

Forests and forest people **in EU Free Trade Agreements**



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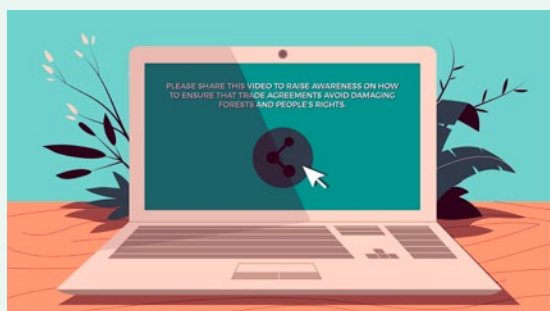
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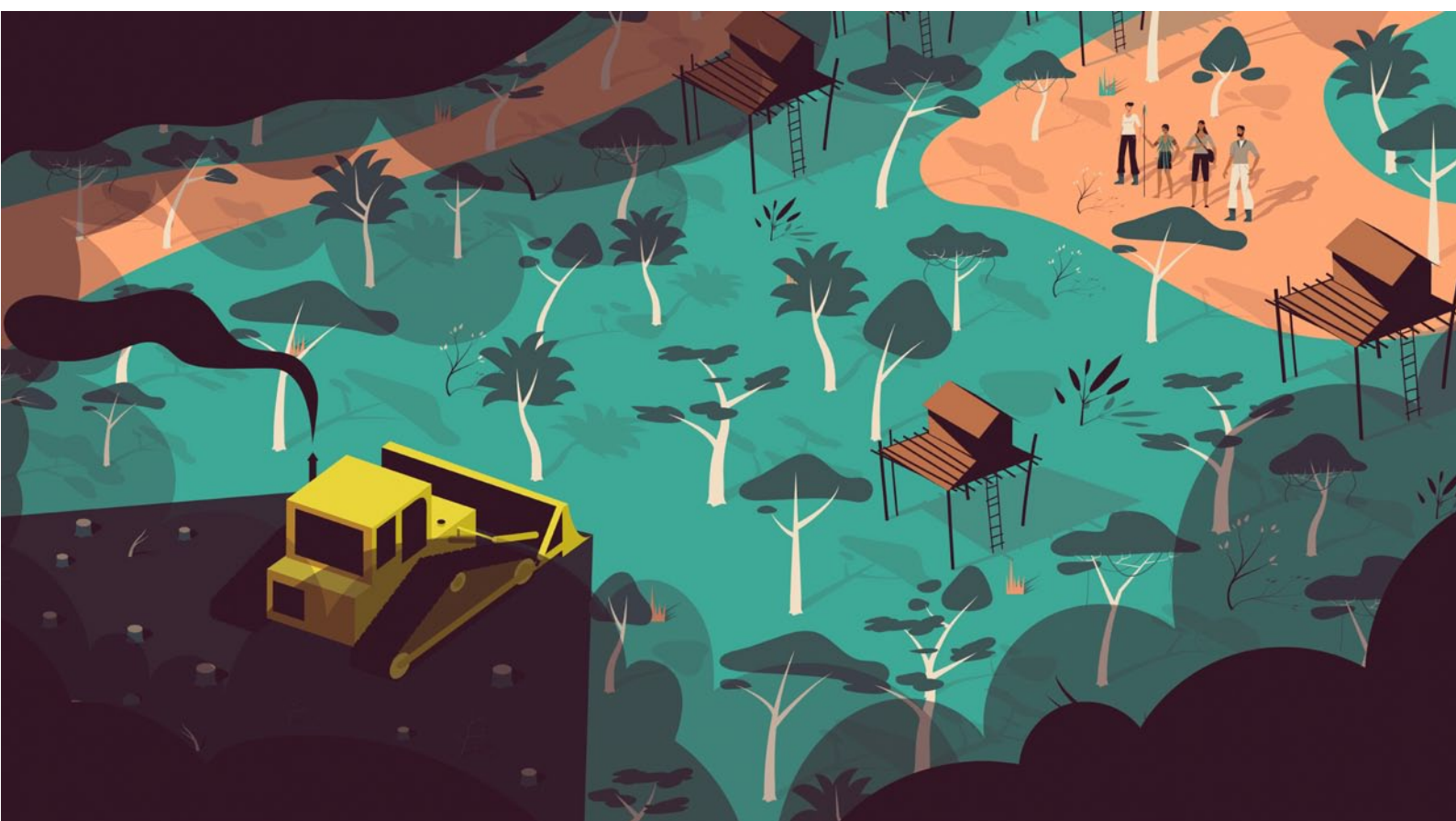


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Acronyms

BAU	business as usual	TEU	Treaty on European Union
CBD	Convention on Biological Diversity	TFEU	Treaty on the Functioning of the European Union
CETA	Comprehensive Economic and Trade Agreement	TREND	Trade & Environment Database
CFS	Committee on World Food Security	TSD	Trade and Sustainable Development
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora	VGGTs	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests
CSF	Civil Society Forum	UN	United Nations
CSO	civil society organisation	USAID	United States Agency for international Development
CSR	Corporate Social Responsibility	VPA	Voluntary Partnership Agreement
DAG	Domestic Advisory Group	VSS	Voluntary Sustainability Standards
DCFTA	Deep and Comprehensive Free Trade Area	WTO	World Trade Organization
DG	Directorate General		
EBA	Everything But Arms		
EEAS	European External Action Service		
EP	European Parliament		
EPA	Economic Partnership Agreement		
EU	European Union		
EUTR	EU Timber Regulation		
FAO	Food and Agriculture Organization		
FLEGT	Forest Law Enforcement, Governance and Trade		
FRC	forest-risk commodity		
FTA	Free Trade Agreement		
GHG	greenhouse gas		
ILO	International Labor Organization		
JIC	Joint Implementation Committee		
LDCs	Least Developed Countries		
LULUCF	Land Use, Land Use Change and Forestry		
MEA	Multilateral Environmental Agreement		
NDC	National Determined Contribution		
NEP	National Energy Policy		
NGO	non-governmental organisation		
OECD	Organization for Economic Co-operation and Development		
OSINFOR	Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre		
SDG	Sustainable Development Goal		
SIA	Sustainability Impact Assessment		
SPS	Sanitary and Phytosanitary Measures		

Executive summary

The EU has made strong commitments to mitigate climate change, stop deforestation and respect human rights, including community rights to land. The trade agreements the EU is currently negotiating with highly forested countries risk, however, undermining these commitments. They do not yet contain sufficient provisions or enforcement mechanisms to prevent forest loss, mitigate climate change and halt human rights abuses. This discussion paper proposes ways to address this.

To ensure coherence between EU trade policy and EU commitments on forests, climate change and human rights, the EU must ensure that the trade agreements it is currently negotiating with highly forested countries – such as Indonesia, Malaysia, the Philippines and the Mercosur bloc – include provisions and enforcement mechanisms that ensure that an increase in trade does not increase deforestation and human rights violations.

This report lists the main commitments the EU has made to mitigate climate change, protect forests and respect human rights – including customary tenure rights of local communities and Indigenous Peoples ([chapter 1](#)). It also highlights the risk that these EU commitments are being undermined by DG Trade when negotiating trade agreements with highly forested countries ([chapter 2](#)).

Chapter 3 gives the following recommendations for how to improve participation, monitoring and enforcement of the commitments that have been made. First, matters affecting forests and land rights should be discussed in a transparent and inclusive manner with all stakeholders and the right experts around the table. Trade partners could do this by jointly developing a ‘roadmap’ with participation of civil society actors. Lessons can be learned from the EU FLEGT (Forest Law Enforcement, Governance and Trade) action plan. Second, the civil society monitoring mechanisms should be clarified, strengthened and well resourced. Third, key questions relating to the effectiveness of the dispute resolution process must be addressed, and mechanisms such as inspections and ex-post evaluations should be included to ensure compliance.

Chapter 4 proposes measures that would ensure that all trade agreements with highly forested countries do not contribute to deforestation and ensure respect for human rights, including customary tenure rights. The negotiation of a Free Trade Agreement (FTA) is also a good moment to discuss how to implement the parties’ National Determined Contributions (NDCs) and provide the means for their effective implementation. Last, parties should enforce these environmental and human rights obligations in the same way and on the same basis as the trade provisions.

To mitigate risks of deforestation and human rights abuses, strengthening the process and the content of trade agreements is important but insufficient. A self-standing human rights due-diligence regulation based on the widely adopted Food and Agriculture Organization (FAO) Guidelines for the governance of tenure may be needed to ensure that forest-risk commodities imported into the EU do not contribute to violations of community tenure rights. It is also worth looking at the idea of developing trade agreements for certain commodities (e.g. on cacao or rubber), similar to the Voluntary Partnership Agreements (VPAs) for timber, between the EU and producing countries.

Recommendations

This is a discussion paper to share our concerns with DG Trade that EU FTAs with forested countries may lead to a violation of human rights, notably community tenure rights, and increase deforestation. This paper proposes ways forward to address these concerns.

- The first proposal focuses on identifying forests and community tenure rights as priority areas that must be discussed in an open, inclusive and transparent process with local civil society organisations and, where possible, community representatives. Lessons can be learned from the FLEGT process. The aim would be for the parties to the agreement to develop a roadmap to address concerns raised.
- The second proposal focuses on how the existing civil society monitoring mechanisms should be clarified, strengthened and properly resourced. Suggestions already made build on the ongoing and positive consultation process to improve content and process of the Trade and Sustainable Development chapters.
- Third, this paper suggests that FTAs include binding and enforceable provisions to control deforestation, respect customary tenure rights, implement the Paris Agreement and put rules in place that require companies to act in line with international obligations.
- Lastly, there are obvious limitations to FTAs. So, for DG Trade to ensure that supply chains into the EU are free from human rights abuses and do not lead to deforestation, as proposed in the Trade for All Policy, we point to other options.
- Developing a Human Rights Due Diligence Regulation could be one way forward. We have developed this idea in another paper.¹ Developing a bilateral trade agreement with Ghana and/or Ivory Coast on cacao, similar to the VPA, is another way.² We are currently working with partners in these countries to develop this further.

1 See Fern reports, "Developing EU measures to address forest-risk commodities: What can be learned from EU regulation of other sectors?", November 2016 and "Hardening international soft law frameworks into EU measures to address forest-risk commodities", October 2018

2 Learning lessons from FLEGT-VPA to promote governance reform in Ghana's cocoa sector, July 2018, Fern, Tropenbos International, Tropenbos Ghana, EcoCare Ghana, and Forest Watch Ghana.

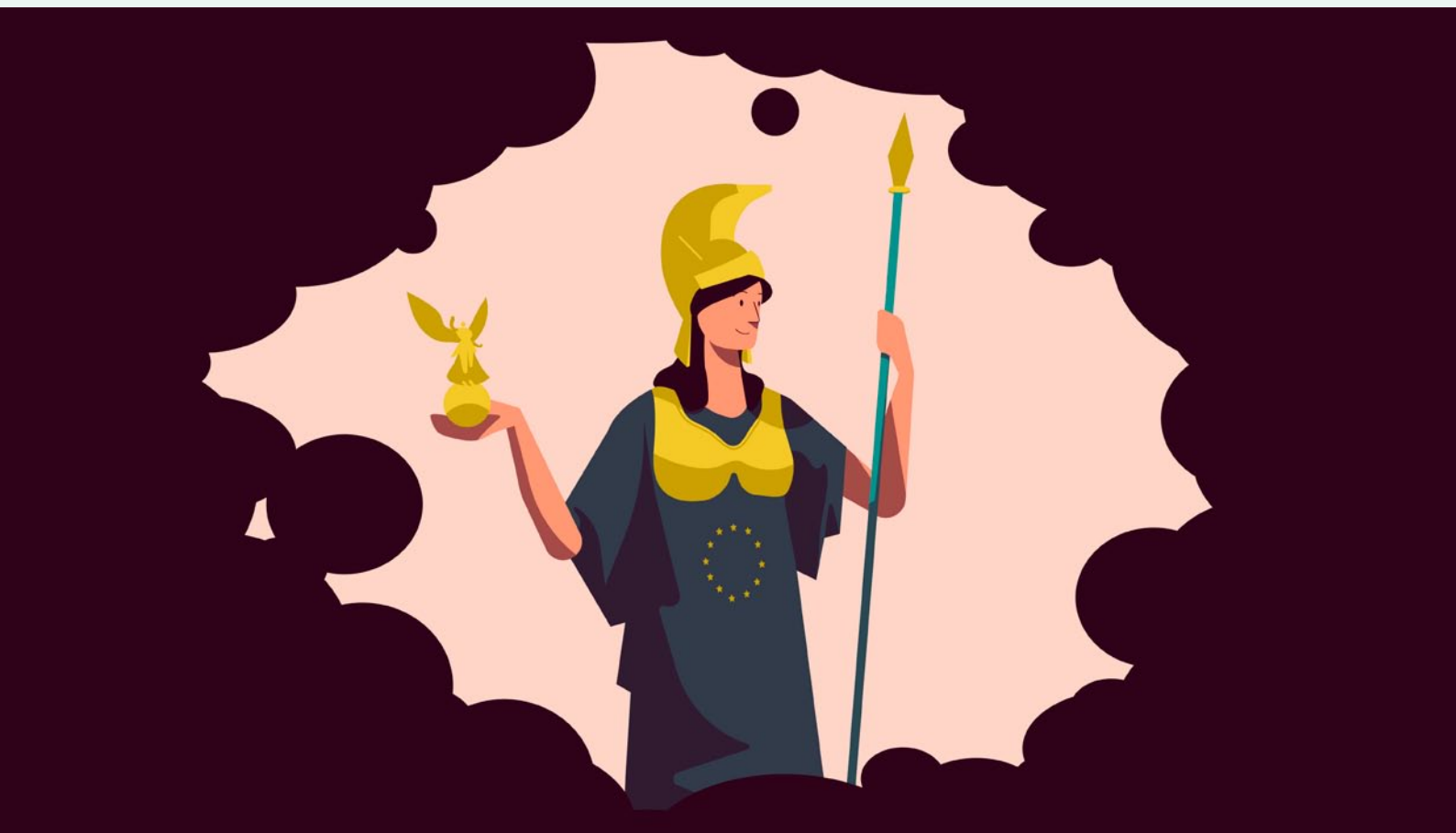
CHAPTER 1

EU commitments to protect forests and respect rights



‘As the world’s largest market of consumers of goods and services, our choices are affecting many hundreds of millions of people every day. We therefore have a responsibility to ensure that those choices do not undermine human rights, labour rights, the protection of the environment and economic opportunity. In short, we need supply chains that are responsible. The question is how to achieve it.’³

DG Trade Commissioner Cecilia Malmström



3 http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154020.pdf

EU commitments to forest protection

By ratifying the Paris Climate Agreement, the EU committed to 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.⁴ DG Trade explicitly states that its trade policy supports the implementation of international environmental rules, including the Paris Agreement⁵ and the European Parliament urges the EU to include binding and enforceable provisions to effectively implement the Paris Agreement.⁶

Forest destruction is responsible for roughly 12 per cent of global carbon dioxide (CO₂) emissions.⁷ Unless forest loss is halted, the EU will fail to meet the Paris commitment. In addition, to stay within 1.5°C, the EU must support efforts to recapture CO₂ from the atmosphere. For that, we need more forests and trees on farms. Ensuring effective implementation of National Determined Contributions (NDCs) is an important (though insufficient) first step to implement the Paris Agreement, which should be supported – or at least not undermined – by EU trade policy.

By signing up to the Sustainable Development Goals (SDGs), the EU committed itself to promote the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally by 2020.

These are only a few of the official commitments that the EU has made to protect and restore forests; others include the New York Declaration on Forests to eliminate deforestation from agricultural supply chains,⁸ and the Bonn challenge to restore 350 million ha of deforested and degraded land by 2030.⁹ To ensure policy coherence, it is important to ensure that Free Trade Agreements (FTAs) support the implementation of these commitments.

EU commitments to respect rights

Forest protection must go hand in hand with respect for human rights, including the customary tenure rights of local communities, who own most of the world's forest land under customary law. Often the national laws of these forest countries fail to recognise these customary rights, creating legal uncertainties and leading to human rights abuses. The tide is turning, however, with more than 50 countries having adopted laws recognising community tenure rights in the last two decades.¹⁰ This is a positive trend, as numerous studies have shown that where communities own their land under national law, creating legal certainty, forests are better protected.¹¹

4 <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>

5 http://ec.europa.eu/trade/policy/policy-making/sustainable-development/#_environmental-protection

6 European Parliament, report on transparent and accountable management of natural resources in developing countries: the case of forests, September 2018 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0249+0+DOC+XML+V0//EN&language=en>

7 With deforestation decreasing but fossil fuel emissions increasing, this percentage has been steadily going down from more than 20 per cent to between 6 and 17 per cent. See <https://www.nature.com/articles/ngeo671>

8 <http://forestdeclaration.org/goals/>

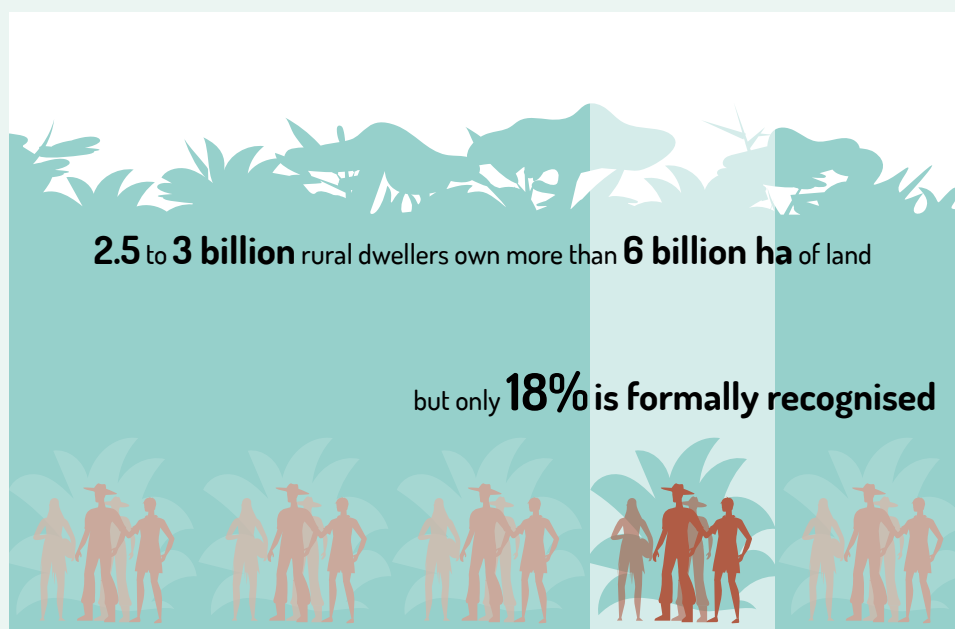
9 <http://www.bonnchallenge.org/>

10 Liz Alden Wily, Collective Land Ownership in the 21st Century; Overview of Global Trends; May 2018 at www.mdpi.com/journal/land

11 Including: <https://invisibleperu.com/deforestation-case-study/>; <https://rightsandresources.org/en/blog/mai-ndombe-press-release/#.WxPbVMKG-70>; <http://www.wri.org/sites/default/files/securingrights-full-report-english.pdf>; Seymour F, La Vina T, Hite K, Evidence Linking Community Level Tenure and Forest Condition: An Annotated Bibliography; February 2014.

Customary community land rights

Although many countries have adopted constitutions or land laws recognising community tenure, the majority of communities still lives in legal limbo. Globally, an estimated 2.5 to 3 billion rural dwellers own more than 6 billion hectares of land under customary law, but much of this is not yet acknowledged as their property. Currently only 18 per cent of land area in 100 countries studied is formally recognised as owned or controlled by local communities and Indigenous Peoples.¹² This leads to frequent conflicts when land customarily owned by communities or Indigenous Peoples is without their consent leased to companies for logging or agricultural concessions (see also the Box on sugar in Cambodia, on page 18).



According to the EU Action Plan on Human Rights and Democracy, respect for human rights is at 'the heart of EU external action, without exception. In particular it will integrate the promotion of human rights in trade, investment [and] technology'.¹³ Article 21 of the Treaty on European Union (TEU) affirms the EU's determination to promote human rights and democracy through all its external actions. On the common commercial policy specifically, Article 207 of the Treaty on the Functioning of the European Union (TFEU) specifies that it 'be conducted in the context of the principles and objectives of the Union's external action'. Moreover, Article 11 of the TFEU states that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. Before FTA negotiations are launched or finalised, the European Commission must consider the human rights situation of the partner country.¹⁴

¹² Liz Alden Wily, *ibid.*

¹³ https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf

¹⁴ https://ec.europa.eu/anti-trafficking/eu-policy/action-plan-human-rights-and-democracy-2015-2019_en

Along with the assertion of the EU's commitment to human rights in external actions, the TEU also cites equality and non-discrimination, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as founding values of the EU (Article 2). In its relations with the wider world, Article 3 (5) of the TEU commits the EU to upholding those values, including 'the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

The Charter of Fundamental Rights of the EU and the European Convention on Human Rights (via Article 6 (3) TEU) provide key sources of rights to be observed by the EU – including in their application to EU external action – as do other sources of international law, including the UN Charter and customary international law. Of relevance in relation to customary tenure rights are the following provisions of the Charter: prohibiting discrimination against minorities (Article 21); committing the EU to respecting cultural, religious and linguistic diversity (Article 22); the right to respect for a private, family life and home (Article 7); and the right to property (Article 17).

Human rights in respect of land and resources are regarded as pivotal to sustainable development, including by EU policy on external action. For example, it is acknowledged that the EU was instrumental in the development and implementation of the UN FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs),¹⁵ which have also attracted strong support from all EU Member States and most of the countries that the EU is negotiating an FTA with. The VGGTs' recognition that states must respect customary tenure rights has its roots in a wealth of international law and jurisprudence, including the UN's and the regional African and the American human rights treaty mechanisms.¹⁶

EU commitments to enhance environmental and human rights

The EU has an obligation to 'foster sustainable environmental development' and to 'help develop international measures to preserve and improve the quality of the environment'.¹⁷ In addition, environmental requirements must be integrated into EU commercial policy.¹⁸ An FTA negotiated and concluded by the EU should not just list the commitments of the contracting parties to comply with the international environmental or social obligations they have ratified: it should also – based on Article 21 of the TEU – require concrete actions to implement these commitments. This is confirmed by Article 191 (1) of the TFEU, which states that EU environmental policy shall promote 'measures at international level to deal with regional and worldwide environmental problems and in particular combating climate change'.

DG Trade confirms that modern EU trade agreements must contain rules on trade and sustainable development that must 'follow international labour and environment standards and agreements; effectively enforce their environmental and labour laws; not to deviate from environmental or labour laws to encourage trade or investment, thereby preventing a 'race to the bottom'; sustainably trade natural resources, such as timber and fish; combat illegal trade in threatened

¹⁵ <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

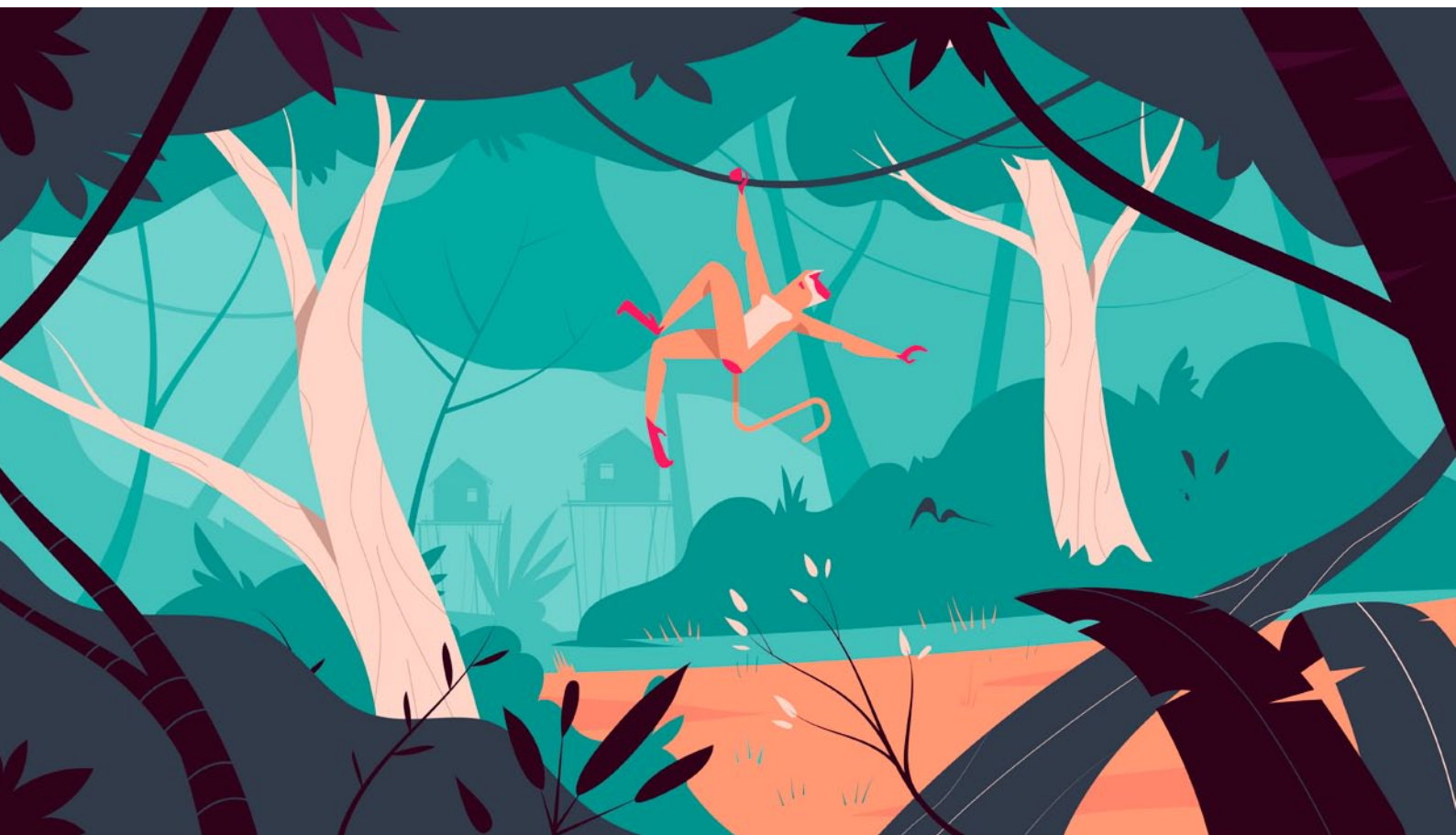
¹⁶ Much of the international jurisprudence has been developed in the context of indigenous and other peoples with particularly all-encompassing cultural connection to their traditional lands, and for whom the impacts of dispossession and forced eviction are potentially ethnocidal. It is for this reason that human rights jurisprudence has dictated that such peoples should not suffer interference with their customary tenure rights without their free, prior and informed consent.

¹⁷ Article 21(2) (d) and (f) TEU.

¹⁸ See Article 11 TFEU.

and endangered species of fauna and flora and encourage trade that supports tackling climate change.¹⁹

FTAs with highly forested countries may lead to increases in forest destruction, CO₂ emissions and human rights violations due to an expected increase in trade. Without strong provisions to protect forests and respect rights, FTAs with highly forested countries risk undermining DG Trade's own policy as well as wider EU commitments to halt climate change, reduce deforestation and respect rights. The EU must therefore include as a minimum clear provisions and enforcement procedures in its trade agreements to prevent these agreements from exacerbating deforestation, climate change and to ensure they respect community rights to their land.



19 Sustainable development in EU trade agreements: <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>

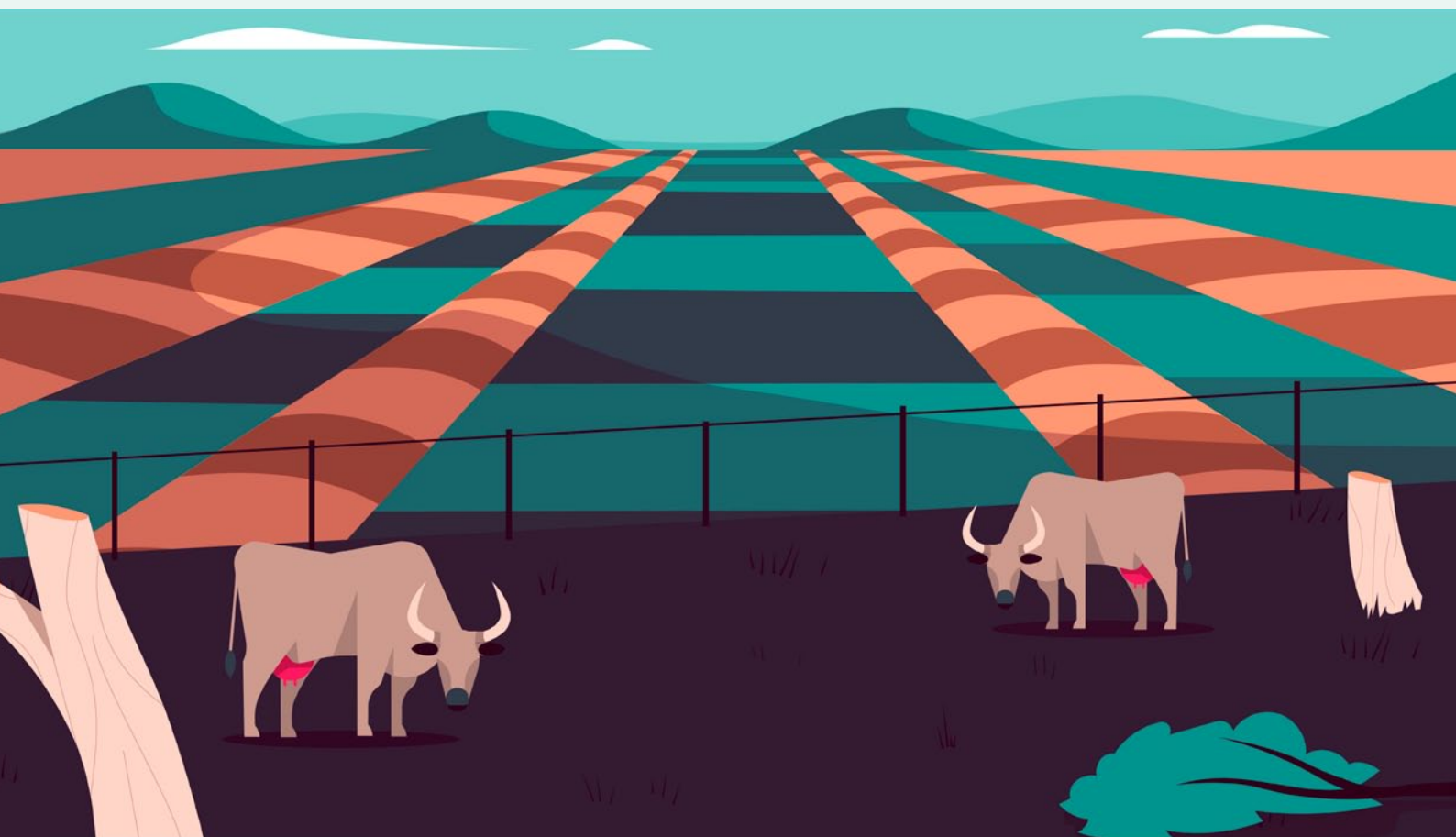
A high-angle photograph showing a massive pile of large-diameter logs stacked on a wooden pier or barge. A person in a blue jacket and hat stands on the logs in the middle ground to provide a sense of scale. The logs are weathered and show signs of being cut. The background shows a body of water.

CHAPTER 2

Trade and deforestation

‘The EU has been leading the world in imports of “embodied deforestation” in the form of agricultural and timber products.’

European Commission²⁰



20 <http://ec.europa.eu/environment/forests/pdf/1.%20Report%20analysis%20of%20impact.pdf>

Links between trade and deforestation

There are direct and indirect links between trade and deforestation. A recent study²¹ links tropical deforestation to the production and trade of four increasingly traded forest-risk commodities (FRCs): beef, soy, palm oil, and wood products. The study concludes that between 2000 and 2011, the production of these four commodities, in just seven countries (Argentina, Bolivia, Brazil, Paraguay, Indonesia, Malaysia and Papua New Guinea), was responsible for 3.8 million ha of forest loss annually, leading to 1.6 billion tons of CO₂ emissions annually, roughly 40 per cent of total tropical deforestation and associated emissions.

One third of these emissions were embodied in products traded with other countries. In six of these countries, commodity production for export was the principal driver of deforestation. If we exclude Brazilian beef (much of which is consumed domestically), 57 per cent was embodied in exports, with the EU and China the biggest importers. Hence EU trade is an important factor in driving deforestation, notably through its demand for commodities, including for livestock and dairy production.

This deforestation is often illegal. Illegal clearance for commercial agriculture is estimated to be responsible for half of all tropical deforestation since 2000.²² Often products grown or reared on recently deforested land are for export. There is documented evidence of widespread breaches of regulations in the conversion of forest for commercial agriculture in most countries where large areas of tropical forest are being lost.²³ In many cases entire developments are illegal, because the right to clear the land does not exist or was illegally issued or obtained, often in contravention of laws meant to protect the rights of local peoples and/or the environment. Even where such rights are legitimate, often companies breach regulations and contractual terms during development of the land, such as by clearing more forest than permitted or failing to make agreed payments to local communities or the government.

Previous studies commissioned by the EU have shown that the EU has been leading the world in imports of 'embodied deforestation' in the form of agricultural and timber products. The EU is also one of the largest importers of *illegal* deforestation. The Fern study 'Stolen Goods'²⁴ estimates that in 2012, the EU imported €6 billion of soy, beef, leather and palm oil which were grown or reared on land illegally cleared of forests in the tropics – almost a quarter of the total world trade in these goods. The equivalent of one football pitch of forest was illegally felled every two minutes between 2000 and 2012 to supply the EU with these commodities.

Although the EU is committed to act to halt global deforestation and mitigate climate change, it cannot expect to achieve this while continuing to contribute to the problem through its consumption of and trade in commodities driving deforestation. Although reducing consumption of forest risk commodities may be not in line with EU trade policy, DG Trade can and must ensure that human rights and notably community land rights are respected, and it can and should use FTAs to promote international environmental and social commitments.

21 <http://www.focali.se/en/articles/artikelarkiv/agricultural-commodity-consumption-and-trade-responsible-for-over-40-of-tropical-deforestation>

22 Lawson S, Consumer Goods and Deforestation: An Analysis of the Extent and Nature of Illegality in Forest Conversion for Agriculture and Timber Plantations, Forest Trends, September 2014.

23 Ibid.

24 Stolen Goods: The EU's Complicity in Illegal Tropical Deforestation, Fern report, March 2015.

Recent studies highlighting trade as a driver of deforestation

Faria and Almeida (2016)²⁵ show empirical evidence that between 2000 and 2007, when Brazilian municipalities of the *Amazonia Legal* opened up to international trade, deforestation increased.

DeFries, Rudel, Uriarte, and Hansen (2010)²⁶ show the same relationship at the national level for the period 2000–05, arguing that policies should focus on reducing deforestation that is carried out for industrial-scale, export-oriented agricultural production.

Gaveau et al. (2016)²⁷ examined the effect of industrial plantation in Borneo since the 1970s. These authors find that it has been the main cause of deforestation of old-growth forests in the Malaysian part, and to a lesser extent in the Indonesian part too.

Schmitz et al. (2015)²⁸ show that further liberalisation would lead to an expansion of deforestation in Amazonia due to the comparative advantages of agriculture in South America. They estimate that globally (using a spatially explicit economic land-use model coupled with a biophysical vegetation model), an additional area of between 30 and 60 million ha (5–10 per cent) of tropical rainforests would be cleared, leading to 20–40 Gt of additional CO₂ emissions by 2050.

An overview of links between trade and deforestation

A 2010 research paper by the World Trade Organization (WTO),²⁹ pulling together existing research into the link between trade and deforestation, concluded that deforestation is affected primarily by agricultural output prices. If an increase in trade pushes local prices upwards, deforestation will increase. Highly forested countries that have a comparative advantage producing agricultural goods and timber products will be potentially most affected by an increase in trade. Therefore countries most at risk from increased deforestation linked to increased trade in forest-risk commodities include Brazil, Andean countries, Central America, Canada, Indonesia and Malaysia. There is less of a risk of deforestation related to trade in agricultural exporting countries with low forest cover, although there may be if prices increase sufficiently. Countries that are currently net importers, and have abundant forest, may also increase deforestation.

Transport also plays a key role in trade flows and hence in deforestation. Although transport investments close to developed areas do not increase deforestation significantly, they do close to or in forested areas. Deforestation increases with lower transport costs. Transport costs, measured according to distances between markets, are among the most significant determinants of trade flows.

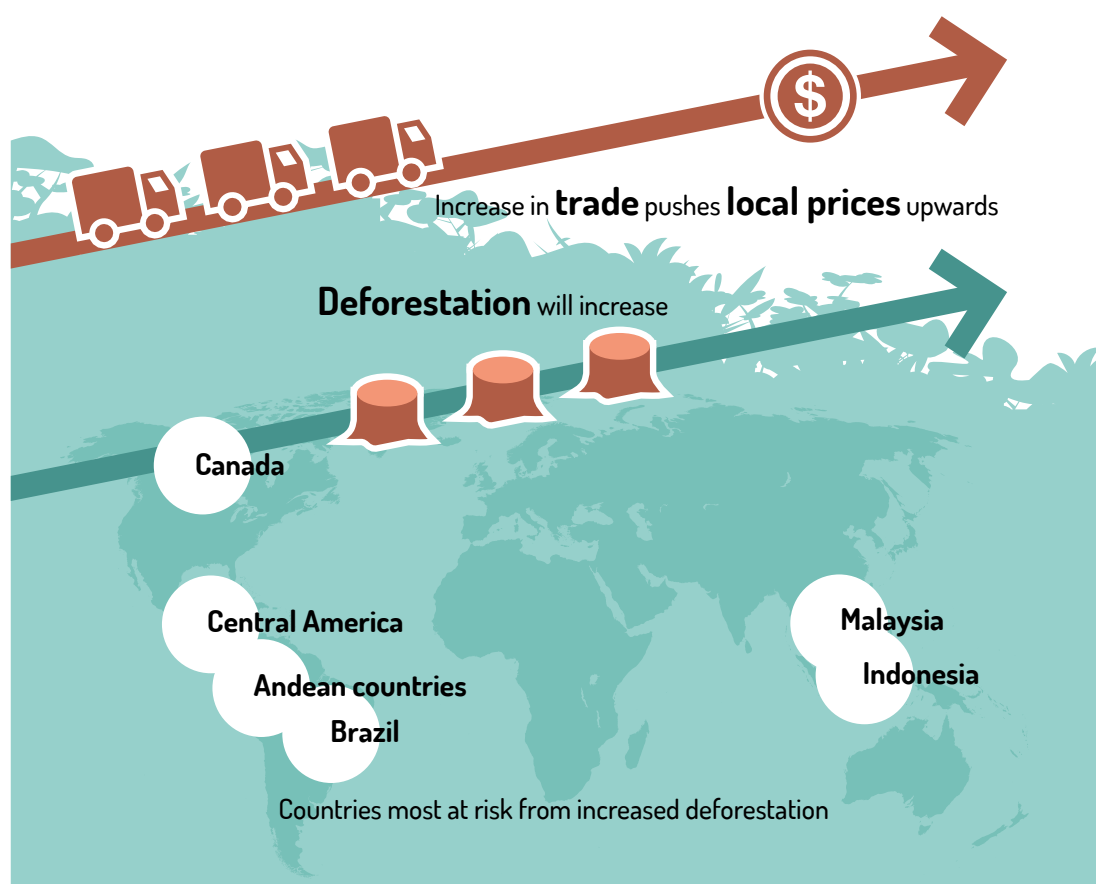
²⁵ http://www.usp.br/nereus/wp-content/uploads/TD_Nereus_03_20131.pdf

²⁶ https://www.researchgate.net/publication/248828436_Deforestation_Drive_by_Urban_Population_Growth_and_Agricultural_Trade_in_the_Twenty-First_Century

²⁷ <https://www.ncbi.nlm.nih.gov/pubmed/27605501>

²⁸ https://www.researchgate.net/publication/269420321_Agricultural_trade_and_tropical_deforestation_interactions_and_related_policy_options

²⁹ https://www.wto.org/english/res_e/publications_e/wtr10_robalino_herrera_e.htm



It is clear from the WTO study that trade can increase the depletion of the resource, which could lead to lower welfare. Instantaneous gain can lead to ongoing resource depletion. Institutions can also affect welfare through their effect on trade. If institutions are not functioning correctly, and if there is a lack of good governance, it is likely that trade reduces welfare. Good governance is therefore a precondition to ensure an increase in trade will not have a negative impact on forests and people.

Last, decreased deforestation in one country can easily lead to increased deforestation in another. It has been estimated that between nine and 42 per cent of reductions in forest products in one country will be offset by increases in another country.³⁰ There are clear indications that the reduction in deforestation in Brazil from 2005 onwards, thanks to stringent national policies, may have simply leaked over into neighbouring countries such as Paraguay and Peru.³¹ This is something that needs to be addressed specifically with regional trade agreements such as with the Mercosur block.

There are other more indirect factors linking trade with deforestation, which will not be further discussed here but which should be considered when doing an FTA Sustainability Impact Assessment (SIA), including international market prices, income levels, exchange rates, and trade policies favouring manufacturing, which may contribute to a reduction in deforestation.

To ensure coherence between EU trade policy and EU commitments on forests, climate change and human rights, the EU must ensure that the trade agreements it negotiates with highly forested

30 <https://www.sciencedirect.com/science/article/pii/S0305750X16305411>

31 <https://www.sciencedirect.com/science/article/pii/S0305750X16305411>

countries – such as the Mercosur block (especially Brazil and Paraguay), Indonesia, Malaysia and the Philippines – include provisions and enforcement mechanisms that ensure that an increase in trade does not increase deforestation and respect human rights, including community tenure rights.

Trade and land rights violation

The potential impact of EU trade policies and actions on local communities is obvious. The Box below provides a clear example. Trade agreements are designed to provide favourable conditions for trade, and for many developing countries, that means making it easier to trade commodities resulting from the dispossession of communities. Mirroring the language of the recent EU report³² on the ‘embodied deforestation’ footprint from EU trade in forest-risk commodities, commodities often also entail ‘embodied human rights violations’. It is therefore essential that, when negotiating FTAs with highly forested countries, the EU ensures that the FTAs’ provisions and implementation of the FTAs do everything to respect human rights.

Sugar exports from Cambodia under the Everything But Arms Scheme

Under the Everything But Arms scheme,³³ Cambodia has benefited from duty free access to the EU for exports of all products, except arms and ammunition since 2011. This has led to an increase in investment in the sugar sector, causing serious human rights abuses and deforestation.³⁴ In 2017, 40 per cent of Cambodia’s exports went to the EU.

To fuel the sugar boom, the government of Cambodia handed out concessions to companies that overlapped with private land of farmers and commonly owned lands and natural resources.³⁵ These communities called on the EU to suspend preferential access for Cambodian sugar, and there have been numerous reports that sugar concession-holders were forcing thousands of rural people off their land.³⁶

The European Parliament issued an urgent resolution in 2012 calling on the Commission to investigate these human rights abuses and to suspend EBA preferences on agricultural products from Cambodia in cases where human rights abuses are identified.

A delegation of the European Commission and the European External Action Service (EEAS) visited Cambodia in July 2018 to evaluate the situation and will consider further steps.³⁷

32 http://ec.europa.eu/environment/forests/impact_deforestation.htm

33 The Everything But Arms arrangement is part of the Generalised Scheme of Preferences developed by the EU. It unilaterally grants exporters from the Least Developed Countries (LDCs) tariff-free and quota-free access to its market for all products (except arms and ammunition) with the aim to contribute to the economic development of these countries and their integration into the global trading system.

34 Bittersweet Harvest, a Human Rights Impact Assessment of the European Union’s Everything But Arms Initiative in Cambodia, Equitable Cambodia • Inclusive Development International, 2013.

35 Ibid

36 <http://www.boycottbloodsugar.net/the-campaign/>

37 http://europa.eu/rapid/press-release_IP-18-4467_en.htm

CHAPTER 3

Process: participation, monitoring and enforcement



‘A central element of improving the accountability of the EU institutions is in addressing how they engage with civil society organisations in Brussels and beyond. Common rules for all EU institutions on stakeholder engagement and civil society dialogue would no doubt be an important step to this end.’³⁸

European Ombudsman Emily O'Reilly



Process-related problems

The participation of civil society organisations (CSOs) in the development, implementation and monitoring of trade agreements and access to information is critical. Without proper access to relevant information, participation of CSOs will always remain limited. The current practice, however, lacks transparency and does not allow for full participation of CSOs in the development of trade agreements. Even if the Commission has recently made improvements in response to the controversy over the Transatlantic Trade and Investment Partnership, more is expected. Key demands from civil society which are not yet satisfied include the timely release of proposals on negotiating positions, consolidated texts, minutes of meetings, public announcements of negotiation rounds, full involvement of social partners and CSOs in the negotiations of the agreements, the realisation of impact assessments and monitoring of the implementation of agreements.

The structures to involve CSOs in the negotiation and implementation of the provisions contained in Trade and Sustainable Development (TSD) chapters³⁹ of FTAs as well as the enforcement mechanisms are not yet effective enough to achieve the stated objective to 'foster real and lasting change on the ground, through the effective application of enhanced social and environmental standards, to the direct benefit of the citizens of our FTA partners'.⁴⁰

Academic studies have pointed to weaknesses in the TSD chapters. For instance, there is apparently limited ownership by key EU officials and officials in partner countries, no effective CSO participation, no effective monitoring, and inadequate provisions for dispute resolution.⁴¹ These weaknesses have been acknowledged by DG Trade, leading to a welcome consultation process on how to improve the TSD chapters.⁴²

How can the situation be improved? First, the process to discuss matters affecting forests and land rights should be more transparent, inclusive and deliberative. Second, the civil society monitoring mechanisms should be strengthened. Third, key questions relating to the effectiveness of the dispute resolution process must be addressed, and mechanisms such as inspections and ex-post evaluations should be included to ensure compliance with the provisions.

Deliberative process

Negotiations around a trade agreement with a country where forests are at risk should not start before there is a commitment from both parties to discuss how the FTA can contribute to halting deforestation and respecting human rights in line with commitments made by both parties. This discussion must be deliberative,⁴³ and learn lessons from the EU FLEGT-VPA⁴⁴ on how to ensure the process is well informed, transparent and inclusive (see Box on FLEGT-VPAs below). It would be

39 These TSD chapters are included in EU trade agreements. They provide provisions and commitments towards sustainable development.

40 Non-paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, February 2018.

41 Harrison J et al., Labour Standards Provisions in EU FTAs: Reflections on the Commission's Reform Agenda. World Trade Review, forthcoming.

42 Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), Non-paper of the Commission services, July 2017 and second non-paper cited in footnote 31.

43 The concept of deliberative democracy is that for a democratic process to be legitimate there must be authentic deliberation. 'Emphasis is generally placed on the participation of civil society in government decision making (e.g. to define a problem, identify priorities, allocate resources or evaluate the implications of various policy options). Deliberation thus promotes not only conciliation between the various actors affected by a policy, the emergence of an informed and engaged public, and the taking into account of the public's perspective, but also transparency, legitimacy and accountability in decision making'. See: What is a Deliberative Process? The National Collaborating Centre for Healthy Public Policy, 2009.

44 FLEGT stands for Forest Law Enforcement, Governance and Trade. The EU's FLEGT Action Plan was established in 2003. It aims to reduce illegal logging by strengthening sustainable and legal forest management, improving governance and promoting trade in legally produced timber. It sets out seven measures that together prevent the importation of illegal timber into the EU, improve the supply of legal timber and increase demand for timber from responsibly managed forests.

useful to make use of the EU's 2002 requirements detailed in the Commission Communication on consultation.⁴⁵ The discussion would ideally lead to a roadmap or action plan to protect forests, mitigate climate change and respect community tenure rights as part of the FTA.

As part of negotiating a roadmap, the EU should support forested countries exporting timber and forest-risk commodities to address forest governance issues, take action to halt deforestation, and respect community land rights. This could lead to legislative reforms before the agreement comes into force. The start of the agreement could be made conditional on complying with these commitments. This is referred to as pre-ratification conditionality, requiring institutional or legislative changes before an agreement can come into force.⁴⁶

The idea of pre-ratification conditionality concerning deforestation and respect for human rights may be the most effective way to mitigate negative impacts on forests and peoples. Several academics have proposed general rules applicable to TSD-related roadmaps to be agreed upon by the parties during negotiation of the agreement.⁴⁷

The FLEGT Action Plan has delivered inclusive trade agreements, widely supported by local CSOs, unlike most EU FTAs or Economic Partnership Agreements (EPAs). Learning from the FLEGT-VPA means engaging in a long-term dialogue with strong representation of civil society actors with the partner country. The high level of trust between VPA stakeholders has been built up over the years thanks in large part to a FLEGT facilitator. This FLEGT facilitator, who is independent from any of the stakeholder groups, has been influential in ensuring that where there are deadlocks, the communication channels remain open to address controversial issues. This has enabled stakeholders to compromise and find common agreement.⁴⁸

FLEGT-VPA deliberative process

The deliberative process that shapes the VPAs negotiated as part of the FLEGT Action Plan should inspire DG Trade's approach to FTAs. A VPA differs from a typical trade agreement in several ways. First, the content of the VPA is decided through a deliberative consultation process that involves stakeholders from government, the private sector and civil society. Second, the two governments negotiate toward the same goals – eliminating illegal timber and improving forest governance. Third, a VPA embeds legal and governance reforms in its text and processes. The reforms are those that all stakeholders identify as necessary to ensure a VPA is credible. This means that a VPA is based on an inclusive participatory process and that it can improve transparency and accountability. As such, a VPA's unique combination of using trade levers towards improved governance, and its multi-stakeholder approach to negotiation and implementation can meet social and environmental, as well as economic goals.⁴⁹

45 Communication: Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission. COM (2002) 704 final.

46 It is acknowledged that this is not easy. Legal reform takes years or even decades. Nonetheless the VPAs do often spell out the need for legal reform.

47 Stoll P, Gött H, Abel P. Model Labour Chapter for EU Trade Agreements, 2017. http://www.fes-asia.org/fileadmin/user_upload/documents/2017-06-Model_Labour_Chapter_DRAFT.pdf

48 Learning lessons from FLEGT-VPA to promote governance reform in Ghana's cocoa sector, briefing note from Fern, Tropenbos International, Tropenbos Ghana, EcoCare Ghana, and Forest Watch Ghana, July 2018

49 What are Voluntary Partnership Agreements?, EU FLEGT facility website

Civil society monitoring of commitments

The current provisions contained in TSD chapters allow Parties a significant amount of leeway concerning how to monitor, and there is little evidence that effective monitoring is taking place.⁵⁰ The institutional setting and specific features of CSO involvement vary across the agreements. Typically, a Domestic Advisory Group (DAG) is set up within each trade partner as well as joint meetings of the DAGs (Joint Civil Society Forum, or CSFs).

Several studies have identified shortcomings with the functioning of DAGs and CSFs: they have insufficient resources, do not meet often enough, have unclear representation, and because their position in relation to other bodies institutionalised within the TSD chapter is also unclear, they can only have a limited impact.⁵¹ Below we describe some of the key shortcomings and suggest ways for improvement.

Purpose of the DAGs

The purpose of the DAGs is unclear. According to the provisions in existing FTAs, DAGs should be established by each party to the trade agreement, with the task of expressing views and making recommendations and providing advice on the implementation of the TSD chapter. In its second 'non-paper',⁵² DG Trade proposes to better enable 'civil society including the Social Partners to play their role in implementation'. It also wants to increase the scope of the DAGs' advice to cover implementation of the full agreement rather than just the TSD chapter, and this is already the practice in the EU Korea FTA DAG.

We therefore suggest clarifying that a key function of the DAGs is monitoring the implementation of the TSD chapter, as well as the sustainability impacts of the trade agreement itself.

Improving effective monitoring

CSOs currently involved in DAGs feel the discussions do not allow for proper monitoring.⁵³ First, it is difficult to discuss whether there is a breach of the provisions because CSOs face limitations in exposing violation of specific international norms and commitments. Second, evidence⁵⁴ recorded by CSOs involved in existing DAGs shows that participants from DG Trade do not always have the capacity to legally interpret key International Labor Organisation (ILO) conventions and Multilateral Environmental Agreements (MEAs) referred to in TSD chapters, and hence cannot always respond to CSO input. Third, CSOs find it challenging to bring specific or individual cases relating to the violation of key labour and environmental provisions and feel frustrated by the lack of triggering mechanisms to enforce the provisions. Therefore discussions in DAG meetings lack substance, and CSOs feel that they have little impact.

It is necessary to ensure sufficient allocation of resources for discussions including rigorous and systematic presence of qualified people for legal interpretation of international conventions at DAG meetings. The participation of experts from other services of the Commission such as DG

50 Harrison J, Barbu M, Campling L, Richardson B, Smith A, Labour standards in EU free trade agreements: working towards what end? GREAT Insights, 2016, 5 (6): 32-34; Marx A, Lein B, Brando N, The protection of Labour Rights in Trade Agreements: The Case of the EU-Colombia Agreement, 2016, Journal of World Trade, 50:4, pp. 587-610; and Smith A, Campling L, Barbu M, Harrison J, Richardson B, Do Labour Provisions in EU Trade Agreements Improve Workers' Lives and Working Conditions Around the World? 2017.

51 Orbie J, Van den Putte L, Labour Rights in Peru and the EU Trade Agreement: Compliance with the Commitments under the Sustainable Development Chapter, 2016, OFSE Working Paper 58. Marx et al. 2016; Harrison et al. 2016; Van Den Putte, 2015; Orbie et al. 2016; Ebert 2017.

52 Non-paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, February 2018.

53 Harrison J et al., *ibid.*

54 *Ibid.*

Environment, Development and Cooperation and the European Union External Action Services in DAG discussion should also be formalised.

The possibility of investigating and exposing concrete examples of violation of TSD chapter provisions or negative impacts of the agreement should be discussed during the development of the rules of procedures of the DAG.

The Voluntary Partnership Agreements as accountability and learning platforms⁵⁵

The joint implementation committees (JICs) of the Voluntary Partnership Agreements (VPA), which include representatives from civil society and the private sector, as well as government officials and the EU, have served as an effective platform for non-governmental organisations (NGOs) to raise issues about the process and enforcement of the VPA and develop mutually acceptable solutions to tackle illegal logging and encourage forest governance reform.

This process of recursive problem-solving combines accountability for agreed commitments with joint learning about how to solve problems. In Indonesia, for example, it has worked through interconnected channels and mechanisms: (1) investigative reports published by domestic and international NGOs; (2) the use of these NGO investigations as ‘shadow reports’ by EU bodies, notably the European Parliament and EU representatives on the JIC, to demand corrective action from the Indonesian authorities; (3) joint evaluation reports about the enforcement of VPA provisions, which take stock of the state of implementation and identify problems which need to be addressed prior to the issuance of FLEGT licences; and (4) regular review of the results of these evaluations within the JIC, leading to the development of solutions through multi-stakeholder working groups and formulation of detailed joint action plans to carry them out, which are themselves periodically reviewed and revised.

Among concrete results, Indonesian CSOs managed to get a national complaint mechanism and succeeded in making information on permit allocation – where corruption is an important issue – public. They also managed to get forest conversion permits – and not only timber concessions permits – put under the scrutiny of the VPA.

In Ghana, the JIC helped NGOs to block the issuance of ‘special permits’ that would have allowed logging companies to bypass environmental and human rights protections. They also helped to relaunch the national forest law reform process, which had been blocked for 20 years, and to increase the logging tax revenues received by the government and communities.

This framework could encourage the implementation of agreed and time-bound roadmaps to protect forests and respect rights, focusing on necessary legislative reforms and appropriate enforcement measures, before the FTA can come into force (see chapter 3).

⁵⁵ Overdevest C, Zeitlin J, *Experimentalism in Transnational Forest Governance: Implementing EU Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana*, 2016.

A monitoring tool should be developed and could include indicators or scorecards⁵⁶ to track progress and ensure accountability from the Parties to implement provisions on TSD.

Furthermore, to increase effectiveness, it would be useful to strengthen the linkages between the different institutional structures set up by the agreement. Civil society recommendations should feed into inter-party dialogues (established in trade agreements) to make it possible to hold governments accountable for the implementation of the decisions concerning TSD provisions. In this way CSOs can play an active role in putting these commitments into practice, as with FLEGT-VPAs (see Box on VPAs as accountability and learning platforms).

Participation in the DAG

The current provisions on CSO involvement in DAGs can be improved by increasing the number of participants as well as representation to ensure diversity. First, the rationale behind the decision on how many CSOs can participate is not clear, and this has an impact on the quality of the representation. As a result, the number of participants varies across the agreements. TSD chapters should stipulate that DAGs have a minimum number of CSO participants.

Second, there is lack of clarity concerning participation. The legal texts stipulate that DAGs shall comprise independent representative CSOs, with balanced representation of economic, social and environmental stakeholders. It is unclear who selects these civil society stakeholders; are they invited by the Parties to the agreement, or can they take the initiative to participate themselves? The concept of civil society differs between countries and cultures. We suggest that it should be up to local CSOs to organise a self-selection process. In this regard, the Committee on World Food Security (CFS) has often been referred to as a model for inclusive participation. A distinctive element of the CFS approach is the full recognition of the principle of self-organisation and autonomy of stakeholder categories. Within the UN system, the CFS is the only intergovernmental forum where the participation of CSOs and private sector associations is facilitated by their own autonomously established coordination mechanisms. Such mechanisms ensure that participation is based on a process of consultation prior to CFS meetings and feedback on results following the meetings.

This could be preceded by a stakeholder mapping exercise, informed (among other things) by the sectors identified as relevant by the Sustainability Impact Assessments. In FTAs with highly forested countries, special attention should be paid to the participation of environmental CSOs, including CSOs focused on the protection of forests, and the participation of direct representatives of forest communities, taking gender considerations into account.

When negotiating trade agreements with highly forested countries, protecting forests and respecting community land rights should be identified as priorities. DAGs could include sub-groups to allow for substantial discussions on the identified priorities. In FLEGT-VPA countries, synergies should be encouraged between monitoring structures of the VPA, including independent forest monitoring activities led by CSOs and the FTA.

The creation of a DAG must be a precondition for implementation of the FTA. In the case of Ukraine, the government has not yet managed to appoint its DAG, one year after the full entry into force of the EU–Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA), more than two years after provisional implementation started, and four years after it was signed.⁵⁷

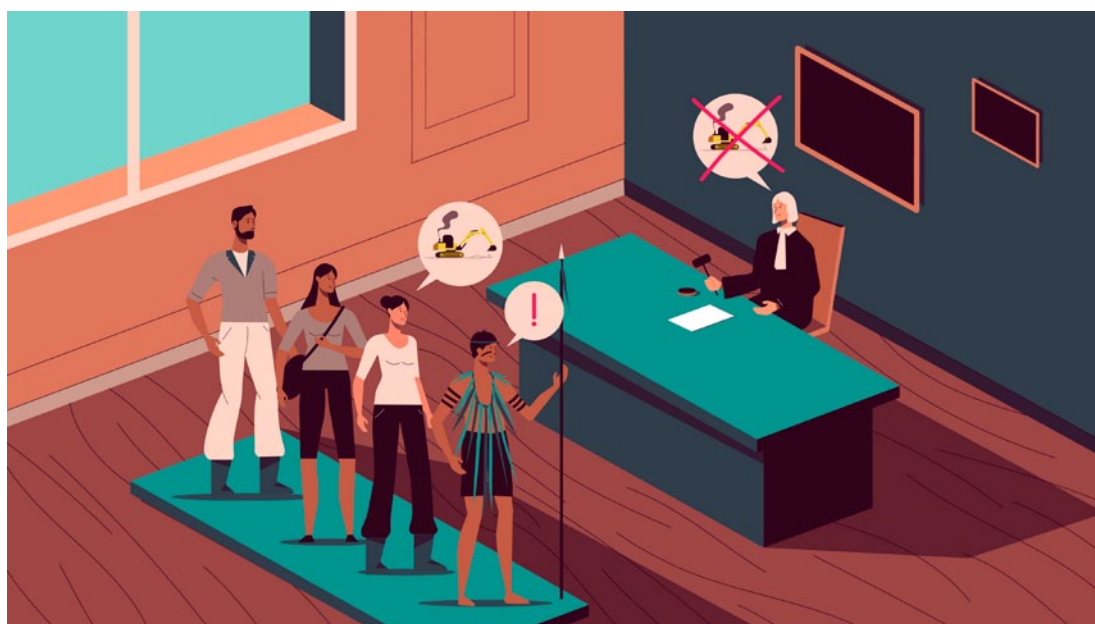
⁵⁶ <https://www.transportenvironment.org/publications/trade-and-sustainable-development-%E2%80%93-chance-innovative-thinking>

⁵⁷ Animal Welfare, Trade and Sustainable development, Eurogroup for Animals, June 2018.

Funding of CSO participation

Many CSOs do not have the financial resources to participate. For the EU–Korea DAG-to-DAG meeting, which alternately takes place in Seoul and Brussel, funding can be provided for one side to travel to the partner country. Such funding is not provided for all agreements. It has been reported that some CSOs cannot afford to attend DAGs meetings; for example, Peruvian CSOs have not been able to attend the meetings in Colombia under the EU–Colombia and Peru Trade Agreement.⁵⁸ Hence, making funding available to fulfil this monitoring function is required as well as capacity building to allow for effective participation.

In its second ‘non-paper’⁵⁹ the Commission announced launching a €3 million tender in 2017 to support civil society participation in the implementation of EU trade agreements as well as a €9 million project on responsible supply chains. This is welcome but cannot replace funding necessary to ensure proper participation of CSOs in the DAG which is needed for a proper working of the institutions set up by the TSD chapters. Relying on ad hoc projects funded by existing funding instruments is insufficient.⁶⁰



Addressing non-compliance

The measures proposed above will increase effectiveness of TSD chapters, but more is needed to ensure enforcement of TSD provisions. The lack of enforcement of these provisions is in stark contrast to other chapters of EU trade agreements, where enforcement is much stronger. For instance, if investors rights are breached, investment chapters give them access to international arbitration processes where they can sue host governments for millions of dollars.

58 Orbie J, Martens D, Van den Putte L, Civil Society Meetings in European Union Trade Agreements: Features, Purposes, and Evaluation, CLEER paper, March 2016.

59 Non-paper of the Commission services, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, February 2018.

60 Harrison et al., *ibid.* footnote 40

There is wide agreement that the dispute resolution process of TSD chapters in case of non-compliance is insufficient.⁶¹ TSD chapters are exempt from the general dispute settlement mechanism of EU FTAs, and disputes are instead supposed to be examined by panels of experts. This process has never been utilised and lacks a credible enforcement mechanism. Several models for dispute settlement mechanisms have been identified in the academic literature,⁶² and complaint procedures have been suggested by CSOs.⁶³ All these proposals should be further discussed with the Commission and relevant stakeholders, including design questions such as how and by whom is a dispute initiated? Who does it target? And who investigates?⁶⁴

It is open to debate whether trade sanctions are the most appropriate device, as is the quantification of the damage caused by the breach of social and environmental provisions. The experience with FLEGT suggests that a country's image carries more weight than some people think, so naming, shaming and praising can have an impact.

The need to have demand- and supply-side measures to foster enforcement

The FLEGT approach is based on demand- and supply-side measures to promote trade in legal timber, and provides inspiration on how to address enforcement. The monitoring and enforcement mechanisms of the FLEGT-VPA (supply-side measure) are supported by a penalty system: the EU Timber Regulation (EUTR) (demand-side measure). The EUTR prohibits the placement of illegal timber products on the EU market and obliges timber operators to carry out 'due diligence' to ensure that the timber is legally sourced.

A Human Rights Due Diligence Regulation could be adopted by the EU to control the trade in commodities violating community tenure rights and driving deforestation.⁶⁵ Such an instrument can be adopted unilaterally by the EU. It would not violate WTO rules, as it would apply to all countries including the EU. If properly enforced by the EU and its Member States, it could act as an incentive to achieve meaningful progress in the negotiation and implementation of trade agreements that benefit the environment and communities.

The risks and costs of being caught trading in illegal timber have served as a powerful motivation for businesses to persist in working through the many obstacles around VPA implementation and meet the requirements for FLEGT licensing. To the extent that it is perceived as credible and properly enforced, the EUTR reinforces the pressure on both public officials and private businesses to achieve the objectives of the VPA.

61 Ibid. footnote 40

62 Ibid. footnote 40

63 See Client Earth briefing, 'A Formal Complaint Procedure for a More Assertive Approach towards TSD Commitments', October 2017 as well as <http://gsppplatform.eu/>

64 Harrison et al., *ibid.*

65 See Fern reports, "Developing EU measures to address forest-risk commodities: What can be learned from EU regulation of other sectors?", November 2016 and "Hardening international soft law frameworks into EU measures to address forest-risk commodities", October 2018

Inspections

Currently not included in any EU agreement, but included in the US–Peru agreement (see Annex I and Box on the US–Peru agreement), are provisions which would allow the EU to organise inspections and verifications in case of suspected non-compliance with provisions laid down in the TSD chapter. Including the ability to organise inspections (to ensure products are in line with the TSD chapter) might provide an additional incentive to comply with the requirements.

Inspiration may be drawn from the provisions included in the Sanitary and Phytosanitary (SPS) chapters of trade agreements which do allow for such verification actions. Similar provisions might be contemplated with regard to the trade in timber products from forest-risk commodities, especially when there are concerns of perceived violations in relations to commitments made under MEAs, labour or other human rights instruments.

The US–Peru Trade Agreement

The US–Peru Trade Agreement (Annex I) provides that Peru increases the number of officials who deal with forest management; that it drafts and applies an anti-corruption plan for this sector; provides for detailed civil and criminal liability provisions and appropriate sanctions; develops an action plan for mahogany trees and fixes an export quota for mahogany wood; and allows the US to request an audit of a specific company and US participation in visits of companies. Although this has proven to be too prescriptive, nor has it been implemented, the verification element has been useful in addressing illegal logging.

Evaluation and impact assessment

Much has been said about provisions on evaluation and impact assessments of FTAs that should be strengthened. In this regard we want to refer to the 2011 UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements⁶⁶ developed by Olivier De Schutter, which provide principles aimed at giving states guidance on how best to ensure that the trade and investment agreements they conclude are consistent with their obligations under international human rights law.

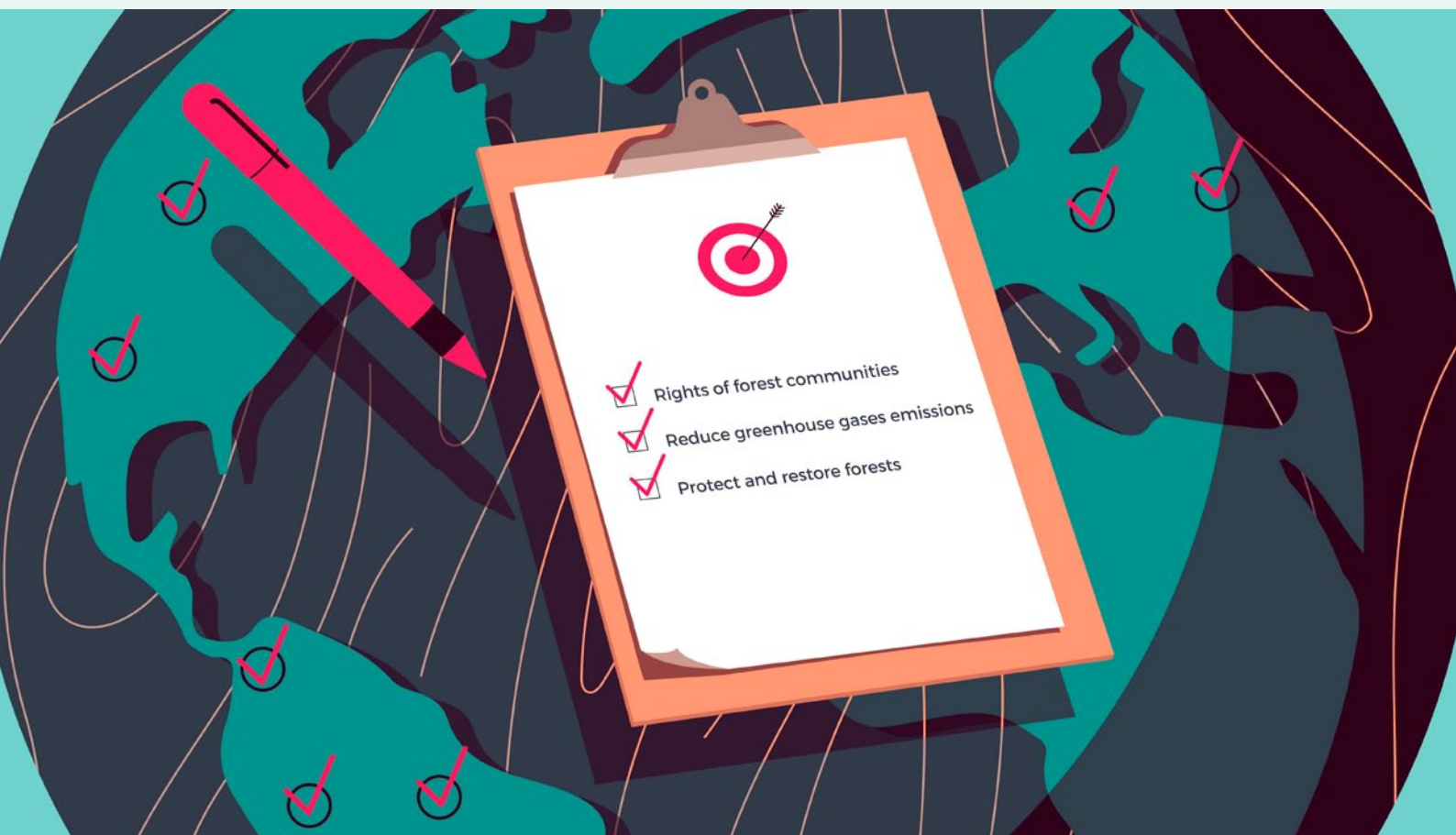
⁶⁶ 2011 UN Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, A/HRC/19/59/Add.5.

CHAPTER 4

Provisions to halt deforestation, mitigate climate change, protect forests and respect rights

‘We need policies that will support the prosperity that local communities derive from trade but also improve working conditions worldwide by ensuring respect for labour and other human rights and protect the environment we all share.’⁶⁷

DG Trade Commissioner Cecilia Malmström



67 http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154020.pdf

Apart from making the process of negotiating an FTA more deliberative, as described in Chapter 3, the content of the FTA should also ensure they do not undermine forest protection and human rights.

In general, Parties should jointly commit to effectively implement all international environmental, labour, and human rights agreements they have ratified. FTAs should ideally include a hierarchy clause stipulating that nothing in the trade agreement may prejudice the effective implementation of these agreements. This is in line with DG Trade's position explained in chapter one that modern EU trade agreements must 'follow international labour and environment standards and agreements; effectively enforce their environmental and labour laws; not deviate from environmental or labour laws to encourage trade or investment, thereby preventing a "race to the bottom".'

One way to make FTAs more 'deforestation and human-rights proof' is the inclusion of relevant provisions in the FTA TSD chapter. TSD chapters rely on dialogue and cooperation for action on environmental and labour issues and are therefore well suited to a deliberative process. On the other hand, putting sustainable development into a single chapter of the agreement risks leading to marginalisation within the agreement. In addition the provisions in these TSD chapters have been exempted from general dispute settlement mechanisms and lack enforcement (see Chapter 3). Nonetheless, while acknowledging the limitations of these chapters, the options proposed here aim to make FTAs more 'deforestation and human-rights proof', by using the TSD chapter.

Strengthening provisions of the TSD chapters

Key commitments in existing TSD chapters include: (1) commitments/reaffirmations in relation to sustainable development, with specific reference to some international conventions and treaties, (2) a commitment not to lower social and environmental standards in order to increase levels of trade and investment, (3) stipulations that parties will cooperate in certain policy areas such as engagement in multilateral forums, exchange of information and best practices on relevant topics, furthering the ratification of sustainable development-related conventions, and promoting corporate social responsibility, and (4) an obligation to monitor and assess the impact of the agreement on sustainable development. These commitments remain very general, and more precise commitments and targets are needed to address forest protection and community rights.

To provide suggestions for improvement of provisions on forests and human rights it is important to look at what existing FTAs say. Of the 680 trade agreements in the TREND database,⁶⁸ around 50 include forest-related provisions. Many of these are not EU trade agreements, and the most comprehensive one – although only focusing on timber – is the US–Peru Agreement (see Annex I). Annex II provides an overview of most key forest provisions in existing trade agreements. Common elements include recognising the importance of forests and sustainable forest management, multilateral commitments (specifically CITES), the need to tackle illegal logging, and the development and strengthening of domestic institutions for forest governance referencing FLEGT-VPA, as well as the recognition of non-state market instruments such as certification and labelling. It is important to note that all provisions focus on the forestry sector, not on forests nor on forest conversion for agricultural crops.

How should the existing TSD chapters be improved when trade partners are highly forested countries? They should at least include enforceable measures to respect human rights including

68 <https://klimalog.die-gdi.de/trend/>

customary tenure rights of local communities and Indigenous Peoples. They should also include language to strengthen the implementation and enforcement of existing environmental and social provisions, including those which flow from multilateral environmental agreements that the parties have ratified, notably the Paris agreement. Last, they should include more specific provisions for companies to adhere to existing standards of corporate social responsibility. A time-bound roadmap or action plan with indicators that can be monitored could be developed to achieve these obligations.

The Commission's non-paper on the 15 proposals⁶⁹ to revamp the TSD chapters goes in the right direction when it promises that the Commission will separately 'identify, consider and address priorities for each partner country' in relation to TSD issues which may lead to the inclusion of specific issues in FTAs beyond the standard TSD formulation, and which will involve the identification of priority issues for implementation by the parties. To meet EU and partner country commitments, we are asking for extra measures concerning forests and community rights in FTAs with highly forested countries.

Provisions to include in an FTA

Controlling deforestation. An FTA with a highly forested country must specify that both parties commit themselves to halting deforestation and hold each other to account concerning implementation of this commitment. The text could say: 'Both parties must develop measures at supply- and demand-side level, adopted through multi-stakeholder processes, to ensure supply chains exclude commodities at risk of being obtained from forest conversion.'⁷⁰ This text could be backed up by an action plan or roadmap (see Chapter 3), developed with all stakeholders including local CSOs, defining and outlining activities for both parties to meet the commitment, including milestones that both parties agree to.

Supporting FLEGT. FTAs should support and create synergies with existing FLEGT-VPA processes (e.g. Vietnam, Indonesia) or stimulate countries to join or support and not undermine the EU FLEGT Action Plan (e.g. Japan, Mercosur). The outcome of the negotiations of the EU–Japan Economic Partnership Agreement in that regard is quite disappointing.⁷¹ The provisions included in the TSD chapter of the FTA risk increasing illegal timber imports to Japan from countries where forest protection is weak and unsustainable practices are widespread, and give Japanese companies an unfair competitive advantage over EU companies by allowing them to trade in illegally sourced wood with impunity while EU companies fall under EUTR obligations. In the EU–Vietnam FTA, the reference to the conclusion of the VPA as a way to contribute to sustainable management of forests is very timid. In the available draft TSD chapter proposal for the EU–Mercosur FTA, FLEGT is not mentioned as a tool to contribute to sustainable management of forests.⁷²

Respecting customary rights. The forest clause in FTAs should refer not only to forest management but also the use of forest lands to ensure rules on land allocation, land use and rights of third parties are being applied. Ensuring land use planning is based on an inclusive deliberative process that respects and strengthens the rights of local and indigenous communities to their

69 See footnote 31.

70 See "Improving the proposed forestry provisions in the EU–Indonesia FTA", Client Earth, June 2018. <https://www.documents.clientearth.org/library/download-info/improving-the-proposed-forestry-provisions-in-the-eu-indonesia-fta/>

71 The EU–Japan Free Trade Deal: A Threat to the Fight Against Illegal Timber? Fern briefing, September 2018. <https://fern.org/briefing/EUJapanFTA>

72 See EU proposals for the trade agreement with Mercosur. <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1769>.

customary land is key to address the possible negative impacts of forest conversion for agricultural production.⁷³

FTAs should include precision on how legitimacy and applicability of customary tenure rights are to be defined and applied. This precision must in turn be consistent with the international and domestic legal frameworks applicable to the jurisdictions of the parties of the FTA. In that respect, the state obligation to respect and protect property rights, as well as the right to equality and non-discrimination, is a feature of international customary law. The same is true of the key treaties to which most states are committed, as well as (in most states) their constitutions. Since customary property rights over land are a form of property right, and since disregarding customary rights would almost certainly be seen as discriminatory, there is arguably no jurisdiction where customary property rights would not demand express respect and protection under an FTA.

In terms of respecting customary rights, the VGGTs could be used to guide the negotiations so long as the generalities and gaps in the VGGTs are clarified to avoid ambiguity in their application and implementation.⁷⁴

Implementing the Paris Agreement. The Parties to the Paris Agreement committed themselves to adapt to climate change and mitigate its effects. An FTA could provide for the obligation to ensure that parties take measures in conformity with the ‘highest possible ambition’⁷⁵ to reduce greenhouse gas emissions. As mentioned above, to meet the Paris Agreement targets of 2°C or 1.5°C, countries must reduce their greenhouse gas emissions as far and fast as possible. A closer look at the NDCs of potential trading partners (see Annex IV) is sobering. The negotiation of an FTA should be used to discuss how to implement the NDCs through legislative reforms and provide the means to do so.

Furthermore, the extensive provisions on cooperation in the Paris Agreement – in particular, cooperation to take concrete steps in adapting to climate change,⁷⁶ cooperation with respect to loss and damage associated with the adverse effects of climate change,⁷⁷ and cooperative action on technology development and transfer⁷⁸ – could be further developed in an FTA. Other provisions of the Paris Agreement which could be inserted into the TSD chapter of an FTA concern capacity-building, education and training, and public awareness, public participation and access to information.⁷⁹

Obligations for companies. TSD chapters should include more systematic references to commitments to the Guidelines for Multinational Enterprises of the Organization for Economic Co-operation and Development (OECD) and the UN Guiding Principles on Business and Human Rights. It should be noted that some FTAs already refer to the OECD Guidelines. As yet, little concrete action has been taken to promote these instruments through TSD chapters.⁸⁰ The key issue is that provisions should not only acknowledge the importance of these instruments, but

73 See footnote 71

74 By way of explanation, the VGGTs were necessarily broadly worded as they were meant to encompass a wide variety of contexts and jurisdictions. Notable in relation to customary rights is the fact that the VGGTs refer to respecting customary land tenure rights where applicable and legitimate. Because the contexts and jurisdictions would be known in advance in relation to an FTA, those gaps and ambiguities can (and indeed, according to the rule of law, must) be resolved to ensure clarity of expectations and responsibilities on all sides.

75 Paris Agreement of 2015 on Climate Change, Article 4 (3).

76 Ibid., Article 7 (7): ‘Parties should strengthen their cooperation on enhancing action on adaptation, including with regard to ...’ (the provision then enumerates five areas of possible cooperation).

77 Ibid., Article 8 (3): ‘Areas of cooperation and facilitation to enhance understanding, action and support may include ...’ (the provision then enumerates eight areas of possible cooperation).

78 Ibid., Article 10 (2).

79 Ibid., Articles 11 to 13.

80 Harrison et al., *ibid.*

also contain elements on how they will be implemented, and address supply-chain dynamics in key export sectors with clear monitoring processes⁸¹ aimed at halting deforestation and stopping violation of community tenure rights. Provisions on how the implementation of these instruments will be pursued and monitored in civil society forums and bilateral dialogues should be included.

Other proposals: a separate chapter or dealing with cacao

A separate chapter?

Apart from improving the text of the TSD chapter, another option would be a full chapter on deforestation and human rights to be included in an FTA with a highly forested country (i.e. a legal text which is a template or blueprint for such a chapter). Such a model would outline all elements necessary to address the issues. The advantage would be that an elaborated model agreement facilitates an in-depth discussion of all the issues. Such a model agreement could be issue-specific (e.g. deforestation, human rights) or product-specific, but should in all cases address deforestation-related production and human rights violations. Such a model chapter would start off from the existing TSD chapters in FTAs but would expand and deepen them and be far more specific and enforceable. It would consist of at least six parts, each with multiple sections and articles (see Annex III).

Bilateral partnership agreement concerning cacao

Fern, together with other NGOs, has initiated a discussion around how the EU could use trade as an incentive to support Ghana tackle governance issues in the cocoa sector.⁸² Cocoa is crucial to Ghana's economy, but is also a significant driver of deforestation. Poverty and child labour in the cocoa sector have become issues of international concern – as has, more recently, deforestation. A number of voluntary initiatives have been launched to tackle these problems: but there are a host of deeper governance issues that must be addressed for these initiatives to have an impact.

The 2018 European Commission feasibility study on agricultural deforestation mentions bilateral partnership agreement as one of the options identified as having 'high' impact to step up EU actions against deforestation.⁸³

In that context, it is relevant to draw lessons from Ghana's ongoing Voluntary VPA process – which has been successfully tackling governance problems in the timber sector for years – and to consider how a bilateral partnership agreement between Ghana and European countries could help encourage governance reform in the cocoa sector.

81 Harrison et al., *ibid.*

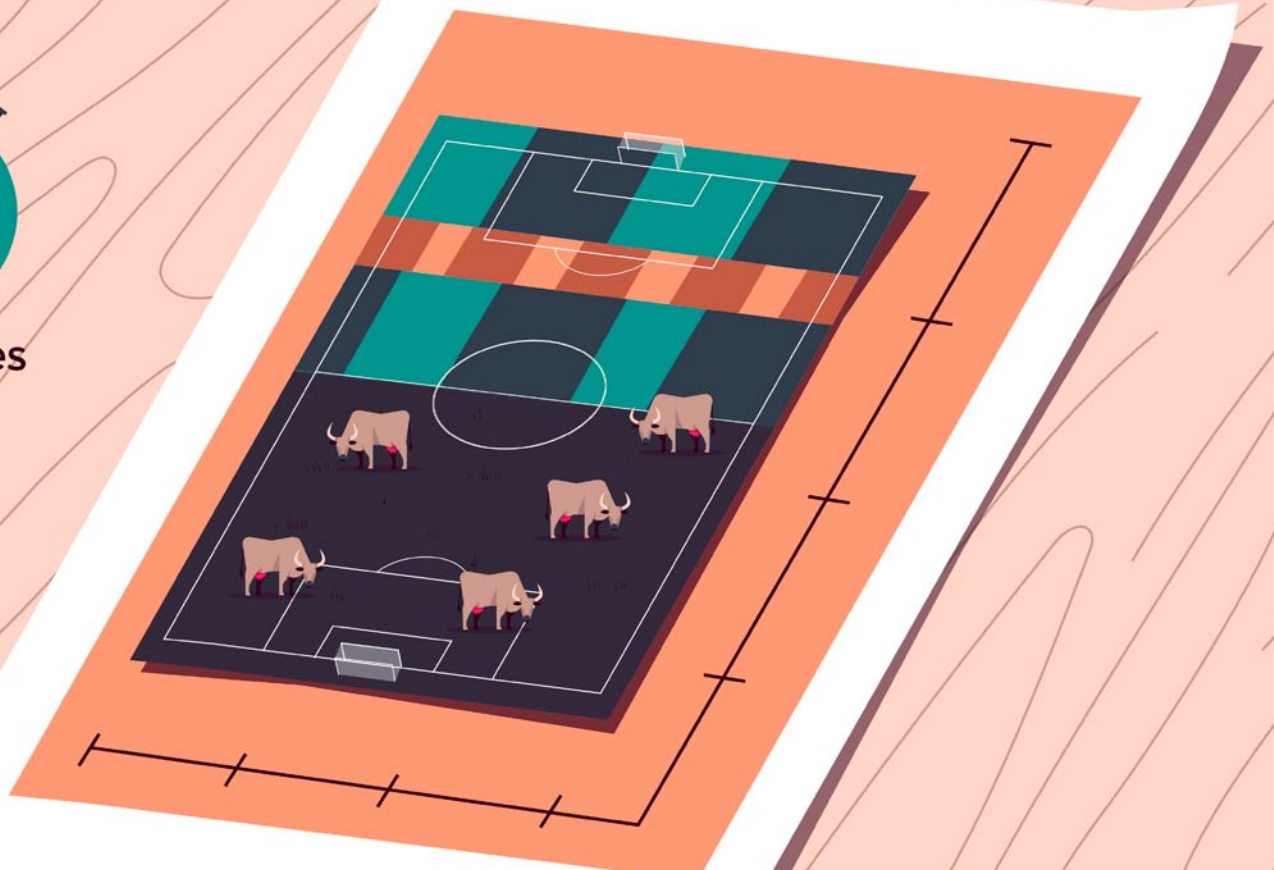
82 Learning lessons from FLEGT-VPA to promote governance reform in Ghana's cocoa sector, July 2018, Fern, Tropenbos International, Tropenbos Ghana, EcoCare Ghana, and Forest Watch Ghana.

83 Feasibility study on options to step up EU action against deforestation, March 2018, <https://ec.europa.eu/environment/forests/pdf/KH0418199ENN2.pdf>

One football pitch of forest was illegally felled every two minutes in the period 2000–12 in order to supply the EU with soy, beef, leather and palm oil.



2 minutes



ANNEXES

Annex I: The US–Peru agreement

By far the most extensive elaboration of commitments to forest governance in a trade agreement can be found in Article 18 of the US–Peru agreement and Annex 18.3.4.

First, concerning strengthening forest sector governance the agreement provides that Peru needs to implement within 18 months of the date of entry into force of the agreements, a series of institutional changes which include (1) increasing the number of personnel devoted to forest protection, (2) providing criminal and civil liability for actions (the annex contains a detailed list) which undermine forest governance, (3) imposing penalties to deter violations of laws related to harvest and trade in timber (products), (4) developing monitoring mechanisms related to tree species listed in CITES and developing an action plan to implement components of CITES, (5) establishing an annual export quota for bigleaf mahogany, (6) improving the administration and management of forest concessions, and (7) promoting the use of tools that complement and strengthen regulatory controls and verification mechanisms relating to the harvest of, and trade in, timber products which includes the participation of local and indigenous communities.

Second, on verification and enforcement measures, the Annex requires that Peru shall conduct periodic audits of producers and exporters. In addition, it includes that the US can request audits of specific producers and exporters and verification requests with respect to a particular shipment of timber products and their compliance with relevant laws governing the harvest and trade of timber products. Peru needs to inform and follow agreed procedures to conduct these verification requests including the possibilities for US competent authorities to participate in the verification missions in Peru. If Peru denies a request for participation in a verification mission, the US may deny entry of shipment.

On fostering compliance, the Annex indicates that the US may deny entry to the shipment that was the subject of verification, and deny entry to products of a firm that has knowingly provided false information to the Peruvian or US officials, especially regarding tree species listed in Appendices to the CITES. Finally, the agreement contains specific commitments toward implementing CITES.

In order to follow up the provisions of the Annex, the agreement establishes a sub-committee on Forest Sector Governance under the Committee on Trade in Goods and the Environmental Affairs Council. This sub-committee consists of government representatives from different ministries and agencies, including – for the Peruvian side – representatives from the Ministry of Foreign Trade and Tourism, the Ministry of the Environment, officials from the supervising agency of forest resources and wildlife, the Ministry of Foreign Affairs, the customs and tax administration and the presidency of the Council of Ministers. From the US side they include representatives from the office of the US Trade Representative, and officials of the state department tasked with environmental protection, the USAID and US Forest Services.

Although there are some similarities with the FLEGT approach, one major difference is that it is a much more top-down approach and is not a deliberative process. NGOs involved in the process have stated that the creation of an active and effective oversight body (OSINFOR), and the requirement for traceability and transparency, are the most relevant elements of the agreement to reduce illegal logging.

Annex II: Current forest provisions in EU trade agreements

Korea

The Korea agreement provide for the following commitments: *'In order to promote the achievement of the objectives of the TSD chapter and to assist in the fulfilment of their obligations pursuant to it, the Parties have established the following indicative list of areas of cooperation: (b) cooperation in international fora responsible for social or environmental aspects of trade and sustainable development, including in particular the WTO, the ILO, the United Nations Environment Programme and multilateral environmental agreements; (c) cooperation with a view to promoting the ratification of fundamental and other ILO Conventions and multilateral environmental agreements with an impact on trade; (d) exchange of information and cooperation on corporate social responsibility and accountability, including on the effective implementation and follow-up of internationally agreed guidelines, fair and ethical trade, private and public certification and labelling schemes including eco-labelling and green public procurement; (i) cooperation on trade-related measures to tackle the deforestation including by addressing problems regarding illegal logging.'*

Georgia and Moldova

The Georgia and Moldova agreements contain similar language, but are rather more extensive and contain a firm recognition on the importance of forests, i.e. *'The Parties recognise the importance of ensuring the conservation and the sustainable management of forests and of forests.'* In addition, the agreement provides provisions such as: *'To that end, the Parties commit to: (a) promoting trade in forest products derived from sustainably managed forests, harvested in accordance with the domestic legislation of the country of harvest, which could include bilateral or regional agreements to that end; (b) exchanging information on measures to promote the consumption of timber and timber products from sustainably managed forests and, where relevant, cooperate to developing such measures; (c) adopting measures to promote the conservation of forest cover and combat illegal logging and related trade, including with respect to third countries, as appropriate; (d) exchanging information on actions for improving forest governance and where relevant cooperating to maximise the impact and ensure the mutual supportiveness of their respective policies aiming at excluding illegally harvested timber and timber products from trade flows; (e) promoting the listing of timber species under CITES where the conservation status of those species is considered at risk; and (f) cooperating at the regional and the global levels with the aim of promoting the conservation of forest cover and the sustainable management of all types of forests.'* (The Moldova agreement adds: *'with use of certification promoting responsible management of the forests.'*)

Singapore

The Singapore agreement contains similar provisions and adds measures to *'promote global forest law enforcement and governance and address trade in illegally harvested timber and timber products through, for example, promoting the use of timber and timber products from legally and sustainably managed forests, including through verification and certification schemes';* and *'The Parties may initiate cooperative activities of mutual benefit in areas including but not limited to: (d) information exchange and cooperation on private and public certification and labelling schemes including eco-labelling, and green public procurement; (h) sustainable forest management to encourage effective measures for certification of sustainably produced timber.'*

Colombia and Peru

The Colombia–Peru agreement has an article on trade in forest products which recognises the *‘importance of having practices that, in accordance with domestic legislation and procedures, improve forest law enforcement and governance and promote trade in legal and sustainable forest products, which may include the following practices: (a) the effective implementation and use of CITES with regard to timber species that may be identified as endangered, in accordance with the criteria of and in the framework of such Convention; (b) the development of systems and mechanisms that allow verification of the legal origin of timber products throughout the marketing chain; (c) the promotion of voluntary mechanisms for forest certification that are recognised in international markets; (d) transparency and the promotion of public participation in the management of forest resources for timber production; and (e) the strengthening of control mechanisms for timber production, including through independent supervision institutions, in accordance with the legal framework of each Party.’*

In addition, the agreement provides for cooperation in activities in areas of mutual interest, such as those specifically relating to forest: *‘(d) activities related to the adaptation to, and mitigation of, climate change, including activities related to the reduction of emissions from deforestation and forest degradation (“REDD”); (g) activities related to the determination of the legal origin of forest products, voluntary forestry certification schemes and traceability of different forestry products.’*

Vietnam

The Vietnam agreement builds on the previous agreements and adds an interesting reference to FLEGT, where it says: *‘To this end, each Party commits to: (a) Encourage the promotion of trade in forest products from sustainably managed forests and harvested in accordance with the domestic legislation of the country of harvest; this may include the conclusion of a Forest Law Enforcement Governance and Trade (“FLEGT”) Voluntary Partnership Agreement.’*

Central America Association Agreement

The references to promoting trade in sustainable products, the role of voluntary and flexible mechanisms and marketing initiatives aimed to promote environmentally sustainable productive systems, CITES and FLEGT are also included in the Central America Association Agreement.

Canada Agreement (CETA)

CETA also contains a firm recognition of the importance of forests. *‘1. The Parties recognize the importance of the conservation and sustainable management of forests for providing environmental functions and economic and social opportunities for present and future generations, and of market access for legally-harvested forest products from sustainably managed forests.’* Second, CETA reiterates some of the commitments referred to also in other EU agreements relating to exchange in information and CITES. Finally, CETA creates a platform – an institution – to further discuss forest trade-related issues. This is the ‘Bilateral Dialogue on Forest Products’, which states:

‘The Parties agree that bilateral dialogue, cooperation and exchange of information and views on relevant laws, regulations, policies and issues of importance to the production, trade, and consumption of forest products are of mutual interest. The Parties agree to carry out this dialogue, cooperation and exchange in the Bilateral Dialogue on Forest Products, including: (a) the development, adoption and implementation of relevant laws, regulations, policies and standards, and testing, certification and accreditation requirements and their potential impact on trade in forest products between the Parties; (b) initiatives of the Parties related to the sustainable management of forests and forest governance; (c) mechanisms to assure the legal or sustainable origin of forest products; (d) access for forest products

to the Parties or other markets; (e) perspectives on multilateral and plurilateral organisations and processes in which they participate, which seek to promote sustainable forest management or combat illegal logging; (f) issues referred to in Article 24.10 (Trade in forest products); and (g) any other issue related to forest products as agreed upon by the Parties.'



Annex III: A model chapter

The six parts of a model chapter could be:

Part I – General provisions including provisions on non-lowering of standards and involvement of CSOs

Part II – Substantive provisions

- **Section 1: All relevant international law concerning deforestation, biodiversity, climate and human rights, as also listed in EP (2017).**
- **Section 2: Specific provisions and targets which could include legality standards on land tenure that meet the adopted Voluntary Guidelines on the Responsible Governance of Tenure; greenhouse gas emission reduction targets as detailed in a country's NDC; deforestation targets; and targets for the restoration of forest ecosystems.**
- **Section 3: Commitments on domestic implementation and enforcement with reference to transparency and domestic enforcement mechanisms and administrative procedures, including consultative processes with local civil society actors and communities.**
- **Section 4: The Parties' obligations regarding the conduct of enterprises. This should include provisions on CSR and VSS.**

Part III – Institutional provisions for the implementation of the chapter, i.e. the establishment of a committee, involvement of domestic advisory groups, and creating links with existing international instruments and agreements (e.g. the CBD). This might also include placing a due diligence requirement on operators and traders.

Part IV – Provisions on bilateral cooperation, especially bilateral technical cooperation for capacity building, and technical assistance in matters related to deforestation, climate change and human rights. Complementing trade with development cooperation might be key, as in the FLEGT-VPA process.

Part V – Dispute settlement and complaints (possibly offering a collective complaints procedure), which should be far more elaborate and sophisticated than the current proposals and provisions. It should include provisions on consultations between parties, complaints procedures, compliance with outcomes of procedures, and a system of agreed sanctions and fines.

Part VI – Evaluation of the chapter.

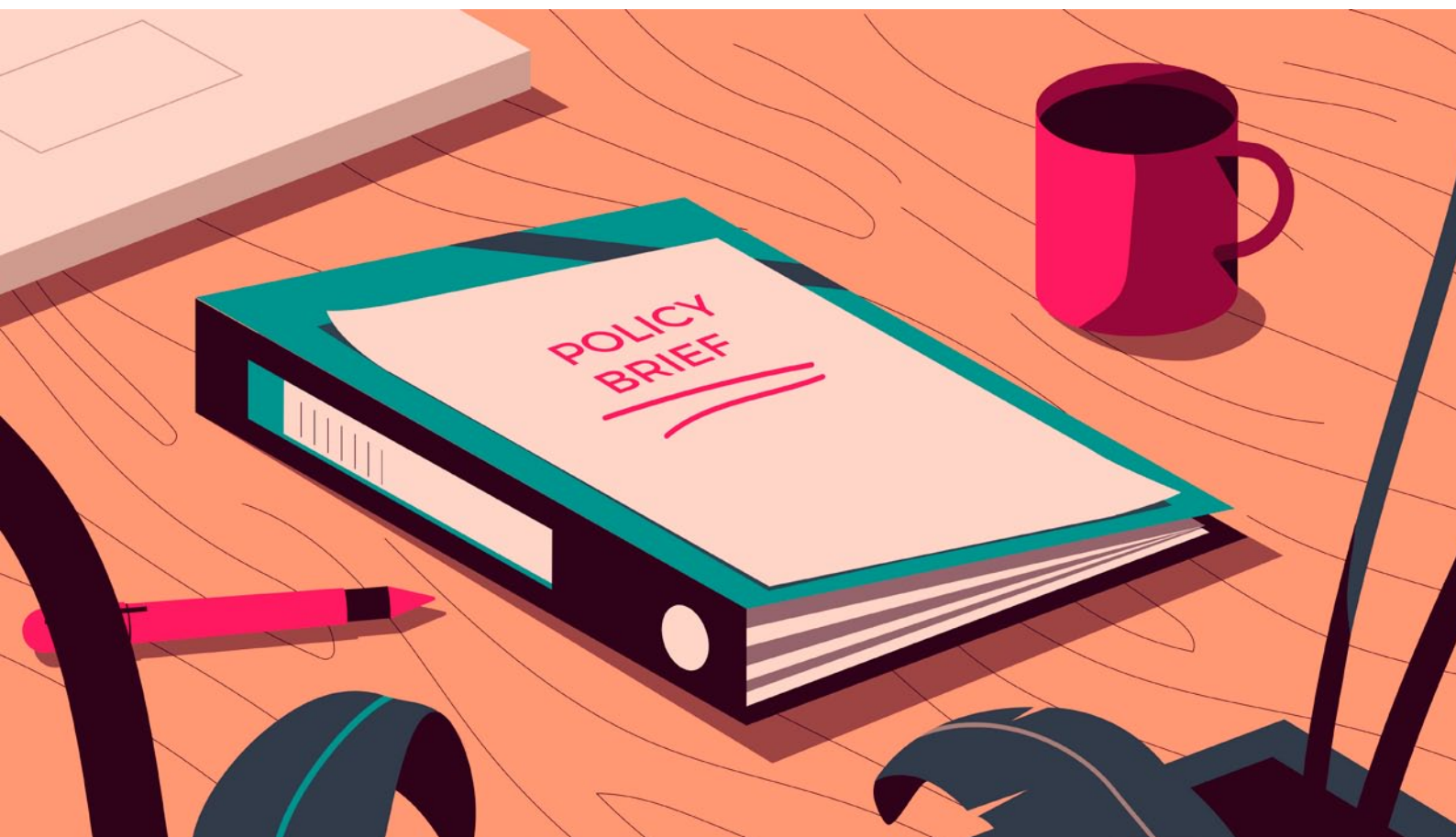
Annex IV: Enforcing NDCs

Indonesia's NDC can be strengthened.⁸⁴ Indonesia's NDC (November 2016) includes a target of reducing GHG emissions including land use, land use change and forestry (LULUCF) by 29 per cent or 41 per cent, conditional on international support below 'business as usual' (BAU) in 2030 (roughly equivalent to doubling today's emissions levels). While Indonesia's reduction targets sound ambitious, Indonesia aims to meet a large share of its commitments through reductions in the forestry sector. This means that other sectors will see substantially lower relative reductions of emissions below BAU. The National Energy Policy (NEP), also mentioned in the NDC, has a target to increase renewable energy to 23 per cent of total primary energy supply by 2025. If Indonesia were to achieve this share, it would exceed its NDC target. Indonesia's NDC could easily be strengthened by explicitly including the envisioned share of renewable energy. Under current policies, Indonesia will not meet the NEP target.

Brazil's NDC is insufficient.⁸⁵ The remarkable progress in mitigating forestry emissions after 2005 seems to have stopped, with deforestation and resulting emissions increases picking up speed again in recent years. Total deforestation increased almost 30 per cent in 2016 compared to 2015, with more than 50 per cent in the Amazon region, adding around 130 MtCO₂ to total net emissions in 2016. This increase in emissions goes in the opposite direction from Brazil's commitments under the Paris Agreement, which include a target of zero illegal deforestation in the Brazilian Amazonia by 2030. Budget cuts of 50 per cent to the Environment Ministry, and of 70 per cent to deforestation monitoring authorities, raise issues of concern around the government's ability to monitor deforestation adequately, as shown by the increasing deforestation levels observed since 2016. Not only has the enforcing capacity of authorities been reduced: the government has also started to reverse LULUCF policies already in place, regularising more illegal land-grabbing practices and removing protection from national forests. Given the key role of the LULUCF sector in Brazil's NDC and the huge importance of its forests for environmental services, biodiversity and carbon sequestration, the Brazilian government urgently needs to strengthen mitigation action in this sector. Emissions in most sectors are expected to rise at least until 2030. In order to reach the point where emissions peak, and then to decrease levels rapidly afterwards (as required by the Paris Agreement), Brazil will need to reverse the current trend of weakening climate policy, by sustaining and strengthening policy implementation in the forestry sector and accelerating mitigation action in other sectors – including reversing present plans to expand fossil fuel energy sources. While the economic recession has resulted in slower than expected emissions growth in Brazil's energy and industry sectors, recent developments in energy infrastructure planning and the above discussed reversal of deforestation policies are evidence of a worsening of Brazil's national climate policy implementation – the opposite of what is needed to achieve the goal of the Paris Agreement.

⁸⁴ <https://climateactiontracker.org/countries/indonesia/>

⁸⁵ <https://climateactiontracker.org/countries/brazil/>



"To achieve coherence between EU trade policy and EU commitments on forests, climate change and human rights, EU trade agreements with highly forested countries must include provisions and enforcement mechanisms to ensure that increased trade does not lead to deforestation and human rights violations."



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