

EU–China Bilateral Coordination Mechanism



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Feasibility analysis of the incorporation of timber legality requirements into Chinese laws or regulations to promote trade in legal forest products

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Research background, objective and methodology

Research background

The issue of timber legality has become increasingly prominent for many governments, environmental organisations, foresters and civil society organisations. A series of measures aimed at ensuring the legality of timber have been taken in recent years. At the government level, the European Union (EU), the United States (US) and other established markets have adopted legislation or implemented government procurement policies and other measures aimed at preventing illegal timber from entering their domestic markets.

China is a very large and complex emerging economy, whose development model has marked historical and regional characteristics. The process of developing legislation on timber legality in China will have to reflect these characteristics, just as it was the case in the EU or the USA.

Research objective

The specific objectives of this study are to identify the regulatory options that China could follow in developing legislation on the legality of timber and timber products' imports and assess the feasibility of these options. The study aims to provide Chinese authorities with incentives to promote and oversee the legality of China's imported timber.

Research methodology

The main focus of this study is to explore the viable regulatory means of eliminating illegal timber from China's forest products supply chain. The regulatory means will likely build on the existing Chinese legal system, as well as the production, import, export, sales and consumption patterns of forest products in China. This study therefore not only uses traditional legal research methods, such as literature review, legal interpretation and comparative research, but also stakeholder interviews, group discussions, brainstorming and others. The study is a collaborative effort, with much of the research and analytical work upon which the findings are based undertaken by The Nature Conservancy and Vermont Law School, under the Responsible Asia Forestry & Trade program (RAFT).

Legal provisions and requirements of major countries to combat illegal logging and associated trade

In order to protect global forest resources, mitigate climate change and protect biodiversity, the international community has developed policy measures to promote sustainable forest

management and combat illegal logging and associated trade. The process of developing these measures involves the close cooperation of governments, international organisations, non-governmental organisations (NGOs) and the private sector. To promote legal logging and the trade in legal timber, these stakeholders use a variety of measures, such as legal reforms, corporate social responsibility commitments, or the promotion of forestry science and technology. Combined with administrative and market mechanisms, these measures have had a significant impact on combating illegal logging and deforestation.

Currently, the US, the EU, Australia, Japan and South Korea have enacted legislation to combat illegal logging and associated trade. The EU Timber Regulation (EUTR), the US Lacey Act and the Australian Illegal Logging Prohibition Acts share similar objectives, enforcement mechanisms and sanctions. However, there are also differences among the three pieces of legislation.

A key concept is that timber is illegal when harvested in contravention of the applicable legislation in the country of harvest. All three pieces of legislation prohibit illegal timber and timber products from being placed on the market, and require due diligence (due care in the Lacey Act) on the part of importers and traders.

The core of the 'due diligence' notion is that operators undertake a risk management exercise so as to minimise the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the market. For example, in the EUTR the due diligence system has three key elements: gathering information, assessing risks and mitigating the risks.

Documentation is collected for the purposes of the risk assessment and is not an independent requirement. The level of governance might undermine the reliability of some documents showing compliance with applicable legislation. Therefore, the country's corruption level, business risk indices, and other governance indicators should be considered. In order to be able to exercise due diligence, operators must be able to evaluate the content and reliability of the documents they collect and to show that they understand the links between the different information in the documents. The obligation to obtain documents or other information should be interpreted broadly, as there are different regulatory regimes in the various countries, and not all of them require the issuing of specific documentation. Importers and traders must take reasonable measures to satisfy themselves that the documents collected are genuine, depending on their assessment of the general situation in the country or region of harvest. In cases when mitigation measures cannot cover all relevant issues (for example because of inexistence of relevant documents or impossibility to conduct additional checks in the field), a change in supply chains is necessary.

Only very specific exceptions are possible. Under the EUTR, timber and timber products covered by FLEGT licences or CITES are considered to fully meet the requirements. This means that operators who place products on the market covered by such documentation do not need to conduct due diligence on these products. This is because legality verification controls – and hence due diligence – will have been carried out in the exporting country in accordance with the Voluntary Partnership Agreements between the country and the EU,

which set the highest standards at the global level, and so operators can consider the timber concerned as risk-free.



Possible options for the incorporation of timber legality requirements into laws or regulations

The report identifies a series of options that China could pursue to incorporate timber legality requirements into laws or regulations. The options are described below.

Option 1: Develop a new Chinese timber legality assurance law on forest products

The first option could be for China to develop its own timber legality assurance law like in the EU or the USA. Chinese policy makers would have to take into account several issues if they want to pursue this option.

The EU and the US rely on the laws and regulations of the country of harvest to define 'illegal' timber, in order to avoid conflicts with the sovereignty of the country of origin. In China, existing forest and environmental laws only deal with domestically harvested timber. The National People's Congress (NPC) and the Standing Committee of the National People's Congress (SCNPC) would have to consider developing and adopting a completely new law, and addressing potential obstacles to its enactment.

The EU and the US are able to control the distribution channels to ensure the legality of imported timber. In China, the producing and processing processes should be subject to closer controls. The due diligence requirements and other legal liability mechanisms should be developed bearing in mind the characteristics of Chinese timber processing companies. The new law and regulations would have to consider the characteristics of company operations, and create a fair competitive environment and incentives for legal compliance.

In developing its own timber legality legislation, China can take into account the already existing experiences in developing and implementing similar legislation in other countries. In particular, governance experiences can be learned and used. Some basic governance principles have universal bearings, such as the establishment of industrial management systems and the legal compliance of companies. The application of good governance

principles to ensure timber legality will lay the ground for the enactment of a potential new law.

Option 2: Develop a timber legality standard, create a timber certification body, and participate actively in the international certification arena

Another option for China could be to create and support its own timber legality standard, and support the establishment and growth of a professional certification body to verify compliance with the standard.

When the EU, the US and other major timber markets enacted timber legality legislation, various industry associations, NGOs and independent research organisation in many countries set up their industry standards and certification bodies on sustainable forest management. Associations, industry organisations, NGOs and research organisations play an indispensable role in building the industry's governance capacity.

In China, the development of an industry standard and a professional certification body is at its inception. It would require further policy support and guidance. Currently, most professional certification bodies or industry standards recognised on the international market are from other countries. China would need to encourage the development of internationally qualified professional certification bodies and become active in the international certification arena.

Option 2 can be complementary to option 1. The same applies for other options mentioned below.



Option 3: Establish a national standard as a legal tool to regulate timber legality

In light of the professionalism and dynamism of national standards, China could use a standard as a mandatory tool to achieve the purpose on some specific legal requirements. For example, the Convention on the International Trade of Endangered Species (CITES) is legally binding on CITES Parties but cannot be fully implemented until specific domestic measures have been adopted for that purpose. It is therefore essential that CITES Parties

have a legal mechanism in place allowing them to implement and enforce all aspects of the Convention.

While CITES is an interesting example, one should not forget that the Convention only covers a limited percentage of timber species so national legislation would be needed to regulate the overall trade in timber and timber products.

Option 4: Develop local laws and regulations to regulate the legality of timber imports

Part of China's imported timber comes from some high-risk producing countries, which are geographically adjacent to China. Cross-border timber trade is concentrated in specific border areas or specific trade ports. The provinces and cities where these areas and ports are located have some degree of jurisdiction over this type of trade. Prohibiting illegal timber imports from these high-risk areas through local laws and regulations is another option that China could follow.

These local laws and regulations could be more targeted. For high-risk timber imports, more stringent administrative measures could be taken, such as requiring the declaration, approval and licensing of timber imports. In response to the international legality requirements of the timber market, the Yunnan Province could require all imported timber to have a certificate of legal origin issued by Myanmar's Government or a professional certification body on the basis of existing regulations. For specific high-risk forest area or tree species, the use of more stringent border management tools could be used through cooperation with the Government of Myanmar.

Option 5: Regulate the legality of imported timber through foreign trade law and foreign trade authorities

Another option could be to use China's Foreign Trade Law to stop illegal timber imports. China's Foreign Trade Law was adopted and amended in 2004. It includes provisions on the restriction and prohibition of import and export of goods. The Ministry of Commerce of the Government of China (MOFCOM) has published a catalogue of goods and technologies whose import and export are restricted or prohibited in accordance with the Foreign Trade Law.

Illegal timber could be integrated into this catalogue system but would require specific technical support. A study of the relevant MOFCOM provisions and practices on the development of catalogues is recommended. Based on the results of this study, a possible catalogue could be designed for imported timber based on the different risk levels in order to achieve the expected regulatory objectives.

Another regulatory tool related to the Foreign Trade Law and the MOFCOM relates to tariffs and subsidies. Tariff catalogues could be amended based on the type of timber or the risk level of illegal logging. This would induce a change in the trade behaviour of timber importers in order to achieve regulatory objectives.

Option 6: Expand the scope of the forest and criminal laws to include violations of laws in foreign countries

The EU and US experiences show that appropriate penalties should be set to ensure companies abide by the law. Pursuing this option would require the amendment and interpretation of the relevant laws in China, in particular the criminal law.

China's criminal law punishes the violations of the forest law, including illegal logging and the destruction of national key protected plant species. China could explore incorporating the legal requirements of other countries into the forest and criminal laws to support responsible behaviour and efforts in producing countries.

Option 7: Bilateral or multilateral agreements and law enforcement cooperation

A final option could be for China to enter into bilateral or multilateral agreements to control international illegal timber trade based on the characteristics of high-risk areas.

China could strengthen its communication and cooperation with the Russian Federation at the legal level, establish mutually-supportive rules on timber import and export, and strengthen bilateral law enforcement and supervision. China and the Russian Federation could ensure timber legality through bilateral cooperation. Such a cooperation would not only effectively help China meet the requirements of the European and US markets, but also ensure the development of healthy, sustainable and stable trade relations between China and the Russian Federation, in line with the long-term interests of both countries.

For those developing countries with weak forest governance capacity, China should consider the issue of illegal timber from a long-term geopolitical point of view, and not only take into account short-term interests. South-east Asia and Africa have a significant influence on China's international policy. China could take measures to safeguard regional and long-term stability. In fact, it would help South-East Asian and African countries build primary and secondary timber processing industries to reduce their log exports. It will not only increase these countries' financial incomes and promote their stability and development, but also ease the environmental and social pressures brought by the intensive low-end wood processing industry. There is the potential to achieve a win-win situation through bilateral or multilateral agreements between China and timber producing countries in Africa and Asia. The restructuring of the industrial chain in the region could be achieved through Governmental guidance.



Challenges to the inclusion of timber legality requirements in Chinese laws or regulations

Diverging definitions of illegality

China's forestry authority has enacted stringent laws and regulations on the trade in domestic timber. However, the legality of imported timber is mainly determined by the laws of the country of harvest. Apart from the regulation of valuable tree species, China has not restricted the import of timber from abroad. It considers that all timber legally exported from the exporting countries and that has been cleared by Chinese customs is legal.

Why does China have different policies for imported and domestic timber? The answer lies in the different understanding of the legality definition. The Chinese Government believes that legality is mainly based on the laws and regulations of the exporting country, which is responsible for implementing governance measures. The regulation of imported timber could be seen by some stakeholders as interference in the internal affairs of other countries. The EUTR offers an interesting solution to this challenge. It does not impose any technical requirements for imported products and fully respects the sovereignty of third countries by defining illegal timber in reference to the applicable legislation in the country of harvest.

The complexity of amending industry laws and regulations in China

China's legal system is complex and adaptive. The revision of a sector's laws and regulations is to be based on the views of relevant industry authorities. Only if industry authorities are in agreement can the amendment be adopted. In such cases, the State Council would submit the amendment to the National People's Congress Standing Committee for approval. This process is very lengthy and requires a variety of conciliation skills. It could take a few years, and in some cases, one could not predict when the amendment process would be completed.

Conflicts of interests and competence in the enactment of laws and regulations

If the State Council of China developed timber legality regulations, it would have to coordinate with other Ministries, public authorities and stakeholders. Competence and jurisdiction would have to be determined and the approval of other Government bodies would have to be sought. In addition, more research about the impact of timber legality legislation on China's domestic timber industry would be needed to create incentives for the sector to support it.

The capacity of Chinese companies and associations in the forest sector would need to be strengthened

The implementation of legislation on timber legality in China would require the prohibition of illegal timber entering the Chinese market. This in turn would oblige Chinese companies dealing with forest products to carry out due diligence checks to ensure the legality of imported timber.

Although the Chinese Government has started developing a timber legality verification system and conducts pilot projects with members of the China National Forest Products Industry Association, the current verification system and standards are not mature yet. They

are not well understood by the public and awareness raising efforts need to be strengthened.

Furthermore, the development of timber legality verification system is a complex process. It would require Chinese companies dealing with forest products to continue to adjust practices, which might lead to increases in production costs. The majority of China's forest products companies are small and medium enterprises (SMEs), which have limited production and financial capacity. They have a low adaptive capacity and in the short term would likely face decreasing profits. The survival of these SMEs would need to be considered in the implementation of timber legality legislation.

The response of countries exporting timber to China

China's timber legality legislation would not only be constrained by domestic factors, but might also be challenged by external factors, including the response of countries exporting timber to China. These countries might argue that China's timber legality requirements constitute a non-tariff barrier to trade and could institute proceedings before the World Trade Organization (WTO).

This challenge was faced by the legislators in the EU when the EUTR was developed. The solution lays in the fact that the EUTR covers trade in timber harvested within the EU as well as imported timber.

In the context of globalisation, international trade in forest products is not confined to forestry, but has political, diplomatic, technological and economic dimensions. Once the law would be enacted, the timber legality requirements would not only influence the behaviour of domestic timber suppliers, but also that of foreign timber suppliers. Suppliers that operate in areas where the risk of illegal logging is high and/or are unable to provide evidence of the legality of their timber will have to develop the necessary standards which will directly contribute to the ultimate goal of fighting the illegal logging. Those that would not develop the necessary standards would likely withdraw from the Chinese market, protected from the risk of placing illegal timber and timber products.

Influence from consumer countries

China's timber legality legislation would be important for consumer countries. Many countries fight against illegal logging, however sometimes the understanding and development of timber legality standards present some differences to reflect specific national or regional characteristics. The Chinese Government would have take this issue into account when considering the development of timber legality laws and regulations. It would be very important to closely cooperate with other consumer countries in order to reach a common understanding on the timber legality standards.