Making soft laws enforceable

How the EU can use human rights guidelines to fight agricultural deforestation
Introduction

The gravity and scale of the problem are not in doubt: agriculture is the greatest threat to the planet’s forests, driving around 80 per cent of deforestation worldwide¹.

The United Nations, the European Union, NASA, corporations, academics and international NGOs all recognise this. But they haven’t found a way to seriously address it.

What’s more, this forest destruction is drenched in illegality. Nearly half of all tropical deforestation for commercial agriculture is believed to be the result of illegal clearing. As one of the largest importers of these illegally produced goods – responsible for almost a quarter of the world’s trade – the EU bears deep responsibility.

Yet while it has found the political will to push through legislation to stop illegally-sourced timber, fish and conflict diamonds from entering its markets, the EU has no tools to end the trade in illegally produced agricultural commodities.

The purpose of this discussion paper, which draws on a detailed Fern report as well as an analysis we will soon be publishing² is to show the contours of a way forward. We intend it to start the conversation about how regulatory approaches could help eliminate deforestation and human rights abuses from global supply chains.

Voluntary measures to tackle deforestation are not sufficient

Razing forests to plant agricultural crops is often tied to human rights abuses, including dispossession of indigenous communities and local people of the land they customarily own. Respecting their tenure rights, as well as addressing the environmental and social impacts of converting forest lands for agriculture, are therefore essential to halt global deforestation.

¹ For example, according to Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers. Lexeme Consulting, Vancouver Canada, August 2012 (Kissinger, G., M. Herold, V. De Sy): “Agriculture is estimated to be the proximate driver for around 80% of deforestation worldwide. Commercial agriculture is the most important driver of deforestation in Latin America (around 2/3 of total deforested area). In Africa and (sub)tropical Asia it accounts for around 1/3 of deforestation and is of similar importance to subsistence agriculture.”
² Hardening international soft law frameworks into EU measures to address forest risk commodities, by Janet Meissner Pritchard. Publication forthcoming.
Supply chains of the main agricultural commodities responsible for tropical deforestation – soy, palm oil, rubber and cocoa – are extraordinarily complex. Materials are mixed along the way and unravelling the specific source of many of the tainted goods contained in the products which line our supermarket shelves, has defeated not only armies of researchers and investigative journalists, but even the manufacturers of the goods.\(^3\)

At the time of writing, we are just 18 months from 2020: the major benchmark set by governments, the EU, businesses and NGOs for ending or halving deforestation.\(^4\)

The chances of realising these goals are receding fast – increasing the urgency of finding ways to stop destroying the world's forests for agriculture. So, what should we do?

The commitments many companies have made to free their supply chains from deforestation - and end the land rights abuses and conflicts accompanying it – matter.

But many companies agree that such voluntary measures are not enough. Instead they should serve as springboards for governments - working with companies, local civil society groups and affected communities to change - and implement - their laws. To work, legislative change must occur in the countries where the commodities are produced, as well as where they are consumed.

As the world’s second biggest importer of agricultural goods which cause deforestation, the EU can – and must – take a lead in shaping legislation to control the imports of these so-called forest risk commodities.\(^5\)

In a recent long-delayed feasibility study, the European Commission offered options to fight deforestation. They described the introduction of new legislation to make it mandatory for companies importing and consuming forest risk commodities to conduct due diligence as the most effective – albeit most politically difficult - option.

\(^3\) Research shows that “very few companies” can even trace the soy and palm oil they use back to its origin. While around 70 per cent of companies have traceability systems in place, only 14 per cent of them are able track soy back to its source. For palm oil, the figure is even more staggering at 2 per cent. See: [http://www.forestdeclaration.org/wp-content/uploads/2015/09/2016-NYDF-Goal-2-Assessment-Report1.pdf](http://www.forestdeclaration.org/wp-content/uploads/2015/09/2016-NYDF-Goal-2-Assessment-Report1.pdf)

\(^4\) The UN's Sustainable Development Goals include a pledge to halt deforestation by 2020; the New York Declaration on Forests has a non-binding commitment to half the rate of deforestation by the same year; and the Consumer Goods Forum – a network of more than 400 retailers, manufacturers and others – has resolved to achieve zero net deforestation by 2020.

\(^5\) Forest risk commodities (FRC) have been defined as: “Globally traded goods and raw materials that originate from tropical forest ecosystems, either directly from within forest areas, or from areas previously under forest cover, whose extraction or production contributes significantly to global tropical deforestation and degradation.”
Putting human rights at the heart of EU action on deforestation

When forests are converted for agriculture on a large scale, an almost inevitable consequence is the violation of community tenure rights. One way of tackling this – and therefore illegal deforestation – is by hardening existing human rights ‘soft law’.  

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, otherwise known as the VGGT could be used as a legal basis to ensure that agricultural commodities entering the EU are free from land rights abuses, thereby reducing deforestation.  

The VGGT are far-reaching guidelines anchored in human rights, which lay down principles to safeguard peoples’ rights to access or own their land, forests and fisheries. They represent a global consensus on tenure, having been endorsed by the Committee on World Food Security (CFS) in 2012, and recognised by the G8 (now the G7) and the G20. They have also been endorsed by many of the countries where agricultural deforestation is rife, as well as transnational agribusiness companies.  

Through promoting customary rights, the VGGT aim to eradicate hunger and poverty, while supporting sustainable development and improving the environment. They offer guidance on the governance of tenure – a politically sensitive and technically complex subject – and outline broad principles that can be adopted in different contexts.  

This proposal comes with an important qualification: it would not work for all forms of agricultural deforestation; notably cocoa farming in Côte d’Ivoire and Ghana, where a different approach is needed.  

---

6 The term “soft law” refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law.  
7 For more information see VGGT: what potential to engage? Available at www.fern.org/VGGT  
8 The Voluntary Partnership Agreement (VPA), timber trade deal that Ghana has signed with the EU holds important lessons for tackling deforestation in the cocoa industry there and in Côte d’Ivoire. See: Paving the way: learning from Ghana’s VPA process to help meet cocoa commitments
Applying the VGGT to the EU

As a forthcoming Fern paper outlines⁹, framing EU measures to halt agricultural deforestation would follow the international trend of developing international ‘soft law’ standards to improve corporate behaviour, and then using that framework to formulate globally coherent national ‘hard law’.

The VGGT; key elements:

The VGGT standard applies general principles anchored in a human-rights based approach and contains progressive text on community tenure, including recognition of the need for States to respect and protect customary and informal tenure systems (Section 9).

A major strength of the VGGT as a potential advocacy tool stems from its high level of legitimacy and endorsement by governments, the G7 and G8, EU, Organisation for Economic Cooperation and Development (OECD), donor agencies and many civil society organisations as well as transnational agribusiness, food and drink companies.

States should “recognise and respect all legitimate tenure rights holders and their rights... take reasonable measures to identify, record and respect legitimate tenure rights holders and their rights, whether formally recorded or not... safeguard legitimate tenure rights against threats and infringements... take active measures to promote and facilitate the full realisation of tenure rights... Provide access to justice to deal with infringements of legitimate tenure rights...”

For more information about the VGGT, see Fern’s publication VGGT: what potential to engage? available at www.fern.org/VGGT

⁹ Hardening international soft law frameworks into EU measures to address forest risk commodities, by Janet Meissner Pritchard. Publication forthcoming.
Shifting the VGGT from a voluntary set of principles into enforceable EU regulation, is a way to set human rights standards - via supply chains - for the suppliers of the agricultural commodities, which are driving illegal forest destruction.

The EU’s ground-breaking attempt to stem the illegal timber trade - the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan – uses demand and supply side measures to achieve its aims. Lessons from FLEGT could be utilised for a regulation to tackle agricultural deforestation.

FLEGT is based on the notion that both supply and demand side measures are required to tackle illegalities.

The supply side measures aim to cultivate better management of natural resources in the producer countries by improving governance; the demand side measures aim to influence the sustainable management of those natural resources with those trading in them required to ensure their supply chains adhere to specific principles. The same theory would have to underly a human rights due diligence regulation.

Under FLEGT, legality definitions are mainly based on national statutory laws; this proposal to use the VGGT as a legal basis would recognise national laws but be based on internationally adopted human rights laws and principles.

Two lessons from efforts to clean up other commodities long riddled with illegalities, should also be taken on board.

First, the complexity hampering the transparency of many agricultural commodities supply chains could be overcome by identifying and focussing on choke points, that is the “key points of material transformation”, such as processing and packaging. This could follow the example of efforts to identify conflict minerals, where supply chains have been beset by the same issue.

Second, adopting the so-called card system at the heart of EU rules to combat illegal fishing, which mark out the best and worst performers, would foster accountability and due diligence and improve good governance.

Using the VGGT as its starting point, the EU should begin dialogue with producer countries where illegal deforestation from agricultural commodities is most acute, to see how best to support them to address illegalities. At the heart of these discussions must be the need to recognise and strengthen forest communities’ customary land rights.