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CURRENT GUIDANCE IN THE DEVELOPMENT OF LEGALITY DEFINITIONS IN FLEGT VOLUNTARY PARTNERSHIP AGREEMENTS

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Purpose of Brief

This brief aims to **guide** countries 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.

Its aim is to help VPA stakeholders better understand the Legality Definition development process and to share lessons, processes, tools and structures from country experiences that have contributed to completion of a *successful* Legality Definition. *Successful* in that it was widely accepted by stakeholders; economic, environmental and social issues were 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?](#)¹.

The Legality Definition in FLEGT Voluntary Partnership Agreements

VPAs between timber producing countries and the European Union (EU) provide one of the measures to confront the problem of illegal logging identified in the EU's FLEGT Action Plan².

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 and therefore each Agreement must clearly describe legal timber according to the partner country's 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. These requirements are chosen involving a multi stakeholder process so that there is wide consensus supporting the requirements.

As described in the *FLEGT Briefing Note No. 2 - 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, i.e. laws aimed at **economic, social, and environmental** objectives. For example, a Definition including laws only 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 license covering a supply of timber can be issued.

The Legality Definition is one of **five elements** in the LAS established by each FLEGT partner country. The elements within the LAS are **interlinked**, combining procedures, documentation, and technology and often involving inter-agency coordination. The system aims to check that forests of origin were managed and that timber was harvested in compliance with the legislative requirements included in the Definition and that FLEGT licenses are issued only for timber for which such compliance has been **verified**.

The **five elements of the LAS** include the following:

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 license can be issued in a country;

¹

http://ec.europa.eu/development/icenter/repository/B2_Flegt_BR2_2007final_en.pdf

²

http://europa.eu/legislation_summaries/development/sectoral_development_policies/r12528_en.htm

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 to point of export;
3. **Verification:** The processes and procedures to systematically check compliance of all the requirements in the Legality Definition and to ensure control of the timber supply chain;
4. **Licensing:** The process of issuing FLEGT licenses in a VPA country confirming that wood products exported have been legally produced;
5. **Independent Audit:** The use of an independent third party to check that all aspects of the LAS function as intended.

sessions with the EU. Experience has shown that countries bring a first draft to the EU at different stages: some countries have developed a full draft after many in-country stakeholder consultations, others have presented a very preliminary outline in order to discuss further. It is during these discussions where the EU may suggest the need for further clarity, practicality, or perhaps identify gaps in the Definition. This can lead to further refinement. This is an iterative process and the draft can go through many different versions before the Legality Definition is finalized.

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; each country faces a different situation with regard to stakeholder concerns, forest resources, forest sector challenges, legislation, systems and frameworks. The time it takes a country to finalize a Legality Definition varies depending on the issues being discussed, ability to reach consensus, and the different country situations.

Even though country situations are different, there are **common steps** or tasks that were used to complete a Legality Definition. Countries may not necessarily use all of these steps, nor 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 actually start.

Each country presents and discusses their Legality Definition in both formal negotiation and technical

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 tenure 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 multi stakeholder 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. Conduct a field test of the Legality Definition once the Legality Definition draft is robust
8. Review and address field test comments and finalize the Legality Definition
9. Present Legality Definition information in the form of an Annex in the VPA
10. Link the Legality Definition to LAS development.

Step 1: Identify Stakeholder Groups and Establish a Stakeholder Consultation Process

Stakeholder involvement in defining legality is essential. Without this, a VPA is unlikely to be viewed as **credible**, either nationally or internationally. Each partner country is responsible for developing, organizing and implementing a consultation process that allows stakeholders a fair opportunity to provide their input.

Why Does the VPA Process Insist Upon Multi Stakeholder Engagement?

Stakeholders are likely to have different perspectives and different experiences on the same issue and therefore will have different views on priorities including their rights and obligations, enforcement challenges, or where legislation is unclear. For instance, social contracts between forest 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 fulfilling their full 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 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 ensure 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 on the ground and which is supported by those most affected.

Stakeholder engagement **familiarizes** stakeholders with current legislation, involves them in choosing the most relevant legal requirements and thereby **solidifies local support** for the Definition and its

content. The aim is to agree on requirements that are clear, unambiguous and that address key priorities.

Involving **ALL** affected stakeholders **educates** and builds a common understanding which helps minimize 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 to inform 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 highlight 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/indigenous peoples involved in or located near logging operations;
- Communities/indigenous peoples 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 both at the central and local levels that enforce, verify, or are in some way related to forest operations, timber transport, timber processing, and timber export or sale 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/regional representatives);
- Civil society organizations and other NGOs;
- University representatives or researchers that are related to the forest sector and timber trade.

Establishing a Stakeholder Consultation Process

A stakeholder consultation process should allow stakeholders the opportunity to provide their input, raise their concerns, and provide suggestions on the content of the Legality Definition. This fosters **dialogue** between the different 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 to date 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 organize themselves and establish the structures to interact and communicate with one another; governments need time to formalize a structure so that consultations can take place. For this reason, many consultation processes were established before formal VPA negotiation sessions began.

Lessons learned from these processes include the following:

- 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 which allows financially weaker groups to participate.
- Recognizing early in the process the need for **appropriate skills and attention** to professionally manage the process, including the necessary resources and qualified personnel to organize and implement.
- **Agreeing** upon structures, rules, and expectations including roles and responsibilities so that all stakeholders understand how the consultations will function.
- Using different 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 appointed representatives. For example, where representatives have been appointed by the government, stakeholders often felt their interests were not correctly represented and if this person was not effective, government was blamed. To avoid potential conflict, encouraging stakeholder groups to select their own representative 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 to ensure their 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.

- Understanding that what appears to be one stakeholder group (e.g. civil society, private sector, or government) may in fact be a number of different interests and would be better served by separating into several different stakeholder groups; therefore, each having a voice in the process. For instance, civil society is sometimes categorized to include all groups other than private sector companies and government agencies. Within this group, there may be indigenous peoples, forest dependent communities, traditional authorities, labour unions, NGOs, University Representatives etc. These groups may have very different interests and perspectives to promote in the VPA process. Understanding the dynamics and interests of the different groups so they all have a voice will help ensure an effective process.

Step 2: Establish and Agree Upon the Legality Definition Development Process

There are several different processes occurring 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 perspective and help formulate country positions; and formal, **external** processes where countries relay and discuss their positions with the European Union in negotiations. Internal and external processes should be linked to ensure in-country processes are actually **informing** negotiations rather than separate stand alone activities.

To ensure an effective linkage, the following proved essential:

- Openness and transparency of both internal and external processes;
- Clarifying how external processes will communicate and be informed by internal processes: procedures, responsibilities, time allotted etc.;

- Consistency of stakeholder representation in both internal and external processes.

Transparency Helps to Clarify Expectations and Avoid Misunderstandings

In developing a Legality Definition, delays, frustration and conflict have resulted because stakeholders had different **expectations** on how decisions would be made on the draft. For example, in some VPA countries, working groups were created to help analyze and develop Legality Definition drafts. These working groups believed that the positions they put forward would be the positions to be presented in negotiations. When this did not occur, working group participants were frustrated and de-motivated because it was not clear how their input would be handled or decisions made.

The same occurred between civil society stakeholder groups and government stakeholder groups. Civil society had certain expectations of how their participation would be integrated into the process; government stakeholders had a different expectation. This led to certain stakeholders actually walking out of the process, causing months of delay and difficulty for the groups to come back together.

Clarifying procedures early in the process on how information will be communicated, analyzed, changed and finalized among stakeholder groups and structures (committees, negotiating teams, platforms, working groups etc.) will help avoid conflict and delay, in particular:

- How will different groups (e.g., communities, indigenous groups, small businesses) be fairly represented?
- Which individuals/groups will actually develop Legality Definition drafts?
- How will drafts allow for stakeholder input? What stakeholders? What process?
- Will each stakeholder group be responsible for their own draft/list of priorities? Or will they provide ideas 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 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 allowing enough **time and tools** 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 scheduling needs of the different stakeholders will ensure and encourage their input. Documents may need to be articulated in a way that it is 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 vocabulary, such as *principles, verifiers, and references* to be able to respond and provide input unless documents are **translated/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 that will be able to adapt information for stakeholders to 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 Legality Definition drafts causing confusion and frustration towards the process.

Consistent stakeholder representation across the two processes, where the different stakeholder groups involved in internal processes are also represented in the external processes, can greatly facilitate the exchange of information and ensure that stakeholder consultations are feeding into negotiations. In all signed VPA countries, the different stakeholder groups were present in both internal and external processes. In the beginning of some VPA negotiations, the country 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 Timber Tenure Rights and Timber Sources to Be Covered in the Legality Definition

Timber sources and tenure rights should be clearly presented in the Legality Definition. As legislative requirements are often different for different tenure types, the Legality Definition should make it clear what requirements correspond to what titles and sources. For example, legal requirements for industrial timber contracts which usually consist of 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 **European Union** come from legal sources; therefore, requirements for timber sources

and tenure rights where these products originate will need to be included in the Legality Definition. And by extension, legislative requirements concerning timber **imports** coming into the country and further exported to Europe as one of the above products will need to be covered in the Legality Definition.

Many countries have decided to include a larger number of products as part of their VPA (e.g. furniture, window frames, flooring). This is a political decision involving a country's trade priorities. So, 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 Europe, but potentially will. These sources have been included in the Legality Definition anticipating this growth. 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 already 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 texts including codes/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 which 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 forest legislation, and therefore it is important to look broader and analyze legislation such as environment or labour codes or legislation that covers regulations for setting up a business.

Every Legality Definition should consider the areas listed below and therefore legislation pertaining to these areas:

- Title/permit allocation processes
- Granting/compliance with rights to harvest
- Forest management/timber processing
- Community rights and welfare
- Environmental legislation
- Labour/health/safety legislation (worker rights, worker health and safety etc.)
- Taxes/import export duties/royalties/fees
- Respect for community and/or indigenous peoples tenure/use rights
- Trade/export procedures

Step 5: Through Multi Stakeholder 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 are nationally based and 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 (document/report/activity that demonstrates compliance to the requirement).
- **Legal references** (legislative text justifying 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.

A table presents the information in a clear, understandable manner and has been the structure of choice by most VPA countries.

The following is an excerpt of the Republic of Congo’s Legality Definition. The 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 below example is taken from their natural forests legality table.³

Example: Republic of Congo				
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	Indicator 4.1.1 Procedures for carrying out environmental impact studies have been followed	Verifier 4.1.1.1 Approval of the office carrying out the study Verifier 4.1.1.2 Impact study report Verifier 4.1.1.3 Minutes of the meeting approving the impact study Report	--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). --Law 003-91 Of 23 April 1991; decree 86/775 of 07 June 1986 (art. 1, 4). -- Law 003-91 du 23 April 1991 (art.2).	CAT, CTI
	Indicator 4.1.2: The measures contained in the approved impact study reports aimed at protecting biodiversity have been carried out.	Verifier 4.1.2.1 Land inspection and audit reports Verifier 4.1.2.2 Inspection report of the Departmental Forest Economy Office Verifier 4.1.2.3 Report of the committee monitoring and reviewing the management plan	--Law 003-91 of 23 April 1991(art. 39); order 1450/MIME/DGE of 19 November 1999 (art.16, 17, 18). --Decree 2002-437 of 31 December 2002 (art. 37, 82). --Decree approving the management plan.	CAT, CTI

³ Republic of Congo actually separated their principles into two categories: principles and criteria. What is listed in the table above actually represents their criteria. The principle overseeing these criteria is: *The State complies with legislation and regulations relating to the environment, management, forestry, processing of timber and tax.*

Cameroon on the other hand created **eight** different legality definition tables: one table for each of the 7 different harvesting titles/licenses and one table for timber processing facilities. Three additional timber production titles will be integrated into the Legality Definition as these are developed. The below examples show 1) the eight different legality definition tables developed and 2) an excerpt showing one of the obligations in Cameroon's legality definition table for a logging agreement:

CAMEROON LEGALITY DEFINITION TABLES	
1.	Logging agreement (CE).
2.	Communal forest (FCle); State logging.
3.	Salvage licence (ARB).
4.	Harvested timber removal licence (AEB).
5.	Cut timber sale (VC) in the national domain.
6.	Community forest (FC); State logging.
7.	Special permit (PS); ebony logging in the national domain and the communal forests.
8.	Timber processing units (UTB).

Example: Cameroon	
MATRIX 1: LOGGING AGREEMENT	
Criterion 1: The logging/processing forestry entity is legally authorized	
<i>Indicator 1.1: The forestry entity has legal personality, holds approval as a logger and is registered as a timber processor.</i>	
References to legislation, regulations and rules	
<ul style="list-style-type: none"> – Article 41 of Law 94/01 of 20 January 1994 – Articles 35(1), 36, 114 and 140(1), (2), (3), (4) and (5), of Decree 95-531 – Law 98/015 of 14 July 1998 relating to establishments classified as dangerous, unhealthy or obnoxious – Decree 99/818/PM of 9 November 1999 laying down the provisions for setting up and operating <i>[the establishments in question]</i> – 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 	
Verifiers	
<ul style="list-style-type: none"> 1.1.1 Certificate of domicile (natural person) 1.1.2 Commercial register maintained at the competent court office 1.1.3 Forestry approval granted by the competent authority 1.1.4 Extract from the registration of the logging hammer stamps with the office of the competent Court of Appeal 1.1.5 Authority to set up and operate a first class establishment from the Ministry responsible for the industry 1.1.6 Certificate of registration as a timber processor from the Ministry responsible for forests 	

PRINCIPLES

- Principles help **categorize** requirements into issue areas. Some countries have used the categories as outlined in *FLEGT Briefing Note #2* and listed in *Step #4* of this paper whereas other countries have created their own list of principles that follow their legislation more closely.
- The categorization 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 rights of workers, employment, social security worker health and safety, and community rights to use of the forest.

REQUIREMENTS

- The chosen legal requirements that will be systematically checked for compliance.
- **Every** requirement included in the Legality Definition will need to be checked and verified for compliance.
- Cannot be ambiguous, open to interpretation or left to someone's judgment, but clearly indicates 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 reaction 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, choosing of requirements should be **strategic**. Being strategic means picking requirements to address the most serious threats from illegal logging and yet not overburden

verification processes. So, identifying the **main challenges** and the requirements best placed to target these challenges becomes an essential part of Legality Definition dialogue. Every requirement included in the Legality Definition has to be checked for compliance before a FLEGT license 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 license is issued, thus, reinforcing the country's goal to ensure logging companies are adhering to social requirements.

Picking a few important requirements vs. overloading the Definition with as many requirements as possible will make the system easier to implement and follow. VPA processes to date have consistently included many more requirements in their first drafts only to be reduced down to usually half or more after intense internal dialogue on key governance priorities and verification practicalities. One country started with 300 requirements at the beginning of the process and ended with a Definition that included less than half that number.

VERIFIERS

- Objective evidence that needs to be provided to demonstrate compliance with a requirement.
- Examples of verifiers include reports, specific documents, licenses, certificates etc.
- 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, minimizing conflict, and misunderstanding. Experience shows that early drafts often show the following problems:

- Language in the requirement or verifier is often too general.
- Verifier doesn't address the requirement.
- Compliance of the requirement is open to interpretation, relying on the judgement 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.”*

The requirement is very general and it is not clear what ‘*generally accepted*’ actually means. This would be impossible to verify without interpretation. One would suggest the country re-work this requirement and actually target specific silvicultural practices known to be a problem or highlight key elements outlined in legislation that reflect certain silvicultural practices.

“Verifier: Audit Reports”

The verifier is also too general. It is not clear what specific audit report is being referred to. Does the report actually assess silvicultural practices? By targeting the silvicultural practices already in the requirement, it is easier to choose a verifier because it is known what document/activity/report is used to demonstrate compliance.

REFERENCES

- The legislative provision justifying the requirement
- The actual citation/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 showing what legal document and the corresponding text (e.g. article numbers) support the requirement.

Some VPA stakeholder processes deemed that certain requirements and verifiers were crucial even though current legislation was not yet in place to support the requirement. The requirement and verifier stayed in the legality table and under references, it was noted that a **legislative reform process** would occur and the legislative reference would be in place before FLEGT licenses were to be 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 where 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. (See Step #6 for more information).

Step 6: Identify Where Further Analysis or Work May Be Appropriate

Many countries encounter difficulties in enforcing forest legislation because it has proven contradictory to other legislation or has been confusing in its interpretation, making it easier 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 and/or studies or analysis. Countries can indicate their intention to address such inconsistencies and include them for example in the Annex outlining *Additional Measures*.

The *Additional Measures* Annex lists out the activities to be completed after concluding negotiations. In some cases new requirements will have to be added before the LAS is operational in order to ensure entire supply chain control. 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 Committee⁴ 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 improves areas of legislation and regulation that are difficult to implement, impractical, or confusing. In some cases it was the first time that such a broad-based reflection process has been undertaken.

Step 7: Conduct Field Test of 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 implemented. The test allows an additional, independent review of the Definition to ensure applicability in the field.

The **objectives** of the test include:

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

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 in-country government professionals that 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. 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 **discusses** with forest operators, communities, and government representatives involved 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 implemented 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* done by the Ministry of Health - but the document had never been used in practice nor was the Ministry of Health involved in VPA discussions. This led to discussions with the Ministry of Health to determine what could be done to maintain the verifier. So, the test provided useful **guidance** for verification procedure development – another element of the LAS – that often is taking place in parallel.

⁴ The Joint Implementation Committee (JIC) is a structure as part of the Agreement that will oversee implementation of the VPA. It has representatives from both parties participating on the committee. Its function, procedures etc. are outlined in an Annex of the VPA.

Step 8: Review and Address Field Test Comments and Finalize Legality Definition

The test team should complete a report with their findings and recommendations. It is for the partner country to analyze and assess the team's report and if necessary, modify the Legality Definition. In some cases, this has instigated further stakeholder consultation on particular requirements, further government procedure (as in the above example) or further clarification in legislation. Changes to the Legality Definition are then presented and confirmed in a negotiation session with the EU.

Step 9: Present Legality Definition in the Form of an Annex in the VPA

The agreed Legality Definition is described in an **Annex of the VPA**. It is often divided into two sections:

- 1) **general information** and
- 2) **Legality Definition table/s** (presenting the principles, requirements, verifiers, and references described above).

The **general information** section briefly describes the country's forest 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 table/s, and any other pertinent information on the country's forest sector that could be useful to a larger audience. Such information may include:

- Background information on the forest sector: legal and institutional framework underlying the definition, e.g. permanent forest, plantations, timber from agricultural land, non permanent forest, etc. and their associated titles/permits/contracts.
- A list of the legislation, regulations, codes/guidelines or any other reference that has been used to define the country's Legality Definition.

- Description of how the Legality Definition was developed, outlining the process (how decisions were made, field tested etc.), describing the different stakeholders involved, and structures used (committees, technical working groups, stakeholder platforms etc.).

Step 10: Link 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 wait until the Legality Definition is complete.

Reflection on verification procedures can often help inform and lead to refinement of the Legality Definition. A **complete** Legality Definition is however needed in order to complete verification, as it is the Definition that sets out all of the requirements that need to be verified in the VPA.

Just as with verification, discussion on **noncompliance** of requirements and corrective actions may lead to further adjustments in the Definition.

The Legality Definition provides a strong basis for the LAS and once the process begins to document the details; there is often a need to go back and refine or adjust based on this new information.

Present the Draft Legality Definition in Negotiation Sessions with the EU and Discuss

Technical and formal negotiation sessions between the EU and a partner country will include discussions on a country's Legality Definition. This particular activity can happen throughout the development of the Definition and at any stage of the draft. Each country develops their own Legality Definition through their own internal processes, but the EU is able to provide support, guidance and further clarity where needed.

These technical and negotiation sessions work towards ensuring that the Legality Definition provides a clear, practical definition; one that is balanced by including relevant social, environmental and economic obligations, that is widely accepted by stakeholders, and that covers all of the necessary issue areas. Generally, several iterations of drafts are discussed before agreement is reached on a final Annex. The EU will often provide suggestions where further clarity or practicality may be needed.

The number of sessions devoted to Legality Definition development varies with each country, depending on how easily and quickly the country can organize consultation processes, the number of issues and the time it takes for these processes to reach consensus and decision on key elements in the Legality Definition.

There is no rule on how advanced a Legality Definition should be before discussing with the EU. Countries have brought drafts to the EU at completely different stages. One country spent months developing their Legality Definition and thought they were bringing a completed Definition to the table only to realize their Definition did not provide the clarity needed to ensure proper implementation. Some countries have barely started their Legality Definition and have brought just an outline to negotiations. As part of this process, the EU offers technical support to further clarify, promote additional analysis where appropriate, and inform stakeholders about EU expectations.

The ultimate aim is to achieve a practical, clear, 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?

No, but it can be integrated into the Legality Definition once it has been formally adopted. However, some countries have still included requirements in the Legality Definition based on anticipated legislation, but have clearly indicated in the references section that legislation is to be developed and is part of the activities listed in the Additional Measures annex. (See page 13 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 be agreed by the EU. 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 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 signing of the Agreement. The process for amending Annexes to the Agreement is set out in the Agreement itself.

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

Consultation processes need to take into account important voices in the process such as forest dependent communities and indigenous peoples and set up appropriate structures to enable them to participate. Some countries have relied upon local organizations 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 License be issued if only some of the requirements are met in the Legality Definition?

No, a FLEGT License is only issued 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.

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

Procedures for noncompliance to the Legality Definition will be described as part of the description in the LAS. It will describe the principles that frame handling of offenses. These would most likely include:

- the different judicial procedures applicable to the LAS;
- sanction types associated with the above procedures;
- how verification bodies inform about detected offenses;
- consequences with the LAS (rectification and corrective actions, possible prohibitions to operate etc.); and
- how to address offences to legal requirements not covered by LAS and how these offences impact LAS.

9. *What if a company is privately certified, do they need to meet Legality Definition requirements?*

Every company in a country that has signed a VPA, producing/exporting VPA products, 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 their LAS systems. Some VPA countries have decided to integrate certification schemes by utilizing them as part of their verification processes, accepting only those schemes that fulfill their FLEGT Legality Definition requirements. One advantage to their integration is to minimize the duplication of verification procedures as well as to help promote private certification in country.

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