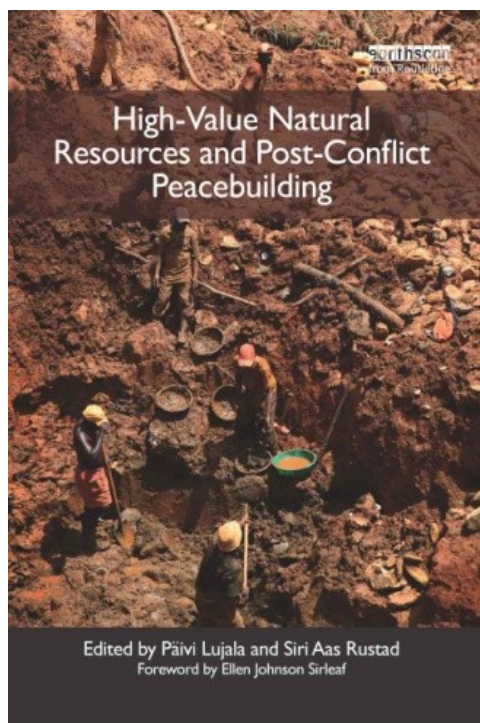


This chapter first appeared in *High-Value Natural Resources and Peacebuilding*, edited by P. Lujala and S.A. Rustad. It is one of 6 edited books on Post-Conflict Peacebuilding and Natural Resource Management (for more information, see [www.environmentalpeacebuilding.org](http://www.environmentalpeacebuilding.org)). The full book can be ordered from Routledge at <http://www.routledge.com/books/details/9781849712309/>.

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**Excluding illegal timber and improving forest governance: The European Union's Forest Law Enforcement, Governance and Trade initiative**  
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Online publication date: June 2012

Suggested citation: D. Brack. 2012. Excluding illegal timber and improving forest governance: The European Union's Forest Law Enforcement, Governance and Trade initiative. In *High-Value Natural Resources and Peacebuilding*, ed. P. Lujala and S. A. Rustad. London: Earthscan.

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# **Excluding illegal timber and improving forest governance: The European Union's Forest Law Enforcement, Governance and Trade initiative**

*Duncan Brack*

In many timber-producing countries in the developing world, illegal logging and the trade in illegally logged timber cause environmental damage, hinder sustainable development, cost governments billions of dollars in lost revenue, promote corruption, and undermine governance and the rule of law. Consumer countries contribute to these problems by importing timber and other forest products without ensuring that they are legally sourced.

Illegal logging and the trade in illegally logged timber first came to international attention in the late 1990s. The event that was largely responsible for triggering international discussion of the issue was the inclusion of illegal logging in the 1998–2002 G8 Action Programme on Forests—which, in recognition of the importance of forestry to development and the environment, was intended to accelerate implementation of the actions that had been proposed in 1997 by the United Nations Intergovernmental Panel on Forests. The Action Programme covered five areas: monitoring and assessment; national forest programs; protected areas; the private sector; and illegal logging. In most of these areas, the G8 countries simply lent support to national initiatives that were already under way; under the heading of illegal logging, however, the United Kingdom took the lead, initiating a wide range of studies, discussions, and meetings—including ministerial-level conferences on forest law enforcement and governance in (1) East Asia, (2) Africa, and (3) Europe and North Asia (G8 Action Programme on Forests 2002). These efforts are still bearing fruit today.

Since the early 2000s, producer and consumer countries alike have increased their efforts to curb illegal logging and the trade in illegal timber. In 2003, the European Union (EU) published the Forest Law Enforcement, Governance and Trade (FLEGT) action plan, the most ambitious set of measures

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adopted by any consumer country or bloc to date. The FLEGT action plan includes the following components:

- The negotiation of voluntary partnership agreements (VPAs) between the EU and timber-producing countries. Each VPA includes a licensing system designed to identify legal products and license them for import to the EU (unlicensed products are denied entry) and capacity-building assistance to help partner countries set up the licensing scheme, improve enforcement, and, where necessary, reform their laws.
- Consideration of additional legislative options to facilitate broader control of the import of illegal timber to the EU—specifically, controls on products that originate in countries that do not have VPAs and are therefore not covered by the licensing scheme.<sup>1</sup>
- Encouragement of voluntary industry initiatives and government procurement policies that would limit purchases to legal sources.
- Encouragement for financial institutions to more closely scrutinize investments in the forestry industry, to help ensure that they are not helping to fund illegal activities.

The VPAs are at the core of the FLEGT approach. Within the EU, the regulation limiting timber imports from VPA countries to licensed products was adopted in December 2005 (European Council 2005). The first countries to enter into VPAs were Ghana (September 2008) and the Republic of Congo (March 2009).<sup>2</sup> Implementation of the VPAs is anticipated to take at least two years, so the first FLEGT-licensed timber could be entering trade in 2011. As of this writing, negotiations were complete with Cameroon and were still under way with the Central African Republic, the Democratic Republic of the Congo, Indonesia, Liberia, Malaysia, and Vietnam; many other countries, particularly in Africa and Southeast Asia, have expressed an interest in entering negotiations.

The FLEGT action plan contained a short section on “conflict timber,” which it defined as “timber traded by armed groups, the proceeds of which are used to fund armed conflicts” (Commission of the European Communities 2003, 4). In some countries, most notably Cambodia, the Democratic Republic of the Congo, and Liberia, revenues from illegal logging have funded fighting. Regardless of whether timber that meets the definition of conflict timber is being extracted illegally,<sup>3</sup> efforts to control the trade in illegal products and the trade in conflict

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<sup>1</sup> This aspect of the action plan eventually led to the timber regulation explained later in the chapter.

<sup>2</sup> The only VPA text that is currently available publicly is that of Ghana; see [www.illegal-logging.info/item\\_single.php?it\\_id=843&it=document](http://www.illegal-logging.info/item_single.php?it_id=843&it=document).

<sup>3</sup> In some circumstances, conflict timber may not be illegal; in Liberia, for example, President Charles Taylor legally asserted control over the country’s forests, then used revenues from the sale of timber to fund armed intervention in Sierra Leone.

products overlap; in fact, the VPA licensing system is modeled, to an extent, on the Kimberley Process Certification Scheme for conflict diamonds.<sup>4</sup>

The FLEGT action plan is not explicitly designed to support post-conflict peacebuilding, but in forest-rich countries recovering from war, it could make a contribution. This chapter describes the FLEGT initiative in more detail—with a particular focus on the VPAs—and considers to what extent it may contribute to peacebuilding in Liberia, where a VPA is currently being negotiated, and in broader contexts.

## **EXCLUDING ILLEGAL TIMBER**

Assuming that it works properly, the licensing system established under the VPAs will prevent partner countries from exporting illegally produced timber products to the EU. “Illegal” timber is defined by the laws of the country in which the timber is being harvested; there is no international agreement on forest management or the timber trade that sets a global framework. Even within a single country, however, determining legality is not always straightforward; in developing countries in particular, the laws governing forests may be unclear, or those at the national level may conflict with those at regional or local levels. And even where the laws are clear, there is the question of which are central to definition of legality. Those that relate to timber harvesting or to the payment of royalties or export duties, for example, are clearly important, but laws that regulate the working conditions of the truckers who transport the timber, for instance, may be more tangential. It is possible to define illegal logging so broadly that no country could avoid it. To avoid that, Cameroon and Indonesia have engaged in multi-stakeholder processes to develop working definitions; in Ghana and the Republic of Congo, the VPAs include commitments to reforms that will clarify relevant laws.

In each country, the VPA will define the scope of the applicable legislation, which is expected to include laws relating to the following (Falconer 2009):

- Access rights.
- Company registration requirements.
- Social obligations, including labor laws.
- Rights of local communities and indigenous populations.
- Environmental safeguards, forest management, timber harvesting, processing operations, and associated financial obligations.
- The transport and commercialization of timber.

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<sup>4</sup> For additional perspectives on the Kimberley Process, see J. Andrew Grant, “The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds”; Harrison Mitchell, “A More Formal Engagement: A Constructive Critique of Certification as a Means of Preventing Conflict and Building Peace”; and Clive Wright, “The Kimberley Process Certification Scheme: A Model Negotiation?” in this volume.

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For each element, the VPA will list the criteria, indicators, and means of verification (such as the documents that timber companies will need in order to prove compliance) that will form the basis for enforcement (Falconer 2009). The designated licensing authority in the partner country will issue FLEGT licenses on the basis of proof of legality, which will be provided by the timber operator.<sup>5</sup>

To ensure the system's integrity, the VPAs will include provisions for independent third-party monitoring, which will specify the responsibilities of the monitoring organizations and the extent to which their findings will be made public. Any major compliance problems will be discussed by a joint oversight committee made up of representatives from both the partner country and the EU. The ultimate sanction is suspension of the agreement, which either party can do.

The VPAs will also include provisions that allow the timber to be tracked through the supply chain. The partner country's timber-tracking system obviously cannot extend outside its borders to cover timber produced elsewhere, which may be imported into the partner country and then exported to the EU. However, under the VPA, the FLEGT license will indicate the country in which the product was harvested, and partner countries will be prohibited from issuing licenses to products that include timber that has been illegally produced in any other country. The Cameroon VPA restricts imports to products that already have a FLEGT or "other authorized" license; and in both Cameroon and the Republic of Congo, mills will be required to use only legal timber, whether domestic or imported. How readily such provisions will be implemented in practice remains to be seen.

The licensing system will apply only to timber products traded between the VPA partner countries and the EU; partner countries are not required to attach FLEGT licenses to products exported to other countries (for example, timber produced in Ghana, processed in China, and ultimately exported to the EU would not need to show a licence at the EU border). But since all the partner countries that have so far entered into VPAs intend to license all their timber exports, regardless of destination, the system may begin to extend beyond the direct trade between the partner countries and the EU.

The potential result—a multilateral timber-licensing system—could help to address an obvious problem with the FLEGT licensing scheme. Since the system is built on agreements with individual countries, it is vulnerable to evasion: illegal products could simply be shipped through nonpartner countries to the EU, thereby avoiding the need for a license. The FLEGT action plan recognized this problem but did not specify precisely how it should be addressed. In 2010, a new timber regulation was agreed on that is designed to counter the risk of

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<sup>5</sup> In many ways, this approach resembles the voluntary forest-certification schemes of the Forest Stewardship Council and the Programme for the Endorsement of Forest Certification, but with the important difference that it applies nationwide. For more details on forest certification, see [www.illegal-logging.info/certification](http://www.illegal-logging.info/certification).

evasion; the regulation is scheduled to enter into force in March 2013 (European Parliament and Council of the European Union 2010).

Under the regulation—which will apply to all timber imports, including those from non-VPA countries, as well as to timber harvested in the EU—timber producers and importers who place timber products on the EU market must possess due diligence systems designed to minimize their chances of handling illegal timber; moreover, the handling of illegal products will be classified as an offense. VPA-licensed timber will automatically qualify without any further checks, thus providing an additional incentive for countries to enter into VPAs. The system has been criticized for applying to imports only at the first point of entry to the EU and not further down the supply chain (there is doubt that some EU member states will be able to effectively control imports); however, this problem may be mitigated by the requirement that traders along the supply chain within the EU keep records showing who their timber or timber product was bought from and to whom it was sold.<sup>6</sup>

## **IMPROVING GOVERNANCE**

Illegal logging can be seen, at its base, as a failure of governance, law enforcement, or both. The legal and regulatory regime that should control timber exploitation may be inadequately designed, poorly enforced, undermined by corruption—or all three. Although the licensing system established by the VPAs is designed mainly to exclude illegal timber from the EU market, the FLEGT initiative may have long-lasting effects on governance in the partner countries.<sup>7</sup>

The VPAs for both Ghana and the Republic of Congo include the following:

- A definition of legal timber, an analysis of existing legislation and its shortcomings, and commitment to reforms where necessary.
- A provision for independent monitoring of the licensing system, with outcomes available to the public.
- A commitment to national stakeholder involvement in the committees established to oversee the process.
- Improvements in transparency, including annual reporting on the functioning of the licensing system and agreement to make more information available on forest sector management (e.g., information on production, rights allocation, finances, and audits).

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<sup>6</sup> The regulation is similar in principle to, though somewhat different in operation from, the Lacey Act, a U.S. law that makes it illegal to import or handle timber products that have been produced illegally in other countries; for more information, see [www.illegal-logging.info/approach.php?a\\_id=202](http://www.illegal-logging.info/approach.php?a_id=202).

<sup>7</sup> For more details, see Falconer (2009).

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The negotiation process itself has also helped to improve transparency, primarily because partner-country civil society groups have been included.

Many governance problems are caused by lack of capacity, and it was always recognized that the VPAs would need to be accompanied by capacity building to support the establishment of the licensing system and improve governance and enforcement. Although the partner countries will meet the costs of operating the licensing systems (which should be somewhat offset by a reduction in illegal behavior and an increase in revenues from taxes and royalties), in most cases the EU will need to help establish the systems. Although such support is not a formal part of the VPAs, where necessary it is being agreed to in the course of the VPA negotiations.

### THE FLEGT INITIATIVE IN A POST-CONFLICT SETTING: LIBERIA

As noted earlier, illegal logging has funded conflict in Liberia and the Democratic Republic of the Congo, among other places. To date, Liberia is the only post-conflict country engaged in the VPA process, though the Democratic Republic of the Congo has expressed interest in the process.

In 2003, in an effort to eliminate the trade in conflict timber that had helped fund both the Liberian civil war and Charles Taylor's destabilizing forays into neighboring Sierra Leone, the UN imposed sanctions on Liberian timber exports. The sanctions were provisionally lifted in June 2006, in the wake of the peaceful presidential elections of November 2005; the lifting was confirmed in October 2006, after the enactment of the National Forestry Reform Law.<sup>8</sup> Entering into a VPA was viewed as means of reinforcing the forestry reform process, and negotiations opened in March 2009.<sup>9</sup> As forestry minister Chris Toe observed at the start of the negotiations,

the launching of the VPA is a notable mark in Liberia's history. Forests cover almost half of the land area of Liberia and are a significant factor in the wealth, and thus political power, of the country. It is well known that Liberia's wealth of timber resources contributed to and supported the protracted and devastating civil conflict, not in small part due to power given by international market forces and economic agendas. The VPA process represents an opportunity for Liberia to further combat illegal logging and strengthen its reform process by reinforcing the notable systems already in place (illegal-logging.info 2009).

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<sup>8</sup> For additional information on the reform, see Stephanie L. Altman, Sandra S. Nichols, and John T. Woods, "Leveraging High-Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forest Initiative in Liberia's Transition to Stability," and Michael D. Beevers, "Forest Resources and Peacebuilding: Preliminary Lessons from Liberia and Sierra Leone," in this volume.

<sup>9</sup> For more information on Liberia and the FLEGT initiative, see [www.illegal-logging.info/approach.php?a\\_id=309](http://www.illegal-logging.info/approach.php?a_id=309).



Unfortunately, the reform process has not proceeded as smoothly as was hoped. In December 2008, for instance, the UN panel of experts on Liberia reported that “the actions of the Forestry Development Authority do not appear to be in compliance with some important requirements of the National Forestry Reform Law and its regulations regarding the process of awarding contracts for commercial timber concessions” (UNSC 2008b, 3). Nongovernmental organizations have raised concerns about violations of the law by bidding companies, and about the failure of government-appointed due diligence teams to undertake full background checks of the bidders.<sup>10</sup> Finally, the community forest law passed in October 2009 explicitly rules out awarding small- and medium-scale contracts (up to 50,000 hectares) on a competitive basis—hardly an encouragement to transparency (GOL 2009).

<sup>10</sup> See, for example, Global Witness (2009).



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Given the record of other VPA negotiations, it seems unlikely that the EU would agree to a VPA that did not convincingly deal with the weaknesses in the reform process and in Liberia's forestry laws. As the UN panel of experts commented in June 2009, "the Panel notes that Liberia has entered into formal negotiations with the European Union. The Panel will monitor this development as it could have very positive implications for the functioning of Liberia's internal controls on the timber sector" (Panel of Experts on Liberia 2008a, 23).

One advantage of the VPA process is the potential to provide a forum in which such problems can be raised and addressed by a variety of stakeholders, including Liberian civil society. There are also indications that the Liberian government plans to use the VPA as a broader opportunity to discuss the forestry reform efforts of the past five years—including the extent to which the reforms realistically reflect the country's institutional capacity. The working group that is developing the definition of legality has expressed interest in carrying out a wholesale review of the forestry reform law and its associated regulations, including the legislation's effects on the contract allocation process to date.

Another possibility is that Liberia will abandon the VPA process altogether, or that negotiations will proceed without conclusion. The country faces substantial problems in reforming its forestry sector, including a serious lack of capacity in both government and civil society. Although the VPA would certainly be beneficial, and possibly essential, in helping Liberia establish a reputation as a reliable supplier of legal timber, export markets other than the EU—China, for example—may care less about such matters. The reconstruction of the timber industry is a key element in the country's economic recovery, and the lure of easy exports may be difficult to resist.

On the other hand, the VPA negotiations have already been accompanied by capacity-building assistance from the EU to establish a timber-tracking system, and the promise of further support should be attractive. The EU market is likely to be more reliable and of higher value than other export destinations (public procurement policies in some EU member states, for example, have already led to price premiums for certified tropical timber products). While the VPA certainly has the potential to reinforce the post-conflict reform process, it will not be enough by itself. Political will and commitment on the part of the Liberian government, the EU, and international donors will be more important.

### **CONCLUSION: VPAS AND PEACEBUILDING**

Liberia's VPA negotiations will offer useful lessons in the extent to which the FLEGT initiative can contribute to peacebuilding. The FLEGT initiative was never, of course, designed to do so, and the issue has never been discussed systematically, within the EU or elsewhere. Furthermore, the number of countries that export possibly illegal timber to the EU (and that are therefore potential VPA partners) substantially exceeds the number of timber-rich countries that are

emerging from conflict. It would therefore be a mistake to view the VPAs as a principal means of contributing to post-conflict recovery.<sup>11</sup>

Nevertheless, VPAs have the potential to help. A VPA provides a framework that should reinforce any forestry reform process that is already under way, and can also help to create forums in which representatives from government, industry, and civil society can discuss forest reform and related matters; such forums are commonly viewed as valuable in peacebuilding efforts related to extractive sectors. Once the timber regulation comes into force in the EU, a VPA may offer the easiest means of demonstrating the legality of timber exports, which will be needed for access to the EU market. (Similar, though arguably more effective, legislation is already in place in the United States, in the shape of the Lacey Act, so any timber exports to the United States will also come under increasing scrutiny.)<sup>12</sup>

What remains unclear is whether a country emerging from conflict will have the capacity to negotiate or implement a VPA. Given the political will, the negotiation process can be quite fast—less than a year for the Republic of Congo, for example. But implementation poses significant challenges (particularly in the establishment of a nationwide timber-tracking system), even in countries where the standards of governance are high; post-conflict countries, where both governance and capacity are likely to be weak, will face even bigger problems, and the EU may be called on to expend much greater resources for capacity building in post-conflict nations than in other countries. The progress of the Liberia VPA will suggest to what degree the benefits of the system can be extended to other forest-rich post-conflict countries.

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<sup>11</sup> This is particularly the case for countries with a limited or nonexistent history of exporting timber to the EU, where the current model of the VPA, which is built primarily on regulating trade, is largely irrelevant.

<sup>12</sup> Lacey Act of 1900. 16 U.S.C. ch. 53, secs. 3371–3378.

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