

Global Witness submission to the Defra consultation on due diligence on forest-risk commodities

5 October 2020

Section A: About you

Question 1: What is your name?

Shona Hawkes

Question 2: What is your email address?

shawkes@globalwitness.org

Question 3: What country are you based in?

The UK

Question 4: Would you like your response to be treated as confidential?

•Yes

•No

Question 5: Are you responding

•On behalf of an organisation

•As an individual

Section B: About your organisation

[Please note this section only applies if responding on behalf of an organisation]

Question 1: What type of organisation are you responding on behalf of?

•A government body

• Non-governmental organisation

•Small or micro business (Less than 50 employees)

•Medium business (50 – 249 employees)

•Large business (250 or more employees)

- Industry association
- Responding on behalf of another type of organisation

Question 2: Please provide your organisation's name.

Global Witness

Section C: About your business

N/A

Section D: About the proposal

Question 1: Should the Government introduce legislation designed to make forest risk commodities more sustainable?

• Yes

• No

• Don't know

Question 2: Should it be illegal for businesses to use forest risk commodities in the UK that have not been produced in accordance with relevant laws?

• Yes

• No

• Don't know

Question 3: Should businesses in the UK be obliged to have a system of due diligence in place to ensure that the forest risk commodities they use have been produced in accordance with relevant laws?

• Yes

• No

• Don't know

Question 4: Should businesses be required to report publicly on their system of due diligence?

• Yes

• No

• Don't know

Question 5: Should the Government be able to levy fines against businesses that use forest risk commodities not produced in accordance with relevant laws?

• Yes

• No

• Don't know

Question 6: Should the legislation apply to larger businesses, over an employee number and turnover threshold, that use forest risk commodities in production or trade?

• Yes

• No

• Other

Question 7: If you responded 'Other' to Question 6, please expand.

The proposal should apply to all businesses of all sizes. Under the [OECD Guidelines on Multinational Enterprises](#) the UK is required to ensure that all businesses are addressing their environmental and human rights risks. This is important in order to create a business culture that sees no business as exempt from acting to reduce environmental and human rights harms. This approach also avoids complex loopholes and streamlines compliance and enforcement. Consistent with the OECD approach, the law should apply to all businesses in the supply chain. Guidance should then be provided to regulators to focus their enforcement efforts on businesses that have the highest level of risk, exposure or contribution to forest destruction and related harms. This would avoid placing undue burden on smaller businesses.

Question 8: Large businesses have existing obligations to report on climate and environment issues including in relation to net zero. To what extent are there opportunities to align the proposal set out in this consultation with businesses'

reporting under existing international frameworks [e.g. the recommendations of the Taskforce on Climate- Related Financial Disclosures (TCFD)]?

There is a gap in current climate and finance initiatives, including the TCFD and the proposed Taskforce on Nature-related Financial Disclosures. These initiatives rely on a business reporting on its net carbon emissions from its planned activities. The challenge with forest-risk commodities is that many of the businesses linked to deforestation already have zero deforestation commitments. Their exposure to deforestation often isn't planned, but arises from a failure to undertake adequate due diligence to identify, mitigate and prevent the risk of deforestation in their supply chains or financing. They are therefore not captured by TCFD reporting. Only by legislating to require rigorous due diligence will companies be required to take action to tackle their deforestation risks.

Question 9: Do you have any further information or comments you would like us to be aware of?

The UK should introduce a law to end the UK's complicity in the destruction of the world's remaining forests. Such a law would show global leadership in tackling imported deforestation and should be put in place to ensure that the UK does not enable, encourage, incentivise or financially reward forest destruction and deforestation, or related abuses against forest defenders. This is critical to build reliable supply chains and a resilient economy, to ensure that the UK is accountable to supporting our global climate and biodiversity and to reduce exposure to pandemic risks that are strongly connected to biodiversity loss.

a) Adopt a deforestation-free standard: The law should state what practices the UK sees as harmful and will no longer be complicit in

To end the UK's complicity in the destruction of the world's forests, the law should clearly outline what practices the UK views as harmful and will not be supporting. This is the approach that the UK has taken to issues such as [bribery and corruption](#), [wildlife protection](#) and [wildlife trafficking](#) where it has clearly defined and outlined what harmful practices UK businesses will not encourage or engage in – irrespective of what local rules allow.

The current proposal would still allow UK businesses to be complicit in forest destruction – if this is defined as legal in the place where harms occur. A 2014 academic study found that under the current Forest Code an additional 88 million hectares of private land could be deforested legally in Brazil. Even then, the proposal only looks to a limited set of forest-related local laws and doesn't include other important laws such as indigenous land tenure. As the UK government acknowledges in its own consultation [document](#), only half of all recent tropical deforestation is the result of illegal clearance for commercial agriculture and timber plantations.

Tolerating UK involvement in forest destruction defined as 'legal' under local rules, could encourage efforts to roll-back hard-won laws and forest enforcement systems such as Jair

Bolsonaro is currently doing in Brazil. This approach may also encourage a ‘race to the bottom’ where businesses flock to countries with the weakest laws and enforcement. When UK businesses continue to support, engage in or financially reward harmful practices this acts as a disincentive for forest-rich countries to outlaw these practices and improve forest enforcement. The scope of the UK proposal must therefore be broadened out to apply to all deforestation if the legislation is to be effective at protecting our climate and environment. It should incorporate measures to ensure that abusive practices cannot simply be relocated from tropical forests to other eco-systems.

The UK government should heed the lessons learned from industry itself. Over the last decade or more, industry standards and accountability mechanisms have focused on stopping deforestation as a whole, rather than only that defined as illegal under local laws. The UK has also committed to this approach under the [New York Declaration on Forests](#) and the [Amsterdam Declaration Partnership](#). A law that commits the UK to adopting deforestation-free supply chains and finance is also easier for communities and business to understand and uphold. It could draw from the internationally recognised [Accountability Framework](#) initiative or government could form a science-based panel to define specific commodity-based standards.

The UK government should ensure that any new legislation does not allow companies to rely on certification schemes as a guarantee of legality or sustainability. Certification schemes have various limitations, including weak auditing, and are no substitute for rigorous and mandatory due diligence by companies on their supply chains.

Similarly, legislation should avoid organisations deferring their own accountabilities via an over-reliance on auditors or industry-led schemes. Where auditors or such schemes are used, high standards should be demanded and enforced. Global Witness is actively investigating auditor practices in relation to certain forest-risk supply chains and we are happy to provide Defra more information on this issue.

b) Write requirements for Free, Prior and Informed Consent into the law

Forest destruction – whether legal or illegal in the place where it occurs – often relies on ignoring or intimidating those who would raise the alarm. Indigenous peoples and local communities are on the frontline of fighting to protect the forests they have safeguarded for generations and they are often silenced by threats, violence, or even murder.

The UN, leading scientists, industry standards, company policies and affected communities themselves have emphasized the need for a prevention-focused approach to avoid harms in the first place – specifically, the importance of businesses requiring Free, Prior and Informed Consent (FPIC) from indigenous peoples and local communities.

If indigenous peoples and forest communities are aware of, and consent to activities happening in their area and have a meaningful say in how they proceed, the likelihood of deforestation and violence is much lower. It also ensures that businesses moving out of deforestation do not encroach onto existing communities’ land.

The UK government should include requirements for FPIC in the law – drawing on how it is articulated in international law. This would recognise that FPIC is a key mechanism for preventing deforestation and included in industry guidance and standards, and cases filed under the Roundtable on Sustainable Palm Oil, the OECD Guidelines on Multinational Enterprises and the World Bank accountability mechanism.

FPIC is defined and articulated in international law as a right of indigenous peoples. FPIC is also recognised as best practice for local communities more broadly. This is the definition and articulation of FPIC that should be the basis of any FPIC requirement. Measures on FPIC, in full or in part, are included in a vast array of industry guidance and standards. This includes: OECD-FAO Guidance for Responsible Agricultural Supply Chains, Food and Agriculture Organization of the Voluntary Guidelines on the Responsible Governance of Tenure, Roundtable on Sustainable Palm Oil, Bonsucro, Roundtable on Responsible Soy, Rainforest Alliance Sustainable Agriculture Standard, Forest Stewardship Council and the World Bank Environmental and Social Framework.

FPIC is written into international human rights law to address structural issues that prevent certain groups from having basic rights recognised and upheld, but also serves as a strong preventative approach to deforestation and land-related issues. If communities consent to activities on their land, it is much less likely that deforestation, violence and abuse will occur – as indigenous peoples and forest communities have safeguarded forests for generations. Forest-related crimes such as corruption, illegality and deforestation can be very dangerous to investigate and resource-intensive to pursue. [Global Witness](#) recorded the highest number of killings of peaceful environmental defenders in 2019, including forest defenders, since it began collating data in 2012. A preventative approach, rooted in FPIC, is much more effective at preventing a range of risks to environmental defenders and provides certainty to business.

A due diligence requirement on FPIC could be written into the primary legislation, with a subsequent guidance produced in conjunction with FPIC legal experts and advice from relevant rights-holders. We are happy to help coordinate with Defra and other government stakeholders a roundtable to provide an opportunity to hear directly from indigenous peoples, lawyers and others with expertise on FPIC.

c) Finance should not be let off the hook

A key recommendation of the UK Government Taskforce, the [Global Resource Initiative](#), was that a due diligence obligation on deforestation should cover finance. Global Witness's [investigation](#) into the financing behind six of the worst agribusiness companies involved in the destruction of climate-critical forests, found the UK to be the single largest provider of international finance between 2013-2019.

To end UK complicity in imported deforestation, it's imperative that UK businesses, including financial institutions, all follow the same set of rules. The law will lack efficacy if companies are hearing one set of priorities from UK government, but the firms that determine their share price and cost of finance are not required to do due diligence on

their deforestation risks and exposure. Similarly, the UK efforts to lead the world on green finance will be undermined if its banks are simultaneously making headlines for financing linked to forest destruction.

The law should apply strict extended liability to UK-based financial institutions that cause, or contribute to, deforestation through their financing or investments in companies involved in forest destruction. This could draw on, and adapt, key legal concepts from existing financial accountability laws. To give one example, an adapted ‘Know Your Customer’ (KYC) provision could require financial institutions to undertake sufficient due diligence of companies operating in forest-risk sectors, and identify core aspects of their business model, to see if they are complying with a UK law on imported deforestation. Individual officers of a financial institution are assigned specific responsibilities and liabilities in these KYC structures, making enforcement and accountability measures much clearer. Once this form of clear legal accountability is put in place, it is likely we would see the rapid uptake of practices such as banks writing binding ‘no deforestation’ clauses into their standard loan agreements with clients in forest-risk sectors. Banks currently do this where they have clear legal accountability (such as on bribery) but have failed to adopt such measures on deforestation even when there is systemic evidence of corruption, illegality and violence.

Building these provisions in the law would be particularly straightforward if the government ensured that the legislation clearly outlined the harms supply chain businesses cannot engage in, as this could more neatly be correlated with laws governing financial crime. The current proposal that permits UK businesses to be complicit in deforestation in some contexts, but not others, would require a more thoughtful structure. What is clear, is that the law should be approached as a single-undertaking. Writing a law without thought to how it interacts with a fundamental driver of supply chain behaviour – the money that fuels the system – will make the legal structure less impactful and cohesive.

d) Penalties should be sufficient to deter harmful practices

To shift the UK complicity in the business models behind deforestation, penalties should be sufficiently strong to deter poor practices. Otherwise, there is a risk that businesses will simply factor in the possibility of fines or penalties into their business model, rather than reorienting to more sustainable supply chains and finance. Businesses should be directly accountable to requirements for deforestation-free supply chains and finance. They should not be able to displace their due diligence onto third parties, such as certification bodies, who themselves have no accountabilities under the law.

The law should also include avenues for communities harmed by deforestation to seek redress. Penalties should include not just fines, but also criminal charges and civil liability. The law should also assign specific accountability to individual company officers – which has been shown to be an effective approach to corporate responsibility.

e) The law should incorporate forest-related human rights compliance

Deforestation and forest-risk commodities often go hand in hand with human rights abuses. Beyond the specific issue of FPIC as raised above, the law should include repercussions for businesses whose forest-risk commodity supply chains or financing are connected to severe human rights harms. It should also include zero tolerance for threats or intimidation against forest and land defenders. We also encourage Defra to seek out discussions with people with lived experience of forest-related human rights abuses to better understand the centrality of human rights to effective action on deforestation.

f) To show leadership, and have impact, the law needs to take effect by 2023

Already, hundreds of global businesses have failed to meet their voluntary commitments to end their contribution to deforestation by 2020. The threats to forests are immediate, urgent and all too often, irreversible. The law will be ineffective if it delays accountability for businesses.

Please note Global Witness is available to discuss with Defra any of the issues raised in this submission or provide further information.

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