The European Commission's new proposed deforestation regulation - What does it mean for indigenous peoples and forest communities?

Forest Peoples Programme

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Key Concerns

1. No requirement to comply with international human rights law standards
The proposed regulation doesn't require compliance with international human rights standards, in particular respect for customary tenure rights and the principle of free, prior and informed consent. This reflects a serious gap for indigenous peoples and forest communities, given that national laws frequently lack adequate protection of indigenous peoples' and forest communities' rights.

2. Difficult to enforce
Relying on national legal frameworks will weaken enforcement, as robust enforcement relies on competent authorities in Europe understanding national laws in every country that supplies the relevant commodities.

3. No access to justice
Access to justice is lacking in the proposal, and as both civil and criminal liability are not included, indigenous peoples and forest communities will have no access to remedy.

4. Exclusion of financial sector
The financial sector - which plays a significant role in funding deforestation and human rights abuses associated with commodity supply chains - is excluded from the proposal - a major limit on its effectiveness.

5. Classification system may lead to loopholes
The existence of a benchmarking system, and a "low-risk" classification limiting due diligence requirements risks creating loopholes in the due diligence process and fostering the laundering of commodities through other "low-risk" areas.

The new deforestation regulation proposed by the European Commission is a significant positive step, but still has some major gaps, among the most important of which is its failure to guarantee respect for the rights of indigenous peoples and forest communities

The new deforestation regulation proposal published on Wednesday 17 November by the European Commission is the most ambitious global legislative initiative on deforestation to date. Going substantially beyond similar legislative initiatives in the UK and the USA, it will be the first legislation of its kind to regulate not only illegal deforestation, but any deforestation linked to the production of key forest-risk commodities. Yet while it is an important step forward, the current proposal has some serious gaps that threaten to limit its effectiveness, particularly as regards the protection of human rights, notably the land and territorial rights of indigenous peoples and forest communities.

The regulation – which applies to cattle, palm oil, soy, wood, cocoa and coffee, as well as some (but not all) products containing or derived from these – aims to prevent commodities linked to deforestation and forest degradation from being placed on the EU market or exported from the EU. Businesses that sell or export these commodities in the EU will be required to undertake due diligence to ensure that their production has not involved deforestation or forest degradation and has complied with national laws in the country of production. Failure to comply with due diligence laws will leave companies open to prosecution and fines.

The proposal has been welcomed by indigenous peoples, forest communities and their support organisations in several countries, who have nonetheless also expressed some significant concerns with the current proposal.

For while the progress towards legal standards for removing deforestation from supply chains is positive, there are a number of shortcomings for indigenous peoples and forest communities living on the expanding frontier of agricultural commodity production, and more broadly. This article assesses and explores some of those weaknesses.

Missing protections for internationally-recognised human rights, particularly customary tenure rights

One of the most significant gaps in the proposed regulation is that it does not explicitly and clearly require businesses to ensure forest-risk commodities have been produced in compliance with international human rights law standards, including in particular respect for customary tenure rights and the principle of free, prior and informed consent.

While the explanatory memorandum to the proposed regulation says that "labour, environmental and human rights laws applicable in the country of production (both national and international) will need to be taken into account when assessing compliance of products with this initiative"[i] – suggesting that international human rights will be incorporated – this component is not binding.

The legal text itself is far more ambiguous. Under the definition of "relevant legislation of the country of production", the law requires compliance with "rules applicable in the country of production concerning the legal status of the area of production in terms of land use rights, environmental protections, third parties' rights and relevant trade and customs regulations under legislation framework in the country of production".[ii] There is no mention of human rights at all; and it is far from clear that international law requirements will always be considered "rules applicable ... under the legislation framework in the country of production", for several reasons.

First, in many countries international human rights law treaties, even when ratified, are not automatically considered to form part of the national legislative framework. Second, human rights treaties may not be considered self-executing, and therefore not directly applicable. Third, international laws will often directly conflict with national sectoral laws that are applied by authorities in the country, and if included this would create huge uncertainties about what is required for companies to comply with (conflicting) laws.

These factors mean the status of international human rights law in the regulation is ambiguous at best; and there is a strong risk that in many if not most cases, international human rights law standards will not be demanded,[iii] and only national, often discriminatory, law standards will apply.

Mina Beyan works with Liberian NGO Social Entrepreneurs for Sustainable Development, which works with many communities affected in particular by expanding palm oil operations. She points out the limitations of national laws:

> ***"Where national laws are not strong enough to protect communities, this law will not help them."***

That is bad news for indigenous peoples and forest communities. Deforestation for commercial agriculture is frequently associated with incursions into the customary lands and territories of indigenous peoples and other communities who live in forested areas. Customary lands are particularly vulnerable to encroachment because they are often not formally titled (itself often in violation of international law) – in fact, while customary lands are estimated to reflect more than half[iv] of the world's land surface, less than 20%[v] are held under legal title or other formal designation.

Norman Jiwan, Dayak indigenous leader from Indonesia, raised his concerns on the absence of international human rights standards:

> ***"Relying on national laws will not be enough – the current Indonesia nationals laws continue to classify customary forests as state forests, and don't recognise communities' customary lands. We need to ensure respect for international human rights standards."***

In many countries, customary lands rights protected by international human rights law are very weakly protected, or not protected at all, by national law. In Cameroon, for example, indigenous Baka hunter-gatherers have no capacity to safeguard their forest lands through titling; while they have some customary use rights under national law, these can be extinguished without compensation if the government decides to grant concessions.[vi] Due to inaccessible procedures, even those areas under cultivation by communities are usually untitled, and therefore vulnerable to expropriation. Lands farmed by communities may indeed become more vulnerable to land grabbing as a result of this law, if companies are incentivised to expand their activities into lands that are already deforested. Similarly, indigenous peoples' and communities' lands in non-forest ecosystems may well face increased pressure.

In other countries, national laws – including both environmental laws as well as laws on land tenure – may be stronger and the regulation may provide a useful hook for indigenous peoples and forest communities

to press for compliance. One example is a recently highlighted[vii] case of deforestation for cattle grazing in the (nationally recognised) territory of the Ayoreo Totobiegosode indigenous peoples – which includes uncontacted peoples – in the Paraguayan Chaco. The deforestation[viii] in question occurred in direct contravention of suspension orders issued by the Paraguayan National Forestry Institute, and also contravenes national laws that prohibit deforestation on indigenous peoples' lands. In this case, even though the deforestation occurred before 2020, the lack of compliance with national laws should still mean that products from these farms do not meet requirements to be placed on the European market.

In fact, in many cases the situation will be ambiguous. In Liberia, for example, there are relatively strong laws to protect community land rights. Yet the way and the extent to which these are implemented in practice, and more broadly the understanding of what effective implementation requires, lags behind. There also continue to be other inconsistent laws on the statute books.

Mina Beyan, Social Entrepreneurs for Sustainable Development in Liberia, adds:

> ***"While it is positive that the proposal includes national law, in countries such as Liberia with good laws protecting community rights, there are still serious uncertainties and gaps in practice, they aren't implemented and it isn't even clear what implementation requires, so how will companies assess compliance?"***

Enforcement - a key concern

The lack of inclusion of international human rights law standards does not only mean some indigenous peoples and forest communities will be left out in the cold – it also creates real and serious challenges to effective enforcement. While in principle, as stated above, companies are required to ensure compliance with relevant legislation in force in the country of production, how will this be monitored or verified? Under the proposed regulation, compliance with the regulation is assured by a competent authority set up in each member state of the EU[ix], which will have the obligation to check compliance by operators and traders with their due diligence obligations, and to impose penalties on companies for non-compliance where appropriate.[x]

In practice, genuine understanding of the level of risk that products do not comply with national law in the country of production would require competent authorities in each member state to understand and assess compliance with national laws from potentially every country in the world which supplies these commodities to the EU. This will be extraordinarily difficult given language barriers, differences in legal systems, difficulties in (physically) accessing laws and regulations from many producer countries, potential changes in those laws, etc – and the cost of obtaining all this information. There is also a risk that – given the deforestation focus of the regulation – competent authorities will be bodies with expertise more adapted to assess deforestation risk than to assessing compliance with land or human rights laws in a foreign country. Yet unless competent authorities have the capacity to assess and verify this type of information, they will be reliant on companies' own self-reported compliance – which is not a robust check.[xi]

Valery Menye Ondo, from BACUDA in Cameroon, had concerns regarding verification of compliance:

> ***"How is it going to be possible to verify the due diligence of companies?"***

Exactly these enforcement difficulties were noted in the FLEGT[xii] fitness check in relation to the (existing) EU timber regulation, which also relies on a national legality standard,[xiii] and were one of the reasons used in the impact assessment for the deforestation regulation to argue for a clear and universal no deforestation standard. However, this only highlights the fact that enforcement of the national legal compliance limb of the due diligence obligation – on which protection for the tenure rights of indigenous peoples and forest communities hinges – will remain complex and problematic.

One step which may at least alleviate – although not solve – this difficulty would be to provide an EU-level body which could support this function by identifying and collating national laws, provide guidance of what compliance should look like and the risks of non-compliance (including particularly human rights and corruption risks) in different countries. This would be a resource for competent authorities and companies (especially small and medium-sized enterprises) alike, and would reduce duplication and promote consistency. It would be sensible to house this function in the EU Observatory on deforestation,[xiv] which the Commission is creating to assess trends and drivers in deforestation and forest degradation around the world.

(Lack of) access to information, justice and remedy

Another major gap in the proposal is a lack of real mechanisms for indigenous peoples and forest communities – and others – to gain access to justice or any form of remedy. While earlier versions of the draft proposal included a provision for civil liability – which would at least allow communities harmed by companies' failure to comply with the law to seek compensation – this has been scrapped in the final proposal put forward by the Commission. Instead, the sole mechanism through which indigenous peoples and forest communities directly affected by deforestation and forest degradation can input into these processes is through submitting a "substantiated concern"[xv] to competent authorities – that is to say, information about company compliance which may prompt a check or prosecution by a competent authority.

Yet while better than nothing, this is hardly an accessible mechanism. Indigenous and forest peoples will generally not be in a position to provide such complaints to competent authorities (who require diverse languages) without significant support and mediation of EU-based NGOs. Finding the evidence to support submission of substantiated concerns is also not facilitated by the proposed regulation. Companies have limited public reporting requirements under the proposal[xvi]: while they must publish annually a report on their due diligence system and the steps taken to comply with their due diligence requirements, there is no requirement to publish substantive details such as where they source from, their analysis of national legal requirements, or their risk assessment, to enable greater scrutiny of the process. This offers no support for indigenous peoples and forest communities struggling to find out who is buying commodities on their land, and seeking to communicate issues of non-compliance.

Norman Jiwan, Dayak indigenous leader from Indonesia, shared his concerns on access to information and justice, including issues of language barriers:

> ***"The EU needs to reduce barriers to accessing these enforcement mechanisms. Submitting substantiated concerns to authorities won't be possible if it has to be in English or the language of the authority. Due diligence statements and risk assessments need to be easily accessible in languages we can understand. Also, it won't help if it is not publicly and easily available for indigenous peoples. It doesn't seem user friendly, and language barriers will undermine access to justice."***

This gap is a major flaw in the Commission's proposal and a failure to protect indigenous peoples' and forest communities' rights – including their right to a remedy. It is also a serious missed opportunity, because communities on the frontline of deforestation and agricultural expansion are in a position to provide key information needed to effectively enforce the regulation. Providing a mechanism for them to share this information – and in return, to receive information to support their own struggles against dispossession and deforestation of their lands – is a win-win, and something that should be further considered in the co-decision phase.

As Victorien Mba, of Cameroonian civil society organisation *Appui pour la Protection de l'environnement et le développement,* comments :

> ***"Much of the verification of compliance with the regulation will depend on us. But it won't be easy to have access to the European authorities. How will we be able to act to help check the information and flag violations?"***

The cut-off date

The proposed regulation applies only to deforestation or forest degradation that occurred after 31 December 2020.[xvii] This is a very unambitious cut-off date given the vast array of commitments made by both companies and governments to remove deforestation from supply chains by an earlier date.

On the positive side, the requirement to ensure products have been produced in accordance with national laws is not subject to a cut-off date. This means that where indigenous peoples or forest communities have been unlawfully dispossessed of their lands prior to 31 December 2020, this will still fall foul of the regulation's requirements – even if the lands were deforested before 31 December 2020.

An enormous number of indigenous and forest peoples whose lands have been expropriated and deforested continue to struggle to regain, retain or restore them – often many years after they were originally stolen. These "legacy" land conflicts – which are ongoing violations of land rights – are often associated with significant other human rights violations as well, which can include threats, intimidation and violence against community human rights defenders, cultural, spiritual and material impoverishment, deterioration of health and significant challenges to continued exercise of self-determination. One example is the story[xviii] of the indigenous Shipibo people of the Santa Clara de Uchunya community in Peru, whose untitled lands have been progressively expropriated and deforested[xix] for over a decade to sow oil palm (sold inter alia to European buyer[xx] Louis Dreyfus Company). The Santa Clara de Uchunya community is still fighting (including legally) for the return[xxi] of their lands. Vast amounts of deforestation occurred on their territories before 2020, and will not be captured by the regulation – their hopes of the regulation supporting their rights thus turn on national law rules both being adequate to protect their rights, and being upheld.

In principle, the regulation would prevent European buyers from purchasing commodities produced on land that was not acquired lawfully (or where appropriate environmental protections were not applied) under rules applicable under the national legislative framework. Of course, this won't help any indigenous peoples or forest communities whose rights are not protected within the national framework. Its utility will also depend significantly on robust enforcement of this national law requirement by EU member states, which, as described above, is likely to present significant challenges.

Other ecosystems

At present, the proposed regulation only places strict requirements to avoid deforestation and forest degradation – it places no direct restrictions on the destruction of other ecosystems (grasslands, peatlands, mangroves etc). The regulation does however propose a review after two years to consider whether inclusion of other ecosystems is required.[xxii]

The obvious risk is that agricultural expansion will shift from forest ecosystems to other ecosystems, many of which are already under significant threat – for example, the Brazilian Cerrado[xxiii], the most biodiverse savannah in the world, or the Pantanal[xxiv] wetlands that span Bolivia, Brazil and Paraguay, both already ravaged by the expansion of cattle and soy. That of course is not only an environmental risk: it will also increase the risks of human rights violations for indigenous peoples and other customary owners of non-forest areas.

This is again one element where the requirement to comply with national laws may be of some help. Companies are required to show that the target commodities have been produced in compliance with national laws regardless of whether they are produced in forest areas or in lands forming part of other ecosystems. Where there are strong national laws protecting customary ownership by indigenous peoples and other groups, this may help prevent the EU law incentivising agricultural expansion into indigenous peoples' and others' lands within these ecosystems, protecting both customary lands and the ecosystems themselves. On the other hand, where strong national laws along these lines do not exist, this could lead to increased impacts both on non-forest ecosystems and on the people who live there. And again, of course, the effectiveness of national legal protections depends also on effective monitoring and enforcement by EU member states.

Incentives to weaken national laws?

The other risk in requiring compliance with rules that apply under the national legislative framework of the country of production is that the EU proposal may provide incentives to producer countries to weaken those laws, so as to mitigate the impact of the regulation. That could have very significant impacts on indigenous peoples and others with customary tenure rights, as well as on the environment.

This risk is not illusory – there are already trends in the five countries with the largest areas of tropical forest – Brazil[xxv], Colombia[xxvi], the Dem-

ocratic Republic of Congo[xxvii], Indonesia[xxviii] and Peru[xxix] – to roll back social and environmental standards to enable resource extraction, forest conversion and infrastructure development.

Hector Jaime Vinasco, of the Resguardo Colonial de Cañamomo Lomaprieta in Colombia, shares his concerns regarding the politic and economic considerations that influence these laws :

> ***"Legislation in these countries have always been in some way distant from the standards of international law, precisely because the people who make the laws are those who have strong influences from certain political affinities or generally just people who promote development-ism, monoculture and the development of the economy through moving and starting the motors of extraction."***

The benchmarking system

The proposal includes a system classifying commodity-producing countries as either "low risk", "standard risk" (the default) or "high risk".[xxx] The due diligence requirements will then depend on the classification of the producing country, with "simplified due diligence"[xxxi] being applied to commodities from "low risk countries".

The benchmarking system effectively exonerates operators sourcing from "low risk" countries from undertaking any risk assessment or adopting any risk mitigation measures, therefore significantly reducing due diligence requirements unless an operator is made aware of specific information pointing to a risk of non-compliance.

The fact that products from low-risk countries have such a simple route to the EU market generates strong incentives for producer countries to seek a "low risk" rating. Despite this incentive, the EU assessment of whether a country is low, standard or high risk shall take into account "information provided by the country concerned"[xxxii] (there is no requirement to take into account any other information) – creating a real possibility of manipulation. Producer countries are also invited to respond to any proposed change in risk rating,[xxxiii] but there is no capacity for other third parties – for example indigenous peoples or forest communities in producer countries – to input into the risk rating process. There is a clear risk that these decisions may be based on selective information and subject to political influence.

Danilo Rueda, National Coordinator of the Colombian NGO Comisión Intereclesial de Justicia y Paz, shares this concern:

> ***"And who decides on the classification? I imagine that it will be a case of the European Union in a dialogue with the [Colombian] state, who will show them all of their bureaucratic infrastructure, all their "green" language and all the public policies that supposedly protect all rights. All this ends up being fiction, a lie, and a case of cleaning up your image in advance."***

The criteria used to identify risk are focussed principally on deforestation and agricultural expansion rates. They do not include any information on the risks of non-compliance with national laws in the country in question – including the non-respect for the rights of indigenous peoples and forest communities – nor do they include any assessment of corruption risk, despite this being of major importance in assessing the reliability of documents used to confirm place of origin and compliance with national law.

It may also be the case that overall deforestation rates in a country appear to be low or reducing – while in certain regions the risks are extremely high. This is the case e.g. in Indonesia[xxxiv], where the apparent fall in deforestation nationally – driven in part by the vast deforestation that has already occurred in many parts of Indonesia – masks increasing deforestation and human rights risk in the remaining more highly forested provinces, such as Papua and Kalimantan. The benchmarking system does allow risk ratings to be applied only for "part" of a country[xxxv] – if this element continues in the regulation finally adopted, it will be important for it to be used in cases where sub-national risks differ substantially.

One other significant risk of this system is that, for low-risk countries or regions, traceability documents – which are the basis for establishing that products are subject only to simplified due diligence – are taken at face value. This could provide a loophole for products with fraudulent documents that falsely indicate a low-risk place of origin, and indeed could incentivise the production of fraudulent documents.

Financiers and investors are not caught

Another very significant gap in the legislative proposal is that while it covers operators and traders of the products, it doesn't place any obligations on European companies that are involved in financing the production of these commodities. Between 2016 and 2020, lenders based in the EU earned €401 million[xxxvi] from deforestation. The Netherlands, Spain and France are amongst the top 10[xxxvii] source countries for financial flows to the largest forest-risk commodity companies.

Danilo Rueda of Comisión Intereclesial de Justicia y Paz, comments:

> ***"The law excludes the financial sector, the investor behind it. That means that, let's say that if the law eventually gets put through, then it would***

only apply to the person who took out the loan, and the lender is completely exempt from any responsibility."

If this law is really going to be effective for reducing EU impacts on both deforestation and indigenous peoples' and forest communities' rights, it is essential not only to focus on buyers and sellers but also the flows of money that make agricultural expansion possible. As it stands, European financiers will continue to be able to profit from deforestation and human rights abuses linked to agricultural expansion, provided that the products are sold to other markets. That is not good enough.

Relationship with FLEGT Voluntary Partnership Agreements

For much of the last decade, the EU has had regulations in place to promote legal timber production in producer countries and to deter consumption of illegal timber in the EU. These have two key elements. The first is the FLEGT regulation and associated binding agreements with producer countries ("voluntary partnership agreements" or VPAs) which seek to improve and formalise producer country systems of legal production of wood products. When these systems are judged adequate, the European Commission may authorise the producer country's authorities to issue a "FLEGT licence" for products it exports, which confirms they have been legally produced. The second complementary element is the European Timber Regulation (EUTR), which prevents illegal wood products – that is products produced in contravention of laws in the country of production – from being placed on the European market. Products with a valid FLEGT licence are deemed to be legal products.

While the EUTR is apparently to be repealed when the new deforestation proposal goes ahead, VPAs have retained a role in the proposed regulation in relation to timber. Although a FLEGT licence will no longer be sufficient to guarantee access to the EU market – a further check on whether the timber has been harvested in compliance with the forest degradation requirements will be required – a valid FLEGT licence will be deemed to establish compliance with relevant national legislation of the country of production.[xxxviii]

Fifteen countries[xxxix] have signed or are negotiating voluntary partnership agreements with the EU. Those agreements set out national laws that timber producers are required to comply with, to provide a definitive "legality assurance system", compliance with which is considered to satisfy all legal requirements in that country. Countries with satisfactory monitoring and verification systems against this legality framework can issue "FLEGT licences", which provide green lane access to the EU market (with no further due diligence checks required). At the moment, only one country – Indonesia – can issue these licences. It is unclear whether under the proposed regulation other countries that have signed VPAs, but which have not yet achieved a functioning licensing system, may still be able to achieve recognition of their verification systems in the future, enabling them also to issue FLEGT licences.

Allowing FLEGT licences to provide comprehensive evidence of the legality of timber production presents some risks for indigenous peoples and local communities. The "legality assurance system" in each country has been the subject of negotiation, and while some include quite comprehensive coverage of laws (including for example laws protecting

customary tenure and other human rights), other VPAs have left out key laws that may protect indigenous peoples and forest communities' rights. For example, Guyana's VPA does not incorporate compliance with the Constitution, which provides key rights protections, in its definition of legal timber.

Aristide Chacgom of Cameroonian civil society organisation Green Development Advocates comments:

"What guarantees are there that authorities will be able to check the products and that we will not end up with the same weaknesses that exist in the VPAs [Voluntary Partnership Agreements entered into under the FLEGT Action Plan]?"

It is also unclear, as stated above, when and whether the validity of FLEGT licences could be challenged by competent authorities, or through substantiated concerns, where there is evidence that timber covered by licences has not in fact been produced in compliance with national laws. This is not a small risk: Indonesia's legality assurance system is based on exporters providing documents showing legal production, but there is no underlying check on the validity or legitimacy of these documents, despite corrupt provision of documents being a recognised problem in Indonesia[xl] (and indeed many other timber-producing countries).

Cooperation with producer countries

To foster positive developments in forest governance in third countries and address the root causes of deforestation and forest degradation, the proposed regulation will require the Commission to continue to engage with producing countries through cooperation mechanisms and partnerships.[xli]

There are some positive elements in this proposal for indigenous peoples and forest communities, including specific requirements that partnerships and cooperation allow the participation of all stakeholders, including indigenous peoples, local communities and civil society, [xlii] as well as stated objectives including inter alia to "strengthen the rights of forest dependent communities including smallholders, indigenous peoples and local communities".[xliii]

However, much will depend on how these are implemented. While requiring participation is positive, participation in multistakeholder forums alone is not enough to guarantee positive outcomes for

indigenous peoples and forest communities, who are often in a marginalised position vis-à-vis other stakeholders, with little power to ensure their rights are accommodated.[xliv] Indeed, multistakeholder forums may instead "put ... recognised rights up for discussion".[xlv] In order for concrete impacts to materialise in producing countries, strong human rights requirements will need to be included in all partnerships and cooperation, and implementation will have to be firmly monitored particularly as regards to the respect of customary tenure rights and free, prior and informed consent. Any cooperation falling short of these requirements will repeat the mistakes of the VPAs, leave behind indigenous peoples and forest communities and ignore their crucial role in halting deforestation.

These considerations are not only vital to the efficiency of these partnerships, they are also essential to achieve the overall objective of the regulation, that is to halt deforestation linked to global commodity production. In the longer term, the effectiveness of the regulation will depend on it prompting broader transformational change in producer countries towards sustainable and human rights-compliant production of commodities, not only for the EU market but throughout the world. If indigenous peoples and forest communities are not adequately protected and incorporated in this process, it is unlikely to succeed in this goal.

Relationship with the Sustainable Corporate Governance Initiative

One of the reasons the Commission has repeatedly given for the failure to include human rights in the proposed regulation is that these will be included in another legislative initiative also under development – the Sustainable Corporate Governance Initiative. This law is expected to impose broad obligations of human rights and environmental due diligence on European companies, and other companies operating in the EU market. Originally due to be released this year, the proposal has now been postponed to 2022.

While it is positive to see that the draft deforestation regulation already includes some markers indicating how the two pieces of legislation may work together – for example preamble paragraphs 38 and 39, article 11(2) – until the directive is published, it is impossible to assess which of these concerns it may address, and whether it will address them sufficiently.

Conclusions and Recommendations

While the deforestation regulation is a welcome and long overdue proposal, the failure to incorporate human rights is a major shortcoming that is likely to limit its effectiveness and generate perverse outcomes. Deforestation and human rights violations are highly correlated, and indigenous and forest peoples are recognised as some of the best guardians of the forest. Not dealing with deforestation and human rights due diligence in an integrated way is a missed opportunity for a more effective and comprehensive regulation and out of step with global sustainability standards. This failing could well have negative consequences for indigenous peoples and forest communities, particularly in situations where their rights are not adequately protected under national laws in the producer country/country of origin.

Norman Jiwan, Dayak indigenous leader from Indonesia comments:

> ***"The regulation feels new and interesting, but challenging. It won't be enough."***

The legislative proposal should explicitly require compliance with international human rights law treaties ratified by States, including specifically the respect for customary tenure rights and the principle of free, prior and informed consent. Doing anything less is failing to live up to the EU's commitments to respect, protect and promote human rights, including those of indigenous peoples. In addition, and crucially, addressing human rights directly – including through standards but also access to remedy – would also improve the effectiveness of the regulation. It would reduce the complexity of enforcement, limit the risks of leakage, provide more avenues for accountability through facilitating the active engagement of peoples living on the frontline of agricultural expansion, and enable them to seek remedy directly. The proposal must also be extended to include financing of deforestation by actors in the EU market. All these issues must be top priority for amendments during the co-decision phase.

Recommendations

- The legislative proposal should explicitly require compliance with international human rights law treaties ratified by States, including specifically the respect for customary tenure rights and the principle of free, prior and informed consent.
- The proposal should include civil and criminal liability to ensure proper access to justice and secure right to remedy for indigenous people and forest communities when they are victims of abuses.
- Companies must be required to report and publish the findings of their due diligence process, including information on product traceability and the risks identified in the risk assessments. This is crucial to allow civil society and communities to raise concerns to competent authorities and facilitate enforcement of the regulation.
- Due diligence obligations should also apply to the financial sector in order to address the flow of money that makes deforestation and associated deforestation possible.
- Simplified due diligence and "low-risk" classifications must be removed from the benchmarking system to ensure the efficacity of the due diligence system.
- An EU-level body should support enforcement by identifying and collating relevant national laws from producer countries, providing guidance on what compliance looks like and indicating the key risks of non-compliance in different countries. This body should also collect information from other stakeholders, including from indigenous peoples, forest communities and both national and international NGOs, to identify risks and potential issues and assist in classifying countries.

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Endnotes

[i] Explanatory memorandum, page 10.

[ii] Article 2(28).

[iii] This is also consistent with statements made by the Commission staff in the lead up to the release of the proposal, which indicated human rights would be covered: see e.g. https://www.fern.org/publications-insight/eu-law-on-deforestation-key-land-rights-risk-being-ignored-in-dg-environments-proposal-2321/.

[iv] Rights and Resources Initiative (August 2020), Estimate of the area of land and territories of Indigenous Peoples, local communities, and Afro- descendants where their rights have not been recognized.

[v] Rights and Resources Initiative (September 2015), WHO OWNS THE WORLD'S LAND? A global baseline of formally recognized indigenous and community land rights

[vi] S Nguiffo, P E Kenrick and N Mballa (2009), Land Rights and the Forest Peoples of Africa – Historical, Legal and Anthropological Perspectives: Cameroon, Forest Peoples Programme; L Alden Wily (2011), Whose land is it? The status of customary land tenure in Cameroon, Fern. For further details of how this plays out in practice, see A Perram (2016), Behind the Veil: Transparency, Access to Information and Community Rights in Cameroon's Forestry Sector, Forest Peoples Programme.

[vii] Earthsight. Open letter: Paraguay must halt invasions, deforestation of indigenous Ayoreo lands. November 2021

[viii] Earthsight. Grand Theft Chaco: The luxury cars made with leather from the stolen lands of an uncontacted tribe. September 2020

[ix] Article 13

[x] Articles 14-16, 23.

[xi] See e.g.K P Pucker (2021), "Overselling Sustainability Reporting", Harvard Business Review. The multiple reports demonstrating compliance issues in "certified" supply chains further demonstrate the need for robust third party checks: see e.g. J Owens (2021), "RSPO criticisms investigated", Ethical Consumer.

[xii] Forest Law Enforcement, Governance and Trade – an EU action plan focusing on illegal timber developed in 2010.

[xiii] European Commission (2021), Impact assessment: minimising the risk of deforestation and forest degradation associated with products placed on the EU market, see page 26: "Results from the Fitness Check that looked at the due diligence implemented under the EUTR suggests that due diligence obligations only relying on the laws of the country of origin are sometimes difficult to implement, as companies and public authorities in charge of enforcement need to find their way among foreign documents, certificates and laws, written in foreign languages, and sometimes produced in countries with high levels of corruption where ascertaining the reliability of documents may also be very difficult."

[xiv] Preamble paragraph 22.

[xv] Article 29.

[xvi] Article 11(2).

[xvii] Article 2(8).

[xviii] Forest Peoples Programme, Defending lands, lives & livelihoods in the Peruvian Amazon. 21 July 2021

[xix] Forest Peoples Programme, Deforestation of indigenous lands still increasing around Ocho Sur oil palm plantation in Peruvian Amazon. October 2020.

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