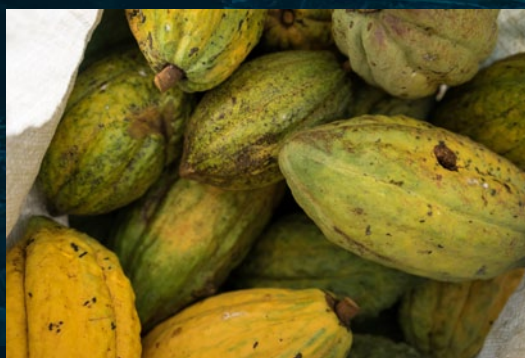


Hardening international soft law frameworks into EU measures to address forest-risk commodities



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Images front page: Background: Gua Musang, Malaysia, photo by Wakx/Flickr.com/CC. Left to right: Indonesia, palm oil plantation, photo by Friends of the Earth Int./Victor Barro/Flickr.com/CC; Colombia, cocoa pods, photo by Thomas Cristofolletti/USAID/Flickr.com/CC; Brazil, cattle, photo by Bernard Dupont/Flickr.com/CC. Image back page: Malawi, soy, photo by Ollivier Girard/EIF/Flickr.com/CC

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Palm oil plantation and forest in West Kalimantan, Indonesia

Photo by Nanang Sujana/CIFOR/Flickr.com/CC



Executive summary

Between 1990-2008, 80 per cent of deforestation was caused by commodity-driven expansion of commercial agriculture, and the EU was the leading importer of these forest-risk commodities (FRCs), which include palm oil, beef and leather, soy, cocoa, and timber. The EU has acknowledged the need for the EU to develop policy proposals to address the environmental impacts of EU consumption of food and non-food commodities as a key component of fulfilling the EU's pledge to tackle global deforestation and forest degradation.

Over recent years major private sector actors have also pledged to eliminate deforestation from their supply chains and investments. But these corporations, too, have identified the need for regulations, both in the EU and, in particular, to guide and support FRC-producing countries' efforts. EU policymakers are now in the process of taking up this challenge, and this paper provides inputs to these policy discussions.

Basing EU measures on internationally agreed soft law frameworks to achieve conflict free and deforestation free supply chains

Forest advocates are calling for both 'conflict-free' and 'deforestation-free' commodity supply chains. Because improving forest and land governance and 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, some advocates include 'conflict-free' as a factor to include within the broader pursuit of deforestation-free supply chains. However, this misses some existing opportunities to pursue conflict-free supply chains. While the concept and operationalisation of 'deforestation-free' is not yet agreed by key forest stakeholders, there already exists an international soft law framework that could be adopted as the basis for EU measures aimed at ensuring conflict-free FRC supply chains: the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT). Therefore, rather than nesting 'conflict free' as one sustainability factor within the broader and more complex concept of 'deforestation free', the EU should adopt a set of well-tailored measures requiring forest-risk commodities to be 'conflict free' as a stand-alone concern, even as it continues to pursue additional measures to achieve deforestation-free commodity supply chains. Once a soft law framework for deforestation-free FRCs has been developed and agreed, a companion set of EU measures to implement that framework can follow.

The VGGT outline how tenure rights to land, fisheries, and forests should be handled and represent the first global consensus on fundamental principles that should underpin land tenure and land governance. As a soft law instrument, the VGGT can provide comprehensive and detailed guidance on the governance of tenure – a subject which is both politically sensitive and technically complicated. The Guidelines respond to demands for a flexible instrument that lays out broad principles that can be adapted to and implemented at various levels and contexts. They aim to be a reference point for the adoption of globally coherent national ('hard law') measures that operationalise tenure governance in line with VGGT values, principles, and objectives.

The VGGT have received widespread support among governments, international development agencies, Civil Society Organisations (CSOs) and International Non-Governmental Organisations

(INGOs). The G7 countries¹ have committed to aligning their development assistance with the VGGT, and bilateral partnerships between national governments and the G7 have focused on entrenching the VGGT in national legal and policy frameworks and on making key documents publicly available. The EU and Member States are already making substantial investments in support of VGGT implementation. The new EU measures proposed in this paper would consolidate, learn from, and build upon these existing efforts and bring them to bear on EU commitments to halt global deforestation.

Framing EU measures around the VGGT would be in line with a growing trend towards developing international 'soft law' standards for responsible business conduct and then using the soft law framework as a basis for globally coherent 'hard' laws at national level. These supply chain-related laws represent a shift in international regulation from the prevailing model of "transnational new governance," which is dependent on voluntary standards by private actors and non-governmental international institutions, towards the use of domestic regulatory law. This shift is significant and important because domestic supply-chain regulation is an avenue by which the regulating state can potentially set environmental and human rights norms for third-party suppliers and their host governments – i.e., the states in which the regulated goods are produced ('producer countries') – via multinational company supply chains. The EU Timber Regulation (EUTR), which is familiar to EU forest advocates, is an example of a supply-chain regulation. The demand-side due diligence measures recommended in this paper follow similar lines. When based upon an already developed and agreed international soft-law framework as advocated here, such laws can have even greater potential to stimulate and weave together a globally coherent set of national laws influenced by the soft law framework in both consumer and producer countries.

The need for both supply-side and demand-side measures

One risk inherent in supply chain regulations that are proposed with the aim of influencing environmental and human rights norms in a third (producer) country is that multinational companies become more than just regulated entities; they now also serve as regulators themselves, imposing standards on their third-party suppliers in other countries. Thus, the implementation of regulations about outsourcing is itself being outsourced to companies, which are responsible for ensuring compliance within the firm's own multi-tiered international supply chains. Complementing demand-side measures of this sort with supply-side measures to foster the producer country's domestic implementation of the same soft law framework helps to ensure that the producer country exercises its duty as the principle guarantor of environmental and human rights norms. Supply-side measures, and related support to build producer countries' governance capacity, can help to temper and correct the 'business turn' cautioned against by some CSOs. They are wary of delegating what are essentially regulatory tasks to multinational corporations.

Both demand- and supply-side measures are required to tackle global deforestation. Supply-side measures aim to foster better governance of natural resources in producer countries by building the country's governance capacity and performance. Demand-side measures influence the sustainable management of natural resources more indirectly by requiring those who trade commodities to evaluate their supply chains in line with specified standards and principles and to only trade in products that comply.

¹ The Group of Seven (G7) is an informal grouping of seven of the world's advanced economies consisting of Canada, France, the United States, the United Kingdom, Germany, Japan and Italy. The European Union is a non-enumerated member of the G7 but neither chairs nor hosts Summits.

A toolbox of recommended supply-side and demand-side measures

- **Fully utilise instruments already available through the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan – Voluntary Partnership Agreement (VPA) processes, timber procurement policies, and the EUTR – to address forest conversion in violation of local laws including communities’ land and forest tenure rights.** Studies have shown that the majority of the tropical deforestation that zero-deforestation pledges seek to halt is illegal in some way.
- **Support the development of guidelines defining how ‘deforestation free’ commodity supply chains could be achieved.** This could be developed through existing international platforms and forums seeking to operationalise companies’ ‘zero-deforestation’ commitments and then incorporated into the Organisation for Economic Cooperation and Development – Food and Agricultural Organisation (OECD-FAO’s) Guidance for Responsible Agricultural Supply Chains.
- **Adopt a third country carding system to promote implementation of Tenure Guidelines by producer countries.** This would be modelled on the third country carding system being implemented under the EU Regulation to end illegal, unreported and unregulated (IUU) fishing (‘IUU Regulation’). A carding system to promote implementation of the VGGT would need to begin with the development of a baseline assessment for each partner country, showing existing measures for securing and protecting tenure. It would be followed by a roadmap developed by each partner country which could, in turn, be monitored and supported to ensure good progress. The Commission should make material publicly available, including: country assessments of their legal frameworks and administrative systems governing tenure; Commission fact-finding missions; and country roadmaps for bringing practices in line with VGGT principles and recommendations. This would not only foster accountability, but also provide very useful information for operators exercising due diligence in reference to VGGT principles.
- **Supplement the proposed carding system with development assistance and other resources. These resources should go to producer country governments and key stakeholder groups, in particular land and forest tenure holders.** Support should also be given to CSOs and NGOs that help tenure holders to secure their rights, and support law reforms and other governance improvements needed to implement the VGGT.
- **Require EU operators trading FRCs to exercise due diligence in relation to whether the land on which the commodities they trade were cultivated was converted from forests in violation of tenure rights.** The proposed due diligence measure would be similar to the due diligence obligations that the EUTR imposes on operators who first place timber or timber products on the EU. It would require operators to either (1) trace their commodity supply chain back to the farm, and be reasonably confident that the land on which the commodities were cultivated was not converted in violation of tenure rights, or (2) be reasonably confident that every entity in their supply chain exercises due diligence to ensure that the commodities were not cultivated on land that was converted in violation of tenure rights.
- **Ensure that due diligence remains the responsibility of economic operators trading in forest-risk commodities (and products that incorporate these commodities) and are not displaced onto voluntary certification schemes or other third parties.** Blacklists of rogue plantations, processors, and other links in the supply chain, as well as whitelists of transparent, well-monitored supply chain actors that demonstrate best practices for adhering to the VGGT, could be developed to aid downstream operators’ in their exercise

of due diligence. But any assistance – whether in the form of whitelists, blacklists, industry schemes, or other tools – cannot release upstream or downstream operators from their due diligence obligation. In other words, compliance tools such as certification schemes and whitelists should be viewed as providing assistance and evidence to support a company's exercise of due diligence, not substituting for it.

- **Require operators to publicly report on their commitments and actions to implement the VGGT.** Mandatory reporting laws should require companies to monitor their efforts to *implement* their stated commitments – that is, monitoring of the *procedures* used to fulfil companies' compliance promises, not just the *existence* of the promises. Requiring operators to publicly state how their operations adhere to the VGGT principles and standards creates a duty of care. It also allows external stakeholders to expose instances where the VGGT are not met.
- **Require Member State competent authorities to investigate and prosecute EU nationals or EU-based companies that benefit from illegal land conversion in producer countries** by financing or operating companies, along the lines of the IUU Regulation.

A man watches as workers stack logs at a wood processing facility outside of Kisumu, Kenya

Photo: Petr Kapuscinski / World Bank / Flickr.com



Acronyms

CFS	The Committee on World Food Security
CSOs	civil society organisations
EUTR	European Union Timber Regulation
FAO	Food and Agriculture Organization of the United Nations
FLEGT	Forest Law Enforcement, Governance and Trade
FRCs	forest-risk commodities
GDWGL	Global Donor Working Group on Land
INGOs	international non-governmental organisations
IUU	illegal, unreported and unregulated fishing
NCP	National Contact Point (for OECD Guidelines)
NGO	Non-governmental organisation
OECD	Organization for Economic Cooperation and Development
RBC	responsible business conduct
SDGs	United Nations Sustainable Development Goals
VGGT	Voluntary Guidelines on the Governance of Tenure, referencing the UN-FAO's <i>Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security</i>
VPA	Voluntary Partnership Agreement

Introduction

Global forests are the largest stores of carbon after oceans, provide habitat for 80 per cent of the world's terrestrial biodiversity, are home to 300 million people, and support the livelihood of 1.6 billion people. Global deforestation and forest degradation account for 11 per cent of greenhouse gas emissions, second only to the energy sector. Deforestation and forest degradation also result in significant biodiversity loss and, in many cases, violate the rights of indigenous peoples and local communities. NGOs are therefore urging the EU to take urgent action to tackle deforestation and forest degradation, "Halting deforestation and forest degradation, and allowing forests as well as other natural ecosystems to continue to function naturally, would provide at least 30 per cent of all mitigation action needed to limit global warming to 1.5°C, as well as dramatically slowing biodiversity loss and enabling forest dependent people to maintain their livelihoods."²

In 2008, the EU pledged to help reduce gross tropical deforestation by at least 50 per cent by 2020 and halt global forest cover loss by 2030.³ This ambition is consistent with more recent global commitments including the Paris Accord and the UN Sustainable Development Goals.⁴ While the EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan adopted in 2003 has made important contributions to the goal of reducing deforestation and forest degradation, much more needs to be done to realise the EU's commitment to tackle global deforestation.

A recent EU study confirms that between 1990-2008 80 per cent of deforestation was caused by commodity-driven expansion of commercial agriculture, and the EU was the leading importer of these forest-risk commodities (FRCs), which include palm oil, beef and leather, soy, cocoa, and timber.⁵ The 7th EU Environmental Action Programme reaffirmed the EU's pledge to tackle global deforestation and forest degradation and acknowledged the need for the EU to develop policy proposals to address the environmental impacts of EU consumption of food and non-food commodities. Over recent years major private sector actors have also pledged to eliminate deforestation from their supply chains and investments. But these corporations have identified the need for regulations, both in the EU and FRC-producing countries, to guide and support their efforts.⁶ EU policymakers are now in the process of taking up this challenge. This paper provides inputs to these policy discussions.

The paper examines a global trend towards developing international 'soft law' standards for responsible business conduct and then using the soft law framework as a basis for the adoption of globally coherent 'hard' laws at national level. It goes on to explore how EU measures to address FRCs could be developed in line with relevant international soft law to foster a globally coherent set of national efforts to reduce global deforestation by addressing FRC supply chains.

2 *Tackling deforestation and forest degradation: a case for EU action in 2017* (ClientEarth, Conservation International, EIA, Fern, Forest Peoples Programme, Global Witness, Greenpeace, WWF) June 2017, available at <https://fern.org/NGOcallforaction>.

3 Communication from the Commission addressing the challenges of deforestation and forest degradation to tackle climate change and biodiversity loss, COM(2008) 645/3, p.9.

4 *See How to Achieve the Sustainable Development Goals? Focus on Forests* (Fern, November 2016), available at <http://www.fern.org/focusonforests>

5 *The impact of EU consumption on deforestation*, available at http://ec.europa.eu/environment/forests/impact_deforestation.htm.

6 Duncan Brack and Mark Gregory, *Company Promises: How businesses are meeting commitments to end deforestation* (Fern, March 2017), available at <http://www.fern.org/companypromises>

The analysis here builds on an earlier paper which draws lessons from EU measures to ensure the sustainability of commodities entering the EU from other sectors – namely, fisheries and minerals – which are based on international legal frameworks, standards, and guidance.⁷

To address global deforestation and forest degradation by reducing the role of the EU as a driver of FRCs, EU NGOs are calling for EU regulations that would require commodities to be both ‘conflict free’ and ‘deforestation free.’ **Section 1** explains these concepts further. **Section 2** elaborates on the growing trend of developing international soft law to provide the basis for globally coherent regulations at national level to achieve human rights, environmental, and other Sustainable Development Goals; recommends this approach as a pathway for achieving conflict-free and deforestation-free global supply chains; and identifies the *Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (‘Tenure Guidelines’ or ‘VGGT’) as an existing soft law framework around which the EU should adopt a set of measures for conflict-free supply chains. **Section 3** outlines specific demand- and supply-side measures the EU could adopt. **Section 4** provides further analysis and discussion of the VGGT as the basis for the proposed set of measures. **Section 5** discusses issues relating to proposed supply-side measures which would be modelled on the third country carding system piloted by the EU Regulation to end illegal, unreported and unregulated (IUU) fishing (‘IUU Regulation’)⁸ and considers how a carding system relating to implementation of the Tenure Guidelines would be both similar to and different from the carding system focussed on illegal fishing. **Section 6** further discusses proposed demand-side measures for conflict-free FRC supply chains, and how they would relate to the VGGT. Finally, **section 7** draws some conclusions.

7 Pritchard, J. *Developing EU measure to address forest-risk commodities: What can be learned from EU regulation of other sectors?* (Fern, 2016), available at http://www.fern.org/sites/fern.org/files/Developing%20EU%20measures_0.pdf.

8 Council Regulation (EC) No. 1005/2008: <http://eur.lex.europa.eu/legal-content/EN/TXT/?qid=1408984470270&uri=CELEX:02008R1005-20110309/>.

1 Pursuing ‘conflict-free’ and ‘deforestation-free’ supply chains

Forest advocates are calling for both ‘conflict-free’ and ‘deforestation-free’ commodity supply chains.⁹ ‘Deforestation-free’ is a term employed in campaigns advocating for sustainable commodity supply chains that do not drive the conversion of forestland to agricultural production. The term ‘deforestation-free’ is preferred to the fuzzier and sometimes controversial term ‘sustainable’ because ‘deforestation-free’ can be more readily understood and endorsed in an intuitive way by consumers, companies, and other stakeholders. ‘Conflict-free’ refers to concern about whether land-use decisions – in particular, decisions to convert forests to large-scale agricultural production – respect customary land and forest tenure rights.

Some advocates consider ‘conflict-free’ to be one factor or attribute of ‘sustainable’ or ‘deforestation-free’ supply chains. This makes sense because ensuring that tenure rights are fully respected makes a very substantial contribution towards achieving sustainable supply chains for forest-risk commodities. Studies have shown that improving forest and land governance and recognising and protecting the rights of local people(s) over forest lands, are two of the most important ways to reduce deforestation.¹⁰ Where communities have secure rights, deforestation rates are lower and carbon storage higher.¹¹

Although ensuring conflict-free supply chains is a significant step towards deforestation-free supply chains, nesting ‘conflict-free’ as a factor within the broader pursuit of deforestation-free supply chains would miss some existing opportunities to pursue conflict-free supply chains. While the two concepts are related, they are not synonymous. Rather, each is comprised of a bundle of attributes that make it distinct from the other, although if these bundles were unpacked it would be clear that some attributes are found within both. More importantly, the two concepts are reflected in different (although sometimes overlapping) sets of international and national laws and voluntary due diligence frameworks that have developed – or are still developing – within the wider context of environmental and human rights developments.

There are compelling practical reasons for moving forward on conflict-free supply chains as a stand-alone concern. As discussed in section 2.2, while the concept and operationalisation of ‘deforestation-free’ is not yet agreed by key forest stakeholders, there already exists an international soft law framework that could be adopted as the basis for EU measures aimed at ensuring conflict-free FRC supply chains: the VGGT.¹² This means that a broad group of

9 Briefing Note: Tackling illegal logging, deforestation and forest degradation: an agenda for EU action (Greenpeace, Conservation International (Europe), WWF, ClientEarth, Fern, EIA, Forest Peoples Programme, Transparency International (EU Office), Global Witness, March 2016), available at <https://eia-international.org/wp-content/uploads/Briefing-Tackling-illegal-logging-deforestation-and-forest-degradation-an-agenda-for-EU-action-FINAL.pdf>

10 See also Britaldo Soares-Filho, et al., *Role of Brazilian Amazon Protected Areas in Climate Change Mitigation*, PNAS 107 (24): 10821–10826 (2010). doi:10.1-73/pnas.0913048107 (attributing most of the 70 per cent 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 per cent decline in tropical deforestation in Brazil over the period 2004–2012). See also Consumer Goods and Deforestation, note 23.

11 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).

12 To access an on-line copy of the Voluntary Guidelines on the Governance on Tenure, see www.fao.org/nr/tenure.

international stakeholders including, importantly, producer country governments as well as indigenous peoples' organisations and other Civil Society Organisations (CSOs) and International Non-Governmental Organisations (INGOs) concerned about securing and protecting land and forest tenure rights, have endorsed the VGGT. They were agreed in 2012 and they have driven considerable momentum and learning over the five years since their adoption, fostered in part through investments made by the EU and its Member States.

Therefore, rather than nesting 'conflict free' as one sustainability factor within the broader and complex concept of 'deforestation free', the EU should adopt a set of well-tailored measures requiring forest-risk commodities to be 'conflict free' as a stand-alone concern, whilst it continues to pursue additional measures to achieve deforestation-free commodity supply chains.

Colombian farmer harvesting cocoa on his farm

Photo: Thomas Cristofolletti / Room for USAID / Flickr.com/CC



2 An international ‘soft law’ approach for globally coherent measures to address forest-risk commodities

There is a growing trend towards developing international ‘soft law’ standards for responsible business conduct (RBC), through entities such as the Organization for Economic Cooperation and Development (OECD) and the Food and Agriculture Organization of the United Nations (FAO), and then using the soft law framework as a basis for globally coherent ‘hard’ laws at national level. This approach cultivates an international consensus on appropriate principles, standards, and other guidance to address a problem. At the same time, the soft law approach respects national sovereignty and circumstances that influence how each country might concretely apply the soft law principles and standards on the ground.

The ethics and sustainability of international supply chains is one area of international concern where this soft law approach has burgeoned during recent years. This paper explores how EU measures to address FRCs could be developed in line with relevant international soft law to foster a globally coherent set of national efforts to reduce global deforestation by addressing FRC supply chains. The analysis here builds on an earlier paper which draws lessons from EU measures to ensure the sustainability of commodities entering the EU from other sectors – namely, fisheries and minerals – which are based on international legal frameworks, standards, and guidance.¹³

2.1 The trend towards soft law frameworks for international supply chains

Under the international soft law approach, countries come together, often with non-governmental stakeholders, to explore and clarify a set of shared concerns and aspirations. The parties set out a shared set of goals and objectives that would address the concerns and clarify principles that will guide their efforts. This approach is increasingly being adopted as an alternative to binding international agreements. Binding international law is often very difficult to enforce at the international level. Detailed and binding international commitments can also take a very long time to agree (or become watered down or even abandoned following extensive but unsuccessful negotiations). The Paris Accord might be viewed as a prominent example of this general trend. Following failed efforts to negotiate and agree a binding international climate change agreement at the UNFCCC talks in Copenhagen a few years earlier, the Paris Accord instead calls on countries to pledge and then report on the steps they will take to address climate change. Under this flexible international framework, countries define their own pledges and actions, but are then held accountable to those pledges through reporting and other monitoring measures.

Soft laws are voluntary; they are not legally binding. They do not replace existing national or international laws, commitments, treaties or agreements. Because of this, some might consider international soft law frameworks to be weaker than binding international law. But soft law agreements can have an advantage over binding international agreements in that they are usually easier for countries to reach agreement on. Once an agreement has been reached and broadly endorsed, more motivated countries can begin to harden the principles into their

13 Pritchard, J. *Developing EU measure to address forest-risk commodities: What can be learned from EU regulation of other sectors?* (Fern, 2016), available at http://www.fern.org/sites/fern.org/files/Developing%20EU%20measures_0.pdf.

national legal frameworks, even if this initially happens in a piecemeal fashion. Forward-moving countries can build momentum for, and share lessons with, slower-moving countries.

Soft laws can also be more comprehensive and provide more details, and they are often better suited for offering guidance on technical matters and best practices in relation to complex subject matter.

Internationally agreed soft law instruments can have a positive impact in guiding national policies and legislation in many countries. Where the principles and regulations impact international trade, agreeing an international soft law framework first helps to foster coherence as countries grapple with how to address the issues within their own context and constraints. When a country enacts all or part of an international soft law framework into its national legal framework, that soft law becomes enforceable 'hard law' within that country. This process of 'hardening' international soft law at the national level is beneficial because national laws will both align international norms and be the result of a nationally owned process that reflects and is integrated into the larger national legal framework.

Thus, each country endorsing an international soft law framework is allowed scope to move forward in a way that accords with the country's own practical and political situation. Of course, like any laws, national laws to harden international soft laws will only be as good as their enforcement, and problems of law enforcement may persist. However, national ownership of laws makes it more likely that they will be enforced and, in any case, where national laws are enforced they are likely to have more immediate effect than attempts to enforce international laws in an international jurisdiction. Also, international soft law instruments often include mechanisms through which more developed countries can help, through the provision of financial and technical support, to build the capacities for less developed countries to reform and enforce their national legal and policy frameworks to effectively implement the international soft laws they have endorsed.

The OECD and FAO have adopted a soft-law approach in relation to international supply chain due diligence. These include general OECD guidelines for responsible business conduct provided in the *OECD Guidelines for Multinational Enterprises*¹⁴ as well as more specific guidelines aimed at particular sets of concerns (such as the *UN Guiding Principles on Business and Human Rights*¹⁵ and the VGGT) or particular sectors (such as the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas*¹⁶ or the *OECD-FAO Guidance for Responsible Agricultural Supply Chains*).¹⁷ The OECD Guidelines are framed as comprehensive approaches to due diligence and responsible supply chain management and incorporate risk-based due diligence into major areas of business ethics.

An important distinguishing feature of soft law guidelines promoted by the OECD is that they are government-backed instruments. To facilitate and strengthen national implementation of the guidelines, each endorsing country is obliged to set up a National Contact Point (NCP) tasked with furthering the guidelines' effectiveness by undertaking promotional activities, handling inquiries, and providing a mediation and conciliation platform for resolving issues that arise from alleged non-observance of the Guidelines. This makes the OECD Guidelines the only international corporate responsibility instrument with a built-in grievance mechanism.

¹⁴ <http://www.oecd.org/corporate/mne/>

¹⁵ <https://www.business-humanrights.org/principles/oecd-guidelines>

¹⁶ <http://www.oecd.org/corporate/mne/mining.htm>

¹⁷ <http://mneguidelines.oecd.org/rbc-agriculture-supply-chains.htm>

While governments play a key role in the development of OECD Guidelines and have the primary duty to facilitate their implementation, the OECD Guidelines are developed in consultation with a broad set of civil society and private sector representatives beyond government, giving these stakeholders the opportunity to participate in developing principles and standards. This multi-stakeholder approach is central to the guidelines' potential to effect change on a broad scale.

The OECD Guidelines also draw upon and strive for consistency with other initiatives and existing private sector and NGO guidance so as to avoid re-inventing the wheel or creating competing or inconsistent frameworks. Rather, they strive to reconcile conflicting norms that may already exist to provide greater uniformity and clarity and to develop coherence and consistency across guidance frameworks operating in the same or overlapping space. For example, the Agricultural Guidance incorporates the VGGT.

Notably, some countries – including the EU and its Member States – have begun to adopt 'hard law' at the national level that aligns with these international soft law frameworks. For example, the California Transparency in Supply Chains Act,¹⁸ the UK Modern Slavery Act,¹⁹ and the US Trade Facilitation and Trade Enforcement Act²⁰ are all examples of national efforts to harden components of the *UN Guiding Principles on Business and Human Rights* to combat forced labour and human trafficking. Sections of the US Dodd-Frank Act²¹ as well as the recently adopted EU regulation on conflict minerals²² are national laws that expressly reference and incorporate the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.

These supply chain-related laws represent a shift in international regulation from the prevailing model of "transnational new governance," which is dependent on voluntary standards by private actors and non-governmental international institutions, towards the use of domestic regulatory law.²³ This shift is significant because domestic supply-chain regulation is an avenue which the regulating state can potentially use to set environmental and human rights norms for third-party suppliers and their host governments – i.e., the states in which the regulated goods are produced ('producer countries') – via multinational company supply chains. In essence, these regulations not only affect the regulated companies; *they also serve as an alternative to international law for shaping the behaviour of host governments*. Under pressure from third-party suppliers operating in countries that have adopted demand-side regulations setting out supply chain requirements, producer countries may pass legislation and strengthen their rule of law to prevent global companies from shifting their supply chains to other regions. The EU Timber Regulation (EUTR), which is familiar to EU forest advocates, is an example of a supply-chain regulation demonstrating this trend. The demand-side due diligence measures recommended in this paper follow similar lines. When based upon an already developed and agreed international soft-law framework as advocated here, such laws can have even greater potential to stimulate and weave together a globally coherent set of national laws influenced by the soft law framework in both consumer and producer countries.

18 <https://www.dol.gov/ilab/child-forced-labor/California-Transparency-in-Supply-Chains-Act.htm>

19 <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

20 <https://www.congress.gov/bills/114/congress/house-bill/644/text>

21 <https://business-humanrights.org/en/conflict-peace/conflict-minerals/implementation-of-us-dodd-frank-act-rule-on-conflict-minerals-commentaries-guidance-company-actions>

22 <http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/>

23 Galit A. Sarfaty, *Shining a Light on Global Supply Chains*, Harvard International Law Journal (2015) (citing Kenneth W. Abbott & Duncan Snidal, Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit, 42 Vand. J. Transnat'l L. 501, 541 (2009))

One risk inherent in supply chain regulations aimed at influencing environmental and human rights norms in a third (producer) country is that multinational companies become more than just regulated entities; they now also serve as regulators themselves, imposing standards on their third-party suppliers in other countries. Thus, the implementation of regulations about outsourcing is itself being outsourced to companies, which are responsible for ensuring compliance by the firms within their multi-tiered international supply chains. Complementing demand-side measures of this sort with supply-side measures to foster the producer country's domestic implementation of the same soft law framework helps to ensure that the producer country exercises its duty as the principle guarantor of environmental and human rights norms. As discussed further in section 3.3, such supply-side measures, and related support to build producer countries' governance capacity, can help to temper and correct a turn towards businesses monitoring themselves. Some NGOs caution against such as a 'business turn' as they see it as delegating what are essentially regulatory tasks to multinational corporations, making them mediators of the environmental and human rights norms enforced by the consumer country via the supply chain regulation.

2.2 Existing and developing international soft law can provide the basis for EU measures to address forest-risk commodities – a contrast with FLEGT

As discussed in section 1, forest advocates are calling for both conflict-free and deforestation-free commodity supply chains. Numerous international companies have pledged to provide deforestation-free (or 'zero-deforestation') commodities and these companies, along with NGOs and governments, are working through international platforms and forums to define more specifically what 'deforestation-free' should mean in operational terms. However, these efforts have not yet resulted in a clear, widely agreed and endorsed soft law framework for defining and operationalising deforestation-free supply chains. This paper urges the EU to pursue a soft law framework for deforestation-free commodities through legitimate international negotiations including representatives of indigenous peoples and other affected communities, civil society and NGOs, as well as governments and private sector representatives. The framework should provide principles, standards, and guidance for how deforestation-free commodity supply chains should be operationalised. There is a risk that, if negotiations are dominated primarily by consumer countries and their private sector and NGO stakeholders, the resulting framework might be perceived as yet another neo-colonial attempt by Northern countries to exercise control over the global South's natural resources. But working through international forums that include producer as well as consumer country stakeholders would help to ensure that the resulting framework for deforestation-free supply chains will be taken up by producer countries. This is most likely to happen if they see them as a legitimate and important tool for securing their environmental assets and sustainable development.

In the meantime, the EU can and should move ahead with measures to foster conflict-free supply chains in line with existing international law including, in particular, the VGGT. Achieving conflict-free supply chains that respect tenure rights would be a significant stride towards halting global deforestation. Because a widely endorsed international soft law framework for pursuing conflict-free FRC supply chains already exists, the EU can already adopt a set of strong and enforceable hard-law measures aligned with the VGGT, seizing and building upon their broad legitimacy and momentum. Therefore, rather than couch 'conflict-free' as one factor within a broader concept of deforestation-free supply chains – the details, scope, and methods for which still need to be negotiated and agreed by stakeholders and then endorsed by countries – the EU should move forward with a set of measures aimed to ensure conflict-free FRC supply chains.

2.2.1 Potential pathways towards an international soft law framework for deforestation-free commodity supply chains

The OECD-FAO Guidance for Responsible Agricultural Supply Chains (Ag Guidelines) are directly relevant to efforts to address FRC supply chains. The current version²⁴ of the Ag Guidelines does not sufficiently address environmental concerns, however. Even within the environmental section, forests receive only a small mention. More developed OECD guidelines, such as those addressing human rights and conflict minerals, have been refined and expanded over the course of multiple revisions, and it is expected that the Ag Guidelines will also be revised and improved. Future revisions could give greater attention to the role of large-scale agricultural development in global deforestation and incorporate components to prevent forest conversion to large-scale agriculture and ensure deforestation-free agricultural commodity supply chains.

The Ag Guidelines are based on other existing industry standards and international law to avoid ‘reinventing the wheel’. The VGGT are one of the existing frameworks incorporated into the Ag Guidelines. To develop the Ag Guidelines as a framework for deforestation-free agricultural commodities, forest advocates could work through existing forums focussed on this topic such as the Tropical Forest Alliance,²⁵ Consumer Goods Forum,²⁶ and/or New York Declaration on Forests.²⁷

2.2.2 Basing EU measures for conflict-free FRCs on the VGGT

More immediately, the EU should move forward with measures for conflict-free FRC supply chains, based on the VGGT. The VGGT are a new international legal instrument, adopted unanimously in 2012 in the United Nations Committee on World Food Security (CFS). They are a soft law instrument that does not create new legally binding obligations on states or responsibilities for private actors, but applies existing standards for governance, particularly including human rights standards, to the management of land. As discussed further in section 4, the VGGT have already begun to gain traction, including through Member States’ efforts to promote and support their implementation in developing countries.

The VGGT are the first ever internationally negotiated document that outlines how tenure rights to land, fisheries, and forests should be handled. Their development shows engagement in changing the rules of the game and working towards more transparent and accountable tenure structures and administration. As a soft law instrument, the VGGT can provide comprehensive and detailed guidance on the governance of tenure – a subject which is both politically sensitive and technically complicated. The Guidelines respond to demands for a flexible instrument that lays out broad principles that can be adapted to and implemented at various levels and contexts. They aim to be a reference point for the adoption of globally coherent national (hard law) measures that operationalise tenure governance in line with VGGT values, principles, and objectives.

2.2.3 A less cost-intensive approach than FLEGT VPAs

When the FLEGT Action Plan was adopted in 2003, there was neither an international agreement for the protection of forests nor an international soft law framework for sustainable forest management which could be referenced and incorporated into EU measures to address

²⁴ <http://mneguidelines.oecd.org/rbc-agriculture-supply-chains.htm>

²⁵ <https://www.tfa2020.org/en/>

²⁶ <http://www.theconsumergoodsforum.com/sustainability-strategic-focus/climate-change/deforestation>

²⁷ <http://www.undp.org/content/undp/en/home/ourwork/sustainable-development/natural-capital-and-the-environment/biodiversity-and-ecosystems-management/new-york-declaration-on-forests.html>

international trade in illegal timber. In the absence of an existing international framework upon which to base their efforts to tackle illegal timber, the EU filled this gap by investing in the bilateral negotiation and implementation of Voluntary Partnership Agreements (VPAs) with producer countries. VPAs aim to address illegal logging by fostering improved forest law, law enforcement, and governance in the partner countries and establishing a legality assurance system for tracing legal timber supply chains. The EUTR was later adopted to complement and reinforce VPAs by guarding against illegal timber from non-VPA countries being brought into the EU and thus 'level up' the playing field towards the kinds of standards and measures being put in place through VPAs.

While the value of governance improvements fostered by FLEGT processes have been recognised,²⁸ concern has been expressed about the extensive EU investment and number of years required to negotiate and implement VPAs.²⁹ More recent EU efforts to ensure that commodities traded in the EU come from legal and sustainable sources have instead relied on existing international legal frameworks, including soft law guidance.³⁰ In the case of EU ambitions to address FRC supply chains, the VGGT is an existing soft law framework that can provide a basis for EU measures. From a cost-effectiveness standpoint, basing new EU measures on the VGGT would have advantages over the bilateral VPA approach. First, international investment (towards which the EU and Member States have already contributed) has already developed relevant frameworks which the EU need not duplicate at a bilateral level. Second, by endorsing an international soft law framework, a producer country is expressing desire and intention to implement the framework's principles, including through its own national laws and policies. Thus, instead of costly, intensive bilateral VPA negotiations, the VGGT's soft law framework provides an already agreed upon starting point for EU engagement with producer countries.

The EU can and should adopt 'hard law' measures for conflict-free FRCs. This would (1) fulfil obligations of the EU and Member States, which have endorsed the VGGT, to adhere to and support implementation of the Tenure Guidelines and (2) contribute significantly to EU commitments to halt global deforestation.

Of course, the hard work of implementing the soft law principles at national level still remains. The remainder of this paper discusses a proposed tool box of EU measures that would foster adherence to and implementation of the VGGT by producer countries as well as by the EU and Member States. A similar set of measures could be adopted to foster the implementation of an international soft law framework for deforestation-free supply chains, once such a framework is defined and agreed. Section 3 briefly outlines a set of proposed EU measures, some of which are elaborated further in subsequent sections.

28 See, e.g., *Evaluation of the EU FLEGT Action Plan (Forest Law Enforcement Governance and Trade) 2004-2014* (April, 2016), available at https://ec.europa.eu/europeaid/evaluation-eu-flegt-action-plan-forest-law-enforcement-governance-and-trade-2004-2014_en; Do FLEGT VPAs improve governance? (Fern, May 2016), available at <http://www.fern.org/impacts>

29 Special Report No 13/2015: *EU support to timberproducing countries under the FLEGT action plan* (European Court of Auditors, October 2015), available at <http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=33292>

30 For example, the EU's IUU Fishing Regulation and the EU Conflict Minerals Regulation, described in Pritchard, J. *Developing EU measure to address forest-risk commodities: What can be learned from EU regulation of other sectors?* (Fern, 2016), available at http://www.fern.org/sites/fern.org/files/Developing%20EU%20measures_0.pdf.

3 A tool box of EU measures to address forest-risk commodities

Both demand- and supply-side measures are required to tackle global deforestation. Supply-side measures aim to foster better governance of natural resources in producer countries by building the country's governance capacity and performance. Demand-side measures influence the sustainable management of natural resources more indirectly by requiring those who trade commodities to evaluate their supply chains in line with specified standards and principles and to only trade products that comply.

First, the EU should **fully utilise instruments already available through the FLEGT Action Plan – VPA processes, timber procurement policies, and the EUTR – to address forest conversion in violation of local laws including communities' land and forest tenure rights.** Studies have shown that most tropical deforestation that zero-deforestation FRC pledges seek to halt is illegal in some way.³¹ Enforcement of the EUTR and continued commitment to VPA processes can play a significant role in preventing FRC-related deforestation.³² These existing measures, with their focus on forest law enforcement and governance, should not be disregarded in favour of new measures. Rather, the additional measures proposed here should supplement existing FLEGT instruments.

The additional supply- and demand-side measures described below aim to ensure conflict-free FRC supply chains by 'hardening' VGGT principles into EU law to promote the implementation of the Tenure Guidelines by producer country governments and adherence with VGGT principles by EU operators trading FRCs. As a first step towards the adoption of a parallel set of measures aimed at ensuring deforestation-free supply chains, the EU and its Member States, together with other consuming and producing countries, should **support the development of an international soft law framework defining the operationalisation of 'deforestation free' commodity supply chains.** As discussed in section 2.2.1, this could be developed through existing international platforms and forums seeking to operationalise companies' 'zero-deforestation' commitments and then incorporated into the OECD-FAO's Guidance for Responsible Agricultural Supply Chains.

3.1 Proposed supply-side measures

The EU should **adopt a third country carding system to promote implementation of the Tenure Guidelines by producer countries.** This would be modelled on the third country carding system being implemented under the EU Regulation to end illegal, unreported and unregulated (IUU) fishing (IUU Regulation).³³ The carding system would serve the same general purpose as FLEGT VPA processes in that it would aim to foster improvements in producer countries' legal frameworks, law enforcement, and governance. But the mechanics of the two approaches differ significantly in the use of carrots versus sticks (incentives and penalties) to encourage desired governance reforms. The carding system uses red cards as a stick to penalise countries that have poor governance regimes that fail to live up to the principles

31 Sam Lawson, *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).

32 For further discussion, see *Catching it All: Making EU illegal logging policies work better for people and forests* (Fern, 2015), available at <http://www.fern.org/catchingitall>

33 Council Regulation (EC) No. 1005/2008: <http://eur.lex.europa.eu/legal-content/EN/TXT/?qid=1408984470270&uri=CELEX:02008R1005-20110309/>.

and recommendations embodied in the soft law framework and/or that fail to cooperate with the EU to share information about how they are implementing the soft law framework. In contrast, FLEGT VPAs offer a carrot to countries identified as high risk for trading illegal timber. The FLEGT licensing systems and related law and governance reforms implemented through VPA processes reduce this risk and result in 'green lane' access for the country's timber exports to the EU market (access which the EUTR would otherwise cut off to suppliers from high-risk countries). Section 5 provides further discussion of what a carding system aligned with the Tenure Guidelines would entail, including how it would differ from the IUU carding system, as well as why a third country carding system focused on the implementation of the VGGT by EU trading partners would be justified.

The proposed carding system should be supplemented by **development assistance and other resources to producer country governments and key stakeholder groups, in particular land and forest tenure holders** as well as CSOs and NGOs that help them to secure their rights, and support law reforms and other governance improvements needed to implement the VGGT.

3.2 Proposed demand-side measures

The EU should **require EU operators trading FRCs to exercise due diligence in relation to whether the commodities were cultivated on land converted from forest in violation of tenure rights**. Due diligence and related risk assessment and risk mitigation are concepts and practices with which EU operators are very familiar and which they already need to exercise in relation to other trade. The proposed due diligence measure would be similar to the due diligence obligations that the EUTR imposes on operators who first place timber or timber products on the EU market. It would require operators to either (1) trace their commodity supply chain back to the farm, and be reasonably confident that the land on which the commodities were cultivated was not converted in violation of tenure rights, or (2) be reasonably confident that every entity in their supply chain exercises due diligence to ensure that the commodities were not cultivated on land that was converted in violation of tenure rights.

As discussed below, blacklists of rogue plantations, processors, and other links in the supply chain, as well as whitelists of transparent, well-monitored supply chain actors that demonstrate best practices for adhering to the VGGT, could be developed to aid downstream operators' in their exercise of due diligence. There are also several initiatives focussed on private-sector compliance with the VGGT which can provide more specific guidance as to what private sector due diligence entails.

The proposed demand-side measure should **ensure that due diligence remains the responsibility of economic operators trading in forest-risk commodities (and products that incorporate these commodities) and are not displaced onto voluntary certification schemes or other third parties**. In this way, the measures will prevent a 'liability loophole' and ensure that the due diligence obligations incentivise continual improvement.³⁴

The EU should also **require operators to publicly report on their commitments to implement the VGGT and actions undertaken to fulfil their commitments**. Mandatory reporting laws should require companies to monitor their efforts to *implement* their stated commitments – that is, monitoring of the *procedures* used to fulfil companies' compliance

34 For further discussion of the liability loophole risk, see *Developing EU measure to address forest-risk commodities: What can be learned from EU regulation of other sectors?* (Fern, 2016) at section 3.2.1, available at http://www.fern.org/sites/fern.org/files/Developing%20EU%20measures_0.pdf.

promises, not just the *existence* of the promises.³⁵ Requiring operators to publicly state how their operations adhere to VGGT principles and standards creates a duty of care. It also creates expectations that external stakeholders will raise concerns in instances where the VGGT are not met. For example, ClientEarth has been researching how consumer protection laws could be used to enforce a company's reported commitments and policies.³⁶

The EU could develop a **blacklisting tool** to identify operators along FRC supply chains that are known to routinely disregard community and tenure rights. It could be particularly helpful to develop blacklists identifying FRC plantations that are the known result of tenure violations, and the multinational companies that financed and/or run them, as well as mills and processors that occupy 'choke points' along the supply chain and who lack a sufficient and well-implemented due diligence system to ensure adherence to VGGT principles.³⁷

Whitelists could also be developed to direct FRC traders to suppliers who consistently demonstrate best practices in relation to the VGGT principles. However, advocates should insist that the procedures for developing and maintaining whitelists are transparent and open to scrutiny. Furthermore, white-listed suppliers should be required to be transparent about their due diligence practices, to report on their due diligence endeavors, and be subject to monitoring by communities, CSOs, and NGOs to ensure their consistent and continued adherence with VGGT principles. The EU should provide capacity building to develop and maintain effective community monitoring schemes, provide a written and reasoned response to any substantiated concerns raised against whitelisted suppliers, and de-list operators where the concerns are found to be credible.

The EU should also **require Member State competent authorities to investigate and prosecute EU nationals or EU-based companies that benefit from illegal land conversion in producer countries**, along the lines of a comparable measure in the IUU Regulation.³⁸

3.3 Tempering the 'business turn' implied by a demand-side approach to the VGGT with supply-side measures focussed on the role of producer country governments as guarantors of tenure rights

While the VGGT identify governments as primarily responsible for implementation, they also set out responsibilities of various groups, including private sector companies and investors. Already in the five years since the VGGT were agreed, there have been several initiatives led by the private sector and/or focussed on private sector adherence to the VGGT.³⁹

35 For further discussion see Sam Lawson, *The flawed focus on corporate voluntary actions* in Pasiecznik, Nick and Herman Savenije (eds.). (2017). *Zero deforestation: A commitment to change*. Tropenbos International, Wageningen, the Netherlands.

36 Diane de Rouvre and Caroline Haywood (ClientEarth), *Zero deforestation commitments under the lens of consumer protection law* in Pasiecznik, Nick and Herman Savenije (eds.). (2017). *Zero deforestation: A commitment to change*. Tropenbos International, Wageningen, the Netherlands.

37 For a further discussion of how FRC supply chains are centered around milling and processing choke points, see *Developing EU measure to address forest-risk commodities: What can be learned from EU regulation of other sectors?* (Fern, 2016), available at http://www.fern.org/sites/fern.org/files/Developing%20EU%20measures_0.pdf, at Figure 4 and accompanying text.

38 For a discussion of the IUU Regulation's measures pertaining to sanctioning EU Member States or EU-based companies that benefit from IUU fishing, see *Developing EU measure to address forest-risk commodities: What can be learned from EU regulation of other sectors?* (Fern, 2016), available at http://www.fern.org/sites/fern.org/files/Developing%20EU%20measures_0.pdf

39 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>.

Inevitably, different actors see the VGGT in different ways. Some CSOs have criticised efforts – by states, development agencies and even some NGOs – for “helping the corporate sector to implement the Tenure Guidelines” so as to secure land and other resources in order to expand their farming and agribusiness operations. In 2015, in a joint statement entitled *The Guidelines on the Responsible Governance of Tenure at a Crossroads*,⁴⁰ published by La Vía Campesina (La Vía Campesina statement), 42 social movements, grassroots organisations and NGOs called on states, UN agencies, research institutions and NGOs “to withdraw and refrain from all initiatives that aim at abetting the corporate sector and private investors to use the Tenure Guidelines for the pursuit of business interests, thus supporting the corporate capture of resources, public policy spaces and human rights.”

This critique of the ‘business turn’ in the implementation of the VGGT claims that investor-focused approaches transform natural resources “from a human rights issue into a matter of business.” According to the La Vía Campesina statement, the rapid growth of guides for investors produced by a spectrum of institutions “start from the wrong premise: they are built around the risks that private and corporate investors encounter in acquiring land, fisheries and forests... in order to manage and reduce economic, financial and reputational risks” rather than the human rights principles which underpin the VGGT. The statement further argues that “these guides implicitly transfer state prerogatives and duties to companies and investors.” The La Vía Campesina statement emphasises that “[t]he Tenure Guidelines are primarily addressed to states. By adopting the Tenure Guidelines, states have committed to apply them according to their paramount objective: to contribute to the realization of the human right to adequate food by improving the governance of tenure for the benefit of vulnerable and marginalized people and communities.” Endorsers of the statement warn against mixing up the roles of states and companies by entrusting businesses to “resolve land conflicts” instead of compelling states, as duty-bearers, to realise and protect tenure rights and to regulate and monitor investors.

Hardening the VGGT principles into their own legal frameworks to exercise their jurisdiction over economic operators placing FRCs onto the EU market is an appropriate way for the EU and Member States to fulfil their own duties to respect the Tenure Guidelines. Due diligence obligations are necessarily framed in terms of risk assessment and risk mitigation in relation to land investments and international commodity trading resulting from such investments. The proposed due diligence measures are not framed as a tool for land investors seeking to obtain and cultivate land in developing countries for large-scale agriculture. Rather, they are intended to steer operators away from commodities cultivated on land in violation of tenure rights, and thus ought to provide a disincentive to the violation of tenure rights. Indeed, the due diligence measure would be expected to steer operators away from procuring supplies from countries where tenure rights are not clearly and consistently protected and from supply chain operators who do not exercise their own due diligence to adhere to VGGT principles.

The ‘business turn’ critique articulated in the La Vía Campesina statement underscores the importance of balancing the private sector risk-oriented approach with complementary supply-side measures squarely focussed on helping producer countries fulfil their duties to secure and protect tenure and forest rights. As emphasised in the La Vía Campesina statement, producer country governments’ duties to implement the VGGT includes the regulation of land investments that would go against the interests of tenure rights holders. The risk assessments undertaken by EU operators regulated by the proposed demand-side measures must, in turn, ensure compliance with producer country laws that protect tenure rights holders and refrain from procuring supplies from places where tenure rights remain unprotected, contested, or unclear.

40 Available at https://www.tni.org/files/article-downloads/2015_tg_statement_final_en.pdf

The proposed supply-side measures also complement the private-sector orientation of the proposed demand-side measures in another way. Companies striving to achieve conflict-free and deforestation-free supply chains have emphasised that clarification of relevant laws, stronger law enforcement, and improved governance in producer countries, particularly in relation to the clarification and protection of community tenure rights is one of the most important things governments could do to facilitate company efforts to implement their zero-deforestation commitments.⁴¹

Furthermore, while attention on responsible agriculture investment focuses on large-scale land acquisitions and multinational companies, there is mounting evidence that dispossession and growing inequality in access to land in developing countries is being driven by small- to medium-scale acquisitions by domestic investors and urban elites. In some countries, notably in Africa, these cumulatively surpass the impact of large-scale deals involving big foreign companies.⁴² This further underscores the need to direct resources to supply-side measures such as the proposed third country carding system, and not rely solely on demand-side measures imposed on EU operators.

41 See *Company promises: How businesses are meeting commitments to end deforestation* (Fern, March 2017), available at <http://www.fern.org/companypromises>

42 Hall, R., and Scoones, I., *Strengthening Land Governance: Lessons from implementing the Voluntary Guidelines* (DFID, LEGEND State of the Debate Report 2016), citing Jayne, T.S., Chamberlin, J., Traub, L., Sitko, N., Muyanga, M., Yeboah, F.K., Nkonde, C., Anseeuw, W., Chapoto, A. and Kachule, R. (2015) 'Africa's changing farmland ownership: The rise of the emergent investor farmer'. Plenary Paper, 29th Triennial International Conference of Agricultural Economists, Milan, 13 August.

4 The status and potential of the VGGT

The Committee on World Food Security (CFS) endorsed the VGGT on 11 May 2012. This was a landmark moment in global recognition of tenure of natural resources as a human rights issue. The VGGT provide both substantive and procedural guidance in terms of how to address tenure issues. They represent the first global consensus on fundamental principles that should underpin land tenure and land governance. They have received widespread support among governments, international development agencies, CSOs and INGOs.

The development of the VGGT involved widespread participation, made possible through inclusive negotiations within the CFS. Social movements, farmer associations, CSOs and private sector companies participated alongside representatives from states. Approximately 190 governments, as well as civil society and private sector groups, participated in negotiations comprised of a series of regional consultations over a period of about two years, the development of a first technical document, and then publication of a zero draft followed by negotiations over another 18 months. Donors, governments, civil society bodies and others contributed their experiences and insights to the drafting and negotiation processes. The resulting VGGT represent a political agreement on the minimum standards for land governance, combined with an authoritative interpretation of international law. While in legal terms the VGGT are voluntary, they constitute a global consensus on a set of norms. While many agree the VGGT are not perfect, they sufficiently reflect the priorities of key actor groups and reflect knowledge and lessons learned over decades of work on land tenure and governance of natural resources.⁴³

The VGGT establish global norms for how tenure and its governance should be addressed in law and in practice. These norms are intended to guide the development and implementation of policies and laws in various specific regional, national, and local settings. Five years after their agreement in 2012, a wide spectrum of initiatives to support and implement the VGGT exist, resulting in further learning. Yet, as stated in the UK Department for International Development (DFID) May 2016 LEGEND State of the Debate report, *Strengthening Land Governance: Lessons from implementing the Voluntary Guidelines*, "The challenge remains to convert this consensus on principles into implementation in global, regional and national governance frameworks, and to anchor legal, policy and institutional reforms through action in defence and support of land rights at local level."⁴⁴

This section reviews what has been done to realise the VGGT so far, current debates surrounding VGGT implementation, and challenges and obstacles that have emerged. Section 5 considers how the VGGT could provide a framework for the proposed supply-side measure modelled on the third country carding system implemented under the IUU Regulation.

43 Hall, R., and Scoones, I., *Strengthening Land Governance: Lessons from implementing the Voluntary Guidelines* (DFID, LEGEND State of the Debate Report 2016), available at <http://www.landgovernance.org/11052016-new-publication-legend-state-of-the-land-debate/>

44 *Ibid.*

4.1 VGGT themes and principles

The VGGT principles address a broad range of issues under six themes:

- **general matters**, including guiding principles of responsible tenure governance; rights and responsibilities; policy, legal and organisational frameworks; and delivery of services
- **legal recognition and allocation of tenure rights and duties**, including safeguards; public land, fisheries and forests; indigenous peoples and other communities with customary tenure systems; and informal tenure
- **transfers and other changes to tenure rights and duties**, including markets; investments; land consolidation and other readjustment approaches; restitution; redistributive reforms; and expropriation and compensation
- **administration of tenure**, including records of tenure rights; valuation; taxation; regulated spatial planning; resolution of disputes over tenure rights; and transboundary matters
- **responses to climate change and emergencies**, including climate change; natural disasters; and conflicts with respect to tenure of land, fisheries and forests
- **promotion, implementation, monitoring and evaluation**

The VGGT also establish 10 principles that should guide implementation:

- **human dignity**: recognise the inherent dignity and the equal and inalienable human rights of all individuals
- **non-discrimination**: no one should be subject to discrimination under law and policies as well as in practice
- **equity and justice**: recognised that equality between individuals may require acknowledging differences between individuals, and take positive action to promote equitable tenure rights for all
- **gender equality**: ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating *de facto* equality when necessary
- **holistic and sustainable approach**: recognise that natural resources and their uses are interconnected, and adopt an integrated and sustainable approach to their administration
- **consultation and participation**: engage with and seek the support of those who could be affected by decisions, prior to decisions being taken, and respond to their contributions; take into consideration existing power imbalances between different parties and ensure active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes
- **rule of law**: adopt a rules-based approach through laws that are widely publicised in applicable languages, applicable to all, equally enforced and independently adjudicated

- **transparency:** clearly define and widely publicise policies, laws and procedures in applicable languages, and widely publicise decisions in applicable languages and in formats accessible to all
- **accountability:** hold individuals, public agencies and non-state actors responsible for their actions and decisions according to the principles of the rule of law
- **continuous improvement:** improve mechanisms for monitoring and analysis of tenure governance

4.2 VGGT implementation initiatives, including by EU and Member States

The FAO, often working in partnership with other multilateral agencies as well as with governments, civil society, and others, has been a central actor in VGGT implementation initiatives. These have included resources to guide private sector investment and value chains, including the OECD-FAO Guidance for Responsible Agricultural Supply Chains promoted through the OECD Global Forum on Responsible Business Conduct. The VGGT are one of the primary soft law frameworks on which the Ag Guidelines are based.

In addition to the FAO, there have been numerous government-to-government initiatives, government-to-CSO partnerships, as well as partnerships between governments, CSOs, and private sector companies and financial institutions.⁴⁵ These initiatives have focussed on awareness raising, capacity development, development of multi-stakeholder platforms, reform of legal and policy frameworks, and VGGT operationalisation.⁴⁶

To consider new EU measures based on the VGGT, it is particularly relevant to highlight existing EU and Member State efforts to support implementation of the Tenure Guidelines. The G7 countries have committed to aligning their development assistance with the VGGT, and bilateral partnerships between national governments and the G7 have focused on entrenching the VGGT in national legal and policy frameworks and on making key documents publicly available. Building upon the G7 commitment, the Global Donor Working Group on Land (GDWGL) was established in 2013 to coordinate donor programmes in support of the Tenure Guidelines and to embark on joint activities in support of the VGGT principles. The GDWGL has so far focussed on coordinating, and making public, its members' donor programs that support the state, civil society, and public sectors. The GDWGL on-line portal⁴⁷ includes an interactive database and map that contains information on the location, duration, funding and scope of each donor-funded programme related to VGGT implementation, as well as the specific chapters that the cited project supports. GDWGL membership currently comprises 38 bilateral and multilateral donors and international organisations (including the EU and 13 Member States)⁴⁸ which between them support a portfolio of 714 projects in 134 countries.⁴⁹

The efforts documented on the GDWGL portal indicate the substantial investments the EU and Member States have made and are making in support of VGGT implementation. The new EU measures proposed in this paper would consolidate, learn from, and build upon these existing

45 For information on various VGGT initiatives underway, see generally <http://www.fao.org/nr/tenure/whats-new/may-2017-newsletter/en/>

46 See LEGEND report at sections 2-6. See also Committee on World Security, Forty-third Session, Making a Difference in Food Security and Nutrition (Rome, Italy, 17-21 October 2016), *Experiences and Good Practices in the Use and Application of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (VGGT) – Summary and Key Elements*, available at <http://www.fao.org/3/a-mr218e.pdf>

47 <https://www.donorplatform.org/land-governance.html>

48 Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Spain, Sweden, and the United Kingdom.

49 <https://www.donorplatform.org/land-governance.html>

efforts and bring them to bear on EU commitments to halt global deforestation. Because the measures are built around a widely endorsed soft law framework – the VGGT – they would also benefit from the investments of other countries, both through the FAO and other multinational organisations and through bilateral and national efforts. When considering the cost of the proposed measures, therefore, amounts already being expended towards the implementation of the VGGT, as well as how the proposed measures could reinforce and further leverage these existing expenditures by the EU, its Member States, and others, should factor into the assessment.

A Malawian farmer cleaning soya beans.

Photo: Ollivier Girard/EIF/Flickr.com/CC



5 Supply-side measures: adapting the IUU Regulation's carding system to the governance of land tenure in producer countries

The IUU Regulation's third country carding system provides a mechanism for supporting developing countries to comply with international agreements relevant to stopping IUU fishing. It also gives the authority to restrict trade from non-cooperative countries. The international agreements to which the IUU carding system seeks to compel adherence differs from the VGGT not only in subject matter but also in the level and nature of detailed directives they contain. The third country carding system nevertheless provides a compelling model for how the EU can support forest countries to implement the VGGT and restrict trade from countries that decline to address these issues. Given the central role that respect for tenure rights plays in the conversion of forest land to large-scale commodities, it makes sense that the EU should not only require economic operators placing FRCs on the EU market to exercise due diligence in relation to tenure rights, but also ban FRCs from countries that decline to take seriously their duties to secure and protect land and forest tenure rights.

This section describes the carding system implemented under the IUU and explains how it might be adapted to the VGGT.

5.1 The IUU Regulation's third country carding system

The IUU Regulation's carding process requires 'third countries' (those not in the EU) which export fish to the EU to meet international standards for fisheries management. If they do not meet these standards, third countries can face a series of measures, culminating in the possible exclusion of their fish products from the EU. The European Commission and third country authorities enter into a dialogue which can last months, and even years, to assess the systems in place to prevent IUU fishing and their compliance with international fisheries management standards. This engagement with third countries provides a framework for the EU to offer capacity-building and technical assistance to strengthen fisheries management and control in third countries.

To implement the IUU carding system, the European Commission conducts fact-finding missions to evaluate the compliance of third countries with their duties as flag, coastal, port, or market states under international agreements.⁵⁰ Where the country is found to be non-cooperative or otherwise fails to make sufficient improvements, the EU will first issue a warning (yellow card) formally setting out the improvements needed to maintain access to the EU market for the flag state's vessels. In the most severe cases of non-performance, the EU will issue a red card, banning the import of fishery products from any of the flag state's vessels. Granting a red card consists of two steps. First, the Commission proposes the red card, setting out the evidence on which its recommendation is based. Second, the Council of the EU adopts the decision to issue a red card and apply sanctions to the third country. On making required improvements, a country can be delisted (green card).

⁵⁰ Article 32 of the IUU Regulation.

EU decisions to yellow- or red-card a third country, or to lift those cards, are made publicly available on the EU's official journal and the Commission's website.⁵¹ If a country is carded, it will need to take a proactive role in complying with international standards in order to be delisted. For a fuller discussion of the history and implementation of the IUU Regulation's carding system, including an analysis the measure's effectiveness so far, see *Developing EU measure to address forest-risk commodities: What can be learned from EU regulation of other sectors?*⁵² For case studies illustrating EU implementation of the IUU carding system, and its impact on governance improvements, see *The EU IUU Regulation carding process: a review of European Commission carding decisions*.⁵³

Since the IUU Regulation came into force in 2010, a series of countries have been issued with warnings – 'yellow cards' – for failure to improve their fisheries management. The majority of these have undertaken robust reforms, and subsequently had the yellow cards removed. Others failed to cooperate and were then issued with red cards, with resulting sanctions. Even more countries improved their fisheries management in response to the EU's engagement and support, without the need for yellow cards. A key element of the EU's carding process is to evaluate the capacity of each third country to fulfil its international obligations and the requirements of the IUU Regulation, and then provide it with assistance to meet those requirements. More than 55 countries have received aid.⁵⁴

European NGOs monitoring the IUU Regulation's third country carding system have lauded the impact the third country carding system has had on encouraging substantial on-the-ground improvements in fishery management in third countries. According to these NGOs, one of the IUU Regulation's greatest achievements so far has been to motivate changes in fisheries management on the part of third countries through the combination of support and pressure provided by the carding system, because the carding system incentivises concrete improvements in fisheries management standards with direct benefits to the communities affected by illegal fishing.⁵⁵ As a direct outcome of the yellow and red carding process introduced by the IUU Regulation, at least nine countries⁵⁶ have reformed their fisheries' laws and management systems. Over a period of two and a half years, these countries undertook substantial legislative, policy, and administrative revisions including among other things implementing international law obligations and adopting an adequate legal framework for fighting against IUU fishing; adopting new policies to strengthen inspections in ports; reforming vessel registration systems; and introducing improved vessel monitoring systems as well as sanctions for vessels involved in IUU fishing; and increasing funding and staff for fisheries management and control departments.⁵⁷ Notably, producer countries have described the carding system as a strong incentive to align their national policies and legislation with international standards and to strengthen their implementation and enforcement of these standards.⁵⁸

51 http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/index_en.htm.

52 Available at http://www.fern.org/sites/fern.org/files/Developing%20EU%20measures_0.pdf.

53 *The EU IUU Regulation carding process: a review of European Commission carding decisions* (Environmental Justice Foundation, Oceana, Pew Charitable Trusts, and WWF, 2016), available at <http://www.iuuwatch.eu>.

54 *Leading the Fight against Illegal Fishing, The EU IUU Regulation – Making it work, together* (Environmental Justice Foundation, Oceana, Pew Charitable Trusts, and WWF, 2015). See also *The EU IUU Regulation carding process: a review of European Commission carding decisions* (Environmental Justice Foundation, Oceana, Pew Charitable Trusts, and WWF, 2016), available at <http://www.iuuwatch.eu>.

55 *Leading the Fight against Illegal Fishing, The EU IUU Regulation – Making it work, together* (Environmental Justice Foundation, Oceana, Pew Charitable Trusts, and WWF, 2015), available at <http://www.iuuwatch.eu>.

56 Belize, Fiji, Panama, Togo, South Korea, Vanuatu, Ghana, Papua New Guinea and Philippines.

57 *Leading the Fight against Illegal Fishing, The EU IUU Regulation – Making it work, together* (Environmental Justice Foundation, Oceana, Pew Charitable Trusts, and WWF, 2015), available at <http://www.iuuwatch.eu>.

58 *The EU IUU Regulation: Building on success, EU progress in the global fight against illegal fishing ('Building on Success' report)* at 17 (Environmental Justice Foundation, Oceana, Pew Charitable Trusts, and WWF, February 2016), available at http://www.iuuwatch.eu/wp-content/uploads/2016/02/IUU_report_090216_web.singles.pdf

5.2 Adapting the carding system to the Tenure Guidelines

A carding system relating to implementation of the VGGT would need to differ, in some ways, from the IUU carding system. The international agreements to which the IUU carding system promotes adherence set out specific steps that endorsing countries must take to manage fisheries and prevent IUU fishing. While the VGGT sets out duties and responsibilities, particularly for states, these are in the form of more general principles and guidance. Therefore, a carding system to promote implementation of the VGGT would need to begin with the development of a baseline assessment for each partner country, outlining existing measures for securing and protecting tenure. This should be followed by a roadmap developed by each partner country which could, in turn, be monitored and supported to ensure good progress. The Commission should make material publicly available including country assessments of their legal frameworks and administrative systems governing tenure; Commission fact-finding missions; and country roadmaps for bringing practices in line with VGGT principles and recommendations. This would not only foster accountability, but also provide very useful information for operators exercising due diligence in reference to VGGT principles.

The proposed carding system relating to the VGGT would entail the following steps:

1. **Engagement with the producer country.** As in the IUU carding system, the first step would be for the European Commission to identify and enter into dialogue with countries supplying FRCs for the EU market. If any country has not yet endorsed the VGGT, then endorsement would be the first step in the process. An initial fact-finding mission, assessment of the country's capacity needs, and the provision of appropriate support to build capacity to improve tenure governance would follow.
2. **Baseline Assessment of Tenure Governance.** A foundational step would be for the country to benchmark its current tenure governance against the VGGT. The FAO has developed a general Land Assessment Tool (LAT) as a framework for comparing existing legal frameworks against VGGT principles as well as a LAT for gender-equitable land tenure to assess compliance of national laws with the VGGT principles on gender equality in access and governance of tenure. Of course, the baseline assessment should not only assess the adequacy of the country's legal framework, but also whether relevant laws are being consistently enforced and whether sufficient resources are being made available to administer tenure governance. A UN-Habitat review of land tenure security in 15 selected countries, conducted with the support of the German Agency for International Cooperation (GIZ), points to the dramatic contrast between tenure rights enshrined in law and actual practices.⁵⁹ While each country's unique tenure system and challenges require tailored responses, the UN-Habitat report calls for substantial investments in land management and administration, as well as work focussed on groups whose tenure rights are weakest.

Comprehensive baseline assessments can form the basis for discussion about necessary reforms. However, the baseline assessment will only be valid if it solicits and incorporates the views and concerns of communities and other stakeholders. Therefore, it will be important that the benchmark assessment be developed in consultation with stakeholders, particularly communities with forest tenure claims.

59 UN-Habitat, *Land Tenure Security in Selected Countries* (Synthesis Report), available at https://issuu.com/unhabitat/docs/land_tenure_security_in_selected_co

3. **Country-specific roadmap to fully implement the VGGT principles.** Having benchmarked the country's existing laws and practices against the VGGT, the next step is to agree a roadmap for bringing the country's governance of tenure into compliance with its principles. Like the benchmarking exercise, it is important that this be done through a multi-stakeholder process in which all stakeholders, in particular communities with forest tenure claims, have an effective seat at the table. The roadmap should include a timetable, milestone targets, and indicators against which progress can be monitored and assessed.
4. **Monitoring and reporting on progress with VGGT implementation.** Once the country roadmap has been developed and agreed, progress can be monitored against the country-specific roadmap.

FRC-supplying countries that decline to pursue the steps outlined above, even where the EU has provided support to address capacity gaps, should be issued yellow cards and, if warranted, red cards. The issuance of a red card would ban the import into the EU of FRCs from the carded country. Given that the EU is a major importer of the key FRCs (palm oil, soy, beef, leather, and cocoa),⁶⁰ this is likely to provide significant leverage to induce FRC-producing countries to take their duties articulated in the Tenure Guidelines seriously and to explain and demonstrate their tenure governance efforts to the EU.

60 See *The impact of EU consumption on deforestation*, available at http://ec.europa.eu/environment/forests/impact_deforestation.htm.

6 Demand-side measures: due diligence, traceability, and reporting

The proposed due diligence measure, along with related whitelisting and blacklisting tools, would all reference the VGGT and be aimed at ensuring adherence.

6.1 Avoiding ‘liability loopholes’ in due diligence regulations

Tools such as voluntary certification schemes or other industry schemes can help companies to carry out their due diligence obligations. However, regulations should explicitly state that the responsibility to carry out and publicly report on due diligence rests with individual companies. Any assistance – whether in the form of whitelists, blacklists, industry schemes, or other tools – cannot release upstream or downstream operators from this individual obligation. In other words, membership in or compliance with a scheme should not, in itself, be equivalent to compliance with the regulation. Compliance tools should be viewed as providing assistance and evidence to support a company’s exercise of due diligence, not substituting for it.

The OECD Due Diligence Guidance and other due diligence laws, including the EUTR,⁶¹ make clear that companies must retain individual responsibility for their due diligence efforts and not pass that responsibility on to third parties. A strong and effective regulation should be designed to exert maximum leverage in relation to the resources invested in its implementation and enforcement. One way to do this is to design regulations to ‘activate’ a wide range of stakeholders to develop the information and other elements necessary for the regulations’ implementation. Such regulations will place clear legal responsibilities – and liabilities – on appropriate parties. Appropriately placed and well calibrated ‘liability hooks’ can, in turn, be expected to stimulate the cultivation, verification, dissemination, and appropriate use of relevant, credible information up and down the supply chain.

It is crucial that legal responsibilities and liabilities are clearly defined and maintained in any demand-led measures to reduce agricultural deforestation. The force of legal obligation and associated risk of penalty for breaches inevitably adds weight to the impact of a law and compels compliance. Legal leverage dissipates, however, where responsibility for ensuring compliance is shifted to another party, while the liability for compliance does not. The manner in which certification schemes can be used to prove compliance with biofuel criteria under the Renewable Energy Directive is a good example of this.⁶² The law allows for approved voluntary schemes to provide evidence of compliance with the criteria. However, in the event that biofuel feedstocks which do not, in fact, comply with the criteria are nevertheless certified by an approved scheme, neither the voluntary scheme nor the operator who relied on the scheme’s faulty certification can be found liable or suffer consequences for this failure. This

61 European Commission, *Guidance Document for the EU Timber Regulation*, C2016 755 final (Feb 2016), available at <http://documents.clientearth.org/wp-content/uploads/library/2016-02-12-guidance-document-for-the-eu-timber-regulation-ext-en.pdf>; Emily Unwin, *The EU Timber Regulation and the use of certification* (ClientEarth, March 2015), available at <http://documents.clientearth.org/wp-content/uploads/library/2015-03-16-the-eu-timber-regulation-and-the-use-of-certification-ce-en.pdf>; see also Emily Unwin, *Considering how the EU Timber Regulation may inform systems of governance for the sustainable production of commodities impacting forest ecosystems* (ClientEarth, Feb 2013), available at <http://www.documents.clientearth.org/library/download-info/considering-how-the-eu-timber-regulation-may-inform-systems-of-governance-for-the-sustainable-production-of-commodities-impacting-forest-ecosystems/>

62 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC

amounts to a 'liability loophole' rendering the regulatory scheme weaker than it would be if liability for such failures were clearly defined and enforced.⁶³

The use of voluntary schemes in the context of the EUTR contrasts with how they are used for the Renewable Energy Directive's biofuels criteria. The EUTR makes clear that ultimate legal responsibility for complying with its due diligence and prohibition requirements rests with operators (those that first place timber on the EU market). The EUTR, and related secondary legislation and guidance, then sets out circumstances when certification schemes may be of use as tools for operators' exercise of due diligence. There is no obligation to use voluntary certification schemes; instead, each operator may decide whether to rely on voluntary certification schemes and, if so, which ones and in which circumstances. In any case, the operator will remain liable.⁶⁴

When utilised within a risk-assessment framework, quality certification schemes can provide a meaningful risk assessment tool. To ensure that 'liability hooks' are not displaced by reliance on certification, it is important that certification is well understood as a tool for compliance, and not simply equated with compliance. Maintaining liability for compliance with the regulation on operators ensures that liability loopholes will not emerge for the EUTR through the use of certification as a compliance tool.

6.2 Ensuring transparency, monitoring, and scrutiny of whitelists

Another liability loophole could be opened up by the use of whitelists, if these lists – and the processes and procedures through which they are developed and maintained – are not fully transparent and open to scrutiny. It will be important that the process for developing and maintaining whitelists of FRC supply chain entities is open, transparent, and subject to scrutiny by stakeholders, including complaint procedures requiring a reasoned response to substantiated concerns about whether an entity deserves to be whitelisted.

Whitelisted suppliers should be transparent about their due diligence practices, report on their due diligence endeavours, and be subject to monitoring by communities, CSOs, and NGOs to ensure their consistent and continued adherence with VGGT principles. The EU should provide capacity building resources to develop and maintain effective community monitoring schemes. In addition, where communities or their representatives or advocates raise substantiated concerns questioning whether an entity deserves to be on a whitelist, complainants should be entitled to a timely due process procedure, including a reasoned, written response to substantiated complaints and the prompt de-listing of challenged entities where the concerns are found to be credible.

6.3 Focusing whitelisting and blacklisting tools on choke points in FRC supply chains

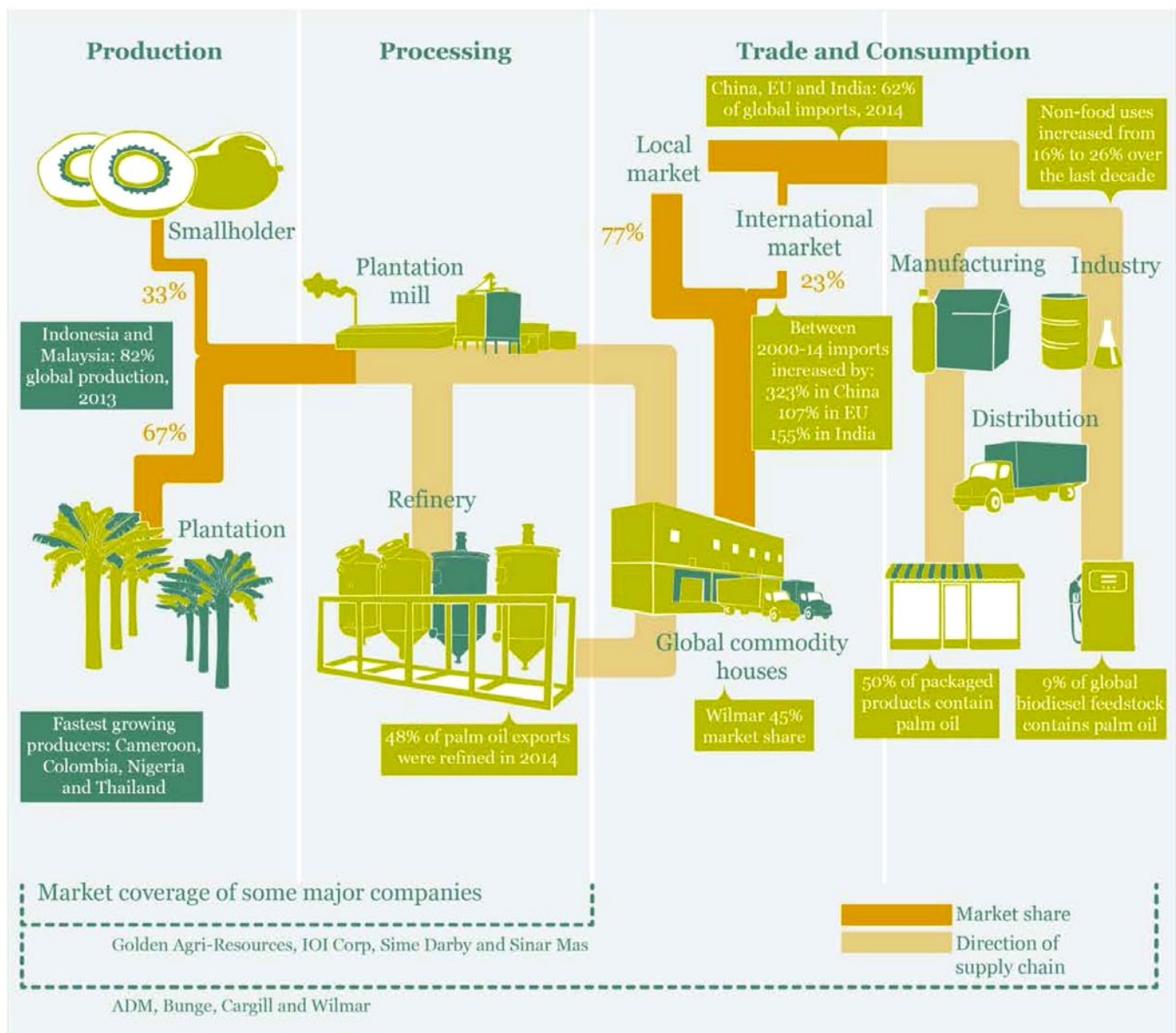
Current supply chains for palm oil and other FRCs are not segregated nor easily traceable, although several companies that dominate international trade in FRCs have made 'zero deforestation' pledges and are making some progress in tracing and segregating supplies.⁶⁵

63 See *Biofuels – Driving best practice in voluntary certification* (ClientEarth 2013), available at <http://www.clientearth.org/reports/clientearth-driving-best-practice-in-voluntary-certification-may-2013.pdf>

64 See *Considering how the EU Timber Regulation may inform systems of governance for the sustainable production of commodities impacting forest ecosystems and Guidance Document for the EU Timber Regulation*, note 60 above.

65 For an analysis of how these commitments are progressing, see *Supply Change: Corporations, Commodities, and Commitments that Count* (Forest Trends, March 2015); *Supply Change: Tracking Corporate Commitments to Deforestation-free Supply Chains* (Forest Trends, June 2016). See also *Responsible Sourcing: A Practical Guide* (Proforest, October 2015).

The complexity of FRC supply chains makes traceability of particular consignments of a commodity from the farm to a product on a retail shelf challenging. This is due to the amalgamation of materials that happens at key processing choke points. This is particularly true for palm oil and soy, which are also, in turn, incorporated into a very wide range of end products.⁶⁶ But global supply chains for palm oil have some clearly identifiable ‘choke points’ – namely, the mills at which the palm fruit or palm kernel is initially processed into oil and processing facilities further down the supply chain through which the oil is further refined and then distributed for various applications and end products.



Reproduced from Duncan Brack, Adelaide Glover and Laura Wellesley, *Agricultural Commodity Supply Chains: Trade, Consumption and Deforestation* (Chatham House, January 2016).

⁶⁶ For a further discussion, see Duncan Brack, Adelaide Glover and Laura Wellesley, *Agricultural Commodity Supply Chains: Trade, Consumption and Deforestation* (Chatham House, January 2016).

Focussing transparent and well-monitored blacklists and whitelists on supply chain choke points could help to push due diligence aimed at adherence with VGGT principles up the supply chain. In order to be whitelisted, a mill or processor would need to develop and implement a due diligence system for ensuring that all of the supplies it processes have a negligible risk of having been cultivated on land that was converted to FRC production in violation of tenure rights, and to report on its due diligence practices and be open to the monitoring of its due diligence practices. A mill or processor could exercise due diligence in relation to all of its supplies rather than segregate conflict-free supplies from supplies that may not be conflict free. In contrast, mills and processors that do not exercised due diligence and consequently become known for supplying FRCs cultivated in violation of tenure rights would be blacklisted. This means that they would lose custom from any downstream buyers who are themselves subject to EU due diligence regulations or otherwise exercising due diligence in compliance with a voluntary commitment.

Over recent years major private sector actors have pledged to eliminate deforestation from their supply chains and investments.

These corporations have identified the need for regulations, both in the EU and, in particular, to guide and support FRC-producing countries' efforts.

EU policymakers are now in the process of taking up this challenge, and this paper provides inputs to these policy discussions.



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