

Environmental Investigation Agency's (EIA) Response to Defra Consultation for “Due Diligence on Forest Risk Commodities”

Introduction

EIA very much welcomes the consultation by Defra on introducing legislation on due diligence on forest-risk commodities and being one of the first countries to propose enacting such legislation.

EIA recognises that legality and governance reforms are central to more sustainable natural resource management practices globally. Support for laws that protect forests, ecosystems and local communities (including Indigenous Peoples), and strengthening the enforcement and design of such laws is crucial. This has been an achievement of the FLEGT process, which EIA has been heavily involved with since its inception. The precise approach to be taken by Defra on legality, however, raises some concerns and in other instances is unclear.

We urge that Defra revises its proposals to clearly:

- Sets clear standards which support national laws that protect natural forests, other ecosystems, and human rights, notably ensuring clear and strong land tenure rights, including the recognition of customary law
- Ensure the regulation aligns with the UK's and other countries' international obligations and commitments
- Provides for a partnership approach within the regulation that supports and incentivises producer countries to enact and enforce such commitments and laws

For the reasons outlined below, we urge the government to carefully review its approach to ensure it has the intended impact which Defra has clearly set out is “*to ensure that forest risk commodities are produced legally and sustainably*”.

1. The UK should set the standard for protecting natural forests and ecosystems and support national laws that meet this standard

EIA recommends that Defra revises its proposal to make it clear that agricultural commodities must be produced only where natural forests and other natural ecosystems are protected and this can be met by national laws, where these laws meet this standard. In other words if a commodity is produced in an area where there is no law protecting the forest or other ecosystem, or laws protecting the forest and other ecosystems has have been violated, the business importing these products would not be in compliance.

Not all laws are good laws. Many laws in producer countries do not protect forests, or are not consistent with international obligations countries may have committed to under international instruments such as the Paris Agreement, UN Convention on Biological Diversity (CBD), UN Forest Strategy and Sustainable Development Goals, and international human rights agreements such as the UN Declaration on the Rights of Indigenous Peoples.

On the other hand, many countries do have laws which are consistent with their international obligations. The UK law should support countries that meet their international obligations and should not support laws that act in harmful ways or in ways that violate international commitments.

There are precedents for the UK setting standards regarding the operations of UK businesses overseas. When addressing similar scenarios, where UK businesses may be complicit in harms caused in other parts of the world, the UK has passed laws setting its own standards for businesses to comply with rather than relying on laws in other countries, for example in the Bribery Act 2010 and the Control in Endangered Species Regulations 2018.

We urge that the regulation applies not just to illegal deforestation, but legal deforestation, requiring companies to ensure their supply chains are deforestation free. This reflects the fact that many forests are cleared legally, and also the importance of ensuring the regulation can be effectively enforced. It may be more burdensome and difficult to confirm whether deforestation has happened illegally, as opposed to confirming whether there has been deforestation or not, as local laws can be complicated, conflicting with one another and vary over time. Furthermore, having a sole focus on illegal deforestation would not align with the no deforestation, no peat and no exploitation (NDPE) policies that numerous UK companies are already implementing and that set a higher bar.

2. The standard set by the UK should be inclusive of human rights, notably clear and strong land tenure rights

Land conflicts, weak tenure security and land rights are highly correlated with forest-risk commodities and land-use change.¹ For example, in Indonesia the plantation sector, mostly in the form of palm oil, is the most highly associated with land disputes, more so than other sectors like the property and agricultural sectors.²

Only focusing on laws that protect forests and ecosystems may cause those laws relating to land rights to be less well enforced or under prioritised. There may be lands where there are legal forest conversion permits in place, but also various social issues including land conflicts. Only focusing on laws that protect forests may have the unintended consequences of exacerbating the undermining of the rights of local communities and Indigenous Peoples, driving conflict and ultimately being counterproductive to attempts to protect natural forests and ecosystems.

Much illegal deforestation is illegal due to failure to recognise land rights, such as without the consent of the landowner, without consultation with communities, or failure to pay appropriate compensation to local communities and landowners in contravention of their rights.

The UK regulation should show clear support and incentives for national legislation and processes that addresses land tenure rights and respect the rights of local communities and Indigenous Peoples, including Free, Prior and Informed Consent (FPIC), such as those that provide legal land titles for farmers, recognise customary land rights, and resolve conflicts between customary and statutory land laws.

A focus only on existing legal provisions may favour statutory land law, leading to a loss of customary rights, as customary rights are rarely recognised in national law. The United Nations Declaration on the Rights of Indigenous Peoples was adopted in 2007 by 144 Parties that set minimum standards for the rights of Indigenous Peoples. Although some countries have adopted laws that respect and

1 TFA (2017) Commodities and Forests Agenda 2020: Ten priorities to remove tropical deforestation from commodity supply chains
https://climatefocus.com/sites/default/files/TFA2020_CommoditiesandForestsAgenda2020_Sept2017_0.pdf

2 The Jakarta Post (2019) Plantations engulfed in land disputes
<https://www.thejakartapost.com/news/2019/01/04/plantations-engulfed-land-disputes.html>

uphold the rights of Indigenous Peoples, progress has been uneven and variable.³ The UK should build on and adopt such standards that are internationally endorsed in its regulation.

3. The scope of the ‘relevant laws’ proposed is too limited

Defra has proposed to define relevant laws as those that “*protect natural forests and other natural ecosystems from being converted in to agricultural land*”. This could exclude many types of illegal deforestation defined in the Forest Trends (2014) report on which Defra is largely basing its proposal.

Many of those identified illegalities were not primarily concerned with protecting forests or ecosystems from conversion, but with illegalities relating to the permitting process, land rights, lack of community consent, corruption or bribery. Therefore, these illegalities would appear to be excluded from the scope of the regulation, and the current wording creates ambiguity about what is and what is not included.

The EUTR defines legal timber as timber produced in compliance with the laws of the country where it is harvested, and therefore is much wider in scope. We understand that a US law on illegal deforestation is currently being considered to be introduced.⁴ This looks set to include deforestation (i.e. loss of natural forests) conducted in violation of any the laws of a country as being illegal deforestation. Similarly, this is wider in scope as it does not limit the illegality to only laws that protect forests.

Additionally, deforestation may be illegal at time of forest clearance, but it is often legalised later, and this creates confusion for applying the proposed law. Much past illegal deforestation may have been legalised by legal reforms, forgiven or is too long ago to be prosecuted or detected. Countries may also look to deregulate by making environmental protections weaker and more deforestation legal. This is a real risk in countries like Brazil and Indonesia, who are currently considering deregulation that would weaken current laws that support the protection of forests. Indonesia passed an “omnibus bill” that significantly weakens laws protecting forests on the same day this consultation ended, making clear how real this risk is.⁵

Many forests and ecosystems are also not protected by law, and deforestation in these contexts is legal. Failure to adequately recognise this would signal UK support for such deforestation. For example, in Indonesia millions of hectares of natural forests are classified as non-forest areas (Areal Penggunaan Lain – APL – in Indonesian) and can legally be converted to agriculture.⁶

4. The regulation must apply to all companies

The regulation should apply to all companies, regardless of their size.

It is risky to assume that most of these commodities are used by large businesses, like major retailers and consumer goods manufacturers. The users could be smaller companies in lesser known sectors that face less consumer pressure, and therefore have lower standards. Examples could include the

³ UN (2019) [State of the World’s Indigenous Peoples, Volume IV, Implementing the United Nations Declaration on the Rights of Indigenous Peoples](https://social.un.org/unpfii/sowip-vol4-web.pdf) <https://social.un.org/unpfii/sowip-vol4-web.pdf>.

⁴ World Economic Forum (2020) Deforestation can’t be stopped by voluntary action alone <https://www.weforum.org/agenda/2020/01/deforestation-voluntary-action-regulation/>

⁵ New York Times (2020) Jobs Bill Advance in Indonesia, Over Labor and Environmental Objections <https://www.nytimes.com/2020/10/05/world/asia/indonesia-stimulus-bill-strike.html>

⁶ Earthworm (2017) Protecting Forests in Indonesia: Legal Options in Land Zoned for Agriculture <https://www.earthworm.org/uploads/files/Legal-options-for-protecting-forests-in-land-zoned-for-agriculture-in-Indonesia.pdf>

food service industry (catering, hotels, restaurants, etc.), oleochemical industry, animal feed industry and biofuel/energy industry.

Also, it has been a key criticism of the French Duty of Vigilance Law that it is unclear which companies are subject to the law, which is based on employee numbers (over 5,000 employees in France or 10,000 worldwide, including in the company's subsidiaries),⁷ and therefore using this metric is not recommended.

It is also unclear how government procurement will be affected by the law. The government is a large user of commodities such as in schools, hospitals and prisons, and government procurement should be the first step for higher standards for commodities.

5. A new law must reflect a partnership approach and not green lane certification schemes

We fully support the UK government taking a bilateral partnership approach and this should be written into the regulation.

Any such bilateral agreement must provide clear support and incentives for governance reform and the enactment of existing commitments by countries, ensuring these align with international commitments. There is the need to define legality in any country through a multi-stakeholder approach. Such agreements must provide incentives for reform and existing commitments by countries to be honoured.

Any regulation should not automatically green lane national standards or certification schemes, and the use of such schemes should not absolve the company of liability. Certification schemes can suffer from critical flaws such as auditors conducting substandard assessments or colluding with companies to cover up violations, resulting in the certification standard not being adhered to and failures in achieving significant change.⁸

Consideration should be made of how to connect the enforcement of the new law with a partnership approach, for example by directing funds obtained by fines imposed on companies to producer countries that are taking active steps to improve governances.

6. Enforcement must be provided adequate resources

The body charged with compliance and enforcement will have to be able to do the following:

- Regularly check the due diligence systems of all the companies covered by the regulation.
- Evaluate whether due diligence systems identify all risks in the relevant supply chain.
- Assess whether those risks are appropriately mitigated or otherwise dealt with.
- Be able to take action to ensure due diligence comes into compliance where they identify failures.
- Investigate and prosecute instances where illegally sourced products are traded in the UK.

⁷ Business and Human Rights Resource Centre (2020) What lessons does France's Duty of Vigilance law have for other national initiatives? <https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives/>

⁸ For example see reports by EIA: <https://eia-international.org/report/who-watches-the-watchmen-2/>; and https://changingmarkets.org/wp-content/uploads/2018/05/False-promise_full-report-ENG.pdf

Adequately performing these tasks will require additional resources. In order to evaluate whether risks have been identified, a regulator will themselves need to know the risks of sourcing commodities from particular locations and suppliers – in effect, the regulator will need to conduct a certain amount of due diligence themselves to evaluate the due diligence being conducted by companies. They will also need to be able to impose penalties sufficiently dissuasive to motivate changes by (in some instances) very large companies.

Given the extent of resources needed and the work that will be required to enforce the regulation, the primary legislation should ideally establish a new regulator, similar to the Competition and Markets Authority or the Office of Fair Trading, with the specific mission of enforcing the law. If this is not done, the authority responsible for enforcing the law must be resourced and empowered to immediately undertake adequate enforcement action.

7. Further elements: Transparency, a complaints mechanism, coverage, smallholders and review

The following considerations should also be taken into account in a new law:

- The law must ensure transparency by both regulated businesses and enforcement authorities, so that the public understands what due diligence is being done, how effective it is, and how effectively the law is being enforced. This should include businesses publicly disclosing their suppliers and the sources of their commodities and any deforestation, illegality, human rights violations and violations of land rights or the rights of Indigenous Peoples where they are sourcing from.
- The new law must clearly cover derived/processed forms of the commodity, not only the raw form, such as leather in the case of beef or oleochemicals in the case of palm oil.
- The law must account for the difficulties that smallholders may have evidencing legality for due diligence and make provisions to ensure smallholders are not excluded from supply chains.
- The new law must have a robust, accessible and transparent grievance redress mechanism for civil society including local communities and Indigenous Peoples where they have been harmed.
- The law must ensure an appropriate definition of “forest-risk commodities” and the correct evidential basis for determining them. It should cover all commodities and then set in legislation which ones are high risk and companies need to report on, allowing for this to be changed over time.
- The new law should have a provision to review its efficacy over time.