

Environmental protection – the need for consideration

Legal toolkit on forest conversion - Factsheet 4





This Factsheet is intended to inform law-makers about legal options to minimise damage to the environment when forests are converted to agriculture, mining or infrastructure, and the risks that may occur when laws do not sufficiently consider the environment. It also provides questions to guide law-makers through processes of law reform to improve the protection of forests.

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

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

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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.¹

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.² 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.³ 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.⁴

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.⁵ Most large-scale projects involving forest conversion require an environmental permit,⁶ 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.⁷



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.⁸ 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%.⁹

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 - sometimes 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.¹⁰ 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.¹¹ 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 ?

1. 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.
2. Décret n°539/PR/MEFEPEPN du 15 juillet 2005 réglementant les Etudes d'impact sur l'Environnement.
3. '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'.
4. Activities Annex I of Decree No. 96–84.
5. 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.
6. Republic of Ghana, Environmental Assessment Regulations 1999, Sections 18 and 19.
7. 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>).
8. 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 grown on forests cleared before that date.
9. <http://news.wisc.edu/study-shows-brazils-soy-moratorium-still-needed-to-preserve-amazon/> and <https://www.sciencedaily.com/releases/2017/04/170429095035.htm>.
10. Concession Agreement between Sime Derby and the Government of the Republic of Liberia, July 2009: (<http://bit.ly/2fA0Zax>).
11. Chain Reaction Research (November 2016) 'Sime Darby: Liberian Crossroads' (<http://bit.ly/2gytpRZ>).

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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