

Clearing forested land – the need for a permit

Legal toolkit on forest conversion - Factsheet 2



This Factsheet is intended to inform law-makers about key legal issues that may arise when forested land is cleared for agriculture, mining or infrastructure, and the risks that may stem from those issues. It also provides questions to guide law-makers through processes of law reform to improve the laws regulating forest clearance with a view to limiting forest loss.

This factsheet is part of a larger toolkit on law reform to address forest conversion:

<https://www.clientearth.org/forest-conversion/>

ClientEarth thanks the following people for participating in initial brainstorming discussions on forest conversion or for undertaking research on specific country contexts: Dr. Fabiano de Andrade Corrêa, Dang Dinh Bach and his colleagues at the Law and Policy of Sustainable Development Research Center, Karl-Heinrich von Bothmer, Dr. Raphael Kra, Alfred Nkodia, Martha Pacheco Cruces, Eugenio Sartoretto, Mustapha Seidu and Glen Asomaning of the Nature and Development Foundation, Yannick Alain Troupah, Professor Cédric Vermeulen, Dr. D. Andrew Wardell, Comptoir Juridique Junior, Heritage Partners and Associates, TaylorCrabbe Initiative and national civil society groups in Ghana, Liberia, Cote d'Ivoire and the Republic of Congo. The information contained in this document is the sole responsibility of its authors and does not necessarily reflect the inputs received from any of the abovementioned people.



The clearance permit represents a crucial stage of the forest-conversion process because it requires consideration of whether or not it is appropriate to clear an area of forest for another use. To help develop a legal framework that comprehensively regulates forest clearance, this Factsheet identifies five essential requirements for law-makers to consider:

1. The permit required for forest clearance is unambiguous and details the clearance process.
2. All forested lands are subject to an environmental and social evaluation of whether clearance is appropriate (see Factsheet 4).
3. When to apply for a clearance permit for is explicit and consistent across all relevant laws.
4. The rights of local communities and indigenous peoples to participate in decisions affecting their land and resources are upheld.
5. Laws are accompanied by strong enforcement and dissuasive penalties.

Although the required permits and procedures differ between countries, these five essentials will be similar for all countries. For each topic, we look at common legal problems and the risks that may stem from those problems. A set of key questions at the end of this Factsheet is offered as a checklist to reference during the process of law review and reform.

Background: the clearance permit

A deforestation or clearance permit provides the right to deforest to use the land for another purpose. Generally, it is distinct from a logging permit because it allows clear-cutting of an entire forest area rather than selective logging of valuable trees. Therefore, clearance permits cause forest loss and should be carefully considered.

Before granting a clearance permit, it is good practice for the government to require specific information or documents, including:

- proof of land title
- confirmation of agricultural or mining plans
- schedule of work, including information on the scope and method of the clearance
- environmental permit, following a process of environmental impact assessment (EIA)
- proof of free, prior and informed consent from affected communities
- forest inventory and/or map, with details of the trees to be cleared (this is important if the timber is to be sold – see Factsheet 3).

When establishing the rules governing forest clearance, the law should at least include: how the clearance takes place; who undertakes the clearance; the areas where clearance can or cannot occur (such as slopes or the banks of waterways); and the destination of timber stemming from the conversion ('conversion timber'). Clearance permits allow the government to monitor conversion activities, better identify illegal deforestation and track forest cover, to ensure forest loss is limited.

1. Legal clarity on clearance permits and standards

Key legal problem: uncertainty and an absence of strict rules

Key risks: forest conversion permits are exploited as a loophole, environmentally and socially destructive clearance practices, illegal timber

In some tropical countries, forest law does not include a clearance permit, or there may be a lack of clarity around which permit should be used for forest clearance (Case Study 1). If no clearance permit exists, the law may not establish where, how and by whom clearance can take place.

- To identify **where** conversion can take place, the law should establish limits on which forests are appropriate for clearance and determine whether small areas require a permit, or whether they are exempt to allow local communities to practise subsistence agriculture.
- To identify **how** clearance should be done, the law should detail permitted methods of deforestation.
- To identify **who** is able to clear the forest, the law should determine whether only registered timber operators are allowed, or whether the company doing the agricultural, mining or other project may itself carry out the clearance.

Case Study 1: Legal confusion on permits in Liberia

In Liberia, there is a lack of clarity in the law about which permit should be used for forest clearance. There are four forest resource permits that companies or individuals must obtain to harvest trees legally.¹ However, none of these four permits is specifically for forest clearance. The Timber Sale Contract (TSC) is often noted to be the most relevant, as it envisages clearing land for agriculture or plantations.² However, it mentions only agriculture and no other uses of the land (such as mining).³ In practice, companies that have cleared land for palm oil plantations have not been required to obtain a TSC in Liberia.

Without precise rules, the forest clearance permit may be used as a loophole that companies exploit to clear forests for the sole purpose of easier access to the timber, without developing the new land use (Case Study 2). When this happens, the potential benefits of the agricultural, mining or infrastructure projects to national development, employment or social security are then lost – in addition to the loss of the forest.



Case Study 2: False use of clearance permits to access timber in the Republic of Congo

In the Republic of Congo, companies are exploiting clearance permits to harvest valuable timber. From 2014-2016, five companies were found to have obtained a forest clearance permit and to have used this permit simply to commercialise the high-value timber in the area, seemingly without the intention to undertake the agricultural activities.⁴

The rules developed for traditional logging are generally strict, and clearance rules should match this stringency to ensure all forestry activities adhere to the same standard. Where rules for the forest clearance are not stringent, clearing forests can be environmentally harmful. If there are no restrictions on who may clear the forest (registered timber operators, or the company running the conversion project), there is a risk of unknowledgeable companies adopting bad practices. Likewise, if clearance methods are not specified, greater destruction of the forest and surrounding areas could result from 'slash and burn'⁵ and other environmentally or socially destructive clearance practices.

Finally, without clarity on the legal clearance permit and the rules regulating forest clearance, it may not be possible to sell the timber legally. The EU, USA and Australia require all timber entering their markets to be legal, based on the laws of the country of production. Companies prove legality by collecting information about the timber, including documents indicating compliance with applicable laws. If the clearance permit does not establish clear rules, the timber could be (seen as) illegal and excluded from trade.

2. Coordination and chronology of conversion authorisations (from land title to clearance permit)

Key legal problem: lack of clarity around when a permit must be obtained

Key risks: confusion over legality of permits, prioritisation of other land uses over forests

In many countries, it may not be clear at what point in the forest-conversion process the clearance permit must be obtained. For example, should the company have already received the licence for the new land use (e.g. a mining or agricultural licence) before the clearance permit is provided? Should the EIA have already been approved? If there is no set chronology or prerequisites, this may cause uncertainty and confusion about the legality of each individual permit.

Where sectoral laws are incoherent or where the chronology of permits is unclear, there is a risk that other uses of land – such as agriculture or mining – will be prioritised over forests. This risk manifests itself in exclusion of forest concerns from conversion decisions, where agricultural or mining laws do not require consultation with the forestry administration (Case Study 3).

A similar risk exists where it is unclear whether a clearance permit must be received before or after a land-use permit. There can be significant pressure on a forest administration to grant the clearance permit, if other agencies have already approved the project.

3. Consultation with affected communities and indigenous peoples

Key legal problem: lack of consultation with communities

Key risks: land-use conflicts and lack of compensation for loss of livelihood

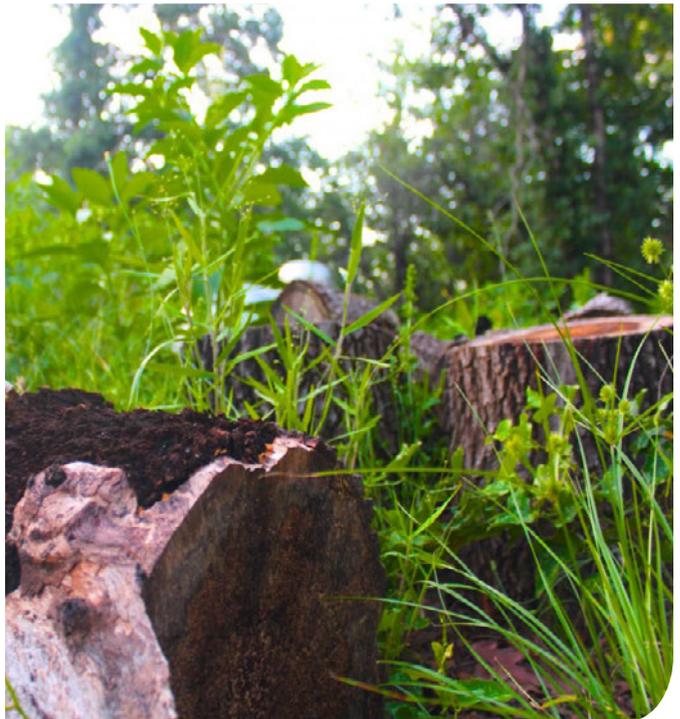
Communities living in or near forests often depend on the forests for their livelihoods, including through collecting timber or non-timber forest products. If these communities are not consulted during the application process for clearance permits, they cannot participate in the decision or receive appropriate compensation for loss of livelihood. This may lead to land-use conflicts, invalidate the clearance permit or delay the conversion project while local communities' rights are considered and alternatives or compensation determined (for more information, see Factsheet 5).

Case Study 3: Different state authorities with differing rules in Liberia

In Liberia, the Minerals and Mining Law allows miners to clear forested land for mining activities⁶ and gives authority to the Minister for Mines to authorise clearing the trees and shrubs “necessary for the mineral rights holder’s activities outside the boundaries of his license or licenses”.⁷ This is incoherent with the forest law, which designates the forestry administration as the “representative of Government in any matter concerning the use of forest”, meaning that no one should clear trees and shrubs, or cut wood, without its permission.⁸

Case Study 4: Amnesty for illegal forest clearance in Brazil

In Brazil, controversy has surrounded the amnesty granted in the 2012 Forest Code to illegal forest clearance carried out before 2008. The 2012 law states that rural land on which native vegetation was cleared before 22 July 2008, regardless of whether the clearance was legal according to reserve requirements, is now ‘legalised’, where there are currently buildings or agricultural activities.⁹ There is a risk that this wide-ranging amnesty could encourage future illegality. On the other hand, some commentators argue that – if accompanied by rules and incentives for forestland owners – the amnesty grants space for increasing compliance with legal requirements for reserved forest areas on rural land.¹⁰



Case Study 5: Illegal use of the clearance permit in Viet Nam

In Viet Nam, the forest clearance permit (the permit for ‘full utilisation of the wood’) states that before the new land use begins, it is necessary to fully exploit the forest products.¹¹ Companies granted a permit for full utilisation of the wood for infrastructure projects, including hydropower dams, have been associated with illegal logging and clearing vast areas of forestland, outside the permit area.

For example, in 2005, the company behind the Khe Dien hydroelectric project was granted a permit for full utilisation of the wood in the area that would be flooded by the dam. However, the company cleared hundreds of hectares of protected forest outside the concession area, mixed this illegal timber with legally harvested timber from within the concession area¹² and falsely sold it using the authorisation provided by the permit. Eleven people were charged with illegal logging in this case in 2008.¹³

4. Strong implementation and enforcement

Key legal problems: limited enforcement, no dissuasive penalties

Key risk: little incentive to apply for a clearance permit and follow clearance rules

Without strong enforcement and dissuasive penalties, there may be little incentive to apply for a clearance permit or to follow the clearance rules (Case Study 4).

Monitoring all clearance permits to identify and apprehend illegal deforestation may be challenging for forest administrations, many of which have limited human and financial capacity. However, without monitoring, companies and individuals may act illegally (Case Study 5).

Key questions for law-makers on forest clearance

A review or reform of national laws may be needed to ensure forest clearance follows a stringent and detailed assessment. For this assessment to be done properly, decision-makers need sufficient information to decide on the merits of the case, without interference. The following questions are for law-makers to consider before starting legal reform of forest-clearance processes.

Legal clarity on clearance permits and standards

1. Is there a clear procedure in place that details how to file a clearance-permit application and which documents must be submitted with the application (e.g. proof of land title, proof of free, prior and informed consent from affected communities, forest inventory and/or map, with details of the trees to be cleared) ?
2. Who grants a clearance permit? Is it the forestry administration? Should there be an advisory committee of representatives from across government?
3. Do all conversion projects need a clearance permit? Should the law distinguish between commercial activities, which require a permit, and subsistence activities, which do not?
4. Are there clear grounds for refusing to grant a clearance permit, such as maintaining slopes or the banks of waterways to protect against erosion or natural hazards?
5. Are there restrictions on which types of forest can be cleared for conversion purposes?
6. Do clearance rules restrict the most harmful clearance methods, such as slash and burn?
7. Are the harvesting rules for forest clearance as stringent as for logging permits?

8. Once the forestland has been cleared, is there a requirement for the land to be developed into the planned agricultural plantation, mine or infrastructure project within a certain timeframe? What is the penalty for a company that does not develop the productive activity?

Coordination and chronology of conversion authorisations

9. Is it clear when a clearance permit must be applied for – before, after or simultaneously with other permits, such as the agricultural, mining or other land-use licence, or the EIA?
10. Is the period of validity of the clearance permit defined? If it is valid for a short period, this may help officials to monitor the permit and to rescind it, if the rules are not followed. If the land is not cleared within the permitted timeframe (see Question 8), does the company have to re-apply?

Consultation with affected communities and indigenous peoples

11. Must affected communities be notified and participate in approving the clearance permit?
12. Should proof of free, prior and informed consent of local communities and indigenous peoples be a prerequisite to all clearance-permit applications?

Strong implementation and enforcement

13. Is there a strong, proportionate and dissuasive penalty regime in place, for permit-holders who do not follow the rules for clearance?
14. How will the government enforce the law? Is independent monitoring of clearance permits allowed, and may complaints be made where infractions are identified?

1. Republic of Liberia, National Forestry Reform Law 2006, Section 5.1.
2. Republic of Liberia, National Forestry Reform Law 2006, Section 5.4.
3. ClientEarth and HPA (2016) 'The legal framework governing forest conversion in Liberia' (<https://goo.gl/67Fzhw>).
4. Independent Monitor of the FLEGT-VPA in the Republic of Congo (2017) 'Rapport N°13 / CAGDF'.
5. 'Slash and burn' is a widely used method of agriculture in tropical countries in which forested land is clear-cut and any remaining vegetation burned, as a method of clearing the land for crop cultivation. When the land becomes infertile, the farmer moves on to another area of land. This can lead to deforestation and forest fires.
6. Republic of Liberia, Minerals and Mining Law 2000, Section 6.7(d)(4).
7. Republic of Liberia, Minerals and Mining Law 2000, Section 11.6.
8. Republic of Liberia, National Forestry Reform Law 2006, Sections 2.2(a) and 11.5.
9. Federal Republic of Brazil, Federal Law 12.727 of 17 October 2012, Chapter III-A, article 42.
10. Lawson, Sam et al. (2014) 'Consumer goods and deforestation: an analysis of the extent and nature of illegality in forest conversion for agriculture and timber plantations', Forest Trends (<https://goo.gl/PFaYKP>).
11. Socialist Republic of Vietnam Ministry of Agriculture and Rural Development, Circular No. 35/2011 / TT-BNNPTNT, 20 May 2011.
12. Cao Ngoc Anh (2016) 'Timber trafficking and its impacts on human security in Vietnam', Doctor of Philosophy Thesis, University of Northumbria at Newcastle (<https://goo.gl/ioB5zC>).
13. Vietnam News (2008) 'Eleven charged with illegal logging in Khe Dien forest' (<http://bit.ly/2ps7KO9>).

Our vision is of a planet where all life is diverse, abundant and thriving. We want a home where people and nature flourish together.

We use law as a tool to mend the relationship between human societies and the earth.

Contact

Clotilde Henriot
Law and policy advisor
chenriot@clientearth.org

Caroline Haywood
Law and policy advisor
chaywood@clientearth.org

Emily Unwin
Senior lawyer
eunwin@clientearth.org

www.clientearth.org

Brussels

60 Rue du Trone (3rd floor)
Box 11, 1050 - Ixelles
Belgium

London

274 Richmond Road
London E8 3QW
United Kingdom

Warsaw

Aleje Ujazdowskie 39/4
00-540 Warszawa
Poland