



Improving the proposed forestry provisions in the EU-Indonesia FTA

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1. Introduction

The negotiations of a Free Trade Agreement (FTA) between the EU and Indonesia, which will soon enter into a fifth round, present a serious challenge for the environment. Environmental impacts linked to increased trade and investment under a FTA could concern several sectors, in particular forestry, agriculture, biofuels and pulp and paper, and are likely to have a particular impact on forests. Already today, Indonesia's forests, covering about 50% of its territory,¹ are under significant pressure, including from large-scale deforestation caused by a growing demand for, and trade in, Indonesian commodities and products associated with deforestation.

Indonesia's main exports to the EU are vegetable oils, fuel and mining products, as well as furniture and textile commodities.² In 2004, Indonesia was the second largest exporter to the EU of commodities associated with deforestation,³ notably because of the trade of palm oil and wood products.⁴ Estimates for the proportion of deforestation caused by the expansion of oil palm cultivation in Indonesia range from 11% (between 2000 and 2010) to a maximum of 16% (between 1990 and 2005),⁵ while exports to the European Union increased by 63% between 1995 and 2004.⁶

The conversion of Indonesian forests for palm oil is also an important source of timber.⁷ Between 2013 and 2016 Indonesia accounted for 21% of the EU's tropical wood product imports.⁸

A free trade agreement that reflects current trade dynamics is likely to exaggerate issues related to deforestation and land-use change. Therefore, unless the environmental provisions of the FTA are sufficiently precise and strong, it is likely to undermine pledges that both parties have made to reduce forest loss and GHG emissions. The land-use, land-use change and forestry sector was Indonesia's largest emitting sector in 2012,⁹ primarily from deforestation and peat fires,¹⁰ making the country one of the largest contributors to global warming.¹¹ Between 1990 and 2015, about a million hectares of Indonesia's forests (1.1%) were cut every year¹² causing loss of biodiversity in ecosystems with some of the highest level of biological diversity in the world.¹³

Trade should be a means to achieve better social and environmental standards, rather than an end in itself. Negotiators should therefore ensure that the FTA does not put further pressure on the environment, social and human rights, and in particular does not negatively impact the livelihoods of forest communities and forest ecosystems. In order to address these issues, and in particular the conversion of Indonesian forests for agriculture and the consumption in the EU of commodities associated with deforestation, other EU¹⁴ and international action on deforestation should be envisaged prior to the adoption of the FTA.

The FTA's provisions should not preclude further action on deforestation but rather support relevant efforts by the EU and Indonesia.¹⁵ The objective of the current briefing is not to discuss such action in detail, but is limited to setting out textual suggestions for improving the sustainable development chapter in the EU-Indonesia FTA in relation to forestry provisions.

1 Food and Agriculture Organization of the United Nations (FAO), 'Global Forest Resource Assessment 2015 – Desk Reference' (2015) p. 5, at: <http://www.fao.org/3/a-i4808e.pdf> (accessed on 8 June 2018).

2 Damuri, Y. R., Atje, R., & Soedjito, A. (with special assistance from Rafitrandi, D., 'Study on the impact of EU-Indonesia CEPA', (2014) Centre for Strategic and International Studies, accessed 7 June 2018 via <https://media.neliti.com/media/publications/332-EN-study-on-the-impact-of-an-eu-indonesia-cepa.pdf>

3 In 2004, Indonesia accounted for 9 % commodities associated with deforestation imported in the EU: VITO, HIVA and IUCN NL, 'The impact of EU consumption on deforestation', European Commission (2012).

4 Palm oil imports from Indonesia represented three-quarters of palm oil associated with deforestation imported into the EU (for the period 1998-2008). In addition to palm oil and timber, the EU also imports large amount of rubber and mineral products associated with deforestation. See 'The impact of EU consumption on deforestation', pp. 106-108 (cited at footnote 3).

5 Abood, S. A., Lee, J. S. H., Burivalova, Z., Garcia-Ulloa, J., and Koh, L.P. 'Relative contributions of the logging, fiber, oil palm, and mining industries to forest loss in Indonesia'. Conservation Letters 8 (2015), 58-67. At: <http://onlinelibrary.wiley.com/doi/10.1111/conl.12103/epdf>

6 van Gelder, J.W., 'Greasy Palms: European Buyers of Indonesian Palm Oil', Friends of the Earth (20018), p. 46.

7 Alison Hoare, Laura Wellesley, 'Illegal Logging and Related Trade: The Response in Indonesia', Chatham House October 2014, p. 14.

8 ITTO/European Commission, 'FLEGT VPA Partners in EU Timber Trade 2014 to 2016 Final Report' (2014), http://www.itto.int/files/user/imm/VPA_Partners_In_EU_Timber_Trade_2014_to_2016_IMM_Summary_Report_Final.pdf (accessed 8 June 2018).

9 Directorate General of Climate Change, Ministry of Environment and Forestry, Republic of Indonesia, 'Indonesia first Biennial Update Report under the UNFCCC', (2015), p. 5: <http://unfccc.int/resource/docs/natc/indbur1.pdf>

10 Climate Action Tracker, Indonesia country profile: <http://climateactiontracker.org/countries/indonesia.html> (accessed on 8 June 2018)

11 European Parliament resolution of 4 April 2017 on palm oil and deforestation of rainforests, Accessed on 7 June 2018 via <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0098+0+DOC+XML+V0/EN>

12 Global Forest Resource Assessment 2015 – Desk Reference, p. 11 (cited at footnote 1).

13 CBD Indonesia Country Profile, <https://www.cbd.int/countries/profile/default.shtml?country=id#facts> (accessed on 8 June 2018).

14 Such as listed in COWI, 'Feasibility study on options to step up EU action against deforestation', European Union (2018), accessed on 8 June 2018 via <http://ec.europa.eu/environment/forests/pdf/KH0418199ENN2.pdf>

15 (Jointly Developed by Civil Society Entities in SEA and Europe), 2017, 'Civil Society Statement on the EU-Indonesia Comprehensive Economic Partnership Agreement (CEPA)', accessed 7 June 2018 via: https://www.illegal-logging.info/sites/files/chlogging/CEPA_Statement_IndonesiaEU.pdf

2. Trade sustainability impact assessment

As a preliminary matter, a sound and diligent trade sustainability impact assessment including a human rights impact assessment must be conducted before and after the conclusion of the FTA.

The European Commission is bound by principles of good administration to carry out and evaluate comprehensively the impact the agreement will have on the environment and human rights.¹⁶ The Commission must therefore follow its 2016 handbook on trade sustainability impact assessments and should base its human rights impact assessment methodology on the UN Guiding principles on human rights impact assessments of trade and investment agreements.¹⁷

In line with these principles, such an in-depth assessment should be conducted after a comprehensive and balanced stakeholder analysis. The findings and recommendations of the sustainability impact assessment should be taken into account by the Commission and guide its negotiating position. Potential negative effects, such as those linked to land use change and deforestation in the case of Indonesia, should be monitored closely and adequate mitigating measures should be adopted.¹⁸



¹⁶ In Decision of 26 February 2016 of the European Ombudsman on Complaint 1409/2014/JN against the European Commission, External Relations, Breach of Art. 4 ECGAB, Duty of Care, the European Ombudsman found that the Commission's refusal to conduct a human rights impact assessment constituted maladministration stating that respect for human rights cannot be subjected to considerations of mere convenience.

¹⁷ http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf, accessed on 8 June 2018.

¹⁸ Such mitigating measures should be meaningful and go beyond the mere inclusion of a trade and sustainable development chapter in the FTA, which was one of the main concrete suggestions in the 2010 Commission position paper on the sustainability impact assessment of the FTA between the EU and ASEAN, accessed 7 June via http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146294.pdf

3. Structural provisions

Moreover, the agreement should feature a number of structural provisions so as to ensure that environmental considerations are built into the fabric of the agreement rather than being included as an afterthought. This requires the inclusion of:

- **core environmental principles, in particular those principles enshrined in the EU treaties**, as guiding principles to the overall agreement;
- a **hierarchy clause** stipulating that nothing in the trade agreement may prejudice the effective implementation of international environmental, labour, and human rights agreements;
- a commitment to **ratify and effectively implement** a core list of international environmental, labour, and human rights agreements before the trade agreement enters into force;
- **effective monitoring and enforcement mechanisms**, with the strengthening of civil society organisations' capacity to effectively participate in such mechanisms and the possibility for citizens and civil society organisations to lodge formal complaints of non-compliance;
- the possibility of **suspension or termination** of the agreement if the ex-post impact assessments of the agreement are negative;
- a **modernised exceptions chapter** cognisant of 21st century challenges, allowing countries full regulatory freedom for recognised public interests such as environmental protection, consumer protection, human rights, animal rights, labour protection, and climate change.

4. Suggested amendments to the FTA's forestry provisions

In addition to these important structural provisions, we suggest the following textual additions (**in bold below**) and deletions (~~deleted text below~~) to the forest-related provisions contained in the EU's proposal of 29 May 2017:¹⁹

Article X.5

Trade and Climate Change

1. The Parties recognise the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (hereinafter referred to as "UNFCCC") in order to address the urgent threat of climate change and the role of trade to this end.
2. Pursuant to paragraph 1, each Party shall:
 - (a) effectively implement the UNFCCC and the Paris Agreement established thereunder; **in particular, each Party shall adopt and implement domestic legislation that has sufficient ambition to achieve the nationally determined contributions submitted by the Parties.**
 - (b) promote the positive contribution of trade to the transition to a low-carbon economy and to climate-resilient development; and
 - (c) cooperate with the other Party on trade-related climate change issues bilaterally, regionally and in international fora as appropriate, including in the UNFCCC, the WTO and the Montreal Protocol on Substances that Deplete the Ozone Layer.

Commentary:

- This is to reflect the Parties' obligations under Article 3 and 4, in particular paragraph 2, of the Paris Agreement.

Article X.7

Trade and Sustainable Use and Management of Forests

1. The Parties recognise the importance of sustainable **use and forest management of forests** and the role of trade in pursuing this objective.
2. Pursuant to paragraph 1, each Party shall:
 - (a) **ensure** ~~encourage~~ (i) the conservation and sustainable **use and** management of forests, **including the recognition of rules and customary rights governing the legal ownership and use rights over forested land, and (ii) the regulation** of trade and consumption of timber and timber forest products from sustainably managed forests **harvested in compliance with all applicable laws and regulations in force in Indonesia and the EU;**
 - (b) implement and **effectively enforce, including by allocating sufficient resources,** measures to combat illegal logging and related trade, including, as appropriate, with respect to trade with third countries, and promote trade in legally harvested **timber** ~~forest~~ products, in particular through the EU-Indonesia Forest Law Enforcement Governance and Trade Voluntary Partnership Agreement;
 - (c) **Implement measures both at supply- and demand-side level, adopted through multistakeholder processes, to ensure that supply chains exclude commodities at risk of being obtained from illegal and unsustainable forest conversion;**
 - (d) exchange information with the other Party and **promote transparency** on trade-related initiatives on sustainable **use and** management **of forest resources,** forest governance and on the conservation of forest cover and cooperate to maximise the impact and ensure the mutual supportiveness of their respective policies of mutual interest; and
 - (e) cooperate with the other Party bilaterally, regionally and in international fora on issues concerning trade **and related to** the conservation of forests as well as sustainable **use and** management of forests.



Commentary:

- On point (2.a):
 - It is important that the forest clause refers not only to forest management but also includes the “use” of forests in order to apply to rules on land allocation, land use and rights of third parties. Ensuring better land use planning, creating stronger processes for allocating land with more participation from local communities and strengthening the rights of such communities to their land are key issues to address the negative impacts of forest conversion for agricultural production.
 - The legality definition in the FTA needs to be at least coherent with the legality definition in the EU-Indonesia VPA, which states “Indonesian timber is deemed legal when its origin and production process as well as subsequent processing, transport and trade activities are verified as meeting all applicable Indonesian laws and regulations”.
- On point (2.b):
 - The parties should focus their attention on adequately monitoring and enforcing the Indonesian-EU Voluntary Partnership Agreement, the EU Timber Regulation and the Indonesian regulatory framework on legal timber imports, as it is not enough to have these rules on paper.
- On point (2.c):
 - The FTA should not preclude domestic and international action on deforestation and trade in other forest risk commodities, such as palm oil, but rather support relevant efforts by the EU and Indonesia. Before the adoption of the FTA, both parties should have adopted strong frameworks to ensure that all supply chains are sustainable and not associated with illegal forest conversion. They should also comply with international standards and obligations on rights of indigenous peoples and local communities, as well as with core labour standards as set out in the fundamental ILO conventions. In this context, forest conversion is to be understood as a process including all stages from land allocation to forest clearance. In the context of the FTA, forests should be understood as including forested wetlands.
- On point (2.d):
 - Exchange of information and transparency is an essential condition for non-governmental stakeholders to have access to information and therefore to participate in strengthening forest governance.



Article X.9

Trade and Responsible Management of Supply Chains

1. The Parties recognise the importance of sustainable and responsible management of supply chains through responsible business conduct and social **and environmental** corporate responsibility practices and obligations and through the provision of an enabling environment, and the role of trade in pursuing the objective of sustainable and responsible management of supply chains.
2. Pursuant to paragraph 1, each Party shall:
 - (a) promote corporate social and environmental responsibility or responsible business conduct, including by encouraging the uptake of relevant practices and standards by businesses; ~~and~~
 - (b) **strengthen existing sustainability standards applicable to the cultivation, processing and trade of forest risk commodities, in particular by enhancing independence and transparency of supply chain verifications as well as the implementation of strong complaints mechanisms; and**
 - (c) support the dissemination and use of relevant international instruments, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact, ~~and~~ the UN Guiding Principles on Business and Human Rights **and the FAO Voluntary Guidelines on the Responsible Governance of Tenure and the United Nations Declaration of the Rights of Indigenous Peoples.**

3. The Parties recognise the utility of international sector-specific guidelines in the area of corporate social **and environmental** responsibility or responsible business conduct and shall promote joint work in this regard. The Parties shall also implement measures to promote their uptake.
4. The Parties shall exchange information as well as best practices and, as appropriate, cooperate with the other Party, regionally and in international fora on issues covered by this Article.

Commentary:

- On point 1:
 - Corporate social responsibility obligations should also extend to environmental risks that the company or its suppliers are exposed to. Beyond voluntary practices, the FTA should also recognize the existence of mandatory requirements that companies may be subject to in this field, such as non-financial reporting obligations under the non-financial reporting Directive²⁰ for certain companies established in the EU or due diligence obligations for certain French companies under the French duty of vigilance law.²¹
- On point 2(b):
 - This provision is to be included because the existing Indonesian palm oil certification scheme ISPO is criticised as being too weak on several aspects, such as on deforestation requirements, social issues and rights and implementation and enforcement mechanisms.²² In particular, complaints procedures should be more transparent and allow third parties an informed response about certification decisions.

²⁰ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

²¹ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

²² Mark Barthel, Steve Jennings, Will Schreiber, Richard Sheane and Sam Royston (3Keel LLP) and James Fry, Yu Leng Khor, Julian McGill (LMIC International Ltd.) 2014, Study on the environmental impact of palm oil consumption and on existing sustainability standards, accessed 7 June 2018 via http://ec.europa.eu/environment/forests/pdf/palm_oil_study_kh0218208enn_new.pdf

Article X.10

Other Trade- and Investment-related Initiatives Favouring Sustainable Development

1. The Parties confirm their commitment to enhance the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions.
2. Pursuant to paragraph 1, the Parties shall:
 - (a) promote trade and investment policies that support the objectives of the Decent Work Agenda, consistent with the 2008 ILO Declaration on Social Justice for a Fair Globalisation, including the minimum living wage, inclusive social protection, health and safety at work, and other aspects related to working conditions;
 - (b) facilitate trade and investment in environmental goods and services, including those of particular relevance for climate change mitigation **and sustainable land use and forest management policies**, such as sustainable renewable energy and energy efficient products and services, through inter alia addressing related non-tariff barriers, the adoption of policy frameworks conducive to the deployment of best available technologies and cooperating in relation to initiatives in this field;
 - (c) promote trade in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that are the subject of voluntary sustainability assurance schemes such as fair and ethical trade schemes and ecolabels; and
 - (d) cooperate bilaterally, regionally and in international fora on issues covered by this Article.

Commentary:

- It is also important to recognise the role of forests and forest-related policies, including land use policies, in global climate change mitigation efforts. It can be estimated that on the aggregate global level, the LULUCF (land use, land use change, and forests) sector is expected to contribute to roughly 20% of the full mitigation potential of all the conditional and unconditional NDC targets.²³

Article X.12

Transparency

Each Party shall, in accordance with Chapter XX [Transparency], ensure that it develops, enacts and implements **any measure adopted for the implementation of this Chapter** in a transparent manner, **ensuring participation of non-state actors with a view of strengthening environmental regulations and in particular forest governance and providing opportunities for such actors to submit their views and formal complaints relating to the compliance with this Chapter.**

Commentary:

- Participation is a fundamental aspect of good forest governance. Stakeholders need to be able to access information about laws and policies in order to reinforce participation, credibility and accountability. This in particular applies to forest communities who should be able to participate in the decisions that affect their rights directly.

²³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5145905/>

Conclusion

The current FTA negotiations between the EU and Indonesia pose a risk of accelerating existing negative environmental impacts linked to trade in commodities and products associated with deforestation. The negotiating parties therefore need to ensure that negative effects on environmental, social and human rights issues are prevented. A sustainability impact assessment needs to be carried out before the conclusion of the FTA and its recommendations implemented.

The adoption of strong environmental safeguards in the trade and sustainability chapter of the FTA should be one of the first remedies adopted. Currently, the provisions proposed by the Commission as a basis for its negotiations with Indonesia are however much too weak to prevent the potential negative effects of increased trade, notably linked to forest conversion for the production of palm oil. The existing provisions must be strengthened and flanked by adequate monitoring and enforcement mechanisms. In addition to strong provisions in the trade and sustainability chapter, a number of core provisions in the FTA should also ensure that environmental considerations are built into the fabric of the agreement and are taken into account in all areas it will cover.





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