Journal Of Environmental Law, 2022, **34**, 245–267
https://doi.org/10.1093/jel/eqac002
Advance access publication 18 February 2022
Original article

OXFORD

Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union

Gracia Marín Durán[*] and Joanne Scott[**]

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. On 17 November 2021, the European Commission took a courageous first step towards reducing the EU's global deforestation footprint, by putting forward a legislative proposal to regulate trade in FRCs. The article analyses this proposal and explains why we consider it to be necessary and justified. Although we identify some important shortcomings in the proposal, particularly in relation to the protection of land tenure rights, we argue that the EU has a moral responsibility to avoid being complicit in the destruction of forests worldwide. We also suggest that the proposed regulation needs to be better designed to be compatible with the law of the World Trade Organisation (WTO), and notably with regards to its country benchmarking system and cooperation with affected exporting countries.

Keywords: deforestation and forest degradation, trade in forest-risk commodities, forest due diligence, EU as a norm catalyst, complicity for deforestation, WTO law, partnership agreements

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 sustaining life on Earth and human well-being.[2] Healthy forest ecosystems provide us with essential services (eg, clean air, water flow regulation, carbon reduction and habitats for animals and plants), are a source of livelihood and income for about 25 per cent of the world's population (including vulnerable and indigenous communities) and hold intrinsic cultural and spiritual values for many people. And yet, it is no secret that the world's forests are in serious

* Faculty of Laws, University College London, London, UK. (gracia.marin-duran@ucl.ac.uk).
** Department of Law, European University Institute, Florence, Italy. (joanne.scott@eui.eu).

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).

danger.[3] According to the latest joint report by the United Nations Environment Programme (UNEP) and Food and Agriculture Organisation (FAO), global deforestation and forest degradation continued to take place at 'alarming rates' in 2015–2020.[4] 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. Over the past three decades, it is estimated that some 420 million hectares of forest have been lost through conversion to other land uses, although this environmental loss has been more pronounced in some regions of the world (ie, Central Africa, South America and Southeast Asia) than in others (eg, Europe).[5]

While threats to the world's forests have been widely recognised 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 European Union (EU) has taken and is considering taking to address its share of responsibility for this global problem.

We begin by explaining how EU consumption of imported forest-risk commodities (FRCs) is a chief driver of deforestation and forest degradation on a global scale, and why trade regulation must be part of the solution (Section 2).[6] We then provide an overview of the 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. After a brief overview of its existing legislation to combat illegal logging and related trade in illegally harvested timber, we examine the Commission's recent legislative proposal to regulate trade in forest-risk agricultural commodities more broadly (Section 4). We argue that stepping up EU action to regulate trade in FRCs is justified on grounds that the Union has a moral duty not to contribute to environmental wrongdoing in third countries through its demand for such commodities. Nonetheless, we consider that the Commission's proposal is less ambitious than the earlier recommendations of the European Parliament (EP) and identify a number of shortcomings particularly from a human rights perspective (Section 5). We further argue that certain elements of the Commission's proposal need to be reviewed to bring it in line with WTO law, and that this can also improve the environmental benefits of the proposed regulation (Section 6). The final section concludes our discussion with key issues to be addressed during the ongoing legislative process at EU level (Section 7).

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'.[7] It found that to an increasing degree, 'Europe is externalising its pressures on key environmental issues

3 This is not to deny the importance of recognising variation in local context or that narratives of forest destruction can sometimes be used politically and against the interests of local communities. See James Fairhead and Melissa Leach, *Reframing Deforestation: Global Analysis and Local Realities – Studies in West Africa* (Routledge 1998).

4 UNEP/FAO, *The State of World's Forests* (2020) xvi <www.fao.org/documents/card/fr/c/ca8642en/> accessed 22 January 2022.

5 ibid xvi and ch 2. Forest cover in Europe has continuously increased by 9 per cent over 1990–2020: Forest Europe, 'State of Europe's Forests 2020' (2020) 15 <https://foresteurope.org/wp-content/uploads/2016/08/SoEF_2020.pdf> accessed 22 January 2022.

6 Due to space constraints, we focus on forests and FRCs, while not neglecting the environmental importance of other high-carbon stock and biodiversity-rich ecosystems as is clear from the discussion below.

7 EEA, *The European Environment – State and Outlook 2020: Knowledge for Transition to a Sustainable Europe* (2019) 32 <www.eea.europa.eu/soer/2020> accessed 22 January 2022.

[to other countries]'.[8] 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.[9] While Europe is 'living well' in terms of levels of human development, it is not 'living within the limits of [the] planet'.[10]

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.[11] 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 per cent 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.[12]

While the level of deforestation associated with EU imports has fallen by around 40 per cent between 2005 and 2017, the EU was still estimated to be responsible for 16 per cent of the deforestation embodied in internationally traded commodities in 2017.[13] Given that around 27 per cent of agricultural commodities was traded that year,[14] this equates to the EU being responsible for a little less than 4.5 per cent of global deforestation, compared to the Commission's earlier estimate of 10 per cent for the period 1990–2008.

In 2018, more than three-quarters of the EU's global deforestation footprint derived from five commodities, namely soy beans (27 per cent), palm oil (26.14 per cent), cocoa (10.14 per cent), coffee (9.05 per cent) and beef (4.47 per cent).[15] While figures for wood are not available for 2018, this is estimated to have comprised a 9 per cent share of embodied deforestation in 2017, bringing it within the top six EU-imported commodities causing global deforestation.[16] Taken together, Indonesia (21.48 per cent), Brazil (20.48 per cent) and Paraguay (12.87 per cent) supplied commodities which embodied more than half of the EU's total imported deforestation in 2018.[17] Although China is now the world's biggest importer of embodied deforestation (24 per cent compared to the EU's 16 per cent),[18] 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 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'.[19]

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,[20]

8 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.

9 Florence Pendrill and others, 'Deforestation Displaced: Trade in Forest-Risk Commodities and the Prospects for a Global Forest Transition' (2019) 14(5) Environmental Research Letters 14, 20.

10 EEA (n 7) 48.

11 See eg, 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.

12 Pendrill (n 9) 20.

13 Béatrice Wedeux 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 7 January 2022. These data predate the UK's departure from the EU.

14 See: Pendrill and others, 'Deforestation Risk Embodied in Consumption and Production of Agricultural and Forestry Commodities 2005-2018' (2022) <https://zenodo.org/record/5886600#.Ye1b7PXP0_U> accessed 22 January 2022.

15 ibid.

16 Wedeaux and Schulmeister-Oldenhove (n 13) 7 and 21.

17 Pendrill (n 14).

18 Wedeaux and Schulmeister-Oldenhove (n 13) 5.

19 ibid 21.

20 Global Witness, 'Money to Burn' (2019) <www.globalwitness.org/en/campaigns/forests/money-to-burn-how-iconic-banks-and-investors-fund-the-destruction-of-the-worlds-largest-rainforests/> accessed 22 January 2022.

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'.[21] 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.[22] 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.[23]

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 FRCs 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.[24] 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.[25] 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 pursuant to their own environmental policies, linked to responsibility for environmental harm,[26] and the evolving notion of 'sustainable forest management'.[27]

More recently, as part of the UN 2030 Agenda for Sustainable Development adopted in September 2015,[28] 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).[29] 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]'.[30] 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.[31] It provides a global framework for action at various levels to manage forests sustainably and to halt deforestation and forest degradation. This

21 ibid 3. This is resonant of the 'structural one health' approach, see: Robert Wallace and others, 'The Dawn of Structural One Health: A New Science Tracking Disease Emergence Along Circuits of Capital' (2015) 129 Social Science & Medicine 68, 69 pinpointing London, New York and Hong Kong as the world's global deforestation hotspots due to their role in finance.

22 Global Witness (n 20), 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.

23 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 10 Commodity Traders Causing the EU's Deforestation Risk': <https://trase.finance/watchlists/3ebfe1f8-0a62-4c6a-8109-707338faf454> accessed 22 January 2022.

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

25 '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).

26 ibid para 1(a).

27 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) 150–51.

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

29 ibid 24.

30 ibid 22.

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

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,[32] and 'building markets and infrastructure to promote production and consumption of sustainably managed forest products' as part of Goal 3.[33]

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 per cent of its land area, thus being utterly crucial for the protection of terrestrial biodiversity.[34] Indeed, the alarming rates of deforestation and forest fragmentation since 1990 have significantly contributed to the on-going loss of biodiversity and ecosystem services that are vitally important to human life and well-being.[35] 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. However, these provisions are framed in open-ended and qualified terms and thus leave considerable discretion to each Contracting Party in terms of implementation.[36] Furthermore, in line with the principle of State sovereignty over its natural resources, primary responsibility for ensuring conservation and sustainable use of forests is allocated on the basis of national jurisdiction or control.[37] In other words, as a CBD party, the EU is legally responsible for preserving forests within its territory rather than those located in third countries. Nonetheless, CBD parties have urged the promotion of sustainable production and consumption of forest products (presumably, including consumption of imported commodities) in achieving the overarching Aichi Biodiversity Targets (2015–2020),[38] and notably the 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 under agriculture and forestry by 2020 (Target 7).[39]

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 per cent of global GHG emissions—that is, the second major cause of climate change after the burning of fossil fuels.[40] 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,[41] with a particular focus being placed on the REDD+[42] mechanism introduced in 2005 under the umbrella of the UN Framework Convention on Climate Change (UNFCCC). Of

32 ibid 8.

33 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/wp-content/uploads/2021/08/NYDF_Declaration.pdf> accessed 22 January 2022.

34 UNEP/FAO (n 4) xvi and ch 3.

35 ibid xvi and ch 4; and 76 pointing to the worrying link between zoonotic diseases and deforestation and habitat destruction.

36 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993), 1760 UNTS 79, arts 6–10. See also, the Expanded Programme of Work on Forest Biodiversity: Conference of the Parties (COP), 'Decision VI/22: Forest Biological Diversity' (19 April 2002).

37 CBD, art 4.

38 See eg, 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) paras 56–57.

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

40 See UN, 'Too precious to lose' <www.un.org/en/observances/forests-and-trees-day> accessed 22 January 2022.

41 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); see also UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994), 1771 UNTS 107, arts 3(3) and 4(1)(c).

42 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 (n 27) 157–167.

most relevance for our purposes is the recent Glasgow Leaders' Declaration on Forests and Land Use, endorsed on 2 November 2021 by 141 UNFCCC parties (including the EU), which explicitly links the collective goal of halting and reversing global forest loss by 2030 with trade regulation. High-ranked representatives of States hosting more than 90 per cent of the world's forests have committed to '[f]acilitate trade and development policies, internationally and domestically, that promote … sustainable commodity production and consumption … and that do not drive deforestation and land degradation.'[43]

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 a comprehensive treaty on forests, which would (*inter alia*) address in more legally binding terms the interconnected areas of sustainable production and consumption. 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. Secondly, 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. Hence, from an international environmental law standpoint, the EU is not strictly required to regulate trade in FRCs but there is recognition that it *should* do so. We do not see how the EU could live up to its international commitments on ending global forest loss and ensuring sustainable *consumption* patterns without regulating international trade, since its responsibility for global forest destruction stems primarily from *importation* of FRCs. Put differently, trade regulation is indispensable if the EU is to eliminate (or, at least, reduce) its share of global embodied deforestation. As will be argued in Section 6, the EU *can* take such a regulatory action from a WTO law perspective, subject to some conditions.

4. CURRENT AND FUTURE EU ACTION

4.1 FLEGT Regulation and Timber Due Diligence Regulation

Having established the need to tackle the EU's import-driven contribution to global deforestation through trade regulation,[44] we now turn to its Forest Law Enforcement Governance and Trade (FLEGT) Action Plan,[45] 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.[46] 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, which we have discussed at length elsewhere and only their main elements will be outlined here.[47]

43 Glasgow Leaders' Declaration on Forests and Land Use (12 November 2021), <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/> accessed 22 January 2022.

44 We limit our analysis here to EU-level action. For an overview of action at Member-State level, see Aleksandra Heflich, *A Legal Framework to Halt and Reverse EU-Driven Deforestation* (European Union 2020) 13–15 <www.europarl.europa.eu/RegData/etudes/STUD/2020/654174/EPRS_STU(2020)654174_EN.pdf> accessed 22 January 2022.

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

46 ibid 4, estimating the value of illegal timber trade to be worth €150 billion per year and illegal logging to cost governments in timber-producing countries around US$10–15 billion each year in lost revenues. From an ecological perspective, illegal logging is one of the main direct causes of deforestation and forest degradation which, in turn, is a major driver of global warning and biodiversity loss: FAO/UNEP (n 4) 83.

47 Gracia Marín Durán and Joanne Scott, 'Reducing the European Union's Global Deforestation Footprint Through Trade Regulation' (2021) EUI LAW Working Paper 2021/14 <https://cadmus.eui.eu/bitstream/handle/1814/73189/LAW%20WP%202021_14.pdf?sequence=1&isAllowed=y> accessed 22 January 2022.

The first is the 2005 FLEGT Regulation,[48] which establishes a licensing scheme for controlling the legality of (listed) timber and timber products imported into the EU.[49] This licensing scheme is to be implemented through the conclusion of Voluntary Partnership Agreements (VPAs) between the EU and timber-producing countries.[50] 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.[51] 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]'[52]—and hence, as agreed with 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) definition of 'legal' timber,[53] sophisticated mechanisms for verifying compliance throughout the production and supply chain,[54] issuance of FLEGT licenses by the competent national authority[55] and independent audits to ensure the entire system is properly implemented.[56] This promotion of 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 jurisdiction.[57] It also allows VPAs to be tailor-made agreements, whereby the legality definition is developed through a national consultation process of different stakeholder groups in each partner country and adapted to the specific local needs and priorities.[58] 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.[59]

In October 2010, the EU strengthened this bilateral approach with the (unilateral) Timber Due Diligence (TDD) Regulation[60] as the second trade-related pillar of its FLEGT Action Plan. In force since 3 March 2013, this Regulation prohibits the placing on the EU market of illegally harvested timber, or products derived from such timber,[61] irrespective of their domestic or foreign origin.[62] It imposes a burden on economic operators (companies) marketing such products for the first time,[63] which are required to exercise due diligence in ensuring their legal origin.[64] In order to ensure its proper operation, the Regulation provides for regular checks to verify

48 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).

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

50 ibid art 1(2) and Annex I.

51 ibid art 4(1)–(2).

52 ibid art 2(10).

53 See eg, 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.

54 ibid art 7 and Annex V.

55 ibid arts 4–6.

56 ibid art 15.

57 See Section 3 above; Savaresi (n 27) 157.

58 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 22 January 2022.

59 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 22 January 2022.

60 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 (TDD Regulation).

61 ibid art 2(a) and Annex.

62 ibid art 4(1).

63 ibid art 1.

64 ibid art 6(1)(a)–(c), whereby operators must use a due diligence system containing three key elements: (i) measures and procedures to keep track of the origin and legality of the timber products; (ii) risk assessment procedures enabling an analysis and evaluation of the risks of illegally harvested timber products being placed on the market; and (iii) in cases where identified risks are more than 'negligible', risk mitigation measures that are adequate and proportionate to minimise effectively those risks.

compliance by operators with the due diligence process[65] and for 'effective, proportionate and dissuasive' penalties in cases of non-compliance.[66] Importantly, the Regulation creates an additional incentive for third countries to enter into VPA negotiations with the EU, by establishing a presumption of compliance with the due diligence requirements for FLEGT-licensed timber originating in partner countries.[67] Put differently, VPAs secure a green lane for licensed timber imports into the EU market.

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.[68] 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 TDD Regulation as a penalty default mechanism to sanction non-cooperation by timber-exporting countries.[69] But a key shortcoming of the current EU regulatory framework is that,[70] being limited to illegally harvested timber products, it 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 per cent of global tropical deforestation between 2000 and 2010, while large-scale commercial agriculture (driven by international demand) caused 40 per cent of the problem over the same period, albeit this figure reached almost 70 per cent in Latin America.[71] As previously seen, the EU is a major importer of agricultural commodities that contribute significantly to this trend, such as palm oil and soy.[72] All EU institutions have recognised the need to step up legislative action in order to reverse the Union's consumption-driven contribution to deforestation and forest degradation worldwide.[73] In October 2020, the EP adopted a resolution with concrete recommendations on EU mandatory due diligence legislation for forest and ecosystem-risk commodities[74] and, on 17 November 2021, the Commission unveiled its own legislative proposal on the matter which we examine next.

65 ibid art 10.

66 ibid art 19(2), which may include fines, seizure of the timber and timber products and immediate suspension of the authorisation to trade.

67 ibid art 3.

68 Commission, 'Evaluation of the EU Action Plan for Forest Law Enforcement Governance and Trade (FLEGT)' SWD (2016) 275, 3, but also 11–12 on slow progress in setting up TLAS in partner countries See also, 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 TDD Regulation.

69 Christine Overdevest 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, but also 72–75 pointing to implementation flaws in VPAs with Ghana and Indonesia.

70 The EU has also addressed deforestation through sustainability criteria for biofuels, but this does not cover uses of commodities (eg, 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.

71 FAO/UNEP (n 4) 82–83, stating that urban expansion accounted for 10 per cent, infrastructure development for 10 per cent and mining for 7 per cent of global deforestation.

72 See Section 2 above; and also COWI and others, *Feasibility Study on Options to Step Up EU Action on Deforestation: Final Report* (European Union 2018) 41–81 <https://ec.europa.eu/environment/forests/pdf/feasibility_study_deforestation_kh0418199enn_main_report.pdf> accessed 22 January 2022.

73 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.

74 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 Forest Resolution).

4.2 Proposed Forest Due Diligence Regulation

The Commission proposes to regulate the placing on the EU market, as well as the exportation from the Union, of certain commodities and products associated with deforestation and forest degradation.[75] The proposal pursues the two-fold aims of minimising the EU's contribution to deforestation and forest degradation worldwide and of reducing the EU's contribution to greenhouse gas emissions and global biodiversity loss.[76] It builds on the existing TDD Regulation, which would be repealed, but differs from it in a number of important ways.

First, with regards to product coverage, the proposed regulation is significantly broader. It is not only limited to timber products but also covers an additional five FRCs, namely: cattle, cocoa, coffee, oil palm and soy (both of EU and foreign origin). It also extends to products that contain these commodities, have been fed with them, or have been made using any one of them (derived products).[77] This initial list appears reasonable, as scientific research confirms the selected six commodities represent the largest share of global deforestation embedded in EU imports and, hence, 'policy intervention could bring the highest benefits per unit value of trade'.[78] However, it has been argued that rubber and maize should have been included in this initial list, given these are still in the top ten EU-imported commodities linked to global forest destruction.[79] Nonetheless, the product scope of the proposed regulation is to be kept under regular review and may be progressively expanded to other commodities based on their effect on deforestation and forest degradation.[80] This is also important in terms of addressing shifts in EU consumption over time and mitigating the risk that covered commodities (eg, palm oil) are substituted by other commodities (eg, other vegetable oils) triggering deforestation outside the reach of proposed measure.

Secondly, the proposed regulation equally expands the conditions for legally placing covered commodities (and derived products) on the EU market (or exporting them). They must not only comply with the legislation of the country of production (ie, a legality requirement similar to that found in the TDD Regulation),[81] but also be 'deforestation-free'.[82] Operators must carry out the stipulated due diligence process[83] in order to ensure compliance with these legality and deforestation-free requirements and can only place the relevant commodities and products on the EU market (or export them) if the risk of non-compliance is no more than negligible.[84] To confirm this is the case, such commodities must be accompanied by a 'due diligence statement'.[85] For all six of the covered commodities (and derived products), the deforestation-free standard requires that they were not produced on land that has been subject to deforestation after 31

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

76 ibid art 1.

77 ibid and Annex I.

78 ibid 27 (para 27), and section 2 above.

79 WWF, 'EU Deforestation Law Proposal: Off to a Strong Start, but Loopholes Must Be Closed' (2021) <www.wwf.eu/?5179866/EU-deforestation-law-proposal-Off-to-a-strong-start-but-loopholes-must-be-closed> accessed 22 January 2022; and Commission, 'Impact Assessment – Minimising the Risk of Deforestation and Forest Degradation Associated with Products Placed on the EU Market' SWD (2021) 326 final (Commission Impact Assessment), 32–33. While both sources rely on Pendrill (n 14), the relative share of the individual commodities differs somewhat. It is not clear whether this discrepancy is because the data in the Commission's Impact Assessment spans a longer period (2008–2017) or because the UK has been excluded.

80 Commission Proposal, art 32(3).

81 ibid art 3(b).

82 ibid art 3(a).

83 ibid arts 8–11 setting out the due diligence system, which includes information requirements (eg, features of relevant commodities and supply chain, geo-location) and detailed procedures for risk assessment and risk mitigation. These obligations also apply to large traders which are not considered 'small and medium size enterprises' (art 6(5)).

84 ibid art 4(5), meaning the compliance assessment 'shows no cause for concern' (art 2(16)).

85 ibid arts 3(c) and 4(2).

December 2020.[86] Only for wood, it also requires that this has been harvested without inducing forest degradation after that same date.[87] This cut-off date of 2020 is anchored in commitments made at the international level (e.g., SDG 15.2),[88] aligned with the regulation's objective of minimising the EU's current and future contribution to global deforestation and forest degradation, and may arguably moderate the immediate costs for operators and third countries.[89]

The addition of a deforestation-free requirement under the proposed regulation seeks to avoid the creation of perverse incentives for third countries exporting the covered commodities to the EU, which may be tempted to weaken their forest regulatory frameworks to facilitate access of their products to the EU market if only the legality requirement was applicable.[90] But it is important to examine in more detail how exactly such a deforestation-free standard is defined by the EU. As recognised by the Commission, underlying definitions should provide legal clarity and 'be measurable based on quantitative, objective and internationally recognized data'.[91] In defining 'forest'[92] and 'deforestation', the Commission draws closely on the FAO's definition of these terms.[93] In its proposal, deforestation involves 'the conversion of forest to agricultural use, whether human induced or not'.[94] This wording is virtually identical to that used by FAO, with some deviation. Understandably given the agricultural focus of its proposal, the Commission's definition deals exclusively with land that is converted for *agricultural* use (including livestock grazing),[95] and does not include land that is converted for non-agricultural uses such as mining or urban development.[96] In principle, the Commission's definition of deforestation appears to provide a sufficiently clear and objective basis for identifying deforested areas through satellite monitoring tools.[97]

Defining 'forest degradation' is more complex because it is caused by a variety of human activities and natural factors (eg storms, fire or drought) that are often interdependent and difficult to quantify. While there is no internationally agreed definition of this term, the Commission's definition is very close to that found in recent FAO reports in so far as it relates to a reduction or loss of the biological or economic productivity and complexity of forest ecosystems.[98] However, for forest degradation to occur according to the proposed regulation, harvesting operations must also be unsustainable. As it stands, the Commission's notion of 'sustainable harvesting operations'—which comprises both procedural and substantive elements—is convoluted and vague.[99] Nowhere in its proposal, or the accompanying impact assessment, the Commission explains the basis for this additional sustainability criterion and how it is to be measured, thus failing to provide much legal clarity.

86 ibid art 2(8)(a).
87 ibid art 2(8)(b).
88 See Section 3. Choosing a cut-off date into the future, as per the current 2030 global target, could risk triggering a 'deforestation rush' in third countries and go against the objective of EU intervention: Commission Impact Assessment, 29.
89 ibid 30–31.
90 Commission Proposal, 11; and Commission Impact Assessment, 26.
91 Commission Proposal, 27 (para 26).
92 ibid art 2(2) defines a forest by reference to the concept of 'land': 'land spanning more than 0.5 hectares with trees higher than 5 meters and a canopy cover of more than 10%, or trees able to reach those thresholds in situ, excluding agricultural plantations and land that is predominantly under agricultural or urban land use.'
93 FAO, 'Global Forest Resource Assessment 2020 – Terms and Definitions' (2020) 4 <www.fao.org/3/I8661EN/i8661en.pdf> accessed 22 January 2022, explicitly recognising that mangroves situated in a tidal zone that meet the definition of a forest are to count as forests regardless of whether the tidal area is classified as land or not, while the Commission's proposal is silent on this point.
94 Commission Proposal, art 2(1).
95 ibid 24 (para 13).
96 FAO (n 93) 6.
97 Commission Impact Assessment, 26.
98 Commission Proposal, art 2(6); and FAO/UNEP (n 4) 19.
99 Commission Proposal, art 2(7). Procedurally, harvesting is to be considered as sustainable when it has been carried out '*considering* maintenance of soil quality and biodiversity *with the aim* of minimising negative impacts' (emphasis added). Substantively, harvesting must ensure certain outcomes, including minimising large clear-cuts, ensuring locally appropriate thresholds for deadwood extractions and using logging systems that minimise impacts on soil quality and on biodiversity.

The third, and perhaps the main innovation of the Commission's proposal in relation to the TDD Regulation, is the three-tier country benchmarking system. It draws a distinction between countries, or parts of countries, that present a 'low', 'standard' or 'high' risk of producing covered commodities (or derived products) that do not meet the deforestation-free requirement. This country classification will apply to both third countries exporting the relevant commodities to the EU, as well as to the Member States for commodities exported from the EU market. At the outset, all countries will be regarded as presenting a standard risk, and the Commission is empowered to adopt implementing acts to move them into the low or high risk categories.[100] In doing so, the Commission is required to take into account information provided by the country concerned and to base its decision on six assessment criteria.

The first three of these criteria pertain to the factual situation in the country concerned with regards to: (i) the rate of deforestation and forest degradation; (ii) the rate of expansion of agricultural land for relevant commodities, and (iii) the production trends of relevant commodities (and derived products).[101] The other three criteria concern aspects of a country's legal framework in relation to: (i) whether emissions from deforestation and forest degradation are accounted towards its mitigation commitments under the Paris Agreement (ie, its nationally determined contribution (NDC)),[102] (ii) whether agreements or other instruments have been concluded between the country concerned and the EU which address deforestation or forest degradation and which facilitate compliance with the proposed regulation, and (iii) whether the country concerned has in place laws and effective enforcement measures to avoid and sanction activities leading to deforestation and forest degradation.[103]

While these criteria may appear objective at first sight, they are framed in open-ended terms and leave a number of issues unclear. For instance, do they to apply cumulatively or can the Commission pick and choose among them when deciding on a country's risk level? And what is the level of performance under each of these criteria that will be required to justify moving a country into the high or low risk category? In addition, the vagueness of these assessment criteria is compounded by the ambiguous definition of forest degradation discussed above, and in particular its EU-determined notion of sustainable harvesting operations. As a result, the Commission will enjoy a considerable margin of discretion in differentiating between third countries (and between them and the EU Member States) when applying these criteria –something that is likely to create tensions with WTO law and will be further discussed in Section 6.

Nonetheless, before allocating a country to the high or low risk category, the Commission is obliged to follow certain procedural requirements.[104] It must notify a country of its intent to change its risk status, providing reason(s) for the intended change, and invite that country to submit any information that it deems useful. It must allow the country in question adequate time to provide a response which may include information on measures taken to remedy the situation where the Commission has notified the country of its intent to move it into the high risk category. The Commission is also required to notify a country of the consequences of it being classified as a low or high risk country, given that obligations for operators and Member States competent authorities are differentiated according to the level of risk.[105] When a country is identified as low risk, operators may follow a simplified due diligence procedure (limited to

100 ibid art 27(1).
101 ibid art 27(2)(a–c).
102 Paris Agreement (n 41), arts 4.2–4.3.
103 Commission Proposal, art 27(2)(d–e).
104 ibid art 27(3). This is reminiscent of the 'carding' system under Council Regulation (EC) 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, chapter VI.
105 Commission Proposal art 27(3)(c).

information requirements),[106] which excludes the most stringent steps of the standard procedure (risk assessment and risk mitigation). By contrast, where commodities or products are produced in a high risk country, or where there is a risk that such commodities or products may enter the relevant supply chain, Member States incur an obligation of enhanced scrutiny. In this situation, their competent authorities are required to carry out annual checks covering at least 15 per cent of operators and 15 per cent of the quantity of each of the relevant commodities.[107]

The fourth notable difference between the TDD Regulation and the Commission's proposal concerns the role and importance of agreements between the EU and third countries. While existing VPAs would remain in place, the proposed regulation does not refer to VPAs as such. Instead, it obliges the Commission to engage with affected countries to develop partnerships and cooperation in order to jointly address deforestation and forest degradation. It is envisaged that cooperation mechanisms may take several forms, including structured dialogues, support programmes and the setting up of new 'Forest Partnerships' that enable third countries to transition to an agricultural production that is compliant with the requirements of the proposed regulation.[108] Some aspects of the Commission's proposal are reminiscent of VPAs, including the fact that partnerships and cooperation should improve forest governance frameworks in partner countries, allow the full participation of all stakeholders and strengthen the rights of forest-dependent communities including smallholders, indigenous peoples and local communities.[109]

However, there is no suggestion that these new forest partnerships will establish licensing schemes similar to those under VPAs and thereby secure a green lane for licensed commodities into the EU market on the basis that they are presumed to present no more than a negligible risk of contributing to deforestation (or forest degradation in the case of wood).[110] The proposed regulation merely provides that '[s]uch agreements and their effective implementation will be taken into account as part of the [country] benchmarking [system]'.[111] It therefore lacks precision both about the content of such agreements and how it will influence the process of identifying countries as presenting a non-standard risk. That is, would the conclusion of a forest partnership *per se* be deemed sufficient for moving towards the low risk category, or would it depend on how ambitious the agreement actually is in terms of enhancing forest governance frameworks and other matters mentioned above? Depending on future practice, this vagueness may reduce the incentives for third countries to enter into agreements of this kind with the EU.

A final difference between the TDD Regulation and the Commission's proposal relates to enforcement. The proposed regulation sets out in substantially greater detail the obligations of Member States' competent authorities to carry out regular checks on operators to assess their compliance with the due diligence requirements, including specific guidance for conducting such checks,[112] a minimum number of inspections,[113] and an obligation to carry them out without prior warning except where prior notification is necessary to ensure their effectiveness.[114] It further incorporates new features to improve the accountability of operators, including an express obligation for operators to collect geo-location of land plots where commodities placed on the EU market were produced.[115] The proposed regulation is also more prescriptive than the TDD Regulation when it comes to the penalties to be applied by the Member States in cases of

106 ibid arts 9 and 12.
107 ibid art 20, as compared to the standard threshold of 5 per cent (art 14(9)).
108 ibid art 28(1).
109 ibid art 28(3).
110 ibid art 10(3) only provides that FLEGT-licensed wood products are deemed to be compliant with the legality requirement (art 3(b)).
111 ibid art 28(1).
112 ibid art 14(3)–(4) on a risk-based plan and art 15 on additional standards for compliance checks.
113 ibid art 14(9) on annual checks covering at least 5 per cent of operators and 5 per cent of each of the relevant commodities.
114 ibid art 14(12).
115 ibid art 9(1)(d).

non-compliance,[116] including as a minimum fines proportional to the environmental damage, the confiscation of relevant commodities and of the associated revenues gained by the operator (or trader) and the temporary exclusion from public procurement processes.[117]

Before moving on to consider the appropriateness and WTO-compatibility of the proposed regulation, we stress that it is significantly less ambitious than the EP's earlier recommendations.[118] The Commission's proposal is limited to forests and does not address the conversion or degradation of other natural ecosystems,[119] and it is largely focused on deforestation and much less on forest degradation. By contrast with the EP recommendations,[120] it does not propose to place due diligence obligations on financial institutions providing finance, investment and insurance to operators engaged in the supply chain of relevant commodities. Nor does it include novel provisions on civil liability, whereby operators would be jointly and severally liable for environmental harm that is directly linked to their products and business relationships, and required to provide remedies to affected third parties.[121] Perhaps most importantly, the Commission's proposal is vastly weaker than the EP's recommendations in relation to the protection of human rights, including land tenure rights.[122] Access to the EU market for FRCs is *not* made conditional on due diligence showing that there is no (or only negligible) risk that such products have been produced in, or linked to, violation of human rights, including the customary land tenure rights of forest-dependent communities and of indigenous peoples. Although operators are required to collect adequate and verifiable information that production has been conducted in accordance with the relevant legislation of the country of production, including any arrangement conferring the right to use the respective area for the purposes of the production of the relevant commodity,[123] there is no obligation to respect international standards on (customary) land tenure rights.[124]

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. While the question of compatibility with WTO law will be examined in Section 6, it is relevant to note that unlike other EU trade-related environmental measures,[125] the FLEGT initiative has not provoked the ire of the EU's trading partners.[126] This is likely because it cannot be considered as unilateral in a conventional sense. Not only does it combine mandatory due diligence with deep cooperation through VPAs, but it is inherently responsive to differences between countries. By looking to third country laws to give content to the underlying legality standard, the EU cannot be accused of foisting its own norms on other countries.[127] Equally, it

116 See (n 66) above.
117 Commission Proposal, art 23(2).
118 For a detailed discussion, see Marín Durán and Scott (n 47) 9–12.
119 EP Forest Resolution, 24.
120 ibid 24–25.
121 ibid 33.
122 ibid 25 and 27–28.
123 Commission Proposal, art 9(1)(h).
124 See FAO, *Voluntary Guidelines for the Responsible Governance of Tenure* (2012) <www.fao.org/3/i2801e/i2801e.pdf> accessed 22 January 2022.
125 See example, the on-going WTO disputes concerning the EU's sustainability criteria for biofuels (n 70): 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.
126 The interventions that have taken place have been pretty pro forma: see eg, WTO CTE, 'Report of the Meeting held on 30 June 2014' (30 June 2014) CT/CTE/M/57 (CTE Committee 2014) [1.13].
127 In contrast to much stronger reaction of WTO members to an earlier Dutch proposal concerning the mandatory labelling of wood: see Marín Durán and Scott (n 47) 12–13.

would have been disingenuous for other countries to be dismissive of the importance of securing compliance with domestic forest laws. It is too early to say whether the proposed due diligence regulation for FRCs will see the light of the day, and if so, how strong or widespread opposition to it will be in the WTO.

At this stage, we will present one argument in favour of EU intervention to reduce its global deforestation footprint through trade regulation. While this argument puts the concept of complicity at its core, it combines moral, legal and pragmatic aspects, showing how these interact in circumstances of shared responsibility for environmental harm. While the notion of complicity is sometimes alluded to in relation to trade in illegally harvested forest products, its relevance has so far been taken for granted.[128] For the purpose of our discussion we have chosen to rely on Lepora and Goodin's understanding of complicity.[129] They consider complicity to arise when an actor knowingly makes a potentially essential causal contribution to wrongdoing that is performed by another actor. They posit that a contribution should be regarded as having been made 'knowingly' where a complicit actor knows (or could and should know) that its action could contribute to an activity which it knows (or could and should know) to be wrong. Moral responsibility for a complicit act is considered to arise where the action of a complicit agent has been performed voluntarily.[130] On this account, it is not necessary to demonstrate that an ostensibly complicit agent either approved of the wrongdoing or shared the wrongful purpose of the wrongdoer.[131] In essence, we argue that the EU may be considered complicit in global deforestation as a result of its continued importation of commodities causing such deforestation.

In developing this argument,[132] we show that the conditions that inform Lepora and Goodin's minimum threshold for complicity are present and that the EU is morally culpable as a result. While we consider that the EU has a *moral* duty to reduce its global deforestation footprint, it will become clear that legal and pragmatic considerations play a role in underpinning this conclusion. Our argument proceeds in five steps, having regard to the five factors that must be present to ground a finding of complicity.[133]

First, it is clear from the discussion in Section 3 that there is widespread international recognition that deforestation constitutes a wrongful activity and that it is essential to halt it. To recall one of the most emphatic examples, 193 States have repeatedly pledged to end deforestation and forest degradation first by 2020 (SDG 15.2) and now by 2030 (UN Strategic Plan for Forests).

Second, the EU has knowledge that deforestation is wrongful. It has endorsed all international instruments highlighted in Section 3 that recognise the profoundly damaging effects of deforestation. Equally, the Commission's proposal starts by observing that '[d]eforestation and forest degradation are occurring at an alarming rate, aggravating climate change and the loss of biodiversity'.[134]

Third, EU action to regulate trade in FCRs has the potential to reduce global deforestation. By failing to act, the EU is therefore making a potentially essential causal contribution

128 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 22 January 2022; and Cassie Dummett and others, 'Illicit Harvest, Complicit Goods: The State of Illegal Deforestation for Agriculture' (Forest Trends 2021) <www.forest-trends.org/publications/illicit-harvest-complicit-goods/> accessed 22 January 2022.

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

130 ibid 79. As seen below, when these conditions are satisfied *pro tanto*, moral responsibility arises and the complicit agent will bear the burden of morally defending its complicit act having regard to competing considerations.

131 ibid 107. Although where they do so, this is viewed as aggravating moral responsibility for the complicit act.

132 We think the EU, as an organisation, may be considered a moral agent, in keeping with Lepora and Goodin's discussion of 'organizational complicity': Lepora and Goodin (n 129) 132, stating that 'formal organizations, with internal authority structures and decision procedures, … are indisputably moral agents, albeit collective in form'.

133 Due to space constraints, we focus here on deforestation but the arguments could be equally extended to forest degradation.

134 Commission Proposal, 1.

to this environmental problem.[135] The EU's capacity to contribute to the achievement of globally-agreed objectives to halt deforestation arises in the first instance due to the large 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 sustainable sourcing can be expected to alter production patterns to increase supply.[136] However, EU cooperation with third countries will be particularly important where there is a danger of trade diversion or 'leakage', 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'.[137] Existing VPAs under the FLEGT initiative have been a promising form of cooperation in this respect because they apply the agreed legality requirements to all exports, including those destined for non-EU countries.[138] Similarly, most have the objective of applying these requirements also to timber products that are consumed domestically within the home market of countries concluding the VPA with the EU.[139] The capacity of future forest partnerships to generate similar spill-over effects, including in relation to the deforestation-free standard, will be a key determinant of their success.

In addition, the EU can play an important role in generating a 'norm cascade', as experienced with the FLEGT initiative which led to the adoption of timber legality legislation by other major timber importing countries, including Australia, Canada, South Korea and Japan.[140] As China, the world's larger importer and exporter of timber, works towards establishing its own timber legality verification scheme, already 70 per cent of its exports by value are destined for countries that have timber legality frameworks in place.[141] 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 USA which had already adopted timber legality legislation in 2008.[142] It has nonetheless been shown that FLEGT has contributed to the emergence of an 'increasingly joined up transnational timber legality regime [that has] developed over the last 15 years'.[143] The collaborative ethos underpinning FLEGT, which emphasises 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.[144] 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.[145]

Fourth, the EU knows that regulating trade in FRCs has the potential to reduce global deforestation. While acknowledging the weaknesses inherent in FLEGT,[146] the Commission

135 See the discussion of connivance as a form of complicity in Lepora and Goodin (n 129) 45–46, making clear that ignoring or overlooking wrongdoing (conniving in it) can sometimes make a causal contribution to it. If there is something that the agent could do to prevent the wrongdoing, then inaction can count as complicity.

136 Werner Raza and others, *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> accessed 22 January 2022.

137 ibid 24.

138 FERN 2013 (n 58), 20 (Table).

139 ibid.

140 Jonathan Zeitlin and Christine Overdevest, 'Experimentalist Interactions: Joining up the Transnational Timber Legality Regime' (2020) 15 Regulation & Governance 686, 693–96, albeit Canada did not adopt new legislation but amended existing legislation.

141 ibid 693 and 700–01 for a discussion of developments in the public and private sectors in China.

142 ibid 692, noting that taken together the EU and the USA enjoyed a 50 per cent market share.

143 ibid 701.

144 ibid 695–96.

145 ibid 696.

146 As highlighted in 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 22 January 2022. Leading environmental NGOs have been highly critical of this fitness check process, pointing to the few submissions received and vast majority being from within EU: see Marín Durán and Scott (n 47) 21–22. For a recent overview of the benefits of VPAs see FERN, 'Voluntary Partnership Agreements 2.0: A Response to the European Commission FLEGT Fitness Check, and Option for the Future' (2021): <www.fern.org/publications-insight/flegt-voluntary-partnership-agreements-2-0-2444/> accessed 22 January 2022.

concludes that experience shows that the EU 'can have an impact and lead the way globally', despite its decreasing market share.[147] It also emphasises that its current proposal builds on and learns from experience under FLEGT.[148] Forest partnerships will continue to be a feature of EU policy and the due diligence requirements under the TDD Regulation will be adapted and improved.[149] The Commission is unequivocal in concluding that its proposal 'will prevent deforestation driven by EU consumption and production of [FRCs] … with projected benefits well above 71,920 hectares of forest less affected by EU-driven deforestation and forest degradation'.[150] While its focus in the main is on making the EU supply chain more sustainable, the Commission also recognises the key importance of pursuing international cooperation with both producer and consumer partner countries to avoid the leakage which results from deforestation-driving commodities being diverted from the EU to other markets.[151]

Fifth and finally, to the extent that legal obstacles do not prevent the EU from using trade regulation to reduce its global deforestation footprint, reluctance on its part to take action of this kind can be viewed as voluntary. While we argue in Section 6 that a carefully designed measure to reduce imports of commodities causing deforestation would be consistent with WTO law, we also highlight some legality concerns that arise specifically in relation to the current Commission proposal.

Before turning to WTO law, 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 because actions taken to avoid complicity may result in even greater wrongdoing. It is, therefore, important to be attentive to the negative consequences that could flow from the Commission's proposal to ensure that its contribution to preventing wrongdoing is not out-weighed by concomitant harms. While we accept that the Commission's proposal has the potential to generate negative as well as positive impacts, we consider this to be a reason to improve the proposal rather than a justification for the EU not to act.

For example, the Commission's decision not to include other natural ecosystems alongside forests could entail the unintended consequence of shifting production from forest ecosystems to other valuable high-carbon stock or biodiversity-rich ecosystems.[152] While the Commission observes its intention to work in partnership with countries in a bid to improve land tenure,[153] and it recognises the issue of 'land grabbing' and the forced displacement of local communities,[154] there is nothing in the proposal to prevent it generating patterns of land use change that fail to respect the land tenure rights, including customary land tenure rights, of local communities and indigenous peoples. It is already the case that 'from the valleys of Eastern Africa to the Cerrado grasslands of Brazil, some of the biggest land grabs have been for pastures [as opposed to forests]'.[155] Similarly, when viewed against a checklist of recommendations to ensure that forest due diligence supports rather than harms smallholders, the Commission's proposal appears to be inadequate.[156] The Commission argues simply that the challenges faced by smallholders in adapting to the proposed regulation will be mitigated by the fact that most products will be

147 Commission Proposal, 6.
148 ibid 62–63.
149 ibid 2 (forest partnerships) and 7 (due diligence).
150 ibid 9.
151 ibid 1, 65.
152 EP Resolution, 12 (para 30).
153 Commission Proposal, recital 21 and art 28(3).
154 Commission Impact Assessment, 13.
155 Oxfam, International Land Coalition, Rights and Resources Initiative, *Common Ground. Securing Land Rights and Safeguarding the Earth. Oxford* (2016) 21 <https://policy-practice.oxfam.org/resources/common-ground-securing-land-rights-and-safeguarding-the-earth-600459/> accessed 22 January 2022.
156 Fair Trade Advocacy Office and others, 'Including Smallholders in EU Action to Protect and Support the World's Forests' (September 2021), <www.iucn.nl/en/publication/including-smallholders-in-eu-action-to-protect-and-restore-the-worlds-forests> accessed 22 January 2022.

sourced from land that was put into agricultural production before the cut-off date of December 2020, which will therefore be considered deforestation free.[157]

The Commission is to be commended for its commitment to reviewing the impact of the proposed regulation on smallholders, indigenous peoples and local communities, together with the need and feasibility of including other natural ecosystems within its scope.[158] It is nonetheless unfortunate that it did not follow the recommmendations of the EP to adopt a more people-centered approach by placing human rights alongside conservation at the core of its legislative proposal. History has 'burdened forest protection with the stigma of colonialism'.[159] While efforts to reduce the off-shoring of demand for natural resources to support European consumption marks a discontinuity with European colonialism, the privileging of forest conservation objectives over the rights and interests of indigenous and local communities signals a regrettable but by no means inescapable continuity.[160]

6. LEGAL CHALLENGES 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 activities (ie, so-called processes and production methods (PPMs)) outside the regulating State, which has regrettably engrained long-standing divisions between the environmental and trade communities.[161] The reality is, however, more nuanced as evidenced by the fact that measures conditioning market access on environmental PPMs (ie, turtle-safe and dolphin-safe harvesting methods) have been successfully justified in WTO compliance proceedings.[162] At the outset, we also underscore that the EU's TDD Regulation, upon which the proposed due diligence regulation 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 recognise that these EU measures regulating trade in illegally harvested timber and other FRCs may be in tension with core WTO disciplines 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 (GATT),[163] namely the most-favoured-nation (MFN) treatment obligation[164] and the national treatment (NT) obligation.[165] 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.

157 Commission Proposal, 9.

158 ibid art 32(2)(b).

159 Joachim Radkau, *Nature and Power: A Global History of the Environment* (CUP 2009) 153.

160 On extraction and exclusionary conservation as twin faces of European colonialism, see William Beinart and Lotte Hughes, *Environment and Empire* (OUP 2007).

161 See eg, Steve Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality' (2002) 27 Yale Journal of International 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.

162 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.

163 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 (n 161) 94–104.

164 art I:1 GATT, which applies to internal regulations covered by art III:4 GATT.

165 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-compliant goods, thereby qualifying as a 'law, regulation or requirement affecting the internal sale' of products. See further, Dylan Geraets and Bregt Natens, 'The WTO Consistency of the European Union Timber Regulation' (2014) 48(2) JWT 433, 440–42.

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,[166] in the sense that it has a 'detrimental impact' (ie, an asymmetric or disparate effect) on their competitive opportunities.[167] Applying this to the proposed regulation and taking wood as an example, it seems clear that it would have a detrimental impact on timber non-compliant with the legality and deforestation-free requirements, which cannot be placed on the EU market, vis-à-vis legally harvested and deforestation-free timber, which can be placed on the EU market. So the key question is whether these two sets of timber 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.[168] 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. To retake our example, if a subset of EU consumers is willing to substitute legally sourced and deforestation-free timber with timber that has been illegally sourced and caused deforestation—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.[169]

Besides the discriminatory treatment between compliant and non-compliant commodities, it is conceivable that the proposed regulation will raise other 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 legality and deforestation-free requirements to the placed on the EU market (eg, imported palm oil) and competing EU agricultural commodities that are not covered by measure (eg, rapeseed and sunflower oil). In addition, the country benchmarking system may lead to a violation of the MFN treatment and NT disciplines, because it is likely to have a detrimental impact on commodities imported from high risk countries (eg, beef imported from country A), which are subject to the standard due diligence requirements for operators and the enhanced scrutiny obligation for Member States, vis-à-vis competing commodities originating from countries in the low risk category (e.g., beef imported from country B or of EU origin), which are only subject to a much simplified due diligence procedure.

However, the fundamental question is whether the proposed due diligence regulation for FRCs can still be justified under Article XX GATT. This provision 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, we believe that the proposed regulation needs to be better designed to meet the chapeau conditions. Yet this should not be seen just as a hurdle to ensure its WTO-compatibility, but as an opportunity to review its soundness also from an environmental policy standpoint.

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

167 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].

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

169 See further, Marín Durán (n 161) 114; Enrico Partiti, 'Regulating Trade in Forest-Risk Commodities' (2020) 54(1) JWT 31, 40–41.

With regards to the first step, there are three policy grounds that appear relevant to the proposed regulation at first glance, but Article XX(g) GATT is the most promising course of action.[170] This provision requires that the measure at issue be related to the conservation of exhaustible natural resources and are made effective in conjunction with restrictions on domestic production and consumption. With regards to the latter, the proposed regulation is likely to meet this even-handedness requirement[171] because, in principle, it imposes the same restrictions on domestically produced and imported FRCs. As to the first condition, it is clear that the proposed regulation is 'closely and genuinely related to'[172] the conservation of natural forests, since it requires covered commodities to be legally sourced and deforestation-free in order to be marketable in the EU and thereby minimises its consumption-driven contribution to global deforestation.[173] There is also little doubt 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 landmark *US—Shrimp* case, the Appellate Body (AB) emphasised the importance of interpreting the concept in an evolutionary 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.[174] As previously discussed, several multilateral instruments have consistently urged action to protect and restore the world's forests since 1992,[175] while the latest UNEP/FAO report warns that the rates of deforestation and forest degradation 'continue to take place at alarming rates'.[176]

An objection that may be raised here is that the proposed regulation (partly) seeks to protect forests *outside* the EU's territory insofar as imported FRCs are concerned and that Article XX(g) GATT cannot justify environmental measures with such 'extraterritorial' effects. We do not agree with this proposition because, firstly, there is no explicit jurisdictional limitation in the 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 of a similar extraterritorial nature.[177] But in any event, it could be argued that a 'sufficient nexus'[178] exists between the forests being protected and the EU, given the transnational consequences of deforestation and forest degradation in terms of climate change and biodiversity loss that also have a negative impact on its own territory.[179] Put differently, the damaging environmental effects of forest destruction are not limited to just the country (or countries) where the forests are located, but also affect other countries through global warning and biodiversity loss as matter of 'common concern'.[180] This is explicitly acknowledged in the dual objectives of the proposed regulation.[181]

170 The other grounds are: art XX(a) on measures 'necessary to protect public morals', which opens room for a complicity-type argument particularly if human rights considerations are integrated (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, see Partiti (n 169) 45–47 and 49–51.

171 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)*) [143–44].

172 ibid [136].

173 See Section 2 above.

174 *US – Shrimp (1998)* [129–32]; 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).

175 See Section 3 above.

176 FAO/UNEP (n 4) xvi.

177 *US – Shrimp (1998)* [133], concerning sea turtles; *EC – Seal Products (2014)* [5.173], concerning seals partly outside the territory of the regulating member. This is not the place to engage with scholarly debate on the appropriateness of this jurisprudential approach: for a recent contribution, see Natalie Dobson, 'The EU's Conditioning of the "Extraterritorial" Carbon Footprint: A Call for an Integrated Approach in the Trade Law Discourse' (2018) 27(1) RECIEL 75, 78–88.

178 *US – Shrimp (1998)* [133].

179 See Section 3.

180 On this point, see further Barbara Coreeman, 'Article XX, MEAs and Extraterritoriality' in Delimatsis and Reins (n 174); Jutta Brunnée, 'Common Areas, Common Heritage and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 564–68.

181 Commission Proposal, 9, where it is expected that the proposed measure would lead to a reduction of at least 31.9 million metric tons of carbon emissions to the atmosphere every year due to EU consumption and production of the relevant commodities; and art 1.

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 can be reconciled with, or rationally connected to, the objective pursued by the measure.[182] In our case, can the EU genuinely justify the instances of discrimination between countries/products we identified above in light of the goal of reducing its consumption-driven contribution to global deforestation?

The discrimination between compliant commodities (permitted in the EU market) and non-compliant commodities (prohibited in the EU market) is most likely justifiable and hence WTO-compatible, inasmuch as the latter are found through the due diligence process to be illegally sourced and/or to have caused deforestation which clearly goes against the objective of the proposed measure. In other words, the EU can objectively demonstrate that these two sets of products pose varying degrees of risk to forests. This is true insofar as the legality and deforestation-free requirements under the proposed regulation are based on objective criteria—ie, the domestic laws of the producing country and internationally accepted FAO definitions, respectively—and these are properly applied by operators when exercising due diligence. However, as discussed earlier, we have some reservations about the Commission's definition of forest degradation (albeit, only relevant to timber products) and the aspect it adds to existing FAO criteria (ie, notion of 'sustainable harvesting operations').[183] Without clearer guidance from the EU legislator on this point, operators will be left to rely on the ill-defined criteria in the current proposal for evaluating the risk of emergence of a vague outcome (forest degradation). This may lead to arbitrary discrimination between timber products in some cases.

A more complicated question is whether the discrimination between low risk and standard/high risk countries arising from the benchmarking system can be rationally explained by the measure's environmental objectives and hence justifiable under WTO law. In broad terms, the Commission posits that this system seeks to incentivise countries to protect their forests, as adopting stronger forest protection and governance standards would bring them within the low risk category and secure easier access for their products to the EU market.[184] But this country classification also pursues other objectives (eg, reduced compliance costs for operators and calibrated enforcement efforts by competent authorities),[185] which are unrelated to the goal of curbing EU-driven global deforestation. In any event, the key challenge for the EU is to show that commodities from countries classified as low risk actually pose a reduced risk of causing deforestation, thus justifying a simplified due diligence procedure.[186] We are not convinced this can be objectively established for two reasons. First, as seen above, the criteria for allocating countries among the different risk categories are stipulated in very loose terms, without clear thresholds as to when a country may be deemed low risk.[187] This vagueness opens the door for

182 WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of Appellate Body* (17 December 2007) WT/DS332/AB/R [226–27]; *EC – Seal Products (2014)* [5.318].

183 See Section 4.2 above.

184 Commission Impact Assessment, 41.

185 ibid, 42; and Commission Proposal, 19.

186 See by analogy, see WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Article 21.5) – Report of the Appellate Body* (11 January 2019) WT/DS381/AB/RW2 [6.278-6.281], where regulatory distinctions drawn under the dolphin-safe labelling scheme had to be 'calibrated to, or explained by, differences in the relative risks of harm to dolphins from different fishing methods in different areas of the ocean' in order to be justified under the chapeau.

187 See by analogy *US – Shrimp (1998)* [178–84], where lack of transparency and predictability in the certification process under the measure proved problematic under the chapeau; and *EC – Seal Products (2014)* [5.322-5.328], where the ambiguous criteria and broad discretion in the application of the Inuit exception were found inconsistent with the chapeau..

potentially biased determinations by the Commission, particularly when assessing performance by third countries against that of EU Member States.

Secondly, it is unclear how these criteria are directly linked to the objective of keeping illegally sourced and deforestation-causing commodities out of the EU market. For example, the mere fact that country A's NDC under the Paris Agreement 'covers emissions from deforestation and forest degradation'[188] is not a guarantee that *all* commodities from that country are deforestation-free.[189] The same applies if country A concludes an agreement with the EU to 'facilitate compliance of the relevant commodities' with the proposed regulation,[190] unless such an agreement establishes a licensing scheme to ensure that only legally sourced and deforestation-free commodities are shipped to the EU—which is not the intention in the Commission's proposal.[191] However, if country A is nonetheless deemed to be low risk by the Commission, operators supplying FRCs from that country would only be required to *collect* information and data, including any information that is relevant to evaluate compliance by relevant commodities with the legality and deforestation-free requirements. Yet crucially, they are *not* obliged to carry out a risk assessment on the basis of that information to ascertain that such commodities are, in fact, legally sourced and deforestation-free. As such, the low risk category could open a loophole for commodities associated with global deforestation and forest degradation to find their way into the EU market. The safest option, from both a WTO law and an environmental perspective, would be to apply the standard due diligence procedure to all FRCs placed on the EU market irrespective of their origin, so as to verify their legal and deforestation-free status on a transaction, rather than a country, basis.

Another 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,[192] or its cooperative requirements are rather confined to the particular circumstances of the *US—Shrimp* case.[193] 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'[194] under WTO law, just as it is under international environmental law.[195] Comparable negotiating efforts should be made with all affected countries (whether before or after the adoption of unilateral measures),[196] even if they do not need to lead to the conclusion of an international agreement, nor identical results between different negotiating groups.[197]

Given this strong preference for international cooperation in WTO law, we consider that the forest partnerships foreseen under the proposed regulation should be an integral element of EU

188 Commission Proposal, art 27(2)(d); and Section 4.2 above.

189 It is also unclear how this assessment criterion will be applied in practice, given that NDCs are formulated in a variety of ways: see for an overview, UNFCCC, 'Nationally Determined Contributions under the Paris Agreement - Synthesis Report by the Secretariat' (17 September 2021) UN Doc/FCCC/PA/CMA/2021/8.

190 Commission Proposal, art 27(2)(e).

191 Unlike the timber legality assurance system under VPAs: see Section 4.1 above.

192 Endorsing this as pre-condition for WTO-compatible unilateral environmental action, see eg, 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) Journal of Environmental Law 1, 23–25. Challenging this reading, see eg, Robert Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 Columbia Journal of Environmental Law 491, 507–09.

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

194 *US – Shrimp (2001)* [124].

195 See eg, '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.

196 *EC – Seal Products (2014)* [5.337].

197 *US – Shrimp (2001)* [122–23].

efforts to tackle global deforestation, and should build on VPAs. There are powerful arguments for not abandoning the VPA approach, and not the least the achievements in terms of enhanced stakeholder participation and improved forest governance frameworks in partner countries which the Commission itself recognises.[198] Moreover, such agreements can serve to temper criticism of unilateral EU action in this domain. The Commission contends that one of the main problems is that key EU trading partners have shown little interest in engaging in the VPA process,[199] but this is not the point. Even where third countries eschew the opportunity to enter into negotiations, the EU can still argue that it favours a cooperative over a unilateral approach to addressing the global challenge of deforestation—as it has done in the past in the WTO Trade and Environment Committee.[200] Also, by giving voice to local communities negatively impacted by deforestation, these partnerships can serve as inclusive incubators for defining sustainability in context, as well as providing an institutional framework for the provision of EU technical and financial assistance to address the supply-side drivers of deforestation and forest degradation.

7. CONCLUSIONS

The EU remains the world's second-largest consumer of global deforestation embodied in its imports of agricultural and timber products. At the UN climate summit in Glasgow, it joined other world leaders in reiterating pledges to end global forest loss and ensure sustainable consumption patterns by 2030. To meet this commitment, the EU needs to step up its action to regulate trade in FRCs in a more holistic manner, going beyond the existing FLEGT initiative that is limited to trade in illegally harvested timber products. In fact, just a few days after the Glasgow summit, the European Commission put forward a landmark proposal for mandatory due diligence legislation for FRCs.

In this article, we have provided a timely assessment of the Commission's proposal and have argued that ambitious EU action to regulate trade in FRCs is justified to prevent the EU being complicit in the destruction of forests worldwide. In making this argument, we stress the broad international consensus that exists to halt deforestation as encapsulated in multiple international legal instruments. We also have regard to the scale of the EU's global deforestation footprint, and to evidence from the FLEGT initiative, when arguing that the EU has the potential to make an essential causal contribution to reducing global deforestation.

Nonetheless, we do recognise that it is challenging for the EU to enact trade regulation to curb its global deforestation footprint. Operating at the contested interface between people and nature, it is essential that EU global forest policy serves to bolster the rights, including the customary land tenure rights, of forest-dependent communities and indigenous peoples. In this respect, we have found that the Commission's current proposal falls short.

In addition, we have shown that the proposed regulation can be made WTO-compatible if better designed to meet the requirements of the GATT Article XX exception clause. At the very least, the EU needs to provide greater clarity and predictability as to why the assessment criteria underlying the country benchmarking system have been chosen and how exactly they will be measured in practice. Unless this can be well grounded in objective environmental indicators, the safest option from a WTO *and* environmental perspective would be to get rid of the country classification and assess deforestation risks on a transaction basis by applying the standard due diligence procedure to commodities from all countries. While not strictly required from a WTO law perspective, the new forest partnerships should draw on the VPA experience and

198 Commission Impact Assessment, 20; see also FERN 2021 (n 146).
199 Commission Proposal, 7.
200 WTO, 'Report of the Meeting held on 30 June 2014' (30 June 2014) CT/CTE/M/57, para 1.18.

continue to play an important role as incubators for negotiated and cooperative solutions to the global problem of deforestation and forest degradation.

By highlighting these shortcomings, we do not intend to underestimate the Commission's courage and conviction in taking a significant and unprecedented step towards reversing the EU's current contribution to global deforestation. However, until these drawbacks are addressed in the ongoing legislative process,[201] we think the EU deserves two cheers not three.

ACKNOWLEDGEMENTS

The authors are deeply grateful to the journal's Editor-in-Chief, Liz Fisher, and two anonymous reviewers, as well as to Claire Kilpatrick, Justine Muller and other colleagues at the European University Institute, for their excellent comments on an earlier draft of this article. We are also very grateful to Martin Persson for the valuable dataset and exchanges on deforestation embodied in EU imports. All opinions and any errors remain our own.

201 To keep up to date with legislative developments, see: 'Legislative Train Schedule' <www.europarl.europa.eu/legislative-train/theme-environment-public-health-and-food-safety-envi/file-eu-driven-global-deforestation> accessed 22 January 2022.