

Section 3

TERMS OF REFERENCE

Support to the Forest Law Enforcement, Governance and Trade (FLEGT) Partnership Agreement Process in Burma/Myanmar

INTRODUCTION

1. DFID's Forest Governance, Markets and Climate (FGMC) Programme is a global programme which has the broad aim of bringing about governance and market reforms that reduce the illegal use of forest resources and benefit poor people who depend on forests for their livelihoods. It supports the EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan, as part of a global effort to tackle deforestation, in particular by tackling illegal logging in developing timber-producing countries and the trade in illegally-produced timber products.¹
2. Voluntary FLEGT Partnership Agreements (VPAs) are one of the main instruments for cooperation with timber-producing countries. Choosing to enter into a VPA is voluntary, but once it is negotiated and endorsed by parliament the VPA becomes a legally-binding bilateral trade agreement between the European Union (EU) and the timber-producing developing country. The EU and EU member states are supporting partner countries to prepare for negotiation and subsequent implementation of VPAs.
3. Each country entering a VPA agrees to reinforce regulatory controls and develops a system that provides confirmation of legal compliance for all production commonly known as a Timber Legality Assurance System (TLAS). This includes articulating and clarifying legal requirements (defining "legal timber"), implementing agreed controls on forest management, timber harvesting, transport and trade, verifying legal compliance and licensing exports and undertaking regular independent audits of the system's

¹ See the European Forest Institute, FLEGT Facility website for all background information on FLEGT and VPAs. Link to VPA unpacked. <http://www.euflegt.efi.int/vpa-unpacked>. Details of the FLEGT Action Plan can be found here: <http://www.euflegt.efi.int/flegt-action-plan>

effectiveness. When the system is in place only exports licensed as legal will be allowed as imports into the EU market.

4. Developing and implementing these systems requires the involvement of a wide range of partner country stakeholders. Apart from government regulators, these include private sector operators from large corporate enterprises to small artisanal loggers, and civil society groups representing local communities and environmental interests. The consultation processes often provides the first opportunity for stakeholders to debate different parties' rights and obligations under a partner country's forest-related laws.
5. During VPA negotiations partner countries establish multi-stakeholder technical working groups who inform the development of detailed policy options and reforms for consideration by the country's negotiating teams. Mechanisms are needed to ensure that representatives of different stakeholders on these groups are able to communicate effectively with their constituencies so that their concerns are given adequate consideration.
6. The ultimate success and credibility of VPAs require: (i) that negotiations are shaped through inclusive stakeholder processes in partner countries; (ii) that requirements of international markets for evidence of legal production of timber are available to, and understood by, stakeholders in partner countries; (iv) that the progress made by partner countries in tackling forest governance challenges, including developing their VPA structures, is known to international stakeholders; and (v) that lessons are shared between countries negotiating and implementing FLEGT VPAs, and with other FLEGT-related activities.
7. Ensuring that all stakeholders in a partner country understand VPA's benefits, requirements and processes, and to help them engage effectively requires expert facilitation and technical support from the time that negotiations start. This seeks to keep stakeholders involved and engaged, while fostering local ownership. Facilitation also helps with communications between a partner country's government, the EU Delegation, the European Commission, EU Member States and involved donors so that all are informed of relevant developments in national policy, regulations and markets.

8. Burma/Myanmar entered into FLEGT VPA process in March 2014 and started its preparation phase in July 2015². The Ministry of Environment, Conservation and Forestry (MoECAF) has been nominated by the Government as the administrative lead with the role of coordinating engagement on its behalf. An Inception Workshop was held in January 2015 to help structure and plan work to be undertaken during the FLEGT VPA process preparation phase.
9. MOECAF has signalled that this preparation phase would constitute an information sharing and awareness raising period for stakeholders in the country with the view to inform and prepare for the anticipated VPA negotiations. An interim Task Force, with balanced representation from the different stakeholder groups has been created and will guide this process and the development and establishment of the longer term institutional structures for VPA negotiation.
10. DFID has agreed to provide support for the preparation and negotiation of this country's VPA. This will cover a) Technical Assistance to the Government; b) Facilitation of the process and c) Financial support to ensure effective preparation, inputs to negotiations, including stakeholder consultations and communications, development of systems to regulate and enforce law and provide market assurance (legality assurance system) as well as supporting logistics of negotiations process. The service provider will be responsible for the management of a £2.5 million VPA Support Fund³.
11. Interim technical assistance to the Government and Facilitation services are being provided by the FAO and European Forestry Institute (EFI) EU FLEGT programmes respectively; this will run for several months up to the end of 2015 until these roles transition into positions managed under the DFID support detailed in this ToR.

² See Appendix 1 for a background assessment of the forest sector in this country. An English translation of the Inception Workshop report will be published here once available.

³ Whilst the managed fund for third parties is £2.5m, it is for the supplier to propose TA, facilitation and fund management costs, and DFID will assess competitiveness here.

OBJECTIVE

12. A Service Provider (SP) will be engaged to provide a Technical Assistant to the Government, facilitator(s) supporting all stakeholders, and administration of the financial support for this country to prepare its VPA negotiations. The overarching objective of the services is to ensure a well prepared and inclusive process to prepare for negotiations, and dynamic and well-informed negotiations that build local ownership and international credibility for the VPA.

RECIPIENTS AND CLIENT OF SERVICES

13. The recipients for the services will be MoECAF and other relevant Government line ministries involved in FLEGT, stakeholders represented on the FLEGT Task Force (and subsequent stakeholder body informing negotiations), and more broadly national stakeholders. The client is the UK Department for International Development (DFID), with the services provided going to national stakeholders.
14. The Service Provider (SP) will provide
 - i. a Technical Assistant to assist the Government in its preparations for the VPA process including assisting with managing stakeholder processes.
 - ii. facilitation of the VPA process: one or several facilitators who will work closely with the European Union (Delegation and European Commission Headquarters) and the full range of Burmese (Myanmar) stakeholders.
 - iii. Financial management of a £2.5 million fund that supports the VPA process and its implementation
15. As resource and revenue sharing agreements, land and inclusive decision-making feature prominently in the ongoing peace process, a conflict-sensitive approach should be taken to the provision of services.
16. The Government of this country and DFID will establish a mechanism of oversight to guide the allocation of support for the VPA process. This mechanism will not be involved in

decision taking over funding priorities, rather establishing clear and transparent rules to ensure it focuses on driving the VPA process in an inclusive and forward focused manner.

SCOPE OF SERVICES

17. The Services will include support to the VPA preparation and negotiation process so that key actors can carry out the actions agreed in accordance with priorities established by the Task Force or in negotiations, political momentum is maintained, stakeholder support for the VPA is built, and actions are focused on achievement of intended results. The services will deliver three distinct and separate outputs: **(i) technical support to the leading VPA ministry through a full time assistant (ii) FLEGT VPA process facilitation, and (iii) administration of a £2.5 million support fund that enables this country to engage effectively in the VPA process.**
18. The Service Provider will propose a performance monitoring approach for the services.
19. The Service Provider will establish a workspace in Yangon sufficient to meet the needs of facilitation and fund administration.
20. Technical Assistance to the Government will see the placement of an individual within in Naypyidaw, with frequent travel to Yangon. Office space will be provided by the ministry.
21. Fund management will require the Service Provider to provide capital upfront initially and claim back from DFID monthly in arrears.
22. The Service Provider will be ready to deploy the Technical Assistant to Government and Facilitation Services within three weeks of commencing the contract.

OUTPUTS

Technical Assistance

23. The Technical Assistant is to help the Government services manage an effective national preparation and negotiation process. The outputs are therefore framed around the outputs of that politically driven process. Outputs will be as follows :

- a) An informed government position that is based on strong evidence and inclusive deliberations with national stakeholders reflecting on whether to advance to VPA negotiations
 - i. In the case of a decision to advance to negotiations, the establishment of clear institutional structures for negotiations and national consultations, that include a mechanism for stakeholder inputs.
 - ii. In the case of a decision to advance to negotiations, an understanding across concerned government bodies of the potential of the VPA to reinforce national reforms and assure access to international markets as reflected in government decisions.
 - iii. Increased understanding of the challenges facing the forestry sector, informed options for addressing these challenges
 - iv. In the case of a decision not to advance to VPA negotiations, alternative strategy is developed for addressing the challenges identified
- b) An informed Government, that is able to understand and provide timely and effective positions and proposals for the VPA with due consideration for stakeholder perspectives and needs. The process results in stakeholder support for proposals tabled for discussions with the EU.
- c) A Government that is able to effectively and efficiently fulfil its role of fostering knowledge sharing amongst all stakeholders and the EU.

Facilitation

24. Overall facilitation of the VPA process should result in the following outputs:

- a) This country and EU negotiation teams are supported to monitor progress, identify problems, understand stakeholder perspectives, and provided relevant and timely input that fosters dialogue between the parties;
- b) **National stakeholders have access to information** on progress with VPA negotiations to ensure maximum opportunity for their effective engagement. To ensure this the facilitator(s) shall encourage stakeholders involvement and support the establishment of a platform to build stakeholders' view to feed into the process;

- c) As guided by both Parties, **lessons learnt from negotiations are shared** with and between national stakeholders, including decision-makers, opinion formers, civil society organisations, the private sector, and with external stakeholders, including donors, the European Forest Institute's FLEGT Facility and EU FAO FLEGT Facility; and
- d) **Information on the requirements of emerging international market standards and legislation** that affect this country related to the trade in timber products, agricultural products grown on forest land and mining products is assembled and effectively communicated to relevant stakeholders to inform negotiation process. The timing for this information sharing will be guided by the VPA negotiation "roadmap".

Financial Administration of VPA Support Fund (financial support for this country to prepare its VPA)

25. The administration of the VPA Support Fund will enable stakeholders to access financial support to assist them in contributing the country's negotiation positions. It should result in the following outputs:

- a) **Stakeholder groups and their constituencies have sufficient resources** for them to participate effectively in national consultation processes in a way that ensures that the negotiation body takes their views into account in preparing the country position;
- b) The **negotiation body has sufficient resources** to enable it to strengthen the dialogue between all interested and impacted country stakeholder groups, including support to the organisation of the consultation processes on elements identified in the work plan, and to reflect the views and interests of its members' constituencies in proposals; and
- c) The **negotiation body has resources** to prepare the countries' positions and proposals for discussion with the EU and to participate in negotiations. This could include but not be limited to providing assistance to engage experts to inform negotiations with studies, piloting or analyses (including preparation of Terms of Reference).
- d) A decision making structure is established that enables all stakeholder interests to engage in the process and that is informed by priorities established during VPA negotiations.
- e) Clear transparent procedures are established for fund administration and reporting.
- f) Fund administration ensures fiduciary responsibility.

REPORTING

26. At the time of writing, MoECAf is the designated lead on FLEGT VPA negotiation. However the institutional structures for managing the VPA process are yet to be defined. The institutional arrangements for this work will be updated once these structures have been formalised.
27. It is expected that lines of direct reporting will be different for Technical Assistance to Government and Facilitators and Fund administration. Reporting arrangements will be finalised during the six week inception phase and described in the institutional structures. Reporting in the initial phase, before inception period is completed will be to DFID.
28. Within six weeks of commencement of the contract, the Service Provider will submit to the FLEGT Focal point within MoECAf, the Interim Task force and DFID an Inception Report, outlining the institutional structures in place to manage technical assistance, facilitation and negotiation support services. This should include a work plan, a detailed budget forecast, and recommendations for performing the services.
29. The Service Provider will report on progress against work plan and ToR outputs to the national structure for FLEGT oversight e.g. FLEGT Task Force. The service provider's quarterly reporting to DFID will be aligned with overall reporting to the national structure for FLEGT oversight.

DUTY OF CARE

30. As part of its Duty of Care Policy, DFID has assessed the risk of working in this country as "Medium". This assessment is provided in order to allow the Service Provider to take reasonable steps to mitigate risks where necessary, see Appendix 2 for the full assessment.
31. The Service Provider will be responsible for the safety and well-being of its Personnel whilst they are in this country and Third Parties affected by their activities under this Contract, including having appropriate security arrangements in place. Acceptance of

responsibility must be supported with evidence of capability (no more than [2] A4 pages) and DFID reserves the right to clarify any aspect of this evidence. In providing this evidence Tenderers should consider the following questions:

- a) Have you completed an initial assessment of potential risks that demonstrates your knowledge and understanding, and are you satisfied that you understand the risk management implications (not solely relying on information provided by DFID)?
- b) Have you prepared an outline plan that you consider appropriate to manage these risks at this stage (or will you do so if you are awarded the contract) and are you confident/comfortable that you can implement this effectively?
- c) Have you ensured or will you ensure that your staff are appropriately trained (including specialist training where required) before they are deployed and will you ensure that on-going training is provided where necessary?
- d) Have you an appropriate mechanism in place to monitor risk on a live / on-going basis (or will you put one in place if you are awarded the contract)?
- e) Have you ensured or will you ensure that your staff are provided with and have access to suitable equipment and will you ensure that this is reviewed and provided on an on-going basis?
- f) Have you appropriate systems in place to manage an emergency / incident if one arises?

START DATE AND DURATION

- 32. The initial contract will be issued for a three year period from 1 June 2016 – 31 May 2019 and will be subject throughout to satisfactory performance and agreement to the progress on outputs and results. As the FLEGT VPA is a political process and subject to significant changes, there is a possibility of an extension for a further two years subject to continued need and satisfactory performance of the Service Provider.
- 33. The Service provider should ensure a smooth transfer of responsibilities from the interim Technical Assistance and Facilitator post holders to mitigate the risk of gaps in the support being provided to the country.

34. DFID reserves the right to include a breakpoint on 31 December 2017, in time for FGMC programme review in order to monitor progress, ensure that Value for Money is being delivered and determine the continued requirement of the services. DFID will also review the contract at the point of the national Government and EU decision whether to proceed to formal VPA negotiations (the timing of this review cannot be confirmed before the contract commences). In any circumstance where DFID decides not to continue with the contract, the contract will be terminated, following the steps set out within the contract General Conditions.

Appendix 1 Background – Burma/Myanmar’s Forest Sector

35. Burma, or The Republic of the Union of Myanmar, has a land area of 677,000 km², and is bordered by Bangladesh, India, China, Laos and Thailand. It has a population of around 51 million, 70% of which live in rural areas. Despite a rich abundance of natural resources which include timber, oil, gas, minerals and gemstones, as well as hydropower potential, this country is one of the poorest in South-East Asia with a GDP per capita of around \$800. It ranked 149 out of 187 countries in the 2012 Human Development Index. This is largely due to a history of economic mismanagement, conflict and international isolation under military dictatorship.
36. After five decades of relative isolation, the 2010 General Election ushered in a quasi-civilian government in March 2011, which initiated wide ranging political and economic reforms. This included a commitment by the Government to create greater transparency in the natural resource sectors and for further fiscal decentralization (IGC 2014). The trajectory of reform is not clear cut, challenges remain and there has been a reverse in some areas.
37. Natural resources contribute significantly to the country budget. However, significant uncertainty remains around resource extraction (including timber) and revenue flow, including: the composition, extent and distribution of the resource endowment; informal extraction and payments; contested areas and parallel administration by non-state groups; the role of military-owned companies; and a lack of routine, disaggregated reporting for formal revenues from the extractive sector (IGC 2014).
38. There are a wide range of forest types that provide an array of ecological and economic benefits. Forests and woodlands cover around 47% of the country and are a crucial livelihood resource for 70% of the countries’ population, and the 17 million who are classed as forest dependent. This country also remains a biomass-energy centered economy; wood accounted for 70% of all primary energy supply in 2009 (UNDP 2013). To put this in context, on average a household will consume 1.5 tons of wood a year. As the economy grows domestic demand for wood fuel, in the medium term at least, will continue to increase.
39. Access and use of the forest resource in this country is closely tied to power politics, ethnic conflict, and the peace process which creates a complex political economy. Yet with its land mass, low population density, reasonable waterway infrastructure and proximity to important international

markets, effectively managed timber could make a very significant contribution to livelihoods and to strengthening the political and economic reform processes.

The Forest Resource:

40. The Government Forestry Department administers around 25% of the country under Forestry Land with 5.75% established as protected areas system. Forest exploitation is controlled by law, but the government allows rural communities to use various forest products (except protected plants and animal species). Communities are however not allowed to enter into commercial harvesting.
41. According to Forest Trends 2013, timber can be defined as coming from five different sources, each with their own degrees of legality, sustainability, land rights regimes, and ethical sourcing: State-managed (Myanmar Timber Enterprise, or MTE) forests, largely consisting of teak; Logging concessions in natural forests, mostly in ethnic conflict areas; Land conversion in natural forests, predominately driven by agribusiness concessions; Tree plantations; and Community forests (Forest Trends 2013).
42. The Myanmar Timber Legality Assurance System, however, defines legal timber as 'Timber harvested by authorized agency from approved areas and timber and timber products extracted transported, manufactured and exported in accordance with the laws, regulations and procedures pertaining to forestry, timber industry and trade of Myanmar'.
43. According to EIA 2013, this country now has one of the highest deforestation rates in the region. It lost an estimated 19% of forests and woodland cover between 1990 and 2013. Of this, 80% of total logged wood was classed as illegal. As an indication of the revenue loss – in the last 10 years \$5.7 billion worth of logs, or 72% of trade, is thought to have been smuggled across the border through illicit export deals (EIA 2013). The Forest Department (FD) reports that deforestation rate was 0.9% of forest cover during 1990 to 2015 and that seized timber, predominantly along the border areas between this country, China, Thailand and India, was more than 50,000 tons during 2011 – 2015.
44. Deforestation is being driven by a number of factors. Cross-border smuggling, fuel-wood, illegal logging and the use of timber revenues to finance internal conflict are commonly cited as the key drivers of deforestation. Forest clearance is also driven by extension in agribusiness, hydropower and extractives. These actions frequently result in land disputes with local communities. Regulation and enforcement of forest resources is weak, with many regional forestry department offices lacking basic infrastructure. Lack of trust between communities and forestry officials is a big challenge; getting the

two groups around the same table to discuss issues of forest management/ use will be a large step forward.

45. To try and revitalise the processing industry and tackle illegal logging and revenue from illegal timber fueling conflict, the Government introduced a Log Export Ban on the 1st of April 2014. There are obvious continuing challenges in areas under conflict, where licenses to land or logging concessions, and timber are sold to foreign timber traders and leave the country using illicit means.
46. The biggest importers of timber from this country are China, India and Thailand. Although the USA, European and Australian markets have been until now small they represent an opportunity for higher-value timber products.
47. Over the years there has been much speculation about the extent of illegal exports of Burmese (Myanmar) timber, especially across the Chinese border (Forest Trends, 2012). In an attempt to crack down on illegal trade between China and Burma/Myanmar discussions took place in 2008 resulting in both sides agreeing to strengthen cooperation in combatting illegal logging along border areas; dialogue between the two countries continue. Illegal trade saw an initial decrease, but recent reports indicate that this has been steadily increasing. Challenges also exist in the definition of “legality” used by these countries respective authorities whereby any timber let into the country by Chinese Customs should be considered legal, regardless of origin.
48. Domestic timber trade typically covers harvesting, processing and domestic demand. These activities are typically informal, poorly regulated and consumption data unreliable.
49. Historically the EU and USA have sanctioned timber leaving this country, although EU sanctions have been lifted, any timber entering the EU now needs to comply with the EU Timber Regulation (EUTR).
50. In July 2014 the US Treasury Department granted a conditional licence to the US International Wood Products Association and its members for a period of one year to engage in importing wood products from the Myanmar Timber Enterprise (MTE). MTE has, in the past, been blacklisted by the USA as an institutionally corrupt trading company and currently remains on the US Treasury, Specially Designated Nationals List (SDN).

Stakeholders:

51. Within this country the Government the Ministry of Environmental Conservation and Forestry (MOECAF) is the responsible ministry for forestry and logging sectors. It includes the Forest Department, Environmental Conservation Department, Survey Department and State/Regional Forestry Departments. MOECAF is the designated lead on FLEGT preparation and negotiations.
52. In addition to MOECAF the timber and forest sector are linked across a number of sectors and ministries including: the Ministry of Home Affairs, the Ministry of Commerce, Ministry of Irrigation, Agriculture, Ministry of Finance (customs department), Ministry of Transport, and the Ports Authority.
53. For timber the state-owned Myanmar Timber Enterprise (MTE), under MOECAF, uses subcontractors to undertake forest operations. MTE has sole extraction rights for teak, though private companies may run teak plantations (IGC, 2014). MTE is also responsible for harvesting, sawmilling downstream processing and marketing of timber; they are also involved in joint venture wood processing.
54. In order to better control revenue from timber Government initiatives have pushed for all timber to be exported via ship, from Yangon Port. Whilst much of the timber is harvested and transported by private Burmese (Myanmar) companies, in cooperation with MTE under MOECAF, all timber shipped out of Yangon is market as MTE wood (Forest Trends, 2012). As such all timber with an MTE stamp is considered legal by the government.
55. Due to the way in which private-sector organisations have operated under the military government it has, to date, been difficult to gain a transparent picture of the entire private sector involved in the forestry supply chain. The Myanmar Timber Merchants Association (MTMA) is the sole commercial association for wood production, marketing, distribution and export and plays an important facilitating role between the MTE and the private sector. The Myanmar Forest Products Merchants Federation (MFPMF), which has been recognised as a federation from Myanmar Timber Merchants Association (MTMA) is a non-profit organisation comprised of forest product producers (covering production, marketing, local distribution and export. MFPMF plays an important facilitating role between MOECAF (MTE and FD in particular) and the Private Sector.
56. Civil Society has historically been systematically excluded from political life, although this is changing rapidly with evident mobilisation and engagement across a range of issues including FLEGT.
57. There are several registered community forest user groups (FUG) with legal community forestry certificates. Although Community Forestry is used as a forest management tool communities are not allowed at present to engage in commercial forestry.

58. Many of the areas where natural timber remains in this country are also conflict areas. With conflicts in these areas to some degree over these resources, including timber. Timber and other non-timber forest products (NTFP) continue to represent a significant source of income for ethnic political groups, most notable in Kachin and Karen States.
59. In areas under ethnic control rules and regulation for forest management and utilisation are specific and different from those prescribed by central Government.

Conflict Resolution and Revenue Sharing

60. Reforms within the forest sector are inherently linked to broader structural and democratic reforms underway across the country: conflict resolution, land tenure reform and enforcing the rule of law and addressing non-inclusive decision making processes.
61. Forest resource sharing is a critical issue for the ethnic areas and a pre-requisite for political settlement beyond the current ceasefires. Peace negotiations between the government, Tatmadaw (military) and ethnic armed groups are moving slowly forwards. The Government is trying to reach an agreement on the national ceasefire agreement (which includes 16 groups, but not all) before the elections being held in October/November 2015. A constructive forest sector reform process could enrich peace negotiations, improve the democratic environment and help mitigate some of the risks to the overall reform process (Springate-Baginski et al, 2014).
62. One of the most valuable aspects of FLEGT is the opportunity it presents in initiating democratic reform: a more inclusive and transparent resource management could help build the trust needed to discuss revenue-sharing arrangements; reform of the forest sector presents an avenue to address grievances and part of the process of reconciliation between groups. As Springate-Baginski et al. (2014) states “promoting a democratic timber trade would be a critical pathway to support the wider democratisation of the nation both for national and regional development”.

Progress with the VPA

63. After an extended period of internal reflection both the EU and Burma/Myanmar are now committed to preparing for negotiation, with an Inception Workshop held in Naypyitaw in January 2015. This event brought together representatives from government, civil society, private sector and donors, and officially kicked off the “preparation phase”.

64. An outcome of the preparation phase was the decision to convene an “Interim Task Force” comprised of 5 members each from civil society, private sector and the government. At the time of writing, counterparts from each member group have been selected but the first meeting has yet to convene.
65. The UK is the lead Member State providing support to this countries VPA process.

FLEGT and VPA processes

The EU and timber producing countries in Asia, Africa and Americas have embarked on VPA processes anchored by the EU FLEGT Action Plan. All background information on FLEGT Action Plan and VPA is accessible on the European Forest Institute EU FLEGT Facility website: <http://www.euflegt.efi.int/vpa> . Of particular interest for this stream of work is the interactive (VPA unpacked” that provides links to all policy, legal and lesson learning material relevant for these tasks.

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