



LAW 2021/14
Department of Law

WORKING PAPER

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Global Deforestation Footprint
Through Trade Regulation**

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LAW Working Paper 2021/14

ISSN 1725-6739

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Published in December 2021 by the European University Institute.
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Italy
www.eui.eu

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With the support of the
Erasmus+ Programme
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Abstract

The European Union (EU) is a major importer of forest risk commodities (FRCs) and thereby bears significant responsibility for the dangerous trend of global deforestation and forest degradation. This article analyses EU action to reduce its global deforestation footprint, including current initiatives to regulate the placing on the EU market of illegally sourced timber and the European Parliament (EP)'s recent push for more ambitious legislation with respect to forest and ecosystem-risk commodities. The article sets out several justifications for stepping up EU action to regulate trade in FCRs, arguing among other things that the EU has a moral imperative to avoid being complicit in global deforestation. The article also argues that measures to reduce the EU's global deforestation footprint can, if carefully designed and applied, be compatible with the law of the World Trade Organization (WTO). The openness of the EU to cooperate with affected exporting countries can make an important contribution in this respect. The paper addresses these issues with reference to the recommendations put forward by the EP for an EU legal framework to halt and reverse EU-driven deforestation. As the European Commission moves forward with its own legislative proposal on this topic, it is important that the EP's ambitious recommendations are not overlooked.

Keywords

Deforestation and forest degradation, trade in forest-risk commodities, forest due diligence, EU as a norm catalyst, WTO law

1. Introduction

By proclaiming an International Day of Forests on 21 March each year,¹ the United Nations General Assembly (UNGA) sought to raise awareness of the indispensable role of forests for life on Earth and human well-being.² Forests provide us with essential goods and ecosystem services (e.g., clean air, rainfall, carbon reduction and habitats for animals and plants), are a source of livelihood and income for about 25% of the world's population (including vulnerable and indigenous communities) and hold intrinsic cultural and spiritual values for many peoples. And yet, it is no secret that the world's forests are in serious danger. According to the latest joint report by the United Nations Environment Programme (UNEP) and Food and Agriculture Organization (FAO), global deforestation and forest degradation continued to take place at 'alarming rates' in 2015-2020.³ During this period, the rate of deforestation was estimated at 10 million hectares per year, compared to 16 million hectares per year in the 1990s. In absolute terms, the global forest area decreased by 178 million hectares between 1990 and 2020, which is an area about the size of Libya, albeit this environmental loss is more pronounced in some regions of the world (i.e., Central Africa, South America and Southeast Asia) than in others (e.g., Europe).⁴

While threats to the world's forests have been widely recognized as one of the biggest sustainability challenges of our time, this has received relatively little attention in legal scholarship, perhaps due to the lack of a comprehensive international treaty on forests. In this article, we wish to fill this gap with a specific focus on the regulatory steps that the EU has taken and is considering taking to address its share of responsibility for this global problem.

We begin by explaining why the EU is part of the global deforestation and forest degradation problem, being notably one of the world's largest importers and consumers of FRCs (Section 2).⁵ We then provide an overview of the plethora of international commitments that have been made over the past three decades, including by the EU, to reverse the trend of global forest loss and ensure sustainable forest management (Section 3). This will serve as a backdrop to our subsequent analysis of EU interventions to reduce its global deforestation footprint. We will examine its existing regulatory initiatives to combat illegal logging and related trade in illegally harvested timber and argue that a more ambitious approach is needed to regulate trade in forest-risk agricultural commodities, along the lines of the recent recommendations put forward by the EP (Section 4). We will offer a number of normative justifications for stepping up EU regulatory action in this direction, including that the EU has a moral duty not to contribute to environmental wrongdoing in third-countries through its demand for FRCs (Section 5). We will then consider potential legal constraints on the contemplated EU mandatory due diligence legislation for FRCs, demonstrating that it can be made compatible with WTO law (Section 6). The final section concludes our discussion and sets out an agenda for future research by reflecting on the need for the EU to integrate better security of supply and sustainability concerns in relation to natural resources (Section 7).

¹ UNGA Res 67/200 (14 February 2013) UN Doc/A/RES/67/200.

² For an excellent overview see Fred Pearce, *A Trillion Trees* (Granta Books, 2021).

³ UNEP/FAO, *The State of World's Forests* (2020) xvi <www.fao.org/documents/card/fr/c/ca8642en/> accessed 14 November 2021.

⁴ *ibid* xvii and ch 2.

⁵ Due to space constraints, we focus in this article on forests and FRCs, while not neglecting the environmental importance of other high-carbon stock and biodiversity-rich ecosystems (e.g., wetlands, peatlands or savannahs). We consider that it is essential for the EU's proposed due diligence legislation discussed below to extend not only to FRCs but also to commodities causing the conversion or degradation of other valuable natural ecosystems.

2. The EU's Global Deforestation Footprint: Consumption and Finance

In its State of the Environment Report 2020, the European Environment Agency (EEA) observed that '[t]hrough trade, European production and consumption patterns contribute significantly to environmental pressures and degradation in other parts of the world'.⁶ It found that to an increasing degree, 'Europe is externalising its pressures on key environmental issues [to other countries]'.⁷ In keeping with this, a significant proportion of the increase in net forest cover in Europe has been offset by deforestation occurring elsewhere in order to produce commodities for consumption in Europe.⁸ While Europe is 'living well' in terms of levels of human development, it is not 'living within the limits of [the] planet'.⁹

Over recent years, considerable progress has been made in understanding the scale and impact of the EU's global deforestation footprint, including deforestation that is 'embodied' in products imported into the EU.¹⁰ A study prepared on behalf of the European Commission suggests that, in the period 1990-2008, EU consumption was responsible for as much as 10% of global deforestation. In ground-breaking research, Pendrill and others established that during the years 2005-2013, Europe (excluding Russia) was the biggest contributor to global deforestation embodied in imported commodities.¹¹

While the level of deforestation associated with EU imports has fallen by around 40% between 2005 and 2017, the EU was still estimated to be responsible for 16% of the deforestation embodied in internationally traded commodities in 2017.¹² Given that around 27% of agricultural commodities was traded that year,¹³ this equates to the EU being responsible for a little less than 4.5% of global deforestation, compared to the Commission's earlier estimate of 10% for the period 1990-2008. In 2017, 90% of the EU's global deforestation footprint derived from imports of six commodities, namely palm oil (42%), soy (17%), wood products (9%), coffee (9%), cocoa (8%) and beef (5%).¹⁴ Taken together, Indonesia (39%) and Brazil (25%) supplied commodities which embodied 64% of the EU's total imported deforestation in 2017.¹⁵ Although China is now the world's biggest importer of embodied deforestation (24% compared to the EU's 16%),¹⁶ the EU's 'relative deforestation impact' per unit of imports is thought to be higher than China for some commodities; for example, twice as high for soy

⁶ EEA, *The European Environment – State and Outlook 2020: Knowledge for Transition to a Sustainable Europe* (2019) 32 <www.eea.europa.eu/soer/2020> accessed 14 November 2021.

⁷ *ibid* 52. See also Richard Fuchs, Calum Brown and Mark Rounsevell, 'Europe's Green Deal Offshores Environmental Damage to Other Nations' (2020) 586 *Nature* 671.

⁸ Florence Pendrill et al, 'Deforestation Displaced: Trade in Forest-Risk Commodities and the Prospects for a Global Forest Transition' (2019) *Environmental Research Letters* 14, 20.

⁹ EEA (n6) 48.

¹⁰ See e.g., Livia Cabernard and Stephan Pfister, 'A Highly Resolved MRIO Database for Analysing Environmental Footprints and Green Economy Progress' (2021) 775 *Science of the Total Environment* 142587, citing key articles in this field.

¹¹ Pendrill (n8) 20.

¹² Béatrice Wedeaux and Anke Schulmeister-Oldenhove, 'Stepping Up? The Continuing Impact of EU Consumption on Nature Worldwide' (WWF 2021) 5 <www.wwf.nl/globalassets/pdf/stepping-up-the-continuing-impact-of-eu-consumption-on-nature-worldwide.pdf> accessed 14 November 2021.

¹³ See: Pendrill et al 2020 - Deforestation risk embodied in production and consumption - v1.0.xlsx <<https://zenodo.org/record/4250532#.YSSIfC1Q06g>> accessed 4 September 2021.

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ Wedeaux and Schulmeister-Oldenhove (n12) 5.

imported from Argentina and Brazil. This is because 'the EU's imports are more often sourced from frontiers of deforestation and conversion, such as the Cerrado'.¹⁷

While consumption of FRCs has provided the main lens through which to analyse the EU's contribution to global deforestation, attention has recently turned to the financing of activities that cause deforestation. Awareness of this is important when discussing EU regulation later in this article. Research commissioned by Global Witness, explores the financing of six of major agribusinesses active in either Papua New Guinea, the Congo Basin or the Brazilian Amazon,¹⁸ and 'reveals with new starkness the golden sinews that link London, Berlin and New York City to the dwindling rainforests of the Amazon, the Congo Basin and the island of New Guinea'.¹⁹ Delving into the credit activities and share/bond holdings of financial institutions in relation to these agribusinesses, it finds that investment firms, banks and pension funds financed them to a tune of \$44 billion between 2013 and 2019. Financiers headquartered in Spain, France, the Netherlands, Germany, Italy and Cyprus are among those which have made the largest investments.²⁰ While Global Witness accepts that it is not possible to determine how much of this financing directly funded deforestation, it uses the evidence it has collected to call for greater regulation – including due diligence and improved disclosure and transparency requirements.²¹

3. International Legal Framework on Forests

The disappearance and degradation of forests has been high on the international agenda for some time, and a brief account of the relevant international legal framework is necessary to support our arguments in favour of EU action to regulate trade in FCRs developed later in the article. Part of this framework takes the form of soft-law instruments which, while formally non-binding, establish acceptable norms of behaviour that place normative expectations of compliance on the international actors concerned, including the EU.²² First among these instruments are the so-called Forest Principles adopted at the 1992 United Nations (UN) Conference on Environment and Development held in Rio de Janeiro.²³ These laid out key precepts that have since shaped international discussions on forests, such as the principle that States have the sovereign right under international law to exploit their forest resources

¹⁷ *ibid* 21.

¹⁸ Global Witness, 'Money to Burn' (2019) <https://www.globalwitness.org/en/campaigns/forests/money-to-burn-how-iconic-banks-and-investors-fund-the-destruction-of-the-worlds-largest-rainforests/> accessed 14 November 2021.

¹⁹ *ibid* 3. This is resonant of the 'structural one health' approach, see: Robert G Wallace et al, 'The Dawn of Structural One Health: A New Science Tracking Disease Emergence Along Circuits of Capital' (2015) 129 *Social Science & Medicine* 68, 69 who pinpoint London, New York and Hong Kong as the world's global deforestation hotspots due to their central role in the provision of capital to deforestation activities.

²⁰ Global Witness (n18), including a list of the top countries in terms of the value of credit and investments and a list of the top providers of credit and investments overall.

²¹ The well-respected Trase Earth initiative has expanded its activities by rolling out a Trase Finance database that seeks to link financial institutions to deforestation risks. This includes a watchlist which identifies the 'top 20 commodity traders causing the EU's deforestation risk': <<https://trase.finance/watchlists/3ebfe1f8-0a62-4c6a-8109-707338faf454>> accessed 14 November 2021.

²² See generally, Alan Boyle, 'Soft Law' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook on International Environmental Law* (OUP 2021) ch 25.

²³ 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests' UN Conference on Environment and Development (Rio de Janeiro 3-14 June 1992) UN Doc A/CONF.151/26 (Vol. III).

pursuant to their own environmental policies, linked to responsibility for environmental harm,²⁴ and the evolving notion of 'sustainable forest management'.²⁵

More recently, as part of the UN 2030 Agenda for Sustainable Development adopted in September 2015,²⁶ the international community pledged '[b]y 2020, [to] promote the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally' (Sustainable Development Goal (SDG) 15.2).²⁷ In addition, SDG 12.2 commits UN members to ensure sustainable patterns of both consumption and production, including through '[achieving] the sustainable management and efficient use of natural resources [by 2030]'.²⁸ Subsequently, the first-ever UN Strategic Plan for Forests (2017-2030) was forged at a special session of the UN Forum on Forests held in January 2017 and then endorsed without a vote by the UNGA in April 2017.²⁹ It provides a global framework for action at various levels to manage forests sustainably and to halt deforestation and forest degradation. This comprises a set of six Global Forest Goals and 26 associated targets to be reached by 2030. Of most relevance to our analysis, these targets include '[enhancing] forest law enforcement and governance ... and [significantly reducing] illegal logging and associated trade worldwide' as part of Goal 5,³⁰ and 'building markets and infrastructure to promote production and consumption of sustainably managed forest products' as part of Goal 3.³¹

Forests have also received increasing attention within international legal regimes on climate change mitigation and biodiversity conservation. With regards to the latter, forests host most of the Earth's animal and plant species and cover just over 30% of its land area, thus being an utterly crucial for protection of terrestrial biodiversity.³² Indeed, the alarming rates of deforestation and forest fragmentation since 1990 have significantly contributed to the on-going loss of biodiversity.³³ The Convention on Biological Diversity (CBD) is presently the main legally-binding instrument applicable to forest ecosystems, including its general obligations on conservation and sustainable use even though these leave considerable discretion to Contracting Parties.³⁴ Nonetheless, several decisions on forest preservation have been adopted under the CBD, notably the 2002 'Expanded Programme of Work on Forest Biodiversity'³⁵ and the Aichi Biodiversity Targets (2015-2020), setting out the strategic goals of halving the rate of loss of natural habitats, including forests, by 2020 and significantly reducing degradation and fragmentation (Target 5), and ensuring sustainable management of areas

²⁴ *ibid* para 1(a).

²⁵ *ibid* para 2(c). See further, Annalisa Savaresi, 'EU External Action on Forests: FLEGT and the Development of International Law' in Elisa Morgera (ed), *The External Environmental Policy of the European Union – EU and International Law Perspectives* (CUP 2012) 150-151.

²⁶ UNGA Res 70/1 (25 September 2015) UN Doc/A/RES/70/1.

²⁷ *ibid* 24.

²⁸ *ibid* 22.

²⁹ UNGA Res 71/285 (1 May 2017) UN Doc/A/RES/71/285.

³⁰ *ibid* 8.

³¹ *ibid* 19. See also, New York Declaration on Forests (23 September 2014), endorsed by more than 150 governments (including the EU), companies, indigenous peoples and civil society organisations (in particular, Goals 1 and 2), <https://forestdeclaration.org/images/uploads/resource/NYDF_Declaration.pdf> accessed 14 November 2021.

³² UNEP/FAO (n3) xvi and ch 3.

³³ *ibid* xvi and ch 4; and 76 pointing to the worrying link between zoonotic diseases and deforestation and habitat destruction, which drive wild animals out of their natural environment and closer to human populations, increasing the latter's exposure to infectious diseases of zoonotic origin.

³⁴ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993), 1760 UNTS 79, arts 6-9.

³⁵ Conference of the Parties (COP), 'Decision VI/22: Forest Biological Diversity' (19 April 2002).

under agriculture and forestry by 2020 (Target 7).³⁶ In achieving these targets, CBD parties (including the EU) have urged the promotion of sustainable production and consumption of forest products.³⁷

Forests are also indispensable in the fight against climate change due to their natural capacity to absorb and store carbon from the atmosphere. The rate of contribution of deforestation and forest degradation to global greenhouse gas (GHG) emissions varies depending on the assessment, but it has been estimated by the UN to account for about 12-20% of global GHG emissions – that is, the second major cause of climate change after the burning of fossil fuels.³⁸ This matter is expressly acknowledged in Article 5 of the Paris Agreement, which provides that parties 'should take action to conserve and enhance, as appropriate' carbon sinks, including forests,³⁹ with a particular focus being placed on the REDD+⁴⁰ mechanism introduced in 2005 under the umbrella of the UN Framework Convention on Climate Change.

Against this backdrop of wide consensus regarding the essential role of forests in addressing the climate change and biodiversity crises, it may appear surprising that the international community has (so far) failed to negotiate an overarching treaty on sustainable forest management. This is particularly remarkable considering that prominent actors, including the EU, have long supported the adoption of a global forest convention.⁴¹ Nonetheless, two key points may be drawn out for our discussion. First, the EU measures we examine below do not take place in a normative vacuum but respond to the urgent need to redress the problem of global deforestation and forest degradation that has been repeatedly and authoritatively acknowledged, including by the UNGA, over the past three decades. Second, the existing international legal framework leaves ample latitude to each actor with regards to the implementation of multilaterally-agreed goals and targets on forest protection and restoration. In this sense, it neither strictly requires, nor prohibits,⁴² the regulation of international trade in FRCs. However, we do not see how the EU could live up to its international commitments on forest preservation, and in particular ensuring sustainable *consumption* patterns, while being one of the largest importers of these FRCs. Put differently, trade regulation is necessary and unavoidable for the EU to eliminate (or, at least, reduce) its share of global embodied deforestation.

4. Current and Future EU Action

4.1 FLEGT Regulation and Timber Due Diligence Regulation

Having established the need to tackle the EU's demand-driven contribution to global deforestation through trade regulation,⁴³ we now turn to its Forest Law Enforcement

³⁶ COP, 'Decision X/2: Strategic Plan for Biodiversity 2011-2020' (29 October 2010).

³⁷ See e.g., COP, 'Decision XIII/3: Strategic actions to enhance the implementation of the Strategic Plan for Biodiversity 2011-2020 and the achievement of the Aichi Biodiversity Targets' (16 December 2016) para 56.

³⁸ See: <https://www.un.org/en/observances/forests-and-trees-day>.

³⁹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UN Doc/FCCC/CP/2015/L.9/Rev/1, arts 5(1)-(2); UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994), 1771 UNTS 107 (UNFCCC), arts 3(3) and 4(1)(c).

⁴⁰ The REDD+ acronym stands for 'reducing emissions from deforestation and forest degradation in developing countries; plus the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries'. See further, Savaresi (n25) 157-167.

⁴¹ *ibid* 150.

⁴² See section 6 below on WTO-compatibility.

⁴³ We limit our analysis here to EU-level action, given our focus on reducing global deforestation embedded in EU imports and the exclusive nature of EU's competence for trade matters. For an overview of action at Member-State level, see Aleksandra Heflich, *A Legal Framework to Halt and Reverse EU-Driven Deforestation* (European Union

Governance and Trade (FLEGT) Action Plan,⁴⁴ which was adopted in May 2003 and is specifically aimed at combatting illegal logging and associated trade in illegally sourced timber products. This initial focus by the EU is understandable, given the egregious nature and scale of the problem and the environmental, cultural and socio-economic costs at stake. While the clandestine nature of illegal logging makes precise calculations difficult, the value of illegal timber trade has been estimated to be worth €150 billion per year,⁴⁵ making it one of the most lucrative natural resource crimes and placing at a competitive disadvantage timber that is legally logged.⁴⁶ For its part, the EU could be considered to be involved in these illegal forestry activities since more than 20% of its wood imports were estimated to come from illegal sources.⁴⁷ From an ecological perspective, illegal logging is one of the main direct causes of deforestation and forest degradation⁴⁸ which, in turn, is a major driver of global warming and biodiversity loss.⁴⁹ The FLEGT Action Plan sets out a package of measures to address the supply and demand factors behind illegal logging in the world's forests and has led to the adoption of two key pieces of legislation.

The first is the 2005 FLEGT Regulation,⁵⁰ which establishes a licensing scheme for controlling the legality of (listed) timber and timber products imported into the EU.⁵¹ This licensing scheme is to be implemented through the conclusion of Voluntary Partnership Agreements (VPAs) between the EU and timber-producing countries.⁵² Pursuant to the Regulation, shipments of timber products to the EU from these partner countries are prohibited unless they are covered by a FLEGT license, which is accepted as proof of legality by the EU.⁵³ Timber products are considered to be 'legally produced' if harvested 'in accordance with the national laws determined by [the] partner country as set out in the [respective VPA]⁵⁴—and hence, as agreed with the EU. At the time of writing, VPAs have been concluded with seven countries—the first one with Ghana in November 2009, followed by the Republic of Congo, Cameroon, Indonesia, the Central African Republic, Liberia and the most recent one with Vietnam in May 2017.⁵⁵

To ensure that only legally harvested timber is exported to the EU, each VPA provides for the establishment of a timber legality assurance system (TLAS) in the third country concerned, which contains the following basic elements: a (country-specific) clear definition of 'legal'

2020) 13-15 <[www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU\(2020\)654174_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU(2020)654174_EN.pdf)> accessed 14 November 2021.

⁴⁴ Commission, 'Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan' COM (2003) 251 final.

⁴⁵ *ibid* 4.

⁴⁶ *ibid*, estimating illegal logging to cost governments in timber-producing countries around US\$10-15 billion each year in lost revenues.

⁴⁷ Yulia Levashova, 'How Effective is the New EU Timber Regulation in the Fight against Illegal Logging?' (2011) 20(3) *RECIEL* 290, 291.

⁴⁸ FAO/UNEP (n3) 83.

⁴⁹ Illegal logging has also been associated with corruption, human right abuses and violent conflicts: COM (2003) 251, 4.

⁵⁰ Council Regulation (EC) 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2005] OJ L347/1 (FLEGT Regulation).

⁵¹ *ibid* art 1(1) and Annexes II (listing timber products covered by all VPAs) and III (listing additional covered by individual VPAs).

⁵² *ibid* art 1(2) and Annex I.

⁵³ *ibid* art 4(1)-(2).

⁵⁴ *ibid* art 2(10).

⁵⁵ VPA negotiations have been recently concluded with Honduras and Guyana and are on-going with Côte d'Ivoire, the Democratic Republic of Congo, Gabon, Laos, Malaysia and Thailand: <<https://ec.europa.eu/environment/forests/flegt.htm>> accessed 14 November 2021.

timber,⁵⁶ sophisticated mechanisms for verifying compliance throughout the production and supply chain,⁵⁷ issuance of FLEGT licenses by the competent national authority⁵⁸ and independent audits to ensure the entire system is properly implemented.⁵⁹ This focus on promoting legality on the basis of the domestic laws of the timber-exporting country may be seen as reinforcing the principle of sovereign rights to exploit natural resources within national jurisdiction⁶⁰ and allows VPAs to be tailor-made agreements.

In fact, the FLEGT Regulation does not prescribe any minimum requirements for the legality definition, in the sense of which aspects of the national legal framework must be included in VPAs (i.e., neither with regards to forest-specific legislation, nor other relevant laws related to, for instance, timber trade, environmental or social protection). The legality definition is thus developed through a national consultation process of different stakeholder groups in each partner country and adapted to the specific local needs and priorities. This flexible approach, however, inevitably leads to substantial differentiation in terms of what constitutes legal timber across VPAs and it is unclear to what extent the EU has insisted on a common baseline in practice. A comparative study of VPAs finds that '[...]there is [no] universally accepted definition of legality from the EU. Instead each VPA includes what is considered a priority in each country, and stakeholders agree jointly on a country-specific definition of [...] legal timber'.⁶¹

As progress towards concluding VPAs remained somewhat limited, the EU strengthened its bilateral approach with the (unilateral) Timber Due Diligence Regulation,⁶² which was adopted in October 2010 as the second trade-related pillar of its FLEGT Action Plan. In force since 3 March 2013, this Regulation applies to all listed timber and timber products⁶³ irrespective of their origin and imposes two main obligations on economic operators that place such products on the EU market for the first time.⁶⁴ It first prohibits the placing of illegally harvested timber (or products derived from such timber) on the EU market.⁶⁵ To that end, operators are required to exercise due diligence in ensuring the legal origin of the timber products they market in the EU. In so doing, they must use a due diligence system, which they may devise themselves, or rely on a system provided by a monitoring organization that is formally recognised by the European Commission.⁶⁶ In either case, the due diligence system must contain three key elements: (i) measures and procedures to keep track of the origin and legality of the timber products;⁶⁷ (ii) risk assessment procedures enabling an analysis and evaluation of the risks of illegally harvested timber products being placed on the market;⁶⁸ and (iii) in cases where

⁵⁶ See e.g., Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on Forest Law Enforcement, Governance and Trade in Timber Products into the European Union [2014] OJ L150/252, art 2(i) and Annex II.

⁵⁷ *ibid* art 7 and Annex V.

⁵⁸ *ibid* arts 4-6.

⁵⁹ *ibid* art 15.

⁶⁰ See section 3 above; Savaresi (n25) 157.

⁶¹ An Bollen and Saskia Ozinga, *Improving Forest Governance – A Comparison of FLEGT VPAs and their Impact* (FERN 2013), 17 and Table 2 <www.fern.org/fileadmin/uploads/fern/Documents/VPAComparison_internet_0.pdf> accessed 14 November 2021.

⁶² Council and European Parliament Regulation (EU) 995/2010 of 20 October 2010 laying down obligations of operators who place timber and timber products on the market [2010] OJ L295/23 (Timber Due Diligence Regulation).

⁶³ *ibid* art 2(a) and Annex.

⁶⁴ *ibid* art 1. Article 5 also imposes a more limited obligation of traceability on 'traders' (i.e., those selling or buying timber or timber products already placed on the EU market).

⁶⁵ *ibid* art 4(1).

⁶⁶ *ibid* art 8(1)-(2).

⁶⁷ *ibid* art 6(1)(a).

⁶⁸ *ibid* art 6(1)(b).

identified risks are more than ‘negligible’, risk mitigation measures that are adequate and proportionate to minimise effectively those risks.⁶⁹ In order to ensure the proper operation of the Regulation, competent authorities designated by each EU Member State shall carry out regular checks to verify compliance by operators with the due diligence requirements.⁷⁰ In cases of non-compliance, EU Member States must provide for penalties that are ‘effective, proportionate and dissuasive’ (including fines, seizure of the timber and timber products and immediate suspension of the authorisation to trade).⁷¹

Nonetheless, two categories of timber and timber products are automatically considered legally harvested for the purposes of the Timber Due Diligence Regulation and, hence, can be marketed in the EU. Of most significance for our purposes, this exemption includes timber products covered by licensing systems put in place by VPAs and which conform with the legality standards laid down therein and with the provisions of the FLEGT Regulation.⁷² In other words, the Timber Due Diligence Regulation creates an additional incentive for third countries to enter into VPA negotiations with the EU, by providing a presumption of compliance with the due diligence requirements for FLEGT-licensed timber originating in partner countries.

However, there is a subtle but important difference in the conditions of market access for legal timber under each of these routes. This is because the Timber Due Diligence Regulation stipulates a more detailed definition of legally harvested timber, by reference to ‘*applicable legislation* in the country of harvest’ with respect to specified matters (including relevant laws on biodiversity conservation and trade),⁷³ when compared to the FLEGT Regulation which, as seen above, refers to ‘national laws *determined by [the] partner country*’ as set out in the VPAs.⁷⁴ As the law stands, there is therefore a possibility that not all national laws that would fall within the definition of applicable legislation under Timber Due Diligence Regulation will be included in VPAs. Where this is the case, VPA countries would be treated more favourably than non-VPA countries when it comes to demonstrating the legality of their timber exports to the EU.⁷⁵

Overall, the EU’s FLEGT initiative is perceived as an important and relatively cost-effective instrument to combat illegal logging and related trade in timber products.⁷⁶ It has even been praised as a ‘novel experimentalist architecture for transnational forest governance’, particularly due to the VPA-driven multi-stakeholder participatory process and its reliance on country-specific legality standards and verification systems, while being backed by the Timber Due Diligence Regulation as a penalty default mechanism to sanction non-cooperation by

⁶⁹ *ibid* art 6(1)(c).

⁷⁰ *ibid* art 10.

⁷¹ *ibid* art 19(2).

⁷² *ibid* art 3. The other category concerns timber from species covered by Council Regulation (EC) 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1, Annexes A, B, C.

⁷³ Timber Due Diligence Regulation, art 2(f) (emphasis added). Article 2(h) further specifies that this refers to legislation in force in the country of harvest covering the following matters: (i) rights to harvest timber within legally gazetted boundaries; (ii) payments for harvest rights and timber including duties related to timber harvesting; (iii) environmental and forest legislation, including on forest management and biodiversity conservation, where directly related to timber harvesting; (iv) third parties’ legal rights concerning use and tenure that are affected by timber harvesting; (v) trade and customs, insofar as the forest sector is concerned.

⁷⁴ FLEGT Regulation, art 2(10) (emphasis added).

⁷⁵ The opposite is also possible, since the list of applicable legislation in the Timber Due Diligence Regulation is exhaustive and does not make reference to, for instance, legislation on transparency in the forest sector or customary rights, which may be included in (some) VPAs: see, Akiva Fishman and Krystof Obidzinski, ‘Verified Legal? Ramifications of the EU Timber Regulation and Indonesia’s Voluntary Partnership Agreement for the Legality of Indonesian Timber’ (2015) 17(1) *Intl Forestry Rev* 10, 16.

⁷⁶ Commission, ‘Evaluation of the EU Action Plan for Forest Law Enforcement Governance and Trade (FLEGT)’ SWD (2016) 275, 3.

timber-exporting countries.⁷⁷ Nonetheless, several flaws in the implementation of both the VPAs and the Timber Due Diligence Regulation have been acknowledged by the European Commission⁷⁸ and scholars.⁷⁹ But even if these shortcomings are effectively remedied (and we believe, they should be), the key concern remains that the current EU regulatory framework,⁸⁰ being limited to illegally harvested timber products, does not tackle another and even more prevalent driver of global deforestation – namely, the expansion of land used for agriculture.

The causal link between agricultural expansion and global deforestation, partly driven by international trade in agricultural commodities, has been well documented. According to the latest FAO/UNEP report, local subsistence agriculture (driven by domestic demand) accounted for about 33% of global tropical deforestation between 2000 and 2010, while large-scale commercial agriculture (driven by international demand) caused 40% of the problem over the same period, albeit this figure reached almost 70% in Latin America.⁸¹ There is also broad consensus that three agricultural commodities –palm oil, beef and soy– bear the highest responsibility for this trend⁸² and, as previously seen, the EU is a major importer of these commodities.⁸³ Hence, we consider that EU legislative action against this embodied deforestation must be stepped up in order to reach the goal of halting global forest loss by 2030, in line with the pledges it has repeatedly made internationally and internally.⁸⁴ In fact, all EU institutions have recognised the need for a more holistic approach towards reversing the EU's consumption-driven contribution to deforestation and forest degradation worldwide.⁸⁵ At the time of writing, only the EP has made concrete recommendations⁸⁶ to regulate trade in forest and ecosystem-risk commodities. These are becoming the basis for on-going discussions in this area, and we will examine them next.

4.2 Proposed Forest Due Diligence Regulation

In a resolution adopted on 22 October 2020, the EP called on the Commission to present a legislative proposal on mandatory due diligence requirements to ensure that commodities

⁷⁷ Christine Overdeest and Jonathan Zeitlin, 'Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana' (2018) 12(1) *Regulation & Governance* 64, 67-69.

⁷⁸ SWD(2016) 275, 11-12 on slow progress in setting up TLAS in partner countries; and Commission, 'Report to the European Parliament and to the Council on Regulation EU/995/2010' COM (2016) 74 final, 11 on uneven progress in the implementation and enforcement of the Timber Due Diligence Regulation.

⁷⁹ On the Timber Due Diligence Regulation, see Levashova (n47) 294-298. On VPAs with Ghana and Indonesia, see Overdeest and Zeitlin (n77) 72-75.

⁸⁰ The EU has also addressed deforestation through sustainability criteria for biofuels, but this does not cover uses of commodities (e.g., palm oil) other than for biofuels: Council and European Parliament Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L328/82 (Renewable Energy Directive).

⁸¹ FAO/UNEP (n3) 82-83, stating that urban expansion accounted for 10%, infrastructure development for 10% and mining for 7% of global deforestation.

⁸² *ibid*, 82; and also COWI, *Feasibility Study on Options to Step Up EU Action on Deforestation: Final Report* (European Union 2018) 44 <https://ec.europa.eu/environment/forests/pdf/feasibility_study_deforestation_kh0418199enn_main_report.pdf> accessed 14 November 2021.

⁸³ See section 2 above; and also COWI (n82) 41-81.

⁸⁴ See section 3 above; and also Council and European Parliament Decision (EU) 1386/2013 of 10 November 2013 on a General Union Environment Action Programme to 2020 [2013] OJ L354/171, para 12.

⁸⁵ Commission, 'Stepping Up EU Action to Protect and Restore the World's Forests' COM (2019) 352 final, 1 and 7; endorsed by Council of the EU 'Conclusions of the Council and of the Governments of the Member States sitting in the Council' (15151/19) 16 December 2019; EP, 'Resolution on the European Green Deal' (P9_TA(2020)0005) 15 January 2020, para 71.

⁸⁶ EP, 'Resolution with Recommendations to the Commission on an EU Legal Framework to Halt and Reverse EU-driven Global Deforestation' (T9-0285/2020) 22 October 2020 (EP Resolution 2020).

deriving from deforestation or degradation of forests and other natural ecosystems are kept out of the EU market. While drawing on the existing Timber Due Diligence Regulation as a model,⁸⁷ the proposed initiative is clearly more ambitious in at least four respects.

Firstly, its scope of application is significantly broader. It would apply not only to economic operators that place covered commodities on the EU market for the first time, but also to financial institutions (authorized to operate in the EU) providing finance, investment and insurance to operators engaged in the supply chain of these commodities. This seems a welcome step, given the link discussed earlier between EU-based financial institutions and global forest destruction resulting from the cultivation of FRCs, albeit the proposal remains quite vague regarding the obligations incumbent upon them.⁸⁸ In addition, the proposed measure would not be limited to timber products, but cover a wider range of commodities that 'are most frequently associated with' deforestation and forest degradation.⁸⁹ While the list is still to be determined, the EP suggests that it should comprise at least palm oil, soy, meat, leather, cocoa, coffee, rubber, and maize (and all products derived from, or containing, these commodities).⁹⁰ The key challenge here is that there is no widely accepted definition of FRCs, and hence the determination would have to be made by the EU on the basis of objective science-based criteria and appropriate risk assessment methodologies.⁹¹ As noted earlier, there is considerable agreement that timber, palm oil, beef and soy generate the highest forest-risks,⁹² but the EU would need to provide scientific evidence for justifying the inclusion of other commodities within the purview of the proposed measure.⁹³

Secondly, the benchmarks for the due diligence obligations differ, with attention shifting away from *legality* (i.e., compliance with applicable third-country laws) under the Timber Due Diligence Regulation to *sustainability* standards set out by the EU under the proposed measure. Economic operators would only be able to lawfully place covered FRCs on the EU market if they can demonstrate, through the stipulated due diligence process,⁹⁴ that there is no more than a 'negligible risk' that such commodities originate from land obtained via deforestation or degradation of forests (or other natural ecosystems), as well as produced in (or linked to) violation of human rights (including customary land tenure rights of forest-dependent communities and of indigenous peoples).⁹⁵ Operators would be required to demonstrate compliance with these forest sustainability (and human rights) criteria both within their own activities and in relation to all types of business relationships that they have with partners and entities along their entire value chain.⁹⁶

However, the key question is on what basis should operators identify deforested and degraded forest areas from which the FRCs included in the measure would not be marketable in the EU.

⁸⁷ Ibid, 13 (para 38).

⁸⁸ Ibid, 24-25, just stating that such financial institutions would also have a responsibility to undertake due diligence to ensure that supply chain companies are respecting the obligations laid down in the proposed measure.

⁸⁹ Ibid, 25.

⁹⁰ Ibid.

⁹¹ Enrico Partiti, 'Regulating Trade in Forest-Risk Commodities' (2020) 54(1) *JWT* 31, 52.

⁹² See n14 and n82 and accompanying text.

⁹³ See e.g., COWI (n82) 41, identifying additional FRCs of EU relevance (coffee, cocoa, leather, maize and rubber).

⁹⁴ This is similar to the due diligence system under the Timber Due Diligence Regulation (see nn 66-69 and accompanying text), including procedures for risk assessment and risk mitigation measures. In addition, operators would be subject to duties of consultation, reporting and transparency: EP Resolution 2020, 28-29 and 31-32.

⁹⁵ Ibid 25 and 27-28. Due to space constraints, our analysis is limited to the forest sustainability standards.

⁹⁶ Ibid 25 and 28.

The EP proposal provides little guidance in this regard.⁹⁷ Employing globally accepted definitions is helpful in safeguarding against potential third-country accusations of arbitrary and subjective determinations by the EU. In this respect, the FAO has sought to promote a common understanding of key terms in the forest sector and defines deforestation as 'the conversion of forest to other land use whether human-induced or not, or the permanent reduction of the tree canopy cover below the minimum 10% threshold'.⁹⁸ Both of these criteria appear objective and readily measurable, albeit on the basis of data submitted by national governments. The identification of degraded forest areas is admittedly more complex, since forest degradation is caused by a variety of human activities (e.g., over-harvesting, shifting cultivation or cattle grazing) and natural factors (e.g., storm or drought) that are often interdependent and difficult to quantify. For this reason, the FAO broadly defines forest degradation as 'the reduction of the capacity of a forest to provide goods and services', which is a more generic definition than those used by other international bodies (e.g., in the CBD and UNFCCC regimes).⁹⁹ Nonetheless, FAO has developed guidelines and indicators for measuring forest degradation¹⁰⁰ that could provide the basis for the EU to establish specific criteria on degraded forest areas linked to agricultural expansion. Therefore, the shift from legality (under the Timber Due Diligence Regulation) to sustainability standards (under the proposed measure) for the purpose of the due diligence obligations raises significant definitional challenges, but the EU can rely on international guidance and its own technical expertise and experience as a global environmental standard-setter.¹⁰¹

Thirdly, the proposed measure provides for enhanced public and private enforcement procedures. In a similar vein to the Timber Due Diligence Regulation, EU Member States are to designate competent authorities to monitor fulfilment of due diligence obligations by operators and provide for 'proportionate, effective and dissuasive' penalties in cases of non-compliance. However, by contrast to the Timber Due Diligence Regulation, Member States would be obliged to include criminal sanctions for most serious offenses.¹⁰² Even more far-reaching are the novel provisions on civil liability, whereby operators would be jointly and severally liable for harm caused to natural forests and ecosystems (or arising out of human rights abuses) directly linked to their products and business relationships and are required to provide remedies to affected third parties.¹⁰³

Finally, the proposed measure foresees the possibility that VPAs be negotiated between the EU and FRC-producing countries, with a view to establishing a licensing scheme that would secure a green lane for licensed commodities to the EU market as these may be presumed to be of a negligible risk by operators in the due diligence process. It thus builds on the FLEGT

⁹⁷ *ibid* 26-27.

⁹⁸ FAO, 'Global Forest Resource Assessment 2020 – Terms and Definitions' (2018) 6 <www.fao.org/3/I8661EN/i8661en.pdf> accessed 14 November 2021. See further Partiti (n91) 53-54, on setting a cut-off date (or baseline year) for the purposes of identifying converted land or reduction in tree canopy cover.

⁹⁹ FAO, 'Assessing Forest Degradation – Towards the Development of Globally Applicable Guidelines' (2011) 1-3 <www.fao.org/3/i2479e/i2479e00.pdf> accessed 14 November 2021.

¹⁰⁰ *ibid*, notably ch 5 on reduced production of forest products (timber, non-wood forest products, fuelwood and charcoal).

¹⁰¹ See e.g., under the Renewable Energy Directive, the contentious criteria of 'indirect-land change use' which is not easily observable or measurable: Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels [2019] OJ L133/1; and Commission, 'Report on the Status of Production Expansion of Relevant Food and Feed Crops Worldwide' COM (2019) 142 final.

¹⁰² EP Resolution 2020, 31-32.

¹⁰³ *ibid* 33, providing that operators may discharge their liability if they can show they acted 'with due care' and took 'all reasonable measures' to identify and avoid the damage.

VPA model examined earlier, including the promotion of an inclusive consultation process among all stakeholders in partner countries and the provision of EU support to upgrade their forest governance and management frameworks. There are, however, important differences between the current and proposed EU measures. In terms of approach, the EP sees bilateral VPAs as secondary to unilateral due diligence legislation for FRCs, which should be adopted first by the EU –thus, reversing the order followed with regards to trade in illegally sourced timber. Second, licensed FRCs under VPAs would have to comply with both the national laws of the partner country *and* the EU-determined forest sustainability (and human rights) criteria, as stipulated in the proposed measure.¹⁰⁴ The latter would thus provide a common baseline for licensing schemes across all VPAs, again departing from the current FLEGT VPA model. As a result, licensed FRCs from VPA countries would be subject to stricter compliance requirements than FRCs from non-VPA countries (i.e., only subject to forest sustainability and human rights criteria) when exported to the EU market.

5. Justifications for Stepping Up EU Action

Having examined the EU's current and prospective future action to reduce its global deforestation footprint, we turn to consider whether and, if so, how EU measures of this kind may be justified as a matter of policy. The question of compatibility with WTO law will be examined in Section 6 below. It is first relevant to note that unlike many of the EU's trade-related environmental initiatives,¹⁰⁵ the FLEGT initiative has not provoked the ire of the EU's trading partners. Even Bolivia was relatively subdued during discussions in the WTO's Committee on Trade and Environment (CTE), making a fairly pro forma intervention about the importance of developing countries enjoying 'sufficient political space' to manage their natural resources 'in a sovereign way'.¹⁰⁶ While the EU did not respond to this point directly, it emphasized the assistance provided to support VPA implementation and the capacity of VPAs to readily accommodate regulatory changes within third countries.¹⁰⁷

Unlike an earlier Dutch proposal concerning the mandatory labelling of wood and wood products, the FLEGT initiative did not lead to the raising of any specific trade concerns by other WTO members within the Committee on Technical Barriers to Trade (TBT).¹⁰⁸ The Dutch proposal was criticized on many familiar grounds. Among other things, it was alleged to be discriminatory, unilateral and extra-territorial. The Philippines, speaking on behalf of the Association of South East Asian Nations (ASEAN), complained that the Netherlands was imposing its own understanding of sustainable forest management in the absence of an internationally agreed definition.¹⁰⁹ She went on to add that 'forest management plans [are] bound to differ from country to country in order to take account of the regional characteristics of forests and the diversity of economic, social and cultural environments'. Therefore, 'the requirement that a country's forest management plan be approved by the Council of

¹⁰⁴ *ibid* 14 (paras 44-45) and 30.

¹⁰⁵ See example, the on-going WTO disputes concerning the EU's sustainability criteria for biofuels: WTO, *European Union: Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels – Request for the Establishment of a Panel by Indonesia* (24 March 2020) WT/DS593/9; and *European Union and Certain Member States: Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels – Request for the Establishment of a Panel by Malaysia* (16 April 2021) WT/DS600/6.

¹⁰⁶ WTO, 'Report of the Meeting held on 30 June 2014' (30 June 2014) CT/CTE/M/57, para 1.13.

¹⁰⁷ *ibid*, para 1.14.

¹⁰⁸ The draft legislation was notified in two forms: WTO, 'Notification by the Netherlands' (26 August, 1998) G/TBT/Notif.98.448 and 'Notification by the Netherlands' (21 April 2004) G/TBT/N/NLD/62. Eight countries raised specific trade concerns (Brazil, Canada, Ecuador, Malaysia on behalf of ASEAN, Norway, Philippines, Poland, US).

¹⁰⁹ WTO, 'Minutes of the Meeting held on 20 November 1998' (10 February 1999) G/TBT/M/14, para 23.

Accreditation, presumably established in the Netherlands, could not be accepted by sovereign states'.¹¹⁰

These criticisms can perhaps help to shed some light on why the EU's FLEGT initiative has not been controversial. It cannot be considered as unilateral in any conventional sense. Not only does it combine mandatory due diligence with deep cooperation through VPAs, but it is inherently responsive to differences between countries with regards forest endowments and management plans. By looking to third country laws to give content to the underlying legality standard, the EU could not be accused of foisting its own norms on other countries. Equally, it would have been visibly disingenuous for other countries to be dismissive of the importance of securing compliance with domestic forest laws.

It is too early to say how strong or widespread opposition to the prospective Forest Due Diligence Regulation is likely to be. As no draft legislation has been notified to the WTO, the moment for countries to raise specific trade concerns before the TBT Committee has not yet arrived. Looking to the concerns expressed by the ASEAN countries about the Dutch proposal, the reaction of the EU's trading partners to a forest due diligence legislation is likely to depend on how the standards underpinning the measure are defined. As the EU moves away from a legality benchmark to benchmarks based on forest sustainability and respect for human rights, the question arises as to whether these will be operationalized in a manner that is sufficiently responsive to the diversity in forest environments – we will return to this point below when assessing WTO-compatibility.

At this stage, we put forward three key arguments in favour of EU intervention to reduce its global deforestation footprint through trade regulation. The essence of the first argument is straightforward. By limiting imports of FRCs, the EU is capable of making a contribution to the realization of the forest conservation and management objectives that command widespread international support. To recall just one aspect of the international legal framework discussed above, in 2017 the UNGA adopted the UN Strategic Plan for Forests 2017-2030 without a vote. Among the objectives that it thereby endorsed were those relating to the reversal of forest cover loss worldwide, increasing efforts to prevent forest degradation and building markets and infrastructure to promote production and consumption of sustainably managed forest products.¹¹¹

The EU's capacity to contribute to the achievement of globally-agreed objectives to halt deforestation and forest degradation arises in the first instance due to the size and importance of its market for FRCs. Where the existing supply of sustainably sourced commodities is not sufficient to satisfy increasing demand for such commodities globally, a shift in EU policy in favour of responsible sourcing can be expected to alter production patterns to increase supply.¹¹² However, where there is a danger of trade diversion, creating the risk that 'sustainable products currently imported into other states would be diverted to the EU, while non-sustainable products currently imported into the EU would be diverted to other markets',¹¹³ it will be especially important for the EU to cooperate with third countries. VPAs constitute a promising form of cooperation in this respect. This is because existing VPAs under the FLEGT initiative apply the agreed legality requirements to all exports, including those destined for non-

¹¹⁰ Ibid. In a similar vein Malaysia speaking on behalf of the ASEAN countries and supported by Brazil and Canada: WTO, 'Minutes of the Meeting held on 30 March 2001' (8 May 2001) G/TBT/M/23, para 25.

¹¹¹ See section 3 above.

¹¹² Werner Raza et al, *How Can International Trade Contribute to Sustainable Forestry and to the Preservation of the World's Forests through the Green Deal?* (European Union 2020) 24-25 <[www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_IDA\(2020\)603513](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_IDA(2020)603513)> accessed 14 November 2021.

¹¹³ *ibid* 24.

EU countries.¹¹⁴ Similarly, most have the objective of applying these requirements also to timber or timber products that are consumed domestically within the home market of countries concluding the VPA with the EU. This spill-over phenomenon is a critical argument in favour of VPAs.

Turning to the second argument, there is also evidence that FLEGT, which was promoted externally by the EU, has played an important role in generating a 'norm cascade' that has resulted in the adoption of timber legality legislation by other major timber importing countries, including Australia, Canada, South Korea and Japan.¹¹⁵ As China, the world's larger importer and exporter of timber, works towards establishing its own timber legality verification scheme, already 70% of its exports by value are destined for countries that have timber legality frameworks in place.¹¹⁶ The EU's efforts at norm diffusion benefitted greatly from the fact that on this occasion it combined its market power with that of the United States (US) which had already adopted timber legality legislation in 2008.¹¹⁷

It has nonetheless been shown that FLEGT played an important role in giving shape to the 'increasingly joined up transnational timber legality regime [that has] developed over the last 15 years'.¹¹⁸ The collaborative ethos underpinning FLEGT, which emphasizes the importance of cooperation and the exchange of best practices between Member State competent authorities and other stakeholders, has infused transnational forest governance and brought consumer nations together in an iterative process of mutual learning and peer review.¹¹⁹ This is said to have contributed to greater convergence in approaches to the enforcement of timber legality legislation in consumer countries and to enhancing the effectiveness of legislation of this kind.¹²⁰

Our third and final argument in support of existing and contemplated future EU action to tackle its global deforestation footprint invokes a concept that is often alluded to in relation to trade in illegally harvested forest products, but rarely defined.¹²¹ It is based on the concept of complicity which for our purpose will be understood in moral as opposed to legal terms.¹²² Drawing on Lepora and Goodin's discussion of complicity, we define complicity as occurring when an agent (a person or an organization) does something that has the potential to contribute causally to wrongdoing that is committed by another agent.¹²³ The act of the complicit agent is not constitutive of the wrongdoing but may nonetheless be expected to contribute to it causally. This could include situations in which an agent overlooks or tacitly assents to wrongdoing in circumstances in which intervention could, potentially, have prevented it.¹²⁴ According to these

¹¹⁴ Bollen and Ozinga (n61) 20 (Table).

¹¹⁵ Jonathan Zeitlin and Christine Overdevest, 'Experimentalist Interactions: Joining up the Transnational Timber Legality Regime' (2020) 15 *Regulation & Governance* 686, 693-696, albeit Canada did not adopt new legislation but amended existing legislation.

¹¹⁶ *ibid* 693 and 700-701 for a discussion of developments in the public and private sectors in China.

¹¹⁷ *ibid* 692, noting that taken together the EU and the US enjoyed a 50% market share.

¹¹⁸ *ibid* 701.

¹¹⁹ *ibid* 695-696.

¹²⁰ *ibid* 696.

¹²¹ Sam Lawson, *Stolen Goods: The EU's Complicity in Illegal Tropical Deforestation* (FERN 2015) <www.fern.org/publications-insight/stolen-goods-the-eus-complicity-in-illegal-tropical-deforestation-544/> accessed 14 November 2021; and Cassie Dummett et al, 'Illicit Harvest, Complicit Goods: The State of Illegal Deforestation for Agriculture' (Forest Trends 2021) <www.forest-trends.org/publications/illicit-harvest-complicit-goods/> accessed 14 November 2021 .

¹²² Gregory Mellema, 'Legal versus Moral Complicity' (2011) 1 *American International Journal of Contemporary Research* 126.

¹²³ Chiara Lepora and Robert Goodin, *On Complicity and Compromise* (OUP 2013) 41.

¹²⁴ *ibid* 44-47 for discussion of complicity by connivance.

scholars, moral responsibility for a complicit act arises when certain minimum conditions are present.¹²⁵ The ostensibly complicit act must have at least the potential to contribute causally to the wrongdoing,¹²⁶ and it must be neither involuntary nor accidental. The agent committing the act must have knowledge or be culpably ignorant of its potential to make a causal contribution to wrongdoing, and must have equally knowledge or be culpably ignorant of the wrongfulness of the behaviour to which the act contributes causally.

In the context of this paper, it is our contention that if the EU were to fail to act within the limits of its powers under EU and international law to reduce the deforestation embodied in imports of FRCs, it could be considered as being complicit in this global deforestation. Where, on the contrary, this failure is caused by legal constraints, we would not consider the EU's failure to be voluntary and therefore it would not give rise to moral culpability.

Our analysis of international action on forests and of the scale of the EU's imports of embodied deforestation has already served to demonstrate how several of the requirements for complicity would be satisfied if the EU were to fail to act to reduce its global deforestation footprint. Notably, repeated calls internationally to halt deforestation and forest degradation leave little room for doubt about either the wrongfulness of this act or the EU's knowledge that it is wrong.¹²⁷ As noted above, there is a substantial body of evidence to show that the EU is a major importer of FRCs,¹²⁸ and the European Commission's own reports on this topic demonstrate unequivocally that the EU has clear knowledge of the EU's consumption-driven contribution to deforestation and forest degradation globally.¹²⁹

It is important to note that Lepora and Goodin accept that there are circumstances in which engaging in a complicit act may 'on balance' be the right thing to do. Specifically, when it is necessary to attain a greater good.¹³⁰ In order to evaluate whether an act is morally justified, all things considered, it is necessary to assess the balance of right and wrong inherent in the different possible actions open to the agent.¹³¹ While one can easily imagine circumstances in which deforestation or forest degradation may be justified – for example, to support the livelihoods of forest-dwelling communities including indigenous peoples – it is more difficult to contemplate circumstances in which FRCs should be shipped or flown half-way round the world in order to satisfy the insatiable appetite of consumers within the EU.

Before concluding this discussion of complicity, it is important to stress that the EP's recommendations are well crafted from this point of view. Taking legal constraints into account, including WTO law,¹³² the proposal is broadly defined and ambitious. The EP is cognizant of the importance of preventing the existence of a regulatory gap at the European level from allowing EU consumers to 'blamelessly, unwillingly and unknowingly drive deforestation'.¹³³ These consumers cannot be considered as complicit in global deforestation because they lack the requisite knowledge of their contribution, and therefore it is incumbent on the EU to act. Equally, the EP is 'convinced that mandatory sustainability rules enacted in a large market, such as the Union market, have the potential of steering global production practices towards

¹²⁵ *ibid* 82-83.

¹²⁶ *ibid* 106 (Table 6.2), making clear that the contribution may be either potentially or definitely causally essential.

¹²⁷ See section 3 above.

¹²⁸ See section 2 above.

¹²⁹ See most recently, COM (2019) 352, 4.

¹³⁰ Lepora and Goodin (n123) 112.

¹³¹ *ibid* 98.

¹³² EP Resolution 2020, 16 (para 58).

¹³³ *ibid* 11 (para 19).

more sustainable ones'.¹³⁴ On this basis, a failure on the part of the EU to regulate trade in FRCs has the potential to make a causal contribution to continuing global deforestation. However, the EP also recognizes the importance of pursuing international cooperation, both to tackle the supply-side drivers of deforestation and forest degradation in supplier countries,¹³⁵ and to ensure a level playing field globally.¹³⁶ Further, the EP's proposal seeks to achieve an on-balance good outcome by seeking to exclude the possibility that rules of this kind could entail the unintended consequence of shifting production from forest-ecosystems to other valuable high-carbon or biodiversity-rich ecosystems.¹³⁷

Moving forward, as the Commission prepares its formal proposal on mandatory due diligence rules for forest and ecosystem-risk commodities, it would do well to keep the concept of complicity in mind. Taken seriously, this provides not just a slogan but a valuable framework for appraising the blameworthiness of EU failure to act or to pursue action that is not sufficiently ambitious, having regard to the legal limits to its powers.¹³⁸ It is to one element of these limits – namely WTO law – that this paper will now turn.

6. Legal Limits on Stepping Up EU Action

From a legal perspective, WTO-compatibility is often perceived as a major barrier to unilateral trade measures addressing global environmental problems and, at times, used as a convenient excuse for not adopting such measures. This has been mainly fuelled by a common (mis)belief that WTO law prohibits trade-related environmental regulation that interferes with production practices (i.e., so-called processes and production methods (PPMs)) outside the regulating State, which has regrettably engrained long-standing divisions between the environmental and trade communities.¹³⁹ The reality is, however, more nuanced as evidenced by the fact that measures conditioning market access on environmental PPMs (i.e., turtle-safe and dolphin-safe harvesting methods) have been successfully justified in WTO compliance proceedings.¹⁴⁰ At the outset, we also underscore that the EU's Timber Due Diligence Regulation, upon which the proposed due diligence legislation for FCRs builds, has been in place for several years and has not yet been challenged in the WTO dispute settlement system.

Nonetheless, we do recognize that these EU measures regulating trade in illegally harvested timber and other FRCs may be in tension with core WTO rules and, hence, be in need of justification under WTO exception clauses. In particular, such measures are likely to be inconsistent with the non-discrimination rules of the General Agreement on Tariffs and Trade

¹³⁴ *ibid* 12 (para 25).

¹³⁵ *ibid* 14 (paras 44-45).

¹³⁶ *ibid* 14-15 (paras 46).

¹³⁷ *ibid* 12 (paras 30).

¹³⁸ From an EU law perspective, we do not foresee any legal constraints on extending the current FLEGT-based legal framework from timber to other FRCs, given the broad powers the EU enjoys for trade and environmental matters under 191 and 207 Treaty on the Functioning of the European Union [2010] OJ L83/47. With respect to extra-territoriality concerns under international law, see Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) *AJCL* 87.

¹³⁹ See e.g., Steve Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale J. Int. Law* 59, 60-79; and Gracia Marín Durán, 'NTBs and the WTO Agreement on Technical Barriers to Trade: The Case of PPM-Based Measures Following US-Tuna II and EC-Seal Products' (2015) 6 *EYIEL* 87, 90-94 and 109-110.

¹⁴⁰ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)* – Report of the Appellate Body (21 November 2001) WT/DS58/AB/RW (US – Shrimp (2001)); *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 by United States)* – Report of the Appellate Body (11 January 2019) WT/DS381/AB/RW2.

(GATT),¹⁴¹ namely the most-favoured-nation (MFN) treatment obligation¹⁴² and the national treatment (NT) obligation.¹⁴³ Essentially, WTO members are required not to discriminate between 'like' products imported from other countries and not to discriminate between foreign and domestic 'like' products, respectively.

According to well-established case law, discrimination occurs when a trade measure treats less favourably one group of products vis-à-vis the group of like products,¹⁴⁴ in the sense that it has a 'detrimental impact' (i.e., an asymmetric or disparate effect) on their competitive opportunities.¹⁴⁵ Applying this to the Timber Due Diligence Regulation, it seems clear that it would have a detrimental impact on *illegally* harvested timber, which cannot be placed on the EU market, vis-à-vis *legally* harvested timber, which can be placed on the EU market, so the key question is whether these two sets of products can be considered 'like'. In WTO jurisprudence, the decisive criterion for assessing likeness is the nature and extent of the competitive relationship between the products concerned, which is determined by a number of factors but in particular consumers' tastes and habits.¹⁴⁶ In other words, an environmentally-sustainable product would be like an environmentally-unsustainable product for WTO law purposes, if (some) consumers in a given market treat them as substitutable. Taking our example, if a subset of EU consumers is willing to substitute legally sourced timber with illegally sourced timber –and we may safely assume this is the case, such products would be deemed like and there would be a breach of the GATT non-discrimination obligations. Generally speaking, this interpretation of likeness inflates the chances of finding a breach for trade measures regulating environmental PPMs, as it is quite improbable that all or most consumers in a given market would be unwilling to substitute between products (or find them 'unlike' in WTO law terms) *just* because of their embodied deforestation or other environmental impact.¹⁴⁷

Another potential violation of the MFN obligation may arise from the differential treatment under the Timber Due Diligence Regulation between VPA-based legally harvested timber and other legally harvested timber subject to the due diligence requirements. As discussed above,¹⁴⁸ VPA countries enjoy greater flexibility in terms of determining the legality definition and, hence, may be treated more favourably than non-VPA countries when exporting timber products to the EU.

As illustrated in Table 1 below, it is conceivable that the proposed due diligence legislation for FRCs will raise similar tensions with the GATT non-discrimination obligations. For instance, a possible breach of the NT obligation could arise from the different treatment between imported FRCs that are covered by the proposed measure and subject to its due diligence requirements

¹⁴¹ General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) LT/UR/A-1A/1/GATT/1. Due to space constraints, we do not consider the WTO Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3, given it is currently unclear the extent to which this agreement applies to PPM-based regulations: see Marín Durán (n139) 94-104.

¹⁴² Art. I:1 GATT, which applies to internal regulations covered by Article III:4 GATT (see n143 below).

¹⁴³ Art. III: 4 GATT. We assume that both EU measures are internal regulations covered by this GATT provision, since they apply to both EU and foreign products and prohibit the 'placing on the market' (and not only the importation) of non-qualifying goods (i.e., illegally harvested timber or unsustainable commodities), thereby qualifying as a 'law, regulation or requirement affecting the internal sale' of such products. See further, Dylan Geraets and Bregt Natens, 'The WTO Consistency of the European Union Timber Regulation' (2014) 48(2) *JWT* 433, 440-442.

¹⁴⁴ Note that the comparison is between *imported* products under the MFN obligation and between *imported and domestic* products under the NT obligation.

¹⁴⁵ WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body* (18 June 2018) WT/DS400/DS401/AB/R (*EC – Seal Products (2014)*) [5.82, 5.84 and 5.101].

¹⁴⁶ WTO, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body* (5 April 2001) WT/DS135/AB/R [99].

¹⁴⁷ See further, Marín Durán (n139) 114; Partiti (n91) 40-41.

¹⁴⁸ See section 4.1 above.

to the placed on the EU market (e.g., imported palm oil) and competing EU agricultural commodities that are not covered by measure (e.g., rapeseed and sunflower oil). Similarly, the detrimental treatment of ‘high-risk’ FCRs which do not meet the forest sustainability criteria under the proposed measure and thus cannot be placed on the EU market (e.g., imported beef from country A) vis-à-vis competing ‘negligible-risk’ FCRs that meet such criteria and can be placed on the market (e.g., EU/imported beef) could amount to a violation of the MFN treatment and NT disciplines.

Table 1 – Proposed Forest Due Diligence Regulation and GATT Core Disciplines

Basis for Differentiation	Like Products	Detrimental Impact	Potential Breach
Product coverage	Covered FRCs (e.g., imported palm oil) v competing non-covered agricultural commodities (e.g., EU/imported rapeseed and sunflower oil)	Subject to sustainability criteria to be placed on EU market v not subject to sustainability criteria to be placed on EU market	MFN and NT obligations
Forest sustainability criteria¹⁴⁹	High-risk/unsustainable FCRs (e.g., imported beef from country A not meeting criteria) v competing negligible-risk/sustainable FRCs (e.g., EU/imported beef meeting criteria)	Cannot be placed on the EU market v can be placed on the EU market	MFN and NT obligations
VPAs	Licensed FCRs (e.g., soy) imported from VPA countries v competing FCRs (e.g., soy) imported from non-VPA countries	VPA countries assume stricter licensing requirements than non-VPA countries to export FCRs to EU market	MFN obligation

However, we believe that both the existing Timber Due Diligence Regulation and the proposed due diligence legislation for FRCs can be justified under Article XX GATT, if carefully designed and applied. Article XX GATT lays down a conditional exception for a measure that is *prima facie* inconsistent with core GATT obligations, provided that: (i) it is provisionally justified under one of the policy grounds listed in paragraphs (a) to (j); and (ii) it meets the requirements of the chapeau (or introductory clause) of that provision. As shown below, these conditions should not be viewed just as a hurdle to ensure the WTO-compatibility of the EU measures, but as an opportunity to assess their soundness also from an environmental policy standpoint.

¹⁴⁹ We use the terms ‘sustainable’ and ‘unsustainable’ to indicate compliance and lack thereof with the forest sustainability criteria established in the proposed measure.

With regards to the first step, there are three policy grounds that appear relevant to the EU measures at first glance, but Article XX(g) GATT is the most promising course of action.¹⁵⁰ This provision requires that the EU measures be related to the conservation of exhaustible natural resources and are made effective in conjunction with restrictions on domestic production and consumption. There is little doubt that the EU measures are 'closely and genuinely related to'¹⁵¹ to the conservation of natural forests, given that they prohibit the placing on the EU market of illegally sourced timber and other FRCs and thereby seek to reduce international demand for such commodities as a chief driver of global deforestation and forest degradation.¹⁵² It is also quite certain that forests constitute 'exhaustible natural resources' within the meaning of Article XX(g) GATT, considering the expansive and flexible interpretation of this term in WTO jurisprudence. Notably, in the ground-breaking *US – Shrimp* case, the WTO Appellate Body (AB) emphasized the importance of interpreting the concept in a dynamic manner, 'in light of the contemporary concerns of the community of nations about the protection and conservation of the environment', with reference to relevant international instruments.¹⁵³ As previously discussed, several multilateral instruments have urged action to protect and restore the world's forests since 1992,¹⁵⁴ while the latest UNEP/FAO report finds that the rates of deforestation and forest degradation 'continue to take place at alarming rates'.¹⁵⁵

An objection that may be raised here is that the EU measures seek to protect natural forests *outside* its territory and that Article XX(g) GATT cannot justify such extra-territorial environmental measures. We do not agree with this proposition because, firstly, there is no explicit jurisdictional limitation in text of Article XX GATT and, secondly, the AB has avoided ruling on whether such a jurisdictional limitation could be implied while accepting the invocation of Article XX GATT as a defence for measures with similar extra-territorial effects.¹⁵⁶ But in any event, it could be argued that a 'sufficient nexus'¹⁵⁷ exists between the natural forests being protected and the EU, given the global effects of deforestation and forest degradation in terms of climate change and biodiversity loss that also have a negative impact on its territory. Lastly, the EU measures are likely to meet the even-handedness requirement of Article XX(g) GATT, since they impose the same restrictions on domestic production of timber products and other FRCs.

Turning to the chapeau of Article XX GATT, it essentially requires that the measure at issue does not result in arbitrary or unjustifiable discrimination between countries (and their products) where the same conditions prevail. A number of factors have been considered in WTO case law to determine when discrimination is arbitrary or unjustifiable, with the most prominent among them being the rational connection standard. This looks at the rationale for the discrimination put forward by the regulating WTO member and the key question is whether it

¹⁵⁰ The other grounds are: Article XX(a) on measures 'necessary to protect public morals', which opens room for a complicity-type argument (see section 5 above) and XX(b) on measures 'necessary to protect human, animal or plant life and health', but both are subject to a stricter necessity test. For further elaboration in the FRCs context, see Partiti (n91) 45-47 and 49-51.

¹⁵¹ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (6 November 1998) WT/DS58/AB/R (*US – Shrimp (1998)*) [136].

¹⁵² See section 2 above; and nn 48 and 81 (and accompanying text).

¹⁵³ *US – Shrimp (1998)* [129-132]; and for further discussion Gracia Marín Durán, 'Exhaustible Natural Resources and Article XX(g)' in Panagiotis Delimatsis and Leonie Reins, (eds) *Trade and Environmental Law* (Edward Elgar Publishing 2021).

¹⁵⁴ See section 3 above.

¹⁵⁵ FAO/UNEP (n3) xvi.

¹⁵⁶ *US – Shrimp (1998)* [133], concerning sea turtles; *EC – Seal Products (2014)* [5.173], concerning seals partly outside the territory of the regulating member.

¹⁵⁷ *US – Shrimp (1998)* [133].

can be reconciled with, or rationally connected to, the objective pursued by the measure.¹⁵⁸ In our case, can the EU legislator genuinely justify the instances of discrimination between countries/products we identified above in light of the forest conservation goal?

The discrimination between illegally harvested timber (prohibited in the EU market) and legally harvested timber (permitted in the EU market) under the Timber Due Diligence Regulation is most likely justifiable and hence WTO-compatible, since illegal logging clearly goes against the forest conservation objective of the measure. Whether the same can be said for the proposed due diligence legislation for FRCs is less clear and will largely depend on how the EU defines the product coverage of the measure, as well as deforestation and forest degradation under the sustainability criteria. Basing these determinations on objective criteria and scientific evidence (e.g., the FAO definitions seen earlier or other reputable sources such as Global Forest Watch data compiled by the World Resources Institute)¹⁵⁹ is not only important for securing WTO-compatibility, but also desirable from an environmental policy perspective. To retake one of our earlier examples, there is no reason to allow discrimination between beef qualifying as ‘sustainable’ (permitted in the EU market) and beef qualifying as ‘unsustainable’ (prohibited in the EU market) unless it is objectively explained by the products’ varying risks to forested areas.

A second factor for assessing arbitrary and unjustifiable discrimination under the chapeau of Article XX GATT pertains to the degree of flexibility of the measure, and in particular whether it conditions market access on ‘single, rigid and unbending’ regulatory requirements or, conversely, it allows for an enquiry into ‘the appropriateness of [such requirements] for the [different] conditions prevailing in exporting countries.’¹⁶⁰ Importantly, this flexibility standard does not require the regulating WTO member to sacrifice the achievement of its environmental objective to any extent, but simply to recognize third-country regulatory programmes that are comparable in environmental effectiveness. This would provide sufficient latitude to exporting countries in designing regulatory programmes that are suitable to their specific conditions in order to achieve the level of environmental protection sought by the importing country.¹⁶¹

Applying this to the FLEGT initiative, it appears to be sufficiently flexible in accommodating the particular conditions of different timber exporting countries, since both the VPAs and Timber Due Diligence Regulation refer back to domestic laws for determining timber legality and, hence, do not impose a single EU-determined legality standard upon these countries. While such flexibility with regards to the substantive *content* of legality is desirable, one may question whether there should be a common baseline with regards to the *scope* of legality –i.e., which domestic laws (other than forest-specific legislation) should be covered. A scenario where non-VPA countries are subject to complying with a broader set of domestic laws under the Timber Due Diligence Regulation vis-à-vis those bilaterally agreed with VPA countries would be difficult to justify as being comparably effective in fighting illegal logging. With respect to the proposed Forest Due Diligence Regulation, the flexibility requirement may be harder to meet since the underlying forest sustainability standards would be defined by the EU and apply to all exporting countries alike. As noted earlier, we believe that it is important that the proposed measure is sufficiently sensitive to the diversity in forest environments across countries and includes reasonable mechanisms to assess whether third-country definitions on deforestation

¹⁵⁸ WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of Appellate Body* (17 December 2007) WT/DS332/AB/R [226-227].

¹⁵⁹ For a discussion of the growing gap in the deforestation data produced by these two sources, and the reasons for this, see Fred Pearce, ‘Conflicting Data: How Fast is the World Losing its Forests’ (9 October 2018) <<https://e360.yale.edu/features/conflicting-data-how-fast-is-the-worlds-losing-its-forests>> accessed 14 November 2021.

¹⁶⁰ *US – Shrimp (1998)* [177].

¹⁶¹ *US – Shrimp (2001)* [142-144].

and forest degradation are comparable in environmental effectiveness to those set out by the EU.

A final element to consider under the chapeau of Article XX GATT concerns international cooperation, and more specifically whether the regulating WTO member is required to engage into good-faith negotiations with affected countries *before* resorting to unilateral measures to protect the global environment. Scholarly views differ as to whether the chapeau imposes such a self-standing duty of prior negotiations before any unilateral environmental action,¹⁶² or it is rather narrowed to the factual circumstances of the *US – Shrimp* case where the United States had plainly discriminated between WTO members by making serious efforts to negotiate an international agreement for the conservation of sea turtles with some shrimp-exporting countries and failed to do so with others.¹⁶³ What seems clear from subsequent case law is that, 'as far as possible', a multilateral cooperative approach to address global environmental challenges is 'strongly preferred'¹⁶⁴ under WTO law, just as it is under international environmental law.¹⁶⁵ Comparable negotiating efforts should be made with all affected countries (whether before or after the adoption of unilateral measures),¹⁶⁶ even if they do not need to lead to the conclusion of an international agreement, nor identical results between different negotiating groups.¹⁶⁷ Given this strong preference for international cooperation in WTO law, we consider that VPAs should continue to be an integral element of the FLEGT initiative. Following this model, a prospective Forest Due Diligence Regulation should provide the basis for negotiating similar partnership agreements with all countries having an export interest in the covered FRCs, as proposed by the EP.

In making this argument, it is relevant to draw attention to the FLEGT Evaluation and Fitness-Check recently conducted by the European Commission,¹⁶⁸ which is meant to inform subsequent regulatory action by the EU on global embodied deforestation. While the European Commission accepts that VPAs show positive results in terms of stakeholder participation and governance arrangements, it suggests that there is no evidence that they have contributed to a reduction in illegal logging in partner countries or to a reduction in the consumption of illegally harvested timber in the EU. Given this, it is possible that the EU may abandon VPAs in favour of vaguely defined alternative partnership arrangements.¹⁶⁹

This suggestion has been greeted by dismay by leading non-governmental organisations active on deforestation, which are mobilizing against what they regard as a premature abandonment of VPAs.¹⁷⁰ They have criticized the fitness check process, pointing out that it

¹⁶² Endorsing this as pre-condition for WTO-compatible unilateral environmental action, see e.g., Catherine Gascoigne, 'Seeing the Wood for the Trees': Revisiting the Consistency of Australia's Illegal Logging Act with the Law of the World Trade Organization' (2021) *J Envtl L* 1, 23-25. Challenging this reading, see e.g., Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Colum J Envtl L* 491, 507-509.

¹⁶³ *US – Shrimp (1998)* [172]; and *US – Shrimp (2001)* [119 and 128].

¹⁶⁴ *US – Shrimp (2001)* [124].

¹⁶⁵ See e.g., 'Rio Declaration on Environment and Development' UN Conference on Environment and Development (Rio de Janeiro 3-14 June 1992) UN Doc/A/CONF.151/26 (Vol. I), Principle 12.

¹⁶⁶ *EC – Seal Products (2014)* [5.337] on EU failing to make comparable efforts in facilitating access of Canadian communities to the Inuit exception under the measure as it did with respect to Greenlandic communities.

¹⁶⁷ *US – Shrimp (2001)* [122-123].

¹⁶⁸ Commission, 'Illegal Logging: Evaluation of EU Rules (Fitness Check)': <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11630-Illegal-logging-evaluation-of-EU-rules-fitness-check-_en> accessed 14 November 2021

¹⁶⁹ Hugo-Maria Schally (DG Environment), 'EU Action on Deforestation: State of Play' (17 March 2021) <https://www.fern.org/fileadmin/uploads/fern/Documents/Presentations/Shally_17_03_21_EU_Presentation_FERN_event.pdf> accessed 14 November 2021.

¹⁷⁰ FERN has been particularly active in this respect. See e.g., 'FLEGT 'Fitness Check': Abandoning FLEGT Licenses Would Harm Forest Governance and the Legal Timber Trade' (8 April 2021)

received very few responses and that the vast majority of these originated from within Europe.¹⁷¹ They argue that VPAs need to be maintained and that the EU needs to invest more diplomatic energy to pressurize partner countries to resolve the political issues that have slowed the implementation of FLEGT licensing schemes.

We also consider that there are powerful arguments in favour of the EU continuing to invest, and indeed investing more, in VPAs, not just in relation to timber but in relation to FRCs more generally. Firstly, the fact that Indonesia –the EU’s single biggest supplier of embodied deforestation– already has a functioning FLEGT licensing system in place for timber products bodes well for its willingness to enter into a more comprehensive arrangement covering a broader range of FRCs. Secondly, and linked to the issue of WTO-compatibility, the marrying of mandatory due diligence with bilaterally negotiated VPAs may temper criticism of EU unilateral action in this domain. This is in part because these agreements create flexibility in terms of the applicable standards and space for negotiated outcomes that are capable of accommodating diversity in forest governance in different countries. They can serve as incubators for defining sustainability in context and to assist the EU in learning from the bottom up when it seeks to give content to the sustainability criteria underpinning mandatory due diligence for FRCs. Thirdly, VPAs also provide an institutional framework for the provision of EU technical and financial assistance to address the supply-side drivers of deforestation and forest degradation. In fact, as the EU moves beyond legality to sustainability as a benchmark for importing FCRs, it will be obliged to confront yet more starkly the fact that deforestation generates distributive conflicts which involve complex trade-offs and winners and losers.¹⁷² VPAs do not shy away from this reality but aim to ‘give voices to populations used to being unheard’ and to ‘secure the rights of those most affected by forest destruction’.¹⁷³

Even when countries eschew the opportunity to enter into negotiations for a VPA – as we would expect, for example, at the current time in relation to Brazil – the EU can respond as it did to Papua New Guinea in the WTO Trade and Environment Committee where it confirmed that ‘any country interested in negotiating a VPA could get in contact’.¹⁷⁴ This has clear potential to assist the EU in justifying, and where necessary defending, its initiatives in the WTO, creating space for it to argue that it too favours a cooperative as opposed to a unilateral approach to addressing the challenge of global deforestation and forest degradation.

7. Conclusions

In this article, we have analysed existing and potential future EU intervention to reverse its demand-driven contribution to global deforestation and forest degradation. This includes prominently its FLEGT initiative and the EP’s recent recommendations for the adoption of mandatory due diligence legislation for forest and ecosystem-risk commodities.¹⁷⁵ We have

<https://www.fern.org/publications-insight/flegt-fitness-check-abandoning-flegt-licenses-would-harm-forest-governance-and-the-legal-timber-trade-2320/> accessed 14 November 2021.

¹⁷¹ Aside from a small number of anonymous responses (7 of 39), only one of the responses received was from outside the EU and was submitted by Partnership for Policy Integrity in the US (see n167 above).

¹⁷² This is brought out in a deeply effective and moving way in Arpitha Kodiveri, ‘Deliberating Development in India’s Forests: ‘Consent, Mining and the Making of the Deliberative State’ (PhD thesis, European University Institute 2021).

¹⁷³ See n 169.

¹⁷⁴ WTO, ‘Report of the Meeting held on 30 June 2014’ (30 June 2014) CT/CTE/M/57, para 1.18.

¹⁷⁵ On 17 November 2021, the European Commission put forward a ‘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. This is not discussed in this paper, but we intend to analyse it in a subsequent contribution.

argued that such an ambitious EU action to regulate trade in FRCs is needed, justified and can be made WTO-compatible, if carefully designed and applied. It is necessary because the EU is presently the world's second-largest consumer of global deforestation embodied in its imports of agricultural commodities. This fact is hard to reconcile with the international pledges that the EU has repeatedly made to end global forest loss and ensure sustainable consumption patterns by 2030 – including most recently at UN climate summit in Glasgow in November 2021.¹⁷⁶

We also consider that stepping up EU action to regulate trade in FRCs is justified. This is partly because the EU is well placed to make a substantial contribution to achieving globally-agreed objectives on halting global deforestation and, in part, because the FLEGT initiative suggests that the EU can play a key role as a norm catalyst, prompting the adoption of similar legislation elsewhere. Moreover, we have argued that the EU has a moral obligation to reduce its global deforestation footprint in order to avoid being complicit in the destruction and degradation of forests worldwide.

In addition, we believe that WTO law should not be used as a convenient excuse for failing to tackle the EU's global deforestation footprint. As we have shown, EU measures regulating trade in illegally sourced timber and other FRCs can be designed and applied in a manner that meets the requirements of the GATT Article XX exception clause and, hence, be WTO-compatible. Furthermore, we have argued that complying with these Article XX-based conditions provides an opportunity for making the EU measures fitter also from an environmental policy viewpoint. Notably, with respect to the proposed due diligence legislation for FRCs, the EU would need to ensure that forest sustainability requirements are well grounded in objective environmental criteria and sufficiently flexible to take account of the diversity in forest environments across exporting countries. While not strictly required from a WTO law perspective, VPAs should continue play an important role as incubators for negotiated sustainability standards and cooperative solutions to the global problem of deforestation and forest degradation.

Whilst we consider that the EU has a moral imperative and is committed internationally to taking steps to reduce its global deforestation footprint, we also recognize that it is challenging for it to do so. Operating at the contested interface between people and nature, it is essential that EU global forest policy serves as intended to bolster the rights, including the customary land tenure rights, of forest-dependent communities and indigenous peoples. Also, in a context of increasing 'great power competition' for natural resources,¹⁷⁷ tensions may arise between security and sustainability of supply. It is notable in this respect that the EEA has identified two of the top five FRCs consumed in the EU as being among the most vulnerable in terms of security of supply.¹⁷⁸ If the EU is to guarantee a secure *and* sustainable supply of agricultural commodities and other natural resources moving forward, it will be important that deforestation risks and other environmental concerns are properly integrated into its assessments of security of supply. This is not currently the case when the EU draws up its list of 'critical raw materials',

¹⁷⁶ 'Glasgow Leaders' Declaration on Forests and Land Use' (2 November 2021), <<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>> accessed 14 November 2021.

¹⁷⁷ Wyatt Scott et al, 'Great Power Resource Competition in a Changing Climate: New America's Natural Security Index' (23 October 2019) <www.newamerica.org/resource-security/reports/great-power-resource-competition-changing-climate/> accessed 14 November 2021.

¹⁷⁸ EEA, 'Global Climate Change Impacts and the Supply of Agricultural Commodities to Europe' (11 February 2021) 9 (Figure 4) <www.eea.europa.eu/publications/global-climate-change-impacts-and> accessed 14 November 2021. Other FRCs register relatively high overall vulnerability scores including coffee, soy in various forms and maize.

the methodology for which privileges security over sustainability of supply.¹⁷⁹ We intend to return to these dilemmas and challenges facing EU global forest policy in future research.

¹⁷⁹ Commission, 'Critical Raw Materials Resilience: Charting a Path towards Greater Security and Sustainability' COM (2020) 474 final, 3. Despite the title of this Communication, and the Commission's insistence that environmental aspects are addressed within this framework (footnote 9), the methodology relied on by the Commission does not accord an important place to such concerns. It is therefore not surprising to find that only one of the top FRCs imported into the EU is included in EU's current list of critical raw materials, namely natural rubber.

