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Is the European Union Deforestation Regulation WTO-Proof?

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EXECUTIVE SUMMARY

The European Union Deforestation Regulation (EUDR) is set to take effect on 30th December 2024. While it aligns with EU's climate goals under the European Green Deal, it has sparked concerns with EU partners regarding its compatibility with World Trade Organization (WTO) principles. Internally, some member-States and productive sectors fear that the lack of clarity in its rules could disrupt European supply chains. Products like coffee, chocolate, and leather are some examples where costs and price are expected to rise due to compliance requirements, documentation, and shipment segregation.

Critics argue that the EUDR's unilateral imposition of EU standards on third countries could be viewed as extraterritorial and more restrictive than necessary towards its objectives. This paper analyses lessons from WTO reports on US Shrimp/Turtle and US Tuna/Dolphin, which are relevant to discussions on non-product-related processes and production methods (PPMs).

Key findings suggest that the EUDR could be justified under GATT exceptions clause (Article XX). However, for this to be successful, the Policy Brief proposes more flexibility in considering local realities of exporting countries. This would include shifting the EUDR approach to cooperating towards an outcome-based equivalence systems instead of rigid procedural requirements.

1. INTRODUCTION

The European Union Deforestation Regulation (EUDR) will take effect on EU importers[1] on 30th December 2024[2]. By tackling the consumption of commodities it understands are linked with deforestation, the EU aims to play a leading role in the global efforts to halt deforestation in third countries and reduce emissions associated to it[3]. Third countries have increasingly criticised the EUDR's stringent rules, arguing that they represent an international intervention into local affairs and may conflict with World Trade Organization (WTO) principles[4]. Most actors agree on the importance of a multistakeholder approach to tackle deforestation. They however condemn EU's inflexible imposition of its own due diligence system without accounting for different realities.

The EU is dependent on the imports of some goods covered by the EUDR, for both domestic consumption and exports. While the regulation does not increase import tariffs, these products are expected to become more expensive due to the added costs of compliance, including documentation and shipment segregation. Empirical economic evidence, such as those presented in the Draghi report[5], suggest that declining competitiveness in various EU sectors is partly attributable to regulatory costs. European producers[6] [7] reliant on imported goods, as well as some national member-State authorities[8] [9], have claimed the unclarity in some aspects of the regulation while pledging for a bigger transition time.

To acknowledge the urgency of climate action and defend the rules-based trading system are not mutually exclusive exercises. Bridging the gap between international trade law and environmental law is essential to strengthening the former with rules and provisions for climate protection. Doing so outside of the rules and negotiations of the WTO, however, sets a risky precedent for increased global economic fragmentation and, ultimately, reduce the chances that climate measures will have the desired effect.

In light of relevant WTO cases, such as US Tuna/Dolphin and US Shrimp/Turtle, this policy brief argues that certain provisions of the EUDR may not fully align with WTO rules. The regulation risks being deemed "unjustifiable extraterritoriality" or "more restrictive than

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1 Soy, beef, coffee, cocoa, timber, palm oil and rubber.

2 European Commission (2023) Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023. (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1115). Accessed on 15/09/2023.

3 European Commission (2021) Questions and Answers on new rules for deforestation-free products. "What is causing forest degradation?" (https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_21_5919/QANDA_21_5919_EN.pdf). Accessed on 28/03/2023.

4 Atibt (2024) 17 producer countries write to the European Union to warn of the potential collateral effects of the EUDR on small producers. (https://www.atibt.org/en/news/13377/17-producer-countries-write-to-the-european-union-to-warn-of-the-potential-collateral-effects-of-the-eudr-on-small-producers). Accessed on 01/09/2024.

5 European Commission (2024) EU Competitiveness: looking ahead. (https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en). Accessed on 12/09/2024

6 FeedNavigator (2024) FERDIOL highlights persistent challenges with EUDR implementation. (https://www.feednavigator.com/Article/2024/09/09/FEDIOL-highlights-persistent-challenges-with-EUDR-implementation). Accessed on 16/09/2024.

7 FEDIOL (2024) FEDIOL, COCERAL, and FEFAC updated position on EUDR implementation. (https://www.fediol.eu/info/fediol%20coceral%20and%20fefac%20updated%20positio/english/1187970086/1719580082.html). Accessed on 16/09/2024

8 Euractiv, (2024) Austria's farming, economy ministers urge von der Leyen to delay EU anti-deforestation law. (https://www.euractiv.com/section/agriculture-food/news/austrias-farming-economy-ministers-urge-von-der-leyen-to-delay-eu-anti-deforestation-law/). Accessed on 01/09/2024

9 Bundeskanzler (2024) Nie waren freie Medien und guter Journalismus so wichtig. (https://www.bundeskanzler.de/bk-de/aktuelles/rede-bk-70-jahre-bdzv-2307876). Accessed on 16/09/2024

necessary" for not adequately considering different conditions in third countries. It concludes by proposing adjustments to make the EUDR more flexible and reflective of local realities to strengthen its WTO compatibility and long-term viability.

2. THE EUROPEAN UNION DEFORESTATION REGULATION (EUDR)

2.1. Background

The EUDR is a product of the European Green Deal which overarching goal is to decarbonise the EU's economy by 2050. Its centrality to the first von der Leyen administration in the European Commission (2019-2024) reflects not only the shifting balance of power following the 2019 European Parliament elections, but also underscores the growing environmental concerns that have emerged in European societies in those years[10].

The background to the EUDR is also rooted in the bloc's new paradigm of Open Strategic Autonomy. This strategy aims to strengthen the EU's position in international value chains by reducing its reliance on imports of key products. Concepts like reshoring, nearshoring, and friendshoring are all part of this approach[11] [12]. In addition to the EUDR, regulations such as the Carbon Border Adjustment Mechanism (CBAM)[13] and the Corporate Sustainability Due Diligence Directive[14] also extend EU requirements to third countries, imposing restrictions on the production method of non-EU companies seeking to export their products to the EU[15].

2.2. Scope and Application

European companies importing soy, beef, coffee, palm oil, wood, cocoa, rubber, and their derivative products will bear the burden of proving that their goods did not originate from forest areas converted after 31st December 2020. They must provide an EUDR statement demonstrating compliance with all relevant local legislation in each exporting country, along with full traceability of the goods throughout their supply chain. The regulation also includes provisions for periodic reviews to potentially expand its scope to cover new products and ecosystems.[16].

The regulation foresees its implementation to fall within the competence of the EU's member states, who have nominated their respective competent authorities on the matter. These

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[10] Pearson, M. Rudig, W. (2020).

[11] Raza, W. Grumiller, J. Grohs, H. Essletzbichler, J. Pintar, N. (2021).

[12] European Central Bank (2023) The EU's Open Strategic Autonomy from a central banking perspective. International Relation Committee. No 311. March 2023. (https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op311~5065ff588c.en.pdf). Accessed on 25/03/2023.

[13] OLP 2021/0214 (COD). (https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0214(COD)&l=en). Accessed on 30/03/2023.

[14] OLP2022/0051(COD).(https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0051(COD)&l=en). Accessed on 30/03/2023.

[15] OLP2021/0366(COD).(https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0366(COD)&l=en). Accessed on 30/03/2023.

[16] Whitin 12 months of entry into force: consideration of including other types of wooded lands; and within 24 months of entry into force: consideration of corn and other commodities, and other ecosystems.

authorities will have the autonomy to assess and check EUDR statements along with any included document or information. They are also tasked to conduct annual checks at firm level, to perform physical inspections of shipments, and if necessary, to apply fines.

2.3. Assessment of Risks and Annual Checks

Imported products will be evaluated based on the perceived deforestation risk associated with their countries of origin, in both EU member-States and third countries. At starting point, all countries were classified as of standard risk of deforestation. By its implementation on 31st December 2024, the European Commission is tasked to reclassify all countries in either low, standard or high-risk. This classification may be subject to further reviews at any time deemed necessary by the Commission.

The risk classification system will function as a benchmark to determine the level of checks performed on importers. Article 16, on paragraphs 8, 9 and 10, stablishes checks on company level that are determined by the country where firms source their imports. For low-risk, Member States are required "to ensure annual checks" (…) [that] "cover at least 1 % of the operators placing or making available on the market or exporting relevant products that contain or have been made using relevant commodities produced in a country or parts thereof classified as low risk"[17].

This level of coverture increases to 3 and 9 percent of the operators "placing or making available on the market or exporting" goods from countries of standard and high-risk, respectively[18]. Paragraph 9 adds a parameter of import checks based on total imports from countries of high-risk. It requires that "Each Member State shall ensure that annual checks [are] carried out by its competent authorities (…) [to] cover (…) 9 % of the quantity of each of the relevant products that contain or have been made using relevant commodities produced in a country or parts thereof classified as high risk".

2.4. Liability

The legal responsibility of providing accurate information in accordance with the EUDR falls upon EU importers. Failing to comply may result in penalties which include fines of up to 4 percent of the company's global turnover[19], confiscation of goods, and a temporary ban on placing products in the European single market.

[17] Article 16, paragraph 10

[18] Article 16, paragraph 8 and 9

[19] Other forms of sanctions are expected as confiscation of goods; confiscation of revenues from the concerned transaction; temporary exclusion from public procurement processes; temporary prohibition from placing goods in the European Single Market; and prohibition to use the simplified due diligence procedure foreseen within the definitions of the proposal.

2.5. EUDR and Existent Regulations

The EUDR introduces an overlapping set of provisions with the existing EU Timber Regulation[20]. The regulation is recognised as a successful tool "against illegal logging and associated trade"[21] in the original proposal text of the EUDR. Notably, the EU Timber Regulation has been widely accepted by international partners due to its reliance on compliance with local legislation in exporting countries, while maintaining a clear link between its objective of forest conservation and the specific imported product (timber). This direct connection allows exporting countries to effectively distinguish legal from illegal timber within their own jurisdictions, and to use the same legality check to comply with the EU Timber Regulation.

In contrast, the EUDR requires products to comply with EU's unique understanding of forest conservation, in which the cut-off date of 31st of December 2020 was chosen. Goods produced in areas that have been converted after this date may not access the EU single market. This imposes a challenge for many developing tropical countries that for historical reasons might have not concluded their processes of land occupation[22]. In some countries, the forestry component is deeply integrated in society and in agricultural practices, unlike in most EU member states where the production frontiers are well defined. In these cases, sustainable forestry management techniques may apply. A unilateral implementation of a cut-off date for all land conversion could restrict market access for goods that are legally produced in their countries of origin.

This makes the EUDR the first of its kind, as it applies an EU criteria of land management to commodities produced overseas. The extraterritoriality of laws, where an importing country enforces its own producing requirement to goods manufactured in third countries, is, however, not new. It has been a subject of international disputes. Some of the most prominent are the cases of US Tuna/Dolphin (1990-2018)[23], US Shrimp/Turtle (1998)[24], and EC Asbestos (2001). These WTO-settled disputes offer valuable insights for assessing the EUDR under the perspective of the WTO agreements.

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[20] European Commission (2010) Timber Regulation. (https://environment.ec.europa.eu/topics/forests/deforestation/eu-rules-against-illegal-logging_en). Accessed on 01/04/2023.

[21] European Commission (2021) COM/2021/706 final. (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:706:FIN). Accessed on 28/03/2023.

[22] In exception to Australia, all other tropical forest stock is found in developing countries. Dataset Mongabay (2023). The World's Largest Tropical Forests - by Country. (https://worldrainforests.com/amazon/countries.html). Access on 25/06/2024

[23] World Trade Organization (2019) DS381 (https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm). Accessed on 02/04/2023.

[24] World Trade Organization (2001) DS58: United States — Import Prohibition of Certain Shrimp and Shrimp Products. (https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm). Accessed on 02/04/2023.

3. IS THE EU DEFORESTATION REGULATION WTO COMPLIANT?

3.1. Non-Discrimination Principles

A rules-based multilateral trading system is fundamental to fostering stability and predictability for businesses. It ensures that countries refrain from unilateral discriminatory practices and unfair competition that could disadvantage domestic and foreign players. The two cornerstones of the WTO system are the principle of the Most-Favoured Nation Clause and the principle of National Treatment, included in the General Agreement on Tariffs and Trade (GATT).

The Most-Favoured Nation Clause prohibits WTO members from granting preferential treatment to goods originating from specific countries. In essence, all WTO members must be treated equally in terms of trade conditions. The National Treatment Clause prohibits member states from imposing more stringent requirements to imports compared to domestic "like products" - meaning they are similar and interchangeable in the market. Furthermore, Article XI of GATT prohibits quantitative restrictions on imports and exports.

While WTO agreements promote free trade, member states retain the right to implement trade-restrictive measures to achieve legitimate policy goals. GATT Article XX provides a framework for such exceptions, encompassing limitations on market access measures outlined in Articles I (Most-Favoured Nation), III (National Treatment), and XI (Quantitative Restrictions). This enables WTO members to restrict trade in pursuit of safeguarding public goods, such as public health or conservation of exhaustible resources.

In the event of disagreement regarding the interpretation of these principles in the context of national regulations, WTO members can initiate a dispute settlement complaint. The WTO dispute settlement system is based on a system of jurisprudence, where certain rulings and decisions issued by the Appellate Body (AB) hold significant weight when interpreting the future application of similar trade-restrictive measures[25].

In defending the WTO compatibility of the EUDR, the EU is likely to rely on Article XX (General Exceptions) to safeguard exhaustible natural resources. This approach mirrors past strategies in relevant disputes, such as the previously mentioned US Tuna/Dolphin (1991 and 2016) and US Shrimp/Turtle (1998) cases, when discussions were centred on interpreting Article XX exceptions to Articles I (Most-Favoured Nation), III (National Treatment), and XI (Quantitative Restrictions) of GATT. The EC Asbestos (2001) case is also relevant as it established a criteria for assessing "like products" under WTO law.

[25] For more on the WTO Dispute Settlement Body procedures: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. Accessed on 20/05/2024

3.2. The Assessment of Likeness within the EUDR Context

The concept of a "like product" lacks a universal definition within WTO agreements. However, the criteria established by the GATT Working Party on Border Adjustments in 1970 have been consistently applied and accepted by the WTO Dispute Settlement System. Based on that, the Appellate Body (AB) ruled in EC-Asbestos (2001) that likeness is affirmed when 4 sets of criteria are met: "the properties, nature, and quality of the products; the end-uses of the products; consumers' tastes and habits in respect of the products; and tariff classification of the products"[26].

In EC-Asbestos, the AB found that the presence or absence of asbestos (a carcinogenic substance) should be considered a physical characteristic. A fully informed consumer, aware of the health risks associated with asbestos, would likely differentiate between products based on this feature. The decision is relevant to environmental measures as it established that, even without actual market data, an expected change in consumers' taste can rule out the likeness of products. In that case, the distinction seemed to still be primarily based on the understanding of a different physical characteristic.

James Bacchus argues that if a WTO panel is convinced that consumers differentiate products due to processes and production methods that are non-product-related (with no influence on the product physical aspect), these products may not be considered like. Illustratively, this is the case of plastic bottle caps produced using a traditional manual inspection in comparison to automated processes. Despite the different inspection methods, the final plastic caps from both processes perform identically and meet all necessary standards for sealing bottles. If a country can convince a panel that consumers do differentiate between the two bottle caps, they might not be considered "like products" and they could be treated differently. Bacchus observes that in EC-Asbestos case, this understanding was reached regarding GATT Article III (National Treatment), while he assumes the same logic would generally apply to other WTO agreements and provisions[27].

The Dispute Settlement System has avoided ruling on likeness of products that derive from non-product-related processes and production methods under environmental demands. Since trade rules are only applied to like products, this refusal can be interpreted as a way of safeguarding the trading system from ruling on topics that are outside the scope of the WTO's trade regime.

If James Bacchus is correct in his assessment, one could argue that deforestation-free and non-deforestation-free products are not 'like products'. In that case, eventual trade distortions between countries of different deforestation status (or benchmark) shall not be considered as discriminatory. In this case, the EUDR would not be in breach of GATT Article I (Most-Favoured Nation), and possibly neither of Article III (National Treatment). Nonetheless, it could still be challenged under eventual breaches of GATT Article XI (Quantitative Restrictions).

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[26] World Trade Organization (2001) Report on Appellate Body European Communities–Measures Affecting Asbestos and Asbestos Containing Products. WTO Doc WT/DS135/AB/R at paras 90–122 and especially para 101. As in Japan – Alcoholic Beverages(1998)

[27] Bacchus, James. (2017)

3.3. Compliance Check: GATT Article XX as Exception to Article I, III and XI

While Articles I (Most-Favoured Nation), Article III (National Treatment) and Article XI (Quantitative Restrictions) from GATT aim at creating a non-discriminatory trade environment, Article XX (General Exceptions) lists up acceptable exceptions to discriminate. Relevant WTO complaints to this exercise are made on the basis of infringement to GATT's Articles, and whether the discrimination can be defended under Article's XX reasons for exceptions. Therefore, specific cases would list specific breaches, while a panel and the AB reports address them individually from the perspective of foreseen and acceptable discrimination, when appropriate.

For this reason, this section will draw lessons from disputed cases where Article I (Most-Favoured Nation), Article III (National Treatment) and Article XI (Quantitative Restrictions) were challenged, simplifying the exercise under a single umbrella of Article XX's exceptions.

3.3.1. Lessons from US Shrimp/Turtle (1998)

The US imposed a prohibition on the importation of shrimp from countries that lacked a conservation system for turtles certified by a US body. The application of the measure disregarded if its objective (the conservation of a natural exhaustible resource, turtles) was achieved by other processes not certified by the US scheme. For not considering the desirable outcome (the conservation of turtles) from different processes and production methods, the AB understood the US measure created an unnecessary barrier to trade. This means that even if the measure in question did not negatively affect the conservation of turtles, the lack of a US based certification, would penalise foreign producers.

In the US Shrimp/Turtle (1998), the AB clarified that, for trade restrictive measures to qualify as exceptions under GATT's Article XX (General Exceptions), they must align with one of the 10 objective elements listed in items a) to j)[28]. Furthermore, these measures should be applied in a manner to avoid unjustifiable or arbitrary restrictions, meaning to not be more restrictive than necessary to comply with its announced objective. The AB validated the link between preferences from local consumers (in the country where the measure is applied) to the protection of exhaustible resources (turtles) in exporting countries. Since this interpretation would grant an importer the right to create trade barriers to protect natural resources abroad, it has been understood by defenders of the EUDR as an essential element of its compatibility with the WTO. This came along with another central understanding that animal and plant life can be considered an exhaustible resource, altering a previous reading that suggested it would apply only to mineral goods. This understanding is especially relevant to expand the use of the exceptions to environmental conservation.

[28] (a) to protect public morals; (b) to protect human, animal or plant life or health; (c) to protect gold and silver stocks; (d) to secure compliance with laws or regulations which are not inconsistent with WTO Agreements, such as customs enforcement, patents, trade marks, copyrights, and deceptive practices; (e) relating to the products of prison labour; (f) protection of national treasures of artistic, historic or archaeological value; (g) conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (h) obligations under any intergovernmental commodity agreement which; (i) restrictions on exports of domestic materials under certain conditions; (j) matters of general or local short supply.

This case is relevant to establish the link between consumers' tastes and environmental conservation in exporting countries. It also paved the way for the understanding that measures that do not take into account policies and realities in exporting countries can constitute an unjustifiable extraterritoriality and an unnecessary barrier to trade. This aspect of the ruling presents a notable parallel with potential concerns regarding the EUDR in relation to Article XX (General Exceptions).

In this regard, the AB concluded that rigid, inflexible and unclear decisions in the US measure were inconsistent with the exemptions permitted by Article XX. Moreover, it concluded that by requiring exporting countries to comply with US local policies, this measure configured an unjustifiable extraterritoriality of US law, what would disregard the conditions prevailing in the context of exporting countries.

If the EUDR imposes rigid, inflexible, or unclear measures that unduly require exporting countries to comply with unilateral understandings by the EU, it could raise questions about the justifiability of such extraterritorial application of EU law. In this specific case, the cut-off date for deforestation (as of December 2020), and the benchmarking system (import checks of 1, 3 or 9 percent applied to different countries) could be understood as such.

A significant concern arises because the risk assessment fails to differentiate between products from legally or illegally cleared properties. This is especially relevant in some countries where clearing private properties within legal limits is permitted by law. In this case, legal deforestation is accounted within national forestry plans and national determined commitments (NDCs) for reducing greenhouse gas emissions[29]. One could say that a country with a "legal stock" to deforest can choose to reduce its emission in other sectors, such as transport, and maintain its emissions from deforestation stable. However, such actions conflict with the EU's unilateral cut-off date, after which it does not accept products from newly cleared areas to access its internal market.

It is important to note that in US Shrimp/Turtle, the AB revised its conclusions of incompatibility to consider the measure WTO-compliant only after the US engaged in cooperation and accepted outcome-based equivalence from third countries' practices[30].

[29] See more about NDCs and national development strategies in Verkuijl and Dzebo (2019)

[30] World Trade Organization (1998) Report of the Appellate Body, United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R. (http://www.wto.org/english/tratop-e/dispue/distabasee.htm). Accessed on 02/04/2023.

3.3.2. Lessons from US Tuna/Dolphin I & II (1990-2018)

This case resolved around a measure enacted by the US that prohibited imports of tuna fished under certain practices that were only used in Mexico. The rationale behind this was the United States' understanding that this specific practice endangered dolphins. In the series of panels (never formally adopted) from US Tuna/Dolphin I (1990)[31] [32], the main conclusion was that restricting market access based on processes and production methods constitutes a violation of GATT's Article XI (Quantitative Restrictions), and could not be an exemption (as listed in Article XX) to Article I (Most-Favoured Nation)[33].

In the reports from what is known as US Tuna/Dolphin II[34], that ranged from 2008-2018, the AB ruled the measure inconsistent to GATT's Article I (Most-Favoured Nation) since this practice was only observed in Mexico. However "uncalibrated" and discriminatory towards Mexico, the measure was considered proportional to its objectives. After adjustments made by the US in its Dolphin Protection Consumer Information Act (DPCIA), the measure was considered "calibrated" and proportional. The adjustments restricted imports based on risks and on levels of dolphins caught during tuna fishing, regardless the practice in place.

As in US Shrimp/Turtle (1998), the AB suggested that outcome-based measures are better fitted for complying with Article XX, in comparison to measures that differentiate goods based on their processes and production methods. Details of the developments in this dispute can be found in Sifonios and Ziegler (2020).

Therefore, one of the main lessons that can be extracted from the US Tuna/Dolphin relates to the distinction between trade restrictive measures based on processes and production methods from measures that consider equivalence of practices serving the same end. Hence, if the EU maintains an inflexible and rigid approach not considering certifications that attest for no-deforestation in exporting countries as an equivalence to an EUDR statement, it could be deemed as 'uncalibrated' to reach its objectives.

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[31] World Trade Organization (1994). Mexico etc versus US: 'tuna-dolphin'. (https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm). Accessed on 02/04/2023

[32] GATT (1994) United States – Restrictions on Imports of Tuna. (https://www.wto.org/gatt_docs/English/SULPDF/91790155.pdf). Accessed on 02/04/2023

[33] World Trade Law (1991). United States - Restrictions On Imports Of Tuna. (https://www.worldtradelaw.net/document.php?id=reports/gattpanels/tunadolphinI.pdf&mode=download). Accessed on 02/04/2023

[34] World Trade Organization (2019) United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products. (https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm). Accessed on 02/04/2023

4. COULD THE EUDR BE WTO COMPATIBLE?

The main lesson from US Shrimp/Turtle is that the applicability of a regulation by an importing country on all third exporting countries can be an unjustifiable extraterritoriality of its laws. The AB asserted that "measures must take into account different conditions in the territories of other Members"[35]. This is reinforced by US Tuna/Dolphin case's shift towards a WTO compatible measure when an outcome-based assessment substituted a differentiation only by processes and production methods.

The EUDR requests an EU-based assessment of deforestation risk to be decisive in granting market access for the relevant commodities. By not taking into consideration programmes, certifications and processes to fight deforestation in third countries, it could jeopardise these local actions in exporting markets by closing its market. The EUDR requests full traceability from each plot of land to individualised goods. As it stands, it excludes the possibility of accepting existent systems of batch certifications or mass balance in production lines.

This is, for instance, the case of the Amazon Soy Moratorium (ASM) in Brazil, a "sectoral agreement under which commodities traders have agreed to avoid the purchase of soybeans from areas that were deforested after 2008"[36]. This private-led initiative was highly successful for this commodity: less than 2 percent of the traded soy in Brazil could be linked to areas of deforestation in the crop of 2018/19[37] [38]. The compliance with the ASM has not just become a condition for international buyers sourcing in Brazil[39], but it has also contributed to dropping overall deforestation levels in the Brazilian Amazon[40]. ASM certified soy from Brazil would, technically, be in compliancy of EUDR's requirement of deforestation-free. It would, however, fail to be EUDR compliant as the regulation requests full traceability of each soy bean from each plot of land until the final product is put in the market. ASM certified soy works in a system of mass balance, where a certified production is accounted over its total weight, granting to producers the right to issue the same amount of that output as ASM certified. To fulfil EUDR's requirements, around 2.6 billion bags of soybeans from Brazil would need to be individually assigned with a unique identification containing its plot of land of harvest.

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35 World Trade Organization (1998) United States — Import Prohibition of Certain Shrimp and Shrimp Products. Available at (http://www.wto.org/english/tratop-e/dispue/distabasee.htm). Accessed on 02/04/2023.

36 Rausch, L. (2001). University of Winsconsin. WWF Case Study. Forest Practice. January 2021. Brazil's Amazon Soy Moratorium. (https://forestsolutions.panda.org/case-studies/brazils-amazon-soy-moratorium). Accessed on 10/09/2024.

37 GTS [Grupo Trabalho de Soja]. (2020). Soy Moratorium, crop year 2018/19; Monitoring non-compliant soy plantations using satellite images. (https://abiove.org.br/en/relatorios). Accessed on 10/09/2024

38 Heilmayr, R., Rausch, L.L., Munger, J. et al. (2020). Brazil's Amazon Soy Moratorium reduced deforestation. Nat Food 1, 801–810. (https://doi.org/10.1038/s43016-020-00194-5). Accessed on 10/09/2024

39 Jolly, J., and Ambrose, J. (2019). UK firms urge Brazil to stop Amazon deforestation for soy production. The Guardian. (https://www.theguardian.com/environment/2019/dec/03/uk-firms-urge-brazil-to-stop-amazon-deforestation-for-soy-production). Accessed on 10/10/2024

40 Kastens JH, Brown JC, Coutinho AC, Bishop CR, Esquerdo JCDM (2017) Soy moratorium impacts on soybean and deforestation dynamics in Mato Grosso, Brazil. PLoS ONE 12(4): e0176168. (https://doi.org/10.1371/journal.pone.0176168). Accessed on 10/10/2014.

The ASM case, which is one of many from other commodities and countries, suggests that the EU has room to cooperate with third countries and understand existent certification schemes and programmes to negotiate outcome-based deforestation-free declarations as requested by the EUDR.

If the assessment of deforestation-free remains an inflexible office-monopoly by the EU, the measure risks to be deemed insufficient to evoke Article's XX exceptions. However, based on the lessons of US Tuna/Dolphin, if the EU opens dialogue and is capable of granting deforestation-free status (and market access) based on the acceptance of outcome-based deforestation-free declarations, it is plausible to suggest that the EUDR could be deemed as non-discriminatory and calibrated towards its objectives. This would, according to this rational, be a sufficient condition to invoke Article's XX exceptions and for the EUDR to be WTO compliant.

The discussion of environmental-led trade barriers is deeper than a simple rules assessment. If some argue that trade rules are secondary to the current climate urgency, others defend the need for a predictable rules-based trade regime as a prerequisite to sustain a necessary peaceful multilateral order to deal with such urgency. The deadlock of the Dispute Settlement System of the WTO can be perceived as a symptom of how some countries would desire to see it governed by a new and modern set of rules, possibly entangling environmental provisions in fully. The EUDR is not the first trade measure to attempt to block trade under environmental conservation. However, the fact that it relies on the right to evoke an exceptions' clause exposes its fragility. Due to WTO's functioning, the AB has avoided to rule in such ways that would create jurisprudence where the exception would become the rule. This could open the pandora box to discrimination and large quantitative restrictions, putting the multilateral system in jeopardy.

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