

Editorial

Towards Reducing the EU's Global Deforestation Footprint?

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It is widely recognized that forests play a vital role in sustaining life on Earth and human well-being through the provision of essential services (e.g., clean air, carbon reduction and habitats for animals and plants) and by being a source of livelihood and income for about 25% of the world's population (including vulnerable and indigenous communities).¹ And yet, there is ample evidence that the world's forests are under serious threat. According to the latest joint report by the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization (FAO), global deforestation and forest degradation continued to take place at 'alarming rates' in 2015–2020, and some 420 million hectares of forest have been lost through conversion to other land uses over the past three decades.² Illegal logging and agricultural expansion have been the chief drivers of this dangerous trend, partly due to international demand for, and trade in, timber products and agricultural commodities.³ Deforestation and forest degradation are, in turn, primary contributors to global warming and biodiversity loss – the two most pressing environmental challenges of our time.⁴

It is equally no secret that the European Union (EU) bears significant responsibility for this destruction of forests around the globe, being ranked as the world's second-largest importer (after China) of commodities linked to deforestation in 2018.⁵ However, the EU appears now to be determined to reverse its consumption-driven contribution to global deforestation and forest degradation. Just a few days after the UN climate summit in Glasgow in November 2021, the European

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¹ UN General Assembly, *Res 67/200 – International Day of Forests*, UN Doc/A/RES/67/200 (14 Feb. 2013).

² UNEP/FAO, *The State of World's Forests* xvi (2020), www.fao.org/documents/card/fr/c/ca8642en/ (accessed 20 Oct. 2022).

³ *Ibid.*, at 82–83.

⁴ G. Marín Durán & J. Scott, *Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union*, 34(2) *J. Envtl. L.* 245, 249–250 (2022).

⁵ *Ibid.*, at 247 and sources cited therein.

Commission released a legislative proposal to regulate the placing on the EU market of forest-risk commodities (FRCs),⁶ which is presently being considered for adoption by the Council and the European Parliament (EP) under the ordinary legislative procedure. The Council has recently agreed its negotiating position (or ‘general approach’) on the proposed regulation on 22 June 2022⁷ and the EP its own position on 13 September 2022.⁸ This new regulatory initiative can be seen as a milestone in driving down the EU’s global deforestation footprint, in that it goes beyond its existing legislation that is confined to combatting illegal logging and related trade in illegally harvested timber products.⁹ But does the proposed regulation, as currently drafted, raise any concerns with regards to its environmental ambition and its conformity with World Trade Organization (WTO) law and human rights protection?

1 THE PROPOSED EU FOREST DUE DILIGENCE REGULATION IN A NUTSHELL

Before dealing with these questions, an overview of the key features of the Commission’s proposal seems necessary. Its stated objectives are to minimise the EU’s contribution to deforestation and forest degradation worldwide and, thereby, reduce its contribution to greenhouse gas emissions and global biodiversity loss (Article 1). In order to meet these goals, it lays down mandatory due diligence rules for all operators and traders that place or make available on the EU market, as well as export from the Union, the following six FRCs: cattle, cocoa, coffee, oil palm and soya (both of EU and foreign origin).¹⁰ Through the due diligence process (Articles 8–11), operators and traders must ensure that such FRCs have been legally produced (i.e., in accordance with the relevant legislation of the country of origin (Article 3(b)) and are ‘deforestation-free’ (i.e., not produced on

⁶ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010*, COM(2021) 706 final (17 Nov. 2021) [Commission Proposal].

⁷ Council of the European Union, *Draft Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 – General Approach* (24 Jun. 2022) [Council Negotiating Text].

⁸ European Parliament, *Amendments adopted by the European Parliament on the proposal for a regulation of the European Parliament and of the Council on making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010* (13 Sep. 2022) [EP Negotiating Text].

⁹ Namely, the 2005 FLEGT Regulation and 2010 Timber Due Diligence Regulation: for an overview, see Marín Durán & Scott, *supra* n. 4, at 250–252.

¹⁰ Commission Proposal, *supra* n. 6, Annex I also extends to a number of ‘derived’ products that contain these commodities, have been fed with them, or have been made using any one of them (e.g., chocolate and furniture).

land that has been subject to deforestation after 31 December 2020 (Articles 2(8)(a) and 3(a)).¹¹ These commodities can only be placed on (or exported from) the EU market if the risk of non-compliance with the legality and deforestation-free standards is shown to be no more than negligible (Article 4(5)). The proposed regulation further sets out in great detail the obligations of Member States' competent authorities to carry out regular controls on operators and traders to assess their compliance with the due diligence requirements (Articles 13–19), as well as the 'effective, proportionate and dissuasive' penalties to be applied in cases of infringements (Article 23).

However, due diligence obligations for operators and traders, as well as surveillance by Member States' competent authorities, will vary according to the level of risk assigned to a particular country (or subnational jurisdiction) under the three-tier benchmarking system (Article 27). This system will apply to both third countries exporting the relevant commodities to the EU, as well as to the Member States for commodities exported from the EU market. It will be operated by the Commission, which is empowered to identify countries as presenting a 'low', 'standard' or 'high' risk of producing commodities that are not deforestation-free, on the basis of a set of criteria that will be discussed below. When operators source commodities from countries placed in the low-risk category, they may follow a simplified due diligence procedure (Articles 9 and 12), which excludes the most stringent steps of the standard procedure (i.e., risk assessment and risk mitigation (Article 10)) and, thereby, reduces compliance costs and administrative burdens. By contrast, commodities originating in high-risk countries will be subject to enhanced scrutiny by the Member States' competent authorities (Article 20).¹²

2 A SIGNIFICANT STEP FORWARD, BUT ...

While the EU is to be commended for taking urgently needed action to cut down its consumption and importation of commodities causing global deforestation and forest degradation, the proposed regulation raises a number of important issues. The first relates to the level of environmental ambition pursued. As previously mentioned, the Commission's proposal and the Council's negotiating text only include six FRCs within the scope of the new due diligence legislation. It is true that the selected six commodities represent the largest share of global deforestation

¹¹ Timber products are subject to an additional requirement that they have been harvested without inducing forest degradation after that same date: Commission Proposal, *supra* n. 6, Art. 2(8)(b).

¹² Different stringency thresholds are proposed in Council Negotiating Text, *supra* n. 7, Art. 14(9)–(10); and EP Negotiating Text, *supra* n. 8, amendment 180.

embodied in EU imports¹³ and, hence, ‘policy intervention could bring the highest benefits per unit value of trade’.¹⁴ However, the EP has called for other commodities, including rubber and maize, to be added to this initial list, given these are still in the top ten EU-imported commodities associated with global forest destruction.¹⁵ In addition, the proposed regulation is limited to protecting forests and does not address the conversion or degradation of other natural ecosystems, such as grasslands and savannahs, which are also essential towards tackling the interconnected climate and biodiversity crisis. The risk here is that the new regulation would have the unintended consequence of shifting agricultural production from forest ecosystems to other high-carbon stock and biodiversity-rich ecosystems, particularly as the EU already imports a great proportion of commodities from these landscapes.¹⁶ Nonetheless, the three EU institutions agree to review the scope of the regulation within 1–2 years of its entry into force with a view to consider the ‘need and feasibility’ of including other commodities and non-forest ecosystems.¹⁷ Such an extension of the regulation’s scope appears to be crucial if the EU is to effectively reduce the negative impact of its consumption on *all* natural ecosystems around the globe.

A second question pertains to the legitimacy of the proposed legislation, and more specifically the extent to which the EU can meet its various commitments under the multilateral environmental and trade regimes. On the one hand, the EU has joined other world leaders in reiterating pledges over the past three decades to halt global forest loss and ensure sustainable consumption patterns by 2030, including as part of the 2030 UN Agenda for Sustainable Development¹⁸ and the UN Strategic Plan for Forests (2017–2030).¹⁹ Trade regulation appears indispensable if the EU is to live up to these international environmental commitments, since its responsibility for global forest destruction stems primarily from the importation (rather than domestic production) of FRCs. In this respect, the

¹³ These are: soya (27%), palm oil (26.14%), cocoa (10.14%), coffee (9.05%), timber (9%) and beef (4.47%). See Marín Durán & Scott, *supra* n. 4, at 247 and sources cited therein.

¹⁴ Commission Proposal, *supra* n. 6, at 27 (para. 27).

¹⁵ EP Negotiating Text, *supra* n. 8, amendments 39 and 83; see also WWF, *EU Deforestation Law Proposal: Off to a Strong Start, But Loopholes Must Be Closed* (2021), www.wwf.eu/?5179866/EU-deforestation-law-proposal-Off-to-a-strong-start-but-loopholes-must-be-closed (accessed 20 Oct. 2022); and European Commission, *Impact Assessment – Minimising the Risk of Deforestation and Forest Degradation Associated With Products Placed on the EU Market*, SWD (2021) 326 final (17 Nov. 2021), at 32–33 [Commission Impact Assessment].

¹⁶ WWF, *Beyond Forests – Reducing the EU’s Footprint on All Natural Ecosystems* 22–31 (2022), www.wwf.eu/?5709966/Beyond-Forests-Reducing-the-EUs-footprint-on-all-natural-ecosystems (accessed 20 Oct. 2022).

¹⁷ Commission Proposal, *supra* n. 6, Art. 32(1)–(3); Council Negotiating Text, *supra* n. 7, Art. 32(1)–(3); EP Negotiating Text, *supra* n. 8, amendments 79 and 227.

¹⁸ UN General Assembly, *Res 70/1 – Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc/A/RES/70/1 (25 Sep. 2015), in particular Sustainable Development Goals 12.2 and 15.2.

¹⁹ UN General Assembly, *Res 71/285 – United Nations Strategic Plan for Forests (2017–2030)*, UN Doc/A/RES/71/285 (1 May 2017).

Glasgow Leaders' Declaration on Forests and Land Use, endorsed by the EU alongside another 140 parties to the UN Framework Convention on Climate Change, explicitly recognises the need to 'facilitate *trade* and development policies ... that promote ... sustainable commodity production and consumption and that do not drive deforestation and land degradation'.²⁰

On the other hand, the use of unilateral trade measures to reduce the EU's global deforestation footprint is not uncontroversial, including in the WTO. This is because measures of this kind give rise to what Joanne Scott has aptly termed as 'territorial extension' of EU environmental law in that they use the existence of a territorial connection with the Union (e.g., access to its market or ports) to gain regulatory leverage over conduct or activities that take place abroad.²¹ If the new forest due diligence regulation is ever challenged in the WTO dispute settlement system, it is likely to be found in tension with the core non-discrimination obligations (Articles I/III) under the General Agreement on Tariffs and Trade (GATT) and necessitate justification under the environmental exception clause (Article XX(g) GATT).²² Here, one concern is that the proposed regulation seeks to conserve exhaustible natural resources (*in casu*, forests) that are (partly) located outside the EU's territory and it is unsettled the extent to which environmental measures with such 'extraterritorial effects' may be justified under WTO law. Nonetheless, the EU could advance a 'common concern' argument, whereby a 'sufficient nexus'²³ exists between the forests being protected and the EU, given the transnational consequences of deforestation and forest degradation in terms of climate change and biodiversity loss. As such, the damaging environmental effects of forest destruction also impact the EU's own territory, and not just the country (or countries) where the forests are located.²⁴

A much more problematic aspect of the proposed regulation from a WTO standpoint is the so-called country benchmarking system. This is because the assessment criteria for the Commission to allocate countries among the different

²⁰ Glasgow Leaders' Declaration on Forests and Land Use (12 Nov. 2021), <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/> (accessed 20 Oct. 2022).

²¹ Among her extensive work on this topic, see J. Scott, *Extra-Territoriality and Territorial Extension*, 62 Am. J. Int'l L. 87 (2014); and J. Scott, *Reducing the European Union's Environmental Footprint Through 'Territorial Extension'*, in *Sustainability and the Law* (V. Mauerhofer, D. Rupo & L. Tarquinio eds, Springer 2020).

²² On this point, see further Marín Durán & Scott, *supra* n. 4, at 261–263.

²³ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* – Report of the Appellate Body WT/DS58/AB/R, para. 133 (6 Nov. 1998) [US – Shrimp (1998)].

²⁴ On this point, see further B. Coreeman, *Article XX, MEAs and Extraterritoriality*, in *Trade and Environmental Law* (P. Delimatsis & L. Reins eds, Edward Elgar Publishing 2021); and N. Dobson, *The EU's Conditioning of the 'Extraterritorial' Carbon Footprint: A Call for an Integrated Approach in the Trade Law Discourse*, 27(1) Rev. Eur. Comp. & Int'l Envtl. L. 75 (2018).

risk categories are stipulated in rather loose terms.²⁵ In particular, it is left unclear why these criteria have been chosen, whether they are to be applied cumulatively or whether the Commission may pick and choose among them, and what is the level of performance under each criteria that will be required to justify moving a country into the high or low risk category. This lack of clarity and predictability has not been addressed in the current negotiating texts of the Council and the EP, which have retained the assessment criteria largely unchanged.²⁶ This is regrettable and opens the door for potentially biased determinations by the Commission, including when evaluating performance by third countries against that of the EU Member States, and subsequent claims of ‘arbitrary and unjustifiable discrimination’ under Article XX GATT.²⁷ From an economic perspective, it is evident that commodities from countries in the low-risk category would enjoy a competitive advantage in terms of lower compliance costs and administrative burdens. From an environmental viewpoint, however, the less stringent due diligence requirements under this vaguely defined low-risk category could open the floodgates for commodities associated with global deforestation to find their way into the EU market. Thus, the country classification system would need to be grounded in more objective and predictable environmental indicators if it is kept in the final legislation. Otherwise, a safer option in WTO law and environmental policy terms would be for the EU to get rid of this system and assess deforestation risks on a transaction basis by applying the standard due diligence procedure to commodities from all countries.²⁸

A third concern relates to the EU’s willingness to combine its unilateral intervention to regulate trade in FRCs with bilateral cooperation with affected exporting countries. This is important because both international environmental law and WTO law express a strong preference for cooperative approaches to address global environmental challenges, and it can serve to temper criticisms of

²⁵ Commission Proposal, *supra* n. 6, Art. 27. These are: (1) the rate of deforestation and forest degradation; (2) the rate of expansion of agricultural land for relevant commodities, (3) the production trends of relevant commodities (and derived products), (4) whether emissions from deforestation and forest degradation are accounted towards a country’s mitigation commitments under the Paris Agreement, (5) whether agreements or other instruments have been concluded between the country concerned and the EU which address deforestation or forest degradation and which facilitate compliance with the proposed regulation; and (6) whether the country concerned has in place laws and effective enforcement measures to avoid and sanction activities leading to deforestation and forest degradation.

²⁶ Council Negotiating Text, *supra* n. 7, Art. 27(2); EP Negotiating Text, *supra* n. 8, amendments 203–207.

²⁷ See by analogy *US – Shrimp (1998)*, *supra* n. 23, paras 178–184, where lack of transparency and predictability in the certification process under the challenged measure proved problematic under the chapeau; and WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body* WT/DS400/DS401/AB/R (18 Jun. 2018), paras 5.322–5.328, where the ambiguous criteria and broad discretion in the application of the Inuit exception were found inconsistent with the chapeau.

²⁸ On this point, see further Marín Durán & Scott, *supra* n. 4, at 264–265.

EU unilateralism in this domain. In fact, previous EU external action on forest conservation has followed a mix of unilateral and bilateral policy tools.²⁹ And yet, it is uncertain how far the EU is committed to continue this hybrid model under the proposed forest due diligence regulation. The Commission's proposal and the Council's negotiating text do foresee engagement with producer countries through 'partnership and cooperation mechanisms' (Article 28(1)), but are imprecise as to the specific form which such cooperation may take and the extent to which the EU is ready to provide financial and technical assistance to facilitate third-country compliance with the legality and deforestation-free requirements under the regulation. The EP, for its part, is pushing for stronger commitments on international cooperation and this remains a sticky point in the inter-institutional negotiations at EU level.³⁰

The same applies to the last but not less significant issue, which is the attention given to human rights protection, and in particular the rights of forest-dependent communities and indigenous people, under the proposed legislation. In this respect, the position of the Commission and the Council is vastly weaker than that of the EP. The latter's negotiating text imposes an additional due diligence obligation on operators to verify that commodities placed on (or exported from) the EU market have been produced in accordance with human rights protected under international law, and in particular customary tenure rights and the right to free, prior and informed consent as set out in (inter alia) the UN Declaration on the Rights of Indigenous Peoples.³¹ This requirement is of critical importance given the growing links between the conversion of forests to agricultural use and human rights violations, including land grabbing often associated with forced displacement of local communities.³²

In sum, as the world's second-largest consumer and importer of deforestation-causing commodities, the EU has little choice but to regulate trade in FRCs if it is to contribute to the multilaterally agreed target of ending global forest loss by 2030. The proposed forest due diligence regulation is a courageous and significant step in this direction but, as discussed above, not one without shortcomings. Addressing them during the ongoing legislative process will go a long way in improving the potential of the EU's regulatory intervention and in enhancing its international credibility and acceptance, including in the WTO.

²⁹ *Ibid.*, at 250–252; and A. Savaresi, *EU External Action on Forests: FLEGT and the Development of International Law*, in *The External Environmental Policy of the European Union – EU and International Law Perspectives* (E. Morgera ed., Cambridge University Press 2012).

³⁰ EP Negotiating Text, *supra* n. 8, amendments 213–214.

³¹ *Ibid.*, amendments 100–104.

³² Commission Impact Assessment, *supra* n. 15, at 13; and C. Golay, *Identifying and Monitoring Human Rights Violations Associated With Large-Scale Land Acquisitions*, 6 *Revue internationale de politique de développement* (2015).

