



MATS

making agricultural trade sustainable

MATS working paper

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More Sustainability with less Competition?

Two EU Proposals for Deforestation-Free Products and for a Green Claims Directive

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Acronyms

ADB	African Development Bank
AfCFTA	African Continental Free Trade Area (AfCFTA) Agreement
CAP	<i>Common Agricultural Policy</i> (EU)
Deforestation Proposal (2021)	Proposal for a Regulation on deforestation-free products ⁴
DFD	deforestation and forest degradation
EP/EC/Council	<i>European Parliament/Commission/Council</i>
ETS	<i>Emission Trading Scheme</i>
EUTR	EU Timber Regulation ⁵ (to be repealed by the Regulation on deforestation-free products)
FF55	<i>Fit-for-55 climate package</i>
FLEGT	Forest Law Enforcement Governance and Trade Action Plan ⁶
FTA / RTA / EPA	<i>Free Trade Agreements / Regional Trade Agreements / Economic Partnership Agreements</i> . Under WTO Law, the MFN obligation is waived for all RTAs covering 'substantially all the trade' (GATT-Article XXIV).
Green Claims Directive (2022)	Proposal for a Directive on substantiation and communication of explicit environmental claims ⁷
GHG	Green House Gases ⁸
Green Deal	European Green Deal ⁹
IFI	International Finance Institutions (IBRD, IMF, ADB etc.)
LDC	<i>Least Developed Countries</i> ¹⁰
MEA	Multilateral Environment Agreements
MRA	Mutual Recognition Agreement

⁴Proposal 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. Available on 5 April 2023 at: https://environment.ec.europa.eu/publications/proposal-regulation-deforestation-free-products_en

⁵ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance (accessed 11 April 2023 @ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010R0995>

⁶ Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan, accessed on 11 April 2023 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003DC0251>

⁷ Available on 5 April 2023 at [EUR-Lex - 2023 85 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/eur-lex-content/EN/TXT/?uri=CELEX:52022DC085)

⁸ Here comprising the following gases: Carbon dioxide (CO₂), Methane (CH₄), Nitrous oxide (N₂O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), Sulphur hexafluoride (SF₆), Nitrogen trifluoride (NF₃) (Source: Doha amendment to the Kyoto Protocol, December 2012, Article 1, Paragraph B)

⁹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal (COM/2019/640 final). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0640&from=EN>

¹⁰ The list of all 46 countries is available, with country profiles, at <https://unctad.org/topic/least-developed-countries/list>

NDC	<i>Nationally Determined Contributions</i> (under the Paris Climate Change Agreement)
PIL	Public International Law
PPM	<i>Production and Processing Methods</i> . The problem, for regulators trying to respect NT, especially for 'non-product related ppm' is to find, and apply, non-trade distorting standards.
SDG	<i>Sustainable Development Goals</i> (https://sdgs.un.org/)
TBT	(WTO Agreement on) Technical Barriers to Trade
TFEU	Treaty of the Functioning of the European Union
UNFCCC	<i>United Nations Framework Convention on Climate Change</i>
WTO	<i>World Trade Organization</i>

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Executive Summary

Sustainability was a moving target long before MATS kicked off on 8 July 2021. The adoption of 17 SDG by all United Nations Member States in 2015 did not clarify incoherencies or set priorities. In MATS we pay particular attention to six SDGs.¹¹ MATS has a clear focus on agricultural trade and sustainability, and can thus fill in some missing pieces of the EU Green Deal. (Filipović, Lior & Radovanović 2022) For our 15 Case Studies, the SDG challenge implies not only analysing existing conditions empirically, but taking on board all relevant regulatory innovations.¹²

The two EU proposals described and analysed in this Discussion Paper (*Deforestation-free Products* and the *Green Claims Directive*) aim at establishing level-playing field conditions of competition between domestic EU-27 production and imports not subject to EU sustainability conditions laid down in regulations and standards. The first proposal (DFRP) proscribes placing on the market domestic and import produce grown on deforested land, with incentives (for EU producers) and disincentives (including possibly WTO-incompatible import bans). The second proposal (Green Claims Directive) is based on TFEU-Article 114. It draws a line between legitimate 'green' claims and consumer deception, taking as a base a high level of environmental protection.

Elaborating these proposals in a drawn-out, transparent and inclusive process is difficult.¹³ Even more difficult, and so far largely absent, are impact studies for specific products and especially in developing countries. Section 6 describes where MATS and many of our case studies can play a concrete and very useful role – both for our operators, civil society advocates, and for the European Commission.

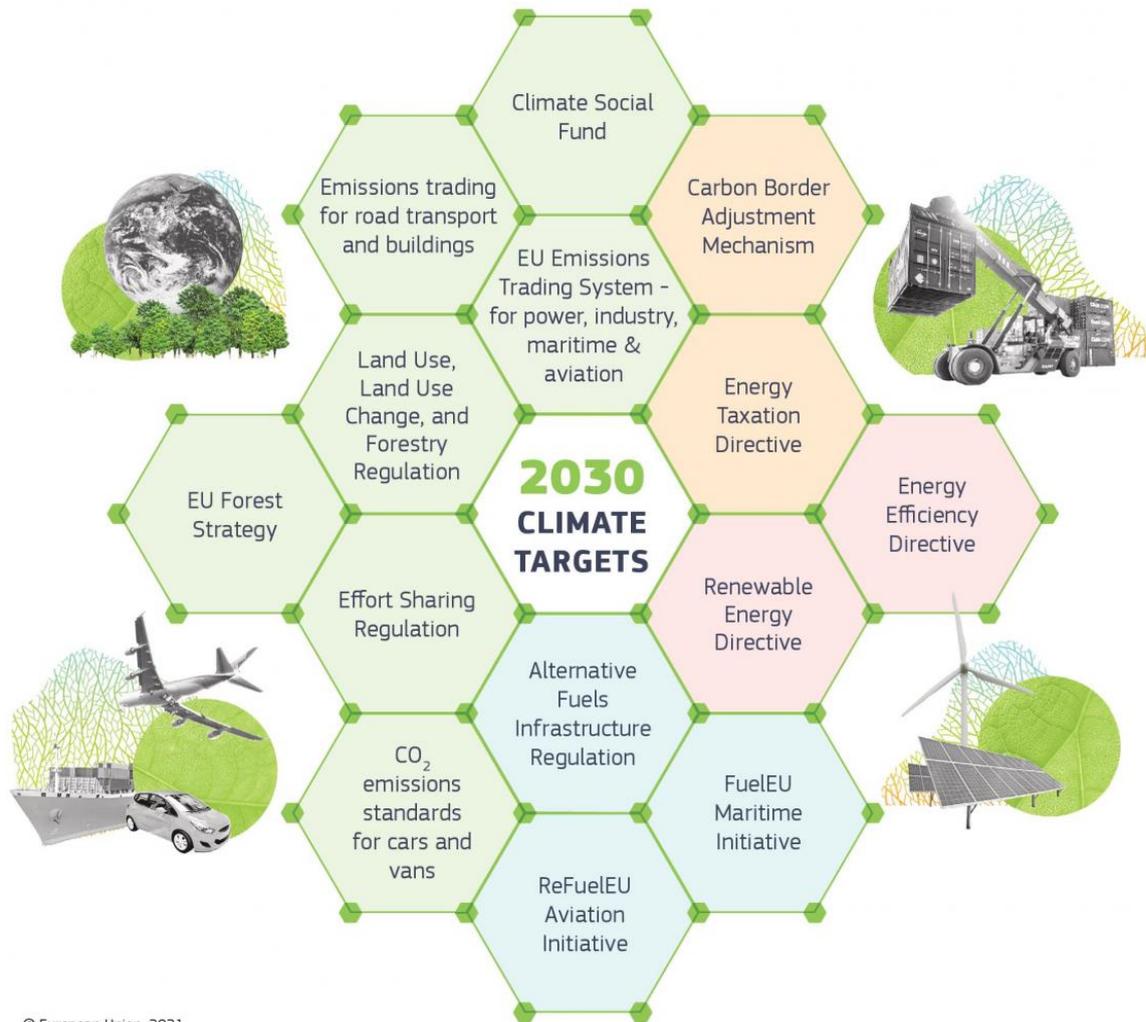
As provided for in D2.4 and D3.1, and further developed in the second phase of MATS, this paper provides concrete leverage points to connect the case studies with the regulatory initiatives proposed by the EU. This in turn will provide most useful inputs to D4.1 and D5.3, under UBern lead, to be finalised in 2024.

¹¹ SDG1 (No Poverty), SDG2 (End Hunger) and SDG3 (Good Health and Well-being), as well as SDG6 (Clean Water), SDG13 (Climate Action) and SDG15 (Life on Land). For a recent, excellent review by IISD on the 'State of Sustainability Initiatives Review Standards and Investments in Sustainable Agriculture', see Voora (2022).

¹² As discussed in Maastricht (October 2022), Case Study Leaders will try to address the potential impact of the CBAM for future trade prospects – and before a detailed implementation framework is available. (Carlson, Häberli & Steiner, 2023)

¹³ For a comprehensive overview "a world of trade opportunities in one place with detailed information about imports, market dynamics, tariffs, regulatory requirements, potential buyers and more" cf. the Databank developed and continuously updated by the *Global Trade Helpdesk* (<https://globaltradeshelphdesk.org/en/about/integrated-tools>).

1. Introduction



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The European Green Deal includes various policy initiatives with direct link-ages to agri-food trade which are of interest for several MATS case studies. Our earlier discussion paper presented interaction between FF55 initiatives and potential MATS avenues (Carlson, Häberli & Steiner, 2023). A huge file not further discussed here is *Due Diligence* i.e. the processes through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts.¹⁴

¹⁴ For starters, look at the Glossary 'Due Diligence explained', accessed on 20 April 2023 @ https://single-market-economy.ec.europa.eu/sectors/raw-materials/due-diligence-ready/due-diligence-explained_en

This Discussion Paper describes and analyses two EU proposals with a potential impact for products examined under the MATS case studies:

1. Proposal for a Regulation on Deforestation-free products (Section 4)¹⁵
2. Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive, Section 5)¹⁶

We first look at the potential impact scenarios related to these two proposals. Do these two proposals promote the “level-playing field” where all operators increase sustainable production and trade without fear of losing competitive advantage? (Similarly to the ‘carbon leakage’ to be prevented by the CBAM, replacing the EU ETS.) This places the discussion in its historical and sectoral context (Section 2), and the most relevant international trade rules and guiding principles (Section 3). The main part examines the concerned agrifood exports of developing country products (Sections 4 for deforestation and and 5 for Green Claims). In our conclusion we suggest a couple of questions to be included in the MATS case studies (Section 6). Annexes 1 and 2 present and discuss the two most recent publications on the EU’s deforestation proposal.

2. Historical and Sectoral Context

David Henig argues that “without measures such as prohibition of products made from recently deforested areas or carbon border adjustment, unfettered trade can have adverse effects on the environment as production shifts to areas with low environmental protections as brings unfair competition for EU producers.” (Henig, Borderlex, 2023). Henig refers to the so-called ‘pollution haven’ hypothesis (Levison & Taylor, 2008), ‘carbon leakage’ or ‘production leakage’ which has been found valid also for agri-food trade (Arvanitopoulos et al. 2021; Grubb et al. 2022, Pendrill et al. 2019a; Pendrill et al. 2019b; DeValue et al. 2022).¹⁷

Before examining these two proposals in more detail it is perhaps useful to recall the international context where we find commitments for both of them, and the regulatory ‘policy space’ each government claims in the same fields.

¹⁵ European Commission, DG Environment, Joint Proposal dated 17 November 2021 (accessed 5 April 2023 @ https://environment.ec.europa.eu/topics/forests/deforestation/regulation-deforestation-free-products_en)

¹⁶ COM(2023) 166 final - 2023/0085 (COD) (accessed 5 April 2023 @ https://eur-lex.europa.eu/procedure/EN/2023_85)

¹⁷ Countries with laxer environmental regulations i.e. lower production costs undermining environmental and social protection, or not accounting for negative production externalities such as carbon emissions, tend to refuse reforms and/or attract companies and actors due to lower production costs.

3. International Legal Context for Deforestation and Green Claims Regulations

We now discuss four relevant rulesets for these EU proposals, and for African regulators: the Climate Agreement, WTO Rules and their meaning for the two EU proposals, EU EPAs, and the AfCFTA.

First, the UN Paris Agreement (UNFCCC) is a very useful intergovernmental agreement for climate mitigation measures, though not all its provisions, such as the Nationally Determined Contributions (NDC) are legally binding.¹⁸ According to the principles of Public International Law (PIL), the UNFCCC as the latter treaty (*lex posterior*), could also inform debates on the application of the most relevant WTO rules for assessing carbon taxing, deforestation, and green claim policies, regulations, directives or other measures. Of course, 'WTO' cannot decide *ex ante* on the compatibility of a proposed measure. A binding decision is only possible for properly introduced complaints by another Member, or a decision by its highest body, the WTO General Council.

Second, the two most important WTO rules are the *Most-Favoured Nation* (MFN) and the *National Treatment* (NT) clauses. The Agreement on Technical Barriers to Trade (TBT) would be a third main source of WTO compatibility assessments.

1. The MFN clause (GATT-Art.I) states that tariffs must be no higher than the maximum rates scheduled by each WTO Member and offered 'immediately and unconditionally to the like product' at the same rate to imports from all other WTO Members; similarly, other border measures will need to apply in the same way to all imports, regardless of their origin.¹⁹ An exception to this rule may be made for RTAs fully compatible with WTO rules when they cover "substantially all the trade" with another country or group of countries (GATT-Art.XXIV).

¹⁸ United Nations (2021). Paris Agreement. Audiovisual Library of International Law. Available at: https://legal.un.org/avl/pdf/ha/pa/pa_e.pdf

¹⁹ GATT-Art.I:1 *in fine*: "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

Also useful for assessing charges applying to both domestic products and imports, by way of levies, is GATT-Art.II:2: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product, (a): a charge equivalent to an internal tax in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part [...]"

2. The NT clause (GATT-Art.III) rules that domestic taxes, regulations and requirements may not afford (additional) protection to domestic production.²⁰ Furthermore, 'differentiation' for physically 'like products' with a different climate footprint scratches at the WTO's 'holy law' of non-discrimination. In such a case, the general exemptions of GATT Article XX might be invoked to justify more favourable treatment of, say, African trading partners enjoying an Economic Partnership Agreement (EPA) with the EU. The so-called Chapeau in Article XX states that measures used should not be used in a way causing "...*arbitrary or unjustifiable discrimination between countries where the same conditions prevail...*". Furthermore, Art. XX(a), Art. XX(b) and Art.XX(g)²¹ exceptions for public morals, public health or conservation of exhaustible natural resources may be relevant here.
3. Finally, and especially for the examination of a complaint against the Green Claims Directive, the TBT Agreement would appear to be a main forum of contention between the interest in more policy space for government regulation, and exporter adversity against unnecessary standards-related barriers to market access. Basically, technical regulations, standards, and conformity assessment procedures must be non-discriminatory. While WTO Members retain their rights to implement measures for legitimate policy objectives, such as the protection of human health and safety, or protection of the environment, they have to base these measures on international standards. Through its transparency provisions, the TBT Agreement contributes to a predictable trading environment.

The WTO-compatibility of different *Production and Processing Methods* (PPM) for *like products* remains an unresolved issue. While the Paris Climate Agreement represents a commitment to 'differentiate' GHG reduction measures by taking PPMs into account, the above-mentioned WTO provisions make no explicit allowance for discriminating imports according to their climate footprint. Calls for a systematic review of these basic rules, and for negotiations by civil society and academia have so far remained unanswered by government delegates, in all quarters. No dispute settlement ruling has acknowledged the

²⁰ GATT-Art.III:1: 'internal taxes and other internal charges, and laws, regulations and requirements [...] should not be applied to imported or domestic products so as to afford protection to domestic production.'

GATT-Art.III:2: (Imports) 'shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1'.

²¹ Also cf. https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf

predominance of PIL over multilateral trade rules – including in the two disputes about US mandatory consumer information labels. (Häberli, 2021a)

Especially important for Green Labels aiming at consumer behavioural changes would be an ‘educated’ assessment made by the regulator of future risks, based on scientific studies in respect of environmentally sustainable choices. (Peschel et al. 2016; Grebitus et al. 2016) For instance, the European Commission’s Product-Environmental-Footprint initiative is based on the fundamental rationale that creating transparency and product-based comparability through product-based footprint labelling, is key to a well-functioning union market in the future. (EC 2022) If embedded carbon footprint is seen as a part of a product’s physical characteristics (e.g. fertiliser), there may be leeway for the argument to treat ‘unlike’ products different under GATT Article XX. However, products from deforested areas may still fall through the legal defense net of Article XX.

The EU must also consider its entitlements and its own commitments made directly under the UNFCCC. This is a treaty ‘within the meaning of international law’, yet, not all its provisions are legally binding. It allows flexibility for implementation of national climate policies but requires transparency for the use of such measures. (Bodansky 2021). This makes interpretation of legal responsibilities ambiguous. The differentiation commitments in the so-called *Common but Differentiated Responsibilities and Respective Capabilities* (CBDR-RC) do refer to footprint differences as well as to different development levels. (Häberli 2021b) The two EU proposals differentiate between production conditions and environmental properties, but do not seem to differentiate between countries, nor do they reserve financial assistance for LDCs, potentially undercutting the principles of CBDR and Special and Differential Treatment (Venzke & Vidigal 2022). It could also be argued that the CBDR-RC principle could lend support to certain specific design features, such as exemptions for LDCs and small island States.²² Both the deforestation and the green label proposal, however, seem to not contain such exemptions.

Third, the EU has concluded RTA with most African countries, the so-called Economic Partnership Agreements (EPA). In their modernised versions, these RTAs contain a separate chapter for *Trade and Sustainability Development* (TSD), with specific provisions for consultations, investments and finance, regulatory cooperation and dispute settlement. WP4 and WP5 will offer a

²² As observed by Rajamani (2016), the Paris Agreement ‘operationalizes the CBDRRC principle not by tailoring commitments to categories of Parties as the UNFCCC and the Kyoto Protocol do, but by tailoring differentiation to the specificities of each of the Durban pillars – mitigation, adaptation, finance, technology, capacity-building and transparency’.

more precise examination of the sustainability provisions in the EPA of interest to our case studies.

EPAs under implementation	(1)-(5) Africa		
	(1) Stepping-stone EPA with Côte d'Ivoire		Côte d'Ivoire
	(2) Stepping-stone EPA with Ghana		Ghana
	(3) Central Africa		Cameroon
	(4) Eastern and Southern Africa		Comoros Madagascar Mauritius Seychelles Zimbabwe
	(5) Southern African Development Community EPA group		Botswana Eswatini Lesotho Mozambique Namibia South Africa

Figure 1 European Commission (2020) Putting Partnerships into Practice

Fourth and final, as for the (still emerging) AfCFTA, its provisions are presently couched in traditional market access terms. The Preamble emphasises that domestic policies such as natural resource management remain the sole prerogative of each member.²³ Environmental protection is only mentioned as one risk assessment factor to “Determine the Appropriate Level of Sanitary or Phytosanitary (Health) Protection”.²⁴ The Climate Agreement or other MEA *are not* listed as an international standard e.g. for cross-boundary water resource management or forest protection.

Without further knowledge of how the deforestation-related import bans or a prohibition of green claims failing to satisfy EU minimum standards will be implemented, it is difficult to see the complainants and their complaints against these proposals. Of course, the EU has the right to regulate its internal market - subject to its obligations under the WTO, the UNFCCC, and the EPA. For instance, it is far from being clear whether the EU can ban imports from child labour or forced labour. Hence, this paper cannot look at the question of ‘how much multilateralism’ is useful, needed, or a nuisance in the search for a more climate-friendly world. (Franck et al. 2021) The EU cannot and will not submit for clearance draft regulations to the WTO or any other intergovernmental organisation. On the other side, regulatory previews are foreseen in many such organisations, and the approval process in the EU might benefit from such previews – especially in their development impact

²³ “Reaffirming the right of State Parties to regulate within their territories and the State Parties’ flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity”

²⁴ Cf. AfCFTA Annex 7, Article 5, para 2.

dimension.²⁵ A good way forward would thus be an EU-internal policy discussion based, for example, on appropriate OECD guidelines, a WTO Secretariat *Trade Policy Review* description, or an impact study by an International Financial Institution. Any EU proposal would gain further acceptance if it were presented and further elaborated in a 'coalition of the willing' discussion like in the (enlarged) OECD, also benefitting from inputs by development organisations such as UNCTAD or ITC, and the economists of the International Finance Institutions (IBRD, IMF, ADB etc.). Linking investment and finance with trade related policies is essential to drive sustainable development and the achievement of SDGs especially in developing countries and LDC. (Aust et al. 2020; Tian 2023)

We now can look at the development impact of the two proposals on deforestation (Section 4) and green labelling disciplines (Section 5). For deforestation, our analysis is facilitated by the first two studies on DFRP (Annexes 1+2).

4. Deforestation: Can MATS inform on the development Impact?

The main objective of this proposal is to reduce CO₂ emissions, strengthen carbon sinks, stop environmental degradation and biodiversity loss through preventing deforestation caused by expansion of agricultural production, driven by consumption and international trade (Pendrill et al 2019a). It sets a new European standard both for European forestry practices and for all imports competing with EU-produce from such areas. The linkages with agricultural trade are found in the due diligence and deforestation free supply chains provisions, also covering wood. In practice, this proposal sets an import ban on certain agri-food and forest products into the EU-27, where they fail to comply with the obligations set by the EU's regulation.

MEA alone, with only environmental objectives may not bring large forests into the sustainability fold. It has been argued that lawlessness is the biggest obstacle to saving rainforests. (The Economist, 2023)

²⁵ Noteworthy, for deforestation, is the refinement of a *global core set of forest indicators* envisaged at the 18th Session of the UN Forum on Forests. The Forum held from 8 to 12 May 2023 at UN Headquarters in New York also discusses financial and technical resources for forests, including the possibility of greater tapping of the carbon market. The session also discussed advances in monitoring, assessment, and reporting. Cf. <https://www.un.org/esa/forests/events/18th-session-of-the-un-forum-on-forests-unff18/index.html#:~:text=The%2018th%20session%20of%20the%20UN%20Forum%20on,May%202023%20at%20UN%20Headquarters%20in%20New%20York> accessed on 11 May 2023.

Moreover, the challenge for all standards is that they can have national, regional, or international scopes. This may create additional certification and monitoring costs. Economic scholars cannot ignore this crucial issue of increasing unilateral standards and regulations created in the EU and elsewhere. Our case studies might therefore find out whether a pool of overlapping and complex standards could transfer added trade value to wholesale traders in Europe, away from operators, particularly small-scale producers in developing countries and LDCs without sufficient knowledge how to apply them.²⁶ Our case studies could therefore examine not only the EU's readiness for a 'true TSD' in its EPA, but at the same time environmentally and socially responsible corporate behaviour and practices in line with, say, OECD guidelines.

In short, deforestation reduction in a co-operative, pragmatic way can make headways with the willing, with compensation for forest owners forfeiting short-term gains both in the EU and in developing countries. EU import bans as an ultimate weapon may be successful in certain cases but hardly as a general enforcement tool also designed to avoid competition with EU products. In the field of production and processing based on ill-defined European values.

5. Green Claims: Can MATS improve Consumer information?

Consumer information abuse has frequently escaped regulatory oversight and sanctions, even though such abuse is, in principle, prohibited under consumer deception regulations. This new attempt by the European Commission, in respect of the rapidly growing number of 'Green Claims' is to find 'red lines' between legitimate contributions to public opinion and Consumer Deception is definitely welcome. Obviously, although the Green Claims Directive will apply in the same way to EU domestic products and imports placed on the internal market, its trade impact should be carefully assessed for an informed opinion on its development-friendliness.

MATS is all about *relatively* more sustainable standards. The challenge here, as we see it for our case studies, is to first find that goose with the golden

²⁶ For instance, Gabon with its large rainforest covering huge natural gas resources may need market access guarantees for its (sustainably produced) fossil fuels, rather than multilateral or EU ODA to leave all its trees standing. This would call for mutual, specific commitments under a comprehensive RTA with its main trading partners. So far, the EU has never made use of actual import bans or preference withdrawals. The USA, Japan, China and others are not really ready for mutual commitments other than for reciprocal, preferential market access. But the US is more trigger-happy than the EU, for its own, domestic reasons, to negotiate and even to cut preferential market access as a tool against illegal logging in Peru, or workers' rights violations in Guatemala and Vietnam. (Häberli, 2017)

eggs – and then ensure that consumer information at home and on export markets is credible and efficient in terms of relative monitoring costs. Without killing the goose!

A full discussion of these issues is difficult here. Nevertheless, a number of caveats would seem to apply for EU imports from countries with weak institutional set-ups and a general lack of effective enforcement. Even public (minimum) standards such as for 'organic' agriculture may be difficult to communicate for origins without a Mutual Recognition Agreement (MRA) with the EU. In such cases, double certification may be necessary, although at the cost of the exporter.

Even more difficult are 'Green Claims' for, say, financial instruments used in agricultural trade finance. Unlike for the Deforestation file, we are not aware of peer-reviewed literature pioneering investor and consumer confidence in 'Green' products. In addition, environment-sensitive consumers may have a natural, if ill-advised, preference for local produce. This looks like an up-hill battle for, say, palm oil content in African chocolate exports (making the product more heat-resistant and cheaper). Never mind the fact that, unlike Indonesia and Malaysia, African EPAs get unconditional market access to the EU for their palm oil exports, both processed and unprocessed.

A thorough, fact-based and ad hoc discussion will be possible when we get the results of our 15 case studies!

6. Potential Research Avenues for MATS

Clearly, food production and trade are no longer a matter only of trade, and tariffs, and tariff quotas. SDG and climate concerns are increasingly addressed with all kinds of policies and non-tariff measures. Operators, small and big, must continuously find new ways to move their own sustainability forward. Evidence so far collected for societal concerns is however limited to very few cases, without clear trends emerging on a future 'level-playing field' for both tariffs and non-tariff measures.

What can MATS do - now? The 15 CSs (D3.3) have varying extents already started their field work, some are advancing with reporting, and some have already finished their initial reports. Nonetheless, the need to link results to new development priorities, trade regimes and transition pathways has become evident. The same goes for the evolving *financial viability* of 'sustainable production and trade' under new agreements, regulations, and consumer and civil society demands.

CSs can identify and assess the trade regime(s) most relevant for their case study (please see the revised D3.1/additional document specifying the CS guidelines): multilateral rules (WTO, UNFCCC, AfCFTA), bilateral agreements/arrangements such as FTA, RTA, or unilateral measures such as the

GSP, CBAM, or the two proposals presented in this document. The following questions are meant to act as practical guiding questions for consideration by the CS.

New regulations may create increasing compliance costs and regulatory burden for agricultural imports and the food processing industry, especially in developing countries. We posit that this is where MATS can come in with a new look – with all its different research disciplines. For instance, deforestation was recognised as one of the transboundary impacts associated with international agri-food trade in MATS deliverable 1.1. It was spelled out that deforestation is among the key questions within some of the MATS case studies. Our first MATS discussion paper had already concluded that the due diligence and deforestation proposal would be of importance for MATS. (Carlson, Häberli, Steiner, 2023) Now that the EU has laid out its legislative proposal on deforestation, and the Green Claims Directive, MATS studies could evaluate the legislative proposals as they evolve during this and possibly next year.

The EU deforestation regulation has relevance at least for the following case studies:

- Case study #1 Coffee in Uganda and Tanzania
- Case study #4 Beverages (coffee and cocoa): Uganda (coffee), Ghana (cocoa), Ethiopia (coffee), Meat/Beef: Ethiopia and Tanzania
- Case study #6 Cocoa, Ghana, Côte d'Ivoire
- Case study #9 Human rights and environmental due diligence in the coffee value chain, Tanzania, Burundi, Uganda, Ethiopia
- Case study #9 Beef, Germany, France, Italy, USA, Brazil, Argentina, Morocco, South Africa, Namibia
- Case study #14 Soybean, Brazil

We suggest that these CSs answer the questions presented by UM in one of the MATS briefing sessions (Available for MATS members [here](#)) regarding trade regimes and in particular the EU deforestation regulation: (a) does country X trade the considered product with the EU, (b) might [coffee/cocoa/beef/soybean etc] production involve any deforestation? (c) will producers face difficulties in compliance, including by providing geo-information? After deciding whether there is a link and relevance, this link should figure in CS reports as one of the relevant trade elements.

More specifically:

- The EC pointed out, in its own impact assessment that the EU-27 is relying on a small number of countries in its imports of cocoa. Most EU imports of cocoa comes from West Africa, including Côte d'Ivoire (44%), Ghana (17%), Nigeria (8%) and Cameroon (7%). However, the EC identified that

all this cocoa production is associated with commodity-driven deforestation – not to mention child labour.

- This gives a strong incentive for each cocoa value chain related MATS CS to evaluate the impacts of the EU regulation on cocoa value chain particularly sourcing from West Africa. Wherever possible through their field research, CS should make an initial assessment of producer reactions in respect of these new initiatives for exports to the EU, including biodiversity costs, and pre-/post financial viability of cocoa-based exports to the EU.
- For each CS, it would be useful to estimate financial assistance (investment) needs for their products/countries to comply with the new regulations, and to avoid EU import bans.
- Other case studies could include calculation of the cost and benefit of deforestation free supply chains (e.g. processing and export/import screening measures, due diligence legislation concerning wood, cattle, soy, palm oil, cocoa and coffee, or forced labour and human rights (also called 'ecodumping' and 'social dumping').
- Wherever agricultural trade involves large enterprises, *corporate social responsibility* would be an important topic.
- Alternatively, local and regional market outlets with less specific requirements of the EU kind would need to be examined to describe the implications for producer and processor choices and decisions.
- For the Green Claims proposal, a 'field test' undertaken by some CS could apply the methods described and used for consumers' valuations of food and non-food products labeled for carbon and water footprints. (Peschel, Grebitus, Steiner & Veeman, 2016)

UM, UH, and UBern/WTI remain at disposal to advise in building these new links into the relevant CS.

There is a caveat though. Any additional initiative or task to be explored by MATS researchers needs to build on *existing modelling and/or case study activities*, while showcasing the strength of the mixed methods approach underlying MATS. The views presented in this discussion paper lead us to ask the Leaders of the 15 Case Studies to examine the potential impact of the two EU proposals. Depending on the outcome, we could then elaborate some of the six options for potential research avenues as part of all our WPs.

We hope to introduce this discussion paper at the MATS Workshop on Making Agricultural Trade Sustainable (Brussels, 16 May 2023).

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Annex 1

CDP Europe, Deforestation-Free Products on the EU Market (DFPR) (2022)

Description

This comment from CDP Europe reports on the commercial actors involved in the DFPR, i.e. operators and traders tasked with compliance with the proposed regulation. The document clearly states the key requirements of operators and traders in terms of due diligence including the nature and collection of information and documents, maintenance of records, risk assessment and mitigation measures. CDP provides a comprehensive table comparing provisions of the EUTR, FLEGT and current DFPR across key elements such as legislative scope, duration, geographical coverage, main actors, products, etc. Furthermore, the interaction between other EU deforestation related legislations like the Corporate Sustainability Due Diligence and Renewable Energy Directives is also briefly discussed in the Q&A.

The CDP puts forth a Forests Questionnaire which majorly simplifies the otherwise broad and unclear provisions of the DFPR and consequently would serve as a compliance guide for companies covered under the regulation.

The document further discusses two types of approaches – the *Landscape Approach Program* and the *Jurisdictional Approach Program*. These programs aim to decouple deforestation from products and align them with countries of origin through cross-sectoral collaboration. The Landscape approach brings multiple stakeholders under the common umbrella of a shared goal, i.e. sustainability. It further aims to balance the differing goals between stakeholders and create a collective action plan. The Jurisdictional approach on the other hand seems to be a subset of the Landscape approach where the landscape is limited to the political boundary of jurisdiction. It focuses on creating strong political leadership as a means to implement the goal of sustainability. However, CDP data shows that when a question regarding the above-mentioned approaches was included in the forest questionnaire, the level of confidence of the responses was extremely low especially in the cattle and soy sectors.

CDP also proposes Supply Chain Membership program as a tool for member companies to engage with key actors in their supply chains thereby enabling more transparency and assisting in the increased reporting requirements under the DFPR.

Analysis

The DFPR proposal comes as a welcome recognition of the EU as to its role as a large consumer of commodities and derivative products with high levels of embedded deforestation/forest degradation. This regulation, is likely however to face fire at the WTO since it may be characterized as a unilateral market access type measure. While the objective is bona fide, the imprecise design of the regulation is unlikely to be found compatible with WTO rules if challenged. This is yet another example of liberalization based international trade rules obstructing “Northern-designed” environmental and social sustainability. For instance, the *country benchmarking system*, which is a key feature of this Regulation laid down in Article 27,

appears to not be detailed in any helpful sense for operators bound by the due diligence obligation.

WTO rules do make allowance for public policy related exceptions through Art XXIV GATT however the policy is never separated from its effect on international trade, specifically the 3 main obligations forming the cornerstone of the GATT namely, MFN, NT and Market Access. The DFPR proposal might be challenged as contrary to all three.

The regulation is in murky water especially because of its sustainability focused approach contrary to earlier approaches based on legality with the domestic law of exporting countries. Here, the EU standard of sustainability seems to be exported to exporting third countries through market access restrictions in the form of import bans from being placed on the EU internal market. The burden although directly imposed on EU operators and traders, is in effect transferred to the exporting countries. While the CDP Q&A comprehensively guides operator and trader companies as to compliance with the requirements of the DFPR, it does not extend the same to the countries of origin from where the covered products and commodities are sourced.

Furthermore, the simplified due diligence system is likely to incentivize operators to shift sourcing to “low-risk” countries. This, while meeting part of the incentive rationale of the DFPR, might actually punish poorer developing countries and LDC that may not have the institutional capacity to adhere to the strict standards (higher than their domestic law) of the EU DFPR. That is not to say the DFPR itself is poorly designed, but merely that its formulation offers the WTO as a forum to obstruct its implementation. In fact, the resistance of existing international trade rules to unilateral regulations like the DFPR, fail to take into account the potential of such regulations to incentivize sustainable investment flow into countries that have a geographic advantage in relevant commodities and products but lack the technical capacity and resources to self-implement. (Kaplinsky 2010)

By placing a heightened due diligence burden on commercial actors, the DFPR may certainly make significant headway in furthering the goal of sustainable agriculture free of DFD, while also potentially boosting the data collection and monitoring systems in exporting origin countries. A substantial problem is a potential WTO inconsistency challenge by a competitor country. This might be a risk which industry investors might be reluctant to shoulder without project viability guarantees difficult to obtain from either host or home states, or development banks. Not to mention pre-and post-project monitoring to be agreed.

Annex 2

Hedemann-Robinson, Legislative Pioneer on Global Forest Protection? A Commentary on the European Union's Proposed Deforestation-Free Product Regulation²⁷

Description

Martin Hedemann-Robinson provides a first analysis of the EU's Draft DFPR Proposal, starting with a description of the international and historical context, especially the lack of an internationally coordinated response to the problem of deforestation and forest degradation (DFD). The author also addresses the shortcomings of the REDD+ scheme which, although a relatively more formal international initiative, only serves as a facility for individual countries to take up as opposed to a specific legal requirement.

The article then considers the present EU's DFD policy. The EU considers the primary drivers of deforestation as being unsustainable conversion of forests to agricultural land and pastures and acknowledges its significant role in driving demand for relevant commodities and derived products (RCPs) that perpetuate the problem of embedded DFD.

Follows a detailed comparative study of the proposed DFPR with two previous legislations addressing the problem of deforestation and forest degradation: the 2003 FLEGT action plan that focused on adopting bilateral partnership agreements (VPA's), the 2010 EUTR complementing the FLEGT on the demand side, and finally the proposed DFPR. The author identifies the key difference of the draft DFPR as having a broader scope, both in terms of sectoral coverage as well as the objective of the regulation. The author identifies similarities in the underlying policy of the DFPR as having been reflected in previous legislations pertaining to renewable energy, i.e. RED I and RED II. However, these too differ from DFPR in that they are limited to biofuels.

By way of comparison, a significant portion of the article compares particular provisions of the EUTR and the draft DFPR proposal. Broadly, the author culls out the common structural features between the two regulations as being focused on instituting controls on circulation and subsequently regulating demand/consumption. On the other hand, the most significant difference is that the DFPR is based on sustainability criteria as opposed to mere illegality in terms of the domestic law of exporting countries. The author then considers the substantive differences in terms of obligations, implementation, sanctions, etc., to achieve this improved and ambitious end. In doing so, the role of various actors and institutions are discussed with the overall conclusion that the draft DFPR proposal is much more sophisticated and detailed than the earlier EUTR which embodies a far more passive approach. In assessing the role of national authorities, the author considers the interaction between Union law and Member states national competencies. The article highlights the differences in the strength of the due diligence obligations, collection of data, monitoring framework and penalties for non-compliance among others. A

²⁷ In 31(6) *European Energy and Environmental Law Review* (2022)

notable observation is the inclusion of civic society in flagging non-compliance and specific rights to that end. Finally, the article considers some of the criticisms faced by the draft proposal such as non-inclusion of specific human rights protections, lack of accountability of the financial sector in investments facilitating embedded DFD and the actual effectivity of public participation in light of the limited access of the public to compliance related information. The author briefly addresses substantive shortcomings such as unclear definitions of key terms, possibility of regulatory leakage, implications of the risk-tiering system, and the possible incompatibility of the regulation with both EU law as well as WTO law. In its conclusion, the paper discusses the power of the EU regulation to serve as a model for other countries to undertake unilateral measures to combat the shared concerns arising out of increasing DFD.

Analysis

The article provides a highly detailed analysis of the provisions of the proposed DFPR, with regard to both substantive content and overall structure. It is evident that the draft DFPR is a highly technical regulation that attempts to cast a horizontally wider net than earlier legislations whilst simultaneously adopting a deeply vertical approach in terms of attention to detail. The most ambitious and striking feature is certainly the shift from a legality focused regulation to a sustainability focused one. However, while laudable, this approach is likely to create a plethora of problems in implementation; yet the article is silent on how the draft DFPR proposal intends to address some of these consequent concerns.

The regulation seems to rely largely on due diligence reports and declarations by commercial actors, namely Operators and Traders. These reports will likely be based on information that will have to be actively sought by said commercial actors from countries of origin. It may be observed that in many countries, while environmental protection may be a national level mandate, the actual regulations pertaining to forestry are often created and administered at a sub-national or regional level. The likelihood of availability of sophisticated data gathering systems and processes at these lower administrative levels is small. This in turn will increase the burden on EU operators and traders in satisfying the due diligence obligations, including the overarching duty to demonstrate how compliance is undertaken, for access to the EU's internal market. It is unclear from the article whether the proposed DFPR takes into account such unavailability/difficulty in accessing information despite bona fide attempts. Furthermore, even though the article states that "supporting the availability of information on forests and commodity supply chains as well as research and innovation" is one of the objectives of EU regulations like DFPR, the article does not clarify how the regulation proposes to do so and whether there will be any inbuilt capacity building, technology transfer, workshops, etc., targeted to enable exporting third countries to satisfy the EU standards being exported through DFPR requirements. Furthermore, the risk-tiering system and "simplified" due diligence requirement for "low-risk" countries or regions may create hurdles. While the WTO consistency in the context of discrimination regarding PPM's is likely to hinder implementation if challenged, the increased (and differential) burden in terms of documentation and data collection for market access may be challenged as a quantitative restriction under Article XI of the

GATT, or a technical trade barrier incompatible with the TBT Agreement. Lastly, the risk hierarchy and simplified due diligence requirement is likely to boost imports (and consequently demand) from “low-risk” countries. In such a case, will demand be met while maintaining the “low risk” status or is the increased demand likely to promote the very problem that the DFPR attempts to mitigate. In the same vein, the article does not specifically address how these hurdles are intended to be overcome by the proposed DFPR since otherwise the regulation will only serve to reward more developed “low-risk” countries while continuing to disadvantage the “high-risk” already disadvantaged countries.