

# Guidance for developing legality definitions in FLEGT Voluntary Partnership Agreements

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## Introduction

This document provides guidance for FLEGT practitioners in partner countries and European Union (EU) delegations in the development of their legality definition as part of a Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreement (VPA) process. It is not meant to be prescriptive but rather describe useful practice based on the experiences and lessons learned from other countries engaged in FLEGT VPA legality definition development.

This document describes lessons, processes, tools and structures from country experiences that have contributed to completion of a successful legality definition. Successful here means that it is widely accepted by stakeholders; economic, environmental and social issues are represented in the legislative requirements; and it is clear and practical to implement.

*This guide will be updated and adapted as new experiences and lessons learned emerge. It is a complement to FLEGT Briefing Note No. 2 – What is Legal Timber?<sup>1</sup>*

## The legality definition in FLEGT Voluntary Partnership Agreements

VPAs between timber-producing countries and the European Union are among the measures for addressing the problem of illegal logging identified in the EU's FLEGT Action Plan.<sup>2</sup>

At the heart of these Agreements are legality assurance systems (LAS), which set out the procedures by which timber-exporting countries will ensure that timber and timber products originate from legal sources. Fundamental to these systems is the ability to differentiate between legal and illegal timber; therefore, each Agreement must clearly describe legal timber according to the partner country's<sup>3</sup> national legislation. Within the VPA, this is called a legality definition.

The legality definition identifies certain legislative requirements taken from a country's national legislation that must be systematically checked to ensure legal compliance. A multistakeholder process is involved in choosing these requirements so that there is wide consensus supporting the requirements.

As described in *What is Legal Timber?*, the long-term aim of the FLEGT Action Plan is sustainable forest management. Legality definitions are therefore expected to

incorporate laws that address the three pillars of sustainability, namely laws aimed at economic, social and environmental objectives. For example, a definition including only laws aimed at economic objectives (e.g. taxes, fees) would not be sufficient within the VPA. In addition, the definition should present these requirements in a framework that makes it clear what evidence is required to demonstrate compliance so that a FLEGT licence covering a supply of timber can be issued.

The legality definition is one of five elements in the LAS established by each VPA partner country. The elements within the LAS are interlinked, combining procedures, documentation and technology and often involving interagency coordination. The system aims to check that the forests from where timber originates were managed and that timber was harvested in compliance with the legislative requirements included in the definition, and that FLEGT licences are issued only for timber for which such compliance has been verified.

The five elements of the LAS are as follows.

1. **Legality Definition:** Defines the legislative and regulatory requirements to be systematically fulfilled and verified, without any exception, to ensure legal compliance of timber products before a FLEGT licence can be issued in a country.
2. **Controlling the Supply Chain:** Timber-tracking systems to help demonstrate that timber originates from legal sources. The timber-tracking system covers the entire supply chain from point of harvest or point of import to point of export.
3. **Verification:** The processes and procedures to systematically check compliance with all the requirements in the legality definition and to ensure control of the timber supply chain.
4. **Licensing:** The process of issuing FLEGT licences in a VPA country confirming that wood products exported were legally produced.
5. **Independent Audit:** The use of an independent third party to check that all aspects of the LAS function as intended.

## Developing a legality definition

Legality definition development is an iterative process: integrating, refining, modifying throughout its development. Modifications can be a result of stakeholder input or new knowledge gained when linking legality definition requirements to verification procedures. Many of these steps will involve several drafts, repeating steps as necessary. There is no blueprint for developing a definition; the situation for each country will differ with regard to stakeholder concerns, forest resources, forestry sector challenges, legislation, systems and frameworks. The

1 [http://www.euflegt.efi.int/files/attachments/euflegt/efi\\_briefing\\_note\\_02\\_eng\\_221010](http://www.euflegt.efi.int/files/attachments/euflegt/efi_briefing_note_02_eng_221010).

2 [http://europa.eu/legislation\\_summaries/development/sectoral\\_development\\_policies/r12528\\_en.htm](http://europa.eu/legislation_summaries/development/sectoral_development_policies/r12528_en.htm).

3 The partner country is the country entering into VPA negotiations with the European Union.

time it takes a country to finalise a legality definition will vary depending on the issues being discussed, ability to reach consensus and the specific country conditions.

Even though country situations are different, common steps or tasks are involved in completing a legality definition. Countries may not necessarily follow all of these steps, or in this order, but many of the outputs implied in these steps can lead to a legality definition widely accepted by stakeholders and manageable in practice. Some of the steps may even get underway before formal VPA negotiations with the EU start.

Each country presents and discusses its legality definition in both formal negotiation and technical sessions with the EU. Experience has shown that countries bring a first draft to the EU at different stages: Some countries developed a full draft after many in-country stakeholder consultations, whereas others presented a very preliminary outline for further discussion. During these discussions, the EU may suggest the need for further clarity or practicality, or perhaps identify gaps in the definition. This can lead to further refinement. As this is an iterative process, the draft can go through many versions before the legality definition is finalised.

### Common steps used in legality definition development

1. Identify stakeholder groups and establish a stakeholder consultation process.
2. Establish and agree upon the legality definition development process.
3. Outline timber harvesting rights and timber sources to be covered by the legality definition.
4. Collate a 'long list' of relevant legislation to consider for legality definition requirements.
5. Discuss and decide, through multistakeholder consultation, legality definition content (e.g. requirements, evidence needed to prove compliance).
6. Identify where further analysis or work may be needed (e.g. contradictory legislation, gaps, law reform).
7. Link the legality definition to the verification procedures in the LAS.
8. Conduct a field test of the legality definition once the draft legality definition is robust, either as a stand-alone test or preferably as part of a comprehensive field test of the LAS.
9. Review and address field test comments and finalise the legality definition.
10. Present legality definition information in the form of an Annex in the VPA.

## Step 1: Identify stakeholder groups and establish a stakeholder consultation process

Stakeholder involvement in defining timber legality and the other aspects of the LAS is essential. Without such involvement, a VPA is unlikely to be viewed as credible, either nationally or internationally. Each partner country is responsible for developing, organising and implementing a consultation process that allows stakeholders a fair opportunity to provide their input.

### Why does the VPA process require multistakeholder engagement?

Stakeholders are likely to have different perspectives and different experiences on the same issue. Therefore, they will have different views on priorities including their rights and obligations, enforcement challenges or where legislation is unclear. For instance, social contracts between forestry companies and communities are often identified in VPA dialogue as an area of concern. Communities often feel they are not properly benefiting from these contracts in that companies are not entirely fulfilling their obligations or government agencies are not properly enforcing these obligations. Companies, on the other hand, often feel requirements are not clear in legislation or are not being properly communicated by the government, which can lead to communities misinterpreting company obligations.

Because stakeholders have different perspectives – forest operators complying with legislation, government agencies enforcing legislation, and communities depending on legislation to uphold their rights – stakeholder consultation allows the different priorities to be shared so that possible conflicts can be addressed. These different perspectives help result in a stronger, clearer definition, one that can realistically be implemented and that is supported by those most affected.

Stakeholder engagement familiarises stakeholders with current legislation and involves them in choosing the most relevant legal requirements, thereby solidifying local support for the definition and its content. The aim is to agree on requirements that are clear and unambiguous and that address key priorities.

Involving all affected stakeholders establishes an inclusive foundation and builds a common understanding that helps minimise frustration and conflict in the field.

In addition, stakeholder consultation not only facilitates the development of the legality definition, it supports the entire VPA negotiation process. Stakeholder consultation is a great conduit for informing in-country negotiation structures about the different stakeholder positions beyond even legality definition development.

## Who are stakeholders?

Many parties with different interests may want to partake in the VPA process to communicate their particular needs and agenda. The FLEGT VPA objectives are quite targeted, so involving at a minimum those stakeholders that are directly involved or affected by forestry operations is crucial.

If affected groups – forest operators, forest workers, forest-dependent communities, permit holders, etc. – are not given the opportunity to reflect on legislation and requirements, the legality definition may not clarify or address stakeholder preoccupations. This in turn could weaken its objectives and support. Therefore, ensuring the representation of these stakeholder interests will make for a more credible legality definition that is not later contested.

VPA stakeholder processes to date have involved the following groups in stakeholder dialogue:

- community members and indigenous groups involved in or living near logging operations;
- communities and indigenous groups dependent upon forest resources for their livelihoods;
- workers that provide labour for timber, timber transport, timber-processing companies;
- private sector forest users and others within the timber supply chain (e.g. forest companies, private use permit holders, plantation owners, processing companies, mill operators, timber federations);
- government agencies at both central and local levels that enforce, verify or are in some way related to forestry operations, timber transport, timber processing and timber export or sales and that are likely to be involved in the national legality assurance system (Ministry of Forestry, Finance, Commerce, Customs, Environment, Health, Labour, Trade, Justice, Commerce, etc.);
- political representatives (traditional authorities, parliamentarians, local and regional representatives);
- civil society organisations and other NGOs;
- university representatives or researchers that are related to the forestry sector and timber trade.

## Establishing a stakeholder consultation process

A stakeholder consultation process should allow stakeholders the opportunity to provide input, raise concerns and offer suggestions on the content of the legality definition. This fosters dialogue between stakeholders to find practical solutions on what economic, environmental and social requirements should be part of the definition and how these requirements will be verified for legal compliance. Many VPA experiences have shown that such involvement, discussions and consensus building helped to build trust among the stakeholders, promoting professionalism in their interactions, and improved their skills to communicate and interact with one another.

Stakeholder consultations take time. Stakeholders need time to organise themselves and establish the structures to interact and communicate with one another. Governments need time to formalise a structure so that consultations can take place. For this reason, many consultation processes were established before formal VPA negotiation sessions began.

Eight main lessons have been drawn from these processes.

- Consultation processes require flexibility to evolve. These processes improve through trial and error and need the time and ability to adapt to changing circumstances and new information.
- Additional support to particular groups may be needed to ensure an equitable consultation process that allows financially weaker groups to participate.
- Recognising early in the process the need for appropriate skills and attention to professionally manage the process, including the necessary resources and qualified personnel for organisation and implementation.
- Agreeing upon structures, rules and expectations including roles and responsibilities so that all stakeholders understand how the consultations will function.
- Using various techniques to consult and communicate, making it clear what will be used when, e.g. stakeholder platforms, national workshops, smaller targeted meetings, notice and comment.
- Self-selection of representatives is more effective than appointment of representatives. For example, where the government appointed representatives, stakeholders often felt their interests were not correctly represented, and blamed the government if the representatives were not effective. To avoid potential conflict, encouraging stakeholder groups to select their own representatives and develop their own positions builds trust in the process that leads to local support and input into the process. It also makes each stakeholder group responsible for ensuring its representative does the job properly.
- All stakeholder groups participating in the process should be equally transparent about the interests they represent in the process and how that representation functions.
- What appears to be one stakeholder group (e.g. civil society, private sector or government) may in fact constitute multiple interests. In these cases, interests would be better served by separating the single group into several stakeholder groups, thus giving each a voice in the process. For instance, civil society is sometimes categorised to include all groups other than private sector companies and government agencies. Within this group, there may be indigenous groups, forest-dependent communities, traditional authorities, labour unions, NGOs and university representatives. These

groups may have very different interests and perspectives to promote in the VPA process. Understanding the dynamics and interests of the various groups so they all have a voice will help ensure an effective process.

## Step 2: Establish and agree upon the legality definition development process

Several processes occur in legality definition development: internal processes between and among in-country stakeholders – often referred to as ‘stakeholder consultation’ processes, as outlined above, where stakeholders provide their perspectives and help formulate country positions; and formal, external processes, where countries relay and discuss their positions in negotiations with the EU. Internal and external processes should be linked to ensure in-country processes are actually informing negotiations rather than functioning as separate standalone activities.

To ensure effective linkage between processes, the following features have proved essential:

- openness and transparency of both internal and external processes;
- clarification of how external processes will communicate with and be informed by internal processes (procedures, responsibilities, time allotted, etc.);
- consistency of stakeholder representation in both internal and external processes.

### Transparency helps clarify expectations and avoid misunderstandings

In some cases of legality definition development, delays, frustration and conflict have resulted because stakeholders had different expectations on how decisions on the draft would be made. For example, in some VPA countries, working groups were created to help analyse and develop draft legality definitions. These working groups believed that the positions they put forward would be presented in negotiations. When this did not occur, the working group participants were frustrated and demotivated because it was not clear how their input would be handled or decisions made.

A similar situation has arisen between civil society stakeholder groups and government stakeholder groups. Civil society had certain expectations of how its participation would be integrated into the process; government stakeholders had a different expectation. This led to certain stakeholders walking out of the process, causing months of delay and difficulty in bringing the groups back together.

One way to help avoid conflict and delay is to clarify, early in the process, the procedures by which information will be communicated, analysed, changed and final-

ised among stakeholder groups and structures (committees, negotiating teams, platforms, working groups, etc.), particularly:

- How will different groups (e.g. communities, indigenous groups, small businesses) be fairly represented?
- Which individuals or groups will actually develop the draft legality definitions?
- How will drafts allow for stakeholder input? Which stakeholders? By what process?
- Will each stakeholder group be responsible for its own draft or list of priorities? Or will groups provide comments on existing drafts?
- How do internal stakeholder processes and discussions link to formal VPA negotiations? How are positions developed? What happens if there is disagreement?
- What are the timeframes to complete the work?
- How are final decisions communicated?

Agreeing early on who will be responsible for draft development, how drafts will be reviewed by the larger stakeholder consultation process and how decisions will be made on requirements and verifiers will greatly facilitate the process and help avoid misunderstandings. Agreeing to these processes before discussing content will promote clearer and more realistic expectations for stakeholder input and participation.

Another lesson learned is that enough time and tools must be allowed for stakeholder representatives to interact with their constituencies. Forest-dependent communities, forest workers and indigenous peoples are often located in remote areas, requiring time to travel and convene to receive input on drafts or decisions. Understanding the scheduling needs of the various stakeholders will ensure and encourage their input. Documents may need to be articulated in a way that makes it easy for stakeholder input to be captured.

Many stakeholders are unlikely to be sufficiently familiar with FLEGT VPA objectives, legality definition tables and legality definition terminology (e.g. principles, verifiers, references) to be able to respond and provide input unless documents are translated or adapted and interpreted so that stakeholders can understand, whether in writing or verbally.

This further reinforces the need for stakeholder groups to choose their own representative, someone who will be able to adapt information so that stakeholders can respond. In some cases – especially with groups located in remote areas – external assistance, for example from local NGOs, community organisations or international organisations, might be needed for support. However, it is important to allow local groups to develop their own positions and avoid imposing external views.

Several of the VPA partner countries learned through experience that by not having the different stakeholders

represented in the external process – negotiations with the EU – decisions and dialogue during these sessions were often not communicated to in-country internal processes. As a result, internal stakeholder processes were discussing out-of-date or incorrect draft legality definitions, causing confusion and frustration with the process.

Consistent stakeholder representation across the two processes, where the stakeholder groups involved in internal processes are also represented in external processes, can greatly facilitate the exchange of information and ensure that stakeholder consultations are feeding into negotiations. In all countries that have signed a VPA, the stakeholder groups were present in both internal and external processes. In some VPA negotiations, the country initially decided not to include private sector or civil society representatives in the external process with the EU, but as difficulties emerged in communicating negotiation results, this changed and representatives were then included in negotiations.

### **Step 3: Outline rights to harvest and timber sources to be covered in the legality definition**

Timber sources and rights to harvest should be clearly presented in the legality definition. As legislative requirements are often different for each permit type, the legality definition should make clear what requirements correspond to what titles and sources. For example, legal requirements for industrial timber contracts, which usually apply to large harvest areas, may have different environmental, social and economic objectives than individual permits, which usually cover very small areas.

At a minimum, the VPA requires that logs, railway sleepers, sawnwood, veneer and plywood products entering the EU come from legal sources; therefore, requirements for timber sources and harvest rights where these products originate will need to be included in the legality definition. By extension, legislative requirements concerning timber imported into the country and then exported to the EU as one of the above products will need to be covered in the legality definition.

Many countries have decided to include a broad range of products as part of their VPA (e.g. furniture, window frames, flooring). This is a political decision based on the country's trade priorities. If the political decision is to include additional products, then the timber sources for these products would need to be reflected in the legality definition, if not already covered.

Some countries have included timber sources that do not currently supply wood for wood products being exported to the EU but potentially will. In anticipation of this growth, these sources are included in the legality definition. For example, if a country exports all of its

plantation timber to a non-EU market, but the country hopes to start creating markets in the EU for its plantation timber, it may make sense to include plantations in the legality definition.

### **Step 4: Collate a 'long list' of relevant legislation to consider for legality definition requirements**

A FLEGT VPA legality definition is based on a subset of the country's national legislation, which could include laws, regulations, ministerial orders and other regulatory instruments including codes or guides and international treaties ratified by the country.

All VPA processes to date have included requirements that draw from legislation broader than forestry legislation. Legality definitions should include legislation covering economic, social and environmental obligations relating to forest management and timber trade. This could include legislation outlining the necessary fees and taxes to operate, legal registration in the country, company obligations to communities, forest worker health and safety requirements, other labour regulations, environmental requirements and customs obligations. Many of these obligations are not captured in a country's forestry legislation, and therefore it is important to look more broadly and analyse legislation such as environment or labour codes or legislation that covers regulations for setting up a business.

Every legality definition should consider nine areas and legislation that pertains to them.

- title and permit allocation processes;
- granting or compliance with rights to harvest;
- forest management and timber processing;
- community rights and welfare;
- environmental legislation;
- labour, health, and safety policies;
- taxes, import–export duties, royalties and fees;
- respect for community and indigenous people's tenure and use rights;
- trade and export procedures.

### **Step 5: Through multistakeholder consultation, decide on legality definition content**

Legality definition content will vary from one country to another depending on the type of forest, national legislation, administrative procedures and governance challenges. For example, some countries have separate and distinct administrative structures and requirements for different parts of the country, whereas other countries' requirements apply across the whole country. The

definitions should accommodate such differences while ensuring a consistent approach. The main elements to include in the legality definition are:

- principles (provides a useful way to group the intentions of different laws);
- requirements (often referred to as indicators);
- verifiers of compliance (documents, reports or activities that demonstrates compliance with the requirement);
- legal references (legislative text justifying the requirement);
- timber sources and tenure rights.

The most effective structure used by VPA countries to convey legality definition content has been to present the information in a table (Table 1).

This legality definition is structured according to forest type: one table for all permits and titles relating to harvesting in natural forests and another table for requirements relating to plantations. The example below is about natural forests.

**Table 1: Example from the Republic of Congo's legality definition.** The Republic of Congo separated the principles into two categories: principles and criteria. The country's criteria are listed in this table. The principle overseeing these criteria is: 'The State complies with legislation and regulations relating to the environment, management, forestry, processing of timber and tax.'

Principles	Requirements	Verifiers	References	Type of permit
Environmental impact studies have been carried out in accordance with legal and regulatory requirements and mitigating measures formulated have been implemented	<b>Indicator 4.1.1</b> Procedures for carrying out environmental impact studies have been followed.	<b>Verifier 4.1.1.1</b> Approval of the office carrying out the study	– Law 003-91 of 23 April 1991 (Art. 2); Decree 86/775 of 07 June 1986 (Art. 1, 4); Order 835/MIME/DGE of 6 September 1999 (Art. 4, 5)	CAT (Convention d'aménagement et de transformation), CTI (Convention de transformation industrielle)
		<b>Verifier 4.1.1.2.</b> Impact study report	– Law 003-91 of 23 April 1991; Decree 86/775 of 07 June 1986 (Art. 1, 4)	
		<b>Verifier 4.1.1.3.</b> Minutes of the meeting approving the impact study report	– Law 003-91 of 23 April 1991 (Art. 2)	
	<b>Indicator 4.1.2:</b> Measures contained in the approved impact study reports aimed at protecting biodiversity have been carried out	<b>Verifier 4.1.2.1.</b> Land inspection and audit reports	– Law 003-91 of 23 April 1991 (Art. 39); Order 1450/MIME/DGE of 19 November 1999 (Art. 16, 17, 18)	
		<b>Verifier 4.1.2.2</b> Inspection report by the Departmental Forest Economy Office	– Decree 2002-437 of 31 December 2002 (Art. 37, 82)	
		<b>Verifier 4.1.2.3</b> Report by the committee monitoring and reviewing the management plan	– Decree approving the management plan	CAT, CTI



Cameroon, by contrast, created eight legality definition tables: one table for each of the seven harvesting titles or licences and one for timber-processing facilities. Three additional timber production titles will be integrated into the legality definition as they are developed. Figure 1 lists the eight tables. Table 2 is an example of one of the obligations in Cameroon’s legality definition table for a logging agreement.

1. Logging agreement
2. Communal forest; state logging
3. Salvage licence
4. Harvested timber removal licence
5. Cut timber sale in the national domain
6. Community forest; state logging
7. Special permit; ebony logging in the national domain and the communal forests
8. Timber-processing units

Figure 1: List of legality definition tables for Cameroon

### Principles

- Principles help categorise requirements into issue areas. Some countries have used the categories outlined in *What is Legal Timber?* and listed in Step 4 above, whereas other countries have created their own list of principles that follow their legislation more closely.
- The categorisation provides a clear overview of a country’s legality definition, enabling the reader to see whether all relevant areas have been addressed.

- For example, one country used the principle ‘The logging/processing forest entity meets its social obligations’ and included legislation relating to workers’ rights, employment, social security workers’ health and safety, and community rights to forest use.

### Requirements

- Every requirement included in the legality definition will systematically be checked and verified for compliance.
- Requirements cannot be ambiguous, open to interpretation or left to anyone’s discretion but must clearly indicate yes/no fulfilment.
- Requirements are based on current legislation including guides, handbooks, codes (where these have legal standing) and international agreements.

A key challenge in preparing legality definitions is deciding what requirements to include. This is not an easy task. The natural inclination is to include as many requirements as possible, but it is not the aim of the legality definition to be an exhaustive inventory of laws and regulations; this is often not practical.

The LAS verification demands regular checks; therefore, requirements should be chosen strategically. Being strategic means selecting requirements to address the most serious threats from illegal logging and yet not overburden verification processes. Therefore, identifying the main challenges and the requirements best placed to target these challenges becomes an essential part of the legality definition dialogue. Every requirement included in the legality definition has to be

Table 2: Example from Cameroon’s legality definition

<b>MATRIX 1: LOGGING AGREEMENT</b> <b>Criterion 1: The logging/processing forestry entity is legally authorised</b>	
Indicator 1.1: The forestry entity has legal personality, holds approval as a logger and is registered as a timber processor.	
References to legislation, regulations and rules	
<ul style="list-style-type: none"> <li>• Article 41 of Law 94/01 of 20 January 1994</li> <li>• Articles 35(1), 36, 114 and 140(1), (2), (3), (4) and (5) of Decree 95-531</li> <li>• Law 98/015 of 14 July 1998 relating to establishments classified as dangerous, unhealthy or obnoxious</li> <li>• Decree 99/818/PM of 9 November 1999 laying down the provisions for setting up and operating [the establishments in question]</li> <li>• Order No 013/MINEE/DMG/SL (Ministry of Energy and Water/Mines and Geology Division/SL) of 19 April 1977 repealing and replacing Order No 154 of 28 March 1957 coding dangerous, unhealthy or obnoxious establishments</li> </ul>	
Verifiers	
<ul style="list-style-type: none"> <li>1.1.1 Certificate of domicile (natural person)</li> <li>1.1.2 Commercial register maintained at the competent court office</li> <li>1.1.3 Forestry approval granted by the competent authority</li> <li>1.1.4 Extract from the registration of the logging hammer stamps with the office of the competent Court of Appeal</li> <li>1.1.5 Authority to set up and operate a first-class establishment from the Ministry responsible for the industry</li> <li>1.1.6 Certificate of registration as a timber processor from the Ministry responsible for forests</li> </ul>	

checked for compliance before a FLEGT licence can be issued. For example, if social agreement obligations are often not implemented or not being monitored for compliance and this issue is known to cause conflict in the country, it might be strategic to include a number of requirements to ensure commitments in social agreements are being met. These requirements would have to be complied with before a FLEGT licence is issued, thus reinforcing the country's goal of ensuring that logging companies are adhering to social requirements.

Selecting a few important requirements, rather than overloading the definition with as many requirements as possible, will make the system easier to implement and follow. In VPA processes to date, the large number of requirements included in first drafts was later usually reduced by half or more after intense internal dialogue on key governance priorities and verification practicalities.

### Verifiers

- Verifiers are forms of objective evidence that needs to be provided to demonstrate compliance with a requirement.
- Examples of verifiers include field reports, specific documents, photos from the field, licences, certificates.
- Verifiers form the basis for verification procedures within the LAS.

Every requirement identified in the legality definition needs to be checked as part of the LAS system. Clear, unambiguous requirements make verification on the ground straightforward, minimising conflict and misunderstanding. Experience shows that early drafts often have the following problems:

- Language in the requirement or verifier is too general.
- The verifier does not address the requirement.
- Compliance with the requirement is open to interpretation, relying on the discretion of the verification team.

For example, an early draft in one VPA outlined the following requirement and verifier:

Requirement: Contract Holders have conducted timber harvesting in accordance with generally accepted silvicultural practices and in accordance with all applicable laws, regulations and guidelines issued by the Authority.

This requirement is very general and it is not clear what 'generally accepted' means. This would be impossible to verify without interpretation. The country could rework this requirement and target specific silvicultural practices known to be a problem or highlight key elements outlined in legislation that reflect certain silvicultural practices.

As a verifier, 'Audit reports' is too general. It is not clear which specific audit report is being referred to or if the audit report actually addresses the silvicultural practices in question. Clarifying in the requirement

what silvicultural practices are to be targeted makes it easier to choose a verifier, because it is known what document, activity or report will be used to demonstrate compliance. The verifier needs to directly reflect compliance with the requirement. For example, if the verifier is a field report, the field report must demonstrate that the particular silvicultural practices were checked; this could be done in written form or through photographs.

### References

- References are the legislative provisions justifying the requirement.
- The actual citation or article number and legislative document need to be indicated.

The legality definition is based on current national legislation of the VPA partner country. All requirements need to have legal justification and this is demonstrated by clearly indicating the legal document and the corresponding text (e.g. article numbers) that support the requirement.

Some VPA stakeholder processes deemed that certain requirements and verifiers were crucial even though legislation was not in place to support the requirement. The requirement and verifier stayed in the legality definition table and, in the references section, it was noted that a legislative reform process would occur and the legislative reference would be in place before FLEGT licences were issued. Other countries chose not to include the requirement in the legality definition table, but listed the potential requirement as an activity to be implemented in the future: once the legislative reform process was complete and the legislative text clear, the requirement would be added. Licensing would therefore not be dependent upon its completion because the requirement was not deemed crucial but would be added at a later date.

### Step 6: Identify where further analysis or work may be appropriate

Many countries encounter difficulties in enforcing forestry legislation because of contradictions with other legislation or confusion in its interpretation, making it relatively easy to circumvent and difficult to apply and enforce. The legality definition development process often identifies such inconsistencies as well as gaps in legislation which warrant further legislative reform, studies or analysis. Countries can indicate their intention to address such inconsistencies and include them, for example, in the VPA annex outlining additional measures.

The additional measures Annex lists the activities to be completed after negotiations are concluded. In some cases, new requirements will have to be added before the

LAS is operational in order to ensure control throughout the supply chain. As new regulations are developed, the legality definition will need to be amended and agreed by both parties (EU and VPA country) through the Joint Implementation Committee<sup>4</sup> to reflect such changes.

The aim of the legality definition is not to create a parallel legal framework for forest management in a country; rather, it provides an opportunity to identify, redress and, in some cases, improve areas of legislation and regulation that are difficult to implement, impractical or confusing. In some countries, it has been the first time that such a broad-based reflection process has been undertaken.

## Step 7: Link the legality definition to LAS development

The legality definition represents one element of a country's legality assurance system (LAS). As the legality definition forms the basis for other elements of the LAS (e.g. verification), it is usually the first element to be addressed in FLEGT VPA negotiations. This does not mean, however, that reflection on elements such as verification and the tracking system should be delayed until the legality definition is complete.

Reflection on verification procedures can often help inform and lead to refinement of the legality definition. However, a complete legality definition is needed in order to complete the description on verification procedures, as it is the definition that sets out all of the requirements that need to be verified in the VPA.

As with verification, discussion on noncompliance with requirements and corrective actions may lead to further adjustments in the definition.

The legality definition provides a strong basis for the LAS. Once countries start to fill in the details on requirements, verifiers and verification procedures, there is often a need to go back and make refinements or adjustments based on this new information.

## Step 8: Field test the legality definition

Once a legality definition has been developed, supported by stakeholders and discussed with the EU, a field test of the legality definition is conducted. The test allows an additional, independent review of the definition to ensure applicability in the field.

The objectives of the test are:

- to identify incoherencies, gaps, impracticalities with requirements, verifiers and references;
- to test the applicability and relevance of the requirements and verifiers;
- to assess whether the definition can be upheld, applied and enforced;
- to specify the government departments involved and how they will collaborate in verification; and
- to facilitate the development of the LAS.

Some countries have done a test focusing only on the legality definition content; other countries have looked at the legality definition content in combination with other elements of the LAS to provide a broader understanding of gaps and inconsistencies across the LAS rather than just within the legality definition.

The test is usually implemented by a team of professionals. Tests done to date have involved independent experts with professional experience in auditing legality standards, joined by the in-country government professionals who will be involved in verification procedures. In some cases, non-government in-country participants have also been involved. This has allowed a balanced combination of individuals familiar with in-country procedures and those that provide a fresh, neutral look at the definition and its applicability in the field.

The test involves visiting a sample of sites representing the different types of permits or circumstances identified in the definition. The team is responsible for assessing the applicability and pertinence of each requirement and verifier in the definition and provides comments and recommendations for improvement where appropriate. Questions the team may consider include: Can the requirements be implemented by companies and the government? Are the requirements and verifiers practical? Do the verifiers address the requirement? The team also assesses whether the references are correctly cited and appropriate to support a requirement. A report is submitted with recommendations and observations.

As part of the test, the team holds discussions with forest operators, communities and government representatives involved in or affected by the forest operation at the given field test site to better understand the concerns that could indicate possible gaps in the definition.

VPA countries have conducted field tests to ensure requirements and verifiers were clear, unambiguous and practical for those control agencies doing the verification. The tests signalled where definition requirements or verifiers could be adjusted, improved or removed. For example, one test identified the need to establish a government procedure in order to keep a verifier. The verifier was a particular document – 'Health and safety report' released by the Ministry of Health – but the document had never

<sup>4</sup> The Joint Implementation Committee (JIC) is a structure as defined in the Agreement that will oversee implementation of the VPA. It has representatives from both parties on the committee. Its function and procedures are outlined in an Annex to the VPA.

been used in practice and the Ministry of Health was not involved in VPA discussions. This led to discussions with the Ministry of Health to determine what could be done to maintain the verifier. In this way, the test provided useful guidance for verification procedure development – another element of the LAS – which often is taking place in parallel.

### Step 9: Review and address field test comments and finalise the legality definition

The test team should complete a report with its findings and recommendations. It is for the partner country to analyse and assess the team's report and, if necessary, modify the legality definition. In some cases, this has instigated further discussions on particular requirements, development of further government procedures (as in the above 'Health and safety report' example) or clarification in legislation. Changes to the legality definition are then presented and confirmed in a negotiation session with the EU.

### Step 10: Present legality definition in the form of an annex in the VPA

The agreed legality definition is set out in an Annex to the VPA that is developed through a drafting process. The aim of the drafts is to advance legality definition development. It is through these drafts that the Legality Definition Annex is refined and further clarified. Furthermore, the drafts focus discussion at a level of technical detail to ensure the legality definition is clear, practical and robust. Therefore, development of the Annex occurs not after legality definition discussions are concluded, but rather during the negotiations themselves.

The Annex is often divided into two sections:

1. general information and
2. legality definition table or tables (presenting the principles, requirements, verifiers and references, as described above).

The general information section briefly describes the country's forestry sector and legal framework, providing basic background and descriptions to help the wider public understand the country's legality definition development process, the basis for the legality definition tables and any other pertinent information on the country's forestry sector that could be useful to a larger audience. Such information may include:

- background information on the forestry sector: legal and institutional framework underlying the definition,

such as titles, permits or contracts associate with permanent forest, plantations, timber from agricultural land or non-permanent forest;

- a list of the legislation, regulations, codes or guidelines or any other reference that has been used for the country's legality definition;
- a description of how the legality definition was developed, outlining the process (how decisions were made, field tested, etc.) and describing the various stakeholders involved and structures used (committees, technical working groups, stakeholder platforms, etc.).

### Discussing the legality definition with the European Union

Technical and formal negotiation sessions between the EU and a partner country will include discussions on the country's legality definition. Each country develops its own legality definition through its own internal processes, but the EU is able to provide support, guidance and further clarity where needed.

There is no rule on how advanced a legality definition should be before it is discussed with the EU. Countries have brought drafts to the EU at completely different stages. One country spent months developing its legality definition and thought it was bringing a completed definition to the table, only to realise that the definition did not provide the clarity needed to ensure proper implementation. Some countries have barely started their legality definition development and have brought just an outline to negotiations.

Dialogue with the EU early on in the legality definition development process is advisable to ensure the definition meets VPA expectations, that is, that the legality definition: is clear and practical to implement; is balanced by having the relevant social, environmental and economic obligations integrated; contains a legal justification for each requirement; is widely accepted by stakeholders; and covers all of the necessary issue areas as outlined in *What is Legal Timber?*. Generally, several iterations of drafts are discussed before agreement is reached on a final Legality Definition Annex. The number of sessions devoted to legality definition development varies from country to country, depending on how easily and quickly a country can organise consultation processes, the number of issues and the time required for these processes to reach consensus and decision on key elements in the legality definition.

**The ultimate aim is to achieve a practical, clear and manageable legality definition.**

## Frequently asked questions

### 1. Whose legislation is used to develop a legality definition?

A legality definition is based on legislation of the timber-exporting country, not legislation of any European country.

### 2. Can draft legislation that is not yet adopted be used in the legality definition?

Yes, but legislation needs to be adopted before the first FLEGT licence is issued. (See Step 5' for more information on this topic.)

### 3. Does the legality definition replace existing legislation?

No, the legality definition is a subset of existing legislation. Legislation not included in the definition continues to be valid, but is not checked as part of the FLEGT VPA legality assurance system.

### 4. What if stakeholders do not agree with or support the country's legality definition?

Legality definitions that are not widely supported in the partner country will be difficult to implement and are unlikely to obtain EU agreement. As many of the issues surrounding legality definitions can be contentious, it is all the more important to promote dialogue to find consensus and compromise so that solutions to conflicts can be found rather than ignored. At the same time, complete consensus is unlikely to be possible and some compromises will have to be made.

### 5. Can the legality definition be amended, e.g. if new legislation is created?

The Legality Definition Annex can be amended and updated to include any changes in the legal framework after the VPA is signed. The process for amending annexes to the VPA is set out in the VPA itself.

### 6. How can communities and indigenous peoples participate when they live in remote areas?

Consultation processes need to take into account important voices such as forest-dependent communities and indigenous peoples and set up appropriate structures to enable them to participate. Some countries have relied upon local organisations to represent community voices; other countries have used representatives from the communities themselves. External support and resources may be needed to facilitate their participation.

### 7. Can a FLEGT licence be issued if only some of the legality definition requirements are met?

No, a FLEGT licence is issued only if all legal requirements in the legality definition concerning a supply of timber have been met. In practice, this may mean that a forest management unit is periodically checked for compliance and that within that period all supplies verified as originating from that unit are considered to be legal and supply chain controls deemed to have been successfully implemented.

### 8. What happens if a requirement is not met? What are the procedures?

Procedures for non-compliance with the legality definition will be described in the LAS. The description will include the principles that frame handling of offences. These principles would most likely include:

- the judicial procedures applicable to the LAS;
- sanction types associated with these procedures;
- how verification bodies report on detected offences;
- consequences within the LAS including rectification, corrective actions or possible prohibitions to operate; and
- how to address offences against legal requirements not covered by the LAS and how such offences affect the LAS.

### 9. If a company is privately certified, does it need to meet legality definition requirements?

Every company that produces or exports products covered by the VPA in their country will be responsible for meeting the requirements set out in the legality definition of that country. It is up to each VPA country to decide how private certification schemes fit with its LAS systems. Some VPA countries have decided to integrate certification schemes by using them as part of their verification processes, accepting only those schemes that fulfil their FLEGT legality definition requirements. One advantage of this form of integration is that it minimises the duplication of verification procedures and helps promote private certification in the country.