



## Private Sector Forest Legality Initiatives as a Complement to Public Action

By:

Richard Z. Donovan<sup>1</sup>

March 2010<sup>2</sup>

### Background

Over the past 20 years a number of public and private sector forest products and forest-related legality verification and certification initiatives have been developed. Real progress has been made. However, governments, civil society, NGOs, and in particular businesses, face real challenges. These include the proliferation of legality standards, checklists, frameworks and auditing processes around the world, and the absence of coordination or clear relationships between the various public and private sector initiatives. Overall, how can these various initiatives be more efficiently related so that the end goal – a global market where illegal and unsustainable forest products is inconsequential – can be reached, and more specifically what role should the private sector play? This paper presents a discussion of some of the related public and private sector initiatives, and in particular examines issues facing private sector legality auditing, verification or certification initiatives, exploring options for private initiatives to better complement, or to improve, public sector initiatives from around the world.

One question not addressed deeply in the discussion below is how, over time, legality initiatives in public and private sectors will evolve. Despite some eight or nine years of experience in both public and private sector legality initiatives, we are still in the early phase of legality systems development. Some have postulated that the various private sector initiatives will disappear as enhanced public sector programs are established. Others suggest that this will be a question of decades rather than years due to confidence in various governments and other factors. In the author's experience, it is way too early to know how this will evolve. It will depend of course in part of the rigor of the public sector programs, the level of global (country by country) adoption of such programs, how variable the implementation of such programs proves in terms of changes in governments, and finally how well they respond to the market pressures. Whatever happens, the author's experience in Canada, USA, China, Africa and elsewhere indicates that the exposure to third party auditing which forest operations gain through private sector initiatives may provide a useful platform or foundation upon which to base enhanced public sector efforts for legal enforcement. Though still subject to conjecture, this type of learning is evident through personal experience with third party sustainable forest certification and parallel or subsequent government-led sustainability initiatives, and more recently private sector forest carbon verification or certification of voluntary REDD (Reduced Emissions through Deforestation and [Forest] Degradation) projects being implemented around the globe, through the Voluntary

---

<sup>1</sup> Mr. Donovan is Rainforest Alliance Senior Vice President & Vice President of Forestry, based in Richmond, Vermont, USA. His email is [rdonovan@ra.org](mailto:rdonovan@ra.org). The author would like to thank Alison Hoare, Christian Sloth, Duncan Brack, Peter Feilberg, John Bazill, Morne van der Linde and Sarah Price for their inputs and background for this paper. Errors and omissions are the sole responsibility of the author.

<sup>2</sup> An initial draft of this paper was distributed in preparation for a meeting of approximately 35 specialists on global legality verification systems, held in London, England on January 19, 2010, and co-convened by Chatham House, Rainforest Alliance, Environmental Investigation Agency (EIA) and World Resources Institute (WRI). For information on follow up to the above meeting, please contact the author.

Carbon Standard (VCS) or Climate, Conservation and Biodiversity (CCB) systems, where the learning from private sector systems may serve as a foundation for learning, or even be an acknowledged element of or formally linked to national public regulatory systems.

### **Public Sector Forest Products Legality Initiatives**

Public sector initiatives include country-specific initiatives, legal requirements in relation to various trade or “free trade” agreements around the world, and various bilateral and multilateral initiatives sponsored by national governments, foreign aid agencies, and multilateral institutions.

- Forest Law Enforcement Governance and Trade (FLEGT) Action Plan is a European Union initiative, started around 2001. Today FLEGT is active in 11 countries<sup>3</sup>, with a strong emphasis on Africa, but interest in FLEGT is growing and incipient efforts are now underway in Asia and there is also interest in South America. FLEGT is being implemented in part through Voluntary Partnership Agreements (VPAs), these being established between the EU and timber producing countries. VPA partner countries are those that have strong trade links with the EU. As part of each VPA, a national definition of legally produced timber and a system for verification (Timber Legality Assurance Scheme or TLAS) are established. Only timber that is verified as legal under this system will be allowed into the European market. This may be guided by an EU-level Due Diligence Requirement (DDR) that is currently under consideration. In theory the DDR would require due diligence similar to the Lacey Act, but without Lacey’s civil, criminal and confiscation enforcement penalties.<sup>4</sup>
- Independent Forest Monitoring (IFM) has been ongoing in a number of countries for approximately 10 years, with independent monitoring organizations contracted to implement monitoring, based largely on field audit comparisons of performance to national or sub-national legal requirements (i.e. laws and administrative requirements). IFM initiatives have been supported by foreign aid agencies and national governments in target regions, including Cambodia, Cameroon, Honduras, Nicaragua and Republic of Congo. IFM efforts have included inputs from civil society and public disclosure of audit results.<sup>5</sup>
- Lacey Act was amended by the U.S. Congress in 2008, adding to the longstanding Lacey Act (originally passed in 1901 and prohibited trade in illegal wildlife articles and species) a focus on compliance with national and sub-national laws related to forestry and forest products in the country of origin. The amendment established civil, criminal and forfeiture penalties governing illegal trade of forest products in USA markets. The passing of this amendment has been referred to as a watershed or “game-changing” event, in particular because it establishes very clear penalties for engaging in illegal forest products trade (timber and non-timber) and the fact that the US government, NGO

---

<sup>3</sup> For updates on FLEGT initiatives, go to [www.loggingoff.info](http://www.loggingoff.info) website. Another website – Chatham House’s [www.illegallogging.info](http://www.illegallogging.info) – contains updates and Chatham House forum presentations (held twice a year) often provide updates that describe FLEGT progress around the globe.

<sup>4</sup> Duncan Brack, “Controlling Illegal Logging: Consumer-Country Measures”, Chatham House Briefing Paper, EERG IL BP 2010/01, January 2010.

<sup>5</sup> Legality initiatives (and potentially IFM) have gained added impetus as part of the discussion on Reduced Emissions from Deforestation and Degradation (REDD), with the proposal by some parties (e.g. NGOs, including Global Witness) that REDD investments be subject to legality monitoring through IFM or other mechanisms. Given that REDD would include support for non-harvested forest services, this implies a broader scope for legality than wood or other harvested non-timber forest products (e.g. brazil nuts, resins, florals such as xate - a palm - in Central America).

and business interests have all united to achieve the same objective – eliminating trade in illegal products. A major challenge presented by the Lacey Act is that no single piece of paper alone – not a certificate, not independent verification – is sufficient to unequivocally meet or document compliance with Lacey requirements. Even if a company has virtually all of its product lines certified under a certification system like the Forest Stewardship Council (FSC), or of its wood supply approved, in theory, by a FLEGT-supported national level legality licensing system, if there is evidence that any part of its wood supply is illegal, that could be sufficient cause for enforcement actions to take place. The extent to which forest certifications or verifications might demonstrate due care taken by buyers and so would reduce risk of litigation is a subject of debate.

- Bilateral or Multilateral Trade-Related Agreements have occurred in some countries, e.g. USA-Peru Free Trade Agreement, North American Free Trade Agreement (NAFTA), USA-China Memorandum of Agreement, Australian government agreements with Singapore and other Asian governments, etc. Often these contain, or are wholly focused, on special legal requirements related to forest products trade and legality. In theory such agreements may also incorporate resources to enable enforcement of the special requirements, but this is a subject a debate between civil society and governments around the world.<sup>6</sup>
- Public Procurement Policies – A growing trend around the world is the development of procurement or purchasing policies established by governments at many levels (e.g. national, provincial/state, municipal) that require legality or sustainability due diligence. This may include incentives or requirements to purchase independently verified legal or sustainably certified products.
- Log Production Monitoring by private sector, independent auditors has occurred in Brazil, Cameroon, Democratic Republic of Congo (DRC), Ecuador, Ghana, Guyana, Papua New Guinea and Peninsular Malaysia<sup>7</sup>. One of the most visible examples in the forestry sector is the independent log export monitoring in Papua New Guinea, which has been done since 1994, with SGS as the auditor. In this case the independent auditor has been contracted by the government to monitor log production, including but not restricted to export-oriented production, by log volume and species, in order to ensure that accurate reporting occurs and is the basis for tax levies on producers/exporters.

### **Private Sector Forest Legality Initiatives**

Over the past year, the author has been tracking private sector driven initiatives to audit, monitor, verify or certify legal forest products (timber and non-timber).

Various organizations (e.g. Bureau Veritas, Rainforest Alliance, SGS, SCS, etc.) have taken a leadership role, sometimes as independent auditors providing direct fee-for-service to forest products manufacturers, traders or forest managers, and sometimes as independent auditors contracted by governments or foreign aid organizations to assist in implementing government legality registration or monitoring systems. According to some auditors, some of these systems (e.g. the SGS TLTV system, see below) have been explicitly designed with the desire to effectively address Lacey or EU-related requirements, or public procurement requirements.

---

<sup>6</sup> See Duncan Brack, 2010, previously cited, for more examples.

<sup>7</sup> Asumadu, Kwama, Illegal Logging in Papua New Guinea: The Other Side of the Story, Papua New Guinea Forestry Industries Association, January 2007

Others are more cautious; indicating that private sector due diligence and auditing can be one tool, but not the exclusive one, for addressing legality challenges.

There are numerous auditing or certification organizations, and non-profits such as The Forest Trust, TRAFFIC and WWF, which have developed their own individually tailored forest legality auditing standards and programs (see below under Standards). In all cases they start by developing a generic or global legality standard, then in some cases a national or sub-national legality standard is put in place (to tune the generic standard to local conditions), and finally an audit system or auditing requirements for that standard is established. Some standards cover all aspects of legality, something that could be considered full legal compliance. Auditing thereof could be called “Verification of Legal Compliance” or VLC. Others focus strictly or only on laws more directly related to forest products or forestry and typically very strongly focus on legal rights to harvest, i.e. tenure, compliance with forest laws where products are harvested, etc. Auditing thereof could be referred to as “Verification of Legal Origin” or VLO. For example, Rainforest Alliance describes VLC as covering all of the following 9 Principles, and VLO as the first 4 plus Principle 9 on Chain of Custody:

- Principle 1 – Legal Right to Harvest
- Principle 2 – Approved Planning Authorizations and Operations
- Principle 3 – Payment of Relevant Fees and Taxes
- Principle 4 – Legal Registration, Transport and Trade
- Principle 5 – Fulfillment of Harvesting Regulations
- Principle 6 – Fulfillment of Environmental Regulations
- Principle 7 – Fulfillment of Social Regulations
- Principle 8 – Control of Unauthorized Activities
- Principle 9 – Chain of Custody

### **Critical Issues**

The author suggests that the evaluation of four main elements provides a relatively simple, but robust, construct for evaluating auditing, verification or certification programs or systems:

1. Governance – how the program or system is governed;
2. Standards – what the standards actually cover in terms of technical content, the process of standards development and continuous management (updating, improvements, etc.);
3. Certification or verification – the process of auditing to the standard by auditors, in this case the relative value of the actual auditing for addressing legality challenges; and,
4. Accreditation – the process of auditing the auditors which is typically a combination of field work, review of documents and procedures, and inputs from stakeholders.

Following are observations on issues in terms of each of these elements, drawing on examples and experience from the forest sector.

**Governance** - There are multiple governance models that may provide value for systems auditing or certifying legality. The following provides a list of the key organizational structures that have governance systems for certification and/or verification of legality.

- FLEGT does not have a rigid approach to governance, though it has key elements that must be addressed, particularly the TLAS system mentioned above. It is important to recognize that the actual implementation of FLEGT on the ground is relatively new – systems in over 10 countries are under development right now and there is not a long

track record to look at (FLEG formally started in 2003). Based on ongoing experience, the fundamentals will include: a national standard for legality, a national legal registry for commercially traded products including tracing to a specific forest area, and a system for enhanced enforcement of legal requirements, building on the requirements in the legality standard and traceability. There will also be a system for monitoring – this will mean at least an audit of the TLAS system, and potentially the whole legality approach within a country. In general it is expected that the FLEGT system will be managed by government, but with the active involvement – engagement, not just consultation - of civil society. A question going forward is how FLEGT’s governance within countries will be handled, by which agencies, how stakeholders are engaged, how transparent is the system, and how rigorous. What guarantees are there that FLEGT will result in more robust enforcement than the past? Will stakeholder participation and the pull of international markets – particularly the EU – be sufficient to overcome deeply entrenched corruption and illegal practices in some countries?

- Forest Stewardship Council (FSC) is a global certification system governed by its membership (see [www.fsc.org](http://www.fsc.org) for more information). The membership elects all board members and approves changes to the FSC Principles and Criteria for Forest Stewardship. Member voting is weighted equally between three member chambers – economic, social and environmental – and further weighting happens to ensure north-south balance (according to United Nations country definitions of north and south) and organizations have a higher weighted value in voting than individuals. In the FSC system, governments cannot be formal members, though they can be observers and participate in technical working groups. Within the FSC system, the international FSC Board and FSC staff make some decisions as delegated in approved statutes by FSC members. For example, the FSC Certification Body (CB<sup>8</sup>) auditing and accreditation process is done by Accreditation Services International (ASI), an FSC subsidiary. Major policies are signed off on by the Board and FSC’s Executive Director, typically after ground work done by Working Groups (typically made up of FSC members and sometimes outside advisors) or FSC staff. The overall system is intended to balance various stakeholder groups and interests. The exception is government – they cannot be formal members, though they often are observers both at the global and national levels (often participating in national standards development processes). Challenges for the FSC are the heavy demands placed on stakeholders to participate in its governance (policy review, assistance in giving input on forest and other certifications, etc.) and the challenging dynamic that FSC faces with its wide base of stakeholders – governments, NGOs, indigenous groups and the commercial forestry and forest products sector; stakeholders that often want more influence over the system than they believe they have, and finally the perception that FSC requirements are too stringent or complicated or unclear for different segments, e.g. small landowners, small and medium sized enterprises (SMEs), etc.
- Programme for Endorsement of Forest Certification (PEFC)<sup>9</sup> –PEFC provides a global framework for endorsing national or sub-national certification programs. Programs apply for endorsement based on PEFC Council-approved requirements, and acceptance (i.e.

---

<sup>8</sup> Auditors have different names in different certification and auditing systems. Recently FSC has moved away from the term CB towards Conformance Assessment Bodies (CABs). In the ISO system, auditors are typically called “Registrars”.

<sup>9</sup> Based on personal communications with Peter Feilberg of NEPCon, an organization conducting PEFC audits, and Sarah Price of PEFC

mutual recognition) of a national or sub-national program into PEFC is obtained from the PEFC Council (see [www.pefc.org](http://www.pefc.org) for more information). So the PEFC Council is a key part of their governance. In contrast to FSC, where accreditation of auditors is done at the global level by ASI, auditors in the PEFC system are typically reviewed and approved by national accreditation agencies. The advantage of this system is that there is country-specific review and quality control of auditors. Challenges include, among others, questions of consistency in terms of rigor and quality control across the globe, how PEFC does or does not key issues such as forest conversion, indigenous peoples' rights, etc. It is also evident that significant members of the NGO sector (e.g. WWF, Greenpeace, FERN, etc.) do not feel that the PEFC system has balanced governance and/or is appropriately responsive to their concerns.

- IFM efforts have been established in various countries and supported by governments, typically with bilateral or multilateral foreign aid. IFM has been governed by the government agency in the target country that appoints the auditors, based on written agreements for operational procedures with financial supporters and typically subject to the involvement of civil society (including individuals, businesses, NGOs, communities, indigenous groups, etc.). Governance depends on the nature of the agreements between the target country's government, foreign aid supporters (typically governments) of IFM, and to some extent interaction with the appointed IFM monitoring organization. Global Witness and Resource Extraction Monitoring (REM) are two groups very actively engaged in IFM, though recently some IFM contracting has gone to other organizations.
- Central Point of Expertise on Timber Procurement (CPET) is a government mechanism in the UK. CPET has been set up to serve as an information source and type of quality control mechanisms for the various wood certification and auditing programs as relates to public procurement in the UK, covering both sustainability and legality. CPET is managed by ProForest under a contract of the Department for Environment, Food and Rural Affairs (DEFRA) of the UK government.
- Keurhout is an example of a private entity that plays a quality control role in terms of the timber trade going into the Netherlands, typically to members of the Dutch Timber Trade Federation. Keurhout has its own legality standards or requirements, a staff and Board of Experts that reviews and approves submissions by producers wishing to sell product to Federation members in the Netherlands. As part of its normal day to day function, it routinely reviews the work of legality verification auditors, and Keurhout leaders have indicated that it may be one option for operating at a global level (i.e. not just for the Netherlands) as a legality accreditation system.

On a far more dispersed level there are the governance systems established by each private sector auditing program (auditors like BV, Rainforest Alliance, SGS or SCS and NGOs such as TFT or WWF). These are typically governed by the staff, Boards of Directors, or Advisory Boards at the entity providing the actual service.

Overall, there is no globally functioning governance system for legality auditors or verifiers, only formal interaction as auditors and auditing system managers through the different certification schemes, IFM, FLEGT and CPET. Keurhout, FSC and PEFC all have accreditation systems in place, with different scopes and different levels of treatment of legality. Informal collaboration and interaction often does occur between auditors, such as when one auditing firm is asked by a buyer to review the audit reports of another auditor as part of legal or sustainability due diligence processes, but this is unstructured and not formal.

A number of key issues surface as one considers governance.

1. There is considerable overlap in the various programs and systems. The panoply of programs and governance structures (and standards, as discussed below) is probably befuddling to users, such as companies seeking such services, NGOs, government and civil society in general. The overlap may also indicate duplication of effort and a waste of resources, and actually may detract from a focused effort to capitalize on these systems to address the amended Lacey Act or pending EU member legal requirements.
2. At least for IFM and FLEGT, governments play a leading role, as they should, but are they free of conflict of interest? The positive perspective of direct government involvement is that civil society sees legality enforcement as a normal government mandate. The challenging aspect is that governments may have conflicting interests (as can have private organizations of course). In many cases governments are forest owners or managers, and in numerous cases have “parastatal” companies that manage forests or produce forest products and are owned completely or partially by governments. Thus governments may own and manage actual commercial “forest operations”. This may introduce an incentive for adopting certain behavior in the way that they monitor legality. Governments also need tax revenues and thus there will be a natural tendency to be careful in how they interact with companies or other interests that generate tax revenues. There are also concerns that, under IFM, governments have in some cases negatively influenced the efficient or effective function of the monitoring mechanism, by suggesting heavy edits to independent monitoring reports, delaying the release of such reports, and/or requesting that significant parts of such reports remain confidential. It should also be noted that, though for example IFM has been around for 10 years<sup>10</sup>, and global forest certification for 20 years (the first actual multi-country forest and chain of custody certifications were done by Rainforest Alliance in 1990 and early 1991), learning and changes in both IFM and certification are constant. With FLEGT there is even less of a track record to build on, with no completely functioning FLEGT systems in place yet. Thus, all of these initiatives are clearly “works in progress” and realistic expectations are needed.
3. For FLEGT or similar government-driven efforts, the questions will be, for each national or sub-national unit implementing or supporting such monitoring, how rigorously will actual monitoring be implemented on the ground, and how robust will systems be in making improvements to respond to weaknesses as experience is gained. Issues mentioned as being of concern include rigor, transparency, and consistency, sufficiency of funding or resources, and adequacy/competence of local auditors – all of which may depend, in part, on the structure of how the systems are being governed.

Based on the above experience in both private and public sectors, is a global framework or system for legality verification necessary? What should its governance look like? Should it build on formal existing governance structure in place at FSC, PEFC, CPET, Keurhout or the ISO system? Or, are there other alternatives, e.g. an informal coalition or federation? Would a common code of good practice be sufficient, rather than establishing a governance structure? And what should the formal linkages between such a framework or system be to government initiatives, or for that matter the involvement of governments in it?

---

<sup>10</sup> Global Witness, “Independent Forest Monitoring and Reducing Emissions from Deforestation and Degradation”, November 2008

## Standards<sup>11</sup>

Over the past 10 years, in addition to the inclusion of legal issues in forest certification standards and work done under IFM or more recently FLEGT, a number of organizations have worked on standards. Following is a summary of the organizations who have taken the lead on developing standards.

1. **ASEAN** – The ASEAN Senior Officials on Forestry adopted on 27 June 2009, in their 12 Meeting held in Myanmar, the ASEAN Criteria and Indicators for Legality of Timber as a regional reference framework for legality of timber in ASEAN Member States. The meeting also adopted the ASEAN Guideline on Phased-approaches to Forest Certification, of which the Criteria and Indicators for Legality of Timber are part of. On 10 November 2009, the ASEAN Ministers on Agriculture and Forestry endorsed both documents. <http://www.illegal-logging.info/uploads/Hinrichs2009BriefingNote.pdf>.
2. **BV** – The Bureau Veritas Origin & Legality of Timber Standard can be obtained by contacting BV forestry certification staff in France.
3. **CertiSource** – Has an overall policy on legality verification and an approach that uses WWF legality guidance as a starting point, or for that matter any other “credible” standards that have been developed on a country-specific basis. See [www.certisource.co.uk](http://www.certisource.co.uk).
4. **FLEGT** – Through the European Commission and EU member states, the Forest Law Enforcement, Governance and Trade initiative has been supporting enhancement of legality efforts in a number of countries around the world, particularly in tropical forest, developing countries. FLEGT-supported legality standards are to cover all legal requirements, and though most FLEGT standards are still a work in progress, it appears that their scope would be similar to Verified Legal Compliance (VLC). FLEGT standards available at [www.loggingoff.info](http://www.loggingoff.info). One difference is that FLEGT is applicable at the national level for all forest operations, whereas private schemes tend to be operation-specific, i.e. particular concessions or operators. In the table below a number of countries are listed – some have full FLEGT processes ongoing; others are where there is interest or some discussion but it is not crystal clear a FLEGT initiative will move ahead formally. Clarifications can be gained by consulting the [www.loggingoff.info](http://www.loggingoff.info) website and/or contacting European Commission staff.
5. **FSC** – Covered aspects of legality when the FSC initially developed its Principles and Criteria for Forest Stewardship (aka P&C) in the period from 1990-1993. In 2009 the FSC began a formal and broad revision process of the P&C. As part of this process, which is still ongoing, it has been formally proposed that Principle 1 become “the legality principle” – a proposal well received by FSC members<sup>12</sup>. Legality is not explicitly covered in FSC normal chain of custody rules, except that some FSC-accredited auditing firm incorporate legality clauses into their normal certification contracts with clients. FSC does include illegality as one area of concern under its Controlled Wood certification standards, which applied to “FSC mixed source” products (those that combine certified and non-certified raw materials – all non-certified inputs must be “controlled”). Non-certified wood from sources that have a high risk of being illegal are subject to field verification. There are specific FSC requirements for this auditing. FSC requires that Controlled Wood be traceable back to the forest of origin in a way that is auditable by FSC-approved auditors. As discussed, the most recent draft of the revised, proposed P&C included a full principle focused on legality.

---

<sup>11</sup> “Standards” will be used interchangeably in this discussion with words such as checklists, frameworks, principles/criteria/indicators, etc.

<sup>12</sup> Personal conversation with Andre de Freitas, December 2009

Another round of consultation is expected to begin very soon on draft 2 of the revision. FSC expects to complete revised P&C during calendar year 2010.<sup>13</sup>

6. **Keurhout** – The Keurhout Management Authority Standard (a generic or global standard) for Legal Origin Timber can be found at: [www.keurhout.nl](http://www.keurhout.nl).
7. **LEI** – Lembaga Ekolabelling Indonesia has developed a legality standard for Indonesia.
8. **PEFC** - Legality aspects are covered by national endorsed PEFC standards for forest management, and documents such as “Basis for Certification Schemes and their Implementation” (latest version November 2009), which are current under revision with a new draft for stakeholder input planned for April or May 2010. In the latter document, PEFC states: “National laws, regulations, programs and policies shall be respected in forest management and certification. Certification schemes may not contradict legislation and any apparent violations of the legislation shall be taken into consideration in internal and external audits”. PEFC also has rules for avoidance of wood from illegal sources to be mixed into PEFC certified products. These are specified in PEFC technical documents. Accordingly, suppliers of certified companies are required to make a self declaration that the supply is not coming from illegal sources as well as the origin of the supply. Certified companies are required to make a risk evaluation of their supply chain as well as the risk of the geographical area where the supply is originating from. If there is high risk for both, an onsite inspection is required. The PEFC standard does not include any specification of the scope of this onsite inspection and requirements for field verification actions are not specifically addressed in the PEFC documents.
9. **RA** – Rainforest Alliance developed a global Generic Standard for Verified Legal Origin (VLO) and for Verified Legal Compliance (VLC) and has developed country specific standards in a number of locations. RA followed ISEAL-approved stakeholder consultation procedures. For actual verification work, a country standard must be developed; in other words the Generic Standard only exists as a global starting point for consistency and building national standards. All RA verification work to date has focused on VLO. Standards can be found at [www.rainforest-alliance.org](http://www.rainforest-alliance.org).
10. **SCS** – Scientific Certification Systems’s Legal Harvest Verification (LHV) Program can be found at [www.scscertified.com](http://www.scscertified.com).
11. **SGS** – Societe General Du Surveillance has developed both a generic standard and a series of country specific standards as outlined below. Standards can be found at [www.sgs.com/forestry-monitoring](http://www.sgs.com/forestry-monitoring).
12. **TFF** – The Tropical Forest Foundation has developed two generic standards – one that is focused on Reduced Impact Logging (RIL) and another that also covers legality – Legal Verified with Chain of Custody. TFF is applying these standards, with 3<sup>rd</sup> party auditors, in Southeast Asia, Africa and parts of South America (e.g. Brazil). TFF Legal Verified Standard is available at [www.tropicalforestfoundation.org](http://www.tropicalforestfoundation.org).
13. **TTAP** – The Timber Trade Action Plan (TTAP), coordinated by The Forest Trust (TFT) has been developing legality checklists for a number of countries. TTAP related staff or advisors emphasize that their checklists are not standards per se; but checklists to be used for internal legality conformance checks. Nonetheless, the checklists provide a useful data point for development of legality standards in some countries. For the checklists go to [www.timbertradeactionplan.info](http://www.timbertradeactionplan.info).
14. **TUV Rheinland** – TUV is implementing Verification of Legal Origin in Indonesia, and also includes coverage of Reduced Impact Logging in combination with this, using the TFF

---

<sup>13</sup> Personal conversation between Andre de Freitas, FSC Executive Director, and Richard Donovan, December 2009

standards referred to above. It is not clear from a review of its website information if Tuv has its own legality standard.

15. **TRAFFIC** – A TRAFFIC global framework for legality verification was developed with EU funding and in collaboration with WWF, working on legality checklists and standards through its Global Forest and Trade Network, national FTNs and collaboration with TRAFFIC. They also developed a series of country standards (as per below). The draft standards are VLC-oriented. Standards can be found at [www.traffic.org](http://www.traffic.org).
16. **Woodmark** – The Soil Association’s Woodmark Programme indicates on its website that it is implementing legality-related auditing. For further information contact [www.soilassociation.org/forestry](http://www.soilassociation.org/forestry).
17. **WWF** – In addition to collaboration with TRAFFIC on the above mentioned efforts, WWF Denmark and WWF Russia have developed a legality verification checklist with support from NepCon for Russia. It can be found at <http://www.wwf.dk/dk/Service/Bibliotek/Skov/Rapporter+mv./verifying+the+legal+origin+of+russian+timber.pdf>.

The following table describes where there are generic (i.e. global), national or sub-national legality standards (final or in process of development), based on information that could be found on websites or through communications with the various programs, as of January 1, 2010.

<b>Scope/Country (* = in process)</b>	BV	FLEGT	Keurhout	LEI	RA	SCS	SGS	TFF	TTAP	TRAFFIC
Generic	X		X		X	X	X	X		X
1. Brazil					X		X		X	
2. Cameroon		X					X		X	
3. Central African Republic		X								X
4. China					X				X	X
5. Congo - Brazzaville		X					X		X	X
6. Congo - DRC		X					X			X
7. Ecuador		X								
8. Gabon		X							X	X
9. Ghana		X								
10. Honduras					X					
11. Indonesia		X		X	X		X	X	X	
12. Laos					X					
13. Liberia		X								
14. Malaysia		X			X				X	
15. Malaysia - Sarawak							X			
16. Nicaragua					X					
17. Papua New Guinea							X			
18. Peru					X					
19. Philippines					X					
20. Tanzania							X			
21. Vietnam		X			X					X

Following are some observations and issues related to standards.

- Transparency & Stakeholder Input in Standards Development – This is an area that is extremely fluid at this time around the globe, with new developments and approaches developing all the time. Over the past couple of years, FSC, Rainforest Alliance and other organizations have become supportive of the standards stakeholder consultation processes developed by the International Social and Environmental Accreditation and Labeling Alliance (ISEAL), which requires two rounds of public consultation, and demonstrated respect for stakeholder inputs for developing and revising standards, among other elements. ISEAL is much younger than RA or FSC, and in developing its approach has been able to capitalize on learning from those organizations, as well as other sectors such as fisheries (and the Marine Stewardship Council or MSC). SGS indicates that it seeks input on standards during the standards adaptation process and both prior to and during evaluation field work (including stakeholder consultation). In the past and even today, some standards are not widely, easily or publicly made available for consultation and review, and even in the cases where organizations indicate an open-minded approach to consultation, the process for achieving this is not clear or readily transparent. This shouldn't be a surprise, as creating credible public standards can be difficult and costly. Using email or the Internet for consultation, a major step taken by many, has severe limitations in many locations. Private auditing organizations may have very limited resources at their disposal for this process, since there is often only very limited support provided by clients to develop the standards. Organizations also may wish to be judicious in investments given the nascent nature of the legality market. In contrast, it appears that FLEGT has put unprecedented resources into the development of legality standards in various countries, and placed a large emphasis not just on stakeholder consultation, but stakeholder engagement – i.e. seeking their active participation in legality standards development.
- Requirements for Local Adaptation of Standards – Some programs require local adaptation of a generic standard before local application by auditors. Given the focus of legislation like the Lacey Act on legality as per source country laws, this would seem both obvious and necessary. However, along those lines, what is the process associated with that adaptation? What is sufficient? How transparent and methodical should it be? How have interested parties been consulted with or engaged (public or private meetings, solely focused on email or Internet)? What should the minimum requirements be in terms of stakeholder engagement/consultation during the local standards adaptation processes, e.g. methods, timeframes, civil society sectors of involvement, etc.?
- Standards Duplication at National/Sub-National Levels – As demonstrated in the Table above, there are numerous countries where there are already multiple legality standards (e.g. China, Vietnam, etc.). For companies that wish to demonstrate a proactive approach to addressing legality, which standard are they to associate with? Rainforest Alliance has recently taken the position that if there is a well-developed and credible pre-existing legality standard in any country, it will approach the related standards developer and seek coordination such that the pre-existing standard could be used for legality verifications. Certisource is headed down the same path. However this can be complicated. Individual organizations may have a proprietary perspective in which they

feel they worked hard to develop their standard, they “own” it, and only want it to be used by their auditors. Some certification systems, e.g. FSC, currently require each certifier to develop their own Interim Standard for forest certification in countries where there is no formal FSC-approved or endorsed standard. This has led to a proliferation of Interim Standards under the FSC system. Rainforest Alliance has now begun to work with other FSC certification bodies (CBs) to develop a more coherent and efficient system related to Interim Standards. Initially it appears this could suggest two parallel paths: Path 1 – If there are already multiple CB Interim Standards, those CBs would voluntarily join together to reach agreement on a common Interim Standard, and Path 2 – If no Interim Standard is in place by any CB, the first CB to develop such an Interim Standard would submit it for formal review by FSC, prior to application by auditors, for a 30 day period of review and improvement, and subsequent to that process all CBs would use the same Interim Standard. The steps proposed by Rainforest Alliance to improve the Interim Standard process in FSC are not meant to undermine ongoing formal FSC standard processes leading to full FSC-endorsed standards in many countries, but in practice Interim Standards have been crucial to FSC’s progress around the world, and a more efficient and credible approach is necessary. How might lessons be learned from the FSC dynamic, or other similar situations, so that there is a reduction in the duplication of standards? Could this potentially result in fewer standards processes in countries, reduced stakeholder fatigue resulting in greater inputs into them, and perhaps more concentrated and more financial support for the remaining, necessary standards development process?

- Key Technical Issues, e.g. Conversion, Customary Tenure – There are a number of key issues where legality standards differ. A comprehensive comparison of the content of standards for both public and private sector programs is needed, though beyond the scope of this paper. However, there are some technical issues which already can be said to receive different or uneven treatment in various standards.
  - Chain of Custody - Some standards are quite detailed in how they cover the topic of chain of custody, incorporating inputs analogous to generic chain of custody or drawing on requirements in forest certification systems. Others deal with the topic in a much briefer way. SCS has separate legality standards for forest and chain-of-custody operations (currently under consultation).<sup>14</sup>
  - Customary tenure - As mentioned elsewhere, some standards pointedly address this issue and give it importance in verification.
  - Large scale forest conversion – Some standards address the topic, others rely solely on what is in national legislation, even if such legislation is agnostic on the issue of conversion (i.e. allows it on a large scale with no controls).
  - Silvicultural Prescriptions - There are countries where some silvicultural actions (i.e. specific prescriptions for how trees are harvested in the forest) are highly regulated, yet both scientists and practitioners (industry, forestry consultants) have fundamental questions as to their sustainability. In concept, FLEGT initiatives are expected to address any such contradictions relating to social issues or sustainable management practices within the body of law of specific countries. But in the absence of such an effort, or perhaps when such an effort does not succeed in resolving the contradiction, how should this be handled by legality verification systems? Should it be ignored? Or not?

---

<sup>14</sup> Email communication from Neil Mendenhall, SCS, January 14, 2010

- Payment of Fees & Transfer Pricing – Certification systems and legality verification programs all appear to cover fee payments to government (at all levels). However, at least one observer (anonymous) brought up the issue of whether transfer pricing should be addressed by legality verification programs. “Transfer pricing” in this context is the illegal practice in which producing companies claim to sell wood for less than its true value to offshore subsidiaries.<sup>15</sup>
- Linking Legality to Sustainability – A major concern of many forest and forest products specialists, NGOs and for that matter some traders or retailers, is that the drive to achieve legality of forest products would supplant efforts to move towards sustainability. In fact many of them believe that legality is a pretty low target for the global trade to point to. At the same time, over the past few years it has become increasingly clear how difficult clear attainment of legality will be in some jurisdictions. To address this issue, some programs (e.g. Rainforest Alliance and Certisource<sup>16</sup>) have put in or are considering requirements in their programs that require review within two or three years that would evaluate whether audited clients must now move towards sustainability (e.g. committing to stepwise FSC certification) in order to remain as a client in their programs. This matches up well with the requirements built into sourcing programs or responsible purchasing policies like those developed by IKEA, TFT, WWF Global Forest and Trade Network, TetraPak, the Kingfisher Group (including B&Q), the USA’s National Wood Flooring Association, Mead Westvaco, etc. However, if such requirements are not consistently a part of legality verification programs, will clients move towards legality verifiers that have the lowest requirements? Or, does the sustainability step represent a practical barrier to operations in countries facing high hurdles to meet just legality requirements?

### **Certification<sup>17</sup>**

The certification or auditing process for legality depends on the system per se. Generally speaking all auditors have in place both documentation and performance auditing requirements, with the latter typically including on-site forest or/ or mill visits. However, there are a number of issues or differences that should be taken into consideration and perhaps looked at to see if a more common platform with consistent procedures would make sense.

- Coverage as compared to government-stipulated legality requirements, e.g. the amended Lacey Act – From a content and auditing process perspective, an issue that perhaps overlays the whole certification process is the extent to which the due diligence measures imbedded within either public or private legality verification systems, or for that

<sup>15</sup> Human Rights Watch, “Wild Money” - The Human Rights Consequences of Illegal Logging and Corruption in Indonesia’s Forestry Sector, December 2009; available at [www.hrw.org](http://www.hrw.org)

<sup>16</sup> Personal communication between Paul Wilson, Certisource and Christian Sloth, Rainforest Alliance, January 6, 2010

<sup>17</sup> The terms certification, verification, auditing or validation are considered synonyms for the purposes of this discussion, though depending on the program or system, each word may have a highly specific meaning. For example, Rainforest Alliance uses verification as the term for its legality work, in order to distinguish it from FSC certification. Also, verifications under the Rainforest Alliance system are allowed to put a tracking or tracing code and “Rainforest Alliance-verified” on-product, but no other sustainability claims as per what happens usually with FSC (verified cannot use the “well-managed” or similar language).

matter the major forest certification systems, are sufficient to enable a company or producer to demonstrate they are meeting Lacey Act or similar legislative requirements around the world. Experience indicates this is a problem. Why? First, as discussed elsewhere in this document, certification systems and legality verifications typically focus on specific product lines, not the full scope of products produced by a company, thus a company could, in theory, have certified product lines and be trading in illegal wood. Perhaps more fundamentally, the systems were not (originally) designed to provide this type of protection or due care, though at least FSC and various private sector efforts (e.g. Rainforest Alliance, SCS, SGS, etc.) are now attempting to address this need. Recent experience in the USA indicates that even companies that have certified product lines are not immune to enforcement actions<sup>18</sup>. In addition, Lacey Act enforcers or policy specialists clearly indicate that having verification or certification alone clearly does not, a priori, mean that companies or products will avoid scrutiny by “just being verified or certified”. So the question becomes, over time, how effective will legality systems in both public and private sectors for demonstrating compliance? What measures need to be put in place to provide more robustness in this regard? As one auditor told the author, “no system will ever provide a 100% assurance”, and such an assurance “is simply unrealistic”.

- Scope of legality verifications – There are at least two issues of scope. One is the issue of product line versus the company as a whole. For example, most verification focuses on auditing product lines, and not all product lines of a particular candidate operation. This can result in the unfortunate circumstance wherein, unless precautions are taken, X Company may have a fully certified product line, but separately may have other product lines with raw materials that come from illegal or highly questionable sources. Rainforest Alliance has addressed this situation by requiring some high-risk companies (e.g. Forestal Venao in Peru and Pizano in Colombia) to commit to Controlled Wood (as per FSC system) sourcing for all raw material sourcing for all product lines before we will do FSC certification. The other issue of scope is that a legality verification may, or may not, include any of the following components, based on existing legality standards:
  - Verified Legal Origin (VLO) – typically ensuring secure legal forest tenure plus laws related to forestry or harvesting;
  - Verified Legal Compliance (VLC) – covering all legal requirements (forestry and non-forestry);
  - Reduced Impact Logging – covering aspects of more sustainable logging practices (as per TFF standards); and/or,
  - Tracing/Tracking or Chain-of-Custody – covering the chain of custody from the forest to point of sale to another legal entity or buyer. Different programs include different scopes and there is no consistent nomenclature to provide clarity.
- Public notice of initial audit (or assessment) – Some systems require this, most don't. The FSC forest certification process requires 30 day stakeholder notification, which in some cases is done via websites and, in most cases, requires proactive notification by auditors to stakeholders to ensure they know about the upcoming audit.

---

<sup>18</sup> In November 2009, Gibson USA, which produces some FSC-certified products, was subject to a Lacey Act enforcement action for allegedly trading in illegal forest products (reportedly not used in FSC product lines). The results of the investigation are still pending.

- Auditing frequency - Some systems requires field audits once a year and others every six months, or audit frequency is adjusted based on risk.
- Chain of custody auditing – Tracing or chain of custody requirements may or may not be an explicit part of the verification scheme. Some systems have very detailed requirements and auditing procedures, and include on-product marking (e.g. a VLO or VLC code) that can be carried all the way to the consumer.
- Stakeholder consultation – Some legality auditing systems require stakeholder consultation, others don't (beyond consultation with government agencies). Most legality verification audits do not include extensive resources for consulting with concerned parties, and are often confined to Internet research, emails or telephone conversations, or in some cases for forest legality, on-site visits and some interviews.
- Public summaries of audit results – Some systems limit their publicly available audit results solely to the name and location of the operation and the scope of the certificate (what mills or forests are covered, dates for which certification is covered, etc.). Other systems provide a summary of the audit results on the Internet.
- Listings of actual verified operations – It can be quite difficult to track down which operations have been actually audited and verified or certified. In most cases either the system or the auditor's websites list the operations, but oftentimes this is not easy to find. There are so many programs it is difficult to track. In order to be able to access this information one must know which systems and auditors are actually doing legality verification – something that even specialists in this area (e.g. the author) faced substantial challenges in finding. There is no central place where legality verifications or certification are listed. The new global Forest Registry, being developed by NEPCo and Rainforest Alliance in collaboration with FSC and others, is interested in establishing a “legality menu” item on its Internet site that would provide access to all legality verifications or certifications in the various systems or by various auditors. Are there other resources that could do this?

### **Accreditation**

As mentioned under governance above, various certification systems structure their accreditation process in different ways. There is no consistent model or global system for verification of legality. With these broad observations in mind, the following are key issues to be considered going forward in terms of accreditation.

- Links between private voluntary systems and FLEGT or other mandatory systems - There are no clearly established expectations, much less formal links, between private voluntary legality verification systems and the up and coming FLEGT licensing schemes.
- National versus global accreditation – FSC has a global model for accreditation (while at the same time requiring that auditors meet national legal requirements for certifier or auditor registration); PEFC has a national model. Both systems are at a minimum ISO friendly – i.e. they use various ISO standards for ensuring conformance.

- Control of public claims (on and off product) – As mentioned above, Rainforest Alliance strictly limits on-product claims, in theory to reduce competition with full FSC certification.
- Central registry of certificates – Keurhout maintains a central registry, on its website, of all Keurhout approved legality verifications. Virtually all the other systems require the public to go to the individual auditors' websites to find out which operations have been officially verified. As referred to above, the new Forest Registry may be a new option as a central registry of legality verifications and certifications.

## Options Going Forward

Based on past experience and observation of processes related to FSC, PEFC, FLEGT, IFM, legality verification and other initiatives, the following are possible ideas for bringing more coherence, rigor and credibility to private sector legality verification initiatives, both as valid initiatives on their own and as an enhanced complement to public sector initiatives.

Option #1 – Governance – Consider establishing a voluntary coalition of legality auditing and verification initiatives for the purpose of developing a common approach for consistency, rigor and credibility of private sector efforts, with a priority on standards (global and national/sub-national) and auditing procedures.

Option #2 – Standards – Consider establishing, on a voluntary basis, coalition support/endorsement for a commonly-shared global framework for legality standards (i.e. principles and criteria, or criteria and indicators), consistent standards development processes, a common, credible approach to stakeholder consultation/engagement on standards development, consistent treatment of key technical issues such as customary tenure, and normalized processes and expectations for revisions or updates to standards.

Option #3 – Standards – Reach out to FLEGT supporters globally and nationally to establish an informal working dynamic so that well-developed (even if not yet formally government approved) FLEGT-supported national standards can be used as the basis for private sector auditing efforts, where appropriate, and thus both reinforce the value of those efforts and avoid duplicative, wasteful use of scarce resources.

Option #4 – Certification – Consider incorporating, on a voluntary basis, a consistent approach for stakeholder notification and engagement in legality verification.

Option #5 – Certification - Examine the challenge and potential solutions of product versus company legality verification methods, in order to avoid the partial legality problem that product-line specific verification can cause.

Option #6 – Accreditation – Explore options for a legality verification accreditation structure that capitalizes on the best features of FSC and PEFC and avoids the pitfalls of both.

Option #7 – Accreditation – Consider establishing a voluntary code of practice that creates consistent and rigorous procedures for on-product versus off-product claims for private sector legality initiatives, and will not undermine global initiatives towards sustainability.

Option #8 – Accreditation – Explore use of the Global Forest Risk Registry, or equivalent mechanisms, as a central point for listing of all public information on private sector legality verification processes.