

The background of the entire page is a photograph of a woman in a forest. She is wearing a headscarf and a dark jacket, looking towards the camera with a slight smile. The image is overlaid with a semi-transparent orange filter. The text of the title is centered over the image in white.

Discussion paper
**Can an EU Human
Rights Due Diligence
Regulation help us
tackle deforestation
and respect human
rights?**

December 2018


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Can an EU Human Rights Due Diligence Regulation help us tackle deforestation and respect human rights?

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A woman in a forest, carrying a large log on her shoulder. She is wearing a white headscarf and a white top. The background is a dense forest with trees and sunlight filtering through the canopy.

In July 2018, Fern brought together experts in the field of trade, due diligence, land rights and deforestation to discuss how the EU could regulate deforestation in supply chains. Fern is exploring regulatory measures to address deforestation because voluntary measures like certification and company commitments are insufficient to halt deforestation and conflicts.¹ Most NGOs are therefore demanding an EU regulation.²

Participants agreed that the EU should build on company commitments to halt deforestation and to strengthen these commitments by creating a soft law framework for deforestation-free commodity supply chains. This could also be taken up by initiatives like TFA2020, or the Amsterdam Declaration . This meeting was held under Chatham House Rules.

1 GCP Forest 500 report, see <https://forest500.org/progress>; Fern and WRI report 'Taking the bads out of the goods' see: <http://fern.org/BadsOutOfGoods>; Fern's report Company Promises at: <http://fern.org/companypromises>.

2 See inter alia: <http://fern.org/NGOcallforaction> and <http://fern.org/ActivistsDemandEUActionOnDeforestation>

Tenure rights: a possible entry point on which to base regulation aimed at halting deforestation?

Fern started by explaining how existing soft law on customary tenure rights (the FAO Voluntary Guidelines on the Governance of Tenure (VGGT) could be used as an entry point for eliminating deforestation in agricultural supply chains. It is based on a study that Fern commissioned available at fern.org/VGGT. One approach is to focus on human rights, and specifically tenure rights because when forests are converted for agriculture on a large scale, an almost inevitable consequence is the violation of community tenure rights.³ Respecting community customary tenure rights reduces forest conversion and hence deforestation. One way of tackling illegal deforestation would therefore be to harden existing human rights 'soft law'⁴ on customary tenure. It is potentially easier to base a regulation around international tenure rights than on deforestation, since there is no international legal framework or standard that defines deforestation. Fern presented two potential pathways to tackle agricultural deforestation:

1. EU regulation on deforestation-free commodity supply chains achieved through an inclusive deliberative process. Principles, standards and guidance for operationalisation of a 'deforestation-free' regulation would first need to be agreed. They could be built onto the FAO/OECD Agricultural Supply Chain Guidelines, which are strong on human rights and include the VGGT. Discussions on such standards are happening in fora such as the TFA2020 and the Amsterdam Declaration Group.
2. EU regulation to foster conflict-free supply chains in line with existing international human rights law, specifically the VGGT. Improving forest and land governance and, in particular, recognising and protecting the rights of local people(s) over forest lands, are two of the most important things that can be done to reduce deforestation.⁵ Where communities have secure rights, deforestation rates are lower and carbon storage higher.⁶ These legislative measures should have both demand and supply side measures [lesson learnt from the EU Forest Law Enforcement Governance and Trade (FLEGT)⁷ Action Plan].⁸

— **Ideas for supply side measures:** one option is a third-country carding system (inspired by the EU Illegal and unreported and unregulated fishing regulation or IUU). This would involve: (1) Engagement with producer countries through an inclusive deliberative process; (2) Baseline assessment of the existing tenure situation; (3) Road map towards

3 Inter alia: <http://www.forestpeoples.org/en/node/50213>

4 The term "soft law" refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law.

5 See also Britaldo Soares-Filho, et al., *Role of Brazilian Amazon Protected Areas in Climate Change Mitigation*, PNAS 107(24): 10821–10826 (2010). doi:10.1173/pnas.0913048107 (attributing most of the 70% decline in tropical deforestation in the Brazilian Amazon over the early part of 2004–2012 to the issuance of rights over large tracts of forests to indigenous groups); Eugenio Y. Arima, et al., 'Public Policies Can Reduce Tropical Deforestation: Lessons and Challenges from Brazil' in *Land Use Policy* 41:465–473 (2014). doi:10.1016/j.landusepol.2014.06.026 (noting that, from 2008 onwards, actions by government to tackle climate illegal deforestation were the most important factor contributing to the 70% decline in tropical deforestation in Brazil over the period 2004–2012). See also *Consumer Goods and Deforestation*, note 23.

6 Rights and Resources Initiative. Annual Review 2016–2017. *From Risk and Conflict to Peace and Prosperity: the urgency of securing community land rights in a turbulent world* at 10 (citing Stevens, C., R. Winterbottom, J. Springer, and K. Reytar. 2014. *Securing Rights, Combating Climate Change: How Strengthening Community Forest Rights Mitigates Climate Change*. Washington, DC: World Resources Institute, available at www.rightsandresources.org/en/publication/securing-rights-combating-climate-change-how-strengthening-community-forest-rights-mitigates-climate-change, and Rights and Resources Initiative. 2016. *Toward a Global Baseline of Carbon Storage in Collective Lands: An updated analysis of Indigenous Peoples' and local communities' contributions to climate change mitigation*. Washington, DC: RRI, available at www.rightsandresources.org/en/publication/global-baseline-carbon-storage-collective-lands).

7 For an explanation of FLEGT see: <http://fern.org/FLEGT> and <https://www.youtube.com/watch?v=wzoscwhpMY>

8 See also EFI briefing on lessons from FLEGT for zero deforestation: <http://www.euflegt.efi.int/publications/achieving-zero-deforestation-commitments>

legislative changes to recognise customary tenure; (4) Monitoring and reporting of implementation. This should be linked with development aid and/or financial support (Note: all G7 countries have said the VGGT are guiding their development aid).

- **Ideas for demand side measures:** One option is a Human Rights Due Diligence (HRDD) Regulation that assesses whether the land on which commodities were cultivated was converted from forests in violation of communities' tenure rights. The study commissioned by Fern indicates that Due Diligence would be based on the OECD due diligence Framework, and could involve the following steps: (1) establish strong enterprise management systems for including VGGT principles in responsible supply chains; (2) identify, assess and prioritise VGGT risks; (3) design and implement a strategy to respond to risks; (4) verify supply chain due diligence and (5) report on supply chain due diligence and notably how the company adheres to the VGGT). Short-cuts could include developing black and white lists, focusing on choke points and making use of existing initiatives focused on private sector compliance with the VGGT.⁹ It could also include investigation and prosecution of EU nationals, and companies benefitting from illegal land conversion in producer countries by financing or operating companies (inspired by the IUU).

Since this study was commissioned, new laws have been adopted in France (and are about to be adopted in Switzerland) which require companies to ensure a 'duty of care'. There are also existing laws in the UK (Modern Slavery Act). We should learn from them.

Fern underlined that in this debate there are no silver bullets and Fern will continue to work to fully operationalise FLEGT so as to address conversion where possible; look at developing or amending existing VPAs for some commodities in some countries (cocoa in Ghana or Cote d'Ivoire); work on inclusion of deforestation in Free Trade Agreements with forested countries (particularly Indonesia) and focus on ensuring the Common Agricultural Policy (CAP) reform deals with increasing protein production in EU and reducing meat consumption.

After Fern's presentation, the following themes were discussed:

Sovereignty

Producer country governments (e.g. Indonesia) are pushing back against rules or regulations (perceived to be) imposed by foreign countries - anything perceived as 'a stick' will provoke a negative reaction. This point was made by various participants. Counterarguments were that these proposals are only about supporting countries to implement what they already have committed to. The point was also made that this 'sovereignty argument' is often being used by governments to suppress indigenous peoples and violate human rights.

There was agreement that to achieve an EU regulation, buy-in of governments (as well as communities, local NGOs and the private sector) is critical, so we should have a clear and strong narrative that works for governments, while pushing back against the argument of sovereignty.

9 See, for example, USAID, "Operational Guidelines for Responsible Land-Based Investment," March 2015, available at <http://usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>; New Alliance for Food Security and Nutrition in Africa, "Analytical Framework for Investors under the New Alliance: Due Diligence and Risk Management for Land-Based Investments in Agriculture," August 2015, available at https://www.growafrica.com/sites/default/files/Analytical-framework-for-investors-under-the%20new-alliance%20%287%29_0.pdf; The Interlaken Group and the Rights and Resources Initiative (RRI), Respecting Land and Forest Rights: A Guide for Companies, August 2015, available at <http://www.interlakengroup.org>. The French Ministry of Foreign Affairs and the French Development Agency (AFD) have also produced a "Guide to due diligence of agribusiness projects that affect land and property rights. Operational Guide," October 2014, available at <http://www.foncier-developpement.fr/publication/guide-to-due-diligence-of-agribusiness-projects-that-affect-land-and-property-rights>.

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT)

There were clarification questions around what the VGGT are and who has signed up. (This [publication](#) about the VGGT may be helpful). The VGGT are far-reaching guidelines anchored in human rights, which lay down principles to safeguard peoples' rights to access or own their land, forests and fisheries. They represent a global consensus on tenure, having been endorsed by the [Committee on World Food Security \(CFS\)](#) in 2012, and recognised by the G8 (now the G7) and the G20. They have also been endorsed by many of the countries where agricultural deforestation is rife, as well as transnational agribusinesses. They offer guidance on the governance of tenure – a politically sensitive and technically complex subject – and outline broad principles that can be adopted in different contexts.¹⁰

Although the VGGT are not legally binding, most principles including the recognition of customary rights are based on existing international law, namely the international bill of human rights. It was pointed out that basing a regulation on the VGGT could be used as evidence that EU concern about land tenure rights is genuine and therefore be justified under the World Trade Organisation General Agreement on Tariffs and Trade (WTO GATT) public morals exception,¹¹ because they have been widely signed-up to. The point was also made that the UN Guiding Principles on Business and Human Rights (UNGPs) are based on international law, which many countries, as well as companies, have committed to implement.¹²

The problem with the VGGT is that they are 'broad and light' and hence difficult to implement coherently – this explains why there are many different standards on how to implement them. Implementation of the VGGT would therefore have to start with agreeing on a baseline and roadmap for improvement. Only then can there be clarity about what is legal and what is illegal land conversion from the perspective of customary tenure rights. This should be based on a good understanding of what is already happening (e.g. one map project in Indonesia).

It was pointed out that for companies it is very difficult to clarify who owns what as there is much division within and between communities and NGOs and the government. Hence, clarification would be welcome.

People asked whether hardening the soft VGGT law into a regulatory instrument would undermine buy-in to the VGGT. Some thought yes, others no.

Should we not focus on deforestation rather than customary tenure rights?

The WTO has dealt with a lot of environmental cases and there is a lot of GATT case law on environment, but hardly any on human rights.¹³

The question was raised that because the production of agro-commodities is largely limited to eight countries. People wondered whether it would therefore be better to focus on developing

10 For more information see *VGGT: what potential to engage?* Available at www.fern.org/VGGT

11 The article XX of the GATT reflects an exhaustive list of exceptions to the basic GATT obligation, which is designed to provide the member states with flexibility in regulating the sensitive areas like protection of public morals, of human, animal or plant life or health. See *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* Volume 20, Issue 9, Ver. IV (Sep. 2015), PP 33-43 e-ISSN: 2279-0837, p-ISSN: 2279-0845. www.iosrjournals.org.

12 Countries do not have an obligation in relation to the UNGPs unless they themselves commit to them. This is mostly done via National Action Plans. They do have obligations in relation to the international human rights treaties (assuming they have signed and ratified them) which the UNGPs seek to enforce with regard to corporations.

13 There is no WTO GATT case in which human rights were invoked directly as justification for trade restrictions; In EC-Seals HRs arguments were used indirectly to show that the EU was acting to protect the public morals. Hence, the existence of international HR instruments to which the EU is committed can help showing that the EU is restricting trade to protect public morals (and not out of protectionism).

bilateral mechanisms, following the Voluntary Partnership Agreement (VPA) logic, rather than setting up a whole regulatory system? Campaigning by NGOs, and government regulations like the EU decision on palm oil could then be the stick to get countries to move into bilateral negotiations.

Some asked whether consumer campaigns can create enough power to make this work. Others pointed out that trade in supply chains and commodities continuously change, which would be a strong argument for a broader regulation. It was also pointed out that consumers are hypocritical as they don't act (buy) in line with what they say they believe in.

Is the carding system the right tool?

It was made clear that under the IUU the carding system works well to improve governance, including addressing human rights issues like slave labour on fishing boats in Thailand. Some participants asked, however, if a carding system would work for deforestation as it would punish all companies in a country rather than specific companies and it may also put countries off wanting to join, though it has been accepted as a means to verify legal fish. It also seems more of a demand-side measure than a supply-side measure. It is noted that the industry is a big player in the agro-commodities sector and their leverage can be very big, which has positive and negative sides.

Other issues raised

- Should we not focus on policies or regulations to create higher prices for truly unsustainable products? An example was given that cheap tyres don't last long and people buying cheap tyres would use twice the amount of rubber, punishing companies that make higher quality tyres. If a legal requirement was made for quality this would have a big impact on resource use. This speaks to measures that fit under the EU's circular economy initiative.
- Responsible investment should be linked to good due diligence practices. The example was given that Canada and the Netherlands have or will reject Export Credit Agency support to companies judged by the OECD National Contact Points (NCP) to have failed their due diligence.
- Any regulation should also include remedial and grievance mechanisms. See also [ECCJ good and short paper on key features of mandatory HRDD](#).
- The deforestation issue is very complex. It is rarely the case that a company just comes into a primary forest area where people live. Deforestation often takes place over many years and includes many different stages before all forests are cleared. Can legislation capture this?

FLEGT

The group discussed what lessons could be learnt from FLEGT. For more information on the FLEGT process, see footnote 7. The most important lessons from FLEGT for this initiative are (1) the biggest gains for improving governance are in the bilateral deliberative (meaning inclusive, participatory, open, consensus-based) VPA process; (2) the EU Timber Regulation (EUTR) is a big incentive for countries to negotiate a VPA (although it is getting more effective, it is not tackling all illegal imports but still has a deterrent effect).

It was noted that the EUTR has two elements: (1) a prohibition to make it a criminal offence to put illegally sourced timber on the EU market and (2) a due diligence process for companies requiring them to know where their timber is coming from. The due diligence process has proven to be the most effective – proving illegality is difficult – but the prohibition element has been important to sell the EUTR and create a deterrent.

From this follows (3) a lesson that any regulation should be clear on what exactly the risk of non-compliance is and how to prove due diligence. Another **crucial** lesson is (4) that it is important that monitoring is independent, as is the case both with the VPA and the EUTR but not in the implementation of trade instruments led by DG Trade (General System of Preferences¹⁴, FTAs, impact assessments).

People asked whether existing FLEGT structures could be used for this proposal? The answer was yes. Civil Society Organisation (CSO) platforms, competent authorities etc all could play a role in similar initiatives re: agro-commodities. CSO platforms in specific countries are already involved in other commodity activities.

Some pointed out that the legal yardstick of FLEGT is a problem as the process defining legality does not normally include international law and hence VPAs don't address land rights. Others point out that, since they are based on a deliberative process, there are different outcomes in different countries. Some VPAs have been instrumental in strengthening land rights (e.g. Ghana).

Sanctions and incentives

Before thinking of sanctions or incentives, as mentioned above, it should first be clear:

1. what the due diligence expectations are (deforestation, land rights or responsible business conduct) of any due diligence regulation (though it was also noted that being vague can be helpful, as the Thai IUU case of shows)
2. who gets sanctioned, the government or companies, or both? and
3. whether there are strong independent monitoring mechanisms on how companies must meet these expectations.

Increasing transparency through good reporting and timebound compliance are also important.

There are many incentives that could be used including creating strong government procurement rules; banning export-import credits or creating lower tariffs.¹⁵

The yellow card in the IUU regulation is an interesting approach as it provides incentives for countries to improve their practice with several clear cases.

Customary land rights

One legal reality was raised: Current EU law does not allow EU courts to deal with company violations of land claims and/or land conflicts; this must be dealt with at the national level. The competent jurisdiction should be located where the property is situated, and not where the company is domiciled. Hence there is no access to EU courts for third country land

¹⁴ The GSP allows vulnerable developing countries to pay fewer or no duties on exports to the EU.

¹⁵ See Fern reports available at Fern.

rights violations. Courts of England and Wales could, for example, refuse to take a Liberian community's case of trespass or some other claim that could be said to be 'principally concerned with a question of the title to, or the right to possession of, that property'.¹⁶ This rules out the investigation and prosecution of EU nationals or companies as suggested above in the study commissioned by Fern, at least until the EU law has changed.

Participants explored to what extent a HRDD approach would be a positive move in efforts to address deforestation. Some responses were that the burden would be on companies, not states to prove compliance; it does not rely on high consumer awareness; it would create a level playing field; it would be normative and support universal human rights; it would also have an impact despite the EU's waning influence since it is based in international norms; and that due diligence is a concept companies understand well.

They also looked at what would be negative. Some responses were that human rights include many different types of rights; that if the focus is on tenure rights, a human rights approach may entail engagement with many other rights that are extraneous to the main goal of tackling deforestation; that customary tenure – being much softer human rights law than e.g. the prohibition of slavery or protection of other fundamental labour rights – could be crowded out; and that HRDD could also have a negative impact on smallholders if it was too onerous.

The UNGP are based on the idea of 'knowing and showing' rather than 'naming and shaming' and hence get high buy in, but transparency and harmonised reporting are not yet the norm. It's often treated by companies as a box-ticking exercise. This is because HRDD is primarily an obligation of **conduct** not of **result** and hence does not, by itself, make companies liable for harm caused. So, a regulation would need to avoid companies getting away with box-ticking. It could therefore be good to build on existing practice like with Non-Financial Reporting Directive and the French Law (which is very process-based) and with the EUTR which includes both an obligation of conduct and of result (prohibition of placing illegal timber products on the EU market). Transparency in due diligence reporting; participation; and (independent) monitoring are all critical (see points made above).

When harm does occur because companies did not take reasonable steps to minimise risks, victims must be able to obtain effective remedies in the courts of the country where the company is based. Hence, good HRDD regulation must include parent company liability and access to remedies for victims.

However, some open questions remained, for example: does a new regulation needs a full set of competent authorities or can it build on what is already there (such as the EUTR and those for conflict minerals)?¹⁷

16 Based on participants' experience in relation to the jurisdiction of England and Wales, where section 30 of the Civil Jurisdiction and Judgments Act 1982 (CJA) says: "The jurisdiction of any court in England and Wales or Northern Ireland to entertain proceedings for trespass to, or any other tort affecting, immovable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom **unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property**." On the EU side, rules on jurisdiction are mentioned in the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). Article 22 of the Brussels I Regulation says: "The following courts shall have exclusive jurisdiction, regardless of domicile: . . . 1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. . . ." Although art. 22 refers to Member State and does not clarify jurisdiction in relation to non-member states, this does mirror the language in CJA in locating jurisdiction where the property is situated, and not where the company is domiciled.

17 Would be good to specify what role these competent authorities would be playing. Certainly, when it comes to monitoring HRDD practice, they are absolutely necessary.

Can companies deal with HRDD?

It's important to know that: companies often have difficulty to know who to talk to; they have a legal department carefully looking at the level of compliance required and the costs of non-compliance and they report directly to the CEO; identifying and working with stakeholders across the supply chain is difficult; investors can be leveraged to impose some of these commitments; the first goal of companies is to make money; companies are large structures with many different divisions who don't always communicate well. It was pointed out that companies often feel uncomfortable with being too transparent in reporting on risks as it could have negative impact on their business. This is a key reason why any regulation must impose transparency – companies are not likely to do it by themselves.

How not to disadvantage smallholders?

OECD guidelines for multinational enterprises include engaging with the informal sector. There is a clear role for the EU to support programmes to make this happen. Land governance is a key lens to look at smallholders. Note that smallholders are not a homogenous group, they are different groups and individuals in different countries, cities, rural areas, and are treated differently depending on their gender.

To mitigate negative impacts, we should look at: group certification; support measures; and less onerous requirements that smallholders can meet – although this can also be problematic. Also issues like closing the yield gap, extension services and capacity building are key.

Some proposals for a way forward came out of the discussion:

- There is a role for the TFA2020 to develop a soft law framework for deforestation-free commodities, using existing TFA principles and the OECD/FAO Agricultural Supply Chain Guidelines as a basis. This could be a starting point for a regulation.
- Bilateral processes could tackle poor forest governance. We would need to consider what 'sticks' or 'carrots' could be used to drive producer governments into these bilateral processes (e.g. like the EUTR drove countries to VPAs). This could be at regional level rather than national level.
- Given the present momentum behind HRDD Regulation, it could be an interesting starting point for a regulation. However, there are limitations since HRDD is very broad. To address deforestation driven by conversion, a focus on land tenure due diligence may be more appropriate than a broader approach using human rights. But we recognise that this would not apply to all commodities (i.e. not cocoa or rubber, since there are not large land tenure violations associated with these commodities) and that other human rights violations are prevalent in the production of Forest Risk Commodities. By focusing narrowly on land tenure due diligence, there is a danger that companies will marginalise other human rights issues in their due diligence process. Different approaches for different commodities may be required.
- Any due diligence regulation needs to be very clear on the expectations that governments require of companies, and any regulation needs strong rules on monitoring how these companies meet these expectations. Scope, transparency requirements, independent monitoring, reporting and access to justice should be carefully thought through. Being vague and broad in some of the legal formulations can, however, also have advantages. Being vague on transparency requirements is nearly always disastrous. However, due

diligence focuses on process rather than result. The EUTR is a hybrid with its prohibition and its due diligence requirements. This may be an interesting example to build on. Other incentives like credits, procurement, other forms of investment - divestment could also play an important role as incentives or sanctions.

- We noted that the EUTR and Conflict Minerals Regulation are not very effective yet on the ground. It takes a decade or more to see meaningful impacts on the ground. Being aware of this and developing benchmarks may be useful.
- The EU Court is not allowed to rule on land conflicts with companies outside the EU. This rules out the option to investigate or prosecute EU nationals or companies benefitting from land use conflicts, unless these EU rules are changed first.
- National Contact Points and Competent Authorities for EUTR and conflict minerals could possibly play a role in implementing due diligence regulation.
- Bringing key government officials from key producing countries into this discussion would be a logical next step to think this through in more detail and assess political feasibility.



Improving forest and land governance and, in particular, recognising and protecting the rights of local people(s) over forest lands, are two of the most important things that can be done to reduce deforestation. Where communities have secure rights, deforestation rates are lower and carbon storage higher.



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