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DOES THE EU DEFORESTATION REGULATION COMPLY WITH WTO REQUIREMENTS?

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In recent years, global concern over deforestation has intensified, alongside heightened recognition of the role consumer countries play in this loss through the demand for "forest-risk commodities" like beef, soy, palm oil, and timber. In response, many nations, particularly in Europe, North America, and Asia, are adopting regulatory frameworks to sever the link between their consumption and deforestation, making it illegal to place products associated with illegal or any deforestation on the market.

This issue has gained traction within the World Trade Organization (WTO), with increased calls for debate in the latter half of 2024 as the EU Deforestation Regulation (EUDR) approaches implementation at the end of the year. Critics, especially from producer nations, have raised concerns that the EUDR's unilateral trade standards could impose higher costs or barriers, particularly for small businesses.

This raises the question of whether the EUDR and similar regulations, such as the proposed US FOREST Act, could potentially conflict with WTO obligations. This report explores the potential conflicts between regulations like the EUDR and WTO obligations, assessing stakeholder concerns and determining whether these regulations align with international trade law.

Key Findings

- The EU Deforestation Regulation (EUDR), and the proposed US FOREST Act are designed to tackle problems associated with clearance of forests for commodities – illegality in the country of origin and, for the EUDR, deforestation, whether legal or illegal.
- Countries exporting commodities affected by the new legislation – most recently, India, Colombia and Brazil – have raised concerns on the grounds of possible incompatibility with WTO trade rules, on the grounds that the regulations impose new non-tariff barriers.
- In reality, however, the WTO system allows governments considerable latitude in imposing trade-related environmental measures. Several existing regulations, in the EU, US and elsewhere, already contain elements similar to those in the EUDR and proposed FOREST Act, and none have ever been challenged at the WTO.
- This paper concludes that, in the event of any WTO challenge against the EUDR or FOREST Act (if it becomes law), legal and illegal products, and products free of deforestation and products produced with deforestation, are not 'like products' in WTO terminology, and discrimination between them would be permitted.
- Even if a dispute panel considered them to be 'like', they would be saved by one or more of the exceptions in the GATT, most probably Article XX(g), 'relating to the conservation of exhaustible natural resources' – in this case, forests – 'if such measures are made effective in conjunction with restrictions on domestic production or consumption.
- Where the regulations lead to imports from different countries being treated differently – for example, as a result of the EUDR's benchmarking process, or the FOREST Act's action plan requirements – it would help the EU's or US's case in any trade dispute if it provides comprehensive assistance to the exporting country in tackling the challenges. And of course, this not only minimises disruption to trade but helps to address the problems of illegality and deforestation that the regulations are designed to address.

Introduction

Recent years has seen growing concern over the extent of global deforestation, together with an increased awareness of the role of consumer countries in driving this forest loss through their consumption of 'forest risk commodities' often associated with deforestation, such as beef, soya, palm oil and timber. Accordingly, an increasing number of countries are putting in place regulatory frameworks to try to break the link between their countries' consumption and deforestation.

In Europe this includes the EU Timber Regulation (EUTR), in force since 2013, which made it an offence to place illegally sourced timber products on the EU market. This has now been replaced by the new EU Deforestation Regulation (EUDR), which extends this approach to a wider range of commodities, and adds, alongside the legality criterion, a requirement that products must have been sourced without deforestation after 2020.

The UK has its own version of the EUTR – the UK Timber Regulation – and is also in the process of introducing legislation to prohibit the placing on the market of a range of commodities whose production has been associated with illegal deforestation.

In the US, the Lacey Act prohibits the import of illegally sourced timber, alongside fish and wildlife. The proposed FOREST ('Fostering Overseas Rule of law and Environmentally Sound Trade') Act, first introduced in the Senate in 2021 and reintroduced in 2023, aims to apply a similar approach to specified forest risk commodities.

Several countries which produce and export large volumes of these commodities have expressed alarm at the possible implications for their economies. In August 2024 it was reported that India regarded the EUDR as an 'instrument of protection' as a non-tariff barrier, and intended to raise their concerns during the next round of free trade negotiations with the EU, scheduled for September 2024.[1] In May 2024, the US government argued that the EUDR posed 'critical challenges' to US producers and asked for a delay in implementation.[2] In June 2023, an Indonesian government minister described the EU as conducting 'regulatory imperialism' with its new deforestation law,[3] though the establishment of an EU–Indonesia–Malaysia Joint Task Force soon after seems to have defused some of the tensions.[4]

The issue has also been raised in discussions within the World Trade Organisation (WTO) in 2023 and 2024, including at meetings of its Committee on Market Access, Council on Trade in Goods and Committee on Trade and Environment. In November 2023 a number of Latin American countries circulated a paper within the WTO expressing: 'concern about this unilateral standard that imposes a trade measure that could generate higher costs or barriers to trade, especially for small businesses and producers in chains of great importance to our countries'.[5] It is notable, however, that no formal dispute has been initiated on the topic, despite much speculation that one could be.[6]

Are there grounds for thinking that the EUDR – and the proposed US FOREST Act, which in some respects is similar – could be incompatible with WTO obligations?

Background: the EU Deforestation Regulation

The EUDR was agreed in 2023 and must be implemented in full by the end of 2024 (small companies have another six months).[7] It contains the following main components:

- A prohibition on first placing or making available designated commodities and products on the EU market or exporting them from the EU unless they are deforestation-free and have been produced in accordance with relevant legislation of the country of production.

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1 'India to bring up CBAM, deforestation rules at FTA talks with EU', *Hindustan Times*, 26 August 2024; https://www.msn.com/en-in/news/India/india-to-bring-up-cbam-deforestation-rules-at-fta-talks-with-eu/ar-AA1pqww3.

2 'US urges EU to delay deforestation law', Financial Times 20 June 2024; https://www.ft.com/content/1b1c7541-92f8-478a-9e18-8c0419af7714.

3 'Indonesia accuses EU of "regulatory imperialism" with deforestation law', *Reuters*, 8 June 2023; https://www.reuters.com/business/environment/indonesia-accuses-eu-regulatory-imperialism-with-deforestation-law-2023-06-08/.

4 'The European Commission, Indonesia and Malaysia agree to set up a Joint Task Force to strengthen the cooperation for the Implementation of EU's Deforestation Regulation', EU press release, 29 June 2023; https://www.eeas.europa.eu/delegations/indonesia/european-commission-indonesia-and-malaysia-agree-set-joint-task-force-strengthen-cooperation_en?s=168.

5 'European Union Regulation on Deforestation and Forest Degradation-Free Supply Chains: Communication from Argentina, Brazil, Colombia, Ecuador, Guatemala, Honduras, Mexico, Paraguay and Peru', 10 November 2023 (WT/CTE/GEN/33);

6 Some of the commentary has confused this issue with completely separate WTO disputes brought by Malaysia and Indonesia over the EU's withdrawal of support for palm oil used in biofuels.

7 https://environment.ec.europa.eu/topics/forests/deforestation/regulation-deforestation-free-products_en.

- An obligation on companies placing the products on the market or exporting them to exercise due diligence to ensure compliance with these criteria, and to file a due diligence statement when placing them on the market or exporting them.
- A 'benchmarking system' to assess the level of risk that products from particular producer countries, or parts of them, may not be in compliance with those criteria.

The commodities covered are cattle, cocoa, coffee, oil palm, rubber, soya and wood. The precise products are specified by their CN customs codes, and include several semi-processed and processed products, such as chocolate and leather. The list of products will be reviewed in 2025, and periodically thereafter; possible additions include maize and biofuels.

'Deforestation-free' is defined in relation to the FAO definition of 'forest', and means produced without deforestation after 31 December 2020; timber products must also have been produced free of forest degradation after this date. 'Legality' is defined as covering the country of origin's laws concerning the legal status of the area of production in terms of land use rights, environmental protection, forest-related rules, third parties' rights, labour rights, human rights protected under international law, the principle of free, prior and informed consent, and tax, anti-corruption, trade and customs regulations.

The process of due diligence a company placing designated products on the market (an 'operator') must go through is spelt out in some detail, and includes:

- Information collection on the products, including their description, quantity, origin (including geolocation data – the geographic coordinates of the land on which they have been grown), details of suppliers, and evidence that the products are deforestation-free and have been produced legally.
- A risk assessment step, to determine the level of risk of non-compliance associated with the products.
- A risk mitigation step if the company cannot be sure that there is no risk, or only a negligible risk, that the products are not compliant.

Companies sourcing products that have already been subject to the due diligence process, e.g. chocolate manufacturers sourcing cocoa beans from an importer into the EU – 'downstream operators' – face lighter obligations. Operators are also obliged to submit a 'due diligence statement' before the products are placed on the market or exported, stating that the products meet the criteria, or at least that there is a negligible risk of them not doing so, and containing basic information about the products, including geolocation coordinates.

Where a company is a 'trader' rather than an 'operator' – i.e. a company further down the supply chain, that purchases products from an operator – it must also keep records of who it buys the products from and who it sells them to, and details of their accompanying due diligence statements. If the trader is an SME, this is its only requirement. Larger traders are subject to the same due diligence requirements as operators, including having to submit due diligence statements.

Under the benchmarking system, the European Commission is required to assess the level of risk of producer countries, or parts of them, and must place them in three tiers: high, standard or low (the default is standard). The level of risk will be based primarily on the rates of deforestation and expansion of agricultural land in the country, but may also take into account a range of other factors,

such as the extent to which the country's Nationally Determined Contribution (NDC) to the Paris Agreement on climate change includes land-use emissions, and the presence of relevant national laws and whether they are effectively enforced. Companies sourcing products from low-risk countries will be subject to a simplified due diligence procedure, including only the information collection requirements and not the risk analysis or risk mitigation steps. Companies sourcing products from high-risk countries will not face any additional requirements, but they will be subject to an increased frequency of checks by enforcement authorities.

Background: the proposed US FOREST Act

The proposed FOREST ('Fostering Overseas Rule of law and Environmentally Sound Trade') Act was first introduced in the Senate in 2021 and reintroduced, with some amendments, in 2023.[8] Its provisions include the following:

- A prohibition on the import of designated commodities, and products containing them, produced on land illegally deforested after the date of enactment of the legislation; the initial list is palm oil, soy, cocoa, cattle and rubber, and various derivative products. (Wood pulp was included in the 2021 version but removed from the 2023 text given it is already covered by the Lacey Act.)
- Illegality is determined in relation to the laws of the country of origin on anti-corruption, land tenure rights and the free, prior, and informed consent of indigenous peoples and local communities.
- A requirement for an import declaration stating that the importer has exercised reasonable care to avoid sourcing products from illegally deforested land (to be introduced a year after enactment).
- A requirement for a more detailed import declaration, including detailed traceability reporting and information on the steps taken by the importer, for products from any high-risk country subject to an action plan (to be introduced a year after finalisation of the action plan).
- US Customs & Border Patrol would conduct random audits of importers filing both types of declaration in order to ensure that the importers have retained documents showing that reasonable care was properly exercised.
- Guidance to be published by the government on what constitutes 'reasonable care' and the traceability information needed, and the possible role of certification systems.
- A 'trusted trader' programme to streamline requirements for importers demonstrating a transparent and credible due diligence system and a track record of compliance, supply chain traceability and transparency, and sourcing of illegal-deforestation-free products.
- A process for identifying countries with a high risk of illegal deforestation (within six months) which will then be made subject to an action plan (within two years). Action plans are to include reforms of laws and policies, capacity-building, and measures to develop traceability, monitoring and data sharing.

[8] https://www.congress.gov/bill/118th-congress/senate-bill/3371.

- Each action plan is to include intermediate and final benchmarks, and there is a procedure for the government to determine whether or not they have been met; when the country has put in place adequate and effective protection against illegal deforestation, the action plan can be terminated.
- The action plan is to be drawn up by the US government, but input is to be sought from the country concerned, and from the public, and financial assistance is to be made available to countries implementing their action plans.
- Preference is to be given in public procurement contracts to contractors having an effective policy in place to avoid products associated with illegal deforestation.

The Act also establishes illegal deforestation as a specified unlawful activity under US money laundering law, meaning that individuals (including foreign persons engaging in transactions in the US) knowingly engaging in financial transactions involving property derived from illegal deforestation could be subject to fines and imprisonment. The global reach of the US financial system could make this provision a significant law enforcement tool.

The bill was introduced by Democrat legislators with Republican co-sponsors. Several US environmental groups, the US cattle industry (concerned about Brazilian competition) and the Sustainable Food Policy Alliance (including Danone, Mars, Nestlé and Unilever) endorsed the proposal, though it was also argued by some NGOs that the proposal did not go far enough, in only targeting illegal deforestation rather than all deforestation. Given US hostility to the EUDR, however (see above), its prospects do not look particularly positive.

The EUDR and FOREST Act and international trade law

Any measures taken by consumer countries – including the EUDR and the FOREST Act – to discriminate in trade between products based on the ways in which the products are produced, rather than their inherent characteristics, raises potential questions of compatibility with the trade disciplines of the World Trade Organisation (WTO).[9]

The WTO agreements lay down general rules for governments to follow in liberalising international trade. They cannot possibly deal with every specific traded product, so they set out broad principles which must be interpreted and applied in particular dispute cases where one WTO member believes that another is failing to comply with them. (WTO rules apply only to governments and public policy, not to private enterprises and their purchasing and sourcing policies.)

The WTO system is based around opposition to discrimination in trade. Its core principles, found in its central agreement, the General Agreement on Tariffs and Trade (GATT), include GATT Articles I ('most favoured nation' treatment) and III ('national treatment'): WTO members are not permitted to discriminate between 'like products' produced by other WTO members, or between domestic and international 'like products'. GATT Article XI ('elimination of quantitative restrictions') forbids any restrictions other than duties, taxes or other charges on imports from and exports to other WTO members.

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[9] For a more detailed discussion of these issues, see Duncan Brack, *Combating Illegal Logging: Interaction with WTO Rules* (Chatham House, 2013).

Essentially the same principles are built into the other WTO agreements that have developed alongside the GATT, such as the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Standards. It was always recognised, however, that some circumstances justified exceptions to this general approach, permitting governments to apply unilateral trade restrictions in particular circumstances; these are set out in GATT Article XX, and similar provisions are included in other WTO agreements. These include two clauses that have often been cited in disputes involving environmental restrictions: measures 'necessary to protect human, animal, or plant life or health' (Article XX (b)); and measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption' (Article XX (g)). In addition, in all cases, the country adopting the measure needs to demonstrate that it is not applied in a manner which would constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and that it is not 'a disguised restriction on international trade'.

The bodies that carry out the interpretation of these rules in trade disputes are the dispute panels (generally composed of trade experts), which issue an initial set of findings, and the WTO Appellate Body (mostly international lawyers), to which dissatisfied parties can appeal. Since their decisions can only be overturned if all WTO members (other than those involved in the dispute) agree – which has never happened – the system has proved to be a powerful means of resolving conflicts and ensuring that trade rules are interpreted and applied consistently around the world. If the loser in any given case does not modify its policy accordingly, the winner is entitled to take trade-restrictive measures (e.g. apply tariffs) against it to the estimated value of the trade lost because of its action.

Currently, however, the WTO's dispute settlement system is in disarray, since the US has systematically blocked the appointment of members to the Appellate Body since 2011, citing a range of objections to the way in which the system has worked. As a result, the Appellate Body – and, in effect, the whole dispute settlement procedure – has now ceased to function. In response, in 2020 a number of WTO members, including the EU and its member states and (currently) 26 other WTO members, established the Multiparty Interim Appeal Arbitration Arrangement, designed to replace the WTO's dispute settlement system on a contingency basis.

It should be noted that interpretations can change, even if the wording that is being interpreted does not. Since the founding of the WTO, decisions by the Appellate Body in particular have clearly helped to shift the way in which the system is applied, especially in environment-related disputes. It is this key role for interpretation that often leads to uncertainty and disagreement over what the WTO rules might mean in practice.

Against this background, the inter-relationship of the EUDR and FOREST Act with the WTO system raises three questions:[10]

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[10] For the WTO compatibility of the EUDR, see Bruno Capuzzi, *Is the European Union Deforestation Regulation WTO-proof?* The context of EU's green agenda and an exercise of WTO compatibility (October 2023; available at SSRN: https://ssrn.com/abstract=4443139 or http://dx.doi.org/10.2139/ssrn.4443139); Gracia Marín Durán and Joanne Scott, 'Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union', Journal of Environmental Law, 2022, 00, 1–29; Enrico Partiti, Regulating trade in forest-risk commodities (Tilburg University Discussion Paper, June 2019); Concetta Maria Pontecorvo, 'The Proposed EU Regulation on Trade in Forest-Risk Commodities (FRCs): A First Assessment', European Yearbook of International Economic Law 2022 13: 507–540.

1. Does the WTO system allow discrimination in trade based on the legality of production (and, for the EUDR, the zero-deforestation requirement) of the products in question?
2. Do the requirements for the due diligence statements of the EUDR, and for the import declaration requirements of the FOREST Act, lead to more favourable treatment for domestic production as against imports?
3. Will the benchmarking system (for the EUDR), or the different treatment of imports from high-risk countries operating under an action plan (for the FOREST Act), represent discrimination on the basis of national origin?

1. Legality-based trade measures

The question of whether products possessing identical physical characteristics but grown, harvested or processed in different ways are 'like products' – for example, certified sustainable timber and timber not so certified – was extensively discussed in the early years of the trade–environment debate. It was triggered in particular by a GATT panel ruling (in the tuna–dolphin dispute case in 1991, before the establishment of the WTO in 1995) which suggested that this kind of discrimination was not compatible with the GATT – a conclusion which became conventional wisdom and which, in some quarters, is still regarded as such.

In fact, however, no such language exists in the GATT or other WTO agreements, and a number of later WTO disputes (in particular the shrimp–turtle disputes of 1998 and 2001 and the asbestos case of 2001) comprehensively undermined the conclusion that discrimination was not permitted on the basis of 'processes and production methods' (PPMs).

In particular, the asbestos dispute, together with an earlier dispute over Japanese alcoholic beverages, helped to determine how 'likeness' should be determined, including through consideration of the nature and extent of the competitive relationship between the products concerned. This determination, which dispute panels have accepted needs to be carried out on a case-by-case basis, covers factors including the end uses of a product in a given market, the product's physical properties, nature and quality, consumer tastes and preferences and tariff classification.

Even where products are determined to be 'like', discrimination could still be permitted under one of the exceptions in GATT Article XX. This applied in the shrimp–turtle dispute, for example, which saw the US permitted to maintain its embargo on imports of shrimp caught in ways which killed endangered species of sea turtles – a PPM. This long-running dispute, involving two separate cases, led to a number of conclusions with important implications for PPM-based trade discrimination. These included the conclusion that discrimination on the basis of PPMs could be permitted as long as it was carefully targeted (e.g. on a shipment of shrimp rather than a country-of-origin basis) and as long as it is enforced evenly between domestic and foreign products; and that while bilateral or multilateral agreements covering the traded products in question are always preferable, unilateral environmental measures which restrict trade may still be lawful even in their absence.

There are no relevant dispute cases involving measures targeting illegal products, such as the EUDR or the proposed FOREST Act. It has been argued by some commentators that legal and illegal timber should be considered to be 'like products' and therefore any discrimination between them would be a violation of GATT Article I. This is not a strong argument. Although, clearly, the end

uses and physical properties of legal and illegal products are the same, consumer tastes and preferences are not; consumers would expect products on sale to have been legally produced. Arguably, legality is a universal requirement that any product must possess to be put on sale in a market.

Even if it was concluded that legal and illegal products are 'like', the measure could still be saved by one of the exceptions in GATT Article – probably Article XX(g), 'relating to the conservation of exhaustible natural resources' – in this case, forests – 'if such measures are made effective in conjunction with restrictions on domestic production or consumption'. The EUDR imposes exactly the same requirements on domestic production as it does on imports, so this second part of the Article should be satisfied. The FOREST Act only applies to imports, but, as argued below, the US has other laws in place to guarantee that production of the commodities in question is legal.

As well as its legality criterion, the EUDR also imposes a zero-deforestation requirement. Again, it can certainly be argued that products produced with and without deforestation are *not* 'like'; consumers have often shown preferences for purchasing, for example, certified timber. Even if they were considered to be 'like', again a strong case can be made for the measure under the environmental exceptions in GATT Article XX.

2. Import declaration requirements

It is of course virtually inconceivable that any country would mount a challenge under the WTO on the basis that illegal products exported from its own territory should not be excluded from international trade – in effect, it would be arguing that its own laws should be broken with impunity. What is more possible is that a country could mount a challenge against measures applied against illegal products that it felt unfairly discriminated against its own exports of legally produced equivalents – for example if they faced requirements for documentary proof of legality that products produced domestically in the importing nation did not.

In fact, precisely this concern was raised by a number of timber-exporting countries, including Canada and New Zealand, during the Australian parliament's hearings on the draft Australian Illegal Logging Prohibition Bill, in 2011–12. They argued that the requirements in the Bill for importers to undertake due diligence to mitigate the risk of their products containing illegally logged timber, and to complete a statement of compliance with the due diligence requirements alongside the customs import declaration, could violate GATT Article XI. The Australian government did not agree with them, however, and the legislation entered into force in 2014; in any case it requires both importers and domestic processors to exercise due diligence with regard to timber products, so there is in practice no discrimination between imports and domestic production. No WTO dispute was pursued.

In the case of the EUDR, the requirements for operators to file a due diligence statement when placing designated products on the market or exporting them are identical whether the products are imported from outside the EU or produced domestically within the EU. As the European Commission concluded, in the impact assessment accompanying its initial proposal for a regulation, there is no discrimination, so the measure should be compatible with WTO obligations.

Even in the absence of discrimination, it is possible that a dispute panel might find that the disruption to trade caused by the requirement for a due diligence statement could outweigh the benefits, and that there were other less trade-restrictive measures available to achieve the same end – as defined in WTO jurisprudence, effectively conducting a 'balance', or 'proportionality' test,

and 'reasonableness' in the application of the measure. It is hard to see what alternative measures could achieve the same result, but the more that the EU makes assistance available to countries that might otherwise be disadvantaged, in order to ensure compliance with the measure – for example with establishing national traceability systems, as the EU is doing in West Africa for cocoa – the more favourably the EUDR would be treated in a dispute.

The FOREST Act is different; it requires importers of the listed products to file an import declaration stating that they have exercised reasonable care to avoid sourcing products from illegally deforested land. Since there is no equivalent obligation for domestic producers of the same or like products, it could be argued that the requirement for an import declaration could violate WTO rules. However, it can also be argued that US producers in practice face similar obligations, in terms of the requirement to ensure that their products are produced legally. The difference is that US producers are assumed to have done so, and do not need to make an explicit declaration that they have; also, they will be subject to legal action within the US if it can be shown that they have engaged in illegal behaviour. The same cannot be said of the equivalent products from other countries where there is a genuine risk of illegal behaviour; the legal framework and law enforcement capabilities are likely to be weaker, and they may well not face prosecution. Thus, the import declaration is designed to show that the conditions under which the products have been produced – i.e. that they have been produced legally – are the same as those faced by US producers.

Even accepting this, if producing the import declaration proves to be excessively burdensome, and creates a competitive disadvantage for importers, there could still be a case of discrimination against imports; this cannot be judged until we know exactly what details will be needed for the declaration.

However, there are a number of similar (though not quite identical) requirements in other aspects of US law, and none have ever been challenged under the WTO. As well as prohibiting the import of illegally sourced timber, fish and wildlife, the Lacey Act requires an import declaration for timber products. This includes information on the scientific name of the species, the value and quantity of the timber and the name of the country in which the timber was harvested; no detail on compliance with national laws is required.

The Seafood Import Monitoring Program establishes reporting and record-keeping requirements for imports of over 1,100 species of fish and seafood products. It was introduced, in 2018, specifically to combat illegal, unreported, and unregulated fish products from entering US commerce. The traceability requirements are designed to deliver chain-of-custody data from the point of harvest or production to the point of entry into the US; companies must provide the name and flag state of the harvesting vessel; evidence of authorisation to fish, farm or both (permit, farm registration or license number); the unique vessel identifier, when available; the name of the farm or aquaculture facility; and the type of fishing gear used. In its requirement for evidence of authorisation, it is similar to the FOREST Act's requirement for proof of legality.

As noted, the FOREST Act imposes a requirement for importers to exercise 'reasonable care' in sourcing their products. In fact importers of all products into the US already operate under an obligation to exercise 'reasonable care' in collecting and notifying the information Customs & Border Patrol needs to allow their import, assess import duties, collect statistics and determine whether any other applicable requirement of the law has been met. This obligation was created under an amendment to the US Tariff Act in 1993. Customs & Border Patrol issues guidance as to what constitutes 'reasonable care', and it seems likely that the guidance to be issued under the

FOREST Act would mirror this approach, extending it to cover the issue of the legality of the products in question. (This specific issue does not feature in the existing guidance except with respect to the question of whether the products have been produced with forced labour, which is explicitly prohibited under the Tariff Act.)

As noted, a definite conclusion on the WTO compatibility of the import declaration requirements of the FOREST Act probably cannot be made until we know exactly what details will be needed.

3. Different requirements for imports from high-risk countries

The final question is whether the different treatment of imports from high-risk countries could be regarded as discrimination on the basis of national origin. For the EUDR, this stems from the benchmarking process to identify the level of risk of source countries, or parts of countries, for the products it covers. As noted above, regardless of the level of risk, any company placing a designated product on the EU market must fulfil the information collection requirements of the regulation, including information on the geolocation of the products, and must file a due diligence statement containing that information and an assertion that there is a negligible risk of non-compliance with the legality and zero-deforestation criteria.

Companies sourcing from standard or high-risk countries must also carry out the risk analysis and risk mitigation steps of the due diligence process; the only difference between these two levels of risk is that enforcement authorities are to apply a higher level of checks on companies sourcing from high-risk countries. Whether in practice this will lead to de facto discrimination between products from countries placed in the different categories of risk is not clear, and will depend to a large extent on the difficulties and burdens of fulfilling the risk analysis and risk mitigation steps, which will not become evident until the EUDR starts to be implemented and enforced. An additional factor is the degree to which the benchmarking procedure is carried out equitably and objectively; whereas many of the factors to be taken into account – such as the rates of deforestation or agricultural expansion – are objective, some of them – such as the effectiveness of enforcement of relevant laws – seem likely to be more difficult to analyse.

If the benchmarking process leads to markedly different treatment of products from countries with different levels of risk, this may be the issue on which a claim of discrimination could carry most weight. Again it will depend on exactly how the process works out, including the extent of dialogue with and assistance offered to potentially high-risk countries which the EUDR requires.

For the FOREST Act, a similar question is raised by the different treatment of imports from high-risk countries operating under an action plan: could this be regarded as discrimination on the basis of national origin? It is logical to require a greater level of detail of traceability information for products from high-risk sources. However, the fact that it is the US government that determines the level of risk of the source country, and imposes the action plan on it, would not be helpful if a WTO case was brought.

As noted above, in general the WTO system prefers multilateral to unilateral action, though it is possible that the unilateral measure could be saved under one of the exceptions in GATT Article XX. The more that it can be shown that the action plan is drawn up jointly between the US and the source country, and the more that the US provides financial and capacity-building support in implementing it (as reflected in the FOREST Act), the lower the chance of a successful WTO challenge (and the lower the chance of a challenge in the first place).

Conclusion

The possibility of a WTO dispute is often highlighted by governments or stakeholders when they disagree with a particular proposal or measure introduced by another government. While such concerns are frequently raised, actual WTO dispute cases are far less common, and the threat is sometimes made without a full grasp of WTO procedures.[11] In practice the WTO system allows governments considerable latitude in imposing trade-related environmental measures.

The approach of both the EUDR and the proposed FOREST Act is to discriminate between products not on the basis of their national origin but on the basis of their legality and, for the EUDR, the extent to which they are associated with deforestation. While there is no experience of any WTO dispute case dealing with trade measures aimed at against illegal products, there are strong reasons to think that:

- Legal and illegal products, and products free of deforestation and products produced with deforestation, are not 'like products' in WTO terminology, and discrimination between them would be permitted.
- Even if a dispute panel considered them to be 'like', they would be saved by one or more of the exceptions in the GATT, most probably Article XX(g), 'relating to the conservation of exhaustible natural resources' – in this case, forests – 'if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

A number of trade measures already in place in various countries, including the EU Timber Regulation, the US Lacey Act and the Australian Illegal Logging Prohibition Act, require importers to treat legal and illegal products differently, and none have ever been challenged at the WTO.

WTO disciplines should not be ignored, however, and it is always worthwhile keeping the disruption to trade necessary to achieve the aims of the regulations to a minimum. Where the regulations lead to imports from different countries being treated differently – for example, as a result of the EUDR's benchmarking process, or the FOREST Act's action plan requirements – it would help the EU's or US's case in any trade dispute if it provides comprehensive assistance to the exporting country in tackling the challenges. And of course, this not only minimises disruption to trade but helps to address the problems of illegality and deforestation that the regulations are designed to address.

[11] It should also be remembered that the WTO dispute resolution system is currently in disarray, which will limit its ability to handle cases efficiently.

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