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# Curbing the European Union's global deforestation footprint through trade

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## ABSTRACT

Notwithstanding their vital role in sustaining human life and well-being on Earth, there is mounting evidence that the world's forests are under serious threat, mainly due to illegal logging and agricultural expansion. The European Union (EU), as a major importer of forest-risk commodities, bears significant responsibility for this trend of global deforestation and forest degradation. However, the EU has recently taken a first step towards addressing its consumption-driven contribution to global forest destruction by adopting the Forest Due Diligence Regulation in May 2023. This contribution provides an assessment of the new regulation, which attempts to achieve environmental conservation objectives through trade, as a novel case study of the EU's management of the environment-trade nexus. More specifically, it enquires into the extent to which the EU has been effective in promoting environmental protection through trade under the Forest Due Diligence Regulation, considering both its institutional effectiveness and its (potential) impact effectiveness. The key finding of this analysis is that while the regulation seeks to strike a balance between environmental and trade objectives, it does not quite yet strike an *appropriate* balance between them.

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## 1. Introduction

While it is widely recognized that the world's forests play an indispensable role in sustaining human life and well-being on Earth through the provision of ecosystem services, global forest loss has continued to take place over the past three decades. Illegal logging and agricultural expansion have been the chief drivers of this alarming trend, partly due to international demand for, and trade in, timber products and agricultural commodities. Deforestation and forest degradation are, in turn, primary contributors to climate change and biodiversity loss – the two most pressing environmental challenges of our time. The European Union (EU) has recently stepped up its regulatory action to reverse its consumption-driven contribution to this global forest destruction by adopting the Forest Due Diligence Regulation (FDDR),<sup>1</sup> which entered into force on 29 June 2023 but whose application has been postponed until 30 December 2025. Essentially, this new regulation bans the placing on the EU market, or export from the Union, of a number of forest-risk commodities (FRCs) – that is, goods and raw materials whose extraction and production has been found to be associated with deforestation or forest degradation, and lays down mandatory due diligence rules for operators and traders to that effect.

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While the EU has been linking environmental and trade policies over the past two decades pursuant to Article 11 of the Treaty on the Functioning of the European Union (TFEU) and Article 21 of the Treaty on the European Union (Marín Durán & Morgera, 2012), the FDDR needs to be placed in the context of the European Green Deal (EGD) put forward by the European Commission in December 2019 (European Commission, 2019). The EGD purports to move environmental sustainability to the centre-stage of the European integration project and to use trade for the EU's aspired green transformation (Schunz, 2022). Together with other legislative initiatives under the EGD, notably the Carbon Border Adjustment Mechanism (CBAM) Regulation as well as the revised Emission Trading System (ETS) Directive and its extension to greenhouse gas (GHG) emissions from international shipping (Marín Durán & Scott, 2024), the FDDR signals an increasingly assertive use by the Union of 'unilateral' (or 'autonomous' in the EU's own words) trade-related measures to tackle its global environmental footprint – that is, the environmental pressures 'embodied' in commodities or services it imports from third countries (see also Mehling et al., as well as Marx, in this issue). This approach is emblematically reflected in the European Commission's Communication on 'An Open, Sustainable and Assertive Trade Policy', where 'support[ing] the green transition and promot[ing] responsible and sustainable value chains' is set out as one of the strategic priorities of the EU's trade policy in the medium term (European Commission, 2021a, p. 12). In advancing this goal, regulatory action is contemplated at all levels – including the EU acting 'autonomously when needed' (ibid., p. 12), drawing on its unique leverage as the world's largest single market.

In line with the broader theme of the special issue, this article examines the extent to which the EU has been effective in promoting environmental conservation through trade under the FDDR, and whether it has succeeded in striking a balance between environmental and trade objectives. In so doing, it seeks to contribute to our understanding of the EU's role in handling the environment-trade nexus, both by focusing on this new regulation which has received very limited attention in the scholarship so far (e.g. De Ville et al., 2023; Berning & Sotirov, 2023) and by highlighting the interactions between the unilateral and multilateral levels of EU action. To this end, it first situates the FDDR as a case study of the EU's management of the environment-trade nexus by explaining how its consumption of imported FRCs is contributing to deforestation and forest degradation worldwide, and why trade regulation must be part of the solution. It then examines the main design features of the regulation from the perspective of 'institutional' (or 'output') effectiveness, gauging the degree to which environmental and trade objectives have been integrated into this instrument (Gstöhl & Schunz, in this issue). It also provides an initial assessment of the regulation's potential 'impact' effectiveness, that is, the extent to which its underlying goals may be actually attained via 'tangible consequences affecting the physical problem at hand' (Skjærseth & Wettestad, 2002, p. 106). In this respect, it highlights some key shortcomings on the extent to which the environmental objectives pursued by the regulation are likely to be achieved, including in relation to the unintended negative consequences of the EU's regulatory action and cooperation with affected third countries. Overall, the key argument is that while the FDDR seeks to strike a balance between environmental and trade objectives, it does not quite yet strike an *appropriate* balance between them. The article concludes by making some recommendations for policy improvement.

## 2. The environment-trade nexus: EU responsibility for global forest destruction

Healthy forest ecosystems provide humanity with essential services (e.g. clean air and water flow regulation). They host most of the Earth's animal and plant species and cover just over 30% of its land area, thus being utterly crucial for the protection of terrestrial biodiversity (UNEP/FAO, 2020, pp. xvi, 35–55). In addition, forests are crucial for combatting climate change due to their natural capacity to absorb and store carbon from the atmosphere ('carbon sinks'). Moreover, forests are a source of livelihood and income for about 25% of the world's population (including vulnerable and indigenous communities) and hold intrinsic cultural and spiritual values for many people (ibid., pp. 57–79).

And yet, there is ample evidence that the world's forests are under serious threat. According to the latest joint report by the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization (FAO), global deforestation and forest degradation continued to take place at 'alarming rates' in 2015–2020 (UNEP/FAO, 2022, p. xiii). 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 prevalent in some regions of the world (i.e. Central Africa, South America and Southeast Asia) than in others (e.g. Europe). Illegal logging and agricultural expansion have been the chief drivers of this trend, partly due to international demand for, and trade in, timber products and agricultural commodities. More specifically, local subsistence agriculture (driven by *domestic* demand) accounted for about 33% of global tropical deforestation between 2000 and 2010, while large-scale commercial agriculture (driven by *international* demand) caused 40% of the problem over the same period, even if this figure reached almost 70% in Latin America (UNEP/FAO, 2020, pp. 82–83). Global forest loss is, in turn, a major contributor to the inter-linked climate and biodiversity crisis. Notably, the United Nations (UN) estimates that deforestation and forest degradation account for about 12–20% of global GHG emissions, constituting the second biggest cause of climate change after the burning of fossil fuels.

The EU bears significant responsibility for the destruction of forests around the globe. However, such a responsibility is not so much due to deforestation and forest degradation happening *within* the territory of its member states as a result of their production processes and other human activities. In fact, in quantitative terms, forest area in Europe has continuously increased by 9% over 1990–2020 (Forest Europe, 2020, p. 15). This responds to the EU's and its member states' obligations under both the Convention on Biological Diversity (CBD) (United Nations, 1992, articles 6–10) and the Paris Agreement (United Nations, 2015, article 5) to ensure the conservation and sustainable use of forests in the EU, in line with the principle of state sovereignty over natural resources. Nonetheless, in qualitative terms, 'less than 5% of European forest areas are now considered to be undisturbed or natural, whereas 10% of European forest areas have been classified as intensively managed', according to the European Environment Agency (European Parliament & Council of the EU, 2023, preamble recital 9).

Rather, the EU's contribution to the global forest loss stems primarily from its *importation* and consumption of FRCs produced abroad. In 2018, the EU ranked as the world's second-largest importer (16%), after China (24%), of commodities causing deforestation. In that same year, more than three quarters of the EU's global deforestation footprint derived from seven commodities: soy beans (27%), palm oil (26.14%), cocoa (10.14%), coffee (9.05%), wood (8.6%), beef (4.47%), and rubber (3.4%). Taken together, Indonesia (21.48%), Brazil (20.48%), and Paraguay (12.87%) supplied commodities which embodied more than half of the EU's imported deforestation in 2018 (Marín Durán & Scott, 2022, p. 247).

Against this backdrop, regulating trade in FRCs appears indispensable from a policy standpoint if the EU is to effectively curb its global deforestation footprint. From a legal perspective, the EU is constitutionally mandated under Articles 11 TFEU and 21 TEU to integrate and promote environmental protection objectives in its external (trade) relations, which underscores the legitimacy of the FDDR within its internal legal order. However, unilateral trade-related measures that seek to mitigate the negative impact of EU consumption on the global environment have often proven fiercely controversial in the international arena. This is because they give rise to what Joanne Scott has aptly termed 'territorial extension' of EU environmental law in that they use the existence of a territorial connection with the EU (e.g. access to its market or ports) to gain regulatory leverage over conduct or activities that take place abroad (Scott, 2014; Scott & Rajamani, 2012). As such, the EU is testing the boundaries under international law of permissible 'unilateral' trade regulation with 'extra-territorial' effects.

However, two important observations ought to be made regarding the contention over this way of managing the environment-trade nexus. First, it is true that the FDDR seeks to protect forests that are located outside the territory of the EU member states insofar as imported FRCs are concerned, and the extent to which environmental measures with such 'extra-territorial' effects may be justified under the law of the World Trade Organization (WTO) is unsettled (Coreeman, 2021; Dobson, 2018). In this respect, the EU could advance a 'common concern' argument, whereby a 'sufficient nexus' (WTO Appellate Body, 1998, para 133) exists between the forests being protected and the EU, given the *transnational* consequences of deforestation and forest degradation in terms of climate change and biodiversity loss. As such, the damaging environmental effects of forest destruction are not confined to the country (or countries) where the forests are located but are felt globally, including in the EU. In fact, the EU successfully made a similar argument in a recent WTO dispute, *EU and Certain Member States – Palm Oil (Malaysia)*, concerning measures restricting the use of crop-based biofuels with a view to

limiting Indirect Land Use Change (ILUC)-related GHG emissions and mitigating climate change. In this case, the Panel found that ‘there is a sufficient nexus between the EU territory and the objective of limiting the risk of ILUC-related GHG emissions’, even if some of these emissions and associated agricultural activities occur outside the EU, given that ‘climate change is inherently global in nature’ (WTO Panel, 2024, para 7.314). The panel further held that the challenged EU measures should not be viewed as regulating GHG emissions outside the EU, but rather as addressing ‘the adverse ILUC impacts that *EU demand* for crop-based biofuels could have’ on the climate (WTO Panel, 2024, para 7.315, emphasis in original). This landmark decision in WTO environment-trade jurisprudence, stressing the cross-boundary nature of climate change and the regulation of EU demand for climate-harmful products within its own territory as the main goal of the measures, makes it easier to justify the EU’s regulatory intervention under the FDDR from a WTO law standpoint – and this is also true for other EDG policy tools with similar ‘extra-territorial effects’ (Norris, 2024, p. 225).

Second, the FDDR can arguably not be considered a ‘unilateral’ measure in a conventional sense. It does not exist in a normative vacuum, but is embedded within an international legal framework that has repeatedly and authoritatively underscored the urgent need to address the problem of global deforestation and forest degradation over the past three decades. While part of this framework takes the form of soft-law instruments that are formally non-binding, they establish acceptable norms of behaviour that place normative expectations of compliance on the international actors concerned, including the EU (Boyle, 2021). One component of this legal framework is the UN 2030 Agenda for Sustainable Development adopted in September 2015, where 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’ as Sustainable Development Goal (SDG) 15.2 (UN General Assembly, 2015, p. 24). 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 (ibid., p. 22). 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 UN General Assembly in April 2017. It provides a global framework for action at various levels to manage forests sustainably and to halt deforestation and forest degradation, comprising a set of six Global Forest Goals and 26 associated targets to be reached by 2030 (UN General Assembly, 2017).

Another, more recent, soft-law instrument emphasizing the need for swift action to protect forests is the Glasgow Leaders’ Declaration on Forests and Land Use, endorsed on 2 November 2021 by over 140 signatories (including the EU) at the 26th Conference of Parties (COP) to the UN Framework Convention on Climate Change. It explicitly links the collective goal of ‘halting and reversing global forest loss and land degradation by 2030’ with trade regulation. High-ranking representatives of states hosting more than 90% of the world’s forests 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’ (UN Climate Change Conference, 2021, emphasis added). The Declaration further recognizes that in order ‘to meet our land use, climate, biodiversity and sustainable development goals, both globally and nationally, will require transformative further action in the *interconnected areas of sustainable production and consumption*; infrastructure, development, trade, finance and investment; and support for smallholders, indigenous people and local communities’ (ibid., emphasis added).

In sum, while the EU is not strictly obliged to regulate trade in FRCs from an international environmental law standpoint, there is strong support for the argument that it *should* do so. It would hardly be possible for the EU to 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 results primarily from the importation of FRCs. Furthermore, as Bodansky (2000, p. 339) aptly puts it,

[a]lthough the preference for international action to protect the environment is understandable, sometimes unilateral action can play a catalytic role in the development of an international regime. Moreover, often effective multilateral action is impossible, so the choice is not between unilateralism and multilateralism, but between unilateralism and inaction. Rather than condemning unilateralism outright, we need to evaluate each particular unilateral action (or inaction) to determine whether, on balance, it advances or detracts from desired ends.

With this in mind, the article turns to an evaluation of the FDDR as a case study of how the EU is seeking to manage the environment-trade nexus, and to shape the governance of the intersection between global deforestation and international trade with a view to making them more coherent.

### 3. The institutional effectiveness of the EU forest due diligence regulation

This section discusses the degree of institutional effectiveness of the FDDR. Following the conceptual framework of the special issue (Gstöhl & Schunz, in this issue), it undertakes an in-depth legal analysis of the FDDR in order to determine the extent to which environmental objectives are taken up, on paper, in this instrument. As a baseline, it is assumed that strong institutional effectiveness would imply that environmental goals are taken up extensively in the FDDR (e.g. broad scope of objectives, clear and mandatory language, strong enforcement provisions), whereas a narrow scope, weaker language, and limited compliance mechanisms would entail weak institutional effectiveness (Gstöhl & Schunz, in this issue).

Conceptually, it should be clarified that the regulation is not a ‘trade instrument’ in a narrow sense: legally speaking, it was formally adopted on the basis of Article 192(1) TFEU, which grants the EU regulatory competence in environmental matters, rather than the legal basis of the EU’s common commercial policy (Article 207 TFEU). This may be partly explained by the fact that it regulates more broadly the ‘placing on’ the EU market of FRCs (including those of domestic origin), and not just the importation and exportation of such commodities. Most importantly, it reflects the predominantly environmental nature of the main objectives pursued by the regulation, namely ‘minimising the Union’s contribution to deforestation and forest degradation worldwide’ and, thereby, ‘reducing [its] contribution to greenhouse gas emissions and global biodiversity loss’ (European Parliament & Council of the EU, 2023, article 1(1)). From this perspective, the regulation is best seen as an ‘environmental’ instrument that effectively tries to manage – and indeed, constrain – international trade in FRCs to promote environmental conservation, as the following overview of its substantive provisions in terms of scope and due diligence requirements shows.

With regards to product coverage, the FDDR represents a step forward when it comes to driving down the EU’s global deforestation footprint, as it goes beyond its predecessor legislation – the 2010 Timber Due Diligence Regulation – that was confined to combatting illegal logging and related trade in illegally harvested timber products (European Parliament & Council of the EU, 2010). The new regulation applies to the following seven FRCs, both of EU and foreign origin: cattle, cocoa, coffee, palm oil, rubber, soy and wood (as well as ‘derived’ products) (European Parliament & Council of the EU, 2023, article 1 and annex 1). This initial list appears reasonable given that, as previously seen, scientific studies confirm that these seven 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’ (European Commission, 2021b, p. 27). However, it has been argued that maize should have been included in this initial list, given that it is also in the top ten EU-imported commodities linked to global forest destruction (WWF, 2021). But the product scope of the regulation will be kept under regular review and, by no later than 30 June 2025, the Commission shall assess the need and feasibility of incorporating other commodities, including maize, based on scientific evidence on their effect on deforestation and forest degradation and changes in consumption (European Parliament & Council of the EU, 2023, article 34(2)).

The regulation prohibits the placing on the EU market, or export from the Union, of the covered FRCs and lays down due diligence obligations for operators and traders (*ibid.*, articles 3 and 4–5). Through the due diligence process (*ibid.*, articles 8–13), operators and traders must ensure that such commodities have been legally produced (i.e. in accordance with the relevant legislation of the country of origin; *ibid.*, article 3(b)) and are ‘deforestation-free’ (i.e. not produced on land that has been subject to deforestation after 31 December 2020; *ibid.*, articles 2(13)(a) and 3(a)). The cut-off date of 2020 is anchored in commitments made at the international level (e.g. SDG 15.2) and ‘was chosen in order to prevent an anticipated acceleration of activities leading to deforestation and forest degradation between the announcement in the Commission proposal and the date of entry into force’ of the regulation (*ibid.*, preamble recital 46). Covered FRCs can only be placed on (or exported from) the EU market if operators and traders can show there is ‘no or only negligible risk’ of non-



compliance with the legality and deforestation-free standards (*ibid.*, articles 4(2) and 5). To confirm this is the case, such commodities must be accompanied by a ‘due diligence statement’ (*ibid.*, article 3(c)).

Being based on dual conditions of legality and sustainability, the FDDR goes further than its predecessor Timber Due Diligence Regulation in pursuing environmental conservation objectives. The addition of the deforestation-free requirement is significant in tackling a sizeable part of the ongoing deforestation that is ‘legal’ under the laws of the third country of production. For instance, it has been reported that, between 2013 and 2019, around 30% of deforestation destined to commercial agriculture in tropical countries was ‘legal’ (European Parliament & Council of the EU, 2023, preamble recital 33). This requirement also avoids the creation of perverse incentives for third countries exporting the covered commodities to the Union, which may be tempted to weaken their forest conservation laws to facilitate access of their products to the EU market if only the legality condition was applicable. Importantly, in setting the new deforestation-free standard, the EU has closely drawn on internationally recognized definitions elaborated by the FAO (*ibid.*, articles 2(3)-(4); FAO, 2020, p. 4), with a view to providing legal clarity and objective criteria for identifying deforested areas (European Parliament & Council of the EU, 2023, preamble recital 35).

The legality requirement has also been considerably expanded, when compared to the legality standard which existed under the precursor Timber Due Diligence Regulation (European Parliament & Council of the EU, 2010, articles 2(f) and 4), particularly to incorporate human rights considerations. It encompasses ‘*laws applicable in the country of production* concerning the legal status of the area of production in terms of: (i) land use rights; (ii) environmental protection; (iii) forest-related rules, including forest management and biodiversity conservation, where directly related to wood harvesting; (iv) third parties’ rights; (v) labour rights; (vi) human rights protected under international law; (vii) the principle of free, prior and informed consent (FPIC), including as set out in the UN Declaration on the Rights of Indigenous Peoples; and (viii) tax, anti-corruption, trade and customs regulations’ (European Parliament & Council of the EU, 2023, article 2(40), emphasis added). However, it will not go as far as excluding FRCs from the EU market that have been harvested or produced in violation of international human rights standards in situations where the country of production fails to give effect to those standards in its domestic laws. This shortcoming is of environmental relevance insofar as the principle of FPIC of indigenous peoples has also been recognized as a key component of the multilateral biodiversity regime under the CBD (Morgera, 2018).

The FDDR further sets out in great detail the obligations of member states’ competent authorities to carry out regular controls on operators and traders to assess their compliance with the due diligence requirements (*ibid.*, articles 14–22), as well as to apply ‘interim measures’ when potential non-compliance has been detected and ‘effective, proportionate and dissuasive’ penalties in cases of infringements (*ibid.*, articles 23 and 25). These detailed and minimum levels of controls and sanctions seek to address the weakness of the old Timber Due Diligence Regulation, which contained more flexible rules on these matters and had led to uneven implementation and enforcement across EU member states (European Commission, 2016, p. 11).

It is important to note that the due diligence obligations for operators and traders, as well as the surveillance by member states’ competent authorities, will vary according to the level of risk assigned to a particular country (or subnational jurisdiction) under the three-tier benchmarking system (European Parliament & Council of the EU, 2023, article 29). This system will apply to both third countries exporting the relevant commodities to the EU and to the EU member states. It will be operated by the Commission, which is empowered to identify countries as presenting a ‘low’, ‘standard’ or ‘high’ risk of producing commodities that are not deforestation-free, on the basis of a set of criteria discussed below. Upon the entry into force of the regulation, all countries have been assigned a ‘standard’ risk level, and the country classification shall be undertaken by the Commission by no later than 30 June 2025 (European Parliament & Council of the EU, 2024, article 1). When operators source commodities from countries placed in the low-risk category, they may follow a simplified due diligence procedure (i.e. limited to information requirements; *ibid.*, articles 9 and 13), which excludes the most stringent steps of the standard procedure (i.e. risk assessment and risk mitigation; *ibid.*, articles 10–11) and, thereby, reduces compliance costs and administrative burdens (*ibid.*, preamble recital 69). By contrast, commodities originating in high-risk countries will be subject to enhanced scrutiny by the member states’ competent authorities (*ibid.*, article 14(8)–(10)).

Altogether, the analysed provisions demonstrate that, on paper, the FDDR integrates environmental and trade objectives to a large extent, and thus in an institutionally effective way. In fact, the regulation manages EU trade in FRCs for environmental conservation as its central objective, by constraining imports and exports of timber and agricultural commodities associated with global forest destruction while permitting trade in those commodities if legally-produced and deforestation-free. In so doing, the FDDR goes beyond its predecessor Timber Due Diligence Regulation with respect to the scope of covered goods, due diligence requirements and compliance mechanisms. Moreover, the EU has made a concerted effort to ground its autonomous regulatory action upon *multilaterally* agreed (rather than EU-determined) objectives and standards on forest protection (e.g. SDGs and FAO definitions) which, arguably, serve to cushion criticisms of classical EU unilateralism in this domain (Bodansky, 2000, p. 345). Nonetheless, the regulation could have been more ambitious in integrating environment-related human rights standards that also form part of the multilateral biodiversity regime, and in particular the principle of FPIC of indigenous peoples.

#### 4. The (potential) impact effectiveness of the EU forest due diligence regulation

Whereas the FDDR achieves greater coherence between international trade and environmental protection on paper, this section turns to evaluate its potential impact effectiveness – i.e. the extent to which its underlying goals may be attained in practice (Gstöhl & Schunz, in this issue). This assessment will be made in light of the twofold environmental objectives of the regulation seen earlier, which reflect the complex nature of the environmental problem at hand. More specifically, how likely is the FDDR to reduce the EU's consumption-driven contribution to global deforestation and forest degradation, and associated global GHG emissions and biodiversity loss? In this regard, the *ex ante* impact assessment projects that (European Commission, 2021c, p. 51):

[the regulation] should be able to prevent a minimum of 29% of deforestation driven by consumption and production of the six commodities included in the scope by 2030, and therefore a minimum of 71,920 hectares of forest less affected by EU-driven deforestation and forest degradation starting in 2030. This would also mean a minimum of 31.9 million metric tons of carbon fewer emitted to the atmosphere every year due to EU consumption and production of the relevant commodities, which could be translated into economic savings of at least 3.2 billion EUR annually.

It is important to note that a conclusive assessment on impact effectiveness is not possible at this stage given that the bulk of the FDDR is yet to be implemented. In fact, on 19 December 2024, the European Parliament and Council agreed with the Commission's proposal to postpone the application of the regulation by 12 months (i.e. 30 December 2025 for large enterprises and 30 June 2026 for micro or small undertakings), in response to concerns expressed by stakeholders, including trading partners, regarding the too short implementation timeframe (European Commission 2024(a), pp. 1 and 7; European Parliament and Council of EU, 2024, preamble recital 6). Nonetheless, this section identifies three features that may potentially undermine the FDDR's impact effectiveness in attaining its underlying environmental objectives, and makes suggestions for policy improvement.

The first feature relates to the FDDR's focus on protecting forests without addressing the conversion or degradation of other natural ecosystems, such as grasslands, peatlands and savannahs, which are also essential to tackle the interconnected climate and biodiversity crisis. The risk here is that the regulation could have the unintended consequence of shifting agricultural production from forest ecosystems to other high-carbon stock and biodiversity-rich ecosystems, particularly as the EU already imports a great proportion of commodities from these landscapes. For instance, in 2019, EU imports of beef and soy from the Brazilian Cerrado, the world's most biodiverse savannah, accounted for, respectively, 26% and 14% of the EU's total beef and soy imports. Similarly, in that same year, the EU imported around 24% of the total soy exported from the Argentinian Chaco, where natural grassland and savannahs were converted to agricultural land during the 2000s, mainly for soy production. Approximately 19% of the EU's imports of natural rubber and 14% of palm oil have been estimated to originate from Sumatra in Indonesia, where only 6% of the peatland (known for its high-carbon storage and habitat for critically endangered species) remains unconverted, with the main drivers



of land conversion being palm oil plantation and rubber production (WWF, 2022, pp. 23–29). To address this shortcoming, the new regulation contains a review clause, whereby the Commission shall conduct an impact assessment and, if appropriate, present a legislative proposal by no later than 30 June 2025 to incorporate other natural ecosystems within the regulation's scope, including other land with high carbon stocks and with a high biodiversity value such as grasslands, peatlands and wetlands (European Parliament & Council of the EU, 2023, article 34). Such an extension of the regulation's scope appears to be crucial if the EU is to effectively reduce the negative impact of its consumption on *all* natural ecosystems around the globe.

A second potentially problematic aspect of the FDDR is the country benchmarking system, mainly because of the assessment criteria for allocating countries to the different risk categories. Whereas the regulation formally provides that country classification 'shall be based on an objective and transparent assessment by the Commission, taking into account the latest scientific evidence and internationally recognized sources' (ibid., article 29(3)), the assessment criteria themselves are stipulated in open-ended and loose terms. These take the form of a combination of mandatory ('shall be based') quantitative criteria and other qualitative criteria that 'may be taken into account' by the Commission. The former category pertains 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 (ibid., article 29(3)). However, the level of performance required under each criterion to justify moving a country into the high or low risk category remains unspecified. For instance, would any rate of deforestation imply that a country is considered 'high' risk, or only if it is above a given threshold? And if the latter, how would such a threshold be determined?

The qualitative criteria concern various aspects of a country's regulatory framework in relation to whether (i) emissions and removals from agriculture, forestry and land use are effectively covered in a country's nationally determined contribution (NDC) under the Paris Agreement; (ii) 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 regulation; (iii) the country concerned has laws and effective enforcement measures in place to avoid and sanction activities leading to deforestation and forest degradation; and (iv) if applicable, the existence, compliance with, or effective enforcement of laws protecting human rights, the rights of indigenous peoples, local communities and other customary tenure rights holders may also come into consideration (ibid., article 29(4)). Such a qualitative approach appears sensible from a forest governance viewpoint, but it remains to be seen how these criteria will be actually applied by the Commission, which is presumably given full discretion to pick and choose among them ('may be taken into account') under the FDDR. Again, by way of illustration, how exactly will the Commission assess whether emissions and removals from agriculture, forestry and land use are *effectively* covered in a country's NDC?

This lack of clarity and predictability in the operation of the country benchmarking system as laid down in the FDDR may prove problematic from both a trade and an environmental standpoint. In fact, the Commission itself has recognised the need for greater transparency and objectivity, and it is in the process of developing general principles for the benchmarking methodology (European Commission 2024(b), pp. 17–19). This, in turn, will be critical in the (likely) event that third countries challenge the FDDR in the WTO dispute settlement system (Marín Durán & Scott, 2022, pp. 264–265). From a trade perspective, it is evident that the regulation has a detrimental impact on the competitive opportunities of products from high-risk countries when compared to (like) products from low-risk countries, potentially leading to a violation of the core non-discrimination obligations under Articles I and III of the General Agreement on Tariffs and Trade (GATT) (ibid., pp. 261–262). This is because commodities originating in countries in the low-risk category enjoy a competitive advantage in terms of lower compliance costs and administrative burdens. As noted earlier, operators supplying FRCs from these countries are only required to collect information and data, but they are not obliged to carry out a risk assessment on the basis of that information to ascertain that such commodities meet the legality and deforestation-free requirements, nor are they subject to risk mitigation requirements.

However, it is questionable whether this discrimination between products from low-risk and high-risk countries can be justified under WTO law. While there is no doubt that WTO members may adopt trade-

restrictive measures to protect the global environment under Article XX(g) GATT (WTO Appellate Body, 1998, paras 129–130; WTO Panel, 2024, para 7.276), they must ensure that any distinction between countries (or products) is objectively justified by the environmental goals pursued – in our case, forest (and climate/biodiversity) conservation – to avoid charges of ‘arbitrary and unjustifiable discrimination’. And yet, the assessment criteria outlined above do not offer a full guarantee that *all* commodities shipped from low-risk countries to the EU are, in fact, legally sourced and deforestation-free. As such, the less stringent due diligence requirements applicable to the low-risk category could open the floodgates for commodities causing global deforestation to find their way into the EU market. The extent to which this risk can be avoided, and whether the actual country classification by the Commission (to be published by no later than 30 June 2025), will be genuinely based on objective and transparent environmental indicators remain to be seen. But in implementing the benchmarking system under the FDDR, the EU should learn from the *EC – Seal Products* and *EU and Certain Member States – Palm Oil (Malaysia)* disputes at the WTO. In both cases, criteria under its challenged regulations (concerning the ‘Inuit communities’ exception and ‘low ILUC risk’ certification, respectively) that look objective and origin-neutral on their face had not been applied by the EU in an even-handed manner across countries and found to constitute arbitrary and unjustifiable discrimination (WTO Appellate Body, 2014, paras 5.322–5.326; WTO Panel, 2024, paras 7.365–7.366 and 7.1097). An alternative and perhaps safer option, which is likely to enhance the impact effectiveness of the regulation in both WTO law and environmental policy terms, would be for the EU to discard this benchmarking system and assess deforestation risks on a transaction basis by applying the standard due diligence procedure to commodities from all countries (Marín Durán & Scott, 2022, pp. 264–265).

A third concern relates to the extent to which the EU may be willing to combine its autonomous intervention to regulate trade in FRCs with bilateral cooperation with affected exporting countries. This is important because both international environmental law and WTO law express a strong preference for cooperative approaches to address global environmental challenges (UN Conference on Environment and Development, 1992, principle 12; WTO Appellate Body, 2001, para 124). In particular, the CBD regime has rested from the outset on a balance between developing countries assuming responsibility for the conservation and sustainable use of biological diversity (including forest ecosystems) within their territories (which the FDDR encourages, or arguably pressures), on the one hand, and developed countries’ obligation to support such efforts through financial resources and technology transfer, on the other hand (United Nations, 1992, articles 20(1)–(4)). More recently, CBD Parties have committed under the 2022 Kunming-Montreal Global Biodiversity Framework to provide ‘adequate means of implementation, including financial resources, capacity-building, technical and scientific cooperation, and access to and transfer of technology ... in an [effective] and equitably accessible manner ... progressively closing the biodiversity finance gap of \$700 billion per year’ (United Nations, 2022, goal D and targets 19–20).

In this context, it should be noted that previous EU external action on forest conservation followed a mix of unilateral and bilateral policy tools. The 2005 Forest Law Enforcement, Governance and Trade (FLEGT) Regulation established a licensing scheme for controlling the legality of timber products imported into the EU, which was implemented through the conclusion of Voluntary Partnerships Agreements (VPAs) between the Union and timber-producing countries (Council of the EU, 2005). Such VPAs, in turn, secured a green lane for FLEGT-licensed timber imports into the EU market, by creating a presumption of compliance with the due diligence requirements under the Timber Due Diligence Regulation (European Parliament & Council of the EU, 2010, article 3). While a comprehensive assessment of the FLEGT initiative is beyond the scope of this article, it has been praised as a novel experimentalist architecture for transnational forest governance, particularly for its VPA-driven multi-stakeholder participatory process and cooperative approaches to improve forest governance frameworks and address the supply drivers of deforestation and forest degradation in partner countries (Overdevest & Zeitlin, 2018, pp. 67–69), which also served to temper criticisms of EU unilateralism in the WTO Trade and Environment Committee (Marín Durán & Scott, 2022, pp. 250–252, 266; De Ville, in this issue).

And yet, it is uncertain how far the EU is committed to continue this hybrid model under the new FDDR. In principle, it foresees the European Commission engaging in ‘a coordinated approach with producer

countries ... that are concerned by this Regulation, in particular those classified as high risk ... through existing and future partnerships, and other relevant cooperation mechanisms to jointly address the root causes of deforestation and forest degradation' (European Parliament & Council of the EU, 2023 article 30(2)). However, it is imprecise as to the specific form that such a coordinated and partnership approach may take. In particular, there are no firm commitments on the part of the EU regarding the provision of financial and technical assistance to third countries affected by the regulation, but only vague and hortatory language in this regard (ibid., preamble recitals 28–29). At the time of writing, the Commission is elaborating a Strategic Framework for International Cooperation Engagement on the FDDR (European Commission 2024(b)), but it remains vague as to amount of EU funding that will be made available to assist compliance by affected third countries. In the absence of EU support, the potential impact of the FDDR on reducing deforestation and forest degradation in developing partner countries is likely to be limited. By implication, it would not effectively promote EU imports from these countries of legally-sourced and deforestation-free timber and agricultural commodities, which would likely be sourced from other origins, including EU domestic production. Stepping up such support for affected developing countries should thus be a major attention point during the implementation phase of the FDDR.

## 5. Conclusion: an appropriate balance in managing the environment-trade nexus?

Over the past two decades, the EU has been one of the world's largest consumers of global deforestation embodied in its imports of agricultural and timber products. As such, the EU has little choice but to regulate trade in FRCs if it is to contribute to the multilaterally-set target of ending global forest loss by 2030 and broader global commitments on halting biodiversity loss and combatting climate change. In May 2023, it took a significant first step towards curbing its consumption-driven contribution to global forest destruction with the adoption of the FDDR. Through an assessment of this new regulation from the perspective of institutional and impact effectiveness, this article has added to our understanding of how the EU handles the environment-trade nexus, by seeking to shape the interface between global deforestation and international trade in a mutually supportive manner, as well as by relying on multilaterally shared environmental goals and targets to justify (or legitimize) its autonomous action to protect the global environment.

The article has shown that the FDDR effectively seeks to manage – and indeed, constrain – trade in FRCs for environmental conservation as its central objective. At least on paper, the regulation achieves a solid degree of institutional effectiveness in integrating environmental and trade objectives in terms of scope, due diligence requirements and compliance mechanisms. The fact that the EU embraces such an approach is not itself surprising, given its simultaneous position as a major trade power and self-proclaimed environmental leader. However, the key question remains whether the EU has struck an *appropriate* balance between environmental and trade considerations under the FDDR. The article has argued that this is not the case, due to three features indicated below that decrease the likelihood that the new regulation will achieve its environmental goals, and thereby undermine its impact effectiveness and external credibility. As the EU implements and reviews this legislation over the next few years, it will thus be important to tackle these shortcomings.

First, the EU should address any unintended negative consequences of its regulatory action. In particular, it should prevent that EU import demand for FRCs is simply shifted to other, non-forest, natural ecosystems that are also valuable carbon sinks and rich in biodiversity. Second, it should ensure that decision-making under the country benchmarking system is transparent and well-grounded in objective environmental indicators and evidence, so as to ensure that illegally sourced and deforestation-causing commodities are truly kept out of the EU market. Last but not least, as the EU becomes increasingly assertive in using autonomous trade-related instruments to promote multilaterally agreed environmental goals, it should also show greater readiness and commitment to support affected third countries with financial and technical assistance. In fact, one important lesson to be drawn from the FLEGT experience is that trade regulation alone is not capable of addressing the root causes of global deforestation and forest degradation. As has been explicitly acknowledged in the multilateral climate and biodiversity regimes, it needs to work in tandem with development policies that strengthen forest governance frameworks and deal with supply-side constraints in developing partner

countries, so that the globally shared environmental objectives underlying the FDDR can be effectively achieved. In the absence of meaningful EU financial and technical support, the regulation is less likely to result in reduced global deforestation and increased trade in deforestation-free commodities, leading to a negative outcome in terms of striking a balance between the two policies (Gstöhl & Schunz, in this issue).

## Note

1. This acronym is used in the article, instead of the most commonly used EUDR (EU Deforestation Regulation), to better reflect the nature of the regulation discussed in section 3 below.

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