



Forest Stewardship Council®



QUESTIONS & ANSWERS

WHITE PAPER ON CONVERSION ANALYSIS, REFLECTIONS & RECOMMENDATIONS RELATED TO OWNERSHIP LOOPHOLES

October 2021

INTRODUCTION

At the FSC General Assembly 2017 in Vancouver, Canada, the FSC membership approved Motion 7 which requests that FSC develops a holistic policy and appropriate treatment at Principle, Criterion and Indicator levels with guidance to national Standards Development Groups, considering compensation for past conversion in terms of:

- a) restoration and/or conservation for environmental values; and
- b) restitution for socio-economic values.

To address Motion 7, FSC established two groups:

- a chamber-balanced working group (WG) to develop FSC Policy to Address Conversion, and
- a technical working group (TWG) to focus on the mechanisms for the implementation of the policy.

Additional information of the WG process can be found [here](#) and TWG process [here](#). The WG was formed in August 2018 and completed the policy development process in December 2020. While the WG agreed on the majority of the policy, the members did not reach consensus on one aspect in the policy element 3 (which outlines remedy requirements for past conversion): how to deal with those organizations that were not involved in the conversion of the management unit. To complete the policy, FSC commissioned Richard Donovan to develop a White Paper on Conversion proposing options for a methodology to address the issue of the ownership loophole. The White Paper:

- Examines the ownership loopholes identified in the September 2020 [Green Paper](#),
- Includes interviews with FSC staff and members around the globe, plus outside experts, focusing on individuals who may have relevant experience or information related to ownership loopholes, certification systems and due diligence processes, compensation, remediation or restitution,
- Examines other initiatives (certification systems, etc.) that may or may not have related ownership loophole experience globally, and,
- Builds on other ongoing FSC activities (e.g., revision of the Policy for Association (PfA), work of the FSC Conversion Policy and multiple chamber-balanced and technical working groups).

Based on the above, the White Paper provides recommendations related to the ownership loophole, including proposed relationships between various factors (e.g., when the conversion occurred, known or unknown ownership related to a specific conversion, degree of environmental and social harm caused by the conversion, etc.) and the level of remedy to be required.

The FSC secretariat is discussing these recommendations with the Policy and Standards Committee (PSC) and the Board of Directors (BoD), and a final proposal will be incorporated in the policy. The Policy to Address Conversion will then be submitted to the PSC and BoD for review and approval in Q4 2021. Further information of the finalization process will be updated on the FSC Policy to Address Conversion webpage [here](#).

QUESTIONS

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1 What is the background of the White Paper?

Instead of reaching consensus on the policy element 3 of the Policy to Address Conversion, the Motion 7 WG developed two options as following:

Option 1:

FSC aims to incentivize and advance the restoration and conservation* of natural forest* and restitution* of social harms* associated with conversion*. For that purpose:*

- a) *Organizations* that were directly or indirectly involved* in conversion* on the Management Unit* after November 1994 and before the effective date of the Policy are eligible for FSC forest management certification of that Management Unit* upon demonstrated conformance with the FSC Remedy Procedure.*
- b) *Organizations* that were directly or indirectly involved* in significant conversion* after November 1994 are eligible to associate with FSC upon demonstrated conformance with the FSC Remedy Procedure.*

Option 2:

FSC aims to incentivize and advance the restoration and conservation* of natural forest* and restitution* of social harms* associated with conversion*. For that purpose:*

- a) *Organizations* that were directly or indirectly involved* in conversion* on the Management Unit* after November 1994 and before the effective date of the Policy are eligible for FSC forest management certification of that Management Unit* upon demonstrated conformance with the FSC Remedy Procedure.*
- b) *Organizations* that have acquired Management Units* where conversion* has occurred after November 1994 and before the effective date of the Policy are eligible for FSC forest management certification of that Management Unit* upon demonstrated conformance with the FSC Remedy Procedure for social harms*.*
- c) *Organizations* that were directly or indirectly involved* in significant conversion* after November 1994 are eligible to associate with FSC upon demonstrated conformance with the FSC Remedy Procedure.*

The difference between these 2 options is whether “to link the remedy liability with the management unit where conversion has occurred, or with organizations involved in conversion”. Please refer to policy crosswalk [here](#) for details.

Major reasons behind the WG disagreement are the issue of **ownership loophole**, and the unknown financial implication associated with remedy requirements.

The FSC secretariat thus sought the consultancy of Richard Donovan to develop a White Paper to analyze issues related to

ownership loophole and to provide recommendations to finalize the Policy to Address Conversion. Further information on the Conversion Policy can be accessed [here](#).

2 What is the “ownership loophole”?

“Ownership loophole” refers to the unintended scenario, whereby areas converted from natural forest after 1994 are eligible for FSC certification despite the existence of questionable aspects regarding the ownership.

FSC Principles and Criteria (P&C) and Policy for Association (PfA) both include definitions of “direct” and “indirect” involvement that are critical in the ownership loophole debate. They are defined as follows in the PfA¹:

- Direct involvement: Situations in which the associated organization or individual is first-hand responsible for the unacceptable activities.
- Indirect involvement: Situations in which the associated organization or individual, with a minimum ownership or voting power of 51%, is involved as a parent or sister company, subsidiary, shareholder or Board of Directors to an organization directly involved in unacceptable activities. Indirect involvement also includes activities performed by subcontractors when acting on behalf of the associated organization or individual.”

Criterion 6.10 in P&C outlines retrospective conversion requirements: management units containing plantations that were established on areas converted from natural forest after November 1994 shall not qualify for certification, except where:

- a) Clear and sufficient evidence is provided that The Organization was not directly or indirectly responsible for the conversion, or
- b) The conversion affected a very limited portion of the area of the management unit and is producing clear, substantial, additional, secure long-term conservation benefits in the management unit.

While there seems to be no direct evidence that the above clause has been abused in the sense that an organization has first converted natural forest to plantations, then sold the unit as ‘FSC-ready’ to another organization, there is a strong perception among some of the membership that this loophole may serve as a perverse incentive for deforestation or conversion. Additional difficulties arise in implementing the criterion, as it may be difficult to verify to what extent current owners are truly independent of previous owners, and whether the organization was indirectly involved in the conversion. This type of condition is often referred to as the ‘**ownership loophole**’ by its critics.

¹ Policy for Association is currently undergoing a revision process. Further information is available [here](#).

3 What are the different types of ownership loopholes?

The White Paper identified four types of ownership loopholes:

- **Scenario 1 – The traditional FSC “ownership loophole”**
This loophole occurs when X company would intentionally seek out and purchase a piece of land converted by another party, perhaps put in a tree plantation and seek FSC forest management (FM) certification. Per FSC rules, if they did not have controlling interest in the land nor were the organization owning the land when conversion happened, defined as “51% or above” ownership, they are not considered to be responsible for the conversion. Thus, once they took over the ownership of the land or operation, they could apply for full FSC FM certification for plantations or other forest management on that land.
- **Scenario 2 – The “Shell” Company Loophole**
This happens when X company creates a “shell” company (with near or distant family members or other business collaborators as owners) under a different name or distinct legal ownership. Under this scenario per current FSC rules, X company might not be held responsible for the conversion actions of the shell company, either for the purposes of converting to plantations.
- **Scenario 3 – The Smallholder (or Community) Loophole**
This happens when groups of smallholders are collectively creating conversion, but because of their scale (individual properties under X hectares) under current (or future) FSC rules they are not held responsible for their individual or collective conversions.
- **Scenario 4 – The Inconsistent FSC Policy & Definitions Loophole**
This loophole is, in theory, the easiest one to address. An identified loophole is derived from FSC’s inconsistency in approaching ownership issues across PFA, FM and COC certification (including Controlled Wood), or approval of License agreements.

4 What are the related issues for FSC membership?

The White Paper outlined various tensions related to conversion and remedy that continue to make the ownership loophole a challenge for FSC members, some of them are as follows:

- **Harms caused by pre-1994 conversions still cause angst**
Particularly in Southeast Asia and South America, issues of social or environmental harm due to pre-1994 conversion continue to cause concern. Some focus more on social harm, due to international principles that indicate

social harm has no end date, no “statute of limitations”. Other FSC members believe that FSC should focus on pre-1994 social or environmental harm only where there are continuing conflicts today. Some suggest that not addressing long-lasting pre-1994 harm is another “loophole”. Others reflected that there are huge equity and development issues - the 1994 date prejudices against the newer developing economies and in favor of those more advanced in ecosystem conversion.

- **Strong support for an FSC focus on restoration, but some members want conversion remedy process issues solved first**

Some FSC members conditionally tie support for restoration to a successful remedy solution, i.e., one cannot happen without the other. This may mean they also see restoration only in the context of remedy. Others do not, i.e., they see a broader opportunity for FSC to engage in restoration and want FSC action now. To some extent, as outlined in the Green Paper, this tension reflects global North-South dynamics which remain challenging for FSC, particularly on conversion and restoration. However necessary to resolve, numerous Global South members (and some in the Global North) believe that FSC should provide a clear public statement of support for restoration, working with other organizations to support restoration, and/or perhaps an FSC option to certify restoration that aligns with FSC values.

- **Smallholder realities are complex and defy solutions**

Based on interviews and the author’s personal experience, there seems to be little doubt that smallholders and communities have contributed to conversion in some situations. The realities are perplexing. There are countries where government concession rules require smallholder involvement as a formal part of concession permits (e.g., Indonesia for pulp and paper and oil palm). There are also situations where companies (or other entrepreneurs) have supported conversion by smallholders and in communities, with the intent of subsequently selling the land for profit, or having more production and supply come from those converted forested areas for their mills. Governments play a role through policies that foster conversion or deforestation, though most would probably deny they are doing so intentionally. But more broadly speaking there is consistent concern that smallholder livelihoods are also precarious enough that putting rigorous “anti-conversion” policies to address any smallholder loophole would be perceived as onerous, unfair or impractical.

- **Tension around inside vs outside management unit restoration**

From a punitive perspective, some members wish that offending converters be forced to remedy by returning (i.e.,

restoring) converted forests on their management units to natural forest ecosystems. Others point out that once conversion is done, the values lost, put in monetary terms for restoration, could have greater biodiversity or perhaps even socioeconomic value by using remedy resources to support conservation ex-situ (outside the management unit). A consistent perspective by NGOs is that restoration/remedy be “proximate” to where it occurred, within at least the nearby landscape or ecosystem.

- **Concern that FSC is rushing the conversion policy processes to expand certification numbers at the expense of credibility**

During outreach on this White Paper various FSC members indicated that FSC’s leadership wants near-term solutions to ongoing PfA cases (e.g., Asia Pulp and Paper or APP), Asia Pacific Resources International Limited or APRIL) as part of an “obsession” to grow the FSC certification portfolio in terms of hectares certified. Other members (and apparently most FSC staff) disagree and point to the length of time and resources that have been devoted to these issues, including on the ownership loopholes, the generic roadmap for PfA, etc. Overall, the fundamental concern is that FSC not rush to judgement or ill-conceived short-term solutions but create lasting positive impact through robust processes that will be seen as durable and offering solid results (e.g., have a global generic roadmap process for PfA in place before agreeing on roadmaps for specific situations or companies).

- **Complexity of assessing social harm**

Social harm for conversion inside the management unit, versus around or further beyond the management unit, remains a challenging discussion. The challenges of identifying social harm, and the corresponding need for remedy, are quite different from biophysical assessments of conversion. Whereas biophysical assessments may be able to count on remote sensing and ground truthing (for recent conversions), social assessments are not as easy. You cannot just “remote sense” them. They become even more challenging when the social harm assessment is extended to scope beyond the area of conversion to the “landscape”, or nearby communities, or for other topics like land grabbing, violation of workers’ rights, etc.

- **Scope of harm & who deserves remedy**

Despite positive changes proposed by the Policy and Technical WG, there is still both tension about the scope and reach of FSC expectations regarding remedy. No one contacted during this White Paper research argued for remedy to apply to far off, downstream locales or to interest groups in urban areas far away from the forest. They argued for remedy clearly within and directly adjoining the management unit. They consistently suggested that if “ex-

situ” remedy is allowed, FSC should ensure that it happen within the same nearby biological and human landscape. Some argued for an ecosystem or landscape approach, but with numerical distance limits applied, e.g., 10, 20 or 30 kilometers maximum. Auditors (including the author) indicate that language that is not precise will confound consistent auditing and expectations across the system. The term “indirectly involved”, whether for remedy or for having input, is consistently regarded as unhelpful and unclear not just for auditors, but by many CHs, FSC members and FSC staff. At the same time, “rights holders” hold an important position in terms of remedy when negatively affected, though the challenge is to balance the interests of those rights holders with other directly affected communities, families and individuals (including workers).

- **Role, or not, of FSC Accredited CBs**

It seems clear that most FSC members want the FSC CB roles to be limited to implementing FM and COC audits. They do not want CBs to be decision-makers on remedy. Members were inconsistent in whether they are comfortable or not with CBs auditing remedy progress. However, if remedy requirements or “corrective actions” are made clear and transparent (with timelines, indicators of progress, etc.), there is an effective and efficient role that CBs can play for monitoring and reporting on Remedy progress.

- **Too many FSC structures?**

There is fatigue with the plethora of FSC committees, WGs, etc. There is concern that the FSC, if it creates roles for new committees or panels, is creating more unnecessary complexity – something FSC members believes happens too often. If new committees or independent panels are created, they should have operating procedures that will keep them accountable and make sure they perform a professional and timely effort.

5 What are the key processes in FSC relevant to ownership loophole?

Key relevant FSC processes are the ongoing development of the Policy to Address Conversion ([here](#)) and Conversion Remedy Procedure ([here](#)), and the Policy for Association ([here](#)) and related Policy for Association Remediation Framework ([here](#)). These processes are all related to conversion, remedy and relevant in the discussion about the ownership loophole.

6 What are the experiences from other organizations related to the ownership loophole?

The White Paper covered fourteen (14) initiatives/resources that are relevant as FSC deliberates ownership loopholes. Analysis here focuses on issues, policies or process that might help resolve cases of unclear ownership. One of the most closely related of these was the Accountability Framework Initiative which states “Companies purchasing or acquiring interests in commodity-producing properties assume

responsibility to remediate past harms, unless this responsibility is explicitly [underline emphasis by this author] and legally transferred to or retained by another party”. This implies there is no statute of limitations on harms. FSC is examining AFi operational recommendations through the PfA and Conversion efforts. To date there seems to be no other certification system has adopted the above-mentioned guidance yet. Please see below for brief introduction on some of the initiatives/resources:

- **Accountability Framework Initiative**
The “ownership loophole” issue is specifically addressed under AFi Core Principles document (Section 9.4) that states “Companies purchasing or acquiring interests in commodity-producing properties assume responsibility to remediate past harms, unless this responsibility is explicitly [underline emphasis by this author] and legally transferred to or retained by another party”.
- **Better Aquaculture Practices (BAP)**
BAP’s system uses regional staff and contacts to manage the certification system and ensure policy consistency. Though the BAP system is far smaller than FSC, the fact that regional management plays a key role in certification processes, and appears to be working well so far, is of significance.
- **Direct Foreign Investors (DFI)**
DFIs do face situations where vague ownership, or the legacy of past social or environmental harms, require due diligence prior to them making an investment. Conversations with some DFIs indicates some concerns regarding ownership loophole scenarios and companies engaged with DFIs indicate FSC’s lack of clarity on conversion creates challenges for DFI investment.
- **High Carbon Stock Approach (HCSA)**
In January 2021 HCSA published a new Grievance Mechanism related to companies that convert natural forests to other land uses, e.g., soy, oil palm, tree plantations, etc. The HCSA Grievance Mechanism was written by lawyers and is extremely detailed (31 pages) with exacting timelines. So far HCSA has not ratcheted up requirements to address business group versus individual company requirements, though some NGOs are pressuring them to do so (along the lines of FSC’s PfA approach and what AFi is currently suggesting should be done).
- **Roundtable Sustainable Palm Oil Certification (RSPO)**
The RSPO certification system has the most detailed approach for addressing conversion, remediation and restoration to date, though questions on its effectiveness exist. Initially launched in 2015, at the urging of RSPO

members, that approach is broadly entitled the Remediation and Compensation Procedure (RaCP). Members of the FSC Conversion Policy and Technical WGs and FSC IC staff have examined the RSPO approach. Recently RSPO contracted an independent review of the RaCP by Helen Newing. The RSPO Biodiversity and High Conservation Values WG, a multistakeholder committee, responded and is following up on the work of Compensation Panels to provide oversight of company implementation of the RaCP.

7 What are the desired outcomes for addressing ownership loopholes?

In the White Paper the author identified potential desired outcomes specifically for the issue of ownership loophole:

1. Policies close systemic FSC ownership loopholes and in doing so reaffirm FSC system and members commitments to recognized well-managed forest operations and stopping forest ecosystem conversion globally.
2. Policies are based on consistent set of definitions (formally incorporated into the FSC system's global "glossary") that foster alignment between different FSC policies and procedures.
3. The FSC system engages the most professional organizations and individuals in the world to address ownership loophole issues whether they arise through the PfA or FM/CoC certification parts of the system, including the use of forensic auditors and/or mediators.
4. Changes to ownership loophole policies do not adversely affect FM operations certified between 1994 and 2020.
5. Procedures for closing ownership loopholes are completed and FSC is free to support forest ecosystem restoration that is aligned with FSC values and requirements around the globe.

8 How to address conversion between November 1994 and the effective date of the conversion policy?

For organizations applying for FSC forest management certification²:

The White Paper recommends that FSC use the following framework for addressing remedy regardless of past ownership dynamics. This means that even new owners should accept liability for past environmental and socioeconomic harm caused by conversion, but on a sliding time-based scale:

Environmental remedy:

- Conversion happened during the last 5 years (2015-present): full 1:1 remedy
- Conversion happened 6-10 years ago (2010-2014): 75% remedy

² Forest Management certification refers to certification against National Forest Stewardship Standard, Interim National Standard or FSC-STD-30-010 Controlled Wood Standard for FM enterprises.

- Conversion happened more than 10 years ago (1994-2009): 50% remedy

Social remedy be based on a process of “Discovery (See question 11)” and social harms assessment, including interactions that balance the interests of communities and directly affected stakeholders and rights holders within the organization’s management unit or immediately adjoining it.

For organizations applying for association³ with FSC:

- a) Take the time to build robust FSC process and solutions to ownership loopholes, but recognize the need for continuous iteration – design, test, improve, and re-test. Use the upcoming FSC General Assembly activities (virtual and face-to-face) to discuss whatever approaches FSC is using, or considering using, and capitalize on those discussions and interaction to continually improve.
- b) Upgrade FSC network resources & staff skills on forensic auditing and conflict mediation at the international and regional levels. FSC IC and regional staff should reach out to establish or enhance contact with global, regional, and national entities (governmental or non-governmental) that have expertise and experience in forensic auditing and conflict meditation that can contribute to addressing FSC’s challenges.
- c) Use high quality forensic auditing to clarify ownership control and address loopholes, recognizing the dynamic nature of PfA issues and corporate ownership.

9 How to address conversion happening after the effective date of the conversion policy?

The White Paper proposes that for conversion happening after the effective date of the conversion policy, FSC should use the relatively new concept of “beneficial ownership”, where X organization benefits are identified and may include owning shares of a company, earning revenue through a separate company, or other financial or business benefits. The White Paper sees NO substitute for FSC improving how it deals with these complicated issues. Improvement requires:

- Eliminating the 51% rule, recognizing that control/responsibility can happen when a shareholder has less than 51% control and the 51% rule can be used to avert due responsibility. “Control” is the key issue and determination of decision-making control is the key factor in assigning responsibility for remedy.
- Putting in place clear rules on what the process is for FSC, CBs or CHs to resolve issues around conversion issues and the related responsibility that comes either before, during or after certification processes.

Based on examples and research, the author suggests that FSC use a combination of steps or tools to reach conclusion on ownership issues, conversion issues and remedy. This

³ An association with FSC is formally established through any of the following relationships: (1) FSC membership; (2) Contractual relationship through: FSC accreditation agreement, FSC license agreement, FSC cooperation agreement, or FSC partnership agreement.

includes:

- a) FSC blended global, regional and national team to initiate and manage the situations created by conversion, ownership or remedy challenges,
- b) Use of independent panels managed by the FSC's blended team to reach recommendations to resolve ownership/control issues and remedy concepts,
- c) Use of professional forensic auditing to clarify control issues around ownership as necessary to identify responsibility for remedy, should an organization wish to become part of the FSC system,
- d) Use of professional mediation to assist in reaching decisions at multiple levels during these processes, whether related to assigning responsibility for conversion or remedy,
- e) The need for FSC staff training on mediation or conflict negotiation to be in a better position for reaching satisfactory solutions, and,
- f) Initial ideas on the role of restoration as part of the FSC system, not just for remedy but also separately as a forest management tool that FSC could support globally.

10 What is the proposed 'discovery' phase?

The White Paper proposes that "Discovery" is a better term for research or investigation during the early phases of PfA, trademark license approvals, or conversion-related ownership-related due diligence (Loopholes 1 & 2) and remedy processes. FSC should rename the early part of these process of examining ownership or conversion issues the "Discovery" phase, including coverage any of the identified loopholes.

Discovery will typically happen after either a CB identifies PfA-related ownership issues during certification processes, or a whistleblower complaint has been lodged related after either FM or CoC certification or PfA processes. The Discovery process should start with voluntary submissions by the organization to attempt to address issues FSC articulates to them in writing, in this case related to ownership loopholes. The author suggests that a 3-person team of FSC staff or representatives – typically 1 member each from FSC IC or Global, and 1 each from the relevant FSC Regional Office and relevant FSC National Office – do the first review of voluntary submissions by the organization. If that information is clear and unequivocally meets FSC's information needs to resolve the ownership/responsibility issues, per the judgement of the 3-person FSC team, and approved by the FSC Director General, certification or license agreement processes can proceed. If the voluntary information is NOT sufficient or is deemed worthy of more scrutiny and due diligence, the FSC 3-person team will recruit and appoint an Independent Panel to resolve the issues, using a combination of experts, forensic auditing and, if

necessary, mediation/conflict resolution. It will be the role of the Independent Panel to decide whether voluntary submissions on the part of the organization sufficiently address issues related to ownership or other issues. Recourse to other due diligence tools such as forensic auditing may also be necessary.

Disclaimer: *The FAQ is drafted to the best of author's knowledge and understanding on the White Paper on Conversion, and it is for general informational purposes only. In the case of a discrepancy, the White Paper on Conversion shall prevail.*



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