Background: environmental legal tools

Specific environmental laws, or environmental protections contained within land, forest or investment laws, can restrict the extent to which forest conversion is allowed, and where and how it may be done, particularly in environmentally sensitive areas. We use the term 'environmental legal tools' to encompass all laws that seek to preserve and protect the environment where it might be affected by forest conversion. Within this Factsheet, two different categories of environmental legal tools are highlighted: protection measures and compensatory measures.

Protection measures aim to protect the environment from forest-conversion impacts. They include:

- establishing protection or conservation areas
- setting limits on the forests that may be cleared
- mitigation measures (e.g. no clearance on steep slopes or the banks of waterways)
- clearance rules (see Factsheet 2).

Compensatory measures aim to counteract, or compensate for, unavoidable impacts of forest conversion. They include restoration of damaged forests and reclamation bonds.[33]

One ubiquitous environmental legal tool is the environmental (and social) impact assessment (EIA), which includes characteristics of both protection and compensatory measures. The EIA grants an opportunity to assess a conversion project in its proposed form, and to investigate mitigating measures to reduce environmental harm or rehabilitate damaged areas. Although crucial, and the focus of this briefing, EIA is only one environmental legal tool, and this Factsheet also highlights others.

1. Laws contain detailed and binding environmental protections

Key legal problems: an absence of detail on implementation, non-binding procedural rules, exceptions to the law

Key risk: inability to enforce the law, increased deforestation

A key problem is that laws may not include detailed information on how environmental legal tools should be implemented. For example, compensatory measures may require rehabilitation of a damaged forest area once a project is complete. However, rehabilitation obligations can be difficult to enforce if they do not include details such as who should perform the rehabilitation, species to be included in the replanted area, the standard to be reached and the approval process, and if they do not establish systems to ensure compliance with these details.

Similarly, when the details of how to implement environmental legal tools are set out in non-legally-binding guidelines or manuals, it is hard to enforce implementation. For example, EIA laws generally require all large projects causing deforestation to undertake an environmental impact assessment. However, the practical details of how the EIA process should proceed, what it should include, and who should undertake and then approve the assessment may be contained in non-binding manuals (Case Study 1).

Case Study 1: EIA content and process are not legally binding in Gabon

In Gabon, the primary regulation on environmental impact assessments (EIAs) does not detail the procedural steps or the components of the assessment.[34] The details of the EIA process and components are established in the Manual of Procedures for EIAs and in the Guidance on Implementation of the Manual of Procedures.[35] Neither the Manual nor the Guidance documents are legally binding.

While headline environmental protections in the law may be strong, broad exceptions can considerably dilute the ability of the law to protect forests. For example, conversion projects of less than a certain size may be exempt from completing a full EIA (although they may have to follow a less-stringent process of environmental assessment). In certain cases, these exemptions can be significant: in Cote d'Ivoire, only clear-cutting projects of over 999 hectares must undertake an EIA.[36]

Incomplete laws, non-binding rules, and exceptions to environmental protections all make it difficult to enforce environmental protections strongly. If rules are unclear or incomplete, it is very difficult to challenge infractions, as the law can be interpreted in different ways. Similarly, vague wording to exceptions may result in different interpretations of the law being possible. Where details of environmental legal tools are established only in non-legally-binding documents, infractions may not be able to be brought before a court.

Finally, a lack of enforcement, coupled with low penalties, creates opportunities for companies and individuals to clear forests illegally, without consequence.

2. Laws that are fit for purpose

Key legal problems: legal processes are inappropriate for the context, laws do not reflect country context

Key risks: potential environmental impacts are not identified, projects are not monitored, small-scale actors are criminalised

Environmental protection laws may be unfit for purpose where a chosen process is inappropriate to the context. An example of this is in the EIA process, where certain countries allow the project owner to assume approval of an environmental assessment after a certain period of silence from the relevant agency ('tacit approval'). Any such tacit approval should be qualified by appropriate checks and balances (e.g. ability of the regulator to revisit and potentially withdraw the EIA approval). Otherwise, this may result in the project progressing without a full consideration of its environmental impacts.

Equally, environmental protection laws need to be resourced so that they can operate effectively. Considering EIAs again, a law may require environmental agencies to audit projects' EIAs regularly, and to monitor companies' adherence to the conditions of their environmental permits. The environmental agency would need appropriate financial and human capacity for these regular audit requirements to be realistic and for environmental agencies to be able to ensure that companies and individuals undertake their conversion projects in line with environmental mitigation measures agreed during the EIA process (Case Study 2).

In addition, environmental processes may treat different actors in the same way, disregarding the specific characteristics and capacities of small-scale actors, for example, who may not need to, or be able to, adhere to rules set for large companies. This increases the risk that small-scale actors are side-lined by the law and do not observe legal standards, including those that could reduce deforestation.

Case Study 2: Inadequate capacity resulting in limited enforcement in Ghana

In Ghana, oversight of conversion projects in forested areas falls primarily to the Forestry Commission and the Environmental Protection Agency (EPA). The EPA should specifically monitor companies' implementation of their environmental permits.[37] Most large-scale projects involving forest conversion require an environmental permit,[38] granted subject to steps to mitigate harm, including deforestation. The volume of projects requiring monitoring, coupled with the limited resources of the EPA, hinder effective enforcement of environmental permits.[39]

3. Chronology of environmental approvals

Key legal problem: an absence of clarity

Key risk: environmental assessment is overlooked or biased

In some countries, the EIA process is the only point at which the environmental impact of a conversion project is considered. To ensure the effectiveness of this process, it should be clear at what point in the forest-conversion process an environmental assessment must be undertaken – including that it must be done before the conversion project begins. Without a set chronology, projects could receive authorisation to proceed with a new land use (e.g. a mining or agricultural licence), and have already started discussions with the relevant investment agencies, by the time the EIA process begins.

If environmental considerations occur at the end of an approval process, there can be significant pressure for the environmental agency to approve a forest-conversion project, so that the project can continue. This can undermine both the impartiality of decision-making and the effective review of the project. The result is that important environmental mitigation measures and alternative sites for a project that could avoid forest clearance may be overlooked.

4. Transparency and access to information

Key legal problem: lack of transparency and access to information

Key risk: environmental requirements are not monitored

Transparency in decision-making and legal rights to access final decisions and documentation are both crucial. However, many countries' laws do not include legal rights to access environmental information; even where such rights are included, they are often under-implemented. Access to information is particularly important for compensatory measures, as these require long-term monitoring to ensure effective implementation.

For citizens to monitor and seek government enforcement of companies' obligations, they need access to information, including information on which conversion projects are required to undertake forest rehabilitation. Similarly, EIAs should be publically available to allow citizens to monitor whether conversion projects are meeting the requirements of their environmental permits.

5. Protected forests

Key legal problem: an absence of clarity and updating of laws

Key risks: increased deforestation, low return on investment

Laws that classify different types of forests can provide long-term protection to important primary forests and natural ecosystems. As mentioned in Factsheet 1, classification of forests defines which forests are degraded, highly biodiverse or of high carbon value, for example. Classification is the first step towards determining which of these types of forests should be protected and which (limited) areas are available for conversion.

However, the process of forest classification and subsequent protection is iterative and must be frequently updated, to ensure that the current state of the forest is known. Otherwise, there may be a gap between classification on paper and in reality. If the classification of forests is not well documented, forests with high levels of biodiversity, carbon-storage potential or social importance risk being cleared.

Clearance of natural forests may occur even where previously deforested or otherwise degraded land is available as an alternative for the conversion project. However, there are also positive examples of where a ban on deforestation in classified areas has led to other lands being found and used for agriculture (Case Study 3).

Case Study 3: Expanding agriculture into already-cleared land in Brazil

Brazil has virtually eliminated new deforestation for soybean plantations in its part of the Amazon, even as it has expanded the area planted with soy by 1.3 million hectares in the eight years following the Soy Moratorium.[40] Rather than clearing forests to plant the soy, farmers have planted on already-cleared land. Unfortunately, some 'leakage' of deforestation did occur in Brazil's cerrado (tropical savannah), and illegal forest conversion occurred for other agricultural practices. Nonetheless, there is enough already-cleared land in the Amazon to expand soy production by 600%.[41]

Sound laws on environmental protection are also important to reduce the risk of conversion projects losing profits and becoming unviable, due to environmental damage and a loss of community goodwill. Greater international attention to the environmental impacts of forest-risk commodities - demonstrated by voluntary sustainability certification schemes - has already delayed conversion operations, as companies must substantively change their operations to address deforestation in their supply chain (Case Study 4). Without clear laws that establish companies' responsibilities, there is a risk that their return on investment will be lower than expected.

Case Study 4: Restrictions on planned commercial activity in Liberia

Sime Derby is one of the largest palm-oil concession holders in Liberia. In 2009, Sime Derby was granted 220,000-hectares to develop fully as an oil-palm plantation over 63 years.[42] However, since that time, it has become clear that Sime Derby cannot develop the full area without violating its own (and voluntary international) sustainability policies. Sime Derby's concession area includes 45% high-density forest, 34% medium-density forest and approximately 55 local communities. The high- and medium-density forests cannot be cleared, in line with Sime Derby's 'no deforestation' policies. Communities must give consent before planting can start in areas where communities live or work.[43] Adhering to these sustainability policies has slowed development of new palm-oil plantations and only just over 10,000-hectares have been planted to date.

Key questions for law-makers on environmental protection

A review or reform of national laws may be needed to ensure that they anticipate and mitigate the environmental impacts of agricultural, mining or infrastructure projects.

Laws contain detailed and binding environmental protections

1. Must everyone undertake an EIA? Should the law require different assessment obligations for large-scale activities (a full EIA) and for small-scale activities (a lesser requirement)?

2. Are there clear grounds on which to refuse to grant an environmental permit? Is it possible for the environmental agency to approve an alternative site, with fewer environmental impacts?

3. Are there clear procedures in place detailing how to implement protective environmental legal tools, and are these procedures established in legally binding laws or regulations?

4. Do rehabilitation or re-classification requirements include sufficient detail for the final compensatory measure to be stringently assessed and approved? Is a reclamation bond required, in case a project does not satisfactorily complete a rehabilitation or re-classification?

5. Are exceptions to environmental laws clear and targeted, without giving decision-makers broad discretion?

Laws that are fit for purpose

6. Are environmental protections consistent and coherent across all relevant sectoral laws?

7. Are laws tailored to different actors, particularly to the specific characteristics and capacities of small-scale actors?

8. How will the government enforce the law? Are environmental legal tools capable of being implemented and enforced, reflecting the capacities and realities of each country context?

Chronology of environmental approvals

9. Is it clear when an EIA process must be undertaken – before, after or simultaneously with other permits, like the agricultural, mining or other land-use licence, or the clearance permit? Should the EIA be done at the beginning of a project, when the land is allocated?

Transparency and access to information

10. Must affected communities be notified and consulted during the EIA process?

11. Is the decision-making process of environmental legal tools public and transparent, such that communities are able to monitor the project's adherence to any mitigation measures?

12. Are EIAs publicly available, including project details (such as maps) and mitigation measures?

Protected forests

13. Are there restrictions on which forests can be cleared for conversion? Is there a presumption that degraded forestlands, rather than primary forests, should be assigned to agriculture, mining or infrastructure uses?

14. Is there an effective, proportionate and dissuasive penalty regime in place, for permit-holders who do not follow the requirements of environmental legal tools ?

5. Communities' rights – the need for recognition

Clarifying and securing rights of local communities and indigenous peoples affected by forest conversion is crucial. This holds true both for the survival of these populations' cultures and livelihoods and for the protection of forests.

To help develop a legal framework that protects and ensures the rights of local communities and indigenous peoples, this Factsheet identifies two crucial areas for law-makers to consider.

1. Local communities' and indigenous peoples' rights over land and forest resources should be formally recognised and protected by national laws.

2. Local communities and indigenous peoples should be part of the decision-making process for any projects affecting the use of their land and forest resources.

Within each of these areas, 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: communities' rights

Forests are essential for local communities and indigenous peoples,[44] who rely on them for their homes, livelihoods and incomes. Forests also often have significance for local or indigenous cultures, traditions and religions. When a project involves the conversion of forests to another land use, this incurs the loss of not only the forest and its associated ecosystems but also the homes, livelihoods and cultures of local communities and indigenous peoples.

Recent research has demonstrated that less deforestation occurs when the land tenure rights of local communities and indigenous peoples are secured.[45] Strengthening communities' rights is also important to the private sector, which avoids investment in a project that could lead to land tenure disputes, for fear of delays and loss of goodwill between communities and companies.

Over the years, many non-legally-binding policies and guidelines have been developed to help secure land rights for communities.[46] However, these do not replace national legal frameworks that formally recognise customary rights to land and forest resources. In recent years, some developing countries have decided to pass and amend laws to secure the land tenure rights of local communities and indigenous peoples. These efforts need to be encouraged and expanded, taking into account each national context.[47]

1. Legal recognition of land tenure rights of communities

Key legal problems: lack of formal recognition of customary land tenure rights, incomplete or unclear legal framework, lack of implementation

Key risks: eviction, land tenure disputes and land scarcity

Land tenure generally encompasses all rights to land, including the rights to possess, control, exploit and sell the land. Land tenure rights should not be confused with use rights, which give communities the right to access forests and to use timber and non-timber forest products, such as for food or shelter (Section 2).

In many countries, for example Gabon and Liberia, there is still no formal legal recognition of communities' customary land tenure rights. In some tropical countries, local communities and indigenous peoples have only received legal recognition of their land tenure rights for a portion of the land they occupy. Where customary land rights are not fully recognised, the state often owns the land and the forest resources, or the state holds the land in trust for 'traditional owners' (local communities and indigenous peoples). The trust relationship requires the state to consult with and act on behalf of the traditional owners; in reality, decision-making power is taken completely by the Government.

Even when customary land tenure rights are formally recognised, establishing legal ownership can be complicated, if not impossible, for communities. There are four main reasons for this:

- **Lack of clarity about the evidence required to demonstrate customary land tenure rights:** Some legal frameworks, as in the Republic of Congo for example, require communities to demonstrate 'the active use of the land' across several years. Without a clear definition of what this means, it can be complicated for communities to demonstrate their ownership.

Definition of customary land tenure (Africa)

"Customary land tenure refers to the systems that most rural African communities operate to express and order ownership, possession, and access, and to regulate use and transfer. Unlike introduced landholding regimes, the norms of customary tenure derive from and are sustained by the community itself rather than the state or state law (statutory land tenure). Although the rules, which a particular local community follows, are known as customary law, they are rarely binding beyond that community. Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility."[48]

- **Complexity and cost of procedures to register land titles:** In Cote d'Ivoire, a law was passed in 1998 that formally recognised customary land tenure rights.[49] This law provides several steps (including a public investigation and issuance of a land certificate) before communities' customary land can be registered. These steps are so complex and expensive that few land titles have been registered to date, and the required timeframes for some steps have had to be extended.[50]

- **Inadequate legal framework:** The procedure for obtaining formal land title for communities relying on customary land tenure rights is not always sufficient. For example, frameworks may set rules that apply for individual ownership, when customary land tenure rights are often held by a community as a whole.

- **Lack of implementing provisions:** Some laws have been developed to offer better recognition of customary land rights but cannot be realised due to the absence of implementing provisions. Therefore, rights of many communities remain insecure over their land and forest resources (Case Study 1).

Case Study 1: Laws without implementing provisions are inoperable (Congo)

In 2011, the Republic of Congo was the first country in Central Africa to adopt a law promoting the rights of indigenous peoples. This law has a full chapter dedicated to ownership rights, which provides, among other things, that indigenous peoples have a collective and individual right to own, access and use the land and resources they occupy or use traditionally for their subsistence, their medicine and their work.[51] However, no implementing legislation has yet been passed to recognise these rights in practice, and so indigenous Congolese peoples are still at risk of being evicted from their land.

It should also be noted that there can be gender inequality in legal frameworks regarding access to land and forest resources.[52] Those inequalities make women more vulnerable than men when their land is taken away, and increase their risk of being left with no resources.

The legal issues set out above lead to three main risks concerning communities and forest conversion.

- **Eviction and displacement:** Without formal recognition of the land tenure rights of local communities and indigenous peoples, forested land is often given to companies without considering the rights of the people who will be affected by forest conversion. Communities may be at high risk of eviction and displacement from their land. Furthermore, without any legal expropriation process, communities risk eviction without compensation.
- **Land tenure disputes:** Evicted communities could decide to claim back their rights over the forested land concerned. There are different ways of doing this, including 'naming and shaming' in the media, and national judicial complaints or other complaint mechanisms (such as that of the Roundtable on Sustainable Palm Oil (RSPO)). When conflicts are not settled by formal mechanisms, they can jeopardise the lives of community members.[53] Conflicts can also slow down or stop commercial activities planned to follow forest clearance, such mining or planting crops.
- **Land scarcity:** When local communities and indigenous peoples are evicted, they have to find a new place to live. Given the current demand for land, particularly by the private sector in many tropical countries, communities are at risk of serious competition for land for their relocation.

2. Consultation with local communities and indigenous peoples during decision-making

Key legal problem: lack of consultation with local communities and indigenous peoples during forest-conversion processes

Key risks: eviction, land tenure disputes and absence of agreements

One way to address the lack of formal recognition of customary land tenure rights of local communities and indigenous peoples, or the lack of land title registration, is to ensure community consultation. This should be done ideally during the process of land allocation, or at least before clearance of the forest is authorised.

Before a conversion project starts, consultation is also essential to identify the use rights of local communities and indigenous peoples. Even though, use rights are typically recognised in statutory forest laws, these laws do not usually protect or compensate the loss of use rights where a project leads to forest conversion. Where a forest is completely cleared, use rights are extinguished. Therefore, it is essential that consultation of local communities and indigenous peoples recognises the forested land that they use, and not just the land they occupy.

Public consultation can take various forms, including a public enquiry or a dedicated committee. A public enquiry is often a requirement of environmental impact assessments, where consultation of affected communities must be completed before an environmental permit is granted by the state. A committee can be created once a forest conversion project is planned, with a mandate to assess the project and its risk of violating any third party's land tenure and use rights. Such a committee should include members of the affected communities.

Perhaps the most powerful form of consultation is the requirement to obtain the 'free, prior and informed consent' (FPIC) of local communities and indigenous peoples affected by a forest conversion project. Increasingly, FPIC has been included in certification schemes such as those of the Forest Stewardship Council (FSC) and the Roundtable on Sustainable Palm Oil (RSPO). However, FPIC has so far rarely been included in national laws as a legally binding obligation, either when land is granted to a company or when forest clearance permits are granted.

Definition of free, prior and informed consent (FPIC)

"FPIC is a right that belongs to the whole community. It means that communities have a right to fully participate in decision-making processes that might affect the lands, forest and resources that they customarily own, live on or use – whether the community has a deed or not. This means that communities must be able to decide for themselves whether and how a project can go ahead if they are approached by government or a company. FPIC requires that communities can negotiate for a fair and legally enforceable agreement, and to say 'no' to any project that does not properly address the community's needs, priorities and concerns."[54]

When FPIC is integrated into laws, it is essential to detail the circumstances in which it applies. Otherwise, the lack of clarity can create legal loopholes allowing the parties to a concession agreement to exclude communities from decision-making (Case Study 2).

Case Study 2: Communities excluded from concession negotiations in Liberia

In Liberia, forest law specifies that the approval of communities is required in advance of any commercial timber logging.[55] However, it is not clear whether this same community approval applies to conversion projects. In consequence, the Government has granted concession agreements to agricultural companies, without any consultation of communities affected and without them being part of the negotiations. Many of these concession agreements also state that the area of land granted to the company is 'free of encumbrances'.[56] In reality, the concession areas include communities' villages and farming land.

Absence of consultation before a government allocates land to an agricultural, mining or infrastructure project, or when it grants a forest clearance permit, creates the same risks as those of lack of legal recognition (Section 1 above) – eviction, land tenure disputes and land scarcity. There is also a high risk that communities excluded from negotiations will not be entitled to claim any compensation, and that benefit-sharing mechanisms will not be established. Communities deprived of access to their land and homes, and to the forest resources providing livelihoods and food security, are left with nothing.

In contrast, by obtaining the consent of communities and negotiating and implementing a fair agreement, companies can reduce their investment risk. Greater international attention to the social impacts of forest-risk commodities has already delayed the operation of conversion projects. Several companies have been required to change their operations substantively in order to demonstrate respect for the rights of communities.[57]

Key questions for law-makers on communities' rights

A review or reform of national laws may be needed to improve security of the rights of local communities and indigenous peoples. In advance of any 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 on communities' rights over land and forest resources.

Recognition of customary land tenure rights

1. Are customary land tenure rights recognised in the law?
2. Are the requirements for obtaining a land title simple, clear and detailed enough to implement and enforce?
3. Do those requirements fit the way in which customary land tenure rights apply on the ground (for example, do they reflect communal or individual tenure rights)?
4. Is there any technical and financial assistance for local communities and indigenous peoples planning to register their land?
5. Could customary land tenure rights be recognised at a local level?
6. Is the legal framework securing and protecting customary land tenure rights complete?
7. Do local communities have access to justice to complain about any violation of their rights?
8. Is there any recognition of resolution mechanisms for customary land rights?

Consultation with local communities and indigenous peoples during decision-making

9. Are there legal requirements to conduct consultations with local communities and indigenous peoples that may be affected by a project leading to forest conversion?
10. Are there legal requirements to establish and mandate a committee to identify third-party rights before a governmental entity grants access to land, including forested land? Does such a committee include representatives of the affected communities?
11. Is there any legal requirement to get the free, prior and informed consent (FPIC) of local communities and indigenous peoples before any decision is made regarding the land and forest resources they occupy and use? If so:

- Is there a list of the different circumstances in which this requirement applies?
- Has the law established specific procedures to obtain the FPIC?
- Is there any specific requirement regarding the consultation of women and other marginalised populations?

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'.
14. Republic of Liberia, National Forestry Reform Law 2006, Section 5.1.
15. Republic of Liberia, National Forestry Reform Law 2006, Section 5.4.
16. ClientEarth and HPA (2016) 'The legal framework governing forest conversion in Liberia' (https://goo.gl/67Fzhw).
17. Independent Monitor of the FLEGT-VPA in the Republic of Congo (2017) 'Rapport N°13 / CAGDF'.
18. 'Slash and burn' is a widely used method of agriculture in tropical countries in which forested land is clear-cut and any remaining vegetation burned, as a method of clearing the land for crop cultivation. When the land becomes infertile, the farmer moves on to another area of land. This can lead to deforestation and forest fires.
19. Republic of Liberia, Minerals and Mining Law 2000, Section 6.7(d)(4).
20. Republic of Liberia, Minerals and Mining Law 2000, Section 11.6.
21. Republic of Liberia, National Forestry Reform Law 2006, Sections 2.2(a) and 11.5.
22. Federal Republic of Brazil, Federal Law 12.727 of 17 October 2012, Chapter III-A, article 42.
23. Lawson, Sam et al. (2014) 'Consumer goods and deforestation: an analysis of the extent and nature of illegality in forest conversion for agriculture and timber plantations', Forest Trends (https://goo.gl/PFaYKP).
24. Socialist Republic of Vietnam Ministry of Agriculture and Rural Development, Circular No. 35/2011 / TT-BNNPTNT, 20 May 2011.
25. Cao Ngoc Anh (2016) 'Timber trafficking and its impacts on human security in Vietnam', Doctor of Philosophy Thesis, University of Northumbria at Newcastle (https://goo.gl/ioB5zC).
26. Vietnam News (2008) 'Eleven charged with illegal logging in Khe Dien forest' (http://bit.ly/2ps7KO9).
27. This is a simple traceability diagram. Often, the traceability steps are more complex; for example, if there are multiple processing steps or if processing takes place in a third country.
28. Lawson (2014), 'Consumer goods and deforestation: an analysis of the extent and nature of illegality in forest conversion for agriculture and timber plantations', Forest Trends (http://www.forest-trends.org/documents/files/doc_4718.pdf); Forest Trends (2015), 'Conversion timber, forest monitoring, and land-use governance in Cambodia' (http://forest-trends.org/releases/p/conversion-timber-forest-monitoring-and-land-use-governance-in-cambodia).
29. ClientEarth (2015) 'Republic of Congo timber: risks of illegality'. The draft forest code that should be adopted soon in the Republic of Congo has some provisions to address those legal issues.
30. Aide Memoire of the Fourth Meeting of the Joint Implementation Committee, Monrovia (21–23 September 2016) (http://bit.ly/2fcQeqs), para 26.
31. ClientEarth (2017) 'New regulation to stop illegal deforestation and promote legal timber trade passes in Ghana' https://www.clientearth.org/new-regulation-illegal-deforestation-promote-legal-timber-trade-ghana/.
32. Republic of Ghana, Timber Resource Management and Legality Licensing Regulations 2017, Section 29(5).
33. A reclamation bond is an upfront payment by a mining or infrastructure company to the government – often to the Environmental Agency – to cover the cost of rehabilitation, if the company does not adequately fulfil its legal requirements.
34. Décret n°539/PR/MEFEPEPN du 15 juillet 2005 réglementant les Etudes d'impact sur l'Environnement.
35. 'Manuel de procédure générale des études d'impact sur l'environnement' et 'Guide d'application du manuel de procédures pour l'instruction des études d'impact environnemental, et le suivi des projets, dans les zones tampons des Parcs nationaux'.
36. Activities Annex I of Decree No. 96–84.
37. The EPA must review and approve (or not) a (provisional) Environmental Management Plan within 18 months of the commencement of the activities and thereafter every three years, an Annual Environmental Report after 12 months and every 12 months thereafter, and evidence that the activity is in line with the conditions written in the EIA within 24 months.
38. Republic of Ghana, Environmental Assessment Regulations 1999, Sections 18 and 19.
39. Bugri, J. and Coulibaly, A.E., 'Ghana: Private investment flows and business models in Ghanaian agriculture' in UN FAO (2012) Trends and impacts of foreign investment in developing country agriculture. Evidence from case studies (http://bit.ly/2khiawY).
40. Under the moratorium, major soy purchasers agreed to not buy soy produced on land deforested after July 2006 (later extended to 2008). Soy was still able to be growth on forests cleared before that date.
41. http://news.wisc.edu/study-shows-brazils-soy-moratorium-still-needed-to-preserve-amazon/ and https://www.sciencedaily.com/releases/2017/04/170429095035.htm.
42. Concession Agreement between Sime Derby and the Government of the Republic of Liberia, July 2009: (http://bit.ly/2fA0Zax).
43. Chain Reaction Research (November 2016) 'Sime Darby: Liberian Crossroads' (http://bit.ly/2gytpRZ).
44. "About 350 million people who live within or close to dense forests depend on them for their subsistence and income. Of those, about 60 million people are wholly dependent on forests" (http://www.worldbank.org/en/topic/forests/overview).
45. For example, in Brazil less than 2% of indigenous land was deforested between 2000 and 2014, while 19% of land deforested on average in the Amazon during the same period. In Bolivia, the average deforestation rate between 2000 and 2012 inside tenure-secure indigenous lands was 0.15%, while the rate outside indigenous lands was 0.43% (http://www.wri.org/blog/2017/03/numbers-indigenous-and-community-land-rights).
46. For example: FAO (2012) 'Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security' (http://www.fao.org/docrep/016/i2801e/i2801e.pdf).
47. Rights and Resources Initiative (2017) 'Securing community land rights: priorities & opportunities to advance climate & sustainable development goals' (http://bit.ly/2EfvJt9).
48. Alden Wily, Liz (2012) 'Customary land tenure in the modern world' Brief 1 of 5 Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa, Rights and Resources Institute (http://bit.ly/2BW0z52).
49. Loi n°98-750 du 23 décembre 1998 modifiée par la loi du 28 juillet 2004 et par la loi N° 2013-655 du 13 septembre 2013.
50. Loi N° 2013-655 du 13 septembre 2013 relative au délai accordé pour la constatation des droits coutumiers sur les terres du domaines coutumier et portant modification de l'article 6 de la loi n° 98-750 du 23 décembre 1998 relative au Domaine Foncier.
51. Loi 5-2011 portant promotion et protection des droits des populations autochtones au Congo.
52. Swedish International Development Cooperation Agency (SIDA) (2013) 'Quick guide to what and how: increasing women's access to land', Women's Economic Empowerment Series (https://www.sida.se/contentassets/ea78527fda4645c380f290a0fcfdf651/quick-guide-to-what-and-how-increasing-womens-access-to-land_3373.pdf); FAO (2010) 'Gender and land rights understanding complexities; adjusting policies, economic and social perspectives' (http://www.fao.org/docrep/012/al059e/al059e00.pdf).
53. Mongabay Series (2017) '"Then they shot me": Land conflict and murder in Ucayali, Peru' (https://news.mongabay.com/2017/10/then-they-shot-me-land-conflict-and-murder-in-ucayali-peru/).
54. Forest Peoples Programme (2016) 'Communities in the Driving Seat' (http://bit.ly/2E5yw4I).
55. Forest Development Authority (FDA) Regulation 102-07.
56. See e.g. 'Concession Agreement between Golden Veroleum Liberia and the Government of the Republic of Liberia' (http://goldenveroleumliberia.com/images/pdf/2014-09-30.2_GVL_Concession_Agreement.pdf).
57. See e.g. ClientEarth (2017) 'Addressing the risks of a weak legal framework governing forest conversion in Liberia' (https://www.clientearth.org/risks-weak-forest-conversion-law-liberia/).

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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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